4-29-2008

The Tropicalization of Proportionality Balancing: The Colombian and Mexican Examples

Luisa Conesa
Columbia University, lconesa@me.com

Abstract

In "The Tropicalization of Proportionality Balancing: the Colombian and Mexican Examples" the author analyzes how the German based proportionality balancing test was exported to Latin America, by studying the Colombian Constitutional Court and the Mexican Supreme Court.

This work is guided by the following questions: what is proportionality balancing? How has it been used by the Colombian and Mexican jurisprudences and what are its influences? Do the Courts cite other jurisdictions when using the test? Have they imported a traditional European test? Or, have they "tropicalized" it?

The study of the Latin American examples leads to the conclusion that the Courts have "tropicalized" proportionality balancing. In this context, the term "tropicalization" is used to describe the fact that the Courts have made the test their own, adjusting it to their particular jurisprudence by combining elements from the original German test, the American based differentiated levels of scrutiny, and elements from their own constitutional standards.

The *Tropicalization* of Proportionality Balancing: The Colombian and Mexican Examples

INDEX

Luisa Conesa

The *Tropicalization* of Proportionality Balancing: The Colombian and Mexican Examples

Introduction

Ever since the Constitutional State replaced the Legislative model –all of which resulted in the Constitution becoming the norm that occupied the pinnacle of the legal system–, the question of "how do we interpret it?" has troubled the minds of scholars and courts alike. The issue is common to European and American styles of judicial review, because as long as there is an organ that must determine the meaning of the constitutional text, questions as to how to do so will arise.[1]

Even though the problem is similar, the method of approaching it has been different in both sides of the world. In the field of rights adjudication the American Supreme Court and the European tradition have developed differentiated techniques: the former –that normally deals with concrete review– has created an enormous amount of jurisprudence establishing an assortment of tests with varying intensities, ranging from rational basis review to strict scrutiny, while the latter has chosen a different path –particularly in the past twenty years– identified as proportionality balancing.

The method known as proportionality balancing started essentially with the German Constitutional Court –although the European Court of Human Rights also played a part– that set forth in their jurisprudence a new and innovate way to

[1] Roughly, it is possible to differentiate European and American traditions in the following terms: on one hand, European –and Latin American– countries have Constitutional or Supreme Courts, established by the Constitution itself and fashioned in the model designed by Hans Kelsen; on the other, the American style is a judicial creation born in *Marbury v Madison.*

deal with rights adjudication that has since become the common language in the field of constitutional argumentation in many parts of the world.[2]

Latin America has not been left out of the argumentative loop. Even though traditionally countries in this region have been influenced by American trends, this work deals with how proportionality has infiltrated Colombia and Mexico, aimed at identifying if the countries have imported the traditional European model, or if they have retained American influence.

The countries chosen provide the opportunity of contrasting a new Court to an old institution, each with its own argumentative style. Colombia's Court is known as possibly the most progressive in Latin America –and one of the most in the world– despite the fact it is one of the youngest ones in existence –created in 1991–. In opposition, the Mexican Supreme Court is better identified as a more traditional and mature organization, sitting before the enactment of the 1917 Constitution en force today.[3]

Our study is guided by the following questions: what is proportionality balancing? How has it been used by the Colombian and Mexican jurisprudences and what are its influences? Do the Courts cite other jurisdictions when using the test? Have they imported a traditional European test? Or have they *tropicalized* it?

By *tropicalization* I mean to ask if the Courts have made the test their own, adjusting it to their particular jurisprudence and added new or different elements from the original courts. My thesis is precisely this, that both Courts have

[2] Since proportionality balancing is a product of Europe, in general, and Germany, in particular, I will use the terminology German Test and European Test indistinctively.

