The Spread and Origins of the German Proportionality Doctrine

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Abstract Deutsch

Das vom deutschen Bundesverfassungsgericht entwickelte Prüfungsschema der Verhältnismäßigkeit (geeignet, erforderlich, verhältnismäßig im engeren Sinne) hat die ganze Welt erreicht. Über die Ursprünge des Schemas ist dennoch recht wenig bekannt. In diesem Aufsatz werden Indizen erbracht, die den Schluss naheliegen, dass Prof. Dr. Gerhard Leibholz (1901–1982), Richter am Bundesverfassungsgericht von 1951 bis 1971, der führende Kopf hinter dieser Entwicklung gewesen sein dürfte. Schon in seinen früheren Schriften, ab Mitte der 1920er-Jahre, werden die drei Bestandteile des Schemas vorweggenommen; seine Entfaltung war im Einklang mit Leibholz' programmatischen Anliegen als Richter; er war in der fraglichen Zeit Richter, auch wenn im „falschen" Senat; und das Schema kam auf einem Gebiet zustande, auf dem er unangefochten als der Experte galt.

* I am very grateful to Dr Manfred Wiegandt, who provided the crucial materials cited below, fn 83. Dr Wiegandt's book-length biography of Gerhard Leibholz was not available to me when writing this draft because international travel was next to impossible and it was not held in any library that I had access to (nor did Dr Wiegandt have a spare copy). It is therefore not cited below, but thanks to my contacts with Dr Wiegandt I can be sure that he would have drawn to my attention anything of relevance to my topic in the biography or anything else germane to my task that he had discovered during his research for it.

Warm thanks are also due to the author's neighbour, Paul Leong, who allowed me free use of his wifi while I was working at home during the height of the pandemic of 2020 in Melbourne, during the very time when the people of that city, while being treated by their supposed compatriots in the rest of Australia as pariahs, astonished themselves and the world by uniquely succeeding in wholly eliminating the virus and returning life to normal for many months in the middle of a pandemic; and to Dr Elizabeth Shi, who retrieved the printed materials necessary for work at home to proceed when the author was confined to home quarantine on the day that his office suddenly closed its doors for many months. All conclusions, however, are solely the author's own responsibility. Translations from German are the author's own except where the contrary is stated or obvious.

On a personal note, I wish to express my profound sense of gratitude for the invitation to contribute to this volume. I first met Prof. Gilbert Gornig in 1997 as a Masters student at the Philipps-Universität Marburg. It was obvious then that he was a scholar who was not afraid to speak his mind and also loved teaching. Because he delighted in teaching so much and made this fact evident, as well as possessing a sovereign command of his field, students enjoyed his classes greatly and looked forward to them – even those whose personal views might have put them at odds with any similarly minded teacher. Now I have the honour, which I can barely conceive of myself as deserving, of being one of Prof. Gornig's colleagues in the professoriate of his University, although necessarily in the *Honorarprofessor* category. With the exception of the citation of my work in the advice of the Judicial Committee of the Privy Council to Her Majesty (*Louisien* v. *Jacob* [2009] UKPC 3, [2]), no greater honour has come my way.

Abstract English

The three-part proportionality test (suitable, necessary and adequacy in balance) developed by Germany's Federal Constitutional Court has conquered the world. But almost nothing is known of its origins. This essay proposes, on the basis of several items of circumstantial evidence, that Gerhard Leibholz (1901–1982), Judge of the Court from 1951 to 1971 and professor of law, may have had the leading role in its development. His early writings from the mid-1920s strikingly presage the development of the test; it suited his broader judicial agenda; he was a Judge when it was developed, even if on the "wrong" side of the Court; and it was developed in an area of law in which he was the acknowledged expert.

1. Introduction

The three-stage German proportionality test has conquered the world. Professor Aharon Barak is the leading scholar of its spread around the world and has done much work to trace its expansion.[1] It spread first to European jurisprudence and from there to the national legal orders of various European states – among them France, Spain and Italy.[2] Through Spain and Portugal it has reached central and southern America: Peru, Columbia, Mexico, Chile, Argentina, and Brazil.[3] A leading scholar of the Canadian Constitution, Professor Peter Hogg Q.C., appears to be responsible for its adoption in Canada in *R* v. *Oakes*.[4] In the 1990s eastern European countries joined the list of countries that have adopted the German test, as did South Africa after the end of *apartheid*. In the U.K. the German test has become increasingly prominent alongside older common-law concepts of proportionality.[5] In Asia and the Middle East this German invention has been adopted in at least Israel, Korea und India, and in Oceania it has reached Australia and New Zealand. Transnational Courts have also adopted the German doctrine. The concept of proportionality features prominently in the recent extraordinary demarca-

1 *Proportionality: Constitutional Rights and their Limitations* (C.U.P., 2012), ch. 7, on which much of this paragraph is based. There are also useful references in Moshe Cohen-Eliya/Iddo Porat, "Proportionality and the Culture of Justification" (2011) 59 Am Jo Comp Law 463, 465; Alec Stone Sweet/Jud Mathews, *Proportionality, Balancing and Constitutional Governance: A Comparative and Global Approach* (O.U.P., 2019), ch. 3.

2 For a useful note on the Swiss situation, see Alec Stone Sweet/Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47 Columbia Jo Transnational Law 72, 103 fn 79.

3 See in particular João Andrade Neto, *Borrowing Justification for Proportionality: On the Influence of the Principles Theory in Brazil* (Springer Nature Switzerland, Cham 2018), ch. 2.

4 [1986] 1 SCR 103. See further Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, Alexandria 2020), pp. 24–26; Stone Sweet/Mathews, above n 2 at 117.

5 Paul Craig, "Proportionality and Judicial Review: A U.K. Historical Perspective" in Stefan Vogenauer/Stephen Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Hart, Oxford 2017), ch. 9; Martina Künnecke, "German Constitutional Law in the U.K. Supreme Court" (2019) 40 Liverpool LR 31, 33–35.

tion disputes between the German Federal Constitutional Court and the European Court of Justice – which have exposed both the uses and some of the limits of the concept.[6]

In the leading Australian case, *McCloy* v. *New South Wales*[7] decided in 2015, the High Court of Australia, in adopting the German test for assessing limitations on the freedom of political communication, cited the writings on the topic by two Judges of the German Federal Constitutional Court, Professor Dieter Grimm und Professor Gertrude Lübbe-Wolff.[8] A few years later, in *Palmer* v. *Western Australia*,[9] the same Court, Australia's highest, confirmed by three votes to two the applicability of the German proportionality test when limitations are imposed on the constitutional freedom of trade, commerce and movement among the States of Australia provided for by s 92 of the federal Constitution. Applying that test, the Court went on to uphold a nearly complete prohibition on entering the State of Western Australia from other States of Australia during the pandemic year 2020 in a very poorly reasoned decision – '[r]arely', wrote a prominent commentator and law professor, 'has Australia's federal integrity as a united nation been so airily dismissed'[10] – showing that the German proportionality test, whatever its other merits may be, is not foolproof.

It is hardly unknown in the history of constitutionalism for ideas from one country to be adopted in another: the separation of powers and bills of rights are two obvious examples.[11] Usually, though, such ideas are more general and politically focused as well as being less detailed. The German proportionality test however is a detailed technical test rather than a general idea like the separation of powers. It has, remarkably, nevertheless been found to be suitable for adoption in a wide variety of cultures and constitutional systems, albeit with some minor changes in different legal orders which others have analysed elsewhere.[12] Yet little is known of its genesis.

6 The story is well told and critically analysed by Peter Hilpold, "So Long *Solange*? The *P.S.P.P. Judgment* of the German Constitutional Court and the Conflict between the German and the European 'Popular Spirit'" [2021] Cam YB Leg Studies 1. Further criticisms are offered by Yun-chien Chang/Xin Dai, "The limited usefulness of the proportionality principle" (2021) 19 ICON 1110.

7 (2015) 257 CLR 178. There is a useful review of Australian developments in Shipra Chordia, "Proportionality and the New Post-War Judicial Paradigm: A Challenge to Australian Exceptionalism?" in Matthew Groves *et al.* (eds.), *The Legal Protection of Rights in Australia* (Bloomsbury, London 2019), pp. 361–366.

8 (2015) 257 CLR 178, 213 fn 158, 216.

9 (2021) 95 ALJR 229. Even more recently, the applicability of the doctrine was confirmed in *Libertyworks* v. *Commonwealth* (2021) 95 ALJR 490. For a comparison of the Australian with international versions of the German doctrine, see Murray Wesson, "The Reception of Structured Proportionality in Australian Constitutional Law" (2021) 49 Fed LR 352. See also Anne Carter, "Moving Beyond the Common-Law Objection to Structured Proportionality" (2021) 49 Fed LR 73.

10 Greg Craven, "For the First Time Since WWI the States are the Boss", "The Australian", 12 April 2021, p. 9.

11 For a note on the mechanics of adoption, see Stone Sweet/Mathews, above n 1 at 60.

12 Thus, for example, in *McCloy*, (2015) 257 CLR 178, 217 fn 173 French C.J., Kiefel, Bell and Keane JJ. state with admirable correctness and brevity that '[t]he Supreme

The main use of the proportionality test is in balancing legal restrictions upon the exercise of a right against the right which has been so limited. No right is absolute and it is normal for legislatures to have the capacity to limit rights, but then there must be some way of testing whether the limitation is reasonable or goes further than can be justified. In the nature of things the proportionality doctrine therefore often arises in cases involving minorities, such as religious minorities[13] or persons with unpopular opinions,[14] but it is applicable across a wide range of other areas. For example, if I am required to limit my movements in order to prevent the spread of an infectious disease, this evidently restricts my basic right to freedom of movement. The proportionality test allows us to balance my right to free movement against the interests served by restricting it and thus to determine whether the restriction on my liberty is or not proportionate to the danger of the infection and the threat to the lives of others.[15]

As the majority judgment of the High Court of Australia stated in *McCloy*, the case in which it adopted and explained the three-part German test:

> The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:
> – *suitable* — as having a rational connection to the purpose of the provision;
> – *necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

Courts of the United Kingdom and Canada divide the same concepts into four'. A more elaborate comparison of Germany and Canada may be found in Dieter Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence" (2007) 57 U Toronto LJ 383, 384, 388–395; and see Chordia, above n 4 at 4, 25f.

