The Anthology of Swiss Legal Culture
(LegalAnthology.ch)

Legal Philosophy and General Jurisprudence

Contributions to the Historical Development of Legal Philosophy and General Jurisprudence in Switzerland During the Twentieth Century

(With an Extended Bibliography
And Literature For Further Reading)

by Michael Walter Hebeisen

Separate Printing
Offered by the Anthology of Swiss Legal Culture
For the Participants of the 2019 World Congress
of the International Association for the Philosophy of Law and Social Philosophy (IVR)
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On "Dignity, Democracy, Diversity"

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Anthology of Swiss Legal Culture

„On the Mutual Relation Between Swiss Legal Culture and Philosophy, or: On the Interdependency Between Swiss Legal Thought and the History of Ideas“

by *Michael Walter Hebeisen*, Dr. iur.

7.16 Hans Saner: Identität und Widerstand – Fragen in einer verfallenen Demokratie, Basel: Lenos Verlag, 1988, pp.

Eighth Section

Openness, Permeability, and Transception of Swiss Legal Thought

8.0 *Wolfgang Fikentscher: Methoden des Rechts in vergleichender Darstellung, 5 vols., Tübingen: J. C. B. Mohr, 1977, vol. 1, pp. IX-XX, 1-34

8.1 Hans Fehr: Der Kampf des dynamischen Rechts mit dem statischen Recht, in: Festschrift för Otto Hjalmar Grandelt, Helsingfors: Juridiska Föreningen 1934, pp.

8.2 Rolf Deppeler: „Due Process of Law" – Ein Kapitel amerikanischer Verfassungsgeschichte, Beitrag zur Erhellung des Problems der Verfassungsinterpretation (Dissertation der Philosophisch-Historischen Fakultät der Universität Bern), Bern: Stämpfli & Cie, 1957, pp.

8.3 Marc Ancel: Utilité et méthodes du droit comparé – Éléments d'introduction générale à l'étude comparative des droits (Travaux publiés sous les auspices de la Faculté de droit et des sciences économiques de l'Université de Neuchâtel, vol. 4), Neuchâtel: Éditions Ides et Calendes, 1971, pp.

8.4 *Arnold Gysin: Bindung und Offenheit des Rechts in rechtsphilosophischer Sicht, in: Homo Creator, Festschrift für Alois Troller, ed. Paul Brügger, Basel: Helbing & Lichtenhahn, 1976, pp. 303-320

8.5 Hans-Urs Willi: Kollektive Mitwirkungsrechte von Gliedstaaten in der Schweiz und im Ausland – Geschichtlicher Werdegang, Rechtsvergleichung, Zukunftsperspektiven, Eine institutsbezogene Studie (Dissertation Universität Bern; Abhandlungen zum schweizerischen Recht, N. S. vol. 519), Bern: Stämpfli, 1988, pp.

8.6 François Ost: (together with Michel van den Kerchove): Le système juridique entre ordre et désordre, Paris: Presse Universitaire de France, 1988 (in englisch translation – Legal system between order and disorder, Oxford: Oxford University Press, 1994), pp.

8.7 Alfred Dufour: Le paradigme scientifique dans la pensée juridique moderne, in: Théorie du droit et science, ed. Paul Amselek, Paris: Presses Universitaires de France, 1994, pp. 147 ss.

8.8 *Peter Häberle*: Europäische Rechtskultur – Versuch einer Annäherung in zwölf Schritten, Baden-Baden: Nomos, 1994, pp. 9-73, 355-364 (81) 378

8.9 Marcel Niggli: Bindung und Norm – Recht, Verhaltenssteuerung und Postmoderne (vol. 1: Menschliche Ordnung – Zu den metaphysischen Grundlagen der modernen Gesellschafts-, Norm- und Straftheorie), Basel: Helbing & Lichtenhahn, 2000, pp.

8.10 Alain Papaux: Introduction à la philosophie du 'droit en situation' – De la codification légaliste au droit prudentiel, Zürich: Schulthess, 2001, pp.

Société suisse des juristes pour son Congrès 1991 à Genève, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1991, pp. 431 ss.

10.7 *Peter Saladin*: Schönheit und Recht, in: Die Wirklichkeit des Einhorns – Geschichten, Bern: Stämpfli, 1997, pp. 11-27 (22) 402

10.8 Elmar Holenstein: Kulturphilosophische Perspektiven – Schulbeispiel Schweiz, Europäische Identität, Globale Verständigungsmöglichkeiten, Frankfurt am Main: Suhrkamp, 1998, pp.

10.9 Alain Papaux: Introduction à la philosophie du 'droit en situation' – De la codification légaliste au droit prudentiel, Zürich: Schulthess, 2001, pp.

10.10 *Georg Kohler: Philosophische Grundlagen der liberalen Rechtsstaatsidee, in: Verfassungsrecht der Schweiz, ed. Daniel Thürer, Jean-François Aubert and Jörg Paul Müller, Zürich: Schulthess, 2001, pp. 247 ss.

10.11 *Marcel Senn: Recht und Kultur – Ein dialektisches Verhältnis, in: Rechtswissenschaft als Kulturwissenschaft, ed. Idem and Dániel Puskás, in: Archiv für Rechts- und Sozialphilosophie, vol. 115 (2007), pp. 13-22

10.12 Simone Zurbuchen: Humanismus – Sein kritisches Potential für Gegenwart und Zukunft, Basel/ Fribourg, Schwabe/ Academic Press, 2011, pp.

10.13 Andreas Kley: Kants republikanisches Erbe – Flucht und Rückkehr des freiheitlichen-republikanischen Kant, eine staatsphilosophische Zeitreise, Baden-Baden: Nomos, 2013, pp.

10.14 Marcel Senn: Rechtswissenschaft und Geschichte – Rechtswissenschaft zwischen Grundlagenkrise und Selbstbeschauung, in: Interdisziplinarität in den Rechtswissenschaften – Ein interdisziplinärer und internationaler Dialog (Recht und Philosophie, vol. 1), ed. Stephan Kirste, Berlin: Duncker & Humblot, 2016

10.15 Carlo Lottieri: Un'idea elvetica di libertà – Nella crisi della modernità europea, Brescia: La Scuola, 2017, pp.

Appendix I

Specialised Legal and Political Philosophy in Switzerland – Proper Philosophers Among Themselves

11.0 Simone Goyard-Fabre: Essai de critique phénoménologique du droit, Paris: Klincksieck, 1972, pp.

11.1 Paul Feyerabend: Against Method – Outlines of an Anarchistic Theory of Knowledge, London: Verso, 1975

11.2 Otfried Höffe: Recht und Moral – Ein kantischer Problemaufriss, in: Neue Hefte für Philosophie, vol. 17, Göttingen: Vandenhoeck & Ruprecht, 1979, pp. 1 ss.

11.3 Otfried Höffe: Hat die Moral einen legitimen Platz in der Politik? In: Politik und Moral - Entmoralisierung des Politischen? Ed. Werner Becker

und Willi Oelmüller (Ethik der Wissenschaften, ed. Hans Lenk, vol. 6), München/ Paderborn: Wilhelm Fink/ Ferdinand Schöningh, 1987, pp. 82 ss.

11.4 Hermann Lübbe: Politischer Moralismus, in: Politik und Moral – Entmoralisierung des Politischen? Ed. Werner Becker und Willi Oelmüller (Ethik der Wissenschaften, ed. Hans Lenk, vol. 6), München/ Paderborn: Wilhelm Fink/ Ferdinand Schöningh, 1987, pp. 75 ss.

11.5 Peter Schaber: Recht als Sittlichkeit – Eine Untersuchung zu den Grundbegriffen der Hegelschen Rechtsphilosophie (Epistemata, Würzburger wissenschaftliche Schriten, Reihe Philosophie, vol. 67; Dissertation Universität Zürich, 1986/ 1987), Würzburg: Königshausen & Neumann, 1989

11.6 Helmut Holzhey: Kants Geschichtsphilosophie im Neukantianismus, in: Kulturkritik nach Ernst Cassirer, hrsg. von Enno Rudolph und Bernd-Olaf Küppers (Cassirer-Forschungen, vol. 1), Hamburg: Felix Meiner, 1995, pp. 85 ss.

11.7 Otfried Höffe: Eine Weltrepublik als Minimalstaat – Zur Theorie internationaler politischer Gerechtigkeit, in: "Zum ewigen Frieden" – Grundlagen, Aktualität und Aussichten einer Idee von Immanuel Kant (Suhrkamp Taschenbuch Wissenschaft, vol. 1227), Frankfurt am Main: Suhrkamp, 1996, pp. 154 ss.

11.8 Jean-Claude Wolf: Ethik aus christlichen Quellen? In: Fundamente der Theologischen Ethik – Bilanz und Neuansätze, ed. Adrian Holderegger, Freiburg: Universitätsverlag Freiburg Schweiz, 1996, pp.126 ss.

11.9 Otfried Höffe: Für und wider eine Weltrepublik, in: Internationale Zeitschrift für Philosophie (Stuttgart: J. B. Metzler), ed. Günter Figal und Enno Rudolph, vol. 1997, Nr. 2, pp. 218 ss.

11.10 Peter Schaber: Moralischer Realismus, Freiburg im Breisgau/ München: Karl Alber, 1997, pp.

11.11 Andreas Graeser: Philosophie und Ethik, Düsseldorf: Parerga, 1999, pp.

11.12 Hermann Lübbe: Politische Organisation in Modernisierungsprozessen – Verfassungspolitische Aspekte, in: Verfassung und Revolution – Hegels Verfassungskonzeption und die Revolutionen der Neuzeit (Hegel-Studien, supplementary vol. 42), ed. Elisabeth Weisser-Lohmann and Dietmar Köhler, Hamburg: Felix Meiner, 2000, pp. 17 ss.

11.13 Martin Bondeli: Kantianismus und Fichteanismus in Bern – Zur philosophischen Geistesgeschichte der Helvetik sowie zur Entstehung des nachkantischen Idealismus (Schwabe Philosophica, vol. 2), Basel: Schwabe & Co., 2001, pp.

11.14 Jean-Claude Wolf: Gesetzesregeln und Gesetzesprinzipien, in: Recueil Ronald Dworkin – Un débat, in der Diskussion, Debating Dworkin, ed. Steffen Wesche and Véronique Zanetti, Zürich: Mentis, 2001, pp. 345 ss.

11.15 Helmut Holzhey: Diltheys Sicht auf die Aufklärung des 18. Jahrhunderts in seinen "Studien zur Geschichte des deutschen Geistes", in: Dilthey und Cassirer – Die Deutung der Neuzeit als Muster von Geistes- und Kulturgeschichte (Cassirer-Forschungen, vol. 10), ed. Thomas Leinkauf, Hamburg: Felix Meiner, 2003, pp. 97 ss.

11.16 Jean-Claude Wolf: Strafe als Wiederherstellung eines Gleichgewichts, in: Jahrbuch für Recht und Ethik, Strafrecht und Rechtsphilosophie, ed. B. Sharon Byrd, Joachim Hruschka and Jan C. Joerden, vol. 11 (2003), Berlin: Duncker & Humblot, 2003, pp. 199 ss.

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9 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Legal Philosophy and General Jurisprudence"
On the Mutual Relation Between Swiss Legal Culture and Philosophy, or: On the Interdependency Between Swiss Legal Thought and the History of Ideas
General Introduction: Highlights of Modern Legal Thought in Switzerland – Historical Circumstances, Sociocultural Setting and Basic Approach
by Michael Walter Hebeisen

> "Auch bei der kritischsten Einstellung dem schweizerischen Denken gegenüber bleibt der allgemeine Eindruck, den man im Verkehr mit den Schweizern von der Eigenart ihres Denkens gewinnt, derjenige einer diesem schweizerischen Denken eigentümlichen Sachlichkeit. [...] Wer daher in der Philosophie nichts anderes sucht als eine Begründung der Wissenschaft, wird kaum geneigt sein, den Schweizern eine eigene Philosophie oder auch nur einen ausgesprochenen Sinn für Philosophie zuzusprechen."
> (*Anna Tumarkin*: Wesen und Werden der Schweizerischen Philosophie, 1948)

[General Introduction (Common Sense): Highlights of Modern Legal Thought in Switzerland – Historical Circumstances, Sociocultural Setting and Basic Approach]

[Preliminary Remark – Tradition of Swiss Legal Philosophy]
From the beginning of and during the twentieth century, there has been a constant occupation with questions of legal philosophy and general jurisprudence in Switzerland that turns out to be characteristically Swiss in its content and particularly Swiss in its approach. Jurisprudence has always been inclined to legal philosophy when it has become veritable practical, when it has been forced to deepen its philosophically reflective thought. Such has been the case on several occasions, for instance in the course of constitution-making or the codification of private law, dealing with methodological alternatives, by the rise of sociology, by the renaissance of natural law after the Second World War, or refusing totalitarian interpretations of the political philosophy of *Jean-Jacques Rousseau*.
The occupation with legal philosophical thought has been undertaken, developed and evolved by jurisprudents, by university teachers and lawyer as well as judges. In the case of Switzerland, it has been less a matter dealt with mainly by academic and professional philosophers, as one could assume. The charge of formally reading legal philosophy at Swiss universities has scarcely been attributed to representatives of penal law, as this is the

case in the tradition of German legal scholarship. Rather, the occupation with legal philosophy has been adopted as a voluntary exercise, and it has been referred to on the occasion of celebrations and jubilees.

[The Specific Cultural Setting of Switzerland]
The basis for a specific and yet differentiated Swiss legal philosophical thought is defined by the unique geographical and cultural situation of Switzerland. During the nineteenth century, mainly French and German cultural life has deeply and profoundly influenced the development of the evolving Swiss Federal State. Both the well-established positivism in France as well as the so-called Historical School of Law in Germany, have had, in particular, a predominant influence on Swiss legal thought and jurisprudence, and the same holds for the monarchical welfare state in Austria. Within the Federal and democratic context of Switzerland, these influences, however, have been adapted and eventually brought to a certain equilibrium, although several disparities have not been bridged for a while (the concurring traditions of French administrative law and German public law for example). As of 1861 onwards, the Swiss experience has somehow been similar to the one in Italy, in succession of the so-called *Risorgimento*, i.e. the successful unification of the Italian nation state.
To some extent, the cultural constellation of Switzerland within the European cultural community has evolved to a melting pot of different and diverse developments in the history of political ideals as well as on the ground of spiritual life and the history of ideas. Confrontation with these traditions and developments in practice and in theory must have induced and inspired Swiss representatives of Jurisprudence to elaborate and propagate original and inventive theories and propositions. In any case, a vivid sensibility has been established with regard to social structure, different cultural foundations or highly differentiated political inclinations, altogether calling for an adequate legislation and a highly sophisticated jurisprudence.
To some extent, the cultural philosophical approach exceeds the outreach of legal philosophical arguments, and is contributing to increasing complexity, at the same time. Hereby, based on the groundwork of Neo-Kantianism, the gain in insight is limited, in conclusion. Despite the fruitful contributions of representatives like *Wilhelm Dilthey* and *Ernst Cassirer*, cultural philosophy and cultural science may lead to relativism, when applied in the domain of legal philosophy, if this lack is not compensated and corrected by other scientific methods and philosophical systems.
Leading representatives of the cultural approach to legal philosophy and history in Switzerland are the jurisprudents *Peter Häberle* and *Marcel Senn* as well as the philosopher *Elmar Holenstein*.

[Characteristics of Swiss Legal Philosophical Thought]
The motto of common sense, opening this general introduction, attributes to the leading figures in Switzerland a particular sense to orientate their thoughts and judgment towards the relevant material, practicality and dispassion. This apparent quality is often addressed

as pragmatism and as an inclination to concordance. Holding a strict understanding of philosophy, one can legitimately ask the question of whether and how the political system and the legal order can be treated in a philosophical way or with scientific methods of proper philosophy. However, regarding more closely and deeply, this deficiency of consistency appears as a specifically Swiss virtue, enabling to work out practical solutions to political and legal problems.
The challenge of being exposed to different and diverse cultural settings has always guided political philosophical as well as legal philosophical thought in Switzerland to reassure itself in contrast to concurring and dissenting opinions and theories, contributing to an elevated self-consciousness and a stronger self-confidence. However, this situation also contributes to an ongoing irritation and uncertainty as well as to a constant questioning of the once achieved solutions. This situation assures that jurisprudence will not get lost in the spheres of theory, but rather remain in close contact to the practice, to respond to the demands of practical life. As a result, one can identify a strong inclination of typically Swiss legal and political thought towards the fundament of everyday life, according to the claims established by the so-called life philosophy (which is also ascertained by *Anna Tumarkin*, the author of the motto, having been a student of *Wilhelm Dilthey* in Berlin; see entry 10.2 of this Legal Anthology).

[Idealist disposition, Respect Towards Historical, Social and Federal Institutions, Orientation Towards Practice]
The main influence on legal philosophical theory-building in Switzerland has definitely been idealist philosophical systems, mainly Neo-Kantianism, as represented by *Rudolf Stammler*, to whom *Eugen Huber* and *Walther Burckhardt* have dedicated their respective thoughts (whereas *Dietrich Schindler*, senior, is dedicated to Hegelianism). However, this general disposition has been directed to social and political practice and abstract ideas have been referred to practically working solutions for the demands of the legal community.
In the French-speaking part of Switzerland, an inclination towards French-style positivism, on the one hand, and natural law theory, respectively, Thomism, on the other hand, can be encountered (*Ernest-Alexandre Roguin, Jean Darbellay*). Despite their diametrically different and much diverse origins, these approaches are also directed to practicable solutions for reality-oriented problems. In the final analysis, they even converge with the above-mentioned idealist movements.
The core ideas, which arrived to combine these influences in a first period, i.e. until the Second World War, are to be found in freedom and democracy, and in deep respect towards the historically grown social and political institutions. Eminent representatives of public and international law thus show a decisive interest in political theory and upcoming political sciences (*William E. Rappard, Carl Hilty*).
Later, an enhanced pluralism can be detected, due to the newly elaborated philosophical positions of phenomenology, existentialism, structuralism and beyond, leading to concurring, rather to conflicting, to syncretistic, rather than dissenting approaches in the

domain of legal philosophical thought in Switzerland (*Hans Ryffel, Aloïs Troller*). Other exponents have contributed much to the development of constitutional theory and constitution-making (*Max Imboden*, *Richard Bäumlin*, *Peter Saladin, Jörg Paul Müller*).

[Some Remarks to the Sociocultural Background]
Switzerland has always been a country of immigrants, and among them also members of the European intelligence of different cultural provenances. They have brought their modes of thought, their own cultural backgrounds, their languages together with their possibilities of expression, and their general ideas and specific theories along with them. In the region of the *Léman*, there has always been an immigration not only of French Protestants but also of representatives of theoretical movements neglected or persecuted in France. In the German-speaking part of Switzerland, there has been a large number of politically persecuted people immigrating from Germany ("Vor-März", 1848 Movement, radical Liberals, and last but not least Jewish people). In the period of *Fin-de-Siècle*, there has been a considerable number of Russian members of the intelligentsia (many of them women) who emigrated to Switzerland.
Early accentuations of sociology (Geneva, Berne), psychology (Basel) and political science (Basel, Zurich) have been established within Swiss Universities mainly thanks to immigrant academic scholars. Among them we can name, for instance, *Arthur Baumgarten*, who has been naturalised in Switzerland due to marriage, and who has laid the groundwork of legal philosophy at the Universities of Geneva, and mainly Basel, by publishing relevant scientific works, before leaving for the newly founded German Democratic Republic after the Second World War. Generally speaking, these scholars have enriched Swiss legal culture in many instances and contributed to its specific characteristics.

[On the Impact of Sociology on Legal Philosophical Thought]
Additional examples for the immigration of academic scholars into Switzerland concern the discipline of sociology. At the University of Geneva, *Louis Wuarin* and his successors have established the discipline in the tradition of French positivism, dating back to *Auguste Comte*. At the Institute in Lausanne, *Vilfredo Pareto* has laid a strong accent on sociology, later leading to political economics. Earlier, before the turn of the Nineteenth Century, *Ludwig Stein*, a Jew originating from Czech Republic, after having been a Rabbi in Berlin, has been called to the University in order to teach philosophy with a strong inclination to sociology.
Without any doubt, these influences have much contributed to the sensitiveness of legal philosophy for social phenomenon and socio-political developments in the country. The leading figure creating awareness of the social question, via socialist movement, to social democracy and the social welfare-state in Switzerland has been *Robert Grimm*, who evolved from a communist activist, organising two international conferences in Zimmerwald and Kiental, to the trade-union leader of the "Oltener Aktionskomitee" in the so-called "Landesstreik", and further to a leading socio-democratic politician in the

Federal Parliament, and a member of the Executive Counsel of the Canton of Berne.
An interest in sociology also appears and is addressed by the theory of the sources of law or when the underlying structure of the political community is discussed in the domain of public and especially constitutional law. An eminent role has been dedicated to the sociological structure of the international community by *Max Huber*, when he elaborated his eminent contribution on the sociological basis of the international law.

[Legal History and the Historicity of Legal Order]
Legal order can only be made consistent and persistent within the limits of social dynamics and historical progress. At the same time, the legal order also prevents some of its fundamental values to be overruled simply by changing attitudes. From this twofold function of the law between preservation and change results a tension that must be confronted by legal philosophy.
Often, legal history stands for depicting the historical development of jurisprudence, and in that case presents an interesting subject for legal philosophical considerations. But only the mere historicity of the law, and even more the dynamic character of the legal order, present an important field for legal philosophical investigations in their own right. Yet, once the actors are rebound to the political system and to the legal order (which is the case in a democratic order), the dynamics within the perspective of history can no longer be neglected by general jurisprudence and legal philosophy.
The core question amounts to how the legal order can or should be represented as an evolving and developing order. If such progress is considered to be a part of natural history, which is the case in natural law theory or by evolutionary theories, the question cannot be answered satisfactorily. Rather, such a development has to be discussed in terms of the history of the spirit, within the history of ideas, leading to a truly philosophical perspective.
This current of thought is represented by *Alfred Dufour* and *Pio Caroni,* among others, in Switzerland.

[Basic Approach]
Legal philosophy is often associated with methodological questions by practising lawyers and judges. Certainly, legal philosophy can help to resolve questions of how legal norms must be interpreted and how the legal order can obtain a consistent and systematic structure. However, legal philosophy goes far beyond the limits of legal methodology, and one could even argue that true philosophy starts at the very point where scientific methodology comes to an end. That is to say, the task of a truly philosophical jurisprudence consists in overcoming methodological questions, left over to be treated within the domain of dogmatic jurisprudence. In this sense, Legal philosophy by far transcends juridical dogmatism. The reason for such an attempt is founded in the fact that legal philosophical argumentation in general has to be free of assumptions and suppositions (“voraussetzungsfrei”). If practised along this ambitious demand and claim, legal philosophy turns out to be a domain within the disciplines of the human sciences.

The borders of mere methodology are left behind where questions of system-building arise, or when the scientific character of jurisprudence is questioned, or when epistemological questions are addressed, or when the inherent formalism is broken through by means of material truth, or when the location of jurisprudence within the system of scientific disciplines is discussed.
The limits of stand-alone jurisprudence are also surpassed when all kinds of mutual relations between the legal order and social reality are taken into consideration. This occurs regularly when the constitutional order is brought into relation with the claims resulting from the political theory of democracy.

[Eminent Representatives of Swiss Legal Culture in the Domains of General Jurisprudence and Legal Philosophy]
Before entering more detail, let us reconsider the main exponents of Swiss legal culture – some of them have already been briefly mentioned hereinabove – together with their major and eminent achievements:

- *Eugen Huber*, the principal architect of the 1912 Swiss Civil Code, discussed problems of legal philosophy in the course of legislation, respectively, codification in his masterwork "Recht und Rechtsverwirklichung" from 1920, preceded by contributions on "Bewährte Lehre" (1910) and on "Realien der Gesetzgebung" (1913), and before concluding with reflections on the schematic structure of legal philosophy, entitled "Das Absolute im Recht" (1922);
- *Walther Burckhardt* shifted the focus on the underlying structure of legal order in his main contribution about "Die Organisation der Rechtsgemeinschaft" in 1927, discussing problems of private, constitutional and international legal order;
- *Dietrich Schindler* (senior) intensified this approach in the light of dialectics, and elaborated a theory of the relations between the constitutional order and the social structure in his book "Verfassungsrecht und soziale Struktur" from 1932, with further fragmentary texts, published as "Zum Wiederaufbau der Rechtsordnung" in 1948;
- *Ernest-Alexandre Roguin*, on the basis of his former book on "Étude de science juridique pure" published in 1889, made his contribution to a pure theory of law in his three-volume magistral work entitled "La science juridique pure" in 1923;
- *Claude Du Pasquier* wrote an "Introduction à la théorie générale et à la philosophie du droit" in 1937;
- *Arthur Baumgarten*, a prolific, however not very inspiring, author exclusively on legal philosophy, published among others two volumes on "Die Wissenschaft vom Recht und ihre Methode" in 1920 and 1922 as well as the article in the German handbook of philosophy, simply entitled "Rechtsphilosophie" published in 1934;
- *William E. Rappard*, a thoroughly international spirit, living in Geneva, delivered a political historical work on "L'individu et l'État dans l'évolution constitutionelle de la Suisse" in 1936, and contributed to the history of ideas with his "L'avènement de la démocratie moderne à Genève" from 1942;

- *Hans Ryffel* inaugurated the renaissance of natural law theory with his contribution "Das Naturrecht – Ein Beitrag zu seiner Kritik und Rechtfertigung vom Standpunkt grundsätzlicher Philosophie" in 1944, and later turned to a political anthropological view in his book "Grundprobleme der Rechts- und Staatsphilosophie" published in 1965;
- *Jean Darbellay* wrote his promotion thesis at the Catholic University of Fribourg about "La règle juridique de la société politique – Son fondement moral et social" in 1945, combining classical Thomist tradition with modern sociological theory;
- *Werner Kägi* appeared as a trendsetter when he inaugurated the material understanding of the constitution in his habilitation thesis "Die Verfassung als rechtliche Grundordnung des Staates – Untersuchungen über die Entwicklungstendenzen im modernen Verfassungsrecht" in 1945, before he wrote on "Rechtsstaatliche Demokratie" in 1953, trying a reconciliation of the rule of law and democracy;
- *Max Imboden*, a delicate and distinguished writer, elaborated a psychological contribution to the forms of government "Versuch einer psychologischen Deutung staatsrechtlicher Dogmen" in 1959, followed by "Die politischen Systeme" from 1962, and held attended conferences on "Helvetisches Malaise" in 1937, and on "Rousseau und die Demokratie" in 1963;
- *Richard Bäumlin* debuted with a study on "Die rechtsstaatliche Demokratie – Eine Untersuchung der gegenseitigen Beziehungen von Demokratie und Rechtsstaat" published in 1954, continuting with "Recht, Staat und Geschichte – Eine Studie zum Wesen des geschichtlichen Rechts" in 1962, before evolving with his contribution to „Lebendige oder gebändigte Demokratie? Demokratisierung, Verfassung und Verfassungsrevision" in 1978, and concluding with an eminent essay on "Jean-Jacques Rousseau und die Theorie des demokratischen Rechtsstaates" in 1979;
- *Aloïs Troller*, a practising lawyer and academic teacher in the domain of intellectual property law, has regularly shown his intent to introduce contemporary philosophical trends into legal philosophy, debuting with "Überall gültige Prinzipien der Rechtswissenschaft" from 1965, preceded by an introduction to jurisprudence for beginners, entitled "Rechtserlebnis und Rechtspflege" in 1962, continuing with an interdisciplinary contribution on "Die Begegnung von Philosophie, Rechtsphilosophie und Rechtswissenschaft" in 1972, and concluding with the principal work on "Grundriss einer selbstverständlichen juristischen Methode und Rechtsphilosophie" in 1972.

Of course, this limited enumeration does not cover all well-known contributors to legal philosophy in Switzerland, nor do they refer to all of their specific contributions. Moreover, the listing does not cover the contributions up to date, but terminates with the old school representatives of jurisprudence, in our understanding. Rather, the list is to be meant as an overview over the rich tradition of general jurisprudence and legal philosophy in Switzerland, as to be further elaborated in the following comments on the selected entries of this "Anthology of Swiss Legal Culture", in the domain of "Legal Philosophy and General Jurisprudence".

[Structure and Content – Abstracts of the Sections]
In the following, the structure and content of the partition on "Legal Philosophy and General Jurisprudence" of this "Anthology of Swiss Legal Culture" is summarised in short abstracts:

- In a preliminary section, fundamental elements of the pre-history of modern Swiss legal philosophical thought is presented. A reconciliation of concurring jurisdictions and a combination of scientific disciplines or methods can be identified as guidelines of the initial constellation of Swiss legal thought.
- First section: Swiss legal culture is introduced as a melting pot of modern philosophical influences, in a presentation and discussion of the main contributions of the eminent representatives of legal thought in Switzerland. We encounter overlapping influences of Neo-Kantianism, Hegelianism, realism, pragmatism, existentialism, phenomenology and beyond lasting relicts of natural law theory and Thomism, respectively Scholastic. These fundaments of philosophical system-building find reception in a very original and fecund way by Swiss Jurisprudence.
- Second section: The enduring occupation of general jurisprudence with methodological questions and with the scientific character of jurisprudence is discussed on the occasion of contributions that tend to overcome the dogmatic inclination of jurisprudence. This occurs before the background of the controversies between positivism and natural law, between monism and dualism. In this situation, the pluralist alternative of human studies may provide a guidance for a truly philosophical treatment of fundamental questions of jurisprudence.
- Third section: In Swiss legal philosophy, there can be detected a strong tendency to understand legal structures as an integrative part of cultural phenomenon, leading to an interdisciplinary approach. This attempt raises, however, the crucial question, to be addressed to the philosophically reflected theory of science, as to what shall be the appropriate location of jurisprudence within the system of scientific disciplines.
- Fourth section: Legal history and the concept of the historicity of legal order are treated within the context of the Swiss legal culture. The critical question relates to the problem on which understanding of history such approaches are based, whether it is to be a naturalist conception of history or a historicist philosophy of history.
- Fifth section: Public law theory in Switzerland presents rich insights into the philosophical dimensions of the rule of law and constitutionalism as well as federalism.
- Sixth section: Swiss theories of (direct or semi-direct) democracy and Swiss political thought are addressed and participation and representation in a strong civil society discussed.
- Seventh section: Jurisprudence can be claimed as the oldest social science, due to its close connection to sociological concepts. In this context, the so-called social

question, the rise and development sociology, the controversy about socialism, the conceptualisation of Swiss social democracy as well as of the Swiss social state show of great importance.

- Eighth section (to be completed): Openness, permeability and transception of Swiss legal thought are identified as core characteristics of Swiss legal philosophical thought.
- Ninth section (to be completed): Realism, Pragmatism and Pluralism are to be addressed as main virtues of Swiss legal culture.
- In the final section (to be completed), eventually, a turn back to the future will have to be accomplished. We argue in favour of a reconstruction of modernity, and against post-modern dis-integration. In conclusion, the main contemporary inclinations, tendencies and prospectives of Swiss legal thought will have to be indicated.
- In a first appendix (to be elaborated), eminent contributions of philosophers in the proper sense, i.e. specialised in legal and political philosophy, with respect to Switzerland are discussed, and the debate among proper philosophers themselves outlined.
- In a second appendix, an extended bibliography is listed for further reading.

[For Further Reading as an Introduction to the related Subjects]
Michael Walter Hebeisen: Schweizer Juristen-Philosophen – Eine eigenständige schweizerische Tradition der Wissenschaftsphilosophie der Jurisprudenz und der Staatslehre in Auseinandersetzungen mit ausgewählten Strömungen der Rechts- und der Staatsphilosophie sowie der Wissenschaftstheorie in der ersten Hälfte des Zwanzigsten Jahrhunderts (Eine programmatische Skizze für ein interdisziplinäres Forschungsvorhaben), in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 50, ed. Peter Häberle, Tübingen: J. C. B. Mohr/Siebeck, 2002, pp. 69-100.

8 April 2018 (revised on 19 July) *Michael Walter Hebeisen*

> "Die Philosophen haben die *Welt* nur verschieden interpretirt, es kömmt drauf an sie zu *verändern*."
> (*Karl Marx*: 11th thesis on *Ludwig Feuerbach*; inscription at the entry of Humboldt-University in Berlin)

[General Introduction (Philosophical, Scientific): Highlights of Modern Legal Thought in Switzerland – Historical Circumstances, Sociocultural Setting and Basic Approach]

[Preliminary Remark – Tradition of Swiss Legal Philosophy]
From the beginning of and during the Twentieth Century, there has been a constant occupation with questions of legal philosophy and general jurisprudence in Switzerland that turns out to be characteristic Swiss in its content and particularly Swiss in its approach. I have already outlined this specific tradition of Swiss legal thought in an essay published in the jubilee 50th volume of the "Yearbook of Public Law" (*Michael Walter Hebeisen*: Schweizer Juristen-Philosophen – Eine eigenständige schweizerische Tradition der Wissenschaftsphilosophie, der Jurisprudenz und der Staatslehre in Auseinandersetzung mit ausgewählten Strömungen der Rechts- und der Staatsphilosophie, sowie der Wisseschaftsphilosophie in der ersten Hälfte des Zwanzigsten Jahrhunderts, in: Jahrbuch des Öffentlichen Rechts der Gegenwart, N. S. vol. 50, Tübingen: J. C. B. Mohr, 2002, pp. 69-100; see entry 1.20 of this Legal Anthology). Yet, this general observation has to be specified and restricted in three ways:

(1) First, there has always been attempts to reflect the law and the legal order in terms of philosophical concepts in Switzerland. However, these attempts have merely been isolated and incoherent, and not permanent nor coherent, even if there are also ruptures and high tides within the development in the twentieth century;
(2) Second, this occupation has to be embedded in the European history of legal thought, even if it shows a specific Swiss character;
(3) Third, these contributions have mainly been elaborated by jurisprudents, lawyers and judges, and not by representatives of the academic discipline of philosophy.

Let us briefly consider these aspects in more detail:

[Jurisprudence and Legal Philosophy Turn Truly Philosophical When They Become Practical]
In the beginning of the twentieth century, or rather towards the conclusion of the nineteenth century, in so-called *Fin-de-Siècle*, a change of paradigm occurs in the domain of general jurisprudence and philosophy of law, that is generally not sufficiently prised by legal studies and legal theory. This eminent turn appears at a time and with a generation of jurisprudents is called to codify the law, at a moment, when time had then eventually proved to be mature and ready for legislation *qua* codification. Accordingly, the motto now had become "the convene of our time to legislation" (compare the contrary judgment

in the early nineteenth century by *Friedrich Carl von Savigny*: Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, 1814). This turning point is the very moment and constellation, when lawyers and jurisprudents become legal philosophers because they have to reflect about the pre-conditions for the codification of the legal order, identify the realities of law as well as judge the realisation of legislation.
In the domain of public law, the foundation of the Swiss Federal State has been merely discussed in terms of political philosophy and the history of political ideas, from 1848 onwards. However, generally speaking, such situations, when jurisprudence goes practise, occur more frequently in public law, namely on the occasion of partial revisions of the Swiss Federal Constitution and in even greater extent on the occasion of total revisions of the Constitution, for example in 1874. Just another illustrative example in the domain of public law, where jurisprudence is called to be creative, inventive and, therefore, philosophically reflective, is the interpretation of legal equality, the equal state of citizens before the law, and especially the protection of arbitrariness during the first decades of the twentieth century (compare *Michael Walter Hebeisen*: Die Konnexität von Freiheit und Gleichheit (sechs Vorlesungen), in: Der lange Weg zu Freiheit und Gleichheit, ed. Anna Maria Diemut Majer, Wien: WUV – Universitätsverlag, 1995, pp. 135-253).
In Switzerland, this turn or change in paradigm happens to coincide with the early beginnings and culmination of an original way to understand legal philosophy by lawyers and jurisprudents. These eminent representatives of practical jurisprudence all reflect the truth that law asks to be realised, accomplished and fulfilled has to become true, and must, therefore, be effective (see *Pietro Piovani*: Il significato del principio di effetttività, Milano: A. Giuffrè, 1953, in german translation: Die Bedeutung des Prinzips der Wirksamkeit, in: Ausgewählte Werke von Pietro Piovani, ed. Michael Walter Hebeisen, vol. 8, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag 2012, pp. 7-251). To understand the law and the legal order in its specific normative character means to take the direction towards a state of human and social behaviour seriously that should be achieved. A legal norm fulfils this task best, when it is made positive, i.e. codified; such objectivation, however, does not mean to render the normative factual, but rather to found a specific state of being, whereby the legal norm can raise its inherent claim to be valid and that means at the same time to be effective.
Hereby, the core subject of our investigations is approximately outlined already. Let us continue to discuss the second and third restrictions or specifications of the general statement made at the very beginning:

[The Provenance and Ubiquity of Philosophy – History of Ideas in Europe, Reception of Laws and Influences on Legal Orders]
When we talk about Swiss legal philosophy and Swiss general jurisprudence, we should have always in mind that philosophy itself cannot and does not have a specific national disposition, but rather has to be qualified as universal, in consequence of its orientation towards the absolute, towards truth. However, a particular inclination or connotation characterises the diverse historical development in specific countries, in function of the

history of philosophical thought and of culture in general. To the last extent, Swiss legal thought always means legal philosophy in Switzerland. This insight is evidently developed by *Bertrando Spaventa* in his inaugural lecture at the University of Naples from 1861, within the context of Italian *Risorgimento*, and with respect the nationalistic movement that leaded to the foundation of the unified nation state of Italy (La filosofia italiana nelle sue relazioni con la filosofia europea, in: Zwei Antrittsvorlesungen und Vorlesungen zur Geschichte der Philosophie in Italien und in Europa, in: Ausgewählte Werke von Bertrando Spaventa, ed. Michael Walter Hebeisen, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2018, pp. 55-88). In the domain of philosophical thought, time and place must necessarily be taken relative; moreover, the history of ideas does not necessarily follow a defined direction of progress, on the contrary there is a kind of continuum of knowledge and wisdom, that is actualised according to the demands of historical circumstances.

In this view, geographical reception has also to be questioned: personal relations decide on what content is replaced, how it is altered and adapted to the new place, where it is meant to cause considerable effect. The specific situation at a given place and time, the situation or constellation of historical knowledge and practical experience fall out different, diverse and this turns out to be of great relevance for the interpretation and adaptation of legal thought within a national context. This is due to the fact that the individual, the concrete is the veritable universal, not the abstract. Therefore, objective entities do not permit one to found a theory of practice, legal thought must on the contrary be founded on specific legal experience and on a particular consciousness of law. This truth must not lead to the misunderstanding of national reference of the process of Reception. Rather, each kind of influence has to be considered carefully and judged with cautiously, for only in that case it can become an act of true legal experience and legal-philosophical consciousness. This process often happens subcutaneously, and subtle reception is frequently only identified, when it comes to a considerable adaption in comparison with the source. The reception of Roman law in German *Kaiserreich*, for instance, shows a very special structure in any respect, leading to Pandectism and eventually to the codification of the "Bürgerliches Gesetzbuch (BGB)".

To place a certain text within an altered context necessarily leads to the characteristic contextualism of legal-philosophical thought. Within such a differentiated situation, the facility of judgment takes an eminent role (see *Pierre Bourdieu*: Die feinen Unterschiede – Kritik der gesellschaftlichen Urteilskraft, Frankfurt am Main: Suhrkamp, 1982; and *Rainer Forst*: Kontexte der Gerechtigkeit − Politische Philosophie jenseits von Liberalismus und Kommunitarismus, Frankfurt am Main: Suhrkamp, 1994). In such a constellation of theory building, questions of hermeneutical interpretation gain in importance, and the application of the legal order advances in the foreground (compare *Martin Kriele*: Besonderheiten juristischer Hermeneutik, in: Text und Applikation − Theologie, Jurisprudenz und Literaturwissenschaft im hermeneutischen Gespräch (Poetik und Hermeneutik, vol. 9), ed. Manfred Fuhrmann, München: Wilhelm Fink, 1981, pp. 409 ss.; compare also *Klaus Günther*: Der Sinn für Angemessenheit − Anwendungsdiskurse in Moral und Recht,

Frankfurt am Main: Suhrkamp, 1988). This ascertainment leads our attention on the third-mentioned precision of the opening observation:

[Switzerland as a Melting Pot of Concurring and Crisscrossing Influences from Abroad]
The identified tradition of legal thought in Switzerland from the beginning of the twentieth century has mainly been initiated and carried by jurisprudents, by lawyers and judges. This crucial point is to be proved by the selection of the discussed texts and can only be explained by indicating to certain particularities in Swiss social and academical structure.
It could be argued that legal philosophy has to be considered as an integral part of philosophy itself (in the Italian tradition *Pietro Piovani*: Filosofia del diritto come scienza filosofica, 1963). The very intention of legal-philosophical thought is to overcome the dogmatic character of jurisprudence by referring it to the philosophically founded system of sciences or to the encyclopaedia of philosophical sciences in Hegelian conception. In any case, philosophical thought leads to a refusal of the dogmatic character of legal theory, admitting of the problematic-critical main feature of legal philosophy in a modern understanding. The problem of this perspective is to ensure the indispensable experience of legal philosophers in legal practice. In the best case, a veritable legal philosopher should be both, experienced jurisprudent and educated philosopher; second best, he would appear as professional jurisprudent with an accentuated inclination in the domain of philosophy.

These arguments will be further developed and enriched in the course of the following presentation of the selected texts, where the evolvement of these dimensions will continuously be discussed. The main subjects, as indicated by the table of content, shall be:

I. philosophical progresses and their influences,
II. problematical methodology,
III. cultural sciences and interdisciplinarity,
IV. history and historicity of law,
V. rule of law and constitutionalism,
VI. democracy and participation,
VII. from socialism to social-democracy,
VIII. characteristics of swiss legal thought,
IX. the alternatives of realism and pragmatism, and finally
X. prospective view of tendencies, inclinations and perspectives.

To provide a starting point to our study of the selected, situated, introduced, summarised and discussed texts, these introductory observations have to be further developed in short, and by doing so, a draft of our personal perspective on jurisprudence and philosophy has equally to be sketched, and the cultural dimension of legal phenomenon, the humanistic approach to jurisprudence, Historicism and Neo-Historicism, respectively the historicity of law, and last but not least the pluralism of multiple standpoints in legal philosophy and general jurisprudence have be taken into consideration:

[Natural Law vs. Law as Cultural Phenomenon]
Renaissance and Humanism mark the turning point within the history of human culture from Antiquity (with its prolongment in the Middle Ages) and Modern civilisation. The core discovery is man as an actor, the human individual as a creative and inventive producing originator. It is essential to grasp this turning point right in order to found an adequate theory of law and legal philosophy, since old metaphysics have to be replaced by a philosophical reflection on legal order as man-made.
In the course of the history of ideas, we encounter a juxtaposition of nature and culture, even if mind and nature build a unity ultimately (see *Gregory Bateson*: Mind and Nature – A Necessary Unity, London: Wildwood House, 1979). If law is no longer to be considered as given by nature, if law is no longer part of God's Nature, but rather has a touch of human nature, it has to be understood as cultural phenomenon, as an achievement of human civilisation, and eventually is not God-given, but rather man-made. Whereas God, the Absolute, Nature remains the very same for all times, the law, legal order is subjected to change, according to the development of human civilisation, human culture, and is characterised by historical dynamics. Therefore, law is not about how to preserve eternal values, not about metaphysical foundationalism, but rather all about resolving conflicts between different views of life and the world and different interpretations of the core value of a certain culture. The unique aim of law in Modern times consists in the peaceful resolution of conflicts, in establishing a culture, how quarrels are to be resolved, and its task is not to unify a certain set of common ideals and values. However legal philosophy and general jurisprudence have mainly opted for the contrary for a long time.
On the contrary, it is helpful to remind that law exceeds the reach of other cultural phenomenon, that means that law does not exhausts in its cultural dimension, but rather exists as "law in culture", i.e. law within the context of culture (*Roger Cotterrell*: Law in culture, in: Associations, Journal for Legal and Social Theory, vol. 7/ I, Berlin: Duncker & Humblot, 2003, pp. 213-225). Law, legal normativity is not to be considered as a fact, but as an artefact, namely the vivid expression of legal experience, which is linked to the historical development of the life of the human spirit.
Now, according to *Giovanni Battista Vico*, man can understand best his own works, whereas nature remains disclosed to man's attempts of cognition, of knowledge, which signifies that the only or the most secure and reliable knowledge man can achieve consists in knowing spiritual experiences, intellectual conceptions or mental entities. The main problem can be addressed by the observation that whereas other cultural works in fine arts and literature present a concluded *oeuvre*, legal order as well as social phenomenon cannot be disclosed ever in their historical development. This difference has not been taken seriously into consideration by Neo-Kantianism that has been the leading theory in consolidating the turn to cultural philosophy (compare *Ursula Renz*: Die Rationalität der Kultur – Zur Kulturphilosophie und ihrer transzendentalen Begründung bei Cohen, Natorp und Cassirer, Hamburg: Felix Meiner, 2002). It makes a huge difference for interpretation of phenomenon whether the subject is concluded and disclosed, or whether it is

part of a dynamic process.
Just another turning point within the philosophical explanation of legal order within the context of cultural phenomenon has been achieved by *Georg Wilhelm Friedrich Hegel* in his concept of "Wirklichkeit des Geistes". Historical-philosophical reflection learns, that the universal law lies in the individual and particular legal order that tends to the universal ideal of law (i.e. the realisation of legal order means make to come true law itself). Whereas the birth of individualism goes back to the period of Renaissance, where the core of Modernity has its foundations, the essential, but underlying change from a static view of affairs to a dynamic conception of historical development has only been introduced by Hegelianism. Each era or epoch has its own law and every collective or community has its own legal order, whether it is represented cyclical (Vichianism) or in terms of linear progress (Hegelianism). Historically, genetically as well as genealogically, jurisprudence has always gone ahead the positive law or legislation, and has always had a certain priority above it, an insight that qualifies jurisprudence as the oldest social science (but not in the instrumental sense as a means to the ends of politics; see *Tim Murphy*: The Oldest Social Science? Configurations of Law and Modernity, Oxford: Clarendon Press, 1997; compare entry 7.0 of this Legal Anthology).
It is somewhat deplorable that the cultural-philosophical approach has not shown much appeal to scholars in legal philosophy. Despite the representatives of cultural philosophy in the domains of fine arts and literature, as focused by the Institution of the Aby Warburg Library, the transversal problematic that affects legal philosophy in its entity seems not to have had great appeal for legal scientists. It is to be indicated that the above-mentioned approach by cultural studies is also inherent in all Humanistic and pluralist understanding of legal phenomenon (*Georg Mohr*: Der Begriff der Rechtskultur als Grundbegriff einer pluralistischen Rechtsphilosophie, in: Dialektik, Enzyklopädische Zeitschrift für Philosophie und Wissenschaften, vol. 1997/ 1, Hamburg: Felix Meiner, 1997, pp. 135 ss.).

[Jurisprudence as a Human Science, Legal Philosophy as Part of Philosophy]
In an introduction to a projected "Grundlehre der Rechtswissenschaft" by *Fritz Affolter* (Die Rechtselemente, in: Archiv für Rechts- und Wirtschaftsphilosophie, vol. 10, 3 (1917), Berlin/ Leipzig: Walther Rothschild, 1917, pp. 263 s.), i.e. by a swiss lawyer in the domain of private law, who at that time has been an extraordinary professor at the University of Heidelberg), a consistent subject of legal philosophy is simply neglected: "Unter dem bekannten Namen 'Philosophie' sind im Laufe der Weltgeschichte inhaltlich so verschiedenartige Lehren aufgetreten, dass es zweifelhaft ist, ob sie noch etwas anderes gemeinsam haben, als nur den Namen. Dies ist eine allgemein anerkannte Tatsache. Weniger erkannt und öffentlich ausgesprochen aber ist die, dass die sogenannte Rechtsphilosophie uns dasselbe Bild in wenn möglich noch gesteigertem Masse darbietet. Vergleicht man nämlich den Inhalt der bis jetzt unter dem Namen 'Rechtsphilosophie' erschienenen Bücher, so wird man kaum weder im System noch im Stoffe etwas Übereinstimmendes finden. Der Unbefangene und Vorurteilslose wird nicht ohne Überraschung diese Tatsache feststellen. Mit Fug und Recht nahm er vor der Lesung an, dass auf einem im Verhältnis

zur Gesamtphilosophie so eng begrenzten Gebiete wie auf dem der Rechtsphilosophie eine wenn nicht dem Systeme, so doch dem Stoffe noch grössere Gleichartigkeit und Übereinstimmung herrschen werde, als auf dem unendlichen Gebiete der Gesamtphilosophie". As reasons, therefore, are identified, a personal inclination and perspective knowledge as well as a lack of positive material to be treated (leading to a highly independent development of the various branches of jurisprudence). In consequence, natural law is taken as a replacement subject for legal philosophy instead of realised positive law, and existing legal order, so as to provide a philosophy of positive law. The only rescue in confrontation with this constellation can be a strict division in practical and theoretical legal sciences, to which we do not agree, since every theory has to be based on experience, i.e. practice. Accordingly, mainstream legal philosophy is mainly rationalist and intellectualist, whereas we personally intend to provide an alternative in the tradition of the other stream in legal philosophy and general jurisprudence as integral parts of human studies. With reference to the so-called "Geisteswissenschaftliche Richtung" of German state theory (*Günther Holstein* and *Rudolf Smend*), and in close adherence to the aforementioned concept of "Kulturwissenschaft" or cultural studies, we have elaborated our own view on the philosophy of law and on the general theory of the state (*Michael Walter Hebeisen*: Recht und Staat als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als Geisteswissenschaften, Biel/Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2004). In the domain of public law, *Peter Häberle* has intended to fecundate the cultural issues of such a foundation of jurisprudential self-reflection (Verfassungsrecht als Kulturwissenschaft, in: Schriften zum öffentlichen Recht, vol. 436, Berlin: Duncker & Humblot, 2nd ed. 1998; *idem*: Europäische Rechtskultur – Versuch einer Annäherung in zwölf Schritten, Baden-Baden: Nomos, 1994). By our shift in attention and inclination to the human studies, we have declared our preference for a humanistic foundation of legal culture instead to a naturalistic one (the alternative being formulated by *Erich Cassirer*: Naturalistische und humanistische Begründung der Kulturphilosophie, in: Erkenntnis, Begriff, Kultur, 1993, first printing 1939).
Human nature is essentially mental and spiritual and, therefore, we argue decisively for a humanistic foundation of jurisprudence as an integral part of human and social sciences, as preferred also by the pragmatist movement, especially by *William James* and *Ferdinand Scanning Scott Schiller,* for instance. The crucial point is to overcome the dogmatic structure of jurisprudence, and to adopt a truly philosophical view without pretending any pre-conditions or axiomatic foundation of legal philosophy (compare *Eduard Spranger*: "Voraussetzungslosigkeit der Geisteswissenschaften", 1929; *Erich Rothacker*: "Die dogmatische Denkform in den Geisteswissenschaften und das Problem des Historismus", 1954; or *Carl August Emge*: Philosophie der Rechtswissenschaft, 1961, pp. 18 ss.). Such a perspective on jurisprudence as a human science, however, is only rarely confirmed, maybe with the exception of *Theodor Viehweg* (Zur Geisteswissenschaftlichkeit der Rechtsdisziplin, in: Rechtsphilosophie und Rhetorische Rechtstheorie – Gesammelte kleine Schriften, ed. Heino Garrn, in: Studien zur Rechtsphilosophie und Rechtstheorie, vol. 9, Baden-Baden: Nomos, 1995, pp. 23 ss.; compare *idem*: Rechtsphilosophie als Grundlagenforschung, l. c.,

pp. 45 ss.).
The eminent social dimension of law and jurisprudence derives from the fact, that a third enters the relation of two subjects, a collective will of the community is added to the will built on the basis of the subject and his otherness. The indispensable historical dimension of the law requires a kind of legal history, where the historical development of jurisprudence itself is included and, therefore, leads to a comprehensive philosophy of legal science in the context of a system of philosophically informed and founded scientific disciplines. Moreover, in order to interconnect the various branches of jurisprudence, a veritable interdisciplinary approach within jurisprudence is demanded.

[History of Law, History of Jurisprudence, and History of Legal Philosophy]
Any reflective thought about what makes jurisprudence scientific is equivalent to a specific philosophy of law in the sense of a philosophical theory of jurisprudence, and not merely as a methodological inspired theory (philosophy is necessarily systematic, i.e. establishes a specific relation with respect to the whole). In other words, legal thought becomes automatically legal philosophy, as soon as it reflects its presuppositions as a philosophical science and the preconditions of its domain or outreach. *Georg Wilhelm Friedrich Hegel* has identified the history of philosophy equally with philosophy itself, and this insight signifies that the history of legal philosophy equals legal philosophy itself. To the least extent, any theory of legal science ultimately is equivalent to a history of legal philosophy, or in short equal to philosophy, therefore (compare *Maximilian Herberger*: Zum Methodenproblem der Methodengeschichte – Einige Grundsatz-Reflexionen, in: Entwicklung der Methodenlehre in Rechtswissenschaft und Philosophie vom 16. bis zum 18. Jahrhundert, in: Contubernium, vol. 46, Stuttgart: Franz Steiner, 1998, pp. 207 ss.).
As a primary demand for jurisprudence, system-building or coherent conceptualisation of legal notions becomes indispensable, and that means legal science turns out to be necessarily philosophical because it is inevitably systematic. This requirement also counts for the so-called Historical School of law, as it has been proposed for instance by *Friedrich Carl von Savigny* or by *Rudolf von Ihering* (see *Walter Wilhelm*: Savignys überpositive Systematik; and *Helmut Coing*: Der juristische Systembegriff bei Rudolf von Ihering, both in: Philosophie und Rechtswissenschaft – Zum Problem ihrer Beziehungen im 19. Jahrhundert, in: Studien zur Philosophie und Literatur des 19. Jahrhunderts, vol. 3, Frankfurt am Main: Vittorio Klostermann, 1969, pp. 123 ss. and pp. 149 ss.). Paradoxically, also and even historical theories of legal order fit better to legal philosophy than they are commonly held to be able to explain. Eventually, they arrive to overcome the frequent reduction to the methodological aspects of legal techniques.

[Philosophies of Law – Pluralistic and Personal]
If philosophy means always expressing a will to system-building, any legal philosophy consists in a coherent master narrative, told in a certain perspective and prospective, founded in a personal understanding of selected contributions, and grounded upon an individual experience of think-acts. Merely encyclopaedical approaches, that represent the

ingredients without assembling them to a comprising, comprehensive, and holistic whole, are to be refused therefore. According to *Pietro Piovani* there are multiple possibilities of legal experience, and jurisprudence based on experience, i.e. truly scientific legal science, turns out to be pluralistic and personal.
Consequently, there is an ultimate need to declare the authors own views, to defend his personal decisions. This task does not follow methodological reflections, but rather only the pragmatic proof of being able to solve problems in an adequate way, as we have extensively argued in our habilitation thesis ("Recht und Staat als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als Geisteswissenschaften", Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2004). In addition, to take pluralism seriously requires founding a theory of multiple and overlapping legal orders, as provided by the so-called theory of institutions, as inaugurated by *Jean-Claude-Eugène-Maurice Hauriou* and *Santi Romano* (compare *Michael Walter Hebeisen*: Pragmatismus, Pluralismus, Pragmatismus – Essayistische Abhandlungen zur den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz", 2005 pp. 1 ss.; see entry 9.12 of this Legal Anthology). Such thought alongside legal order must not be confused with political order though in *Carl Schmitt*, beware.

Let us in conclusion of this general introduction briefly reconsider the framework of our attempt, or better speaking delineate the main determinants of our approach. This can be done by succeedingly addressing Historical School of Law, Natural Law tradition, Positivism, Kantianism as well as the ongoing emancipation of legal philosophy and general jurisprudence in the way of hermeneutics:

[Pre-Dominance of German Historical School of Law]
During the whole nineteenth century, the Historical School of Law has been pre-dominating in German-speaking countries, and it especially decided the quarrel about the codification of private law in the negative sense. Even critics as the prominent *Rudolf von Ihering* remain in the spirit of "Historische Rechtsschule", led by the eminent *Friedrich Carl von Savigny*, despite their battle on the law (more important than *Anton Friedrich Justus Thibaut* seems to me Ihering's "Wiener Antrittsrede" about "Wissenschaftlichkeit der Jurisprudenz" than the well-known "Battle on the Law" by the same author; see entry 2.0 of this Legal Anthology). The highly problematical issues of the classic historical law school, however, have meanwhile been identified by *Klaus Luig* (Rudolf von Ihering und die Historische Rechtsschule, in: Iherings Rechtsdenken – Theorie und Pragmatik im Dienste evolutionärer Rechtsethik, ed. Okko Behrends, in: Abhandlungen der Akademie der Wissenschaften in Göttingen, vol. 216, Göttingen: Vandenhoeck & Ruprecht, 1996, pp. 255 ss.). Philosophically reconsidered, even the Historical School of Jurisprudence has remained merely dogmatic and, therefore, not truly historical in the sense of Neo-Historicism (as proposed and postulated by *Johann Gustav Droysen*, *Wilhelm Dilthey*, *Friedrich Meinecke*, and *Ernst Troeltsch*), that only enables veritable criticism (leading to truly philo-

sophical understanding, namely to "Geschichtlichkeit" in the sense of the historicity of human existence).
Within the conceptions of the Historical School of Law, history actually refers to permanent nature, not to alterable culture, as it has been outlined by *Alfred Dufour* (Histoire naturelle ou nature historique du droit dans l'École du Droit Historique, in: Recht zwischen Natur und Geschichte, (Ius Commune, vol. 100), Frankfurt am Main: Vittorio Klostermann, 1997, pp. 125 ss.). The decision, what kind of history or historicity has to be adopted to provide a sound basis for modern legal thought has therefore to be answered just in the other sense. Only, in the course of its reception in American legal thought, the false direction of German Historical School of law has been widespread, *mutandis mutatur*, for instance by the documented influence of *Rudolf von Ihering* on a whole generation of American legal thinkers, i.e. *Oliver Wendell Holmes*, *Roscoe Pound*, *Karl N. Lewellyn*, and *Lon L. Fuller* (see *Robert S. Summers*: Rudolf von Ihering's influence on American legal theory – A selective account, in: Iherings Rechtsdenken – Theorie und Pragmatik im Dienste evolutionärer Rechtsethik, ed. Okko Behrends, in: Abhandlungen der Akademie der Wissenschaften in Göttingen, vol. 216, Göttingen: Vandenhoeck & Ruprecht, 1996, pp. 61 ss.) as well as on the Australian legal thinker *Julius Stone* (The Province and Function of Law – Law as Logic, Justice, and Social Control (A Study in Jurisprudence), Sydney: Associated General Publications, 1946, reprint Buffalo: William S. Hein & Co.; and *idem*: Legal System and Lawyer's Reasoning, Sydney: Maitland Publications, 1968). However, the penetrating inclination to realism and/or pragmatism that is evident in this transplantation of general ideas has hindered to exceed with the deficiencies of the Continental European tradition of Historicism. By this adapting reception, the so-called orientations of "Analytical Jurisprudence", "American Legal Realism" and "Critical Legal Studies" have been able to avoid the trap of natural history or the naturalistic misunderstanding of historicity (compare *Edgar Bodenheimer*: Jurisprudence − The Philosophy and Method of Law, Cambridge: Harvard University Press, 1962, Seiten 120f.). These currents are rather systematically interconnected with "Scandinavian Legal Realism" and have had a major implication back on European legal thought. When judging such processes of reception of whole theories, it has to be taken into consideration, however, that to find similarities corresponds very much to the associative abilities of human mind, whereas fundamental differences can always be identified to an overwhelming extent, so that in conclusion the different surpasses the similar by far.

[Natural Law Theory Revisited – A Relict to Overcome]
Philosophically speaking, natural law theory refers always to the Nature, to the Absolute, to God as an everlasting, inalterable entity and, therefore, has to be characterised in an old-fashioned way as metaphysical. *Jean Barbeyrac*, one of the Swiss precursors of natural law theory, has added history to the ideal of natural law in 1711 – in his inaugural lecture entitled "*De dignitate et utilitate Juris ac Historiarum et utriusque disciplinae Amica coniunctione*" – in order to mobilise the dynamic potential of the idea of international law and legal order in general. Contrary, in Catholic milieus, we can find even natural law theory

in pure culture, for instance in *Ignaz Franz Paul Troxler*'s "Philosophische Rechtslehre der Natur und des Gesetzes mit Rücksicht auf die Irrlehren der Liberalität und Legitimität" from 1820. Maybe the best-known representative of late natural law theory is *Johann Caspar Bluntschli*, who aims to gain political influence by founding his claims for the organisation of public law on natural law. This attempt addresses the problem to co-ordinate ethics or moral philosophy, on the one hand, and law or jurisprudence, on the other hand (see *Helmut Coing*: Das Verhältnis der positiven Rechtswissenschaft zur Ethik im 19. Jahrhundert, in: Recht und Ethik – Zum Problem ihrer Beziehung im 19. Jahrhundert, in: Studien zur Philosophie und Literatur des 19. Jahrhunderts, vol. 9, Frankfurt am Main: Vittorio Klostermann, 1970, pp. 11 ss.; compare also *Fritz Eichengrün*: Die Rechtsphilosophie Gustav Hugos – Ein geistesgeschichtlicher Beitrag zum Problem von Naturrecht und Rechtspositivismus, Den Haag: Martinus Nijhoff, 1935). The pretention to consider natural law as evolving, mutable and capable to adaption to new circumstances only signifies an abolishment of metaphysical foundationalism for practical reason, for individual and collective practice. Ultimately, there is no direct, non-intermediate perception of abstract ideas in Modern times, but the only remaining possibility consists in a related, mediated conceptual cognition of concrete individuals and individualities. Natural law theories have thus lost any legitimate application. In a last attempt to reconcile natural law and modern legal and social philosophy, *Wilhelm Dilthey* held that the problem proposed by the natural law theory can only be solved in the context of the positive human sciences, which is an abolition of the classical question natural law theory has ever dealt with: "Das Problem, welches sich das Naturrecht stellte, ist nur lösbar im Zusammenhang der positiven Wissenschaften des Rechts. [...] Hieraus folgt, dass es eine besondere Philosophie des Rechts nicht gibt, dass vielmehr ihre Aufgabe dem philosophisch begründeten Zusammenhang der positiven Wissenschaften des Geistes wird anheimfallen müssen" (Einleitung in die Geisteswissenschaften − Versuch einer Grundlegung für das Studium der Gesellschaft und der Geschichte, in: Gesammelte Schriften, vol. 1, Göttingen: Vandenhoeck & Ruprecht, 9th ed. 1990, p. 79; excellent introductions into the thought of Dilthey provide *Rudolf A. Makkreel*: Dilthey – Philosopher of the Human Studies, Princeton: Princeton University Press, 1975, in German translation: Dilthey, Philosoph der Geisteswissenschaften, Frankfurt am Main: Suhrkamp, 1991; as well as *Ilse N. Bulhof*: Dilthey – A Hermeneutic Approach to the Study of History and Culture (in: Philosophical Library, vol. 2), The Hague: Martinus Nijhoff, 1980).
Nevertheless, even in the mid-twentieth century, *Helmut Coing* has argued for and against changing natural law (Naturrecht als wissenschaftliches Problem, in: Sitzungsberichte der wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt am Main, vol. 3 (1964), Nr. 1, Wiesbaden: Franz Steiner, 1965); and, even worse, after the Second World War, there has been a revival of natural law theory, just with the intention to preserve the positive legal order from being perverted by positivistic legal thought.

[Concurring Positivisms and Elaboration of More Sophisticated Neo-Positivisms]
Legal positivism is a tricky and misleading issue, as it has virtually nothing to do with

positivism in a scientific-philosophical sense. In the domain of legal thought, there are simply no such data and facts that could render possible any positivistic construction, and even positivism in social theory remains highly problematic due to the specific character of the artefacts of human coexistence within society. In the domain of jurisprudence, positivism is generally founded on public law theories, namely originally in Germany in the form of constitutional positivism, as elaborated by *Carl Friedrich von Gerber* and *Paul Laband* (see *Manfred Friedrich*: Geschichte der deutschen Staatsrechtswissenschaft, in: Schriften zur Verfassungsgeschichte, vol. 50, Berlin: Duncker und Humblot 1997, pp. 222 ss. and 256 ss.), or in the domain of administrative law by *Otto Mayer* (with essential corrections foremost by *Fritz Fleiner*). Already by the next generation of legal thinkers, i.e. for instance in *Gerhard Anschütz* and *Richard Thoma*, the strong concept of positivism has been considerably moderated. The dogmatic of early positivism in late "Kaiserreich" and "Weimar Republic" have been critically valuated by *Otto von Gierke* (Die Grundbegriffe des Staatsrechts und die neusten Staatsrechtstheorien, Tübingen: J. C. B. Mohr, 1915, first in: Zeitschrift für die gesamte Staatswissenschaft, vol. 1874/ 1-2, reprint Aalen: Scientia, 1973; compare *idem*: Labands Staatsrecht und die deutsche Rechtswissenschaft, Darmstadt: Wissenschaftliche Buchgesellschaft, 2nd ed. 1961, first in: Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich, N. S. vol. 7/ 1883, 4). Similarly, in France the positivistic theory building by *Léon Dugit* has been criticised by *Jean-Claude-Eugène-Maurice Hauriou*.

Neo-Positivism has potentially changed this situation, and legal positivism has undergone an eminent reformation by the "Pure Theory of Law" (1934) by *Hans Kelsen*, preceded by the preparatory work "Hauptprobleme der Staatsrechtslehre" (1911). As a result, this doctrine has been intensely discussed and widely adopted, even if this is not always transparently declared by the adepts. This theory of law seems to be well founded, even if it designates an often-criticised position, often without profound understanding, until recently. It may be even better known in Anglo-American legal thought than in European, especially in German-speaking, theory building. Nevertheless, the antithesis of Natural Law theory and positivism affects also this kind or modality of positivistic approach to law and legal order, despite its ideological-critical inclination and its option for the rule of law. For it remains basically founded on the critical epistemological philosophy of Kantianism that confuses the primacy of practical reason with the metaphysical foundation of pure reason.

[True Kantianism – The Subject Taking Part in Cognition and Perception, and: True Hegelianism: Dynamic conception of Change and Development]

There is a philosophy of law in *Immanuel Kant*'s thought, but the essential part is not explicitly declared in the writing on "Metaphysische Anfangsgründe der Rechtslehre", but rather sketched in some political-philosophical writings and in the essay "On Eternal Peace" (on the occasion of the centenary of the first publication of this essay, a great number of contributions have been published; compare the contributions in: Immanuel Kant – Zum ewigen Frieden, in: Klassiker auslegen, vol. 1, ed. Otfried Höffe, Berlin:

Akademie-Verlag, 1995; Frieden durch Recht – Kants Friedensidee und das Problem einer neuen Weltordnung, in: Suhrkamp Taschenbuch Wissenschaft, vol. 1269, ed. Matthias Lutz-Bachmann and James Bohmann, Frankfurt am Main: Suhrkamp, 1996; 200 Jahre Kants Entwurf "Zum Ewigen Frieden" – Idee einer globalen Friedensordnung, ed. Volker Bialas and Hans-Jürgen Hässler, Würzburg: Königshausen & Neumann, 1996; as well as *Volker Gerhardt*: Immanuel Kants Entwurf "Zum ewigen Frieden" – Eine Theorie der Politik. Darmstadt: Wissenschaftliche Buchgesellschaft, 1995; among others). According to the Kantian critical epistemology, all science and knowledge has to be conceptualised based on legal experience.

In Kantian philosophy, we also discover an entire theory of judgment as a paradigmatic nucleus for jurisprudence and legal philosophy, moreover. For the very first time, it is ascertained that in jurisprudence, legal science takes an active, creative and productive part in the recognition of law, not only by interpretation and jurisdiction, but also in the course of legislation (to realise the law is equal to positivise, to codify the law). Kant's legal philosophy is actually included in his "Critique of judgment" (see *Wolfgang Wieland*: Kants Rechtsphilosophie der Urteilskraft, in: Zeitschrift für philosophische Forschung vol. 52/ 1 (1998), Frankfurt am Main: Vittorio Klostermann, pp. 1 ss.). In this respect, Neo-Kantian legal thought must be questioned, and it also has been criticised by *Erich Kaufmann* (Eine Kritik der neukantischen Rechtsphilosophie – Eine Betrachtung über die Beziehungen zwischen Philosophie und Rechtswissenschaft, 1921).

Just another prospective that is generally omitted, consist in the concurring lecture of Kantianism, as already provided by *Jakob Friedrich Fries* (Philosophische Rechtslehre und Kritik aller positiven Gesetzgebung, 1803) and later and even more radically by *Leonard Nelson* (Die Rechtswissenschaft ohne Recht, 1916; *idem*: System der philosophischen Rechtslehre und Politik, vol. 3 of: Vorlesungen über die Grundlagen der Ethik, 1924). We mention these attempts because they have shown some effect on *Walther Burkhardt*, and great influence on *Arnold Gysin*, two important legal thinkers in Switzerland.

With Hegelian and Neo-Hegelian legal thought, there occurs a paradigmatic change from a static perception of objective matters to a dynamic understanding of objectivised phenomenon that turns out to be rich of consequences. In this spirit, *Max Weber,* for instance, invites us to view the state and the law as improvised and transitory objectivations that stand within the flow of historical change, may this be progress or development or simply vicissitude (Herausgebererklärung zum "Archiv für Sozialwissenschaft und Sozialpolitik", 1904; compare *idem*: "Wirtschaft und Gesellschaft − Grundriss der verstehenden Soziologie", ed. Johannes Winckelmann, Tübingen: J. C. B. Mohr, 5th ed. 1972). This radical change of view means a challenge that has not yet been accomplished by today's general jurisprudence and legal philosophy so long.

Consequently, ontology and metaphysics (with their reference to being, objective reality) are to be replaced by process and structure with social phenomenon as their subjects, and with scientific conceptualisation as their problematic task. Neo-Kantian inclination with its foundation of cultural sciences has produced a strong influence of hermeneutics on jurisprudence; however, it is to be reminded, that in one case the art-work serves as model

for interpretation, enabling to understand disclosed artefacts, whereas in the other case, we encounter an undisclosed, open texture, and an endless changing character of the achievements of human spirit, of the outputs of spiritual life in a Hegelian sense. This may be the hidden cause for its revival with the so-called discourse of application in the School of *Jürgen Habermas*. In any case, the faculty of esthetical judgment instead of hermeneutical interpretation and understanding occurs in prospective:

[Emancipation of Jurisprudence – Historical Conditions and Self-Consciousness]
Only in the moment when legal science, jurisprudence takes an active part in the codification of legal order, in the legislation it comes accordingly to an emancipation of legal philosophy and general jurisprudence. The change in the function and task of legal science leads to the insight that jurisprudence itself must be an integral part of the system of the sources of law (achieved by *Eugen Huber*: "Bewährte Lehre", 1910; see entry 1.4 of this Legal Anthology). Embedded in the evolving reception in the history of ideas (especially of Neo-Kantian legal thought represented by *Rudolf Stammler*), the high tide of legal philosophy in Switzerland broaches in the beginning of the twentieth century and raises right from an imaginary starting point with the pinnacle of "Recht und Rechtsverwirklichung", published in 1920 by *Eugen Huber*. Hereby, not only the interdiction to interpret the positive law is overcome, but also a permission and an invitation expressed to go far beyond, and to create the concrete systematics of legal order in the way of application (compare *Ernst Forsthoff*: Recht und Sprache – Prolegomena zu einer richterlichen Hermeneutik, in: Schriften der Königsberger gelehrten Gesellschaft, vol. 17/1, Halle an der Saale: Max Niemeyer, 1940; *idem*: Zur Problematik der Verfassungsauslegung, in: res publica, Beiträge zum öffentlichen Recht, vol. 7, Stuttgart: Kohlhammer, 1961).
A prominent scholar of this interpretational approach to law is *Josef Esser* (Vorverständnis und Methodenwahl in der Rechtsfindung – Rationalitätsgrundlagen richterlicher Entscheidpraxis, Frankfurt am Main: Athenäum Fischer Taschenbuch Verlag, 1972; groundbreakingly compare *idem*: Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts – Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre, Tübingen: J. C. B. Mohr, 4. ed. 1990; see in short *idem*: Einführung in die Grundbegriffe des Rechtes und Staates – Eine Einführung in die Rechtswissenschaft und in die Rechtsphilosophie (Rechts- und Staatswissenschaften, vol. 5), Wien: Springer, 1949; in extenso the collected essays by *idem*: Wege der Rechtsgewinnung – Ausgewählte Aufsätze, ed. Peter Häberle und Hans G. Leser, Tübingen: J. C. B. Mohr, 1990; and *idem*: Das Bewusstwerden wissenschaftlichen Arbeitens, in: Roland Dubischar, Grundbegriffe des Rechts – Eine Einführung in die Rechtstheorie, Stuttgart 1968). A similar hermeneutical approach to questions of understanding, interpreting and application of the law has been proposed by *Emilio Betti* (Zur Grundlegung einer allgemeinen Auslegungslehre, Tübingen: J. C. B. Mohr, 1988, first printing in: Festschrift für Ernst Rabel, ed. Wolfgang Kunkel and Hans Julius Wolf, vol. 2, pp. 79-168). The essential contribution with respect to legal-philosophical thought, however, is to be considered the enlargement of hermeneutics to

philosophy *in extenso*, as elaborated by *Hans-Georg Gadamer*: Wahrheit und Methode – Grundzüge einer philosophischen Hermeneutik, 2 vols., Tübingen: J. C. B. Mohr, 1990, 1st ed. 1960). With this enhancement, jurisprudence decisively becomes a human (and social) science, based on the foundations of philosophical hermeneutics.
The aspects of the cultural dimension of legal phenomenon, the humanistic approach to jurisprudence, Historicism and Neo-Historicism, respectively the historicity of law, the achievements of Kantianism and Neo-Kantianism with their dynamic dialectics, as contributed by Hegelianism, and last but not least the pluralism of multiple standpoints in legal philosophy and general jurisprudence – with its necessity for hermeneutics in order to conciliate different interpretations of the same legal text – all stand in a coherent and consistent connection between each other.

[For Further Reading]
Jean Barbeyrac: De dignitate et utilitate Juris ac Historiarum et utriusque disciplinae Amica coniunctione, Amsterdam: Pierre de Coup, erweiterte und verbesserte ed. 1712 (1st ed. Lausanne: Frédéric Gentil und Théophile Crosat, 1711);
Johann Caspar Bluntschli: Allgemeines Staatsrecht, geschichtlich begründet, 2 vol., München: J. G. Cotta, 4th ed. 1868 (1st ed. München: Verlag der literarisch-artistischen Anstalt, 1852);
Alfred Dufour: Genève et la science juridique européenne du début du XIXème siècle – La fonction médiatrice des Annales de Législation (1820-1823), in: Wechselseitige Beeinflussungen und Rezeptionen von Recht und Philosophie in Deutschland und Frankreich, 3. deutsch-französisches Kolloquium vom 16. bis 18. September 1999 in La Bussière/ Dijon, ed. Jean-François Kervégan and Heinz Mohnhaupt (Ius Commune, supplementary vol. 144), Frankfurt am Main: Vittorio Klostermann, 2001, pp. 287ss.;
Fritz Fleiner: Institutionen des deutschen Verwaltungsrechts, Tübingen: J. C. B. Mohr, 8. 1928;
Michael Walter Hebeisen: Schweizer Juristen-Philosophen – Eine eigenständige schweizerische Tradition der Wissenschaftsphilosophie der Jurisprudenz und der Staatslehre in Auseinandersetzungen mit ausgewählten Strömungen der Rechts- und der Staatsphilosophie sowie der Wissenschaftstheorie in der ersten Hälfte des Zwanzigsten Jahrhunderts (Eine programmatische Skizze für ein interdisziplinäres Forschungsvorhaben), in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 50, ed. Peter Häberle, Tübingen: J. C. B. Mohr/Siebeck, pp. 69ss.;
Georg Wilhelm Friedrich Hegel: Grundlinien der Philosophie des Rechts (1820) (Philosophische Bibliothek, vol. 483), Hamburg: Felix Meiner, 1995; *Idem*: Vorlesungen zur Geschichte der Philosophie (Vollständige Ausgabe der Werke, vol. 13), ed. Carl Ludwig Michelet, Berlin: Duncker & Humblot, 1840;
Pietro Piovani: La filosofia del diritto come scienza filosofica, Milano: A. Giuffrè, 1963 (in german translation: Die Rechtsphilosophie als philosophische Disziplin, s. www.swuv.bodautor.de/Editionen/Pietro-Piovani-Edition/); *Idem*: La filosofia del diritto nella pluralità delle esperienze giuridiche, in: Rassegna italiana di sociologia, Jg. 1962, H. 1

(in french translation, in: Qu'est-ce que la philosophie du droit – Archives de philosophie du droit, vol. 1962; in German translation: Die Rechtsphilosophie im Rahmen der Pluralität der Rechtserfahrungen, s. l. c.);
Alphonse Rivier: Principes du droit des gens, Paris: Rousseau, 1889 (in deutscher Übersetzung: Lehrbuch des Völkerrechts, Hannover: Ferdinand Enke, 2nd ed. 1899);
Charles Secrétan: La philosophie de la liberté – Cours de philosophie morale, 2 vol., Paris/ Lausanne: L. Hachette et Cie/ Georges Bridel, 1849;
Bertrando Spaventa: Della nazionalità nella filosofia, Prolusione, in: La filosofia italiana nelle sue relazioni con la filosofia europea (1862), in: Opere (Classici della filosofia Bd. XII), ed. Giovanni Gentile, Firenze: Sansoni, 1972, vol. 2, pp. 407ss.;
Anna Tumarkin: Wesen und Werden der schweizerischen Philosophie, Frauenfeld: Huber & Co., 1948;
Giovanni Battista Vico: Scienza Nuova (1. ed. 1725; 3. ed. 1744), in: Opere, vols. 3 and 4, ed. Fausto Nicolini, Bari: Laterza, 1931/ 1911/ 1916 (German translation: Prinzipien einer neuen Wissenschaft über die gemeinsame Natur der Völker, ed. Vittorio Hösle and Christoph Jermann, Hamburg: Felix Meiner, 1990).

23 January 2018 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Preliminary Section "Elementary Pre-History of Modern Swiss Legal Thought – Reconciliation of Concurring Jurisdictions and Combination of Scientific Disciplines or Methods"
Entry 0.6 "Johann Anton von Tillier, Geschichte der Eidgenossenschaft"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Johann Anton von Tillier
Title: Geschichte der Eidgenossenschaft während der Zeit des sogenannten Fortschrittes, von dem Jahre 1830 bis zur Einführung der neuen Bundesverfassung im Herbste 1848, aus authentischen Quellen dargestellt
Edition(s): Bern: J. Körber, 1854/1855, 3 vols., vol. 1, pp. 1-66

[Introduction]
The achievements of legal order and legal thought in Switzerland cannot be understood without the crucial moments of general history or political history in the nineteenth century. The Ideas and Ideals of the French Revolution could not immediately and not lastingly, nor entirely become adopted and practised effectively in the Swiss Feder State or the Cantons, the Member States. In the beginning, they have been octroyed with force by France, leading to a relatively short period of so-called “Helvetik”. However, the conservative political forces have soon re-installed the principles of *Ancien Régime* during Restauration. Only in the period of “Regeneration” political order has been reformed in such a way that this time from 1830 to 1833 is commonly called an era of continuous and lasting Progress. The fundamental changes have been of political and historical interest in that time and ever since but have not been treated in terms of the progress of legal order as such or in the function of jurisprudence in abundance.
As a basis for insights in the fundamental role of this period of “Regeneration”, two sources have been selected, both dealing with the development within the entire Swiss Federal State, whereas the constitutional reforms have mainly been achieved within several of the leading Member States. (see also the entry 0.8, *Peter Feddersen*: Geschichte der Schweizerischen Regeneration.)

[Historical Situation and Systematic Context]
It might be interesting to give an overview of some of the fundamental output of historians with respect to the period in case:
A comprehensive bibliography has been established by *G. R. Ludwig von Sinner*: Bibliographie zur Schweizergeschichte, oder systematisches und theilweise beurtheilendes Verzeichniss der seit 1786 bis 1851 über die Geschichte der Schweiz, von ihren Anfängen an bis 1798, erschienen Bücher - Ein Versuch. Bern/ Zürich: Stämpfli/ Schulthess, 1851.
A short outline of historiography can be found with *Georg von Wyss*: Geschichte der Historiographie in der Schweiz, hrsg. durch die Allgemeine geschichtsforschende

Gesellschaft der Schweiz, Zürich: Fäsi & Beer, 1895.
A collection of important sources for historical studies is provided by *Wilhelm Oechsli*: Quellenbuch zur Schweizergeschichte für Haus und Schule, neue Folge mit besonderer Berücksichtigung der Kulturgeschichte, 2 vols., Zürich: Friedrich Schulthess, 1886/1893.
An overview over the development in the domain of public law can best be consulted with Aloïs von Orelli: Das Staatsrecht der Schweizerischen Eidgenossenschaft (Handbuch des Öffentlichen Rechts, hrsg. von Heinrich Marquardsen, vol. 4: Das Staatsrecht der ausserdeutschen Staaten, 1. Halbband, 2. Abteilung), Freiburg im Breisgau: J. C. B. Mohr (Paul Siebeck), 1885.

The dynamic progress within the Cantons, the Swiss Member States is represented by the following authors:
Johannes Dierauer: Geschichte der Schweizerischen Eidgenossenschaft (Allgemeine Staatengeschichte, hrsg. von Hermann Oncken, 1. Abteilung: Geschichte der europäischen Staaten, hrsg. von A. H. L. Heeren, 26. Werk), 5 vols., Gotha: Friedrich Andreas Perthes A.G., 1st to 3rd eds., 1919ff.;
Johann Caspar Bluntschli/ Johann Jakob Hottinger: Geschichte der Republik Zürich, 3 vols., Zürich: Friedrich Schulthess, 1847/ 1856;
Jacob Baumartner: Die Schweiz in ihren Kämpfen und Umgestaltungen von 1830 bis 1850, geschichtliche dargestellt, 4 vols., Zürich: Friedrich Schulthess, 1853ff.;
Ludwig Meyer (von Knonau): Handbuch der Geschichte der Schweizerischen Eidgenossenschaft, 2 vols., Zürich: Orell, Füssli und Compagnie, 1826;
Wilhelm Oechsli: Die Anfänge der Schweizerischen Eidgenossenschaft, zur sechsten Säkularfeier des ersten ewigen Bundes vom 1. August 1291 verfasst im Auftrag des schweizerischen Bundesrates, Zürich: Ulrich & Co., 1891; and *Idem*: Geschichte der Schweiz im neunzehnten Jahrhundert (Staatengeschichte der neuesten Zeit, vol. 29), Leipzig: S. Hirzel, 1903;
Josef Anton Henne: Schweizerchronik, in vier Büchern aus den Quellen untersucht und dargestellt, St. Gallen: Jakob Friedrich Wartmann, 2., völlig umgearbeitete und vermehrte Auflage 1840;
Johannes Strickler: Die Helvetische Revolution 1798 mit Hervorhebung der Verfassungsfragen, Frauenfeld: J. Huber, Neudruck mit Verbesserungen und Beigaben, 1898;
Charles Monnard: Geschichte der Eidgenossen während des 18. und der ersten Decennien des 19. Jahrhunderts. Aus dem Französischen. Zürich: Orell Füssli und Comp., 1853;
Heinrich Zschokke: Des Schweizerlands Geschichte für das Schweizervolk, Aarau: Sauerländer, 2. verbesserte ganz wohlfeile Original-Auflage 1824;
Johann Jakob Blumer: Staats- und Rechtsgeschichte der schweizerischen Demokratien, oder der Kantone Uri, Schwyz, Unterwalden, Glarus, Zug und Appenzell, St. Gallen: Scheitlin und Zollikofer, 1850-1859.

[Content, Abstracts/Conclusions, Insights, Evidence]

The treatise by *Johann Anton von Tillier* opens with the events of the year 1830 which have been like a revolution in Switzerland, and he takes the action of the so-called "Tagsatzung", the central organ of the Swiss Federal State of that time, as a starting point for his considerations. We will not discuss the content in detail here. We have chosen this representative and highly significant piece of history in order to indicate that historical consciousness, a vivid sense for the historical dimension of legal order, legal practice and political order remains the precondition for a development to a higher level of legal philosophy and general jurisprudence, indeed.

With respect to constitutional law and political history of the Swiss Federal State, the following contributions are worth to be mentioned:
Rudolf Eduard Ullmer: Die staatsrechtliche Praxis der schweizerischen Bundesbehörden aus den Jahren 1848-1860, Zürich: David Bürkli, 1862; *Idem*: Le droit public suisse ou jurisprudence des arrêts des autorités fédérales suisses pendant les années 1848-1860, Traduit de l'allemand et publié, par ordre du Conseil fédéral par Eugène Borel, 2 vols., Montandon Frères, Neuchâtel 1864;
Johann Jakob Blumer: Handbuch des Schweizerischen Bundesstaatsreches, 2 vols., Schaffhausen: Friedrich Hurter, 1863/64; *Idem* / *Joseph Morel*: Handbuch des schweizerischen Bundesstaatsrecht, 3 vols., Basel: Helbing & Lichtenhahn, 3rd ed. 1880-1891;
Ludwig Rudolf von Salis: Schweizerisches Bundesrecht - Staatsrechtliche und verwaltungsrechtliche Praxis des Bundesrates und der Bundesversammlung seit dem 29. Mai 1874, Im Auftrage des Schweizerischen Bundesrates bearbeitet, 5 vols., Bern: K. J. Wyss, 2., bis Ende 1902 fortgeführte Auflage 1903/1904; *Idem*: Schweizerisches Bundesrecht. Staatsrechtliche und Verwaltungsrechtliche Praxis des Bundesrates und der Bundesversammlung seit dem 29. Mai 1874. vols. III und IV. Bern 1893;
Eduard His: Geschichte des neuern Schweizerischen Staatsrechts, 3 vols., Basel: Helbing & Lichtenhahn, 1920-1938;
Peter Conradin von Planta: Die Schweiz in ihrer Entwickelung zum Einheitsstaate, Zürich: Verlags-Magazin, 1877;
Jakob Hodler: Allgemeine Grundsätze des natürlichen Staatsrechts mit vergleichender Berücksichtigung der schweizerischen Bundesverfassung und der bernischen Kantonsverfassung, Bern: Rudolf Jenni, 1863;
Jakob Schollenberger: Das Bundesstaatsrecht der Schweiz – Geschichte und System, Berlin: O. Häring, 1902; *Idem*: Politik in systematischer Darstellung, Berlin: O. Häring, 1903; *Idem*: Bundesverfassung der Schweizerischen Eidgenossenschaft – Kommentar mit Einleitung, Berlin: O. Häring, 1905; *Idem*: Geschichte der schweizerischen Politik, 2 vols., Frauenfeld: Huber & Co., 1906/1908;
Carl Hilty: Die Bundesverfassungen der Schweizerischen Eidgenossenschaft, Bern: K. J. Wyss, 1891; *Idem*: Les constitution fédérales de la Confédération suisse, Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger frères, 1891.

(Réédition: Les Éditions de l'Aire 1991);
Walther Burkhardt: Schweizerisches Bundesrecht – Staats-und verwaltungsgerichtliche Praxis des Bundesrates und der Bundesversammlung seit 1903, Im Auftrag des schweizerischen Bundesrates bearbeitet, 5 vols., Frauenfeld: Huber & Co., 1930/1931.

[Further Information About the Author]
Johann Anton von Tillier, born on 24 January 1792 in Berne, died on 16 February 1854 in Munich, has studied history and jurisprudence in Geneva between 1809 and 1811, before leaving Switzerland for Jena in Germany from 1811 to 1813. Being back in Berne, he was a politician for the conservative party, but with progressive ideas, as well as a judge. In 1848, he was elected a member of the first parliament of the Swiss Federal State. His well founded work as a historian has only been published posthumous, in part.

[Selected Works of the Same Author]
Johann Anton von Tillier: Geschichte des eidgenössischen Freistaates Bern von seinem Ursprunge bis zu seinem Untergange im Jahre 1798, aus den Urquellen, vorzüglich aus den Staatsarchiven, dargestellt, 5 vols, Bern: Fischer, 1838/1839; *Idem*: Geschichte der helvetischen Republik von ihrer Gründung im Frühjahr 1798 bis zu ihrer Auflösung im Frühjahr 1803, vorzüglich aus dem helvetischen Archiv und anderen noch unbekannten handschriftlichen Quellen dargestellt, 3 vols., Bern: Fischer, 1843; *Idem*: Geschichte der Eidgenossenschaft während der Herrschaft der Vermittlungsakte, Von ihrer Einführung im Frühjahr 1803 bis zu ihrer Auflösung in den letzten Tagen des Jahres 1813, aus den Urquellen dargestellt, 2 vols., Zürich: Schulthess, 1845/1846.

[For Further Reading]
Carl Hilty: Öffentliche Vorlesungen über Helvetik, Bern: Max Fiala, 1878;
Alfred Kölz: Die Bedeutung der Französischen Revolution für das schweizerische öffentliche Recht und politische System – Eine Skizze, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 108, Basel: Helbing & Lichtenhahn, 1989, pp. 497 ss.

25 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Preliminary Section "Elementary Pre-History of Modern Swiss Legal Thought – Reconciliation of Concurring Jurisdictions and Combination of Scientific Disciplines or Methods"
Entry 0.8 "Peter Feddersen, Geschichte der Regeneration"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Peter Feddersen
Title: Geschichte der Schweizerischen Regeneration von 1830 bis 1848, nach den besten Quellen bearbeitet
Edition(s): Zürich: Verlags-Magazin, 1867, pp. 30-86

[Introduction]
The achievements of legal order and legal thought in Switzerland cannot be understood without the crucial moments of general history or political history in the nineteenth century. The Ideas and Ideals of the French Revolution could not immediately and not lastingly, nor entirely become adopted and practised effectively in the Swiss Feder State or the Cantons, the Member States. In the beginning, they have been octroyed with force by France, leading to a relatively short period of so-called “Helvetik”. However, the conservative political forces have soon re-installed the principles of *Ancien Régime* during Restauration. Only in the period of “Regeneration” political order has been reformed in such a way that this time from 1830 to 1833 is commonly called an era of continuous and lasting Progress. The fundamental changes have been of political and historical interest in that time and ever since, but have not been treated in terms of the progress of legal order as such or in function of jurisprudence in abundance.
As a basis for insights in the fundamental role of this period of “Regeneration”, two sources have been selected, both dealing with the development within the entire Swiss Federal State, whereas the constitutional reforms have mainly been achieved within several of the leading Member States. (see also the entry 0.6, *Johann Anton von Tillier*: Geschichte der Eidgenossenschaft während der Zeit des sogenannten Fortschrittes.)

[Historical Situation and Systematic Context]
It might be interesting to give an overview of some of the fundamental output of historians with respect to the period in case:
A comprehensive bibliography has been established by *G. R. Ludwig von Sinner*: Bibliographie zur Schweizergeschichte, oder systematisches und theilweise beurtheilendes Verzeichniss der seit 1786 bis 1851 über die Geschichte der Schweiz, von ihren Anfängen an bis 1798, erschienen Bücher - Ein Versuch. Bern/ Zürich: Stämpfli/Schulthess, 1851.
A short outline of historiography can be found with *Georg von Wyss*: Geschichte der Historiographie in der Schweiz, hrsg. durch die Allgemeine geschichtsforschende Gesellschaft der Schweiz, Zürich: Fäsi & Beer, 1895.

A collection of important sources for historical studies is provided by *Wilhelm Oechsli*: Quellenbuch zur Schweizergeschichte für Haus und Schule, neue Folge mit besonderer Berücksichtigung der Kulturgeschichte, 2 vols., Zürich: Friedrich Schulthess, 1886/1893. An overview over the development in the domain of public law can best be consulted with Aloïs von Orelli: Das Staatsrecht der Schweizerischen Eidgenossenschaft (Handbuch des Öffentlichen Rechts, hrsg. von Heinrich Marquardsen, vol. 4: Das Staatsrecht der ausserdeutschen Staaten, 1. Halbband, 2. Abteilung), Freiburg im Breisgau: J. C. B. Mohr (Paul Siebeck), 1885.

The dynamic progress within the Cantons, the Swiss Member States is represented by the following authors:
Johannes Dierauer: Geschichte der Schweizerischen Eidgenossenschaft (Allgemeine Staatengeschichte, hrsg. von Hermann Oncken, 1. Abteilung: Geschichte der europäischen Staaten, hrsg. von A. H. L. Heeren, 26. Werk), 5 vols., Gotha: Friedrich Andreas Perthes A.G., 1st to 3rd eds., 1919ff.;
Johann Caspar Bluntschli/ Johann Jakob Hottinger: Geschichte der Republik Zürich, 3 vols., Zürich: Friedrich Schulthess, 1847/ 1856;
Jacob Baumartner: Die Schweiz in ihren Kämpfen und Umgestaltungen von 1830 bis 1850, geschichtliche dargestellt, 4 vols., Zürich: Friedrich Schulthess, 1853ff.;
Ludwig Meyer (von Knonau): Handbuch der Geschichte der Schweizerischen Eidgenossenschaft, 2 vols., Zürich: Orell, Füssli und Compagnie, 1826;
Wilhelm Oechsli: Die Anfänge der Schweizerischen Eidgenossenschaft, zur sechsten Säkularfeier des ersten ewigen Bundes vom 1. August 1291 verfasst im Auftrag des schweizerischen Bundesrates, Zürich: Ulrich & Co., 1891; and *Idem*: Geschichte der Schweiz im neunzehnten Jahrhundert (Staatengeschichte der neuesten Zeit, vol. 29), Leipzig: S. Hirzel, 1903;
Josef Anton Henne: Schweizerchronik, in vier Büchern aus den Quellen untersucht und dargestellt, St. Gallen: Jakob Friedrich Wartmann, 2., völlig umgearbeitete und vermehrte Auflage 1840;
Johannes Strickler: Die Helvetische Revolution 1798 mit Hervorhebung der Verfassungsfragen, Frauenfeld: J. Huber, Neudruck mit Verbesserungen und Beigaben, 1898;
Charles Monnard: Geschichte der Eidgenossen während des 18. und der ersten Decennien des 19. Jahrhunderts. Aus dem Französischen. Zürich: Orell Füssli und Comp., 1853;
Heinrich Zschokke: Des Schweizerlands Geschichte für das Schweizervolk, Aarau: Sauerländer, 2. verbesserte ganz wohlfeile Original-Auflage 1824;
Johann Jakob Blumer: Staats- und Rechtsgeschichte der schweizerischen Demokratien, oder der Kantone Uri, Schwyz, Unterwalden, Glarus, Zug und Appenzell, St. Gallen: Scheitlin und Zollikofer, 1850-1859.

[Content, Abstracts/Conclusions, Insights, Evidence]
In the selected text, *Peter Feddersen* deals with the dynamic process of constitutional

progress in the short period of "Regeneration" on the level of the Member States; constitutional consolidation on the level of the Federal State should take place somewhat later, in 1848. We will not discuss the content in detail here. We have chosen this representative and highly significant piece of history in order to indicate that historical consciousness, a vivid sense for the historical dimension of legal order, legal practice, and political order remains the precondition for a development to a higher level of legal philosophy and general jurisprudence, indeed.

With respect to constitutional law and political history of the Swiss Federal State, the following contributions are worth to be mentioned:
Rudolf Eduard Ullmer: Die staatsrechtliche Praxis der schweizerischen Bundesbehörden aus den Jahren 1848-1860, Zürich: David Bürkli, 1862; *Idem*: Le droit public suisse ou jurisprudence des arrêts des autorités fédérales suisses pendant les années 1848-1860, Traduit de l'allemand et publié, par ordre du Conseil fédéral par Eugène Borel, 2 vols., Montandon Frères, Neuchâtel 1864;
Johann Jakob Blumer: Handbuch des Schweizerischen Bundesstaatsreches, 2 vols., Schaffhausen: Friedrich Hurter, 1863/64; *Idem* / *Joseph Morel*: Handbuch des schweizerischen Bundesstaatsrecht, 3 vols., Basel: Helbing & Lichtenhahn, 3. A. 1880-1891;
Ludwig Rudolf von Salis: Schweizerisches Bundesrecht - Staatsrechtliche und verwaltungsrechtliche Praxis des Bundesrates und der Bundesversammlung seit dem 29. Mai 1874, Im Auftrage des Schweizerischen Bundesrates bearbeitet, 5 vols., Bern: K. J. Wyss, 2., bis Ende 1902 fortgeführte Auflage 1903/1904; *Idem*: Schweizerisches Bundesrecht. Staatsrechtliche und Verwaltungsrechtliche Praxis des Bundesrates und der Bundesversammlung seit dem 29. Mai 1874. Bände III und IV. Bern 1893;
Eduard His: Geschichte des neuern Schweizerischen Staatsrechts, 3 vols., Basel: Helbing & Lichtenhahn, 1920-1938;
Peter Conradin von Planta: Die Schweiz in ihrer Entwickelung zum Einheitsstaate, Zürich: Verlags-Magazin, 1877;
Jakob Hodler: Allgemeine Grundsätze des natürlichen Staatsrechts mit vergleichender Berücksichtigung der schweizerischen Bundesverfassung und der bernischen Kantonsverfassung, Bern: Rudolf Jenni, 1863;
Jakob Schollenberger: Das Bundesstaatsrecht der Schweiz – Geschichte und System, Berlin: O. Häring, 1902; *Idem*: Politik in systematischer Darstellung, Berlin: O. Häring, 1903; *Idem*: Bundesverfassung der Schweizerischen Eidgenossenschaft – Kommentar mit Einleitung, Berlin: O. Häring, 1905; *Idem*: Geschichte der schweizerischen Politik, 2 vols., Frauenfeld: Huber & Co., 1906/1908;
Carl Hilty: Die Bundesverfassungen der Schweizerischen Eidgenossenschaft, Bern: K. J. Wyss, 1891; *Idem*: Les constitution fédérales de la Confédération suisse, Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger frères, 1891. (Réédition: Les Éditions de l'Aire 1991);
Walther Burkhardt: Schweizerisches Bundesrecht – Staats-und verwaltungsgerichtliche

Praxis des Bundesrates und der Bundesversammlung seit 1903, Im Auftrag des schweizerischen Bundesrates bearbeitet, 5 vols., Frauenfeld: Huber & Co., 1930/1931.

[Further Information About the Author]
Peter Feddersen, born on 18 January 1812 in Altona nearby Hamburg, dead on 5 July 1874 in Basel, is a very interesting figure, originated in Mecklenburg, he married an Italian woman, *Esther Daverio Possenti*, as his future wife. He followed his academic studies in jurisprudence at the Universities of Kiel and Heidelberg from 1830 onwards. In 1833, he participated to a republican revolt in Frankfurt am Main and had to emigrate to Switzerland, first to Zurich, then to Berne, where he worked as a journalist. In 1848, he visited Germany and was expelled by the Bernese Government. He, therefore, settled in Basel and became redactor in chief of the local "Tagblatt". His main and only historical work, "Geschichte der schweizerischen Regeneration" has appeared in 1867.
Peter Feddersen is also renowned as a translator of *Thomas Carlyle*: Die Französische Revolution, 2 vols., aus dem Englischen von P. Feddersen, umgearbeitet von E. Erman, Leipzig: Brockhaus, 11th ed. 1922.

[For Further Reading]
Carl Hilty: Öffentliche Vorlesungen über Helvetik, Bern: Max Fiala, 1878;
Alfred Kölz: Die Bedeutung der Französischen Revolution für das schweizerische öffentliche Recht und politische System – Eine Skizze, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 108, Basel: Helbing & Lichtenhahn, 1989, pp. 497 ss.

25 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Preliminary Section "Elementary Pre-History of Modern Swiss Legal Thought – Reconciliation of Concurring Jurisdictions and Combination of Scientific Disciplines or Methods"
Entry 0.10 "Carl Hilty: Ideen und Ideale schweizerischer Politik"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Carl Hilty
Title: Ideen und Ideale schweizerischer Politik – Ein academischer Vortrag
Edition(s): in: Vorlesungen über die Politik der Eidgenossenschaft, Bern: Max Fiala, 1875

[Introduction]
In an appendix to his "Lectures on the Politics of the Swiss Federal State" from 1875, *Carl Hilty* also published a short, but comprehensive academic lecture on "Ideas and Ideals of Swiss Politics", where he characterises the core concepts of Swiss political thought. As a general publisher of the "Political Yearbook of the Swiss Federal State" from 1886 onwards to his death, that was meant to be a journal for politicians, diplomats, and scientists from all disciplines, the author later established as a forerunner of the early political science in Switzerland.

[Historical Situation and Systematic Context]
The Lectures by *Carl Hilty* have been dedicated to the academic youth. They treat the following subjects and deal with the undercurrent cultural and political life, these concepts are rooted in: the Swiss nationality, the leading political idea in the time of the foundation of the Swiss Federal State, the struggle for power and against Austria, the alliance with France, interior politics, the role of freedom and equality, the so-called "Sonderbund" and the resolution of religious tensions, the set of ideals of Swiss Federal politics as well as the actual situation of Swiss politics. Of main interest hereby has always been to the author the period of "Helvetik" i.e. the relatively short epoch after the intervention of revolutionary France on the Swiss territory. Only 3 years later, Hilty should publish accordingly specific lectures on that subject (see the proposal for further reading).

[Content, Abstracts]
Men are driven by ideas and ideals, *Carl Hilty* argues, and hereby establishes a kind of idealism or humanism in cultural matters. Not only individuals have this kind of soul, but also collective bodies as the nation state. Switzerland has been exposed to two main challenges, according to the author: 1st a reduced sovereignty concerning the inner development but also the outer independence, with an according sensibility as for the impacts from neighbour states; and 2nd a somewhat diffuse and constantly changing principle of its existence. From this derives a double nature of the Swiss Federal State and an interdependency with a variety of conceptions of the world as well as of life in general.

The author identifies three main dimensions of Swiss ideas and ideals, namely to establish true democracy in political practice, to conquer social malaise by adopting socialist doctrines, and to guarantee free practice of religious, i.e. Christian convictions. These themes are discussed by the author extensively.
The characteristics of Swiss politics are described by *Carl Hilty* as follows: the specifically Swiss spirit or thought is vivid, self-conscious and self-confident, and always oriented to practice, i.e. to practical solutions of all human and social quests and problems; such occurs nationwide, includes all the regions of the Federal State, reflects collective well-being and collective freedom, above all changing time spirit. Symptomatically, the author refers to the special qualification and competence of women for these means to collective life.
In conclusion, the highest aim is declared to be "the ever-lasting ideas within the life of nations".

[Conclusions, Insights, Evidence/Philosophical Valuation and Jurisprudential Significance]
In his analysis, *Carl Hilty* addresses clearly the basis of success of all national collectives, routed in an inter-cultural ambiance. Political institutions have to be founded on ethical valuations of ideas and ideals, and the legal order serves to this end pragmatically.

[Further Information About the Author]
Carl Hilty, born on 28 February 1833 in Grabs, dead on 12 October 1909 in Clarens, studied jurisprudence at the University of Göttingen (1851-1853) and graduated 1854 with a doctor's degree from the University of Heidelberg. Afterwards, he went to Paris and London, before founding a lawyer's chancery in Chur in Graubünden, his native Swiss canton. He was nevertheless more occupied with publishing studies of public law as well as religious and ethical essays, than with defending clients in court.
In 1868, he published "Theoretiker und Idealisten in der Demokratie" and in 1891 his main work "Die Bundesverfassungen der schweizerischen Eidgenossenschaft". In 1874, he was called to the ordinary chair of federal law and Bernese public law at the University of Berne, where after 1882 his lectures covered also the general theory of the state and international law. In 1909, he was nominated as a representative of the Swiss government at the International Court of Arbitration in Den Haag. However, he was also the chief editor of "Politischen Jahrbuch der Schweizerischen Eidgenossenschaft", and he remained so until his death.
Our interest is focusing on his critical considerations of ambiance and sense for legal politics in history and in an intercultural context. In a very pragmatic way, he tried to grasp political institutions and their ethical values in order to render them fecundly again for the needs of his time and his place.
For more information, please consult:
Walther Burckhardt: Carl Hilty (1833-1909), in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, vol. 24 (1910), pp. 405 ss.;
Felix Renner: Der Verfassungsbegriff im staatsrechtlichen Denken der Schweiz im 19. und

20. Jahrhundert (Dissertation Universität Zürich), Zürich: Schulthess & Co., 1968, pp. 254 ss.;
Daniel Thürer (together with *Karin Spinnler Schmid*): Ein typisch-untypischer Schweizer Staatsrechtler – Die Bedeutung Carl Hiltys für das schweizerische Staatsleben, in: Werdenberger Jahrbuch, vol. 2009, Buchs 2008, pp. 204-214 (auch in: Zeitschrift für Schweizerisches Recht, vol. 2009/ I, pp. 111-129).

[Selected Works of the Same Author]
Carl Hilty: Die Bundesverfassungen der Schweizerischen Eidgenossenschaft, Bern: K. J. Wyss, 1891 (in französischer Übersetzung: Les constitutions fédérales de la Confédération suisse – Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger, 1891; reprint Neuchâtel: Les Éditions de l'Aire, 1991); *Idem*: Fin de Siècle; and *Idem*: Die Zukunft der Schweiz, both in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, ed. by Carl Hilty, vol. 13 (1899), p. 3-21, resp. vol. 16 (1902), p. 3-39, Bern: K. J. Wyss, 1899/ 1902; *Idem*: Über das Studium des Rechts in unserer Zeit, in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, ed. Carl Hilty, vol. 23, Bern: K. J. Wyss, 1908; *Idem* (Ed.): Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, 1886-1909.

[For Further Reading]
Carl Hilty: Öffentliche Vorlesungen über Helvetik, Bern: Max Fiala, 1878; *Idem*: Die Bundesverfassungen der Schweizerischen Eidgenossenschaft, Zur sechsten Säcularfeier des ersten Ewigen Bundes vom 1. August 1291, Bern: K. J. Wyss, 1891 (in French language: Les constitution fédérales de la Confédération suisse. Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger frères, 1891; reprint Les Éditions de l'Aire 1991).

24 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Preliminary Section "Elementary Pre-History of Modern Swiss Legal Thought – Reconciliation of Concurring Jurisdictions and Combination of Scientific Disciplines or Methods"
Entry 0.12 "Ludwig Stein, Wesen und Aufgabe der Sociologie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Ludwig Stein
Title: Wesen und Aufgabe der Sociologie – Eine Kritik der organischen Methode in der Sociologie
Edition(s): in: Archiv für systematische Philosophie, vol. 4, Berlin: Georg Reimer, 1898, 38 pp.

[Introduction]
Early sociology is to be considered as a reaction to the social question – to phenomenon like widespread poverty, repression of the working class and working children – as well as socialism is meant to be a political reaction. The Swiss Federal State has been, from its beginnings, a social and welfare organisation, dealing with the protection of workers, care for the poor and education. Like *Louis Wuarin* in Geneva, *Maurice Millioud* in Lausanne, and *Abroteles Eleutheropulos* in Zurich, *Ludwig Stein* has been one of the forerunners of sociology at the University of Berne. With respect of the system of scientific disciplines, his conception of sociology as equal to social philosophy is of particular importance, as it also includes all practical philosophy, i.e. legal philosophy, moral philosophy and political philosophy.

[Historical Situation and Systematic Context]
In contrast to predominating positivism in the French speaking parts of Switzerland, the conception of sociology, as documented by *Ludwig Stein* in his short writing on "Wesen und Aufgabe der Sociologie" from 1898 is directed towards a philosophical understanding of human behaviour and action within a given group, or community, or society itself and against the functional or so-called organic method in sociology of that time. However, it cannot be brought into a closer connection to the so-called "verstehende Soziologie" as later inaugurated by *Max Weber*. Rather, it resembles the very early legal economics of *Gustav Schmoller* or legal sociology as projected by *Ludwig Gumplowicz* ("Grundriss der Sociologie", Wien, 2nd ed. 1905; "Sozialphilosophie im Umriss", Innsbruck 1910; see also his principal writing: "Die sociologische Staatsidee", Innsbruck, 2nd ed. 1902).

[Content, Abstracts]
The sociological approach to human behaviour stands for the prerogative of practice over theory. The process of genetic development of sociology shows as a process in progress and sociology is far from of being established as a scientific discipline. Thus, the various

conceptions of social science. According to *Ludwig Stein*, sociology shares his subject with history, cultural history, philosophy of history, ethnography, anthropology, economics and statistics. Within this context, sociology has to emancipate as the leading discipline that has to include and integrate all other scientific treatments of human behaviour, and by doing so it resembles philosophy with its overall approach. "So hat die Sociologie die Wechselwirkung menschlicher Individuen, das heisst alle Formen menschlichen Zusammenlebens und Zusammenwirkens des gesellschaftlichen Geschehens eine soziale Weltanschauung herauszupräparieren, gleichwie die grossen Denksysteme der Vorzeit uns eine universelle Weltanschauung zurechtkonstruiert haben". Therefore, sociology is, in essence, social philosophy, philosophy of society and community. Sociological theory has in consequence to investigate all kind of interaction of human behaviour including and covering the practical parts of philosophy, as legal philosophy, philosophy of religion and political philosophy.
The ideal of this kind of sociology, or better social philosophy, is dynamics, the model for its methodology is the explanation of modalities and relations of social classification. Hereby, *Ludwig Stein* marks a difference to philosophers, dealing with social questions, as for instance *Wilhelm Windelband*, *Georg Simmel*, and *Heinrich Rickert*, whose ideal is still some kind of metaphysics, according to their idealistic inclination. This inter-position characterises the conception of sociology by Stein as singularity. Nevertheless, this approach is very interesting in terms of the history of thought, as it is closely related to the historical-genetical method as practised by Hegelian philosophers, even if this insight goes in some way back to *Giovanni Battista Vico*. Highly significant is also the individualistic turn in sociology compared to collective conceptions. "Hier hat nun die Sociologie einzusetzen, um die Kluft zwischen bleibender Eigenschaft und einzelner Handlung des Menschen, zwischen Gesetz und Ereignis, zwischen Collectivhandlungen und Einzelhandlungen, zwischen Gattung und Exemplar, zwischen Milieu und Individuum wissenschaftlich zu überbrücken". Both concurring methods have their own right, according to Stein, the organic method as heuristic principle and the historically comparing method as normative principle. This conviction brings sociology as concepted by Stein in close proximity to legal philosophy, indeed.

[Conclusions, Insights, Evidence]
Ludwig Stein has shown in practice in his writing "Die sociale Frage im Lichte der Philosophie" (Stuttgart: Enke, 1897), how the application of his method could work and what results can be obtained. The social phenomenon is to be considered in its dynamics, in its individual implications, with its collective consequences. The social question should be analysed scientifically and philosophically in order to provide the necessary cognitions for political action. The encouragement to confront with the social demands of his time can probably be explained by the Jewish background of Stein who had been educated as a Rabbi in Berlin.

[Further Information About the Author]

Ludwig Stein, born on 12 November 1859 in Erdö-Benye (Hungary), died on 13 July 1930 in Salzburg, went to Berlin and Halle an der Saale in order to study philosophy with *Eduard Zeller* and *Wilhelm Dilthey*. As an eminent representative of the Jewish community, he also became a rabbi. In 1886, he was called a lecturer at the "Eidgenössisches Polytechnikum" and at the same time at the University of Zurich. Between 1891 and 1910, he was a professor of philosophy at the University of Berne with a strong inclination to sociology. In 1893, he obtained Swiss citizenship in his new hometown of Zurich. *Walter Rathenau*, *Leo Trotsky* and *Rosa Luxemburg* were among his students. In 1909, he organised the 7th congress of sociology in Berne, in the name of the *Institut International de Sociologie*. Back in Berlin he was the chief editor of the "*Archiv für Geschichte der Philosophie*" as well as of the "*Archiv für systematische Philosophie und Soziologie*".
Although a pacifist and a member of the Committee of the international Bureau for Peace, *Ludwig Stein* was thoroughly bourgeois in his mind. He, therefore, criticised not only socialist ideas but also conservative politics. He, for example, argued against the theories of *Friedrich Nietzsche*. Greater influence, however, may have had his activities as a publicist writing in numerous journals and papers.

[Selected Works of the Same Author]
Ludwig Stein: Die sociale Frage im Lichte der Philosophie – Vorlesungen über Socialphilosophie und ihre Geschichte, Stuttgart: Ferdinand Enke, 1897; *Idem*: Wesen und Aufgabe der Sociologie – Eine Kritik der organischen Methode in der Sociologie, in: Archiv für systematische Philosophie, vol. 4, Berlin: Georg Reimer, 1898, 38 pp.; *Idem*: An der Wende des Jahrhunderts – Versuch einer Kulturphilosophie, Tübingen: J. C. B. Mohr 1899; *Idem*: Der soziale Optimismus, Jena: Hermann Costenoble, 1905; *Idem*: Die Anfänge der menschlichen Kultur – Eine Einführung in die Soziologie, Leipzig: B. G. Teubner, 1906; *Idem*: Philosophische Strömungen der Gegenwart, Stuttgart: Ferdinand Enke, 1908; *Idem*: Dualismus oder Monismus? – Eine Untersuchung über die doppelte Wahrheit, Berlin: Reichl, 1909; *Idem*: Die Juden in der neueren Philosophie, Berlin, M. Poppelauer: 1919; *Idem*: Einführung in die Soziologie, München: Rösl, 1921; *Idem* (Ed.): Archiv für die Geschichte der Philosophie; *Idem* (Ed.): Archiv für systematische Philosophie und Soziologie.

[For Further Reading]
Markus Zürcher: Unterbrochene Tradition – Die Anfänge der Soziologie in der Schweiz, Zürich: Chronos-Verlag, 1995.

3 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Preliminary Section "Elementary Pre-History of Modern Swiss Legal Thought – Reconciliation of Concurring Jurisdictions and Combination of Scientific Disciplines or Methods"
Entry 0.13 "Ernest-Alexandre Roguin, Étude de science juridique pure"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Ernest-Alexandre Roguin
Title: Étude de science juridique pure – La règle du droit (Analyse générale, spécialités, souveraineté des États, assiette de l'impôt, théorie des statuts) – Système des rapports de droit privée précédé d'une introduction sur la classification des disciplines
Edition(s): Paris/ Lausanne: Librairie Générale de Droit et de Jurisprudence/ F. Rouge, 1889

[Introduction]
Fourtyfive years before *Hans Kelsen* published his "*Reine Rechtslehre*" (1934), *Ernest Roguin* inaugurated his highly independent project of a "*Science juridique pure*" in 1889, entitled "*La règle de droit".* He pretends to provide a view on jurisprudence absolutely neutral, without any traces of critique, and without any valuations on questions of justice nor of moral philosophy. This thoroughly ambitious writing turns out to be a merely dogmatic treatise on general jurisprudence, as an introductory lecture the author was charged to hold at the University of Lausanne. What Kelsen had done by his collection of the core questions of public law ("*Hauptprobleme der Staatsrechtslehre*", 1st ed. 1911, 2nd ed. 1923), Roguin tried to do with the matters of private law ("*Système de rapport de droit privé*"). His purely dogmatic point of view he later confirmed in a three-volumes writing with the title "*La science juridique pure*". His dogmatism, however, is not of the same kind and has not the same motivation and foundation as does Kelsen's *Reine Rechtslehre*. The perspective of Roguin is rooted in classical French positivism, especially positivist sociology, whereas the position of Kelsen is undoubtedly founded in neo-positivist theory. (For more detailed informations see *Sandrine Pina*: La recherche d'une science pure du droit – L'œuvre méconnue d'Ernest Roguin face à la théorie de Hans Kelsen, in: Droits, Revue française de théorie, de philosophie et de cultures juridiques, vol. 2014/ 2, Nr. 60, Paris: Presses Universitaires de France, 2014.)

[Historical Situation and Systematic Context]
When defining his own standpoint, *Ernest Roguin* is clearly conscious not to provide a piece of natural law, nor reflections about legal philosophy in the proper sense, nor to give a historical overview. As an example, he chooses chemistry (or he could also choose biology) and pretends to argue in an analytical and synthetical way, a procedure that is meant to serve for the examination of juridical matters ("*examen de choses*"). By doing so, he wants to avoid the term of dogmatism, confessing to consider this notion to be highly

misleading. On the one hand, he is aware of dogmatism and, on the other hand, he elevates the dogmatical system of judgments to a pre-condition of his legal thought, which is highly dogmatic. This ambiguity remains unsolved, even in the later intention to consolidate and to confirm his theory. Today, it may resemble a kind of self-dispensation to pretend to be able to derive practical consequences from so-called truths in a domain such as jurisprudence.
There is a biographical explanation for such a behaviour in theory building, however. *Ernest Roguin* must have been an intimate friend of *Vilfredo Pareto*, the sociologist originating from Italy who settled in Lausanne. In an article, it is mentioned that the rising star of Roguin had already declined early; "*Son évocation demeure cependant incontournable lorsque l'on évoque Pareto. Il a en effe été, sinon véritablement proche de ce dernier, du moins son plus fidèle ami dans une faculté où Pareto s'est en réalité créé peu de liens*". (*Denis Tappy*: Vilfredo Pareto and Ernest Roguin, in: Cahiers Vilfredo Pareto, Revue européenne de science sociales, vol. XLVIII (2010), pp. 146 ss.) Pareto has been one of the founding fathers of political economy and his writings have apparently not been of any interest to jurisprudents in his time, with the exemption of Roguin.

[Content, Abstracts]
The system built by *Ernest Roguin* seems to be influenced by vitalism, a current inclination in France, later leading to the existentialism of *Henri Bergson* among others. He constantly refers to the system by his method of classification. However, this kind of system building turns out to be inappropriate for the problems faced by jurisprudence. This kind of systematisation is routed in organic functions of parts in the context of a whole. This deviation of logics is highly misunderstanding, when creation is considered to be a modality of imagination that no longer follows the reasonable rules of thought. History or better historicity as well as criticism are also understood as functions within this kind of biological connectivity. The functional approach is intimately combined with the virtue of jurisprudential artistry ("*l'art juridique*"), subsequently.
The allusion of a pure theory of legal reasoning, inaugurated by *Ernest Roguin*, tends to dismiss the term of nature and to focus entirely on economics instead. This argument is developed in the second chapter we have selected as our proposition to read. It may surprise that in such a context Roguin is still referring to the nature of things as a point of reference: "*Notre travail n'est en aucune façon ni une oeuvre de critique ni une oeuvre d'histoire. Il est simplement un essai de science pure; il procède en faisant des suppositions qu'il emprunte indifféremment à l'histoire et à l'imagination, à la seule condition qu'elles soient conformes à la nature des choses; il analyse et classe les relation ainsi constituées artificiellement, puis il en recherche les consequences forcées*".

[Conclusions, Insights, Evidence]
Once criticism and history have been omitted, there is little help provided by identifying the reasons that could found some practices and disqualify others. Eventually everything becomes a matter of artificial construction and deriving consequences according to

whatever logic.

[Philosophical Valuation and Jurisprudential Significance]
A well founded appreciation and critique of the overall approach by *Ernest Roguin* can be found in an article by *Norberto Bobbio*: Le Vaudois Ernest Roguin, sociologue et théoricien du droit, in: Cahiers Vilfredo Pareto, Revue européenne de science sociales, vol. XIX (1981), Nr. 59, pp. 121 ss. The arguments developed hereby and the insights gained will be condensed and discussed on the occasion of the introduction and commentary on the more extensive writings by Roguin, "*La science juridique pure*" (see no. 1.5 of this Legal Anthology), that build so to say a chain with the book published a generation's lifetime earlier.

[Further Information About the Author]
Ernest Roguin, born on 27 May 1851 in Yverdon-les-Bains, died on 5 May 1939 in Lausanne, followed his studies in jurisprudence at the Universities of Lausanne and Leipzig from 1869 onwards and obtained his master's degree in 1874 by the Academy of Lausanne (which at that time has not yet been a University properly speaking and, therefore, did not have the permission to award doctorates). In the very beginning of his career, he was sent as a diplomat to Paris until 1884; and later in his life he was sent as a Swiss representative to the Den Haag Conferences. Even in 1884, he was nominated an extraordinary professor at the University of Lausanne, and from 1880 to 1926 he taught academic courses in the domains of international civil law, comparison of legal orders as well as introductions to jurisprudence. From 1903 to 1917, he signed as president of the *École des sciences sociales et politiques*, and from 1891 he was a member of the *Institut de droit international*. In his time, Roguin was highly regarded as an outstanding jurisprudent and received many titles and honours.
The thesis of *Ernest Roguin* was dedicated to article 50 of the Swiss Federal Constitution and appeared in 1880. In his main domain, he published a first treatise on "*Conflits des lois suisses en matière internationale et intercantonale*" and between 1904 and 1912 appeared his magistral work "*Traité de droit civil compare*" in seven volumes. Our focus, however, is on the two titles covering legal philosophy, i.e. the early volume "*La régle de droit*" (1889) and the tree volumes proposing "*La science juridique pure*" (1923).
For more information about the person, please consult:
Norberto Bobbio: Le vaudois Ernest Roguin, sociologue et théoricien du droit, in: Cahiers Vilfredo Pareto, Jg. 181, Nr. 59, S. 121-140;
François Guisan: Ernest Roguin, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, hrsg. von Hans Schulthess, Zürich: Schulthess & Co. A.-G., 1945, S. 393ff.

[Selected Works of the Same Author]
Ernest Roguin: Étude de science juridique pure – La règle du droit (Analyse générale, spécialités, souveraineté des États, assiette de l'impôt, théorie des statuts) – Système des

rapports de droit privée précédé d'une introduction sur la classification des disciplines, Paris/ Lausanne: Librairie Générale de Droit et de Jurisprudence/ F. Rouge, 1889; *Idem*: Observation sur la codification des lois civiles, Lausanne: Ch. Ciret-Genton, 1896, pp. 73-134; *Idem*: La science juridique pure, 3 vols., Paris/ Lausanne: Librairie Générale de Droit et de Jurisprudence/ F. Rouge 1923; *Idem*: Sociologie 5 vols., Lausanne: C. Pasche, 1928-1932.

[For Further Reading]
Norberto Bobbio: Le Vaudois Ernest Roguin, sociologue et théoricien du droit, in: Cahiers Vilfredo Pareto, Revue européenne de science sociales, vol. XIX (1981), Nr. 59, pp. 121 ss.;
Sandrine Pina: La recherche d'une science pure du droit. L'œuvre méconnue d'Ernest Roguin face à la théorie de Hans Kelsen, in: Droits, Revue française de théorie, de philosophie et de cultures juridiques, vol. 2014/ 2, Nr. 60, Paris: Presses Universitaires de France, 2014;
Ernest Roguin: La science juridique pure, 3 vols., Paris/ Lausanne: Librairie Générale de Droit et de Jurisprudence/ F. Rouge 1923;
Denis Tappy: Vilfredo Pareto and Ernest Roguin, in: Cahiers Vilfredo Pareto, Revue européenne de science sociales, vol. XLVIII (2010), pp. 146 ss.

31 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Preliminary Section "Elementary Pre-History of Modern Swiss Legal Thought – Reconciliation of Concurring Jurisdictions and Combination of Scientific Disciplines or Methods"
Entry 0.15 "Carl Hilty, *Fin de Siècle* und Zukunft der Schweiz"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Carl Hilty
Title: Fin de Siècle; and: Die Zukunft der Schweiz
Edition(s): both in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, ed. by Carl Hilty, vol. 13 (1899), p. 3-21, resp. vol. 16 (1902), p. 3-39, Bern: K. J. Wyss, 1899/ 1902, pp.

