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Elaine Fahey
Dublin Institute of Technology, elaine.fahey@dit.ie

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Elaine Fahey
Dublin Institute of Technology, elaine.fahey@dit.ie

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Elaine Fahey
Dublin Institute of Technology, elaine.fahey@dit.ie

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A Constitutional Crisis in a Tea-Cup: The Supremacy of EC law in Ireland

Dr. Elaine Fahey[*]

Introduction

The recent decision of the Irish High Court in *Minister for Justice, Equality & Law Reform & Commissioner of An Garda Siochana v. Director of Equality Tribunal*[1] might at first glance appear as the unlikely source of a constitutional crisis. In fact, however, the decision may represent the most recent instance of a threat to the supremacy of European Community (EC) law in Ireland, or at the least, a decision of extraordinary incongruity to litigants seeking to rely upon EC law. The decision of Charleton J. concerned a "Henry VIII" clause, whereby secondary legislation had the effect of amending primary legislation, similar to the famous "Metric Martyrs" case in the UK.[2] In proceedings before the Irish Equality Tribunal the subject of judicial review proceedings before Charleton J., a conflict arose between primary and secondary legislation, raising the question as to whether the Tribunal was entitled in effect to set aside a statutory instrument, by virtue of the operation of EC law. A complicating factor in the case is the interpretation by Charleton J. of a recent decision of the Court of Justice[3] on the powers of quasi-judicial bodies to apply the doctrine of direct effect, but not supremacy, resulting in what is suggested here to be a most incongruous outcome.

The Supremacy or Primacy of EC law

The supremacy or primacy of EC law is mostly but not uncritically accepted in world-wide scholarship, since *Costa v. E.N.E.L.*[4] As is well-known, primacy or supremacy of EC law exists where a divergence exists between national and Community law and the conditions for direct effect are satisfied such that Community law ought to prevail.[5] In Ireland, supremacy

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[*] LL.B (Dub.) LL.M (Cantab) Ph.D (Dub.) Barrister-at-law Attorney-at-law (New York), Assistant Lecturer in Law, School of Social Sciences and Law, Dublin Institute of Technology, Ireland. Email: elaine.fahey@dit.ie.

[1] *Minister for Justice, Equality & Law Reform & Commissioner of An Garda Siochana v. Director of Equality Tribunal* [2009] IEHC 72.

[2] *Thoburn v. Sunderland City Council* [2003] QB 151 ("Metric Martyrs"), discussed below. See Gwynn Morgan *The Separation of Powers in the Irish Constitution* (Roundhall, 1997) pp.246-250 (Henry VIII clauses).

[3] Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] 2 CMLR 47.

[4] See C-6/64 *Costa v. ENEL* [1964] ECR 585, considered below; Dougan "When worlds collide! Competing visions of the relationship between direct effect and supremacy" (2007) 44 Common Market Law Review 931 (Distinction between a "primacy" and "trigger" model and considers "exclusionary effects" and "substitutionary effects"); Alter *Establishing the Supremacy of EC Law* (Oxford, 2001) (Inter-court competition as basis for acceptance of supremacy).

[5] An even more nuanced view distances itself from direct effect and sees indirect effect and state liability as manifestations of supremacy: Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA*

of Community law is not provided for explicitly, but rather indirectly in legislation and not in the Constitution, in the form of s. 2 of the European Communities Act, 1972. This provides that:

> "From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties."

The consequences of supremacy have been accepted largely unquestioningly by the Irish courts, with only one threat to this state of affairs on the thorny question of abortion that never came to fruition.[6] The Irish courts are overwhelmingly pro-*communautaire* and three former members of the Court of Justice sit on the Irish Supreme Court, arguably eliminating many potential supremacy debacles. [7] However, EC law is employed infrequently in Irish litigation and the Irish courts have generated particularly low levels of preliminary references since accession.[8]

Article I-6 of the ill-fated *Treaty Establishing A Constitution for Europe*,[9] provided that "'[t]he Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States". Much controversy was generated by the manner of this formulation and the explicit statement of constitutional supremacy in the text of the treaties.[10] "Primacy" is not now provided for in the text of the Treaty of Lisbon,[11] but rather in a Declaration, with a Legal Opinion of the Council attached thereto, which is not binding as a matter of law and recites the *Costa v.*

[1990] ECR I-4135 (mode of consistent interpretation or "indirect effect"); Joined cases C-6/90 and C-9/90 *Francovich v. Italian Republic* [1991] ECR I-5057 (State Liability resulting in damages for breach thereof).