[3] It is important to mention that even though the Mexican Supreme Court has well before the 1917 Constitution, the jurisprudence identified as valid is the one issued since 1917, identified as *Quinta Época* (Fifth Epoch). Another relevant note is that the Mexican Judiciary was completely restructured in 1994 though a constitutional amendment, which effectively transformed the Supreme Court into a Constitutional Court with abstract review, concrete review, and individual complaints under its jurisdiction –they are known as *acción de inconstitucionalidad, controversia constitucional,* and *amparo* respectively–.

effectively *tropicalized* proportionality balancing as they have adapted the test to their own circumstances by combining European and American elements.[4]

What is proportionality?

Proportionality balancing came to life as a tool for a new type of constitutionalism that viewed the founding document not only as a set of rules but as a richer universe that also contains principles and values, and must be interpreted accordingly.

The problems that call for its use are not the simple cases in which two rules compete against each other but rather the hard cases in which principles and values come into play that –because of their incommensurability– demand a different approach.

Robert Alexy explains that proportionality and principles are two closely related concepts:

> The nature of principles implies the principle of proportionality and vice versa. That the nature of principles implies the principle of proportionality means that the principle of proportionality with its three subprinciples of suitability, necessity (use of the least intrusive means), and proportionality on its narrow sense (that is, the balancing requirement) logically follows form the nature of principles; it can be deduced from them. The Federal Constitutional Court has stated in rather obscure terms that the principle of proportionality emerges 'basically from the nature of constitutional right themselves'.[5]

Scholars point out that the use of the word proportionality began in Europe in the late 1960s. According to Sánchez González it was the German Constitutional Court that in 1968 recognized the prohibition for excess (*Übermassverbot*) and the principle of proportionality (*Verhältnis mässigkeitsprinzip*) as rules that were applicable to all State activities deriving from the rule of law.

In the terminology that was developed, the prohibition for excess and proportionality in the broad sense were treated as equivalents, while

[4] Because the central focus of this work is proportionality and not American tests, the conceptual framework deals exclusively with the former.

[5] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS. 66 (OXFORD UNIVERSITY PRESS 2002).

proportionality in the narrow sense was the balancing requirement (*Abwägung*). The latter was introduced in the *Luth* ruling, where the Court argued that since the Constitution must be understood as dynamic whole that encompassed an objective scale of values, the interpreter had to balance them in the context of the litigation.[6]

The test is aimed at determining if the State's intervention on an individual's fundamental rights is constitutional, establishing in each case the hierarchy of the confronting principles.

As applied by the German Constitutional Court, proportionality balancing involves a three-tier test that will evaluate a State action that an individual has proved that *prima facie* constitutes a violation of his rights:

a) Suitability (*Geeignetheit*): The legislative measure or State action must be coherent with the legitimate end it was designed to achieve. In other words, if the mean is suitable to achieve the desired end, it will pass this stage. On the contrary, if the measure is not related to the end, it will be struck down.

b) Necessity (*Erforderlichkeit* or *Notwendigkeit*): The question at this point is whether the end can be equally well achieved by the use of other means less burdensome to the individual –i.e. a least restrictive means test–.

c) Proportionality in the strict sense or balancing (*Proportionalität* or *Abwägung*). The final stage of the test is to ask if even though the measure is narrowly tailored by the first two standards, it fails in terms of proportionality in the narrow sense because it infringes more on a right that it ought to in constitutional terms. This final stage is the core of the German test, what Dworkin would characterize as taking rights seriously.

For Alexy, the third sub-principle expresses the meaning of optimization relative to competing principles, that is identical with his Law of Balancing that states: the greater the degree of non satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.[7]

---

[6] Santiago Sánchez González, *De la Imponderable Ponderación y Otras Artes del Tribunal Constitucional,* TEORÍA Y REALIDAD CONSTITUCIONAL, 12, 2003 at 9, 10.
[7] *Id.* at 401.

