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Kai Möller<sup>1</sup>

## A Response to Afonso da Silva, Harel, and Porat

The issues and criticisms that Virgílio Afonso da Silva, Alon Harel and Iddo Porat raise about *The Global Model of Constitutional Rights*<sup>2</sup> relate, first, to its methodology (in particular the nature of my theory as morally reconstructive, and its global character), second, to the role of autonomy (in particular its relation to equality, and my defence of a general right to autonomy), and third, to the problem of justification (outcome-based versus excluded reasons-based ways of reasoning about questions of rights). Correspondingly, I divide this response into three sections, dealing with the methodological questions in the first, with the autonomy-related issues in the second, and with the problem of justification in the final section.

### I. Methodology

#### 1. Moral Reconstruction

Any morally reconstructive theory is Janus-headed: it looks both to fit with the practice and to moral value. Thus, a morally reconstructive theory of the global model of constitutional rights must meet two criteria: first, it must ‘fit’ the global model sufficiently well to be rightly considered a theory ‘of’ that practice, and second, it must be morally coherent. If, on the one hand, my theory did not have sufficient fit, then it would simply be a free-standing theory of rights – indeed it might be excellent in this regard, but it could not claim to be a theory *of* the global model. If, on the other hand, my theory were morally incoherent, it could not claim to be a *moral* reconstruction. The goal of the book is to show that the global model, which departs in so many ways from how almost all moral and political philosophers think about rights, is morally defensible. A morally incoherent theory obviously could not be used to demonstrate this claim. It is of course a possibility that a practice is morally indefensible: that it cannot be reconstructed in a way which fits the practice and shows it as morally appealing (think of Nazi law as an extreme example). Where that is the case, it must be concluded that

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<sup>1</sup> Associate Professor of Law, Department of Law, London School of Economics and Political Science. I would like to express my gratitude to Alon Harel and David Enoch for organising a symposium on my book in Jerusalem in December 2013, and to Virgílio Afonso da Silva, Alon Harel, and Iddo Porat for their insightful and challenging comments on that occasion. Virgílio Afonso da Silva deserves additional thanks for several days of intense discussions about the nature of constitutional rights, which was a pleasant and worthwhile way of spending the time while we were waiting for the weather in Jerusalem to improve and the symposium to go ahead.

<sup>2</sup> Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012) (henceforth: GMCR).

the practice ought to be abandoned or radically changed, precisely because no theory that fits that practice sufficiently well displays moral coherence.

This Janus-headedness is the source of some confusion. There are three avenues available to a critic to criticise a morally reconstructive theory: he can criticise the methodology as such; he can claim that the theory does not fit the practice well enough; or he can claim that the theory is morally incoherent. To the extent that the commentators chose the third avenue, I will deal with their arguments in the following sections. Here, I will respond to their challenges of the methodology and the charge of insufficient fit.

Porat makes some criticisms relating to my reconstructive methodology. He says: ‘I would ... have preferred that Moller would simply say: I will give you my version of the best normative account of rights, and show you that it is closer to the global model than the American one.’<sup>3</sup>

This sounds straightforward. However, had I followed Porat’s advice, my book would have been disingenuous. The idea that triggered the process that led to the book was precisely not to develop the best possible theory of rights. Rather, I had observed that philosophers tend to talk about rights in a way that is structurally quite far removed from how most courts approach them (e.g. they perceive rights as trumps; they see social rights as an anomaly; they think that rights were limited in scope). My moral intuition was that whatever the merits of the philosophers’ view, the courts had a defensible and coherent conception of rights, and my motivation for starting the research that culminated in the book was to demonstrate this. Thus, had I followed Porat’s advice I would have had to hide my true ambitions. I would have had to say: ‘Look, I have developed a new theory of rights. And what a coincidence, it also explains the global practice quite well!’ But it was not a coincidence; it was a deliberate plan.

This is not just a piece of personal anecdote. Theorists often want to explain something important about a certain practice. Therefore, they must develop their theories with the practice in mind, and they cannot wait until the very end, after they have constructed their entire theory, to examine the extent to which the theory illuminates the practice. If what the theorist wants to explain about the practice is its moral defensibility, then she is engaged in a moral reconstruction. Of course, her project might be a different one, for example, she might be interested in some sociological, historical, or cultural aspect of the practice, in which case its moral defensibility will be irrelevant or at least not central.

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<sup>3</sup> Iddo Porat, (title tbc), 7 (forthcoming [2014] *Jerusalem Review of Legal Studies*).

