

PROPORTIONALITY AND TRANSFORMATION

This is the first book on proportionality in Latin American constitutional law. Leading scholars in the region explore how proportionality analysis has become a key part of the constitutional law of a region where, almost paradoxically, constitutions with clear transformative intentions coexist with the highest indicators of social inequality in the world. In this book, scholars, practitioners and students will find a fascinating account of how proportionality has been a central concept in Latin America's constitutional struggles to curtail excessive uses of state power. The book illustrates how, more recently, proportionality has played an important role in national processes of constitutionalization and transitional justice, and how its current uses in the domain of social rights endow it with a distinctive meaning and role in regional constitutionalism. This pioneering book opens up the space for a much needed global conversation on how Latin America has decisively contributed to comparative constitutional law.

FRANCISCA POU-GIMÉNEZ is Senior Researcher at the Institute for Legal Research of the National Autonomous University of Mexico (UNAM) and Lecturer in Law at the Autonomous Technologic Institute of Mexico (ITAM).

LAURA CLÉRICO is Professor at the University of Buenos Aires, Senior Researcher at the National Scientific and Technical Research Council of Argentina (CONICET) and Honorary Professor at the University of Erlangen-Nuremberg in Germany.

ESTEBAN RESTREPO-SALDARRIAGA is Associate Professor at the University of the Andes Law School in Bogotá, Colombia.



ASCL STUDIES IN COMPARATIVE LAW

ASCL Studies in Comparative Law publishes monographs and collections that broaden theoretical and practical knowledge of the world's many legal systems. Published under the direction of the American Society of Comparative Law, the ASCL Studies examine legal problems in a comparative light to advance legal science, develop technical insights, and promote greater cooperation across jurisdictional and cultural boundaries. This book series serves legal practitioners and those seeking to improve law and justice by publishing in-depth comparative studies of specific legal problems in every area of law.

The series has two general editors. David Gerber is Distinguished Professor of Law and Co-Director of the Program in International and Comparative Law at Chicago-Kent College of Law, Illinois Institute of Technology. He is past President of the American Society of Comparative Law. Mortimer Sellers is Regents Professor of the University System of Maryland and Director of the Baltimore Center for International and Comparative Law. He is past President of the Internationale Vereinigung für Rechts-und Sozialphilosophie.

Series Editors

David Gerber Chicago-Kent College of Law

Mortimer Sellers University of Baltimore

Editorial Board

Richard Albert University of Texas

David Clark Willamette University

Helge Dedek McGill University

James Feinerman Georgetown University

Richard Kay University of Connecticut

Maximo Langer University of California Los Angeles

Ralf Michaels Duke University

Fernanda Nicola American University

Jacqueline Ross University of Illinois

Kim Lane Scheppele Princeton University

Franz Werro Georgetown University

External Advisory Board

Josef Drexl University of Munich



Diego Fernandez Arroyo Institut d'etudes politiques de Paris

Hongjun Gao Tsinghua University

Michele Graziadei University of Turin

Ko Hasegawa University of Hokkaido

Hisashi Harata University of Tokyo

Andreas Heinemann University of Zurich

Christophe Jamin Institut d'etudes politiques de Paris

Yong-Sun Kang Yonsei University

Claudia Lima Marques Federal University of Rio Grande do Sul

Bertil Emrah Oder Koç University

Amr Shalakany American University of Cairo



Proportionality and Transformation

THEORY AND PRACTICE FROM LATIN AMERICA

Edited by

FRANCISCA POU-GIMÉNEZ

Institute for Legal Research of the National Autonomous University of Mexico

LAURA CLÉRICO

University of Buenos Aires

ESTEBAN RESTREPO-SALDARRIAGA

University of the Andes







Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA 477 Williamstown Road, Port Melbourne, VIC 3207, Australia 314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org Information on this title: www.cambridge.org/9781009201803

DOI: 10.1017/9781009201797

© Cambridge University Press & Assessment 2022

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press & Assessment.

