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Staatsrecht-Volkrrecht-Europarecht: Festschrift

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gaining Process, Legal Concepts (W. J. Mahoney English trans.), in C. KIRCHNER et al., MINING VENTURES IN DEVELOPING COUNTRIES.

*Louis G. T. Wells**

STAATSRECHT-VÖLKERRECHT-EUROPARECHT: Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag am 28. März 1981. Edited by Ingo von Münch.[1] Berlin: Walter de Gruyter, 1981. Pp. xv, 1023. n.p.

For one fascinated by the argumentative methods of traditional legal scholarship, von Münch's *Festschrift* to Hans-Jürgen Schlochauer is a gold mine of raw material. For a laudatory collection of essays, this volume is remarkable for its breadth and for the quality of almost every contribution. Virtually everyone recognized by the community of German international legal writers as a scholar in the field has made a contribution. Moreover, the volume encompasses the recognized legal fields of *Staatsrecht, Völkerrecht,* and *Europarecht.* It would be difficult to think of a comparable collection of American international legal writing.

This collection, while representing the academic establishment, does contain innovation and controversy. The entire teapot tempest of liberal and conservative, positivist and naturalist, law leading and following life is there. This is indeed a fitting tribute to Professor Schlochauer, the consummate established scholar. Longtime Professor and Director of the Institute of Foreign and International Economic Law at the University of Frankfurt-am-Main, Schlochauer has worked broadly and innovatively in the fields of domestic public and European law, as well as in public international law. One of the generation whose academic career was broken from 1933–1945, he retained an academic detachment from public service. His various experiences as judge and arbiter complement his vision of academia as trustworthy for its neutral distance. Within the academic realm his scholarship has been prodigious — its breadth characterized by the multi-volume *Dictionary of International Law,* which appeared in the early 1960's under his editorship. The contributors follow Schlochauer's example in producing analyses of recognizable quality within the well-defined contours of respectable scholarship.

More interesting than the various analyses compiled in the *Festschrift,* however, is its value as a guide to current conceptions of legal

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scholarship within the German academic community. The uniformity of the scholarship is suggestive, considering the diversity of individual contributors. One could begin with the contributor list. Traditionally, a *Festschrift* collected the work of the honored individual's immediate colleagues. The modern version replaces "colleagues" with those academicians "working within the field," regardless of the distance of their personal relationship with the volume's namesake. In von Münch's words, this permits a "thematic concentration in one of the larger legal fields." Viewed from another perspective, such a volume defines not a gentleman's field of friends, but his field of law. This system encourages academic uniformity. Because the scholar's status is no longer revealed by the participant list but rather by the comprehensiveness of the treatment given the field, the more central a scholar's position within the field, the more neutral and respectable his jurisprudence, the greater the likelihood that the field defined in his *Festschrift* will be broad and his status high. Not only does a *Festschrift* now perform a substantive function, but the hallmark of quality is centrality, neutrality, and breadth. Von Münch's comprehensive volume is a classic example of precisely such high status treatment.

But who actually participates? All hold the title of either Professor or *Privat Dozent* (a holding category for those with post-doctoral dissertations but no chair) and are attached to a university. Although billed as an opportunity for "young scholars" to show their stuff, there are no students, no doctoral candidates, no "Assistants" on the list, although these are often responsible for a large share of the actual teaching and research at the typical German university or research institute. Although billed as representative of the legal "fields" listed in the title, there are no practitioners, no politicians, no bureaucrats, and no journalists on the list, although these are responsible for most of the thinking and activity in these legal areas. The authors form a very small all male club. Hardly a living author is cited anywhere in the volume who does not also appear in the list of contributors. Each imagines his own place in the constellation but clearly no one questions the shape of the relevant universe. No one working generally on legal theory, practice, history, anthropology, semiotics, rhetoric or sociology seems relevant within these legal fields despite their recognized relevance elsewhere in legal scholarship and their conscious attempt to make these appear to be fields of law like all others.

