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.

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Proportionality and Transformation

THEORY AND PRACTICE FROM LATIN AMERICA

Edited by

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4

Proportionality and the Construction of Democracy

Notes from the Peruvian Jurisprudence

Pedro Grández Castro

I INTRODUCTION

This chapter will explore the uses and misuses of proportionality in the judiciary during a crucial period of Peruvian democracy: the transition of the 2000s, following the collapse of the Fujimori regime. Although the gradual increase in the use of proportionality can be associated to valuable signs of progress in terms of the effectiveness of constitutional rights and the defense of democratic institutions, its expansive presence in judicial reasoning also reveals an alarming trend toward its formalistic use, which often operates not to place rights restrictions under stricter scrutiny, but rather to validate invasions and even open interferences on rights by public and private powers.

As happens in other countries, the history of the principle of proportionality in Peru is associated to the development of judicial review and the expansion of constitutionalism. In what follows, I focus on the emergence of balancing, not always explicitly, in the resolution of rights conflicts by the Constitutional Tribunal (Section II). Afterwards, after describing the process of institutionalization of proportionality in the case law, I will illustrate its multiple uses and functions (Section III), and also dysfunctions, as frequently appreciated in recent years (Section IV).

Since the Constitutional Tribunal has been the main actor behind this process, I will mainly focus on decisions by this court. However, I will also register the recurrent use of proportionality by the judiciary at large, especially when exercising decentralized judicial review of legislation, setting norms aside in specific cases,[1] in

[1] According to the Constitutional and Social Chamber of the Supreme Court,

> constitutional control entails the non-application of the rule to the particular case. Therefore, it is an unavoidable requirement to identify the fundamental rights involved in the specific case, the means used, the purpose pursued, the fundamental right intervened and the degree of intervention, in order to be able to apply the proportionality test . . . examine the legal measure, passes the suitability test (from medium to end), the

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ordinary criminal procedures, and in proceedings where the legality of preventive detention during criminal proceedings is examined.

II THE EMERGENCE OF PROPORTIONALITY ANALYSIS IN PERU

A *An Antecedent under the 1979 Constitution*

Constitutional review of legislation was created late in Peru. It was the 1979 Constitution that introduced, for the first time, a Tribunal of Constitutional Guarantees (*Tribunal de Garantías Constitucionales*, TGC), closely following the model set forth by the Spanish Constitution passed just the year before. The experience of the TGC during the 1980s was not auspicious in any sense.[2] Yet almost at the end of that inaugural cycle of constitutional justice, an important case appeared. It may be well considered the first of its kind, and it would definitely announce the arrival of balancing to constitutional reasoning.

This paradigmatic case of the early 1990s concerned the validity of the Act known as the Labor Exchange Act (*Ley de la bolsa de trabajo*). The goal of the statute was to strengthen the role of labor unions in negotiations with companies of the construction sector.[3] According to the complaint filed by the National Prosecutor, which echoed the views of the construction companies, the statute violated the companies' freedom of association and contractual freedom, in obliging them to hire a percentage of workers affiliated to the labor union. The Tribunal, however, found in favor of the validity of the Act, concluding that "far from undermining equal treatment, what it really does is to restore equal treatment, which has been lost due to the discrimination introduced by the employer."[4] The measure was a necessary element of fair compensation, a sort of positive discrimination device intending to balance and prevent discriminatory preferences or abuses in the hiring of workers.[5]

> need test (from medium to medium), and the proportionality test in the narrower sense (the greater the intensity of the intervention or affectation of fundamental right, the degree of satisfaction or optimization of the constitutional purpose must be greater).
>
> *Matthew Romel Delgado Pereda* v. *Luis Fernando Manuelo Eguavel* [2017] Corte Suprema de Justicia 1618-2016-Lima Norte [all the translations are mine].

[2] César Landa, *Tribunal Constitucional y Estado Democrático* (1st edn. Palestra 2007).

[3] Act 25202 [1990] that Creates the Labor Exchange to Fill the Job Vacancies for the Labor Personnel of the Various Categories and Specialties in the Civil Construction Works. The Act states: "Create the job bank, to promote the workplaces of workers in the various categories and specialties, in civil construction works, private, state and parastatals that will be covered by the civil construction workers' unions of the Republic, in a proportion of 25% of the total number of places required."

[4] TGC, decision of August 13, 1990.

[5] César Landa, "La sentencia del Tribunal de Garantías Constitucionales sobre la constitucionalidad de la ley de la bolsa de trabajo y los principios de igualdad y Libertad" (1991) 45 *Derecho PUCP* 433.

While the Tribunal's reasoning is not explicit in recognizing a weighting of values going on (economic freedom of the employer and the promotion of workers' rights, in connection to labor unionism), the debate that followed the decision is enlightening about the unmistakable presence of proportionality in the context of a reasoning that is symptomatic an effort to gesture toward a paradigm of social constitutionalism that would not ultimately find ways of development under the 1979 Constitution. Thus, in commenting on the ruling, Professor César Landa would remark that, when a tension between rights occurs, what must be done, rather than excluding one of them, is to integrate both. Quoting Konrad Hesse, he would state that in this kind of cases, "setting the limits must be accounted for in each specific case in terms of the principle of proportionality. A proportional relationship between the right to work and freedom of contract must therefore be established, this being an expression of the principle of constitutional unity."[6]

B *First Cases under the 1993 Constitution: Implicit Balancing or "Control of Injustices"*

The cycle of social constitutionalism that began under the 1979 Constitution came to an end with the 1992 Fujimori coup and the elaboration of a constitution promulgated in December 1993. A singular note of the new constitution was the economic regime, oriented to promote foreign investment and markets. The new economic legal framework allowed for the creation of institutions such as INDECOPI (the National Institute for the Defense of Competition and the Protection of Intellectual Property),[7] which soon became an institution for the promotion of economic freedoms that would control the performance of the state, even when acting in defense of other goods of public relevance or the common interest.

Because of this, in its first appearances under the 1993 Constitution, proportionality analysis plays a relevant role in administrative decisions. A pronouncement of the Commission of Access to the Market (CAM) of August 1997[8] may be considered the first decision that, in the administrative domain, illustrates the functions of reasonability analysis as an instrument of state control. In that case, a municipal

[6] Ibid., 447.

[7] The National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI) is a specialized public institution. It began its activities in November 1992, through Act 25868. In accordance with Article 2, "INDECOPI applies mandatory legal norms to protect: a) The market for monopolistic practices that were controlled and restrictive of competition in the production and conversion of goods and in the provision of services, as well as practices that produce unfair competition, and those that affect market agents and consumers."

[8] Decision 182-97-TDC (Record No. 036-96-CAM), published on August 20, 1997.

regulation that made it an obligation to paint cars if they were to be destined to provide transportation services as taxis was examined.[9]

The CAM decision includes two standards: (1) legality analysis and (2) "rationality" analysis, which verifies whether the measures are justified "in a public interest function under the responsibility of the administration . . ., and identifies cases where means come to be disproportionate in view of their purposes, or establish unjustified discriminations between the economic agents that concur in the market." Applying this rationality test, the CAM decision concludes that the compulsory painting of the taxis is arbitrary and does not satisfy the public interest requirement.

