Traditionalism—Rationalism.
Two Paths to the Prussian Reforms ? [1]

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Friedrich Schiller's paradoxical metaphor of the "living clockwork" of the state of 1795 makes his point of view clear: the state cannot be treated as a clockwork, it is a living structure following its own regularities, a „living organism", not a „dead" mechanism. [2] Both metaphors turned into slogans in the political arena during the 1790s and shaped the reform era. They give expression to what was considered self-evident at the time. Using Max Weber's typology of rule, [3] one might say—simplifying considerably—that there were two opposing types of political action and ways of dealing with history: a rational one and a traditional one. The rational type of action follows the statement of an abstract goal that needs to be accomplished through a rational calculation of purpose and means. What is old, that is, what has historically grown, has no legitimacy in its own right, except if it has shown to serve a purpose. Political rationalism has a certain affinity to the machine metaphor: action is categorized as the process of planned technical production. [4] Acting in terms of the traditionalist type, however, perceives itself as return to the past, which, in its own terms appears as reasonable and legitimate, as it appears to have in its support the consensus of many generations. Traditionalism has a certain affinity to the metaphor of a living organism, into which arbitrary interventions are not allowed. This, of course, is not a statement about whether or not changes are actually ongoing; it is merely a statement about the modalities of legitimation.

It is well known that the transformation from the pre-modern to the modern age can be described as a fundamental change of modalities of legitimation. [5] What I would like to sketch in what follows is that traditionalist and rationalist ways of thinking coexisted in the second half of the eighteenth century, and both of them impacted on the political minds of the reformers.

I.

The reformers who had studied at universities in the Holy Roman-German Empire during the later eighteenth century were familiar with two academic disciplines, one might be called traditionalist, namely the imperial constitutional law (*ius publicum Romano-Germanicum*), and the other rationalist, namely natural law or natural public law (*ius naturale* or *ius publicum universale*). I am keen to learn whether there was a similar dualism in the late Tokugawa Period. Could it be that Mito-Gaku is comparable to the German school of imperial historiography; were there, on the other side, in the Japanese reform bureaucracy parallels to the rationalist natural law doctrine? [6]

It is possible to categorize both disciplines as „political languages" in the sense of the Cambridge School of Intellectual History.[7] That concept would direct attention to everything that shapes and structures political statement by implication. A political language is a set of methodical rules, concepts, rhetorical conventions, patterns of argument, but also assumptions, motives, in a word, a collective code in which everyone who has been introduced to it can communicate with ease.

The Prussian reformers as well as their opponents gained their academic education at the universities of Göttingen, Königsberg, Halle, Leipzig, etc. There, they acquired a common academic habitus which partly bridged the differences of social status, territorial provenance, and confession and caused a bureaucratic *esprit de corps*. Since the seventeenth century, the German lower nobility had abandoned their reservations against university studies and thus regained ground in attaining high administrative and judicial offices in the German principalities. For aristocratic students, jurisprudence was the preferred field of study, and Göttingen was the preferred place. There, they learned the two political languages of natural law and imperial law. These two disciplines offered two opposite ways to describe the political body. They fundamentally differed in their objects, methods, vocabularies, and social functions.

On the one hand, representatives of imperial constitutional law described the Empire in its historically grown and hence extremely contradictory condition. Representatives of natural state law, on the other hand, sought to categorize the state as such, the *societas civilis*, in its reason-based timeless basic structure. Imperial publicists collected, ordered and commented upon the law as it had grown in the course of the centuries and in accordance with the hierarchical order that was given within this structure, that is, from the emperor as the head down to the many members at the local level.[8] The hierarchy as the model for the ordering of the large amount of heterogeneous material. Imperial historiography served as an auxiliary science for this enterprise. The best know case is Johann Jakob Moser's 53-volume *Teutsches Staatsrecht*, which soon had to be supplemented by another 43-volume *Neues Teutsches Staatsrecht*, not to mention the hundreds of Moser's shorter papers.[9]

On the other side, representatives of seventeenth- and eighteenth-century natural public law proceeded according to what might be called the method of the abstract legitimation of the law through the instances of human nature, beyond customary or positive law. They borrowed their method from seventeenth-century science. Like science, natural law claimed to be able to penetrate through the muddle of contending opinions through the use of exact methods—*more geometrico* - and to reveal the unchanging laws of societal movement.[10]

