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The politics of bureaucracy in the face of different legal futures

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Geert Bouckaert and Marleen Brans 

Abstract

The ‘politics of bureaucracy’ not only presents a tour de force of a single scholar. It is also a call for engaging the broader Public Administration community in a comparative understanding of present and future challenges to public bureaucracies. Of the many critical developments within and outside bureaucracy, this commentary lays out eight emerging legal futures. Four utopian and four dystopian readings are presented as a research heuristics for thinking through and evidencing the impact of different legal futures on the politics of bureaucracy and the key variables in Peters’ work: United Nations Governance, Neo-Weberian Bureaucratic State, Partner State, Corporatist State, Central World Government, National(istic) Administrative State, Government by Google, and Failed States.

Keywords

bureaucracy, central world government, corporatist state, failed states, government by Google, legal capacity, legal futures, national administrative state, neo-Weberian state, partner state, United Nations World Government

Introduction

‘*The Politics of Bureaucracy: an introduction to comparative public administration*’ (Peters, 2018b) describes the development, in theory and in compared practice, of public administrations (PAs) in a political context. While there are many merits to the book, three stand out: the crossing of sub-disciplines, the holistic approach to studying public bureaucracies, and the comparative purport of the book. ‘*The Politics of Bureaucracy*’ was and is a great exercise in marrying political science, public policy and public management scholarship, having different relevant literatures speak to each other on such major themes as administrative culture, public service personnel recruitment, politico-administrative relations, accountability, budgeting, and public sector reform. The book explicitly placed public bureaucracies in a political context, as well as treats public bureaucracies as actors in their own right. Both as collective actors and as collections of

Public Governance Institute, KU Leuven, Leuven, Belgium

Corresponding author:

Marleen Brans, Public Governance Institute, KU Leuven, Parkstraat 45, B-3000 Leuven, Belgium.

Email: marleen.brans@kuleuven.be 

individuals, the book understands bureaucracies in their varying interactions with political and societal institutions, with political masters and overseers, with interest groups, social movements, and citizens. The book moreover presented a break with parochialism in the PA discipline, by adding to a comparative understanding of bureaucracies in, albeit predominantly, consolidated democracies. To some extent, the book was and is a grand project of comparative politics and administration calling for involvement of the broader academic community, rather than a finished *tour de force* by a single scholar.

Yet, this project is a challenging one, because of developments both in society and academia. With the current threats and realities of populism (Borins, 2018; Stoker, 2017), pressures on democratic traditions, significant distrust levels and discontentment (Van de Walle, 2017), reinventions of nationalism and extremism, also the politics of bureaucracy are put under severe stress. And it is uncertain how, on one hand, politicians and bureaucracies and, on the other hand, PA scholars should deal with this systemic stress.

In the academic PA community, holistic accounts have become rarities. Academic foci on micro PA research topics not only prioritise academic rigour over relevance for practice. They also prevent bigger questions and issues from being a visible part of an academic agenda. Trends towards hyper-specialisation and methodification socialise researchers to focus on very narrow questions and interact only with colleagues in the same sub-disciplinary silos. Knowledge gets fragmented and holistic scientific accounts are generally ill rewarded in career advancement. Despite lip service to transdisciplinarity, the actual professional environment is not promoting public administrationists to search answers to major challenges (Brans and Blum, 2018). Yet, societal developments need an academic community that is rigorous and relevant in its research output, and that at the same time treats micro (organisations), meso (cross organisational policies), and macro (systemic) questions of PA (see also Bouckaert and Jann, 2019; Roberts, 2010).

In '*The Politics of Bureaucracy*', the assumption is that all major state functions function: the independence of justice, the transparency and correctness of elections, due process, checks and balances, acceptance of the need of a well-functioning professional bureaucracy which is responsible/responsive and accountable, and so on. In such optimal and stable circumstances, it is acceptable to focus predominantly on micro and meso topics, and to contextualise these topics by comparative similarities and differences at the macro level of political systems. Yet, when these optimal and stable circumstances are not in place, then the picture of the playground changes drastically. The assumption of the obvious presence of optimal and stable state institutions is increasingly under pressure, or even actively attacked even to the extent of the deconstructing the administrative state.

In this commentary, we challenge whether '*The Politics of Bureaucracy*' is ready to deal with emerging disconcerting legal futures, the unstable conditions of which might undermine the importance of bureaucracy and the very politics of it. For that purpose, legal frames become an essential part to envelop the 'politics of bureaucracy' (see Figure 1).

