

The research leading to these results has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013) / ERC grant agreement n°313100.



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## Le interviste.

The metaphysics and legal history. An interview with Michael Stolleis.



by Ville Erkkilä<sup>1</sup>

*This interview seeks to elucidate some of the prominent points in Michael Stolleis's writings, as well as his thoughts about history, society and the meaning of scientific work. The interview, as a way of considering his texts, allows the reader to better understand the dynamic nature of his works and possibly historical writing in general. The interview also concerns historiography as an academic and educated contribution to the shared meaning given to the past, written amidst and in the shadow of historically effective events. The topics of this discussion, the Historikerstreit, metaphysics in science and individual responsibility, further emphasize the constant intertwining of personal stance and collective meaning in written history.*

*Keywords: Historiography, Germany, metaphors, concepts, tradition*

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*This work was supported by the European Research Council Starting Grant [313000].*

was saved from immediate tragedies, the effects of the Nazi-era on the lives of Stolleis's parents and the collective reconstruction process in the French-occupied Pfalz region, remained important conditions in directing his later choices on education and scientific orientation.<sup>2</sup> He received his doctorate in 1967 under the supervision of Sten Gagnér and was later promoted to Professor of Public Law in Frankfurt am Main in 1974.

During his academic career, stretching over six decades, Stolleis has written extensively on questions varying from the history of the German public law to the methodological questions of legal history. His works in analyzing the German legal system during the National Socialist era have not only shed light on the previously insufficiently studied and complicated phenomenon of distorted legal science under fascism, but have also contributed importantly to the public debate on the legacy of Nazism in German legal culture. Moreover, *A History of Public Law in Germany*, in four volumes, is regarded as the most comprehensive presentation of the history of public law and its implications in the continental legal tradition.<sup>3</sup> In the field of methodology, Stolleis adopted and advocated linguistic and analytic philosophical views on legal history and science. Thus, his dialogue with the German tradition of legal history is not only restricted to the ideological sphere, but also includes methodological and philosophical levels. As the director of the Max Planck Institute he steered the research focus of the institute more towards comparative and international questions in order to better meet the new challenges legal systems were (and still are) facing.

Interviewer: I have four themes for this interview. We could start with your writings on Nazi law, and then continue to the methodological questions of legal history. I've also prepared a few questions on the public law – private law controversy, if there is any, and finally I would like to hear your thoughts on your book *Das Auge des Gesetzes*.<sup>4</sup> But first, the book *Law under the Swastika*,<sup>5</sup> a

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<sup>2</sup> M. STOLLEIS, *Nahes Unrecht, fernes Recht. Zur Juristischen Zeitgeschichte im 20. Jahrhundert*, Göttingen-Wallstein 2014, 173 ss.; Also p.12 in this essay.

<sup>3</sup> See e.g. D. GOSEWINKEL review of „A History of Public Law in Germany“ in *The American Historical Review* 111, 3/4, 2006, 2 ss, Originally in German: M. STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland*, Band 1-4, München-C.H.Beck.

<sup>4</sup> M. STOLLEIS, *Das Auge des Gesetzes. Geschichte einer Metapher*, München-C. H. Beck 2004, 88 ss., Translated into eight languages. In English: M. STOLLEIS, *The Eye of the Law. Two Essays on Legal History*, Abingdon-Birkbeck law Press 2009, 96 ss.

modern classic. It actually consists of articles, some of which were written in the 1980s. What was the response to those texts? How did the scientific community react and how did the public audience accept the book?

Michael Stolleis: In general, not bad, but not enthusiastic. The studies on Nazi law started nearly in 1965, when we had the first rounds of public lectures in the universities of, for example, Munich, Berlin and Tübingen about the history of our profession during National Socialism. I remember how it was, one can say we were completely uninformed about the recent past, and I myself especially, because I came from the province, and at school we just didn't hear much about the proceedings of Nazis. But during my early student years we had the Auschwitz process in Frankfurt, we had the trial in Jerusalem against Eichmann, so the public and student interest was turning more towards these themes. After my doctoral thesis, I started to think more intensively about Nazi law and write articles. It took almost 20 years from that point until the completion of the book *Law under the Swastika*.

