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How Global is Global Constitutionalism?: Comments on Kai Moller's *The Global Model of Constitutional Rights*

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1. A global model of constitutional rights

Kai Möller's *The Global Model of Constitutional Rights*[1] is an ambitious project. In this book, he aims to develop a theory of rights which could explain the main features of what he calls the "global model of constitutional rights." These main features are as follows: rights inflation, positive obligations and socioeconomic rights, horizontal effects, and balancing and proportionality.[2] According to him, despite the success of the so-called global model, especially regarding judicial practice, there is still no comprehensive theory able to explain it. Still according to him, such a comprehensive theory should be able to explain which values are protected by rights and what their limits are, as well as establish the proper relation between judicial enforcement of rights and democracy.

The main features of Möller's theory are as follows: it is a substantive, reconstructive, and general theory, in contrast to formal, normative, or particular theories. In the following sections, I will focus on the first two characteristics and attempt to analyze whether (i) his reconstructive theory can

*Professor of Law, University of São Paulo. Email: vas@usp.br. I would like to thank Alon Harel not only for the invitation to participate in the discussion of Möller's book, but also for his ability to organize a colloquium despite supposedly the heaviest snowstorm in Jerusalem in over 100 years. If the time for the colloquium had to be shorter than planned, the time for chatting in a completely white Jerusalem was longer. It was definitely a unique experience. I would also—and especially—like to thank Kai Möller. While waiting for better weather in Jerusalem, we could extensively discuss our ideas on balancing, proportionality, constitutional rights, and several other subjects in the only two or three open restaurants and cafés in town. As a happy coincidence, when I was invited to participate in the colloquium at the Hebrew University of Jerusalem, I had already chosen Kai Möller's book as the work to be discussed in my course "Readings in Constitutional Law" at the University of São Paulo. I am sure that the discussion with my students helped me to clarify, and in some cases to change, my own views on the subject. Therefore, I would like to thank all of them, but especially those who most actively took part in the debates: Artur Monteiro, Beatriz Bellintani, Beatriz Coppola, Cecilia Lima, Larissa Dahyr, Marcela Mattiuzzo, Pollyana Lima, and Saylon Pereira.

[1] Kai Möller, The Global Model of Constitutional Rights (2012).

[2] *Id.* at 2.

be substantive, and whether (ii) his substantive theory can be global. Additionally, since the proportionality test is a central feature of Möller's global model, I will also analyze one specific element of his account of this test.

My analysis is surely biased by my own *theoretical* background, as well as by the *geopolitical* status of the country and region I live in. Hence, in the following sections I will argue that a formal (or structural) model is better able to reconstruct the judicial practice of different supreme and constitutional courts than a substantial model. This, as I will explain in more detail below, is the *theoretical* background underlying my objections. The *geopolitical* variable will come into play when discussing the global character of Möller's model. I begin by considering what it means when one speaks of global constitutionalism.

2. How global is the global model?

Constitutional law has become "global." Global constitutionalism and similar expressions, like world constitutionalism or global community of courts are labels increasingly encountered in the literature.[3] However, what these labels mean is far from clear. As a matter of fact, they seem to mean several different things to different people.[4] But despite the semantic variation associated with these expressions, at least one thing seems to be constant: globe and global are terms bandied about rather loosely and freely. In almost every work that assumes the existence of global constitutionalism, the globe they refer to seems to be quite small: take 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*.

Möller stresses that *global* cannot be understood in the sense that the model "is accepted in every jurisdiction."[5] In Möller's book, global means that the *model's appeal* "is not limited to certain countries" and that "it can claim greater appeal on a global scale than any rival model."[6] Notwithstanding this clarification and limitation of the meaning of the term "global," some methodological problems still remain. How can we measure the "appeal" of a given model in the first place? And does it matter how many countries in fact adopt it (or at least some of its central features)?

