

Electronic translation by DeepL, revised by Peter Grimshaw, grad. engineer/translator — the German text will be published in a special issue (Sonderausgabe) of the Zeitschrift für Schweizerisches Recht «Pandemie und Recht, Beitrag des Rechts zur Bewältigung einer globalen Krise» electronically at the beginning of May, in print in June 2020

Risk and Response – Responses to Risks

On the need for a strategic approach to catastrophic risk law in border areas of technological and scientific development

"Reality lawyering in times of crisis"

"See it fresh – see it whole – see it as it works", Karl Llewellyn, *American Jurist* (1898–1962)

"Better never than late", Tomi Ungerer, artist and writer (1931-2019)

Jens Drolshammer

I wrote the following text as a *reprint* during a stay as Visiting Research Professor at Harvard Law School in 2005: *Risk and Response - On the necessity of a strategic approach to catastrophic risks at the frontier of technological and scientific developments*. I published this text in 2007 in a commemorative publication for Jacques Santer¹ and in 2009 in a collection of essays with the main title "A Timely Turn to the Lawyers?", which I guess is not well known in Switzerland. After the outbreak of the worldwide Covid19 pandemic, on the Sunday before the *lockdown* in Switzerland on 16 March 2020, I thought of the text and read it again. In a first round I sent it to Urs Gasser, Jörg Paul Müller and Pascal Pichonnaz asking: "What do you think I could do with this in view of the catastrophe that has occurred? I suggested To Pascal Pichonnaz that in his editorial capacity he might consider making special editions to draw the attention of lawyers in Switzerland.

The equivalent new text below is of equal length and significance at the same level. It represents an update to fundamental questions about the position of law and lawyers involved in crisis management before and after the outbreak, and introduces the basic ideas of the 2005 text into the legal realities prevailing during lockdown.

The two texts are conjoined twins of a special kind, taking a new look at the basic concept in the same place, at the same time and in the same journal.

Verba volant - scripta manent? *Spoken words fly away, do written words remain?* That applied 15 years ago as the "voice of the printed word", but now there is a global crisis.

¹ Jens Drolshammer: Risk and Response - On the Necessity of a Strategic Approach to Catastrophic Risks at the Frontiers of Technological and Scientific Developments, in: Festschrift Jacques Santer, Luxembourg 2007; Reprint in A Timely Turn to the Lawyer - Globalization and the Anglo-Americanization of Law and Legal Professions - Essays, Zurich 2009, p. 751, (); see detailed list at Drolshammer.net, Publications, a series of contributions with specific references to the question of introducing a strategic perspective in the field of law and lawyers under the metaphors "lawyering", "actual lawyering" and "actual lawyering in crisis" and beyond.

The Covid19 pandemic has changed everything. While the scope of thought, action and communication in dealing with catastrophes envisaged in the 2005 text was an open and future-oriented essay, this text and its possible meanings here and now, after the outbreak of the Covid-19 pandemic, are to be interpreted anew and differently from various points of view. It explains and comments on the 2005 text, and updates it in key areas to the present day as "text 2020". It examines the central aspects of the topos "law in crisis" in concrete crisis management *hic et nunc*. While looking into a cracked rear-view mirror, I stare at a cracked timeline. I would like to point out that the original text was an *essay* and *not a scientific treatise*. It set out some observations and suggestions in narrative style to thank Jacques Santer for a speech he gave in Zurich in 2000 entitled "The Europe of the Small States". The present text is again a footnote-free essay in *telegram form with dispatches from the crisis field*. In view of the fact that a *catastrophic risk* has been realised in the Covid19 pandemic as an extreme event of low probability but with high damage potential, I am trying to link the different times of 2005 and 2020 in my text. I wrote it during the lockdown, also over the Easter holidays - the feast of resurrection and a birthday celebration (13.4.1944) - on the "romping ground" of my home office and went to the "cracked ice rink", where I skated in "normal situations", usually in senior freestyle. With pencil in hand I focused on the period from Sunday, March 17 to Monday, April 20, 2020, the editor's *deadline* for handing in the manuscript. It is about first statements, impressions and insights, also of a personal nature, under pressure of time in special circumstances. The result is once again an *essay*, a kind of reportage, on daily developments and events along the timeline after the Covid-19 pandemic outbreak. *It refers exclusively to aspects of the role of law and lawyers in the current national existential crisis management - largely from the oily engine room rather than the bridge - before and after outbreak of the Covid19 pandemic*. Security policy and strategy are rather far removed from the everyday work of lawyers, and even more so their actual lawyering roles during crises. Under the guiding metaphor "see it fresh - see it whole" - and first and foremost "*see it as it works*" (Karl Llewellyn), I as a pathfinder would like to show motivated readers how to find their way through this "reality lawyering" during "law in crisis". At these low flying heights of legal activities in current realities, I use a holistic approach and on a meta-level, an issue-related, diversified grid with a view to the specific heat maps of law in the present crisis. The focus is on *reality lawyering in law in crisis is what crisis lawyers do*. I am also motivated by my professional, legal, academic and military approach to crises (see footnote at the end). In order to ensure the factual correctness of my writing, I was assisted by expert colleagues as counter-readers and commentators² on specific questions and areas.

² Urs Gasser (basic concept and digitisation), Günter Müller-Stewens (strategy and law), Paul Richli (list of legal issues as examples), Bruno Lezzi (Swiss security policy), Heinz Wanner (general third view), Jörg Paul Müller, friendly counter-reader (content and form); I would like to thank these collegial companions for their timely and appropriate, professional and selfless contributions in a short and eventful period of time; I would like to thank Ms. Susanne Meier for taking the trouble to go the distance in the lockdown and for her precise accompaniment of the manuscript's creation under pressure, prudently and in compliance with the rules of social distancing, in my home office working rooms.

According to Martin Wolf, Chief Economist of the Financial Times in the Weekend Edition of April 8, 2020 (front page and p. 17), the warning sign on all the walls of the world was "Our Path lies between Mass Death and Economic Mayhem".

I Updating point of note: Richard Posner's approach and starting point in the book *Catastrophe - Risk and Response* (2004) on the existence, potential and handling of catastrophes that endanger humanity is all the more valid and legally relevant in this Covid-19 crisis - a white box

