Stability and Change under the Global Model of Constitutional Rights: A Reply to Vanessa MacDonnell

Kai Möller

I. Introduction

Global constitutionalism holds, broadly speaking, that there are certain moral standards relating to, in particular, democracy, the rule of law, and human rights which apply both within states and beyond the state. The task that some global constitutionalists set themselves, then, is to articulate these standards. My book *The Global Model of Constitutional Rights*[1] can be read as a contribution to this project. It starts from the observation that, by and large, the constitutional traditions of various liberal democracies around the world subscribe to a set of four structural features of constitutional rights: rights inflation; negative and positive obligations as well as social rights; vertical and horizontal effect; balancing and proportionality. The book then goes on to demonstrate that this 'global model' flows from a morally coherent theory of rights which is based on the values of freedom (autonomy) and equality. I argue that every person has a comprehensive right to autonomy; this implies that every limitation of a person's autonomy triggers the duty of justification. This justification succeeds if the policy or act in question flows from a reasonable (as opposed to the one correct) specification of the spheres of autonomy of equal citizens; proportionality and balancing are the doctrines that judges use to carry out this assessment. Thus, the global model recommends itself to countries and constitution-makers that want to adopt and protect a coherent conception of constitutional rights, and to judges who are trying to figure out how to interpret their constitutions in a way that is morally coherent.

In this essay, I want to pick up a challenge raised by Vanessa MacDonnell[2] in order to explore the question of stability and change under the global model of constitutional rights. Constitutionalism carries the promise of both stability and justice; but given that our understanding of justice evolves over time – ideally towards moral progress – there may be a tension between these two values. This (real or perceived) tension may become stronger when we take constitutionalism from the national to the global level. There are different ways of dealing with this issue. Originalism – according to which the meaning of the constitution remains stable over time and special emphasis is given to what the framers or people at the

[1] Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press, 2012; paperback 2015).

[2] Vanessa MacDonnell, 'The Reductionism of Global Models of Constitutional Rights', 2017 *Law&Ethics of Human Rights* (in this issue).

time of its adoption thought or would have thought – resolves the tension in favour of stability and at the cost of justice: what matters is the original meaning, independently of how old, unfortunate or, in light of evolving views of political morality, plainly unjust it may be. By and large, the approach that has prevailed in most of the liberal democratic world is closer to the opposite end of the spectrum: the structure of constitutional rights provisions is generally very open, and the approaches to constitutional rights interpretation that have emerged focus little on text and history and overwhelmingly on (moral) justification of state action and omission. Under the theory that I propose as a reconstruction of the global model, constitutional rights require an assessment of whether a policy or act by a public authority is based on a reasonable specification of the spheres of autonomy of equal citizens; thus, put shortly, the question is whether it is compatible with the status of the people as free and equal. Under this conception, there exists arguably a considerable lack of stability – because those factors that are often viewed as guarantors of stability, namely text and history, count for little and also because it is hard to know in advance what the outcome of a given case will be, given that the only guidance available to judges operates at a high level of abstraction –; however, the flipside is that there is a great potential for justice because the law comes fairly close to simply instructing judges to find the just solution to a question of rights.

In the debates following the publication of my book and an earlier article,[3] one criticism that was made was that my theory overemphasises justice at the cost of stability.[4] In light of this, it is refreshing that in this issue, MacDonnell accuses me of the opposite failure: she claims that my theory is incapable of capturing the drive for social change,[5] reinforces existing patterns of privilege[6] and perpetuates the exclusion of traditionally marginalised individuals and groups,[7] may deepen inequality,[8] and legitimises imperialism[9].

How can my theory be guilty of these charges? One possible answer, albeit not MacDonnell's, would be that the fault is not with the theory as such but rather with the fact that judges, who have the power of deciding how the abstract values of, in particular, freedom

[3] Kai Möller, 'Proportionality: Challenging the Critics', 10 (2012) *International Journal of Constitutional Law* 709.
[4] Francisco Urbina, '"Balancing as reasoning" and the problems of legally unaided adjudication: A reply to Kai Möller", 12 (2014) *International Journal of Constitutional Law* 214; Urbina, 'Is It Really That Easy? A Critique of Proportionality and "Balancing as Reasoning"', 27 (2014) *Canadian Journal of Law and Jurisprudence* 167; see also my '"Balancing as reasoning" and the problems of legally unaided adjudication: A rejoinder to Francisco Urbina', 12 (2014) *International Journal of Constitutional Law* 222.
[5] MacDonnell (above n 2), (10-18).
[6] Ibid., (21).
[7] Ibid., (21).
[8] Ibid. (21).
[9] Ibid., (14).

