Constitutional Law in Germany

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however, it is the aspect of the binding character of the constitution that underpins the placement of the principle of proportionality within the rule of law.

In the *Pharmacy* decision, the principle of proportionality had already been framed in terms of a suitability test and the controversial necessity test. In turn, the appropriateness test takes the form of a three-tiered approach (*Drei-Stufen-Theorie*), which the Federal Constitutional Court developed to assess infringements of the fundamental right to freedom of occupation.[60] In addition to suitability and necessity, the appropriateness test compares infringements of varying degrees with the regulatory interests behind an infringement – the first tier being objective access limits to professions such as concession systems; the second subjective access limits such as qualification requirements; and the third regulations that merely affect if and how a profession may be practiced. In the *Pharmacy* decision, the Federal Constitutional Court structured the principle of proportionality as a review standard, and established its applicability to the legislature. It has never once looked back. As early as in the very next year, in 1959, the Court stopped associating the principle with various individual fundamental rights and instead began referring to a "general principle of proportionality."[61] **33**

The Federal Constitutional Court rightly assumed that the Basic Law did not want fundamental rights that were "hollow" vis-à-vis the legislature. Against the background of the Weimar experience, Art. 1 (3) GG, which expressly states that fundamental rights are binding for the legislature, tasked the Court with looking for ways to give substance to this constitutional command. From a systematic perspective, provisos that reserve the power to limit fundamental rights to the legislature were still problematic, as they had been in the Weimar Republic. The Court made this issue particularly clear in one of its earliest decisions, stating: "Legal scholars often held that the basic right of Article 2.1 will prove hollow if it is put under such a broad limitation because it could be restricted by any act of Parliament. They overlook the fact that legislative power is subject to more stringent constitutional restrictions than under the Weimar Constitution of 1919.… The legislature at that time could modify or alter constitutional rights at will. The Basic Law, on the other hand, erected a value oriented order that limits public authority."[62] Faced with the challenge of how to establish such limits, the principle of proportionality provided a way forward. As for legislation, it made it possible to limit the power of the legislator to infringe upon fundamental rights despite the wide-ranging provisos. As for the courts, the principle was able to shape the contours of the balancing called for in the *Lüth* decision. Thus, scepticism regarding the binding character of fundamental rights was countered by the principle of proportionality, both with regard to the legislature and the judiciary. It is considered to be the "universal key to binding fundamental rights."[63] **34**

Some of the historical significance and corresponding relevance of the principle of proportionality stems from the Prussian Higher Administrative Court having used it as a legal standard of review of police action. The story is often told as if the triumphal march of the principle of proportionality began in Prussia, continued to the Federal Constitutional Court and the Basic Law, and ultimately culminated in the European and international protection of human rights. However, this account shows some cracks. The **35**

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[60] See BVerfGE 13, 97 (104) [1961] – *Befähigungsnachweis für Handwerker*: tiered theory of the *Pharmacy* decision as "the result of the strict application of the principle of proportionality."

[61] BVerfGE 10, 141 (173) [1959] – *privatrechtliches Versicherungswesen*; see also BVerfGE 10, 221 (225) [1959] – *Nichtanhörung Sachverständiger*. The principle was also immediately generalised in the literature. For a prime example, see Lerche (1961); under the term "practical concordance" (*praktische Konkordanz*), used in particular for proportionality in the narrow sense, see Hesse (1967), 28 et seq.

[62] BVerfGE 6, 32 (40) [1957] – *Elfes*, translation taken from Bröhmer/Elsner/Spitzkatz, *70 years of German Basic Law*, 150.

[63] Bumke, (2019) 144 *AöR*, 1 (52 et seqq.)., translation by the author.

Prussian Higher Administrative Court did indeed introduce the principle of proportionality to administrative law, in particular police law.[64] The Prussian Court, however, limited the principle to a suitability and necessity test.[65] Further, the *Pharmacy* decision does not refer to the Prussian Higher Administrative Court but rather to interpretations of the guarantee of the essence (*Wesensgehalt*) of fundamental rights by the Federal Administrative Court and the Federal Court of Justice, which had already referred to elements of the principle of proportionality; the Bavarian Constitutional Court, which, in relation to the general proviso in Art. 98 of the Bavarian Constitution, examined whether the restriction of a fundamental right by law was "absolutely necessary"[66]; as well as the necessity test (*Notwendigkeitskontrolle*) carried out occasionally by the Imperial Court of Justice (*Reichsgericht*) on emergency decrees issued by the President of the Reich (*Reichspräsident*).[67] Only recently released records of the court proceedings show that the judges also drew on the principle of proportionality from administrative law in their internal deliberations.[68] What is more important, however, is that the Court relied on the principle of proportionality to solve a problem with structural similarities to the one faced by the Prussian Higher Administrative Court.[69] In police law, the courts relied on very general legal provisions empowering the police in cases of a danger to public security or order. A general clause mandated the police simply with "measures". To rein in the wide discretion given to the police and to give the judicial review of police measures some bite, the Prussian Higher Administrative Court resorted to the principle of proportionality. Thus, while tradition played a role in administrative law, the principle of proportionality was well positioned, primarily for functional reasons. It can resolve issues of legal bindingness in both administrative and constitutional law that are triggered by overly broad authorisations.