I: This book can be connected to the *Historikerstreit*<sup>6</sup> in the 80s and 90s. The two phases of this debate comprised a scientific context for your book. Lately some British scholars<sup>7</sup> have argued that now that we know more about Communist totalitarianism (after the collapse of the Soviet Union and the Eastern

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<sup>5</sup> M. STOLLEIS, *The Law under the Swastika. Studies on Legal History in Nazi Germany*, Chicago-University of Chicago Press 1998, 280 ss., Originally in German, M. STOLLEIS, *Studien zur Rechtsgeschichte des Nationalsozialismus*, Frankfurt am Main-Suhrkamp Verlag 1994, 342 ss.

<sup>6</sup> *Historikerstreit* was a debate about the social origins of Nazi crimes and their comparability with those of Communist totalitarianisms. Although there were many contributors in this scientific dispute, including some British historians like Richard J. Evans, usually the debate is simplified as a quarrel between two opposite views: Ernst Nolte's right wing and conservative views, and Jürgen Habermas's leftist and liberal stance. The latter view emphasized the *Sonderweg*, the special nature of the German society. The debate started in 1986 as a public controversy regarding Nolte's printed speech *Die Vergangenheit, die nicht vergehen will*, where he asserted that "race murder" by the Nazis was a copy of the "class murder" of the Soviet Union, and thus the atrocities committed by the Nazis were reactionary in nature. The debate flared up again in the 1990s and some comments relating to it have also been heard in the 21<sup>st</sup> century. See e.g. R. AUGSTEIN (hrsg.), "*Historikerstreit*". *Die Dokumentation der Kontroverse um die Einzigartigkeit der nationalsozialistischen Judenvernichtung*, München-Piper 1987, 397 ss.

<sup>7</sup> N. DAVIES, *Europe at War 1939–1945: No Simple Victory*, New York-Penguin Books 2006, 648 ss.

European totalitarianism), the right-wing approach to the Historikerstreit seems to be more correct; there was no deutsche Sonderweg, and National Socialism was more a reaction against Communist crimes. What do you now think of the Historikerstreit and these newer contributions?

MS: This is a very tough thesis originally coming from Nolte. We cannot say that National Socialism was only and purely a reaction to the Soviet Union. National Socialism had many roots leading to the German past; German anti-Semitism of the 1890s following Bismarck was very common in non-Jewish families; it was also a reaction to the crisis of the Weimar Republic, to the treaty of Versailles, to declaring Germany as being solely responsible for the evils of the First World War. So Hitler's fanatic anti-Semitism in these conditions enabled him to introduce the people's community, Volksgemeinschaft, and also the inner enemy of the community, the very small Jewish minority. Although well-situated, the ideology was arbitrary, and the people couldn't foresee that Hitler was going to use the position for his own, destructively anti-Semite purposes and conditions. And so my view on the Historikerstreit was quite different from Nolte's and partly also from Habermas's. Habermas was understandable because he was an opponent to the thesis of Nolte. Nolte's intention seemed to diminish the German guilt, in comparison to the crimes of the Soviet Union. It was not correct. Nolte wrote a very good book about fascism, and in the beginning he was open-minded, but in the end, his tones sounded more conservative or even right wing. In this sense Habermas's reaction was well-grounded and he was quite right. But Nolte was correct in saying that the Soviet Union started a reign of terror from Stalin's horrible crimes, and that these crimes were well known but denied.

I: In Law under the Swastika you emphasize, when talking about different forms of totalitarianism, the Nazi coup of rhetorical power, of language. We talked about Volksgemeinschaft and its many uses. One can argue that the Nazi coup was different and successful in comparison to prior ones, in the sense that the Nazis understood the importance of language. They also understood the anatomy of the German society as a community of communities. A Gesellschaft with many Gesellschaften, and language as a means to control all of them.<sup>8</sup> Is it here where the "lure of fascism" lies? In the sense of communalism and in the enthusiasm it evoked?

