

ECONOMIC CRISES AND EMERGENCY POWERS IN EUROPE

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1. Introduction

This article discusses the state reactions to financial crises from the point of view of domestic constitutional law and the main international obligations of European countries. State reactions in such circumstances have been very different, and so have the legal questions they raise. This article will describe the legal framework that applies to state action in such circumstances. Part 3 will briefly describe how Iceland reacted to its crisis in October 2008 and how courts and international organizations have dealt with its reactions.

The essential issue here is what state reactions are permissible. They sometimes involve the state taking over property and prerogatives belonging to private actors. It does seem clear that such state reactions may violate the respective domestic constitution, e.g. its expropriation or anti-discrimination clauses, or the international obligations of the state. Is it then possible for states to use emergency arguments (in some cases, declaring a state of emergency) to justify their reactions?

Constitutions and constitutional orders in Europe differ, of course. Therefore, it is not useful to try to draw a broad picture of constitutional protection and how recent state reactions to economic crises comply with them. But it can be safely stated that most European constitutions, if not all, have an expropriation (or property) clause, and many have anti-discrimination or equal protection provisions.¹ These are the provisions that have been most relevant regarding state reactions to economic crises.²

In the case of most European nations, and all those who are now embattled economically, the international obligations in question primarily result from their

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¹ See e.g., 1975 SYNTAGMA 4, 17 (Greece); ICELAND CONST., 1944, arts. 65, 72; IRELAND CONST., 1937, arts. 40, 43; NORWAY CONST., 1814, art. 105.

² This is based on the Icelandic example from 2008, as well as the Argentine example and the Norwegian example in the early 1990s, *supra*.

obligations under the European Convention on Human Rights on the one hand,³ and their membership of the European Union or the European Economic Area on the other.⁴

2. The Relevant Law

Domestic constitutional law

In many states, *inter alia* all of the Nordics, the circumstances surrounding legislation play a role in the interpretation of constitutional provisions by courts reviewing the law's constitutionality.⁵ However, the elasticity of constitutional provisions is limited, and many constitutional orders permit derogations from the regular constitutional order in exceptional circumstances. These exceptions—emergency powers—are sometimes explicitly described in the constitution. Such provisions often permit the executive to declare a state of emergency or permit certain derogation from normal procedure when important decisions are made. Examples include section 23 of the Finnish constitution,⁶ section 10 of Chapter 2 and Chapter 13 of the Swedish *Instrument of Government*,⁷ and section 16 of the French constitution.⁸

In some countries, such exceptions are not spelled out in the constitutional text. Unwritten constitutional principles are recognized in countries such as Denmark, Norway and Iceland, where derogations from the constitutions have been accepted in wartime by

³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 (hereinafter “ECHR”). Forty-seven states, with a population of over 800 million people, are now members.

⁴ I include the European Economic Area here, because Iceland is a member of it and that had certain implications for Iceland's possibility to react to the 2008 crisis. There is a difference between EU and EEA law, but it is not relevant for discussion here. I will therefore use the term “EU/EEA law” even though those laws are not completely identical in all cases and the term is therefore imprecise.

⁵ See e.g., ISC No. 340/2011 (Oct. 28, 2011) (Ice.), discussed *infra*; OLA RAMBJØR HEIDE, KONSTITUSJONELL NØDRET – SETT I LYS AV DEN EUROPEISKE MENNESKERETTIGHETSKONVENSIJON ARTIKKEL 15 [CONSTITUTIONAL EMERGENCY POWERS – IN LIGHT OF ART. 15 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS] 89 & 150 (1998).

⁶ Article 23 of the Constitution of Finland is titled, “Basic rights and liberties in situations of emergency.” FINLAND CONST., 1999. It says:

“Such provisional exceptions to basic rights and liberties that are compatible with Finland's international human rights obligations and that are deemed necessary in the case of an armed attack against Finland or in the event of other situations of emergency, as provided by an Act, which pose a serious threat to the nation may be provided by an Act or by a Government Decree to be issued on the basis of authorisation given in an Act for a special reason and subject to a precisely circumscribed scope of application. The grounds for provisional exceptions shall be laid down by an Act, however.

Government Decrees concerning provisional exceptions shall without delay be submitted to the Parliament for consideration. The Parliament may decide on the validity of the Decrees.”

⁷ REGERINGSFORMEN [RF] [CONSTITUTION] 2:10 (Swed.).