The differences between the two disciplines can be illustrated on three examples. First, imperial constitutional law considered treaties as manifest agreements among rulers as established bearers of political rights. Natural public law considered treaties as hypothetical contracts

through which political rights were to be established. Second, imperial constitutional law did not take into consideration freedom in the singular but took for granted the existence of many freedoms in the sense of privileges, for instance the relief from common burdens. By contrast, natural public law treated freedom as something that appeared to have originally been common to all humankind. Third, imperial constitutional law gave priority to rank as a legal issue, as rank and dignity appeared as valuable social goods and were, by consequence, factors of endless conflicts among members of the Empire. By contrast, the issue of rank did not exist at all in natural public law. Introducing or abolishing ranking schemes among the ruled appeared to fall into the competence of the ruler.

There was much polemic among representatives of both disciplines. On the one side, Moser dubbed natural law a „miscreation of popular philosophers and reformers of humankind" and accused it of „sacrificing the wellbeing and fortune of entire nations to the individual will of a single human being" by serving the interest of territorial rulers.[11] On the other side, for representatives of natural law such as Samuel Pufendorf, imperial constitutional law was the production of much meaningless written work merely sanctioning „established abuses", the rule and privileges of thousands of petty aristocratic despots and to conserve the Empire in its „Gothic monstrosity".[12] Nevertheless there were jurists who wrote textbooks for both disciplines, among them Nikolaus Hieronymus Gundling at Halle[13] and the famous Johann Stephan Pütter at Göttingen.[14] Imperial constitutional law was usually accommodated in the law faculties, where it occupied the highest rank, whereas natural law was usually taught within the discipline of Practical Philosophy. In this respect, natural law gained considerable influence as it was included among the preparatory fields of study.

II

What did become of these two disciplines in view of the unprecedented transformations through the French Revolution? Where are traces of the two „political languages" in the work of the reformers, despite the rupture of experiences, despite the discrediting of established political doctrines? I cannot provide a systematic answer but will discuss some cases as examples.

Imperial constitutional law lost its point of reference in 1806 with the demise of the Empire. Henceforth, the *Ius publicum Romano-Germanicum* ceased to exist as a field of study. Jurists who had been employed in imperial service had to look for positions in the new sovereign monarchies. But the scholars „transferred their views onto the new matter"[15], continuing to apply the methods of imperial constitutional law to the ordering of heterogeneous legal material to the public law of the German Confederation. The liberal jurist Johann Ludwig Klüber, one of Hardenberg's close aids, thought as late as in 1817 that a large part of imperial

constitutional law „was not merely useful to the man of state and the learned jurist but indispensable“.[16] The same applied to natural public law. The field of study continued to be taught at universities—as „General Theory of the State“ in the new Philosophical Faculties, as „General State Law“ in the law faculties. Yet two serious complaints were being addressed to natural law. Its liberal-republican variant was accused of having contributed to revolution, regicide, terror, in short, the „French madness“. Its bureaucratic welfare-state oriented variant was attacked because it appeared to have contributed to the collapse of the Prussian state. The Prussian „machine state“, once the model of enlightened reform absolutism, now counted as an aberration, much as political rationalism as a whole appeared to have been thoroughly discredited. Schiller's metaphor refers to this rupture in the political language.

However, the change of the leading metaphors obfuscates how much the reformers owed to the rationalist natural public law doctrine. Natural law had helped founding an abstract method for the foundation of a state. In this capacity natural public law doctrine „was compatible with the mentality of the bureaucracy“.[17] Merely minor shifts were necessary to transform the welfare-state oriented and absolutist natural public law doctrine into a liberal one. What was required was only the redefinition of the state purpose and to replace general happiness with the preservation of civil liberties. Most reformers drew on this variant on the natural public law doctrine, and there are no doubts about the continuity of the liberal natural law doctrine throughout the nineteenth century.[18] The reform memoranda use this language and more or less follow the deductive approach; they read like manuals of the natural public law: „The general principle for the change of the constitution flows from the highest idea set for the whole as the leading principle“, wrote Altenstein at the beginning of his memorandum of 1807. From one „clear, appropriate idea, rounded off in itself“ were to follow all single reform measures step by step and with necessity.[19]

