Effectiveness and Output Legitimacy in Crisis

Michaela Hailbronner[*]

> *"Whatever other values a constitutional system might be expected to realize, it must structure the exercise of public power so as to ensure the safety and security of its citizens, resolve conflicts, facilitate material prosperity, collect public revenue, participate in the international system, and fulfil the greater and smaller tasks that define a polity. In short, the constitution's authority at least partially rests on enabling effective government. Although the challenge of constitutional rule is often framed as one of calibrating the demands of individual liberty and popular sovereignty, it is more accurate to speak of a three-way balance between the principles of individual and collective autonomy and effective government."*[1]

Output legitimacy used to play an important part in our thinking about the legitimacy of political authority. Orientation towards public welfare was key to distinguishing legitimate rulers from tyrants in medieval and early-modern writings. Such ideas did not disappear from public law with the advent of democracy, as encapsulated in Abraham Lincoln's famous

* Prof. Dr. Michaela Hailbronner, LL.M. (Yale) is professor of German and International Public Law and Comparative Law at the University of Münster, Faculty of Law. Please note that this book chapter partly builds on arguments developed originally in Chapter 8 of my *habilitation*, 'Acting When Others Aren't – Arguments from Failure in Comparative Public and International Law', submitted on 4 March 2023, which will be published with Cambridge University Press, 2025.

1 T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, 2016) 41-42.

description of democracy as 'government of the people, by the people, for the people'.[2]

However, it is not clear what, if any, role the idea of 'government for the people' – or, in Isiksel's terms, effective government oriented towards providing things such as safety or prosperity – can play in democratic constitutionalism today. In scholarly writings, perhaps more so in Germany than elsewhere, there is a growing trend of thinking of (normative) legitimacy and legality as the same thing and, accordingly, there is no real need to think about the place of legitimacy in public law. This particularly affects the concept of output legitimacy, as well as the related idea of effectiveness, previously seen to be a central source of governmental legitimacy.

In this paper, I explore the role of output legitimacy and effectiveness arguments through the prism of debates about constitutional theory and with a particular emphasis on times of crisis where ideas of output legitimacy are usually especially prominent. I argue that the standard view today – that legitimacy is legality – is essentially correct, but that this leaves open the question how to address arguments about effectiveness, which I consider in three distinct forms: as arguments about implied powers, arguments from failure, and emergency arguments, all of which draw on ideas of necessity– and thus arguments about enabling effective government – in order to justify legal changes. I argue that these examples address the importance of considerations of effectiveness in public law as well as its dangers, and suggest something of a middle path when it comes to effectiveness as a public law value.

I. Staking Out the Problem

There is a long tradition of viewing output as central to the legitimacy of any government, and sometimes to its legality. For example, in medieval legal thinking, legitimate government was typically understood to be legal government, in the absence of a clear and comprehensive written constitution. Both input and output factors were thus relevant to assessing legitimacy and legality, such as the monarch's (hereditary) claim to his

2 A Lincoln, *The Gettysburg Address* (19 November 1863), The Avalon Project, Yale Law School, available at https://avalon.law.yale.edu/19th_century/gettyb.asp, last visited Sept. 1, 2023.

title, as well as his commitment to public welfare.[3] Some early-modern writers such as John Locke argued that a monarch who exercised his authority in a tyrannical fashion could be overthrown.[4] However, with the rise of modern constitutional states, the relationship between legality and legitimacy became more complicated. Famously, Max Weber theorized and distinguished between different forms of legitimate authority – charismatic, traditional and rational-legal –, but in doing so established legitimacy as a sociological rather than a normative category.[5] Treating the rational-legal form of authority as only one particular kind of legitimate government, Weber moreover severed the link between legitimacy and legality. In other words: Legitimate authority in sociological terms did not necessarily have to be legal. Carl Schmitt further built on Weber's distinction by juxtaposing legality as the central principle of Weimar's parliamentary democracy to its plebiscitarian elements, which he associated with legitimacy.[6]

In contemporary theories of democratic constitutionalism, the place of legitimacy, sometimes called legitimation,[7] and, in particular, of output legitimacy as a normative concept is often unclear.

