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THE RESURGENCE OF EXECUTIVE PRIMACY IN THE AGE OF POPULISM: INTRODUCTION TO THE SYMPOSIUM

Peter Cane*

At the end of the twentieth century, after a hundred years of large-scale wars, major financial crashes, and the rise and fall of fascist, Nazi, and communist ideologies, Francis Fukuyama asked the question whether the process of political development in the "West" that had begun, (let us say for the sake of argument) in seventeenth-century England, had culminated in the global establishment of liberal democracy as the gold standard for human social organisation.[1] In his latest book,[2] Fukuyama interprets the election of Donald Trump as U.S. President, and the Brexit referendum vote in the United Kingdom in favour of leaving the European Union, as signs that the question must (for the moment, anyway) be answered in the negative. The problem, as he sees it, is that while "[m]odern liberal democracies promise and largely deliver a minimal degree of equal respect, embodied in individual rights, rule of law, and the franchise . . . [this] does not guarantee . . . that people in a democracy will be equally respected in practice, particularly members of groups with a history of marginalisation."[3] Fukuyama argues that such practical "demands for equal recognition . . . are unlikely to ever be completely fulfilled."[4] This, in turn, creates space for political actors to exploit "common" people's realisation of and dissatisfaction, with liberal democracy's inability to realise "practical" equality, in order to gain power by undermining and exploiting the very mechanisms through which liberal democracy delivers its "minimal degree of equal respect."

Put bluntly, the point is that although democracy may be reasonably good at delivering liberty, it is much less good, in combination with its economic corollary, a free-market economy, at delivering material equality. This gap between the promise and the reality tends to generate conflict that

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1 Francis Fukuyama, *The End of History?*, 16 NAT'L INTEREST 3 (1989); FRANCIS FUKUYAMA, IDENTITY: CONTEMPORARY IDENTITY POLITICS AND THE STRUGGLE FOR RECOGNITION xii–xiii (2018) (discussing FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992)).

2 IDENTITY, *supra* note 1.

3 *Id.* at xiii.

4 *Id.*

"populist" politicians can exploit, for their own aggrandisement, to justify "executive primacy" or even dictatorship. Fukuyama's suggested prophylactics against such negative outcomes are "more universal understandings of human dignity."[5]

The articles in this issue, devoted to legal and constitutional issues around executive primacy and populism, were first presented at an Advanced Workshop on the Resurgence of Executive Primacy in the Age of Populism, organised by Professor Cheng-Yi Huang and held at the Institutum Jurisprudentiae of the Academica Sinica in Taipei, Taiwan on June 21 and 22, 2018. Scholarly interest in populism has grown over the past thirty years to the point where it could recently be the subject of *The Oxford Handbook of Populism*, published late in 2017. According to the editors of that volume, the bulk of scholarly analysis of populism since 1990 (outside the United States, at least) has been undertaken by political scientists. Some legal scholars have written about what we might call "popular constitutionalism," which can be understood as referring to the theoretical and legal framework of liberal democracy. So far, however, public lawyers have not shown a great deal of interest in what we might call "populist constitutionalism," which can be thought of as the theoretical and legal framework of "populism," understood as a pathology of liberal democracy. The Taipei workshop was designed to encourage lawyers to think more carefully about legal tools, expressions, and implications of populism, if only because "the devil you know is easier to live and deal with than the devil you don't."

Political accounts and legal analyses of phenomena such as populism can be linked by thinking of public law as providing a rule-based ("normative") framework for the practice of politics. Put differently, public law is concerned with the formal recognition of public, political power, its allocation, exercise, and control. For present purposes, we may think of politics as being primarily concerned with distribution of resources and, in that guise, as being embedded in normative principles of distributive justice (which may, or may not, have legal foundations). The main categories of public law are constitutional law, administrative law, and international law. Whereas international law frames relations between ("inter"), above ("supra") and across ("trans") nation-states, the concepts of constitutional law and administrative law structure public law at all levels—sub-national, national, international, supra-national, and transnational. In very crude terms,

[5] *Id.* at xvi.

constitutional law is conceptualised as dealing with large-scale "structural" or "architectural" issues of politics, while administrative law deals with the smaller-scale, quotidian engineering of governance. As a moment's reflection on the Trump Presidency and the Brexit referendum will confirm, the constitutional and the administrative, the national, international, supra-national, and transnational, are all linked to one another in complex webs of interaction and influence.

The term "populist constitutionalism" may strike the reader as a contradiction in terms. After all, from one point of view, populism involves misuse and abuse of the mechanisms of (popular) constitutionalism. However, if a constitution is defined as a legal framework for the conduct of politics, and if it is accepted (as it universally is) that law partly constitutes such a framework, populism and constitutionalism are "not necessarily in contradiction."[6] Jan-Werner Mueller argues that although, outside government, populists may seek to navigate a course through or around the constitutional strictures of liberal democracy, once in power, they will seek to put in place new constitutional frameworks that will facilitate and legitimate their continuation in office. In other words, populists and authoritarians are not against constitutionalism in the sense of conduct of politics within and according to a framework of legal rules. Nor do they necessarily seek power by unconstitutional means. On the contrary, they may use constitutionalism to their own advantage, to facilitate and support stronger government than is generally thought compatible with liberal democratic principles, with the professed aim of achieving outcomes that liberal democracy has proved unable to deliver.

