3

Proportionality

3.1 Introduction

Today, it is no longer contested that the United Nations has a mandate to deal with domestic human rights violations. There are international treaties on human rights, in particular the two International Covenants, as well as an institutional infrastructure to help enforce the rights contained therein, albeit imperfectly. But in the 1950s, this was not true. Fears of the potential of human rights to undermine states' sovereignty played an important role in discussions about human rights protection in the United Nations, leading initially to the adoption of only the non-binding Universal Declaration.[1] Human rights were mentioned in the UN Charter, of course, such as in the Preamble. Art. 62 of the Charter charged the Economic and Social Council (ECOSOC) with the responsibility to 'make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all'. Art. 68 explicitly provided that this task included setting up a human rights commission. Yet, the powers of this Commission beyond the drafting of the Universal Declaration were unclear. It did not initially deal with reports of concrete rights violations, even though it almost immediately received hundreds of individual communications from individuals complaining of rights abuses.[2] Instead, the Commission followed a policy Howard Tolley describes as 'self-denial', deciding that it lacked authority to take action regarding concrete complaints about human rights violations.[3] In the mid-1960s, however, this changed – and it

[1] For a comprehensive historical account of the drafting history, see J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent, Pennsylvania Studies in Human Rights* (University of Pennsylvania Press, 1999), pp. 15 ff.

[2] H. Jr. Tolley, *The U.N. Commission on Human Rights* (Westview Press, 1987) and id., 'The Concealed Crack in the Citadel: The United Nations Commission on Human Rights Response to Confidential Communications' (1984) 6:4 *Human Rights Quarterly* 420.

[3] Tolley, 'The Concealed Crack', 420 at 422.

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changed due to the recognition that some kinds of human rights abuses could simply not be ignored by the United Nations. Justifying this expansion of its mandate, the Commission and its Sub-Commission sought (albeit with moderate success) to distinguish 'ordinary' rights violations from other, more systemic ones, and in doing so essentially developed an argument from failure.

The empowerment of the UN Commission of Human Rights and its Sub-Commission is interesting here because it involves an attempt to cash out more explicitly the kind of failure that would lead to an expansion of the United Nations' mandate on human rights. While this attempt is set in a specific context and deals with international rather than domestic constitutional law, we will see that the criteria developed here strongly resemble what we encounter in the context of structural reform litigation – and they can still provide guidance for dealing with arguments from failure today. The story of the UN Human Rights Committee also shows how attempts to categorize failure in legal terms will typically give rise to contestation. Such contestation takes place within broader legal and constitutional structures, shaped by the interests of those in power. But even while this is true, our example also shows that this may nevertheless serve as a tool for empowerment in some cases.

The expansion of the Human Rights Commission's mandate represented an important success for many newly independent Southern states' efforts at the United Nations. These states began to use human rights as part of their broader struggle against colonialism and racial oppression. In the 1960s, Apartheid South Africa became a subject of nearly constant human rights criticism in UN institutions.[4] It was in this broader context of de-colonisation that ECOSOC started to push for the Human Rights Commission 'to consider the question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories'.[5] The Sub-Commission, consisting of a panel of experts, first considered setting aside the principle of non-intervention

[4] Tolley, 'The Concealed Crack', 420 at 426 ff. For a comprehensive account of the role of former colonial states in the human rights movement, see S. L. B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge University Press, 2016).

[5] E.S.C. Res. 1102, 40 U.N. ESCOR Supp. (No. 1) at 6, U.N. Doc. E/4179 (19), quoted according to Tolley, 'The Concealed Crack', 420 at 426.

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in domestic affairs in cases where, as a draft by the US representative suggested, 'a consistent pattern' of rights violations existed. This language subsequently made its way to the Human Rights Commission, which adopted Resolution 8 (XXIII). The Resolution asked ECOSOC to expand its mandate to study and investigate concrete rights violations in situations where a consistent pattern of human rights violations appeared and suggested that the Sub-Commission bring such cases to its attention, including 'policies of racial discrimination, segregation and apartheid'.[6]

Unsurprisingly, the language was deliberately chosen so as not to raise concerns among the representatives of powerful states. Thus, during the debates, Mr Waldron-Ramsey, a Tanzanian delegate, reassured US and UK colleagues: 'Obviously the Commission had no need to concern itself with any regrettable violation of human rights in the United Kingdom itself, or in the United States, since those were attributable to individuals and did not stem from the official policy of government in power.'[7] Waldron-Ramsey was of course very much aware that the proposed course of action might well have implications for these powers, as his references to the US civil rights movement and the continuing legacy of British imperialism demonstrated. Indeed, while he explicitly recognized the US federal government's efforts to address racial discrimination at home, Britain came in for critique for its colonial legacy as well as its ongoing protection of African states that practised apartheid. In legal terms, the challenge was to balance sovereignty and human rights. The United Nations was after all not a 'world government', as the British delegate Sir Samuel Hoare pointed out.