36 Discussions about the principle of proportionality are structured very differently abroad. In the United States, for example, the principle of proportionality is approached from the opposite direction, so to speak.[70] The various constitutional amendments very clearly address the legislature. The First Amendment even begins with the phrase "Congress shall make no law." The U.S. Constitution does not make use of provisos. Consequently, the development of a doctrine of fundamental rights in the United States faces the diametrically opposite problem to the German one: It is not a question of limiting the reach of provisos that might otherwise enable the legislature to undermine (or to "hollow out") fundamental rights (→ § 3 paras 25 et seqq.); rather, it is about opening up the possibility for the legislature to regulate, something that the categorically-formulated text of the U.S. Constitution seems to rule out. The doctrinal problem of fundamental rights in the U.S. Constitution does not lie in making the various rights legally effective in the first place, but rather in opening up possibilities to limit rights that are too broadly defined. Accordingly, discourse in the United States has not focused on proportionality, but on the role of rights. Placing the rights guaranteed by the Bill of Rights in a position where they may be weighed against other rights and public interests and orienting this

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[64] PrOVG (*Preußisches Oberverwaltungsgericht*), Judgment of 10 April 1886 – I.C 155/85, PrOVGE 13,424/425 et seq.

[65] PrOVG (*Preußisches Oberverwaltungsgericht*), Judgment of 10 April 1886 – I.C 155/85, PrOVGE 13,424/425 et seq.

[66] BayVerfGHE 72, 158 (177) [1956].

[67] BVerfGE 7, 377 (411) [1958] – *Apothekenurteil*.

[68] Michl, (2020) 68 *JöR*, 323 (332, 337).

[69] The author thanks Bernhard Schlink for highlighting this point.

[70] On the differences, see Kumm in Pavlakos (ed), *Philosophy of Alexy*, 131 (134 et seqq.); on the basis of BVerfGE 54, 143 [1980] – *Taubenfütterungsverbot*, see also Greene, (2018) 132 *Harvard Law Review*, 28 (56 et seqq.).

weighing-up process to the principle of proportionality does not lead to the strengthening of these rights – unlike the situation under the Basic Law – but rather to weakening them.

37 In the mid-1970s, Ronald Dworkin brought this perspective to bear in his claim that rights are best perceived as "trumps."[71] A weighing-up against public interests threatens to weaken fundamental rights. For instance, how can fundamental rights assert themselves against national security interests? After all, when it comes to protecting national security, almost any infringement on fundamental rights seems proportional. In contrast, Dworkin's view of rights as "trumps" emphasises the absolute aspect of individual rights and freedoms, the purpose of which is to enable them to assert themselves against overwhelming collective interests. Nonetheless, the fundamental rights of the Constitution of the United States must also be circumscribed. To this end, the Supreme Court developed a tiered system of review. In response to the compelling state interest test that the court relied on in its activist Lochner era, it introduced a mere rational basis test for some restrictions and later added an intermediate standard of review for still others, which relies on a substantial relation of the infringement to important government objectives.[72] Ultimately, these tests are also based on forms of balancing that subject the ends pursued by the state and the means employed to achieve these ends to degrees of review of varying intensity.[73] This has tended to reap more criticism than support.[74] As an alternative to subjecting rights and freedoms to restrictions based on balancing, the idea of fundamental legal interests that, by their essence, are not susceptible to balancing has been emphasised repeatedly. Frederick Schauer, for instance, expresses his support for this approach in his phrase "rights as shields": A right as a shield is not simply subject to balancing against public interests but rather can be overridden only by a sufficiently compelling state interest.[75]

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3. Criticism of the principle of proportionality

