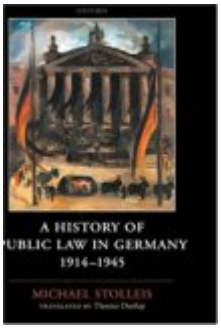
H-Net Reviews
in the Humanities & Social Sciences

Michael Stolleis. *A History of Public Law in Germany 1914-1945.* Oxford: Oxford University Press, 2004. xiv + 489 pp. $165.00 (cloth), ISBN 978-0-19-926936-5.



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Published on H-German (March, 2006)

Empire–Republic–Dictatorship: The Continuities of Public Law and Political Culture in Germany, 1914-45

Right at the beginning of this review I should like to note that Michael Stolleis's book is a truly important scholarly achievement. It needs to be studied by anyone even remotely interested in the history of law in Germany and in German political culture between the World Wars. This is also the reason why this review might be somewhat more detailed than usually should be the case.

Writing a detailed history of German public law–as opposed to a history of legal theory–is perhaps an impossible undertaking. Apart from time and patience, it would require an acute understanding of the political and philosophical debates that have marked legal thought since the 1500s. It would also call for a consideration of the development of university education as well as of intellectual trends in a wide range of neighboring fields. As impossible as this might seem, it is precisely what Michael Stolleis–since 1991 Director of the Max Planck Institute for European Legal History in Frankfurt am Main–has achieved in three volumes that were originally published in Germany between 1988 and 1999. This work covered the evolution of public in law in the German-speaking countries from the 1500s to 1945.[1] Several years ago, the second volume of this enterprise, dealing with the period between 1800 and 1914, was translated into English, following an earlier translation of Stolleis's studies on legal thought in Nazi Germany.[2] With the 2004 publication of *A History of Public Law in Germany, 1914-1945*, the third volume of Stolleis's grand history of public law is now available in translation. One can only hope that a British or American university press will also realize the need to make the first volume available to English-speaking readers.

Stolleis's *A History of Public Law in Germany, 1914-1945* is undoubtedly a magisterial work that provides an intellectual history of legal thought in Germany and that can furthermore serve as an encyclopedic handbook for the study of legal practice during the Weimar Republic and Nazi Germany. In fact, no scholar who wishes to address the political landscape of Weimar Germany will be able to ignore this book. Written in a clear and elegant style, the book is divided into ten chapters. Stolleis begins with a broad historical tableau (outlining the nineteenth-century background of his study) and ends with pertinent questions concerning the state of law around 1945. Thomas Dunlap's translation is accurate, fluent and leaves nothing to be desired.

The book begins by pointing out continuities between Imperial Germany and the Weimar Republic. Marked by a tension between the continuity of the corporate state on the one hand, and the demands of economic modernization on the other, the political situation of Imperial Germany clearly affected the understanding of the function of law. By around 1900, the frontlines in public law, which continued to shape the discussion after the First World War, were clear: state law positivism stood in sharp contrast to historical and political conceptions of law, while actual legal practice often proceeded relatively independent of the theoretical discussions among, for instance, constitutional lawyers. Nevertheless, it is important to realize, as Stolleis perceptively notes, that "[i]n the years after 1900, the field .. saw a renewed de-

bate about fundamentals" (p. 18). Constitutional changes during the First World War and the limitation of basic rights, such as the freedom of speech and movement, continued an administrative expansion of the Reich as an authoritarian state, which had already been underway since the mid-1870s.[3] It was precisely this situation that led to a new and remarkable interest in the constitutional foundations of the modern nation-state, which became particularly manifest in the work of those legal scholars who also shaped the formulation and teaching of public law throughout the Weimar Republic, including Georg Jellinek, Hugo Preuß, Heinrich Triepel and Hans Kelsen (pp. 30-31).