[6] See *Pesca Valentia v. Minister for Fisheries (No. 2)* [1990] 2 IR 305 (Interim relief granted as to Act of the Oireachtas); *Tate v Minister for Social Welfare* 1995] 1 ILRM 507 (Doctrine of State Liability accepted); *Coppinger v. Waterford County Council*. [1998] 4 IR 220 (Doctrine of State Liability accepted); *Eircom Limited v Commission for Communications Regulations* [2006] IEHC 138 (Doctrine of indirect effect accepted); *Campus Oil v. Minister for Industry and Energy* [1983] IR 82 (Article 234 EC referral procedure supported). C-159/90 *SPUC v. Grogan* [1989] IR 753; [1990] ILRM 350; [1991] ECR I-4685 largely stands alone in this regard: see the comments of Walsh J. in the Supreme Court *obiter* as to the right to life of the unborn and Phelan *Revolt or Revolution: The Constitutional Boundaries of the European Community* (Roundhall, 1997). The Court of Justice diffused any controversy by deciding that financial consideration for services did not exist so to bring the EC Treaty into play as to the facts of the dispute involving the provision of abortion information by student unions.

[7] Murray CJ, Fennelly & Macken JJ. are the respective judges. See generally, Fahey *Practice and Procedure in Preliminary References to Europe: 30 years of Article 234 EC caselaw from the Irish Courts* (Firstlaw, 2007).

[8] *Ibid.*

[9] OJ 2004 C310, p. 1.

[10] See Kumm & Comella "The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union" (2006) 3 International Journal of Constitutional Law 473, Kumm "The Jurisprudence of Constitutional Conflict: Constitutional supremacy in Europe before and after the Constitutional Treaty" (2005) 11 European Law Journal 262, Reestman "Primacy of Union Law" (2005) 1 European Constitutional Law Review 104.

[11] OJ 2007C306, p. 1

E.N.E.L. decision.[12] Primacy or supremacy nonetheless remains the cornerstone of EC law, both in theory and practice.

Factual and legal background of the proceedings

The notice parties in *Minister for Justice, Equality & Law Reform & Commissioner of An Garda Siochana v. Director of Equality Tribunal* applied to train as members of Garda Siochana (Irish police) but were deemed ineligible by virtue of their age, which was governed *inter alia* by secondary legislation (the Garda Siochana (Admission and Appointments) (Amendments) Regulations 2004).[13] However, the (Irish) Equality Act 2004 sought to give effect to Council Directive 2000/78/EC,[14] which prohibited discrimination *inter alia* on the basis of age. Temporally, the secondary legislation was passed *subsequent* to the primary legislation so as to implement the Directive and thus Irish law conflicted with EC law.[15] The procedural history of the case resulting before Charleton J. in the High Court from the Equality Tribunal is unfortunately not outlined and whether these proceedings arose prior to the enactment of the secondary legislation is not clear. [16] However, Charleton J. framed the issue before the Court as being:

> "whether the Equality Tribunal, as a body whose powers are defined by statute, is entitled to commence a hearing that has the result that it assumes a legal entitlement to overrule a statutory instrument made by the first applicant where by law it is not entitled so to do. My view is that it is not…."

Decision of the Irish High Court

Charleton J. held that it was beyond the scope of any decision that he was required to make to assess whether national legislation correctly implemented the directive and stated that the obligation to construe national legislation in light of the obligation under EC law did not

[12] Declaration 17, Annexed to the Final Act. See Dougan "The Treaty of Lisbon 2007: Winning Minds, not Hearts" (2008) 45 Common Market Law Review 617, at 700.

[13] Which entailed that they had to be at least 18 years of age and under 35 years of age in the year that they applied.

[14] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[15] The secondary legislation was passed in November 2004 and the primary legislation came into effect in July 2004.

[16] The High Court noted *en passant* correspondence from The Equality Authority that had previously expressed the view that the admission criteria discriminating on the basis of age were not consistent such legislative provisions. The nature of this correspondence or its relevance to the actual proceedings was not specified by the Court.

extend to "re-writing" the legislation. [17] In support of this much, Charleton J. cited the recent decision of the Court of Justice in *Impact v. Minister for Agriculture and Food*,[18] meriting closer analysis.

