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Balancing and judicial self-empowerment: A case study on the rise of balancing in the jurisprudence of the German Federal Constitutional Court

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Abstract: Many critics of the proportionality principle argue that balancing is an instrument of judicial self-empowerment. This contribution argues that the relationship between balancing and judicial power is more complex. Balancing does not necessarily create judicial power, but it presupposes it. 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.

Keywords: balancing; judicial activism; judicial review; legitimacy; proportionality

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]

[1] See A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73, 75; S-IG Koutnatzis, 'Verfassungsvergleichende Überlegungen zur Rezeption des Grundsatzes der Verhältnismäßigkeit in Übersee' (2011) 44 *Verfassung und Recht in Übersee* 32; A Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, Cambridge, 2012) 181–210; J Saurer, 'Die Globalisierung des Verhältnismäßigkeitsgrundsatzes' (2012) 51 *Der Staat* 3; K Möller, *The Global Model of Constitutional Rights* (Oxford University Press, Oxford, 2012) 178; V Perju, 'Proportionality and Freedom' (2012) 1 *Global Constitutionalism* 334, 334; F Becker, 'Verhältnismäßigkeit' in H Kube *et al.* (eds), *Leitgedanken des Rechts: Band I* (CF Müller, Heidelberg, 2013) 225, sections 12–27.

Many courts use it as the central doctrinal tool of constitutional review.[2] The US 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

[2] See Barak (n 1) 182; M Cohen-Eliya and I Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, Cambridge, 2013) 10–14. But see also J Bomhoff, *Balancing Constitutional Rights* (Cambridge University Press, Cambridge, 2013), who argues that balancing has different 'local meanings' in different jurisdictions.

[3] However, some authors argue that even the American constitutional law doctrine implicitly also contains elements of proportionality, see ET Sullivan and RS Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (Oxford University Press, New York, 2009) 53–66; J Mathews and A Stone Sweet, 'All Things in Proportion? American Rights Review and the Problem of Balancing' (2011) 60 *Emory Law Journal* 102, 117–40. But see also RH Pildes, 'Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law' (1994) 45 *Hastings Law Journal* 711; RH Pildes, 'Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism' (1998) 27 *Journal of Legal Studies* 725, who argues that what looks like balancing in the jurisprudence of the US Supreme Court is only a means to identify illegitimate goals.

[4] See B Schlink, *Abwägung im Verfassungsrecht* (Duncker & Humblot, Berlin, 1976); TA Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943; PW Hogg, 'Section 1 Revisited' (1991) 1 *National Journal of Constitutional Law* 1, 23–4; J Habermas, *Between Facts and Norms* (MIT Press, Cambridge, MA, 1996) 259; S Woolman, 'Out of Order? Out of Balance? The Limitation Clause of the Final Constitution' (1997) 13 *South African Journal of Human Rights* 102, 114–121; M Jestaedt, *Grundrechtsentfaltung im Gesetz* (Mohr Siebeck, Tübingen, 1999) 206–60; L Blaauw-Wolf, 'The 'Balancing of Interests' with Reference to the Principle of Proportionality and the Doctrine of *Güterabwägung* – A Comparative Analysis' (1999) 14 *SA Public Law* 178, 210; H Botha, 'Rights, Limitations, and the (Im)possibility of Self-Government' in H Botha, A Van der Walt and J Van der Walt (eds), *Rights and Democracy in a Transformative Constitution* (Sun Press, Stellenbosch, 2003) 13, 21–3; E-W Böckenförde, 'Schutzbereich, Eingriff, verfassungsimmanente Schranken' (2003) 42 *Der Staat* 165, 190; K-H Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik* (Mohr Siebeck, Tübingen, 2004); JT Gunn, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 *Emory International Law Review* 465; F Raue, 'Müssen Grundrechtsbeschränkungen wirklich verhältnismäßig sein?' (2006) 131 *Archiv des öffentlichen Rechts* 79; B Çali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions' (2007) 29 *Human Rights Quarterly* 251; M Jestaedt, 'Die Abwägungslehre – ihre Stärken und ihre Schwächen' in O Depenheuer, M Heintzen, M Jestaedt and P Axer (eds), *Staat im Wort: Festschrift für Josef Isensee* (CF Müller, Heidelberg, 2007) 253, 260–75; R Christensen and KD Lerch, 'Dass das Ganze das Wahre ist, ist nicht ganz unwahr' (2007) 62 *Juristenzeitung* 438; S Woolman and H Botha, 'Limitations: Shared Constitutional Interpretation, an Appropriate Normative Framework & Hard Choices' in S Woolman and M Bishop (eds), *Constitutional Conversations* (Pretoria University Law Press, Pretoria, 2008) 149, 157–60; A Fischer-Lescano, 'Kritik der praktischen Konkordanz' (2008) 41 *Kritische Justiz* 166; I Porat, 'Some Critical Thoughts on Proportionality' in G Bongiovanni, G Sartor and C Valentini (eds), *Reasonableness and Law* (Springer, Dordrecht, 2009) 243; S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 *International Journal of Constitutional Law* 468;

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 allows them to veil political decisions behind legal terms.[8] This paper suggests that the relationship is more complex: Balancing does not necessarily create judicial power; it rather presupposes it. The argument will be developed in two steps. First, the paper will develop a theoretical framework. We will see that a doctrinal

GCN Webber, *The Negotiable Constitution* (Cambridge University Press, Cambridge, 2009) 87–115; B Rusteberg, *Der grundrechtliche Gewährleistungsgehalt* (Mohr Siebeck, Tübingen, 2009) 64–76; D Susnjar, *Proportionality, Fundamental Rights, and Balance of Powers* (Martinus Nijhoff, Leiden, 2010); GCN Webber, 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship' (2010) 23 *Canadian Journal of Law & Jurisprudence* 179, 194–8; JZ Benvindo, *On the Limits of Constitutional Adjudication* (Springer, Berlin, 2010); J von Bernstorff, 'Kerngehaltsschutz durch den UN-Menschenrechtsausschuss und den EGMR: Vom Wert kategorialer Argumentationsformen' (2011) 50 *Der Staat* 165, 184–90; C Hillgruber, 'Ohne rechtes Maß? Eine Kritik der Rechtsprechung des Bundesverfassungsgerichts nach 60 Jahren' (2011) 66 *Juristenzeitung* 861, 862–3; JJ Moreso, 'Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism' (2012) 25 *Ratio Juris* 31; P Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *LQR* 223; R Camilo de Oliveira, *Zur Kritik der Abwägung in der Grundrechtsdogmatik* (Duncker & Humblot, Berlin, 2013); G Huscroft, 'Proportionality and Pretence' (2013) 29 *Constitutional Commentary* (forthcoming); F Müller and R Christensen, *Juristische Methodik: Band I* (Duncker & Humblot, Berlin, 2013) section 72; J 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 L Lazarus, C McCrudden and N Bowles (eds), *Reasoning Rights* 63 (Hart, Oxford, 2014).

