The Constitution and Retrospective Tax Legislation
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Finance Act 2009 applied its increased income levy rates to payments which were made prior to April's Emergency Budget[1]. Many felt aggrieved by the measure and some may seek to challenge it. Further retrospective taxing provisions are a possibility. This article considers the constitutionality of tax laws with retrospective application and the use of press releases and financial resolutions to introduce such laws.

Article 15.5

Article 15.5.1° of Bunreacht na hEireann provides:

> "The Oireachtas shall not declare acts to be infringements of the law which are not so at the date of their commission".

In *McKee v Culligan*[2], (a case concerning extradition) the Supreme Court held that Article 15.5.1° constitutes an unambiguous prohibition against the enactment of retrospective laws which acts to be an infringement of the law. However, the Court went on to say that it is not a general prohibition on retrospective legislation; its application is confined to situations where apparently innocent actions are retrospectively construed as constituting infringements of the law. This narrow interpretation of the Article which was re-iterated by the Supreme Court as recently as 2005[3].

In an 1985 decision, the Supreme Court made comments which are worth mentioning. *Doyle v An Taoiseach*[4] concerned a 2% levy imposed from May to December 1979 by a statutory instrument. The Court held it was an invalid delegation of legislative power. Anticipating this result, the State argued that this was 'cured' when the measure was confirmed in section 79 of the Finance Act 1980. In the course of his judgment, Henchy J stated:

> "If it were held to operate retrospectively, [section 79] would have the effect of making, *ex post facto*, non-payment of the levy in 1979 an infringement of the law. Such a result would make s.79 invalid having regard to Article 15.5 of the Constitution."

This statement was made *obiter dicta*[5] and does not form a binding precedent.

While not ruling Article 15.5.1° out altogether, in the writer's opinion, a challenge to retrospective tax laws grounded on fundamental property rights would be more palatable to the Courts and, therefore, more likely to succeed.

Property Rights

Property is protected by two Articles of Bunreacht na hEireann:

> **Article 40.3.2°:**
> The State shall … by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the … property rights of every citizen.

[1] see "Living with the Levy" Pat O'Brien *Irish Tax Review* 22/3 (May 2009) p42
[2] [1992] 1 IR 233
[3] *Dublin City Council v Fennell* [2005] 2 ILRM 288
[4] [1986] IRLM 693
[5] i.e. not relevant to the case at hand

Article 43:

1. 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

   2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2. 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

   2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

Taxation is an interference with property rights. This was recognised in *Brennan v Attorney General*[6] and *Daly v Revenue Commissioners*[7]. The *Brennan* decision involved rates payable in respect of farm land. The rates were based on property values determined in the 1850s which were at complete variance with modern property values. This resulted in an arbitrary and unfair imposition of tax. The *Daly* decision was concerned with a withholding tax on payments to doctors. The tax so withheld was allowed as a credit against the doctor's income tax bill at the end of the year. The problem was that the withholding tax was invariably considerably higher than the income tax eventually payable. Therefore, the doctor was placed at a significant cash flow disadvantage.

In *Daly*, Mr Justice Costello stated:

> "… legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved. When, as in this case, an applicant claims that his constitutionally protected right to private property referred to in Article 40.3.2° has been infringed and that the State has failed in the obligation imposed on it by that article to protect his property rights he has to show that those rights have been subject to 'an unjust attack'."

That begs the question: what constitutes 'an unjust attack'?

In *Dreher v Irish Land Commission*[8], the Supreme Court stated that "any State action that is authorised by Article 43 of the Constitution and conforms to that Article cannot by definition be unjust for the purposes of Article 40.3.2°". The Supreme Court has repeatedly confirmed this point[9].

Retrospective Legislation

The Supreme Court has also recognised that:

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[6] [1984] ILRM 355.

[7] [1995] 3 IR 1

[8] [1984] ILRM 94

[9] *O'Callaghan v Commissioners of Public Works* [1985] ILRM 364, *Madigan v Attorney General* [1986] ILRM 136 at p161 and *In re Article 26 and the Health (Amendment) (No2) Bill 2004* [2005] 1 IR 205

- retrospective legislation is on its face unjust[10].

- because of this, a statute should be presumed to be prospective only unless the words express a clear and unambiguous intention to the contrary[11].

- having retrospective effect does not necessarily render a statute unjust (i.e. it may be justified)[12].

A recent case on the constitutionality of retrospective legislation is *Re Article 26 and the Health (Amendment) (No2) Bill 2004*[13] (referred to below as the "*Health Bill Case*"). The facts of the case were that, since 1975, the State had been charging elderly people for treatment and care notwithstanding that they were entitled to that treatment free-of-charge. The charges levied were unlawful. The government introduced a Bill seeking to retrospectively render the charges lawful.

The Supreme Court stated the correct approach in such cases was:

> "… firstly, to examine the nature of the property rights at issue; secondly, to consider whether the Bill consists of a regulation of those rights in accordance with principles of social justice and whether the Bill is required so as to delimit those rights in accordance with the exigencies of the common good; thirdly, in the light of its conclusions on these issues, to consider whether the Bill constitutes an unjust attack on those property rights."

