

Report from Ireland

presented by

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INTRODUCTION

In Ireland there is no system of separate administrative law such as one finds in civil law countries. There is no system of administrative Courts existing side by side with the ordinary Courts.

The Constitution contemplates law being either civil or criminal. To put it very shortly everything that is not criminal law is civil law. Therefore the expression civil law would include all matters which fall under the heading of constitutional law, ordinary civil suits and administrative law.

Administrative law is conventionally defined as the law regulating the organisation, composition, functions and procedures of public authorities; their impact on the citizen; and the restraint to which they are subject. By public authorities is meant the State itself, the Government, a Minister in his Department, local authorities, State companies or corporations, and where applicable, officials of the State or of other authorities of a public nature who are given some function in which they are required to make adjudications.

By comparison with another common law State, namely, the United Kingdom, there are comparatively few administrative tribunals in Ireland. While the Constitution of Ireland draws a clear distinction between the legislative, executive and judicial powers of Government, administrative acts or the decisions of administrative tribunals do not fall within the administration of justice, but they are matters in which the parties making the decision must act judicially; that means they must act in accordance with fair procedures which the Constitution requires of all decision making authorities which are called upon to make adjudications which may impose liabilities or affect rights.

It has been decided by the Supreme Court of Ireland that both public policy and the dictates of constitutional justice require that all laws, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities must be construed as providing for fair procedures. The Constitution of Ireland, in Art. 40, guarantees fair procedures and the rules by which this is enforced by the Courts is known as constitutional justice. It has already been held by our Courts that the expression natural justice which in terms of common law was confined to two maxims namely, *audi alteram partem* and *in sua causa nemo iudex est* were not sufficiently comprehensive to cover all the matters which might arise under the enforcement of the constitutional guarantee of fair procedures — hence the expression constitutional justice.

In Irish law administrative law may be defined as internal public law which is not criminal law and is not constitutional law in the strict sense. The administrative function can be performed in a direct explicit way either by word of mouth or in written form or by other symbols, and indirectly by way of behaviour from which the will of an administrative organ to express legal rules can be inferred.

Direct expressions of the administrative function usually take the form of decisions, which may be administrative decisions for individual decisions or policy rules laid down in Ministerial directives and circulars, etc. But if a policy rule does not itself have a statutory basis, it is not and cannot be characterised as delegated legislation, but simply as an administrative act.

An indirect expression of legal volition of an administrative organ can be found in a policy rule or rule of practice that, though not merely explicit in any published document, can be inferred from one or more decisions.

Rules conceived in the form of administrative decisions are binding on the person or persons directly concerned as well as on third parties. These may be classified as rules of administrative law at the lowest level of the hierarchy of norms which is so characteristic of administrative law. As explained earlier the term civil law will include administrative law and constitutional law as well as ordinary civil law. Therefore when controversies arise between citizens and the State, or between the citizen and other authorities they are in the broad sense subject to civil law. The State itself is bound by civil law when it is performing its administrative function. This is because the State itself is also subject to the supervisory power of the Courts and judicial review takes place in accordance with the general standards of constitutional justice applied in cases involving public bodies as well as in cases involving private bodies.

Some statutes dealing with administrative law expressly provide for appeal to the ordinary civil Courts. Administrative decisions may also be attacked in the procedure known as judicial review. The Courts power of judicial review is an inherent jurisdiction derived from the Constitution itself, and this inherent jurisdiction could not be removed by any statute. On the other hand appellate jurisdiction conferred by statute being the creation of statute can be varied, or even abolished by statute, and there are no constitutional impediments to the abolition of such a statutory jurisdiction. When dealing with a statutory appeal the Court is concerned with the merits of the administrative decision where as in judicial review the Court is concerned with the legality of the administrative decision. Thus when the Court is exercising a statutory appellate jurisdiction, it has generally spea-

king the power to alter or vary the administrative decision, or, if needs be, to remit the case back to the administrative body concerned. However in judicial review proceedings the Court is faced with a choice somewhat similar to that faced by a *Cour de Cassation* in civil law countries. It is, generally speaking, faced with the choice of either quashing the administrative decision or part of it where such a decision is severable or not quashing it.

