

# INTRODUCTION





# INTRODUCTION

This report on the work of the Institute in the years 2018–2020 is in many ways different to the previous one. Since 1 January 2021, the Institute has a new name – the Max Planck Institute for European Legal History has become the Max Planck Institute for Legal History and Legal Theory. The reason for the name change is the welcome expansion of the Institute: the two existing Departments, led by Stefan Vogenauer and Thomas Duve, were joined on 1 September 2020 by a third Department, led by Marietta Auer. Marietta Auer's plans outlined in this report show how promising the establishment of the Department is not only for legal theory but also for legal historical work. That we took this opportunity to remove 'European' reflects the fact that we are now active on all continents, and that we increasingly endeavour to place the legal history of Europe in its global context. Thus, European legal history continues to be an important part of our research, but we practice it differently than at the time the Institute was founded – and we understand Europe as a global region that is developing through intensive exchange with others.



A glance at the report will also show that not only the Institute but also the three Departments have been given names: *Multidisciplinary Theory of Law* (Marietta Auer), *Historical Regimes of Normativity* (Thomas Duve) and *European and Comparative Legal History* (Stefan Vogenauer). These designations are also programmatic. In addition, the number of independent Research Groups has also grown: next to the two existing Max Planck Research Groups – *Governance of the Universal Church after the Council of Trent* (Benedetta Albani) and *Translations and Transitions* (Lena Foljanty) – on 1 April 2021 a third Max Planck Research Group has been added: *Legal Connectivities and Colonial Cultures in Africa* (Inge Van Hulle).

Due to these changes in the year 2020, we have also renewed our research profile. With the *Forum* we have established a new level of scientific communication and cooperation at the Institute. In the monthly *Plenum* we report on research findings from the Departments and Research Groups to one another. In the *Colloquium*, also held monthly, all researchers meet to discuss methodological-theoretical questions and problems that are relevant to us all. In 2020, the topics were 'Methods for Legal History' and 'Archives'. Interdepartmental working groups and seminars help to ensure that we continue to see ourselves as an Institute, despite the increasing number – soon to be 200 – of staff members.

In the last three years, our ways of working have also changed drastically. The pandemic, which characterised 2020–2021 globally, has been a challenge for us all. For many, this time brought great limitations. Over many months, access to archives and libraries was not possible. Many of our employees, who come from all continents, could not visit their families. Conferences were cancelled and research stays postponed. Here in Frankfurt, our Visitors' Programme could only be maintained to a very limited extent.

In the day-to-day life of the Institute, we have learned to use new forms of communication. We are sure that much of that will remain. We have made intensive use of the opportunity to meet with the world's leading experts in our field for discussions – in an uncomplicated and resource-efficient way – through video conferences. It has also become even clearer how important electronic access to sources and literature is. This is not only a confirmation of our long practice of electronic Open Access publication. We have also seen that our projects digitising private law scholarship and legal journals as well as our extensive digital editions of foundational works of legal history have become everyday working tools for many colleagues around the world. This research infrastructure requires resources, and we are very pleased that we can now make many of these digital sources available through a modernised platform *Digital Libraries Connected* (DLC) developed together with other Max Planck Institutes.

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**Digital Libraries Connected (DLC)**

Digital Libraries Connected (DLC) ist eine frei zugängliche Publikationsplattform für digitale Dokumente und Sammlungen aus derzeit vier Bibliotheken der Max-Planck-Gesellschaft. Über die Portalfunktion hinaus bietet sie auch umfangreiche Optionen zur Nachnutzung von Inhalten und Metadaten, eine Auswahl an unterschiedlichen Viewern sowie vielfältige Zitier- und Verlinkungsmöglichkeiten. Die Inhalte werden kontinuierlich erweitert.

But despite many innovations, we have also stuck with the tried and tested. The two legal historical Departments have, as is clear from the report, continued to develop their larger projects and Research Fields. Our researchers have published in journals and collected volumes, and produced monographs in various languages. In 2018 and 2019 we hosted our Summer Academy and were again able to welcome a large number of international visitors as scholarship holders. Overall, we have continued to work on implementing the Max Planck Society's mission in the scientific sector for the field of our small discipline: just as the Max Planck Institutes are intended to be complementary to university structures, we have endeavoured to use our resources for the further internationalisation of the discipline, for long-term expansive innovative research, for methodological innovation, not least in the field of Digital Humanities, and for interdisciplinary cooperation. Furthermore, our Institute is the permanent seat of Max Planck Law, which is led by Stefan Vogenauer; and this too, despite the pandemic, has resulted in dynamic processes of cooperation within the Max Planck Society. For doctoral students in particular, this cooperation offers important new qualification opportunities and the possibility to exchange ideas with colleagues from other Institutes.