The aim then was to identify cases such as Apartheid South Africa and distinguish them from others arising in powerful Western states. The Commission's request to ECOSOC was successful. ECOSOC followed up with Resolution 1235 (XLII), conferring on the Commission the task to analyze 'situations which reveal consistent pattern of violations of human rights'.[8] While careful not to tread on the sensitivities of powerful Western states, this concept clearly had subversive elements, being

[6] UN Human Rights Commission Resolution 8 (XXIII), see 42 ESCOR, Suppl. No. 6 (E/4322), pp. 80–146. My account largely follows Medina, see C. Medina Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American system* (Springer, 1988), pp. 7 ff.

[7] Commission on Human Rights, Twenty-Third Session, Feb. 22, 1967, E/CN.4/SR. 898, 11.

[8] Economic and Social Council Resolution 1235 (XLII), 42 U.N.

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directed against Apartheid South Africa, which was then still officially supported by the UK and US governments. However, it also reduced the threat to those governments of becoming targets themselves, by putting forward what was essentially a concept of failure in human rights.[9] As the later president of the Inter-American Court, Cecilia Medina Quiroga, argued in her Dutch dissertation in 1988, titled *The Battle of Human Rights – Gross, Systematic Violations and the Inter-American system*:

> [o]nly when national governments fail to give adequate protection to human rights, the international community is called to fill in the gap and lend some form of protection of the victim. It could thus be assumed that the international community starts from the premise that its task is subsidiary and that its purpose is to supplement an already existing national system for the protection of human rights.[10]

Newly endowed with its mandate, the Sub-Commission soon began to explore other cases such as Haiti and even situations in non-colonial settings, such as, most prominently, Greece, which had recently turned authoritarian. In debating these two cases, in both of which government representatives denied that human rights had been violated, delegates discussed what constituted a consistent pattern of rights violations.[11]

Perhaps unsurprisingly, the record shows that they disagreed about nearly everything in doing so. Some delegates argued that considerations of both the nature and the scale of the violations were relevant. Others sought to define the concept as 'implying the repeated occurrence of violations over a substantial period of time as a result of a deliberate governmental policy'[12]. Still others objected to the time component, connecting the term instead to the Security Council's authority to take action in cases of threats to international peace and security.[13] '[F]lagrant and systematic' human rights violations in their opinion were likely to lead to this situation.[14] It was also unclear how the Commission should react when it had identified a consistent pattern of human rights violations. Should it issue a condemnation, or was this not an adequate reaction given

[9] Commission on Human Rights, Twenty-Third Session, Mar. 8, 1967, E/CN.4/SR.918, 14.
[10] Medina, *The Battle of Human Rights*, p. 17.
[11] J. Carey, 'U. N. Response to Government Oppression' (1968) 3:1 *The International Lawyer* 102 and Tolley, 'The Concealed Crack'.
[12] U.N. Human Rights Commission's Report on the Twenty-Fourth Session, U.N. Doc. E/4475-E/CN.4/972 (1968), 69, para. 170.
[13] Ibid.
[14] Ibid., 70, para. 171.

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that it was not a judicial body? In any event, Greece and Haiti were dropped from the agenda, ostensibly for lack of sufficient evidence but in truth for manifold reasons.[15] In response, the Sub-Commission began to use individual communications as evidence for their reports, much as the Inter-American Commission on Human Rights had already begun using such communications to start investigations in 1961.[16]

ECOSOC Resolution 1503 of May 1970 finally ratified and formalized the earlier practice, introducing with the so-called 1503 procedure the oldest human rights complaint mechanism in the UN system.[17] It authorized a working group of the Sub-Commission to consider all communications and bring to the attention of the Sub-Commission those that 'appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms within the terms of reference of the Sub-Commission'.[18] The 'consistent pattern' subsequently became a criterion for admitting individual communications, as did a requirement that victims must first exhaust domestic remedies. In the future, the Sub-Commission and the Commission would monitor cases, often on a confidential basis, communicating with governmental institutions sometimes over the course of several years. More rarely, statements and sometimes studies were released to the public in an attempt to put pressure on intransigent governments. However, the selection of cases continued to be challenging and led to accusations of the Commission's politicization. Ultimately, this led to broader institutional reforms, replacing the Human Rights Commission with the contemporary Human Rights Council, which would now scrutinize reports by all UN member states on a regular basis.

3.2 Proportionality

The attempt to define under what conditions UN bodies should be competent to deal with concrete rights violations in individual member states was ultimately an attempt to define failure in a specific human rights context – and it provides the main remaining puzzle piece for the framework developed here.

