ADDRESS BY MICHAEL MCDOWELL S.C.
TO THE FIRST ANNUAL REVIEW OF IRISH REGULATORY AFFAIRS
WEDNESDAY 26TH NOVEMBER 2008
RADISSON HOTEL, STILLORGAN ROAD, DUBLIN.

"THE LEGAL CONTEXT FOR REGULATORY ACTIVITY IN IRELAND"

CONSTITUTION DESCRIPTION OF REGULATION

Can I begin by drawing to your attention the constitutional framework within which Irish regulatory law is located?

Article 6 of the Constitution provides as follows:

> *"1. All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.*
>
> *2. These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution."*

Article 6 divides the powers of democratic government into three broad categories, legislative, executive and judicial.

In this context, we have to ask into which category, if any, we can fit the activities of our regulators. Are they sometimes legislative? Are they sometimes executive? Are they sometimes judicial? It seems to me that some regulators make regulations by way of delegated legislative function. Some adjudicate and others simply enforce.

Do they fit, then, neatly into the tripartite separation of powers provided for in Article 6?

This is a question to which I will return shortly.

But in the meantime, it is worth noting that the powers of regulatory bodies are definitely *"powers of government"* and are therefore exercisable *"only by or on the authority of the organs of State established by this Constitution"*.

This latter consideration raises further questions. What are the organs of State established by the Constitution? It is clear that whatever they are, the regulatory powers are exercisable either *"by"* or *"on the authority of"* these organs.

It is very important to stress that *"powers of government"* in Ireland are the monopoly of the *"organs of State established"* by the 1937 Constitution. Those powers can only be exercised by those constitutionally established organs of State or, alternatively, on the authority of such organs.

It would seem that some regulators act on the authority of the Oireachtas. This raise the question as to the extent that the Oireachtas is constitutionally competent to take executive power away from the Government and to confer it on other bodies.

THE JUDICIAL POWER

It is interesting to note, in this context, that Article 64 of the Irish Free State Constitution provided as follows:-

> *"The judicial power of the Irish Free State (Saorstát Éireann) shall be exercised and justice administered in the public Courts established by the Oireachtas by judges appointed in manner hereinafter provided."*

That clause was not faithfully replicated in the 1937 Constitution. It provided, at Article 34.1 as follows:-

> *"Justice shall be administered in courts established by law by judges appointed in the manner provided in this Constitution …"*

Furthermore, Article 37 of the 1937 Constitution was enacted to the following effect:-

> *"37.1 Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under the Constitution."*

Thus, the seemingly watertight monopoly conferred on the Courts in the Irish Free State over the judicial power was qualified and it was acknowledged in 1937 that bodies other than Courts could exercise *"limited functions and powers of a judicial nature"* as long as they were not criminal matters and provided that they were *"duly authorised by law to exercise such powers and functions"*.

HOW DO REGULATORS FIT INTO THE SEPARATION OF POWERS?

The Supreme Court in *Abbey Films v. The Attorney General*[1] held that *"the framers of the Constitution did not adopt a rigid separation between the legislative, executive and judicial powers"*.

---

[1] (1981) I.R. 158

Article 37.1 of the Constitution was intended to make it clear that persons or bodies of persons other than Courts could exercise limited functions and limited powers of a judicial nature, notwithstanding that they were not Courts or Judges appointed under the Constitution.

Does this mean that specialised tribunals exercising judicial functions are lawful as long as their area of competence is limited and as long as their powers are limited to the exercise of those functions?

The Supreme Court, in *Re Solicitors Act*[2] case stated as follows:-

> *"A tribunal having but a few powers and functions but those of far reaching effect and importance could not properly be regarded as exercising 'limited' powers and functions ... If the exercise of the assigned powers and functions is calculated ordinarily to effect in the most profound and far reaching way the lives, liberties fortunes or reputations of those against whom they are exercised, they cannot properly be described as 'limited'."*

WHERE ARE THE BOUNDARIES OF THE JUDICIAL POWER?

As to what amounts to *"the administration of justice"* or *"judicial power"*, there is unfortunately no clear jurisprudence. Deciding what lies within the exclusive competence of Judges in Courts and what may be carried out by other tribunals or persons even if under an obligation to behalf to one extent or another judicially, is by no means an exact science as far as Irish constitutional jurisprudence is concerned.