[3] *See*, for instance Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72–165 (2008); Peer Zumbansen, *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order*, 1 GLOBAL CONSTITUTIONALISM 16–52 (2012); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L. J. 191–219 (2003); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VIRGINIA L. REV. 771–97 (1997).

[4] For a summary, *see* Antje Wiener et al., *Global Constitutionalism: Human Rights, Democracy and the Rule of Law*, 1 GLOBAL CONSTITUTIONALISM 1–15 (2012).

[5] MÖLLER, *supra* note 1, at 15.

[6] *Id.*

I am of course aware that it would be impossible to analyze every constitutional democracy, not to mention every country in the world. But still, the fact that almost no one goes beyond the four or five countries mentioned above is doubtlessly intriguing. And resorting to the concept of "appeal" in order to avoid this empirical issue seems to be unsound. The empirical issue is simply unavoidable. Take the example of proportionality. This is a tool that has been used by the German Constitutional Court for decades. But its qualification as the "universal criterion of constitutionality"[7] or as the "foundational element of global constitutionalism"[8] is rather recent and is based on a clear empirical assumption, namely that many courts throughout the world are using some kind of proportionality test as a decisional tool. The definition of "global" is thus necessarily an empirical issue.

Even in Möller's book, the impression that this is really an empirical issue (and not simply an issue of how broad the appeal of a model is) is everywhere. Even in his very definition of the appeal of the global model. He argues that "[i]ndicators of its dominant global appeal are, first, the convergence in the doctrinal arsenal that is employed *globally*,"[9] but here, as in the whole book, "globally" means in the jurisdiction of a few countries.[10]

There is no doubt that the judicial decisions of the constitutional or supreme courts of these few countries are highly influential. But this confirms, rather than undermines, my critique that "the globe" is made up of just a few countries. This feeling is reinforced by the fact that Möller dedicates an entire section to explain why he excludes the U.S. jurisprudence from his analysis: "the US follows a model of rights which is different from that of the *rest of the world*."[11] But there are of course many other countries that also follow a different model of rights. Why the need to explain only the absence of the United States? Why is there no explanation of the absence of France? Or Mexico? Or India? Or the Inter-American Court of Human Rights? The answer is straightforward: because the United States is part of the small world of global constitutionalism and its absence seems to establish a duty of justification.

Möller assumes that, even though he deals with the jurisprudence of only a few countries, several other constitutional or supreme courts follow the same

[7] David M. Beatty, The Ultimate Rule of Law 162 (2004).

[8] Stone Sweet & Mathews, *supra* note 3, at 160; *see* also Matthias Klatt & Moritz Meister, The Constitutional Structure of Proportionality 1 (2012).

[9] Möller, *supra* note 1, at 15 (emphasis added).

[10] The case of socioeconomic rights is exemplary. Although several constitutions have had provisions for a long time concerning socioeconomic rights (as is the case of the Brazilian constitution from 1988), sometimes it seems that the first time that this kind of rights were constitutionalized was in the 1996 South African constitution. *See id.* at 5: "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)." For an example of this late discovery of the constitutionalization of socioeconomic rights, *see* Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 Const. Forum 123–32 (2001).

[11] Möller, *supra* note 1, at 17 (emphasis added).

model of rights. And what is crucial: that even though these countries do not make up the majority of the constitutional democracies in the world, no other model appears as a rival, as already mentioned above. Yet I would not be so sure of this. As a matter of fact, it may be the case that the rival model is exactly what Möller calls "the dominant narrative," against which the global model is contrasted. According to the dominant narrative, constitutional rights cover only a limited domain, impose primarily negative obligation on the state, operate only between a citizen and her government, and enjoy a special normative force, which means that they cannot be outweighed.[12] This dominant narrative may quite well still be the dominant model in constitutional and supreme courts throughout the world. The fact that it does not attract much attention any longer, or that it is considered by many (including myself) as outdated and wrong, does not necessarily mean that it is not still widely accepted.

