

## STATUTE LAW SOCIETY CONFERENCE

BELFAST, OCTOBER 2008

### Statutory Interpretation in the context of the Irish Constitution

The Hon. Mr Justice Hugh Geoghegan  
Judge of the Supreme Court, Republic of Ireland

Although the title to my paper is technically "*Statutory Interpretation in the context of the Irish Constitution*", I do not intend to confine myself to the narrow issue of special constitutional requirements of interpretation in certain instances, but rather to give a broad outline of how statutory interpretation is approached in my jurisdiction.

Since earlier this year, we now have a textbook on Statutory Interpretation in Ireland by David Dodd and I am indebted to him for helping me to order my mind in considering what I would talk to you about. In the preface to his book, Mr. Dodd refers to a case with the Irish name of **O'Flaherty v. McDowell** [1857] 6 HLC 142 in which Lord St. Leonards implored courts to be kind to drafters with the reminder that –

*"... we ought to make great allowance for the framers of Acts of parliament in these days; nothing is so easy as to pull them to pieces, nothing is so difficult as to construct them properly."*

In some areas, legislation is so complicated nowadays that one can only have sympathy with the draftsman. The reality is rather different however. I fully admit that probably far too often we, the Supreme Court, publicly attack the way an Act has been drafted. I suspect we are particularly prone to doing this when we are uneasy about the consequences of our decisions. I do not know about the U.K. but in fairness to ourselves, Irish legislation implementing the European Arrest Warrant leaves a lot to be desired.

I do not intend to deliver a heavily structured lecture on statutory interpretation in Ireland which quite frankly would be boring. Rather I will deal with some random topics and cases to illustrate our approach. Towards the end, I will say something about our Interpretation Act, 2005 which contains some novel provisions.

It might be of interest if I explain first that the culture of statutory interpretation though nominally the same as that of the U.K. apart from changes brought about expressly or by implication by the Constitution, is in practice different. The mindset is somehow different. For instance, we do not speak normally of the sovereignty of parliament. This is not just because the people are sovereign under the Constitution. After all, the monarch is sovereign in the U.K. It is, essentially, a different way of thinking. Restraint on the part of the courts in trespassing on what are the functions of parliament is dictated not by some doctrine of sovereignty of parliament but rather on the principle of separation of powers. In Irish constitutional theory, the legislature, the executive and the judiciary are all equal powers of government operating in their own separate spheres.

By two different methods which I will be explaining, legislation enacted by our parliament may be declared invalid by the Supreme Court or indeed in one of those procedures by the High Court. But there is no sovereignty issue there other than the sovereignty of the people in enacting the Constitution. Rather the courts are exercising the functions conferred on an organ of government exercising the judicial power of government.

Even within its own separate legislative power, the Irish parliament, that is the Oireachtas, is not sovereign in the sense that its legislation can be struck down. In both our islands, including Northern Ireland, that can, of course, happen in respect of legislation which contravenes laws and regulations of the European Union. Neither in our jurisdiction nor in any of the U.K. jurisdictions can the courts declare a piece of legislation invalid for contravening the European Convention on Human Rights. Although Ireland has been a signatory to the Convention for many years, the Convention has only become part of domestic law quite recently in an Act of 2003 and its provisions are, if anything, weaker than the U.K. legislation. But the Constitution is quite different. The Irish public and media are, in general, quite conscious of the power of the courts to strike down legislation as being contrary to the Constitution even if they have no great consciousness as to the position of European law. Giving a personal opinion which may surprise a U.K. audience, the powers of the courts to strike down legislation as contravening the Constitution are, I think, popular. This is in sharp contrast to what seems to be a media hysteria in the U.K. against any element of judicial intervention in relation to legislation. In the Irish media, there is more likely to be criticism of the Supreme Court in a given case for not striking down legislation rather than the other way round. Apart from one exception I would have to rack my brain to think of a controversy which related to the striking down of legislation.