Starting from the premise that constitutions both establish and constrain state power, it seems that there can be no (normative concept of) legitimacy beyond the respective constitution. This at least represents the standard position in contemporary German constitutional theory, which contrasts with traditional state-centered constitutional writings of Weimar and post-Weimar German writers, who frequently treated the state and its interests/survival as an obvious normative value of its own and as an overarching purpose of any theories of legitimacy, without recourse to specific constitutional text, and indeed preceding the latter.[8] Thomas Wischmeyer presents a convincing version of the contemporary argument in his mono-

3 W Reese-Schäfer, 'Legitimität staatlicher Herrschaft – die historische Perspektive' in A Thiele (ed.), *Legitimität in unsicheren Zeiten. Der demokratische Verfassungsstaat in der Krise?* (Mohr Siebeck, 2019)21-38.

4 J Locke, *Two Treatises of Government* (Yale University Press, 2003)191-192, § 207.

5 M Weber, *Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie. Studienausgabe*. (, Mohr Siebeck, 1990) Kap. III, 1, § 2, 124.

6 C Schmitt, *Legalität und Legitimität* (Duncker & Humblot, 2012).

7 C Möllers, *Gewaltengliederung* (Mohr Siebeck, 2005) 11.

8 For the broader history of German "Staatsrechtslehre", see C Möllers, *Der vermisste Leviathan: Staatstheorie in der Bundesrepublik* (Suhrkamp, 2008); also, F Guenther (ed.), *Denken vom Staat her: Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949-1970* (Oldenbourg Wissenschaftsverlag, 2004).

graph on the role of purposes (*Zwecke*) in public law.[9] Dismissing traditional accounts, Wischmeyer argues that, in a constitutional democracy, there can be no purposes beyond those laid down in the constitution itself. In a democracy, citizens are free to make their own choices and decide which goals are worth pursuing within the respective constitutional framework.[10]

Christoph Möllers goes a step further and argues that output legitimacy has no place in constitutional theory. He argues that that questions of whether the parliament within a given society actually represents the will of the people or whether a given constitution will stabilize political order must remain outside of a legal theory of legitimation.[11] This is not to say, as Möllers explicitly clarifies, that lawyers cannot consider the consequences of state actions, but rather that those consequences themselves are only legally relevant insofar as they are themselves the product of democratic or rights-enforcing procedures rather than their precondition.[12] In other words, in a constitutional democracy, citizens realize their collective autonomy within democratic procedures, while rights protect their individual autonomy through individualized procedures; whereas whether they get rich or live in peace with each other while doing so is not relevant from the perspective of constitutional theory.

As a result, legitimacy in a constitutional democracy should be understood as being directed towards enabling individual and collective self-determination; there is no place for effectiveness considerations as a source of legitimacy of their own. Once again, it bears repeating that this is not an argument that outputs or goal mandated in the constitution itself may not be pursued, but rather an argument about constitutional legitimacy, or more specifically about the conditions under which we consider a constitutional democracy normatively legitimate as a matter of constitutional theory. If we follow Möllers, whether it enables effective government or not is not relevant in this regard. If we follow Isiksel, it is indeed relevant.

But Isiksel's argument, quoted above, really raises two distinct normative problems: The first is whether there can be recourse to considerations of (typically output) legitimacy that have no basis in the constitutional text. The second concerns the broader role of effectiveness arguments in consti-

9 T Wischmeyer, *Zwecke im Recht des Verfassungsstaates: Geschichte und Theorie einer juristischen Denkfigur* (Mohr Siebeck, 2015).

10 T Wischmeyer, *ibid,* 208.

11 C Möllers, *The Three Branches* (Oxford Unity Press, 2013) 53; C Möllers, *Gewaltengliederung* (Mohr Siebeck, 2005) 35.

12 C Möllers, *Gewaltengliederung* (Mohr Siebeck, 2005) 38.

tutional interpretation. In the next two sections of this chapter, I focus on these two problems.

II. Output Legitimacy and Legality

Isiksel's argument finds itself in a long tradition of constitutional theorists who have treated arguments about the need to protect certain vital state interests, such as security, as valid arguments as a matter of constitutional theory and constitutional law, sometimes independently of any basis in the constitutional text.