It is with the interaction between populist politics and executive primacy on the one hand, and the constitutional and legal frameworks of governance on the other, that the papers in this Symposium are primarily concerned. In his paper, Gábor Attila Tóth maintains that constitutionalism may be understood as resting on an equilibrium between two theoretical conceptions of government: a Hobbesian conception based on trust in government and a Lockean conception based on distrust. The Hobbesian conception facilitates and justifies strong government, while the Lockean conception favours limited government. Tóth suggests that populism and authoritarianism may be a product of a transition from one equilibrium to another. The populist deploys the legal and constitutional tools of one

[6] Jan-Werner Mueller, *Populism and Constitutionalism*, *in* THE OXFORD HANDBOOK OF POPULISM 602 (Cristobal Rovira Kaltwasser et al. eds., 2017).

equilibrium to gain power and, once in office, uses those tools to engineer a new equilibrium within which executive power can be aggrandised and perpetuated.

This sort of (non-r)evolutionary process of to-ing and fro-ing between equilibria of political power is explored by Mauro Hiane de Moura with reference to the recent history of Brazil. De Moura identifies two levers, for concentration of power and authoritarianism, that have been particularly salient in Brazil. One is the relationship between the executive and the bureaucracy. This is a key dimension of the allocation of public power in the modern world of large, active, and positive governments. Depending on other features of the design of the governmental system, either a relatively closer relationship between executive and bureaucracy (as in the United Kingdom) or a more distant relationship (as in the United States) may be compatible with the realisation of "liberal democratic" ideals. On the other hand, in presidential systems, centralisation of control of the bureaucracy within the office of the president is a common tool of and path to authoritarianism. Another lever of power-concentration is the economic system. Political liberalism (democracy) is typically associated with economic, free-market liberalism. Economic liberalism requires that economic policy be driven by "technical" and efficiency-based economic theory, implemented by agencies relatively independent of "politics." By contrast, populist and authoritarian regimes, whether "left-wing" or "right-wing," are often committed to centralised distribution or redistribution of resources according to criteria other than economic efficiency. The two levers are related in the sense that executive control of economic policy involves "politicisation" of the bureaucracy.

The relationship between the executive and the bureaucracy is commonly not expressly regulated by codified constitutions. This may enable populists and authoritarians to manipulate the relationship to their own advantage within the pre-existing constitutional framework, without acting unconstitutionally. Drawing on illustrations from Japan, Taiwan, and Poland, Cheng-Yi Huang discusses the use of what he calls "unenumerated powers." Unenumerated powers are executive powers not expressly conferred by the constitution but established by political usage ("conventions of the constitution" in English constitutional terminology). They may include powers to appoint, monitor, and dismiss bureaucrats, to coordinate policy-making activities, and to control a political party. Unenumerated powers are generally found to be essential for efficient and effective day-to-day

government, but their limits tend to be ill-defined, and courts may be unwilling or unable to control their use by authoritarians to concentrate and centralise power.

In her study of the history of the relationship between the political executive and the appointed bureaucracy in Japan, especially in the last hundred years, Mayu Terada illustrates the dynamics of the bureaucratic appointment power in a multi-party system in which one political party holds the reins of government for a long period. She explores reforms designed to de-politicise the appointment process and to strengthen the role of technocratic voices in the policy-making process.

Anya Bernstein takes a very different approach to the same topic. She sets out to discover how bureaucrats in Taiwan and the United States respectively understand their positions and roles in government and their relationships with the executive, other organs of government, and the general population. Her most general finding is that U.S. bureaucrats position themselves predominantly vis-à-vis the executive, whereas Taiwanese bureaucrats see themselves as interacting within a wider and more diverse circle including, for instance, the legislature and citizens. Bernstein suggests that the openness of Taiwanese bureaucrats to outside influences may be less congenial to, and more obstructive, of populism than the more executive mentality of U.S. bureaucrats.

Whereas codified constitutions typically say relatively little about the executive and bureaucracy, they usually spell out in some detail the procedure for amending the constitution, which usually makes it more difficult for any one institution or group to control the amendment process than it is to control the normal processes for making non-constitutional law. This may make it harder for politicians to achieve and exercise constituent power to their own advantage. Maciej Bernatt and Michal Ziólkowski provide a vivid account of the use of a technique that they call “statutory anti-constitutionalism” in Poland in recent years. This is a process by which, without formally amending the constitution and without following the constitutionally-specified amendment procedures, a government can use a parliamentary majority effectively to amend the constitution by ordinary law-making procedure, and protect those amendments from challenge by cutting off avenues of recourse to the courts. Just as reducing the “independence” of bureaucrats is a commonly-used tool for concentrating political power, so is reducing the independence of, or disabling, the judiciary.

According to Fukuyama, populist authoritarianism is a disease of liberal democracy contracted as a result of its inability to meet popular aspirations for both liberty and equality. His suggested cure is that we redefine what it means for human beings to be equal. This is a vague and daunting prescription. In the final article in the Symposium, I take a somewhat less ambitious and more concrete tack. As the articles in this Symposium suggest, populism and authoritarianism present ongoing challenges not only to liberal democracy but also to its legal underpinnings. Manipulation, avoidance, evasion, and outright rejection of the constitutional and legal frameworks of liberal democracy are features of much populist authoritarianism. My basic argument is that liberal-democratic public law and legal theory no longer reflect human needs and desires because they were conceived, born, and grew up in worlds that no longer exist, when the main pre-occupation was to secure liberty, not equality—when inequality was taken for granted and the most immediate threat appeared to be absolute authoritarian rule. Now many people want constitutions, laws, and government that strike a different balance between liberty and equality in a time when human beings are more aware than ever before of their interdependence and the importance of concerted action to our future well-being and even survival. The modest aim of my article is to explain the inherited structure of our public law and theory, and the main changes that have brought us to the position where it may be thought to no longer mirror politics.

The hope of all the contributors to this Symposium is that it might challenge lawyers to think more carefully and constructively about the specifically constitutional and legal aspects of the political phenomena of executive primacy and populism. We need to understand the disease (however that be defined) before attempting a cure. Otherwise, we risk killing the patient, or feeding the cancer, rather than preventing its spread.