Impact concerned a claim by Irish civil servants challenging their pay and pension entitlements as fixed-term contract workers and the manner and effect of the renewal thereof. The issue arose *inter alia* as to the direct effect of a Directive implementing a Framework Agreement[19] and the jurisdiction of the Irish Rights Commissioner or Labour Court to consider the claim of a fixed-term worker as to direct effect in respect of a period after the due date for implementation and prior to the date of transposition of the directive.

No express jurisdiction had been conferred on these bodies as to European law matters under Irish law, although generally they had, what was argued by the Irish State, to be "an optional jurisdiction" over claims arising and so a High Court challenge could have been initiated by the claimants in the alternative. The Court of Justice held that to compel the applicants to have to bring a separate action before the High Court to assert their rights would have resulted in procedural disadvantages to them, including cost and time disincentives, which the national referring court would have to consider. The Court of Justice in *Impact* reasoned that the:

> "principle of effectiveness requires that those individuals should also be able to seek before the same courts the protection of the rights which they can derive directly from the directive itself … the obligation to divide their action into two separate claims and to bring the claim based directly on the directive before an ordinary court leads to procedural complications liable to render excessively difficult the exercise of those rights conferred on the parties by Community law.
>
> If the referring court were to find such an infringement of the principle of effectiveness, it would be for that court to interpret the domestic jurisdictional rules in such a way that, wherever possible, they contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law."[20]

Only part of the above quotation was referred to by Charleton J. which, it is suggested here, supports the contrary proposition, that is, that the Equality Tribunal *should* have been able to consider the direct effect of the Directive at issue and that to compel parties to re-litigate in another forum was in fact precluded by the decision in *Impact*. The failure of Charleton J.

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[17] Without citing or discussing any relevant caselaw, but ostensibly meaning the caselaw resulting from Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135 (doctrine of "indirect effect," obliging national judge to read conflicting national law in light of European legislation).

[18] Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] 2 CMLR 47, a referral from the Irish Labour Court.

[19] Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. The doctrine of supremacy was not a feature of *Impact*.

[20] Paras. 53-54. Only para. 54 is cited by Charleton J.

to discuss the facts of *Impact* is most unsatisfactory, especially where it is unclear as to the date of the commencement of the proceedings here and whether the jurisdiction of the Equality Tribunal to invoke the doctrine of direct effect was at issue. Instead, Charleton J. held that:

> "[t]here is no principle of European law which allows an administrative body or a court of limited jurisdiction to exceed its own authority in order to achieve a result, whereby it is of the view that European legislation has not been properly implemented …"[21]

Strictly speaking, this statement is incorrect in that the transposition of the directive was not ostensibly challenged (albeit by deduction we must draw this conclusion) but rather that subsequent Irish secondary legislation enacted after the transposition of the directive by primary law was simply inconsistent with the aims and provisions of the directive. Charleton J. then held that the Equality Tribunal should have held that no remedy was forthcoming from that Tribunal and that the complainants should have subsequently sought a declaration from the High Court that the secondary legislation had purported to, in his words, "overrule" European law. It is submitted that Charleton J. fundamentally misinterpreted the decision of the Court of Justice in *Impact*, particularly given the interpretation that the Irish Labour Court itself, practitioners and scholars have been attributing to that decision.[22]

Analysis

The absence of any reference by Charleton J. to the question of supremacy and the duties incumbent upon national courts flowing therefrom is also most striking indeed. It is now trite to recount that the Court of Justice held in the infamous decision in *Costa* v. *E.N.E.L.*[23] that the new legal order of the European Economic Community, autonomous as it was from international law, resulted in the supremacy of Community law in the event of conflict arising before national courts between national law and European law. This entailed that that:

> "law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however

[21] At para. 8.

[22] *Kildare County Council v. Halton* (FTC/05/15 21st November, 2008 (Labour Court)); O' Mara "European Developments" (2008) 5(2) Irish Employment Law Journal 80: "The importance of this judgment for Ireland is really to be found in the findings that the Rights Commissioners and the Labour Court (and implicitly, where relevant, the Employment Appeals Tribunal) are "national courts" for the purpose of Community law. Even though the Oireachtas has not conferred retrospective jurisdiction on them to interpret and enforce Community law, they are now confirmed to have this capacity."

[23] Case 6/64 *Costa* v *ENEL* [1965] ECR 505.

> framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question…"

The rationale for such supremacy was enunciated to be "that the Executive force of community law cannot vary from one state to another…without jeopardizing the attainment of the objectives of the treaty." The practical operation of the doctrine of supremacy was then established in *Amministrazione del Finanze dello Stato v. Simmenthal*,[24] where the Court held that in case of conflict that supremacy resulted in:

> " a national court...[being] under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means."[25]

In fact, as the Court has clarified in *Ministero delle Finanze v IN.CO.GE.'90 Srl*,[26] *Simmenthal* did not entail that a national law rule in such a case of conflict was non-existent but rather that the national court was obliged to "dissapply" conflicting national law. No clearer decision on point is available on the question before Charleton J. and the failure of the Court to correctly resolve the issue before the Court leaves Irish jurisprudence in a most unsatisfactory state. In any event, the Equality Tribunal is most certainly captured by the duties envisaged by the *Simmenthal* or *IN.CO.GE.'90 Srl* decisions and should have been instructed by the High Court simply to "dissapply" the conflicting Irish statutory instrument.

Some of the most important decisions in European Union and Community law have been generated by lower courts from all over the European Union lacking any powers of judicial review as a matter of domestic constitutional law and thereby benefiting from supremacy and direct effect.[27] In fact, one of the very first Irish references to the Court of Justice in the 1970s concerned a District Court and the question of compatibility of criminal prosecutions taken under Irish secondary legislation (Sea Fishing (Sea Fisheries (Conservation And Rational Exploitation) Orders 1977) with the Treaty of Rome, where the Court of Justice held that a conviction under the Irish secondary law was incompatible with EC law. The net result, thirty years ago, was that Irish law would be "disapplied" by the District Court in favour of EC law.[28]

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[24] in Case 106/77 *Amministrazione del Finanze dello Stato v Simmenthal* [1978] ECR 629.
[25] At para. 24.
[26] C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl* [1998] ECR I-6307
[27] Alter *Establishing the Supremacy of EC Law* (Oxford, 2001); Fahey *Practice and Procedure in Preliminary References to Europe: 30 years of Article 234 EC caselaw from the Irish Courts* (Firstlaw, 2007).
[28] C-88/77 *Minister for Fisheries v. Schonenberg* [1978] ECR 473. Although, no explicit question was put to the Court on this basis and the Court was in fact applying a ruling it had delivered that day. However, a District Court would not normally possess the constitutional powers to deem a conviction to be invalid or to declare secondary legislation unconstitutional.

Procedural hurdles to asserting EC law rights

A major difficulty with the reasoning of Charleton J. is that it invented procedural obstacles to the resolution of a relatively elementary point of EC law. EC law provides that:

> "the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)."[29]

The effectiveness of EC law is substantially diminished if the litigation of EC law rights becomes mired in claims before multiple fora and is rendered costly and inefficient. Not merely does the decision of the High Court constitute a misinterpretation of EC law, it also adds extraordinary expense and inconvenience to litigants who were entitled to succeed under Irish legislation implementing EC law, by being given incongruous advice from Charleton J. to return to the Tribunal that they hailed from, to be returned again to the High Court by way of judicial review in order to succeed.

Article 234 EC Preliminary Reference: An Alternative Remedy?

The proceedings in the instant case of course were generated by the Equality Tribunal and the ability of such a quasi-judicial body to constitute a Court or Tribunal for the purposes of Article 234 EC is capable of little dispute.[30] In the seminal decision of the Court of Justice in *Doris Saltzmann*,[31] the Court held that in order to determine whether a referring body was a court or tribunal the Court had to take into account a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. Nonetheless, the Equality Tribunal on this basis is a suitable referring body, satisfying a majority of these factors, given that it is, *inter alia*, established by law, a permanent body, an independent body and applies rules of law.[32] Perhaps the litigants would have been best advised to have sought a preliminary reference to the Court

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[29] *Impact,* para. 46. See Case 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989; Case 45/76 *Comet* [1976] ECR 2043; Case C-312/93 *Peterbroeck* [1995] ECR I-4599 and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233.

[30] See generally, Fahey *Practice and Procedure in Preliminary References to Europe: 30 years of Article 234 EC caselaw from the Irish Courts* (Firstlaw, 2007); Collins & O'Reilly *Civil Proceedings and the State* (Roundhall, 2003).

