

# Challenges of Rule of Law: Juristocracy, Deep State, Administrative State

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## **Juristocracy**

- In the past decades we have witnessed at home and around the world the valorization of judicial review.
  - The revolution of basic law fundamentalism characterized the European legal development of the last decades
  - Constitutions have cataloged the fundamental human rights of individuals
  - Fundamental rights are constitutional constraints on government power, which, if violated, individuals call for judicial review
  - Legislative acts that restrict individual freedom and can not be justified on reasonable public grounds are considered illegitimate
  - Judicial review is essential for the overall legitimacy of a constitutional democracy
  - We can call this arrangement „Legal constitutionalism”
- Recently, as a response to this tendency, the theory of „political constitutionalism” conceptualized both in the political and in the legal thinking, as an alternative to the – so far predominant – theory of legal constitutionalism.
- This phenomenon takes different forms (both in theory and in practice) in different countries – eg. US, Germany, England – but there is a similarity in tensions and dynamics: the emphasis has moved from the definite primacy of the protection of basic rights in the direction of questions concerning the protection of the nation’s latitude.

## **Judicial governance**

Challenges to parliamentarian democracy / „Judicial governance” (U.S.):

- Debates over the functioning of separation of powers and the system of checks and balances
- Criticism of the overwhelming power of the Supreme Court: „Grand Ayatollahs of the Constitution”.
- „We are under a Constitution, but the Constitution is what the judges say it is” (Charles Evans Hughes)
- „Fed Up! Our Fight to Save America from Washington” is a 2010 political non-fiction book authored by Governor of Texas Rick Perry. The sixth chapter, titled "Nine Unelected Judges Tell Us How to Live", examines the Supreme Court of the United States and how some of its decisions have taken away the right of states to legislate, particularly on criminal law, religious expression in public, gun law, abortion, marriage and race-based law. He argues that many of the justices are activists, making policy on their own rather than interpreting the Constitution. He finds this to be troubling since justices are unelected and appointed for life.

## **Populism And...the judicial populism?**

Challenges to parliamentary democracy / „Judicial populism”:

- All agree that populism poses a challenge – perhaps even a crisis – for liberal democratic constitutionalism.
- Most work explicitly or implicitly agrees with the view that populism is a threat to liberal democratic constitutionalism: Suggesting that they and they alone truly represent the people, populists are anti-pluralist and thus to some degree illiberal.
- Experience suggests that when liberal democratic constitutions are attacked, what replaces them is usually not newer, better institutions but instead formal and informal arrangements that erode the liberal or democratic nature of the polity.
- Constitutional courts are critical but no longer sufficient: constitutions need a range of specialized independent institutions to ensure the integrity of elections, cleanse corruption, and hold elected leaders to account
- Those relying on courts as the exclusive or perhaps even major bulwark against populists are likely to be disappointed. Most obviously, head-on collisions between courts and populist leaders are likely to end badly for the courts. Leaders determined to undermine a court have a number of different devices with which to do so, ranging from abolishing the court to changing its jurisdiction to simply packing it over time.
- Another interesting line of inquiry some contributions follow is what happens when courts themselves turn “populist” by focusing on public approval as the gauge for their action. Connecting the two inquiries, some authors ask if judicial populism represents a viable strategy to contain populist threats to constitutionalism.

- As a general rule, Andrew Arato argues, courts will be most successful in opposing populism where they enjoy strong support from civil society initiatives which can in turn reinforce the judicial role.
- But even where we are more skeptical of linking judicial authority directly to opinion polls, judicial populism seems to have become an increasingly prevalent phenomenon in some jurisdictions such as India (Anuj Bhunia).
- As a means of confronting populist movements, judicial populism is a risky strategy given that judges enjoy less direct popular legitimacy than elected leaders and courts typically depend on other institutions to enforce their judgments. Some, like Harel, therefore argue that judicial populism may decrease public support by making courts look unprincipled.