Almost simultaneously to the first uses by INDECOPI, proportionality appears as implicit reasoning in some decisions of the Constitutional Tribunal, which had been reestablished by the 1993 Constitution.[10] A first case addressed a complaint by the ombudsman, who was arguing that the text of Article 337 of the Civil Code violated the Constitution in stating that "abuse, serious defamation and dishonorable conduct are to be appreciated by the judge taking into account the education, customs and conduct of both spouses." The petitioner believed that those provisions discriminated against women suffering violence or mistreatment from their husbands, leaving them unprotected by giving space to sustain that those practices were associated to "education" or "customs."[11]

The Tribunal admits the existence of a conflict between "two values recognized as constitutional and legitimate: defense and preservation of the marital bond, [and] defense of some of the fundamental rights a person enjoys, married or not."[12] But the Tribunal remarks that no purpose, not even the preservation of marriage, can be justified if its attainment implies encroaching on the fundamental rights of one of the spouses, inherent to her status as a human being. The Tribunal did not engage in a structured proportionality analysis, as it would do at a later stage, but implicitly established the greater "weight" of an individual's dignity and integrity before a goal such as the preservation of marriage.

[9] On November 21, 1996, the taxi company "La Merced" claimed against the mayor and the Municipality of Trujillo for imposing "bureaucratic obstacles" that affect their permanence in the market (Act 023-96-MPT).

[10] It should be noted that the Constitutional Guarantees Court was established by the 1979 Constitution, and then replaced in the 1993 Constitution.

[11] In the summary of the ruling, it is stated that the ombudsman argued that: (1) The rule places people with low education and low economic resources in a disadvantaged situation in relation to those who do have studies or a good economic position; (2) although the purpose of preserving the marriage bond is legitimate, the restrictive regulation of divorce in the current Civil Code is a sign that there are other means that can lead to the end, without sacrificing the constitutional principle of equality; and that (3) the right to life, to physical, psychological and moral integrity as well as the right to honor and good reputation are more important than the preservation of the marriage bond.

[12] *Defensor del Pueblo* v. *Congreso de la República del Perú* [1997] Constitutional Tribunal 018-96-I/TC, para. 3.

During these initial years, the Tribunal uses proportionality in generic terms, sometimes only to justify its conclusion that a given result is unfair or arbitrary.[13] In the *Vaca Ávalos* case of 1997, the Tribunal seems to detect a case of "obvious" unfairness or disproportion that must be evaluated under substantive due process standards.[14] The case concerned an employee of the Court of Justice in La Libertad who in 1995 was given an award for his dedication. The day of the ceremony, excited by the circumstances, he gave an emotional speech that was not planned to occur in the protocol. He was suspended for eight days. Trying to justify the punishment, the president of the Court alleged that the speech did not have "the authorization of the presidency," and that the alteration of the program "caused discomfort to the judge who was to deliver the official speech."[15]

The Constitutional Tribunal declared in review that the president had not considered "the nature of the offense, the record of the employee, the absolute lack of recidivism and other elements – all of them mitigating factors – acting on a wrong and misconceived understanding of discipline, as if the judiciary was like the military; it was a distortion of the punishing power that blurs the relation between cause and effect, subverting the basic sense of justice," the Tribunal remarked before declaring the punishment invalid.[16]

These initial cases show that during the 1990s, except for what concerns the control exerted by INDECOPI over bureaucratic barriers to market access, the principle of proportionality did not develop beyond generic references to the prohibition of manifest arbitrariness or blatant injustice. Its development as a staggered method of reasoning would appear during the democratic transition, after the fall of the Fujimori regime.

C *The Institutionalization of Proportionality*

Proportionality is today, also for Peruvian law, not only a way of reasoning, but a principle of constitutional relevance. This understanding is the result of a certain standardization and of a certain degree of development that creates a minimum of

[13] Úrsula Indacochea, *Aproximación al concepto de ponderación y su aplicación por el Tribunal Constitucional peruano entre los años 1996 a 2006* (1st edn. Pontificia Universidad Católica del Perú 2006).

[14] "As well as due process is formally distorted when the rights and principles of those who are judicially, administratively or corporately prosecuted are contravened (hypothesis that, by the way, has also occurred in the present case) said attribute is equally distorted, however, in material or substantive terms, when, as in the present case, there is no coherence between the offense committed and the sanction adopted." *Juan Pedro Vaca Ávalos* v. *Presidente de la Corte Superior de Justicia de La Libertad* [1998] Constitutional Tribunal 0408-1997-AA/TC, para. 4.

[15] This is stated in the background information contained in *Vaca Ávalos*.

[16] Marcial Rubio, *La interpretación de la Constitución según el Tribunal Constitucional* (Pontificia Universidad Católica del Perú 2005) 251.

theoretical and jurisprudential consensus regarding its foundation, status, structure and the levels of rationality that can be achieved through its proper implementation.

At first, the distinction between proportionality and reasonableness[17] was not clear, and the Tribunal treated them as a homologous "conceptual pair."[18] Later on, following Manuel Atienza,[19] the Tribunal stated that a decision is reasonable if it is the result of a rational justification process. This rational procedure will be, in this case, proportionality analysis.

The incorporation of the European three-prong scheme (suitability, necessity and proportionality in the narrow sense)[20] occurred between 2003 and 2004.[21] Several cases decided at that time embrace a structure that includes a *prima face* evaluation of the legitimacy of the intervention, of the suitability of the means, and of the absence of alternatives (necessity). In the case on the Act on Land Registry (Act 27755), to promote security in land ownership, the statute had replaced the usual Public Deed by a Registry Form with signatures legalized before a notary public. The notaries challenged the Act, contending that it gave second-rate legal certainty to the property of the less well-off, discriminating against them.

The Tribunal however, considered that the statute was creating a less costly option for property holders of scarce resources, and observed that evaluation of the necessity of the measure must include evaluation of the degree of interference with the opposite principle – that is, a measure is necessary only if it is simultaneously proportional in the narrow sense. While not unreasonably disrespecting legal certainty, the statute offered an option that was proportional to the legitimate aim of having more people enjoying security in their property rights.[22]

In a case that addressed the determination of public transportation fees, the Tribunal again referred only to suitability and necessity. After entertaining doubts

[17] Úrsula Indacochea, "¿Razonabilidad, proporcionalidad o ambos? Una propuesta de delimitación de sus contenidos a partir del concepto de ponderación" (2008) 55 *Themis: Revista de Derecho* 97.

[18] See, for instance: *Colegio de Abogados del Cusco y del Callao* v. *Congreso de la República del Perú* [2005] Constitutional Tribunal 0050-2004-AI/TC, para. 109; *Colegio de Abogados del Cono Norte de Lima* v. *Congreso de la República del Perú* [2005] Constitutional Tribunal 0045-2004-AI/TC; *Gonzalo Antonio Costa Gómez y Martha Elizabeth Ojeda Dioses* v. *Alcalde de la Municipalidad Provincial de Tumbes* [2004] Constitutional Tribunal 2192-2004-AA/TC, para. 15; *César Augusto Becerra Leiva* v. *Juez del Primer Juzgado Civil de Chiclayo* [2008] Constitutional Tribunal 0579-2008-PA/TC, para. 15; among others.