The text ties in again with Richard Posner's book, *Catastrophe - Risk and Response* (2004)³, in which, in the context of the intensive political and scientific discourse and publications on *catastrophes* in the United States after 9/11, he for the first time focuses radically on the question of how to deal with scientifically recognized extreme risks that endanger existence, even humanity. The immediate reason for Richard Posner to write this book was reading and reviewing the novel "Oryx and Crane" by Margaret Atwood, the subsequent Nobel Prize winner for literature, in The New Republic under the title "The End is Near (2003)"⁴. The novel deals with a bio-chemical catastrophe that is portrayed as threatening to humanity. Richard Posner describes for the first time scientifically the existence of a series of *catastrophes* that are dangerous to humanity; among them, under the title "What are the Catastrophic Risks and How Catastrophic are they? (p. 21): *natural catastrophes (pandemic, asteroids, other natural catastrophes), scientific accidents (the strangelet scenario, omnivorous nanomachines, genetically modified crops, artificial intelligence), other unintended man-made catastrophes (global warming, exhaustion of natural resources, loss of biodiversity, a note on population, bioterrorism, cyberterrorism, digitalization and concealment, intentional catastrophes ("nuclear winter", bioterrorism, cyberterrorism, digitalization: surveillance and concealment), catastrophic synergies and lesser included catastrophes*, and postulates an obligation of scientists and politicians - for the first time clearly including law and lawyers - to deal with these catastrophes systematically, foresightedly and globally. He describes what has changed in dealing with catastrophic risks and identifies cultural, psychological and economic reasons why little is being done in this area. He presents the contributions to be expected in a number of scientific disciplines according to the state of the art at the time. *With regard to law, he concludes for the United States that the law in this area is backward and that lawyers as legal actors are uninterested and not optimally trained or prepared*. Richard Posner was the most cited American jurist at the time as a judge, academic researcher, teacher and author of academic treatises - "a man for all seasons". This wake up call and eye opener with reference to the existence of catastrophes endangering humanity, the *obligation to take responsibility for them, also through the law*, and the aforementioned backwardness of the law and the legal profession, was conspicuously unmistakable to me - if a "law-crisis-adequate mindset" existed anywhere. Richard Posner's 2004 postulation on catastrophes is still valid

³ Richard A. Posner, *Catastrophe – Risk and Response*, Oxford University Press, 2004.

⁴ Margaret Atwood, *Oryx and Crake*, 1st published in Great Britain by Bloomsbury, 2003.

today, and even more so at the time when the Covid-19 pandemic has materialized as one of the risks described.

II Updated points of reference for dealing with disasters threatening Switzerland's existence - a white box

A) On the history of dealing with disasters threatening existence in the context of Switzerland's security policy - from 1973 to the present

The *sedes materiae* of dealing with "disasters threatening existence" is Switzerland's security policy, which is updated and related to the current pandemic.

Since the 1970s, "events threatening existence" have increasingly become the focus of strategic concepts, adapted to the respective assessments of strategic situation. The *report by the Federal Council of 27 June 1973 on Switzerland's security policy (Concept for Overall Defence)* also identifies "disaster situations" in the section on "strategic cases" (p. 13). The "six strategic cases" listed were used by the Chief of Staff Operational Training (SCOS) to systematically review the decisions taken by the civilian authorities and the army command in the overall defence exercises. Thus, the corresponding exercise scenarios, which were designed with the help of expertise and know-how from the state and private sectors, covered disasters and emergencies outside the traditional area of "power-based crises" in ever new and different ways. After reunification, these were subsumed under the emerging "expanded security concept" and integrated into the concept of the "composite crisis" with a view to the goal of "securing livelihoods".

The *Federal Council's Report 90 on Switzerland's security policy* entitled "Swiss Security Policy in Transition" is to be understood as an adaptation to the international political situation as it developed after the fall of the Berlin Wall in 1989 and the subsequent dissolution of the Soviet Union and the Warsaw Pact. Possible positive or negative developments were identified in four basic scenarios. The "assessment of opportunities and threats" also includes the "basic scenario of increasing vulnerability of modern society" (p. 28). Among the security policy objectives, "protection of the population and its livelihood" (p. 31) is mentioned. In the security policy strategy, the "contribution to securing livelihoods" comes in third place. In the area of "securing livelihoods", the "security policy means" also involve a "combined use of means" and the "allocation of resources" in the areas of "foreign policy, army, civil defence, economic policy and foreign trade policy, national economic supply, state protection and information".

Even in the period after the fall of the Berlin Wall, in which priorities were reconfigured and repositioned on the basis of the perceptions of danger at the time - parallel to the restructuring of the armed forces - the government's involvement with extreme events continued; the corresponding exercises - not the planning - of large parts of Switzerland's command organisations, in particular the federal and cantonal

executives and their crisis organisations, were transferred from the then EMD to the "civilian" area of the federal administration under the responsibility of the Federal Chancellery. In the area of strategic leadership training (SFA), one of the main focuses of training was on practical strategy design, strengthening core competencies and *crisis management*. Notable are the Strategic Leadership Exercise 1997 (SFU 97) and the Strategic Leadership Exercise 2005 (SFU 05) with the relevant topic for this text: "Epidemic in Switzerland" (bird flu). The exercise was designed according to information provided by the then Head of Strategic Leadership Training on the basis of model analyses by Rand Corporation. In between, intensive training in strategic leadership took place. Yehezkel Dror writes in his book "The Capacity to Govern" (2001): "Only in single countries are crisis exercises for high-level decision-makers and feedback sessions accepted. The institutionalization of strategic schooling, including crisis exercises on the highest level, in the office of the Swiss Federal Chancellery in 1998 (Carrel) illustrates the possibilities; but most countries and senior politicians are not ripe for crises exercises. "I was a militia officer with the Chief of Staff for Strategic and Operational Training (SCOS) from 1985-1990 and designed scenarios for large exercises. Afterwards, I was a member of the Strategy Section as an advisory body to the Chief of Staff until the end of my service. In this context I became a member of the International Institute for Strategic Studies (IISS) at an early stage.

This approach to dealing with catastrophic events that threaten existence continues to this day. Under the heading of "National Risk Analysis of Disasters and Emergencies" - which includes pandemics - there is today in Switzerland a wide variety of organisations dealing with the management of disasters and emergencies, the current generic term also for Catastrophic Risks, which cover a diverse and broad spectrum of events - "natural, technological and socially induced disasters and emergencies". According to the *Federal Office for Civil Protection* now responsible for this area, that means: "The management of such hazards must be organised and planned. In order to obtain a systematic overview of the hazard potential of possible catastrophes and emergencies, the responsible organisations use hazard or risk analysis as part of disaster management. This involves identifying the spectrum of possible hazards, developing concrete scenarios for them, analysing their effects in a differentiated manner and estimating the probability of the defined scenarios occurring. With the national hazard analysis of catastrophes and emergencies in Switzerland, the Federal Office for Civil Protection FOCP creates the basis for precautionary planning and event preparation at all levels of government". As part of the interconnected crisis analysis, "products" have been developed which are updated periodically. These include *risk advice, methods, hazard catalogues* and *hazard dossiers*.

Current national crisis management during the Covid19 pandemic should be seen against this background of dealing with disaster situations in Switzerland.

B) On "risks" and "black swans" as "catastrophes" and their course from 2000 to the present day - new forms and greater frequency

With regard to the current catastrophe of the Covid 19 pandemic, I would like to refer once again to the categories of *catastrophic risks* to humanity first identified by Richard Posner in 2004. These catastrophes, then referred to as risks of "extreme

events", have a low probability of occurrence but consequences that threaten the existence of the human race.

