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The impact of Covid-19 on Better Regulation agenda¹

Panagiotis Karkatsoulis²

Abstract

The outbreak of the Covid-19 has had a negative impact on Governance systems. According to the recent literature, the pandemic should be understood as one more step towards Autocracy. Governance systems have reacted to the coronavirus pandemic through a series of decisions, which suffer both in terms of their issuing significant faults as far as it concerns both their process of issuing and their content. The vast majority of the commented decisions are violating the legality principle and have been issued on a “state of emergency” basis.

In fact, what has been happening during the pandemic, is a systematic cancellation of the Better Regulation Agenda. Recent surveys have shown that the poorest the quality of Governance, the heaviest (negative) impact of the coronavirus on regulatory policies. In Greece there was an intensification of corporatistic regulation and decisions during the crisis. Covid-19 has functioned as an alibi: Many agencies and public organizations followed an extralegal procedure, when it came to the recruitment of personnel as well as public procurement. What does change during a crisis like the pandemic, is the people’s attitude towards government, which offers an opportunity to push some reforms forward. But as long as the governance system remains unchanged those reforms are bound to fade out soon after the crisis is over.

Introduction

The outbreak of the Covid-19 has a negative impact on Governance systems. Though the pandemic has just happened and the short time does not allow to draw secure conclusions, we consider that the vast majority of literature is tending that the recent pandemic should be understood as one more step in a transition from Democracy to Autocracy (Cepaluni, Dorsch, & Branyiczki, 2020; Kavanagh & Singh, 2020). Furthermore, many writers recall the long-established strand of critique of modern biopolitics in the humanities represented by authors like Michel Foucault (Nygren, Olofsson, & Olofsson, 2020), Roberto Esposito (Short, 2020), and Giorgio Agamben (Berge, 2020).

Recently, Agamben made his standpoint clear in an article about the Coronavirus, in which he describes the media and the authorities as doing ‘their utmost to create a climate of panic, thus provoking a true state of exception, with severe limitations on movement and the suspension of daily life and work activities for entire regions’ (Agamben, 2020).

Biopolitics became not only a global fact but they have introduced a new set of notions and distinctions, which, as it seems, they are going to dominate (at least for the near future) the discussion

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about social coherence and integrity. As Roberto Esposito explains on the meaning of immunity “Socially and politically speaking, even face masks and social distancing are part of an immunitarian attitude toward human interaction. So, immunity is at the center of everyday life today. Immunity is something ambivalent: it generates its own risks and dangers as well. To connect this to the contemporary crisis, during the pandemic, the intertwining of politics and medicine has become absolutely central. On the one hand, medicine has become politicized in the crisis, as shown by the conflicts between virologists and epidemiologists on what seems like purely scientific questions. These are, in fact, also of a social and geo-political nature. On the other hand, politics has become medicalized, treating the citizen as a patient in need of perpetual care and turning social deviance into an epidemic disruption to be treated or suppressed. Of course, this has very significant consequences. Giving doctors the task of political decision-making, on the one hand, strongly reduces the scope for political action and, on the other hand, radically transforms the political arena, making deviance a pathological condition” (Esposito, 2020).

However, since we are still in the unknown as far as it concerns the deep structure and the extent of the coronavirus disastrous impact on the human organism, we can admit with Habermas that: “The economic and social science experts should be cautious about making ill-considered forecasts. One thing can be said: There has never been so much awareness of our ignorance and of the necessity to have to act and to have to live under conditions of uncertainty (Habermas, 2020). On a juxtaposition, Slavoj Žižek has published a book in which he claims that the pandemic is revealing the need for a ‘reinvented communism’ (Žižek, 2020)

Apart from the various positions and estimations, there is not even one who predicts an easy way of disengagement from Covid-19. Bruno Latour in its essay on Coronavirus stresses that: “It’s a huge experiment. This is a global catastrophe that has come not from the outside like a war or an earthquake, but from within. Viruses are completely inside us. We cannot completely eject them. We must learn to live with them” (Latour, 2020).

From the philosophical point of view to an administrative/political

Moving from the philosophical point of view to an administrative/political one, some certain evidence-based conclusions are already present: Governance systems have reacted to the coronavirus pandemic through a series of decisions, which suffer significant faults as far as it concerns both the process of issuing them and their content. Most of the commented decisions are violating the legality principle and operating on a “state of emergency” situation.

A state of emergency is a situation in which a government is empowered to perform actions or impose policies that would normally not be permitted to undertake. A government can declare such a state during a natural disaster, civil unrest, armed conflict, medical pandemic or epidemic or other biosecurity risk. Such declarations alert citizens to change their normal behavior and orders government agencies to implement emergency plans.

States of emergency can also be used as a rationale or pretext for suspending rights and freedoms guaranteed under a country's constitution. The procedure for and legality of doing so vary by country.