First published 2022

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data

NAMES: Pou Giménez, Francisca, editor. | Clérico, Laura, editor. | Restrepo Saldarriaga, Esteban, editor. TITLE: Proportionality and transformation: theory and practice from Latin America / edited by Francisca Pou-Giménez, ITAM Law School; Laura Clérico, University of Buenos Aires; Esteban Restrepo-Saldarriaga, Universidad de los Andes.

DESCRIPTION: First edition. | Cambridge, United Kingdom; New York, NY: Cambridge University Press, 2022. | Series: ASCL studies in comparative law | Includes bibliographical references and index. IDENTIFIERS: LCCN 2022022840 (print) | LCCN 2022022841 (ebook) | ISBN 9781009201803 (hardback) | ISBN 9781009201797 (epub)

SUBJECTS: LCSH: Proportionality in law–Latin America. | BISAC: LAW / Comparative CLASSIFICATION: LCC KG83 .P76 2022 (print) | LCC KG83 (ebook) | DDC 342.802–dc23/eng/20220630 LC record available at https://lccn.loc.gov/2022022840 LC ebook record available at https://lccn.loc.gov/2022022841

ISBN 978-1-009-20180-3 Hardback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.



Contents

Editors		page xi
List	List of Contributors	
Ack	nowledgments	xix
	Introduction	1
	Francisca Pou-Giménez, Laura Clérico and Esteban	
	Restrepo-Saldarriaga	
	PART I PROPORTIONALITY AND PROCESSES	
	OF CONSTITUTIONALIZATION	19
1	The Standard Reasonableness Test and Proportionality in	
	Argentina: A Matter of Interactions	21
	Laura Clérico and Federico de Fazio	
2	Proportionality in the Case Law of the Constitutional Court	
	of Ecuador	41
	Daniela Salazar Marín and Ramiro Ávila Santamaría	
3	Proportionality and Human Rights in Mexico	63
	Arturo Bárcena Zubieta	
4	Proportionality and the Construction of Democracy: Notes	
	from the Peruvian Jurisprudence	88
	Pedro Grández Castro	



viii Contents

5	Proportionality in the Case Law of the Chilean Constitutional Court Verónica Undurraga and Pascual Cortés	110
	PART II PROPORTIONALITY IN SOCIAL RIGHTS AND EQUALITY-BASED ADJUDICATION	135
6	Socioeconomic Rights in the Colombian Constitutional Jurisprudence: Proportionality and the Prohibition of Regressive Measures Magdalena Correa Henao and Alejandra Osorio Alvis	137
7	Progressive Realization, Nonretrogression and Maximum of Available Resources: Agreements and Disagreements between the Inter-American Court and the United Nations ESCR Committee Julieta Rossi	161
8	The Use of Proportionality by the Inter-American Court in Equality and Nondiscrimination Cases Silvia Serrano Guzmán	185
9	Transformation and Its Limits: Proportionality, Courts and Socioeconomic Rights in Brazil Virgílio Afonso da Silva and Paula Gorzoni	205
	PART III PROPORTIONALITY, BETWEEN TRANSFORMATION AND THE STATUS QUO	221
10	Between Exception and Transition: Proportionality and Necessity in the Colombian Quest for Peace Antonio Barreto Rozo and Jorge González-Jácome	223
11	Proportionality and State Ius Puniendi Mary Beloff	2 43
12	Distributional Analysis as an Alternative to Proportionality Analysis in Judicial Decision-Making Isabel Cristina Jaramillo Sierra	265
13	Proportionality, Social Justice and Democracy Martín Aldao	278



	Contents	ix
14	Unilateralism, Dialogue and False Necessity: The Distribution of the Burden of Proof in Proportionality Analysis Francisca Pou-Giménez	2 89
	Epilogue: The Elephant in the Room Jamal Greene	309
Ind	lex	325



Editors

Francisca Pou-Giménez is Senior Researcher at the Institute for Legal Research of the National Autonomous University of Mexico (UNAM) and Lecturer at Law at ITAM Law School in Mexico. She holds a Law degree from Pomepu Fabra University, Barcelona, and a Master's and a doctoral degree from the Yale Law School. Her scholarship addresses constitutional change, judicial review and judicial institutions, Mexican and Latin American constitutionalism, rights protection, and rights doctrine, with a special focus on equality and nondiscrimination. She is currently coediting a book on constitutionalism and gender in Latin America.

