QUESTIONING EXECUTIVE SUPREMACY IN AN ECONOMIC STATE OF EMERGENCY

Alan Greene[1]

INTRODUCTION

The global economic crisis that crystallised in September 2008 sent reverberations throughout the world. The magnitude of this 'economic state of emergency' was dramatically described by UK Prime Minister David Cameron as the 'economic equivalent of war'.[2] Conceptualising an economic crisis as tantamount to war or a state of emergency is not, however, a 21st Century development. Since the early decades of the 20th Century, and even before that,[3] political rhetoric compared economic crises to military threats and therefore perceived or represented by government rhetoric as necessitating an emergency response.[4] This article presents a legal, as opposed to political or economic, perspective on these 'emergency' responses to economic crises. The aim of this article is not to question the economic merits or efficacy of these economic measures, but to challenge from a legal constitutionalist perspective the validity of arguments pertaining to the manner in which such emergency measures are enacted. Specifically, can equivalence be drawn between economic crises and national security crises? Focus therefore is on the processes surrounding the introduction of these economic measures rather than the substantive content of the measures themselves.

In particular, this article questions whether the suppositions that underpin the standard national security emergency response of legislative (as distinct from judicial) deference to the executive in times of emergency can be assumed for economic crises. Part I introduces this concept of emergency government in a period of crisis, emphasising the consolidation of power in the executive when confronting a threat to national security. Fundamental aspects

[1] Lecturer in Law, Durham Law School. I'd like to thank the anonymous reviewers, Fiona de Londras, Aoife Nolan, and Natasa Mavronicola for their comments on earlier drafts of this paper. I presented this paper at the Durham Law School Staff Seminar Series, and the IACL-AIDC World Congress of Constitutional Law in June 2014. I am grateful to the participants at these events for their feedback.

[2] 'Debt Crisis: CBY Conference as it happened- November 19, 2012' *The Daily Telegraph* (19 November 2012) available at http://www.telegraph.co.uk/finance/debt-crisis-live/9687330/Debt-crisis-CBI-Conference-as-it-happened-November-19-2012.html (Last accessed, 10 December 2014).

[3] See J Reynolds, 'The Political Economy of States of Emergency' 14 Oregon Review of International Law 85.

[4] WE Scheuerman, 'The Economic State of Emergency' (1999-2000) 21 Cardozo Law Review 1869, 1870-1872, 1878-1879. Economic crises have also been compared to natural disasters, with the US Supreme Court drawing this equivalence in *Home Building and Loan Association v Blaisdell* 290 US 423.

of the emergency paradigm – temporariness, necessity, and expedience – are introduced; and the classic defence of this 'executive supremacy' is then explained as due to the speed at which the executive is able to react to a crisis, and the expertise the executive possess in issues of national security making them best placed to decide what response is necessary.

Part II presents an illustrative discussion of economic crises being subject to emergency responses similar to crises to national security. Historical examples from the 20th Century will be sketched before providing more recent instances from the 2008 economic crisis. Ireland's response to its acute economic crisis in particular shall be proffered as an example of an emergency response and how there is a close correlation between the manner in which states have responded to economic and national security crises.

Part III then challenges this legislative deference to the executive in a period of economic emergency. This shall be done firstly by questioning the concept of executive expertise on economic issues, and secondly by challenging the 'necessity' of such economic measures. This article concludes by contending instead that arguments of necessity in an economic crisis are arguments about expedient government and law-making. However, as the issue of speed is not one unique to economic crises but is endemic throughout the regulation of the everyday capitalist world, it cannot amount to a normative argument for departing from the status quo. If such arguments are acceded to in the name of speed alone then the result will be a permanent change to the legal system rather than an exceptional measure in a period of crisis. Furthermore, many responses to economic crises do not envisage a return to the status quo that existed before the economic state of emergency as aspects of this prior status quo were responsible for the crisis. Economic states of emergency thus usher in a 'new normalcy'. While this key justification of the emergency paradigm – that such exceptional measures are temporary – is one that is being increasingly challenged in the wider literature on emergency powers today, this article contends that the temporariness of emergency powers is a particularly problematic assumption when applied to economic states of emergency.

1. States of Emergency: Executive Supremacy

Emergency is a term used in legal norms, political rhetoric, and lay understanding to cover a multitude of different crises and phenomena of varying magnitudes. In a generalist sense, states of emergency are declared by governments or emergency services in order to facilitate

an expedited response of an exceptional nature to a perceived threat or crisis. Legal sources giving effect to this 'emergency paradigm' recognise this element of urgency with the ordinary controls on state power relinquished to enable a swift response to the crisis at hand once a state of emergency is declared. Analogously, a *de jure* state of emergency may not be declared but the state or its actors may respond to a crisis in a manner similar to that in which they would have reacted had an emergency been declared.[5] These *de facto* emergencies mirror closely, both in the response taken and particularly in the political rhetoric justifying their introduction, the assumptions that underpin an official declaration of an emergency.[6] Consequently, the fact that a state has not declared a state of emergency is not conclusive that it is not utilising an 'emergency paradigm'. The phenomena that trigger such emergency responses vary widely: from war and terrorist attacks, to natural disasters, and, as this article contends, economic crises; nevertheless, it is the case that the majority of academic scrutiny operates on instances pertaining to national security specifically.[7] In particular, numerous writers have drawn attention to the proper functioning of the separation of powers in such emergencies and the resultant executive supremacy that occurs as a response to these national security crises.[8]

Regardless of the phenomenon that triggers it, an emergency response should be one not permissible during 'normalcy' as it is the constraints on power that ordinarily exist that requires the *de jure* declaration of an emergency. Once an emergency is declared, the relevant state actors are liberated from these constraints and free to act accordingly. Often, however, the constraints that are relaxed or abandoned imbue the political, legal, and constituent

[5] N Questiaux, 'Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency' UNESC, E/CN.4/Sub2/1982/ 15 (27 July 1982) 26.

[6] ibid. *De facto* emergencies are problematic from a constitutionalist perspective as they bypass the shielding effect of the emergency paradigm – quarantining exceptional measures to exceptional situations – leaving only their role as a sword – as an enabler of state power. See A Greene, 'Separating Normalcy from Emergency: The Jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12(11) German Law Journal 1764, 1765-1766.

[7] See e.g. E Posner and A Vermeule, *Terror in the Balance: Security Liberty and the Courts* (Oxford University Press 2007); F de Londras and F Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms' (2010) 30 OJLS 19; B Ackerman, *Before the Next Attack: Preserving Civil Liberties in the Age of Terrorism* (Yale University Press 2006); H Fenwick and G Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counterterrorism Law and Beyond' (2011) 46(4) McGill Law Journal 863 to name but a select few.

[8] Posner and Vermeule ibid; de Londras and Davis ibid; Ackerman ibid; J Lobel 'Emergency Powers and the Decline of Liberalism' (1989) 98(7) Yale Law Journal 1385; Mark Tushnet, 'Controlling Executive Power in the War on Terrorism' (2005) 118 *Harvard Law Reivew* 2673; C Rossiter, *Constitutional Dictatorship: Emergency Powers: Crisis Government in the Modern Democracies*(Transaction Publishers 2002).

identity of a state; i.e. in a liberal-democratic state with respect for the rule of law and human rights it is these very ideals that may be slackened or derogated from altogether. The unpalatable nature of emergency powers is tempered by their assumed temporariness: once the threat is defeated so too will the exceptional measures disappear.[9] The emergency paradigm is thus based upon the assumption that one can separate emergency from 'normalcy;' with exceptional crises and responses to such crises falling into the former category, quarantined from the ordinary phenomena and powers that define the status quo.[10] Emergency is the outlier to this normalcy and once the threat is defeated, so too will the exceptional emergency powers be relinquished.

This assumption of a separation between normalcy and emergency is one that is increasingly challenged in the literature, however. The idea that we are instead living in a permanent state of emergency where exceptional powers are no longer temporary, has arguably become the dominant paradigm. Threats such as terrorism that a state faces today are, or at least represented to be, no longer temporary.[11] Furthermore, the responses to such crises have also changed. Emergencies, today are something to be managed by the state or prevented in the first instance, as distinct from reacting to in a 'fire-fighting manner' as the classic understanding of a state of emergency conceptualises them.[12] These crises therefore are transformative; effecting permanent change, with restoration of the status quo or 'normalcy' either perpetually suspended or rejected as the goal.[13] That conceded, while this temporary nature of emergency powers may now be questionable, these exceptional measures are

[9] Rossiter ibid 306.

[10] O Gross, 'Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?' (2000) 112 Yale Law Journal 1011, 1069-1096.

[11] Gross ibid. Oren Gross argues that the four classic degrees of separation between normalcy and emergency – us v them, domestic v international, spatial separation, and temporal separation – are no longer tenable in modernity. Mark Neocleous argues that 'permanent state of emergency' has now become the dominant mantra of the left and the libertarian right. M Neocleous, 'The Problem with Normality: Taking Exception to "Permanent Emergency"' (2006) 31 Alternatives 191, 195. I have argued elsewhere that the blurring of the lines between normalcy and emergency is not wholly explainable by the objective nature of the threats that face the state but through a subjective labelling of certain threats as 'emergency' that would not have been labelled and treated as such in the past. See generally Greene (n 6).

[12] O Gross and F Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (CUP 2006) 22; A Greene, 'Shielding the State of Emergency: Organised Crime in Ireland and the State's Response' (2011) 62(3) NILQ 249, 252-254.