In the case of *McDonald v. Bord na gCon (No. 2)*[3], Kenny J. defined the administration of justice as having five *"characteristic features"*. These were:-

"1) A dispute or controversy as to the existence of legal rights or a violation of the law;

2) The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;

3) The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;

4) The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive arm of the State which is called in by the Court to enforce its judgment;

5) The making of an order by the Court which as a matter of history is an order characteristic of Courts in this country."

---

[2] (1960) I.R. 239

[3] (1965) I.R. 217

Does this imply that a regulator established by law insofar as it is bound to act judicially must either be a Court or else be a body authorised under Article 37?

In my view, the Supreme Court decision in *McDonald v. Bord na gCon* created a third category. It was possible for there to exist bodies which *"while bound to act judicially, are not constituted judicial persons or bodies nor do they exercise powers of a judicial nature within the meaning of Article 37"*.

As Kelly's Irish Constitution puts it:-

> *"It follows from this formulation that the Court saw a landscape containing (1) Courts; (2) non Courts exercising limited judicial functions under Article 37; (3) administrative bodies bound to act judicially. Where the theoretical or dogmatic boundaries were to be drawn between these three categories remained as uncertain as before."*

It would appear that Irish constitutional jurisprudence regards the activities of statutory bodies which either compulsorily acquire property or licence activities which are prohibited if not licensed as *"administrative"* rather than judicial powers.

The Dublin Castle tribunals excited a good deal of constitutional and judicial review type litigation. It was found that the activities of the tribunals were not *"an administration of justice"* within the meaning of Article 34.

In *Goodman International v. Hamilton (No. 1)*[4], Chief Justice Finlay stated that the activities of the Beef Tribunal did not come within the fifth principle laid down by Kenny J. in *McDonald v. Bord na gCon*. He stated:-

> *"It is no part, and never has been any part of the function of the judiciary in our system of law, to make a finding of fact, in effect, in vacuo and to report it to the Legislature. The courts do not even exercise a function of making, in cases between litigants, a finding of fact which does not have an effect on the determination of a right."*

McCarthy J. stated in *Keady v. The Garda Commissioner*[5] in relation to the powers of the Garda Commissioner:-

"It is easier, if intellectually less satisfying, to say in a given instance whether or not the procedure is an exercise of [the judicial power], rather than to identify a comprehensive check list for that purpose. ***The requirement to act judicially is not a badge of such power".*** [my emphasis]

---

[4] (1992) 2 I.R. 542
[5] (1992) 2 I.R. 197

In view of the foregoing, it is very clear that various bodies or tribunals established under law to exercise what are now termed *"regulatory"* functions, including licensing, disqualifications, and regulatory activities such as determining the manner in which licensed or regulated activities may be carried out, may well require the regulator to act judicially, to one extent or another, either procedurally or substantively, but these requirements, and the susceptibility of such bodies to judicial review by the High Court, do not by themselves make regulators into bodies exercising the judicial power in the manner contemplated by Article 37 of the Constitution.

IS THERE A CONSTITUTIONAL MANDATE FOR REGULATORS?

In relation to the regulation of economic activity, it is instructive to have regard to the provisions of Article 43 of the Constitution. Article 43.2 recognises that property rights *"ought, in civil society, be regulated by the principles of social justice"*.

It authorises the State, accordingly, *"as occasion requires"* to *"delimit by law the exercise of 'property rights' with a view to reconciling their exercise with the exigencies of the common good."*

Article 45 of the Constitution, which is directed exclusively to the Oireachtas and is not directly enforceable by the Courts, provides that as a matter of social policy the Irish State must direct its policy to securing *"especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment"*. The same Article while requiring the State to *"favour and, where necessary, supplement private initiative in industry and commerce"*, also requires the State to *"endeavour to secure that private enterprise shall be so conducted as to ensure reasonable efficiency in the production and distribution of goods and as to protect the public against unjust exploitation"*.

It can be said safely that regulation of property rights, economic rights, and the activities of enterprise is not merely possible but positively mandated by the terms of the 1937 Constitution. In this context, it must be stressed that the directive principles of social policy direct the Irish State to favour *"private initiative in industry and commerce"*.

ARE REGULATORS LIABLE TO BE JUDICIALLY REGULATED?

Having set out the constitutional basis for regulatory activity and having tried to fix the exercise of powers by regulatory bodies within the constitutional firmament, I want to turn my attention now to the question of the manner in which regulators must discharge their functions and their legal liability for failure to comply with the law.