In the sentence following the one quoted above, Porat modifies his claim and says: ‘Or [I would have preferred Möller to say]: for too long the imagination of the philosophical account of rights has been limited by the American experience and it is time to break this limitation; I will give you a philosophical account the imagination of which is based on the European model.’<sup>4</sup>

I have no fundamental objection to this way of putting the goal of my book – we could indeed say, without too much distortion, that it is about a philosophical account of rights the imagination of which is based on the European (I would prefer: global) model. This at least makes it clear that I am not starting the development of my theory of rights ‘out of the thin air’ but rather with a certain practice (the global model) in mind. But then I wonder what Porat’s criticism of my methodology actually is; I cannot identify a significant difference between my way of putting it (moral reconstruction) and his in the quote above. Porat recommends that I should have relied on Rawls’ idea of reflective equilibrium;<sup>5</sup> in his view this would have highlighted the two-directional relationship between theory and fact more clearly than my account, and it would also have made it clear that my theory is clearly normative. But I do not see how I could have made it clearer that my theory is two-directional – as I explained above as well as in the book, this is precisely what a moral reconstruction is about; and I cannot see, either, how I could have made it clearer that my theory is normative – in fact moral; that is even expressed in referring to it as a ‘*morally* reconstructive theory’. Rawls’ idea of reflective equilibrium is not far removed from my methodology, but at least in Rawls’ usage, it relates to certain *judgments* that have to be brought into coherence,<sup>6</sup> whereas my theory is about a *practice* (the global model). Therefore I could not have used Rawls’ term without modifications and clarifications that would in substance have amounted to explaining the same issues that I explained in the book under the heading of ‘moral reconstruction’.

A further criticism of Porat’s is that ‘to the extent that Moller remains committed to the idea of reconstruction and description his project needs more historical and cultural context.’<sup>7</sup> As a preliminary point, I am not sure why or to what extent my book can be read as being ‘committed to the idea of description’. The goal of my book is to offer a theory of rights that explains and justifies the global model; thus, the book presents a moral theory of rights. Given that it is a reconstructive theory of rights, it relates to a practice: it is the theory ‘of’

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<sup>4</sup> Porat (above n. 3), p. 7.

<sup>5</sup> Porat (above n. 3), p. 7.

<sup>6</sup> John Rawls, *A Theory of Justice* (Revised edition, Oxford University Press, 1999), 18.

<sup>7</sup> Porat (above n. 3), p. 7.

that practice. I do give an account of the practice that is being reconstructed in the book, mainly in chapter 1. Does Porat mean that this account should have been more comprehensive? If so, then Porat would need to explain this further. I cannot know whether I should have given a more comprehensive overview of the global model unless he shows me which information, in his view, is missing, and how it would have been relevant for the theory. He does point to a passage where I talk in passing about how the attitudes and beliefs of people about the moral structure of rights have changed; but I fail to see how the argument that I make at that passage would have benefited from a cultural or historical investigation. Of course, it is always possible to provide more background information, paint a more comprehensive picture, and so on. But the real issue is whether this additional information is necessary for the argument that the work advances, and I fail to see why this should be the case in the passage Porat points out.

Maybe Porat's point is a different one. Maybe he means that one cannot develop a morally reconstructive theory of rights without a cultural and/or historical theory of the practice that is being reconstructed. If this is his criticism, then I disagree: a morally reconstructive theory is simply a different project from a culturally or historically reconstructive theory. I do not deny the value of the latter; in fact I think that Porat's and Cohen-Eliya's book *Proportionality and Constitutional Culture*<sup>8</sup> offers an insightful cultural reconstruction of the global model and its American counterpart. But it is a different project from mine. Let us again take the extreme example of a theory of Nazi law. A theorist engaged in a moral reconstruction of Nazi law would have to ask whether Nazi law can be brought into a morally coherent system. One does not need much cultural or historical understanding to conclude that the answer is negative: whatever the culture or history of a place, laws such as the Nuremberg race laws can never be morally defensible. By way of contrast, a different theorist who is interested in a historical or cultural reconstruction of Nazi law could possibly develop an illuminating theory about the historical or cultural context within which Nazi law arose. It would be an unjustified criticism of the first theorist to accuse him of not giving a comprehensive cultural and historical analysis of Nazi law; this is simply not needed for the task that that theorist set himself. The analogous point applies to my project of a morally reconstructive theory of rights: while of course a comprehensive historical or cultural analysis of the global model is highly interesting for a variety of reasons, it is not necessary for a moral reconstruction.

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<sup>8</sup> Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013).

Porat's final criticism in his passage relating to my reconstructive methodology is that I do not talk enough about the procedures for judicial review (for example, should there be strong or weak judicial review) and about institutional questions.<sup>9</sup> But again, this is not the topic of the book. My book is *not* a comprehensive discussion of the pros and cons of judicial review. Rather, it articulates a theory of rights – in this regard its ambition is similar to those of other authors who have articulated theories of rights: think of Ronald Dworkin's theory of rights as trumps,<sup>10</sup> or James Griffin's theory of rights as protecting personhood.<sup>11</sup> Just as these and other authors can articulate their theories of rights without addressing procedural and institutional questions, so can I. My theory of rights can be implemented in a system of strong or weak judicial review; it can be applied to judges who are elected or appointed; etc. All the book tries to achieve is to articulate a theory of rights which makes sense of the emerging global practice that I have called the global model. Porat may object that I talk about institutional questions in chapter 5 of the book, where I make a case for the institutional competence of judges to decide questions of rights.<sup>12</sup> But I stress in the relevant section that my goal is not to give a comprehensive account of the institutional questions but rather to assess them only in so far as this is necessary to confirm the validity of the theory of rights that I propose. In other words, I only ask whether a plausible case can be made for the involvement of courts in adjudicating rights issues according to the theory proposed, because if no such case can be made, then this would throw doubts on the correctness of my reconstructive account.<sup>13</sup> So, to repeat, the book does not claim to give a comprehensive account of the institutional questions; it simply articulates a theory of rights which, as it shows, can be applied by courts, without assessing all the pros, cons, and modalities that such an application would entail.

