An Chúirt Uachtarach

The Supreme Court

Clarke CJ
O'Donnell J
MacMenamin J
Dunne J
Charleton J

Supreme Court appeal number: S:AP:IE:2020:000097
[2020] IESC 000
High Court record number 2017/146 JR
[2020] IEHC 178

Between

Naisiúnta Léictreach Contraitheoir Éireann Coideachta Faoi Theorainn Ráthaoichta
Applicant/Respondent

- and -

The Labour Court, The Minister for Business, Enterprise and Innovation, Ireland and the Attorney General
Respondents/Appellants

Judgment of Mr Justice Peter Charleton delivered on Friday 18 June 2021

1. Article 15.4.1° of the Constitution bars the Oireachtas from passing "any law which is in any respect repugnant to this Constitution or any provision thereof", the Irish text making it clearer that there is no permission to legislate against the fundamental law: "Ní cead don Oireachtas aon dlí a achtú a bheach ar aon chuma in aghaidh an Bhunreachta seo nó in aghaidh aon fhorála den Bhunreacht seo." In so far as that happens, such law is invalid, "gan bhail". Articles 15.2 and 15.3 enable subordinate legislatures and provide for vocational councils. Neither have ever come to pass. These subordinate legislatures would be set up by the Oireachtas, for instance regionally, with limitations as to "powers and functions", or in the case of vocational councils, on the basis of limitations as to "rights, powers and duties". Thus, it is established in the text of the Constitution that delegation of law-making authority may originate from the Oireachtas and devolve to bodies so authorised but subject to express limitations which are in themselves set by the Oireachtas. But the possibilities for such devolution are necessarily limited. These sub-articles are one with the declaration in Article 5 that: "Ireland is a sovereign, independent democratic state." Further, Article 6 in declaring that all "powers of government, legislative, executive and judicial, derive under God,

from the people" establishes the democratic imperative as integral to the nature of the State since it is in the people that there is the sole right 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." In concurring with the judgment of MacMenamin J, therefore, some observations may usefully be added as to the Constitution and the delegation of power.

2. Much of the drafting debate as to the change from the Constitution of Saorstát Éireann of 1922 to the 1937 Constitution centred on sovereignty, on the ultimate ownership of land being in the Irish people and on the necessity to declare and to emphasise the independence of the Irish Republic from any other polity. Yet technical legal measure in defining the nature of the State and in establishing a separation of powers on definite foundations were no less important; Hogan, *The Origins of the Irish Constitution 1928-1941* (Dublin, Royal Irish Academy, 2012). Article 15.2 of the Constitution in continuing Article 12 of the earlier constitution, had its origins as a statement of independence but was also included so as to preserve that delegation of legislative powers to government ministers and local authorities which traditionally characterised the prior polity: "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State." This is both declarative, that only the elected representatives of the Irish people may construct laws to govern them, and imperative, that the powers vested in the Oireachtas are to be exercised by Dáil Éireann, Seanad Éireann and the President. These cannot be alienated to any other body in such a way as to undermine the democratic nature of the State, declared in Article 5, and nor can the required mandate of the people to their elected representatives under Article 6 be shunned through sloughing off powers that the Constitution requires the Oireachtas to exercise.

Origin of laws

3. As those drafting the Constitution of 1937 were aware, laws are to be found not only in parliamentary legislative measures but also in the myriad of statutory rules and orders made by government and in the bye-laws made by local councils and other authorities. It does not appear to have been intended by any of those debating the wording of the Constitution that Article 15.2 would dry up these sources of legislation, quite the opposite; Hogan, 438, 459 (observation of George Gavan Duffy, later a judge of the High Court). Rather, a specific mischief was recognised whereby it was expected that the Oireachtas should legislate and in delegating would be confined to permitting only details to be formulated subordinately. Thus, Philip O'Donoghue, later a judge of the European Court of Human Rights, observed that the "the principles of legislation must be definitely enacted in the Statute." But that "form, time and manner of carrying into effect the objects of the statute" could be left to regulation, though "any such rule which would seek to depart from the scope of the statute, impose new obligations or confer new rights" would be unlawful; Hogan, 480-481, 438. Such subordinate rule-making powers in a statute, according to the Attorney General, while clearly laws when promulgated by a delegated authority, "must be in conformity" with the primary legislation and "something necessary to enable the carrying out of" what is "in conformity with it strictly and literally."

4. At that time, delegation to newly empowered parts of the British Empire, the conferring of dominion and other status, had been a part of the legislative task of Westminster since earlier in the century. What was of concern in the Observations on the Draft Constitution, of March 1937, was based, like the other considerations quoted, on keeping the legislature to its task. Hence, "Ministers and Departments" were not to be allowed to legislate outside the boundaries of what a statute necessitated, and the *ultra vires* rule in English law, which reigned in any excessive subordinate legislation inside the parameters fixed by the primary enactment, was deemed adequate

to restrain the potential mischief in delegated legislation. This was trenchantly described by O'Donoghue thus:

> Statutory Rules and Orders, as the title suggests, are intimately related with legislative enactments. They are considered part of the law and have the force of law but alone do not constitute legislation. They must always be referred back to the enabling statute under which they are made. Very little consideration will indicate the abuses which would grow up of the legislature contented itself with enacting loose and indefinite principles adding that the Minister could give effect to such principles by rules regulations.

