Introduction

I.1 Failure in Public Law

Policy failures, state failures, dysfunction, systemic deficiencies and structural problems seem to be everywhere. No longer are these labels reserved mostly for 'developing states', justifying intervention by well-meaning international bureaucracies in one form or another. Increasingly, they are applied to more established democracies, too. In the United States, 'dysfunction' and 'failures' in the context of the political and health crises of the past years have become a staple of both media and academic commentary.[1] Britain, too, has repeatedly been called a failed or failing state, and not just by tabloids.[2] And even in Germany, supposedly home to a well-functioning rational Weberian bureaucracy, talk of 'Staatsversagen' (state failure) has become commonplace, especially in the context of the Covid pandemic.[3] Populist movements in particular thrive on the rhetoric of disaster and failure, sowing discontent against institutions and elites to push demands for radical change.[4] But of course, governmental failure is a necessary part of our attempts to make things work. It occurs in all

[1] For many, see Y. Abutaleb et al., 'The U.S. Was Beset by Denial and Dysfunction as the Coronavirus Raged', *The Washington Post*, 4 April 2020, https://tinyurl.com/2v6d49yw see also, e.g., S. Levinson and J. M. Balkin, *Democracy and Dysfunction* (University of Chicago Press, 2019).

[2] For some recent accounts, see S. Freedman, *Failed State: Why Nothing Works and How We Fix It* (Pan Macmillan, 2024); J. Calvert and G. Arbuthnott, *Failures of State: The Inside Story of Britain's Battle with Coronavirus* (Mudlark/HarperCollins, 2021); see also K. Viner, 'The Guardian View on Broken Britain: It Won't Be Fixed with the Status Quo', *The Guardian*, 9 June 2023, https://tinyurl.com/4zj9kr6c.

[3] J. Hermann, 'Staatsversagen im Corona-Winter: Deutschlands Regierung wird von der vierten Welle überrollt', *Neue Züricher Zeitung*, 2 December 2021, https://tinyurl.com/ed7tvbna; or S. Gennies, 'Steingefechte um Grenzwerte – Wenn Corona weiterherrscht, ist es Staatsversagen', *Tagesspiegel*, 3 March 2021, https://tinyurl.com/yjbuxab6.

[4] This represents a broader hallmark of populist movements; see B. Moffitt, 'How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism' (2015) 50:2 *Government and Opposition* 189; see also more broadly, e.g.,

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political systems, domestic and international, Northern and Southern. And talk of failure is part of our ordinary arsenal of opposition rhetoric in a democracy.

In the last ten years, the themes of institutional failure and dysfunction have increasingly become a field of research of their own among political economists and scientists.[5] The theme has its roots in parallel earlier debates in economics around the concept of market failure. Market failure represented a challenge to the liberal economic theories of Adam Smith and others, which stressed the ability of the market to self-regulate and provide for a socially efficient distribution of wealth.[6] If such economic self-regulation did not work and market failure arose, theorists suggested that state institutions must fill the gap.[7] Since states were of course not infallible either, there soon emerged the parallel concept, and research field, of governmental or institutional failure.

Lawyers are, as usual, late to the party. This is not surprising given that 'failure' is not prima facie a legal concept, but a weapon for political combat and often part of populist rhetoric. And especially in Europe, lawyers all too often allow themselves to assume that they are dealing with a basically functional system and to proceed to address legal issues from there.

This is a mistake. Institutional failure – which I will use as a shorthand for a range of other terms, such as policy or state failure, dysfunction and structural or systemic deficits[8] – features frequently in public law, including international and European Union law. Law and lawyers have to grapple with the phenomenon in different forms and circumstances, but frequently we encounter what I call in this book *arguments from failure*. The standard template of these arguments is that the failure of one (state) institution

J. Müller, *What Is Populism*? (University of Pennsylvania Press, 2016); E. Laclau, *On Populist Reason* (Verso, 2005).

[5] P. Zittoun, 'Analysing Policy Failure as an Argumentative Strategy in the Policymaking Process: A Pragmatist Perspective' (2015) 30:3 *Public Policy and Administration* 243; see also for the broader debate A. Prakash and M. Potoski, 'Dysfunctional Institutions? Toward a New Agenda in Governance Studies' (2016) 10:2 *Regulation & Governance* 115; and for a recent literature survey P. Derwort, N. Jager and J. Newig, 'Towards Productive Functions? A Systematic Review of Institutional Failure, Its Causes and Consequences' (2019) 52:2 *Policy Sciences* 281.

[6] A. Smith, *The Wealth of Nations* (1776).

[7] J. M. Buchanan, 'Market Failure and Political Failure' (1988) 8:1 *Cato Journal* 1; on the origins of market failure, see A. Marciano and S. G. Medema, 'Market Failure in Context: Introduction' (2015) 47 *History of Political Economy* 1 and other contributions in the same issue.

[8] I address some of the differences between those terms in later chapters.