The author further explains that while principles are optimization requirements relative to what is legally and actually possible,[8] the three subprinciples in question are not principles in that sense but actually rules, as the question is whether they are satisfied or not, and their non-satisfaction leads to illegality. He further states that while the principle of proportionality in its narrow sense follows from the fact that principles are optimization requirements relative to what is *legally* possible, those of necessity and suitability follow from what is *factually* possible.[9]

Having laid out the general structure of the German proportionality test, the next step of this work is to examine how it has been applied in Colombia and Mexico.

The Colombian Case

Proportionality balancing appeared in Colombian jurisprudence via violations on the principle of equality, and it has achieved its greatest growth on this field.

The first time the Court introduced the test was on ruling T-422/92 decided on June 19, 1992, where it had to rule on a possible violation of the right of equality in relation to the merits of the appointment of public servants. Instead of taking a traditional approach to equality, the Corporation specifically cited the doctrine of the European Court of Human Rights in arguing that not all different treatments will result in discrimination but only those that are not justifiable under constitutional terms. The relevant arguments are the following:

> Formulas for pointing out when a difference is relevant
>
> 12. The principle of equality has the characteristic of being a rule in modern constitutions, with the inclusion of modern criteria that determines specifically prohibited categories, that have lead all constitutional jurisdictions to create formulas aimed at establishing when one is facing an irrelevant difference, and thus, a discrimination. The most important are the reasonableness of the difference and the proportionality of the means incorporated in the means and ends of the norm in question.

[8] Values belong in the axiological realm, as opposed to principles that work at deontological level.
[9] *See* Alexy, *supra* note 2, at 67.

> Objective and reasonable justification
>
> 13. According to the European Court of Human Rights, not every difference is a discrimination: equality is only violated if the difference lacks an objective and reasonable justification, and the existence of such justification must be appreciated in light of the ends and the effects of the measures considered, with a reasonable relationship of proportionality between the means used and the ends desired.
>
> Reasonableness of the norm
>
> 14. The pairing of the principle of equality with the requirement of reasonableness in the difference does not solve the problem regarding which must be the criteria that the judge must choose when evaluating the work of the legislator. The constitutional judge must not only contrast his reason with the legislator, even less so when he is judging the constitutionality of a legal norm. Jurisdiction is a cultural way of producing the law; the power of the judge derives exclusively from the community and only the latter's judicial conscious allows the former to make a decision on the reasonableness of the legislator's will.
>
> Proportionality of the norm
>
> 15. On the other hand, the means chose by the legislator must not only be in proportion to the ends sought out by the norm, but must also share its legitimating. The principle of proportionality seeks not only that the measure has a legal base, but also that it is applied in such a way that the legal interests of other people or groups are not affected, or only in a minimal way. This way, the community is safeguarded against the excesses or abuses of power that would come from the indiscriminate use of the legislative power or the discretion granted to the administration.
>
> The burden of argumentation
>
> 16. The linking of the principle of equality and the prohibition of State arbitrary action necessarily supposes a procedural issue regarding who has the burden of argumentation on the reasonableness of a different treatment. If the argued inequality comes from a distinction made from the legislator, and its validity is denied, then the burden of proven the reasonableness is put upon the organ that defends the law; on the other hand, the one who questions the law for considering it ignores substantial differences, must give reasons to support his reasoning.[10]

Through this argumentation one can identify the beginning of a proportionality test strictly linked to the principle of equality. The most important elements of this elementary test are: the objective and reasonable justification, the reasonableness of the norm, its proportionality, and the burden of argumentation.

[10] Action of *tutela* number T-298, Jorge Eliecer Rangel Peña *v*. Recursos Naturales Renovables y del Ambiente, INDERENA, decided by the 7th Chamber of Revision of the Constitutional Court, 1992.