This contribution first illustrates how major concerns of the future of public bureaucracy threaten to remain locked in micro- and meso-level perspectives. It next requests attention for considering the future of bureaucracies at the macro level, particularly as concerns the legal systemic capacity of government. The commentary present eight legal futures, four of which follow a utopian design and four derive from a dystopian reading. It then ventures into considering the consequences of these futures for the politics of bureaucracy, in terms of bureaucracies as political actors in varying political environments enveloped by varying legal systems.

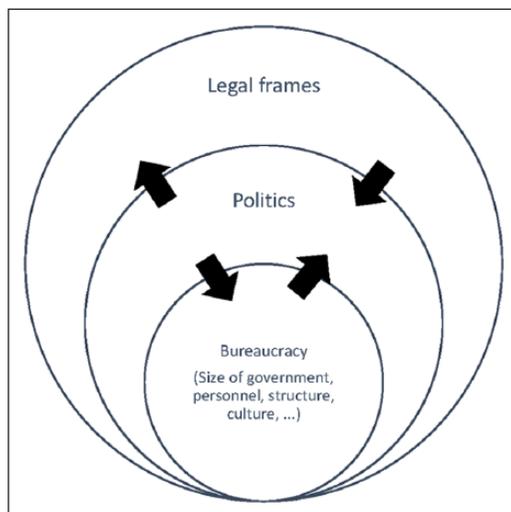


Figure 1. Legal frames of politics of bureaucracy.

From grand challenges to deconstructing the administrative state

To develop its strategic plan for 2018–2023, the US Government Accountability Office (GAO) listed several ‘trends affecting government and society’. These trends included security, debt and the fiscal outlook, trade, jobs and education, demography, technology, and a sustainable environment. One of the trends was also the risks, challenges, and opportunities associated with increasingly complex governance relationships and practices. The impact on government and governance is four-fold: developing whole-of-government strategies, systematically managing risk, collaborating across boundaries and borders, and building communication and civic engagement (GAO, 2018: 30).

However, the possibilities, capabilities, and the capacities to realise these four ‘solutions’ are decreasing or actively deteriorated. There is more a tendency to have the opposite of ‘United’ Kingdoms and ‘United’ States, or the opposite of a ‘Whole-of-Government’-approach. Instead of managing risk, several political decisions seem to look for risk, organise fear, and construct polarisation (Gore, 2004). Increased emphases on borders, also national borders, become a common denominator for many countries. Miscommunication seems to be a standard for un-civic engagement. This is almost the opposite of all the GAO solutions.

There are efforts, also in the United States, to look for best practices for intergovernmental leaders for ‘governing across the divide’ (National Academy of Public Administration (NAPA), 2017a). In an effort to reflect and to learn how government leaders may bridge the divides ‘to improve service delivery’, NAPA suggests an enterprise-wide innovation capacity, optimization and rethinking of the systematic interaction of stakeholders, prioritisation of factual and useful information, and an emphasis on patient and persistent engagement of constituents, citizens, and the workforce (NAPA, 2017a). There is an assumption that ‘effective governance’ is able, necessary, and sufficient to bridge major gaps.

There are some burning platform feelings resulting in an awareness and two White Papers (NAPA, 2017b, 2018) stating that there is ‘no time to wait’ to build ‘a public service for the 21st century’. According to a NAPA panel, the fundamental problem is that:

the federal government’s human capital system is fundamentally broken. The more complex and wicked problems become, the more government needs smart leaders with the skills to solve them. But the current system, too often, has become trapped in processes that keep leaders from leading. (NAPA, 2017a: 1)

This is why, according to this analysis, there is a need for a focus on flexible human capital matching missions of organisations, merit principles, and accountability for both principles and accountability.

But all these analyses assume a proper functioning of major state functions, as Waldo (1948) described in his definition of an ‘Administrative State’. At the Conservative Political Action Conference, Steve Bannon declared the politics of ‘deconstructing the administrative state’ (cited in Kettl, 2017: 639), which could happen, for example, by freezing or cutting budgets, or by appointing deregulating regulators, or by not appointing persons in leadership positions (Belton et al., 2017: 643). Interestingly, some capacity is also needed to deconstruct the administrative state (Heidari-Robinson, 2017).

Bridging grand challenges by ‘politics of bureaucracy’?

