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Balancing and Judicial Self-Empowerment – On the rise of balancing in the jurisprudence of the German Constitutional Court –

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BALANCING AND JUDICIAL SELF-EMPOWERMENT – ON THE RISE OF BALANCING IN THE JURISPRUDENCE OF THE GERMAN CONSTITUTIONAL COURT –

By Niels Petersen[*]

Abstract

Many critics of the proportionality principle argue that balancing is an instrument of judicial self-empowerment. This contribution challenges this critique. It argues that the relationship between balancing and judicial power is reverse. Balancing does not create judicial power; it presupposes the latter. This argument is confirmed through a case study of the German Federal Constitutional Court. The analysis shows that the German Constitutional Court was very reluctant to base decisions, in which it overturned legislation, on balancing in the first two and a half decades of its jurisprudence. However, in the late 1970s, once the Court had strengthened its own institutional position, it increasingly relied on balancing when declaring laws as incompatible with the constitution. Then, balancing developed into the predominant argumentation framework of constitutional review that it is today in the Court's jurisprudence.

[*] Dr. iur. Senior Research Fellow at the Max Planck Institute for Research on Collective Goods, Bonn. I am indebted to Or Bassok, Bruce Cain, Christoph Engel, Stephen Gardbaum, Dieter Grimm, Valéria Guimarães de Lima e Silva, Gianluca Parolin, Pasquale Pasquino, Samuel Issacharoff, Arie Rosen, Re'em Segev, Emanuel Towfigh, and Joseph Weiler for comments, advise, and inspiration.

I. Introduction: Balancing and its Critique

The rise of proportionality in constitutional law is a puzzling phenomenon. On the one hand, the principle enjoys enormous popularity around the world.[1] Many courts use it as the central doctrinal tool of constitutional review.[2] The U.S. Supreme Court is probably the only major exception that still resists the explicit acknowledgement of proportionality as an instrument of constitutional review.[3] On the other hand, proportionality has faced fierce criticism in the scholarly literature across various jurisdictions. This criticism focuses primarily on the last step of the proportionality test, the balancing of the individual right and the competing public interest.[4] As the

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1 *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COL. J. TRANSNAT'L L. 73, 75 (2008); Stylianos-Ioannis G. Koutnatzis, *Verfassungsvergleichende Überlegungen zur Rezeption des Grundsatzes der Verhältnismäßigkeit in Übersee*, 44 VERASSUNG UND RECHT IN ÜBERSEE 32 (2011); AHARON BARAK, PROPORTIONALITY – CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 181-210 (2012); KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS 178 (2012); Vlad Perju, *Proportionality and Freedom – An essay on methods in constitutional law*, 1 GLOBAL CONSTITUTIONALISM 334, 334 (2012); Johannes Saurer, *Die Globalisierung des Verhältnismäßigkeitsgrundsatzes*, 51 DER STAAT 3 (2012); Florian Becker, *Verhältnismäßigkeit*, *in* LEITGEDANKEN DES RECHTS. PAUL KIRCHHOF ZUM 70. GEBURTSTAG. BAND I 225 (Hanno Kube *et al.* eds., 2013), at ¶¶ 12-27.

2 *See* Barak, *supra* note 1, at 182; MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 10-14 (2013).

3 However, some authors argue that even the American constitutional law doctrine implicitly also contains elements of proportionality, *see* E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW 53-66 (2009); Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 102, 117-140 (2011). But see also Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998), who argues that what looks like balancing in the jurisprudence of the U.S. Supreme Court is only a means to identify illegitimate goals.

4 *See* BERNHARD SCHLINK, ABWÄGUNG IM VERFASSUNGSRECHT (1976); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943 (1987); Peter W. Hogg, *Section 1 Revisited*, 1 NAT. J. CONST. L. 1, 23-24 (1991); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 259 (1996); Stuart Woolman, *Out of Order? Out of Balance? The Limitation Clause of the Final Constitution*, 13 S. AFR. J. HUM. RTS. 102, 114-121 (1997); Loammi Blaauw-Wolf, *The 'balancing of interests' with reference to the principle of proportionality and the doctrine of Güterabwägung – a comparative analysis*, 14 SA PUBL. L. 178, 210 (1999); MATTHIAS JESTAEDT, GRUNDRECHTSENTFALTUNG IM GESETZ 206-260 (1999); Ernst-Wolfgang Böckenförde, *Schutzbereich, Eingriff, verfassungsimmanente Schranken: Zur Kritik gegenwärtiger Grundrechtsdogmatik*, 42 DER STAAT 165, 190 (2003); Henk Botha, *Rights, Limitations, and the (Im)possibility of Self-Government*, *in* RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION 13, 21-23 (Henk Botha, André van der Walt & Johan van der Walt eds., 2003); KARL-HEINZ LADEUR, KRITIK DER ABWÄGUNG IN DER GRUNDRECHTSDOGMATIK (2004); Jeremy T. Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. 465 (2005); Frank Raue, *Müssen Grundrechtsbeschränkungen wirklich verhältnismäßig sein?*, 131 ARCHIV DES ÖFFENTLICHEN RECHTS 79 (2006); Basak Çali, *Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions*, 29 HUM. RTS. Q. 251 (2007); Ralph Christensen & Kent D. Lerch, *Dass das Ganze das Wahre ist, ist nicht ganz unwahr*, 62 JURISTENZEITUNG 438 (2007); Matthias Jestaedt, *Die Abwägungslehre – ihre Stärken und ihre Schwächen*, *in* STAAT IM WORT – FESTSCHRIFT FÜR JOSEF ISENSEE 253, 260-275 (Otto Depenheuer, Markus Heintzen, Matthias Jestaedt & Peter Axer eds., 2007); Andreas Fischer-Lescano,

balancing exercise often requires the comparison of incommensurable values, some authors claim that balancing is "arbitrary".[5] They argue that it allows courts to second-guess policy evaluations and thus to overstep the boundary from the legal to the political realm.[6]

Some legal scholars even take the critique one step further. They argue that balancing is a tool for judicial self-empowerment.[7] It provides them with a doctrinal structure that

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Kritik der praktischen Konkordanz, 41 KRITISCHE JUSTIZ 166 (2008); Stuart Woolman & Henk Botha, *Limitations: Shared Constitutional Interpretation, an Appropriate Normative Framework & Hard Choices*, *in* CONSTITUTIONAL CONVERSATIONS 149, 157-160 (Stu Woolman & Michael Bishop eds., 2008); Iddo Porat, *Some Critical Thoughts on Proportionality*, *in* REASONABLENESS AND LAW 243 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009); BENJAMIN RUSTEBERG, DER GRUNDRECHTLICHE GEWÄHRLEISTUNGSGEHALT 64-76 (2009); Stavros Tsakyrakis, *Proportionality: An assault on human rights?*, 7 INT'L J. CONST. L. 468 (2009); GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION 87-115 (2009); JULIANO ZAIDEN BENVINDO, ON THE LIMITS OF CONSTITUTIONAL ADJUDICATION. DECONSTRUCTING BALANCING AND JUDICIAL ACTIVISM (2010); DAVOR SUSNJAR, PROPORTIONALITY, FUNDAMENTAL RIGHTS, AND BALANCE OF POWERS (2010); Grégoire C.N. Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 CAN. J. L. & JURISPRUDENCE 179, 194-198 (2010); Jochen von Bernstorff, *Kerngehaltsschutz durch den UN-Menschenrechtsausschuss und den EGMR: Vom Wert kategorialer Argumentationsformen*, 50 DER STAAT 165, 184-190 (2011); Christian Hillgruber, *Ohne rechtes Maß? Eine Kritik der Rechtsprechung des Bundesverfassungsgerichts nach 60 Jahren*, 66 JURISTENZEITUNG 861, 862-863 (2011); Josef Isensee, *Das Grundrecht als Abwehrrecht und als staatliche Schutzpflicht*, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND. BAND IX: ALLGEMEINE GRUNDRECHTSLEHREN 413, at ¶ 136 (Josef Isensee & Paul Kirchhof eds., 2011); José Juan Moreso, *Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism*, 25 RATIO JURIS 31 (2012); RENATA CAMILO DE OLIVEIRA, ZUR KRITIK DER ABWÄGUNG IN DER GRUNDRECHTSDOGMATIK (2013); Grant Huscroft, *Proportionality and Pretence*, 29 CONST. COMM. (forthcoming 2013); FRIEDRICH MÜLLER & RALPH CHRISTENSEN, JURISTISCHE METHODIK. BAND I: GRUNDLEGUNG FÜR DIE ARBEITSMETHODEN DER RECHTSPRAXIS ¶ 72 (11th ed., 2013); Philip Sales, *Rationality, Proportionality and the Development of the Law*, 129 L.Q. REV. 223 (2013); Jochen von Bernstorff, *Proportionality without Balancing – Why Judicial ad hoc-balancing is unnecessary and potentially detrimental to the realization of individual and collective self-determination*, *in* REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT (Liora Lazarus, Christopher McCrudden & Nigel Bowles eds., forthcoming 2014).

