LEGITIMATE AND ILLEGITIMATE POLITICAL SELF-ENTRENCHMENT AND ITS IMPACT ON POLITICAL EQUALITY

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ABSTRACT

Self-serving politicians and self-entrenchment of the political establishment is a diachronic problem tantalizing liberal democracies. Incumbent political actors around the world constantly purport to entrench not only their presence in the political arena, but also their power and as a result, barriers to entry to new political actors are set, the chain of the democratic choice is disrupted and equality of opportunity is distorted.

This article focuses on the available means in the constitutional system in order to safeguard a level playing field in the political arena. To this end, this article has three scientific objectives. First, it elaborates on the significance of equality of opportunities in the political system. Second, it identifies how political self-entrenchment creates an uneven playing field. Third, it focuses on the remedies that exist in the constitutional system and examines both legal and quasi legal mechanisms.

With an analysis on the current means that are available in the constitutional system, the judicial review, and the alternative political processes based on independent bodies and quasi-judicial mechanisms, this article concludes that self-entrenchment and self-serving politicians are mainly left to be resolved by political means, the so called self-corrective promise of politics.

INTRODUCTION

In Country A, since the foundation of the Republic and the establishment of a new Constitution, the ruling party has won every election. Currently it holds 180 seats in Parliament out of 300. During the last elections, members from five opposition parties run for office. But due to harsh laws on libel and the prosecutions their members faced in the past, some seats were left uncontested, and the ruling party secured an easy victory.

In Country B, members of the legislative body receive allowances to cover cost of their travel, lodging etc. Since there is no control on how such allowances are spent, it is a widespread practice for incumbents to use such allowances in order to finance their political campaign in the forthcoming elections.

In Country C, just before the elections, a bipartisan agreement between the two major political parties was achieved to redraft the boundaries of the electoral districts. The rest of the parties claim that the redrafting of the electoral districts is a manipulation so as to favour the two major parties.

Finally, in Country D, once the political party won the elections and secured the majority in the house, it changed the directors in the Public Broadcasting Service, positioning loyal party members within it. Moreover, it amended the electoral law by amending the boundaries of the electoral districts. The opposition claims that the redrafting of the district favours the ruling party

What seems to be common in the aforementioned paradigms, which are not fictional, is the fact that political actors, such as ruling political parties and incumbents with legitimate or illegitimate ways take advantage of their power in order to politically entrench their position.[1] Inspired by the

[1] We define political self-entrenchment, as the use of legitimate or illegitimate tools by which political actors insulate themselves from political change. Political self- entrenchment is a subsection of political entrenchment, which is a broader concept, and it is about the practice by which political actors insulate their policies and themselves from political change. For more details on political entrenchment see Daryl Levinson, and Benjamin Sachs, 'Political Entrenchment and Public Law' by (2015) 125 The Yale Law Journal 400. In addition, political entrenchment shall not be confused with the entrenchment of constitutional norms such as human rights. For more details on the latter see Eric Posner and Adrian Vermeule, 'Legislative Entrenchment: A Reappraisal' (2002) 111 Yale Law Journal 1665. For more details on political self- entrenchment see Michael Klarman, 'Majoritarian Judicial Review: The Entrenchment Problem' (1997) 85 Georgetown Law Journal 491; Richard H Pildes, 'The Constitutionalization of Democratic Politics' (2004) 118 Harvard

pragmatism and simplicity of Clausewitz and paraphrasing, his words on the object of the war, it seems that the political object of governance can be of two kinds; either to totally destroy the adversary, to limit their influence in the political arena, or else to prescribe the terms to the political agenda.[2] In line with the above, political self-entrenchment is a tool of paramount importance as barriers to entry are set, new political actors cannot compete with incumbents[3] and as a result, re-election is reinforced.[4]

Indeed, political actors around the world constantly purport to entrench not only their presence in the political arena, but also, most importantly, their power.[5] This has a severe impact on the quality of democracy; the chain of the democratic choice is disrupted, as the formation of alternatives is hindered.[6]

This is what Pildes has identified as 'the structural cancer of political self-entrenchment',[7] while Buchanan referred to the so called 'political income', pecuniary or non-pecuniary, as a part of the total rewards of office.[8] Nonetheless, political self-entrenchment is not a new problem. That power rots political actors was remarked by Alexis de Tocqueville who famously said that '[i]ntrigue and corruption are the natural defects of elective government'.[9] Moreover, Madison during the drafting of the US Constitution remarked upon the tendency of the legislative branch to render into a self-serving clique. Specifically, Madison acknowledged, and hence proposed, that

> *'[t]he remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified'*.[10]

Nowadays, what exacerbates this old rooted problem is the fact that we are living in the era of information; people see and feel that the political system is rigged and self-serving. Such realization impacts on the way people feel about democracy. And indeed, although democracy has proven to be a very successful form of governance in the 20th century, at the turn of the 21st century it appears to be traumatized.

Law Review 28; Daryl Levinson, and Benjamin Sachs, 'Political Entrenchment and Public Law' by (2015) 125 The Yale Law Journal 400; Robert Dahl, *On political Equality* (Yale University Press 2005).

[2] Clausewitz had written on war that '[t]he political object of war can be of two kinds; either to totally destroy the adversary, to eliminate his existence as a State, or else to prescribe peace terms to him.' See Michael Howard, Clausewitz; A very short Introduction (OUP 2002) 17.

[3] The scope of the article is the distortion of the competition in liberal democracies. About the elimination of competition in illiberal democracies see Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 *UCLA Law Review* 79, 136. In addition, this article does not examine the case of electoral abuses from incumbents that aim to manipulate the electoral results. For more details about electoral integrity and electoral frauds, see Joshua A. Tucker, Enough! Electoral Fraud, 'Collective Action Problems, and Post-Communist Colored Revolutions' (2007) 5 Perspectives on Politics 535; S Chernykh, 'When Do Political Parties Protest Election Results?' (2014) 47 Comparative Political Studies 1359.