Legislative models

5. The language of limitation, of principle, of filling in detail, of primary legislation being required to set clear boundaries and that definite objects must be found within the statutory text to validate secondary legislation is language expressing a concept that continues into the analysis of the boundaries of permissible delegation in modern constitutional analysis by this Court. The commentators on the 1937 draft wrote in a simpler age, when legislation was less complex, with quasi-judicial decision making sparsely resorted to as a societal structure, at a time prior to effective planning regulation, with scarcely any oversight of financial institutions, and where the requirements of a modern state did not insistently demand bodies outside the traditional ambit of government, courts and legislature.

6. A second factor not considered in any of the documents gathered and analysed by Hogan is what in other contexts is akin to the right of appeal from a quasi-judicial decision, or even an administrative decision, whereby decisions can be reviewed through fresh determination in a court. The possibility of keeping control over quasi-judicial decisions through a legislative provision enabling a court appeal is akin, where delegated legislation is concerned, to the bringing back before the Oireachtas of the legislative measure delegated to a Minister or local authority and requiring some measure of democratic scrutiny. This was also part of the Westminster approach, and, see below as to the three models, it seems, first appears in this jurisdiction within a decade of the referendum adopting the Constitution in sections 4 and 6 of the Local Government Act 1946.

7. There are three common formulations in delegated legislation whereby democratic scrutiny is potentially to be reaffirmed by the Oireachtas. These models are in the Westminster procedure of the British parliament as well; Craig, *Administrative Law* (8th edition, London, 2016) 16-008. The first, and most common to legislation which delegates powers to local authorities, is where the local authority sets rates or other charges, such as harbour fees, or makes rules for the use of public spaces: there is no potential for debate before the Oireachtas as to the balance or lack thereof of these decisions. The only remedy for those claiming to be affected would be judicial review as to reasonableness and vires under the primary legislation. Partly, the reason for such local rules not returning to the Oireachtas is that the local authorities have their own debating bodies and their membership is subject to local election. Hence, harbour charges for using ports are laid down by local authorities but the classification of vessels, the extent of the charges and the conditions of use are matters outside the remit of any body save that of local government, properly so called for this reason but exercising democratic powers devolved from central government; see *Island Ferries Teoranta v Ireland* [2015] IESC 95, [2015] 3 IR 637 as an example. In that first instance, there is no reappraisal by the Oireachtas. The second and third models involve the Oireachtas sending away within a package of legislation some issue, one usually requiring detailed expert assistance or technical assessment, with an imperative for it to return and, hence, carrying the prospect of fresh scrutiny. That model may be that the subordinate measure be laid before the Dáil and Seanad

where it will pass unless taken up by a sufficient number of representatives to require that it be debated before being passed or rejected.

8. A common formulation, in this second instance, found in almost 300 pieces of legislation, is that the subordinate legislation passes automatically if laid before the Oireachtas and will only fail "if a resolution annulling the regulation is passed by either such House". Of the examples helpfully provided in argument, there appears to be no discernible gradation of importance. For instance, an example of this second instance was the formulation in s 38 of the Misuse of Drugs Act 1977 whereby newly invented or discovered dangerous drugs could be added by ministerial regulation to the schedule to that legislation, provided any such statutory instrument was not annulled by the Oireachtas; see *Bederev v Ireland* [2016] IESC 34, [2016] 3 IR 1.

9. Finally, and most commonly of recent times, a statutory provision may call for a positive consideration of a subordinate legislative measure by one or more houses of the Oireachtas before a statutory instrument may achieve the force of law. This is found in around 200 pieces of legislation where "a resolution approving of the draft has been passed by each such House" which means the Dáil and Seanad. This requires more in terms of the mechanism of scrutiny, if not in its actuality, than a provision requiring merely the passing of time and the absence of sufficient public representatives being exercised enough to cause the matter to be placed on the order of business of either house; which is the second instance. In this example, according to the explanation of the Attorney General on this appeal, that scrutiny is already there. The subordinate legislation does not achieve the force of law without a democratic vote by the people's representatives. While it may be difficult to see democratic representatives becoming energised by such a provision as the conferral of additional functions onto the board of Bord Gáis Éireann, under s 34(3) of the Gas Regulation Act 2013, no such Ministerial order is valid unless actively passed by the Dáil and Seanad. Exceptionally, only one house may be involved, as in s 2 of the Financial Provisions (Covid-19) (no. 2) Act 2020 which requires a Ministerial Order varying the amount, percentage, reduction or period of wage subsidy to be passed by Dáil Éireann alone. Within that same legislation, s 4(2) requires other provisions to have the positive approval of both houses.