[15] Ibid., 75, para. 192. For an overview, see Tolley, 'The Concealed Crack', 420 at 430 f.
[16] Tolley, 'The Concealed Crack'; on the Inter-American system, see Medina, *The Battle of Human Rights*, pp. 71 ff.
[17] United Nations Economic and Social Council, Res. 1503 (XLVIII): Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms, 27 May 1970.
[18] The procedure has been revised as of 2000.

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In the last two chapters, we have mainly engaged with institutional questions – who is acting, what are their competences, what is the basis for their legitimacy. Yet, to grapple with arguments from failure, it also matters what kind of failure we are talking about and what might be done about it. In other words, we need to continue the work of these UN institutions in thinking about what makes a consistent pattern of rights violations, as a prerequisite for intervention. We need to consider the proportionality of the intervention, in light of the problem to be resolved.

That proportionality is a necessary puzzle piece in a framework to evaluate arguments from failure hardly comes as a surprise. It is the standard test when it comes to the exercise of emergency powers and also plays an important role in the more recent literature on structural reform litigation.

Thus, Art. 4 (I) ICCPR, Art. 15 (I) ECHR and Art. 27 (I) IACHR all allow for the suspension of certain human rights in cases of emergency, but require any measures to pass a strict necessity test. It also features in the jurisprudence of the European Court of Human Rights[19] as well as the Inter-American Court on Human Rights.[20] Scholars, too, have routinely placed emphasis on necessity as a prerequisite for any exercise of emergency powers. Drawing on a range of sources, including Just War Theory, political theorist Kreuder-Sonnen argues for the adoption of a proportionality framework consisting of functionality, necessity and costs to evaluate the exercise of emergency powers in an international context.[21]

A similar proportionality framework not only recurs in standard domestic rights review but also when it comes to assessing judicial engagement in structural reform cases. Proportionality has been explicitly adopted by Kent Roach as a tool to evaluate which remedies are appropriate in a given case, in particular with an eye to structural remedies.[22] Similar considerations appear in the Colombian Court's

[19] *Mehmet Hasan Altan v. Turkey*, Case No. 13237/17; *Şahin Alpay v. Turkey*, Case No. 16538/17; *Kavala v. Turkey*, Case No. 28749/18; *A. and Others v. the United Kingdom* [GC] Case No. 3455/05, para 182 ff. (ECHR).

[20] Advisory Opinion OC-8/87 of January 30 1987 (Inter-American Court of Human Rights).

[21] C. Kreuder-Sonnen, *Emergency Powers of International Organizations: Between Normalization and Containment* (Oxford University Press, 2019), p. 61; however, note that this is not in fact the key object of Kreuder-Sonnen's monograph but rather its relevance to the question whether the emergency powers exercised will likely be entrenched in the future (ratchet effect) as so often or whether they will be rolled back.

[22] K. Roach, *Remedies for Human Rights Violations: A Two-Track Approach to Supranational and National Law* (Cambridge University Press, 2021), Introduction and elsewhere.

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doctrine of the 'unconstitutional state of affairs', which seeks to qualify certain rights violations as distinct and requiring specific judicial action – quite similar to the attempts to define a consistent pattern at the United Nations.[23] While I discuss the latter two approaches later in Part II when I turn to analyzing structural reform litigation, it is important to note the overlap between international and domestic standards in this regard as well as the fact that considerations of necessity are not exclusively tied to an individual rights framework.

Proportionality is thus the final hurdle arguments from failure must clear. In many ways, this is foreshadowed already in the discussion in Chapter 2. There, I emphasized the need to evaluate an expansion of competences based on failure in the context of the broader legal and political framework, taking into account the democratic stakes of such arguments as well as other existing remedies available. Proportionality focuses our attention on the issue that has been left unattended as a result of existing failures or indeed been directly caused by such failures. Not any kind of violation of law warrants interventions beyond the routine channels provided. This is the lesson from the United Nations' moves to start scrutinizing human rights violations in specific countries. It also follows from the close relationship between arguments from failure and emergency arguments. However, I cannot emphasize often enough that it remains key not to treat proportionality as the only or even most important requirement when considering arguments from failure.

Since proportionality is a notoriously vague and problematic concept, in what follows I try to spell out a bit more what it should entail in the context of arguments from failure. In doing so, I build on Kreuder-Sonnen's framework, which distinguishes functionality, necessity and costs. As we will see, some of the considerations under such a framework closely parallel some of the arguments put forward in Chapter 2, while others supplement them.

3.2.1 Functionality

Functionality is a standard part of proportionality analysis nearly everywhere. It requires that the institution seeking to respond will be likely to resolve the problem at hand or at least contribute significantly to resolving it. Two related considerations are important in this regard. First, this

[23] Decision T-025 of 2004 (Colombian Constitutional Court).

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involves thinking about what needs to be done to resolve the issue. Second, we need to assess the capacities of the institution seeking to respond.