A good contemporary example is provided by Adrian Vermeule's recent theory of common-good constitutionalism. Vermeule argues that both progressive liberal theories of constitutionalism and originalist approaches are deeply flawed, albeit for different reasons.[13] If the search for original meaning is ultimately not possible and can lead to unconvincing results (such as the dismissal of the establishment of the US regulatory state), liberal theories prioritize individual self-determination with (in conservative eyes) unappealing results such as the creation of a right to same-sex marriage. Instead, Vermeule argues, US lawyers should look to classical theories of the public good to develop an account that roots individual freedom in a shared conception of (traditionally understood) public and social morality.[14] Though Vermeule believes that the framers of the US constitution shared a similar belief in a classical theory of the role of law as an instrument for public welfare, his argument does not hinge on any textual connection to the US constitution. Rather, he advocates an independent concept of law not tied to any particular textual reading of the US constitution. He views his account for this reason as partly Dworkinian in the sense of connecting law to public morality, albeit with a rather different understanding of morality than that advocated by Dworkin.[15]

Leaving aside the question whether or not we agree with Vermeule's conservative values, his account raises some interesting questions with regard to the broader relationship between legality and legitimacy today. For while Vermeule is not interested in making an interpretive argument in the strict sense, he is putting forward a normative account of law and

13 A Vermeule, *Common Good Constitutionalism* (Wiley & Sons, 2022), Introduction.
14 *Ibid.*
15 *Ibid,* 5 ff.

its function, which in turn informs his constitutional theory, and this raises the question whether legitimacy is something distinct from legality. The fact that Vermeule would possibly deny this reveals the murky terrain in which we are moving.

Consider as another example progressive theories of transformative constitutionalism which often stress certain substantive goals as key to the legitimacy of the constitution and the state itself, such ending or combatting poverty.

Both approaches clearly advocate the importance of certain outputs or values to constitutional theory and constitutional interpretation. We might even say that for both approaches a (differently defined) idea of the common good is central to the legitimacy of the respective constitutional democracy. Yet, while we are moving in murky terrain, transformative constitutionalism, at least in Klare's original version, understands itself as an interpretive account – it presents a specific and, Klare suggests, indeed the best reading of the South African constitution in its historical context.[16] This, to be sure, is not necessarily true for other proponents of transformative constitutionalism. For Klare, however, transformation did not represent a purpose external to the South African constitution, but rather one intrinsic to it. Is the same true for Vermeule's account? To me, it seems that the lack of a connection to any positive norms – a deliberate move by Vermeule – means that we are leaving the realm of what – normatively – constitutes constitutional theory as defined above, i.e., as a theory about a particular constitution. For while Vermeule presents a theory of law, it is in many ways not a theory about the US constitution, and I believe this is where we move from constitutional theory into the terrain of political theory.

Another way of making the same point is to say that Vermeule adopts an idea of a mainly output- oriented, i.e., welfare-oriented, concept of legitimacy that goes beyond the legal text, and thus legality, and stands in contrast to what I would characterize as being the more standard German view on this, which Friedrich Müller captures as follows:

> *"Legality is often associated with accordance with (statutory) law (...) Legitimacy is traditionally associated with supra-positive "values", such as the idea of law, to distinguish it from legality. This is, however, superfluous in modern constitutional states. Here, legitimacy is a term of positive law.*

16 K Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

> *It expresses the statement that the results of legal action on the basis of the positive constitution conform to its central norms and structural principles and at the same time are open to an open legal debate about the sources and arguments for legitimacy.*"[17]

If we follow Müller, there is hence no room for a theory of output legitimacy going beyond those outputs explicitly set forth in the constitutional text. However, insofar as the constitution itself includes certain policy goals or values, in the form of a directive principle or by including explicit or implicit positive rights that enable individuals to put forward a constitutional argument demanding the state to act in a specific way, considerations of output matter, but not otherwise. Thus, from this perspective it does not necessarily follow that there cannot be an output-oriented source of legitimacy that supplements the two more standard ideas of individual and collective self-determination. For example, under a transformative constitution the need for social and political change may well constitute a source of constitutional legitimacy of its own that may have to be balanced with democracy and the need for individual rights protection, in contrast with Christoph Möllers' account.

This has broader implications for effectiveness arguments, which may thus be legitimate where they are directed towards effectively realizing the policies passed in democratic procedures or the more specific constitutional purposes of individual constitutions. However, there cannot then be a place for output legitimacy as such or, for that matter, for considerations of effectiveness decoupled from democratic procedures or constitutional norms.

That said, there will likely be room to argue which kinds of policy goals or values may count as constitutional. What drives a particular constitution, its central beliefs and historical background, will feed into constitutional theory from which we can develop a normative account that speaks to the legitimacy of this particular constitution, as well as constitutionalism more broadly. Obviously, not all elements of a given constitution are relevant to its legitimacy in the same way, and different constitutional theories – each put forward on the basis of a particular reading of the constitution – may be in conflict with each other and accordingly support different readings of legality, i.e., of specific constitutional norms in concrete cases.