[Introduction]
As a general publisher of the "Political Yearbook of the Swiss Federal State" from 1886 until his death, that was meant to be a journal for politicians, diplomats and scientists from all disciplines, *Carl Hilty* established as a forerunner of the early political science in Switzerland. As such, he has always addressed the context of legal practice and the preconditions for the application of the legal order.

[Historical Situation and Systematic Context]
We have brought together two essays by *Carl Hilty* that show the particular historical situation of his time, i.e. the last decades of the nineteenth century and the very beginning of the twentieth century, often called the era of *Fin-de-siècle*. The analysis and diagnosis of this period of time by the author is highly illustrative and very interesting in terms of the specific situation of jurisprudence at that time.
In a second essay, dating only three years later, *Carl Hilty* – in his function as a president of the University of Berne – outlines the future development of sociocultural circumstances.

[Content, Abstracts]
Instead of advancing progress, *Carl Hilty* puts a deep sense for the human and an intense longing for humanism in the foreground. The progress of the natural sciences has produced an overwhelming materialism that covers all matters in society. When dealing with society and community, the real focus, contrarily, is mainly on the self-conscious human individual, the human subject of all interaction in society. This makes it evident that jurisprudence serves the aims of individualism as legal practice takes into consideration the situation of the concrete subjects by the way of application of the legal order to the specific case, leading to justice in the single case. This historical constellation does not allow agnosticism any more. The overall task is to prevent open conflict that leads to war and agony.
The University of Berne is addressed not only as a castle of knowledge, but as the main

and central fortress of the Swiss Federal State, whereby it is scientific knowledge that surpasses all other kinds of power and strength. History and the future development are identified as interdependent narratives. The so far acclaimed freedom in every respect should produce a sentiment of peace and welfare; instead the contemporary feelings consist in inquietude, yet anxiety, and uneasiness or uncertainty. The foregrounding occasion for this discrepancy is the war against the Second Great Bore War, the deeper cause lies in the declining age of Western imperialism, and the increasing tensions on religious diversity. The author refers to other periods on the future of the Swiss Federation, especially in the first decades of the Nineteenth Century. "*Feliciter Helvetia evasit*", "fortunately the Swiss Federation has overcome these situations", that would be an adequate motto for history at that time. Moral importance is due to strong republican though and due to the fit of historically grown structures to a whole. To maintain and strengthen power, however, is highly misleading in any situation. Instead, the specific character of a nation is to be conserved and actualised. Only resistance and refinement both together can guarantee prosperity in every respect. In an inner perspective this means to keep the "Volksgeist", or in modernized terms "Idealism", sound and safe and in an outer perspective this is equivalent to maintain a strong order of international law. The basis for all this lies in a future generation of leading spirits, sociocultural leaders, who the people can trust.

[Conclusions, Insights, Evidence/Philosophical Valuation and Jurisprudential Significance]
The main interest of *Carl Hilty* consists in focusing on critical considerations of ambiance and sense for legal politics within history and in an inter-cultural context. In a very pragmatic way, he tries to grasp political institutions and their ethical values in order to render them fecundly again for the needs of his time and place.

[Further Information About the Author]
Carl Hilty, born on 28 February 1833 in Grabs, died on 12 October 1909 in Clarens, studied jurisprudence at the University of Göttingen (1851-1853) and graduated 1854 with a doctorate from the University of Heidelberg. Afterwards, he went to Paris and London, before founding a lawyer's chancery in Chur in Graubünden, his native Swiss canton. He was, nevertheless, more occupied with publishing studies of public law as well as religious and ethical essays, than with defending clients in court.
In 1868 he published "Theoretiker und Idealisten in der Demokratie" and, in 1891, his main work "Die Bundesverfassungen der schweizerischen Eidgenossenschaft". In 1874, he was called to the ordinary chair of federal law and Bernese public law at the University of Berne, where after 1882 his lectures covered also the general theory of the state and international law. In 1909, he was nominated representative of the Swiss government at the International Court of Arbitration in Den Haag. But he was also the chief editor of "Politischen Jahrbuch der Schweizerischen Eidgenossenschaft", and he remained so until his death.

For more information, please consult:
Walther Burckhardt: Carl Hilty (1833-1909), in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, vol. 24 (1910), pp. 405 ss.;
Felix Renner: Der Verfassungsbegriff im staatsrechtlichen Denken der Schweiz im 19. und 20. Jahrhundert (Dissertation Universität Zürich), Zürich: Schulthess & Co., 1968, pp. 254 ss.;
Daniel Thürer (together with Karin Spinnler Schmid): Ein typisch-untypischer Schweizer Staatsrechtler – Die Bedeutung Carl Hiltys für das schweizerische Staatsleben, in: Werdenberger Jahrbuch, vol. 2009, Buchs 2008, pp. 204-214 (auch in: Zeitschrift für Schweizerisches Recht, vol. 2009/ I, pp. 111-129).

[Selected Works of the Same Author]
Carl Hilty: Die Bundesverfassungen der Schweizerischen Eidgenossenschaft, Bern: K. J. Wyss, 1891 (in französischer Übersetzung: Les constitutions fédérales de la Confédération suisse – Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger, 1891; reprint Neuchâtel: Les Éditions de l'Aire, 1991); *Idem*: Ideen und Ideale schweizerischer Politik – Ein academischer Vortrag, Bern: Max Fiala, 1875; *Idem*: Fin de Siècle; and *Idem*: Die Zukunft der Schweiz, both in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, ed. by Carl Hilty, vol. 13 (1899), p. 3-21, resp. vol. 16 (1902), p. 3-39, Bern: K. J. Wyss, 1899/ 1902; *Idem* (Ed.): Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, 1886-1909.

[For Further Reading]
Carl Hilty: Öffentliche Vorlesungen über Helvetik, Bern: Max Fiala, 1878; *Idem*: Die Bundesverfassungen der Schweizerischen Eidgenossenschaft, Zur sechsten Säcularfeier des ersten Ewigen Bundes vom 1. August 1291, Bern: K. J. Wyss, 1891 (in French language: Les constitution fédérales de la Confédération suisse. Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger frères, 1891; reprint Les Éditions de l'Aire 1991).

23 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Preliminary Section "Elementary Pre-History of Modern Swiss Legal Thought – Reconciliation of Concurring Jurisdictions and Combination of Scientific Disciplines or Methods"
Entry 0.16 "Carl Hilty, Über das Studium des Rechts"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Carl Hilty
Title: Über das Studium des Rechts in unserer Zeit
Edition(s): in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, hrsg. von Carl Hilty, Bd. 23, Bern: K. J. Wyss, 1908

[Introduction/Historical Situation and Systematic Context]
As a general publisher of the "Political Yearbook of the Swiss Federal State" from 1886 until his death, that was meant to be a journal for politicians, diplomats and scientists from all disciplines, *Carl Hilty* established as a forerunner of the early political science in Switzerland. As a professor of state and administrative law at the University of Berne, he was also in close touch with the constant needs of academic doctrine and with the inclining demands for young talented lawyers.

[Content, Abstracts]
In his speech, *Carl Hilty* deals with very concrete questions of legal studies of his time, i.e. in 1908. Thoughtful reflections on jurisprudence or legal studies as an academic discipline always means to reflect philosophically the methods, foundations and applications of legal practice. The challenge for jurisprudence in his time is identified as extra great, since the ongoing changes in social structures cannot be neglected and the lawyer has to take everything into his considerations, according to the roman dictum "*Iurisprudentia est scientia omnium rerum, tam divinarum, quam humanarum*", i.e. has not only reflect on the human needs, but also on the demands of the absolute.
To meet the challenges of legal studies, young students have to be well educated, in the first place, and bids are addressed to the colleges. Nevertheless, the Universities also have to be structured in a way that the can provide a framework for comprehensive academical studies. The combination of teaching and research have already been highly problematic at that time, it makes the appearance, and the necessity of so-called research professorships. It is arguably the most influence lectures can have on students by the extraordinary exemplarity of academic teachers.
The author even gives biographical indications of what they should not omit to read during the legal studies at University. The general aim is excellence, but not in an arrogant or selfish sense, according to *Ralph Waldo Emerson*: "The few who conceive of a better life, are always the soul of the world. In whatever direction their activity flows, society can never spare them, but all men feel even in their silent presence a moral debt to such – were

it only the manifestation of the fact that there are aims higher than the average. In this country we need whatever is generous and beautiful in character [sic!] more than ever because of the general mediocrity of thought produced by the arts of gain". In order to choose jurisprudence as their field of studies, students have to bear the inclination of being reformers from the very beginning of their academic education.
Philosophy is declared to be the basis and core of all legal studies, that is to say the key discipline to all scientific knowledge in general, but above all for jurisprudence. *Carl Hilty* spoke about the hint for his students to read as much as they can from the beginning of their academic studies, and they are consulted to study some semesters at a University abroad. Legal philosophy, however, is judged to be a propaedeutic and encyclopaedical discipline, as a mere introduction to the subject itself, even if to assist to the lectures in legal philosophy "makes part of a completed curriculum in legal studies". This valuation may surprise one since it is from a person who counts among the representatives of the discipline in case and may stand for the overall level of comprehensive legal philosophy of that time. A compensation can only be brought to this lack by a general knowledge of man and a refined conduct with every kind of person.

[Conclusions, Insights, Evidence/Philosophical Valuation and Jurisprudential Significance]
In the very conclusion to his lecture, *Carl Hilty* claims to the general conditions of justice in everyday life as well as for social justice. Jurisprudents challenge the increasing demands of the practical application of a just legal order. The ethical-moral, sociocultural level of a nation state can be easily measured by the spiritual standing of its lawyers, the author argues. Up to date, only one single lawyer has been declared a saint, namely *Ivo de Caermartin*: "*Sanctus Ivo erat Brito, / advocatus, sed non latro, / res miranda populo*". There should be fewer sacred jurisprudents! "Truth is the summit of being; justice is the application of it to affairs".

[Further Information About the Author]
Carl Hilty, born on 28 February 1833 in Grabs, died on 12 October 1909 in Clarens, studied jurisprudence at the University of Göttingen (1851-1853) and graduated 1854 with a doctorate from the University of Heidelberg. Afterwards, he went to Paris and London, before founding a lawyer's chancery in Chur in Graubünden, his native Swiss canton. He was, nevertheless, more occupied with publishing studies of public law as well as religious and ethical essays, than with defending clients in court.
In 1868, he published "Theoretiker und Idealisten in der Demokratie" and, in 1891, his main work "Die Bundesverfassungen der schweizerischen Eidgenossenschaft". In 1874, he was called to the ordinary chair of federal law and Bernese public law at the University of Berne, where after 1882 his lectures covered also the general theory of the state and international law. In 1909, he was nominated representative of the Swiss government at the International Court of Arbitration in Den Haag. But he was also the chief editor of "Politischen Jahrbuch der Schweizerischen Eidgenossenschaft", and he remained so until his death.

Our interest is focusing on his critical considerations of ambiance and sense for legal politics in history and in an intercultural context. In a very pragmatic way, he tried to grasp political institutions and their ethical values in order to render them fecundly again for the needs of his time and place.
For more information, please consult:
Walther Burckhardt: Carl Hilty (1833-1909), in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, vol. 24 (1910), pp. 405 ss.;
Daniel Thürer (together with *Karin Spinnler Schmid*): Ein typisch-untypischer Schweizer Staatsrechtler – Die Bedeutung Carl Hiltys für das schweizerische Staatsleben, in: Werdenberger Jahrbuch, vol. 2009, Buchs 2008, pp. 204-214 (auch in: Zeitschrift für Schweizerisches Recht, vol. 2009/ I, pp. 111-129).

[Selected Works of the Same Author]
Carl Hilty: Die Bundesverfassungen der Schweizerischen Eidgenossenschaft, Bern: K. J. Wyss, 1891 (in französischer Übersetzung: Les constitutions fédérales de la Confédération suisse – Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger, 1891; reprint Neuchâtel: Les Éditions de l'Aire, 1991); *Idem*: Ideen und Ideale schweizerischer Politik – Ein academischer Vortrag, Bern: Max Fiala, 1875; *Idem*: Fin de Siècle; and *Idem*: Die Zukunft der Schweiz, both in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, ed. by Carl Hilty, vol. 13 (1899), p. 3-21, resp. vol. 16 (1902), p. 3-39, Bern: K. J. Wyss, 1899/ 1902; *Idem* (Ed.): Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, 1886-1909.

[For Further Reading]
Carl Hilty: Öffentliche Vorlesungen über Helvetik, Bern: Max Fiala, 1878; *Idem*: Die Bundesverfassungen der Schweizerischen Eidgenossenschaft, Zur sechsten Säcularfeier des ersten Ewigen Bundes vom 1. August 1291, Bern: K. J. Wyss, 1891 (in French language: Les constitution fédérales de la Confédération suisse. Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger frères, 1891; reprint Les Éditions de l'Aire 1991).

24 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
First Section "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Kantianism, Hegelianism, Realism, Phenomenology, Pragmatism, and Beyond"
Introduction
by Michael Walter Hebeisen

> "Feuriges Gefühl für das Seinsollende zeichnet die wachsenden Zeiten & Menschen aus."
> (*Eugen Huber*, dedication on the title-page of *Fritz Wartenweiler*'s biography)

[First Section: "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Kantianism, Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond"]

[Introduction: Manifold Characteristics Within a Heterogenous Movement]
At the beginning of the twentieth century, the dominant figure in the domain of legal philosophy was undoubtedly *Rudolf Stammler*, a representative of Neo-Kantian philosophy. Despite a devotion to his authority, this idealistic ground-pattern is modified and altered by Swiss legal thinkers. *Eugen Huber* is melting the background of German idealism with impacts of the rich Historical School of law tradition, mainly with reference and reverence to *Rudolf von Ihering*. *Walther Burckhardt* is amalgamating his adoration to Stammler with renewed positivism, then predominating in the domain of public law. Another important representative of constitutional law, *Dietrich Schindler* (senior), elects rather Hegelianism, than Kantianism as a philosophical background for his convincing legal thought.
In contrast to this intellectual predisposition, founded on the tradition of German idealism, Natural Law theory is revitalised by *Hans Ryffel* and *Jean Darbellay*. Embedded in the revival of Natural Law after the Second World War, these two representatives, however, modernise classical Natural Law theory in two very different ways: the former taking it as a starting point to explore the legal community in a principally sociological manner, the latter fecundating profound thoughts by *Jacques Maritain* with a personal touch and a typical Swiss inclination.
In French-speaking Switzerland, positivism is still *en vogue* at that time, celebrating its high tide. The eccentric person of *Ernest Roguin* for instance is elaborating his own personal pure theory of law in a specific *esprit Vaudois*. Neo-Positivism as a common ground is still flourishing, while *François Gilliard* is presenting his dialectical theory of the juridical experience. Another original and lucent, self-declared legal philosopher gives the epigone *Arnold Gysin*, who connects the circle of *Leonard Nelson* in Göttingen with his own personal views, inspired by his teacher *Eugen Huber* and his tutor *Walther Burckhardt*.

The junctions to existential philosophy, phenomenology, and structuralism elaborated by *Alois Troller*, one of the most inspired and inspiring Swiss legal thinkers, in my opinion, turn out more forward looking, yet not trendsetting.

[Excursus: Complex Intellectual Sociology and Sociocultural Mixture]
The opening sentence of my summary and overview on legal philosophy and general jurisprudence in Switzerland in the twentieth century, containing an observation and an assertion at the same time, reads transcribed as follows: "In the twentieth century, there exists an original and specific Swiss tradition of lawyers and jurisprudents, who philosophically reflect on the subjects of general jurisprudence and the general theory of the state" (*Michael Walter Hebeisen*: Schweizer Juristen-Philosophen, in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 50 (2002), Tübingen: J. C. B. Mohr, 2002, pp. 69-100; see entry 1.20 of this Legal Anthology). However, the representatives of this movement are not philosophers of law in the proper sense, but rather "philosopher-jurisprudents", or "philosophising jurisprudents", as we have pointed out in the general introduction. We would like to give a number of personal examples, to explore the circulation of legal-philosophical thought in Europe, in order to render this biographical setting more precise:
Karl Mannheim has inaugurated a typological sociological explanation of intellectual knowledge (Ideologie und Utopie, Bonn: Friedrich Cohen, 1929). Switzerland has always been a country who has received refugees for multiple reasons: early protestants from France, in the mid nineteenth century progressive Liberals from Germany, escapees from the Austrian occupation from Italy, members of the Russian intelligentsia in *Fin-de-Siècle*, and so forth... These individuals deeply enriched Swiss intellectual culture at any point of time. Let us briefly consider some illustrious biographical examples: the precursor of sociology and Rabbi *Ludwig Stein*, the philosopher *Anna Tumarkin* and the jurisprudent *Peter von Tuhr* all from Russia, for instance, or *Georg (Ludwig) Cohn* from (eastern) Germany, to say nothing about Jews immigrating from Germany in the period of National Socialist regime and beyond.
However, there has not only occurred this kind of importation of foreign intelligence, but in another sense there has also been a considerable exportation: for example, *Johann Caspar Bluntschli* to Munich, *Fritz Fleiner* to the Universities of Heidelberg and Tübingen, and *Hans Ryffel* to the "*Hochschule für Verwaltungswissenschaften*" in Speyer.

[General Situation of Academic Philosophy and Sociology in Switzerland]
As a context for legal philosophy and general jurisprudence, the general situation of philosophy in Switzerland cannot be ignored. We encounter Phenomenology and Existentialism as dominating in French-speaking part, German Idealism and Historical School of Law in the German-speaking part of the country, with an inclination to political philosophy (for instance in *Hermann Lübbe* or *Otfried Höffe*, both visitors from). The strong idealist tradition goes back to the nineteenth century, namely to the representatives *Johann Samuel Ith*, *Philipp Albert Stapfer*, *Jens Baggesen*, *Anne Louise Germaine de Staël-Holstein*

(Madame *de Staël*, née *Necker*), or *Benjamin Constant*, who hold various forms of Kantianism and Fichteanism, as well as *Ignaz Paul Vital Troxler*, *Carl Hebler*, *Alexandre Vinet*, *Charles Secrétan*, *Ernest Naville*, and *Henri-Frédéric Amiel*, who are primarily oriented toward the philosophical systems established by *Friedrich Wilhelm Joseph Schelling* and *Georg Wilhelm Friedrich Hegel*. Moreover we also encounter significant references to the figures of *Friedrich Albert Lange*, *Wilhelm Windelband*, *Wilhelm Dilthey* and *Friedrich Nietzsche*, in Switzerland with their characteristic inclination toward so-called "Lebensphilosophie". Finally, there are important representatives of modernist philosophical movements, for example ontology and anthropology in *Paul Häberlin*, existentialist philosophy in *Karl Jaspers, Heinrich Barth*, and *Ludwig Binswanger*, as well as socialist criticism in *Jeanne Hersch* and *Hans Saner*. This variety is enriched with the special cases of *Karl Jaspers* in Basel, an eminent exponent of Existentialism, together with his fellow scholar *Annemarie Piper*, and the Dominican Congregation, that held the monopoly for philosophy at the University of Fribourg for a long time.
Legal-sociological theory-building is also of great importance for jurisprudence and legal philosophy in Switzerland. After an early and strong presence at the University of Geneva (with *Louis Wuarin*, *Jean Piaget*, and *Vilfredo Pareto*), at the University of Berne (with *Ludwig Stein*), as well as at the University of Basel (with *Edgar Salin*), there has been an interruption of the presence of sociology at Swiss Universities due to the student's revolt in Paris in 1968 (see article "Soziologie", in: Historisches Lexikon der Schweiz; and *Markus Zürcher*: Unterbrochene Tradition – Die Anfänge der Soziologie in der Schweiz, Zürich: Chronos-Verlag, 1995). Finally, after far too long, this constellation has normalised and has given way to the foundation of a Swiss Committee of Legal Sociology ("*Forschungskommission für Rechtssoziologie und Rechtstatsachenforschung*", within the Swiss Society of Sociology), in 2002.

[For Further Reading]
Thomas Löffelholz: Die Rechtsphilosophie des Pragmatismus – Eine kritische Studie (in: Monographien zur philosophischen Forschung, vol. 31), Meisenheim am Glan: Anton Hain, 1961;
Manfred Ludwig: Rechtstheorie als Sprachkritik – Zum Einfluss Wittgensteins auf die Rechtstheorie (Dissertation Universität Göttingen 1994; *idem*: Schriften zur Philosophie und Rechtstheorie, vol. 8), Baden-Baden: Nomos, 1995;
Hans Schultz: Existenzphilosophie und Rechtsphilosophie – Kritischer Bericht über einige Neuerscheinungen, in: Studia Philosophica, vol. 18, Basel: Recht und Gesellschaft, 1958.

24 January 2018 (revised on 19 July) *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
1st Section "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Neo-Kantianism, Neo-Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond"
Entry 1.0 "Rudolf Stammler, Grundsätzliche Richtungen der neueren Jurisprudenz"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Rudolf Stammler
Title: Die grundsätzlichen Richtungen der neueren Jurisprudenz (1923)
Edition(s): in: Rechtsphilosophische Abhandlungen und Vorträge, Berlin-Charlottenburg: Rolf Heise, 1925, vol. 2, pp 333-392

[Introduction/Historical Situation and Systematic Context]
We intend to give a point of reference for the discussion of the development of legal thought and legal philosophy in Switzerland by presenting an overview to the currentspractised mainly in Germany in the course of the so-called "Richtungsstreit" or "Methodenstreit". Further we take this occasion to present the leading legal philosopher, *Rudolf Stammler*, who represents Marburg Neo-Kantianism in the domain of legal thought. His opinions must have been present to all jurisprudents in German-speaking Europe, and his method is widely accepted as exemplary. However, he personally has also been part of the controversy and has also provoked criticism. Neo-Kantian legal philosophy as summarised and accentuated by Stammler serves as a point of reverence while being the focus of criticism at the same time, as it has been pointed out by *Felix Somló*: "Vielleicht ist es Stammler gerade durch die seltsame Verknüpfung von Eigenschaften, der befruchtenden Fragestellung mit der unbefriedigenden Lösung derselben, in so hohem Mass vergönnt, anregend zu wirken und zum bedeutendsten Kristallisationspunkt der neueren Rechtsphilosophie zu werden. Er vermag es, wie kein anderer, rechtsphilosophische Untersuchungen hervorzulocken und an den seinigen sich emporranken zu lassen. Sein abgerundetes, scharfsinniges und tiefernstes, aber schliesslich doch nicht befriedigendes Gedankensystem ladet förmlich zu einer Untersuchung darüber ein, an welchem Punkt man ihm die Gefolgschft zu versagen hat. Dadurch wurde er so Vielen zum willkommenen Vehikel ihrer Gedanken; dadurch wirde er auch zum Meistbesprochenen und Meistumstrittenen der neueren deutschen Rechtsphilosophie, wie ja der Schüler häufig gerade dem widerspricht, von dem er am meisten gelernt, im Kampf mit dem er sich zu einer eigenen Ansicht durchgerungen hat" (Juristische Grundlehre, Leipzig: Felix Meiner, 2nd ed. 1927; 1st ed. 1917, pp. 45 s.).
Swiss legal thinkers have dedicated their principal legal philosophical writings to Stammler, for instance *Eugen Huber* and *Walther Burckhardt* (see no. 1.1. and 1.6 of this Legal Anthology, where the respective relations are discussed).

[Content, Abstracts / Conclusions, Insights, Evidence]

Influenced by his own preferences, *Rudolf Stammler* undertakes to discuss the leading currents of legal thought in an essay from 1923. In addition, a condensed presentation of "Rechts- und Staatstheorien der Neuzeit" from 1917 can be consulted, to provide an overview for the inexperienced reader (see our recommendation for further reading). The leading currents are to be identified, apart from so-called Historical School of law, in the orientations of sociological jurisprudence, of the abnegation of legal philosophy as essential for jurisprudence, of realism and empiricism in legal thought, and of so-called "Freirechtslehre", according to Stammler. "In starken Wendungen, wie sie gefühlsmässigen Weltverbesserern zu eigen zu sein pflegen, wandten sie sich gegen einzelne Richtersprüche, verallgemeinerten etwa vorgekommene Fehler oder Engherzigkeiten und versuchten schliesslich, eine durchgreifende Theorie der Gesetzgebung und Rechtspraxis aufzustellen, wobei das Stichwort, wie bemerkt, die freie Rechtsfindung abgab. [...] Die Behauptungen der freirechtlichen Bewegung sind sachlich nicht klar von ihren Vertretern aufgestellt worden. So konnte es kommen, dass in kritischer Überlegung von dritten Beurteilern angenommen wurde, dass die Freirechtler den Richter über das Gesetz stellen wollten. Die Diskussion drehte sich dann darum, ob das ein nützliches Ergebnis sein würde".
Within the system of Neo-Kantian legal reasoning, as it is practised by *Rudolf Stammler*, there are some crucial questions to be clarified, first is the function of transcendental cognition, the connectivity between legal and social philosophy and the function and legitimacy of the concept of so-called "richtiges Recht", an idea that applies the concept to be explained and understood to itself in order to qualify this concept further... The primary questions of any legal theory remain the very same, i.e. the concept of law, the binding force of the legal order, and the content of legal norms. "Besteht somit die Aufgabe der (theoretischen) Rechtswissenschaft nicht nur in der systematisch-begrifflichen Konstruktion, sondern darüber hinaus darin, den Inhalt des gesetzten Rechts zu objektivieren und ihm dadurch den Charakter des Richtigen zu verleihen, so erfüllt sie notwendig originär ethische Aufgaben. Denn gerade darin findet nach der Stammlerschen Bestimmung in 'Wirtschaft und Recht' die Ethik ihre Aufgabe, dass in ihr die Einzelzwecke unter dem einheitlichen Gesichtspunkt einer allgemeinen Gesetzmässigkeit geordnet und bestimmt, das heisst objektiviert werden" (*Claudius Müller*: Die Rechtsphilosophie des Marburger Neukantianismus – Naturrecht und Rechtspositivismus in der Auseinandersetzung zwischen Hermann Cohen, Rudolf Stammler und Paul Natorp (Tübinger rechtswissenschaftliche Abhandlungen, vol. 75; Dissertation Universität Tübingen 1992), Tübingen: J. C. B. Mohr, 1994, pp. 110 s.).

[Philosophical Valuation and Jurisprudential Significance]
We have partially criticised the standpoint of *Rudolf Stammler* as inadequate to the fundamental insights of Kantianism, and we have indicated Hegelianism as a possible remedy to cure the illness of Neo-Kantianism. In terms of the history of legal thought, Stammler's legal philosophy in particular and the significance of the Marburg Neo-Kantian movement have been extensively investigated by the comprehensive presentation

of *Claudius Müller* for instance ("Die Rechtsphilosophie des Marburger Neukantianismus – Naturrecht und Rechtspositivismus in der Auseinandersetzung zwischen Hermann Cohen, Rudolf Stammler und Paul Natorp" (Tübinger rechtswissenschaftliche Abhandlungen, vol. 75; Dissertation Universität Tübingen 1992), Tübingen: J. C. B. Mohr, 1994. Sometimes it is more instructive to consult valuations within the same period of time, as for instance by *Isaac Breuer*: Der Rechtsbegriff auf Grundlage der Stammlerschen Sozialphilosophie (Kant-Studien, ed. Hans Vaihinger, supplementary vol. 27), Berlin 1912 (reprint Vaduz: Topos, 1984). Nevertheless, further research should be undertaken in order to better understand the paths of reception.

[Further Information About the Author]
Rudolf Stammler, born on 19 February 1856 in Alsfeld, died 25 April 1938 in Wernigerode, was an eminent representative of Neo-Kantian current of legal thought. He had studied at the Universities of Giessen and Leipzig and obtained a doctorate in 1877 based on a dissertation on "Notstand im Strafrecht". In 1880, he presented his habilitation thesis in the domain of roman law. Between 1882 and 1884 he was extraordinary professor at the University of Marburg, then until 1885 extraordinary professor at the University of Giessen. For a period, between 1885 and 1923, he held a chair at the University of Halle an der Saale, before being called the the Humboldt University in Berlin.
In 1913 he founded the journal "Zeitschrift für Rechtsphilosophie", and in 1933 he was nominated a member of the "American Academy of Arts and Sciences". In times of National Socialism in Germany, he was part of the "Ausschuss für Rechtsphilosophie" within the "Akademie für Deutsches Recht".
For more information about the person and his works, please refer to:
Alexander Graf zu Dohna: Rudolf Stammler zum 70. Geburtstag, in: Kant-Studien, Philosophische Zeitschrift, vol. 31 (1926), Berlin: Rolf Heise, 1926, pp. 1 ss.
Gustav Radbruch: Rudolf Stammler – Zum 70. Geburtstag, in: Gesamtausgabe, vol. 16, ed. von Günter Spendel, Heidelberg: C. F. Müller, 1988.

[Selected Works of the Same Author]
Rudolf Stammler: Die Lehre von dem richtigen Rechte, Berlin 1902; *Idem*: Theorie der Rechtswissenschaft, Halle: Buchhandlung des Waisenhauses, 1911 (2nd ed. 1923); *Idem*: Lehrbuch der Rechtsphilosophie, Berlin/ Leipzig: Walter de Gruyter & Co., 3rd ed. 1928; *Idem*: Wirtschaft und Recht nach der materialistischen Geschichtsauffassung – Eine sozialphilosophische Untersuchung, Leipzig: Veit & Co., 1896 (3rd ed. 1914; 5th ed. 1924); *Idem*: Rechts- und Staatstheorie der Neuzeit – Leitsätze zu Vorlesungen, Leipzig: Veit & Comp., 1917; *Idem*: Rechtsphilosophische Abhandlungen und Vorträge, 2 vols., Berlin-Charlottenburg: Rolf Heise, 1925; *Idem*: Deutsches Rechtsleben – Lehrreiche Rechtsfälle, gesammelt und bearbeitet, 2 vols., München: C. H. Beck, 1932.

[For Further Reading]
Isaac Breuer: Der Rechtsbegriff auf Grundlage der Stammlerschen Sozialphilosophie (Kant-

Studien, ed. Hans Vaihinger, supplementary vol. 27), Berlin 1912 (reprint Vaduz: Topos, 1984);
Karl Larenz: Rechts- und Staatsphilosophie der Gegenwart (Philosophische Forschungsberichte, vol. 9), Berlin: Junker und Dünnhaupt, 1931;
Claudius Müller: Die Rechtsphilosophie des Marburger Neukantianismus – Naturrecht und Rechtspositivismus in der Auseinandersetzung zwischen Hermann Cohen, Rudolf Stammler und Paul Natorp (Tübinger rechtswissenschaftliche Abhandlungen, vol. 75; Dissertation Universität Tübingen 1992), Tübingen: J. C. B. Mohr, 1994;
Rudolf Stammler: Rechts- und Staatstheorien der Neuzeit – Leitsätze zu Vorlesungen, Berlin: Veit & Comp, 1917.

9 November 2017 *Michael Walter Hebeisen*

[Reproduction of pp. 335-392]

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Entry 1.1 "Eugen Huber, Recht und Rechtsverwirklichung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Eugen Huber
Title: Recht und Rechtsverwirklichung – Probleme der Gesetzgebung und der Rechtsphilosophie
Edition(s): Basel: Helbing & Lichtenhahn, 1920

[Introduction]
With this work we find swiss legal philosophy already at its best, from the beginning at the very pinnacle of its future development. *Eugen Huber*, praised as the genius that elaborated the Swiss Civil Code based on his investigations on the private law of the Swiss Cantons, is often neglected as a legal philosophical thinker. He himself did not understand his contributions as philosophical or pretend himself to be a philosopher; rather his legal thought is considered to be that of a jurisprudent reflecting his subjects profoundly and in relation to the whole life of spirit. "Ein Philosoph, der, von seinem System der Weltanschauung getragen, über unseren Gegenstand gesprochen hätte, würde unzweifelhaft ein ganz anderes Buch geschrieben haben. Allein es mag dem Juristen vorbehalten sein, nicht nur für seine Fachgenossen, sondern auch für den philosophischen Fachmann mit seiner Art der Darstellung manches in neue Beleuchtung gebracht zu haben, ohne deshalb unwillkommen zu sein". Apparently, Huber was fully conscious of the new dimensions he introduced in legal philosophy, but with the modesty only self-confidence can prove as appropriate. The principal monography in question dates of the old age of its author, and is dedicated to his friend *Rudolf Stammler*, teaching at the University of Marburg at that time.
The book in question by *Eugen Huber* covers some 450 pages that are filled with condensed argumentations. In the first part there is a direct correspondence with the later essay on "Absolutes Recht" (1922), as well as some overlapping with the two earlier treatises "Über die Realien der Gesetzgebung" (1913) and "Bewährte Lehre" (1910) by the same author. They can all be considered to contain independent preparatory work (see nos. 1.2 and 1.4 of this Legal Anthology). According to the sub-title, "Probleme der Gesetzgebung und Rechtsphilosophie", we find abbreviated and condensed a general setting of idealistic legal theory, however with attention to the specific task and function of jurisprudence in conjunction with the codified law. The proper innovation included in this concept consists in a comprehensive occupation with the juridical-philosophical dimension of the accomplishment, fulfilment and realisation of the legal order. Thereby the differences, deviations and enhancements are of special interest, which is always the case when the

realisation, the of law is taken into consideration.
As a motto for the lecture of the eminent writing in question, let us allude to dedication of *Eugen Huber* on the titlepage of the biography by *Fritz Wartenweiler* that reads: "Feuriges Gefühl für das Seinsollende zeichnet die wachsenden Zeiten & Menschen aus". The very same sentiment may characterise the portrayed grand man of Swiss jurisprudence and author of the work to be discussed, himself. It is not so easy, however, to grasp the particular novelty of the approach inaugurated by Huber. According to *Adolf Menzel*, this difficulty is due to an intermediate, mediating standpoint of the author: "Es ist nicht leicht, Hubers Grundgedanken herauszuarbeiten, da er zwischen einer soziologisch-psychologischen Auffassung und einer idealistischen, von *Rudolf Stammler* beeinflussten Rechtstheorie zu vermitteln suchte" ("Zum Problem Recht und Macht, in: Beiträge zur Geschichte der Staatslehre (Sitzungberichte der Akademie der Wissenschaften in Wien, Philosophisch-Historische Klasse, vol. 210, no. 1), Wien/ Leipzig: Hölder-Pichler-Tempsky, 1929).

[Historical Situation and Systematic Context]
In order to start *in medias res*, let us refer to the dedication of the monography to *Rudolf Stammler*, among whose friends we can also find its author *Eugen Huber*. Neo-Kantian legal philosophy as summarised and accentuated by Stammler serves as a point of reverence as well as of criticism at the same time, as it has been pointed out by *Felix Somló*: "Vielleicht ist es Stammler gerade durch die seltsame Verknüpfung von Eigenschaften, der befruchtenden Fragestellung mit der unbefriedigenden Lösung derselben, in so hohem Mass vergönnt, anregend zu wirken und zum bedeutendsten Kristallisationspunkt der neueren Rechtsphilosophie zu werden. Er vermag es, wie kein anderer, rechtsphilosophische Untersuchungen hervorzulocken und an den seinigen sich emporranken zu lassen. Sein abgerundetes, scharfsinniges und tiefernstes, aber schliesslich doch nicht befriedigendes Gedankensystem ladet förmlich zu einer Untersuchung darüber ein, an welchem Punkt man ihm die Gefolgschft zu versagen hat. Dadurch wurde er so Vielen zum willkommenen Vehikel ihrer Gedanken; dadurch wirde er auch zum Meistbesprochenen und Meistumstrittenen der neueren deutschen Rechtsphilosophie, wie ja der Schüler häufig gerade dem widerspricht, von dem er am meisten gelernt, im Kampf mit dem er sich zu einer eigenen Ansicht durchgerungen hat" (Juristische Grundlehre, Leipzig: Felix Meiner, 2nd ed. 1927; 1st ed. 1917, pp. 45 s.).
In function to the importance of this general setting of Neo-Kantianism for the legal philosophical thought of Huber, let us briefly represented the well-known exponents of this orientation of legal philosophy: Often forgotten is *Emil Lask* who took part in the south-west-German current of Neo-Kantianism, together with *Wilhelm Windelband* and *Heinrich Rickert* ("Rechtsphilosophie", in: Gesammelte Schriften, ed. Eugen Herrigel, Tübingen: J. C. B. Mohr, 1923, vol. 1, pp. 275 ss.). This scholar of philosophy had projected an extensive legal philosophy but died prematurely in the First World War. Better known are the exponents of the so-called Marburg neo-Kantianism, represented by *Paul Natorp* who also held "Vorlesungen über praktische Philosophie" in 1925), as well as of the less

known *Wilhelm Schuppe* with his "Grundzüge der Ethik und Rechtsphilosophie" from 1881. For further reading in the subject of the legal philosophy of the so-called Marburger Neo-Kantianism, please consult *Claudius Müller* ("Die Rechtsphilosophie des Marburger Neukantianismus – Naturrecht und Rechtspositivismus in der Auseinandersetzung zwischen Hermann Cohen, Rudolf Stammler und Paul Natorp", Tübingen: J. C. B. Mohr, 1994). It may be historically wrong, even if it turns out to be right in the outcome and in review, to compare the verdict of Neo-Kantianism by *Erich Kaufmann*, who judged Kantianism in the domain of practical philosophy to be too abstract, purified from concrete experience, yet senseless, and to be a purely rational theory, that metaphysically misunderstood pure cognition. ("Eine Kritik der neukantischen Rechtsphilosophie – Eine Betrachtung über die Beziehungen zwischen Philosophie und Rechtswissenschaft", Tübingen: J. C. B: Mohr, 1921). Concurring influence can be distinguished by the Writings of *Wilhelm Wundt*, especially his treatise on "Ethics" (Ethik – Eine Untersuchung der Tatsachen und Gesetze des sittlichen Lebens, 3 vols., Stuttgart: Ferdinand Enke, 1886, 4th ed. 1912) and his "Völkerpsychologie" (Völkerpsychologie – Eine Untersuchung der Entwicklungsgesetze von Sprache, Mythus und Sitte, Leipzig: Alfred Kröner, 1918, vol. 9: Das Recht).

Despite this, at the time of *Eugen Huber*, there was a high tide of Neo-Kantianism in the philosophy of law, for instance in Italy in conjunction with Neo-Thomism in the figure of *Giorgio Del Vecchio* ("Grundlagen und Grundfragen des Rechts – Rechtsphilosophische Abhandlungen", 1963). This predominance has only been balanced with some concurring opinions one can find in *Gustav Radbruch*. In general, despite the Kantian references, many of the Neo-Kantians have in fact still adherent to Natural Law theories. In this situation, an increment of this tendency is welcome, and it occurs with Huber, who is at the same time deeply influenced by the so-called "Historische Rechtsschule", by the historical, historistic theory of law, as represented among others by his academic teachers, i.e. by *Otto von Gierke* ("Die historische Rechtsschule und die Germanisten", 1903) and by *Johann Adolf Tomaschek* in Berlin, as well as by *Lorenz von Stein* in Vienna (*Rudolf von Ihering* seems to be a special case to me). Within the Historical School of law, we can often not find a decisive distinction between nature and history, although there is an inclination toward the cultural aspects of historical development. It may not be a hazard that the theoretical and philosophical foundation of historicism has been achieved by a Neo-Kantian thinker, namely by *Heinrich Rickert* ("Die Grenzen der naturwissenschaftlichen Begriffsbildung – Eine logische Einleitung in die historischen Wissenschaften", 1913).

Contrarily, Neo-Hegelianism was only in germination in German-speaking Europe at that time, non-regarding the political exploit by right and left wing Hegelianists, maybe with the exception of *Hans Freyer* ("Theorie des objektiven Geistes – Eine Einleitung in die Kulturphilosophie", Leipzig: B. G. Teubner, 1923; *Idem*: "Der Staat", Leipzig: Fritz Rechfelden, 1925) and of *Theodor Litt* ("Individuum und Gemeinschaft – Grundfragen der sozialen Theorie und Ethik", Leipzig/ Berlin: B. G. Teubner, 1919; *Idem*: "Erkenntnis und Leben – Untersuchungen über Gliederung, Methoden und Beruf der Wissenschaften", Berlin: B. G. Teubner, 1923), and with significant and interesting exceptions of *Walther*

Schönfeld ("Über den Begriff einer dialektischen Juridprudenz", in: Greifswalder Universitätsreden, vol. 20, Greifswald: L. Bamberg, 1929) and *Hermann Heller* ("Staatslehre", ed. Gerhart Niemeyer, Leiden 1934) where the concrete realisation is understood as manifestation of the claim of individual consciousness for universal validity. A fundamentally different situation can only be found in Italy with a true reception of Hegelianism by *Bertrando Spaventa* and the first consequently reformed Hegelian philosophy of law by *Giovanni Gentile* ("I fondamenti della filosofia del diritto", 1916).
The position held by *Eugen Huber* decidedly finds itself in contrast and in fundamental dissent with positivism in legal philosophy, as represented specifically by *Hans Kelsen* ("Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze", 1911, 2nd ed. 1923; and *Idem*: "Reine Rechtslehre – Einleitung in die rechtswissenschaftliche Problematik", 1934) and as symptomatically accentuated by *Rudolf Bierling* ("Juristische Prinzipienlehre", 5 vols. Tübingen: J. C. B. Mohr, 1894; *Idem*: "Zur Verständigung über Begriff und Aufgaben der Juristischen Prinzipienlehre", in: Archiv für Rechts- und Wirtschaftsphilosophie, vol. 11 (1917/ 1918), pp. 205 ss., Berlin/ Leipzig: Walther Rothschild, 1918). The overall situation and constellation in the domain of legal philosophy in the time of *Fin-de-Siècle* and in the first two decades of the twentieth century can be characterised in the following ways, in consequence: we find lasting Natural Law theories and predominating positivism in controversy and contradiction with each other, and there becomes more and more manifest a common obligation to build a bridge between both, or rather an invitation to invent new strategies to overcome both of these well documented, but insufficient and unsatisfying positions.

[Content, Abstracts/Conclusions, Insights, Evidence]
As our proposal to read, we have selected extracts from the second part of "Recht und Rechtsverwirklichung", dealing with the realisation of law, with the claim to be valid law, with the application of law, as well as with the methodology of legal thought, as in the first part we encounter subjects also treated in the very same way in the essay "Das Absolute im Recht" (see no. 1.2 of this Legal Anthology).
Following the concept of law established by *Eugen Huber*, the law ("Sollen") is to be realised to become true ("Sein") in the way of application. The legal order stands for the objectivation, or positive realisation of the idea of law. By legislation, the law as a mere ideal becomes practical, gains reality. This is simply done by obeying certain rules constantly, so that they consist in normal behaviour, together with the conviction, that the individuals follow a legal norm (*opinio iuris*). The identification of the rule of law occurs by means of increasing consciousness of institutes of law, institutions of law and the legal order itself. This process has much to do with common sentiment within a legal community, and the binding power of customary law becomes the principal legislator. "Das Wesen der Gemeinschaft in Gestalt dieser Gebundenheit ist allezeit und überall notwendig gegeben". By this tendency, factual power is converted to legal power, to the empowerment to develop and applicate the legal order, and in consequence legislating

and judicial organs are assigned to establish the objective legal order with its rights and duties. Legal community is based upon a set of elements that ensure cohesion, for instance language, religion and class. "Vergegenwärtigen wir uns demgegenüber die Gemeinschaft der schweizerischen Eidgenossenschaft, so bestätigen wir eine alte Entdeckung, wenn wir feststellen, dass kein einziger der unterschiedenen Kohäsionsfaktoren die Schweiz zusammenhält. Und doch besteht dieser Zusammenhang in einer uns immer neu erfassenden Kraft. Daraus können wir die Einsicht gewinnen, dass die angeführten Momente eben doch nur Kohäsionsfaktoren, und nicht Voraussetzungen der Gemeinschaftsbildung sind. Sie begünstigen die Bildung der Gemeinschaft, aber weder der eine noch der andere ist begrifflich oder praktisch absolut notwendig". The legal community of the modern nation state turns out to be more and more directed toward aims and efforts. The following arguments resemble a reduction of the extended version of "Der Zweck im Recht" by *Rudolf von Ihering*, whose lectures Huber assisted in Vienna. We also encounter a notion that will be of lasting importance for Swiss legal thought, i.e. "Organisation der Gemeinschaft", a concept that affects more the inner order than the outer organisation of a legal community. This concept will be at the core of the second principal monography in the history of Swiss legal philosophy, written by *Walther Burckhardt* only five years later (see no. 1.6 of this Legal Anthology).

As for the concept of so-called realities of legislation, wherein truly consists a personal invention of the author, we refer to the extended discussion in a separate essay by *Eugen Huber* (see no. 1.3 of this Legal Anthology).

The main force behind the realisation of the legal order is free will, as legal norms are normally obeyed without any formal enforcement of the duties of the legal order. This seems to be obvious, however it is often neglected by legal reasoning. If we seriously pose the question why people obey the law, the answer will not be the power of authority standing behind the legal norms, but simply other directives, inclinations, even when the subjects do not know about their legal obligations. Maybe they consult their relatives in cases of uncertainty, or they seek legal advice. This insight helps to overcome the paradox of how legal order can be completed in the way of the application of the law. In consequence, legal decision making can be adopted as a true source of law as it is disposed by the 1st article of the Swiss Civil Code, where "bewährte Lehre und Überlieferung" are simply translated into French and Italian languages as "*jurisprudence*", respectively "*giurisprudenza*" (this crucial point has been developed separately by Huber in an essay, see no. 1.4 of this Legal Anthology). At this point we find a reference to the categorical imperative as it is formulated by Immanuel Kant in his "Critique of practical reason": "Finde der Richter aber auch hierin [in der bewährten Lehre und Überlieferung] keine Anhaltspunkte, so kann er nur noch seiner Überzeugung folgen, und was hiefür ihm als Anweisung gegeben zu werden mag, besteht einzig darin, dass gesagt wird, er habe den Fall nicht nach Willkür, nach dem augenblicklichen Eindruck der Umstände, nach Mitleid, Entrüstung oder persönlicher Neigung zu entscheiden, sondern so, als würde er gleich dem Gesetzgeber den Satz formulieren, um ihn dan auf den Fall anzuwenden, der seines Urteils harrt". We have to be careful and precise in our understanding: first the judge has

to establish a norm of decision and second to applicate this legal norm to the case in question by interpretation and application. There is no structure of judicial judgment in general by any method, knowing that methodology alone cannot guarantee the outcome to be true and just. Huber payed special attention to the justification of sanction in the domain of penal law.
With respect to logics and methodology, *Eugen Huber* inserts the legal consciousness in the process of legal reasoning, as mentioned just before. A specific modality of juridical judgment is postulated ("juristische Denkungsart") that distinguishes legal thought: "Dieses juristische Denken beruht selbstverständlich auf logischen Grundsätzen, aber es handelt sich für dasselbe nicht um reine Logik, sondern um eine Logik, bei der eine besondere Art des Urteils mitzuwirken hat. Juristisch Denken heisst nicht einfach ein Rechnen mit Begriffen, sondern eine Operation, die durch das Rechtsbewusstsein beherrscht wird". This consciousness is not to be confused with a mere feeling or sentiment, as it has been claimed by the trend of so-called "Gefühlsjurisprudenz". Legal consciousness means conscious knowledge, cognition that includes the subject of cognition, that acknowledges the creative activity of the subject that has to recognise the law: "Das juristische Denken erfolgt nach allgemeinen Regeln, die in dem Wesen des Rechtes begründet sind. Sie wohnen dem Rechte inne und sind notwendig, wie das Recht selbst. Sie lassen sich nicht willkürlich setzen, sondern treten nur deshalb verschieden auf, weil ihre Erkenntnis mehr oder weniger klar sein mag, wie das bei jedem Erkennen der Fall ist. [...] Jedermann, der im Rechte tätig ist, hat sich zu bemühen, die Regeln, nach denen dieses Denken erfolgt, so zu erfassen, dass sie ihm stets vor Augen stehen und er sich nach ihnen als selbstverständlich zu richten vermag. Sie müssen ihm, wie man zu sagen pflegt, in Fleisch und Blut übergehen. Andernfalls kann auch der Gebildetste in eine gefühlsmässige oder schablonenhafte Rechtsbetätigung verfallen". Therefore, jurisprudence has to be a part of the human sciences: "Bei den Geisteswissenschaften begegnen wir der Wertung und Beurteilung der menschlichen Handlungen nach einer Idee, unter deren lebendigem Bilde die geschichtlichen Tatsachen erfasst und zustimmend oder ablehnen dargestellt werden. / Diese Idee nun ist bei der Rechtswissenschaft die Rechtsidee, aus der wir unsere Rechtsüberzeugung gewinnen". The concept of law consists in the overall outcome of the totality of all practical applications of the self-conscious legal judgment.

[Philosophical Valuation and Jurisprudential Significance]
Neo-Kantianism applies the foundation of natural sciences to human sciences, not taking into consideration the Kantian monition of prerogative of practical reason above pure reason. This has been partially corrected by the foundation of the human sciences as provided by *Wilhelm Dilthey*. Law in practice pretends to be a "Sollen" that is destinated to be realised, to become "Sein", according to the synthesis of Hegelian dialectics "Sein – Nicht-Sein – Werden, or Sein-Sollen". "Ideal-Realism", as it is inaugurated by *Eugen Huber*, can serve as a strategy to overcome these deficiencies of Neo-Kantianism, so that Hegelianism can be actualised by means of reconsidering Kantianism (see *Nicolai*

Hartmann: Diesseits von Idealismus und Realismus, in: Kant-Studien, Philosophische Zeitschrift, vol. 29, 1-2 (1924), Berlin: Rolf Heise, 1924, pp. 160 ss.).
Law can also be understood as claim for validity of a certain rule to be implemented in society or better community, as it is described in the form of teleological rationality (of a kind of economy in the larger sense) by *Rudolf von Ihering*, i.e. as a characteristic sign of morality ("Der Zweck im Recht", Leipzig: Breitkopf und Härtel, 1877/ 1883, vol. 2), or even as it is admitted by *Rudolf Stammler* as counterstatement to the Marxist understanding of social philosophy ("Wirtschaft und Recht nach der materialistischen Geschichtsauffassung – Eine sozialphilosophische Untersuchung", Leipzig: Veit & Co., 1896, 3rd ed. 1914, 5th ed. 1924).
Reception essays on "Recht und Rechtsverwirklichung" have been written and published by *Hans Kelsen*, in: Zeitschrift für Schweizerisches Strafrecht, vol. 34, pp. 217-246, and by *Arthur Baumgarten*, in: Archiv für Rechts- und Wirtschaftsphilosophie, vol. 15 (1921/ 1922), S. 341 ss., among others. This shows the great influence on legal thought that this writing must have had. *Eugen Huber* was once claimed to be true positivist and once criticised to be a positivist and relativist! This shows the controversial reception of its conception. *Max Rümelin* protects Huber from both of the objections ("Eugen Huber", Rede gehalten bei der akademischen Preisverteilung am 6. November 1923, Tübingen: J. C. B. Mohr, 1923, pp. 76 ss.), holding that Huber follows his idealistic state of mind in a critical sense, i.e. according to the foundations of Kantianism or Neo-Kantianism, and gives a true fellow of *Rudolf Stammler* in this respect – with a decisive difference, however, insofar as he did not build monumental constructions, but followed closely the reality of legal consciousness and experience, equal to prefer the pragmatic practice of law above any abstract theory of law, and that means to found a veritable legal theory of legal practice.

[Further Information About the Author]
Eugen Huber, born 13 July 1849 in Oberstammheim, died 23 April 1923 in Berne, followed (among others) the lectures of *Rudolf von Ihering* at the University of Vienna during his studies. *Rudolf Stammler* and *Max von Rümelin* were counted among his friends.
In 1881 he was named professor of federal law, civil law and legal history at the University of Basel. He was asked by the "Schweizerischer Juristenverein" to develop an overview over the legal order of the 25 Swiss cantons in order to establish grounds for the unification of Swiss civil law, a duty he was prepared to fulfil in excellence, which is proved by the four volumes of "System und Geschichte des schweizerischen Privatrechts" (1886-1893). As a historian, he collected a variety and peculiarites of the specific Swiss common law, that characterised the legal order of the Swiss federal state. As the very basis of the unification and codification of Swiss civil law, he identified the collective Swiss public spirit (the so-called "Volksgeist"), an idea that resembles more the public consciousness or common sense for the law.
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It was only in 1892 that he was called back to Switzerland to take the ordinary chair for

civil law, legal history and philosophy of law at the University of Berne. From the Swiss Federal Government, he soon got the task to prepare the codification of Swiss civil law and developed a proposal for the later "Schweizerisches Zivilgesetzbuch" (1900). By an intelligent combination of existing traditions and modern innovations he succeeded in a reconstruction of the hidden common understanding of Swiss private Law. His proposal found approbation in 1907 and gained validity in 1912.
In retrospective, he completed his philosophically informed views of law only in his later period of life. In his groundbreaking and masterful work on "Recht und Rechtsverwirklichung", he identified jurisprudence as a contributor to the cognition and perception of the law, according to the Kantian criticism in epistemology. Courts and judges are an integrative part of the finding of the law, and their interpretations of the common law serve as a veritable source of law.
In 1922 his last work on legal philosophy appeared, devoted to the "Absolute im Recht", where he claimed that the ideal of the law is based on the common sentiment or the common sense of the law. However, this was not meant to be an unaltered idealistic legal theory, but rather intended to establish a ground of positive law and its tendency to realise the eternal idea of law. Therefore, the ideal has to be proved by the reality of sociocultural legal practice.
For further information, please consult:
Theo Guhl: Eugen Huber, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 323ff.;
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Gustav Radbruch: Rechtsidee und Rechtsstoff - Eine Skizze, in: Kant-Festschrift zu Kants 200. Geburtstag am 22. April 1924, im Auftrag der Internationalen Vereinigung für Rechts- und Wirtschaftsphilosophie ed. Friedrich von Wieser u.a., S. 183ff., Berlin-Grunewald: Walther Rothschild, 2. Ed. 1924; *Idem.*: Die Problematik der Rechtsidee (1924), in: Gesamtausgabe, vol. 2, ed. Arthur Kaufmann, Heidelberg: C. F. Müller, 1993; *Idem*: Einführung in die Rechtswissenschaft (1. Ed. 1910; 8. Ed. 1929), in: Gesamtausgabe, vol. 1, ed. Arthur Kaufmann, Heidelberg: C. F. Müller, 1987; *Idem*: Der Relativismus in der Rechtsphilosophie (1934), in: Gesamtausgabe, vol. 3, ed. Winfried Hassemer, Heidelberg: C. F. Müller, 1990; *Idem*: Die Natur der Sache als juristische Denkform (1948), in: Gesamtausgabe, vol. 3, ed. Winfried Hassemer, Heidelberg: C. F. Müller, 1990;
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8 November 2017 *Michael Walter Hebeisen*

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Entry 1.2 "Eugen Huber, Schematischer Aufbau einer Rechtsphilosophie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Eugen Huber
Title: Das Absolute im Recht – Schematischer Aufbau einer Rechtsphilosophie, in: Festgabe der juristischen Fakultät der Berner Hochschule zur Jahresversammlung des Schweizerischen Juristenvereins von 1922
Edition(s): Bern: Stämpfli & Cie. AG, 1922

[Introduction/Historical Situation and Systematic Context]
In the essay on "The Absolute in Law", *Eugen Huber* presented the essence of his legal philosophical thought to the assembly of the Swiss Association of Lawyers and Jurisprudents, in occasion of a congregation at the Faculty of Law at the University of Berne in 1922. This very comprehensive and easy to read text of about 70 pages provides a condensed and reduced version of the principal writing of the same author, "Recht und Rechtsverwirklichung" from 1920 (see no. 1.1 of this Legal Anthology); this version is corresponding more or less to the first part of the beforementioned work, and can be consulted as a complementary addition (or substitution) to it. Therefore, the sub-title pretends ambitiously to provide the author's conception of "The Scheme and Structure of Philosophy of Law".

[Content, Abstracts/Conclusions, Insights, Evidence]
Of course, this piece of legal philosophy by *Eugen Huber* also contains an idealistic view on law, legal order and jurisprudence, according to the reference to *Rudolf Stammler*. However, there is another general inclination predominating the whole argumentation. In the first section the notion of life goes across all arguments of the appearance, determinations and valuations of law. The so-called philosophy of life of the time ensures close relations to the human experience of law and legal order or practice, in conjunction with the spiritual element of "the absolute in law" (*nota bene* it is hereby the law does not pretent to be absolute, but only the law as a form of the absolute). "Betrachten wir das Recht als Lebenserscheinung, so bildet es als solche mit absoluter Notwendigkeit ein Stück, und zwar ein wesentliches, im Leben der Menschen, sei es jedes einzelnen oder aller zusammen. Es ist ein Stück, das sich im vernünftigen Bewusstsein des Menschen bewegt, im Willen speziell hervortritt und unter der Rechtsidee nach einer bestimmten Gestaltung des Lebens verlangt".
According to this constellation, there are neither dualism nor dialectics as guiding principles or methods of *Eugen Huber*'s conception of legal philosophy. Instead a plurality

of principles is identified, a cognitive, agitative and regulative element. In consequence, there are acknowledged the three moments of cognition, activity or creation, and regulatory judgment as equally important for the dynamic process of law. Particularly significant is the third-mentioned element, the regulatory or reflective moment that is conceptualised according to the "Critique of Judgment" by *Immanuel Kant*. "Das regulative Prinzip lehrt uns, dass wir in unserer Vernunft nicht nur die Gabe besitzen, zweckmässige Mittel zu wählen, sondern zugleich auch die Fähigkeit haben, in der Zwecksetzung und in der Wahl der Mittel eine Regulierung vorzunehmen. Wir vermögen in der Zweckverfolgung ein Sollen anzuerkenne und werden zu dessen Befolgung durch unser vernünftiges Bewusstsein angehalten. Aus allem dem, was uns entgegentritt, sollen wir das wählen, was recht ist, und wir sollen es so vollführen, wie es recht ist. Wir sollen nur dergestalt und insoweig unsere Zweck verfolgen, als es mit dem Recht verträglich ist. [...] Das regulative Prinzip führt in unserem Bewusstsein zur Abgrenzung und Beschränkung der Zweckverfolgung nach dem, was Recht ist. Damit wird erst den Handlungen des Menschen den Wert verliehen, auf den das Recht Anspruch hat: Das Recht soll in der menschlichen Gemeinschaft über alle Interessen gestellt werden und schliesst den obersten Lebenswert in sich". Faithful to the idealistic inclination of this conception of legal philosophy, the law must surpass a merely economic dimension.

[Philosophical Valuation and Jurisprudential Significance]
Normally we encounter a strict division of law and morality or ethics in the context of neo-idealistic theory building in legal philosophy, especially in Neo-Kantianism. *Eugen Huber* overcomes this limitation or restriction and eventually proposes a concept about how these normative orders can be co-ordinated. In fact, there are even more dominating ideas, such as logics, power and methodology, trying to influence the process of constructing and develop a just legal order. All of these relations are addressed by the author, each within the tension between individualism and collectivism.
In a dynamic view, within a historical understanding of the foundation and development of legal order, it turns out that the fulfilment of legal claims is crucial, that the realisation of the legal order is eminently important. Legal norms are postulated as valid in order to influence human behaviour and have therefore to become true, real. Legal order, however, is itself bound by realities, by factual forms of life in a human community. The application of law cannot be understood as a one-way implementation; on the contrary, there are multiple normative ideas and ideals that operate in the inverse sense. A human ability to estimate and valuate all these claims must be postulated, a kind of legal judgment operating at the core of interpretation and application.

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Dominique Manaï: Eugen Huber - Jurisconsulte charismatique, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1990;
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Aloïs Troller: Eugen Hubers Allgemeingültige Rechtsphilosophie, in: Gedächtnisschrift für Peter Jäggi, ed. Bernhard Schneider and Peter Gauch, Universitätsverlag Freiburg Schweiz 1977;
Fritz Wartenweiler: Eugen Huber – Der Lehrer, Gesetzgeber, Mensch, Zürich/ Leipzig:

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Eugen Huber: Erläuterungen zum Vorentwurf eines Schweizerischen Civilgesetzbuchs, Bern: Büchler & Co., 1902 (pp. 1-39); *Idem*: Das Absolute im Recht – Schematischer Aufbau einer Rechtsphilosophie, in: Festgabe der juristischen Fakultät der Berner Hochschule zur Jahresversammlung des Schweizerischen Juristenvereins von 1922, Bern: Stämpfli & Cie. AG, 1922; *Idem*: Recht und Rechtsverwirklichung – Probleme der Gesetzgebung und der Rechtsphilosophie, Basel: Helbing & Lichtenhahn, 1920; *Idem*: Über die Realien der Gesetzgebung, in: Zeitschrift für Rechtsphilosophie in Lehre und Praxis, ed. Felix Holldack, Rudolf Joergens and Rudolf Stammler, Leipzig: Felix Meiner, 1913, pp. 39ss.; *Idem*: Bewährte Lehre – Eine Betrachtung über die Wissenschaft als Rechtsquelle, Bern: K. J. Wyss, 1910.

[For Further Reading]
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Alois Troller: Eugen Hubers Allgemeingültige Rechtsphilosophie, in: Gedächtnisschrift für Peter Jäggi, ed. Bernhard Schneider and Peter Gauch, Freiburg im Üechtland: Universitätsverlag, 1977.

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Entry 1.3 "Eugen Huber, Realien der Gesetzgebung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Eugen Huber
Title: Über die Realien der Gesetzgebung
Edition(s): in: Zeitschrift für Rechtsphilosophie in Lehre und Praxis, hrsg. von Felix Holldack, Rudolf Joergens und Rudolf Stammler, Leipzig: Felix Meiner, 1913, S. 39ff.

[Introduction/Historical Situation and Systematic Context]
Reflection about the realities in the course of legislation have also been extensively treaded by *Eugen Huber* in his later major writing entitled "Recht und Rechtsverwirklichung" (see no. 1.1 of this Legal Anthology). However, the article, the essay in case indicates the veritable *locus classicus* of the fundamental ideas on "Realien der Gesetzgebung", and above all must have had a great influence on legal thought across Europe because of the widespread journal, where they have been printed for the first time, i.e. the well-known "Zeitschrift für Rechtsphilosophie in Lehre und Praxis", edited by *Rudolf Stammler* among other editors. The title of this periodical sounds like it could be the motto of Huber's legal philosophical thought, that is intended to bridge the gap between theory and practice. Concerning the greater context of the particular questions addressed by *Eugen Huber* in this article, please consult the introduction to the principal monography "Recht und Rechtsverwirklichung", where the arguments discussed above have been introduced without considerable alterations (pp. 281 to 336).

[Content, Abstracts/Conclusions, Insights, Evidence]
Apart from custom law, there are multiple facts and realities to be taken into consideration by the legislator as well as jurisprudence, when they realise the idea of law by objectivise this ideal within the legal order:
1st In the human being, considered as an individual consists the primary reality for any legislation. This requirement founds a deeply human, humanistic approach to legal order, indeed. Human existence is not dominated by psychology in the first place, but rather by conceptions of human life, by the social inclination of the individual that founds communities of all kinds, and last but not least by ethics and religion. By doing so the individuality is acknowledged.
2nd The so-called natural facts can directly influence legislation, as it is proved by the verbalism "the nature of things". These conditions consist in the economic situation, the circumstances of work and labour, the technical constellation, and so on. Generally speaking, these are anthropological structures to be accepted in a major or minor extent.

3rd Pre-existing legal order is often forgotten as a reality of fact, as human community is always structured and ordered in a certain way or the other. This seems to be obvious, however it has to be taken seriously, as even the very first legislation must have had a previous one, according to the insight, that every state of development of human community has its own law. The existing legal order has to be studied and reflected in an exhaustive manner in order to understand its concepts and institutions thoroughly. This task is of particular importance when it comes to unifying several pre-existing legal orders to a new one with greater outreach, i.e. in the process of codification. "Es handelt sich hier überall insofern um Realien, als der überlieferte Zustand durch die anderen Realien gefordert und von ihnen getragen ist ("Recht und Rechtsverwirklichung", p. 232). That does not mean that given situations and circumstances cannot and should not be altered, but only that the tension between the demands of a time and the legally founded claims of the future legal order have to be taken in earnest consideration. Such reflections can lead to a reduced attempt of modernisation and prove the respect for approved solutions to everlasting problems. More over, this reality is considered to be a process: "Mag auch noch so sehr jede Änderung in der Rechtsordnung unter der Idee einer Verbesserung geboren sein, so ist sie doch, sobald sie konkrete Gestalt annimmt, wiederum ihrerseits der Beurteilung nach der Idee unterworfen, und daraus ergibt sich eine Anlehnung oder Prüfung nach Altem und Neuem, die ganz notwendig den bestehenden Rechtszustand als ein Reale der Gesetzgebung erscheinen lässt"
All these realities can be considered under the aspect of motivation, formalisation or realisation. "Die instinktive Motivierung verbindet sich mit der primitiven Formulierung und der intuitiven Realisierung, und dasselbe geschieht mit den übrigen hervorgebrachten Momente, so dass zusammenfassend typisch von einer instinktiv-primitiv-intuitiven, einer autoritativ- schablonenhaft-formalistischen, oder endlich einer organisch-spekulativ-intellektuellen Gestalt der Rechtsordnung gesprochen werden kann". It is all too obvious that *Eugen Huber* himself was ambitious enough to intend the last modality of legislation when he projected the Swiss Civil Code. It is noteworthy that, in the course of legislation and jurisdiction, they build a system of constraints, even if they differ from mere circumstances, preferences or needs. They are necessary to the concept of law, as well as the idea of law: "Es gibt Momente, mit denen die Gesetzgebung sich jederzeit abfinden muss, die also für die Gesetzgebung so notwendig sind, wie die Idee des Rechts selber" ("Recht und Rechtswirklichkeit", p. 283). Eventually legislation is not a reality, but a task, a work to be done in practice by the legislator.

[Further Information About the Author]
Eugen Huber, born 13 July 1849 in Oberstammheim, died 23 April 1923 in Berne, followed (among others) the lectures of *Rudolf von Ihering* at the University of Vienna during his studies. *Rudolf Stammler* and *Max von Rümelin* were counted among his friends.
In 1881, he was named professor of federal law, civil law and legal history at the University of Basel. He was asked by the "Schweizerischer Juristenverein" to develop an overview over the legal order of the 25 Swiss cantons in order to establish the ground for

the unification of Swiss civil law, a duty he was prepared to fulfil in excellence, which is proved by the four volumes of "System und Geschichte des schweizerischen Privatrechts" (1886-1893). As a historian, he collected a variety and peculiarites of the specific Swiss common law, that characterised the legal order of the Swiss federal state. As the very basis of the unification and codification of Swiss civil law, he identified the collective Swiss public spirit (the so-called "Volksgeist"), an idea that resembles more the public consciousness or common sense for the law.
Between 1882 and 1892 he taught commercial law and German public law at the University of Halle an der Saale.
It was only 1892 when he was called back to Switzerland to take the ordinary chair for civil law, legal history and philosophy of law at the University of Berne. From the Swiss Federal Government, he was soon given the task to prepare the codification of Swiss civil law and developed a proposal for the later "Schweizerisches Zivilgesetzbuch" (1900). By an intelligent combination of existing traditions and modern innovations he succeeded in a reconstruction of the hidden common understanding of Swiss private Law. His proposal found approbation in 1907 and gained validity in 1912.
In retrospective, he completed his philosophically informed views of law only in his later period of life. In his groundbreaking and masterful work on "Recht und Rechtsverwirklichung", he identified jurisprudence as a contributor to the cognition and perception of the law, according to the Kantian criticism in epistemology. Courts and judges are an integrative part of the finding of the law, and their interpretations of the common law serve as a veritable source of law.
In 1922, his last work on legal philosophy appeared, devoted to the "Absolute im Recht", where he claimed that the ideal of the law is based on the common sentiment or the common sense of the law. However, this was not meant to be an unaltered idealistic legal theory, but rather intended to establish a ground of positive law and its tendency to realise the eternal idea of law. Therefore, the ideal has to be proved by the reality of sociocultural legal practice.
For further information, please consult:
Theo Guhl: Eugen Huber, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 323ff.;
Dominique Manaï: Eugen Huber - Jurisconsulte charismatique, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1990;
Max Rümelin: Eugen Huber, Rede gehalten bei der akademischen Preisverteilung am 6. November 1923, Tübingen: J. C. B. Mohr, 1923;
Aloïs Troller: Eugen Hubers Allgemeingültige Rechtsphilosophie, in: Gedächtnisschrift für Peter Jäggi, ed. Bernhard Schneider and Peter Gauch, Universitätsverlag Freiburg Schweiz 1977;
Fritz Wartenweiler: Eugen Huber – Der Lehrer, Gesetzgeber, Mensch, Zürich/ Leipzig: Rotapfel-Verlag 1923.

[Selected Works of the Same Author]
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[For Further Reading]
Eugen Huber: Recht und Rechtsverwirklichung – Probleme der Gesetzgebung und der Rechtsphilosophie, Basel: Helbing & Lichtenhahn, 1920;
Alois Troller: Eugen Hubers Allgemeingültige Rechtsphilosophie, in: Gedächtnisschrift für Peter Jäggi, ed. Bernhard Schneider and Peter Gauch, Freiburg im Üechtland: Universitätsverlag, 1977.

8 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
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1st Section "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Neo-Kantianism, Neo-Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond"
Entry 1.4 "Eugen Huber, Bewährte Lehre"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Eugen Huber
Title: Bewährte Lehre – Eine Betrachtung über die Wissenschaft als Rechtsquelle
Edition(s): Bern: K. J. Wyss, 1910 (also in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, ed. Carl Hilty, vol. 25 (1911), Bern: K. J. Wyss, 1911, pp. 3-59)

[Introduction/Historical Situation and Systematic Context]
In an essay from 1910, *Eugen Huber* defends his conviction that jurisprudence has to be explicitly acknowledged as a source of law. In the Swiss Civil Code (1st article paragraph 3), the term "bewährte Lehre" is translated into French and Italian language to "*jurisprudence*" and "*giurisprudenza*" in short. The opinion of the author has been adopted by the codified theory of the sources of Swiss private law: "Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung enthält. / Kann dem Gesetze keine Vorschrift entnommen werden, so soll der Richter nach Gewohnheitsrecht und, wo ein solches fehlt, nach der Regel entscheiden, die er als Gesetzgeber eufstellen würde. / Er folgt dabei bewährter Lehre und Überlieferung". This formulation, however, is all too narrow. The declarations by Huber in the essay to be discussed below, contrarily, are to be understood in a much larger sense than the ordinary interpretation of the abovementioned article, as they refer to jurisprudence, to legal science in a larger understanding.
For the general setting and for the specific context of this theory, please refer to the arguments that are included in the principal writing of the same author, i.e. "Recht und Rechtsverwirklichung", as well as in the essay "Über die Realien der Gesetzgebung" (see no 1.1 and 1.3 of this Legal Anthology). See also the essay by *Walther Burckhardt* concerning the vacations within the codified legal order (Die Lücken des Gesetzes und die Gesetzesauslegung, in: Abhandlungen zum schweizerischen Recht, N. S. vol. 8, Bern: Stämpfli & Cie., 1925, pp. 62-106; see no. 2.1 of this Legal Anthology).

[Content, Abstracts/Conclusions, Insights, Evidence]
Eugen Huber confers an active, yet creative role and function to jurisprudence, to the scientific discipline that has to deal with the legal order as its object. Thereby, he claims to acknowledge the contribution of the subject within the process of legal cognition, whether this be jurisprudence itself, or the court, or a judge, an advocate or even the individual subjected to the law. Each member of the legal community is invoked to interpret and to applicate the legal order, according the theory held by Huber.

The problem is identified as twofold, as the terms 'source of law' and 'jurisprudence' are to be defined in this context. Jurisprudence is declared to be a practical discipline, an applied science. "Wissen und Können, Erkennen und Schaffen, – eine neueste Richtung in der Betrachtung der geistigen Welt würde sagen Wissen und Leben – stehen sich, wie auf allen Gebieten des menschlichen Handelns, auch auf demjenigen des Rechts und der Rechtsverwirklichung in dem gleichen Sinne gegenüber. Die Wissenschaft hat es nach ihrem Wesen mit dem ersteren zu tun, in dem letzteren handelt es sich um eine Betätigung des Willens oder eine 'Kunst'. Zwischen beiden besteht jedoch eine sehr enge Verbindung". It is obvious that *Eugen Huber* in his following arguments relies on this relation between the two positions, a relation that has to be established first. Under the impression of the controversy, Huber's arguments are carefully developed, and expressed in a very diplomatic way. We always have to take this fact into account when reading the essay in question, as the author is an official person having projected to implement his solution into the valid legal order by introducing it into the Swiss Civil Code.
Jurisprudence has to deal not only with knowledge about the law, but also with real facts, with a systematic order on the one hand and with historical structures on the other hand. At this point, judicial judgment appears once more: "So sind denn jene mit Urteilskraft aus den tatsächlichen Feststellungen gewonnen Ergebnisse wahr und ist das Wissen von ihnen als wissenschaftlich anzuerkennen. Mit einem Vorbehalt [...] der Übereinstimmung mit dem vernünftigen Urteil, also mit dem Urteil, das sich ein jedes vernünftige Wesen gestatten darf". The principle evoked is clearly Kantian, as it resembles one expression of the so-called categorical imperative. And the argument refers to the entire legal community, even if there can be identified arguments that contradict, strictly interpreted, to the leading argumentation, for instance that jurisprudence has to proceed by hypothesis.
There is another restriction to be overcome in order to make the argument valid for jurisprudence as a source of law, as held by *Eugen Huber*. That is the notion of source has to be broadened to cover also the process of interpretation and application of the legal order. If customary law is accepted as a source of valid law, there is, principally speaking, no hindrance not to also acknowledge the contributions of the subjects in their active role within the way of implementation and application of the legal order. "Als Wissenschaft kann nur anerkannt werden die Feststellung und Beurteilung des Rechtes im allgemeinen, als eines objektiven Rechtsbestandes, aber freilich nicht nur die irgendwie zweckmässige Wiedergabe dessen, was objektiv vorliegt, sondern auch seine Vertiefung und Ergänzung nach den Regeln wissenschaftlicher Untersuchung und Feststellung, also auch wieder als objektive Ordnung gedacht". Let us abstract from the qualification of the legal order as objective, as it occurs as misleading, in a philosophical understanding. The sense of the claim is that the organs that are invoked to applicate the law have to build norms of decision or case norms, that can be understood as concrete derivations of a universal rule. The crucial point to validate law is reference to the universal idea of law, as it is emphasised by the author in his other writings. This calls back legal judgment: "Die Urteilskraft ist die erste und gewaltigste Macht in diesen Dingen, ihre Betätigung macht

den guten Gesetzgeber oder Richter aus. Und wenn die Wissenschaft mitwirkt, so vermag sie es nur, indem eben auch sie mit der Urteilskraft arbeitet". In this passage we find the functions of the legislator, as well as of the judge or court co-ordinated in a parallel manner. With jurisprudence, a difference is established by the author, however: "Bei der Wissenschaft aber ergeben sich aus ihr die Betrachtungen, die uns über den Rechtsbestand in seiner ganzen Ausdehnung und Tiefe belehren. Sie ist Lehre, und nicht Kritik nicht Befehl, nicht Urteil, wenngleich sie auch auf diese Dinge indirekt von dem allergrössten Einfluss sein kann". The established difference is at the same time taken back. In principle, however, it seems that Huber intended to promote a narrow conception of jurisprudence, in contrast to legislation and jurisdiction, even if the difference between jurisdiction and jurisprudence is merely functional, but not founded in scientific terms or in terms of cognition. "Wissenschaft bedeutet hiernach die Lehre, unterschieden von der Gesetzgebung und der Rechtsprechung. Sie ist die Lehre vondem, was Recht in objektivem Sinne ist (oder gewesen ist), aber nicht beschränkt auf die durch die anderen Faktoren der Rechtsverwirklichung bereits festgestellten Rechtssätze, sondern im ganzen Umfange dessen, was auf dieser Grundlage gemäss wissenschaftlicher Prüfung und Gestaltung als Recht zu betrachten ist". In the outcome, in effect, these doubts do not prevent Huber from accepting jurisprudence as a source of law, and it seems that the established restrictions are only due to a concept of legal cognition that is all too old-fashioned. The qualification of legal theory as "bewährt", as proved or approved, was eventually abolished. The deeper reason to acknowledge jurisprudence as a veritable source of law, therefore, is the fact that the very same judgment as it is active in legislation and jurisdiction can be found.

[Information About the Author]
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Dominique Manaï: Eugen Huber - Jurisconsulte charismatique, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1990;
Max Rümelin: Eugen Huber, Rede gehalten bei der akademischen Preisverteilung am 6. November 1923, Tübingen: J. C. B. Mohr, 1923;
Aloïs Troller: Eugen Hubers Allgemeingültige Rechtsphilosophie, in: Gedächtnisschrift für Peter Jäggi, ed. Bernhard Schneider and Peter Gauch, Universitätsverlag Freiburg Schweiz 1977;
Fritz Wartenweiler: Eugen Huber – Der Lehrer, Gesetzgeber, Mensch, Zürich/ Leipzig: Rotapfel-Verlag 1923.

[Selected Works of the Same Author]
Eugen Huber: Erläuterungen zum Vorentwurf eines Schweizerischen Civilgesetzbuchs, Bern: Büchler & Co., 1902 (pp. 1-39); *Idem*: Das Absolute im Recht – Schematischer Aufbau einer Rechtsphilosophie, in: Festgabe der juristischen Fakultät der Berner Hochschule zur Jahresversammlung des Schweizerischen Juristenvereins von 1922, Bern: Stämpfli & Cie. AG, 1922; *Idem*: Recht und Rechtsverwirklichung – Probleme der Gesetzgebung und der Rechtsphilosophie, Basel: Helbing & Lichtenhahn, 1920; *Idem*: Über die Realien der Gesetzgebung, in: Zeitschrift für Rechtsphilosophie in Lehre und Praxis, ed. Felix Holldack, Rudolf Joergens and Rudolf Stammler, Leipzig: Felix Meiner, 1913, pp. 39ss.; *Idem*: Bewährte Lehre – Eine Betrachtung über die Wissenschaft als Rechtsquelle, Bern: K. J. Wyss, 1910.

[For Further Reading]
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Oscar Adolf Germann: Gesetzeslücken und ergänzende Rechtsfindung; *Idem*: Richterrecht; and *Idem*: Zum Verhältnis von Rechtsquellen und Rechtsfindung, all in: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli, 1965, pp. 111 ss., 227 ss. and 367 ss.; *Idem*: Durch Judikatur erzeugte Rechtsnormen, Zürich: Schulthess Polygraphischer Verlag, 1976;
Gustav Radbruch: Rechtswissenschaft als Rechtsschöpfung - Ein Beitrag zum juristischen Methodenstreit (1906), in: Gesamtausgabe, Band 1, hrsg. von Arthur Kaufmann, Heidelberg: C. F. Müller, 1987.

9 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
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Entry 1.5 "Ernest-Alexandre Roguin, Science juridique pure"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Ernest-Alexandre Roguin
Title: La science juridique pure, 3 vols.
Edition(s): Paris/ Lausanne: Librairie Générale de Droit et de Jurisprudence/ F. Rouge & Cie., 1923

[Introduction]
With his three-volume treatise on "Pure legal science" from 1923, *Ernst Roguin* accomplishes the proposals he had made thirtythree years earlier in his book on "*La règle de droit*" from 1889. (See no. 0.13 of this Legal Anthology.)

[Historical Situation and Systematic Context]
Ernest Roguin indicates to have taken profit from his extensive occupation with the comparison of legal orders, leading to his "*Traité de droit civil compare*", a seven volume *opus magnum*. In short, the author only defends his general attitude as well as his standpoint in specific questions of the earlier volume with the very same subject. Apparently, the publication of the earlier book had caused a lot of criticism. However, the delay in time of these arguments seems to be too distant, the replication shows to be rather late; therefore, the subsequent attempt to confirm his purely dogmatic jurisprudence seems to be untimely, unnecessary indeed. Instead of a vivid discussion or even reception, one can only *ex post* ascertain the failure of the main proposals made by Roguin. In consequence, his attempt to a pure legal science remains episodic.

[Content, Abstracts]
As a basis for his system of pure jurisprudence, *Ernest Roguin* distinguishes five intellectual functions: imagination, history, pure science or theory-matic, art and critique. Law is located in the third category or classification, a choice that corresponds to the decision to incorporate legal thought within a framework of sociology. Therefore, critique for instance cannot be justified before the high court of behaviourism, that is the underlying ground on which jurisprudence should be established as a purely dogmatic science. *Charles Secrétan* has criticised this division from the standpoint of Catholic social philosophy, however his criticism is not accepted by Roguin. The same applies to history, because the only laws claimed valid are these of interdependence and causation, and the model for jurisprudence this time is mathematics (in comparison to chemistry and biology in the first treatise). The definition of law, i.e. the concept of law is to be derived from

general insights into the hierarchical structure of legal order and not from the reality of legal practice. But what Roguin does in fact, is nothing less and nothing more than to extract a certain pure theory of law out of the material of legal practice.
Such generalities of law are followed by special considerations on the law about nature, possibility, utility and so on. The core and highlight of this characterisation by *Ernest Roguin* are that pure legal science according to his position is only possible and not necessary, is only one of more other possible characters of jurisprudence. If this is true, what would the whole exercise be worth? Accordingly, there is not one logic, but a number of possible logics. But for what reason can a set of diverse logics be introduced into a scientific context? In any case this strategy is not allowed by a philosophical point of view!
A difference between the pure legal science, the interpretation and application of positive law, and the so-called encyclopaedia of law, as well as the natural law is identified. The scientific, purely dogmatic jurisprudence turns out to be only a part of every integral jurisprudence, and therefore there is a crucial difference to legal philosophy: "*Nous pensons qu'il convient de réserver la denomination de 'philosophie du droit' aux travaux qui définissent le droit, en recherchent le fondement, en poursuivent l'évolution historique dans ses grands traits, étudient le role du droit dans le monde social, et peut-être s'efforcent de construire une legislation naturelle ou idéale. Si on admet cette conception, 'La règle de droit' et le present livre contiennent certaines études rentrant dans la philosophie du droit; mais les plus nombreuses y restent étrangères à raison du point de vue particulier auquel ells sont faites et du caractère trop special de leurs objets*". This passage seems to be symptomatic in our view. The outcome of the own research stands in function to the personal decisions of the author, that is true. It should be avoided, however, that the personal systematisation of individual inspirations and imaginations are based on an attitude, that is typically vaudoise, i.e. "*si oui, si non*". This practice of science is nothing more than a personal view of an eccentric person, roughly speaking. *François Guisan* has characterised the type of thinker in the following way: "*Vraiment un type original de Vaudois! Aggressif en paroles au lieu de conciliant, incisive au lieu de précautionneux, rigoureux et précis dans la pensée au lieu d'indécis et de vague, d'une intransigeante indépendance au lieu de suivre prudemment la majorité, travailleur acharné au pays de l'aimable douceur de vivre, conservateur enfin, et aristocrate déclaré, au milileu d'un people très démocrate et féru d'égalité: comme Vaudois, Roguin est lui-même un paradoxe*" (*François Guisan*: Ernest Roguin, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Zürich: Schulthess & Co. A.-G., 1945, pp. 393 ss., 400). This characterisation partly dissents the prementioned judgment, however, they perfectly coincide because where could the difference be?

[Conclusions, Insights, Evidence]
In order to render justice to the work of *Ernest Roguin* one has to admit that he represents many of the dogmatical arguments in their elementary form, arguments that often occur even today. In terms of an enlightened legal philosophy, the approach appears merely

dogmatic, i.e. implicit conditions are not at all reflected, not only not taken into consideration, but explicitly externalised. Similar ideas can also be found in Germany, as a counterpart to the predominating Historical School, namely in *Karl Bergbohm* ("Jurisprudenz und Rechtsphilosophie – Kritische Abhandlungen", Leipzig: Duncker & Humblot, 1892).

[Philosophical Valuation and Jurisprudential Significance]
In his treatise of general sociology ("*Traité de sociologie générale*"), *Vilfredo Pareto* praises the writing by *Ernest Roguin* in question above all. He identifies an attempt of jurisprudence to become a positivist science of law, as he declares. However, whereas the treatise by Pareto has established as a classical piece of literature in economics, the overwhelmingly extensive work of Roguin has disappeared from the scene of jurisprudence.
In his comprehensive consideration of the relationship between *Ernest Roguin* and Vilfredo *Pareto*, *Norberto Bobbio* is forced to conclude to the following judgment: "*Du bref avant-goût que Roguin donne de sa future sociologie dans l'introduction du tôme premier, on peut tirer avec certitude la conclusion qu'elle n'était aucunement influence par celle de Pareto*". (*Norberto Bobbio*: Le vaudois Ernest Roguin, sociologue et théoricien du droit, in: Cahiers Vilfredo Pareto, Jg. 181, Nr. 59, S. 121-140.) This system should be based upon a double tendency of inclusion and repulsion within a certain group or society or community. The very same occurs in the domain of the purely dogmatic legal science, leading to a result that differs only to a minimal extent from the so-called "Freund-Feind" doctrine proposed by *Carl Schmitt*. This conclusion one would not have supposed from the opening declarations of purity as a means to provide some kind of neutral legal thought.

[Further Information About the Author]
Ernest Roguin, born on 27 May 1851 in Yverdon-les-Bains, died 5 May 1939 in Lausanne, followed his studies in jurisprudence at the Universities of Lausanne and Leipzig from 1869 onwards and got his master's degree in 1874 by the Academy of Lausanne (which at that time was not yet a University, properly speaking and therefore did not have the permission to award a doctorate). In the very beginning of his career, he was sent as a diplomat to Paris until 1884; and later in his life he was sent as a Swiss representative to the Den Haag Conferences. Even in 1884 he was nominated extra-ordinary professor at the University of Lausanne, and from 1880 to 1926 he taught academic courses in the domains of international civil law, comparison of legal orders, as well as introductions to jurisprudence. From 1903 to 1917 he signed as president of the *École des sciences sociales et politiques*, and since 1891 he was a member of the *Institut de droit international*. In his time, Roguin was highly regarded as an outstanding jurisprudent and received many titles and honours.
The thesis of *Ernest Roguin* was dedicated to article 50 of the Swiss Federal Constitution and appeared in 1880. In his main domain he published a first treatise on "*Conflits des lois suisses en matière internationale et intercantonale*" and between 1904 and 1912 his magistral work "*Traité de droit civil compare*" appeared in seven volumes. Our focus, however, is on

the two titles covering legal philosophy, i.e. the early volume "*La régle de droit*" (1889) and the three volumes proposing "*La science juridique pure*" (1923).
For more information about the person, please consult:
Norberto Bobbio: Le vaudois Ernest Roguin, sociologue et théoricien du droit, in: Cahiers Vilfredo Pareto, Jg. 181, Nr. 59, S. 121-140;
François Guisan: Ernest Roguin, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Zürich: Schulthess & Co. A.-G., 1945, pp. 393 ss.

[Selected Works of the Same Author]
Ernest Roguin: Étude de science juridique pure – La règle du droit (Analyse générale, spécialités, souveraineté des États, assiette de l'impôt, théorie des statuts) – Système des rapports de droit privée précédé d'une introduction sur la classification des disciplines, Paris/ Lausanne: Librairie Générale de Droit et de Jurisprudence/ F. Rouge, 1889; *Idem*: Observation sur la codification des lois civiles, Lausanne: Ch. Ciret-Genton, 1896, pp. 73-134; *Idem*: La science juridique pure, 3 vols., Paris/ Lausanne: Librairie Générale de Droit et de Jurisprudence/ F. Rouge 1923; *Idem*: Sociologie 5 vols., Lausanne: C. Pasche, 1928-1932.

[For Further Reading]
Norberto Bobbio: Le Vaudois Ernest Roguin, sociologue et théoricien du droit, in: Cahiers Vilfredo Pareto, Revue européenne de science sociales, vol. XIX (1981), Nr. 59, pp. 121 ss.;
Sandrine Pina: La recherche d'une science pure du droit. L'œuvre méconnue d'Ernest Roguin face à la théorie de Hans Kelsen, in: Droits, Revue française de théorie, de philosophie et de cultures juridiques, vol. 2014/ 2, Nr. 60, Paris: Presses Universitaires de France, 2014;
Ernest Roguin: Étude de science juridique pure – La règle du droit (Analyse générale, spécialités, souveraineté des États, assiette de l'impôt, théorie des statuts) – Système des rapports de droit privée précédé d'une introduction sur la classification des disciplines, Paris/ Lausanne: Librairie Générale de Droit et de Jurisprudence/ F. Rouge, 1889;
Denis Tappy: Vilfredo Pareto and Ernest Roguin, in: Cahiers Vilfredo Pareto, Revue européenne de science sociales, vol. XLVIII (2010), pp. 146 ss.

31 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
1st Section "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Neo-Kantianism, Neo-Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond"
Entry 1.6 "Walther Burckhardt, Organisation der Rechtsgemeinschaft"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Walther Burckhardt
Title: Organisation der Rechtsgemeinschaft – Untersuchungen über die Eigenart des Privatrechts, des Staatsrechts und des Völkerrechts
Edition(s): Basel: Helbing & Lichtenhahn, 1927

[Introduction]
When reading or re-reading the monography on "The Organisation of the Legal Community" by *Walther Burckhardt* from 1927, we encounter another principal work of Swiss legal philosophy, in addition to *Eugen Huber*'s "The Law and the Realisation of Legal Order". As a first step into an introduction to his legal thought, let us look at some highly significant parts of the letter exchanges between 1924 and 1936 that Burckhardt had with *Arnold Gysin*, one of his scholars with a strong inclination on legal philosophy. "Ich bin der Meinung, dass man sich nicht zum vornherein einer Schule verschreiben darf, aber auch nicht den Grundsatz aufstellen kann, man dürfe sich keener Schule, das heisst keinder bestehenden und in planmässiger Darstellung dastehenden Lehre anschliessen". "Meine Ansicht, dass das Studium der Rechtsphilosophie gewinne durch die gleichzeitige Pflege einer positivrechtlichen Disziplin, hat sich bestärkt". "*Hans Kelsen*s Staatslehre hat mich wenig befriedigt; es ist wohl ein zusammenhängender Versuch, seine im Einzelnen schon entwickelten Lehren durchzuführen, aber ich wundere mich, dass er gerade bei dieser Durchrführung nicht mehr auf die Mängel dieser Lehren aufmerksam geworden ist. Gewiss muss das Recht als Bestandteil der praktischen Philosophie verstanden warden, aber um es richtig zu verstehen, muss man beides kennen". "Kelsen ist ein sehr scharfsinniger, gefährlich schrfsinniger Dialektiker, aber kein grosser Philosoph; da ist mir *Leonard Nelson* noch lieber". "Ich lese dieses Semester [2nd semester 1927] Rechtsphilosophie und sehe, dass recht viel Interesse dafür da ist; es ist eine andere Zeit als vor vierzig Jahren, wo alles positivistisch sein wollte und für unwissenschaftlich galt, wer sich dabei nicht beruhigte. *Rudolf Stammler* war der erste, der dagegen auftrat. Und in jungen Köpfen und unverbauten Gehirnen findet man schon noch Zugang für neue Gedanken; das ist das Schöne an unserem Beruf". "Im zweiten Teil aber sprechen Sie von der Jurisprudenz und der Rechtsphilosophie, und fragen, welche Aufgaben diesen Disziplinen gegenüber dem Recht zukommen; Sie sagen: der Rechtsphilosophie die kritische, inhaltliche; der Jurisprudenz die logische, formelle. Das ist meines Erachtens richtig (im Wesentlichen); aber es ist, wenn ich recht sehe, eine andere Frage, und nicht die Antwort auf die obige Frage. Gewiss muss die Wissenschaft beides thun und das eine vom

anderen auseinanderhalten. Dem Juristen ist das Recht ein Gegebenes, das er logisch, folgerichtig, aufzubauen, zu durchleuchten hat; dem Rechtsphilosophen ist es eine Frage. Aber eine andere Frage ist, wie das positive Recht als verbindlich angesehen warden kann. Ohne Positivierung geht es nicht ab; durch die Positivierung, die Satzung, wird aber der Inhalt nicht vernünftig und verbindlich. Jedes verbindliche (auch das beste) Recht wird auch von der logischen Seite betrachtet warden müssen. Aber wie eine Rechtsordnung allgemein, autoritativ (nicht durch Gründe) verbindlich gemacht warden kann, das ist die Frage, um die sich die Naturrechtskontroverse drehte und noch dreht". "Ich habe mit Gewinn *Nicolai Hartmann*s Ethik gelesen. In seiner Werttafel ist zwar noch nicht alles im Blei; er verabsolutiert Werte, die meines Erachtens geschichtlich bedingt sind. Aber es ist ein wertvolles Werk". "Ich komme über meine alten Bedenken nicht ganz hinweg, bezüglich der Möglichkeit solcher Betrachtungen; ist es Jurisprudenz, Ethik, Psychologie: Ontologie? Sie warden mir antworten: Soziologie. Ja aber! Aber was ist Soziologie?" "Es sind methodologische Fragen, die immer die schwierigsten sind". (All passages published in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 188-211; see also *Arnold Gysin*: "Walther Burckhardt als Rechtsphilosoph", Rechtsphilosophischer Nachruf, first published in: Zeitschrift des Bernischen Juristenvereins, vol. 1940, pp. 105-111; and *Idem*: Zum rechtstheoretischen Vermächtnis Walther Burckhardts, in: Zeitschrift des Bernischen Juristen-Vereins, vol. 107 (1971), pp. 23 ss.) These statements have to be understood as a kind of self-qualification and as confessions to his former student *Arnold Gysin*, and must be reflected in function to his personal views following the thoughts specially of *Jakob Friedrich Fries* ("Philosophische Rechtslehre (1803)", in: Schriften zur angewandten Philosophie, vol. 1 (in: Sämtliche Schriften, vol. 9), reprint Aalen: Scientia, 1971) and *Leonard Nelson* ("Die Rechtswissenschaft ohne Recht - Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts insbesondere über die Lehre von der Souveränität", Leipzig: Veit & Comp., 1917) (see nos. 1.7, 2.3 and 3.3 of this Legal Anthology).

The position of *Walther Burckhardt* signifies an eventually ambiguous attitude toward the challenges of positivism and relativism, as no dedication to natural law has place, but instead a reference to the idea and to the ideals of legal order in a comprehensive, holistic sense. The methodological stress in dialectical, or rather dualistic method of legal reasoning that remains of great influence and maybe stands for the lasting heritage of Burckhardt as the leading representative of legal philosophy in Switzerland, after the death of *Eugen Huber*.

Finally, Walther Burckhardt did not withstand the tragedies and catastrophic inclinations of his time and committed suicide in autumn 1939. An obsessing uncertainty remains however, as Burckhardt told a former student that he would like to recommence right from the beginning his work on jurisprudence and legal philosophy, if he could do so. But what did he regret in particular? Could it be that he was suddenly aware that mere consistency of a legal order cannot prevent it from being converted and corrupted?

[Historical Situation and Personal Context]
Let us take a brief consideration of the education in jurisprudence. After having followed his studies in Switzerland at the Universities of Basel, Berne and Neuchâtel, he did extensive post-graduate studies in Leipzig with *Karl Binding* and *Wilhelm Wundt* ("Ethik - Eine Untersuchung der Thatsachen und Gesetze des sittlichen Lebens", Stuttgart: Ferdinand Enke, 1886; and *Idem*: "Völkerpsychologie - Eine Untersuchung der Entwicklungsgesetze von Sprache, Mythus und Sitte" (vol. 9: "Das Recht"), Leipzig: Alfred Kröner, 1918), and later he travelled to Berlin and visited the lectures of *Otto von Gierke* ("Naturrecht und deutsches Recht", Rede zum Antritt des Rektorats der Universität Breslau gehalten am 15. Oktober 1882, Frankfurt am Main: Rütten & Loening, 1883 (reprint Aalen: Scientia, 1973); *Idem*: "Die historische Rechtsschule und die Germanisten", Rede zur Gedächtnisfeier des Stifters der Berliner Universität König Friedrich Wilhelm III., gehalten am 3., August 1903, Berlin: Gustav Schade, 1903 (reprint Aalen: Scientia, 1973); *Idem*: "Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien", Tübingen: J. C. B. Mohr, 1915 (first printing in: Zeitschrift für die gesamte Staatswissenschaft, vol. 1874, No. 1/ 2; reprint Aalen: Scientia, 1973); and *Idem*: "Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien – Zugleich ein Beitrag zur Geschichte der Rechtssystematik", Breslau: M. & H. Marcus, 1913), and also *Josef Kohler* ("Lehrbuch der Rechtsphilosophie", Berlin-Grunewald: Walther Rothschild, 2nd ed. 1917, 3rd ed. Arthur Kohler 1923; *Idem*: "Moderne Rechtsprobleme" (Aus Natur und Geisteswelt, vol. 128), Leipzig 1907 (2nd ed. 1913); and *Idem*: "Einführung in die Rechtswissenschaft", Leipzig 1902; 5th ed. 1919), as well as of the eminent philosophers *Georg Simmel* and *Friedrich Paulsen*. Virtually no influence concerning the respective answers to the treaded matters can be detected, however, this may have been the case with respect to the subjects, the questions and certainly the genres of scientific literature, and above all, these representatives of jurisprudence and philosophy may have given an example of high level human, yet humanistic education.
It is certainly just the other way around with *Eugen Huber*, whose former scholar and later colleague *ex aequo Walther Burckhardt* was, joined in deep friendship and companionship due to the admiration of *Rudolf Stammler* by both of them. Burckhardt also had a lasting friendship with *Carl Hilty*, the former editor and later coeditor of the "Political Yearbook of Switzerland". Dating from his studies in Neuchâtel, Burckhardt must have remained a close friend of *Ernest Roguin*.
From 1896 onwards, he served the Swiss Federal Administration, and in 1905 he signed as a head of the Swiss Federal Office of Justice. Thereby he learned to be an all-round jurisprudent, knowing both public law and private law extensively, as well as international law in the same extent.

[Content, Abstracts]
In his principal legal philosophical writing "Die Organisation der Rechtsgemeinschaft" from 1927, *Walther Burckhardt* addresses plenty of matters – questions such as the subjective right, the legal person, the validity of the legal order, the application of law,

customary law, rule of law theory, and international law – altogether in close relation to each other. This attempt is directed toward a comprehensive juridical conceptualisation. "Durch diese Verbindung der Fragen soll die Erklärung daber nicht ins Allgemeine, Unbestimmte, Verschwommene greaten. Gerade um diesen Fehler zu vermeiden, muss die unerbittliche Forderung gelten, nicht nur in Begriffen, sondern auch in durchaus klaren Begriffen zu denken. Wenngleich abstrakte, so sollen die Begriffe doch fest und klar sein; ja, sie warden erst klar warden, wenn die Abstraktion weit genug getrieben wird. Wer das Recht selbst und seine Bedeutung ergründen will, kann sich zwar nicht mit Rechtsbegriffen begnügen. Wer aber Rechtswissenschaft betreibt, soll mit Rechtsbegriffen arbeiten und seinen Gedanken soweit abklären, bis er ihn in bekannten Begriffen ausdrücken kann. Er soll nicht fremde Begriffe in seine Wissenschaft hineintragen, auch nicht unter dem verdeckten Zierat beziehungsreicher Bilder. *In ethicis* mit 'Kräften', *in iuridicis* mit 'organischem Wachstum', *in politicis* it 'soziologischen Gesetzen' und dergleichen mehr zu operieren, ist immer gefährlich und missverständlich. Die Eigenart rechtlicher einrichtungen, wie der Staat, die Juristische Person, die Strafe, das Privatrecht, muss sich in klaren juristischen Begriffen ausdrücken lassen; sonst ist sie nicht klar erkannt". This passage shows the inclination of Burckhardt in a symptomatic way: on the one hand, he requires a strongly systematic conceptualisation and disciplinary isolation, on the other hand, he is fully aware that this leads to dogmatism and has to be overcome to provide true cognition. The general approach is invoked by logics, or maybe, better addressed, by logicism. Burckhardt practises a very rational dualistic method in developing his arguments and pays high attention to consistency and un-contradictoriness. "Was folgerichtig und was folgewidrig ist, das allein vermag die Rechtswissenschaft aufzuzeigen, nicht was richtig oder was unrichtig, was rechtens oder nicht rechtens ist. [...] Die logische Durcharbeitung des Rechtsstoffes ist also die einzige Aufgabe der Rechtswissenschaft. Die Rechtswissenschaft vermag nur darzutun, welche Rechtssätze ohne Widerspruch nebeneinander bestehen können" (these citations are both taken from the foreword). Though, this definition is all too narrow, even if it is conceded that in order to put a question of justice critically, one has to answer the question of how the legal order has to be considered as a whole.
As the extract to be reproduced, we have selected a passage, where *Walther Burckhardt* defines the state. This passage is easy to understand and exemplifies the mode of thought. At the same time, the arguments are strinkingly conventional. On the contrary many of his arguments and concepts have found entrance into the core of jurisprudential dogmatic and are even valid today. That is why we have to invite the talented reader to investigate this eminent monography in its entirety and recommend its lecture from the beginning to the very end, rather than limit the interest only to a partition of it.

[Conclusions, Insights, Evidence]
It is a fact that *Walther Burckhardt* has concepted jurisprudence as a dogmatic science, founded in a certain methodology – which is in itself nothing special –, however in the plain consciousness of its dogmatical character, i.e. knowing the limits of methodology

and dogmatic, and completing this perspective with a treatment of its connections to ethics in large, with practical philosophical domains in particular. The crucial point of such a conception is that legal valuations have to be done in a creative spirit, this for the legislator as well as for the judge or the lawyer. To limit the state to the aim to establish and evolve a legal order means at the same time to restrict jurisprudential activities to the will of the political society, and by doing so to confer to the state the unlimited authority to positivise the law. Normally this attitude leads directly toward positivism; the remedies proposed by Burckhardt, who negates natural law altogether, appear relatively weak, as they are merely formal, not material. In any case, the state is not only to be considered as an organisation, but also as an order, respecting the rule of law.
Hans Huber, the indirect successor on the chair of public law at the University of Berne, pointed out the motivation of *Walther Burckhardt* to do so: "Wer dem geltenden Recht eine moralische Autorität vorbehalten will, der muss ein Prinzip anerkennen, das den Gesetzen gemeinsam ist und in dessen Namen sie sprechen. [...] Dieses Prinzip kann selbst keine Norm sein, welche schon die volle Entscheidung enthält; dafür würde es die Kenntnis der tatsächlichen Situation brauchen. Das Prinzip kann nur eine Idee im philosophischen Sinn sein, es bleibt formal" (Walther Burckhardt, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 485 ss. 505 s.). The very concluding addition, however, is not necessarily in a philosophical sense, as such a principle can also turn out to be concrete, because the most universal claims can also be conceptualised as the most concrete. This choice, at least, shows lately insufficient foundation, and the very problem consists in the determination of the relationship between the more abstract and the more concrete norms, or, in other words, between the principles of a legal order and the decision or case norm to be applied in a specific situation. The basic advantage of such a conception lies in the lack of any moral obligation to obey to the law, as ethics are only to be understood as an appeal to politics to work out the legal order in a just manner.

[Philosophical Valuation and Jurisprudential Significance]
Prominently in the discussed writing of Walther Burckhardt, it turns out that jurisprudence and legal philosophy as disciplines that are to be concepted as parts of an ethical whole, according to their underlying and integrative social order. Such an orientation toward society does not refer to the ordinary sociological terminology but rather means community, as has been further outlined by *Ferdinand Tönnies* ("Gesellschaft und Gemeinschaft", 1887). This attempt postulates legal thought to be situated in the context of a so-called "Ordnungslehre", i.e. within a theory of legal order and state organisation as elaborated for instance by *Maurice Hauriou* and *Santi Romano*, in contrast to the political order thought hold by *Carl Schmitt* (please refer to no. 9.12 of this Legal Anthology). This stress on organisation could possibly be the result of a fundamental legal-sociological interests of the author. In conclusion, however, the legal philosophy of Burckhardt remains highly ambiguous.

[Further Information About the Author]
Walther Burckhardt, born 19 May 1871 in Riehen, died 1 October 1939 in Berne, pursued his legal studies at the Universities of Leipzig, Neuchâtel, Berlin and Berne, where he graduated and obtained a doctorate with *Eugen Huber*. From 1896 onwards, he served the federal administration, in 1902 he was nominated ordinary professor of the University of Lausanne, and in 1909 he changed to the chair for Swiss federal law at the University of Berne. Together with *Carl Hilty* he was editor of the "Politischen Jahrbuchs" between 1910 and 1917. From 1923 to 1928 he took part in the delegation at the League of Nations and was judge at the international court in Den Haag.
He is best known for his "Kommentar zur Schweizerischen Bundesverfassung" (3. ed. 1931). Similar to *Eugen Huber*, but in an all different way, he adhered to Neo-Kantianism and referred to *Rudolf Stammler*. In his main contributions to legal theory, "Die Organisation der Rechtsgemeinschaft" (1927), "Methode und System des Rechts" (1936) and "Einführung in die Rechtswissenschaft" (1939) he developed a coherent theory of the legal order as a completed system of law. Law is mainly concepted as a means to the ends of legal politics, as an instrument to realise the tasks of the state in an understanding as the institution that enforces the rule of law. In this intention he clearly separates the concept of law from the idea of law or the ideal law and holds a strong distinction of "Sein" and "Sollen". In 1939 he committed suicide under the strain of the decline of the order of free states and the breakdown of liberal international law.
For further information, please consult:
Arnold Gysin: Zum rechtstheoretischen Vermächtnis Walther Burckhardts, in: Zeitschrift des Bernischen Juristen-Vereins, vol. 107 (1971), pp. 23 ss.;
Hans Huber: Walther Burckhardt, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 485 ss.; *Idem*: Zur Einführung, in: Aufsätze und Vorträge 1910-1938, ed. idem, Bern: Stämpfli & Cie., 1970, pp. 9 ss.;
Kurt Naegeli-Bagdasarjanz: Walther Burckhardts Rechtsphilosophie (Zürcher Beiträge zur Rechtswissenschaft, N. S. vol. 229), Aarau: Sauerländer, 1961.

[Selected Works of the Same Author]
Walther Burckhardt: Organisation der Rechtsgemeinschaft – Untersuchungen über die Eigenart des Privatrechts, des Staatsrechts und des Völkerrechts, Basel: Helbing & Lichtenhahn, 1927; *Idem*: Methode und System des Rechts mit Beispielen, Zürich: Polygraphischer Verlag, 1936; *Idem*: Die Lücken des Gesetzes und die Gesetzesauslegung, in: Abhandlungen zum schweizerischen Recht, N. S. vol. 8, Bern: Stämpfli & Cie., 1925, pp. 62-106; *Idem*: Recht als Tatsache und als Postulat, in: Festgabe für Max Huber zum 60. Geburtstag, Zürich: Schulthess, 1934; *Idem*: L'État et le droit, in: Zeitschrift für Schweizerisches Rechts, ed. Eduard His, N. S. vol. 50, Basel: Helbing & Lichtenhahn, 1931; *Idem*: Die Krisis der Verfassung (1838), in: Aufsätze und Vorträge 1910-1938, Bern: Stämpfli & Cie., 1970, pp. 340ss.; *Idem*: Über das Verhältnis von Recht und Sittlichkeit (1922); *Idem*:

Staatliche Autorität und geistige Freiheit 1936), beide in: Aufsätze und Vorträge 1910-1938, ed. Hans Huber, Bern: Stämpfli & Cie., 1970, pp. 35 ss. resp. pp. 64 ss.

[For Further Reading]
Briefwechsel zwischen *Walther Burckhardt* und *Arnold Gysin*, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 188-211.

7 November 2017 *Michael Walter Hebeisen*

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Entry 1.7 "Arnold Gysin, Rechtsphilosophie und Jurisprudenz"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Arnold Gysin
Title: Rechtsphilosophie und Jurisprudenz
Edition(s): Zürich: Girsberger & Co., 1927, 54 pp. (auch in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 5-47)

[Introduction / Historical Situation and Systematic Context]
Arnold Gysin intended originally to promote at the University of Berne with a legal philosophical thesis with *Eugen Huber*; however, the latter delegated him to his younger colleague *Walther Burckhardt* who remained his mentor until his death ("Die Lehre vom Naturrecht bei *Leonhard Nelson* und das Naturrecht der Aufklärung"). The interest of Gysin has been directed toward the critique of jurisprudence as it had been addressed by *Leonard Nelson*, who originated from Low-Saxony and represented a key figure in the domain of German legal thought (please consult his well-known principal writing: Die Rechtswissenschaft ohne Recht – Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts, insbesondere über die Lehre von der Souveränität, Leipzig: Veit & Comp., 1917). Nelson is principally associated with the Kantian and therefore idealistic current within legal philosophy, however he stands for a third orientation, going back to the Immanuel Kant-scholar *Jakob Friedrich Fries*. These relations turned out to be very important in order to understand the general attitude of Gysin toward jurisprudence and legal philosophy.
Jakob Friedrich Fries (refugeed in Switzerland during the so-called Helvetik period) distinguished apprehension radically from reason, and thereby he criticised the critique of reason and cognition, as it had been established by *Immanuel Kant*. In the understanding of Fries, reason was not to be considered as lucid and enlightened but as dark, turbid and partially unconscious. Based on such concrete insights, philosophy has to build a system of metaphysics by reflecting these pieces of conscious reason and to identify principles. Such a critique of reason is grounded in psychological analysis, i.e. the psychological approach is integrated into theoretical philosophy. Generally, reason is only to be considered as conscious, where it is accompanied by concrete application and illustrated by conception or perception. Fries had *Carl Gustav Jung* among his students at the University of Jena, the grandfather of the psycho-analyst with the very same name; the family Jung had to emigrate to Switzerland, and Jung was asked to re-organise the Faculty of medicine at the University of Basel, recommended by *Alexander von Humboldt*.

The basic conviction of *Jakob Friedrich Fries* lies in the systematics of legal philosophy. Every philosophical reflection is declared to be natural law in effect, and therefore a philosophical enlightened jurisprudence equals a critique of positive legal order. Critisism, however, is also addressed to natural law theory, and the general intention consists in founding a renewed natural law theory, in consequence. These thoughts show already in the title of the principal writing in case: "Philosophische Rechtslehre und Kritik aller positiven Gesetzgebung, mit Beleuchtung der gewöhnlichen Fehler in der Bearbeitung des Naturrechts" (Jena: Johann Michael Mauke, 1803; reprint in: Sämtliche Schriften, vol. 9: Schriften zur angewandten Philosophie, vol. 1, Aalen: Scientia, 1971). This work is highly recommended for further reading...
Leonard Nelson had been attracted by the so-called Fries school early in his career and decidedly defended the philosophical character of the practical philosophical applications of the psychological inclined theory of cognition. In constant dispute and controversy with the rich number of Fries scholars, representing the savant intelligence of his time, Nelson proposed an application of the moral philosophy to legal thought. As a communist, converted to a socialist or sociodemocratic Nelson established on the basis of this philosophical orientation a profoundly cardinal and categoric criticism of virtually all currents of legal thought. And his critique mainly of positivistic inclinations was heard and discussed vividly in his time. We do not consider as Nelson's principal writing his polemic, yet militant "Jurisprudence Without Law", but rather his extended and comprehensive "System der philosophischen Rechtslehre und Politik" (the 3rd vol. of: Vorlesungen über die Grundlagen der Ethik, Leipzig: Peter Reinhold, 1924), a book that is recommend for further reading.
Let us briefly reconsider the practical philosophical background of this critique that has his foundations in a certain view of ethical and moral claims. This connection and intimate relation are founded in natural law theory, now gently modernised and not practised in the old school manner. The intention is to direct normative claims of all kinds toward a material and value based normative theory that includes the legal order as well as the Kantian moral law ("Sittengesetz" or "Moralgesetz"). Thereby duty-based normative theory is complemented by a novel value-based normative order. This approach, however, does not directly lead to the so-called "materiale Wert-Ethik" by *Max Scheler* or *Nicolai Hartmann*, but rather to a revival of natural law theory, which is highly problematic in terms of the heritage of Kantianism as philosophical modernism (and ultimately on a basis of protestant ethics).

[Content, Abstracts/Conclusions, Insights, Evidence]
As an introduction to his volumes containing essays in legal philosophy, *Arnold Gysin* places his view about how legal philosophy and jurisprudence are to be separated and related. He examines the binding force of law, the validity and effectiveness of the legal order and states these questions to be as of merely methodological character. Already this declared approach prohibits a true philosophical determination of the relation and proportion of the two disciplines in case, however. With reference to *Julius Bergbohm*

("Jurisprudenz und Rechtsphilosophie – Kritische Abhandlungen, vol. 1: Das Naturrecht der Gegenwart", Leipzig 1892; reprint 1973), dualism is held as unavoidable: "Bergbohm zeigt, dass jeder Versuch, rechtsphilosophisches und juristisches Denken miteinander zu vereinen, zu einem unerträglichen Dualismus führe. Der Dualismus wurzelt in der Verbindlichkeit des Rechts. Im Wesen eines jedes Rechts nämlich liegt es, schlechthin und ohne jede Einschränkung verbindlich zu sein. Das heisst, die Verbindlichkeit einer Anforderungen kann nicht geleugnet werden, ohne dass zugleich ihr Rechtscharakter bestritten wird". In consequence, legal philosophy should be excluded from the scientific disciplines. Contrarily, legal philosophy itself stands for legal principles and claims the legal order to be founded in light of these principles. The concurring position is attributed to *Rudolf Laun* ("Recht und Sittlichkeit", Hamburg: Julius Springer, 2nd ed. 1927; 3rd ed. 1935). As a mediating position, *Max Salomon*'s "Grundlegung zur Rechtsphilosophie" (Berlin, 2nd ed. 1925) is presented as a salomonic justice. However, such an intermediate position is not considered to be a lasting determination of the relation between the two disciplines. The Hegelian approach of resolution of the conflict is refused by Gysin and commented with the following words, that prove the misunderstanding instead of founding his rejection: "Der Konflikt ist jetzt beseitigt! Die Rechtsphilosophie hat sich als legitimen Trabanten der Jurisprudenz erkannt. Sie schreibt fortan ihre Lehre für die Jurisprudenz und entnimmt ihre Weisheit der positiven Doktrin". With his argumentation, Gysin abolishes empirical and materialistic conceptions of the co-ordination of legal philosophy and jurisprudence, and with this he also refers to the abnegation by *Rudolf Stammler* who is held to be the leading representative of legal thought in that time. The cultural philosophical approach is also discredited: "Entweder, das Recht ist begrifflich als 'Selbstzweck', als unbedingt verbindliches Sollen zu betrachten. Oder es ist ein Mittel zum Zweck (beziehungsweise ein bedingtes Element in einem übergeordneten Ganzen)". By this juxtaposition, Gysin excludes all third and fourth possibilities.

Legal philosophy states justice as the fundamental value to be followed by jurisprudence. The crucial question is addressed by *Arnold Gysin* as follows: "Soll die Jurisprudenz an dieser zwingenden Erkenntnis ihren Willen brechen? Soll sie das Feld ihres bisherigen Wirkens als ein verlorenes Gebiet verlassen, um zur angewandten Rechtsphilosophie, zur angewandten Gerechtigkeitslehre überzugehen? [...] Muss die Jurisprudenz eines Tages verschwinden? Ist sie vor dem Richterstuhl der Erkenntnis ein verlorener Posten? Ist sie dazu verurteilt, im Fortschreiten des objektiven Denkens schliesslich als Normlehre beseitigt zu werden?" The solution to this problem seems to consist in determining jurisprudence as a positive science of normative principles, leading to an acceptance of the positivist character of the legal order, i.e. of empirical effectiveness. "Das Rechtskriterium der Jurisprudenz hat die Form einer willkürlichen (das heisst durch Willensakt gesetzten) Hypothese. [...] Sie ist das Dogma der durchgreifenden Verbindlichkeit der nach dem Positivitätskriterium ermittelten Regeln. [...] Sie folgt unmittelbar aus dem prinzipiellen Verhältnis von Sein und Sollen einerseits und aus dem Begriffe der Jurisprudenz als einer positiven Normwissenschaft". This necessarily leads to the separation of a true philosophical discipline on the one hand and a merely dogmatical scientific treatment of

the legal order on the other hand. The Neo-Positivist solution adopted by *Hans Kelsen* is also rejected by Gysin. It remains eventually a position with principally no positive content, as only criticism is addressed to all currents, without presenting an alternative. The declaration that both, legal philosophy and jurisprudence are summarised by the entity and unity of the ethical and moral order evokes natural law theory in its mode held by catholic and Scholastic social doctrine. "Sie nehmen ihren Ursprung aus dem einen Grundgesetze – aus der äusseren Anwendungsform des Sittengesetzes. Und deshalb sind sie bleibend auf einander angewiesen: Die Rechtsphilosophie vermittelt der Jurisprudenz ihr Selbstbewusstsein und ihre Selbstbeschränkung. Sie aber kann ihrerseits die Verwirklichung des letzten Ziels nicht ohne die Hilfe der Jurisprudenz erwarten". This conclusion, however, is no conclusion ever, in fact.
These arguments have to be completed by those put forward by *Arnold Gysin* in two other essays, entitled "Naturrecht und Positivität des Rechts", and "Philosophische Grundlage der Naturrechtslehre und des Rechtspositivismus", respectively, that can be considered as a trilogy of fundamental essays (se nos. 2.3a and 2.3b), all together trying to revitalise natural law theory in order to overcome predomination positivism, however not in a catholic or Scholastic tradition, but on the basis of modified Kantianism and Fichteanism (whereas in *Jakob Friedrich Fries* reason is routed in the un-conscious, in *Johann Gottlieb Fichte* critical cognition is founded in self-consciousness).

[Further Information About the Author]
Arnold Gysin, born 29 August 1897 in Basel, died 13 October 1980 in Lucerne, obtained his doctorate in 1923 at the University of Berne, before practicing as a lawyer in Zurich and Lucerne. From 1924 to 1934 he was a private lecturer at the University of Basel. Between 1952 and 1968 he was a federal judge at the insurance court, in the years 1960 and 1961 its president.

[Selected Works of the Same Author]
Arnold Gysin: Die Lehre vom Naturrecht bei Leonhard Nelson und das Naturrecht der Aufklärung (Dissertation Universität Bern 1924, bei Walther Burckhardt), Berlin-Grunewald: Walther Rothschild, 1924, 139 pp.; *Idem*: Rechtsphilosophie und Jurisprudenz, Zürich: Girsberger & Co., 1927, 54 pp.; *Idem*: Recht und Kultur auf dem Grunde der Ethik, Zürich: Girsberger & Co., 1929, 48 pp.; *Idem*: Ungeschriebenes Gesetz und Rechtsordnung – Mit Gedanken zur Rechtsphilosophie von Jakob F. Fries und Leonhard Nelson, in: Festschrift für Fritz von Hippel zum 70. Geburtstag, ed. Josef Esser and Hans Thieme, Tübingen: J. C. B. Mohr, 1967; *Idem*: Rechtsgedanke und Kulturgedanke im Verhältnis von Gesetzesethik und Wertethik; *Idem*: Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, beide in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969; *Idem*: Zur rechtstheoretischen Vermächtnis Walther Burckhardts, in: Zeitschrift des Bernischen Juristen-Vereins, vol. 107 (1971), pp. 23 ss.; *Idem*: Bindung und Offenheit des Rechts in rechtsphilosophischer Sicht, in: Homo Creator,

Festschrift für Alois Troller, ed. Paul Brügger, Basel: Helbing & Lichtenhahn, 1976, pp. 303 ss.

[For Further Reading]
Jakob Friedrich Fries: Philosophische Rechtslehre und Kritik aller positiven Gesetzgebung, Jena: Johann Michael Mauke, 1803 (reprint in: Sämtliche Schriften, vol. 9: Schriften zur angewandten Philosophie, vol. 1, Aalen: Scientia, 1971);
Arnold Gysin: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969;
Leonard Nelson: Die Rechtswissenschaft ohne Recht – Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts, insbesondere über die Lehre von der Souveränität, Leipzig: Veit & Comp., 1917 (2nd ed. Göttingen/ Hamburg: Öffentliches Leben, 1949); *Idem*: Vorlesungen über die Grundlagen der Ethik, Band 3: System der philosophischen Rechtslehre und Politik, Leipzig: Peter Reinhold, 1924.

13 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
1st Section "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Neo-Kantianism, Neo-Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond"
Entry 1.8 "Dietrich Schindler, Verfassungsrecht und soziale Struktur"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Dietrich Schindler (senior)
Title: Verfassungsrecht und soziale Struktur
Edition(s): Zürich: Schulthess & Co., 1932

[Introduction]
As already announced in his inaugural lecture at the University of Zurich of 1928, *Dietrich Schindler*'s main interest consists in drawing the connecting lines between the written Constitution and the underlying constitutional ambiance. This is the key concept to understand the evolution of legal thought in the domain of public law, indeed. The philosophical inclination is proved by constantly interconnecting the legal order as a part to the whole of the cultural and intellectual background of historical progress. The core for such an enterprise is Hegelian dialectics, as will be explained hereafter.
Instead of a second introduction into the tendencies of his time (please refer to the introductory notes in no. 5.1 of this Legal Anthology), let us follow the characterisation by *Max Huber*, one of the friends of *Dietrich Schindler* and brother in spirit: "Es ist ein charakteristischer Zug der wissenschaftlichen Arbeit Schindlers, dass er, bei aller streng juristischen Behandlung des positive Rechts, die auch für ihn stets die erste und unmittelbare Aufgabe des Juristen bildet, immer auch den ausserrechtlichen Gegebenheiten des Rechtes und des Staates sucht. Diese sind teils soziologischer und psychologischer Natur, teils sin des die Werte, welche die ethischen, letztlich im Transzendenten begründeten Forderungen darstellen, die den Inhalt der Rechtsnormen bestimmen sollen. Bei dieser Betrachtungswese wird das Juristische weder mit dem Ausserrechtlichen vermischt, noch warden sie bloss nebeneinander gestellt, sondern in ihrer wechselseitigen Bedingtheit, in ihrem dialektischen Verhältnis erfasst. Das Recht kann nicht wirkliches, geltendes Recht sein, wenn ihm nicht durch den Staat die Macht der überindividuellen Gemeinschaft geliehen wird; die Macht des Staates ist aber nur blosse, der Willkür ausgelieferte Gewalt, wenn sie nicht durch das Recht bestimmt ist, das selber seine Grundlage und seinen Massstab nicht im blossen gesetzgeberischen Willen des Staates, sondern in den jenseits des Staates liegenden Werten menschlicher Existenz hat" (Dietrich Schindler (1890-1948), in: Rückblick und Ausblick, Gesamelte Aufsätze und Ansprachen, Zürich: Atlantis-Verlag, 1957, vol. 4, pp. 449 ss., 452).