As Gessen stresses In “Surviving Autocracy,” (Gessen, 2016) the United States has been terribly unprepared for a figure like Donald Trump. Not because he came out of nowhere; if anything, he took advantage of a political system that was ripe for a demagogue, swollen already by money and the powers concentrated in the executive branch. The same goes to Greeks who have been exhausted by the leftist Government led by Tsipras who has been transformed from a revolutionary to a pure neo-liberal.

Following Schmitt's terms (Ausnahmezustand) (Schmitt, 1978), the emergency has led governments to violate the division of powers and undertake the legislator's role, which has been, practically, abandoned by the legislature. The pandemic is a sort of a global state of emergency which must be studied in its detail. However, it's a paradox the mere fact that each one of the EU member states has reached a decision on a state of emergency, according to its own estimation and decision making mechanisms. The “state of emergency” was a true expression of sovereignty.

However, the modern state of emergency due to the coronavirus copies Schmitt's definition of “sovereignty” as the power to decide to initiate a state of exception. Through the state of exception, Schmitt included all types of violence under right, in the case of the authority of Hitler leading to the formulation "The leader defends the law" ("Der Führer schützt das Recht") (Schmitt C. , 1934).

The violation of the principle of the separation of powers and, specifically in the pandemic case, of the legislative function, has led to the institutionalization of “new, extralegal rules” (Mbembe).

In fact, what has been happening on the pandemic, it is a systematic cancelation of the Better Regulation Agenda, as it has been applied during the last decades. In this sense the violation of Democracy is, somehow, indirect. We may call it a “hollowing out of the rule of law” paraphrasing the term “Hollowing out of the State” introduced by R. W. Rhodes (Rhodes, 1994). It is a continuous slip to authoritarianism.

There are, though, significant differences between the classic example of the Reichstag Fire (the arson against the German parliament) which led to President von Hindenburg's “Reichstag Fire Decree”

following Hitler's advice, but there are undoubtful similarities as well: The consequences of entering a state of exception may unroll slowly. "Even the original Reichstag Fire was not the Reichstag Fire of our imagination—a singular event that changed the course of history once and for all," Gessen wrote, pointing out that the Second World War did not begin for another six years after the Reichstag burned.

Alongside with the state of exemption another phenomenon in governance has been developing: the “hollow out of the state” (Rhodes, 1994). Hollowing out of the state, is a concept to describe a situation where an increasing number of public interest services is provided by the private sector or networks outside government, while at the same time public authorities seem to maintain control, but they are doing so just in a symbolic way. The hollow state can be identified by four main elements: privatization; alternative service delivery systems; the transfer of sovereign powers to the EU; and the new public management as the private sector’s toolkit applied to the public sector. The resulting problems include fragmentation and lack of accountability.

A combination of the state of exemption with the hollowing out of the state results to a “hollowing out of the Rule of Law”. When we apply the above described concepts of the “the state of exemption” and the “hollowing out of the state” to the current coronavirus crisis, we conclude the following:

1. Parliaments set back during a crisis and the executive takes over and regulates through emergency legislation.
2. The crisis creates a regulatory trilemma:
 - Changes and reforms may happen, which in “normal” times cannot be implemented. According to this concept, crisis creates a fertile ground for changes.
 - The crisis may open Pandora’s Box resulting to an escalation of the crisis.
 - The crisis might not influence functionalities and structures of Governance, since its results do not create any threat for established culture and values which have been remained unchangeable for a long period of time.

