Conclusion and Perspectives

9.1 Summary

I started out writing this book convinced of the benefits of structural reform litigation. I believed it might be an approach that courts in Europe, including the German one, should occasionally adopt to address structural problems and dysfunctions. I still believe this to be true. Yet, in the course of my research, I have also become much more critical of such arguments and the discourses of effectiveness and improvement that surround them.

The most important lesson of this book is that we need to take arguments from failure seriously as a concept of comparative public law. Arguments from failure are commonplace in public law and international law. But while arguments from failure may be related to emergency arguments or arguments about implied powers, they are not identical with either of them nor with arguments about the effective realization of certain key goals or values. Instead, they come with a distinct structure and represent a distinct idea, based on a broad understanding of the separation of powers as a tool to restrain, but also to enable effective government.

Many institutions and office-holders in very different settings invoke the real or perceived failure of other institutions to justify an expansion of their own competences. This is true in international settings and within nation states as well as in different institutional constellations. Global South scholars often draw on arguments from failure to try and convince judges to take on more robust roles in designing and monitoring specific remedies to realize socio-economic rights and ultimately a more equal and just society. In contrast, the European Court of Justice's language of efficiency, underpinned by arguments from failure, has more often than not been deployed to realize a neo-liberal economic vision of the common market in Europe. In the international realm, too, arguments from failure have contributed to legitimize structural adjustment

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programs and elements of the war on terror, continuing long-standing legacies of (neo-)colonialism. And yet, at the same time, they are also at the root of some of international law's proudest achievements – the creation and development of supranational human rights institutions. The riddle posed by these different ideological underpinnings cannot be satisfactorily resolved by linking all these examples to the emergence of a hegemonical Western capitalism based on an overarching logic of efficiency. The ideological differences we observe are real ones. Transformative constitutionalism is not simply the human face of legal neo-liberalism, whatever precisely it entails and whether it is ultimately postliberal or not. Rather, arguments from failure – like the broader theme of efficiency in which they are embedded – are empty vessels that may be employed for a wide variety of political projects and purposes.

This makes it hard, and to some degree impossible, to evaluate such arguments normatively without saying more about the underlying political and legal discourses. This is another lesson of this book: Whenever we confront and seek to evaluate arguments from failure, we need to know more about the political and legal context, including the broader institutional arrangements and legal rules in place. In other words, the question is not simply one of asking if the risk or problem at hand justifies institutional action without explicit textual authority. Rather, the first question will always have to be whether we are operating in a context where it makes sense to talk of ideas of mutual checks and inter-institutional cooperation, on the basis of which one institution might step in when another is failing. This will typically be the case within nation states, but in an international context it will often be a more challenging proposition, as we have seen. And even where we are operating within such a broader context, we will want to know more about what the specific competences of the institutions involved are and how their relationship is legally structured. In some cases, existing rules may open up possibilities for assistance or a temporary takeover quite naturally – and the more that is true, the less we need arguments from failure and might draw on a doctrine of implied powers instead. In other cases, such interventions may be much more of a stretch in legal terms. It will also matter whether the institutions seeking to assert new powers are situated in a broader institutional context and what the characteristics of the legal order in question are. In other words, are we dealing with a system with comprehensive regulatory arrangements seeking to provide for all circumstances or are we dealing with a set of piecemeal arrangements only, potentially designed a long time ago and hard to change? In the latter case, there is much more room for arguments from failure.

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The legitimation and respective political power of the institutions involved also play a role. Thus, I have argued that we should consider if there exist other, more democratic means to address the problem at hand. This means that we need to consider the democratic legitimacy of the different institutions involved. In other words, it matters if these are (comparatively) inclusive institutions, such as the General Assembly of the United Nations, or not. Finally, we will want to know whether they are situated in a hegemonic position, where an abuse of powers is more likely and more dangerous, or not. In the former case, we will scrutinize any arguments from failure more carefully and apply stricter standards, whereas in the latter case – as with courts – we may be more generous.

