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Constitutional balancing as a systemic corrective in criminal subsumption: overcoming the aporias of jakobs' functionalism in the plurinational state of Bolivia**Ponderación constitucional y subsunción penal: correctivo sistémico al funcionalismo jakobsiano en Bolivia**¹Antonio Lennar Loredó Ríos  .¹Universidad Mayor de San Andrés (UMSA), La Paz, Bolivia, Universidad San Francisco Xavier de Chuquisaca (USFX), Sucre***Corresponding author:** Antonio Lennar Loredó Ríos 

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ABSTRACT

Introduction: This study examines the methodological tension between constitutional balancing and criminal subsumption in the jurisprudence of Bolivia's Plurinational Constitutional Tribunal (TCP) from 2012 to 2024, considering the fragmented reception of Jakobs' systemic functionalism and the constitutional limits imposed on punitive intervention.

Objective: To identify the epistemological aporias associated with that reception, document the quality of constitutional balancing in the selected jurisprudential corpus, and formulate the theoretical foundations of a pre-typical constitutional balancing model adapted to plurinational constitutionalism.

Methodology: A mixed approach with qualitative predominance was applied to a defined corpus of 18 TCP constitutional rulings. Each decision was examined through seven indicators scored from 0 to 3 and classified as P0, P1, P2, or P3 according to its overall balancing quality. The corpus corresponds to the 18 rulings documented in the author's doctoral research source chapter and was analyzed in full for this article.

Results: None of the 18 rulings reached P3 rigorous balancing. Five were classified as P0, five as P1, and eight as P2, establishing partial balancing as the highest observed level.

Conclusions: The findings document a persistent methodological deficit but do not empirically validate the proposed model. Constitutionally limited constructivism and the pre-typical balancing protocol are presented as theoretical-normative proposals requiring independent empirical evaluation before claims about practical effectiveness can be sustained.

Keywords: constitutional balancing; criminal subsumption; Jakobs functionalism; guaranteeism; Plurinational State of Bolivia

RESUMEN

Introducción: Este estudio examina la tensión metodológica entre ponderación constitucional y subsunción penal en la jurisprudencia del Tribunal Constitucional Plurinacional de Bolivia (TCP) entre 2012 y 2024, considerando la recepción fragmentaria del funcionalismo de Jakobs y los límites constitucionales de la intervención punitiva. Objetivo general: Identificar las aporías epistemológicas asociadas con esa recepción, documentar la calidad de la ponderación constitucional en el corpus jurisprudencial seleccionado y formular

los fundamentos teóricos de un modelo de ponderación constitucional pre-típica adaptado al constitucionalismo plurinacional.

Metodología: Se aplicó un enfoque mixto con predominancia cualitativa a un corpus definido de 18 sentencias constitucionales del TCP. Cada decisión fue examinada mediante siete indicadores valorados de 0 a 3 y clasificada como P0, P1, P2 o P3 según su calidad ponderativa global. El corpus corresponde a las 18 resoluciones documentadas en el capítulo fuente de la investigación doctoral del autor y fue analizado íntegramente para este artículo.

Resultados: Ninguna de las 18 sentencias alcanzó la categoría P3 de ponderación rigurosa. Cinco fueron clasificadas como P0, cinco como P1 y ocho como P2, por lo que la ponderación parcial constituyó el nivel máximo observado.

Conclusiones: Los hallazgos documentan un déficit metodológico persistente, pero no validan empíricamente el modelo propuesto. El constructivismo constitucionalmente limitado y el protocolo pre-típico se presentan como propuestas teóricas que requieren evaluación.

Palabras clave: ponderación constitucional; subsunción penal; funcionalismo jakobsiano; garantismo; Estado Plurinacional de Bolivia

INTRODUCTION

The criminal legal system of the Plurinational State of Bolivia faces a methodological tension between criminal subsumption and constitutional control of restrictions on rights. Recent literature on proportionality shows that constitutional examination is not limited to a generic reference to reasonableness: it requires distinguishing suitability, necessity, and proportionality in the strict sense, as well as justifying the relationship between the restrictive measure and the constitutional purpose pursued (1,2). Recent comparative studies also confirm that proportionality maintains its control function even under scenarios of institutional uncertainty, provided that each stage makes explicit its premises and the standard of review applied (3). In criminal matters, this requirement acquires special intensity, because prosecution, precautionary measures, and punishment produce direct restrictions on freedom, privacy, property, and due process (4). The corpus of jurisprudence analyzed allows us to observe how this requirement is translated or not translated into specific decisions of the Plurinational Constitutional Court (TCP).

The problem is not posed as a disqualification of the jurisdictional function, but as a question of argumentative architecture. Contemporary studies on constitutional adjudication warn that proportionality loses its capacity for control when its stages are confused, when the need is treated superficially or when the weighting becomes a conclusive formula without exposition of alternatives and degrees of affectation (1,2). In the criminal sphere, proportionality must also operate as a limit of punitive intervention and not only as a criterion for subsequent review (4). This perspective allows the reasoning of the TCP to be examined from verifiable parameters and, at the same time, avoids attributing to the test an automatic precision that recent literature does not support.