13 For example, those who believe themselves subject to a divine command to wear certain items of clothing, who have produced an extraordinary amount of litigation in defence of this belief. A recent German example is BVerfGE 153, 1. The author has referred to other cases in "Teachers' Religious Headscarves in German Constitutional Law" (2017) 6 Ox Jo Law & Religion 93; as the draft of this chapter was being finalised, *Hak c. Procureur général du Québec* [2021] QCCS 1466 was in the news and the government of Quebec had announced its intention to appeal against the few aspects of this decision that were not favourable to it.

14 For example, in the Canadian Holocaust-denial cases, *R* v. *Keegstra* [1990] 3 SCR 697 and *R* v. *Zündel* [1992] 2 SCR 731.

15 This was done in relation to the curfew in the Australian State of Victoria, which experienced a strict but also successful lockdown during the pandemic year 2020, in *Loielo* v. *Giles* (2020) 63 VR 1 and *Cotterill* v. *Romanes* (2021) 360 FLR 341, and in relation to curfews and other assorted measures to combat the pandemic in numerous cases in Germany culminating, just as this chapter was receiving its final polishing up, in BVerfG, NJW 2021, 1808. An example from New Zealand is *Borrowdale* v. *Director-General of Health* [2020] 2 NZLR 864, 889, 925, although as will be seen the plaintiff there did not take issue on proportionality but rested his successful case on "old-fashioned" questions of strict legality.

– *adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.[16]

In German these three steps are described as testing whether the law in question is *geeignet*,[17] *erforderlich* and finally *zumutbar* or *verhältnismäßig im engeren Sinne* (literally "proportionate in the narrower sense"). Much scholarly and judicial effort on every inhabited continent has been devoted to the further elucidation of these criteria, and this work cannot be reviewed here.[18]

πάλαι δὲ τὰ καλὰ ἀνθρώποισι ἐξεύρηται, ἐκ τῶν μανθάνειν δεῖ[19]: it is clear enough and has been known for some time that the general concept of proportionality as a legal test – as distinct from the specific, more precise three-stage test of modern days – emerged in modern times in Germany in a long series of Court decisions spanning the nineteenth century and extending into the twentieth, although distinct traces of the idea in a more or less legal context can be found in writers even of antiquity.[20] One German scholar cites Blackstone as an early voice for proportionality.[21] What is completely unknown and will be the subject of the present investigation is where the more specific, structured three-stage test came from. Clear signs of it can be seen in the very early case law of the German Fed-

16 (2015) 257 CLR 178, 194f. For an extra-judicial consideration of the topic by a Justice of the Court with references to the pre-history of proportionality going back to antiquity and the *Magna Carta*, see Kiefel J., "Proportionality: A Rule of Reason" (2012) 23 PLR 65; and see *Palmer*, (2021) 95 ALJR 229, 243f.

17 Gertrude Lübbe-Wolff, "The Principle of Proportionality in the Case Law of the German Federal Constitutional Court" (2014) 34 Human Rights LJ 12, 14 proposes "apt" instead as a translation of this word, which is a good suggestion.

18 *Cf.* Robert Alexy, "Balancing, Constitutional Review and Representation" (2005) 3 ICON 572, 573, who over fifteen years ago, and despite being the leading modern exponent of doctrine in this area, declared himself unable to provide even a list of the issues raised by the doctrine in the space available to him.

19 'Long ago good principles have been apparent to humanity, and one should learn from them': Herodotus, *Histories* 1.8.4.

20 See, for example, Barak, above n 1 at 177–179; Moshe Cohen-Eliya/Iddo Porat, *Proportionality and Constitutional Culture* (C.U.P., 2013), ch. 2; Moshe Cohen-Eliya/Iddo Porat, "American Balancing and German Proportionality: the Historical Origins" (2010) 8 ICON 263, 271–276; Grimm, above n 12 at 384f; Neto, above n 3 at 35f; Stone Sweet/Mathews, above n 2 at 97–104; Stone Sweet/Mathews, above n 1 at 60–64; Franz Wieacker, „Geschichtliche Wurzeln des Prinzips der verhältnismäßigen Rechtsanwendung" in Marcus Lutter/Walter Stimpel/Herbert Wiedemann (eds.), *Festschrift für Robert Fischer* (de Gruyter, Berlin 1979).

21 Klaus Stern, „Zur Entstehung und Ableitung des Übermaßverbots" in Peter Badura/Rupert Scholz (eds.), *Wege und Verfahren des Verfassungslebens: Festschrift für Peter Lerche zum 65. Geburtstag* (C.H. Beck, Munich 1993), p. 170, citing the following passage: 'Political […] or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the publick': Wilfrid Prest/Ruth Paley (eds.), *Oxford Edition of Blackstone: Commentaries on the Laws of England* Book I: Of the Rights of Persons (O.U.P., 2016), p. 85.

eral Constitutional Court, although it is often said[22] that it originated with the *Pharmacy Case* of 1958.[23] Later cases over the following ten years or so develop it further into something approaching its present form. But the Court never mentions what the authority for this new approach is or where it came from. It is almost as if it were considered an obvious development not needing explanation – '[t]he principle was introduced as if it could be taken for granted', as Professor Dieter Grimm,[24] a former Justice of the Federal Constitutional Court, writes. But of course the three-step procedure, at least – suitable, necessary and adequacy in balance – is a highly specific test which could have emerged in any number of other forms.

This essay will propose a candidate for the honour of originating the proportionality test which Germany has given to the world. Necessarily, this attribution must be tentative, not merely because of the uncertainty that will always surround historical work where there is nothing comparable to a direct eyewitness report of events that are reconstructed from circumstantial evidence but also because, as will already be apparent, this essay was written during the pandemic of 2020–2022, which disrupted international travel and made visits by the author to libraries in Germany and above all to the *Bundesarchiv* in Koblenz impossible. At the same time, however, what can be said now is testimony to the richness of Australia's libraries and the amount of material that is now available on the Internet; and on the theory put forward here, there will be nothing of interest in the files in the *Bundesarchiv* anyway.

First it will be necessary to trace the origin of the test in more detail, for the usual attribution of it to the *Pharmacy Case* turns out, on examination, to be something of a half-truth.

2. Development of proportionality in early Court decisions

2.1. The earliest cases

It has been very rightly said that '[p]roportionality's journey through the case law of the [Federal Constitutional] Court, from the early and reticent decisions to its acclamation as an essential principle of fundamental rights adjudication, was long, tortuous and sometimes precarious'.[25] The first appearance of a recognisable, if still unsystematised[26] idea of proportionality may be found in March 1952. In that

22 See, for example, Armin von Bogdandy/Peter Huber, "Evolution and *Gestalt* of the German State", in: *id./id.*/Sabino Cassese, *The Max Planck Handbooks in European Public Law: the Administrative State* Vol. 1 (O.U.P., 2017), p. 224.

23 BVerfGE 7, 377. There is a translation of the essential parts of the judgment in Donald Kommers/Russell Miller, *Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed., Duke U.P. 2012) pp. 666ff; see also p. 67 for a short summary of proportionality doctrine.

24 Grimm, above n 12 at 385.

25 Neto, above n 3 at 37.

26 Eberhard Grabitz, „Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts" AöR 98 (1973), 568, 569.

month the First Senate of the Court decided a case about the constitutionality of arrangements to re-integrate public employees into local authorities' workforces where their original position had disappeared as a result of the War, the consequent enormous loss of German territory afterwards or other War-related upheavals.[27] In a brief passage the First Senate of the Court said:

> What may in quiet and administratively unproblematic circumstances be objected to as an impermissible restriction [on the autonomy of local authorities] must, if it concerns the speedy rectification of exceptional emergencies, be seen as permissible and indeed even required. All that can be demanded is that such unusual interventions take place in legislative form and that they are restricted to what is unarguably necessary in terms of time and their content.[28]

The *Socialist* Reich *Party Case* of October 1952 also contained a brief reference to proportionality, referring to the execution of the Court's judgment by the police 'who are not bound by anything other than generally applicable rules of the *Rechtsstaat*, such as the need for the means to be appropriate to the police's execution of measures required to be taken'.[29] The reference to the *Rechtsstaat* in combination with the need for means to be appropriate to ends is certainly no developed doctrine of proportionality; the case did not call for proportionality to be considered, outside the context of the execution of the judgment, as the banning of a political party does not raise the issue.[30] Another reference in March of the following year by the First Senate to the use of the least rights-invasive means of criminal investigation also has only a rudimentary doctrine of proportionality.[31]

27 BVerfGE 1, 167. As a result of the Allies' agreements during the War, Poland, as the man in whose honour this book is published well knows, was essentially picked up and shifted several hundred miles to the west at the expense of Germany, while the original Prussian capital Königsberg became Kaliningrad in Russia. At first the Federal Republic refused to recognise that the territories concerned were under anything more than temporary Polish and Russian administration; the matter was not finally legally resolved until Reunification of Germany in 1990. The Germans in this vast area fled before the advancing Red Army in 1944–45 or left or were expelled after the War; among them was Maria Dening *née* Gröger (1922–2013), this author's paternal grandfather's much-loved second wife. Then there were ex-soldiers and expellees from Czechoslovakia and other eastern European countries to be accommodated also even though the borders there did not change.