An updating look at the timeline up to the present day shows that since the end of the 20th century, humanity has been increasingly confronted with new and additional "events" that have major and sometimes existentially threatening effects, but which occur unexpectedly, at least as far as time and place are concerned. Nassim Taleb speaks here of "black swans"; such an event is hardly predictable in terms of time and relatively improbable, and occurs rarely, irregularly but increasingly frequently. The present pandemic Covid-19 2020 can be classified as such. In this sense, the following events should be considered on the time axis: Ebola 2014, Sars 2012, Fukushima 2011, Euro crisis 2010, subprime crisis 2008, Sumatra-Andaman earthquake 2004, September 11, 2001, dotcom bubble 2000 and related also Chernobyl 1986. These "events" have very far-reaching, mostly negative consequences, which render existing plans largely obsolete and fundamentally call into question previous thinking and action. These "events" highlight the "blind spots" in collective perception and understanding and make us aware of how vulnerable "everything and everyone" is due to plan-based thinking and interdependencies. Friedrich Dürrenmatt said: "the more systematically people proceed, the more susceptible they are to chance".

Today, when dealing with these "events", it is appropriate to speak of "risks" and "black swans" and to distinguish them for specific purposes. According to common opinion, "risks" can be assigned with probabilities as done by insurance and reinsurance companies, for example, and as is common practice in risk theory. "Black swans", on the other hand, cannot. Classifying Covid-19 as a "black swan" *would have foretold the present global pandemic (came before and will come again, but unpredictably where and when)*. I point out this peculiarity of "black swans" because it makes crisis management of catastrophic risks like pandemics much more difficult; see below for an attempt to characterize the features of this type of event, which were already anticipated earlier and are now recognizable from experience. When considering this sequence of partially new and other types of crises between 2005 and 2020, when my two texts were written, this subsequent update must be kept in mind; the particularities of the pandemic type of crisis described below are an essential basis for the way in which a strategic perspective is taken into account and for listing examples of *legal issues* before (III, A) and after the outbreak of the Covid 19 pandemic (III, B).

In view of the state's involvement in the planning and implementation of crisis management, I believe that it is irrelevant for the purposes at hand whether such an "event" is classified as a "risk" or a "black swan". This distinction is irrelevant to the objective of "securing livelihoods" provided for in the Constitution and in the law. This distinction is also irrelevant with regard to the "necessity of a strategic handling of catastrophic risks in border areas of technological and scientific developments" suggested in the 2005 text. The suggestions and observations made in the 2005 text with the state of knowledge at that time, primarily for the phase of preparation and training for a crisis, also apply in the same way, but modified in content and processes for the phase of actual crisis management and the phase of post-crisis management. They become more defined in the light of events after 2000 and the characteristics of the crisis-typical pandemic we are currently experiencing (III, A) and B)).

C) The pandemics characteristics that are decisive for the Covid-19 composite crisis management are manifested today

Updated and related to the current catastrophe, a pandemic belongs to the category of *catastrophic risks* in Richard Posner's book and is listed in Swiss security policy as such under the recorded events in the strategic case "*disaster*" (overall defence concept 1973) under *component 4 "contribution to general livelihood security"* of Switzerland's security policy strategy (Report on Security Policy 90) and in the Federal Office for Civil Protection under "*disasters and emergencies*" in planning and training, and in the Covid-19 crisis it is considered a conceptual basis for national crisis management.

In general, and with regard to the role of law and lawyers in crisis management, particular attention should be paid to the following *characteristics of a pandemic as a composite crisis*. Partly already in the evaluations of the strategic leadership exercise of 2005 (pandemics) at the time of writing the 2005 text, certain characteristics, which are relevant to leadership and law, have become apparent in the area of preparations for this crisis, which are now manifested in the current disaster of the Covid 19 pandemic. I had no knowledge of this leadership exercise when I wrote the 2005 text in Cambridge, Mass. The reality *hic et nunc* shows that there are many additional characteristics that are also legally relevant:

- In the case of pandemics such as the Covid 19 pandemic, there is *prior knowledge* about the causes, the course and the beginning of this pandemic, which gives some lead time to the preparations in pre-crisis 'crisis management' (1).
- The 'crisis case' that triggers crisis management is *not a one-off event*, but a *multidimensional crisis process* in chronological and geographical progressions that are difficult to capture (2).
- This *crisis process is based on the assumption* that the *duration of a pandemic is limited in time* from the time of the crisis, the course of which is unclear and indefinite at the beginning, and the duration of which is constantly becoming clear as a function of the course of the crisis and the crisis management itself (3).
- Dealing with a pandemic seems to *require* a simultaneous and parallel crisis management of the current crisis and the ongoing *planning of the various post-crisis measures* after the preparation phase from the time of the 'event' (4).
- The current pandemic is an evolving crisis situation in which, at least in the initial phase, *health is the central issue* (5).
- It is an *interconnected crisis* in which all the relevant interests must be identified and weighed up against each other quickly and simultaneously from the point of view of 'safeguarding livelihoods' (6); the interconnected crisis is '*total*' in this sense.
- As already demonstrated in the 2005 strategic leadership Pandemics exercise, *integral communication* (including to the general population) is a high priority as a management tool in actual crisis management (7).
- In contrast to certain other disasters, crisis management by its very nature and according to a state of knowledge that is constantly becoming more evident, *per se and from the outset* concerns an "*international crisis*" and at national level can only be assessed and dealt with in agreement and coordination with other national, regional and international crisis managements (8).

- At the same time, this pandemic is a global crisis, so it is also subject to a global crisis management (9).
- Because of the "total" extent of the risks and due to the increasing pressure of time for coping with the decisive phases while simultaneously planning in parallel the various post-crisis measures, *time* and *resources management* are key factors (10).
- A further peculiarity of this pandemic as an "event" threatening livelihoods is, in my understanding, that the *focus of attention* and the associated dominance of communication about the pandemic let other strategically relevant activities fade into the background, although they should continue as an integral part of the overall crisis management (11).
- Ultimately, the Covid 19 pandemic has a completely new peculiarity, which manifests itself for the first time as a structural element: it is the first "*digital pandemic*" (Urs Gasser), which against the background of "*underlying conditions*" before, during and after the crisis manifests itself continuously as a cross-sectional function; this leads to a paradigm shift in dealing with this "existence-threatening catastrophe" (12).

These sudden and accelerated manifestations of distortions, questioning and fragmentation of forms of state and government, of basic values and of cohesion (also induced by digitisation or published through digitisation) give rise to unexpected tasks for all national and international actors at all levels of dealing with the global nature of the crisis; this applies above all to post-crisis measures.

In the following attempt to formulate clearly when and how a strategic approach is to be applied in legal crisis management, the entire list of examples given before (III, A) or after (III, B) the outbreak of the crisis must be seen and understood essentially in the light of these characteristics of the Covid-1 pandemic.

