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IRELAND

EUROPEAN UNION

I. National Practices Concerning Law-making Procedures in Case of Urgent and/or Exceptional Circumstances

1) Does your national legal order identify urgent and/or exceptional cases as the justification for applying special law-making procedures?

Ireland does identify urgent and exceptional cases as the justification for applying special law-making procedures. In Article 28 of Bunreacht na hÉireann (The Irish Constitution), four cases are presented as justifying the application of special law-making procedures. First, following a declaration of war by Ireland, per Article 28.3.1°. Second, following an actual invasion of Ireland, per Article 28.3.2°. Third, during an armed rebellion, per Article 28.3.3°. Fourth, per Article 28.3.3°: ‘when there is taking place an armed conflict in which the State is not a participant but in respect of which each of the Houses of the Oireachtas [Parliament] have resolved that, arising out of such armed conflict, a national emergency exists affecting the vital interests of the State.’ This fourth state of emergency ‘includes such time [...] as may elapse until each of the Houses of the Oireachtas shall have resolved that the national emergency occasioned by such war, armed conflict, or armed rebellion has ceased to exist.’

These militaristic conditions are the only circumstances in which special law-making procedures may be implemented. There is no recourse to special law-making procedures available in cases of natural disasters.

Are the concepts of “urgency” and “exceptionality” used cumulatively or alternatively as conditions for the special law-making procedures?

Neither the term ‘urgency’ or ‘exceptionality’ are expressly used in Article 28 as conditions for the law-making process, however an examination of the content of the Article suggests that in cases where Ireland has been invaded, urgency is the condition for the usage of special law-making procedures. Article 28.3.2° states ‘in the case of an actual invasion, the Government may take whatever steps they may consider necessary for the protection of the

State, and Dáil Éireann [the lower House of the Oireachtas] if not sitting shall be summoned to meet at the earliest practicable date. Until the Dáil is convened, the special law-making procedures at the Government's disposal are premised on 'urgency.'

In cases where the Houses of the Oireachtas declares war or passes resolutions declaring a state of emergency due to an armed conflict to which Ireland is not party, exceptionality and urgency cumulatively condition usage of this procedure. The Constitution specifies that such resolutions declaring a national emergency must follow the finding that 'a national emergency exists affecting the vital interests of the state'. This is a condition premised on urgency. However, that the national emergency exists until the Houses of the Oireachtas resolve that the emergency ceases to exist enables those Houses to maintain a state of national emergency indefinitely, despite the nonexistence of any actual emergency. Leaving it to the Oireachtas to decide when the emergency ends is premised on exceptionality: it allows for an emergency to extend beyond the period of urgency which justified the initial resolution until the time the Oireachtas deems prudent. Article 28.3.3° provides the same mechanism for the termination of an emergency founded upon a declaration of war: the Oireachtas must resolve that the emergency has ceased.

Are there distinct or common law-making procedures applying in urgent and/or exceptional cases?

During national emergencies, common law-making procedures apply for all legislation, except that which is passed with the express purpose of 'the public safety and the preservation of the State', such as the Emergency Powers Act 1939 and the Emergency Powers Act 1976. These Acts have exceptional status under Article 28.3.3°. Unlike all other legislation, such emergency powers legislation cannot be invalidated by reference to any Article of the Constitution (with one exception in regards Article 15.5.2° of the Constitution: the proscription of the death penalty.)

2) Do the eventual special law-making procedures in case of urgent and/or exceptional circumstances derive from de facto practices or are they set out in the Constitution and/or in ordinary legislation?

The special law-making procedures in case of urgent and/or exceptional circumstances are set out in the Constitution, at Article 28.3.3°.

What are the main principles and the concrete proceedings of law-making in urgent and/or exceptional circumstances in your national legal order?

The main principle discernible in urgent and/or exceptional circumstances is that executive decision-making should be made as expeditious as possible, and so should not be restricted by constitutional judicial review. As states of emergency have only ever been called following a resolution from both Houses of the Oireachtas in accordance with Article 28.3.3°,

it is only in relation to such emergencies that the main proceedings have been elaborated upon. In one of the few cases challenging emergency powers legislation, *State (Walsh) v Lennon* [1941] IR 112, Gavan Duffy J held that: “the apprehension of judicial intervention may at some delicate moment hamper the legislative or executive authority when Government needs all possible strength and freedom to steer the ship of state through the crisis.” Thus, the principle behind Ireland’s emergency powers provision is the prioritisation of swift and effective Government action over governance which is in full conformity with the State’s duties under the Constitution.

