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CONFERENCE
ON

"ACCESS TO THE COURT - THE APPLICANT IN THE CONSTITUTIONAL JURISDICTION"
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REPORT

"RIGHTS OF ACCESS TO THE IRISH COURTS FOR COMPLAINTS OF UNCONSTITUTIONALITY"

by
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I want to start by thanking the Venice Commission for nominating me as a rapporteur at this conference, dealing as it does with a topic which has engaged the Irish Supreme Court in different ways. Let me add, it is particularly pleasing to visit Latvia, a country with close links with Ireland in recent years particularly when our economy was in a happier state than it is now. We are constantly encountering Latvians in our day to day business contacts and relations between our two peoples have been excellent.

This conference, as I understand it, is primarily concerned with rights of access to constitutional courts and indeed rights to challenge laws on grounds of unconstitutionality with particular focus on the right of juristic persons and associations of persons as distinct from individuals to such access.

I have been asked to outline the relevant Irish jurisprudence within a twenty minute address, not an easy task. I will have to be economical in my approach. Notwithstanding the short time at my disposal, it would make no sense to explain the Irish law without first explaining the role of the Irish written Constitution which embodies both express and implied fundamental rights and also our system of courts.

There is no separate constitutional court in Ireland. Constitutional rights and challenges to the constitutionality of legislation may be asserted in ordinary litigation before the higher courts both of first instance and of appeal.

My impression from attending conferences, and especially the biennial meetings of the Conference of European constitutional courts, is that Ireland is second to none in both the degree of access to the courts and indeed the effectiveness of remedies for breach of constitutional rights including challenging the validity of unconstitutional legislation. Our legal system is a common law system and not the civil law system pertaining in most of continental Europe. Unlike the U.K. however, it is a common law system upon which is superimposed a written constitution. As I mentioned, we do not have a separate constitutional court in the sense that Germany and most continental European countries have. Indeed, we do not have a separate system of administrative courts. Nor have we anything analogous to the Conseil d'Etat. We have simply one system of courts for every kind of case, though under the Constitution only the High Court (which is the highest court of first instance) and the Supreme Court on appeal may declare a statutory provision invalid having regard to the Constitution. An action for damages for negligent driving of a motor car, an action for an injunction to prevent damage to one's property or an action seeking a declaration that some piece of legislation is invalid having regard to the Constitution are all commenced and proceeded with under the same procedure and in the same set of courts and before the same set of judges. A corollary of this is that a constitutionality issue may be joined with any other cause of action in High Court proceedings. I am one of eight judges of the Irish Supreme Court which hear appeals from the High Court. We sit as either a court of five or a court of three or very occasionally a court of seven. There are no specialist chambers. We deal with final appeals on every branch of the law, criminal, civil, family law, administrative law and constitutional law. Furthermore, unlike the U.K. there is almost no restriction on the right to appeal to the Supreme Court except in the field of criminal law and even there, there is a right of appeal to a special appeal court presided over by a Supreme Court judge and a further appeal to the Supreme Court can be made with permission where there is an exceptional point of law of public importance involved.

The two questions which I now intend to address are as follows:

1. Does all this mean that any kind of obsessive crank or vexatious litigant (and we have many of them and worse still usually unrepresented) may waste the time of the courts in making an unstateable case to have a statutory provision annulled. The answer is no. First of all, an unstateable case of any kind, constitutional or otherwise, can always be struck out at an early stage. But quite apart from that, there are limits on the categories of persons who may

seek to have legislation declared invalid. In a well-known Irish case **East Donegal Co-operative Limited v. Attorney General** [1970] I.R. 317, Mr. Justice Walsh, himself a distinguished constitutional lawyer and for many years as well as being a judge of the Supreme Court of Ireland was a judge of the European Court of Human Rights, said the following and I quote:

> *"With regard to the locus standi of the plaintiffs the question raised has been determined in different ways in countries which have constitutional provisions similar to our own.. At one end of the spectrum of opinions on this topic one finds the contention that there exists a right of action akin to an actio popularis which will entitle any person, whether he is directly affected by the Act or not, to maintain proceedings and challenge the validity of any Act passed by the parliament of the country of which he is a citizen or to whose laws he is subject by residing in that country. At the other end of the spectrum is the contention that no one can maintain such an action unless he can show that not merely do the provisions of the Act in question apply to activities in which he is currently engaged but that their application has actually affected his activities adversely. The court rejects the latter contention and does not find it necessary in the circumstance of this case to express any view upon the former."*