3. Form and substance

As I stressed in the first section, my analysis is surely biased by my theoretical background. My approach to the issue discussed here can be classified as *formal*,[13] an approach that Möller rejects in the first page of his book: "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."[14]

Möller's substantive theory is grounded in one central, substantial concept: *autonomy*. As a matter of fact, he argues that autonomy is *the* overarching value against which the legitimacy of every state action or omission should be measured.[15] I think this strategy cannot be successful, due to at least three reasons. First, because it undermines the universal character a global model must have. Second, it undermines the reconstructive character of Möller's approach. Third—and most importantly—focusing exclusively on autonomy does not sufficiently explain every aspect of constitutional rights. I argue that a formal approach is the best way of avoiding these three problems. I will develop this line of thought in the following sections.

[12] *Id.* at 2.

[13] *See*, for instance, Virgílio Afonso da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 Oxford J. Legal Stud. 273–301 (2011). *See* also Virgílio Afonso da Silva, Grundrechte und gesetzgeberische Spielräume (2003) and Virgílio Afonso da Silva, Direitos fundamentais: conteúdo essencial, restrições e eficácia (2009).

[14] Möller, *supra* note 1, at 1–2.

[15] *Id.* at 95: "any state action or omission which affects a person's ability to conduct his life according to his self-conception interferes with a constitutional right and thus triggers the duty of *justification*: to be legitimate, the state policy that denies the right-holder some element of control over his life must *take his autonomy interests adequately into account*."

3.1. Defending the formal approach

The core of the formal approach I adopt is Alexy's idea of rights as principles.[16] According to him, principles are optimization requirements, i.e. "[n]orms which require that something be realized to the greatest extent possible given the legal and factual possibilities." These legal and factual possibilities are almost never ideal, especially due to the fact that the expansive tendency of principles usually implies that the full realization of one is impaired by the realization of other principles. Principles are therefore characterized by the fact that they can be satisfied to varying degrees. There is thus a difference between what is prima facie and what is definitively protected by constitutional principles.

Although Möller rejects the formal approach, I do not think that he does so because he deems it incompatible with his own approach, but rather because: (i) he thinks that the formal approach is insufficient; and (ii) he argues that a formal model cannot justify itself without an underlying substantive value.[17] I will analyze these objections below, but it is already possible to argue that the formal approach is not really incompatible with Möller's model. Quite the contrary, his model assumes (albeit implicitly) the formal approach.[18] Therefore, the issues to be dealt with here are rather (i) the reasons why there could not be a *strictly formal* model; and (ii) whether by appending substantial reasoning he successfully fixed the alleged shortcomings of the formal approach or, on the contrary, left too many questions unanswered.

Constitutional norms may be understood as requiring that something be realized either to *some extent* or to the *greatest extent possible*.[19] A model that holds that constitutional norms require that something be realized to some definite extent necessarily needs to justify why a given norm requires that something be realized to this and not to that extent. No strictly formal model could, for instance, justify—in advance and independently from context—the view that the right to life does not protect, not even prima facie, foetuses within the first three months of pregnancy or that the right to freedom of expression does not protect, not even prima facie, hate speech. For this purpose, one needs substantive arguments.

In contrast, Alexy's theory of constitutional rights, because it does not assign any definitive content to constitutional rights, is able to remain strictly formal.

[16] *See* Robert Alexy, A Theory of Constitutional Rights 47 (Julian Rivers trans., 2002).

[17] This claim was made by Möller during the colloquium in Jerusalem (see note *). With a slightly different accent, but similar in outcome, *see* Kai Möller, *Balancing and the Structure of Constitutional Rights*, 5 Int. J. Const. L. 453–68, 461ff (2007).

[18] Some features of the formal approach are actually *explicitly* assumed, especially the difference between prima facie and definitive right and all the consequences flowing from this distinction.

[19] I am of course ruling out a third possibility, namely that they require that something be realized to no extent at all, since this would deny them the very character of a legal norm (in order to avoid misunderstandings, this is not the case of prohibitions; although the compliance with a norm that forbids that something be done occurs when this something is not done, the prohibition as such is to be fully realized).

