

# Legal Reforms: Changing the Law in Germany in the *Ancien Régime* and in the *Vormärz*

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IF WE CONSIDER the notions of law and of reform and their relation to each other, our first reaction might be influenced by rather sceptical thoughts. To a certain extent, it always was and still is the task of the law to uphold the status quo. As far as this is the case, putting together 'law' and 'reforms' might even be seen as a contradiction in itself. On the other hand, the law is subject to change, and these changes can be effected by deliberate acts. Moreover, any reforms are usually accomplished by the law, or, to put it in more general terms, by instruments which the law provides or which have legal effects.<sup>1</sup> In this sense, any reform is a legal reform and a legal change. For the subject of my paper, this would open up the whole panorama of reforms in Germany in the eighteenth and the first half of the nineteenth century.

The scope of my paper has to be more modest. I will not look at law reforms in the sense of a book published in London in 1901, which considers the changes in all branches of the law in the nineteenth century, from criminal law, public and private international law, labour law, real property and so on, to joint stock and limited liability companies.<sup>2</sup> I will deal with the

<sup>1</sup> For the history of the notion 'reform', see Eike Wolgast, 'Reform, Reformation', in Otto Brünnner, Werner Conze and Reinhart Koselleck, eds, *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (8 vols, Stuttgart, 1975–97), v, pp. 313–60; the relation between enlightened absolutism and reforms is discussed in H. M. Scott, ed., *Enlightened absolutism: reform and reformers in later eighteenth-century Europe* (Ann Arbor, 1990); cf. also the useful overview by Walter Demel, *Vom aufgeklärten Reformstaat zum bürokratischen Staatsabsolutismus* (Munich, 1993), and Günter Birtsch, 'Aufgeklärter Absolutismus oder Reformabsolutismus?', *Aufklärung*, 9 (1996), pp. 101–9; Eberhard Weis, ed., *Reformen im rheinbündischen Deutschland* (Munich, 1984).

<sup>2</sup> *A century of law reforms: twelve lectures on the changes in the law of England during the nineteenth century* (London, 1901).

changes in legislation and in its concept, in other words, with legislative reforms, with projects for reforms and with the theory of legislation. Still, the history of legislation remains a vast area, so I shall concentrate on some parts of it. My main point will be that, on the whole, the legal reform projects of enlightened absolutism in Germany were destined to fail, whereas the reform legislation of the German states in the first half of the nineteenth century was more successful.

My paper will have four parts. To begin with it will briefly outline the developments which are usually regarded as important for the history of legislation in Germany in the eighteenth and nineteenth centuries. Then the focus will be on some fundamental concepts and aims of legislation and reforms in the era of enlightened absolutism. The third section will deal with the question of how the ambitions of the reform programme of enlightened absolutism relate to the German states' reality. The fourth and final part will look at legislation and its theory in the German states in the first part of the nineteenth century.

### **The traditional view: the two phases of the history of codification in Germany**

In the history of legislation and of the theory of legislation in Germany in the eighteenth and nineteenth centuries, as one would find them, for instance, in textbooks on legal history, two developments are usually considered to be important.<sup>3</sup> The first one comprises the four decades around 1800 and is commonly, yet misleadingly, referred to as the era of natural law codifications (*Naturrechtskodifikationen*). It is seen as a European phenomenon, the most important and influential results of which are supposed to be the Prussian 'Allgemeines Landrecht' of 1794, the Austrian civil code of 1811–12 (*Allgemeines Bürgerliches Gesetzbuch*) and the French codifications. In terms of Germany, one might describe the projects and results of this movement towards codifying the law as the legislative efforts of enlightened absolutism and of the age of reforms. Both the history of the codes themselves and the political and legal theory upon which they were based are covered relatively

<sup>3</sup> See R. C. van Caenegem, *An historical introduction to private law* (Cambridge, 1992); Friedrich Ebel, *Rechtsgeschichte. Ein Lehrbuch* (Heidelberg, 1993), II; Wilhelm Ebel, *Geschichte der Gesetzgebung in Deutschland* (2nd edn, Göttingen, 1958; reprinted with supplements, Göttingen, 1988); Ulrich Eisenhardt, *Deutsche Rechtsgeschichte* (2nd edn, Munich, 1995); Hans Hattenhauer, *Europäische Rechtsgeschichte* (Heidelberg, 1992); Karl Kroeschell, *Deutsche Rechtsgeschichte* (2nd edn, Wiesbaden, 1993), III; Adolf Laufs, *Rechtentwicklungen in Deutschland* (5th edn, Berlin/New York, 1996); O. F. Robinson, T. D. Ferguson and W. M. Gordon, *An introduction to European legal history* (2nd edn, Edinburgh, 1987); Hans Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte* (8th edn, Heidelberg, 1996); Uwe Wesel, *Geschichte des Rechts. Von den Frühformen bis zum Vertrag von Maastricht* (Munich, 1997).

comprehensively by scholarly literature.<sup>4</sup> However, there is considerable controversy about the political aims which enlightened rulers in Germany pursued with planning or — in Prussia — actually putting into force new codifications.

The second crucial development is usually seen to be the vast legislation by the second German empire after its foundation in 1871. In fact, the many codes enacted during that period have moulded even the German legal system of today; quite a number of them are still in force, though they have been altered to a greater or lesser degree since then. Legislative efforts before 1871, for instance by the German Union (*Deutscher Bund*), are usually regarded as mere predecessors of the legislation of the German empire.

This view of the history of legislation in Germany seems to be corroborated by the result of one of the most famous controversies in German legal history.<sup>5</sup> In 1814, Anton Friedrich Justus Thibaut, professor of law at the University of Heidelberg, had argued in favour of a civil code for Germany.<sup>6</sup> His Berlin colleague, Friedrich Carl von Savigny, opposed this view and pleaded that Roman law should retain its central position.<sup>7</sup> As a German civil code did not come into force before 1900, it seemed that Savigny and the historical school of law had effectively prevented legislative efforts for codifications for more than half a century.