Without going into too much technical detail, there are broadly two circumstances in which legislation can be declared invalid by the Supreme Court. One is where the President of Ireland refers a Bill to the Supreme Court before he or she signs it for a decision by the Supreme Court as to whether it is valid. Most judges and lawyers find this particular procedure somewhat flawed. If the court upholds the Bill it is then signed into an Act and no part of it can afterwards be challenged on constitutional grounds. This means that all potential problems are

being dealt with on a theoretical and academic basis which is not satisfactory. The court, at the expense of the State, does assign two senior counsel and a junior counsel to argue against the Bill. There can only be one judgment. The existence of dissents cannot be made known. All of this is somewhat unsatisfactory. In practice however the number of Bills which are referred in this way to the Supreme Court average out at something like one in every three years.

The more effective and more popular way in which statutory provisions can be judicially reviewed (in the American sense) is by relief in an ordinary action or as a relief in a judicial review, that expression being used in the British or Irish sense. For almost thirty years after the enactment of the current Constitution, i.e. the 1937 Constitution, there was almost no litigation challenging on constitutional grounds ordinary legislation. After the 1960s and into the 1970s there was a flourishing trade in this kind of litigation. I suppose that at most about one legislative provision a year is declared invalid by the Supreme Court. The High Court has this power also but almost invariably there is an appeal to the Supreme Court.

In practice, the only time that the striking down of legislation causes consternation in government circles is if it has financial implications for the Exchequer. More often than not however it does not attract the ire of the ordinary taxpayer. It is the ire of the Minister for Finance that it attracts.

In at least two cases of importance, the retroactive consequences of striking down legislation have had to be considered by the courts. There are some strong dicta particularly from a former Chief Justice more or less to the effect that if an Act is declared to be invalid having regard to the Constitution the consequence is the same as if the Act had never been enacted in the first instance. However, a combination of pragmatism and procedural good order have prevented the logical consequences of that approach. In a case well known to all Irish constitutional lawyers **Murphy v. The Attorney General** [1982] I.R. 241, Henchy J., while on the one hand, stating that a declaration of invalidity "*amounts to a judicial death certificate, with the date of death stated as the date when the Constitution came into operation*", nevertheless, joined with the rest of the Supreme Court in holding that although certain sections of an Income Tax Act by providing for the aggregation of earned incomes of married couples and, therefore, imposing upon them a higher rate of tax were repugnant to the Constitution, only the actual plaintiffs could make a claim for restitution of excessive tax paid.

More recently, the Supreme Court struck down 1935 legislation relating to sexual intercourse with a girl under a particular statutory age, because neither expressly nor by implication did the section permit of a defence of *bona fide* mistake as to age. *Habeas corpus* applications were immediately brought by prisoners who had been convicted of such offences. In none of those cases had any attempt been made at the hearing to raise such a defence. Nevertheless, the High Court granted the order in the first and test case but the Supreme Court reversed the judgment basically on the grounds that cases completed could not be reopened. This decision gave rise to criticism among the legal profession and the media. Personally, I

believe it to be correct but that is understandable as I delivered one of the judgments. At any rate, the controversy has long ago died down. Courts such as the German Constitutional Court and the Canadian Supreme Court have had these problems and different solutions have been found.

What I have just been talking about is not strictly speaking related to the Irish Constitution having an effect on legislative interpretation. Rather it is dealing with the effect of the Irish Constitution on the validity of legislation. The Irish Constitution, however, also has major effect on interpretation itself. First of all, it has long been held that an Act of Parliament enjoys the presumption of constitutionality. This, of course, is a rebuttable presumption. It can only be rebutted in the High Court or the Supreme Court, not in any lower court. A side effect of this presumption is that if there are two or more constructions of a statutory provision which are reasonably open and only one of which is in conformity with the Constitution it must be presumed, as a matter of statutory interpretation, that parliament intended only the construction which conformed with the Constitution. This is known as the “*double construction rule*”. The seminal case from which it derives is **McDonald v. Bord na gCon** (No. 2) [1965] I.R. 217. Bord na gCon is the Irish for the Greyhound Board. Briefly, the facts were that there was an investigation as to whether a particular greyhound owner should be excluded from the track because of alleged cheating in the filling of forms and at the end of the inquiry he was so excluded. He brought an action challenging the constitutionality of the relevant section of the Greyhound Industry Act, 1958 and he was successful in the High Court on the basis that the Board, which was not a court, was carrying out a judicial function which was not merely a limited function and, therefore, was something expressly prohibited by the Constitution. This decision was reversed by the Supreme Court. That court held that the section was constitutional because it could be given a constitutional interpretation. That interpretation would be that before the finding of any investigation could be relied upon as justification for an exclusion order, the investigation would be required to be conducted in accordance with the dictates of natural justice and result in an objective decision. The judgment goes on to explain that the expression “*natural justice*” in this context could really be described as “*constitutional justice*” because it would have a wider meaning than simply the observance of the two traditional requirements.