28 BVerfGE 1, 167, 178.

29 BVerfGE 2, 1, 78f.

30 The reasons for this were spelt out by the Court many decades later in BVerfGE 144, 20, 230–233: in brief, it is because prohibiting a political party is not a discretionary decision; if the requirements for prohibition are satisfied, the legal consequence follows. The Court qualified this statement somewhat at 158f but it is not necessary for present purposes to pursue that angle.

31 BVerfGE 2, 121, 123. This case is referred to in English by Lübbe-Wolff, above n 17 at 12 fn 2. In upholding the criminal prohibition of male homosexuality in BVerfGE 6, 389, the Court again referred to the need for punishments to be proportionate to the criminality of the deed and the offender if they were to be constitutional (at 439) but said nothing to suggest a developed doctrine of proportionality.

In May 1953 rather more of the modern proportionality doctrine emerged in a decision of the First Senate. The issue was the constitutionality of a provision relating to the treatment of refugees from communist east Germany, of which there were already many thousands (with more to come from the following month after the popular rebellion of June 1953 was brutally suppressed by Soviet tanks); one would-be refugee had found his application to be treated as a refugee entitled to move to western Germany rejected (for reasons not clearly stated in the judgment, he was not thought to have a valid reason for flight).

Upholding the provision in question, the Court first referred to what we now know as the margin of appreciation: 'the legislator must have the capacity to regulate this procedure in accordance with its discretion, and only if it creates an unequivocally inappropriate procedure can the Federal Constitutional Court declare it unconstitutional'.[32] 'It is not subjective arbitrariness', the First Senate continued, 'that leads to a declaration of unconstitutionality, but objective, *i.e.* real and unequivocal inappropriateness of legislative provisions in proportion to the actual situation which is to be mastered'.[33] The concept of proportionality thus found a foothold in the Court's jurisprudence outside the area of police powers where it was already a staple of the ordinary law,[34] but there is no three-stage test as yet. While two of the three stages can be seen with the eye of faith, there is as yet no developed idea of how they relate to each other.

In August 1953 the First Senate struck down a provision requiring parties without significant parliamentary representation to find five hundred nominators for candidates to the *Bundestag*, deciding that that law exceeded the margin of appreciation which should be allowed to the legislature on the topic.[35] It held that 'no material reason'[36] justified such a high number, ten times more exacting in effect than the requirement that had existed under the Weimar Republic when popular willingness to support openly a political party had not yet been impaired by the Nazi experience. A first glimpse of a developed system for comparing a provision to its alleged aim is discernible, for the Court spends some time in determining the precise purposes that it would be permissible for the legislator to pursue through such provisions, namely the genuineness of nominations and avoiding splitting of the vote, purposes which in turn served the aim of allowing for a functioning government to be formed.[37] Only then did it hold that the legislator had exceeded the margin of appreciation available to it.

32 BVerfGE 2, 266, 280.
33 BVerfGE 2, 266, 281.
34 See below, fn 58.
35 The famous 5% hurdle, also widely copied from Germany even if it did not originate there, may also be part of an effort to preserve the monopoly of the parties founded shortly after the War. On the hurdle's history, see further Greg Taylor, "The Constitutionality of Election Thresholds in Germany" (2017) 15 ICON 734, 734f. (Shortly after that article was published, the Court's decision in BVerfGE 146, 327 appeared indicating that there is no constitutional requirement to permit voters to indicate which party will receive their vote if their first choice falls at the hurdle.)
36 BVerfGE 3, 19, 28.
37 BVerfGE 3, 19, 27.

However, the Court, in upholding a set of requirements directed at ensuring the genuineness of signatures in candidate nominations, sent a mixed message: on the one hand, it said that the requirements were suitable to achieve that aim, but then added that it was not for the Court to judge whether they were suitable for the aim![38] (At about this time, too, a certain Rupprecht von Krauss, writing on administrative law rather than constitutional doctrine, coined the term under which we now know the third stage of the proportionality test, *Verhältnismäßigkeit im engeren Sinne*/proportionality in the narrower sense.[39] Little seems to be known about him, but his contribution is certainly a reminder that the proportionality bandwagon was gaining more and more adherents; as we shall see, the topic was in the air at the time.)

Shortly afterwards, however, in June 1954, the First Senate of the Court was faced with a related challenge requiring a hundred signatures for nominations in State elections in the State of North Rhine/Westphalia[40] except for parties with existing substantial parliamentary representation. A new party, the All-German Bloc, challenged the criterion for distinguishing between parties that were not required to fulfil the 100-signature requirement because they had substantial existing parliamentary representation and those that were so required: the requirement was waived for parties that had had at least three representatives in and throughout the term of the expiring State legislature. This case, it is important to note, did see a substantial development in the proportionality doctrine of the Court beyond what it had felt able to say less than a year earlier in a very similar context – while also being, as one distinguished writer has said, '[a] nice example of the judicial art of staging the first appearance of an instrument of judicial power as unobtrusively as possible'.[41]

The Court first identified the purpose of drawing the distinction among political parties for the purpose of nominations: eliminating parties without a sufficient degree of durability which might produce unjustified splitting of the vote (and thus make the process of forming a stable government and a functioning legislature much harder; after the Weimar experience it is understandable that the Court did not add a reference to these more fundamental desiderata in so many words). It then said:

38 BVerfGE 3, 19, 32f.

39 Benedikt Pirker, *Proportionality Analysis and Models of Judicial Review: A Theoretical and Comparative Study* (Europa Law, Groningen 2013), p. 104.

40 In English *Nordrhein-Westfalen* is often rendered as "North Rhine-Westphalia", which has the unfortunate effect of implying the existence of a region "Rhine-Westphalia" of which this State would then occupy the northern portion. While Germany does paradoxically have a region known as East Westphalia, there is no "Rhine Westphalia" (for the Rhine does not flow through Westphalia at all) and my slash is meant to indicate the true position: *Nordrhein-Westfalen* is the State that includes both the northern Rhine region based on Cologne, Düsseldorf *etc.* and the region of Westphalia to its east (Dortmund, Bochum, Münster) which has such a significant place in the history of international law.

41 Lübbe-Wolff, above n 17 at 12.

> This requirement […] is a suitable [*geeignet*] means to reach this goal. It also does not exceed the limits that the principle of proportionality draws between ends and means. Within these limits the legislator is unrestricted unless there are relevant special provisions of the constitution.[42]

We are now able to distinguish two parts of the proportionality test: the Court must identify a goal pursued by the legislation in question and ensure that it is adapted to reaching that goal – the first stage of our modern three-part test. It must then conduct a comparison of the proportionality between means and ends – the third part of the test.

The Court then asked itself 'whether the legislator has avoided choosing other criteria which would also make evident the durability and constitutional/political importance of a party'.[43] It thereby posed the second issue of the modern proportionality doctrine: whether there is an obvious and less rights-intrusive alternative available. The question arose because the All-German Bloc argued that the criteria for exemption from the 100-signature rule should be expanded to include parties with three representatives from North Rhine/Westphalia in the federal Parliament (the *Bundestag*), not just for those with three representatives in the State legislature, even though State elections were in question here and not federal ones. The Court rejected this argument on the ground that there were differences between the two levels of government and that the All-German Bloc had representatives in the *Bundestag* only because it had received sufficient votes in other States rather than in North Rhine/Westphalia, so its representation there did not say enough about its durability in that State and it was reasonable to treat it as a non-exempt party in the State elections in issue. While the tests appear the wrong way around from the present point of view – the second requirement here is dealt with after the third – the case marks a very substantial step towards the modern doctrine and it is particularly remarkable that it came only a few months after a previous decision on electoral law which only briefly mentioned the topic and also appeared to suggest that it was not really a judicial matter at all.

In a recent book Dr Shipra Chordia[44] has suggested that the Court in this case applied a merely 'limited, means/ends analysis' and did not delve into the 'substantive considerations of the normative weight to be attached to competing considerations'. I am not sure that that latter statement is quite right, but it is certainly true that there was little balancing evident on the surface of the judgment – indeed, on one view it is only in the late 1970s that the balancing component of the three-stage test regularly came to the fore in German law.[45] That, however, should not deter us from seeing it as a major advance. First, the facts themselves and the arguments of the plaintiff suggested a nearly exclusive focus on the second stage, that of necessity: was the requirement of a hundred nominators really the only way to achieve the goals pursued with the limited exemption attached to it, or could

42 BVerfGE 3, 383, 399.
43 BVerfGE 3, 383, 399.
44 Above n 4 at 34.
45 Wesson, above n 9 at 26.

the exemption be expanded without loss to the goal? Secondly, once that question is answered in favour of the existing law it does suggest that any balancing issue will be decided accordingly: either the exemption applies or it does not; the factors that would be involved in any balancing exercise are to all intents and purposes mentioned in the necessity stage which the Court examined in detail. Moreover, the values promoted by the rule were, as has just been suggested, not in need of explanation for those who had lived through the decline and fall of the Weimar Republic; and the Court had, moreover, just reminded the forgetful of them in the decision of August 1953. And finally, it does not take a genius to work out that a proportionality doctrine will need a proportionality component. The advance made in this case consisted in the judicial endorsement of the two preceding stages which are by no means so obvious and which are the hallmarks of modern proportionality doctrine.