[19] Manuel Atienza, "Para una razonable definición de 'razonable'" (1987) 4 *Doxa* 189.

[20] Robert Alexy, *Teoría de los derechos fundamentales* (Centro de Estudios Políticos y Constitucionales 2008) 511.

[21] *Colegio de Notarios de Junín* v. *Congreso de la República del Perú* [2003] Constitutional Tribunal 0016-2002-AI/TC; *Roberto Nesta Brero* v. *Poder Ejecutivo* [2003] Constitutional Tribunal 008-2003-AI/TC; *Jorge Power Manchego-Muñoz* v. *Congreso de la República del Perú* [2004] Constitutional Tribunal 0018-2003-AI/TC; *José Miguel Morales Dasso* v. *Congreso de la República del Perú* [2005] 0048-2004-AI/TC; among others.

[22] *Colegio de Notarios del Distrito Notarial de Lima* v. *Congreso de la República del Perú* [2003] Constitutional Tribunal 0001/0003-2003-AI/TC, para. 4.

as to the adequacy of the measure, it found necessity not satisfied, since the Executive Power had failed to explore alternative measures less invasive of free concurrence that were also compatible with the constitution.[23]

Finally, in the *PROFA* case (*Programa de Formación de Aspirantes*), where the Tribunal invalidated a statute that made entrance to the judiciary conditional on the following of a training program that was only offered in Lima, thus discriminating against residents of other cities, the Tribunal used for the first time the reasoning scheme with the three subprinciples.[24] In this case, the Tribunal also declared that reasonableness was included in the proportionality test: "the principle of proportionality contains the requirement of reasonableness, and additionally integrates the principle of proportionality in the strict sense or weighting."[25]

The process of institutionalization of proportionality also addressed the issue of its constitutional foundation. The starting point of this reconstructive task was a famous 2003 ruling examining the constitutionality of antiterrorist legislation.[26] On that occasion, based on Article 200 of the Constitution,[27] the Tribunal expanded its scope in establishing that proportionality "serves to analyze any restrictive act of a subjective attribute of the person, regardless of whether that has been declared or not."[28] This portraying of proportionality as a "general principle" is also based on the consideration that it "is derived from the rule of law clause," which, according to the Tribunal, includes "specific requirements of substantive justice" that are relevant not only for legislation, but for all sorts of public decisions.[29]

At other times, the Tribunal identified the "substantive" dimension of due process as grounds, to the extent it entails that all public decisions (included judicial ones)

[23] *Roberto Nesta Brero* v. *Poder Ejecutivo* [2003] Constitutional Tribunal 008-2003-AI/TC. The case concerned an Urgency Decree (No. 140-2001) that gave the government power to determine minimal fees for public transportation service of people and goods. The intervention on economic freedom had to be evaluated under proportionality. Protection of health and security of users, as the defense of free market concurrence were constitutionally legitimate aims, but the suitability and the necessity of fixing minimum fees had to be examined as well.

[24] The Court applied an intense scrutiny. It said that when a measure is accused of being discriminatory, the analysis must include the following steps: "a) determination of the different legislative treatment: intervention in the prohibition of discrimination; b) determination of the "intensity" of the intervention in equality; c) determination of the purpose of the different treatment (objective and purpose); d) Suitability test; e) examination of need; f) proof of proportionality in the narrower sense, or weighting," *Colegio de Abogados del Cono Norte de Lima*, para. 4.

[25] Ibid., para. 30.

[26] *Cinco mil ciudadanos* v. *Congreso de la República del Perú* [2003] Constitutional Tribunal 0010-2002-AI/TC. In this decision, the Constitutional Tribunal analyzed the antiterrorism legislation issued during the Fujimori regime in the 1990s.

[27] The last paragraph of Article 200 states: "When actions of this nature are filed [processes of habeas corpus or amparo during states of emergency] in relation to restricted or suspended rights, the competent court examines the reasonableness and proportionality of the restrictive act."

[28] *Cinco mil ciudadanos*, para. 195.

[29] Ibid., paras. 197–199.

must be reviewed not only in formal terms, but also in light of the "reasonableness and proportionality that every judge must respect under the Constitution and the laws."[30] The Tribunal has also referred to the implicit principle of "interdiction of arbitrariness in the exercise of public power" as a principle associated to reasonableness and justice, requiring that "decisions be taken in that context respond to criteria of rationality and that are not arbitrary."[31]

Finally, the Constitutional Tribunal has ultimately sought support for the principle of proportionality on the idea that human dignity and its clearest expression – all fundamental rights – do not admit arbitrary or unjustified restrictions. The Tribunal has affirmed that "any limit to fundamental rights must not exceed the 'limit of limits', that is, the principles of reasonableness and proportionality."[32] Proportionality has been considered "an essential constitutionality standard to determine the public authorities' performance, especially when it affects the exercise of fundamental rights."[33]

III THE FUNCTIONS AND USES OF PROPORTIONALITY

During the democratic transition, after the fall of Fujimori's authoritarian regime, proportionality analysis consolidated its role.[34] The following sections analyze this period and explore the variety of uses and contexts in which we find proportionality-based adjudication. Although they focus on constitutional case law, the expansion of proportionality in judicial reasoning is also visible in criminal law adjudication, where it is used, for example, when analyzing preventive detention, conflicts of rights and even claims about the "proportional" determination of punishments. Some of the uses that we will survey are clearly dysfunctional, as occurs when proportionality is applied to validate acts of power, public or private, in the course of

[30] *Compañía Cervecera Ambev Perú* v. *Corte Superior de Justicia de Lima* [2006] Constitutional Tribunal 1209-2006-AA, para. 28.

[31] Tomás Ramón Fernández, *Discrecionalidad, arbitrariedad y control jurisdiccional* (Palestra 2006) 215.

[32] *Confederación General de Trabajadores del Perú* v. *Municipalidad Metropolitana de Lima* [2005] Constitutional Tribunal 4677-2004-AA/TC, para. 28.

[33] *Colegio de Abogados del Cusco y del Callao*, para. 109.

[34] Some of the most relevant studies are: Noemí Ancí and Enrique Sotomayor, "Hacia un modelo ponderativo-especificacionista de ponderación entre principios" in *Anuarios de Investigación CICAJ 2015–2016* (Centro de Investigación, Capacitación y Asesoría Jurídica –Pontificia Universidad Católica del Perú 2016) 401–429; Miguel Carbonell and Pedro Grández, *E l principio de proporcionalidad en el Derecho contemporáneo* (Palestra 2010); Luis Castillo, "El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional peruano" (2005) 6 *Revista Peruana de Derecho Público* 127; Indacochea (n 17); José Víctor García, *El test de proporcionalidad y los derechos fundamentales* (Adrus 2012); Marcial Rubio, *El test de proporcionalidad en la jurisprudencia del Tribunal Constitucional* (Pontificia Universidad Católica del Perú 2011).

rhetorical attempts to hide their lack of justification; occasionally, it is poor methodological rigor what discredits the balancing reasoning.