It seems to me that regulatory bodies vary hugely both as to their nature and as to the scope of their powers. The 2004 White Paper entitled *"Regulating Better"* noted that there were *"over 500 public agencies/bodies in Ireland, many of which have a regulatory function – either as a 'rule maker' or 'rule enforcer'."*

The Government and the ministers who form the Government together with the departments in which the minister are located is, perhaps, by default, the primary constitutional regulatory body and the only one specifically mentioned in the Constitution.

Government itself has inherent executive powers which are not dependent on legislative bases. In addition, Government ministers are frequently given regulatory powers under statute.

At a different level, local authorities can make by-laws within their area of jurisdiction. They can also devise development plans and administer their implementation through the Planning Acts.

Other bodies include sectoral regulators such as ComReg, Ifsra, etc. Sometimes these bodies are given the same right as ministers under legislation to make regulations within overall policy parameters set out by legislation.

In other cases, regulatory bodies are given the function of enforcing regulations made by ministers. It would be impossible, in the time available to me, to set out and consider each of the regulatory bodies which Governments have established over the years. There are a multitude. Nearly all of them are susceptible to judicial review by the High Court in the exercise of their functions.

JUDICIAL REVIEW

If they act *ultra vires*, or if they act unlawfully, or if they act maliciously, they are subject to the remedy of judicial review.

The modern law of judicial review is set to in very basic terms in the Rules of the Superior Courts. It embodies three separate remedies based on old prerogative writs of the common law judiciary, namely, certiorari, mandamus and pro onto. It also nowadays includes a declaratory jurisdiction and claims for judicial review can be coupled with claims for injunctions and claims for damages in certain cases.

WHAT ABOUT DAMAGES?

It is to this last matter of damages that I wish to turn my attention now. We are quite conversant with regulatory bodies being subject to judicial review in the sense of having their decisions quashed or being ordered to carry out their functions in one way as opposed to another, or having the eligibility of members challenged and determined. We are familiar with regulatory bodies being told by way of judicial review decisions that they must not discharge their functions in a particular way or that they must afford persons affected by their decisions particular rights of audience etc.

But as Hogan and Morgan state in *Administrative Law in Ireland* (3rd edition) at page 811:-

> *"It is a cardinal principle ... that there is no direct relationship between the power of the court to annul an administrative act and liability to pay damages or monetary compensation. When a court annuls an administrative act on procedural grounds, that decision is deemed to be ultra vires and void ab initio. However it does not follow that a declaration of invalidity of an administrative decision in and of itself gives rise to a cause of action in damages. It seems that an invalid administrative act will sound in damages only if: (i) it happens also to constitute the commission of a recognised tort, such as false imprisonment, trespass or negligence; (ii) where the invalid act was motivated by malice or the authority knew that it did not have the power which it purports to exercise i.e. the tort or misfeasance of public office; (iii) there is a breach of statutory duty; or (iv) the invalid act amounted to an infringement of a personal constitutional right or a breach of the plaintiff's legitimate expectations."*

Put succinctly, this means that a local authority which acts unlawfully in granting a planning permission or in failing to do so, or a licensing authority which acts unlawfully in refusing or granting a licence, or a regulator which acts unlawfully in taking into account irrelevant considerations when fixing tariffs or the like, does not expose itself to a claim in damages by a person adversely affected by the unlawful decision in every case.

But what happens if a regulator simply gets it wrong? There is a tort of *"misfeasance in public office"*. This tort is committed where an act is performed by a public official or tribunal either maliciously or with actual knowledge that it is committed without jurisdiction and is so performed with the known consequence that it would injure the plaintiff. In these circumstances, an injured plaintiff can sue for damages. However, the onus of proof on a plaintiff is to establish not merely that the decision was wrong or improperly made, but that it was made in bad faith either with active malice or alternatively with utter recklessness as to its legality.

In the case of *Re 'The La Lavia'* the High Court awarded damages in misfeasance against the Office of Public Works following the quashing of a preservation order which had been made in respect of a maritime wreck. The Court held that it was *"satisfied that the officials who were responsible for the making of the order knew, or strongly suspected, there was no statutory authority under (the National Monuments Act 1930) for making it. It seems to me that the circumstances fall within the principles laid down the Supreme Court in Pine Valley Developments Limited v. Minister for the Environment that where it did not possess the power which it purported to exercise, it is answerable in damages to a person who is injured by the exercise of the power"*.

Damages may also lie against a regulatory body for *"breach of statutory duty"* and for *"breach of constitutional rights"*.

WHAT ABOUT NEGLIGENT ERROR?

However, a wholly separate issues arises as to whether public bodies are liable to individuals who suffer loss or damage as a result of the negligent exercise of discretionary public powers.