Yet the whole view seems to neglect other and perhaps more important perspectives. The concept of 'natural law codes' is misleading as it suggests that the codes mostly embodied the principles and teachings of the textbooks and writings of the natural law of that time. Moreover, it seems to underline the common characteristics rather than the vast differences between the Prussian code on the one hand and more modern ones like the French codes and the Austrian civil code on the other. Apart from this, the focus on a few however important codes does prevent us realizing the importance of many other statutes and to see the whole scope of the legislative activities and aims of the German states of that time. As to the period up to the founding of the 'Norddeutscher Bund' and the second German empire, the considerable and successful legislative activities of the German states up to that time are not

<sup>4</sup> See the useful bibliography in Laufs, *Rechtsentwicklungen*, 145–8, 159–61; Helmut Coing, ed., *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* (Munich, 1982), III(i), entry on France by Ernst Holthöfer, pp. 863–1068; for Austria see note 18, for Prussia note 35.

<sup>5</sup> For a thorough and scholarly analysis of the Thibaut–Savigny controversy, see Joachim Rückert, *Jurisprudenz und Politik bei Friedrich Carl von Savigny* (Ebelsbach, 1984), pp. 160–93.

<sup>6</sup> Anton Friedrich Justus Thibaut, *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (Heidelberg, 1814).

<sup>7</sup> Friedrich Carl von Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (Heidelberg, 1814); an English translation by Abraham Hayward was published in 1831: *Of the vocation of our age for legislation and jurisprudence* (London, 1831).

taken into account. Recent research indicates that it might be this legislation which adapted German law to the social, economic, and political needs of that time.<sup>8</sup>

### Legislation and reforms in the era of enlightened absolutism

1 In the course of the eighteenth century, the governments of many German states, and likewise many intellectuals, thought of reforming the existing law. But what was the existing law, or, more precisely, which were the sources from which the law was drawn? In the German context, there usually is no simple answer to this question, as it might be that dozens of quite different sources have to be considered, depending on which territory, town or even village the question would be asked for. To give a somewhat simplified answer one could say that, on the whole, Roman law applied since the so-called reception of the Roman law or rather since the spreading of academically trained lawyers since the twelfth century. In addition to that, there were statutes of the German empire and of the German princes and townships as well as medieval precedents, law-books (*Rechtbücher*)—i.e. private compilations like the *Sachsenspiegel*—and customary laws, to mention but a few other sources. In theory, the more specific sources prevailed over Roman law; but, in practice, it might be difficult to prove that a specific customary law really existed in a village, and lawyers trained in Roman law certainly tended to apply their skills and their knowledge of Roman law, which they had learned at the law faculty of a university, even to legal sources of quite different origins.

But if the sources—not to mention the contents—of the law were heterogeneous in this way, the question arises what the concept of reforming the law was, who would be the competent person or body to change the law, and what changes were to be brought about?

2 In 1747, two lecturers at the Prussian University of Halle, the brothers and doctors Gustav Bernhard Beckmann and Ott David Heinrich Beck-

<sup>8</sup> See Rolf Grawert, 'Gesetzgebung im Wirkungszusammenhang konstitutioneller Regierung', in *Gesetzgebung als Faktor der Staatsentwicklung* (Berlin, 1984), pp. 113–60; Coing, ed., *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* III(ii), pp. 1403–561 (entries by Barbara Dölemeyer on several German states), pp. 1626–773 (Stephan Buchholz); in III(i), see also the introductory essays by Helmut Coing ('Allgemeine Züge der privatrechtlichen Gesetzgebung im 19. Jahrhundert'), pp. 3–16, and Dieter Grimm ('Die verfassungsrechtlichen Grundlagen der Privatrechtsgesetzgebung'), pp. 17–173; as to the criminal law of that time, see the reprinting project *Kodifikationsgeschichte Strafrecht* (Goldbach, 1988–), ed. and with introductory essays by Werner Schubert *et al.*; Rainer Schröder, 'Die Strafgesetzgebung in Deutschland in der ersten Hälfte des 19. Jahrhunderts', in *Die Bedeutung der Wörter. Festschrift für Sten Gagnér* (Munich, 1991), pp. 403–20.

mann, dealt with some of these problems in a pamphlet called *Thoughts on reforming the law*.<sup>9</sup> Reforming the law, they pointed out, has two meanings: firstly, to change the law and statutes of a state, and secondly, to change the way to teach them at a university. They emphasize that it is a *ius majestaticum*, the exclusive right of the ruler of a state, to legislate and to change the law by legislation; therefore, they point out, it cannot be up to his subjects to legislate or even to come near to it by teaching a new law. If academic lawyers want to reform the law, they are restricted to changing the manner of teaching it, but they are not allowed to meddle with its contents.

Though the direct purpose of the pamphlet was to attack the law professor Daniel Nettelblatt,<sup>10</sup> a colleague of theirs in Halle, we can use it as a starting point to get some answers to our questions, since the brothers Beckmann represent the mainstream of political theory dealing with legal reforms at the time.

First of all, the question of reforming the law was clearly deemed worth treating in the middle of the eighteenth century. Changes in the law were to be effected by legislation. As the Beckmanns wrote in the eighteenth century and not in the Middle Ages, this is not surprising. But who is to be the legislator?

The authors presuppose that the ruler of a territory in Germany had the right to legislate. Legally speaking, this was not self-evident at all, as this right was supposed to be the most important part of sovereignty.<sup>11</sup> Up to the end of the German empire, it was highly controversial among German lawyers and political theorists as to who in the empire was sovereign — the emperor, or the emperor together with the imperial estates (*Reichsstände*), or the rulers of the many German monarchies and republics (e.g. *Reichsstädte*), or these rulers together with their estates (*Landstände*) respectively.<sup>12</sup> Nevertheless, in the eighteenth century, the legislative power is usually attributed to the rulers of the many German territories, and they certainly exercised this right, which was usually considered as encompassing the right to give general laws and to provide for single cases by legislation, as well as the right to

<sup>9</sup> Gustav Bernhard Beckmann and Ott David Heinrich Beckmann, *Gedanken vom Reformiren des Rechts. Womit sie ihre instehende Winter-Vorlesungen anzeigen* (Halle, 1747).

<sup>10</sup> This becomes obvious when reading the anonymously published answer to the Beckmanns' pamphlet, *Schreiben eines guten Freundes von Halle an einen andern nach Jena, nebst einigen Anmerkungen über die Gedancken der Herren Beckmänner vom Reformiren des Rechts* (Jena, 1747).

<sup>11</sup> See Helmut Quaritsch, *Staat und Souveränität, Die Grundlagen* (Frankfurt, 1970), I, especially pp. 343 ff.; Helmut Quaritsch, *Souveränität. Entstehung und Entwicklung des Begriffs in Frankreich und Deutschland vom 13. Jh. bis 1806* (Berlin/Munich, 1986).