10. What is missing in both the second and third instances is assent by the President. Under Article 20 of the Constitution, every bill, save for budgetary legislation, initiated in and passed by the Dáil may be amended by the Seanad with the imperative for the Dáil to reconsider and vote on any such amendment. Legislation, apart from budgetary legislation, may start in the Seanad to be considered and voted on by the Dáil and if necessary amended there. All bills, save for ones proposing a vote by the people to amend the Constitution, are, under Article 25, presented to the President for signature and for promulgation as law. Much legislation contains a commencement section whereby a law may not come into force until a particular Minister signs a statutory instrument. Usually, this is because the ground needs to be prepared for the law by the government or executive. Notably, some laws passed by the Oireachtas in the form of individual sections of Acts have never come into force for some reason. No comment is here made on the constitutional conformity of this. The President must sign legislation into force within five to seven days of presentation by the Taoiseach, though cases of urgency may enable an earlier signing under Article 25.2.2° and 25.3. The President must, according to Article 13.3.2° "promulgate every law made by the Oireachtas." Exceptionally, under Article 27, where a petition is presented by a majority of Dáil Éireann and not less than a third of Seanad Éireann asking the President not to sign, and hence promulgate as law, a bill, that must be considered and may be sent for referendum within 18 months by the people by the President or by Dáil Éireann "passed within the said period after a dissolution and re-assembly of Dáil Éireann." That power has not been used. The only other legislative involvement of the President is to submit a bill for the consideration of the Supreme Court as to its constitutionality under Article 26. Both exceptional powers require the President to

consult the Council of State. In both models where legislation is returned to the Oireachtas after formulation by a subordinate body, the President has no role and the law is promulgated either by an absence of a negative vote or by a positive vote. Some pieces of subordinate legislation require simply the measure to be laid on the floor of the Dáil and Seanad and some require the Dáil and Seanad to positively vote, or exceptionally, only the Dáil.

11. Perhaps there is rhyme or reason to this distinction, but none is immediately apparent from the importance of the measure and the variation in legislative treatment as to the approval of subordinate rules to make them law. Making new drugs subject to criminal regulation on indictment, varying the powers of a gas company, or supporting people devastated financially by the latest pandemic; should not logic dictate that these be tiered in importance and the nature of the scrutiny afforded democratically intensified according to their impact and significance? Perhaps, but as the judgments in *Bederev* indicate, this return to harbour of delegated legislation, set forth for subordinate drafting, for express or tacit approval has become part of the scheme of complex legislation since shortly after the promulgation of the Constitution in 1937 and must definitely be a factor as to whether the Oireachtas have exercised or have unconstitutionally abdicated the powers granted to them by the people.

Legislative background

11. In the High Court, the trial judge analysed the Industrial Relations (Amendment) Act 2015 on the basis of what emerges from the text of his written judgment as a stark polarity of choices. Either the 2015 Act was one necessitated by membership of the European Union or it was not and any relevant statutory background in European legislation was excluded. In this regard, Simons J, although not citing *Meagher v Minister for Agriculture and Food* [1994] 1 IR 329, approached the origin of the legislation as if it was either derived from a European imperative or not. In *Meagher,* an amendment by subordinate legislation by the Minister of pre-independence legislation requiring prosecution by summons in the District Court to be commenced within six months was enabled through the necessity of compliance with European animal remedies, in effect anti-doping laws, whereby analysis required a wider timeframe. Where European legislation reduces "choices as to policy available … almost to vanishing point", to quote Keane CJ in *Maher v Minister for Agriculture and Food* [2002] 2 IR 139 at 185, it may make a Member State almost a delegate for that legislation, enabling its implementation through subordinate legislation, subordinate here to the European legislature; see the analysis in *Kelly: The Irish Constitution* (5th edition, Dublin, 2018) 4.2.52-61. There is a presumption against the accidental alteration of other legislation through the promulgation of an Act dealing with a specific topic; *Maxwell on the Interpretation of Statutes* (11th edition, London, 1962) at 78. Simons J was thus correct to be chary about any assumption that the particular legislative scheme in the 2015 Act derived from Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. He held this could not be used as a source of principles and policies that might elucidate the scope of the boundaries of any delegated power under the 2015 Act, holding, at [138], that there was nothing in the parent legislation which evinced that the Oireachtas has adopted that legislative background as part of the choices to be used in setting limits to any subordinate action.

12. That, however, should not exclude from consideration any necessary legislative and historical background to an enactment: "Legislative intention is not a myth or fiction, but a reality founded in the very nature of legislation." See Bennion, *Statutory Interpretation* (London, 1984) 226; in citing these works, the most recent editions have also been consulted. What is not excluded is the necessary backdrop to legislation and what is not mandated is the reduction of interpretation to binary choices appropriate to another context. Informed interpretation recognises that if the drafters of an enactment were to explain every choice as to mischief to be addressed, as to the necessity for amendment, as to the scope of the law, as to the interaction of parts of a statute with

other parts such as schedules or interpretation sections, as Bennion states at 262, the statute would of necessity "need to use far more words than is practicable in order to convey the meaning intended." Contrary to the view taken by the High Court, an Act of the Oireachtas is not shorn of the factual situation, including legislative matrix, which motivates its passing no more than a contract is to be construed as an arid document divorced from its necessary background. Bennion, at 263, puts the matter thus:

> The informed interpretation rule requires that, in the construction of an enactment, attention should be paid to relevant aspects of the state of the law before the Act containing it was passed, of the history of the enacting of that Act, and of the legal events which occurred in relation to the Act subsequent to its passing.