2.2. The major decisions of the late 1950s

Perhaps the most significant decision of the Federal Constitutional Court in its history was the *Lüth* decision of 15 January 1958[46] on the relationship between constitutional principles and the private law. The facts and basic decision of the Court have been very adequately described in many other places.[47] Proportionality was not central to the issues or the decision. Nevertheless the issue of how constitutional rules affected the private law was the greatest doctrinal question of the first decade of the Basic Law's and the Federal Constitutional Court's existence.

The case concerned a call by one Erich Lüth for a boycott of films involving a director and actor named Veit Harlan owing to his involvement in anti-Semitic films during the Third *Reich*. Lüth was prohibited from making such calls by the decisions of the ordinary Courts and sued in the Federal Constitutional Court on the ground that his freedom of speech was infringed; Harlan countered that Article 5 (1) of the Basic Law contained an exception for restrictions of free speech found in the 'general laws', which in turn (§ 826 of the Civil Code) referred to intentionally harming others *contra bonos mores*.

In applying these two phrases, the 'general laws' in the Basic Law and *contra bonos mores* in the Civil Code, the Court pointed out, as part of a much longer analysis, that it was not in fact Lüth's aim to harm Harlan but rather to contribute to the formation of public opinion.

> It is at this very point that the relationship between ends and means becomes important. The protection of a private interest can and must yield when – and this is all the more so as this aspect predominates – the statement in question is not immediately directed against that interest in the private economic realm or in the pursuit of selfish goals, but is a contribution to the intellectual battle of opinions in a question that significantly affects the public […].[48]

46 BVerfGE 7, 198.
47 *E.g.* Kommers/Miller, above n 23 at 60 ff.
48 BVerfGE 7, 198, 212.

And in deciding whether a call for a boycott was *contra bonos mores*, 'the motives, goal and aim of the utterance are to be considered; furthermore, the question also depends upon whether the complainant in pursuing his goals has not exceeded the boundaries of what is necessary and appropriate damage under the circumstances to the interests of Harlan and the film companies'.[49]

We come then to the First Senate's judgment in the *Pharmacy Case* of 11 June 1958[50] which is traditionally held to be the starting point for the modern proportionality doctrine. The case concerned restrictive requirements for the licensing of pharmacies which aimed to limit competition; a pharmacist took the State of Bavaria to the Federal Constitutional Court when it refused to grant him a licence because doing so might affect the commercial viability of other pharmacies, claiming that that refusal violated his constitutional right to free choice of his occupation under Article 12 (1) of the Basic Law. In upholding the pharmacist's complaint, the Court produced a sophisticated schema for determining issues under that Article: it divided them into issues around the bare choice of occupation and its practice, and the latter further into objective and subjective requirements such as a person's educational attainments. Each of these sub-divisions was subject to legislative regulation but at different levels of scrutiny – and subject always to the principle of proportionality. The Court also held that the legislature was obliged to select rules that affected the free choice of occupation least and to select the subdivision of the right to be affected by a law in accordance with the same principle also, choosing from among the three sub-divisions regulation of that level which would affect the basic right least[51] – an adaptation of the second stage of modern proportionality analysis to this special context.

The Court went into the second stage's requirements in some detail, while providing little on the other two stages of proportionality analysis, the first and the third. The following passage gives the flavour of its views on the second stage:

> The general principles governing the regulation of vocational activity may be summarised as follows: the practice of an occupation may be restricted by reasonable regulations predicated on considerations of the common good. The freedom to choose an occupation, however, may be restricted only for the sake of a compelling public interest; that is, if, after careful deliberation, the legislature determines that a common interest must be protected, then it may impose restrictions in order to protect that interest, but only to the extent that the protection cannot be accomplished by a lesser restriction on freedom of choice. In the event that an encroachment on freedom of occupational choice is unavoidable, lawmakers must always employ the regulative means least restrictive of the basic right.[52]

In another passage the Court even suggested that the requirement to choose, among available and equally suitable alternatives, the least rights-invasive one might even

49 BVerfGE 7, 198, 215.

50 See above, fn 23. There is some anticipation of what the Court held in this case in Herbert Krüger, „Die Einschränkung von Grundrechten nach dem Grundgesetz" DVBl 1950, 625, 628.

51 BVerfGE 7, 377, 405, 408, 410f.

52 BVerfGE 7, 377, 405, as translated by Kommers/Miller, above n 23 at 668.

apply only to the free choice of occupation or at least to basic rights which admitted of a similar graduated analysis in order to ensure that the least rights-invasive stage is chosen.[53]

Again the Court did not refer to many sources for the principles thus called into being, although it did refer to decisions of the Weimar-era constitutional Court which had taken upon itself to determine whether the infamous emergency presidential decrees really were necessary to meet an extraordinary emergency.[54] At no point, curiously, did the First Senate refer to the decision on the 100-signature requirement for parliamentary nominations in North Rhine/Westphalia which had been delivered only four years earlier and which also set up a requirement to choose the least restrictive means. It may well be that there is some unspoken Bavarian influence in play at this point,[55] and further work would be needed to determine when and how the standard test for all occasions came to be accepted alongside the slightly adapted version for the specific right in question in the *Pharmacy Case*. That work cannot be undertaken here, but only the general direction of further cases indicated.

2.3. Succeeding cases

A brief overview of the succeeding cases can now be given, culminating in the First Senate's declaration in December 1965 that '[i]n the Federal Republic of Germany the principle of proportionality is of constitutional rank'.[56]

The first case dates from January 1960 and involved a challenge to the refusal of the criminal Courts to let an appellant out on bail pending the hearing of his appeal because of the danger that he might attempt to influence witnesses. In this decision of the Second Senate, rather than the First which has been the principal actor until now, it was held that this decision was constitutionally in order. The Court also referred to the need for imprisonment to be 'in the right proportion'[57] to the established facts but as this was a well-established principle of the criminal law already[58] and there was no substantive reason to object on the grounds of

53 BVerfGE 7, 377, 410f.

54 BVerfGE 7, 377, 413. As can be seen at 411, the Court also referred to post-War precedents of the non-constitutional Courts in which they had undertaken to decide whether the limitation of a basic right was truly necessary, while disapproving those precedents on other grounds.

55 Alexander Tischbirek, *Die Verhältnismäßigkeitsprüfung: Methodenmigration zwischen öffentlichem Recht und Privatrecht* (Mohr Siebeck, Tübingen 2017), pp. 18f, 30f. See also below, fn 56.

56 BVerfGE 19, 342, 348. As can be seen in, for example, Stern, above n 21 at 171, the Bavarian Constitutional Court made a similar declaration ten years earlier, but our topic here, it must be recalled, is not the unequivocal proclamation of the constitutional status of the proportionality test in a single sentence but the development of the modern three-part test.

57 BVerfGE 10, 271, 274.

58 This is demonstrated by, for example, Stefan Naas, *Die Entstehung des preußischen Polizeiverwaltungsgesetzes von 1931* (Mohr Siebeck, Tübingen 2003), pp. 145f.

proportionality there was no call for the Court to go any further into the question. The same may be said of a decision in June 1963 in which the Court, this time again the First Senate, struck down as disproportionate a decision by the ordinary Courts to order the accused in a minor companies-law criminal case to provide samples of blood, brain and spinal-cord fluids in order to determine whether he was suffering from a disorder of the nervous system.[59]

In March 1960 the First Senate had to deal with another anti-competitive provision in the health sector, this time one restricting the number of medical practitioners with access to the health insurance funds and again alleged to be necessary in the public interest. This time the Court's analysis was not as elaborate as for the pharmacists, but in again invalidating the law in question it referred to the principles it had established in that case and described them as requiring a careful examination of 'the degree of restriction for the individual and the necessity of the provision for the protection of the public'.[60] Yet another restrictive occupational requirement was in issue in July 1961, this time one affecting tradespeople running independent businesses, who were required to have obtained the rank and status of master in the trade in question. This requirement was upheld, the Court's First Senate stating that its graduated schema in the *Pharmacy Case* was the result of applying a general principle, namely 'the principle of proportionality'.[61] The margin of appreciation put in another appearance also with the Court's declaration that it could overrule the legislator's judgment only when it was 'obviously defective or incompatible with the value system of the Basic Law'.[62]

What the Court again referred to as the 'principle of proportionality'[63] required the following analysis to be gone through – respectively the second, first and third stages of the test we know today followed by another reference to the margin of appreciation:

> [T]he initial question is whether the legislature was required at all [*überhaupt genötigt*] to undertake restrictions of the free choice of occupation rather than limiting itself to regulating the practice of the vocation, and whether the conditions it places upon practice is not an obviously inappropriate [*ungeeignet*] means for upholding community values; and, finally, it must consider whether these requirements for practising considered in themselves burden the affected individual disproportionately and unacceptably [*übermäßig und unzumutbar*]. In relation also to such questions of value judgment and balancing, which regularly occur in this context, the views of the legislature cannot be objected to by the Federal Constitutional Court as long as it is not plain that those views are not based upon incorrect presuppositions of fact or incompatible with the constitution.[64]

The second criterion, necessity, continued to assert itself as a separate part of proportionality doctrine in a decision of July 1963 in which it was held that a person accused of two fairly minor dishonesty offences could not be compelled to under-

59 BVerfGE 16, 194.
60 BVerfGE 11, 30, 42.
61 BVerfGE 13, 97, 104.
62 BVerfGE 13, 97, 107.
63 BVerfGE 13, 97, 115.
64 BVerfGE 13, 97, 113.

go an pneumoencephalography (a medical investigating technique involving the addition of air to the brain cavity) to check on his mental state because the 'principle of proportionality requires in criminal procedure above all that requirements are unavoidable, stand in a proper relationship to the seriousness of the crime and are justified by the weight of evidence against the accused'.[65] Before making such orders criminal Courts were required to consider their '*Erforderlichkeit und Verhältnismäßigkeit*'[66] – their necessity, in the sense used in the three-stage test, and proportionality.

