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Leibholz: Politics and Law

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POLITICS AND LAW. By *Gerhard Leibholz*. Leyden: A. W. Sythoff. 1965. Pp. 339.

These essays on some fundamentals of statecraft, national and international alike, international relations, and the law governing those substantive areas, cannot be measured only by the yardsticks which apply in the reviewing of writings on law and political science generally. The book satisfies such customary criteria of judgment, but its singular value lies in an autobiographical element.

Professor Leibholz is known as a distinguished German legal scholar and as Justice of the Federal Republic's highest court, the Bundesverfassungsgericht. Most of the essays were written and published between 1938 and 1945 in Great Britain, where the author had sought refuge from the tyranny which found victims among his relatives and friends in Germany. Thus, the individual entries not only give an assessment of the subjects dealt with but also trace the portrait of a great jurist who, in distress no less than in more fortunate circumstances, remained as distant from sarcastic genuflection before power as from unrealistic disregard for the evolution—ideological, political, military, and otherwise—brought about by the power politics of a dictatorship. Moreover, Justice Leibholz' essays show a sustained reliance on religious faith and humanitarian conviction as standards of individual and national conduct—noble precepts indeed, which not only serve as a basis for the condemnation of organized terror, but also inspire that tolerance so vital to any constitutional form of government. The essays should therefore serve an eminently pedagogical end far beyond their substantive content, with their importance and value by no means limited to a German audience.

The first part of the book deals with the environmental setting of law and the state. It discloses the vices of totalitarianism, and, since that ideology has evolved in a society devoted to the rule of law and

in states with a representative government and democratic institutions, proceeds to a reappraisal of these essentials of a free body politic. The reason for the evolution is found in the divorce of the standards of conduct of individual and state and in the rather consequential efforts to gear the machinery of government exclusively to the criterion of efficiency, with the corresponding neglect of separation of powers as a means for moderating state action and safeguarding the sphere of the individual. Where successful, these two tendencies must, in the author's opinion, necessarily bring about the dictatorship of one man or a group of men whose decision is beyond, and destructive of, democratic institutions. As compared with the latter, monocratic rule has that degree of initial efficiency which, together with the short-run results obtainable, is invoked so often as an excuse for the disregard of moral values. While this reasoning is not directly applied to international relations, Professor Leibholz' wartime plea for the international recognition and protection of human rights seems nevertheless an appropriate continuation of his observations on ethics and power on the national level.

In earlier monographs in German,¹ the author had dealt with equality as a principle of constitutional and international law, as well as with the concepts and practices of representative government. The concluding entries in the first part of the collection provide him with a testing ground for his previous doctrinal findings. The day-to-day observation of the oldest democracy furnished ample material for empirical review and confirmation of conclusions reached by different methods in the earlier writings.

The second part of the collection (*Politics*) is devoted to the German opposition to Hitler and to a memorial to the members of that movement who sacrificed their lives before and after July 20, 1944. It also traces the aetiology of the resistance against the German occupants in Europe generally and gives an assessment of the component elements of the resistance groups, in particular the Christian churches. The two last entries in the chapter, first published in 1944 (*The Unity of Europe*) and 1945 (*Sovereignty and Peace*), stand as testimony to the author's foresight of things to come, both in regional and world-wide international organizations.

Apart from two essays on international legal aspects of nationality and the refugee problem, the third part is devoted to constitutional law, in particular judicial review in post-war Germany. Since these articles were originally conceived as lectures to non-German audiences, it is hardly surprising that they should be less analytical in approach, and place more emphasis on description, than the other entries. However, all essays betray the author's conviction—so force-

1. LEIBHOLZ, DAS VERBOT DES ERMESSENSMISSBRAUCHS IM VÖLKERRECHT (1929; 2d ed. 1964); LEIBHOLZ, DAS WESEN DER REPRÄSENTATION (1929; 2d ed. 1960); LEIBHOLZ, DIE GLEICHHEIT VOR DEM GESETZ (1925; 2d ed. 1959).

fully expressed in a study on the status of the Bundesverfassungsgericht which had a trail-blazing effect far beyond German legal theory and entailed consequential modifications of German federal legislation²—that not only is that court the guardian of the constitution, but the court and its members are equal in rank and dignity to the other supreme organs of the Federal Republic—Parliament, the President of the Republic, and the federal Cabinet.

The book is dedicated to the memory of Dietrich Bonhoeffer, Justice Leibholz' brother-in-law, who was executed by special order of Himmler in the Flossenburg concentration camp on April 9, 1945, and George Bell, the late Bishop of Chichester. The dedication brings to mind the political history of Germany between 1933 and 1945, when exemplary sacrifice and noble defeat of men like Dietrich Bonhoeffer were among the few traits of which one could be proud, and when the understanding attitude of men like the late Bishop of Chichester, who never failed to distinguish between organized terror and the German nation as a whole, produced the few rays of hope penetrating into Germany from abroad. This reminder of how the torch of liberty was kept aflame in Germany and how, therefore, the distinction between a perverted machinery of government and a people remained legitimate should be gratefully acknowledged. The present reviewer does not hesitate to do so.

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2. 6 LEIBHOLZ, JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART (Neue Folge 1957).