[13] Thus McCormick argues that the key difference between Carl Schmitt's conception of 'commissarial' versus 'sovereign' dictatorship is that the former is temporary and reactionary whereas the latter is permanent and transformative: JP McCormick, 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers' (1997) 10 *Canadian Journal of Law and Jurisprudence* 163, 165-167; See Carl Schmitt, *Dictatorship* (Polity Press 2013).

additionally represented as justified on the consequentialist grounds that they are necessary to respond to the threat at hand.

Necessity: the justification for exceptionality

In national security emergencies, the sacrifice of constitutionalist principles such as human rights, the rule of law, and ordinary democratic procedures are represented as being unpalatable but unavoidable decisions that need to be taken in order to respond to a threat at hand.[14] However, while such measures are unpalatable, they are nevertheless represented as preferable to a failure not to act and not confront the emergency. In essence, emergency situations present an example of a duress of circumstances that requires a decision-maker to choose between comparably unpalatable courses of action.

This idea of a constraint of choices in a period of emergency is reflective of the concept of necessity in both philosophy and the criminal law. The classic thought experiment of necessity in philosophy is that of the run-away trolley, where the subject is asked whether it is morally right for a person to change the direction of a railway trolley in order to save five innocent people by directing it into the path of one innocent person thus killing them instead.[15] The subject in the trolley problem could possibly avail of the criminal law the defence of necessity which potentially arises where:

> the defendant could have complied with the letter of the law, but decided not to do so because he thought that such compliance would in all probability result in a harm or evil as great or greater than that which would ensue from doing (or omitting to do) what *prima facie* is prohibited (or commanded).[16]

[14]This is recognised be international human rights treaties such as Article 4 ICCPR and Article 15 ECHR which allow contracting states to derogate from their ordinary human rights obligations 'to the extent strictly required by the exigencies of the situation'.

[15] JJ Thomson, 'Killing, Letting Die, and the Trolley Problem' (1976) 59(2) The Monist 204; JJ Thompson, 'The Trolley Problem' (1985) 94 Yale Law Journal 1395; M Otsuka, 'Double Effect, Triple Effect and the Trolley Problem: Squaring the Circle in Looping Cases' (2008) 20(1) Utilitas 92.

[16] PR Glazebrook, 'The Necessity Plea in English Criminal Law' (1972) 30 Cambridge LJ 87, 88. The defence of necessity in criminal law operates to justify an individual's actions. See the judgment of Brooke LJ in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 148 who held that the separation of the conjoined twins and resultant death of one twin would be justified as distinct from excused. Brooke LJ's judgment is not, however, a statement of the *ratio decidendi* of the case as all judges in the Court of Appeal used different justifications for ultimately deciding that the twins should be separated.

With necessity, often the idea of a choice may be constrained to such an extent that it is merely notional, with the actor asserting that they 'had no choice' but to pursue the course of action they had taken.[17] Nevertheless, there is still always a choice, although it may be one between two comparable evils with the choice being the 'lesser of two evils'.[18]

The use of torture and the attempts by some states' criminal justice systems to excuse or justify such behaviour, notwithstanding the *jus cogens* status of the prohibition of torture in international law, illustrates how criminal law and national security concepts of necessity can overlap. In *Public Committee against Torture in Israel v Israel* the Israel Supreme Court held that a person prosecuted for using torture may be able to rely on the defence of necessity.[19] A similar sentiment was echoed by US officials tasked with issuing advice to CIA interrogators regarding their liability for so-called 'enhanced interrogation techniques' by relying on §3.02 (1)(a) of the US Model Penal Code which states that:

> Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defences dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.[20]

Attempts to justify exceptional and illegal measures such as torture therefore rely on the claim that they are necessary, using consequentialist or utilitarian forms of ethical reasoning. Such consequentialist arguments become more pronounced depending upon the severity of harm sought to be avoided by the exceptional response. 'Ticking time bomb scenarios' or other thought experiments seek to stress-test the values a state clings to in a time of emergency further, including the validity of absolute rights like the prohibition on torture.[21]

---

[17]See FMc Auley and JP McCutcheon, *Criminal Liability: A Grammar* (Roundhall Sweet & Maxwell 2000) 779-801

[18] *United States v Holmes* (1842) 26 Fed Cas 360.

[19] *Public Committee against Torture in Israel v Israel* HC 5100/94 (Israel 1999).

[20] J Bybee, 'Memorandum for A. Gonzales… [Re:] Standards for Conduct for Interrogation under 18 USC 2340-2340A. United States, Department of Justice, Office of Legal Counsel, (1 August 2002).

[21] See N Mavronicola, 'What is an 'Absolute Right?' Deciphering Absoluteness in the Context of Article 3 of the European Convention of Human Rights' (2012) 12(4) HRLR 723; O Gross, 'Are Torture Warrants Warranted?' (2004) 88 Minnesota Law Review 1481, 1497 - 1500. Gross' piece is a response to Alan

'Ticking time bomb scenarios' 'ratchet' up the harm and its imminence that could potentially be avoided to such magnitude as to seek to out-weigh the deontological justification of such absolute norms.[22] States of emergency thus accentuate the notion of a constrained choice further by placing pressure on the time a person has to make a decision. Emergency protocols likewise streamline the ordinary decision-making procedures enabling individuals such as the emergency services to respond rapidly.[23]

This link between necessity and emergency powers in a crisis of national security is not limited to legal or philosophical debates surrounding the appropriateness of torture. Scholars of emergency powers have debated the legality and the value of such legality of exceptional powers in general, and whether emergency powers exist or should exist within or outside the law.[24] As brusquely put by Abraham Lincoln in justifying his dictatorial actions on the eve of the US Civil War:

> The law is made for the state not the state for the law. If the circumstances are such that a choice must be made between the two, it is the law which must be sacrificed to the state. *Salus Populi suprema lex esto*.[25]

National security states of emergency reflect the concept of necessity with decision-makers justifying their choices on the grounds that such action, despite its unpalatable or even illegal nature must nevertheless be taken in order to alleviate a greater harm that would occur were the status quo maintained. This representation of necessity must not be taken at face value, however. Giorgio Agamben stresses the naivety of theories that assume necessity is an objective fact.[26] Agamben instead asserts that the concept of necessity is 'an entirely subjective one, relative to the aim that one wants to achieve.'[27] The language of emergency is a powerful and emotive force that can shape the legal discourse around the necessity of such

---

Dershowitz's torture warrants proposal. See A Dershowitz, 'Tortured Reasoning' in S levinson, *Torture: A Collection* (OUP 2004) 257.

[22] Gross, ibid.

[23] See text to n 130 below for a discussion of how 'time compression theory' is challenging liberal democracy's ability to react expeditiously to problems facing the state.

[24] See e.g. See D Dyzenhaus, Schmitt v Dicey: Are states of Emergency Inside or Outside the Legal Order?'(2006) 27 Cardozo Law Review 2005.

[25]Rossiter (n 8) 12.

[26] G Agamben, *State of Exception* (University of Chicago Press 2005) 29-30.

[27] ibid.

a response.[28] This rhetoric is not merely reactive – describing objectively ascertainable truths – but instead creates the lens, or 'frame' through which others view the debate and thus shapes the contours of the debate, generally.[29] The invocation of the rhetoric of 'emergency' or 'necessity' to a political debate, particularly when this is done by the executive thus sets the parameters for the debate, creating a much more persuasive narrative for their chosen course of action.[30] Invoking the rhetoric of emergency therefore emphasises the necessity of the response taken by the decision maker, thus cloaking the political ideology underlying the responses taken in a veil of objectivity.

The subjective nature of the labelling of a crisis as warranting an emergency response must be taken into account; however, this too should not be over-stated. What gives necessity an objective component is that the aim to be achieved by undertaking the measure is one that anyone would agree ought to be achieved if they found themselves in a given situation. Agamben's critique of necessity should not result in an abandonment of the concept of necessity in general but instead it should focus a more critical scrutiny upon the decision-maker who invokes the rhetoric of emergency in the first instance. Invariably, in crises of national security it is the executive that is this initial decision maker. The executive therefore acts while the legislature and courts defer.

The emergency paradigm and executive dominance

A quintessential aspect of the emergency paradigm is that it is the executive that acts in a period of extreme crisis. Emergency situations amplify a tension at the heart of the separation powers theory: the prevention of a consolidation of power in one branch of government and potential abuse that could arise from this; and the facilitation of a state structure that is appropriately able to exercise its powers in a timely and efficient manner.[31] Eric Barendt, for

[28] This can cause increased popular support for a strong response as a result of a 'rally around the flag' effect. See B Russett, *Controlling the Sword: The Democratic Governance of National Security* (Harvard University Press 1990) 34.

[29] See for example, RR Krebs and PT Jackson, 'Twisting Tongues and Twisting Arms: The Power of Political Rhetoric' (2007) 13 European Journal of International Relations 25; D Kahnamen and A Tversky, 'Prospect Theory: An Analysis of Decision Under Risk' (1979) 47(2) Econometrica 263.

[30] ibid; O Gross and F Ní Aoláin, 'The Rhetoric of War: Words, Conflict and Categorization Post- 9/11' (2014) 24 (2) Cornell Journal of Law and Public Policy, Minnesota Legal Studies Research Paper No. 14-47. Available at SSRN: http://ssrn.com/abstract=2530789, 5-7.