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provides a justification for other institutions to act 'to get a job done', even though they ordinarily do not have the competence to tackle the issue in question. In other words, institutional failure serves as an argument for expanding institutional competences and for legal innovation.

Consider the following examples:

In November 1950, the General Assembly of the United Nations argued in its famous Uniting for Peace Resolution:

> If the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.[9]

In German law, courts have allowed individual patients to obtain reimbursement for certain treatments or medications outside of publicly prescribed schedules in exceptional situations. This is permitted when they have encountered *a systemic deficiency or systemic failure* on part of the bodies responsible for drawing up these schedules, for example where new treatments had not been assessed for the purposes of adding them to what is covered. System failure (*Systemversagen*) is thus a doctrinal concept in German social law that provides a reason for courts to step in where they would ordinarily defer to other institutions.[10]

In March 2017, in one of its most detailed and expansive judgments to date, the South African Constitutional Court placed the South African Social Services Agency (SASSA) under court supervision. SASSA had failed to arrange for the payment of social grants after the Court had set aside a previous contract with a private service provider (CPS) because of an illegal tender process.[11] After reiterating that 'SASSA has adopted an unhelpful and almost obstructionist stance', the Constitutional Court noted that 'the problem to be addressed was the demonstrated inability of SASSA to get its own affairs in order, in relation to the performance of

[9] United Nations General Assembly (UNGA) Res. 377 V (1950) UN Doc A/1775.

[10] H. Lang, '§ 27 Krankenbehandlung', in Ulrich Becker and Thorsten Kingreen (eds.), *SGB V, Gesetzliche Krankenversicherung*, 8th edn (C.H. Beck, 2022), para. 69, with further references; see also Chapter 6.

[11] *Black Sash Trust v. Minister of Social Development* 2017 (3) SA 335 (CC) (S. Afr.).

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the contract, a competitive bidding process and becoming able to make payment of grants under its own steam'.[12] In response, the Court set out duties for the future provision of social services, ordered independent auditing and required the Minister of Social Affairs and SASSA to provide reports on their progress every three months.

In all of these instances, failure drove innovation and the expansion of the competences and activities of institutions not usually responsible for the issue at hand. This is most straightforward in the Uniting for Peace Resolution, in which the General Assembly claims for itself a right to act if the Security Council fails to do its job. In the German example, systemic failure ultimately leads to an expansion of individual rights, but more importantly, the decision to step in represents an expansion of the court's own role in these cases. And in South Africa, the Constitutional Court justifies the adoption of unusually strong supervision and remedies on the basis of the previous obstructionism of the responsible state actors.

Many other examples from a range of different contexts could be added here and will feature throughout this book. Many of the ones I discuss are taken from a judicial context, involving courts acting in an expansive way, but not all of them are. Not only courts step in when other institutions are seen to be failing. As we will see, in some cases arguments from failure are explicit; in others, they are for various reasons hidden or entwined with other arguments. In many cases, they are bound up with discourses of modernization and efficiency. Sometimes this has a (neo-)liberal thrust, as in the jurisprudence of the European Court of Justice, or indeed neo-colonial undertones, as in the 1990s discourses on state failure and structural adjustment programmes. At other times, they are deployed in the service of progressive social transformation, to alleviate poverty, end governmental impunity and realize key human rights. In such contexts, failure usually serves as an argument for why courts need to act to realize constitutional values and rights where democratic systems or individual institutions are considered dysfunctional.

The different discourses around these themes tend to stay in their own siloes. We are not used to connecting the arguments we encounter in these different spheres. They seem to be apples and oranges. This, I believe, is another mistake. Despite the sharp ideological differences between the different discourses and contexts, the arguments presented operate with a similar argumentative structure: Failure implies the need

[12] Ibid.

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for distrust and for diverging from established paths, while at the same time holding out the promise of a better future. The arguments also share a common emphasis on output, whatever that may be, and come with a high risk of abuse. Looking at examples from different contexts and engaging with the different literatures dealing with them can help us better understand the risks and challenges that come with arguments from failure and, ultimately, develop ways to evaluate such arguments.

This is the project of this book, which sets itself three main objectives accordingly.

First, I seek to identify arguments from failure in a range of different settings. I analyze how they are framed and consider how they intersect with broader discourses of modernization, neoliberalism or more progressive themes of transformative constitutionalism and combatting poverty. Arguments from failure have a lot to tell us about power relationships and institutional self-perception. They also provide a window into the loss of trust in public institutions in our time. This becomes particularly clear if we draw on the connection to the (socio-)legal literature dealing with the relationship of law and disasters, connecting back to earlier scholarship on emergencies following September 11 and the ensuing 'war on terror'. Among the key insights of that literature is that neither disasters nor emergencies should be understood as merely objective events to which states then subsequently try to respond. Rather, they are always shaped by existing legal and governmental structures, which shape them in turn.[13] Disasters, Bandopadhyay argues in his recent book, are key to the formation of modern Western states, whose claim to authority is based on securing 'normalcy'. This echoes deeper legal theoretical insights of law as a plan[14] and as a tool for stabilizing normative expectations.[15] Where states fail to manage disasters, we typically observe a loss of trust, and we encounter discourses of state failure or policy failure, as Stephen Griffin notes for the United States.[16] A similar story can be told about the European Union.[17]

[13] S. Bandopadhyay, *All Is Well: Catastrophe and the Making of the Normal State* (Oxford University Press, 2022); also K. Loevy, *Emergencies in Public Law: The Legal Politics of Containment* (Cambridge University Press, 2016).