38 The idea that rights are being diluted by the application of the principle of proportionality is at the root of much of the criticism aimed at it in the international discussion. The entry of the principle into international legal discourse has been seen as an "attack on human rights."[76] It has been argued that, as a result of the link between the principle and the balancing process, fundamental rights have lost their impact and can no longer offer effective protection.[77]

39 In Germany, too, the development of the concept of balancing and the recourse to the principle of proportionality have not escaped criticism. However, the objections have generally been in line with those that were rejected in the *Pharmacy* decision: They question the effectiveness of the principle of proportionality and raise the related question concerning the separation of powers and the legitimacy of the Court.[78] Yet while the criticism already mentioned by the Court in the *Pharmacy* decision dealt with the practicality of the necessity test and the implications of broader judicial review of the legislature for the

[71] Dworkin (1977), xi; Dworkin in Waldron (ed), *Theories of Rights*, 153 (153 et seqq.).
[72] Fallon, JR. (2019), 105 et seqq.
[73] Veel, (2010) 4 *LEHR*, 177 (1406 et seq.).
[74] Rather exceptional, the recent criticism of Greene, (2018) 132 *Harvard Law Review*, 28.
[75] Schauer, (1992) 27 *Ga. L. Rev.*, 415 (428 et seqq.).
[76] Tsakyrakis, (2009) 7 *Int. J. Const. L.*, 468; see also the response by Khosla, (2010) 8 *Int. J. Const. L.*, 298 and the rejoinder by Tsakyrakis, (2010) 8 *Int. J. Const. L.*, 307.
[77] Beatty (2010), 160 et seqq.; Tsakyrakis, (2010) 8 *Int. J. Const. L.*, 307; Tsakyrakis, (2009) 7 *Int. J. Const. L.*, 468 (489); from the German discussion Rusteberg (2009), 71.
[78] Forsthoff (1971), 137 et seqq.

separation of powers, the focus of criticism subsequently shifted to the actual balancing element of appropriateness.

40 The emergence of this criticism may be related to two developments in case law. First, some legislative reforms introduced by the social-liberal coalition government in the 1970s were not only politically controversial, but also challenged in front of the Federal Constitutional Court. This gave the Court further opportunities to apply the principle of proportionality to legislation.[79] Second, during the same time period, the appropriateness test gained importance in the Court's case law, whereas previously the focus had been on suitability or necessity.[80] Today, some constitutional judgments rely almost exclusively on the appropriateness test. For example, in the 2016 decision on the Federal Criminal Police Office Act, the fundamental rights affected by the Act were briefly mentioned at the beginning of the examination of the merits. The Court then stated that the constitutionality of the powers conferred by the Act depends on their proportionality. The suitability and necessity of the Act are also affirmed in a brief passage before making the following statement: "Limitations result mainly from the requirements of proportionality in the strict sense. Accordingly, the surveillance and investigative powers must be appropriately designed with a view to the weight of the interference."[81] Of the decision's 244 paragraphs devoted to the constitutionality of the Act in question, 236 deal with the appropriateness test. It is possible that these two developments – the rise of constitutional challenges to parliamentary laws and the increase in importance of the appropriateness test – are connected to each other. Given the uncertainties associated with prognostications, the suitability and necessity of abstract general laws are much more difficult to assess than they are for judgments or for individual administrative decisions.

41 While the necessity of proportionality review has not been called into question as such, criticism has been directed primarily at the rational potential of the appropriateness criterion and the constitutional standard of review that the Court associates with it.[82] This criticism aims at the difficulty of rationalising the balancing of values or interests and the resulting questions that arise with regard to the separation of powers as far as the relationship between the legislature and the Federal Constitutional Court is concerned. After all, so the argument goes, the appropriateness criterion allows the Court to substitute its own value judgments for those of the legislature, whose democratic legitimisation is incomparably superior to the Court's.

42 Such criticism is not unique to German literature: A second line of criticism can also be found in the literature in the United States.[83] In the context of the various tests it has developed, the Supreme Court, too, refers time and again to the balancing of rights and public interests. Depending on the phase of development of the case law, balancing has resulted both in the curtailing and the broadening of fundamental legal interests. Aleinikoff's criticism, for example, aims precisely at this divide: "In earlier days, the global critique of balancing was often political. To the critics of the 1950's and 1960's, balancing was a technique for watering down constitutional guarantees. Today, balancing opinions can tip either way. Much of the modern due process and equal-protection law can be explained as the Court placing its finger on the scale on behalf of individuals and

[79] Petersen (2017), 83 et seqq.

[80] Petersen (2017), 83 et seqq.