Moreover, the contributors seem to share a rather uniform vision of the nature of legal scholarship and the dimensions of their fields. An in-depth analysis of the raw material collected here could reveal much about legal scholarship in Germany today — a lengthy but valuable methodological inquiry. The editors argue that the *Festschrift*

is valuable for its representation of the state of the art in West German international legal scholarship. To my mind that representation is more than a who's who or a list of topics of current interest. It is the working out of a particular ideology about the nature of scholarship and of international law.

The contributors seem to share a belief in the naturalness of this division of fields. There is almost no discussion *about* the fields — only argument within them.[2] The breadth of analysis and the type of issues appropriate in a discussion of a legal topic which happens to crop up within a particular field is limited. Naturally, when a *Völkerrechtler* writes about something normally considered by a *Staatsrechtler,* he advances his status by partly mastering the conventions of argument within a different field. He may make a particularly valuable contribution by failing to mutate completely — resulting in his bringing some insight from one field into another, but not in his undermining the basic consensus about the naturalness of the field division.

The contributors also seem to share in a stylistic consensus. Within each field, "good scholarship" takes several characteristic forms. Each contribution contains elements of each type of scholarship and seems animated by all of the principal oppositions of traditional scholarship. One typical form elaborates an established doctrine or the relationship between two doctrines.[3] This is often done in the context of a new case or factual development.[4] The goal is to assimilate these devel-

2. General discourse about the fields is characterised by an acceptance of their naturalness, even when a new, more "practical" approach to their justification is developed to justify them. *See,* for example: Hoffmann, "Von der Brauchbarkeit des Völkerrechts in unserer Zeit" (pp. 363–384), or Grewe, "Über den Gesamtcharakter der jüngsten Epoche der Völkerrechtsgeschichte" (pp. 301–328).

3. For examples of doctrinal elaboration, see: Klein, "Beihilfe zum Völkerrechtsdelikt" (pp. 425–438); Mosler, "Nichtteilnahme einer Partei am Verfahren vor dem Internationalen Gerichtshof" (pp. 439–457); or Tomuschat, "Equality and Non-Discrimination under the International Covenant on Civil and Political Rights" (pp. 691–716). Two doctrines are assimilated to each other by both Bindschedler, "Der Schutz der Menschenrechte und das Verbot der Einmischung" (pp. 179–192), and Frowein, "Probleme des allgemeinen Völkerrechts vor der Europäischen Kommission für Menschenrechte" (pp. 289–300). Of course modes of assimilation differ. For example, most contributions, in the process of assimilating a norm to a factual situation, cannot help but engage simultaneously in the assimilation of normative content to normative context. It is obvious that elaborators are only able to do so by sorting instances of application. Nevertheless the structure of the assimilation is the same. Other examples of this type are: Münch, "Das Völkerrecht der militärischen Besetzung vor nationalen Gerichten" (pp. 457–476), and Rauschning, "Allgemeine Völkerrechtsregeln zum Schutz gegen grenzüberschreitende Umweltbeeinträchtigungen" (pp. 557–576).

4. Most of the contributions in the field of public international law are of this type. The development may be an instance or a trend, and the doctrine may be a rule or an entire field of law. The contributors consider a wide variety of each type of development. *See,* for example: Bernhardt, "Das Urteil des Internationalen Gerichtshofs im Ägäis-Streit" (pp. 167–178); Bleckmann, "Gedanken zur Repressalie. Ein Versuch der Anwendung der Interessenjurisprudenz auf das Völkergewohnheitsrecht" (pp. 193–214) (reevaluating the large doctrinal area of customary