The key to this is the concept of optimization requirements and the distinction between prima facie and definitive rights. No substantive argument is needed to claim that fundamental rights are principles and therefore norms which require that something be realized to the greatest extent possible given the legal and factual possibilities, since this formula ascribes no *definitive content* to any fundamental right. The definitive content is defined by balancing between competing principles. Admittedly, this balancing involves substantive (constitutional, moral, cultural, political, economic) arguments.[20] However, its outcome is not defined nor controlled by the formal model itself: it is context-dependent and the same principles may be weighed differently not only in different situations within the same constitutional court but also in similar situations in different constitutional courts.

Möller argues that this understanding of constitutional rights as optimization precepts is *near-banal*.[21] Though I do not think it is, this is not what is at stake here. Banal or not, it is a formal concept that is compatible with different substantive points of view, for it is not grounded in one single moral value. One of the greatest advantages of a formal approach—especially when the universal or global character of a theory is at stake—is its flexibility and adaptability vis-à-vis different substantive and moral issues. It is not the goal of a formal theory to define which value should be ranked highest in every corner of the world (no matter how wide or narrow we define world). It may work fine with constitutions as different as the Brazilian, Canadian, Indian, Japanese, or Spanish. It may also work perfectly with different supranational declarations of rights, like the European or the Inter-American. It is neutral to the diversity of cultures and moral standards of each country and region. This is one of its greatest strengths.

It may be the case that autonomy is a value that many constitutions—explicitly or implicitly—rank very high. But surely not every constitution nor every legal culture does. Autonomy may, for instance, be a central value in many western constitutions. But it may not have this centrality in some eastern constitutional democracies. A model based exclusively on autonomy cannot cope with these differences adequately, unless it demonstrates that, as a matter of fact, autonomy is ranked highest in every constitutional democracy. But, again, such a Herculean reconstructive approach would demand an empirical basis that Möller's model lacks.

3.2. The reconstructive character of the global model

What I have just argued leads necessarily to the second problem mentioned above. Möller argues that his approach is reconstructive, "which means that it

[20] *See* da Silva, *supra* note 13, at 288.
[21] *See* Möller, *supra* note 17, at 464.

is a theory of the practice of constitutional rights law around the world."[22] He contrasts this approach with a philosophical approach, which would be insensitive to 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."[23]

The question to be answered here is: how reconstructive may be a theory based on one single value like autonomy? In several parts of the book, the reader may have the impression that the approach is rather normative than reconstructive. As Möller himself points out, the practice may sometimes depart from the reconstructive theory. In this case, "this particular aspect of the practice is, all things being equal, a mistake which should be corrected."[24] There is doubtlessly a normative element here, but this normative element is different from that of a philosophical theory. A genuine reconstructive theory contains a normative element which is triggered if and only if a specific practice departs—without further qualifications—from the general practice that the theory seeks to reconstruct.

I will use two examples which for me do not fit well in a reconstructive theory. The first is related to judicial practice: the definition of the scope of rights. The second is related to the legislative or rather to the constitution-making practice: the definition of a catalog of constitutional rights.

Möller's theory is based on a very generous definition of the scope of constitutional rights. He favors a comprehensive model of the scope of rights, rejecting therefore a threshold model. In his own definition, according to the threshold model "autonomy interests will only attract constitutional protection if they cross a specific threshold of importance," whereas according to the comprehensive model he favors, "any autonomy interest, however trivial, will be sufficient."[25] In the language of the formal approach I favor, one speaks of a narrow or wide scope of rights. According to a wide model: "Everything which has at least one characteristic, which—viewed in isolation—would suffice to bring the matter within the scope of the relevant right, does so regardless of what other characteristics it has. [...] Within the semantic leeway of the concepts defining the scope, wide interpretations are to be adopted."[26]

In my opinion, the comprehensive model (Möller) or the wide scope model (Alexy) are indeed the best ways to reconstruct the case law of those courts