[5] Habermas (n 4) 259.

[6] See Schlink (n 4) 190; E-W Böckenförde, *Zur Lage der Grundrechtsdogmatik nach 40 Jahren Grundgesetz* (Carl Friedrich von Siemens Stiftung, Munich, 1989) 54; B Schlink, 'Der Grundsatz der Verhältnismäßigkeit' in P Badura and H Dreier (eds), *Festschrift 50 Jahre Bundesverfassungsgericht: Zweiter Band* (Mohr Siebeck, Tübingen, 2001) 445, 461; Webber, *The Negotiable Constitution* (n 4) 147–8; Hillgruber (n 4) 862; Sales (n 4) 225; Camilo de Oliveira (n 4) 223–31; Bernstorff, 'Proportionality without Balancing' (n 4). However, some critics of balancing point to 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., Tsakyrakis (n 4); Rusteberg (n 4).

[7] See W Leisner, *Der Abwägungsstaat* (Duncker & Humblot, Berlin, 1997) 170–3; U Haltern, 'Integration als Mythos: Zur Überforderung des Bundesverfassungsgerichts' (1997) 45 *Jahrbuch des öffentlichen Rechts* 31, 69; CD Classen, 'Das Prinzip der Verhältnismäßigkeit im Spiegel europäischer Rechtsentwicklungen' in M Sachs and H Siekmann (eds), *Der grundrechtsgeprägte Verfassungsstaat: Festschrift für Klaus Stern* (Duncker & Humblot, Berlin 2012) 651, 653; Benvindo (n 4) 31–81; Huscroft (n 4).

[8] Christensen and Lerch (n 4) 440.

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 analyses 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 from which to draw lessons. 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

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 hand, it gives courts room for manoeuvre.[11] They can confine themselves to resolving 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

[9] Stone Sweet and Mathews (n 1) 74.

[10] Stone Sweet and Mathews (n 1) 88.

[11] See T Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *ICON* 106, 133–4; A Voßkuhle, 'Stabilität, Zukunftsoffenheit und Vielfaltssicherung: Die Pflege des verfassungsrechtlichen "Quellcodes" durch das BVerfG' (2009) 64 *Juristenzeitung* 917, 922; O Lepsius, 'Die maßstabsetzende Gewalt' in M Jestaedt, O Lepsius, C Möllers and C Schönberger (eds), *Das entgrenzte Gericht* (Suhrkamp, Berlin, 2011) 159, 205.

[12] A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, Oxford, 2000) 142; U Kranenpohl, 'Die Bedeutung von Interpretationsmethoden und Dogmatik in der Entscheidungspraxis des Bundesverfassungsgerichts' (2009) 49 *Der Staat* 387, 401. On the importance of judicial flexibility, see also D Robertson, *The Judge as Political Theorist* (Princeton University Press, Princeton, 2010) 282.

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] But this critique is usually not based on a systematic analysis of the judicial practice. At best, it refers to individual cases as anecdotal evidence. Furthermore, it assumes that the open analytical structure of balancing automatically leads to judicial activism. However, this argument overlooks the fact that courts face not only methodological, but also institutional constraints.[16]

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 is told that the former US president Andrew Jackson once said after the US Supreme Court had handed down a decision of which 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

[13] Stone Sweet and Mathews (n 1) 90; W Sadurski, 'Reasonableness and Value Pluralism in Law and Politics' in G Bongiovanni, G Sartor and C Valentini (eds), *Reasonableness and Law* (Springer, Dordrecht, 2009) 129, 140.

[14] See DM Beatty, *The Ultimate Rule of Law* (Oxford University Press, Oxford, 2004) 169–71.

[15] See n 7.

[16] On the role of institutional constraints, see BE Friedman, 'The Politics of Judicial Review' (2005) 84 *Texas Law Review* 257, 316–20.

[17] See J Isensee, 'Bundesverfassungsgericht – quo vadis?' (1996) 51 *Juristenzeitung* 1085, 1086; H Klug, 'Introducing the Devil: An Institutional Analysis of the Power of Constitutional Review' (1997) 13 *South African Journal of Human Rights* 185, 189; H Schulze-Fielitz, 'Das Bundesverfassungsgericht in der Krise des Zeitgeists: Zur Metadogmatik der Verfassungsinterpretation' (1997) 122 *Archiv des öffentlichen Rechts* 1, 27; R Lhotta, 'Das Bundesverfassungsgericht als politischer Akteur' (2003) 9 *Swiss Political Science Review* 142, 143; A Lang, 'Wider die Metapher vom letzten Wort: Verfassungsgerichte als Wegweiser' in D Elser *et al.* (eds), *Das letzte Wort: Rechtsetzung & Rechtskontrolle in der Demokratie* (Nomos, Baden-Baden, 2014) 15.

[18] Cited after JE Smith, *John Marshall: Definer of a Nation* (Henry Holt, New York, 1996) 518.

[19] See H Laufer, *Verfassungsgerichtsbarkeit und politischer Prozeß* (JCB Mohr, Tübingen, 1968) 167–9.

competencies, cut the budget or redesign the election rules for judges in order to guarantee that a majority of judges are favourable 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 disproportionate concentration of power on the federal level.[21] At the same time, the court may equally 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 they enjoy.[23] The stronger the public acceptance of a court, the more politicians have to fear losing electoral support if they openly refuse to implement judicial decisions.[24] If a court enjoys a high degree of legitimacy, non-compliance 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

[20] G Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press, Cambridge, 2005) 6.

[21] See D Herrmann, 'Akte der Selbstautorisierung als Grundstock institutioneller Macht von Verfassungsgerichten' in H Vorländer (ed), *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (VS Verlag für Sozialwissenschaften, Wiesbaden, 2006) 141, 166.

[22] See BE Friedman and EF Delaney, 'Becoming Supreme: The Federal Foundation of Judicial Supremacy' (2011) 111 *Columbia Law Review* 1137, 1152–9.