An important dimension of our work in these years was the publication of our journal *Rechtsgeschichte – Legal History* and the supervision of our various publication series. In the journal, we published a wide variety of international research as well as works on legal history in the German-speaking world during the reporting period. The themes of the issues were as wide-ranging as our research activities: in Rg 26 (2018) and Rg 27 (2019), alongside the articles published in the *Research* section, we had special *Focus* sections on empires, *convivencias* in the Iberian worlds, the School of Salamanca, Tridentine marriage, translations of the Weimar constitution in a global perspective, as well as on the *Oxford Handbook of Legal History* and the *Oxford Handbook of European Legal History*. In issue 28 (2020), we were able to publish the results of a research project by colleagues from Switzerland on financial markets, speculation and regulation, in addition to essays from the context of our own research on pragmatic literature. A section with contributions on the work of our former External Scientific Member Knut Wolfgang Nörr, who died in 2018, gave us the opportunity to commemorate him.

Moreover, despite difficult circumstances, the established cooperation with Klostermann Verlag enabled us to publish 17 books in our series *Studien zur europäischen Rechtsgeschichte* as well as three volumes of the series *Studien zu Policey, Kriminalitätsgeschichte und Konfliktregulierung* during the reporting period. In addition, the *Global Perspectives on Legal History* series, published both online in Open Access and as printed books, has grown by six volumes, and the first volume of a new publication series *Max Planck Studies in Global Legal History of the Iberian Worlds*, also Open Access, was published. The Institute's Research Paper Series at SSRN has amassed 68 new titles in these years.

As the consistent internationalisation of our work means that now a large proportion of our staff are not from Germany, and we maintain many international collaborations and have become a point of contact for legal historians around the world, we are pleased that we can also bring our work into new forms of cooperation with our colleagues in Germany. We do this, for example, in cooperation with the Goethe Universität in the framework of our contribution to the LOEWE Focus *Architectures of Order*, which began in 2020, and in the long-term *School of Salamanca* project, funded by the Akademien der Wissenschaften, which was positively evaluated in 2020. Members of the Institute were involved in the Collaborative Research Centre (DFG Sonderforschungsbereich 1095) *Discourses of Weakness and Resource Regimes* at Goethe Universität, which was funded

until 2019. We have maintained a Research Group at the Bonn Cluster of Excellence *Beyond Slavery and Freedom* since 2018. In 2020, a Max Planck Fellow Group *The History of Labour Law in the European Union* began its work; and we are engaged with various partners in labour law history, including in a third-party funded research project on special legal orders in the German metal industry, which began in 2019. Smaller projects contribute to these efforts to integrate our work into the German research landscape, such as the publication of a book entitled *Rechtswissenschaft in der Berliner Republik* (2018), which has since also been published in Chinese, our regular *Rechtshistorische Abendgespräche*, held in cooperation with the Institute for Legal History at Goethe Universität, and our engagement at the *Deutsche Rechtshistorikertag*. The fact that during the reporting period researchers who worked at the Institute during their post-doc phase were able to take up professorships at universities in Chile, Mexico, the USA, Ireland, Austria and China strengthened our integration into the international scientific landscape, as did research collaborations with institutions abroad. This is also evident in the participation of researchers in the RISE project *Resistance* within the framework of the EU Marie Skłodowska-Curie Actions.

We were also able to rely on excellent working conditions during the reporting period because we are fortunate to have outstanding support from the Editorial Department, the Administration, the Library, the IT Department and from our Research Coordinator. The pandemic and the expansion of the Institute by a third Department have presented these areas with special challenges. This can only be reflected to a limited extent in this Activity Report.

This report is thus the last to provide information on the work of the Max Planck Institute for European Legal History, even though it already appears under our new name and gives a brief overview of the work of Marietta Auer. It is also the last in which we can report on the work of Michael Stolleis. Michael Stolleis was not only our long-term Director, but also after his retirement a wise observer and helpful companion for all of us. We remember him in a short obituary in this Activity Report.

