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Legal Manifestations of Emergency in National Eurocrisis Law:

Ireland

Stephen Coutts

Article 28.3.3° Bunreacht na hÉireann (the Constitution of Ireland) provides that 'nothing in this Constitution…shall be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war or armed rebellion'.[1] While politically the economic and financial crisis that engulfed the state in 2008 and subsequent years has frequently been described as a period of general crisis, an attempt to draw an analogy to Article 28.3.3° by invoking a comparable state of economic emergency has generally not been a feature of the Irish implementation of Eurocrisis law. Nonetheless, an awareness on the part of the Courts to the general political and above all financial context of some of the measures adopted to combat the economic crisis has emerged in certain discrete areas, particularly in relation to measures adopted in the immediate aftermath of the financial crisis to deal with the states deteriorating financial position and its insolvent banking system. An awareness of the economic context of the adoption of certain measures is evident in three areas in particular. Firstly, in relation to public sector pay. Secondly, in relation to the role of Parliament in the budgetary process. Finally, in relation attempts to repair the financial position of the state's banks.[2] The principal effect of this awareness has been to extend the discretion afforded the Government. Nonetheless, in general the Courts have incorporated concerns relating to the state of the country's finances into existing legal concepts. Indeed, the need to remain within the bounds of the Constitution, even when dealing with a national economic emergency has been stressed by the Supreme Court.

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[1] Bunreacht na hÉireann, art 28.3.3°.

[2] It will be noted that none of these areas deal with law that is a direct result of measures adopted at a European level to deal with the Eurocrisis, either in setting up bail-out mechanisms or in reform of the budgetary governance framework. Nor are they a direct result of the Programme of Financial assistance, as measures designed to implement the Memorandum of Understanding. Nonetheless, they are intimately connected with the same economic and financial crisis, albeit emphasising for example in relation to the banking measures, the specific features of Ireland's experience.

Firstly, the area in which mention of the economic circumstances of the state has been the greatest is in the area of public sector employment. The Financial Emergency Provisions in the Public Interest Act 2009 (FEMPI Act 2009),[3] granting the Government the power to impose a levy public servants to fund their pensions and to reduce payments to service providers has been challenged, unsuccessfully, before the Courts on the grounds of property rights in particular. In all cases the High Court has noted the special circumstances and purposes of the FEMPI Act 2009 in contributing to the stabilisation of the finances of the state and in ensuring that the public sector makes a fair contribution to such a stabilisation. In *Haire*[4] and *UNITE*[5] the High Court found that the economic context in which the FEMPI Act 2009 was adopted and its stated public interest purposes meant that any purported attack on property rights would not be 'unjust' within the meaning of Article 40.3.2° of the Constitution.[6] In *Garda Representative Association*, the High Court, while in general dealing with the detail of the FEMPI Act 2009 rather than the constitutional context, found that when deciding whether to exclude a particular group (in this case the police) from the pension levy, the Minister for Finance had a significant degree of discretion due to the fact that the FEMPI Act 2009 was a question of political choice and was 'both policy-based and fiscal'.[7] Finally, most strikingly, in *McKenzie*, the High Court found that the Minister for Defence was entitled to bypass a Conciliation and Arbitration scheme (the C & A Scheme) when imposing a general government-wide reductions in allowances for travel.[8] In finding in favour of the Minister, the Court found that in adopting measures in response to the 'most serious economic crisis in [the state's] history that has been deepening by the week' the Government was acting 'in the urgent national interest', allowing it to bypass the C & A Scheme according to Article 3 of that scheme.