III Updating points of reference on the necessity of a strategic juridical approach to law in the management of crises threatening existence (A), and lists of such legal issues as examples before and after the outbreak of the Covid-19 pandemic (B) - what happens in the realities of crisis management? - A black box

According to the mandatory handling of catastrophic risks postulated by Richard Posner, the law and lawyers are "put in charge" from the moment the risk is recognized. Against this background, I describe in an updated and more concrete manner the essential points I wrote in 2005 on the question of the significance of a strategic handling of catastrophic risks in border areas of technological and scientific developments, and illustrate them with examples. I comment on why a strategic perspective (A) is so important in the crisis process described here, and on the recording of certain facts and circumstances before or after the outbreak of the Covid 19 pandemic in legal crisis management inasmuch as they are manifested in the lists and examples before and after the outbreak of the pandemic *hic et nunc* with legal relevance (B). I will limit myself to statements on the role of law and lawyers that, by contrast to the "normal situation" in crisis management, manifests itself as legal crisis management in extraordinary and crisis situations.

**A) Why is a strategic perspective also necessary in legal crisis management?
What could it consist of today?**

"Strategic thinking", "strategic perspective" and "strategy" tend to be forms of thinking and action that are stranger and more distant from the law and lawyers, including the practices of strategists among those of legal decision-makers (cf. text 2005, p. ...). In my opinion, far too little of any consequence has been expounded about the connections between "strategy" and "law". Years ago, I had already intended to deepen this area with Günter Müller-Stewens. In co-teaching, we have conducted some interesting interfaculty and transactional courses, and occasionally published together. But although we touched this area again and again, we never got any deeper. This dearth of practical application-oriented thinking and action in law is underestimated and unmanaged in my opinion. In this essay, the methodological preliminary question of interest is whether the nature of the issue - here concerning catastrophic risks - as an object of cognisant description and behavioural prescription itself requires an adequately methodical approach and handling that can in part be described as "strategic" in neighbouring sciences and neighbouring policies. Scientifically described as such, it might then be transferred to the field of jurisprudence and legal policy.

Various aspects of the issues involved in dealing with catastrophic risks are striking: they are new and future-oriented, they touch on central fundamental values and interests, they are unusually complex, they claim large areas because of their cross-border character, and they require an above-average and also anticipatory understanding of time in various respects. The issues at stake demand the most fundamental decisions in implementation and control, as well as specially engineered ways of achieving objectives. Dealing with issues of the threats posed by technological and scientific change also involves specific realities, such as limited predictability of developments, a diversity of events, simultaneous contradictions and ambiguities in perceptions, and often a lack of dismantlability. It is a matter of access to and dealing with the realities of science and technology, which traditional lawyers, as mentioned above, tend to find "foreign and distant" in their everyday work. (Müller-Stewens Günter, Lechner Christoph, Strategic Management: How strategic initiatives lead to change, Stuttgart, 2001.

In general, the following keywords address the question of the fundamental importance of the strategic perspective: *Strategy* (Günter Müller-Stewens) is not extrapolation, but dealing with discontinuities and irregularities, building structural bridges. - Strategy is the art of the possible - law limits the space of the possible - conversely, strategy points to spaces that still require a (new) legal design.

Features of *strategic issues*:

- Significant impact on stakeholders and affected parties
- Open according to development of the underlying assumptions (scenarios)
- Require thinking about options and choices in the face of bifurcations
- Ambidexterity is also required in order to deal with dilemmas and areas of tension (e.g. health vs. economy)

For example, the key question of what is specifically strategic in dealing with the crisis management of a catastrophe such as the Covid 19 pandemic, and which topics actually need to be labelled "*strategic*", is answered in strategic management theory for companies by saying that such topics are of strategic importance, have a significant influence on the direction of company development and concern decisions that can be of an existential nature. In view of the complexity, ambiguity and also the lack of predictability of the developmental trajectories of catastrophic risks, one-dimensional planning is not enough. Rather, it is a matter of thinking in options based on alternative development scenarios and thus gaining resilience (robustness) with regard to the future developments that actually take place. This has to be applied to the present crisis management.

According to Müller-Stewens, this question of the strategic is always about options, also in the present context. This is also the case for the state as crisis manager of the Covid 19 pandemic in Switzerland. From this perspective, the list of "issues" and "legal issues" before and after the outbreak of the Covid-19 pandemic is decisively determined in B).

Against the background of the above-mentioned characteristics of the pandemic as a composite crisis, what could be the main areas of "strategic" handling and activity in current state crisis management in dealing with the Covid 19 pandemic?

- The question of the *issue-adequate* - here *crisis-adequate* - *mindset* for thought and action (1).
- The question of the issue-oriented *design* of the procedure for recognizing and acting (2).
- The question of the goal-oriented linking of recognition and action for appropriate handling (3).
- The question of necessary policy decisions in strategic decision-making that arose on the timeline and at all stages in all areas (4).
- The question of changing or improving the analysis conditions and the creation of an appropriate environment (5).
- The question of generating knowledge or bringing about an issue-adequate interdisciplinarity for national and international cooperation (6).
- The question of the social and legal policy decisions on the expected collisions of fundamental rights (7).
- The question of defining the optimal policies, including legal policy, in the planning and implementation of pre-crisis, actual and post-crisis management (8).
- The question of taking due account of all relevant stakeholder interests (affected and involved parties) (9).

In dealing with the borderline area of catastrophic risks, it is striking that a possible meaning of including the strategic dimension (in addition to the formulation of "strategic planning" and "strategic implementations" in the processes and procedures of crisis management) is as a precondition for establishing and realizing a certain strategic mindset in times of crises, with reference in our context to the right of a "crisis-adequate-mindset of real lawyers" in the area of "law in crisis".

What are the essential characteristics of the "strategic" in dealing with *catastrophic risks*? These kinds of thinking and acting have characteristics that are also presupposed and important when dealing with catastrophic risks. These discussions, I believe, are

co-determining and decisive for all phases both of "normal situations" and "extraordinary situations", including the Covid-19 pandemic as a "crisis situation". Here this includes among other things the following:

The mindset itself is located *on meta levels*.

- Thinking is located on a meta-level insofar as it also deals with *creating the preconditions* for recognition and action in preparing for the constantly changing event (1).
- Thinking is directed towards the *achievement of goals* and is therefore focused on both recognition and action (2).
- The thinking here is *fundamentally* oriented towards the survival of a state community (3).
- Thinking is geared towards *overcoming challenges* (4).
- Thinking is based on a *holistic approach to the issue* (5).
- Thinking is aligned *in a manner appropriate to the issue on effectiveness over significant periods of time* (6).
- Thinking is open to issues and oriented towards decisions and their implementation, and not "infected" or limited to a certain extent by the difficulties of the perceived realization of later action in the political process (7).
- Thinking is cross-disciplinary, cross-institutional and cross-frontier (8).
- Thinking is so unbiased that *counterintuitive and out of the box methods* and solutions are not a priori discredited or discriminated against, so that *imagination* and *intuition* can also contribute to crisis management (9).

I would like to take the opportunity here to "*transplant*" the suggestion made in 2005, into a "normal situation", of taking into account some strategic examples of how lawyers deal with "crisis law in a possible crisis situation" (p. ..) into the current "crisis", *updating* the current crisis management in Switzerland, and to *plead* for it to be taken into account for *updating* the roles in legal crisis management from a strategic perspective. I make this statement about the conditions in Switzerland without reference to Richard Posner's fundamental criticism in the United States of the suitability of law and lawyers.