[22] Möller, *supra* note 1, at 20.
[23] *Id.*
[24] *Id.* at 21. It is doubtful, however, if this claim is compatible with an objection Möller had previously raised to Alexy's reconstructive approach. Möller had argued that Alexy's formal reconstruction is flawed simply because Alexy's claims are not *completely supported* by judicial practice (*see* Möller, *supra* note 17, at 467). As Möller now argues, a reconstructive model must not always be completely supported by the practice.
[25] Möller, *supra* note 1, at 74.
[26] Alexy, *supra* note 16, at 210.

which use proportionality as a means of solving conflict of rights.[27] But this is not an *empirical* assumption. As a matter of fact, I suppose that most judges in those courts which use some kind of proportionality test would not accept a very broad definition of the scope of rights. Contrary to the German Constitutional Court, I think that most courts would not accept a fundamental right to feed pigeons or to ride on the woods, not even as a prima facie right. Is this a problem for a reconstructive theory? Not necessarily. Problems arise only when the reconstructive approach assumes empirical assumptions concerning the reasons why a wide or comprehensive model is or is not adopted.

Möller is aware that many courts would not accept a fundamental right to feed pigeons or to ride in the woods. But his attempt to justify this departure from the comprehensive model is unsound. According to him, if some jurisdictions still follow a threshold model, "the best explanation for this threshold lies *not* in a morally different conception of autonomy or rights, but in a simple pragmatic consideration, namely a sense that constitutional courts should, because of their limited resources, only deal with matters of a certain *importance*."[28]

I think that here Möller departs from his own idea of a reconstructive approach. If he assumes that the comprehensive model (wide scope of rights) is the model that fits the practice better than any other model,[29] but, at the same time, many courts seem to reject this approach, then either there is a flaw with his reconstruction or, as already mentioned above, "this particular aspect of the practice is [...] a mistake which should be corrected."[30] But Möller, as mentioned above, chooses a third alternative to cope with the difference between his reconstruction and the general practice, suggesting that those courts *would actually agree* with the comprehensive model at the theoretical level, but depart from it at the practice level for pragmatic reasons. However, this assumption demands empirical evidence which Möller does not present.

The Brazilian Supreme Court, for instance, has repeatedly rejected a comprehensive model.[31] But it cannot be said that this rejection is based on pragmatic reasons. As a matter of fact, in these decisions in which a comprehensive model is rejected, one can find only theoretical, moral, and methodological justifications and no pragmatic consideration, especially those associated with

[27] This does not mean, of course, that one cannot explain the practice of these courts using a different approach. For an analysis that conciliates a narrow scope (or a threshold model) to the use of proportionality, *see*, for instance, Bodo Pieroth & Bernhard Schlink, Grundrechte - Staatsrecht II 50 (§ 195) (16th ed., 2000).

[28] Möller, *supra* note 1, at 77.

[29] Fitting the practice better than any other coherent theory is a central element of his reconstructive model (*see Id.* at 20).

[30] *Id.* at 21.

[31] *See*, for instance, MS 21.729 (opinion of Justice Sepúlveda Pertence: the right to privacy does not imply, not even prima facie, bank secrecy) or HC 82.424 (opinion of Justice Maurício Correa: freedom of expression does not protect, not even prima facie, discriminatory speech).

limited resources or workload. Additionally, since the Brazilian Supreme Court decides tens of thousands of cases on the most varied subjects every year,[32] it seems implausible to assume that pragmatic considerations have been playing any role in the definition of the court's docket. Following Möller's reasoning, a court so generous in accepting almost any kind of case would be the perfect locus for a comprehensive model. But it is not.