5 Habermas, *supra* note 4, at 259.

6 *See* Schlink, *supra* note 4, at 190; ERNST-WOLFGANG BÖCKENFÖRDE, ZUR LAGE DER GRUNDRECHTSDOGMATIK NACH 40 JAHREN GRUNDGESETZ 54 (1989); Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, *in* FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT. ZWEITER BAND: KLÄRUNG UND FORTBILDUNG DES VERFASSUNGSRECHTS 445, 461 (Peter Badura & Horst Dreier eds., 2001); Webber, *supra* note 4, at 147-148; Hillgruber, *supra* note 4, at 862; Camilo de Oliveira, *supra* note 4, at 223-231; Sales, *supra* note 4, at 225; Bernstorff, *supra* note 4. However, some critics of balancing point into the opposite direction: They do not complain that courts interfere too much with the legislative branch, but they believe that balancing is too deferential towards the legislature, *see*, e.g., Rusteberg, *supra* note 4, at 70-74; Tsakyrakis, *supra* note 4.

7 *See* Ulrich Haltern, *Integration als Mythos. Zur Überforderung des Bundesverfassungsgerichts*, 45 JAHRBUCH DES ÖFFENTLICHEN RECHTS 31, 69 (1997); WALTER LEISNER, DER ABWÄGUNGSSTAAT – VERHÄLTNISMÄßIGKEIT ALS GERECHTIGKEIT? 170-173 (1997); Benvindo, *supra* note 4, at 31-81; Claus Dieter Classen, *Das Prinzip der Verhältnismäßigkeit im Spiegel europäischer Rechtsentwicklungen*, *in* DER GRUNDRECHTSGEPRÄGTE VERFASSUNGSSTAAT. FESTSCHRIFT FÜR KLAUS STERN ZUM 80. GEBURTSTAG 651, 653 (Michael Sachs & Helmut Siekmann eds., 2012); Huscroft, *supra* note 4.

allows them to veil political decisions behind legal terms.[8] This paper will challenge this critique. It suggests the opposite: Balancing does not create judicial power; instead, it presupposes it. The argument will be developed in two steps. First, the paper will have a closer look at the theoretical consistency of the critique. We will see that a doctrinal structure that is as severely criticized as the doctrine of proportionality is not able to legitimize contested court decisions. A weak court that bases the unconstitutionality of a law on balancing as an argumentation framework would jeopardize its own institutional position.

Second, these theoretical considerations will be confirmed by a case study that analyzes the development of balancing as a doctrinal tool in the fundamental rights jurisprudence of the German Federal Constitutional Court. The German Constitutional Court was the first court to use proportionality as an instrument of constitutional review.[9] For this reason, it has a long history to study and to draw lessons from. If we look at the development of the proportionality principle in the German jurisprudence, we see that the German court initially was very reluctant to base its decisions on balancing in situations, in which it held that a statute was inconsistent with the constitution. However, this changed after two and a half decades of the Court's existence. Since the late 1970s, balancing is the central doctrinal tool of the Court when it overturns statutes. This development suggests that the Constitutional Court first had to gain institutional strength before it could use balancing as an argumentation framework when confronting the legislature.

II. Balancing and Institutional Constraints on Constitutional Judges

1. Balancing between flexibility and activism

The popularity of proportionality among courts is easy to explain: Proportionality offers judges a formal argumentation structure to resolve conflicts between individual rights and competing rights or public interests. Courts can avoid expressing abstract preferences for one value over another and thus refrain from establishing hierarchies of competing values.[10] This non-hierarchical approach has two advantages: On the one

8 Christensen & Lerch, *supra* note 4, at 440.
9 Stone Sweet & Mathews, *supra* note 1, at 74.
10 *Id.*, at 88.

hand, it gives courts room for manœuvre.[11] They can confine themselves to resolve the case at hand without setting precedents for future situations that are difficult to predict.[12] On the other hand, it expresses respect for the position of each of the parties.[13] It does not fundamentally discredit the abstract legitimacy of one of the positions. Instead, the ruling is based on the circumstances of the individual case.[14]

However, the critique of balancing suggests that balancing has a fundamental methodological deficit. A doctrinal instrument that grants judges flexibility may also open the door for judicial activism. That is why many scholars argue that balancing is an instrument of judicial self-empowerment.[15] However, this critique is usually not based on a systematic analysis of the judicial practice. At best, it refers to individual cases as anecdotal evidence without ensuring their representativeness. Furthermore, it assumes that the open analytical structure of balancing automatically leads to judicial activism. This argument overlooks, however, that courts do not only face methodological, but also institutional constraints.[16]

2. Judicial power and judicial legitimacy

When courts exercise constitutional review, they cannot implement their own judgments.[17] They have no sword that could force politics to comply with their rulings. It

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11 *See* Theunis Roux, *Principle and pragmatism on the Constitutional Court of South Africa*, 7 INT'L J. CONST. L. 106, 133-134 (2009); Andreas Voßkuhle, *Stabilität, Zukunftsoffenheit und Vielfaltssicherung – Die Pflege des verfassungsrechtlichen "Quellcodes" durch das BVerfG*, 64 JURISTENZEITUNG 917, 922 (2009); Oliver Lepsius, *Die maßstabsetzende Gewalt*, *in* DAS ENTGRENZTE GERICHT 159, 205 (Matthias Jestaedt, Oliver Lepsius, Christoph Möllers & Christoph Schönberger eds., 2011).

12 ALEC STONE SWEET, GOVERNING WITH JUDGES. CONSTITUTIONAL POLITICS IN EUROPE 142 (2000); Uwe Kranenpohl, *Die Bedeutung von Interpretationsmethoden und Dogmatik in der Entscheidungspraxis des Bundesverfassungsgerichts*, 49 DER STAAT 387, 401 (2009). On the importance of judicial flexibility, see also DAVID ROBERTSON, THE JUDGE AS POLITICAL THEORIST. CONTEMPORARY CONSTITUTIONAL REVIEW 282 (2010).

13 Stone Sweet & Mathews, *supra* note 1, at 90; Wojciech Sadurski, *Reasonableness and Value Pluralism in Law and Politics*, *in* REASONABLENESS AND LAW 129, 140 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009).

14 *See* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 169-171 (2004).

15 *See supra*, note 7.

16 On the role of institutional constraints, see Barry Evan Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 316-320 (2005).

17 *See* Josef Isensee, *Bundesverfassungsgericht – quo vadis?*, 51 JURISTENZEITUNG 1085, 1086 (1996); Heinz Klug, *Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review*, 13 S. AFR. J. HUM. RTS. 185, 189 (1997); Helmuth Schulze-Fielitz, *Das Bundesverfassungsgericht in der Krise des Zeitgeists – Zur Metadogmatik der Verfassungsinterpretation*, 122 ARCHIV DES ÖFFENTLICHEN RECHTS 1, 27 (1997); Roland Lhotta, *Das Bundesverfassungsgericht als politischer Akteur: Plädoyer für eine neo-institutionalistische Ergänzung der Forschung*, 9 SWISS POL. SC. REV. 142, 143

is told that the former US president Andrew Jackson once said after the U.S. Supreme Court had handed down a decision that he disapproved: "John Marshall has made his decision, now let him enforce it."[18] Moreover, the refusal to implement a court decision is not the only potential sanction that the political branch has against a court.[19] Depending on the institutional framework, it can also narrow the court's competencies, cut the budget, or redesign the election rules for judges in order to guarantee that a majority of judges are favorable to the government's policies.