<sup>12</sup> See Diethelm Klippel, 'Staat und Souveränität VI–VIII', in Brunner, Conze and Koselleck, eds, *Geschichtliche Grundbegriffe*, VI, pp. 115–20.

interpret the laws authentically, to change them, to repeal them generally or in a particular case (*Dispens*), and to grant privileges.<sup>13</sup>

3 But what, then, were the goals of law reforms by legislation? This question can be answered by looking at a contemporary English translation of one of the first comprehensive reform projects, the Prussian *Project des Corporis Juris Fridericiani*. Two parts of the planned three parts were published in German in 1749 and 1751. Section 10 of the introduction summarizes what the reform was thought to be about; it neatly and concisely puts together the aims of the legislative reforms of an enlightened absolutist government:<sup>14</sup>

In order to remedy so many abuses, we have caused compose a body of law for our dominions, founded on certain and rational principles; in which we have indeed taken the Roman law for a foundation, in so far as its general principles appeared drawn from natural reason, and we have preserved the names and terms of art, to which so many judges, and even the subjects are already accustomed. But we have excluded all the subtilties [sic] of the Roman laws, and every thing not applicable to the constitution of our dominions. We have especially had it in view, to reduce the whole work to the form of a clear and distinct system; and we have caused publish it in the German language, that our subjects may themselves be able to read it, and occasionally to have recourse to it. We have introduced into it, under proper rubrics, all the edicts concerning judicatures, without treating here of those which regard the police, military affairs, and the like.

Here, we find all the well-known ingredients which are typical for enlightened absolutist law reforms: the author aims at replacing the function of Roman law by a codification which, nevertheless, is based on Roman law to a great extent. The code's purpose is to simplify and unify the law; it is to be clear and easily understandable, therefore, it is to be written and published in German.

Elsewhere, the Bavarian codes dated around 1750 and an Austrian draft, the *Codex Theresianus*, from 1766, are early examples of the states' efforts to codify their law or parts of it. In the case of Prussia and Austria, there is no need to recall the further history of these efforts: they resulted in the Prussian

<sup>13</sup> E.g. Ludwig Julius Friedrich Höpfner, *Naturrecht des einzelnen Menschen, der Gesellschaften der Völker* (2nd edn, Gießen, 1783), pp. 164 f.; Carl Anton Freiherr von Martini, *Lehrbegriff des Natur-, Staats- und Völkerrechts*, III, *Allgemeines Staatsrecht* (Vienna, 1783), pp. 49 f.; Ludwig Gottfried Madihn, *Grundsätze des Naturrechts zum Gebrauch seiner Vorlesungen*, II (Frankfurt a. d. Oder, 1795), pp. 77 f. Cf. Heinz Mohnhaupt, 'Potestas legislativa und Gesetzesbegriff im Ancien Régime', *Ius commune*, 4 (1972), pp. 188–239.

<sup>14</sup> I quote from the English translation: *The Frederician Code; or, a body of law for the dominions of the king of Prussia. Founded on reason, and the constitutions of the country* (2 vols, Edinburgh, 1761), I, p. 10–11. The English translation was based upon a French edition.

*Allgemeines Landrecht* of 1794 and the Austrian general civil code of 1811. But these three comparatively big states were by no means the only ones which addressed themselves to the task of legal reforms. On the contrary, in the eighteenth century, nearly every German state considered drafting a codification. Further examples about which Barbara Dölemeyer has collected new material are Baden, Hanover, Hessen-Darmstadt, Hessen-Kassel, Mecklenburg, and Saxony.<sup>15</sup> Some authors, like Karl Theodor von Dalberg in 1787 or the Dean of the Faculty of Law of the University of Freiburg as late as in 1803, even demanded that the German empire draft and put into force a general code.<sup>16</sup>

All the examples display the same pattern.<sup>17</sup> As a first step, a compilation consisting of Roman law and the law of the land was considered; in this process, Roman law was to be cleared of discrepancies and academic controversies. In some states this was all that happened. As a second step a complete code of law was planned, in some cases later on influenced by the developments in Prussia. Even the theory underlying the projects and the thoughts about the aims of legislation were more or less the same as in Prussia.

### Ambitions and reality

The authors of various eighteenth-century texts justifying plans to reform the law pointed out that the existing unclear and complex laws were the reason for unnecessary and costly litigation.<sup>18</sup> This indicates that the states possessed ulterior motives for revising the law. In fact, the planning of codes was part of what might be called an entire programme of reforms in contemporary German states. It is well known that we speak of 'enlightened' or 'reformist' absolutism, because such reforms are seen as characteristic for most governments in the second half of the eighteenth century.<sup>19</sup>

<sup>15</sup> Barbara Dölemeyer, 'Kodifikationspläne in deutschen Territorien des 18. Jahrhunderts', in Barbara Dölemeyer and Diethelm Klippel, eds, *Gesetz und Gesetzgebung im Europa der Frühen Neuzeit* (Berlin, 1998), pp. 201–23.

<sup>16</sup> *Ibid.*

<sup>17</sup> See Dölemeyer, 'Kodifikationspläne'; Werner Ogris, 'Aufklärung, Naturrecht und Rechtsreform in der Habsburgermonarchie', *Aufklärung*, 3 (1988), pp. 29–51; Wilhelm Brauner, 'Vernünftiges Recht als überregionales Recht: Die Rechtsvereinheitlichung der österreichischen Zivilrechtskodifikationen 1786–1797–1811', in Reiner Schulze, ed., *Europäische Rechts- und Verfassungsgeschichte. Ergebnisse und Perspektiven der Forschung* (Berlin, 1991), pp. 121–37.

<sup>18</sup> *The Frederician Code*, I, p. 8; Georg Friedrich Lamprecht, *Versuch eines vollständigen Systems der Staatslehre* (Berlin, 1784), p. 203.

<sup>19</sup> The various views of 'aufgeklärter Absolutismus' and 'Reformabsolutismus' are discussed by Demel, *Vom aufgeklärten Reformstaat*, pp. 61 ff. and in Scott, ed., *Enlightened absolutism*.