The Reich constitution collapsed toward the end of the First World War and public and administrative law were largely overshadowed by emergency decrees. Nonetheless, Stolleis highlights a clear continuity in legal thought and practice from the final decade of Imperial Germany to the first decade of the Weimar Republic. The general assumption that public law remained essentially apolitical enabled legal scholars to adapt to the new political realities with relative ease after the turmoil of the years 1918 and 1919. Once the Weimar Constitution had been established–Stolleis, of course, focuses predominantly on Hugo Preuß's involvement (pp. 53-60)–public lawyers found themselves in a peculiar position, which ultimately highlighted the undeniable tension between a formal, (supposedly) value-neutral conception of public law and one grounded in political reality. Thus, while most public lawyers regarded it as a given that the Weimar Republic as a legal entity was simply identical with the German Reich of 1871, they were also highly critical of Weimar Germany as a parliamentary democracy (p. 24).

Given this tension, it is not surprising that the decisive problem on which the theoretical discussion of public law centered in Weimar Germany had been of little concern in Imperial Germany, namely "the attitude toward parliamentarism and toward the bearer of sovereignty" (p. 33). The crucial importance of this new problem also meant that, in the aftermath of the November Revolution and the Treaty of Versailles, the external continuities between Reich and republic slowly began to give way to a wide range of fundamentally different positions in the area of state law. Stolleis traces these different approaches with a keen sense for detail through the ensuing discussions surrounding the validity of the constitution.

The validity of the constitution, needless to say, proved to be a contentious issue. It highlighted the need to defend the unity of the new state against those who sought to challenge the legitimacy of the Weimar Republic from extreme positions on both sides of the political divide, while those that had the task of defending the constitution were themselves not entirely comfortable with the demands of a parliamentary democracy (p. 67). Even though Stolleis's critical presentation of the most central themes of constitutional interpretation–from the unity of the state, the status of parliamentary parties and the position of the Reichspräsident to the much-discussed "coup against Prussia" in 1932–does not present any radically new material, it is a particularly welcome addition to present scholarship because it is unusually clear and concise (pp. 76-105) and widens the perspective beyond the continuing fascination in the Anglo-American world with Carl Schmitt. Stolleis does not stop here, however, for in the fourth chapter he offers a thorough account of one significant aspect of constitutional debate in Weimar Germany that is consistently ignored by most recent Anglo-American scholarship: the constitutional arrangements of the *Länder* and their complex relationship to the government of the Reich. While much work in this area has centered, of course, on Prussia and Bavaria, Stolleis deserves much credit for focusing also on the smaller *Länder*, such as Thuringia, Württemberg and Hesse.

Mainly concerned with the theoretical foundations of constitutional debate and public law in Weimar Germany, Stolleis's central chapter elegantly outlines the crisis of the state as it emerged throughout the 1920s. In doing so, he provides an accessible overview of a complex issue that could stand on its own. More importantly, though, he raises significant questions that still require more detailed investigation. From the perspective of public law, it is safe to say that "there was no one-way street that led inexorably to National Socialism" (p. 139). Against this background, it would be necessary to readdress the relationship between a neo-Kantian legal formalism, on the one hand, and the politicization of public law, on the other. These issues are far more complex than generally assumed. Consider the example of Hans Kelsen and Carl Schmitt. While Schmitt, in his early work, is surprisingly close to Kelsen's liberal neo-Kantian formalism (as Georg Jellinek had already pointed out), one of the consequences of Kelsen's formalism–the necessary dissolution of the difference between public and private law on normative grounds–unintentionally played into the hands of a *völkisch* conception of law that sought to replace the seemingly contradictory legal spheres of

the modern state with a unifying notion of "community" (pp. 169, 359). These idiosyncrasies also make it obvious that we should not expect much unity among liberal legal scholars: Kelsen and Hermann Heller, for instance, who were the only Social Democrats among the state law teachers of the Weimar Republic, were entirely unable to agree on the philosophical foundation of the modern state: Heller's Hegelianism proved incompatible with Kelsen's neo-Kantian formalism (pp. 175-176). This situation is further complicated by one aspect of public law in Weimar Germany that often tends to be underplayed: the fundamental discussions over legal methods and the constitutional framework of the new state had no real effect on most areas of legal practice. While Stolleis does not follow up on this problem, it might be interesting to examine why constitutional theory in Weimar Germany failed to have an effect, for instance, on the practice of labor law or tax law.