The challenges caused by the mismatch between the government’s workforce and its mission are growing rapidly into a major crisis. To govern effectively, government must have the capacity to govern. The bedrock of that capacity is its workforce. (NAPA, 2018: 47)

For bridging grand challenges, or even counterbalancing deconstruction of an administrative state, workforce capacity is a necessary – note micro-condition but not a sufficient one. A state needs policy capacity, which should include legal capacity, not just analytical, managerial, and political capacity. Policy capacity needs to be defined at the individual, organisational, and systemic level (Wu et al., 2018), thus at the micro, meso, and macro level.

According to Wu et al. (2018), policy capacity is defined as the set of skills and resources, or competences and capabilities, necessary to perform policy functions. They define this at the individual, organisational, and systemic level, and they unpack this as analytical, operational, and political skills and competences. Analytical skills are deployed for problem diagnostics, solution finding, and policy evaluation. Operational skills mobilise material and organisational resources to implement policies in practice. Political skills enable policy actors to mobilise resources for garnering and maintaining support for policies and their implementation (Wu et al., 2018: 5).

To these three sets of competences, Brans et al. (2018) add legal skills and competencies as a fourth category to redress the relative neglect in policy capacity studies (and in the ‘politics of bureaucracy’ for that matter) of legal intelligence, legal counsel and advice, legal procedures, adjudication, and legal feedback. The ‘starting point is that modern governments function as a system of law, irrespective of what the nature is of that law’ (4). Law should be defined in its broadest scope, broader than a traditional definition as a system of legal rules and principles which are recognised and sanctioned by courts. It should include material legal rules, generally binding principles of law, jurisprudence,

and also soft law such as administrative guidance and communication which cannot be directly sanctioned by courts, but which steers behaviour, can be scrutinised by non-judicial means such as an ombud, or even can be used in courts as interpretative tools for binding instruments (5).

At the systemic level, legal capacity ‘is constituted by the rule of law, legal coherence, and legal feedback from society’ (16). This needs to be cascaded down to organisational and individual legal capacity.

Which legal systems for the future?

According to the Hague Institute for the Innovation of Law (HiiL, 2012), future legal macro frameworks may follow several scenarios (HiiL, 2012). In their ‘Law Scenarios 2030’ HiiL developed four types based on two dimensions. First, legal systems may further internationalise, or, conversely, there may happen a reversal of this internationalisation, resulting in legal regimes that becomes more nationalised or re-nationalised. Second, legal systems may further develop as predominantly public legal systems, or the opposite tendency may be development towards private legal regimes. These four ideal types need to respond to the following systemic questions: what is the main principle of the regime?, who is making the rules?, how are these rules enforced?, and how are conflicts resolved? and how do answers to these questions impact on the politics of bureaucracy.

This results in the four pure types of legal systems, where politics and bureaucracy drive the system in totally different ways (HiiL, 2012: 13). The four combinations are the following:

1. International/public which is a ‘global constitution’ type of system.
2. International/private which is a ‘legal Internet’ type of system.
3. National/public which is labelled as a ‘legal borders’ type of system.
4. National/private which is labelled as a ‘legal tribes’ type of system.

Just like ‘utopias’ may have adverse ‘dystopias’ versions (Achten et al., 2016), each of these four legal prototype systems may have a positive, harmonious, functional, and general interest version (see Figure 2); and a negative, conflictual, dysfunctional, and private interest version (see Figure 3).

A utopian design

A positive reading of the systems results in a utopian design of four possible futures (see Figure 2).

‘United Nations Governance’: International and public

United Nations (UN) Governance is a functional regime which is designed according to international and public law. It is based on principles of the rule of law as defined by the UN. Even if there are many regional interpretations of the ‘rule of law’, leading to a legal pluralism in a decentralised context, there are shared principles which are contingent in their implementation. National parliaments increasingly are connected to an internationally defined parliament to define new laws.