For this reason, courts are, to a certain extent, dependent on the cooperation of the political branch when they exercise constitutional review.[20] On the one hand, they can secure this cooperation by exploiting institutional conflicts within the political branch. Such institutional conflicts occur primarily in federal systems. Here, the state governments and legislatures may see the court as a guarantee against a disproportional concentration of power on the federal level.[21] At the same time, the court may also help the federal institutions to implement their policy goals within the individual states.[22]

On the other hand, courts can also confront the political branches directly. In such a case, their judicial power depends on the legitimacy that the court enjoys.[23] The stronger the public acceptance of a court, the more politicians have to fear to lose electoral support if they openly refuse to implement judicial decisions.[24] If a court enjoys a high

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(2003); Andrej Lang, *Wider die Metapher vom letzten Wort: Verfassungsgerichte als Wegweiser*, *in* DAS LETZTE WORT – RECHTSETZUNG & RECHTSKONTROLLE IN DER DEMOKRATIE (Rahel Baumgartner *et al.* eds., forthcoming 2013).

18 Cited after JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 518 (1996).

19 *See* HEINZ LAUFER, VERFASSUNGSGERICHTSBARKEIT UND POLITISCHER PROZEß 167-169 (1968).

20 GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 6 (2005).

21 *See* Dietrich Herrmann, *Akte der Selbstautorisierung als Grundstock institutioneller Macht von Verfassungsgerichten*, *in* DIE DEUTUNGSMACHT DER VERFASSUNGSGERICHTSBARKEIT 141, 166 (Hans Vorländer ed., 2006).

22 *See* Barry Evan Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COL. L. REV. 1137, 1152-1159 (2011).

23 Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985 (1990); Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. & SOC. REV. 117, 125 (2001); Vanberg, *supra* note 20, at 49-53; Christoph Engel, *Delineating the Proper Scope of Government: A Proper Task for a Constitutional Court?*, 157 JITE 187, 213 (2001); Clifford James Carrubba, *A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems*, 71 J. POL. 55, 65 (2009); SASCHA KNEIP, VERFASSUNGSGERICHTE ALS POLITISCHE AKTEURE 199 (2009).

24 Georg Vanberg, *Verfassungsgerichtsbarkeit und Gesetzgebung: Zum politischen Spielraum des Bundesverfassungsgerichts*, *in* MECHANISMEN DER POLITIK – STRATEGISCHE INTERAKTION IM DEUTSCHEN

degree of legitimacy, noncompliance is usually perceived as a violation of the fundamental rules of democracy.[25] In contrast, if a court lacks acceptance, politicians who oppose the implementation of judgments do not jeopardize electoral approval. Legitimacy is thus a central source of judicial power.[26] Only a significant public support enables courts to take decisions that are costly for the government and the parliamentary majority.

The legitimacy of courts relies on the perception that courts are neutral arbiters that base their decisions on legal considerations.[27] One of the principal lines of defending the legitimacy of constitutional review in continental Europe is to stress the different rationality of legal decisions of constitutional courts when compared to political decisions of the legislature.[28] If a court were perceived to be a political actor with its own political agenda, this would undermine its legitimacy and thus weaken its institutional position.[29]

Certainly, one cannot expect the general public to follow the methodological intricacies of the constitutional jurisprudence closely. The daily business of courts usually flies under the radar of public attention. In high profile cases, public opinion focuses more on the result than on the reasoning. Over time, however, a dubious methodological approach may nevertheless affect the public reputation and thus the general acceptance of a court. The link between the court's legitimacy and its style of argumentation is provided by the legal academy. If the vast majority of legal academics disapproves the

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REGIERUNGSSYSTEM 183, 188 (Steffen Ganghof & Philip Manow eds., 2005); ANDRÉ BRODOCZ, DIE MACHT DER JUDIKATIVE 99 (2009).

25 Vanberg, *supra* note 20, at 74.

26 Hans Vorländer, *Deutungsmacht – Die Macht der Verfassungsgerichtsbarkeit*, *in* DIE DEUTUNGSMACHT DER VERFASSUNGSGERICHTSBARKEIT 9, 24 (Hans Vorländer ed., 2006); BARRY EVAN FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 375 (2009).

27 Stone Sweet, *supra* note 12, at 199-200; Martin Shapiro, *The Success of Judicial Review and Democracy*, *in* ON LAW, POLITICS, AND JUDICIALIZATION 149, 165 (Martin Shapiro & Alec Stone Sweet eds., 2002); UWE KRANENPOHL, HINTER DEM SCHLEIER DES BERATUNGSGEHEIMNISSES 409 (2010); *see also* Ulrich Sieberer, *Strategische Zurückhaltung von Verfassungsgerichten – Gewaltenteilungsvorstellungen und die Grenzen der Justizialisierung*, 16 ZEITSCHRIFT FÜR POLITIK 1299, 1308 (2006); Or Bassok, *The Two Countermajoritarian Difficulties*, 31 ST. LOUIS U. PUBL. L. REV. 333, 370 (2012).

28 *See* John Ferejohn, *Judicializing Politics, Politicizing Law*, 65 LAW & CONTEMP. PROBS. 41, 45 (2002); Robertson, *supra* note 12, at 383; Christoph Möllers, *Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts*, *in* DAS ENTGRENZTE GERICHT 281, 328 (Matthias Jestaedt, Oliver Lepsius, Christoph Möllers & Christoph Schönberger eds., 2011).

29 Gregory A. Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SC. REV. 1209 (1986).

methodological approach of the court and accuses the latter of judicial activism, the image of the court as a neutral arbiter would be severely damaged. For this reason, the effectiveness of a specific doctrine presupposes that it is accepted as a legal argument within constitutional law scholarship.

3. Legitimacy and balancing

Consequently, constitutional courts will be sensitive to the methodological problems of balancing. They have to develop strategies to dissipate the suspicion that they are taking political decisions when they are applying the proportionality test. When analyzing the potential harm that balancing may cause to judicial legitimacy, we have to distinguish three situations. If a court wants to confirm a piece of legislation, balancing does not pose any legitimacy issues. The court confirms a legislative decision and does thus not interfere with the political branches. It cannot be criticized of being activist or having a political agenda. If the court reverses decisions of lower courts without implicitly reviewing the statutory basis of these decisions, there is a conflict between courts. This may also involve a conflict about the scope of the competencies of the competing courts, and there are often political considerations at stake. From an institutional perspective, the constitutional court does, however, not transgress the border to the political branches.[30]

If a court wants to strike down legislation as unconstitutional, it comes into conflict with the legislature. If a court bases such a decision on the balancing stage of the proportionality test, it has to justify why its valuation of the competing interests at stake is superior to the valuation of the legislature. For this reason, we should expect that courts are particularly guarded to use balancing in such a situation. They will try to base their decisions on alternative arguments or to rationalize the balancing exercise in order to signal that they refrain from making a political judgment.

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30 *See* Fritz Ossenbühl, *Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit – Gedanken zur Wahrung der Verfahrensgrundrechte*, *in* HAMBURG – DEUTSCHLAND – EUROPA. FESTSCHRIFT FÜR HANS PETER IPSEN ZUM SIEBZIGSTEN GEBURTSTAG 129, 129 (Rolf Stödter & Werner Thieme eds., 1977); Schlink, *supra* note 6, at 461; CHRISTOPH MÖLLERS, GEWALTENGLIEDERUNG – LEGITIMATION UND DOGMATIK IM NATIONALEN UND INTERNATIONALEN RECHTSVERGLEICH 144 (2005); *similarly also* BRUN-OTTO BRYDE, VERFASSUNGSENTWICKLUNG. STABILITÄT UND DYNAMIK IM VERFASSUNGSRECHT DER BUNDESREPUBLIK DEUTSCHLAND 325 (1982).

This does not mean that courts totally refrain from balancing. However, the likelihood that courts recur to balancing when reviewing legislation depends on two factors. First, a court will balance more often the stronger its institutional position. If a court enjoys widespread public support, it has less political and methodological constraints. A weak court, in contrast, will try to avoid an argumentation framework that appears to be 'political' and that could undermine its legitimacy. Second, the use of balancing considerations depends on the level of acceptance of balancing as a 'legal' argument in the legal discourse. The more balancing is accepted as a doctrinal instrument, the more the constitutional court will rely on balancing when reviewing legislative decisions.