[31] C Montesquieu, *The spirit of laws* (T Nugent tr, Continental Press 1949); J Locke, *Second Treatise of Government* (first published 1689,CB MacPherson ed., Hackett Publishing Company, 1980) 84-88; Eric Barendt, 'Separation of powers and constitutional government' [1995] Public Law 599, 601.

example, argues that John Locke's theory of the separation of powers was as much concerned with government expediency as it was with the prevention of tyranny.[32] Locke's recognition of the requirement of expediency and exceptionality in government is most clearly concretised in his concept of the Prerogative of the Crown: 'the power of the King to do good without a rule and sometimes even against it.'[33] Locke's model of a separation of powers thus illustrates the tensions at play when attempting to curtail absolutism and promote expediency; tensions which continue to manifest today, particularly in a period of crisis. In such crises, expediency and perceived necessity tends to outweigh concerns about absolutism, and a consolidation of power takes place in the executive branch of government at the expense of the legislature and the judiciary. The legislature and judiciary instead defer to the executive in a period of emergency that stems from a national security crisis. Referring to the United States' presidential model, Mark Tushnet notes that 'when government is unified… in the hands of the same party… Congress will probably authorise anything… the President asks'.[34] The parliamentary democratic system of states such as the United Kingdom or Ireland would suggest that legislative oversight would be even less of a control seeing as the executive axiomatically dominates the legislature due to their fused nature.[35] The separation of powers theory, particularly in parliamentary democracies, therefore should not be explained solely in terms of a strict categorisation and allocation of functions or personnel between the three branches but rather by understanding the aforementioned rationale behind the separation of powers: as a brake on and an enabler of government expediency.

Deferring to the Executive

According to Aileen Kavanagh, 'judicial deference occurs when judges assign varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy'.[36] Deference is a variable spectrum, with the degree of deference accorded to the initial decision-maker malleable according factors such as the subject matter of the decision and the respect accorded to the decision-maker.[37] While

[32] Barendt, for example, notes Locke's endorsing of Parliament's need for a permanent body to enforce laws it had created as Parliament often did not sit once it had passed laws. See Barendt ibid 602.

[33] Locke (n 31) 84-88.

[34] Tushnet, (n 8) 2679.

[35] de Londras and Davis (n 7) 34-37 (per de Londras).

[36] A Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126(2) LQR 222,223.

[37] See e.g. F Klug, 'Judicial Deference under the Human Rights Act 1998' [2003] EHRLR 125, 125-126; P Daly, *A Theory of Deference in Administrative Law* (CUP 2012) Ch 1.

this article is concerned with legislative – as distinct from judicial – deference to the executive during economic crises, Kavanagh's definition is nevertheless useful as it presents an accurate synopsis of the relevant justifications for deference: that the branch one is deferring to has superior expertise, institutional competence, or legitimacy than the branch that is deferring.

National security is a field in which the institutional competence and expertise of the judiciary is represented as being weak.[38] Furthermore, the lack of democratic legitimacy weighs heavily on the judiciary when assessing national security implications, again resulting in the deference to the political branches. Democratic legitimacy cannot, however, displace legislative oversight of executive decisions on national security issues. On the contrary, the trend is that such legislative affirmation is becoming more important to legitimise executive action. Thus while the UK government may undertake military action without legislative approval, it has been suggested by former Prime Minister Gordon Brown that it is highly unlikely that it would ever do so in future.[39] That the executive has less democratic legitimacy than the legislature is seen by the lesser hesitancy judiciaries have in invalidating executive orders that are deemed to infringe on human rights than legislation that similarly infringes, even in jurisdictions where the judiciary have the power to strike down laws as unconstitutional.[40]

Notwithstanding the legislature's superior democratic legitimacy, the executive is nevertheless considered to be best placed to take decisions on national security, particularly in a time of crises. The executive is the branch most capable of taking expedient decisions due to a lack of formalist decision-making procedures that can slow down such processes in the legislature and particularly in the courts. The executive may also be privy to sensitive or

[38] *CCSU v Minister for Civil Service* [1985] AC 374, 412 (Lord Diplock).

[39] S Issacharoff, 'Political Safeguards in Democracies at War' 29 OJLS 189, 204. The defeat in Parliament of the UK Government's motion to militarily intervene in Syria's civil war on 29 August 2013 corroborates Brown's assertion on this point. See N Watt and N Hopkins, 'Cameron forced to rule out British attack on Syria after MPs reject motion' *The Guardian* (29 August 2013), available at: http://www.theguardian.com/world/2013/aug/29/cameron-british-attack-syria-mps (last accessed, 3 April 2014). One year later in September 2014, the UK Parliament, passed a Government-backed proposal, authorising air-strikes against targets of the so-called 'Islamic State' (IS) operating in parts of Iraq. See HC Deb 26 September 2014, vol 585 cols 1255-1360.

[40].This can be seen by the decline in the use of prerogative powers by the UK government in favour of statutorily conferred powers that attract democratic legitimacy. See M Elliott, J Beatson and M Matthews, *Beatson, Matthews and Elliott's Administrative Law Text and Materials* (4th edn, Oxford University Press 2011) 116-123.

specialist information that the other branches of government do not have access to and ought not to have access to due to its sensitive or secret nature the release of which to the public domain may hamper the emergency response effort.[41] With both the judiciary and the legislature operating in public they become inappropriate fora for the handling of such material. This 'expertise' of the executive therefore creates an additional incentive for the branches of government to defer or acquiesce to the executive's assessment of what should be done in a period of crisis.[42]

Executive supremacy and the assumption of temporariness?

Emergency theories, however, attempt to reassure us that parliamentary deference in times of a national security crisis is an exceptional response to an exceptional crisis. It is a temporary aberration that will dissipate once normalcy is restored. Parliamentary ineffectiveness or acquiescence to the executive is not, however, wholly containable to emergency situations. The decline of the influence of parliaments can be seen in the everyday workings of the modern state with Andrew Moravcsik arguing that 'the late 20th Century has been the period of the decline of parliaments and the rise of courts, public administrations and the core executive'.[43] This was noted as far back as 1963 with the editorial of *The Political Quarterly* lamenting the UK Parliament 'losing in popular esteem, losing the degree of control it should exercise over the government, failing to adapt itself to the complexity of the tasks the quickened tempo of modern life has thrust upon it.'[44] Parliaments have themselves facilitated this decline, delegating broad regulatory powers upon administrative organs entrusted, due to their expertise, to unpack in greater specificity and complexity the norms that ought to be applied in their specific sphere of competence. Parliamentary decline is therefore endemic in normalcy too. This 'technocratisation' of decision-making has accelerated since then, in particular in relation to financial regulation.[45] Economic transactions and their resultant consequences can reverberate around the globe almost instantaneously today. Reactions to stock market developments can occur at a much more rapid pace than ever before. Globalisation has resulted in an inter-connected world where states' economies are

[41] de Londras and Davis (n 7) 27.

[42] *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at [87] Laws; de Londras and Davis (n 7) 27.

[43] A Moravcsik, 'In Defence of the Democratic Deficit' (2002) 40(4) Journal of Common Market Studies 603, 613.

[44] 'The Decline of Parliament' (1963) 34(3) The Political Quarterly 233,233.

[45] See text to n 130 below.

intertwined, interdependent, and therefore feel the effects of fluctuations in each other. Under this 'compression theory' the globalised world is a much smaller place where economic interactions happen at an ever increasing pace.[46] Furthermore, a globalised economy requires a similarly globalised regulatory framework, beyond national parliaments and capable of responding in an expedient fashion. Expedient decision-making thus appears to be endemic to economic decision-making, even in normalcy. However, when economic decision-making is conceptualised as being undertaken in a period of emergency (whether *de facto* or *de jure*), the necessity of expedience is arguably compounded further. It is to these 'economic states of emergency' that this article now turns to.

2. THE ECONOMIC STATE OF EMERGENCY

The early years of the 21st Century have been dominated by two distinct international emergencies. The attacks on the World Trade Centre in New York and the Pentagon in Washington DC on 11 September 2001, and the resultant 'war on terror' shaped international relations in the subsequent years. The global economic crisis that then crystallised in 2008 led to the creation of new legal norms and emergency responses by various states and international organisations. As stated previously, however, equating an economic crisis to a state of emergency is not a 21st Century development. Classic national security emergency responses such as martial law or state of siege were not suitable for economic crises,[47] yet the concepts and assumptions that underpinned martial law and state of siege were ,nevertheless, mirrored in the responses taken to economic crises. Indeed, such was their success and malleability that these emergency powers came to surpass the need to declare martial law or state of siege. Thus the state of emergency became the predominant response mechanism for war, natural disaster or economic emergency.[48]

Economic emergencies in the 20th Century

The events and aftermath of World War I demonstrates the emergency paradigm's perceived capacity to accommodate economic crises. France's state of siege, for example, which was designed to cope with military matters, was abandoned in favour of a broad delegation of

[46] See WE Scheuerman, 'Constitutionalism in an Age of Speed' (2002) 19 Constitutional Comment 353.

[47] For a discussion on the evolution of the state of emergency and the corresponding reduction in the use of martial law see M Neocleous, 'From Martial Law to the War on Terror' (2007) 10 New Criminal Law Review 489.

[48] ibid.

legislative power to the executive to tackle the conditions of 'severe economic distress' in 1924.[49] Germany too found its economy ravaged by World War I and the harsh conditions of the Treaty of Versailles. Faced with a crippled economy and hyperinflation, on 12 October 1922 a 'necessary' presidential order was passed without parliamentary input or approval forbidding speculation in foreign currencies using the now infamous emergency powers clause contained in Article 48 of the Weimar Constitution.[50] Rossiter describes this utilisation of Article 48 to deal with economic crises as the 'entering wedge' on the road to fascism.[51] Article 48 was clearly broader in scope than the old German state of war which axiomatically was designed to deal with armed conflicts and had nothing to do with economic issues. The use of Article 48 to deal with economic crisis in Weimar Germany illustrated the problems that can arise from a separation of powers in a period of emergency. Given the utter failure of the legislature in the 1930s, due primarily to it being composed of diametrically opposing factions (communists vs national socialists) both committed to the destruction of the liberal democratic order, Article 48 and the vast discretion to rule by executive decree it enabled was to play a key role in governing the Weimar Republic until Hitler's ascension to power.[52]

Economic states of emergency have also been experienced by the United States, with the Great Depression and Roosevelt's New Deal programme representing an archetypal example.[53] From the outset of his presidency, Roosevelt drew equivalence between war and economic crisis and made clear he intended to tackle the Great Depression with strong executive power; in much the same way as Lincoln fought the Civil War. In Roosevelt's inaugural speech he declared that he would 'ask the Congress for the one remaining instrument to meet the crisis: broad executive power to wage a war against the emergency, as great as the power that would be given me if we were in fact invaded by a foreign foe'.[54] On

[49] Rossiter (n 8) 117-127.

