

Abuse of power and Self-entrenchment as a State Response to the Coronavirus Outbreak: The role of Parliaments, Courts and the People

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Abstract

The World Health Organization, on March 11th, declared the novel coronavirus outbreak a pandemic and while the pandemic is still spreading, and some counties are affected more than others, governments have had to respond, given that SARS-CoV2(Covid-19) poses a serious public health threat. In their responses, governments have adopted emergency measures balancing public health with a plethora of rights such as freedom of movement, right to assembly and freedom to religion.

In liberal constitutional theory, the norm is that during emergencies power is concentrated in the hands of the executive. Interestingly due to the nature of the pandemic, in some countries, such as in Hungary, parliamentary sessions were suspended, in others such as in Greece and the UK they were either under function or gone virtually via online platforms respectively. This limited function of the legislative body has grave implications on the quality of modern democracy as parliamentary scrutiny is restricted, ministerial accountability is distorted and most importantly the voice of the opposition does not have an appropriate forum to be heard. On the top of that, a well established stance of deference prevails in the judiciary weakening judicial review as an extra mechanism of protection to monitor the political process.

Such constitutional circumstances may give rise to abuse of executive power and application of policies for self-serving purposes and self-entrenchment. For instance, the government may allocate funding in a way to favor its reelection. The aim of this paper it to examine legitimate and illegitimate executive self-entrenchment in times of emergency and identify the role of different institutions, to monitor and scrutinize executive emergency actions.

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Introduction

The World Health Organization, on March 11th, declared the coronavirus outbreak known as SARS-CoV2 (severe acute respiratory syndrome coronavirus 2) or Covid-19 pandemic.

The pandemic was spreading across the globe causing an unprecedented pressure on public health systems, while until the end of 2020 more than 1.800.000 people died.¹ While some countries are affected more than others, governments were under pressure to respond as the mortality of the new virus was much higher than the influenza, estimated up to 1 per cent² while the transmission intensity and the spread was much faster compared again to the common influenza.³ This high mortality rate and transmission intensity in combination with the lack of medicine and preemptive vaccination disrupted ordinary politics and policies.

The common strategy for mitigation of the Covid-19 was the so-called policy of social distancing.⁴ A plethora of tools were used to that objective, from the mandatory wear of masks, to general or partial lockdowns depending on the surge of the Covid-19 incidents. For the implementation of such extraordinary measures the emergency frameworks were employed for instance in Italy,⁵ in the USA,⁶ in Spain⁷ etc.

¹ For more details on the data regarding the infections and the death toll caused by Covid-19 see worldometers available at <https://www.worldometers.info/coronavirus/>.

² According to a report published in February 2020, the case fatality ratio (CFR) was estimated in the range 1.2-5.6%. However the mortality rate from country to country may vary as it depends on the statistical methods used in combination with the ‘sensitivity of the divergent surveillance systems to detect cases of differing levels of severity of the illness. For more details, see I. Dorigatti, L. Okell, A. Cori, et al. Report 4: Severity of 2019-novel Coronavirus (nCoV) Available at https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200219-sitrep-30-covid-19.pdf?sfvrsn=3346b04f_2, Accessed 30th June 2020.

³ According to a report published in January 2020 it was estimated that each patient infected 2.6 new people. For more details see N. Imai, A. Cori, I. Dorigatti, et al. Report 3 - Transmissibility of 2019-nCoV Available at <https://www.imperial.ac.uk/mrc-global-infectious-disease-analysis/covid-19/report-3-transmissibility-of-covid-19/> Accessed 30th June 2020.

⁴ See N. Ferguson, D. Laydon, G. Nedjati-Gilani et al, Report 9: Impact of non-pharmaceutical interventions (NPIs) to reduce COVID-19 mortality and healthcare demand Available at <https://www.imperial.ac.uk/mrc-global-infectious-disease-analysis/covid-19/report-9-impact-of-npis-on-covid-19/> Accessed 30th June 2020. ‘(a) mitigation, which focuses on slowing but not necessarily stopping epidemic spread – reducing peak healthcare demand while protecting those most at risk of severe disease from infection, and (b) suppression, which aims to reverse epidemic growth, reducing case numbers to low levels and maintaining that situation indefinitely.’

⁵ About Italy see DECRETO-LEGGE 23 febbraio 2020, n. 6 available at <http://www.governo.it/it/approfondimento/coronavirus-la-normativa/14252>.