Usually Freiherr vom Stein is being juxtaposed as a traditionalist against Hardenberg and Altenstein as the rationalists. Stein has been credited with an „imperial mind“. His origins were in the lower aristocracy of the imperial knights, not in the Berlin enlightened milieu. However, recent research[20] has emphasized again and again that it is not possible to construct a consistent structure of ideas from out of which Stein should have generated his reform plans. Instead, Stein's own writings reflect certain contradictions, for one, that he classes the reform as a new creation on the one side while, on the other, he places it into the context of historical continuity. While Johann Jakob Moser had referred with contempt to the „most abstruse Teutonic antiquities, useful to no one but serving mere curiosity“,[21] Stein wanted to document precisely these medieval antiquities. Like Montesquieu and Hegel he spotted the origins of the representative constitution in the „forests of ancient Germany“.[22] History became a political quarry, a reservoir for the invention of traditions. Stein's relationship with history was fundamentally different from that of the representatives of imperial constitutional law; he was far more indebted to political rationalism than to the pre-revolutionary traditionalism.

By way of conclusion, I would like to say that the eighteenth-century „political languages" did have an impact on the reform period, not with regard to certain positions and programs but through the socially integrating effect, the formation of a bureaucratic self-consciousness, a certain mental habit and a rational willingness to shape politics. The „political languages" created a common platform for communication for wide circles of the political legal elite that far continued beyond the demise of the Empire and the collapse of the Prussian state.

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2 Friedrich Schiller, *Briefe über die ästhetische Erziehung des Menschen*, 3. Brief [1795], Schiller, *Sämtliche Werke*, vol. 5 (Munich, 1962), pp. 573-576 („Wenn der Künstler an einem Uhrwerk zu bessern hat, so lässt er die Räder ablaufen; aber das lebendige Uhrwerk des Staats muss gebessert werden, indem es schlägt, und hier gilt es, das rollende Rad während seines Umschwunges auszutauschen.")

3 Max Weber, *Wirtschaft und Gesellschaft*, fifth, revised edititon, ed. by Johannes Winckelmann (Tübingen, 1980), p. 124.

4 For further evidence, see Barbara Stollberg-Rilinger, *Der Staat als Maschine. Zur politischen Metaphorik des absoluten Fürstenstaats* (Berlin, 1986) (Historische Forschungen. 30.)

5 Max Weber, op.cit.

6 Cf. for the impact of the metaphor of the political body on the Meiji reformers in the later 19th century: Reinhard Zöllner, 'Lorenz von Stein und *kokutai*', in: *Oriens extremus* 33.1 (1990), pp. 65-76.

7 John Greville Agard Pocock, *Politics, Language, and Time* (London and New York, 1971) [reprint (Chicago, 1989)]. For studies see: Iain Hampsher-Monk, 'Political Languages in Time. The Work of J. G. A. Pocock', in: *British Journal of Political Science* 14 (1984), pp. 112-116. Melvin Richter, 'Reconstructing the History of Political Languages. Pocock, Skinner, and the *Geschichtliche Grundbegriffe*', in: *History and Theory* 29 (1990), pp. 38-70.

8 See, instead of many others, Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. I (Munich, 1988).

9 Johann Jakob Moser, *Teutsches Staatsrecht*, 50 vols., 2 suppl. vols., (Frankfurt and Leipzig, 1737-1754). Moser, *Neues Teutsches Staatsrecht*, 20 vols., 3 suppl. vols. (Frankfurt and Leipzig, 1766-1782); [reprint (Osnabrück, 1967)].

10 See Diethelm Klippel, *Politische Freiheit und Freiheitsrechte im deutschen Naturrecht des 18. Jahrhunderts* (Paderborn, 1976). Eckhart Hellmuth, *Naturrechtsphilosophie und bürokratischer Werthorizont. Studien zur preußischen Geistes- und Sozialgeschichte des 18. Jahrhunderts* (Göttingen, 1985). *Naturrecht—Spätaufklärung—Revolution*, ed. by Otto Dann / Diethelm Klippel (Hamburg, 1995). *Naturrecht und Staat. Politische Funktionen des europäischen Naturrechts*, ed. by Diethelm Klippel (Munich, 2006).