Underlining the true complexity of legal positivism in Weimar Germany, which stretched from the bourgeois liberal camps to the far right, Stolleis's admirably detailed and balanced account presents legal positivism as the dominant position among state law teachers. As such, the dominance of legal positivism is also responsible for the relatively easy transition from Reich to republic. Taking into account the wide-ranging political orientations of those public lawyers that, in one way or another, subscribed to positivism, Stolleis also prevents us from adopting the comfortable, though illusory, conclusion that legal positivism represents an essentially liberal theoretical framework. Indeed, Kelsen's neo-Kantian liberalism is in many ways a notable exception, for especially those "who lived politically at the outer reaches of the right," and who thus most easily adapted to the National Socialist regime, "were also for the most part positivists" (p. 147). As such, Stolleis's distinction between the positivism of German public lawyers and the Vienna School is a particularly perceptive. Likewise, the camp of the so-called "anti-positivists"–Heinrich Triepel, Erich Kauffmann, Rudolf Smend, Hermann Heller and of course Carl Schmitt–emerges as an extremely heterogeneous intellectual field. Within this context, the remnants of the Historical School and of German idealism were easily able to cross with the new sciences of the state and the influence of confessional politics.

While this is not the right place to discuss Stolleis's account of administrative law theory in any detail, it is interesting to note that the formulation and implementation of administrative law in Weimar Germany not only altered the practice of social, tax and labor law, but these changes were in many ways directly dependent on new practices of channeling information: "The mass of printed material grew to such a degree that journals, yearbooks, and anthologies had to resort increasingly to commentary reports and summaries to obtain an overview of the field.... The most important means of channeling the continual flow of follow-up information were loose-leaf collections of binders. They replaced the (law-)book that was essentially conceived as permanent and transformed it into a fluid and evolving material, whose obsolete parts instantly fell into oblivion.... Scholarship also increasingly relied on the fact that expert commentary by ministerial officials, which was becoming as established practice, provided the authentic material on how a law came into existence and collected in one place all the legislation that was relevant to its amendment" (pp. 200-201). The nature of the interdependence of the media of law and the formulation of law in Weimar Germany still requires a more detailed assessment, but Stolleis raises an important issue, which has recently also been addressed by the legal historian Cornelia Vismann and the historian of science Peter Galison.[4] Stolleis himself is, however, less interested in the media of law than in the formation of standards in administrative law and the way in which the latter were fundamentally shaped by the seminal textbooks of Fritz Fleiner, Julius Hatschek and Walter Jellinek.[5]

The final part of Stolleis's book focuses on the development of administrative and state law in Nazi Germany, which abruptly (albeit expectedly) ended any serious reflection on constitutional law and ultimately dissolved the relation between citizen and state into the numinous notion of "community" or *Volk*. There are undoubtedly many lessons to be learned from the end of constitutional law in Germany with regard to the–dare I say–more recent readiness to circumvent constitutional provisions by a direct appeal to the sovereignty of executive power. Indeed, historical lessons are all too often forgotten, or perhaps simply ignored, in contemporary constitutional thought. It is precisely in this respect, however, that Stolleis's account of public law between 1933 and 1945 serves as a powerful reminder of the need to take constitutional arrangements seriously.