Two years after this judgment came the first appearance of what the Corporation called a "reasonableness test" in ruling T-230/94 decided on May 14, 1994. The case dealt with unions and the principle of equality and the Court's development of the test was as follows:

> 6. With the purpose of clarifying the justification of the differentiated treatment, the analysis of the norm can be phenomenologically divided into several elements. This process is known as the "reasonableness test".
>
> C. The "reasonableness test".
>
> 1. The linking between the factual differences and the "pattern of equality" must be such that the differentiated treatment is justified. To reach this end international doctrine has pointed out the following defining aspects of the justification:
>
> 1. Difference between the facts.
>
> 2. The existence of a normative purpose (end or value) in the different treatment.
>
> 3. Constitutional validity of the proposed purpose.
>
> 4. Effectiveness between facts, norm, and end.
>
> 5. Proportionality in the relationship of effectiveness.
>
> 2. The "test" has the advantage of showing the complexity of the hermeneutic judgment, separating elements that usually are left untouched in a general perspective. However, this perspective is a victim of the contrary defect that one is trying to avoid: the lack of unity. When considering each one of the 5 step is an autonomous variable, one has the impression of a purely logical and mechanical analysis that forgets the real problem of balancing that is at stake, which is no other than the reasonable interpretation.
>
> 2.1. Of the steps provided in the "test", the first, that refers to the difference in facts, more than an element of analysis in treatment is a fact that is proved empirically (inequality in the facts). The next two following elements can be joined in a single normative study related to the valid end (reasonableness) ad the justification of the decision that creates a difference. The effectiveness between the relationship of the normative means and the end or constitutional value (rationality), as well as its adjustment (proportionality) can be joined in a single moment, which is undoubtedly the decisive and most complex point.
>
> The term "proportionality" is one of relationship between objects, or part of them, quantifiable for reasons of degree, intensity, magnitude, or another purpose. The idea of adjustment, on the other hand, is broader and introduces an estimative and circumstantial connotation that is better for constitutional analysis of values. Yes, when the interpreter analyzes the whole, composed by the facts, the norm that creates a distinction, and the pattern of equality, he performs a unique act, very much like the

> circumstances he is judging. His task is not to subsume the facts in the legal norm and the former, in turn, in the constitutional norm with the purpose of verifying a logical fitting from the particular to the general. The constitutional judge is actually called upon to understand –with all the semantic force of this word– the relationship of the adjustment of the elements. It is a hermeneutical task in which the elements make up an organic whole and not just the sum of separable parts.[11]

It is evident that the Colombian Court took the application of the "reasonableness test" quite seriously. It devoted a great deal of time in explaining not just the mechanics of the test but also why it was the best way to deal with rights adjudication. It is not the case that it simply imports a model from international doctrine, but rather that it is preoccupied with justifying its new approach in balancing.

The finalized version of its method of dealing with proportionality and equality can be found in C-022/96 –a case that dealt with privileges given to students that had done military services– decided in January 23rd, 1996. In this occasion the Court devoted more analysis to the element of proportionality –as applied by the German Constitutional Court– in its own "reasonableness test". It argued:

> German scholars, studying the jurisprudence of the German Constitutional Court, have shown how the concept of reasonableness can be applied satisfactorily only if it is concretized in a more specific one, that of proportionality. The concept of proportionality is an important tool when balancing constitutional principles: when two principles collide, because the application of one implies the reduction of another's, it is the task of the constitutional judge to determine if this reduction is proportional in light of the affected principle's importance.
>
> The concept of proportionality encompasses three partial concepts: the *fitting* of the chosen means in achieving the desired end, the *necessity* of using those means to achieve the end (that there is no least restrictive means that can achieve the end and that is less intrusive to other constitutional principles) and the *proportionality in the strict sense* between means and ends, that is, that the principle that is satisfied by achieving the end does not sacrifice other more important constitutional principles.
>
> When it comes to equality, proportionality means that a differentiated treatment does not infringe on this principle if one can prove that it is 1) fitting to the achievement of a constitutionally valued end, 2) necessary, in

[11]Action of *tutela* number T-28139, Juan de Jesús Jiménez *v.* COOP-FEBOR, decided by the 3rd Chamber of Revision of the Constitutional Court, 1994.