11 [Johann Jakob Moser], *Gedanken über das neu-erfundene vernünftige Staats-Recht des Teutschen Reichs* (Frankfurt/Main, 1767), p. 26.

12 Samuel Pufendorf, *De statu imperii Germanici* (Utopiae [i.e. Geneva], 1668).

13 Nicolaus Hieronymus Gundling, *Ius naturae ac gentivm* (Halle, 1728) [further edns (Halle, 1736); (Geneva, 1751)]. Gundling, *Ausführlicher Discurs über das Natur-und Völcker-Recht* (Frankfurt, 1732) [further edns (Frankfurt, 1734); (Frankfurt, 1747)]. Gundling, *Abriß zu einer rechten Reichs-Historie* (Halle, 1707) [further edns (Halle, 1708); (Halle, 1724)].

14 Johann Stephan Pütter, *Erklärung des teutschen Staatsrechtes* (Vienna, 1793). Pütter, *Erörterungen und Beispiele des Teutischen Staats- und Fürstenrechts* (Göttingen, 1797). Pütter, *Institutiones iuris*

publici Germanici (Göttingen, 1770) [further edns (Göttingen, 1776); (Göttingen, 1782); (Göttingen, 1792)]. Pütter, *Kurtzer Begriff des teutschen Staatsrechts* (Göttingen, 1764) [further edn (Göttingen, 1768)]. See also Karl Friedrich Häberlin, *Handbuch des Deutschen Staatsrechts. Nach dem System des Geheimen Justizrath Pütter* (Frankfurt, 1794).

15 See Michael Stolleis, *Geschichte des Öffentlichen Rechts* (note 8), vol. 2, p. 48.

16 Johann Ludwig Klüber, *Öffentliches Recht des teutschen Bundes und der Bundesstaaten*, Part 1, third edn (Frankfurt, 1831), p. XVI.

17 Hellmuth, *Naturrechtsphilosophie und bürokratischer Werthorizont* (note 10), p. 279.

18 Ernst-Wolfgang Böckenförde, *Die deutsche verfassungsgeschichtliche Forschung im 19. Jahrhundert. Zeitgebundene Fragestellungen und Leitbilder* (Berlin, 1961). *Naturrecht im 19. Jahrhundert. Kontinuität—Inhalt—Funktion—Wirkung*, ed. by Diethelm Klippel (Goldbach, 1997).

19 Georg Winter, *Die Reorganisation des Preußischen Staates unter Stein und Hardenberg*. Erster Teil: Allgemeine Verwaltungs- und Behördenreform, vol. 1 (Leipzig, 1931), pp. 369-370, 396.

20 Heinz Duchhardt, *Stein. Eine Biographie* (Munster, 2007). Paul Nolte, *Staatsbildung als Gesellschaftsreform. Politische Reformen in Preußen und in den süddeutschen Staaten. 1800—1820* (Frankfurt and New York, 1990) (Historische Studien. 2). Willibald Steinmetz, ‚Steins Institutionsbegriff und das Beispiel des englischen Parlaments‘, in: *Karl vom und zum Stein: der Akteur, der Autor, seine Wirkungs- und Rezeptionsgeschichte*, ed. by Heinz Duchhardt / Karl Teppe (Mainz, 2003), pp. 1-27.

21 Johann Jakob Moser, *Teutsches Staatsrecht*, vol. 2 (Frankfurt and Leipzig, 1738), p. 241 [reprint (Osnabrück, 1968)].

22 Karl Freiher vom und zum Stein, ‘Über die Herrenbank‘ [February 1816], in: Freiherr vom Stein, *Briefe und amtliche Schriften,* 10 vols., ed. by Erich Botzenhart, new ed. by Walther Hubatsch (Stuttgart, 1957-1974), vol. 5, pp. 464 f. See also Stein, ‘Westfälische Denkschrift‘ [1816], in: Stein, *Briefe und amtliche Schriften* (as above), vol. 5, p. 539. Cf. Stein, Letter to the Czar [1812], in: Stein, *Briefe und amtliche Schriften* (as above), vol. 3, p.742 f. Stein, Letter to B. G. Niebuhr [1822], in: Stein, *Briefe und amtliche Schriften* (as above), vol. 6, p. 467.