[50] Ibid.

[51] ibid 41.

[52] Indeed it was the primary catalyst for Hitler's ascension. See Rossiter ibid 33-60; E Kennedy, *Constitutional Failure: Carl Schmitt in Weimar* (Duke University Press, 2004) Ch 6; D Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford University Press, 1997) 32-37; Agamben (n 26) 14-16.

[53] B A Meyler, 'Economic Emergency and the Rule of Law' (2006). Cornell Law Faculty Publications. Paper 68. ,http://scholarship.law.cornell.edu/lsrp_papers/68 (Accessed 17 May 2011) 1.

[54] Scheuerman, (n 4) 1871. See also RI Roots, 'Government by Permanent Emergency: The Forgotten History of the New Deal Constitution' (1999-2000) 33 Suffolk University Law Review 259, 260-261. A transcript of Roosevelt's speech may be found at http://www.bartleby.com/124/pres49.html (Accessed 29 June 2011). See para.22 for the aforementioned quote.

6 March 1933, 48 hours after assuming office, Roosevelt utilised the Trading with the Enemy Act 1917, specifically designed to meet only wartime exigencies, to declare a bank holiday and force the closure of financial institutions.[55] On 9 March 1933 Roosevelt signed the Emergency Banking Act into law which restructured these financial institutions to ensure that viable institutions could then reopen once the bank holiday was lifted.[56] This act also created the Federal Deposit Insurance Corporation (FDIC) and introduced into the US the 'temporary' deposit insurance fund to protect depositors in financial institutions should those institutions go into liquidation.[57] This temporary fund became permanent and the FDIC employed an 'essentiality test' to assess the systemic importance of a distressed institution, with the ultimate goal being to prevent systemic risks.[58] In other words, it was the first recognition of the concept of financial institutions that were 'too big to fail' and out of necessity needed to be rescued. Indeed, such has been the impact of the FDIC that the notion of 'too big to fail' has been labelled a 'perennial issue.'[59] Roosevelt's actions thus paved the way for emergency powers in the form of executive action to be applied in the USA in instances beyond the original conception of emergency as a military phenomenon.[60]

Roosevelt's declaration of National Emergency in 1933 to deal with the 'Great Depression' remained in existence long after his death. A report by the Special Committee on the Termination of the National Emergency, chaired by US Senators Charles Mathias and Frank Church in 1973 (Church-Mathias Committee) commences with the line: 'Since March 9, 1933, the United States has been in a state of declared national emergency.'[61] In fact, along with Roosevelt's declaration, there were actually three other simultaneous states of emergency in existence: President Truman's declaration to deal with the Korean War; and two declarations by President Nixon: firstly to deal with a strike by postal service workers,

[55] Roots, ibid, 262. According to Belknap, the Trading with the Enemy Act was a World War I statute that had never been repealed. MR Belknap, 'The New Deal and the Emergency Powers Doctrine' (1983-1984) 62(1) Texas Law Review 67, 73.

[56] US Senate Special Committee on the Termination of the National Emergency, 'Report of the Special Committee on the Termination of the National Emergency' (19 November 1973) 4.

[57] RC Moyer and RE Lamy, 'Too Big to Fail: Rationale, Consequences and Alternatives' (1992) 27(3) Business Economics 19, 20.

[58] Ibid.

[59] Marc Labonte, 'Systemically Important or "Too Big to Fail" Financial Institutions' *Congressional Research Service* (30 July 2013) CRS 7-5700, 1.

[60]ibid; Belknap (n 55) 68.

[61] Church-Mathias Committee (n 56) 93-549, II .

and secondly to meet an international monetary crisis.[62] These emergency decrees gave effect to 470 provisions of federal law which, according to the authors, conferred enough powers on the President to be able to rule the country without reference to normal constitutional processes.[63] The US' experience of tackling economic crises with emergency-type responses therefore illustrates the difficulties of keeping such measures temporary. Instead, it is indicative of the tendency of exceptional responses to seep into normalcy.

The 2008 Financial Crisis: The EU Reaction

Similar to the manner in which economic crises in the US paved the way for permanent changes, the post-2008 financial crisis had a comparable effect on the European Union (EU) and its member states. The basis of the Fiscal Compact Treaty (FCT),[64] Europe's principal structural change in response to the economic crisis is Article 122(2) of the Treaty on the Functioning of the European Union (TFEU):

> Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.[65]

In this regard, the EU legally, as well as rhetorically, equates the financial crisis to 'natural disasters or exceptional occurrences beyond its [a state's] control.' The FCT effects a permanent change to the manner in which Eurozone states set their macroeconomic budgets. The underlying rationale behind the FCT thus assumes that there were fundamental flaws in these budgetary processes prior to its enactment that needed to be addressed and prevented from re-occurring in future. Here, however, we see a dichotomy between the classical understanding of phenomena that trigger emergencies and economic crises. Whereas natural disasters may be 'exceptional circumstances beyond its [a state's] control', economic crises are often seen as a result of the state's actions or its mismanagement of the economy.

[62] HC Relyea, 'National Emergency Powers', *Congressional Research Service* (GOV, updated 30 August 2007) 98-505

[63] 'Forward' in Church-Mathias Committee (n 56).

[64] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact Treaty; FCT), entered into force, 1 January 2013.

[65] Article 122(2) TFEU.

Responses are therefore not just fire-fighting but also preventative and future-oriented in order to prevent such mismanagement from occurring again. A return to the status quo or 'normalcy' that existed prior to the crisis is therefore not desirable as this 'normalcy' is itself represented as being part of the problem. This is true too of the manner in which states respond to terrorist threats, no longer merely reacting but also seeking to prevent future attacks from happening by 'defending further up the field.'[66] Thus 'normalcy' in the sense of the status quo that existed before the crisis – be it economic or terroristic in nature – will not be restored, nor, as this rhetoric represents, should it. Former US Vice-President Dick Cheney succinctly describes this post 9/11 world of perpetual terrorist and perpetual counter-terrorist prevention measures as the 'new normalcy' and the same is applicable for the post Euro-crisis EU.[67] The financial crisis therefore has not been so much an emergency for the EU warranting temporary fire-fighting responses. Instead it was more akin to a 'constitutional moment' or, at the very least, a constitutional challenge requiring fundamental institutional reforms.[68] It is, in essence, a catalyst for a 'new normalcy' in the Eurozone area.

The 2008 Financial Crisis: The Irish Experience

Prior to, and in addition to the FCT, many EU member states had to introduce domestic measures to combat the financial crises they were facing. Ireland's response to its acute economic crisis provides an illustrative example of deference to and conferral of power on the executive in such perceived exceptional economic circumstances. While the Irish economy began to stutter from late 2007, it was the events of the night of 29 September 2008 that crystallised the recession, heralded the death of the so-called 'Celtic Tiger' economy, and triggered emergency economic responses in Ireland.[69] On that night, taken by surprise and struck by feeling the necessity to act, the then Irish Government decided to guarantee all deposits and liabilities of six Irish financial institutions following a meeting with high level officials from the impaired banks.[70] This decision was taken so quickly that the European

[66] D Anderson, 'Shielding the Compass' (2013) 3 EHRLR 233, 243.

[67] Richard B. Cheney delivers remarks to Republican Governors Association' *FDCH Political Transcripts* (25 October 2001).

[68] Bruce Ackerman, for example, describes Roosevelt's New Deal as a constitutional moment in the US. See B Ackerman, *We the People: Volume 1: Foundations* (Harvard University Press 1993) 289.

[69] M Kelly, 'Whatever Happened to Ireland? *Centre for Economic Policy Research Discussion Paper Series*, No. 7811, 15. Available at: www.cepr.org/pubs/dps/DP7811.asp (Last accessed: 5 August 2013) 15.

[70] Ibid. The institutions to be protected by the guarantee were Allied Irish Bank (AIB), Anglo Irish Bank, Bank of Ireland, the Educational Business Society (EBS), Irish Life and Permanent TSB, and Irish Nationwide Building Society. Postbank Ireland Ltd were also included at a later date. See Department of Finance, 'List of

Central Bank (ECB) was informed only minutes before the public announcement.[71] The following day, the Credit Institutions (Financial Support) Bill 2008 was presented to the Oireachtas (the Irish bicameral legislature) for ratification. The Irish government argued that the guarantee was necessary to restore confidence in Irish banks that were suffering from a liquidity, as distinct from a solvency, crisis.[72] The guarantee, worth greater than twice the then GDP of Ireland (€190bn) was expedited through the Oireachtas and was signed into law on 17 October 2008.[73] It subsequently transpired that the financial institutions were insolvent and to date the state has injected an estimated €64.1 billion into Irish banks.[74]

The collapse in Ireland's banking sector also played a significant role in the deterioration of the Irish State's public finances, resulting in a so-called 'sovereign debt crisis'. Lack of investor confidence in Ireland's ability to continue servicing its national debt resulted in a spike in bond yield rates to levels considered unsustainable.[75] In November 2010, as a result of these unsustainable rates, Ireland entered into an 'Economic Adjustment Programme' with the EU and International Monetary Fund (IMF) providing loans to the Irish State at rates less than the market demanded rate with conditions pertaining to macro-economic adjustments to be undertaken by the Irish state attached.[76] This 'economic adjustment programme' again illustrates how the response to an economic crisis spills over into the everyday regulation of the state's financial affairs, with measures introduced by the Irish government to tackle its

---

Covered Institutions' (6 November 2008) available at: http://www.centralbank.ie/regulation/industry-sectors/credit-institutions/Documents/List%20of%20covered%20institutions.pdf (last accessed 21 May 2014).