[4] Mayhew has identified that re-election is the main concern of Congressmen in the US. See David Mayhew, *Congress*: *The Electoral Connection* (Yale University Press 2004). However, this article does not argue that the motive of re-election, as such is problematic. But, it argues for instance that re-election via the legitimate and illegitimate self-entrenchment limits and distorts the democratic choices are incompatible with the essence of democracy.

[5] Public choice theory has thoroughly examined the relationship between elected representatives and voters and it has shown the tendency of representatives to entrench their power see James M Buchanan, 'Politics without Romance; A Sketch of Positive Public Choice Theory and its Normative Implications' in James M Buchanan and Robert D Tollison, ed *The Theory of Public Choice – II* (Michigan University Press 2009) 13 ff.

[6] Schedler identifies 7 conditions which are necessary for an effective democratic choice during elections: empowerment, free supply, free demand, inclusion, insulation, integrity and irreversibility. See Andreas Schedler, 'Elections Without Democracy: The Menu of Manipulation' (2002) 13 Journal of Democracy 35, 39.

[7] Richard H Pildes, 'The Constitutionalization of Democratic Politics' (2004) 118 Harvard Law Review 28, 44.

[8] James M. Buchanan, *The Limits of Liberty; Between Anarchy and Leviathan* (Liberty Fund 2000) 198.

[9] Alexis de Tocqueville, *Democracy in America* (Henry Reeve tr, Penn State Electronic Classics Series Publication) 156.

[10] James Madison, 'Federalist No 51', in Clinton Rossiter, ed *The Federalist Papers* (New American Library, 1961) 319.

Specifically a number of democracies have adopted illiberal reforms creating a new model of governance, between democracy and authoritarianism; the so called illiberal democracy.[11] Political actors amend constitutional rules in order to enhance their self-entrenchment in power. For example, according to Freedom House's data, 'leaders in 34 countries have tried to revise term limits—and have been successful 31 times—since the 13-year global decline began. Attacks on term limits have been especially prominent in Africa, Latin America, and the former Soviet Union.'[12]

Actually, people express concerns about democracy among the most established democracies, and the confidence in democratic institutions has been shaken. For instance, a poll published by *The Washington Post* just before the presidential election of 2016 revealed that 40 per cent of Americans had 'lost faith in democracy'.[13] Furthermore, according to the Gallup levels of confidence, which runs for 40 years, the US Congress receives very low appreciation rates.[14] Likewise, in Europe, according to Eurobarometer, among EU citizens the trust over the National Governments and National Parliaments is around 27 per cent and 28 per cent respectively.[15]

The question is first how constitutional law addresses political self-entrenchment, and whether constitutional law is well equipped with efficient tools to protect the fair playing field in the political process. Accordingly, this article focuses on the constitutional implications of political self-entrenchment and intends to examine this issue via the lenses of political equality, a core right and bedrock in every modern democracy. By examining case law it argues that courts are not sufficiently equipped to face cases of political self-entrenchment and by analysing the alternative way based on political means such as independent bodies and the quasi- judicial process of impeachment it argues that such processes have inherent limits.[16]

It is said that the realization of the problem is half of the solution. Accordingly, the ultimate goal of this article is to stress the constitutional value of equality of opportunities in democracies -for both constitution drafters and judicial review- with the aim of demonstrating that a coherent framework with extra constitutional configurations and safeguards is necessary to enhance the accessibility on the condition of a level playing field in the democratic system.

The present article has the following structure: It identifies first the interaction between self-entrenchment and political equality, and second it analyses how political actors and incumbents create barriers to entry in the political system. In particular, it explores political self-entrenchment by categorizing practices between legitimate and illegitimate self-entrenchment. This leads to the third topic, which is how the constitutional edifice treats such cases. For this purpose, it examines the role of the courts as guardians to democracy and political equality, but also it examines the role of alternative political means namely of independent bodies and of the impeachment process.

I. Self-entrenchment and Political Equality

While political self-entrenchment is not addressed directly by modern constitutions, a number of constitutional provisions explicitly protect equality of opportunities, and the accessibility in democracies on condition of a level playing field. The principle of political equality in the right to stand for election (passive suffrage) is embedded in the constitutional provision on equality.[17]

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[11] See Fareed Zakaria, 'The rise of illiberal democracy' (1997) 76 Foreign Affairs 22.

[12] Freedom House Report 2019, Democracy in Retreat https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat. See also Tom Ginsburg, James Melton, and Zachary Elkins, 'On the Evasion of Executive Term Limits' (2011) 52 William & Mary Law Review 1807.

[13] see Washington Post, Americans are losing faith in democracy — and in each other 14 October 2016 https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy--and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4_story.html?utm_term=.6508ef0e81d5

[14] see https://news.gallup.com/poll/1597/confidence-institutions.aspx.

[15] See Standard Eurobarometer 85 Spring 2016 [14].

[16] Ely has first remarked and suggested two cures for the pathologies in the political process: the former is political via the mechanism of re-election and the latter is purely legal via the mechanism of judicial review. John Hart Ely, *Democracy and Distrust; A Theory of Judicial Review* (Harvard University Press 1980) 78.

[17] see for instance article 3 of the Basic Law of Germany, or at a pan European level see Article 3 of Protocol No. 1 to the European Convention of Human Rights, likewise in the US the Equal Protection Clause of the 14th Amendment, see also Colegrove v. Green, 328 U.S. 549 (1946).

Since the early manuscripts of John Locke on equality of rights,[18] the orthodoxy among academics is that political equality is the cornerstone of the modern democracy.[19] Dworkin defined democracy as 'government subject to conditions […] of equal status for all citizens',[20] and remarked that 'two political values that have been important in Western political theory. The first principle seems an abstract invocation of the ideal of equality, and the second of liberty.'[21] Rawls points out that 'The basic principle of the law of nations is a principle of equality. Independent peoples organized as states have certain fundamental equal rights. This principle is analogous to the equal rights of citizens in a constitutional regime.'[22] Moreover, Dahl emphasizes that political equality is a 'fundamental premise of democracy'[23] and Christiano argues that democracy and basic liberal rights altogether are founded based on the principle of public equality.[24] Furthermore, political equality is a shared value for both political[25] and legal constitutionalism,[26] regardless their different approach on the role of the law and the judges in the legal order and the political system.