13. More trenchantly, at article 230 of his Code, Bennion at 514 correctly posits:

> The interpreter cannot judge soundly what mischief an enactment is intended to remedy unless he knows the previous state of the law, the defects found to exist in that law, and the facts that caused the legislature to pass the Act in question.

14. Simons J dismissed the background to the 2015 Act. The trial judge did this by construing the legislation in isolation; see [137-140]. There were, however, two relevant background items which enabled an informed construction. Firstly, following on this Court's decision as to the constitutionality of Part III of the Industrial Relations Act 1946 in *McGowan v Labour Court* [2013] IESC 21; [2013] 3 IR 718 there, inevitably and justifiably from the point of view of conformity with the Constitution, came about a void in the promulgation of the results of collective bargaining as minimum rates of pay and other conditions. Simons J took that specific point into account: but there he stopped. Before the High Court, an affidavit was presented on behalf of the Minister which explained the mischief of social dumping, a practice confronted by Directive 96/71/EC. This is part of the necessary background to any proper understanding of the 2015 Act. It involves bringing into a Member State with a high cost of labour in any sector, workers from another Member State where costs of living and wages and conditions reflect a different economic system and paying those imported workers as if they had not left their own economy. The Court of Justice of the European Union had held in Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* that collective bargaining agreements in Sweden could not be enforceable against a company which had brought posted workers from Latvia there, in the absence of universally and generally applicable rates to all similar businesses within the relevant sector.

15. Thus, it was part of the necessary background to the construction of the 2015 Act that the State moved to action against the exploitation of non-national workers, to level the field of economic endeavour through the possible setting of universal rates in particular sectors and by setting up a mechanism for the examination of how those rates might be set and the appropriate level and conditions for workers so affected. Even still, while that ameliorates the starkness of the choices which the trial judge felt it necessary to make, if, as argued on behalf of the employer's body, the delegation offended the Constitution, the relevant provisions set out in the principal judgment of MacMenamin J must fail. In this instance, the delegation of limited legislative power is properly bounded and informed by policy.

Boundaries and construction

16. Cases on the necessary constriction of subordinate legislation by way of judicial review challenging ministerial statutory instruments or local authority orders tend to focus on whether these were within the limitations proposed by the parent legislation. If a subordinate order is not possible within the boundaries of the legislation, construed as a whole, there will be no power to sub-legislate. In that regard, as MacMenamin J emphasises in his concurring judgment in *Bederev*, a serious risk of misconstruction arises through shearing off part of an Act which touches on the necessity to read

legislation together with the background necessary for informed interpretation. In *Bederev* it was the schedule that had been shorn away, thus reducing the legislation to incomprehensibility. That diminished legislation operated in its truncated form only against the use of dangerous drugs generally so that only opium dens were expressly prohibited. All of the other criminal prohibitions depended upon the schedule of a huge list of drugs, their salts and esters, preparations and compounds that were specifically listed for the purpose of making the Act effective. As the main judgment in *Bederev* emphasises, the Oireachtas may only delegate those powers which arise by necessary implication of the entirety of a statute. Although a statutory instrument or local authority order has the apparent force of law, it may be challenged by judicial review for exceeding the scope of the subsidiary legislative power that is delegated by the parent enactment.

17. The Oireachtas is, in addition, presumed not to intend what Henchy J in *Burke v Minister for Labour* [1979] IR 354, 362 calls "unjust and tyrannous abuse". Hence, to be lawful as being within the powers conferred by the parent enactment, delegated legislation must be confined to the power given and for the purpose given and any results which are arbitrary, unjust or partial can never have been intended; see Kelly 4.2.66, *Cassidy v Minister for Industry and Commerce* [1978] IR 297. These rules are fully analysed in *Island Ferries Teroranta v Minister for Communications* [2015] IESC 95 and do not need repetition here; see particularly the judgment of Feeney J in *John Grace Fried Chicken Ltd. & Ors v Catering Joint Labour Committee & Ors* [2011] 3 IR 211. Thus, the central question in a challenge to the proper use of a delegated legislative power is what is or is not authorised. Those affected by subsidiary legislation are entitled to query whether such instruments were made within jurisdiction. What the Oireachtas intends to delegate should be clear from the text of legislation. Hence, an informed construction of the legislation as a whole, not shearing away parts of an enactment, much less an entire detailed schedule to which many sections of the legislation refered, as MacMenamin J emphasised in *Bederev*, but construing the delegated power within the context of the enactment as a whole, should yield clear boundaries and a defined subject matter for subsidiary law-making. Those affected should know from the text of legislation where those boundaries are and what that subject matter is. This is akin to, but not the same as, the reasons doctrine in administrative law.