1 I would like to illustrate this with the case of Hessen-Darmstadt.<sup>20</sup> When Landgrave Ludwig IX assumed power in 1768, he inherited a debt of enormous proportions: almost 4 million Gulden was owed to around 150 creditors, threatening to precipitate direct rule on the part of the Holy Roman Emperor, bringing an end to the rule of the house of Hessen-Darmstadt. In 1772 Ludwig IX appointed the famous Friedrich Karl von Moser chancellor and president of council. Moser tried to reconstruct the declining Hessian economy through reform; sequestration was avoided by financial settlements concluded in 1772 and 1779. Among those measures that he sought to introduce were reforms to the administration and to the judiciary, which involved among other things the introduction of a new form of remuneration to judges, the creation of a court of appeal, the inauguration of a commission charged with the collation of information on prevailing economic and social conditions, and also the foundation of a journal, the *Hessen-Darmstädtische privilegierte Landeszeitung*; Moser succeeded in getting the writer and poet Matthias Claudius as an editor. Administrative reform required, not least of all, suitably qualified experts, and Moser expected that these would be created by thorough cameralistic training rather than by relying on the state's existing elites. This training was going to be provided by the Economic Faculty of the state's university, the University of Gießen; therefore, a fifth faculty, the Economic Faculty, was founded in 1777. However, the faculty existed for eight years only.<sup>21</sup>

It is not surprising that the plan to create a code, the *Codex Ludovicianus* formed part of this programme in Hessen,<sup>22</sup> as it was realized that the quality of the law and of the staff putting it into practice influenced the amount of litigation and the economy in general. Consequently, the law and the judiciary could not be neglected.

The motivations and pitfalls of reform in the smaller and medium-sized states of the German empire have been outlined by Eberhard Weis:<sup>23</sup> the aim

<sup>20</sup> For the following, cf. Jürgen Rainer Wolf, 'Hessen-Darmstadt und seine Landgrafen in der Zeit des Barock, Absolutismus und der Aufklärung (1650–1803)', in Uwe Schultz, ed., *Die Geschichte Hessens* (Stuttgart, 1983), pp. 121 ff., 130 f.; Karl Witzel, *Friedrich Carl von Moser. Ein Beitrag zur hessen-darmstädtischen Finanz- und Wirtschaftsgeschichte am Ausgang des 18. Jahrhunderts* (Darmstadt, 1929); Hans Heinrich Kaufmann, *Friedrich Carl von Moser als Politiker und Publizist (vornehmlich in den Jahren 1750–1770)* (Darmstadt, 1931); Angela Stirken, *Der Herr und der Diener. Friedrich Carl von Moser und das Beamtenum seiner Zeit* (Bonn, 1984).

<sup>21</sup> Diethelm Klippel, 'Johann August Schlettwein and the Economic Faculty at the University of Gießen', *History of Political Thought*, 15 (1994), pp. 203–27.

<sup>22</sup> Dölemeyer, 'Kodifikationspläne', p. 203.

<sup>23</sup> Eberhard Weis, 'Der aufgeklärte Absolutismus in den mittleren und kleinen deutschen Staaten', *Zeitschrift für bayerische Landesgeschichte*, 42 (1979), pp. 31 ff., also in idem, *Deutschland und Frankreich um 1800* (Munich, 1990); cf. Charles Ingrao, 'The smaller German states', in Scott, ed., *Enlightened absolutism*, pp. 221–43.



was to strengthen the state by increasing its revenues; but the realization of this aim was prevented by constitutional and social structures of the corporatist state in which the estates (the *Stände*) played a central or important role, by a fragmented and/or small territory with an equally fragmented sovereignty, both of which impeded the implementation of an independent economic policy, and by the lack of an efficient, well-educated administration. This might well be true for the larger states as well.<sup>24</sup>

2 Before turning to the question of success or failure of the reforms, I would like to look briefly at the blueprints for the reforms, the underlying political theory of enlightened absolutism: it is the 'law of nature' of that time. In Germany, numerous textbooks and treaties on natural law and universal public law — *ius publicum universale*, that part of natural law concerned specifically with the state — legitimated the absolutist ambitions of the princes as well as the reforming activities of enlightened absolutism.<sup>25</sup>

This may be illustrated by the theory of the purpose of the state.<sup>26</sup> In the natural law of enlightened absolutism, *Glückseligkeit* — happiness — both of the state as a whole and of its subjects, was frequently regarded as the chief end of all the state's activities. This led to a vast extension of the concerns of the state, as it was regarded as the task of the state to achieve even the happiness of the individuals, who, therefore, were not supposed to be free or independent in their pursuit of happiness. Accordingly, the state had to legislate very comprehensively, as shown by a book on the theory of legislation, published anonymously in 1777: 'if they [i.e. the laws] do not regulate everything which can be regulated; if they do not put the whole of society into such an order that all its parts and their changes correspond with the common weal, then disorder will more or less prevail in them'.<sup>27</sup>

Contemporary textbooks of universal public law and *Polizeiwissenschaft* convey an image of what the state had to regulate by legislation. In addition

<sup>24</sup> See Demel, *Vom aufgeklärten Reformstaat*, pp. 73 ff., 77 f., 80 ff., 83 ff.; for Prussia, see T. C. W. Banning, 'Frederick the Great and enlightened absolutism', in Scott, ed., *Enlightened Absolutism*, pp. 265–88; Eckhart Hellmuth, 'Der Staat des 18. Jahrhunderts: England und Preußen im Vergleich', *Aufklärung*, 9 (1996), pp. 5–24; the discrepancies between the plans of the enlightened absolutist reformers as regards schooling and their realization are described persuasively by Wolfgang Neugebauer, *Absolutistischer Staat und Schulwirklichkeit in Brandenburg-Preussen* (Berlin, 1985) and James Van Horn Melton, *Absolutism and the eighteenth-century origins of compulsory schooling in Prussia and Austria* (Cambridge, 1988).

<sup>25</sup> Diethelm Klippel, 'The true concept of liberty: political theory in Germany in the second half the eighteenth century', in Eckhart Hellmuth, ed., *The transformation of political culture: England and Germany in the late eighteenth century* (Oxford, 1990), pp. 447–66, especially 452–6.

<sup>26</sup> In the following, I rely on material and deliberations also used in Diethelm Klippel, 'Reasonable aims of civil society: concerns of the state in German political theory in the eighteenth and nineteenth century', in John Brewer and Eckhart Hellmuth, eds, *Rethinking Leviathan: the eighteenth-century state in Britain and Germany* (Oxford, forthcoming 1999).