[23] Vanberg (n 20) 49–53; WF Murphy and J Tanenhaus, 'Publicity, Public Opinion, and the Court' (1990) 84 *Northwestern University Law Review* 985; L Epstein, J Knight and O Shvetsova, 'The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government' (2001) 35 *Law & Society Review* 117, 125; C Engel, 'Delineating the Proper Scope of Government: A Proper Task for a Constitutional Court?' (2001) 157 *Journal of Institutional and Theoretical Economics* 187, 213; CJ Carrubba, 'A Model of the Endogenous Development of Judicial Institutions in Federal and International Systems' (2009) 71 *Journal of Politics* 55, 65; S Kneip, *Verfassungsgerichte als politische Akteure* (Nomos, Baden-Baden, 2009) 199; S von Steinsdorff, 'Verfassungsgerichte als Demokratie-Versicherung? Ursachen und Grenzen der wachsenden Bedeutung juristischer Politikkontrolle' in KH Schrenk and M Soldner (eds), *Analyse demokratischer Regierungssysteme: Festschrift für Wolfgang Ismayr* (VS Verlag für Sozialwissenschaften, Wiesbaden, 2010) 479, 492.

[24] G Vanberg, 'Verfassungsgerichtsbarkeit und Gesetzgebung: Zum politischen Spielraum des Bundesverfassungsgerichts' in S Ganghof and P Manow (eds), *Mechanismen der Politik* (Campus Verlag, Frankfurt am Main, 2005) 183, 188; A Brodocz, *Die Macht der Judikative* (VS Verlag für Sozialwissenschaften, Wiesbaden, 2009) 99.

[25] Vanberg (n 20) 74.

do not jeopardize electoral approval. Legitimacy is thus a central source of judicial power.[26] Only 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 as 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 disapproved the methodological approach of the court and accused 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.

[26] H Vorländer, 'Deutungsmacht: Die Macht der Verfassungsgerichtsbarkeit' in H Vorländer (ed), *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (VS Verlag für Sozialwissenschaften, Wiesbaden, 2006) 9, 24; BE Friedman, *The Will of the People* (Farrar, Straus and Giroux, New York, 2009) 375.

[27] Stone Sweet (n 12) 199–200; M Shapiro, 'The Success of Judicial Review and Democracy' in M Shapiro and A Stone Sweet (eds), *On Law, Politics, and Judicialization* (Oxford University Press, Oxford, 2002) 149, 165; U Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses* (VS Verlag für Sozialwissenschaften, Wiesbaden, 2010) 409; see also O Bassok, 'The Two Countermajoritarian Difficulties' (2012) 31 *St. Louis University Public Law Review* 333, 370; U Sieberer, 'Strategische Zurückhaltung von Verfassungsgerichten: Gewaltenteilungsvorstellungen und die Grenzen der Justizialisierung' (2006) 16 *Zeitschrift für Politikwissenschaft* 1299, 1308.

[28] See J Ferejohn, 'Judicializing Politics, Politicizing Law' (2002) 65 *Law & Contemporary Problems* 45; Robertson (n 12) 383; C Möllers, 'Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts' in M Jestaedt, O Lepsius, C Möllers and C Schönberger (eds), *Das entgrenzte Gericht* (Suhrkamp, Berlin, 2011) 281, 328.

[29] GA Caldeira, 'Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court' (1986) 80 *American Political Science Review* 1209.

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 analysing 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. Certainly, confirming the constitutionality of a statute can be highly political. But it does not evoke an institutional conflict. The court confirms a legislative decision and thus does not interfere with the political branches. It cannot be accused of being activist or having an independent 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, however, the constitutional court does 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 it 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 courts to be particularly guarded about using 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.

This does not mean that courts totally refrain from balancing. However, the likelihood of courts recurring to balancing when reviewing legislation depends on two factors. First, a court will balance more often the stronger its institutional position is. 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.

[30] See F Ossenbühl, 'Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit' in R Stödter and W Thieme (eds), *Hamburg – Deutschland – Europa: Festschrift für Hans Peter Ipsen* (JCB Mohr, Tübingen, 1977) 129, 129; Schlink (n 6) 461; C Möllers, *Gewaltengliederung* (Mohr Siebeck, Tübingen, 2005) 144; similarly also B-O Bryde, *Verfassungsentwicklung* (Nomos, Baden-Baden, 1982) 325.

III. The historical development of balancing

In this section, I will retrace 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. In the following, I will first describe the analysed data. In a second step, I will discuss the results of the quantitative analysis, which shows a historical trend in the use of balancing. While the German Constitutional Court was very reluctant to base a decision, in which it overturned a piece of legislation on balancing considerations in the first 25 years of its jurisprudence, balancing developed into the predominant argumentation framework from 1978 onwards. The final two subsections exemplify the characteristics of the jurisprudence of the Court in the pre- and the post-1978 period.

The analysed data

The analysis comprises 238 decisions, the last of which was rendered in December 2012. It includes 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. The study is limited to decisions, in which a law is held to be unconstitutional because these decisions evoke an institutional conflict with the legislature. Decisions, in which the Court confirms a law or reverses the decision of a lower court, may also be highly political. But they do not involve an institutional conflict between judiciary and legislature.

Certainly, the distinction between correcting lower courts and confronting the legislature is not always clear-cut. Notably, the interpretation of a statute according to the values of the constitution (*verfassungskonforme Auslegung*) may ultimately lead to an interpretation of a statute that contradicts the explicit intention of the legislature.[31] However, it is assumed that the *verfassungskonforme Auslegung* is not primarily an instrument to correct the legislature. Functionally, the interpretation according to the values of the constitution was developed as an instrument to discipline lower courts. The German Constitutional Court is no supreme court that can review all legal aspects of a lower court decision. Rather, its

[31] See, in particular, the critique of U Lembke, *Einheit aus Erkenntnis? – Zur Unzulässigkeit der verfassungskonformen Gesetzesauslegung als Methode der Normkompatibilisierung durch Interpretation* (Duncker & Humblot, Berlin, 2009) (arguing that the *verfassungskonforme Auslegung* violates the separation of powers between judiciary and legislature).

standard of review is limited to constitutional issues. The *verfassungskonforme Auslegung* is thus the only instrument for the Constitutional Court to correct the interpretation of lower courts without invalidating the underlying statute.