⁶ About the USA see ‘Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak’ available at <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>

⁷ About Spain see the Real Decreto 463/2020, de 14 de marzo, por el que se declara el estado de alarma para la gestión de la situación de crisis sanitaria ocasionada por el COVID-19, available at <https://www.boe.es/buscar/doc.php?id=BOE-A-2020-3692>.

Much ink has been spilled over the risks and the dangers of such emergency provisions. On the one hand concerns have been voiced from a human rights perspective. It is argued that emergency measures unnecessarily and disproportionately infringe human rights.⁸ Furthermore, it is argued that emergency measures enacted on a temporary basis are often renewed to become permanent features of the constitutional order.⁹

On the other hand, concerns are expressed that emergency provisions imperil democratic institutions.¹⁰ The claim is that concentration of powers in the executive vis a vis the legislature¹¹ and dejuridification might lead to democratic backsliding of the type seen in the Weimar Republic.¹²

However, less attention has been paid to the use of emergency provisions for political self-entrenchment purposes.¹³ This chapter considers the way COVID-19 has been used and might be used as an opportunity for political self-entrenchment especially from the executive. In doing so, it will first examine political self-entrenchment both during ordinary conditions and during times of emergency, such as the case of the pandemic. Then the second part will focus on the available means to face political self-entrenchment and in particular, it will focus on both political and legal means. By examining the role of the judiciary, the legislature, the media and the people, this chapter will argue that during the pandemic, when the legislatures are suspended or under functioned, the ground is more fertile for abuse of power for self-entrenchment purposes on behalf of the executive. The main conclusion is that democracies are left vulnerable in times of emergencies with less safeguards to secure their orderly function and proper protection against acts of self-entrenchment.

⁸ See for instance David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006).

⁹ John E Finn, 'Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation' (2010) 48 *Columbia Journal Transitional Law* 442, 501.

¹⁰ Antonios Kouroutakis and Sofia Ranchordás 'Snoozing Democracy: The De-juridification of Emergencies' [2016] *Minnesota Journal of International Law* 25.

¹¹ Jan Petrov, 'The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?' (2020) 8 *The Theory and Practice of Legislation* 71; Elena Griglio, 'Parliamentary Oversight under the Covid-19 Emergency: Striving against Executive Dominance' (2020) 8 *The Theory and Practice of Legislation* 49.

¹² On the way the Executive manipulated constitutional emergency provisions in order to establish an authoritarian regime see Antonios Kouroutakis, 'The Virtues of Sunset Clauses in Relation to Constitutional Authority' (2020) 41 *Statute Law Review* 16, 23 ff.

¹³ Political self-entrenchment, which is defined by Levinson and Sachs as the use of tools by which political actors insulate themselves from political change has been examined from different perspectives and provoked scepticism in different sciences. For more details on political self-entrenchment see Daryl Levinson, and Benjamin Sachs, 'Political Entrenchment and Public Law' by (2015) 125 *The Yale Law Journal* 400; Michael Klarman, 'Majoritarian Judicial Review: The Entrenchment Problem' (1997) 85 *Georgetown Law Journal* 491;

Part A: Abuse of power and political self-entrenchment during ordinary conditions and during times of emergency

Executive and political self-entrenchment

In theory, political self-entrenchment takes place when ‘political actors, incumbent politicians, prevailing political parties, and electoral majorities, take advantage of and even abuse their power for self-serving purposes’.¹⁴ Political self-entrenchment is relevant for incumbents in both executive and legislative positions. As Gardbaum puts it, political self-entrenchment is a political failure and it can take different forms, such as government capture of independent agencies or political process.¹⁵

For instance, political self-entrenchment takes place when parliament changes the electoral law and adopts a new scheme that favors the incumbents, or when the government appoints in the public broadcasting company directors who lack independency and impartiality and thus use their office to promote the government’s agenda. Consequently, when political actors in power abuse their power for self-serving purposes, an uneven playing field is formed in the political arena. In particular, political actors without power and political opponents, face disadvantages, obstacles and possibly barriers to entry.