[81] BVerfGE 141, 220 (267) [2016] – *BKA-Gesetz*, translation taken from Bröhmer/Elsner/Spitzkatz, *70 years of German Basic Law*, 930; for a similar pattern see BVerfG, Judgement of the First Senate of 16 February 2023 – 1 BvR 1547/19 – *Automatisierte Datenanalyse*.

[82] In general, see Schlink (1976), 125 et seqq.; for an alternative doctrinal suggestion, see Rusteberg (2009), 223 et seqq.: The limits of legislative freedom should lie in the essence of constitutional rights.

[83] On the persistent differences in both discussions on balancing, see Bomhoff, (2010) 4 *LEHR*, 108; Bomhoff (2013), 78 et seqq.

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minorities. But rather than restoring balance to constitutional law, the hasty recourse to to balancing threatens constitutional law. Balancing has turned us away from the Constitution, supplying 'reasonable' policymaking in lieu of theoretical investigations of rights, principles and structures."[84]

In light of this criticism, the question remains as to why judicial proportionality review **43**
including the balancing of rights, values, and interests – with all its various nuances – has found its way into so many different constitutional and human rights jurisdictions. A legal realist explanation could simply point to the attractiveness of the proportionality review to the courts that claim it. It provides constitutional courts – and other courts that perform constitutional review – with a broad and flexible power of judicial review with which to overturn legislative enactments. But even if the temptations associated with judicial power are part of the explanation, it would be strange for courts to assert this power in so many jurisdictions without losing acceptance in the absence of underlying reasons of political morality upon which the proportionality control can lean. In any event, the widespread use of the proportionality review certainly cannot be explained by theories of democracy since, as critics never tire of emphasising, the democratic legitimacy of courts is much weaker than that of parliaments when it comes to the balancing of conflicting interests.

Thus, there must be other normative foundations of the liberal constitutional state **44**
upon which the courts can base their use of proportionality review of acts of the legislature with its greater democratic legitimacy. Matthias Kumm sees such a principle in the fact that in the liberal constitutional state, even the democratically-elected parliament must justify itself to individuals for interfering with their rights: There is a right to justification vis-à-vis the democratic process.[85] This right to justification can be based on an ethics of recognition,[86] for which the fundamental recognition of the other as a rational subject is anchored in the right to justification.[87] The legitimacy of democracy lies not in a power struggle in which the interests of the majority override those of the minority; rather, its legitimacy lies in the pursuit of reasonable consensus concerning the common good that, given irreconcilable differences, must be determined on the basis of the majority criterion. Yet it remains the case, according to Kumm, that it must be possible to justify democratic decisions as reasonable. Due to a number of potential pathologies of the democratic process – such as unreflected path dependencies, ideological influences, or special interests that do not promote the common good – this need for reasonableness and justification is not always fully satisfied by parliamentary discussion and decision alone. The constitutional requirement of proportionality demands this justification. It does not rely on hermeneutical efforts, which are otherwise the hallmark legal argumentation. It does not demand a justification based on an authoritative text[88] but rather an instrumental and normative justification of sovereign acts on the basis of rational standards. With the constitutional jurisdiction and especially the ability of individuals to bring constitutional complaints to the fore, the right to justification is also taken seriously from an organisational perspective and – like the principle of democracy in parliaments – institutionalised in court. The principle of proportionality forces representatives of the majority to provide a rational justification for their decisions that has the potential to also elicit consent from those who do not stand to benefit. In turn, constitutional jurisdiction

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[84] Aleinikoff, (1987) 96 *Yale L. J.*, 943 (1004).
[85] Kumm, (2010) 4 *LEHR*, 141 (157 et seqq.); Petersen (2017), 18 et seqq.
[86] On the importance of legal recognition for self-confidence, see Honneth (2005), 121 et seqq.
[87] On the importance of human rights, see Forst (2007), 9 et seqq., 68 et seqq., 291 et seqq.
[88] The hermeneutic justification is marked by an intentional reference to texts, and the same is true of the doctrinal development of law as explained in Poscher in Glanert/Girard (eds), *Law's hermeneutics*, 207 (207 et seqq.).

forces the representatives of the majority to present this justification to an institution that, due to judicial independence, is particularly suitable from a functional perspective. Kumm sees the courts in a reactive role provoked by the principle of proportionality. It is not their place to substitute their idea of proportional balancing for that of institutions whose democratic legitimacy is stronger, but rather to use the principle to force such institutions to show that their decisions are rationally justifiable. The extent to which the principle of proportionality satisfies this reactive profile depends not least on how all of its various elements are developed and how rationally effective they prove to be.