What needs to be done is often not an easy question to answer. It depends on why state institutions are not acting to address the issue or indeed why they are causing it. Resistance in particular can be hard to overcome, particularly if important institutional actors are unwilling to do something. The same can be true for problems stemming from a mix of coordination problems, capacity issues and other structural factors. Overcoming what will often be entrenched dysfunction, due, for example, to corruption and capture of agencies, can be exceedingly difficult and sometimes impossible. In at least some cases, therefore, functionality will mean that arguments from failure cannot justify intervention by other institutions simply because there is no realistic chance of change. At the same time, the fact that it is not immediately clear what needs to be done is not a conclusive argument for doing nothing. But the remedy may not always lie in other institutions expanding their powers to take over. In some cases, the best strategy may lie in constructing so-called institutional bypasses that allow citizens to sidestep failing institutions by creating new channels and institutions rather than fixing the old ones. The idea – explored in more detail by Mariana Mota Prado and Michael Trebilcock in their pioneering work in this area – is that this can either exercise pressure on the old institution to reform or make the old ones superfluous in the long run.[24] And where new institutions are created, this is of course not necessarily an exercise of power that requires special justification.

In our context, we need to consider if the institution seeking to take over is itself institutionally suited to doing so. In many cases, this will be doubtful as institutions created for certain purposes will not have the necessary expertise or capacities to act on other issues. Some challenges in this regard will be more easily remedied than others. Thus, if expertise is the problem, the institution in question may bring in outside experts on specific questions. However, if the problem is of a strongly polycentric nature and we are dealing with a court considering to step in, it may not be amenable to resolution within the traditional bipolar structure of judicial trials, and courts then will have to decide whether to develop new procedures – as they often do in practice – or step back from the

[24] M. M. Prado and M. J. Trebilcock, *Institutional Bypasses: A Strategy to Promote Reforms for Development* (Cambridge University Press, 2019).

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issue entirely. This is also where the literature on democratic experimentalism may show us the way to address structural problems in a creative and experimental manner.

3.2.2 *Necessity and Costs*

Necessity in our context must be understood both in terms of the legitimacy of the institution acting and the one seen to be failing – requiring us to conduct a no-more democratic means test – and as a qualifier when it comes to the problem that purportedly needs fixing.

On the first point, it bears emphasizing that it is not just the institutions that matter but the process too. Here, too, the democratic experimentalism literature offers important insights when it comes to favouring more flexible as well as participatory approaches over final dictates by individual judges. We must also address the question if the problem that has been left unaddressed due to the institutional failure is significant enough to warrant the intervention of an institution that ordinarily has no powers to address the issue in the way needed. What factors should matter in this context?

Recall the introduction to this chapter and the attempt by the UN Commission on Human Rights to carve out an exception to the standard practice of non-intervention for situations in which they encountered a consistent pattern of gross human rights violations. Spelling out what this meant was not an easy task. The Sub-Commission later asked a Russian expert, Dr. Stanislav Chernichenko, to prepare a paper inter alia to define what cases qualified.[25] This study was subsequently submitted to the Human Rights Committee. Chernichenko emphasized the difficulty of establishing clear criteria when it came to distinguishing 'gross', 'massive' or 'systematic' human rights violations both from each other and from other cases:

> One of the hardest problems is to draw the line between individual instances and massive violations of human rights. (. . .) It is also difficult to draw the line between minor and gross violations of human rights. This

[25] Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-Ninth session, Item 11 (c) of the provisional agenda, 28 May 1997, E/CN.4/Sub.2/1997/29, at 3. See also on this H. Rombouts, P. Sardaro and S. Vandeginste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', in K. de Feyter et al. (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005), p. 345.

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> can be done only approximately. The same can also be said of systematic violations of human rights. In theory it is possible to conceive of systematic violations of the human rights of a particular person or small group of persons. A failure to nip them in the bud, however, would probably indicate a generally unhealthy human rights situation. (. . .) Attempts have been made to "measure" violations of human rights. One idea that merits attention is to use three indicators: the scope of violations, i.e. the degree of seriousness; their intensity, i.e. the frequency of their occurrence over a given period of time; and their range, i.e. the size of the population affected. One may object to the terms proposed. The intensity of human rights violations denotes less the frequency of occurrence than the degree of severity, or both. But in principle, "measuring" human rights violations like this is clearly the right way to go.[26]

Chernichenko also offered examples. According to his account, gross violations referred to a specific kind of human rights violation, for example cases of torture or arbitrary and protracted detention. They often led to 'massive' violations (understood in terms of range) such as genocide, disappearances, slavery-like practices, and mass and arbitrary executions, which also counted as gross violations at the same time. And though in principle open to measuring rights violations in some way, Chernichenko argued that the three factors to consider offered in the literature, namely 'the scope of violations, i.e. the degree of seriousness; their intensity, i.e. the frequency of their occurrence over a given period of time; and their range, i.e. the size of the population affected', were ultimately insufficient. In particular, when it came to economic, social and cultural rights, the problem was often going to be that governments simply did not have the means of improving things, and such cases thus typically should not be considered gross violations under the definition.