Other than focusing on decisions, which overturn a piece of legislation, the case selection has been qualified in two further respects. On the one hand, the analysis focused on the jurisprudence concerning fundamental rights. On the other hand, the German fundamental rights doctrine distinguishes between 'liberty' and 'equality' rights. The study only focused on the former category of rights. Judgments not related to liberty rights were not examined because the constitutional court does not usually rely on the proportionality test in these cases.

Consequently, five categories of cases were excluded. This concerns, first, all decisions that were taken on formal grounds. Thus, cases in which the 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, as laid out in section 3 of the German Constitution, were 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.[32] 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.[33] Finally, this is also true for judgments concerning the taxing power of public authorities, which were equally excluded.

[32] On the extent and limits of the application of the proportionality test in the context of equal protection guarantee, see, e.g., K Hesse, 'Der Gleichheitssatz in der neueren deutschen Verfassungsentwicklung' (1984) 109 *Archiv des öffentlichen Rechts* 174, 188–92; R Wendt, 'Der Gleichheitssatz' (1988) 7 *Neue Zeitschrift für Verwaltungsrecht* 778; S Huster, *Rechte und Ziele* (Duncker & Humblot, Berlin, 1993); C Brüning, 'Gleichheitsrechtliche Verhältnismäßigkeit' (2001) 56 *Juristenzeitung* 669.

[33] For a detailed analysis of the case law, see, e.g., U Volkmann, *Politische Parteien und öffentliche Leistungen* (Duncker & Humblot, Berlin, 1993); S Issacharoff and RH Pildes, 'Politics As Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643, 690–9; M Morlok, 'Parteienrecht als Wettbewerbsrecht' in P Häberle, M Morlok and V Skouris (eds), *Festschrift für Dimitris Th. Tsatsos* (Nomos, Baden-Baden, 2003) 408; N Petersen, 'Verfassungsgerichte als Wettbewerbshüter des politischen Prozesses' in D Elser *et al.* (eds), *Das letzte Wort: Rechtsetzung und Rechtskontrolle in der Demokratie* (Nomos, Baden-Baden, 2014) 59.

In the study, balancing was understood as a residual category.[34] All decisions that 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, were classified as balancing decisions. The coding of the analysed decisions is represented in the table in the annex to this paper.

The historical trend

Figure 1 shows the evolution of the balancing argument in the case law of the German constitutional court in cases where the court overturned a piece of legislation. Based on this graph, 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 one-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.

The pre-balancing period

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*[35] nor a *Makwanyane*[36] judgment in the German case law. Instead, the development was more gradual. The most important step in this development was the pharmacy

[34] Similarly Möller (n 1) 137–40; M Kumm and AD Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law* 67, 69 (Cambridge University Press, New York, 2014); see also SE Gottlieb, 'The Paradox of Balancing Significant Interests' (1994) 45 *Hastings Law Journal* 825, 839, who believes that balancing is indefinable.

[35] *R v Oakes* [1986] 1 SCR 103.

[36] *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).

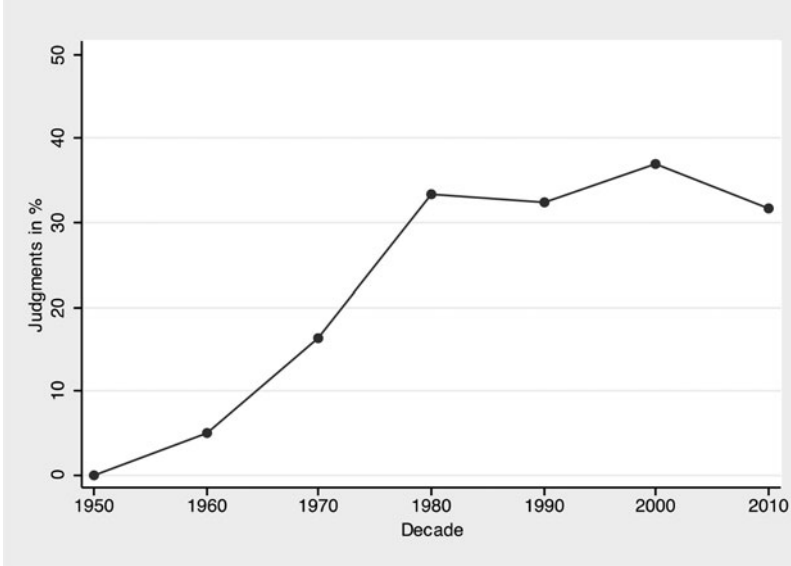

Figure 1. The evolution of balancing in Germany

judgment,[37] which the Court handed down in 1958.[38] In 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.

[37] BVerfGE 7, 377.

[38] See E Grabitz, 'Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts' (1973) 98 *Archiv des öffentlichen Rechts* 568, 569–70; K Stern, 'Zur Entstehung und Ableitung des Übermaßverbots' in P Badura and R Scholz (eds), *Wege und Verfahren des Verfassungslebens* (CH Beck, Munich, 1993) 165, 172; S Heinsohn, *Der öffentlichrechtliche Grundsatz der Verhältnismäßigkeit* (Dissertation, Münster, 1997) 69; H Schulze-Fielitz, 'Wirkung und Befolgung verfassungsgerichtlicher Entscheidungen' in P Badura and H Dreier (eds), *Festschrift 50 Jahre Bundesverfassungsgericht: Erster Band* (Mohr Siebeck, Tübingen, 2001) 385, 396; D Grimm, 'Proportionality in Canadian and German Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 385; Stone Sweet and Mathews (n 1) 108; M Jestaedt, 'Phänomen Bundesverfassungsgericht: Was das Gericht zu dem macht, was es ist' in M Jestaedt, O Lepsius, C Möllers and C Schönberger (eds), *Das entgrenzte Gericht* (Suhrkamp, Berlin, 2011) 77, 122; C Hillgruber, 'Grundrechtsschranken' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland: Band IX* (CF Müller, Heidelberg, 2011) ch 201, section 52.

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.[39]

The Court did not draw the consequence of checking the motivation of the legislature. Instead, it used this observation to justify a particularly strict standard of scrutiny for the legislative scheme.[40]

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 individual liberty, while the limitations clause of the provision aimed to protect the public interest.[41] 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.[42]

However, in the further course of the judgment, the Court avoided basing 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 fierce competition between the pharmacies and compromise their economic soundness.[43] In such an environment, the pharmacies might be inclined to violate obligations

[39] BVerfGE 7, 377, 408 (emphasis added) (translation by the author. The German original reads as follows: '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.').