Obviously, political self-entrenchment poses imperative questions about the state of equality within the modern democracy. In particular, it questions the equality of opportunities to run for office in the political system,[27] as political self-entrenchment results in an uneven playing field with barriers to entry or in a political arena with distorted competition where incumbents have a substantial advantage. The significance of the equality of political opportunity during elections, was highlighted by the Venice Commission stressing that 'equality of opportunity should be ensured between parties and candidates and should prompt the state to be impartial towards them and to apply the same law uniformly to all'.[28]

In theory, the political ideal of equality of opportunity attracted scholars in legal and political philosophy.[29] However, scholars approach the concept of equality of opportunity from different point of view and thus different conception have emerged[30] such as the distinction between formal and substantive equality of opportunity. According to the formal dimension of equality of opportunities, all positions and posts are open and they are allocated based on merit. Westen states that 'equal opportunity exists wherever two or more people fall within a class of agents who are all free from the same obstacle to attain the same goal'.[31]

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[18] John Locke, *Second Treatise of Government* (CB MacPherson, ed, Hackett, 1980, first published 1690)

[19] Exception to this orthodoxy is the seminal work of Peter Westen arguing that equality 'is an idea that should be banished from moral and legal discourse as an explanatory norm'. In particular Westen founds his argument on two propositions: 'that statements of equality logically entail (and necessarily collapse into) simpler statements of rights; and that the additional step of transforming simple statements of rights into statements of equality not only involves unnecessary work but also engenders profound conceptual confusion.' For more details see Peter Westen, 'The Empty idea of Equality' (1982) 95 Harvard Law Review 537, 542.

[20] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 2005) 17

[21] Ronald Dworkin, Is Democracy Possible Here? (Pinceton University Press 2006) 10.

[22] John Rawls, *A Theory of Justice* (Harvard University Press 1999) 332.

[23] Robert Dahl, *On political Equality* (Yale University Press 2005);

[24] Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (OUP 2008).

[25] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007)

[26] John Hart Ely, *Democracy and Distrust; A Theory of Judicial Review* (Harvard University Press 1980).

[27] Equality of opportunities, rights and obligations compose the concept of equality before the law. For more details see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 227

[28] see Council of Europe's European Commission for Democracy through Law (the Venice Commission) Code of Good Practice in Electoral Matters Adopted by the Venice Commission at its 51st plenary session (5-6 July 2002) (CDL-AD(2002)023) at [2.3] .

[29] Ronald Dworkin, 'What Is Equality? II. Equality of Resources' (1981) 10 Philosophy and Public Affairs 283; Elizabeth Anderson, 'What Is the Point of Equality?' (1999) 109 Ethics 287; Bernard Williams, 'The Idea of Equality', in Laslett Peter and Runciman WG (eds.), *Philosophy, Politics, and Society, Series II*, (Basil Blackwell 1962); Andrew Mason, *Levelling the Playing Field: The Idea of Equal Opportunity and its Place in Egalitarian Thought* (OUP 2006); Michel Rosenfeld, 'Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal' (1986) 74 California Law Review 1687; Peter Westen, 'The Concept of Equal Opportunity' (1985) 95 Ethics 837; James Harvie Wilkinson III, 'The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality' (1975) 61 Virginia Law Review 945; Samuel Scheffler, 'What is Egalitarianism?' (2003) 31 Philosophy and Public Affairs 5.

[30] see Richard Arneson, 'Equality of Opportunity' The Stanford Encyclopedia of Philosophy (Summer 2015 Edition), Edward N Zalta (ed.), (https://plato.stanford.edu/archives/sum2015/entries/equal-opportunity/)

[31] see Peter Westen, 'The Concept of Equal Opportunity' (1985) 95 Ethics 837, 850.

On the other hand, the formal version of equality of opportunity was criticized by a number of scholars. Specifically they argue that the formal dimension perpetuates inequality unless equality of opportunity includes fair access to the qualifications required for success.[32] Without underestimating the importance of substantive equality of opportunity, political self-entrenchment has an impact on the formal equality of opportunities. To exemplify this, it is well known that 'election law by its very nature excites the basic instinct for self-perpetuation and a desire often not to experiment, but to preserve the status quo which led to power'.[33] So when the political actors manipulate the electoral laws for self-serving purposes, equality of opportunity in the political system is distorted, an uneven playing field is formed and re-election and self-entrenchment is reinforced.

II. How political actors distort Equality of Opportunities?

Political actors in power are entrusted with the state resources and policies that have direct or indirect financial impacts. Moreover, in order to accomplish their duty, they are even supported with funds and allowances. Obviously, their role is to administer state resources and policies with the aim of promoting the public good and public interest, while the support they receive in the form of funds and allowances is expected to be used as a means to achieve such goals. This is an issue that has already attracted the attention of several international organizations and institutions.[34]

On the top of that a plethora of cases are recorded with incumbents who abused their power and in an illegitimate way misused and maladministered public resources to entrench their position in the political system. Such cases are subject to criminal laws i.e. general bribery offences and embezzlement and subject to ordinary or extraordinary procedures such as impeachment processes or special prosecutions.