Though the efforts to define a consistent pattern were ultimately abandoned at the UN, Chernichenko was not the only one to attempt to define the term.[27] Similar to the three-factor test Chernichenko had discussed and dismissed, the Austrian scholar Ermacora suggested in 1974 that three elements had to be present: first, a time element in the

[26] *Excerpt from the expanded working paper submitted to the UN Human Rights Commission by Russian expert Dr. Stanislav Chernichenko, 28 May 1997,* Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-Ninth session, Item 11 (c) of the provisional agenda, 28 May 1997, E/CN.4/Sub.2/1997/29, para. 38.

[27] For an overview, see L. F. Damrosch, 'Gross and Systematic Human Rights Violations', *Max Planck Encyclopedia of Public International Law*, 2011, https://tinyurl.com/mr3uaetk.

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sense of some continuity of the violations; second, a quality element that required violations to have a similar scope as apartheid and racial discrimination; finally, there should be a quantity element comprising a substantial number of cases and an expression of a broader policy or ongoing practice where no effective remedies existed within the state concerned.[28] These criteria lingered on in a later attempt at definition by US commentator Maxime Tardu. He added that there needed to be an additional element of planning or of sustained will on the part of the perpetrators, and that in considering the scope of violations, many thought that a degree of inhuman or degrading treatment should be required.[29]

The most comprehensive and convincing attempt at defining the term, however, was presented by Medina in her doctoral dissertation.[30] Based on her analysis of the UN developments and her reading of Ermacora and Tardu, Medina proposed a four-factor test for rights violations to count as gross, requiring (1) sufficient quantity, (2) a temporal element, (3) quality and (4) an element of governmental planning. While the first elements are fairly self-explanatory, it is less clear how to assess the quality of rights violations. Medina argued for an integrated approach which would consider the quality of the right or prohibition in question, the kind of violation, and the status of the victim. Regarding the quality of the right in question, she referred to the category of ius cogens offences, the categorization as international crimes or the fact that only some rights tend to be non-derogable in human rights treaties. The fourth and final element of planning is unfortunately not fleshed out much by Medina. She argued that violations cannot be committed 'at random' but must typically serve a specific goal and thus be part of a broader plan or policy. (This understanding, as we will see later, would make it very hard to capture socio-economic rights violations, today a major area of expansive action by domestic courts.) Summed up in one sentence by Medina:

> gross, systematic violations of human rights [are] violations, instrumental to the achievement of governmental policies, perpetrated in such a quantity and in such a manner as to create a situation in which the rights to life, to personal integrity or to personal liberty of the population as a

[28] F. Ermacora, 'Procedures to Deal with Human Rights Violations: A Hopeful Start in the United Nations?' (1974) 7 *Human Rights Journal* 670.
[29] M. E. Tardu, 'United Nations Response to Gross Violations of Human Rights: The 1503 Procedure' (1980) 20 *Santa Clara Law Review* 559.
[30] Medina, *The Battle of Human Rights*.

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> whole or of one or more sections of the population of a country are continuously infringed or threatened.[31]

This analysis focusing on the quantity, duration and quality of rights violations has strong parallels to the doctrines we see in some courts today to deal with structural reform cases. This includes the Colombian Constitutional Court with its 'unconstitutional state of affairs doctrine,'[32] which I discuss in Chapter 4, as well as the European Court of Human Rights' pilot judgment procedure under Art. 61 of the Court's Rules of Procedure. In both courts, considerations of quantity and time are central to analyzing whether the cases they confronted warrant the application of the unconstitutional state of affairs doctrine or the pilot procedure – and thus an exceptional structural remedy.

Intent, on the other hand, usually plays a lesser role. In my view, it should not be taken as a requirement for intervention, which may appear necessary also in cases of incapacity or incompetence that do not include intent to violate, as the literature on structural reform litigation demonstrates. That said, intent can play some role as an additional argument for certain kinds of interventions.

Finally – costs. The costs of the respective intervention should ideally be understood to include both immediate costs as well as potential long-term consequences, which will often be harder to assess. They can accrue in relation to the institution failing to act as well as the one seeking to intervene or the broader public. Thus, it may be that an intervention will both remedy a pressing problem and help restore trust in the state and its institutions. However, the intervention may also contribute to fostering an abdication of responsibility by the institution in question and draw attention to dysfunctionalities in a way that damages public trust in institutions more permanently. Finally, as we know from the emergency literature, what starts as an intervention in an exceptional case may become normalized and entrenched in the longer run (the so-called ratchet effect),[33] extending the power of the institution to act in circumstances beyond the original case. In some situations, we may be able to take mitigating measures to lower the risks of certain negative consequences, but in others this may not be possible. Unfortunately, assessing

[31] Ibid., p. 315.
[32] See, e.g., Decision T-025 of 2004 (Colombian Constitutional Court).
[33] Kreuder-Sonnen, *Emergency Powers*, p. 44.