B) What are the identifiable strategic legal issues before and after the outbreak of the current Covid-19 pandemic? - first concrete results and issue spotting observations as examples of "everything is law" - a black box

On Wednesday 15 April, when writing this text during lockdown, Martin Wolf's editorial (see above) on the *Financial Times front page* said: "*This Great Shutdown Now Rivals the Great Depression*", the title of the article being "*The World Economy is now collapsing*".

In the following, I will try to identify and illustrate the *updates* to sections I and II by citing examples of issues. One example is the "complex issues" in the crisis, among which we focus here on those in which law and lawyers in the crisis are also the primary objects (legal issues) of observation. In telegram style, this is done in the form of lists. In view of the time pressure on editorial staff and the time of observing these issues, the examples are neither complete nor prioritized. I do not express any opinions on these issues here, and identify them from my memories and

understanding of the crisis, which were shaped by the 2005 text, and my current *observations* since the outbreak of the Covid 19 pandemic. Some of the examples address fundamental issues of law and lawyers before, during and after the crisis, which have not been much discussed and are difficult to address. In a first step, it is a matter of a phenomenological exploration of the legal realities in this context with a view to further analysis.

At the beginning of my examination of the crises named and described by Richard Posner, I make assumptions about the role of law and lawyers in this context for which - for various reasons - I lack the words in the original language. In my opinion, it is appropriate to talk and write about them, even if their scope and meaning cannot yet be expressed in language that is generally understandable. For the updates in this text, I am first of all presenting a starting point from which all statements about Law and Lawyers can and should be made in the present context. I am therefore presuming, with reference to the disasters that have been identified by Richard Posner as being dangerous to humanity, that:

"Law is everywhere at any time" and "Everything is law". It is necessary to transport and concretise this general working hypothesis into the mindset, action and communications dealing with the Covid 19 pandemic. In the following, I will focus on some examples before the outbreak of the Covid-19 pandemic and after its outbreak; I essentially follow the timeline, in the same way as the central *commitment of Law and Lawyers with regard to crises in pre-, actual and post-crisis management*.

1) Strategic legal issues before the outbreak of the Covid 19 pandemic - Issue spotting

Examples (legal issues):

- From the point in time when a certain minimum level of knowledge (Posner's cut) about Catastrophic Risks is reached, the handling of potential threats to existence and their realization is a legal issue. There is a legal obligation to deal with this knowledge in a legally relevant way with regard to the purpose laid down in the state's constitution to secure existence, and to augment this knowledge in case the risk is realised. There are strategic options as to what is done when and by whom (1).
- Posner's legally relevant cultural, psychological and economic factors that negatively affect the handling of access to the topic must be clarified and removed as obstacles. (2).
- There are legally relevant strategic options as to with which security policy concepts and security policy strategies these risks are recorded in a strategic situation assessment according to strategy and weighted relative to each other. (3).
- Pandemics, for example, are usually to be treated differently from a legal point of view (e.g. in comparison to the terrorism risk after 9/11); (Michael Osterholm in *Deadliest Enemy*, discussed in FT 11./12.4.2020 p. 8). (4).
- When planning how to deal with a pandemic crisis, there are also legally relevant basic options for dealing with it, already at the constitutional level: there are options for shaping it from various perspectives in the legislative implementation (see report Security Policy 91). (5)
- "Crisis situations" are to be practised according to the constantly changing situation assessments, especially in exercise scenarios, also in the legally relevant area, and the corresponding conclusions are to be drawn continuously (see the Strategic Leadership Exercise 2005 Pandemics). (6)

- In view of the great importance of communication about pandemics during a crisis, there are alternatives and options as to whether and how legal communications in the event of a crisis are considered, planned and practised. In this way, it would be legally relevant to avoid the fact that lawyers and law - unlike, for example, virologists and economists - have so far been absent, with exceptions, from the public debate insofar as conducted via the media, since the beginning of 2020 and especially since the lockdown. (7).

2. Strategic legal issues after the outbreak of the Covid 19 pandemic - Issue Spotting - the Black Box

Methodologically, it must be assumed in these observations that the concrete realities of the "reality lawyer in times of crisis" described here are not directly observable for me as an outsider during lockdown in the home office, but only indirectly.

In the following, we identify complex issues (complex factual relationships) that are by their very nature linked to legal issues that have become apparent to an outsider since the outbreak of the Covid 19 pandemic. I am currently, in the lockdown even more so, a "participating observer" who is largely guided by the national and international media available to me on a daily basis. Some of the following examples materialize through my memories; one part manifests itself in a "law-in-crisis journal" with Prof. Urs Gasser, Executive Director of the Berkman Klein Center for Internet & Society at Harvard University, with whom I have been working as a Faculty Associate since the beginning of the Covid-19 crisis. Since 15 March, we have been feeding this "law-in-crises journal" daily with texts and documents found according to ten search criteria, and discussing them regularly. An important part of the insight into the reality of the issues, which is important for the development of this text, is manifested in the conversation with counter-readers of the manuscript and in comments and corrections by the counter-readers, who are particularly knowledgeable in certain areas, during the whole period of the lockdown until 20 April (cf. FN 2).

The following examples are in turn initial observations of circumstances in which legal issues also arise in the context of actual crisis management. All further assessments, classifications of these legal issues and theoretical considerations of a reflexive handling of the legal present are made later. Many of the current legal issues cannot be found in the media. Due to the dynamics inherent in the Covid-19 pandemic of the role of internationalisation, the totality of interests involved, the above-average role of communication, the inherent need for simultaneous current crisis management and simultaneous planning of the post-crisis situation due to time limitation (see above), the issues described below manifest themselves in a variety of different areas and often simultaneously. As a rule, they involve early, rapid, appropriate and timely decisions and solutions, in which the time factor and the resource factor play a central role (cf. above). Often the issues also affect strategic areas and raise questions of decisions on basic options. Often the issues are dealt with by "informalised" personnel constellations through shortened decision-making paths and procedures. *Crisis management* leads to decisions with sometimes grave consequences and sometimes legal consequences that are difficult to reverse within a limited period of time. Observations show that general state crisis management has not only been illustrated and commented on by the media for several weeks now, but has also been criticised in part. All examples are again based on the working hypothesis "in everything is law - law is in everything - everywhere and at any time" or "anything is law - everywhere

and at anytime". For a majority of the issues addressed in the examples, the matter itself is of a strategic nature and/or a strategic perspective is indicated in dealing with it. It is always only a question of how and when an issue becomes manifest in the reality of crisis management. With regard to the listed examples of legal issues, it is always a matter of timely and appropriate decisions and their implementation. This enumeration of examples is in the form of *issue spotting* in the context of an extended consideration of "issue management in the crisis".

With regard to the recognisability of the legal bases that may be implied in the legal issues, it appears - in contrast to the "normal situation" - that in the "extraordinary situation" and in the crisis situation at least the Federal Council and the Federal Administration do not name the relevant legal bases in their public communication. This reduced communication in the event of a crisis reduces accessibility for outsiders - ranging from citizens to the legal professions and even law professors - and thus hinders timely orientation. Experience has shown that the media do not assume a corresponding communication function with regard to these legal foundations.