In what follows, we focus on the uses and functions of proportionality associated with the strengthening of institutions and the protection of rights. Sometimes, however, this function is not fulfilled in favor of rights, but is instrumental to the purpose or interests of the person who applies the test. In Section IV we will present cases that show malfunctions or anomalies in the use of proportionality.

A *Defense of Human Dignity and Counterterrorism Legislation*

The principle of proportionality, even before attaining institutional status in the form of a three-level test, was invoked to impose limits on the counterterrorist legislation. In the memorable decision that we have already mentioned, the Tribunal established that in the sphere of action of the legislator, life imprisonment was forbidden. The Tribunal contended that "the projection of the principle of dignity implies the state obligation to take the suitable and necessary means so that the offender can be re-socialized,"[35] and made it clear that life punishment is repulsive to human nature and not justifiable under constitutional rule of law, even when a person intends to destroy or undermine life.[36] Years later, however, analyzing recidivism in terrorism cases, the Tribunal concluded that a statute that had reintroduced life imprisonment was not disproportional.[37]

Counterterrorism legislation involves complex balancing problems, in a context of high social sensitivity before events that are central in recent history. Particularly delicate are cases in which proportionality is used in abstract review. The defense of rights through a proportionality test that is too lax may obscure the always fragile line between what is constitutionally allowed and what violates rights. The *Magisterial Reform Act* case of 2012 illustrates these complexities. The statute under review provided that public school teachers who had been sentenced for terrorism or apology of terrorism, regardless of whether they had been resocialized after serving their sentence, should cease to be in public service.[38] The Tribunal approved the measure under proportionality analysis.

[35] *Cinco mil ciudadanos*, para. 187.

[36] Ibid., para. 188.

[37] *Cinco mil ciudadanos* v. *Congreso de la República del Perú* [2006] Constitutional Tribunal 003-2005-PI/TC. This case was about a constitutional control of Legislative Decree 921 that established in its Article 3: "The maximum penalty established for recidivism contemplated in article 9 of Act 25475 will be life imprisonment." After analyzing this penalty in light of the principle of proportionality with its three levels, the Tribunal concluded: "In short, the Court has the opinion that the right to freedom intervention, through article 3 of the Legislative Decree 921, does not violate the principle of proportionality, in its variant of prohibition or interdiction of excess; so that provision must be considered constitutionally legitimate," para. 74.

[38] Act 29944, Article 49: "Causes for dismissal, transgression by action or omission of the principles, duties, obligations and prohibitions in the exercise of the teaching function,

The Tribunal identified as legitimate purposes the state willingness to guarantee that only people who respect human rights, democracy and other principles are members of the public education system, to separate teachers who have been linked to terrorist activities, and to discourage the commission of crimes of terrorism, apology for terrorism, among others. All of them would be linked to the constitutional protection of the right to education.[39] The Tribunal considers the statute to be suitable, necessary and proportional in the narrow sense. With regards necessity, the Tribunal explores alternatives such as the creation of a "supervision regime" to verify whether resocialization has been completed or not, but ultimately decides that it depends on "person internal convictions," and that it would not be effective.

In actual fact, the Tribunal seems to ground its reasoning on an abstract suspicion of those convicted for terrorism or apology to terrorism – a suspicion that also affects other constitutionally protected rights like freedom of conscience or opinion. Given the dimension of the rights affectations involved, a strict scrutiny under proportionality should have left open the possibility of specific weightings in order to identify exceptional cases where the statute causes extreme injustice. One may think, for instance, about teachers convicted and then pardoned after the injustice of the sentence has been demonstrated;[40] teachers condemned by apology to terrorism that during the sentence have distanced themselves from the terrorist organization; and convicted teachers who never admitted their guilt and were given sentences in procedures that did not make room for a proper defense.

All of those cases are imaginable in view of the Peruvian context of the 1980s and 1990s. Because they are imaginable, an exercise of abstract balancing that concludes by validating the statute proves that necessity scrutiny has not been very demanding. A less restrictive strategy is possible: one in which the statute acknowledges these distinctions. In any case, if the language of the law casts suspicion on all condemned individuals, an interpretation of the law harmonic with the constitution should prevent the consummation of extreme injustices such as the ones just suggested.

considered as very serious. The following are also considered very serious offenses, subject to dismissal: c) Having been convicted of a crime against sexual freedom, apology for terrorism or a crime of terrorism and its aggravated forms."

[39] *Colegio de Profesores del Perú y ciudadanos* v. *Congreso de la República del Perú* [2014] Constitutional Tribunal 0021-2012-PI/TC, paras. 222 and 223.

[40] On August 17, 1996, Act 26655 created an ad hoc commission to recommend "pardons" to the president of the Republic, consisting of three members: the ombudsman (chair), the minister of Justice and a representative of the president of the Republic. The president at the time, Alberto Fujimori, elected as his representative Father Hubert Lanssiers, a chaplain of prisons with broad social support. More than 700 people were pardoned and the unfairness of their sentences recognized. Walter Alban, "Comisión *Ad Hoc*: Antecedentes, funciones y perspectivas" (1997) 12 *Derecho y Sociedad* 44.

B *Anticorruption Legislation*

A relevant case in the anticorruption domain during the Fujimori regime was *Chicha newspapers*, a series of flyers that were printed to revile politicians or businessmen who were critical to the regime. The newspapers owners, the Wolfenson family, were being prosecuted under a home detention mandate. As the process progressed and conviction was the most evident possibility, the family succeeded in having Congress pass a statute (called the Wolfenson Act) that gave home detention the same effective status as time in a prison.[41]

A group of Congress members challenged the law and, in spite of the fact that it was soon derogated because of public outcry against it, the Tribunal considered that it could still examine its validity and declared it constitutional. Having identified as legitimate the aim the optimization of personal freedom, the question was whether the statute was disproportional "by default or deficiency,"[42] this is, not for excess but for granting a benefit that, in violation of equality, unreasonably benefits people whose actions have caused serious damage to society. After observing that from an equality perspective, there was no "objective and reasonable basis" justifying the means, it added that "the measure empties the general preventive purpose of penalty, since it unreasonably reduces the possibility of generating a sufficient intimidation effect."[43] There was an "unjustified emptying" of the purposes of punishment.

In the fight against corruption, another area that both judges and the Constitutional Tribunal have addressed through proportionality is preventive detention of ex-politicians prosecuted for corruption. In some cases, as we will see in surveying dysfunctions, it is a tautological use that excessively formalizes the analysis; yet in others, balancing has made it possible to control the discretion of criminal judges.

The *Ollanta Humala and Nadine Heredia* case[44] of 2015 is representative.[45] According to the Constitutional Tribunal, "the use of preventive detention within the framework of the Constitutional State has a particularly serious impact on the

[41] Criminal Code, Article 47: "The time of preliminary, preventive and domiciliary detention, which the accused has suffered, will be added to the penalty imposed on the basis of one day of imprisonment for each day of detention."

