



## **THE PRINCIPLE OF PROPORTIONALITY IN GERMAN LABOUR LAW**

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# The Principle of Proportionality in German Labour Law

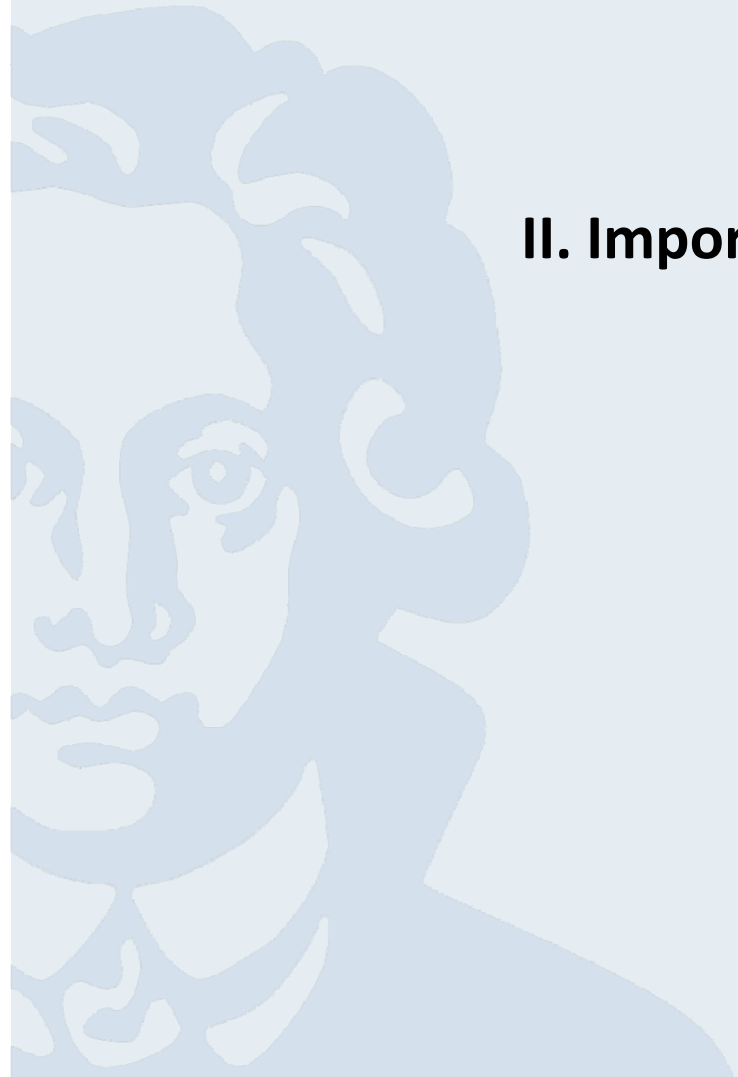
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## I. Introduction

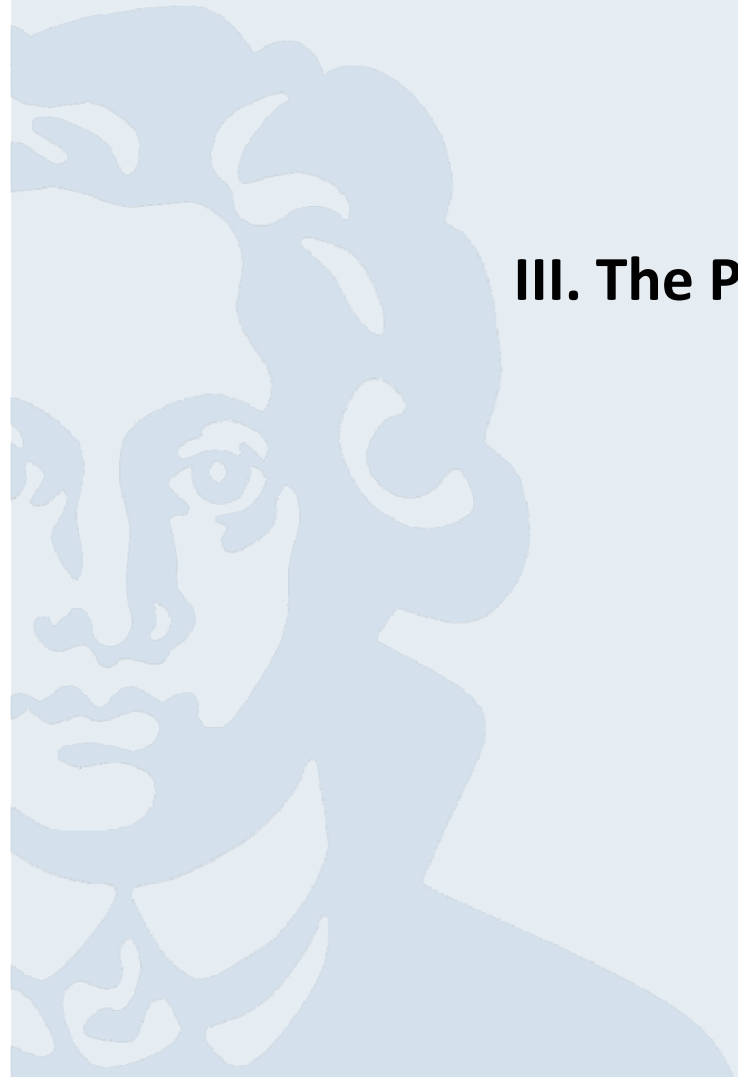
- The proportionality test was first developed by the **High State Administrative Courts in the late 19th century**, to review actions by the police.
- It was then fleshed out by the **German Constitutional Court**.
- For many decades it has been applied by the **Federal Labour Court**, in particular in the area of **dismissal protection**.