The fracture that the jurisprudential analysis documents has a particularly illustrative expression in the contrast between two resolutions of the same Court on the same matter. The Plurinational Constitutional Judgment (SCP) 0673/2018-S3 granted constitutional protection precisely because the defendant members failed to apply the guidelines of proportionality, necessity and suitability when ruling on precautionary measures in a criminal proceeding. However, four years later, SCP 1599/2022-

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S2 expressly stated that the weighing of the elements that motivate criminal precautionary measures does not correspond to constitutional jurisdiction, but only to ordinary judges. Two judgments of the same court, on the same criminal precautionary matter, produce diametrically opposed rules of precedence on who has the constitutional duty to weigh.

This article proposes three articulated objectives: first, to analyze the epistemic aporias generated by the fragmentary appropriation of Jakobsianism with respect to Luhmann's systems theory; second, to empirically document the deficit of constitutional weighting based on the qualitative and quantitative study of the 2012-2024 corpus; and third, to build, on theoretical-normative foundations and not as a result derived directly from the empirical analysis of the corpus, the foundations of a methodological model of pre-typical constitutional weighting as a systemic corrective of the identified aporias, articulated with the particularities of plurinational constitutionalism. This third objective is of a propositional nature: the empirical diagnosis of the 18 judgments evidences the need for the model, but does not constitute its validation.

The fundamental hypothesis defended here is the following: the integration of constitutional weighting as a prior instance and conditioning of criminal subsumption, through a tripartite proportionality test of a mandatory nature for prosecutors of the Public Prosecutor's Office and criminal judges, constitutes a theoretically suitable methodological response to overcome the aporias of Jakobsianism found in the jurisprudence of the TCP for the period 2012-2024 and to contribute to guaranteeing due process in the Plurinational State of Bolivia. This hypothesis is formulated as a theoretical proposition susceptible to subsequent empirical validation; the present study is limited to the diagnosis of the deficit and the formulation of the model, without implementing or evaluating it in practice.

LITERATURE REVIEW

Constitutional proportionality as a structure of justification

Contemporary literature conceives proportionality as a structure for justifying restrictions on rights and not as an open authorization to decide according to judicial intuitions. Recent comparative analysis insists on separating its stages because each one answers a different question: appropriateness examines the connection between means and end; necessity requires contrasting less restrictive alternatives; and proportionality in the strict sense assesses the relationship between constitutional benefit and sacrifice of the right (1). This sequence is relevant for the present study because it allows a broad doctrinal category to be transformed into observable criteria within a judgment. Weighting quality does not depend, therefore, on the court mentioning the word "proportionality", but on making explicit the chain of reasons that allows the decision to be reviewed.

One of the most relevant recent contributions is to recover the sub-principle of necessity as an autonomous component. Da Silva shows that, despite its importance, necessity is often eclipsed by the final stage of balancing, which weakens the test's ability to identify equally effective and less harmful means (2). This observation is particularly relevant to criminal proceedings: before accepting an intense restriction of liberty or other rights, the reasoning should show why a less burdensome

measure would not achieve the same purpose. The absence of such a contrast is not a merely formal defect, because it prevents us from knowing whether state intervention was really indispensable. For this reason, the instrument applied to the corpus includes necessity as an independent indicator and does not subsume it within an overall assessment of reasonableness.

Proportionality also faces problems arising from factual uncertainty. Recent work warns that weighting can appear accurate even when the empirical premises that support the adequacy, necessity, or weight attributed to principles are weak. Pecaric proposes strengthening the evaluation of uncertainty to prevent the structure of the test from hiding decisions based on insufficiently justified estimates; this concern coincides with recent studies on proportionality in contexts of constitutional uncertainty (5,6). In a complementary direction, comparative experience shows that institutional design can modify the way in which courts use proportionality, privileging state interests over individual rights in some contexts (7). For this article, both caveats justify valuing not only the nominal presence of sub-principles, but also the density of argumentation, the explicitness of the affectation, and the coherence between premises, precedents, and conclusion.

Proportionality and constitutional limits of criminal intervention

The relationship between proportionality and criminal law has received renewed attention because the punitive power concentrates some of the most intense restrictions that the State can impose. Beade argues that constitutional proportionality can restructure the evaluation of certain forms of criminal responsibility by forcing the damage, risk, and legitimacy of the intervention to be justified (4). From the perspective of criminal proceedings, Blanco emphasizes that the principle is not limited to the legislative definition of crimes and penalties, but is projected on evidentiary proceedings, precautionary measures, and other decisions capable of affecting fundamental rights (8). This literature supports a reading in which subsumption does not exhaust judicial reasoning: determining that a conduct formally fits into a norm does not answer, by itself, the constitutional question about the legitimacy of the specific restriction.

This distinction is central to the concept of pre-typical weighting developed in the manuscript. The model does not intend to replace criminal dogma or turn every controversy into a mathematical operation, but to introduce a prior constitutional control when the application of the type or a procedural measure produces a relevant collision of rights. The comparative literature shows that proportionality can operate with different intensities and purposes depending on the institutional context, so its usefulness depends on transparent argumentation rules and the correct identification of the restricted right (1,7). Consequently, the diagnosis of the Bolivian corpus focuses on whether the decision identifies principles in tension, determines the degree of affectation, applies the three stages of the test, and connects the conclusion with precedents and human rights standards.