[71]P Honohan, 'Policy Paper: Resolving Ireland's Banking Crisis' (2009) 40(2) Economic and Social Review 207, 221.

[72] Commission of Investigation into the Banking Sector in Ireland, 'Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland, (March 2011) ix. Available at: http://www.bankinginquiry.gov.ie/Documents/Misjuding%20Risk%20-%20Causes%20of%20the%20Systemic%20Banking%20Crisis%20in%20Ireland.pdf (last accessed 12 August 2014).

[73]M Becht, P Bolton and A Röell, 'Why Bank Governance is Different' (2011) 27(3) Oxford Review of Economic Policy 437, 442.

[74] 'Written answer from Minister for Finance Michael Noonan TD to Joanna Tuffy TD' 763(2) *Dáil Debs* Col.65 (26 April 2012); Gavan Reilly, 'After 4 Years and €64.1 Billion, Bank Guarantee is Finally Scrapped' *The Journal.ie* (29 March 2013) Available at: http://businessetc.thejournal.ie/ireland-bank-guarantee-officially-ends-850021-Mar2013/ (Accessed 10 August 2013). See text to n 94 below for further discussion on this issue.

[75]National Treasury Management Agency, *Annual Report and Accounts for the Year Ended 31 December 2010* (21 July 2011) available at: http://www.ntma.ie/download/publications/NTMA_Annual_Report_2010_English.pdf (accessed 15 December 2014) 8.

[76] See 'EU/IMF Programme of Financial Support for Ireland' (16 December 2010) Available at: (http://www.finance.gov.ie/documents/publications/reports/2011/euimfrevised.pdf) Accessed 12 August 2013).

deficit, like a property tax and household charges for water consumption clearly not meant to be temporary.

Following Ireland's entry into this economic adjustment programme, the Oireachtas passed the Credit Institutions (Stabilisation) Act 2010 (CISA 2010).[77] The Act gave the Minister for Finance the authority to issue various orders pertaining to the restructuring of financial institutions without the need of legislative assent, i.e. by executive decree.[78] The scope of these powers was decried by the opposition, with Pat Rabbitte TD (Teachta Dála; Member of Parliament) acerbically asking the Minister for Finance why he wanted to be a one-man legislature.[79] Rabbitte's colleague, then Labour Party spokesperson on finance Joan Burton TD argued that the powers contained in s.53 of the act allowed the Minister for Finance to rule by ministerial diktat.[80] Even government aligned TDs expressed concern at the scope of the legislation, with Fianna Fáil TD Ned O' Keeffe describing the CISA 2010 as a frightening piece of legislation, more dramatic than the Special Powers Act you'd only find in Cuba or North Korea'.[81] The CISA 2010, which consisted of 77 sections, passed through the Dáil (lower house) after just four hours of debate.[82] The then Minister for Finance Brian Lenihan justified the expedition of the enactment of the CISA 2010 and effective relegation of the legislature to rubber-stamping the will of the executive on a number of grounds: firstly, it would demonstrate to the international community Ireland's efforts at tackling its financial crisis;[83] secondly, the 'clear benefit of having the necessary powers available to the Minister for Finance at the earliest possible stage'; and finally, the 'imperative of empowering the Minister for Finance with the statutory authority to ensure all [our] institutions are in conformity with regulatory capital requirements set by the Central Bank of Ireland at the end of this year [2010]'.[84] S.69 (1) of the CISA 2010 contained a clause 'sunsetting' the Act on 31 December 2012. The temporary duration of the act reinforced its status as an exceptional emergency response. That conceded, s.69(2) stated that 'Notwithstanding the cessation in

[77] S Collins, 'President signs Bill on Banks into Law' *Irish Times* (Dublin, 22 December 2010).

[78] Part 2 (Direction orders) and Part 3 (Special Management) CISA 2010.

[79] P Rabbitte, *Dáil Debs* Vol 725 No2 (15 December 2010).

[80] J Burton, ibid.

[81] N O' Keefe, ibid.

[82] S Collins (n 77).

[83] B Lenihan, *Dáil Debs* (n 79).

[84] Lenihan, ibid. see also statement of Minister of State Martin Manseragh during the course of the debate, ibid.

effect of this Act, any order or requirement made under it continues to have effect according to its terms.' In December 2012, the Oireachtas passed a motion to extend the period of effectiveness of the CISA 2010 by deleting the time limit of 31 December 2012 and introducing a new sunset clause of 31 December 2014.[85] The CISA 2010 was not renewed beyond this; however, the system of banking regulation did not return to the status quo that existed prior to the enactment of the CISA 2010. Instead, the principal reason why the powers were not renewed was due to the enactment of European Bank Recovery and Resolution Directive (BRRD) which had a transposition date of 31 December 2014.[86]

The above illustrative examples of state-level and international responses to economic crises mirror closely the responses taken in times of the archetypal national security emergency.[87] States utilised exceptional measures that would not have been contemplated in ordinary circumstances, and did so in an expedient fashion. Despite these similarities between responses to economic crises and national security emergencies, however; the assumptions that underpin these responses – their necessity and the requirement of an expedient response – warrant a closer analysis and further stress-testing.

3. QUESTIONING DEFERENCE IN AN ECONOMIC CRISIS

Constructing a typology of emergency powers based on the phenomena that trigger them may be of limited use for critical academic inquiry. Such a typology could be counter-productive due to the evolving nature of crises and the additional problems or unrest that may erupt after the initial triggering event. A war, for example, could have economic consequences; and vice versa. However, it is also possible that the phenomenon that triggers the emergency response – whether *de facto* or *de jure* – warrants its own unique response. Responses to a national security crisis will be fundamentally different from those in a period of economic crisis; however, as discussed above, the procedures through which such measures are introduced – through executive supremacy – are strikingly similar. The use of political rhetoric to equate economic crises to war further corroborates the need to inquire into this equivalence that is drawn and whether the assumptions that underlie legislative deference to the executive in a national security emergency – the greater expertise of the executive and the necessity issue –

[85] 219 (11) *Sen Debs* (18 December 2012).

[86] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014.

[87] text to n 53 above.

also arise in a period of economic crisis. On a wider note, the capacity of economic states of emergency to be conceptualised as exceptional aberrations from the status quo capable of being quarantined from 'normalcy' also requires greater scrutiny.

The expertise of the executive on economic issues?

As stated previously, legislative and judicial deference to the executive on matters of national security is justified by the ability of the executive to decide in an expedient manner and the perceived expertise the executive has to make such decisions. Like in crises pertaining to national security, the judiciary is often considered an inappropriate branch to decide upon issues of economic policy due to the lack of expertise they have in making decisions pertaining to macro-economic policy and the legitimacy of such electorally salient issues dependent upon democratically responsible decision-makers.[88]

In contrast to courts, the evolution of the power of the UK Parliament is integrally linked to its role as scrutiniser of Crown expenditure. The celebrated Magna Carta, for example, precluded the Crown from collecting taxes or levies, save with the assent of his Royal Council. It was this Royal Council that eventually evolved into the English Parliament. In the aftermath of the 'Glorious Revolution' of 1688, Parliament restricted the power of their preferred King William III further, precluding the Crown from maintaining an army or raise taxes without Parliament's permission.[89] Today, in most liberal-democratic states, economic policy and the levying of taxes proceeds on interplay between the executive and legislative branches, with the judiciary having little say on such matters. The legislature therefore is seen as having the competence to have input on economic issues, exercising an important scrutinising and legitimising role. This raises the question of whether such a role ought to be exercised during an economic state of emergency.

Economic crises and information

To recap, in national security crises, classified information that the executive is privy to acts as a strong reason for the legislature to accede to the executive's assessment of what ought to be done. Economic crises are, however, substantially different. Economic crises are,

[88] *International Transport Rother GmbH* (n 42); *Sinnott v Minister for Education* [2001] 2 IR 545, 710 (Hardiman J). The role of the judiciary in protecting and vindicating socio-economic rights is beyond the scope of this article. The claims made in this paper therefore are exclusively reserved to the relationship between the executive and the legislature.

[89] R Masterman and C Murray, *Exploring Constitutional and Administrative Law* (Pearson, 2013) 240-241.

according to Posner and Vermeule, essentially crises of investor confidence. Dealing principally with financial crises, Posner and Vermeule define these as instances where 'people stop extending credit to other people because they fear that the loans will not be repaid'.[90] Such crises of confidence are triggered by information investors have about market conditions. The Efficient Market Hypothesis states that markets are essentially based upon information, with prices in 'strong information efficiency markets' based upon publically available information.[91] Individuals make choices based on the information that they have. It is for this reason that publicly listed companies are obliged to produce quarterly reports outlining their performances in order to allow shareholders and potential shareholders to make decisions regarding their future involvement with the company. Relatedly, individuals privy to commercially sensitive information are prohibited from acting according to this information. Such insider trading is seen as unfair to other investors who do not have access to such information as well as being potentially damaging to the company.