[14] S. J. Shapiro, 'Law, Plans, and Practical Reason' (2002) 8:4 *Legal Theory* 387.

[15] N. Luhmann, *Rechtssoziologie* (Springer, 2008).

[16] S. M. Griffin, *Broken Trust: Dysfunctional Government and Constitutional Reform* (University Press of Kansas, 2015).

[17] M. Hailbronner, 'Beyond Legitimacy: Europe's Crisis of Constitutional Democracy', in M. Graber, S. Levinson and M. Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018), p. 277.

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Second, I argue that arguments from failure constitute a distinct category of legal and constitutional argument that we should take seriously and analyze on its own terms, for both analytical and normative reasons. We need to distinguish such arguments from other related and more familiar concepts of public law, such as emergency arguments and broader teleological approaches to interpretation, including doctrines of implied powers. As we will see, there is a tendency to invoke emergency arguments in cases of institutional failure and accordingly to justify institutional overreach in response to the magnitude of the problem. I argue that this is a temptation we should resist. Not only do emergency arguments open up a very dangerous slippery scale – in which the greater the problem, the more it seems legally permissible to set aside existing rules – but they are also ultimately different from arguments from failure, which are concerned with institutional relationships and responsiveness.

Third, I draw up a set of standard questions and considerations for evaluating arguments from failure in a host of different settings – international, federal and domestic – as well as in different institutional contexts. That there are such shared considerations and something of a shared framework is not self-evident, given the different discourses and settings in which we encounter arguments from failure. Nevertheless, there is a common set of factors that are central to evaluating all such arguments. In a nutshell, I argue that arguments from failure are only ever defensible within a context of a legal order in which legal arguments about institutional cooperation and mutual support as well as checks have a place. This typically presupposes a constitutional framework, and it is why such arguments become more problematic when we encounter them in the international realm. We also typically need to identify a violation of law and consider the broader institutional and legal context in which arguments from failure are employed – whether there exists a 'gap' in the law, in other words. Depending on the intervening institution, it also matters whether there are other more democratic mechanisms available to address the problem, thus requiring what I will call a no-more-democratic-means test.

Finally, we will need to assess the functionality, necessity and costs associated with the transgression of an institution's ordinary role. This amounts to a kind of proportionality test. In this context, we need to consider the likelihood of success, which is not a given in many cases and which I can only address very partially in this book. *What kind* of intervention is likely to be successful *when* is often an extremely difficult question to answer from a comparative perspective. A wide range of

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background factors will impact on the chances of success, even if we confine ourselves to a judicial context. As we will see in Chapter 4, there is, for example, a considerable discussion in the US literature about how successful structural reform litigation is and to what degree it might make things worse rather than better. Examples for both sides of this argument are not hard to come by. Things are no different elsewhere. Some judicial interventions have done relatively little to change matters. Others have brought about positive changes, albeit often slowly and incrementally, as in the case of the Colombian Court's famous decision on displaced persons, which is mostly considered a success in the literature.[18] The basic premise of this book is therefore that attempts to 'fill the gap', including in the context of structural reform litigation, work at least sometimes, and we should not therefore rule out such actions a priori on the basis that they will not succeed. When and under what conditions success is more likely than not is a question I touch on occasionally, but to which I do not provide a comprehensive answer. Evaluating success is a highly complex task. It involves both factual questions that lawyers have a hard time answering, as well as difficult normative questions about what counts and how much, in particular whether indirect and long-term consequences should be taken into account.[19] I nevertheless offer some preliminary thoughts in the second part of this book as to how we might think about functionality and costs so as to better address situations where we encounter these questions.

To evaluate proportionality and in particular necessity, we will also need to consider the problem at issue in more detail: how long it has existed, how many people are affected by it and how serious it is. In the context of structural reform litigation – a practice standardly justified with reference to the failure of other institutions – the problem in question will typically be a rights violation. We thus need to consider the number of cases and affected people, the seriousness and duration of the violations and what the government's relationship or reaction to them has been. These factors are necessarily vague – and some may think that they are too vague to be helpful at all. Yet, I believe the

[18] M. J. Cepeda Espinosa, 'The Constitutional Protection of IDPs in Colombia', in R. A. Rivadeneira (ed.), *Judicial Protection of Internally Displaced Persons: The Colombian Experience* (The Brookings Institution – University of Bern Project on Internal Displacement, 2009); on the likely reasons of success, also D. Landau, 'The Reality of Social Rights Enforcement' (2012) 53:1 *Harvard International Law Journal* 319.