Stolleis's account of public law in Nazi Germany is based on an intriguing thesis that deserves much attention: Despite the obvious end of the debate about constitutional fundamentals, it would be short-sighted to assume that Nazi Germany was, as one commentator cited by Stolleis put it, "essentially ... a sphere devoid of law."[6] In contrast, Stolleis himself argues for a more

evenhanded approach that does not simply replace scholarship with moral judgment. While Stolleis argues that an analytical examination of law in Nazi Germany "does not exclude the question of morality," he also notes that "moral assessment should be analytically separated from the primary interest–to illuminate the complex way in which individual and supra-individual factors worked together" (p. 251). Indeed, seen from this perspective, the history of public law in Nazi Germany can and should be considered as a test case able to highlight the dangers which have threatened constitutional law even after the 1930s and 1940s: "The conditions of this dictatorship provide an especially good model for studying how traditional legal doctrine was distorted and devalued by a result-oriented vulgar jurisprudence, how the scholarly networks were transformed, and how the individual processing of reality was deformed by external and internal pressure" (p. 251).

One consequence of Stolleis's intriguing perspective is that it enables him to focus on a peculiar contradiction within public law in Nazi Germany: on the one hand, we witness a broad attack on constitutional thought and the teaching of state law, and on the other, we see a series of innovative trends in administrative and international law.

The hope of many public lawyers (even of those who contributed to the downfall of the Weimar Constitution)–that the new regime could be transformed into a "national Rechtsstaat"–proved to be illusory (p. 250). The seeming institutional and personal continuity of the judicial system–exemplified by Franz Gürtner, the Minister of Justice, and the State Secretary Franz Schlegelberger–could not prevent the almost immediate destruction of legal scholarship. By the beginning of the summer term of 1933, the attack on the teaching of constitutional and state law at German universities was well underway. With the peculiar exceptions of Erlangen-Nürnberg and Gießen, which both had rather small law departments, expulsions threatened the existence of legal studies at virtually every German university, while the law department at the University of Kiel began to play an increasingly important role in the construction of National Socialist law.[7]

This destruction of legal thought can be observed, of course, not only on an institutional level, but also with regard to the fate of already established law journals, such as the *Deutsche Juristen-Zeitung* and the *Jahrbuch des öffentlichen Rechts*, and the orientation of Nazi periodicals, such as the *Zeitschrift der Akademie für Deutsches Recht*, which appeared from 1933 to 1944. As a result of these developments, state law theory clearly found itself in rapid decline. Ironically, even Carl Schmitt's attempt to move into the center of political power–by justifying the murders in connection with the so-called "Röhm-Putsch" of 1934–serves as an example for the growing divide between the new political regime and the community of public lawyers: "Even the frequently cited article 'The Führer Protects the Law' had no effect on the political leadership; in front of the legal scholarship it gave its blessings to a piece of gangsterism and ruined the moral reputation of its author" (p. 335). Even though Stolleis is probably right to note that Schmitt had little influence on the political practice of the Nazi regime, Schmitt himself continued to be active politically and in 1936, around the time of his own fall from grace, contributed to a widely reported conference on Jews in German legal scholarship that sought to shore up support for the antisemitic policies of the Nazi regime.[8]

Despite this clearly detrimental state of public law, Stolleis emphasizes that nonetheless "the politically motivated, radical abandonment of liberal administrative law after 1933 also had innovative effects" (p. 392). The destruction of liberal administrative law also meant that the problems rooted in Bismarck's political system could be overcome and the interventionist state of the nineteenth century could be replaced by an administrative infrastructure that focused on service and planning: "Only with the waning of the traditional dichotomy of individual and state power did it become clear that the central place was no longer occupied by 'intervention' but by the 'service' provided by the state" (p. 392).

A similar development can be observed with regard to the sudden rise of international law during the mid-1930s, which allowed scholars to avoid the "increasingly dangerous" field of state and constitutional law (p. 408). Until 1939, international law remained a relatively stable field of research, since the gradual dismantling of the Treaty of Versailles and the disintegration of the League of Nations "created questions of international law that were of an utmost immediate relevance" (p. 413). Toward the end of the 1930s, though, international law also began to follow the program of the NSDAP and by 1939 it was in any case irrelevant.