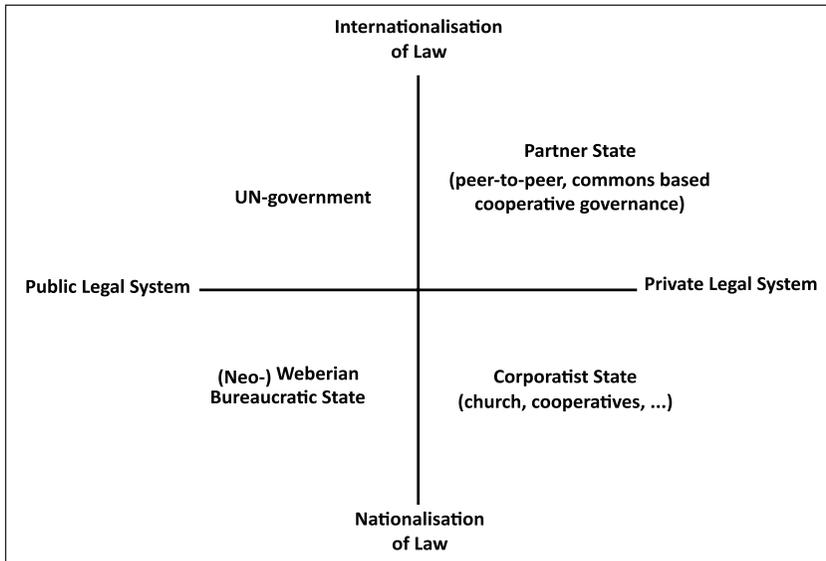


Figure 2. Four types of legal systems which take a positive turn with their 'politics' and 'bureaucracy' (based on Hiil, 2012: 13).

National and international bureaucracies still play complex games in uploading and downloading international norms. The transposition of international regimes in national law and the subsequent implementation thereof require careful international monitoring. Yet, lesson drawing and transfer lead to growing convergence in implementation structures, accountability mechanisms, and budgeting constraints, mitigated to a limited extent by political institutions and political actors. International courts of justice are powerful, and international regimes are actively sanctioned in national contexts. A combination of UN-'blue helmets' with policing functions will enforce and solve conflicts. Citizens' respect and support international regimes, as do their political representatives.

There is strong mobility within and between the international and national public services, with civil servants strongly socialised to support internationalism. The international evidence base of policies relies on strong collaboration between international and national centres of expertise. This results in shared databases and advanced comparative policy analytics.

'(Neo-)Weberian bureaucratic state': National and public

The push to autonomy and decentralisation has created a tendency to strengthen local identities and cultures. The reality of economic crises and the competition has also resulted in stronger borders. This has strengthened nations, states, nation-states, and nationalism, even within classical states. The extreme swing of neo-liberal economies, and New Public Management also has resulted in the need, and the awareness of a solid-state administration where traditional bureaucratic resources, such as permanence and stability, as well as neutral expertise and information (Peters, 2018b: 208–2010) re-emerge. Bureaucracy becomes again a respectable system with value-added, able to rely on trust in institutions (Bouckaert, 2012). It results in a modern Weberian bureaucracy, surrounded by strong legal systemic capacity. Traditional concepts of the 'rule of law' with respect for

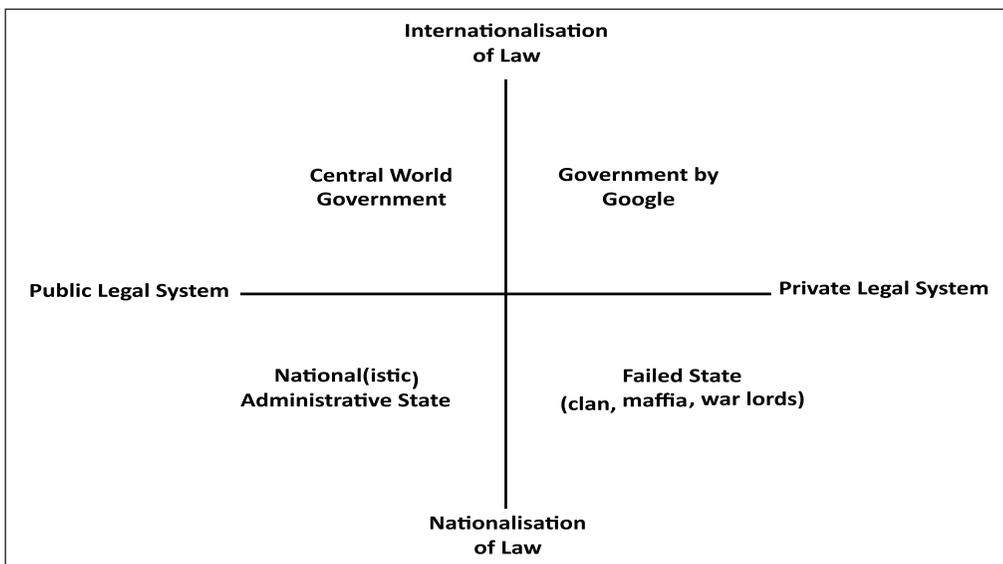


Figure 3. Four types of legal systems which take a negative turn with their ‘politics’ and ‘bureaucracy’ (based on Hiil, 2012: 13).

human rights, separation of state and church, and a general respect for due process and legality is accepted. Legal feedback from society is supported through freedom of information and public accountability mechanisms. Many Weberian classical bureaucracies have evolved to a neo-Weberian bureaucracy by not just looking at due process but also at results, and by not just taking a (distant) professional expert stand vis-a-vis society but also by taking citizens into account (Pollitt and Bouckaert, 2017: 121–124).

