



# The Global Model of Constitutional Rights: Introduction

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# The Global Model of Constitutional Rights: Introduction

Kai Möller \*

**Abstract:** Since the end of the Second World War and the subsequent success of constitutional judicial review, one particular model of constitutional rights has had remarkable success, first in Europe and now globally. This global model of constitutional rights is characterized by an extremely broad approach to the scope of rights (sometimes referred to as 'rights inflation'), the acceptance of horizontal effect of rights, positive obligations, and increasingly also socio-economic rights, and the use of the doctrines of balancing and proportionality to determine the permissible limitations of rights.

Drawing on analyses of a broad range of cases from the UK, the European Court of Human Rights, Germany, Canada, the US, and South Africa, the book provides the first substantive moral, reconstructive theory of the global model. It shows that it is based on a coherent conception of constitutional rights which connects to attractive accounts of judicial review, democracy and the separation of powers.

The first part of the book develops a theory of the scope of rights under the global model. It defends the idea of a general right to personal autonomy: a right to everything which, according to the agent's self-conception, is in his or her interest. The function of this right is to acknowledge that every act by a public authority which places a burden on a person's autonomy requires justification. The second part of the book proposes a theory of the structure of this justification which offers original and useful accounts of the important doctrines of balancing and proportionality.

The introductory chapter gives an overview of the project of the book and identifies the existence of the global model of constitutional rights. It then explains the terminology – in particular the use of the terms 'constitutional' and 'global' –, the reconstructive methodology, and addresses the question of whether the US tradition of constitutional rights law forms part of the global model. It concludes by providing a summary of the book's main claims.

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## *The Global Model of Constitutional Rights*

### I. THE PROJECT

Since the end of the Second World War and the subsequent success of constitutional judicial review, one particular model of constitutional rights has had remarkable success, first in Europe and now globally. In a nutshell, this *global model of constitutional rights* sees rights as protecting an extremely broad range of interests but at the same time limitable by recourse to a balancing or proportionality approach. Thus, it places itself in sharp contrast to the conceptions of rights proposed by most if not all moral and political philosophers who agree that rights protect only a limited set of especially important interests while enjoying a special, heightened, normative force. However, while the global model of constitutional rights does not seem to sit well with the philosophical conceptions of rights that have been proposed to date, it has itself still not been sufficiently theorized. The important and interrelated questions which it raises are the following. (1) Which *theory* or *conception of rights* explains best the global model of constitutional rights, including the questions of which values are protected by rights and what are their limits? (2) How does the judicial enforcement of *this particular conception* of constitutional rights relate to the value of *democracy*? (3) How does it relate to the value of the *separation of powers*, in particular to considerations of the *relative institutional competence* of courts on the one hand and the elected branches on the other? A comprehensive theory of constitutional rights must provide an *integrated* answer to these questions: the theory of rights which it proposes must also reflect attractive conceptions of democracy and the separation of powers. This book presents such a theory.

Its main features are the following. (1) The theory follows a *substantive moral approach* in that it is grounded in political morality; this can be contrasted with a formal theory such as Robert Alexy's influential theory

of rights as principles or optimization requirements.<sup>1</sup> (2) It is *reconstructive*, i.e. it is a theory of the actual practice of constitutional rights law around the world. I will explain this in detail below. (3) It is *general* in that it does not focus on specific issues or rights but aims at identifying features of their moral structure which are shared by many or all constitutional rights.

## II. THE GLOBAL MODEL AND THE DOMINANT NARRATIVE

This section will introduce the four central features of the global model of constitutional rights; and it will do so by contrasting them with what I shall call the *dominant narrative* of the philosophy of fundamental rights. The dominant narrative holds (1) that rights cover only a *limited domain* by protecting only certain *especially important* interests of individuals; (2) that rights impose exclusively or primarily *negative* obligations on the state; (3) that rights operate only *between a citizen and his government*, not between private citizens; and (4) that rights enjoy a *special normative force*, which means that they can be outweighed, if at all, only under *exceptional circumstances*. Of these features of the dominant narrative, the general acceptance of the second—rights as imposing negative obligations on the state—has already eroded considerably, mainly because of the growing recognition of social and economic rights.<sup>2</sup> The third—limitation to the relationship between citizen and government—while generally held to be true, does not normally attract much attention from rights theorists. The first and the fourth—special importance and special normative force—are still hardly controversial. However, under the global model of constitutional rights *all four* elements of this narrative have been given up—and often a long time ago. The doctrines and developments in constitutional rights law which have led to their erosion are rights inflation, positive obligations and socio-economic rights, horizontal effect, and balancing and proportionality. These doctrines and developments form the core of the global model of constitutional rights and provide the basic materials out of which the following chapters will reconstruct the theory of rights proposed here.

<sup>1</sup> Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002). My essay 'Balancing and the Structure of Constitutional Rights', (2007) 5 *International Journal of Constitutional Law* 453 criticizes Alexy's formal approach and recommends a substantive moral one; this book, by providing such a substantive moral theory of rights, can thus be read as offering a constructive response to what I regard as deficiencies in Alexy's methodology. For a generally positive review of Alexy's book see Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice', (2004) 2 *International Journal of Constitutional Law* 574.

<sup>2</sup> For a theoretical account of this development, see Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008), ch. 1.

### 1. Rights inflation

Constitutional rights are no longer seen as only protecting certain particularly important interests. Especially in Europe a development has been observed which is sometimes pejoratively called ‘rights inflation’,<sup>3</sup> a name which I shall use in a neutral sense as referring to the increasing protection of relatively trivial interests as (prima facie) rights. The European Court of Human Rights (ECtHR) routinely reads such interests into the right to private life (Article 8 of the European Convention on Human Rights [ECHR]). For example, in the famous *Hatton* case, which concerned a policy scheme which permitted night flights at Heathrow airport, thus leading to noise pollution which disturbed the sleep of some of the residents living in the area, the Court discovered as part of Article 8 the right not to be ‘directly and seriously affected by noise or other pollution’,<sup>4</sup> dismissively dubbed ‘the human right to sleep well’ by George Letsas.<sup>5</sup> The broad understanding the Court takes towards the issue of private life becomes clear in one of its more recent attempts to circumscribe it:

The Court recalls that the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person’s physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Art. 8. Beyond a person’s name, his or her private and family life may include other means of personal identification and of linking to a family. Information about the person’s health is an important element of private life. The Court furthermore considers that an individual’s ethnic identity must be regarded as another such element. Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. The concept of private life moreover includes elements relating to a person’s right to their image.<sup>6</sup>

Thus, the Court has, for example, considered the storing of fingerprints and DNA samples by the state<sup>7</sup> and the publication of photographs of a

<sup>3</sup> Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), 126.