A second example is related to the legislative or rather to the constitution-making practice: the definition of a catalog of constitutional rights. Möller argues that, for framers of new constitutions, "the idea of a comprehensive right to personal autonomy calls into question the necessity of a set of distinct constitutional rights. Nothing would be lost in theory by simply acknowledging one comprehensive prima facie right to personal autonomy instead."[33]

Here, I do not want to analyze how convenient it is to reject a fully articulated catalog of rights, like those every constitutional democracy has.[34] My concern is rather methodological. It seems difficult to develop a reconstructive theory and, at the same time, embrace an approach which deviates completely from the constitutional practice of the last 200 years. Moreover, even those who assume the existence of a comprehensive right to autonomy—as I also do—do not necessarily assume the thesis that this right to autonomy—no matter how widely defined—is enough to ground every right we usually find in constitutional rights catalogs around the globe. This leads to the third problem I mentioned earlier: focusing exclusively on autonomy is not enough to explain every aspect of constitutional rights.

3.3. Do all roads lead to the right to autonomy?

The Brazilian constitution has an extensive catalog of fundamental rights. The core of this catalog are articles 5, 6, and 7 of the constitution. Article 5 has 78 sections, mainly with provisions related to rights to freedom; article 6 guarantees 11 socioeconomic rights; article 7 has 34 sections with the so-called worker's rights. It is of course not only a question of quantity, but it is hard to imagine each and every one of these more than 100 provisions simply as developing from the idea of personal autonomy.

[32] The Brazilian Supreme Court decided 90.014 cases in 2013. Though the great majority of them were individual decisions, plenary decisions still added up to 2.449 (source: Supremo Tribunal Federal, Relatório de atividades 2014 26–27 (2014), http://www.stf.jus.br/arquivo/cms/sobreStfConhecaStfRelatorio/anexo/relatorio2013.pdf (last accessed March 26, 2014)). Compared to other constitutional or supreme courts, and even if one considers only the plenary decisions, these numbers are extremely high.

[33] Möller, *supra* note 1, at 88.

[34] It should be stressed that Möller does not really advocate the absence of an articulated catalog of rights in new constitutions. He states that he "would still argue in favour of a well-designed list of rights" (*Id.* at 89). Nevertheless, the statement, already quoted above, that "[n]othing would be lost in theory by simply acknowledging one comprehensive prima facie right to personal autonomy" is too strong to be compatible with his reconstructive model.

But even if we set aside a constitution so generous in its rights catalog as the Brazilian, it is not hard to find examples which may undermine the all-embracing character of autonomy. Möller himself seems to identify at least one problematic example: the right to equality.[35] Even though in some points of the book equality seems to be a second central value that complements autonomy,[36] he nevertheless argues that "a separate right to equality is not needed: all cases which could be constructed as involving a violation of the right to equality will also involve a violation of the right to autonomy."[37] In order to show that this is not the case, I will use an example from Möller himself.

Möller incorporates the right to equality in his autonomy-based model by resorting to the idea of coherence: "Often, the state chooses a policy which in isolation may be justifiable but whose fault is that it treats others in similar circumstances differently. [. . .] an incoherent policy does not specify the sphere of autonomy of the affected right-holder in a reasonable way."[38] He illustrates this with an example: if a state policy bans headscarves in the public sphere, but not crucifixes, then, because of its incoherence, "it would not specify the spheres of autonomy of the affected women in a reasonable way."[39]

It seems to me that Möller's idea of coherence between spheres of autonomy is nothing more than a different name for the *duty of equal treatment* that underlies the right to equality. With the right to autonomy alone, this case could not be adequately solved. Let us suppose that instead of banning the use of headscarves in general, the state policy had only restricted its use in some specific cases. Let us also suppose that this restriction was considered proportional. In this case, one could not argue that there has been a violation of the freedom of religion and, consequently, of the right to autonomy. A proportional restriction is not a violation. However, if one assumes that wearing a Muslim headscarf and wearing a Christian crucifix are similar actions, and if wearing crucifixes was not restricted, then we have a violation of the right to equality, without having at the same time a violation of the freedom of religion and of the right to autonomy.

