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2

Abuse of Power and Self-entrenchment as a State Response to the COVID-19 Outbreak: The Role of Parliaments, Courts and the People

ANTONIOS KOUROUTAKIS

I. Introduction

The World Health Organization, on 11 March 2020, declared the coronavirus outbreak known as SARS-CoV2 (severe acute respiratory syndrome coronavirus 2) or COVID-19 a pandemic.

The pandemic was spreading across the globe causing an unprecedented amount of pressure on public health systems, while before 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 cent,² while the transmission intensity and the spread was much faster compared again with 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.

¹For more details on the data regarding the infections and the death toll caused by COVID-19 see [worldometers, www.worldometers.info/coronavirus](https://www.worldometers.info/coronavirus).

²According 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)', www.who.int/docs/default-source/coronaviruse/situation-reports/20200219-sitrep-30-covid-19.pdf?sfvrsn=3346b04f_2.

³According 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', www.imperial.ac.uk/mrc-global-infectious-disease-analysis/covid-19/report-3-transmissibility-of-covid-19/.

The common strategy for mitigation of COVID-19 was the so-called policy of social distancing.⁴ A plethora of tools were used to that objective, from the mandatory wearing 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.

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 à 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

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', www.imperial.ac.uk/mrc-global-infectious-disease-analysis/covid-19/report-9-impact-of-npis-on-covid-19/: '(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 As regards Italy see DECRETO-LEGGE 23 febbraio 2020, n 6, www.normattiva.it/uri-res/N2Ls?urn:nir:statto:decreto.legge:2020-02-23;6!vig= and for the list of executive Decrees adopted by the executive see www.governo.it/it/coronavirus-normativa.

⁶ As regards the USA see 'Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak', trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/.

⁷ As regards 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, www.boe.es/buscar/doc.php?id=BOE-A-2020-3692.

⁸ See for instance D Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (CUP, 2006).

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

¹⁰ A Kouroutakis and S Ranchordás 'Snoozing Democracy: The De-juridification of Emergencies' (2016) *Minnesota Journal of International Law* 25.

¹¹ J 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; E 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 A 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

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 in the case of the pandemic. 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.

II. Abuse of Power and Political Self-entrenchment During Ordinary Conditions and During Times of Emergency

A. 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 favours 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.

and provoked scepticism in different sciences. For more details on political self-entrenchment see D Levinson, and B Sachs, ‘Political Entrenchment and Public Law’ (2015) 125 *The Yale Law Journal* 400; M Klarman, ‘Majoritarian Judicial Review: The Entrenchment Problem’ (1997) 85 *Georgetown Law Journal* 491.

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

¹⁵ S Gardbaum, ‘Comparative Political Process Theory’ (2020) 18 *International Journal of Constitutional Law* 1429.

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 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 situation 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, once Viktor Orban 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

¹⁶ See 'Money in Politics: Sound Political Competition and Trust in Government' (OECD, Paris, 14–15 November 2013) [20], www.oecd.org/gov/ethics/Money-in-politics.pdf.

¹⁷ See A Kouroutakis, 'Legitimate and Illegitimate Political Self-entrenchment and its Impact on Political Equality' (2021) *Vienna Journal on International Constitutional Law* 1.

¹⁸ WD 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.

¹⁹ See D Pavli 'Berlusconi's Chilling Effect on Italian Media' (30 March 2010), www.opensociety-foundations.org/voices/berlusconi-s-chilling-effect-italian-media.

²⁰ See 'The state of Hungarian media: Endgame', blogs.lse.ac.uk/medialse/2017/08/29/the-state-of-hungarian-media-endgame/.

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

B. 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 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 was suspended in the US²³ and in a plethora of jurisdictions some trials were operating online.²⁴ On 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 US, once Congress passed the COVID-19 relief package and authorised 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 without saying that the President's name on

²¹ O Liebermann and A Carey, 'Israel's Benjamin Netanyahu to be indicted on corruption charges, pending hearing' (CNN, 28 February 2019) edition.cnn.com/2019/02/28/middleeast/israel-benjamin-netanyahu-indictment-intl/index.html.

²² I Waismel-Manor, I Bar-Siman-Tov, O Rozenberg, A Levanon, C Benoît and G Ifergane, 'COVID-19 and Legislative Activity: A Cross-National Study' (2 July 2020) Bar Ilan University Faculty of Law Research Paper No. 20-12: www.researchgate.net/publication/342514148_Covid-19_and_Legislative_Activity_A_Cross-National_Study.

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

²⁴ A Kouroutakis, 'Legaltech in Public Administration: Prospects and Challenges' in *The Cambridge Handbook of 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; B Aditya, 'The Origins of Judicial Deference to Executive Interpretation' (2017) 126 *Yale Law Journal* 908.

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

the stimulus check is free advertisement which was especially valuable 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 an 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 have burdened ordinary handling by the US Postal Service. In addition, it was expected that more ballots by email would favour 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 the US Postal Service, 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 the 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 promptly shut non-essential businesses and imposed a stay-at-home order. Among the emergency measures adopted, the government was authorised to run an awareness campaign regarding the pandemic. By executive legislation, private and public radio and TV stations were obliged to air for free awareness messages on how to minimise 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

²⁷ Kouroutakis (n 14).

²⁸ E Kaufman, M Cohen, J Hoffman and N Robertson, 'Trump says he opposes funding USPS because of mail-in voting' (CNN, 13 August 2020) [cnn.com/2020/08/13/politics/trump-usps-funding-comments-2020-election/index.html](https://www.cnn.com/2020/08/13/politics/trump-usps-funding-comments-2020-election/index.html).