[19] See, e.g., the arguments and the discussion in O. L. M. Ferraz, *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (Cambridge University Press, 2020).

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flexibility they afford is a necessary response to the complexities of real life in which we come across arguments from failure in very different contexts. These complexities and background conditions matter to how we assess the legitimacy of these arguments. At least in a comparative law context, therefore, I don't think that we can be much more determinate than the framework I propose here, which I spell out in more detail in the following chapters using some case studies from different jurisdictions.

However, in some cases, we should not even get to questions of proportionality, because arguments from failure are inappropriate outside a constitutional context due to the considerations above, that is because existing institutional frameworks are comprehensive or because there are more democratic means available to address the problem. Only where this is not the case, the questions of functionality, necessity and costs and thus proportionality arise and become central for assessing arguments from failure. This book, therefore, presents not just an argument for taking arguments from failure seriously and accepting them as legitimate arguments under certain conditions but also an argument for when and why to reject such arguments, namely in most cases.

I.2 Methodology

How can one study 'institutional failure' across multiple legal orders? Is there really a useful comparison to be drawn between the Uniting for Peace Resolution, the European Court of Justice's doctrine of systemic deficits and structural reform litigation in India? One standard approach to these questions might be to outline in Chapter 1 a normative concept of institutional failure and then demonstrate how different legal orders respond to failure thus defined, using that concept to measure their success. Such an inquiry raises the question of how we would go about defining institutional failure in the first place. Where would we look to come up with such a concept? To comparative law? To political theory?

In this book, I deliberately take a different approach. I don't narrow my inquiry upfront to one particular understanding of institutional failure defined at the outset. Instead, I focus on a type of public law argument: the argument from failure. This involves distinguishing such arguments from other doctrines and concepts, but it does not involve a definition of failure beyond the conceptual framework sketched out here and in Part I. Rather, my approach is best described as iterative, cycling back and forth between description and analysis of arguments from failure in different contexts and normative considerations. Thus, the

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theoretical arguments I put forward in Part I of this book include many examples and are built on the more specific cases and discourses I discuss in Parts II and III, where I subsequently refine some of my arguments and show how they might apply in specific settings.

I choose this somewhat unconventional approach for two reasons. First, I think it is at least as important to show and explain how 'arguments from failure' play a role in a range of different contexts as it is to evaluate them – and perhaps more so. This inquiry should not be limited upfront by focusing on cases that fit a certain definition of institutional failure. And though I cannot offer a comprehensive account here, and I will still be leaving out many instances where we encounter arguments from failure in many parts of the world, I have attempted to provide a big picture in this book. I include examples from a relatively wide range of different legal systems, international, regional and domestic, including states belonging to Global North and South jurisdictions – albeit focusing mainly on the 'usual suspects' where we already have plenty of English language scholarship to draw on. Analyzing arguments from failure in such different contexts, I am interested in both the commonalities and differences we find in the way these arguments are deployed and in their ideological underpinnings. I do not make any causal claims in an empirical sense in this book, but I do try to shed light on what appear to be some common threads and trends.

Second, from a comparative law perspective, I am not convinced that we can usefully operate with one comprehensive concept of institutional failure beyond the argumentative structure outlined in this book. Perhaps the most important point to emphasize upfront is what failure here is *not*, namely just any breach of law. For example, from a human rights lawyer's perspective, it may seem that every rights violation should be considered a failure. Many have suggested precisely this to me when I have presented my work at different conferences over the past years. However, if we call to mind the central purpose of arguments from failure – that is to justify an expansion of existing competences – we realize that this is not a useful definition of institutional failure. That rights will occasionally be violated is something we have built into most of our legal systems. We have institutions, namely courts (among others), to deal with such rights violations. More than that: With the proliferation of rights and rights talk, rights violations can happen and do happen anywhere and at any time, simply because no system or society is perfect. Speaking of failure in this context is therefore not a convincing use of that term. When institutions refer to failure to expand their competences

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in situations where ordinarily others would tackle the issue, the failure in question must therefore be special in some way. A rights violation as such is not enough to justify this.