Laura Clérico is Professor of Constitutional Law at the University of Buenos Aires, DAAD Professor, and Honorary Professor of Constitutional Comparative Law and Human Rights Protection at the University of Erlangen-Nuremberg, as well as Research Fellow at the National Scientific and Technical Research Council of Argentina (CONICET). She holds a law degree from the University of Buenos Aires, and Master's and doctorate degrees from the University of Kiel. She has written extensively in her main areas of interest: constitutional and human rights legal argumentation (including equality, gender and proportionality), social rights, comparative constitutional law and international human rights law.

Esteban Restrepo-Saldarriaga is Associate Professor of Law at the University of the Andes School of Law, Colombia. He holds degrees from the University of the Andes School of Law and the Yale Law School. He writes in the fields of critical theory, Latin American legal theory, law and literature, law and sexuality, and constitutional law.



Contributors

Virgílio Afonso da Silva is Professor of Law at the University of São Paulo. He holds degrees from the University of São Paulo and the University of Kiel, Germany, and has written extensively in his main areas of interest: fundamental rights, constitutional interpretation and adjudication (including proportionality), history of constitutional law, and electoral law. His book *The Constitution of Brazil: A Contextual Analysis* was published in 2019 by Hart Publishing.

Martín Aldao holds a PhD from the University of Buenos Aires, Argentina, where he is Lecturer in Public Law. He is also Research Fellow at CONICET and coordinates a legal clinic on sociourban issues at the National University of Avellaneda. Presently he leads a project that explores the role of equality in the enforcement of social rights in Argentinian judicial practice at the national and subnational levels, and has written about equality law in human rights adjudication, and social movements.

Ramiro Ávila Santamaría holds law degrees from Pontificia Universidad Católica del Ecuador and the Columbia Law School, as well as a sociology degree from the University of País Vasco, Spain. His topics of interest include legal theory, neoconstitutionalism, criminal *garantismo*, legal pluralism, indigenous justice, social rights, judicial activism and legal culture. In 2017, after teaching for several years at the Universidad Andina Simón Bolívar, he was appointed Justice of the Constitutional Court of Ecuador (2019–2022).

Arturo Bárcena Zubieta holds a PhD in law from the University of Girona, and a Master's degree in Constitutional Law from the Center for Political and Constitutional Studies, Madrid. For nine years he served as a senior law clerk at the Mexican Supreme Court, where he was later appointed General Director of Human Rights. He is currently General Director of the Mexican Federal Judicial School.



xiv

List of Contributors

Antonio Barreto Rozo is Associate Law Professor, Director of the Master's program and Head Editor of the Collection History and Materials of Law at the University of the Andes, Colombia. He holds a law degree (the University of the Andes), Master's in Philosophy (MA, The National University of Colombia), Master's in Law (LLM, Yale Law School) and doctorate in Law (JSD, Yale Law School). His academic areas of interest revolve around constitutional law, legal history and political philosophy. Among his publications stand out the books *Venturas y desventuras de la Regeneración* and La generación del estado de sitio.

Mary Beloff received her law degree and a PhD in Criminal Law from the University of Buenos Aires, Argentina, where she is Professor of Criminal Law and Procedure. She also holds a Master's in Law (LLM) from the Harvard Law School. She has served as General Prosecutor for Criminal Justice Policy, Human Rights and Community Services in Argentina since 2007. Her writings explore, among other topics, human rights law and the justification of punishment, criminal justice reform, juvenile justice, the intersections between gender and criminal justice, as well as Inter-American case law in her fields of expertise. She is currently an appointed member of the UN Committee on the Rights of the Child (2023–2027).