<sup>27</sup> *Entwurf der allgemeinen Grundsätze der Gesetzgebung* (Frankfurt/Leipzig, 1777), pp. 117 f.

to war, taxation, and the administration of justice, it was the duty of the state to maintain 'gute Policey'; 'gute Policey' can be seen as the means to reach the final aim, i.e. *Glückseligkeit* as the purpose of the state. In this sense, a contemporary author defined *Polizei* as 'the sum of all endeavours to link the welfare of the individual directly with the *Glückseligkeit* of the whole. Its objects are the population, morality, skills, safety, comfort, nourishment, wealth, and honour'.<sup>28</sup> This opened up a vast area for the state's activities — and thus for legal reforms, starting with the economy and public health, and ending with morality, religion, the family, education, and other cultural aspects such as the arts.

One might ask where all this leaves the progressive concepts we usually associate with the Enlightenment, for instance natural rights, the abolition of torture and of the death penalty and others. On the whole, the discussion about all these topics fits well into the pattern outlined above. It was supposed to be in the interest of the state to find out what served its purpose and concerns best, and so the discussion of many subjects was encouraged by means of prize competitions run by academies, universities, societies, or by the state itself.<sup>29</sup> I am not concerned here with the dynamics public discourse could develop: of course, there were limits to what the state would tolerate. For instance, the Austrian government rejected the suggestion of a 'political code' which would have laid down, among other things, certain constitutional principles and perhaps even natural rights.<sup>30</sup> But, on the whole, enlightened discourse did not really trouble the enlightened absolutist state and its theory, as long as it did not question the absolutist rule.

3 Many German states actually put parts of their reform programme into practice or tried to do so. That raises the question of to what extent the law reforms were successful.

<sup>28</sup> Heinrich Gottfried Scheidemann, *Das allgemeine Staatsrecht überhaupt und nach der Regierungsform* (Jena, 1775), p. 95. On the concept of 'gute Policey' cf. Franz-Ludwig Knemeyer, 'Polizei', *Economy and Society*, 9 (1980), pp. 172–96; Peter Preu, *Polizeibegriff und Staatszwecklehre. Die Entwicklung des Polizeibegriffs durch die Rechts- und Staatswissenschaften des 18. Jahrhunderts* (Göttingen, 1983); Marc Raeff, *The well-ordered police state* (New Haven and London, 1983); Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* (2 vols, Munich, 1988 and 1992), I, pp. 334 ff., II, pp. 250 ff.; Hans Boldt, 'Geschichte der Polizei in Deutschland', in *Handbuch des Polizeirechts* (Munich, 1992), pp. 1 ff.

<sup>29</sup> Cf. the examples in: Hans-Heinrich Müller, *Akademie und Wirtschaft im 18. Jahrhundert. Agrarökonomische Preisaufgaben und Preisschriften der Preussischen Akademie der Wissenschaften im Zeitalter der Aufklärung* (Berlin, 1975); Rudolf Vierhaus ed., *Deutsche patriotische und gemeinnützige Gesellschaften* (Munich, 1980); Ulrich Im Hof, *Das gesellige Jahrhundert. Gesellschaft und Gesellschaften im Zeitalter der Aufklärung* (Munich, 1982). Indeed, after the publication of the first draft of the Prussian code (*Entwurf eines Allgemeinen Gesetzbuchs für die Preussischen Staaten*, Berlin, 1784–8), the public was asked to criticize the draft, and prizes were offered for the best contributions (*Monita*): see Andreas Schwennicke, *Die Entstehung der Einleitung des Preussischen Allgemeinen Landrechts von 1794* (Frankfurt a.M., 1993), pp. 29 ff.

<sup>30</sup> Ogris, 'Aufklärung, Naturrecht und Rechtsreform in der Habsburgermonarchie', p. 36.

There can be no doubt that they succeeded in some regards, for example the abolition of torture, or the enactment of minor but nevertheless important codes such as, for instance, procedural codes.<sup>31</sup> But I would like to argue that, contrary to widely accepted views, parts of the reform programme were bound to fail, and in fact did fail.

To start with, the mere scope of the reform programme is enough to render one sceptical. Even modern states with efficient administrations would find it difficult to fulfil the many goals of enlightened absolutism. In eighteenth-century German states there simply was no efficient, well-trained bureaucracy; on the contrary, one of the aims of the reform programme was to create an efficient body of civil servants, so that, at its best, this process had just started.<sup>32</sup>

Secondly, the intended reforms, and indeed many of the successful reforms, conflicted with the constitutional rights of the estates and corporations. Many aims of enlightened absolutism implied a massive infringement of these rights. This could create a dilemma: either the estates turned hostile to reforms, or reforms had to be watered down by taking into account the existing rights. In spite of bold theoretical ambitions, absolutism never really overcame these obstacles.<sup>33</sup> Still, sometimes the estates contributed to the reform policy.<sup>34</sup>

Thirdly, leaving economic reforms aside, there is also much evidence to suggest that the idea of having a universal code of law as represented by the Prussian *Allgemeines Landrecht* of 1794 is not a good argument for the success of enlightened absolutism, though this has hardly ever been questioned so far.<sup>35</sup> For a start, the *Allgemeines Landrecht* was only ever intended

<sup>31</sup> As to Prussia, new procedural codes were enacted in 1781 and 1793, and a *Hypothekenordnung* in 1783.

<sup>32</sup> See Wilhelm Bleek, *Von der Kameralausbildung zum Juristenprivileg. Studium, Prüfung und Ausbildung der höheren Beamten des allgemeinen Verwaltungsdienstes in Deutschland im 18. und 19. Jahrhundert* (Berlin, 1972); Bernd Wunder, *Geschichte der Bürokratie in Deutschland* (Frankfurt a.M., 1986).

<sup>33</sup> For the role of the estates in Prussia, see Peter Baumgart, 'Zur Geschichte der kurmärkischen Stände im 17. und 18. Jahrhundert', in Dietrich Gerhard, ed., *Ständische Vertretungen in Europa im 17. und 18. Jahrhundert* (Göttingen, 1969); esp. for their contribution to drafting the Prussian code: Günter Birtsch, 'Gesetzgebung und Repräsentation im späten Absolutismus. Die Mitwirkung der preußischen Provinzialstände bei der Entstehung des Allgemeinen Landrechts', *Historische Zeitschrift*, 208 (1969), pp. 265–94; Schwennicke, *Die Entstehung*, pp. 34 ff.

<sup>34</sup> Demel, *Vom aufgeklärten Reformstaat*, pp. 67 f.