[31] Case C-178/99 *Doris Saltzmann* [2001] ECR I-4421, para. 13

[32] See Employment Equality Act 1998-2008, Equal Status Act 2000-2008 and the Pensions Act 1990-2004. See also www.equalitytribunal.ie, which states that: "[t]he Equality Tribunal is the impartial forum to hear or mediate complaints of alleged discrimination under equality legislation. It is independent and quasi-judicial and its decisions and mediated settlements are legally binding."

of Justice, although presumably the judicial review proceedings initiated were intended to have a speedier outcome than a preliminary reference might have offered, given the unlikelihood that the accelerated procedure could have been availed of.[33]

A "Metric Martyrs" Debacle

The decision of Charleton J. ultimately raises a question similar to that raised in the decision of the Divisional Court (Queens Bench) in the infamous "Metric Martyrs" case considering the constitutionality of a Henry VIII clause and the effects of the European Communities Act 1972.[34] *Thoburn v. Sunderland City Council*[35] concerned the Units of Measurement Regulations, 1994, made pursuant to the powers conferred by s. 2 of the European Communities Act, 1972, that purported to amend s. 1 of the Weights and Measures Act, 1985, a "Henry VIII" clause. The amending legislation rendered it illegal to use imperial measures in preference to continental metric units and the defendants had been charged pursuant to the new legislation for failing to indicate a unit price per kilo for various goods and argued that the new legislation was invalid in that it had impliedly repealed s. 2(2) of the Act of 1972 which empowered the making of subordinate legislation. For the Divisional Court, Laws L.J. held that ordinarily, ordinary statutes could be impliedly repealed within the English constitutional matrix. However, he held that special circumstances entailed that constitutional statutes could not be impliedly repealed, one of which being the Act of 1972. Laws L.J. held that:

> "…All the specific rights and obligations which EU law creates are by the ECA [European Communities Act 1972] incorporated into our domestic law and rank supreme: that is, anything in our substantive law inconsistent with any of these rights and obligations is abrogated or must be modified to avoid the inconsistency… The ECA is a constitutional statute: that is, it cannot be impliedly repealed..."

He thus gave effect to the supremacy of EC law.[36] The decision has naturally been the subject of considerable analysis given its consequences for a constitutional order based upon parliamentary supremacy.[37] No such constitutional crisis need necessarily follow from

[33] See Article 104a of the Rules of Procedure of the Court of Justice.
[34] The Irish equivalent legislation was not at issue in the case under discussion.
[35] *Thoburn v. Sunderland City Council* [2003] QB 151, which was not considered by the Irish High Court.
[36] See also *McWhirter v. Secretary of State for Foreign & Commonwealth Affairs* [2003] EWCA (Civ) 384; *Oakley Inc. v. Animal Ltd*. [2006] Ch. 337
[37] See O'Neill "Fundamental Rights and Constitutional Supremacy of Community law in the United Kingdom after Devolution and the Human Rights Act" (2002) 46 Public Law 724; Boyron "In the name of European law: the Metric Martyrs case" (2002) 27 European Law Review 771; Barber & Young "The Rise of Prospective Henry VIII Clauses and their Implications for Sovereignty" (2003) 47 Public Law 112; Perreau-Saussine "A tale of two supremacies, four greengrocers, a fishmonger, and the seeds of a constitutional court" (2002) 61 Cambridge Law Journal 527; Elliott "Embracing "Constitutional" legislation: Towards Fundamental Law?" (2003) 54 Northern Ireland Law Quarterly 25.

an Irish case considering this question and our courts have previously accepted the consequences of supremacy almost unquestioningly in the Irish legal order, none of which received any analysis here by Charleton J.[38] On one level, the absence of analysis of supremacy or primacy and its relevance to the proceedings substantially diminishes the extent to which a constitutional crisis *per se* results therefrom. Nonetheless, the operation of the doctrines of direct effect and the supremacy of EC law in Ireland is significantly affected by such an erroneous interpretation of EC law, as are litigants, even if the decision of the High Court is more in the realm of a storm in a tea-cup, in light of the *communautaire* nature of the Irish judiciary. Neither the infrequent use of EC law in the Irish courts nor the historically low levels of preliminary references generated by the Irish judiciary are, however, ameliorated as a result of this decision.

Conclusion

The operation of the supremacy or primacy of EC law is fundamental to the effectiveness of EC law in the national courts. The decision of Charleton J. is an unfortunate example of litigants being denied remedies that they were entitled to under EC law and being subjected to procedural disadvantage through erroneous interpretation. Moreover, the use to which the decision of Charleton J. is put by the Irish judiciary as a whole will be the determining factor as to whether the decision is a minor or major threat to the operation of supremacy in the Irish legal order. The controversy surrounding the appropriate expression of the principle of primacy or supremacy of EC law may remain a feature of modern scholarship, however the practical operation of the doctrine in cases such as the present after three decades of membership of the European Union should be beyond dispute.

[38] See above ***.