[40] See also A-B Kaiser, 'Das Apothekenurteil des BVerfG nach 50 Jahren: Anfang oder Anfang vom Ende der Berufsfreiheit?' (2008) 30 *Juristische Ausbildung* 844, 850.

[41] BVerfGE 7, 377, 404.

[42] Ibid, 405 (emphasis added) (translation by the author. The German original reads as follows: '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.').

[43] See ibid, 413–14.

concerning prescriptions, quality control of the medical drugs and training of personnel in order to increase 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.[44] To justify this less-restrictive-means argument, the Court relied on a simple economic consideration: The establishment of a pharmacy required a significant initial investment. For this reason, a pharmacist usually made an economic assessment as to whether the investment would pay off before he established a new pharmacy.[45] 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 Switzerland: The Swiss had not restricted the establishment of new pharmacies, and the system was working just fine.[46]

With regard to the argument that pharmacists might violate their professional obligations when faced with fierce competition, the Constitutional Court countered with a coherency argument. If there was a danger of members of the professions not complying with their professional obligations, this danger should occur with equal likelihood in other liberal professions. Nevertheless, the legislature had not deemed it necessary to establish access restrictions for doctors or other comparable professionals.[47] 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.[48] 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.[49]

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 in which the Court overturned legislation.

[44] Ibid, 415–21.
[45] Ibid, 420.
[46] Ibid, 415–16.
[47] Ibid, 429–30.
[48] Ibid, 430.
[49] BVerfGE 7, 377, 438–42.

The Court used balancing rhetoric, but refrained from a comparison of the value of the competing interests. Instead, it placed 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.

In many early decisions of the Court, the argumentation patterns followed the general lines that we have observed in our analysis of the pharmacy judgment. When it applied the principle of proportionality, the Court predominantly used rational-connection and less-restrictive-means arguments.[50] Moreover, it often relied on consistency and coherency arguments[51] or challenged the lack of protection of legitimate expectations.[52] An example that further illustrates this early approach is the COD ruling, in which the Constitutional Court overturned a law prohibiting the cash-on-delivery shipment of living animals.[53] 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.

The Court substantially based its verdict on two principal arguments. On the one hand, it found that the legislation was overbroad because it targeted even those shipments that did not involve a considerable danger of harm for the animals.[54] Furthermore, an empirical assessment of the situation had shown that only a tiny fraction of all shipments had been returned to the sender.[55] 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.[56] For these reasons, the Court found that there was no sufficient rational connection between measure and purpose.[57] 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

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

[51] See, e.g., BVerfGE 8, 1, 26–27; 25, 236, 251–52.

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

[53] BVerfGE 36, 47.

[54] Ibid, 60.

[55] Ibid, 61–62.

[56] Ibid, 63.

[57] Ibid.

not demanded that all deliveries be 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.[58]

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.[59] 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.[60] 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.[61]

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 extended the limit on shopping hours to vending machines.[62] 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.[63] Before 1978, there were only three more rulings in which the Constitutional Court overturned a law based on balancing considerations.[64] 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[65] – i.e., exactly as many as in the 27 years before.

[58] Ibid.
[59] Ibid, 60.
[60] Ibid, 61.
[61] Ibid, 64.
[62] BVerfGE 14, 19.
[63] Ibid, 23–24.
[64] See BVerfGE 21, 173, 182–83; 31, 229, 243–44; 34, 165, 198.
[65] See BVerfGE 47, 285, 322–35; 49, 382, 400–02; 52, 1, 36; 52, 357, 366.

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.[66] The confidence of the Constitutional Court in utilizing balancing considerations is particularly evident in a decision on the status of transsexuals from May 2008.[67] 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 sex reassignment surgery to transform his sex from male to female in 2002. However, she was denied a respective change of her civil status because the civil status could, according to the law that was applicable at the time, only be changed if she got divorced before.

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 at the couple's request. 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 her right to privacy.[68] 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.[69]

Even if balancing has become the predominant argumentation framework in today's jurisprudence, it is not the only one. In many cases, the German Constitutional Court even combines balancing considerations with other

[66] See BVerfGE 47, 285, 322–35; 49, 382, 400–02; 52, 1, 36; 52, 357, 366; 53, 257, 302–04; 53, 336, 349–50; 55, 134, 143; 58, 137, 149–50; 61, 291, 318; 62, 117, 152; 68, 155, 173–75; 69, 209, 219; 72, 51, 63–64; 74, 203, 216–17; 77, 308, 337; 78, 58, 75; 78, 77, 86–87; 79, 256, 272–73; 81, 156, 197–99; 84, 133, 156; 85, 226, 235–37; 87, 114, 148–49; 90, 263, 273; 92, 26, 45; 93, 1, 21–24; 97, 228, 262–63; 99, 202, 212–14; 100, 226, 243; 100, 313, 384–85; 101, 54, 99–100; 104, 357, 368; 108, 82, 109–20; 109, 279, 347–49; 112, 255, 266–68; 113, 348, 387–88; 115, 1, 20–24; 117, 202, 229–39; 119, 59, 87–89; 120, 274, 326–31; 121, 30, 64–67; 121, 175, 194–202; 121, 317, 360–68; 125, 39, 90–95; 125, 260, 329–30; 128, 109, 130–36; 128, 157, 177–83; 130, 372, 395–97.

[67] BVerfGE 121, 175.

[68] Ibid, 194–202.

[69] Ibid, 203.

arguments. One example is the telecommunications surveillance judgment from 1999.[70] In the judgment, the Court reviewed a statute that authorized the German intelligence agency to monitor certain international calls and to pass the obtained data to the public prosecution authority. It acknowledged that the aim to prevent and to prosecute criminal actions was a legitimate goal that was, in principle, suitable to justify an infringement of the right to secrecy of telecommunications, guaranteed by section 10 of the Constitution.[71]

However, the Court found several flaws in the legislation. To identify these flaws, it used different forms of argumentation: It recurred to balancing, consistency and procedural arguments, arguing that the law was, in part, overly indeterminate. The Court used balancing when it examined the conditions for the telecommunications surveillance.[72] The legislature had established a catalogue of criminal offences as a condition for monitoring calls. The Court held that telecommunications surveillance was only justified when the targeted criminal offence was sufficiently severe.[73] It found that the offence of counterfeiting did not fulfil this requirement. The degree of severity was significantly lower than that of any of the other offences listed in the catalogue.[74]