If our analysis in those terms bears out that there is simply no room for any arguments from failure in a given context because the legal framework is strictly comprehensive and/or there are other more democratic means to address the problem, then this is where we have to stop. We face a case where arguments from failure should not be considered legitimate as a matter of comparative constitutional theory.

In contrast, *if* there is in principle room for arguments from failure, we must then engage with the proportionality of the expansion of powers sought in light of the failure in question. This is also where I engage the definitional question of what counts as institutional failure. As we have seen, attempts to define institutional failure in any precise manner are riddled with difficulties, given how rarely we will have an objective yardstick of what constitutes adequate performance. And while lawyers will want to rely on the violation of legal rules to determine failure, not every rights violation can qualify, as I have argued in the introduction to this book. If and when a rights violation must be considered a failure thus depends on the intended institutional responses. In other words, failure and the response to it are not just related in practice, but also conceptually. Insofar as we can approach the question on an abstract basis, it is through the lens of proportionality – and here lessons learnt from the emergency literature prove useful. Thus, we will have to assess both the functionality, necessity and overall proportionality of the alleged failure and the response to it.

This involves asking if the intended intervention is actually likely to improve matters as well as whether the failure itself warrants the takeover of the issue by another institution. It matters, therefore, if we are dealing with clear violations of human, constitutional or quasi-constitutional provisions or rights. We will further inquire how long the situation has been going on, how many people are affected and if these are particularly vulnerable people and/or particularly important and long-entrenched rights, or not.

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This framework is necessarily vague, as proportionality tests generally are. Unfortunately, there is no way around that if we want to eschew the trap of universalizing where room for different institutional arrangements, politics, laws and legal and political cultures needs to be preserved. I have attempted in this book to make that room while also offering some guidance in tackling arguments from failure not just in courts and in the context of structural reform litigation but in other circumstances as well.

However, perhaps the most important point ultimately is how much the first prong of our framework, the broader institutional and legal analysis, matters in confronting arguments from failure. Proportionality tests fulfil an important function. But they also open the door to the sliding scale of necessity arguments: The greater the problem, the more will be justified to grapple with it. This problem is familiar from the emergency literature. Arguments from failure risk falling into the same trap – and perhaps especially so in circumstances where we are confronted with severe human rights abuses. Yet, we should resist the temptation to think that to alleviate grave suffering or indeed stop climate change, everything is permitted. Rules and competences continue to matter, albeit not in the way we associate – rightly or wrongly – with legal formalism, in the sense of narrow technical ('heartless') constraints that force us to remain inactive in such situations. Instead, they matter as part of a response that needs to be both workable and legitimate.

9.2 Challenges

How and why is all of this relevant? There are several reasons why public lawyers should care about the lessons from this book. First, many states are currently grappling with the challenges of effective and good governance. Second, and despite this, in many states our understanding of what constitutionalism entails has greatly expanded in the past two decades. Individually and in combination, these two factors will put further pressure on constitutional law to deliver 'results', and this has implications that public lawyers have yet to grapple with. Understanding and analyzing arguments from failure is one part of such a necessarily broader endeavour.

Start with the first point, which is often taken for granted for Global South jurisdictions. However, nearly all states currently face a range of political challenges, from ongoing wars in Ukraine and Gaza and the rise of right-wing authoritarian movements in many regions of the world to climate change. This happens at a time when many states are

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experiencing crises of governance, from states with persistent fragility problems to those that have been relatively stable democracies, as, for example, the United Kingdom, where a range of factors have contributed to broader dysfunctionalities of British political institutions.[1] And even where we – rightly or wrongly – have long expected things to work well, as in Europe or indeed in Germany, we find pockets of dysfunctionality, and sometimes more than that. Administration in the German state of Berlin has not for some time now conformed to the – albeit always exaggerated – ideal of German administrative capacity. Serious deficits have arisen not just in areas such as migrants' affairs but also when it comes to something as central as organizing elections.[2] Not least, some states in Southern Europe have long been considered – rightfully or not – as dysfunctional in important respects. Talk about the 'Latin-Americanization' of the European Human Rights system[3] echoes similar concerns, directed mainly towards Central and Eastern Europe. These problems are partly driven and partly exacerbated by a broader loss of trust in state institutions in nearly all regions of the world.[4] This loss of trust is often coupled with increasing political fragmentation, as the traditional post-war party system comes apart, as well as in some regions with a trend towards political polarization.