17 F Müller, 'Demokratie in der Defensive: Funktionelle Abnutzung – soziale Exklusion – Globalisierung' (Duncker & Humblot, 2001) 197 *Schriften zur Rechtstheorie*, 61f., my translation.

So far, so good. The question is whether this is enough or whether there is a need for an account of output legitimacy that is independent of specific constitutions. In other words, we need to ask ourselves if this is a convincing understanding of the relationship of legality and legitimacy as a matter of comparative constitutional theory.

To answer that question, the first challenge must be to think about whether the account above is any different from a constitutional theory that includes an independent idea of output legitimacy in modern constitutional systems. In other words, we must ask when we would want to refer to considerations of output legitimacy that are not themselves part of the constitution or set forth as policy in a democratic procedure.

One thing seems clear: Effectiveness arguments are widespread. Consider, as an example, electoral-threshold rules which allow representatives of a given party list only to take their seats in parliament when that party has reached a certain threshold of votes in the respective elections. Such rules are typically justified as a means of enabling effective governance through coalition-building, which can become difficult if seats are split among too many parliamentary factions. Treating effectiveness as a source of legitimacy of its own might allow us, as Isiksel argues,[18] to conceptualize the conflicts more clearly that are raised by the respective cases with regard to the two standard sources of legitimacy: democracy and the protection of individual rights. In our example, therefore, democratic representation may be curtailed for the sake of effective government.

But while this is true, effectiveness is mostly of instrumental value insofar as standard examples are dealing with the pursuit of democratically chosen goals. In other words: It is a democratic choice, too, to avoid parliaments being split by too many factions, and thus we ultimately do not need to have recourse to extraconstitutional values or vital state interests beyond the constitution. Add to this that many modern constitutions include a great number of rights, as well as, increasingly, other values or directive principles that constitutional theorists can draw upon if they are interested in making an argument about the importance of certain (constitutionally mandated) outputs. As a result, the range of issues that can be understood as constitutional issues has dramatically expanded in the last few decades. Transformative constitutionalism presents one example here, but there is

18 T Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press, 2016) 41-42.

also a broader trend towards what Mattias Kumm has called 'the total constitution', where all political questions and interests can ultimately be reframed in terms of constitutional norms and principles.[19]

For these reasons, therefore, it can seem that today there is simply no need for drawing on any extraconstitutional source of output legitimacy and that effectiveness therefore is today always and necessarily of instrumental value, but this is also sufficient if we are worried about outputs. In other words, it is not clear that the question has any real stakes anymore. But is this really true?

In constitutional practice, the standard scenario for output arguments in the form of necessity are situations of crisis and emergency. The question is thus whether, under those circumstances, we need to rely on an extraconstitutional concept of output legitimacy after all?

To address that question, it is useful to take a step back and try to adopt a broader historical perspective. If we do so, we will realize that, from a historical perspective, crises and their management are central to understanding the emergence of modern bureaucratic states and key to their sociological legitimacy. Karin Loevy and others have drawn attention to the role of the financial crisis in the creation of modern US administrative states.[20] Similarly, Saptarishi Bandopadhyay shows, in a series of case studies from India to France, how disaster management became a core function of 18th-century states whose rulers began to frame disasters and emergencies not as a part of fate or God's will, but rather as situations to be managed and dealt with by the state.[21] The ability to get things under control and reinstate 'normalcy' thus became essential to the legitimacy of the states in question, and central to their establishment of modern bureaucracies.

While these examples do not amount to a normative argument as such, they demonstrate that, in the cases mentioned, output legitimacy in a sociological sense assumes a key role. More than that, the examples also

19 M Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2019) 7 *German Law Journal* 341, 346; see also M Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South' (2015) 65 Amer*ican Journal of Comparative Law* 527; for a recent critique of this approach, see also M Loughlin, *Against Constitutionalism* (Harvard University Press, 2022)132 ff.

20 K Loevy, 'Emergencies in Public Law: The Legal Politics of Containment' (2016) 1 *International Journal of Constutional Law* 300.