An expression of political self-entrenchment in the executive is the maladministration of state resources. In particular, incumbents who have access to taxpayer-funded resources may manage and transform state resources, such as state owned enterprises and free airtime, into public subsidies. According to a report from the OECD ‘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.’¹⁶

In general, in times of normality, a plethora of political self-entrenchment cases are recorded which are divided between legitimate and illegitimate.¹⁷ For instance, a case of legitimate self-entrenchment in executive position was recorded by Nordhaus. Nordhaus in a ground-breaking article, remarked that governments constantly manipulate monetary policy for re-election purposes and proposed ‘to entrust economic policy to persons who will not be tempted by the Sirens of partisan politics.’¹⁸ This paved the way for the independence of central banks. Nowadays incumbents generally do not have the power

¹⁴ A. Kouroutakis, ‘How liberal is a democracy without a level playing field in the political process?’, U.K. Const. L. Blog (21st May 2020) (available at <https://ukconstitutionallaw.org/>).

¹⁵ Stephen Gardbaum, *Comparative Political Process Theory* (2020) 18 *International Journal of Constitutional Law* (forthcoming).

¹⁶ See *Money in Politics: Sound Political Competition and Trust in Government* (OECD Paris 14-15 November 2013) [20]. available at <https://www.oecd.org/gov/ethics/Money-in-politics.pdf>.

¹⁷ See Antonios Kouroutakis, ‘Legitimate and Illegitimate Political Self-entrenchment and its Impact on Political Equality’ (2021) *Vienna Journal on International Constitutional Law* (forthcoming).

¹⁸ William D. Nordhaus, ‘The Political Business Circle’ (1975) 42 *The Review of Economic Studies* 169, 188. 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.

to use monetary policy for re-election purposes in a way that harms long-term financial interests.

Furthermore, in relation to the media, the control of the public broadcasting services by the executive is another common case that exemplifies the maladministration of state resources. In Italy, during the governments of the Prime Minister Berlusconi, who controlled Italy's top three national and private TV channels, known as the Mediaset empire, via the appointment of the director of the national broadcaster, the so-called Radiotelevisione Italiana (Rai), his governments controlled the vast majority of the popular TV networks.¹⁹ As a result, airtime from both the private and the public TV channels was used to promote the government's policies. Likewise, in Hungary, Viktor Orbán once he won the elections 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.²⁰

Finally, a case of illegitimate self-entrenchment in relation to executive office is recorded in Israel. In 2019, Prime Minister Netanyahu 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 more favourable coverage of Netanyahu's government, in exchange for the former limiting the circulation of a rival newspaper.²¹

ii. Self-entrenchment cases during the pandemic

While much ink is spilled on the issue of political self-entrenchment, substantially less ink is spilled on the issue of political self-entrenchment and abuse of power during emergencies. During emergencies, the separation of power is reshaped, and power is concentrated in the hand of the executive. Thus, political self-entrenchment during emergencies in most of the cases is associated with abuse of power in executive positions.

During the pandemic, the emergency of the public health, that required social distancing from the common people, at the same time imposed the shutdown of the Legislatures or the limited function.²² Likewise, Courts' function was affected. For instance, jury by trial

¹⁹ See Darian Pavli 'Berlusconi's Chilling Effect on Italian Media' (March 30, 2010) <https://www.opensocietyfoundations.org/voices/berlusconi-s-chilling-effect-italian-media> (last date visited 10 November 2020).

²⁰ See 'The state of Hungarian media: Endgame' at <http://blogs.lse.ac.uk/mediapolicyproject/2017/08/29/the-state-of-hungarian-media-endgame/> (last date visited 10 November 2020).

²¹ 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>

²² Waismel-Manor, Israel and Bar-Siman-Tov, Ittai and Rozenberg, Olivier and Levanon, Asaf and Benoît, Cyril and Ifergane, Gal, COVID-19 and Legislative Activity: A Cross-National Study (July 2, 2020). Bar Ilan University Faculty of Law Research Paper No. 20-12, Available at SSRN: <https://ssrn.com/abstract=3641824> or <http://dx.doi.org/10.2139/ssrn.3641824>

was suspended in the US²³ and in a plethora of jurisdictions some trials were operating online.²⁴ On the top of that, it is well known that the judiciary in times of stress shows deference on emergency provisions.²⁵

On the one hand, the limited function of the legislatures and on the other hand the operation of courts in an environment of emergency created a fertile ground for the executive to take the lead in the constitutional system. That said a number of questionable executive laws and actions in relation to the pandemic were recorded in which abuse of power is encapsulated.