II. The structure of proportionality

45 As Bernhard Schlink has rightly pointed out, German constitutional law evinces the triadic and relational structure of proportionality.[89] Means and end constitute the first two elements of this triad, with the third element incorporating the legal interests infringed on by the means. In the main application of the principle of proportionality, this concerns the intensity of the infringement on fundamental rights. Lastly, it is neither only means and end nor means and legal interest infringed on that are evaluated: The degree to which an end is achieved, and the degree of legal infringement of rights are also compared. This structure results in a triangle of proportionality relations:

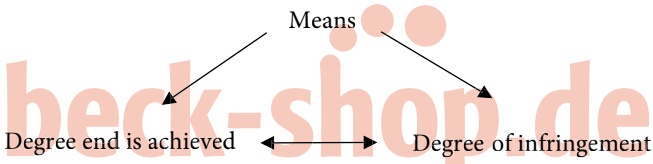

Figure 2: triangle of proportionality relations

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46 The evaluative relations between means and end, on the one hand, as well as the degree to which an end has been achieved and the degree of infringement of rights, on the other, are constitutive for the proportionality analysis of suitability, necessity, and appropriateness.[90] Suitability is used solely to examine the relationship between means and end, while the criterion of the least restrictive means is applied to both the relationship between alternative means and the end, as well as the relationship between alternative means and affected rights. Finally, the appropriateness criterion applies solely to the relationship between the degree to which an end has been achieved and the degree of infringement of rights incurred. As a normative standard, the principle of proportionality also presupposes the legitimacy of the means and the end. Illegitimate means may be suitable and necessary for illegitimate purposes, but because of their illegitimacy they cannot meet the normative standard of proportionality. The principle of proportionality therefore requires that legitimate ends be pursued via legitimate means that are suitable, necessary, and appropriate for the end in view of the infringed rights.

47 Whereas suitability and necessity are transitive (only suitable means can be necessary), necessity and appropriateness are analytically intransitive. In a normative sense, the infringement associated with a means can still be proportional to the degree to which the end was achieved even if another, less burdensome, means is available that would better

[89] Schlink in Rosenfeld/Sajó (eds), *Comparative Constitutional Law*, 718 (720 et seq.).

[90] On the different elements as applied by the Federal Constitutional Court Bumke/Voßkuhle (2019), 60 et seq.

meet the appropriateness criterion. Deficiencies or shortcomings regarding necessity do not automatically imply the inappropriateness of a means. Furthermore, a suitable and less restrictive means may be inappropriate, while a more intensive infringement may be appropriate. If the more restrictive means promotes the achievement of the end to a far greater extent than does the less restrictive means, this will have an effect on the degree to which the end was achieved, which is relevant within the framework of appropriateness. As far as the suitability of a means is concerned, it is deemed suitable so long as it supports the achievement of the state's objective in some way – even if only partially. Thus, means that are only weakly supportive of the state's objective can still be considered suitable and necessary. However, such means may well fail the appropriateness test if the infringement on freedom they entail is not commensurate to the marginal degree of support of the end. This is due to the fact that the appropriateness criterion compares not only the abstract importance of the state's purpose, on the one hand, with the abstract value of rights, on the other, it also assesses and compares the concrete degree to which the end was achieved with the concrete degree of infringement on fundamental rights. If, however, a more restrictive means achieves the desired end particularly well, then the more intensive infringement on fundamental rights associated with this means need not necessarily be considered inappropriate. An example can be found in the Federal Constitutional Court's decision on legislation banning smoking in restaurants. This case hinges on the fact that the legislature decided against a complete ban, instead enacting a law that provided for a series of exceptions in certain establishments whilst being well aware that the exceptions would render the measure much less effective regarding its public health objective. While the Court considered a complete ban appropriate from a public health perspective, it held that the less restrictive exception-laden law was incompatible with Art. 12 GG because no exception was provided for smaller establishments that primarily serve alcoholic beverages ("corner pubs").[91] Using the categories of the principle of proportionality, this can be read as follows: The grave consequences of a complete smoking ban for corner pubs was inappropriate in relation to the only moderate improvement in public health that the otherwise exception-laden law was designed to achieve. A more restrictive means, which would have achieved a more ambitious aim, could have been appropriate where a less restrictive means was not.