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which of these consequences is most likely will often be difficult and involve prognoses with significant uncertainty.

3.3 Summary

With this, it is now time to gather the insights of our discussion in these first three chapters. In Chapter 1, we saw how arguments from failure overlap with existing arguments for institutional expansion but are also in important ways different from them. We saw that there are resources to justify intervention in cases of failure in the existing literature on the separation of powers and democratic theory, but also that such a flexible approach comes with risks.

Drawing on these debates, I propose that if we seek to evaluate arguments from failure from the perspective of comparative constitutional theory, we need to consider four different questions:

As a first step, we need to ascertain that we are operating within a context in which arguments from failure can generally have a place, that is within a system where expectations of mutual collaboration and responsiveness are appropriate. As I argued in Chapter 2, this is typically the case within standard constitutional democracies, but it may pose a more significant challenge in the international context (see more in Chapter 7).

Second, there needs to be a violation of law, with one exception, which I will discuss in Chapter 6. This, too, is typically a hurdle easily cleared. In the context of the UN bodies' involvement with human rights, the violation of law giving rise to accusations of failure would be the initial rights violations by the respective governments.

Third, it is important to take the existing institutional structures and legal frameworks seriously. This means that we need to consider whether existing frameworks should be understood as comprehensive. We also need to consider the legitimacy of the institutions involved, which includes a no-more-democratic-means-test, and distinguish cases of failure from those of disagreement.

Fourth, we need to assess the functionality, necessity and costs of the intervention proposed in light of the issue to be addressed.

These considerations necessarily provide only a rough guide to assessing arguments from failure in normative terms. The details will depend on the particular legal and institutional context in which the argument is put forward. Nevertheless, I believe that even the rough guidelines I offer here can be useful to help us think productively about arguments from

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failure rather than subsume them under existing doctrines of emergency powers or implied powers, or for that matter rejecting them altogether.

3.4 Case Study: The British Post Office Scandal

All of this is fairly abstract and vague. I, thus, want to turn to a real case, which is, I argue here, best understood and discussed in terms of an argument from failure. The case in question starts with the British so-called Horizon scandal from 1996 to the end of 2018, which ultimately saw legislation passed to quash the wrongful criminal convictions of postmasters, subpostmasters and other post office employees (in the following: postmasters) for offences including fraud, theft and false accounting.

3.4.1 Background

The events leading up to the passage of this legislation constitute one of Britain's major political scandals in the last ten years. They have been the subject of much public discussion as well as the release of a mini-series, titled *Mr. Bates vs the Post Office*.[34] In brief: From 1996 onwards, the British Post Office had piloted a new software called Horizon, designed by the Japanese company Fujitsu, to streamline accounting in its post offices. However, that software had serious flaws that were not public knowledge at the time. These led to the appearance of shortfalls in a range of post offices in Britain and subsequently to post office employees being investigated for a series of offences. As a result, many of those employees lost their jobs and their savings on account of having to make up for alleged shortfalls out of their own pockets. Four people killed themselves and hundreds ended up criminally convicted, with some serving time in prison. As the scandal slowly unravelled, the Post Office was shown to have ignored early warning signs about the software. More than that, the Post Office, which enjoys the legal power to conduct its own investigations instead of involving the British police, had not always conducted these investigations with the necessary care. It had sometimes only passed on

[34] On the background story, see S. Lipscombe et al., 'Post Office (Horizon System) Offences Bill', *House of Commons Library – Research Briefing*, 18 March 2024, www.commonslibrary.parliament.uk/research-briefings/cbp-9986/; S. Mason, 'The Post Office Horizon Scandal: A Brief Chronology' (2021) 18 *Digital Evidence and Electronic Signature Law Review* 1.

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parts of the evidence to the state prosecutors, who subsequently brought the criminal charges against the employees. Efforts by the postmasters to uncover the truth were hampered for a long time by the Post Office's lack of cooperation, until they ultimately succeeded in the courts. In the landmark *Bates v. The Post Office* judgment, computer flaws were finally determined to be the cause for the alleged shortfalls.[35] Subsequently, a number of postmasters involved with the litigation successfully challenged their criminal convictions in the appeals courts, leading to a finding that not only had the defendants previously not received a fair trial, but also that the Post Office had acted to subvert the integrity of the justice system and undermine public confidence.[36]

However, it also became clear that there were hundreds of wrongful convictions still remaining on the books, leading to the question of how to deal with this situation. The normal route to challenging such convictions depends on where the original cases were tried and whether the individuals in question had pleaded guilty – which had often been the case, as many postmasters took deals to avoid prison time. Nevertheless, ultimately overturning convictions could only be done by the appeals courts, in some cases (especially after guilty pleas), only after a referral by the criminal cases review commission. However, given that some of the criminal convictions went back 20 years and evidence was not always still available, the process of overturning the convictions in the courts was neither straightforward nor fast, with each case requiring separate consideration. In other words, this route was quite burdensome and problematic. In response, the British government chose to draft legislation instead, quashing all convictions of post-office employees for certain offences falling within the prescribed time frame.