<sup>4</sup> *Hatton v. United Kingdom* (2003) 37 EHRR 28, para. 96.

<sup>5</sup> Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), 126.

<sup>6</sup> *S v. United Kingdom* (2009) 48 EHRR 50, para.66 (footnotes omitted).

<sup>7</sup> *Ibid.*, para. 67.

person in her daily life by a magazine<sup>8</sup> as falling within the scope of 'private life'. With regard to sexual autonomy, the Court not only held that consensual homosexual sex was part of 'private life',<sup>9</sup> but came close to saying that homosexual sado-masochistic group sex orgies involving considerable violence were protected as well.<sup>10</sup> Article 8 also protects a right to access to the information relating to a person's birth and origin.<sup>11</sup>

While the ECtHR has not provided a comprehensive definition of the meaning of 'private life', it will still require that the interest in question be part of 'private life', whatever that term exactly means, and thus the Court will not necessarily accept *any* interest as falling within the scope of Article 8; in other words there is still a threshold which needs to be crossed for an interest to become a right. By way of contrast, the German Federal Constitutional Court has explicitly given up any threshold to distinguish a mere interest from a constitutional right. As early as 1957 it held that Article 2(1) of the Basic Law, which protects everyone's right to freely develop his personality, is to be interpreted as a right to freedom of action.<sup>12</sup> The Court provided various doctrinal reasons for this result, its main argument being that an earlier draft of Article 2(1) had read 'Everyone can do as he pleases' (*Jeder kann tun und lassen was er will*), and that this version had been dropped only for linguistic reasons.<sup>13</sup> The Court affirmed this ruling in various later decisions; most famously it declared that Article 2(1) of the Basic Law included the rights to feed pigeons in a park<sup>14</sup> and to go riding in the woods.<sup>15</sup>

It must be noted that the broad understanding of rights does not, of course, imply that the state is prohibited from interfering with the right in question. Rather, there is an important conceptual distinction between *an interference with* and *a violation of* a right: an interference will only amount to a violation if it cannot be justified at the justification stage. Thus, the broad understanding of rights at the *prima facie* stage must be seen in conjunction with the proportionality test which permits

<sup>8</sup> *von Hannover v. Germany* (2005) 40 EHRR 1, para. 53.

<sup>9</sup> *Dudgeon v. United Kingdom* (1982) 4 EHRR 149, paras. 40–41.

<sup>10</sup> *Laskey, Jaggard and Brown v. United Kingdom* (1997) 24 EHRR 39, para. 36. The Court left open the question of whether the activities in question fell within the scope of Article 8 in their entirety, but proceeded on the assumption that they did.

<sup>11</sup> *Odievre v. France* (2004) 38 EHRR 43, para. 29.

<sup>12</sup> BVerfGE 6, 32 (*Elfès*).

<sup>13</sup> *Ibid.*, 36–7.

<sup>14</sup> BVerfGE 54, 143 (*Pigeon-Feeding*).

<sup>15</sup> BVerfGE 80, 137 (*Riding in the Woods*).



the limitation of prima facie rights when they are outweighed by a competing right or public interest. But it is notable that, contrary to the language used by philosophers, courts are very generous in labelling an interest a 'right', and therefore, again contrary to philosophical usage, they do not attach much weight to a right simply by virtue of its being a right. Furthermore, and again in contrast to some philosophical usage, what is referred to as the 'right' is only the prima facie right, not the definite right. So European lawyers routinely speak of human or constitutional rights to many things which people regularly do not have a definite right to.<sup>16</sup>

## 2. Positive obligations and socio-economic rights

Rights are no longer regarded as exclusively imposing negative obligations on the state. But while most theorists of rights only started to reconsider their views on this issue following the growing acceptance of socio-economic rights (particularly their inclusion in the South African Constitution), constitutional rights law abandoned the view that rights impose only negative obligations in the 1970s, when the doctrines of positive obligations or protective duties became established. The idea is that the state is under a duty to take steps to prevent harm to the interests protected by (otherwise negative) rights. Thus, the state must, as a matter of constitutional rights law, put in place a system which effectively protects the people from dangers emanating from other private persons, such as criminal activities which threaten, for example, life, physical integrity, or property; and it must also protect them from dangers which do not have a (direct) human cause, such as natural disasters.

In the jurisprudence of the ECtHR, the idea of positive obligations, first introduced in the *Belgian Linguistics* case of 1968,<sup>17</sup> is well-established. In the case of the right to life, it is even supported by the text of the Convention, which states in Article 2(1) that '[e]veryone's right to life shall be *protected* by law'. The *Osman* case provides a good

<sup>16</sup> This approach is sometimes criticized as 'guilty of "promoting unrealistic expectations"' (Webber, *The Negotiable Constitution: On the Limitation of Rights* [Cambridge University Press, 2009], 123), but whether it really is promoting such expectations depends on the way the word 'right' is used by the people. I am not sure that Europeans would be misled in the way Webber envisages; in any case the charge that they would be unsubstantiated. Furthermore, the linguistic meaning of the terms 'human right' or 'constitutional right' as used by the population is likely to change over time, following the developments in the courts.

<sup>17</sup> *Case Relating to Certain Aspects of the Laws on the Use of Languages In Education In Belgium* (1979–80) 1 EHRR 252, para. 3.

example of the Court's approach to this provision. A former teacher of Ahmet Osman, who was about 15 years old at the time, was obsessed with him and ultimately wounded the boy and killed his father. The family alleged that the police had not done enough to protect Osman and his father from the threat. The Court argued that Article 2(1) ECHR required not only that the state refrain from killing, but also that it 'put in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions'<sup>18</sup> and that the provision may additionally 'imply in certain well-defined circumstances a *positive obligation* on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.<sup>19</sup>

In the case of other rights there is no explicit textual basis supporting the acknowledgement of positive obligations, but the Court nevertheless consistently accepts their existence. Of the countless cases, the first *von Hannover* judgment provides a good example of the Court's approach. Princess Caroline of Monaco had unsuccessfully tried to stop the publication of certain pictures of her in German gossip magazines; she argued that the publication violated her right to private life under Article 8 of the Convention. The Court relied on its well-established case law to grant the existence of a positive obligation to protect privacy:

The Court reiterates that although the object of Art. 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. That also applies to the protection of a person's picture against abuse by others.<sup>20</sup>

The legally difficult question in cases involving positive obligations is not the existence of positive obligations as such; this is well-established case law. Rather, it is the question of whether the state has done enough to comply with its obligation (in *Osman* it had, and in *von Hannover* it had

<sup>18</sup> *Osman v. United Kingdom* (2000) 29 EHRR 245, para. 115.