[42] Regarding these issues, see Laura Clérico, "Proporcionalidad, prohibición de insuficiencia y la tesis de la alternatividad" in Gustavo Beade and Laura Clérico (eds.), *Desafíos de la ponderación* (Universidad Externado 2011) 385.

[43] *Congreso de la República* v. *Congreso de la República del Perú* [2005] Constitutional Tribunal 00019-2005-AI/TC, paras. 45 and 46.

[44] Ollanta Humala was the president of Peru from 2011 to 2016, and Nadine Heredia was his wife, the first lady. In 2017, Humala and Heredia were arrested because of their participation in the *Odebrecht case*, one of the biggest scandals of corruption in Latin America.

[45] *Ollanta Moisés Humala Tasso y de doña Nadine Heredia Alarcón* v. *Corte Superior de Justicia de Piura y Lima* [2018] Constitutional Tribunal 04780-2017-PHC/TC and STC 00502-2018-PHC/TC.

right to freedom" and therefore calls for a stricter justification.[46] In Ms. Heredia's case, the Court analyzed the proportionality of the preventive detention that criminal judges had ordered because she had allegedly "falsified her hand writing" while in a test during the prosecutor's investigation – the criminal judges considered it an "obstructionist conduct." However, the Constitutional Tribunal observed that "even though the promotion of truth-promoting conducts by defendants is a constitutionally valuable purpose, it is not clear that sending them to prison is a suitable means for attaining it (suitability sub-principle)." On these grounds, it is clear for the Tribunal that preventive detention was in the case "disproportionate and violated the fundamental right to freedom."[47]

C *Protecting Equality and Social Rights*

The expulsion of female students from military and police schools because of their pregnancy has been a practice that the Tribunal has managed to control effectively.[48] Only in the *Álvarez Villanueva* case of 2015, however, does the Tribunal incorporate proportionality analysis to control the internal regulations of the Peruvian Armed Forces.[49]

Ms. Álvarez Villanueva had been expelled from the Training School of the Peruvian Air Force due to her pregnancy. The Tribunal had precedents issued in very similar cases, but this time decided to examine the constitutionality of the background decree. The Tribunal observed right at the beginning that the statute "contributes to strengthen the historical situation of inferiority of women in social and public life, and that it affects women's rights to nondiscrimination on the grounds of sex, education and the free development of personality."[50] Despite the apparently conclusive character of these remarks, it nonetheless engages in examining the suitability and necessity of the exclusion.

On suitability, the Tribunal argues that "if the purpose is to train people in an integral manner, but specially on physical conditions, in order to contribute in the

[46] The argument strategy in constitutional jurisprudence must analyze "whether the criminal judge has acted in accordance with the exceptional, subsidiary and proportional nature of [such measure]," *Aureliano Alejo Calisaya* v. *Corte Superior de Justicia de Puno* [2016] Constitutional Tribunal 00038-2015-PHC/TC, para. 4, *Tyrone Hussein Rivas Melgar* v. *Corte Superior de Justicia de Arequipa* [2017] Constitutional Tribunal 06099-2014-PHC/TC, para. 4, *Pedro Luis Ecca Guerrero* v. *Corte Superior de Justicia de Ica* [2015] Constitutional Tribunal 05314-2013-PHC/TC, para. 8, among others.

[47] *Ollanta Moisés Humala Tasso y de doña Nadine Heredia*, para. 112.

[48] One of the first cases was resolved in 2009, *Vaca Barturen* v. *Corte Superior de Justicia de Lambayeque* [2009] Constitutional Tribunal 05527-2008-PHC/TC; *Marthyory del Rosario Pacheco Cahuana* v. *Policía Nacional del Perú* [2010] Constitutional Tribunal 01151-2010-PA/TC.

[49] *Andrea Celeste Álvarez Villanueva* v. *Ministerio de Defensa* [2014] Constitutional Tribunal 1423-2013-PA-TC. The regulations are contained in the Executive Decree 001-2010-DE/S.

[50] Ibid., paras. 36 and 37.

immediate future to the optimal functioning of the Armed Forces, whose institutional purpose is linked to national defense, a person who is pregnant probably does not achieve this task."[51] As can be seen, the Tribunal is not examining the expulsion, but the presence of the pregnant person, applying the subprinciple of suitability through a fallacy: Since a pregnant woman would not be in a position to fulfill the "institutional role," then the norm is suitable.

A more correct application of the prong would have asked whether expelling pregnant students achieves some relevant constitutional purpose. On necessity, the Tribunal suggests that a suspension is less harmful a punishment for pregnant women – an alternative whose existence would render the statute unconstitutional. The whole reasoning, however, is incongruous with the opening arguments: If women deserve equal treatment on the basis of their equal status in all dimensions, and if a pregnancy does not eliminate her conditions for any profession, then, any punishment for a pregnant woman would be unreasonable, in punishing her status as a woman. Cases like these seem to give reason to the critics that argue that proportionality test (when misused) opens a dangerous margin of appreciation, even in cases where the Constitution gives categorical answers.[52]

Along with equality, other social rights have also been subjected to proportionality analysis. An interesting case emerged from a writ of unconstitutionality filed by tobacco companies against a statute that prohibited smoking in schools, public transport and in closed places open to the public.[53] The Constitutional Tribunal based its argumentation on the theory of paternalism, and then reinforced it with balancing reasoning. Still, the coexistence between definitive answers that respond to substantive reasons and the responses that are justified through a procedural rationality raises some doubts.[54]

As Isaiah Berlin wrote, "to be deprived of my liberty at the hands of my family, friends or fellow citizens is to be deprived of it just as effectively,"[55] and this regardless of the reasons that may justify it. Yet constitutionalism places on the scales, with the same weight, goods like moral autonomy and freedom. Very often

[51] Ibid., para. 38.

[52] A critique in this regard can be seen in Grégoire Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press 2009).

[53] In the case *Colegio de Abogados de Lima Norte* v. *Congreso de la República del Perú* [2014] 0032-2010-PI: Act 28705, modified by Article 2 of Act 29517, established in Article 3 that

> 3.1 Smoking is forbidden in establishments dedicated to health or education, in public offices, in workplaces, in enclosed public spaces and in any means of public transport, which are 100% smoke-free environments; 3.2 Interiors or closed public spaces are understood as any place of work or access to the public that is covered by a roof and closed between walls, regardless of the material used for the roof and that the structure is permanent or temporary.

[54] Pedro Grández, "Paternalismo y ponderación: dos esquemas de argumentación en la jurisprudencia constitucional. Notas a la sentencia del TC en el caso de la Ley Antitabaco (STC 032-2010-AI/TC)" (2016) 11 *Cuadernos de análisis y crítica a la jurisprudencia constitucional* 127.

[55] Isaiah Berlin, *Sobre la Libertad* (Alianza 2004) 247.

the full freedom demanded by some frontally collides with the minimum well-being demanded by others. Hence, the relevance of argumentative strategies like balancing, which respond to the special "nature" of the legal positions protected by constitutional rights.