Legal pluralism and intercultural interpretation

Plurinational constitutionalism adds a dimension that cannot be resolved through a mechanical translation of European models of proportionality. The comparative study by Bagni, Rodríguez Caguana and Castro León on Bolivia, Colombia and Ecuador shows that intercultural legal pluralism requires dialogue between normative orders and a hermeneutic capable of recognizing the legal

agency of indigenous peoples without reducing their institutions to exceptions tolerated by state law (9). In Bolivia, Doyle's study shows that the constitutional recognition of indigenous jurisdictions does not eliminate practical tensions over authority, competence and definition of justice, which reinforces the need to examine how normative orders are coordinated in specific cases (10). In the same vein, recent Latin American research argues that pluralism should be analyzed as an institutional relationship between concurrent legalities, not as a simple descriptive coexistence (11). In the Bolivian case, this implies that constitutional weighting must incorporate the distribution of competences, cultural identity and community forms of resolution before assuming that ordinary jurisdiction is the only legally available response.

Recent literature on Bolivia provides a direct link between weighting and interculturality. Rojas Tudela analyzes the practice of the TCP around the paradigm of living well and argues that intercultural interpretation can expand the technique of weighting beyond an exclusively state rationality (12). Moreira Cordova, through jurisprudential analysis, identifies difficulties in the operationalization of living well and in the deepening of intercultural patterns within the constitutional decision (13). These findings are relevant to the present study because they show that incorporating legal pluralism does not consist of adding a rhetorical reference to cultural diversity. It requires verifying how competence is determined, what normative sources are recognized, how the community is listened to, and how these considerations concretely modify the examination of necessity and proportionality.

The debate on pluralism also warns of risks of incomplete institutionalization. Analysis of indigenous normative orders in Latin America shows that their exclusion from state decisions can persist even when constitutional systems formally recognize diversity and collective rights (14). Recent comparative studies on Bolivia and Peru also show that constitutional recognition can coexist with state boundaries that reduce the practical autonomy of those legal orders (15). From a broader Latin American perspective, legal pluralism has been reframed as a critical tool for examining the persistence of monist structures within formally plural constitutions (11). This tension helps to clarify the scope of the proposed model: the pre-typical balancing should not presume that every community practice displaces ordinary jurisdiction, but neither can it consider the state penal response as an unquestionable starting point. The constitutional question must include the existence of culturally relevant normative competencies and alternatives before justifying punitive intervention.

Constitutional jurisprudence, consistency and argumentative control

Recent research on constitutional courts shows that the quality of reasoning depends both on the structure of the test and on the consistency with which it is applied to comparable cases. In studies of constitutional adjudication, proportionality is presented as a mechanism capable of making visible the reasons for state intervention, but its effectiveness diminishes when the court omits stages, alters the standard without explanation, or gives decisive weight to abstractly formulated public interests (7). Latin American literature has also highlighted the role of courts as institutional counterweights when they develop sufficiently motivated and publicly verifiable constitutional controls (16). For this reason, the present paper incorporates coherence with precedents as one of its seven indicators: it

is not enough to resolve each case in isolation if upcoming decisions produce incompatible rules without an explicit justification for the change.

The state of the literature allows us to identify a specific gap that justifies this study. Recent literature separately addresses proportionality, necessity, penal intervention, and legal pluralism; however, less frequent studies that integrate these dimensions in a systematic evaluation of criminal decisions of the Bolivian TCP over a prolonged period of time. The evidence on Aymara indigenous justice also underscores that community responses have their own rationalities that should not be automatically assimilated to Western categories of restorative justice (17). The contribution of the manuscript is located precisely at this intersection: it uses a closed corpus of 18 sentences to diagnose the quality of the weighting through seven indicators and, separately, formulates a theoretical-normative proposal for pre-typical weighting adapted to plurinational constitutionalism. The distinction between diagnosis and proposal is essential: the results of the corpus allow us to describe argumentative patterns, but they do not constitute empirical validation of the effectiveness of the model, which will require subsequent designs of independent application and contrast.

METHOD

The research combines a documentary analysis of the jurisprudential corpus with the elaboration of a normative-dogmatic methodological model, as detailed in the following subsections.

Material

The empirical corpus of this article is made up of the eighteen constitutional judgments of the Plurinational Constitutional Court included in the jurisprudential analysis of Chapter V of the author's doctoral thesis, the primary source from which the case matrix reproduced below is derived. For this manuscript, a new search was not carried out to construct a different sample, nor was a random sampling carried out on the TCP portal: this previously delimited corpus was incorporated in its entirety. For this reason, at this stage there is no additional universe of recovered records or a chain of exclusions that leads from a bibliographic search to the 18 resolutions. The traceability of the material is guaranteed by the individual identification of each SCP by code and year in the corpus table, which allows each resolution to be located in the TCP institutional repository (18). The substantive delimitation of the corpus responds to five criteria applied in the original research: link with criminal matters; presence of a relevant constitutional collision; inclusion of constitutional actions with sufficient argumentative density to evaluate weighting; coverage of the 2012-2016, 2017-2020 and 2021-2024 phases; and diversity of constitutional conflicts. Consequently, the 18 judgments are analyzed as a closed intentional corpus and not as a probabilistic sample of the set of criminal decisions of the TCP. This precision avoids attributing to the article a search strategy or exclusion figures that the available methodological record does not document.