A second charge that could be launched against my theory is that of insufficient fit, and indeed, all three commentators raise more or less the same point here: how can I claim, they ask, that my theory is a reconstruction of the global model when, with the possible exception of Germany, no jurisdiction in the world accepts what seems to be a crucial element of my theory, namely a comprehensive right to autonomy that protects all exercises of autonomy,

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<sup>9</sup> Porat (above n. 3), 7-8.

<sup>10</sup> Dworkin has defended this position throughout his career; see for example his 'Rights as Trumps' in Waldron (ed.), *Theories of Rights* (Oxford University Press, 1984). For a more recent restatement see his *Justice for Hedgehogs* (Harvard University Press, 2011), 329.

<sup>11</sup> James Griffin, *On Human Rights* (Oxford University Press, 2008), 32-37.

<sup>12</sup> GMCR, 126-131.

<sup>13</sup> GMCR, 128.

including trivial and evil ones?<sup>14</sup> The theoretical question this criticism raises is how much ‘fit’ is required for a reconstructive theory to still be a theory ‘of’ the practice it seeks to reconstruct, as opposed to what in the book I called a ‘philosophical’ theory, that is, one which is insensitive to the practice.

There is no simple, mechanical, or quantitative answer to this question; it is one that requires the exercise of judgment. But it is important to get the question right. The correct way of posing the question is not to take the one feature where the practice and the theory depart and then to ask whether with regard to this feature, the theory displays sufficient fit. This cannot be the right approach because no reconstructive theory of a diverse and complex practice will fit all its features. Rather, the correct way of asking the question is whether the theory *as a whole* fits the practice *as a whole* sufficiently well to be regarded a theory ‘of’ that practice. Applied to the issue at stake here, the correct question is *not* whether the idea of a right to autonomy fits sufficiently well that aspect of the practice of judicial review that mostly denies the existence of such a right. Rather, the issue is whether the *entire* theory of rights as proposed in my book fits the practice under the global model *as a whole* so well that it can be regarded as a theory of that practice. Alternatively, one may ask whether the *entire* theory of rights as proposed in the book fits the rights jurisprudence *of a given country* so well that it can be regarded as a theory of that country’s jurisprudence. So, to put it bluntly, a lack of fit with regard to the scope of rights can be counterbalanced by sufficient fit with regard to the other features of the global model: the endorsement of horizontal effect, positive obligations and social rights, and, most importantly, balancing and proportionality. In light of this, I do not see the fact that many countries do not endorse a comprehensive right to autonomy as threatening the viability of my theory as a reconstructive theory.

It is not only acceptable but to be expected and in a sense even necessary that a reconstructive theory of a complex and diverse practice takes issue with some of the convictions of the agents shaping the practice. If it did not, then it would not add anything of relevance to the discussion except the comforting but ultimately uninteresting insight that everyone is getting everything right already. Thus, my theory, by insisting that the best way to reconstruct the global model requires the acknowledgement of a right to autonomy, encourages the actors that shape the practice to reconsider their views on this issue because, as I argue in the book, where the practice departs from the theory, this is, all things equal, a mistake which should be

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<sup>14</sup> Virgílio Afonso da Silva, ‘How Global is Global Constitutionalism?’, (2014) *Jerusalem Review of Legal Studies* (forthcoming), 7-8; Alon Harel, ‘Do Legal Rights Matter? A Defence of Constitutional Rights’, (2014) *Jerusalem Review of Legal Studies* (forthcoming), 3; Porat (above n. 3), p. 6.

corrected.<sup>15</sup> It is not a coincidence but rather the point of a moral reconstruction that it allows for the practice to be measured against it and encourages the actors that shape the practice to improve the practice in line with what the theory recommends.

That said, I acknowledge in the book that there may be valid institutional or pragmatic considerations which justify a departure from the theory. With regard to the right to autonomy, I speculate that the reason that many countries do not protect such a right may lie in the fact that access to constitutional courts is a scarce resource and should arguably be granted only in the case of important issues, not relatively trivial ones such as feeding birds in a park.<sup>16</sup> Afonso Da Silva makes the interesting observation that this explanation seems implausible in the case of the Brazilian Supreme Court: that court seems totally unmoved by considerations of workload, given that it willingly decides tens of thousands of cases every year.<sup>17</sup> Now, that may be true. But it is not a challenge to the reconstructive nature of my theory. My theory claims that there is no principled way to delineate autonomy interests which attract the protection of constitutional rights from those which do not, and that therefore all autonomy interests ought to be protected. If a court fails to do so and it cannot point to any pragmatic justification for this – such as limiting its workload – then it simply makes a mistake. I do not have sufficient expertise with regard to the Brazilian legal system to take a definite view on this issue, but it surely seems a possibility that the Brazilian Supreme Court simply gets things wrong when it denies the existence of a general right to autonomy. For example, intuitively the judges may be drawn to the idea that there is a threshold which delineates an interest from a right – an idea that I believe to have shown to be wrong.