⁸ 1958 CONST. 16 (Fr.).

the courts.⁹ Such derogations have concerned both individual rights and procedural questions. None of the Nordic states have declared a state of emergency or openly derogated from their constitution since World War II. While it is clear from Nordic practice that the use of emergency powers is mainly limited to times of war, constitutional theorists agree that international law plays a role in whether emergency powers can be invoked; that emergency powers mainly apply to procedures (rather than individual rights); and that a balancing test (proportionality test) always applies.¹⁰ Constitutional theorists also agree that emergency powers can only be invoked in extreme circumstances.

The European Convention on Human Rights

It is widely accepted in northern European constitutional theory that any use of emergency powers or derogations would be evaluated in light of Article 15 of the European Convention on Human Rights.¹¹ And since the Convention is binding on all of Europe, Article 15 would be relevant if governments elsewhere on the continent want to derogate from rights protected in the convention. The text of Article 15, titled “Derogation in time of emergency,” is as follows:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also

⁹ The fundamental idea behind emergency powers is “needs must,” in other words, powers whose legitimacy stems from necessity. Obviously, this causes all sorts of theoretical problems when the norm derogated from is a constitution. That seems to counteract the very purpose of constitutions. But those issues will not be discussed further here; it’s sufficient to say that this legal institution exists in the Nordics and in the ECHR regime and has (arguably) not been abused. On emergency powers in Iceland, see GUNNAR G. SCHRAM, *STJÓRNSKIPUNARRÉTTUR [CONSTITUTIONAL LAW]* 646 (1999) and Bjarni Benediktsson, *Stjórnskipulegur neyðarréttur: Fyrirlestur við lagadeild Háskóla Íslands [Constitutional Emergency Powers: A Lecture given at the University of Iceland]*, 1 *TÍMARIT LÖGFRÆÐINGA*, 4 (1959); Regarding Norway, see JOHS. ANDENÆS, *STATSFORFATNINGEN I NORGE [THE CONSTITUTION OF NORWAY]* 455 (8TH ed. 1998), HELSET & STORDRANGE, *NORSK STATSFORFATNINGSRETT [NORWEGIAN CONSTITUTIONAL LAW]* (1998) and HEIDE, *supra* note 5.

¹⁰ See e.g. HELSET & STORDRANGE, *supra* note 9, at 88.

¹¹ See HEIDE, *supra* note 5.

inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.¹²

It is clear from paragraph 2 that a government cannot derogate from the right to life, the prohibition on torture and slavery, and the principle of *nulla poena sine lege*. In other cases, the conditions for derogation are (according to paragraph 1):

- a) war or another public emergency threatening the life of the nation;¹³
- b) that the derogation is strictly required by the exigencies of the situation;
- c) that the measure is consistent with other obligations under international law; and
- d) that the state informs the Secretary General of the Council of Europe.¹⁴

There have been notifications under Article 15 regarding around thirty situations.¹⁵ Some were long lasting (almost 30 years in Northern Ireland¹⁶) while others were resolved quickly (Georgia declared derogations for 7 days following an attempted coup d'état in 2007¹⁷). All but one of the notifications by states invoked the danger of war, terror threats, disturbances or riots. They frequently refer to loss of life and damage to

¹² ECHR, *supra* note 3, art. 15.

¹³ The European Court of Human Rights has held that these words refer to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the state is composed”. *A. & Others v. United Kingdom*, App. No. 3455/55 ¶ 176 (Eur. Ct. H.R. Feb.19, 2009) (citing *Lawless v. Ireland*, App. N. 332/57 ¶ 28 (Eur. Ct. H.R. July 1, 1961). It referred to the premises used by the European Commission of Human Rights in the *Greek Case* “that the emergency should be actual or imminent; that it should affect the whole nation to the extent that the continuance of the organised life of the community was threatened; and that the crisis or danger should be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, were plainly inadequate.” *Greek Case*, 1969 Y.B. EUR. CONV. ON H.R. (Eur. Comm’n H.R.) 1 ¶ 153.

¹⁴ This is very important in order to make derogations public and open and minimize the risk of secret derogations and human rights violations

¹⁵ See the Treaty Database of the Council of Europe, *available at* <http://conventions.coe.int/Treaty/Commun/ChercheDeclSTE.asp?CM=9&CL=ENG>, which allows a search for derogations by country.

¹⁶ Derogation contained in a Note verbale, from the Permanent Representation of the United Kingdom, to the Secretariat General, June 27, 1957, *available at* <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CV=0&NA=&PO=UK&CN=999&VL=1&CM=9&CL=ENG>.