A similar logic was applied in a different context in another landmark decision in **East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General** [1970] I.R. 317 where a licensing section on the face of it gave unfettered discretion to the Minister granting the licence. Such an interpretation would have been unconstitutional. The Supreme Court held that powers granted to a Minister which are prefaced or followed by words such as “*at his discretion*” or “*as he shall think proper*” or “*if he so thinks fit*” are powers which may be exercised only within the boundaries of the stated objects of the Act. It was held, therefore, that notwithstanding the existence of words, such as these, an exercise of the powers outside the boundaries of the stated object would be *ultra vires*.

I think it would be fair to say that in the sixties and early seventies judges, barristers and law students were quite sanctimoniously proud of these decisions and saw them as arising from our having a written Constitution. We were, in these respects, wholly superior to the U.K. The irony now is that judges, such as Lord Bingham of Cornhill have been as good as any written constitution and English statutory powers are not by any means interpreted as being unfettered. In fact, I am not sure that in this respect there is much difference between how the U.K. and Irish courts interpret statutory powers. There is, however, one advantage we may have. Parliament cannot turn round and reverse the decision. That can and does happen in the U.K.

That is all I need to say for the moment about the effect of the Constitution on statutory interpretation. I turn now to the traditional problems of the canons of construction and the extent to which, if at all, statements in parliament can be used in the interpretation of a statute.

Probably, the two most important cases in the Irish Supreme Court on these topics in modern times are **Howard v. Commissioners of Public Works** [1994] 1 I.R. 101 and **Crilly v. T & J Farrington Limited** [2001] 3 I.R. 251.

The Howard case had an unusual judicial history. There is a unique part of Ireland, with which some of you may be familiar, known as "*The Burren*". This is an area in County Clare in which for a short period of the year round about May, a multitude of unusual wild flowers appear. In the immediate vicinity the State, through the Commissioners of Public Works, decided to construct a Visitors' Centre which it was estimated could attract 60,000 visitors a year. Many of these would arrive in coaches etc. The proposal attracted considerable public controversy. There were grave fears that the Burren area could be permanently adversely affected, especially as a consequence of underground seepages from inadequately maintained sewers. A group of concerned citizens sought an injunction mainly on two grounds, one of which need not concern us for the purposes of this conference. The ground that need not concern us was that allegedly the Commissioners of Public Works had no statutory power to carry out this development and indeed the High Court so held, a finding which was not appealed.

The second ground of attack however was that the Commissioners had not obtained planning permission. The principal Act relating to planning in Ireland was enacted in 1963. Basically, it required planning permission of structural developments of any kind and for any material change of use of land. There were, however, exceptions which were described as "*exempted developments*". Among those listed were developments by a local authority. A county council could, therefore, develop without permission. However, there was no such express exemption for the State in any of its forms that is to say, the State as such or any of the Ministers or bodies such as the Commissioners of Public Works. But there was a special provision in the Act, section 84, mandating that before a State authority could undertake the construction or extension of any building (admittedly the section only applied to buildings) such State authority was required to consult with

the planning authority (in other words the County Council) *“to such extent as may be determined by the Minister for Local Government”* and in the case of any objections raised by the planning authority not being resolved, consult on the objections with the Minister for Local Government unless it was that Minister himself who was carrying out the development.

Both in the High Court and in the Supreme Court on appeal, it was clear that all sides were in consensus that it would never have been intended that a State authority, such as the Commissioners, would have been required to obtain a planning permission, but the reason that that was not expressly stated was, because as of 1963, it was firmly believed by everybody, partly on the basis of prior authority that the old exemption of the Crown from being bound by a general statute unless otherwise stated continued into the independent state and that an equivalent immunity was conferred on the State. However, some years after the Act, the Supreme Court in a landmark decision in **Byrne v. Ireland** held that Crown prerogatives were not carried over and that in the absence of express or implied exclusions, the State was bound by a statute.