The court recognised that patients unlawfully charged had a property right consisting of a right of action to recover that money. The court found that the patients' property rights in relation to the money would be abolished by the bill. Murray CJ stated:

> "In the view of the Court, such legislation cannot be regarded as *"regulating"* the exercise of property rights. It is straining the meaning of the reference in Article 43.2.1 of the Constitution to the *"principles of social justice"* to extend it to the expropriation of property solely in the financial interests of the State.
> …
> Where a statutory measure abrogates a property right, as this Bill does, and the State seeks to justify it by reference to the interests of the common good or those of general public policy involving matters of finance alone, such a measure, if capable of justification, could only be justified as an objective imperative for the purpose of avoiding ***an extreme financial crisis or a fundamental disequilibrium in public finances***." [emphasis added]

The Supreme Court held that neither an extreme financial crisis nor a fundamental disequilibrium in public finances justifying the Bill had been established. Consequently, the proposed legislation amounted to "an abrogation of property rights and an unjust attack on them contrary to the provisions of the Constitution and in particular Articles 43 and 40.3.2." Given this conclusion, the Court stated, it was unnecessary to consider any argument based on the principle of proportionality.

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[10] See *Hamilton v Hamilton* [1982] IR 466 at 474.
[11] per Henchy J in *Hamilton* at p484
[12] *Minister for Social Welfare v Scanlon* [2001] 1 IR 64
[13] [2005] 1 IR 205

The phrases "extreme financial crisis" and "fundamental disequilibrium in public finances" go some way towards describing Ireland's present predicament. Legislation imposing tax retrospectively in the present circumstances to raise badly needed funds for the State's coiffeurs could arguably be a justified abrogation of property rights.

But is that the end of the matter? The decision in the *Health Bill Case* suggests that one should then proceed to investigate whether the measure meets with the principle of proportionality. The relevant part of the judgment is worth setting out in full:

> "Having regard to the terms of the Bill and taking into account all of the submissions of counsel, nothing has emerged in the course of the Reference from which the Court could conclude that the abrogation of the property rights in question is an imperative for the avoidance of an extreme financial crisis or a fundamental disequilibrium in public finances.
>
> For the reasons set out above the Court is satisfied that subsection (5) and the associated provisions of the Bill constitute an abrogation of property rights and an unjust attack on them contrary to the provisions of the Constitution and in particular Articles 43 and 40.3.2°.
>
> Having regard to the conclusion expressed in the immediately preceding paragraph, it is unnecessary to consider any argument based on the principle of proportionality."

The Proportionality Test

Assuming, for argument's sake, that the Court did proceed to considering whether or not a provision was proportionate, the following test would be applied[14]:

> The provision must:
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> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
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> (b) impair the right as little as possible, and
>
> (c) be such that its effects on rights are proportional to the objective.

Given the objective of increasing the State's revenue, would a retrospective taxing measure impair the property rights as little as possible? Would the effect on property rights be proportional to the objective? Would it go too far? Clearly, it would be possible to increase the State's revenue by simply increasing current tax rates without delving into the past.

The Supreme Court has demonstrated its willingness to entertain arguments that statutory provisions are disproportionate[15]. However, the Court has also shown a reluctance to "take

[14] see *Heaney v Ireland* [1994] 2 ILRM 420

[15] see *PJ Carroll & Co Ltd v Minister for Health & Children* [2005] IESC 26 and *Blehein v Minister for Health & Children* [2008] IESC 40

over the policy making powers of the Oireachtas" [16] by identifying less invasive means of achieving the same end[17]. It is difficult to say with any certainty whether the Court would entertain a proportionality review and, if it did, what approach the Court would take.

Press Releases

The Minister for Finance or his Department may issue a press release announcing that legislation will be introduced at a future date imposing a tax or removing a relief from the date of the press release. Without doubt, this is intended to take the political sting out of a sudden change in tax law. Presumably, there is also a desire to undermine any argument by taxpayers that the law when enacted is retrospective.

One of the fundamental tenets of our Constitution is that the power to legislate is vested in the Oireachtas alone. This is particularly so in relation to financial matters (i.e. "No taxation without representation"). The key test was set out in *Cityview Press Ltd v An Comhairle Oiliuna*[18]:

> "… the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised, for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits, if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body, there is no unauthorised delegation or legislative power."

Is the issue of a press release (which is clearly designed to influence people's actions) by the Department of Finance, before the Dail has had an opportunity to scrutinise, debate and vote on the measure, effectively legislating? If it is, it is in breach of Article 15.2. If it is not, then the legislation which is stated to be operative as and from the date of the press release will be retrospective in effect and analysed in accordance with the principles set out above. The existence of the press release may go some way toward mitigating the inherent unfairness of retrospective legislation.