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<sup>8</sup> cf. C. KOONTZ, *The Nazi Conscience*, Cambridge, MA.-Belknap Press of Harvard University Press 2003, 368 ss.

MS: This was the great movement after the First World War, originally from the Socialist side. During the deep crises of the society, when one had the mass movement on the left side, the aggressive right-wing side wanted to “come together” in a Volksgemeinschaft to secure the stability of the society. It became the word and symbol representing both the crisis and hope, especially for the younger generation; to forget the class troubles and battles, and instead unite in a Volksgemeinschaft. It seemed an acceptable way, in particular for the middle-class. In Hitler’s propagandist language the meaning of the word was further developed to emphasize the risks; excluding the threats in order to gain greater unity. The old traditions of anti-Semitism and also mediating with the help of anti-Semitism were continued. And yes, for some people it was convincing. The word Volksgemeinschaft had Socialist connotations, and National Socialists had a left-wing, Social Democrats without democracy. It was a promise of acceptance of “Arbeiter der Stirne und Faust”,<sup>9</sup> as equals. Actually, this was a great promise for some former Communists in Weimar Republic, a pledge of stable family life and, in contrast to the crisis, accepted in the social sense. It demonstrated parity with the intellectuals. There was hope in the word.

I: There is this book by Michael Wildt...,<sup>10</sup> [MS: Die Generation des Unbedingten?] Yes, do you think that this promise came to a fruitful land?

MS: In a way. Wildt generally concentrates on the National Socialist elite, the leading persons in the SS. They were the special type of young, career-oriented and well-educated men. “Uncompromising” refers to their spirit, their rejection of classical morals, the pride in their elitism and despising of the weak. In this sense his book is quite good and interesting.

I: In your works in general you emphasize the fact that history is a linguistic enterprise, and that studying as well as writing history means analysing language.

MS: The only material we have are our texts from the past. Even concrete remnants of the past must be translated into language. Without language one cannot understand or formulate any interpretation of the real facts. So we, as historians, are essentially concentrated around language, the texts. In order to

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<sup>9</sup> There is no direct equivalent for this propaganda slogan in English. It can be roughly translated as “Workers of both the Forehead and Fist [vote for Hitler]”.

<sup>10</sup> M. WILDT, *Generation des Unbedingten: Das Führungskorps des Reichssicherheitshauptamtes*, Hamburg-Hamburger Edition 2003, 966 ss.

give an adequate, understandable form to our readers for the purposes of interpretation there is no other way.

I: In *Rechtsgeschichte schreiben*<sup>11</sup> you write quite extensively about Reinhart Koselleck and his conceptual history; you agree with him in the view that words and concepts are a result of a historical development and that they should be studied as such. However, there is also disagreement with respect to the metaphorical concentration of the juridical concepts.<sup>12</sup> Do you see the main difference between legal history and general history here?

MS: No, I don't think so. I do not deny that jurisprudence uses metaphors. It very often uses metaphors, and metaphors are very interesting as objects of interpretation. I can't see any methodological difference between history and legal history. Legal history is history with a special object, like other historical fields. So there is no distinction. I distinguish myself from Koselleck to the extent that he uses the word *Begriff*, and thus concepts, in a different sense.<sup>13</sup> The word *Begriff* is a neologism of the 18<sup>th</sup> century. The verb *begreifen* means to touch, to have security or to understand. In the 18<sup>th</sup> century *Begriff* was introduced in the context of natural law, as a class of words with a clear and sharp definition, by for example Christian Wolff. Koselleck uses *Begriff* in a very different way. He came from the idealistic philosophy of the 19<sup>th</sup> century, so with his use of 'the concept' he tried to find central political and social terms characterizing the time between 1750 and 1850, the famous "Sattelzeit". My proposition was to eliminate 'Begriffe' to avoid the philosophical connotations of the 19<sup>th</sup> century. Inevitably, in every text and every time we must give a correct reading

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<sup>11</sup> M. STOLLEIS, *Rechtsgeschichte schreiben. Rekonstruktion, Erzählung, Fiktion?*, Basel-Schwabe Verlag 2008, 48 ss.