In dealing with the constitutionality of the regulation of ride-share services in 1964, the First Senate again referred to the need for the means chosen to be appropriate to the end allegedly pursued (as distinct from the end at which the regulation may really have been aimed, the protection of the state-owned railways from competition) and also proportional, and derived these requirements from 'the principle of the *Rechtsstaat*'.[67] The First Senate expanded upon this in the decision of December 1965 with which I opened this section, which concerned the need to ensure that the constitutionally entrenched principle of proportionality – necessity and suitability[68] – was respected in deciding whether accused murderers received bail or were remanded in custody:

> In the Federal Republic of Germany the principle of proportionality is of constitutional rank. It is derived from the principle of the *Rechtsstaat*, in essence even from the nature of the basic rights themselves, which, expressing the general claim of the citizen against the state to freedom, can be restricted only as far as is necessary [*unerläßlich*] to protect the public interest.[69]

It is to this decision, along with that of June 1963 on bodily samples,[70] that the First Senate's declaration in 1983 of the tripartite scheme as its 'settled jurisprudence' can be traced on the references provided by the Court itself in its decision.[71]

3. Gerhard Leibholz

3.1. Man and work

I now propose that the much-copied, world-conquering German proportionality doctrine owes its adoption by the Federal Constitutional Court largely to Profes-

65 BVerfGE 17, 108, 117.
66 BVerfGE 17, 108, 119.
67 BVerfGE 17, 306, 313.
68 BVerfGE 19, 342, 347 – '*erforderlich und zweckmäßig*'.
69 BVerfGE 19, 342, 348.
70 Above n 59.
71 The case of 1983 involving the declaration of *ständige Rechtsprechung* is BVerfGE 65, 1, 54, referring to BVerfGE 27, 344, 352f, a case from 1970 just before Leibholz' retirement which in turn refers to BVerfGE 16, 194, 202 and BVerfGE 17, 108, 117 as the source for the tripartite test.

sor Gerhard Leibholz (1901–1982).[72] Leibholz had concerned himself with the question of proportionality in the legal context since writing his doctorate in 1924 and continued to think and write about it almost until his death. In his writings he derived the principle of proportionality from the prohibition of arbitrariness and that in turn from the *Rechtsstaat* principle, just as the Court was to do in the 1950s. In pursuit of an aim that was most important to him, namely providing more precise legal standards for the vague and politically tinged rules of constitutional law, Leibholz even before the War had worked out a division of the proportionality concept consisting of three separate categories very similar to those that are accepted today. Much of the development of proportionality in the Court's case law of the 1950s, including the first mention of a tripartite scheme, occurred as we saw in the North Rhine/Westphalia case on political parties and the law – a field in which Leibholz was an acknowledged expert and intellectual leader. Finally, Leibholz is known to have exercised influence over the Court's decisions informally behind closed doors even when he was not part of the Bench deciding the case. Taking all these facts together, there is a substantial circumstantial case for regarding Leibholz as the instigator of the modern-day German proportionality schema that has swept the world.

Leibholz owes his prominence in this account to his occupancy of a Judgeship at the Federal Constitutional Court from its foundation in 1951, when he was in his fiftieth year, until his retirement in 1971. Those dates, however, also indicate that he must be one of the many jurists whose careers were affected by the Nazi period. He was Jewish and related to Pastor Dietrich Bonhoeffer by marriage – Leibholz' wife was the Pastor's twin sister. He owed his appointment in 1951 not only to his own intellectual brilliance and his willingness to return to Germany from English exile but also partly to the comparative lack of untainted competition. There can however be no doubt at all of his intellectual calibre or of his suitability for the highest judicial appointment. His doctorate, completed in 1924 when he was barely in his mid-twenties, is a *tour de force* and leaves the reader amazed that such a young and inexperienced man should be capable of heights which would do credit to any mature modern-day legal scholar – and that although Leibholz was writing in a legal culture which, despite its long tradition of legal philosophy and serious scholarship in the civil law, had only just emerged from constitutional authoritarianism.

Leibholz' thinking resists easy classification.[73] On the other hand, he was opposed to mere formalism or a refusal to recognise the political aspect of constitu-

72 Much of what follows is based upon Manfred Wiegandt, "Gerhard Leibholz (1901–1982)" in Jack Beatson/Reinhard Zimmermann (eds.), *Jurists Uprooted: German-Speaking* Émigré *Lawyers in Twentieth-Century Britain* (O.U.P., 2004), pp. 535–581.

73 See Manfred Wiegandt, "Anti-Liberal Foundations, Democratic Convictions: the Methodological and Political Position of Gerhard Leibholz in the Weimar Republic" in Peter Caldwell/William Scheuermann (eds.), *From Liberal Democracy to Fascism: Political and Legal Thought in the Weimar Republic* (Humanities Press, Boston 2000), pp. 108f – in which the author also points out how the positivist/non-positivist split aligned with attitudes to the Weimar Constitution in a manner that may surprise those

tional adjudication or constitutional practice in general;[74] in the Weimar era when the issue was still controversial he thought, for example, that the role of political parties should be constitutionally recognised as a legitimate means of channelling the popular will in a mass democracy. After the War, in discussing the function of the new Federal Constitutional Court in a major report to a plenary session of its Judges, Leibholz stated that constitutional law was different from other fields of law because 'it turns matters truly political in content into the subject of legal decision-making. Constitutional law is in the real sense of the word political law.'[75]

On the other hand, *'Zwei Seelen wohn[t]en, ach! in [s]einer Brust'*: while rejecting arid positivism Leibholz was keen to ensure that Judges did not run the risk of being seen merely as politicians in fancy robes; he was therefore concerned to develop doctrine in such a way that new and vague stipulations of constitutional law such as the principle of equality before the law were rendered more precise and legally structured. Law and politics were activities of different natures, the former being static and rational and the latter dynamic and non-rational. Four pages later in the same report to the plenary session just quoted we therefore find Leibholz saying:

> In reality the question whether constitutional Courts are applying genuine law will in the end alone depend upon whether there is available a justiciable norm, that is, a provision the content of which is susceptible of a more precise legal meaning. If none such appears – if there is no norm which permits of the resolution of differences of opinion and doubts about the content of a provision by sensible interpretation – then the "rational standards" are missing by which the Federal Constitutional Court in its judicial capacity could orient its decisions.[76]

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who are unfamiliar with the legal history. It would be too much of a detour to go into that matter here, but there is a similar combination of democratic commitment and arid positivism to be found in Australia in the seminal *Engineers' Case* (1920) 28 CLR 129.

74 There are some short quotations in English from his works on this point in Kommers/Miller, above n 23 at 65. See also the work of his doctoral supervisor, Prof. Heinrich Triepel, reproduced in ch. 5 of Arthur Jacobson/Bernhard Schlink (eds.), *Weimar: A Jurisprudence of Crisis* (U. of California Press, 2000).

75 Leibholz, „Bericht des Berichterstatters an das Plenum des Bundesverfassungsgerichts zur ‚Status'-Frage" AöR 6 (1957), 120, 121. Another extract from this report appears, in English translation, in Leibholz, "Legal Philosophy and the Federal Constitutional Court" in Edward McWhinney, *Constitutionalism in Germany and the Federal Constitutional Court* (A.W. Sythoff, Leyden 1962), pp. 16f, reprinted in Leibholz, *Politics and Law* (A.W. Sythoff, Leyden 1965), p. 297.

76 Leibholz (1957), above n 75 at 125. The words "rational standards" are in English and in inverted commas in the original but it is not apparent whether they are a citation and if so of what; the context of the essay suggests that Leibholz may have been thinking of the U.S. political questions doctrine. Leibholz applies these principles to the Federal Constitutional Court's work specifically, stating that it too needs proper legal standards to be able to do its work, in an English-language essay entitled "The Federal Constitutional Court in the Constitutional System of the Federal Republic of Germany" in *Legal Essays: a Tribute to Frede Castberg* (Universitetsforlaget, Oslo 1963), p. 499, reprinted in Leibholz (1965), above n 75 at 274f; and see Leibholz' "Legal

In a legal culture which has always had a great, perhaps even an exaggerated respect for logical schemes and structures in the civil and criminal law, Leibholz from the first wished to ensure that constitutional law was of the traditional legal stamp and thus could not be dismissed as politics by another name – not least by the enemies of the Weimar Constitution in general and of judicial review of legislation in particular. An opponent of ideas that would have seen the equality principle relegated to secondary importance, Leibholz nevertheless was a middle-of-the-road conservative on a number of topics to the extent that his loyalty to Weimar democracy was sometimes questioned; he was politically inclined towards the right and even capable of friendly remarks about Mussolini's Italy (which saved his job for a while even after the Nazi takeover and had this Jewish man suspected of Nazi sympathies during his wartime exile in England). With these two souls dwelling in his breast, Leibholz was the idea candidate to develop modern proportionality doctrine with its mixture of loyalty to the inherited "scientific" tradition alongside a less cramped, transformative view of the judicial role that emerged as a reaction to the recent past.[77]

After the War, on his return to teaching in Germany, Leibholz' interests noticeably broadened and included unequivocally political topics (despite his lack of any formal qualifications in the field)[78] such as "State and Society in England"; he was formally appointed to a visiting professorship which included teaching in political science as well as law.