The argument from moral autonomy is therefore just one among others and must be subject to balance.[56] Perhaps because of this, the Tribunal seems to give up in its reasoning, when stating that "a paternalistic measure is justified in the Constitutional State" when "the degree of interference on freedom is minimal compared to the degree of protection it generates in terms of certain fundamental rights."[57] Yet, in this way paternalism ends up by being finally included inside the structure of balancing and can no longer be considered an autonomous substantive argument.

In the field of social rights, another right that has interacted with proportionality is the right to education. Act 29947, on the Protection of the Family Economy, prohibited private schools from conditioning the continuation of studies or the taking of examinations on payment of the monthly fees. The Tribunal confirmed the constitutionality of the statute after applying proportionality analysis.[58] For the Tribunal, the aim of the statute was to guarantee the right to education, even if it admits that the presence of institutions organized in the form of educational associations implies also a restriction to the rights of business freedom, autonomy and freedom of association. The case is interesting because the analysis concentrates on the subprinciple of proportionality in the narrow sense.

Following Alexy,[59] the Tribunal uses the triadic scale (light, moderate and severe) to "measure" both the intensity of the interference and the degree of satisfaction of the colliding principle. In this case, the Tribunal considered that the degree of affectation to business freedom, the right to associate and autonomy was light, while the degree of satisfaction of the right to education was high. Additionally, in terms of security of the empiric assumptions, the Tribunal considers that interference in business freedom and accompanying rights is real and objective, and that the satisfaction of the right to education is certain, while the fulfillment of the social goals of the measure is not evidently false. Each of these values was rigorously justified, proving that balancing may represent a useful space for the rational presentation of arguments.

[56] Douglas has written that "Once the notion of consent is omitted from the criteria and it becomes evident that the central focus is on the reasonableness of the interference, it is easier to appreciate that the attempt to employ the notion of moral autonomy as a barrier to justify paternalism is unsuccessful." See Husak Douglas, "Paternalism and Autonomy" (1981) 10 *Philosophy & Public Affairs* 35.

[57] Para. 60.

[58] *Colegio de Abogados de Lima Norte* v. *Congreso de la República del Perú* [2014] Constitutional Tribunal 0011-2013-PI-TC.

[59] Robert Alexy, *Ensayos sobre la teoría de los principios y el juicio de proporcionalidad* (Palestra 2019) 147.

The Tribunal recognizes that private education companies benefit from principles such as "self-determination" or the possibility of managing without interference in administrative and economic affairs.[60] However, it rejects the idea that students and educational organizations are bound by a contract equivalent to any sort of commercial deal.[61] The Tribunal, in sum, considers the legislation has a constitutionally relevant purpose (to guarantee a full educational service for students who have been affected by economic difficulties in the course of a specific school year),[62] and concludes that the means are not excessive or disproportionate; even though there is "a state intervention," it is one that intends to promote "competition on equal terms, because the purpose of educative companies is not for suspend students, but protect education as a constitutional right."[63]

Finally, proportionality played a role in the protection of social security. In the *Ending of the Cédula Viva Pension Plan (Act 20530)* case,[64] the Tribunal examined a legal and constitutional reform to the pension system of 1974. One of the things this reform did was to set maximum amounts for contributions, since there was a large number of people receiving exorbitant pensions, compared to a small group whose pensions were minimal. The Tribunal confirmed the constitutionality of the reform and ended the Cédula Viva Pension Plan, considering that "the intervention, in the concrete case, of the fundamental right to the pension, is constitutionally legitimate, insofar as the degree of achievement of the [constitutional] objective – justice and pension equality – is proportional to the degree of affectation of the right; likewise, because it does not empty its content."[65]

D *Restricting Business Freedom and Mass Media*

One of the constitutional issues that always generates discussion in today's democracies is the prohibition for media owners – as well as most other business sectors – to form monopolies and/or hoard information and opinion networks. The Constitutional Tribunal has addressed this matter in several decisions, among them two that are adjudicated under the principle of proportionality: case 00015-2010-PI/TC, and cases 0012-2018-PI/TC and 0013-2018-PI/TC.

In 2012, in an unconstitutionality writ against the *Radio and Television Act*, the Tribunal had to assess the proportionality of the provisions incorporated in Article 22, which considered it to be a monopolistic position to own more than 30 percent

[60] *Colegio de Abogados de Lima Norte*, para. 88.
[61] Ibid., para. 89.
[62] Ibid., para. 94.
[63] Ibid., para. 95.
[64] *Colegio de Abogados del Cusco y del Callao* v. *Congreso de la República del Perú* [2005] Constitutional Tribunal 0050-2004-AI/TC, 0051-2004-AI/TC, 004-2005-PI/TC, 007-2005-PI/TC, 009-2005-PI/TC.
[65] Ibid., para. 113.

of the technically available frequencies, assigned or not, in the same frequency band within the same location. Yet proportionality analysis was used not to analyze the reasonableness of that limitation of freedom of enterprise and free participation in economic life, but to evaluate whether the difference between the maximum established for television frequency (30 percent) and the maximum for the radio (20 percent) was justified. The Tribunal applied an equality test, and then used proportionality to weight the suitability of the means (business and market share). And considered them reasonable:

> the regulation …, is compatible with the normative content of article 61 of the Constitution, because it does not only guarantee the absence of monopolies at the media level, but it also prevents a single natural or legal person to "monopolize" the television frequencies of the same band in the same locality, controlling a significant percentage. In turn, by setting the maximum control limit at 30%, it maintains a reasonable space for free competition, encouraging different television companies to fight for the domain of the maximum legally allowed, and allowing the optimization of service quality broadcasting provided to consumers and users.[66]

Although the decision represents an advance in relation to the limitation of the "media market," until today, we do not find in the Peruvian case law an adequate account of the content of the right to the free formation of ideas, or a guarantee of an authentic informative pluralism, in relation to the real problems, which have to do with the way the mass media develop their economic activity in Peru. The way the owners of communication companies behave should be the object of deep critical analysis. Because proportionality analysis has an important potential as argumentative resource in the context of that project, the Tribunal should not miss any opportunity when mass media problems are placed again in the public debate.

An opportunity actually arose very recently, in 2018, in the so-called *Mulder Act* case. This statute included, among other provisions, a prohibition of public spending in private media, and even typified this spending as a crime. The plaintiffs argued that these provisions unreasonably affected freedom of information and freedom to contract. The Constitutional Tribunal considered that they were right: Applying the proportionality test, it declared that the decision to ban "any kind of state advertising in private media has a purpose that, although legitimate, ends up being disproportionate … Although the means have a legitimate and constitutional purpose, it is unnecessary to comply, because there are alternative measures that do not unreasonably limit the right to freedom of information."[67]

The problem in the proportionality reasoning deployed in this case is that the Tribunal, in order to balance the principles in collision on the basis of specific facts and context, reduced the examination of the purpose to only one constitutionally

[66] Para. 30

[67] *Poder Ejecutivo y congresistas* v. *Congreso de la República del Perú* [2018] Constitutional Tribunal 0012-2018-PI/TC and 0013-2018-PI/TC.

relevant aim. According to the Tribunal, the Mulder Act sought only "to optimize the criteria for efficient execution to meet the basic social needs of the Republic's budget."[68] Because of this, it was not very difficult to anticipate that the measure was bound to fail the necessity analysis, given that there are clearly several alternatives to control efficiency of public spending.