<sup>12</sup> M. STOLLEIS, *Rechtsgeschichte schreiben* cit. 15 ss.

<sup>13</sup> R. KOSELLECK, *Begriffsgeschichten. Studien zur Semantik und Pragmatik der politischen und sozialen Sprache*, Frankfurt am Main-Suhrkamp Verlag 2006, 569 ss. Although the German word 'Begriff' has been translated as 'concept', and 'Begriffsgeschichte' as 'conceptual history', the terms are not strictly equivalent. Stolleis speaks here how certain concepts in Koselleck's conceptual history have become sharply defined linguistic tools and elevated above ordinary language. So instead of concepts they are 'the concepts', 'Begriffe'. In order to be more illuminating with respect to the difference between Stolleis's and Koselleck's views, in the following text I use more the German word *Begriff* rather than 'concept', and when Stolleis refers to 'the concepts' in an elevated matter (as in Koselleck's conceptual theory) I mark them as 'Begriffe'.

and we are called upon to give a correct interpretation of those words. Lawyers have especially since the 19<sup>th</sup> century focused on the concepts because they are convinced of having particular purposes in constructing their juridical work, and that they are quite different from historical work. For me as a legal historian, I'm less interested in actual jurisprudence, because of its anachronistic use of words; I would clearly separate the juridical version and the work of historical interpretation. So I have no need to use the word 'Begriffe', nevertheless many philosophers are against me in this area and very often historians too. Many think that we need 'Begriffe' to give limits to the events and developments; they need to be made understandable through the 'Begriffe'. My point is: why not use normal language to explain history? Normal language is quite enough and it is a flexible and wonderful instrument of description. Here I'm very much influenced by my teacher Sten Gagnér, who was in turn a follower of Wittgenstein's late philosophy. You might recall the phrase Wittgenstein wrote in his *Philosophical Investigations*: "the meaning of the word is its use in the language". You have to look at the language and the usage of the language in daily life and in scientific texts.

I: Jörn Rüsen has written that it looks as though the trend in historiography, in a way, is beginning to go back to meaning. Nowadays, scholars are again studying memory, enactment and experience. Rüsen wonders whether the emphasis on language made history cold and too rational, causing people to need more material to identify with, more warmth. To him it looks like a turning back to German idealism.<sup>14</sup>

MS: Perhaps he is right in the sense of there being a roll-back after the times of criticism. Also, in the political scene one can see some return to the old positions and language of metaphysics. For example, when I started in 1969, in criticism of the National Socialist language, my first book publication was about *Gemeinwohl*.<sup>15</sup> The Nazis used this formula as a means of oppression, simply holding to the idea that if one wasn't for the common good, one was hostile towards the people's community. In the last ten years, I have surprisingly seen books that again discuss the common good; I was even more surprised that the

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<sup>14</sup> J. RÜSEN, *What does 'Making sense of history' mean?* in *Meaning and Representation in History*, New York-Berghahn books 2006, 5 ss.

<sup>15</sup> *Gemeinwohl* means common or communal good. The book in question here is M. STOLLEIS, *Gemeinwohlformeln im nationalsozialistischen Recht*, Berlin-Schweitzer 1974, 315 ss.

old critical part has been forgotten. So the new movement and revival of this communal tradition, even religious tradition, which the word connotes, wasn't anything new, but the moment and forms it now takes are peculiar. I see similar things happening in Russia, Hungary and other countries as people reminisce about "the good old days".

I: This idea of tradition leads us to the previous generation of scholars. For example, Franz Wieacker; there is continuity between him and 19<sup>th</sup>-century legal scientists. Wieacker really tried to work with the concepts that Savigny and Jhering had introduced. I mean, if you think about *Rechtsgewissen*, his *History of the private law in Europe* was actually the history of this mind-setting.<sup>16</sup> He truly wanted to find out what this concept is; what is a pure legal interpretation and how it should be used in his contemporary society? Do you agree?<sup>17</sup>