The remaining part of this paper will test these theoretical hypotheses through a case study. It will analyze the development of balancing as an argumentation framework in the jurisprudence of the German Constitutional Court. First, we will have a look at the birth moment of proportionality as an instrument of constitutional review in Germany and analyze the argumentation pattern of the Court's pharmacy judgment. Second, we will examine the bigger picture and make a quantitative analysis of the use of balancing in cases in which the Constitutional Court overturned legislation over time. Third, the findings will be contrasted with the situation in cases in which the Court overturned lower courts' decisions or confirmed legislation, before the observations will, finally, be compared to the theoretical predictions developed in this section.

III. The Micro-analysis: The pharmacy judgment as a starting point

Unlike the Canadian Supreme Court or the South African Constitutional Court, the German Constitutional Court has not developed proportionality in one paradigmatic judgment. There is neither an *Oakes*[31] nor a *Makwanyane*[32] judgment in the German case law. Instead, the development was more gradual. The most important step in this development was the pharmacy judgment,[33] which the Court handed down in 1958.[34] In

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31 R v. Oakes, [1986] 1 S.C.R. 103.

32 S v Makwanyane and Another (CCT 3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

33 BVerfGE 7, 377.

34 *See* Eberhard Grabitz, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts*, 98 ARCHIV DES ÖFFENTLICHEN RECHTS 568, 569-570 (1973); Klaus Stern, *Zur Entstehung und Ableitung des Übermaßverbots*, *in* WEGE UND VERFAHREN DES VERFASSUNGSLEBENS 165, 172 (Peter Badura & Rupert Scholz eds., 1993); STEPHANIE HEINSOHN, DER ÖFFENTLICHRECHTLICHE GRUNDSATZ DER VERHÄLTNISMÄßIGKEIT 69 (1997); Helmuth Schulze-Fielitz, *Wirkung und Befolgung*

this case, the Court held that a licensing scheme for pharmacies in the state of Bavaria was incompatible with the constitutional freedom of profession. The applicant had intended to open a pharmacy in the Bavarian village of Traunreut. The administrative authority had denied the request because the establishment of a new pharmacy was not in the public interest. The already existing pharmacy was supposed to be sufficient to serve the inhabitants of Traunreut with the necessary medical drugs.

There are two interesting points to note about this case. First, the Constitutional Court had cautiously raised the suspicion that the scheme was actually set up to protect the existing pharmacies against competition. It qualified the licensing scheme as a quantitative access restriction and argued that in such circumstances

> [t]here is a significant danger of [the legislative decision] being influenced by *illicit motives*; in particular, it seems likely that the access restriction is supposed to protect those who are already part of the profession against competition – a motive that, according to common opinion, cannot justify an infringement of the freedom of profession.[35]

The Court did not draw the consequence to check the motivation of the legislature. Instead, it used this observation to justify a particularly strict standard of scrutiny for the legislative scheme.[36]

Second, while framing the standard of review in the abstract, the Court recurred to balancing rhetoric. It argued that the freedom of profession was supposed to protect

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verfassungsgerichtlicher Entscheidungen, *in* FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT. ERSTER BAND: VERFASSUNGSGERICHTSBARKEIT, VERFASSUNGSPROZEß 385, 396 (Peter Badura & Horst Dreier eds., 2001); Dieter Grimm, *Proportionality in Canadian and German Jurisprudence*, 57 U. TORONTO L.J. 383, 385 (2007); Stone Sweet & Mathews, *supra* note 1, at 108; Christian Hillgruber, *Grundrechtsschranken*, *in* HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND. BAND IX: ALLGEMEINE GRUNDRECHTSLEHREN 1033, ¶ 52 (Josef Isensee & Paul Kirchhof eds., 2011); Matthias Jestaedt, *Phänomen Bundesverfassungsgericht: Was das Gericht zu dem macht, was es ist*, *in* DAS ENTGRENZTE GERICHT 77, 122 (Matthias Jestaedt, Oliver Lepsius, Christoph Möllers & Christoph Schönberger eds., 2011).

[35] BVerfGE 7, 377, at 408 (emphasis added) (translation by the author. In the German original, it says: "Die Gefahr des Eindringens sachfremder Motive ist daher besonders groß; vor allem liegt die Vermutung nahe, die Beschränkung des Zugangs zum Beruf solle dem Konkurrenzschutz der bereits im Beruf Tätigen dienen – ein Motiv, das nach allgemeiner Meinung niemals einen Eingriff in das Recht der freien Berufswahl rechtfertigen könnte.").

[36] *See also* Anna-Bettina Kaiser, *Das Apothekenurteil des BVerfG nach 50 Jahren – Anfang oder Anfang vom Ende der Berufsfreiheit?*, 30 JURISTISCHE AUSBILDUNG 844, 850 (2008).

individual liberty, while the limitations clause of the provision aimed to protect the public interest.[37] It continued:

> If one tries to accommodate both objectives, which are equally legitimate in a social constitutional democracy, as effectively as possible, the resolution can only be found *through a thorough balancing* of the importance of the opposite and possibly competing interests.[38]

However, in the further course of the judgment, the Court avoided to base its reasoning on a balancing of the competing interests. Instead, it used a combination of less-restrictive-means and coherency arguments. The Bavarian government had argued that an unrestricted freedom to establish new pharmacies would lead to a fierce competition between the pharmacies and compromise their economic soundness.[39] In such an environment, the pharmacies might be inclined to violate obligations concerning prescriptions, quality control of the medical drugs, and education of the personnel in order to raise their revenue. Furthermore, an excessive supply of medical drugs might increase the consumption of these drugs and enhance addiction.

The Constitutional Court rejected these arguments. First, it found that the access restriction was not necessary to secure the economic soundness of the pharmacies.[40] To justify this less-restrictive-means argument, the Court raised a simple economic consideration: The establishment of a pharmacy required a significant initial investment. For this reason, a pharmacist usually made an economic assessment whether the investment would pay off before he established a new pharmacy.[41] Therefore, an abundant increase of pharmacies was unlikely. Instead, the market already took care of the problem that the licensing scheme was supposed to address. The Court supported these theoretical considerations with a reference to the situation in

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37 BVerfGE 7, 377, at 404.

38 *Id*., at 405 (emphasis added) (translation by the author. In the German original, it says: "Sucht man beiden - im sozialen Rechtsstaat gleichermaßen legitimen - Forderungen in möglichst wirksamer Weise gerecht zu werden, so kann die Lösung nur jeweils in sorgfältiger Abwägung der Bedeutung der einander gegenüberstehenden und möglicherweise einander geradezu widerstreitenden Interessen gefunden werden.").

39 *See id*., at 413-14.

40 *Id*., at 415-21.

41 *Id*., at 420.

Switzerland: The Swiss had not restricted the establishment of new pharmacies, and the system was working just fine.[42]

With regard to the argument that pharmacists might violate their professional obligations if they face fierce competition, the Constitutional Court countered with a coherency argumentation. If there was a danger that members of the professions did not comply with their professional obligations, this danger should equally occur in other liberal professions. Nevertheless, the legislature had not deemed it necessary to establish access restrictions for doctors or other comparable professionals.[43] Furthermore, the Court argued that violation of professional obligations did not only occur in situations of economic need. Mere greed might be a sufficient motivation, and greed could also be observed in a regulated environment.[44] The Court thus found that strengthening the supervision of pharmacies and decreasing unnecessary administrative burdens for pharmacists would have been a less restrictive and more effective means to pursue the same ends.[45]

In the pharmacy judgment the German Constitutional Court started to develop a formal argumentation framework to resolve conflicts between individual rights and competing public purposes. The judgment is characteristic for many early decisions of the Court. The Court used balancing rhetoric, but refrained from a comparison of the value of the competing interests. Instead, it put an emphasis on the empirical questions underlying the economic regulation. In the end, it overturned the legislation because it had serious doubts about the effectiveness of the chosen regulatory scheme.