The concrete proceedings in instances where the State declares war per Article 28.3.1° have never been realised, however a declaration of war would serve as the permission to pass emergency powers legislation referenced in Article 28.3.3°. In instances of actual invasion, per Article 28.3.2°, ‘the Government may take whatever steps they consider necessary for the protection of the State, and Dáil Éireann if not sitting shall be summoned to meet at the earliest practicable date.’ At this meeting, it is assumed that war will be formally declared and emergency powers legislation passed.

The concrete proceedings of law-making in urgent and/or exceptional circumstances have only been followed-through upon in relation to instances where a resolution of the Oireachtas declares a state of emergency. In such instances, following the resolution of a national emergency, emergency legislation will be passed ‘for the purpose of securing the public safety and the preservation of the state in time of war.’ This legislation will vest additional powers in the Executive which will not be subject to invalidation through judicial review under the Constitution, save in relation to Article 15.5.2° (forbidding the reintroduction of the death penalty.) Any legislation passed in accordance with the state of emergency will expire either after a prescribed date, or upon the formal ending of the national emergency, following a resolution by both Houses of the Oireachtas that the emergency is over.

3) What is the respective role of the legislative and the executive power, and eventually of other institutions, in dealing with urgent and/or exceptional circumstances?

The role of the legislative power is to either to declare war or pass resolutions declaring a state of emergency, and then to pass emergency legislation vesting power in the Executive. The role of the Executive is to use its expanded powers to ‘secure public safety and preserve the state’ in times of war, armed conflict or armed rebellion. The ‘emergency orders’ passed by the Executive are presented to the Legislature, and can be annulled if both Houses of the Oireachtas resolve within 21 days that it should be annulled. Otherwise it is upheld without a further vote in the Houses being required. In cases of actual invasion, the role of the

Executive is 'to take whatever steps they consider necessary for the protection of the State' in the period between the invasion and the assembly of the Legislature.

Do the Head of the State, the Parliament and the Government retain a particular role?

The previous answer outlined the role of the Parliament and the Government. In regards the Head of State, under the Irish Constitution this is a largely ceremonial office. The President signs the emergency powers legislation into law. Other than this, the President of Ireland does not retain any particular role in relation to urgent and/or exceptional circumstances.

4) On what occasions and how frequently have the urgent and/or exceptional law-making procedures been applied in your national legal order?

Since the implementation of the current Irish Constitution in 1937, Ireland has neither been invaded, nor been subject to an armed rebellion, nor declared war. Consequently, urgent and/or exceptional law-making procedures have not been applied in Ireland on foot of these conditions listed under Article 28. However, on two occasions the Houses of the Oireachtas have passed resolutions declaring a state of emergency. First, in September 1939, upon the outbreak of World War II, a conflict to which Ireland was neutral. This state of emergency lasted until 1976, when it was terminated. However, its repeal was immediately followed by a second resolution as to a state of emergency arising out of the ongoing violence in Northern Ireland. This state of emergency lasted until 1995, when it was terminated as part of the Northern Irish peace process. Thus, for 56 of the 80 years which the Irish State has been in existence, Ireland has been under a state of emergency.

The 1939 declaration of a national emergency was followed by the Emergency Powers Act 1939. This Act provided the Executive with the power to seize property, detain without trial, censor communications, and control the distribution of resources, amongst other powers. The Emergency Powers Act 1939 expired in 1945, following the end of WWII, however the declared emergency which justified the passing of the Emergency Powers Act remained for a further 31 years. The Emergency Powers Act 1976, which was passed in the immediate aftermath of the second resolution of a state of emergency, had a more restricted scope. The 1976 Act allowed for the detention without charge for seven days of any individual suspected with reasonable cause of committing, having committed, or about to commit an offence listed under the Offences Against the State Act 1939. The 1976 Act was predominantly used to detain republican paramilitary forces.

Have they been activated in abusive ways and has there been a political criticism against their application?

It is arguable that the continuation of the first state of emergency beyond the end of World War II in 1945 was abusive, as it allowed the Oireachtas to pass emergency powers

legislation at any time without another resolution of emergency being declared. However, this did not happen and the Emergency Powers Act 1939 expired in 1945.