The Court also found flaws with regard to the utilization of the data that had been obtained through the monitoring of the calls. First, the statute had provided for an obligation of the intelligence agency to report to the federal government. The Court agreed that such an obligation was necessary, but found that the statute was overly indeterminate. In particular, it did not limit the purposes for which the government could use the data.[75] Second, the statute authorized the intelligence agency to pass on the data to public prosecution authorities under certain conditions. The Court held that these conditions were insufficient. Passing on data should only be allowed if the severity of the criminal offence outweighed the interest in the protection of the data.[76] The Court found that the offences listed in the catalogue and the standards for the necessary evidence did not all meet these requirements.[77] It supported its findings with a coherency argument, referring to a different provision of the German

[70] BVerfGE 100, 313.
[71] Ibid, 373.
[72] Ibid, 375–85.
[73] Ibid, 382.
[74] Ibid, 384–85.
[75] Ibid, 387–88.
[76] Ibid, 392.
[77] Ibid, 393–95.

criminal procedure law, which authorized public prosecution authorities to monitor telecommunication, but imposed stricter conditions on the authorities.[78]

Finally, the Constitutional Court required the legislature to impose certain procedural safeguards. It demanded a recording of the data that was passed on to the public prosecution authorities in order to guarantee effective control of the executive action.[79] Moreover, it postulated more stringent notice requirements. The challenged provision had only required informing the monitored person of the surveillance if the data had been stored for more than three months. The Constitutional Court held that the notice requirement was a fundamental guarantee because it enabled the concerned individual to seek a legal remedy. Therefore, a notice to the monitored person should only be held back in exceptional circumstances.[80]

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. On 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.[81] 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 in these cases as the Court confirms the legislative decision.[82]

[78] Ibid, 393–95.
[79] Ibid, 395–96.
[80] Ibid, 397–99.
[81] See, e.g., BVerfGE 9, 338, 346; 10, 89, 103–07; 13, 97, 113–22; 13, 181, 187–90; 14, 263, 282–84; 15, 235, 243–44; 16, 147, 174–83; 21, 245, 259–60; 23, 50, 59–60; 25, 1, 22–23; 27, 1, 8; 28, 191, 200; 30, 1, 32–33; 32, 54, 75–76; 33, 367, 378–82; 37, 1, 22–23; 38, 61, 92 and 94–95; 39, 210, 234; 50, 290, 350–51 and 365.
[82] See above section II.

Second, the Constitutional Court balanced when it reviewed decisions of lower courts.[83] The seminal case is the *Lüth* judgment, which was issued in January 1958 – five months before the pharmacy judgment.[84] 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 by 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 ordered 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.[85] It argued that fundamental rights not only contained obligations for the legislature, but also bound private law courts when they decided on conflicts between individuals.[86] 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.[87] On both sides of the equation, it considered the extent to which the competing interests were affected. On the one hand, it analysed 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 Lüth had intended to protect the reputation of the German film industry abroad and to fend off any Nazi influences.[88]

[83] See, e.g., BVerfGE 7, 198, 215–29; 12, 113, 124–27; 16, 194, 203; 17, 108, 118–20; 22, 114, 123–24; 24, 278, 282–88; 34, 238, 248–51; 35, 202, 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, 82–88; 27, 344, 352–53. But in the vast majority of cases, the Constitutional Court predetermines the result of the balancing test in its decision. This applies, in particular, to the initially cited cases.

[84] BVerfGE 7, 198, 215–19.

[85] See R Wahl, 'Lüth und die Folgen' in T Henne and A Riedlinger (eds), *Das Lüth-Urteil aus (rechts-)historischer Sicht* (Berliner Wissenschafts-Verlag, Berlin, 2005) 371, 375; H Vorländer, 'Die Deutungsmacht des Bundesverfassungsgerichts' in RC van Ooyen and MHW Möllers (eds), *Das Bundesverfassungsgericht im politischen System* (VS Verlag für Sozialwissenschaften, Wiesbaden, 2006) 189, 190; Robertson (n 12) 50; Jestaedt (n 38) 93.

[86] BVerfGE 7, 198, 203–12.

[87] Ibid, 215.

[88] Ibid, 216–18.

It qualified the applicant's concern for the German reputation as 'significant'.[89] Furthermore, it acknowledged that it was necessary to interfere with Harlan's interests in order to pursue this purpose.[90] On the other hand, the Court argued that statement did not infringe the core of Harlan's identity as an artist.[91] Lüth had exercised neither physical nor legal force, and Harlan was not denied the opportunity to continue working in the film business.[92] 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.[93] 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.[94] In one decision, the Constitutional Court reversed a decision to investigate an accused by means of a pneumoencephalography, an extremely painful procedure that allowed reproducing the structure of the brain on an X-ray image.[95] As the applicant was accused of a misdemeanour, 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 audio tape recordings as evidence.[96] The Constitutional Court argued that the high court had not sufficiently justified why it believed that the criminal offence had been so severe that it outweighed the right to privacy of the accused.[97] 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.

[89] Ibid, 216 (In the original, it says: 'eine für das deutsche Volk sehr wesentliche Frage').
[90] Ibid, 217.
[91] Ibid, 220–21.
[92] Ibid, 221.
[93] See n 79.
[94] See, e.g., BVerfGE 16, 194, 203; 17, 108, 118–20; 22, 114, 123–24; 34, 238, 248–51; 35, 35, 39–40.
[95] BVerfGE 17, 108, 118–20.
[96] BVerfGE 34, 238.
[97] Ibid, 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 of a court balancing depended on two factors.[98] On the one hand, a court is more likely to use balancing considerations the stronger its institutional position is. 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.[99] Some studies in political science show that the legitimacy of constitutional courts – all other factors being equal – in principle increases over time, as courts have had more opportunities to attract public support.[100] 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, repeatedly tried to damage the authority of the court.[101] Furthermore, the government entertained reform plans that would have given it much greater influence with regard to nominating of judges to the Court.[102]

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.[103]

[98] See above section II.

[99] G Vanberg, 'The Will of the People: A Comparative Perspective on Friedman' (2010) 2010 *Michigan State Law Review* 717, 720–1.

[100] JL Gibson, GA Caldeira and VA Baird, 'On the Legitimacy of National High Courts' (1998) 92 *American Political Science Review* 343, 355.