MS: Yes, I agree completely. He was one of the best intellectuals in our field. That is to say, he was perfectly informed about all the movements in the 19<sup>th</sup> century, about the crisis of legal positivism, the reaction of Jhering, the *Freirechtsschule* and all those streams that were against the methodological heritage of the 19<sup>th</sup> century. On the other hand, he was deeply influenced by philosophical idealism. So in the 1950s and 60s, when he wrote his book, he attempted to find the way between the 19<sup>th</sup> century and the extreme modernism of our time. He was also deeply affected by his experiences during the Nazi time. He saw he had erred. Wieacker was engaged with the Nazi theme in the first years, and later in his texts after 1945 he worked through his own history in a methodological way. Perhaps he was the most clear-minded, and actually the only, legal historian to reflect upon his own sins. His revisitation of the article in *Quaderni Fiorentini* in the 1970s was admirable in its sincere reflection.<sup>18</sup>

I: Wieacker's scientific opposite, and this might consider the whole tradition he represents, is Hans Kelsen. How do you place Wieacker and Kelsen in the larger context of the 20<sup>th</sup> century? Kelsen's construction, of course, has no metaphysics in it.<sup>19</sup>

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<sup>16</sup> F. WIEACKER, *Privatrechtsgeschichte der Neuzeit*, Göttingen-Vandenhoeck & Ruprecht 1952, 379 ss. *Rechtsgewissen* has been translated as *legal conscience*.

<sup>17</sup> F.WIEACKER, *Privatrechtsgeschichte* cit. 348–361 ss.

<sup>18</sup> Franz Wieacker, "Wandlungen der Eigentumsverfassung" revisited in *Quaderni fiorentini per la storia del pensiero giuridico moderno* 5-6, 1976-1977, 18 ss.

<sup>19</sup> H.KELSEN, *Reine Rechtslehre: Einleitung in die rechtswissenschaftliche Problematik*, Leipzig, Wien-F.Deuticke 1934, 236 ss.

MS: The rejection of metaphysics is one of the central differences between Kelsen and the majority of the lawyers in Germany. Kelsen's situation stands, not only for the struggle to establish jurisprudence as a science, but also for the wider conditions of the Jewish minority in Austria in the 19<sup>th</sup> and 20<sup>th</sup> century. They viewed science as a way to be accepted in society, and specifically pure science, a non-metaphysical one because in human sciences metaphysics was related to the Catholic tradition and culture. This stance of *Reinheit*, purity, in legal science wasn't accepted at all in Germany due to a strong tradition of idealistic philosophy and Catholic, as well as Protestant nuances, in humanistic studies. Especially in the years after 1919, during the crisis of the Weimar Republic and the struggle against the Treaty of Versailles, the majority of the people wanted and longed for some kind of metaphysical base for governing and philosophy. So in this sense Kelsen's demand for pure normative order didn't at all meet the contemporary trend of scientific circles, where it was commonly held that legal science without the content, metaphysical orientation, was impossible. As far as I know, Wieacker was not a religious person. He was as we say a "Kulturprotestant". His metaphysical orientations were concentrated on the idea of justice. So he was clearly against Kelsen, akin to the dominant opinion, which held that philosophy needs an orientation. For Kelsen metaphysics was not acceptable as a science and the analysis of legal norms needed to be separated from reflections on the economy, history or ethics. And honestly, how does it help in critical social situations? We need history and we need a law anchored in history, the same goes for economics and ethical orientation. This controversy became visible after the Nazi era because the opponents were able to say that National Socialist injustice was a consequence of the externalized pure legal order. So after 1945, the conviction was that the pure legal science had been a perfect way to give the Nazis free reign to accomplish their goals. Pure legal science had not naturally been undemocratic or an advocate of National Socialism; it is an absurd idea. After the war, however, the German conviction was that a community needs a (new) *Weltanschauung* and religious orientation, and therefore Kelsen wasn't accepted at all in the 1950s and 60s, and only along with analytical philosophy, his theory return.

I: There's continuity between your work and Wieacker's, at least in the sense that you have both contributed a methodological article to the Handbook of German Legal History: Wieacker in the 80s and you recently in the 2<sup>nd</sup> edi-

tion.<sup>20</sup> What did Wieacker give to the legal history in a methodological way, and is there any continuity from his studies to our times?