<sup>35</sup> A number of books published on the occasion of the Prussian code's 200th anniversary provide a good impression about older and recent research and about scholarly controversies: Günter Birtsch and Dietmar Willoweit, eds, *Reformabsolutismus und ständische Gesellschaft. 200 Jahre preußisches Allgemeines Landrecht* (Berlin, 1998); Barbara Dölemeyer and Heinz Mohnhaupt, eds, *200 Jahre Allgemeines Landrecht für die preußischen Staaten. Wirkungsgeschichte und internationaler Kontext* (Frankfurt a.M., 1995); Friedrich Ebel, ed., *Gemeinwohl — Freiheit — Vernunft — Rechtsstaat. 200 Jahre Allgemeines Landrecht für die Preußischen Staaten* (Berlin, 1995); Gerd Kleinheyder, *Das Allgemeine Landrecht für die Preußischen Staaten vom 1. Juni 1794*

to be subsidiary law. As such, it replaced Roman law in some parts of the law, such as for instance private law. But Roman law maintained its leading role as the most important field even at Prussian universities, whereas lectures on the Prussian *Allgemeines Landrecht* were rarely given. Moreover, the notion of drafting a code which completely covered the fields of law it dealt with and which was so clear that it needed no interpretation soon turned out to be an illusion despite the nearly 20,000 sections of the code. Proof for this can be found in many successful periodicals which satisfied the needs of Prussian lawyers to be informed about legislation changing the *Landrecht*, about questions of interpretation and about interesting cases.<sup>36</sup> Moreover, the code was soon out of step with contemporary ideas about the methods and contents of legislation. A comparison between the *Allgemeines Landrecht* and the French codes can demonstrate this clearly. Still, some of the contents of the code were sensible legal innovations or proved to be useful in the nineteenth century; so, in this respect, the values of the code should not be underestimated.

But the assertions that the Prussian *Allgemeines Landrecht* guaranteed civil liberties or civil liberties of a kind, that it fulfilled the functions of a written constitution or that it really intended to further the rule of law are, at their best, grossly exaggerated.<sup>37</sup> Research by, amongst others, Eckhart

(Heidelberg, 1995); Detlev Merten and Waldemar Schreckenberger, eds, *Kodifikation gestern und heute. Zum 200. Geburtstag des Allgemeinen Landrechts für die Preussischen Staaten* (Berlin, 1995); Jörg Wolff, ed., *Das preußische Allgemeine Landrecht. Politische, rechtliche und soziale Wechsel- und Fortwirkungen* (Heidelberg, 1995). See also Gerhard Dilcher, 'Die janusköpfige Kodifikation', *Zeitschrift für Europäisches Privatrecht*, 2 (1994), pp. 446–69.

<sup>36</sup> In addition to the *Annalen der Gesetzgebung und Rechtsgelehrsamkeit in den Preussischen Staaten*, ed. Ernst Ferdinand Klein (26 vols, 1788–1809), which, originally, were meant to inform about questions relating to legislation and to the drafting and the progress of the Prussian code, there were the following journals: *Beiträge zur Kenntniß der Justizverfassung und juristischen Literatur in den Preussischen Staaten*, ed. F. P. Eisenberg and L. Stengel (18 vols, 1796–1804); *Archiv des Preussischen Rechts*, ed. Karl Ludwig Amelang and K. August Gründler (3 vols, 1799–1800); *Neues Archiv der Preussischen Gesetzgebung und Rechtsgelehrsamkeit*, ed. Karl Ludwig Amelang (4 vols, 1800–5); *Allgemeine juristische Monatsschrift für die Preussischen Staaten*, ed. August von Hoff and H. F. Mathis (11 vols, 1805–11); *Jahrbücher für die Preussische Gesetzgebung, Rechtswissenschaft und Rechtsverwaltung*, ed. Karl Albert von Kamptz (66 vols, 1813–45). Before Klein's *Annalen*, only three short-lived journals specializing on the law of Prussia were published, see Joachim Kirchner, ed., *Bibliographie der Zeitschriften des deutschen Sprachgebiets* (Stuttgart, 1969), 1, nos 2548, 2564 and 2568.

<sup>37</sup> The controversies related to these questions are discussed by Demel, *Vom aufgeklärten Reformstaat*, pp. 81 f.; Schwennicke, *Die Entstehung*, pp. 4 f., 71 ff., 297 ff.; Günter Birtsch, 'Zum konstitutionellen Charakter des preußischen Allgemeinen Landrechts von 1794', in *Politische Ideologien und nationalstaatliche Ordnung. Studien zur Geschichte des 19. und 20. Jahrhunderts. Festschrift für Theodor Schieder* (Munich/Vienna, 1968), pp. 97 ff.; Dietmar Willoweit, 'War das Königreich Preußen ein Rechtsstaat?', in *Staat, Kirche, Wissenschaft in einer pluralistischen Gesellschaft. Festschrift für Paul Mikat* (Berlin, 1989), pp. 451 ff.; Rudolf Vierhaus, 'Das Allgemeine Landrecht für die Preussischen Staaten als Verfassungersatz?', *200 Jahre Allgemeines Landrecht für die preussischen Staaten*, pp. 1 ff.; see also above, note 35.

Hellmuth and Andreas Schwennicke has shown that the ideas of the authors of the code were not compatible with a concept of a civil society based on liberty and equality.<sup>38</sup> As far as those parts of the *Landrecht* are concerned in which some authors believe to have detected traces of the rule of law: these sections were shaped by objections expressed by the Prussian estates, which saw that the absolutist state intended to infringe upon their rights; these sections, therefore, maintain the status quo of the *ancien régime* against the interests of the enlightened absolutist state.<sup>39</sup> Moreover, the authors of the Prussian code never intended to guarantee civil or human rights in a modern liberal sense: the 'natural liberty' which is mentioned in two sections of the code is subject to requirements of the purpose of the state, the common good. In fact, contemporary German political theory was far more advanced than the code.<sup>40</sup>

### Legislation in the *Vormärz*

1 The authoritative bibliography on German periodicals, Kirchner, lists 123 periodicals dealing with law that were published for the first time in the four decades around 1800. According to their titles, 40 of these were devoted to legislation and the law in a particular German state, whereas we find only four of that kind in the rest of the eighteenth century, i.e. up to 1780.<sup>41</sup>

The significance of these periodicals is not just apparent in their overall publication figures, but stressed further by the fact that more and more periodicals of this kind were produced as the nineteenth century progressed: only five of them were published between 1781 and 1790, another five between 1791 and 1800, but 16 in the first decade of the nineteenth century, fourteen in the years between 1811 and 1820 and fifteen between 1821 and 1830. Moreover, a lot of these periodicals lasted rather longer than other law journals of that time.