[Introduction: Constitutional Courts and Populism | Michaela Hailbronner @ <http://www.iconnectblog.com/2017/04/introduction-constitutional-courts-and-populism/> ]

## **Judicial activism vs. Parliamentary Supremacy**

Challenges to parliamentary democracy / „Judicial activism“:

- The political criticism of judicial activism under legal constitutionalism:
  - "Coup d'état" took place in the courtrooms: radical transformation of the normative legal system through "law making" by constitutional courts
  - Decisions of the Constitutional Courts' which are considered to be of political-type limit the maneuvering capacity of legislative and executive powers to handle crisis
  - The essence of the constitutions is not the human rights catalogs, which are imposed on the fundamental laws, but the ultimate decision-making competence by the chosen politicians
  - The legal nature of the judicial justification makes it difficult for judges to deal with the moral aspects and economic consequences of the issues raised by the cases
- According to the ideological flow called political constitutionalism:
  - Legislators with a democratic mandate are much more competent and have more power to solve the problems caused by "reasonable differences of opinion" than judges who ignore the majority opinion
  - We should return to governance by elected and accountable leaders, political decisions should be made by politicians

- The accountable government, together with the parliament with sovereign and democratic representations, is the depositary of political decisions

## **Legal vs. political constitutionalism?**

*„We have no fundamental laws, and no constitutional court charged with checking to see if legislation is compliant with them. [...] The result is to keep our constitution in a perennial dynamic tension with political consent and consensus.”* - Jesse Norman, Conservative Member of Parliament (UK)

- Political constitutionalism = dynamic constitutionalism .
- „I turn now to the question of remedies. The genius of our constitution is not that it is unwritten—much of it is in fact written down, in statute, rules of procedure etc.—but that it is unentrenched. We have no fundamental laws, and no constitutional court charged with checking to see if legislation is compliant with them. Rather, our constitution is in large part an extension of the methods of the common law to the practice of governing. It is provisional, and any aspect of it can in principle be revised or repealed. The result is to keep our constitution in a perennial dynamic tension with political consent and consensus. The narrow rulebook stays connected with what one might term, à la Montesquieu, the spirit of the nation.” - Jesse Norman, Conservative Member of Parliament (UK)

## **Administrative State**

- Theodore Roosevelt, when he explained how little people know of how government really operates:

„Political parties exist to secure responsible government and to execute the will of the people.

From these great tasks both of the old parties have turned aside. Instead of instruments to promote the general welfare, they have become the tools of corrupt interests which use them impartially to serve their selfish purposes. Behind the ostensible government sits enthroned an invisible government owing no allegiance and acknowledging no responsibility to the people.

To destroy this invisible government, to dissolve the unholy alliance between corrupt business and corrupt politics is the first task of the statesmanship of the day.”

- The Deep State has the power to limit the elected president and to return him to the conventional framework that the previous presidents had to adhere to.
- Does the public administration (state administration) have such a professional content (and rules of operation) that every elected power has to hold, or is the "Deep State" an invisible state possessing strong financial and other power resources?

## Debate: 'Deep State' – shadow government?

Challenges to parliamentary democracy / „Deep State“:

- Lofgren made the following statement in "The Deep State": In fact, in America, there has always been a " deep state ", a background state or a background power that was largely capable of balancing or limiting the power of the elected president, based on the administration, the security agencies (CIA and the FBI) and part of the courts
- watching debates in the House or Senate chambers that he or she is seeing a kind of marionette theater, with members of Congress reading carefully vetted talking points about prefabricated issues.
- Our venerable institutions of government have outwardly remained the same, but they have grown more and more resistant to the popular will as they have become hardwired into a corporate and private influence network with almost unlimited cash to enforce its will.
- They are symptoms of a shadow government ruling the United States that pays little heed to the plain words of the Constitution.
- Its governing philosophy profoundly influences foreign and national security policy and such domestic matters as spending priorities, trade, investment, income inequality, privatization of government services, media presentation of news, and the whole meaning and worth of citizens' participation in their government.