At the same time, we are experiencing a shift in our understanding of constitutionalism, one which has been ongoing for some decades at this point. The shift is away from the traditional negative-freedom-oriented model of constitutionalism towards a more comprehensive and social democratic, aspirational[5] or transformative idea of constitutionalism.[6] Traditional or standard accounts of democracy usually start from the premise that citizens are free to decide collectively what goals and projects the state should pursue, within the boundaries of existing constitutional law, including individual rights. In the classic liberal

[1] S. Freedman, *Failed State: Why Nothing Works and How We Fix It* (Pan Macmillan, 2024).
[2] VerfGH 154/21, 16 November 2022 (Constitutional Court of Berlin, Germany).
[3] See first C. M. Cerna, 'The Inter-American System for the Protection of Human Rights' (2004) 16:1 *Florida Journal of International Law* 195; subsequently, J. L. Cavallaro and S. E. Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court' (2008) 102:4 *American Journal of International Law* 768.
[4] J. Perry, 'Trust in Public Institutions: Trends and Implications for Economic Security', *UN-DESA Policy Brief* 108, 15 June 2021, https://tinyurl.com/ctejxjkx.
[5] A. Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014); M. Loughlin, *Against Constitutionalism* (Harvard University Press, 2022).
[6] M. Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2017) 65:3 *American Journal of Comparative Law* 527.

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understanding of rights, therefore, rights are understood as limitations of the powers that the constitution elsewhere grants to the state. In other words: Competences enable the state, rights limit its powers. This picture no longer adequately describes constitutionalism as it exists today in a wide range of states whose constitutions either include positive rights or directive principles and/or whose courts have read rights or directive principles to entail positive obligations for states to act. In other words, parliamentary majorities are not entirely free in the policies they pursue, but the constitution requires them to do certain things. This shift comes with many positive aspects; in particular, it allows us to understand and frame structural power imbalances and inequality as constitutional challenges that demand a political response. At the same time, it is part of a broader trend described by Kumm as the 'era of the total constitution', where all political questions can in principle be reframed as constitutional questions.[7]

We can observe a similar development in the context of human rights law. Its scope, too, has been considerably expanded over the past decades, treating ever more political issues as questions of human rights. Today, both left progressives and conservatives frequently rely on human rights language to put forward their own political agendas. It is the left that has had the larger impact on this development so far, though this may be changing.[8]

With this shift has come the expectation that law – in particular constitutional law and human rights – will and should be the tool to address and redress all injustice. As a result, the question will often arise if state institutions have done enough to protect a given right or constitutional value. This understanding will put pressure on states to respond – and on existing legal rules to be set aside where it appears necessary to better protect constitutional goals and rights.

As I said, there is much to like about this development. And of course there never was an age of 'neutral' or apolitical human or constitutional rights. They have always enshrined demands won in past political struggles by particular political groups. Retrenching such rights and confining them to what they used to mean fifty years ago or after the Second World War is not an attractive proposition from a politically left perspective – and it would come with some significant losses for those

[7] Loughlin, *Against Constitutionalism*, p. 131. M. Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the C onstitutionalization of Private Law' (2006) 7:4 *German Law Journal* 341–69; K. Möller, 'Justifying the Culture of Justification' (2019) 17:4 *International Journal of Constitutional Law* 1078, 1081.

[8] G. de Búrca/K. G. Young, 'The (Mis)Appropriation of Human Rights by the New Global Right: An Introduction to the Symposium' (2023) 21:1 *International Journal of Constitutional Law* 205.

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groups most in need of protection. Nevertheless, the heightened expectations that come with the expansion of rights and law to remedy injustice represent a shift towards output rather than input legitimacy in constitutional law, with the effective protection of rights being the output in question. This is why we have seen parallels in this book between forms of legal argument in Global South contexts and in the European Union.