IV. The macro-analysis: The historical development of balancing

Let us now take a step back and have a look at the bigger picture. This section is not concerned with a single judgment, but retraces the historical development of balancing as a legal argumentation framework in the jurisprudence of the German Constitutional Court. The analysis is based on a quantitative assessment of the different arguments, on which the Constitutional Court has based the constitutional incompatibility of statutes.

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42 *Id*., at 415-16.
43 *Id*., at 429-30.
44 *Id*., at 430.
45 BVerfGE 7, 377, at 438-42.

1. The analyzed data

The analysis comprises all decisions in which the German Constitutional Court held that a piece of legislation was incompatible with the German constitution and which were published in the official reports of the Federal Constitutional Court up to volume 132. In total, 238 decisions were analyzed, the last of which was rendered in December 2012. However, there are a few exceptions. The German constitutional law doctrine makes a distinction between liberty and equality rights. The analysis focused on the jurisprudence concerning individual rights, and within the category of individual rights only on liberty rights. Judgments not related to individual liberties were not examined because the constitutional court usually does not rely on the proportionality test in these cases.

Consequently, five categories of cases were excluded. First, all decisions that were taken on formal grounds were excluded. Cases in which Court overturned a statute because the legislature lacked the formal competency or because the decision-making procedure was deficient were not considered. Second, judgments concerning the guarantee of municipal autonomy were not included as these decisions, in principle, concern the distribution of competencies between the German states and the municipalities.

Third, all judgments which were exclusively based on the prohibition of discrimination that is contained in section 3 of the German Constitution where excluded. Even though the Court sometimes relies on proportionality considerations in these cases, the doctrine is markedly different from the Court's approach regarding liberty rights so that the respective case law merits an independent analysis.[46] Fourth, decisions concerning the organization of the political process were excluded, as the principle of proportionality does not play a significant role in these cases.[47] This is, finally, also true for judgments concerning the taxing power of public authorities, which were equally excluded.

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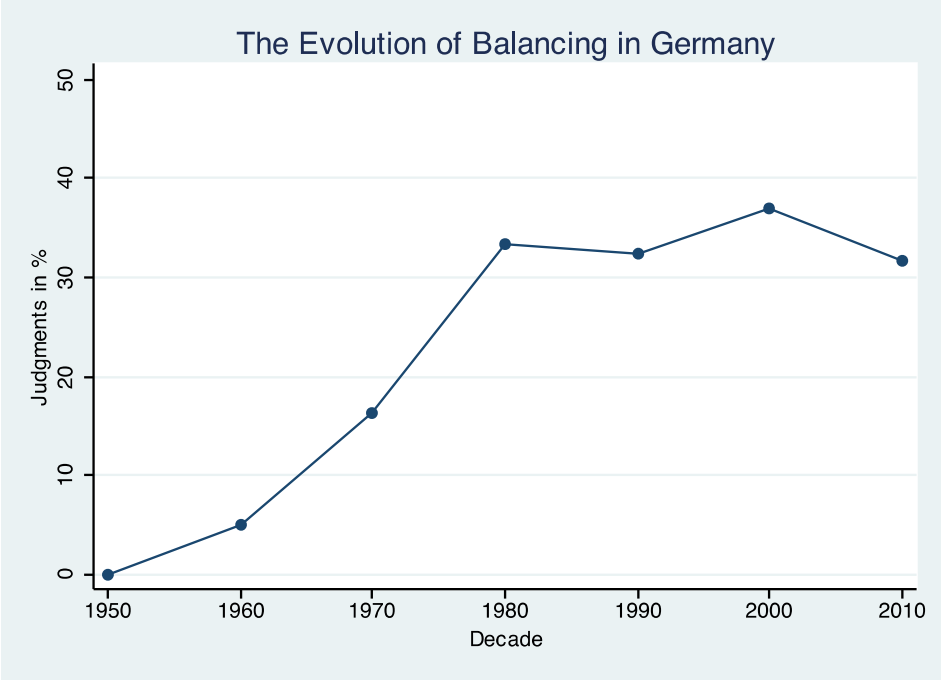
46 On extend and limits of the application of the proportionality test in the context of equal protection guarantee, see, e.g., Konrad Hesse, *Der Gleichheitssatz in der neueren deutschen Verfassungsentwicklung*, 109 ARCHIV DES ÖFFENTLICHEN RECHTS 174, 188-192 (1984); Rudolf Wendt, *Der Gleichheitssatz*, 7 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 778 (1988); STEFAN HUSTER, RECHTE UND ZIELE – ZUR DOGMATIK DES ALLGEMEINEN GLEICHHEITSSATZES (1993); Christoph Brüning, *Gleichheitsrechtliche Verhältnismäßigkeit*, 56 JURISTENZEITUNG 669 (2001).

47 For a detailed analysis of the case law, see, e.g., UWE VOLKMANN, POLITISCHE PARTEIEN UND ÖFFENTLICHE LEISTUNGEN (1993); Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 690-699 (1998); Martin Morlok, *Parteienrecht*

In the study, balancing was understood as a residual category.[48] All those decisions were classified as balancing decisions, which were based on proportionality considerations, but could not be assigned to any of the other three steps of the proportionality test, i.e. the determination of a legitimate purpose, the rational connection or the less-restrictive-means test.[49]

2. The historical trend

The following graph shows the evolution of the balancing argument in the case law of the German constitutional court in cases, in which the court overturned a piece of legislation:



als Wettbewerbsrecht, *in* FESTSCHRIFT FÜR DIMITRIS TH. TSATSOS 408 (Peter Häberle, Martin Morlok & Vassilios Skouris eds., 2003); Niels Petersen, *Verfassungsgerichte als Wettbewerbshüter des politischen Prozesses*, *in* DAS LETZTE WORT – RECHTSETZUNG & RECHTSKONTROLLE IN DER DEMOKRATIE (Rahel Baumgartner *et al.* eds., forthcoming 2013).

[48] *Similarly* Möller, *supra* note 1, at 137-140; Mattias Kumm & Alec D. Walen, *Human Dignity and Proportionality: Deontic Pluralism in Balancing*, *in* PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING (Grant Huscroft, Bradley Miller & Grégoire Webber eds., forthcoming 2014); *see also* Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests*, 45 HASTINGS L.J. 825, 839 (1994), who believes that balancing is indefinable.

[49] For a detailed classification of the analyzed judgments, see NIELS PETERSEN, VERHÄLTNISMÄßIGKEIT ALS RATIONALITÄTSKONTROLLE (forthcoming 2014). For all decisions that were qualified as balancing decisions, see *infra*, notes 65 and 67.

We can identify a historical trend. For two and a half decades after the foundation of the Court, balancing only played a marginal role when the Court justified the constitutional incompatibility of a statute. From 1951 to 1977, the Court struck down a law only four times because it deemed the law to be disproportionate. If the Court recurred to proportionality arguments, it usually based its decision on the lack of a rational connection between means and end or the existence of a less restrictive means. This picture changes toward the end of the 1970s. In the 35 years from 1978 to 2012, the Court based about a third of its decisions, in which it overturned a piece of legislation on balancing considerations. In relative terms, balancing became the most important argumentation framework from the 1980s onwards.

3. The pre-balancing period

In the early case law, the argumentation patterns follow the general lines that we have observed in our analysis of the pharmacy judgment.[50] When it applied the principle of proportionality, the Court predominantly used rational connection and less restrictive means arguments.[51] Moreover, it often relied on consistency and coherency arguments[52] or challenged the lack of protection of legitimate expectations.[53] An illustrative example of the early approach is the COD ruling, in which the Constitutional Court overturned a law prohibiting the cash-on-delivery shipment of living animals.[54] The challenged statute aimed to protect animal health. It was supposed to avoid long transport times that could occur if the purchaser refused to accept the delivered animal.

Substantially, the Court based its verdict on two principal arguments. On the one hand, it found that the legislation was overbroad because it targeted even those shipments, which did not involve a considerable danger of harm for the animals.[55] Furthermore, an empirical assessment of the situation had shown that only a tiny fraction of all

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50 *See supra*, III.