To begin with, in the United States, once Congress passed the Covid-19 relief package and authorized the president to administer this relief package, President Trump decided to print his name ‘Trump’ in the memo section of the stimulus check granted to millions of Americans.²⁶ This action, which was *prima facie* a questionable exercise of power, at the same time signals a clear and outright expression of political self-entrenchment. It goes out without saying that the President’s name on the stimulus check is free advertisement especially precious a couple of months before the elections.

Interestingly, the appearance of the President’s name on an Internal Revenue Service disbursement was a breach of a longstanding practice, and possibly a constitutional convention, as it was the first time such incident took place.²⁷

Moreover, more indirect policies hide self-serving interests, remarkably by inaction. For instance, in the looming elections of November 2020, Democrats were urging their voters to vote by mail due to social distancing reasons. This meant a huge influx of ballots by postal mail that would undoubtedly burdened the ordinary handling by the US Post Service. In addition, it was expected that more ballots by email would favor in general the Democratic Party, with the exception of some states like Arizona where it is regular for both republicans and democrats to vote by mail.

Thus, the administration of President Trump was opposing the funding of the US postal service. CNN reported that ‘Trump is fueling allegations that he is trying to manipulate the postal system for political gain. The pandemic has led to record-shattering levels of voting-by-mail, but Trump has tried to restrict the voting method because he says it will hurt his re-election and Republicans across the board.’²⁸ It was reported that by defunding

²³ Courts Suspending Jury Trials as COVID-19 Cases Surge (November 20, 2020) available at <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge>

²⁴ Antonios Kouroutakis, ‘Legaltech in Public Administration: Prospects and Challenges’, in *Lawyering in the Digital Age* (CUP 2021) forthcoming

²⁵ About deference 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.

²⁶ In unprecedented move, Treasury orders Trump’s name printed on stimulus checks (The Washington Post April 15, 2020) https://www.washingtonpost.com/politics/coming-to-your-1200-relief-check-donald-j-trumps-name/2020/04/14/071016c2-7e82-11ea-8013-1b6da0e4a2b7_story.html

²⁷ A. Kouroutakis, ‘How liberal is a democracy without a level playing field in the political process?’, U.K. Const. L. Blog (21st May 2020) (available at <https://ukconstitutionallaw.org/>).

²⁸ Ellie Kaufman, Marshall Cohen, Jason Hoffman and Nicky Robertson, Trump says he opposes funding USPS because of mail-in voting (CNN 13 August 2020) available at

the US Postal Office, the latter would have been unable to deliver the ballots by mail on time, which would lead to the disenfranchisement of those votes.²⁹ Moreover, President Trump put forward to idea that votes by postal mail would lead to voting fraud in order to block states from adapting to mail balloting.³⁰

Across the ocean, in Europe, Greece successfully contained the spread of the virus during the first wave, in part by executive legislation that shut promptly non-essential businesses and imposed a stay at home order. Among the emergency measures adopted, the government was authorized to run an awareness campaign over the pandemic. By executive legislation, private and public radio and TV stations were obliged to air for free awareness messages on how to minimize the spread of the virus.³¹

While the awareness campaigns for free is an emergency measure excused by the exigency of the pandemic, interestingly, with another piece of executive legislation, the government was allowed to derogate from the existing national provisions and to run an additional awareness campaign, this time with payment.³² However, the latter measure became the source of controversy between the government and the parties of the opposition. The government distributed 20 million euros to news websites, printed journals and TV and radio stations, without transparency. There was suspicion that the distribution was ‘based on political criteria and whether media were sympathetic towards the government’.³³

In the case of Greece, the pandemic gave the government the opportunity to deviate from ordinary procedures and direct money to the media. The government, thus, created a fertile ground for positive reception of its policies and a hostile ground for the policy proposals of the opposition. In other words, the government captured the media with state funds. In this way, the press, the so-called Fourth Estate in the political system, loses its capacity of advocacy and its ability to control those in government.