[Historical Situation and Systematic Context]
Circumstances have changed rapidly within only a few years in the field of public law. In

1928, *Rudolf Smend* had published his integrational theory of the state and the constitution ("Verfassung und Verfassungsrecht", München 1928); and the principles of sovereignty as proposed by *Hans Kelsen* and *Carl Schmitt* have meanwhile been contradicted by a leading sociodemocratic jurisprudent, *Hermann Heller* ("Staatslehre", posthumous ed. Gerhart Niemeyer, Leiden: A. W. Sijthoff's Uitgeversmaatschappij N. V., 1934). This development must have given much affirmation to the tendencies already anticipated by *Dietrich Schindler*, and especially the example of Heller must have had great influence on Schindler, as his writings are repeatedly referred to (for more information, please consult *Peter Schneider*: Geisteswissenschaften in den Zwanziger Jahren – Staatstheorie in der Schweiz und in Deutschland, in: Geisteswissenschaften zwischen Kaiserreich und Republik – Zur Entwicklung von Nationalökonomie, Rechtswissenschaft und Sozialwissenschaft im 20. Jahrhundert (Arbeitskreis "Methoden der Geisteswissenschaften" der Fritz Thyssen-Stiftung), Stuttgart: Fritz Steiner, 1994, pp. 187 ss.).
Abstracting from specific questions of public law and leaving the final passage about the polarity within the social structure under liberal and democratic constitutions for further reading, we have selected the kernel of the argumentation in the 3rd part of *Dietrich Schindler*'s monography on "Constitutional law and social structure", dealing with society or community as context of legal order. In order to prepare this lecture, let us briefly summarise the opening remarks on method and the arguments for a dialectical reconstruction of the figuration of law. The ideological connection with *Hermann Heller* covers substantially the reference to Hegelianism, to Hegelian dialectics to be more precise. Dialectics is to be understood as an alternative to the predominating dualism between social phenomenon and normative values and ideas, as proposed for instance by *Georg Jellinek* and *Hans Kelsen* ("Der soziologische und der juristische Staatsbegriff – Kritische Untersuchung des Verhältnisses von Staat und Recht", Tübingen: J. C. B. Mohr (Paul Siebeck), 1922), and as practised by many of the legal thinkers contemporary to Schindler. "Das dialektische Denken ist bewegt, es wandert dem Gegenstand entlang in engster Anschmiegung an seine intelligiblen Konturen. Die Bewegtheit ist dabei wesentlich ein Exponent der Inadäquatheit des Gedankens, sowie der aus ihr ständig neu resultierenden Adäquationstendenz. Die Dialektik ist eine eigentümliche, originäre, nicht weiter zerlegbare Art des geistigen Sehens, eine Form der Fühlungnahme mit der Sache. Dieses Denken verlangt die 'Anstrengung des Begriffs', es setzt die Kraft voraus, starre Begriffsschemata zu sprengen und auf die konkrete Gestalt durchzustossen [...] Im dialektischen Verhältnis verbinden sind so miteinander zwei Aussagen, die nicht aufeinander reduzierbar sind, auch nicht auf eine gemeinsame logische Wurzel zurückgeführt warden können, sich aber, indem sie sich gegenseitig voraussetzen, auf einen Gegenstand beziehen". Legal thought has, therefore, proceeded by thesis and anti-thesis in order to conclude to its subjects, its matters that build the synthesis. Theory building, as scientific conceptualisation, always has to refer to an extrinsic existing reality. It, however, contributes to complement and compensate this reality. This model represents the relation between scientific theory and concepts on the one hand, and social practice on the other hand. Scientific thought has to add to the deficient social practice, that lacks the

latter in terms of consistency and consciousness.
The specific tension and/or co-ordination of content and form characterises all legal matters and questions, yet legal thinking itself as co-incidence of content and form. What is important, according to *Dietrich Schindler*, is the shift of accent between content and form, as legal order means necessarily procedural formalisation. The ideal of such an interconnection is the perfect equilibration of the two moments, i.e. content and form. The common-law tradition finds itself closer to this equilibrium, whereas codification leads to an accentuation of the formal aspects of legal order. This insight is particularly evident and proves the effectiveness and accurateness of the analytic instruments of dialectical legal thinking. In reality the law always covers the sphere defined by the moments of order, power, ethics and vital necessities.

[Content, Abstracts]
The whole of social life gives the reference for the legal order in general, for constitutional law in particular. The state and society cannot be juxtaposed but have to be bridged by the concept of political community (see *Ferdinand Tönnies*: Gemeinschaft und Gesellschaft – Grundbegriffe der reinen Soziologie, Berlin: Karl Curtius, 2nd ed. 1912). The legal order intends to influence human behaviour and so does the extra-legal norms, so that the two normative spheres stand in a reciprocative, mutual interaction and therefore have to exist and to operate in a parallel and complementary way. Law is not properly understood as a means to an end, what can lead to an approach comparable to social engineering; on the contrary legal order is to be thought as an end itself. Schindler treats the effectiveness and efficiency of law extensively, knowing that in the domain of international law, this is a requirement for validity of the legal order (compare later *Pietro Piovani*: Il significato del principio di effettività, Milano: A. Giuffrè, 1953). The very same complementary relation between foreground and background can also be considered in the relationship between the conscious and the unconscious, where the half-conscious is also to be taken into consideration by legal thought.
At this point of the argumentation, an original idea is introduced by *Dietrich Schindler* on the scene of legal reasoning: idealist conceptualisation means to the last extent that legal order is subjected under the precondition of a certain "Ambiance", or ambient order. "Da nun die Ambiance nicht Recht ist, kommt ihr auch nicht die gleiche Festigkeit zu, wie dem Recht. In der Verschiedenheit der Änderungsleichtigkeit, der Änderungsursachen und der Änderungsform von Recht und Ambiance liegt der Grund für die allmählich entstehende Disharmonie zwischen dem Recht und der das Recht ergänzenden, tragenden und balancierenden Umgebung. [...] Die Änderung liegt aber weniger im Recht selber, als vielmehr im Ausserrechtlichen. Denn alles objective Recht ist starr und formal und verleiht regelmässig unfangreichere subjective Rechte und Kompetenzen, als dem sozialen eigentlich zuträglich ist. Aber das Recht kann nicht anders, weil die notwendig allgemeine Formulierung des Rechtssatzes eine feiner abgestufte Normierung nicht zulässt. Wohl aber zählt es darauf, dass diese subjektiven Rechte und Kompetenzen nicht bis zu ihren äussersten Möglichkeiten ausgenützt warden. Denn die Entartung eines Rechtsinstituts

besteht in der zur Regel werdenden äussersten Ausnützung der von ihm gegebenen formalrechtlichen Möglichkeiten. Es liegt an der unvermeidlichen Einseitigkeit jeder juristischen Formulierung, das sein Rechtssatz seine soziale Funktion nur dann richtig erfüllen kann, wenn das dem formulierten Rechtsprinzip entgegengesetzte Prinzip als sein polarer Gegensatz zum Ausserrechtlichen wirksam ist und verhindert, dass die im Rechtsstatz selbst liegende Möglichkeit bis zum Äussersten ausgenützt wird". This theory established by Schindler reflects the relationship between legal norms and legal principles in a thoroughly adequate and comprehensive way.

[Conclusions, Insights, Evidence]
Finally, jurisprudence and the theory of the state are considered by *Dietrich Schindler* as integral parts of the human sciences, in function to their complementary working reflection and production. "Constitutional law and social structure" represent not only the most important writing of an eminent legal thinker, but also a significant contribution to legal philosophy in the larger sense. For the first time, Swiss thought of public law is state of the art. Schindler had projected to write a consecution of his proposed reflections with philosophical significance for the rest of his life, i.e. until his death in 1948. However, some fragments that should serve as a basis for such an enterprise have been published posthumous by the editor *Hans Nef*, a scholar of Schindler's (see No. 1.12 of this Legal Anthology).

[Philosophical Valuation and Jurisprudential Significance]
In order to provide an overall appreciation, we conclude with a valuation by *Max Huber* who has already opened the discussion: "Die Bedeutung *Dietrich Schindler*s lag zunächst in seiner wissenschaftlichen Leistung, die durch Zuverlässigkeit und Tiefe der Forschung, aber auch durch die Weite des Horizontes sich auszeichnete. Sein Geist besass Sinn für Mass und den Sinn für das Wesentliche und Bedeutende. Dadurch verfiel er, trotz seiner tiefen Heimatverbundenheit, nie in nationale Enge, vermochte aber aus dem gleichen Grunde auch die lebenswirhcitgen Fragen unseres nationalen und internationalen Daseins von einem Niveau aus zu behandeln, von wo sie jedem aufgeschlossenen und denkenden Menschen verständlich werden" [loc. cit., pp. 457]

[Further Information About the Author]
Dietrich Schindler (senior), born 3 December 1890 in Zurich, died 1 January 1948 in the same town, did his legal studies at the Universities of Zurich, Leipzig and Berlin, before he presented his promotion thesis in 1916 and his habilitation thesis in Zurich. In 1936 he was nominated ordinary professor for public law (federal constitutional und administrative law) as well as for international law and legal philosophy. For a long period, he was the legal adviser of the Swiss government.
For more information, please see:
Felix Renner: Der Verfassungsbegriff im staatsrechtlichen Denken der Schweiz im 19. und 20. Jahrhundert (Dissertation Universität Zürich), Zürich: Schulthess & Co., 1968, pp. 453

ss.;
Daniel Thürer: Dietrich Schindler (sen.) (*3.12.1890-1948), in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 381 ss.

[Selected Works of the Same Author]
Dietrich Schindler: Der Kampf ums Recht in der neueren Staatsrechtslehre, in: Festgabe der rechts- und staatswissenschaftlichen Fakultät der Universität Zürich zum Schweizerischen Juristentag 1928, Zürich: Schulthess & Co., 1928; *Idem*: Recht und Staat, in: Zeitschrift für Schweizerisches Recht, ed. Eduard His, N. S. vol. 50, Basel: Helbing & Lichtenhahn, 1931; *Idem*: Zum Wiederaufbau der Rechtsordnung, posthumous ed. by Hans Nef, in: Recht, Staat, Völkergemeinschaft – Ausgewählte Schriften und Fragmente aus dem Nachlass, Zürich: Schulthess & Co., 1948, pp. 73-143.

[For Further Reading]
Dietrich Schindler (senior): Der Kampf ums Recht in der neueren Staatsrechtslehre (akademische Antrittsvorlesung an der Universität Zürich), in: Recht, Staat, Völkergemeinschaft – Ausgewählte Schriften und Fragmente aus dem Nachlass, Zürich: Schulthess & Co., 1948 (erstmals in: Festgabe der rechts- und staatswissenschaftlichen Fakultät der Universität Zürich zum Schweizerischen Juristentag 1928, Zürich: Schulthess & Co., 1928), pp. 5-30.

1 November 2017 *Michael Walter Hebeisen*

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1st Section "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Neo-Kantianism, Neo-Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond"
Entry 1.9 "Arthur Baumgarten, Rechtsphilosophie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Arthur Baumgarten
Title: Rechtsphilosophie
Edition(s): in: Handbuch der Philosophie, Section IV: Staat und Geschichte, München/ Berlin: R. Oldenbourg, 1934, pp. 3 ss.

[Introduction/Historical Situation and Systematic Context]
Within the six heavy volumes of the "Handbook of Philosophy" (München/ Berlin: R. Oldenbourg, 1934) we find in volume four, entitled "Staat und Geschichte" a contribution by *Arthur Baumgarten*, an acknowledged scholar in legal philosophy with personal and professional Swiss connections. State theory has been represented by two authors, *Günther Holstein* (a forerunner of the so-called "geisteswissenschaftliche Richtung" in public law) and *Karl Larenz* (a well known jurisprudent in private law, who also had a string inclination to legal philosophy, consult his research essay: Recht- und Staatsphilosophie der Gegenwart, Berlin: Junker und Dünnhaupt, 1931), and the philosophy of history has been represented by *Erich Rothacker*, a philosophical thinker in the domain of the human sciences (compare his contribution to the 2nd vol. of the forementioned handbook, entitled "Logik und Systematik der Geisteswissenschaften").
The contribution on legal philosophy should have been delivered by a relatively unnkown *Hans Gerber* from the University of Marburg. Apparently, *Arthur Baumgarten* had taken the burden to elaborate this section unforeseeably and in relatively short time. As for the personal approach we refer to the contributions of the author on "Cognition, Science, Philosophy", and "Legal Science and Legal Method" (see nos. 3.2 and 2.2 of this Legal Anthology). A contribution to an eminent handbook, however, has to be comprehensive and neutral to some extent, but nevertheless a systematic treatment of legal philosophy is only possible within a certain system of philosophy itself. "Nun wüsste ich kein System der Philosophie, an das ich anknüpfen könnte. Ich bin kein Thomist und noch weniger ein Hegelianer. Die Philosophie, die Kopf und Herz des modernen Menschen Genüge leisten würde, scheint vorläufig noch nicht zu existieren, aber freilich dürfte sie im Werden begriffen sein. Daher will ich denn auch hier nicht eine Darstellung der Rechtsphilosophie geben, sondern will mich in der mäeutischen Kunst [der Geburtshilfe] versuchen".

[Content, Abstracts/Conclusions, Insights, Evidence]
As the starting point, *Arthur Baumgarten* takes the necessity to define a particular worldview, a certain opinion on life, in order to provide the foundations of jurisprudence

(in detail see *August Simonius*: Wissenschaftliche Weltanschauung und Rechtswissenschaft – Zur Rechtsphilosophie Arthur Baumgartens, in: Zeitschrift für Schweizerisches Recht, ed. Eduard His, N. S. vol. 49, Basel: Helbing & Lichtenhahn, 1930). The author hereby inaugurates a philosophy of the sciences, that has to locate the different scientific disciplines within the system of philosophy as a holistic frame. Such an approach transcends mere methodology from the beginning.
A historical introduction covers one third less than a hundred pages of the contribution by *Arthur Baumgarten*. The author appears as an encyclopaedic spirit that takes into consideration many of all possible currents in his overview, but he also undergoes his own restrictions. In the end he takes a metaphysical foundation as indispensable in order to ground normative claims scientifically. The options to do so are numerous: eudemonism, egoism, utilitarism, historical teleology, entelechy, for instance. In his approach the author shows a true philosophical attempt to found legal thought in a mainframe of a critical theory of cognition.
As it comes to discuss the very core of the subject, however, *Arthur Baumgarten* is proceeding in an eclectic way. We have chosen the passage that treats the "metaphysical principles of ethics in comparison with the legal order". That means that there are no metaphysical principles of law itself, and that a foundation of the legal order must be obtained by referring the law to the ethical order, to the last extent. Security of legal decisions is identified as crucial for the validity of the positive legal order or the authority of law. "Daher beruht es auf dem höchsten Sittengesetz, wenn dem Inbegriff unserer rechtlichen Pflichten das gegen den Staat gerichtete subjektive Recht entspricht, dass unser Pflichtenkreis nur aus schwerwiegenden Gründen und nie bis zur Vernichtung unserer Freiheit ausgedehnt werde. Bei diesem negativen Recht hat es nicht sein Bewenden. [...] Je mehr die Rechtsordnung die Dispositionsgewalt, die der Egoismus in der Form des privaten subjektiven Rechts für sich fordert, sinschränkt, um so mehr muss sie die Teilnahme am Gemeinschaftsleben mit relativ freier Entscheidungegewalt zum subjektiven öffentlichen Recht des einzelnen stempeln". This resembles many contributions to the difference between private and public law. The specific task for legal philosophy is not explained simply by a description of the mutual interactions between philosophical criticism and dogmatical jurisprudence, as long as such a critical approach is not founded in philosophical terms. "Kommt die Rechtsphilosophie durch ernstliche Berücksichtigung der jeweils herrschenden Bestrebungen und Anschauungen der positiven Jurisprudenz entgegen, so muss andererseits diese durch die Ausgestaltung ihrer Grundbegriffe für die allmähliche Annäherung des Rechts an das höchste sittliche Ziel die Handhabe bieten. [...] Die Rechtswissenschaft als Wissenschaft einer geltenden Lebensordnung muss sich bei aller Sollensbetrachtung den Blick offenhalten für Handel und Wandel des wirklichen Lebens". In consequence, critical thought is focused merely on juridical conceptualisation, has only to answer the question, how the concepts of jurisprudence have to be built.

[Further Information About the Author]

Arthur Baumgarten, born 31 March 1884 in Königsberg, died 27 November 1966 in Berlin (East), was originally a German citizen, but from 1936 was also a Swiss citizen, as he married *Nina Helena von Salis-Soglio*. He conducted his legal and philosophical studies at the Universities of Tübingen, Geneva, Leipzig and Berlin, where he received his promotion in 1909. Until 1920 he was a professor in Geneva, from 1920 to 1923 in Cologne, between 1923 and 1930 in Basel, between 1930 to 1933 in Frankfurt am Main, before he returned and emigrated back to Basel, where he remained until 1949. He then decided to settle in Berlin (East), where he was a professor at the Humboldt University until 1953. He originally taught penal law, however his main subject became more and more legal philosophy. In his last period of life, living in the German Democratic Republic, he also signed as chief editor of the periodical "Sozialismus", and finally contributed to the theoretical foundations of the socialist regime of Eastern Germany.
His philosophy of law can best be described as syncretistic, as he changed from moralistic views to Kantian criticism and varied between a conservative mood to socialist opinions. Moreover, his theory was characterised by the separation between morality and law and their interconnection. In our treatment we shall focus on the early period, when his fundamental conceptions show best in their origins and consolidation, namely in his works about "Die Wissenschaft vom Recht und ihre Methode" (1920) and his contribution "Rechtsphilosophie" to the "Handbuch der Philosophie" (1934).
For more information, please see:
Karl Polak (Ed.): Festschrift Arthur Baumgarten zu seinem 70. Geburtstag, Berlin: VEB Deutscher Zentralverlag, 1960;
Gerd Irrlitz: Rechtsordnung und Ethik der Solidarität – Der Strafrechtler und Philosoph Arthur Baumgarten, Berlin 2008;
Christina Peschel: Arthur Baumgarten, in: Rechtsgeschichtswissenschaft in Deutschland 1945 bis 1952, ed. Horst Schröder, Frankfurt am Main: Vittorio Klostermann, 2001, S. 129-150;
August Simonius: Wissenschaftliche Weltanschauung und Rechtswissenschaft – Zur Rechtsphilosophie Arthur Baumgartens, in: Zeitschrift für Schweizerisches Recht, ed. Eduard His, N. S. vol. 49, Basel: Helbing & Lichtenhahn, 1930.

[Selected Works of the Same Author]
Arthur Baumgarten: Die Wissenschaft vom Recht und ihre Methode, 2 vols., Tübingen: J. C. B. Mohr, 1920/ 1922 (reprint Aalen: Scientia, 1978); *Idem*: Erkenntnis, Wissenschaft, Philosophie – Erkenntniskritische und methodologische Prolegomena zu einer Philosophie der Moral und des Rechts, Tübingen: J. C. B. Mohr, 1927 (reprint Aalen: Scientia, 1978); *Idem*: Der Weg des Menschen – Eine Philosophie der Moral und des Rechts, Tübingen: J. C. B. Mohr, 1933 (reprint 1978); *Idem*: Rechtsphilosophie, in: Handbuch der Philosophie, Section IV: Staat und Geschichte, München/ Berlin: R. Oldenbourg, 1934, pp. 3 ss.; *Idem*: Grundzüge der juristischen Methodenlehre, Bern 1939 (reprint, ed. Hermann Klenner: Freiburg im Breisgau: Rudolf Haufe, 2005); *Idem*: Die Geschichte der abendländischen Philosophie – Eine Geschichte des geistigen Fortschritts der Menschheit, Genève: Imprimérie de St.

Gervais, 1945; *Idem*: Die Entwicklung der Idee der Demokratie und des Rechtsstaates in der Neuzeit, Stuttgart: Fritz Mittelbach, 1946; *Idem*: Ansprache an Kants 150. Todestage, Berlin: Akademie-Verlag, 1954; *Idem*: Bemerkungen zur Erkenntnistheorie des dialektischen und historischen Marxismus, Berlin: Akademie-Verlag 1957; *Idem*: Vom Liberalismus zum Sozialismus, Berlin: Akademie-Verlag, 1967; *Idem*: Rechtsphilosophie auf dem Wege – Vorträge und Aufsätze aus fünf Jahrzehnten, Berlin: Akademie-Verlag, 1972.

20 November 2017 *Michael Walter Hebeisen*

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1st Section "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Neo-Kantianism, Neo-Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond"
Entry 1.10 "Hans Ryffel, Naturrecht"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Hans Ryffel
Title: Das Naturrecht – Ein Beitrag zu seiner Kritik und Rechtfertigung vom Standpunkt grundsätzlicher Philosophie
Edition(s): Bern: Herbert Lang & Cie., 1944

[Introduction]
In modern times, natural law theory repeatedly occurs as a possibility to found a positive or material concept of law based on experience. In this intention, the problem of natural law is everlasting, as it is pointed out by *Guglielmo Salvadori* shortly after the beginnig of the twentieth century: "Das moderne Denken leidet an einer Krisis, welche als vollkommener Gegensatz zu der philosophischen Krisis erscheint, an der schon vor zwei und einhalb tausend Jahren das griechische Denken unter dem Einfluss ganz derselben Ursachen gelitten hat: nämlich an der Unfähigkeit das Werden der Erscheinungen mit dem Sein der Dinge zu versöhnen, und demnach zu einer vollen Erfassung der Wirklichkeit zu gelangen" (Das Naturrecht und der Entwicklungsgedanke – Einleitung zu einer positiven Begründung der Rechtsphilosophie, Leipzig: Theodor Weicher, 1905). A kind of presentiment, we can already find in the three-volume "Ethics" by *Wilhelm Wundt* (Ethik – Eine Untersuchung der Thatsachen und Gesetze des sittlichen Lebens, Stuttgart: Ferdinand Enke, 1886, vol. 3), and in the current of so-called material ethics of values, as elaborated by *Max Scheler* and *Nicolai Hartmann*. Even before the Second World War, there is to be identified an inclination to re-found legal thought on natural law, especially within the Italian cultural context (mind the books for further reading by *Igino Petrone*, *Giorgio Del Vecchio*).
Under the impression of the perverting of the legal order by National Socialism in Germany, a strong turn to natural law theory occurs just after the Second World War. In combination with questions of material justice, this current showed not to be a temporary episode, but rather a lasting tendency (see the contributions by *Erik Wolf*, *Werner Maihofer* and *René Marcic* at the end of this entry). Often forgotten is the precondition for such a natural law turn, i.e. the common understanding of the concept of nature as a changing, dynamic reference to the ontological order, and not as a merely unalterable absolute. Within this situation, it can also be explained, why natural law theory has proved to be compatible the phenomenological philosophy (see no. 3.7 of this Legal Anthology).

[Historical Situation and Systematic Context]

In this historical context, *Hans Ryffel*, a Swiss scholar of jurisprudence and philosophy, handed in his thesis at the University of Berne in 1943, simply entitled "Das Naturrecht", meant to be a critical contribution to justify natural law from a systematical-philosophical standpoint. And he finds himself in good company a few years later, when also eminent legal scholars as *Helmut Coing, Hans Welzel*, and *Erik Wolf* had published their principal writings on natural law (see the indications at the end of this entry). They all refer to the abovementioned tradition of legal thought and do not invent something radically new. The argumentation in detail, however, differs considerably from earlier references to natural law theory. Coing's regress goes on human activity, social life in human community, and sentiment and consciousness as sources of legal valuation. Welzel's contribution is a kind of history of natural law theory, including German idealism in *Immanuel Kant* and *Georg Wilhelm Friedrich Hegel*, and even further in conjunction with positivism, Neo-Kantianism, Marxism, so-called life philosophy, existentialism, before he concludes that the main intention of the revival of natural law theory consists in fighting relativism. This main intention is not only shared with Catholic milieus, but also with protestant theology (*Emil Brunner*, *Karl Barth*). "Man mag unter Naturrecht verstanden haben, was man wollte, stets schwingt in ihm der Gedanke mit, dass das Recht nicht einfach identisch ist mit dem Befehl einer bestehenden Macht. Am stärksten zeigt er sich in den idealistischen und theistisch-voluntaristischen Naturrechtslehre; aber selbst in der Lehre vom Recht des Stärkeren ist er noch leise spürbar; denn diese will, soweit sie überhaupt als Naturrecht auftritt, nicht darüber etwas aussagen, was faktisch besteht, sondern darüber, dass es richtigerweise so besteht oder so bestehen sollte". In Wolf, we find a similar attempt for orientation within heterogenous references by legal thought to nature, and it is evident that it is not nature itself, but rather human nature that designates the point of reference.

[Content, Abstracts/Conclusions, Insights, Evidence]
The contribution elaborated by *Hans Ryffel* is based upon a clear distinction between theory and practice, and a preference of the latter, induced by the framework of *Carlo Sganzini*, who was professor of philosophy at the University of Berne, at that time. Above all, it is not grounded and founded in Catholic natural law thought, but rather on material legal philosophy, as elaborated by *Julius Binder, Karl Larenz*, and *Walther Schönfeldt*, three Neo-Hegelians, as well as by *Hans-Helmut Dietze*. The argumentation developed by Ryffel culminates in the concept of "potential relevance" of natural law claims as characteristic validity in contrast to the validity of the legal order, that has to be realised, actualised. The early dissertation by *Hans Ryffel* already indicates the direction toward the later inclinations of the author, i.e. to anthropological, sociological and political-philosophical approaches (see no. 1.15 of this Legal Anthology).

[Philosophical Valuation and Jurisprudential Significance]
Generally speaking, the intentions of *Hans Ryffel* to rescue natural law theory as a kind of philosophy of the positive legal order cannot remain without ambiguities and

contradictions, even if nature is broadly considered as human nature, as long as naturalism is not excluded decidedly. However, this position marks progress in comparison to *Gustav Hugo* for instance (see Fritz Eichengrün: Die Rechtsphilosophie Gustav Hugos – Ein geistesgeschichtlicher Beitrag zum Problem von Naturrecht und Rechtspositivismus, Den Haag: Martinus Nijhoff, 1935, pp. 81 ss.).

[Further Information About the Author]
Hans Ryffel, born 27 June 1913 in Berne, died 30 September 1989 in Thun, studied from 1932 onwards both jurisprudence and philosophy at the University of Berne. In 1943 he handed in his dissertation "Das Naturrecht" at the philosophical-historical faculty. Nevertheless, he also had his patent as a lawyer in court already in 1938. From 1951 onwards he taught as a private lecturer in general philosophy, in particular philosophy of the law and theory of the state, before he was called to the „Hochschule für Verwaltungswissenschaften" in Speyer in 1962, where he remained until 1979, and whose chancellor he was two times. His main interest was normative rules for human behaviour and his intention was to make evident the multiple dimensions of the legal and social sciences. For further information and for a complete bibliography, please consult:
Erk Volkmar Heyen: Vom normativen Wandel des Politischen – Rechts- und staatsphilosophisches Kolloquium aus Anlass des 70. Geburtstags von Hans Ryffel, Berlin: Duncker & Humblot, 1984.

[Selected Works of the Same Author]
Hans Ryffel: Das Naturrecht – Ein Beitrag zu seiner Kritik und Rechtfertigung vom Standpunkt grundsätzlicher Philosophie, Bern: Herbert Lang & Cie., 1944 (extract); *Idem*: Grundprobleme der Rechts- und Staatsphilosophie – Philosophische Anthropologie des Politischen, Neuwied/ Berlin: Luchterhand, 1969 (extract); *Idem*: Rechtssoziologie – Eine systematische Orientierung, Neuwied/ Berlin: Luchterhand, 1974 (extract); *Idem*: Philosophie und Leben, Antrittsvorlesung, gehalten am 14. Februar 1953, Bern: Paul Haupt, 1953; *Idem*: Zur anthropologischen Begründung des Rechts, in: Archiv für Rechts- und Sozialphilosophie, supplementary vol. 4, Stuttgart: Franz Steiner, 1988, pp. 9ss.

[For Further Reading]
Helmut Coing: Die obersten Grundsätze des Rechts – Ein Versuch zur Nebegründung des Naturrechts (Schriften der Süddeutschen Juristen-Zeitung, vol. 4), Heidelberg: Lambert Schneider, 1947; *Idem*: Naturrecht als wissenschaftliches Problem, in: Sitzungsberichte der wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt am Main, vol. 3 (1964), No. 1, Wiesbaden: Franz Steiner, 1965;
Giorgio Del Vecchio: Individuum, Staat und Korporationen, in: Zeitschrift für Schweizerisches Recht, ed. Eduard His, N. S. vol. 54 (1935), Basel: Helbing & Lichtenhahn, 1935; *Idem*: Die Gerechtigkeit, Basel: Verlag für Recht und Gerechtigkeit, 1940; *Idem*: Studi sul diritto (Pubblicazioni della Facoltà di Giurisprudenza dell'Università di Roma, vol. 5), 2 vols., Milano: A. Giuffrè, 1958; *Idem*: Vom Wesen des Naturrechts, in: Grundlagen und

Grundfragen des Rechts – Rechtsphilosophische Abhandlungen, Göttingen: Vandenhoeck & Ruprecht, 1963, pp. 55 ss.;
Werner Maihofer: Recht und Sein – Prolegomena zu einer Rechtsontologie (Philosophische Abhandlungen, vol. 12; Habilitationsschrift an der Universität Freiburg im Breisgau), Frankfurt am Main: Vittorio Klostermann, 1954;
René Marcic / Ilmar Tammelo: Naturrecht und Gerechtigkeit (Salzburger Schriften zur Rechts-, Staats- und Sozialphilosophie, vol. 9), Frankfurt am Main/ Bern/ New York/ Paris: Peter Lang, 1989;
Adolf Menzel: Zur Lehre vom Naturrecht, in: Beiträge zur Geschichte der Staatslehre (Sitzungsberichte der Akademie der Wissenschaften in Wien, Philosophisch-historische Klasse, vol. 210, no. 1), pp. 107 ss., Wien/ Leipzig: Hölder-Pichler-Tempsky, 1929 (reprint Glashütten im Taunus: Detlev Auvermann, 1976);
Igino Petrone: Filosofia del diritto, Regia: Università di Modena, 1897/ 1898 (2nd ed. by Giorgio Del Vecchio, Milano: A. Giuffrè, 1950); *Idem*: Problemi del mondo morale meditati da un idealista, Palermo: Sandron, 1908; *Idem*: Il diritto nel mondo dello spirito – Saggio filosofico, Milano: Libreria Editrice Milanese, 1910;
Hans Ryffel: Recht und Moral nach dem neuzeitlichen Umbruch, in: Verrechtlichung und Verantwortung, ed. Helmut Holzhey and Georg Kohler, in: Studia philosophica, supplementary vol. 13, Bern: Paul Haupt, 1987, pp. 81-103; *Idem*: Gewissen und rechtsstaatliche Demokratie, in: Verwaltung im Rechtsstaat, Festschrift für Carl Hermann Ule zum 80. Geburtstag, ed. Helmuth Quaritsch, Köln: Heymanns, 1987, pp. 321-335;
Guglielmo Salvadori: Das Naturrecht und der Entwicklungsgedanke – Einleitung zu einer positiven Begründung der Rechtsphilosophie, Leipzig: Theodor Weicher, 1905;
Hans Welzel: Naturrecht und materiale Gerechtigkeit, Görringen: Vandenhoeck & Ruprecht, 4th ed. 1962 (1st ed. 1951);
Erik Wolf: Das Problem der Naturrechtslehre – Versuch einer Orientierung (Freiburger Rechts- und Staatswissenschaftliche Abhandlungen, vol. 2). Karlsruhe: C. F. Müller, 2nd ed. 1959 (1st ed. 1955).

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Entry 1.11 "Jean Darbellay, Fondement moral et social de la règle juridique"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Jean Darbellay
Title: La règle juridique de la société politique – Son fondement moral et social (Dissertation Universität Freiburg)
Edition(s): St. Maurice: Imprimerie de l'Oeuvre St. Augustin, 1945

[Introduction]
Jean Darbellay was educated by members of the Augustin congregation at the Abbey of Saint-Maurice in the Canton of Valais (*Territorialis Abbatia Sancti Mauritii Agaunensis*), under the auspices of the abbot and bishop *Bernard Alexis Burquier* (C.R.A.). The Catholic milieu of such a college was of great importance for the further development of thought and of the later academic representative of philosophy and jurisprudence at the same time. This is also the case with *Hans Ryffel*, however just the reversed way (see nos. 1.10 and 1.15 of this Legal Anthology). Insofar as the two eminent exponents of natural law theory in Switzerland of the early post-World War II period provide an interesting example of how the embedment into a specific sociocultural context can have very different influence on the outcome of legal philosophical thought.
Apparently the Caholic milieus in the French-speaking parts of Switzerland have primarily orientated their attention toward France and Belgium, especially the eminent representants of the Catholic University of Louvain. *Jean Darbellay* must have been driven by his convictions to seek a closer contact to *Jacques Maritain* – who after his conversion to Catholicism and his emigration to Canada and the United States of America was a professor at Toronto University, at Princeton University (New Jersey) and at Columbia University (New York City). This eminent scholar of *Henri Bergson* must have become a mentor of Darbellay from the very early years (and the devotion continued during the emigration, and remaind after the return to Toulouse (France), and until the death of Maritain in 1973): "*J'aime beaucoup Jean Darbellay; enfin je crois que sa timidité a craqué, il m'a écrit quelques lettres où j'ai pu mieux connaître son intelligence (qui est grande) et son coeur, et depuis lors nous avons commencé à causer. Il a le sens de la poésie, et il est philosophe. Je voudrais bien l'aider*" (letter from 2nd February 1936, addressed to *Chanoine Paul Saudan*, Abbaye de Saint-Maurice). This benevolent judgment dates ten years before Darbellay had presented his dissertation thesis to the University of Freiburg im Üechtland (Switzerland).

[Historical Situation and Systematic Context]
At that time, in 1945, *Jean Darbellay* indicated on the back of the title page, that he intended

to prepare a continuation to his monography, entitled "*Le droit natural et le droit positif de la société politique*"; however, this text that has never been accomplished as an extended monography and has only been published as an article with the same title according to our information (in: Revue thomiste, Paris 1946, pp. 540-571). As pieces that can be considered as complementary contributions to the inaugurated highly ambitious project, the following articles have to be mentioned: there has appeared an article in the "Journal for Swiss Law" in 1957, entitled "*La société politique et le droit*" (vol. 76 (1957), pp. 351-366); followed by an essay on "*L'objectivité du droit*" (in: Mélanges Jean Dabin, Paris/ Bruxelles, 1963, vol. 1, pp. 59-77); and later the author published his "*Réflexions sur la variabilité du droit naturel*" (in: Festschrift für Oscar Adolf Germann, Bern: Stämpfli, 1969, pp. 10-26). All these contributions have to be taken into consideration in order to provide a true image of the natural law theory, held by Darbellay; and they are easy to consult, as they have partially reprinted in a collection volume, entitled "*La réflexion des philosophes et des juristes sur le droit et le politique*" (pp. 279 ss., 71 ss., respectively pp. 53 ss., with the exception of the first-mentioned title). So to say the programme of the author's lifelong work can be recognised in the opening declaration by the editors of this collection, *Marco Borghi* and *Augustin Macheret*: "*L'un des aspects les plus marquants de l'enseignement et de l'oeuvre de M. Darbellay tient dans l'affirmation de la nécessité d'une continuelle remise en question du droit positif. Ainsi s'affirme l'exigence d'une critique fondée non seulement sur des règles internes, immanentes au système, à l'ordre juridique, mais bein plus sur une donnée extérieure et transcendent ce système. Celle qui impose à l'observateur un regar indépendant, autonome, 'révolutionnaire' sur la régle de droit. / Le juste, naturel et fondant la validité de toute norme, constituera dès lors l'optique, le critère déterminant. L'ojectivation et la concrétisation de cette valeur primordiale seront le but et le produit d'une démarge intellectuelle tour à tour déductive et inductive*" (preface, pp. VII s.).

[Content, Abstracts/Conclusions, Insights, Evidence]
In the very beginning of the preface of his thesis "*La règle juridique – Son fondement moral et social*", *Jean Darbellay* formulates his dedication to the masterful philosophical thought of *Jacques Maritain* as follows: "*Nous ne nous sommes point fait faute, pour notre part, de pénétrer cette matière éminemment humaine à l'aide de concepts et de notions philosophiques, faisant particulièrement appel à la '*philosophia perennis*' dont notre maître, M. Jacques Maritain, nous avait appris à saisir les éléments et à utiliser les possibilités d'explication à tous les étages de l'être et de la vie*".
The ambitious aim of *Jean Darbellay* consists in analysing the juridical normativity or the obligatory character of the legal order – concepted as the positive order of sociopolitical community – in its relations to the ethical and moral order and to the social structure. The general conviction of the author is that there is no separation between the legal order and the moral order that is governed by natural law, and the conclusion of the considerations consist in the intrinsic moral character of the rule of law. The first chapter provides a merely empirical investigation of the social conditions and circumstances, to which the legal order has to be referred.

In the 2nd chapter, entitled "*La règle juridique de la société politique et l'ordre moral*", that we have chosen as an extract for standalone reading, we encounter the core arguments, presented with a typically French understatement of eloquent discourse: the specific structure of the legal rules has the quality of an organic unity of the legal order, as stabilised by political community. The human character of the individual is directed toward society in the structure of an organised political community (with references to *Jean Dabin*, *Joseph T. Delos* and *Georges Ripert*). The author is following the institutional theory of the state and of legal order (see *Joseph T. Delos*: La théorie de l'institution, in: Archives de philosophie de droit, vol. 1931, Nos. 1 s.; and *Idem*: Le problème des rapports du droit et de la morale, in: Archives de philosophie de droit, vol. 1933, Nos. 1 s.). In conclusion, the legal norms contribute to the determination of the social and moral rules, what is defined as positivity of the legal order. This approach is grounded on the proposition that human community has been founded by God as the absolute authority. This principle is associated with nature, and therein stands the natural law theory as proposed by *Jean Darbellay*. This conception is primarily the same as in Thomism, as in social philosophy of Aquinas.
In the 3rd chapter, *Jean Darbellay* analyses ontologically the general principles of sociology and defends the pure sociological explanation of juridical normativity. For scholars interested in Catholic social and legal philosophy, the whole classical text is worth a read, even seventy years after its apparition.

[Further Information About the Author]
Jean Darbellay, born 1912, died 18 September 2008, promoted in 1944 at the University of Freiburg im Üechtland (Switzerland), and ten years later he was nominated extraordinary professor. In 1972 he changed to the chair for public law (i.e. constitutional and administrative law), general jurisprudence and legal philosophy at the very same university and was dean of the faculty for two years, in 1958 and 1967. He was an emeritus since 1982.

[Selected Works of the Same Author]
Jean Darbellay: L'action du pouvoir sur l'évolution du droit, in: Zeitschrift für schweizerisches Recht, N. S. vol. 74/ 1, pp. 117-148, Basel: Helbing & Lichtenhahn, 1955; *Idem*: Emmanuel Kant – Vers la paix perpétuelle (Essai philosophique), Traduction de l'ouvrage avec une introduction historique et critique, Paris: Presses Universitaires de France, 1958; *Idem*: L'objectivité du droit, in: Mélanges en l'honneur de Jean Dabin, Paris: Sirey, 1963, vol. 1; *Idem*: Réflections sur la variabilité du droit naturel, in: Rechtsfindung – Beiträge zur juristischen Methodenlehre, Festschrift für Oscar Adolf Germann zum 80. Geburtstag, Bern: Stämpfli & Cie AG, 1969; *Idem*: La notion de nature chez Aristote et les origines du droit naturel, in: Festschfift für Eugen Isele, ed. Louis Carlen, Freiburg: Universitätsverlag, 1973; *Idem*: Le rapport de droit dans l'évocation des droits de l'homme et des libertés fondamentales, in: Gedächtnisschrift für Peter Jäggi, Freiburg: Universitätsverlag, 1977; *Idem*: Droit et contrainte, in: Recht als Prozess und Gefüge, Fest-

schrift für Hans Huber zum 80. Geburtstag, Bern: Stämpfli & Cie AG, 1981; *Idem*: La réflection des philosophes et des juristes sur le droit et le politique, Fribourg: Éditions Universitaires, 1987.

[For Further Reading]
Joseph T. Delos: La théorie de l'institution, in: Archives de philosophie de droit, vol. 1931, Nos. 1 s., Paris: Recueil Sirey, 1931; and *Idem*: Le problème des rapports du droit et de la morale, in: Archives de philosophie de droit, vol. 1933, Nos. 1 s., Paris: Recueil Sirey, 1933; *Jacques Maritain*: La philosophie Bergsonienne – Études critiques (Bibliothèque de philosophie, vol. 10), Paris: Librairie Marcel Rivière, 2nd ed. 1930; *Idem*: Antimodern – Die Vernunft in der modernen Philosophie und Wissenschaft und in der aristotelisch-thomistischen Erkenntnisordnung, Augsburg 1930; *Idem*: Principes d'une politique humaniste, New York: Éditions de la Maison Française, 1944; *Idem*: Von Bergson zu Thomas von Aquin – Acht Abhandlungen über Metaphysik und Moral, Cambridge 1945; *Idem*: L'homme et l'État, Paris: Presses Universitaires de France, 1953.

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Entry 1.12 "Dietrich Schindler, Wiederaufbau der Rechtsordnung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Dietrich Schindler (senior)
Title: Zum Wiederaufbau der Rechtsordnung
Edition(s): posthumous ed. by Hans Nef, in: Recht, Staat, Völkergemeinschaft – Ausgewählte Schriften und Fragmente aus dem Nachlass, Zürich: Schulthess & Co., 1948, pp. 73-143

[Introduction]
These fragments build so to say a chain with the main writing of *Dietrich Schindler*, "Verfassungsrecht und soziale Struktur" from 1928 (see no. 1.8 of this Legal Anthology). In a foreword to the 2nd edition of this early work, the author intended to partly revise and extend, although the main arguments could remain unaltered. The later, unfinished and posthumous edited parts of the projected monography bear the title "Reconstruction of the legal order", faithfully transcribed. The first part probably should replace and enhance the existing introduction to the earlier book. However, the systematic order cannot be defined for sure.

[Historical Situation and Systematic Context]
The already built legal order should be reconstructed according to the alterations of new reconceptions in legal thought. *Dietrich Schindler*'s proposal was to include international law into legal considerations from the very beginning, i.e. also in the logical basements, in the philosophical groundwork. The necessity derives from the fact that the statal legal order is no longer to be considered as an entity, as a standalone unity. The diagnosis of a certain malaise in legal thought is based on the identification of an increasing tension between the valid public law and the underlying, hidden constitutional order. The logics of the whole legal system should be changed from a formal logic to a logic of values. It cannot be assured that Schindler intended to allude to the so-called Wertethik as proposed by *Max Scheler* (Der Formalismus in der Ethik und die materiale Wertethik, Neuer Versuch der Grundlegung eines ethischen Personalismus, Halle: Max Niemeyer, 2nd ed. 1921; separat printing from: Jahrbuch für Philosophie und phänomenologische Forschung", vols. 1 and 2, ed. Edmund Husserl, Freiburg im Breisgau); however, he had already indicated to *Wilhelm Wundt* in his breaking work from 1928 (Völkerpsychologie - Eine Untersuchung der Entwicklungsgesetze von Sprache, Mythus und Sitte, vol. 9: Das Recht, Leipzig: Alfred Kröner Verlag, 1918).

[Content, Abstracts]
According to *Dietrich Schindler*, the problem consists in the concurring values of equality and freedom: "Gleichheit und Freiheit bilden als Rechtssätze sozusagen offene Türen, durch die Wertgesichtspunkte, ja ein ganzes Wertsystem fortwährend in die konkrete Rechtsgestaltung einströmt. Freilich bedürfen sie auch eines solchen Wertsystems, den wenn ein solches mangelt, warden Gleichheit und Freiheit zu mechanischen, jede Ordnung von innen her aufhebenden Rechtssätzen. Nicht zufällig wird in Ländern, die die politische Freiheit nie gekannt haben, diese als ungefähr identisch mit Anarchie bezeichnet". Interpreting the legal order cannot be the same as to implement a system of abstract values, although judgment is a faculty included in every hermeneutically sensible application of the law.
Further fragments deal with the relation between philosophical systems and social facts, social reality, as well with the stratification of reality itself. The desirable has to be in a sound tension with the existing. With reference to *Nicolai Hartmann*, *Dietrich Schindler* provides a sketch of the stratification in material, organic and spiritual claims for order (Das Problem des geistigen Seins – Untersuchungen zur Grundlegung der Geschichtsphilosophie und der Geisteswissenschaften, Berlin/ Leipzig: Walter de Gruyter, 1933). This structure knows intermediate stratifications, such as the experience of the human soul or the revelation above the life of the spirit (*Emil Brunner*). Such a stratification also takes place within the realm of values, together with all possible interdependencies and ruptures. Antinomies of values show up in the legal order as well, as law is determined to realise values. The task of the implementation of the legal order consists in solving the discontinuities between material and order values, respectively legal order values.
In a last fragment, covering some forty pages, *Dietrich Schindler* discusses how to build a self-understanding, constant and consistent, as well as just legal order. "Wenn die Rechtswissenschaft ihren Beitrag zur Wiederherstellung einer klaren, festen und gerechten Rechtsordnung leisten will, muss sie sich in erster Linie Rechenschaft über die Bedingungen geben, unter denen eine solche Ordnung bestehen kann. Nur wenn man die Gründe der Dauerhaftigkeit und die Ursachen des Zusammenbruchs von Rechtsordnungen kennt, wird man sich daran wagen dürfen, am Neubau einer solchen mitzuwirken". The overall system of values of society or community can be compared to its health, whereas jurisprudence serves this end as a doctor, however with a holistic approach. Careful consideration deserves the axiomatic structure and the preconditions of jurisprudence in general, because their true identification can only guarantee an acceptable outcome. Norms should not be absolutely objectivated, because the legislator is far from omnipotent. Conflicts of norms have to be reconciliated by an international legal order so that sovereignty becomes relative, and originating communities are replaced by societies governed by purposes and aims. Schindler refers repeatedly to the writing "Die Organisation der Rechtsgemeinschaft" by *Walther Burckhardt* (compare no. 1.6 of this Legal Anthology). Normally the connection between the microcosmos and the macrocosmos are neglected, Schindler argues: "Der Mikrokosmos ist starker als der Makrokosmos;

Änderungen der staatlichen Verfassung vermögen die Beziehungen von Mensch zu Mensch nicht zu ändern, höchstens zu zerstören. Umgekehrt wirkt sich der Zerfall dieser Beziehungen notwendig auf den Staat aus. Denn eine bestimmte Staatsordnung bedarf einer bestimmten Feinstruktur des sozialen Gefüges, wie eine bestimmte Bauart der Häuser eine bestimmte Festigkeit der Baumaterialien voraussetzt. Wo der soziale Baustoff weichem Lehm gleicht, kann nur eine sehr starke, von aussen kommende staatliche Kraft dem Gefüge Halt verleihen. Die in der Reihe der Sozialformen höchste Stufe, die liberale Demokratie, setzt den Baustoff mit der festesten Feinstruktur voraus".

[Conclusions, Insights, Evidence]
These fragments, at least the final fragment, show a very disparate state of elaboration. Toward the end, the arguments tend to be barely excerpts from eminent sources of legal thought in the twentieth century, such as *Santi Romano*, *Jean-Claude-Eugène-Maurice Hauriou*, *Georges Renard*, as well as classics of political-philosophical thought, such as *Montesquieu*, *Jean-Jacques Rousseau*, *Benjamin Constant* among others. Eventually these merely draft arguments by *Dietrich Schindler* cannot be valuated, nor judged without rendering injustice to the author.

[Further Information About the Author]
Dietrich Schindler (senior), born 3 December 1890 in Zurich, died 1 January 1948 in the same town, and did his legal studies at the Universities of Zurich, Leipzig and Berlin, before he presented his promotion thesis in 1916 and his habilitation thesis in Zurich. In 1936 he was nominated ordinary professor for public law (federal constitutional und administrative law) as well as for international law and legal philosophy. For a long period, he was the legal adviser of the Swiss government.
For more information, please see:
Daniel Thürer: Dietrich Schindler (sen.) (*3.12.1890-1948), in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 381 ss.

[Selected Works of the Same Author]
Dietrich Schindler: Der Kampf ums Recht in der neueren Staatsrechtslehre, in: Festgabe der rechts- und staatswissenschaftlichen Fakultät der Universität Zürich zum Schweizerischen Juristentag 1928, Zürich: Schulthess & Co., 1928; *Idem*: Recht und Staat, in: Zeitschrift für Schweizerisches Recht, ed. Eduard His, N. S. vol. 50, Basel: Helbing & Lichtenhahn, 1931; *Idem*: Zum Wiederaufbau der Rechtsordnung, posthumous ed. by Hans Nef, in: Recht, Staat, Völkergemeinschaft – Ausgewählte Schriften und Fragmente aus dem Nachlass, Zürich: Schulthess & Co., 1948, pp. 73-143.

[For Further Reading]
Dietrich Schindler (senior): Verfassungsrecht und soziale Struktur, Zürich: Schulthess & Co., 1932;
Idem: Der Kampf ums Recht in der neueren Staatsrechtslehre (akademische

Antrittsvorlesung an der Universität Zürich), in: Recht, Staat, Völkergemeinschaft – Ausgewählte Schriften und Fragmente aus dem Nachlass, Zürich: Schulthess & Co., 1948 (erstmals in: Festgabe der rechts- und staatswissenschaftlichen Fakultät der Universität Zürich zum Schweizerischen Juristentag 1928, Zürich: Schulthess & Co., 1928), pp. 5-30.

1 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
1st Section "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Neo-Kantianism, Neo-Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond"
Entry 1.13 "Hans Huber, Niedergang des Rechts und Krise des Rechtsstaates"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Hans Huber
Title: Niedergang des Rechts und Krise des Rechtsstaates,
Edition(s): in: Demokratie und Rechtsstaat, Festschrift für Zaccaria Giacometti, Zürich: Polygraphischer Verlag A. G., 1953, pp. 59-88; reprinted in: Rechtstheorie, Verfassungsrecht und Völkerrecht, Ausgewählte Aufsätze 1950-1970, zum 70. Geburtstag des Verfassers ed. Kurt Eichenberger, Richard Bäumlin and Jörg Paul Müller, Bern: Stämpfli & Cie. AG, 1971, pp. 27-56

[Introduction/Historical Situation and Systematic Context]
Hans Huber has been the successor on the chair of *Walther Burckhardt* at the University of Berne, i.e. he lectured public law and international law. His person must have been lucent, although his diagnosis sometimes lucid. His legal views and proposals have been judged differently, according to the relation between the judge and the judged. His approach has transcended the mere juridical sphere and included legal politics as well as sociological facts. "Aus der Spannung von Recht und politischem Dasein, aus dem Ineinanderwirken von Norm und soziologischer Wirklichkeit hat Hans Huber seine wesentlichen wissenschaftlichen Erkenntnisse geschöpft. Gegenwartsbezogen und doch in der grossen Überlieferung der europäischen Rechtslehre stehend, hat er in intuitiver Hellsicht Grundfragen der Rechtsordnung in ein neues Licht gerückt" (preface of the editors, in: Verfassungsrecht und Verfassungswirklichkeit – Festschrift für Hans Huber zum 60. Geburtstag am 24. Mai 1961, Bern: Stämpfli, 1961, p. 7).
In retrospect, *Hans Huber*'s opinions are to be considered as extremely changing, following the evaluation by *Andreas Kley* (see the introductory notes to no. 1.16 of this Legal Anthology): "Hans Huber war weniger ein Wissenschaftler als ein politischer Akteur; als aktiver jungliberaler Politiker, Bundesrichter und Professor bewegte er sich unentwegt in der Öffentlichkeit. [...] Je nach politischer Lage und rechtlichen Bedürfnissen konnte er die eine Theorie vertreten und die andere verwerfen; in einer neuen Situation ergab sich das Gegenteil. Huber verwendete so ziemlich jede Theorie, welche die Wissenschaft vom öffentlichen Recht schon aufgestellt hatte." (Hans Huber – Der "Preis der Unsicherheit und der Unruhe", in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 549 s.). Hans Huber rejected natural law theory, but defended *Emil Brunner*, an eminent protestant theologian presenting a natural law founded theory of society; and he rejected naked positivism, but defended legal politics without any boundaries at the same time. The only constant attitude in Hans Huber seems

to be eclecticism and statolatry, in short.

[Content, Abstracts/Conclusions, Insights, Evidence]
As an example of the diagnostic abilities of *Hans Huber*, we have selected an essay where the author analyses a decline of the legal order and a crisis of the rule of law, in immediate post Second World War period. To indicate the relation between the two tendencies is the declared aim of the essay in honour of *Zaccaria Giacometti*. Reduced to the maximum, the problem consists in identifying the relation between the law and the state, to determine the extent of legal obligation binding the state itself. "Unter dieser rechtlichen Eingrenzung ist jedoch nicht nicht neukantische Auffassung zu verstehen, dass Recht und Rechtsverwirklichung (einziger) Staatszweck seien, ebensowenig die thomistische, dass die Verfassungspolitik in einer Rechtsfunktion aufgehe und dass das Naturrecht in extremis das positive Recht, auch das Verfassungsrecht und Verwaltungsrecht, mit brechender Kraft davor bewahren könne, beliebige Inhalte aufzunehmen. Nicht alle Gemeinschaftsaufgaben, die der Staat dann und wann, da und dort erfüllt, fallen in den Rahmen der Rechtsverwirklichung, und umgekehrt wäre er ohne sie nicht 'zwecklos'". Theleological rational determination of the functions of the modern state are refused and a conception adopted, whereupon the sovereign state forms an effective unity of performances. State order is held as *ordo ordinans* and the legal order as *ordo ordinatus*. If the political ideologies transform the state into a dynamic evolving order, this conception leads to the followin problematic: "Von dieser Eigenständigkeit der staatlichen Ordnung, die komplex ist, werden vor allem diejenigen rechtsstaatlichen Postulate berührt, die in der Idee des Konstitutionalismus zusammentreffen. Die normative Verfassung ist 'schwerflüssiger' als der von den sozialn Kräften fortwährend veränderte Staat". [...] Das Recht ist machtbildend und herrschaftsaufbauend, und die Macht ist rechtsbildend, indem Machtentfaltung zur Rechtspositivierung und Rechtsverwirklichung nötig ist". However, in the way of dynamic tensions between the principles of the rule of law and the institutions and the specific character of the legal order, the impact of law on state power is not agitated, according to the author. The antinomy, however, becomes manifest as a necessary crisis of both elements.
In consequence of the analysed tendency, legality, i.e. the binding force of the law, is getting weaker, as the state has transformed into an agency to secure welfare and to influence all kinds of individual and collective behaviour. Therefore, equality is broken, and the law entirely stressed. American pragmatism of legal thought is considered as mere materialistic theory of society, according to *Hans Huber*. "In Europa scheinen Rechtsphilosophie und Rechtswissenschaft auf die Zumutungen, welche die Massenbedürfnisse an das Recht stellen, eher negativ zu reagieren, auch wenn sie das Postulat einer Synthese, nämlich des sozialen Rechtsstaates, das aber zunächst nur eine Formel ist, akzeptieren. [...] Es färgt sich nur, ob Rechtswissenschaft und Rechtsphilosophie, wenn sie in dieser Weise, mit einer Läuterung des Wesens des traditionellen Rechts, gegen die Dynamik der gesellschaftlichen Wirklichkeit ankämpfen, die Wesensveränderung des Rechtzuhalten vermögen". The conservative function of

legislation is hereby defined as a good to be rescued. But can the functions of general jurisprudence be reduced to that idea? Could not the contrary be the case? Is it true that the rule of law has to defend itself against the disintegrated legal order?
Anyway, the conceptualisation by *Hans Huber* does not allow us to tackle these questions philosophically. Antinomies and dichotomies are sharpened in a high degree, in order to accentuate existing tensions that are self-understanding within every constitutional order under the impression of dynamic evolving society. The crucial question is, whether the democratic form of government is also the formal ideal of the social life.

[Further Information About the Author]
Hans Huber, born 24 May 1901 in St. Gallen, died 13 November 1987 in Muri bei Bern, followed the course of his jurisprudential studies at the Universities of Zurich and Berne, mainly with *Walther Burckhardt*, and obtained a doctorate in 1926. After having been secretary and later judge of the Federal Supreme Court in Lausanne, he taught public law and international law at the University of Berne, where he was chancellor in 1960. He represented the young-liberal movement and in his domain, he introduced insights of the social and political sciences as well as historical reflections into legal thinking and legislation.
For more information, please consult:
Andreas Kley: Hans Huber – Der "Preis der Unsicherheit und der Unruhe", in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 539 ss.

[Selected Works of the Same Author]
Hans Huber: Das Menschenbild des Rechts (first printing in: Zeitschrift für Schweizerisches Recht, ed. Max Gutzwiller, N. S. vol. 80 (1961), Basel: Helbing & Lichtenhahn, 1961), in: Rechtstheorie, Verfassungsrecht und Völkerrecht, Ausgewählte Aufsätze 1950-1970, zum 70. Geburtstag des Verfassers ed. Kurt Eichenberger, Richard Bäumlin and Jörg Paul Müller, Bern: Stämpfli & Cie. AG, 1971, pp. 76ss.

[For Further Reading]
Max Imboden: Helvetisches Malaise (1964), in: Staat und Recht, Ausgewählte Schriften und Vorträge, Basel/ Stuttgart: Helbing & Lichtenhahn, 1971, pp. 279-307.

27 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
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1st Section "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Neo-Kantianism, Neo-Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond"
Entry 1.14 "Aloïs Troller, Prinzipien der Rechtswissenschaft"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Aloïs Troller
Title: Überall gültige Prinzipien der Rechtswissenschaft
Edition(s): Frankfurt am Main/ Berlin: Alfred Metzner, 1965

[Introduction]
Aloïs Troller's primary earnings are to be found in the domain of intellectual property rights. However, he had a strong and lifelong inclination toward legal philosophy. He was the first author in Switzerland to adopt the newer tendencies in philosophy, i.e. existentialism and phenomenology, as well as structuralism and to apply them fecundly to legal thought. The condensation of his occupation with existentialism, Troller layed down in his early introduction to jurisprudence, entitled "Legal Experience and Jurisprudence", whereas his thoughts on phenomenological philosophy found their expression in the principal writing, entitled "Principles of Jurisprudence, Applicable Everywhere" from 1965; later, in 1975, he also published a classical writing on legal methodology, entitled "Foundations of a Self-Understanding Legal Methodology and Legal Philosophy". Moreover, the relation between the disciplines of philosophy, legal philosophy and jurisprudence have been treated by the same author in a monography from 1971. All together, these writings stand for the so to say second high tide of legal philosophy, after the early pre-war culmination in *Eugen Huber* and *Walther Burkhardt*.

[Historical Situation and Systematic Context]
These "Principles of Jurisprudence" by *Aloïs Troller* are explicitly based on phenomenological philosophy. If one takes into consideration the index of literature, the reference of this legal philosophical contribution goes mainly to philosophical thinkers in the proper sense. This masterful writing in the domain of legal philosophy therefore unveils as a true piece of philosophical thought, as part of the discipline of philosophy as rigorous scientific research in the understanding of *Edmund Husserl* (consult "Philosophie als strenge Wissenschaft", Frankfurt am Main: Vittorio Klostermann, 1965; first printing in: Logos, vol. 1 (1910), Tübingen: J. C. B. Mohr, 1911). Thus, phenomenological philosophy is to be considered as a transcendental foundation of scientific thought, i.e. as transcendental phenomenology; moreover, it consists in a philosophy of thought, of the spirit in a Hegelian sense, it is rigorous science of the human spiritual life in an absolute understanding. This transcendental function in contrast to everyday phenomenon is assured by the so-called *epoché*, by epochal reduction of naturalist impressions (of mere

data or facts) to spiritual or mental expressions (to concepts and acts of thought). The key concept of such an approach becomes the phenomenological research about the essence or being of human things and thoughts. It is to be mentioned, in addition, that this conception of philosophy also goes back to so-called life philosophy, as it has been inaugurated by *Wilhelm Dilthey*, and as it has been theorised by idealist Historicism, in the same degree as existentialism in *Martin Heidegger* refers to the very same roots in the history of philosophical thought.
The problem in the course of historical development of phenomenological philosophy with respect to jurisprudence consists in the fact that *Gerhart Husserl*, the son of Edmund, has somehow consumed this approach for jurisprudence, as he was a professional jurisprudent at the University of Kiel, before he had to emigrate to the United States of America after 1936 (compare Recht und Welt – Rechtsphilosophische Abhandlungen, Frankfurt am Main: Vittorio Klostermann, 1964; *Idem*: Recht und Zeit – Fünf rechtsphilosophische Essays, Frankfurt am Main: Vittorio Klostermann, 1955; and *Idem*: Recht und Welt, in: Festschrift Edmund Husserl, Halle an der Saale: Max Niemeyer, 1929; also to be consulted are the contributions to: Festschrift für Gerhart Husserl zum 75 Geburtstag, ed. Thomas Würtenberger, Frankfurt am Main: Vittorio Klostermann, 1969). Not to be forgotten is the contribution of the phenomenological approach for the so-called comprehensive sociology of *Max Weber* in particular (see *Robert Williame*: Les Fondements Phénomenologiques de la Sociologie Compréhensive – Alfred Schütz et Max Weber (Phaenomenologica, vol. 58), Den Haag: Martinus Njihoff, 1973). Phenomenological theory-building definitely had more success in France, than in Germany, as the leading scholars of phenomenological philosophy have all been French-speaking legal thinkers, such as *Paul Amselek* and *Bernhard Waldenfels*, or *Alexandre Kojève* for instance (for a comprehensive overview see *Simone Goyard-Fabre*: Essai de critique phénoménologique du droit, Paris: Librairie Klincksieck, 1972). *Aloïs Troller*, however, successfully overcame the penetrating ontological inclination of his earlier legal thought, as he understands phenomenological philosophy as a means to establish a true cognition of legal valuations and not only to establish an ontological order between a given set of legal values.

[Content, Abstracts/Conclusions, Insights, Evidence]
Aloïs Troller's intention is not to provide an overall legal philosophy, including a discussion of the leading philosophical systems in legal thought, rather he wants to reassure himself, that practice and theory in the domain of legal thought and jurisprudence can coexist with each other and both serve the purpose of peaceful human community in friendly neighbourhood, as he writes in the foreword.
In his introduction, *Aloïs Troller* takes medicine as a significant model for jurisprudence, as both of the disciplines count to the so-called great faculties (together with theology). The objects causing quarrels between the different currents of jurisprudence are identified as marginal. "Die Rechtswissenschaft hat schon Bedeutendes geleistet, wenn sie jene Stellen anzeigt, wo die metaphysische Anschauung (religiöse Überzeugung oder Ideologie) das letzte Wort hat. Das gelingt ihr dadurch, dass sie das riesige Gebiet vorweist, das der

objektiven Erkenntnis offen steht und dass sie bis zu dessen Grenzen hinführt". Scientific thought, eventually, means to applicate cognition to define the borderlines of assured knowledge (a true Kantian principle, in fact). With his study, Troller intends to enlighten the turbid consciousness and to establish a sound self-consciousness of legal theory. "Dieses Unterfangen ist deshalb so spannend, weil es einerseits nur von den allgemein wahrnehmbaren Erscheinungen der geistigen und körperlichen Welt ausgeht, und weil andererseits eine metaphysische Überzeugung dazu den Anlass gab, deren Richtigkeit noch nicht beweisbar, das heisst nicht zu einer Evidenz zu bringen ist, die alle erkennen können". The intention of the argumentation as a whole consists in providing a set of generally valid principles for legal thought, or as the title of the study suggests "principles that can be applicated everywhere". The Method to follow by doing so is based upon phenomenological philosophy.

Often, the scientific character of jurisprudence is exclusively guaranteed by method. However, essential for scientific practice is knowledge, and with respect to philosophical science not only logical truth, but true cognition of reality. The dogmatical structure of jurisprudence is therefore to be enlarged to a veritable theory of legal knowledge, the authority of positive law to be founded in a transcendental philosophical way in order to ascertain true and valid knowledge of the law. "Wissenschaftliches Tun ist eigenes vernunftsgemässes Erkennen und nicht autoritätsgläubiges Hinnehmen und Auswendiglernen von Thesen. [...] Die Wissenschaft handelt vom vernunftmässigen und daher überprüfbaren Erkennen ihrer Gegenstände in einer Weise, die allgemeine Richtlinien für das Vorgehen und seine Ergebnisse angesichts gleichartiger Erscheinungen zu geben vermag. Durch dieses Hinaufsteigen ins Allgemeingültige unterscheidet sie sich von der Praxis, die jeweilen nur den einzelnen Fall zu bewältigen hat". This attempt transcends pure logic by far and cannot be persecuted in terms of mere methodology. It rather demands for a process to generate actively true knowledge and for a systematic order of the contributions of the specific scientific disciplines ("System der Wissenschaften"). "Zur Rechtswissenschaft gehört auch die Rechtsphilosophie, sofern diese zur Lösung der Aufgaben unmittelbar herangezogen und nicht nur als spekulativer Erholungsort vor der täglichen Fron oder als hohe Lehre, an der die gewöhnliche Jurisprudenz sich bloss ehrfurchtsvoll erbauen kann, behandelt wird".

Phenomenological cognition is adopted by *Aloïs Troller* as a methodological grounds for jurisprudence. First, the so-called problem of legal cognition ("Erkenntnisproblem") is to be solved. The phenomenological reduction, as elaborated by *Edmund Husserl*, can provide a valid foundation for legal knowledge, and help to transcend ordinary methodology and to overcome merely logical conclusions. This method follows the Kantian Criticism, enlarging it considerably with respect to scientific knowledge: "Es besteht, besonders in der Nachfolge *Immanuel Kant*s, die Gefahr, dass der Mensch, der vertrauensvoll der gepriesenen Vernunft folgt, den Weg nicht bis zum Schluss mitgeht und somit die Ratio verliert und den Glauben nicht findet. [...] Wichtig ist die Erkenntnis, dass diese Denkmethoden zwar, wie es sich ergeben wird, auf den richtigen Weg hinleiten, aber ins Metaphysische hinüberwechseln, bevor dieser Weg erreicht ist". The postulated method

follows the Cartesian principle of the thinking subject of cognition and accentuates its active, yet creative role within the generation of knowledge. The self-conscious subject, however, is located in a context of equals, of equally self-confident subjects with their interpretations of the legal world. In order to overcome dogmatical knowledge, a key function is the so-called transcendental reduction, as it takes the consciousness as a starting point to construct valid knowledge. Therefore, the focus is entirely set on legal consciousness and has to be enlarged to a kind of legal ideation ("Wesensschau des Rechtlichen"), which stands for a pure concept: "Das Wesen (*eidos*) ist ein neuartiger Gegenstand. So wie das Gegebene der individuellen oder erfahrbaren Anschauung ein individueller Gegenstand ist, so das Gegebene der Wesensanschauung ein reines Wesen (*Edmund Husserl*: Ideen zu einer reinen Phänomenologie und phänomenologischen Philosophie – Allgemeine Einführung in die reine Phänomenologie, in: Husserliana, vol. 4, Den Haag: Martinus Njihoff, 1950)". Instead of with things as such ("Ding an sich"), we have to deal with phenomenological representations of subjects and objects, in consequence. The process of phenomenological cognition is hereby not yet concluded, however; in the way of *epoché*, consciousness has to be enlightened in order to be able to identify the significant phenomenological ideations, by a procedure of inclusion and exclusion. Nevertheless, the life remains unaltered as an entity, as unity, and so the legal life is considered to be such an entity or unity. "Der Rechtswissenscafter mag danach fragen, wo da sein Nutzen bleibe, ob er nicht vielmehr unnötig ins Gestrüpp philosophischer Spekulationen geraten sei. Später wird er jedoch rückblickend des unschätzbaren Gewinns inne. Die wirkliche Lebenswelt, so wie sie für die Menschen Geltung hat, ist ihm gegeben. Er erfährt nicht nur die verwirrende und niemals systematisch zu bewältigende Vielfalt der einzelnen Erscheinungen, sondern die in der Gegenwart gesehenen, aus der Vergangenheit heraufgeholten und in die Zukunft vorausprojizierten Wesenhaftigkeiten dieser Erscheinungen und ihrer Gesamtheiten. Er erfährt somit das, was die Phänomene zu dem macht, als das sie in verschiedenen menschlichen Bewusstsein unabhängig vom Zeitmodus in unverwechselbarer Identität erscheinen können [...]. Der Rechtswissenschafter steht nicht mehr allein, nur auf sich angeweisen dem Lebensverhältnis und dem gegenüber, was davon schon ausgesagt wurde. Er hat nicht der ordnende Geist zu sein, den nur sein persönliches immanentes Erfahren belehrt, sein eigenes visionäres ethisches Gefühl. Er sieht in der Lebenswelt nicht bloss isolierte Rechtssubjekte, von denen jedes den Schutzkreis um sich ziehen möchte. Die Lebenswelt, sein Tätigkeitsgebiet, liegt vor ihm ausgebreitet, so wie die unzähligen Rechtssubjekte sie unablässig gemeinsam neu formen. Jedes von ihnen trägt also die Verantwortung dafür mit, dass die Erscheinungen in der richtigen Intention gesehen, die Geltungen erfahren und vollzogen werden".
In conclusion, the principal writing of *Aloïs Troller* is recommended in the highest degree for extensive lecture entirely.

[Philosophical Valuation and Jurisprudential Significance]
The relation between the partitional legal experience and the life in its entirety is

structured in a methodological manner by phenomenological philosophy. Such a process or procedure transcends common methodology and logics by far and is considered to be a well-founded strategy to gain legal knowledge, to obtain true cognition of the legal order of a given legal community. Cognition is accepted as being singular, individual and subjective, and nevertheless intersubjective order is directed to a common aim, valid for all participants within a given sphere of life. This takes into consideration that it is in the individual, where the universal lies in the highest degree.

[Further Information About the Author]
Aloïs Troller, born 15 May 1906 in Wilihof, died 15 May 1987 in Luzern, graduated in Freiburg in 1837, after having studied jurisprudence at the Universities of Berne and Basel. He also followed his musical studies as a singer in Munich. From 1950 onwards, he taught as a private lecturer at the University of Freiburg, where he was entitled professor of intellectual property between 1957 and 1976, as well as of legal philosophy between 1971 and 1978. Above all he influenced the development of intellectual property rights in Europe by his eminent work in two volumes "Intellectual Property Law" ("Immaterialgüterrecht"; 3. ed. 1983-1985).
His philosophical thought was mainly influenced by phenomenology, whose insights he tried to apply to jurisprudence.
For further information, as well as for a complete bibliography, please refer to:
Werner Krawietz/ Walter Ott (Ed.): Formalismus und Phänomenologie im Rechtsdenken der Gegenwart, 1987.

[Selected Works of the Same Author]
Aloïs Troller: Die Aufgabe der Rechtsphilosophie, in: Schweizerische Juristen-Zeitung, vol. 69 (1973), pp. 97 ss.; *Idem*: Grundriss einer selbstverständlichen juristischen Methode und Rechtsphilosophie (Das Recht in Theorie und Praxis), Basel/ Stuttgart: Helbing & Lichtenhahn, 1975; *Idem*: Rekonstruktion und Rechtswirklichkeit – Ein Beitrag zu einem kritischen Rechtsrealismus, in: Rechtstheorie, vol. 11 (1980), vol. 2, pp. 137 ss.

[For Further Reading]
Aloïs Troller: Jurisprudenz auf dem Holzwege, in: Schriftenreihe der Internationalen Gemeinschaft für Urheberrecht, vol. 13, Berlin/ Frankfurt am Main, 1959; *Idem*: Eugen Hubers Allgemeingültige Rechtsphilosophie, in: Gedächtnisschrift für Peter Jäggi, ed. Bernhard Schneider and Peter Gauch, Freiburg im Üechtland: Universitätsverlag, 1977.

14 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
1st Section "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Neo-Kantianism, Neo-Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond"
Entry 1.15 "Hans Ryffel, Philosophische Anthropologie des Politischen"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Hans Ryffel
Title: Grundprobleme der Rechts- und Staatsphilosophie – Philosophische Anthropologie des Politischen
Edition(s): Neuwied/Berlin: Luchterhand, 1969

[Introduction]
Stringently concluded, natural law theory leads to a claim for true law, and accordingly relative natural law to temporary true law. We have already encountered the differentiated position elaborated by *Hans Ryffel* in his early dissertation (see no. 1.10 of this Legal Anthology). Later the author frankly declared to have changed his mind and confesses an explicit abolition of natural law theory, in a letter exchange with *Hans Merz*. He even agrees with a citation of *Walther Burckhardt* ("Die Verwirklichung der reinen Idee des Rechts in einer konkreten Rechtsordnung führt durch die unreine Werkstatt der beschränkten Menschen") that gives the context of the following arguments: "Sachlich entspricht der Idee des Gerechten (unter gegebenen Umständen) stets nur eine Rechtsordnung; welcher von verschiedenen Vorschlägen der richtige sei, ist nicht nur eine Frage des subjektiven Empfindens, sondern eine nach objektivem Massstab zu lösende Frage. Aber in dieser Frage haben die unvollkommenen Menschen, die sie beantworten sollen, nur eine unvollkommene Einsicht; und ihre Antwort wird deshalb auch, nach ihrer subjektiven Bedingtheit, verschieden sein. Wenn man sie, die beschränkten Menschen, entscheiden lässt, führt man ein irrationales Moment in das Problem ein, und es gibt keine Gewähr mehr für eine rationelle Lösung. Kein Mittel kann mehr gewährleisten, dass die richtige Lösung herauskomme, ja dass überhaupt eine Lösung herauskomme. Folgerichtigerweise muss man darüber stets die Vernunft entscheiden lassen; aber dann bleibt die Lösung auch stets (unter den Menschen) unentschieden, da der Appell an die Vernunft stets offen bleibt".
In his answer to this letter, *Hans Merz* indicates a crucial point that serves as a key to a better understanding of the legal thought held by *Hans Ryffel*: "Gewisse Schwierigkeiten bereitet mir (und wohl auch Ihnen) die Konkretisierung der moralischen Selbstbestimmung in der demokratischen politischen Wirklichkeit. Sie verlangen von den Beteiligten, dass sie sich gemeinsam den Rechtsnormen unterstellen, die am unverfügbaren Massstab orientiert sind. Wir wissen, dass das für nicht so wenige Beteiligte nicht gilt. Ihnen gegenüber muss aber die einigermassen der Rechtsidee entsprechende Ordnung doch durchgesetzt werden. Das Wort 'Rechtsidee' ist mir

unwillkürlich in meinen Gedankengang geflossen. Ich habe daraufhin bei Burckhardt in der 'Organisation [der Rechtsgemeinschaft]' geblättert und bin dabei auf die Stelle gestossen[:] 'Die Verwirklichung der reinen Idee des Rechts in einer konkreten Rechtsordnung führt durch die unreine Werkstatt der beschränkten Menschen[; wer eine Rechtsordnung haben will, muss die Gefahr der Verunreinigung der Idee mit in Kauf nehmen]'. Ist das nicht ein Gedanke, der Ihrer Auffassung ebenfalls zugrunde liegt?" In a typewritten letter from 27th August 1987, Hans Ryffel responds as follows: "Die Konkretisierungsprobleme bedürften in der Tat der Bearbeitung, und ich hoffe, in einer grösser angelegten Sache (so etwas wie 'Elemente einer Philosophie der Praxis', die freilich gar sehr unter dem grossen Vorbehalt Ihres '*Dieu voulant*' stehen) auch dazu etwas mehr als bisher sagen zu können, obwohl mich diese Dinge '*sub specie* ...' nicht sonderlich ansprechen. Konkrete Einzelheiten – es sei offen eingestanden und aufrichtig beklagt – waren schon immer weder meine Vorliebe noch meine Stärke (worüber sich bekanntlich der Teufel freuen dürfte). / Was die Konkretisierung der Selbstbestimmung anbelangt, stimme ich dem Burckhardt-Zitat ganz zu (die 'unreine Werkstatt des Menschen' – ein trefflicher Ausdruck – ist nicht der Ort, wo das reine Richtmass der 'Rechtsidee' zur Geltung kommen könnte)". To carry out his inaugurated writing has not been allowed to Ryffel, however.

[Historical Situation and Systematic Context]
After having been nominated professor at the „Hochschule für Verwaltungs-wissenschaften" in Speyer in 1962, *Hans Ryffel* developed his views further and set legal thought in a greater context, namely he enlarged the frame of disciplines to be considered to provide a true concept of legal and state community to sociology and political theory. His main interests remain philosophical, insofar as they refer to the extended context of life and being, however with a strong inclination toward anthropological philosophy. The relationship between the scientific disciplines and philosophy should not be misunderstood as a repartition of the subjects treated by the specific methods. Rather, the independence of the specific disciplines has to be compensated by philosophy that provides a relational knowledge to the spiritual life and to human experience, including the relation between theory and practice. "Die offenen Kontroversen der Wissenschaft, die in den Einzeldisziplinen immer wieder auftauchen und in disparaten oder gegensätzlichen methodologischen Positionen, etwa in der juristischen Auslegungslehre oder in der Diskussion über die 'Werte' und das 'Naturrecht', ausdrücklich formuliert werden, können nur im Lichte der philosophischen Besinnung beigelegt werden, sofern eine Beilegung grundsätzlich überhaupt möglich ist. Ebenso verspricht ein Rückgang auf die philosophischen Grundfragen am ehesten eine Überwindung der Nöte der Praxis. Und soweit die philosophische Besinnung weder wissenschaftliche Kontroversen beizulegen noch praktische Nöte zu beheben vermag, kann sie doch die Gründe solchen Misslingens aufdecken". Philosophy is eventually proposed as a domain, where interdisciplinary questions can be discussed and overcome. Coherence, the relation to the whole context, is best guaranteed by philosophical reflected thought, that can judge the individual

pretensions to gain valid knowledge by the different scientific disciplines.

[Content, Abstracts/Conclusions, Insights, Evidence]
Scientific theory and practice designate a tension that is constantly debated by *Hans Ryffel*. We have selected two passages for further reading, one dealing with the renewal of philosophy itself, and one with considerations to the practical outreach of jurisprudence, state theory and political theory. After having treated the philosophical foundations of the scientific disciplines in cause, Ryffel addresses the core question of the possibility of a philosophical founded reflection on the practice of life ("Lebenspraxis"). "Die philosophisch reflektierende Lebenspraxis unterwirft die Wissenschaften, aber auch alle menschlichen Betätigungen, kurz: das Dasein im ganzen, den Massstäben des Richtigen und zieht daraus Folgerungen für die Gestaltung der rechtlich-staatlichen Ordnung. [...] In eine solche philosophische Reflexion, die sich in der Gestaltung der rechtlich-staatlichen Ordnung unweigerlich auswirkt, durch bestimmte Vorkehren oder auch die Unterlassung solcher, werden nicht nur die Wissenschaften, sondern alle Betätigungen des Menschen, die auf das gemeinschaftliche Dasein von Einfluss sind und diese verändern oder bestätigen, einbezogen, von der Wirtschaft bis zur Kunst und Religion. [...] / So zielt die in der Lebenspraxis sich einstellende philosophische Reflexion letztlich auf die eine Frage nach der richtigen Gestaltung der Praxis im ganzen, die immer auch eine politische Frage ist".
Within such a perspective, the empirical based disciplines, that generate factual knowledge ("Tatsachenwissenschaften"), are accentuated and a major importance is conferred to them, eventually.

[Philosophical Valuation and Jurisprudential Significance]
It is a rather long way from natural law theory to sociological, anthropological and political philosophical thought. Actually, this evolutionary development within the process of increasing scientific efforts occurs to follow an internal logic. Within such a tendency, philosophy is destined to ensure critical distance and to provide a neutral forum, where the proposals and suggestions of the various disciplines can be validated or disqualified in the light of their integration in a holistic perspective. This attempt closes the circle and leads back to the inaugural lecture by *Hans Ryffel*, held on the 14th of February 1953, entitled "Philosophie und Leben" (Bern: Paul Haupt, 1953; see no. 9.4 of this Legal Anthology).

[Further Information About the Author]
Hans Ryffel, born 27 June 1913 in Berne, died 30 September 1989 in Thun, studied from 1932 onwards both jurisprudence and philosophy at the University of Berne. In 1943 he handed in his dissertation "Das Naturrecht" at the philosophical-historical faculty. Nevertheless, he also had his patent as a lawyer in court already in 1938. From 1951 onwards he taught as a private lecturer general philosophy, in particular philosophy of the law and theory of the state, before he was called to the „Hochschule für Verwaltungs-

wissenschaften“ in Speyer in 1962, where he remained until 1979, and whose chancellor he was two times. His main interest was normative rules for human behaviour and his intention was to make evident the multiple dimensions of the legal and social sciences. For further information and for a complete bibliography, please consult:
Erk Volkmar Heyen: Vom normativen Wandel des Politischen – Rechts- und staatsphilosophisches Kolloquium aus Anlass des 70. Geburtstags von Hans Ryffel, Berlin: Duncker & Humblot, 1984.

[Selected Works of the Same Author]
Hans Ryffel: Das Naturrecht – Ein Beitrag zu seiner Kritik und Rechtfertigung vom Standpunkt grundsätzlicher Philosophie, Bern: Herbert Lang & Cie., 1944 (extract); *Idem*: Rechtssoziologie – Eine systematische Orientierung, Neuwied/ Berlin: Luchterhand, 1974 (extract); *Idem*: Zur anthropologischen Begründung des Rechts, in: Archiv für Rechts- und Sozialphilosophie, supplementary vol. 4, Stuttgart: Franz Steiner, 1988, pp. 9ss.; *Idem*: Philosophie und Leben, Antrittsvorlesung, gehalten am 14. Februar 1953, Bern: Paul Haupt, 1953.

[For Further Reading]
Helmut Coing: Die obersten Grundsätze des Rechts – Ein Versuch zur Nebegründung des Naturrechts (Schriften der Süddeutschen Juristen-Zeitung, vol. 4), Heidelberg: Lambert Schneider, 1947; *Idem*: Naturrecht als wissenschaftliches Problem, in: Sitzungsberichte der wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt am Main, vol. 3 (1964), No. 1, Wiesbaden: Franz Steiner, 1965;
René Marcic / Ilmar Tammelo: Naturrecht und Gerechtigkeit (Salzburger Schriften zur Rechts-, Staats- und Sozialphilosophie, vol. 9), Frankfurt am Main/ Bern/ New York/ Paris: Peter Lang, 1989;
Adolf Menzel: Zur Lehre vom Naturrecht, in: Beiträge zur Geschichte der Staatslehre (Sitzungsberichte der Akademie der Wissenschaften in Wien, Philosophisch-historische Klasse, vol. 210, no. 1), pp. 107 ss., Wien/ Leipzig: Hölder-Pichler-Tempsky, 1929 (reprint Glashütten im Taunus: Detlev Auvermann, 1976);
Hans Ryffel: Recht und Moral nach dem neuzeitlichen Umbruch, in: Verrechtlichung und Verantwortung, ed. Helmut Holzhey and Georg Kohler, in: Studia philosophica, supplementary vol. 13, Bern: Paul Haupt, 1987, pp. 81-103; *Idem*: Gewissen und rechtsstaatliche Demokratie, in: Verwaltung im Rechtsstaat, Festschrift für Carl Hermann Ule zum 80. Geburtstag, ed. Helmuth Quaritsch, Köln: Heymanns, 1987, pp. 321-335;
Guglielmo Salvadori: Das Naturrecht und der Entwicklungsgedanke – Einleitung zu einer positiven Begründung der Rechtsphilosophie, Leipzig: Theodor Weicher, 1905;
Hans Welzel: Naturrecht und materiale Gerechtigkeit, Görringen: Vandenhoeck & Ruprecht, 4th ed. 1962 (1st ed. 1951);
Erik Wolf: Das Problem der Naturrechtslehre – Versuch einer Orientierung (Freiburger Rechts- und Staatswissenschaftliche Abhandlungen, vol. 2). Karlsruhe: C. F. Müller, 2nd ed. 1959.

15 November 2017 *Michael Walter Hebeisen*

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Entry 1.16 "Hans Huber, Gesamtsituation des Rechts"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Hans Huber
Title: Betrachtungen über die Gesamtsituation des Rechts
Edition(s): in: Zeitschrift des Bernischen Juristenvereins, vol. 106 (1970), pp. 393-411; reprinted in: Rechtstheorie, Verfassungsrecht und Völkerrecht, Ausgewählte Aufsätze 1950-1970, zum 70. Geburtstag des Verfassers ed. Kurt Eichenberger, Richard Bäumlin and Jörg Paul Müller, Bern: Stämpfli & Cie. AG, 1971, pp. 11-26

[Introduction/Historical Situation and Systematic Context]
During his lifetime activities, *Hans Huber* must have had considerable influence as a judge and as an academic teacher. He was very open minded toward the factual situation and constellation in society and in politics, confessing that he had himself been disturbed and made insecure by his own attitude ("um den Preis der Unsicherheit [Verunsicherung] und Unruhe [Beunruhigung]"). He definitely had no absolute references and instead adopted a thoroughly dynamic view, and he therefore favoured a decisive abolition of all kind of natural law theories, including a foundation for human rights and individual freedoms in natural law. Hans Huber initially explicitly showed a certain admiration for *Carl Schmitt* and his decisionism according the necessities of the situation (as well as for *Ernst Forsthoff*). However, he has later taken some distance to this position in occasion of the book review of *Peter Schneider* "Ausnahmezustand und Norm", entitled "Einige Bemerkungen über die Rechts- und Staatslehre von Carl Schmitt" (1958). Eventually, he even favoured an adoption of the more sophisticated general views of *Rudolf Smend*'s theory of integration. These conversions, in fact, tend to label him as a highly eclectic legal thinker.
Hans Huber has been among the first jurisprudents to defend an institutional theory of human rights and individual freedoms, as he explicitly confessed in the occasion of *Peter Häberle*'s dissertation thesis from 1962 "Die Wesensgehaltgarantie des Art. 19 Abs. 2 Grundgesetz – Zugleich ein Beitrag zum institutionellen Verstandnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt (Dissertation Freiburg im Breisgau), Karlsruhe 1962, 3rd ed. Heidelberg 1983". This is just another change in his opinions, however, as the situation in Switzerland had been prepared for a reception of such new doctrine: "Die institutionelle Grundrechtstheorie kam zur richtigen Zeit, da die gesetzgeberische Entwicklung und damit die Rechtsprechung auf eine gewisse Erweiterung der Grundrechtstheorie sozusagen warteten. Der schweizerische Staat hatte, durch die Vollmachtenregime der beiden Weltkriege bereits daran gewöhnt, im Zuge der ökonomisch-gesellschaftlichen Entwicklung immer mehr Aufgaben übernommen. Die alte politische Forderung der

Sozialdemokratie und der Gewerkschaften, den Aufgabenkreis des Staates zu erweitern, wurde mehrheitsfähig. Im Bereich der Freiheitsrechte waren nach der neuen Theorie nicht mehr die Menschen allein zuständig, vielmehr kamen die Normenkomplexe hinzu, die die Lebensbereiche 'verfassen', sie 'stützen' und 'prägen'. Das liberale Verteilungsprinzip erfuhr danach eine starke Relativierung: Die staatlichen Aufgaben wuchsen gewaltig und im gleichen Umfang formten sie die Freiheit, indem sie diese zur rechtlich geordneten Freiheit machten. / Die verfassungsrechtlich naheliegende Folge der institutionellen Grundrechtstheorie bestand darin, dass der Staat für die reale Verwirklichung der Grundrechte die Verantwortung übernahm. Zusätzlich sollte sich das institutionelle Denken nicht nur auf das öffentliche Recht beschränken, sondern in allen Rechtsgebieten, insbesondere im Privatrecht, wirksam werden. Das bedeutete, dass der Adressatenkreis der Grundrechte zu erweitern war: Diese verpflichteten auch die Privaten untereinander und drangen damit in ein neues Gebiet vor." (Andreas Kley: Hans Huber – Der "Preis der Unsicherheit und der Unruhe", in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, p. 548).

[Content, Abstracts/Conclusions, Insights, Evidence]
As a text worth to be reconsidered, we have selected the lecture in the occasion of *Hans Huber*'s retreat from the University. When he had to leave academic teaching, he felt entitled to judge the overall situation of the law in retrospect. But can the law with its absolute claim for validity be located within such a situation of constellation and thereby become relative? The author addresses this doubt and is dispensing himself from an answer. Or rather, the answer is given implicitly, and in a highly polemical argumentation. The discourse forms so to say a chain with the diagnosis of the decline of legal order and the crisis of state rule of law. It is the very same hiatus between dynamic social change and the relatively solid, constant, and persistent legal order. "Ist die gegenwärtige Störung des Gleichgewichts nicht teilweise schlimmer und auswegloser als eine Revolution, weil Ordnungen zwestört, ohne dass neue begründet werden, weil niemand um neues Recht kämpft, sondern Lähmung und Teilnahmslosigkeit am Geschick der Rechtsordnung sich verbreiten"?
The general situation is to be characterised by a weakness or even a lack of normativity in individual life and in human community. This tendency is even increased by a decline of the positive law in a formal sense, which is more or less the same indication as the pretended feebleness of the binding force of the law, generally speaking. "Letztlich aber ist die Rechtsferne der heutigen Gesellschaft nur so zu erklären: Die Menschen treten mehr und mehr aus den überkommenen Ordnungen heraus. Schon *Max Scheler* schrieb im 'Mensch und Geschichte', dass sich der Mensch völlig und 'restlos' problematisch geworden sei". Such a quintessence of a jurisprudent's lifelong work is due to a thoroughly pessimistic inclination of the suffering patient, as it resembles. In any case, the potential of the identified problems cannot be made fruitful, because the analysis is not accomplished adequately, with a considerable deficiency in clear concepts, and therefore criticism is merely negative and destructing, rather than providing a sound basis for

solutions, to in order to build solid construction, which is the very task for science, legal science included!

[Further Information About the Author]
Hans Huber, born 24 May 1901 in St. Gallen, died 13 November 1987 in Muri bei Bern, followed the course of his jurisprudential studies at the Universities of Zurich and Berne, mainly with Walther Burckhardt, and obtained a doctorate in 1926. After having been secretary and later judge of the Federal Supreme Court in Lausanne, he taught public law and international law at the University of Berne, where he was chancellor in 1960. He represented the young-liberal movement and in his domain, he introduced insights of the social and political sciences as well as historical reflections into legal thinking and legislation.
For more information, please consult:
Andreas Kley: Hans Huber – Der "Preis der Unsicherheit und der Unruhe", in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 539 ss.

[Selected Works of the Same Author]
Hans Huber: Niedergang des Rechts und Krise des Rechtsstaates, in: Demokratie und Rechtsstaat, Festschrift für Zaccaria Giacometti, Zürich: Polygraphischer Verlag A. G., 1953, pp. 59-88; *Idem*: Das Menschenbild des Rechts (first printing in: Zeitschrift für Schweizerisches Recht, ed. Max Gutzwiller, N. S. vol. 80 (1961), Basel: Helbing & Lichtenhahn, 1961), in: Rechtstheorie, Verfassungsrecht und Völkerrecht, Ausgewählte Aufsätze 1950-1970, zum 70. Geburtstag des Verfassers ed. Kurt Eichenberger, Richard Bäumlin and Jörg Paul Müller, Bern: Stämpfli & Cie. AG, 1971, pp. 76ss.

[For Further Reading]
Walther Burckhardt: Die Krisis der Verfassung (1838), in: Aufsätze und Vorträge 1910-1938, Bern: Stämpfli & Cie., 1970, pp. 340-355;
Max Imboden: Helvetisches Malaise (1964), in: Staat und Recht, Ausgewählte Schriften und Vorträge, Basel/ Stuttgart: Helbing & Lichtenhahn, 1971, pp. 279-307.

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Entry 1.17 "François Gilliard, L'expérience juridique"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: François Gilliard
Title: L'expérience juridique – Esquisse d'une dialectique (Travaux de droit, d'économique, de sociologie et de sciences politiques, vol. 119)
Edition(s): Genève/Paris: Librairie Droz, 1979, pp. 37-82

[Introduction/Historical Situation and Systematic Context]
The somewhat misleading title could easily refer to the current of so-called legal philosophy based upon experience, as it was inaugurated by *Giuseppe Capograssi* (Studi sull'esperienza giuridica (1932), in: Opere, vol. 2, Milano: A. Giuffrè, 1959, pp. 211 ss.), and as it has also been proposed by *Miguel Reale* (O direito como experiência (Il diritto come esperienza), Såo Paulo: Ediçåo Saraiva, 1968 (Milano: A. Giuffrè, 1973). However, experience can also serve to delimit, where legal science is possible and where the realm of legal experience begins. It serves to denominate the relation between the subject and the object of legal cognition, and in consequence to separate subjective from objective knowledge of the legal sphere. That this attempt is labelled as dialectical, even increases the ambiguities, as normally in philosophical thought in the tradition of Hegelianism, dialectical logics are considered to be a means to overcome traditional views of subjectivity and objectivity.

[Content, Abstracts/Conclusions, Insights, Evidence]
It is this ontological trap, that *François Gilliard* falls in, when he is opting for *Hans Kelsen*'s "Reine Rechtslehre" as a guide. Two forms of legal experience are distinguished, one unhidden and the other closed. The authority of the legal order is, therefore, to be identified as ontological. The state is reduced, thereby, to the rule of law, neglecting all sociological and political elements, and by doing so also the philosophical moments. Despite all the insufficiencies and inadequacies, this attempt is highly significant as a warning for free adaptions of legal theories. The normally unconscious heritage of this kind of legal thought consists in a non-reflected system building within a legal order ("Stufenbau der Rechtsordnung"; "chaîne des normes"), where the ordering principle is characterised merely rational and intellectual. This approach leads to misconceptions of the relations between different legal orders, that cannot be judged based on hierarchical ideas of order, but only founded on a differed view on the complexity of interrelations between multiple legal orders or parts of a unified legal order (see *Roman Schnur*: Einleitung, in: Institution und Recht (Wege der Forschung, vol. 572), ed. Roman Schnur,

Darmstadt: Wissenschaftliche Buchgesellschaft, 1968, pp. VII ss.; with reference to *Santi Romano* and *Maurice-Jean-Claude-Eugène Hauriou*).

[Further Information About the Author]
François Gilliard, born on 25 October 1921, died 27 November 2003, followed his studies in jurisprudence at the University of Lausanne, with semesters at the Sorbonne University in Paris (he studied with *René Le Senne* and *Jean Hyppolite*). From 1952 to 1961 he was extraordinary professor, then until 1987 ordinary professor for private law at the University of Lausanne. He was also charged by lectures on legal philosophy.

[Selected Works of the Same Author]
François Gilliard: La relation sujet-objet et ses avatars dans la génèse du juridique (Travaux des sciences sociales), Lausanne: Droz, 2002.

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Entry 1.18 "Jean Darbellay, Réflections des philosophes et des juristes"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Jean Darbellay
Title: La réflection des philosophes et des juristes sur le droit et le politique
Edition(s): Fribourg: Éditions Universitaires, 1987

[Introduction/Historical Situation and Systematic Context]
For a short introduction to the legal philosophical thought of *Jean Darbellay*, please refer to the first sections of no. 1.11 of this Legal Anthology.

[Content, Abstracts/Conclusions, Insights, Evidence]
In his attempt to define legal philosophy, *Jean Darbellay* confronts the merely theoretical and technical legal science to jurisprudence as a practical science directed toward the fulfilment of justice. "*Histoire, sociologie juridique, science juridique accumulent les connaissances théoriques appelées à jouer un rôle instrumental lorsqu'elles sont mises à profit par le juriste praticien du droit. La science du juriste, en définitive, assume une finalité Elle ne saurait se contonner dans la constatation pure sans trahier la nature du droit. Elle est une science pratique*". Significant is the association between this finality of justice with the nature of law, where slightly modernised natural law theory shows through. Consequently, legal philosophy is identified as an integral part of social philosophy: "*La philosophie du droit s'incorpore, par sa structure et sa méthode, à la philosophie morale. Elle apparaît comme une partie de cette philosophie appliquée à la connaissance approfondie du droit et de la justice, des valeurs morales contenues dans l'ordere juridique et véhiculées par les sociétés politiques*".

[Philosophical Valuation and Jurisprudential Significance]
Such a conception, as held by *Jean Darbellay*, poses the problematical question of the relationship between legal philosophy and general jurisprudence, leading directly to the distinction between experience based legal philosophy and dogmatical founded legal science. Such a dualism can be exposed and explicated based on natural law theory, that has its foundations in *Aristotle*.

[Further Information About the Author]
Jean Darbellay, born 1912, died 18 September 2008, promoted in 1944 at the University of Freiburg im Üechtland (Switzerland), and ten years later he was nominated extraordinary professor. In 1972 he changed to the chair for public law (i.e. constitutional and administrative law), general jurisprudence and legal philosophy at the very same

university and was dean of the faculty for two years, in 1958 and 1967. He was an emeritus since 1982.

[Selected Works of the Same Author]
Jean Darbellay: La règle juridique de la société politique – Son fondement moral et social (Dissertation Universität Freiburg), St. Maurice: Imprimerie de l'Oeuvre St. Augustin, 1945; *Idem*: L'action du pouvoir sur l'évolution du droit, in: Zeitschrift für schweizerisches Recht, N. S. vol. 74/ 1, pp. 117-148, Basel: Helbing & Lichtenhahn, 1955; *Idem*: Emmanuel Kant – Vers la paix perpétuelle (Essai philosophique), Traduction de l'ouvrage avec une introduction historique et critique, Paris: Presses Universitaires de France, 1958; *Idem*: L'objectivité du droit, in: Mélanges en l'honneur de Jean Dabin, Paris: Sirey, 1963, vol. 1; *Idem*: Réflections sur la variabilité du droit naturel, in: Rechtsfindung – Beiträge zur juristischen Methodenlehre, Festschrift für Oscar Adolf Germann zum 80. Geburtstag, Bern: Stämpfli & Cie AG, 1969; *Idem*: La notion de nature chez Aristote et les origines du droit naturel, in: Festschfift für Eugen Isele, ed. Louis Carlen, Freiburg: Universitätsverlag, 1973; *Idem*: Le rapport de droit dans l'évocation des droits de l'homme et des libertés fondamentales, in: Gedächtnisschrift für Peter Jäggi, Freiburg: Universitätsverlag, 1977; *Idem*: Droit et contrainte, in: Recht als Prozess und Gefüge, Festschrift für Hans Huber zum 80. Geburtstag, Bern: Stämpfli & Cie AG, 1981.

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Jacques Maritain: La philosophie Bergsonienne – Études critiques (Bibliothèque de philosophie, vol. 10), Paris: Librairie Marcel Rivière, 2nd ed. 1930; *Idem*: Antimodern – Die Vernunft in der modernen Philosophie und Wissenschaft und in der aristotelisch-thomistischen Erkenntnisordnung, Augsburg 1930; *Idem*: Principes d'une politique humaniste, New York: Éditions de la Maison Française, 1944; *Idem*: Von Bergson zu Thomas von Aquin – Acht Abhandlungen über Metaphysik und Moral, Cambridge 1945; *Idem*: L'homme et l'État, Paris: Presses Universitaires de France, 1953.

17 November *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
1st Section "Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Neo-Kantianism, Neo-Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond"
Entry 1.20 "Michael Walter Hebeisen, Schweizer Juristen-Philosophen"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Michael Walter Hebeisen
Title: Schweizer Juristen-Philosophen – Eine eigenständige schweizerische Tradition der Wissenschaftsphilosophie der Jurisprudenz und der Staatslehre in Auseinandersetzungen mit ausgewählten Strömungen der Rechts- und der Staatsphilosophie sowie der Wissenschaftstheorie in der ersten Hälfte des Zwanzigsten Jahrhunderts (Eine programmatische Skizze für ein interdisziplinäres Forschungsvorhaben)
Edition(s): in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 50, ed. Peter Häberle, Tübingen: J. C. B. Mohr/ Siebeck, pp. 69-100 (extended version in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 651-711)

[Further Information About the Author]
Michael Walter Hebeisen, born on 9th January 1965, after having studied violoncello and musicology at the Conservatory of Berne, followed his studies in jurisprudence at the University of Berne, with semesters abroad at the University of Cambridge. He graduated in 1992 and received his doctorate in 1994, after having collaborated with doctor father *Peter Saladin*.
He then changed for a period of seven years to the Federal Office of Justice, in an entity that was occupied with the preparation of the reform, i.e. the total revision of the Swiss Federal Constitution. In addition, he got a habilitation scholarship from the Swiss National Foundation for Scientific Research, under the survey of *Peter Häberle*, which enabled him to pursue an old-fashioned post-doc journey across Europe. He travelled to Oxford University (University College), where he assisted and contributed to the ongoing reform of British Constitution by the shadow Cabinet of the Labour Party. Back on the Continent, he directed to the "*Dilthey Forschungtsstelle*" and "*Hegel-Archiv*" at Ruhr University of Bochum and to the Humboldt University in Berlin. After a short residence at the "*Faculté de droit de l'Université de Toulouse*" where he studied the theory of *Jean-Claude-Eugène-Maurice Hauriou*, he settled for a long time in Naples where he established contacts with the philosophers of the School of Neo-Historicism, i.e. with *Fulvio Tessitore*, *Giuseppe Cacciatore*, *Giuseppe Cantillo* among others. In consequence of his fascination with the tradition of these thinkers, he undertook to translate selected works by Pietro Piovani (9 volumes), Giuseppe Capograssi (6 volumes), Giovanni Gentile (11 volumes) and

eventually plans an Edition of the works of Bertrando Spaventa (6 volumes).
Back in his home country, he is established as an eminent thinker in the domain of legal philosophy as well as theory of the human sciences.

[Selected Works of the Same Author]
Michael Walter Hebeisen: Souveränität in Frage gestellt – Die Souveränitätslehren von Hans Kelsen, Carl Schmitt und Hermann Heller im Vergleich (Dissertation Universität Bern 1994), Baden-Baden: Nomos 1995 (extract); *Idem*: Staat und Recht als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als Geisteswissenschaften, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2004, pp. 395-456; *Idem*: Krise der universellen Rechtsidee angesichts des Pluralismus der positiven Rechtsordnungen – Pragmatische Nachforschungen aufgrund der Institutionenlehren von Jean-Eugène-Claude Hauriou und Santi Romano, in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 1-65; *Idem*: Die Verfassung als Vermittlerin von Wert- und Gerechtigkeitsvorstellungen? – Geisteswissenschaftliche Überlegungen zum Wert der Verfassung als Hilfe auf dem Weg zum gerechten Zusammenleben von Menschen und Völkern, in: Herausgeforderte Verfassung – Die Schweiz im globalen Kontext (16. Kolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften), ed. Beat Sitter-Liver, Freiburg: Universitätsverlag, 1999, pp. 133 ss.; *Idem*: Schweizer Juristen-Philosophen – Eine eigenständige schweizerische Tradition der Wissenschaftsphilosophie der Jurisprudenz und der Staatslehre in Auseinandersetzungen mit ausgewählten Strömungen der Rechts- und der Staatsphilosophie sowie der Wissenschaftstheorie in der ersten Hälfte des Zwanzigsten Jahrhunderts (Eine programmatische Skizze für ein interdisziplinäres Forschungsvorhaben), in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 50, ed. Peter Häberle, Tübingen: J. C. B. Mohr/ Siebeck, pp. 69-100 (extended version in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 651-711); *Idem*: Liberalismus und Kommunitarismus betreffend das Verhältnis des Rechten zum Guten – Prinzipielle Opposition oder pragmatische Annäherung, Vorrang oder Unabhängigkeit? In: Archiv für Rechts- und Sozialphilosophie (ARSP), supplementary vol. 76, ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2000, pp. 119 ss.; *Idem*: Note sulla filosofia del diritto di Pietro Piovani – Appunti di un giurista ultramontano, Referat gehalten am Studienseminar aus Anlass des 20. Todestages von Pietro Piovani in Neapel vom 29. Juni bis 1. Juli 2000, in: Archivio di storia della cultura (Firenze: Liguori), vol. 14 (2001), ed. Fulvio Tessitore, pp. 289-305; *Idem*: „An sich redet Alles, was ist, das Ja" – Zur Verwendung Friedrich Nietzsches durch den Rechtsphilosophen Carl August Emge, Referat, gehalten auf dem internationalen Kongress der Stiftung Weimarer Klassik „Missbrauch, Ereignis und Kritik – Zur deutschen

Nietzsche-Rezeption zwischen 1933 und 1945“, in: Widersprüche – Zur frühen Nietzsche-Rezeption, ed. Andreas Schirmer and Rüdiger Schmidt, Weimar: Hermann Böhlaus Nachfolger, 2001, pp. 291 ss., also published in: Nietzsche und das Recht (Archiv für Rechts- und Sozialphilosophie, supplementary volume 77), ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2001, pp. 219 ss.; *Idem*: Geschichte der Vergangenheit, Geschichten für die Zukunft in: Erzählungen des Staates, ed. Otto Depenheuer, Wiesbaden: VS Verlag für Sozialwissenschaften, 2010, pp. 35 ss.; *Idem*: Souveränität bei Otto Kirchheimer – Das Dogma der Souveränität zwischen Staatslehre und Politikwissenschaften, in: Otto Kirchheimers Staatsverständnis, ed. Robert Christian van Ooyen and Frank Schale (Reihe „Staatsverständnisse“, ed. Rüdiger Voigt), Baden-Baden: Nomos Verlagsgesellschaft 2010, pp. 87-117; *Idem*: Vom ästhetisch-poëtischen Grundzug des modernen Verständnisses von Geschichte – Im Besonderen von der Urteilskraft in Iurisprudenz und Staatslehre als Geisteswissenschaften, in: Moderne und Historizität, ed. for the „Klassik Stiftung Weimar“ by Stefan Wilke, Weimar: Verlag der Bauhaus-Universität Weimar, 2011, pp. 134-164.

28 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Second Section "Legal Methodology and Scientific Character of Juridprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralistic Alternative of Human Studies"
Introduction
by Michael Walter Hebeisen

> "Es gibt keine besondere Methode, die Erfolg garantiert oder wahrscheinlich macht. Wissenschafter lösen Probleme nicht darum, weil sie einen methodologischen Zauberstab schwingen."
> (*Paul Feyerabend*: Die Wissenschaften in einer freien Gesellschaft, in: Der wissenschaftstheoretische Realismus und die Autorität der Wissenschaften − Ausgewählte Schriften I (Wissenschaftstheorie, Wissenschaft und Philosophie, Band 13), Braunschweig/ Wiesbaden: Vieweg, 1978, p. 353)

[Section 2: "Legal Methodology, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralistic Alternative of Human Studies"]

[Introduction: Methodological vs. Philosophical Foundation of Jurisprudence]
Paul Feyerabend, professor at the Federal Polytechnical School in Zurich ("Eidgenössische Technische Hochschule"), expresses a deep scepticism, when he writes about the "magic baton of methodology" that does not exist and, therefore, cannot guarantee success in science. Hereby, he addresses the risk of pan-methodology, i.e. the fact that methodology is, generally speaking, an expression of insurmountable rationalism and intellectualism. In his monography published in 1975, entitled "Against Method", he had already outlined his anarchistic theory of science, and in his later monography published in 1999, he praises the "Conquest of Abundance", and qualifies abstraction as a fairy tale, to be replaced by the richness of being. By analogy adapted to jurisprudence, this criticism of methodology is more than at its right place, since the law and the legal order are a means to the end of the individual situation, of the individual themselves. The application of the law to the individual case by jurisdiction as well as the objectivation of the law in the positive legal order by the legislator, and in general legal thought, as practised by jurisprudence can alltogether only be successful as a kind of practice in art, based on judicial judgment, because the method alone cannot guarantee successful outcomes in jurisprudence. Even philosophy cannot provide any ascertained ontological or deontological systematic order of normative rules or principles. Rather, one has to opt for an ecology of mind, as this has

been proposed by *Gregory Bateson*: An Ecology of Mind – Collected Essays in Anthropology, Psychiatry, Evolution, and Epistemology, London: Jason Aronson, 1987, first printing San Francisco: Chandler, 1972).
Let us briefly review the selected Swiss contributions on methodology that mainly concern the scientific character of jurisprudence: They virtually all surpass mere methodology, since *Walther Burckhardt* writes on method and its sublimation in a system, *August Simonius* treats the deeper origins of the theory of the sources of law, when referring to the dictum, that "*lex facit regem*" (*Henry de Bracton*), and even *Wilhelm Oswald*, who deals with persistent formalism in legal thinking tends to escape from methodological fields by calling material ethics in cause; *Alois Troller*, finally, favours an inventive and significant enlargement of method by philosophy itself, when he designs his "Grundriss einer selbstverständlichen juristischen Methode und Rechtsphilosophie". If questions of methodology are not set introduced into the context of legal philosophy in a broader sense, the questions of jurisprudence turn out to be only apparent problems (*Gregor Edlin*: "Rechtsphilosophische Scheinprobleme"). A more specific matter consists in the problem of the proper and correct interpretation of the Swiss Civil code, especially how vacations (*lacunae*) in the legal text have to be filled by jurisdictional application (case law).
However, we also have to indicate the propaedeutic importance of methodologically orientated general introductions to jurisprudence in favour of young students, as elaborated, for instance, by *Walther Burckhardt*, by *Claude Du Pasquier*, and especially by *Alois Troller*, who also gives a true introduction to legal philosophy in his writing, entitled "Ein Fussweg zur Jurisprudenz".

[Excursus – Stephen Edelston Toulmin: Jurisprudence as Model for Logics and Epistemology]
From all that, we have to conclude that legal methods and methodology show an ambiguous character, as they are convenient for jurisprudence as a dogmatic art and science, but non-constructive for a philosophically enlightened jurisprudence, as they are enabling and compromising jurisprudence at the same time. This limitation of the usefulness of the legal method also affects logic in general, and even epistemology, as it has been profoundly unveiled by *Stephen Edelston Toulmin*: "Epistemology, in short, has comprised a set of logical-looking answers to psychological-looking questions". What veritable sciences need is a working logic instead of idealised methodology: "Logic is concerned not with the manner of our inferring, or with questions of technique: its primary business is a retrospective, justificatory one − with the arguments we can put forward afterwards to make good our claim that the conclusions arrived at are acceptable, because justifiable, conclusions. [...] Logic is concerned with the soundness of the claims we make − with the solidity of the grounds we produce to support them, the firmness of the backing we provide for them − or, to change the metaphor, with the sort of case we present in defence of our claims. [...] Logic (we may say) is generalised jurisprudence. Arguments can be compared with law-suits, and the claims we make and argue for in extra-legal contexts with claims made in the courts, while the cases we present in making

good each kind of claim can be compared with each other. A main task of jurisprudence is to characterise the essentials of the legal process: the procedures by which claims-at-law are put forward, disputed and determined, and the categories in terms of which this is done. Our own inquiry is a parallel one. [...] Our subject will be the *prudentia*, not simply of *ius*, but more generally of *ratio*" (The Uses of Argument, Cambridge: Cambridge University Press, 1958, p. 6). Such a conception is particularly evident in the case of jurisprudence because of its being a prototype of scientific *prudentia*. Toulmin addresses radical critique to logic and argues "that formal logicians have misconceived their categories, and reached their conclusions only by a series of mistakes and misunderstandings. They seek to justify their paradoxes as the result of thinking and speaking, for once in a while, absolutely strictly; whereas the conclusions the present turn out on examination to be, in fact, not so much strict as beside the point. [...] The over-simplified categories of formal logic have an attraction, not only on account of their simplicity, but also because they fit in nicely with some other influential prejudices" (l. c., p. 146). Toulmin even beholds jurisprudence as a model for logics, and not the inverse way. He is convinced that "by treating logic as generalised jurisprudence and testing our ideas against our actual practice of argument-assessment, rather than against a philosopher's ideal, we shall eventually build up a picture very different from the traditional one". He explains "that the categories of formal logic were built up from a study of the analytic syllogism, that this is an unrepresentative and misleading simple sort of argument, and that many of the paradoxical commonplaces of formal logic and epistemology are arising from the misapplication of these categories to arguments of other sorts". In the following, he argues, "that formal logicians have misconceived their categories, and reached their conclusions only by a series of mistakes and misunderstandings. They seek to justify their paradoxes as the result of thinking and speaking, for once in a while, absolutely strictly; whereas the conclusions the present turn out on examination to be, in fact, not so much strict as beside the point. [...] The over-simplified categories of formal logic have an attraction, not only on account of their simplicity, but also because they fit in nicely with some other influential prejudices" (l. c.).

Confronted with this constellation, *Stephen Edelston Toulmin* raises the following demands: "(1.) the need for a *rapprochement* between logic and epistemology, which will become not two subjects but one only; (2.) the importance in logic of the comparative method – treating arguments in all fields as of equal interest and propriety, and so comparing and contrasting their structures without any suggestion that arguments in one field are 'superior' to those of another; and (3.) the reintroduction of historical, empirical and even – in a sense – anthropological considerations into the subject which philosophers had prided themselves on purifying, more than all other branches of philosophy, of any but *a priori* arguments" (l. c., p. 254). In order to establish such an intellectual enterprise, jurisprudence can serve as a model and prototype, in order to interrupt the false dominance of induction in the domain of analytic theory of sciences, deriving from the pure logics of mathematics. "Geometry and jurisprudence, the traditional models for the sciences, have been displaced in recent centuries from their earlier pre-eminence, and one must acquire an understan-

ding also of the methods of thought characteristic of physics, biology and the other natural – or 'inductive' – sciences. [...] Epistemology can divorce itself from psychology and physiology, and logic can divorce itself from pure mathematics: the proper business of both is to study the structures of our arguments in different fields, and to see clearly the nature of the merits and defects characteristic of each type of argument. [...] Jurisprudence is one subject which has always embraced a part of logic within its scope, and what we called to begin with 'the jurisprudential analogy' can be seen in retrospect to amount to something more than a mere analogy. If the same as has long been done for legal arguments were done for arguments of other types, logic would make great strides forward" (l. c., p. 249, 255).

[For Further Reading]
Paul Feyerabend: Against Method – Outline of an Anarchistic Theory of Knowledge, London: Verso, 1975; *idem*: Conquest of Abundance – A Tale of Abstraction versus the Richness of Being, ed. Bert Terpstra, Chicago/ London: The Universitsy of Chicago Press, 1999; *idem*: Die Torheit der Philosophen – Dialoge über die Erkenntnis (Platonic Phantasies – Concluding Unphilosophical Walk in the Woods), Hamburg: Junius, 1995 (first printing 1990); *idem*: Wissenschaft als Kunst, in: Edition Suhrkamp, vol. 1231, Frankfurt am Main: Suhrkamp, 1984; *idem*: Die Wissenschaften in einer freien Gesellschaft, in: Der wissenschaftstheoretische Realismus und die Autorität der Wissenschaften − Ausgewählte Schriften I (Wissenschaftstheorie, Wissenschaft und Philosophie, Band 13), Braunschweig/ Wiesbaden: Vieweg, 1978;
Stephen Edelston Toulmin: The Uses of Argument, Cambridge: Cambridge University Press, 1958; *idem*: The Philosophy of Science – An Introduction, London: Hutchinson University Library, 1953; *idem*: An Examination of the Place of Reason in Ethics, Cambridge: Cambridge University Press, 1950; *idem*: Foresight and Understanding – An Enquiry Into the Aims of Science, London: Hutchinson, 1961.

24 January 2018 (revised on 19 July) *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.0 "Rudolf von Ihering, Ist die Jurisprudenz eine Wissenschaft?"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Rudolf von Ihering
Title: Ist die Jurisprudenz eine Wissenschaft? – Iherings Wiener Antrittsvorlesung vom 16. Oktober 1868
Edition(s): ed. Okko Behrends. Göttingen: Wallstein, 1998, pp. 47-92

[Introduction]
Rudolf von Ihering's best known writing is without a doubt "Der Kampf um's Recht", where the argumentation is determined by the overall situation of the legal order and the methods of jurisprudence in Germany. Although he had studied with *Friedrich Carl von Savigny*, the head of the so-called Historical School of law, his loyalty was with the adversaries of this leading figure, and the foundation of his legal philosophy has to be sought in *Anton Friedrich Justus Thibaut*, *Georg Wilhelm Friedrich Hegel* and *Eduard Gans*, i.e. in Hegalian dialectics. In his most significant work, the two volumes of "Der Zweck im Recht", he detected a hidden teleology underneath the surface of interests and these unconscious intentions allowed him to found a true philosophy of the positive legal order. The particular egoisms, considered as a system of interactions, results in an inclination that surpasses the egoistic interest of the individual participants in order to present a hidden teleological direction towards the ethical life of the whole legal community and, therefore, towards the absolute value of the concept of law within the legal order (compare *Alexander Somek*: Die Kaserne des Egoismus – Iherings Genealogie der Moralität, in: Der Kampf um's Recht – Forschungsband aus Anlass des 100. Todestages von Rudolf von Ihering, ed. Gerhard Luf and Werner Ogoris, Berlin: Duncker & Humblot, 1995, pp. 57-94). The influence of the legal thought of *Rudolf von Ihering* has not only been of immense importance throughout Europe, but also considerable for the American Continent. *Oliver Wendell Holmes*, *Roscoe Pound*, *Karl N. Llewellyn*, and *Lon L. Fuller* have to be considered to have taken profit from the arguments in Ihering to a high degree. However, it is not so easy to determine the precise influence, as there is rather an inclination in the spirit to be detected (for details see *Robert S. Summers*: Rudolf von Ihering's influence on American legal theory – A selective account, in: Iherings Rechtsdenken – Theorie und Pragmatik im Dienste evolutionärer Rechtsethik (Abhandlungen der Akademie der Wissenschaften in Göttingen, Philologisch-historische Klasse, 3rd Series, No. 216), ed. Okko Behrends, Göttingen: Vandenhoeck & Ruprecht, 1996, pp. 61-76).

[Historical Situation and Systematic Context]

As of special interest in our context, and in order to represent a common reference abroad from Switzerland (after all, the author had a short so to say guest performance in Switzerland, at the University of Basel in 1845), we have selected another essay by *Rudolf von Ihering*, entitled "Ist die Jurisprudenz eine Wissenschaft?", the inaugural lecture at the University of Vienna on 16 October 1868. Apparently, this speech consists in an answer to the militant offence to jurisprudence by *Julius Hermann von Kirchmann* in 1848 in his address "Die Wertlosigkeit der Jurisprudenz als Wissenschaft" (ed. Heinrich H. Meyer-Tscheppe, Heidelberg: Manutius, 1988). Ihering had identified the spirit of Roman law directly as legal philosophy behind the actions of its legal order, and his foundation for legal thought, for jurisprudence as well as for legal philosophy consists in the absolute spirit of law that is active within the historical development or evolution of the legal order. This conviction could serve as a starting point to found a veritable philosophy of positive law, indeed, and signify an abolition of natural law theories as undercurrent legal philosophy, in addition and in completion to jurisprudence.

[Content, Abstracts/Conclusions, Insights, Evidence]
The differentiated arguments cannot be further condensed at this place. Rather, we have to focus on the main insights that should prove to be important for the future self-understanding of jurisprudence and legal philosophy. "Rechtswissenschaft ist definiert als eine Haltung der ständigen Vergegenwärtigung und Reflexion in Bezug auf die rechtskulturell verpflichtenden Gehalte des Rechts. [...] Die Gefahr des schlechten Positivismus ist dem Recht inhärent und kann sich jederzeit verwirklichen, wenn die Rechtswissenschaft versagt. [...] Die Philosophie liefert die ethischen Grundprinzipien des Rechts, die Rechtsgeschichte die Institutionen des Rechts. Geschichte wird dabei begriffen als der in die Gegenwart hineinreichende Erfahrungsraum des Menschengeschlechts" (*Okko Behrends*: Iherings Evolutionstheorie des Rechts zwischen Historischer Rechtsschule und Moderne – Eine wissenschaftliche Einordnung des Iheringschen Rechtsdenkens aus Anlass der Herausgabe der Wiener Antrittsvorlesung, in: Rudolf von Ihering, Ist die Jurisprudenz eine Wissenschaft? – Iherings Wiener Antrittsvorlesung vom 16. Oktober 1868, ed. Okko Behrends, Göttingen: Wallstein, 1998, pp. 98 s.). In the last consequence, we encounter a historical, yet human historistic theory of law, that includes a dynamic view of the evolutionary development of the legal order as well as of jurisprudence. This prospective is obviously directed towards an understanding of application of the law as a mere automatism. The fulfilment of the idea and ideals of law is not at all self-understanding, rather as an ambitious task for scientific jurisprudence. This scientific discipline, however, is not to be conceived as a merely dogmatic system of the positive legal order, but as humanistic *iuris-prudentia* with its singular elegant method of a stand-alone science, far beyond legal practice. As the last and latest sources of law, human consciousness and practical needs are identified by Ihering. Historical evolution does not mean natural history with its immanent natural laws, but rather progressive development of the truths that are embedded in human and, therefore, cultural history as a product of the absolute spirit in a Hegelian sense. The prototype of a jurisprudent has to unify

jurisprudence, philosophy, and history, therefore. This argument leads to an all new defined relationship between legal theory and legal practice.
"Und wenn ich jetzt die Summe ziehe von dem, was ich gesagt habe, so nenne ich die Rechtswissenschaft das wissenschaftliche Bewusstsein in Dingen des Rechts, das Bewusstsein, das nach Seiten der Rechtsphilosophie hin die letzten Gründe zu erforschen hat, denen das Recht auf Erden seinen Ursprung und seine Geltung verdankt, nach Seiten der Rechtsgeschichte ihm folge auf allen seinen Wegen, die es genommen hat, um von Stufe auf Stufe zur höheren Vollkommenheit sich zu erheben, nach Seiten der Dogmatik die zum praktischen Gebrauch geordnete wissenschaftliche Darstellung aller Erfahrungen und Thatsachen, welche den augenblicklichen Höhen- und Endpunkt unserer Erkenntniss und Erfassung des Rechts in sich schliessen".
There is evidence that Rudolf von Ihering is inspired in his genius by Hegelian philosophy, despite his allusions to evolutionary theory building (compare the differentiated view in *Wolfgang Pleister*: Persönlichkeit, Wille und Freiheit im Werke Iherings (Münchner Universitätsschriften der Juristischen Fakultät, Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung, vol. 51), Ebelsbach: Rolf Gremer, 1982, pp. 221 ss.). His method is thoroughly humanistic and not at all naturalistic; moreover, he does not ask for help in metaphysics in order to explain the deeper structure of legal order, but rather appeals to the artfulness of reason itself to reconstruct the philosophical grounds of law and jurisprudence. However, the author unfortunately did not have the strength to formulate his proper approach in a concluded systematic manner.
"Depressionen waren ihm nicht weniger vertraut als Euphorien, entstanden doch seine Werke unter 'greulichsten Geburtswehen'. Die sich zuweilen bis zur Impotenz steigernde Mühseligkeit, mit der er produzierte, hinderte ihn daran, sich etwas Geniales zu leisten zuzutrauen" (*Hermann Klenner*: Ihering's Kampf um's Recht, in: Rudolf von Ihering, Der Kampf um's Recht (1872), Freiburg im Breisgau/ Berlin: Rudolf Haufe, 1992, pp. 146 s.). Nevertheless, his two-volume monography on "Zweck im Recht" has to be considered as masterful writing in legal philosophy and is worth being read in its entirety.