Generally speaking, there are three explanations for why a court may depart from what my reconstructive theory recommends. First, my theory could be mistaken and the court right. Second, my theory may be right and the court mistaken. Third, there may be a good pragmatic or institutional reason for departure from the theory (for example, the necessity to select and focus on important cases). Thus, to demonstrate that my theory is unattractive as a reconstructive theory with regard to Brazil, Afonso da Silva would have to show not only that there is no valid pragmatic reason for the Brazilian Supreme Court's departure from my theory, but also that the Court is justified in rejecting a comprehensive right to autonomy; thus, he would need to engage with my argument that there is no principled way of

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<sup>15</sup> GMCR, 21.

<sup>16</sup> GMCR, 77.

<sup>17</sup> Afonso da Silva (above n. 14), 8-9.

delineating rights from mere interests. As long as he does not show this argument to be wrong, the possibility remains that the Brazilian Court simply made a mistake when excluding certain interests from the scope of rights.

## 2. *Formal versus substantive*

Afonso Da Silva prefers Robert Alexy's formal theory of constitutional rights<sup>18</sup> according to which rights are principles and optimisation requirements.<sup>19</sup> As I have argued elsewhere,<sup>20</sup> I do not believe that a formal theory of constitutional rights will be sufficiently illuminating of their structure. Rights are creatures of morality and therefore have to be analysed in moral – that is, substantive – terms. Whatever *formal* structure may turn out to illuminate constitutional rights, it can do so only if and to the extent that it happens to reflect the *moral* structure of rights. Robert Alexy's famous theory is, in my view, rightly celebrated as a milestone in our understanding of constitutional rights. But the formal structure which Alexy outlines holds such a power not because it is true as a matter of logic (as Alexy claims) but rather because it reflects what morality has to say about the structure of constitutional rights. It is because *as a matter of morality* there is a comprehensive right to autonomy, and because *as a matter of morality* rights are interests which have to be brought into a balance with other interests, etc., that the formal model which regards rights as principles that have to be balanced against other principles has a great explanatory and, for some, intuitive, force. If the moral situation were different – say, if rights were, as James Griffin claims, a highly limited set of interests, or if they were, as Ronald Dworkin argued, trumps, then Alexy's formal model would not hold the appeal it does because it would not illuminate their moral structure sufficiently well.

Afonso da Silva further argues that the formal theory has the advantage of being neutral with regard to the value(s) it ranks highest and that it will therefore be acceptable to regions and cultures that do not hold personal autonomy in as high regard as I do in the book.<sup>21</sup> For example, personal autonomy may not be held in high esteem in China, but a formal theory could nevertheless make sense of the Chinese constitution.

In response to this, let us ask whether we could apply the formal theory to Nazi Germany with a (hypothetical) Nazi constitution. It would seem that we can: the 'principles' which

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<sup>18</sup> Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), ch. 3.

<sup>19</sup> Afonso da Silva (above n. 14), p. 4.

<sup>20</sup> Möller, 'Balancing and the structure of constitutional rights', (2007) 5 *International Journal of Constitutional Law* 453.

<sup>21</sup> Afonso da Silva (above n. 14), p. 6.

ought to be optimised in the Nazi constitution are, say, the superiority of the Aryan race, the implementation of the Führer principle, and so on. Now, I had to put ‘principles’ in apostrophes because, of course, the ‘principles’ I mentioned are not really principles but falsities: they carry no moral value at all. My theory, however, promises to deliver a morally acceptable theory of rights, that is, one which is based on moral principle as opposed to falsity. Therefore I am unimpressed by the suggestion that by keeping the theory formal, I could have made it acceptable to those regions or countries that do not value autonomy. Afonso da Silva would only have a valid objection to my theory if he could show that those regions that do not value autonomy are *justified* in doing so: that there is a morally defensible theory of rights which places another value or set of values at the top. While I cannot rule this out in the abstract, my moral intuition is that people value and want autonomy (freedom) and equality everywhere, and rightly so. My hunch is, therefore, that those countries or regions which do not subscribe to these values make a moral mistake. If this is true, then the fact that my theory will presumably not appeal to those who deny autonomy and equality their central place does not pose a problem for my theory as a reconstructive theory or for its global character.

### 3. *Global appeal?*

‘[T]he globe ... seems to be quite small’ writes Afonso Da Silva. ‘[T]ake some decisions of some supreme or constitutional courts of a few English speaking countries like the United Kingdom, the United States, Canada and South Africa, throw in decisions of the German Constitutional Court, and it seems you are already entitled to speak of *the globe*.’<sup>22</sup>

Afonso Da Silva’s striking observation puts its finger on a weak spot of the current discourse about global constitutionalism. While his point is (deliberately) exaggerated, it has a true core. Is it a problem for global constitutionalism that it concerns itself mostly with the countries mentioned by Afonso Da Silva?