In this case, I am not expressing any *opinions* on how to deal by law with the crisis in these issues and I am not judging them. The ongoing critical monitoring and any criticism of the implementation of the planned regulations in pandemics is also not an issue here. The same applies to the studies and research already conducted on the status and quality of national preparations before the outbreak of the crisis.

Examples (legal issues):

- The basic strategic decision to classify a pandemic as a health disaster as opposed to a natural disaster (fundamentally different course of events, e.g. USA). (1)
- The choice and implementation of the basic behavioural strategies such as lockdown in various gradations, "controlled infection for mass immunity" or "doing nothing", depending on their legal requirements and implications for implementation. (2)
- The foreseeable planning and the relaxation of the chosen type of lockdown strategy in various stages decided on 16 April. (3)
- Organisational safeguarding of resources and time capacities for simultaneous actual crisis management and planning of post-crisis measures in staged phases depending on the specific nature of maturity of the crisis type (see above), (e.g. the creation and procurement of medical and personal protection equipment (PPE) on the world market and its distribution). (4)
- The options of relying on the constitutional basis for legal enactments in exceptional situations (discussion using the currently questionable expression emergency law); restrictions on the basis of BV 181, which as a police clause allows "serious public disturbance of public order" without legal basis and is limited to the targeted and direct combating of dangers. (A. Kley, NZZ 7.4.2020.) (5)
- The options and the implementation of interventions in popular rights of democracy such as postponing the referendum of 17 May, a standstill in political rights and application of the ban under the Covid-2 Ordinance on holding meetings, to cantonal parliament meetings. (A. Kley, NZZ 7.4.2020, radio statements and expert reports Portmann, Canton of Zurich). (6)
- The crisis-oriented organisation of parliamentary activities, e.g. the appointment of a special commission of the National Council and of the Council of States under Art. 42 para. 2 of the Parliamentary Act (ParlG) or the creation of a permanent crisis commission by adapting the Parliamentary Act to supplement the controls of the Finance Delegation (elaborated proposals by Paul Richli). (7)
- The fundamental rights, which are to be constantly taken into account as a cross-sectional measure (manuscript Thomas Cottier and Jörg Paul Müller, excerpts in the NZZ: *Die Grundrechte der Verfassung als Maßstab und Leitlinie in der Pandemie*). (8)

- The principle of federalism to be taken into account as a cross-cutting measure, such as division of responsibilities between the Confederation and the cantons in connection with the implementation of the Covid-19 ordinances (e.g. Uri and Ticino); and the subject of federalism in crisis mode (see Institute of Federalism at the University of Fribourg - Newsletter FF Covid-19). (9)
- The principle of proportionality to be taken into account as a cross-sectional measure. (10)
- The cross-cutting dimensions of coordination, solidarity, comity and humanitarian tradition, etc. to be taken into account in international relations during the crisis (11)
- The principle of sustainability to be considered as a cross-cutting measure. (12)
- The constant and simultaneous weighing of all legally relevant private and public interests in crisis management from the point of view of "securing livelihoods" in dealing with a pandemic - meta issue and permanent "crisis scene". (13)
- Upholding the functioning of parliamentary operations, in particular of assemblies at federal and cantonal level (with questionable exemplary function of the federal parliament under the pretext of "not being allowed to assemble" in times of lockdown). (14)
- The options in the competency ordinance under the gradation of special and extraordinary situations on the basis of the Epidemic Law. (15)
- The options for the use of mobile phones and personal data on mobile phones in the various strategies for dealing with the pandemic (see China, Hong Kong, South Korea, Israel, especially Singapore); options with regard to the limited access purposes and intensities in Switzerland; legal issues related to the use of personal data on mobile phones as a tool for tracing and for determining the geographical locations and size of assemblies. Legal Issues also in dealing with the options that arise with various ways of gradually loosening the lockdown (e.g. by introducing *tracing*). (16)
- Dealing with shortages and capacity bottlenecks in the health care sector, especially in hospitals, in decisions on the allocation of medical and testing equipment and in decisions on which patient is treated how and where with which equipment (e.g. NZZ Commentary 18.3.2020, interview with Prof. Bernhard Rütscbe). (17)
- The area of dealing with "recoveries", with access to appropriate tests on immunization, and the related issue of an "immunity certificate". (18)
- The options for implementing the chosen arrangements in the area of the federal aid package for SMEs and the self-employed, against the background of the associated interaction between the Swiss National Bank and FINMA. (19)
- Dealing with the SME aid package in the context of the business closure orders, in particular the issues of loss of earnings insurance and compensation on the basis of the National Pensions Act (LVG) and the Epidemics Act (EC), with a view to the principle of the cross-sectional scale of the evaluation congruence of regulations (document Paul Richli, letter to Federal Councillor Keller-Sutter and 30 National Councillors of 14.4.2020; already forwarded by them to the WAK National Council (in Luzerner Tagblatt, St. Galler Nachrichten, etc. of 18.4.2020). (20)
- The choice of options and their implementation following the decision in the area of air traffic, in particular to secure the strategic function of airports and air traffic control; particularly in the chosen option of bridging financing for the airlines Swiss, Edelweiss and Easyjet Switzerland; the associated handling of flight-related operations such as Swissport, Swiss Technics and Gate Gourmet; the legal status of Swiss Airlines as a subsidiary of the Lufthansa Group with regard to a possible claim for regulation by the German aviation authority. The implementation and enforcement of a principle of subsidiarity vis-à-vis the financing of support for parent companies abroad, and the securing of a long-term link between Switzerland and international air traffic. (NZZ 8.4.2020, Werner Enz); and since 14.3.2020, a contract for the procurement on the world market of protective masks (order volume CHF 600-800 million) and other protective material with regard to the strategic options in plans to lift the lockdown, and a contract for the logistical distribution of the relevant material in Switzerland with the use of Swiss Airlines aircraft. (21)