Of course, considerations of effectiveness have always been relevant in constitutional law, perhaps in particular in the context of proportionality analysis. This becomes particularly clear in the work of Robert Alexy. He describes constitutional rights as optimization principles that should be realized to the greatest extent possible – a task that can be realized with the help of the proportionality principle, where rights limitations are justified as long as they are proportional to the goal pursued by the government.[9] Some scholars, such as Carl Schmitt, have accordingly understood attempts to reframe constitutional law as values as part of a move from legal to essentially economic forms of arguments.[10] Others have argued that 'necessity' represents an administrative way of thinking that is ultimately not compatible with legality as a limitation on the 'overall teleological compass of administrative action'.[11] Such claims have a basis in proportionality's origins in Prussian administrative law principles and private law thinking at the end of the nineteenth century.[12] That said, functionalist arguments are not confined to proportionality. The kind of considerations raised in proportionality analysis are standard even in systems that eschew proportionality as a constitutional principle, such as the United States.[13]

[9] R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002).

[10] C. Schmitt, *Die Tyrannei der Werte* (Duncker & Humblot, 1967).

[11] A. Somek, 'Administration Without Sovereignty', in P. Dobner and M. Loughlin (eds.), *The Twilight of Constitutionalism?* (Oxford University Press, 2010), p. 267; see also Cohen and Porat, who view the shift towards a proportionality approach to rights view as a shift towards an administrative model of constitutional law, M. Cohen-Eliya and I. Porat, 'Proportionality and the Culture of Justification' (2011) 59:2 *The American Journal of Comparative Law* 463.

[12] M. Cohen–Eliya and I. Porat, 'American Balancing and German Proportionality: The Historical Origins', in B. Bix and H. Spector (eds.), *Rights: Concepts and Contexts* (Routledge, 2017), p. 463.

[13] For example, US scholars noted in the late 1990s how the Supreme Court adopted a mix of 'functionalist' and 'formalist' approaches to separation of powers questions. See P. L. Strauss, 'Formal and Functional Approaches to Separation of Powers Questions: A Foolish Inconsistency' (1987) 72:3 *Cornell Law Review* 488; see also Eskridge on this, arguing that courts usually combined several approaches: W. N. Eskridge, 'Relationships Between Formalism and Functionalism in Separation of Powers Cases' (1998) 22:1 *Harvard Law Review* 21.

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What then are the consequences of all this? Are we observing the triumph of a new administrative and essentially output-focused paradigm of constitutional legality (constitutionalism 3.0), as Somek argues? We might also recall Hannah Arendt's warning about a utilitarian approach to law, which is worth quoting here:

> (Hitler's motto that "Right is what is good for the German people" is only the vulgarized form of a conception of law which can be found everywhere and which in practice will remain ineffectual only so long as older traditions that are still effective in the constitutions prevent this.) A conception of law which identifies what is right with the notion of what is good for – for the individual, or the family, or the people, or the largest number – becomes inevitable once the absolute and transcendent measurements of religion or the law of nature have lost their authority. And this predicament is by no means solved if the unit to which the "good for" applies is as large as mankind itself. For it is quite conceivable, and even within the realm of practical political possibilities, that one fine day a highly organized and mechanized humanity will conclude quite democratically-namely by majority decision – that for humanity as a whole it would be better to liquidate certain parts thereof.[14]

All of this is a long way of saying that pressure to reach certain outcomes and results poses risks both to democracy and the rule of law. This is demonstrated by the example of the European Union and even more so by plenty of authoritarian and semi-authoritarian regimes. And such risks increase as the ability of governments to deliver results is stagnating or indeed decreasing in response to current challenges.

9.3 Perspectives

How can we respond to this and where do we go from here? As I have argued above, I don't believe that we should endeavour to return to a more classically liberal understanding of rights and constitutionalism that focuses on constraining political power. Such an understanding privileges the status quo and risks cementing existing social and political hierarchies. If we believe constitutionalism has something to say on these things, there is no way around the total constitution.