However, this legislation faced controversy among British public lawyers and judges. Some considered it an inappropriate intervention by the government into the judicial domain that interfered with the rule of law, the independence of the judiciary and, ultimately, the separation of powers. There have been more specific concerns about how to identify the people whose convictions would be quashed. Concerns about the legislation's legality have also been raised by the Chair of the Justice Select Committee in the House of Commons, Robert Neill, and by the United Kingdom's Chief Justice, who has challenged the claims that the justice system had not been able to process the appeals sufficiently,

[35] *Alan Bates and Others v. Post Office Limited* [2018] EWHC 2698 (QB).
[36] *Hamilton v. Post Office Ltd* [2021] EWCA Crim 577.

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efficiently and swiftly.[37] That said, others defended the legislation as an appropriate use of parliamentary powers to address legitimate grievances within the British system of government, with its particular emphasis on parliamentary sovereignty. In this view, the legislation contributed to upholding the rule of law. It ensured that justice was done in a situation where many criminal convictions had been based on incomplete evidence.[38] In addition, the fact that the legislation targeted specific convictions meant, some argued, that it did not impinge on the rule of law or the separation of powers. Rather, it constituted an instance of parliament addressing a structural problem with corporate culture in the Post Office at the time and served to remind institutions with their own powers of investigation, such as the Post Office, of their duty to exercise these powers in a careful and impartial manner.[39]

While it, therefore, remains contested whether the separation of powers indeed allows for the passage of a statute quashing convictions, it seems fair to state that its passage involved an unconventional use of parliamentary powers. Thus, the official explanatory notes to the statute itself state under 'legal background' that '[t]his is an unprecedented and wholly exceptional legal solution to a miscarriage of justice of unparalleled scale and impact (. . .) The approach to quashing convictions in the Act does not set any constitutional precedent'.[40]

It seems to me that the postmasters statute is best understood in terms of an argument from failure, with the failure in question being the previous miscarriages of justice leading to hundreds of wrongful convictions and thus rights violations. Understanding the legislation in those terms makes clear that it does not involve an either-or-case, in the sense of parliament either having powers to quash convictions by legislative fiat or not. Rather, it is a case where such a power might be defended only in terms of the need to react to an exceptional situation by unconventional means and was not intended to set a precedent for the future.

[37] Lipscombe et al., 'Post Office Research Briefing', reference p. 36 with further references.
[38] R. Craig, 'The Constitutional Implications of Legislating to Exonerate the Post Office Sub-Postmasters', *UK Constitutional Law Association*, 16 January 2024, https://tinyurl.com/mrvyp3w8; see also K. Dewsnip, 'The Post Office Bill: Constitutionally Unusual, but not Inappropriate', *The Constitution Society*, 24 April 2024, www.consoc.org.uk/the-post-office-bill/.
[39] Craig, 'Constitutional Implications'.
[40] 'Explanatory Notes: Post Office (Horizon System) Offences Act 2024', www.legislation.gov.uk/ukpga/2024/14/pdfs/ukpgaen_20240014_en.pdf, n. 23 and 24.

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As an argument from failure, we can then ask our set of questions. The first of these concerns the existence of a framework where there is a legal expectation of mutual collaboration and support. This is a hurdle easily cleared if we recall the broad basis for a collaborative understanding of constitutionalism in the United Kingdom, as argued convincingly by Aileen Kavanagh.[41]

The same applies to the requirement of a breach of law, which in this case was the miscarriage of justice involving criminal convictions on the basis of flawed evidence, as set out in the judgment of *Bates v. The Post Office*.[42]

The third concerns the question if we can indeed identify something like a gap in the law, in the sense of there being no comprehensive framework to deal with issues such as the one that has arisen. Here, things start getting trickier, given that there obviously is a process for overturning criminal convictions in place. The question then is to what degree we should understand this framework to be comprehensive. More particularly, we might ask if it is a framework that is geared to operate or can operate not just to deal with isolated wrongful convictions but rather with structural problems leading to hundreds of wrongful convictions, as in this case. This is where different understandings of the rule of law and the role of the British parliament start to matter. Given the principle of parliamentary supremacy and the traditional role of parliament in addressing grievances, it seems to me that there must be at least some room in principle for a parliamentary role in dealing with structural problems in the justice system as opposed to an isolated individual wrongful conviction – and this suggests that we should not view the existing judicial mechanisms as fully comprehensive. However, we should be mindful here that such an argument might be more difficult to make in other constitutional democracies where a stricter understanding of the separation of powers prevails.