This case demonstrates how simple it can be to select the purpose of the statute in a biased manner, even if it does not coincide with the one proposed by the legislator. The *margin for the election of the aims or goals* may conflict with the legal attribution of balancing technique. Although the criminal punishment of any form of state advertising in private media is openly disproportionate, due to the fact that the use of criminal law should be an *ultima ratio* resource, it is not plausible to assume that the Mulder Law had the sole constitutional purpose of controlling the efficiency of public spending.

As the Tribunal itself points out later in the same ruling, outside proportionality reasoning, it is necessary to create "stricter controls which make it possible to analyze whether or not state advertising is being used to meet the fundamental duties of the state, and not as a perverse incentive mechanism for the media to be servile to the government, since this may lead to political subordination, with all the evils that this brings about in a democratic system."[69]

IV THE DISFUNCTIONS AND "EXCESSES" IN PROPORTIONALITY ANALYSIS

A *Contradictory Balancing*

In spite of the enthusiastic reception of balancing in the Peruvian constitutional case law, it is important to mention the permanent frustrations generated by its implementation in the hands of a Tribunal that it is neither possible nor convenient to subject to controls other than those that come from the public scrutiny of its rulings.

First of all, on some occasions, the principle of proportionality is applied without any argumentative support. The negative impact of this is that, occasionally, the Tribunal decides differently in substantially equal cases. For instance, in two identical cases of expulsion of students from higher education centers for having violated the internal regulations, the Tribunal's responses have been opposed.

In one case, the Tribunal decided on the basis of the principle of legality, without assessing the substantive proportionality of the measure. This was the *Sáenz Lumbreras* case, a woman that was expelled from an industrial training center (SENATI) for kissing her boyfriend inside the institution, a situation that was

[68] Ibid., para. 119.
[69] Ibid., para. 128.

described by the authorities as "serious misconduct,"[70] Sáenz Lumbreras claimed her right to equality and respect for the principle of legality. Yet the Tribunal justified the expulsion, precisely on the basis of the principle of legality and applying proportionality:

> The Constitutional Court considers that the sanction is not unconstitutional – even when the student considers its implementation excessive. Its imposition denotes the strict observance of the principle of legality, since the sanction was previously contemplated in the institute internal regulation.[71]

The student had challenged the degree of certainty of the internal regulation, but the Tribunal contended that, in the absence of a necessary relationship between the principle of legality and the principle of taxativity, the details in the description of the behaviors can be understood "through the basic rules of common sense, since morality is the science that deals with good in general."[72] As to the proportionality of the expulsion, in view of the student claiming that the sanction was excessive because she "[had] been performing efficiently, respectfully, complying with the payment of its ordinary fees, not having been sanctioned, nor committed any other disciplinary offense," the Tribunal said that "the expulsion . . . was the only possible sanction to be imposed."

Proportionality then is being subordinated to the principle of legality. Decisions like this seem to prove right those critics who see in balancing a discretionary tool for justifying decisions.[73] However, it is clearly an argumentation problem of the Tribunal and not of the technique itself.

In a similar case, the *Oroya Gallo* case, in which the complainant also requested his return to the university he had been expelled from for having been found using marijuana, the Tribunal, applying proportionality, took an opposite decision.[74] The problem is similar to the previous one (lack of precision in the regulation of sanctioning measures) but the Constitutional Tribunal, this time with good judgment, ordered the reinstatement of the expelled student, after considering the measure as disproportionate.

In contrast with the former case, the reasonableness of the measure was evaluated not only in formal terms, but as a consequence of the argumentative development included in the proportionality test.[75] The Tribunal said that the lack of certainty cannot be compensated for by acts exercised outside control. Because the

[70] *Sáenz Lumbreras* v. *Director Zonal Lima-Callao del SENATI* [2007] Constitutional Tribunal 01182-2005-AA, para. 17.
[71] Ibid., para. 18.
[72] Ibid., para. 15.
[73] Juan Antonio García Amado, *Ponderación judicial. Estudios críticos* (Zela 2019).
[74] *Rodolfo Luis Oroya Gallo* v. *Universidad San Ignacio de Loyola* [2009] Constitutional Tribunal 00535-2009-AA.
[75] Ibid., para. 15.

circumstances were not specifically considered in applying the internal regulation, the measure was considered to be disproportionate:

In this regard, the Tribunal considered that the imposition of sanctions, by public and private entities, cannot be a mere mechanical application of rules, but rather a reasonable assessment of the facts in each specific case must be made, considering the offender's personal background and the circumstances that surround the commission of the offence. The result of this assessment will lead to a reasonable and proportional decision.[76]

A proportionality scrutiny that develops the justification of the principles in collision represents a substantial improvement in motivation, and a greater commitment for the protection of fundamental rights.

The presence of contradictory balancing exercises, or exercises that lead to contradictory decisions exemplifies the risks that courts face when engaging in the practice of balancing. Citizens might not follow the sophisticated reasoning deployed along the application of the test, but common sense is sufficient to detect the existence of contradictory responses to substantially equal cases. When that happens, logic seemingly returns with all possible force: A correct reasoning cannot possibly have two opposite directions.

B *"Excessive" or "Unnecessary" Balancing*

In the Peruvian legal system, judges may discard directly, and at any stage of the proceedings, the application of a legal regulation if they believe it collides with the Constitution.[77] Decentralized review in Peru does not even require the opening of an incident, but proceeds at the level of interpretive reasoning. Judges can conclude that a statute is incompatible with the Constitution on the basis of an interpretation of it. In recent years, the "discovery" of proportionality became a form of reasoning that may be undermining the meaning and justification of this kind of review. The Supreme Court, through its "consultation" jurisdiction, may confirm or strike down the lower decisions where constitutional review is carried out.[78]

[76] Ibid., para. 13.

[77] According to Article 138 of the Constitution, "In any process, if there is incompatibility between a constitutional norm and a legal norm, the judges prefer the first one."

[78] Article 3 of the Constitutional Procedural Code:

> The judicial decisions adopted in application of decentralized constitutional review will be elevated in consultation to the Constitutional and Social Chamber of the Supreme Court of Justice of the Republic, if they are not appealed . . . The same will happen with appeal rulings where the same provision is applied, even if there is no channel of defense against them. In all these cases, judges limit themselves to declaring the non-application of the norm due to unconstitutional incompatibility, for the specific case, without affecting its validity, engaging in constitutional interpretation, in the form and manner provided for in the Constitution.