Secondly, the High Court has also mentioned the economic context in the context of the issuance of promissory notes to recapitalise the banking sector. In *Collins*[9] the High Court found that the once the Oireachtas (Parliament) has authorised the

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[3] Financial Emergency Provisions in the Public Interest Act 2009.
[4] *J & J Haire & Company Ltd & Ors v Minister for Health and Children & Ors* [2009] IEHC 562.
[5] *UNITE & anor v Minister for Finance* [2010] IEHC 354.
[6] It should be noted that in *Haire* (n 4) the Court found that in any event the alleged property right did not in fact exist and it was on this basis the decision was decided.
[7] *Garda Representative Association v Minister for Finance* [2010] IEHC 78 para 23. This analysis would seem to flow both from the nature of the act as one regulating public sector pay but more importantly from its purpose and general place in the response of the Government to the economic crisis and the policy decision to ensure that the public sector make a proper contribution to its resolution.
[8] *McKenzie & Anor v Minister for Finance & Ors* [2010] IEHC 461.
[9] *Collins v Minister for Finance and others* [2013] IEHC 530.

government to make payments or a specific purpose, here in extending financial aid to credit institutions, there is no limit on the amount the government may spend and there is no corresponding need to return to parliament to obtain further authorisation. While the Court expressly excludes the economic context as a relevant consideration in its legal analysis, an emphasis is placed on a need to secure freedom of action for the government in its executive role, with the Court noting that 'as recent experience has all too painfully demonstrated, the welfare of the entire citizenry is hugely dependent on the capacity of the State to be able to raise money without hindrance on international markets'[10]

In both cases the economic crisis has either been invoked directly, in the case of employment rights, or served a the context for, a facilitation of governmental discretion. In *Garda Representative Association* the description of the FEMPI Act 2009 as a reaction to the economic crisis and its stated goal to 'share the burden' ensured that the decisions of the Minister were of a political and policy-based nature, thereby ensuring a minimal level of judicial scrutiny. Similarly in *Haire* and *UNITE* the economic crisis served as the context in which any attack on property rights were to be considered proportionate and therefore not unjust within the meaning of the constitution. In *McKenzie*, explicit reliance is made on Article 3 of the Concilliation and Arbitration Scheme that preserves the Government's liberty of action in the exercise of their constitutional authority'.[11] Finally, in *Collins*, the freedom of the Government to act in the national interest was a key consideration in finding that it did not have to return to Parliament in order to secure further authorisation to issue billions of euro in promissory notes.

Nonetheless, in all cases considerations relating to the financial crisis and any 'economic emergency' have been located and accommodated within an existing legal framework, be it the test for an 'unjust' attack on property rights in the cases of *Haire*[12] and *UNITE* [13] or the constitutional framework for the national budget in Collins.[14] Even *McKenzie*, perhaps the clearest assertion of a national economic emergency, is fitted within article 3 of the Conciliation and Arbitration Scheme.[15] While, particularly in the case of the *FEMPI* litigation, the economic circumstances of the state have had an influence on the legal analysis, in no case has a stand-alone doctrine of a national economic emergency been developed or applied to justify governmental action that would otherwise be illegal.

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[10] Ibid para 124.
[11] *McKenzie* (n 8) para 5.3.
[12] *Haire* (n 4).
[13] *UNITE* (n 5).
[14] *Collins* (n 9).
[15] *McKenzie* (n 8).

Indeed, in the final area in which the concept of an economic emergency has been raised, namely the transfer of toxic loans to a 'bad bank', the Supreme Court has endorsed this approach of allowing economic circumstances to play a role in legal analysis, such as in a proportionality analysis while ensuring this is done within the framework of the Constitution itself. In *Dellway* an individual challenged the decision of the National Asset Management Agency (NAMA) under the NAMA Act 2009 to acquire his loans from his bank without any hearing. While a relatively minor part of the decision, a number of opinions indicated a certain hostility to an attempt by the Government to raise the possibility of an economic state of emergency analogous to the state or war or rebellion found in Article 28.3.3° Bunreacht na hÉireann with one justice noting that 'the Act of 2009 requires to be construed in accordance with the Constitution. Clearly the Act of 2009 was part of governmental policy introduced to meet the very serious banking crisis within the State. However, this does not exempt it from the principles of the Constitution.'[16]

[16] *Dellway Investments Ltd v National Asset Management Agency* [2011] IESC 4, Denham J.

J & J Haire & Company Ltd & Ors v Minister for Health and Children & Ors [2009] IEHC 562
Garda Representative Association v Minister for Finance [2010] IEHC 78
McKenzie & Anor v Minister for Finance & Ors [2010] IEHC 461
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