<sup>19</sup> *Ibid.* (emphasis added).

<sup>20</sup> *von Hannover v. Germany* (2005) 40 EHRR I, para. 115.

not). But that is a separate question concerning the limits of the right, which does not affect the point to be made here, namely the move away from an understanding of rights as concerned exclusively with negative obligations.

The textual basis for the assumption that Convention rights generally impose positive obligations is weak. In particular, the limitation clauses, especially of Articles 8 to 11 (the rights to respect for private and family life, freedom of religion, freedom of expression, and freedom of association and assembly), regularly refer to ‘restrictions’, ‘limitations’, and ‘interferences’, which indicates a negative understanding of rights. In its more recent case law, the Court has tried to support its approach by reference to Article 1. For example, in a case involving the right to property (Article 1 of Protocol No. 1) the Court stated:

The essential object of Article 1 of Protocol No. 1 is to protect a person against unjustified interference by the State with the peaceful enjoyment of his or her possessions. However, by virtue of Article 1 of the Convention, each Contracting Party ‘shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention’. The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property.<sup>21</sup>

But obviously, the reference to the word ‘secure’ in Article 1 ECHR does not even come close to a water-tight doctrinal argument for the general doctrine of positive obligations. The Court was certainly not forced to its conclusion by such textual subtleties; rather it must have found the idea of positive obligations attractive as a matter of the theory of rights underlying the Convention as a whole. But it has never spelt out what this theory is.

In German constitutional jurisprudence, the idea of *protective duties* (*Schutzpflichten*) was acknowledged for the first time in the first abortion decision of 1975, where the Federal Constitutional Court held that the state is under a duty to protect the fetus against the implementation of the woman’s wish to have an abortion.<sup>22</sup> To establish the existence of the protective duty, the Court referred to the idea of an ‘objective system

<sup>21</sup> *Broniowski v. Poland* (2005) 40 EHRR 495, para. 143.

<sup>22</sup> BVerfGE 39, 1 (*First Abortion Judgment*).

of values' set up by the Basic Law, which it had first established in the *Lüth* decision, discussed below, and to the principle of human dignity enshrined in Article 1 of the Basic Law.<sup>23</sup> In subsequent case law it dropped the reference to dignity and replaced the phrase 'objective system of values' with the less controversial 'objective dimension' of the basic rights. Today it is uncontroversial in Germany that the doctrine of protective duties is a *general* doctrine the application of which is not limited to certain rights; rather, the state is under a general obligation to take positive steps towards the protection of the rights of each person. In practice, however, most cases have been about life and physical integrity. In the *Schleyer* case of 1977, the Court held that the state was under a duty to take adequate steps to rescue Martin Schleyer, who had been kidnapped by the terrorist Red Army Faction (*Rote Armee Fraktion*). The following quotation shows nicely the Court's basic approach to the issue.

Art. 2(2)(1) [the right to life] in conjunction with Art. 1(1)(2) Basic Law [the duty to protect and respect human dignity] obligate the state to protect every human life. This protective duty is comprehensive. It requires the state to protect and support each life; this implies mainly to protect it from illegal interferences by others. All state organs must, according to their special roles, orient their activities towards this task. As human life presents a supreme value, this protective duty must be taken particularly seriously.<sup>24</sup>

The Court also had to deal with cases relating to the risks or harm flowing from the use of nuclear energy,<sup>25</sup> aircraft noise,<sup>26</sup> and the storage of American chemical weapons.<sup>27</sup> It stuck to its earlier jurisprudence and affirmed the existence of protective duties in all cases.

The South African Constitution explicitly endorses positive duties by stating in its section 7(2): 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.' Here, 'respect' refers to negative duties, whereas 'protect' refers to positive duties. The South African Constitutional Court has affirmed the existence of positive duties in its case law:

It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs

<sup>23</sup> *Ibid.*, 41–2.      <sup>24</sup> BVerfGE 46, 160, 164 (*Schleyer*).      <sup>25</sup> BVerfGE 49, 89 (*Kalkar I*).

<sup>26</sup> BVerfGE 56, 54.      <sup>27</sup> BVerfGE 77, 170.

to provide appropriate protection to everyone through laws and structures designed to afford such protection.<sup>28</sup>

Furthermore, there is the aforementioned trend towards the acknowledgement of socio-economic rights, which obviously impose positive duties on the state and thus conflict with the dominant narrative according to which rights are concerned only with negative obligations. Socio-economic rights are explicitly included in the South African Constitution, which contains in its sections 26, 27, and 29 rights to housing, health care, food, water, social security, and education. Of course, it would be naïve to think that the inclusion of such rights in a constitution was a sufficient step to resolve poverty. As acknowledged by the South African Constitutional Court in its first decision on socio-economic rights, a major practical problem lies in the scarcity of resources,<sup>29</sup> and this cannot be fixed by a constitutional provision. But the important point for present purposes is that socio-economic rights are acknowledged at the constitutional level, however easily limitable those rights may be.

While the South African Constitution is explicit about the inclusion of socio-economic rights, as a matter of substance, similar rights have been read into other constitutions. The ECtHR, while regularly stressing that the ECHR ‘does not, as such, guarantee socio-economic rights’,<sup>30</sup> has accepted some socio-economic entitlements mainly through the use of its doctrine of positive obligations, discussed above, as flowing from several Convention articles, including Articles 2 (life), 3 (prohibition of inhuman or degrading treatment), 6 (fair trial), 8 (private and family life), and 14 (non-discrimination).<sup>31</sup> The German Federal Constitutional Court holds the view that a right to a social minimum follows from Articles 1(1) and 20(1) of the Basic Law (the principle of human dignity in conjunction with the principle of the welfare state).<sup>32</sup> Thus, in light of the relative wealth of Germany compared to South Africa, the actual constitutional entitlements of a poor person will be considerably higher in Germany

<sup>28</sup> *Carmichele v. Minister of Safety and Security*, 2001 (4) SA 938 (CC), para. 44. See also *Rail Commuters Action Group v. Metrorail*, 2005 (2) SA 359 (CC), paras. 70–71.

<sup>29</sup> *Soobramoney v. Minister of Health (KwaZulu-Natal)* (1997) ZACC 17, para. 11.

<sup>30</sup> See, for example, *Pančenko v. Latvia* (App No 40772/98), Decision of 28 October 1999, para. 2.

<sup>31</sup> For an overview, see Brems, ‘Indirect Protection of Social Rights by the European Court of Human Rights’, in Barak-Erez and Gross (eds.), *Exploring Social Rights* (Hart Publishing, 2007), ch. 7.