- The state communication about the crisis on the background of its coordination with the information activity of the media with regard to the factually correct and communicationally clear use of language expressions and corresponding presentation with legal content. (For example, dealing with the expression "Not" (strategic emergency) and "emergency" law in the sense of the state and constitutional discussion in specialist journals and the media on the exceptional order from 1939 until after the end of World War II, which was shaped by the Schindler/Giacometti dispute; examples: Wrong Choice USA after 9/11 with the expression "Attack on America" and Wrong Choice USA after the outbreak of the Covid-19 pandemic with the expressions "war", "enemy" and "Chinese virus") (22)
- The deployment of parts of the armed forces and use of the armed forces for different categories of service and different types of military action with a view to the various missions offered or required in a crisis; dealing with the large number of registered volunteers, including women, and dealing with members of the civil defence service; basic demarcations with the activities of the Federal Office for Civil Protection and the corresponding responsibilities of the cantons. (23)
- The non-public mandate to the armed forces, within the framework of a contract volume of CHF 600-800 million, to procure personal protection equipment (PPE) primarily in China with the aid of Swiss Airlines passenger and freight aircraft, in view of the various exit options from the lockout - at a price up to four times higher than usual on the world market, cf. Tages-Anzeiger Der Morgen, 19.4.2020 - and to allocate and logistically distribute it in Switzerland (cf. in this context the deployment of the NATO military alliance with deliveries to the Czech Republic of protective suits and masks for respirators that can be produced with 3D printers, by the "Euro-Atlantic Coordination Centre for Disaster Relief" and other NATO deliveries from Turkey to Italy and Spain, and from dealing with the new NATO member North Macedonia (e.g. Daniel Steinvorth, Brussels, NZZ 15.4.)). (24)
- The options for foreign policy behaviour that have emerged as a result of the peculiarities of the Covid pandemic (see above) and the rapid internationalisation of crisis management implementation, among other things under the following aspects: humanitarian tradition, solidarity, cooperation, comity, cooperation in various relevant sub-areas of crisis management (e.g. Participation in G20 crisis meeting, inclusion in the EU crisis organisation, taking over Italian and French patients, lifting of export stops by France and Germany with regard to medical equipment and materials of importance for Switzerland, voting on how to deal with cross-border commuters in the Basel, Geneva and, in particular, Ticino regions). (25)
- Positional references of the political parties such as the SVP (early) and the FDP (late) with concept documents on the strategy for easing the lockdown. (26)
- The options directly arising from the Covid-9 pandemic for initiating crisis-related projects in cantonal and national research programmes (e.g. the ad-hoc research project SNSF, CHF 20 million spread over 2 years (according to the press conference of the Federal Council 17.4.2020). (27)
- Options related to the question of how to bury people dying during lockdown in accordance with religious customs, and how family members and friends may attend the funerals and subsequently conduct the death ceremonies. (28)

Updates in II and II - final remarks on the context in which this text was produced

This enumeration of examples describes the period from Sunday, March 17 (start of lockdown) to Sunday, April 19 (day before the manuscript's deadline). It was added in the evaluation of the daily Journal with Urs Gasser, which is updated daily according to the course of the crisis. The parallel project with daily feed of texts and documents and the ongoing exchange of ideas with Urs Gasser has additionally opened my eyes to what it means: in dealing with the Covid-19 pandemic we are talking about the *"first*

*digital pandemic*⁵ in the ZSR special issue "Pandemic and Law: Contribution of the Law to Coping with a Global Crisis", Basel, 2020. Initial experience with such a journal idea has shown that continuous observation is valuable in terms of ongoing and subsequent analyses and evaluations and could usefully be supplemented by a parallel tool for presenting the *timeline*, which chronologically displays the entries compiled from various points of view. In addition, an instrument based on *Lex Corona*, which can be found in German on Wikipedia, could also be useful. This is a multi-dimensional and multi-level instrument that continuously records on a daily basis the specific legal developments in the form of legislation in the areas of constitution, laws, ordinances, Federal Council and parliament. Such instruments, implemented early in the crisis, allow for different types of use during and after the crisis in different contexts. I have no knowledge of whether comparable information and orientation instruments are used in the administrations at the federal and cantonal level. It would seem obvious to anticipate at least the use of a Lex Corona as a Lex Corona Helvetica instrument.

The handling of legal events and legal operations described here before and especially during the crisis is a black box for third parties: it is not transparent from the outside and has only limited access. This also makes communication in writing [for a special issue of the ZSR] about a "strategic handling" of issues arising in the area of "law in crisis" even more difficult, because the areas of "law in crisis" and "strategic handling of law in crisis" are now usually different and therefore unusual even for the legal profession. I am of the opinion that, precisely against the background of these two difficulties in communication, writing about the observed legal realities is nevertheless sensible and necessary - perhaps - for this very reason.

Conclusion: A guide to current contexts and topics for the near future - a personal wish and a hope for Switzerland in the crisis, which was already expressed at the end of the 2005 text

"The future used to be better too" (Karl Valentin). I do not write about futures in this text with premeditation. With a view to the near future, I am placing at the end of this "telegram with dispatches from the lockdown" about "reality lawyering in times of crisis" a high signpost with some groundbreaking recent media headlines. The following is a subjective and random selection of viewpoints from different aspects and in different directions.

Again the *Coronavirus* flag: *Risk and Response*, (FT 24.3.) -- *Why we fail to prepare for disasters* (FT 18.4.) -- *Is China winning? - The Geopolitical Consequences of Covid-19* (Economist, April 18-22) -- *Covid-19 and the Threat to US Primacy* (Gideon Rachman, FT 14.4.) and *The Pandemic Won't Make China Leader* (Foreign Affairs 17.4.) -- *Corona, Expression of an Ecological Crisis? Climate change, air and water pollution, monocultures, dense housing and tight cages for animals: the causes are many* (Heinz

⁵ Urs Gasser "Digital Pandemic and the Role of Law in Pandemics and Law: Contribution of Law to Overcoming a Global Crisis, Special Edition of the Zeitschrift für Schweizerisches Recht, 2020, Basel, p. ...; see also Urs Gasser/Jens Drolshammer The Brave New World of (Swiss) Law; Contours of a Framework and Call for a Strategy to Shape Law's Digital Revolution, in *Recht im digitalen Zeitalter*, Festgabe Schweizerischer Juristentag 2015 in St. Gallen, Zurich/St. Gallen, 2015, pp. 83-106.

Wanner, Infosperber 10.4.) [and in an email from April 14: "I can simply reiterate that the danger of pandemics in the future has grown extremely for exactly the reasons I mentioned in the Infosperber article. If we don't make fundamental changes in the way we treat our planet and rethink, this will build up extremely; such pandemics will lose their role as "black swan" completely and become a normal event"] -- *Deadliest Enemy: Our War against Killer Germs* by Michael Osterholm and Mark Olshaker (book review in FT 11.4/4/12/4 *The War on Germs; this persuasive manifesto for changing our thinking on natural threats will help shape the post-coronavirus conversation*) -- On the question of the "state of emergency" and the danger of its perpetuation as a philosophical and legal-philosophical core problem, the guest commentaries in the NZZ Feuilleton: Slavoj Zizek, *Wir Verdrängungskünstler: How the Coronavirus changes us* (NZZ 4.3.); Slavoj Zizek: *Mankind will never ever be the same again: That is the lesson that the corona virus holds for us* (NZZ 18.3.) -- Giorgio Agamben, *Now we are only naked life* (NZZ 18.3.) with reference to Giorgio Agamben and Giorgio Agamben, *On how liberal democracies deal with the corona virus: I have a question* (NZZ 15.4.) -- all on the basis of Giorgio Agamben's book, *Ausnahmezustand* (der Ausnahmezustand als Paradigma des Regierens) (2004) - (not yet any) legal philosophical or legal texts, nor on Carl Schmitt's seminal text of the political (1932) ("where have all the lawyers (flowers) gone? -- Branko Milanovic, *The real danger of this pandemic is social collapse* (NZZ am Sonntag, 19.4.) -- Hans Ulrich Gumbrecht, *Der Notstands-Staat* (NZZ 24.3.) and *Celebrating at the Abyss - if we are to die of a virus, then we at least want to have lived intensively* (NZZ 18.4.) -- then on the Sechseläuten weekend this year from the NZZ on Falkenstrasse, at the place where except during the Second World War, the Böög was always burned, "The Other View" by Eric Guyer, Editor-in-Chief, from the *Arsenal neuer Keulen, Please no epidemic socialism* (NZZ 18.4.) or in electronic preliminaries: *We will not defeat the epidemic with socialism. After the Corona crisis, we need less state and not more - our commentary; a new "auntie"* -- with a different view, Peter A. Fischer, Economy Editor in Chief, *The Federal Council is looking for a middle way, but remains very hesitant and bossy* (NZZ 17.4.) and *From lockdown to a new normality* (NZZ 18.4.), in addition to guest commentaries by Slavoj Zizek, Giorgio Agamben and Hans Ulrich Gumbrecht in the feuilleton section, also a literature review by Angela Schader, *Why not dance with the Devil, three authors show how to keep anger and resignation at bay* (NZZ 17.4.).