These numbers indicate that the periodicals fulfilled a certain demand. A look at the forewords and the tables of contents reveals what the journals could offer: First of all, they printed amendments to codes, other statutes and all kinds of subordinate legislation and official regulations. Moreover, they

<sup>38</sup> Eckhart Hellmuth, *Naturrechtsphilosophie und bürokratischer Werthorizont. Studien zur preußischen Geistes- und Sozialgeschichte des 18. Jahrhunderts* (Göttingen, 1985); Schwennicke, *Die Entstehung*; Thomas Finkenauer, 'Vom Allgemeinen Gesetzbuch zum Allgemeinen Landrecht — preußische Gesetzgebung in der Krise', *Zeitschrift für Rechtsgeschichte. Germanistische Abteilung*, 113 (1996), pp. 40–216, 127 ff.

<sup>39</sup> Schwennicke, *Die Entstehung*.

<sup>40</sup> Diethelm Klippel and Louis Pahlow, 'Freiheit und aufgeklärter Absolutismus. Das Allgemeine Landrecht in der Geschichte der Menschen- und Bürgerrechte', in Birtsch and Willoweit, eds, *Reformabsolutismus und ständische Gesellschaft*, pp. 215–53.

<sup>41</sup> Kirchner, ed., *Bibliographie der Zeitschriften*, 1, 140–50.

published precedents, commentaries and essays about parts of the codes and statutes, reviews, statistics, and so on. In brief, they tried to inform about the increasing legislative activities of the German states and especially about problems regarding the interpretation and implementation of the codes and statutes.

Apart from the law journals, many German states began to print official gazettes (*Gesetz- und Verordnungsblätter*), in which they published statutes and important other official regulations. To give some examples: the 'Großherzoglich Badisches Staats- und Regierungs-Blatt' started in 1803, the 'Königlich-Baierisches Regierungsblatt' and the 'Gesetz-Sammlung für die Königlichen Preußischen Staaten' in 1806, the 'Sammlung der Gesetze, Verordnungen und Ausschreiben für das Königreich Hannover' and the 'Gesetzsammlung für das Königreich Sachsen' in 1818, the 'Großherzoglich Hessisches Regierungsblatt' in 1819. These were by no means comprehensive, so that there still was enough official material to be printed by the law journals. Together with these the gazettes successfully ensured that the state's statutes and orders were well publicized and distributed throughout the country — something which the states never had really achieved before.

2 Both the law journals and the official gazettes prove the state's continuing and even increasing interest in legislation. In fact, the German states saw the necessity to unify the law and to pass new codes in many fields of the law, because the Holy Roman Empire had ceased to exist, because nearly every state which continued to exist after that and after 1815 had acquired new territories, and because there could no longer be any doubt that they had become sovereign. The reasons for legislation which had been brought forward by enlightened absolutism — among others, the uncertainty and the particularization (*Rechtszersplitterung*) of the law — not only continued to exist but had become more pressing because of the political developments mentioned above.

It is not surprising, therefore, that the German states addressed themselves to the task of legislation and succeeded in modernizing both the law and the administration. The codes and statutes they enacted covered most fields of the law, ranging from criminal and procedural codes to industrial codes and trade laws. Most German states even tried to draft civil codes like the French civil code, but only Saxony succeeded in actually putting the *Sächsisches Bürgerliches Gesetzbuch* into force in 1865.<sup>42</sup> Consequently, in those states which had not got a code covering private law, Roman law in combination with local statutes remained in force up to 1900.<sup>43</sup> But, of

<sup>42</sup> See Christian Ahcin, *Zur Entstehung des Bürgerlichen Gesetzbuchs für das Königreich Sachsen von 1863/65* (Frankfurt a.M., 1996).

<sup>43</sup> For details, see *Deutsche Rechts- und Gerichtskarte. Mit einem Orientierungsheft* (Kassel, 1896), reprinted with an introduction and ed. Diethelm Klippel (Goldbach, 1996).

course, this does not mean that the comprehensive legislative efforts of the states did not succeed in other fields of the law.

Though not much of the outcome of these efforts has as yet been closely looked at by historians or legal historians, and though there are still a number of gaps in our knowledge of these developments, I would like to argue that efforts at legal reforms continued building on the reforms or the reforming ambitions of enlightened absolutism, though underpinned by a different political theory, and managed to make the German states adapt to the social, economic and political needs of the nineteenth century.

The theoretical basis, again, was provided by the treatises and textbooks on the 'law of nature', but by a natural law quite different from that which had justified enlightened absolutism. In the last decade of the eighteenth century German natural law had turned into a political theory of liberalism, taking up many ideas of English and French political theorists, though, as to their method, most authors followed Immanuel Kant.<sup>44</sup> They did not cease to point out and criticize the deplorable discrepancies between natural and positive law; they did not tire in stressing the superior validity of natural law and demanded that its rules should be observed by the state.

If, as a result, natural law positions should be realized in positive law, legislation could not but become the vital link between natural law theory and legal practice. Therefore, legislation and its theory formed a major part of natural law. New codes and statutes were regarded as a means to implement natural law ideas. This was one of the crucial aims of natural law at the end of the eighteenth and in the first half of the nineteenth century: to base legislation firmly on natural law ideas, that is, to put into practice the political ideas of liberalism. In 1837, Carl Friedrich Wilhelm Gerstacker put it like this: the 'science of natural law' is 'the one and only source by which positive legislation can be criticized, the one and only source of good statutes'.<sup>45</sup>

If legislation was deemed to be the most important connecting link between natural and positive law, then it became necessary to look more closely at the contents and the form of the state's legislative activities. This was the specific task of the so-called science of legislation as part of natural law. Thus, in 1806, Karl Salomo Zachari made it quite clear that, in his opinion, the science of legislation was to be 'the science of those principles

<sup>44</sup> Diethelm Klippel, *Politische Freiheit und Freiheitsrechte im deutschen Naturrecht des 18. Jahrhunderts* (Paderborn, 1976).

