

**Questionnaire  
for the XIV<sup>th</sup> Congress of the Conference of European Constitutional Courts**

**“PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE”**

**RESPONSE OF IRELAND**

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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)”.<sup>1</sup> 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.<sup>2</sup> 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-

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<sup>1</sup> See fn 1, Questionnaire for the XIV<sup>th</sup> Congress of the Conference of European Constitutional Courts

<sup>2</sup> 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.”





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*.<sup>11</sup> 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.

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<sup>11</sup> The remedy of *habeas corpus* is guaranteed by Article 40.4 of the Constitution.