Fourth, we will have to ask about the functionality, necessity and costs involved in quashing the convictions by legislative action. We, thus, need to answer the question if the legislation will actually remedy the problem. The main challenge in this regard will be whether it is possible to identify all the relevant post office employees. Some have argued that the framing of the statute is vague in places, thus making it difficult to identify with certainty all cases where criminal convictions should be

[41] Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2023).
[42] *Bates and Others v. Post Office.*

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overturned.[43] Nor does the statute address the question of financial compensation, which is being addressed through additional legislation.

More difficult still is the question of necessity in the case at hand. For while it is clear that the Post Office scandal indeed involved a structural problem leading to miscarriages of justice in hundreds of cases with severe personal consequences, it is less clear that legislating to overturn previous convictions was necessary to restore justice. This question is perhaps the one that has loomed largest in the British debate, albeit in a rather freewheeling way that speaks to how we understand necessity to be a core requirement whenever we confront arguments from failure. The key question has been in particular whether the existing judicial process was indeed as slow as it was suggested, and if so, whether the best way to increase speed might not have been to increase funding for the Criminal Cases Review Commission instead. Like many British institutions, the Commission had suffered from severe cutbacks in the last fifteen years.[44] Others have, however, questioned if funding is the real or only problem. They have traced the very low success rates of appeals to the Criminal Cases Review Commission to the high statutory threshold for referring cases back to the appeals court, which requires a 'real possibility' of having the case overturned.[45] But whether funding or the current statutory framework is slowing things down, both could be addressed either by increasing funding or by changing the legislative framework.[46] It has also been pointed out that, currently, none of the people convicted are still serving prison sentences, and accordingly, the need for urgent action is less dramatic than it would have been some years ago. That said, previous criminal convictions of course continue to impact the lives of those concerned negatively in other ways. Overall, however, it seems that there is considerable scepticism within the British public law community as to whether legislation was necessary to deal with the situation. If the

[43] S. Tierney, 'The Post Office (Horizon System) Offences Act 2024: Necessary Remedy or Unwarranted Interference with Judicial Independence?', *UK Constitutional Law Association*, 3 June 2024, https://tinyurl.com/3jex8cmh.

[44] J. Robins, '#The Law is Broken', *New Law Journal*, 11 May 2018, www.newlawjournal.co.uk/content/law-broken.

[45] M. Naughton, 'What If the CCRC Had Unlimited Funding? A Submission to the Law Commission's Review of the Appeals System', *University of Bristol Law School Blog*, 23 January 2023, https://tinyurl.com/m4pejnte.

[46] D. Green, 'Why Legislating to Acquit Horizon Victims May Be Unnecessary in Practice and Wrong in Principle', *Prospect Magazine*, 18 January 2024, https://tinyurl.com/5yj2rmp9.

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sceptics are right, the argument from failure would have to be rejected at this stage.

Lastly, when it comes to costs, additional problems surface. The legislation will likely exonerate some people whose criminal convictions were not based on flawed evidence. It will also lead to awkward results insofar as it excepts people who previously tried to challenge their convictions in the appeals court but were unsuccessful on the basis that their convictions were likely not based on the flawed Horizon evidence. Yet, this leads to a situation where people who would now have had their convictions purged under the more lenient statutory approach are excluded merely because they previously sought to use the ordinary appeals process to challenge their convictions. Most importantly, however, there is the risk of the legislation creating a precedent for other cases in which parliament might feel the need to overturn sets of judgments it considers problematic, albeit that the statute itself disavows that idea. On the other hand, there is a pressing need to bring about justice for hundreds of people whose lives had previously been turned upside down by wrongful convictions. All things considered, it would seem that the costs in this case are perhaps not the main challenge, but that it hinges on the question of necessity.

British public lawyers are far better qualified than I am to resolve that question, and I, accordingly, do not seek to provide a full answer here. My interest in this case is as an illustration of how treating the legislation quashing the convictions as an argument from failure provides a way to deal with the question of parliamentary overreach in a principled manner. As we have seen, evaluating the legislation in those terms means addressing many of the considerations already present in current British debates, but it does so within a broader theoretical and legal framework. That framework offers no straightforward answers. It also leaves plenty of room for discussion, as we have just seen. Context and the specifics of the local legal systems will have to be taken into account to come up with an answer. But the same is true for other approaches used in the existing debates, framed in terms of the scope of parliamentary sovereignty, or the somewhat free-floating references to necessity. Treating the legislation as an argument from failure at least means asking the right questions and thus provides an important step for ultimately developing a convincing answer.

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