[Further Information About the Author]
Rudolf von Ihering, born on 22 August 1818 in Aurich (Germany), died on 20 September 1892 in Göttingen, studied jurisprudence at the Universities of Heidelberg, München, and Göttingen, and from 1838 at the University of Berlin, where he received his doctorate in 1842, and where he was a private lecturer. In 1845, he was called to the University of Basel, but only for one year, before going to Rostock, Kiel and Giessen; from 1872, he taught at the University of Vienna, where *Eugen Huber* counted among his scholars, before settling definitively in Göttingen in 1872.
Rudolf von Ihering had experienced *Friedrich Carl von Savigny* in person and for sure he knew his writings in detail, as he published a series of essays about "Die historische Schule der Juristen" in the periodical "Literarische Zeitung" (printed in Berlin). However, he cannot be considered as a member of the so-called Historical School of law, and he had a temporary sympathy for the "Interessenjurisprudenz" and founding his very own

personal School.
Rudolf von Ihering's most popular, however not the most important, writing "Der Kampf um's Recht" has gained wide reception, as it was translated to fifty different languages. In his most significant work, the two volumes of "Der Zweck im Recht", he detected a hidden teleology underneath the surface of interests and these unconscious intentions allowed him to found a true philosophy of the positive legal order.

[Selected Works of the Same Author]
Rudolf von Ihering: Der Kampf um's Recht (1872), ed. Hermann Klenner, Freiburg im Breisgau/ Berlin: Rudolf Haufe, 1992; *Idem*: Der Zweck im Recht, 2 vols., Leipzig: Breitkopf und Härtel, 1877-1883.

[For Further Reading]
Okko Behrends (Ed.): Iherings Rechtsdenken – Theorie und Pragmatik im Dienste evolutionärer Rechtsethik (Abhandlungen der Akademie der Wissenschaften in Göttingen, Philologisch-historische Klasse, 3rd Series, No. 216), Göttingen: Vandenhoeck & Ruprecht, 1996;
Helmut Coing: Der juristische Systembegriff bei Rudolf von Ihering, in: Philosophie und Rechtswissenschaft – Zum Problem ihrer Beziehung im 19. Jahrhundert (Studien zur Philosophie und Literatur des Neunzehnten Jahrhunderts, vol. 3), ed. Jürgen Blühdorn und Joachim Ritter, Frankfurt am Main: Vittorio Klostermann, 1969, pp. 149 ss.;
Athanasios Gromitsaris: Theorie der Rechtsnormen bei Rudolf von Ihering – Eine Untersuchung der Grundlagen des deutschen Rechtsrealismus, Berlin: Duncker & Humblot, 1989;
Gerhard Luf/Werner Ogoris (Ed.): Der Kampf um's Recht – Forschungsband aus Anlass des 100. Todestages von Rudolf von Ihering, Berlin: Duncker & Humblot, 1995;
Wolfgang Pleister: Persönlichkeit, Wille und Freiheit im Werke Iherings (Münchner Universitätsschriften der Juristischen Fakultät, Abhandlungen zur rechtswissenschaftlichen Grundlagenforschung, vol. 51), Ebelsbach: Rolf Gremer, 1982.

21 November *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.1 "Walther Burckhardt, Lücken des Gesetzes"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Walther Burckhardt
Title: Die Lücken des Gesetzes und die Gesetzesauslegung
Edition(s): in: Abhandlungen zum schweizerischen Recht, N. S. vol. 8, Bern: Stämpfli & Cie., 1925, pp. 62-106

[Introduction/Historical Situation and Systematic Context]
In our introduction and commentary of *Walther Burckhardt*'s "Method and System of Law", we have argued that contradictions as well as vacancies within the legal order cannot be simply be detected and resolved by using method; instead jurisprudential judgment has to be addressed with its thoroughly active, creative intervention. When it comes to fill an omission within the legal order, the rule of the 1st article of the Swiss Civil Code is understood in a broader than literal sense, i.e. as expression of a general attitude towards a highly creational interpretation of law throughout. In an essay dedicated to the Bernese Association of Lawyers and Jurisprudents from 1925, Burckhardt discusses the problem of voids extensively.

[Content, Abstracts]
"Das im echten Sinn lückenhafte Gesetz genügt nicht dem Begriffe des Rechts; das im unechten Sinn lückenhafte Gesetz genügt nicht der Idee des Rechts. Was erkennen lässt, dass diese beiden Begriffe nicht ohne praktische Bedeutung, also nicht ohne Berechtigung sind. Was dem Begriff des Rechts nicht entspricht, kann nicht rechtens sein; was der Rechtsidee nicht entspricht, soll nicht rechtens sein. Nachdem Rechtsbegriff bestimmt sich, was gelten kann, nach der Rechtsidee, was gelten soll". In pratice jurisprudence does not doubt of the validity of a norm as a shown part of the legal order. "Was logisch korrekt, aber ethisch sinnlos ist, kann nicht Anspruch auf Exitenzberechtigung machen". And even though it is valid law.

[Conclusions, Insights, Evidence]
The analysis of the problem of vacancies by *Walther Burckhardt* is bribing but concludes without a satisfying solution. With logical and methodological estimations, an answer to the problem remains impossible; philosophical considerations, that could provide arguments to overcome the paradox, however, are rejected by the author. At the same time, such a resolution would require a completion of receptive hermeneutics as a method of interpreting the law by a kind of productive hermeneutics as a guideline or process for

the making of law.

[Further Information About the Author]
Walther Burckhardt, born 19 May 1871 in Riehen, died 1 October 1939 in Berne, pursued his legal studies at the Universities of Leipzig, Neuchâtel, Berlin and Berne, where he graduated with a doctorate with *Eugen Huber*. From 1896 onwards, he served the federal administration, 1902 he was nominated ordinary professor of the University of Lausanne, and 1909 he changed to the chair for Swiss federal law at the University of Berne. Together with *Carl Hilty* he was editor of the "Politischen Jahrbuchs" between 1910 and 1917. From 1923 to 1928, he took part in the delegation at the League of Nations and was judge at the international court in Den Haag.
He is known best for his "Kommentar zur Schweizerischen Bundesverfassung" (3. ed. 1931). Similar as *Eugen Huber*, but in an all different way, he adhered to Neo-Kantianism and referred to *Rudolf Stammler*. In his main contributions to legal theory, "Die Organisation der Rechtsgemeinschaft" (1927), "Methode und System des Rechts" (1936) and "Einführung in die Rechtswissenschaft" (1939) he developed a coherent theory of the legal order as a completed system of law. Law is mainly concepted as a means to the ends of legal politics, as an instrument to realise the tasks of the state in an understanding as the institution that enforces the rule of law. In this intention, he clearly separates the concept of law from the idea of law or the ideal law and holds a strong distinction of "Sein" and "Sollen". In 1939, he committed suicide under the impression of the decline of the order of free states and the breakdown of liberal international law.
For further information, please consult:
Arnold Gysin: Walther Burckhardt als Rechtsphilosoph, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 182 ss. (first printing in: Zeitschrift des Bernischen Juristenvereins, vol. 1940, pp. 105-111); *Idem*: Zum rechtstheoretischen Vermächtnis Walther Burckhardts, in: Zeitschrift des Bernischen Juristen-Vereins, vol. 107 (1971), pp. 23 ss.;
Hans Huber: Walther Burckhardt, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 485ss.; *Idem*: Zur Einführung, in: Aufsätze und Vorträge 1910-1938, ed. idem, Bern: Stämpfli & Cie., 1970, pp. 9 ss.;
Kurt Naegeli-Bagdasarjanz: Walther Burckhardts Rechtsphilosophie (Zürcher Beiträge zur Rechtswissenschaft, N. S. vol. 229), Aarau: Sauerländer, 1961.

[Selected Works of the Same Author]
Walther Burckhardt: Organisation der Rechtsgemeinschaft – Untersuchungen über die Eigenart des Privatrechts, des Staatsrechts und des Völkerrechts, Basel: Helbing & Lichtenhahn, 1927; *Idem*: Methode und System des Rechts mit Beispielen, Zürich: Polygraphischer Verlag, 1936; *Idem*: Die Lücken des Gesetzes und die Gesetzesauslegung, in: Abhandlungen zum schweizerischen Recht, N. S. vol. 8, Bern: Stämpfli & Cie., 1925, pp.

62-106; *Idem*: Recht als Tatsache und als Postulat, in: Festgabe für Max Huber zum 60. Geburtstag, Zürich: Schulthess, 1934; *Idem*: L'État et le droit, in: Zeitschrift für Schweizerisches Rechts, ed. Eduard His, N. S. vol. 50, Basel: Helbing & Lichtenhahn, 1931; *Idem*: Die Krisis der Verfassung (1838), in: Aufsätze und Vorträge 1910-1938, Bern: Stämpfli & Cie., 1970, pp. 340ss.; *Idem*: Über das Verhältnis von Recht und Sittlichkeit (1922); *Idem*: Staatliche Autorität und geistige Freiheit 1936), beide in: Aufsätze und Vorträge 1910-1938, ed. Hans Huber, Bern: Stämpfli & Cie., 1970, pp. 35 ss. resp. pp. 64 ss.

[For Further Reading]
Briefwechsel zwischen *Walther Burckhardt* und *Arnold Gysin*, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 188-211.

7 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.2 "Arthur Baumgarten: Wissenschaft vom Recht und ihre Methode"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Arthur Baumgarten
Title: Die Wissenschaft vom Recht und ihre Methode, 2 vols.
Edition(s): Tübingen: J. C. B. Mohr, 1920/ 1922 (reprint Aalen: Scientia, 1978)

[Introduction/Historical Situation and Systematical Context]
In his most extended writing, covering three volumes, *Arthur Baumgarten* treats jurisprudence and its methods, whereas the scientific character of jurisprudence is discussed on the background of a vast knowledge of the common-sense philosophy of that time. The principal work of the author is dedicated to his fellow professor at the University of Geneva, the private law jurisprudent *Gottlieb August Meumann* (compare: Prolegomena zu einem System des Vermögensrechts (Studien zur Erläuterung des bürgerlichen Rechts vol. 12), Breslau: Marcus, 1903; and *Idem*: Observations sur le système du droit privé, Publisher, Georg & Cie, 1909).
In the 2nd part, a casuistic presentation of the different partitions of legal studies covers more than 500 pages, followed by an attempt to critically represent the method of jurisprudence. Eventually, the fundamentally diverse principles of teleological and positivistic method and the respective currents are disqualified by interpreting them as mere elements and moments. The task for legal philosophy is determined as follows: "Die Rechtsphilosophie hat die Aufgabe, das Recht als Gegenstand der Rechtswissenschaft begrifflich zu bestimmen, in Aufstellung der höchsten Prinzipien des Rechts den Zusammenhang des Rechts mit einer universellen Weltbetrachtung zu gewährleisten und als Methodenlehre der Rechtswissenschaft die verschiedenen Wege der Forschung zu weisen". The first aim consists in a merely dogmatical construction of adequate conceptions, whereas the last task is reduced to merely methodological questions that fall within the narrow frame of logics. The intermediate task for legal philosophy is not provided by the author, and later he explicitly declares it as temporarily or generally impossible.
For further information about the context of this monumental monography within the principal writings of *Arthur Baumgarten*, please consult nos. 1.9 and 3.2 of this Legal Anthology.

[Content, Abstracts/Conclusions, Insights, Evidence]
The first part of the monumental writing by *Arthur Baumgarten* on scientific jurisprudence and its methods provides the theoretical ground, whereas the practical questions are

related to the second partition. In consequence to an eventual positivistic approach, the problems *de lege ferenda* are separated from the problems *de lege lata*, thereby following the tendency of "Begriffsjurisprudenz", of modernised Pandect School. The inclination of the author is towards a metaphysically founded Liberalism, in his own words; this intention has not been worked out, however, and it remains uncertain how these two historically different and diverse things should be brought together. This is just another way not only to declare that legal philosophy and jurisprudence have no common subject, but even worse that jurisprudence is only a maiden of legal politics, or even a servant in the service of power, that the law is to be understood as an instrument to extrinsic purposes. Let us briefly reconsider the arguments in short: Jurisprudence cannot be reduced to aspects *de lege lata*, but rather has to evolve into a constructive legal theory, i.e. has also to consider aspects *de lege ferenda*. So far, so well. These two qualifications, however, are identified with the formal and material aspects of the legal order. The virtue of positivism is described with the follwing metaphor: "Die Menschen brauchen ein Ruhekissen, auf das sie von Zeit zu Zeit ihr schwaches und müdes Haupt legen können, auch wenn es sich nicht gerade um die Befriedigung des Schlafbedürfnisses handelt. Es wäre zuviel an Verantwortung dem Menschen aufgebürdet, wenn er nicht bisweilen das, was die anderen regelmässig in gleicher Lage tun, unbesehen als richtig annehmen dürfte. Dass wir mit diesen Ausführungen weder übertriebener Denkfaulheit noch gehässiger Verdächtigung derjenigen, die den von der Sitte vorgeschriebenen Weg nicht einhalten, das Wort reden möchten, braucht kaum ausdrücklich gesagt zu werden". Such a position, however, is an eloquently covered draw, a stalemate, an unsolved dilemma in a dualistic structure of isolated and repartitioned problems. Eventually, such an attempt must end in an abolition of autonomy and leads directly to heteronomy, this in contrast to the Kantian principles of normativity, called in case.

In general terms, *Arthur Baumgarten*'s argumentation follows a principally dualistic method, and therefore the counterparts are often not really related to each other but are only identified and remain unbridged. "Der Unterschied zwischen Recht und Sittlichkeit besteht in Wahrheit darin, dass das Recht anders als die Sittlichkeit eine positive, das heisst nicht eine notwendig der objektiven Vernunft entsprechende, sondern durch eine beschränkte, individuelle Vernunft festgelegte Lebensordnung ist. [...] In diesem Sinne dürfen wir sagen, dass das Recht eigentlich nichts anderes als eine Art der Moral sei". Despite this confession, the legal order is intended to be treated in the way of classical positivism, where coherent construction is the only claim. Positivism means relativism in a certain sense, and criticism remains unfounded, cannot be motivated in terms of methodology, nor in the current framework of Neo-Kantianism. In conclusion, the outcome is very similar to the legal thought by *Gustav Radbruch*, who also was a penal lawyer practicing legal philosophy, as such is regularly the case in German Universities. Without respect to pluralism, the reference to worldview, to a common opinion of life leads only to doctrinarism, that cannot serve as a common ground for scientific theories that are founded in philosophically reflecting thought.

[Philosophical Valuation and Jurisprudential Significance]
The encyclopaedic spirit of all studies by *Arthur Baumgarten* provides a broad knowledge of his time, that is analysed pragmatically in function of legal practice. The valuations and judgments remain, however, eclectic because there is a lack of a consolidated philosophical system, which would only allow to refer the arguments to a systematic coherent conception of legal philosophy.

[Further Information About the Author]
Arthur Baumgarten, born 31 March 1884 in Königsberg, dies 27 November 1966 in Berlin (East), was originally a German citizen, but from 1936 also a Swiss citizen, as he married Nina Helena von Salis-Soglio. He prosecuted his legal and philosophical studies at the Universities of Tübingen, Geneva, Leipzig and Berlin, where he received his promotion in 1909. Until 1920 he was professor in Geneva, from 1920 to 1923 in Cologne, between 1923 and 1930 in Basel, between 1930 to 1933 in Frankfurt am Main, before he returned resp. emigrated back to Basel, where he remained until 1949. He then decided to settle in Berlin (East), where he was professor at the Humboldt University until 1953. He originally taught penal law, however his main subject became more and more legal philosophy. In his last period of life, living in the German Democratic Republic, he also signed as chief editor of the periodical "Sozialismus", and finally contributed to the theoretical foundations of the socialist regime of Eastern Germany.
His philosophy of law can best be described as syncretistic, as he changed from moralistic views to Kantian criticism and varied between a conservative mood to socialist opinions. Moreover, his theory was characterised by the separation between morality and law and their interconnection. In our treatment we shall focus on the early period, when his fundamental conceptions show best in their origins and consolidation, namely in his works about "Die Wissenschaft vom Recht und ihre Methode" (1920) and his contribution "Rechtsphilosophie" to the "Handbuch der Philosophie" (1934).
For more information, please see:
Karl Polak (Ed.): Festschrift Arthur Baumgarten zu seinem 70. Geburtstag, Berlin: VEB Deutscher Zentralverlag, 1960;
Gerd Irrlitz: Rechtsordnung und Ethik der Solidarität – Der Strafrechtler und Philosoph Arthur Baumgarten, Berlin 2008;
Christina Peschel: Arthur Baumgarten, in: Rechtsgeschichtswissenschaft in Deutschland 1945 bis 1952, ed. Horst Schröder, Frankfurt am Main: Vittorio Klostermann, 2001, S. 129-150;
August Simonius: Wissenschaftliche Weltanschauung und Rechtswissenschaft – Zur Rechtsphilosophie Arthur Baumgartens, in: Zeitschrift für Schweizerisches Recht, ed. Eduard His, N. S. vol. 49, Basel: Helbing & Lichtenhahn, 1930.

[Selected Works of the Same Author]
Arthur Baumgarten: Die Wissenschaft vom Recht und ihre Methode, 2 vols., Tübingen: J. C. B. Mohr, 1920/ 1922 (reprint Aalen: Scientia, 1978); *Idem*: Erkenntnis, Wissenschaft, Philo-

sophie – Erkenntniskritische und methodologische Prolegomena zu einer Philosophie der Moral und des Rechts, Tübingen: J. C. B. Mohr, 1927 (reprint Aalen: Scientia, 1978); *Idem*: Der Weg des Menschen – Eine Philosophie der Moral und des Rechts, Tübingen: J. C. B. Mohr, 1933 (reprint 1978); *Idem*: Rechtsphilosophie, in: Handbuch der Philosophie, Section IV: Staat und Geschichte, München/ Berlin: R. Oldenbourg, 1934, pp. 3 ss.; *Idem*: Grundzüge der juristischen Methodenlehre, Bern 1939 (reprint, ed. Hermann Klenner: Freiburg im Breisgau: Rudolf Haufe, 2005); *Idem*: Die Geschichte der abendländischen Philosophie – Eine Geschichte des geistigen Fortschritts der Menschheit, Genève: Imprimérie de St. Gervais, 1945; *Idem*: Die Entwicklung der Idee der Demokratie und des Rechtsstaates in der Neuzeit, Stuttgart: Fritz Mittelbach, 1946; *Idem*: Ansprache an Kants 150. Todestage, Berlin: Akademie-Verlag, 1954; *Idem*: Bemerkungen zur Erkenntnistheorie des dialektischen und historischen Marxismus, Berlin: Akademie-Verlag 1957; *Idem*: Vom Liberalismus zum Sozialismus, Berlin: Akademie-Verlag, 1967; *Idem*: Rechtsphilosophie auf dem Wege – Vorträge und Aufsätze aus fünf Jahrzehnten, Berlin: Akademie-Verlag, 1972.

20 November 2017 *Michael Walter Hebeisen*

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2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.3a "Arnold Gysin, Naturrechtslehre und Rechtspositivismus"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Arnold Gysin
Title: Naturrecht und Positivität des Rechts
Edition(s): in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969), pp. 48-81

[Introduction/Historical Situation and Systematic Context]
Arnold Gysin intended originally to promote at the University of Berne with a legal philosophical thesis with *Eugen Huber*; however, the latter delegated him to his younger colleague *Walther Burckhardt* who remained his mentor until his death ("Die Lehre vom Naturrecht bei *Leonhard Nelson* und das Naturrecht der Aufklärung"). The interest of Gysin has been directed towards the critique of jurisprudence as it had been addressed by *Leonard Nelson*, who originated from Low-Saxony and represented a key figure in the domain of German legal thought (please consult his well-known principal writing: Die Rechtswissenschaft ohne Recht – Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts, insbesondere über die Lehre von der Souveränität, Leipzig: Veit & Comp., 1917). Nelson principally counts to the Kantian and therefore idealistic current within legal philosophy, however he stands for a third orientation, going back to the Immanuel Kant-scholar *Jakob Friedrich Fries*. These relations turned out to be very important in order to understand the general attitude of Gysin towards jurisprudence and legal philosophy.
Jakob Friedrich Fries (refugeed in Switzerland during the so-called Helvetik period) distinguished apprehension radically from reason, and thereby he criticised the critique of reason and cognition, as it had been established by *Immanuel Kant*. In the understanding of Fries, reason was not to be considered as lucid and enlightened but rather as dark, turbid, and partially unconscious. Based on such concrete insights, philosophy has to build a system of metaphysics by reflecting these pieces of conscious reason and to identify principles. Such a critique of reason is grounded in psychological analysis, i.e. the psychological approach is integrated into theoretical philosophy. Generally, reason is only to be considered as conscious, where it is accompanied by concrete application and illustrated by conception or perception. Fries had *Carl Gustav Jung* among his students at the University of Jena, the grandfather of the psychoanalyst with the very same name; the family Jung had to emigrate to Switzerland, and Jung was asked to reorganise the Faculty of medicine at the University of Basel, recommended by *Alexander von Humboldt*.

The basic conviction of *Jakob Friedrich Fries* lies in the systematics of legal philosophy. Every philosophical reflection is declared to be natural law in effect and, therefore, a philosophical enlightened jurisprudence equals a critique of positive legal order. Critisism, however, is also addressed to natural law theory, and the general intention consists in founding a renewed natural law theory, in consequence. These thoughts show all um already in the title of the principal writing in case: "Philosophische Rechtslehre und Kritik aller positiven Gesetzgebung, mit Beleuchtung der gewöhnlichen Fehler in der Bearbeitung des Naturrechts" (Jena: Johann Michael Mauke, 1803; reprint in: Sämtliche Schriften, vol. 9: Schriften zur angewandten Philosophie, vol. 1, Aalen: Scientia, 1971). This work is highly recommended for further reading...
Leonard Nelson has been attracted by the so-called Fries school early in his career and decidedly defended the philosophical character of the practical philosophical applications of the psychological inclined theory of cognition. In constant dispute and controversy with the rich number of Fries scholars, representing the savant intelligence of his time, Nelson proposed an application of the moral philosophy to legal thought. As a communist, converted to a socialist or socio-democratic Nelson established on the basis of this philosophical orientation a profoundly cardinal and categoric criticism of virtually all currents of legal thought. And his critique mainly of positivistic inclinations has been heard and discussed vividly in his time. We do not consider as Nelson's principal writing his polemic, yet militant "Jurisprudence Without Law", but rather his extended and comprehensive "System der philosophischen Rechtslehre und Politik" (the 3rd vol. of: Vorlesungen über die Grundlagen der Ethik, Leipzig: Peter Reinhold, 1924), a book that is recommended for further reading.
Let us briefly reconsider the practical philosophical background of this critique that has his foundations in a certain view of ethical and moral claims. This connection and intimate relation are founded in natural law theory, now gently modernised and not practised in the old school manner. The intention is to direct normative claims of all kinds towards a material and value based normative theory that includes the legal order as well as the Kantian moral law ("Sittengesetz" or "Moralgesetz"). Thereby duty-based normative theory is complemented by a novel value-based normative order. This approach, however, does not directly leads to the so-called "materiale Wert-Ethik" by *Max Scheler* or *Nicolai Hartmann*, but rather to a revival of natural law theory, which is highly problematic in terms of the heritage of Kantianism as philosophical modernism (and ultimately on a basis of protestant ethics).

[Content, Abstracts/Conclusions, Insights, Evidence]
*Arnold Gysin'*s interest is clearly focused on the question of the application of the legal order. The structure of legal order is routed in postulates: "Sie sind allgemeine Bedingungen, die erfüllt sein müssen, um das 'Rechtsgesetz', oder wie man es in der Rechtsphilosophie öfters nennt, das 'ungeschriebene Gesetz' auf das Ganze einer menschlichen Gesellschaft überhaupt erst anwenden zu können. Die Postulate sind [...] 'Anforderungen, die an den Zustand einer Gesellschaft zu stellen sind, damit er ein

Rechtszustand zu heissen verdient'" (Zur Rechtsphilosophie von Jakob Friedrich Fries und Leonard Nelson, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, p 153). It turns out, in conclusion, that "die Bedingungen der Rechtlichkeit einer Gesellschaft (Nelson) oder die regulativen Leitlinien, nach denen sich die menschliche Gesellschaft allmählich den Forderungen der Gerechtigkeit annähern kann (Fries), dem Sinn nach nichts anderes bedeuten als das, was Juristen und Rechtsphilosophen heute als 'Rechtsidee' bezeichnen. Dabei liegt das Schwergewicht in der Fries-Nelsonschen Fassung auf der Sichtbarmachung einiger von historischen Besonderheiten unabhängiger Strukturen der Rechtsordnung und der für ihre inhaltliche Ausgestaltung massgebenden Grundprinzipien". These reflections indicate the general setting of the legal philosophical thought of Gysin.

As leading text by *Arnold Gysin*, we have selected the essay on "Naturrecht und Positivität des Rechts", where the traditional misunderstandings of natural law theory are addressed and identified as rationalism, anarchism, abstraction and formalism. As so-called material principles of legal and social order, foundationalism, equality and natural positivism are highlighted. The core concept seems to be positivism in an understanding of natural law theory and within the Thomist tradition. The positivity of legal order means directly the elimination of natural law theory, according to Gysin. "Man beachte aber, dass diese Aufhebung des Naturrechts, die in einer fertig gebildeten Rechtsordnung auf der ganzen Linie erfolgen muss, durch eine rein naturrechtliche Überlegung begründet ist, durch welche das naturrechtliche Denken als solches nicht aufgehoben wird: Die Idee der Positivität ist hier gedacht als Präzisierung des Gerechten. Und nicht aus dem Willensursprung als solchem, sondern aus der inhaltlichen Gerechtigkeit fliesst nach wie vor die verbindliche Kraft der polisitiven Bestimmung. Mit anderen Worten: das materiale Prinzip des Rechts bildet die feste Schranke der Positivität [...] / Das heisst für uns, dass auch nach der Ablehnung des Naturrechts das naturrechtliche Denken bestehen bleibt als die Methode der Rechtserkenntnis (oder der Rechtsfindung, was im Grund dasselbe bedeutet)". Looking back, this differentiation of natural law and its implementation into positivist legal thought (as a kind of natural law methodology) seems to be highly problematic, however.

These arguments have to be completed by those put forward by *Arnold Gysin* in two other essays, entitled "Grundlagen des Naturrechts und des Rechtspositivismus", and "Rechtsphilosophie und Jurisprudenz", respectively, that can be considered as a trilogy of fundamental essays (se nos. 2.3b and 1.7), altogether trying to revitalise natural law theory in order to overcome predomination positivism, however not in a Catholic or Scholastic tradition, but on the basis of modified Kantianism and Fichteanism (whereas in *Jakob Friedrich Fries* reason is routed in the un-conscious, in *Johann Gottlieb Fichte* critical cognition is founded in self-consciousness).

[Further Information About the Author]

Arnold Gysin, born 29 August 1897 in Basel, died 13 October 1980 in Lucerne, obtained his

doctorate in 1923 at the University of Berne, before practicing as a lawyer in Zurich and Lucerne. From 1924 to 1934 he was a private lecturer at the University of Basel. Between 1952 and 1968, he was a federal judge at the insurance court, in the years 1960 and 1961 its president.

[Selected Works of the Same Author]
Arnold Gysin: Die Lehre vom Naturrecht bei Leonhard Nelson und das Naturrecht der Aufklärung (Dissertation Universität Bern 1924, bei Walther Burckhardt), Berlin-Grunewald: Walther Rothschild, 1924, 139 pp.; *Idem*: Rechtsphilosophie und Jurisprudenz, Zürich: Girsberger & Co., 1927, 54 pp.; *Idem*: Recht und Kultur auf dem Grunde der Ethik, Zürich: Girsberger & Co., 1929, 48 pp.; *Idem*: Ungeschriebenes Gesetz und Rechtsordnung – Mit Gedanken zur Rechtsphilosophie von Jakob F. Fries und Leonhard Nelson, in: Festschrift für Fritz von Hippel zum 70. Geburtstag, ed. Josef Esser and Hans Thieme, Tübingen: J. C. B. Mohr, 1967; *Idem*: Rechtsgedanke und Kulturgedanke im Verhältnis von Gesetzesethik und Wertethik; *Idem*: Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, beide in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969; *Idem*: Zur rechtstheoretischen Vermächtnis Walther Burckhardts, in: Zeitschrift des Bernischen Juristen-Vereins, vol. 107 (1971), pp. 23 ss.; *Idem*: Bindung und Offenheit des Rechts in rechtsphilosophischer Sicht, in: Homo Creator, Festschrift für Alois Troller, ed. Paul Brügger, Basel: Helbing & Lichtenhahn, 1976, pp. 303 ss.

[For Further Reading]
Jakob Friedrich Fries: Philosophische Rechtslehre und Kritik aller positiven Gesetzgebung, Jena: Johann Michael Mauke, 1803 (reprint in: Sämtliche Schriften, vol. 9: Schriften zur angewandten Philosophie, vol. 1, Aalen: Scientia, 1971);
Arnold Gysin: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969;
Leonard Nelson: Die Rechtswissenschaft ohne Recht – Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts, insbesondere über die Lehre von der Souveränität, Leipzig: Veit & Comp., 1917 (2nd ed. Göttingen/ Hamburg: Öffentliches Leben, 1949); *Idem*: Vorlesungen über die Grundlagen der Ethik, Band 3: System der philosophischen Rechtslehre und Politik, Leipzig: Peter Reinhold, 1924;
Christoph Westermann: Recht und Ethik bei Fries und Nelson, in: Recht und Ethik – Zum Problem ihrer Beziehung im 19. Jahrhundert (Studien zur Philosophie und Literatur des Neunzehnten Jahrhunderts, vol. 9), ed. Jürgen Blühdorn and Joachim Ritter, Frankfurt am Main: Vittorio Klostermann, 1970, pp. 113 ss.

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Entry 2.3b "Arnold Gysin, Philosophische Grundlagen"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Arnold Gysin
Title: Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus
Edition(s): in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 82 ss.

[Introduction/Historical Situation and Systematic Context]
Arnold Gysin intended originally to promote at the University of Berne with a legal philosophical thesis with *Eugen Huber*; however, the latter delegated him to his younger colleague *Walther Burckhardt* who remained his mentor until his death ("Die Lehre vom Naturrecht bei *Leonhard Nelson* und das Naturrecht der Aufklärung"). The interest of Gysin has been directed towards the critique of jurisprudence as it had been addressed by *Leonard Nelson*, who originated from Low-Saxony and represented a key figure in the domain of German legal thought (please consult his well-known principal writing: Die Rechtswissenschaft ohne Recht – Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts, insbesondere über die Lehre von der Souveränität, Leipzig: Veit & Comp., 1917). Nelson principally counts to the Kantian and therefore idealistic current within legal philosophy, however he stands for a third orientation, going back to the Immanuel Kant-scholar *Jakob Friedrich Fries*. These relations turned out to be very important in order to understand the general attitude of Gysin towards jurisprudence and legal philosophy.
Jakob Friedrich Fries (refugeed in Switzerland during the so-called Helvetik period) distinguished apprehension radically from reason, and thereby he criticised the critique of reason and cognition, as it had been established by *Immanuel Kant*. In the understanding of Fries, reason was not to be considered as lucid and enlightened but as dark, turbid, and partially unconscious. Based on such concrete insights, philosophy has to build a system of metaphysics by reflecting these pieces of conscious reason and to identify principles. Such a critique of reason is grounded in psychological analysis, i.e. the psychological approach is integrated into theoretical philosophy. Generally, reason is only to be considered as conscious, where it is accompanied by concrete application and illustrated by conception or perception. Fries had *Carl Gustav Jung* among his students at the University of Jena, the grandfather of the psychoanalyst with the very same name; the family Jung had to emigrate to Switzerland, and Jung was asked to reorganise the Faculty of medicine at the University of Basel, recommended by *Alexander von Humboldt*.

The basic conviction of *Jakob Friedrich Fries* lies in the systematics of legal philosophy. Every philosophical reflection is declared to be natural law in effect and, therefore, a philosophical enlightened jurisprudence equals a critique of positive legal order. Critisism, however, is also addressed to natural law theory, and the general intention consists in founding a renewed natural law theory, in consequence. These thoughts show all um already in the title of the principal writing in case: "Philosophische Rechtslehre und Kritik aller positiven Gesetzgebung, mit Beleuchtung der gewöhnlichen Fehler in der Bearbeitung des Naturrechts" (Jena: Johann Michael Mauke, 1803; reprint in: Sämtliche Schriften, vol. 9: Schriften zur angewandten Philosophie, vol. 1, Aalen: Scientia, 1971). This work is highly recommended for further reading...
Leonard Nelson has been attracted by the so-called Fries school early in his career and decidedly defended the philosophical character of the practical philosophical applications of the psychological inclined theory of cognition. In constant dispute and controversy with the rich number of Fries scholars, representing the savant intelligence of his time, Nelson proposed an application of the moral philosophy to legal thought. As a communist, converted to a socialist or socio-democratic Nelson established on the basis of this philosophical orientation a profoundly cardinal and categoric criticism of virtually all currents of legal thought. And his critique mainly of positivistic inclinations has been heard and discussed vividly in his time. We do not consider as Nelson's principal writing his polemic, yet militant "Jurisprudence Without Law", but rather his extended and comprehensive "System der philosophischen Rechtslehre und Politik" (the 3rd vol. of: Vorlesungen über die Grundlagen der Ethik, Leipzig: Peter Reinhold, 1924), a book that is recommended for further reading.
Let us briefly reconsider the practical philosophical background of this critique that has his foundations in a certain view of ethical and moral claims. This connection and intimate relation are founded in natural law theory, now gently modernised and not practised in the old school manner. The intention is to direct normative claims of all kinds towards a material and value based normative theory that includes the legal order as well as the Kantian moral law ("Sittengesetz" or "Moralgesetz"). Thereby duty-based normative theory is complemented by a novel value-based normative order. This approach, however, does not directly leads to the so-called "materiale Wert-Ethik" by *Max Scheler* or *Nicolai Hartmann*, but rather to a revival of natural law theory, which is highly problematic in terms of the heritage of Kantianism as philosophical modernism (and ultimately on a basis of protestant ethics).

[Content, Abstracts/Conclusions, Insights, Evidence]
As a complement, we have selected an essay, where *Arnold Gysin* discusses two essays on natural law theory by *Hans Kelsen*, published in "Zeitschrift für öffentliches Recht" (vol. 7 (1928), pp. 221 ss.) and in "Zeitschrift für die Theorie des Rechts" (vol. 2 (1928), pp. 71 ss.), entitled "Das Problem des Naturrechts". "Sie stellen einen bemerkenswerten Versuch dar, die Methode der positiven Jurisprudenz einerseits zu begründen als ein Verfahren wissenschaftlicher Sollenserkenntnis und sie andererseits zugleich aufs strengste zu

unterscheiden von der Methode des Naturrechts". The condensed argumentation of this rereview article cannot be further condensed. The conclusions of Gysin are somewhat irritating, as he considers the attempt by Kelsen with respect to his "Pure Theory of Law" to reassure his own opinions bysed on a modified and modernised natural law theory. "Mit dem Fortschreiten objektiver Erkenntnis muss daher der Dualismus zwischen Naturrecht und Rechtspositivismus verschwinden. Und zwar verschwindet er zu Gunsten eines 'kritischen Positivismus'. [...] Deshalb kann dieses positivistische Verfahren denn auch nur praktisch begründet werden, genauer: nur als eine technische Notwendigkeit der Praxis, nicht aber als Verfahren der Rechtserkenntnis. Und damit diese Begründung der eigenartigen positivistischen Methode möglich sei, ist die Existenz einer naturrechtlichen Methode Voraussetzung". In other words, Gysin holds that natural law theory may serve as a legitimate basis of judicial cognition, whereas an immanent consolidation of legal positivism is to be considered as impossible, according to him.
These arguments have to be completed by those put forward by *Arnold Gysin* in two other essays, entitled "Naturrecht und Positivität des Rechts", and "Rechtsphilosophie und Jurisprudenz", respectively, that can be considered as a trilogy of fundamental essays (se nos. 2.3a and 1.7), alltogether trying to revitalise natural law theory in order to overcome predomination positivism, however not in a Catholic or Scholastic tradition, but on the basis of modified Kantianism and Fichteanism (whereas in *Jakob Friedrich Fries* reason is routed in the unconscious, in *Johann Gottlieb Fichte* critical cognition is founded in self-consciousness).

[Further Information About the Author]
Arnold Gysin, born 29 August 1897 in Basel, died 13 October 1980 in Lucerne, obtained his doctorate in 1923 at the University of Berne, before practicing as a lawyer in Zurich and Lucerne. From 1924 to 1934 he was a private lecturer at the University of Basel. Between 1952 and 1968 he was a federal judge at the insurance court, in the years 1960 and 1961 its president.

[Selected Works of the Same Author]
Arnold Gysin: Die Lehre vom Naturrecht bei Leonhard Nelson und das Naturrecht der Aufklärung (Dissertation Universität Bern 1924, bei Walther Burckhardt), Berlin-Grunewald: Walther Rothschild, 1924, 139 pp.; *Idem*: Rechtsphilosophie und Jurisprudenz, Zürich: Girsberger & Co., 1927, 54 pp.; *Idem*: Recht und Kultur auf dem Grunde der Ethik, Zürich: Girsberger & Co., 1929, 48 pp.; *Idem*: Ungeschriebenes Gesetz und Rechtsordnung – Mit Gedanken zur Rechtsphilosophie von Jakob F. Fries und Leonhard Nelson, in: Festschrift für Fritz von Hippel zum 70. Geburtstag, ed. Josef Esser and Hans Thieme, Tübingen: J. C. B. Mohr, 1967; *Idem*: Rechtsgedanke und Kulturgedanke im Verhältnis von Gesetzesethik und Wertethik; *Idem*: Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, beide in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969; *Idem*: Zur rechtstheoretischen Vermächtnis Walther

Burckhardts, in: Zeitschrift des Bernischen Juristen-Vereins, vol. 107 (1971), pp. 23 ss.;
Idem: Bindung und Offenheit des Rechts in rechtsphilosophischer Sicht, in: Homo Creator, Festschrift für Alois Troller, ed. Paul Brügger, Basel: Helbing & Lichtenhahn, 1976, pp. 303 ss.

[For Further Reading]
Jakob Friedrich Fries: Philosophische Rechtslehre und Kritik aller positiven Gesetzgebung, Jena: Johann Michael Mauke, 1803 (reprint in: Sämtliche Schriften, vol. 9: Schriften zur angewandten Philosophie, vol. 1, Aalen: Scientia, 1971);
Arnold Gysin: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969;
Leonard Nelson: Die Rechtswissenschaft ohne Recht – Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts, insbesondere über die Lehre von der Souveränität, Leipzig: Veit & Comp., 1917 (2nd ed. Göttingen/ Hamburg: Öffentliches Leben, 1949); *Idem*: Vorlesungen über die Grundlagen der Ethik, Band 3: System der philosophischen Rechtslehre und Politik, Leipzig: Peter Reinhold, 1924.

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Entry 2.4 "Gregor Edlin: Rechtsphilosophische Scheinprobleme"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Gregor Edlin
Title: Rechtsphilosophische Scheinprobleme und der Dualismus im Recht
Edition(s): Berlin-Grunewald: Walther Rothschild, 1932, pp. 199-246

[Introduction/Historical Situation and Systematic Context]
Gregor Edlin, with a doctor's degree in jurisprudence and in philosophy, a practising lawyer in Zurich, handed in a promotion thesis in 1918 at the University of Zurich, entitled "Recht und Rechtsnorm – Kritische Essays". More than a decade later, the second and ultimate writing appeared, published by the philosophical editor *Walther Rothschild* in Berlin.
The explicit programme consists in reassuring dualism in legal thought, and to reassign a different and corrected meaning to dualism in a pretendedly sound understanding: "Durch die Vermengung zweier durchaus verschiedener Sphären [des positiven und des natürlichen Rechts] erhält sowohl das Bild des geltenden, als auch dasjenige des Naturrechts eine unheilvolle Verfälschung. Die Grenzen zwischen empirischer Geltung und absoluter Gültigkeit sind aufgehoben; die rein empirische Tatsächlichkeit wird verabsolutiert und idealisiert, das Absolute dagegen wird vollständig relativiert. [...] / Diesem sowohl vom Gesichtspunkt des positiven Rechts als auch von demjenigen des Naturrechtsprinzips höchst bedauerlichen Zustand der Verwirrung kann nur eines Abhilfe bringen: die restlose und konsequente Durchführung der soziologischen Rechtsauffassung. Es kann sich dabei keineswegs um blosse, wenn auch noch so weit gehende, Zuständnisse an den soziologischen Standpunkt handeln, sondern um die kompromiss- und vorbehaltlose Einsicht, dass das ganze Phänomen der Rechtsgeltung und infolgedessen Begriff und Inhalt des geltenden Rechts gar nicht anders verstanden werden können, denn als eine Funktion des tatsächlichen, empirischen, einheitlichen gesellschaftlichen Lebens. [...] Es sind zwei verschiedene Disziplinen vom Recht möglich: die das geltende Recht erforschende historisch-interpretativ-empirisch-soziologische und die das Recht an sich suchende psychologisch-naturrechtliche."

[Content, Abstracts/Conclusions, Insights, Evidence]
Such an asserted self-understanding variant of dualism has been troubled, according to the author, by the merely apparent problems of consciousness, ethical and moral questions, and monism (all of Hegelian provenance, to be mentioned). *Gregor Edlin* rejects the positions held by *Rudolf Stammler*, *Hans Kelsen* and *Alf Ross*, and he also addresses

criticism to the positions held by *Walther Burckhardt* and *Dietrich Schindler* (senior) and to their solutions to the fundaments of legal normativity (see nos. 1.6 and 1.8 of this Legal Anthology).
Contrarily and according to his favour for sociological jurisprudence, *Gregor Edlin* adopts the views of *Max Weber*, *Emil Lask*, *Gustav Radbruch* and *Carl August Emge*. The deeper motive for this selection, however, is missing and the connection between the mentioned legal thinkers not disclosed. The diagnosis of the advocate in cause reads as follows: there can be identified a dualism of reality and significance within the legal order, a profound difference between legal order and the life or reality of law: "Der Dualismus im Recht ist kein Dualismus der Methode, kein Dualismus der blossen Geltung, kein Dualismus von Soziologischem und Normativem. Alle diese angeblichen Dualismen sind immer nur Konstruktionen und Fiktionen der Theorie. Der wirkliche und grundlegende Dualismus im Recht ist derjenige, der seinen Ausgangspunkt vom Begriff des geltenden Rechts nimmt und danach fragt, ob es noch ein anderes Recht gibt, als das 'geltende'. Freilich ist unter diesem Dualismus in unserem Sinne nicht etwa ein logischer 'Gegensatz' zu verstehen, als ob das eine das andere begrifflich ausschlösse; es handelt sich logisch vielmehr um eine Kreuzung, um zwei sich schneidende Kreise, sodass die Umfänge beider Begriffe beziehungsweise Kreisflächen sich teilweise decken. Mit dem Begriff 'Dualismus im Recht' meinen wir die Tatsache, dass das rechtliche Denken von zwei grundlegenden Fragestellungen beherrscht wird, von denen keine auf die andere zurückführbar ist und jede eine besondere Antwort erfordert".
The according definition of law as such reads as follows: "Recht an sich ist jene Art des sozialen Lebens, jene Gestaltung der sozialen Beziehungen, bei denen jedem Beziehungsglied nach Massgabe der körperlich-seelischen Gesetzmässigkeiten und Bedürfnisse die Lebenserhaltung und maximale körperlich-seelisch-geistige Entwicklung im Rahmen der im gleichen Masse schutzwürdigen und zu wahrenden Entwicklungsmöglichkeiten und Entwicklungsbedürfnisse aller anderen Beziehungsglieder gesichert und so eine übergreifende, überpersönliche Einheit aller Lebensinteressen, ein sozialer Kosmos hergestellt wird".

[Philosophical Valuation and Jurisprudential Significance]
It is not so easy to deal with this kind of false questions in the domain of legal philosophy, due to dilettantism. Rather universal, particular, and individualist entities as principal categories or characters of normative claims should be addressed and discussed, and in consequence universalism, pluralism or relativism, individualism would have to be favoured, with all the possible varieties of rational, ethical, transcendental and objective foundations. On this background one would even be able to debate about critical realism or real-idealism, for sure. For a better example of such debate, one can refer without any regret to *Karl Larenz* (Rechts- und Staatsphilosophie der Gegenwart (Philosophische Forschungsberichte, vol. 9), Berlin: Junker & Dünnhaupt, 1931).

[Selected Works of the Same Author]

Gregor Edlin: Recht und Rechtsnorm – Kritische Essays, Dissertation Universität Zürich, 1918.

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Entry 2.5 "August Simonius, Lex facit regem"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: August Simonius
Title: "*Lex Facit Regem*" – Ein Beitrag zur Lehre von den Rechtsquellen (Basler Studien zur Rechtswissenschaft, vol. 5)
Edition(s): Basel: Helbing & Lichtenhahn, 1933

[Introduction/Historical Situation and Systematic Context]
August Simonius has been a professor at the University of Basel for a long time, before, during and after the Second World War as well as a great personality who must have had great influence on legal thought in Switzerland. He got his doctor's degree in 1915 and later received many titles *honoris causa* of the Universities of Paris, Padova, Strasbourg, Bordeaux, Dijon and Geneva. "Das juristische Seminar auf dem Münsterplatz ist recht eigentlich sein Werk, und ganze Generationen von Studenten haben es ihm zu verdanken, dass sie dort Ruhe, die innere Atmosphäre und die nötigen Hilfsmittel für ihr Studium gefunden haben. Seine Tätigkeit an der Universität war ihm Hauptanliegen, dem er bis zu seinem Tode treu blieb. Seine Vorlesungen, frei vorgetragen, waren bis aufs letzte durchdacht und dem neuesten Stand der Rechtswissenschaft angepasst. Es gibt heute wenig Juristen in Basel, die nicht bei ihm den ersten und wohl wichtigsten Kontakt mit den Lehren des Römischen Rechts und den Prinzipien des Obligationenrechts erhielten. Alle werden sich immer erinnern, wie wohlausgewogen, wie humorvoll, wie kritisch und anregend Simonius seine Übungen und Vorlesungen gestaltete (*Max Gerwig*: Zum Gedenken an August Simonius, in: Basler Jahrbuch, vol. 1959, pp. 59)."
August Simonius not only had an inclination towards French and Italian culture, but he also must have had a sense for the arts and for the spiritual life in general. It is not surprising then that he also published essays in the domains of legal politics and legal philosophy.

[Content, Abstracts/Conclusions, Insights, Evidence]
As an example of *August Simonius* as a legal thinker we have selected an essay from 1933 that served as a programme for the rectorate of the University of Basel and had been dedicated to the University of Zurich in occasion of its hundred-year jubilee. The comprehensive text deals with the genesis of the positive legal order as a fact of communitarian and cultural life. Ethical aspects are to be opted out but are not considered as impossible explicitly; rather the focus is on the psychological pre-conditions for the validity of the positive legal order, respectively for the binding force of positive law. As his starting point, Simonius has chosen a dictum by *Henry de Bracton*: "*Ipse autem rex non debet*

esse sub homine, sed sub deo et sub lege, quia lex fecit regem. [...] Non es enim rex ubi dominatur voluntas et non lex". The authority of law as an absolute order deriving from God is superposed to the human will of the princeps as a legislator. Later, the authority of the positive legal order is legitimated by reference to the legislator as the supreme sovereign. This dogma is hereby conditioned by the conformity of the positive legal order to the absolute idea of law. Though, the author opts for an empirical based theory of the sources of the law.

As a guiding idea for the legal order, not codified positive law is taken by *August Simonius*, but rather customary law and international law are understood as prototypes. As a crucial point occurs the *opinio iuris* or *opinio necessitatis*, the conviction that the norm in case has the character of a law or rule, that is necessary and therefore belongs to the corpus of legal norms. "Das Gesetz war, wie wir es sahen, der Ausgangspunkt der staatlichen Quellenlehre. Bei oberflächlicher Beobachtung scheint ja tatsächlich das von den staatlichen Organen gesetzte Recht auf den Staat als Quelle zurückzugehen. Doch hält diese Annahme näherer Prüfung nicht stand. Sie wäre höchstens unter zwei Voraussetzungen richtig: einmal dass nur diejenigen Gesetze gelten, die von einer dafür zuständigen Behörde erlassen wurden, sodann dass jedes von der zuständigen Behörde geschaffene Gesetz wirklich in Geltung steht, solange es nicht durch ein neues Gesetz aufgehoben wird. Keine dieser Voraussetzungen trifft aber zu: Auf die Beseitigung des Gesetzes durch Gewohnheitsrecht oder sonstiges ungeschriebenes Recht haben wir bereits hingewiesen; [...] Andererseits können in allen Staaten Gesetze gelten, zu deren Erlass die gesetzgebende Behörden nicht befugt waren, die also verfassungswidrig sind". The validity of the law depends on the will of the majority of the legislating community, so that the conviction to be obliged to obey the law derives from that collective and cannot have another reason. The question about the reason or legitimacy of the validity of a certain legal order is without any sense and can only trouble the true foundation of the obligatory character of law. There is no uniformity concerning the validation of legal rules, neither.

August Simonius opts for the theory of the sources of law, as proposed by *Léon Duguit*, however without its inclination to natural law theory. The legal order shows in consequence an explicit nearness to rules based on ethical and moral convictions. In conclusion, that there is a psychological impact on the critical conviction that a certain legal norm is a valid part of the positive legal order, cannot be doubted.

In order to define the relation between the State and the legal order, there is only one single possibility, according to *August Simonius*: "Nämlich den Begriff 'Staat' auf die, ein bestimmtes Gebiet bewohnende, unter einer eigenen Rechtsordnung lebende und durch diese organisierte Menschengruppe selbst anzuwenden. So vermag allerdings der Staat dem Recht entgegengestellt zu werden; das Verhältnis kann aber kein anderes sein als Unterordnung des Staates unter das Recht; schon das Bestehen einer Organisation setzt diese Unterordnung voraus. Insofern ist das Verhältnis des Staates zum Rechte überhaupt kein besonderes Problem; es fällt mit dem Problem der Geltung des Rechts zusammen". Eventually, the dictum by *Henry de Bracton*, that "*lex facit regem*", turns out to be true even

in modern times.

[Further Information About the Author]
August Simonius, born 7 August 1885 in Basel, died 24 December 1957 in his native town, followed his legal studies at the Universities of Basel, Paris, Berlin and Leipzig, before was he promoted in 1915 in Basel, where he was ordinary professor for roman law and the law of obligations, and where he was also dean and chancellor. He signed as a co-editor of the "Zeitschrift für Schweizerisches Recht" and between 1841 and 1943 he was president of the "Schweizerischen Juristenverein".
For further information and for a complete bibliography, please consult:
Max Gerwig: Zum Gedenken an August Simonius, in: Basler Jahrbuch, vol. 1959, pp. 58-64; *A. Staehelin*: Professoren der Universität Basel aus fünf Jahrhunderten – Bildnisse und Würdigungen, Basel: Friedrich Reinhardt AG, 1960, p. 378; *Max Gutzwiller*: Zu einem siebzigsten Geburtstag (August Simonius), in: Elemente der Rechtsidee, ed. A. Heini, Basel/ Stuttgart: Helbing & Lichtenhahn, 1964, pp. 42ss.; *Hans Merz* (Ed.): Juristengenerationen und ihr Zeitgeist, Zürich: Schulthess, 1991, pp. 309ss.

[Selected Works of the Same Author]
August Simonius: Wissenschaftliche Weltanschauung und Rechtswissenschaft – Zur Rechtsphilosophie Arthur Baumgartens, in: Zeitschrift für Schweizerisches Recht, ed. Eduard His, N. S. vol. 49, Basel: Helbing & Lichtenhahn, 1930; *Idem*: Über Bedeutung, Herkunft und Wandlung der Grundsätze des Privatrechts, in: Zeitschrift für Schweizerisches Recht – Centenarium 1852-1952, Basel: Helbing & Lichtenhahn, 1952, pp. 237ss.

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Entry 2.6 "Walther Burckhardt, Methode und System des Rechts"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Walther Burckhardt
Title: Methode und System des Rechts mit Beispielen
Edition(s): Zürich: Polygraphischer Verlag, 1936

[Introduction]
Generally speaking, legal method and methodology cannot guarantee, that obeying certain rules, the outcome of legal thought be true. Often method is stated as if it could provide such truth or certainty. However, it has to be acknowledged that only by means of reference to legal experience cognition can prove as true or valid, i.e. as according to legal reality. This can only be guaranteed by a process of verification including highly creative arguments, and not by following a set of rational rules that are systematically and rationally condensed to a certain methodology.
Walther Burckhardt accepted this limitation of method and the need for cognition, when he referred to "The Organisation of Legal Community" in his principal treatise of legal philosophy from 1927 (please consult no. 1.6 of this Legal Anthology). The claim for connectivity between the systematic order of law and justice within the legal order can be hold for the main outcome of a constellation or problems that surpass mere methodological reflections, thus. This conception leads directly to ethical founded tasks for the legislator and for jurisprudence, either.

[Historical Situation and Systematic Context]
By choosing dualistic classifications as basis for jurisprudential dogmatic and method, *Walther Burckhardt*– in his monography entitled "Method and System of Law" from 1936 – gives way to many irritations of this general insight, however. Although jurisprudential concepts are claimed to be diverse from the classifications of biology, he states the following: "Wäre nun die Praxis im sicheren Besitz der richtigen Methode, so wäre diese Aufgabe der Wissenschaft erfüllt und es gäbe nur noch die bekannte Wahrheit den späteren Geschlechtern zu überliefern, ihnen also gewissermassen das Werkzeug in die Hand zu geben, mit dem sie jeweils den zeitgenössischen Stoff kunstgerecht gestalten können. / Dem ist aber keineswegs so. Weder ist sich die Praxis überall, wo sie richtig verstährt, ihrer Methode klar bewusst, noch verfährt sie überall richtig". This could lead to the conclusion that the author has not be fully aware of his own methods... When he discussed the so-called "Methodenstreit" in German jurisprudence, he nevertheless corrects himself, when he excludes philosophical valuation from being restricted by

method, and when he claims that legal methodology has to orientate to practical philosophical cognition. The role and function of logic for jurisprudence are addressed, but the relation between logic and methodology, respectively and axioms of any dogmatical science is not further indicated. The intention to deal with scientific method in a philosophical framework remains unaccomplished, in consequence. "Der Verfasser ist sich bewusst, dass die Methode des Rechts nur im Rahmen einer umfassenden Rechtsphilosophie vollständig begründet warden könnte; mancher Vorfrage der Methode bleibt die vorliegende Arbeit die Antwort schuldig" (these passages are cited of the foreword).
In contrast, the title itself, "Method and System", would have lead to the opinion that legal methodology should be related to system building with a legal order, and that therefore dogmatical aspects would be referred to the truly philosophical argument, what determines the relationship between the part and the whole.
Arnold Gysin, a scholar of *Walther Burckhardt*, explained himself these and other ambiguities as follows: "Walther Burckhardt ist den Weg seines rechtsphilosophischen Denkens aus einem Zustand der Vereinzelung heraus gegangen. Er ist mit diesem Interesse erst in den beiden letzten Jahrzehnten seines arbeitsreichen Lebens hervorgetreten" ("Walther Burckhardt als Rechtsphilosoph", in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 182 ss.; first printing in: Zeitschrift des Bernischen Juristenvereins, vol. 1940, pp. 105-111). Has there nevertheless been a hidden tendency to natural law within the concept of Burckhardt? This possibility occurs as a misunderstanding by Gysin, when he establishes a difference between two kinds of rational postulates that are not only terminologically differentiated but signify a difference in matter. Gysin intends to exploit the theory of Burckhardt in function of his own views, i.e. natural law theory and Catholic social philosophy. In his overall attitude, however, he remains faithful to his master: "Aber ich darf doch wohl behaupten, dass Burckhardt mit seiner These, das Recht sei nicht blosse Tatsache, sondern ethische Norm, Schule gemacht hat, vorderhand wenigstens für die schweizerische Rechtswissenschaft. [...] Er hat auf dem Fundament dieser einstmals allgemein anerkannten, zum Beispiel in der katholischen Rechtsphilosophie stets hochgehaltenen, und nun wieder neu errungenen Erkenntnis bisher Unerreichtes geleistet. [...] Es ist vielleicht noch kein Rechtsphilosoph so tief wie er mit der ganzen Grösse des Rechtsgedankens in das Gefüge der positive Rechtsordnung eingedrungen".

[Content, Abstracts/Conclusions, Valuation]
By selecting the very last partition of the writing in case, we have gone over many interesting questions discussed in the previous parts, for instance how purity of method can be guaranteed, or what difference the legal methodology in jurisprudence and other approaches of method could be. These arguments are worth to be read and reflected altogether even today and remain unsurpassed in many respects, but not always in the outcome. To indicate that legal method has to follow that of practical disciplines, or that

the valid judgments are to be characterised as practical, does not help much, as long as there are deficiencies within the conception of a systematic order of the concerning sciences.
The attitude of *Walther Burckhardt* shows clearly, when he addresses the claim that the legal order be ethically true, the law be according the idea of justice. "Die beiden Forderungen der Folgerichtigkeit und der Gerechtigkeit stehen in einem gewissen Verhältnis zueinander: was durchwegs gerecht ist, ist auch einheitlich, folgerichtig; und in gewissem Sinn kann nur das Gerechte ganz folgerichtig, ohne Widerspruch zu Ende gedacht warden. Aber bis zu einem gewissen Grad kann auch das Ungerechte konsequent sein; und jedenfalls sind die beiden Forderungen, auch wenn sie praktisch untrennbar sind, das heisst wenn die eine nicht ohne die andere verwirklicht werden kann, doch begrifflich zu trennen, das heisst man muss sich der Eigenart der beiden Seiten des Richtigen, hier einer richtigen Rechtsordnung, bewusst werden: der logischen und der ethischen". This statement establishes a connection, without giving some reasons, without discussing exemptions, and without conceptualising the inner connectivity of these concepts; in consequence this dualistic treatment identifies problems without resolving them dialectically.
In this context highly significant is the question, according to what method the law has to be applicated to the specific case. *Walther Burckhardt* identifies the standpoint of jurisprudence with respect to the positive legal order in the following way: "Die Wissenschaft vom positive Recht ist die Lehre von der Anwendung eines gegebenen Rechts; ihre Daseinsberechtigung und ihr Ziel ist die Anwendung des Rechts; die methodische Anwendung des Rechts. Was gleich bleibt ist die Methode; der Inhalt wechselt je mit dem gesetzen Recht". The first sentence could lead to interesting reflections, the second part however undermines the potentially fruitful problematic all of a sudden. That method should remain the same, whereas the content of law can and has to vary, this abnegates the inner dependency between the two activities of interpreting the legal order and of giving the law. Contradictions as well as vacancies within the legal order cannot be simply be detected and resolved by using method; instead jurisprudential judgment has to be addressed with its thoroughly active, creative intervention. As for the interpretation of law a kind of hermeneutical method is adopted by Burckhardt. When it comes to fill an omission within the legal order, the rule of the 1st article of the Swiss Civil Code is understood in a broader than literal sense, i.e. as the expression of a general attitude towards a highly creational interpretation of law throughout.
"Die hier dargelegte Lehre von der Auslegung des Gesetzes unterscheidet sich von den zahlreicheren früheren dadurch, dass sie die Aufgabe der Auslegung nicht für sich betrachtet, sondern in Beziehung setzt zu den Grundfunktionen des Staates, zur Rechtssetzung und zur Rechtsanwendung. [...] / [...] Man kann das Einzelne nur im Zusammenhang des Ganzen richtig erfassen und die Erfüllung der Aufgaben der besonderen Rechtsgebiete nur im Zusammenhang mit der Aufgabe des Rechts überhaupt. Die Aufgabe des Rechts ist die Verwirklichung der Gerechtigkeit in der menschlichen Gemeinschaft". To respond to this task makes this treatise on legal method worth reading

again, especially the great number of striking examples provided in its arguments.

[Further Information About the Author]
Walther Burckhardt, born 19 May 1871 in Riehen, died 16 October 1939 in Berne, pursued his legal studies at the Universities of Leipzig, Neuchâtel, Berlin and Berne, where he graduated with a doctorate with *Eugen Huber*. From 1896 onwards, he served the federal administration, 1902 he was nominated ordinary professor of the University of Lausanne, and 1909 he changed to the chair for Swiss federal law at the University of Berne. Together with *Carl Hilty* he was editor of the "Politischen Jahrbuchs" between 1910 and 1917. From 1923 to 1928 he took part in the delegation at the League of Nations and was judge at the international court in Den Haag.
He is known best for his "Kommentar zur Schweizerischen Bundesverfassung" (3. ed. 1931). Similar as *Eugen Huber*, but in an all different way, he adhered to Neo-Kantianism and referred to *Rudolf Stammler*. In his main contributions to legal theory, "Die Organisation der Rechtsgemeinschaft" (1927), "Methode und System des Rechts" (1936) and "Einführung in die Rechtswissenschaft" (1939) he developed a coherent theory of the legal order as a completed system of law. Law is mainly concepted as a means to the ends of legal politics, as an instrument to realise the tasks of the state in an understanding as the institution that enforces the rule of law. In this intention, he clearly separates the concept of law from the idea of law or the ideal law and holds a strong distinction of "Sein" and "Sollen". In 1939, he committed suicide under the impression of the decline of the order of free states and the breakdown of liberal international law.
For further information, please consult:
Arnold Gysin: Walther Burckhardt als Rechtsphilosoph, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 182 ss. (first printing in: Zeitschrift des Bernischen Juristenvereins, vol. 1940, pp. 105-111); *Idem*: Zum rechtstheoretischen Vermächtnis Walther Burckhardts, in: Zeitschrift des Bernischen Juristen-Vereins, vol. 107 (1971), pp. 23 ss.;
Hans Huber: Walther Burckhardt, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 485ss.; *Idem*: Zur Einführung, in: Aufsätze und Vorträge 1910-1938, ed. idem, Bern: Stämpfli & Cie., 1970, pp. 9 ss.;
Kurt Naegeli-Bagdasarjanz: Walther Burckhardts Rechtsphilosophie (Zürcher Beiträge zur Rechtswissenschaft, N. S. vol. 229), Aarau: Sauerländer, 1961.

[Selected Works of the Same Author]
Walther Burckhardt: Organisation der Rechtsgemeinschaft – Untersuchungen über die Eigenart des Privatrechts, des Staatsrechts und des Völkerrechts, Basel: Helbing & Lichtenhahn, 1927; *Idem*: Methode und System des Rechts mit Beispielen, Zürich: Polygraphischer Verlag, 1936; *Idem*: Die Lücken des Gesetzes und die Gesetzesauslegung, in: Abhandlungen zum schweizerischen Recht, N. S. vol. 8, Bern: Stämpfli & Cie., 1925, pp.

62-106; *Idem*: Recht als Tatsache und als Postulat, in: Festgabe für Max Huber zum 60. Geburtstag, Zürich: Schulthess, 1934; *Idem*: L'État et le droit, in: Zeitschrift für Schweizerisches Rechts, ed. Eduard His, N. S. vol. 50, Basel: Helbing & Lichtenhahn, 1931; *Idem*: Die Krisis der Verfassung (1838), in: Aufsätze und Vorträge 1910-1938, Bern: Stämpfli & Cie., 1970, pp. 340ss.; *Idem*: Über das Verhältnis von Recht und Sittlichkeit (1922); *Idem*: Staatliche Autorität und geistige Freiheit 1936), beide in: Aufsätze und Vorträge 1910-1938, ed. Hans Huber, Bern: Stämpfli & Cie., 1970, pp. 35 ss. resp. pp. 64 ss.

[For Further Reading]
Briefwechsel zwischen *Walther Burckhardt* und *Arnold Gysin*, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 188-211.

7 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.7 "Claude du Pasquier, Théorie générale et philosophie du droit"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Claude Du Pasquier
Title: Introduction à la théorie générale et à la philosophie du droit
Edition(s): Paris/Neuchâtel: Recueil Sirey/Éditions Delachaux & Niestlé, 1937

[Introduction/Historical Situation and Systematic Context]
Before the Second World War, one can speak of a confusion in the domain of legal philosophy, indeed, in Germany as well as in France. In French-speaking countries, the so-called institutional theory of law and of the State has widely been adopted, lead by *Maurice-Jean-Claude-Eugène Hauriou*, and later by *Georges Renard* (see Albert Broderick (Ed.): The French Institutionalists – Maurice Hauriou, Georges Renard, Joseph T. Delos. Cambridge: Harvard University Press, 1970). Concerning the interpretation and application of the legal order, the theory of *François Gény* have had considerable success.

[Content, Abstracts/Conclusions, Insights, Evidence]
As a representative of legal philosophy in Franch-speaking Switzerland, *Claude Du Pasquier* is not only embedded in this culture, but also tributes to his German-speaking colleagues *Eugen Huber* and *Walther Burckhardt* among others. He even adopts their theories widely, but with remarkable differences in detail and in argumentation: the legal order is situated within social and legal community, the system of the sources of the law enlarged, the application of the law taken into consideration, and so on...
In contrast there are parts where the author deals with logics, rather than with methodological questions, or determines the nature of law, including an extensively presented history of natural law theories. The considerable introduction to jurisprudence and legal philosophy resembles an accumulation of diverse and inconsistent contributions, held together only by the half-leather French binding between the antique book covers.
As a suggestion to read, in order to form a well informed judgment on this writing by *Claude Du Pasquier*, we have selected the final passage containing the conclusions. That is where the intrinsic system should appear, if ever. Not regarding the bibliographical references in the text and in the footnotes, the undercurrent and unconscious popular philosophy that characterises the argumentation is based on common sense realism, common sense pragmatic thoughts as well as on dogmatical distinctions and dualistic concepts in a remarkable degree. Dualism occurs to be the main philosophical ingredient for this potpourri in period legal thought. Nevertheless, it is instructive to read, anyway.

[Further Information About the Author]
Claude Du Pasquier, born on 2 April 1886 in Le Havre (France), died on 23 January 1953 in Neuchâtel, obtained in 1909 a doctorate from the University of Lausanne and in 1912 he passed the lawyer's examinations. From 1911, he taught commercial law at the School for Commerce in Neuchâtel, in 1916 he handed in a habilitation thesis at the University of Neuchâtel, and from 1923 to 1953 he signed for a very long period of time as an ordinary professor responsible for the introduction to legal studies. Later, he was president of the same academic institution and between 1947 and 1953 he was also charged to lecture legal philosophy at the University of Geneva. Besides he persecuted a career as a judge and as a political representative of the liberals or radicals. Further, he also was a member of the Red Cross Committee and presided the Council for scientific research of his origin Canton. He also followed up a career as an officer in the headquarters of the Swiss Army, and even achieved the ranks of a brigade and division commander.

[Selected Works of the Same Author]
Claude Du Pasquier: Modernisme judiciaire et jurisprudence suisse, in: Recueil de travaux offert par la Faculté de Droit de l'Université de Neuchâtel à la Société des Juristes, Neuchâtel: Paul Attinger, 1929; *Idem*: Vue d'ensemble sur les conceptions de l'État – La neutralité morale de l'État, in: Recueil de Travaux publié par la Faculté de l'Université de Neuchâtel à l'occasion du Centenaire de la Fondation de l'Académie 1838-1938, Paris: Recueil Sirey, 1938; *Idem*: Valeur et nature de l'enseignement juridique (Mémoires publiés par la Faculté de Droit de l'Université de Genève, vol. 7), Genève: Librairie de l'Université, 1950; *Idem*: La notion de justice sociale et son influence sur le droit suisse, in: Zeitschrift für schweizerisches Recht, Centenarium 1852-1952, pp. 69 ss., Basel: Helbing & Lichtenhahn, 1952; *Idem*: Essai sur la nature juridique du faux en écriture, Lausanne: A. Jaunin, 1909.

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The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.8 "Walther Burckhardt, Einführung in die Rechtswissenschaft"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Walther Burckhardt
Title: Einführung in die Rechtswissenschaft
Edition(s): Zürich: Polygraphischer Verlag A.-G., 1939 (2nd ed. with a preface by Hans Huber, Zürich: Schulthess Polygraphischer Verlag, 1948; reprint 1976)

[Introduction/Historical Situation and Systematic Context]
It is very common to charge legal philosophers with the task to introduce to jurisprudence. This seems to be a mere propaedeutic duty that could be fulfilled with an encyclopaedical representation, so as to give an overview for the student beginning his studies in jurisprudence. In an approach of legal philosophy, this task could easily be enlarged to a theory of the principles of jurisprudence or a general theory of law and jurisprudence. However, *Walther Burckhardt*'s intention is more modest, i.e. to give an educationalist introduction to jurisprudence in the large sense, even if he combines this aim with some kind of a propaedeutic treatment of general jurisprudence. To our knowledge, this "Introduction" is the very first of its kind and appeared before the opening of the Second World War, and less than one year before the premature death of the author.

[Content, Abstracts/Conclusions, Valuation]
The treated matters consist in a variety of purely dogmatical questions; the answers provided by *Walther Burckhardt*, however, are given in a larger perspective including philosophical reflections. The author follows his dualistic distinctions of private and public law, adding international law as the domains of positive legal order.
By selecting the ultimate partition of the monography, we have focused on general questions, such as the definition of law, jurisprudence, respectively legal science, legal politics, legal history, as well as the legal professions.
Let us take a brief view on the arguments in the chapter about legal philosophy: Walther Burckhardt assigns legal philosophy the foundation of the methodology of legal practice, i.e. legal politics and the application of the legal order. The functions dedicated to legal philosophy are: to identify the object of legal science; to determine the method of legal practice; the systematic structure and ethical content of the legal order. In detail: "Der unvollendete Bau [der Rechtsordnung] muss planmässig und stilgerecht vollendet werden; die Wissenschaft muss ihn, durch Auslegung und Ergänzung, folgerichtig und richtig zu Ende führen. Der wissenschaftliche Bearbeiter des (stets unvollkommenen) positiven Rechts muss sich also bereits über die an das Recht zu stellenden logischen und

ethischen Anforderungen Rechenschaft geben. [...] Über die ethische Richtigkeit gibt es kein solches System von Fragen [wie über die logische Richtigkeit]. Die Rechtsphilosophie kann dem Gesetzgeber nur klar machen, was er übrigens immer schon fühlt, dass es seine Aufgabe ist, das Gerechte zu verwirklichen. Viel mehr lässt sich darüber allgemeingültig nicht sagen. Aber diese schlichte Einsicht ist auch schon wertvoll". Taken in consideration the arguments presented in the principal writings ("Die Organisation der Rechtsgemeinschaft", "Logik und System des Rechts"), this statement seems to be simply a round-about defeat. "Es gibt also kein Recht, das unbedingt richtig wäre; aber ein regulatives Prinzip, einen allgemeingültigen Richtpunkt, an dem zu erkennen ist, ob ein Recht für die gegebene Lage richtig ist". On this point, we are thrown back to a situation, where there is no justified task for legal philosophy with any influence on practical jurisprudence. The standpoint of the author becomes merely relativistic, yet occasional, and we are definitely confronted by naked positivism, indeed.

[Further Information About the Author]
Walther Burckhardt, born 19 May 1871 in Riehen, died 16 October 1939 in Berne, pursued his legal studies at the Universities of Leipzig, Neuchâtel, Berlin and Berne, where he graduated with a doctorate with *Eugen Huber*. From 1896 onwards, he served in the federal administration, in 1902 he was nominated ordinary professor of the University of Lausanne, and in 1909 he changed to the chair for Swiss federal law at the University of Berne. Together with *Carl Hilty,* he was editor of the "Politischen Jahrbuchs" between 1910 and 1917. From 1923 to 1928, he took part in the delegation at the League of Nations and was judge at the international court in Den Haag.
He is known best for his "Kommentar zur Schweizerischen Bundesverfassung" (3. ed. 1931). Similar as *Eugen Huber*, but in an all different way, he adhered to Neo-Kantianism and referred to *Rudolf Stammler*. In his main contributions to legal theory, "Die Organisation der Rechtsgemeinschaft" (1927), "Methode und System des Rechts" (1936) and "Einführung in die Rechtswissenschaft" (1939) he developed a coherent theory of the legal order as a completed system of law. Law is mainly concepted as a means to the ends of legal politics, as an instrument to realise the tasks of the state in an understanding as the institution that enforces the rule of law. In this intention, he clearly separates the concept of law from the idea of law or the ideal law, and holds a strong distinction of "Sein" and "Sollen". In 1939, he committed suicide under the impression of the decline of the order of free states and the breakdown of liberal international law.
For further information, please consult:
Arnold Gysin: Walther Burckhardt als Rechtsphilosoph, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 182 ss. (first printing in: Zeitschrift des Bernischen Juristenvereins, vol. 1940, pp. 105-111); *Idem*: Zum rechtstheoretischen Vermächtnis Walther Burckhardts, in: Zeitschrift des Bernischen Juristen-Vereins, vol. 107 (1971), pp. 23 ss.;
Hans Huber: Walther Burckhardt, in: Schweizer Juristen der letzten hundert Jahre, mit

einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 485ss.; *Idem*: Zur Einführung, in: Aufsätze und Vorträge 1910-1938, ed. idem, Bern: Stämpfli & Cie., 1970, pp. 9 ss.; *Kurt Naegeli-Bagdasarjanz*: Walther Burckhardts Rechtsphilosophie (Zürcher Beiträge zur Rechtswissenschaft, N. S. vol. 229), Aarau: Sauerländer, 1961.

[Selected Works of the Same Author]
Walther Burckhardt: Organisation der Rechtsgemeinschaft – Untersuchungen über die Eigenart des Privatrechts, des Staatsrechts und des Völkerrechts, Basel: Helbing & Lichtenhahn, 1927; *Idem*: Methode und System des Rechts mit Beispielen, Zürich: Polygraphischer Verlag, 1936; *Idem*: Die Lücken des Gesetzes und die Gesetzesauslegung, in: Abhandlungen zum schweizerischen Recht, N. S. vol. 8, Bern: Stämpfli & Cie., 1925, pp. 62-106; *Idem*: Recht als Tatsache und als Postulat, in: Festgabe für Max Huber zum 60. Geburtstag, Zürich: Schulthess, 1934; *Idem*: L'État et le droit, in: Zeitschrift für Schweizerisches Rechts, ed. Eduard His, N. S. vol. 50, Basel: Helbing & Lichtenhahn, 1931; *Idem*: Die Krisis der Verfassung (1838), in: Aufsätze und Vorträge 1910-1938, Bern: Stämpfli & Cie., 1970, pp. 340ss.; *Idem*: Über das Verhältnis von Recht und Sittlichkeit (1922); *Idem*: Staatliche Autorität und geistige Freiheit 1936), beide in: Aufsätze und Vorträge 1910-1938, ed. Hans Huber, Bern: Stämpfli & Cie., 1970, pp. 35 ss resp. pp. 64 ss.

[For Further Reading]
Briefwechsel zwischen *Walther Burckhardt* und *Arnold Gysin*, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 188-211.

7 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.10 "Oscar Adolf Germann, Grundlagen der Rechtswissenschaft"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Oscar Adolf Germann
Title: Grundlagen der Rechtswissenschaft – Einführung in deren Probleme, Methoden und Begriffe
Edition(s): Bern: Stämpfli, 1950

[Introduction/Historical Situation and Systematic Context]
After the very first "Introduction to jurisprudence" by *Walther Burkhardt*, and the even previous writing by the same author, entitled "System and Method of Law" from 1936 and 1939 (consult nos. 1.6 and 1.8 of this Legal Anthology), the second "Introduction to Jurisprudence" is published by *Oscar Adolf Germann* in 1950, with an intermezzo in the wartime period. According to the personal inclination of the author to methodological questions, this introductory lectures at the University of Basel do not require much previous knowledge to be properly understood. The indication as "Grundlagen" does not refer to its philosophical foundation, but rather to its propaedeutic character as basic knowledge about the legal order and jurisprudence for the beginning student. Therefore, it also provides an overview to the different parts of the legal order. "Damit hängt zusammen, dass hier zuweilen von einem mehr persönlichen als allgemein anerkannten Gesichtspunkt ausgegangen wird, wo nicht für die Rechtswissenschaft grundlegende Begriffe zu prägen sind, sondern das Verständnis für grössere Zusammenhänge geweckt werden soll. Das Buch macht keinen Anspruch darauf, axiomatisch gültige Sätze wiederzugeben (deren es auf diesem Gebiete streng genommen wohl überhaupt keine gibt [*sic*!], sondern will den Leser nur heranführen zu den Quellen eigener Erkenntnis". The difference could not be greater in contrast to the highly ambitious contributions by *Walther Burckhardt*, who struggled for lasting insights into the very core of the structure of the legal order and the profound character of jurisprudence. In this context, and with the same respect, the contribution in French language by *Claude Du Pasquier* have to be mentioned, entitled "Introduction à la théorie générale et à la philosophie du droit", that also has a much broader horizon (Paris/ Neuchâtel: Recueil Sirey/Éditions Delachaux & Niestlé, 1937; see no. 2.7 of this Legal Anthology]. A positivist contribution to the introduction into jurisprudence and the legal order has also been provided by *Hans Nawiasky*, entitled "Allgemeine Rechtslehre als System der rechtlichen Grundbegriffe" (Einsiedeln/Köln: Benzinger & Co., 1941).

[Content, Abstracts/Conclusions, Insights, Evidence]

In *Oscar Adolf Germann*, the subjects of the treatment of introductory legal questions are the object, the task and the historical development of jurisprudence, the various domains of the positive legal order. Only after 200 pages, the author leaves his merely dogmatical interest in the subjects in case and discusses the place of jurisprudence within the system of scientific displines. "Aus der Zugehörigkeit zu den Geisteswissenschaften ergibt sich für die Jurisprudenz zunächst, dass ihre Jünger ausserhalb des engeren Fachgebiets vor allem bei den philosophisch-historischen Wissenschaften ergänzende theoretische Kenntnisse sich erwerben können. [...] / Wichtig sind ferner als weitere Konsequenz, dass die naturwissenschaftlichen Methoden und Begriffe grundsätzlich auf die Rechtswissenschaft nicht anwendbar sind". This consists in a very minimal common understanding of jurisprudence, however. Moreover, the disciplines of the human sciences, including philosophy, are defined to deliver merely complementary theories... To such an extent, generic concepts and arguments cannot contribute to a sound foundation of the future generation of jurisprudents, indeed. After all, some more interesting spheres are also addressed, as for instance cultural history and juridical conceptualisation according to Neo-Kantian doctrine. Eventually, the arguments remain oddly enough undecided and insignificant: the line of demarcation (*sic*!) between normative and descriptive disciplines is asserted to run within the legal disciplines: "Rechtsgeschichte und Rechtssoziologie sind prinzipiell deskriptiv-explikative Wissenschaften, die Rechtspolitik ist umgekehrt normativ, bei näherem Zusehen auch die dogmatische Rechtswissenschaft de lege lata, die wohl ihren Ausgang nimmt von der Feststellung des positiven Rechts, aber gestützt darauf die richtigen Normen herauszuarbeiten hat, die letztlich sich ausrichten auf die Frage, was de lege lata gelten soll. Deshalb ist es in der Jurisprudenz, wo grundsätzlich verschiedene Fragen sich stellen und nach verschiedenen Methoden zu behandeln sind, besonders wichtig, jene Methoden-Dualismus sich klarzumachen und in jdem einzelnen Fall sich darüber Rechenschaft zu geben, welcher Art die aufgeworfene Frage ist; mangelde Klarheit in dieser Hinsicht, wie sie leider oft in Dissertationen und anderen wissenschaftlichen Arbeiten zu treffen ist, rächt sich schwer". And what about legal philosophy? And how to overcome the separation of conflicting standpoints and concurring methods. This outlay should lead, instead, to the conclusion that the independence and self-reliance of jurisprudence is best guaranteed as a stand-alone so-called great faculty within the systematic order of academic disciplines (i.e. in comparison to theology and medicine).

In the last chapter, *Oscar Adolf Germann* discusses even more komplex fundamental questions of law and jurisprudence, namely legal philosophical issues. Power is confronted with law, international with national legal order, legal order to freedom, and moral theory or natural law to legal positivism. However, wherein shall the overcoming of legal positivism consist, if law is confronted to justice without any guidelines how potential conflicts can be resolved? Justice against the law, ethical versus legal order, co-ordinated by the need of equality and security by jurisdiction signifies a dogmatical answer to a philosophical question, eventually.

[Further Information About the Author]
Oscar Adolf Germann, born 19 August 1889 in Frauenfeld, died 1 December 1979 in Bottmingen, followed his jurisprudential studies in Germany and Austria, before obtaining his doctorate at the University of Zurich in 1914. Afterwards, he joined the federal administration and was a lecturer for labour legislation at the University of Berne. Between 1930 and 1960, he was ordinary professor of penal law at the University of Basel. From 1952 to 1961, he was chief editor of the "Schweizerische Zeitschrift für Strafrecht". He also persecuted a notable career in the Swiss Army.

[Selected Works of the Same Author]
Oscar Adolf Germann: Präjudizien als Rechtsquelle – Eine Studie zu den Methoden der Rechtsfindung, in: Acta Instituti Upsaliensis Iurisprudentiae Comparativae, vol. 2, Stockholm: Almqvist & Wiskell, 1960; *Idem*: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli, 2. ed. 1967; *Idem*: Grundsätze der Gesetzesauslegung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 43, pp. 193-215, Basel: Helbing & Lichtenhahn, 1924; *Idem*: Imperative und autonome Rechtsauffassung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 46, Basel: Helbing & Lichtenhahn, 1927, pp. 183 ss.; *Idem*: Präjudizielle Tragweite höchstinstanzlicher Urteile, insbesondere der Urteile des schweizerischen Bundesgerichts – Ein Beitrag zu den grundsätzlichen Fragen der Rechtsfindung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 68, pp 297-332, 423-456, Basel: Helbing & Lichtenhahn, 1949; *Idem*: Méthodes d'interprétation et problèmes fondamentaux du droit (Faculté de Droit de l'Université de Montpellier, 1957), in: Probleme und Methoden der Rechtsfindung. Bern: Stämpfli & Cie AG, 1965, pp. 377 ss.; *Idem*: Problematik der Rechtsverbindlichkeit und der Rechtsgeltung, in: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli & Cie., 1965, pp. 17 ss. (first printing in: Revue Hélvetique de Droit International, vol. 1965); *Idem*: Zur Überwindung des Positivismus im schweizerischen Recht – Geschichtlicher Rückblick und kritische Stellungsnahme zu den Methoden der Rechtsfindung, in: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli & Cie., 1965, pp. 307-342 (erstmals in: Zeitschrift für Schweizerisches Rechts, Centenarium 1852-1952, Basel: Helbing & Lichtenhahn, 1952, pp. 99-140); *Idem*: Neuere Judikatur des Schweizerischen Bundesgerichtes zur Frage der Gesetzesauslegung nach den Vorarbeiten, insbesondere nach dem darin geäusserten Willen des Gesetzgebers, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 81/ I, pp. 207-243, Basel: Helbing & Lichtenhahn, 1962.

[For Further Reading]
Oscar Adolf Germann: Präjudizien als Rechtsquelle – Eine Studie zu den Methoden der Rechtsfindung, in: Acta Instituti Upsaliensis Iurisprudentiae Comparativae, vol. 2, Stockholm: Almqvist & Wiskell, 1960.

13 November 2017 *Michael Walter Hebeisen*

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2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.11 "Claude du Pasquier, Enseignement juridique"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Claude Du Pasquier
Title: Valeur et nature de l'enseignement juridique (Mémoires publiés par la Faculté de Droit de l'Université de Genève, vol. 7)
Edition(s): Genève: Librairie de l'Université, 1950, 29 pp.

[Introduction/Historical Situation and Systematic Context]
The occasion to treat "*La formation du juriste et les valeurs humaines*", and "*Que vous propose la Faculté de Droit?*" in two conferences has been provided to *Claud Du Pasquier* by the invitation of the University of Geneva to give "*cours généraux*". They can serve as a condensed introduction to jurisprudence and reflect the spirit of the time in the domain of legal thought, as well as the overall approach of the author that can be characterised by pragmatism and common sense, however in the untechnical, not the philosophical sense of these terms. (For a comprehensive monography on legal philosophy see no. 2.7 of this Legal Anthology.)

[Further Information About the Author]
Claude Du Pasquier, born on 2 April 1886 in Le Havre (France), died on 23 January 1953 in Neuchâtel, achieved in 1909 a doctorate from the University of Lausanne and, in 1912, he passed the lawyer's examinations. From 1911, he taught commercial law at the School for Commerce in Neuchâtel, in 1916 he handed in a habilitation thesis at the University of Neuchâtel, and from 1923 to 1953 he signed for a very long period of time as an ordinary professor responsible for the introduction to legal studies. Later, he was president of the same academic institution and between 1947 and 1953 he was also charged to lecture legal philosophy at the University of Geneva. Besides he persecuted a career as a judge and as a political representative of the liberals or radicals. Further, he also was a member of the Red Cross Committee and presided the Council for scientific research of his origin Canton.
He also followed up a career as an officer in the headquarters of the Swiss Army, and even achieved the ranks of a brigade and division commander.

[Selected Works of the Same Author]
Claude Du Pasquier: Modernisme judiciaire et jurisprudence suisse, in: Recueil de travaux offert par la Faculté de Droit de l'Université de Neuchâtel à la Société des Juristes, Neuchâtel: Paul Attinger, 1929; *Idem*: Introduction à la théorie générale et à la philosophie du droit, Paris/ Neuchâtel: Recueil Sirey/ Éditions Delachaux & Niestlé, 1937 (reprint

Neuchâtel/ Paris: Delachaux et Niestlé, 1988); *Idem*: Vue d'ensemble sur les conceptions de l'État – La neutralité morale de l'État, in: Recueil de Travaux publié par la Faculté de l'Université de Neuchâtel à l'occasion du Centenaire de la Fondation de l'Académie 1838-1938, Paris: Recueil Sirey, 1938; *Idem*: La notion de justice sociale et son influence sur le droit suisse, in: Zeitschrift für schweizerisches Recht, Centenarium 1852-1952, pp. 69 ss., Basel: Helbing & Lichtenhahn, 1952; *Idem*: Essai sur la nature juridique du faux en écriture, Lausanne: A. Jaunin, 1909.

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2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.12 "Oscar Adolf Germann, Überwindung des Rechtspositivismus"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Oscar Adolf Germann
Title: Zur Überwindung des Positivismus im schweizerischen Recht – Geschichtlicher Rückblick und kritische Stellungsnahme zu den Methoden der Rechtsfindung
Edition(s): in: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli & Cie., 1965, pp. 307-342; erstmals in: Zeitschrift für Schweizerisches Rechts, Centenarium 1852-1952, pp. 99-140

[Introduction/Historical Situation and Systematic Context]
In occasion to the Centenary of the famous "Journal for Swiss Law" in 1952, *Oscar Adolf Germann* presented an essay that discusses the overcome of legal positivism in retrospect. The arguments are structured in historical observations and in critical considerations.

[Content, Abstracts/Conclusions, Insights, Evidence]
According to *Oscar Adolf Germann*, positivism has been mainly favoured in the course of the great codifications of legal order and based on the pretention of the monopoly of the codified law as the only source of positive legal order. This could only be possible on the basis of the assumption of the seclusive character of the legal order as a holistic system. On the contrary, the legislator was held as omnipotent instance to positivise valid law. As the outcome of this exaggerations has not proved to be neither satisfying nor desirable. In consequence, the conviction grew especially in France, which the so-called école de l'éxegèse had to be overcome, and *François Gény* founded a new paradigma of legal interpretation (in his writings "*Méthode d'interprétation*" and "*Science et technique en droit privé positif*"). In Germany, the Historic School of law had already discovered the positivistic attitude as limited and the so-called quarrel on methods, as prosecuted by the diverse currents of legal thought ("Richtungsstreit") had evolved more sophisticated concepts of legal interpretation. As for the development in Switzerland, that in a high degree depended on the evolution abroad (compare the contributions by *Eugen Huber* and *Walther Burckhardt* to this question; see nos. 1.4 and 2.1 of this Legal Anthology, as well as the introduction in no. 1.1 of this Legal Anthology). "Wie sich ergibt, ist die Judikatur unseres Bundesgerichts weit über den formalen Gesetzespositivismus hinausgekommen, ohne prinzipiell den Boden des positiven Rechts zu verlassen". Thereby is identified an important and basic ambiguity of legal practice.
According to the valuation by *Oscar Adolf Germann*, Neo-Kantianism has contributed a great deal to overcome positivism in practice This negative conclusion is to be somewhat

attenuated insofar as the change of factual circumstances is considered to be as of great importance in Swiss legal thought. In this situation, the author stresses the certainty of judicial decisions as well as the equality before the law as main achievements of the overcoming and surpassing of legal positivism.

[Further Information About the Author]
Oscar Adolf Germann, born 19 August 1889 in Frauenfeld, died 1 December 1979 in Bottmingen, followed his jurisprudential studies in Germany and Austria, before obtaining his doctorate at the University of Zurich in 1914. Afterwards he joined the federal administration and was a lecturer for labour legislation at the University of Berne. Between 1930 and 1960, he was ordinary professor of penal law at the University of Basel. From 1952 to 1961, he was chief editor of the "Schweizerische Zeitschrift für Strafrecht". He also persecuted a notable career in the Swiss Army.

[Selected Works of the Same Author]
Oscar Adolf Germann: Grundlagen der Rechtswissenschaft – Einführung in deren Probleme, Methoden und Begriffe, Bern: Stämpfli, 1950; *Idem*: Präjudizien als Rechtsquelle – Eine Studie zu den Methoden der Rechtsfindung, in: Acta Instituti Upsaliensis Iurisprudentiae Comparativae, vol. 2, Stockholm: Almqvist & Wiskell, 1960; *Idem*: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli, 2. ed. 1967; *Idem*: Grundsätze der Gesetzesauslegung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 43, pp. 193-215, Basel: Helbing & Lichtenhahn, 1924; *Idem*: Imperative und autonome Rechtsauffassung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 46, Basel: Helbing & Lichtenhahn, 1927, pp. 183 ss.; *Idem*: Präjudizielle Tragweite höchstinstanzlicher Urteile, insbesondere der Urteile des schweizerischen Bundesgerichts – Ein Beitrag zu den grundsätzlichen Fragen der Rechtsfindung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 68, pp 297-332, 423-456, Basel: Helbing & Lichtenhahn, 1949; *Idem*: Méthodes d'interprétation et problèmes fondamentaux du droit (Faculté de Droit de l'Université de Montpellier, 1957), in: Probleme und Methoden der Rechtsfindung. Bern: Stämpfli & Cie AG, 1965, pp. 377 ss.; *Idem*: Problematik der Rechtsverbindlichkeit und der Rechtsgeltung, in: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli & Cie., 1965, pp. 17 ss. (first printing in: Revue Hélvetique de Droit International, vol. 1965); *Idem*: Neuere Judikatur des Schweizerischen Bundesgerichtes zur Frage der Gesetzesauslegung nach den Vorarbeiten, insbesondere nach dem darin geäusserten Willen des Gesetzgebers, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 81/ I, pp. 207-243, Basel: Helbing & Lichtenhahn, 1962.

[For Further Reading]
Oscar Adolf Germann: Präjudizien als Rechtsquelle – Eine Studie zu den Methoden der Rechtsfindung, in: Acta Instituti Upsaliensis Iurisprudentiae Comparativae, vol. 2, Stockholm: Almqvist & Wiskell, 1960.

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2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.13 "Wilhelm Oswald, Formalismus in der Jurisprudenz"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Wilhelm Oswald
Title: Formalismus in der Jurisprudenz und materiale Rechtsethik, Festrede des Rektors, gehalten am Dies academicus der Universität Freiburg am 15. November 1954
Edition(s): in: Freiburger Universitätsreden, N. S. Nr. 19, Freiburg im Üechtland: Universitätsverlag, 1957

[Introduction/Historical Situation and Systematic Context]
Having been educated partially in Rome, the primary theme of *Wilhelm Oswald* during his whole life remained the relation between law, the legal order and the state on the one side and religion respectively theology on the other side. In 1936, called to the University of Freiburg im Üechtland, an academic institution under Catholic influence, he held the chair for public law. In 1944, for instance, he published a first essay, entitled "Das Dilemma des säkularisierten Staates – Seine Rückbiegung auf das christliche Menschenbild" (Freiburg im Üechtland: Paulusdruckerei, 1944), that leads into the direction of the later interest in State theory and political philosophy.
To some extent as a motto, we can take an excerpt from the beforementioned essay that served as an inscription on the verso of a collection of biographical essays, edited by *Carl Hans Burnschwiler*,: "Kein Vernünftiger kann Halt machen bei der Untersuchung des positiven Rechts. Denn auf diese Weise käme man dazu, das Gewissen zu verleugnen und es seiner Autorität zu berauben, denn das Gewissen setzt sich mit aller Macht zur Wehr gegen den extremen Rechtspositivismus, welcher der Frage nach dem Gerechten und damit nach dem letzten Grunde des Rechtes ausweichen möchte. Wir besitzen in unserem Seelenleben eine ursprüngliche Fähigkeit, die Gerechtigkeit von der Ungerechtigkeit zu unterscheiden. [...] Die Entscheidung über das Gerechte und das Ungerechte steht nicht lediglich dem Staate zu. Der Bürger, welcher sich eine derartige Entscheidung nach seinem eigenen Rechtsgefühl anmasst, begeht kein Verbrechen gegen den Staat, wie die skeptischen und realistischen Lehren aller Jahrhunderte wahrhaben wollen. Sie setzen die Gerechtigkeit mit der blossen Legalität in eins und lassen derart die Gerechtigkeit mit dem Befehl zusammenfallen. Das bedeutet aber eine Abdankung des Geistes (*Wilhelm Oswald*: Das Dilemma des säkularisierten Staates, 1944, p. 35 s.)"

[Content, Abstracts/Conclusions, Insights, Evidence]
The essay proposed as a text worth to be read consists in a speech of *Wilhelm Oswald* as rector of the University of Freiburg (Switzerland), held on 15 November 1954. Starting

with an analysis of the reality of law, the author identifies a tension between the formal aspects of the legal order and its material content. Formalism in jurisprudence is meant to me a maxim that has to be overcome by material ethics. Oswald refers to the philosophers *Max Scheler* and *Nicolai Hartmann* and their attempts to a so-called "materiale Wert-Ethik" (please refer to the proposed texts for further reading). The core argument is to give back the material values and valuations to the merely formal structure of legal thought. This task can be fulfilled by relating the rules of the constitution back to the idea and ideal of humanity and ethics, both non rational, but rather substantial. The same relation is to be realised between the legal order and justice, respectively human rights in the sense of modern natural law theory (*Johannes Messner*): "Naturrecht als derjenige Teil des natürlichen Sittengesetzes und damit des in der Natur des menschlichen Seins gründenden ethischen Sollens, der die zwischenmenschlichen Beziehungen auf Grund der Gerechtigkeit regelt, bedeutet Einheit von Sein und Sollen, die Verankerung der deontologischen Ordnung in der Ontologie. Der Urheber alles geschaffenen Seins bekundet auch in der Rechtsnorm seinen Willen". Further foundations of the arguments can be taken both from traditional Thomistic natural law theory, and from evangelical ethics (as represented by *Emil Brunner*, for instance). And the consequences of a material understanding of the constitution have already been sketched by *Richard Bäumlin* and *Werner Kägi*, at that time (see nos. 5.6 and 5.11 of this Legal Anthology).

The identified tension between formal procedures and material content in the domain of public law is transferred by *Wilhelm Oswald* into a tension between legal positivism and the ideal of law. The problem consists therein that this ideal is not understood immanently, as realised within history, but rather located as a transcendental absolute, represented and personalised by God. "Es ist die wichtige Aufgabe unserer Universität, in dieser orientierungslosen Zeit einzutreten für das Transzendente gegen das Immanente, das Ewige gegen das Unzulängliche". Such a radical accentuation takes the immanent as a particular entity that is without any value nor sense; rather, the individual is the only seat of the absolute, and such individualities are existing entities (immanent in reality), in fact. Why should we sharpen the transcendence when we have access to the absolute in the materialised form of history? By arguing this way, the dilemma of recent natural law theory under Catholic influence and ethical theory in the current of life philosophy shows up clearly.

Wilhelm Oswald identifies four domains where the material turning point of Christian ethics have found its precipitation in public law, in the constitutional legal order: the relation of rule of law democracy to values, the true authority in the context of democracy, freedom and equality as guiding principles, and last but not least social security. It has not to be outlined explicitly that the author prefers collective, communitarian arguments to found these arguments. Indeed, these tendencies and inclinations have deeply characterised a certain period of legal thought in the domain of constitutional law. In consequence, a material notion of the constitution is proposed: "Werterkenntnis und Wertentscheid im politischen Lebensraum sind in erster Linie auf die Verfassung gerichtet; sie ist im Grunde nicht lediglich ein positiver Begriff soziologischer und rechtlicher

Ordnung. Als organisatorische Grundnorm des Staates geht sie, durch alle Wesenszusammenhänge hindurch, über in eine geistige Ordnung, die den Gedanken einer moralischen Verpflichtung in sich trägt. Mit einer bloss formalen Durchdringung, ohne Zurückversetzung auch der Verfassung in die richtige Ordnung zur Metaphysik und damit zur Wirklichkeit, kommt man nicht zu einem sinnvollen Verfassungsbegriff". The question to answer remains, which metaphysics would be adequate to the constitution of a democratic community... In such a context, reference to pre-modern metaphysics as provided by Thomism and Catholic natural law theory is highly ambiguous and problematic.

[Further Information About the Author]
Wilhelm Oswald, born 3 March 1900 in Bünzen, died 20 October 1982 in Fribourg, started with philosophical studies at the University of Rome, and changed later to jurisprudence, studying at the Universities of Rome, Freiburg im Üechtland (Switzerland) and Zurich. After having presented his promotion and habilitation thesis at the University of Freiburg, he taught at the law faculty legal philosophy, public law, i.e. federal constitutional and administrative law from 1936 to 1970. Between 1954 and 1956, he was chancellor of his University, and as such he addressed himself with the speech "Formalismus in der Jurisprudenz und materiale Rechtsethik" to the academic public. From 1948 to 1974 he also acted as a judge of the supreme court of the principality of Liechtenstein.

Carl Hans Brunschwiler (Ed.): Freundesgabe für Wilhelm Oswald, Baden: Baden-Verlag, 1977.

[Selected Works of the Same Author]
Wilhelm Oswald: Das Dilemma des säkularisierten Staates – Seine Rückbiegung auf das christliche Menschenbild, Freiburg im Üechtland: Paulusdruckerei, 1944; *Idem*: Topisches und systematisches Denken in der Rechswissenschaft, in: Festgabe für Wilhelm Schönenberger zum 70. Geburtstag, Freiburg im Üechtland: Universitätsverlag, 1968.

[For Further Reading]
Nicolai Hartmann: Grundzüge einer Metaphysik der Erkenntnis, Berlin: Walter De Gruyter, 2nd ed. 1925, 5th ed. 1965; *Idem*: Diesseits von Idealismus und Realismus, in: Kant-Studien, Philosophische Zeitschrift, begründet von Hans Vaihinger, vol. 29 (1924), nos. 1 s., Berlin: Rolf Heise, 1924, pp. 160 ss.;
Johannes Messner: Naturrecht – Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik, Innsbruck/ Wien/ München: Tyrolia-Verlag, 5th ed. 1966;
Max Scheler: Der Formalismus in der Ethik und die materiale Wertethik – Neuer Versuch der Grundlegung eines ethischen Personalismus, in: Jahrbuch für Philosophische und phänomenologische Forschung, Halle an der Saale: Max Niemeyer, 1916, 2nd ed. 1921;
Eduard Spranger: Lebensformen – Geisteswissenschaftliche Psychologie und Ethik der Persönlichkeit, Halle an der Saale: Max Niemeyer, 3rd ed. 1922.

22 November 2017 *Michael Walter Hebeisen*

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Entry 2.14 "Aloïs Troller, Rechtserlebnis und Rechtspflege"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Aloïs Troller
Title: Rechtserlebnis und Rechtspflege – Ein Fussweg zur Jurisprudenz, für Ungeübte begehbar
Edition(s): Frankfurt am Main/ Berlin: Alfred Metzner, 1962, pp. 29-72

[Introduction]
Aloïs Troller's primary earnings are to be found in the domain of intellectual property rights. However, he had a strong and lifelong inclination towards legal philosophy. He was the first author in Switzerland to adopt the newer tendencies in philosophy, i.e. existentialism and phenomenology as well as structuralism and to apply them fecundly to legal thought. The condensation of his occupation with existentialism, Troller layed down in his early introduction to jurisprudence, entitled "Legal Experience and Jurisprudence", whereas his thoughts on phenomenological philosophy found its expression in the principal writing, entitled "Principles of Jurisprudence, Applicable Everywhere" from 1965; later, in 1975, he also published a classical writing on legal methodology, entitled "Foundations of a Self-Understanding Legal Methodology and Legal Philosophy". Moreover, the relation between the disciplines of philosophy, legal philosophy and jurisprudence has been treated by the same author in a monography from 1971. All together, these writings stand for the so to say second high tide of legal philosophy, after the early pre-war culmination in *Eugen Huber* and *Walther Burkhardt*.

[Historical Situation and Systematic Context]
In his earliest of these masterful writings in legal philosophy, *Aloïs Troller* refers to existentialism in order to discuss the principal problems of jurisprudence in a very comprehensive and easy to understand way. There are, however, no references in terms of explicit indications or citations. But definitely the spirit of these arguments consists in a fecund adoption of the philosophical questions about the existence of man and of human community. In truth, the author even goes back to previous currents within the history of philosophical thought, i.e. the life philosophy as established by *Wilhelm Dilthey* (see nos. 2.24 and 3.8 of this Legal Anthology), and an orientation of legal philosophy, that relies on experience as a fundamental basis for the legal order and of jurisprudence, as inaugurated by *Giuseppe Capograssi* (Studi sull'esperienza giuridica (1932), in: Opere, vol. 2, Milano: A. Giuffrè, 1959, pp. 211 ss.), and as proposed by *Miguel Reale* (O direito como experiência (Il diritto come esperienza), Såo Paulo: Ediçåo Saraiva, 1968 (Milano: A. Giuffrè, 1973)). These

two classical works of legal philosophy are highly recommended for further reading.

[Content, Abstracts/Conclusions, Insights, Evidence]
As a starting point, the legal order accounts for the basis of human existence. In the beginning of his introduction to jurisprudence, *Aloïs Troller* addresses the general object as well as the specific contents of legal order, before he defines the order itself: "Ordnung ist nie bloss das Festlegen von irgendwelchen Beziehungen, sondern stets das Ausrichten nach der leitenden Idee. Die Ordnung, das heisst die Regeln über die Beziehungen der einzelnen Objekte, über ihre festen und ihre wechselnden Standorte, versteht man demnach erst dann, wenn man die Idee begriffen hat, die das System entwerfen liess". Order is not to be misunderstood in terms of logics, and it consists not only in a certain surface.
The deeper structure of order derives from nature, or to be more precise from human existence as an individual human being as well as human community. The bases of a just legal order are to be just in an existential philosophical sense, i.e. in an understanding founded in the experience of justice and injustice. In a long tradition arithmetical, geometrical, and distributive justice are discussed in a new light. "Gleichgewicht, Ausgewogensein, geordnete Verhältnisse des einzelnen zum Ganzen und umgekehrt begegnen uns in den mathematischen Formeln; von ihnen hängt das technische Gelingen ab; sie geben Kunstwerken die Geschlossenheit. Ins Gleichgewicht zu bringen sind alle Elemente, die im zu ordnenden Gesamten und den Teilen, die es bilden, erscheinen und wirken: in der Technik die Naturkräfte; bei den Kunstwerken je nach ihrer Art: Linien und Farben, Rythmen und Töne; bei den Menschen aber entsprechend ihrem Wesen das Körperliche, Seelische und Geistige". Such an approach resembles natural law theory, apparently. The natural in an existentialistic understanding refers to human nature, to the nature of human being. "Naturrecht und positives Recht müssen zusammenwirken, damit wir eine gute Rechtsordnung erhalten. Das Naturrecht als Vorbild, zu dem wir hinstreben, ohne es je ganz zu erfassen und zu verstehen, und die verkündenden Gesetze, die festen Gewohnheiten und die Rechtsprechung, die uns nach Möglichkeit sichere Auskunft geben; das Naturrecht als das Bewegende und das positive Recht als das zur Ruhe Hinweisende entsprechen gemeinsam unserem dynamischen und statischen Wesen". This reference to natural law remains ambiguous, however. Anyway, it indicates to a dynamic evolution of the idea, and identifies the underlying structure of human existence, respectively the ethical, moral and customary orders as the principle influencing legal order.
"Rechtsordnung, Moral und gute Sitten sind für die menschliche Gemeinschaft unentbehrlich. Keines dieser drei Ordnungssysteme lässt sich ohne Zerrüttung der Gesellschaft aufheben. Sie sind gleichermassen zu achten und zu pflegen. Im täglichen Leben braucht man sich nicht zu überlegen, ob man im Bereich der einen oder der anderen Ordnung handelt. Rechtsgefühl, Gewissen und gesellschaftlicher Anstand leiten uns gemeinsam und geben der menschlichen Existenz Sicherheit und Ruhe. Die Ordnung des menschlichen Zusammenlebens ist ein unteilbares Ganzes. Deshalb hat es keinen Sinn, darüber zu streiten, ob der Beitrag des einen oder des anderen dieser drei Systeme

wichtiger sei".
In this general and integral view of legal order and other kinds of ordinating or normative forces within human community, peace is outlined as the main aim and purpose of law, according to *Aloïs Troller*. "Der Wille zum Rechtsfrieden ist ein Teil der Gerechtigkeit".

[Philosophical Valuation and Jurisprudential Significance]
Post-World-War-II existentialist philosophy stands under the impression of the tragedy of failing legal order, obviously. The recourse to natural law within this current of existentialism and its reception by legal thought has barely nothing to do with concurring tendencies favoured by Catholic social philosophy. Such reference can be motivated sociologically (as it is the case in *Hans Ryffel*; see nos. 1.10 and 1.15 of this Legal Anthology) or, as it is the case in *Aloïs Troller*, be based on considerations about justice in a teleological framework. As a perusing aspect, and due to the professional practice, the aesthetical inclination of the author's argumentation is interesting to follow, above all.

[Further Information About the Author]
Aloïs Troller, born 15 May 1906 in Wilihof, died 15 May 1987 in Luzern, graduated in Freiburg in 1837, after having studied jurisprudence at the Universities of Berne and Basel. He also followed his musical studies as a singer in Munich. From 1950 onwards, he taught as a private lecturer at the University of Freiburg, where he was entitled professor for intellectual property between 1957 and 1976 as well as for legal philosophy between 1971 and 1978. Above all, he influenced the development of intellectual property rights in Europe by his eminent work in two volumes "Intellectual Property Law" ("Immaterialgüterrecht"; 3. ed. 1983-1985).
His philosophical thought was mainly influenced by phenomenology, whose insights he tried to apply to jurisprudence.
For further information as well as for a complete bibliography, please refer to:
Werner Krawietz/ Walter Ott (Ed.): Formalismus und Phänomenologie im Rechtsdenken der Gegenwart, 1987.

[Selected Works of the Same Author]
Aloïs Troller: Überall gültige Prinzipien der Rechtswissenschaft, Frankfurt am Main/ Berlin: Alfred Metzner, 1965; *Idem*: Die Aufgabe der Rechtsphilosophie, in: Schweizerische Juristen-Zeitung, vol. 69 (1973), pp. 97 ss.; *Idem*: *Idem*: Grundriss einer selbstverständlichen juristischen Methode und Rechtsphilosophie (Das Recht in Theorie und Praxis), Basel/ Stuttgart: Helbing & Lichtenhahn, 1975; *Idem*: Rekonstruktion und Rechtswirklichkeit – Ein Beitrag zu einem kritischen Rechtsrealismus, in: Rechtstheorie, vol. 11 (1980), vol. 2, pp. 137 ss.

[For Further Reading]
Aloïs Troller: Jurisprudenz auf dem Holzwege, in: Schriftenreihe der Internationalen Gemeinschaft für Urheberrecht, vol. 13, Berlin/Frankfurt am Main, 1959; *Idem*: Eugen

Hubers Allgemeingültige Rechtsphilosophie, in: Gedächtnisschrift für Peter Jäggi, ed. Bernhard Schneider and Peter Gauch, Freiburg im Üechtland: Universitätsverlag, 1977.

14 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.16 "Oscar Adolf Germann, Méthodes d'interprétation "
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Oscar Adolf Germann
Title: Méthodes d'interprétation et problèmes fondamentaux du droit
Edition(s):, in: Probleme und Methoden der Rechtsfindung. Bern: Stämpfli & Cie AG, 1965, pp. 377 ss. (first printing Montpellier: Faculté de Droit de l'Université, 1957)

[Introduction/Historical Situation and Systematic Context]
In an essay from 1963, entitled "Methoden der Gesetzesauslegung" (in: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli & Cie., 1965, pp. 47 ss.), *Oscar Adolf Germann* has led the basis for reflected thought about the interpretation of the legal order. These arguments have all become canonical for legal thought in Switzerland and can be found in many of the later attempts to theorise legal interpretation and application with a set of methodological based issues. These so-called elements of interpretation are meant to provide a sound foundation, but as they can easily contradict each to the other or concur with each other this attempt is very limited, philosophically speaking (however, they represented the state of art in legal interpretation for quite a long period of time, and even today, they are held at least for propaedeutic purposes). This lack of foundation has only been filled with the principle of hermeneutic interpretation, as it is for instance elaborated and proposed by *Georg Hinderling* ("Rechtsnorm und Verstehen – Die methodischen Folgen einer allgemeinen Hermeneutik für die Prinzipien der Verfassungsauslegung", in: Abhandlungen zum schweizerischen Recht, Bern: Stämpfli, 1971; see no. 2.17 of this Legal Anthology).

[Content, Abstracts/Conclusions, Insights, Evidence]
In addition to the main stream of methodological based legal interpretation (instead of an epistemological approach), we have selected an essay by *Oscar Adolf Germann* that has been addressed to a specific audience, i.e. French students at the *Faculté de Droit* of the University of Montpellier, dating from 1957. In this text, Swiss particularities of legal interpretation are indicated in a manner that is very easy to understand.

[Further Information About the Author]
Oscar Adolf Germann, born 19 August 1889 in Frauenfeld, died 1 December 1979 in Bottmingen, followed his jurisprudential studies in Germany and Austria, before receiving his doctor's degree at the University of Zurich in 1914. Afterwards, he joined the federal administration and was a lecturer for labour legislation at the University of Berne.

Between 1930 and 1960, he was ordinary professor of penal law at the University of Basel. From 1952 to 1961, he was chief editor of the "Schweizerische Zeitschrift für Strafrecht". He also persecuted a notable career in the Swiss Army.

[Selected Works of the Same Author]
Oscar Adolf Germann: Grundlagen der Rechtswissenschaft – Einführung in deren Probleme, Methoden und Begriffe, Bern: Stämpfli, 1950; *Idem*: Präjudizien als Rechtsquelle – Eine Studie zu den Methoden der Rechtsfindung, in: Acta Instituti Upsaliensis Iurisprudentiae Comparativae, vol. 2, Stockholm: Almqvist & Wiskell, 1960; *Idem*: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli, 2. ed. 1967; *Idem*: Grundsätze der Gesetzesauslegung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 43, pp. 193-215, Basel: Helbing & Lichtenhahn, 1924; *Idem*: Imperative und autonome Rechtsauffassung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 46, Basel: Helbing & Lichtenhahn, 1927, pp. 183 ss.; *Idem*: Präjudizielle Tragweite höchstinstanzlicher Urteile, insbesondere der Urteile des schweizerischen Bundesgerichts – Ein Beitrag zu den grundsätzlichen Fragen der Rechtsfindung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 68, pp 297-332, 423-456, Basel: Helbing & Lichtenhahn, 1949; *Idem*: Problematik der Rechtsverbindlichkeit und der Rechtsgeltung, in: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli & Cie., 1965, pp. 17 ss. (first printing in: Revue Hélvetique de Droit International, vol. 1965); *Idem*: Zur Überwindung des Positivismus im schweizerischen Recht – Geschichtlicher Rückblick und kritische Stellungsnahme zu den Methoden der Rechtsfindung, in: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli & Cie., 1965, pp. 307-342 (erstmals in: Zeitschrift für Schweizerisches Rechts, Centenarium 1852-1952, Basel: Helbing & Lichtenhahn, 1952, pp. 99-140); *Idem*: Neuere Judikatur des Schweizerischen Bundesgerichtes zur Frage der Gesetzesauslegung nach den Vorarbeiten, insbesondere nach dem darin geäusserten Willen des Gesetzgebers, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 81/ I, pp. 207-243, Basel: Helbing & Lichtenhahn, 1962.

[For Further Reading]
Oscar Adolf Germann: Präjudizien als Rechtsquelle – Eine Studie zu den Methoden der Rechtsfindung, in: Acta Instituti Upsaliensis Iurisprudentiae Comparativae, vol. 2, Stockholm: Almqvist & Wiskell, 1960.

13 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
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2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.18 "Georg Hinderling, Rechtsnorm und Verstehen"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Georg Hinderling
Title: Rechtsnorm und Verstehen – Die methodischen Folgen einer allgemeinen Hermeneutik für die Prinzipien der Verfassungsauslegung (in: Abhandlungen zum schweizerischen Recht)
Edition(s): Bern: Stämpfli, 1971, pp. 95-101 and 238-169

[Introduction/Historical Situation and Systematic Context]
The invention of hermeneutics by *Friedrich Daniel Ernst Schleiermacher* originally consisted in a means to the end of reconciling different and divergent interpretation of the Holy Bible. It can be considered as the art of interpreting textual documents by relating the significance of each part to the whole that results from all the meanings of the parts it includes (leading to the so-called hermeneutical circle that is not at all vicious). Moreover, it also enables to situate a text within its context in a cultural view. In *Wilhelm Dilthey* this method has been enlarged and applied to cultural phenomenon (“Lebenskreise”, “Kultursysteme”). The difficulty, however, is how to interpret entities that are not concluded and represent an open and dynamic development or progress.
Hermeneutics, as a tool for inclusive interpretation, have been further developed by *Hans-Georg Gadamer* to a veritable hermeneutical approach to philosophy itself, i.e. broadened to provide a foundation for philosophical thought in the domain of human sciences. This current has been very influential for the progress of modern philosophy in the Twentieth Century.
Another aspect of hermeneutics has lead *Emilio Betti* to construct a comprehensive theory of legal interpretation (compare the essays in *Vito Rizzo* (Ed.): Emilio Betti e l'interpretazione (Università degli Studi di Camerino, vol. 14), Napoli: Edizioni Scientifiche Italiane, 1991; and in *Vittorio Frosini/Francesco Riccobono* (Eds.): L'Ermeneutica giuridica di Emilio Betti (Pubblicazioni dell'Istituto di Teoria della Interpretazione e di Informatica Giuridica dell'Università "La Sapienza", Roma, vol. 10), Milano: A. Giuffrè, 1994). It is deplorable that this application of hermeneutics as a method for the interpretation of legal norms and legal order has not been widely adopted in jurisprudence, although eminent legal scholars have received inspiration by this current.
The core of the hermeneutical question, with respect to legal thought, consists therein, that the text of a legal norm has not only to be interpreted in general, but also to be applicated to a specific case (see the contributions in “Text und Applikation” as selected for further reading). This would be the very link between rule based and precedent orientated legal

systems, and also be a key to a deeper understanding of the relation between more general legal rules or principles and more specific legal norms. Hermeneutics could enable to widen the methodological stricture in legal theory, when reconsidered in a creative manner, following the examples of historicism and hermeneutics (consult no 3.15 of this Legal Anthology).

[Content, Abstracts/Conclusions, Insights, Evidence]
Georg Hinderling counts to the first legal thinkers who have elaborated the implications of hermeneutics on legal interpretation in general, and especially on the interpretation of constitutional law. In his dissertation entitled "Rechtsnorm und Verstehen", the author provides rich material to inform constitutional interpretation with hermeneutical principles. The discussion opens with a presentation of the similarities and differences between the approaches inaugurated by *Hans-Georg Gadamer* and *Emilio Betti*. A convincing argumentation in theological hermeneutics leads the author to the opinion that historical understanding tends to refer to existential truths. The question of whether there can be an existentialistic philosophical interpretation of legal order, however, is omitted. The crucial point seems to be, whether the interpretation is allowed to be creative, i.e. participate in the creation of the very meaning of the legal text, or whether it is restrained to be merely a comprehension in the sense of a reproduction. Critical reflection shows that interpreting a text is always and necessarily creative and even inventive, as the subject of cognition has to contribute to the recognised object, and such even in a considerable degree. If one is ready to accept this contribution, the according paradox or dilemma vanishes.
In a second part of this investigations, *Georg Hinderling* discusses the specific juridical aspects of hermeneutics, as the acclaimed method, the problem of vacancies within the legal order, and general legal principles as well as topical understanding. The author favours an existentialistic interpretation in general (see the passage selected for reading). So to say as a direct consequence, the concept of substantialisation or concretisation is proposed by *Georg Hinderling*. In any given case of possible application, the norm included in the positive legal order has to be specified in order to be able to provide a rule of decision (*Wolfgang Fikentscher*) or a so-called case-norm (*Friedrich Müller*), i.e. jurisdiction will always take an active and creative part in the process of application. The normative density of constitutional norms is necessarily more abstract, and the necessity of such a procedure even increased or more evident. Therefore, these norms have to be made more concrete to serve as a starting point of interpretation and application. The whole process not only of interpretation, but rather of application can very well be conceptualised in terms of hermeneutics (this is also the case in the domain of theology, where the texts of the Holy Bible are applicated to the community by the priest's sermon). Also in this specific respect of constitutional law, hermeneutical interpretation has an inclination towards existentialistic understanding, according to the author. In conclusion two special questions are addressed: constitutional rules form an order insofar as they are based on a certain set of valuations, and constitutional rights and freedoms demand for an adequate

interpretation. In these two cases, the tool of hermeneutical insights enables to provide convincing solutions.

[Philosophical Valuation and Jurisprudential Significance]
In conclusion, hermeneutics do not stand for a sophisticated method of interpretation, but rather for a comprehensive and inclusive modality to understand the prescriptions of the legal order. It should occur that this art of hermeneutical interpretation eventually evolves to a veritable standard, to the state-of-the-art level. The province of hermeneutics, i.e. theology, can help to sharpen the consciousness of the absolute in the law on one side, and to bridge or overcome the tension between divergent possibilities of interpretations that refer to the very same text. It must be taken into consideration that legal interpretation has to tend to a unique and ascertained meaning or significance of legal texts.

[Further Information About the Author]
Hans Georg Hinderling received his doctorate in 1971 at the University of Basel, and in 1973 he also received an LL.M. of Harvard Law School. Since 1971, he is an independent advocate in Basel; he is chairman of the Swiss section (VDF) of the World Federation of Direct Selling Associations (WFDSA).

[For Further Reading]
Emilio Betti: Zur Grundlegung einer allgemeinen Auslegungslehre, Tübingen: J. C. B. Mohr, 1988 (first printing in: Geschichte der Antiken Recht und Allgemeine Rechtslehre, Festschrift für Ernst Rabel, ed. Wolfgang Kunkel and Hans Julius Wolff, 1954, vol. 2, pp. 79 ss.;
Dietrich Böhler: Philosophische Hermeneutik und hermeneutische Methode, in: Text und Applikation – Theologie, Jurisprudenz und Literaturwissenschaft im hermeneutischen Gespräch, ed. Manfred Fuhrmann (Poetik und Hermeneutik, vol. 9), München: Wilhelm Fink, 1981, pp. 483 ss.;
Rudolf Bultmann: Das Problem der Hermeneutik. In: Glauben und Verstehen – Gesammelte Aufsätze, Tübingen: J. C. B. Mohr, 1933/ 1952, vol. 2, pp. 211 ss.;
Ernst Forsthoff: Recht und Sprache – Prolegomena zu einer richterlichen Hermeneutik (Schriften der Königsberger Gelehrten Gesellschaft, Geisteswissenschaftliche Klasse, vol. 17 (1940), Nr. 1, Halle an der Saale: Max Niemeyer, 1940;
Hans-Georg Gadamer: Hermeneutik, in: Gesammelte Werke, vols. 1 and 2, Tübingen: J. C. B. Mohr, 6th ed. 1990 and 2nd ed. 1993; *Idem*: Hermeneutik als praktische Philosophie, in: Rehabilitierung der praktischen Philosophie, ed. Manfred Riedel, Freiburg im Breisgau: Rombach, 1974, vol. 1, pp. 325 ss.;
Martin Kriele: Besonderheiten juristischer Hermeneutik, in: Text und Applikation – Theologie, Jurisprudenz und Literaturwissenschaft im hermeneutischen Gespräch, ed. Manfred Fuhrmann (Poetik und Hermeneutik, vol. 9), München: Wilhelm Fink, 1981, pp. 409 ss.;
Odo Marquard: Frage nach der Frage, auf die die Hermeneutik die Antwort ist, in: Text und

Applikation – Theologie, Jurisprudenz und Literaturwissenschaft im hermeneutischen Gespräch, ed. Manfred Fuhrmann (Poetik und Hermeneutik, vol. 9), München: Wilhelm Fink, 1981, pp. 581 ss.;
Dieter Nörr: Triviales und aporetisches zur juristischen Hermeneutik, in: Text und Applikation – Theologie, Jurisprudenz und Literaturwissenschaft im hermeneutischen Gespräch, ed. Manfred Fuhrmann (Poetik und Hermeneutik, vol. 9), München: Wilhelm Fink, 1981, pp. 235 ss.;
Paul Ricoeur: Zu einer Hermeneutik des Rechts – Argumentation und Interpretation, in: Die Gegenwart der Gerechtigkeit – Diskurse zwischen Recht, praktischer Philosophie und Politik, ed. Christoph Demmerling and Thomas Rentsch, Berlin: Akademie-Verlag, 1995, pp. 69 ss.;
Gunter Scholtz: Ethik und Hermeneutik – Schleiermachers Grundlegung der Geisteswissenschaften (Suhrkamp Taschenbuch Wissenschaft, vol. 1191), Frankfurt am Main: Suhrkamp, 1995;
Oliver Robert Scholz: Verstehen und Rationalität – Untersuchungen zu den Grundlagen von Hermeneutik und Sprachphilosophie (Philosophische Abhandlungen, vol. 76), Frankfurt am Main: Vittorio Klostermann, 1999; *Idem*: Ius, Hermeneutica iuris und Hermeneutica generalis – Verbindungen zwischen allgemeiner Hermeneutik und Methodenlehre des Rechts im 17. und 18. Jahrhundert, in: Entwicklung der Methodenlehre in Rechtswissenschaft und Philosophie vom 16. bis zum 18. Jahrhundert – Beiträge zu einem interdisziplinären Symposium in Tübingen, 18. bis 20. April 1996, ed. Jan Schröder, (Contubernium, vol. 46). Stuttgart: Franz Steiner, 1998, pp. 85 ss.;
Joachim Wach: Das Verstehen – Grundzüge einer Geschichte der hermeneutischen Theorie im 19. Jahrhundert (vol. 1: Die grossen Systeme; vol. 2: Die theologische Hermeneutik von Schleiermacher bis Hofmann), Tübingen: J. C. B. Mohr, 1926/ 1929.