A report issued from Freedom House remarks that ‘authoritarian and democratically elected leaders alike have failed to be candid about the impact of the coronavirus. In the survey, 62 percent of the respondents said they distrust what they are hearing about the

<https://edition.cnn.com/2020/08/13/politics/trump-usps-funding-comments-2020-election/index.html>

²⁹ Elizabeth Bauer, Separating Fact From Fiction On Trump And The Post Office - And Why It Matters (Forbes 16 August 2020) available at <https://www.forbes.com/sites/ebauer/2020/08/16/separating-fact-from-fiction-on-trump-and-the-post-officeand-why-it-matters/?sh=66c553273d74>

³⁰ Michael Wines As Trump Rails Against Voting by Mail, States Open the Door for It (New York Times 22 May 2020) available at <https://www.nytimes.com/2020/05/21/us/vote-by-mail-trump.html>

³¹ Legislative Content Act of 11.03.2020 "Urgent measures to address the negative consequences of the occurrence of coronavirus COVID-19 and the need to limit its spread." , codified with 4737/2020 (in Greek) available at <https://www.taxheaven.gr/law/%CE%A0%CE%9D%CE%A011.03.2020/2020>

³² Legislative Content Act of 14.03.2020 Urgent measures to address the need to limit the spread of coronavirus COVID-19, codified by 4735/2020 (in Greek) Available at <https://www.taxheaven.gr/law/%CE%A0%CE%9D%CE%A014.03.2020/2020>

³³ ‘Greek government exposed over COVID-19 awareness funds’ *Euractiv 9 July 2020) available at https://www.euractiv.com/section/politics/short_news/athens-greek-government-exposed-over-covid-19-awareness-funds/

pandemic from the national government in their country of focus³⁴ and it further explains that ‘governments are also using the outbreak as a justification to grant themselves special powers beyond what is reasonably necessary to protect public health. They have exploited new emergency authority to interfere in the justice system, impose unprecedented restrictions on political opponents, and sideline crucial legislative functions.’³⁵

Within this context, abuses especially from the executive during the pandemic were not a rare or an isolated practice, although it seems that it does not attract much attention. This is quite a paradox given the grave consequences on the quality of the democratic system. But the question is the following: how do we safeguard democracy from political actors who during a state of emergency abuse their power for self-serving purposes in order to retain and consolidate their power? What does constitutional law do to face this problem and what more should it do? How different institutions act and react?

Part B: The difficulty to face political self-entrenchment during the pandemic

The role of the courts

During emergencies, the focus lies often on the over-reaction with disproportionately limiting human rights, or the expansion of the executive powers at the expense of the legislature.³⁶ These are obviously important issues that demand scrutiny and sufficient attention; however, it is also crucial to attend to emergency measures aiming to promote political self-entrenchment.

In general, political actors in power are entrusted with the state resources and policies that have direct or indirect financial impacts. Obviously, their role is to administer state resources and policies with the aim of promoting the public good and public interest. In times of crisis, such resources shall be spent with the aim to face the emergency. However, when incumbents misuse emergency state resources in their favor, turning them into tools with tremendous impact on the political competition they distort the political fair play and the democratic equilibrium.

Ely elaborated on the pathology of the political self-entrenchment, though for times of normality, and remarked that ‘in a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote

³⁴ Freedom House, *Democracy under Lockdown - The Impact of COVID-19 on Global Freedom* (October 2020) available at <https://freedomhouse.org/article/new-report-democracy-under-lockdown-impact-covid-19-global-freedom>

³⁵ Freedom House, *Democracy under Lockdown - The Impact of COVID-19 on Global Freedom* (October 2020) available at <https://freedomhouse.org/article/new-report-democracy-under-lockdown-impact-covid-19-global-freedom>

³⁶ For instance, Dyzenhaus offers a critique on emergency laws hindering civil liberties, see David Dyzenhaus, ‘The Permanence of the Temporary - Can Emergency Powers Be Normalized?’ In Ronald J. Daniels, Patrick Macklem & Kent Roach, eds *The Security of Freedom: Essays on Canada's Anti-terrorism Bill*, (University of Toronto Press, 2001) 21. Moreover, Justice Brennan has famously said that ‘[a]fter each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary’. See William J. Brennan, Jr., ‘The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises’ (1988) 18 *Israel Yearbook on Human Rights* 11.

them out of office. Malfunction occurs when the process is underserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.’³⁷

That said, in times of normality Ely remarked and suggested two cures: the former is political³⁸ via the mechanism of reelection and the latter is purely legal via the mechanism of judicial review. In particular, Ely argued that if incumbents depend on the re-election, this will drive them into self-restraint since in democratic regimes with free and fair elections, it is possible that voters would punish the incumbents who abused the power for self-serving purposes.

On the other hand, the mechanism of judicial review relies on judges to oversight the political process. Participants in the political process, such as political parties, or members of the opposition, and even ordinary citizens might challenge governmental decisions and laws that distort the political process.