There has consistently been some political criticism of Article 28.3.3°. The 1967 Committee on the Constitution, an informal Oireachtas committee set up to perform a general review of the Constitution, recommended 'adding to Article 28.3.3° a clause providing that resolutions declaring an emergency shall have effect for a period of three years only unless renewed by further resolutions of both Houses of the Oireachtas.

The 1996 Constitutional Review Group was established by the Irish Government to undertake a further review of the Constitution. This Group was composed not of politicians, but of lay individuals, predominantly civil servants and lawyers. The Constitutional Review Group recommended that the Constitution should make clear that specific fundamental rights – such as the right to life; the right not to be tortured or subjected to inhuman or degrading treatment; the right not to be held in slavery or servitude; etc. – may not be derogated from, even in states of emergency. Additionally, the Constitutional Review Group recommended that there should be a limit on the period for which emergency legislation can continue without parliamentary review.

In 2003 the Eighth Progress Report of the All-Party Oireachtas Committee on the Constitution recommended that a resolution of the Houses of the Oireachtas shall have effect for a period specified not being greater than one year, and that such resolution may be renewed by another resolution subject to that requirement.

5) Are the urgent and/or exceptional regulatory procedures and measures subject to judicial review in your country?

The question of whether emergency legislation is subject to judicial review was dealt with in one case: *In Re Article 26 and the Emergency Powers Bill 1976*. [1977] 1 IR 159. This case followed an Article 26 application by the President of Ireland. Article 26 permits the President to refer a Bill to the Supreme Court for verification as to the constitutionality of the Bill. *Re Article 26 and the Emergency Powers Bill 1976* held that, while the substance of emergency legislation cannot be subjected to judicial review where the outcome would be the invalidation of the legislation; a review of the preliminary and procedural requirements for the passage of the bill by both Houses of the Oireachtas is permitted.

Additionally, while judicial review of the content of emergency legislation is not allowed where the outcome would be the striking down of the legislation, the Supreme Court in *Re Article 26 and the Emergency Powers Bill 1976* held that judicial review is permitted to challenge the terms of a detained person's detention under the terms of the emergency legislation. That is "any arrest sought to be justified [by S2 of the Emergency Powers Act

1976] must be in strict conformity with it. No such arrest may be justified by imparting into the section incidents or characteristics of an arrest which are not expressly or by necessary implication authorised by the section.

Thus, urgent and/or exceptional regulatory procedures and measures are subject to judicial review in Ireland to a degree, however it is not possible to invalidate any measures authorised by emergency legislation by reference to any article of the Constitution (again, with the exception of Article 15.5.2°, the proscription on capital punishment.)

In particular, is this review the task of a constitutional court?

A review of the terms of a detained person's detention under an Emergency Powers Act is not exclusively the task of the constitutional court. The High Court also could undertake this review.

Is the existence of the "urgent" and/or the "exceptional" situation a factual or a legal issue?

As aforementioned, the question as to the existence of an 'urgent' and/or 'exceptional' situation, and whether or not that question is a factual or legal issue, has only be dealt with in cases where the Houses of the Oireachtas pass resolutions declaring a state of emergency, and not by the other circumstances: declaring war; being invaded; or armed rebellion. Where the state of emergency is declared following a resolution by both Houses of the Oireachtas, it is the resolution arising out of an armed conflict to which Ireland is not party which pertains to the existence of an urgent or exceptional situation. The Supreme Court in *In Re Article 26 and the Emergency Powers Bill 1976* "expressly reserves for future consideration the question whether the Courts have jurisdiction to review such resolutions." Thus, it is not presently clear whether the existence of an 'urgent' or 'exceptional' situation is a factual or legal question, as the Courts have reserved for themselves a power to determine that a resolution is not legally capable of necessitating a national emergency where the urgency or exceptionality of the situation is not upheld.

Is there a special duty for the executive to give reasons for the application of an urgent and/or exceptional regulatory procedure? Are these reasons subject to judicial control, and, if so, to what extend?

There is currently no special duty for the executive to give reasons for the application of an urgent and/or exceptional regulatory procedure. As mentioned in the previous answer, the Supreme Court in *In Re Article 26 and the Emergency Powers Bill 1976* reserved for later adjudication the question of whether the reasoning behind passing a resolution necessitating a national emergency, and by this necessitating the passage of emergency legislation, can be subject to judicial review.

