

**Questionnaire
for the XIVth Congress of the Conference of European Constitutional Courts**

“PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE”

RESPONSE OF IRELAND

It is not clear from the questionnaire what is meant by a “legal gap”. However, the questionnaire does refer to the concept of “legislative omission”, defined as “a legal gap prohibited by the Constitution (or any other act of a higher power)”.¹ Such a concept is not known in those terms in our constitutional law or legal system.

Accordingly, most questions in this questionnaire are not relevant to our system in the terms posed. However, there are some analogous situations in our constitutional system to the so-called “gaps” referred to, and some additional observations are made with regard to such instances.

The Constitution of Ireland

The Constitution of Ireland is the basic law of the State. Enacted by referendum in 1937, it is the canopy under which justice is administered in Ireland and legal rights are enforced in courts established by law. Containing 50 Articles, it establishes the institutions of the State and lays down the rules governing the interaction between the organs of State and between the State and the individual. It may be invoked by individuals to challenge the constitutionality of laws passed by the Oireachtas (parliament) and to seek redress for breach of constitutional rights.

Like other constitutions worldwide, the Constitution is not a detailed instrument; rather, it contains general principles and guarantees the protection of fundamental rights. The protection of specified rights is expressly guaranteed by the text of the Constitution. There is also a general provision concerning protection of the “personal rights” of the citizen in Article 40.3.1 of the Constitution.² As regards this general guarantee, the courts have filled in the gaps at a constitutional level by developing a doctrine of unenumerated rights, to which general constitutional protection, through this guarantee, applies. In this manner, personal rights as diverse as the right to bodily integrity, the right to marry and the right to earn a living, among others, have been held to be guaranteed by the Constitution although they are not explicitly referred to in its text.

In addition, although the Constitution does not expressly refer to, for example, due process, the courts through case law have fashioned due process principles derived from the Constitution by interpreting its provisions, including the constitutional duty in Article 34 to “administer justice”, creating what has been termed a “meta-

¹ See fn 1, Questionnaire for the XIVth Congress of the Conference of European Constitutional Courts

² Article 40.3.1 provides that “The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.”

Constitution”.³ Such principles derived from the Constitution are therefore constitutional principles with which all State actors must comply.

Constitutional Control by the Courts

The courts engage in constitutional control regarding “gaps” in legislation concerning certain fundamental rights protected by the Constitution of Ireland. Article 15.4.2 of the Constitution provides that the Oireachtas shall not enact any law which contravenes any of the Constitution’s provisions,⁴ including provisions protecting fundamental rights, such as those guaranteeing due process or fair procedures. The Supreme Court, as the constitutional court of final instance, has the power to declare any legislation, primary or secondary, as being unconstitutional and of no effect.

The nearest analogy to a “gap” in legislation may arise in Irish constitutional law where legislation confers powers on public officials, such as government Ministers or the police (Garda Síochána), without providing express protection for the constitutional rights of the citizen. In certain circumstances, the duty to respect those rights in the exercise of those powers may be considered implicit in such legislation. On the other hand, if the terms of the relevant legislation are such that the necessary respect for constitutional rights cannot be found to be implicit, the Act concerned (or provisions thereof) may be found to be unconstitutional.

This issue is best illustrated by the case of *East Donegal Co-operative Livestock Mart Ltd. v. the Attorney General*.⁵ In this case, the constitutionality of the Livestock Marts Act 1967 was challenged, as it conferred on the Minister for Agriculture and Fisheries the power to attach any conditions he thought proper to a licence granted for the selling of certain livestock, or to amend or revoke any such conditions. The High Court held that this gave to the Minister unfettered discretion which could be exercised, within the limits of the Act, in a manner that would be contrary to the guarantee of equality before the law contained in Article 40.1 of the Constitution and that the licensing provisions of the Act were therefore necessarily invalid having regard to the provisions of the Constitution.

On appeal, the Supreme Court held that, as the impugned Act had been passed after the Constitution of Ireland had come into force, it enjoyed the presumption of constitutionality laid down in a previous decision.⁶ One effect of this presumption is that, “if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction and a Court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the constitutional construction.”⁷ An Act or part thereof can therefore only be held to be unconstitutional where no construction compatible with the Constitution is possible. As noted in the instant case, however, this does not empower the courts to confer an

³ Paul O’Mahoney, *Criminal Justice in Ireland* (Institute of Public Administration, 2002) p. 76.

⁴ Article 15.4.2 provides that: “Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid.”