<sup>32</sup> Cf. most recently BVerfG, 1 BvL 1/09 of 9.2.2010 (*Hartz IV*), para. 133.

than in South Africa, in spite of the absence of an explicit commitment to socio-economic rights.

It is remarkable that while positive obligations were first acknowledged by courts in Europe on the basis of constitutional texts which at face value offered very little support for this view, the new South African Constitution, as the youngest constitution considered here, explicitly endorses both positive obligations and socio-economic rights. Both of these observations—the endorsement in absence of textual support and the subsequent explicit inclusion in the text of a new constitution—provide strong indicators that positive duties and socio-economic rights are indeed part of an emerging global consensus of thinking about constitutional rights which departs from the dominant narrative in important ways.

### 3. *Horizontal effect*

Constitutional rights are no longer seen as affecting only the relationship between the citizen and the state; rather, they apply in some way between private persons as well. For example, the constitutional right to privacy may protect a person not only against infringements of his privacy by the state, but also against such infringements by his neighbour, landlord, or employer. The doctrinal tool which achieves this is called the *horizontal effect* of rights, where ‘horizontal’ as opposed to ‘vertical’ indicates that rights operate between private persons. It is possible to see the horizontal effect of rights as a subset of positive obligations, discussed above: the state is under a positive obligation to ensure that private persons do not violate other private persons’ rights. Alternatively, it can be seen as its own category which gives effect to constitutional rights between private persons.

The first court to acknowledge horizontal effect was the German Federal Constitutional Court in its famous *Lüth* decision of 1953.<sup>33</sup> Erich Lüth had called for a boycott of a new film by director Veit Harlan on the grounds of the latter’s previous involvement with the Nazi regime. As this call for a boycott had the potential to result in substantial harm to the financial success of the movie, the producer and his distributing company obtained a court injunction against Lüth. When the

<sup>33</sup> BVerfGE 7, 198 (*Lüth*). English translation from the website of the University of Texas School of Law: [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/\[copyright: Basil Markesinis\]](http://www.utexas.edu/law/academics/centers/transnational/work_new/[copyright: Basil Markesinis]).

matter came before the Federal Constitutional Court, it had to decide whether constitutional law, especially the right to freedom of opinion (Article 5[1] of the Basic Law) had any effect on the private law governing the relationship between Lüth and Harlan (and his distributing company). The Court first set out the traditional understanding of constitutional rights: 'There is no doubt that the main purpose of basic rights is to protect the individual's sphere of freedom against encroachment by public power: they are the citizen's bulwark against the state.'<sup>34</sup> But it then added one of the most famous paragraphs of its history:

But far from being a value-free system the Constitution erects *an objective system of values* in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.<sup>35</sup>

Applying this approach to the facts, it concluded that the lower court had failed to adequately take into account the right to freedom of opinion. The idea of an objective system (or order) of values subsequently became one of the cornerstones of German constitutional jurisprudence. It was heavily criticized by some academics in particular for its moralistic undertones; it was feared that the 'objective order of values' could easily lead to a 'tyranny of values' which would be relied upon to restrict individual freedom.<sup>36</sup> Presumably in response to these concerns, the Court later quietly replaced the term with the less controversial idea of an 'objective dimension' of the basic rights. But what exactly the objective system of values or the objective dimension of the basic rights mean remains something of a mystery to this day. In spite of this open question, the important lesson to be drawn is that the idea of constitutional rights affecting only the relationship between the citizen and the state was abandoned as early as 1953 in Germany. The Court affirmed the doctrine of the horizontal effect of rights in numerous later decisions, many but not all of which are about freedom of opinion; it is uncontroversial that the doctrine is not limited to certain rights but applies across

<sup>34</sup> Ibid., 204.

<sup>35</sup> Ibid., 205 (emphasis added; references omitted).

<sup>36</sup> Denninger, 'Freiheitsordnung—Wertordnung—Pflichtordnung', (1975) *Juristenzeitung* 545, 547.

the board. For example, the Court decided that a judgment of a lower court violated the claimant's personality right (Article 2[1] in conjunction with Article 1[1] of the Basic Law) by upholding a contractual agreement between the claimant's parents and their bank which led to the imposition of heavy debts on the claimant, who was a minor at the time;<sup>37</sup> and it declared a judgment which relied on aesthetic reasons to deny a Turkish tenant the right to install a dish antenna which would have enabled him to receive TV programmes from Turkey a violation of his right to freedom of information.<sup>38</sup>

In Canada, the question of whether constitutional rights operate between private persons was first considered by the Canadian Supreme Court in the *Dolphin Delivery* case in 1986, only four years after the Canadian Charter of Rights and Freedoms had come into force. *Dolphin* had obtained an injunction against a union, prohibiting secondary picketing; the union argued that this was unconstitutional in that it violated their right to freedom of expression. The important constitutional question was whether Charter rights applied between private litigants. While the Court in a first step denied the direct applicability of the Charter when the relevant law was, as in the case at hand, common law, it then continued by stating that even though the Charter was not directly applicable, the common law ought to be developed in a way consistent with Charter values, thus installing what is technically called weak indirect horizontal effect.<sup>39</sup>

South Africa is, to my knowledge, the only jurisdiction today which has explicitly endorsed horizontal effect in its constitution. Section 8(2) of the South African Constitution states in slightly awkward language: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' This explicit endorsement of horizontal effect in a young constitution strengthens further the view proposed here that horizontal effect is by now a well-established feature of the global model of constitutional rights.

There exist a number of complex and controversial issues about horizontal effect; in particular, first, the question of whether it is strong or weak, i.e. whether in a case where it is not possible to reinterpret the statute in question in line with the requirements of constitutional rights,

<sup>37</sup> BVerfGE 72, 155.      <sup>38</sup> BVerfGE 90, 27.

<sup>39</sup> *Retail, Wholesale & Dep't Store Union v. Dolphin Delivery Ltd.* (1986) 2 SCR 573, 605. The subsequent judgment in *Hill v. Church of Scientology of Toronto* (1995) 2 SCR 1170 confirmed this approach and fleshed it out further.



the statute is unconstitutional or not; and second, whether horizontal effect should be direct or indirect, i.e. whether constitutional rights ‘directly’ create rights between private persons or whether they do so only ‘indirectly’ via the (re-)interpretation of the existing private law.<sup>40</sup> The brief overview presented above cannot do justice to the complexities. But it does show that the practice of constitutional rights law no longer sees rights as exclusively concerned with the relationship between the individual and the state; rather, in some way, they have an impact on the relationship between private individuals as well.