Frankfurt, May 2021

Thomas Duve, Managing Director of the Institute, 2019–2021





## MICHAEL STOLLEIS (1941–2021)

There are few images that have shaped our idea of the early modern state as much as the frontispiece of Thomas Hobbes' *Leviathan*, published in 1651. Above the head of the majestic colossus is written 'There is no power on earth to be compared to him'.

Those who were born in 1941 in Germany and studied law in the 1960s had every reason to question the power of the state: after the injustices committed by the state – also through the use of the law – after the failure of the elites, after the role of the 'terrible jurists' in National Socialism.

However, the 1968 movement and Brandt's 'Dare more democracy' (*Mehr Demokratie wagen*) in turn gave many hope that a different state could be possible: a constitutional and welfare state that would not become a means of oppression, but rather one that could ensure justice and offer life opportunities for all.

For Michael Stolleis, the confrontation with German history already began at a young age. His birthday on 20 July, and his own family history, appear from a later perspective as a mandate to engage with the unfathomable. As a seventeen year old, his visit to the theatre at Schiffbauerdamm to see Brecht's 'The Resistable Rise of Arturo Ui' was formative. While studying law, first in Heidelberg, then in Würzburg, he bought, like so many others at the university entrance, the 'Brown Book' from the GDR, which published material on jurists from the Federal Republic and their involvement in National Socialism. He attended the first lecture series on National Socialism and sought out an untainted doctoral supervisor.

He found more than such a person in the Munich legal historian Sten Gagnér. His dissertation on the late enlightenment philosopher Christian Garve was not least about the *Staatsräson* ('reason of the state'), ie the boundary between the validity of the law and the violation of law, about the state of emergency as an instrument of law, about law in situations of injustice – one of the great problems of legal history that accompanied Michael Stolleis throughout his life. His habilitation thesis on formulas for the common good (*Gemeinwohlformeln*) in national socialist law directly addressed this lifelong topic. The study of National Socialism appeared to him, as he put it in a speech on the occasion of being awarded the Balzan Prize in 2000, to be both scientifically interesting and a requirement of political morality: from his student days, he asked himself why does a brutal and martial dictatorship – one that from the very beginning beat up, imprisoned and killed its political opponents – continue to use legal form? Why is it, following Brecht, that the times of extreme oppression are also generally the times when there is so much talk of great and lofty things? The method of carefully reconstructing the use of language that Michael Stolleis employed to examine the formulas for the common good owed much to his encounter with the Wittgensteinian critique of language in Sten Gagnér's seminar. It became a creed for him, as it did for many other students of the now largely forgotten Gagnér. Language also includes images, as Michael Stolleis demonstrated in his well-known study on the metaphor and image of *The Eye of the Law* (*Das Auge des Gesetzes*).

To submit a habilitation like this on National Socialism in 1973 at the Munich law faculty – ie that of Karl Larenz and Theodor Maunz – was not without risk to his further academic career, even if pioneering studies such as that of Bernd Rüthers had paved the way for an examination of the role of law in National Socialism. The Savigny journal, the flagship of the discipline, limited itself to a short announcement of his thesis, perhaps also because the field of ‘contemporary legal history’ did not even exist yet; it was Michael Stolleis himself who later gave the decisive impulse for its establishment in the canon of university subjects. In addition, the combination of public law with legal history and canon law was no guarantee for his career prospects. However, in Frankfurt, where he was appointed professor in 1974, a liberal spirit prevailed. The university was growing, the basic legal subjects were strong and original minds were sought. Social law and Protestant church law, which he had engaged with as assistant to Axel Freiherr von Campenhausen, became his main focus areas in public law.

In legal history, Michael Stolleis turned back to the early modern period, to the time of the growth of the Leviathan. This resulted in studies on political philosophers of the 17th and 18th centuries, on the political theory of the 17th century and on the state and the ‘reason of the state’ in the early modern period. Above all, however, his plan for a history of the science of public law was maturing. The first volume was published in 1988; three others followed. Initially conceived as a single-volume counterpart to Franz Wieacker’s history of private law – this highly influential book that was based on a strong philosophical conviction about the nature of law – the history of public law became much more: an erudite overall account of *ius publicum* between 1600 and 1990 emerged such as had never existed before, not in Germany, not in Italy, not even in France, to which he felt particularly attached. Guided by the firm resolution to avoid writing a highbrow history of great minds or narratives of progress, and oriented towards guides such as Johann Stefan Pütter’s *Litteratur des Teutschen Staatsrechts* (1776–1783) and Robert von Mohl’s *Geschichte und Literatur der Staatswissenschaften* (1855–1858), it explores, down to the smallest details, the institutional contexts of knowledge production, the histories of the fields of law and politics, literary histories, constitutional history and the history of ideas over four centuries. For legal history, traditionally concentrated on private law, this work opened a new world.

