

The Anthology of Swiss Legal Culture

A new Approach to Swiss Legal Culture in a European and Global Context in English – A Science and Communication Project¹

<http://www.legalanthology.ch/>

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Content

A. Motivation and Context.....	1
B. Structure and Content.....	2
C. Work in Progress.....	4
D. Chances and Significance of Anthology.....	4

A. Motivation and Context

For centuries, Swiss law has evolved in a diversified cultural environment, which is characterized by various linguistic regions with various legal traditions in German and Romanic law. Later, Swiss law was under the influence of the creation of nation-states in Europe. In the past decades, this imprint has been replaced by the increasing influence of European as well as American law in the course of globalization. This is also due to an increased significance of international law during the second half of the 20th and the beginning of the 21st century. This background often remains concealed in the modern legal context. Legal practice and legal education continue to be largely oriented by positive Swiss law; and, they are only minimally interested in the origins and

¹ This text is an updated version of the article which has been published in German in: *Zeitschrift für Schweizerisches Recht* 2016, Vol. I, p. 73–78.

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Since 2017, Prof. Dr. iur. Pascal Pichonnaz, LL.M., University of Fribourg is also co-editor in chief of the Anthology of Swiss Legal Culture.

context of its genesis in a European and global context when applying the law. Where the principles and rules have their origin is mostly the subject of legal history under private or public law; these areas hardly deal with the younger and current development. Their influence on Swiss legal development often remains in the dark and is known to the fewest actors.

The *Anthology of Swiss Legal Culture* builds on this result and increasingly tries to direct attention to cultural backgrounds and features of Swiss law in a European and global context, and to shed light on it. With its broad selection of texts, the anthology contributes to research development, and it supports education at universities. The anthology also wants to be an important source of information for the interested legal profession, as well as for everyone who generally deals with the development of Switzerland's intellectual history and its culture. Thus, the anthology is, in particular, also important for a public that is interested in the cultural history of Switzerland; law and its development are understood as part of the culture that goes beyond paragraphs and legislation.

B. Structure and Content

The anthology consists of a collection of relevant texts from science and legal practice that give an explanation about the context of Swiss law. To date, it follows a predefined structure and provides a quick access to preliminary texts - above all, to the original articles in their full text in the respective language, and to biographies of distinguished jurists. The articles are topped off by bibliographical notes on the authors, as well as on jurists who have— throughout their legal practice - made major contributions to the development of law in and from Switzerland. Therefore, the anthology enables readers to obtain an independent view; and, it thereby promotes an understanding for our legal culture while also expanding the awareness of it.

To satisfy the purpose of the worldwide dissemination, the anthology is web-based but partly also published as a print edition and exclusively composed in English. Many of the original texts are also available in English.

The editors have made a selection of significant basic texts and annotated them. In addition to *seminal texts*, there are also documents for the new generation; their long-term importance is indeed open.

They deal directly or indirectly with Switzerland's influence on the general legal development. This was in particular evident in the early phase, while the post war era was characterized mainly by the reception and perception of foreign law. This applies primarily to the influence of European law on Swiss law but also to the influence of US law in the course of globalization, and a certain internationalization of the various legal professions in Switzerland.

The anthology is currently divided into seven parts:

- International Law: Thomas Cottier, Isabel Kölliger and Jack Williams,
- Europeanization: Jens Drolshammer,
- Americanization: Jens Drolshammer,
- Globalization: Jens Drolshammer,
- Swiss Law and Economics: Peter Nobel,
- Information Law: Rolf H. Weber,
- Philosophy of Law: Michael Hebeisen.

Werner Stocker, former director at Dike Verlag, made a major contribution to the conceptualization and implementation of the project.

The anthology covers, in its present stage of development, especially Switzerland's contribution to the development of international law; this was characterized, mainly in the 18th century, as a result of the small state and the proximity of national boundaries, especially in Geneva and the French speaking part of Switzerland. It includes the relevant authors from Jean-Jacques *Burlamaqui*, Emer *de Vattel* to Johann Caspar *Bluntschli* and Max *Huber* as well as other major contributions from Switzerland to the development of international law, and up to the present. The anthology portrays the influence of European law, which characterizes the recent past and the present, and which has largely replaced traditional comparative law and recourse to different European traditions. It also shows that Swiss authors and practitioners influenced the early development of law in the USA; although, Switzerland recently became the recipient of US law. This legal culture characterizes not only the education of Swiss lawyers in constitutional law and private law but also, and increasingly, the method of international legal practice in Switzerland.

In the selected contributions, it is noted that creative lawmaking has generally declined in Switzerland during the past decades and that the legal system is and has been increasingly influenced by foreign developments in the course of the Europeanization and globalization, without the existence of corresponding instruments of participation in the critical phases of the lawmaking. This applies in particular to European law, which was compiled in different ways, as well as to Anglo-American law. And finally, it also applies to modern international law, which is linked to an increasing limitation of the "Treaty-Making Power" of Switzerland in its understanding as an alliance outside of the European Union.

The choice of the texts was made by the above mentioned editors. The seven clusters comprise the following number of authors and articles:

- International Law: 51 articles from 35 authors,
- Europeanization: 36 articles from 24 authors,
- Americanization: 62 articles from 55 authors,
- Globalization: 20 articles from 17 authors,
- Swiss Law and Economics: 43 articles from 34 authors,
- Information Law: 20 articles from 20 authors,
- Philosophy of Law: 102 articles from 49 authors.

Within this selection, where one often finds interesting texts and connections, is the actual scientific work of the anthology and its versatile materials. Apart from early and well-known texts, namely on international law, it was not an easy task, but a very exciting one. In Switzerland, the formation and perception of *seminal texts* is not part of our legal culture. This is related to the fact that an awareness of the importance of case law as part of the legal process still lags behind reality. Casebooks with *leading cases* are also still an exception in Switzerland.