¹⁷ Declaration contained in a letter, from the Minister of Foreign Affairs of Georgia, to the Secretariat General, Nov. 9, 2007, *available at* <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CV=0&NA=15&PO=GEO&CN=999&VL=1&CM=9&CL=ENG>.

property that have already taken place and to the function of authorities being endangered. However, their merits are clearly debatable. It is very hard to sympathize with the rationale for certain derogations, such as the declarations of the Greek generals in 1961, derogating from the ECHR based on “internal dangers which threaten public order”.¹⁸

No government has ever declared a derogation from the ECHR based on an economic or financial crisis. The derogations that have been adjudicated before the European Court of Human Rights have all involved either (civil) war, armed attack, or threats of terrorism.

The European Court of Human Rights has never challenged a member state’s evaluation regarding the existence of an emergency.¹⁹ By contrast, it has often found that individual derogations were not strictly required by the exigencies of the situation. This has resulted from the use of a proportionality test asking what rights are being derogated from; for how long; and what the guarantees against abuse exist. The court has also found a number of times that a state has violated the convention by using emergency measures outside their territorial or temporal scope.²⁰

The International Covenant on Civil and Political Rights

Principles regarding limitations and derogations from the UN Covenant on Civil and Political Rights—known as the *Siracusa Principles*—have been formulated by a group of experts within international law:

A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

- (a) affects the whole of the population and either the whole or part of the territory of the State, and
- (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or

¹⁸ See Derogation contained in a letter, from the Permanent Representative of Greece, to the Secretariat General, May 3, 1967, available at <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=005&CV=0&NA=&PO=GRE&CN=999&VL=1&CM=9&CL=ENG>. After the 1967 coup d’etat, the country was governed by a military junta until 1974.

¹⁹ On the other hand, the European Commission on Human Rights found, once, that no emergency situation existed. See Greek Case, *supra* note 13.

²⁰ See Jens Elo Rytter, *Undtagelsestilstanden og dens judicielle efterprøvelse – Suspension af menneskerettigheder i kampen mod terrorisme [The State of Emergency and its Review by the Courts: The Suspension of Human Rights in the War on Terror]*, 2009/4 JURISTEN 103, at 112.

basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant.

Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.²¹

Economic difficulties per se cannot justify derogation measures.²²

It is clear, that for an emergency to be accepted as a reason for derogation under those international obligations, which also play a role in the evaluation of constitutionality in most European countries, the circumstances must fulfill the criteria set out by Article 15 of the European Convention on Human Rights and possibly the Siracusa principles. This means that for an emergency to justify derogations from the ECHR, the ICCPR and most European domestic constitutions ask if there is an exceptional situation of crisis or emergency that affects the whole population and constitutes a threat to the organized life of the community of which the state is composed. Economic difficulties are, according to the Siracusa principles, not enough per se, so values and interests other than economic ones must be at stake. Finally, it is clear that the danger in question “should be actual or imminent, . . . affect the whole nation, . . . exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate”²³ and that “[t]he continuance of the organised life of the community must be threatened.”²⁴

In order to evaluate whether a financial crisis can constitute an emergency that justifies derogations from domestic constitutional law or the international obligations mentioned (the ECHR or the ICCPR), it is necessary to determine whether they fulfill those criteria.

A general note on EU/EEA law

State reaction to economic crises can run afoul of rules found in the EU treaties (e.g. the four freedoms and ban on discrimination), rules found in secondary EU legislation, or fundamental principles of EU law.²⁵

While there are express clauses allowing states to justify exceptions (such as Article 36 of the Treaty on the Functioning of the European Union regarding free

²¹ U.N. Comm’n on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, E/CN.4/1985/4 (1984), available at <http://www.unhcr.org/refworld/docid/4672bc122.html>.

²² *Id.* ¶¶ 39–41.

²³ *A. & Others v. United Kingdom*, App. No. 3455/55 ¶ 176 (Eur. Ct. H.R. Feb.19, 2009) (citing the premises used by the European Commission of Human Rights in the *Greek Case*, 1969 Y.B. EUR. CONV. ON H.R. (Eur. Comm’n H.R.) 1 ¶ 153.

²⁴ *Id.*

²⁵ In EEA law there is no difference between the two first groups of rules.

movement of goods),²⁶ there are also exceptions developed by the European Court of Justice: the so-called mandatory requirements that apply only when no secondary legislation applies. By contrast, no general emergency powers have been accepted: EU law can only be deviated from if there is an express provision to that effect or if one of the mandatory requirements apply. All justifications for exceptions are interpreted very conservatively, and the proportionality principle (balancing test) is key.²⁷