Unconstitutional abrogation

18. With Article 15.2 of the Constitution, any challenge to subsidiary enactments is more than to the authority of the subordinate rule-making body, rather, as in this case, it is the very entitlement of the Oireachtas to subordinate in the first place. The issue may be lack of clear guidance in the statutory text, read as a whole, so that a subordinate rule-making authority is left at large, as in *City View Press v AnCO* [1980] IR 381, or that the nature of what is delegated is so wide as to enable the subordinate authority to make primary legislation which was the issue in *McGowan v Labour Court* and in *Bederev*. In that regard, in argument a series of propositions were advanced by the Attorney General and usefully commented on by counsel for the applicant, that might be considered in the light of the decided cases.

19.While these propositions started with the necessity in a modern polity to have decision-making bodies as to the content of subsidiary legislation outside the central legislature, of primary importance is the duty of the Oireachtas to legislate. Elected representatives owe a responsibility to the Irish people to legislate for them and this cannot be abdicated by any indolent or ill-defined delegation to a subordinate authority. To so act is not only an unconstitutional shirking of responsibility but sets the authority of the subordinate above that of the supreme vested authority, namely the Oireachtas and the people from whom under Articles 5 and 6 legislative power is derived. Thus, the Oireachtas must direct, by way of statutory command, which does not need to be, and is almost never, a prescriptive list of factors, but which must be apparent from the entire legislative text, what the limits of the outcome of any subsidiary legislation should be. This may take different

forms. In *Bederev,* it was the setting up of some 127 different dangerous drugs in a schedule to the Misuse of Drugs Act 1977, together with salts and esters where relevant, which set out the limitations of any control that might be extended by Ministerial order and laying of regulations before the Houses. In *City View Press v AnCO* a delegation to the training authority to set a levy was not an impermissible abuse of Article 15.2 since the only purpose for which the funds could be used were the narrow purposes of AnCO itself. In *Pigs and Marketing Board v Donnelly* [1939] IR 413, decided under Article 12 of the Constitution of Saorstát Éireann, the fixing of pork prices was delegated to an expert body under strict conditions of an investigation by experts as to proper price under normal conditions. This according to Hanna J was a "giving effect to the statutory provisions as to how they should determine the price." In *Leontjava and Chang v DPP* [2004] 1 IR 591, ministerial regulations as conditions of registration, common in other European countries, travel and abode were expressly conferred by the Aliens Act 1935 in a narrow area with very little space for discretion.

20. Of its essence, the legislative function is both the setting of policy through legislation for the government to pursue and the executive to manifest, through the formulation and promulgation as a defined and binding rule of conduct or, where subsidiary rules are needed, overall guidelines and limits which the entity involved in making the subsidiary rules must obey. The fundamental infringement of the Constitution by the abrogation by the Oireachtas of the central democratic power of the State is that described by Fennelly J in *Kennedy v Law Society* [2002] 2 IR 458, 486:

> The Oireachtas may, by law, while respecting the constitutional limits, delegate power to be exercised for stated purposes. Any excessive exercise of the delegated discretion will defeat the legislative intent and may tend to undermine the democratic principle and ultimately the rule of law itself.

21. Allied to the constitutional imperative in command of democracy is that any delegation must be done in such a way as to preserve the control of the Oireachtas over what is done subordinately. Expressly, the drafters of the Constitution approved the necessity for subordinate rules and the Attorney General of the time described the need for a separate sub-article authorising the existing and time-honoured practice as "pointless"; see Hogan 438. Yet, even in their remarks it is apparent that there was a search for a definition of sufficiency whereby enough guidance would have been given to a subordinate authority so that control by the Oireachtas as to the outcome might still be maintained. This is the fundamental rule. All of the cited cases constitute a consistent line of authority with *O'Sullivan v Sea Fisheries Protection Authority* [2017] IESC 75, [2018] 1 ILRM 245, where O'Donnell J emphasised, as in *Bederev*, that every authority to which sub-legislative power is delegated "must exercise some choice" and continued:

> If the parent legislation dictated he outcome, then there would be no benefit gained by the delegation of the task to the subordinate; the parent legislation could, and therefore should, include the provision in the first place. Thus the entire concept of subordinate regulation depends upon and contemplates decisions being made between a range of options. Any decision involves consideration of what the decision-maker considers is the best solution in the circumstances.