Table. Corpus of eighteen constitutional judgments analyzed (2012-2024)

Code	Year	Type of action	Constitutional conflict	Category
SCP 2172/2012	2012	Constitutional protection	Private property vs. collective community rights	Q2
SCP 2201/2013	2013	Freedom Action	Personal liberty (minor) vs. criminal prosecution	P1
SCP 0243/2014-S2	2014	Freedom Action	Freedom/presumption of innocence vs. sexual indemnity of children and adolescents	P1
SCP 0487/2014	2014	Amparo/popular action	Indigenous territorial rights vs. ordinary legality	P2
SCP 1305/2015-S1	2015	Freedom Action	Personal liberty vs. procedural security	P0
SCP 1336/2016-S2	2016	Constitutional protection	Indigenous jurisdiction vs. ordinary jurisdiction	P2
SCP 0084/2017	2017	Abstract unconstitutionality	Political rights vs. limits on re-election	P2
SCP 1226/2017-S1	2017	Constitutional protection	Due process of evidence vs. criminal efficacy	P1
SCP 0252/2018-S3	2018	Constitutional protection	Genocide and civil reparations	P2
SCP 0673/2018-S3	2018	Freedom Action	Personal Liberty vs. Prosecution of Family Violence	P2
SCP 1161/2019-S2	2019	Freedom Action	Freedom (adolescent) vs. criminal prosecution	P0
SCP 0835/2020-S4	2020	Constitutional protection	Mining property/rights vs. public interest	P0

Code	Year	Type of action	Constitutional conflict	Category
SCP 0664/2021-S2	2021	Privacy protection	Freedom of expression vs. honor/privacy	P2
SCP 0825/2021-S1	2021	Constitutional protection	Basic services vs. property rights	P1
SCP 1599/2022-S2	2022	Freedom Action	Personal liberty vs. protection of minor victim	P0
SCP 1014/2023-S4	2023	Freedom Action	Right to life vs. prison procedure	P0
SCP 0108/2024-S3	2024	Privacy protection	Privacy (deprived of liberty) vs. public interest	P1
SCP 0754/2024-S1	2024	Freedom Action	Rights of child victims vs. due process	Q2

Source: Authors' elaboration based on the jurisprudential analysis of Chapter V of the author's doctoral thesis.

Methods

The research adopts a mixed approach with a predominance of qualitative. The qualitative analysis hermeneutically examines the sentences of the TCP and ordinary criminal sentences through files designed to evaluate seven indicators of weighted quality: identification of principles in tension, determination of the degree of affectation, application of the subprinciple of suitability, application of the subprinciple of necessity, application of proportionality in the strict sense, coherence with precedents and consideration of inter-American standards.

Each of the seven indicators is assessed on a four-level scale: 0 (absent), 1 (rhetorical), 2 (partial), and 3 (rigorous). The sum produces a total score between 0 and 21. The operationalization was designed to distinguish the mere invocation of proportionality from a structured application of appropriateness, necessity, and proportionality in the strict sense, a distinction consistent with contemporary literature on constitutional control (1,2).

The classification thresholds were defined as P0 (0-5), P1 (6-11), P2 (12-17), and P3 (18-21). P3 requires that most indicators be at the highest level and, therefore, reserves the category of rigorous weighting for decisions that make the conflict explicit, justify the intensity of the affectation, develop the tripartite test, and maintain consistency with inter-American precedents and standards. The intermediate ranges distinguish a rhetorical use from a partial application. This coding rule is an operational decision of the study and is not presented as a previously validated scale; its reproducibility depends on the definitions and criteria described in this section.

The assessment of the battery of indicators produces a final figure between 0 and 21, from which the judgment is classified into four categories: P0 without weighting (0-5), P1 rhetorical weighting (6-11),

P2 partial weighting (12-17) and P3 rigorous weighting (18-21). The quantitative analysis, on the other hand, processes the frequencies of use of constitutional weighting by years and by type of dispute, and the evolutionary trends between the three phases of the period; the jurisprudential coherence between similar cases is examined qualitatively in the Discussion section.

The legal methods used are: dogmatic-criminal law, critical-epistemological, analytical-synthetic, comparative, empirical-jurisprudential and hermenteutic-constitutional.

RESULTS

The results of the analysis are presented below, organized in two empirical dimensions: the aporias of Jakobsian functionalism identified through jurisprudential evidence, and the quantitative analysis of the corpus of eighteen sentences. The theoretical construction derived from these results, constitutionally limited constructivism, the pre-typical weighting protocol and its adaptations to plurinational constitutionalism, is developed in the Discussion section.

The aporias of Jakobsian functionalism

Günther Jakobs's penal functionalism aims to operate on Luhmann's premises of autopoiesis and normative construction of the fact. However, the tension between systemic construction, individual responsibility, and constitutional limits is examined here as a problem of compatibility between the logic of subsumption and the contemporary demands for justification of restrictions on rights (4,8). The central aporia consists in sustaining, on the one hand, the character of the normative construction of the criminal subject and, on the other, his condition of being free and morally responsible, on which categories such as guilt and imputability of enlightened roots are based. In the analytical framework of the article, the difficulty arises when criminal attribution is presented as a self-sufficient normative operation without explaining how it is compatible with the constitutional control of state intervention.

This aporia is reproduced in each penal subsumption in which the subject is constructed as an instrumental fiction of the system to recreate the validity of the norm in the sense of Jakobsian positive general prevention — while simultaneously imposing a penalty based on the individual responsibility of the accused subject, without any of these treatments having been examined as to their constitutionality. The most serious practical consequence is that the penal system reproduces itself in a self-referential way through the mechanical subsumption of the fact to the type, applying its normative categories outside the fundamental rights that the Political Constitution of the State imposes as heteropoietic limits external to the punitive power.