In parallel, he produced countless reviews on the legal history of the modern period, collected works on German lawyers of Jewish origin, works on the history of legal history, and studies on social law and its history. In a large-scale research project at the Max Planck Institute for European Legal History, the institution where Michael Stolleis became director in 1991 and which he decisively shaped for two decades, a repository of early modern so-called police ordinances (*Policeyordnungen*) grew through a patient collection of sources. The research on early modern police ordinances that built on this uncovered a dimension of authoritarian and state control of behaviour that until then had been practically unknown to legal history. At the same time, it led the subject into a new dialogue with the historical sciences, in particular in relation to secularisation, confessionalisation, social discipline and norm implementation. The fact that Michael Stolleis clearly defined legal history as a historical subject, argued with an awareness of method and presented with a brilliant rhetoric, made him a sought-after dialogue partner in legal and historical scholarship. Over the decades, an overall picture emerged which he increasingly embedded in a European context. Against the background of his history of public law, he claimed that the shared



European ideal not only involved the search for the binding of state power to the law, the protection of zones of privacy and autonomy, and legal protection through judicial decisions, but also the responsibility of the authorities for a just social order.

It was also this insight into the rule of law and the welfare state as cultural achievements in European history that motivated Michael Stolleis to turn with particular enthusiasm to the legal history of the GDR and Eastern Europe after the fall of the Berlin Wall, and the Max Planck Institute gave him the institutional framework to do so. For this purpose, he used the funds from the Gottfried Wilhelm Leibniz Prize awarded in 1991, and in the 2000s he completed a larger project on the legal history of South Eastern Europe in cooperation with the Cluster of Excellence *The Formation of Normative Orders*. Support for young researchers from these regions was a particular concern of his, just as he spent a great deal of time and had a great personal commitment to developing and training the young European legal history research community. The Institute and the cooperation with the legal historians at the Goethe Universität Frankfurt gave him the possibility to do just this, and he never regretted having decided for legal history and against the directorship also offered to him at the Max Planck Institute for Foreign and International Social Law in Munich. There has been no lack of prizes and honours: a few years ago he was inducted into the order *Pour le Mérite* for Sciences and Arts and more recently was appointed to its Office of Vice Chancellor, along with receiving numerous academic memberships and honorary doctorates. He was always pleased to receive these, and could certainly state this with a quiet self-irony.

Above all, however, Michael Stolleis saw himself as an observer and narrator of the history of law, this history of the great attempt to lay the foundations for peaceful and just coexistence – which is, at the same time, also a history of the constant threat to civilisational achievements and the fragility of human existence. As a historian and thus one who works with language (*Spracharbeiter*), as he saw himself, the virtues of craftsmanship were important to him, as he had learned them in his apprenticeship as a vintner in his native Palatinate region. He valued integrity more than extravagance; he did not need to strive for elegance. He considered self-discipline, attention to detail, reliability and fairness to be the essential prerequisites for scientific work, and if they were lacking, he could be quite blunt. He viewed the emphasis on collaborative research structures and the associated rhetoric of relevance with increasing scepticism; for him it was a mark of the highest esteem to call someone erudite. His generosity with his time and his knowledge, kindness and understanding became exemplary for many of his companions and students.

As someone who would have preferred to study literature and art, in recent years he was increasingly drawn to storytelling. Playing with form and genre was also a piece of freedom he enjoyed after decades of disciplined research. The *Akademie für Sprache und Dichtung* (Academy for Language and Poetry) was particularly dear to his heart, and in the book *Margarethe und der Mönch* he told legal history in stories. The last volume, which he completed just a few weeks ago, is entitled *recht erzählen* (telling the story right and, at the same time, narrating law). It contains tales from Frankfurt and his native region, reflecting the growth of the Leviathan, whose power and greatness had been a lifelong preoccupation of his.

Thomas Duve