And we can find ideas of what makes failure special in this sense in a range of public law constellations. For example, in international law some have argued that there is a legal concept of state failure.[20] Courts, too, sometimes use specific procedural or remedial tools to deal with certain kinds of rights violations, such as the pilot procedure in the European Court of Human Rights or the unconstitutional state of affairs doctrine in a range of Latin American countries.[21] Yet, attempts to define institutional failure wholesale in public law are scarce. The only genuine attempt to define it more broadly in legal terms to my knowledge is Simon and Sabel's famous paper on 'destabilization rights'.[22] They suggest that institutional failure exists whenever institutions no longer fulfil minimum standards of adequate performance, with reference to 'industry standards',[23] that is existing quantitative benchmarks of institutional performance in the United States. This sounds intuitively plausible, but there are a number of problems with their approach. It is already debatable if and to what degree failure or dysfunction can be objectively measured. In most cases in most of the world, there will not be readily available quantifiable benchmarks as to what constitutes adequate institutional performance. But their approach also runs into problems on a more principled level. Rights violations are not always and necessarily linked to institutional mandates, and so even massive violations of rights may therefore not appear as malperformance in the terms of their definition. For example, the police may lower criminality rates in a given area while at the same time violating rights on a massive scale. However, if we want to capture something like this – as courts do in practice – in terms of institutional failure, we will find that we often disagree about what counts as success.

In this situation, public lawyers may be tempted to turn to other disciplines for help. But political economists have so far mainly emphasized how concepts such as institutional or policy failure are not

[20] See in particular P. Starski, *The 'Unwilling or Unable' State as a Challenge to International Law*, Habilitation/Postdoctoral thesis, Bucerius Law School (2020).
[21] See Chapter 4 for details.
[22] C. F. Sabel and W. H. Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1016.
[23] Ibid., 1063.

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straightforward. A literature survey demonstrates that no one definition of failure or dysfunction has emerged in that literature either. Thus, for example, Prakash and Potoski distinguish between four categories of dysfunction: (1) design failures, where institutions are designed in a way that does not enable them to pursue their function to channel private interests towards collective ends; (2) institutional mismatch and obsolescence, where new challenges to regulation have emerged, either in the form of external challenges or because those subject to regulation have devised new ways to avoid undesirable regulation or there is a new group of actors subject to regulation that the old rules do not fit; (3) adaptation failures, where institutions do not have sufficient flexibility to adapt to previously unforeseen problems; and finally (4) cases of institutional capture, where narrow interests subvert the common good orientation of particular institutions to their own benefit.[24] These categories are certainly helpful to better understand and distinguish between different types of dysfunction and devise a response to them. But operationalizing them for legal purposes is not always straightforward. Judges might decide to apply stricter scrutiny in cases of institutional failure thus defined, for example by treating capture or design flaws as forms of failure that warrant deviation from their standard of review.[25] However, it will often be difficult for judges to assess if and when these things are present. Moreover, using their categorization as a legal template would run into the same problem as Simon and Sabel's account: that some cases of failure are hard to capture in terms of dysfunction.

Something similar is true for Cass Sunstein's approach. He argues that we should understand dysfunction in terms of the state's ultimate goal of helping citizens to lead good lives.[26] Whatever our differences about what precisely a good life entails, Sunstein suggests we should be able to agree that five factors are important to that ability: namely subjective well-being, longevity, health, educational attainment and per capita income. Whether institutions fail or succeed then depends on what they contribute to the attainment of these goals. In the context of this book and its concern with the legal concept of failure, this approach is both too vague and insufficiently anchored in legal principles. Apart from the difficulties of measuring regulatory impact and for

[24] Prakash and Potoski, 'Dysfunctional Institutions'.

[25] T. W. Merrill, 'Capture Theory and the Courts: 1967–1983' (1997) 72:4 *Chicago-Kent Law Review* 1039–117 at 1039.

[26] C. R. Sunstein, 'Nonsectarian Welfare Statements' (2016) 10:2 *Regulation & Governance* 126.

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that matter evaluating trade-offs between these indicators, lists of goods of this kind are always going to be endlessly contested.

Ultimately, scholarly discussions around the concept of policy failure and institutional failure in the political economy literature over the last few years show that it is not an objective one. While we may capture some aspects of policy failure in terms of quantifiable benchmarks, ultimately assessments of failure are rooted in particular discourses within particular communities, as well as, in some cases, among the broader public.[27] Philippe Zittoun in particular draws attention to this discursive function of failure as an argument used by stakeholders in the political process to serve multiple aims. This includes legitimizing an obligation to act – which is closest to my starting point here – but also its use as a prognostic argument intended to block reform proposals or challenge authority more broadly.[28] And as we will see in the course of this book, discourses about failure are frequently driven by powerful actors seeking to expand their power, but they are also used to challenge exclusionary politics and give voice to marginalized and vulnerable groups, articulating hopes for a better future.

Yet, the fact that arguments from failure will always be rooted in particular discourses is not to say that arguments from failure cannot be a legal concept. The trick, I believe, is to turn the question on its head. We should not ask for a legal concept or definition of institutional failure as such, but rather start by asking what it is that arguments from failure seek to justify and approach the question of whether we are dealing with a case of failure from there. In other words, failure and the response to it need to be tailored to each other.

And this, unlike the definitional question, is a question on which comparative constitutional theory can have something to say, or so I argue in this book. Arguments from failure confront a range of normative challenges that are sufficiently similar across different jurisdictions and contexts to engage with them from the perspective of comparative constitutional theory.