That said, the most sophisticated way is the legitimate misuse of public resources for personal gain. In principle, it is broadly accepted that the 'government should abstain from influencing elections'.[35] Obviously, the decision making process is influenced by the personal views and personal interests of the political actors. Buchanan acknowledged this, but he made a distinction between on the one hand political actors who 'will choose that alternative or option which maximizes his own, not his constituents', utility'[36] and on the other hand 'that of the politician who does seek pecuniary gains from his office.'[37] Hence, political actors who administer state resources might take advantage of this privileged access and with a completely legitimate way to misuse them for the purpose of increasing their personal or party interest

The following part will demonstrate how political actors maladminister state resources in a legitimate way for self-entrenchment purposes, while the second part will focus on illegitimate practices. Interestingly both legitimate and illegitimate self-entrenchment results in the distortion of the democratic equilibrium, in the creation of an uneven playing field.

A. Legitimate political self-entrenchment

Maladministration of state resources occurs in different levels of government based on individual or collective decisions. For instance, in 1975, Nordhaus, in a ground-breaking article, remarked that

[32] See Bernard Williams, 'The Idea of Equality', in Laslett Peter and Runciman WG (eds.), *Philosophy, Politics, and Society, Series II*, (Basil Blackwell 1962) 110–131; John Rawls, *A Theory of Justice* (Harvard University Press 1999) [section 12].

[33] see James Harvie Wilkinson III, 'The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality' (1975) 61 Virginia Law Review 945, 964

[34] For more details about the impact of money in politics, see U.S. Agency for International Development (USAID): Money in politics handbook. A guide to Increasing transparency in emerging democracies, November 2003, Technical Publication Series, Washington, DC, 2004; Council of Europe, Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns (Adopted by the Committee of Ministers on 8 April 2003 at the 835th meeting of the Ministers' Deputies).

[35] see Money in Politics: Sound Political Competition and Trust in Government (OECD Paris 14-15 November 2013) [32].

[36] James M. Buchanan, *The Limits of Liberty; Between Anarchy and Leviathan* (Liberty Fund 2000) 198.

[37] James M. Buchanan, *The Limits of Liberty; Between Anarchy and Leviathan* (Liberty Fund 2000) 198.

governments constantly manipulate monetary policy for re-election purposes[38] and proposed 'to entrust economic policy to persons who will not be tempted by the Sirens of partisan politics.'[39] This paved the way to the independence of the central banks, and nowadays incumbents do not have the power to use monetary policy with myopic financial interests in a way, which harms long-term financial interests.

Quite recently, the recent legal reforms in Hungary, which became an issue of concern,[40] exemplify how dominant political actors may use the amendment process for political self-entrenchment. Specifically, the political party 'Fidesz – Hungarian Civic Alliance' which in the 2010 national elections secured the minimum number of seats in the lawmaking body (263 seats out of the 386-seat parliament), amended the Constitution in order to loose checks and balances entrenched its power.[41]

Pertaining to the law making process, gerrymandering is a well-known problem put forward to create safe seats and promote re-election.[42] On this issue, Justice Kagan stressed that gerrymandering 'enables politicians to entrench themselves in power against the people's will'.[43] Moreover, there is thorough literature on the phenomenon of 'clientelism',[44] which is associated with the use of public resources in order to target specific groups of voters or individuals in return for their support.[45] Interestingly, the 'proffering of material goods' may also have the form 'of threats rather than inducements' as Stokes remarked.[46]

Finally pertaining to the executive, incumbents may manage and transform state resources, such as free airtime, into public subsidies.[47] In particular, when incumbents have access to taxpayer-funded resources such as state owned enterprises, and make decisions at the expense of public finance, they are positioned with the opportunity to maladminister such recourses for self-serving purposes. Such purposes might include tpubliche financing of a re-election campaign, or even for personal or family enrichment.

A case that exemplifies the maladministration of state resources is the appointment of directors to the national broadcaster. The most well-known case arose in Italy, where the then Prime Minister Berlusconi, controlled Italy's top three national TV channels, known as the Mediaset empire,

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[38] William D. Nordhaus, 'The Political Business Circle' (1975) 42 The Review of Economic Studies 169. Nordhaus examined the Phillips curve and argued that before elections, politicians increase inflation with the aim to decrease unemployment, which will lead to increased salaries.

[39] William D. Nordhaus, 'The Political Business Circle' (1975) 42 The Review of Economic Studies 169, 188.

[40] see European Parliament, Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded 2017/2131(INL). For more details on democracy and democratic backsliding see David Waldner and Ellen Lust, 'Unwelcome Change: Coming to Terms with Democratic Backsliding' (2018) 21 Annual Review of Political Science 93 and Tom Ginsburg, and Aziz Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, 2018)

[41] For me details see Tom Ginsburg, and Aziz Huq, *How to Save a Constitutional Democracy* (University of Chicago Press, 2018) 68ff.

[42] For more details on gerrymandering from the perspective of self-entrenchment see Samuel Issacharoff, 'Gerrymandering and Political Cartels' (2002-2003) 116 Harvard Law Review 593; Richard H Pildes, 'The Constitutionalization of Democratic Politics' (2004) 118 Harvard Law Review 28, 58

[43] Gill v. Whitford, 585 U.S. ___ (2018) [concurring opinion].

[44] See Kanchan Chandra 'Counting heads: a theory of voter and elite behavior in patronage democracies' in H Kitschelt and S Wilkinson ed Patrons, Clients, and Policies: Patterns of Democratic Accountability and Political Competition, (CUP 2007) 183; Gary Cox, *Voters, core voters, and distributive politics* (University of California, San Diego 2006); Gary Cox and Mathew McCubbins, 'Electoral politics as a redistributive game' (1986) 48 Journal of Politics 370.

[45] Luis Roniger 'Political Clientelism, Democracy, and Market Economy' (2004) 36 Comparative Politics 353, 354; 'In the political realm, clientelism is associated with the particularistic use of public resources and with the electoral arena. It entails votes and support given in exchange for jobs and other benefits. It can become a useful strategy for winning elections and building political support through the selective release of public funds to supporting politicians and associates or the acceptance of political nominees as personnel in state-related agencies.'

[46] Susan C. Stokes 'Political Clientelism' in Robert E Goodin ed, *The Oxford Handbook of Political Science* (OUP 2011) 649.