Although there is no specific framework to regulate the level playing field in the political process, political actors and ordinary citizens seek protection before the courts,³⁹ based on constitutional provisions such as the provision on equality,⁴⁰ and on ordinary laws such as campaign finance laws⁴¹ and ordinary criminal laws.⁴² In the frequently cited footnote 4 of the 1938 case is *United States v. Carolene Products*, Justice Stone distinguished the level of scrutiny exercised by the courts between statutes dealing with economic and social-welfare legislation and those dealing with, among others topics, the political process.⁴³ In theory, Ely has stressed the paramount role of the Supreme Court Justices to

³⁷ John Hart Ely, *Democracy and Distrust; A Theory of Judicial Review* (Harvard University Press) 78

³⁸ On political constitutionalism and its virtues see Richard Bellamy, *Political Constitutionalism A Republican Defence of the Constitutionality of Democracy* (CUP 2007).

³⁹ In addition, in some countries independent agencies and bodies, such as electoral commissions, are entrusted with the role to solve political disputes. See Bruce Ackerman: ‘Good-bye, Montesquieu’, in Susan Rose-Ackerman and Peter L. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar, 2010). However, such independent bodies are not always efficient. 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 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’. Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007) 112.

⁴⁰ On the equality in the political process, see Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (OUP 2008) and Robert Dahl, *On political Equality* (Yale University Press 2005).

⁴¹ For instance about campaign finance laws in the USA see the Federal Election Campaign Act of 1971 (FECA), Pub.L. 92–225, 86 Stat. 3, and for similar laws in a number of EU countries see Study for the AFCO Committee, *Party Financing and Referendum campaigns in EU Member States* (Publications Office of the EU 2015)

⁴² i.e. general bribery offences, fraud, breach of trust and embezzlement.

⁴³ See *United States v. Carolene Products Company*, 304 U.S. 144 (1938), at [fn 4].

interpret the open ended provisions of the constitution, with an obligation to protect the political process and reinforce participation and representation.⁴⁴ In addition, Ginsburg has argued that judicial review is an important tool to safeguard democracy.⁴⁵ Furthermore, Pildes discusses in detail a plethora of decisions from courts around the world, such as the US Supreme Court, the European Court of Human Rights, and the Supreme Court of South Africa that have delivered key decisions protecting the political process.⁴⁶

However, the role of the Courts to resolve disputes on political issues is not straightforward as judicial review has external and internal limits. To begin with, there are areas that are not subject to judicial review, such as the amendment process⁴⁷ or the *interna corporis*.⁴⁸ Second, courts show deference to the political branches of the government in some policy areas.⁴⁹ Suffice to cite here the dissenting opinion of Justice Stevens in *Jones* who 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’.⁵⁰ In addition, Justice Felix Frankfurter has famously said that ‘it is hostile to a democratic system to involve the judiciary in the politics of the people’.⁵¹

On the top of that, in times of emergency such as a pandemic, when the public health is endangered, and technocrats with expertise in medicine decide policy options, courts are prone to show more and wider deference.⁵²

Remarkably, cases of political self-entrenchment have not reached the courts in order to test and examine in practice their stance.⁵³ No complaint was brought on the defunding

⁴⁴ John Hart Ely, *Democracy and Distrust; A Theory of Judicial Review* (Harvard University Press 1980) at [Ch 4 and Ch 5].

⁴⁵ see Tom Ginsburg, *Judicial review in New Democracies: Constitutional Courts in Asian Cases* (CUP 2003) 22 ff,

⁴⁶ Richard H Pildes, ‘The Constitutionalization of Democratic Politics’ (2004) 118 *Harvard Law Review* 28, 32ff,

⁴⁷ There is a trend, however, for the review of the amendment process, see Yaniv Roznai, *Unconstitutional Constitutional Amendments The Limits of Amendment Powers* (OUP 2017).

⁴⁸ 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].

⁴⁹ 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.

⁵⁰ *California Democratic Party v. Jones*, 530 U.S. 567 (2000) at [598].

⁵¹ *Colegrove v. Green*, 328 U.S. 549 (1946) at [554].

⁵² Regarding deference in emergencies in a number of countries see Guobin Zhu, *Deference to the Administration in Judicial Review*, (Springer 2019).