Together with the main epistemological aporia, the analysis identifies three complementary dimensions of the problem. The methodological deficiency of mechanical subsumption operates as a logical-deductive syllogism that verifies whether the facts fit the conditions of the type, without first verifying whether the criminalization of the specific case satisfies the constitutional requirements of proportionality, necessity and subsidiarity of the *ius puniendi*. The institutional disconnection between the ordinary jurisdiction and the TCP means that no body carries out the weighing at the time that guarantee-based constitutionalism demands: before subsumption and as a condition of its

constitutional legitimacy. The absence of communicative rationality in criminal decisions prevents mechanical subsumption from satisfying the minimum conditions that the public justification of constitutional decisions requires: to produce justifiable resolutions in a rational argumentative process that respects the autonomy, equality and reason of all participants.

Quantitative analysis of TCP jurisprudence 2012-2024

The quantitative analysis of the corpus of jurisprudence reveals a systematic pattern of weighting deficit that confirms the hypothesis of the research. The P0 category (without any weighting) includes cases in which the TCP resolves by means of formal verification of legality or procedural redirection that shields the criminal decision from any proportional scrutiny. The P1 category (rhetorical weighting) corresponds to judgments that make a nominal mention of the language of proportionality, without developing it in structured reasoning. The P2 category (partial weighting) includes the most methodologically advanced judgments in the corpus, which elaborate conventional and substantive doctrinal foundations, but without organizing it in the complete tripartite test. The P3 category (rigorous weighting) is completely absent in the corpus analyzed: no judgment of the period applies the complete test with the three explicit sub-principles and assignment of degrees of affectation by means of the mild-medium-intense triadic scale. The judgment that comes closest to this standard is SCP 0673/2018-S3, which nominally invokes the three sub-principles and grants protection precisely because of their omission, but without developing the complete weighting balance – being classified in the P2 category.

The jurisprudential ceiling of the TCP in the period 2012-2024 is the P2 category, reached only by the most methodologically advanced judgments in the corpus: SCP 0252/2018-S3 (genocide and reparations), SCP 0673/2018-S3 (precautionary measures), SCP 0664/2021-S2 (freedom of expression and gender), SCP 0487/2014 (indigenous territorial rights) and SCP 0754/2024-S1 (rights of children and adolescents). Categories P0 and P1 predominate in the corpus, with examples such as SCP 1014/2023-S4, in which the right to life of a person deprived of liberty is subordinated to requirements of documentary sufficiency without a minimum of proportional scrutiny, or SCP 1599/2022-S2, in which the TCP expressly renounces the function of weighting in precautionary matters.

Table A disaggregates this distribution by time phase, confirming that no judgment reaches category P3 in any of the three periods analyzed.

Table A. Distribution of the corpus of 18 judgments by time phase

Phase	Number of judgments	P0	P1	Q2	Q3
Foundation (2012-2016)	6	1	2	3	0
Consolidation (2017-2020)	6	2	1	3	0
Recent (2021-2024)	6	2	2	2	0
TOTAL	18	5	5	8	0

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Source: Authors' elaboration based on the Corpus Table (observation 10). No sentence reaches P3 in any of the three phases.

Table B disaggregates, in turn, the distribution by type of constitutional collision, showing that the deficit is reproduced in a transversal manner in all the thematic categories identified in the corpus.

Table B. Distribution of the corpus of 18 judgments by type of constitutional collision

Type of constitutional collision	Number of judgments	P0	P1	P2	P3
Personal liberty vs. criminal prosecution / procedural security	7	3	2	2	0
Indigenous collective rights vs. ordinary jurisdiction	3	0	0	3	0
Property/public interest vs. economic rights	2	1	1	0	0
Personality rights vs. freedom of expression/public interest	2	0	1	1	0
Due process of evidence vs. criminal efficacy	1	0	1	0	0
Others (political rights, civil reparation, protection of children)	3	1	0	2	0
TOTAL	18	5	5	8	0

Source: Authors. Note: the classification by type of collision was established according to the predominant constitutional conflict in each judgment. SCP 1014/2023-S4 was incorporated into "Other" because the core of the case corresponds to the right to life and the penitentiary procedure; SCP 2172/2012 was placed in "Indigenous collective rights vs. ordinary jurisdiction" due to the

community dimension of the conflict. The categories are mutually exclusive for the purposes of the count and total the 18 sentences in the corpus.

DISCUSSION

The empirical results presented by the epistemological aporia of Jakobsian functionalism and the systematic deficit of rigorous weighting in the corpus of eighteen sentences support the theoretical-normative proposal that is developed below: constitutionally limited constructivism as a synthesis that overcomes these aporias, the pre-typical weighting protocol that operationalizes it, and its adaptations to Bolivian plurinational constitutionalism. This proposal is not derived as an empirical finding from the corpus analyzed, but is built on theoretical-normative foundations aimed at overcoming the deficit that the empirical analysis documents.

Constitutionally limited constructivism as a overcoming synthesis

To overcome the identified aporias, this research proposes constitutionally limited constructivism as an epistemologically coherent synthesis. It recognises with Luhmann the constructed character of the criminal categories typicity, anti-legality, culpability as normative constructions of the system, but submits them, with constitutional guarantees, to external heteropoietic limits arising from the fundamental rights enshrined in the CPE and in the constitutionality block, thus overcoming both naïve ontological realism and pure systemic functionalism and its structural aporias. The model operates consciously on the two discursive levels that the critical literature establishes as essential: the metatheoretical, from which systems theory looks at law externalizing it as a constructed phenomenon with its own categories; and the internal dogmatic, which demands that these constructions be faithful to the constitutional criteria of legitimacy.