24 November 2017 *Michael Walter Hebeisen*

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Entry 2.18 "Aloïs Troller, Grundriss einer selbstverständlichen Methode und Rechtsphilosophie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Aloïs Troller
Title: Grundriss einer selbstverständlichen juristischen Methode und Rechtsphilosophie (Das Recht in Theorie und Praxis)
Edition(s): Basel/ Stuttgart: Helbing & Lichtenhahn, 1975

[Introduction/Historical Situation and Systematic Context]
Aloïs Troller's primary earnings are to be found in the domain of intellectual property rights. However, he had a strong and lifelong inclination towards legal philosophy. He was the first author in Switzerland to adopt the newer tendencies in philosophy, i.e. existentialism and phenomenology as well as structuralism and to apply them fecundly to legal thought. The condensation of his occupation with existentialism, Troller layed down in his early introduction to jurisprudence, entitled "Legal Experience and Jurisprudence", whereas his thoughts on phenomenological philosophy found its expression in the principal writing, entitled "Principles of Jurisprudence, Applicable Everywhere" from 1965; later, in 1975, he also published a classical writing on legal methodology, entitled "Foundations of a Self-Understanding Legal Methodology and Legal Philosophy". Moreover, the relation between the disciplines of philosophy, legal philosophy and jurisprudence has been treated by the same author in a monography from 1971. All together, these writings stand for the so to say second high tide of legal philosophy, after the early pre-war culmination in *Eugen Huber* and *Walther Burkhardt*.
Concerning the main theories, it is to refered to the extensively discussed writings by *Aloïs Troller*, i.e. to the "Introduction" as well as to the "Principles of Jurisprudence" (see nos. 1.14 and 2.14 of this Legal Anthology).

[Content, Abstracts/Conclusions, Insights, Evidence]
If the method of jurisprudence be self-understanding, there would not be any necessity to discuss the relation between theory and practice. In his last legal philosophical publication, *Aloïs Troller* undertakes to reassure himself and the reader that theory be a true reflection of practice and not to dominate legal practice with its dogmatic doctrines. This wish exactly defines the task for legal philosophy, according to the author's personal view. He tends towards relativism, insofar as he takes seriously the individual, subjective approach he had put forward in his previous writings.
As an extract, we have selected for reading a passage, where the old-fashioned question of

the relation between being ("Sein") and ought ("Sollen") is discussed. As a kind of remedy, *Aloïs Troller* invents a dialectical variant to existentialism, where the existing ("Sein") is changed for the being ("Dasein"), and where the normative, imperative consists in the desicion of the desirable state of being ("Sein-Sollen", respectively "Dasein-Sollen"). "Die These, dass aus dem was ist, nicht gefolgert werden kann, was sein soll, sieht am menschlichen Sein und Dasein vorbei. Sie erklärt sich aus einer Spaltung des Erkenntnisbereits in einen materiellen und einen moralischen Teil. Der Mensch und damit sein Dasein und sein Sein ist unteilbar Materie, Seele und Geist. Und alle Erkenntnis bedarf der Grundlage in der Materie, so wie ein Geisteswerk (Erfindung, Wer der Literatur, Musik oder Kunst) nur im körperlichen Träger sich erfahren lässt. Es gibt kein moralisches Sein des Menschen, das von der Materie gelöst sich entwickeln würde. Die Erfahrung beweist das Gegenteil". Eventually, we have found back to experience, to legal, ethical, moral and consuetudinary experience. This approach not only throws a new light upon the everlasting problem of justice, but also opens unseen possibilities to deal with the goods of nature and environment within legal order.

[Further Information About the Author]
Aloïs Troller, born 15 May 1906 in Wilihof, died 15 May 1987 in Luzern, graduated in Freiburg in 1837, after having studied jurisprudence at the Universities of Berne and Basel. He also followed his musical studies as a singer in Munich. From 1950 onwards he taught as a private lecturer at the University of Freiburg, where he was entitled professor for intellectual property between 1957 and 1976 as well as for legal philosophy between 1971 and 1978. Above all he influenced the development of intellectual property rights in Europe by his eminent work in two volumes "Intellectual Property Law" ("Immaterialgüterrecht"; 3. ed. 1983-1985).
His philosophical thought was mainly influenced by phenomenology, whose insights he tried to apply to jurisprudence.
For further information as well as for a complete bibliography, please refer to:
Werner Krawietz/ Walter Ott (Ed.): Formalismus und Phänomenologie im Rechtsdenken der Gegenwart, 1987.

[Selected Works of the Same Author]
Aloïs Troller: Die Aufgabe der Rechtsphilosophie, in: Schweizerische Juristen-Zeitung, vol. 69 (1973), pp. 97 ss.; *Idem*: Überall gültige Prinzipien der Rechtswissenschaft, Frankfurt am Main/ Berlin: Alfred Metzner, 1965 (extract); *Idem*: Rekonstruktion und Rechtswirklichkeit – Ein Beitrag zu einem kritischen Rechtsrealismus, in: Rechtstheorie, vol. 11 (1980), vol. 2, pp. 137 ss.

[For Further Reading]
Aloïs Troller: Jurisprudenz auf dem Holzwege, in: Schriftenreihe der Internationalen Gemeinschaft für Urheberrecht, vol. 13, Berlin/ Frankfurt am Main, 1959; *Idem*: Eugen Hubers Allgemeingültige Rechtsphilosophie, in: Gedächtnisschrift für Peter Jäggi, ed.

Bernhard Schneider and Peter Gauch, Freiburg im Üechtland: Universitätsverlag, 1977.

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Entry 2.19 "Oscar Adolf Germann, Durch Judikatur erzeugte Rechtsnormen"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Oscar Adolf Germann
Title: Durch Judikatur erzeugte Rechtsnormen
Edition(s): Zürich: Schulthess Polygraphischer Verlag, 1976, 36 pp.

[Introduction/Historical Situation and Systematic Context]
In the 1st article of the Swiss Civil Code, jurisprudence is accepted as a source of law to fill the vacations of the codified legal order. This covers also jurisdiction as part of the realisation and fulfilment of the legal order, according to the classical writing by *Eugen Huber* (Bewährte Lehre – Eine Betrachtung über die Wissenschaft als Rechtsquelle", Bern: K. J. Wyss, 1910 (also in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, ed. Cal Hilty, vol. 25 (1911), Bern: K. J. Wyss, 1911, pp. 3-59; see no. 1.4 of this Legal Anthology). This theory has not only found reception in ("Die Lücken des Gesetzes und die Gesetzesauslegung", in: Abhandlungen zum schweizerischen Recht, N. S. vol. 8, Bern: Stämpfli & Cie., 1925, pp. 62-106; see no. 2.1 of this Legal Anthology), but has also induced *Oscar Adolf Germann* to write a classical monography about the subject in cause, entitled "Präjudizien als Rechtsquelle – Eine Studie zu den Methoden der Rechtsfindung" (in: Acta Instituti Upsaliensis Iurisprudentiae Comparativae, vol. 2, Stockholm: Almqvist & Wiskell, 1960). Later the same author has published a condensed and somewhat abbreviated version of his thoughts in an essay from 1976, that serves as an introduction to the theory of prejudices in the Swiss legal order until today.

[Content, Abstracts/Conclusions, Insights, Evidence]
According to the personal inclination of *Oscar Adolf Germann*, the arguments developed in his essay "Durch die Judikatur erzeugte Rechtsnormen" are merely of methodological character. However, he included the aspects of the function of prejudices in the anglo-american legal thought as well as the problem of how prejudices can be changed ("Praxisänderung"). "Die Bedeutung der Präjudizien ist im englischen Recht besonders gross, weil wichtige Fagen dort überhaupt nicht gesetzlich geregelt sind; das Gesetzesrecht (statute law) beschränkt sich im englischen Recht auf Spezialgebiete, für welche das überlieferte 'Common law' als ungenügend sich erwiesen hat". The adoption of such a culture of prejudices in the Swiss legal order is of restricted outreach and can be legitimated by reference to the principles of the equality before the law and the legal certainty, i.e. the predictability of legal decisions. For the question of how prejudices can be altered and adapted, we refer to the monography by *Hans Dubs* ("Praxisänderungen",

in: Basler Studien zur Rechtswissenschaft, Dissertation Universität Basel, Basel: Helbing & Lichtenhahn, 1949). The principles established in these writings can be considered as adequate even today, in general.
Additional arguments can also be found in the earlier essays of *Oscar Adolf Germann*, entitled "Gesetzeslücken und ergänzende Rechtsfindung", and "Richterrecht" (both in: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli & Cie., 1965, pp. 111 ss. and pp. 227 ss.).

[Further Information About the Author]
Oscar Adolf Germann, born 19 August 1889 in Frauenfeld, died 1 December 1979 in Bottmingen, followed his jurisprudential studies in Germany and Austria, before obtaining his doctorate at the University of Zurich in 1914. Afterwards he joined the Swiss Federal administration and was a lecturer for labour legislation at the University of Berne. Between 1930 and 1960, he was ordinary professor of penal law at the University of Basel. From 1952 to 1961, he was chief editor of the "Schweizerische Zeitschrift für Strafrecht". He also persued a notable career in the Swiss Army.

[Selected Works of the Same Author]
Oskar Adolf Germann: Grundlagen der Rechtswissenschaft – Einführung in deren Probleme, Methoden und Begriffe, Bern: Stämpfli, 1950; *Idem*: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli, 2. ed. 1967; *Idem*: Grundsätze der Gesetzesauslegung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 43, pp. 193-215, Basel: Helbing & Lichtenhahn, 1924; *Idem*: Imperative und autonome Rechtsauffassung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 46, Basel: Helbing & Lichtenhahn, 1927, pp. 183 ss.; *Idem*: Präjudizielle Tragweite höchstinstanzlicher Urteile, insbesondere der Urteile des schweizerischen Bundesgerichts – Ein Beitrag zu den grundsätzlichen Fragen der Rechtsfindung, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 68, pp 297-332, 423-456, Basel: Helbing & Lichtenhahn, 1949; *Idem*: Méthodes d'interprétation et problèmes fondamentaux du droit (Faculté de Droit de l'Université de Montpellier, 1957), in: Probleme und Methoden der Rechtsfindung. Bern: Stämpfli & Cie AG, 1965, pp. 377 ss.; *Idem*: Problematik der Rechtsverbindlichkeit und der Rechtsgeltung, in: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli & Cie., 1965, pp. 17 ss. (first printing in: Revue Hélvetique de Droit International, vol. 1965); *Idem*: Zur Überwindung des Positivismus im schweizerischen Recht – Geschichtlicher Rückblick und kritische Stellungsnahme zu den Methoden der Rechtsfindung, in: Probleme und Methoden der Rechtsfindung, Bern: Stämpfli & Cie., 1965, pp. 307-342 (erstmals in: Zeitschrift für Schweizerisches Rechts, Centenarium 1852-1952, Basel: Helbing & Lichtenhahn, 1952, pp. 99-140); *Idem*: Neuere Judikatur des Schweizerischen Bundesgerichtes zur Frage der Gesetzesauslegung nach den Vorarbeiten, insbesondere nach dem darin geäusserten Willen des Gesetzgebers, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 81/ I, pp. 207-243, Basel: Helbing & Lichtenhahn, 1962.

[For Further Reading]

Oscar Adolf Germann: Präjudizien als Rechtsquelle – Eine Studie zu den Methoden der Rechtsfindung, in: Acta Instituti Upsaliensis Iurisprudentiae Comparativae, vol. 2, Stockholm: Almqvist & Wiskell, 1960;
Eugen Huber: Bewährte Lehre – Eine Betrachtung über die Wissenschaft als Rechtsquelle, Bern: K. J. Wyss, 1910 (also in: Politisches Jahrbuch der Schweizerischen Eidgenossenschaft, ed. Cal Hilty, vol. 25 (1911), Bern: K. J. Wyss, 1911, pp. 3-59).

13 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
2nd Section "Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies"
Entry 2.24 "Michael Walter Hebeisen, Recht und Staat als Objektivationen des Geistes in der Geschichte"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Michael Walter Hebeisen
Title: Eine Staats- und Rechtslehre Wilhelm Diltheys? − Fundament einer lebenspraktischen Lehre der politischen Vergemeinschaftung
Edition(s): in: Recht und Staat als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als Geisteswissenschaften, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag SWUV, 2004, pp. 395-456

[Further Information About the Author]
Michael Walter Hebeisen, born on 9 January 1965, after having studied violoncello and musicology at the Conservatory of Berne, followed his studies in jurisprudence at the University of Berne, with semesters abroad at the University of Cambridge. He was graduated in 1992 and received his doctor's degree in 1994, after having collaborated with doctor father *Peter Saladin*.
He the changed for a period of seven years to the Federal Office of Justice, in an entity that was occupied with the preparation of the reform, i.e. the total revision of the Swiss Federal Constitution. In addition, he got a habilitation scholarship from the Swiss National Foundation for Scientific Research, under the survey of *Peter Häberle*, what enabled him to pursue an old-fashioned post-doc journey across Europe. He travelled to Oxford University (University College), where he assisted and contributed to the ongoing reform of British Constitution by the shadow Cabinet of the Labour Party. Back to the Continent, he directed to the "*Dilthey Forschungtsstelle*" and "*Hegel-Archiv*" at Ruhr University of Bochum and to the Humboldt University in Berlin. After a short residence at the "*Faculté de droit de l'Université de Toulouse*" where he studied the theory of *Jean-Claude-Eugène-Maurice Hauriou*, he settled for a long time in Naples where he established contacts to the philosophers of the School of Neo-Historicism, i.e. with *Fulvio Tessitore*, *Giuseppe Cacciatore*, *Giuseppe Cantillo* among others. In consequence of his fascination for the tradition of these thinkers, he undertook to translate selected works by Pietro Piovani (9 volumes), Giuseppe Capograssi (6 volumes), Giovanni Gentile (11 volumes) and eventually plans an Edition of the works of Bertrando Spaventa (6 volumes).
Back in his home country, he established as an eminent thinker in the domain of legal philosophy as well as theory of the human sciences.

[Selected Works of the Same Author]
Michael Walter Hebeisen: Souveränität in Frage gestellt – Die Souveränitätslehren von Hans Kelsen, Carl Schmitt und Hermann Heller im Vergleich (Dissertation Universität Bern 1994), Baden-Baden: Nomos 1995 (extract); *Idem*: Staat und Recht als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als Geisteswissenschaften, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2004, pp. 395-456; *Idem*: Krise der universellen Rechtsidee angesichts des Pluralismus der positiven Rechtsordnungen – Pragmatische Nachforschungen aufgrund der Institutionenlehren von Jean-Eugène-Claude Hauriou und Santi Romano, in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 1-65; *Idem*: Die Verfassung als Vermittlerin von Wert- und Gerechtigkeitsvorstellungen? – Geisteswissenschaftliche Überlegungen zum Wert der Verfassung als Hilfe auf dem Weg zum gerechten Zusammenleben von Menschen und Völkern, in: Herausgeforderte Verfassung – Die Schweiz im globalen Kontext (16. Kolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften), ed. Beat Sitter-Liver, Freiburg: Universitätsverlag, 1999, pp. 133 ss.; *Idem*: Schweizer Juristen-Philosophen – Eine eigenständige schweizerische Tradition der Wissenschaftsphilosophie der Jurisprudenz und der Staatslehre in Auseinandersetzungen mit ausgewählten Strömungen der Rechts- und der Staatsphilosophie sowie der Wissenschaftstheorie in der ersten Hälfte des Zwanzigsten Jahrhunderts (Eine programmatische Skizze für ein interdisziplinäres Forschungsvorhaben), in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 50, ed. Peter Häberle, Tübingen: J. C. B. Mohr/ Siebeck, pp. 69-100 (extended version in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 651-711); *Idem*: Liberalismus und Kommunitarismus betreffend das Verhältnis des Rechten zum Guten – Prinzipielle Opposition oder pragmatische Annäherung, Vorrang oder Unabhängigkeit? In: Archiv für Rechts- und Sozialphilosophie (ARSP), supplementary vol. 76, ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2000, pp. 119 ss.; *Idem*: Note sulla filosofia del diritto di Pietro Piovani – Appunti di un giurista ultramontano, Referat gehalten am Studienseminar aus Anlass des 20. Todestages von Pietro Piovani in Neapel vom 29. Juni bis 1. Juli 2000, in: Archivio di storia della cultura (Firenze: Liguori), vol. 14 (2001), ed. Fulvio Tessitore, pp. 289-305; *Idem*: „An sich redet Alles, was ist, das Ja" – Zur Verwendung Friedrich Nietzsches durch den Rechtsphilosophen Carl August Emge, Referat, gehalten auf dem internationalen Kongress der Stiftung Weimarer Klassik „Missbrauch, Ereignis und Kritik – Zur deutschen Nietzsche-Rezeption zwischen 1933 und 1945", in: Widersprüche – Zur frühen Nietzsche-Rezeption, ed. Andreas Schirmer and Rüdiger Schmidt, Weimar: Hermann Böhlaus Nachfolger, 2001, pp. 291 ss., also published in: Nietzsche und das Recht (Archiv für Rechts- und Sozialphilosophie, supplementary volume 77), ed. Kurt Seelmann, Stuttgart:

Franz Steiner, 2001, pp. 219 ss.; *Idem*: Geschichte der Vergangenheit, Geschichten für die Zukunft in: Erzählungen des Staates, ed. Otto Depenheuer, Wiesbaden: VS Verlag für Sozialwissenschaften, 2010, pp. 35 ss.; *Idem*: Souveränität bei Otto Kirchheimer – Das Dogma der Souveränität zwischen Staatslehre und Politikwissenschaften, in: Otto Kirchheimers Staatsverständnis, ed. Robert Christian van Ooyen and Frank Schale (Reihe "Staatsverständnisse", ed. Rüdiger Voigt), Baden-Baden: Nomos Verlagsgesellschaft 2010, pp. 87-117; *Idem*: Vom ästhetisch-poëtischen Grundzug des modernen Verständnisses von Geschichte – Im Besonderen von der Urteilskraft in Iurisprudenz und Staatslehre als Geisteswissenschaften, in: Moderne und Historizität, ed. for the "Klassik Stiftung Weimar" by Stefan Wilke, Weimar: Verlag der Bauhaus-Universität Weimar, 2011, pp. 134-164.

28 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Third Section "Legal Structures as an Integrative Part of Cultural Phenomenon, leading to an Interdisciplinary Approach as Part of the Theory of Science"
Introduction
by Michael Walter Hebeisen

> "Doch in solch dichter Nacht voller Finsternis, mit der die erste von uns so weit entfernte Urzeit bedeckt ist, erscheint dieses ewige Licht, das nicht untergeht, folgender Wahrheit, die auf keine Weise in Zweifel gezogen werden kann: dass diese politische Welt sicherlich von den Menschen gemacht worden ist; deswegen können (denn sie müssen) ihre Prinzipien innerhalb der Modifikationen unseres eigenen menschlichen Geistes gefunden werden."
> (*Giovanni Battista Vico*: Prinzipien einer neuen Wissenschaft über die gemeinsame Natur der Völker, in: Philosophische Bibliothek, vol. 418, ed. von Vittorio Hösle and Christoph Jermann, Hamburg: Felix Meiner, 1990, vol. 1, Nr. 331, S. 142)

[Third Section: "Legal Structures as an Integrative Part of Cultural Phenomenon, leading to an Interdisciplinary Approach as Part of the Theory of Science"]

[Reductionist and Dogmatic Structure of Science vs. Human, Cultural, and Social Studies]
Philosophy is often requested to provide answers and solutions to questions in doubt and to non-resolved issues within the specific sciences. Such answers and solutions provided by philosophy, however, are necessarily more detailed and complex than the simple questions and problems, posed by the sciences. The reason for increased complexity is the fact that dogmatic scientific disciplines have an axiomatic structure that enables them to reduce complexity for their own purpose. Such reductionism is not allowed in the domain of philosophy, including human and cultural studies, as they are free of dogmatical or axiomatical pre-conditions (see *Eduard Spranger*: Der Sinn der Voraussetzungslosigkeit in den Geisteswissenschaften, in: Sitzungsberichte der Preussischen Akademie der Wissenschaften, Philosophisch-Historische Klasse, vol. 1929, No. 1, Berlin: Walter De Gruyter, 1929).
In consequence of this epistemological rule, legal philosophy invites jurisprudence to leave the field, where they govern with self-confidence, and to risk a more complex view on their subjects. It should no longer irritate, but rather console and taken as the norm that

legal philosophy provides complex answers and solutions to simple questions and problems, just because it surpasses the reductionist structure of jurisprudence.

[An Appendix to the General Introduction: Law Within the Context of Cultural Phenomenon]
When addressing legal thought in the setting of cultural philosophy, as outlined in the general introduction, we constantly have to take into consideration these before mentioned restrictions. A culturally integral prospective on law and the legal order has become paradigmatic for legal reasoning for *Ernst Rudolf Huber* (Problematik des Kulturstaates" (1958), but also for Neo-Hegelianism in general, for instance for *Hans Freyer* (Theorie des objektiven Geistes, eine Einleitung in die Kulturphilosophie, Leipzig: B. G. Teubner 1923, 3. ed. 1934). We can even detect a true political and legal philosophy in one of the principal writings of *Ernst Cassirer*, an eminent forerunner of the cultural philosophy movement (An Essay on Man – An Introduction to a Philosophy of Human Culture, New Haven: Yale University Press, 1944; in German translation: Versuch über den Menschen – Einführung in eine Philosophie der Kultur, Frankfurt am Main: S. Fischer, 1990; and *idem*: The Myth of the State, New Haven/ London: Yale University Press, 1946; in German translation: Der Mythus des Staates – Philosophische Grundlagen politischen Verhaltens, Frankfurt am Main: Fischer Taschenbuch Verlag, 1985, 1st ed. Zürich und München: Artemis, 1949; compare also *idem*: Zur Logik der Kulturwissenschaften – Fünf Studien, 1942). Nevertheless, such differentiating considerations, together with a comprehensive collection of materials concerning legal phenomenon, can provide a strong basis for legal philosophical reasoning in a cultural perspective, a process that has been initiated during the Renaissance with its accentuation of the human individual and individuality in general. In Italy, an attempt has been made by the collection of "*Materiali per una storia della cultura giuridica*" (ed. by *Giovanni Tarello*, Bologna: Società Editrice il Mulino; compare *idem*: Diritto, enunciati, usi, Bologna: Il Mulino, 1974; and *idem*: Il realismo giuridico americano, in: Pubblicazioni dell'Istituto di filosofia del diritto dell'Università di Roma, vol. 18, Milano: A. Giuffrè, 1962) or by the contributions included in the "*Archivio di Storia della Cultura*" (ed. by *Fulvio Tessitore*, Napoli: Liguori Editore; compare *idem*: Introduzione a lo storicismo, Bari/ Roma: Laterza, 1996), as well as by virtually all contributions to the philosophy of *Giovanni Battista Vico*, contained in the "*Bolletino del Centro di Studi Vichiani*" (ed. *Giuseppe Cacciatore*, Napoli: Bibliopolis; compare *idem*: Scienza e filosofia in Dilthey, Napoli: Guida, 1976; *idem*: Die Tradition des problematisch-kritischen Historismus im Rahmen der italienischen philosophischen Kultur der zweiten Hälfte des 20. Jahrhunderts, in: Historismus in den Kulturwissenschaften – Konzepte, historische Einschätzungen, Probleme, ed. Otto Gerhard Oexle and Jörn Rüsen, in: Beiträge zur Geschichtskultur, vol. 12, Köln/ Weimar/ Wien: Böhlau, 1996, pp. 331 ss.). These initiatives have been transferred to and integrated into Italian jurisprudence by *Widar Cesarini Sforza* (Filosofia del diritto, Milano: A. Giuffrè, 3rd ed. 1958; in German translation: Rechtsphilosophie, ed. by Alessandro Baratta, München: C. H. Beck, 1966; see *Gaetano Marini*: Widar Cesarini Sforza tra idealismus e positivismo giuridico, Padova: CEDAM, 1980), as well as by *Alessandro*

Baratta (Ricerche su "essere" e "dover essere" nell'esperienza normativa e nella scienza del diritto, Milano: A. Giuffrè, 1968; *idem*: Natura del fatto e giustizia materiale – Certezza e verità nel diritto, Milano: A. Giuffrè, 1968; *Idem* (together with *Hartmut Wagner*): article "Rechtsidee", in: Historisches Wörterbuch der Philosophie, ed. Joachim Ritter and Karlfried Gründer, Basel: Schwabe & Co., 1992, vol. 8, pp. 281 ss.). As for the Iberian culture compare in this respect the works of *José Ortega y Gasset*, for Dutch culture see the writings by *Jan Huizinga* (Der Mensch und die Kultur, in: Parerga, ed. Werner Kägi, Basel/ Amsterdam: Pantheon, 1945; *idem*: Homo ludens – Versuch einer Bestimmung des Spielelementes der Kultur, Basel: Akademische Verlagsanstalt Pantheon/ Verlag für Geschichte und Politik, 3rd ed. 1949).
The fundamental groundwork for cultural philosophy has also been done, and issues in cultural philosophy have been elaborated in German language, namely by virtually all contributions to the predominant leaders in this domain, *Wilhelm Dilthey* ("Dilthey-Jahrbuch") and *Ernst Cassirer* ("Cassirer-Forschungen"). They can all be recommended as a starting point; however, the writings by *Georg Simmel* or *Eric Voegelin* (Die neue Wissenschaft der Politik – Eine Einführung, ed. Peter J. Opitz, Freiburg im Breisgau/ München: Karl Alber, 4th ed. 1991) should not to be forgotten.

[Contributions to Jurisprudence in the Context of Human, Cultural and Social Studies]
The inclination towards human and cultural studies is inherent, but regularly not expressed in Swiss legal thought. A close adherence to legal practice and legal experience encourage that jurisprudents in Switzerland regularly include philosophical, political and social pre-conditions into their scientific considerations. As a result, one can observe implicitly a strong tendency to inter-disciplinary thought, to inter-connection between related scientific disciplines.
Such a pre-disposition of jurisprudence can be observed in many ways, for instance in relating jurisprudence to philosophy, epistemology (as in *Arthur Baumgarten* and *Alois Troller*), in addressing Neo-Kantian issues in cultural studies (as in *Arnold Gysin*, *Peter Häberle* and *Kurt Seelmann*), by indicating to the underlying values, that render judgment possible (*Alois Riklin*), by elaboration the connection between Natural Law theory and phenomenology and existentialism (*Elisabeth Hruschka*), or, last but not least, by regressing directly to *Wilhelm Dilthey* as the precursor of this kind of human studies (as provided by *Nikolaus Kreissl*).

[Excursus: Ernst Cassirer's Philosophy of Symbolic Forms, the Myth of the State, and the Theory of Science]
In the German-thinking consciousness, this form of investigation is associated with *Wilhelm von Humboldt* and *Johann Gottfried Herder*, and maybe also *Johann Wolfgang Goethe*, and has been fully elaborated by *Wilhelm Dilthey*. A more recent eminent representative is *Ernst Cassirer*, the founder of the so-called philosophy of symbolic forms. The persistent subjects are the arts and language, may this be Renaissance painters, or Romantic Poets and Literates. Language played a key role, until the sceptical criticism by *Ludwig*

Wittgenstein. The third volume of the "Philosophy of Symbolic Forms" is dedicated to language as a prototype phenomenon for cultural-philosophical reflections. In his American exile, Cassirer wrote the monography on "The Myth of the State", just before he died in 1945. In his foreword to this study, *Charles W. Hendel* praises the author as follows: "Whenever Cassirer treated of any subject he not only passed in review with fine understanding what the preceding philosophers had thought but he also brought together into an original, synoptic view whatever related to the subject from every aspect of human experience – art, literature, religion, science, history. In all that he undertook there was a constant demonstration of the relatedness of the different forms of human knowledge and culture" (The Myth of the State, New Haven: Yale University Press, 1946, p. VIII). By his ability of judging the inter-disciplinary aspects of each subject, Cassirer can undoubtedly serve as a model scientist for cultural studies. Political theory, and accordingly the general theory of the state, is understood by Cassirer as a constant struggle against mythological conceptions. However, this attempt of enlightenment by political philosophy in modern times has only produced renewed myths, for instance in *Thomas Carlyle* and *Georg Wilhelm Friedrich Hegel*. The fundamental insight into symbolic forms by cultural philosophy, therefore, cannot surpass these mental dispositions and inclinations, in order to save the idea of the state from being perverted on a mythological level, in the long run. Despite the merely negative outcome of this kind of cultural studies, the arguments on the way are rich with discoveries in the history of ideas and convincing in a historical perspective. Nevertheless, there is a hidden theory of science, or rather a philosophy of the human and social sciences in *Ernst Cassirer*, since idealism is proved in everyday experience and part of a dynamic development within historical progress of mankind (compare *Karl-Norbert Ihmig*: Grundzüge einer Philosophie der Wissenschaften bei Ernst Cassirer, Darmstadt: Wissenschaftliche Buchgesellschaft, 2001). It remains, thus, the problem of application, that is unsolved by Cassirer.

[For Further Reading]

Giuseppe Cacciatore: Dilthey und Cassirer über die Renaissance, in: Cassirers Weg zur Philosophie der Politik (Cassirer-Forschungen, vol. 5), ed. Enno Rudolph, Hamburg: Felix Meiner, 1999, pp. 113 ss.;
Ernst Cassirer: The Myth of the State, New Haven: Yale University Press, 1946; *idem*: Zur Logik der Kulturwissenschaften – Fünf Studien, Darmstadt: Wissenschaftliche Buchgesellschaft, 6th ed. 1994; idem: Versuch über den Menschen – Einführung in eine Philosophie der Kultur (An Essay on Man – An Introduction to a Philosophy of Human Culture), Frankfurt am Main: S. Fischer, 1990 (New Haven: Yale University Press, 1944);
Birgit Recki: Interdisziplinarität ohne Disziplin? Kulturphilosophie und Kulturwissenschaften nach Ernst Cassirer, in: Dialektik, Zeitschrift für Kulturphilosophie (Hamburg: Felix Meiner), vol. 2005, Nr. 2, pp. 131 ss.;
Enno Rudolph (Ed.): Cassirers Weg zur Philosophie der Politik, in: Cassirer-Forschungen, vol. 5, Hamburg: Felix Meiner, 1999.

25 January 2018 (revised on 19 July) *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
3rd Section "Legal Structures as an Integrative Part of Cultural Phenomenons, leading to an Interdisciplinary Approach as Part of the Theory of Science"
Entry 3.1 "Max Rümelin, Erlebte Wandlungen in Wissenschaft und Lehre"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Max Rümelin
Title: Erlebte Wandlungen in Wissenschaft und Lehre, Rede gehalten an der akademischen Preisverteilung am 6. November 1930
Edition(s): Tübingen: J. C. B. Mohr, 1930, 77 pp.

[Introduction]
The last important writing by *Max Rümelin* provides a comprehensive portrayal of the development from the so-called "Begriffsjurisprudenz", based on the Pandect movement, to the "Interessenjurisprudenz" by *Philipp Heck* in German jurisprudence. "Freirechtsschule" and "Gefühlsjurisprudenz" are also part of the argument. In the long run, particularities of national cultures and of specific legal orders tend to be overcome: "Man verlangt bei jeder dogmatischen Arbeit, die sich nicht lediglich mit der Einzeltechnik des einheimischen Gesetzes befasst, sondern grundlegende Frage, sei es der Methodologie, sei es der Interessenwertung in Angriff nimmt, die rechtsvergleichende Orientierung".

[Content, Abstracts]
The arguments, put forward by *Max Rümelin*, are worth to be read altogether even today and cannot easily be condensed to abstracts.

[Conclusions, Insights, Evidence]
There is a very interesting statement, made by *Max Rümelin*, concerning the so-called "Methodenstreit" in German jurisprudence: "Ein zweiter Fortschritt liegt in dem grossen Aufschwung, den die von der historischen Schule lange zurückgedrängte rechtsphilosophische Betrachtungsweise genommen hat. Der Streit über die Methoden der Rechtfindung musste notwendig zur Erkenntnislehre und Rechtsphilosophie führen. In derselben Richtung hat, wie schon oft, die Bewegung gewirkt, in die die Geister durch die Stürme des Kriegs und der Revolution versetzt warden. [...] Mit dem Dilettantismus früherer Zeite, der sich häufig auf einen allein auserkorenen Philosophen festlegte, kommt man nicht mehr durch". Debates about methods are often some kind of catalysator that enables diffused ideas to condensate and to find to their felicitous form. A third consequence of methodological discussions can be found in inter-disciplinary co-ordination and co-operation, for instance between jurisprudence and economics, or early political science. Interesting conclusions are made towards the end of the lecture with respect to academic teaching and scientific research. Apparently, the number of students

in jurisprudence goes back in these times, when Rümelin speaks out the following warning: "Der Übelstand des Massenbetriebs in den Übungen muss rückhaltlos anerkannt werden. Man darf sich da nicht einfach mit dem Gedanken trösten wollen, dass der augenblickliche Hochstand der Frequenz bald wieder nachlassen werde. Denn es werden immer noch genug Juristen übrig bleiben, um eine Überfüllung der Praktika, namentlich der guten, herbeizuführen. [...] Die einzige Abhilfe liegt in dem Ausbau des Assistentenwesens".

[Further Information About the Author]
Max Friedrich Gustav von Rümelin, born on 15 February 1861 in Stuttgart, died on 22 July 1931 in Tübingen, was chancellor of the University of Tübingen between 1908 and 1931, after having been nominated as a rector of the same institution already two years before and was an ordinary professor since 1895. Before being engaged in southern Germany he was already a professor for jurisprudence, roman law and civil procedural law at the Martin Luther-University of Halle-Wittenberg. As a member of the "*Akademische Gesellschaft Stuttgardia*" he participated in the development of a liberalism typical for Baden-Württemberg. In 1930 the received the doctorate *honoris causa* in theology, 1931 that in political sciences. Especially his academic speeches as a president of his University must have been a must have read lecture for Swiss jurisprudents in this period of time. In particular his last address as a chancellor in 1930, entitled "Erlebte Wandlungen in Wissenschaft und Lehre", represents a kind of quintessence of past and current specific conceptions of jurisprudence and can serve as a reference for further development. Although not having explicit relations with Switzerland (apart from being an intimate friend of *Eugen Huber* among others), *Max Rümelin* deeply influenced Swiss jurisprudence by establishing the so-called "Interessenjurisprudenz" at the University of Tübingen with the eminent exponents of *Philipp Heck* (he taught there between 1901 and 1928). Not only geographic neighbourhood, but also the fact that a great number of Swiss lawyers have spent some time at the University of Tübingen justifies the selection of some crucial writings of this eminent representative of German jurisprudence of his time.
For more information, please refer to:
August Hegler: Zum Gedächtnis von Max von Rümelin, Reden gehalten am 6. November 1931, Tübingen: J. C. B. Mohr, 1931.

[Selected Works of the Same Author]
Max Rümelin: Juristische Begriffsbildung – Akademische Antrittsschrift, Berlin: Duncker & Humblot, 1878; *Idem*: Eugen Huber, Rede gehalten bei der akademischen Preisverteilung am 6. November 1923, Tübingen: J. C. B. Mohr, 1923; *Idem*: Rechtsgefühl und Rechts-bewusstsein, Rede gehalten bei der akademischen Preisverteilung am 6. November 1925, Tübingen: J. C. B. Mohr, 1925; *Idem*: Reden und Aufsätze, Tübingen: H. Laupp, 1875.

[For Further Reading]
Nikolas Hasslinger: Max Rümelin (1861–1931) und die juristische Methode (Beiträge zur

Rechtsgeschichte des 20. Jahrhunderts, vol. 81), Tübingen: J. C. B. Mohr, 2014;
Max Rümelin: Eugen Huber, Rede gehalten bei der akademischen Preisverteilung am 6. November 1923, Tübingen: J. C. B. Mohr, 1923.

2 November 2017 *Michael Walter Hebeisen*

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3rd Section "Legal Structures as an Integrative Part of Cultural Phenomenons, leading to an Interdisciplinary Approach as Part of the Theory of Science"
Entry 3.2 "Arthur Baumgarten: Erkenntnis, Wissenschaft, Philosophie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Arthur Baumgarten
Title: Erkenntnis, Wissenschaft, Philosophie – Erkenntniskritische und methodologische Prolegomena zu einer Philosophie der Moral und des Rechts
Edition(s): Tübingen: J. C. B. Mohr, 1927 (reprint Aalen: Scientia, 1978)

[Introduction/Historical Situation and Systematic Context]
This writing by *Arthur Baumgarten* goes back to the author's first stay at the University of Basel and promises to provide a foundation of moral and legal philosophy by means of methodology and by a critique of cognition. The paradoxical analysis of the author, whereupon he experiences a need for metaphysics, misleads the questions and arguments from the beginning. The core question should instead be addressed by determining which metaphysics can be guidelines for the future and which are definitely old-fashioned. Historicism and human sciences are held to be neighbours of *Herbert Spencer*ian Evolutionism and biology, a comparison that is not true at all. Unfounded criticism is misleading the author to disqualify all currents of his time. Phenomenology for instance is held to have a fatal impact on legal philosophy: "Hier haben Phänomenologie und Neukantianismus ein schreckliches Gebilde gezeugt. Vom Neukantianismus haben unsere neuen Rechtsphilosophen den Formalismus, von der Phänomenologie die Gabe der Entdeckung bisher unbekannt gebliebener Wesenheiten, die sich bei ihnen als 'Lust zu fabulieren' äussert". On the other side: "Die unentbehrliche Auseinandersetzung mit der Kantischen Erkenntnistheorie darf nicht rein negativ-kritisch sein". How should this become compatible?

[Content, Abstracts/Conclusions, Insights, Evidence]
Normative sciences are held to be psychological inclination by *Arthur Baumgarten*. This judgment evidently shows the author's inclination to associative argumentation. His encyclopaedic approach in conjunction with his eclecticism leads to results, that do not convince anymore today. However, there is one single great advantage and virtue of such syncretism: attention is directed towards previously unknown currents within the history of human thought, even if the conclusions cannot be held any longer. As an example of the writing's rich source of actually new currents in its time, we have selected two figures, namely *William James* and *Henri Bergson*, i.e. the founders of pragmatism and French existentialism. The text of paragraphs 42 and 43 are concentrated with citations and excerpts; however, it remains unclear how these passages and the included arguments can be brought in closer contact to legal thought. Anyway, it apparently has not been

impossible in these days to procure a first flashy insight into American psychology, respectively French philosophy, as well as into Anglo-American theory building for any well-informed jurisprudent. For Baumgarten, the only alternative to the criticised currents of idealism, pragmatism, realism and theories of antinomy consists in legal positivism. "Der Positivismus ist eine Weltanschauung und kann daher zusammen mit der in ihn einbezogenen Erkenntnistheorie nur vom Standpunkt einer anderen Weltanschauung, nicht auf dem Boden einer sich isolierenden Erkenntnistheorie abschliessend kritisiert werden. Wir werden in der Metaphysik die Auseinandersetzung mit dem Positivismus wieder aufnehmen, und es wird uns dies um so mehr obliegen, als der Positivismus nicht ein Weltanschauung unter vielen, sondern eine der wenigen wahrhaft einflussreichen Weltanschauungen ist. Ja er ist nicht nur heute unter den sogenannten Intellektuellen die fast unbestritten herrschende Weltanschauung – allen scheinheiligen oder prätentiösen gegenteiligen Weltanschauungen zum Trotz – sondern er wird es vielleicht auch immer sein, solange Menschen auf Erden leben". This is an apotheosis of positivism, however, of naive positivism, not enlightened Neo-Positivism; and moreover, it seems that the lecture of concurring and dissenting opinions of his own culture and abroad has left the author himself untouched... and last but not least, the conversion of the declared liberal thinker to socialism and his engagement for the purposes of the German Democratic Republic seems to be only a slight shift in preferences.

[Philosophical Valuation and Jurisprudential Significance]
The encyclopaedic spirit of all studies by *Arthur Baumgarten* provides a broad knowledge of his time, that is analysed pragmatically in function of legal practice. The valuations and judgments remain, however, eclectic because there is a lack of a consolidated philosophical system, that would only allow to refer the arguments to a systematic coherent conception of legal philosophy.

[Further Information About the Author]
Arthur Baumgarten, born 31 March 1884 in Königsberg, died 27 November 1966 in Berlin (East), was originally a German citizen, but from 1936 also a Swiss citizen, as he married Nina Helena von Salis-Soglio. He prosecuted his legal and philosophical studies at the Universities of Tübingen, Geneva, Leipzig and Berlin, where he received his promotion in 1909. Until 1920 he was professor in Geneva, from 1920 to 1923 in Cologne, between 1923 and 1930 in Basel, between 1930 to 1933 in Frankfurt am Main, before he returned, or better speaking emigrated, back to Basel, where he remained until 1949. He then decided to settle in Berlin (East), where he was professor at the Humboldt University until 1953. He originally taught penal law, however his main subject became more and more legal philosophy. In his last period of life, living in the German Democratic Republic, he also signed as chief editor of the periodical "Sozialismus", and finally contributed to the theoretical foundations of the socialist regime of Eastern Germany.
His philosophy of law can best be described as syncretistic, as he changed from moralistic views to Kantian criticism and varied between a conservative mood to socialist opinions.

Moreover, his theory was characterised by the separation between morality and law and their interconnection. In our treatment we shall focus on the early period, when his fundamental conceptions show best in their origins and consolidation, namely in his works about "Die Wissenschaft vom Recht und ihre Methode" (1920) and his contribution "Rechtsphilosophie" to the "Handbuch der Philosophie" (1934).
For more information, please see:
Karl Polak (Ed.): Festschrift Arthur Baumgarten zu seinem 70. Geburtstag, Berlin: VEB Deutscher Zentralverlag, 1960;
Gerd Irrlitz: Rechtsordnung und Ethik der Solidarität – Der Strafrechtler und Philosoph Arthur Baumgarten, Berlin 2008;
Christina Peschel: Arthur Baumgarten, in: Rechtsgeschichtswissenschaft in Deutschland 1945 bis 1952, ed. Horst Schröder, Frankfurt am Main: Vittorio Klostermann, 2001, S. 129-150;
August Simonius: Wissenschaftliche Weltanschauung und Rechtswissenschaft – Zur Rechtsphilosophie Arthur Baumgartens, in: Zeitschrift für Schweizerisches Recht, ed. Eduard His, N. S. vol. 49, Basel: Helbing & Lichtenhahn, 1930.

[Selected Works of the Same Author]
Arthur Baumgarten: Die Wissenschaft vom Recht und ihre Methode, 2 vols., Tübingen: J. C. B. Mohr, 1920/ 1922 (reprint Aalen: Scientia, 1978); *Idem*: Der Weg des Menschen – Eine Philosophie der Moral und des Rechts, Tübingen: J. C. B. Mohr, 1933 (reprint 1978); *Idem*: Rechtsphilosophie, in: Handbuch der Philosophie, Section IV: Staat und Geschichte, München/ Berlin: R. Oldenbourg, 1934, pp. 3 ss.; *Idem*: Grundzüge der juristischen Methodenlehre, Bern 1939 (reprint, ed. Hermann Klenner: Freiburg im Breisgau: Rudolf Haufe, 2005); *Idem*: Die Geschichte der abendländischen Philosophie – Eine Geschichte des geistigen Fortschritts der Menschheit, Genève: Imprimérie de St. Gervais, 1945; *Idem*: Die Entwicklung der Idee der Demokratie und des Rechtsstaates in der Neuzeit, Stuttgart: Fritz Mittelbach, 1946; *Idem*: Ansprache an Kants 150. Todestage, Berlin: Akademie-Verlag, 1954; *Idem*: Bemerkungen zur Erkenntnistheorie des dialektischen und historischen Marxismus, Berlin: Akademie-Verlag 1957; *Idem*: Vom Liberalismus zum Sozialismus, Berlin: Akademie-Verlag, 1967; *Idem*: Rechtsphilosophie auf dem Wege – Vorträge und Aufsätze aus fünf Jahrzehnten, Berlin: Akademie-Verlag, 1972.

20 November 2017 *Michael Walter Hebeisen*

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Cluster "Philosophy of Law and General Jurisprudence"
3rd Section "Legal Structures as an Integrative Part of Cultural Phenomenons, leading to an Interdisciplinary Approach as Part of the Theory of Science"
Entry 3.3 "Arnold Gysin, Recht und Kultur"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Arnold Gysin
Title: Rechtsgedanke und Kulturgedanke im Verhältnis von Gesetzesethik und Wertethik
Edition(s): in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969 (first published under the title "Recht und Kultur auf dem Grunde der Ethik", Zürich: Girsberger & Co., 1929)

[Introduction/Historical Situation and Systematic Context]
The essay to be discussed was first published by *Arnold Gysin* as a speech before the philosophical association in Zurich in 1929, entitled "Recht und Kultur auf dem Grund der Ethik". In order to be introduced into the collection volume, the text has undergone re-elaboration and some retrenchment.
The title is rich in promise, the argumentation, however, is merely accidental and thoroughly eclectic in outcome.

[Content, Abstracts/Conclusions, Insights, Evidence]
It is the intention of *Arnold Gysin* to locate the law within all the cultural phenomenon as a whole. "Für die Rechtsphilosophie und ihre Forschung eröffnet sich hier das weite, unermessliche Feld der kulturellen Zwecke des Rechts. [...] Das ist die Quintessenz und das sind die Leistungen der sogenannten kulturphilosophischen Rechtsphilosophie, die sich vornehmlich im Neukantianismus grosser Beliebtheit erfreut. Sie begründet das Recht als Mittel für die Zwecke der Kultur. Sie betrachtet es in der Einheit eines kulturellen Zweckzusammenhangs. [...] Der Rechtsgedanken wird einfach in der Einheit des Kulturgedankens absorbiert. [...] Aber damit ist die Richtigkeit des grundsätzlichen Standpunkts der Kulturphilosophie noch keineswegs erwiesen. Denn sobald man hier näher zusieht, so kann man sich des Eindrucks nicht erwegren, dass die Evidenz und Popularität der geschilderten Betrachtungsweise und die Leichtigkeit der auf ihr aufbauenden kulturphilosophischen Behandlung unseres Problems darauf beruhen, dass eine präzise Stellungnahme zum Wertbegriff und zum Verbindlichkeitsbegriff vermieden wird". In sequence, there is a counter-sense to the kernel of legal philosophy in *Immanuel Kant* identified by the author himself. However, it would be worth questioning to which part of the Kantian legal theory hereby is referred. Because the metaphysical foundations of the legal theory are not only in part, but entirely contradicted by the conceptions postulated in the "treatise on eternal peace" and in the later arguments on political philosophy, according to which for instance it is not desirable for philosophers to become

kings, and the like...
The ideological references of such an understanding definitely go to *Jakob Friedrich Fries*, *Max Scheler*, and *Nikolai Hartmann*, and the whole argumentation provided by *Arnold Gysin* resembles the one proposed by *Leonard Nelson*. This orientation is newly proving the adherence of the author to the circle around the authoritative head of the Nelsonian School in Göttingen (see the introductions to nos. 1.7 and 2.3a of this Legal Anthology).
The quintessence provided by *Arnold Gysin* reads as follows: "So muss es sich denn alle Kultur der menschlichen Gemeinschaft gefallen lassen, dass sie einem Kulturrecht und einer Rechtskultur unterworfen wird. Nur in der Verwirklichung dieses Kulturrechts können die Anforderungen des Kulturgewissens und des Rechtsgewissens zur Einheit von Recht und Kultur vereinigt werden, zu jener Einheit, in der man die höchste Sozialidee, das Ziel der menschlichen Gesellschaft, den diesseitigen Zweck ihrer Geschichte erblicken kann. In dieser Idee der Menschheit sind Recht und Kultur schliesslich harmonisch verbunden".

[Philosophical Valuation and Jurisprudential Significance]
The author has to allow the question, if he does not merely provide an ontological view far from any prospective in the domain of cultural philosophy. It is thus held by *Christoph Westermann*, that the current invoked by *Leonard Nelson* and referred to *Jakob Friedrich Fries* cannot fecundly elaborate any cultural philosophical thought (Recht und Ethik bei Fries und Nelson, in: Recht und Ethik – Zum Problem ihrer Beziehung im 19. Jahrhundert (Studien zur Philosophie und Literatur des Neunzehnten Jahrhunderts, vol. 9), ed. Jürgen Blühdorn and Joachim Ritter, Frankfurt am Main: Vittorio Klostermann, 1970, pp. 113 ss.).

[Further Information About the Author]
Arnold Gysin, born 29 August 1897 in Basel, died 13 October 1980 in Lucerne, obtained his doctorate in 1923 at the University of Berne, before practising as a lawyer in Zurich and Lucerne. From 1924 to 1934 he was a private lecturer at the University of Basel. Between 1952 and 1968 he was a federal judge at the insurance court, in the years 1960 and 1961 its president.

[Selected Works of the Same Author]
Arnold Gysin: Die Lehre vom Naturrecht bei Leonhard Nelson und das Naturrecht der Aufklärung (Dissertation Universität Bern 1924, bei Walther Burckhardt), Berlin-Grunewald: Walther Rothschild, 1924, 139 pp.; *Idem*: Rechtsphilosophie und Jurisprudenz, Zürich: Girsberger & Co., 1927, 54 pp.; *Idem*: Recht und Kultur auf dem Grunde der Ethik, Zürich: Girsberger & Co., 1929, 48 pp.; *Idem*: Ungeschriebenes Gesetz und Rechtsordnung – Mit Gedanken zur Rechtsphilosophie von Jakob F. Fries und Leonhard Nelson, in: Festschrift für Fritz von Hippel zum 70. Geburtstag, ed. Josef Esser and Hans Thieme, Tübingen: J. C. B. Mohr, 1967; *Idem*: Die philosophischen Grundlagen der Naturrechtslehre und des Rechtspositivismus, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main:

Vittorio Klostermann, 1969, pp. 82 ss.; *Idem*: Zur rechtstheoretischen Vermächtnis Walther Burckhardts, in: Zeitschrift des Bernischen Juristen-Vereins, vol. 107 (1971), pp. 23 ss.; *Idem*: Bindung und Offenheit des Rechts in rechtsphilosophischer Sicht, in: Homo Creator, Festschrift für Alois Troller, ed. Paul Brügger, Basel: Helbing & Lichtenhahn, 1976, pp. 303 ss.

[For Further Reading]
Arnold Gysin: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969.

12 December 2017 *Michael Walter Hebeisen*

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Entry 3.7 "Elisabeth Hruschka, Phänomenologische Rechtslehre und Naturrecht"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Elisabeth Hruschka
Title: Die phänomenologische Rechtslehre und das Naturrecht (Dissertation Universität Freiburg im Üechtland 1966)
Edition(s): München: Charlotte Schön, 1967, 69 pp.

[Introduction/Historical Situation and Systematic Context]
The University of Freiburg im Üechtland, or Fribourg (Switzerland), has been a place, where Catholicism in its numerous forms has dominated academic education. The fraternity of the Dominicans have monopolised the philosophical faculty for a long period of time, for example. (for details see *Urs Altermatt*: Die Universität Freiburg auf der Suche nach ihrer Identität – Essays zur Kultur- und Sozialgeschichte der Universität Freiburg im 19. und 20. Jahrundert, Freiburg: Universitätsverlag, 2009). It is not surprising, therefore, that also at the Faculty of Jurisprudence, Economics and Social sciences the Catholic spirit has had great influence on the students, and mainly on the selection of the teachers. Between 1936 and 1970, *Wilhelm Oswald* was professor of public law, and even the president of the University from 1954 to 1956 (see no. 2.13 of this Legal Anthology). Another well-known docent of the same faculty was *Jean Darbellay*, who represented legal philosophy, even if he was vested the chair for administrative and constitutional law between 1972 and his retreat in 1982 (see nos. 1.11 and 1.18 of this Legal Anthology). These two members of the Faculty of Law signed as experts and referents for an exemplary dissertation thesis, written in 1967 by *Elisabeth Hruschka* from Germany, entitled "Phenomenological Legal Thought and Natural Law Theory".

[Content, Abstracts/Conclusions, Insights, Evidence]
After having located phenomenological legal philosophy and selected *Adolf Reinach, Edith Stein, Gerhart Husserl, Herbert Spiegelberg* and *Hans Welzel* as reference authors, *Elisabeth Hruschka* identifies a material proximity of the current in case with natural law, especially the rationalist natural law of the Age of Enlightenment. In conjunction with the undercurrent Thomist theory, as established by *Aquinas*, legal thinkers have formulated the axiomatic concept of a so-called "juridical apriori". The ideation and idealisation of law and the conception of the essence of law lead directly to an ontological structure of legal conceptualisation. These entities can be held as real and material, or as merely potentially real and material, according to the concept of nature itself. Despite such a foundation in the idea of an absolute, legal concepts tendentially follow the logics of

matters and problems. In consequence, reference to natural law turns out to be variable, to be dynamic exceptions from the unalterable absolute, and natural law becomes a strategy to conceptualise relativity as relative. In conclusion the fundamental axiom of former natural law theory has been changed to its contrary, and this due to the influence of phenomenological philosophy, that is widely accepted also, even and particularly within these Catholic milieus.

[Further Information About the Author]
Elisabeth Hruschka, born on 6 September 1935 in Steinheim (Westfalen, Germany), has concluded her studies in jurisprudence at the Universities of Marburg, München and Freiburg im Üechtland (Switzerland). In 1961 and 1966 she passed the two stages of the German juridical state examinations, before receiving her doctorate at the University of Freiburg in 1967.

[For Further Reading]
Helmut Coing: Naturrecht als wissenschaftliches Problem, in: Sitzungsberichte der wissenschaftlichen Gesellschaft an der Johann Wolfgang Goethe-Universität Frankfurt am Main, vol. 3 (1964), No. 1, Wiesbaden: Franz Steiner, 1965;
Günter Ellscheid: Das Naturrechtsproblem in der neueren Rechtsphilosophie, in: Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart, ed. Arthur Kaufmann und Winfried Hassemer, Heidelberg/ Karlsruhe: C. F. Müller, 1977, pp. 23 ss.;
Adolf Menzel: Zur Lehre vom Naturrecht, in: Beiträge zur Geschichte der Staatslehre (Sitzungsberichte der Akademie der Wissenschaften in Wien, Philosophisch-historische Klasse, vol. 210, no. 1), pp. 107 ss., Wien/ Leipzig: Hölder-Pichler-Tempsky, 1929 (reprint Glashütten im Taunus: Detlev Auvermann, 1976);
Johannes Messner: Das Naturrecht – Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik, Innsbruck/ Wien/ München: Tyrolia-Verlag, 5th ed. 1966;
Erik Wolf: Das Problem der Naturrechtslehre – Versuch einer Orientierung (Freiburger Rechts- und Staatswissenschaftliche Abhandlungen, vol. 2). Karlsruhe: C. F. Müller, 2nd ed. 1959.

15 November 2017 *Michael Walter Hebeisen*

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3rd Section "Legal Structures as an Integrative Part of Cultural Phenomenons, leading to an Interdisciplinary Approach as Part of the Theory of Science"
Entry 3.8 "Nikolaus Kreissl, Das Rechtsphänomen bei Wilhelm Dilthey"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Nikolaus Kreissl
Title: Das Rechtsphänomen in der Philosophie Wilhelm Diltheys
Edition(s): in: Basler Studien zur Rechtswissenschaft, vol. 93, Basel/ Stuttgart: Helbing & Lichtenhahn, 1970, pp. 38-81

[Introduction/Historical Situation and Systematic Context]
Wilhelm Dilthey was called to the University of Basel in 1867, after having been a private lecturer at the *Friedrich-Wilhelm*s-Universität in Berlin. However, his stay in Switzerland had only been episodic, since he left for Kiel in 1868. From 1883 until 1908 he had a principal chair for philosophy at the Humboldt-University in Berlin. He is to be considered as the founder of a philosophical foundation of the human sciences in general, to the hermeneutical tradition in specific, but also inspired the current of so-called life philosophy. His influence on modern philosophical theory building is immense but not always reflected and explicitly declared.
The legal thought of *Hermann Heller*, of the eminent representative of public law in the Weimar Republic, has been inspired by *Wilhelm Dilthey*, mediated by *Theodor Litt* and *Hans Freyer*. In order to free jurisprudence and legal philosophy from natural law theories and their naturalistic background, it appears essential to refer to an understanding of legal thought as belonging to the human sciences to the framework sketched by Dilthey. Preceded by Italian philosophers, *Michael Walter Hebeisen* has undertaken this task lately (see no. 2.24 of this Legal Anthology). It has been the deeply founded conviction of Dilthey that "Das Problem, welches sich das Naturrecht stellte, ist nur lösbar im Zusammenhang der positiven Wissenschaften des Rechts. [...] Hieraus folgt, dass es eine besondere Philosophie des Rechts nicht gibt, dass vielmehr ihre Aufgabe dem philosophisch begründeten Zusammenhang der positiven Wissenschaften des Geistes wird anheimfallen müssen (Einleitung in die Geisteswissenschaften − Versuch einer Grundlegung für das Studium der Gesellschaft und der Geschichte (Gesammelte Schriften, vol. 1), Göttingen: Vandenhoeck & Ruprecht, 9th ed. 1990, p. 79)". This announcement of an abolition of legal philosophy turns to its contrary, however, namely to a philosophical theory of the law as a cultural phenomenon and of jurisprudence as a human science.

[Content, Abstracts/Conclusions, Insights, Evidence]
An exception to the neglection of *Wilhelm Dilthey* among legal scholars is the promotion thesis presented by *Nikolaus Kreissl* in 1970 at the University of Basel. The approach is dominated by the difficulties to select the material out of the twenty volumes of collected

works by Dilthey. There is to be mentioned a significant distance from intellectualistic conceptions of law and jurisprudence. In short, on the ninety pages of the all too generic arguments the author does not arrive to decisive conclusions. "Die Begriffe Recht und Sittlichkeit treten in der Philosophie Diltheys meist in jener auffälligen Parallelstellung auf, die die besondere Diltheysche Fassung von Leben, Geschichte und Objektivation gerade kennzeichnet". This assertion indicates a lack of distinction in Dilthey himself, and cannot be considered as a great achievement, in fact. In this context, it is impossible to grasp the nuances of critique Dilthey's of Hegelianism, apart from identifying an inclination towards historicism, and a refusal of traditional metaphysics.

[Further Information About the Author]
After having received his doctorate in 1970, *Nikolaus Kreissl* entered the administration of the Canton of Basel Stadt.

[For Further Reading]
Otto Friedrich Bollnow: Dilthey – Eine Einführung in seine Philosophie, Schaffhausen: Novalis, 4th ed. 1980;
Ilse N. Bulhof: Wilhelm Dilthey – A Hermeneutic Approach to the Study of History and Culture (Martinus Nijhoff Philosoph Library, vol. 2), The Hague: Martinus Nijhoff, 1980;
Giuseppe Cacciatore: Vita e forme della scienza storica – Saggi sulla storiografia di Dilthey (Collana di filosofia, N. S. vol. 7), Napoli: Morano, 1985; *Idem*: Vico e Dilthey – La storia dell'esperienza umana come relazione fondante di conoscere e fare, in: Bolletino del Centro di Studi vichiani, vol. 9 (1979), pp. 35 ss.;
Arne Homann: Diltheys Bruch mit der Metaphysik – Die Aufhebung der Hegelschen Philosophie im geschichtlichen Bewusstsein, Freiburg im Breisgau/ München: Karl Alber, 1995;
Hans Ineichen: Erkenntnistheorie und geschichtlich-gesellschaftliche Welt – Diltheys Logik der Geisteswissenschaften (Studien zur Philosophie und Literatur des 19. Jahrhunderts, vol. 28), Frankfurt am Main: Vittorio Klostermann, 1975;
Thomas Leinkauf (Ed.): Dilthey und Cassirer – Die Deutung der Neuzeit als Muster von Geistes- und Kulturgeschichte (Cassirer-Forschungen, vol. 10), Hamburg: Felix Meiner, 2003;
Arthur Liebert: Wilhelm Dilthey – Eine Würdigung seines Werkes zum 100. Geburtstage des Philosophen, Berlin: E. S. Mittler & Sohn, 1933;
Rudolf A. Makkreel: Dilthey – Philosoph der Geisteswissenschaften (Dilthey – Philosopher of the Human Studies), translated from the American by Barbara M. Kehm, Suhrkamp, Frankfurt am Main 1991 (Princeton University Press, Princeton 1975);
Giuliano Marini: Dilthey e la comprensione del mondo umano, Milano: A. Giuffrè, 1965;
Clara Misch (geborene *Dilthey*): Der junge Dilthey – Ein Lebensbild in Briefen und Tagebüchern 1852-1870, Mit einem Jugendbildnis, Leipzig/ Berlin: B. G. Teubner, 1933;
Georg Misch: Vom Lebens- und Gedankenkreis Wilhelm Diltheys, Frankfurt am Main: Gerhard Schulte-Bulmke, 1947;

Frithjof Rodi: Pragmatische und universalhistorische Geschichtsbetrachtung – Anmerkungen zu Diltheys Skizzen einer Historik, in: Dilthey und Yorck – Philosophie und Geisteswissenschaften im Zeichen von Geschichtlichkeit und Historismus (Acta Universitatis Wratislaviensis, vol. 1788), ed. Jerzy Krakowski and Gunter Scholtz, Wroclaw, Wydawnictwo Uniwersytetu Wrochlawskiego, 1996, pp. 119 ss.;
Erich Rothacker (Hrsg.): Briefwechsel zwischen Wilhelm Dilthey und dem Grafen Paul Yorck von Wartenburg 1877-1897 (Philosophie und Geisteswissenschaften, vol. 1), Halle an der Saale: Max Niemeyer, 1923;
Werner Stegmaier: Diltheys Denken des Lebens. In: Hermeneutik des Lebens – Potentiale des Lebensbegriffs in der Moderne, ed. Ralf Elm, Kristian Köchy and Manfred Meyer, Freiburg im Breisgau/ München: Karl Alber, 1999, pp. 100 ss.;
Arthur Stein: Der Begriff des Geistes bei Dilthey, Bern: Max Drechsel, 1913;
Julius Stenzel: Dilthey und die deutsche Philosophie der Gegenwart (Philosophische Vorträge, veröffentlicht von der Kant-Gesellschaft, ed. Paul Menzer, vol. 33), Berlin-Charlottenburg: Pan-Verlag, 1934.

24 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
3rd Section "Legal Structures as an Integrative Part of Cultural Phenomenons, leading to an Interdisciplinary Approach as Part of the Theory of Science"
Entry 3.9 "Aloïs Troller, Philosophie, Rechtsphilosophie und Rechtswissenschaft"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Aloïs Troller
Title: Die Begegnung von Philosophie, Rechtsphilosophie und Rechtswissenschaft
Edition(s): in: Die philosophischen Bemühungen des 20. Jahrhunderts, Basel/ Stuttgart: Schwabe & Co., 1971, pp. 90-138

[Introduction/Historical Situation and Systematic Context]
Aloïs Troller's primary earnings are found in the domain of intellectual property rights. However, he had a strong and lifelong inclination towards legal philosophy. He was the first author in Switzerland to adopt the newer tendencies in philosophy, i.e. existentialism and phenomenology, as well as structuralism and to apply them fecundly to legal thought. The condensation of his occupation with existentialism, Troller laid down in his early introduction to jurisprudence, entitled "Legal Experience and Jurisprudence", whereas his thoughts on phenomenological philosophy found its expression in the principal writing, entitled "Principles of Jurisprudence, Applicable Everywhere" from 1965; later, in 1975, he also published a classical writing on legal methodology, entitled "Foundations of a Self-Understanding Legal Methodology and Legal Philosophy". Moreover, the relation between the disciplines of philosophy, legal philosophy and jurisprudence have been treated by the same author in a monography from 1971. All together, these writings stand for the so to say second high tide of legal philosophy, after the early pre-war culmination in *Eugen Huber* and *Walther Burkhardt*.
Concerning the main theories, we should refer to the extensively discussed writings by *Aloïs Troller*, i.e. to the "Introduction", as well as to the "Principles of Jurisprudence" (see nos. 1.14 and 2.14 of this Legal Anthology).

[Content, Abstracts/Conclusions, Insights, Evidence]
In a monography covering more than 200 pages, entitled "The Encounter of Philosophy, Legal Philosophy, and Jurisprudence", *Aloïs Troller* describes the inter-relations between the disciplines in case in an original manner, by producing a dialogical scenery between the three actors. Out of this opera, we have selected the passage, where the encountering participants express their statements. The important thing is, that these statements are included in a dialogical conversation, that they are equilibrated by dialectical procedure. Also, such a dialogue is meant to occur within a subjective consciousness, as a reasonable reflection of all arguments that have been put forward. "Der Rechtsphilosoph kommt zuerst zum Wort. Er schildert das Anliegen so, wie er es gesehen hat und wie er annimmt, dass der Philosoph die Probleme erkennen könne. Der Rechtswissenschafter zeigt

ergänzend besondere Probleme, die er lösen muss, um die Rechtsordnung besser überblicken, verstehen, darstellen und an ihrer Verbesserung wissender arbeiten zu können. Hierauf kommt der Philosoph zu Wort. Er hat am meisten zu sagen, weil die beiden anderen darnach streben, von ihm zu lernen und nicht aus ihm einen Juristen zu machen". In conclusion, this dialogue only makes sense, if all participants are not only trying to convince the others, but also willing to be convinced by the others. The whole situation is based on mutual respect of the three actors, and on the fact that they remain themselves, so that we encounter a true inter-disciplinary dialogue. In his early writings, Troller had put the stress and the main burden of argumentation on Jurisprudence, whereas at this place he seems to consider philosophy the leading discipline in the context of the inter-disciplinary discourse.
In the course of such an enterprise of dialog, there are obstacles however, that can prohibit a profound discourse and sound dialogue. Not all currents within the historical development of philosophy offer themselves as possible interlocutors and not every representative of jurisprudence is to be set on legal thought that would enable an encounter with philosophical thinkers. In addition, philosophers are seeking truth, are criticising apparent cognition and they are impeaching dogmatical knowledge, above all, whereas jurisprudents are inclined to dogmatical thought, and incline to all too solid conceptualisations. Moreover, the abysses between different legal cultures have to be bridged, and the impediments between different communities of languages have to be overcome. These restraints and restrictions have to be taken seriously, indeed.

[Further Information About the Author]
Aloïs Troller, born 15 May 1906 in Wilihof, died 15 May 1987 in Luzern, graduated in Freiburg in 1837, after having studied jurisprudence at the Universities of Berne and Basel. He also followed his musical studies as a singer in Munich. From 1950 onwards, he taught as a private lecturer at the University of Freiburg, where he was entitled professor of intellectual property between 1957 and 1976, as well as of legal philosophy between 1971 and 1978. Above all he influenced the development of intellectual property rights in Europe by his eminent work in two volumes "Intellectual Property Law" ("Immaterialgüterrecht"; 3. ed. 1983-1985).
His philosophical thought was mainly influenced by phenomenology, whose insights he tried to apply to jurisprudence.
For further information, as well as for a complete bibliography, please refer to:
Werner Krawietz/ Walter Ott (Ed.): Formalismus und Phänomenologie im Rechtsdenken der Gegenwart, 1987.

[Selected Works of the Same Author]
Aloïs Troller: Die Aufgabe der Rechtsphilosophie, in: Schweizerische Juristen-Zeitung, vol. 69 (1973), pp. 97 ss.; *Idem*: Überall gültige Prinzipien der Rechtswissenschaft, Frankfurt am Main/ Berlin: Alfred Metzner, 1965 (extract); *Idem*: Rekonstruktion und Rechtswirklichkeit – Ein Beitrag zu einem kritischen Rechtsrealismus, in: Rechtstheorie, vol. 11 (1980), vol. 2,

pp. 137 ss.

[For Further Reading]
Aloïs Troller: Jurisprudenz auf dem Holzwege, in: Schriftenreihe der Internationalen Gemeinschaft für Urheberrecht, vol. 13, Berlin/ Frankfurt am Main, 1959; *Idem*: Eugen Hubers Allgemeingültige Rechtsphilosophie, in: Gedächtnisschrift für Peter Jäggi, ed. Bernhard Schneider and Peter Gauch, Freiburg im Üechtland: Universitätsverlag, 1977.

14 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
3rd Section "Legal Structures as an Integrative Part of Cultural Phenomenons, leading to an Interdisciplinary Approach as Part of the Theory of Science"
Entry 3.13 "Peter Häberle, Verfassungslehre als Kulturwissenschaft"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Peter Häberle
Title: Verfassungslehre als Kulturwissenschaft (Schriften zum Öffentlichen Recht)
Edition(s): Berlin: Duncker & Humblot, 1982, pp. 28-92, 578-594

[Introduction/Historical Situation and Systematic Context]
Among *Peter Häberle*'s best-known discoveries is his identification of jurisprudence as a cultural science. It is a matter of fact that the author not only has a very large horizon but also enlarges considerably his writings from one to the other edition. His technique of argumentation is inclusive, holistic and heuristic thought, and the textual form not only includes excurses, but also so-called incurses, where the material is lead to a deeper understanding. These predispositions apply in a great extent to his eminent and prominent opus magnum about jurisprudence as a cultural science.

[Content, Abstracts/Conclusions, Insights, Evidence]
Both constitution-making and constitutional practice show as a cultural process, the constitution appears as a cultural challenge, achievement and heritage. This can best be expressed comparing the different levels of the textual constitution, as practised by *Peter Häberle*. By doing so, comparing the constitution of the "Grundgesetz" with constitutions of third world countries and with small countries (as Switzerland, a veritable *topos* in Häberle), constitutional comparison is at its best. We would like to leave this passage to the free appreciation by the reader as a monument of encyclopaedic knowledge, respectively of a well organised and structured archive. Apparently small countries provide a very rich cultural background in their constitutions.
The constitution exceeds, surmounts, and transcends the legal sphere by far, according to the enlarged understanding of *Peter Häberle*: "Verfassung ist nicht nur juristischer Text oder normatives 'Regelwerk', sondern auch Ausdruck eines kulturellen Entwicklungszustandes, Mittel der kulturellen Selbstdarstellung des Volkes, Spiegel seines kulturellen Erbes und Fundament seiner Hoffnungen. Lebende Verfassungen als ein Werk aller Verfassungsinterpreten der offenen Gesellschaft sind der Form und der Sache nach weit mehr Ausdruck und Vermittlung von Kultur, Rahmen für kulturelle (Re-)Produktion und Rezeption und Speicher von überkommenen kulturellen 'Informationen', Erfahrungen, Erlebnissen, Weisheiten. Entsprechend tiefer liegt ihre – kulturelle – Geltungsweise". One can also take the constitution in his large sense as an object of sociological investigations, of course: "Im Begriff 'Verfassungskultur' als der Summe der subjektiven Einstellungen, Erfahrungen, Werthaltungen, der Erwartungen und

des Denkens sowie des (objektiven) Handelns der Bürger und Pluralgruppen, der Organe auch des Staates etc. im Verhältnis zur Verfassung als öffentlichem Prozess findet diese nicht-juristische Fassung der Verfassung eines politischen Gemeinwesens einen angemessenen Ausdruck". Evidently, the author herby is guided by associative thought. Particularly significant are the programmatical conclusions, derived by *Peter Häberle* at the very end of his large volume. As preliminary, the history of cultural thought is summarised comprehensively. The rich tradition of cultural philosophy during the second half of the nineteenth century and *Fin-de-siècle* period, lasting until the 1920s, was interrupted, not only in Germany, due to historical tragedies. The deeper reason is the increasing and ongoing economisation of domains of thought that have previously been occupied by legal philosophical thought. Eventually the discussion about political culture may have contributed to reanimate the legal cultural debate. "Selbst in den langwierigen Kontroversen um das Verhältnis von (Verfassungs-)Recht und Wirklichkeit blieb verdeckt, dass diese Wirklichkeit gewiss auch eine soziale Wirklichkeit ist, weiter und tiefer gesehen aber vor allem eine kulturelle Wirklichkeit". A cultural science approach in general jurisprudence and legal philosophy could help to compensate the lack and loss of knowledge that could fecundly be taken into consideration.

[Further Information About the Author]
Peter Häberle, born on 13 May 1934 in Göppingen (Germany), has been charged to lecture legal philosophy at the University of St. Gallen for more than twenty years. He persecuted studies in jurisprudence at the Universities of Tübingen, Bonn, Freiburg im Breisgau and Montpellier and received his doctorate in 1961 from the Albert-Ludwigs-University in Freiburg (Germany), as a scholar of Konrad Hesse. His promotion thesis, entitled "Die Wesensgehaltgarantie des Artikel 19 Absatz 2 Grundgesetz – Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt" has been much discussed in Germany and abroad. In 1969 he handed in his habilitation thesis, entitled "Öffentliches Interesse als juristisches Problem" and got the *venia legendi* for public law. Most of his time as an academic teacher was spent at the University of Bayreuth. *Peter Häberle*'s best-known discoveries are the identification of jurisprudence as a cultural science, the comparison of different legal or constitutional orders as the fifth moment in interpretation of the law, and last but not least as an inventor of many current concepts in public law. His legal thought stands in the tradition of *Hermann Heller* and *Rudolf Smend*, generally speaking. For a long period, he signed as the editor in chief of the acknowledged "Jahrbuch des öffentlichen Rechts der Gegenwart", published by Mohr/ Siebeck in Tübingen. Apart from all of this, he is also an excellent pianist, having been educated in a household of musicians.

[Selected Works of the Same Author]
Peter Häberle: Öffentliches Interesse als juristisches Problem – Eine Analyse von Gesetzgebung und Rechtsprechung, Bad Homburg: Athenäum, 1970; *Idem*: Die Verfassung des Pluralismus – Studien zur Verfassungstheorie der offenen Gesellschaft, Königstein:

Fischer Taschenbuch, 1980; *Idem*: Europäische Rechtskultur – Versuch einer Annäherung in zwölf Schritten, Baden-Baden: Nomos, 1994; *Idem*: Europäische Verfassungslehre in Einzelstudien, Baden-Baden: Nomos, 1999; *Idem*: Gemeineuropäisches Verfassungsrecht, in: Der europäische Verfassungsraum, ed. Roland Bieber and Pierre Widmer (Publications de l'Institut de droit comparé, vol. 28), Zürich: Schulthess Polygraphischer Verlag, 1995, pp. 361 ss.; *Idem*: Das Menschenbild im Verfassungsstaat (Schriften zum Öffentlichen Recht, vol. 540), Berlin: Duncker & Humblot, 1988; *Idem*: Textstufen als Entwicklungswege des Verfassungsstaates – Arbeitsthesen zur Verfassungslehre als juristischer Text- und Kulturwissenschaft, in: des Menschen Recht zwischen Freiheit und Verantwortung, Festschrift für Karl Josef Partsch zum 75. Geburtstag, Berlin: Duncker & Humblot, 1989; *Idem*: Ausstrahlungswirkungen des deutschen Grundgesetzes auf die Schweiz – Ein Beispiel für weltweite Prozesse der Produktion und Rezeption „in Sachen Verfassungsstaat", in: Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen – 40 Jahre Grundgesetz, Berlin: Duncker & Humblot, 1990, pp. 1 ss.; *Idem*: Ethik „im" Verfassungsrecht, in: Rechtstheorie, Zeitschrift für Logik, Methodologie, Kybernetik und Soziologie des Rechts, vol. 21 (1990), pp. 269 ss., Berlin: Duncker & Humblot, 1990; *Idem* (Ed. together with *Michael Kilian* and *Heinrich Wolff*): Staatsrechtslehrer des 20. Jahrhunderts – Deutschland, Österreich, Schweiz, Berlin: Walter De Gruyter, 2015.

[For Further Reading]
Peter Häberle: Die Wesensgehaltgarantie des Artikel 19 Absatz 2 Grundgesetz – Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt, Heidelberg: C. F. Müller, 1962 (3rd ed. 1983); *Idem*: Öffentliches Interesse als juristisches Problem, Bad Homburg: Athenäum Verlag, 1970 (2nd ed. 2006); *Idem*: Grundrechte im Leistungsstaat, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, vol. 30 (1972), pp. 43 ss.

15 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
3rd Section "Legal Structures as an Integrative Part of Cultural Phenomenons, leading to an Interdisciplinary Approach as Part of the Theory of Science"
Entry 3.15 "Michael Walter Hebeisen, Ästhetisch-poetischer Grundzug"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Michael Walter Hebeisen
Title: Vom ästhetisch-poëtischen Grundzug des modernen Verständnisses von Geschichte – Im Besonderen von der Urteilskraft in Iurisprudenz und Staatslehre als Geisteswissenschaften
Edition(s): in: Moderne und Historizität, hrsg. für die Klassik Stiftung Weimar von Stefan Wilke, Weimar: Verlag der Bauhaus-Universität Weimar, 2011, pp. 134-164

[Further Information About the Author]
Michael Walter Hebeisen, born on 9 January 1965, after having studied violoncello and musicology at the Conservatory of Berne, followed his studies in jurisprudence at the University of Berne, with semesters abroad at the University of Cambridge. He graduated in 1992 and received his doctorate in 1994, after having collaborated with doctor father *Peter Saladin*.
He then changed for a period of seven years to the Federal Office of Justice, in an entity that was occupied with the preparation of the reform, i.e. the total revision of the Swiss Federal Constitution. In addition, he got a habilitation scholarship from the Swiss National Foundation for Scientific Research, under the survey of *Peter Häberle*, that enabled him to pursue an old-fashioned post-doc journey across Europe. He travelled to Oxford University (University College), where he assisted and contributed to the ongoing reform of the British Constitution by the shadow Cabinet of the Labour Party. Back on the Continent, he directed to the "*Dilthey Forschungtsstelle*" and "*Hegel-Archiv*" at Ruhr University of Bochum and to the Humboldt University in Berlin. After a short residence at the "*Faculté de droit de l'Université de Toulouse*" where he studied the theory of *Jean-Claude-Eugène-Maurice Hauriou*, he settled for a long time in Naples where he established contacts with the philosophers of the School of Neo-Historicism, i.e. with *Fulvio Tessitore*, *Giuseppe Cacciatore*, *Giuseppe Cantillo* among others. In consequence of his fascination for the tradition of these thinkers, he undertook to translate selected works by Pietro Piovani (9 volumes), Giuseppe Capograssi (6 volumes), Giovanni Gentile (11 volumes) and eventually plans an Edition of the works of Bertrando Spaventa (6 volumes).
Back in his home country, he is established as an eminent thinker in the domain of legal philosophy as well as theory of the human sciences.

[Selected Works of the Same Author]
Michael Walter Hebeisen: Souveränität in Frage gestellt – Die Souveränitätslehren von Hans Kelsen, Carl Schmitt und Hermann Heller im Vergleich (Dissertation Universität Bern

1994), Baden-Baden: Nomos 1995 (extract); *Idem*: Staat und Recht als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als Geisteswissenschaften, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2004, pp. 395-456; *Idem*: Krise der universellen Rechtsidee angesichts des Pluralismus der positiven Rechtsordnungen – Pragmatische Nachforschungen aufgrund der Institutionenlehren von Jean-Eugène-Claude Hauriou und Santi Romano, in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 1-65; *Idem*: Die Verfassung als Vermittlerin von Wert- und Gerechtigkeitsvorstellungen? – Geisteswissenschaftliche Überlegungen zum Wert der Verfassung als Hilfe auf dem Weg zum gerechten Zusammenleben von Menschen und Völkern, in: Herausgeforderte Verfassung – Die Schweiz im globalen Kontext (16. Kolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften), ed. Beat Sitter-Liver, Freiburg: Universitätsverlag, 1999, pp. 133 ss.; *Idem*: Schweizer Juristen-Philosophen – Eine eigenständige schweizerische Tradition der Wissenschaftsphilosophie der Jurisprudenz und der Staatslehre in Auseinandersetzungen mit ausgewählten Strömungen der Rechts- und der Staatsphilosophie sowie der Wissenschaftstheorie in der ersten Hälfte des Zwanzigsten Jahrhunderts (Eine programmatische Skizze für ein interdisziplinäres Forschungsvorhaben), in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 50, ed. Peter Häberle, Tübingen: J. C. B. Mohr/ Siebeck, pp. 69-100 (extended version in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 651-711); *Idem*: Liberalismus und Kommunitarismus betreffend das Verhältnis des Rechten zum Guten – Prinzipielle Opposition oder pragmatische Annäherung, Vorrang oder Unabhängigkeit? In: Archiv für Rechts- und Sozialphilosophie (ARSP), supplementary vol. 76, ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2000, pp. 119 ss.; *Idem*: Note sulla filosofia del diritto di Pietro Piovani – Appunti di un giurista ultramontano, Referat gehalten am Studienseminar aus Anlass des 20. Todestages von Pietro Piovani in Neapel vom 29. Juni bis 1. Juli 2000, in: Archivio di storia della cultura (Firenze: Liguori), vol. 14 (2001), ed. Fulvio Tessitore, pp. 289-305; *Idem*: „An sich redet Alles, was ist, das Ja" – Zur Verwendung Friedrich Nietzsches durch den Rechtsphilosophen Carl August Emge, Referat, gehalten auf dem internationalen Kongress der Stiftung Weimarer Klassik „Missbrauch, Ereignis und Kritik – Zur deutschen Nietzsche-Rezeption zwischen 1933 und 1945", in: Widersprüche – Zur frühen Nietzsche-Rezeption, ed. Andreas Schirmer and Rüdiger Schmidt, Weimar: Hermann Böhlaus Nachfolger, 2001, pp. 291 ss., also published in: Nietzsche und das Recht (Archiv für Rechts- und Sozialphilosophie, supplementary volume 77), ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2001, pp. 219 ss.; *Idem*: Geschichte der Vergangenheit, Geschichten für die Zukunft in: Erzählungen des Staates, ed. Otto Depenheuer, Wiesbaden: VS Verlag für Sozialwissenschaften, 2010, pp. 35 ss.; *Idem*: Souveränität bei Otto Kirchheimer – Das

Dogma der Souveränität zwischen Staatslehre und Politikwissenschaften, in: Otto Kirchheimers Staatsverständnis, ed. Robert Christian van Ooyen and Frank Schale (Reihe „Staatsverständnisse", ed. Rüdiger Voigt), Baden-Baden: Nomos Verlagsgesellschaft 2010, pp. 87-117; *Idem*: Vom ästhetisch-poëtischen Grundzug des modernen Verständnisses von Geschichte – Im Besonderen von der Urteilskraft in Iurisprudenz und Staatslehre als Geisteswissenschaften, in: Moderne und Historizität, ed. for the „Klassik Stiftung Weimar" by Stefan Wilke, Weimar: Verlag der Bauhaus-Universität Weimar, 2011, pp. 134-164.

28 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Fourth Section "Legal History and the Historicity of Law Within the Swiss Legal Context"
Introduction
by Michael Walter Hebeisen

> "Das Problem, welches sich das Naturrecht stellte, ist nur lösbar im Zusammenhang der positiven Wissenschaften des Rechts. [...] Hieraus folgt, dass es eine besondere Philosophie des Rechts nicht gibt, dass vielmehr ihre Aufgabe dem philosophisch begründeten Zusammenhang der positiven Wissenschaften des Geistes wird anheimfallen müssen."
> (*Wilhelm Dilthey*: Einleitung in die Geisteswissenschaften − Versuch einer Grundlegung für das Studium der Gesellschaft und der Geschichte, in: Gesammelte Schriften, vol. 1, Göttingen: Vandenhoeck & Ruprecht, 9th ed. 1990, p. 79)

[Fourth Section: "Legal History and the Historicity of Law Within the Swiss Legal Context"]

[Introduction: Nature vs. History, Naturalism vs. Historicism]
If jurisprudence be considered to provide merely classification, the appropriate methodology for legal science would turn out to be a kind of biology (botany). To characterise jurisprudence as an integral part of history, to admit the legal order as historical, to understand positive law in its historicity, just means to secure the antithesis to such a misconception of legal science. The problem, however, remains to detect an adequate conception of history, of historicity. Commonly human history is not clearly distinguished from natural history and, therefore, held as mere development in the sense of evolution, so that naturalism re-enters jurisprudence and legal history from the back door. Rather we have to identify a qualified conception of history and historicity, in order to make sure, that the specific human nature, the mental-spiritual character of law and legal order can be maintained.

[The Historical School of Law and Critical-Problematical Historicism]
During the entire nineteenth century, the Historical School of Law was pre-dominating in German-speaking countries, and it especially decided the quarrel about codification of private law in the negative sense, i.e. in the direction of a refusal of codification. Even critics such as the prominent *Rudolf von Ihering* remain in the spirit of "Historische

Rechtsschule", led by the eminent *Friedrich Carl von Savigny*, despite their battle on the law (more important than *Anton Friedrich Justus Thibaut* seems to me Ihering's "Wiener Antrittsrede" about "Wissenschaftlichkeit der Jurisprudenz" than the well-known series of lectures on "The Struggle for Law" by the same author; see entry 2.0 of this Legal Anthology). Within the conceptions of the Historical School of Law, history actually refers to permanent nature, not to alterable culture, as it has been outlined by *Alfred Dufour* (Histoire naturelle ou nature historique du droit dans l'École du Droit Historique, in: Recht zwischen Natur und Geschichte, (Ius Commune, vol. 100), Frankfurt am Main: Vittorio Klostermann, 1997, pp. 125 ss.). This highly problematical perception by the classic historical law school, however, has have meanwhile been identified and discarded by *Klaus Luig* (Rudolf von Ihering und die Historische Rechtsschule, in: Iherings Rechtsdenken – Theorie und Pragmatik im Dienste evolutionärer Rechtsethik, ed. Okko Behrends, in: Abhandlungen der Akademie der Wissenschaften in Göttingen, vol. 216, Göttingen: Vandenhoeck & Ruprecht, 1996, pp. 255 ss.). The question what kind of history or historicity has to be adopted in order to provide a sound basis for modern legal thought has therefore to be answered just in an alternative sense. Philosophically reconsidered, even the Historical School of Jurisprudence has remained provided merely dogmatical answers and therefore has not evolved to a truly historical understanding of the addressed problem, in the sense of Neo-Historicism (as proposed and postulated by *Johann Gustav Droysen*, *Wilhelm Dilthey*, *Friedrich Meinecke*, and *Ernst Troeltsch*), that only enables veritable criticism (leading to truly philosophical understanding, namely to "Geschichtlichkeit" in the sense of the historicity of human existence). This renewed historical and cultural-philosophical influenced orientation of Neo-Historicism has best been interpreted and conceptualised by eminent Italian thinkers, for instance by *Fulvio Tessitore* and *Giuseppe Cacciatore*.

We have treated this alternative current of history extensively in our habilitation thesis, right from the starting point of the historical foundation of the human sciences by *Wilhelm Dilthey* (*Michael Walter Hebeisen*: Recht und Staat als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als Geisteswissenschaften, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, SWUV, 2005). If we adopt the introductory quotation above, we have to confess that natural law theories often turn out to be historical in a higher degree than the Historical School of law itself, depending on their conception of historical development, rooted in social community. The crucial point of such a perspective seems to be the free will of the collective body, of the legal community. Freedom to objectivate the positive legal order transgresses the alleged necessities of natural-historical laws. In this respect, the historical foundations of international law as characterised by *Max Huber* (customary law as prototypical legal order) turn out to be highly significant, as well as the history of the codification of private law as described by *Pio Caroni* (including the reverse process of de-codification). History does not mean to simply focus on past experience in the sense of heritage, but rather to re-enact experience in present times, to actualise historical achievements.

[The Challenge of Historicism by Social Contract Theory - The "Problem" *Jean-Jacques Rousseau*]
The challenge to such a modern conception of historicism has always been the social contract, as elaborated by *Jean-Jacques Rousseau*. The problem consists in the interpretation of the inadequate, inappropriate terminology of Natural Law in early Enlightenment, that fails in expressing the advanced ideas of modernity. Although Rousseau has defended a profoundly individualistic conception of man, his theory has given way to totalitarian misunderstandings. Subtle philological interpretation and a comprehensive inclusion of all writings of Rousseau (especially the inclusion the project of a constitution of Corse and the treatise on equality among men) have allowed Swiss legal thinkers, to correct this caricature right from the beginning. Rectified Rousseauism has been a constant ingredient of legal-philosophical thought in Switzerland, be it *Fritz Fleiner* reflecting the origins and growth of general theories of the state, be it *Max Imboden* indicating the legitimate form of democratic government. "Stets hat *Jean-Jacques Rousseau* den Gedanken des absolut Richtigen und Gerechten im Sinn einer Grösse, die dem Menschen verfügbar wäre, verworfen. Das unterscheidet ihn klar vom Standpunkt des Doktrinärs, der sich anmasst, seine Erkenntnis anderen als die unbedingte und allgemein gültige aufzudrängen"(*Richard Bäumlin*: Rousseau und die Theorie des demokratischen Rechtsstaates, in: Berner Festgabe zum Schweizerischen Juristentag 1979, ed. Eugen Bucher and Peter Saladin, Bern: Paul Haupt, 1979, pp. 13-49; see entry 6.11 of this Legal Anthology)

[For Further Reading]
Richard Bäumlin: Rousseau und die Theorie des demokratischen Rechtsstaates, in: Berner Festgabe zum Schweizerischen Juristentag 1979, ed. Eugen Bucher and Peter Saladin, Bern: Paul Haupt, 1979, pp. 13-49;
Giuseppe Cacciatore: Die "politische" Dimension des problematisch-kritischen Historismus in Italien, in: Historismus am Ende des 20. Jahrhunderts – Eine internationale Diskussion, edg. Gunter Scholtz, Berlin: Akademie-Verlag, 1997, pp. 84 ss.; *idem*: Die Tradition des problematisch-kritischen Historismus im Rahmen der italienischen philosophischen Kultur der zweiten Hälfte des 20. Jahrhunderts, in: Historismus in den Kulturwissenschaften – Geschichtskonzepte, historische Einschätzungen, Grundlagenprobleme, ed. Otto Gerhard Oexle and Jörn Rüsen (Beiträge zur Geschichtskultur, vol. 12), Köln/ Weimar/ Wien: Böhlau, 1996, pp. 331 ss.; *idem*: Vita e forme della scienza storica – Saggi sulla storiografia di Dilthey (Collana di filosofia, N. S. vol. 7), Napoli: Morano, 1985; *idem* (ed.): Lo storicismo e la sua storia – Temi, problemi, prospettive, Milano: Guerini e Associati, 1997;
Robin George Collingwood: The Philosophy of History, Oxford: Clarendon Press, 1946 (German translation: Philosophie der Geschichte, Stuttgart: Kohlhammer, 1955);
Fulvio Tessitore: Introduzione a lo storicismo, Bari/ Roma: Laterza, 1996; *idem*: Benedetto Croce und der italienische "Neo-Historismus", in: Historismus am Ende des 20. Jahrhunderts – Eine internationale Diskussion, ed. Gunter Scholtz, Berlin: Akademie-Verlag, 1997, pp. 55 ss.;

25 January 2018 (revised on 19 July) *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
4th Section "Legal History and the Historicity of Law Within the Swiss Legal Context"
Entry 4.1 "Fritz Fleiner, Entstehung und Wandlung moderner Staatstheorien"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Fritz Fleiner
Title: Entstehung und Wandlung moderner Staatstheorien in der Schweiz; and *Idem*: Wandlungen der demokratischen Ideen (Vortrag in Strassburg im November 1934)
Edition(s): Zürich: Orell Füssli, 1916; also reprinted in: Ausgewählte Schriften und Reden, Zürich: Polygraphischer Verlag AG, 1941, pp. 163-180, 426-441

[Introduction]
Depending on the adopted point of view, the person and the writings of *Jean-Jacques Rousseau* consist in a problem, challenge, spring, or even in nuisance for jurisprudence and legal philosophy (and for political philosophy and political economy, too). His fundamental idea was to modify the contractual theory, as founded by *Thomas Hobbes*, to a comprehensive theory legitimation of the power of the modern state. For Switzerland, Rousseau's arguments have been of invaluable importance: "Erst der grosse citoyen de Genève, *Jean-Jacques Rousseau*, hat der Theorie vom *contrat social* die zündende und revolutionierende Kraft eingehaucht". It should be taken into consideration that these arguments for democratic and liberal government have been the object of constant controversies between different lectures, interpretations, diverse uses and even explicit commissioning of the arguments proposed by Rousseau in his principal writing "*Le contrat social*" from 1762 (see nos. 4.4 and 6.11 of this Legal Anthology). The very character of Swiss democracy cannot be conceptualised without reference to Rousseau. "Aus der Verschmelzung der alt-germanischen Rechtsgedanken mit der Theorie Rousseaus ist der schweizerische Staat der Gegenwart, die reine Demokratie, hervorgegangen. [...] Aus der Theorie Rousseaus hat der schweizerische Volksstaat unschätzbare Kräfte gezogen".

[Historical Situation and Systematic Context]
In order to provide the cultural context of the debate in Switzerland during the twentieth century, we would like to indicate a few contributions to the theme in case by legal philosophy. The predominant figure of *Rudolf Stammler* treated the subject ("Begriff und Bedeutung der Volonté générale bei Rousseau" (1912), in: Rechtsphilosophische Abhandlungen und Vorträge, Berlin-Charlottenburg: Rolf Heise, 1925, vol. 1, pp. 375 ss.), as well as an all diverse representative of legal thought, *Adolf Menzel* ("Jean-Jacques Rousseau als Rechtsphilosoph", in: Archiv für Rechts- und Wirtschaftsphilosophie mit besonderer Berücksichtigung der Gesetzgebungsfragen, ed. Josef Kohler and Fritz Berolzheimer, vol. 10 (1916/1917), Berlin/Leipzig: Walther Rothschild, 1917, pp. 338 ss.). We do not include an overview of French-written contributions, as these are too numerous. Rather, we would like to mention the less known contributions by the Italian

legal philosopher *Giorgio Del Vecchio* (Des caractères fondamentaux de la philosophie politique de Rousseau, traduit de l'Italien par R. et F. Pubanz, in: Revue critique de Législation, Paris: Pichon, 1914) and by *M. Landmann* (Die Rechtsphilosophie des Jean-Jacques Rousseau – Ein Beitrag zur Geschichte der Staatstheorien, Berlin: J. Guttentag, 1898).

[Content, Abstracts/Conclusions, Insights, Evidence]
Jean-Jacques Rousseau, in his own right, stands for a reposing pole to measure progress and at the same time the deeper reason of development in the domain of public law theory. This deliberation forms the leading idea of *Fritz Fleiner*'s inaugural lecture at the University of Zurich from 1916, entitled "Origins of and changes in modern state theory in Switzerland". The elements identified within Rousseau's theory are the following: sovereignty of the people, principle of equality, as well as political and religious freedoms. The radical democrat inclination in Rousseau did not only have followers, but also provoked conservative counter-theories (for instance *Carl Ludwig von Haller*). Fleiner is characterising the exchange of ideas in Europe, with specific respect to Switzerland:"Gebend und empfangend, so steht die Schweiz an der Grenzscheide dreier grosser Nationen. Was der Kleinmut als ihr Verhängnis beklagt, hat sich als eine Quelle ihres staatlichen Reichtums erwiesen. Aus der Enge des Gebiets ist die Freude am Staat emporgewachsen, und die Berührung germanischen und romanischen Geistes hat die politischen Kräfte und Ideen frei gemacht, die zu Bausteinen der modernen Staaten geworden sind".
Another speech of *Fritz Fleiner*, which is of great interest in this context and vividly proposed to be read, was held in Strassbourg in November 1934 and is entitled "Development of democratic ideas". The arguments have been formulated under the impression of the then recent takeover of the national socialist party in Germany. This situation is a bidden occasion to sketch just another image of Rousseau, namely as a defender of the democratic and liberal State. Fleiner's intention reads as follows: "die Verteidigung unserer demokratischen Einrichtungen und der liberalen Gedanken gegen Staatsanschauungen, die zur Diktatur hinstreben und in einem Teil Europas praktische Gestalt gewonnen haben. Denn so oft die grossen Ideen der Demokratie und der Liberalismus der Anfechtung ausgesetzt sind, sind wir gezwungen, uns auf ihren Wahrheitsgehalt zu besinnen und vorurteilslos zu erwägen, was wir den Gegnern zu erwidern haben". Subsequently, the author pays attention and reverence to *Carré de Malberg* (teaching at the University of Strassbourg at his time) and his "Théorie générale de l'État". Legitimate government is eventually based on free will, in the obedience of the citizens to the legal order. "Der Gehorsam gegenüber den Rechtssätzen wurzelt in erster Linie auf der Überzeugung der Bürger von der Legitimität der bestehenden Rechtsordnung. Wenn dieser Glaube an die Legitimität infolge äusserer Impulse ins Wanken gerät, so stürzt auch diese innere Haltung, die Gehorsamsbereitschaft, zusammen und es kommt zur Revolution". The theories of *Montesquieu*, *Georges Sorel* ("*Les réflexions sur la violence*"), and *Vilfredo Pareto* are discussed further, and arguments against

mythological thought are developed by the eminent author, with specific respect to Swiss political culture and Swiss history of ideas. “In den Volksrechten erblicken wir in der Schweiz die Garantie gegen Staatstheorien, welche die Grundfesten unserer Demokratie erschüttern müssen. Über diesen speziell Schweizerischen steht aber noch ein Allgemeineres. Wir haben unausgesetzt zu kämpfen für die Herrschaft der Gesetze und den Respekt vor der individuellen Tätigkeit des Bürgers”. As his very conclusion, Fleiner refers to a sentence that could have been his motto: “Recht muss Recht bleiben” (psalm 94, verse 15).

[Further Information About the Author]
Fritz Fleiner, born 24 January 1867 in Aarau, died 26 October 1937 in Ascona, received his academic education at the Universities of Zurich, Leipzig, Berlin and Paris, before he was promoted and habilitated in public law of the religion communities in 1890 and 1892, and in consequence was private lecturer and later extraordinary professor at the University of Zurich from 1892 on. In 1897, he settled over to the University of Basel, where he was as an ordinary professor in charge of public law, i.e. federal constitutional and administrative law. In 1906 he was called to the University of Tubingen, in 1908 he changed to the University of Heidelberg, elaborating a masterful work on the “Institutionen des Deutschen Verwaltungsrecht” (1911), a general theory of the administrative law, that stands in the tradition of the famous *Otto Mayer*.
Between 1915 and 1936 he had the ordinary chair at the University of Zurich, back in his home country, where in 1916 he held his famous inaugural lecture in subject of “Entwicklung und Wandlung moderner Staatstheorien in der Schweiz”. He virtually introduced modern administrative studies to Switzerland. In 1923, he published his main work about “Schweizerisches Bundesstaatsrecht”, later further developed together with his colleague *Zaccaria Giacometti*. He had a liberal mentality and a specific historical and political approach to public law, and he therefore intended to strengthen the rule of law, the fundamental liberties and freedoms and he promoted the establishment and enlargement of a constitutional and administrative jurisdiction.
For further information, please consult:
A. Im Hof: Fritz Fleiner, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 455ss.;
Felix Renner: Der Verfassungsbegriff im staatsrechtlichen Denken der Schweiz im 19. und 20. Jahrhundert (Dissertation Universität Zürich), Zürich: Schulthess & Co., 1968, pp. 270 ss.;
Giovanni Biaggini: Fritz Fleiner, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 111 ss.

[Selected Works of the Same Author]
Fritz Fleiner: Institutionen des deutschen Verwaltungsrechts, Tübingen: J. C. B. Mohr, 8. ed. 1928; *Idem*: Ausgewählte Schriften und Reden, Zürich: Polyagraphischer Verlag AG, 1941;

Idem: Entstehung und Wandlung modernen Staatstheorien in der Schweiz, in: Ausgewählte Schriften und Reden, Zürich: Polygraphischer Verlag AG, 1941, pp. 288ss.; *Idem* (later editions together with *Zaccaria Giacometti*): Schweizerisches Bundesstaatsrecht, Tübingen: J. C. B. Mohr, 1923 (3. ed. Zürich: Polygraphischer Verlag, 1949; reprint 1969).

[For Further Reading]
Richard Bäumlin: Jean-Jacques Rousseau und die Theorie des demokratischen Rechtsstaates, in: Berner Festgabe zum Schweizerischen Juristentag 1979, ed. Eugen Bucher and Peter Saladin, Bern: Paul Haupt, 1979, pp. 13-49.

29 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
4th Section "Legal History and the Historicity of Law Within the Swiss Legal Context"
Entry 4.2 "Max Huber, Die geschichtlichen Grundlagen des Völkerrechts"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Max Huber
Title: Die geschichtlichen Grundlagen des Völkerrechts
Edition(s): in: Gesellschaft und Humanität – Vermischte Schriften, Zürich: Atlantis, 1948, vol. 3, pp. 177-196 (first printing in: Wissen und Leben, vol. 16 (1923)

[Content, Abstracts/Conclusions, Insights, Evidence]
In a relatively short essay, *Max Huber* gives a comprehensive overview of the historical development of international law and its doctrines and theories. In the period of early Modern Times, the sovereignty of principalities as well as the open seas have contributed to the genesis of international legal order, principally based on natural law theory. The crucial turn consists in the differentiation between the nation state and morality in the largest sense as positive social order. As the most influential elements of this development of international law in a truly modern understanding are to be considered the principle of nationality and worldwide commerce.
Romanticism and its concept of "Staatsraison" are addressed by *Max Huber* as a definitive change of paradigms: "Entgegen dem individualistischen Naturrecht ist der Romantizismus, der mit dem Nationalitätsprinzip zeitlich und geistig eng verbunden ist, am Ganzen, am Volk orientiert. Recht und Staat erwachsen aus dem Volksgeist, sind nicht mehr rational gewollte Schöpfungen des Menschen. Ein fast mythisches Element liegt in dem Begriff des 'Sacro egoismo', dem der Staat in der Verwirklichung des nationalen Gedankens folgen soll. Aber auch losgelöst vom romantischen und völkischen Vorstellungen hat der Staat seine philosophische Anerkennung als absoluter Wert namentlich durch Hegel gefunden. Wenn der Staat seine eigene, in seiner besonderen Natur und Zweckbestimmung begründete Moral hat, werden die inneren Hemmungen beseitigt, die sich in der Person des Staatsmannes oder Strategen aus dem persönlichen sittlichen Empfinden der schrankenlosen Durchsetzung des Staatsinteresses entgegenstellen können. Eine besondere Moral des Staates ist aber unvereinbar mmit jeder absoluten Ethik, insbesondere mit der christlichen". A certain affinity of the so-called Historical School of Law and modern international jurisprudence cannot be neglected, according to us, even if the international legal order exceeds any specific method of jurisprudence or jurisdiction.
Succeeding, liberalism and imperialism are addressed by *Max Huber* as dominating elements of the further realisation of international legal order. However, both have failed, as the First World War has proved. "Das Wesentliche für den Staatsmann ist, dass er den Takt des politischen Handelns, das Gefühl für das Mögliche und für das Tempo der Entwicklung besitze, dass die Kühnheit seines Entschlusses, die Fähigkeit zur Vision des

Kommenden gleichwertig sei der Besonnenheit, mit der alle wirksamen Tatsachen der Gegenwart von ihm gewürdigt werden. Die Gegenwart aber kann nur verstehen, wer ihr Werden aus der Vergangenheit begreift. Niemand darf solcher Einsicht mehr als der, welcher internationale Politik treibt. Erfolgreich sind deshalb besonders diejenigen Staaten, deren Leiter aus einer alten Tradition heraus handeln und doch wach sind für alles, was die Gegenwart Neues bringt". The challenge remains to bridge the abyss between the legal order and society or political community... Hence, the need for a sociological consideration of the discrepancy between international law and its underlying social structure (see no. 7.9 of this Legal Anthology). "Auch für Kulturvölker gilt hier das *Hamlet*-Wort: Sein oder Nichtsein, das ist die Frage".

[Further Information About the Author]
Max Huber, born 28 December 1874 in Zurich, died 1 January 1960 in Zurich, studied jurisprudence at the Universities of Lausanne, Zurich and Berlin, where he acquired a doctorate. In 1902, he was called onto the ordinary chair for constitutional law, public church law and international law by the University of Zurich, a professorship to which he remained faithful until 1921. As a legal consultant of the Swiss government, he represented Switzerland 1907 to the Second Den Haag and in 1919 to the Paris Conference, where he took part in shaping the neutrality of his country. As a legal diplomat he was delegated to several boards of the League of Nations. He was also a member of the Den Haag International Court between 1922 and 1932 and was even its president between 1925 and 1927. Just another obligation for him was to preside over the International Red Cross Committee from 1928 to 1944, where he contributed to the development of the humanitarian law. He obtained multiple honours such as 10 doctors *honoris causa*, and above all was a man with a huge reputation in his time.
For further information, please consult:
Peter Vogelsanger: Max Huber, Berlin: Duncker & Humblot, 1967;
Felix Renner: Der Verfassungsbegriff im staatsrechtlichen Denken der Schweiz im 19. und 20. Jahrhundert (Dissertation Universität Zürich), Zürich: Schulthess & Co., 1968, pp. 441 ss.;
Daniel Thürer: Max Huber – A Portrait in Outline, in: The European Journal of International Law, vol. 18 (2007), S. 69-80;
Andreas Kley: Max Huber – Völkerrechtler des 20. Jahrhunderts, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 161 ss.

[Selected Works of the Same Author]
Max Huber: Heimat und Tradition, Glaube und Kirche, Gesellschaft und Humanität, Rückblick und Ausblick, Vermischte Schriften, 4 vol. Zürich: Atlantis, 1948.

5 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
4th Section "Legal History and the Historicity of Law Within the Swiss Legal Context"
Entry 4.3 "Peter Liver, Freiheit"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Peter Liver
Title: Von der Freiheit der alten Eidgenossenschaft und nach den Ideen der französischen Revolution
Edition(s): in: Die Freiheit des Bürgers im schweizerischen Recht, Festgabe zur Hunderjahrfeier der Bundesverfassung, hrsg. von den Iuristischen Fakultäten der schweizerischen Universitäten, Zürich: Polygraphischer Verlag, 1948, pp. 37-52

[Introduction/Historical Situation and Systematic Context]
Peter Liver was an eminent legal historian, originating from the Canton of Graubünden. On the occasion of the Centenary of the Swiss Federal Constitution in 1948 (for two other contributions on this occasion, see nos. 5.7 and 5.8 of this Legal Anthology), he characterised freedom as the leading idea of the renewal of the much elder Swiss Confederation with a considerable distinction. This difference is not more and not less than the change from feudal liberties and freedoms, as granted by the principalities, to a republican idea and concept of political freedom. This development has undergone some crucial historical events, namely in the periods of so-called Helvetic and Regeneration.
In philosophical terms, these epochs signed the reception of idealistic ideas in Switzerland, for instance of the provenance of *Immanuel Kant* and *Johann Gottlieb Fichte*. Consequently, the political idea of freedom correlated in some degree to the philosophical idea of liberty within an idealistic context (for specific information, consult *Martin Bondeli*: Kantianismus und Fichteanismus in Bern – Zur philosophischen Geistesgeschichte der Helvetik, sowie zur Entstehung des nachkantischen Idealismus (Schwabe Philosophica, vol. 2), Basel: Schwabe & Co., 2001).

[Content, Abstracts/Conclusions, Insights, Evidence]
With respect to freedom, tradition in Switzerland has not been without ruptures, and the change from elder concepts of liberty, corresponding to the idea of Swiss Confederation, to the newer republican idea and ideal of liberty in the Swiss Federal State denotes a deep conversion. "Mit den folgenden Ausführungen soll der Versuch gemacht werden, die verschiedenen Arten und Formen altschweizerischer Freiheit festzustellen und ihre Merkmale näher zu bestimmen, um besser erkennen zu können, was davon in der Bundesverfassung von 1848 bewahrt und erneuert, und was zerstört oder überwunden worden ist". In his essay, *Peter Liver* undertakes the task to determine the elder uses of liberty in order to understand the modern understanding of liberty better, by historical difference.
The change goes from the associational, corporatist principle to the liberal conception of

social and political community, and from autarchy to participation as the main effect of liberties in the sense of independence. Thereby the natural law principles of collective liberties become an integrated part of the new federal structure of the republican nation state.

[Further Information About the Author]
Peter Liver, born 21 August 1902 in Flerden, died 10 September 1994 in Ittigen, first studied history at the Universities of Jena, Berlin and Zurich, before he received his doctorate in Jurisprudence from the University of Berne (1928 resp. 1931). Between 1939 and 1944 he was professor at the well-known Eidgenössische Technische Hochschule in Zurich, before moving to the University of Berne, where he was an academic teacher in legal history and private law.

[Selected Works of the Same Author]
Peter Liver: Der Begriff der Rechtsquelle, in: Rechtsquellenprobleme im schweizerischen Recht, Festgabe der rechts- und wirtschaftswissenschaftlichen Fakultät der Universität Bern für den Schweizerischen Juristentag 1955 (Zeitschrift des Bernischen Juristenvereins, vol. 91bis), Bern: Stämpfli & Cie., 1955, pp. 1ss.

[For Further Reading]
Martin Bondeli: Kantianismus und Fichteanismus in Bern – Zur philosophischen Geistesgeschichte der Helvetik, sowie zur Entstehung des nachkantischen Idealismus (Schwabe Philosophica, vol. 2), Basel: Schwabe & Co., 2001;
Richard Feller: Berns Verfassungskämpfe 1846, Bern: Herbert Lang & Cie., 1948;
Carl Hilty: Öffentliche Vorlesungen über Helvetik, Bern: Max Fiala, 1878;
Leonhard von Muralt: Alte und neue Freiheit in der helvetischen Revolution (Akademische Antrittsrede 1941), Zürich: Schulthess & Co., 1941; reprinted in: Der Historiker und die Geschichte, Ausgewählte Aufsätze und Vorträge, Festgabe für Leonhard von Muralt, Zürich: Schulthess, 1960, pp. 147-160.

11 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
4th Section "Legal History and the Historicity of Law Within the Swiss Legal Context"
Entry 4.4 "Max Imboden, Rousseau und die Demokratie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Max Imboden
Title: Rousseau und die Demokratie
Edition(s): in: Recht und Staat in Geschichte und Gegenwart, vol. 267, Tübingen: J. C. B. Mohr, 1963, 26 pp. (reprinted in: Staat und Recht – Ausgewählte Schriften und Vorträge, Basel: Helbing & Lichtenhahn, 1971, pp. 75-91)

[Introduction/Historical Situation and Systematic Context]
We already have encountered the ideas of *Jean-Jacques Rousseau* as a persistent question and challenge for legal and political thought in the inaugural lecture by *Fritz Fleiner* (see no. 4.1 of this Legal Anthology). In his meaningful essay from 1963, *Max Imboden* connects to this tradition and enlarges the chain, considerably. The starting point is the consideration that one cannot do without reference to the classic argumentations included in the writing "Contrat social" from 1762. "In Ablehnung oder Zustimmung, niemals aber in Indifferenz zum '*Contrat social*', hat sich das Staatsdenken der letzten zwei Jahrhunderte fortentwickelt. Anhänger einer totalitären und einer freiheitlichen Ordnung, Demokraten und Despoten, Revolutionäre und Konservative haben sich Rousseau in gleicher Weise zum Zeugen gemacht".
Meanwhile the possible interpretations or rather the various availments or diverse commissioning has even increased and covers from Rousseauism as a kind of romanticism to totalitarian adaptations and incorporations of *Jean-Jacques Rousseau*'s ideas and ideologies.

[Content, Abstracts/Conclusions, Insights, Evidence]
There is a shift from the question about the form of government to the legitimacy of state power to be detected (compare no. 5.10 of this Legal Anthology). This displacement of the core question from octroy to consent in political theory is important, although the metaphor of contract is hiding the intrinsic cleavage, according to *Max Imboden*. "Auf die Frage nach dem Grund der Herrschaft gibt Rousseau eine Antwort, die – obwohl nicht neu – zu einer der einprägsamsten und geläufigste Formeln der politischen Lehre wurde. Der Staat beruht auf Zustimmung; seine Existenz, seine Werthaftigkeit und die normative Kraft seiner Anordnungen gründen sich auf einen autonomen Entscheid der Bürger. [...] Die Leichtigkeit, mit der diese Formel eingeht, verdeckt die ihr eigene tiefe Widersprüchlichkeit". There is a complementary relation between contrat social and volonté générale, between contractual legitimation and common-sense will as symbolic forms of autonomy and authority as the two poles that form a tension, which every social community has to overcome. In this situation, the postulated sovereignty of the people

serves as an intermediary and mediating concept: "So sehr ist uns diese Formel vertraut geworden, dass wir die in ihr liegende Spannung oft kaum noch wahrnehmen. Was sich der Allgemeinheit zudenken lässt, ist ein letztes Mass, und wer die Allgemeinheit für sich hat, verwaltet letzte Autorität – das ist die eine Aussage. Für den einzelnen hat die von der Allgemeinheit getroffene Entscheidung deshalb den charakter des unwiderruflich Verpflichtenden, weil das Gesetz der Gesellschaft zugleich das Gesetz des Menschen ist, weil ihm der Bürger im höheren Sinn seine Zustimmung gab – das ist die andere Aussage". The author holds, that a tension between universal will and the particular expressions of individual be immanent in the concept of law. In Rousseau we find a conception of democracy as an apriorical ideal versus the need for practised democracy as incarnation of the model. In quintessence, hereby is expressed the conviction that state community is to be founded in the life of will. Rousseau's intention definitely consists in re-thinking the state, lies in a re-conception of political community, and not at all means a revolutionary turn from renewing conceptualisation to enactment in practice (as the dictum by *Karl Marx*: Thesen über Feuerbach, 11th thesis, would suggest: "Die Philosophen haben die Welt nur verschieden interpretirt, es kömmt drauf an sie zu verändern"). Modern output orientated theory-building must therefore be disappointed by the imaginary solutions provided by Rousseau. "Wer nach den Möglichkeiten realer demokratischer Gestaltung sucht, wir von Rousseau da verlassen, wo die praktische Aufgabe beginnt". As an intermediary consequence, the unrealistic proclamation of the identity between government and citizen (i.e. self-governance) turns out to be illusionary. Nonetheless, a psychological enlightenment of persistent ideologies is thoughtfully elaborated by *Max Imboden*. Concerning the task for practical democratic politics, the author speaks out loud a warning: "Vergeblich suchen wir im '*Contrat social*' nach Hinweisen und Ratschlägen für die Lösung der eigentlichen demokratischen Aufgabe. Dass wir sie nicht finden, ist nicht einfach eine Lücke des Werkes und eine Unterlassung des Autors. Dieses Fehlen ist in seiner Art ein Bekenntnis". The explanation of this lack is significant, as for *Jean-Jacques Rousseau* ideas are held as essential, and not the structure, the institutions of a positive, real political community. "Rousseau deutet das Geschehen und setzt unvermittelt seine Deutung an die Stelle der zu erklärenden Wirklichkeit. So steht seine Theorie zwischen Hellsicht und Halluzination, zwischen interpretierender [Re-]Konstruktion und Postulat, zwischen Idee und Programm [Ideologie]". Furthermore, the touchstone of pluralistic society shows Rousseau as a rational thinker far from political reality.

[Philosophical Valuation and Jurisprudential Significance]
The very conclusion of *Max Imboden*'s argumentation shall serve us for a valuation at the same time: The author determines a symptomatic co-incidence between political reality in Switzerland and the main source of inspiration for Rousseau's theory, in addition to the analysis by *Fritz Fleiner*: "Der genossenschaftliche Staat wird in der Schweiz seit Jahrhunderten gelebt. Er hat Rousseau wesentliche Eindrücke vermittelt, aus denen er seine Lehre schuf. Das geprägte, abstrakte Leitbild fiel zurück auf seinen lebendigen

Ursprung. Aus ihm gewann die formelhafte und ferne Lehre konkreten Bezug und fassbare Gestalt. In der Schweiz aber wurde ein historischer Besitz zu neuem Leben erweckt".

[Further Information About the Author]
Max Imboden, born 19 June 1915 in St. Gallen, died 7 April 1969 in Basel, studied jurisprudence at the Universities of Geneva, Berne and Zurich, and he obtained a doctorate with his dissertation "Bundesrecht bricht kantonales Recht" (1939) with *Zaccaria Giacometti*. In 1944, he published his habilitation thesis about "Der nichtige Staatsakt". After having been extraordinary professor in Zurich, he was called to the ordinary chair for public law, i.e. constitutional and administrative law at the University of Basel. Together with *René Rhinow*, he published the standard reference "Schweizerischer Verwaltungsrechtsprechung". In 1964, he promoted the reform of the Swiss federal constitution by publishing his invocation "Helvetisches Malaise".
His thoughts were subtle, refined and distinguished due to his inclination to psychological ideas, which he applied to the forms of government.
For further information, please consult:
Peter Saladin/ Luzius Wildhaber (Ed.): Der Staat als Aufgabe, Basel: Helbing & Lichtenhahn, 1972, Vorwort;
Georg Kreis: Das "Helvetische Malaise" – Max Imbodens historischer Zuruf und seine überzeitliche Bedeutung, 2011;
Andreas Kley: Max Imboden – Aufbruch in die Zukunft, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 877 ss.;
Dietrich Schindler (junior): Max Imboden, in: Staat und Recht - Ausgewählte Schriften und Vorträge, Basel/ Stuttgart: Helbing & Lichtenhahn, 1971, pp. 1-5.

[Selected Works of the Same Author]
Max Imboden: Das Gesetz als Garantie rechtsstaatlicher Verwaltung (Basler Studien zur Rechtswissenschaft, vol. 38), Basel: Helbing & Lichtenhahn, 1962 (1. ed. 1954); *Idem*: Die Staatsformen – Versuch einer psychologischen Deutung staatsrechtlicher Dogmen, Basel/ Stuttgart: Helbing & Lichtenhahn, 1959 (extract); *Idem*: Helvetisches Malaise, in: Staat und Recht, Ausgewählte Schriften und Vorträge, Basel/ Stuttgart: Helbing & Lichtenhahn, 1971, S. 279ff.; erstmals 1964; *Idem*: Politische Systeme, Basel/Stuttgart: Helbing & Lichtenhahn, 1964.

29 October 2017 *Michael Walter Hebeisen*

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Cluster "Philosophy of Law and General Jurisprudence"
4th Section "Legal History and the Historicity of Law Within the Swiss Legal Context"
Entry 4.7 "Alfred Dufour, Histoire naturelle ou nature historique"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Alfred Dufour
Title: Histoire naturelle ou nature historique du droit dans l'École du Droit historique,
Edition(s): in: Recht zwischen Natur und Geschichte, Deutsch-französisches Symposium vom 24. bis 26. November 1994 an der Universität Cergy-Pontoise (Ius Commune, supplementary vol. 100), ed. Jean-François Kervégan and Heinz Mohnhaupt, Frankfurt am Main: Vittorio Klostermann, 1997, pp. 125-168

[Introduction/Historical Situation and Systematical Context]
It is common-place to juxtapose natural law theory to the so-called Historical School of law, represented by *Friedrich Carl von Savigny*, and to suppose the first to have neglected the historical dimension of law, and to the latter to have installed legal history at the proper place for jurisprudence. However, both positions cannot be held in this diametral opposition, as the legal historian and philosopher *Alfred Dufour* has demonstrated in an essay. Rather, the true question is, whether one has to adopt a natural history or a specific nature of history as the proper foundation of jurisprudence. Or in short, the question is, which kind of history be adequate for legal history?
Eduard Gans, in the foreword to his monumental "Erbrecht in weltgeschichtlicher Entwicklung" (1824), addressed the critique of "un-historical" and at the same time "un-philosophical" to the current of the Historical School of law. This critique leads us to the very core of the historicity of law itself and answers the question of the historical development and dynamic change of legal order in a truly Hegelian sense. In fact, after the dialectical system of philosophy was established by *Georg Wilhelm Friedrich Hegel*, it is difficult to imagine, how one could go back to a static consideration of the law itself.

[Content, Abstracts/Conclusions, Insights, Evidence]
Alfred Dufour, after having exposed the problem, reconstructs the terminology used by *Friedrich Carl von Savigny*, extensively, passing by the accuses to the declared "a-historical" School that has to promoted positivise the law by means of codification (for instance *Anton Friedrich Justus Thibaut*, see the well-known pamphlets by the two exponents, collected by the editor Jacques Stern: Thibaut und Savigny – Zum 100jährigen Gedächtnis des Kampfes um ein einheitliches bürgerliches Recht für Deutschland 1814-1914, Die Originalschriften in ursprünglicher Fassung mit Nachträgen, Urteilen der Zeitgenossen und einer Einleitung, Berlin: Franz Vahlen, 1914). The argumentation provided by the legal historian Dufour is rich and comprehensive, and the original texts carefully interpreted.
As highly significant occurs the reference of legal historicism to the organic or organologic conception of the social and legal community. This refers to the romantic idea of natural

law, properly speaking of human law, as elaborated by *Johann Gottfried Herder*. The conclusion is that "la conception savignienne de l'histoire, partant velle de la nature historique du Droit, procède d'une philosophie de la nature plus que d'une philosophie de l'esprit, et ceci quelque soit l'influence romantique et de l'idéalisme allemand sur Savigny". The qualification of history as natural history by the Historical School of law misleads the true problem, as the proper character of history should rather be spiritual, i.e. based on human mind. Consequently, the legal order does not follow the model of natural laws governed by God, but rather a specific human law made by human beings, human civilisation and human culture. The deeper reasons, why *Friedrich Carl von Savigny* did not adhere to the truly modern understanding of history, is threefold, according to *Alfred Dufour*: based on the fact that he is not a philosopher, and that his battle is taking place on a political field, and founded on his rejection of universal history as a scientific thinker, diffident to the very systematics and methodology of legal order itself.

[Further Information About the Author]
Alfred Dufour, born on 3 December 1938 in Zurich, accomplished his studies at the Universities of Geneva, Heidelberg and Freiburg im Breisgau and received a master's degree in jurisprudence and in philosophy from the University of Geneva in 1961 and 1962, respectively. In 1971 he received his doctorate from the very same University. After having been an assistant lecturer, research professor, and extraordinary professor at the University of Geneva, he signed as an ordinary professor for legal history, for canonical law, and for the introduction to jurisprudence at the University of Freiburg im Üechtland, (Switzerland) from 1977 to 1982. Between 1980 and 2003 he was a professor for legal history and the history of the political institutions, as well as later of political ideas at the University of Geneva.

[Selected Works of the Same Author]
Alfred Dufour: Droit, individu et pouvoir – De l'École du droit naturel à l'École du droit historique (Collection Léviathan), Paris 1991; *Idem*: Vocabulaire fondamental du droit: Droit naturel, droit positif, in: Archives de philosophie du droit, Jg. 1990, pp. 59 ss.; *Idem*: La problématique du fondement des droits de l'homme dans une perspective historique, in: Archiv für Rechts- und Sozialphilosophie, Beiheft N. S. 26, Stuttgart: Franz Steiner, 1986, pp. 9 ss.; *Idem*: Histoire et Constitution – Pellegrino Rossi et Alexis de Tocqueville face aux institutions politiques de la Suisse, in: Présence et actualité de la Constitution dans l'ordre juridique, Mélanges offerts à la Société suisse des juristes pour son Congrès 1991 à Genève, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1991, pp. 431 ss.; *Idem*: Le paradigme scientifique dans la pensée juridique moderne, in: Théorie du droit et science, ed. Paul Amselek, Paris: Presses Universitaires de France, 1994, pp. 147 ss.; *Idem*: Rousseau revisité – Jean-Jacques Rousseau et la démocratie genevoise, in: Die Ursprünge der schweizerischen direkten Demokratie, ed. Andreas Auer, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1996, pp. 65 ss.; *Idem*: Genève et la science juridique européenne du début du XIXème siècle – La fonction médiatrice des Annales de Législation (1820-

1823), in: Wechselseitige Beeinflussungen und Rezeptionen von Recht und Philosophie in Deutschland und Frankreich, 3. deutsch-französisches Kolloquium vom 16. bis 18. September 1999 in La Bussière/ Dijon, ed. Jean-François Kervégan and Heinz Mohnhaupt (Ius Commune, supplementary vol. 144), Frankfurt am Main: Vittorio Klostermann, 2001, pp. 287 ss.