4. Proportionality: three or four stages?

In its original and most widespread version, the proportionality test is divided into three stages: suitability, necessity, and proportionality in the narrow sense (balancing). Möller prefers the version with a preliminary stage, the analysis

[35] *See id.* at 41–3, 123–6.
[36] *See*, for instance, *id.* at 42.
[37] *Id.* at 123.
[38] *Id.* at 125.
[39] *Id.*

of the legitimacy of the goal. However, it is not clear what this first test adds to the proportionality test as a whole.

Since Möller's theory is grounded in the widest possible concept of autonomy, which includes a right to everything, it is difficult to find a policy goal that could not be justified as legitimate under any point of view whatsoever. Admittedly, there are policies that are illegitimate. Möller presents some such examples. But in every case it seems that the definition of a policy as legitimate or illegitimate is rather the *outcome*, and not the starting point of the proportionality test. Thus, state policies that make school prayer compulsory[40] or that award to black members of a community less rights than to others[41] should be considered constitutionally impermissible because they do not pass the proportionality test, not because they are illegitimate as such.[42]

Additionally, one of the greatest appeals of proportionality as a decisional tool is its structure. Unlike other standards of interpretation, proportionality seems to provide an analytical framework that is able to translate and channel the most complex and diverse substantive assumptions on the relationship between rights into a straightforward formal structure. This advantage is also stressed by Möller: "The added value is that the proportionality test provides a structure which guides judges through the reasoning process as to whether a policy is constitutionally legitimate. It breaks down the complex question of whether a policy resolves a conflict of autonomy interests in a reasonable way into four smaller questions."[43]

However, his account of the legitimacy test completely undermines this advantage. Unlike the other tests, which may each be summarized by one single and straightforward question, the legitimacy test lacks this quality. What is being asked when we test the legitimacy of a policy? It cannot simply be "is the policy legitimate?" or "are the goals permissible?", since these questions would not add anything to the definition of legitimacy itself. Thus, if there is no well-defined question that underlies the legitimacy test, one of the most important arguments in favor of a proportionality test—its analytical strength—is simply lost. If this is so, there are only favorable arguments to prefer a three-stage test, which, after all, is the most widespread version of proportionality, as I mentioned above.

[40] MÖLLER, *supra* note 1, at 184.
[41] *Id.* at 185.
[42] This becomes even clearer when we carefully analyze the vocabulary Möller employs. For instance, when he argues: "The proper way of dealing with the problem of whether to acknowledge harm flowing from ethical dislike is straightforward: it must not be accorded *any weight* in a political community committed to personal freedom. While, to repeat, *the loss* in autonomy may be real, *the price to pay* for a commitment to freedom must be that others use their freedom in ways which one finds ethically wrong" (*Id.* at 189—emphasis added). The definition of how much weight should be accorded to this or that right, or whether the loss on one side is compensated by the gain on the other side, is the core of the balancing stage. It cannot be, at the same time, an essential part of the legitimacy test.
[43] *Id.* at 179.

5. Conclusion

I would like to conclude with a statement that may seem to be at odds with all that I have argued so far, but it is not: by and large I agree with Möller's substantive assumptions. For me, though, this is simply a coincidence and not evidence that these assumptions are correct or, what is more important, that they are globally valid. It indicates only that we both, as individuals, share common values. The central role of autonomy may sound correct to us not because it is correct, but because we share similar theoretical, cultural, and historical background, despite the fact that we are from different parts of the globe (provided that Brazil is considered part of the globe!). However, other individuals—and other constitutions and other constitutional courts—in other parts of the world, may strongly disagree with us. Does this mean that we are right and they are wrong? I do not think so. I think that this only means that the globe is quite vast and quite complex and that a single value can hardly express this complexity.

Having said this, I am convinced that, despite our specific disagreements, and especially despite the fact that I am still convinced that a formal approach to constitutional rights is the best option, Möller's theory is able to explain and justify the practice of constitutional courts of a growing number of countries. Even though I would not call it *global*, this is an outstanding achievement.