51 *See*, e.g., BVerfGE 7, 320, at 325-26; 7, 377, at 419-23 and 439-41; 9, 39, at 52-55 and 58-62; 11, 30, at 46-47; 11, 168, at 188; 12, 144, at 148-150; 13, 290, at 315-17; 17, 269, at 277-80; 17, 306, at 315-16; 19, 330, at 338-340; 21, 261, at 268-70; 21, 271, at 283; 30, 1, at 31-32; 30, 227, at 245-46; 30, 336, at 354-55; 34, 71, at 79; 34, 165, at 198; 36, 47, at 60 and 63; 36, 146, at 166; 40, 371, at 383; 41, 378, at 396-97.

52 *See*, e.g., BVerfGE 8, 1, at 26-27; 25, 236, at 251-52.

53 *See*, e.g., BVerfGE 2, 380, at 403; 13, 206, at 213; 13, 261, at 270-71; 15, 167, at 209; 18, 429, at 439; 24, 75, at 97-103; 30, 367, at 385-91; 31, 94, at 99; 31, 275, at 293; 32, 1, at 28; 43, 242, at 288; 43, 291, at 393-94.

54 BVerfGE 36, 47.

55 *Id.*, at 60.

shipments had been returned to the sender.[56] Not all of the shipments had been returned because the purchaser had rejected the animal. Some were due to other reasons, e.g., false mailing addresses or the absence of the addressee.[57] For these reasons, the Court found that there was no sufficient rational connection between measure and purpose.[58] On the other hand, the Court made a coherency argument. The legislature had extended the prohibition of cash-on-delivery even to express shipments. At the same time, it had not demanded that all deliveries were expedited. The Court noted that the transport time for non-express shipments often exceeded the total time of returned express deliveries. Therefore, it found the legislation to be inconsistent.[59]

Finally, the Court supported its substantial arguments by an inquiry into the legislative process. It noted that the prohibition of COD shipments had been introduced in the legislation without giving the concerned professions the opportunity to state their views.[60] Furthermore, it highlighted that some of the reasons that were mentioned in the legislative procedure to justify the prohibition had subsequently proven to be wrong.[61] For this reason, the legislature could not have considered all relevant factors in the balancing process and had thus been guided by incomplete and inaccurate considerations.[62]

The argumentation structure of the decision is similar to the one that we have observed in the pharmacy judgment. On the one hand, the Court highlighted failures of the legislative procedure. The legislature had not made a sufficient factual inquiry nor had it considered all relevant factors. On the other hand, it showed how these deficiencies of the legislative process affected the substance of the legislation by pointing out that it was overbroad and inconsistent.

Balancing decisions were very rare in the first twenty-five years of the Court's jurisprudence. The first decision came in 1962, when the Court overturned a law that

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56 *Id*., at 61-62.
57 *Id*., at 63.
58 *Id*.
59 *Id*.
60 *Id*., at 60.
61 *Id*., at 61.
62 *Id*., at 64.

extended the limit on shopping hours to vending machines.[63] These vending machines were only profitable when they operated 24/7. At the same time, a 24-hour-operation did not compromise the existence of competing shops. For this reason, the Court held that the law imposed a disproportionate burden on the operators of vending machines.[64] Before 1978, there were only three more rulings, in which the Constitutional Court overturned a law based on balancing considerations.[65] As in the vending machine case, the stakes for the legislature in these decisions were fairly low. The change of direction came in 1978 and 1979, when the Court used balancing in four judgments[66] – i.e. in exactly as many as in the 27 years before.

4. The second period: Balancing as the predominant argumentation framework

From 1978 onwards, balancing has become the predominant argumentation framework. Relatively speaking, the Court has relied on balancing to overturn a law more often than on any other argument.[67] The confidence of the Constitutional Court in utilizing balancing considerations is particularly evident in a decision on the status of transsexuals from May 2008.[68] In this decision, the Court balanced even though the case seemed to be a textbook example for the less-restrictive-means test. The applicant, who was born in 1929, had been married since 1952. For a long time, he had felt that he belonged to the female gender. Therefore, he underwent a surgery to transform his sex from male to female in 2002. However, he was denied a respective change of his civil status because the civil status could, according to the law applicable at the time, only be changed if he got divorced before.

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63 BVerfGE 14, 19.

64 *Id*., at 23-24.

65 *See* BVerfGE 21, 173, at 182-83; 31, 229, at 243-44; 34, 165, at 198.

66 *See* BVerfGE 47, 285, at 322-35; 49, 382, at 400-2; 52, 1, at 36; 52, 357, at 366.

67 *See* BVerfGE 47, 285, at 322-35; 49, 382, at 400-2; 52, 1, at 36; 52, 357, at 366; 53, 257, at 302-4; 53, 336, at 349-50; 55, 134, at 143; 58, 137, at 149-50; 61, 291, at 318; 62, 117, at 152; 68, 155, at 173-75; 69, 209, at 219; 72, 51, at 63-64; 74, 203, at 216-17; 77, 308, at 337; 78, 58, at 75; 78, 77, at 86-87; 79, 256, at 272-73; 81, 156, at 197-99; 84, 133, at 156; 85, 226, at 235-37; 87, 114, at 148-49; 90, 263, at 273; 92, 26, at 45; 93, 1, at 21-24; 97, 228, at 262-63; 99, 202, at 212-14; 100, 226, at 243; 100, 313, at 384-85; 101, 54, at 99-100; 104, 357, at 368; 108, 82, at 109-20; 109, 279, at 347-49; 112, 255, at 266-68; 113, 348, at 387-88; 115, 1, at 20-24; 117, 202, at 229-39; 119, 59, at 87-89; 120, 274, at 326-31; 121, 30, at 64-67; 121, 175, at 194-202; 121, 317, at 360-68; 125, 39, at 90-95; 125, 260, at 329-30; 128, 109, at 130-36; 128, 157, at 177-83; 130, 372, at 395-97.

68 BVerfGE 121, 175.

With this provision, the legislature had intended to prevent the matrimony of same-sex couples. However in 2001, the legislature had passed a new law that allowed a civil union of same-sex couples. Since then, the legislative purpose could have been attained through a less-restrictive means: the transformation of the matrimony into a civil union on request of the couple. Nevertheless, the Court recurred to balancing in its reasoning. It argued that the divorce requirement imposed a disproportionate burden on the applicant and thus violated his right to privacy.[69] When the Court discussed the possible consequences, however, it explicitly advised the legislature of the possibility to transform the matrimony into a civil union as one possible option.[70]

IV. Balancing and the review of decisions of civil and criminal courts

In the previous section, we have seen that the Constitutional Court was reluctant to use balancing considerations in the first two and a half decades of its existence when it overturned a law. However, that does not mean that the Court totally refrained from balancing in this early period. To the contrary: Even in the time from the 1950s to the late 1970s, we find many decisions, in which the Court recurred to balancing. First, the Court balanced when it confirmed the constitutionality of a law.[71] For two reasons this is not surprising. On the one hand, balancing is a necessary step in the doctrine of the proportionality test when the law has passed the first three steps of the test. On the other hand, we have already seen that balancing does not raise the suspicion of the Court interfering with the political sphere as the Court confirms the legislative decision.

Second, the Constitutional Court balanced when it reviewed decisions of lower courts.[72] The seminal case is the *Lüth* judgment, which was handed down in January 1958 – five

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69 *Id*., at 194-202.

70 *Id*., at 203.

71 *See*, e.g., BVerfGE 9, 338, at 346; 10, 89, at 103-7; 13, 97, at 113-22; 13, 181, at 187-90; 14, 263, at 282-84; 15, 235, at 243-44; 16, 147, at 174-83; 21, 245, at 259-60; 23, 50, at 59-60; 25, 1, at 22-23; 27, 1, at 8; 28, 191, at 200; 30, 1, at 32-33; 32, 54, at 75-76; 33, 367, at 378-82; 37, 1, at 22-23; 38, 61, at 92 and 94-95; 39, 210, at 234; 50, 290, at 350-51 and 365.