At the end of this text 2020, I refer to end of my twin text 2005 with thanks to Jacques Santer for his speech in Zurich in 2000 on The Europe of the Small States, on the occasion of which he was elected Honorary Abbot and Patron Saint of the Monastery of La Claustra, a converted artillery fort at a strategic location on the Gotthard. It was about a project by the artist Jean Odermatt and the possible meaning of art; this also applies today in the following context.

Here I continue with pointed reference to the possible meaning of art these days. Paul Jandl writes (NZZ of April 20, subtitled 50th anniversary of the poet Paul Celan's death): "On 20 April 1970, he plunged into the Seine in Paris. His desperation could no longer be channelled into poetic paths". An article about an interview on the occasion of the 70th birthday of Jacques Herzog and Pierre de Meuron with Bice Curiger in the NZZ on 18 April was subtitled "Conscious perception is the order of the day - art serves as an essential thought-provoking stimulus for the architects Jacques Herzog and Pierre de Meuron". I would not have been able to write the texts 2005 and 2020 if

Margaret Atwood had not written the novel *Oryx and Crake* in 2003, which deals with a biochemical world catastrophe, and Richard Posner had not reviewed it in the same year under the title *The End is Near*. That led him straight away to write the book *Catastrophe - Risk and Response* in 2004, in which, in the context of the post-9/11 discourse on risks, he was the first to go to the limits of what he described as risks that endangered humanity. The changed online world of art and artists in this pandemic shows the importance of this perspective, which often captured certain realities long before the sciences found more than on the radar. In this context, I venture to wish - "if wishing still helps" - that the world-renowned South African artist William Kentridge, now 65 years old (both his parents were lawyers during the apartheid era in South Africa, his father being Nelson Mandela's main defender), after his terrifying *cycle about the plague in the Middle Ages*, would do the same about the corona pandemic today in modified form.

With regard to Switzerland and Europe, I furthermore repeat the hope expressed to Jacques Santer at the end of the twin 2005 text:

"May Culture and Nature - and the depths of improbability - help our patron saint Jacques Santer guard us from such catastrophic risks to ensure that these shelters from military threats on the Gotthard - the most European landscape in Switzerland - no longer have to afford protection against any "nuclear winter" or bio-technological terrorism - if they can still be reached at all in the worst case. Carpe Diem!"

That may still be true today - hic et nunc.

"The Times They Are A-Changin'", Bob Dylan, musician and poet, Nobel Prize winner for literature 2016, (1941) - without question.

Zurich, April 2020

Jens Drolshammer

Prof. em. Dr. iur., MCL, Attorney
Susenbergstrasse 157, 8044 Zurich
+41 44 363 81 11 - +41 79 404 07862
office@drolshammer.com
www.drolshammer.net

Peter J. Grimshaw, grad. engineer/translator
Mühlebachstrasse 84, 8008 Zurich
+41 44 310 13 81
topteam@swissonline.ch

For a better understanding of the text (or texts) I add the following as an insight into the experience of various professional activities in dealing with crises: With reference to the "context" of the text, it should be noted that the realities of crises and of phenomenological and strategic issues in various professional fields have taught me a lot throughout my life. In my legal consultancy work since the 1980s, I have been intensively involved in dealing with industrial or medical "life threatening" crises for companies (including asbestos and duogynon-like child malformation risks, the Swissair Grounding and bankruptcy) and for the state, among others in judicial conflicts with the United States in mutual legal assistance cases in an advisory capacity for the Federal Office of Justice (FOJ) (including Holocaust cases, dormant accounts cases - year ...) and in a Federal Council expert commission task force on "Banking Secrecy and International Taxation (year ...) as one of the only two outsiders. In my legal practice, I have dealt with strategic legal advice, in particular with "legal crisis management" as a focal point. As an academic teacher at the University of St. Gall, I conducted a one-semester interdisciplinary special course [within the framework of the *venia* "American Legal Culture"] entitled "Attack on America: The Consequences - from a Legal Perspective - the Role of Law, Lawyers and Law Enforcement in Times of Crisis" (published in 2009 in the collection of essays *A Timely Turn to the Lawyers?* (see FN 1). In a large number of publications, both openly and hidden, I have often made suggestions for the consideration of a strategic perspective of dealing with law in general and in the professional activities of the various lawyers in their individual professions (see www.drolshammer.net under Publications). As a militia officer, I worked for several years - by chance - with the then Chief of Staff for Operational and Strategic Training (SCOS), mainly on militarily confidential scenarios for various types of major exercises (including the last overall defence exercise in 1988/89 before the fall of the Berlin Wall). The subject of these exercise scenarios was repeatedly "existentially threatening disasters" from the non-military sector, including pandemics. As a member of the Strategy Section of the then advisory body to the Chief of Staff and the International Institute for Strategic Studies (IISS), I also became acquainted with foreign and international strategic perspectives of crisis management in disasters. These military activities were a motivation to "transplant" in text 2005 and text 2020 the insights on *catastrophes* by Richard Posner, the recognition and management of *catastrophes* and the related role of law and lawyers, into the field of crisis management in Swiss security policy. For reasons of military confidentiality and certain post-war conventions, these activities are little known and not publicized. The other important motivation is to deal with the role of the strategic in law and the activities of lawyers in various professional roles also in Switzerland. The 2005 and 2020 texts are essentially written against the background of an "actor-network-approach" which, as a complementary aspect of the traditional view of law, takes as its starting point the roles of professional activities in their respective networks and relationships. The "*phenomenological*" exploration of actual "legal realities" and a "*strategic*" perspective of professional realities play a driving role. This different and complementary perspective is the basis of a series of books under the heading "The World in Swiss Law - Swiss Law in the World?" (see www.drolshammer.net, list of publications, with flyers and reviews). The present text is subtitled "Reality Lawyering in Times of Crisis", as a special part of the legal profession dealing with "crisis management of existential "catastrophes".