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

³⁰ M Wines, 'As Trump Rails Against Voting by Mail, States Open the Door for It' (*New York Times*, 22 May 2020) 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) www.taxheaven.gr/law/%CE%A0%C'E%9D%CE%A011.03.2020/2020.

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 COVID-19. In the survey, 62 percent of the respondents said they distrust what they are hearing about the pandemic from the national government in their country of focus'³⁴ 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 do different institutions act and react?

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), 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) www.euractiv.com/section/politics/short_news/athens-greek-government-exposed-over-covid-19-awareness-funds/.

³⁴ Freedom House, 'Democracy under Lockdown – The Impact of COVID-19 on Global Freedom' (October 2020) freedomhouse.org/article/new-report-democracy-under-lockdown-impact-covid-19-global-freedom.

³⁵ *ibid.*

III. The Difficulty of Facing Political Self-entrenchment During the Pandemic

A. The Role of the Courts

During emergencies, the focus lies often on the overreaction 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 of facing the emergency. However, when incumbents misuse emergency state resources in their favour, turning them into tools with tremendous impact on the political competition, they distort 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 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 recognise 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 on 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 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 power for self-serving purposes.

³⁶For instance, Dyzenhaus offers a critique on emergency laws hindering civil liberties, see D Dyzenhaus, ‘The Permanence of the Temporary – Can Emergency Powers Be Normalized?’ in RJ Daniels, P Macklem and K 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 WJ Brennan, Jr, ‘The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises’ (1988) 18 *Israel Yearbook on Human Rights* 11.

³⁷JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 78.

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

On the other hand, the mechanism of judicial review relies on judges to oversee 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 of *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 other topics, the political process.⁴³ In theory, Ely has stressed the paramount role of the Supreme Court Justices to 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 Secondly, courts show deference to the

³⁹In addition, in some countries independent agencies and bodies, such as electoral commissions, are entrusted with the role of solving political disputes. See B Ackerman, 'Good-bye, Montesquieu' in S Rose-Ackerman and PL 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.' Bellamy (n 38) 112.

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

⁴¹For instance, as regards 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).

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

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

⁴⁴Ely (n 37) chs 4 and 5.

⁴⁵See T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (CUP, 2003) 22 ff.

⁴⁶RH Pildes, 'The Constitutionalization of Democratic Politics' (2004) 118 *Harvard Law Review* 28, 32ff.

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

⁴⁸For 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].

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 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 their stance in practice.⁵³ No complaint was brought on the defunding of the US Postal 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 a 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 dominate 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 self-serving purposes, which may be to consolidate power or enable their reelection.

As the political actors in power abuse their power for self-serving purposes, and courts are silenced, the level playing field is distorted and self-entrenchment

⁴⁹ See Allan (n 25); A Bamzai, ‘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 G 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 Article 8(2) of the Basic Law by adopting a complete ban of assemblies, see BVerfG, decision of the 1st Chamber of the First Senate of 15 April 2020 – 1 BvR 828/20 –, Rn. 1-19, www.bverfg.de/e/rk20200415_1bvr082820.html.

⁵⁴ For more details see Ely (n 37).

takes place. Political actors find it difficult to compete with the incumbents and the quality of democracy is at risk.

B. The Political Means; Legislative Scrutiny, the Press, and the People

The previous section 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 citizen 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 of limited function or conducted virtually via online platforms respectively. Bar-Siman-Tov explains that 'legislatures' very 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.

However, virtual transformation of assemblies was not possible everywhere due to technological limits.⁵⁶ In total, it was estimated that due to the pandemic governments 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', secondly 'problems of input and throughput democracy are gaining major significance vis-à-vis law-making practices during the COVID-19 emergency' and thirdly '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

⁵⁵ See I 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.

⁵⁶ See Bar-Siman-Tov (n 55).

⁵⁷ C Provost, N Archer and L Namubiru, 'Alarm as 2 billion people have parliaments shut or limited by COVID-19' www.opendemocracy.net/en/5050/alarm-two-billion-people-have-parliaments-suspended-or-limited-covid-19/.

⁵⁸ Griglio (n 11).

Moreover, there is a fourth reason, which is relevant to executive self-entrenchment. Regardless of 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 scrutinise 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, oversight exercised by the media and ordinary people is therefore critical. To begin with, the role of the media during the pandemic was criticised 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 without good reasons. The media are entrusted with the role of sharing information and such information is critical for the evaluation of governmental policy in the democratic process. Media panels and columns in newspapers 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 well situated to raise awareness on cases of abuse of power, and to stop disinformation campaigns and governmental propaganda. Their potential criticism of 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 their representatives during the elections 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 democratic constitutions where the sovereignty lies with the people, the people have an obligation to defend the quality of the democratic polity. People should criticise activities of self-entrenchment and penalise with their votes incumbents who take advantage of an emergency by abusing their power for self-serving purposes.

⁵⁹ See A Alemanno, 'Taming COVID-19 by Regulation: An Opportunity for Self-Reflection' (2020) *European Journal of Risk Regulation* 1 and Bar-Siman-Tov (n 55).

IV. Conclusions

This chapter examined the pathology of executive self-entrenchment during the pandemic of COVID-19. Most countries have implemented one way or another an emergency framework and power was concentrated in the hands of the executive to face the exigency. While the focus in times of exigency is on human rights violations and the adoption of disproportionate executive measures, less focus is paid to the possibility of executive abuse of power for self-serving purposes. Political self-entrenchment is an old 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 with self-serving purposes. The key question that was analysed was how different institutions face such problems.

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 scrutinise executive practices of self-entrenchment were 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 subject to media scrutiny and the peoples' engagement, it means that democracies are 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 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 outlasts 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 consequence. Political opposition would be disadvantaged in the political arena, and a democracy without a level playing field and without equality is a democracy without quality.