***Pou-Giménez, Francisca, Clérico, Laura, Restrepo-Saldarriaga, Esteban* (eds.): Proportionality and Transformation. Theory and Practice from Latin America.** Cambridge: Cambridge University Press 2022. ISBN 978-1-009-20180-3. xix, 376 pp. £95.00 (hardback)

The dominant narrative in the international discourse on proportionality assumes that proportionality originated in 19th century Prussian administrative law and was picked up by the German Federal Constitutional Court after the second World War. From there, it proliferated across the globe.[1] The book *Proportionality and Transformation* that was edited by three leading Latin American constitutionalists, Francisca Pou-Giménez, Laura Clérico and Esteban Restrepo-Saldarriaga, wants to challenge this narrative. The editors intend to enrich the international debate, showcasing the Latin American experience, and highlight that the Latin American use of proportionality has its own idiosyncrasies (pp. 3-4). The result is a welcome addition to the global debate. The book covers a region which is underrepresented in the English-speaking discourse and is another proof that the widespread adoption of proportionality does not necessarily lead to a "global model"[2] of constitutional rights.[3]

This case is made most elegantly by Laura Clérico and Federico De Fazio in their chapter on proportionality in Argentina. The authors show that the idea of proportionality emerged in Argentinian jurisprudence in the form of a reasonableness test in the first half of the 20th century. This test combined a suitability assessment and a balancing test (p. 22). In its later case law, the Argentine Supreme Court was influenced both by the German Federal Constitutional Court as well as the United States (US) Supreme Court. However, it did not replace its own doctrines with the ideas of the latter courts, but rather used them to shape the doctrine, while keeping the original core.

Other chapters illustrate the development of the proportionality doctrine in Ecuador, Mexico, Peru, and Chile. For example, Daniela Salazar-Marín and Ramiro Ávila Santamaría provide a rich description of the Ecuadorian experience. They refer to the influence of Robert Alexy (p. 46) and make a detailed and thorough systematisation of the use of proportionality in the case law of the Ecuadorian Constitutional Court. However, not all Latin American jurisdictions have wholeheartedly adopted the proportionality test.

1 Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism', Colum. J. Transnat'l L. 47 (2008), 68-149 (73).

2 Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press 2012).

3 See Jacco Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge: Cambridge University Press 2013).

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Virgílio Afonso da Silva and Paula Gorzoni show for the Brazilian Supremo Tribunal Federal that proportionality considerations can only be found in opinions of individual judges. However, as there has never been a majority of judges basing their opinion on proportionality, it is difficult to say that the Supreme Court as such has adopted proportionality as a fundamental rights doctrine.

Some chapters go beyond the discussion of the practice of different Latin American courts. For example, Francisca Pou-Giménez has included a thought-provoking piece on the observation that many courts do not discuss the question of who bears the burden of proof and justification in proportionality cases. In his excellent epilogue, Jamal Greene contrasts the Latin American with the US experience, asking why civil law jurisdictions in Latin America have adopted the flexible proportionality approach, while the US Supreme Court as a common-law court has favoured a more categorical approach. Greene argues that the resistance in the US to proportionality ultimately boils down to latent anti-egalitarian sentiments in the Supreme Court after Nixon provided the Court with a conservative majority. He observes that anti-egalitarian effects were easier to defend using categorical doctrines without having to reveal the real, anti-egalitarian motives (pp. 319-323).

However, despite the richness of some of the individual accounts of the different proportionality experiences, the reader is left to wonder whether there are specific Latin American characteristics to these experiences. Some chapters describe an interesting fusion of elements of the German and the US fundamental rights doctrines (e. g. Argentina, Mexico, Colombia). However, this is nothing that is unique to Latin America, but can also be found in other jurisdictions with a strong exposure to both German and the US legal culture, such as, e.g. Taiwan.[4]

Another feature particular to the region seems to be the presence of proportionality in the realm of social rights. There is some evidence for the use of proportionality in this context. This contrasts with some other jurisdictions, such as South Africa or Germany, in which proportionality plays a prominent role, but has not been employed in the area of social rights.[5] The use of proportionality in the context of social rights can, in particular, be observed in Colombia. Magdalena Correa Henao and Alejandra Osorio Alvis show how proportionality has been incorporated into the integrated regres-

4 See Chin-Chie Lin, 'Proportionality in Taiwan: American-German Fusion' in: Po-Jen Yap (ed.), *Proportionality in Asia* (Cambridge: Cambridge University Press 2020), 60-80.

5 See Niels Petersen, *Proportionality and Judicial Activism* (Cambridge: Cambridge University Press 2017), 145-146 for Germany; David Bilchitz, *Poverty and Fundamental Rights* (Oxford: Oxford University Press 2007), 135-177 for South Africa.

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sion test that the Colombian Constitutional Court uses when reviewing the potential violation of economic, social and cultural rights. The Colombian Constitutional Court argues that regressive legislative measures can only be justified if they pass the proportionality test (pp. 144-145). In the case of the Inter-American Court of Human Rights (IACtHR), the picture is less clear. The chapter of Serrano Guzmán focuses on the use of proportionality in equality cases. The author shows that the IACtHR frequently uses proportionality in direct discrimination and arbitrary treatment cases (pp. 191-197). However, while the IACtHR has given a social rights dimension to equality by imposing a positive duty on states to overcome structural disadvantages (most notably in the *Fireworks Factory* case), the Court has, so far, refrained from using proportionality in this context (p. 203). Therefore, the book does present some, but no widespread evidence for the use of proportionality in social rights cases.

However most strikingly, the book lacks evidence for a specifically Latin American judicial discourse on proportionality. Do different Latin American jurisdictions influence each other when it comes to the use of proportionality? To what extent are domestic courts influenced by the IACtHR? If the individual chapters refer to foreign influences, they usually refer to Germany or the United States (see, e.g. pp. 46, 69, 101). Armin von Bogdandy and René Urueña have recently observed the emergence of a Latin American human rights community that includes, among other actors, the IACtHR as well as domestic judges and that leads to a "Latin American transformative constitutionalism".[6] This community is largely absent in the picture of the development of proportionality that emerges from the reviewed book. It would have been interesting to know whether this is because such a community does not exist in the specific context of proportionality or whether the absence in the book has other reasons. Is the parallel development of proportionality in many Latin American jurisdictions just a coincidence?

Despite this omission, the book is a valuable resource about the use of the proportionality doctrine in Latin America. As such, it makes some jurisdictions accessible to the international discourse, for which it is difficult to find comprehensive accounts in English. Therefore, it is a highly welcome addition to the research on proportionality. Even beyond providing a mere description of the proportionality practice, it includes many excellent chapters that are worth reading. However, it does not completely fulfil its potential because it leaves the reader wondering what the specifi-

6 Armin von Bogdandy and René Urueña, 'International Transformative Constitutionalism in Latin America', AJIL 114 (2020), 403-442.

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city of the proportionality practice in Latin America is. Nevertheless, the book makes an already rich international discussion on proportionality even richer.

Niels Petersen, Münster

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