<sup>45</sup> Carl Friedrich Wilhelm Gerstacker, *Systematische Darstellung der Gesetzgebungskunst sowohl nach ihren allgemeinen Prinzipien, als nach den, jedem ihrer Haupttheile, der Civil-, Criminal-, Polizei-, Prozeß-, Finanz-, Militair-, Kirchen- und Constitutions-Gesetzgebung eigenthümlichen Grundsätzen* (Frankfurt a.M., 1837), I, p. 154; similar views are expressed by Carl Dresler, *Ueber das Verhältniß des Rechts zum Gesetze* (Berlin, 1803), pp. 162 ff., 191 ff., 202 ff.; Karl Salomo Zachari, *Die Wissenschaft der Gesetzgebung* (Leipzig, 1806), pp. 222 ff.

which guide the drafting and enacting of laws'.<sup>46</sup> It follows that virtually every question concerning legislation, about its contents, forms, and procedures, was being discussed in the science of legislation.<sup>47</sup>

3 Though there are many other examples, criminal law is perhaps one of the best to illustrate the connection between the codifications of the German states in the first half of the nineteenth century and the natural law theory of legislation as well as eighteenth-century authors. In the first decades of the nineteenth century, many German states thought of drafting a modern criminal code. Starting with the Bavarian code of 1813, nearly every German state then succeeded in putting one into force in the first half of the century.<sup>48</sup> Most of these codes were discussed thoroughly by the public; drafts were criticized from the point of view of natural criminal law and the science of legislation as well as from a practical point of view; some authors even wrote and published alternative drafts of their own.<sup>49</sup> In books and journals, the modern discussion about the purpose of criminal punishment and criminal law, which had started with Beccaria, continued, together with the discussion on capital punishment and on prison reform.<sup>50</sup> It even led to a new branch of psychology, criminal psychology, being founded, which was

<sup>46</sup> Zachariä, *Die Wissenschaft der Gesetzgebung*, p. 18; cf. Friedrich Purgold, *Die Gesetzgebungswissenschaft, in Entwicklung der für den Entwurf eines neuen, namentlich deutschen, Gesetzbuches sich ergebenden Grundsätze* (Darmstadt, 1840), p. 19: 'The science of legislation . . . shows how natural law [Vernunftrecht] develops into positive law'.

<sup>47</sup> Zachariä, *Die Wissenschaft der Gesetzgebung*, pp. 26 ff.; Gerstäcker, *Systematische Darstellung der Gesetzgebungskunst*, I, pp. 194, 210.

<sup>48</sup> See Hinrich Rüping, *Grundriß der Strafrechtsgeschichte* (2nd edn, Munich, 1991), pp. 79 f; Rainer Schröder, 'Die Strafgesetzgebung in Deutschland in der ersten Hälfte des 19. Jahrhunderts', in *Die Bedeutung der Wörter. Festschrift für Sten Gagnér* (Munich, 1991), pp. 403–20.

<sup>49</sup> To give just a few examples: Eduard Henke, *Beyträge zur Criminalgesetzgebung, in einer vergleichenden Uebersicht der neuesten Strafgesetz-Bücher und Entwürfe* (Regensburg, 1813); Karl Salomo Zachariä von Lingenthal, *Strafgesetzbuch. Entwurf. Mit einer Darstellung der Grundlagen des Entwurfes* (Heidelberg, 1826); a review by Carl Trummer of eight books on the code planned for Hanover, *Kritische Zeitschrift für Rechtswissenschaft*, vol. 3/3 (1827), pp. 367–462; Carl Josef Anton Mittermaier regularly published overviews on criminal legislation, e.g. 'Ueber die neuesten Fortschritte der Strafgesetzgebung', *Archiv des Criminalrechts. Neue Folge* (1837), pp. 537–60, (1838), pp. 1–35; Ignaz Beidtel, *Untersuchungen über einige Grundlagen der Strafgesetzgebung mit Rücksicht auf die neueren Entwürfe zu Strafgesetzbüchern und einige neue Strafgesetze* (Leipzig, 1840).

<sup>50</sup> Cf. Monika Frommel, *Präventionsmodelle in der deutschen Strafzweck-Diskussion. Beziehungen zwischen Rechtsphilosophie, Dogmatik, Rechtspolitik und Erfahrungswissenschaften* (Berlin, 1987); Martin Fleckenstein, *Die Todesstrafe im Werk von Carl Joseph Anton Mittermaier (1787–1867). Zur Entwicklungsgeschichte eines Werkbereichs und seiner Bedeutung für Theorie- und Methodenbildung* (Frankfurt a.M., 1992); Richard J. Evans, *Rituals of retribution: capital punishment in Germany, 1600–1987* (Oxford, 1996); Franz von Holtzendorff, ed., *Handbuch des Gefängniswesens* (Hamburg, 1888); Hemma Fasoli, *Zum Strafverfahrensrecht und Gefängniswesen im 19. Jahrhundert. Der Jurist Ludwig von Jagemann (1805–1853). Seine Rolle in Deutschland unter Berücksichtigung der Entwicklungen in England, Frankreich und USA* (Kehl am Rhein, 1985).



sometimes thought of as being a part of natural law.<sup>51</sup> Its theories greatly influenced those sections of the criminal codes which dealt with psychological questions: for example, under which circumstances a person was free from criminal liability, such as for instance delinquents afflicted by certain mental disorders.<sup>52</sup> It seems that in the first part of the nineteenth century the seeds of the enlightened discourse in the eighteenth century ripened, at last, in the criminal codes.<sup>53</sup>

<sup>51</sup> Thus in the bibliography by Hermann Theodor Schletter, *Handbuch der juristischen Literatur in systematisch-chronologischer Ordnung, von der Mitte des vorigen Jahrhunderts bis zum Jahre 1840* (2nd edn, Grimma/Leipzig, 1851), no. 12639–743.

<sup>52</sup> Ylva Greve, 'Die Unzurechnungsfähigkeit in der Criminalpsychologie' in Michael Niehaus and Hans-Walter Schmidt-Hannisa, eds, *Unzurechnungsfähigkeiten* (Frankfurt a.M., 1998), pp. 107–32.

<sup>53</sup> More generally on the question of continuity between Enlightenment and the 'age of reforms': Rudolf Vierhaus, 'Aufklärung und Reformzeit. Kontinuitäten und Neuansätze in der deutschen Politik des späten 18. und beginnenden 19. Jahrhunderts', in Weils, ed., *Reformen im rheinbündischen Deutschland*, pp. 287–301.