## II. Importance of Judge-made Law



- **No comprehensive codification** of labour law in Germany.
- So-called '**further development of the law by judges**' (*richterliche Rechtsfortbildung*) is **generally acknowledged**.
- 'Further development of the law' is **among the tasks of the Federal Labour Court** (see section 45(3) of the Labour Court Act).

### III. The Principle of Proportionality





## 1. The Role of the Federal Constitutional Court

### Decision of 17.07.1961:

- „Under the Constitutional order the personality of a human being enjoys **paramount legal value** and must carry a maximum of freedom of choice (of employment)“.
- „Accordingly, it may be restricted by the legislator only to the extent that such limitation is **indispensable for the common good**“.

### Decision of 16.04.1971:

- „The protected sphere of freedom of the individual, the objectives pursued by the legislator in the public interest and the means used to achieve them must all be **weighed against each other** in such a way that the fundamental status and role of the people in the society and the state remain guaranteed.“

## 2. Requirements of Proportionality

- **Legitimate Aim:** Public Interest.
- Measure must be **appropriate:** If the desired result can be promoted.
- Measure must be **necessary** to achieve the aim: If there is no equally effective and, in light of the restricted right, less restrictive measure.
- Measure must be **reasonable** (proportional in the strict sense), considering the competing interests of different groups at hand: Overall balance between the seriousness of the interference and the weight and urgency of the reasons justifying it.

### 3. Application of the Principle by the Federal Labour Court

#### Federal Labour Court of 30.05.1978:

“As far as dismissal protection is concerned, the principle of proportionality applies regardless of whether it is based on operational, personal or behavioral reasons, and whether an employee is dismissed with or without notice. As a consequence **dismissal can only be a means of last resort** meaning that it is **lawful only if there is no possibility of any other work with the same or poorer working conditions.**”

### 4. Illustrations

- **Extraordinary dismissal:**

Extraordinary termination can only be considered if all other milder means (eg, warning, transfer, consensual modification of the contract or ordinary termination) are exhausted (Federal Labour Court of 30.05.1978).

- **Ordinary dismissal because of sickness:**

Ordinary dismissal based on a long term sickness is lawful only if there are no other measures as hiring of temporary staff, ordering of overtime work, staff reorganisation or organisational reorganisation (Federal Labour Court of 22.02.1980).

- **Ordinary dismissal for behavioral reasons:**

Before giving notice a warning is required. Such warning is an expression of the principle of proportionality. It's dispensable only under exceptional circumstances (Federal Labour Court of 19.04.2007).

- **Ordinary dismissal for operational reasons:**

Lawfulness of dismissal only if there is **no possibility of further employment either within the establishment or at another establishment belonging to the company** (section 1(2) sentence 2 of the Dismissal Protection Act, which was not part of the original Act and is widely regarded as a concretion of the principle of proportionality by the legislator).

Federal Labour Court: In exceptional cases even the **possibility of further employment at another company (within a group of companies)** may have to be taken into consideration.

Employers even have to consider employment opportunities that are suitable for the worker concerned after **reasonable retraining or further training**.

## IV. Discussion and Conclusions

### 1. Rationale of applying the Principle

- Proportionality principle is derived from the **public law sphere**.  
Protection of the individual against excessive government intervention.
- Application in the area of private law: Justifiable if there is an **analogous situation**.  
Claimed to be the case because the employer when giving notice makes use of an unilateral power.



## 2. Underlying Problem: The Relationship between the Judges and Legislation

- To what extent does statutory law leave **room for application of an (unwritten) general principle?**
- Some commentators criticise the Federal Labour Court for **transgressing the boundaries** of lawful further development of the law.

**Still a Model despite all Reservations?**