72 *See*, e.g., BVerfGE 7, 198, at 215-29; 12, 113, at 124-27; 16, 194, at 203; 17, 108, at 118-20; 22, 114, at 123-24; 24, 278, at 282-88; 34, 238, at 248-51; 35, 202, at 221-38. The Constitutional Court does not always engage in balancing itself. In many decisions, it frames its argument as a mere review of whether the lower court has considered all relevant factors in the balancing test. However, the level of scrutiny varies. In some decisions, the Constitutional Court simply states that the civil or criminal court has failed to assess the scope of a fundamental right properly, but leaves the final balancing decision to the court of first instance; *see*, e.g., BVerfGE 27, 72, at 82-88; 27, 344, at 352-53. But in the vast majority of cases, the

months before the pharmacy judgment.[73] The case concerned a statement of Erich Lüth, who, at the time, was the director of the Hamburg press office. Lüth had called for a boycott of the latest film of the director Veit Harlan, who had produced several anti-Semitic movies in Nazi Germany. After the producer and the distributor of Harlan's film had obtained an injunction against Lüth, which asked him to refrain from calling for a boycott against the film, Lüth turned to the Constitutional Court. He argued that the injunction violated his freedom of expression.

The judgment is of seminal importance for two reasons. On the one hand, the Court extended its own jurisdiction to the review of decisions of civil courts even if these decisions were not based on an unconstitutional law.[74] It argued that fundamental rights did not only contain obligations for the legislature, but also bound private law courts when they decided on conflicts between individuals.[75] On the other hand, it recurred to a "balancing of the fundamental right contained in section 5 para. 1 sent. 1 of the Constitution [i.e. the freedom of expression] and the rights and values that restrict its exercise" for the resolution of the conflict between the applicant's freedom of expression and Harlan's professional reputation.[76] On both sides of the equation, it considered the extent to which the competing interests were affected. On the one hand, it analyzed the motives of Lüth's statement, and, on the other, it examined the intensity of the restriction of Harlan's rights.

The Court found that the Lüth had intended to protect the reputation of the German film industry abroad and to fend off any Nazi influences.[77] It qualified the applicant's concern for the German reputation as "significant".[78] Furthermore, it acknowledged that it was necessary to interfere with Harlan's interests in order to pursue this purpose.[79] On

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Constitutional Court predetermines the result of the balancing test in its decision. This applies, in particular, to the initially cited cases.

73 BVerfGE 7, 198, at 215-19.

74 *See* Rainer Wahl, *Lüth und die Folgen – Ein Urteil als Weichenstellung für die Rechtsentwicklung*, *in* DAS LÜTH-URTEIL AUS (RECHTS-)HISTORISCHER SICHT 371, 375 (Thomas Henne & Arne Riedlinger eds., 2005); Hans Vorländer, *Die Deutungsmacht des Bundesverfassungsgerichts*, *in* DAS BUNDESVERFASSUNGSGERICHT IM POLITISCHEN SYSTEM 189, 190 (Robert Christian van Ooyen & Martin H.W. Möllers eds., 2006); Robertson, *supra* note 12, at 50; Jestaedt, *supra* note 34, at 93.

75 BVerfGE 7, 198, at 203-12.

76 *Id*., at 215.

77 *Id*., at 216-18.

78 *Id*., at 216 (In the original, it says: "eine für das deutsche Volk sehr wesentliche Frage").

79 *Id*., at 217.

the other side, the Court argued that statement did not infringe the core of Harlan's identity as an artist.[80] Lüth had exercised neither physical nor legal force, and Harlan was not denied to continue to work in the film business.[81] For this reason, the Court held that the injunction violated the applicant's freedom of expression.

In the *Lüth* judgment, the Court thus displayed a typical balancing test. It evaluated and compared the importance of the competing interests and the intensity, with which they were affected. The *Lüth* judgment was no exception in the early years.[82] Moreover, the Court did not only apply balancing considerations while reviewing the decisions of civil courts. Instead, it also overturned several decisions of criminal courts, in which it found measures of criminal procedure to be disproportionate.[83] In one decision, the Constitutional Court reversed a decision to investigate an accused by means of a pneumoencephalography, an extremely painful procedure that allowed to reproduce the structure of the brain on an X-ray image.[84] As the applicant was accused of a misdemeanor, the Court held that the severity of the bodily harm caused by the measure was disproportionate regarding the severity of the crime.

In a different decision, the Constitutional Court overturned a high court judgment, in which the high court had based a conviction on audiotape recordings as evidence.[85] The Constitutional Court argued that the high court had not sufficiently justified why it believed that the criminal offense had been so severe that it outweighed the right to privacy of the accused.[86] These examples show that the Constitutional Court widely used balancing as a doctrinal instrument in some of its early landmark decisions when reviewing lower court decisions, even though it was rather reluctant to use balancing when declaring a law as unconstitutional.

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80 *Id*., at 220-21.
81 *Id*., at 221.
82 *See supra* note 72.
83 *See*, e.g., BVerfGE 16, 194, at 203; 17, 108, at 118-20; 22, 114, at 123-24; 34, 238, at 248-51; 35, 35, at 39-40.
84 BVerfGE 17, 108, at 118-20.
85 BVerfGE 34, 238.
86 *Id*., at 251.

V. Balancing and the institutional strength of the Constitutional Court

These observations confirm the predictions of the theoretical framework, which had hypothesized that the likelihood that a court balances depended on two factors.[87] On the one hand, a court is more likely to use balancing considerations the stronger its institutional position. On the other hand, it will lean on balancing more heavily the more balancing is accepted as a doctrinal argument in the legal community.

The institutional strength of a court is not constant. Instead, it develops over time. Constitutional Courts need to gain the trust of the citizenry in order to increase their public support.[88] Some studies in political science show that the legitimacy of constitutional courts generally increases over time, as courts had more opportunities to attract public support.[89] Particularly, in the first years of their existence, constitutional courts are usually in a rather precarious situation and still have to establish their authority.

The German Constitutional Court is no exception in this respect. In the 1950s, the Court faced severe political pressure from the Adenauer government. When the Court was deciding about the constitutionality of Germany's participation in the planned European Defense Community, the government feared that the court could be a serious obstacle to their foreign policy agenda. For this reason, Adenauer's Minister of Justice, Thomas Dehler, continuously tried to damage the authority of the court.[90] Furthermore, the government entertained reform plans, which would have given the government much greater influence on the nomination of judges to the Constitutional Court.[91]

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87 *See supra*, II 3.

88 Georg Vanberg, *The Will of the People: A Comparative Perspective on Friedman*, 2010 MICH. ST. L. REV. 717, 720-721 (2010).

89 James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SC. REV. 343, 355 (1998).

90 *See* Manfred Baldus, *Frühe Machtkämpfe – Ein Versuch über die historischen Gründe der Autorität des Bundesverfassungsgerichts, in* DAS LÜTH-URTEIL AUS (RECHTS-)HISTORISCHER SICHT 237, 241-242 (Thomas Henne & Arne Riedlinger eds., 2005); Oliver W. Lembcke, *Das Bundesverfassungsgericht und die Regierung Adenauer – vom Streit um den Status zur Anerkennung der Autorität, in* DAS BUNDESVERFASSUNGSGERICHT IM POLITISCHEN SYSTEM 151, 156-157 (Robert Christian van Ooyen & Martin H.W. Möllers eds., 2006).

91 *See* Laufer, *supra* note 19, at 169-206; RICHARD HÄUßLER, DER KONFLIKT ZWISCHEN BUNDESVERFASSUNGSGERICHT UND POLITISCHER FÜHRUNG 40-47 (1994); Lembcke, *supra* note 90, at 158.

Even though these plans did not succeed in the end, they show that the position of the Court was much more tenuous in the 1950s than it is today.[92] By the late 1970s, the Court had consolidated its position. It enjoyed widespread public support,[93] and its institutional position was much stronger than in the 1950s when the court developed the proportionality test. Consequently, when the Court started to use balancing as an argumentation framework to overturn legislation more consistently from 1978 onwards, it had gained sufficient institutional strength and self-confidence for such a doctrinal move.