Proportionality was certainly in the air in early post-War Germany. Several scholars advocated its adoption as a legal standard and it can be found mentioned in a more or less well thought through way in Court decisions such as some of those already mentioned.[79] What distinguishes Gerhard Leibholz, however, is a series of factors: his early preoccupation with the topic; his desire, in accordance with his life-long views mentioned earlier, to make the vague idea of proportionality more precise and legally credible; and the similarity of much of his thinking, even as early as the mid-1920s, with the doctrine adopted by the Federal Constitutional Court in its early form in the 1950s – and then adopted throughout the world over the ensuing seventy years. I commence, however, with a peek behind the curtain.

3.2. Leibholz' influence behind the scenes

The possibility that Gerhard Leibholz might have been influential in the development of the doctrine of the Federal Constitutional Court has no doubt been over-

Philosophy and the Federal Constitutional Court" above n 75 at 15f, also reprinted in Leibholz (1965), above n 75 at 300.

77 Chordia, above n 4 at 66–71.

78 Apart, perhaps, from an earlier thesis entitled *Fichte und der demokratische Gedanke* ("Fichte and the Democratic Idea"): Hans Klein, „Gerhard Leibholz (1901–1982): Theoretiker der Parteiendemokratie und politischer Denker – ein Leben zwischen den Zeiten" in Fritz Loos (ed.), *Rechtswissenschaft in Göttingen: Göttinger Juristen aus 250 Jahren* (Vandenhoeck & Ruprecht, Göttingen 1987), pp. 528–530.

79 Stone Sweet/Mathews, above n 2 at 104–107; Stone Sweet/Mathews, above n 1 at 63.

looked largely because he was in the wrong Senate. From the beginning the Federal Constitutional Court has been divided into two "Senates", a word that recalls the Roman-law heritage of Germany, with precisely defined responsibilities, each of which has the full powers and authority of the Court although only half of its Judges. Originally, the chief organising principle was that the First Senate and its Judges dealt with basic rights and the Second Senate and its Judges with everything else, most obviously questions of federalism and the institutions of government, although this neat division has been muddied over time.[80] No order of precedence is implied by the numbers. While almost all of the crucial early decisions, as we saw earlier, were made by the First Senate, Leibholz remained throughout his twenty-year judicial career (1951–1971) in the Second Senate.

It is now clear, however, that Leibholz' intellectual leadership of the Court extended more widely than it strictly ought to have done. Perhaps a hint at this is provided by Dr Martin Bullinger, as he then was, in a book review dealing with Leibholz' works in 1961, in which we find the sentence: 'It is known that important leading decisions of the Federal Constitutional Court were formulated or inspired by Gerhard Leibholz'[81] – hardly something that it would be necessary to say about a serving Judge of the Court unless that Judge's influence extended more widely than was apparent from the written record. However, we owe to Leibholz himself, speaking ten days before his death, the information that in 1952 he exerted intellectual influence behind the scenes in the case before the First Senate relating to the prohibition of the neo-Nazi Socialist *Reich* Party under Article 21 (2) of the Basic Law,[82] a case which featured briefly in the previous section for its contribution to the development of proportionality doctrine. As a result of his intervention, he stated in a radio interview in 1982, 'the decision was […] in essence in the relevant part just as if I had written it myself'.[83]

The story based on that radio interview is well told by Leibholz' biographer, Dr Manfred Wiegandt, in English:

> At the time the [Socialist *Reich* Party] case was pending before the Court, Leibholz was at a social event in the house of the President of the Court, [Dr Hermann] Höpker-Aschoff, who was also presiding over the First Senate. Höpker-Aschoff and the reporter for the case [Prof. Konrad Zweigert, another Judge in the First Senate] told Leibholz that they wanted to prohibit the neo-Nazi party, but had not found the right argument

80 See § 14 of the *Bundesverfassungsgerichtsgesetz*. For a note on the Senate system in English, see Kommers/Miller, above n 23 at 18–20.

81 Book review, Politische Vierteljahresschrift 2 (1961), 87, 87.

82 BVerfGE 2, 1.

83 „Recht, Philosophie und Politik", Gerhard Leibholz with Werner Hill, N.D.R. 2 radio, 17 March 1982, from 8 p.m.; transcript kindly supplied to me by Leibholz' biographer, Dr Manfred Wiegandt. This interview, which the dates indicate was broadcast posthumously, is also cited in Wiegandt, above n 72 at 537 fn 5. A newspaper article based upon parts of this interview and published over two-and-a-half years later is „Als es umschlug an den deutschen Universitäten: Erinnerungen des Staatsrechtslehrers und späteren Bundesverfassungsrichters Gerhard Leibholz", „Frankfurter Allgemeine Zeitung", 22 October 1984, p. 11, but it does not contain anything of relevance to the present topic.

> for doing so. Leibholz suggested that he knew of a sound argument and sat down with the reporter to explain his approach. One passage in the eventual decision sounded very much like a section in Leibholz's presentation at the meeting of the National Convention of German Lawyers in 1950, where Leibholz had defined a party that was opposed to the liberal and democratic order of the constitution and which could therefore be prohibited. The Court even adopted Leibholz's idea of a tension between Article 21 and Article 38 [of the Basic Law].[84]

It will be recalled from the earlier analysis that the status of political parties in a democracy had long been a major concern of Leibholz going back to his pre-War views of the nature of Weimar democracy and its legal underpinnings, and his interest in unequivocally political matters only increased after he returned to Germany and took up the post of Judge of the Federal Constitutional Court. In the Federal Republic, Leibholz' expertise in the law affecting political parties was recognised universally and earnt him, for example, a place on the commission drafting the federal *Parties Act* still in force today.[85] Recognising his interest in this field and the contribution he could make to the development of the Court's jurisprudence on it, the Judges in the First Senate, in preparing the decision in the *Socialist* Reich *Party Case* delivered in October 1952, informally asked for and received, to their great profit, Leibholz' guidance on political parties and the law.

In August 1953, the First Senate's decision on nominations for the *Bundestag* elections was published, and it is simply unimaginable that Leibholz did not read it. It appeared to doubt whether many questions of proportionality were even suitable for judicial determination. I suggest the possibility – I would go so far as to say that it is a probability – that the great development in the First Senate's jurisprudence that occurred in the North Rhine/Westphalia case in June 1954 on the very same topic of nomination hurdles, including and above all the appearance of a recognisable form of the three-stage modern test, is to be attributed to Leibholz' suggestions to the Judges behind the scenes after he read the decision of August 1953 and saw opportunities to improve the quality and legal credibility of their analysis. Perhaps, being as concerned as he was with ensuring that the Court's decisions were both politically realistic but also legally credible, Leibholz even took matters into his own hands and suggested to his fellow Judges in the First Senate a more sophisticated approach to solving issues relating to the number of nominees required for candidates; perhaps the topic came up at another judicial house party; at all events, after he read the decision of August 1953 the expert in electoral law could not allow the Judges of the other Senate to be without the benefit of his

84 Wiegandt, above n 72 at 574. I have of course compared the quoted passage to the radio interview cited in fn 83 and found it an accurate summary. It is also worth noting that Prof. Zweigert was alive for fourteen years after this interview was broadcast and as far as is known did not contradict what is said in it. I should also add that I have no doubt that similar tales could be, and probably have been told of judicial method in the common-law world. As a well-known Australian lawyer and Prime Minister is reported to have said: only the impotent are pure.

85 Peter Unruh, „Erinnerung an Gerhard Leibholz (1901–1982) – Staatsrechtler zwischen den Zeiten" AöR 126 (2001), 66, 84.

own reflections which were then found in the First Senate's decision in June of the following year.

3.3. Proportionality in Leibholz' works

For both proportionality and electoral law were topics that Leibholz had long made his own. I start my review of proportionality in Leibholz' works with the Federal Constitutional Court's judgment in the *South-West State Case* of 1951,[86] one of the very first decisions of the Court and one which was also the responsibility of the Second Senate of which Leibholz was a member. The judgment, part of a very long-running and complicated set of legal and political decisions that resulted in the amalgamation of three south-western States into the present-day State of Baden-Württemberg, said little about proportionality as such but is very well worth mentioning as a further example of Leibholz' influence. For we find the following passage in the Court's judgment – as translated into English, published in the "American Political Science Review" and commented upon by Leibholz himself less than a year after the Court's judgment appeared:

> [T]he equality principle prohibits differential treatment of that which is essentially equal, but does not prohibit that that which is essentially unequal shall be treated differently in proportion to its inequality. The principle of equality is violated if a legal regulation accords either equal or different treatment, but no plausible reason can be found for this act, either a reason which stems from the inherent qualities of the matter nor one which can otherwise be logically explained: in short, whenever the regulation must be termed as arbitrary.[87]

These words, which record the first appearance of what is now the fundamental premise of the firmly and long-established doctrine of the Court on the question of equality,[88] could well have been not just translated, but also written by Leibholz himself,[89] both as regards his concept of proportionate equality and in the reference to the basic principle to the prohibition of arbitrariness. For this was one of his principal concerns in his doctorate of 1924: not merely asserting the justiciability of the equality principle, but also providing a more sophisticated test for its infringement which was exactly along the lines of the passage just quoted and as-

86 BVerfGE 1, 14.

87 BVerfGE 1, 14, 52. Leibholz' translation may be found in "The Federal Constitutional Court in Germany and the 'South-West Case'" (1952) 46 Am Pol Sc Rev 723, 729, reprinted as "The German Constitutional Federal Court and the 'South-West Case'" in Leibholz (1965), above n 75 at 293. I have made one or two minor alterations to his translation: in particular, I have substituted "principle of equality" for Leibholz' "law of equality" as a better translation of *Gleichheitssatz*. I also assume, in stating that Leibholz can be found translating this passage within a year of its appearance in the Court's judgment, that the relevant issue of the "American Political Science Review" actually appeared in the month stated on the cover!