We must not throw the baby out with the bath water. My goal in the book was to present a morally coherent theory of rights that fits the practice of judicial review in a sufficiently broad range of countries to justify referring to that practice as ‘global’. Precisely because my interest was in a morally coherent theory, one of the relevant factors for choosing the jurisdictions to consider was whether they would offer sufficiently interesting and important contributions to the development of such a theory. Conversely, prudent use of the scarce

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<sup>22</sup> Afonso da Silva (above n. 14), p. 2.

resources of time and energy dictated that I would not look at the practice of those countries that will not be able to contribute much to a coherent theory of constitutional rights. This means that broadly speaking, the pool of countries that remain of potential interest is restricted to liberal democracies. The world being what it is, this excludes a large share of the world's jurisdictions.

With regard to the remaining countries – those that can broadly be classified as liberal democracies – a reconstructive theorist will, again, have to set priorities because it will be impossible for any one theorist to study the jurisprudence of all those countries in depth. Given that the goal is to develop a morally appealing theory, the theorist will have to pick those countries which have the most to contribute in terms of the quality of their jurisprudence. This requires the inclusion of the United States – or, as in the case of my book, its exclusion requires a justification. U.S. jurisprudence offers the oldest and in many ways intellectually richest and most stimulating practice of constitutional rights protection in the world, and it served as the role model for existing and aspiring democracies, in particular after World War II. While it is currently in a deep crisis because of the regrettable politicisation of the legal system and while correspondingly its influence and perceived attractiveness are declining, it nevertheless continues to be of major influence. Furthermore, Germany must be included because of the ways in which its post-WW II jurisprudence have shaped the global model: the doctrines of horizontal effect and proportionality are of German origin, and the German Federal Constitutional Court was among the first courts to establish the idea of positive obligations.

Beyond the US and Germany, the question of whom to include becomes more difficult. It is certainly the case that a country whose jurisprudence is available in English has a strategic advantage, and this may explain – though not justify – why Canada and South Africa are often regarded as members of the 'global club'. With regard to Brazil, in addition to the problem that its jurisprudence is not available in English, the sheer number and length of the Brazilian Supreme Court's judgments will operate as a barrier to its inclusion in practical terms.

But there are certainly good justifications for closely studying Canadian and South African jurisprudence, namely the relatively high quality of Canadian and South African judges and judgments. To repeat, whether a country is 'included' (that is, its rights jurisprudence studied and taken as relevant for the development of a morally reconstructive theory) does not depend on the country's size, wealth, political power, etc., but exclusively on what its jurisprudence can contribute to the development of a theory of rights. Canadian and South

African jurisprudence with its often highly interesting cases and arguments certainly passes the threshold of relevance. This is not to be understood as involving any judgment about the quality of the jurisprudence of all those liberal-democratic countries which I did not look at in any depth in the book – given that I know little of it, I cannot pass judgment. Rather, it only means that the countries which I picked did have something important to offer for a reconstructive theory, not that the countries which I left out cannot offer as much.

The above thoughts lead me to the view that I fully agree with Afonso da Silva that it would be desirable to expand the list of countries regularly considered in discussions about global constitutionalism beyond the few countries that he mentions. While I have no easy answer as to how this can be achieved, it seems plausible that there is a responsibility not only on the side of global constitutionalists but also on the sides of the respective country to ensure that its jurisprudence be available in English and of scholars working within a specific national or regional context to introduce important developments taking place there to the wider community of global constitutionalists.

## **II. Personal Autonomy**

### *1. Autonomy and equality*

Afonso Da Silva claims that I neglect the importance of the right to equality.<sup>23</sup> This raises the question of the relationship between autonomy and equality, which is an important point on which my book may be misunderstood. True, I do talk mainly about personal autonomy in the first part of the book (chapters 2 to 4), and there is no chapter or part dedicated specifically to equality. Nevertheless, in my account of constitutional rights, autonomy and equality are of equal importance. As I argue in chapter 5, a policy is constitutionally legitimate if it is based on a reasonable specification of the spheres of *autonomy* of *equal* citizens. The main problem for a specification of a person's sphere of autonomy is that one person's autonomy interests will usually clash with the autonomy interests of others. Equality is the value which is needed to resolve these conflicts: the way in which the policy under consideration has resolved a conflict of autonomy interests must be compatible with their status as equals.

My emphasis in the first part of the book on the importance of autonomy is not in order to give it an importance that is greater than the importance of equality. Rather, it is for reasons of the best doctrinal construction of a test as to whether a policy (or another act by a public

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<sup>23</sup> Afonso da Silva (above n. 14), p. 10.

authority) violates constitutional rights. The first question to ask is whether the policy limits the right-holder's right to autonomy: the duty of justification is triggered only when a policy affects the right-holder's ability to live his life according to his self-conception. This explains why chapters 2 to 4 talk about autonomy in depth and do not need to take recourse to equality. The second question is whether the limitation is justifiable, and this is the case if it flows from a reasonable specification of the spheres of autonomy of equal citizens; here equality is added to the test. Given that almost all policies will limit someone's autonomy, the emphasis of the test is on the second stage, and here autonomy and equality clearly feature on equal terms.