21 S Bandopadhyay, *All Is Well: Catastrophe and the Making of the Normal State* (Oxford University Press, 2022) 173.

raise questions whether an instrumental understanding of effectiveness is sufficient in grappling with these cases from a normative perspective. This is because we often shift to an executive mode of decision-making. What is key in justifying actions taken to deal with the crisis at hand is frequently not that this represents a democratic choice, but rather necessity: the need to deal with a certain problem. There is, of course, always the possibility of drawing on constitutional norms to justify the actions in question. Under what Kumm considers as examples of a 'total constitution', in the sense that nearly all questions can be framed as constitutional questions, there may be no need to refer to ideas of output legitimacy outside of the constitutional framework.

However, under more classical constitutional regimes such as the US, such constitutional framing may be more difficult, and therefore the need to refer to 'extraconstitutional' ideas of output legitimacy arises. The standard trope in this context is that the constitution is not designed as a "suicide pact",[22] but allows for self-defense measures, and illustrates that point. These are therefore the kind of situations where traditional theories of state prerogatives or the reference to vital interests in international law claim primary relevance because necessity arguments fall outside of the constitutional framework. In other words, our answer will depend on the broader constitutional regime in place and its respective ideas of constitutional legitimacy. However, note that, even where we can identify some directive principle or constitutional right warranting defense and protection of certain rights or goals, and thus making room for effectiveness arguments, any references to effectiveness come with their own problems.

III. Effectiveness and Its Place in Constitutional Theory

The only real question remaining, then, is whether it is important for reasons of analytical clarity to treat effective government as a source of legitimacy of its own, which is the other half of Isiksel's point.

Again, it bears repeating that effectiveness considerations are ubiquitous in constitutional law. In the context of proportionality analysis, now a standard tool of constitutional review in many places, we ask, for example, whether there is a rational connection between the governmental means

22 See, e.g., *Terminiello v Chicago*, 337 U. S. 1 [1949] (US Supreme Court) (dissenting opinion, Justice Robert H. Jackson).

chosen and the purpose of the respective measure. We also ask whether there are other less-restrictive means available to achieve the purpose in question. Both elements raise, in different ways, questions regarding effectiveness. But this is not all there is. Teleological or purposive interpretation is typically concerned with interpreting laws in a way that realizes their – objective or subjective – purpose. All of this is part of a constitutional lawyer's standard toolkit.

Effectiveness assumes an even greater role in the context of arguments not about rights, but about the scope of competences which arise particularly often in multilevel systems such as the EU – hence Isiksel's interest in them –, but are not confined to such settings. Thus, one application of teleological arguments are arguments about implied powers. Essentially, implied-power arguments suggest that we should interpret an existing competence broadly as encompassing the means to fulfill certain functions attributed to the particular institutions.[23] From here, however, it is only a small step to what I call arguments from failure and emergency arguments, both of which serve as a basis for claiming competences in order to deal with an important problem and thus are about effective problem-solving. More precisely, arguments from failure involve one institution invoking the failure of another institution in order to expand its power to deal with a problem arising from this failure.[24] Think of Uniting for Peace Resolution as an example, with the UN General Assembly invoking the failure of the Security Council as a reason for recommending actions to the members states on its own, thus expanding its standard set of powers.[25] Emergency arguments are more familiar; they involve an appeal to a problem or threat of some scale and urgency as a basis for acting, in the absence of a specific legal competence. Like arguments about implied powers, emergency arguments and arguments from failure are functionalist, in the sense of being directed towards enabling good outcomes and effective problem-solving, and they should be understood as operating on a continuum. In implied-power arguments, an effort is usually made to put forward a structuralist reading of the respective powers – a reading that, while transcending the constitutional text, nevertheless seeks to take the positive constitutional rules and competences seriously. In emergency cases, this is only sometimes

23 The standard example for this kind of approach is the US Supreme Court's landmark judgment in *McCulloch v. Maryland*, 17 U.S. 316 [1819] (US Supreme Court).

24 For more, see M Hailbronner, *habilitation thesis* (note * above), Chapter 5 in particular.

25 UNGA Res. 377 V, UN Doc. A/1775 [1950].

the case – typically, here, we find the argument that the graver the danger or risk in question is, the more deviations from existing rules can be justified. The most interesting case, I believe, is arguments from failure which are typically based both on a sense of a shared project and the need to step in for others who are not fulfilling their proscribed role – which I would consider a more structuralist/legal approach – and, on the other hand, considerations of necessity.

