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Beginning in 1995, the Institut
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Contents

Introduction

<i>Christian Starck: Hermann von Mangoldt (1895 - 1953)</i>	11
-------------------------------------------------------------------	----

GATT Focus Section

<i>John H. Jackson: Appraising the Launch and Functioning of the WTO</i>	20
--------------------------------------------------------------------------------	----

<i>Peter Nunnenkamp: Winners and Losers in the Global Economy: Recent Trends in the International Division of Labor, Major Implications and Critical Policy Challenges</i>	42
----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----

<i>Thomas J. Schoenbaum: Market Contestability and Reform of the Antidumping Laws</i>	82
---------------------------------------------------------------------------------------	----

<i>Karl-Nikolaus Peifer: Brainpower and Trade: The Impact of TRIPS on Intellectual Property</i>	100
-------------------------------------------------------------------------------------------------------	-----

<i>Matthias Lücke: Accession of the CIS Countries to the World Trade Organization</i> .	134
-----------------------------------------------------------------------------------------	-----

<i>Guglielmo Verdirame: The Definition of Developing Countries under GATT and other International Law</i>	164
-----------------------------------------------------------------------------------------------------------------	-----

Articles

<i>David P. Fidler: Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law</i>	198
--------------------------------------------------------------------------------------------------------------------------------------	-----

<i>Paul Conlon: The Humanitarian Mitigation of UN Sanctions</i>	249
-----------------------------------------------------------------------	-----

<i>Peter D. Coffman: Obligations Erga Omnes and the Absent Third State</i>	285
----------------------------------------------------------------------------------	-----

<i>Joachim Lippott: The Commonwealth of Independent States as an Economic and Legal Community</i>	334
---------------------------------------------------------------------------------------------------------	-----

<i>Heike Gading</i> : Litigation by Public-Interest Groups in European Law	361
<i>Alberto Soria Jiménez</i> : Ecological Catastrophes in light of the Rio Agreements	388

International Law Developments

<i>Kai Koschorreck and Miriam Müller</i> : Report on the International Criminal Tribunal for the Former Yugoslavia	409
<i>Eric Johnson</i> : <i>Kadic v. Karadzic</i> and <i>Doe I and II v. Karadzic</i> : The Latest Stage in Alien Tort Act Jurisprudence	434
<i>Renata Hliwa/Leszek Wiśniewski</i> : The International Covenants on Human Rights in the Decisions of the Polish Supreme Court, Constitutional Tribunal and the Supreme Administrative Court	468
<i>Frank Bodendiek/Karsten Nowrot</i> : Die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte im Jahre 1995	481

German Law Developments

<i>Stephan Hobe/Christian Tietje</i> : Government Criminality: The Judgment of the German Constitutional Court of 24 October 1996	523
<i>Vicki Traulsen</i> : The German Federal Constitutional Court's Decision on Asylum Law	544

Comment

<i>Jacob W. F. Sundberg</i> : The European Convention on Human Rights in Swedish Law — Reply to <i>Ulf Bernitz</i>	558
------------------------------------------------------------------------------------------------------------------------------	-----

Book Reviews

<i>Sands</i> : Principles of International Environmental Law I — Frameworks, Standards and Implementation (<i>Delbrück</i>)	571
<i>Sands/Tarasofsky/Weiss</i> (eds.): Principles of International Environmental Law IIA and IIB — Documents in International Environmental Law (<i>Delbrück</i>)	571

<i>Sands/Tarasofsky</i> (eds.): Principles of International Environmental Law III — Documents in European Community Environmental Law (<i>Delbrück</i>)	571
<i>Scharpenack</i> : Das ‚Recht auf Entwicklung‘. Eine völkerrechtliche Untersuchung der konzeptionellen und normativen Strukturen eines ‚Menschenrechts auf Entwicklung‘ (<i>Edinger</i>)	573
<i>Oppenheimer</i> (ed.) with Foreword by <i>Sir Leon Brittan</i> : The Relationship between European Community Law and National Law: The Cases (<i>Feist</i>)	575
<i>Harris/O’Boyle/Warbrick</i> : Law of the European Convention on Human Rights (<i>Genet</i>)	576
<i>Köbler</i> : Rechtsfranzösisch: deutsch-französisches und französisch-deutsches Rechtswörterbuch für Jedermann (<i>Genet</i>)	578
<i>Reuter</i> : Introduction au droit des traités (<i>Genet</i>)	578
<i>Booyen</i> : International Transactions and the International Law Merchant (<i>Happ</i>) . . .	580
<i>ElBaradei/Nwogugu/Rames</i> (Hrsg.): The International Law of Nuclear Energy: Basic Documents (<i>Harders</i>)	581
<i>Steiner/Alston</i> : International Human Rights in Context: Law, Politics, Morals (<i>Hensley</i>)	583
<i>Craig/de Búrca</i> : EC-Law. Text, Cases and Material (<i>Hobe</i>)	586
<i>Falterbaum</i> : Entwicklungshilfe im nationalen und internationalen Recht (<i>Hobe</i>) . . .	587
<i>Koenig/Haratsch</i> : Einführung in das Europarecht (<i>Hobe</i>)	588
<i>Marwege</i> : Der Andengerichtshof (<i>Hobe</i>)	589
<i>Graf von Bernstoff</i> : Einführung in das englische Recht (<i>Johnson</i>)	590
<i>Köbler</i> : Rechtsenglisch (<i>Johnson</i>)	591
<i>Paust</i> : International Law as Law of the United States (<i>Johnson</i>)	592