88 See Kommers/Miller, above n 23 at 421.

89 As noted, he was on the Bench for this case; but in German practice majority judgments at least are issued in the name of the Court and not attributed to any one Judge.

sociating it with the basic idea of arbitrariness.[90] There is even a hint at the later proportionality doctrine in the idea of the need for a 'plausible reason' that can be 'logically explained' for different treatment.

Leibholz' doctoral thesis completed in 1924 was entitled *Die Gleichheit vor dem Gesetz: eine Studie auf rechtsvergleichender und rechtsphilosophischer Grundlage (Equality Before the Law: a Study on the Basis of Comparative Law and Legal Philosophy*).[91] It is possible to quote the words of Leibholz himself, writing in English in 1971, to illustrate his principal argument in 1924 (as well as the consistency of his thought over almost half a century).

> [O]ne must attempt to understand the rules of law and the concepts applied in them more and more from the point of view of reality, and to determine their content in the same way. This means that a change in constitutional reality must be able to affect the interpretation of constitutional law. Let us take, for example, the change of meaning undergone by the rule that all are equal before the law. In the nineteenth and the early twentieth century this rule was interpreted as meaning that Judge and administrative official are bound to apply the law in absolutely the same way in all cases without regard to the person. Under the Weimar Constitution the wording of the rule remained the same, but because of far-reaching changes in basic constitutional law and political reality it came to be mostly understood, both in theory and in practice, as prohibiting the legislator also from treating like as unlike, or unlike as like, that is to say, from making arbitrary distinctions. This change of meaning of the rule of equality before the law has been confirmed by the Bonn Basic Law. […] Thus, rules of a constitution can, without the need for any change of wording, absorb changing political reality and thereby require a new interpretation.[92]

Two changes were brought about, therefore, by the Weimar Constitution's requirement of equal treatment before the law in Article 109 (1): a substantive rather than formal doctrine of equality[93] and its enforceability against the legislator (at least in Leibholz' view; this point remained controversial at the time when he wrote).[94]

90 Klein, above n 78 at 534.

91 Otto Liebmann, Berlin 1925. It was reprinted in a second edition in 1959 by C.H. Beck, Munich. There is a good summary in English in Wiegandt, above n 15 at 114–117. Leibholz himself provides an extended summary in Leibholz, "Equality as a Principle in German and Swiss Constitutional Law" (1954) 3 J Pub Law 156, 159ff, reprinted in Leibholz (1965), above n 75 at 305 ff.

92 Leibholz, "Constitutional Law and Constitutional Reality" in Henry Steele Commager *et al.* (eds.), *Festschrift für Karl Loewenstein aus Anlaß seines achzigsten Geburtstages* (Mohr, Tübingen 1971), p. 306.

93 This doctrine was not invented by Leibholz, for it can be found in the works of his doctoral supervisor, but he did develop it substantially: Klein, above n 78 at 533; Unruh, above n 85 at 60, 68.

94 The two English-language sources cited above, fn 91, provide more information on this point for those interested in this now long-obsolete legal controversy. Leibholz himself deals with the case law of Germany, Austria and Danzig on the issue almost to the end of its currency in „Höchstrichterliche Rechtsprechung und Gleichheitssatz" AöR 19 (n.F.) (1930), 428, without saying anything germane to the present topic. It is now established, and has been established from the beginning in 1949, that the equivalent provisions of the Basic Law in its Art. 3 bind the legislator, not least because Art. 1 (3) says so.

There is one further concept in that extract, however, which leads to the idea of proportionality: the prohibition of arbitrariness, obviously connected with the need to avoid arbitrary discrimination. It was this thought that led Leibholz to ruminate on a doctrine of proportionality, for 'the prohibition of arbitrariness means nothing other than that the constitution is bound by the concept of justice [*Rechtsidee*] and thus introduces a non-formal element into the idea of the *Rechtsstaat* which only thus attains completeness'.[95] The concept of proportionality occurs already, however, in his discussion of a non-formal doctrine of equality, which he calls proportionate equality[96] and illustrates by means of matters such as the proportionate share of the parties in the membership of parliamentary committees: despite the consequent inequality in numbers among the parties on the committees, the parties are treated equally because the inequality results from their unequal strength in the legislature.[97]

I set out the crucial passage in Leibholz' doctorate on the topic of proportionality as it relates to determining whether a statute meets the test for substantive equality in both the original language and my own translation:

> Wenn sich andererseits ein vernünftiger Grund für das in der Norm für maßgeblich erachtete Kriterium überhaupt nicht finden läßt, wenn der von dem Rechtssatz normierte Tatbestand mit der an denselben geknüpften Rechtsfolge schlechthin unvereinbar ist, wenn überhaupt kein innerer Zusammenhang zwischen der getroffenen Bestimmung und zwischen dem durch dieselbe erstrebten Zweck besteht, oder wenn ein solcher zwar besteht, aber in einem völlig unzulänglichen Verhältnis, so kann man diese Norm als willkürlich charakterisieren.[98]

95 Leibholz (1925), above n 91 at 72.

96 He may be found using the concept of proportionate equality in an English-language essay from 1945, "Two Types of Democracy" (1945) 44 Hibbert Jo 35, 39, reprinted in Leibholz (1965), above n 75 at 42, and in "The Foundations of Justice and Law in the Light of the Present European Crisis" (1943) 212 Dublin Rev 32, 32, 35, reprinted at pp. 253, 256 of Leibholz (1965), above n 75.

97 Leibholz (1925), above n 91 at 45.

98 Leibholz (1925), above n 91 at 76. As is apparent from Leibholz' fn 1 at p. 76, he did not claim complete originality for this thought. In particular he refers to a work by Walther Burckhardt, *Kommentar der schweizerischen Bundesverfassung vom 29. Mai 1874* (2nd ed., Stämpfli, Bern 1914) – in which the author states (at p. 65):

> „dass nicht jede ungerechtfertigte Gleichstellung verschiedener Fälle oder Unterscheidung gleicher Fälle eine Verletzung des [Gleichheitssatzes] bedeute, sondern nur eine Unterscheidung oder Gleichstellung, für die sich irgend ein vernünftiger Grund, wenn auch ein unzureichender, nicht ausfinding machen lasse; wenn sich die fragliche Bestimmung und der Tatbestand, an den sie anknüpft, in keinen vernünftigen Zusammenhang bringen lassen."

There is a similar passage in U. Lampert, *Das schweizerische Bundesstaatsrecht: systematische Darstellung mit dem Text der Bundesverfassung in Anhang* (Art. Institut Orell Füssli, Zürich 1918), p. 42, which Leibholz also cites; Prof. Lampert also refers to the need for *ein zureichender Grund*.

Hans Huber, „Die verfassungsrechtliche Bedeutung der Grundrechte und die schweizerische Rechtsprechung" Recht, Staat, Wirtschaft 1953, 120, 131 states that the origin of these principles in Switzerland is unknown because of the Continental custom of

> If on the other hand there can be found absolutely no sensible reason for the criterion set out in the law as determinative, if the criteria set out in the statute are simply incompatible with the legal consequences, if there is absolutely no inner connexion between the rule enacted and the goal it is pursuing, or if there is one but in a totally inadequate proportion – such a norm can be characterised as arbitrary.

Here we find the seed of the modern proportionality doctrine developed in the 1950s and planted by Leibholz in the minds of the Judges who decided the crucial early cases in that decade. Moreover, just as they were to do thirty years later, Leibholz here derives his principle of proportionality ultimately from the *Rechtsstaat* principle. Leibholz, with characteristic consistency, repeated in 1951 the above passage in very similar terms in an analysis of the Basic Law of 1949,[99] so the ideas he floated in 1924 were clearly still at the forefront of his mind in the first half of the 1950s.

In the first part of the quoted passage, the idea of a 'sensible reason' for the law clearly raises the idea of its suitability for the purpose allegedly pursued by the legislator, as does the idea of the lack of an 'inner connexion' between rule and purpose – the first part of our three-part proportionality doctrine. The idea of proportionality in the narrower sense, the third and final limb of the test, is equally clearly raised by the last few words of the quoted passage along with a nod to the margin of appreciation ('totally'). The second part of our test is whether a law is necessary – that is, whether there is a compelling and less rights-intrusive alternative. This is not as clearly identifiable as the other two limbs, but the germ of this idea may be discerned in the statements that the criteria set out in the statute must not be 'simply incompatible with the legal consequences' and there must be an inner connexion between the rule and the already identified goal. These words suggest an intermediate stage of analysis between the identification of the goal and the balancing of interests in which the "fit" between the law and the goal is tested, although the precise standard by which the test is conducted is not yet clearly apparent.

Leibholz followed the passage just quoted with a defence of his thoughts from the accusation that they were merely feelings unsuited to judicial application, in which he says that 'the Judge may not decide in a purely subjective and undisciplined way, deciding according to what he personally thinks unsuitable [*ungeeig-*

not publishing the names of Judges in reports of decisions, and at 134 refers to an undated and unpublished decision of the Swiss Federal Court declaring that the closure of public baths to both sexes was an excessive means of ensuring public decency (the second stage of our proportionality test). Another debt is pointed out by Wiegandt, above n 73 at 114 (and also acknowledged in Leibholz' footnotes).