[For Further Reading]
Alfred Dufour: Droit, individu et pouvoir – De l'École du droit naturel à l'École du droit historique (Collection Léviathan), Paris 1991.

12 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
4th Section "Legal History and the Historicity of Law Within the Swiss Legal Context"
Entry 4.9 "Pio Caroni: Il codice disincantato"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Pio Caroni
Title: Il codice disincantato
Edition(s): in: Saggi sulla storia della codificazione (Facoltà di Giurisprudenza dell'Università di Firenze, vol. 51), Milano: A. Giuffrè, 1998, pp. 99-134 (Das entzauberte Gesetzbuch, in: Zeitschrift für Geschichte, vol. 41 (1991), pp. 249-273)

[Introduction]
The codification of Swiss Civil Law, as elaborated by *Eugen Huber*, and as leading to the adoption of the "Schweizerisches Zivilgesetzbuch" in December 1907, was based on extended historical work, namely the collection of the private laws of the Swiss Cantons, as documented by the "Sammlung schweizerischer Rechtsquellen" edited by *Andreas Heusler*, among others. After the unified and codified law was practised for a period of two generations, the question arises: which history is adequate to tell the stories of ongoing alterations within this codification? What have been the effects on social community? How can the relation between the codified law and changing legal experience be understood? One of *Pio Caroni*'s claims is the following: "Das Gesetzbuch hat seine eigene, eigenständige Vergangenheit und ist als 'einheitsstiftender Wurf' zu historisieren, nicht aber durch neo-humanistische oder neo-pandektistische Bemühungen. [...] Nur eine Kontinuität durchzieht das Geschehen, dass nämlich der Kontext des Rechts stets antagonistisch und Recht Ergebnis einer gesellschaftlichen Dialektik ist". The question "*Quale storia per il diritto ingabbiato dal codice*", which expresses the problem clearly, the author has treated in a comprehensive essay that is recommended for further reading (in: Norm und Tradition – Welche Geschichtlichkeit für die Rechtsgeschichte? Ed. Pio Caroni and Gerhard Dilcher, Köln/ Weimar/ Wien: Böhlau, 1998, pp. 77-108).

[Historical Situation and Systematic Context]
Pio Caroni appears as the very prototype of an Europolitan legal historian, multi-lingual and with wide-spread interests for legal culture in its historical dimension, having published numerous contributions and collections mainly on the history of the process of codification in European private law. And yet, towards the end of his life, dedicated to science, he expresses a certain solitude of the legal historian (as the title of a newer collection suggests), this is not only due to the recent decline in the importance of historical, social and philosophical foundations within legal education. "Und doch – oder gerade deshalb? – ist er einsam geblieben, ein Germanist italienischer Kultur im Grenzland zwischen Deutsch und Welsch, der sich der Vereinnahmung der Rechtsgeschichte durch die erdrückende Mehrheit ihrer Vertreter aus Deutschland und

Österreich sowie der Unterwerfung unter deren jeweilige Modethemen widersetzte, der die Besonderheit der Schweiz betonte und innerhalb der Schweiz den Blick auf das Kleinräumige und das Eigenständige, die Täler namentlich Graubündens und des Tessins richtete. Vor allem aber leistete er Widerstand gegen die, welche der Rechtsgeschichte ein bestimmtes Pflichtenheft vorschreiben und ihre Daseinsberechtigung in besonderer Weise begründen wollten. Was dazu führte, dass er zunehmend in grundlegenden Widerspruch auch mit den Romanisten geriet, nicht nur denen an seiner Universität. Er verteidigte seine Positionen stets leise, aber bestimmt, führteden Kampf ohne jedeAusfälligkeit und mit großer Beharrlichkeit. Für ihn ist das Forschungs- und Lehrfach Rechtsgeschichte unabhängig vom geltenden Recht und seiner Dogmatik. Konsequenterweise findet man in seinem Schriftenverzeichnis Beiträge zum geltenden Recht so gut wie keine" (*Matthias Schwaibold*: Caronisierung, in: Rechtsgeschichte, Zeitschrift des Max-Planck-Instituts für Rechtsgeschichte in Frankfurt am Main, vol. 8 (2006), p. 58). This characterisation is felicitous and describes the general attitudes of Caroni as a legal historian in its own right to the point. His contributions are not overall argumentations, do not treat with development in general, condensed in ponderous monographies, but rather chirurgical sections across specific microscopic phenomenon in a historian's laboratory. Whereas his later writing significantly all are collections of essays, his first significant writing, entitled "Einflüsse des deutschen Rechts Graubündens südlich der Alpen" (Forschungen zur Neueren Privatrechtsgeschichte, vol. 14, Köln-Wien 1970), remained the only monography. With his very sympathetic authority not only in academic education, but also as a natural person, the eminent figure of Caroni occurred eminently critical in an encyclopaedic sense and decidedly social in his attitude, socialistic, yet communist in his engagement. He is considered as the veritable founder of a modern tradition of social history in the domain of legal history in Switzerland.

[Content, Abstracts/Conclusions, Insights, Evidence]
Pio Caroni has published more than one contribution to the codification of Swiss Civil law, in 1971 and 1987, before he returned to this leading motive in 1991 with an article entitled "Das entzauberte Gesetzbuch", or "*Il codice disincantato*", reading somewhat like "The code, that has lost its magic". The author addresses the relationship between the lasting dispositions of the codified legal order in the domain of private law, and the autonomy of the private subjects that ordinate their legal relations based on their legal experience. The codification appears as an elaboration of scientific jurisprudence at one point within historical development, but in the following is exposed to various attempts of enhancement and complement by legal politics, that withdraw the original magical appeal of the code. In particular the socio-economic context has to be taken seriously. Consequently, the material and the form of the original code erode, and eventually become merely extrinsic and abstract. In legal reality, the codification appears as something all too different from the intentions of the historical author, may he be considered as a single person, for instance *Eugen Huber*, or the political community as a whole.

According to *Pio Caroni*, the reverse process of de-codification signifies an ultimate transformation process from an authentic to an autonomous interpretation, following an explicit historical logic. Thereby, the relative abstraction and timeless character of the original codification is reduced and replaced by the specific needs of a particular time, exposed to change in function to social progress. "Anche il concetto di codificazione al quale abbiamo implicitamente aderito, e che orienta la ricerca in direzioni determinate, non è già per questo fatto quello giusto, ma piuttosto solo il nostro concetto, che le generazioni future relativizzeranno o persino abbandoneranno, con le stesso diritto con il quale noi abbiamo criticato antiche scelte". This relativity of his own standpoint guides the author to two main conclusions: "In primo luogo, la convizione che una descrizione credibile del ruolo rivendicato dal diritto codificato in una determinata società storica non è concepibile senzy considerare il retroterra politico e sociale di un condice, o senza risalire al modello sociale ad esso sotteso. [...] / Secondariamente, la convizione che nuessuna codificazione potè limitarsi a postulare o confermare la realtà, anche perché nessuna riuscì ad esser esclusivamente il riflesso fedele dell'ordinamento giuridico vigente".

[Further Information About the Author]
Pio Caroni, born in 1938 in Ticino (Switzerland), concluded his studies in jurisprudence at the University of Berne, after having been abroad in Germany and Italy. In 1971, he was called on the chair for legal history at the same University, where he remained for more than thirty years, and where he signed as a rector later in his academical career. After having published a monography on Swiss constitutionalism ("*Il dualismo costituzionale svizzero*", Milano 1964), he remained faithful to his Italian-speaking origin and frequented the institutes of the Universities of Milano and Firenze, and he also participated in the well-known "*Centro di studi per la storia del pensiero giuridico moderno*".
For further information about the author and his writings, please consult:
Matthias Schwaibold: Caronisierung, in: Rechtsgeschichte, Zeitschrift des Max-Planck-Instituts für Rechtsgeschichte in Frankfurt am Main, vol. 8 (2006), pp. 58–162.

[Selected Works of the Same Author]
Pio Caroni: Saggi sulla storia della codificazione (Facoltà di Giurisprudenza dell'Università di Firenze, vol. 51), Milano: A. Giuffrè, 1998; *Idem*: "Privatrecht" – Eine sozialhistorische Einführung, Basel: Helbing & Lichtenhahn, 1988; *Idem*: Quale storia per il diritto ingabbiato dal codice, in: Norm und Tradition – Welche Geschichtlichkeit für die Rechtsgeschichte? Ed. Pio Caroni and Gerhard Dilcher, Köln/ Weimar/ Wien: Böhlau, 1998, pp. 77-108; *Idem*: Rechtseinheit – Drei historische Studien zu Art. 64 BV, Basel: Helbing & Lichtenhahn, 1986; *Idem*: Ungleiches Recht für alle – Vom Werden des ungleichen und nicht systemwidrigen Privatrechts, in: Zentrum und Peripherie – Zusammenhänge, Fragmentierungen, Neuansätze, Festschrift für Richard Bäumlin zum 65. Geburtstag, ed. Roland Herzog, Chur/ Zürich: Rüegger, 1992.

[For Further Reading]

Pio Caroni: "Privatrecht" – Eine sozialhistorische Einführung, Basel: Helbing & Lichtenhahn, 1988; *Idem*: Gesetz und Gesetzbuch – Beiträge zu einer Kodifikationsgeschichte, Basel/ Genf/ München: Helbing & Lichtenhahn, 2003.

12 December 2017 *Michael Walter Hebeisen*

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Cluster "Philosophy of Law and General Jurisprudence"
4th Section "Legal History and the Historicity of Law Within the Swiss Legal Context"
Entry 4.14 "Michael Walter Hebeisen, Geschichten für die Zukunft"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Michael Walter Hebeisen
Title: Geschichte der Vergangenheit, Geschichten für die Zukunft
Edition(s): in: Erzählungen des Staates, ed. Otto Depenheuer, Wiesbaden: VS Verlag für Sozialwissenschaften, 2010, pp. 35-60

[Further Information About the Author]
Michael Walter Hebeisen, born on 9 January 1965, after having studied violoncello and musicology at the Conservatory of Berne, followed his studies in jurisprudence at the University of Berne, with semesters abroad at the University of Cambridge. He graduated in 1992 and received his doctorate in 1994, after having collaborated with doctor father *Peter Saladin*.
He then changed for a period of seven years to the Federal Office of Justice, in an entity that was occupied with the preparation of the reform, i.e. the total revision of the Swiss Federal Constitution. In addition, he obtained a habilitation scholarship from the Swiss National Foundation for Scientific Research, under the survey of *Peter Häberle*, which enabled him to pursue an old-fashioned post-doc journey across Europe. He travelled to Oxford University (University College), where he assisted and contributed to the ongoing reform of British Constitution by the shadow Cabinet of the Labour Party. Back on the Continent, he directed the "*Dilthey Forschungtsstelle*" and "*Hegel-Archiv*" at Ruhr University of Bochum and to the Humboldt University in Berlin. After a short residence at the "*Faculté de droit de l'Université de Toulouse*" where he studied the theory of *Jean-Claude-Eugène-Maurice Hauriou*, he settled for a long time in Naples where he established contacts with the philosophers of the School of Neo-Historicism, i.e. with *Fulvio Tessitore*, *Giuseppe Cacciatore*, *Giuseppe Cantillo* among others. In consequence of his fascination for the tradition of these thinkers, he undertook to translate selected works by Pietro Piovani (9 volumes), Giuseppe Capograssi (6 volumes), Giovanni Gentile (11 volumes) and eventually plans an Edition of the works of Bertrando Spaventa (6 volumes).
Back in his home country, he is established as an eminent thinker in the domain of legal philosophy as well as in the theory of the human sciences.

[Selected Works of the Same Author]
Michael Walter Hebeisen: Souveränität in Frage gestellt – Die Souveränitätslehren von Hans Kelsen, Carl Schmitt und Hermann Heller im Vergleich (Dissertation Universität Bern 1994), Baden-Baden: Nomos 1995 (extract); *Idem*: Staat und Recht als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als

Geisteswissenschaften, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2004, pp. 395-456; *Idem*: Krise der universellen Rechtsidee angesichts des Pluralismus der positiven Rechtsordnungen – Pragmatische Nachforschungen aufgrund der Institutionenlehren von Jean-Eugène-Claude Hauriou und Santi Romano, in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 1-65; *Idem*: Die Verfassung als Vermittlerin von Wert- und Gerechtigkeitsvorstellungen? – Geisteswissenschaftliche Überlegungen zum Wert der Verfassung als Hilfe auf dem Weg zum gerechten Zusammenleben von Menschen und Völkern, in: Herausgeforderte Verfassung – Die Schweiz im globalen Kontext (16. Kolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften), ed. Beat Sitter-Liver, Freiburg: Universitätsverlag, 1999, pp. 133 ss.; *Idem*: Schweizer Juristen-Philosophen – Eine eigenständige schweizerische Tradition der Wissenschaftsphilosophie der Jurisprudenz und der Staatslehre in Auseinandersetzungen mit ausgewählten Strömungen der Rechts- und der Staatsphilosophie sowie der Wissenschaftstheorie in der ersten Hälfte des Zwanzigsten Jahrhunderts (Eine programmatische Skizze für ein interdisziplinäres Forschungsvorhaben), in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 50, ed. Peter Häberle, Tübingen: J. C. B. Mohr/ Siebeck, pp. 69-100 (extended version in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 651-711); *Idem*: Liberalismus und Kommunitarismus betreffend das Verhältnis des Rechten zum Guten – Prinzipielle Opposition oder pragmatische Annäherung, Vorrang oder Unabhängigkeit? In: Archiv für Rechts- und Sozialphilosophie (ARSP), supplementary vol. 76, ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2000, pp. 119 ss.; *Idem*: Note sulla filosofia del diritto di Pietro Piovani – Appunti di un giurista ultramontano, Referat gehalten am Studienseminar aus Anlass des 20. Todestages von Pietro Piovani in Neapel vom 29. Juni bis 1. Juli 2000, in: Archivio di storia della cultura (Firenze: Liguori), vol. 14 (2001), ed. Fulvio Tessitore, pp. 289-305; *Idem*: „An sich redet Alles, was ist, das Ja" – Zur Verwendung Friedrich Nietzsches durch den Rechtsphilosophen Carl August Emge, Referat, gehalten auf dem internationalen Kongress der Stiftung Weimarer Klassik „Missbrauch, Ereignis und Kritik – Zur deutschen Nietzsche-Rezeption zwischen 1933 und 1945", in: Widersprüche – Zur frühen Nietzsche-Rezeption, ed. Andreas Schirmer and Rüdiger Schmidt, Weimar: Hermann Böhlaus Nachfolger, 2001, pp. 291 ss., also published in: Nietzsche und das Recht (Archiv für Rechts- und Sozialphilosophie, supplementary volume 77), ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2001, pp. 219 ss.; *Idem*: Geschichte der Vergangenheit, Geschichten für die Zukunft in: Erzählungen des Staates, ed. Otto Depenheuer, Wiesbaden: VS Verlag für Sozialwissenschaften, 2010, pp. 35 ss.; *Idem*: Souveränität bei Otto Kirchheimer – Das Dogma der Souveränität zwischen Staatslehre und Politikwissenschaften, in: Otto Kirchheimers Staatsverständnis, ed. Robert Christian van Ooyen and Frank Schale (Reihe

„Staatsverständnisse“, ed. Rüdiger Voigt), Baden-Baden: Nomos Verlagsgesellschaft 2010, pp. 87-117; *Idem*: Vom ästhetisch-poëtischen Grundzug des modernen Verständnisses von Geschichte – Im Besonderen von der Urteilskraft in Iurisprudenz und Staatslehre als Geisteswissenschaften, in: Moderne und Historizität, ed. for the „Klassik Stiftung Weimar“ by Stefan Wilke, Weimar: Verlag der Bauhaus-Universität Weimar, 2011, pp. 134-164.

28 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Fifth Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Introduction
by Michael Walter Hebeisen

> "Nicht in einer äusseren Gewaltenmechanik, sondern in dem durch den kontrastschaffenden Gewaltenpluralismus vermehrten bürgerlichen Bewusstsein liegt der eigentliche Damm gegen die ungeformte und verschlingende Gewalt." (*Max Imboden*: Die Staatsformen – Versuch einer psychologischen Deutung staatsrechtlicher Dogmen, Basel/ Stuttgart: Helbing & Lichtenhahn, 1959)

[Fifth Section: "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"]

[Introduction: Public Law, Historical, Political and Philosophical Dimensions]
Based on the reforms in the era of so-called Regeneration that have primarily materialised in the public law of the Swiss Cantons, the foundation of the Swiss Federal State in 1848 has been the work of politically inspired liberals. Due to a curious artfulness of history, it has not been a common market with its liberality of persons and goods, and not an agency in order to plan and finance infrastructure projects, that have been created by the foundation of the Swiss Federal State, but rather a Federal State Organisation in its own right. Only the total revision of the Swiss Federal Constitution in 1874 has in fact accomplished this shift in quality.
According to the nature of the public law during the nineteenth century, the scientific treatment of public law has shown a mainly historical and political character, for half a century. In the context of the history of political ideas, the constitutional order has been elaborated in terms of traditional history for example by *Eduard His* (Geschichte des neuern Schweizerischen Staatsrechts, 3 vols., Basel: Helbing & Lichtenhahn, 1920-1938), and in terms of political history prominently by *William E. Rappard* (see entries 5.3 and 5.5 of this Legal Anthology), and treated in terms of the history of ideas for instance by *Carl Hilty* (see entries 0.15 and 0.16 of this Legal Anthology) and even *Jakob Schollenberger*, professor at the University of Zurich (Das Bundesstaatsrecht der Schweiz – Geschichte und System, Berlin: O. Häring, 1902; *idem*: Bundesverfassung der Schweizerischen Eidgenossenschaft – Kommentar mit Einleitung, Berlin: O. Häring, 1905; *idem*: Geschichte der schweizerischen Politik, 2 vols., Frauenfeld: Huber & Co., 1906/1908; *idem*: Politik in systematischer Darstellung. Berlin: O. Häring, 1903). With *Walther Burckhardt*, teaching at

the University of Berne, and with *Fritz Fleiner*, teaching at the University of Zurich, public law has eventually been conducted to positivism in the sense of an increasing scientific and conceptual focus. It is interesting to review this development the light of contributions to the various celebrations on multiple occasions, i.e. the celebration of 600 years of *Confoederatio Helvetica* in 1891, the celebration of 50 years since the total revision from 1874 in 1924, the Centenary of the Swiss Federal Constitution in 1948, the celebration of the first total revision of the Swiss Federal Constitution in 1974, and the seven hundred years of the *Confoederatio Helvetica* in 1991.
A turn to a more sophisticated and philosophically founded treatment of public law only occurs together with the further expansion of the fundamental rights and individual freedoms by the Federal Court, and in controversy with the decline of the rule of law in National Socialist Germany, as well as in the course of the exercise of plain and urgent powers by the Swiss Federal Authority, circumventing parliament and without any constitutional foundation in defining the relationship between the Cantons as Member States and the Federal State. *Dietrich Schindler* (senior) and *Zaccaria Giacometti* have played a key role in this dispute by elaborating a broader view on public law and by criticising public law practice in the perspective of democratic principles.

In order to follow this change of perspective, we have selected three plans, where the significant development has been expressed paradigmatically:

(1) the impression of several crisis in the course of attempts to renew the Swiss Federal Constitution, originating in the abovementioned deviation of the formal division of competences, leading to the diagnosis of a malaise in the core of the political system (*Walther Burckhardt, Zaccaria Giacometti, Max Imboden*);
(2) the elaboration and development of a material conception of the constitution in the sense of qualified rule of law (*Werner Kägi, Richard Bäumlin, Peter Saladin, Jörg Paul Müller*); and
(3) some original additions to complete the overall perspective on public law by the aspect of matriarchy, by a psychological explanation of the different forms of government, by the question of the juridical personality of the State and by the dimension of responsibility (*Hans Marti, Max Imboden, Ulrich Häfelin, Peter Saladin*).

[The Art of Constitution-Making: 1831-1833, 1848, 1866, 1872, 1874, 1948, 1970s, 1987, 1999]
Each time public law goes to practice, or assists in constitution-making, an occasion to prove its strength and to reflect the constitutional legal order philosophically comes to life. The foundation of the Swiss Federal State is mainly based on the preparation by the public law of the Cantons, that have undergone profound political reforms in the period of Regeneration (1831-1833), leading to the project *Pellegrino Rossi* for the renewal of the Confederation (based on the so-called "Bundesakte"). In the very same way, the reform of the Bernese Constitution in 1993 has had an impact on the ongoing reform of the Swiss Federal Constitution in the 1990s. There were also fruitless attempts to reform the Federal Constitution, in 1866, 1872 and in the 1970s. In the long run, however, these approaches of

legal thought in the domain of public law to assist in practical constitution-making have been fruitful. The successful reform in 1874 and the reform of the economic constitution in 1948 for instance cannot be understood without the failures that have preceded them. Moreover, there is a constant process of partial revision of the Swiss Federal Constitution that makes the sense of the art of constitution-making vivid and alert.
Similarly, the process eventually leading to the renewed Swiss Federal Constitution of 1999 has had a long pre-history, going back to the diagnosis of a malaise by *Max Imboden* and the finding of an unfulfilled constitution by *Peter Saladin*. Even without a significant political will to renew the Constitution, such a reform process evolved during the 1970s under the auspices of *Kurt Furgler*, leading to extensive preparatory work for further total revision of the Swiss Federal Constitution (compare: Schlussbericht der Arbeitsgruppe Wahlen, Bern 1973). The value of such attempts cannot be neglected, despite of well-founded criticism for example by the writer *Adolf Muschg*: "Es war nichts als der Versuch, auf der Höhe einer gesellschaftlichen Revolution zu bleiben, die in der Sache längst eingetreten war. Der Staat − vielmehr: ein vorgeschicktes Expertengrüppchen − bot eine nationale Debatte darüber an, wie unser Gemeinwesen die neuen Herausforderungen bestehen könne, statt sie bloss zu erleiden" (Die Schweiz am Ende / Am Ende die Schweiz − Erinnerungen an mein Land vor 1991, Frankfurt am Main: Suhrkamp, 1990, S. 121). At the same time, philosophers have also participated in this process, for instance by discussing the adequate legal order of property to be adopted by the constitution, or by elaborating the alternative between a minimal state and the social state (compare Ofried Höffe: Minimalstaat oder Sozialrechte – Eine philosophische Problemskizze, in: Verfassungsreform und Philosophie, ed. *Helmut Holzhey* and *Jean-Pierre Leyvraz*, in: Studia Philosophica, vol. 41, Bern/ Stuttgart: Paul Haupt, 1982).
After the Swiss Federal Parliament adopted the task to at least update the existing constitution and to incorporate henceforth unwritten richts and rules (so-called “Nachführung”) in 1987, which was the merit of *Josephine Johanna (Josi) Meier*, a somewhat technocratic process has developed and an approach to constitution-making has been followed, where the science of public law has been in charge, and has taken up its advisory and conceptual responsibilities. This kind of maieutic assistance to constitutional politics probably remains an eternal task and demand for a philosophically and historically enlightened scientific treatment of public law by any true *juris prudentia* (see *Peter Saladin*: Die Kunst der Verfassungserneuerung, in: Der Staat als Aufgabe, Gedenkschrift für Max Imboden, ed. Peter Saladin and Luzius Wildhaber, Basel/ Stuttgart: Helbing & Lichtenhahn, 1972, pp. 269-292; compare entry 5.15 of this Legal Anthology).
The art of constitution-making has been poetically described by *Gottfried Keller*: "Eine Verfassung ist keine stilistische Examensarbeit. Die sogenannten schönen, philosophischen Verfassungen haben sich nie eines langen Lebens erfreut. Wäre mit solchen geholfen, so würden die überlebten Republiken noch da sein, die sich einst bei Rousseau eine Verfassung bestellten, weil sie kein Volk hatten, in welchem die Verfassungen latent sind bis zum letzten Augenblick. Uns scheinen jene Verfassungen die schönsten zu sein, in welchen ohne Rücksicht auf Stil und Symmetrie ein Concretum, ein errungenes Recht neben dem

andern liegt, wie die hartglänzenden Körner im Granit, und welche die klarste Geschichte ihrer selbst sind".

[For Further Reading]
Walter Oechsli: Die Anfänge der Schweizerischen Eidgenossenschaft, zur sechsten Säkularfeier des ersten ewigen Bundes vom 1. August 1291 verfasst im Auftrag des schweizerischen Bundesrates, Zürich: Ulrich & Co., 1891;
Carl Hilty: Die Bundesverfassungen der Schweizerischen Eidgenossenschaft − Zur sechsten Säcularfeier des ersten ewigen Bundes vom 1. August 1291 geschichtlich dargestellt im Auftrag des Schweizerischen Bundesrathes, Bern: K. J. Wyss, 1891 (Les Constitution fédérales de la Confédération suisse − Exposé écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger Frères, 1981, Réédition chez Les Éditions de l'Aire, 1991);
Zaccaria Giacometti: Rundfrage über die Totalrevision der Bundesverfassung − Die Antwort von Zaccaria Giacometti, in: Ausgewählte Schriften, ed. Alfred Kölz, Zürich: Schulthess Polygraphischer Verlag, 1994, pp. 159 ss. (first printing in: Neue Schweizerische Rundschau, vol. 1934, pp. 129 ss.);
Fritz Fleiner: Zum Jubiläum der Bundesverfassung von 1874, Gedenkrede, gehalten an der ordentlichen Delegiertentagung der freisinnig-demokratischen Partei der Schweiz vom 17./ 18. Mai 1924, in: Ausgewählte Schriften und Reden, Zürich: Polygraphischer Verlag, 1941, pp. 219 ss.;
William E. Rappard: Die Bundesverfassung der Schweizerischen Eidgenossenschaft 1848-1948 − Vorgeschichte, Ausarbeitung, Weiterentwicklung (La Constitution fédérale de la Suisse), Zürich: Polygraphischer Verlag, 1948 (Boudry 1948);
Die Freiheit des Bürgers im schweizerischen Recht, Festgabe zur Hundertjahrfeier der Bundesverfassung, hrsg. von den Juristischen Fakultäten der schweizerischen Universitäten, Zürich: Polygraphischer Verlag, 1948;
Richard Bäumlin: Was lässt sich von einer Totalrevision erwarten? In: Totalrevision der Bundesverfassung − Ja oder Nein (Zeitschrift für Schweizerisches Recht, N. S. vol. 87/I, supplementary vol. 4, Basel: Helbing & Lichtenhahn, 1868, pp. 7 ss.;
Fritz Gygi: Die schweizerische Wirtschaftsverfassung, in: Referate und Mitteilungen des Schweizerischen Juristenvereins (Basel: Helbing & Lichtenhahn), vol. 104 (1970), Nr. 3, pp. 268 ss.;
Max Imboden: Verfassungsrevision als Weg in die Zukunft (1966), in: Staat und Recht − Ausgewählte Schriften und Vorträge, Basel: Helbing & Lichtenhahn, 1971;
Peter Saladin: Die Kunst der Verfassungserneuerung, in: Der Staat als Aufgabe, Gedenkschrift für Max Imboden, ed. Peter Saladin and Luzius Wildhaber, Basel/ Stuttgart: Helbing & Lichtenhahn, 1972, pp. 269-292 (also in: Die Kunst der Verfassungserneuerung, Schriften zur Verfassungsreform 1968-1996, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1998, pp. 15-36);
Ernst-Wolfgang Böckenförde: Zur Diskussion um die Totalrevision der Schweizerischen Bundesverfassung, in: Archiv des öffentlichen Rechts (Tübingen), vol. 106 (1981), Nr. 4,

pp. 580 ss.;
Adolf Muschg: Die Schweiz am Ende / Am Ende die Schweiz − Erinnerungen an mein Land vor 1991, Frankfurt am Main: Suhrkamp, 1990;
Jean-François Aubert: La Constitution, son contenu, son usage, Referat zum 125. Schweizerischen Juristentag 1991, Basel: Helbing & Lichtenhahn, 1991;
Kurt Eichenberger: Sinn und Bedeutung einer Verfassung, Referat zum 125. Schweizerischen Juristentag 1991, Basel: Helbing & Lichtenhahn, 1991;
Das Parlament – "Oberste Gewalt des Bundes"? Im Auftrag der Präsidenten des Nationalrates und des Ständerates hrsg. von den Parlamentsdiensten, Festschrift der Bundesversammlung zur 700-Jahr-Feier der Eidgenossenschaft, Redaktion: Madeleine Bovey Lechner, Martin Graf, Annemarie Huber-Hotz, Verlag Paul Haupt, Bern und Stuttgart 1991;
Rainer J. Schweizer: Die Totalrevisionen der Bundesverfassung von 1872 und 1874 – Erfahrungen im Blick auf die laufende Verfassungsrevision, in: De la constitution − Études en l'honneur de Jean-François Aubert, ed. Piermarco Zen-Ruffinen and Andreas Auer, Basel/Frankfurt am Main: Helbing & Lichtenhahn, 1996, pp. 101 ss.;
Claude Klein: Pourquoi écrit-on une Constitution? In: 1789 et l'invention de la Constitution, ed. von Michel Troper and Lucien Jaume, Paris: Librairie Générale de Droit et de Jurisprudence, 1994, pp. 89 ss.

27 January 2018 (revised on 19 July) *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.1 "Dietrich Schindler, Kampf ums Recht"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Dietrich Schindler (senior)
Title: Der Kampf ums Recht in der neueren Staatsrechtslehre (akademische Antrittsvorlesung, gehalten am 12. November 1927 an der Universität Zürich)
Edition(s): in: Festgabe der rechts- und staatswissenschaftlichen Fakultät der Universität Zürich zum Schweizerischen Juristentag 1928, Zürich: Schulthess & Co., 1928

[Introduction/Historical Situation and Systematic Context]
In his inaugural lecture from 1927 at the University of Zurich, under the impression of the First World War, *Dietrich Schindler* proved his intention to overcome legal positivism in the domain of public law for the first time. The predominant positivistic tendency addressed by him is to be identified as the kind of positivism held by *Friedrich Gerber* and *Paul Laband* in Germany. Schindler finds himself in good community with *Otto von Gierke* and *Roscoe Pound* and does not want to make allusion to the Darwinist theory of *Rudolf von Ihering*, as the title of this essay could suppose.
The characteristics of positivism are not to ask about the source of validity of the legal order, and to exclude in consequence all questions of a properly juridical treatment that could transcend the discourse of the application of positive law. This turn has gained influence due to the progresses of natural sciences and the claim to scientific thought in the domain of jurisprudence. The tendency to positivism in the figure of formalistic systematisation has found its culmination point in *Rudolf Jellinek*, in his well-known "Allgemeine Staatslehre" (Berlin: O. Häring, 3. Auflage 1914; reprint Darmstadt: Wissenschaftliche Buchgesellschaft, 1959). The leading concept of public law is no more the law itself, but rather the state, i.e. the nation state with its unlimited power to positivise the legal order. Consequently, jurisprudence remains without its proper subject, the law, as indicated by *Leonhard Nelson* ("Die Rechtswissenschaft ohne Recht - Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts insbesondere über die Lehre von der Souveränität", Veit & Comp., Leipzig 1917).
Neo-Positivism is also addressed by Dietrich Schindler, especially the positivistic system of the so-called "*Reine Rechtslehre*", as established by *Hans Kelsen*. The main criticism is argued in the following way: "Die methodenreine Rechtslehre macht den Eindruck einer Mühle, die leer läuft. Sie ist nicht mehr das Wissen von etwas, sondern sie ist eine Denktechnik. Sie entwickelt die Fähigkeit, den Stoff – und zwar sehr spärlichen Stoff – nach bestimmten rein formalin Gesichtspunkten zu zergliedern und damit in ein bereitgestelltes Schema hineinzupressen. Eine Begrünfund des Rechts liefert sie – mit Wissen und Willen - nicht".

[Content, Abstracts/Conclusions, Insights, Evidence]
As a turning point within the overall inclination to overcome positivism, *Dietrich Schindler* identifies sociology in general, as well as the claim to consider the legal order itself as subject of sovereignty (see *Heinrich Krabbe*: Die Lehre der Rechtssouveränität – Beitrag zur Staatslehre, Groningen: J. B. Wolters, 1906), and a reference to justice made by French public law (by *Léon Duguit*: Souveraineté et liberté, Leçons faites à l'Université de Colombia "New York", Paris: Alcan, 1895; and *Idem*: Le droit social, le droit individuel et la transformation de l'état – Conférences faites à l'école des hautes études sociales. 3ème édition revue augmentée d'une préface nouvelle, Paris: Félix Alcan, 1922). Authors like Rudolf Stammler and Walther Burckhardt can only come to material conclusions about the law, because they follow a syncretistic method in jurisprudence. Contrarily, natural law has been discredited by its long and vicissitudinous tradition. The only way to conquer positivism is, according to Schindler, to admit the idea of law and at the same time to confer sovereignty to the state to positivise the legal order: "Eine Überwindung dieser Antinomie zwischen Rechtsidee und positive Recht gibt es nicht; abzulehnen ist die monistische Auffassung des Widerspruchs, sei es dadurch, dass die Rechtsidee dem positive Recht oder dass das positive Recht dem Naturrecht geopfert wird. Über den Widerspruch lässt sich nicht hinwegkommen. Wenn wir nun fragen, was nach dieser Auffassung letzte Instanz ist, so lautet die vielleicht etwas resignierte Antwort: theoretisch ist die Rechtsidee, praktisch der Staat die letzte Instanz".

[Philosophical Valuation and Jurisprudential Significance]
This intermediate point of reflection should be overcome in the later writings of Dietrich Schindler. The alternative of jurisprudence as an integrated part into the human sciences is rejected at this starting point of the career of the author, yet. There is no sharp distinction between recognising the law and shaping the legal order, in fact. This lack of the two functions shows as the phenomenon that juridical practice cannot interpret the law without actively continuate to educate the legal order. Later on, this will no longer be considered as a deficiency, but rather as an achievement and attainment of jurisprudence.

[Further Information About the Author]
Dietrich Schindler (senior), born 3 December 1890 in Zurich, died 10 January 1948 in the same town, did his legal studies at the Universities of Zurich, Leipzig and Berlin, before he presented his promotion thesis in 1916 and his habilitation thesis in Zurich. In 1936 he was nominated ordinary professor for public law (federal constitutional und administrative law) as well as for international law and legal philosophy. For a long period, he was the legal adviser of the Swiss government.
For more information, please see:
Daniel Thürer: Dietrich Schindler (sen.) (*3.12.1890-1948), in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 381 ss.

[Selected Works of the Same Author]
Dietrich Schindler: Verfassungsrecht und soziale Struktur, Zürich: Schulthess & Co., 1932; *Idem*: Recht und Staat, in: Zeitschrift für Schweizerisches Recht, ed. Eduard His, N. S. vol. 50, Basel: Helbing & Lichtenhahn, 1931; *Idem*: Zum Wiederaufbau der Rechtsordnung, posthum ed. by Hans Nef, in: Recht, Staat, Völkergemeinschaft – Ausgewählte Schriften und Fragmente aus dem Nachlass, Zürich: Schulthess & Co., 1948, pp. 73-143.

[For Further Reading]
Otto von Gierke: Gierke, Otto von: Die Grundbegriffe des Staatsrechts und die neuesten Staatsrechtstheorien, Tübingen: J. C. B. Mohr, 1915 (erstmals in: Zeitschrift für die gesamte Staatswissenschaft, vol. 1874, No. 1/ 2; reprint Aalen: Scientia, 1973);
Rudolf von Ihering: Der Kampf ums Recht (Haufe-Schriftenreihe zur rechtswissenschaftlichen Grundlagenforschung, Band 3), hrsg. von Hermann Klenner, Freiburg im Breisgau/ Berlin: Haufe, 1992;
Leonhard Nelson: Die Rechtswissenschaft ohne Recht - Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts insbesondere über die Lehre von der Souveränität, Veit & Comp., Leipzig 1917;
Roscoe Pound: An Introduction to the Philosophy of Law, New Haven: Yale University Press, 1922 (reprint Clark: The Lawbook Exchange, 2003); *Idem*: The Spirit of the Common Law & Other Writings, Boston: Marshall Jones, 1921 (Reprint Birmingham: Legal Classics Library, 1985).

1 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.2 "Walther Burckhardt, Einleitung zum Kommentar der Bundesverfassung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Walther Burckhardt
Title: Kommentar der Schweizerischen Bundesverfassung vom 29. Mai 1874
Edition(s): Bern: Stämpfli, 1905 (3rd ed. 1931), pp. 1-42 (Vorwort und Einleitung)

[Introduction/Historical Situation and Systematic Context]
After the first publications of *Jakob Schollenberger*, professor of public law at the University of Zurich, who held constitutional law as a merely political order (Das Bundesstaatsrecht der Schweiz – Geschichte und System, Berlin: O. Häring, 1902; and *Idem*: Bundesverfassung der Schweizerischen Eidgenossenschaft – Kommentar mit Einleitung, Berlin: O. Häring, 1905), *Walther Burckhardt* was among the first authors to present a comprehensive commentary on the Swiss Federal Constitution. Normally jurisprudents consult the 3rd edition from 1931, and they do forget that the previous editions contained an extensive, yet condensed introduction to the matter of about forty pages (in his foreword, the author indicates the reason for this omission, namely the inclusion of the arguments in his later writing "Die Organisation der Rechtsgemeinschaft"; see no. 1.6 of this Legal Anthology). This introductory essay gives a master example for comparative constitutional legal thought, provides a theory of the Swiss Federal State, with special respect to the questions of sovereignty and the partition of competences between the Federal State and the Cantons, and it even elaborates in prospect a theory of fundamental individual rights and freedoms, including a discussion of the concept of so-called subjective public rights ("subjekive öffentliche Rechts"), and a brief overview over the concept of administrative appeal in the course of the violation of these basic rights ("staatsrechtliche Beschwerde").

[Content, Abstracts/Conclusions, Insights, Evidence]
We will not discuss the arguments in detail; rather we want to present the document to the reader as an eminent example of rather historical positions in Swiss constitutional thought. *Walther Burckhardt* gives a perfect and representative impression of his far-seeing and lucid, yet formal, logical and intellectual coined legal positivism. For instance, we encounter as a perpetual reference the treatise by *Paul Laband*, entitled "Das Staatsrecht des Deutschen Reichs" (4th ed. 1901). The argumentation opens with a discussion of the binding force of the constitution: "Damit, dass die Verfassung höhere Autorität geniesst, soll nicht gesagt sein, dass Verfassungspflichten anderer Natur seien, heiliger seien als Gesetzspflichten und Verordnungspflichten; es sind Rechtspflichten wie alle anderen; es ist von ihnen nichts weiteres zu sagen, als dass sie Nachachtung heischen, dass, wer sie

befolgt, rechtmässig, wer sie nicht befolgt, rechtswidrig handelt. Ihr Anspruch auf Gehorsam ist daher nicht stärker, intensiver, als derjenige einer von kompetenter Verwaltungsbehörde erlassenen Vollziehungsverordnung. Die Verfassungsvorschriften geniessen aber in dem Sinne höhere Autorität, dass sie auch für den Gesetzgeber bindend sind, während das Gesetz den Gesetzgeber selbst, als solchen, nicht bindet, gleich wie das Gesetz, welches die verordnende Behörde bindet, höhere Autorität besitzt als die Verordnung". This position indicates the very status quo before the incline to a material concept of constitutional legal order. Further considerations with special respect to the revision of the formal constitution show the non-existence of any binding force of legal restrictions of the revision-process.
We would like to leave the arguments about the Swiss Federal system to the reader's appreciation. When we study the contribution to the theory of fundamental rights and freedoms, we can only be amazed by the contemporary touch and actual outreach of the claims held by *Walther Burckhardt*, in contrast to the postulates elaborated by the late *Georg Jellinek*. "Die 'Freiheitsrecht' sind ihrem Objekte nach wohl geeignet, subjektive Rechte zu sein. Durch was lassen sich aber die Freiheitsrechte und die subjektiven öffentlichen Rechte überhaupt positiv charakterisieren und unterscheiden von den blossen Reflexwirkungen objektiver Rechtsnormen? Beides findet sich in der Rechtsordnung nach Ansicht der Verteidiger des öffentlichen subjektiven Rechts; dann muss sich letzteres auch durch ein fassbares Merkmal von ersterem unterscheiden. Diese Unterscheidung scheint mir aber bisher nicht gelungen zu sein. [...] Es kann aber nach meiner Überzsugung überhaupt kein materiellrechtliches Kriterium des subjektiven öffentlichen Rechts im Gegensatz zur blossen Reflexwirkung gefunden werden. / Im Falle des bestkonstatierten subjektiven öffentlichen Rechts liegt in Wirklichkeit nichts anderes vor als eine durch objektiven Rechtssatz statuierte Pflicht staatlicher Organe, sich gegenüber Privatpersonen in bestimmter Weise zu verhalten". Of course, this position has been overhauled by the theory of so-called "Drittwirkung von Grundrechten", however, the doubts addressed by the author still remain intact, eventually.

[Further Information About the Author]
Walther Burckhardt, born 19 May 1871 in Riehen, died 1 October 1939 in Berne, pursued his legal studies at the Universities of Leipzig, Neuchâtel, Berlin and Berne, where he graduated with a doctorate with *Eugen Huber*. From 1896 onwards, he served the federal administration, in 1902 he was nominated ordinary professor of the University of Lausanne, and in 1909 he changed to the chair for Swiss federal law at the University of Berne. Together with *Carl Hilty* he was editor of the "Politischen Jahrbuchs" between 1910 and 1917. From 1923 to 1928 he took part in the delegation at the League of Nations and was judge at the international court in Den Haag.
He is known best for his "Kommentar zur Schweizerischen Bundesverfassung" (3. ed. 1931). Similar to *Eugen Huber*, but in an all different way, he adhered to Neo-Kantianism and referred to *Rudolf Stammler*. In his main contributions to legal theory, "Die Organisation der Rechtsgemeinschaft" (1927), "Methode und System des Rechts" (1936)

and "Einführung in die Rechtswissenschaft" (1939) he developed a coherent theory of the legal order as a completed system of law. Law is mainly concepted as a means to the ends of legal politics, as an instrument to realise the tasks of the state in an understanding as the institution that enforces the rule of law. In this intention he clearly separates the concept of law from the idea of law or the ideal law and holds a strong distinction of "Sein" and "Sollen". In 1939 he committed suicide under the impression of the decline of the order of free states and the breakdown of liberal international law.
For further information, please consult:
Arnold Gysin: Walther Burckhardt als Rechtsphilosoph, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 182 ss. (first printing in: Zeitschrift des Bernischen Juristenvereins, vol. 1940, pp. 105-111); *Idem*: Zum rechtstheoretischen Vermächtnis Walther Burckhardts, in: Zeitschrift des Bernischen Juristen-Vereins, vol. 107 (1971), pp. 23 ss.;
Hans Huber: Walther Burckhardt, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 485ss.; *Idem*: Zur Einführung, in: Aufsätze und Vorträge 1910-1938, ed. idem, Bern: Stämpfli & Cie., 1970, pp. 9 ss.;
Kurt Naegeli-Bagdasarjanz: Walther Burckhardts Rechtsphilosophie (Zürcher Beiträge zur Rechtswissenschaft, N. S. vol. 229), Aarau: Sauerländer, 1961.

[Selected Works of the Same Author]
Walther Burckhardt: Organisation der Rechtsgemeinschaft – Untersuchungen über die Eigenart des Privatrechts, des Staatsrechts und des Völkerrechts, Basel: Helbing & Lichtenhahn, 1927; *Idem*: Methode und System des Rechts mit Beispielen, Zürich: Polygraphischer Verlag, 1936; *Idem*: Die Lücken des Gesetzes und die Gesetzesauslegung, in: Abhandlungen zum schweizerischen Recht, N. S. vol. 8, Bern: Stämpfli & Cie., 1925, pp. 62-106; *Idem*: Recht als Tatsache und als Postulat, in: Festgabe für Max Huber zum 60. Geburtstag, Zürich: Schulthess, 1934; *Idem*: L'État et le droit, in: Zeitschrift für Schweizerisches Rechts, ed. Eduard His, N. S. vol. 50, Basel: Helbing & Lichtenhahn, 1931; *Idem*: Die Krisis der Verfassung (1838), in: Aufsätze und Vorträge 1910-1938, Bern: Stämpfli & Cie., 1970, pp. 340ss.; *Idem*: Über das Verhältnis von Recht und Sittlichkeit (1922); *Idem*: Staatliche Autorität und geistige Freiheit 1936), beide in: Aufsätze und Vorträge 1910-1938, ed. Hans Huber, Bern: Stämpfli & Cie., 1970, pp. 35 ss. resp. pp. 64 ss.

[For Further Reading]
Briefwechsel zwischen *Walther Burckhardt* und *Arnold Gysin*, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 188-211.

1 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.3 "William E. Rappard, l'individu et l'État"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: William E. Rappard
Title: L'individu et l'État dans l'évolution constitutionelle de la Suisse
Edition(s): Zürich: Éditions Polygraphiques SA, 1936

[Introduction]
In *William E. Rappard* we encounter an eminent jurisprudent, economist and historian at the same time, active in the domain of international relations in the first half of the twentieth century, a true advocate of liberty and a loyal servant of his country (for a comprehensive biography in historical perspective consult *Victor Monnier*: William E. Rappard – Défenseur des libertés, serviteur de son pays et de la communauté internationale, Basel/ Genève: Helbing & Lichtenhahn/ Édition Slatkine, 1995). During his legal formation he visited Harvard University two times, in 1906/1907 and from 1911 to 1913, among other visits in Berlin, Munich, and Vienna, but solidly associated with the University of Geneva. From the very beginning of his formation Rappard appears as a veritable cosmopolitan. His interests and inclinations run more or less parallel to the attempts by *Vilfredo Pareto*. However, Rappard not only co-founded the discipline of political economics, but practised his convictions in Swiss politics, in later years as a Member of Parliament. An illustrative example of Rappard's network provides the collection of "*Varia politica*", published in 1953 on the occasion of the seventieth birthday of the author, where the list of the colleges and friends reads like a who's-who in international intelligence (Varia politica publiés ou réimprimés à l'occasion du soixante-dixième anniversaire, Zürich: Éditions Polygraphiques, 1953).

[Historical Situation and Systematic Context]
Our specific interest is in the two extended historical monographies about the "Relation between the human individual and the State" and the "Development of modern democracy in Geneva" (see no. 5.5 of this Legal Anthology), both comprehensive studies dating from the 1930s and 1940s. As a historian, or better as a representative of social history, we encounter *William E. Rappard* principally as a defender of liberty in general and specifically of political freedom. In his self-qualification, the author judges his contributions as mostly composite, including and unifying scientific and political aspects: "*mes espoirs ont été formulés à la lumière de mon interprétation du passé*" (letter, 26 January 1953).

[Content, Abstracts/Conclusions, Insights, Evidence]

On invitation of an American editor and of the University of Lucerne, *William E. Rappard* has undertaken the challenge to draw the relation between the human individual and the political collective or legal community, between the single citizen and the state. The ambiguous relationship between etatism on the one side and individualism, liberalism, and democracy on the other side serves the author as his guiding idea to focus on constitutional history, so that the writing also provides an interpretation of the political institutions in Switzerland, eventually. As the starting point, Rappard in his subtle consideration points to the historical effects of the French Revolution on the political structures in Switzerland. "L'idée me vint donc d'étudier ces relations dans l'évolution constitutionelle de la Suisse. Ainsi, à une vaine abstraction sociologique, se substituait dans mon esprit une réalité historique d'un intérêt puissant. Et l'étude de cette réalité historique ne serait-elle pas la meilleure préparation à la rédaction du manuel de politique suisse qu'on me demandait par ailleurs?" The main attempt of the author is to describe this chapter of social history as part of the social sciences. Such analysis directs the author to the general diagnosis that etatism has tendentiously overruled individualism and democracy.

If we turn to *William E. Rappard*'s introduction to the method of historical thought, we find an orientation towards experience based on the knowledge of the past. "Il n'est déjà pas facile de découvrir sous ses apparences législatives la réalité sociale de l'évolution constitutionelle de la Suisse moderne. [...] D'ailleurs la démonstration de théorèmes historiques est-elle jamais autre chose qu'un exercise intellectual inspiré du désir avoué ou secret de justifier des préférences instinctives"? Apparently, the attempts of the author to inaugurate a social history of constitutional development lead to a kind of substitution of philosophy of history "Geschichtsphilosophie": "Si l'on voulait faure rentrer cette étude dans une des catégories convenues des sciences morales, ce serait, nous semble-t-il, à la philosophie de l'histoire qu'il conviendrait de la rattacher. Mais la plupart des philosophies de l'histoire se ornent à la recherche des causes générales des faits particuliers. Elles tirent donc leur intérêt de leur valeur explicative. Notre propos, au contraire, sans que nous nous désintéressions des causes de l'évolution constitutionelle, visera surtout à découvrir, dans le domaines des relations entre l'individu et l'État, les effets de cette évolution". The deficiencies of past theory building have had the effect that the individual and the state are both considered to be mere abstractions that have to be mediated by means of concrete institutes and institutions. Rappard's initiative directed towards the conservative interpretations by *Gonzague de Reynold* and find welcome company rather in the historical writings of *Alexis de Tocqueville*.

On the five hundred pages of his book, *William E. Rappard* provides rich material and convincing arguments, and by doing so adds a considerable contribution to the constitutional history of the nineteenth century. As a timeless interesting passage, we have selected the very end and conclusion of this *opus magnum*, addressing the future prospective. "Au cours de la marche à l'étatisme que poursuit la Suisse depuis un demi-siècle, les anciennes conquêtes de l'individualisme et même de la démocratie semblent quelque peu perdues de vue sinon compromises. En étandant sans cesse la sphère de ses

interventions et de ses activités propres, l'État n'a pu qu'envahir celle de l'individu et réduire ainsi ses libertés. Et en se diversifiant, en se compliquant et en s'enrichissant d'organismes toujours nouveaux, la machine de l'État est devenue d'un fonctionnement à la fois si délicat et si imposant, qu'elle échappe de plus en plus au contrôle et même à l'entendement de l'individu. / Ainsi l'individualisme et même la démocratie paraissent aujourd'hui sérieusement menacés par les progrès de l'étatisme". By this lucid analysis and severe diagnosis is expressed the author's well-founded fear, but no remedies are found yet in order to cure the disease.

[Further Information About the Author]
William Emmanuel Rappard, born 22 April 1883 in New York, died 29 April 1858 in Bellevue, grew up in the United States of America before settling down in the Geneva area in his adolescence. He studied jurisprudence at the University of Geneva, where he obtained a doctorate in 1908; between 1905 and 1909 he travelled abroad, to Berlin, Munich, Harvard, Paris and Vienna. His first academic occupations were lectureships for economic history in Geneva and for Economics at Harvard University, before he was called ordinary professor for economic history and public finance by the University of Geneva. He was the eminent promoter of the faculty for economic and social sciences at this university as well as the founder and later director of the well-known "*Institut Universitaire de Hautes Études Internationales*" in the same town. Between 1917 and 1920 he engaged his person for the interests of the International Red Cross, and in 1919 he represented the Swiss government at the Peace Conference held in Paris and promoted Geneva as the future seat of the League of Nations (where he served his country as delegate) and defended the idea of Swiss neutrality. Later in his life he invested his personality to the demands of labour protection (in 1951 he even signed as president of the International Labour Organisation). On the international level he truly was a pacifist, and on the level of the nation state he distrusted nationalism as a danger for peace. His interest in legal thought showed his intention to protect the individual from an all-mighty state, which is documented in his study "*L'individu et l'État dans l'évolution constitutionelle de la Suisse*" (1936). As an example, and model for sound democracy he represented the pre-history of the republic of Geneva prior to the foundation of the Swiss federal state, in the so-called era of Regeneration in Switzerland ("*L'avènement de la démocratie moderne à Genève 1814-1847*").
For more information and a comprehensive bibliography, please consult:
Victor Monnier: William Emmanuel Rappard – Défenseur des libertés, serviteur de son pays, Genève: Édition Slatkine, 1995.

[Selected Works of the Same Author]
William E. Rappard: L'avènement de la démocratie moderne à Genève 1814-1847, Genève: Alexandre Jullien, 1942; *Idem*: La consitution fédérale de la Suisse 1848-1948, Boudry: La Baconnière, 1948; *Idem*: La révolution industrielle et les origines de la protection légale du travail en Suisse, Bern: Stämpfli, 1914 (reprint Zürich: Schulthess, 2008).

[For Further Reading]
William E. Rappard: La consitution fédérale de la Suisse 1848-1948 (Die Bundesverfassung der Schweizerischen Eidgenossenschaft 1848-1948), Boudry: La Baconnière, 1948 (Polygraphischer Verlag AG, Zürich 1948).

6 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.4 "Walther Burckhardt, Krisis der Verfassung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Walther Burckhardt
Title: Die Krisis der Verfassung (Vortrag, gehalten am 23. November 1937 in Basel in der "Neuen Helvetischen Gesellschaft")
Edition(s): in: Aufsätze und Vorträge 1910-1938, Bern: Stämpfli & Cie., 1970, pp. 340-355 (first printing in: Schweizer Monatshefte, vol. 17 (1938), no. 10)

[Introduction/Historical Situation and Systematic Context]
Constitutional practice in the 1930s showed a veritable crisis in the binding force of the formal Swiss Federal Constitution, as there has been a considerable shift in competences towards the Government, the executive power based only on urgency, leading to the promulgation of so-called skeleton-law. Such a process undermines the authority of the Constitution, but also of the whole legal order, in consequence. Eventually, this practice has been abdicated even during the Second World War (formally, the regime lasted until 1952), after being criticised by eminent jurisprudents, especially by *Zaccaria Giacometti* ("Die Gegenwärtige Verfassungslage", in: Schweizerische Hochschulzeitung 1942, pp. 139–154).

[Content, Abstracts/Conclusions, Insights, Evidence]
Walther Burckhardt has already dealt with this inclination in 1938, in one of his last essays before he died. With his sharp intellectual analysis, the author distinguishes three possible kinds of constitutional crisis with their respective solutions: diverse interpretations of the constitutional dispositions, doubts about the adequateness of the positive constitution and questions about the binding force of constitutional law. In the following, Burckhardt is discussing aspects of the third variant of crisis.
Of merely historical interest are the questions of how the urgency of a particular legislation can be legitimated and whether a shift in competences within a Federal state is necessary and legitimate. The core of the problem consists in adopting the means of skeleton-law as a steady practice. "Es ist nicht korrekt, dieses Notrecht gewissermassen in die Verfassung hineinzuintrepretieren, um es dann als eine verfassungsmässige Kompetenz in Anspruch zu nehmen. [...] Man hüte sich auch, eine Theorie des Notrechts, einen Kodex des Verfassungsbruchs aufzustellen. Die Behörden brauchen die Verfassung, um ihre eigene Autorität, ihren eigenen Anspruch auf Gehorsam zu begründen. Wenn sie im Volk das Vertrauen auf ihre Verfassungsreeue untergraben, [...] erschüttern sie das Fundament, auf dem der Staat ruht". Thereby, it is clearly expressed that such a practice is illegal and illegitimate. If legislation is inducted by necessity rather than based on

constitutional competence, the exception gains importance and the regularity, the rule-based application of the legal order becomes secondary. This fatal tendency cannot be compensated by any attempts to guarantee obedience to declared procedures for such practice. Remedies, however, could be qualified majority and constitutional jurisdiction without any restrictions in cognition. The conclusion reads as follows: "Die Verfassung ist so auszubauen, dass sie in den voraussehbaren Fällen gehalten werden kann; aber dann soll sie auch gehalten werden".

[Further Information About the Author]
Walther Burckhardt, born 19 May 1871 in Riehen, died 1 October 1939 in Berne, pursued his legal studies at the Universities of Leipzig, Neuchâtel, Berlin and Berne, where he graduated with a doctorate with *Eugen Huber*. From 1896 onwards, he served the federal administration, in 1902 he was nominated ordinary professor of the University of Lausanne, and in 1909 he changed to the chair for Swiss federal law at the University of Berne. Together with *Carl Hilty* he was editor of the "Politischen Jahrbuchs" between 1910 and 1917. From 1923 to 1928 he took part in the delegation at the League of Nations and was judge at the international court in Den Haag.
He is known best for his "Kommentar zur Schweizerischen Bundesverfassung" (3. ed. 1931). Similar as *Eugen Huber*, but in an all different way, he adhered to Neo-Kantianism and referred to *Rudolf Stammler*. In his main contributions to legal theory, "Die Organisation der Rechtsgemeinschaft" (1927), "Methode und System des Rechts" (1936) and "Einführung in die Rechtswissenschaft" (1939) he developed a coherent theory of the legal order as a completed system of law. Law is mainly concepted as a means to the ends of legal politics, as an instrument to realise the tasks of the state in an understanding as the institution that enforces the rule of law. In this intention he clearly separates the concept of law from the idea of law or the ideal law and holds a strong distinction of "Sein" and "Sollen". In 1939 he committed suicide under the impression of the decline of the order of free states and the breakdown of liberal international law.
For further information, please consult:
Felix Renner: Der Verfassungsbegriff im staatsrechtlichen Denken der Schweiz im 19. und 20. Jahrhundert (Dissertation Universität Zürich), Zürich: Schulthess & Co., 1968, pp. 342 ss.;
Arnold Gysin: Walther Burckhardt als Rechtsphilosoph, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 182 ss. (first printing in: Zeitschrift des Bernischen Juristenvereins, vol. 1940, pp. 105-111); *Idem*: Zum rechtstheoretischen Vermächtnis Walther Burckhardts, in: Zeitschrift des Bernischen Juristen-Vereins, vol. 107 (1971), pp. 23 ss.;
Hans Huber: Walther Burckhardt, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 485ss.; *Idem*: Zur Einführung, in: Aufsätze und Vorträge 1910-1938, ed. idem, Bern: Stämpfli & Cie., 1970, pp. 9 ss.;

Kurt Naegeli-Bagdasarjanz: Walther Burckhardts Rechtsphilosophie (Zürcher Beiträge zur Rechtswissenschaft, N. S. vol. 229), Aarau: Sauerländer, 1961.

[Selected Works of the Same Author]
Walther Burckhardt: Organisation der Rechtsgemeinschaft – Untersuchungen über die Eigenart des Privatrechts, des Staatsrechts und des Völkerrechts, Basel: Helbing & Lichtenhahn, 1927; *Idem*: Methode und System des Rechts mit Beispielen, Zürich: Polygraphischer Verlag, 1936; *Idem*: Die Lücken des Gesetzes und die Gesetzesauslegung, in: Abhandlungen zum schweizerischen Recht, N. S. vol. 8, Bern: Stämpfli & Cie., 1925, pp. 62-106; *Idem*: Recht als Tatsache und als Postulat, in: Festgabe für Max Huber zum 60. Geburtstag, Zürich: Schulthess, 1934; *Idem*: L'État et le droit, in: Zeitschrift für Schweizerisches Rechts, ed. Eduard His, N. S. vol. 50, Basel: Helbing & Lichtenhahn, 1931; *Idem*: Die Krisis der Verfassung (1838), in: Aufsätze und Vorträge 1910-1938, Bern: Stämpfli & Cie., 1970, pp. 340ss.; *Idem*: Über das Verhältnis von Recht und Sittlichkeit (1922); *Idem*: Staatliche Autorität und geistige Freiheit 1936), beide in: Aufsätze und Vorträge 1910-1938, ed. Hans Huber, Bern: Stämpfli & Cie., 1970, pp. 35 ss. resp. pp. 64 ss.

[For Further Reading]
Briefwechsel zwischen *Walther Burckhardt* und *Arnold Gysin*, in: Rechtsphilosophie und Grundlagen des Privatrechts – Begegnung mit grossen Juristen (Juristische Abhandlungen, vol. 9), Frankfurt am Main: Vittorio Klostermann, 1969, pp. 188-211.

30 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.5 "William E. Rappard, Démocratie moderne à Genève"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: William E. Rappard
Title: L'avènement de la démocratie moderne à Genève 1814-1847
Edition(s): Genève: Alexandre Jullien, 1942

[Introduction/Historical Situation and Systematic Context]
William E. Rappard was deeply associated with the town of Geneva and its University, even though he was considered to be a true cosmopolitan. Following his interest in local history ("*une histoire de famille*") within the great sphere of historical thought, he elaborated a study on the "Development of modern democracy in Geneva", published in 1942. "Mais l'intérêt que présente l'avènement il y a cent ans du gouvernement populaire dans la cité de *Calvin* et de *Rousseau* dépasse de beaucoup les bornes de cette cité, et même les frontières nationales de la Confédération suisse. L'expérience genevoise, en effet, présente un puissant intérêt microcosmique, si l'on peut dire. S'étant poursuivie au grand jour, dans un milieu exceptionellement éclairé, elle est pleine d'enseignements d'une portée générale".
(As for an introduction to the author and the biographical context, please refer to no. 5.3 of this Legal Anthology.)

[Content, Abstracts/Conclusions, Insights, Evidence]
As a defender of liberty, and as an advocate of democracy, *William E. Rappard* was eager to study the preparation and pre-history of democracy in the Canton of Geneva within the period of 1814 and 1847, i.e. in so-called Helvetic epoch until the end of Regeneration, where the Canton of Geneva took part relatively late (see nos. 0.6 and 0.8 of this Legal Anthology). In his timeless writing, the author has explicated the rich historical experience in democratic government and the lessons in political thought with success.
Within the period taken into consideration by *William E. Rappard*, the development of democracy follows a straight line: "Qu'on y voie une ascension ou une decente – je m'expliquerai à ce sujet tout à l'heure – la marche suivie par la république de Genève n'a connu ni déviation, ni retour en arrière. Toujours plus de liberté politique, toujours moins de limitations à l'exercice de la souveraineté populaire, telle est la tendence dominante et preque exclusive de l'évolution rectiligne que nous allons étudier". This could appear as a story of untroubled success for democracy, however history does not ever progress with progress only, since Restauration has also left his traces in the Canton of Geneva, even if there has always been a democratically elected Parliament, representing the people of the republic.

With the passage selected for further reading, we have focused on the qualification of the Constitution of 1814 as anti-democratic, because of its oligarchic character. This analysis may be surprising at the first sight but is thoroughly founded in the arguments provided by *William E. Rappard*.

[Further Information About the Author]
William Emmanuel Rappard, born 22 April 1883 in New York, died 29 April 1858 in Bellevue, grew up in the United States of America before settling down in the Geneva area in his adolescence. He studied jurisprudence at the University of Geneva, where he obtained a doctorate in 1908; between 1905 and 1909 he travelled abroad, to Berlin, Munich, Harvard, Paris and Vienna. His first academic occupations were lectureships for economic history in Geneva and for Economics at Harvard University, before he was called ordinary professor of economic history and public finance by the University of Geneva. He was the eminent promoter of the faculty for economic and social sciences at this university as well as the founder and later director of the well-known "*Institut Universitaire de Hautes Études Internationales*" in the same town. Between 1917 and 1920 he engaged his person for the interests of the International Red Cross, and 1919 he represented the Swiss government at the Peace Conference held in Paris and promoted Geneva as the future seat of the League of Nations (where he served his country as delegate) and defended the idea of Swiss neutrality. Later in his life he invested his personality to the demands of labour protection (in 1951 he even signed as president of the International Labour Organisation).
On the international level he truly was a pacifist, and on the level of the nation state he distrusted nationalism as a danger for peace. His interest in legal thought showed his intention to protect the individual from an all-mighty state, which is documented in his study "*L'individu et l'État dans l'évolution constitutionelle de la Suisse*" (1936). As an example and model for sound democracy he represented the pre-history of the republic of Geneva prior to the foundation of the Swiss federal state, in the so-called era of Regeneration in Switzerland ("*L'avènement de la démocratie moderne à Genève 1814-1847*").
For more information and a comprehensive bibliography, please consult:
Victor Monnier: William Emmanuel Rappard – Défenseur des libertés, serviteur de son pays, Genève: Édition Slatkine, 1995.

[Selected Works of the Same Author]
William E. Rappard: L'individu et l'État dans l'évolution constitutionelle de la Suisse, Zürich: Éditions Polygraphiques SA, 1936; *Idem*: La consitution fédérale de la Suisse 1848-1948, Boudry: La Baconnière, 1948; *Idem*: La révolution industrielle et les origines de la protection légale du travail en Suisse, Bern: Stämpfli, 1914 (reprint Zürich: Schulthess, 2008).

[For Further Reading]
Alfred Dufour: Genève et la science juridique européenne du début du XIXème siècle – La fonction médiatrice des Annales de Législation (1820-1823), in: Wechselseitige

Beeinflussungen und Rezeptionen von Recht und Philosophie in Deutschland und Frankreich, 3. deutsch-französisches Symposion vom 16. bis 18. September 1999 in La Bussière/ Dijon, ed. Jean-François Kervégan und Heinz Mohnhaupt (Ius Commune, supplementary vol. 144), Frankfurt am Main: Vittorio Klostermann, 2001, pp. 287 ss.;
Carl Hilty: Öffentliche Vorlesungen über Helvetik, Bern: Max Fiala, 1878;
William E. Rappard: La consitution fédérale de la Suisse 1848-1948 (Die Bundesverfassung der Schweizerischen Eidgenossenschaft 1848-1948), Boudry: La Baconnière, 1948 (Polygraphischer Verlag AG, Zürich 1948).

6 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.6 "Werner Kägi, Verfassung als Grundordnung des Staates"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Werner Kägi
Title: Die Verfassung als rechtliche Grundordnung des Staates – Untersuchungen über die Entwicklungstendenzen im modernen Verfassungsrecht (Habilitationsschrift Universität Zürich)
Edition(s): Zürich: Polygraphischer Verlag, 1945

[Introduction]
In his youth, *Werner Kägi* was influenced by national-socialist ideology in his dissertation thesis from 1937, entitled "Zur Entstehung, Wandlung und Problematik des Gewaltenteilungsprinzipes", as he belonged to the movement of so-called frontists, i.e. he was a leading member of the Swiss "national front". "Mit dabei war Werner Kägi nicht etwa als einer von vielen Mitläufern, sondern als Angehöriger der Kerntruppe, das heisst: in weit stärkerem Mass engagiert, als bisher angenommen worden ist und als er selbst je zugegeben hat. / Der junge Kägi war mindestens in den Jahren 1932 bis 1935 Mitglied der 'Neuen Front' und dann der 'Nationalen Front' und gehörte zu den ideologischen Vordenkern dieser Organisationen. Er verharmloste die nationalsozialistische Gewaltpolitik, wollte mit einer 'totalen Mobilmachung' über eine ständestaatliche Verfassungsreform die Schweiz in ein neues Zeitalter überführen, und er sah im Antisemitismus seiner Organisation keinen Grund zu Distanzierung. [...] Frontist in Jugendjahren – Verteidiger der Menschenrechte in fortgeschrittenen Jahren: Wie passt das zusammen? Es passt nicht zusammen, kann in einem Leben aber durchaus vereinigt sein. [...] Der Positionswechsel zwischen Dissertation und Habilitationsschrift könnte auf einen radikalen Bruch mit der Vergangenheit hinweisen. Kägi hielt aber noch einige Zeit am Vokabular und damit am Gedankengut der 'Vorzeit' fest" (see *Georg Kreis*: Der Staatsrechtler Werner Kägi war in jungen Jahren ein Frontist, in: Neue Zürcher Zeitung vom 11th November 2013).
This issue does matter, indeed, because it sheds a bright light on the pessimistic inclination of the author, on the allegation of a crisis of the very idea of the constitution, on the decline of normativity in the legal order, both diagnosed by the author, as well as on the author's assertion of the political character of constitutional law. It also explains the inadequacy of the used terminology to the discussed problems, even if it cannot excuse this lack of conceptual accuracy. Conceptual terminology is replaced by everyday language, as the problems addressed are mere common-place. This analysis, however, does not provide a sound foundation for the re-construction of a constitutional order in the post Second World War period.

[Historical Situation and Systematic Context]
Even if *Werner Kägi* intented to express a distance to what he calls literature of the legal crisis (as identified in *Carl Hilty, Eduard His, William Rappard, Walther Burckhardt*), he is deeply affected by his own pathology of the overall situation of constitutional order and legal order itself, and it is not to expect that such a faulty analysis and diagnosis could include reasons that would help to positively heal the patient. The possibility of a constitution as the founding document of a legal order is even doubted. The fact that the author uses the term of "Grundgesetz" must have contributed to the fact, that the habilitation thesis did have a great influence on the ideas of the founding fathers of the Constitution of the West German Republic of Bonn.
Consequently, however not in the deeper causes, the argumentation provided by *Werner Kägi* does resemble the attitudes of *Hans Huber*, who with his eclectic and changing opinions has contributed much to the post-war impression of uncertainty and insecurity regarding the constitutional order. Analysis and diagnosis itself can be part of the problem, as a self-fulfilling prophecy. For instance, *Carl Schmitt* and *Friedrich Nietzsche* are cited as authorities by the author, even in his habilitation thesis. In the domain of concepts, pluralism, self-differentiation of society and dynamic tendencies are understood as endangerment of legal order, in particular of constitutional order. However, this danger does only occur due to the inadequate instruments and conceptions of analysis; but instead to develop and establish a new conceptual context, the antique terminology has endeavoured to prove the corruption of existing order. Postulated by self-professed representative of ethical judgment, the menaces to constitutional order become enemies and demons that have to be fought and defeated. This is just an example of the militant, bellicose terminology adopted by the author. If a scientific author speaks of "Verfassungsdämmerung", this must refer to "Götterdämmerung" as understood in the German mythical world of *Richard Wagners* musical dramas; only it does not contribute to enlighten the twilight of mythical shades by a rational scientific approach. Afflicted by these defects the discussed writing serves more as a symptomatic example of post-World War II low point of constitutional jurisprudence, in our view.

[Content, Abstracts/Conclusions, Insights, Evidence]
As an excerpt of this prominent and principal writing by *Werner Kägi*, we have selected the passage, where the author debates the relation between the constitution and democracy (later he should write a second contribution to this theme, see no. 6.6 of this Legal Anthology). That is to say, we skip the supposed reasons for the constitutional malaise and the praise of political jurisprudence to overcome the crisis (in allusion to the concept of politics as it has been established by *Carl Schmitt*, with its friend-enemy dichotomy). Although the question has much to do with the so-called decisionistic attitude of "the political" (in the sense attributed by Schmitt) in juxtaposition to the normative, rule-based legal order. The immanent tension between the rule of law and democracy is not bridged, but rather sharpened to become a radical discrepancy. Reading the opening period of the

7th chapter, it is mere cynicism to make allusion to the organic unity of both principles as stated as an ideal by *Fritz Fleiner*. Moreover, one has to take into consideration that *Zaccaria Giacometti* was the scholar of this eminent legal thinker, and still was in charge, when Werner Kägi applied for the *venia legendi* at the University of Zurich.
Werner Kägi identifies a backstroke of the normative principles, of the rule of law in confrontation with democratic decisions in the sense of decisionism. Apparently the decisionistic approach to a solution is favoured over the normative attitude, that is disqualified as autocratical. Such misleading sentences should not only be accepted anymore today, however, they should have been sanctioned even more in post Second World War time. Legal positivism is equalised with the "positivism of life", i.e. objectively existing values, according to the author; this is just another example for a fully inadequate terminology dealing with question of great importance. "In Praxis und Theorie hat ziemlich allgemein die Lehre vom allmächtigen, durch keine Norm beschränkten und beschränkbaren *pouvoir constituant* Anerkennung gefunden". One remains uncertain, whether the author favours or criticises this inclination, that cannot stand alone without being contradicted. In fact, this tendency is not approved and appears simply faulty, wrong. What should the pretended voluntaristic turn contribute to the solution of the proposed question, thus? To mention the theory of *Jean-Jacques Rousseu* in the context of decisionistic decline of the rule of law.
"So hat die Verfassung gerade auch in der Demokratie die grosse Aufgabe, das Abgleiten in den Absolutismus zu verhindern. [...] Aber dennoch kann und muss auch dieser neue Ausgleich von Autorität und Freiheit in den Grundlinien in der klaren, festen Form einer grundgesetzlichen Normordnung verankert werden". *Werner Kägi*, after having accused the weakness of the constitutional order, is hoping for the efficacy of a strong "fundamental statute", in the concluding passage. Unfounded the analysis and diagnosis, this hope remains unfounded, too, however.
In an essay from 1953, *Werner Kägi* repeatedly dealt with the matter, and tried to come to a synthesis of rule of law and democracy; however, on the basis of antinomies no logical synthesis could ever be validly concluded, rather the necessary conclusion will be provided by further historical development (compare no. 6.6 of this Legal Anthology).

[Further Information About the Author]
Werner Kägi, born on 26 August 1909 in Biel, died on 4 October 2005 in Zurich, completed his studies in jurisprudence and theology in Zurich, Berlin (with *Dietrich Bonhoeffer*), and London. In 1937 he handed in his promotion at the University of Zurich (with *Zaccaria Giacometti*). By the end of the Second World War he published a widely recognised habilitation thesis, entitled „Die Verfassung als rechtliche Grundordnung des Staates. From 1952 to 1979 he signed as an ordinary professor for public law, international law and church law at the University of Zurich. In 1973 he received a doctorate *honoris causa* from the University of Berne.
For more information, please consult:
Walter Haller: Werner Kägi, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland,

Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 779 ss.;
Felix Renner: Der Verfassungsbegriff im staatsrechtlichen Denken der Schweiz im 19. und 20. Jahrhundert (Dissertation Universität Zürich), Zürich: Schulthess & Co., 1968, pp. 479 ss.

[Selected Works of the Same Author]
Werner Kägi: Zur Entstehung, Wandlung und Problematik des Gewaltenteilungsprinzipes (Dissertation Universität Zürich, 1937); *Idem*: Persönliche Freiheit, Demokratie und Föderalismus, in: Die Freiheit des Bürgers im schweizerischen Recht, Festgabe zur Hundertjahrfeier der Bundesverfassung, Zürich: Polygraphischer Verlag, 1948, pp. 53 ss.; *Idem*: Zur Entwicklung des schweizerischen Rechtsstaates, in: Zeitschrift für Schweizerisches Recht – Centenarium 1852-1952, Basel: Helbing & Lichtenhahn, 1952, pp. 173 ss.; *Idem*: Rechtsstaat und Demokratie – Antinomie und Synthese, in: Demokratie und Rechtsstaat, Festgabe zum 60. Geburtstag von Zaccaria Giacometti, Zürich: Polygraphischer Verlag, 1953, pp. 107-142; *Idem*: Von der klassischen Dreiteilung zur umfassenden Gewaltenteilung, in: Verfassungsrecht und Verfassungswirklichkeit – Festschrift für Hans Huber zum 60. Geburtstag am 24. Mai 1961, dargebracht von Freunden, Kollegen, Schülern und vom Verlag, Bern: Stämpfli & Cie, 1961, pp. 151 ss.; *Idem*: Die Grundordnung unseres Kleinstaates und ihre Herausforderung in der zweiten Hälfte des 20. Jahrhunderts, in: Das schweizerische Recht - Besinnung und Ausblick, Festschrift zur Schweizerischen Landesausstellung 1964, Helbing & Lichtenhahn, Basel 1964; *Idem*: Legitimation, Ordnung und Begrenzung der Macht im Kleinstaat, in: Macht und ihre Begrenzung im Kleinstaat Schweiz, ed. Werber Kägi and Hansjörg Siegenthaler (Zürcher Hochschulforum, Band 1), Zürich: Artemis, 1981, pp. 21 ss.

[For Further Reading]
Richard Bäumlin: Die rechtsstaatliche Demokratie – Eine Untersuchung der gegenseitigen Beziehungen von Demokratie und Rechtsstaat, Zürich: Polygraphischer Verlag, 1954.

27 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.7 "Jean-Charles Biaudet, Les origines de la Constitution fédérale de 1848"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Jean-Charles Biaudet
Title: Les origines de la Constitution fédérale de 1848 (Publications de l'Université de Lausanne, Centenaire de la Constitution fédérale de 1848, vol. 5)
Edition(s): Lausanne: F. Rouge, 1949, pp. 7-33

[Introduction/Historical Situation and Systematic Context]
On the occasion of the first centenary jubilee of the Swiss Federal Constitution from September 1848 several volumes were published, whereas in 1891 the Swiss Government had invited *Carl Hilty* to publish an account (Les constitution fédérales de la Confédération suisse – Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger frères, 1891; reprint: Les Éditions de l'Aire 1991). In 1948 the published book consisted in a volume of collected essays, edited by the Faculties of Law of the Swiss Universities (Die Freiheit des Bürgers im schweizerischen Recht, Festgabe zur Hundertjahrfeier der Bundesverfassung, Zürich: Polygraphischer Verlag, 1948), and *William E. Rappard* published a volume presenting the constitutional development between the adoption of the constitution of 1848, the successful total revision of the Swiss Federal Constitution in May 1874, to the centenary celebration (La consitution fédérale de la Suisse 1848-1948 (Die Bundesverfassung der Schweizerischen Eidgenossenschaft 1848-1948), Boudry: La Baconnière, 1948 (Polygraphischer Verlag AG, Zürich 1948)). Separately, a small volume has been published by the editor François Rouge in Lausanne, containing the two conferences held on 8 and 15 November 1948 at the "Salle Tissot" of the "Palais de Rumine" in Lausanne, when *Jean-Charles Biaudet* and *Marcel Bridel* held their respective lectures which are consulting even today (compare no. 5.8 of this Legal Anthology).

[Content, Abstracts/Conclusions, Insights, Evidence]
Jean-Charles Biaudet, dealing with the origins of the Swiss Federal Constitution of 1848, covered in his contribution the periods of so-called Helvetic, Restauration and Regeneration, leading to the attempts to found the Federal state and the preparatory work of the first Swiss Federal Constitution itself (see nos. 0.6 and 0.8 of this Legal Anthology). It is noteworthy, that the foundation of the Swiss Federal authority was due to a civil war between the protestants and the Catholics, and in function to the victory of the radical liberalist over the retro-orientated conservatives. However, this change has been administrated with caution and political virtue in order to enable the adoption of the

Swiss Federal Constitution.

[Further Information About the Author]
Jean-Charles Biaudet, born on 19 February 1910 in Montreux, died on 7 August 2000 in Cully, spent his life in Algérie and Paris until 1930. From 1932 to 1933 he was a teacher at the institution "Le Rosey" in Rolle. In 1936, he finished his studies at the University of Lausanne, and in 1940 he received his doctorate. Between 1943 and 1950 he was an archivist at the State Archive of the Canton de Vaud, and from 1950 to 1955 he was director of the University Library in Lausanne. In 1945 he signed as a private lecturer, in 1955 he was nominated extraordinary professor, and from 1961 to 1979 he had the chair for modern history at the University of Lausanne (where he was also dean of his faculty and vice president of the University). He was also the editor in chief of the "Journal for Swiss History" ("Schweizerische Zeitschrift für Geschichte").

[Selected Works of the Same Author]
Jean-Charles Biaudet: La Révolution Vaudoise de 1845, Lausanne: F. Rouge, 1946.

[For Further Reading]
Carl Hilty: Les constitution fédérales de la Confédération suisse – Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger frères, 1891 (reprint: Les Éditions de l'Aire 1991);
William E. Rappard: La consitution fédérale de la Suisse 1848-1948 (Die Bundesverfassung der Schweizerischen Eidgenossenschaft 1848-1948), Boudry: La Baconnière, 1948 (Polygraphischer Verlag AG, Zürich 1948);
Die Freiheit des Bürgers im schweizerischen Recht, Festgabe zur Hundertjahrfeier der Bundesverfassung, ed. by the Law Faculties of the Swiss Universities, Zürich: Polygraphischer Verlag, 1948.

6 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.8 "Marcel Bridel, Constitution fédérale de 1848"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Marcel Bridel
Title: L'esprit et la destinée de la Constitution fédérale de 1848 (Publications de l'Université de Lausanne, Centenaire de la Constitution fédérale de 1848, vol. 5)
Edition(s): Lausanne: F. Rouge, 1949, pp. 37-69

[Introduction/Historical Situation and Systematic Context]
On the occasion of the first centenary jubilee of the Swiss Federal Constitution from September 1848 several volumes were published, whereas in 1891 the Swiss Government invited *Carl Hilty* to publish an account (Les constitution fédérales de la Confédération suisse – Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger frères, 1891; reprint: Les Éditions de l'Aire 1991). In 1948 the published book consisted in a volume of collected essays, edited by the Faculties of Law of the Swiss Universities (Die Freiheit des Bürgers im schweizerischen Recht, Festgabe zur Hundertjahrfeier der Bundesverfassung, Zürich: Polygraphischer Verlag, 1948), and *William E. Rappard* published a volume presenting the constitutional development between the adoption of the constitution of 1848, the successful total revision of the Swiss Federal Constitution in May 1874, to the centenary celebration (La consitution fédérale de la Suisse 1848-1948 (Die Bundesverfassung der Schweizerischen Eidgenossenschaft 1848-1948), Boudry: La Baconnière, 1948 (Polygraphischer Verlag AG, Zürich 1948). Separately, a small volume was published by the editor François Rouge in Lausanne, containing the two conferences held on 8 and 15 November 1948 at the "Salle Tissot" of the "Palais de Rumine" in Lausanne, when *Jean-Charles Biaudet* and *Marcel Bridel* held their respective lectures worth to be consulted even today (compare no. 5.7 of this Legal Anthology).

[Content, Abstracts/Conclusions, Insights, Evidence]
Marcel Bridel, dealing with the subject of the spirit and destiny of the Swiss Federal Constitution of 1848, addressed in his lecture the spirit and the destiny of the Swiss Federal Constitution in the period of the first centenary. He highlights liberty, equality, separation of powers, democracy and representation, republicanism and constitutionalism, respectively rule of law as the principal dimensions of the constitution. Interesting is the remark, that the label of "Confederation" has been no more adequate since 1848, since the Federal Republic (a relic that even survived the total revision leading to the Swiss Federal constitution from April 1999).
We shall skip the arguments in detail, and jump to the core question for the future of the

Swiss Federal State: "Le libéralisme est-il une doctrine périmée? Que représente au juste notre Constitution? Quel est le vrai sens de la Démocratie"? These lasting questions remain unanswered even today., i.e. they are answered differently, according to the various standpoints and during the changing times.

[Further Information About the Author]
Marcel Bridel, born on 19 May 1898 in Clarens (Montreux), died on 11 April 1980 in Lausanne, did his studies in jurisprudence at the Universities of Lausanne and Paris, before receiving his doctorate in 1927 from the University of Lausanne. After having been a secretary at the Swiss Federal Supreme Court, he was nominated extraordinary professor in 1936 and ordinary professor for public law in 1943. In 1948 he changed to the chair for compared theory of institutions at the department of social and political sciences at the very same University, and between 1949 and 1952 he signed as a vice president for the Executive Committee of the international Association for Political Studies.
Marcel Bridel has taken an active role in the foundation of modern political science in Switzerland and was a founding member as well as the first member of the board of directors of the Swiss Association for Political Science in 1959. Between 1959 and 1960 he also assisted with the elaboration of the Constitution of Cyprus.

[Selected Works of the Same Author]
Marcel Bridel: Sur les limites des libertés individuelles, in: Die Freiheit des Bürgers im schweizerischen Recht, Festgabe zur Hundertjahrfeier der Bundesverfassung, hrsg. von den Iuristischen Fakultäten der schweizerischen Universitäten, Zürich: Polygraphischer Verlag, 1948, pp. 99 ss.; *Idem*: Essai théorique sur le régime représentatif dans les démocraties modernes, in: Mélanges François Guisan, Receuil de travaux publié par la faculté de droit de l'Université de Lausanne, Lausanne: Rouge et Cie., Librairie de l'Université, 1950, pp. 3-35; *Idem*: Réflexions sur le principe majoritaire dans les démocraties. In: Festschrift Werner Kägi, 1979, pp. 45 ss.; *Idem* (Ed.): La démocratie directe dans les communes suisses (Recueil de travaux publié par l'Institut de science politique de l'Université de Lausanne), Zürich: Polygraphischer Verlag, 1952.

[For Further Reading]
Carl Hilty: Les constitution fédérales de la Confédération suisse – Exposé historique écrit sur la demande du Conseil fédéral à l'occasion du sixième centenaire de la première alliance perpétuelle du 1er août 1291, Neuchâtel: Imprimerie Attinger frères, 1891 (reprint: Les Éditions de l'Aire 1991);
William E. Rappard: La consitution fédérale de la Suisse 1848-1948 (Die Bundesverfassung der Schweizerischen Eidgenossenschaft 1848-1948), Boudry: La Baconnière, 1948 (Polygraphischer Verlag AG, Zürich 1948).
Die Freiheit des Bürgers im schweizerischen Recht, Festgabe zur Hundertjahrfeier der Bundesverfassung, ed. by the Law Faculties of the Swiss Universities, Zürich: Polygraphischer Verlag, 1948.

6 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.9 "Hans Marti, Urbild und Verfassung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Hans Marti
Title: Urbild und Verfassung – Eine Studie zum hintergründigen Gehalt einer Verfassung
Edition(s): Bern/ Stuttgart: Hans Huber 1958

[Introduction/Historical Situation and Systematic Context]
In 1861, *Johann Jacob Bachofen*, teaching Roman law at the University of Basel, published his historical investigations in the domain of antique anthropology, mythology, religion and symbolism. "Unter wenige grosse Gesichtspunkte lassen sich die mannigfaltigen Erscheinungen, welche das Leben der Muttervölker zu allen Zeiten und in allen Zonen der Erde darbietet, zusammenfassen, und diese selbst sind so tief in der menschlichen Natur begründet, dass sie fortan als durchaus gesichertes Besitzthum unserer wissenschaftlichen Geschichtserkenntniss unerschüttert und der Bestätigung durch manche ferner Beobachtungen entgegenstehend dastehen werden" (Das Mutterrecht – Eine Untersuchung über die Gynaikokratie der alten Welt und ihrer religiösen und rechtlichen Struktur, p. 420). These aspects, however, do not appear evident from the expanded material of matriarchal elements within the cultural history of antiquity. Bachofen had studied with *Friedrich Carl von Savigny* (i.e. was a representative of the so-called Historical School of law), and he also had a background in natural law theory. In his inaugural lecture from 1841, entitled "Das Naturrecht und das geschichtliche Recht in ihren Gegensätzen", he combined these two attitudes. (For a comprehensive discussion consult *Michele Cascavilla*: Johann Jakob Bachofen – Dalla parte del diritto femminile? In: Hermeneutica, Pubblicazione dell'Istituto Superiore di Scienze Religiose dell'Università degli Studi di Urbino, ed. Italo Mancini, vol. 9, Urbino: QuattroVenti, 1989, pp. 163 ss.) Apparently, the matriarchal aspects have disappeared in modern times – at least temporarily – as a reverse development can be identified in recent times, i.e. a change from hierarchical, intellectual, deductive (patriarchal) principles to the matrix (*sic*!) of communitarian order with its genealogical, intuitive, inductive (matriarchal) principles.

[Content, Abstracts/Conclusions, Insights, Evidence]
In his essayistic study, *Hans Marti*, a professor of public and notary law, starts in close connection with the arguments put forward by *Dietrich Schindler* in his monography about "Verfassung und soziale Struktur", where he investigates the relation between the legal text of the constitution and its context in communitarian life (see no. 1.8 of this Legal Anthology). Marti addresses the tension between the text of a constitution and the constitutional reality as a significant dimension. "Jede Verfassung setzt – meist

stillschweigend – einen Bestand an bestimmten ausserrechtlichen Verhaltensnormen und gewisse soziale Gegebenheiten voraus. Ändern sich diese in Zeiten der Wandlung, so wird ihr Verhältnis zur Verfassung problematisch, und die stets vorhandene Spannung zwischen Norm und Wirklichkeit, zwischen Sollen und Sein kann ein Mass erreichen, das nurnoch als Verfassungskrise zu bezeichnen ist. Ein richtiges Verständnis der Verfassung fordert daher eine Aufhellung aller ihrer Bezüge zu den vorausgesetzten ausserrechtlichen Normen und zur ebenfalls vorausgesetzten sozialen Wirklichkeit; für die Fortbildung des Verfassungsrechts im Wege der Verfassungspraxis und der Verfassungsrevision ist dies sogar unerlässlich". The crucial imagination is identified as irrational, as unconscious, and rooted in under-consciousness, psycho-analytically speaking. In the following, the collective prefiguration or ark-type for constitutional conceptualisation is sketched by the author.

Hans Marti takes the antique idea of *magna mater* as a starting point: "Die Bezüge einer Verfassung zu ihren Urbildern, zu ihren Archetypen, sind wohl die wichtigsten Bezüge überhaupt. Ohne diese Beziehung zu den Urbildern hätte keine Verfassung Bestand; soll sie eine dauerhafte Ordnung schaffen, so setzt das voraus, dass sie allgemeine Anerkennung findet, was nur möglich ist, wenn ihr Staatsbild auch der unbewussten Einstellung der Bürger entspricht". His diagnosis is a strong tendency from patriarchal to matriarchal principles, corresponding in the reverse sense to the investigations by *Johann Jacob Bachofen*. Subsequently, the psychological history of this change of imagination and prefiguration is outlined.

We would like to skip the description of the patriarchal type and directly jump to the idea of *Helvetia mater* as a maternal allegory. *Hans Marti*'s analysis reads as follows: "Seit einigen Jahrzehnten wird aber der Archetypus der Grossen Mutter auch im staatlichen Bereich immer anziehender; die weibliche Seite des Menschen will sich auch im Staat entfalten, und zunehmend bemächtigen sich arechetypische Vorstellungen, die zum Kreise der Grossen Mutter gehören, der staatlichen Einrichtungen. Immer mehr ist es die weibliche, matriarchalische Einstellung, welche die staatlichen Zielsetzungen und die Art der Verwirklichung dieser neuen Staatszwecke beeinflusst". This inclination corresponds to a fundamental change from the classical state, governed by the rule of law, to the foreseeing welfare state. We would like to leave the selected passage of the text to the personal valuation of the reader, indeed. However, it seems to be necessary to indicate that the addressed static prototypes of paternalism and maternalism should eventually be overcome by the idea of dynamical change and perpetual evolution or development. In a dialectical understanding this could be the third ark-type or prefiguration that would serve to override the thesis and antithesis and install the concept of historical vicissitude and eternal change as a leading synthetic idea.

[Further Information About the Author]

Hans Marti, born in 1896, died in 1985, concluded his studies in jurisprudence at the University of Berne in 1939 by becoming an approved advocate. Subsequently he went to the *Académie de droit international* in Den Haag. In war times he prepared his dissertation

and in 1944 he handed in a habilitation thesis on "Das Verordnungsrecht des Bundesrats". After being a private lecturer for many years he was eventually nominated extraordinary professor in 1953.
For further information about the person and publications, please consult:
Festgabe für Professor Dr. Hans Marti zum 70. Geburtstag am 14. Januar 1985, in: Berner Notariat, vol. 1985, pp. 1 ss.

[For Further Reading]
Johann Jacob Bachofen: Das Mutterrecht – Eine Untersuchung über die Gynaikokratie der alten Welt und ihrer religiösen und rechtlichen Struktur, Stuttgart: Krais & Hoffmann, 1861.

25 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.10 "Max Imboden, Staatsformen"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Max Imboden
Title: Die Staatsformen – Versuch einer psychologischen Deutung staatsrechtlicher Dogmen
Edition(s): Basel/Stuttgart: Helbing & Lichtenhahn, 1959

[Introduction/Historical Situation and Systematic Context]
According to the reports of his scholars, *Max Imboden* had the intention to write a general theory of the state ("Allgemeine Staatslehre") before he died prematurely in 1969. However, among his writings, we encounter two main essays that could easily count as preparatory work for such an attempt. To be discussed subsequently is a psychological interpretation of the forms of government from 1959, where the three forms of government are presented within the context of the dogmatic theory that goes back to Greek antiquity. To the other monography, providing an overview of the political systems, we can simply refer at this point (see no. 6.8 of this Legal Anthology).
"Die vorliegende Arbeit vollzieht das Wagnis, die bereits verwirrende Fülle weiter zu mehren. Sie unternimmt den Versuch, die Betrachtung in eine Richtung zu lenken, die weder der üblichen Marschroute der Staatsrechtslehre noch der anderen gesellschaftswissenschaftlichen Disziplinen entspricht. / Trotz der wenig orthodoxen Betrachtungsweise mündet der Weg schliesslich in jene grosse Strasse ein, die den im klassischen Altertum liegenden Beginn des abendländischen Denkens über den Staat mit den späteren grossen Epochen der politischen Ideengeschichte verbindet. Ja es zeigt sich, dass gerade die zunächst ungewohnte Fragestellung die alten Quellen neu zu erschliessen vermag. Dieses Resultat ist für den Verfasser selbst zum überraschenden Erlebnis geworden. Ist es nicht ein beredtes Zeugnis dafür, dass jene Ausweitung des Gesichtskreises, die sich in der modernen Staatslehre vollzieht, im Grund nur das mühsame Abstreifen einer durch das 19. Jahrhundert künstlich auferlegten Fessel ist? Als etwas eigentlich 'Neues', mit dem Pathos des Fortschrittes zu Feierndes wird jedenfalls diese Entwicklung nicht gelten können. Sie stellt nur wieder her, was dem früheren Menschen selbstverständlich war; sie öffent den Weg zur Wiedergewinnung eines verlorenen Gutes: einer ursprünglich vorhandenen Ganzheit, eines wahrhaften Humanismus". A specific personal characteristic is the open-minded procedure of argumentation, as adopted by the author, a significantly heuristic thought that leads to veritably new cognition, to new-old insights, and finally to a renewal of antique (?) and Renaissance humanism.
Explicitly the approach of *Max Imboden* guided by psychology. Apparently, there are not

many contributions with respect to jurisprudence that take into consideration the heritage and challenge of modern development in the domain of psychology. In our context, we would like to indicate the essays by *Jonas Cohn* (Zur Psychologie der Weltanschauungen, in: Kant-Studien, Philosophische Zeitschrift (Berlin: Rolf Heise), vol. 26 (1921), pp. 74 ss.), as well as by the Swiss philosopher *Anna Tumarkin* (Wie ist Psychologie als Wissenschaft möglich? In: Kant-Studien, Philosophische Zeitschrift (Berlin: Rolf Heise), vol. 26 (1921), pp. 390 ss.). In recent times, psycho-analytical theories have inspired legal scholars as *Peter Goodrich* (Oedipus Lex - Psychoanalysis, History, Law. Berkeley/Los Angeles/London: University of California Press, 1995) to address problems of the unconsciousness within the concept of law.
Particularly comprehensive and symptomatic at the same time are the arguments of Carl *August Emge* (Recht und Psychologie – Gedanken über ihre Beziehung, in: Abahndlungen der Akademie der Wissenschaften und der Literatur in Mainz, Geistes- und sozialwissenschaftliche Klasse, vol. 1954, Nr. 1, Wiesbaden: Franz Steiner, 1954, pp. 8 and 10). He understands the theme as a task to determine the relationship between inner sphere and outer world in the domain of legal thought. He defines legal psychology as transcentental in relation to jurisprudence, as the individuals are subjected to the legal order: „Halten wir zunächst an dem charakteristischen fest, dass hier die Psychen zwar vom Rechtlichen beeinflusst sind (weil es immer bereits Recht gibt), dass die Psychen aber dem Recht gegenüberstehen, dass sie begrifflich nicht in das Recht einbezogen sind. [...] Anders steht es nun mit der Rechtspsychologie, die wir als der Jurisprudenz jenseitig, transzendent bezeichneten". The principal problems, thus, remain unaltered, i.e. above all the psychological disposition of the human individual, and the legal sentiment or feeling (compare no. 9.2 of this Legal Anthology). An interesting argument is proposed at the very end and the human psyche representated as a kind of actuality of the normativity or obligatory character of law. This would mean to prospect a true theory of real validity of the legal order.

[Content, Abstracts/Conclusions, Insights, Evidence]
The analysis elaborated by *Max Imboden* has its foundations in the author's psychological sensibility, and not whatsoever in a reception of psychological theories. He addresses the theory of a cyclic change of the three-fold forms of government, as well as the theory of mixt government. The psychical aspects or moments that are important to legal thought are identified in the facts of individualistic consciousness, rather than in the historical levels of collective consciousness. This observation contradicts so-called social psychology, as it is often applied to questions of legal order (compare *Wilhelm Wundt*: Völkerpsychologie – Eine Untersuchung der Entwicklungsgesetze von Sprache, Mythus und Sitte, vol. 9: Das Recht, Leipzig: Alfred Kröner, 1918; and *Moritz Lazarus*: Grundzüge der Völkerpsychologie und Kulturwissenschaft (Philosophische Bibliothek, Band 551), ed. Klaus Christian Köhnke, Hamburg: Felix Meiner, 2003.). Contrarily, Imboden establishes a certain connectivity with the crucial question about the separation of powers within the State's organisation (the ordinary trinitary pluralism of powers could possibly even be

increased): “Nicht in einer äusseren Gewaltenmechanik, sondern in dem durch den kontrastschaffenden Gewaltenpluralismus vermehrten bürgerlichen Bewusstsein liegt der eigentliche Damm gegen die ungeformte und verschlingende Gewalt”.
As an exemplary passage for further reading, we have selected chapters five to eight, where the legitimacy of state government is discussed (*Max Weber*). Max Imboden’s diagnosis points to the problem of rationalist and intellectualist overweight within the communitarian equilibrium, and addresses the particular and the universal, absolute communities, corresponding to open and disclosed society.
The identified elements or moments result in a stratification of powers within a political community. This resembles some kind of applied philosophical structuralism. His analysis finally leads the author to the core problem of constitutional order: “Das Besondere und Wesentliche liegt in einer spezifischen Betonung und Hervorhebung der Grundstruktur. Es soll ihr [der Verfassung als Grundordnung] Dauer und Unverbrüchlichkeit verliehen werden. [...] Die Hervorhebung der staatlichen Grundstruktur bedeutet deren bewusstseinsmässige Erhellung. [...] Es ist die drohende Gefahr der Gegenwart, das Bewusstsein um die wahre Verfassung unter der Last des der Verfassungsurkunde eingefügten verfassungsfremden Stoffes zu erdrücken. Die Verfassung hat bildhaft und einprägsam die Grundstruktur des Staates zum Ausdruck zu bringen. Das verlangt nicht nur die Weglassung allen Ballastes in der Verfassungsurkunde, vorab der blossen Richtlinien über die staatliche Rechtspolitik; das verlangt ebensosehr, dass die Verfassung selbst die Komplexität des Sozialgefüges zum Ausdruck bringt. Nicht die folgerichtige Verfassung, sondern die in der bewussten Bejahung der bestehenden Antinomien reale und dem menschlichen Bewusstsein konforme Konstitution ist das Werk der Reife. Im Wissen um die Komplexität der Ordnungsprinzipien liegt das Geheimnis aller wahrhaft stabilen staatlichen Ordnungen”. By his attempt to make fecundly psychological insights into legal order, Imboden eventually utters the well-founded claim to overcome rational normativism.

[Further Information About the Author]
Max Imboden, born 19 June 1915 in St. Gallen, died 7 April 1969 in Basel, studied jurisprudence at the Universities of Geneva, Berne and Zurich, and he obtained a doctorate with his dissertation “Bundesrecht bricht kantonales Recht” (1939) with *Zaccaria Giacometti*. In 1944 he published his habilitation thesis about “Der nichtige Staatsakt”. After having been extraordinary professor in Zurich, he was called to the ordinary chair for public law, i.e. constitutional and administrative law at the University of Basel. Together with *René Rhinow*, he published the standard reference “Schweizerischer Verwaltungsrechtsprechung”. In 1964 he promoted the reform of the Swiss federal constitution by publishing his invocation “Helvetisches Malaise”.
His thoughts were subtle, refined and distinguished due to his inclination to psychological ideas, which he applied to the forms of government.
For further information, please consult:
Peter Saladin/ Luzius Wildhaber (Ed.): Der Staat als Aufgabe, Basel: Helbing & Lichtenhahn,

1972, Vorwort;
Georg Kreis: Das "Helvetische Malaise" – Max Imbodens historischer Zuruf und seine überzeitliche Bedeutung, 2011;
Andreas Kley: Max Imboden – Aufbruch in die Zukunft, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 877 ss.;
Dietrich Schindler (junior): Max Imboden, in: Staat und Recht - Ausgewählte Schriften und Vorträge, Basel/ Stuttgart: Helbing & Lichtenhahn, 1971, pp. 1-5.

[Selected Works of the Same Author]
Max Imboden: Das Gesetz als Garantie rechtsstaatlicher Verwaltung (Basler Studien zur Rechtswissenschaft, vol. 38), Basel: Helbing & Lichtenhahn, 1962 (1. ed. 1954); *Idem*: Politische Systeme, Basel/ Stuttgart: Helbing & Lichtenhahn, 1962; *Idem*: Helvetisches Malaise (1964), in: Staat und Recht, Ausgewählte Schriften und Vorträge, Basel/ Stuttgart: Helbing & Lichtenhahn, 1971, pp. 279ss.; *Idem*: Rousseau und die Demokratie, in: Recht und Staat in Geschichte und Gegenwart, vol. 267, Tübingen: J. C. B. Mohr, 1963, 26 pp.

4 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.11 "Richard Bäumlin, Rechtsstaatliche Demokratie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Richard Bäumlin
Title: Die rechtsstaatliche Demokratie – Eine Untersuchung der gegenseitigen Beziehungen von Demokratie und Rechtsstaat (Dissertation Universität Bern)
Edition(s): Zürich: Polygraphischer Verlag, 1954

[Introduction/Historical Situation and Systematic Context]
The relationship between democracy and rule of law normally is condensed to the interleave of the firm standing term of "demokratischer Rechtsstaat"; *Richard Bäumlin*, however, denominates his synthesis just the other way around as "rechtsstaaliche Demokratie". In the first case the defining denominator is the rule of law, whereas the qualification as democratic is merely a specific difference. In the second case the essential is the qualification as democracy and the rule of law consists merely in a specification. With his creative approach, integrating political theory and philosophy, the social and human sciences into jurisprudence and state theory, Bäumlin definitely surpasses and excels not only all of his contemporary colleagues, but also equals today's state of art. In conclusion, democracy and rule of law are considered to relate vitally one upon the other, or to build fellow sufferers. The declared aim of *Richard Bäumlin*'s promotion thesis is to demonstrate "die enge Schicksalsgemeinschaft von Demokratie und Rechtsstaat". Taking into consideration the possibility of antinomy or synthesis of democracy and rule of law, the author discusses freedom of speech, freedom of religion and intermediary corporations as well as federalism as domains where democracy and the rule of law build a close connection with each other.

[Content, Abstracts/Conclusions, Insights, Evidence]
According to *Richard Bäumlin*, the normative concept of democracy and its contrary, autarchy are not only to be considered as relative, because of their ideal type, but rather to be criticised. Democracy is not only a specific way to determine the content of a legal order, based on general vote of all citizens, but far more than that, i.e. to be understood as a material qualification of the legal order itself, as a specific way to determine the nature of the form of government. Bäumlin connects to the concept of social community as proposed by *Dietrich Schindler* (senior) in his treatise on "Verfassungsrecht und soziale Struktur" from 1932 (see no. 1.8 of this Legal Anthology), and therefore intermediate follows the concepts elaborated by *Hermann Heller*. However, also to such an understanding, Bäumlin addresses criticism, as a merely sociological method where its causal laws cannot provide a solid base for deeper insights into democracy either. Rather

the two principles establish a tension between the two possibilities of thought. The essential understanding can only be established as a material qualification of democracy, as the legal order follows rational, functional, or better speaking teleological principles. "Mit dem bisherigen ist aber nur gesagt, dass die Demokrati auch als auf bestimmte Werte bezogen zu verstehen gesucht werden müsse. Über die Natur dieser Werte ist damit noch nichts ausgesprochen". Anthropology teaches that such decisions on about tasks and aims of a political community are due to a specific image of man, of mankind in general.
In a second part, *Richard Bäumlin* debates the various conceptions of rule of law in a continental European sense of "Rechtsstaatlichkeit". Formal rule of law, whereupon state action is reduced to the performance of the legal order, is rejected as a historical step in a constant evolution of the model. The material conceptualisation is discussed with attention to compared public law. Rule of law also shows material impacts and refers to a constitution based on human rights, individual freedoms with a social dimension. These claims are so to say realised ideals of humanity within an existing social and political community. The modern state has to organise the framework of legal order in such a way, that the human individual can develop their talents best. To be read are the remarks to the constitutional legal order of the rule of law in a material understanding, as presented by the author on pp. 72 ss. The state organisation in the light separation of powers is also to be integrated as a qualification in the picture of material rule of law theory.

[Philosophical Valuation and Jurisprudential Significance]
Although the attempt made by *Richard Bäumlin* could appear as merely analytic, the inherent convictions regarding human rights and individual freedoms clearly give a highly pointed direction to the overview of pre-existing theories. This distinction should characterise the personal style of the author during the long and fecund career as an academic teacher at the University of Berne, as well as the other involvements of the sympathetic person. Eventually democracy is presented as a project within the development of the history of ideas, and thereby the aspect of historicity or historical dimension of democracy are stressed, referring to an ideal that is to be realised (compare the contribtion to the essays in honour of Bäumlin by *Jörg Paul Müller*: Recht und Zeit, in: Zentrum und Peripherie - Zusammenhänge, Fragmentierungen, Neuansätze, Festschrift für Richard Bäumlin zum 65. Geburtstag, ed. Roland Herzog, Chur und Zürich: Rüegger, 1992, pp. 95 ss.).

[Further Information About the Author]
Richard Bäumlin, born 9 September 1927 in Berne, retired in Erlenbach im Simmental, did his studies in jurisprudence at the Universities of Berne and Göttingen, before presenting his doctor's thesis in Berne in 1954, where he taught as a private lecturer starting 1957. In 1960 he was elected ordinary professor for public law and constitutional history, as well as for social philosophy. As a member of the socio-democratic party he was engaged in the domain of social politics and social philosophy and defended the rights of foreigners and human rights. He was also a member of the Club of Rome.

His lectures in constitutional history were legendary, as he tried to give an introduction to the integral history of political ideas.
For further information, including a comprehensive bibliography, please see:
Roland Herzog (Ed.): Zentrum und Peripherie – Zusammenhänge, Fragmentierungen, Neuansätze, Festschrift für Richard Bäumlin zum 65. Geburtstag, Chur/ Zürich: Rüegger, 1992.

[Selected Works of the Same Author]
Richard Bäumlin: Lebendige oder gebändigte Demokratie? Demokratisierung, Verfassung und Verfassungsrevision, Basel: Z-Verlag, 1978; *Idem*: Recht, Staat und Geschichte – Eine Studie zum Wesen des geschichtlichen Rechts, entwickelt an den Grundproblemen von Verfassung und Verwaltung, Zürich: EVZ-Verlag, 1961.

[For Further Reading]
Richard Bäumlin: Artikel "Rechtsstaat", in: Evangelisches Staatslexikon, ed. Roman Herzog, Stuttgart: Kreuz, 3rd ed. 1987, columns 2806–2818;
Werner Kägi: Die Verfassung als rechtliche Grundordnung des Staates – Eine Untersuchung über die Entwicklungstendenzen im modernen Verfassungsrecht (Habilitationsschrift Universität Zürich), Zürich: Polygraphischer Verlag, 1945.

8 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
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5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.12 "Ulrich Häfelin: Rechtspersönlichkeit des Staates"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Ulrich Häfelin
Title: Die Rechtspersönlichkeit des Staates – Dogmengeschichtliche Darstellung (alles Erschienene)
Edition(s): Tübingen: J. C. B. Mohr (Paul Siebeck), 1959, pp. 355-404

[Introduction/Historical Situation and Systematic Context]
In 1959 and 1961, *Ulrich Häfelin* received his doctorate and his *venia legendi* at the University of Zurich, being a scholar of *Zaccaria Giacometti*. On both occasions he had selected the subject in case, i.e. on the juridical personality of the state. This primary doctrine had not been developed in Switzerland, nor adapted to Swiss circumstances, even though it represented a major theme and problem in other European countries. The question, whether to attribute a specific personality to the State, has been vividly debated and controversialy discussed in France and Germany, in post Second World War times. *Ulrich Häfelin* must have been a dedicated lecturer and benevolent conveyor of many young talented jurisprudents, studying at the University of Zurich. "Als Häfelin seine Lehrtätigkeit aufnahm, dominierten 'Vorlesungen' im wörtlichen Sinn, welche die Funktion der Studierenden weitgehend auf das Zuhören und Aufschreiben reduzierten. Häfelin wollte vom professoralen Monolog im Hörsaal wegkommen. Er rang sich, früher als viele seiner Kollegen, zu einer (heute beinahe selbstverständlich gewordenen) Unterrichtsform durch, die den Dialog mit dem Publikum sucht und es zur aktiven Teilnahme und zum kritischen Fragen motiviert. Das erfordert Lehrmittel, die eine seriöse Vorbereitung auf jede Unterrichtsstunde erlauben" (*Walter Haller*, in: Neue Zürcher Zeitung vom 11. Mai 2016).

[Content, Abstracts/Conclusions, Insights, Evidence]
The first planned, but only achieved volume about the subject of the juridical personality of the state, as it has been elaborated by *Ulrich Häfelin*, contains the history of the dogma, represented in a historical and compared perspective. The author proved an encyclopaedic overview of the history of ideas in modern times, as well as over the theory building in European countries, i.e. Germany, France and Italy. The concept of the juridical personality of the state has been rejected by many jurisprudents, in Switzerland especially by *Albert Affolter, Walther Burckhardt*, and *Zaccaria Giacometti*, as in France by *Léon Duguit, Louis Le Fur, Georges Scelles*, and *Henri Berthélemy*, in Italy, whereas in Germany it has been adopted by most eminent legal thinkers, favoured by *Johann Caspar Bluntschli, Otto von Gierke, Hugo Preuss, Carl Friedrich von Gerber, Paul Laband*, and *Georg Jellinek* (but rejected by

Otto Mayer). A very specific function has been designed to the concerning dogma by *Hans Kelsen*, in the context of his Pure Theory of law. Häfelin was very sensitive about the particular context of theory building and clearly discerns the arguments for and against the adoption and acceptance of the dogmatic figure or fiction in case (according to the respective standpoint).
For further reading, we have selected the appendix, where *Ulrich Häfelin* deals with the rejection of the doctrine of the juridical personality of the state in the different European countries, including Switzerland. Faithful to his approach as a historian of the history of ideas, the author does not want to draw any thesis. In conclusion, the question is risen, whether the theory can be considered as a unique entity, or rather has to be devised and partitioned into a set of specified questions. Häfelin doubts, "in welchem Mass bei den Wandlungen, die der Begriff der Staatsperson in den verschiedenen Schulrichtungen durchgemacht hat, doch noch von einer Einheit des Dogmas die Rede sein kann". This could be the conclusion of a sceptical thinker, comparing theories using the same notion without attributing the same meaning to them. However, the problem is more deeply rooted. "In der Entwicklung der Staatspersönlichkeitstheorien fällt zunächst auf, dass mit fortschreitender Zeit dem Begriff der Rechtspersönlichkeit des Staates eine immer grössere Bedeutung zugemessen wurde. [...] Die Zunahme der rechtssystematischen Bedeutung findet ihr Gegenstück im Anwachsen des Geltungsbereiches der Persönlichkeitskonstruktion im Verhältnis zum umfassenden Staatsbegriff. [...] Die Fortführung des Staatspersönlichkeitsdogmas durch die verschiedenen Epochen und Rechtsschulen hindurch bedeutet nicht nur eine Weiterentwicklung und intensivere Ausgestaltung dieser Staatskonstruktion. Vielfach lag darin ein innerer Strukturwandel der Auffassung von der juristischen Staatssubjektivität. [...] Von den einzelnen Schulrichtungen wurde der Begriff der Rechtspersönlichkeit des Staates auf diese Weise in völlig verschiedenartige Systemzusammenhänge gestellt". The very problematic character of this doctrine lies in the various possibilities to establish a conception of the relationship between the state in the sense of rule of law and elements or moments that exist beyond the legal order. Or in other words it consists in the different conceptualisations of the relation between the legal state and the social community.
The conclusion, whereupon the doctrine does not represent a coherent historical development, but rather a change within the structure of scientific conceptualisation of the rule of law, or the state based on the legal order, expresses the degeneration of a dogma and its diversification into a set of axiomatic structures, or in one word a change in paradigms. This situation resembles the one diagnosed and analysed in the domain of sovereignty, a core term of the entire construction of public order, i.e. the connection between state power and legal order, as it has been elaborated and documented by *Michael Walter Hebeisen* (Souveränität in Frage gestellt – Die Souveränitätslehren von Hans Kelsen, Carl Schmitt and Hermann Heller im Vergleich (dissertation thesis at the University of Berne, 1994), Baden-Baden: Nomos, 1995). The very same way, the dogma of sovereignty disappeared as a founding concept, because it has been replaced by a set of axiomatic scientific structures by ongoing development of modern jurisprudence in the twentieth

century, the theory of the legal personality of the state also has undergone fundamental changes and has eventually become undefinable to some extent.

[Further Information About the Author]
Ulrich Häfelin, born on 26 March 1923, died on 2 May 2016, after having prepared his promotion with *Zaccaria Giacometti* in 1959 handed in his habilitation thesis on the same subject in 1961 at the University of Zurich. In 1969 he was nominated as an extraordinary professor of public law, and from 1972 until his retirement in 1990 he was an academic teacher, inspiring and influencing many scholars in jurisprudence. Together with *Dietrich Schindler* (junior), he also was a founding director of the "Institut für Völkerrecht und ausländisches Verfassungsrecht" at the University of Zurich.

[Selected Works of the Same Author]
Ulrich Häfelin/ Walter Haller: Schweizerisches Bundesstaatsrecht – Ein Grundriss, Zürich: Schulthess Polygraphischer Verlag, 4. ed. 1998 (with a supplement volume: Die neue Bundesverfassung, 2000).

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The Anthology of Swiss Legal Culture
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5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.13 "Max Imboden, Helvetisches Malaise"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Max Imboden
Title: Helvetisches Malaise
Edition(s): in: Staat und Recht, Ausgewählte Schriften und Vorträge, Basel/ Stuttgart: Helbing & Lichtenhahn, 1971, pp. 279-307 (first printing in: Polis, Evangelische Zeitbuchreihe, vol. 20, Zürich: EVZ-Verlag, 1964)

[Introduction/Historical Situation and Systematic Context]
By two of his scholars, *Peter Saladin* and *Luzius Wildhaber*, *Max Imboden* has been characterised as "*'homo politicus'* im besten Sinne. Ihn faszinierte die Aufgabe, an der Lösung der verschiedensten Grund-Probleme unserer Staatsordnung mitzuarbeiten. [...] Er war eine starke, ausserordentliche Persönlichkeit, zugleich aber auch warmherzig, gütig, sensitiv, loyal und voller Menschlichkeit" (Vorwort, in: Der Staat als Aufgabe – Gedenkschrift für Max Imboden, Basel/ Stuttgart: Helbing & Lichtenhahn, 1972, p. V). With his psychological sensitiveness and his vivid sense for historical dispositions, he has not only produced an output in the domain of public law, especially of administrative law, but has also elaborated important writings in 1959 and 1961, entitled "Staatsformen – Versuch einer psychologischen Deutung staatsrechtlicher Dogmen", respectively "Politische Systeme" (see nos. 5.10 and 6.8 of this Legal Anthology). Only a year before his well-known diagnosis of a "malaise" in Swiss politics, he also indicated to *Jean-Jacques Rousseau* as a leading figure for further development of the political system (see no. 4.4 of this Legal Anthology). The writing on "Helvetic malaise" opens so to say the pre-history of an initiative for a total revision of the Swiss Federal Constitution, that was persued without success in the 1970s. Imboden himself did some preparatory work for this attempt to reform the constitution, namely in his essays, entitled "Verfassungsrevision als Weg in die Zukunft" and "Die Totalrevision der Bundesverfassung". After the premature death of Imboden in 1969, his ideas and initiatives were been succeeded by his scholar *Peter Saladin*, for instance in the essay, entitled "Die Kunst der Verfassungserneuerung", a contribution to the essays in honour of Imboden (see no. 5.15 of this Legal Anthology).

[Content, Abstracts/Conclusions, Insights, Evidence]
"Das Wort 'Malaise' drückt eine immer weiter um sich greifende schweizerische Grundtimmung aus. Es bezeichnet eine seltsame Mittellage zwischen ungebrochener Zuversicht und nagendem Zweifel. Der Wille ist noch immer auf Bejahung gerichtet, aber es stellen sich ihm aus einem schwer durchdringbaren Halbdunkel entscheidende Hindernisse entgegen. Noch bleibt die Haltung der Bürger weit von der offenen

Ablehnung entfernt; aber das selbstverständliche Einvernehmen mit der politischen Umwelt und ihrer Form, der Demokratie, ist zerbrochen".
The analysis and diagnosis, as provided by *Max Imboden*, reads as follows: participation of the citizen in political process, incremented or refused, populistic, if not demagogical propaganda of political parties, decreased capacity and output of Federal and Cantonal State Administration, and distortion within the structure of political community. As reasons are determined: fading strength for institutional reforms, missing or questionably collective rights of the citizenship, decision-making influenced by technocratic preparation and lobbying efforts, endangered legal order and unprotected rights, and cleavage of political parties. Therein consists the classical set of challenges for every up-to-date-democracy, thus.
As leading principles and healthy remedies for a regeneration of democratic politics are addressed by *Max Imboden*: a re-construction of new concepts for changed situation, attempts to cope with technical progress, proposals to strengthen political institutions, i.e. Parliament, Government, jurisdiction, as well as a reformation of collective political rights, i.e. initiative and referendum. "Wir Schweizer sind im grossen der Angst vor dem echten Wettbewerb erlegen. An zu vielen Orten wurde die Wirtschaft von der lebendigen Luft der Konkurrenz abgeschirmt. Unsere Stellung im Völkergefüge schien uns ohne grossen Einsatz anerkannt und gesichert – und mit einem Male haben wir feststellen müssen, dass wir in der Gefahr stehen, in eine unbemerkte Ecke abseits zu rücken. Und nicht anders haben wir im Inneren unserer Demokratie die schöpferischen Spannungen abgetragen. Um den Preis des Mittelmasses suchten wir Ruhe. Heute müssen wir feststellen, dass gerade aus der gewollten Ruhe neue Unruhe zu werden droht. Aus einem politischen Alltag mit wenig Höhen und Tiefen, aber mit manchen schlecht übertünchten Rissen werden wir in freiere Luft gelangen, sobald die politischen Gruppen die Kraft zum Eigenen und den Mut zum wahren Wettbewerb schöpfen". The proposal of Imboden could be summarised in a claim for increased concurrence within democracy.

[Further Information About the Author]
Max Imboden, born 19 June 1915 in St. Gallen, died 7 April 1969 in Basel, studied jurisprudence at the Universities of Geneva, Berne and Zurich, and he obtained a doctorate with his dissertation "Bundesrecht bricht kantonales Recht" (1939) with *Zaccaria Giacometti*. In 1944 he published his habilitation thesis about "Der nichtige Staatsakt". After having been extraordinary professor in Zurich, he was called to the ordinary chair for public law, i. e. constitutional and administrative law at the University of Basel. Together with *René Rhinow*, he published the standard reference "Schweizerischer Verwaltungsrechtsprechung". In 1964 he promoted the reform of the Swiss federal constitution by publishing his invocation "Helvetisches Malaise".
His thoughts were subtle, refined and distinguished due to his inclination to psychological ideas, which he applied to the forms of government.
For further information, please consult:
Peter Saladin/ Luzius Wildhaber (Ed.): Der Staat als Aufgabe, Basel: Helbing & Lichtenhahn,

1972, Vorwort;
Georg Kreis: Das "Helvetische Malaise" – Max Imbodens historischer Zuruf und seine überzeitliche Bedeutung, 2011;
Andreas Kley: Max Imboden – Aufbruch in die Zukunft, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 877 ss.;
Dietrich Schindler (junior): Max Imboden, in: Staat und Recht - Ausgewählte Schriften und Vorträge, Basel/ Stuttgart: Helbing & Lichtenhahn, 1971, pp. 1-5.

[Selected Works of the Same Author]
Max Imboden: Das Gesetz als Garantie rechtsstaatlicher Verwaltung (Basler Studien zur Rechtswissenschaft, vol. 38), Basel: Helbing & Lichtenhahn, 1962 (1. ed. 1954); *Idem*: Die Staatsformen – Versuch einer psychologischen Deutung staatsrechtlicher Dogmen, Basel/ Stuttgart: Helbing & Lichtenhahn, 1959 (extract); *Idem*: Politische Systeme, Basel/ Stuttgart: Helbing & Lichtenhahn, 1964; *Idem*: Rousseau und die Demokratie, in: Recht und Staat in Geschichte und Gegenwart, vol. 267, Tübingen: J. C. B. Mohr, 1963, 26 pp.

[For Further Reading]
Peter Saladin: Die Kunst der Verfassungserneuerung, in: Der Staat als Aufgabe, Gedenkschrift für Max Imboden, ed. Peter Saladin and Luzius Wildhaber, Basel/ Stuttgart: Helbing & Lichtenhahn, 1972, pp. 269-292 (reprinted in: Die Kunst der Verfassungserneuerung, Schriften zur Verfassungsreform 1968-1996, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1998, pp. 15-36)

30 November 2017 *Michael Walter Hebeisen*

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5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.14 "Peter Saladin, Grundrechte im Wandel"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Peter Saladin
Title: Grundrechte im Wandel – Die Rechtsprechung des Schweizerischen Bundesgerichts zu den Grundrechten in einer sich ändernden Umwelt
Edition(s): Bern: Stämpfli & Cie. AG, 1970 (3. ed. 1982), pp. 425-462

[Introduction/Historical Situation and Systematic Context]
In his monumental writing on fundamental rights and individual freedoms from 1970, *Peter Saladin* has not only discussed the various aspects of the conception and practice of the Swiss Federal Constitution, he also provided an abbreviated theory of constitutional rights and freedoms. These claims do not only fulfil their sociological and economical function increasingly less, they cannot meet the spiritual, mental and cultural expectations any longer. The very idea of fundamental human rights and freedoms should be developed further, and new criteria found to meet the new dangers. Anthropological optimism contrasts the stagnating theory building by far and consequently new attempts are made to adapt the conception fecundly to the new circumstances. This renewal has been propagated by a renaissance of natural law theories in the domain of public law. The fact, that human nature is not natural, but rather mental, spiritual leads to the proposal to accentuate the theological foundation of the fundamental rights and of the constitution itself. Regularly the text of the constitution refers to God as an almighty absolute in its preamble: “Im Namen Gottes des Allmächtigen...”. In the course of the total revision of the Swiss Federal Constitution (to be adopted in April 1999), Saladin elaborated this aspect and developed specific arguments on this issue (compare Zur Präambel einer revidierten Verfassung, in: Die Kunst der Verfassungserneuerung – Schriften zur Verfassungsreform 1968-1996, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1998, pp. 37 ss.).

[Content, Abstracts/Conclusions, Insights, Evidence]
Peter Saladin has thrown a Christological light on the fundamental rights and freedoms as well as on the constitution itself in the two concluding chapters of his principal writing on “Grundrechte im Wandel”. The starting point is the concept of so-called theodicea, i.e. the inaccessibility of God for the human being. Yet, with the incarnation of *Jesus Christ*, God has ascertained men of his love and his shelter. The death and resurrection of Jesus Christ assigns the dignity to all human beings, and the graciousness of God is conferred to all men. Saladin does not refer principally to Thomism and Catholic social theory, but rather to Protestant theology, as represented by *Jacques Ellul*, *Karl Barth* (christology) *Richard Bultmann* (eschatology), and *Dietrich Bonhoeffer* (existentialism).