This is how things proceeded in a case from Arequipa where two common law partners requested the adoption of the nephew of one of them. The child had been raised by the couple since he was very young, since his mother was in difficulties and the biologic father was gone. According to the Civil Code, two persons many only adopt if they are a married couple.[79] In addressing the "consultation," the Supreme Court assumed that the statutory provision was favoring the "consolidation of family status," and allowing for "conditions of greater stability," in view of the mandate of Article 4 of the Constitution providing that "the community and the State ... also protect the family and promote marriage."[80]

Of course, this reading is significantly biased, since the Constitution protects common law or factual unions to the same degree as married ones.[81] Instead of exploring interpretative options allowing for a reasonable resolution to the case, however, the Court "creates" a normative conflict, in considering that the case "involves the rights and interests of a minor, which makes relevant the principle of the superior interest of minors"; in the presence of a conflict situation, the Court then observes that the usual strategy to solve conflicts – the proportionality test – should be applied.[82]

In applying suitability scrutiny, the Court finds that although the restriction to *common law* unions (thee court assumes the law implies such a restriction) "is intended to protect and consolidate the family status of the minor, this purpose becomes unrealizable because the norm prevents the adoption of the minor."[83] The Court concludes that "the means selected by the legislator in relation to the prohibition established, due to the case peculiarities is not suitable for the intended purpose of protection of the minor fundamental rights and the family consolidation."[84] Although the subsequent steps of reasoning are confusing and ignore the structure of the balancing,[85] the conclusion that is arrived at gives priority to the child rights. The Court says that "it is necessary to declare the nonapplication

[79] Article 382: "No one may be adopted by more than one person, except for those that are married."

[80] *Ana María Villafuerte Recavarren y Eduardo Néstor Cervantes Pinto* v. *Julissa Jesús Villafuerte Recavarren* [2014] Supreme Court 7307-2014.

[81] Article 5: "The stable union of a man and a woman, free of matrimonial impediment, that form a *de facto* home, gives rise to a community of property subject to the regime of the marital property company as applicable."

[82] *Ana María Villafuerte Recavarren y Eduardo Néstor Cervantes*, para. 6.6.

[83] Ibid., para. 8.3.

[84] Ibid., para. 8.4.

[85] The reasoning on necessity, for instance, goes like this: "the application of the rule would prevent the shelter in a family, with the stability granted by the non-dispositive nature of the institution of adoption; when the norm definitively prevents the right of the child to be adopted when at the stage of like when he is most vulnerable, the intensity of the interference is high" (para. 9.1). As far as balancing is concerned, the Supreme Court makes categorical statements, noting that "the dismissing of the demand, based on the prohibition, will in this case directly affect the child and negatively impact on his familiar stability, identity, as well as full and harmonious development of his personality" (para. 10.2).

of the norm provided in Article 382 of the Civil Code, due to constitutional incompatibility."[86]

Cases like these have been frequent in recent years at the Supreme Court[87] and also at the Constitutional Tribunal.[88] The principle of proportionality is used in these cases as a kind of excuse to exercise the power of constitutional review, disregarding the always present possibility of using other argumentative strategies to protect the goods and values involved. In the former case, it would have been enough to use reasoning by analogy[89] in order to extend the effects of the normative solution provided for in the Civil Code for married couples, even more in view of the fact the Constitution itself provides equal protection for the *de facto* unions.

V FINAL CONSIDERATIONS

In Peru, the emergence and evolution of proportionality analysis is associated to the belated development of constitutional review. In the beginning, the invocation of proportionality was made in the context of allegations of arbitrariness and "obvious" injustice; these claims led to a sort of "outcome balancing" exercises in whose context the *iter* of the reasoning is not perceptible. It can be affirmed that the subsequent institutionalization of proportionality reasoning has been possible thanks to the work of the Constitutional Tribunal, which has "popularized" it until

[86] Ibid., para. 10.5.

[87] See, for instance, Supreme Court ruling 286-2013-Arequipa, which involved the application of Article 378.2 of the Civil Code, establishing that the age of the adopter most "be at least equal to the sum of the official majority age and that of the child to adopt." In this case, the adoptee, who had been raised from the earliest days by his relative, was twelve years old, while the adopter was twenty-seven. Under the statute, the adopter should have been thirty years old, since the majority age is reached at eighteen. Again, the judges here assume that, because the rule prevents adoption, it would very intensively restrict the child's rights to have a family, thus being disproportionate in the circumstances of the case. Again, the Court "creates" conflicts that from the perspective of an "integrative" interpretation would not be so; under the latter, it would be enough to identify the underlying reason of the rule under scrutiny, and to analyze the circumstances of the case (like, for instance, the fact the adopter was the sister of the child), in the way to concluding that statutory rules like these cannot be applied without carefully accounting for the circumstances of each specific case.

[88] See, for instance, *Mauricio Gilberto Ponce Nuñez* v. *Corte Superior de Justicia de Arequipa* [2013] Constitutional Tribunal 02964-2011-PHC, which inapplies Article 423.3 of the Code of Criminal Procedure, which states that "if the appellant does not attend the meeting, without justification, the appeal will be dismissed." In this case, only his lawyer attended. The Court used proportionality and concludes that the need for the physical and personal presence of the appellant it is not necessary or indispensable, since the hearing can take place with the presence of the lawyer. In another case (*Rosa Felícita Elizabeth Martínez García* v. *Corte Superior de Justicia de Ica* [2011] Constitutional Tribunal 02132-2008-PA/TC), the Court declared inapplicable Article 2001.4 of the Civil Code, which provides, among other things, for the prescription of food debts in two years. The Court considered that this provision disproportionately restricted the child's rights. In both cases, the decision could have been justified without resort to proportionality analysis.

[89] Giovanni Tarello, *La interpretación de la ley* (Palestra 2018).

transforming it into a true standard of justification during the first years of the democratic transition, after the fall of the Fujimori regime in 2000.

Even though the expansion of the proportionality test with its four elements (identification of a legitimate purpose, suitability, necessity, and proportionality in the narrow sense) has brought about various achievements, which express themselves in terms of greater rights effectiveness and a defense of democratic institutionality, we must be alert to its constant risks and dysfunctions.

Among these risks, perhaps the greatest one is to forget that proportionality analysis must include a justification of each of the statements contained in its structure; the claim that a measure is legitimate *prima facie*, suitable in relation to certain purposes, necessary and proportional, can only amount to due justification if based on arguments and supporting evidence. Otherwise, rulings run the serious risk of endorsing an empty formula that easily opens up the possibility of falling into a "new" formalism in Peruvian courts.

It is alarming that, in recent years, proportionality analysis has been so hegemonic, to the exclusion of other reasoning methodologies, in the context of decentralized review of legislation. The pair "proportionality–decentralized review" can easily erode the legitimacy foundations of judicial review of legislation, to the extent that, under a covering of rational reasoning, judges set aside statutes whose constitutionality should be the object of a more robust debate, which deserve some deference, and that should benefit from judges doing a greater effort at using integrative techniques, conform interpretation[90] and a presumption of constitutionality.

The best evidence for the critics of balancing is a scenario where, in the same court and over a short period of time, opposite outcomes in very similar cases are reached. Here it is worth reminding the importance of precedents, which may allow not only for the universalization of specific balancing exercises, but also for the maintenance of coherence in the system under value assessments that, if a minimum of contextualized rationality is observed, should be exceedingly stable over time.

[90] See Eduardo Ferrer Mac-Gregor, "Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano" (2011) 9 (2) *Estudios Constitucionales* 531.