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Book Note

THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS, by Kai Möller¹

KENDALL GRANT

Since the end of the Second World War and the subsequent increased prevalence of constitutional judicial review, one particular model of constitutional rights has had notable success around the world. In his new book, Kai Möller draws on a broad range of cases from the European Court of Human Rights, the United Kingdom, Germany, Canada, and South Africa to provide the first substantive moral, reconstructive theory of this global model of constitutional rights.

In Part I, Möller abandons the “dominant narrative”²—that rights hold a special normative force—and rejects the entrenched concept of negative freedom,³ as well as human dignity⁴ and equality.⁵ Instead, he champions personal autonomy as the value that encompasses the major elements of the global model of constitutional rights, characterized by the following: rights inflation, an extremely broad approach to the scope of rights; horizontal effect, in addition to the traditional, vertical conception of rights; positive obligations; and the inclusion of socio-economic rights as the essential preconditions of autonomy.

Möller introduces two possible conceptions of personal autonomy: (1) the excluded reasons conception; and (2) the protected interests conception.

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1. (Oxford: Oxford University Press, 2012) 210 pages.
 2. *Ibid* at 2.
 3. For an early caution on the adoption of a positive rights interpretation of the US Constitution, see David P Currie, “Positive and Negative Constitutional Rights” (1986) 53:3 U Chicago L Rev 864.
 4. For an analysis of human dignity as a universalistic basis for judicial decision-making in the human rights context, see Christopher McCrudden, “Human Dignity and Judicial Interpretation of Human Rights” (2008) 19:4 EJIL 655.
 5. For an example of an equality-driven narrative that is compatible with autonomy, see Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000).

The former's exclusion of moralism and paternalism leads to a subjective/objective approach that may accommodate the freedom of religion, expression, and association,⁶ and the rights to life and liberty, yet still fails to explain the rights to property, privacy, and profession.⁷ By contrast, the protected interests conception adopts the point of view of the internal self-conception of the agent. It tends to recognize more rights and interpret existing rights more broadly, thus aligning with rights inflation, horizontal effect, positive obligations, and socio-economic rights.

In chapter 4, Möller describes how the point of rights under the global model is to show respect for persons by insisting that state measures which affect a person's ability to live life according to one's self-conception be justified. Möller recommends a "list of rights" approach for new constitutions,⁸ because it avoids the misleading impression that all instances of a person's autonomy will receive the same level of protection; it leaves out rights that never survive the justification stage; and it is easier to understand for ordinary citizens, compared to an exhaustive *prima facie* right to autonomy.

Part II proposes a theory of justification using the doctrines of balancing and proportionality.⁹ In chapter 5, Möller contends that the "point and purpose" of state policies is to specify the spheres of autonomy of equal citizens in a reasonable way.¹⁰ This philosophical inquiry addresses the relationship between constitutional rights and democracy and relevant institutional questions of legitimacy, linking two abstract concepts—democracy and human rights—to the same underlying ideal, *i.e.*, self-determination.¹¹

In the final two chapters of the book, Möller explores what is known as "two-step proportionality/balancing."¹² In chapter 6, Möller examines balancing, which occupies the final stage of the proportionality test and thus holds an important position in the global model of constitutional rights.

6. See *supra* note 1 at 52-53.

7. See *ibid* at 55-56.

8. *Ibid* at 89-90.

9. For a comparative perspective on balancing and proportionality, see Stephen Gardbaum, "Limiting Constitutional Rights" (2007) 54:4 UCLA L Rev 789.

10. *Supra* note 1 at 133.

11. A right to equality does not add anything to the protection offered by the right to autonomy, subject to three qualifications: in cases of incomplete constitutions, where policy coherence so requires, and where equality can be employed as useful rhetoric. See *ibid* at 124.

12. See *e.g.* Charles-Maxime Panaccio, "In Defence of Two-Step Balancing and Proportionality in Rights Adjudication" (2008) 24:1 Can JL & Jur 109.

Balancing does not refer to utilitarianism, but provides a solution to the central problem: conflicts of autonomy interests.

Möller's most useful contribution on balancing is his flexible vision of balancing as "concentric circles."¹³ His proposed model identifies three goals that policies pursue in setting up spheres of autonomy: regulation of harmful behaviour; redistribution; and provision of public goods and services. In all three, formal balancing is most appropriate.¹⁴ It also solves the issue of incommensurability.¹⁵ Proportionality¹⁶ is applicable only to negative rights in their vertical dimension; balancing is more suitable for positive obligations and socio-economic rights.¹⁷

Moral questions are at the core of *The Global Model of Constitutional Rights*. The wide scope of rights, allowing for trivial and even immoral activities, reflects the fact that respect for a person's autonomy requires taking all of his or her projects seriously.¹⁸ By defending a distinction between policy-making and policy reviewing—between empirical and moral questions—Möller's framework integrates the elements of the global model; addresses the role of democracy and equality; and preserves the separation of powers. His writing style is heading-heavy and highly structured without losing readability. In so doing, Möller offers an accessible, comprehensive, and compelling theory for global constitutional rights.

13. *Ibid* at 137.

14. *Ibid* at 151.

15. "It may ... be perfectly possible to compare the value of objectively incommensurable options from the perspective of the self-conception of the agent." *Ibid* at 175.

16. For a thorough genealogy of proportionality since its German origins and an argument for its influence in the expansion of judicial power globally, see Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47:1 *Colum J Transnat'l L* 72.

17. *Supra* note 4 at 179.

18. *Ibid* at 207.