#### 4. *Balancing and proportionality*

Contrary to the dominant narrative, it is not the case that constitutional rights generally enjoy a special or heightened normative force in legal practice. While it is true that some rights, such as the right to freedom from torture and degrading or humiliating treatment or punishment in Article 3 ECHR, or the right to a fair trial in Article 6 ECHR, are absolute, most rights—including the rights to life, physical integrity, privacy, property, freedom of religion, expression, assembly, and association—can generally be limited in line with the proportionality test, at the core of which is a balancing exercise where the right is balanced against a competing right or public interest. Proportionality has become *the* central concept in contemporary constitutional rights law, and, in addition to the jurisdictions examined in this book, has been accepted by virtually every constitutional court in Central and Eastern Europe and is increasingly employed in Central and South American jurisdictions.<sup>41</sup> Different courts use different formulations of what is essentially the same test. The German Federal Constitutional Court follows a four-pronged test according to which the policy interfering with the right must be in pursuit of a legitimate goal; it must be a suitable means of furthering the achievement of the goal (suitability or rational connection); it must be necessary in that there must not be a less restrictive and equally effective alternative (necessity); and it must not impose a

<sup>40</sup> On these distinctions and other doctrinal problems involved in the doctrine of horizontal effect cf. Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’, (2003–4) 102 *Michigan Law Review* 387; Gardbaum, ‘Where the (State) Action is’, (2006) 4 *International Journal of Constitutional Law* 760; Kumm and Ferreres Comella, ‘What is so Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Effect’, in Sajó and Uitz (eds.), *The Constitution in Private Relations* (Eleven, 2005).

<sup>41</sup> Stone Sweet and Mathews, ‘Proportionality Balancing and Global Constitutionalism’, (2008–9) 47 *Columbia Journal of Transnational Law* 72, 112.

disproportionate burden on the right-holder (balancing or proportionality in the strict sense). The ECtHR demands that the policy further a legitimate goal and a pressing social need and that it be proportionate to the achievement of the legitimate goal.<sup>42</sup> The Canadian Supreme Court adopted proportionality analysis, which has become known as the ‘*Oakes* test’, in its most famous judgment to date:

First, the measures adopted must be . . . rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of ‘sufficient importance’.<sup>43</sup>

Proportionality is also accepted in South Africa. It was first established in the *Makwanyane* case, which was decided under the Interim Constitution, where the Court held:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality . . . [T]here is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.<sup>44</sup>

The Court later affirmed this approach in its interpretation of the final Constitution of 1996. Finally, the UK House of Lords (now Supreme Court) accepted as appropriate the test:

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the

<sup>42</sup> *Norris v. Ireland* (1991) 13 EHRR 186, para. 41.

<sup>43</sup> *R. v. Oakes* (1986) 1 SCR 103, para. 70 (emphasis in the original).

<sup>44</sup> *S. v. Makwanyane* (1995) 3 SA 391, para. 104.

legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.<sup>45</sup>

In a later decision, it added the fourth stage (the balancing requirement): '[the judgment on proportionality] must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention.'<sup>46</sup>

While these tests are all slightly different on the surface, they have in common a *balancing exercise* where the right is balanced against the competing right or public interest, which implies that in contrast to the dominant narrative, rights do not seem to enjoy any special or elevated status over public interests, but rather operate on the same plane as policy considerations. This has been captured in Robert Alexy's influential theory of rights as principles which have to be balanced against competing principles which include policy considerations;<sup>47</sup> remarkably, this theory is widely regarded as the best reconstruction of constitutional rights law available.<sup>48</sup>

### III. TERMINOLOGICAL CLARIFICATIONS

#### 1. *Global?*

The notion of 'the global' model of constitutional rights requires explanation. My claim is not that the model introduced in the previous section is global in the sense that it is accepted in every jurisdiction; rather its global character flows from the combination of two factors: first, that its appeal is not limited to certain countries or regions (e.g. Europe); and second, that it can claim greater appeal on a global scale than any rival model (such as, in particular, the US model of rights<sup>49</sup>). Indicators of its dominant global appeal are, first, the convergence in the doctrinal arsenal that is employed globally, in particular the ideas of horizontal effect, positive obligations, and balancing and proportionality, and, second, the historical links which provide explanations of how ideas and concepts travelled between jurisdictions. Some of the historical

<sup>45</sup> *R (Daly) v. Secretary of State for the Home Department* (2001) UKHL 26, para. 27.

<sup>46</sup> *Huang and others v. Secretary of State for the Home Department* (2007) UKHL 11, para. 19.

<sup>47</sup> Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), ch. 3.

<sup>48</sup> Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice', (2004) 2 *International Journal of Constitutional Law* 574, 596.

<sup>49</sup> See s. IV on the question of whether the US follows a different model of rights.

roots of the global model lie in Europe. The doctrine of horizontal effect was first acknowledged by the German Federal Constitutional Court in 1953; the doctrine of positive obligations was first developed in the late 1960s by the ECtHR and from the mid-1970s by the German Court. The origin of the principle of proportionality—which is *the* core concept of constitutional rights law today—lies in German administrative law<sup>50</sup> and was imported into constitutional law by the Court as early as 1957 in its famous *Pharmacy Judgment (Apothekenurteil)*.<sup>51</sup> These doctrines, and inseparable from them, a certain model of rights, travelled from Germany and the European level to other European jurisdictions, such as in particular the ex-communist countries, and to other parts of the world, such as Canada and South Africa.<sup>52</sup> This explains why some authors loosely speak of the ‘European’ model of rights; but this has to be understood in the sense of ‘originating from Europe’ as opposed to ‘being endorsed (only) in Europe’; because of its global appeal it is more precise to speak of the global model of constitutional rights.

## 2. *Constitutional rights*

This book mainly considers materials—mostly cases—from the ECtHR, Germany, the United Kingdom, South Africa and Canada. This selection may raise questions relating to its usage of the terms ‘constitution’ and ‘constitutional’. I include the ECHR here in spite of the fact that it is technically not a constitution but an international treaty; however, the ECtHR performs a review function very similar to that of the highest domestic courts, the main difference arguably being a somewhat relaxed intensity of review. Furthermore, I will generally refer to ‘constitutional’ rights in this book, a term which has some advantages over its alternatives, ‘human’ or ‘fundamental’ rights, in that it makes clear that we are concerned with *legal* (often justiciable) rights of a certain *elevated status* over that of ordinary legislation. This includes the rights of the ECHR and also the rights protected under weak systems of judicial review such as the one in the United Kingdom. Furthermore, I will refer to the courts adjudicating upon constitutional rights (in the sense just explained) as

<sup>50</sup> Cf. Stone Sweet and Mathews, ‘Proportionality Balancing and Global Constitutionalism’, (2008–9) 47 *Columbia Journal of Transnational Law* 72, 97; Cohen-Eliya and Porat, ‘American Balancing and German Proportionality: The Historical Origins’, (2010) 8 *International Journal of Constitutional Law* 263, 271.