MS: I found Wieacker to be one of the most open-minded legal historians of his time. My admiration for him was based on his intellectual habits, and our shared knowledge of European culture with all its influences from Antique to the modern times. In methodology, one can see it in the way he attempted to get behind the actual law and concentrate on the historical processes where it was based. Also, the way he minded anachronisms and anachronistic definitions. That's all. Of course our contexts are very different. I grew up in a peaceful society. Regarding the scientific conditions, I had the opportunity and willingness to learn from Anglo-American and Scandinavian traditions of legal thinking. I had people around me like Wolfgang Stegmüller and Norbert Hoerster, a friend of mine. These views from analytical philosophy gave me a different direction of thinking, in comparison to, for example, Wieacker's time. I am not a philosopher, I'm a legal historian, but I have the impression that philosophical training and thinking enables one to remain open minded. Nevertheless, I am impressed by the way Wieacker expressed his knowledge in his works; especially by writing a history of European legal culture in five hundred pages. It was a great scholarly achievement and it was an inspiration to me, to try to portray a parallel picture in the intellectual history of public law. At the beginning, I was full of hope, and aimed for one volume. Well, I ended up with four volumes, so I was not that concentrated as Wieacker! On the other hand, that's my excuse, I had to go through much more unexplored territory, because our legal history was and is so focused on the history of private law.

I: That brings us to the third theme of this interview, public law. You were the first director of the Max Planck Institute who has made a career in public law. Am I correct in interpreting that public law has been a bit overlooked during the 20<sup>th</sup> century?

MS: Perhaps the main reason lies in the history of the legal faculties in Germany. Since the 19<sup>th</sup> century, legal history has been combined with private law. Every German professor of legal history had to teach normally, also actual private law. In my case it was impossible to open this combination, so for twenty

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<sup>20</sup> F.WIEACKER, *Methode der Rechtsgeschichte*, in *Handwörterbuch zur deutschen Rechtsgeschichte*, Berlin-Erich Schmidt Verlag 1978, 8 ss, M. STOLLEIS, *Methode der Rechtsgeschichte* forthcoming in *Handwörterbuch zur deutschen Rechtsgeschichte*, Berlin-Erich Schmidt Verlag 2016.

years I taught public law and wrote legal history. In the Max Planck Institute they had a different principle, and I was able to connect those two previously separated fields, but also to direct the studies of the institute to public law, international law, etc. So hiring me benefited both, I think. With respect to the divisional lines between these subjects, the history of public law has been practised for a long time in the form of the history of constitutional law [Verfassungsgeschichte]. Yet, the connection between intellectual history and public law was uncharted. Historical facts, different constitutions were well documented but they hadn't really been combined with the traditions of intellectual history and methodology. There were few examples, but not really a great picture of public law teaching and writing from the 16<sup>th</sup> century up to the present. That was what I started to do by rephrasing the question on public law teaching. My attempt was to clarify the conditions around the beginnings of teaching of the subject: why precisely around 1600 and, why namely in German Protestant universities?

I: You have observed the long line of public law in Germany. What are the crucial years and turning points in this narrative?

MS: The first fundamental break in Germany is in the year 1806, when the Holy Roman Empire ceased to exist. It seemed then that the old information wasn't useful in explaining the new situation. The old books were neglected, but in the books after 1815 one could see the old methodology working in the new material. The foundation of the Bismarck empire, in 1871, is of course the next crucial point for Germany, followed by the third in 1918, after the First World War. The conditions, with respect to public law after the Great War, were especially interesting; a new constitution, but also an understanding of its role, its definition in a philosophical sense was in transition. Social movements and by-products of industrialization challenged people to really reflect what public law in practice actually meant and represented, amidst the crisis of bourgeois society. I think it is typical for these turbulent times that the most interesting books about public law appeared, namely, during the Weimar era with Rudolf Smend, Herman Heller, Carl Schmitt, Erich Kaufmann, etc. Especially Heller was brilliant, concentrating on the questions of how to manage the crisis of the republic; how to proceed in the right direction without forgetting the past. Kaufmann, as well, in the way he influenced the post-Second World War era as an advisor for Konrad Adenauer and the foreign office. The last breaking point, excluding the extraordinary and cruel years of National Socialism, is clearly 1945, even if the metaphor "Hour Zero" is only partly acceptable.