and equality ought to be interpreted, will make misguided interpretations of those values that lead to the negative outcomes that MacDonnell fears. The issue of the quality of judges is, of course, an important one, even though I should add that in my book I deliberately have not addressed it comprehensively; the book simply presents a moral theory of rights and goes no further than stating that under certain favourable conditions it is plausible to assume that judges will be capable of doing their job well.[10]

But, as I said, the concern about judges does not seem to be MacDonnell's. Rather, she argues that theories of constitutional rights ought to be concerned with 'account[ing] for the forces of social change'[11]. For example, movements for social change can sometimes influence courts deciding cases and lead to the adoption of new constitutional doctrines.[12] While she acknowledges that my theory, because of the relatively high level of abstraction at which it operates, will be able to accommodate social change quite often,[13] I understand her point to be that the fault of my theory is that it does not place the issue of social change at its very core.

In the following section I will explain why I believe that MacDonnell's criticism rests on a misunderstanding. In the third section, I will look at the issue of social change from a different angle and propose an argument about the kind of public culture that the global model envisages and may help bring about, namely one which routinely insists on reasoned justification for any political action and inaction and which therefore may deliver both change and stability.

II. Moral theories of rights, and social change

For MacDonnell, a theory of rights should be concerned with social change. It is important to note, however, that social change is not self-validating; rather, there can be change for the better or the worse. Therefore, any theory that places change front and centre would still need a moral core that explains what kind of change would be desirable or necessary. For example, I believe that the judgment of the European Court of Human Rights in *Stübing v. Germany,*[14] which held that the criminalisation of incest is compatible with the ECHR, was wrongly decided. Thus, I believe that Germany violated Patrick Stübing's human rights when it convicted and jailed him for having had sex with his sister, and I also believe that social

[10] Möller (above n 1), 126-131.
[11] MacDonnell (above n 2), (2).
[12] Ibid., (12).
[13] Ibid., (12).
[14] *Stübing v. Germany,* (2012) 55 E.H.R.R. 24.

change with regard to the criminalisation of incest is a moral necessity. However, to reach this conclusion I need to engage in moral reasoning; simply looking out for the views on incest held by Germans or Europeans or social activists would not be sufficient because the possibility exists that they are wrong. Nor would it be sufficient to point to the fact that people engaging in incest are marginalised and/or excluded from society (for example, laws against murder have the effect of marginalising and excluding murderers, but this does not make those laws problematic). The real issue is whether the laws that have the effect of contributing to their exclusion and/or marginalisation are *justifiable*, and a moral theory of rights can help structure an argument about this question. If it leads to the conclusion that no such justification exists, then a social movement and social change with regard to incest are valuable.

Maybe the root of the misunderstanding is that MacDonnell thinks that a theory of rights should take as its starting point the moral views that people in a society happen to hold at a certain moment in time and should then focus on the potential of a future change of those views. But my theory, as a moral theory, has a different focus; it is not about someone's (possibly misguided) moral *views* but about *morality* (and as such, it is inevitably aimed at social change). For example, in 1986 the U.S. Supreme Court decided in *Bowers v. Hardwick* that the prohibition of sodomy was compatible with the U.S. Constitution,[15] a decision which it reversed in 2003 in *Lawrence v. Texas*, where it explicitly acknowledged that *Bowers* had been decided wrongly.[16] A moral theory of rights has no interest in explaining this change in the jurisprudence because from a moral perspective, the prohibition of sodomy was as much a violation of rights in 1986 as in 2003. What has changed in the example is not *morality* but rather the moral *views* of people (e.g. the population, or maybe simply the views of the majority of judges). Moral theories of rights do not need to incorporate the potential for changing views in society because those views are (usually) irrelevant to what morality requires.

MacDonnell pushes her criticism further: she says that not only may there be change with regard to how rights are interpreted (which we agree my theory can accommodate, even though MacDonnell would prefer a more prominent place for it), there may and will also be challenges and eventually changes to the basic conception of rights.[17] Her example is that

[15] *Bowers v. Hardwick*, 478 U.S. 186.

[16] *Lawrence v. Texas*, 539 U.S. 558, 578: '*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.' (Kennedy J).

[17] MacDonnell (above n 2), (p. 12).

there has been a move towards the recognition of collective rights in Canada, which she believes my theory, which is about individual rights, cannot accommodate.[18]

I am happy to concede that it is a possibility that my theory of rights is morally deficient and may need updating, or that it is a possibility that it is so wrong that it needs to be replaced with a different theory. This, however, is something that all moral theories share. Let's assume that we discover the importance and centrality of, say, collective rights, and let's further assume that my theory cannot adequately explain them. The inability of my theory to make sense of a newly discovered yet central feature of rights would be a weakness in the theory, and the correct response to this weakness would be to either fix or abandon the theory. With regard to her example of collective rights, I have no ready answer but I am confident that the point of collective rights, at the end of the day, lies in the freedom and equality of individual people, and that therefore my theory, which places these values at its core, will be able to make sense of them. But be that as it may. A moral theory cannot, and would not want to, insure itself against moral progress or moral mistakes – in other words, its validity is always contingent on the moral correctness of the claims it makes.