Furthermore, it is no new phenomenon that courts develop doctrinal frameworks in situations where they target less powerful actors, and then turn them against more powerful ones once the doctrine has been accepted in the legal discourse. Barry Friedman and Erin Delaney have shown in a study that the U.S. Supreme Court developed certain doctrinal tools initially when reviewing state measures.[94] In these cases, the Court backed the Federal government against the states. However, once the doctrines were established and accepted, the Court also turned them against the Federal government.[95]

Similarly, the German Constitutional Court developed the balancing doctrine when reviewing lower courts' decisions and confirming pieces of legislation. When it confirmed legislation, it confirmed the decision of the political branches. When it reviewed decisions of civil or criminal courts, the review of these decisions was arguably in the interest of politics. There had been a deep suspicion against the general judiciary among the delegates of the Parliamentary Council that drafted the German constitution.[96] The judiciary had played a crucial role in the Third Reich, stabilizing and supporting the regime by interpreting the existing laws through the lens of the Nazi

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92 *See* Brun-Otto Bryde, *Der Beitrag des Bundesverfassungsgerichts zur Demokratisierung der Bundesrepublik*, *in* DAS BUNDESVERFASSUNGSGERICHT IM POLITISCHEN SYSTEM 321, 323 (Robert Christian van Ooyen & Martin H.W. Möllers eds., 2006).

93 *See* Hans Vorländer & André Brodocz, *Das Vertrauen in das Bundesverfassungsgericht: Ergebnisse einer repräsentativen Bevölkerungsumfrage*, *in* DIE DEUTUNGSMACHT DER VERFASSUNGSGERICHTSBARKEIT 259, 264 (Hans Vorländer ed., 2006).

94 Friedman & Delaney, *supra* note 22.

95 *Id*., at 1188-1192.

96 DONALD P. KOMMERS, JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT 75 (1976).

ideology.[97] This was one of the reasons why the Constitutional Court, which was not part of the traditional judicial hierarchy, was awarded the exclusive competency to overturn laws that it found to be unconstitutional.[98] Furthermore, among the first judges that had been elected to the Constitutional Court, a considerable number had openly resisted the Nazi regime.[99]

When the Constitutional Court ceased the authority to review decisions of the civil courts by extending the scope of fundamental rights also to private relations in *Lüth*, it dealt with a case that catered to the suspicion against the general judiciary. *Lüth* was thus ideal for claiming the review authority and to introduce the balancing argument.[100] The applicant was a prominent state official, who had spoken up against a film director with a significant Nazi past. When the civil courts issued an injunction against *Lüth*, they trivialized Harlan's role in the Third Reich. The Constitutional Court could thus emphasize its role as the guardian of the fundamental values of post-war Germany. It could also introduce the balancing framework and develop it without undermining its own legitimacy.

In the late 1970s, when the Court extended the use of the doctrine, balancing was predominantly accepted as a doctrinal instrument of fundamental rights review in constitutional law scholarship.[101] It was so much part of the arsenal of doctrinal

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97 *Seminally* BERND RÜTHERS, DIE UNBEGRENZTE AUSLEGUNG. ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS (1968).

98 Kommers, *supra* note 96, at 75.

99 Richard Ley, *Die Erstbesetzung des Bundesverfassungsgerichtes*, 13 ZEITSCHRIFT FÜR PARLAMENTSFRAGEN 521, 532 (1982); Brun-Otto Bryde, *Die Rolle der Verfassungsgerichtsbarkeit in Umbruchsituationen*, *in* VERFASSUNGSRECHT UND VERFASSUNGSPOLITIK IN UMBRUCHSITUATIONEN 197, 201 (Joachim Jens Hesse, Gunnar Folke Schuppert & Katharina Harms eds., 1999); Christoph Schönberger, *Anmerkungen zu Karlsruhe*, *in* DAS ENTGRENZTE GERICHT 9, 30 (Matthias Jestaedt, Oliver Lepsius, Christoph Möllers & Christoph Schönberger eds., 2011); MICHAEL STOLLEIS, GESCHICHTE DES ÖFFENTLICHEN RECHTS IN DEUTSCHLAND IV 147-154 (2012).

100 *See also* Lepsius, *supra* note 11, at 192 on the significance of the Nazi background oft he case.

101 *See* PETER HÄBERLE, DIE WESENSGEHALTSGARANTIE DES ART. 19 ABS. 2 GRUNDGESETZ 31-39 (1962); Manfred Gentz, *Zur Verhältnismäßigkeit von Grundrechtseingriffen*, 21 NEUE JURISTISCHE WOCHENSCHRIFT 1600, 1604-1605 (1968); Peter Wittig, *Zum Standort des Verhältnismäßigkeitsgrundsatzesim System des Grundgesetzes*, 21 DIE ÖFFENTLICHE VERWALTUNG 817 (1968); Grabitz, *supra* note 34, at 575-581; Christian Starck, *Staatliche Organisation und staatliche Finanzierung als Hilfen zu Grundrechtsverwirklichungen?*, *in* BUNDESVERFASSUNGSGERICHT UND GRUNDGESETZ. FESTGABE AUS ANLAß DES 25JÄHRIGEN BESTEHENS DES BUNDESVERFASSUNGSGERICHTS. ZWEITER BAND 480, 482 (Christian Starck ed., 1976); PETER BADURA, FRITZ RITTNER & BERND RÜTHERS, MITBESTIMMUNGSGESETZ 1976 UND GRUNDGESETZ 196 (1977); JÜRGEN SCHWABE, PROBLEME DER GRUNDRECHTSDOGMATIK 319-323 (1977); Robert Alexy, *Zum Begriff des Rechtspinzips*, *in* ARGUMENTATION UND HERMENEUTIK IN DER JURISPRUDENZ 59 (Werner Krawietz, Opalek Kazimierz,

instruments in constitutional law that the shift was barely noticed in the legal academy.[102] The Constitutional Court could thus apply the balancing test to the review of legislation without having to fear a significant critical scrutiny of this move in the legal scholarship.

VI. Conclusion

Doctrinal argumentation frameworks are not discovered, but constructed. However, contrary to what critics sometimes argue, courts are not unconstrained in the development of their doctrinal tools. Instead, they face institutional constraints. Courts have neither sword nor purse to implement their own decisions. Consequently, they need public support if they want to take decisions that impose costs on government and legislature. Their legitimacy depends on being perceived as neutral arbiters who decide according to legal, not to political considerations. If they are perceived as activist, they jeopardize their legitimacy. Thus, they have to choose the doctrinal tools they use carefully in order to dissipate the suspicion of having a political agenda.

To substantiate this hypothesis, this contribution analyzed the development of the proportionality test in the jurisprudence of the German Federal Constitutional Court. In particular, the last step of the test is often severely criticized.[103] Balancing is seen as an arbitrary exercise that lacks rational standards and is thus suspicious of being a veil for political considerations in legal decision-making. For these reasons, some authors even argue that balancing is an instrument of judicial self-empowerment.[104]

However, the German Constitutional Court was sensitive to the methodological problems of balancing when it developed the proportionality test in the late 1950s. Initially, it was very reluctant to base judgments on balancing considerations when it overturned a piece of legislation. Instead, it recurred to balancing when it overturned decisions of lower courts or when it confirmed legislative decisions. In these cases,

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Aleksander Peczenik & Alfred Schramm eds., 1979); Rudolf Wendt, *Der Garantiegehalt der Grundrechte und das Übermaßverbot*, 104 ARCHIV DES ÖFFENTLICHEN RECHTS 414, 455-456 (1979).

102 The only exception I am aware of is Schlink, *supra* note 6, at 463, who observes that the decisions in which the Court had fundamentally relied on balancing had increased „over the years".

103 *See supra*, note 4.

104 *See supra*, note 7.

referring to balancing did not pose any legitimacy issues because the court did not second-guess political considerations of the legislature.

Starting in the late 1970s, the Court's approach changed. It increasingly relied on balancing when overturning legislation. This change was due to two reasons. On the one hand, the institutional position of the Constitutional Court in the late 1970s was much stronger than in the 1950s. It did not have to fear that an increasing reliance on balancing would immediately undermine the level of legitimacy that it had build up over the previous two and a half decades.

On the other hand, balancing was not a new concept in the Court's jurisprudence anymore. As the Court had applied balancing considerations in other circumstances, balancing was widely accepted as a legal argumentation framework by then. Consequently, the court predominantly did not arise the suspicion to hide political considerations behind legal terms. Unlike the critics suggest, balancing is thus not a tool of judicial self-empowerment. Courts cannot simply choose doctrinal tools as they wish. Instead, they gradually need to develop the instruments of judicial review to impose effective constraints on the legislature.