[47] 'Public subsidies to political parties can take a variety of forms, including tax breaks, free access to public services including airtime, access to public buildings, provision of goods and allocation of financial resources. Considering the impact of resources on political competition the two most important forms of public subsidies are financial support and free airtime.' See Money in Politics: Sound Political Competition and Trust in Government (OECD Paris 14-15 November 2013) [20].

and the national broadcaster, the so called Radiotelevisione Italiana (Rai).[48] Nowadays, in Hungary, it is argued that after they won the elections, Viktor Orban and his ruling party Fidesz introduced a new law, which gave them control of the public media, and the ability to use this as a platform for the promotion of governmental policies.[49] Such cases are in substance suspected to distort the level playing field among political actors because the air time of the national broadcaster might be used to promote the government.

B. Illegitimate Self-entrenchment

A fortiori, private and public funds have an impact on political competition. The OSCE/ODIHR Handbook for the Observation of Campaign Finance stresses that 'the abuse of state resources can be defined as undue advantage obtained by certain parties or candidates, through use of their official positions or connections to governmental institutions, in order to influence the outcome of elections.'[50] A great deal of research has been done on both public and private campaign finance,[51] juxtaposed with the allowances that the incumbents receive.[52] In fact, a report produced for the OECD states that 'in many countries reporting is limited to how subsidies received from the state have been spent'.[53]

For instance, at an EU level, the Members of the European Parliament receive a number of subsidies, and they are prevented from using them in order to fund political parties.[54] The EU's anti-fraud office, also known as Olaf, investigates incidents of misuse of these allowances,[55] however it does not have prosecutor powers.[56] In 2018, Marie Le Pen, a Member of the European Parliament from 2009 to 2017, was requested to return almost €300 000 for the employment of a parliamentary assistant due to her failure to provide financial evidence. Le Pen challenged the decision of the European Parliament but the Court rejected her application.[57]

In addition, regarding the General Expenditure Allowance, which is €4,416, awarded to MEPs per month to fund their constituency offices,[58] Investigative Reporting Denmark reported a number of discrepancies. In particular, 'a series of investigations across the 28 Member States found at least 41 cases where MEPs pay rent to national political parties or even to their own personal accounts. In

[48] See Darian Pavli 'Berlusconi's Chilling Effect on Italian Media' (March 30, 2010) https://www.opensocietyfoundations.org/voices/berlusconi-s-chilling-effect-italian-media

[49] See 'The state of Hungarian media: Endgame' at http://blogs.lse.ac.uk/mediapolicyproject/2017/08/29/the-state-of-hungarian-media-endgame/

[50] Handbook for the Observation of Campaign Finance, Published by the OSCE's Office for Democratic Institutions and Human Rights (OSCE/ODIHR 2015), 22.

[51] See Ivan Pastine and Tuvana Pastine, 'Incumbency advantage and political campaign spending limits' (2012) 96 Journal of Public Economics 20; Thomas Stratmann, 'Some talk: Money in politics. A (partial) review of the literature' (2005) 124 Public Choice 135; Thomas Stratmann, 'Campaign Contributions and Campaign Finance' in Charles K. Rowley and Friedrich Schneider, *The Encyclopedia of Public Choice Vol I* (Kluwer Academic Publishers, 2004) 59; Ingrid van Biezen, Financing political parties and election campaigns – guidelines (Council of Europe Publishing 2003); Samuel Issacharoff and Pamela S Karlan, 'Hydraulics of Campaign Finance Reform' (1998-1999) 77 Texas Law Review 1705; D Austen-Smith, 'Allocating access for information and contributions' (1998) 14 Journal of Law Economics and Organization 277.

[52] See for instance the parliamentary 'Green Book' on expenses rules. The Green Book stresses that the allowances granted to MPs are granted only for the 'purpose of a Member carrying out his or her parliamentary duties' and it stresses that 'claims cannot relate to party political activity'. The Green Book, A Guide to Members' Allowances (HC March 2009) 7.

[53] See Money in Politics: Sound Political Competition and Trust in Government (OECD Paris 14-15 November 2013) [22].

[54] Regulation (EC) No 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at European level and the rules regarding their funding (OJ L 297, 15.11.2003) Article 7.

[55] See the Olaf Report 2017 [23] available at https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2017_en.pdf

[56] In 2020 the European Public Prosecutor's Office (EPPO), a new Europe-wide and independent body will be operational and in charge of illicit activities regarding the EU Budget with power to investigate, prosecute and bring to judgment crimes against the EU budget. About the Relations of EPPO with Olaf see Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') OJ L 283, 31.10.2017, Article 101.

[57] Judgment of the General Court of 19 June 2018 — Le Pen v Parliament (Case T-86/17). However, an appeal is pending.

[58] Decision of the Bureau of 19 May and 9 July 2008 concerning implementing measures for the Statute for Members of the European Parliament 2009/C 159/01, Article 28.

249 cases, MEPs either said they have no offices, refused to reveal their addresses, or the location of the offices could not otherwise be tracked.'[59] Interestingly, in a case brought before the European Court, the Court upheld the decision of the European parliament that MEPs do not have to provide documents, receipts or details regarding travel expenses, subsistence allowances, general expenditure allowances and staffing arrangements expenses.[60]

That said, it seems that the granting of allowances lacks a comprehensive framework that would create the necessary checks to prevent members from using allowances in order to finance future political campaigns. By transforming the allowances into subsidies, Members of Parliament gain a significant advantage over their competitors, resulting in a distortion of the political competition[61] and ultimately the whole political process.