"Welches sind die Richtlinien, die sich vom Neuen Testament her für die Gestaltung unserer Rechtsordnung ergeben? Auszugehen ist davon, dass die Rechtsordnung als Gnadengabe Gottes dazu bestimmt ist, 'den Menschen vor dem Einbruch des Chaos zu schützen und also ihm Zeit zu geben: Zeit für die Verkündigung des Evangeliums, Zeit zur Busse, Zeit zum Glauben'. Eine solche Deutung des Rechts-Zwecks ist existential: Rechts- und Staatsordnung sind auf Erhaltung des Einzelnen in der Existenzmöglichkeit gerichtet, wobei sich die Exitenz eben in der Entscheidung vor Gott vollzieht". Several aspects of such an existentialistic perspective on the constitution and on legal order itself are derived by the author, among others the principle of personal responsibility of human actions and behaviour (see no. 5.17 of this Legal Anthology). "Nicht allein durch Gewährung politischer Freiheit, sondern ebenso durch Gewährleistung eines Bezirks, in dem der Mensch wenigstens die rechtliche Möglichkeit zur verantwortlichen, autonomen Gestaltung seines Lebens hat, kann die Staatsordnung den Einzelnen zur verantwortlichen Entscheidung erziehen. Aber auch hier ist der Umkehrschluss verfehlt: Die Freiheitsgarantie schliesst, wie die Erfahrung zeigt, die Möglichkeit des sinnvollen Gebrauchs ebenso ein wie die des Missbrauchs".
Human dignity, estimation of the nature, protection of religious freedom (in the positive and negative sense), right and duty to non-selfish love, for instance, provide principles to respect in the way of interpreting, applicating and realising fundamental rights and individual freedoms. The crucial point of this Christological foundation of constitutional principles consists in a rejection of contributing absolute value and dignity to these rights and freedoms, based on eschatological reflections: "Die verfassungsmässigen Grundrechte – Schutzrechte und Freiheitsrechte – haben an der christologischen Rechtfertigung des Staates teil, sie können aber nur im Rahmen dieser Rechtfertigung transzendentale Würde beanspruchen. Sie verwirklichen keinen obersten Wert, sie sind nicht Ausdruck absoluter Werte, sie sind – von den Biblischen Weisungen her gesehen – zu einem grossen Teil in ihrer Legitimität bedingt und überdies in der Umreissung ihres Wirkungsbereichs notwendig geschichtlichem Wandel unterworfen". Every temptation to hold these rights and freedoms as absolute, is therefore misleading, the written constitution is no suitable object to be glorified (exclusion of patriotism referring to the constitution, as occurred in Germany). "Unsere geschichtliche Erfahrungen müssen den Blick dafür geöffnet haben, dass dem Grundrechtsbegriff, vor allem aber dem engeren Freiheitsrechtsbegriff etwas Dämonisches anhaftet. Wir wissen heute, dass es möglich ist, in der Verfassung sich zu einer idealistischen, hochgesinnten Freiheitsrechtslehre zu bekennen und sie unmittelbar anschliessend, ohne dass ein einziger Begriff geändert werden müsste, auf die niederträchtigste, egoistischste, unmenschlichste Weise zu missbrauchen. Dieser Gefahr kann erst dann grundsätzlich begegnet werden, wenn der Grundrechtsgedanke von seiner Verkettung mit dem hinfälligen Ego befreit wird; wenn erkannt wird, dass es bei den Menschenrechten nicht nur um Rechte geht, die der Mensch hat oder zu haben glaubt, 'sondern um das Recht, in dem wir einer den anderen anzuerkennen haben'". In short, the invocation of God at the very beginning of almost every constitution in the Christian sphere provides an indispensable lesson in humbleness and piousness before the absolute,

may this be understood with or without reference to Christian religion and Christian theology.

[Further Information About the Author]
Peter Saladin, born 4 February 1935 in Basel, died 25 May 1997 in Berne, studied jurisprudence at the University of Basel, where he received a doctorate in 1961, being a scholar of *Max Imboden*. After having practised as a lawyer, he went to the *Freie Universität Berlin* and to the Michigan Law School in 1962/1963. He then joined the federal administration, worked for the federal department of justice and was secretary of the scientific council. In 1969 he presented his habilitation thesis, a standard work on "Grundrechte im Wandel", published in 1970. In 1972 he was ordinary professor for public law at the University of Basel, and between 1976 until his death he was professor of constitutional and administrative law at the University of Berne. He was mainly occupied with public church law, invested himself to the promotion of ecology and claimed rights of nature, and intended to also take into consideration the rights of future generations. His core interest remained the preservation of the dignity of every single human being. In 1991 he received the honour of doctor *honoris causa* by the University of Geneva.
Our interest in his broad publications consists in his revolution of the doctrine of rule of law by introducing the concept of responsibility into the legal order.
For further information, please consult:
Diemut Majer: Peter Saladin, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 1021 ss.

[Selected Works of the Same Author]
Peter Saladin: Grundrechte im Wandel – Die Rechtsprechung des Schweizerischen Bundesgerichts zu den Grundrechten in einer sich ändernden Umwelt. Bern: Stämpfli & Cie. AG, 3. ed. 1982; *Idem*: Kleinstaaten mit Zukunft? In: Die Kunst der Verfassungsreneuerung, Schriften zur Verfassungsreform 1968-1996, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1998, pp. 361 ss.; *Idem*: Unerfüllte Bundesverfassung? In: Hundert Jahre Bundesverfassung 1874-1984, Die Bundesverfassung gestern, heute, morgen (Zeitschrift für Schweizerisches Recht, N. S. vol. 93, vol. 3/ 4, pp. 307 ss.), Basel: Helbing & Lichtenhahn, 1974.

[For Further Reading]
Rudolf Bultmann: Glauben und Verstehen – Gesammelte Aufsätze, 2 vols., Tübingen: J. C. B. Mohr, 1933/ 1952;
Peter Saladin: Wozu noch Staaten? – Zu den Funktionen eines modernen demokratischen Rechtsstaats in einer zunehmenden überstaatlichen Welt, Bern: Stämpfli, 1995.

15 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.15 "Peter Saladin, Kunst der Verfassungserneuerung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Peter Saladin
Title: Die Kunst der Verfassungserneuerung
Edition(s): in: Der Staat als Aufgabe, Gedenkschrift für Max Imboden, ed. Peter Saladin and Luzius Wildhaber, Basel/ Stuttgart: Helbing & Lichtenhahn, 1972, pp. 269-292 (reprinted in: Die Kunst der Verfassungserneuerung, Schriften zur Verfassungsreform 1968-1996, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1998, pp. 15-36)

[Introduction/Historical Situation and Systematic Context]
The title of the essay by *Peter Saladin*, to be discussed further, "The art of renewing the constitution," has been selected to give the title of the author's collected essays by the editors. In fact, this essay appears very significant and representative for the author's writings, apart from his monographies "Grundrechte im Wandel" and "Verantwortung als Staatsprinzip" (see nos. 5.14 and 5.17 of this Legal Anthology). To some extent, with this essay Saladin follows the stacks of his academic teacher, Max Imboden (see no. 5.13 of this Legal Anthology).
Peter Saladin has practised this art of constitution-making extensively, as he participated in the unsuccessful attempt of a total revision of the Swiss Federal Constitution in the 1970s, and he has contributed a great deal to the successful Constitution of the Canton Berne of June 1993. With vivid interest he followed the progress of the constitutional reform process, leading to the Swiss Federal Constitution of April 1999; however, he could no longer participate in an active way and died before the renewed Constitution entered into validity.

[Content, Abstracts/Conclusions, Insights, Evidence]
With practice in constitution-making, jurisprudence in the domain of public law becomes practical and therefore definitely enters the realm of legal philosophical thought. *Peter Saladin* addresses this practice with the qualification as an art, not as artistry as the output is radically different from artificial. It is commonly known, that the initiative and courage of this attempt to renew the constitution failed and gave way to an all too modest partly technocratic process of tracking the valid constitutional law and re-formulating its substance in the second half decade of the 1990s. However, the impetus of the first attempt is worth to be reconsidered, even after having experienced the success of the second approach.
In judging the opportunity, *Peter Saladin* perfectly agrees with his academic teacher *Max Imboden*. His approach is to be considered as heuristic, as he identifies the necessity of re-

thinking, of thinking over the existing constitutional order, proposes a method to adopt and identifies the following priorities: the environment is to be analysed, human dignity to be secured, political models have to be evaluated and finally leading ideas and concepts have to be elaborated. The author is fully aware that his conception means to start a process with an open ending, depending on what should remain and what has to be renewed. His leading ideas do not only reflect the status quo of constitutional thought within the political society: "Sie machen nicht die Grundideen der politischen Gemeinschaft aus, sondern sie müssen schlagwortartig, exemplifizierend, einprägsam anzeigen, wie die Grundideen in der historischen Situation von heute und morgen eine neue politische Ordnung gestalten sollen. Die Leitmotive müssen nicht nur rational einleuchten, sondern auch in einer seelischen Schicht anklingen".
Peter Saladin's intention is to enlarge the process of constitution-making into the future and to respect the needs of human circumstances and the natural environment (two guidelines that have been elaborated separately by the author). Within the process, even such old-conduced and approved concepts as Swiss federalism have to be questioned and taken into consideration. "Für die Verfassunggebung – und vor allem für eine eigentliche Neuschöpfung der Verfassung – genügt heute nicht mehr, was wir mit berechtigter Bewunderung den Vätern unserer geltenden Bundesverfassung zurechnen: Weitblick, Intuition, staatsmännische Einsicht in das politisch Fruchtbare und Tragbare. All diese Tugenden müssen zwar auch die Verfassungsschöpfer von heute und morgen auszeichnen. Sie bedürfen aber notwendig der Ergänzung durch die Bereitschaft, Analysen und Modelle systematisch zu erarbeiten". Thereby, jurisprudence is taken into obligation and responsibility, however not in the sense of an academical exercise, but rather in a truly creative way, in order to complement the crucial task for the political community.

[Further Information About the Author]
Peter Saladin, born 4 February 1935 in Basel, died 25 May 1997 in Berne, studied jurisprudence at the University of Basel, where he received a doctorate in 1961, being a scholar of *Max Imboden*. After having practised as a lawyer, he went to the *Freie Universität Berlin* and to the Michigan Law School in 1962/1963. He then joined the federal administration, worked for the federal department of justice and was secretary of the scientific council. In 1969 he presented his habilitation thesis, a standard work on "Grundrechte im Wandel", published 1970. From 1972 he was ordinary professor for public law at the University of Basel, and between 1976 until his death he was professor for constitutional and administrative law at the University of Berne. He was mainly occupied with public church law, invested himself to the promotion of ecology and claimed rights of nature, and intended to also take into consideration the rights of future generations. His core interest remained the preservation of the dignity of every single human being. In 1991 he received the honour of doctor honoris causa by the University of Geneva.
Our interest in his broad publications consists in his revolution of the doctrine of rule of

law by introducing the concept of responsibility into the legal order.
For further information, please consult:
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[Selected Works of the Same Author]
Peter Saladin: Grundrechte im Wandel – Die Rechtsprechung des Schweizerischen Bundesgerichts zu den Grundrechten in einer sich ändernden Umwelt. Bern: Stämpfli & Cie. AG, 3. ed. 1982 (extract); *Idem*: Kleinstaaten mit Zukunft? In: Die Kunst der Verfassungsreneuerung, Schriften zur Verfassungsreform 1968-1996, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1998, pp. 361ss.; *Idem*: Unerfüllte Bundesverfassung? In: Hundert Jahre Bundesverfassung 1874-1984, Die Bundesverfassung gestern, heute, morgen (Zeitschrift für Schweizerisches Recht, N. S. vol. 93, vol. 3/ 4, pp. 307ss.), Basel: Helbing & Lichtenhahn, 1974.

[For Further Reading]
Max Imboden: Helvetisches Malaise, in: Staat und Recht, Ausgewählte Schriften und Vorträge, Basel/ Stuttgart: Helbing & Lichtenhahn, 1971, pp. 279-307 (first printing in: Polis, Evangelische Zeitbuchreihe, vol. 20, Zürich: EVZ-Verlag, 1964).

1 December 2017 *Michael Walter Hebeisen*

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Entry 5.17 "Peter Saladin, Verantwortung als Staatsprinzip"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Peter Saladin
Title: Verantwortung als Staatsprinzip – Ein neuer Schlüssel zur Lehre vom modernen Rechtsstaat
Edition(s): Bern/ Stuttgart: Paul Haupt, 1984, pp. 40-81

[Introduction/Historical Situation and Systematic Context]
To found human rights and individual freedoms on responsibility in modern times goes back to the conception of constitutional rights in *Max Weber*'s understanding, comprehensive sociology (see *Winfried Brugger*: Menschenrechtsethos und Verantwortungspolitik – Max Webers Beitrag zur Analyse und Begründung der Menschenrechte, Freiburg und München: Karl Alber, 1980). In modern theory of democracy, the concept of responsibility has been explored as a founding principle by *Amitai Etzioni* (Die Verantwortungsgesellschaft – Individualismus und Moral in der heutigen Demokratie (The New Golden Rule – Community and Morality in a Democratic Society). Frankfurt am Main/New York: Campus, 1997). Responsibility has also been discussed in the tension between freedom and democracy (compare *Eberhard Döring / Walter Döring*: Philosophie der Demokratie bei Kant und Popper – Zum Verhältnis von Freiheit und Verantwortung, Berlin: Akademie-Verlag, 1995). A classical writing in this context has become *Jonas, Hans*: Das Prinzip Verantwortung – Versuch einer Ethik für die technologische Zivilisation (Suhrkamp Taschenbuch, vol. 1085, Frankfurt am Main: Suhrkamp, 1984; for a comprehensive interpretation see *Jörg Schubert*: Das "Prinzip Verantwortung" als verfassungsstaatliches Rechtsprinzip – Rechtsphilosophische und verfassungsrechtliche Betrachtungen zur Verantwortungsethik von Hans Jonas (Studien zur Rechtsphilosophie und Rechtstheorie, vol. 18; Dissertation Universität Bayreuth 1998). Baden-Baden: Nomos, 1998). In a sociological and anthropological dimension, responsibility is endangered by the tendency to render duties anonymous (*Paul Trappe*: Über die Anonymisierung von Verantwortung, in: Recht und Gesellschaft, Festschrift für Helmut Schelsky zum 65. Geburtstag, ed. Friedrich Kaulbach and Werner Krawietz, Berlin: Duncker & Humblot, 1978; compare the well-known thesis by *Ulrich Beck*, according to which dangers and risks tend to be distributed democratically: Risikogesellschaft, Auf dem Weg in eine andere Moderne, Frankfurt am Main: Suhrkamp, 1986). In Switzerland an early collective volume is to be mentioned, focusing on the relation between humanism and responsibility (und politische Verantwortung, Erlenbach-Zürich/ Stuttgart: Eugen Rentsch, 1964). This selection is far away from being representative and shows the virulence of the concept of responsibility in scientific

disciplines with diverse methodologies.

[Content, Abstracts/Conclusions, Insights, Evidence]
Peter Saladin has provided a fecund application of the principle of responsibility in the domain of state theory in his book from 1984, entitled "Verantwortung als Staatsprinzip", and he has proposed it as a key for a better understanding of the modern state, based on rule of law. We skip the analytical attempt to define responsibility in a pragmatic and topological manner, and enter the discussion, where it comes to identify responsibility as a constitutive element of various principles of the modern state and of the rule of law. Separation of powers, representation, participation and fundamental rights are detected as such domains, where divided responsibility takes place. The problem lies in the form of division, every aspect of responsibility allows, in contrast to a personal duty. However, this tendency is not only to be considered as a deficiency, but also as enabling to share heavy burdens one single person could never bear.
Peter Saladin continues reflections made by *Montesquieu, John Locke, Edmund Burke, Emmanuel de Sieyès*, and *Jean-Jacques Rousseau* and comes to the conclusion that responsibility is the counterpart to freedom, as duties are the counterpart to rights. However, during the nineteenth century, this connection has been too weak and feeble. "Erst im 20. Jahrhundert setzte sich der Gedanke durch, dass die Gewährleistung rechtlicher Freiheit notwendig das Überbinden rechtlicher Verantwortung einschliesst – notwendig im logischen und im sozialen Sinn: Freiheit jedes einzelnen ist – dies freilich schon die Erkenntnis der klassischen Menschenrechtserklärungen – nicht denkbar ohne Repekt jedes einzelnen vor der Freiheit jedes anderen; und soziale Ziele lassen sich nicht erreichen, wenn sie die Macht des 'Freien' nicht paart mit rechtlich fixierter Verantwortung für die sozial-orientierte Ausübung seiner Freiheit".
The question of legal responsibility for the pre-conditions to act as a collective in freedom, directly leads to the conceptions of tasks as concrete duties: "Eine Lehre der Staats-Verantwortung ist damit notwendig eine Lehre der Staatsaufgaben und der Voraussetzungen und Verfahren, wie diese ermittel, festgelgt und erfüllt werden können". Such assignments of duties to the state as such and to its organs, become problematic when it comes to fulfilling social rights, to allocate collective goods. "Der Mangel an systematischem Nachdenken über Staatsaufgaben – allgemeiner: über Staatszwecke – ist mit-schuldig am oft beklagten Schwinden der Überzeugung von Sinn und Notwendigkeit des modernen 'westlichen' Staates. [...] Die inhaltliche Beliebigkeit, die der Glaube an ausschliesslich prozedurale Legitimation impliziert, ist ein Luxus, den wir uns nicht mehr leisten können". We have undertaken an attempt to analyse the structure of finalistic determination of state action in our monography on "Staatszweck, Staatsziele und Staatsaufgaben – Leistungen und Grenzen einer juristischen Behandlung von Leitideen der Staatstätigkeit", re-constructing the foundations of the teleological determination of responsibility within the history of ideas, in retrospect (Chur/ Zürich: Rüegger, 1996). *Peter Saladin* himself has – with our collaboration – asked the critical question about the sense of the state in the future (Wozu noch Staaten? – Zu den Funktionen eines modernen

demokratischen Rechtsstaats in einer zunehmend überstaatlichen Welt, Bern: Stämpfli, 1995). Hereby the analytical identification of responsibility as a founding principle of the modern state based on the rule of law is continued in prospective.

[Further Information About the Author]
Peter Saladin, born 4 February 1935 in Basel, died 25 May 1997 in Berne, studied jurisprudence at the University of Basel, where he received a doctorate in 1961, being a scholar of *Max Imboden*. After having practised as a lawyer, he went to the *Freie Universität Berlin* and to the Michigan Law School in 1962/1963. He then joined the federal administration, worked for the federal department of justice and was secretary of the scientific council. In 1969 he presented his habilitation thesis, a standard work on "Grundrechte im Wandel", published in 1970. From 1972 he was ordinary professor for public law at the University of Basel, and between 1976 until his death he was professor of constitutional and administrative law at the University of Berne. He was mainly occupied with public church law, invested himself to the promotion of ecology and claimed rights of nature, and intended to also take into consideration the rights of future generations. His core interest remained the preservation of the dignity of every single human being. In 1991 he received the honour of doctor *honoris causa* by the University of Geneva.
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Peter Saladin: Grundrechte im Wandel – Die Rechtsprechung des Schweizerischen Bundesgerichts zu den Grundrechten in einer sich ändernden Umwelt. Bern: Stämpfli & Cie. AG, 3rd ed. 1982; *Idem*: Kleinstaaten mit Zukunft? In: Die Kunst der Verfassungsreneuerung, Schriften zur Verfassungsreform 1968-1996, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1998, pp. 361 ss.; *Idem*: Unerfüllte Bundesverfassung? In: Hundert Jahre Bundesverfassung 1874-1984, Die Bundesverfassung gestern, heute, morgen (Zeitschrift für Schweizerisches Recht, N. S. vol. 93, vol. 3/ 4, pp. 307 ss.), Basel: Helbing & Lichtenhahn, 1974.

[For Further Reading]
Peter Saladin: Wozu noch Staaten? – Zu den Funktionen eines modernen demokratischen Rechtsstaats in einer zunehmenden überstaatlichen Welt, Bern: Stämpfli, 1995.

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5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 5.19 "Michael Walter Hebeisen, Verfassung als Vermittlerin"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Michael Walter Hebeisen
Title: Die Verfassung als Vermittlerin von Wert- und Gerechtigkeitsvorstellungen? – Geisteswissenschaftliche Überlegungen zum Wert der Verfassung als Hilfe auf dem Weg zum gerechten Zusammenleben von Menschen und Völkern
Edition(s): in: Herausgeforderte Verfassung – Die Schweiz im globalen Kontext (16. Kolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften), ed. Beat Sitter-Liver, Freiburg: Universitätsverlag, 1999, pp. 133 ss.

[Further Information About the Author]
Michael Walter Hebeisen, born on 9th January 1965, after having studied violoncello and musicology at the Conservatory of Berne, followed his studies in jurisprudence at the University of Berne, with semesters abroad at the University of Cambridge. He graduated in 1992 and received his doctorate in 1994, after having collaborated with doctor father *Peter Saladin*.
He then changed for a period of seven years to the Federal Office of Justice, in an entity that was occupied with the preparation of the reform, i.e. the total revision of the Swiss Federal Constitution. In addition, he got a habilitation scholarship from the Swiss National Foundation for Scientific Research, under the survey of *Peter Häberle*, which enabled him to pursue an old-fashioned post-doc journey across Europe. He travelled to Oxford University (University College), where he assisted and contributed to the ongoing reform of British Constitution by the shadow Cabinet of the Labour Party. Back on the Continent, he directed to the "*Dilthey Forschungtsstelle*" and "*Hegel-Archiv*" at Ruhr University of Bochum and to the Humboldt University in Berlin. After a short residence at the "*Faculté de droit de l'Université de Toulouse*" where he studied the theory of *Jean-Claude-Eugène-Maurice Hauriou*, he settled for a long time in Naples where he established contacts with the philosophers of the School of Neo-Historicism, i.e. with *Fulvio Tessitore*, *Giuseppe Cacciatore*, *Giuseppe Cantillo* among others. In consequence of his fascination with the tradition of these thinkers, he undertook to translate selected works by Pietro Piovani (9 volumes), Giuseppe Capograssi (6 volumes), Giovanni Gentile (11 volumes) and eventually plans an Edition of the works of Bertrando Spaventa (6 volumes).
Back in his home country, he is established as an eminent thinker in the domain of legal philosophy as well as theory of the human sciences.

[Selected Works of the Same Author]
Michael Walter Hebeisen: Souveränität in Frage gestellt – Die Souveränitätslehren von Hans

Kelsen, Carl Schmitt und Hermann Heller im Vergleich (Dissertation Universität Bern 1994), Baden-Baden: Nomos 1995 (extract); *Idem*: Staat und Recht als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als Geisteswissenschaften, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2004, pp. 395-456; *Idem*: Krise der universellen Rechtsidee angesichts des Pluralismus der positiven Rechtsordnungen – Pragmatische Nachforschungen aufgrund der Institutionenlehren von Jean-Eugène-Claude Hauriou und Santi Romano, in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 1-65; *Idem*: Die Verfassung als Vermittlerin von Wert- und Gerechtigkeitsvorstellungen? – Geisteswissenschaftliche Überlegungen zum Wert der Verfassung als Hilfe auf dem Weg zum gerechten Zusammenleben von Menschen und Völkern, in: Herausgeforderte Verfassung – Die Schweiz im globalen Kontext (16. Kolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften), ed. Beat Sitter-Liver, Freiburg: Universitätsverlag, 1999, pp. 133 ss.; *Idem*: Schweizer Juristen-Philosophen – Eine eigenständige schweizerische Tradition der Wissenschaftsphilosophie der Jurisprudenz und der Staatslehre in Auseinandersetzungen mit ausgewählten Strömungen der Rechts- und der Staatsphilosophie sowie der Wissenschaftstheorie in der ersten Hälfte des Zwanzigsten Jahrhunderts (Eine programmatische Skizze für ein interdisziplinäres Forschungsvorhaben), in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 50, ed. Peter Häberle, Tübingen: J. C. B. Mohr/ Siebeck, pp. 69-100 (extended version in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 651-711); *Idem*: Liberalismus und Kommunitarismus betreffend das Verhältnis des Rechten zum Guten – Prinzipielle Opposition oder pragmatische Annäherung, Vorrang oder Unabhängigkeit? In: Archiv für Rechts- und Sozialphilosophie (ARSP), supplementary vol. 76, ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2000, pp. 119 ss.; *Idem*: Note sulla filosofia del diritto di Pietro Piovani – Appunti di un giurista ultramontano, Referat gehalten am Studienseminar aus Anlass des 20. Todestages von Pietro Piovani in Neapel vom 29. Juni bis 1. Juli 2000, in: Archivio di storia della cultura (Firenze: Liguori), vol. 14 (2001), ed. Fulvio Tessitore, pp. 289-305; *Idem*: „An sich redet Alles, was ist, das Ja" – Zur Verwendung Friedrich Nietzsches durch den Rechtsphilosophen Carl August Emge, Referat, gehalten auf dem internationalen Kongress der Stiftung Weimarer Klassik „Missbrauch, Ereignis und Kritik – Zur deutschen Nietzsche-Rezeption zwischen 1933 und 1945", in: Widersprüche – Zur frühen Nietzsche-Rezeption, ed. Andreas Schirmer and Rüdiger Schmidt, Weimar: Hermann Böhlaus Nachfolger, 2001, pp. 291 ss., also published in: Nietzsche und das Recht (Archiv für Rechts- und Sozialphilosophie, supplementary volume 77), ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2001, pp. 219 ss.; *Idem*: Geschichte der Vergangenheit, Geschichten für die Zukunft in: Erzählungen des Staates, ed. Otto Depenheuer, Wiesbaden: VS Verlag für

Sozialwissenschaften, 2010, pp. 35 ss.; *Idem*: Souveränität bei Otto Kirchheimer – Das Dogma der Souveränität zwischen Staatslehre und Politikwissenschaften, in: Otto Kirchheimers Staatsverständnis, ed. Robert Christian van Ooyen and Frank Schale (Reihe „Staatsverständnisse", ed. Rüdiger Voigt), Baden-Baden: Nomos Verlagsgesellschaft 2010, pp. 87-117; *Idem*: Vom ästhetisch-poëtischen Grundzug des modernen Verständnisses von Geschichte – Im Besonderen von der Urteilskraft in Iurisprudenz und Staatslehre als Geisteswissenschaften, in: Moderne und Historizität, ed. for the „Klassik Stiftung Weimar" by Stefan Wilke, Weimar: Verlag der Bauhaus-Universität Weimar, 2011, pp. 134-164.

28 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Sixth Section "Swiss Theories of (Direct or Semi-Direct) Democracy and Political Thought – Participation, Representation in a Strong Civil Society"
Introduction
by Michael Walter Hebeisen

> "Stets hat *Jean-Jacques Rousseau* den Gedanken des absolut Richtigen und Gerechten im Sinn einer Grösse, die dem Menschen verfügbar wäre, verworfen. Das unterscheidet ihn klar vom Standpunkt des Doktrinärs, der sich anmasst, seine Erkenntnis anderen als die unbedingte und allgemein gültige aufzudrängen." (*Richard Bäumlin*: Rousseau und die Theorie des demokratischen Rechtsstaates, in: Berner Festgabe zum Schweizerischen Juristentag 1979, ed. Eugen Bucher and Peter Saladin, Bern: Paul Haupt, 1979)

[Sixth Section: "Swiss Theories of (Direct or Semi-Direct) Democracy and Political Thought – Participation, Representation in a Strong Civil Society"]

[Introduction: The Swiss Political System Between Participation and Representation]
The crucial question to be discussed has been addressed by *Richard Bäumlin*, when he offered an alternative between a vivid democracy and a subdued democracy (Lebendige oder gebändigte Demokratie? Demokratisierung, Verfassung und Verfassungsrevision, Basel: Z-Verlag, 1978; see entry 6.10 of this Legal Anthology). Evidently, the answer to this question depends on the interpretation of *Jean-Jacques Rousseau*. If the fear of a totalitarian misunderstanding can be discarded, there is no reason not to opt for a vivid civil society and for a strong concept of democratic participation (see entry 6.11 of this Legal Anthology).
When describing traditional elements, dogmatic democracy and continuous development as an equilibrium, *Fritz Fleiner* has not really opted to take side between between these two options (entry 6.3 of this Legal Anthology). Neither did so *Walther Burckhardt* when he discussed the concept of authority within a semi-direct democracy (see entry 6.4 of this Legal Anthology). It is only *Zaccaria Giacometti*, who explicitly argues that democracy is not menacing human rights and individual freedoms, but rather securing them (Die Demokratie als Hüterin der Menschenrechte, in: Festreden zur 121. Stiftungsfeier der Universität Zürich, in: Jahresberichte der Universität Zürich, vols. 1954, pp. 3-23).
Apparently, the solution to the crucial problem of democracy, the rule of law, and human rights consists in identifying the core values within the constitutional legal order, or the

codified political system of Swiss democracy. This approach has been undertaken by *Werner Nef*, in his attempt to distil the order of values underlying the constitution (see entry 6.5 of this Legal Anthology), and equally by *Werner Kägi*, in his effort to provide a synthesis of democracy and the rule of law (see entry 6.6 of this Legal Anthology). These two initiatives at conceptualisation, however, are not open to fully fledged and veritable democratic discourse, as they take the pre-existing order for a given and everlasting. In order to proceed to a more sophisticated conception of the problems in cause, we have to reconsider the theory of the different forms of government and not only to revisit it, but rather to revise it, as *Max Imboden* has proposed (see entry 6.8 of this Legal Anthology). Nevertheless, one important question seems to remain unresolved, namely whether there are some ground-laying values to be rescued from free democratic decision. In his political-philosophical writing on "Democratic Justice" published in 1993, *Jörg Paul Müller* has answered this question in the positive, affirmative sense (see entry 6.13 of this Legal Anthology). Subsequently, in a more recent writing on the "Constitution of Democracy" published in 2002, the same author has modified his former conviction and has renounced to fundamental values within the constitutional order of democracy, with the exception of abstract fundamental qualifications (see entry 6.14 of this Legal Anthology), according to our reading and following our opinion.

[A Theory of Representation as a Complement to the Theory of Democracy]
Semi-direct democracy as a characteristic of the Swiss political and constitutional system would deserve a proper theory of representation, in complement to direct democratic participation, as a matter of fact. For it is the interplay of representative and participatory forces, that actually produces the checks and balances within the Swiss Federal Constitutions. Such a theory of representation has been discussed in times of the French Revolution, and a scientific attempt to found such a theory has been undertaken by *Gerhard Leibholz* in German "Weimar Republic". In Switzerland, however, there is an apparent lack of such an approach to representation in connection to direct-democratic participation (maybe with the exception of the doctoral dissertation by *Kurt Zwyssig*).

[The Enduring Meaning of the Theory of *Pouvoir Constitutant* – The Question of Constraints to the Process of Constitution-Making]
In Swiss constitutional law the question of material restrictions or constraints to the process of Constitution-Making has repeatedly been discussed (*Hans Nef*: Materielle Schranken der Verfassungsrevision, in: Zeitschrift für Schweizerisches Recht, vol. 1942/ I, Basel: Helbing & Lichtenhahn, 1942, pp. 108 ss.; *Hans Haug*: Die Schranken der Verfassungsrevision, St. Gallen, 1947; *Paul Siegenthaler*: Die materiellen Schranken der Verfassungsrevision als Problem des positiven Rechts. Verlag Stämpfli und Cie AG, Bern 1970; *Jörg Paul Müller*: Materiale Schranken der Verfassungsrevision? In: Festschrift für Hans Haug, Bern 1986,pp. 195 ss.; *Luzius Wildhaber*: Rechtsfragen der Verfassungsrevision – Materielle Schranken, materielle Totalrevision, Abstimmungsverfahren bei Totalrevision, in: Aktuelle Probleme des Staats- und Verwaltungsrechts, Festschrift für Otto K. Kauf-

mann, Bern/ Stuttgart: P. Haupt, 1989, pp. 43 ss.; and *Martin Kayser*: Grundrechte als Schranke der schweizerischen Verfassungsgebung – Ein Beitrag zur Lehre von den materiellen Schranken der Verfassungsrevision, in: Zürcher Studien zum öffentlichen Recht, vol. 140, Zürich: Schulthess, 2001) and attempts have been made to identify a kernel that would not be open to the access of the *Pouvoir Constituant* in the course of a revision of the constitution (compare *Walter Jellinek*: Grenzen der Verfassungsgesetzgebung, Berlin: Springer, 1931). Such temptations (as the pseudo solution adopted by the "Bonner Grundgesetz") may apparently have the appeal of legal-philosophical argumentation, however they do not hit the core of the question. According to *Walter Burckhardt*, not even the constitutional dispositions about the revision of the constitution itself can claim a binding character (Einleitung, in: Kommentar der schweizerischen Bundesverfassung vom 29. Mai 1874, Bern: Stämpfli & Cie, 1st ed. 1905, p. 6 s.). In a truly republican sense, the constitution-making body, i.e. the *Pouvoir Constituant* is totally free from obligations deriving from the former legal order. Nevertheless, it would be appropriate to speak of "Realien der Verfassunggebung", of "binding realities for constitution-making" in the sense established by *Eugen Huber* in the perspective of the process of codification of the private or civil law (apart from the binding force of *ius cogens* and of the international legal order in general). If ever, such restrictions have to be stated by international law, or they refer to generic ideas underlying every legal order, as in particular the guarantee of human dignity (*Philippe Mastronardi*: Menschenwürde als materielle "Grundnorm" des Rechtsstaates, in: Verfassungsrecht der Schweiz, ed. Daniel Thürer, Jean-François Aubert and Jörg Paul Müller, assisstance Oliver Diggelmann, Zürich: Schulthess, 2001, pp. 233 ss.), or the principles of rule of law or due process of law (*Martin Luchsinger*: Die Prinzipien des Rechtsstaates als materielle Schranken der Verfassungsrevision, Zürich, 1960).

[For Further Reading]
Gerhard Leibholz: Das Wesen der Repräsentation unter besonderer Berücksichtigung des Repräsentativsystems − Ein Beitrag zur allgemeinen Staats- und Verfassungslehre, in: Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, ed. Viktor Bruns, Nr. 13, Berlin/ Leipzig: Walter de Gruyter, 1929;
Giuseppe Sartori: Demokratietheorie, Darmstadt: Wissenschaftliche Buchgesellschaft, 1992;
Kurt Zwyssig: Repräsentation – Versuch einer neuen Repräsentationstheorie (Dissertation Universität Zürich), Zürich: Schulthess Polygraphischer Verlag, 1971.

27 January 2018 (revised on 19 July) *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
6th Section "Swiss Theories of (Direct or Semi-Direct) Democracy and Political Thought – Participation, Representation in a Strong Civil Society"
Entry 6.3 "Fritz Fleiner, Tradition Dogma Entwicklung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Fritz Fleiner
Title: Tradition, Dogma, Entwicklung als aufbauende Kräfte der schweizerischen Demokratie
Edition(s): in: Ausgewählte Schriften und Reden, Zürich: Polygraphischer Verlag AG, 1941, S. 288-302 (first printing Zürich: Orell Füssli, 1933)

[Introduction/Historical Situation and Systematic Context]
Legal order can be dogmatically understood as an attempt to make the constant change in legal life and legal experience more constant and continuous. Within the process of legislation, legal politics stand for the potential possibility to change legal order and to adapt it to the new needs of the time, whereas jurisprudence with the dogmatical structure of its concepts and institutions stands for resistance to such developments, even if it often not represents the static element, but rather contributes a lot to adapt the legal order to changing circumstances, by appealing to legal principles.
We have already encountered the dynamic conception of change and development in *Fritz Fleiner*'s inaugural lecture at the University of Zurich (see no. 4.1 of this Legal Anthology) as well as in its thematic complement from 1934, entitled "Wandlungen der demokratischen Ideen". These contributions evidently stand under the impression of the menace from German totalitarianism. In this situation, it is an urgent requirement to identify the cultural forces that have enabled Switzerland has overcome abstract political theories by concrete political ideas.

[Content, Abstracts/Conclusions, Insights, Evidence]
The starting point of the according argumentation, and the main interest of *Fritz Fleiner* consists in determining the crucial deviations of the Swiss political system from both parliamentary system and autocratical government. The Swiss Federal State appears as the antithetical conception to both of these: "Die Schweiz ist in Europa das demokratischste, aber am weitesten vom Parlamentarismus entfernte Land, und andererseits steht sie in ihrer Verehrung des Satzes, dass die Mehrheit König ist, in vollem Gegensatz zu jeder Form der Diktatur. Diese Besonderheiten lassen sich nur aus geschichtlichen Verhältnissen und durch den Hinweis auf die im Volke ruhenden Vorstellungen über das staatliche Zusammenleben erklären. Sie sind durch bestimmte geistige Kräfte ans Licht gezogen und zur Entfaltung gebracht worden. Unter diesen schöpferischen Kräften kommt der Tradition, dem politischen Dogma und dem Gedanken der Entwicklung eine überragende Bedeutung zu". We skip tradition and dogmatism as building principles of Swiss juridical-

political system, where constant reference is made to *Jean-Jacques Rousseau* and his theories as guiding principles.
We directly jump to the third-mentioned element of permanent change, of continuous development as an integrated force in the Swiss political system. By means of this idea, it occurs a replacement of static views by a dynamic conception of institutions, included the nation state. "Die Schweiz hat konservative und vorwärtstreibende Kräfte des Staatslebens organischer als ein anderer Staat – England ausgenommen – zu einer Einheit zusammengefasst und Gemeinschaft und Individuum verbunden. Das Unreflektierte verflicht sich in unserer Verfassungsentwicklung mit der bewussten Rechtsschöpfung. Weil das schweizerische Verfassungsleben so stark in den besonderen geschichtlichen Zusammenhängen unseres Landes und den besonderen politischen Vorstellungen seiner Bürger verankert ist, so weicht der schweizerische Staat in so Vielem von den herrschenden wissenschaftlichen Lehren über die Demokratie ab". Dynamic alterations of the constitutional order have accompanied the historical revisions of the Swiss Federal Constitution at least from May 1874, if not from the very beginning in 1848 or from the failed attempts in 1861, and they continue in the Twentieth Century in the way of partial revisions, crossing many declared crisis, to lead to the intent of a total revision of the formal Constitution in the 1970s, in succession to a malaise, analysed by *Max Imboden*, in order to come to its conclusion in the 1990s with the successful revision process based on the will to trace all valid constitutional rules and to express them textually, leading to the adoption of the revised Constitution in April 1999.

[Further Information About the Author]
Fritz Fleiner, born 24 January 1867 in Aarau, died 26 October 1937 in Ascona, received his academic education at the Universities of Zurich, Leipzig, Berlin and Paris, before he was promoted and habilitated in public law of the religion communities in 1890 and 1892, and in consequence was private lecturer and later extraordinary professor at the University of Zurich from 1892 on. In 1897, he settled over to the University of Basel, where he was as an ordinary professor in charge of public law, i.e. federal constitutional and administrative law. In 1906, he was called to the University of Tubingen, in 1908 he changed to the University of Heidelberg, elaborating a masterful work on the "Institutionen des Deutschen Verwaltungsrecht" (1911), a general theory of the administrative law, that stands in the tradition of the famous *Otto Mayer*.
Between 1915 and 1936 he had the ordinary chair at the University of Zurich, back in his home country, where in 1916 he held his famous inaugural lecture in subject of "Entwicklung und Wandlung moderner Staatstheorien in der Schweiz". He virtually indtroduced modern administrative studies to Switzerland. In 1923 he published his main work about "Schweizerisches Bundesstaatsrecht", later further developed together with his colleague *Zaccaria Giacometti*. He had a liberal mentality and a specific historical and political approach to public law, and he therefore intended to strengthen the rule of law, the fundamental liberties and freedoms and he promoted the establishment and enlargement of a constitutional and administrative jurisdiction.

For further information, please consult:
A. Im Hof: Fritz Fleiner, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 455ss.;
Felix Renner: Der Verfassungsbegriff im staatsrechtlichen Denken der Schweiz im 19. und 20. Jahrhundert (Dissertation Universität Zürich), Zürich: Schulthess & Co., 1968, pp. 270 ss.;
Giovanni Biaggini: Fritz Fleiner, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 111 ss.

[Selected Works of the Same Author]
Fritz Fleiner: Institutionen des deutschen Verwaltungsrechts, Tübingen: J. C. B. Mohr, 8. ed. 1928; *Idem*: Ausgewählte Schriften und Reden, Zürich: Polyagraphischer Verlag AG, 1941; *Idem*: Entstehung und Wandlung modernen Staatstheorien in der Schweiz, in: Ausgewählte Schriften und Reden, Zürich: Polygraphischer Verlag AG, 1941, pp. 163ss.; *Idem* (later editions together with *Zaccaria Giacometti*): Schweizerisches Bundesstaatsrecht, Tübingen: J. C. B. Mohr, 1923 (3. ed. Zürich: Polygraphischer Verlag, 1949; reprint 1969).

1 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
6th Section "Swiss Theories of (Direct or Semi-Direct) Democracy and Political Thought – Participation, Representation in a Strong Civil Society"
Entry 6.5 "Hans Nef, Wertordnung der Bundesverfassung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Hans Nef
Title: Die Wertordnung der schweizerischen Bundesverfassung
Edition(s): in: Verfassungsrecht und Verfassungswirklichkeit – Festschrift für Hans Huber zum 60. Geburtstag, Bern: Stämpfli & Cie., 1961, pp. 190-205

[Introduction/Historical Situation and Systematic Context]
Where can the intrinsic relation of the law to values consist, if law is concepted as merely outer behaviour in concordance with ethical values? It could be a case of mental reservation or of blind obedience to the directives of a commander – but would it be a true obedience to law, then? Why do people obey the law (see *Tom Tyler*: Why People Obey the Law, New Haven/London: Yale University Press, 1990)? And what does this reason matter when it comes to judge legal behaviour? It does matter because the law is rooted deeper in the basic structure of normativity and a will with a universal character, i.e. a will valid *erga omnes* as it unifies the subjective and the objective element or moment of will (in Hegelian terminology). Significant, yet decisive will not be the difference, but rather the bridge built between the various kinds of values, i.e. the consistent system of values.
If a material concept of law is adopted, such a foundation within a philosophical system would be indispensable. Without, one will not be able to decide neither the value in case, nor the priority between more than one concurring or conflicting values. In the domain of ethics, such questions are often discussed as collision between moral or legal duties. The turn to a material concept of the constitution in Switzerland, as it has taken place after the Second World War, may do without such a philosophy of normative values, but it will suffer from this omission.

[Content, Abstracts/Conclusions, Insights, Evidence]
In a short essay in honour of *Hans Huber* from 1961, *Hans Nef* treats the questions deriving from such valuations for the constitutional order of the Swiss Federal Constitution. The core of the problem consists in the experience that not conflicting values can get in conflict to each other in the way of application to a concrete situation: “Viel wichtiger ist es für das Recht, dass Werte, die an sich nicht widersprüchlich sind, in der konkreten Situation sich widerstreiten können. Es kann die konkrete Situation bewirken, dass Werte in Konflikt geraten. So kann es zwischen Werten, die an sich nicht gegensätzlich sind, gerade dann zu Kollisionen kommen, wenn es um ihre Verwirklichung geht. [...] Das Recht aber hat es mit der Realisation der Werte zu tun. Und daher ist es für das Recht unausgesetzt von Aktualität, dass Werte, die an sich vereinbar sind, in der konkreten Situation, in der es

darum geht, sie zu verwirklichen, einander widersprechen können". The contrary experience is that people often agree to abstract principles in general, whereas the dissent, when it comes to a deduction to concrete norms in a specific case. This phenomenon, however, is highly significant for the adoption of the constitution itself, as a unilateral consensus can more easily be obtained concerning abstract value, and relatively abstract principles. Moreover, this procedure occurs on many different stages, in the way of dynamic and increasing concretisation of values within the process of legislation.
We shall skip the whole casuistic and directly come to the conclusion. However, the author does not provide any conclusion at all, since the highest value of freedom, as guaranteed by the constitution is restricted in many ways, following the rule of exceptions of the underlying freedom. The inclusive, undercurrent conclusion is that constitutional jurisdiction as a holistic systematic approach establishes the positive system of values within a legal order. Thus, such decisions concerning the priority of certain values above others cannot be made without constant reference to arguments that do not make explicitly part of the positive constitutional order.
Despite the title, that indicates a general purpose, the addressed problem is not developed further by *Hans Nef*. This highly desirable, but undelivered theory of legal values and their system in the way of application is symptomatically obliterated, though it appears as fundamental for the current of material constitutional thought, as practised by *Max Huber*, *Dietrich Schindler* (senior), *Werner Kägi*, and as become a standard or state of the art until its re-conception by *Jörg Paul Müller*.

[Further Information About the Author]
Hans Nef, born on 3 November 1911 in Herisau, died on 6 January 2000, has been the son of a docent for philosophy and literature. During his studies he signed as a member of the so-called "Kampfgruppe gegen den geistigen Terror". In 1936, he obtained his doctorate based on a dissertation thesis entitled "Recht und Moral in der deutschen Rechtsphilosophie seit Kant" from the University of Zurich. At the same University, he handed in his habilitation thesis in 1939 and got the *venia legendi* for legal philosophy and public law. In 1946, he was nominated ordinary professor and between 1967 and 1978 he signed as the president of the very same University.

[Selected Works of the Same Author]
Hans Nef: Recht und Moral in der deutschen Rechtsphilosophie seit Kant, Dissertation Universität Zürich, Fehr: St. Gallen, 1937; *Idem*: Demokratie und Richtigkeit des Rechts, in: Zentralblatt für Staats- und Gemeindeverwaltung, vol. 8 (1947), Nr. 17; *Idem*: Das Werturteil in der Rechtswissenschaft, in: Zeitschrift für Schweizerisches Recht, N. F. vol. 86, H. 2, Basel: Helbing & Lichtenhahn, 1967.

[For Further Reading]
Hans Nef: Recht und Moral in der deutschen Rechtsphilosophie seit Kant, Dissertation Universität Zürich, Fehr: St. Gallen, 1937.

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The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
6th Section "Swiss Theories of (Direct or Semi-Direct) Democracy and Political Thought – Participation, Representation in a Strong Civil Society"
Entry 6.6 "Werner Kägi, Rechtsstaat und Demokratie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Werner Kägi
Title: Rechtsstaat und Demokratie – Antinomie und Synthese
Edition(s): in: Demokratie und Rechtsstaat, Festgabe zum 60. Geburtstag von Zaccaria Giacometti, Zürich: Polygraphischer Verlag, 1953, pp. 107-142

[Introduction/Historical Situation and Systematic Context]
In his habilitation thesis from 1945, entitled "Die Verfassung als rechtliche Grundordnung des Staates – Untersuchungen über die Entwicklungstendenzen im modernen Verfassungsrecht", *Werner Kägi* has considerably tapered the dichotomy and antinomy of rule of law and democracy (compare no. 5.6 of this Legal Anthology). As a complement to this explicitly unresolved question, the author promised to reconcile the two concepts, under the impression of the recent synthesis. But how could such a reconciliation become possible within less than a decade? And what conceptualisation would enable the author to analyse and fortify such a desirable tendency?
"Die alte Problematik bleibt, und in vielen verfassungsrechtlichen und verfassungspolitischen Fragen der Gegenwart stossen wir immer wieder auf die Antinomie. / [...] Der Kern der Problematik liegt in einer ganz bestimmten Auffassung von der Demokratie, die wir die 'dezisinistisch-totalitäre' nennen möchten. Die Überwindung dieses Missverständnisses ist eine Schicksalsfrage der Demokratie wie des Rechtsstaates. Dieses Umdenken, das wohl nur in einer langen pädagogischen Arbeit schliesslich im politischen Leben zur Auswirkung kommen kann, muss jedenfalls mit einer Neubesinnung im Rechtsdenken beginnen". This task for jurisprudence is to demolish the mythical concept of democracy and cannot be done simply by postulating new concepts, according to *Werner Kägi*. However, the author himself had considerably contributed to the exaggeration of this mythos and not provided any usable conceptualisation in order to be able to discuss the old aporetic in a renewed context. And is there any hope to establish a new pattern of political thought in political life by means of paternalistic education, one is tempted to ask the author posthumously...

[Content, Abstracts/Conclusions, Insights, Evidence]
In his essay, *Werner Kägi* does no more refer to *Carl Schmitt* in order to identify the decisionistic legal thought, but rather to *Jean-Jacques Rousseau* and *Abbé de Sieyès*. This thought is characterised by majority being the sovereign instance, that is deciding absolutely, that unifies all possible competences, unbound by any form of decision, and that cannot be represented and therefore is indivisible, whose decisions are just and stand

for the will of God as a kind of democratic Leviathan. In every respect, this is not the case, as the people is included in the constitutional frame of decision-making. This framework of the constitutional competences and function is destined to become more and more void and obsolete, according to the author. In terms of apocalypse the question how to reconcile the rule of law with democracy is addressed as the core question for the future of western civilisation. But this appears only as one of the few overestimations of the author. Proposed is a battle for rule of law as a necessity to conquer the dogmas of "decisionistic democratism", transliterated from the words of the author.
In reality, however, this highly dogmatic, polemically pointed sketch is not taking place. The doctrinaire analysis and diagnosis are not true, as everything is just the other way around. *Werner Kägi* even rescues himself to the promise that democracy has a specific vocation to make the rule of law come true! And he adds that democracy be a highly human order adequate for a politically matured people! At the very end, however, the crisis and the menacing totalitarianism of democracy (*sic*!) is addressed once more, this in function of the author's proposition to make little steps in this battle about the rule of law in everyday political life, having the ideal of reconciliation of democracy and the rule of law before his eyes. Obviously, the author has not been able himself to make a little step forward within the period of a decade in order to present an appropriate vocabulary and adequate concepts to deal with the problem he is addressing as the main challenge for human life in community, governed by the rule of law.

[Further Information About the Author]
Werner Kägi, born on 26 August 1909 in Biel, died on 4 October 2005 in Zurich, persecuted his studies in jurisprudence and theology in Zurich, Berlin (with *Dietrich Bonhoeffer*), and London. In 1937, he handed in his promotion at the University of Zurich (with *Zaccaria Giacometti*). By the end of the Second World War he published a widely recognised habilitation thesis, entitled "Die Verfassung als rechtliche Grundordnung des Staates". From 1952 to 1979, he signed as an ordinary professor for public law, international law and church law at the University of Zurich. In 1973, he received a doctor's degree *honoris causa* of the University of Berne.
For more information, please consult:
Walter Haller: Werner Kägi, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 779 ss.;
Felix Renner: Der Verfassungsbegriff im staatsrechtlichen Denken der Schweiz im 19. und 20. Jahrhundert (Dissertation Universität Zürich), Zürich: Schulthess & Co., 1968, pp. 479 ss.

[Selected Works of the Same Author]
Werner Kägi: Zur Entstehung, Wandlung und Problematik des Gewaltenteilungsprinzipes (Dissertation Universität Zürich, 1937); *Idem*: Persönliche Freiheit, Demokratie und Föderalismus, in: Die Freiheit des Bürgers im schweizerischen Recht, Festgabe zur Hundertjahrfeier der Bundesverfassung, Zürich: Polygraphischer Verlag, 1948, pp. 53 ss.;

Idem: Zur Entwicklung des schweizerischen Rechtsstaates, in: Zeitschrift für Schweizerisches Recht – Centenarium 1852-1952, Basel: Helbing & Lichtenhahn, 1952, pp. 173 ss.; *Idem*: Rechtsstaat und Demokratie – Antinomie und Synthese, in: Demokratie und Rechtsstaat, Festgabe zum 60. Geburtstag von Zaccaria Giacometti, Zürich: Polygraphischer Verlag, 1953, pp. 107-142; *Idem*: Von der klassischen Dreiteilung zur umfassenden Gewaltenteilung, in: Verfassungsrecht und Verfassungswirklichkeit – Festschrift für Hans Huber zum 60. Geburtstag am 24. Mai 1961, dargebracht von Freunden, Kollegen, Schülern und vom Verlag, Bern: Stämpfli & Cie, 1961, pp. 151 ss.; *Idem*: Die Grundordnung unseres Kleinstaates und ihre Herausforderung in der zweiten Hälfte des 20. Jahrhunderts, in: Das schweizerische Recht - Besinnung und Ausblick, Festschrift zur Schweizerischen Landesausstellung 1964, Helbing & Lichtenhahn, Basel 1964; *Idem*: Legitimation, Ordnung und Begrenzung der Macht im Kleinstaat, in: Macht und ihre Begrenzung im Kleinstaat Schweiz, ed. Werber Kägi and Hansjörg Siegenthaler (Zürcher Hochschulforum, Band 1), Zürich: Artemis, 1981, pp. 21 ss.

[For Further Reading]
Richard Bäumlin: Die rechtsstaatliche Demokratie – Eine Untersuchung der gegenseitigen Beziehungen von Demokratie und Rechtsstaat, Zürich: Polygraphischer Verlag, 1954; *Idem*: Jean-Jacques Rousseau und die Theorie des demokratischen Rechtsstaates, in: Berner Festgabe zum Schweizerischen Juristentag 1979, ed. Eugen Bucher and Peter Saladin, Bern: Paul Haupt, 1979, pp. 13-49;
Max Imboden: Rousseau und die Demokratie, in: Recht und Staat in Geschichte und Gegenwart, vol. 267, Tübingen: J. C. B. Mohr, 1963, 26 pp. (reprinted in: Staat und Recht, Ausgewählte Schriften und Vorträge, Basel/Stuttgart: Helbing & Lichtenhahn, 1971, pp. 75 ss.);
Werner Kägi: Die Verfassung als rechtliche Grundordnung des Staates – Untersuchungen über die Entwicklungstendenzen im modernen Verfassungsrecht (Habilitationsschrift Universität Zürich), Zürich: Polygraphischer Verlag, 1945.

27 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
6th Section "Swiss Theories of (Direct or Semi-Direct) Democracy and Political Thought – Participation, Representation in a Strong Civil Society"
Entry 6.8 "Max Imboden, Politische Systeme"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Max Imboden
Title: Die politischen Systeme
Edition(s): Basel/Stuttgart: Helbing & Lichtenhahn, 1962

[Introduction/Historical Situation and Systematic Context]
According to the reports of his scholars, *Max Imboden* had the intention to write a general theory of the State ("Allgemeine Staatslehre") before he died prematurely in 1969. However, among his writings, we encounter two main essays that could easily count as preparatory work for such an attempt. His psychological interpretation of the forms of government from 1959, where the three forms of government are presented within the context of the dogmatic theory that goes back to Greek antiquity, have already been discussed (see no. 5.10 of this Legal Anthology). Subsequently, the other monography, providing an overview over the political systems, will be introduced, a study that originates in the distress of the 1960s.
"Durch die systematische Erfassung der politischen Systeme strebt sie eine Standortbestimmung der Gegenwart an. Darüber hinaus sucht sie nach einer Deutung der Vorgänge und Kräfte, in deren Spannungsbereich unsere Zeit steht". Such is the declared aim of the author. The main questions are the following: "Lässt sich das politische Geschehen überhaupt systematisch erfassen? Folgen die politischen Strukturen inneren Gesetzmässigkeiten, die sich dem menschlichen Geiste erschliessen? [...] Soll das Typische in der Herrschaftsstruktur oder soll es in der Herrschaftsgesinnung gesucht werden? Soll sich der erkennende Geist dem Äusseren oder dem Inneren des Sozialköpers zuwenden"?

[Content, Abstracts / Conclusions, Insights, Evidence]
In his condensed study, *Max Imboden* undertakes the challenge, to identify the structures of the political system typologically, and hereby he is rather confident and optimistic, than sceptical and pessimistic: "Der abendländische Mensch war in allen Entwicklungsstufen seiner Kultur ein politisch denkender und politisch handelnder Mensch. Er sieht es als eine seiner grossen Aufgaben an, die soziale Wirklichkeit bewusst zu meistern und nach seinem Sinne zu gestalten. Die politische Theorie ist ein unlösbarer Bestandteil unserer geistigen Umwelt. Und doch dürfte es letztlich eine Verkennung und eine Überschätzung sein, unserer Hochkultur nicht nur einen Vorrang, sondern geradezu ein geistiges Vorrecht in der gedanklichen Erfassung des Politischen zuzusprechen. [...] Die Typologie des Politischen soll – der überkommenen Betrachtung folgend – zunächst aus den äusseren Strukturen gewonnen werden. Es wird sich freilich im Verlauf der weiteren

Untersuchungen zeigen, dass der nach aussen gewandten Typologie zugleich eine nach innen gewandte Typologie entspricht. Was sich im sozialen Gefüge als 'Struktur' manifestiert, ist nur der Widerschein von Vorgängen, die sich im Innern des Menschen vollziehen. 'Innen' und 'Aussen' sind letztlich eines. Es gibt nur eine Wirklichkeit im sozialen Zusammensein der Menschen: die aus der Erfüllung der eigenen Persönlichkeit geschaffene Beziehung zum Anderen".

We shall skip the first eighty pages, where *Max Imboden* presents the outer structures of the common understanding of political communities. Scientifically speaking, only possible solutions can be identified, but in no way the future development can be predicted. In the second part, entitled "Fundamental questions of political structure", the author intends to address primary tensions between the human individual and the social collective, and between the normative authority of order and individual obedience. The first-mentioned tension has to be equilibrated and the tension to be measured, whereas the second-mentioned tension is bridged by several techniques of representation in order to show the autonomous character of binding legal order to the subjected individuals.

We would like to leave these sophisticated, yet comprehensive arguments of *Max Imboden* to the valuation of the reader, and focus on the two different manners, how political ideas and ideals can be represented, namely as ideology and as utopia. The concept of political order can be so to say dis-materialised and located in the realm of utopia, and the ideal character of political thought can be converted to mere ideology. Imboden undertakes to point out, how this fatal tendency can be inversed, and the direction of the inclination be reversed. Ideology stands for the influence of polemical controversy. In case of success, ideological positions become a thoroughly dogmatical character. Utopia is understood as the end of a schismatic process, which can have negative, regressive effects, or positive, progressive effects according the underlying pessimistic or optimistic world-views. "Gegenüber der Ideologie, die einen Teilaspekt der ganzen Wahrheit ausmacht, und gegenüber der Utopie, die die Wahrheit entzweit und deren eine Hälfte an ein unwirkliches Fernbild heftet, ist die Ordnung voram Ganzheit. Sie erfasst das Politische in seiner Totalität und setzt ihm zugleich feste Schranken". In such a holistic vision, political order means pluralism of social forces, reference to the only true political and social reality, and disclosure, respectively limitation in relation to the outside. "Der Verfassungsstaat vermochte das Volk wohl als gedankliche Gegebenheit, nicht aber als politische Potenz in das von ihm geschaffene Gefüge zu integrieren. Dadurch dass das Volk eine frei schwebende politische Gewalt blieb, wurde der Staat der Gefahr ausgesetzt, im Dienste ausserstaatlicher, 'irregulärer' Ordnungskräfte zum blossen Instrument herabzusinken. Sodann lies das Souveränitäts-Dogma das Missverständnis offen, dass dem Staate in der Bestimmung über Recht und Unrecht keine Schranken gesetzt sind". Communism, functional communities, and personalised Government have undermined the very idea of order, whereas democracy has compensated the first-mentioned weakness, but increased the second-mentioned error. "So verschieden alle diese Wege erscheinen mögen, sie treffen sich in einem: Sie mindern das politische Bewusstsein; sie entfremden den Menschen dem zur Ordnung gewordenen Staat und verschliessen ihm

damit einen Bereich, in dem die abendländische Kultur eine ihrer grössten gestaltenden Leistungen vollbracht hat". This analysis appears not only to be of lasting significance but has been prophetic in its time.

[Further Information About the Author]
Max Imboden, born 19 June 1915 in St. Gallen, died 7 April 1969 in Basel, studied jurisprudence at the Universities of Geneva, Berne and Zurich, and he took a doctor's degree with his dissertation "Bundesrecht bricht kantonales Recht" (1939) with *Zaccaria Giacometti*. In 1944 he published his habilitation thesis about "Der nichtige Staatsakt". After having been extraordinary professor in Zurich, he was called to the ordinary chair for public law, i.e. constitutional and administrative law at the University of Basel. Together with *René Rhinow*, he published the standard reference "Schweizerischer Verwaltungsrechtsprechung". In 1964, he promoted the reform of the Swiss federal constitution by publishing his invocation "Helvetisches Malaise".
His thoughts were subtle, refined and distinguished due to his inclination to psychological ideas, which he applied to the forms of government.
For further information, please consult:
Peter Saladin/ Luzius Wildhaber (Ed.): Der Staat als Aufgabe, Basel: Helbing & Lichtenhahn, 1972, Vorwort;
Georg Kreis: Das "Helvetische Malaise" – Max Imbodens historischer Zuruf und seine überzeitliche Bedeutung, 2011;
Andreas Kley: Max Imboden – Aufbruch in die Zukunft, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 877 ss.;
Dietrich Schindler (junior): Max Imboden, in: Staat und Recht - Ausgewählte Schriften und Vorträge, Basel/ Stuttgart: Helbing & Lichtenhahn, 1971, pp. 1-5.

[Selected Works of the Same Author]
Max Imboden: Das Gesetz als Garantie rechtsstaatlicher Verwaltung (Basler Studien zur Rechtswissenschaft, vol. 38), Basel: Helbing & Lichtenhahn, 1962 (1. ed. 1954); *Idem*: Politische Systeme, Basel/ Stuttgart: Helbing & Lichtenhahn, 1962; *Idem*: Helvetisches Malaise (1964), in: Staat und Recht, Ausgewählte Schriften und Vorträge, Basel/ Stuttgart: Helbing & Lichtenhahn, 1971, pp. 279ss.; *Idem*: Rousseau und die Demokratie, in: Recht und Staat in Geschichte und Gegenwart, vol. 267, Tübingen: J. C. B. Mohr, 1963, 26 pp.

4 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
6th Section "Swiss Theories of (Direct or Semi-Direct) Democracy and Political Thought – Participation, Representation in a Strong Civil Society"
Entry 6.10 "Richard Bäumlin, Lebendige oder gebändigte Demokratie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Richard Bäumlin
Title: Lebendige oder gebändigte Demokratie? Demokratisierung, Verfassung und Verfassungsrevision
Edition(s): Basel: Z-Verlag, 1978

[Introduction/Historical Situation and Systematic Context]
The contribution by *Richard Bäumlin* to be introduced and discussed clearly stands within the context of ongoing constitutional reform in the 1970s, the attempt of a total revision of the Swiss Federal Constitution that in a first attempt remained without success and only had success in 1999 (see the diagnosis as "Helvetic malaise" by *Max Imboden*; no. 5.13 of this Legal Anthology). The considerations in this essayistic writing connect perfectly to the analysis, the author has done in his inaugural dissertation from 1954 (compare no. 5.11 of this Legal Anthology).
Although the attempt made by *Richard Bäumlin* could appear as merely analytic, the inherent convictions regarding human rights and individual freedoms clearly give a highly pointed direction to the overview over pre-existing theories. This distinction should characterise the personal style of the author during the long and fecund career as an academic teacher at the University of Berne as well as the other involvements of the sympathetic person. Eventually democracy is presented as a project within the development of the history of ideas, and thereby the aspects of historicity or historical dimension of democracy are stressed, referring to an ideal that is to be realised (compare the contribtion to the essays in honour of Bäumlin by *Jörg Paul Müller*: Recht und Zeit, in: Zentrum und Peripherie - Zusammenhänge, Fragmentierungen, Neuansätze, Festschrift für Richard Bäumlin zum 65. Geburtstag, ed. Roland Herzog, Chur und Zürich: Rüegger, 1992, pp. 95 ss.).

[Content, Abstracts/Conclusions, Insights, Evidence]
In a introductory part, *Richard Bäumlin* sketches the development of the concept of democracy from the narrow concept of political theory as a specific form of government, where the sovereign are identical to the subjected to the very incarnation of political order that is to be qualified as just or good governance. The author rejects the uses of democracy as a metaphysical and/or theological foundation of the State, as proposed by liberal theory building, as an elitist political philosophy, as technocratic exercise all together. "Je demokratischer ein Staat organisiert ist, desto mehr werden die herrschenden Interessen und ihre 'unverfälschte' Repräsentation gefährdet. [...] Was andere nie laut herauszusagen

und vielleicht nicht einmal klar zu denken wagen, hier ist es unmissverständlich ausgesprochen: Nicht von Seiten extrmistischer Rebellen, auf die man sonst so gerne die Aufmerksamkeit lenkt, um wirksamen Bürgerschreck walten zu lassen, droht die Gefahr. Der wahre und als gefährlich erkannte Gegner ist eine geschulte, informierte und daher ihrer selbst bewusst werdende demokratische Mehrheit. In der Tat, die Autoren sind realistisch; sie sind es auch in bezug auf die Methoden der Abwehr, die sie entwerfen! Ist die mündige demokratische Mehrheit der wahre Feind, so muss dafür gesorgt werden, dass dieser Feind gar nicht erst zu sich selber kommen kann. Die Information der Aktivbürger, die den herrschenden Interessen in die Quere kommen könnte, soll vereitel twerden" (with reference to "Bericht zur Lage der Demokratie in der Gegenwart" from 1975). The revolutionary potential of every process of democratisation is to be taken seriously. We would like to address, with respect to this inclination, to the attempts to provide a solid education and formation of the people as mature and responsible citizens in the period of so-called Regeneration in Switzerland. In context with the wholehearted project to educate the citizen for their function within a democracy the educational system of the reformed Swiss Cantons has been considerably changed (see my master's thesis at the University of Berne in 1992, entitled "Von der Mündigkeit des Bürgers zur Demokratie").

As indicated in the opening passage, democracy is understood as a continuous process of increasing democratisation, by *Richard Bäumlin*. Political society has not only to be an open community, but also take an active part in the formation of the political will, in order to provide the basis for real self-governance. Criticisms to such an ongoing process, whereupon democratisation should lead to an unlimited and totalitarian political process cannot be held. Rather democracy is meant to be an alternative to the closed community of liberal capitalism and to bureaucracy, i.e. government by state administration. The process of democratisation takes place in various domains, especially in education and socio-economic circumstances. Democracy shows a certain close relation to socialism: "Demokratisierung kann durchaus mit dem Inbegriff der Ziele und Wege eines Sozialismus gleichgesetzt werden, der seine Hoffnung auf Freiheit und Entfaltung aller Menschen ins Werk setzt. Selbstverständlich darf die Theorie der Demokratisierung keine, wie auch immer gestaltete, sozialistische Theorie dogmatisieren. Vielmehr ist Demokratisierung nach den jeweiligen Umständen von Zeit und Ort zu verfolgen, was übergreifende Leidideen nicht ausschliesst. [...] Theorie und Praxis der Demokratisierung nimmt den [politischen] Liberalismus mit seinen Freiheitsversprechen beim Wort und geht zugleich, weil ihr Worte und Ideale nicht genug sind, darauf aus, die gesellschaftlichen Voraussetzungen für die Selbstentfaltung einer möglichst grossen Zahl, die Grundlagen einer wirklich 'offenen' Gesellschaft erst zu schaffen". This direction of democratisation evidently contradicts all kind of conservative theories of natural order, of the "rule of nature", and contrasts them by a concept of "human nature" that is always also a "social nature".

[Further Information About the Author]

Richard Bäumlin, born 9th September 1927 in Berne, retired in Erlenbach im Simmental, did his studies in jurisprudence at the Universities of Berne and Göttingen, before presenting his doctor's thesis in Berne in 1954, where he taught as a private lecturer from 1957. In 1960 he was elected ordinary professor for public law and constitutional history as well as for social philosophy. As a member of the socio-democratic party he was engaged in the domain of social politics and social philosophy and defended the rights of foreigners and human rights. He also was a member of the Club of Rome.
His lectures in constitutional history were legendary, as he tried to give an introduction to the integral history of political ideas.
For further information, including a comprehensive bibliography, please see:
Roland Herzog (Ed.): Zentrum und Peripherie – Zusammenhänge, Fragmentierungen, Neuansätze, Festschrift für Richard Bäumlin zum 65. Geburtstag, Chur/ Zürich: Rüegger, 1992.

[Selected Works of the Same Author]
Richard Bäumlin: Die rechtsstaatliche Demokratie – Eine Untersuchung der gegenseitigen Beziehungen von Demokratie und Rechtsstaat (Dissertation Universität Bern), Zürich: Polygraphischer Verlag, 1954 (extract); *Idem*: Recht, Staat und Geschichte – Eine Studie zum Wesen des geschichtlichen Rechts, entwickelt an den Grundproblemen von Verfassung und Verwaltung, Zürich: EVZ-Verlag, 1961; *Idem*: Artikel "Rechtsstaat", in: Evangelisches Staatslexikon, ed. Roman Herzog, Stuttgart: Kreuz, 3rd ed. 1987, columns 2806–2818.

[For Further Reading]
Werner Kägi: Die Verfassung als rechtliche Grundordnung des Staates – Eine Untersuchung über die Entwicklungstendenzen im modernen Verfassungsrecht (Habilitationsschrift Universität Zürich), Zürich: Polygraphischer Verlag, 1945.

8 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
5th Section "Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism"
Entry 6.11 "Richard Bäumlin, Rechtsstaatliche Demokratie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Richard Bäumlin
Title: Die rechtsstaatliche Demokratie – Eine Untersuchung der gegenseitigen Beziehungen von Demokratie und Rechtsstaat (Dissertation Universität Bern)
Edition(s): Zürich: Polygraphischer Verlag, 1954

[Introduction/Historical Situation and Systematic Context]
The relationship between democracy and rule of law normally is condensed to the interleave of the firm standing term of "demokratischer Rechtsstaat"; *Richard Bäumlin*, however, denominates his synthesis just the other way around as "rechtsstaaliche Demokratie". In the first case, the defining denominator is rule of law, whereas the qualification as democratic is merely a specific difference. In the second case, the essential thing is the qualification as democracy and the rule of law consists merely in a specification. With his creative approach, integrating political theory and philosophy, the social and human sciences into jurisprudence and state theory, Bäumlin definitely surpasses and excels not only all of his contemporary colleagues, but also equals today's state of the art.
In conclusion, democracy and rule of law are considered to relate vitally one upon the other, or to build fellow sufferers. The declared aim of *Richard Bäumlin*'s promotion thesis is to demonstrate "die enge Schicksalsgemeinschaft von Demokratie und Rechtsstaat". Taking into consideration the possibility of antinomy or synthesis of democracy and rule of law, the author discusses freedom of speech, freedom of religion and intermediary corporations as well as federalism as domains where democracy and the rule of law build a close connection with each other.

[Content, Abstracts/Conclusions, Insights, Evidence]
According to *Richard Bäumlin*, the normative concept of democracy and its contrary, autarchy are not only to be considered as relative because of their ideal type, but rather to be criticised. Democracy is not only a specific way to determine the content of a legal order, based on general vote of all citizens, but far more then that, i.e. to be understood as a material qualification of the legal order itself, as a specific way to determine the nature of the form of government. Bäumlin connects to the concept of social community as proposed by *Dietrich Schindler* (senior) in his treatise on "Verfassungsrecht und soziale Struktur" from 1932 (see no. 1.8 of this Legal Anthology) and, therefore, intermediate follows the concepts elaborated by *Hermann Heller*. However, also to such an understanding, Bäumlin addresses criticism, as a merely sociological method with its

causal laws cannot provide a solid base for deeper insights into democracy, neither. Rather the two principles establish a tension between the two possibilities of thought. The essential understanding can only be established as a material qualification of democracy, as the legal order follows rational, functional or better speaking teleological principles. "Mit dem bisherigen ist aber nur gesagt, dass die Demokrati auch als auf bestimmte Werte bezogen zu verstehen gesucht werden müsse. Über die Natur dieser Werte ist damit noch nichts ausgesprochen". Anthropology teaches that such decisions on the tasks and aims of a political community are due to a specific image of man, of humankind in general.
In a second part, *Richard Bäumlin* debates the various conceptions of rule of law in a continental European sense of "Rechtsstaatlichkeit". Formal rule of law, whereupon state action is reduced to the performance of the legal order, is rejected as historical step in a constant evolution of the model. The material conceptualisation is discussed with attention to compared public law. Rule of law also shows material impacts and refers to a constitution based on human rights, individual freedoms with a social dimension. These claims are so to say realised ideals of humanity within an existing social and political community. The modern state has to organise the framework of legal order in such a way, that the human individual can develop his talents best. To be read are the remarks to the constitutional legal order of the rule of law in a material understanding, as presented by the author on pp. 72 ss. The state organisation in the light separation of powers is also to be integrated as a qualification in the picture of material rule of law theory.

[Philosophical Valuation and Jurisprudential Significance]
Although the attempt made by *Richard Bäumlin* could appear as merely analytic, the inherent convictions regarding human rights and individual freedoms clearly give a highly pointed direction to the overview over pre-existing theories. This distinction should characterise the personal style of the author during the long and fecund career as an academic teacher at the University of Berne as well as the other involvements of the sympathetic person. Eventually democracy is presented as a project within the development of the history of ideas, and thereby the aspect of historicity or historical dimension of democracy are stressed, referring to an ideal that is to be realised (compare the contribtion to the essays in honour of Bäumlin by *Jörg Paul Müller*: Recht und Zeit, in: Zentrum und Peripherie - Zusammenhänge, Fragmentierungen, Neuansätze, Festschrift für Richard Bäumlin zum 65. Geburtstag, ed. Roland Herzog, Chur und Zürich: Rüegger, 1992, pp. 95 ss.).

[Further Information About the Author]
Richard Bäumlin, born 9 September 1927 in Berne, retired in Erlenbach im Simmental, did his studies in jurisprudence at the Universities of Berne and Göttingen, before presenting his dissertation in Berne in 1954, where he taught as a private lecturer from 1957. In 1960, he was elected ordinary professor for public law and constitutional history as well as for social philosophy. As a member of the socio-democratic party he was engaged in the domain of social politics and social philosophy and defended the rights of foreigners and

human rights. He also was a member of the Club of Rome.
His lectures in constitutional history were legendary, as he tried to give an introduction to the integral history of political ideas.
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Roland Herzog (Ed.): Zentrum und Peripherie – Zusammenhänge, Fragmentierungen, Neuansätze, Festschrift für Richard Bäumlin zum 65. Geburtstag, Chur/ Zürich: Rüegger, 1992.

[Selected Works of the Same Author]
Richard Bäumlin: Lebendige oder gebändigte Demokratie? Demokratisierung, Verfassung und Verfassungsrevision, Basel: Z-Verlag, 1978; *Idem*: Recht, Staat und Geschichte – Eine Studie zum Wesen des geschichtlichen Rechts, entwickelt an den Grundproblemen von Verfassung und Verwaltung, Zürich: EVZ-Verlag, 1961.

[For Further Reading]
Richard Bäumlin: Artikel "Rechtsstaat", in: Evangelisches Staatslexikon, ed. Roman Herzog, Stuttgart: Kreuz, 3rd ed. 1987, columns 2806–2818;
Werner Kägi: Die Verfassung als rechtliche Grundordnung des Staates – Eine Untersuchung über die Entwicklungstendenzen im modernen Verfassungsrecht (Habilitationsschrift Universität Zürich), Zürich: Polygraphischer Verlag, 1945.

8 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
6th Section "Swiss Theories of (Direct or Semi-Direct) Democracy and Political Thought – Participation, Representation in a Strong Civil Society"
Entry 6.13 "Jörg Paul Müller, Demokratische Gerechtigkeit"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Jörg Paul Müller
Title: Demokratische Gerechtigkeit – Eine Studie zur Legitimität rechtlicher und politischer Ordnung
Edition(s): München: Deutscher Taschenbuch Verlag, 1993, pp. 9-38

[Introduction/Historical Situation and Systematic Context]
Although *Jörg Paul Müller*'s main interest focuses on fundamental rights, human rights and individual freedoms since his first publication, he has much contributed to constitutional theory building. In his principal writing on "Democratic Justice", he expresses his view of fundamental rights as founding consensus that renders the constitutional order itself legitimate. This theory of legitimation has been modified, however, in his later contribution, entitled "The democratic constitution" (see no. 6.14 of this Legal Anthology). In the following we would like to discuss this tension, exclusively. In one of his contributions to the attempt to reform the Swiss Federal Constitution in the 1970s, *Jörg Paul Müller* has already indicated the importance and value of fundamental rights within the process of constitution-making (Grundrechte und staatsleitende Grundsätze im Spannungsfeld heutiger Grundrechtstheorie, in: Totalrevision der Bundesverfassung – Zur Diskussion gestellt (Zeitschrift für Schweizerisches Recht, N. S. vol. 97 (1978), Nr. 3/4, Basel: Helbing & Lichtenhahn, 1978, pp. 265 ss.). In his principal writing from 1993, he has delivered the theoretical background for his conviction. Within the context of the ongoing and finally successful constitutional reform, leading to the adoption of the Swiss Federal Constitution of April 1999, he has confirmed his views in a lecture, held in occasion of a symposium organised by the "Swiss Academy of Human and Social Sciences" in Gerzensee. At this moment, we have partly contradicted to his opinions in our contribution to the very same congress (*Michael Walter Hebeisen*: Geisteswissenschaftliche Überlegungen zum Wert der Verfassung als Hilfe auf dem Weg zum gerechten Zusammenleben von Menschen und Völkern. Referat, gehalten am 2. Oktober 1997 im Forschungskolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften (SAGW) "Herausgeforderte Verfassung" in Gerzensee, in: Herausgeforderte Verfassung – Die Schweiz im globalen Kontext (16. Kolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften), ed. Beat Sitter-Liver, Freiburg: Universitätsverlag, 1999, pp. 133-155). In the following, we would like to reconstruct this argument and to reconsider the answers given to this important subject, as the author himself has considerably changed his mind meanwhile.
In our summary to the above-mentioned essay, we have condensed our view in a pointed

argumentation: “Die positive Verfassung ist nicht eine Verkörperung von Wertvorstellungen, die in einer politischen Gemeinschaft geteilt werden müssten (‘Staatszweck’, ‘Staatsziele’); sie ist vielmehr Rahmenordnung des Politischen, das heisst sie verfasst einmal die Auseinandersetzungen um die Zuordnung von Rechten dort, wo Werte konfligieren (‘Verfahrensgerechtigkeit’), und dann verbietet sie mit gewissen Grundrechten, eine Uniformität der Wertvorstellungen in der Gemeinschaft auf dem Weg der Autorität des Rechts herzustellen (‘Verfassung des Pluralismus’). – Die Verfassung, so wie auch die Rechtsordnung insgesamt, objektivieren vielmehr hintergründige Vorstellungen von Gerechtigkeit; in ihr schlagen sich Strategien nieder, die einen Ausgleich zwischen verschiedenen Werten und unterschiedlichen Rangordnungen von geteilten Werten mittels eines republikanischen Toleranzprinzips zu schaffen versprechen (‘Kompromisshaltung’)”. The according thesis reads as follows: “Die Legitimationsdebatte ist mit Bezug auf Recht, Verfassung und Staat abzulösen durch einen Anwendungsdiskurs; der Wert der Verfassung ist rechtsimmanent zu verstehen. Die Verfassung ist demnach nicht werthaft, weil sie sich auf eine homogene Wertgemeinschaft bezieht, sondern weil sie die politische Gemeinschaft überhaupt verfasst, das heisst Verfahren vorsieht zur staatlichen Willensbildung”.

[Content, Abstracts/Conclusions, Insights, Evidence]
In the light of discourse theory, *Jörg Paul Müller* highlights the actual importance and lasting necessity to legitimate democratic order. Democracy is defined functional in relation to the human condition: “Demokratie ist jene politische Ordnung, die der Selbstbestimmung oder Autonomie des Menschen als Individuum und als in die Gemeinschaft eingebettetes Wesen optimal entgegenkommt”. Hence, the possible conflict between the political community and its minorities is not resolved, but even accentuated. *Jörg Paul Müller* hold a fundamental consensus as crucial for enabling democratic order. In a cultural and philosophical perspective this is certainly true, as the democratic conviction of the citizen demands for a subject within the written constitution, to which it can refer. Already *Hermann Heller* had argued that every community is based on a certain amount of social homogenity. With reference to Kantian principles, Müller detects equality as the very core of democratic order, whereas we would rather like to stress the principle of individualistic freedom to explore the abilities and to expand the creative, creational possibilities of every single individual, instead. Fundamental consensus is due to pluralism, as Müller argues: “Die hier vertretene Demokratietheorie geht von einer normativen Prämisse aus: Ihr für alle verpflichtender Gehalt kann in einer säkularen Gesellschaft weder theologisch noch sonst metaphysisch oder transzendental begründet werden, sondern muss ihre Geltung aus einer elementaren Zustimmung aller ziehen”. Up to this point in the argument, we fully agree. In this consent, the fundamental consensus comprises: “Dieser Grundkonsens ist weder lediglich ein normatives Prinzip noch blosser Erfahrungswert; er entspricht einer grundlegenden Haltung des Vertrauens in die Ansprechbarkeit (Diskursbereitschaft) und Gewaltlosigkeit der Mitglieder der Rechtsgemeinschaft und einem praktizierten Stil des Umgangs mit der Lösung von

politischen Fragen, der dieses Vertrauen immer wieder rechtfertigt". We shall leave the monopoly of force by the State aside. It remains the potential possibility to participate within the shaping of the political will of the community – perfect. As a third element enters a reference to stylistic modalities of policymaking, an extra-constitutional fact, that can be true or not, and that will serve to legitimate state power or government dynamically. Discourse theory apparently contributes to sharpen consciousness on the dynamic character of legitimation, which is a true merit. But where rests an argument, an element within such a conception of consensus, that reports and relates to the very source of the binding character of the legal order? The conclusion, derived by Müller, is true, however, and at the same time symptomatic: "Der Entscheid für Demokratie verlangt den anspruchsvollsten Konsens, der einer Rechtsgemeinschaft zugemutet werden kann". But this highly ambitious consensus in principle refers clearly to the social and communitarian context of the constitutional text, is related to ideas that exceed the positive constitution by far.

The crucial point remains, how such a fundamental consensus can be rendered concrete by the constitutional order. The main strategy, followed by *Jörg Paul Müller*, consists in taking the constitution into question or even doubt, by reference to the uncertainty of the founding consensus, that can dynamically increase or decrease. The continuation in argument is universally valid, whereupon sociability, i.e. the social inclination of the human individual and species, is to be considered as an assumption to political and constitutional order itself. The positive organisation of the founding consensus also affects liberty: "Zu einer offenen Gesellschaft gehört auch ein offener Freiheitsbegriff. Er ist nicht ausgenommen vom Lernprozess, in dem sich eine demokratische Gemeinschaft stets befindet". The result of such an attitude towards freedom is the open society in the sense, *Karl Raimund Popper* has given to this concept. Within this context, democracy means participation, active participation to the decision-making of the political community. This process is to be corrected, however, by the normative principle to accept the otherness of other participants within this process (Müller refers to psychology in this context, but one could also refer to Hegelian dialectics).

The argumentation is continued by *Jörg Paul Müller* with a discussion on the normative references, a theory of democracy should rely on. The very point of reference can only be a specific conception of justice, social or political justice. The author addresses the concepts elaborated by *Jean-Jacques Rousseau* and *Immanuel Kant* and their more recent counterparts, as for instance *John Rawls* or *Jürgen Habermas*. The problem is that such a search for justice directly leads to the controversy between liberalism and communitarianism (see no. 6.16 of this Legal Anthology).

[Further Information About the Author]

Jörg Paul Müller, born on 16 September 1938 in St. Gallen, has prosecuted his legal and sociological studies at the Universities of Geneva and Berne, before directing himself to the Harvard Law School, where he graduated with a Master of Law degree. In 1964, he obtained his doctorate with a treatise on "Die Grundrechte der Verfassung und der

Persönlichkeitsschutz des Privatrechts" (in: Abhandlungen zum schweizerischen Recht. N. S. vol. 360), Bern: Stämpfli, 1964), and in 1971 he handed in his habilitation thesis, entitled "Vertrauensschutz im Völkerrecht" (Köln: Heymann, 1971), both at the University of Berne. Soon he became an ordinary professor for public law and legal philosophy in Berne, and he also was a lecturer for constitutional law, state theory and political philosophy at the Universities of Freiburg (Switzerland), Basel, St. Gallen and at the Federal Technical University in Zurich (ETHZ).

[Selected Works of the Same Author]
Jörg Paul Müller: Die Grundrechte der Verfassung und der Persönlichkeitsschutz des Privatrechts (Dissertation Universität Bern 1964); *Idem*: Elemente einer schweizerischen Grundrechtstheorie, Bern: Stämpfli & Cie AG, 1982; *Idem*: Demokratische Gerechtigkeit – Eine Studie zur Legitimität rechtlicher und politischer Ordnung, München: Deutscher Taschenbuch Verlag, 1993, pp. 9-38; *Idem*: Die demokratische Verfassung – Zwischen Verständigung und Revolte, Zürich: Neue Zürcher Zeitung, 2002, pp. 13-46; *Idem*: Die demokratische Verfassung – Wie Menschen sich in einer Gesellschaft selbst bestimmen, Zürich: Neue Zürcher Zeitung, 2nd ed. 2009; *Idem*: Der politische Mensch – Menschliche Politik, in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 37 (1988), pp. 1 ss., ed. Peter Häberle, Tübingen: J. C. B. Mohr, 1988; *Idem*: Versuch einer diskursethischen Begründung der Demokratie, in: Im Dienst an der Gemeinschaft, Festschrift für Dietrich Schindler zum 65. Geburtstag, ed. Walter Haller, Alfred Kölz, Georg Müller and Daniel Thürer, Basel: Helbing & Lichtenhahn, 1989, pp. 617 ss.; *Idem*: „Responsive" government – Verantwortung als Kommunikationsproblem, in: Zeitschrift für schweizerisches Recht, N. S. vol. 14 (1995), pp. 3 ss., Basel: Helbing & Lichtenhahn, 1995; *Idem*: Menschenrechte als normativer Kern globaler Politik, in: Der politische Mensch, menschliche Politik, Demokratie und Menschenrechte im staatlichen und globalen Kontext, Basel/ München: Helbing & Lichtenhahn/ C. H. Beck, 1999, pp. 118 ss.; *Idem*: Rechtsphilosophie und Verfassungsphilosophie in der Demokratie, in: Staats- und Verfassungstheorie im Spannungsfeld der Disziplinen, ed. Philippe Mastronardi, in: Archiv für Rechts- und Sozialphilosophie, supplementary vol. 105, Stuttgart: Franz Steiner, 2004.

[For Further Reading]
Jörg Paul Müller: Der politische Mensch, menschliche Politik, Demokratie und Menschenrechte im staatlichen und globalen Kontext, Basel/ München: Helbing & Lichtenhahn/ C. H. Beck, 1999.

14 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
6th Section "Swiss Theories of (Direct or Semi-Direct) Democracy and Political Thought – Participation, Representation in a Strong Civil Society"
Entry 6.14 "Jörg Paul Müller, Demokratische Verfassung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Jörg Paul Müller
Title: Die demokratische Verfassung – Zwischen Verständigung und Revolte
Edition(s): Zürich: Neue Zürcher Zeitung, 2002, pp. 13-46

[Introduction/Historical Situation and Systematic Context]
Although *Jörg Paul Müller*'s main interest focuses on fundamental rights, human rights and individual freedoms since his first publication, he has much contributed to constitutional theory building. In his essayistic writing from 1993, entiteled "Demokratische Gerechtigkeit" (see no. 6.13 of this Legal Anthology), he has expressed his view of fundamental rights as founding consensus that renders the constitutional order itself legitimate. This theory of legitimation has been modified, however, in his later contribution that is to be discussed hereinafter.
In one of his contributions to the attempt to reform the Swiss Federal Constitution in the 1970s, *Jörg Paul Müller* has already indicated the importance and value of fundamental rights within the process of constitution-making (Grundrechte und staatsleitende Grundsätze im Spannungsfeld heutiger Grundrechtstheorie, in: Totalrevision der Bundesverfassung – Zur Diskussion gestellt (Zeitschrift für Schweizerisches Recht, N. S. vol. 97 (1978), Nr. 3/4, Basel: Helbing & Lichtenhahn, 1978, pp. 265 ss.). In his principal writing from 1993, he has delivered the theoretical background for his conviction. Within the context of the ongoing and finally successful constitutional reform, leading to the adoption of the Swiss Federal Constitution of April 1999, he has confirmed his views in a lecture, held in occasion of a symposium organised by the "Swiss Academy of Human and Social Sciences" in Gerzensee. At this moment, we have partly contradicted his opinions in our contribution to the very same congress (*Michael Walter Hebeisen*: Geisteswissenschaftliche Überlegungen zum Wert der Verfassung als Hilfe auf dem Weg zum gerechten Zusammenleben von Menschen und Völkern. Referat, gehalten am 2. Oktober 1997 im Forschungskolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften (SAGW) "Herausgeforderte Verfassung" in Gerzensee, in: Herausgeforderte Verfassung – Die Schweiz im globalen Kontext (16. Kolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften), ed. Beat Sitter-Liver, Freiburg: Universitätsverlag, 1999, pp. 133-155). In the following, we would like to reconstruct this argument and to reconsider the answers given to this important subject.

[Content, Abstracts/Conclusions, Insights, Evidence]
According to our interpretation, *Jörg Paul Müller* continues the debate he had developed in

his earlier writing on "Demokratische Gerechtigkeit" (compare no. 6.13 of this Legal Anthology). In comparison to the earlier inclination, the tension between consensus and dissent is even accentuated. As a starting point, equality of all members within a democratic political order is adopted. However, equality is no longer misunderstood as a factual equalness among citizen, but rather concepted as potential equality as human beings, i.e. as a process of the realisation of freedom, leading to equal liberties. Political institutions, and that also includes the constitution (*sic*!), are questioned: "Die Hoffnung der Demokratie gilt letztlich nicht so sehr dem Automatismus formal definierter Institutionen, sondern wesentlich dem praktizierten Stil des Umgangs mit politischen Fragen, auf den die Mitglieder aufgrund gemeinsamer Erfahrungen vertrauen dürfen. Die demokratische Art sozialer Daseinsbewältigung lebt somit auch von der elementaren Rücksichtnahme, die menschliches Zusammenleben auf allen Gebieten und Ebenen erfordert". Are there such common experiences, that could inter-connect all members of a political community?

The main difference consists in the choice of peace as the ultimate goal of legal and constitutional orders. *Jean-Jacques Rousseau* and *Montesquieu* are reconsidered and defended against totalitarian interpretations. "Gerade im Hinblick auf Immanuel Kant ist interessant, dass Rousseau in der Enzyklopädie bereits das Problem globaler Ordnung anspricht. Im politischen Körper der 'grossen Stadt Welt' sind die Staaten und Völker nur einzelne Glieder, darum kann, was in Bezug auf Staatsbürger richtig ist, Ausländern gegenüber falsch sein, denn hier gilt ein besonderer Gemeinwille, der universalen Charakter hat". This universal will becomes the veritable point of reference and in an idealistic context this means critically reflected, i.e. reasonable liberty, rather than equality. Maybe this shift in stress is due to the occupation with the Kantian writing on "Eternal peace" by the author (compare Kants Entwurf globaler Gerechtigkeit und das Problem der republikanischen Repräsentation im Staats- und Völkerrecht – Eine Interpretation der Friedensschrift von 1795, in: De la Constitution – Études en l'honneur de Jean-François Aubert, ed. Piermarco Zen-Ruffinen and Andreas Auer, Basel/Frankfurt am Main: Helbing & Lichtenhahn, 1996, pp. 133 ss.).

"Bleiben wir beim rationalen Verständnis von Konsensbildung: Sind echte Konsense über Fragen der politischen Ordnung in einer säkuöaren, pluralistischen Gesellschaft überhaupt noch erreichbar? / Man muss sich im Politischen von der Vorstellung losen, Konsens entstehe wie beim klassischen privatrechtlichen Vertrag durch die Übereinstimmung des reflektierten und aufgeklärten Willens mehrer Personen. [...] / Dieser Vielschichtigen Konsensbereitschaft müsste eigentlich Rechnung getragen werden, wollte man den Bindungs- oder Verpflichtungswillen der Einzelnen in demokratischen Verfahren richtig gewichte. [...] / Diese Einsicht ist darum wichtig, weil sie die Vorstellung korrigiert, Legitimität in der Demokratie folge zwangsläufig aus der positiven Stellungnahme einer Mehrheit. Ise das Resultat für eine Minderheit unzumutbar, das heisst, wird sie in Grundrechtspositionen verletzt, ist die Mehrheit demokratisch nicht massgebend". Decision-making in a democratic political order has to be directed towards solutions that can be accepted, are actually agreed on and must be tolerated by all citizens.

Herby the decisive question is clearly addressed. And it also becomes understandable, why the author tends to except fundamental rights from the free will of the majority. However, does it make sense to propose this solution in the form of a concept that consists in a founding consent that should legitimate? Whereas in the earlier writing, Jörg Paul Müller has principally agreed to the concepts elaborated by discourse theory, he now tends to dissent with the leading orientation: "Es scheint heute wenig sinnvoll und realitätsfern, die Vorstellung eines authentischen Diskurses zwischen allen Menschen als ideales Modell einer zeitgemässen Demokratie zu wählen". We cannot evite to discover some contradictory elements within this theory of democracy, as proposed by Müller, despite the considerable alterations and rectifications occurred.
In our summary to the abovementioned essay, we have condensed our view in a pointed argumentation: "Die positive Verfassung ist nicht eine Verkörperung von Wertvorstellungen, die in einer politischen Gemeinschaft geteilt werden müssten ('Staatszweck', 'Staatsziele'); sie ist vielmehr Rahmenordnung des Politischen, das heisst sie verfasst einmal die Auseinandersetzungen um die Zuordnung von Rechten dort, wo Werte konfligieren ('Verfahrensgerechtigkeit'), und dann verbietet sie mit gewissen Grundrechten, eine Uniformität der Wertvorstellungen in der Gemeinschaft auf dem Weg der Autorität des Rechts herzustellen ('Verfassung des Pluralismus'). – Die Verfassung, so wie auch die Rechtsordnung insgesamt, objektivieren vielmehr hintergründige Vorstellungen von Gerechtigkeit; in ihr schlagen sich Strategien nieder, die einen Ausgleich zwischen verschiedenen Werten und unterschiedlichen Rangordnungen von geteilten Werten mittels eines republikanischen Toleranzprinzips zu schaffen versprechen ('Kompromisshaltung')". The according thesis reads as follows: "Die Legitimationsdebatte ist mit Bezug auf Recht, Verfassung und Staat abzulösen durch einen Anwendungsdiskurs; der Wert der Verfassung ist rechtsimmanent zu verstehen. Die Verfassung ist demnach nicht werthaft, weil sie sich auf eine homogene Wertgemeinschaft bezieht, sondern weil sie die politische Gemeinschaft überhaupt verfasst, das heisst Verfahren vorsieht zur staatlichen Willensbildung". It seems to be the case, that *Jörg Paul Müller*, has adapted his theory of founding consensus within democratic order in the sense of republicanism, i.e. in favour of freedom!

[Further Information About the Author]
Jörg Paul Müller, born on 16 September 1938 in St. Gallen, has prosecuted his legal and sociological studies at the Universities of Geneva and Berne, before directing himself to the Harvard Law School, where he graduated with a Master of Law degree. In 1964, he obtained his doctorate with a treatise on "Die Grundrechte der Verfassung und der Persönlichkeitsschutz des Privatrechts" (in: Abhandlungen zum schweizerischen Recht. N. S. vol. 360), Bern: Stämpfli, 1964), and in 1971 he handed in his habilitation thesis, entitled "Vertrauensschutz im Völkerrecht" (Köln: Heymann, 1971), both at the University of Berne. Soon he became an ordinary professor for public law and legal philosophy in Berne, and he also was a lecturer for constitutional law, state theory and political philosophy at the Universities of Freiburg (Switzerland), Basel, St. Gallen and at the

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Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Michael Walter Hebeisen
Title: Liberalismus und Kommunitarismus betreffend das Verhältnis des Rechten zum Guten – Prinzipielle Opposition oder pragmatische Annäherung, Vorrang oder Unabhängigkeit?
Edition(s): In: Archiv für Rechts- und Sozialphilosophie (ARSP), Beiheft 76, ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2000, pp. 119ss.

[Further Information About the Author]
Michael Walter Hebeisen, born on 9 January 1965, after having studied violoncello and musicology at the Conservatory of Berne, followed his studies in jurisprudence at the University of Berne, with semesters abroad at the University of Cambridge. He was graduated in 1992 and obtained his doctorate in 1994, after having collaborated with doctor father *Peter Saladin*.
He the changed for a period of seven years to the Federal Office of Justice, in an entity that was occupied with the preparation of the reform, i.e. the total revision of the Swiss Federal Constitution. In addition, he got a habilitation scholarship from the Swiss National Foundation for Scientific Research, under the survey of *Peter Häberle*, what enabled him to pursue an old-fashioned post-doc journey across Europe. He travelled to Oxford University (University College), where he assisted and contributed to the ongoing reform of British Constitution by the shadow Cabinet of the Labour Party. Back to the Continent, he directed to the "*Dilthey Forschungtsstelle*" and "*Hegel-Archiv*" at Ruhr University of Bochum and to the Humboldt University in Berlin. After a short residence at the "*Faculté de droit de l'Université de Toulouse*" where he studied the theory of *Jean-Claude-Eugène-Maurice Hauriou*, he settled for a long time in Naples where he established contacts to the philosophers of the School of Neo-Historicism, i.e. with *Fulvio Tessitore*, *Giuseppe Cacciatore*, *Giuseppe Cantillo* among others. In consequence of his fascination for the tradition of these thinkers, he undertook to translate selected works by Pietro Piovani (9 volumes), Giuseppe Capograssi (6 volumes), Giovanni Gentile (11 volumes) and eventually plans an Edition of the works of Bertrando Spaventa (6 volumes).
Back in his home country, he established as an eminent thinker in the domain of legal philosophy as well as theory of the human sciences.

[Selected Works of the Same Author]
Michael Walter Hebeisen: Souveränität in Frage gestellt – Die Souveränitätslehren von Hans

Kelsen, Carl Schmitt und Hermann Heller im Vergleich (Dissertation Universität Bern 1994), Baden-Baden: Nomos 1995 (extract); *Idem*: Staat und Recht als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als Geisteswissenschaften, Biel/Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2004, pp. 395-456; *Idem*: Krise der universellen Rechtsidee angesichts des Pluralismus der positiven Rechtsordnungen – Pragmatische Nachforschungen aufgrund der Institutionenlehren von Jean-Eugène-Claude Hauriou und Santi Romano, in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 1-65; *Idem*: Die Verfassung als Vermittlerin von Wert- und Gerechtigkeitsvorstellungen? – Geisteswissenschaftliche Überlegungen zum Wert der Verfassung als Hilfe auf dem Weg zum gerechten Zusammenleben von Menschen und Völkern, in: Herausgeforderte Verfassung – Die Schweiz im globalen Kontext (16. Kolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften), ed. Beat Sitter-Liver, Freiburg: Universitätsverlag, 1999, pp. 133 ss.; *Idem*: Schweizer Juristen-Philosophen – Eine eigenständige schweizerische Tradition der Wissenschaftsphilosophie der Jurisprudenz und der Staatslehre in Auseinandersetzungen mit ausgewählten Strömungen der Rechts- und der Staatsphilosophie sowie der Wissenschaftstheorie in der ersten Hälfte des Zwanzigsten Jahrhunderts (Eine programmatische Skizze für ein interdisziplinäres Forschungsvorhaben), in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 50, ed. Peter Häberle, Tübingen: J. C. B. Mohr/Siebeck, pp. 69-100 (extended version in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 651-711); *Idem*: Liberalismus und Kommunitarismus betreffend das Verhältnis des Rechten zum Guten – Prinzipielle Opposition oder pragmatische Annäherung, Vorrang oder Unabhängigkeit? In: Archiv für Rechts- und Sozialphilosophie (ARSP), supplementary vol. 76, ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2000, pp. 119 ss.; *Idem*: Note sulla filosofia del diritto di Pietro Piovani – Appunti di un giurista ultramontano, Referat gehalten am Studienseminar aus Anlass des 20. Todestages von Pietro Piovani in Neapel vom 29. Juni bis 1. Juli 2000, in: Archivio di storia della cultura (Firenze: Liguori), vol. 14 (2001), ed. Fulvio Tessitore, pp. 289-305; *Idem*: „An sich redet Alles, was ist, das Ja" – Zur Verwendung Friedrich Nietzsches durch den Rechtsphilosophen Carl August Emge, Referat, gehalten auf dem internationalen Kongress der Stiftung Weimarer Klassik „Missbrauch, Ereignis und Kritik – Zur deutschen Nietzsche-Rezeption zwischen 1933 und 1945", in: Widersprüche – Zur frühen Nietzsche-Rezeption, ed. Andreas Schirmer and Rüdiger Schmidt, Weimar: Hermann Böhlaus Nachfolger, 2001, pp. 291 ss., also published in: Nietzsche und das Recht (Archiv für Rechts- und Sozialphilosophie, supplementary volume 77), ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2001, pp. 219 ss.; *Idem*: Geschichte der Vergangenheit, Geschichten für die Zukunft in: Erzählungen des Staates, ed. Otto Depenheuer, Wiesbaden: VS Verlag für Sozialwissen-

schaften, 2010, pp. 35 ss.; *Idem*: Souveränität bei Otto Kirchheimer – Das Dogma der Souveränität zwischen Staatslehre und Politikwissenschaften, in: Otto Kirchheimers Staatsverständnis, ed. Robert Christian van Ooyen and Frank Schale (Reihe „Staatsverständnisse", ed. Rüdiger Voigt), Baden-Baden: Nomos Verlagsgesellschaft 2010, pp. 87-117; *Idem*: Vom ästhetisch-poëtischen Grundzug des modernen Verständnisses von Geschichte – Im Besonderen von der Urteilskraft in Iurisprudenz und Staatslehre als Geisteswissenschaften, in: Moderne und Historizität, ed. for the „Klassik Stiftung Weimar" by Stefan Wilke, Weimar: Verlag der Bauhaus-Universität Weimar, 2011, pp. 134-164.

29 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Seventh Section "Jurisprudence as the Oldest Social Science – Social Question, Socialism, Swiss Social Democracy"
Introduction
by Michael Walter Hebeisen

> "Die soziale Gesinnung stammt aus dem vernünftigen Bewusstsein, und das bedeutet eine vernünftige Beurteilung der Dinge." (*Eugen Huber*: Über soziale Gesinnung, in: Politisches Jahrbuch der schweizerischen Eidgenossenschaft, ed. Walther Burckhardt, vol. 16 (1912), Bern: K. J. Wyss, 1912)

[Seventh Section: "Jurisprudence as the Oldest Social Science – Social Question, Socialism, Swiss Social Democracy"]

[Introduction: Historical Coherence Between the Social Question, Socialism, Sociology, Social Democracy and the Social State]
The circumstances of mass production, industrialisations and the advent of urbanisation have generated the so-called social question by the mid-nineteenth century. From the very beginnings in 1848, the Swiss Federal Authorities have been an agency not only to build a common market on the whole Swiss territory, but also to establish a social welfare state, called to guarantee for labour protection, factory legislation, and social insurances later on. In parallel the early Socialist movement step by step developed into a modern Social-Democratic Party. This process has been accompanied by sociology, and jurisprudence as the oldest social science.
These dynamic developments, be they parallel or in succession, all refer to a typically Swiss accentuation of social consciousness, of a sense for social community, of a veritable common sense or common faculty of judgment, to which *Eugen Huber* alludes, when he writes about social attitude. Since the French Revolution, this attitude has become the title of solidarity.

[The Alternative of Humanist Sociology]
In his collection of essays, entitled "Approach to Cultural Philosophy", *Ludwig Stein* addresses the twentieth century as follows: "Das Zwanzigste Jahrhundert wird unter den Auspizien einer in vollständiger Umwälzung begriffenen Philosophie einsetzen. Für das heranwachsende Denkergeschlecht ist der Schwerpunkt des dialektischen Fürwitzes verschoben; er heisst nicht mehr Welt, sondern Mensch. Wir stehen mit einem Worte unter dem Zeichen der werdenden Sozialphilosophie" (Die menschliche Gesellschaft als philosophisches Problem, in: An der Wende des Jahrhunderts – Versuch einer Kulturphiloso-

phie, Tübingen: J. C. B. Mohr 1899, pp. 202-230). Cultural philosophy becomes a thoroughly social connotation, when facing the needs of modern society with its division of work and the resulting consequences. This understanding of sociology is not positivistic, nor scientifically founded, but indeed rather an expression of humanism. The very same intention may have led *Max Weber* to focus on legal sociology, despite his demand for the scientific vocation of sociology.

[From Class Struggle to Participation – Socialism and Social Democracy]
In Switzerland the categorical change from socialist, i.e. Marxist and communist class struggle to the integration of the working class through the Socio-Democratic Party is closely linked to one single person. The typograph *Robert Grimm* represented the prototype of working-class intelligence, and he travelled to France, Austria and Italy. Back in Switzerland, he joined the socialist, respectively, socio-democratic party and worked as a trade-union secretary and editor of a left-wing journal. He debuted with a pamphlet on mass strike, and in 1912 he represented his party at the Second Congress of International Socialist Parties, where he was working for the Bureau. As such he accommodated the ideas and ideals of *Karl Marx*, whereas he had some ideological and personal tensions with *Wladimir Iljitsch Lenin.* In 1915 and 1916 he organised the Socialist Conferences of the pacifist wing of the socialist movement in Zimmerwald, respectively Kienthal, both situated in the rural areas of the Canton of Berne. In 1918 he reached the focus of the public as president of the so-called "Oltener Aktionskomitee", and he organised the "Landesstreik", a nationwide general walkout. Although resigning to adhere with his party to the Third Socialist Congress, *Robert Grimm* kept on fighting for its Programme, whose author he actually was. Meanwhile he had a very moderate and intelligent sense of the political dimension of the socialist movement. It was only in 1935, when he changed his mind and supported parliamentary democracy and collective defence of the nation-state, that enabled him to chair the caucus of members of the socio-democratic party within the Swiss Federal Parliament between 1936 and 1945. He thoroughly criticised capitalism and held a severe anti-Americanism; nevertheless, as a leader with a socialist consciousness he had a rather pragmatic practice of Marxist principles and eventually changed to a socio-democratic statesman, the first in Switzerland in fact. He was a member of Parliament from 1911 to 1955, and in 1926 he was elected as a vice president and in 1946 as the president of the Swiss Federal Assembly. Finally, he even participated in and shared the Bernese Executive body, which would have been unthinkable on the level of the Swiss Federal State at that time.

[The Social Foundations of International Law as the Prototype of Legal Order]
In his contribution to the knowledge of international legal order and the international community of states, entitled "Die soziologischen Grundlagen des Völkerrechts", the eminent jurisprudent (and eventually Judge at the Permanent Court of International Justice) *Max Huber* has expressed in a paradigmatic manner the philosophical foundations not only of international law, but rather of legal order itself (first printing in: Jahrbuch des

Öffentlichen Rechts der Gegenwart, vol. 4 (1910), Tübingen: J. C. B. Mohr, 1910; 2nd ed. Berlin: Walther Rothschild, 1928). The intention to influence individual behaviour within the context of social community characterises an understanding of jurisprudence, that shows as a promotor of legal order in all its forms. The essential parts deal with legal philosophical questions concerning the sociological understanding of legal order in the domain of international law. The core argumentation consists in a kind of a theory of international law "*in nuce*", and the author argues in a manner or modality that resembles argumentation in the domains of sociology, anthropology and ethnography, to a certain extent. Law and legal order appear as the main achievements of the human faculty to build social communities, and jurisprudence as the leading science, when it comes to construct and defend the binding force, the obligatory or normative character of rights and duties. The numerous writings of Huber have been influential way beyond Switzerland. They have provided the basis of predominant recognition of state sovereignty, requiring the exercise of effective control over the territory. They have also provided the foundation of legal realism in the United States after the Second World War and have contributed to the renewal of the Den Haag School of Jurisprudence.
That this view on legal order is not at all singular, demonstrates the reception by *Jacob Wackernagel*, documented in his writing on "the sociological perspective, in particular in international law" (in: Festgabe zum 70. Geburtstag von Max Gutzwiller, ed. Juristische Fakultät der Universität Freiburg im Üechtland, Basel: Helbing & Lichtenhahn, 1959, pp. 119-133). "Der Jurist bezweckt mit rechtssoziologischer Forschung ausschliesslich ein Verstehen des Rechts, allerdings ein Verstehen des Rechts in seinen gesellschaftlichen Beziehungen. Für den Soziologen aber dient die Betrachtung des Rechtsstoffes letztendlich einem Verstehen der allgemeinen gesellschaftlichen Zusammenhänge. Er will nicht das Recht sondern Gesetzmässigkeiten des gesellschaftlichen Daseins erkennen". This difference in approaches of jurisprudence and sociology does not hinder fecund collaboration, when it comes to determining the fundamentals of international law and legal order in general, however.

[For Further Reading]
Terry Eagleton: The Illusions of Postmodernism, Oxford: Basil Blackwell, 1996 (German translation: Die Illusionen der Postmoderne – Ein Essay, Stuttgart: J. B. Metzler, 1997);
François Furet: Le passé d'une illusion – Essai sur l'idée communiste au XXème siècle, Paris: Robert Laffont/ Calmann-Lévy, 1995;
Robert Grimm: Geschichte der Schweiz in ihren Klassenkämpfen, Bern: Buchhandlung des Waisenhauses, 1920; *idem*: Geschichte der sozialistischen Ideen in der Schweiz, Zürich: Oprecht & Helbing AG, 1931;
George Lichtheim: A Short History of Socialism, New York/Washington: Praeger Publishers, 1970;
Tim Murphy: The Oldest Social Science? Configurations of Law and Modernity, Oxford: Clarendon Press, 1997;
Valentino Petrucci: Socialismo aristocratico – Saggio su Georges Sorel, Napoli: Edizioni

Scientifiche Italiane, 1984.

25 January 2018 (revised on 19 July) *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
7th Section "Jurisprudence as the Oldest Social Science – Social Question, Sociology, Socialism, Swiss Social Democracy, Social State"
Entry 7.0 "Timothy Murphy, The Oldest Social Science"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Murphy, W. Timothy
Title: The Oldest Social Science? – Configurations of Law and Modernity
Edition(s): Oxford: Clarendon Press, 1997, pp. 1-36, 186-220

[Introduction]
The selected monography by a young Scholar in Jurisprudence and Social Theory has been inserted into the "Oxford Socio-Legal Studies Series", alongside with *Roger Cotterell*'s "Law's Community" for instance and seems to show an unhidden eclecticism.

[Historical Situation and Systematic Context]
The author poses questions about the place and function of law in modern society. He goes on to also consider what implications there might be for any future role for law. This book looks critically at some of the underlying assumptions which shape our current understanding of the role and purpose of law and society. Hereby the long-term perspective of law within western civilization is addressed.

[Content, Abstracts]
The author primarily takes issue with the general assumption that law is the solution to the problems of society. Instead, he presents in this book an argument that conventional ways of thinking about law in society, which he suggests are framed by hierarchical assumptions, need to be revised to give greater emphasis to what he thinks of as "horizontal or parallel relations". Some of the implications of this alternative view are addressed.
It focuses on adjudication as a social practice and as a set of governmental techniques. From this vantage point, it explores how the relationship between law, government and society has changed in the course of history in significant ways. At the core of the argument is the elaboration of the notion of 'adjudicative government.' From this perspective it is argued that the relationship between law and society must be conceived in a different way in the era of economics, sociology and statistics. The impact of these disciplines both constitutes 'modernity' and unfolds a different role for the law. The author argues that the traditional vision of the role of law, rooted in a complex set of hierarchical assumptions, is no longer adequate.
In the first of the selected part of text the starting point is law as the one and single measure (Nomos) for all specific cases it should be adopted or applicated, leading to the presumption of the sovereignty of legal order. "What is the nature of law? By this question

I do not mean to ask in what its validity or justification lies. I am interested rather in its modes of application, in its presuppositions as it moves into action, and in, as it does, so, what it claims to know about the targets of its Operations. All these 'its' are, of course, problematic. In many respects my resort to this usage is no more than a convenient rhetoric, a discursive economy to permit much ground to be covered relatively briefly." In the following argumentation the author confronts interiority and subjectivity to externality and objectivity. The many insights cannot however compensate the focus on merely ontological questions and the lack of the practical, pragmatic and applicational dimensions. "The penetrative scheme is no more or less than a fantasy, a chimera. At the same time, it is 'effective' as long as it affords a compelling vehicle for problematization of the ills of the world or of existence, as long as it can generate from within itself recipes and remedies, means of intervention, techniques of governance and the means of conducting humanity towards its future and its destiny. Such a means was found in what is termed here adjudicative government. Though the origins of this are again diffuse, the key point to note is the elective affinity (here, the term is apposite) between the penetrative scheme of ruler and ruled and a mode of government which comes to privilege the soul, and which is based on the divide between the inner and the outer".
In the second of the extracted parts of text legal individualism is explored and localised within the ethical space. "The argument is that there was indeed at some time in the past a special affinity between law and society in the sense that the categories of society were legal categories and that the categories of law were therefore social categories. There was not for many purposes a distinction between the two, and therefore the kinds of problems of translation between the two which exist today did not exist in their modern form.' In this sense law was the oldest social science and a rich – though not the only – reservoir for the language of politics. Even the question of form and substance within this traditional scheme is a distinction which appears within law and society simultaneously and in the same shape".

[Conclusions, Insights, Evidence]
Starting from insights provided by *Friedrich Nietzsche*, *Niklas Luhmann*, *Michel Foucault* and *Pierre Legendre* the author holds that law is both epistemically and practically irrelevant to the modern positivities of science and government, and to the techniques of management through which their knowledge are applied. From that derived a general decline of law that has mainly been based on Jewish and Christian foundations and has therefore never been a science, but rather an object of faith with inclinations to ceremony and mystery. More over a shift from adjudication to autopoiesis can be identified. In consequence law escapes the analytical frame of sociology in the tradition of *Max Weber*. Law is to be located within society and no longer serves as an instrument to shape social structures. The systematic character of legal order – simply taken as the outlook of the scientific character of law – becomes fiction and cannot been held any longer. Salutary correction to the adjunctive model of social governance.

[Philosophical Valuation and Jurisprudential Significance]
In a book review, *Peter Goodrich* has payed extensive attention to the comprehensive study undertaken by *Timothy Murphy*. After having addressed the deficiencies of the analytical scheme, the main merits are put forward in a language that is somewhat easier to understand: "At the level of ideology law clings to its antique function of structuring the social order and providing the language within civic and national governance is effected. The dogma of law persists and so too does its social visibility, even though its role in reality is now to follow events rather than to mould them. The paradox of this somberly scientific depiction of the new social order lies in the fast that whatever the actual role of law in the strategies of governance, the legal order persists and indeed gains in cultural importance and status at the same time as its epistemic significance is eclipsed. Law is displaced by a myriad of laws, the legal system by ever expanding normative subsystems. At the same time that the classical model of law disappears, the plurality of laws forces the legal model of governance into the center of the social stage. It is this irony of the autopoietic project that is most interesting and most open to criticism. It suggests a certain ambiguity or uncertainty to the (religious) metaphor of systems. It could also be argued that the concept of law as a system tends to lead the autopoietic theorist back to a somewhat uncritical acceptance of the notion of law as a system – albeit a subsystem amongst others – rather than as a plurality. The tendency to portray the legal system as marginal to the analysis or apprehension of the social could in the end be no more than a reflection of a theory that clings to an antiquated and dogmatic conception of law".

[Further Information About the Author]
W. Timothy Murphy is currently a reader in Law at the London School of Economics.

[Selected Works of the Same Author]
W. Timothy Murphy: Reason and Society – The Science of Society and the Sciences of Man: Durkheim and Weber, in: Reason and History – Or Only a History of Reason? Ed. Philipp Windsor, Leicester: Leicester University Press, 1989, p. 56-88; *Idem*: Reference Without Reality – A Comment on a Commentary on Codifications of Practice, in: Law and Critique, vol. 1 (1990), p. 61-80; *Idem*: The Oldest Social Science – The Epistemic Properties of the Common Law Tradition, in: Modern Law Review, vol. 54 (1991), p. 182-215; *Idem* (together with *Simon Roberts*): Understanding Property Law, Oxford: Clarendon Press, 2. Ed. 1996.

[For Further Reading]
Peter Goodrich: Social Science and the Displacement of Law, in: Law & Society Review, vol. 32 (1998), No. 2, pp. 473-492;
Peter Wagner: Book Review of: W. Timothy Murphy, The Oldest Social Science, in: Social and Legal Studies, London: SAGE-Publications, vol. 8 (1999), No. 2, p. 297-299.

23 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
7th Section "Jurisprudence as the Oldest Social Science – Social Question, Sociology, Socialism, Swiss Social Democracy, Social State"
Entry 7.3 "Ludwig Stein, Versuch einer Kulturphilosophie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Ludwig Stein
Title: An der Wende des Jahrhunderts – Versuch einer Kulturphilosophie
Edition(s): Tübingen: J. C. B. Mohr 1899, pp. 202-230 ("Die menschliche Gesellschaft als philosophisches Problem") and pp. 47-77 ("Das Prinzip der Entwickelung in der Geistesgeschichte")

[Introduction/Historical Situation and Systematic Context]
Already in his writing about "Wesen und Aufgabe der Sociologie" from 1898 (see no. 0.12 of this Legal Anthology), *Ludwig Stein* has decidedly pointed out his conception of sociology as social philosophy, and therefore includes legal philosophy as well. In his project to establish cultural philosophy as a scientific discipline he addresses "human society as a matter of philosophy", in a chapter of his collection volume entitled "At the Turning Point of the Century".

[Content, Abstracts]
The dynamic approach in sociology is even accentuated by the general idea of a cycle or spiral in the domain of the history of human thought. Although this conception is commonly associated with Hegelianism, *Ludwig Stein* identifies pre-conceptions of such an ideal already in Antiquity and in the Middle Ages, as he proves in the chapter on "The Principle of Development in History of Human Thought".
In his conception of cultural philosophy of cycles of human thought, *Ludwig Stein* establishes the link to Hegelian dialectics: "Wollte man *Georg Wilhelm Friedrich Hegel* trauen, so würde sich der ganze Weltprozess, die Selbstentfaltung des Weltgeistes (Logos) nach dem triadischen Rhythmus, dem Dreiviertelstakt von An-Sich, Für-Sich und An-und-Für-Sich, einen in sich geschlossenen Kreis der Selbstbewegung des Gedankens darstellen". Already this sentence, however, indicates that there are some reserves to be made. "Das Problem der menschlichen Gesellschaft liefert uns, geschichtlich angesehen, einen willkommenen Beleg dafür, dass Ideenbewegungen nicht kreisförmig, sondern spiralförmig verlaufen". Dynamic progress shall lead from the periphery of a circle to its centre, instead to remain on the circumcircle. This proposition poses the problem of how the categories of social progress should be defined, as there are significant differences in systematic-theoretical philosophy on this point.

[Conclusions, Insights, Evidence]
Ludwig Stein tends to identify these categories as individualism vs. universalism,

respectively, individualism vs. collectivism. However, this conception of individualism has to be secured from anarchy and egoism. As a remedy to the exaggerations of individualism, principles have to be evoked about how to build a human community and how to found social coherence within a collective group. "Das Problem der menschlichen Gesellschaft ist in ein akutes Stadium getreten. Es pocht an jede Thüre und weckt auch den verschlafensten speculativen Träumer aus seinen Phantasien. Man harrt ungeduldig um Antwort. Die Philosophie darf nicht zaudern, will sie nicht Gefahr laufen, in Zukunft überhaupt nicht mehr gefragt zu warden. Und so bildet sie sich an der Wende unseres Jahrhunderts offensichtlich um. Die sozialen Probleme rücken in den Vordergrund. Der Mensch ist endlich wieder nach zwei Jahrtausenden bei sich selbst angelangt, zur philosophischen Erforschung, Beleuchtung und streng wissenschaftlichen – nicht religiösen, auch nicht bloss ethischen –, das heist mathematisch genauen Formulierung seiner Beziehungen zur sozialen Umwelt, zu seinem Mitmenschen zurückgekehrt. Wir erleben augenblicklich eine Renaissance des Anthropozentrismus. Nur steht der heutigen Philosophie der Mensch nicht mehr, wie der früheren anthropozentrischen Weltanschauung, im Mittelpunkt des Universums, sondern nur im Mittelpunkt des philosophischen Interesses. Nicht die Welt, sondern die menschliche Gesellschaft wird, wenn nicht alle Anzeichen trügen, das zentrale Problem der philosophischen 'Moderne', der 'Jungen'. Das Zwanzigste Jahrhundert wird unter den Auspizien einer in vollständiger Umwälzung begriffenen Philosophie einsetzen. Für das heranwachsende Denkergeschlecht ist der Schwerpunkt des dialektischen Fürwitzes verschoben; er heisst nicht mehr Welt, sondern Mensch. Wir stehen mit einem Worte unter dem Zeichen der werdenden Sozialphilosophie".

[Further Information About the Author]
Ludwig Stein, born on 12 November 1859 in Erdö-Benye (Hungary), died on 13 July 1930 in Salzburg, went to Berlin and Halle an der Saale in order to study philosophy with *Eduard Zeller* and *Wilhelm Dilthey*. As an eminent representative of the Jewish community he also became a rabbi. In 1886, he was called a lecturer at the "Eidgenössisches Polytechnikum" and at the same time at the University of Zurich. Between 1891 and 1910 he was a professor of philosophy at the University of Berne with a strong inclination to sociology. In 1893 he obtained Swiss citizenship in his new hometown of Zurich. *Walter Rathenau*, *Leo Trotsky* and *Rosa Luxemburg* were counted among his students. In 1909 he organized the 7th congress of sociology in Berne, in the name of the *Institut International de Sociologie*. Back in Berlin he was the chief editor of the "*Archiv für Geschichte der Philosophie*" as well as of the "*Archiv für systematische Philosophie und Soziologie*".
Although a pacifist and a member of the Committee of the international Bureau for Peace, *Ludwig Stein* was thoroughly bourgeois in his mind. He therefore criticised not only socialist ideas, but also conservative politics. He, for example, argued against the theories of *Friedrich Nietzsche*. Greater influence, however, may have been his activities as a publicist writing in numerous journals and papers.

[Selected Works of the Same Author]
Ludwig Stein: Die sociale Frage im Lichte der Philosophie – Vorlesungen über Socialphilosophie und ihre Geschichte, Stuttgart: Ferdinand Enke, 1897; *Idem*: Wesen und Aufgabe der Sociologie – Eine Kritik der organischen Methode in der Sociologie, in: Archiv für systematische Philosophie, vol. 4, Berlin: Georg Reimer, 1898, 38 pp.; *Idem*: An der Wende des Jahrhunderts – Versuch einer Kulturphilosophie, Tübingen: J. C. B. Mohr 1899; *Idem*: Der soziale Optimismus, Jena: Hermann Costenoble, 1905; *Idem*: Die Anfänge der menschlichen Kultur – Eine Einführung in die Soziologie, Leipzig: B. G. Teubner, 1906; *Idem*: Philosophische Strömungen der Gegenwart, Stuttgart: Ferdinand Enke, 1908; *Idem*: Dualismus oder Monismus? – Eine Untersuchung über die doppelte Wahrheit, Berlin: Reichl, 1909; *Idem*: Die Juden in der neueren Philosophie, Berlin, M. Poppelauer: 1919; *Idem*: Einführung in die Soziologie, München: Rösl, 1921; *Idem* (Ed.): Archiv für die Geschichte der Philosophie; *Idem* (Ed.): Archiv für systematische Philosophie und Soziologie.