When a financial crisis occurs, it is indicated in the market data, e.g. a fall in stock prices, the drying up of credit etc. Again, such data is openly available. It is this information and the negative content or forecasts that it suggests that can trigger 'crises of confidence' and consequently economic crises. According to this concept of markets and financial crises, the idea that the executive is privy to sensitive information that members of the legislature do not have access to does not arise in an 'economic state of emergency' as the information about a crisis is readily available to the public at large and therefore the legislature too. It follows that the executive would not be privy to inside information in a market with 'strong information efficiency' and thus there is no reason to assume it has an expertise or advantage in assessing how the state ought to react.

Indeed, it is the reaction of the markets to this publicly available information that causes or at least perpetuates the crisis.[92] In the past, an ordinary person could get a stock market price each morning from the newspapers. This 'snap shot in time' changed, however, with

[90]E Posner and A Vermeule, 'Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008' (2009) 76 University of Chicago Law Review 1613 1618.

[91] See EF Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 (2) Journal of Finance 383. There are severe limitations to this theory with behavioural economists arguing that market prices are not wholly based upon the rational evaluation of information but that irrationality and emotion affects prices too. See BG Malkiel, 'The Efficient Market Hypothesis and its Critics' (2003) 17(1) Journal of Economic Perspectives 59.

[92] See text to n 90 above.

television, 24 hour news channels, and most recently the internet. Access to real-time stock information is now readily available permitting anybody with an interest to react based upon the most up to date information they have access to. The increased proliferation of this information and the more efficient manner in which individuals can react to it accelerates economic crises in modernity faster than before. This raises further questions regarding the increasing speed at which economic crises erupt today and the corresponding narrowing of the window of opportunity within which a decision-maker can react. Consequently, for the legislature to defer to the executive on the grounds that the executive has greater expertise than the legislature on economic issues is not grounded upon any real basis when discussing a market with strong information efficiency.

Weak information efficiency and economic crises

A scenario may arise where an impending crisis may be foreseen on the basis of commercially sensitive information not disclosed to the public. The government, being privy to such sensitive information after being briefed by individuals with inside information, seeks to act upon this to initiate an emergency response to temper or prevent an economic crisis. In other words, the market in this scenario is demonstrating weak information efficiency and the executive wishes to capitalise upon it.[93] In such instances the executive may be able to claim a certain degree of expertise over the legislature. An example of this may be seen from Ireland's decision to guarantee the vast majority of liabilities in its banking system in September 2008.

The decision to guarantee Irish banks by the then government was taken after a late night meeting with representatives from the impaired banks. Then Minister for Finance Brian Lenihan further stated that the Irish government's decision to issue such a guarantee was also informed by advice from the Governor of the Central Bank and the Financial Regulator.[94] The guarantee was then presented to the Oireachtas by the government as a solution to a liquidity problem in six Irish financial institutions.[95] However, as stated previously, it ultimately transpired that the financial institutions in question did in fact have a solvency problem.

[93] Fama, ibid.

[94] 662 (1) *Dáil Debs* (30 September 2008) para. 35.

[95] Per Minister for Finance, (n 94).

The plan to introduce the banking guarantee was initially supported by all parties in the Oireachtas with the exception of the Labour Party, which preferred nationalisation.[96] This cross-party support was achieved by the Irish Government successfully convincing the Oireachtas that a liquidity problem existed in Irish banks. The Government presented itself as being privy to sensitive information and possessing special expertise that the Oireachtas did not have access to; consequently, the Oireachtas deferred to this expertise.[97] Hindsight has shown, however, that this special information was incorrect; catastrophically so, in fact. It is not clear whether those lobbying the Government deliberately misled it regarding the extent of their problems or whether they genuinely believed they had only a liquidity problem. What is clear, however, is the special information which the Government and ultimately the Oireachtas relied upon in making their decision was incorrect. In contrast, commentators such as Morgan Kelly had previously, and up to the very night that the guarantee was announced, argued that Irish banks and the economy as a whole faced a potentially catastrophic solvency crisis.[98] Using publically available data, and basing his analysis on previous historical property market crashes, Kelly argued that the Irish property market was facing a similar crisis.[99] Ireland's late-night decision on the bank guarantee and the resultant cost of it stands as an example of how legislatures are placed in a difficult situation when the executive claims that it is privy to sensitive or non-public information regarding the economy. Even with such inside information, debate may still rage over the correct course of action to be taken and whether such information can be relied upon. Of course, the evidence pertaining to a national security emergency may also be contested; however, this argument should be directed towards enhanced legislative scrutiny in a national security emergency.

[96] 662(2) *Dáil Debs* (1 October 2008) para 447.

[97] See n 94 above.

[98] Morgan Kelly appeared on Irish current affairs show 'Prime Time' on 30 September 2008 arguing that Irish banks were facing an insolvency not a liquidity crisis. A video is available at http://www.youtube.com/watch?v=11CCxv2ueiQ (accessed 4 April 2014).

[99] M Kelly, 'How the corner stones of our economy could go into rapid freefall', *The Irish Times* (28 December 2006); M Kelly, "Banking on very shaky foundations", *The Irish Times*, (7 September 2007); Morgan Kelly. 'On the likely extent of Falls in Irish House Prices' UCD Centre for Economic Research Working Paper Series WP07/01 (February 2007). Philip Ingram, an analyst at Merrill Lynch, produced a report outlining serious problems with Ireland's banking system in March 2008; however, the report was subsequently redacted from public scrutiny. See M Lewis, 'When Irish Eyes are Crying' *Vanity Fair* (March 2011); L O'Carroll, 'Ireland bank collapse: the strange case of the disappearing Merrill Lynch research note' *The Guardian Online Edition* (2 February 2011) available at: http://www.theguardian.com/business/ireland-business-blog-with-lisa-ocarroll/2011/feb/02/ireland-merrill-lynch-research-note-irish-banks (accessed 4 April 2014).

Economic crises: beyond investor confidence

While Posner and Vermeule's definition of an economic crisis is based on 'investor confidence' and crises afflicting financial markets, the post-2008 economic crises facing Ireland, Greece, and Cyprus (amongst) others cannot be solely be accommodated under this definition. While Ireland's crisis may have started out as such, the concern was not merely that private institutions described as being of 'systemic importance' were in danger of being liquidated; it morphed into a sovereign debt crisis where the solvency of the state itself was threatened. The measures taken by the state to respond to this economic emergency were not limited to exceptional encroachments into the regulation of private companies, but instead required adjustments to the finances of the states themselves. The ordinary budgetary decisions of the state thus had to be altered to confront this sovereign debt crisis. These adjustments, for example, the measures taken by successive Irish Governments in line with memoranda of understanding agreed with the Troika do not correlate with this classic understanding of emergency responses as 'fire-fighting' in nature. Instead, both the emergency measures and the phenomenon itself seep into normalcy itself. New found fiscal discipline is not something to be cast aside once the crisis has abated but becomes the norm itself, as concretised in the provisions of the FCT. It therefore seeps into the ordinary role of the legislature: to act as a check on the executive's assessment of how state finances should be raised and allocated.

Necessity in economic crises: A constrained choice?

The above claims to executive supremacy in an economic crisis assume that expertise, or the executive's expertise, produces the *best* decision with regards to what action should be taken. Assessment of what is the 'best' decision, however, requires agreed parameters of what makes a 'good' decision in the first instance before such a discussion can take place. Such agreed parameters are noticeably absent in economic discourse, i.e. there is often a fundamental, irreconcilable disagreement as to what ought to be done to rectify an economic crisis. This gives rise to further problems for executive supremacy: that of the necessity of deference.

As stated previously, the necessity of exceptional emergency measures is fundamental to justify departing from normalcy, i.e. that there is no real choice but to take such measures.[100]

[100] text to n 17.

In national security crises, a convergence in political opinion often results and exceptional encroachments on human rights and other safeguards or democratic procedures may be acquiesced to with minimal resistance from political opponents, at least at the outset of the emergency.[101] While there may be some differences as to the degree to which such rights ought to be sacrificed in order to preserve security or the best approach to tackle the crisis; nevertheless, a certain modicum of restriction is generally agreed upon. In this instance, there is a general convergence in opinion on both the left and right that state security interests ought to be advanced at the expense of individual liberty.[102] This convergence of opinion is potentially symptomatic of a degree of objectivity of the 'necessity' of decision-making in a national security crisis; i.e. to use Agamben's terminology, that the ends to be achieved by the claim to necessity are agreed upon by both the left and the right. That stated, this consensus may also arise for more malevolent reasons such as the potential to gain electorally from a 'rally around the flag' effect that can be seen in national security crises.[103] It is because of this convergence of opinion amongst political actors that de Londras argues in favour of judicial defence of rights in a period of national security crisis, due to the legislature's reluctance to push back against the executive.[104]

A convergence of opinion on economic issues?

In contrast to national security emergencies, the political sphere is more divided on economic issues. Even during a so-called economic state of emergency, the left and right may have wholly irreconcilable, antithetical solutions to the crisis at hand; for example, whether to increase or decrease state spending. In the current crisis, this may be seen in the debate between Keynesian economists such as Paul Krugman arguing for increased state spending during a recession and the 'austerity' approach advocated by the EU, requiring Eurozone

[101] Ibid. to give another example, the US Patriot Act, was passed by the House of Representatives by a margin of 357 to 66, while it passed the Senate by a resounding 99 to 1. 'HR 3162 - USA Patriot Act of 2001 - Voting Record' available at: https://votesmart.org/bill/votes/8289#.U1psn1VdXAk (accessed, 1 April 2014).As time wears on and the emergency recedes, the legislature and the judiciary may push back against executive supremacy and defer less. See de Londras and Davis (n 7) with de Londras and Davis each respectively arguing that the judiciary or legislature push back against the executive over time. Bruce Ackerman bases his 'super-majoritarian legislative escalator' for the renewal of a state of emergency is a presidential system on the assumption that increasing numbers of the legislator will push back over time. See B Ackerman, 'The Emergency Constitution' (2004) 113 Yale Law Journal 1029.