Is a separate right to equality needed? I argue in the book that there is nothing conceptually wrong with such a right, but that it does not add anything that the right to autonomy does not already provide. Afonso Da Silva objects: his example is that a particular regulation of the right to wear a Muslim headscarf might be considered proportionate in isolation, but that it might nevertheless be constitutionally illegitimate if wearing the Christian cross is not regulated in the same way.<sup>24</sup>

I agree that this case could be resolved using a right to equality. However, it can also be resolved by relying on the right to autonomy. The policy in Afonso Da Silva's example does not specify the spheres of autonomy of Muslim women in a reasonable way because of the unequal treatment of Muslims compared to Christians. Contrary to Afonso Da Silva's claim, it is conceptually possible to resolve this issue under the heading of a right to autonomy: there is an interference with the right to autonomy, and this interference is not justifiable because the policy is incoherent. I agree (and state in the book<sup>25</sup>) that the proportionality test as currently constructed in legal practice does not contain a separate coherence stage in addition to the other four stages, and that as long as this remains the case, there is room for a separate right to equality (which would perform the function of a coherence check). However, it would also be possible to test the coherence of a policy as part of the proportionality assessment, and then no need for a separate right to equality would arise. To repeat, I am all in favour of a right to equality, and as I made clear, I believe that the value of equality is as fundamental as autonomy. My point is that all policies that violate the right to equality will also violate the right to autonomy, and that therefore a separate right to equality is not needed.

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<sup>24</sup> Afonso da Silva (above n. 14), p. 10.

<sup>25</sup> GMCR, 125-6.

## 2. *The importance of autonomy*

Harel takes issue with my proposal of a general right to autonomy, adopts the position of what he calls ‘an old-fashioned rights-fetishist’<sup>26</sup> and defends the idea of a catalogue of narrowly defined rights. What makes his position particularly interesting is that he does not walk into the trap that, in my opinion, many of the other ‘old fashioned rights fetishists’ have fallen into. Harel does not claim that there is a principled way of distinguishing those interests which attract the protection of rights from those which do not. This was the route that James Griffin took in his influential book *On Human Rights*,<sup>27</sup> where he argued that those interests which are important for personhood qualify as human rights, whereas those that do not meet the personhood threshold don’t. I attacked this reasoning by demonstrating that Griffin does not, and could not, define the threshold of personhood in a principled way, and I concluded that threshold theories are unworkable and should be abandoned in favour of a conception of rights which acknowledges that all interests are protected as rights.<sup>28</sup> This model is not only theoretically appealing but can also make sense of the global model with its tendency towards rights inflation and the inability of courts around the world of articulating a threshold.

Harel takes a different route. He argues that the value of entrenching rights is that it creates a common culture that facilitates the exercise of autonomous choices. This value cannot, for Harel, be realised through a general right to autonomy: ‘A person cannot be asked to exercise her autonomy without specifying designated activities in which choices matter; without developing coherent rationales for the protection of such choices and without a public culture which grants respect to choices made within those designates spheres.’<sup>29</sup> So for him, the point of legally entrenched rights is to guide citizens towards those areas in which autonomy is important.<sup>30</sup>

One of my worries about this conception of the point and purpose of rights is that it strikes me as paternalistic. Why should I accept the guidance of constitutional rights, for example the guidance that expression and marriage are important areas of autonomy but feeding the birds or going for walks in the forest are not? I do not want or need this kind of guidance. But if I cannot accept it for myself, then I cannot claim that it would be acceptable to impose it on others. Just as Harel claims to be an old fashioned rights fetishist, so am I: to my mind

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<sup>26</sup> Harel (above n. 14), p. 2.

<sup>27</sup> Griffin (above n. 11).

<sup>28</sup> GMCR, 75-77.

<sup>29</sup> Harel (above n. 14), p. 7.

<sup>30</sup> Harel (above n. 14), p. 4.

constitutional rights are designed to promote or reflect my freedom and equality, not to paternalistically guide me and educate me about the areas of life where autonomy matters. However, while constitutions must not tell people how to live their lives, their design can surely *reflect* conventional wisdom about what people regard as important for their own lives. This is why I have no principled objection to a catalogue of rights, as opposed to simply one comprehensive right to autonomy. These catalogues reflect those areas of life that have proven to be important to people: free expression, religion, property, and so on. But the justification of these catalogues is not to guide people but to reflect their already-existing self-conceptions about what is important for their lives. Furthermore, a general right to autonomy is needed partly in order to protect precisely those activities and personal resources the enjoyment of which is not widely shared: even if I am the only person in my country who enjoys feeding the birds, my right to do so must be protected and cannot be denied to me on the ground that in my country, its protection is not required because it cannot contribute to an autonomy-enhancing culture, given that nobody else wishes to use their autonomy in this way. It would be closer to the truth to say that *especially* when I am the only one in the whole country who wants to engage in this activity, I need the protection of constitutional rights because constitutional rights are not only for those with conventional tastes or those willing to accept the guidance of the constitution; they are also for those whose tastes are idiosyncratic and those who may be outsiders.