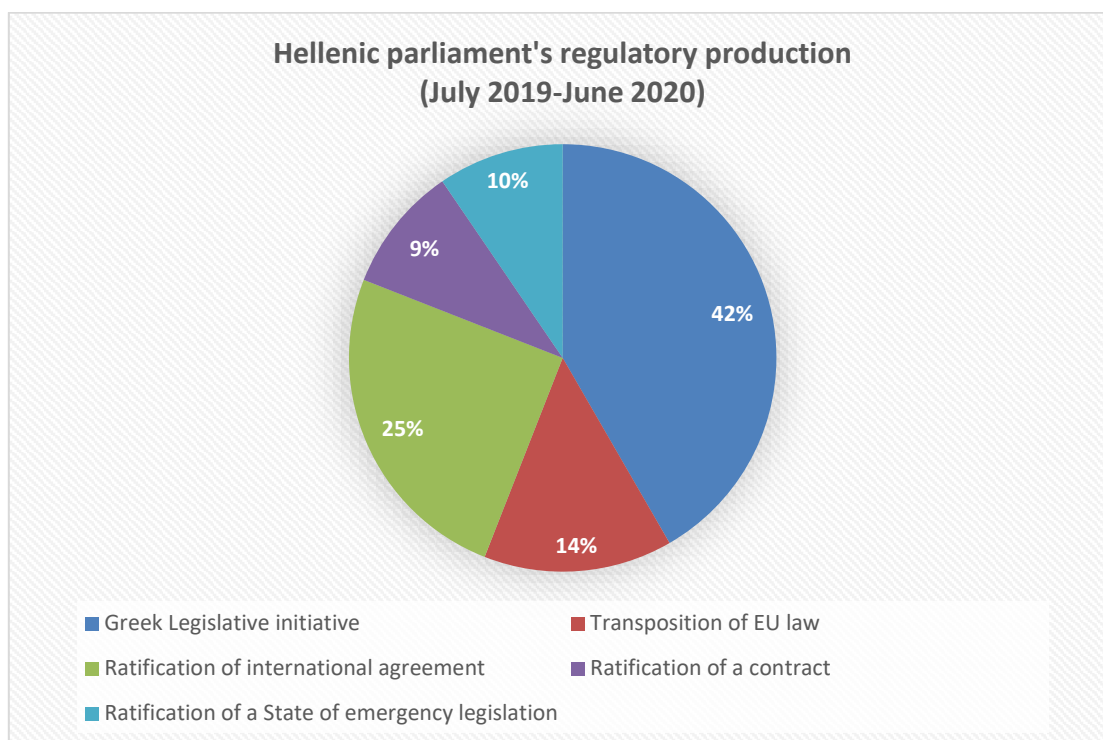
Having studied and analyzed the Greek regulation during the outbreak in Greece (February 2020-June 2020), we have concluded that there are significant deviations from the Better Regulation standards and principles as they have been formed by both the European Commission and the Greek Government. Better regulation relies on evidence and a transparent process, which involves citizens and stakeholders (for example, businesses, public administrations and researchers) throughout the law-making process.

Emergency legislation is an exceptional regulatory process, which, according to the Greek constitution, should be used strictly in emergency situations. The over-use of it shall be avoided. Emergency legislation is issued by the executive, namely the council of ministers, and has then to be ratified by the parliament within certain time limits, in order to be valid. The emergency legislation during the pandemic were 4 legislative acts in a total of 43 legislative acts enacted during that period. Compared to the regulatory production of the previous 12 months (July 2019 – June 2020) there is no spike in emergency legislation. More specifically, from July 2019 to June 2020 there have been enacted 8 emergency legislations in a total of 82 legislative acts (including the pandemic period). That means that in the past year the government has made use of the emergency legislation 4 times during the pandemic and 4 more times before that. Nevertheless, the issues regulated by the 4 emergency legislation issued during the pandemic, were indeed connected to the coronavirus, such as:

- The organization of the immigrants hot spots, the requisition of emergency housing to host infected immigrants in case of an outbreak, and other issues related to immigrants.
- The extra financing to the ministry of health in order to deal with the coronavirus extra expenses
- Labour related issues, for workers to be able to follow the lockdown instructions without been fired.

But the issues regulated through emergency legislation before the pandemic were mostly clientelistic arrangements. Those arrangements did not contain themselves just into the emergency legislation, but spread throughout the legislative production of the 12 months period. Clauses that introduced exceptions from the law had been enacted many times between July 2019 – June 2020. Clientelism, present in Greece for two centuries, has evidently affected the law-making practices as well. Most of the Greek Governments, both left and right wing, have paid their tribute and reproduced the clientelistic networks. The right-wing government of New Democracy (ND), that emerged after the elections in July 2019, is no exception.

From the total of the parliamentary regulatory production of the previous 12 months, there is a 10% that refers to the state of exemption due to the coronavirus. The rest 42% refers to regulations initiated by the Greek government, while another 25% refers to the ratification of international agreements, 14% to the transposition of EU law, and 9% to the ratification of public contracts.

Figure 1: Regulatory production of the Hellenic parliament (July 2019 - June 2020)

There have been 36 laws (42% of the legislative production, as shown in figure 1) for which the legislative initiative belonged to the Greek government. Those are the laws that are inhibited by regulatory exemptions, as international agreements, contracts and EU law have a mostly pre-described text. In those 36 laws we have mapped 90 cases of exceptional regulatory clauses:

- 14 exemptions regarding staff hiring in the civil service
- 34 exemptions regarding secondments, transfer and mobility in the public sector
- 8 exemptions regarding remuneration of civil servants
- 6 exemptions regarding the selection of the leadership in the public sector
- 25 exemptions referred to public procurement
- 3 exemptions referred to other administrative issues.

Conclusion

To conclude, the impact of the coronavirus on governance depends on its context. The political, legal and administrative culture of each country is not affected even in a case like the pandemic, which

creates the need for immediate and acute actions. Even if the results of governing through a crisis may seem different (i.e. more effective) than usual, the underlying practices and culture remains the same. What does change during a crisis like the pandemic, is the people's attitude towards government, which offers an opportunity to push some reforms forward. But as long as the governance system remains unchanged those reforms are bound to fade out soon after the crisis is over.

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