A finding of illegality or invalidity will in practice have *erga omnes* effect. Thus a large category of persons who, being similarly affected by the impugned legislation or administrative act, will be permitted to rely on this finding of invalidity. In contrast where the Courts are dealing with a statutory appeal, the decision of the High Court is in practice a ruling which is effective only *inter partes*, that is to say between the appellant and the administrative body concerned. Such a decision will only rarely have general significance. In such cases if the Court rules against the administrative body concerned this will only have a prospective affect and will not call into question the legality of any earlier administrative decisions.

Judicial review is how the Courts in virtue of their inherent jurisdiction from the Constitution exercise their supervisory power. The remedies available include the remedies of *certiorari*, which means quashing, *mandamus* which is to make an order directing an administrative body to do something and to do it in accordance with law, and *prohibition* which is an order directed to an administrative body which may prohibit it from undertaking the making of the decision or *quo warranto* which challenges the very legality of the existence of the body. In addition the remedy may include either declaration as to rights or an injunction to restrain some wrongful activity. And it may also include the awarding of damages for any wrong done resulting in loss or other damage. In modern terminology *certiorari*, *mandamus* and *prohibition* might be considered to be pure public law remedies while *declarations*, *injunctions* and *damages* are private law remedies.

PART I

THE ENFORCEABLE NATURE OF ADMINISTRATIVE ACTS

1. Administrative bodies, most of which have been set up by statute, will almost always have the right to enter into contractual relations with

other parties just as ordinary citizens can, provided that the contracts they entered into would not be regarded as *ultra vires*, that is to say ones outside the power given to them by statute or alien to the objectives of the administrative body. In such cases the ordinary law of contract will apply just as if the contract had been entered into between two private parties.

Apart from that, however, administrative bodies set up by statute are frequently given powers to make enforceable decisions. Sometimes this will take the form of having the capacity to go to Court to get an order to enforce their decisions if they have not been obeyed. Frequently such powers are also backed up by the criminal law to the extent that failure to obey certain administrative decisions can result in a criminal prosecution. This, of course, can only arise where it is so provided in the law or the statute setting up the administrative body and conferring the necessary powers upon that body.

2. Many administrative decisions which are to be of general application require publication in newspapers or other source of information to which the public will have access before they can be validly enforced. Other administrative decisions which are directed only at a particular individual or individuals will usually require that some stipulated notice of the decision be given to that party before the party can be called upon to obey it.

While there is a presumption that all laws passed by Parliament are valid this, of course, can be displaced if the matter is contested. Strictly speaking no such presumption applies to administrative decisions or to subordinate legislation, but in practice it makes very little difference because if the administrative decision, whether it takes the form of subordinate legislation or is simply a decision, does not conform to the relevant and the governing law, then it will not be enforceable. However unless it is successfully shown that the decision or regulation in question is *ultra vires* in some way, then it will take effect.

In general an administrative body cannot ask for a court decision to the effect that its own decision is valid unless a challenge has been raised. Equally, persons who are not affected by the administrative decision will not have sufficient *locus standi* to raise any challenge. Therefore in practice one might say there is to some extent a presumption of validity, but like all presumptions in Irish law they are capable of being rebutted.

3. While administrative decisions may either impose obligations or grant rights, they are in general not enforceable by the administrative

authority in question save by the intervention of civil Courts or in some cases the criminal Courts. Thus an administrative body whose decision is not being obeyed may have a right to go to Court to seek some order in the nature of an injunction to compel enforcement or to restrain disobedience of its decision, but in very many cases there is also a possibility of imposing criminal sanctions by a criminal prosecution against the person concerned. The statute which permits such prosecutions would usually fix what the maximum penalty would be, but more importantly may provide that in a case of a continuing disobedience or a continuing violation of an administrative decision, there may be a penalty imposed for each day of the disobedience or violation. Persons against whom injunctions are granted and who refuse to obey these injunctions may ultimately find themselves being imprisoned for contempt of Court in that they have refused to carry out the order of a court. Thus the basis of this form of compulsion is not that the party concerned has disobeyed the administrative decision, but rather has disobeyed the Court decision. There may be other sanctions which might loosely be called administrative sanctions in that failure to obey some administrative decision may result in the loss of a benefit, which would result from obedience to the decision in question, or to which a person might be entitled under some other administrative order after accepting the first decision.