[101] See M Baldus, 'Frühe Machtkämpfe – Ein Versuch über die historischen Gründe der Autorität des Bundesverfassungsgerichts' in T Henne and A Riedlinger (eds), *Das Lüth-Urteil aus (rechts-)historischer Sicht* (Berliner Wissenschafts-Verlag, Berlin, 2005) 237, 241–2; OW Lembcke, 'Das Bundesverfassungsgericht und die Regierung Adenauer – vom Streit um den Status zur Anerkennung der Autorität' in RC van Ooyen and MHW Möllers (eds), *Das Bundesverfassungsgericht im politischen System* (VS Verlag für Sozialwissenschaften, Wiesbaden, 2006) 151, 156–7.

[102] See Laufer (n 19) 169–206; R Häußler, *Der Konflikt zwischen Bundesverfassungsgericht und politischer Führung* (Duncker & Humblot, Berlin, 1994) 40–47; Lembcke (n 101) 158.

[103] See B-O Bryde, 'Der Beitrag des Bundesverfassungsgerichts zur Demokratisierung der Bundesrepublik' in RC van Ooyen and MHW Möllers (eds), *Das Bundesverfassungsgericht im politischen System* (VS Verlag für Sozialwissenschaften, Wiesbaden, 2006) 321, 323.

By the late 1970s, the Court had consolidated its position. It enjoyed widespread public support,[104] 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 US Supreme Court developed certain doctrinal tools initially when reviewing state measures.[105] 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.[106]

Similarly, the German Constitutional Court developed the balancing doctrine when reviewing the decisions of lower courts 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 the political elites. There had been a deep suspicion against the general judiciary among the delegates of the Parliamentary Council that drafted the German constitution.[107] 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 ideology.[108] 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.[109] Furthermore, among the first judges who had been elected to the

[104] See H Vorländer and A Brodocz, 'Das Vertrauen in das Bundesverfassungsgericht: Ergebnisse einer repräsentativen Bevölkerungsumfrage' in H Vorländer (ed), *Die Deutungsmacht der Verfassungsgerichtsbarkeit* (VS Verlag für Sozialwissenschaften, Wiesbaden, 2006) 259.

[105] Friedman and Delaney (n 22).

[106] Ibid, 1188–92.

[107] DP Kommers, *Judicial Politics in West Germany* (Sage, Beverly Hills, 1976) 75.

[108] Seminally B Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (Mohr Siebeck, Tübingen, 1968).

[109] Kommers (n 107) 75.

Constitutional Court, a considerable number had openly resisted the Nazi regime.[110]

When the Constitutional Court ceased the authority to review decisions of the civil courts by extending the scope of fundamental rights 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 balancing as a doctrinal tool.[111] 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.[112] It was so much part of the arsenal of doctrinal instruments in constitutional law that the shift was barely noticed in the legal academy.[113] 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.

[110] R Ley, 'Die Erstbesetzung des Bundesverfassungsgerichtes' (1982) 13 *Zeitschrift für Parlamentsfragen* 521, 532; B-O Bryde, 'Die Rolle der Verfassungsgerichtsbarkeit in Umbruchsituationen' in JJ Hesse, GF Schuppert and K Harms (eds), *Verfassungsrecht und Verfassungspolitik in Umbruchsituationen* (Nomos, Baden-Baden, 1999) 197, 201; C Schönberger, 'Anmerkungen zu Karlsruhe' in M Jestaedt, O Lepsius, C Möllers and C Schönberger (eds), *Das entgrenzte Gericht* (Suhrkamp, Berlin, 2011) 9, 30; M Stolleis, *Geschichte des öffentlichen Rechts in Deutschland: Vierter Band* (CH Beck, Munich, 2012) 147–54.

[111] See also Lepsius (n 11) 192 on the significance of the Nazi background of the case.

[112] See P Häberle, *Die Wesensgehaltsgarantie des Art. 19 Abs. 2 Grundgesetz* (CF Müller, Karlsruhe, 1962) 31–9; M Gentz, 'Zur Verhältnismäßigkeit von Grundrechtseingriffen' (1968) 21 *Neue Juristische Wochenschrift* 1600, 1604–5; P Wittig, 'Zum Standort des Verhältnismäßigkeitsgrundsatzes im System des Grundgesetzes' (1968) 21 *Die Öffentliche Verwaltung* 817; Grabitz (n 38) 575–81; C Starck, 'Staatliche Organisation und staatliche Finanzierung als Hilfen zu Grundrechtsverwirklichungen?' in C Starck (ed), *Bundesverfassungsgericht und Grundgesetz: Zweiter Band* (JCB Mohr, Tübingen, 1976) 480, 482; J Schwabe, *Probleme der Grundrechtsdogmatik* (Habilitationsschrift, Darmstadt, 1977) 319–23; P Badura, F Rittner and B Rüthers, *Mitbestimmungsgesetz 1976 und Grundgesetz* (CH Beck, Munich, 1977) 196; R Wendt, '*Der Garantiegehalt der Grundrechte und das Übermaßverbot*' (1979) 104 *Archiv des öffentlichen Rechts* 414, 455–6; R Alexy, 'Zum Begriff des Rechtspinzips' in W Krawietz, O Kazimierz, A Peczenik and A Schramm (eds), *Argumentation und Hermeneutik in der Jurisprudenz* (Duncker & Humblot, Berlin, 1979) 59.

[113] The only exception I am aware of is Schlink (n 6) 463, who observes that the decisions in which the Court had fundamentally relied on balancing had increased 'over the years'.

Certainly, the preceding analysis provides no detailed proof of the causal relationship between balancing and institutional strength. We only observe a correlation, no causality. In particular, the study cannot explain why balancing took off precisely in the late 1970s and not a few years earlier or later. Institutional developments are often caused by a combination of macro- and micro-factors. This paper focused on the institutional framework, the macro-environment. If we want to explain the precise date, we would have to look into the micro-factors as well. One likely explanation might be a change in the composition of the judges. However, a precise assessment of causality would require a more detailed quantitative analysis of the data, which would be beyond the scope of this paper. To bridge the gap between correlation and causality, we have to rely on the plausibility of the theoretical argument. If the theory is correct, the case study suggests that institutional strength was a precondition for even balancing-minded judges to perform the observed doctrinal shift.

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 rather than 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 analysed 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.[114] 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.[115]

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

[114] See n 4.
[115] See n 7.