Financial Resolutions

On each Budget day, the Dail passes Financial Resolutions which purport to give effect to the immediate changes the Minister for Finance wants to introduce. This is done pursuant to the *Provisional Collection of Taxes Act 1927* ('the 1927 Act'). Stated briefly, the Dail declares that a Financial Resolution has "statutory effect". That effect will continue for a maximum of four months unless the provisions of the resolution are enacted within that period[19].

The constitutionality of this particular procedure has never been questioned before the Courts. The 1927 Act has been the subject of amendments since 1937 and, so, has been considered by the Oireachtas and enjoys at least a partial presumption of constitutionality.

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[16] per Finlay CJ in *Re Article 26 and the Matrimonial Homes Bill 1993* [1994] 1 IR 305 at 309. See *Touhy v Courtney* [1994] 3 IR 1. See also Brian Foley PhD BL "The Proportionality Test: Present Problems" (2008) 1 *JSI Journal* 72

[17] Dr Michael Forde uses the phrase 'less drastic action', see: "Constitutional Law" 2nd Ed p737

[18] [1980] 1 IR 381 restated in *Laurentiu v Minister for Justice* [2000] 1 IR 1

[19] see s.4 of the Act (amended by s.85 of Finance Act 1974)

The Constitution sets out a very specific procedure for making financial legislation which involves all three components of the Oireachtas: the Dail, the Seanad and the President[20]. The 1927 Act provides for the Dail alone to legislate. Indeed, the 1927 Act itself distinguishes between the Dail and the Oireachtas.

The case of *McDaid v Sheehy*[21] is relevant here. The *Imposition of Duties Act 1957* ('the 1957 Act') provided that the government could make orders imposing taxes and that those orders should have statutory effect pending confirmation by a statute passed within a year. In 1975, the government introduced a revenue offence by a government order. In 1976, the government order was confirmed in the Finance Act. Mr McDaid was convicted of an offence in 1986.

In the High Court, Blaney J held that the power under the 1957 Act to make the temporary order in 1976 pending formal enactment in 1976 was unconstitutional:

> "When the [*Cityview Press* test] is applied to the provisions of the 1957 Act, giving the government power to impose customs and excise duties, and to terminate and vary them in any manner whatsoever, I have no doubt that the only conclusion possible is that such provisions constitute an impermissible delegation of the legislative power of the Oireachtas. The question to be answered is: are the powers contained in these provisions more than a mere giving effect to principles and policies contained in the Act itself? In my opinion they clearly are. There are no principles or policies contained in the Act."

On appeal, the Supreme Court held that Mr McDaid's case could be answered without having to consider the constitutionality of the 1957 Act. So, Blaney J's decision on that point was set aside. Crucially, this does not mean that Blaney J was wrong – it simply means that matter did not need to be decided upon to deal with the case before the Court. Indeed, Blaney J's reasoning in relation to the provisions of 1957 Act has been described by one commentator as "unimpeachable"[22].

Arguably, the same reasoning can be applied to the 1927 Act. If a Financial Resolution is invalid, then the subsequent Finance Act imposing or amending a tax with effect from Budget day becomes retrospective legislation which, again, would fall to be analysed in accordance with the principles outlined above.

Conclusion

In the writer's opinion, there ought to be only two circumstances justifying retrospective tax legislation. The first is where the provision is what is described as "curative" legislation. That is, legislation that will ratify prior official conduct or make a remedial adjustment in an administrative scheme. In such situations, the legislature is simply removing unintended statutory flaws and giving full effect to the legislative intent behind the initial or original legislation[23].

The second situation is where the legislation is an "objective imperative" to prevent the State going bankrupt. Part of a taxpayer's property rights is the right to know where he or

[20] see Articles 15.1.2°, 15.2.1°, 21, 22, 25.
[21] [1991]1 IR 1
[22] See Casey "Constitutional Law in Ireland" 3rd Ed.
[23] This is discussed in the *Health Bill Case* judgment.

she stands[24]. That is, a right to know in advance what the tax implications of his or her actions will be. Any interference with that right should only be justified when prospective legislation is inadequate to prevent an extreme financial crisis for the State. The latter situation could arise where, for example, a major tax charging provision was found void from its enactment.

For retrospective tax legislation to come before the Courts, there will need to be a case taken by a taxpayer[25]. Such legal actions are rare. Whether the current crisis will produce one, we will have to wait and see. Those contemplating a challenge should note that, in *Murray v AG*[26], where a tax provision was found invalid, only those who had initiated proceedings before the date of the decision were entitled to recover tax unlawfully charged.

The practice of passing Financial Resolutions is dubious. Then again, the Constitutional framework for enacting financial legislation is unsuited to our times - the government needs to be able to make decisions with immediate effect so that citizens bear their fair share of the tax burden. Perhaps, constitutional amendment is needed.

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[24] see "General Anti-Avoidance – Time for a Re-think?" *Irish Tax Review* 21/4 (July 2008) p65

[25] Article 26 does not permit the President to refer "money bills".

[26] [1982] IR 241