Though the nature and possibilities of comparative constitutional theory are still subject to debate, such an approach reflects one of the standard methodologies in comparative public law today. As Gary

[27] Zittoun, 'Analysing Policy Failure'; see also for the broader debate Prakash and Potoski, 'Dysfunctional Institutions' as well as Derwort, Jager and Newig, 'Towards Productive Functions?'.

[28] Zittoun, 'Analysing Policy Failure'.

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Jacobsohn and Miguel Schor point out in the introduction to their edited volume on the subject, constitutional theorists have long worked with comparisons to other systems, going back to the writers of the Federalist Papers as well as key early authors such as Montesquieu, Bodin and Dicey. Each conceptualized their own (real or desired) constitutions by comparative references to others. Indeed, defining constitutional terms solely with reference to one particular constitutional text ignores to what degree such terms are a result of not only local but transnational and foreign struggles and debates.[29]

For more than a hundred years, constitutions have employed a host of identical terms – building blocks[30] – that constitutional framers have drawn upon when drafting their own texts. Though these universal components will take on a life of their own once they are integrated into a particular legal system,[31] and though some elements of a constitution may find no counterparts in other places, the universal/foreign origin of many components still provides a basis for comparison and for the approach Ran Hirschl labels 'concept formation through multiple description'.[32] Thus, if constitutional theorists *within one legal system* endeavour to theorize constitutional provisions with reference to their own particular system and other concepts within that system, *comparative* constitutional theorists construct concepts on the basis of a comparison of different legal systems, albeit without necessarily arriving at one definition or precise concept at the end. For example, constitutional theorists may shed light on the meaning of human dignity or the separation of powers in a particular legal system by reference to the history of those terms, including previous struggles that led to their introduction. They may also refer to other constitutional rights or concepts and broader considerations about the telos and origins of the constitution in question. In contrast, comparative constitutional theorists will consider and compare how different legal systems construct the meaning of such terms in constitutional scholarship and in judicial

[29] G. Jacobsohn and M. Schor (eds.), *Comparative Constitutional Theory* (Edward Elgar Publishing, 2018).

[30] G. Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited' (2010) 8:3 *International Journal of Constitutional Law* 563.

[31] Ibid.; for the classical argument (formulated in stronger terms than here), see P. Legrand, 'The Impossibility of "Legal Transplants" (1997) 4 *Maastricht Journal of European & Comparative Law* 111.

[32] R. Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press, 2014), p. 240–1.

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practice. Of course, the bare fact that certain terms are understood in a particular way even in a majority of states provides no good argument for interpreting them in the same way within any one particular system. What is normatively relevant, however, is arguments about why they should be understood in a particular way. Such normative arguments may be grounded in constitutional and/or political theory, reasoning about what makes a just state and society, and they can be drawn from multiple scholarly traditions and regions. This is what I offer here: not a universal account of the legality of failure arguments, but a set of questions and considerations based on my analysis of practice and theory from multiple jurisdictions to help us think through such arguments in concrete cases.

I.3 Perspectives and Building Blocks

In exploring if and how arguments from failure might be justified (or not) in normative terms, my work resonates with Jeremy Waldron's call for more institutional analysis in public law in *Political Political Theory*.[33] It also echoes earlier work on interinstitutional comparison in law as championed by Neil Komesar,[34] building on political economists such as Douglass North.[35] However, unlike these earlier authors and unlike current work by political scientists on constitution drafting and institutional design, I focus here on the question whether exceptions to the default arrangement of competences may be legitimate from a public law perspective, rather than inquiring about the best institutional design or the optimal distribution of rights and obligations among private persons or vis-à-vis the state more broadly.

The questions I ask tend to be most explicitly addressed in contemporary debates about judicial review and the separation of powers. Such arguments often draw on political process arguments, sometimes based on previous work by John Hart Ely, for whom the question of trust and distrust vis-à-vis the political system was central to determining the

[33] J. Waldron, *Political Political Theory* (Harvard University Press, 2016).

[34] N. K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press, 1994); and id., *Law's Limits: Rule of Law and the Supply and Demand of Rights* (Cambridge University Press, 2001).

[35] D. North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990).

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necessity (and scope) for judicial review.[36] The closest approach to my own in this regard is Rosalind Dixon's recent work on responsive review. Dixon argues that courts need above all to be responsive to the political environment in which they are operating. She sets out a nuanced template for judicial review that can range from super-strong review, where it is necessary to protect a democratic minimum core, to weak forms of review to address legislative blindspots and burdens of inertia as they arise even in well-functioning democratic systems.[37] My own work here builds on Dixon's approach as well as on David Landau's earlier work.[38] Landau has argued that political context and the existing institutional setup and functioning are key to evaluating the legitimacy of judicial intervention – an argument he has since expanded in other work.[39] He is not alone in building on the notion of malfunction as a justification for expansive judicial action, as we will see in Chapter 5.[40] Add to this strand of research another emerging line of comparative scholarship on structural remedies and the judiciary's ability to steer reform processes in public institutions, taken up inter alia by Po Jen Yap and[41] Kent Roach,[42] as well as by Alexandra Huneeus[43] in the international human rights context.