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The general structure of the principle of proportionality should not obscure the fact that it can be applied to very different types of legal acts. In administrative law, the principle has been historically developed to evaluate individual administrative measures. In this context, the principle provides a structure for the weighing of abstract rules and individual circumstances of concrete cases against one another. The role of the principle under the Basic Law is particularly significant, however, with regard to the development of the binding character of the fundamental rights on the legislature. The legislature does not regulate individual cases but rather enacts rules that are abstract and general. In this respect, the principle of proportionality does not seem to be able to fulfil its original function of balancing an abstract rule with an individual case. That said, this finding needs to be qualified in two ways. **48**

First, it is possible to distinguish between rules that are more and those that are less abstract. The relationship of the more abstract to the less abstract rule is similar to that of the less abstract rule to an individual case. In comparison to the less abstract rule, the more abstract rule can also be characterised as over- or under-inclusive. Under- and over-inclusiveness of rules are fractal in the sense that they can be found at each level of abstraction. Accordingly, they can be compensated for by a proportional adjustment **49**

[91] BVerfGE 121, 317 (362 et seqq.) [2008] – *Rauchverbot*; for more on the concept of system equality (*Systemgerechtigkeit*) on which this decision is based, supra fn 235.

of the more concrete rule, even if questions of over- and under-inclusiveness also arise concerning the more concrete rule in relation to the individual case.

50 Second, due to the constitutional requirement of equal treatment, which requires deciding like cases alike, the proportional balance between a rule and an individual case must be generalisable.[92] For example, a decision cannot be based on the social status, wealth, or family affiliation of those affected, even if this would be a particularly suitable way to achieve social pacification in a specific historic context. The concrete situation calls for the further development and specification of the rule; the adjustment of the rule to the individual case, however, remains just that: an adjustment of a *rule*. It does not lead to abandoning rule-based decision-making. Therein lies the difference between a balancing undertaken on the basis of the rule of law – which is always rule-oriented – and a purely situational one (→ § 3 paras 4 et seqq. and footnote 3).

51 The rather gradual theoretical differences between the application of the principle of proportionality to decisions involving individual cases, on the one hand, and to abstract regulations, on the other, come with categorical implications in constitutional law and theory. Judicial review of the proportionality of formal laws raises issues concerning the separation of powers and the democratic relationship between the Federal Constitutional Court and the German parliament. For one, tensions regarding the legitimacy of judicial review are more pronounced here than vis-à-vis the executive branch or other courts. Compared to the legislature, the democratic legitimacy of the Federal Constitutional Court is weak. Secondly, the exercise of judicial review is not deeply steeped in a tradition of judiciary oversight. Administrative courts have been reviewing executive measures since their establishment in the second half of the 19th century. The idea of a judicial review of parliamentary laws, however, did not come up in Germany until the Weimar Republic and was still contested and anything but established at the time. It is therefore not surprising that the task of establishing and adjusting the individual elements of the principle of proportionality for a judicial review of the legislature fell to the Federal Constitutional Court: The court had to recalibrate the principle for reasons of practicality and legitimacy, for example by enlarging the margin of appreciation for the legislature (→ § 3 paras 104 et seqq.).

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52 In the case of administrative measures or in the case of decisions of other courts, it is also possible that the review of the legislature and of the executive or the courts are intertwined. If not only the application of the law but also the law itself raise questions of proportionality, the Court first reviews the proportionality of the law itself and then reviews the proportionality of its application. Often, the proportional application of the law opens up possibilities for it to be interpreted in a way that is compatible with the constitution; this prevents the law from being struck down as disproportionate.[93] In U.S. law, a similar interpretative means is behind the doctrine of constitutional avoidance[94].

1. Legitimate ends

53 It may seem strange at first that in the context of proportionality, legitimate state interests, on the one hand, and fundamental rights and their realisation, on the other, are compared.[95] Do *legitimate* state interests and the realisation of fundamental rights not

[92] Petersen (2017), 56 et seq.

[93] See, e.g., BVerfGE 19, 342 (350) [1965] – *Untersuchungshaft*; 69, 315 (347 et seqq.) [1985] – *Brokdorf II*; 90, 145 (189 et seqq.) [1994] – *Cannabis*; 110, 226 (262 et seqq.) [2004] – *Geldwäsche*; 141, 220 (291 et seqq., 304 et seqq.) [2016] – *BKA-Gesetz*.

[94] Nolan, *Congressional Research Service* 2014; Fish, (2014) 114 *Michigan Law Review*, 1275 .

[95] Engel, *Preprints of the Max Planck Institute for Research on Collective Goods* 2011, 2 (7)