In addition, another area which is vulnerable to maladministration is public procurement.[62] For instance, in Greece, a report confirmed that the financing of political parties 'has been linked over time to various allegations of corruption or illegal funding. One such case concerned allegations of illegal payments from a foreign company to officials of two political parties, which were in power in 1996-2004 and 2004-09, allegedly in exchange for securing public contracts. After the Greek State claimed that it had suffered damages in excess of EUR 2 million, a settlement was reached in 2012; the criminal proceedings are not yet closed'.[63]

Finally, in Israel, the Prime Minister Netanyahu in 2019 was indicted on corruption allegations. The prosecutor based the charges on allegations that the Prime Minister agreed with Arnon 'Noni' Mozes, the owner of one of Israel's largest newspapers, Yedioth Ahronoth, that the latter would offer a more favourable coverage, in exchange for the former limiting the circulation of a rival newspaper.[64]

Having said this, due to the above-mentioned practices, incumbents misuse state resources in their favour, turning them into tools with tremendous impact on the political competition distorting the equality of opportunities in the political arena and thus hurting the quintessence of democracy. The part below will examine the means available in the constitutional system to protect democracy and the equality of opportunities.

III. CONSTITUTIONAL SAFEGUARDS FOR THE POLITICAL EQUALITY

This part will examine the existing mechanisms in constitutional law to defend the equal opportunities in the political process.[65] In particular, it will focus on the role of the courts, independent bodies and of special constitutional processes such as the impeachment in treating self-entrenchment processes.

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[59] Citizens pay for EU ghost offices – not used and not on the maphttp://www.ir-d.dk/2017/05/citizens-pay-for-eu-ghost-offices/.

[60] Maria Psara and Others v European Parliament, Case T-639/15 (2016/C 048/61).

[61] A number of scholars compare the political process in democracies with the completion in the market Economy. For instance Schumpeter has defined democracy as 'that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote.' See Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Routledge 2003, first published in 1942) 269. Furthermore, Cooter defined democracy as a 'a system of popular competition for directing the state's monopoly powers' and he further argued that 'competitive elections make government to respond to citizens much like competitive markets make the economy to respond to consumers.' See Robert Cooter, *Strategic Constitution* (Princeton University Press) 4. However, the politics-like-market analogy is not ideal as differences exist. See Robert Cooter, *Strategic Constitution* (Princeton University Press) 540ff.

[62] See for instance OECD, Public Procurement and Corruption (2016) at http://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf

[63] Greece to the EU Anti-Corruption Report COM(2014)38 final p 7, at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_greece_chapter_en.pdf

[64] Oren Liebermann and Andrew Carey 'Israel's Benjamin Netanyahu to be indicted on corruption charges, pending hearing' CNN, 28 February 2019 at https://edition.cnn.com/2019/02/28/middleeast/israel-benjamin-netanyahu-indictment-intl/index.html

[65] In theory, Ely in his well cited work Democracy and Distrust argues that there are two mechanisms to protect democracies from political actors who infringe the political process. The former is the "re-election" and the latter is "judicial review". See John Hart Ely, Democracy and Distrust; A Theory of Judicial Review (Harvard University Press) 78.

It will argue that for a number of reasons the safeguards are not efficient in practice. About the role of the courts, it argues that areas of laws fall outside the judicial review, and the value of political equality under certain circumstances it clashes with other values. Second, while independent bodies with the role to monitor the electoral process are widespread practice, their de facto dependency on the political system limits their effectiveness while impeachment processes depend heavily on the political equilibrium and are captured by the so-called party discipline.

A. Judicial Review and its current limits

The role of the courts as a guardian of the level playing field in the political arena was remarked in the well known footnote 4 of the 1938 case is *United States v. Carolene Products*.[66] In particular, Justice Stone remarked that courts should exercised more scrutiny on legislative acts dealing with, among others topics, the political process.[67] Based on this footnote, Ely has argued that open ended provisions of the constitution, must be interpreted so as to protect the political process and reinforce participation and representation.[68] More recently, Ginsburg has highlighted the role of the judicial review as a mechanism to protect in general democracy.[69] Pildes in his work examines decisions from courts around the world that have delivered decisions relating to key issues of the political process.[70]

To exemplify how the judiciary can serve as a guardian of a level playing field, it is suffice to mention the case of the payment of a deposit by candidates. A number of legal order require the payment of a deposit from candidates to encourage responsible participation in the electoral process and to discourage frivolous candidatures. However, such public policy 'inhibit[s] smaller parties and independents from participating as candidates'.[71] For instance, in Ireland, the Court in the Redmond case,[72] abolished the payment of a deposit by candidates as it discriminated against persons of reduced means. On the same matter the US, the Supreme Court unanimously held that 'laws that affect candidates always have at least some theoretical, correlative effect on voters',[73] and likewise abolished the payment of a deposit by candidates.

However, the role of the courts as guardians to the political process has internal and external limits. Regarding the internal limits, in some policy areas, especially related to politics, courts have developed the so called practice of deference.[74] Justice Stevens in his dissenting opinion in Jones stated that 'it is not this Court's constitutional function to choose between the competing visions of what makes democracy work-party autonomy and discipline versus progressive inclusion of the entire electorate in the process of selecting their public officials-that are held by the litigants in this case'.[75] Moreover, Justice Felix Frankfurter has stated that 'it is hostile to a democratic system to involve the judiciary in the politics of the people'.[76]

On the other hand, pertaining to external limits, there are areas that fall outside judicial review, such as the amendment process[77] the *interna corporis,*[78] or the immunities and jurisdictional privileges of incumbents in lawmaking and executive positions.[79] In addition, in certain circumstances constitutional provisions might be in conflict. This is acknowledged for instance by