> other words, that there is no other means that is less harmful, in terms of the sacrifice of the other constitutional principles, to achieve the end, and 3) proportionate, this is, that the differentiated treatment does not sacrifice values and principles (including equality) that have more weight that the principle that is to be satisfied by the treatment.[12]

In its jurisprudence the Colombian Court has developed a "European inspired" reasonableness test, that links equality to proportionality in the German sense. But it didn't stop there. Carlos Bernal Pulido –the author that has devoted the most time in analyzing the relationship between equality and proportionality in Colombian jurisprudence– explains that it is possible to distinguish three different types of tests in Colombian rulings: a European that is based on proportionality with equal intensity; an American that distinguished different levels of intensity, and combination of the two:

> 1. The judgment of equality as a test judgment of proportionality in the jurisprudence of the Constitutional Court
>
> A first version of the judgment of equality developed by the Constitutional Court in several rulings, adopts the basic elements of the test of equality that is applied by the European Court of Human Rights, and the Spanish and German Constitutional Courts –the former through the "new formula"–, structured through the principle of proportionality. The Court has referred to this methodology as "proportionality" and "reasonableness test", which regardless of its own terminology, as we stated in other occasions, cannot be treated as synonyms.
>
> (…)
>
> 2. The judgment of equality with three types of scrutiny
>
> According to the Constitutional Court, the second of its lines of jurisprudence on the principle of equality, "with roots in the jurisprudence of the Supreme Court of the Unites States" –takes elements from the most recent American jurisprudence related to the equal protection clause established in the 14th Amendment– "is based on the existence of different levels of scrutiny or "tests" of equality (strict, intermediate, or weak)". It's a scale of intensities on the application of the principle of equality.
>
> (…)
>
> III. The integrated equality judgment
>
> 1. The Constitutional Court's version
>
> In the ruling c-93 of 2001, the Constitutional Court tried to build an "integrated equality judgment", that combines the advantages of the

[12] Action for unconstitutionality C-022/96, made by Alvaro Montenegro García, decided by the Colombian Constitutional Court, sitting *en banque*, 1996.

> European test –structured around proportionality– with those of the American method. It was about harmonizing the analytical clarity that the proportionality test offers, with the possibility that each one of its subprinciples can be applied with a different intensity, according with the extension of the appreciation that the Legislator or the Administration has in the relevant subject.[13]

The Colombian Court has done something unique. It has, on the one hand, applied the German and the American tests to its own circumstances and, on the other, has given us an example of *tropicalization* creating a new doctrine that combines both and is a fundamental tool in its constitutional analysis.

The study of the 3rd type of Colombian test –which constitutes *tropicalization* at its best– will not be done here but rather through the Mexican example because, as we shall see, the latter adopted the test very recently and only embraced the integrated judgment of the Colombian jurisprudence, adding some elements of its own as well.

The Mexican Case

Even though the Mexican Court is older than its Colombian counterpart, its story when it comes to proportionality is very recent. It was in late 2004 when the Court began using proportionality balancing, using a "reasonableness test" –again, mainly in the field of equality– that is based on to the integrated Colombian test, but has its own particularities when it comes to varying the degree of intensity.

The Mexican interpretation of the "reasonableness test" was born in its *amparo* rulings ADR 988/2004 and AR 1629/2004. The first is a criminal case and the second a tax, but both deal with equality. They are the first two precedents that gave way to the jurisprudence titled "EQUALITY. CRITERIA FOR DETERMINING IF THE LEGISLATOR RESPECTS THIS PRINCIPLE" which presents the test in the following terms:

> Equality in our constitutional text constitutes a complex principle that not only grants people the guarantee that they will be equal to the law (in their

[13] Carlos Bernal Pulido, *El Juicio de la Igualdad en la Jurisprudencia de la Corte Constitucional Colombiana,* Universidad Externado de Colombia, 5, 8, 13, available at *http://www.cajpe.org.pe/rij/bases/nodiscriminacion/BERNAL.PDF*.