Magdalena Correa Henao holds degrees from the Externado University of Colombia, the University of Antwerp, Belgium, the Center of Political and Constitutional Studies, Madrid, and Carlos III University, also in Madrid. She is an expert on economic constitutional law and on the case law of the Constitutional Court of Colombia. She has been Director of the Constitutional Law Department Externado University of Colombia, Deputy Justice at the Colombian Constitutional Court, and a member of the Interdisciplinary Group of Independent Experts (GIEI) of Bolivia. She is currently Professor of Law at Externardo University of Colombia and consultant to public institutions and civil society organizations.

Pascual Cortés holds a law degree from the University of Chile and a Master's in Law (LLM) from the London School of Economics and Political Science. He has worked in human rights and public law from different venues: civil society, public service and private practice. He is Professor of Human Rights, Public Law and Policy Regulation at Adolfo Ibáñez University and O'Higgins University in Chile.

Federico De Fazio is Professor of Law at the University of Buenos Aires, Argentina, where he obtained his law degree and his doctorate degree. He has been a DAAD fellow at the Institute for Legal Philosophy and General State Theory in Erlangen-Nuremberg and a visiting researcher at University of São Paulo. His work in legal theory focuses on the application of principles and proportionality to the domain of social rights. His book *Teoría principialista de los derechos sociales* [A Principialist Theory of Social Rights] has been recently published in Spain by Marcial Pons.



List of Contributors

XV

Jorge González-Jácome is Associate Professor and PhD in Law Program Director at the University of the Andes School of Law, and Editor in Chief of the *Latin American Law Review* (LAR). He holds an SJD from Harvard University. His scholarship focuses on legal history, law and literature, human rights, and constitutional law. Two of his most recent publications are: "The War on Drugs between Exception and Legitimacy: García Márquez's News of a Kidnapping" (34 *Law and Literature* 1 [2022]) and "Reconstruction of Temporality and the Rule of Law: The Never-Ending Transition in El Secreto de sus Ojos" (8 *Critical Analysis of Law* 108 [2021]).

Paula Gorzoni holds a doctoral degree from the University of Kiel. She studied law at the University of São Paulo (Master's and Bachelor's in Laws), and has been a researcher at the University of Heidelberg, the Max Planck Institute for International Law and Comparative Public Law and the Brazilian Society of Public Law. Her research interests are in the field of fundamental rights doctrine, theory of principles and judicial interpretation. Her book on the margin of appreciation doctrine in the European Court of Human Rights (Der "margin of appreciation" beim Europäischen Gerichtshof für Menschenrechte) was published by Nomos in 2019.

Pedro Grández Castro holds degrees from Universidad Nacional Mayor de San Marcos, Lima, Pontificia Universidad Católica del Perú, Universidad de Castilla La Mancha, Spain, and Universidad de Alicante. He is Professor of Law at Università degli studi di Brescia, Italy, and a member of Research Group on Constitutional Law and Fundamental Rights at Pontificia Universidad Católica del Perú. He has written extensively on legal reasoning and constitutional interpretation.

Jamal Greene is the Dwight Professor of Law at the Columbia Law School. His scholarship focuses on the structure of legal and constitutional argument, often in comparative terms. He is the author of more than thirty law review articles and is a frequent media commentator on the Supreme Court and on constitutional law. He has served as a law clerk to the Honorable Guido Calabresi and to Justice John Paul Stevens. He has recently published *How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart* (Houghton Mifflin Harcourt, 2021).

Isabel Cristina Jaramillo Sierra holds degrees from the University of the Andes (LLB with honors, 1996) and the Harvard Law School (LLM-waived, 2000 and SJD, 2007). Educated in the critical tradition, she has studied feminist legal reform in Colombia and feminist jurisprudence in Latin America. Her recent publications in English include Trans Rights and Wrongs: A Comparative Study of the Rights of Transpersons (with Laura Carlson, coeditor) (Springer, 2021), "Sex Equality" in The Oxford Handbook of Constitutional Law in Latin America (Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi, editors) (Oxford University Press, 2022), "The Healing Power of Telling Stories? Some Unforeseen Effects of #MeToo in Colombia" in The Global #MeToo Movement (Ann Noel and David



xvi

List of Contributors

Oppenheimer, editors) (Full Court Press, 2020) and "Latin American Feminist Legal Theory: Taking Multiple Subordinations Seriously" in *Routledge Handbook on Latin American Law and Society* (Rachel Sieder, Karina Ansolabehere and Tatiana Alfonso, editors) (Routledge, 2019).