[66] United States v. Carolene Products Company, 304 U.S. 144 (1938).
[67] see United States v. Carolene Products Company, 304 U.S. 144 (1938), at [fn 4]
[68] John Hart Ely, *Democracy and Distrust; A Theory of Judicial Review* (Harvard University Press 1980) at [Ch 4 and Ch 5].
[69] see Tom Ginsburg, *Judicial review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003) 22 ff
[70] Richard H Pildes, 'The Constitutionalization of Democratic Politics' (2004) 118 Harvard Law Review 28, 32ff
[71] see Electoral Administration Bill: changing the election deposit threshold SN/SG/3779)
[72] Redmond v. Minister for the Environment [2001] IEHC 128.
[73] see Bullock v. Carter, 405 U.S. 134 (1972).
[74] see TRS Allan, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' (2010) 60 University of Toronto Law Journal 41; Bamzai Aditya, 'The Origins of Judicial Deference to Executive Interpretation' (2017) 126 Yale Law Journal 908.
[75] California Democratic Party v. Jones, 530 U.S. 567 (2000) at [598].
[76] Colegrove v. Green, 328 U.S. 549 (1946) at [554].
[77] however, there is a trend for the review of the amendment process, see Yaniv Roznai, *Unconstitutional Constitutional Amendments The Limits of Amendment Powers* (OUP 2017)
[78] for instance in the UK, Courts do not have jurisdiction to review the *interna corporis*, see Anisminic Ltd v. Foreign Compensation Commission [1968] UKHL 6, at [13].
[79] See below text to note 87.

the European Court of Human Rights in the case of *Bowman v. United Kingdom*.[80] For instance, in the case *Maria Psara and Others v European Parliament* when journalists sought access to receipts with travel expenses and the allowances of the Members of the European Parliament, as there was suspicion that such allowances are used to finance their future campaigns as Le Pen did[81] the European Court rejected their request based on privacy and data protection.[82]. Therefore, constitutional provisions even serve as a constitutional protection for the self-entrenchment.

In addition, equality is not the only value that shapes the judicial review. For instance, in the US, the majority in the Supreme Court in the *Timmons* case upheld a State regulation banning the fusion, which 'precludes one party's candidate from appearing on the ballot, as that party's candidate, if already nominated by another party', as the majority prioritized party stability, while the minority cherished the party competition.[83]

It is also worth mentioning the example of media access during the electoral period. The access to the media and other means of communication due to practical constraints, such as, the duration and breadth of a program's coverage departs from the formal equality among candidates and political parties. For instance in many countries such as in Germany[84] and in Greece,[85] the amount of free air time to the political parties depends on their relative importance based on the principle of gradual equality based on each parties' results in the last general election.[86]

B. Political means and their current limits

While the legal dimension of self-entrenchment was discussed in the previous sections with an analysis on the relevant positive law and the role of the courts and of the independent bodies, the analysis neglects the socio political dimension of this issue. By conceiving self-entrenchment as a sociopolitical problem, the limits and the weakness of law to tackle it are better understood. For instance, Bellamy is critical to the role of the courts to solve disputes ,which are political in essence and he claims in favour of political deliberative processes[87] Moreover, a pure legal approach might lead to the judicialization of politics and the overreliance to the courts to solve political issues.[88]

This mainly explains the surge of independent agencies, which are in nature quasi executive or quasi judicial bodies with the role to supervise the political process. But such agencies have not been proven very effective. As Bellamy has put it:

> *'most states lack a tradition of independent public service, making electoral commissions heavily biased towards the prevailing administration of which they often form a part, either*

[80] This is acknowledged for instance by the European Court of Human Rights in the case Case of Bowman v. United Kingdom [1998] ECHR 4 at [43].

[81] Judgment of the General Court of 19 June 2018 — Le Pen v Parliament (Case T-86/17).

[82] Maria Psara and Others v. European Parliament, Case T-639/15 (2016/C 048/61). Cf with Corporate Officer of the House of Commons v Information Commissioner [2008] EWHC 1084 (Admin). In this case, a major political scandal erupted in the UK in 2009 surrounding the misuse of parliamentary allowances, as several MPs were found to have used public subsidies for purposes contrary to their original purpose. In particular, a number of journalists requested information relating to the Additional Costs Allowance; an allowance payable to Members of Parliament. Although Parliament objected to such disclosure, the dispute was ultimately decided before the courts, with the High Court ruling in favour of the disclosure.

[83] Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997) 382, Stevens J, dissenting.

[84] About Germany, see Political Parties Act Art.5

[85] About Greece, see Presidential Decree 26/2012 Art.45.1. Interestingly, in Greece with the previous legal framework of the law 3023/2002 political parties were divided into three categories, first in political parties already represented in the national or European parliament second in political parties that had participated in the previous elections, taking at least 0, 5% of the total number of votes without being represented and third in new political parties or political parties that had received less than 0.5% of the votes in the previous elections. In the latter category, the law allocated only five (5) minute free air time while it is estimated that the most popular party received 3,768 minutes of free time. See Council of the State, Plenary Session, (Supreme Administrative Court) 3427/2010.

[86] See also Electoral Processes Report, *Sustainable Governance Indicators 2015* page 27 available at http://www.sgi-network.org/docs/2015/thematic/SGI2015_Electoral_Processes.pdf

[87] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007)

[88] For more details about the judicialization of politics, see Ran Hirschl, 'The Judicialization of Politics' in Robert E Goodin ed, *The Oxford Handbook of Political Science* (OUP 2011)

as appointees or as members of the same electoral ticket. Yet, it has been an area where the Court has usually been reluctant to intervene'.[89]

Furthermore, given that incumbents in law making and executive bodies are vested with immunities or jurisdictional privileges,[90] ordinary courts have limited or no jurisdiction to treat illegitimate ways of self-entrenchment. Hence, special processes, more political in nature, are embedded in the constitution such as the impeachment.[91] However, it is important to acknowledge that such processes are often curtailed as they are subject to party considerations or party discipline. Specifically, for the impeachment processes, law-making bodies are transformed into judicial bodies[92] but the nature of the process is at its core political.[93] Hence, party politics considerations prevail, trusts among the members of the same party are formed and as Hamilton has foresaw 'in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt'.[94]

That said, while mechanisms already exist within constitutional law, which aim to create a level playing field for all political actors, it seems that the absence of a coherent and overarching principle for the protection of political competition on an equal footing in the political process results in different values shaping the outcome of the judicial review or in the bending of such values due to exceptional circumstances. Furthermore, even extra constitutional safeguards such as independent bodies that aim to protect the level playing field for all political actors, are occasionally bended or they are proven inefficient in action.