22.What is not permitted is a delegation "so broad as to constitute a trespass by the delegate or subordinate on an area reserved to the Oireachtas". The factors include "the function of the parent legislation and the area in which the subordinate has freedom of action"; thus what is wide in appearance "may be limited by principles and policies clearly discernible" on the entirety of the legislation, as in *Bederev*, but where there is a very narrow delegation, little guidance is required. The point being the continued guiding hand within discernible boundaries by the sole constitutional legislative body. Perhaps the models of, first, subordinate rules never returning to the Oireachtas,

or second, coming back but passing unless put on the order paper of either house by sufficient numbers of public representatives, or third, reverting as an item on the order paper and requiring a positive vote, have received little attention in former decisions, but it is nonetheless clear that this may be a key factor. In *Bederev*, it was mentioned as a factor which may involve the retention of the democratic control that the Constitution requires; judgment of Charleton J [49]. Similarly, in *McGowan*, the absence of this factor was regarded as telling in the context of the extraordinarily wide powers conferred on the Labour Court in rewriting employment contracts; judgment of O'Donnell J [30]. In the High Court in *Bederev* this factor was regarded as key by Gilligan J, at [2014] IEHC 490 at [54], as it was by Feeney J in *John Grace Fried Chicken* [2011] IEHC 277:

> The Court is also influenced by the power of review and annulment of any regulations which are created under s. 2(2) of the Act which is retained by the Oireachtas under s. 38(3) of the Act. Such a power of supervision is an important safeguard and must influence the Court's "holistic" view of this legislation. Feeney J. at para. 22 of his decision in *John Grace Fried Chicken Ltd. & Ors v Catering Joint Labour Committee & Ors* [2011] 3 I.R. 211 states that one of the factors to be taken into account by a court which is faced with this issue is whether or not the "Oireachtas has reserved to itself a power of supervision including the power of revocation or cancellation." Given that this is the case in this instance this provision assists the Court in coming to its conclusion.

23. But why would that factor influence the issue of abrogation or retention of democratic power under Article 15.2? Clearly, it cannot be the only factor and is not mentioned in any of the cited decisions as being in itself determinative. Even with the model of providing for subsidiary rule-making and the return of the specific results to the Oireachtas to be conferred with legal status through either the absence of objection or a positive vote, this cannot be the same as legislation. The President, the third house of the Oireachtas with the powers to press for a re-vote or referendum on a petition or to refer draft legislation to the Supreme Court, is excluded. That is one reason, but another surely must be that the Constitution, in setting the aims of that fundamental text as the promotion of the common good and requiring the due observance of prudence and in remembering the struggle for independence of our ancestors, requires that the Oireachtas apply itself to legislating. To slough off that democratic responsibility for the setting of the fundamental policy of the State would be to offend the constitutional scheme. But, reconsideration and either the absence of objection or a positive affirmation is both democratic and an indication of approval. For such taking back to itself, the Oireachtas, through its individual members, can be held electorally responsible should the measure generate individual approval or informed public debate.

24. In terms of the interpretation of the entire corpus of legislation, the role of the judicial arm of government interacts with the work of the Oireachtas. While, necessarily restrained, remarks on the need to reform some statutory defect or to reconsider the overall working of a scheme may not meet with immediate action, it is to be presumed that such judicial hints are noted if not heeded. As an approach to statutory construction, the decisions of the courts in their interaction with legislation or with common law rules are a guide to the position of the legislature; Bennion 78-79. Thus, there can be a construction of tacit parliamentary approval even though there has been no vote and no step has been taken to formally bring a court decision to the attention of the legislature. Bennion states the rule of tacit approval has been disputed. Yet, as he convincingly argues, where the legislature strongly disapproves either of the current law as set out in an enactment or with a court decision, there is both the impetus and the potency to move to change it. Approving this as a principle of statutory interpretation, he states:

> Where Parliament does not intervene to reverse or modify processing effected by courts or officials it can be taken tacitly to approve it. As Professor Pearce has said: 'if a legislature has chosen not to make any change in an Act following upon its interpretation by the judiciary, it is strong ground for thinking that the legislature is satisfied with the court's ruling'. {D C Pearce *Statutory Interpretation in Australia* (2nd edn, 1981) p 6. Cf the treatment of custom in H L A Hart *The Concept of Law* pp 45-8.}
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> For this principle of 'tacit legislation' to apply, a reasonable period must have elapsed after the processing with which Parliament might, if it chose, have legislated the other way. The point strengthens the validity of processing as in effect a function exercised under power impliedly delegated by the legislature.

25. While the limits of what delegation is permissible to a rule making subordinate authority may not exceed the imperative of the democratic mandate, laying rules before the houses of the Oireachtas for approval is beyond the tacit approval rule. Instead, the approval is express. While there are clearly limits to this model, the interaction as between the degree of power delegated, the extent of the aims and boundaries of what a subordinate rule making authority is expected to exercise as apparent from the informed construction of the parent legislation and the type of scrutiny, positive affirmation or disapproval only through objection, involved, it is the overall package that a court must earnestly consider should a case be made of an infringement of Article 15.2. To that, it must be cautioned the courts never comment on the degree of attention or lack thereof bestowed by parliamentary debate on legislation. This appeal has been one where Ministerial impact assessments of the 2015 Act and the accompanying explanatory memorandum have been played in aid of construing the legislation. The fundamental rule remains one of the courts construing the text of an enactment against the necessary factual and legal backdrop and not the reach into secondary opinion as to what legislation may be thought by others to do.