I: This role of Adenauer I see as really interesting. He was conservative, but distinguished himself from the previous tradition by being really pragmatic; his idea of European unity was built on the basis of economy. Do you see there a true breach in tradition? Or is it just that in 1945 the political change was so total that it overshadowed all else?

MS: About Adenauer, an interesting character. He was already an influential politician during the Weimar times, suffered a lot at the hands of the Nazis. Deeply Catholic, deeply anti-Nazi and anti-Communist. When the Western zones of Germany were constructed, he was not a young man, in many respects, already 70 and well known. He united and built the zones against the Communists and he broadly accepted the old members of the NSDAP in his government and in other official positions. This was a feature that non-German Western countries could hardly understand. Communism was in Germany's own country, there were hostilities and the aggressive form of the GDR, and so sentimental support for Adenauer was very strong. Also, because the other option, the Social Democrats, couldn't distinguish themselves clearly enough from the aggressive Socialist tradition, and were still dispersed by their power struggle with the Communists. The main good that Adenauer brought to the people of Western Germany was the feeling of security. And that was what the wounded German souls needed. This also relates to the process of remembering, namely the recalling of the Nazi past. During his first years, where it was nearly but not completely forgotten, we observed a "communicative silence".<sup>21</sup> It was not customary to talk about it. Perhaps a normal psychological reaction. After some consolidation between 1960 and 1965 all the past came out, as I said before. And that also meant a turning point for Adenauer's policy, but for the years following 1949 he was clearly the leader of the Western German policy. He was really thoroughly informed about the social security system, and its reform was also a key to his political peak in 1957.

I: In this sense, and in my education, the welfare state and public legislation concerning it, is a compromise where all the partakers agree to give up some of their privileges in order to reach stability. I mean the economic profit, the right

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<sup>21</sup> H. LÜBBE, *Der Nationalsozialismus im politischen Bewusstseins der Gegenwart*, in *Deutschlands Weg in die Diktatur. Internationale Konferenz zur nationalsozialistischen Machtübernahme im Reichstagsgebäude zu Berlin. Referate und Diskussionen. Ein Protokoll*, Berlin-Siedler Verlag 1983, 20 ss.

to strike and the legislative power of the government are all, to some extent, given up for the purpose of agreement. So how do you see the Adenauer renewals in the light of this phenomenon? There is a long history of public interventions in the German...

MS: Since Bismarck's time; he was the inventor of the German social security system. Like Adenauer, he was clearly conservative, but Adenauer had to put party politics aside in light of this question. It is characteristic for this German system, originally between the CDU<sup>22</sup> and the Social Democrats, this attempt for a compromise, which we see repeating itself every ten or fifteen years, whenever the social security system needs reforming. This is the reason for enormous social stability.

I: Actually, we are now in our last theme, your small book *Das Auge des Gesetzes* or *The Eye of the Law*.<sup>23</sup> In this book you write about the personification of law, of how law has been represented through metaphors of the human body. Can you tell about it in your own words?

MS: The original idea came from the famous poem, *Das Lied von der Glocke*, by Friedrich Schiller, published in 1799,<sup>24</sup> a poem that we learnt in school. It says that "citizens can sleep at night because the eye of the law is watching". So I asked: where does this connection between the law, authority or security, and the eye come from? We know the eye of God, but it occurred in the era preceding the Enlightenment, where the metaphor mutated from God's eye to the prince's eye, who now controlled and protected the subjects. After the revolutions, public life should not have been controlled by princes or dictators but only by the "law". So in the new form of the metaphor the watching is made by this abstract (eye of the) law. The law that signifies the will of the people, legislated by and in the parliament. In the 19<sup>th</sup> century, the metaphor was later used in an ironic way, meaning surveillance or simply police. And so in the end, you have the situation where any institutional watching isn't allowed, but still there is this never-ending control by the abstract eye of the law. It was partly amusing to find all these pictures illustrating the change of the metaphor. But it has also been an interpretation of legal history since medieval times. Who is governing

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<sup>22</sup> *Christlich Demokratische Union Deutschlands*. Konrad Adenauer was one of the founders of this party. After the Second World War the Social Democratic party, the SPD and the CDU, have been the two major parties in the (West) German political system.