⁵³ However, Courts have not shown complete deference on issues of civil liberties. On the contrary, they have examined restrictions case by case and occasionally they have ruled some restrictions as unconstitutional. For instance, the US Supreme Court granted an injunction against New York State’s ‘very severe restrictions on attendance at religious services in areas classified as “red” or “orange” zones’, see *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 592 U. S. ____ (2020). In addition, the Constitutional Court in Germany has ruled that the Hessian state government infringed the Article 8 (2) of the Basic Law by adopting a complete ban of

of the US post services in the US, nor on the imprint of the name of the President on the stimulus checks.

In the Greek situation there has been no case recorded pertaining to the payments made to the media in relation to the pandemic. Possibly, the lack of a coherent framework to regulate political self-entrenchment, the well-known practice of deference shown by the courts during emergencies, or the lack of standing in specific cases have deterrent effect keeping challenges away from the courts.

In theory, judicial review is a key aspect of constitutionalism and the courts are entrusted with the safeguarding of the political process.⁵⁴ However, when in times of exigency, courts show deference inevitably, political actors with power, incumbents, are allowed de facto to dominated on the political arena. Such dominance takes place in a number of forms, for instance by abusing procedures, such as elections, or by maladministering public resources, Such practices entertain the self serving purposes, which may be to consolidated power or their reelection.

As the political actors in power abuse their power for self-serving purposes, and courts are silences, the level playing field is distorted and self-entrenchment takes place. Political actors find it difficult to compete with the incumbents and the quality of democracy is at risk.

The political means; legislative scrutiny, the press, and the people

The previous part has examined the role of the courts during the pandemic and has shown its limitations. Thus, the protection of democracies from political self-entrenchment during emergencies relies more on the political means. In that process, the role of the opposition in the legislature, of the media and of the ordinary citizens is critical to prevent and block self-entrenchment practices.

Interestingly due to the nature of the pandemic, in some countries, such as in Hungary, parliamentary sessions were suspended, in others such as in Greece and the UK they were either under function or gone virtually via online platforms respectively. Bar-Siman-Tov explains that ‘legislatures’ were operation is based on the assembly of many people together. Indeed, the idea of gathering or assembling is so fundamental to the identity of legislatures, that it is even reflected in their institutional names.’⁵⁵

Therefore, the ordinary assembly of parliaments was a potential cluster for infections and the safe option was their limited function. Obviously, the temporary suspension meant the gravest impairment of the role of the legislature, with the virtual transposition to be the least impairment, and the under function to lie in between.

assemblies, see BVerfG, decision of the 1st Chamber of the First Senate of April 15, 2020 - 1 BvR 828/20 -, Rn. 1-19, available at: http://www.bverfg.de/e/rk20200415_1bvr082820.html.

⁵⁴ For more details see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

⁵⁵ See Ittai Bar-Siman-Tov *Covid-19 meets politics: the novel coronavirus as a novel challenge for legislatures* (2020) 8 *The Theory and Practice of Legislation* 11.

However, the virtual transformation of the assemblies was not everywhere possible due to technological limits.⁵⁶ In total, it was estimated that governments due to the pandemic have shut or limited parliaments in countries with 2 billion people.⁵⁷ It is argued that the weakening of the legislature in times of emergency such as the covid-19 pandemic has paramount consequences for three reasons: first ‘legislative control over the acts and actions of emergency authorities is of vital importance for safeguarding the rule of law and democracy’, second ‘problems of input and throughput democracy are gaining major significance vis-à-vis law-making practices during the Covid-19 emergency’ and third ‘emergency legislation adopted through fast-tracked procedures in response to urgent and compelling policy concerns is traditionally regarded as difficult to reconcile with requirements for good quality legislation’.⁵⁸

Moreover, there is a fourth reason, which is relevant to executive self-entrenchment. Regardless the system of separation of powers, presidential or parliamentary, the legislature is the forum in which the opposition operates. By deactivating the legislatures, the opposition is shut down as it loses its forum to scrutinize governmental policies, to question executive actions, to record and condemn practices of self-entrenchment and to keep the government accountable. In other words, this limited function of the legislative body has grave implications on the quality of modern democracy as parliamentary scrutiny is restricted, ministerial accountability is distorted and most importantly the voice of the opposition becomes hollower.