26. Rather than focus on the return to the Oireachtas of rules made under parent legislation, prior decisions have used a range of descriptive terms to analyse what, on the one hand, is the abrogation of democratic power through an Act having no apparent guidance for what a subordinate rule making authority may do or setting no limits to their responsibility, or on the other, the minor role expected of that authority and the circumscription of what may be done. Here, the principles and policy test has been often repeated. While mentioned in many cases, principles and policies is not an imperative in the Constitution. It is an expression in analysing the extent to what has been conferred and the degree of discretion or general decision-making involved in subordinate rule setting. The Constitution speaks for itself as to what may be done. Limited delegation for an express purpose and with sufficient guidance to an assured outcome, or an outcome within a defined and limited range, or discretion within a limited assessment, is what is required. More than that infringes the Constitution. This approach requires the informed construction of the complete legislation and the analysis of each part of the enactment to see precisely what authority to make rules has been delegated and whether this is more than the Constitution permits. Some modern enactments might almost be construed as addressing themselves to courts and to the mischief which the under-construction or non-comprehensive analysis of legislation may lead to in the undue condemnation of subordinate legislation.

27. Hence, in s 40A(2) of the Social Welfare Consolidation Act 2005 as amended in the context of the Covid-19 pandemic by the Health (Preservation and Protection and Other Emergency Measures) Act 2020, typically states that when making regulations the Minister shall have regard to a range of features which could be an aide-memoir or become a checklist, namely:

> (a) the nature and potential impact of Covid-19 on individuals, society and the State;

(b) the capacity of the State to respond to the risk to public health posed by the spread of Covid-19;
(c) the policies and objectives of the Government to protect the health and welfare of members of the public;
(d) the need to ensure the most beneficial, effective and efficient use of resources;
(e) the need to mitigate the economic effects of the spread of Covid-19;
(f) in relation to regulations made for the purposes of section 40(7)(c), the impact of the requirement for certification on the availability of resources within the health services.

28. It stands to reason that the more limited a delegation, the more constricted the opportunity to possibly move outside the borders of what the Oireachtas has set, the less likely it will be for a court to find an abrogation of power. It is not uncharacteristic that legislation requires an administrative body to take into consideration prices or standards, particularly in the economic sphere. It would not accord with the decided cases to set down any rigid prioritisation of those factors as to how they might apply in a given case. It is sufficient that the relevant factors are identified and latitude is given within identifiable boundaries to the deciding body to determine how they apply in the particular case or how they are to be taken account of in a particular case. Technical tasks, the analysis of data and the setting of numbers or standards for implementation within a defined range meet that test, unless the delegated power is one of wide policy or ranges over an ill-defined or wide area. Thus, in *McGowan,* O'Donnell J refers to the Labour Court exercising more than "a limited power" and that rather that what was involved was "a wholesale grant … of law making power to private persons unidentifiable … to make law in respect of a broad and important area of human activity and subject only to a limited power of veto by a subordinate body"; [30]. This was enabling those who would otherwise have contracted by private negotiation to make the insertion of extensive clauses into other contracts. There, this Court looked at what limitations there were on the regulation making power and whether there were sufficient restrictions on that power and sufficient guidance as to the key concept of what group of employers and employees would be regarded as "representative" so as to extend their agreement more widely onto swathes of other workers and employers; [28]. In *Bederev,* the limitations were found in the entire text of the legislation, in particular with the schedule of psychotropic and dangerous drugs enabling a clear view as to what was "in the contemplation of the enactment in enabling secondary law-making"; Charleton J [41]. These decisions condemn the sloughing off of undefined and wide ranging powers. In *Pigs and Marketing Board,* it was the technical nature of the task, following on precise investigation and calculation, which rendered the setting of prices by a subordinate body lawful.

29. Certainly, the Oireachtas can and does set minimum wage rates for the economy generally in order to protect the working man and woman, or approves these by vote, but other sectors about which the individual members of the houses cannot be expected to know in detail are surely different. There, a precise calculation of the effects on competitiveness, on maintaining employment in specialised sectors and enhancing industrial peace require a technical and individual assessment which the Labour Court is delegated by experience and which its record of dispute resolution in labour affairs is particularly suited. There may be, and are, many tasks of rule-making for the proper ordering of society which are beyond the broad policy investigation and analysis that typifies a democratic legislature. The entrustment of these to another body with sufficient guidance and within defined limits is part of the democratic mandate. References to principles and policies or defined aims and definite limits are simply tools in the overall analysis of the informed interpretation of a statute, what the enactment means and the extent of the delegation, the precision of the task, its nature and the guidance afforded by the entire text as to what is to happen. Also important is that the rules may return to the Oireachtas for approval.