Alejandra Osorio Alvis is a researcher at the Centre for Comparative Constitutional Studies of the Academia Interamericana de Derechos Humanos in Mexico, where she is conducting a PhD in Human Rights. She holds a law degree and a Master's from Externado University of Colombia, where she was assistant researcher and a member of the Constitutional Justice group at the Constitutional Law Department. She has been a member of Observatory of Development and Social Policy (ODEPS) in Colombia. She has recently coedited the series Conflicto armado y derecho internacional humanitario: reflexiones sobre el caso colombiano (Externado University of Colombia, 2022).

Julieta Rossi is Adjunct Professor of International Human Rights Law at the University of Buenos Aires, as well as Professor, researcher and Director of the Master's Program in Human Rights at the University of Lanús. She holds degrees from the University of Buenos Aires and New York University. She is also law clerk at the National Office of the Argentine Attorney General Office in the area that intervenes before the Argentine Supreme Court. She has written extensively in the area of economic, social and cultural rights and the human rights—based approach in public policies. She has been recently appointed member of the ESCR Committee (2023–2026).

Daniela Salazar Marín is a judge of the Constitutional Court of Ecuador. She was Vice President of the Court between 2019 and 2022. She is a law professor at San Francisco de Quito University (USFQ), and served as Vice Dean at the USFQ Law School until February 2019, where she was also Codirector of the Legal Clinic. She received her law degree from USFQ and a Master's degree (LLM) from Columbia University in New York, after obtaining a Fulbright scholarship. Between 2005 and 2009, she worked as a human rights specialist for the Inter-American Commission of Human Rights, for which she received a Rómulo Gallegos scholarship.

Silvia Serrano Guzmán is Associate Director of the Health and Human Rights Initiative at the O'Neill Institute for National and Global Health Law and Adjunct Professor at Georgetown University Law Center, Washington, DC. She has Master's degrees from Georgetown University and the University of Alicante. She was an attorney at the Executive Secretariat of the Inter-American Commission on Human Rights, where she was in charge of the cases at the merits stage and before the Inter-American Court. She has extensive expertise on serious human rights violations, transitional justice, right to health, antidiscrimination law, rights of indigenous communities, rights of children and adolescents, rights of migrants, and reproductive rights.



List of Contributors

xvii

Verónica Undurraga is a graduate of the University of Chile and the Columbia Law School, and an Associate Professor at Adolfo Ibáñez University in Chile. She has written extensively on constitutional law (including proportionality), human rights and gender studies, especially sexual and reproductive rights, health, and nondiscrimination. She has been visiting instructor and scholar at the University of Toronto and advisor to several international institutions. She participates in public interest projects and belongs to several Latin American research networks.



Acknowledgments

This book is the result of more than three years of work, advanced with the supplemental difficulties brought about by the Covid pandemics. The origins of the project were informed by the discussions at a seminar about Rule of Law, Adjudication and Proportionality held at the University of the Andes School of Law in Bogotá at the end of 2018, where the editors and several of the authors were present. By mid-2019, preliminary drafts were discussed at the Faculty of Law of the University of Buenos Aires. Remaining feedback was given virtually, due to prevailing circumstances. The book was ultimately made possible by the commitment of the authors, to whom our deepest thanks go. We are also grateful with three anonymous reviewers, whose insights improved the book. We finally want to thank the directors of the ASCL collection, Mortimer Sellers and David Gerber, the president of the ASCL, Máximo Langer, and Tom Randall, Robert Judkins, Vinithan Sethumadhavan and Abigail Neale at Cambridge University Press.