[102] de Londras and Davis (n 7) ; Ackerman (n 101).

[103] J Simon, *Governing Through Crime* (Oxford University press 2007) Ch 9.

[104] Text to n 101.

member states to balance their budgets by contracting expenditure and increasing taxes.[105] Others may go so far as to completely reject the notion of even doing anything at all; instead preferring a policy of non-intervention, even in times of crisis. The convergence of opinion seen in national security crises as a result of the perceived necessity of such measures thus does not occur in an economic state of emergency. Indeed, debate still rages today as to whether the New Deal policies of Roosevelt ended or perpetuated the great depression.

This lack of agreement may be explained by what Lon Fuller terms the 'polycentric' nature of economic disputes.[106] Polycentric disputes 'comprise a large and complicated web of interdependent relationships, such that a change to one factor produces an incalculable series of changes to other factors.'[107] While the target of Fuller's article was the judiciary and the appropriate role of adjudication, the polycentric nature of a dispute should also be relevant when assessing whether the legislature ought to defer to the executive. Similarly, the lack of agreed consensus on economic issues led John Rawls to argue that civil disobedience should never be deployed against fiscal decisions.[108] Given the nature of the range of variables involved in polycentric disputes pertaining to economic choices, Rawls contended that it would be incredibly difficult to adduce a moral argument in favour of civil disobedience against a fiscal decision that would trump the moral validity of the rule of law in a liberal democratic state.

To say therefore that an economic crisis constrains choice to an extent that such an option was 'necessary', ought to be viewed with scepticism as a result of the polycentric nature of the disputes involved and the resultant lack of consensus that arises with regards to what ought to be done. Instead, the subjective nature of necessity is particularly heightened with regards to economic crises. Such necessity, to use Agamben's language, is 'relative to the aim that one wants to achieve' and therefore reflective of the ideology of the decision-maker. This may be particularly divergent from others' to a degree not seen in national security

[105] P Krugman, 'How the Case for Austerity Crumbled' *The New York Review of Books* (6 June 2013). The EU's desire to see Eurozone member states balance their budgets was codified in the FCT. See text to n 64.

[106] See L Fuller, 'The Forms and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353.

[107] JA King, 'The Pervasiveness of Polycentricity' [2008] PL 101, 101-102; ibid 395.

[108] 'The choice of these [economic policies] depends upon theoretical and speculative beliefs as well as upon a wealth of concrete information, and all of this mixed with judgment and plain hunch, not to mention in actual cases prejudice and self-interest.' J Rawls, 'The Justification of Civil Disobedience' in WA Edmundson (ed), *The Duty to Obey the Law: Selected Philosophical Readings* (Rowman & Littlefield Publishers, 1999) 49, 57.

emergencies. A claim to necessity for a certain course of economic action is instead a claim that an individual's subjective assessment of what ought to be done should trump the normative value of the democratic processes which the vast majority of participants in the political system would attribute a degree of value to. A claim to necessity in economic crises cloaks the executive's subjective ideology in the objective language of necessity. Thus Paul O'Connell argues that most successful ruse of neo-liberal dominance in both global and domestic affairs is the definition of economic policy as primarily a matter of neutral, technical expertise.[109] These claims in a parliamentary democracy manifest themselves through the use of strict whipping systems or guillotining debate time. This undermines the procedural legitimacy of the measures taken, an aspect of fundamental importance given the polycentric nature of the disputes in question.

Entrenching subjective perspectives into normalcy

The broad spectrum of opinions on economic policy means that at the very least, the most legitimate answer as to what should be done should be left to bodies with the democratic legitimacy to do so.[110] Indeed, the whole purpose of the structure of legislatures is that they facilitate debate on these contested issues. Waldron, for example, describes disagreement on matters of principle to be 'not the exception but the rule in politics.'[111] Ideally, legislatures are designed to enable debate by those of various ideological perspectives, to glean a cumulative understanding of the issues involved or to compare and contrast alternative perspectives. Of course, it is often the case – particularly so in parliamentary democracies that operate a party whipping system – that after debate, a cumulative understanding or compromise approach is not possible. Furthermore, the irrationality of popular debate that Scheuerman argues is endemic of parliaments today acts as an additional critique of this ideal understanding of how parliaments operate.[112] Nevertheless, adequate time to debate is, it is submitted, necessary in order to bestow the requisite procedural legitimacy on the measures enacted, even if that measure ultimately stems from the executive's intention.[113] Legislatures

[109] P O'Connell, 'Let them Eat Cake: Socio-Economic Rights in an Age of Austerity' in A Nolan, R O'Connell and C Harvey (eds), *Human Rights and Public Finance* (Hart, 2013) 59, 69.

[110] See generally, L Fuller, 'The Forms and Limits of Adjudication' (1978) 92(2) Harvard Law Review 353.

[111] J Waldron, *Law and Disagreement* (OUP, 1999) 15.

[112] WE Scheuerman, *Liberal Democracy and the Social Acceleration of Time* (Johns Hopkins University Press, 2004) 39.

therefore aim at reaching a legitimate settlement in areas of contestation as distinct from a negotiated agreement. Every legislator or member of the public may not be convinced to change their minds with regard to the correct course of action; however, the procedural principles underpinning the debate should suffice to legitimise the decision taken.

As stated previously, however, the 20th Century has been characterised by what Moravcsik describes as the 'decline of parliaments'.[114] While Fuller's 'polycentric disputes' concept can be used to argue for a legitimising input from the legislature, it also potentially contains an implicit theory of the decline of parliament. Some polycentric disputes, Fuller notes, are potentially resolved through managerial discretion as distinct from majority voting.[115] Even where disagreement as to what ought to be done is resolved through a voting body such as a parliament, the options must be simplified considerably first before being put to a vote. An accommodation of interests must be reached and parliamentary methods, such as a 'political deal' struck between party leaders utilised in order to construct this simplified question that can then be voted upon. Recognition of the potential of managerial discretion to resolve polycentric disputes thus paves the way for the rise of the executive or the administrative state where experts take decisions in areas where the legislature has delegated competence to.[116] The legislature is thus reduced to rubber-stamping decisions that have already been made,

This rubber-stamping role and the decline of parliaments has arguably been exacerbated by the increased globalised nature of governance. International affairs are, generally speaking, within the competence of the executive and the increased regulation from the globalised sphere is negotiated by the executive and vested interests in a particular area. Increased globalisation has thus also led to the rise of unelected decision-makers based on their expertise. In particular, the EU has been subject to intense criticism regarding the democratic deficit at its heart. Follesdal and Hix argue that European integration has meant an increase in

[113] Thus Waldron argues that the basic argument for the legitimacy of an enacted statute is that all the alternatives had the opportunity to put their case and failed to win majority support, thus presupposing the possibility of individuals involved in the debate changing their minds. Waldron (n 113) 27.

[114] Moravcsik (n 43).

[115] Fuller (n 110) 399-402

[116] ibid.

executive power and a decrease in national parliamentary control.[117] In particular, governments can effectively ignore their national parliaments when making decisions in Brussels.[118] Moravcsik, writing in 2006, defended this democratic deficit on a number of grounds, arguing, in particular, that there were sufficient degrees of democratic input into the EU to render it legitimate.[119] Furthermore, he cautioned against measures to further enhance democratic input on the grounds that the work of EU organisations is generally of low 'electoral salience' for voters.[120] However, the Eurozone crisis threating the future of the Euro and the measures the EU sought to impose on member states does question the continued relevance of Moravcsik's point on this issue. The policy decisions taken at EU level to confront this economic crisis, the correlating budgetary measures taken by many member states, and the resultant outbreak of public protests and volatility of electorates show that these policies are certainly not of 'low electoral salience'.

Executive dominance in financial crises is therefore linked to its institutional competence to conduct international affairs. An increasingly globalised and inter-connected world is further facilitating this 'decline of parliament.' This decline cannot be limited to periods of emergency. It is instead a permanent feature of modernity that is recalibrating the relationship between the executive and the legislature in normalcy too. Even when measures to increase national parliamentary oversight of the EU are introduced, such as in the Lisbon treaty, Chiti and Teixeira argue that the response of European states to the Eurocrisis has seen a jettisoning of EU institutions and EU channels of regulation and negotiation. The 'Union method' of solving the crisis was seen as requiring too much ceding of sovereignty to the EU, and so responses to the crisis were increasingly intergovernmental.[121] This international component of financial regulation thus adds a further cloaking layer to the subjective assessment of what ought to be done in an economic crisis.

Expedient decision-making in a period of economic crisis

[117] A Follesdal and S Hix, 'Why there is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44(3) JCMS 533, 534.

[118] Ibid 535.

[119] Moravcsik (n 43).

[120] Ibid 615.

[121] E Chiti and PG Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 CMLR 683, 690-692.

Integral to Waldron's concept of the dignity of legislatures is that there is ample time for debate to legitimise the decision.[122] As stated previously, however, a fundamental element of the emergency paradigm is the concept of an expedient response. This requirement for expedience results in the legislature deferring to the executive by expediting emergency legislation or resolutions. However, while it is conceded that expediency is an integral element of the emergency paradigm, when dealing with economic decision-making, this claim for expediency is not exceptional.