6) Do you think that any general or particular feature of your national special law-making procedures could be used at a European level for the management of urgent and/or exceptional circumstances?

That Irish emergency legislation has to be passed by both Houses of the Oireachtas could be used at the EU level for the management of urgent and/or exceptional circumstances by requiring both the European Parliament and the Council of the European Union to assent to the proposed emergency powers legislation. However, the political system in Ireland is much more conducive to passing such legislation than is the case with Europe. As the Executive in Ireland is made up of members of the Legislature, and as Irish politics maintains a strong whip system, there was relatively little resistance to passing emergency powers legislation. This is contrastable to the European political system, where the European proxy of the Executive, the Commission, is not selected from parliamentarians, and where the Parliament and Council are not whipped by the Commission. Thus, the beneficial expeditiousness of the passage of emergency legislation through the Houses of the Oireachtas would likely not be replicated on the European level. As a result, the Commission would not be vested with discretionary powers as speedily as is the case within the Irish system.

That Irish emergency legislation cannot be invalidated by the courts with reference to the Constitution could be replicated on the EU level by making emergency regulations not subject to invalidation by the CJEU for breaching the Treaties. This would help expedite the emergency powers of the Commission, whose power would anyway remain restrained by the European Council's check on power even in the absence of judicial review.

Additionally, Ireland's emergency powers conditions are all militaristic: they pertain to war, invasion, armed conflict, and armed rebellion. Were the EU to fashion an emergency powers function, it ought to relate to a different range of conditions, including natural disasters, the refugee crisis, and the Eurocrisis.

That states of emergency in Ireland can continue indefinitely should the Houses of the Oireachtas opt not to resolve to terminate the emergency (which they have no legal duty to do) militates against replicating the Irish model on a European scale. Member States would be naturally wary against arrogating to the European Union broad competences which would not be subject to invalidation through judicial review where they trespassed on the division of competences or fundamental rights.

Which criteria could be apt to guide this transposition?

Were transposition to occur, the key criterion of a resolution from both the European Council and the European Parliament vesting the European Commission with the emergency powers would be necessary.

7) Do you think that under the current circumstances your national Government would be willing to grant competence for urgent and/or exceptional legislation to the EU?

Notwithstanding voting against the Treaties of Nice and Lisbon the first time, Ireland is not a generally Eurosceptic Member State, and the present Government is characterisable as Pro-European. There is no major Eurosceptic party in Ireland. Consequently, I do not believe Ireland would have any especial objection to the EU gaining competence for the passage of urgent and/or exception legislation. Rather, I suspect the objections which all other Member States would have as to the concentration of power in Brussels would be equally shared in Ireland.

II/ Potentialities of an Urgent and/or Exceptional Law-making Procedure at the European Level

1) How could an urgent and/or exceptional law-making procedure be established at the EU level?

In particular, could one use the current EU rules by broadening their scope of the application or is it necessary to introduce new provisions, exclusively destined to address urgent and/or exceptional circumstances?

Is a revision of the Treaties necessary or is it possible to reach a solution by means of secondary law? In the former case, would it be sufficient a simplified procedure according to the article 40 TEU?

I believe that the introduction of new provisions through Treaty revision is necessary to establish urgent and/or exceptional law-making procedures at the EU level. The Treaty on European Union, at Articles 24 and 26 particularly, recognises that the Common Foreign and Security Policy is to be defined and implemented by the European Council, with the adoption of legislative acts in this area specifically excluded in Article 24.1. The establishment of urgent and/or exceptional powers for the EU would, it is proposed, require some express role for the European Commission. The European Commission would function in a similar way to a national Executive in a national emergency: it would be vested with greater discretionary powers in order to deal timeously with the emergency. Presently, there is no way within the Treaties to vest the Commission with this power in relation to Common Foreign and Security Policy, the area under which emergency powers legislation as found in Ireland would pertain. The European Council has sole authority over the definition and implementation of the Common Foreign and Security Policy. To expressly include an emergency powers provision within the EU structure, and avoid using alternative

international law agreements between the 27 Member States (as initially with ESM), the European Commission must be able to enforce the agreement reached by the European Council.