While I disagree with Harel's more specific argument about the importance of autonomy, I do think that he has a valid, original and important point to make about the value of rights. The entrenchment of rights does serve an important public-culture related value, but it is not the one Harel has in mind (guiding people to areas of life where autonomy is important). Rather, entrenching the conception of rights which I advocate in my book contributes to the creation of a public culture where a certain attitude towards state authority is displayed by the citizenry: an attitude that insists that actions by public authorities, to be constitutionally legitimate, must always be justifiable as a matter of substance. Put differently: a citizen who asks why she should obey a certain law or administrative decision must always be given a better reply than 'Because the state said so.' In addition to a procedural requirement for legitimate authority (someone must have issued a directive in line with certain procedures, for example a vote in parliament) there is a substantive requirement, namely that the directive in question be justifiable as a matter of substance, that is, that it be based on a reasonable specification of the spheres of autonomy of equal citizens. Citizens who understand that the law is based on this understanding of legitimate authority will take a critical attitude towards

political authorities and will insist that the authority always justify its actions (and omissions). This brings with it a number of benefits. First, it is empowering for the individual citizen who knows that he can force the authority to defend itself and justify its actions (*individual empowerment*). Second, it forces public authorities to work in a careful and coherent way if they want their decisions to stand (*good governance*). Third, it fosters a common culture that understands that political authority is based not exclusively on procedure but also on substance, and therefore directs part of the democratic discourse to a discussion focussing on the justifiability of the authority's acts (*justification-oriented discourse*). Thus, Harel is right to point out that there is more to rights than the values which they protect (such as autonomy and equality). One of the reasons supporting the legal entrenchment of constitutional rights under the global model is that such entrenchment promotes a public culture oriented towards the three values listed above.

### **III. Justification**

Porat claims that there are, structurally, two models of rights which he refers to as the outcome-based (or protected interests) model and the intent-based (or excluded reasons) model.<sup>31</sup> According to the former, what matters most is the importance of the interest at stake, whereas according to the latter, what matters most is the reason for the restriction of the right. Porat believes in the superiority of the intent-based model and relies on the Israeli *Horev* case to demonstrate his point.<sup>32</sup> In that case, the Israeli government prohibited the use of a street in Jerusalem in order to protect the religious feelings of ultra orthodox Jews living close by. Porat's argument is that those outraged by the ban did not point to the importance of the interest at stake (avoiding a short detour) but rather to the reasons for the restriction (presumably the perceived absence of a secular justification). The point can be generalised, for Porat, the argument being that focusing on the importance of the interest at stake is unhelpful and a distraction and we should instead reason about rights by focusing on the reasons for their restriction.

My reply to this criticism is that both the outcome-based and the intent-based models are deficient. Porat has demonstrated that the outcome-based model is unattractive; however, since I do not advocate that model, this is not an attack on my theory. I fully agree with his account of an important weakness of the outcome-based model: if that model were correct, then the more important an interest is to the right-holder, the more protection it receives, and

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<sup>31</sup> Porat (above n. 3), p. 8.

<sup>32</sup> Porat (above n. 3), p. 10.

this cannot be right.<sup>33</sup> If it were, then those who shout the loudest and make the greatest demands would in return get the highest protection. For example, a religion that has strong ideas about how everyone else should live and about how society should be organised would be entitled to more protection than another religion which has no such preferences and simply requires their adherents to pray and care only about their own relationship with their god; this cannot be right because it would lead to discrimination between different religious groups.

But Porat's preferred alternative, the intent-based model, is not attractive either, at least not unless one stretches the idea of excluded reasons so far that it involves at least sometimes the assessment of the weight of the respective interests. Porat is right that there are some cases which can be resolved entirely by pointing to the impermissible reasons on which the state relied. Take the example of an anti-sodomy law which is defended on the grounds of homosexuality being morally destructive to society. This case can easily be resolved without taking recourse to the importance of the interest in being free to engage in sodomy by pointing to the fact that the reason given involves moralism and is therefore not acceptable. However, I do not believe that we can resolve all constitutional rights cases in this straightforward way. Usually, when reaching the balancing stage within the proportionality assessment, the weight of the respective interests is compared. Now, as Porat notices, in my account of balancing, determining the weight of the right-holder's right requires more than just establishing the importance of the respective interest for the agent. Rather, many other considerations come into play as well.<sup>34</sup> However, in the course of determining how much weight to attach to a specific interest, the importance of the interest for the agent must always be the starting point. Even in Porat's example this is the case, even though he chose it to prove the opposite point. One possible way to defend the ban in the *Horev* case is to see it as an act of accommodation. Especially in cases involving religion we sometimes accommodate people even when this imposes an otherwise unjustifiable burden on others (for example by making an otherwise illegal drug available if used in the context of a religious ceremony). Thus, in the *Horev* case it seems to me that a judge deciding the case should ask herself whether the ultra orthodox jews' interest in 'the maintaining of a special religious atmosphere'<sup>35</sup> in their neighbourhood justifies accommodating them by closing down the street that runs through their neighbourhood, thus imposing an otherwise unjustifiable two minute detour on drivers. The balancing that is required here is not of a consequentialist kind,

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<sup>33</sup> Porat (above n. 3), p. 12.