Given these slight innovative developments in administrative and international law during the 1930s, the "end" of public law, properly speaking, falls into the period between 1939 and 1945. Most published works, as Stolleis points out, were mediocre at best, largely em-

bellished with Nazi propaganda, and refrained from addressing truly important issues. Indeed, this is perhaps the real failure and moral bankruptcy of public law in Nazi Germany: only a few scholars either supported the regime unconditionally or began to formulate cautious criticism, but the majority simply remained silent. Again, even though Stolleis does not elaborate on this, there are clearly lessons to be learned.

A History of Public Law in Germany, 1914-1945 is an important and groundbreaking scholarly achievement. Its range and breadth are truly breathtaking and there is nothing available that would even be remotely comparable. Carefully researched and argued, elegantly written, this is a major contribution to both the history of legal thought and German political culture. Of course, it would help if Oxford University Press were to recognize the need for an affordable paperback edition.

Notes

[1]. See Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 3 vols. (Munich: C. H. Beck, 1988-1999).

[2]. See Michael Stolleis, *Public Law in Germany, 1800-1914* (New York: Berghahn, 2001) and his *The Law under the Swastika: Studies on Legal History in Nazi Germany* (Chicago: University of Chicago Press, 1998).

[3]. See Wolfgang J. Mommsen, *Der autoritäre Nationalstaat. Verfassung, Gesellschaft und Kultur des deutschen Kaiserreiches* (Frankfurt/M.: Fischer Taschenbuchverlag, 1990).

[4]. See Cornelia Vismann, *Akten. Medientechnik und Recht*, 2nd ed. (Frankfurt/M.: Fischer Taschenbuch Verlag, 2001), and "Cancels: On the Making of Law in Chanceries," *Law and Critique* 7 (1996), pp. 131-51. See also Peter Galison, "Removing Knowledge," *Critical Inquiry* 31 (2004), pp. 229-243.

[5]. See Fritz Fleiner, *Institutionen des deutschen Verwaltungsrechts*, 8th ed. (Tübingen: J.C.B. Mohr, 1928); Julius Hatschek, *Institutionen des deutschen und preußischen Verwaltungsrechts* (Leipzig: Deichert, 1919); Walter Jellinek, *Verwaltungsrecht* (Berlin: Julius Springer, 1928).

[6]. Knut Wolfgang Nörr, *Zwischen den Mühlsteinen. Eine Privatrechtsgeschichte der Weimarer Republik* (Tübingen: J.C.B. Mohr, 1988), p. 244. See also Manfred Friedrich, *Geschichte der deutschen Staatsrechtswissenschaft* (Berlin: Duncker und Humblot: 1997), p.404.

[7]. The fate of the law department at Erlangen-Nürnberg does not represent the academic environment at this Bavarian university as a whole. The moral downfall of provincial Bavarian universities began to take on form even before the new regime took over power. By 1929, there were no Jewish professors at Erlangen-Nürnberg.

[8]. See Carl Schmitt, "Eröffnung der wissenschaftlichen Vorträge durch den Reichsgruppenwalter Staatsrat Professor Dr. Carl Schmitt," in *Das Judentum in der Rechtswissenschaft. Ansprachen, Vorträge und Ergebnisse der Tagung der Reichsgruppe Hochschullehrer des NSRB am 3. und 4. Oktober 1936* (Berlin: Deutscher Rechtsverlag, 1936), pp. 14-17, and "Die deutsche Rechtswissenschaft im Kampf gegen den jüdischen Geist," *Deutsche Juristen-Zeitung* 41 (1936), cols. 1193-1199.

Citation: Christian J. Emden. Review of Stolleis, Michael, *A History of Public Law in Germany 1914-1945*. H-German, H-Net Reviews. March, 2006.

URL: http://www.h-net.org/reviews/showrev.php?id=11549