Perhaps surprisingly, in some ways, the State in the High Court and on appeal in the Supreme Court conceded at all stages that it could not rely in support of its submission that planning permission was not required, on the common misconception in 1963 that the act would not have bound the State. A strong argument was, however, made on behalf of the State that as a matter of construction, the State was not obliged to obtain planning permission given the inclusion of section 84. It was suggested that it was an absurdity to have a law under which the State would first have to consult with the planning authority to which it would be applying for permission and under which the extent of these consultations would be determined by the same Minister as the Minister who would hear any appeal from a granting or refusal of such permission. Furthermore there would be an obligation before applying for the planning permission to consult with the same Minister on any objections that might have been raised by the planning authority in the consultations and which were not resolved even though the application would ultimately be made to that authority and an appeal from the decision of that authority would be to that Minister. Nevertheless in a carefully considered reserved judgment, Mr. Justice Costello in the High Court opted for and applied the traditional canons of construction and held on that basis that notwithstanding the existence of section 84, the Commissioners were obliged to apply for planning permission. Curiously enough, he specifically raised the likelihood that the two houses of our parliament were under the reasonable misapprehension that the State was not bound by statutes but then proceeded to make use of that point against the State rather than in its favour.

At this point in the judicial saga, I must temporarily digress and I must move from the beautiful County Clare to the beautiful County Wicklow. There was also at more or less the same time a proposal that the Commissioners of Public Works would develop an interpretative centre in the scenic area of Luggala, Roundwood in County Wicklow. Another group of concerned citizens brought separate

proceedings in the High Court likewise seeking an injunction on much the same grounds. That case was heard by a different judge of the High Court, Mr. Justice Lynch. He took the diametrically opposite view to that taken by Mr. Justice Costello. One particular sentence in his judgment captures the flavour. After outlining the provisions of section 84 to which I have already referred, he said the following:-

*“If after or concurrently with such consultation planning permission is also necessary, it could lead to absurd results. A planning authority on consultation by a state authority may raise objections which it refuses to withdraw and with which the State authority refuses to comply. The Minister may then on being consulted by the State authority seek to overrule the planning authority under section 84. The State authority must then apply for planning permission which the planning authority will presumably refuse for the same reasons as it raised objections under section 84.”*

The judge then went on to point out that although, since an amending Act of 1976, an appeal would be to a planning appeal board rather than the Minister, at the time of the passing of the act an appeal would have been to the Minister who would have to be consulted in the first place and that what he called a *“convoluted course of futile consultations, applications and appeals”* were absurd and could never have been the intention of the legislature.

Both cases were appealed and were heard together by the Supreme Court. The court divided by three judges to two in favour of the strict constructionist view of Mr. Justice Costello. The judgments are quite interesting however. Chief Justice Finlay firmly took the view that there was no principle of common law independent of the particular position of the Crown in English constitutional theory which led to a presumption of State exemption. Any such exemption related exclusively to the doctrine and history of Crown prerogative. He then went on to endorse a passage from a judgment in the Indian Supreme Court after the independence of India in a case **The State of West Bengal v. Calcutta Corporation** [1967] A.I.R. 997. The passage in the judgment of Subba Rao C.J. read as follows:

*“There is therefore no justification for this court to accept the English canon of construction for it brings about diverse results and conflicting decisions. On the other hand, the normal construction, namely, that the general act applies to citizens as well as to the State, unless it expressly or by necessary implication exempts the State from its operations, steers clear of all the said anomaly. It **prima facie** applies to all states and subjects alike, a construction consistent with the philosophy of equality enshrined in our Constitution. This natural approach avoids the archaic rule and moves with the modern trends. This will not cause any hardship to the State. The State can make an act if it chooses, providing for its exemption from its operation, though the State is not expressly exempted from the operation of an act under*

*certain circumstances, such an exemption may necessarily be implied. Such an act, provided it does not infringe fundamental rights, will give the necessary relief to the State.”*