> condition of recipients of norms and users of the judicial system), but also in the law (in relation to its content). The principle of equality must be understood as the constitutional requirement to treat equals equally and unequals unequally, and because of this sometimes making distinctions is forbidden, while in others it is permitted, or even constitutionally demanded. When the Supreme Court of Justice decides a case in which the law distinguishes between two or many facts, situations, individuals or collectives. To do so, it must determine first if this distinction rests on objective and reasonable ground: the legislator cannot arbitrarily introduce differentiated treatments, but it must do so with the aim of reaching admissible ends within the limits marked by the Constitution, or clearly included in it. Secondly, it is necessary to examine the rationality or fitting of the distinction made by the legislator: it is necessary that the introduction of the difference constitutes an apt mean to achieve the end or objective, that is, that there is an instrumental relationship between ends and means. Thirdly, it must comply with the proportionality requirement: the legislator cannot try to reach legitimate constitutional objectives in an openly disproportionate manner, and because of this the judge must determine if the legislative distinction is within the measures that can be considered as proportionate, taking into account the facts, objectives, and constitutional goods affected; reaching for a constitutional objective cannot be done at the expense of an unnecessary or excessive affectation of other constitutionally protected goods and rights. Lastly, it is of great importance to determine in each case what is the equality referent, because equality is both a principle and a right of a fundamentally adjective nature that is always applied in relation to a particular situation, and this is relevant in the constitutional control of laws, because the Constitution allows the legislator in some instances more freedom to carry about his duty, while on others it requires the Judge to be specially demanding when determining if the legislator has complied with the burdens of the principle in question.[14]

Through the above mentioned jurisprudence the Mexican Supreme Court established its 3-tier reasonableness test that –when dealing with equality– will be applied in the following terms:

a) First determine if the end is objective and constitutionally admissible;

b) Second analyze the *rationality* of the measure, which translates into an instrumental relationship between means and ends;

c) And third study the *proportionality* between means and ends, determining if the quest to achieve a constitutional purpose does not translate into an unnecessary or excessive transgression of other constitutional values,

[14] IGUALDAD. CRITERIOS PARA DETERMINAR SI EL LEGISLADOR RESPETA ESE PRINCIPIO CONSTITUCIONAL, Primera Sala de la Suprema Corte de Justicia de la Nación (S.C.J.N.), Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXIV, Septiembre de 2006, Tesis 1a./J. 55/2006, 75 (Mex.).

verifying if there is a less restrictive measure that the legislator could have chosen.

After studying the Colombian jurisprudence, one can conclude that this test is almost identical to their integrated test. It is important to distinguish an important difference: the Mexican variation stops short of the "proportionality in the strict sense" component, setting the highest bar in the least restrictive means test, which leads to striking down far less legislation and state action.

In adding its own touch of *tropicalization*, the Mexican Court created another jurisprudence titled "EQUALITY. CASES IN WHICH THE CONSTITUTIONAL JUDGE MUST USE STRICT SCRUTINY IN JUDGING LEGISLATIVE CLASSIFICATIONS (INTERPRETATION OF ARTICLE 1 OF THE MEXICAN CONSTITUTION)", aimed at establishing varying degrees of scrutiny, in line of the Colombian integrated test, but modifying it in light of the particularities of Article 1 of the Mexican Constitution:

> (…) Article 1 of the Federal Constitution establishes several cases in which strict scrutiny is called for. In its first paragraph, it proclaims that all individuals must enjoy all the guarantees the text grants, which cannot be qualified or suspended but in the cases and conditions the text established, which evidences the constitutional desire to ensure in the broadest terms the enjoyment of fundamental rights, and that their limitations are few, according to the exceptional characteristic the Constitution points out. Because of this, whenever a classification done by the legislator infringes on fundamental rights, it will be necessary to apply with strict scrutiny the requirements derived from the principles equality and non-discrimination. In turn, its third paragraph shows the will of the legislator to extend the guarantee of equality to fields that are broader than the constitutional scope, as it prohibits the legislator to incur in acts of discrimination regarding ethnicity, nationality, gender, age, disabilities of any kind, social status, health, religion, opinion, preference, or civil status, or any other that goes against human dignity and has the object of annulling or transgressing the rights and liberties of the people. The Constitutional intention is, therefore, to extend the implicit guarantees in the equality principle to the field of legislative action that have a significant impact in liberty and human dignity, as well as those that relate to the series of suspect classification visible in paragraph three, without implying that the legislator is absolutely forgiven to use said categories, but only that he must be very careful in doing so. In those cases, the

> constitutional judge must analyze the legislator's work under strict scrutiny, through the looking glass of the equality principle.[15]

The interpretation of Article 1 of the Mexican Constitution allowed the Court to build a standard for strict scrutiny while applying the reasonableness test.[16] Later, it also developed a standard for a weaker scrutiny –closer to American rational basis review– in the economic field, through the jurisprudence titled "CONSTITUTIONAL ANALYSIS. ITS INTENSITY IN LIGHT OF THE DEMOCRATIC PRINCIPLE AND THE SEPARATION OF POWERS":

> According to the reasons exposed by this Chamber in the jurisprudence titled ""EQUALITY. CASES IN WHICH THE CONSTITUTIONAL JUDGE MUST USE STRICT SCRUTINY IN JUDGING LEGISLATIVE CLASSIFICATIONS (INTERPRETATION OF ARTICLE 1 OF THE MEXICAN CONSTITUTION)", whenever the classification done by the legislator transgresses on fundamental rights, it will be necessary to apply strict scrutiny in accordance to the requirements of the equality principle and non-discrimination. In a similar manner, in those cases in which the constitutional text limits the discretion of Congress or the Executive, the intervention and control of the constitutional court must be greater, in order to respect the design established for these purposes. It is clear that the normative force of the democratic principle and separation of powers brings the consequence that other State organs –amongst them, the constitutional judge–, must respect the liberty of configuration bested upon Congress and the Executive, according to their own powers. Accordingly, the severity of constitutional control is inversely related with the degree of liberty of configuration given to the creators of the norm. In

---

[15] IGUALDAD. CASOS EN LOS QUE EL JUEZ CONSTITUCIONAL DEBE HACER UN ESCRUTINIO ESTRICTO DE LAS CLASIFICACIONES LEGISLATIVAS (INTERPRETACIÓN DEL ARTÍCULO 1o. DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS). Pleno de la Suprema Corte de Justicia de la Nación (S.C.J.N), Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XX, Diciembre de 2004, tesis 1a. CXXXIII/2004, 361 (Mex).

[16] The text of Article 1 is as follows:

Article 1

In the Mexican United States all individuals shall be entitled to the privileges and immunities granted by this Constitution. Such privileges and immunities shall not be restricted or suspended, but in the cases and under the conditions established by this Constitution itself.

Slavery shall be forbidden in Mexico. Every individual who is considered as a slave at a foreign country shall be freed and protected under the law by just entering national territory.

Discrimination based on ethnical or national origin as well as discrimination based on gender, age, disabilities of any kind, social status, health condition, religious opinions, preferences of any kind, civil status or on any other reason which attempts against human dignity and which is directed to either cancel or restrain the individuals' privileges and immunities, shall be prohibited.

> this way, it is evident that the Constitution requires a modulation of the reasonableness test, which in no way implies that the Court is renouncing the exercise of its powers. To the contrary, in the case of the legislation concerning economic or tax matters, as a general rule, the intensity of constitutional analysis must not be strict, with the object of respecting the political liberty of the legislator in fields like the economic, where the Constitution itself establishes a wide capacity of intervention and regulation in favor of the State, considering that, when the constitutional text grants the State a margin of discretion it means that the possibility of action in favor of the constitutional judge is narrower and, accordingly, the intensity of control is weakened. In those fields, a very strict control would lead the constitutional judge to substitute itself in the legislative power –or the extraordinary capacities given to the Executive–, because it is not the work of the judiciary, but of the political bodies, to analyze if the economic classification are the best or if they are necessary.[17]

Through the abovementioned jurisprudences the Mexican Supreme Court has built its particular scheme of proportionality, through a mix of the integrated Colombian test and its own Constitutional mandates.