A clause would have to be added stating that the European Council can specify that the European Commission has temporary extraordinary competence in relation to Common Security and Foreign Policy as it relates to a specific express circumstance, such as terrorism. Following this approval of the expansion of the Common Foreign and Security Policy, the Commission would have to draft legislation, to be approved by both the European Parliament and the Council of the European Union, granting the Commission with this power. This clause should recognise that even where specific Common Foreign and Security Policy powers are derogated to the Commission in cases of emergency, the European Council retains primacy within the EU institutions in this area. It is the European Council who, within prescribed limits, empowers the Commission to exercise emergency powers, and the Council who can reassume these powers should the Commission abuse them.

I believe that Treaty revision is necessary to establish special law-making powers for the EU. Additionally, it would be much more politically salient to establish these powers through Treaty revision than by implying them into the existing system, given the increased legitimacy of express Treaty articles with the approval of all Member States as contrasted with the legitimacy costs of the EU institutions vesting themselves with these powers, albeit through the European Council, consisting of the Member States' heads of government.

2) Which cases are to be considered as “urgent” and/or “exceptional” in the EU legal order?

Is it necessary to distinguish between “urgent” and/or “exceptional” cases?

Are there any sensitive domains that should be excluded from the application of urgent and/or exceptional EU law-making procedures?

It has been proposed that the Eurocrisis, refugee crisis, and terrorism provide instances where exceptional EU law-making procedures may be apt. Following a natural disaster or a meltdown of a nuclear reactor are also instances where exceptional law-making procedures could be considered. I view these cases as urgent cases as opposed to exceptional cases.

I would suggest that urgency should be distinguished from exceptionality in the EU context. The vesting of broad powers in the European Commission, acting as a proxy for a national Executive during an emergency, is politically dangerous. While there are checks on their power, and while the selection of Commissioners is subject to the approval of the European Parliament, nevertheless there remains the democratic deficit between European and

national emergency law-making procedures. Moreover, the judicial check on power is not present in cases of Common Foreign and Security Policy, rendering the situation even more procedurally fraught. As a result, there should be a requirement for the situation to be urgent, and for the emergency to terminate once the circumstances which led to the declaration of an emergency have passed.

I have reservations as to the correctness of instituting an emergency powers function within the European Union, however I believe the best check on the abuse of this power lies in the proposed institutional requirement that the European Council unanimously assent to the derogation of powers to the Commission. Whilst I believe that sensitive domains such as declaring war ought to be viewed as principally national rather than European concerns, it may not be necessary to adumbrate what areas of Common Foreign and Security Policy the European Council can grant the Commission momentary competence; as the difficulty in convincing all the Member States to concur on the need to grant the Commission powers in areas of such sensitivity ought to provide an appropriate barrier to the expansion of the urgent exceptional law-making powers into such areas.

3) Can you suggest a possible model for urgent and/or exceptional EU law-making procedures?

In particular, what would be the different phases of such procedures, the institutions involved and their respective roles as well as the applicable timetable for the issuing of an urgent and/or exceptional EU regulatory measure?

The model I would propose for urgent and/or exceptional EU law-making procedures begins with a unanimous decision by the European Council to declare a Europe-wide state of emergency. The European Council would issue a draft legislation which the European Commission, as the only legislation-proposing body in the EU, would present to the Parliament and the Council of the European Union. It is proposed that there be a requirement that both the European Parliament and the Council of the European Union meet within five working days of the issuing of the draft legislation, to expedite the ordinary legislative procedure. This legislation would grant extraordinary discretion to the Commission in relation to a discrete area of Common Foreign and Security policy which would otherwise be the exclusive purview of the European Council. The legislation, as it pertains to Common Foreign and Security Policy, would not be subject to review by the CJEU. The emergency legislation would have a short expiry date, requiring the European Council to review the emergency regularly. The European Council will be able to terminate the emergency and reassume its competence over Common Foreign and Security Policy. This oversight by the European Council, and the ability of the European Council to reassume

the powers vested temporarily in the European Commission will act as the primary check on abuse by the European Commission of its emergency powers.

4) What kind of control is to be provided for the eventual urgent and/or exceptional EU law-making procedures and measures?

Would you consider a system of judicial review or rather a system of political accountability?

In what terms should either system operate?

To enable expeditious action, following passage of the emergency powers legislation, the actions of the Commission in that area will not require Parliamentary approval. The primary control on the law-making procedures and measures is the veto power of the European Council to terminate the emergency. This will act as the mechanism of political accountability. Judicial review will not be provided so long as the emergency legislation pertains to the Common Foreign and Security Policy, as this is excluded from the judicial oversight. Actions of the European Commission which exceed this remit however would be reviewable.