In light of the above considerations, it is also possible to clarify a misunderstanding MacDonnell has with regard to global constitutionalism and what she calls 'global models': she claims that 'the standard for updating a global constitutional model is high. It is not enough for a major constitutional change to occur in one of the global model countries; rather, groups or interests in multiple countries must succeed in securing majority support for constitutional change before a revision of the global constitutional model would be justified.'[19] Her point seems to be that this will again slow down social change.

Partly, MacDonnell's criticism is based on her misunderstanding of my usage of the term 'global'. As I have pointed out before and am happy to repeat, I refer to my model as 'global' not because it is accepted in all or most countries (it isn't), but rather because its geographical appeal is not restricted to a certain region (such as Europe) and because it holds a broader appeal on a global scale than any rival model I am aware of.[20] Furthermore, I do not use the term 'global' in the sense of 'the model that ought to be accepted everywhere'. Rather, my 'global model' is simply a term for a globally successful practice, and my theory of the global model is simply that - an academic's theory. More specifically, it is *not* a source of law that has authority over people who reject it; rather, its only power is its convincingness. To the

[18] Ibid. (13)
[19] MacDonnell (above n 2), (p. 18).
[20] Möller (above n 1), 15-16; Möller, 'The Global Model of Constitutional Rights: A Response to Afonso da Silva, Harel, and Porat', 10 (2014) *Jerusalem Review of Legal Studies* 206, 214-15.

extent that people believe that the theory is true, they can use it as an interpretative tool when interpreting a constitution or determining the requirements of human or constitutional rights; and if they believe it does not have sufficient value, they are free to reject it and resort to another, or no, theory. And while it is admittedly difficult to change a globally successful practice (this could not be otherwise), it does not take much to 'change' the theory of rights that I claim underlies the global model: it needs only one scholar who proposes a better theory.

Maybe what MacDonnell has in mind is that once a certain way of thinking about rights has been labelled 'the global model', this may create pressure on other countries who had no voice in its creation and who may reject it. That is a conversation that should be had. At this point, I will just offer a different perspective: the fact that there is now a model that is justifiably called 'global' (because it is successful and its appeal is not geographically restricted) and that is based on a morally appealing conception of rights may encourage a new democracy to be inspired by this model and to possibly adopt some version of it, thus improving its legitimacy and respect for human rights, whereas formerly the view may have prevailed that constitutional rights are inextricably bound up with a particular national history and therefore no genuine role models could possibly exist.

III. Change and stability under the global model

I would like to conclude by offering a sketch of the relationship between change and stability which I regard as more appealing than MacDonnell's account. My theory holds that any act by a public authority which places a burden on someone's ability to live her life in accordance with her self-conception limits that person's right to autonomy and is therefore in need of a justification in terms of freedom and equality. Thus, there is no domain of politics that does not touch upon constitutional rights; in contrast to a wide-spread view according to which rights are narrowly defined and consequently many or most policies do not touch upon rights, under the global model *all* policy-making is about specifying the rights of free and equal citizens and is legitimate only when the specification chosen by the decision-maker is reasonably justifiable in terms of freedom and equality. A society that subscribes to this justification-oriented understanding of constitutional rights will therefore, over time, become a place where the citizens routinely question and challenge *all* laws and acts of public authorities; they will insist that nothing deserves being called 'law' unless it can be justified to those affected by it in terms of a plausible conception of freedom and equality; thus, they will display a healthy, critical attitude towards authority. This attitude will then inevitably

lead to considerable social change because over time, more and more laws and practices that were previously regarded as unproblematic will be scrutinised in these terms and, if found to be unjustifiable, modified. Thus, the social movement for justice that Macdonnell rightly appreciates is, for my theory, one that flows from the attitudes not of those good people who have made activism for a certain valuable cause their project but rather those of *every* citizen because the public culture insists on a reasonable justification for all laws and thus orients every citizen's political thinking towards justice. Here, then, we may have found a point where the needs for stability and change converge and the two values pull in the same direction: for a society to constantly question and, where necessary, challenge the status quo and thus embrace the possibility and necessity of change, something must remain stable, namely the stubborn democratic insistence that any state action must be reasonably justifiable to those affected by it in terms of their freedom and equality.