opments into the field by flexing, but not violating, the central defining concepts of the field. More ambitiously, an entire area of doctrinal concern can be integrated and treated like its municipal counterpart. Environmental or human rights fields are now recognized instances of this more massive assimilation and categorical reorganization. The younger and more progressive a scholar, the more daring the assimilation. A less settled, more extreme new development will be explained, or a more well-accepted doctrine will be explained by flexing the theoretical linchpins of the field more drastically — perhaps, for example, to include "interest analysis." But "good" scholarship does not examine the theoretical premises head on, nor investigate precisely this process of assimilation. The key dogmas are not challenged when they do not relate to doctrinal developments in a settled way. There seems no sure way to differentiate violating the field from developing it. Of course, no one thinks these dogmas are totally determinate of given applications of norms to facts. That explains the diversity of the field. But if this volume is any indication, everyone thinks all instances can be linked to a field's central premises somehow and that some linkages are better than others. Moreover, at least sometimes, a field precludes a development — which must then be rejected or assimilated elsewhere. Should the process of assimilation and explanation prove unconvincing, the fault lies with the scholar, not the stuff of law. We blame the carpenter, not the tools.

The consensus about the nature of scholarship makes the volume rather tedious considering the array of fascinating developments slated for discussion in the table of contents. Somehow the interesting issues and questions seem to have been factored out of the discussion. The task of examining and explaining each shell's place on the beach is indeed tedious. When a scholarly consensus prevents inquiry into the coherence and meaningfulness of a structure which claims to explain the nature and placement of *every* shell, the task may appear empty as well. Whether by conscious design or not this makes international

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law in a single context to include so-called interests analysis); Breuer, "Gegenwartsfragen des Verhältnesses Reeder — Staat — Flagge" (pp. 215–226) (re-examining a central theme of one doctrinal area in the light of modern factual developments); Bryde, "Die Intervention mit wirtschaftlichen Mitteln" (pp. 227–243) (assimilation of a new form of interaction to a basic norm); Delbrück, "Die Konvention der Vereinten Nationen zur Beseitigung jeder Form der Diskriminierung der Frau von 1979 im Kontext der Bemühungen um einen völkerrechtlichen Schutz der Menschenrechte" (pp. 247–271); Folz, "Bemerkungen zur völkerrechtlichen Beurteilung der Vorgänge um die amerikanischen Geiseln im Iran" (pp. 271–288); Kimminich, "Der Einfluss des humanitären Völkerrechts auf die Kernwaffenfrage" (pp. 407–424); Oppermann, "Der Beitrag des Internationalen Rechts zur Bekämpfung des internationalen Terrorismus" (pp. 494–514); Schwarzenberger, "Détente und Völkerrecht" (pp. 603–614); Simma, "Fragen der zwischenstaatlichen Durchsetzung vertraglich vereinbarter Menschenrechte" (pp. 635–648) (an ambitious methodological departure assimilating an entire field to its municipal counterpart).

law seem a lot like other fields of legal scholarship. In fact, one might describe the consensus among German scholars as recognition of the debilitating and unsatisfying nature of attacking "first questions," a tendency which had plagued the last generation of *Völkerrecht* greats. The attempt to avoid discussion of the discipline's core assumptions may result from ambition to join the mainstream of explainers and practical doers. Whatever the motivation, one might at least question whether international law might not be made more helpful to practitioners as well as to scholars by using it as a tool to question assumptions central to more conventional fields of law.

Whatever its source and precise nature, the astonishing harmony of views represented by this collection about what constitutes acceptable argument and scholarship in international law is a cause for concern. At the very least it portends a stagnation in international legal scholarship in Germany today despite the vigor, depth and substantive diversity of individual contributions. I do not mean that conclusions within the field are controlled — though one might argue that the preference for a positivist approach and the hesitancy of protonaturalists to come out of the closet amounts to the same thing. My sense is more that the structure of inquiry controls the type of questions one thinks of asking. At best this consensus stifles vitality as it channels research. At the worst, it reinforces the view that the legal fabric as it exists is reasonable, flexible, elaborate, and, above all, normal. This view diminishes the possibility that vision may meaningfully reform the legal structure.

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