30. The Constitution is not to be construed as denying the Oireachtas essential measures of flexibility

and practicality to fulfil the democratic mandate through the mechanism of legislation which sets out the structure and limits of subordinate rules, the detail of which is to be filled in by the body ultimately directed to achieve the outcome. It has often been remarked that without such resort to subsidiary rule making, social order would be undermined. McKechnie J in *BUPA Ireland v Health Insurance Authority*, a dispute as to the cross-support of health insurers through a monetary transfer mechanism, referred to it being "impossible, or at least highly impracticable, to oblige the Oireachtas to respond in a timely manner to ever changing and evolving circumstances which could have a major impact on fundamental issues"; [2006] IEHC 431, and see *Maher v Minister for Agriculture* at 245 and Kelly 284. The Constitution promotes order and as such does not demand the impossible or the highly impracticable. It does compel the Oireachtas to find for itself every fact upon which it desires to base legislative action, or that it should make for itself detailed determinations which it has already determined to be a prerequisite of the application of the legislative policy to particular circumstances that would be impossible for the Oireachtas itself properly to investigate

31. Difficulty in framing legislation is not a valid defence to the Oireachtas abdicating its authority. In *Bederev,* that authority precisely informed the nature of what drugs could be added to the existing schedule to the Misuse of Drugs Acts; the ease with which these could be identified arising from the nature of what was already there. What was required was a technical examination of the substances proposed for inclusion in a regulation as to their use and effects as judged against the precise guidelines and limits in the parent legislation. While this was a clear example of ever evolving circumstances, this was not the "assignment to the executive by the legislature of exclusive responsibility for determining policy"; see the judgment of Keane CJ in *Leontjava v Director of Public Prosecutions* [2004] 1 IR 591, 624. Rather, where the policy of the legislature has been determined, and limits set, a limited task over a specialised, evolving or technical area is part and parcel of the legislative will of the Oireachtas as expressed in the enactment. It should never be the difficulty in construing the enactment that may result in legislation being condemned, but neither the ease of implementation nor the difficult task of informed construction are relevant. What has been done, what guidance is given, what limits are set and the degree of democratic involvement subsequent to rule making subordinately are the tests applicable.

32. While the decision in *McGowan* references, at [30], the absence of democratic oversight, either directly to the Oireachtas or to a Minister answerable to the houses, the nature of the body to which rule making subordinate authority is delegated is perhaps less important. Of its nature, such a body would be exercising a public law function and thus amenable to judicial review. Tribe, *American Constitutional Law*, disapproving *ALA Sechter Poultry Corp v US* 295 US 495 (1935), nonetheless regards the United States Constitution in its separation of powers structure and requirement for legislative control as being "difficult to reconcile with any delegation of governmental or quasi-governmental power" to religious groups or to private groups. Hence, the power to issue drink licences within a radius of a house of worship was struck down in *Larkin v Grendel's Den Inc* (259) US 116 (1982). Where US law has moved on from the 1930s is in the acceptance of public regulation of private contracts. This is lawfully to be done by public bodies and within appropriate legal limits. But the Labour Court is a statutory body, operating within defined limits and subject to public law. As MacMenamin J in his analysis of the 2015 Act explains, and unlike the prior situation in *McGowan*, that body has independent and circumscribed powers of intervention subject to judicial review.

Reasons

33. As MacMenamin J states in his judgment, what characterises the lack of reasons by the Labour Court in this instance is puzzlement: who can say why the decision was made? But, this valuable body, key to the maintenance of industrial peace, is not to be put under the obligation of issuing discursive judgments as if from a leading jurisprudent. The normal rule is this: if the reasons are

such that an intelligent person observing the court proceedings can say why the judge made the decision, and that with a knowledge of having heard all of the evidence and submissions as the judge did, then that suffices. Hence, a judgment stating that Ms A was evasive and the evidence of Mrs B is preferred is enough; a judgment stating that the court is satisfied that a smell was intolerable or that banging went on all night habitually, that is enough to found a decision in damages for, or an injunction against, nuisance. Further, not every single point needs to be dealt with; *Forshall v Walsh* [1998] IESC 24. But what is central to a decision, the key point, needs some reason as to why a point is found in favour of a party or against. On the analysis of MacMenamin J, that is what is missing here in merely reciting that regard has been had to a series of factors. What needs to be said is simply why the outcome is as it has been arrived at.

This case

34. Here, the Oireachtas has set forth a policy and objectives, or boundaries with guidance, in sufficient detail. The objectives include the key value of supporting collective bargaining. In fact, Part 3 of the Act deals with collective bargaining designed to support it. A key policy is to promote harmonious relations between workers and employers and to avoid industrial strife. That is a central factor in a modern democracy open to outside competition and key to supporting competitiveness. The 2015 Act also seeks to promote or to preserve high standards of training and qualification and by a subordinate body searching for, and the Oireachtas ultimately approving, fair and sustainable rates of remuneration. All these are objectives well recognised in a modern democratic society that strives for both economic dynamism and for social protection; an aim that becomes unachievable in chaos or stagnation. These must be recognised as being legitimate matters which the Oireachtas can pursue or seek to achieve. The doctrine of separation of powers does not deny to the Oireachtas the power to direct that an administrative body, properly designated for that purpose, and properly delimited as to its task, should have a latitude within which it is to ascertain the conditions which the Oireachtas has made prerequisite to the operation of its legislative command. In concurring with the analysis of MacMenamin J, this analysis is proffered in support of the correctness of his conclusions as to the breadth of guidance and limits of authority within the 2015 Act and on the absence of reasons point.