Capitalism's traditionally preferred mode of governance was liberal democracy, whether it is presidential or parliamentary in its design. As liberalism is essentially about individual freedom and capitalism about freedom to engage in markets, this inter-relation between liberalism and capitalism appears as *prima facie* synergistic. Indeed, liberalism has been termed 'bourgeois' due to its content and its origin; being primarily advocated by the rising merchant classes in the late seventeenth and early eighteenth centuries.[123] Capitalism's and indeed liberalism's alliance with democracy is, however, not as clear-cut. Originally, liberalism aligned with democracy as a theory of legitimacy in order for the rising merchant classes to wrest power from the then hegemonic noble classes.[124] Liberalism's relationship with democracy is, however, not guaranteed, with fundamental contradictions forcefully argued by scholars such as Carl Schmitt. Liberalism, according to Schmitt, is private ideology dealing with the relation between individuals and their property.[125] However, in order to properly protect these ideals liberalism must make a 'pact' with parliamentary democracy and enter the public sphere.[126] Once it enters the public sphere, liberalism privatises it, making it vulnerable to the interests of all other private interest groups. Liberalism's proposed claim to 'neutrality' between these differing private factions leaves it incapable of defending itself against those who use this privatisation of the public sphere as a sledgehammer against liberalism itself.[127] It is therefore possible to have illiberal democracies or at least illiberal regimes that claim democratic legitimacy. Indeed, capitalism itself can now be seen as

[122] J Waldron, 'Principles of Legislation' in Richard W. Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (CUP 2006) 15,27.

[123] B Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 43.

[124] ibid

[125] See D Dyzenhaus, '"Now the Machine Runs itself": Carl Schmitt on Hobbes and Kelsen' (1994) 16 Cardozo Law Review 1.

[126] Dyzenhaus (n 52) 56-58.

[127] Dyzenhaus (n 125).

divorced from liberalism. China's embrace of capitalism and economic growth has not seen a corresponding growth in personal freedom of its citizens or democratisation of its institutions.

A further integral element of a liberal democracy – the rule of law – is also dependent upon a slow rate of change. While avoiding a universally accepted definition, the rule of law in generally considered to require that laws be clear and prescribed beforehand so that individuals know what the law is and can conduct their affairs accordingly.[128] Legislation is therefore forward looking: it prescribes what ought to be done, not what should have been done. Legal norms must be prescribed first in order for them to be effective: one cannot discern what one ought to do if such prescriptions are not already in place. Correspondingly, the legislature is 'past orientated' as its prescriptions come from the past to effect the present and the future.[129]

The legal system of a liberal democratic state therefore has two factors that necessitate ample time for the creation of new norms: time to debate and review the laws that are to be created to ensure their *content* and prescriptions are meritorious; and time between their inception and application to ensure that such *application is legitimate* from the perspective of the rule of law. As stated previously, however, emergencies put temporal pressure on decision-making by constraining dramatically the period in which the state has time to decide what ought to be done. For this reason the legislature defers to the executive's assessment of the situation about what should be done to confront the crisis at hand.

While Albert Einstein famously demonstrated that time is relative, the changing nature of the perception of time as stated by a number of social theorists can be felt at a much more tangible level in society. According to 'time compression theory' our perception of time, rather than being fixed, is necessarily dependent upon the epoch and society we live in.[130] The faster the pace of life within this society, the faster our perception of time. Time can therefore be seen as analogous to money: its value is predicated upon what can be achieved with a fixed quantum. However, whereas a pound or a dollar today would buy noticeably less

[128] J Raz, *The Authority of Law* (2nd ed OUP, 2009) 214; P Craig, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework' [1997] PL 467, 469.

[129] Scheuerman (n 4) 1887.

[130] Scheuerman (n 46) 355; J Agnew, 'The New Global Economy: Time-Space Compression, Geopolitics, and Global Uneven Development' (2001) 7(2) Journal of World-Systems Research 133.

than a pound or dollar in 1900, the opposite is true for what can be achieved in an hour in 2014 than in an hour in 1900. Advances in technology have increased economic productivity and made commuting long distances faster. This 'time deflation' has therefore, from an economic perspective, made an hour today much more valuable than an hour in 1900. Relatedly, with the help of technology, greater distances can now be traversed in a much shorter period of time. This has led therefore to the compression of space as much as to a compression of time. A 20 mile journey by foot or by horse seems much shorter when it can be taken by rail or by car. Conception of distance is therefore equally dependent upon the epoch and society we live in.[131]

Compression theory in economic affairs presents a challenge to liberal democratic states. As time is needed for the wheels of the liberal-democratic state to churn, time deflation heightens the consequences of a delayed response and thus increases the perceived requirement for an expedient choice of action. The compression of space also has an added effect of increasing the impact zone of a disaster. While the immediate effects of a natural disaster such as an earthquake may still be felt by the same radius from the epicentre as they always have been, the political reverberations of such an earthquake are felt further away by virtue of the response it predicates. Knowledge and information of the earthquake can spread all around the globe and a response effort can be co-ordinated beyond local parameters. Space compression can also exacerbate the perception and impact of a crisis beyond its initial 'ground zero'. The spread of disease as a result of international travel, for example, is a challenge the World Health Organisation faces as evidenced by the proliferation of the H1N1 influenza virus that spread throughout the globe.[132] Military and other violent crises are also exacerbated by time and space compression. The proliferation of long range weapons, for example, has increased the geographical parameters of areas affected by such weapons. Relatedly, the speed at which such devastating weapons can be deployed is also a cause for concern. States can now launch military missions from thousands of miles away with the threat of the deployment of such weapons ever present.[133]

[131] Ibid.

[132] See R McKie, 'Swine Flu H1N1: Evolution of a Virus' *The Observer* (26 April 2009).

[133] In April 1964, speaking on the justification of the continued existence of a state of emergency dating from World War II in Ireland, then Taoiseach Seán Lemass stated that: In view of the international situation and the speed of delivery and the destructive power of the weapons of war now available, the Government would consider it unwise to move the terminating resolution and so deprive themselves – or any future Government which foresaw an imminent war – of the protection of Article 28.3.3° [Ireland's constitutional emergency

Of the various different types of phenomena that can trigger an emergency response in a state, crises that are economic in nature are those that are most affected by the compression of time and space. The increased speed of the capitalist market, coupled with the compression of space presents a fundamental challenge to the liberal democratic state that assumes ample time is available for it to make laws and apply them in accordance with rule of law principles and the separation of powers. However, such time and space compression is not experienced only during an economic crisis. Rather, it is symptomatic of the modern capitalist state. It is a permanent not an exceptional challenge that the state faces. Consequently, the idea that ordinary democratic procedures should be departed from would also not be temporary but permanent. It presents a permanent challenge to liberal democracy and the need for time that produces substantively better, but more importantly, morally, legally, and politically legitimate norms. Deferring to, or broad delegation of power to the executive therefore becomes not an exceptional approach but one that would be permanently required for the management of the economy. The examples from Ireland delineated above, and of the finding of the Church-Matthias Committee pertaining to the prolific use of emergency powers by the US president in economic affairs suggests that this is a change that is already occurring and has progressed significantly.[134] Permanent changes introduced into the structure of the Eurozone by the FCT further indicates that the response to the 2008 economic crisis viewed 'normalcy' as existed prior to the economic emergency as part of the problem. Normalcy if it is to be restored will therefore not look like the status quo that existed before the crisis as this is represented as part of the problem that caused the economic state of emergency in the first instance. Instead, the Eurozone crisis, and indeed economic crises tend to usher in 'new normalcies' where the mistakes of the past cannot be repeated. Permanent changes as a result of an economic state of emergency are therefore replete.

4. CONCLUSION

In general, the emergency paradigm has becoming an increasingly contested concept in the literature, particularly due to the assumption the paradigm makes in the ability to separate normalcy from emergency. Economic crises and the measures taken on foot of such crises have a particular tendency to seep into normalcy. Economic states of emergency therefore are

powers provision]. See 209 *Dáil Debates* Cols 2-4 (21 April 1964; See also A Greene, 'The Historical Evolution of Article 28.3.3° of the Irish Constitution' (2012) 47(1) Irish Jurist 117, 139.

[134] Text to n 56 above.

not reactive and defensive but instead seem to be transformative, viewing the status quo that existed prior to the crisis as part of the problem that needs to be tackled. The classic justification of emergency measures – that they are self-defeating and seek to restore normalcy – is thus very weak when applied to economic crises.

The strongest correlation between economic crises and the emergency paradigm occurs in the area of restricted time. With time and space compression amplified in the area of economic affairs of capitalist states, pressure is ratcheted up and the window of opportunity within which a decision-maker can act becomes narrower. Governments may therefore feel they must make a swift decision and so ought to have the capacity to do so. The idea that it is 'necessary' for them to take action must, however, be recognised as a subjective claim and the legislature should be loath to defer to the executive's assessment.

In light of this, do economic crises justify deferring to the government? Three factors militate against such deference: the 'weak necessity' argument, the lack of superior expertise of the executive in matters regarding economic regulation, and the inability to quarantine such a side-lining of the legislature to exceptional situations as it is instead symptomatic of the decline of parliaments in modernity. In contrast, one factor weighs in favour of such deference: the time and space compression experienced by the modern capitalist state that the ordinary trappings of law and decision-making in a liberal democratic society can potentially not cope with. Do arguments against deference trump those in favour of it, or vice versa? Of course, a lot will depend upon each individual crisis at hand as consensus on what course of action should be taken fluctuates. However, arguments regarding deference to the government in periods of economic emergency are considerably weaker than those in periods of national security crises or responding to natural disasters. Consequently, notwithstanding this perception of urgency, deference to the executive during an economic crisis should be treated with scepticism.