The finalized version can be explained in the following terms: there are two opposite sides of constitutional control, strict scrutiny on one hand –which the Court also refers to as "super motivation"– and weak scrutiny –that the Court calls "legislative deference" and would best be identified with American rational basis review– on the other. The reasonableness test will vary in light of the subject in accordance to those categories.

Defining what level of scrutiny should be applied is part of the constitutional analysis process, just like the reasonableness test. The steps that the Mexican Court will take in said process –when it comes to the principle of equality, which has the most development in Mexican jurisprudence– can be explained by the subsequent series of questions:

1. Has the plaintiff argued a case based on the principle of equality?
2. Has the plaintiff given the *tertium comparationis* –a basis for comparison– and the defendant supported the burden of proof?

[17] ANÁLISIS CONSTITUCIONAL. SU INTENSIDAD A LA LUZ DE LOS PRINCIPIOS DEMOCRÁTICO Y DE DIVISIÓN DE PODERES. Primera Sala de la Suprema Corte de Justicia de la Nación (S.C.J.N), Semanario Judicial de la Federación y su Gaceta, tomo XXIV, Noviembre de 2006, Tesis 1a./J. 84/2006, 29 (Mex.).

3. Is the *tertium comparationis* within the scope of the principle of equality?
4. Is the differentiated treatment based on suspect classification? If the answer is positive, it will lead to strict scrutiny in the reasonableness test.
5. If it is not a suspect classification, then what is the level of intensity must be applied? If it is an economic matter, the test will be weaker, similar to a type of rational basis review. It is also possible to acknowledge the possibility of an intermediate review based on other categories.
6. Is the differentiated treatment justified? This is the application of the 3-tier reasonableness test.

For example, in the case of a criminal disposition –that inflicts a person's fundamental right to liberty– the judge can ask if the road chosen by the legislator was the most suitable means to achieve the desired end, whereas in the tax subject the Court must stay one step back, and only ask if there isn't an unnecessary violation of other rights, but not striking down legislation because the legislator didn't choose another road that that the Court might have considered better.

In short, the Mexican Court will only apply strict scrutiny –which, as mentioned, stops at the least restrictive means test and doesn't go as far as proportionality in the strict sense– in the extraordinary cases when the Constitution itself calls for it. Seeing as economic and tax petitions constitute the majority of work for this Court, striking down a law based on strict scrutiny will be rare occurrence.

Conclusion: the *Tropicalization* of Proportionality Balancing

After having reviewed the way the Colombian and Mexican Courts deal with rights adjucation through their particular versions of proportionality balancing, one cannot help but conclude that they have *tropicalized* the

European tests, adding elements from their own constitutional orders and American jurisprudence to finally create their own standards.

On one hand, the Colombian Court got a head start on the Mexican and was more explicit in citing comparative law. First, they adopted the German test with proportionality in the strict sense, and then used the American versions as far varying degrees of scrutiny, finally creating an integrated test that combined the two.

On the other hand, the Mexican Court in recent years adopted the Colombian model –without explicitly saying so– but decided to modify the varying degrees of scrutiny in relation to its reading of the Mexican Constitution, stopping at the least restrictive means level. In the end, they created standards for what American scholars would call rational basis review and strict scrutiny, in combination with the German test.

In a final word I would like to emphasize the fact that *tropicalization* is not a pejorative attribute, but rather the process of explaining how constitutional control is part of a global community in which doctrines are easily exported and adapted to best fit the needs of each jurisdiction.