<i>Stephens/Ratner: International Human Rights Litigation in U.S. Courts (Johnson)</i> . . .	595
<i>Birnie/Boyle: Basic Documents on International Law and the Environment (König)</i> .	597
<i>Cron: Das Umweltregime der Nordsee – völker- und europarechtliche Aspekte (König)</i>	598
<i>Gavouneli: Pollution from Offshore Installations (König)</i>	599
<i>Higgins: Problems and Process: International Law and How We Use It (König)</i>	600
<i>Alexy: Begriff und Geltung des Rechts (Lembcke)</i>	604
<i>Reinisch: State Responsibility for Debts: International Law Aspects of External Debt and Debt Restructuring (Oeter)</i>	606
<i>Johnson/Corcelle: The Environmental Policy of the European Communities (Pardo López)</i>	608
<i>Schlemminger/Wissel (eds.): German Environmental Law for Practitioners (Pardo López)</i>	609
<i>Ahlt: Europarecht (Peters)</i>	611
<i>Nicolaysen: Europarecht II. Das Wirtschaftsrecht im Binnenmarkt (Peters)</i>	612
<i>Delbrück: Die Konstitution des Friedens als Rechtsordnung: Zum Verständnis rechtlicher und politischer Bedingungen der Friedenssicherung im internationalen System der Gegenwart (Randelzhofer)</i>	613
<i>Gading: Der Schutz grundlegender Menschenrechte durch militärische Maßnahmen des Sicherheitsrates – das Ende staatlicher Souveränität? (Schreuer)</i>	615
<i>Peters: Das Gebietsreferendum im Völkerrecht – seine Bedeutung im Licht der Staatenpraxis nach 1989 (Stein)</i>	616
<i>Diem: Freihandel und Umweltschutz in GATT und WTO (Tietje)</i>	618
<i>Hahn: Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie (Tietje)</i>	621

<i>Contents</i>	9
<i>McGovern: International Trade Regulation (Tietje)</i>	623
<i>Fechner/Oppermann/Prott (Hrsg.): Prinzipien des Kulturgüterschutzes (Turner)</i> ...	625
<i>Wolfrum (Ed.-in-Chief)/Philipp (Managing Ed.): United Nations: Law, Policies and Practice (Watts)</i>	628
 <i>Books Received</i>	 636
 <i>List of Contributors</i>	 639

INTRODUCTION

Hermann von Mangoldt (1895 – 1953)

Member of the *Parlamentarischer Rat* and Commentator to the *Grundgesetz**

I. Background

Hermann von Mangoldt wrote as the conclusion to his 1938 book ‘The Concept of the Rule of Law and Governmental Forms in the United States’ the following statement on national constitutions:

A constitution should in general be a quiet pole, and should provide the entire body politic the fixed and lasting foundation that is a condition for the continual development of the State free from disturbance. A constitution should preserve a consistent line that must be present despite the continually changing demands of political life if the population and the State are not to be injured.

This doctrine of the ‘philosophical bases of American constitutional law’ — the subtitle of the book — demonstrates two things:

First: *Hermann von Mangoldt* as a mature scholar had studied a successful foreign constitutional system, including its practical application, especially case law, and put forward in his book the result of this study, that the doctrines of European political philosophy applied in a pragmatic Anglo-Saxon sense are the basis for founding a State whose constitution takes into account the potential of human reason as well as of human corruptibility, including the corruptibility of those responsible for State affairs.

Second: The convictions gained from this study were a fundamental portion of the legal thinking of *Hermann von Mangoldt*, who in 1931 in Königsberg had completed his *Habilitation* on American constitutional law.¹ While others attempted to establish law according to contemporary ideas about a State based on the *Volk*, *von Mangoldt* was investigating the socio-political strength of the democratic constitutional State through his analysis of the American constitutional order.

* The text was translated from German into English by *Marianne Nilsson*, *Eric Johnson* and *Vicki Traulsen*.

¹ Compare *Hermann von Mangoldt*, *Geschriebene Verfassung und Rechtssicherheit in den Vereinigten Staaten von Amerika* (Abhandlungen der Rechts- und Staatswissenschaftlichen Fakultät der Universität Königsberg, Heft 6), 1934.

Hermann von Mangoldt's academic career led him from Königsberg via Tübingen (1935) and Jena (1941) to Kiel (1943), where he began his lectures in winter semester 1944/45 and took over as Director of the *Institut für Internationales Recht*. In 1945 he was named *Dekan der Fakultät*, and in 1947/48 *Rektor*. At the same time *von Mangoldt* pursued a political career. He joined the newly founded Christian Democratic Union (CDU) party, in 1946 was briefly *Innenminister* (Interior Minister) of Schleswig-Holstein and served as a member of the Schleswig-Holstein *Landtag* (parliament) and in this function was elected by the *Landtag* to be a member of the *Parlamentarischer Rat*.² And thus we would find ourselves at the first main theme.