With limited parliamentary scrutiny, the oversight is exercised by the media and ordinary people is therefore is critical. To begin with, the role of the media during the pandemic is criticized due to the exaggeration of the risks and disproportionate coverage.⁵⁹ However, the media are not considered as the 4th power in the separation of power for good reasons. Media are entrusted with the role to share information and such information is critical for the evaluation of governmental policy in the democratic process. Media panels and columns in newspaper can become a forum for unfettered political debate where political actors representing the government and the opposition may discuss the appropriate and more efficient mechanisms to face the pandemic. This is significant especially in times with shut or under functioning parliaments.

Traditional media and the press, are essential means of information and transparency in times where legislature and courts are silenced or under functioned. They are at the appropriate position to raise awareness on cases of abuse of power, and to stop

⁵⁶ See Ittai Bar-Siman-Tov Covid-19 meets politics: the novel coronavirus as a novel challenge for legislatures (2020) 8 *The Theory and Practice of Legislation* 11.

⁵⁷ Claire Provost, Nandini Archer and Lydia Namubiru, Alarm as 2 billion people have parliaments shut or limited by COVID-19 available at <https://www.opendemocracy.net/en/5050/alarm-two-billion-people-have-parliaments-suspended-or-limited-covid-19/>

⁵⁸ Elena Griglio, ‘Parliamentary Oversight under the Covid-19 Emergency: Striving against Executive Dominance’ (2020) 8 *The Theory and Practice of Legislation* 49.

⁵⁹ See Alberto Alemanno, ‘Taming COVID-19 by Regulation: An Opportunity for Self-Reflection’ [2020] *European Journal of Risk Regulation* 1 and Ittai Bar-Siman-Tov Covid-19 meets politics: the novel coronavirus as a novel challenge for legislatures (2020) 8 *The Theory and Practice of Legislation* 11.

disinformation campaigns and governmental propaganda. Their potential criticism to the executive actions might act as a bulwark to prevent abuse of power.

But in democracies, where sovereignty lies with the people, people have a responsibility. The people choose during the elections their representatives and decide who will govern them. This decision is a transfer of power, though temporary. The people have an obligation as watchdog to oversee the exercise of this power. In modern times, where social media assist the mainstream media, the people have more power, in theory to control the policies implemented to combat the pandemic, to participate in public debate with proposals for better solutions.

Democracy under no circumstances is allowed to be imperiled.. In most of the democratic constitutions where the sovereignty lies with the people, the people have an obligation to defend the quality of the democratic polity. People should criticize activities of self-entrenchment and penalize with their votes incumbents who take advantage of an emergency by abusing their power for self-serving purposes.

Conclusions

This Chapter examined the pathology of executive self-entrenchment during the pandemic of Covid-19. Most of the countries have implemented one way or another an emergency framework and the power was concentrated in the hands of the executive to face the exigency. While the focus in times of exigency is on the human rights violations and the adoption of disproportionate executive measures, less focus is paid on the possibility of executive abuse of power for self-serving purposes. Political self-entrenchment is an old routed problem and incumbents in power often aim to perpetuate and consolidate their power, however, this seems to be neglected in times of crisis.

The current pandemic has shown a number of self-entrenchment practices. Cases from the US and Greece were mentioned where governments have taken the opportunity given by the pandemic in order to act for self serving purposes. The key question that was analysed was how different institutions face such problem.

Based on Ely, in theory there are two ways; the legal and the political way. In the legal way, where the Courts are in the frontline, it was discussed that in practice and given the conditions of the pandemic, courts are unlikely to diverge from the general stance of deference they show in times of crisis. Moreover, no incident of executive self-entrenchment was brought before the courts.

On the other hand, the role of politics was examined. Given that parliaments around the world were suspended or under functioning the authority of the political opposition to monitor and scrutinize executive practices of self-entrenchment was limited. It seems that it is left to mainstream media to report and put in the spotlight such incidents and the people to engage with such events. Unfortunately, when democracies are left at the sake of the media scrutiny and of the peoples' engagement, it means that democracies is vulnerable in times of emergencies with less safeguards to secure their orderly function and proper protection against acts of self-entrenchment.

All in all, times of exigency create a fertile ground for incumbents to take advantage of the power for self-serving purposes, while the system of checks and balances is left with less means to face such practices. The critical issue is that self-entrenchment has a long-standing impact on the political arena and the quality of the democracy that outlast the emergency period.

While self-entrenchment took place in times of exigency with limited control, when normality would be restored, the political system would suffer from each consequences. Political opposition would be disadvantaged in the political arena and democracy without level playing field, and without equality is a democracy without quality.