C. Work in Progress

The Anthology is *work in progress*, and it can make use of the great advantages of flexible and electronic desk publishing, as well as worldwide tangible access that is free of charge. New entries

and new areas are to be exploited in the coming years and, thus, the anthology will constantly develop with new discoveries.

The project is in its middle stage and does not yet cover central areas of Swiss law. The broad areas of constitutional law, and also of private law and family law await their treatment. The same applies to international arbitration, which has a tradition in Switzerland, and other special areas, which are of particular importance in Switzerland. Since the publication of the anthology in mid-2014, a basis has been created, which can now be built upon. In addition to the previous editors, the committee consists of Urs Gasser, Peter Nobel, Daniel Thürer, Nedim Peter Vogt, Franz Werro, and, as a consultant, Werner Stocker. Preparation is already in progress for further work planned. Thus, for a next stage of two to three years, well-known editors could be acquired:

- Paolo Bernasconi: International Criminal Law and Judicial Assistance,
- Andrea Büchler: Family Law,
- Felix Dasser: International Arbitration,
- Dominique Dreyer and Michael Pfeifer: Internationalization of Legal Professions,
- Andreas Kley: relevant legal texts «Grosser Schweizer»,
- Susanne Leuzinger and Jörg Paul Müller: The Swiss Federal Court in the World,
- Peter Nobel (Swiss International Commercial Law),
- Pascal Pichonnaz: International Aspects of Swiss Contract Law and Historical Aspects,
- Andreas Thier and Hanno Menges: Legal History,
- Daniel Thürer: Constitutional Law seen from an International Perspective,
- Axel Tschentscher: Public Law,
- Jacques de Werra: Intellectual Property Law.

Additional personalities are called for. Paul Richli, former Rector of the University of Lucerne, did develop a concept in order to finance the project.

D. Chances and Significance of Anthology

The anthology makes a contribution in the course of increasing the informatization from sources, their organization and interconnectedness, and their accessibility on the worldwide web. Similar projects exist in the USA; however, hardly in Europe. The anthology takes a new approach, and, hopefully, it will be of increasing interest not just to historians and philosophers but also to research, the legal education and the legal profession for the aforementioned reasons. The anthology was primarily designed as an instrument for research and doctrine, which increasingly has to deal with the background and context of the law beyond its immediate wording and interpretation if it wants to satisfy today's requirements for an increasing internationalization. We also wish that the texts will be used in seminars and lectures and that young colleagues are able to find – by recourse to the internet, which they are familiar with – sources and texts of unabated importance, which shall lead to a good education and which shall contribute to a lifetime interest in the background and genesis of the law.

Thus, the anthology differs significantly from previous works that were dealt with by well-known Swiss jurists.³

The connection between the introduction, the location and the summary of the original texts, supplemented by the bibliographies and biographies, opens up the developments on a broad level and gives the reader the possibility to make his own assessment of key documents and texts on Swiss legal development. Above all, the texts are worldwide accessible thanks to the internet, and, thus, they definitely are no longer limited to just the German speaking area.

The anthology is published and developed in cooperation with the Berkman Center for Internet & Society of Harvard University, which holds a leading position in cyber law and the development of online platforms for educational purposes (<https://cyber.law.harvard.edu/>). The online-edition of some parts of the clusters is the first international project to include the H2O-software developed by the Berkman Center for the Law Library of Harvard Law School.

Professor Urs Gasser, Executive Director of the Berkman Center and Professor of procedural law at Harvard Law School, is a member of the General Editors Board. This is not a coincidence. In the USA, the development of online vessels is more advanced than in Europe, not just for the education but also for the recording of intellectual, historical and legal developments. A similar project is presented by David Kennedy and Terry Fisher (eds.), *The Canon of American Legal Thought*, Princeton University, Press 2006, which seeks to capture the US American legal thinking since 1890 on the basis of 21 texts (<http://press.princeton.edu/titles/8318.htm>). With the Anthology of Swiss Legal Culture, we are following this development for Switzerland. It will take time for the anthology to arouse the interest of the jurists, professors and students in Switzerland and abroad. Until now, it has only occasionally been used in class, although the number of downloads indicates an interest. In the first years since the website was launched, several thousand people worldwide visited the Anthology site. It has so far found the greatest interest from legal and cultural historian circles. However, a trend is apparent, whereas jurists from the practice and doctrine in Switzerland and abroad have shown an interest in dealing with the genesis and background of today's current legal reality, and in understanding the law as part of the Swiss culture in a European and global context. This also allows us to address the deeper dimension of questions regarding law and justice. It was this insight and conviction that even enabled us eight years ago, to take this scientific and communication project (which is open to the future) on the Swiss legal culture.⁴

³ Hans Merz, Dietrich Schindler, Hans Ulrich Walder (ed.), *Juristengenerationen und ihr Zeitgeist. Abhandlungen grosser Juristen aus zwei Jahrhunderten. Zum 200jährigen Bestehen des Verlags Schulthess*, Zurich 1991; Hans Schulthess (ed.) *Schweizer Juristen der letzten hundert Jahre*, Zürich 1945.

⁴ Events on Anthology of Swiss Legal Culture were also held in 2016 together with the authors and selected guests in cooperation with the Collegium Helveticum of the University of Zurich under the leadership of Prof. Dr. Gerd Folkers and the General Editors of Anthology.

The colloquiums are under the motto «Ein Experiment des Collegium Helveticum und als Laboratorium für Transdisziplinarität».