One might take as an example the laws concerning planning and the restrictions which these laws may impose upon the construction of buildings or other structures. Generally speaking no such work can be varried out without obtaining the permission of the local planning authority. This usually is preceded by issuing a public notice so that all the public likely to be affected by the matter can become aware of what is proposed. If the planning authority refuses planning permission an appeal may be taken to an Appeal Board, and the decision of that Board will be final. Even when a planning authority gives permission, those who may legitimately object under the law may themselves take an appeal against the permission granted, and seek to have it overruled by the Appel Board. Either the planning authority or the Appeal Board may grant permission subject to particular conditions. Any structure which is erected either without permission or in breach of the conditions of a permission granted may be ordered by the planning authorities to be taken down or removed, and failure to do so will result in an application being made to the Court for the necessary injunction to compel the person concerned to remove the structure. In this particular area of the law the statute also gives power to private citizens to seek an

injunction from the Courts to compel obedience to the planning laws on the part of some person who has infringed them. In addition to all of this the breaches of the planning laws can result in criminal prosecutions which are not simply alternative to the other procedures but may be additional.

4. Any effort by an administrative body to carry out its duties or to enforce its decisions by irregular or illegal means or to take decisions in an illegal or irregular way is a good ground for refusing to obey them and, indeed, a good ground for having these decisions set aside by the Courts.

5. The unlawful use of force either by the administrative authority or by any person to whom the administrative decision is directed will, of course, also attract not merely the civil sanctions of the Court such as an injunction etc. but in most cases attract the ordinary criminal law apart altogether from any special criminal procedure which may be provided by the particular law. It is not possible under the Constitution for any administrative body to impose by its own authority any criminal sanction upon anybody, whether it be by way of fine, forfeiture or deprivation of liberty. Such matters would be regarded as being exclusively within the competence of the criminal law, which the Constitution requires to be administered only in the Courts.

6. In certain rare types of cases, such as the protection of children, or the protection of persons who are dangerously mentally ill the administrative authorities may take immediate action and use as much force as may be necessary to achieve the objective if the matter is one of urgency. However even though the administrative act in such circumstances takes immediate effect, nevertheless the legality of it can always be challenged either immediately or soon afterwards in the ordinary Courts. If it has been found to have been an illegal exercise of power, then of course the administrative authority may find itself paying damages to the person concerned.

Similarly the administrative act may be a disciplinary one in the case of dealing with people who are employed by the administrative authority and that may take immediate effect such as suspending the employee with or without remuneration, and that suspension will remain effective unless and until it is set aside by a court order, or until the period for which it was imposed expires in the ordinary way. But again in all such cases the legality of such activities can be challenged after they have taken effect or, in some instances, if there is sufficient advance warning of the matter possibly by an injunction to prevent the execution of any such decision. A decision which

is a nullity can produce no valid legal effect, and a decision which has not in fact been taken, even though it might appear to have been taken, likewise can produce no valid legal effect.

7. The administrative authorities and their officers may be liable for damages if they exceed their authority and although the individual officers concerned may be personally liable, so also will be the administrative authority for the acts of its own servants or agents in the purported exercise of the powers of the authority. In such cases the doctrine of *respondeat superior* would apply. Such a doctrine does not apply in the case of the criminal law and anybody or any authority which is guilty of a breach of the criminal law would be dealt with on the basis of his own or its own activities. There is no vicarious liability in criminal law. Each one is answerable only for his own acts or omissions where such act or omission constitutes a criminal offence.

PART II

8. The High Court has competence to intervene in the carrying out of any administrative act, if it is alleged the administrative act is illegal. In certain particular cases lower Courts such as the Circuit Court or the District Court may have a jurisdiction or competence to intervene in the matter.

9. The purpose of judicial intervention is basically to see that no illegality is being committed or is sought to be committed. The illegality may be a breach of the ordinary law or of some particular statute under which the act complained of purports to be carried out or it may be of a more fundamental character amounting to a breach of constitutional rights.

In the realm of the defence of constitutional rights this may involve judicial intervention to prevent infringements of rights of personal liberty, or rights of property, or family rights or any other right guaranteed by the Constitution whether expressly set out in the Constitution itself or if it is what the Irish constitutional jurisprudence calls an unspecified right of a fundamental character. These are given equal protection by the Constitution. Recourse to the Courts will in general be for the purpose of protecting persons against any infringement of their rights by an administrative decision or administrative action. On the other hand however the Courts may be called upon to intervene sometimes, not to defend anybody against administrative activity or decisions, but rather to compel the administrative authori-

ty to arrive at a decision or to carry out something which is bound in law to do.