That approach of Chief Justice Finlay contrasted with the views expressed in the dissenting judgment of Mr. Justice O’Flaherty. Essentially, he made two points. I hope I will not be oversimplifying them by the following summary. On the one hand, he took the view that the presumption of a non-application of a general statute to the State should still be upheld as a necessary ingredient of our constitutional democracy unless of course the Act expressly stated otherwise. Contrary to the view of Chief Justice Finlay, Mr. Justice O’Flaherty suggested that the presumption which he was advocating did not depend on any reliance on the historical role of the royal prerogative. His second point was that having regard to section 84 of the Act it would be absurd to suggest that the Commissioners were obliged to obtain planning permission. In other words, he was in complete agreement with Mr. Justice Lynch. That last point formed the general thrust of the other minority judgment of Mr. Justice Egan. The traditional textbook principles, as set out in Maxwell and in Craies, formed the main basis of the judgment of Mr. Justice Blayney. He set out these principles uncompromisingly and his view of them was expressly accepted by Chief Justice Finlay. Finally, in a separate judgment, Mrs. Justice Denham agreed that on an application of the traditional canons of construction, planning permission was required.

As all these judges, bar one, are still very much alive and indeed one of them is still on the court, I have to be careful expressing my own irrelevant views. But *sotto voce* I rather favour the view of the dissenters.

The **Pepper v. Hart** issue arose essentially though by way of *obiter dicta* in the second of the two important cases on legislative construction to which I have referred, that is to say, the **Crilly** case. The facts of that case are boring and it is not necessary to go into them. It was the view of both the High Court judge and all five judges of the Supreme Court on appeal that the point of statutory interpretation at issue could be clearly decided without any confirmatory assistance from a ministerial statement in the Dáil, that is to say, the lower House of our Parliament. But the High Court judge (I will not say who it was) foolishly and by way of *obiter dicta* confirmed his own view by accepting evidence of a ministerial statement introducing the legislation in the Dáil that supported it. On appeal to the Supreme Court, the High Court was upheld on the issue that was relevant to the ministerial statement though reversed on another issue which is not material to this discussion. The Supreme Court judges took much more interest in what for shorthand, I will call the **Pepper v. Hart** issue. They all proved hostile. Mrs. Justice Denham, with whose judgment, Mr. Justice Murphy agreed, said for instance the following:-

*“To hold that parliamentary debates are admissible would be an alteration in the law and an alteration which would have a profound effect. For example, it could have a negative effect on presumptions,*

*such as the presumption of the constitutionality of legislation. Canons of construction and presumptions, which are the product of many years of common law, could be called into question. In addition, it could have an effect on the Dáil and Seanad which might feel bound when debating each Bill to state what is meant by each section of a Bill. It is possible that a Minister's speech would then be drafted with a view to persuading a court of a certain approach. This would bring a new aspect to the parliamentary process in addition to its current role. It might render the processing of legislation more complex. In addition, if a Minister's statement in the Dáil is to be accepted, are those of the opposition to be excluded? Their interpretation may be radically different. Further, Bills are often amended as they proceed through the Dáil and Seanad. These amendments may significantly alter the intention expressed in the original ministerial speech. Are all speeches then to be analysed together with the amendments to obtain the expressed intention on the meaning of an Act?*

*For well established reasons, including those I have just stated, the speeches made by Ministers in the Dáil and Seanad when introducing legislation have not been admissible in court when the court is construing statutes. I am not persuaded that good reason has been indicated in this case for changing or developing the common law in this jurisdiction."*

Mrs. Justice Denham, in that passage, has expressed a number of fears. Interestingly, they are somewhat different fears than the fears expressed in the dissenting speech of Lord Mackay of Clashfern L.C. in **Pepper v. Hart**. His fears mainly relating to increased cost of litigation are replicated however in the judgment of Mr. Justice Fennelly. Some of the concerns expressed in that passage by Mrs. Justice Denham relate I think to objections which have been raised in the United States of America and which are referred to in the judgment of Mr. Justice Murray in the **Crilly** case. The American legislative culture is so different from ours that there would be arguable doubt that these fears are justified. Indeed a case could be made that a relaxation of the rule could work perfectly well in Ireland having regard above all to the Irish legislative culture. We have a long tradition of legislation being almost exclusively introduced and promoted by the government even when the contents involve issues of conscience. Secondly, we have probably one of the tightest party whip regimes in any democracy. It is an extremely rare event for any member of an Irish government political party to vote against the government. At any rate, it would probably be unthinkable that any statement would be admitted in the courts other than a formal statement by the Minister as to the purpose of any particular statutory provision and in the context of that purpose remaining unaltered during the stages of the Bill. Again, objections based on our presumption of constitutionality of legislation are at least questionable. That presumption is rebuttable and if as a consequence of applying a strictly limited rule of admitting in particular circumstances a ministerial statement in parliament, the Act was