Shortly after that decision another equally distinguished Supreme Court judge, Mr. Justice Henchy, referred to the mischief which could be caused by what he called *"nominal plaintiffs"* seeking declarations of unconstitutionality. This brings me on to the principal Irish case on the subject in which the main judgment was delivered by that judge. It is a case famous in Irish jurisprudence called **Cahill v. Sutton** reported in [1980] I.R. 269. The effect of that decision was to limit *locus standi* in actions challenging the constitutional validity of a statutory provision to persons who could prove a detriment actual or apprehended to themselves resulting from the Act's operation. Mr. Justice Henchy in his judgment was impliedly critical of the passage from the earlier judgment of Mr. Justice Walsh which I have cited. He considered that the contrast drawn in the passage as between two widely divergent opinions or contentions could not be regarded as representing two opposing judicial attitudes taken up in other jurisdictions. He took the view that they were two extreme polarised opinions neither of which would have been judicially approved of in any other country. He went on to state and I quote:

> *"The widely accepted practice of courts which are invested with comparable powers of reviewing legislation in the light of constitutional provisions is to require the person who challenges a particular legislative provision to show either that he has been personally affected injuriously by it or that he is in imminent danger of becoming the victim of it. This general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right. In that way each challenge is assessed judicially in the light of the application of the impugned provision to the challenger's own circumstances."*

The judge went on to make clear that this rule, which he called a rule of judicial self-restraint, was not absolute. A plaintiff would not lack *locus standi* if the application of that rule worked an obvious injustice.

It is only fair to say that there is a *quasi* exception to the rule in the Irish Constitution itself. Under Article 26, the President, if he or she is concerned as to the constitutionality of legislation intended to be signed may first refer the unsigned Bill to the Supreme Court. Counsel for the Attorney General then argue before the court in favour of its constitutionality and a team of counsel nominated by the court itself argue the opposite. Only one judgment is permitted and if the Bill or any particular provision of it is held to conform with the Constitution, the issue of its validity cannot be reopened afterwards by any aggrieved person. Not all Irish

lawyers have been totally happy with this provision, but there is no evidence that it has caused an injustice. The number of Bills referred by the President to the Supreme Court would not average more than about one every two years. A decision on it can give confidence to the general public. What Mr. Justice Henchy makes clear however in **Cahill v. Sutton** is that the existence of that constitutional provision is exceptional and in no way dilutes the ordinary principles underlying *locus standi* which he has set out in the judgment and to which I have referred. Indeed, he adds the following:

> *"There is also the hazard that, if the courts were to accord citizens unrestricted access, regardless of qualification, for the purpose of getting legislative provisions invalidated on constitutional grounds, this important jurisdiction would be subject to abuse. For the litigious person, the crank, the obstructionist, the meddlesome, the perverse, the officious man of straw and many others, the temptation to litigate the constitutionality of a law, rather than to observe it, would prove irresistible on occasion."*

In the short time available that is all I am going to say about the general principles of *locus standi* in constitutional challenges to legislation in the Irish courts.

I move now to an aspect of access which I understand is of particular interest to Latvia. It is the question of whether juristic persons or associations of persons showing a concern as distinct from individuals should have *locus standi* to challenge legislation on constitutional grounds. Under Article 40.1 of the Irish Constitution there is a guarantee of equality before the law conferred on *"all citizens"* as *"human persons"*. That is the only provision in the Constitution which expressly singles out citizens *"as human persons"*. In the 4th edition of Kelly on the Irish Constitution, the leading textbook on that subject and now edited by two lecturers in Trinity College Dublin, the view is expressed that *"The preponderance of modern authority has been to accord juristic persons the same rights as citizens, save for special cases where this would be clearly inappropriate."* The editors have included an interesting footnote citing Article 8(4) of the South African Constitution which reads as follows:

> *"A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person."*

This would seem to me to make sense because behind the imputed plans, intentions and purposes of a body corporate are individual human beings.

The issue has been considered by the Irish Supreme Court in three important cases. First, it was **Private Motorists Provident Society v. Attorney General** [1983] I.R.339. The view was taken in that case, and which attracted subsequent academic criticism was that the issue need not really be decided because behind every company there was a shareholder whose personal rights would have been equally interfered with. It has been pointed out that this view goes against the fundamental principle of company law that the company has legal personality wholly independent of its shareholders.