Notably, in all three scenarios, effectiveness arguments may well be deployed in the service of protecting constitutional rights or constitutional principles, but this is not really the issue. Rather, the problem is that such arguments feed into a broader managerial paradigm of constitutionalism where legal competences are highly flexible in order to realize the best possible output. Alexander Somek has juxtaposed this managerial and essentially administrative approach to a legal understanding of constitutionalism where institutional powers are a priori legally delineated rather than dependent on outcomes.[26]

As we can see, this is not just a niche problem of constitutional interpretation. Arguments about the scope of competences in constitutional law are standard, and considerations of effectiveness often central to their resolution, not only in the context of multilevel constitutionalism. They also tie into modern theories on the separation of powers, which not only stress the importance of enabling effective governance as a central purpose of the separation of powers, but also the need for a degree of institutional flexibility and, in particular, for collaboration among different institutions. Nick Barber,[27] Dimitrios Kyritsis[28] and, more recently, Aileen Kavanagh[29] emphasize such considerations in different ways, defending, for example, the expansion of institutional powers in cases of institutional failure. Thus, Nick Barber argues that institutions should exercise their powers flexibly to compensate for failures of others, adding that the separation of powers should, accordingly, not be understood in a rigid manner.[30]

Without going into all the details, it is important to recognize that Barber's approach is driven ultimately by considerations of effective govern-

26 A Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014)222.
27 N Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018).
28 D Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford University Press, 2017).
29 A Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2023).
30 N Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018) 79.

ment, albeit employed in the interest of realizing a constitutional template or vision. To that aim, Barber is willing to accept a degree of institutional flexibility. This is not to say that effectiveness works only in one direction. It may well be that the rule of law, or aspects of it, is beneficial for economic growth or political stability and thus for achieving certain outputs.[31] But if this is the question we deem relevant, we are already buying into the logic of efficiency and functionalism of which Somek warns us.

What happens, therefore, if we take a more flexible approach to competences in order to maximize effectiveness? Somek develops his account primarily against the background of European law. By adopting an output-based paradigm of constitutionalism, Somek points out, we are essentially parting with the idea of a democratic rule of law. For what is legal now depends on its ability to bring about certain outcomes, rather than on whether it can be traced back to a democratic decision. In his reading, the European Union, which largely follows such a paradigm of law in his reading, becomes a system best described in terms of Herrmann Hellers' authoritarian liberalism.[32] We might also say, with Hannah Arendt, that such an understanding which she associated with Nazi ideology leads to confusion between what is right and what is good.[33]

It is too easy to dismiss these critical voices as overdramatizing the point, and this is all the more true in the current political climate, where we see a resurgence of populist modes of arguments in a range of countries, as well as democratic backsliding to authoritarian or semi-authoritarian regimes. The performance of crisis, in Benjamin Mofitt's terms, and the insistence on action is part of the standard repertoire of populist and authoritarian discourses.[34] Emergency arguments and arguments from failure are a central part of populist rhetoric, and the potential for abuse of such arguments is immense. Yet, as Somek's work shows, it is not just the deliberate bad-faith instrumentalization, and thus abuse, of such arguments, but also their good-faith deployment that is problematic.

31 There is a significant body of literature on this theme; for a more recent nuanced discussion, see, e.g., S Haggard and L Tiede, 'The Rule of Law and Economic Growth: Where Are We?' (2011) 39 *World Development* 673ff.

32 A Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014) 238.

33 H Arendt, *The Origins of Totalitarianism* (Harper Collins, 1973) 299.

34 B Moffitt, 'How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism' (2015) 50 *Government and Opposition* 189.

IV. Conclusion

What, then, is the conclusion? Effectiveness arguments are firmly entrenched in public law as well as in large parts of constitutional theory. This, it seems to me, is not as such a bad thing. What we need to do is thus not get rid of such arguments entirely, which would hardly be possible anyway, but rather to clarify their relationship with other sources of constitutional legitimacy. Where the respective constitutional regime itself is closely connected to certain substantive ideas of justice, and thus aspirations and outputs, such ideas can serve as an independent third source of constitutional legitimacy, besides the protection of individual rights and democratic self-government. Indeed, even under more traditional narrow, i.e., non-aspirational, constitutions, it makes sense to treat the need for effective government as a source of legitimacy. Yet, effectiveness should always be understood as instrumental, as a tool to realize those goals set in democratic procedures, or as a necessary tool to protect constitutional rights.