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, 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. The Court did not have to fear that an increasing reliance on balancing would immediately undermine the level of legitimacy that it had built 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 by then widely accepted as a legal argumentation framework. Consequently, the court did not run into danger to be suspected of hiding political considerations behind legal terms. Certainly, this development does not completely disprove the argument of the critics. Once accepted as a doctrinal tool, balancing could still be used as an instrument of judicial self-empowerment. However, this analysis suggests that the relationship is at least more complex than commonly assumed. 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.

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Annex: The classification of the decisions of the German Federal Constitutional Court

The following table lists all decisions, in which the German Constitutional Court declared a statute as unconstitutional (taking into account the limitations discussed under section III). The column BAL indicates whether the Court based its decision on balancing considerations.

Ref.	Year	BAL
2, 380	1953	
4, 331	1955	
6, 55	1957	
7, 320	1958	
7, 377	1958	
8, 1	1958	
8, 71	1958	
9, 39	1958	
9, 83	1959	
9, 268	1959	
10, 118	1959	
10, 200	1959	
11, 30	1960	
11, 168	1960	
11, 203	1960	
12, 81	1961	
12, 144	1961	
13, 206	1961	
13, 261	1961	
13, 290	1962	
14, 19	1962	1
14, 174	1962	
14, 254	1962	
15, 167	1962	
15, 275	1963	
15, 328	1963	
16, 94	1963	
16, 203	1963	
17, 148	1963	
17, 269	1964	
17, 306	1964	
18, 97	1964	
18, 429	1965	
19, 206	1965	
19, 226	1965	
19, 242	1965	
19, 268	1965	

(*continued*)

Annex. (*Continued*)

Ref.	Year	BAL
19, 330	1965	
20, 150	1966	
21, 139	1967	
21, 173	1967	1
21, 261	1967	
21, 271	1967	
22, 42	1967	
22, 49	1967	
22, 163	1967	
22, 180	1967	
24, 75	1968	
24, 104	1968	
25, 236	1969	
26, 79	1969	
27, 355	1970	
28, 324	1970	
29, 57	1970	
30, 1	1970	
30, 227	1970	
30, 292	1971	
30, 336	1971	
30, 367	1971	
31, 94	1971	
31, 229	1971	1
31, 275	1971	
32, 1	1971	
33, 303	1972	
34, 71	1972	
34, 165	1972	1
35, 79	1973	
36, 47	1973	
36, 146	1973	
38, 1	1974	
38, 61	1974	
39, 1	1975	
40, 371	1975	
41, 378	1976	
43, 242	1977	
43, 291	1977	
44, 249	1977	
45, 393	1977	
47, 46	1977	
47, 285	1978	1
48, 127	1978	

(*continued*)

Annex. (*Continued*)

Ref.	Year	BAL
48, 376	1978	
49, 382	1978	1
50, 265	1979	
51, 193	1979	
51, 356	1979	
52, 1	1979	1
52, 357	1979	1
53, 135	1980	
53, 257	1980	1
53, 336	1980	1
53, 366	1980	1
54, 159	1980	
54, 301	1980	
55, 134	1980	1
55, 159	1980	
56, 192	1981	
57, 295	1981	
57, 361	1981	
58, 137	1981	1
59, 302	1982	
61, 210	1982	
61, 291	1982	1
61, 358	1982	
62, 117	1982	1
62, 374	1982	
63, 88	1983	
63, 131	1983	
64, 323	1983	
64, 367	1983	
65, 1	1983	
68, 155	1984	1
68, 272	1984	
69, 209	1985	1
71, 1	1985	
71, 183	1985	
71, 255	1985	
72, 9	1986	
72, 51	1986	1
72, 155	1986	
72, 200	1986	
72, 278	1986	1
73, 118	1986	
74, 33	1986	
74, 203	1987	1

(*continued*)

Annex. (*Continued*)

Ref.	Year	BAL
74, 297	1987	
75, 40	1987	
75, 166	1987	
75, 284	1987	
77, 308	1987	1
78, 58	1988	1
78, 77	1988	1
78, 179	1988	
78, 364	1988	
78, 374	1988	
79, 256	1989	1
81, 156	1990	1
81, 242	1990	
81, 363	1990	
82, 60	1990	
83, 238	1991	
84, 133	1991	1
84, 168	1991	
85, 226	1992	1
85, 360	1992	
86, 81	1992	
87, 114	1992	1
87, 153	1992	
88, 203	1993	
90, 60	1993	
90, 128	1994	
90, 263	1994	1
91, 1	1994	
92, 26	1995	1
92, 158	1995	
93, 1	1995	1
93, 362	1995	
94, 372	1996	
95, 193	1997	
97, 228	1998	1
98, 17	1998	
98, 169	1998	
98, 265	1998	
99, 202	1998	1
99, 216	1998	
99, 246	1998	
99, 300	1998	
99, 341	1999	
100, 1	1999	

(*continued*)

Annex. (*Continued*)

Ref.	Year	BAL
100, 226	1999	1
100, 313	1999	1
101, 54	1999	1
101, 106	1999	
101, 397	2000	
102, 197	2000	1
103, 1	2000	
104, 357	2002	1
105, 135	2002	
106, 181	2002	
107, 104	2003	
107, 150	2003	
107, 186	2003	
107, 395	2003	
108, 82	2003	1
108, 150	2003	
109, 64	2003	
109, 256	2004	1
109, 279	2004	1
110, 33	2004	
111, 191	2004	
112, 255	2005	1
113, 273	2005	
113, 348	2005	1
114, 1	2005	
114, 73	2005	
114, 371	2005	
115, 1	2005	1
115, 118	2006	
115, 259	2006	
115, 276	2006	
116, 96	2006	
117, 163	2006	1
117, 202	2007	1
117, 372	2007	
118, 45	2007	
118, 168	2007	
119, 59	2007	1
119, 181	2007	
119, 247	2007	
120, 125	2008	
120, 274	2008	1
120, 378	2008	
121, 30	2008	1

(*continued*)

Annex. (*Continued*)

Ref.	Year	BAL
121, 175	2008	1
121, 205	2008	
121, 317	2008	1
123, 148	2009	
123, 267	2009	
125, 39	2009	1
125, 175	2010	
125, 260	2010	1
127, 1	2010	
127, 31	2010	
127, 61	2010	
127, 87	2010	
127, 132	2010	
128, 109	2011	1
128, 157	2011	1
128, 282	2011	1
128, 326	2011	
129, 269	2011	1
130, 131	2012	
130, 151	2012	
130, 263	2012	
130, 318	2012	
130, 372	2012	1
132, 134	2012	
132, 302	2012	