Most importantly, the lack of accessibility in democracies on a level playing field has been addressed by constitution drafters and the courts only partially and in a fragmented manner, while in theory a coherent framework is absent. Pildes confesses that 'constitutional law is often an awkward and limited means to remedy problems of political self-entrenchment',[95] while the OSCE/ODIHR Handbook for the Observation of Campaign Finance acknowledges that 'the abuse of state resources is difficult to address through formal regulations alone and also requires vigilance and monitoring by civil society and the media.'[96]

So far it seems that self-entrenchment and self-serving politicians are left to be resolved to the self-corrective promise of politics. In theory, the people can always oust from office incumbents who abuse their position in the political system for self-entrenchment purposes. In practice, the self-corrective promise of politics has limits. It is well known that the voice of the people may be distorted with the manipulation of the electoral system. Suffice to mention here the case of Hungary where the

[89] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007)112.

[90] See for instance Constitution of France, Article 26 para 2. For more details on immunities from a comparative perspective see Federica Iovene, 'A Comparative Analysis of National Provisions Granting Immunity to Politicians' In F. Zimmermann, ed, *Criminal Liability of Political Decision Makers: A Comparative Perspective* (Springer 2017) 293. In particular on parliamentary immunity see Venice Commission, Report on the Scope and Lifting of Parliamentary Immunities, CDL-AD(2014)011.

[91] See US Constitution, Article 2 Section 4. To exemplify this, currently in the US, the House of Commons initiated an impeachment inquiry against the President of the US. The accusation against the head of the executive is that he abused his power by pressuring the President of Ukraine to initiate an investigation, which will help the President's 2020 reelection bid. See 'The complaint', 12 August 2012 available at https://intelligence.house.gov/uploadedfiles/20190812_-_whistleblower_complaint_unclass.pdf

[92] See Blackstone, *Commentaries on the Law of England* Vol 4, 256. See also the opening argument of Benjamin Curtis for the defense in the Impeachment Trial of President Andrew Johnson available at Congressional Globe, 40th Congress, 2d session, Supplement 134 (1868).

[93] The political nature of the impeachment was observed by Hamilton when he discussed the role of the Senate in the process. See The Federalist Papers, No. 65. See also Laurence Tribe and Joshua Matz, *To End a Presidency: The Power of Impeachment* (Basic Books 2018).

[94] The Federalist Papers, No. 65.

[95] Richard H Pildes, 'The Constitutionalization of Democratic Politics' (2004) 118 Harvard Law Review 28, 78.

[96] Handbook for the Observation of Campaign Finance, Published by the OSCE's Office for Democratic Institutions and Human Rights (OSCE/ODIHR 2015), 22.

ruling party, once it won the elections it changes the electoral law and redrafted the electoral districts in order to perpetuate its power.[97]

All told, it seems that neither the legal safeguards, not the political safeguards are well equipped to protect the fair competition in the political arena. Clausewitz has famously said that war is the continuation of politics with different means.[98] In fact, it is similarly possibly that ordinary politics is the continuation of war with different means. Adversaries employ different strategies, they select the timing, they take advantage of their positioning, they want to keep up controlling power, they use unrestrained force, there is no level playing field in the battle, and the goal of winning justifies the means. Thus if incumbents have the means to entrench their power, with legal or illegal means, they would do it. Consequently, an uneven playing field is a persisting problem because self-entrenchment is not addressed adequately by constitutional drafters and policy makers, while it seems that self-entrenchment is left to be resolved to the self-corrective promise of politics.

However, ordinary politics shall not resemble wars and power struggles. The goal of winning the elections and preserving powers must be subject to restrains and paramount safeguards of a level playing field, which is a precondition for equality of opportunities in the political arena.

CONCLUSIONS

The principal aim of this article was to examine political self-entrenchment from the perspective of equality and its impact on modern democracy. In doing so, it has argued that equality of opportunities, which is a core foundation in every democracy, is in practice distorted by self-serving politicians. It has analysed political self-entrenchment via categorizing it between legitimate and illegitimate practices and it has exemplified cases of self-entrenchment with examples from different legal orders.

Then the article has turn its focus on the remedies that exist in the constitutional system and it has examined both legal and political mechanisms. With an analysis on the current means that are available in the constitutional system, the judicial review, and the alternative political processes, such as the independent bodies and quasi-judicial processes this article has argued that constitutional law and policy makers are unable in practice to face the challenges posed by political self-entrenchment.

Given the lack of a level playing field and the inability of the constitutional institutions to prevent and block self-entrenchment, this might lead to voters' dissatisfaction with the political system as their voice is distorted. The core idea of this paper is the following: if policy makers want to reinvigorate the trust in the political system, they should reinforce the equality of opportunities in the political arena, and make the political system equally accessible. Therefore, constitution drafters should include configurations that will block political actors from abusing their structural advantage, prevent them from forming political trusts, and prevent the misuse of their access to state resources.

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[97] Kim Lane Scheppele, Hungary: An Election in Question, Paul Krugman, The Conscience of a Liberal, Feb. 28, 2014, Part I https://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-1/, Part II https://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-2/, Part III https://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-in-question-part-3/, Part IV https://krugman.blogs.nytimes.com/2014/02/28/ hungary-an-election-in-question-part-4/, Part V https://krugman.blogs.nytimes.com/2014/02/28/hungary-an-election-inquestion-part-5/. See also Kim Lane Scheppele, Legal but not Fair, Paul Krugman, The Conscience of a Liberal, Apr. 13, 2014, https://krugman.blogs.nytimes.com/2014/04/13/legal-but-not-fair-hungary/

[98] See Andreas Herberg-Rothe, *Clausewitz's Puzzle; The Political Theory of War* (OUP) 84.