⁵ [1970] 1 I.R. 317 (H.C.), [1970] 1 I.R. 336 (S.C.).

⁶ *McDonald v. Bord na gCon* [1965] I.R. 217.

⁷ *Ibid.*, at 239.

opposite meaning to a provision which is clear and unambiguous in order to render it constitutional.

In addition, the presumption of constitutionality of legislation carries with it the presumption that “the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained and corrected by the Courts.”⁸ In the instant case, the Supreme Court expressly limited what had been considered unfettered powers by the High Court, by requiring the relevant Minister to exercise his powers under the Act strictly in accordance with the limited objectives of the Act, in accordance with fair procedures and the principles of constitutional justice. In this manner, the Court held respect for fundamental rights to be implicit in the legislation, thereby narrowing the *prima facie* arbitrary and unqualified power of the Minister to grant or refuse licenses or attach conditions thereto and rendering any exercise by the Minister of his powers under the Act which was not in accordance with constitutional principles *ultra vires* the Act. The Court accordingly held the Act (save a small number of provisions) to be constitutional based on its own specific construction of its substance.

Individual citizens have a right to challenge the constitutionality of an Act, and this generally applies to any person materially affected by that Act. While the precise limits of this right have not been defined, the courts thus far have generally taken a generous approach to allowing citizens to challenge legislation.⁹ In addition, under Article 26 of the Constitution the President of Ireland may refer any legislative Bill (subject to limited exceptions) to the Supreme Court for a decision as to whether such Bill (or part thereof) is repugnant to the Constitution. The Supreme Court’s jurisdiction applies to all legislative acts, permitting both *a priori* and *a posteriori* control.

The first reference made by a President under Article 26 – *In the Matter of Article 26 of the Constitution and in the Matter of the Emergency Powers Bill 1976*¹⁰ – provides a further illustration of this power of the courts to address a situation analogous to “legislative omission”. In this case, the Supreme Court was required to determine the constitutionality of the Emergency Powers Bill, a legislative measure drafted to address the national emergency arising out of the conflict taking place in Northern Ireland at that time. Section 2 of the Bill conferred on the Garda Síochána (police) extensive powers to stop, search, question and arrest without warrant, not only persons suspected (with reasonable cause) of committing or intending to commit an offence under the Offences Against the State Act 1939, but also those suspected of possessing information on the commission or intended commission of any such offence. It also provided for the detention of persons in a Garda station, prison, “or any other convenient place” for 48 hours, with the possibility of extension for a further five days.

⁸ [1970] 1 I.R. 336 at 341.

⁹ In the *East Donegal* case Walsh J. opined that the concept of a ‘person aggrieved’ should be ‘generously interpreted’, and this has been the general approach of the Irish courts in subsequent cases.

¹⁰ [1977] 1 I.R. 159.

In the course of its decision, the Supreme Court set out the relevant rights of the citizen, such as the right of suspects to have reasonable access to their legal advisors and medical assistance, guaranteed but not specified by the “personal rights” provisions in Article 40.3.1 of the Constitution, and other constitutional rights derived from the common law, such as *habeas corpus*.¹¹ In relation to the latter right, the Court held that where “the suspicions on which the suspect was arrested were unfounded, he ought to be released unconditionally forthwith; otherwise, he ought to be released on bail, unless there is reasonable cause for believing that, if so released, he is unlikely to stand his trial.”

The Court went on to state that a “statutory provision of this nature which makes such inroads upon the liberty of the person must be strictly construed. Any arrest sought to be justified by the section must be in strict conformity with it. No such arrest may be justified by importing into the section incidents or characteristics of an arrest which are not expressly or by necessary implication authorised by the section.” Thus, the Court held, “the section is not to be read as an abnegation of the arrested person’s rights (constitutional or otherwise) in respect of matters such as the right to communication, the right to have legal and medical assistance, and the right of access to the Courts”, and that were the section so used, “the High Court might grant an order for release [of the person(s) affected] under the provisions of *habeas corpus* contained in the Constitution.”

Ultimately, the Court upheld the constitutionality of the Bill, but only once it had delineated its scope through careful interpretation to such an extent as to render its application by the Garda Síochána compatible with the Constitution.

It may be noted that all decisions of the Supreme Court concerning the constitutionality of legislation, including those made pursuant to a reference under Article 26 of the Constitution, are binding.

¹¹ The remedy of *habeas corpus* is guaranteed by Article 40.4 of the Constitution.