[<http://www.mikelofgren.net/introduction-to-the-deep-state/>]

## 'Administrative state'

- Dwight Waldo (1948)
  - Democracy →← Bureaucracy
  - Service to the public →← Efficiency
- the phrase “the Administrative State” was coined by Dwight Waldo in 1948
- The Administrative State is Dwight Waldo's classic public administration text based on a dissertation written at Yale.
  - Here Waldo argues that democratic states are underpinned by professional and political bureaucracies and that scientific management and efficiency is not the core idea of government bureaucracy, but rather it is service to the public. The work has contributed to the structure and theory of government bureaucracies the world over and is one of the defining works of public administration and political science written in the last 75 years.
- Ideals of the book

- The book posits that an "administrative state" contains a tension between democracy and bureaucracy that should oblige career public servants to protect democratic principles. The political administration dichotomy is false. Public servants hold political positions that require more than merely implementing policy set by elected officials. Public servants must negotiate efficiencies demanded by the scientific management movement with due process and public access to government. Government cannot be run like a business.
- History on the concept and practical consequences:
  - the concept of administrative powers and responsibilities has been the subject of debate for as long as the structure of democratic government has been implemented.
  - Basically, the debate is over whether or not nonelected agencies of the government have the power to legislate as well as enforce. The argument for the power is that all federal agencies/ officials are subject to the President of the United States, who is elected accommodating the new power democratically so that it does not need to be voted on directly by the public; where the counter is that “agencies remain inefficient, ineffective, and undemocratic;” attempting to justify that the public’s inability to vote for the policy that the agency adopts is undemocratic/unconstitutional (Harvard Law Review)
- Arguments:
  - Dr. Michael Greve, a law professor at George Mason University School of Law: the current implemented administrative state of the United States [has] the power to make binding rules without law, outside the law, or against the law, exercised by someone other than an elected legislature. .. this is the opposite intention of the “founders” . ...agencies will ultimately strive for [their own interest], instead of acting in the best interest of the country.

VS

Justice Elena Kagan: agency implemented policy/ law is subject to democracy by the citizens being able to hold the elected official at the head of the relevant chain of government responsible.

### **Eurocracy - ‘Deep State’ -‘Administrative state’**

- ‘Democratic deficit’ is a term used by people who argue that the EU institutions and their decision-making procedures suffer from a lack of democracy and seem inaccessible to the ordinary citizen due to their complexity.
- The EU has established an extensive ‘Eurocracy’ outside of the Commission hierarchy, including over 30 European agencies and a number of networks of national

regulatory authorities (NRAs). [examining] the politics of institutional choice in the EU, explaining why EU policy-makers create agencies in some policy areas, while opting for looser regulatory networks in others. It shows that the design of EU regulatory institutions – ‘the Eurocracy’ – is driven not by functional imperatives but by political considerations related to distributional conflict and the influence of supranational actors. - R. Daniel Kelemen: The Political Foundations of the Eurocracy. West European Politics, Volume 34, 2011 - Issue 5.

- 'The institutions of the European Union, despite valiant efforts to increase their transparency, remain puzzling to specialists and citizens alike, encouraging reductionisms such as that of a tentacular and all-powerful 'Brussels bureaucracy.' There are bureaucrats in Brussels, they are divided, functionally dispersed and, while very competent, much less powerful than such myths make them out to be. This excellent volume helps greatly to map 'Eurocracy' and demolish these myths. At a moment when the project for building a new Europe is under siege, such contributions are essential.'- George Ross, ad personam Chaire Jean Monnet, Université de Montréal, Canada [etc.] -- about the book: The Field of Eurocracy - Mapping EU Actors and Professionals. Editors: Georgakakis, D., Rowell, J. (Eds.). Palgrave Macmillan UK, 2013