[36] J. H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

[37] R. Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023).

[38] D. Landau, 'Political Institutions and Judicial Role in Comparative Constitutional Law' (2010) 51:2 *Harvard International Law Journal* 319.

[39] M. J. Cepeda Espinosa and D. Landau, 'A Broad Read of Ely: Political Process Theory for Fragile Democracies' (2021) 19:2 *International Journal of Constitutional Law* 548.

[40] See, e.g., S. Issacharoff and R. H. Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50:3 *Stanford Law Review* 643; P. S. Karlan, 'Politics by Other Means' (1999) 85:8 *Virginia Law Review* 1697; N. Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press, 2017); S. Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015); T. Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (Cambridge University Press, 2017); S. Gardbaum, 'Comparative Political Process Theory' (2020) 18:4 *International Journal of Constitutional Law* 1429.

[41] P. J. Yap, *Constitutional Remedies in Asia* (Routledge, 2019); id., 'New Democracies and Novel Remedies' (2017) 1 *Public Law* 30; id., 'Remedial Discretion and Dilemmas in Asia' (2019) 69:1 *University of Toronto Law Journal* 84.

[42] K. Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law (Cambridge Studies on Constitutional Law, Vol. 27)* (Cambridge University Press, 2021); id., 'Polycentricity and Queue Jumping in Public Law Remedies: A Two-Track Response' (2016) 66:1 *University of Toronto Law Journal* 3.

[43] A. Huneeus, 'Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts' (2015) 40 *Yale Journal of International Law* 1.

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I see this book as a contribution to this work, but my aim here is both narrower and at the same time broader than the existing literature. My focus is narrower than existing theories of review insofar as I do not put forward a general theory of judicial review, of constitutionalism or the separation of powers. At the same time, I also pursue a broader project, because I am not only interested in courts and judicial review. Even though courts feature prominently throughout this book, I also seek to trace how arguments from failure are framed in different contexts and understand the larger normative stakes of such arguments in different fields of public law. The inclusion of examples from public international and European law has shaped my thinking and my theoretical approach, which understands arguments from failure as one among several efficiency- or output-focused arguments in public law. As such, it is not accidental that they are hard to capture and grapple with in legal terms. This is in fact a core property insofar as they are meant to destabilize existing rules in the interest of achieving certain results. To fully understand what this means and where this may lead without very careful constraints, the examples from international law and the jurisprudence of the European Court of Justice towards the end of this book are essential. They offer a perspective missing in the usual literature on structural reform litigation or remedies.

Finally, the normative framework I propose here fits into existing theories of a more collaborative approach to the separation of powers, as set out especially in Aileen Kavanagh's recent work.[44] It also aligns with theories of judicial review that emphasize the primacy of democratic mechanisms and the necessity of judicial responsiveness to them,[45] without, however, depending on any one particular theory of democracy or the separation of powers. This flexibility is intentional and necessary in light of the task of coming up with a comparative approach to arguments from failure. While consistent with a core understanding of constitutional democracy, I have attempted to be minimalist and pragmatic. I leave wide room for contextual adaptation to specific legal cultural backgrounds as well as a range of political positions within constitutional democracy. Thus, for example, in countries where constitutional review is rare and courts tend to exercise considerable deference, the framework I offer here might help judges determine where to intervene in the first place, rather than offering a path to structural reform

[44] A. Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2023).
[45] Dixon, *Responsive Judicial Review*.

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litigation. Those who are generally sceptical of arguments for judicial intervention might therefore treat cases of institutional failure where trust in other institutions has been shattered as the rare exception to the presumption in favour of judicial restraint.

I.4 Outline

The book is divided into three main parts – a theoretical discussion; a discussion of failure arguments in a judicial context, with particular emphasis on structural reform litigation; and finally, a section on international and European law. I draw in Parts II and III on the theoretical arguments developed in Part I, but what I offer in these later parts is not a straightforward application of the earlier arguments. It is, rather, a mix of description, analysis and normative assessment in concrete circumstances, including in cases where I will argue there is ultimately no sufficient basis for arguments from failures.

In Part I, I engage with the normative questions raised by arguments from failure. I start in Chapter 1 by discussing what arguments from failure are and why we may need them, in light of other existing checks prevalent in many constitutional democracies. I argue that arguments from failure are one among several tools to respond flexibly to the challenges of governing. I distinguish them from their key competitors, implied powers arguments and emergency arguments. Neither of these, I argue, quite captures what is going on in arguments from failure. Nor is the normative framework they come with sufficient – and this suggests that arguments from failure are better treated as a distinct legal concept.