10. Persons who are the victims of irregular or illegal enforcement of administrative decisions can apply to the Courts for injunctions to restrain the enforcement of any such decision. Sometimes it may be sufficient simply to seek a declaration of right which effectively will produce to same result in that it will determine the matter, but if there is a threat of some physical activity then an injunction may be coupled with it. If damage has already been caused to the person against whom the administrative decision is directed then in addition to obtaining an injunction may also obtain damages.

11. Because of the fact that there are no administrative Courts in Ireland in the sense in which they exist in civil law countries, all questions concerning the legality of the decisions or activities of administrative bodies or administrative organs are matters for the ordinary civil Courts.

12. If it is urgently necessary to restrain some administrative decisions taking effect or some administrative activity an interim injunction may be sought immediately without notice to the other side. In Irish law this is referred to as an injunction sought on *ex parte* application, and this will endure for a few days to give sufficient time to put the administrative body or organ on notice, so then the matter will be heard again in Court in the presence of both parties. The idea of the interim injunction is to prevent the commission of some irreparable damage. Failure to obey either an interim injunction or a full injunction will result in proceedings for contempt of Court which may result in imprisonment of the person who has been in contempt. An injunction is always effective against all of those to whom it is expressly addressed and frequently to all persons who are aware of its existence even though it may not be expressly directed to them if they are also engaged in the unlawful act.

13. Administrative acts or decisions may be treated as illegal if they contravene the terms of the law or the statute which gives the power to make such decisions or if the decision is an abuse of power or is so unreasonable as to be regarded effectively as an abuse of power and therefore to be deemed not to be contemplated by the law in question. A decision which in itself is good may be rendered nugatory if the method used to carry it out is illegal.

14. An injunction may be sought to suspend the carrying out of a decision pending an investigation where at least a prima facie case of illegality is set up. The ultimate decision may be to remove the suspension and to permit the administrative decision to take effect or it may be to annul that decision in whole or in part.

15. While in most cases administrative authorities do not have power to suspend the effect of their own decisions they can frequently achieve the same result by suspending the enforcement of them. Particularly in cases against individuals, administrative decisions can be more easily suspended by being withdrawn or abandoned by the administrative authority concerned. Indeed the same may apply to decisions which are of general concern, but failing any such action the decision is in force even if not being enforced for the time being. Generally speaking the Courts will not intervene if it is simply a question of reasonableness the administrative decision unless it is a case where the Courts are of opinion that the decision is so unreasonable as to be unlawful.

PART III

16. The question of the intervention of the courts in questions dealing with the environment and planning etc. has already been touched upon. So far as the environment protection is concerned as distinct from the enforcement of planning laws the Courts in the absence of special statutes dealing with the matter do not intervene unless the matter complained of amounts either to a public nuisance or a private nuisance. If it does, then the Courts have power to grant injunctions or damages or both. If the Courts are being called upon to protect the environment by virtue of some particular legislation dealing with that question, then of course, it will employ and enforce the remedies provided for in that legislation. Such matters would include protection against pollution of rivers and other waterways and similar matters which are the subject of public laws.

17. In Ireland there is no particular law dealing with the question of political refugees. Indirectly this may be dealt with in the laws dealing with the control of aliens, and such laws must, of course, be administered fairly and justly by the authorities having the power to deal with such matters. If not the Courts may intervene because failure to act fairly in accordance with

the law would be a breach of the law. So far as political refugees are concerned it is really a matter of Government discretion as to whether a particular alien would be classed by the Government in the particular case as a political refugee and be permitted to stay in the country, and to live and work in it just as if he were an accepted alien. Ireland has adhered to the 1951 United Nations Convention on the Status of Refugees and the 1967 Protocol. The Government has an agreement with the U. N. High Commissioner for Refugees, whose function it is to supervise compliance with the Convention and Protocol, which in effect permits him to monitor the application of these instruments in Ireland.

PART IV

18. In general the whole topic of judicial control of administrative action or administrative decision making is a matter which falls within the competence of the ordinary Courts. The remedies already mentioned in the introductory part of this paper may either be of a public law nature or private law nature, but they are all part of the range of remedies available to the Courts to prevent or restrict all administrative authorities whether they be local authorities, statutory authorities or Government authorities from acting illegally or in excess of their powers or prevent them acting without observing the required formalities. There is a very considerable body of case law in Irish jurisprudence dealing with the whole question of judicial control of administrative action. However unlike countries with the civil law tradition the remedies available are sought in the ordinary civil court.