As public lawyers, it is our task to recognize the temptations that come with total constitutions and confront them in a clear-eyed manner. It means that we need to take effectiveness seriously as a source of constitutional legitimacy, in practice, but also in theory. Though there

[14] H. Arendt, *The Origins of Totalitarianism* (Harcourt Brace & Company, 1973), p. 299.

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is more to be said here,[15] effectiveness and the doctrines and tools to realize effective government are part and parcel of both the theory and practice of government. Taking effectiveness seriously enables us to highlight trade-offs and conflicts that arise between the goals of making the government effective and the realization of collective or individual autonomy.[16] These conflicts should be teased out and openly addressed so as not to leave effectiveness arguments to the wrong people, to be deployed to whittle down constitutional constraints. Legality matters and constitutional provisions allocating functions and competences to different bodies need to be taken seriously. In many ways, therefore, this book is about when and why *not* to draw on arguments from failure, namely in most cases. The challenge will be to strike a balance: a balance between updating the law, on the one hand, in order to allow institutional adaptation to new problems and challenges as well as temporary fixes in some cases, while also preserving some limits and restraints on state power, on the other.

Add to this that the role of parliaments and administrative organs in protecting and realizing constitutional rights and/or directive principles needs to be rethought. This is all the more true as many of the newly construed positive rights or duties will involve spending new money. They thus involve questions of distribution and redistribution where a collective and democratic mode of decision-making is particularly important. In some systems, specific mechanisms to ensure a central role for parliament are already institutionally entrenched, such as in some Commonwealth countries, or exist in other, less explicit forms of weak review. In others, such as my own home jurisdiction of Germany, this is a challenge yet to be confronted. While there cannot be one model of review that will fit all systems and all contexts, Rosalind Dixon's proposal for a responsive theory of review provides an important template for thinking about these questions in different legal systems.[17]

Comparative perspectives on public law can inform such research and thinking. Public lawyers in Europe and elsewhere should therefore start looking more at countries where the challenges described here are more

[15] See for a preliminary argument M. Hailbronner, 'Output-Legitimacy and Its Limitations in Constitutional Theory', in A. Klafki (ed.), *Patterns of Legitimacy* (Nomos), p. 151, with further references. For a more comprehensive discussion on thinking about 'policy goals' (Zwecke) in public law, see T. Wischmeyer, *Zwecke im Recht des Verfassungsstaates: Geschichte und Theorie einer juristischen Denkfigur* (Mohr Siebeck, 2015).

[16] T. Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, 2016).

[17] R. Dixon, *Responsive Judicial Review* (Oxford University Press, 2023).

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commonplace and judges and lawyers have been grappling with them for some time. This means in particular looking outside of Europe and – albeit not only – to Global South jurisdictions, where they will encounter both lacking state capacities and low levels of trust in public institutions as well as a broad – often transformative – understanding of constitutional law at the same time. In doing so, we will be able to learn – sometimes by inspiration through new ideas, sometimes by learning to avoid what has gone awry elsewhere. Indian public interest litigation thus may offer both inspiration and a cautionary tale of what can go wrong. European lawyers may also begin to see the United States in a new light – no longer as a beacon of the most admirable constitutional system in the world nor for that matter simply as a corrupt oligarchy, but as a state with both long-entrenched dysfunctionalities and plenty of creative politics and lawyering seeking to fix things and confront the challenges that come with such efforts. Such comparative work is not what judges and law clerks can do in the context of deciding individual cases, but it requires time and cooperation between institutions and academics in different parts of the world.

Many open questions and challenges remain. This book grapples only with a specific aspect of a much broader set of effectiveness arguments in public law. But as we have seen, arguments from failure share many of the risks as well as the promise associated with this line of arguments, albeit that they present us with a distinct structure and logic of its own. In excavating and analyzing that structure, I hope to have cast a light on the broader themes running through this book and made some progress in grappling with such arguments as a matter of constitutional theory as and when they arise. I have no doubt that many readers will remain sceptical that there can be one framework to grapple with the very different constellations in which we encounter arguments from failure. So am I. This book contains less a set of answers than a framework for paying attention. If we simply pay closer attention to arguments from failure, instead of unreflectively adopting a necessity approach, as we so often do, this itself would be a good outcome.

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