<sup>23</sup> See above, footnote 3.

<sup>24</sup> The poem can be found online at <http://gutenberg.spiegel.de/buch/friedrich-schiller-gedichte-3352/32> (last visited 2 February 2016)

the world? God, a prince or a democratic society ruled by law?

I: This translation of everyday abstractions to understandable language through metaphors is a fascinating phenomenon. How do three fields of culture, language and body affect and interact in a metaphor?<sup>25</sup> For example, metaphors do express pain. The change from the late 18<sup>th</sup> century of illustrations involving mechanical language [MS: Industrial metaphors] to more violent descriptions of the World Wars follows the general trends in culture and language, but always refers these fields to the body.

MS: The parallel metaphor is the judge who is sitting on his throne, and judging in the name of. Name of whom? The king, God, liberty, people, constitution? In Germany we use “in the name of the people”. It is still necessary for a judge to legitimate a personal decision based on law, text and interpretation, with a reference to a higher instance. Like “my decision is not my own, I am speaking on behalf of someone else”. Today we have the European decision courts in Luxembourg or in Strasbourg or in The Hague, and they do not speak in the name of anyone. The formula doesn’t exist there, because we don’t have a European people either. So as a judge you cannot speak on behalf of the European people, there is no metaphysics anymore. No God, king, people or a distinguished constitution can legitimate the judge’s decision. Really interesting also with respect to the metaphysics we spoke of earlier.

I: I have one last question. We talked about metaphysics and the practices of making metaphysics personal, concerning life and the choices of an individual. If we now leave legal history as a scholarly enterprise aside and just concentrate on history as a vision of the past, what is the meaning of history to a single individual? What should one do with it?

MS: History does not give advice for the future. History explains and to some extent can be helpful in understanding the present. In this way one can say that learning from the past is possible, in a very limited way. But it provides no prophesy for the future. Similarly, history is no religion, it doesn’t give metaphysical content. If there is no sense to the world, history for sure cannot construct it. Yet, as a teacher for a younger generation of lawyers, I would say that one has to have knowledge about the past in order to understand where the le-

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<sup>25</sup> See e.g., J. BOURKE, *Pain: Metaphor, body, and culture in Anglo-American societies between the eighteenth and twentieth centuries* in *Rethinking History. The Journal of Theory and Practice* 18, 4/4, 2014, 23 ss.

gal culture can take us. Knowledge about the past, history, gives us modest hints as to what shouldn't be done. But the positive decisions about the future are ethical and political. We live in a democratic society and the majority decides. I see similarities in today's world with the situation that the generation in Germany before the Nazi time faced. In Syria, Russia, Belarus...people have to decide what to do. In their decisions history can be a helpful thing, but in the end their choices are ethical ones. It is about one's soul, personality, religion; are you able to resist the mainstream or not? Going with the flow might be the easiest way, but not necessarily the right one.

I: Big question

MS: Yes, a very big and a very personal question. I often reflect and compare my situation to the one of my father's. He was an idealist patriot and convinced, as a young lawyer, in 1929 that Hitler could be the solution to Germany's problems. But his eyes were opened in 1938 to the fact that he was serving a criminal state. At the time he was working as a mayor of a relatively big industrial town, but he resigned and joined the army and served as a simple soldier. He thought it was the honest way. He spent six years as a prisoner of war in North Africa and Australia, giving him time to reflect on his thoughts and doings from 1929 onwards. So in my family I was very well informed about the ethical conflicts and for the need of a personal decision in one's actions. That's perhaps one of my motives for engaging in the study of law and legal history.

I: Professor Stolleis, thank you very much for this interview.

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