<sup>51</sup> BVerfGE 7, 377 (*Pharmacy Judgment*).

<sup>52</sup> Stone Sweet and Mathews, ‘Proportionality Balancing and Global Constitutionalism’, (2008–9) 47 *Columbia Journal of Transnational Law* 72, 112–31.

‘constitutional’ courts, independently of whether they are technically supreme courts, constitutional courts, or—as in the case of the ECtHR—international courts.

#### IV. THE US: AN OUTLIER?

This book excludes US jurisprudence from the set of materials which it seeks to reconstruct. The reason for this lies not in any claim to the effect that the US follows a model of rights which is different from that of the rest of the world; the book leaves this issue open. Rather it is that at this particular point of its history, US practice is *on the surface* different enough from the global model to justify leaving it aside, in order to avoid the long, complicated and controversial argument which would inevitably be needed to justify its inclusion and which would only distract from the book’s main claims.

US constitutional rights law can be regarded as differing from that of the rest of the world in several respects. Most obviously, it is different with regard to the outcomes that it produces: many substantive views of the US Supreme Court about what rights do or do not require are not shared by other courts, for example on issues relating to abortion, hate or other offensive speech, or gun control, to name a few. But more important in the present context is that it seems, at least on the surface, that the US follows a structurally different understanding of rights which seems much closer to the dominant narrative. First, there is no rights inflation in the US Supreme Court, or at least not to the same extent as in Europe: the Court will only accept a liberty interest as a right if it can be shown to be ‘deeply rooted in this Nation’s history and tradition’;<sup>53</sup> its reason for this caution is that ‘[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field”’.<sup>54</sup> Second, there is no general acknowledgement of horizontal effect; rather, constitutional rights will only apply when there is ‘state action’.<sup>55</sup> Third, there is no endorsement of positive duties and

<sup>53</sup> See, for example, *Washington v. Glucksberg* (1997) 521 U.S. 702, 720.

<sup>54</sup> *Ibid.*

<sup>55</sup> For an overview, see Barendt, ‘The United States and Canada: State Action, Constitutional Rights and Private Actors’, in Oliver and Fedtke (eds.), *Human Rights and the Private Sphere* (Routledge-Cavendish, 2007), 399.

certainly none of socio-economic rights. The *DeShaney* case illustrates this approach: the petitioner was a child who was subjected to a series of beatings by his father until he eventually suffered permanent, serious brain damage. He and his mother argued that the state had violated his constitutional rights by failing to protect him from his father. The Supreme Court, however, held that the Fourteenth Amendment, which states that ‘no State shall . . . deprive any person of life, liberty, or property, without due process of law’, was not violated. It relied on textual and historical reasons to support this conclusion, arguing that the clause was phrased as a limitation on the state’s power to act, not as a guarantee of certain minimal levels of safety and security, and that its history showed its purpose to be the prevention of government abusing its power or employing it as an instrument of oppression. ‘Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process.’<sup>56</sup> This understanding of constitutional rights thus places the US Supreme Court in diametrical contrast to the ECtHR, which would have applied its general doctrine of positive obligations and held that the right to life and the right to private life (into which the Court reads a right to physical integrity) place obligations on the state to protect people’s lives and physical integrity from violations by third parties. Finally, US constitutional law has not subscribed to the proportionality test to determine the permissible limitations of rights, but uses a variety of standards, including the strict scrutiny test which demands that a law interfering with a fundamental right must serve a compelling government interest and be narrowly tailored to the achievement of that interest. According to common wisdom, this requirement is harder to fulfil than proportionality; as the saying goes, strict scrutiny is “‘strict” in theory and fatal in fact’.<sup>57</sup>

It must be noted that all the above observations on the current state of US law are controversial; and it would seem possible to construct an argument to the effect that upon closer inspection the US model of rights is not far removed from the global model. With regard to rights inflation, it is arguable that the rational basis test which the US Supreme

<sup>56</sup> *DeShaney v. Winnebago County Department of Social Services* (1989) 489 U.S. 189, 196.

<sup>57</sup> This famous phrase was coined by Gunther, ‘The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection’, (1972) 86 *Harvard Law Review* 1, 8.

Court applies to interests not deemed fundamental does in substance award those interests a protection similar to the protection offered to trivial interests under, for example, the German or European approaches, albeit without labelling those interests as 'rights'. With regard to horizontal effect, the simple reference to the 'state action' doctrine raises the question of what counts as state action: under the broadest possible understanding, the creation of any (private law) statute or common law doctrine amounts to state action, from which it follows that there is indeed state action in *every* legal dispute; and furthermore, court decisions adjudicating claims between private individuals can always be constructed as involving state action.<sup>58</sup> At times the Supreme Court has come close to taking this view,<sup>59</sup> which, taken seriously, would in substance lead to a broad acknowledgement of horizontal effect via the state action doctrine. Thus, referral to the requirement of 'state action' does not resolve the problem of whether and to what extent constitutional rights have an impact on the legal relationship between private parties. With regard to the absence of positive obligations, the *DeShaney* judgment has been sharply criticized as relying on a mistaken interpretation of the US constitution.<sup>60</sup> And finally, with regard to balancing and proportionality, even within the US Supreme Court, Justice Breyer has shown sympathies for the European approaches on balancing and proportionality and would prefer to see those approaches used more widely within the interpretation of the US Bill of Rights.<sup>61</sup> Furthermore, it is arguable that the current tiered scrutiny (strict and intermediate scrutiny; rational basis review) amounts in substance to something similar to proportionality analysis.

Thus, it is certainly a possibility that upon deeper analysis it turns out that US practice, too, is best explained by the global model and the reconstructive theory developed in this book. Furthermore, it remains of course true that US constitutional rights law is a part of a Western liberal tradition of rights discourse and that for this reason examples and cases drawn from it will be useful for the analysis of specific issues even if its

<sup>58</sup> Kumm and Ferreres Comella, 'What is so Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Effect', in Sajó and Uitz (eds.), *The Constitution in Private Relations* (Eleven, 2005).

<sup>59</sup> *Shelley v. Kramer* (1948) 334 U.S. 1.

<sup>60</sup> Strauss, 'Due Process, Government Inaction, and Private Wrongs', (1989) *Supreme Court Review* 53.