In general terms, where a planning authority or a regulatory body makes a decision wrongly but in good faith, a person who has been injured by the legal error is not entitled to claim compensatory damages in consequence.

Thus, if an applicant for a taxi plate is wrongly refused, then as long as the Taxi Regulator is acting in good faith (i.e. without malice or recklessness) the mere fact that the regulator's decision is subsequently quashed by the High Court does not entitle the would-be taxi driver to, say, one year's profits occasioned by a year's delay in obtaining a licence.

The same applies in much more complex cases. If a development authority wrongly decides to permit or to prohibit a development by reason of a misinterpretation of its powers or the taking into account of *ultra vires* considerations or some other breach of the reasonableness test, and if such a decision is quashed or reversed on foot of a judicial review application, it does not follow that the public body in question is thereby exposed to a claim of damages by the would-be developer.

Erroneous decisions do not give rise to an entitlement to compensation for persons adversely affected by them.

We live in a world in which regulatory bodies have very extensive powers. But the consequence of correction by way of judicial review is by no means a presumptive entitlement to compensation for the error or illegality involved in the quashed decision. Thus, while the State is not immune in tort under Irish law since the decision in *Byrne v. Ireland*, it is not a tort in most cases for a State body of whatever kind to make an error in the discharge of a discretionary decision making power and the tax payer is not made liable to the aggrieved party for loss incurred by that person by reason of governmental or regulatory errors in most cases.

A POSTSCRIPT ON THE FUNCTION OF DÁIL ÉIREANN AND ITS MEMBERS

The last point that I wish to make is of a constitutional kind. There is a myth that members of Dáil Éireann are elected solely to be legislators and that they are betraying their constitutional function when they act as intermediaries between the citizens and the organs of Government and, in particular, the executive organ of Government itself.

I recently heard that excellent author, Joseph O'Connor, in a radio essay, suggest that TDs who take the grievances of their constituents and make representations to Government or to organs of Government on their behalf, are in effect betraying their constitutional function as legislators.

Understandable though that criticism may be, it is, in my view, profoundly wrong. In the first place, Dáil Éireann is not solely a legislature. It is described in our Constitution as *"a House of Representatives"*. It, along with Seanad Éireann and the President forms our national parliament, the Oireachtas.

Article 15.2 of the Constitution does provide that *"the sole and exclusive power of making laws for the State is hereby invested in the Oireachtas"*.

But it does not follow that the sole and exclusive function of Dáil Éireann is to make laws.

Equally important in the constitutional scheme of things are the provisions of Article 28 of the Constitution. Article 28.2 provides that *"the executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the government."* Article 28.4 goes on to provide that the government shall be responsible to Dáil Éireann. Dáil Éireann chooses the Taoiseach and approves the appointment of members of the Government. The Taoiseach's tenure is dependent upon the support of a majority in Dáil Éireann and he is obliged to *"resign from office upon his ceasing to retain the support of a majority in Dáil Éireann"* unless, being a defeated Taoiseach, he obtains a dissolution of the Dáil and on its reassembly secures the support of a majority. Dáil Éireann, in addition, and its members, are responsible for considering estimates, receiving and considering the reports of the Comptroller and Auditor General, and voting Supply to the Government.

It is, accordingly, simply wrong to assert that the sole and exclusive function of Dáil Éireann is to act as a legislative chamber.

It is the function of a Dáil deputy, as a public representative, to represent the interests of individual citizens and of society in general and to hold the executive organ of the State, the Government, and all of its machinery of State, accountable to the individuals. That includes major matters of public accountability and minor matters of individual accountability. So, for instance, there was nothing wrong with an individual's mother going to her constituency TD and asking that TD to request the Minister for Justice, who is in charge of prisons, to ensure that her son who was a prisoner was properly looked after in respect of his need for dental services while incarcerated.

While Citizens Advice Bureaus and customer charters in State bodies may, in some cases be sufficient or preferable safeguard mechanisms for the individual citizen's rights when dealing with the Executive, it nonetheless remains entirely proper and appropriate for elected *"public representatives"* to hold the Executive answerable to individual citizens whether through Parliamentary Questions or otherwise to the extent that that is necessary and that such accountability is not otherwise available. It is not, accordingly, a reduction of the function of a Dáil Deputy to that of messenger boy for individual ministers or for Government departments or agencies to receive and to respond to individual representations on behalf of elected public representatives.

Misguided purism on this issue should be challenged.

ENDS