[For Further Reading]
Markus Zürcher: Unterbrochene Tradition – Die Anfänge der Soziologie in der Schweiz, Zürich: Chronos-Verlag, 1995.

3 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
7th Section "Jurisprudence as the Oldest Social Science – Social Question, Sociology, Socialism, Swiss Social Democracy, Social State"
Entry 7.5 "Eugen Huber, Soziale Gesinnung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Eugen Huber
Title: Über soziale Gesinnung
Edition(s): in: Politisches Jahrbuch der schweizerischen Eidgenossenschaft, ed. Walther Burckhardt, vol. 16 (1912), Bern: K. J. Wyss, 1912, 69 pp.

[Introduction]
In his magistral principal writing from 1922, "Recht und Rechtsverwirklichung", *Eugen Huber* referred to a specific concept of legal community, as he had worked out ten years earlier in an essay for the "Political Yearbook of Switzerland", entitled "Über soziale Gesinnung". The term 'Gesinnung' is slightly old-fashioned and has to be gently modernised to 'Bewusstsein', so that the subject of this essay could be circumscribed as "On social consciousness" or extended as "On the Self-Consciousness of Social and Legal Community". That would very precisely correspond to the argumentation developed by Huber: "Es handelt sich für uns demnach um eine wissenschaftliche Orientierung über das Wesen des sozialen Elementes in der menschlichen Gemeinschaft". (As for the general context and specific embedment of the argument in the principal work of legal philosophy of the same author, please refer to no. 1.1 of this Legal Anthology.)

[Content, Abstracts/Conclusions, Insights, Evidence]
Society means rather community, social and legal community, as the human being is a thoroughly social animal. This confession indicates the social inclination of the general attitude of *Eugen Huber*, based on his ethical and religious convictions. This very ancient idea and ideal are transposed by Huber in modern times, and are to be characterised by technical inventions, growing realism, and increasing socialism due to the so-called social question ("soziale Frage"). The analysis of his time by the author provides an according diagnosis of the social circumstances. "Bei der Betrachtung des geselligen Lebens halten wir uns nun gerade an diesen einen, aber grundlegenden Faktor, an die Gesinnung. Wir lassen mithin alles, was der objektiven sozialen Ordnung angehört, als in irgend einer Art gegeben und bekannt, unberührt. [...] Die Gesinnung mit Hinblick auf das Gemeinschaftsleben, die bald richtig, bald unrichtig sein kann, immer aber jene Qualitäten aufweisen wird, die wir, als mit der Gesinnung in sozialer Hinsicht notwendig verknüpft, des näheren untersuchen werden". In itself the allusion to 'Gesinnung' is highly problematic, but it seems that this should only emphasise the subjective aspect and exclude the objectivated social organisation and institutions. The investigations of the author are not sociological, strictly speaking, but rather psychological or socio-

philosophical, depending on their foundation.
We shall skip the preliminary definitions and directly consider the relation and interdependence of subjective consciousness and objective life of will, between the individual and collective moment within this connection. “Das Bewusstsein seiner selbst [*sic*!] und der Gemeinschaft verschafft jedem Einzelnen ein Urteil über die Individual- und die Kollektivexistenz. Aus dem Urteil erwachsen Willensimpulse, und aus dem Willen springt die Tat hervor. Das Bewusstsein führt also den Einzelnen zur Betätigung in der Gemeinschaft und stellt das tätige Zusammenwirken aller Verbundenen her. Was in dieser Betätigung äusserlich hergestellt wird, ist die Frucht der übereinstimmenden Anlage zum geselligen Leben”. This inclination of the individual to live together with his fellow man within a social community is considered in a way that anticipates social psychology. “Die Gesinnung begleitet auf dem Fundament des Bewusstseins die Handlungen des Menschen, wie auf dem Boden der physischen Existenz der Herzschlag das körperliche Leben”. ‘Gesinnung’ turns out to be a complement to cognition, as it stands not for the receptive aspect, but rather for the active moment within the life of the will, that can be individual or collective. “So lernen wir in der Gesinnung die Grundstimmung kennen, mit der das menschliche Bewusstsein die Zweckmässigkeitshandlungen des Menschen begleitet, und unter der sozialen Gesinnung verstehen wir diese Grundstimmung in ihrer mit der menschlichen Gemeinschaft gegebenen, auf das Verhältnis zwischen Individualmoment und Kollektivmoment bezogenen Richtung”.
These moments are not to be considered as elements or components, rather than an intrinsic unity. *Eugen Huber* states, that the individual should form his will, and make his decisions upon rational consciousness: “Die soziale Gesinnung stammt aus dem vernünftigen Bewusstsein, und das bedeutet eine vernünftige Beurteilung der Dinge”. It is not evident, however, if this concept should encourage individual activities or temper collective pretensions. Ultimately, Huber defends individuality as a convinced representative and advocate of the social and state collective, and this mismatch cannot avoid the production of a number of strange ambiguities. This inconsistency is bridged precariously by pretending a parallelism or synchronism: “Wer die persönlichen Interessen und Bedürfnisse nicht als des Lebens Hauptzweck betrachtet, der wird um so mehr geneigt sein, sich in der Anteilnahme am Leben der Welt nach den Postulaten der sozialen Gesinnung zu richten”.

[Further Information About the Author]
Eugen Huber, born 13 July 1849 in Oberstammheim, died 23 April 1923 in Berne, followed (among others) the lectures of *Rudolf von Ihering* at the University of Vienna during his studies. *Rudolf Stammler* and *Max von Rümelin* were counted among his friends.
In 1881, he was called professor for federal law, civil law and legal history at the University of Basel. He was asked by the “Schweizerischer Juristenverein” to develop an overview of the legal order of the 25 Swiss cantons in order to establish the grounds for the unification of Swiss civil law, a duty he was prepared to fulfil in excellence, which is proved by the four volumes of “System und Geschichte des schweizerischen Privatrechts”

(1886-1893). As a historian, he collected the variety and peculiarities of the specific Swiss common law, that characterised the legal order of the Swiss federal state. As the very basis of the unification and codification of Swiss civil law, he identified the collective Swiss public spirit (the so-called "Volksgeist"), an idea that resembles more the public consciousness or common sense for the law.
Between 1882 and 1892, he taught commercial law and German public law at the University of Halle an der Saale.
Only in 1892 was he called back to Switzerland to take the ordinary chair for civil law, legal history and philosophy of law at the University of Berne. From the Swiss Federal Government, he soon got the task to prepare the codification of Swiss civil law and developed a proposal for the later "Schweizerisches Zivilgesetzbuch" (1900). By an intelligent combination of existing traditions and modern innovations he succeeded in a reconstruction of the hidden common understanding of Swiss private Law. His proposal found approbation in 1907 and gained validity in 1912.
In retrospect he completed his philosophically informed views of law only in the later period of his life. In his ground-breaking and masterful work on "Recht und Rechtsverwirklichung" he identified jurisprudence as a contributor to the cognition and perception of the law, according to the Kantian criticism in epistemology. Courts and judges are an integrative part of the finding of the law, and their interpretations of the common law serve as a veritable source of law.
In 1922, his last work on legal philosophy appeared, devoted to the "Absolute im Recht", where he claimed that the ideal of the law is based on the common sentiment or the common sense of the law. However, this was not meant to be an unaltered idealistic legal theory, but rather intended to establish a ground of positive law and its tendency to realise the eternal idea of law. Therefore, the ideal has to be proved by the reality of socio-cultural legal practice.
For further information, please consult:
Theo Guhl: Eugen Huber, in: Schweizer Juristen der letzten hundert Jahre, mit einem Vorwort von Max Huber, mit einer historischen Einleitung von Eduard His, ed. Hans Schulthess, Schulthess & Co. A.-G., Zürich 1945, pp. 323ff.;
Dominique Manaï: Eugen Huber - Jurisconsulte charismatique, Basel/ Frankfurt am Main: Helbing & Lichtenhahn, 1990;
Max Rümelin: Eugen Huber, Rede gehalten bei der akademischen Preisverteilung am 6. November 1923, Tübingen: J. C. B. Mohr, 1923;
Aloïs Troller: Eugen Hubers Allgemeingültige Rechtsphilosophie, in: Gedächtnisschrift für Peter Jäggi, ed. Bernhard Schneider and Peter Gauch, Universitätsverlag Freiburg Schweiz 1977;
Fritz Wartenweiler: Eugen Huber – Der Lehrer, Gesetzgeber, Mensch, Zürich/ Leipzig: Rotapfel-Verlag 1923.

[Selected Works of the Same Author]
Eugen Huber: Erläuterungen zum Vorentwurf eines Schweizerischen Civilgesetzbuchs,

Bern: Büchler & Co., 1902 (pp. 1-39); *Idem*: Das Absolute im Recht – Schematischer Aufbau einer Rechtsphilosophie, in: Festgabe der juristischen Fakultät der Berner Hochschule zur Jahresversammlung des Schweizerischen Juristenvereins von 1922, Bern: Stämpfli & Cie. AG, 1922; *Idem*: Recht und Rechtsverwirklichung – Probleme der Gesetzgebung und der Rechtsphilosophie, Basel: Helbing & Lichtenhahn, 1920; *Idem*: Über die Realien der Gesetzgebung, in: Zeitschrift für Rechtsphilosophie in Lehre und Praxis, ed. Felix Holldack, Rudolf Joergens and Rudolf Stammler, Leipzig: Felix Meiner, 1913, pp. 39ss.; *Idem*: Bewährte Lehre – Eine Betrachtung über die Wissenschaft als Rechtsquelle, Bern: K. J. Wyss, 1910.

9 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
7th Section "Jurisprudence as the Oldest Social Science – Social Question, Sociology, Socialism, Swiss Social Democracy, Social State"
Entry 7.6 "Robert Grimm, Geschichte der Schweiz"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Robert Grimm
Title: Geschichte der Schweiz in ihren Klassenkämpfen
Edition(s): Bern: Verlag der Unionsdruckerei, 1920

[Introduction/Historical Situation and Systematic Context]
Robert Grimm appears as the personification of the development from social question and socialism or communism to modern socio-democracy, and as the representation of the inter-connection between socialism, social democracy and the modern social state. He represented the prototype of working-class intelligence, when he learned the profession of typography and travelled to France, Austria and Italy. Back in his country, he joined the socialists respectively socio-democratic party and worked as a trade-union secretary and editor of a left-wing journal. He debuted with a pamphlet on mass strike, and in 1912 he represented his party at the Second Congress of International Socialist Parties, where he was working for the Bureau. As such he accommodated to the ideas and ideals of *Karl Marx*, whereas he had some ideological and personal tensions with *Wladimir Iljitsch Lenin*. In 1915 and 1916, he organised the Socialist Conferences of the pacifist wing of the socialist movement in Zimmerwald, respectively Kienthal. In 1918, he reached the focus of the public as president of the so-called "Oltener Aktionskomitee", and he organised the "Landesstreik", a nationwide general walkout. Punished by a military judge to six months of prison, he undertook to write down the first of his main books, "Geschichte der Schweiz in ihren Klassenkämpfen" (1920).
Although resigning to adhere with his party to the Third Socialist Congress, *Robert Grimm* kept on fighting for its Programme, whose author he actually was. Meanwhile he had a very moderate and intelligent sense of the political dimension of the socialist movement, which he partly documented in his second monography on "Geschichte der sozialistischen Ideen in der Schweiz" (1931; see no. 7.7 of this Legal Anthology). It was only in 1935 that he supported parliamentary democracy and collective defence of the nation-state, which enabled him to preside over the members of the socio-democratic party within the Swiss Federal Parliament between 1936 and 1945. He thoroughly criticised capitalism and held a severe anti-Americanism; nevertheless, as a leader with a socialist consciousness he had a rather pragmatic practice of Marxist principles and eventually changed to a socio-democratic statesman, the first in Switzerland in fact. He was a member of the Parliament from 1911 to 1955, and in 1926 he was elected as a vice president, and in 1946 as the president of the Swiss Federal Assembly.

[Content, Abstracts/Conclusions, Insights, Evidence]
As already mentioned, *Robert Grimm* wrote the manuscript for his first monography during his imprisonment in 1919. We encounter in this book a veritably social history of Switzerland from the foundation of the Confederation to the present time. This proves that the author did not understand the term "class conflict" only in the sense of *Karl Marx*, but in a much broader sense. Swiss historical development is presented as a constant struggle between the different social classes and brought in connection with major events and leading political persons.
For further reading, we have selected the last part of the principal historical writing by *Robert Grimm*, entitled with "dawn and dusk". Together with the foundation of the modern Nation State by the Swiss Federal Constitution of 1848, bourgeois capitalism has risen and undergoes a constant change and further development. One should not forget that many of the legislation projects within the first century of Swiss Federal politics have dealt with social problems, such as the effects of poverty, the labour situation in mass production factories, social assurances, and so on. The chapter of worker's movements and trade unions is opened thereby, and under the pressure by mass strike the modern political community is driven to social democracy. The former capitalist state has to experience a radical change by the success of protests and pressure, leading to an alteration of the production circumstances.
Proletarian representatives eventually appear as the "victorious enunciators of a new epoch in social community".

[Further Information About the Author]
Robert Grimm, born 16 April 1881 in Wald (ZH), died 8 March 1858 in Berne, represented the prototype of working-class intelligence, when he learned the profession of typography and travelled to France, Austria and Italy. Back in his country, he joined the socialist respectively socio-democratic party and worked as a trade-union secretary and editor of a left-wing journal. By the end of his life, he was the director of the "Bern-Lötschberg-Simplon-Bahnen (BLS)". This, however, is nothing compared with the setting of a leading socialist thinker in Switzerland.
He debuted with a pamphlet on mass strike, and in 1912 he represented his party at the Second Congress of International Socialist Parties, where he was working for the Bureau. As such he accommodated to the ideas and ideals of *Karl Marx*, whereas he had some ideological and personal tensions with *Wladimir Iljitsch Lenin*. In 1915 and 1916, he organised the Socialist Conferences of the pacifist wing of the socialist movement in Zimmerwald, respectively Kienthal. In 1918 he reached the focus of the public as president of the so-called "Oltener Aktionskomitee", and he organised the "Landesstreik", a nationwide general walkout. Punished by a military judge to six months of prison, he undertook to write down the first of his main books, "Geschichte der Schweiz in ihren Klassenkämpfen" (1920). Although resigning to adhere with his party to the Third Socialist Congress, he kept on fighting for its Programme, whose author he actually was. Meanwhile, he had a very moderate and intelligent sense of the political dimension of the

socialist movement, what he partly documented in his second monography on "Geschichte der sozialistischen Ideen in der Schweiz" (1931). It was only in 1935 that he supported parliamentary democracy and collective defence of the nation-state. He thoroughly criticised capitalism and held a severe anti-Americanism; nevertheless, as a leader with a socialist consciousness he had a rather pragmatic practice of Marxist principles and eventually changed to a socio-democratic statesman, the first in Switzerland in fact.

[Selected Works of the Same Author]
Robert Grimm: Geschichte der sozialistischen Ideen in der Schweiz, Zürich: Oprecht & Helbing AG, 1931.

7 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
7th Section "Jurisprudence as the Oldest Social Science – Social Question, Sociology, Socialism, Swiss Social Democracy, Social State"
Entry 7.7 "Robert Grimm, Geschichte der sozialistischen Ideen"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Robert Grimm
Title: Geschichte der sozialistischen Ideen in der Schweiz
Edition(s): Zürich: Oprecht & Helbing AG, 1931

[Introduction/Historical Situation and Systematic Context]
Robert Grimm appears as the personification of the development from social question and socialism or communism to modern socio-democracy, and as the representation of the interconnection between socialism, social democracy and the modern social state. He represented the prototype of working class intelligence, when he learned the profession of typography and travelled to France, Austria and Italy. Back in his country he joined the socialist respectively socio-democratic party and worked as a trade-union secretary and editor of a left-wing journal. He debuted with a pamphlet on mass strike, and in 1912 he represented his party at the Second Congress of International Socialist Parties, where he was working for the Bureau. As such, he accommodated to the Ideas and Ideals of *Karl Marx*, whereas with *Wladimir Iljitsch Lenin* he had some ideological and personal tensions. In 1915 and 1916, he organised the Socialist Conferences of the pacifist wing of the socialist movement in Zimmerwald, respectively Kienthal. In 1918, he reached the focus of the public as president of the so-called "Oltener Aktionskomitee", and he organised the "Landesstreik", a nationwide general walkout. Punished by a military judge to six months of prison, he undertook to write down the first of his main books, "Geschichte der Schweiz in ihren Klassenkämpfen" (1920; see no. 7.6 of this Legal Anthology).
Although resigning to adhere with his party to the Third Socialist Congress, *Robert Grimm* kept on fighting for its Programme, whose author he actually was. Meanwhile, he had a very moderate and intelligent sense of the political dimension of the socialist movement, what he partly documented in his second monography on "Geschichte der sozialistischen Ideen in der Schweiz" (1931). It was only in 1935, he supported parliamentary democracy and collective defence of the nation state, which enabled him to preside over the members of the socio-democratic party within the Swiss Federal Parliament between 1936 and 1945. He thoroughly criticised capitalism and held a severe anti-Americanism; nevertheless, as a leader with a socialist consciousness, he had a rather pragmatic practice of Marxist principles and eventually changed to a socio-democratic statesman, the first in Switzerland in fact. He has been member of the Parliament from 1911 to 1955, and in 1926 he has been elected as a vice president, in 1946 as the president of the Swiss Federal Assembly.

[Content, Abstracts/Conclusions, Insights, Evidence]
In contrast to the historical writing, *Robert Grimm* exposes his political ideas and socialist convictions in his treatise on the historical development of socialist, Marxist, and communist ideas, ideals and ideologies in Switzerland. Based on social circumstances, under the impression of the so-called social question, a specific consciousness among the working class arises. The essential is to elevate this social experience to a political movement. "Im Lichte marxistischer Geschichtsauffassung erhebt sich die sozialistische Idee zur philosophischen Idee und lässt den Ausgangspunkt des proletarischen Leidens zum Ausgangspunkt höherer und vollkommenerer Lebensformen werden". By having an efficient impact on social and political community, socialism is no longer merely utopian, but rather becomes a historical necessity.
On little more than two hundred pages, *Robert Grimm* draws the outlines of a development from opposition to collaboration between the socialist movement and the modern Nation State in Switzerland, addressing the ideas and works of *Jakob Treichler, Albert Galeer, Pierre Coullery, Johann Philipp Becker, Hermann Greulich, Friedrich Albert Lange, Albert Steck* and *Otto Lang* as well as partly of his own person. Bolshevik Revolution in Russia in 1918 induces political socialism in Western Europe to take a distance from communism and to adhere to a new model of social-democratic politics. "Vielleicht aber ist die Entwicklung der sozialistischen Ideen in der Schweiz gerade aus diesen Gründen [demokratische Tradition, Föderalismus] interessant. Diese Entwicklung ist aufs engste mit den wirtschaftlichen, sozialen und politischen Veränderungen des Landes verknüpft. Die sozialistische Ideenentwicklung ist ihr getreues Spiegelbild und stellt, herausgeschält aus der manchmal verwirrenden Hülle der Ereignisse, ein zusammenhängendes Ganzres dar. Sie bietet einen bemerkenswerten geistigen Aufstieg einer bescheiden um ihre Existenz ringenden Klasse, ein ehrliches, an den Zeitverhältnissen orientiertes Streben nach Klarheit und Wahrheit".
The inevitable new definition of the relationship between communism and socialism leads to the revisionist conversion and moderation to socio-democratic movement in Switzerland. This requires a turn from Marxist ideology to socio-democratic pragmatism, guided by a sense for social reality. "Die sozialistischen Ideen sind Lehren der Wirklichkeit, nicht Bestandteil eines Systems der philosophischen Spekulation. Aus der Wirklichkeit entstanden und entwickelt, sind sie für die Wirklichkeit geschaffen und durch sie in allen wesentlichen Teilen bestätigt worden. Ihre Grundlagen sind die gesellschaftlichen Zustände, denen sie kritisch gegenüber treten, sie aus der geschichtlichen Vergangenheit ableiten, ihre Zusammenhänge aufzeigen und ihre Weiterentwicklung darstellen". Marxist-Leninist theory and ideology have evolved to indicate a critical, historically conscious, holistic and prospective approach to daily politics within a democratic political community with a federal organisation. "Jetzt, nachdem ein halbes Jahrhundert proletarischer Klassenkämpfe im nationalen und internationalen Massstab zeigte, wie richtig der Satz ist, dass die immer weiter um sich greifende Vereinigung, nicht der unmittelbare Erfolg das Resultat dieser Kämpfe ist, jetzt, nachdem die Krise des Kapitalismus alle sozialen Errschungenschaften der Arbeiterklasse bedroht,

die Mittel der bisherigen Organisationen nicht ausreichen, um diese Gefahr abzuwenden, der demokratische Staat immer unverhüllter die Formen der wirtschaftlichen und finanziellen Diktatur der kapitalistischen Herrschaft annimmt, tritt die Notwendigkeit der Überwindung der alten Gesellschaft immer stärker in das Bewusstsein der Arbeiter. Der Sozialismus erscheint jetzt nicht nur als ein Ergebnis theoretischen Denkens. Seine Notwendigkeit geht nun hervor aus dem unmittelbaren praktischen Erleben der Gegenwart. Was einst Idee war, erhält Fleisch und Blut, was einst blosse Theorie war, wird zur lebendigen Wirklichkeit. / Damit tritt die Geschichte der sozialistischen Ideen in eine neue Phase ein. Sie geht vom Bewusstsein über in das praktische Handeln. Früher ein Objekt theoretischer Auseinandersetzungen, wird die sozialistische Idee Objekt des proletarischen Massen- und Klassenkampfes. In ihrem Zeichen wird die Menschheit den Weg zu neuen Formen des gesellschaftlichen Daseins beschreiten, in ihrem Zeichen ihren Aufstieg, ihre Befreiung vollziehen". This is the intermediate conclusion on the way to determine the relation between theory and practice by socio-democratic revisionism and pragmatism; however, the means of mass strikes, of nationwide walkout remains the vehicle of pressure and influence on bourgeoise politics, according to *Robert Grimm*'s mental disposition of a representative of the working class, as an eloquent self-made intellectual, and as a militant politician. Within this new framework, the law is meant to be an instrument to fulfil political tasks, is considered to instrumentally serve politics as a means to extrinsic ends. This may be the main deficiency of the socialist approach to solutions of social problems, indeed.

[Further Information About the Author]
Robert Grimm, born 16 April 1881 in Wald (ZH), died 8 March 1858 in Berne, represented the prototype of working-class intelligence, when he learned the profession of typography and travelled to France, Austria and Italy. Back in his country, he joined the socialist respectively socio-democratic party and worked as a trade-union secretary and editor of a left-wing journal. By the end of his life, he was after all director of the "Bern-Lötschberg-Simplon-Bahnen (BLS)". This, however, is nothing less than the setting of a leading socialist thinker in Switzerland.
He debuted with a pamphlet on mass strike, and in 1912 he represented his party at the Second Congress of International Socialist Parties, where he was working for the Bureau. As such, he accommodated to the Ideas and Ideals of *Karl Marx*, whereas with *Wladimir Iljitsch Lenin* he had some ideological and personal tensions. In 1915 and 1916, he organised the Socialist Conferences of the pacifist wing of the socialist movement in Zimmerwald respectively Kienthal. In 1918, he reached the focus of the public as president of the so-called "Oltener Aktionskomitee", and he organised the "Landesstreik", a nationwide general walkout. Punished by a military judge to six months of prison, he undertook to write down the first of his main books, "Geschichte der Schweiz in ihren Klassenkämpfen" (1920). Although resigning to adhere with his party to the Third Socialist Congress, he kept on fighting for its Programme, whose author he actually was. Meanwhile, he had a very moderate and intelligent sense of the political dimension of the

socialist movement, what he partly documented in his second monography on "Geschichte der sozialistischen Ideen in der Schweiz" (1931). It was only in 1935 that he supported parliamentary democracy and collective defence of the nation state. He thoroughly criticised capitalism and held a severe anti-Americanism; nevertheless, as a leader with a socialist consciousness, he had a rather pragmatic practice of Marxist principles and eventually changed to a socio-democratic statesman, the first in Switzerland in fact.

[Selected Works of the Same Author]
Robert Grimm: Geschichte der Schweiz in ihren Klassenkämpfen, Bern: Buchhandlung des Waisenhauses, 1920.

[For Further Reading]
Rudolf Stammler: Wirtschaft und Recht nach der materialistischen Geschichtsauffassung – Eine sozialphilosophische Untersuchung, Leipzig: Veit & Comp., 3. A. 1914;

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The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
7th Section "Jurisprudence as the Oldest Social Science – Social Question, Sociology, Socialism, Swiss Social Democracy, Social State"
Entry 7.9 "Max Huber, Die soziologischen Grundlagen des Völkerrechts"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Max Huber
Title: Die soziologischen Grundlagen des Völkerrechts (1st edition entitled: Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft)
Edition(s): in: Gesellschaft und Humanität – Vermischte Schriften, Zürich: Atlantis, 1948, vol. 3, pp. 49-162 (first printing in: Jahrbuch des Öffentlichen Rechts der Gegenwart, vol. 4 (1910), Tübingen: J. C. B. Mohr, 1910; 2nd ed. Berlin: Walther Rothschild, 1928)

[Introduction/Historical Situation and Systematic Context]
One of *Max Huber*'s best-known essays, in the 1st edition entitled "Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft", has been printed in the "Yearbook of public law" in 1910. This publication is a well-known journal which must have contributed to the widespread knowledge of this essay, which covers more than a hundred pages. The essential parts deal with legal philosophical questions concerning the sociological understanding of legal order in the domain of international law. Whereas the forms and epochs within the development of international legal order are not more than informative today, because highly dependent on historical circumstances, the core argumentation consists in a kind of a theory of international law "*in nuce*" (compare paragraphs five and six, concerning the relation between common law and international community, and the further integration of the community of independent states). Although the author refers to evolutionary theory as proposed by *Herbert Spencer*, rather to historical philosophical theories, this error in taking biology as a model for legal thought does not affect the validity of the core arguments, after all. *Max Huber* argues in a manner or modality that resembles argumentation in the domains of sociology, anthropology and ethnography, to a certain extent.
This presentation of some of the principal questions of international law in these times by *Max Huber* shows a considerable and beneficial difference to the theory of the sources of international law, as presented by positivistic jurisprudence, for example by *Paul Guggenheim* (Lehrbuch des Völkerrechts – Unter Berücksichtigung der internationalen und schweizerischen Praxis, 2 vols., Basel: Verlag für Recht und Gesellschaft, 1948/ 1951), as well as to natural law based theories, such as in *Dionisio Anzilotti* (Lehrbuch des Völkerrechts, vol. 1: Einführung, allgemeine Lehren (Institut für ausländisches öffentliches Recht und Völkerrecht), Berlin/ Leipzig: Walter der Gruyter & Co., vom Verfasser durchgesehene und autorisierte Übertragung nach der 3., erweiterten und revidierten italienischen Auflage 1929), and in *Franz von Liszt* (Das Vökerrecht, Berlin: Springer, 1918).

[Content, Abstracts/Conclusions, Insights, Evidence]
Max Huber takes the dualistic view of law and its social substrate as his starting point. The main thesis, that has found reception by *Jacob Wackernagel* (see no. 7.10 of this Legal Anthology), reads as follows: "Es kann wohl kaum fraglich sein, dass von allen Rechten das Völkerrecht sich am engsten an seinen sozialen Unterbau anschliesst und anschliessen muss, weil hier die objektive Rechtsordnung unmittelbar auf dem Willen der Rechtssubjekte beruht, und weil es hier an Organen fehlt, welche in der Lage wären, unabhängig vom Willen einzelner Rechtssubjekte die objektive Rechtsordnung zu verwirklichen. [...] / Weil den Kollektivinteressen der Staaten keine wirksame Organisation entspricht, ist die Verletzung dieser internationalen Rechtsordnung leichter als diejenige der staatlichen; aber gleichwohl wirkt diese Ordnung im Staatenleben als selbständige Grösse, und sie trägt die Garantie ihrer Geltung darin, dass sie, als autonomes Produkt aller beteiligten Rechtssubjekte, im wesentlichen der Ausdruck der tatsächlichen Verhältnisse ist. Das Völkerrecht ist eine Rechtsordnung, welche nicht den momentanen Verhältnissen zwischen zwei einzelnen Staaten, sondern dem durchschnittlichen und dauernden Wesen der Beziehungen aller Staaten zueinander entsprechen soll und auch entspricht". The international legal order consists essentially in a tendency to become an independent and autonomous legal order in comparison to the individual will of the contributing states. "Auch dem Völkerrecht ist die Tendenz nach Selbständigkeit gegenüber dem sozialen Substrat immanent. Ja, das Völkerrecht ist zu einem grossen Teil durch die Naturrechtslehre als völlig selbständiges Recht, wir würden sagen als Postulat, geschaffen worden, und die tatsächlichen Beziehungen haben sich diesem postulierten Rechte wenigstens teilweise angeglichen und es auf diese Weise zu positivem Recht gemacht. [...] / Aber auch heute, wo diese naturrechtlichen Einflüsse zum grössten Teil verschwunden sind, strebt das Völkerrecht gleichwohl nach Selbständigkeit".
Max Huber's ending of the opening statements anticipates the very conclusion in advance: "Die sozialen Vorgänge des Staatenlebens äussern sich im Völkerrecht rascher und unmittelbarer als die für die innerstaatliche Ordnung erheblichen Vorgänge im staatlichen Recht. Jurisprudenz und Soziologie weisen auf dem Boden des internationalen Recht einen strengeren Parallelismus auf als im Staats- oder gar im Privatrecht, aber das Völkerrecht geht deshalb nicht in Geschichte und Politik auf, sondern strebt trotz aller Gebundenheit an sein soziales Substrat nach Hervorbringung selbständiger Rechtsbegriffe und eines aus diesen durch juristische Gedankenoperationen aufzubauenden Systems". The existence of particular international legal orders cannot be prevented, nor assumed and, therefore, the unilateral common international law stands representative for the only one universal order, according to the unity of the international community of states, that have to represent the collective interests of humanity

[Further Information About the Author]
Max Huber, born 28 December 1874 in Zurich, died 1 January 1960 in Zurich, studied jurisprudence at the Universities of Lausanne, Zurich and Berlin, where he obtained a doctorate. In 1902, he was called onto the ordinary chair for constitutional law, public

church law and international law by the University of Zurich, a professorship to which he remained faithful until 1921. As a legal consultant of the Swiss government, he represented Switzerland 1907 to the Second Den Haag and 1919 to the Paris Conference, where he took part in shaping the neutrality of his country. As a legal diplomat, he was delegated to several boards of the League of Nations. He also was a member of the Den Haag International Court between 1922 and 1932, even its president between 1925 and 1927. Just another obligation for him was to preside the International Red Cross Committee from 1928 to 1944, where he contributed to the development of the humanitarian law. He obtained multiple honours such as 10 doctors honoris causa, and above all was a man with a huge reputation in his time.
For further information, please consult:
Peter Vogelsanger: Max Huber, Berlin: Duncker & Humblot, 1967;
Felix Renner: Der Verfassungsbegriff im staatsrechtlichen Denken der Schweiz im 19. und 20. Jahrhundert (Dissertation Universität Zürich), Zürich: Schulthess & Co., 1968, pp. 441 ss.;
Daniel Thürer: Max Huber – A Portrait in Outline, in: The European Journal of International Law, vol. 18 (2007), S. 69-80;
Andreas Kley: Max Huber – Völkerrechtler des 20. Jahrhunderts, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 161 ss.

[Selected Works of the Same Author]
Max Huber: Heimat und Tradition, Glaube und Kirche, Gesellschaft und Humanität, Rückblick und Ausblick, Vermischte Schriften, 4 vol. Zürich: Atlantis, 1948.

5 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
7th Section "Jurisprudence as the Oldest Social Science – Social Question, Sociology, Socialism, Swiss Social Democracy, Social State"
Entry 7.10 "Jacob Wackernagel (junior), Rechtssoziologische Betrachtungsweise"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Jacob Wackernagel (junior)
Title: Über rechtssoziologische Betrachtungsweise, insbesondere im Völkerrecht
Edition(s): in: Festgabe zum 70. Geburtstag von Max Gutzwiller, hrsg. von der Juristischen Fakultät der Universität Freiburg im Üechtland, Basel: Helbing & Lichtenhahn, 1959, pp. 119-133

[Introduction/Historical Situation and Systematical Context]
In paragraph two of his principal writing on Swiss public law, *Fritz Fleiner* elaborates the "politische Grundanschauungen des schweizerischen öffentlichen Rechts" (Schweizerisches Bundesstaatsrecht, Zürich: Schulthess, 1949, paragraph 2; see also *Idem*: Ansprache am Schlusse der Vorlesung über Schweizerisches Bundesstaatsrecht, in: Ausgewählte Schriften und Reden, Zürich: Polygraphischer Verlag AG, 1941, pp. 424 ss.). This passage could serve as a plea for sociological considerations in the domain of public law, in general. The essay by *Jacob Wackernagel*, that is inserted into the essays in honour of *Max Gutzwiller*, deals with this subject in the domain of internatinal law, and refers to the prominent writing by *Max Huber*, entitled "Die soziologischen Grundlagen des Völkerrechts" (first printing in: Jahrbuch des Öffentlichen Rechts der Gegenwart, vol. 4 (1910), Tübingen: J. C. B. Mohr, 1910; 2nd ed. Berlin: Walther Rohtschild, 1928; see no. 7.9 of this Legal Anthology), as well as to a monography by *Franz W. Jerusalem*, entitled "Völkerrecht und Soziologie" (Jena: Gustav Fischer, 1921), and, last but not least, offers a selection of contributions by the old school of international law (with vast and comprehensive bibliographic references).
"Der Jurist bezweckt mit rechtssoziologischer Forschung ausschliesslich ein Verstehen des Rechts, allerdings ein Verstehen des Rechts in seinen gesellschaftlichen Beziehungen. Für den Soziologen aber dient die Betrachtung des Rechtsstoffes letztendlich einem Verstehen der allgemeinen gesellschaftlichen Zusammenhänge. Er will nicht das Recht sondern Gesetzmässigkeiten des gesellschaftlichen Daseins erkennen". This difference in approaches of jurisprudence and sociology does not hinder fecund collaboration, when it comes to determine the founding bases of international legal order, however.

[Content, Abstracts/Conclusions, Insights, Evidence]
According to *Jacob Wackernagel*, an eminent representative of the history of law (*sic*!), legal sociology instructive especially in the domain of public law, including international law. The argumentation is developed with particular attention to the phenomenon of customary law. As one of the core questions with respect to legal sociology, occurs the

decision, whether an effective order has to be qualified as of legally binding character or simply sanctioned by behaviour within society, a question that is often neglected, indeed. Generally speaking, many of the insights of legal sociology have attained common acceptance, for instance the fact that the validity of legal prescriptions is eventually based on regular obedience by the subjected.
Let us highlight the main arguments, as proposed by *Jacob Wackernagel*: "Dieses Angeschlossensein des Völkerrechts an seinen sozialen Unterbau [as it has been identified and expressed by *Max Huber*] ist vor allem deswegen vorhanden, weil das Völkerrecht in seinen hauptsächlichen Bestandteilen Gewohnheitsrecht darstellt, das unmittelbar aus diesem sozialen Unterbau herausgewachsen ist. Dabei ist vor allem in Betracht zu ziehen, dass einerseits die wichtigsten zwischenstaatlichen Rechtsbeziehungen gewohnheitsrechtlich geregelt sind und dass andererseits das internationale Vertragsrecht letztendlich seine Grundlage im Gewohnheitsrecht hat." The qualifying character consists in *consuetudo* based on *opinio iuris et necessitatis*, i.e. in customary rule founded in the legal judgment of its necessity in the sense of legality, which is a circular argument and only refers to judgment as an essentially human faculty. This theory provides only a dogmatic superstructure in order to identify, ascertain, and accept already existing normative laws to qualified as belonging to a certain legal order, that is equal to introduce this norm as an integral part into legal reality.
There are further interesting considerations concerning the so-called fundamental rights of the states as members within the international community: "Wenn man von der Tatsache ausgeht, dass den Grundrechtsnormen einzig die Aufgabe zukommt, die einzelne Staatsindividualität innerhalb der Staatengesellschaft in ihrer Existenz rechtlich zu sichern, so genügt eine Gruppierung der diesem Zwecke dienenden gewohnheitsrechtlichen Normen, einmal in ein Grundrecht der Staaten auf Respektierung ihrer politischen Unabhängigkeit, worin dann auch die Respektierung ihrer Gebietshoheit eingeschlossen wäre". "Das Völkerrecht bedarf der Staaten und somit ihrer Sicherung durch Grundrechtsnormen auch deswegen, weil letztlich seine Geltungskraft von der Völkerrechtsbereitschaft der Staaten abhängt. Die Staaten sind in diesem Sinne einzeln oder in völkerrechtssichernde Organisationen zusammengefasst Träger und Garanten der zwischenstaatlichen Rechtsordnung. / Von einem andern Gesichtspunkt aus betrachtet stellen im weiteren die Grundrechtsnormen das theoretische Völkerrechtsminimum dar. An sich wäre ein – gewiss primitives und wenig entwickeltes – Völkerrecht denkbar, das sich auf diese die einzelstaatliche Existenz gegenüber den andern Staaten sichernden Regeln beschränken würde". These essential dispositions and inclinations of the states could form a proper subject to be taken into consideration by legal sociology, as the author argues in conclusion.

[Further Information About the Author]
Jacob Wackernagel (junior), born on 2 October 1891 in Basel, died on 14 July 1967 in Santa Margherita di Pula (Sardegna), son of the famous classicist with the same name (1853-1938) has been a jurisprudent in legal history at the University of Basel. In 1956, he signed

as rector of this academic institution.

[Selected Works of the Same Author]
Jacob Wackernagel (junior): Die Wirklichkeit des Naturrechts, in: Zeitschrift für Schweizerisches Recht, N. S. vol. 85 (1966), Basel: Helbing & Lichtenhahn, 1966, pp. 1-39; *Idem*: Über die Rechtsidee in ihrer Bedeutung für die Staatsrechtslehre, in: Mélanges Marcel Bridel, Lausanne: Impriméries Réunis, 1968.

[For Further Reading]
Jacob Wackernagel (junior): Der Wert des Staates – Untersuchungen über das Wesen der Staatsgesinnung (Baseler Studien zur Rechtswissenschaft, vol. 6), Basel: Helbing & Lichtenhahn, 1934.

5 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
8th Section "Openness, Permeability, and Transception of Swiss Legal Thought"
Entry 8.6 "Peter Häberle, Europäische Rechtskultur"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Peter Häberle
Title: Europäische Rechtskultur – Versuch einer Annäherung in zwölf Schritten
Edition(s): Baden-Baden: Nomos, 1994, pp. 9-73, 355-364

[Introduction/Historical Situation and Systematic Context]
Among *Peter Häberle*'s best-known discoveries are the identification of jurisprudence as a cultural science, and the comparison of different legal or constitutional orders. Both achievements are fecundly practised when it comes to identifying cultural difference and similarities between constitutional order, and this qualified approach serves for instance to understand better the typically European legal culture.
The European integration of legal cultures resembles the cross-wise reception of legal inventions in ancient times, according to *Peter Häberle*. "Europa bestätigt sich als »Kraftfeld« von Rechtsproduktionen und -rezeptionen, und dieses Europa durchlebt heute selbst eine einzigartige Europäisierung in der Weise des Rechts, die den Blick auf ältere Perioden des 'gemeinen Rechts' des europäischen Mittelalters vor der Zeit des klassischen Nationalstaates zurücklenkt".

[Content, Abstracts/Conclusions, Insights, Evidence]
Peter Häberle's intention is to identify a common legal tradition, a "common legal culture" in Europe. We have discussed the cultural approach separately more in detail (see no. 3.13 of this Legal Anthology). The aspect of culture guides the attention to the essentially human character of legal order, to the law as an achievement and heritage of human life within a social community. Repeatedly, it is held that the law does not refer to nature properly speaking, but rather to human nature, spiritual life, the history of ideas, and so on, i.e., in short, culture. As the most significant elements of European legal culture are identified: history and historicity of the law, jurisprudence in the sense of legal science as a scientific discipline (including the dogmatic character of legal thought), independence of jurisdiction, neutral role of the state with respect of religious convictions, pluralistic variability within a unified framework, and the unity of particularities and universal claims. Subsequently, the author addresses the possibility of a common European legal culture as a ground for legal unification – as usual with encyclopaedical extension – and even takes the risk to sketch a common Europa constitutional law and jurisprudence, containing specific European principles.
Special attention is attributed by *Peter Häberle* to the "laboratory of Switzerland" towards the conclusion of his writing: "Die Schweiz ist ein lebendiger Faktor inmitten des sich kulturell erneuernden Gesamteuropas. Sie hat ihm nicht nur wirtschaftliche Erfolge,

sondern Geistiges zu bieten, vor allem eine blühende Verfassungsrechtskultur im Ganzen wie in einzelnen Werkstücken zum Beispiel ihres Föderalismus".

[Further Information About the Author]
Peter Häberle, born on 13 May 1934 in Göppingen (Germany), lectured on legal philosophy at the University of St. Gallen for more than twenty years. He persecuted studies in jurisprudence at the Universities of Tübingen, Bonn, Freiburg im Breisgau and Montpellier and obtained a doctorate in 1961 from the Albert-Ludwigs-University in Freiburg (Germany), as a scholar of Konrad Hesse. His promotion thesis, entitled "Die Wesensgehaltgarantie des Artikel 19 Absatz 2 Grundgesetz – Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt" has been extensively discussed in Germany and abroad. In 1969, he handed in his habilitation thesis, entitled "Öffentliches Interesse als juristisches Problem" and obtained the *venia legendi* for public law. Most of his time as an academic teacher was spent at the University of Bayreuth.
Peter Häberle's best-known discoveries are the identification of jurisprudence as a cultural science, the comparison of different legal or constitutional orders as the fifth moment in interpretation of the law, and last but not least as an inventor of many nowadays current concepts in public law. His legal thought stands in the tradition of *Hermann Heller* and *Rudolf Smend*, generally speaking. For a long period, he signed as the editor in chief of the acknowledged "Jahrbuch des öffentlichen Rechts der Gegenwart", published by Mohr/Siebeck in Tübingen. Apart from all that, he is also an excellent pianist, having been educated in a household of musicians.

[Selected Works of the Same Author]
Peter Häberle: Öffentliches Interesse als juristisches Problem – Eine Analyse von Gesetzgebung und Rechtsprechung, Bad Homburg: Athenäum, 1970; *Idem*: Die Verfassung des Pluralismus – Studien zur Verfassungstheorie der offenen Gesellschaft, Königstein: Fischer Taschenbuch, 1980; *Idem*: Europäische Verfassungslehre in Einzelstudien, Baden-Baden: Nomos, 1999; *Idem*: Gemeineuropäisches Verfassungsrecht, in: Der europäische Verfassungsraum, ed. Roland Bieber and Pierre Widmer (Publications de l'Institut de droit comparé, vol. 28), Zürich: Schulthess Polygraphischer Verlag, 1995, pp. 361 ss.; *Idem*: Verfassungslehre als Kulturwissenschaft (Schriften zum Öffentlichen Recht), Berlin: Duncker & Humblot, 1982; *Idem*: Das Menschenbild im Verfassungsstaat (Schriften zum Öffentlichen Recht, vol. 540), Berlin: Duncker & Humblot, 1988; *Idem*: Textstufen als Entwicklungswege des Verfassungsstaates – Arbeitsthesen zur Verfassungslehre als juristischer Text- und Kulturwissenschaft, in: des Menschen Recht zwischen Freiheit und Verantwortung, Festschrift für Karl Josef Partsch zum 75. Geburtstag, Berlin: Duncker & Humblot, 1989; *Idem*: Ausstrahlungswirkungen des deutschen Grundgesetzes auf die Schweiz – Ein Beispiel für weltweite Prozesse der Produktion und Rezeption „in Sachen Verfassungsstaat", in: Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen – 40 Jahre Grundgesetz, Berlin: Duncker & Humblot, 1990, pp. 1 ss.; *Idem*:

Ethik „im“ Verfassungsrecht, in: Rechtstheorie, Zeitschrift für Logik, Methodologie, Kybernetik und Soziologie des Rechts, vol. 21 (1990), pp. 269 ss., Berlin: Duncker & Humblot, 1990; *Idem* (Ed. together with *Michael Kilian* and *Heinrich Wolff*): Staatsrechtslehrer des 20. Jahrhunderts – Deutschland, Österreich, Schweiz, Berlin: Walter De Gruyter, 2015.

[For Further Reading]
Peter Häberle: Die Wesensgehaltgarantie des Artikel 19 Absatz 2 Grundgesetz – Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt, Heidelberg: C. F. Müller, 1962 (3rd ed. 1983); *Idem*: Öffentliches Interesse als juristisches Problem, Bad Homburg: Athenäum Verlag, 1970 (2nd ed. 2006); *Idem*: Grundrechte im Leistungsstaat, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, vol. 30 (1972), pp. 43 ss.

15 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
9th Section "Realism, Pragmatism, and Pluralism as Virtues of Swiss Legal Culture"
Entry 9.1 "Max Rümelin, Rechtsgefühl und Rechtsbewusstsein"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Max Rümelin
Title: Rechtsgefühl und Rechtsbewusstsein, Rede gehalten bei der akademischen Preisverteilung am 6. November 1925
Edition(s): Tübingen: J. C. B. Mohr, 1925, 80 pp.

[Introduction]
In his speech in 1925, *Max Rümelin* as the chancellor of the University of Tübingen addresses an explicitly legal philosophical question, i.e. the relationship between sentiment or feeling, on the one hand, and consciousness or awareness, on the other hand. More than fifty years before then, his father, *Gustav von Rümelin*, as chancellor of the University of Tübingen from 1870 until the succession by his son, has held a lecture on this subject, that must have been, however, of no remarkable interest for the students and the public of his time. But times have changed and after the virulent discussions on method in jurisprudence in Germany the subject has gained greater interest, indeed, due to the so-called “Gefühlsjurisprudenz”.

[Historical Situation and Systematic Context]
The answer from the Historical Law-School to the question in case has consisted in the so-called “Volksgeist”. “Heute ist das alles von Grund auf anders geworden. Die rechtsphilosophische Neigung der Juristen hat sich auch auf das Problem des Rechtsgefühls erstreckt und hat eine ganze Reihe von Aufsätzen und Abhandlungen über den Gegenstand hervorgetrieben. In der ganzen juristischen Literatur, und ebenso in der Judikatur des Rechtsgerichts, begegnet man an allen Ecken und Enden einer Bezugnahme auf Rechtsgefühl, Rechtsbewusstsein, Rechtsüberzeugung und gleichbedeutende Begriffe. [...] Damei ist ein lebhafter Streit über die Bedeutung des Rechtsgefühls für das Rechtsleben und die Rechtswissenschaft entstanden, und im Mittelpunkt dieses Streits steht die Frage, ob und in welchem Sinn das Rechtsgefühl oder das Rechtsbewusstsein eine Quelle für die Rechtfindung im konkreten Fall sein könne”.

[Content, Abstracts]
The very notion of sentiment or feeling of law can vary and present shades from classical *opinion iuris*, the conviction that a normative pattern be part of the legal order, to the flagrant impression of injustice. Psychological investigations and common sense reflections seem not to conduct the question to its solution, however. A specific judgment is always based on reflective thought, of philosophically reflecting considerations. In order not to become purely dogmatical, such reflections have to take into consideration the

problems of customary law and possible vacant spaces within the legal order to be filled by the judicial organs that are called to fill these gaps. Legal consciousness is closely linked with the collective sentiment to build a legal organised community, according to *Max Rümelin*. "Dazu treten bald in grösserem, bald in geringerem Umfang und in mannigfacher Mischung Vorstellungen über bestimmte Regeln dieses Zusammenlebens mit verschiedenartigem Inhalt. Vorstellungen, die sich auch auf das äusserlich gesetzte Recht beziehen und solche, die ein richtiges Recht zum Gegenstand haben. Die letzteren kann man wieder in Gerechtigkeits- und Zweckmässigkeitsvorstellungen einteilen, je nachdem sie die im Gemeinschaftsleben zu verfolgenden Ziele oder die zur Erreichung bestimmter vorausgesetzter Ziele erforderlichen Mittel ins Auge fassen". In the course of the discussion of these highly philosophical questions, Rümelin constantly refers to the authority of *Eugen Huber*. In contrast to the solution provided by Huber, *Rudolf von Ihering* has supposed a natural impulse to the law, and has in consequence limited the outreach of any affection, sentiment or feeling, or let us name it faculty of judgment, to a minimum. Eventually, Rümelin does not propose a founded conclusion and the tension between a postulated cognition of the law and the indispensable legal judgment in the course of the application of law is not resolved, cannot be resolved in terms of mere methodology.

[Conclusions, Insights, Evidence]
Towards the end of the argumentation the assumption becomes more and more convincing that by using concepts such as "Freirechtsschule" or "Gefühlsjurisprudenz" – in quarrel with rationalism, positivism and natural law theories, and with subjectivity or objectivity, and with relativism and absolutism – the crucial question of how to deal with the creative moment within the act of application of the legal order, with the actively practised judgment cannot be brought to an end. Today the field, where the question in case is most controversially discussed, consists in the relationship between legal principles and legal norms, respectively relatively abstract norm and more concrete norms.

[Further Information About the Author]
Max Friedrich Gustav von Rümelin, born on 15 February 1861 in Stuttgart, died on 22 July 1931 in Tübingen, has been chancellor of the University of Tübingen between 1908 and 1931, after having been nominated as a rector of the same institution already two years before and has been an ordinary professor since 1895. Before being engaged in southern Germany he already was a professor for jurisprudence, roman law and civil procedural law at the Martin Luther-University of Halle-Wittenberg. As a member of the "*Akademische Gesellschaft Stuttgardia*", he participated in the development of a liberalism typical for Baden-Württemberg. In 1930, he obtained a doctorate *honoris causa* in theology, and in 1931 in political science. Especially his academic speeches as a president of his university must have been a must have read lecture for Swiss jurisprudents in this period of time. In particular his last address as a chancellor in 1930, entitled "Erlebte Wandlungen in Wissenschaft und Lehre", represents a kind of quintessence of past and current specific conceptions of jurisprudence and can serve as a reference for further development.

Although not having explicit relations with Switzerland (apart from being an intimate friend of *Eugen Huber* among others), *Max Rümelin* deeply influenced Swiss jurisprudence by establishing the so-called "Interessenjurisprudenz" at the University of Tübingen with the eminent exponents of *Philipp Heck* (he taught there between 1901 and 1928). Not only geographic neighbourhood, but also the fact that a great number of Swiss lawyers have spent some time at the University of Tübingen justifies the selection of some crucial writings of this eminent representative of German jurisprudence of his time.
For more information, please refer to:
August Hegler: Zum Gedächtnis von Max von Rümelin, Reden gehalten am 6. November 1931, Tübingen: J. C. B. Mohr, 1931.

[Selected Works of the Same Author]
Max Rümelin: Juristische Begriffsbildung – Akademische Antrittsschrift, Berlin: Duncker & Humblot, 1878; *Idem*: Erlebte Wandlungen in Wissenschaft und Lehre, Rede gehalten bei der akademischen Preisverteilung am 6. November 1930, Tübingen: J. C. B. Mohr, 1930; *Idem*: Eugen Huber, Rede gehalten bei der akademischen Preisverteilung am 6. November 1923, Tübingen: J. C. B. Mohr, 1923; *Idem*: Reden und Aufsätze, Tübingen: H. Laupp, 1875.

[For Further Reading]
Nikolas Hasslinger: Max Rümelin (1861–1931) und die juristische Methode (Beiträge zur Rechtsgeschichte des 20. Jahrhunderts, vol. 81), Tübingen: J. C. B. Mohr, 2014;
Max Rümelin: Eugen Huber, Rede gehalten bei der akademischen Preisverteilung am 6. November 1923, Tübingen: J. C. B. Mohr, 1923.

2 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
9th Section "Realism, Pragmatism, and Pluralism as Virtues of Swiss Legal Culture"
Entry 9.4 "Hans Ryffel, Philosophie und Leben"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Hans Ryffel
Title: Philosophie und Leben, Antrittsvorlesung, gehalten am 14. Februar 1953
Edition(s): Bern: Paul Haupt, 1953

[Introduction/Historical Situation and Systematic Context]
In the inaugural lecture of *Hans Ryffel* at the University of Berne, held on 14 February 1953, we encounter reflections on the relationship between philosophy and life, between reflected theory and everyday practice. Ten years earlier, this jurisprudent and philosopher had handed in his thesis on natural law theory (see no. 1.10 of this Legal Anthology), and two years before he already was a private lecturer of philosophy, legal and political philosophy in particular. The presented arguments all turn around the role of philosophy within cultural life, the life of the spirit as well as everyday life practice. This is the very first appearance of a discussion of the relation between theory and practice, a theme that should be accentuated later as the guiding principle of the author's philosophical thought. The approach is apparently reflecting the "Theory of fundamental structures" by the former academic teacher *Carlo Sganzini* as well as the psychological and pedagogic inclinations of the philosophy of *Paul Häberlin*, both professors at the University of Berne, subsequently to the presence of *Ludwig Stein* (see nos. 0.12 and 7.3 of this Legal Anthology).

[Content, Abstracts/Conclusions, Insights, Evidence]
The core of the question, treated by *Hans Ryffel* in his lecture, concerns the adventure of life, the adventure of living thought, the adventure of spiritual life. The object of philosophical reflection consists in radicalising, in tapering the theoretical and practical expressions of life itself and the task of philosophy is to provide foundations for these forms and to accomplish consequently these forms of life. "Könnte die Philosophie in ihrer Radikalität, um es mit einem von anderen geprägten treffenden Ausdruck zu sagen, nicht gar so etwas wie ein 'Abenteuer des Geistes' sein, und zwar in seinem eigentlichen und prägnanten Sinne, das heisst ein Abenteuer, das keine Grenzen seiner möglichen Fahrten kennen würde und auf nie Geahntes gefasst sein müsste, und das so kraft der Aktualität der Philosophie zu einem Abenteuer des Menschen zu werden drohte". This redesignation of philosophy to life demands for an anthropological turn. "Auf der anderen Seiten zeigen sich sowohl in vorphilosophischer Lebenspraxis wie in philosophischer Besinnung gemeinsame Grundgehalte, die anscheinend dem Menschen als solchem zukommen und von denen auch alle Philosophie ausgeht, oder die sie doch voraussetzt und zu denen sie gar, genau besehen, letztlich wieder gelangt". To render philosophy human – which is not

self-understanding after centuries of the identification of the absolute with God – correlates to characterise life practice itself as human and to abolish natural, naturalistic views, in fact. However, the task for philosophy is not only to ascertain and to prove, but rather to ask new, open questions: "Mag man nämlich auch darob beruhigt sein, dass die Philosophie kein pures Abenteuer des Geistes und damit des Menschen ist, vielmehr im angeführten Sinne jenen schon der schlichten Lebenspraxis gemeinsamen Gehalten verhaftet, also im Leben selber verwurzelt ist und immer wieder zu ihm zurückkehrt, so erscheint sie nun vom Standpunkt dieser Lebenspraxis aus unter neuen Aspekten als fragwürdig". Profound philosophical thought only becomes possible on the way of an open-minded philosophical reflection, thus. "Ihre Hauptaufgabe besteht so darin, in kritischer Prüfung die Einseitigkeiten und Verzerrungen zu berichtigen und sie in das lebendige Ganze hineinzustellen, und ferner den Rahmen abzustecken, den die Philosophie, mit ihr aber auch alle Lebenspraxis in allen ihren Formen, nicht überschreiten darf, ohne zum 'Abenteuer des Geistes' und schliesslich des Menschen zu werden. Philosophie ist nichts anderes als zu Ende geführte Lebenspraxis, zu Ende geführte, ihrer sinnerfüllung zurückgegebene Wissenschaft und im Letzten fundiertes praktisches Tun sowie gegebenenfalls begriffener und legitimierter Gottesglaube. Philosophie ist so das Gewissen des Lebens im höchsten Sinne, und so wäre sie wahrhafte Aktualität bei aller Radikalität des Fragens; oder anders gesagt: wahrhafte Selbst- und Weltauslegung und so zugleich in den Gründen verwurzelte Selbst- und Weltgestaltung". Crucial is the insight, that philosophical thought is not only reconstructing, and reflecting reality, but rather takes an active role in creating reality and consists in a creative element of cognition itself.

[Philosophical Valuation and Jurisprudential Significance]
As the adequate method hermeneutical interpretation of the human world and of cultural products is adopted by *Hans Ryffel*, whereas in terms of objects of thought, a phenomenological approach is proposed, leading to a refusal of dogmatism. This inclination goes back to the so-called "Lebensphilosophie", a current founded by *Wilhelm Dilthey*s and made popular by *Max Scheler* (Versuche einer Philosophie des Lebens, in: Abhandlungen und Aufsätze, Leipzig: Verlag der Weissen Bücher, 1915, vol. 2, pp. 169 ss.), *Georg Simmel* (Lebensanschauung – Vier metaphysische Kapitel, München/ Leipzig: Duncker & Humblot, 1918), *Eduard Spranger* (Lebensformen – Geisteswissenschaftliche Psychologie und Ethik der Persönlichkeit, Halle an der Saale: Max Niemeyer, 7th ed. 1930, 2nd ed. 1921), and *Heinrich Rickert* (Die Philosophie des Lebens – Darstellung und Kritik der philosophischen Modeströmungen unserer Zeit, Tübingen: J. C. B. Mohr, 2nd ed. 1922; 1st ed. 1920), among others. For a comprehensive introduction to this orientation can be consulted best *Georg Misch*, a scholar of Dilthey's (Die Idee der Lebensphilosophie in der Theorie der Geisteswissenschaften, in: Kant-Studien, Philosophische Zeitschrift (Berlin: Rolf Heise), vol. 31 (1926), pp. 536 ss.; *Idem*: Der Aufbau der Logik auf dem Boden der Philosophie des Lebens – Göttinger Vorlesungen über Logik und Einleitung in die Theorie des Wissens, ed. Gudrun Kühne-Bertram und Frithjof Rodi, Freiburg im Breisgau-München: Karl Alber, 1994). To take life itself as a reference for philosophy and to take

human practice as a starting point for philosophical reflections turns out not to be a merely temporary hype within the history of philosophical thought, but rather as a lasting achievement (as actual representatives can be considered: *Ferdinand Fellmann*: Lebensphilosophie – Elemente einer Theorie der Selbsterfahrung. Hamburg: Rowohlt, 1993. critique *Karl Albert*: Lebensphilosophie – Von den Anfängen bei Nietzsche bis zu ihrer Kritik bei Lukács. Freiburg im Breisgau/München: Karl Alber, 1995).

[Further Information About the Author]
Hans Ryffel, born 27 June 1913 in Berne, died 30 September 1989 in Thun, studied from 1932 onwards both jurisprudence and philosophy at the University of Berne. In 1943, he handed in his dissertation "Das Naturrecht" at the philosophical-historical faculty. Nevertheless, he also had his patent as a lawyer in court already in 1938. From 1951 onwards, he taught as a private lecturer general philosophy, in particular philosophy of the law and theory of the state, before he was called to the "Hochschule für Verwaltungswissenschaften" in Speyer in 1962, where he remained until 1979, and whose chancellor he was two times. His main interest was normative rules for human behaviour and his intention was to make evident the multiple dimensions of the legal and social sciences. For further information and for a complete bibliography, please consult:
Erk Volkmar Heyen: Vom normativen Wandel des Politischen – Rechts- und staatsphilosophisches Kolloquium aus Anlass des 70. Geburtstags von Hans Ryffel, Berlin: Duncker & Humblot, 1984.

[Selected Works of the Same Author]
Hans Ryffel: Das Naturrecht – Ein Beitrag zu seiner Kritik und Rechtfertigung vom Standpunkt grundsätzlicher Philosophie, Bern: Herbert Lang & Cie., 1944 (extract); *Idem*: Grundprobleme der Rechts- und Staatsphilosophie – Philosophische Anthropologie des Politischen, Neuwied/ Berlin: Luchterhand, 1969 (extract); *Idem*: Rechtssoziologie – Eine systematische Orientierung, Neuwied/ Berlin: Luchterhand, 1974 (extract); *Idem*: Zur anthropologischen Begründung des Rechts, in: Archiv für Rechts- und Sozialphilosophie, supplementary vol. 4, Stuttgart: Franz Steiner, 1988, pp. 9ss.

[For Further Reading]
Hans Ryffel: Recht und Moral nach dem neuzeitlichen Umbruch, in: Verrechtlichung und Verantwortung, ed. Helmut Holzhey and Georg Kohler, in: Studia philosophica, supplementary vol. 13, Bern: Paul Haupt, 1987, pp. 81-103; *Idem*: Gewissen und rechtsstaatliche Demokratie, in: Verwaltung im Rechtsstaat, Festschrift für Carl Hermann Ule zum 80. Geburtstag, ed. Helmuth Quaritsch, Köln: Heymanns, 1987, pp. 321-335; *Max Scheler*: Versuche einer Philosophie des Lebens, in: Abhandlungen und Aufsätze, Leipzig: Verlag der Weissen Bücher, 1915, vol. 2, pp. 169 ss.

15 November 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
9th Section "Realism, Pragmatism, and Pluralism as Virtues of Swiss Legal Culture"
Entry 9.6 "Manfred Rehbinder, Methoden der Rechtstatsachenforschung"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Manfred Rehbinder
Title: Zu den Methoden der Rechtstatsachenforschung
Edition(s): in: Homo Creator, Festschrift für Alois Troller, hrsg. von Paul Brügger, Basel: Helbing & Lichtenhahn, 1976, pp. 13-35

[Introduction/Historical Situation and Systematic Context]
On 2 December 1906, *Eugen Ehrlich* held his inaugural lecture at the University of Czernowitz, entitled "Die Tatsachen des Gewohnheitsrechts", and published in the "Österreichische Richter-Zeitschrift" an essay concerning "Soziologie und Jurisprudenz" (Gutenberg, Czernowitz: Gutenberg, 1906; reprint Aalen: Scientia, 1973); in 1916 followed his principal work on "Grundlegung der Soziologie des Rechts" (München/Leipzig: Duncker & Humblot, 1913). He was not only one of the founding fathers of legal sociology in the German-speaking countries, but also an eminent representative of the so-called Freirechtslehre. The other representant of early legal sociology was *Theodor Geiger* who has to be located in the tradition of *Max Weber*'s so-called "verstehende Soziologie". Together with *Ernst E. Hirsch*, *Paul Trappe* and *Thomas Würtenberger* as fellow companions, we encounter *Manfred Rehbinder*, co-editor of "Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung". After having been called to the University of Zurich he also dealt with specific Swiss legal reality, as has been documented in his collection of "Schweizerische Beiträge zur Rechtssoziologie – Eine Auswahl (in: Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung, vol. 56, Berlin: Duncker & Humblot, 1984).
Legal sociology depends on legal facts to a high extent. It has been the merit of *Manfred Rehbinder* to initiate and to favour such factual material as the fundamental data of legal sociology. His American connections are documented in a volume of the Stanford Law Review dating from 1971, where he published an essay on "Status, Contract, and the Welfare State". Later, he also signed as an editor of parts of the bequest of *Karl Nickerson Llewellyn* and published in German translation a collection of fragments, entitled with "Recht, Rechtsleben und Gesellschaft" (in: Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung, vol. 40, Berlin: Duncker & Humblot, 1977).

[Content, Abstracts/Conclusions, Insights, Evidence]
Opening his contribution for the essays in honour of *Alois Troller* with a statement on the necessity of empirical social enquiry, *Manfred Rehbinder* focuses on legal facts as the basic material for legal sociology. Such insights are considered to be not only helpful, but indispensable in order to applicate general dispositions and undetermined concepts

within the legal order as well as to fill the vacations within the legal texts, and to enable teleological interpretation. "Jede empirische Rechtsforderung geht von der Erkenntnis aus, dass die subjektive, sogenannte Lebenserfahrung nicht ausreicht, will man wissenschaftlich begründete Aussagen über die soziale Wirklichkeit des Rechts machen. [...] Subjektive Erfahrung ist lediglich geeignet, wissenschaftliche Behauptungen über soziale Wirklichkeit zu illustrieren, nicht dagegen, diese Behauptungen zu verifizieren. Unsystematische persönliche Erfahrung muss daher durch allgemeine, nach 'Regeln' durchgeführte Erhebungen ersetzt werden". It is the task for "Rechtstatsachenforschung", for systematic enquiries on legal facts, to provide the scientific foundations for the demanded relation to legal experience, or legal reality. Its method is fundamentally empirical and part of the social sciences.
In his comprehensive essay, *Manfred Rehbinder* defines the subject of such an enquiry, the questions of such research. "Ist das Modell entwickelt und eine Hypothese über Kausalzusammenhänge aufgestellt, so ist als nächstes zu überlegen, unter welchen Bedingungen diese Hypothese verifiziert werden kann". The technique is rather experimental, than systematic, and includes historical or comparative arguments.
At this point, we confront the old question, whether sociological evidence should merely describe, or understand the detected data and facts. Where the inner circle of observation is left, and enquiry or analysis of artefacts required, an interpretative and understanding approach seems to be indispensable. In any case, one has to take into consideration, that the facts are not natural facts, but are always human made, are rather artefacts than facts, and that this very nature of the legal facts demands for an adequate method.

[Further Information About the Author]
Manfred Rehbinder, born on 22 March 1935 in Berlin, followed his legal studies at the Free University of Berlin. After his master's degree, he worked for *Ernst E. Hirsch* for two years, before obtaining his doctorate in 1961 (see his thesis "Die öffentliche Aufgabe und rechtliche Verantwortlichkeit der Presse – Ein Beitrag zur Lehre von der Wahrnehmung berechtigter Interessen"). In 1969, he handed in his habilitation thesis and was an academic teacher at the University of Bielefeld, before being nominated in 1973 as a professor for labour law, intellectual property law, and legal sociology by the University of Zurich (he is an emeritus since 2002). He is also a member of the European Institute for legal psychology.

[Selected Works of the Same Author]
Manfred Rehbinder: Einführung in die Rechtssoziologie – Ein Textbuch für Studenten der Rechtswissenschaften, Frankfurt am Main: Athenäum Fischer, 1971; *Idem*: Rechtssoziologie, Berlin/ New York: Walter de Gruyter, 2nd ed. 1977; *Idem*: Die Rezeption fremden Rechts in soziologischer Perspektive, in: Rechtstheorie, Zeitschrift für Logik, Methodologie, Kybernetik und Soziologie des Rechts, vol. 14 (1983), Berlin: Duncker & Humblot, 1984, pp. 305 ss.; *Idem*: Die Begründung der Rechtssoziologie durch Eugen Ehrlich, Berlin: Duncker & Humblot, 2nd ed. 1986, pp. 305 ss.; *Idem*: Fortschritte und

Entwicklungstendenzen einer Soziologie der Justiz, in: Würzburger Vorträge zur Rechtsphilosophie, Rechtstheorie und Rechtssoziologie, vol. 9, Frankfurt am Main: Alfred Metzner, 1989; *Idem*: Einführung in die Rechtswissenschaft – Grundfragen, Grundlagen und Grundgedanken des Rechts (sequel to Bernhard Rehfeld's monography), Berlin: Walter de Gruyter, 7th ed. 1991; *Idem* (Ed.): Schweizerische Beiträge zur Rechtssoziologie – Eine Auswahl (Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung, vol. 56), Berlin: Duncker & Humblot, 1984; *Idem* (Ed., together with *Klaus-Peter Tieck*): Max Weber als Rechtssoziologe (Schriftenreihe für Rechtssoziologie und Rechtstatsachenforschung, vol. 63), Berlin: Duncker & Humblot, 1987.

[For Further Reading]
Theodor Geiger: Über Moral und Recht, Streitgespräch mit Uppsala, in: Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung, ed. Ernst E. Hirsch and Manfred Rehbinder, vol. 45, aus dem Dänischen übersetzt und eingeleitet von Hans-Heinrich Vogel. Berlin: Duncker & Humblot, 1979;
Manfred Rehbinder: Abhandlungen zur Rechtssoziologie, in occasion of his 60th birthday selected and introduces by Thomas Würtenberger (Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung, vol. 77), Berlin: Duncker & Humblot, 1995.

11 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
9th Section "Realism, Pragmatism, and Pluralism as Virtues of Swiss Legal Culture"
Entry 9.7 "Peter Häberle, Verfassung des Pluralismus"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Peter Häberle
Title: Die Verfassung des Pluralismus – Studien zur Verfassungstheorie der offenen Gesellschaft (Gastvortrag, gehalten am 12. Januar 1978 im Freiburger Konrad Hesse-Seminar)
Edition(s): Königstein: Fischer Taschenbuch, 1980, pp. 45-105 (first printing in: Verfassung als öffentlicher Prozess, Berlin 1978, pp. 121 ss.)

[Introduction/Historical Situation and Systematic Context]
Peter Häberle's best-known discoveries are the identification of jurisprudence as a cultural science, the comparison of different legal or constitutional orders as the fifth moment in interpretation of the law, and last but not least as an inventor of many nowadays current concepts in public law. His legal thought stands in the tradition of *Hermann Heller* and *Rudolf Smend*, generally speaking. This mental disposition is evident, when he deals with the concept of the constitution under the impression of pluralistic world-views and ideas of life.
In the first place, the constitution is identified as undergoing a process of pluralisation in function of the interpretation by the many actors and due to its public dimension: "Eine derartige Sicht der Verfassungsinterpretation ist nicht Ergebnis theoretischer Willkür und persönlicher Beliebigkeit; sie ist vielmehr 'angeregt' durch die bisherige Praxis der Verfassungsinterpretation zum Grundgesetz, insbesondere auf erkennbar öffentlichkeits- und gemeinwohlbezogene Begriffe [...]. Verfassungsinterpretation bedarf theoretisch der Erweiterung und Vertiefung um die Dimension des Öffentlichen, weil ihr Gegenstand die Verfassung der *res publica* ist und weil die an ihren Vorgängen personal Beteiligten öffentliche Kräfte und 'Faktoren' sind".

[Content, Abstracts/Conclusions, Insights, Evidence]
Peter Häberle takes as a starting point for his discussion the fact that the public sphere is essentially included in every constitution. "Öffentlichkeit ist vielfältig strukturiert und insbesondere den Steuerunsinhalten und -vorgängen der Verfassung unterworfen. Sie ist intrakonstitutionell auch dort, wo sie normative Kraft entfaltet. Diese Öffentlichkeit ist – als vom Grundgesetz geprägte – komplex". To interpret and apply the constitution is a task addressed to many actors and factors within constitutional practice, not only subjected to the authoritative explanation by a high court. "Ein Verständnis der Verfassungsinterpretation als öffentlicher Prozess hat Grenzen und birgt Gefahren. Sie liegen in der denkbaren zu starken Dynamisierung des sogenannten 'geschriebenen' Verfassungsrechts – das freilich weit mehr ungeschrieben ist als gemeinhin gesehen wird,

insofern Verfassungsauslegung prinzipiell im Spannungsfeld von (verfassungsrechtlichem) Grundsatz und ('unterverfassungsrechtlicher') Norm geschieht". Relatively abstract principles (as found within the constitution regularly), and relatively concrete normative dispositions (to be found within the entire legal order) indicate to the tension in the way of application or concretisation of constitutional law, generally speaking. In any case, interpretation of principle demands in a high degree for creative, inventive and prospective understanding in the hermeneutical sense, including critical judgment.
As a premise for the proposed model of constitutional interpretation, *Peter Häberle* refers to the concept of "open society" as elaborated by *Karl Raimund Popper*. "Prämisse ist das Pluralismusmodell, Pluralismus verstanden als Vielfalt von Ideen und Interessen im politischen Gemeinwesen, von Ideen als Interessen beziehungsweise umgekehrt, - gesehen im Hier und Jetzt". The constitutional regulation is not only based upon the open society but enables one to organise it by use of constitutional principles.
The constitution of an open society in both senses of legal and physiological or phenomenological constitution signifies essentially a dynamic process. "Diese Konzeption setzt die ständige Weiterentwicklung des Pluralismus als Verfassungstheorie und Verfassungspraxis voraus. [...] Der Verfassungsstaat ist nicht schon deshalb an sein Ende gekommen, weil die klassischen Theorien in vielem nicht mehr ausreichen. Allein die 'rechtsstaatliche Verfassung' im Zentrum der Verfassung, alles andere ausserhalb, unter oder gar gegen sie sich abspielen zu lassen, spricht nicht gegen die Verfassungsidee, sondern gegen die Phantasie ihrer heutigen Interpreten, theoretiker und Politiker. Ein reformpluralistischer Ansatz könnte hier weiterhelfen. / Ich komme zum Schluss: Pluralismus ist ein Stück 'Idealität', ist nie voll erreichte Wirklichkeit, aber auch Chance und darum ständige Aufgabe, wie die Verfassung selbst Norm und Aufgabe ist (*Ulrich Scheuner*). Diese Einsicht sollte zu unserem Grundlagenkonsens gehören".

[Further Information About the Author]
Peter Häberle, born on 13 May 1934 in Göppingen (Germany), lectured on legal philosophy at the University of St. Gallen for more than twenty years. He persecuted studies in jurisprudence at the Universities of Tübingen, Bonn, Freiburg im Breisgau and Montpellier and received his doctor's degree in 1961 from the Albert-Ludwigs-University in Freiburg (Germany), as a scholar of *Konrad Hesse*. His promotion thesis, entitled "Die Wesensgehaltgarantie des Artikel 19 Absatz 2 Grundgesetz – Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt" has much been discussed in Germany and abroad. In 1969 he handed in his habilitation thesis, entitled "Öffentliches Interesse als juristisches Problem" and got the *venia legendi* for public law. Most of the time as an academic teacher he spent at the University of Bayreuth.
Peter Häberle's best-known discoveries are the identification of jurisprudence as a cultural science, the comparison of different legal or constitutional orders as the fifth moment in interpretation of the law, and last but not least as an inventor of many nowadays current concepts in public law. His legal thought stands in the tradition of *Hermann Heller* and

Rudolf Smend, generally speaking. For a long period, he signed as the editor in chief of the acknowledged "Jahrbuch des öffentlichen Rechts der Gegenwart", published by Mohr/Siebeck in Tübingen. Apart from all that, he is also an excellent pianist, having been educated in a household of musicians.

[Selected Works of the Same Author]
Peter Häberle: Öffentliches Interesse als juristisches Problem – Eine Analyse von Gesetzgebung und Rechtsprechung, Bad Homburg: Athenäum, 1970; *Idem*: Europäische Rechtskultur – Versuch einer Annäherung in zwölf Schritten, Baden-Baden: Nomos, 1994; *Idem*: Europäische Verfassungslehre in Einzelstudien, Baden-Baden: Nomos, 1999; *Idem*: Gemeineuropäisches Verfassungsrecht, in: Der europäische Verfassungsraum, ed. Roland Bieber and Pierre Widmer (Publications de l'Institut de droit comparé, vol. 28), Zürich: Schulthess Polygraphischer Verlag, 1995, pp. 361 ss.; *Idem*: Verfassungslehre als Kulturwissenschaft (Schriften zum Öffentlichen Recht), Berlin: Duncker & Humblot, 1982; *Idem*: Das Menschenbild im Verfassungsstaat (Schriften zum Öffentlichen Recht, vol. 540), Berlin: Duncker & Humblot, 1988; *Idem*: Textstufen als Entwicklungswege des Verfassungsstaates – Arbeitsthesen zur Verfassungslehre als juristischer Text- und Kulturwissenschaft, in: des Menschen Recht zwischen Freiheit und Verantwortung, Festschrift für Karl Josef Partsch zum 75. Geburtstag, Berlin: Duncker & Humblot, 1989; *Idem*: Ausstrahlungswirkungen des deutschen Grundgesetzes auf die Schweiz – Ein Beispiel für weltweite Prozesse der Produktion und Rezeption „in Sachen Verfassungsstaat", in: Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen – 40 Jahre Grundgesetz, Berlin: Duncker & Humblot, 1990, pp. 1 ss.; *Idem*: Ethik „im" Verfassungsrecht, in: Rechtstheorie, Zeitschrift für Logik, Methodologie, Kybernetik und Soziologie des Rechts, vol. 21 (1990), pp. 269 ss., Berlin: Duncker & Humblot, 1990; *Idem* (Ed. together with *Michael Kilian* and *Heinrich Wolff*): Staatsrechtslehrer des 20. Jahrhunderts – Deutschland, Österreich, Schweiz, Berlin: Walter De Gruyter, 2015.

[For Further Reading]
Peter Häberle: Die Wesensgehaltgarantie des Artikel 19 Absatz 2 Grundgesetz – Zugleich ein Beitrag zum institutionellen Verständnis der Grundrechte und zur Lehre vom Gesetzesvorbehalt, Heidelberg: C. F. Müller, 1962 (3rd ed. 1983); *Idem*: Öffentliches Interesse als juristisches Problem, Bad Homburg: Athenäum Verlag, 1970 (2nd ed. 2006); *Idem*: Grundrechte im Leistungsstaat, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer, vol. 30 (1972), pp. 43 ss.

14 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
9th Section "Realism, Pragmatism, and Pluralism as Virtues of Swiss Legal Culture"
Entry 9.12 "Michael Walter Hebeisen, Krise der universellen Rechtsidee"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Michael Walter Hebeisen
Title: Krise der universellen Rechtsidee angesichts des Pluralismus der positiven Rechtsordnungen – Pragmatische Nachforschungen aufgrund der Institutionenlehren von Jean-Eugène-Claude Hauriou und Santi Romano
Edition(s): in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, S. 1-65, 75-112

[Further Information About the Author]
Michael Walter Hebeisen, born on 9 January 1965, after having studied violoncello and musicology at the Conservatory of Berne, followed his studies in jurisprudence at the University of Berne, with semesters abroad at the University of Cambridge. He graduated in 1992 and obtained his doctorate in 1994, after having collaborated with doctor father *Peter Saladin*.
He the changed for a period of seven years to the Federal Office of Justice, in an entity that was occupied with the preparation of the reform, i.e. the total revision of the Swiss Federal Constitution. In addition, he got a habilitation scholarship from the Swiss National Foundation for Scientific Research, under the survey of *Peter Häberle*, what enabled him to pursue an old-fashioned post-doc journey across Europe. He travelled to Oxford University (University College), where he assisted and contributed to the ongoing reform of the British Constitution by the shadow Cabinet of the Labour Party. Back to the Continent, he went to the "*Dilthey Forschungtsstelle*" and "*Hegel-Archiv*" at Ruhr University of Bochum and to the Humboldt University in Berlin. After a short residence at the "*Faculté de droit de l'Université de Toulouse*" where he studied the theory of *Jean-Claude-Eugène-Maurice Hauriou*, he settled for a long time in Naples where he established contacts with the philosophers of the School of Neo-Historicism, i.e. with *Fulvio Tessitore*, *Giuseppe Cacciatore*, *Giuseppe Cantillo* among others. In consequence of his fascination for the tradition of these thinkers, he undertook to translate selected works by Pietro Piovani (9 volumes), Giuseppe Capograssi (6 volumes), Giovanni Gentile (11 volumes) and eventually plans an Edition of the works of Bertrando Spaventa (6 volumes).
Back in his home country, he established as an eminent thinker in the domain of legal philosophy as well as theory of the human sciences.

[Selected Works of the Same Author]
Michael Walter Hebeisen: Souveränität in Frage gestellt – Die Souveränitätslehren von Hans

Kelsen, Carl Schmitt und Hermann Heller im Vergleich (Dissertation Universität Bern 1994), Baden-Baden: Nomos 1995 (extract); *Idem*: Staat und Recht als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als Geisteswissenschaften, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2004, pp. 395-456; *Idem*: Krise der universellen Rechtsidee angesichts des Pluralismus der positiven Rechtsordnungen – Pragmatische Nachforschungen aufgrund der Institutionenlehren von Jean-Eugène-Claude Hauriou und Santi Romano, in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 1-65; *Idem*: Die Verfassung als Vermittlerin von Wert- und Gerechtigkeitsvorstellungen? – Geisteswissenschaftliche Überlegungen zum Wert der Verfassung als Hilfe auf dem Weg zum gerechten Zusammenleben von Menschen und Völkern, in: Herausgeforderte Verfassung – Die Schweiz im globalen Kontext (16. Kolloquium der Schweizerischen Akademie der Geistes- und Sozialwissenschaften), ed. Beat Sitter-Liver, Freiburg: Universitätsverlag, 1999, pp. 133 ss.; *Idem*: Schweizer Juristen-Philosophen – Eine eigenständige schweizerische Tradition der Wissenschaftsphilosophie der Jurisprudenz und der Staatslehre in Auseinandersetzungen mit ausgewählten Strömungen der Rechts- und der Staatsphilosophie sowie der Wissenschaftstheorie in der ersten Hälfte des Zwanzigsten Jahrhunderts (Eine programmatische Skizze für ein interdisziplinäres Forschungsvorhaben), in: Jahrbuch des öffentlichen Rechts der Gegenwart, N. S. vol. 50, ed. Peter Häberle, Tübingen: J. C. B. Mohr/ Siebeck, pp. 69-100 (extended version in: Realismus, Pragmatismus, Pluralismus – Essayistische Abhandlungen zu den wissenschaftsphilosophischen Grundlagen für eine integrale Jurisprudenz sowie ergänzende rechtsphilosophische Anhänge, Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag, 2005, pp. 651-711); *Idem*: Liberalismus und Kommunitarismus betreffend das Verhältnis des Rechten zum Guten – Prinzipielle Opposition oder pragmatische Annäherung, Vorrang oder Unabhängigkeit? In: Archiv für Rechts- und Sozialphilosophie (ARSP), supplementary vol. 76, ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2000, pp. 119 ss.; *Idem*: Note sulla filosofia del diritto di Pietro Piovani – Appunti di un giurista ultramontano, Referat gehalten am Studienseminar aus Anlass des 20. Todestages von Pietro Piovani in Neapel vom 29. Juni bis 1. Juli 2000, in: Archivio di storia della cultura (Firenze: Liguori), vol. 14 (2001), ed. Fulvio Tessitore, pp. 289-305; *Idem*: „An sich redet Alles, was ist, das Ja" – Zur Verwendung Friedrich Nietzsches durch den Rechtsphilosophen Carl August Emge, Referat, gehalten auf dem internationalen Kongress der Stiftung Weimarer Klassik „Missbrauch, Ereignis und Kritik – Zur deutschen Nietzsche-Rezeption zwischen 1933 und 1945", in: Widersprüche – Zur frühen Nietzsche-Rezeption, ed. Andreas Schirmer and Rüdiger Schmidt, Weimar: Hermann Böhlaus Nachfolger, 2001, pp. 291 ss., also published in: Nietzsche und das Recht (Archiv für Rechts- und Sozialphilosophie, supplementary volume 77), ed. Kurt Seelmann, Stuttgart: Franz Steiner, 2001, pp. 219 ss.; *Idem*: Geschichte der Vergangenheit, Geschichten für die Zukunft in: Erzählungen des Staates, ed. Otto Depenheuer, Wiesbaden: VS Verlag für

Sozialwissenschaften, 2010, pp. 35 ss.; *Idem*: Souveränität bei Otto Kirchheimer – Das Dogma der Souveränität zwischen Staatslehre und Politikwissenschaften, in: Otto Kirchheimers Staatsverständnis, ed. Robert Christian van Ooyen and Frank Schale (Reihe „Staatsverständnisse", ed. Rüdiger Voigt), Baden-Baden: Nomos Verlagsgesellschaft 2010, pp. 87-117; *Idem*: Vom ästhetisch-poëtischen Grundzug des modernen Verständnisses von Geschichte – Im Besonderen von der Urteilskraft in Iurisprudenz und Staatslehre als Geisteswissenschaften, in: Moderne und Historizität, ed. for the „Klassik Stiftung Weimar" by Stefan Wilke, Weimar: Verlag der Bauhaus-Universität Weimar, 2011, pp. 134-164.

28 October 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture
Cluster "Philosophy of Law and General Jurisprudence"
Final Section "Back to the Future: In Favour of a Reconstruction of Modernity and Against Post-Modern Disintegration – Inclinations, Tendencies, and Perspectives of Swiss Legal Thought"
Entry 10.1 "Charles Secrétan, Philosophie de la liberté"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Charles Secrétan
Title: La philosophie de la liberté – Cours de philosophie morale, 2 vols.
Edition(s): Paris/ Lausanne: L. Hachette et Cie/ Georges Bridel, 1849

[Introduction]
Already in the middle of the Eighteenth Century there was a remarkable influence of the spirit of the Age of Enlightenment, notably in the Canton of Berne. With the French Revolution this cosmopolitan inclination leads to a progressive movement, especially in the cultural sphere. From the beginning of the Nineteenth Century, there can be found a remarkable influence of German idealism on philosophical thought in Switzerland. At the Academy of Berne, for instance, there can be noticed a vivid reception of Kantianism, Fichteanism, Schellingeanism as well as Hegelianism and German idealist philosophy clearly dominated the intellectual debates in general. This influence can be found, for example, in *Johannes Ith* and in *Philipp Albert Stapfer*, both teaching on the so-called "Politisches Institut" in Berne, the fore-runner of the University of Berne, as well as *Jens Baggesen* (dealing mainly with self-consciousness) and *Johann Rudolf Steck* (dealing mainly with Stoicism in idealist philosophy). With respect to politics, the state of Berne was definitely orientated towards France, whereas in the domain of spiritual and cultural life, German idealism was clearly predominating. This resulted in a tendency towards a philosophy of freedom, or at least of reform-orientated thought, especially on the field of practical philosophy (see *Martin Bondeli*: Kantianismus und Fichteanismus in Bern – Zur philosophischen Geistesgeschichte der Helvetik, sowie zur Entstehung des nachkantischen Idealismus (Schwabe Philosophica, vol. 2), Basel: Schwabe 2001, introduction).

[Historical Situation and Systematic Context]
The selected text by *Charles Secrétan* stands for a reception of this philosophical influence on Catholic philosophy, i.e. on social philosophy in Catholic territories of Switzerland. The philosophy of liberty is brought in close relationship with religious ideology, not regarding that the principle of religious thought lies in authority but rather than liberty, generally speaking. The work of the author is meant to be an essay in apology, based on the virtues of Christianity. In consequence, the argumentation refers to thinkers of religious philosophy in the past as well as leading figures of modern social and political thought. Another concurring example can be found in the philosophical thought of *Ignaz Franz Paul Troxler*, a philosopher originating from the Canton of Lucerne.

[Content, Abstracts/Conclusions, Insights, Evidence]
There can be found a few similarities of the concept of freedom, hold by *Charles Secrétan*, with the ideas of *Plotin*, of *Duns Scotus*, as well as of *René Descartes*. The focus is, however, more on moral philosophy, than on experience and scientific knowledge. This practical turn derives from the thoughts of *Friedrich Wilhelm Joseph Schelling*, who was teaching in Munich, where Secrétan has pursued his philosophical studies for a while. Morality is understood as the art of regulating human activities ("*La morale est l'art de régler l'activité humaine*"). Such a creational theory of liberty leads immediately to a so-called pantheistic view. Morality is, therefore, necessarily defined by the content of moral duties and rights. The principle of absolute knowledge, inspired by religious thought, has to be implemented to everyday life, must become the actual will of morally acting persons.

As a complement so to say, we have also reproduced the final lesson of the second volume of "The Philosophy of Liberty", of the main contribution of *Charles Secrétan*, where practical applications of the insights are concluded. To realise liberty means the overall duty for moral action, in the field of economics as well as in the sphere of politics ("*L'être libre doit realiser sa liberté*"). In this respect, liberty turns to the founding principle of equality. The will of the State is, therefore, subjected to the moral and spiritual life of its community. To the last extent, liberty can only be fulfilled by the love of God ("*La liberté ne se realise que dans l'amour de Dieu*"). According to *Friedrich Wilhelm Joseph Schelling*, the absolute corresponds to nature and, therefore, moral activities follow the laws of nature.

[Philosophical Valuation and Jurisprudential Significance]
In terms of history of philosophical thought, this signifies an act of reception of the state-of-the-art idealistic philosophy in Switzerland. Not only in the sphere of political thought, but also with regard to legal thinking, this outcome consists rather in constructing the ground for a general acceptance of political freedoms and freedoms, as guaranteed by the constitutions of the Cantons and the Swiss Federal Constitution later on in the Nineteenth Century. This also includes, for instance, the equality of rights between men and women, as the author developed in his writing "Les droits des femmes" in 1885: "*Il est evident, en effet, que la question des droit de la femme s'absorbe dans la question générale de l'existence du droit et se resout avec elle*".

[Further Information About the Author]
Charles Secrétan, born on 19 January 1815 in Lausanne, died on 21 January 1895, obtained a licence in jurisprudence at the academy of Lausanne, before he went to Munich in 1835 to study with *Friedrich Wilhelm Joseph Schelling*. Back to the *Léman* region he founded the "*Revue Suisse*", a journal of cultural philosophy. After having taught history and philosophy at the University of Lausanne, he was nominated ordinary professor in these domains. Due to political circumstances he had to emigrate to Paris, before coming back to Neuchâtel and later turned back to Lausanne, where he also lectured on natural law

between 1874 and 1895. His main work, "*La philosophie de la liberté*", is written in the spirit of *Alexandre Vinet*, followed the current of German idealism and professed the ideals of social Christianity as well as associationist theories and the claims of the labour movement. To be noted is a later writing on "*Droit des femmes*", where he defended the emancipation of women. From 1883, he was a corresponding member of the *Académie des sciences morales et politiques de l'Institut de France*.
The person of the philosopher *Charles Secrétan* is not to be confused with the lawyer with the same name (1784-1858) who was a professor of civil and roman law at the University of Lausanne.
For more information about the person as well as his main work, please consult:
H. Barker: François T. Pillon, La philosophie de Charles Secrétan, in: Mind (Oxford: Oxford University Press), N. S. vol. 7, No. 27 (1898), pp. 423-426;
François T. Pillon: La Philosophie de Charles Secrétan, Paris: Félix Alcan, 1898 (reprinted 2006).

[Selected Works of the Same Author]
Charles Secrétan: Le droit de l'humanité, Lausanne/ Paris: Payot & Cie/ Félix Alcan, 1890; *Idem*: Mon utopie – Nouvelles études morales et sociales, Paris/ Lausanne: Félix Alcan/ F. Payot, 1892; *Idem*: Droit des femmes, Lausanne/ Paris: B. Benda/ Félix Alcan, 3rd ed. 1886.

[For Further Reading]
Martin Bondeli: Kantianismus und Fichteanismus in Bern – Zur philosophischen Geistesgeschichte der Helvetik, sowie zur Entstehung des nachkantischen Idealismus (Schwabe Philosophica, vol. 2), Basel: Schwabe 2001;
André Burnier: La pensée de Charles Secrétan et le problème du fondement métaphysique des jugements de valeur moraux (Dissertation Universität Lausanne), Neuchâtel: Paul Attinger S. A., 1934;
Felix Lehner: Freiheit in Wirtschaft, Staat und Religion – Die Philosophie der Gesellschaft von Charles Secrétan (1815-1895), Zürich: Orell Füssli, 1967;
Philipp Albert Stapfer: Die fruchtbarste Entwicklungsmethode der Anlagen des Menschen zufolge eines kritisch-philosophischen Entwurfs der Culturgeschichte unseres Geschlechts in der Form einer Apologie der classischen Werke des Alterthums, eine bey Eröffnung der Vorlesungen des politischen Instituts den 13. November 1792 gehaltene Rede, Bern: Hochobrigkeitliche Buchdruckerey, 1792;
Ignaz Franz Paul Troxler: Philosophische Rechtslehre der Natur und des Gesetzes mit Rücksicht auf die Irrlehren der Liberalität und Legitimität, Zürich: Gessner'sche Buchhandlung, 1820.

30 October 2017 *Michael Walter Hebeisen*

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Final Section "Back to the Future: In Favour of a Reconstruction of Modernity and Against Post-Modern Disintegration – Inclinations, Tendencies, and Perspectives of Swiss Legal Thought"
Entry 10.2 "Anna Tumarkin, Wesen und Werden der schweizerischen Philosophie"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Anna Tumarkin
Title: Wesen und Werden der schweizerischen Philosophie
Edition(s): Frauenfeld: Huber & Co., 1948, pp. 7-30, 86-116

[Introduction/Historical Situation and Systematic Context]
To characterise Swiss philosophy, or better philosophy in Switzerland, one should not rely on self-declarations of the principal actors, but rather on considerations by a third party, in a certain distance, but close enough to know the matter thoroughly. This is perfectly the case with *Anna Tumarkin* who emigrated from Belarus in a wave of exodus of the Russian intelligence in the period of *Fin-de-Siècle*. She supposedly knew *Ludwig Stein* from the Jewish community in Berlin, as a Rabbi, who has been teaching in Zurich, before becoming a professor of philosophy in Berne. In 1892, Tumarkin settled in Berne and in 1895 she obtained her doctorate at the University of Berne and, in 1898, after having studied with Wilhelm Dilthey in Berlin, she was nominated the very first female professor in Europe with full rights and duties within the faculty.

[Content, Abstracts/Conclusions, Insights, Evidence]
In her comprehensive, yet condensed main writing, *Anna Tumarkin* provides a precise characterisation of what could be considered as typically Swiss philosophical thought. She treats the historical development of philosophy in the period of Enlightenment and before as well as the specifically Swiss theory of education. Of particular interest may be her judgment on Swiss natural law and her indications of the inclination of Swiss interest in philosophy in general.
Rich of well reflected analytical insights shows the general introduction of *Anna Tumarkin*'s writing on "The essence and development of Swiss philosophy". Her diagnosis begins with considerations on the lack of interest in philosophical system-building in Switzerland. This is, however, not due to a reduced intelligence, but the consequence of a reserve from abstraction and its dangers. At the core of philosophical thought in Switzerland, the author identifies a focus on relevance, practicality and dispassion regarding the matter in question, i.e. dedication to the matter itself, freedom of personal interests as well as practical orientation of concrete arguments. "Auch bei der kritischsten Einstellung dem schweizerischen Denken gegenüber bleibt der allgemeine Eindruck, den man im Verkehr mit den Schweizern von der Eigenart ihres Denkens gewinnt, derjenige einer diesem schweizerischen Denken eigentümlichen Sachlichkeit". This kind of typically

Swiss inclination means that the interest in philosophy is mainly on the object of knowledge, which results in an overall orientation towards reality, life itself, based on a deep estimation of the individuality and dignity of the human being. This interest covers all spheres of practical life and, therefore, philosophical thought is not meant to be *l'art pour l'art*. Tumarkin does not hide her appreciation and the admiration of the philosophical system established by *Wilhelm Dilthey*, the great forerunner of idealistic historicism. "Wer daher in der Philosophie nichts anderes sucht als eine Begründung der Wissenschaft, wird kaum geneigt sein, den Schweizern eine eigene Philosophie oder auch nur einen ausgesprochenen Sinn für Philosophie zuzusprechen". This expression covers last but not least legal philosophy, and the author declares the main issue in Swiss philosophy as practical idealism, or transcribed as realistic idealism, or idealistic realism.

We have selected a second passage out of the same writing by *Anna Tumarkin*, which is worth taking into consideration. In her treatment of natural law theory, the author distinguishes yet another arch-typically Swiss virtue of philosophical thought. "Was aber in den Augen dieser schweizerischen Naturrechtslehrer das 'natürliche', das heist aus der menschlichen Wesensnatur selbst sich ergebende Recht unterscheidet von dem aus besonderen Vereinbarungen entstandenen positive Recht, ist nicht, dass die Vernunft es als dem allgemeinen und dauernden Vorteil dienend erkennt, wie das *Hugo Grotius* von dem Vertragsrecht angenommen hatte, sondern dass sie es als der höheren Bestimmung des Menschen, in Frieden und Gemeinschaft miteinander zu leben, entsprechend anerkennt". *Jean Barbeyrac* and *Jacques Burlamaqui* are identified as leading thinkers who turned the Evangelic duty of love to the neighbour into the demand of a legal order that corresponds with nature in the sense of justice and true natural law that confirms the nature of the human being. Hereby not only the justice of God, but also the justice among men means a legitimate foundation for valid law. To his French translation of Samuel Pufendorf's main writing "*De iure naturae et gentium libri octo*" (1672) Barbeyrac gives as an introduction his view of a truly modern moral science: "*La conformité de la morale chrétienne avec les lumières les plus pures de Bon-sens est une des preuves les plus convaincante de la divinité du Christianisme*". Burlamaqui therefore identified the deeper reason why these meanings should coincide in the identity of the destination of mankind with the development of the circumstances of human life. This kind of a system of humanity itself signifies the characteristically Swiss inclination of legal philosophy, according to Tumarkin. Natural law is founded in human reason eventually, as declared by Burlamaqui: "*C'est le système des règles, que la seule raison préscrit aux hommes, pour les conduire sûrement au but, qu'ils doivent se proposer et qu'ils se proposent tous en effet, je veux dire un veritable et solide Bonheur, considérées comme autant de lois, que Dieu impose aux hommes, que l'on appelle Droit de la nature*". In the interpretation of Tumarkin this has much to do with the virtues of Calvinism and must be recognised as the contribution of Geneva to any normative science: "Die gleiche Übereinstimmung zwischen der Vernunfterkenntnis und dem Offenbarungsglauben, in der Burlamaqui das Wesen der Humanität erkannte, machte auch seine eigene im vollkommenen Zusammenfallen von Glück und Tugend bestehende

Humanität aus". In the following passages the theory of natural law as proposed by *Jean-Jacques Rousseau* is addressed.

[Further Information About the Author]
Anna Tumarkin, born on 16 February 1872 in Dubrowna (Belarus), died on 7 August 1951 in Muri bei Bern, was a Jewish Philosopher originating from Russia. Initially, she was educated to be a teacher in Kischinew. In 1892, she settled in Berne to perfect her philosophical studies with *Ludwig Stein*, who was also Jewish. In 1895, she obtained her doctorate and went to Berlin to assist the lectures of *Wilhelm Dilthey*. In 1898, she was the very first female professor with regular habilitation thesis in Europe and with the full right to promotion of her best students. She also was the first female lecturer at the University of Berne and was nominated titular professor in 1906 and was an ordinary professor for Philosophy and Aesthetics between 1909 and 1943. She also participated in the women's rights movement and presided a network of female academicians. In 1937, she was honoured with the *Theodor Kocher*-prize.
For a comprehensive overview over the methods of the author, please refer to:
Judith Jánoska: Die Methode der Anna Tumarkin, Professorin der Philosophie, in Bern, in: Der Eigensinn des Materials – Erkundungen sozialer Wirklichkeit, Festschrift für Claudia Honegger zum 60. Geburtstag, Frankfurt am Main: Stroemfeld, 2007, pp. 151-168.

[Selected Works of the Same Author]
The whole inheritance is located in the University Library of Berne.

[For Further Reading]
Jean Barbeyrac: De dignitate et utilitate Juris ac Historiarum et utriusque disciplinae Amica coniunctione, Amsterdam: Pierre de Coup, erweiterte und verbesserte ed. 1712 (1. ed. Lausanne: Frédéric Gentil und Théophile Crosat, 1711), French translation in: Écrits de droit et de morale, ed. Simone Goyard-Fabre, Paris: Centre de philosophie du droit, 1996;
Henri Lauener: Zeitgenössische Philosophie in der Schweiz, Bern: Haupt, 1984;
Franziska Rogger: Der Doktorhut im Besenschrank – Das abenteuerliche Leben der ersten Studentinnen am Beispiel der Universität Bern, Bern: Efef-Verlag, 2nd ed. 2002.

30 October 2017 *Michael Walter Hebeisen*

[Reproduction of pp. 7-30 ("Allgemeine Richtung des philosophischen Interesses der Schweizer"), 86-116 ("Das schweizerische Naturrecht")]

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Entry 10.7 "Peter Saladin, Schönheit und Recht"
Selected, Elaborated and Discussed by Michael Walter Hebeisen

Author: Peter Saladin
Title: Schönheit und Recht
Edition(s): in: Die Wirklichkeit des Einhorns – Geschichten, Bern: Stämpfli, 1997, pp. 11-27

[Introduction/Historical Situation and Systematic Context]
In our promotion thesis, under the auspices of *Peter Saladin*, we have undertaken to explain the dissolution of the traditional dogma of sovereignty into a rich set of axiomatic fundamental structures for jurisprudence, respectively state theory (*Michael Walter Hebeisen*: Souveränität in Frage gstellt – Die Souveränitätslehren von Hans Kelsen, Carl Schmitt und Hermann Heller im Vergleich, Baden-Baden: Nomos, 1995). In conclusion of our example of scientific-historical thought, we have set in prospect a sequel to these investigations, guided by the veritably speculative-philosophical concept of aesthetical judgment: "Ästhetik ist ein Konzept, allgemeinverbindliche Forderungen zu begründen innerhalb einer Ordnung, die auf sich allein verwiesen ist, sie ist die wissenschaftliche Methode, Verbindlichkeit mittels Anschauung zu begreifen und Unverbrüchlichkeit zu begründen in einem auf sich selbst verwiesenen System. Dass Ästhetik in zeitlicher Hinsicht zuerst auf die Kunst Anwendung fand, darf nicht darüber hinwegtäuschen, dass das Konzept universell anwendbar ist. Das Kunstschöne hat einach nur als erste der menschlichen Ordnungen definitiv den religiösen Kontext verlassen. Im Prozess der säkularisierung des Politischen erscheint die transzendentale Begründung der moralischen Ordnung wie derjenigen des Rechts so quasi als Zwischenlösung: Kategorische Begriffe werden einer ontologisch anderen Ebene angesiedelt, um die Gesellschaftsordnung als kollektives Handeln begreifen zu können, als zugleich säkular und doch wertorientiert. Unveräusserliches, unverbrückliche Werte können jedoch in letzter Konsequenz mittels der Ästhetik auch ordnungsimmanent begriffen werden, die Säkularisierung kann perfektioniert und die Aufklärung weitergeführt werden ohne Verlust verbindlicher Werte".
Apparently, this prospective in aesthetical theory has inspired *Peter Saladin* to reflect and to argue for and against such a project, as later – after the tragical death of our academic teacher – has been elaborated in our habilitation thesis, entitled "Recht und Staat als Objektivationen des Geistes in der Geschichte – Eine Grundlegung von Jurisprudenz und Staatslehre als Geisteswissenschaften" (Biel/ Bienne: Schweizerischer Wissenschafts- und Universitätsverlag SWUV, 2004). Our perspective on aesthetic judgment, as expressed in political-philosophical introduction to this writing, has been adopted by *Jörg Paul Müller*

(in an article written during his visit at the "Wissenschaftskolleg" in Berlin published in the journal "recht", vol. 1999, Bern: Stämpfli).

[Content, Abstracts/Conclusions, Insights, Evidence]
In the collection of dialogical essays by *Peter Saladin*, written in the last months of his life, and published by his wife, we encounter a fairy tale world, where the unicorn becomes real. In the first of these creative examples of truly speculative legal philosophical thought, the author enters in dialogue with the unicorn about the subject of "beauty and law". In the course of the arguments developed in this conversation, the author sketches a kind of an answer to the above-mentioned prospective of critical aesthetics, or rather critical judgment as a possible fundament for state theory and legal philosophy.
Peter Saladin is interested in experiencing and understanding the unicorn's attitude towards beauty in law. The dialogue opens with a rhetorical question, asked by the unicorn: "Warum soll Wahrheit – was immer darunter zu verstehen ist – nicht schön sein? Ganz abgesehen davon, dass Wahrheit als Ziel einer normativen Wissenschaft – als welche sich Rechtswissenschaft wohl überwiegend begreift – sich nicht genügt. Gerechtigkeit und Klarheit verdienen als Ziele doch gewiss beigefügt, ja vorangestellt zu werden. Gerechtigkeit aber ist Harmonie, und Klarheit Licht, darum sind sie schön! Nun bestreite ich keineswegs, dass viele von Euch mit Eurer Wissenschaft Gerechtigkeit und Klarheit anstrebt und damit auch Schönheit. Aber Ihr macht Euch diesen Zusammenhang zu wenig bewusst! [...] Dazu ist vieles zu sagen! Zunächst ein Hinweis auf das Wie, auf das Kleid, auf die Darstellung Eurer Wissenschaft! Die Suche nach dem Schönen sollte doch wohl schön erfolgen, auf einem schönen (wenn auch vielleicht steilen Weg), in einer schönen und hoffentlich zweckmässigen Ausrüstung; sonst wird solche Suche gewiss unglaubwürdig." After some manifestations of wonderment, the unicorn proceeds as follows: "Wissenschaft, so hast Du gesprochen, sucht Wahrheit, nicht Schönheit. Ich habe gefragt, warum Wahrheit nicht schön sei, und habe hingewiesen auf die besondere Problematik einer Ausrichtung von Rechtswissenschaft auf Wahrheit. Aber in Deiner Aussage verbirgt sich ein allgemeineres und grundsätzlicheres Problem. Wozu dient Wissenschaft?" In the continuation, truth is referred to a true relation between representation and objective reality. This equivalence can only be estimated by aesthetic judgment, at the end. Beauty or aesthetics must not be reduced to the phenomenon of nature. After having addressed several positive problems of the application of aesthetical criteria to legal order, the somehow agree that the only possibility to speak about the artistic, not artificial quality of legal science is the language of arts... music and beauty: "Das Einhorn veränderte sich: über sein silbergraues Fell liefen plötzlich Farb-Wellen, alle Farben des Regenbogens, sie tanzten über den ganzen Körper und darüber hinweg, die Luft war erfüllt vom Schwingen der Farben, und das Einhorn schwebte in dieser Fülle einem glühenden Abendhimmel zu".
The question remains: to what end does science or scientific research serve? To ask this question already implies to reject the possibility of science as an end to itself, as *l'art pour l'art*. And it signifies to search for another end among the ultimate cultural systems of

religion, philosophy and – art. "Schönheit ist eine Weise, wie Wahrheit als Unverborgenheit west" (*Martin Heidegger*).

[Further Information About the Author]
Peter Saladin, born 4 February 1935 in Basel, died 25 May 1997 in Berne, studied jurisprudence at the University of Basel, where he obtained his doctorate in 1961, being a scholar of *Max Imboden*. After having practised as a lawyer, he went to the *Freie Universität Berlin* and to the Michigan Law School in 1962/1963. He then joined the federal administration, worked for the federal department of justice and was secretary of the scientific council. In 1969, he presented his habilitation thesis, a standard work on "Grundrechte im Wandel", published 1970. From 1972, he was an ordinary professor of public law at the University of Basel, and between 1976 until his death he was professor for constitutional and administrative law at the University of Berne. He was mainly occupied with public church law, invested himself in the promotion of ecology and claimed rights of nature, and intended to take into consideration also the rights of future generations. His core interest remained the preservation of the dignity of every single human being. In 1991, he received the honour of doctor *honoris causa* by the University of Geneva.
Our interest in his broad publications consists in his revolution of the doctrine of rule of law by introducing the concept of responsibility into the legal order.
For further information, please consult:
Diemut Majer: Peter Saladin, in: Staatsrechtslehrer des 20. Jahrhunderts, Deutschland, Österreich, Schweiz, Berlin: De Gruyter, 2015, pp. 1021 ss.

[Selected Works of the Same Author]
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15 December 2017 *Michael Walter Hebeisen*

The Anthology of Swiss Legal Culture –
Section „Legal Philosophy and General Jurisprudence“
„On the Mutual Relation Between Swiss Legal Culture and Philosophy, or: On the Interdependency Between Swiss Legal Thought and the History of Ideas“
Confidential Overall Conception, proposed by *Michael Walter Hebeisen*, Dr. iur.

1. *Possible Structure and Suggested Arguments*:

   Highlights of Modern Legal Thought in Switzerland – Historical Circumstances, Socio-Cultural Setting, and Basic Approach

   0. Elementary Pre-History of Modern Swiss Legal Thought – Reconciliation of Concurring Jurisdictions and Combination of Scientific Disciplines or Methods
   1. Swiss Legal Culture as a Melting Pot of Modern Philosophical Influences – Overlapping Neo-Kantianism, Neo-Hegelianism, Realism, Pragmatism, Existentialism, Phenomenology, and Beyond
   2. Legal Methodology and Scientific Character of Jurisprudence, or: Controversy Between Positivism and Natural Law, Between Monism and Dualism, and the Pluralist Alternative of Human Studies
   3. Legal Structures as an Integrative Part of Cultural Phenomenons, leading to an Interdisciplinary Approach as Part of the Theory of Science
   4. Legal History and the Historicity of Law Within the Swiss Legal Context
   5. Insights into the Philosophical Dimensions of Rule of Law and Constitutionalism
   6. Swiss Theories of (Direct or Semi-Direct) Democracy and Political Thought – Participation, Representation in a Strong Civil Society
   7. Jurisprudence as the Oldest Social Science – Social Question, Sociology, Socialism, Swiss Social Democracy, Social State
   8. Openness, Permeability, and Transception of Swiss Legal Thought
   9. Realism, Pragmatism, and Pluralism as Virtues of Swiss Legal Culture
   10. Back to the Future: In Favour of a Recontruction of Modernity and Against Post-Modern Disintegration – Inclinations, Tendencies, and Prospectives of Swiss Legal Thought

   Appendix: Global Index of Literature

2. *Selection of Texts to be Possibly Included* (with special reference or particular connection to swiss legal philosophy and swiss general jurisprudence, to be inserted into the abovementioned structure, listed with no respect to systematic order according the approximate chronological order, selection to be reduced and/or to be enhanced):

Jean Barbeyrac: De dignitate et utilitate Juris ac Historiarum et utriusque disciplinae Amica coniunctione, Amsterdam: Pierre de Coup, erweiterte und verbesserte ed. 1712 (1. ed. Lausanne: Frédéric Gentil und Théophile Crosat, 1711); Idem: Écrits de droit et de morale, ed. Simone Goyard-Fabre, Paris: Centre de philosophie du droit, 1996 (extract);

Jean-Jacques Burlamaqui: Principes du droit naturel, Genève: Barillot & Fils, 1747, 352 pp.;

Emer de Vattel: Le droit de gens, ou: principes de la loi naturelle – Appliqués à la conduite & aux affaires des nations & des souverains, London 1758;

Béat-Philippe Vicat: Traité du droit naturel et son application au droit civil et au droit des gens, 1777;

Philipp Albert Stapfer: Die fruchtbarste Entwicklungsmethode der Anlagen des Menschen zufolge eines kritisch-philosophischen Entwurfs der Culturgeschichte unseres Geschlechts in der Form einer Apologie der classischen Werke des Alterthums, eine bey Eröffnung der Vorlesungen des politischen Instituts den 13. November 1792 gehaltene Rede, Bern: Hochobrigkeitliche Buchdruckerey, 1792;

Benjamin Constant: Fragments d'un ouvrage abandonné sur la possibilité d'une constitution républicaine, 1803; Idem: Principes de politique, applicable à tous les gouvernements représentatifs, Paris: Alexis Eymery, 1815;

Ignaz Franz Paul Troxler: Philosophische Rechtslehre der Natur und des Gesetzes mit Rücksicht auf die Irrlehren der Liberalität und Legitimität, Zürich: Gessner'sche Buchhandlung, 1820 (extract);

Heinrich Zschokke: Des Schweizerlands Geschichte für das Schweizervolk, Aarau: Sauerländer, 1824;

Friedrich Ludwig Keller: Die neuen Theorien in der Zürcherischen Rechtspflege, 1828, 42 pp.; Idem: Vorlesungen über Pandekten, posthum ed. by William Lewis, Leipzig: Bernhard Tauchnitz, 2. A. 1866/ 1867 (1. A. 1861, ed. Emil Friedberg; Reprint Frankfurt am Main: Vico Verlag, 2015);

Ludwig Snell: Entwurf einer Verfassung nach dem reinen und ächten Repräsentativsystem, das keine Vorrechte noch Exemtionen kennt, sondern auf der Demokratie beruht, 1830; Idem: Handbuch des Schweizerischen Staatsrechts, 2 vols., Zürich 1839/ 1845;

Marc-Antoine Fazy-Pasteur: La constitution du canton de Genève mise en parallèle avec les constitutions des cantons de Zurich, Berne, Fribourg,

Bâle et Vaud, Genève 1834; Idem: Centralisation et unification du droit en Suisse, Genève/ Bâle, 1890;

Aléxis de Tocqueville: De la démocratie en Amérique 2 vols., Paris: Pagnerre, 1835/ 1840; Idem: L'Ancien Régime et la Révolution, Paris: Pirmin Didot, 1856;

Jean-Charles-Léonard Simonde de Sismondi: Étude sur les sciences sociales, 3 vols., Paris/ Strasbourg: Treuttel & Würtz, 1836-1838;

Samuel Ludwig Schnell: Allgemeine Rechtslehre – Vorlesungen im Wintersemester 1838/ 1839 an der Universität Bern, nachgeschrieben von J. R. Roth (Manuskript);

Wilhelm Snell: Vorlesungen über Naturrecht, vorgetragen im Winter-Semester 1839, handschriftlich aufgezeichnet von Rudolf Roth; Idem: Naturrecht nach den Vorlesungen, mit einem Vorwort von einem Freunde des Verewigten, Langnau: Fr. Wyss'sche Offizin, 1857;

Johann Jakob Bachofen: Das Naturrecht und das geschichtliche Recht, Basel 1841; Idem: Das Mutterrecht – Eine Untersuchung über die Gynaikokratie der alten Welt nach ihrer religiösen und rechtlichen Natur (1861), ed. Hans-Jürgen Hinrichs, Frankfurt am Main: Suhrkamp, 1975; Idem: Selbstbiographie und Antrittsrede über das Naturrecht (Philosophie und Geisteswissenschaften), ed. Alfred Baeumler, Halle an der Saale: Max Niemeyer, 1927;

Anoine-Élisée Cherbuliez: De la démocratie en Suisse, 2 vols., Paris/ Genève, 1843;

Louis-François-Frédéric Gauthey: Essai d'instruction civique, Lausanne 1844;

Charles Secrétan: La philosophie de la liberté – Cours de philosophie morale, 2 vols., Paris/ Lausanne: L. Hachette et Cie/ Georges Bridel, 1849 (extract);

Ferdinand Lecomte: Éléments d'instruction civique et de droit public au canton de Vaud, Lausanne 1855;

Johann Caspar Bluntschli: Allgemeines Staatsrecht, geschichtlich begründet, 2 vol., München: J. G. Cotta, 4. ed. 1868 (1. ed. München: Verlag der literarisch-artistischen Anstalt, 1852) (extract);

Hans Hürlimann: Kritik des bestehenden Rechtes – Prinzipielle Darstellung der verfehlten, von allen Völkern verwirklichten, und der richtigen, Alle ohne Ausnahme dies- und jenseits glückselig machenden zukünftigen Rechts- und Weltordnung (Das bestehende Recht als weltgeschichtlicher Irrthum und Quelle des Unheils der Welt auch speziell nachgewiesen), Zürich/ Schaffhausen: Brodtmann, 1861;

Émile Acollas: L'idée du droit – Cours de Droit civil français, donné à l'Université de Berne, Paris/ Genève, 1871; Idem: Les droits du peuple – Philosophie de la science politique, et commentaire de la déclaration des droits de l'homme de 1793, Paris 1880;

Max Rümelin: Juristische Begriffsbildung – Akademische Antrittsschrift, Berlin: Duncker & Humblot, 1878 (extract); Idem: Erlebte Wandlungen in Wissenschaft und Lehre, Rede gehalten bei der akademischen Preisverteilung am 6. November 1930, Tübingen: J. C. B. Mohr, 1930; Idem: Eugen Huber, Rede gehalten bei der akademischen Preisverteilung am 6. November 1923, Tübingen: J. C. B. Mohr, 1923; Idem: Rechtsgefühl und Rechtsbewusstsein, Rede gehalten bei der akademischen Preisverteilung am 6. November 1925, Tübingen: J. C. B. Mohr, 1925; Idem: Reden und Aufsätze, Tübingen: H. Laupp, 1875;

Aimé Humbert (-Droz): Étude sur la philosophie du droit, Lausanne 1881;

Numa Droz: La démocratie et son avenir, in: Bibliothèque Universelle, vol. 87/ 16, pp. 385-415, Lausanne/ Genève 1882; Idem: Instruction civique – Manuel à l'usage des écoles primaires supérieures, des écoles secondaires, des écoles complémentaires et des jeunes citoyens, Suivi d'un exposé des institutions du canton de Berne par Albert Cobat, Lausanne: D. Lebet, 1885; Idem: La démocratie fédérative et le socialisme d'État, Conférence donné à Genève le 20 février 1896, Genève/ Paris: Eggimann & Alcan, 1896;

Louis-Henry Reymond: Les institutions civiles de la Suisse au point de vue de l'histoire et de la philosophie du droit, Genève 1885;

Alphonse Rivier: Principes du droit des gens, Paris: Rousseau, 1889 (in deutscher Übersetzung: Lehrbuch des Völkerrechts, Hannover: Ferdinand Enke, 2. ed. 1899); Idem (together with Franz von Holtzendorff): Introduction au droit des gens, Bruxelles/ Hamburg 1888;

Ernest Roguin: Étude de science juridique pure – La règle du droit (Analyse générale, spécialités, souveraineté des États, assiette de l'impôt, théorie des statuts) – Système des rapports de droit privée précédé d'une introduction sur la classification des disciplines, Paris/ Lausanne: Librairie Générale de Droit et de Jurisprudence/ F. Rouge, 1889; Idem: Observation sur la codification des lois civiles, Lausanne: Ch. Ciret-Genton, 1896, pp. 73-134; Idem: La science juridique pure, 3 vols., Paris/ Lausanne: Librairie Générale de Droit et de Jurisprudence/ F. Rouge 1923; Idem: Sociologie 5 vols., Lausanne: C. Pasche, 1928-1932;

Albert Affolter: Untersuchungen über das Wesen des Rechts, in: Vortag vor der Töpfergesellschaft Solothurn, Nr. 295 vom 19. Dezember 1888, Solothurn 1889; Idem: Grundzüge der Allgemeinen Staatslehre, Stuttgart: Ferdinand Enke, 1892; Idem: Das ethische Recht und der Staat, Stuttgart: Ferdinand Enke, 1928; Idem: Grundzüge des Schweizerischen Staatsrechts, Zürich: Orell Füssli, 1904; Idem: Naturgesetze und Rechtsgesetze, München 1904; Idem: Rechtsbegriffe und Wirklichkeit, in: Archiv für öffentliches Recht, vol. 21 (1907), Tübingen: J. C. B. Mohr, 1907; Idem: Zur Normentheorie, in: Archiv für öffentliches Recht, vol. 23 (1908), Tübingen: J. C. B. Mohr, 1908,

pp. 361-418; Idem: Recht an sich und erkennbares Recht, in: Archiv für Rechts- und Wirtschaftsphilosophie, vol. 14 (1920/ 1921), pp. 395-404;

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Louis-Théodore Wuarin: Une vue d'ensemble de la question sociale, le problème, la méthode, Paris: L. Larose, 1896;

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Ludwig Stein: Die sociale Frage im Lichte der Philosophie – Vorlesungen über Socialphilosophie und ihre Geschichte, Stuttgart: Ferdinand Enke, 1897; Idem: Wesen und Aufgabe der Sociologie – Eine Kritik der organischen Methode in der Sociologie, in: Archiv für systematische Philosophie, vol. 4, Berlin: Georg Reimer, 1898, 38 pp.; Idem: An der Wende des Jahrhunderts – Versuch einer Kulturphilosophie, Tübingen: J. C. B. Mohr 1899; Idem: Der soziale Optimismus, Jena: Hermann Costenoble, 1905; Idem: Die Anfänge der menschlichen Kultur – Eine Einführung in die Soziologie, Leipzig: B. G. Teubner, 1906; Idem: Philosophische Strömungen der Gegenwart, Stuttgart: Ferdinand Enke, 1908; Idem: Dualismus oder Monismus? – Eine Untersuchung über die doppelte Wahrheit, Berlin: Reichl, 1909; Idem: Die Juden in der neueren Philosophie, Berlin, M.

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André de Maday: Essai d'une nouvelle classification des systèmes politico-sociaux et de ses applications, Nauchâtel, 1911; Idem: Essai d'une explication sociologique de l'origine du droit – Théorie de la valeur des droits, Paris: Girard, 1911;

François Gény: Science et technique en droit privé positiv – Contribution à la critique de la méthode juridique, 4 vols., Paris 1914-1924; Idem: Essai sur l'éloquence juridique, Paris: Buchet/ Chastel, 1947, 266 pp.;

Fritz Fleiner: Entstehung und Wandlung moderner Staatstheorien in der Schweiz, Akademische Antrittsrede an der Universität Zürich, Zürich: Orell Füssli, 1916 (also in: Ausgewählte Schriften und Reden, Zürich: Polygraphischer Verlag AG, 1941, pp. 163-180); Idem: Politische Selbsterziehung, Zürich: Orell Füssli, 1918 (also in: Ausgewählte Schriften und Reden, Zürich: Polygraphischer Verlag AG, 1941, pp. 214 ss.); Idem: Schweizerische und deutsche Staatsauffassung, in: Ausgewählte Schriften und Reden, Zürich: Polygraphischer Verlag AG, 1941, pp. 235 ss.; Idem: Die Staatsauffassung der Franzosen, in: Ausgewählte Schriften und Reden, Zürich: Polygraphischer Verlag AG, 1941, pp. 120 ss.; Idem: Tradition, Dogma, Entwicklung als aufbauende Kräfte der schweizerischen Demokratie (1933), in: Ausgewählte Schriften und Reden, Zürich: Polygraphischer Verlag AG, 1941, pp. 288-302;

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Henri Lévy-Ullmann: Éléments d'introduction générale à l'étude des sciences juridiques – La définition du droit, Paris: Recueil Sirey, 1917;

Gregor Edlin: Recht und Rechtsnorm – Kritische Essays, Dissertation Universität Zürich, 1918; Idem: Rechtsphilosophische Scheinprobleme und der Dualismus im Recht, Berlin-Grunewald: Walther Rothschild, 1932;

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3. *Portraits of Persons and Institutions*

3.1 A Selection of the above mentioned authors

3.2 Possibly featured institutions (among others, to be completed):
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Swiss section of the „Internationale Vereinigung für Rechts- und Sozialphilosophie“ (together with the series „Archiv für Rechts- und Sozialphilosophie“ {ARSP} und the additional series „Beihefte“);
Swiss “Vereinigung für Gesellschaft und Recht”, association in the domain of legal sociology, since 1976;
Tradition of education of citizen (for instance Helvetische Gesellschaft);
Active culture of so-called Festschriften (for instance on the occasion of the regularly held Schweizerischen Juristentags);
Several Institutions as part of swiss Universities: Institut für Ethik und Menschenrechte (Freiburg); Institut für Sozialethik (Zürich); Kompetenzzentrum Medizin – Ethik – Recht Helvetiae (Zürich); private Institutions, for instance: THÉMIS – Centre d'Etudes de Philosophie du droit, de Sociologie du droit et de Théorie du droit in Geneva.

23 October, 2017 *Michael Walter Hebeisen*