Secondly, and relatedly, the need for certain (even constitutionally mandated) outputs must always be balanced with the need for democratic government and the protection of individual rights in constitutional theory. Conflicts between these different sources of legitimacy need to be clearly analyzed; in particular, effectiveness arguments may not be used to hollow out democratic and rights-based constraints in the sense of protecting the core of those ideas. This also means that, when we invoke effectiveness arguments, such arguments should never stand on their own, but rather must be embedded in a broader structural and constitutional analysis. In other words, necessity is never enough. If we argue for institutions to step in for others who are seen to be failing, or if we believe that, in order to realize its mandate, an institution's powers must be read broadly, the broader structural arguments matter; it matters whether there is a clear gap in the existing legal frameworks, or whether those frameworks seem comprehensive; it also matters what kind of institution is acting, and with what kind of democratic legitimacy.[35] Only by taking these broader legal concerns into account can we avoid sliding into an altogether different legal paradigm that thrives on the logic of effectiveness at the cost of democracy or of the protection of individual rights.

35 For more on this, see M Hailbronner, *habilitation thesis* (note * above).

Bibliography

Arendt, Hannah, The Origins of Totalitarianism, HarperCollins, Orlando 1973.

Bandopadhyay, Saptarishi, All Is Well: Catastrophe and the Making of the Normal State, Oxford University Press, Oxford 2022.

Barber, Nick, The Principles of Constitutionalism, Oxford University Press, Oxford 2018.

Guenther, Frieder, Denken vom Staat her: Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949-1970, Oldenbourg Wissenschaftsverlag, München 2004.

Haggard, Stephan/Tiede, Lydia, The Rule of Law and Economic Growth: Where Are We?, World Development, Vol. 39 (2011), 673-685.

Hailbronner, Michaela, Transformative Constitutionalism: Not Only in the Global South, American Journal of Comparative Law, Vol. 65 (2015), 527-565.

Isiksel, Turukuler, Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State, Oxford University Press, Oxford 2016.

Kavanagh, Aileen, The Collaborative Constitution, Cambridge University Press, Cambridge 2023.

Klare, Karl, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights, Vol. 14 (1998),146-188.

Kumm, Mattias, Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law, German Law Journal, Vol. 7 (2019), 341-369.

Kyritsis, Dimitrios, Where Our Protection Lies: Separation of Powers and Constitutional Review, Oxford University Press, Oxford 2017.

Locke, John, Two Treatises of Government, Yale University Press, New Haven 2003.

Loevy, Karin, Emergencies in Public Law: The Legal Politics of Containment, International Journal of Constutional Law, Vol. 16 (2016), 300-302.

Loughlin, Martin, Against Constitutionalism, Harvard University Press, Cambridge 2022.

Moellers, Cristoph, Der vermisste Leviathan: Staatstheorie in der Bundesrepublik, Suhrkamp, Frankfurt am Main 3. Auflage 2008.

Moellers, Cristoph, Gewaltengliederung, Mohr Siebeck, Tübingen 2005.

Moellers, Cristoph, The Three Branches: A Comparative Model of Separation of Powers, Oxford University Press, Oxford 2013.

Moffitt, Benjamin, How to Perform Crisis: A Model for Understanding the Key Role of Crisis in Contemporary Populism, Government and Opposition, Vol. 50 (2015),189-217.

Müller, Friedrich, Demokratie in der Defensive: Funktionelle Abnutzung – soziale Exklusion – Globalisierung, Duncker & Humblot, Berlin 2001.

Reese-Schäfer, Walter, Legitimität staatlicher Herrschaft – die historische Perspektive, in Thiele (ed.), Legitimität in unsicheren Zeiten. Der demokratische Verfassungsstaat in der Krise?, Mohr Siebeck, Tübingen 2019, 21-38.

Schmitt, Carl, Legalität und Legitimität, Duncker & Humblot, 8. Ed., Berlin 2012.

Somek, Alexander, The Cosmopolitan Constitution, Oxford University Press, Oxford 2014.

Weber, Max, Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie. Studienausgabe. Mohr Siebeck, Tübingen 1990.

Wischmeyer, Thomas, Zwecke im Recht des Verfassungsstaates: Geschichte und Theorie einer juristischen Denkfigur, Mohr Siebeck, Tübingen 2015.

Vermeule, Adrian, Common Good Constitutionalism. Recovering the Classical Legal Tradition, Wiley & Sons, Cambridge (UK) 2022.