‘Partner state’: International and private

Based on a ‘peer-to-peer’ interaction, and resulting in a shared system of new commons, a cooperative governance becomes the design for Internet-based societies and economies. New technologies such as block-chain (Ølnes et al., 2017) connect databases to deliver services, develop policies, and connect people and ‘things’, meaning that public services become increasingly customised to individual citizens. Digital platforms and clever data analytics allow to connect, supply, and demand for almost all services. This results in a bottom-up, user-driven, and consensually developed system of regulations and rules which govern individual and collective practices. This kind of co-creation and co-production by citizens, government, and other stakeholders generates the rules, their enforcement, and conflict resolutions.

Since data-clouds transcend borders, the push to an international platform is obvious. Cloud-governance is ensured by the user defined new commons (Bouckaert and Cropvoets, 2016). Most of the communities are policy field defined and global.

‘Corporatist state’: National and private

The ‘corporatist state’ is an open system of corporations based on churches, cooperatives, user-based volunteer organisations, and local networks of ‘citizens’. A combination of

self-organisations, with (non)-religious communities in a tolerant and liberal setting provides a diverse set of local communities or villages and cities with social control. There is solidarity between the communities who take care of public goods. This corporatist state consists of the major entities which are represented. In the corporatist state, the public bureaucracy is highly representative of the organised interests in society. Its implementation structures and budgets are naturally light, as the corporate entities provide services to their members predominantly on the basis of mutualist contributions. Public services administered through corporatist entities are responsive to specific conditions and through direct forms of citizen/member participation. Intergroup decisions are taken in networks on the basis of collaborative agreements. There is strong interpersonal trust. Public institutions are trusted to the extent they respect the liberties and autonomy of organised groups and facilitate their service delivery.

A dystopian design

'Central world government' (International and public)

As a robust legal order of its own, central world government is highly integrated with national legal systems which are absorbed and subjected to an international legal order. The main principle of the regime could be a blend of power and regional representation combining cultural and legal traditions. To avoid too much diversity, a centralised vision is dominant resulting in global law. Bureaucratic resources are permanence and stability, with administrators strongly socialised towards the central government ideologies, supported by a limited number of global representative interest organisations. There is a central world agenda of problems and a central repertoire of solutions, and convergence of both agendas and solutions follow processes of coercion and imposition.

The challenges for the 'politics of bureaucracy' are legal coherence and co-ordination, and strengthening capacity for legal feedback from society. Trust in government risks to be low, as citizens may increasingly feel alienated, except where remaining variations of local democracy give voice to local concerns. Rules are produced in a top-down way, and enforced by a central system which also resolves conflicts. In addition, central world government puts exceedingly high demands on vertical co-ordination and control to deal with top down implementation deficits of all kinds. Bottom up implementation problems remain unresolved. Strong material legal and centrally defined principles of law are directly sanctioned by courts and detailed administrative guidance leave little interpretative room in jurisprudence.

'National(istic) administrative state' (National and public)

In the national(istic) administrative state, administrators are ruling the state and are presented, pejoratively, as a 'deep state'. Administrative systems are powerful and those administering them are in charge of providing leadership and direction. When combined with nationalism, this leads to a thickening of legal national borders, resulting in a further fragmentation where the international level has a reduced impact, or where it, at most, includes the regional level. Public servants are elitist. The public bureaucracy is not seeking representativeness as nationalism has increased the 'fear of otherness'. Civil servants are socialised towards adherence to national administrative ideologies. Although they are highly expertised, they are not interested in international policy transfer and lesson-drawing.

The procedural control systems define the main principle of the regime. Even if politicians are deciding on the rules, permanent bureaucratic experts are very influential. Rules are enforced and conflicts are resolved by specialised expert agencies. Detailed administrative guidance restricts jurisprudential discretion. The ‘fear of otherness’ has lowered interpersonal trust among citizens. Vis-a-vis government, citizens are wary of technocracy.

‘Government by Google’ (International and private)

‘Government by Google’ is a regime where international rules and institutions are expanding and replace state-based legal systems by ‘private governance mechanisms and private legal regimes’ (HiiL, 2012: 34). A proto-type is ‘government by Google’.