However, we remain for a moment in the background, *i.e.* with the early works of *von Mangoldt*, which formed such a fortunate basis for his political appointment to the *Parlamentarischer Rat*. In the introduction to his 1938 book on America he enquired into the purpose of comparative law. "How is the philosophical basis of a foreign system of law relevant to us? Are its insights at all useful for a deeper insight into our own system?" To these questions he gave a double answer.

First, today, when no nation can lead an isolated existence or distance itself from the exchange of the intellectual and material goods of other nations, it should be for every educated person the most fervent desire to look into the souls of these foreign peoples. Where can this better take place than in the area of the fundamental norms of the legal system of a State, which norms are, as all law, so closely bound to the cultural existence of a people? Second, a comparison is worthwhile also from the standpoint of understanding one's own system, when one considers the potential enrichment such a correctly conducted comparison can yield.

After the inescapable conclusion that German law at the time differed strongly from American law, *von Mangoldt* wrote of the formal elements of the American legal order that exercised such strong influence over its development and that were not to be overlooked. He names the supremacy of the constitution over other law and other concepts of order and of the rule of law that were being ignored in Germany at the time. With respect to this book *Walter Strauß* wrote in *von Mangoldt's* obituary,³ "Just as *Johnathan Swift* was forced to mirror the conditions of his time only indirectly through *Gulliver's Travels*, so also was *von Mangoldt* able to bring his readers in those years to the *philosophical and constitutional bases of individual freedom* only through the portrayal of a foreign system."

² For more on *von Mangoldt's curriculum vitae* see above all *Waltraut von Mangoldt, Hermann von Mangoldt*, in: *Fünfzig Jahre Institut für Internationales Recht an der Universität Kiel*, 1965, 221 - 233, as well as the obituaries of *Viktor Böhmert*, *Juristenzeitung* (JZ), 1953, 254 - 255.; *Walter Strauß*, *Die Öffentliche Verwaltung* (DÖV), 1953, 247 - 248; *Gerhard Leibholz*, *Jahrbuch für Öffentliches Recht* (JÖR), n.F. 2, 1953, III - IV; *Walther Schoenborn*, *Archiv des Öffentlichen Rechts* (AÖR), 1952/53, 257 *et seq.*; *Rudolf Laun/Viktor Böhmert/Hartwig Bülow*, *Jahrbuch für Internationales Recht*, 1954, 5 *et seq.*

³ *Strauß* (note 2), 248 (emphasis in original).

Just under ten years after the publication of the book on America *von Mangoldt* produced a small work concerning the rebuilding of German State authority.⁴ This work, which appeared in 1947, probably goes back to a lecture that *von Mangoldt* held at the latest in the summer of 1946. In the context of the declaration of the Allied Powers of 5 July 1945 stating that they had taken over the governmental control of Germany, *von Mangoldt* developed his thoughts on the rebuilding of an independent German State authority modeled on democratic principles. In answer to the Potsdam Agreement,⁵ and following his own convictions, he demanded the recreation of local authorities according to democratic principles and the introduction as quickly as possible of the idea of representative government and elections at the district and *Länder* levels. By the time the work was published, the elections for the *Länder* parliaments had already taken place and the *Länder* governments had already been established.

The work goes further and discusses Germany as a whole, which could regain its position as an independent State in the international legal sense only if “the new State authority grows out of the German people.” The work continues as follows:

From this importance of independent power to create a constitution for the recognition of a community as an independent State follows also the supreme importance of determining the basic order of the nation, *i.e.* the creation of a constitution. . . . This is so because it is essential to democracy that the various factions and opinions in a nation concerning the tasks and goals of the State and concerning the structure of the State be given the opportunity to express themselves as to the future form of government so that the State becomes a true expression of the views of the people that live within the State. In other words, in a democracy each person must possess the opportunity freely to exist within the State and to affect the political order of the State. In protecting such an opportunity, however, the new order would become chaos if from the start certain fundamental rules of the game for the activity of parties and other political powers were not established. (14)

The work ends with the following notation:

Whether constitutional practice indeed develops in accordance with the concept of a genuine State ruled by law, in which the freedom of the individual and human dignity are guaranteed, depends on the use that each individual makes of the rights and liberties granted to him by the State. Only when society remains continually conscious that its participation and interest in the State structures is required will a lasting political order be created and the return of the terrible conditions of the past avoided.(16)

⁴ *Hermann von Mangoldt*, Grundsätzliches zum Neuaufbau einer deutschen Staatsgewalt: Eine staats- und völkerrechtliche Studie (Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel, Heft 2), 1947.

⁵ *Compare* Amtliche Verlautbarung der Potsdamer Konferenz from 2 August 1945, section III (Deutschland) A 9 (I), (III).