Of course, it would not be sensible to declare Prof. Burckhardt, who died in 1939, or anyone else the true originator of the modern proportionality doctrine. We all stand, after all, on the shoulders of those who have gone before us; the principal credit belongs to the person(s) who had proportionality adopted by the Court; and above all, Prof. Burckhardt does not use the concept of proportionality in the quoted passage expressly, unlike Leibholz.

99 „Die Gleichheit vor dem Gesetz und das Bonner Grundgesetz" DVBl 1951, 193, 195, reprinted in Leibholz (1959), above n 91 at 245.

net], inappropriate [*zweckwidrig* – not conducive to the aim pursued], arbitrarily, but the question to be answered is to be posed purely objectively …'.[100] In this passage also Leibholz very nearly gives the three sub-headings of the doctrine of proportionality which the Court adopted thirty years after he wrote. Indeed, if we replace 'arbitrarily' by "disproportionately" – and Leibholz associated those two concepts closely – we have it exactly.

In another work from 1931 Leibholz refers to what we now know as the margin of appreciation:

> [I]n cases where doubt is possible about whether the rationality, appropriateness or necessity of a provision can be seriously discussed, the provision concerned cannot be declared arbitrary and a breach of the equality principle. The Judicature will therefore always need to practise a certain reticence in the practical application of this principle against the legislature and may make use of its rights only in extremely infrequent cases in which arbitrariness can be spoken of in the sense just identified.[101]

The second step in modern proportionality analysis, the need to ensure that there is no obvious less rights-intrusive alternative, may, finally, be seen with somewhat greater clarity in Leibholz' essay on "The Prohibition of Arbitrariness and Misuse of Discretion in International-Law Relations of States"[102] published in 1929. Here he is able to fill in more detail of the second stage in the test which he had been grasping towards in his doctorate five years earlier but not yet quite able to articulate clearly. In the 1929 article Leibholz is clearly on the verge of developing a full proportionality doctrine based on the rejection of arbitrariness; there are passages in which one almost expects him to launch into the full post-War doctrine. Again he starts with the concept of arbitrariness, referring to it as 'not a formal, but a materially based value concept. It is the opposite correlate of justice and implies its radical absolute negation.'[103] Perhaps its most concrete application, he says, is in the prohibition of misuse of discretion, both in international and in administrative law[104] – by which he means not merely administrative, but also legislative discretion. Echoing language used in his doctorate already quoted,[105] Leibholz declares the prohibition of arbitrariness perfectly suited to practical application, for 'the decision-maker may not decide in a purely subjective and undisciplined way

100 Leibholz (1925), above n 91 at 82f. This is not an easy passage to translate; I am not the only one who has found Leibholz sometimes unique in his mode of German expression: Unruh, above n 85 at 80.

101 The quotation is from an address at the Fifth German Legal Conference of 24 May 1931 entitled „Begründet der in den verschiedenen Verfassungen ausgesprochene Grundsatz der Gleichheit aller vor dem Gesetze durchsetzbares subjektives Recht?" in Leibholz (1959), above n 91 at 224.

102 „Das Verbot der Willkür und des Ermessensmißbrauches im völkerrechtlichen Verkehr der Staaten" (1929) 1 ZaöRV 77. The journal concerned now bears the additional English-language title "Heidelberg Journal of International Law".

103 (1929) 1 ZaöRV 77, 78.

104 (1929) 1 ZaöRV 77, 80.

105 See above, fn 100.

according to what he personally thinks is unsuitable [*ungeeignet*], inappropriate [*zweckwidrig*], arbitrary', but must rather pose an objective question.[106]

Applying these and other related principles to the question whether international law permits states to refuse admittance to foreigners more readily than it permits their expulsion, he denies that such a clear distinction can be made and says:

> Differentiating between the legal permissibility of admitting foreigners and expelling them is only allowed in cases in which one of those steps, expulsion or admittance, would suffice to attain the same result in itself permitted under international law. For it would be arbitrary if a state were to use the instrument of expulsion, which is always predicated upon the prior existence of closer relations of the foreigner to his state of residence, in preference to refusal of admission. In such a case arbitrariness would be constituted by the irrational choice of a step which affects the individual disproportionately.[107]

It is not quite clear to me what situation Leibholz has in mind here in which a state would have a choice between refusal of admittance to foreigners and their expulsion after admission, unless perhaps he is illustrating his point using the improbable but useful example that a state, rather than refusing entry outright at the border, might pointlessly admit a person to its territory only thereupon to conduct an expulsion, perhaps in purported compliance with a treaty or a domestic law – but that is not significant for present purposes. Here Leibholz clearly says that it is arbitrary and disproportionate if the state chooses a means of dealing with a problem that ignores an obvious and less rights-intrusive alternative. Five years after he finished his doctorate, we find in his works the second limb of the modern proportionality test.

It is certainly true that there is no one place in Leibholz' works where the three constituent parts of the modern proportionality test are set out as they would be in a modern textbook. However, he was not writing such a textbook – and even in relation to his post-War trademark topic of parties and the state a reviewer of his thoughts states that they emerged only 'in stages', with 'at first a few details, rather hidden in the whole work and in their content sceptical and reserved', the menu being 'served, so to speak, in bite-sized slices'.[108]

We can however clearly see how Leibniz progressed from his doctrine of equality to thinking about proportionality and how the modern doctrine emerged from his thinking about equality. The equality principle, he held – and his own Senate followed him on this – required only those distinctions to be made that were justified by differences among the subjects of the law. But they could not just be any distinctions randomly selected; they needed to be distinctions that are connected with and promote the purpose of the law, for otherwise there would be no check upon legislative arbitrariness to distinguish among subjects of the law using irrelevant criteria. This requirement of a rational connexion with the purpose of the

106 (1929) 1 ZaöRV 77, 83.
107 (1929) 1 ZaöRV 77, 96.
108 Jan Hecker, „Die Parteienstaatslehre von Gerhard Leibholz in der wissenschaftlichen Diskussion" Der Staat 34 (1995), 287, 293.

law gives us the first part of the modern test. Moreover, the distinctions could not be significantly disproportionate to those purposes, or else the smallest relevant differences among the subjects of the law might be held to justify enormous disparities in legal treatment. Shortly afterwards, in a related context, Leibholz hit upon the further idea that there should not be an obvious and less rights-intrusive option available to the legislature and added that concept to his proportionality thinking. Leibholz' doctrine of proportionality needed only to be detached from its moorings in the equality doctrine to be a fully-fledged legal doctrine in its own right, and the means of so detaching it was the *Rechtsstaat* doctrine. When they arose, the two nomination hurdle cases positively invited such treatment given uncertainties about the extent to which parties could take advantage of the equality principle itself, as Leibholz well knew from his own criticism of the jurisprudence on this point under the Weimar Republic.[109]

4. Conclusion

Proof by deductive reasoning beyond reasonable doubt of Leibholz' leading role in the adoption of modern tripartite proportionality test is not available. Indeed, no proof to that standard of anyone's contribution is available.[110] But the three-step test did not invent itself. A substantial case based on circumstantial evidence has however been amassed here to show that Leibholz was the leading spirit behind its adoption by the Federal Constitutional Court: the most significant development occurred in two cases squarely in his field of interest and expertise; he is known to have exercised influence over the Court's decisions in an informal behind-the-scenes way; ensuring that legal rules were properly thought through was supremely important to him; and his own writings presage the development of the modern doctrine both as regards the three-stage modern test and the concept of the *Rechtsstaat* on which proportionality is based. His path to the proportionality doctrine *via* his thinking on the equality principle, which has become the unchallenged jurisprudence of the Court, has also been clearly shown.

Aside from the need to attribute credit for this world-conquering innovation justly, the question may be asked whether the recognition of Leibholz' leading role makes any difference to contemporary decision-making. This is a difficult question to answer because of the very widespread use of the German scheme. It would be beyond anyone's capacity to give even an overview of the proportionality doctrine in the present-day jurisprudence of the numerous countries in which it has been adopted[111] and then to determine, on that basis, what the history has to say about the law of many different countries with wildly different legal texts, cultures

109 See in particular the note on the position on this point under the Weimar Republic and in the early years of the Federal Republic, with special mention of Leibholz himself, in BVerfGE 99, 1, 8f.

110 Tischbirek, above n 55 at 30.

111 See above, fn 18.

and needs. Needs also vary across time as well as place: the present is not bound by the understanding of the principle held by its creators; we are entitled, and our successors in future years will be entitled, to adapt the principle to unfolding contemporary needs. It must also be stated that, as we have seen hinted at here in there in this essay and other scholars have already examined in detail, there were other significant contributors to the development of the post-War proportionality doctrine as well, and the recognition of Leibholz' role is not intended to denigrate their contributions in any way.

Two matters may, however, be highlighted as important to Leibholz and still of relevance today. First, the principle has its origin in the prohibition of arbitrary legislation and the equality principle and from there in the idea of the state governed by the rule of law, the *Rechtsstaat*. Secondly, Leibholz was concerned to emphasise the high bar that was set for the finding of arbitrariness and the substantial area of discretion that was left to the legislature in determining what the law should be. Now that emphasis may be due in part to the need to ensure that the principle he was advocating in the Weimar years attracted the largest available degree of assent by his colleagues and did not unduly frighten the horses. Nevertheless a matter of importance to Leibholz which is not immediately referable only to the Weimar era and underpins these concerns is his strict distinction between the dynamic and non-rational nature of politics and the rational and static nature of legal rules. Leibholz was concerned to ensure that political judgment was respected except in clear cases, and the history presented here is a reminder to apply the proportionality principle with a light hand, with respect for the separation of powers and with a generous margin of appreciation for the elected branches of government.

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