The implication for the ‘politics of bureaucracy’ is probably that ‘public’ is first absorbed by private sector dominated public–private arrangements which will ultimately transform into pure private systems (Bouckaert and Cromptoets, 2016). Most if not all public services will be outsourced to private providers.

The invasion of private law into the public sphere is a general phenomenon which has already been empirically observed but which has been under-investigated as to the consequences for a state of law. Opacity of companies will rule, and accountability procedures are damaged. Instead of government and corporations being transparent, it is citizens who are transparent and subject to extreme surveillance (Stoermer et al., 2019). The main principles of the system derive from private interests of major corporations who define the rules of the game. Multinational digital corporations control government decision-making, since they dispose of relevant data, as well as of decision-making tools. Government suffers from extreme capture by highly capable private interests, whose information control and policy analytical capacity greatly surpasses that of bureaucracies. Adjudication is replaced by mediation. Enforcement and conflict resolution will cause exclusion of the system.

‘Failed states’ (National and private)

These states lead to regime where private systems take over national regimes, in a fragmented, competing, dispersed, and chaotic way. This will result in a diminished and dismantled power of the state. This develops into an increasingly public–private or even a purely private legal regime. Blurring of public–private boundaries first leads to a diversification of personnel and moves to contractualisation instead of special civil services status. Eventually, the status of civil servants become precarious. Politicisation and patronage will reign. Putsches and purges make public office – both bureaucratic and political – a risky occupation. Bureaucratic agents are socialised through their clients (or even clan), groups, and patrons. This will eat away at public service motivation, and carry with it risks of corruption. Bureaucratic agencies without clients have difficulties to survive in budgetary battles. Expertise is weak and directly subjected to political control. The main principles are defined by the clans in power. They make the rules, enforce them with violence, if need be. Conflicts are also resolved in such a way. Populations will thus depend on local and private legal governance systems, with a high chance of conflict resolution by politics, power, and violence.

This regime is close to deconstructing the administrative state, which no longer has the ‘monopoly of the legitimate use of physical force’ (Weber, 1980), necessary to protect its

citizens. Summary execution and show trials feed a climate of fear and terror. The implication for the ‘politics of bureaucracy’ is that local, power-based warlords, and clans or mafia systems will shape societies, and that governments probably will end as ‘failed states’ (see Risse, 2013). Whatever legitimacy is left is just a façade behind which private power and corruption fester (see Peters, 2018a). Even in less extreme cases, such as ‘negotiated states’ (see Müller 2012 discussed in Peters, 2018a), what is left of the state carries little legitimacy, competes with other actors for control, and has difficulties to organise effective public services. **[AQ: 2]**

Conclusion

In this contribution, we have built on Peters’ seminal work to try and look 40 years ahead. Imaging the future of bureaucracy and the construction of ideal and prototypes might be frowned upon as academic pastime. Yet, exaggerating possible futures as thought experiments, both utopian and dystopian help us to make sense of emerging challenges and discover keys to anticipate solutions. We have illustrated how some answers to problems of bureaucracies are locked in micro- and meso-level boxes, unable to interact, let alone to address events and developments that affect the macro context of government and governance. To construct a bigger picture of how certain events might develop over time, we enveloped the politics of bureaucracy in two quadrants of legal frames and arrived at eight imaginable futures, four of which follow a utopian pattern and four a dystopian pattern.

The parsimonious space of this commentary limited the extent to which we could reason through all the variables that ‘politics of bureaucracy’ includes, but we hope to have contributed to continuing Peters’ research agenda for the study of such important variables of culture and trust, bureaucratic resources, and accountability structures, adding somewhat more attention to legal systemic capacity as a driver of systems.

The two quadrants may also serve as a research heuristic for model testing. Daily evidence demonstrates a reality of shifting systems. On one hand, there are Sustainable Development Goals and the Paris Climate Treaty strengthening a world vision on governance, and there are new types of ‘commons’ with active citizen participation. On the other hand, there is evidence for ‘government by Google’, ‘failed states’, deconstructing administrative states, and ‘illiberal’ democracies. For the research field of PA, it is essential to be aware of facts and evidence. It is also essential to be relevant in our research and analyses by being ahead of realities. Therefore, this framework could help drive comparative research across Europe and the rest of the world.

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ORCID iD

Marleen Brans  <https://orcid.org/0000-0003-0468-2929>

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