<sup>34</sup> See GMCR, ch. 6.

<sup>35</sup> See Porat (above n. 3), Fn. 27.

and the determination of the weight that should be attached to the ultra orthodox jews' interests involves more than simply asking the question of 'how important is it to the ultra-orthodox Jews that this street be closed?'. But the crucial point is that it *also* involves asking this question because if the answer were 'not very important' then any claim to accommodation would not even get off the ground. From how Porat presents the case, the main worry about the government's decision is the fear that the respective group's agenda is to impose religious rules on more and more aspects of Israel's public life. If that is so, then this is surely also a consideration that must be taken into account in the balancing process. Thus, it is imaginable that in a different country with a different religious setup (that is, where the religious group does not have an agenda to dominate public life), accommodation of the kind that happened in the *Horev* case might be justifiable, whereas in the *Horev* case it may not have been. This, again, shows that it is not sufficient to focus exclusively on excluded reasons and to set aside categorically the necessity of recurring to the importance of certain interests.

The preferable approach is to accept that reasoning with rights has a complex structure which involves both the assessment of the importance of certain interests and the exclusion of certain reasons. This is the model that I advocate in my book. I argue that structurally, the assessment of whether an act by a public authority violates rights starts with the question of whether the right-holder's rights, understood as his autonomy interests, have been limited. If this is so, then the following question is whether this limitation is justifiable, and this depends on, in particular, whether a clash between the right-holder's interests and those of others or the public has been resolved in a reasonable way. This is, on the one hand, reasoning with *interests* (and in this sense it can be described as interest-based), and on the other hand, it will sometimes involve the exclusion of certain reasons (such as moralistic or paternalistic reasons).

Thus, it is a mistake to reduce reasoning with rights exclusively to a 'consequentialist' weighing up of interests, just as it is a mistake to reduce it to a 'deontological' act of excluding certain reasons. Reasoning with rights is deontological in nature because it is about assessing whether an act by a public authority is justifiable to the person affected by it and because this justification does not depend exclusively on outcome-based considerations (and contrary to a common misunderstanding it is not a feature of deontology that it is insensitive to consequences; all that deontology claims is that outcomes are not necessarily and in all cases the only thing that matters). But while it is deontological, it involves both outcome-

sensitive and outcome-insensitive ways of reasoning, and it involves reasoning with interests and reasoning about the acceptability of certain reasons.

Porat thinks that he has found a way around assessing the strength of certain interests by relying on the idea of indifference.<sup>36</sup> According to this approach, the government must not show indifference to the right-holder. But how can we establish the existence of an indifferent attitude? The answer must be: by asking whether the right-holder's interests have been taken into account adequately. Where the government fails to take a person's interests into account adequately, it shows indifference to him or her. But the assessment of whether the government has taken the right-holder's interests adequately into account will often require balancing and proportionality analysis. Thus, all that the indifference approach does is to put a new label on balancing and proportionality.

Take as an example the *Odievre* case,<sup>37</sup> which was about an adopted woman who claimed a right against the French government to be told the identity of her biological mother who had released her for adoption after birth. This case did not involve moralism, paternalism or any other excluded reasons; rather, the European Court of Human Rights asked itself whether France had weighed up the respective interests in an acceptable way: the identity-based interest of the applicant in finding out about her own history; the interests of the adoptive family; the interest of the biological mother in remaining anonymous; the interest of society in showing pregnant women an alternative to abortion (by making anonymous adoption available). This case seems to me to be a paradigm example of a case whose satisfactory resolution requires striking a balance between different conflicting considerations. The idea of balancing is however not available to Porat because he believes that the only legitimate way of reasoning with rights is the exclusion of certain reasons. He would therefore ask whether the French government showed indifference towards Ms Odievre. But in order to establish whether the government indeed showed such indifference, he would have to assess the balance between the interests at stake: if the refusal to release the name of her biological mother to Ms Odievre imposed a disproportionate burden on her, then it would display indifference.

To generalise the point, we cannot, as Porat claims, use the idea of indifference as a way to avoid balancing and proportionality because the establishment of whether indifference was present will involve, precisely, balancing and proportionality analysis. Thus, we cannot rely on an excluded reasons model alone unless we extend the idea of excluded reasons so far that

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<sup>36</sup> Porat (above n. 3), p. 15.

<sup>37</sup> *Odievre v. France*, (2004) 38 EHRR 43.

in substance it incorporates balancing and proportionality under the heading of an excluded reason such as 'indifference'.