The fundamental difference with Jakobsian functionalism lies in the principle of heteropoietic openness: while in functionalism the categories are self-referentially reproduced, separated from external constitutional principles, the constitutionally limited constructivist perspective makes the tripartite proportionality test a current structural condition and conditioning the subsumption of the type. The fundamental rights enshrined in Articles 22, 23, 116 and 117 of the CPE are not, from this perspective, external limits that arise ex post on the result of subsumption: they are structuring conditions that channel the construction of the fact to the type from the outset (19).

Pre-typical weighting as a methodological protocol

The proposed methodological model, structured in four stages, operates as a prior instance and conditioning of any criminal subsumption. The first stage consists of identifying the constitutional conflict: determining which constitutional principles come into tension when the criminalization of conduct is contemplated, identifying the scope of protection of each principle and verifying whether its structure requires a gradual optimization, instead of a binary application.

The second stage corresponds to the establishment of the intensity of the intervention: corroborate the magnitude of the impact on each principle by means of the triadic scale; once a grade has been assigned, justify it argumentatively and verify whether this impact reaches the essential core of the

insurmountable limit right that the balancing operation does not reach, in accordance with Article 22 of the CPE, which enshrines dignity as inviolable.

The third stage applies the three-element proportionality test. The sub-principle of suitability requires proof that the criminal rule is adequate to achieve the legitimate constitutional aim pursued in the specific case (thus disqualifying symbolic or manifestly ineffective criminalisations). The sub-principle of necessity requires proving that there is no equally effective but less restrictive alternative to the fundamental right affected: the prosecutor must justify that criminal prosecution is necessary and not other responses of the legal system, whether civil, administrative or restorative. The sub-principle of proportionality in the strict sense requires proving that the degree of satisfaction of the principle that justifies the punitive intervention is equivalent to the degree of affectation of the fundamental right of the accused, operationalizing the contemporary structure of the proportionality test in ordinary reasoning (2).

The fourth stage consists of the explicit justification of the decision: express motivation for each step of the weighting reasoning, with citation of binding constitutional precedents of the TCP in accordance with Article 203 of the CPE, incorporation of the standards of the Inter-American Court of Human Rights that make up the constitutional block of Article 410.II, in particular the criteria of the cases *Kimel v. Argentina* (2008), *Chaparro Álvarez v. Ecuador* (2007) and *Norín Catrimán v. Chile* (2014), and submission of the result to the adversarial control of the parties, in compliance with the principle of communicative rationality that the public justification of constitutional decisions requires as a condition of democratic legitimacy of legal-criminal decisions.

Adaptations to plurinational constitutionalism

The plurinational constitutionalism of the CPE of 2009 introduces normative and axiological dimensions that no comparative model contemplates in its entirety and that the pre-typical weighting must incorporate as its own operational criteria. Interculturality, as a guiding principle of Article 178.I of the CPE, acts as a balancing criterion because it accentuates the weight of the rights of the accused when the criminalized conduct is related to cultural practices of indigenous peoples, in line with the standards of the Inter-American Court of Human Rights in the case of *Norín Catrimán* (2014) on the limits that universal fundamental rights impose on the systems of administration of indigenous justice. Recent literature on Bolivian intercultural jurisprudence supports the need to treat these elements as operational criteria and not as symbolic references (12,13).

The legal pluralism contained in Articles 179.II and 190 of the CPE requires verifying, before subsuming the act as an ordinary criminal offence, whether the conduct is also known to the original indigenous peasant jurisdiction, in accordance with the Law of Jurisdictional Demarcation (Law No. 073). The principle of living well (*suma qamaña*, *sumak kawsay*) of Article 8.I of the CPE is deployed on two levels: as a meta-principle of interpretation that conditions the meaning of the entire pre-typical weighting, and as a criterion of the sub-principle of necessity that refers to exploring restorative responses of a community sense before resorting to deprivation of liberty. The *pro persona* principle of Article 13.IV of the CPE operates as a tie-breaking criterion in cases of epistemic ponderative uncertainty: when the degrees of affectation are approximately equivalent, the doubt is

resolved in favor of the freedom of the accused. Recent studies on pluralism in Bolivia and the region show that normative coexistence requires explicit mechanisms for coordination and delimitation of competencies (10,15). Research on Aymara justice adds that community solutions must be understood from their own normative logic before being translated into state restorative categories (17).

The results obtained are consistent with the hypothesis of the research and allow the formulation of five conclusions of theoretical and practical scope that contribute to the debate on the legitimacy of punitive power in the Plurinational State.

In the first place, the methodological fracture between Jakobsian functionalism and guaranteeist constitutionalism is not an individual deficiency of legal operators: it is a structural consequence of a system that lacks the methodological instrument necessary to reconcile, in the daily practice of criminal prosecution, the epistemological presuppositions with which it was formed with the demands imposed on it by the Constitution. This confirmation extends the diagnosis of the critical literature on the epistemological incoherence of functionalism to the context of Bolivia's plurinational constitutionalism, to the extent that the substantial density acquired by the CPE of 2009 makes the autopoietic closure of the penal system even more unsustainable.