<sup>61</sup> *District of Columbia v. Heller* (2008) 128 S.Ct. 2783, 2852 (Breyer J, dissenting). For an insightful discussion, cf. Cohen-Eliya and Porat, 'The Hidden Foreign Law Debate in *Heller*: The Proportionality Approach in American Constitutional Law', (2009) 46 *San Diego Law Review* 367.

doctrinal structure arguably differs from the global model. Therefore this book will occasionally rely on US cases to illustrate a point. But for the reasons given, a comprehensive analysis of how US law relates to the global model is beyond the scope of this book.

It is an interesting point to note that many of the leading philosophers of rights—Ronald Dworkin, Robert Nozick, James Griffin and others—are Americans; their theories may be influenced by or, as in Dworkin's case, reconstructions of the US practice which, as explained, at least on the surface seems to be much closer to the dominant narrative. If so, then this makes even clearer the need for a theory of rights which is developed against the backdrop of the global model of constitutional rights.

#### V. THE RECONSTRUCTIVE APPROACH

The theory proposed in this book is *reconstructive*, which means that it is a theory of the practice of constitutional rights law around the world ('the practice') and especially those features of the practice which I summarized under the label of 'the global model of constitutional rights'. This can be contrasted with what we might call a '*philosophical*' theory of constitutional rights which is insensitive to the practice. A philosophical theory will aim at providing the morally best account of constitutional rights while ignoring the question of the extent to which this account fits the practice. When the practice departs from the philosophical theory then this is for the philosophical theory a reason for regret only insofar as the practice is deficient; but it does not affect the validity of the philosophical theory. The reconstructive theory, by way of contrast, aims at providing a theory which, like the philosophical theory, is morally coherent, but unlike it, need not be the morally best ('the one right') theory, where 'morally best' is understood as morally best independently of the practice. Of the several morally coherent theories, the reconstructive theory will pick the one which fits the practice better than any other coherent theory. Thus, the reconstructive theory is sensitive to both moral value and the practice it seeks to reconstruct; it is, in Ronald Dworkin's terminology, an *interpretive* theory.<sup>62</sup>

There are two reasons why this book chooses the reconstructive approach. First, the practice of constitutional rights adjudication around the world provides scholars with a wealth of case law and doctrines produced by judges who often deal with questions of constitutional

<sup>62</sup> On interpretivism see Dworkin, *Law's Empire* (Hart Publishing, 1986), ch. 2.



rights on a daily basis and accumulate a practical expertise in this area which philosophers cannot hope to match. It would simply be imprudent to ignore this wealth of materials and experience when developing a theory of rights. Second, the extraordinary amount of political power exercised by constitutional courts raises particularly urgent questions of legitimacy and requires an assessment of the moral justifiability of the practice; and for this the reconstructive account can be used.

The reconstructive theory can be employed for two further purposes. First, it can be used to assess specific aspects of the practice; where the practice departs from the reconstructive theory, this particular aspect of the practice is, all things being equal, a mistake which should be corrected. For example, if the reconstructive account holds that the practice is best reconstructed as excluding moralism, then we can conclude that those cases in which moralism nevertheless features are, all things being equal, mistakes and should have been decided differently. Second, one can assess the reconstructive account in light of a philosophical account and use the philosophical account to criticize the reconstructive one and recommend reform. However, for any philosophical theory to convincingly claim the need for reform of the practice, it must first provide the best possible understanding of the practice; otherwise the philosophical account risks fighting against a distorted account of the practice or a straw man.

There are two kinds of reconstructive theories. The first can be called *moral reconstruction*; this is the kind of theory which I have outlined above and which will be proposed in this book. It aims at finding moral value in a practice: something which makes it worth continuing with that practice. It is of course possible that there is no such moral value, in which case this would have to be acknowledged by adopting the perspective of what Dworkin calls the internal sceptic;<sup>63</sup> the consequence is that the practice ought to be discontinued. The second kind of reconstruction is morally neutral; we might call it *zeitgeist reconstruction*. Rather than aiming at identifying moral merit it aims at reconstructing the practice in a way which shows the *zeitgeist* predominant in shaping the practice. *Zeitgeist* reconstruction is a valid scholarly enterprise and can be important for, in particular, historical and sociological purposes. Two examples will show the difference between the two kinds of reconstruction. We might be interested in a *zeitgeist* reconstruction of Nazi law. So we would look at the practice of Nazi law and try to identify

<sup>63</sup> Ibid., 78–9.

important themes in it; and we would find one important theme which is the idea of the racial superiority of Aryans over Jews. So we might say that one aspect of our *zeitgeist* reconstruction of Nazi law is this presumed superiority. By way of contrast, if we had engaged in a *moral* reconstruction of Nazi law, we could not have held that the idea of a superiority of Aryans over Jews was a valid reconstruction: it lacks moral value; or in other words, it is not a principle but a falsity. So a moral reconstruction of Nazi law would look very different from a *zeitgeist* reconstruction. The second example is closer to contemporary constitutional rights law. Suppose that a look at the practice shows that sometimes the practice rejects moralism and sometimes it approves of moralism. For example, moralism towards homosexuals is no longer regarded as acceptable today by the courts, whereas 50 years ago it clearly was; but recently the German Federal Constitutional Court regarded moralism towards people engaging in incest as acceptable.<sup>64</sup> Someone engaging in moral reconstruction must give a morally coherent account of the legitimacy of moralism which also fits the practice. She could not just argue that the correct moral reconstruction held that moralism was acceptable when directed against whoever is the unpopular group of the day: that blatantly lacks moral coherence because the mere fact that a group is unpopular does not justify limiting this group's freedom. But it might be a very good *zeitgeist* reconstruction: it might be the case that the *zeitgeist* in Western societies is such that it is regarded as permissible to engage in moralism towards a group only if that group is really unpopular. So, again, two persons engaging in reconstructive enterprises might come up with very different reconstructive accounts depending on what the goal of their reconstruction is. Since the aim of this book is to assess the moral legitimacy of the practice it seeks to reconstruct, it must engage in a moral reconstruction.

## VI. A SUMMARY

The book will rely on the four features of the global model of constitutional rights presented in section II in order to develop its theory of rights: first, rights inflation and the broad understanding of (*prima facie*) rights, including a right to privacy which protects almost all, at least all non-trivial, interests; second, the existence of positive obligations and the

<sup>64</sup> BVerfGE 120, 224, 248 (referring to a 'sense of wrongness [*Unrechtsbewusstsein*] anchored in society' as reinforcing the reasons supporting the prohibition).

growing acceptance of socio-economic rights; third, the acknowledgement of horizontal effect; and fourth, the use of the doctrines of balancing and proportionality. My claim is that on the basis of this set of materials it is possible to construct a theory of constitutional rights which fits these materials and is morally coherent. To this end, the structure of this book will reflect the unanimous practice of courts in distinguishing between the *prima facie* stage of rights and the justification stage.

