"The High Tide of Legal Philosophy and General Jurisprudence in Twentieth Century Switzerland"

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> "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)

[Introduction, Topic]

From my contribution to the "Anthology of Swiss Legal Culture", I have selected three renowned Swiss jurisprudents who stand for the culmination of legal philosophy and general jurisprudence in our country during the period between the two World Wars. An exhausting evaluation of Swiss contributions to the European development of legal thought in the course of the twentieth century can be found in the numerous introductions and commentaries to the fore-mentioned legal anthology. After having addressed three positions that stand for the Neo-Kantian idealistic, the monistic or positivistic, and the Hegelian dialectical standpoints, the primary occasions and the main outcome of the typically Swiss contributions to legal philosophy and general jurisprudence can be indicated more precisely.

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 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.

[*Eugen Huber* – Bridged Dualism on Neo-Kantian Idealist Grounds]

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.

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.
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. 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.

[*Walther Burckhardt* – Unsolved Monism Leading to Positivism]
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?

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 co-editor 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.

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.
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.

[*Dietrich Schindler* senior – Working Dialectics Leading to a Differentiated and Sophisticated Understanding]
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.
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.
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. 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. 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.
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.
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.

[Conclusion, Perspectives]
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.
Legal order can only be made consistent and persistent within the limits of social dyna-

mics 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.

[For Further Reading]
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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

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idem: Contributions to the Historical Development of Legal Philosophy and General Jurisprudence in Switzerland During the Twentieth Century, on: www.swuv.jimdo.com.

[Abstracts]
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. 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 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.

[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*, 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.

16 October 2018 *Michael Walter Hebeisen*