interpreted by the court in a particular way which would render the provision unconstitutional, then so be it. Arguably this would simply be an instance of the presumption of constitutionality being lawfully rebutted. At any rate on a careful reading of all five judgments in Crilly, I am satisfied that the issue is not closed and this has been the view of academic commentators. I should hold, however, that the three conditions laid down by Lord Browne-Wilkinson in his speech in Pepper v. Hart were not fulfilled in the Crilly case. It is fair to say that the judges showed no enthusiasm for modifying the so called “*exclusionary rule*”.

Mr. Justice Murray delivered a lengthy and erudite judgment. Two paragraphs towards the end of his judgment encapsulate his views. They read as follows:-

*“Having regard to the respective roles of the Oireachtas and of the courts and all the considerations which I have mentioned, I am not satisfied that it has been shown that recourse to ministerial statements as an aid to the construction of statutes is sufficiently neutral, useful or efficient to outweigh, from a judicial policy point of view, the disadvantages or possible inconveniences of abolishing or modifying the exclusionary rule. I do not in this case consider it necessary to go so far as to say that this should be decided as a matter of principle.*

*Maintaining the classical exclusionary rule also has the advantage of avoiding a potentially dangerous dichotomy entering into the interpretive practice of the courts. The courts seek the objective intent of the legislature while the purpose of looking at parliamentary debates as a source of interpretation is to seek the subject of intent. Even in contemporary circumstances applying the traditional exclusionary rule is more likely to promote certainty in the interpretation of statutes than to dilute it. It also has the advantage of avoiding any risk that in abolishing or modifying the exclusionary rule the courts might, even unwittingly, affect the legislative process of the Oireachtas and the role of the members of the two Houses.”*

I think it is fair to say that although Mrs. Justice McGuinness and Mr. Justice Fennelly expressed somewhat similar views, they were not closing the door to an argument being used in some future case. They were confining their views to the case at hand. The same can be said of the other two judgments.

Finally, I would like to say a few words about a new piece of Irish legislation the Interpretation Act, 2005. This is an Act which repeals the previous Interpretation Acts but re-enacts many of their provisions. The Act, for the most part, was intended to reflect recommendations contained in a report of the Law Reform Commission. I intend only to refer to one section, section 5. That section provides that in construing a provision of any Act (other than a provision that relates

to the imposition of a penal or other sanction) that is obscure or ambiguous or that on a literal interpretation would be absurd or would fail to reflect the plain intention of the Oireachtas, the provision (and I quote) *“shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole.”* This provision was undoubtedly recommended by the Law Reform Commission but in draft legislation prepared by the Commission there was express provision for the use of extrinsic aids in interpretation. These included several categories of documents but most significantly it included (and I quote) *“A speech made by a Minister on the second reading of a Bill”* and *“any other material from the official record of debates on the Bill in the Dáil or Seanad”*. This list of aids was not included in the 2005 Act. When the Bill, leading to that Act, was being piloted through the Dáil and Seanad by two different Ministers it was more or less stated that these matters were being left to the judges but most significantly one of the Ministers said the following:

*“Anything that would help in the interpretation of legislation is important. In many circumstances Oireachtas debates have helped in that interpretation and the courts have used this. My understanding of the section, however, is that it does not preclude them from doing this. They may still continue to look at the Oireachtas debates to see the intention behind legislation”.*

Both that Minister’s statement and other interventions in the parliament make it clear that the politicians were under the misapprehension that the judges regularly looked at the record of parliament including the debates if they felt they needed to. While there were one or two High Court cases where that happened it was far from normal practice and is now condemned in the **Crilly** case. The final irony will be, if in support of a request to a judge by counsel in some future case for the court to read, say, a statement by the relevant Minister when piloting a particular Bill, the judge in considering that request may take the view that he or she should read the debates leading up to the Interpretation Act, 2005 to discover the real intention behind section 5. I look forward with some wry amusement to that event.