In Chapters 2–4, the book develops a theory of the scope of *prima facie* rights which makes sense of the broad understanding of rights, horizontal effect, positive obligations, and socio-economic rights. Chapter 2 (‘Negative and Positive Freedom’) argues that the value protected by constitutional rights must be positive freedom, or *personal autonomy*: in particular the doctrines of positive obligations and horizontal effect and the increasing acceptance of socio-economic rights indicate that the point of rights is to *enable* people to live their lives autonomously, as opposed to *disabling* or limiting the government in certain ways.

Chapter 3 (‘Two Conceptions of Autonomy’) discusses two competing conceptions of personal autonomy which I term the *excluded reasons conception* and the *protected interests conception*. The excluded reasons conception—related in particular to Dworkinian theories of rights—holds that in order to respect a person’s autonomy, the state must not rely on certain (excluded) reasons in its treatment of him, in particular moralistic or paternalistic reasons or reasons based on the idea that some people are worth less than others. The chapter argues that while this is a coherent and intuitively appealing conception of autonomy, it cannot explain the broad scope of (*prima facie*) rights accepted today. The second and preferable conception of autonomy—the protected interests conception—focuses directly on the actions and personal resources which are important for the purpose of leading an autonomous life. For example, it recognizes the importance for autonomous persons of being able to choose one’s intimate partners, utter one’s political views, and control what happens to one’s body, and takes the importance of these interests as the reason for protecting them. It is then possible to assess the weight of a specific autonomy interest with reference to its importance *from the perspective of the self-conception of the agent*. This approach is related but preferable to similar concepts used by courts and philosophers, such as the idea of developing one’s personality, which is widely used in European human rights law, James Griffin’s

idea of living one's conception of a worthwhile life, or the idea of self-realization. The chapter demonstrates that the protected interests conception is successful and superior to the excluded reasons conception in explaining the broad scope of rights under the global model.

Chapter 4 ('The Right to Autonomy') proposes a comprehensive conception of (prima facie) rights. It demonstrates that it is coherent to accept rights to whatever is in the interest of the autonomy of a person, including socio-economic rights (which protect the preconditions of autonomy) and rights to engage in trivial activities (such as pursuing one's hobbies) and even immoral and harmful activities (such as murder). It thus concludes that the almost unanimously held view that there is a *threshold* which separates interests from rights should be given up. The point and purpose of constitutional rights under the global model is thus not to single out certain especially important interests for heightened protection but rather to ensure that *all* autonomy interests of a person are *adequately protected* at all times. The broad understanding of prima facie rights is simply a tool which ensures that all autonomy interests survive the prima facie stage in order to assess the adequacy of their protection at the justification stage, using, in particular, the proportionality test.

In the subsequent three chapters, Chapters 5–7, the book develops a theory of the justification stage, focussing on the core doctrinal tools used at that stage, namely balancing and the principle of proportionality. Chapter 5 ('Towards a Theory of Balancing and Proportionality: The Point and Purpose of Judicial Review') starts from the premise that in order to develop a substantive moral theory of balancing and proportionality, we first need an account of the point and purpose of judicial review under the global model. This account must integrate the reconstructive theory of rights as it has emerged in the previous chapters with attractive accounts of the values of democracy and the separation of powers. Having established in Chapter 4 that constitutional rights comprehensively protect a person's autonomy, this chapter goes one step further and argues that not only rights but also (almost all) policies are oriented towards autonomy. It follows that constitutional rights and policy-making are concerned with the same subject-matter, namely *the specification of the spheres of autonomy of equal citizens*. This raises a problem for the legitimacy of judicial review because it seems to imply that there is no room left for democratic decision-making. Relying on a reinterpretation of Matthias Kumm's work, the chapter proposes a solution to this problem by arguing that for a policy to be constitutionally

legitimate and democratic properly understood, it must represent a *reasonable* specification of the spheres of autonomy of equal citizens, as opposed to *the one correct* specification. The chapter further integrates this result with the value of the separation of powers by arguing that even if one accepted the controversial proposition that considerations relating to institutional competence are the key to a proper appreciation of that value, no objection to judicial review would arise because it is plausible to assume that courts will be capable of assessing constitutional legitimacy in the specific sense just described.

The following two chapters build on these conclusions to develop an account of balancing and proportionality. Chapter 6 ('Balancing') presents the operative heart of the doctrine proposed in this book: a theory of personal autonomy under conditions of *conflict*. When there is such conflict between the autonomy interests of one person with the autonomy interests of another person, constitutional law recommends that the competing autonomy interests are to be 'balanced'. The chapter first clarifies the various possible meanings of this idea by presenting four concepts of balancing: balancing as autonomy maximization, interest balancing, formal balancing, and balancing as reasoning. It argues, negatively, that equating, without further argument, balancing with consequentialist reasoning or mechanical ways of quantification would be misguided; at the most general level, the doctrine of balancing, properly understood, simply refers to the need to resolve a conflict of autonomy interests in line with sound moral arguments (balancing as reasoning). Positively, the chapter proposes a set of moral principles to adequately deal with such conflicts, illustrating this with analyses of a broad range of important constitutional rights cases relating to issues including abortion, hate speech, religious drug use, euthanasia, and many others. Thus, it explores the considerable complexity that hides under the convenient doctrinal label of 'balancing' and develops a workable theory of how this balancing ought to be conducted in the resolution of actual cases.

The final chapter ('Proportionality') integrates the results of the previous chapters into a comprehensive theory of proportionality. It argues that the principle of proportionality is a tool for the structured resolution of conflicts of autonomy interests. Each of the four stages of the proportionality test (legitimate goal; suitability or rational connection; necessity; balancing or proportionality in the strict sense) has its own role to play in this regard. The purpose of the legitimate goal stage is to exclude goals which, while sometimes autonomy-related, must not be accorded any weight: in particular moralistic or impermissibly

paternalistic goals. The point of the suitability stage is to establish the extent to which there is a genuine conflict between the two autonomy interests at stake. The necessity stage deals with alternative policies which are less restrictive of the right. At the balancing stage the conflict is ultimately resolved, using the framework developed in Chapter 6. In assessing the balance, courts grant the original decision-maker what in Europe is called a 'margin of appreciation'; other courts do the same under different terminologies. This margin of appreciation incorporates the reasonableness requirement proposed in Chapter 5 into constitutional rights law: a policy will be regarded as constitutionally legitimate if it falls within the margin of appreciation of the elected branches, i.e. if it resolves a conflict of autonomy interests in a way which is reasonable (as opposed to correct). Thus, the principle of proportionality, properly applied, guides judges through the reasoning process as to whether a policy is constitutionally legitimate.