3. The Icelandic example: EU/EEA Law and Icelandic Constitutional Law

In October 2008, all three of Iceland's biggest banks were taken over by the state.²⁸ In the course of these development, the Icelandic Parliament passed the so-called "Emergency Act" aimed at safeguarding the functioning of the banking system and restoring public confidence.²⁹ The Act granted depositors priority ranking in insolvency proceedings over that of other unsecured creditors. It also enabled the Icelandic Financial Supervisor to transfer assets and liabilities from the collapsed banks to newly established banks. Obviously, creditors other than depositors were deeply unhappy and challenged this under both EEA law and Icelandic constitutional law.³⁰ In addition, the Icelandic Government made a distinction between depositors in domestic and foreign branches. Domestic deposits continued to be available after they were taken over by New Landsbanki, whereas the foreign depositors lost access to their deposits and did not enjoy the minimum guarantee, or at least not right away.³¹

ESA on granting depositors priority

In December 2010, the EFTA Surveillance Authority ("ESA") concluded that the

²⁶ On the use of this and other exceptions from free movement of goods, see STEINER & WOODS, EU LAW 442-454 (10th ed. 2009).

²⁷ On these questions, see, for example, CATHARINE BARNARD, THE SUBSTANTIVE LAW OF THE EU – THE FOUR FREEDOMS 149-192 (3rd. ed. 2010). Which justifications come into play depends on the reactions of the state in question.

²⁸ See, e.g., David Teather, *Takeover and currency slide fuel fears for economy built on credit*, GUARDIAN, Oct. 3, 2008, <http://www.guardian.co.uk/world/2008/oct/04/iceland>

²⁹ Emergency Act (Act No. 125/2008) (Ice.), available at http://eng.efnahagsraduneyti.is/media/acts/Act_No._125-2008_unusual_financial_market_circumstances_13.10.2008.pdf

³⁰ See EFTA Surveillance Authority Decision of 15 December 2010 to close seven cases against Iceland commenced following the receipt of complaints against that State in the field of capital movements and financial services (Dec. No. 501/10/COL) (2010), available at <http://www.eftasurv.int/media/decisions/571071.pdf>; ISC No. 340/2011 (Oct. 28, 2011) (Ice.).

³¹ The British and Dutch governments paid out deposits that covered the minimum guarantee and more. Negotiations as to repayment by the Icelandic government are ongoing as this is written. See, e.g., *Fact Sheet: The Icesave Issue* (Iceland Ministry for Foreign Affairs, 2010), available at http://eng.utanrikisraduneyti.is/media/MFA_pdf/Fact-Sheet---The-Icesave-Issue-June.pdf.

Icelandic Emergency Act granting depositors priority ranking in insolvency proceedings over that of other unsecured creditors³² and the decisions of the Icelandic Financial Supervisory Authority to transfer assets and liabilities from the failed banks to newly established entities, taken on the basis of Article 5 of the Act, neither constituted discrimination nor a limitation of the free movement of capital.³³ But in astonishing obiter dictum, it also discussed the hypothetical situation that would have arisen if the actions of the Icelandic state had been viewed as discrimination or restrictions.

ESA stated at the outset that economic interests were not enough to justify deviations from fundamental principles,³⁴ but concluded that if the entire banking, and payment system is in danger, then the interests being protected are no longer “merely economic”.³⁵ The next step would then be to determine whether the proportionality principle had been respected. ESA referred to the IMF’s appraisal of the situation in Iceland in the autumn of 2008, discussing the significance of the country’s three large banks and painting a gloomy picture of the worst case scenario without government intervention: “Limits in accessing such accounts would have instantly risked causing a full run on the banks with consequent serious risks for public security. Businesses could not have used funds to pay for their resources and to pay wages to employees; retail suppliers could not have imported necessities for the public, drugs and food, etc. . . This would have increased the already existing risk of systemic financial collapse.”³⁶

The reasoning of ESA echoes domestic constitutional theory, Article 15 of the ECHR, and the Siracusa principles: The measures were justified because of the risk for public security and the risk of a stop on imports, including of food and drugs.

The Icelandic Supreme Court on granting depositors priority

On October 28, 2011, the Icelandic Supreme Court handed down a landmark decision on the constitutionality of the Emergency Act no. 125/2008. The plaintiffs in case 340/2011 argued that certain provisions of that law were not compatible with the Icelandic Constitution and certain specified international agreements ratified by Iceland.

When examining the constitutionality of the emergency law, the court stated:

The plaintiffs support their grounds in particular on the protection of property rights and equal treatment... It has earlier been established that

³² See Article 6 and 9 of Act No. 125/2008.

³³ EFTA Surveillance Authority Decision of 15 December 2010 to close seven cases against Iceland commenced following the receipt of complaints against that State in the field of capital movements and financial services (Dec. No. 501/10/COL) (2010), *available at* <http://www.eftasurv.int/media/decisions/571071.pdf>.