Secondly, the lack of explicit weighting, far from generating the certainty that functionalism promises, produces jurisprudential inconsistencies in which similar cases are resolved in different ways depending on the operator and his criteria. The contradiction between SCP 0673/2018-S3 and SCP 1599/2022-S2 on who weighs in precautionary matters constitutes the most accurate institutional expression of this inconsistency, which, in the doctrinal interpretation proposed here, would violate at the same time the legal certainty of Article 178.I and the equality before the law of Article 14.I of the CPE. The alternative to explicit weighing is not certainty, but opaque decisionism, which recent critical literature points to as the real risk of principalist reasoning without methodological discipline.

Thirdly, contemporary literature shows that objections to balancing do not eliminate its usefulness, but rather make it necessary to specify its conditions of exercise. The test must separate its stages, justify the factual premises, examine less restrictive alternatives and make the attribution of weight to principles controllable (2,5). In criminal matters, these requirements are intensified by the seriousness of the restrictions and by the need to demonstrate that state intervention is constitutionally indispensable (4,8). The proposed model includes these conditions as requirements for motivation: tripartite structure, presentation of alternatives, delimitation of the essential content and possibility of contradiction by the parties. This avoids presenting weighting as a rhetorical formula or as an authorization to decide without verifiable parameters.

Fourth, the most recent judgment in the corpus, SCP 0754/2024-S1, constitutes a robust institutional signal, because the TCP expressly requires for the first time that the Public Prosecutor's Office carry out the weighting before ruling, which implies acknowledging that it had not taken place. This requirement anticipates the proposed pre-typical weighting model, but without providing the methodological protocol that would make it effective. This gap between the recognition of the need

to weigh and the absence of an operational methodology is the most direct point of intervention of the model formulated in this article.

Fifth, contemporary comparison shows that proportionality adopts different institutional configurations and that its quality depends on how the courts justify each stage of the examination (3,7). In Latin America, studies on legal pluralism and intercultural interpretation also show that constitutional adjudication must respond to contexts in which normative orders and differentiated conceptions of authority and justice coexist (9,14). The Bolivian specificity lies in the fact that interculturality, legal pluralism, and living well are part of the constitutional framework that conditions the decision. The proposed protocol attempts to integrate these dimensions without assuming that its normative formulation alone guarantees better results; its practical usefulness should be evaluated through independent application and systematic comparison in subsequent research.

CONCLUSIONS

First. Jakobs's fragmentary and inconsequential appropriation of Luhmann's systems theory generates epistemological aporias that are not academic residues without practical consequence: they are reproduced in the jurisprudence of the TCP and in the ordinary criminal jurisdiction, naturalizing mechanical subsumption as a technically neutral operation when, in reality, he uncritically reproduces the self-referential categories of the system without contrasting them with the fundamental rights of the specific accused.

Second. The quantitative and qualitative analysis of the 2012-2024 body of case law confirms that no judgment of the TCP reaches the P3 category of strict weighting; the jurisprudential ceiling of the period is the P2 category substantive doctrinal and conventional foundation, without reaching a complete tripartite structure; and the P0 and P1 categories absence of merely rhetorical weighting or weighting predominate in the corpus analyzed, where there are even judgments in which fundamental rights such as the right to life are subsumed in considerations of formal procedural requirements, without room for the judgment of proportionality.

Third. Constitutionally limited constructivism constitutes the epistemologically coherent synthesis that manages to transcend the extremes of naïve ontological realism and pure systemic functionalism, since it accepts the constructed character of criminal categories and, at the same time, subjects them to the external heteropoietic limits that derive from fundamental rights, thus resolving the aporia identified through a conscious articulation between the systemic plane of normative construction and the constitutional plane of legitimacy.

Fourth. The pre-typical weighing protocol, structured in four stages: identification of the conflict, determination of the intensity, tripartite test and reasoned justification, is proposed as a concrete methodological instrument, susceptible to application and subsequent empirical validation, aimed at translating the constitutional mandate of proportionality into a daily practice that can be controlled, reviewable and consistent with the binding precedent of the TCP. Its use by the Public Prosecutor's Office and criminal operators does not entail an additional burden on legal reasoning: it is the

concretization of the duty to state reasons already established in Article 115.II of the CPE and that the TCP itself has rhetorically demanded without having yet operationalized it.

Fifth. The adaptation of the model to Bolivian plurinational constitutionalism through the incorporation of interculturality, legal pluralism and living well as its own weighting criteria is not a rhetorical concession to plurinational discourse: it is a constitutional requirement derived from Articles 8.I, 178.I and 190 of the CPE, which qualitatively distinguishes the Bolivian system from the comparative models and which Bolivian legal doctrine has not yet developed with the systematicity that judicial practice demands.

The practical considerations of the proposed model are projected in three directions. For the TCP, the proposal requires the development of a consistent weighting jurisprudence that gives rise to rules of conditional precedence, transferable as binding precedents in the terms of art. 203 of the CPE, correcting the jurisprudential inconsistency that generates breaches of legal certainty and equality before the law. For the Public Prosecutor's Office, the proposal raises the need to incorporate the pre-typical test as a mandatory protocol for formal accusation and accusation, so that all criminalization is, beforehand, subject to constitutional verification. For the Bolivian legal academy, the proposal opens a line of work in which the epistemological debate of Jakobsian functionalism is articulated with the specific requirements of plurinational constitutionalism, contributing to the formation of legal operators capable of consciously and deliberately moving between criminal dogma and constitutional guarantees.