If Chapter 1 presents a prima facie case for why arguments from failure might be useful, this is not the same as saying that we should take them seriously as a *legal* argument. It may be that such arguments are just too political and abuse-prone and don't fit with standard ideas of constitutionalism as power grounded in law. In Chapter 2, I therefore engage in more detail with the normative stakes of arguments from failure, discussing different conceptions of the separation of powers as well as democracy and the rule of law to determine if and when arguments from failure can be justified in those terms. At the bottom line, I argue that we do have the theoretical resources to defend arguments from failure as a legal concept – in some narrowly circumscribed cases. A less scholarly way of expressing this would be to say that such arguments should be safe, legal and rare.

In Chapter 3, I further qualify the conditions for when arguments from failure might be defensible. I draw on the discussions and concepts that

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emerged when the UN Human Rights Commission first started to claim a mandate for dealing with concrete rights violations as well as the literature on structural reform litigation and on emergencies. All of these sources point to the need to consider the proportionality of interventions in response to failure, taking into account the functionality, necessity and costs of such interventions. I end the chapter by discussing a more recent example where an argument from failure might be usefully deployed, namely the statute deployed by the UK House of Commons to quash postmasters' wrongful convictions in response to the Horizon scandal.

Part II deals with the role of failure arguments in courts. Chapter 4 begins with the story of the development of structural reform litigation, discussing examples from the United States, India, South Africa and Colombia. Courts and scholars in these systems frequently invoke governmental failure to justify both novel judicial procedures and expansive remedies, but typically do so in the context of generally declining trust in the government. At the same time, structural reform litigation in these systems has developed in different ways and assumed different forms, from emphasizing compliance with past judgments as in South Africa to a much broader response to political malfunction and an outlet for judicial exasperation with politics in India and to some degree Colombia.

From there, I move in Chapter 5 to the normative questions. I pick up the discussion from Part I and examine its implications for evaluating structural reform litigation in the context of broader debates about the role of courts in addressing political malfunction, drawing on political process theory. I provide some more guidance here as to how judges and lawyers might approach the question of proportionality and flesh out how a range of factors, that is the quantity, duration and quality of rights violations, as well as the intent or lack thereof behind them, can help us to assess that question.

In Chapter 6, I turn away from the realm of structural reform litigation to consider courts that rely on arguments from failure as judicial trumps to override otherwise existing reasons for judicial deference. I show how arguments from failure can drive judicial innovation, but also discuss the difficulties in determining when to intervene, given that – unlike in typical cases of structural reform litigation – it is often not clear here that rights have been violated in the first place. To that end, I discuss a range of examples from Germany, South Africa and the Netherlands, including some of the emerging case law on climate change where arguments from failure are sometimes deployed to overcome the lack of explicit legal standards.

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In the last part of the book, I deal finally with a set of examples from public international and European law where arguments from failure are occasionally deployed but often blur into other arguments. These include arguments about implied powers, including arguments about effective realization in European Union law and emergency arguments.

I begin in Chapter 7 by discussing one of the most explicit and famous examples of an argument from failure: the Uniting for Peace Resolution at the United Nations. From there, I dive into the murky waters of the discourse on state-failure in the 1990s, sketching out some of its most (in)famous manifestations from the law on the use of force and self-defense to the role of failure arguments in international development cooperation. Drawing on existing international law scholarship, I show how these examples speak to the central role of failure arguments as a justification for the expansion of the authority of international bodies. They highlight the need of taking power structures into account when assessing arguments from failure. But there are also broader questions about the appropriateness of invoking failure in an international context in the first place, given that we are typically operating here outside of a traditional constitutional context where principles such as the separation of powers are key concerns. Drawing on Part I, I reiterate that while arguments from failure may be legitimate outside of domestic contexts, they do suppose a quasi-constitutional context where expectations of mutual support and cooperation are normatively appropriate, something often lacking in the international realm.

Next, I turn to the European Union as a legal system where considerations of effectiveness, sometimes including arguments about failure, have long played a central role in driving European integration. I discuss in this context the recent concept of systemic deficiencies in European law as well the *Solange*-jurisprudence of the European Court of Justice, contextualizing these as part of the Court's broader functionalist approach. While some of my examples here involve arguments that are not strictly speaking arguments from failure, European law provides perhaps the best illustration of the risks and chances associated with a broad functionalist approach to legal interpretation.

In the final chapter of this book, Chapter 9, I summarize key findings and finally return to the bigger picture of rising distrust in state institutions, crises of governance and the simultaneous expansion of constitutional law and constitutional review. These developments not only increase our expectations in law and courts to fix existing problems,

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but they also drive arguments for legal flexibility, including based on arguments from failure, whenever it seems necessary to ensure certain outputs. Yet, the risks of thus enabling a slide into increasingly authoritarian patterns of governance are significant, as this book shows – and therefore suggest that great care and caution is needed in handling arguments for flexibility in public law.

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