³⁴ *Id.* ¶ 87 (citing Case E-10/04 Piazza, [2005] EFTA Ct. Rep. 76, paragraph 42; Case E-3198 Rainford-Towning 1998 1EFTA Ct. Rep.205, ¶ 42.)

³⁵ *Id.* ¶ 89.

³⁶ *Id.* ¶ 99.

their claims should enjoy protection as property rights within the meaning of article 72 of the Constitution and that they have demonstrated a loss, but not to the extent that they themselves maintain. After reaching this conclusion, it is necessary to examine whether the provisions of article 6 of law 125/2008 involve an impairment of the rights of the plaintiffs which should be deemed to be expropriation or such a restriction of property rights as to breach article 72 or article 65 of the Constitution.”³⁷

The Court rejected the property rights and equal protection arguments of the plaintiff, as well as their arguments that their legitimate expectations had been frustrated, their rights impaired retroactively and that the state reaction was disproportionate. The court then concluded:

In the resolution of the part of the proceedings about the constitutional validity of law 125/2008 reference has earlier been made to the broad margin of appreciation of the legislature in the assessment of the need for the measures which were involved in the law, on the grounds that a major threat was present to the whole society because of the catastrophic effect of the collapse of the largest commercial banks, which could end with the collapse of economic life in the country. The legislature, for these reasons, had not only a right but above all a constitutional duty to protect the welfare of the public and financial activity against the collapse of the banks first and foremost by the objective of the law and be equivalent to the approach which was taken.³⁸

The Icelandic Supreme Court upheld the disputed legislation, just like ESA stated it would have done if necessary. But it is noteworthy that the Court did not do so based on emergency powers. It did so, according to the judgment itself, because it found that the reactions of the state were within the bounds of the constitution, as it should be interpreted in the light of the circumstances.

ESA on the difference between depositors in domestic and foreign bank branches

In a decision dated June 10, 2011, ESA decided on the “compliance, by Iceland, with [its] obligations ... according to which all depositors whose deposits in branches of Icelandic banks became unavailable must be compensated according to the terms of the protection laid down by Directive 94/19/EC and without discrimination.”³⁹

³⁷ ISC No. 340/2011 (Oct. 28, 2011) (Ice.), at 18–19.

³⁸ *Id.* at 23.

³⁹ Reasoned Opinion delivered in accordance with Article 31 of the Agreement between the EFTA

Iceland tried, again, to argue that the action was justified based on special circumstances. Here, the ESA disagreed, saying “The terms of the Directive itself cannot support such an argument. According to the case law of the Court of Justice, a Member State cannot plead exceptional circumstances to justify non-compliance with a directive in the absence of a specific legislative provision in the directive to that effect.”⁴⁰ ESA cited the ECJ on the undesirability of recognizing “the existence of a general reservation covering exceptional situations, outside the specific conditions laid down in the provisions of the Treaty and the second directive, would, moreover, be liable to impair the binding nature and uniform application of Community law.”⁴¹ This illustrates that when there are express emergency provisions in EU legislation—in this case sections allowing late payment—other emergency measures are unacceptable. There is thus no unwritten emergency derogation clause in EU law. This decision also suggests that even if some measures may be warranted by emergency situations, others—in particular discrimination based on nationality—are unacceptable.

4. Conclusion

Governments have been given certain leeway to deal with serious economic crises, constitutions and international obligations notwithstanding. Each case is, of course, unique, as are the desired actions by governments are. However, the principles described in Part 2, apply to most of Europe, and the principles set down by the European Court of Human Rights and the Siracusa principles apply to all of Europe. The Icelandic example shows that these derogations or exceptions must be taken into consideration and that it is not only question of “home court advantage;” international organization are ready to take financial crises into account as well, provided that the conditions described earlier apply.

It is extremely important to discuss these derogation clauses or exceptions. As all exceptions undermine the role of constitutions, public debate on their scope and justification every time they are used is a key mechanism in minimizing the risk of abuse. This is also the rationale behind the requirement that all derogations be publicly proclaimed, a requirement found both in the European Convention on Human Rights and in many domestic constitutions.

States on the Establishment of a Surveillance Authority and a Court of Justice concerning Iceland's failure to comply with its obligations under the Act referred to at point 19a of Annex IX to the EEA Agreement (*Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes*) and/or Article 4 of the EEA Agreement (Dec. No. 180/11/COL) (2011), available at http://www.eftasurv.int/media/internal-market/RDO-180_11_COL.pdf.

⁴⁰ *Id.* at 17.

⁴¹ *Id.*