The present study has limitations that must be considered when interpreting its results. First, the corpus of 18 judgments is intentional and closed, comes from the jurisprudential analysis developed in the original doctoral research and does not claim probabilistic representativeness with respect to the universe of TCP resolutions in criminal matters. Second, the coding of the seven indicators was carried out by a single codifier, the author, so a second independent evaluation was not available nor was it possible to calculate inter-judge agreement; consequently, the P0–P3 categories should be interpreted as the results of a systematic procedure, but subject to an interpretative component. Third, the seven-indicator instrument has not been externally validated by replication by other coders or in an independent jurisprudential corpus. Fourth, the pre-typical weighting protocol is a theoretical-normative construction formulated from the diagnosis and doctrinal discussion; the 18 judgments do not constitute an empirical validation of its effectiveness. Its application by judicial or prosecutorial operators and the evaluation of its effects on the quality of the motivation require subsequent research with specific validation designs.

BIBLIOGRAPHIC REFERENCES

1. Gavião Filho AP, Guidolin RV. The test of proportionality in the Constitutional Court of Peru and in the Federal Supreme Court. *Rev Human Rights Democr.* 2023; 11(22):e13607. <https://doi.org/10.21527/2317-5389.2023.22.13607>.
2. da Silva VA. Standing in the shadows of balancing: proportionality and the necessity test. *Int J Const Law.* 2022; 20(5):1738-1767. <https://doi.org/10.1093/icon/moac105>.

3. Ondřejek P, Horák F. Proportionality during times of crisis: precautionary application of proportionality analysis in the judicial review of emergency measures. *Eur Const Law Rev.* 2024; 20(1):27-51. <https://doi.org/10.1017/S1574019624000051>.
4. Beade GA. Crimes of Danger and Constitutional Proportionality: A Restructuring of Criminal Responsibility under the Basic Guidelines of the Principle of Proportionality. *Ius Prax.* 2022; 28(3):191-210. <https://doi.org/10.4067/S0718-00122022000300191>.
5. Pecaric M. A Bayesian improvement of the proportionality principle. *Ratio Juris.* 2022; 35(4):419-436. <https://doi.org/10.1111/raju.12366>.
6. Sánchez Barroso B. The principle of proportionality in contexts of uncertainty: insufficiencies and possible solutions in the light of COVID-19. *Rev Esp Derecho Const.* 2023; (128):37-71. <https://doi.org/10.18042/cepc/redc.128.02>
7. Xiao S. State-centric proportionality analysis in Chinese administrative litigation. *Int J Const Law.* 2023; 21(2):461-487. <https://doi.org/10.1093/icon/moad051>.
8. Blanco AE. The jurisprudence of the Spanish Constitutional Court on the principle of proportionality in criminal proceedings. *Anu Derecho Penal Cienc Penal.* 2021; 74(1). <https://doi.org/10.53054/adpcp.v74i1.7910>
9. Bagni S, Rodríguez Caguana A, Castro León F. An exploration of intercultural legal pluralism in the jurisprudence of Bolivia, Colombia and Ecuador. *Rev Derecho Estado.* 2023; (58):61-90. <https://doi.org/10.18601/01229893.n58.03>
10. Doyle M. The case of Piruani: contested justice, legal pluralism, and indigeneity in Highland Bolivia. *Polit Leg Anthropol Rev.* 2021; 44(1):60-74. <https://doi.org/10.1111/plar.12424>.
11. Wolkmer AC. Rethinking practices of legal pluralism in Latin America. *Rev Crit Cienc Soc.* 2023; (132):27-48. <https://doi.org/10.4000/rccs.15103>
12. Rojas Tudela F. Weighting and intercultural dialogue: jurisprudence and practice of the Plurinational Constitutional Court. *Rev Derecho UCB.* 2024; 8(17):51-79. <https://doi.org/10.35319/lawreview.202415107>.
13. Moreira Cordova JA. A jurisprudential analysis in relation to the operationalization of the paradigm of living well from the guidelines of intercultural interpretation of rights. *Rev Con-Sciencias Soc.* 2023; 15(28):34-47. <https://doi.org/10.35319/consciencias.20232873>.
14. Ochoa Jiménez MJ. Indigenous peoples' normative orders and restitution: Latin American private international law and human rights. *Legal Plur Crit Soc Anal.* 2022; 54(2-3):176-192. <https://doi.org/10.1080/27706869.2022.2122317>.
15. Banse M, Stanka H. The complex relationship between legal pluralisms and the Rechtsstaat in Peru and Bolivia. *Z Vgl Polit Wiss.* 2025;19:291-311. <https://doi.org/10.1007/s12286-025-00640-3>.
16. Gamboa L, García-Holgado B, González-Ocantos E. Courts against backsliding: lessons from Latin America. *Law Policy.* 2024; 46(4):358-379. <https://doi.org/10.1111/lapo.12246>.
17. Baffero F, et al. The restorative nature of Aymara Indigenous justice in Bolivia. *Int J Restor Justice.* 2024; 7(2):202-225. <https://doi.org/10.5553/TIJRJ.000171>.
18. Plurinational Constitutional Court of Bolivia. Search Engine for Cases and Resolutions. Available at: <https://buscador.tcpbolivia.bo/busqueda-resolucion>

19. Plurinational State of Bolivia. Political Constitution of the State. Official Gazette of the Plurinational State of Bolivia; 2009. Available at:
<https://www.gacetaoficialdebolivia.gob.bo/app/webroot/archivos/constitucion.pdf>

ETHICAL CONSIDERATIONS

Not applicable. This study is a review of the published literature and did not involve the direct involvement of humans, animals, interventions, or the collection of personally identifiable data.

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