The second case was **The Society for the Protection of Unborn Children (Ireland) Limited v. Coogan** [1989] I.R. 734. The plaintiff was a company limited by guarantee with objects of protecting the right to life of the unborn child. It brought an action which came on for hearing in the High Court in 1988 and in the Supreme Court on appeal in 1989 seeking an injunction restraining publication of material giving information on abortion and pertinent addresses in a book published by the students union of University College Dublin. It was argued that this company had no *locus standi* but the Supreme Court rejected that submission and held that the Society was a legitimate plaintiff provided it could show that it had a genuine *bona fide* concern and interest, it not being sufficient merely to include this objective in the Articles and Memorandum of Association. It should be explained that the Irish Constitution, as

a consequence of an amendment contains an express acknowledgment and guarantee of protection to the life of the unborn subject only to the equal right to life of the mother. In that sense the case might have been thought as exceptional on its own facts.

The issue, however, was dealt with in a much more general way by Mr. Justice Keane in the Irish High Court (himself a future Chief Justice) in the case of **Iarnród Éireann v. Ireland** [1996] 3 I.R. 321. That was a case where the plaintiff, a statutory railway company challenged the constitutionality of a particular statutory provision. The shareholding in the company was held by another statutory corporation so that there were therefore no human shareholders. The key passage from the judgment of Mr. Justice Keane read as follows:

> *"Undoubtedly some at least of the rights enumerated in Article 40.3.2 the right to life and liberty – are of no relevance to corporate bodies and other artificial legal entities. Property rights are, however in a different category. Not only are corporate bodies themselves capable of owning property … but the 'property' referred to clearly includes shares in companies formed under the relevant company's legislation which was already a settled feature of the legal and commercial life of this country at the time of the enactment of the Constitution. There would accordingly be a spectacular deficiency in the guarantee to every citizen that his or her property rights will be protected against 'unjust attack', if such bodies were incapable in law of being regarded as 'citizens', at least for the purposes of this Article, and if it was essential for the shareholders to abandon the protection of limited liability to which they are entitled by law in order to protect, not merely their own rights as shareholders but also the property rights of the corporate entity itself, which are in law distinct from the rights of its members."*

While the matter may not be finally determined the views expressed by Mr. Justice Keane probably represent modern Irish law.

I will be interested to hear more discussion about the Latvian case giving rise to this conference. If I understand the position correctly, that case was brought allegedly in the public interest by a body calling itself the Coalition for Nature and Cultural Heritage Protection. In Ireland, we have a somewhat analogous body but it is a body created by statute. It follows from that, that in so far as it challenges planning or environmental decisions by public bodies, no problem of *locus standi* arises. However, we have also had cases where groups of persons formed a company or indeed proceeded in their own names even though not necessarily directly affected. The leading case on this whole topic in Ireland is not actually a constitutional action. It was a proceeding seeking judicial review of a decision by the statutory planning appeal body on the basis of alleged illegality by that body but not on the basis of unconstitutionality. It, therefore, does not form part of our constitutional jurisprudence as such, but the issues of *locus standi* that arose in that case would equally apply in a constitutional action. The case is **Lancefort Limited v. An Bord Pleanála** (No. 2) [1999] 2 I.R. 270. As in the Latvian case there was a dissenting judgment. That dissenting judgment took a liberal view of the rights of concerned citizens to object and to form a company to pursue the objection in the courts. The majority judgment, however, narrows the grounds. The details are technical and I do not intend to go into them. Broadly speaking, the majority of the court took the view that as ordinary objectors had a right of hearing both in relation to the original planning application and the appeal to the planning appeal board, the right to judicially review the decision in the courts when they had no proprietary interest, was a limited one, but not non-existent. It depended on the seriousness of the issue and the justice of the case.

What seems to run through all aspects of *locus standi* in Ireland and what I think is probably a just approach is to apply reasonably strict criteria against persons or bodies who have no proprietary interest in proceedings challenging the constitutionality of a provision or

indeed the illegality of an executive act by a public body but there is not an absolute prohibition. It depends on all the circumstances whether principles of justice dictate that the proceedings should be admitted.