From a Legal Order to a Legal System, Scholten's Contribution to a Theory of Legal Change

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Abstract

Not only Paul Scholten has considered that every legal order (in a determined country) consisted in statutory rules and in judicial decisions, but the Dutch writer has defended the idea of "an open legal system", which could not be reduced to a set of logical statements.

I propose to discuss Scholtens's concept of "legal system" through a distinction (made by some interpreters of Herbert Hart) between a legal order (the set of rules that are valid in a determined space at a determined time) and a legal system (the historical succession of legal orders in a determined space). It seems to me that Scholten's conception of a dynamic system, changing every time through new statutes and decisions but maintaining one part of the past order, can support a conception of the science of law focusing on these continual changes. In the same time, I would like to ask if Scholten's conception about "formal categories" and "moral principles" inside the legal system is not an obstacle to the understanding of legal

revolutions and a risk to under-evaluate the difficulties to know all the complexity of a legal order.

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1. Introduction

In his preface of the 1954 French translation of Paul Scholten's *Algemeen Deel*,[1] Georges Ripert has considered that the Dutch jurist has defended some ideas that were largely adopted by French professors of civil law: the defence of subjective rights, the existence of legal principles above the statute laws, the importance of the feeling of justice in the judge's decision. Whereas these ideas seem today old-fashioned and are now rejected by many legal positivists, another aspect of Paul Scholten's work appears today as more consistent with normativist conceptions and with modern theories of legal change. I think that Ripert has overestimated some of Scholten's trends towards the defence of individual rights (rooted in natural law) through the judges and against statutory laws. Of course, French jurists are struck *prima facie* by some similarities between Scholten's approach and those of Gény and Saleilles in France about thirty years earlier. All these authors had shared a critical view against a too strictly "legalist" or "exegetic" conception, according which the judge applied mechanically the clear texts of codified laws to the facts. In a meaningful manner, Scholten has quoted Robespierre and the French Revolution tradition as the origins of this "naïve" conception of the judge as an automaton always using the syllogistic deduction. But, in the first pages of the *Algemeen Deel (*from now on called *General Method of Private Law,* cf footnote 1*)*, Paul Scholten is more audacious than his French forerunners (who are not quoted at this time of the Introduction): he does not hesitate to oppose legal rules (like statutory laws) and legal decisions (as judgments) and seems to support a kind of rules-scepticism that can be compared with Llewellyn's arguments in the same years 1930s.[2] Is Law something different from a set of rules? Paul Scholten's answer to this iconoclast question in a civil law country is positive ("it is impossible to describe law as a complex of rules"),[3] but immediately nuanced: Law does not consist only in rules, what means in statutory rules; one has to take account of both rules and decisions (i.e. judgments as rulings). The fact that Paul Scholten has quoted Merkl and Kelsen[4] in the same development shows that he could combine his point of view with the hierarchy of norms.

One can accept the doctrine of the „Stufenbau" in law, the hierarchy of legal norms without accepting the school of thought in its totality.[5]

In a modern vocabulary, one can say that Scholten has thus accepted to consider law as a "set of norms," which includes - according Kelsens' vocabulary (which was not completely fixed in 1931) - general norms (like constitutions and statutory laws) and individual norms (like judgements and private acts). Scholten's conceptions were also

nearer to those of Kelsen than to those of his contemporary French colleagues when he considered that there was no gap between the creation and the application of Law: statutory law was, according Scholten, an "historical event" which introduced a new element in the legal order and its application was in fact the creation of a new meaning (or the succession of new interpretations) for the legal statement.[6] When Scholten discussed the use of the historical (subjective) and of the systematic (objective) interpretations of statutory laws, he referred expressly to this integration of any new norm in the complex whole of law.[7] In the next pages Scholten concedes that lawyers (judges as well as law professors) are constrained to use different rules for deciding one case, but also to systematize and to consider the legal order as a "unity."[8]

2. Dynamic conception of law

Without under evaluating some great differences between Scholten and Kelsen's conceptions (for example, about the role of the legal science[9], or the idea that logical and fundamental forms of law could exist,[10] and more difficult to combine with positivist theories, the recourse to "moral principles,"[11] I would like to focus my analysis on one aspect of convergence between these two great legal theorists: the dynamic conception of the law and the way to deal with legal changes through history. Not only Paul Scholten has considered that every legal order (in a determined country at a determined time, not "independently of time and place"[12]) consisted in statutory rules and in judicial decisions (what Kelsen has called a "static" point of view of the hierarchy of norms), but the Dutch writer has defended the idea of "an open legal system," which could not be reduced to a set of logical statements.

My point of departure is the well-known section 17 of the *General Method of Private Law* about the "open system of law."[13] In this section, Scholten has begun to explain that the legal order is a system or can be conceived as a system. As he dealt with the work of coordinating rules and classifying them, in order to (last but not least) discover legal principles, I understand that Scholten has first taken the point of view of the law professor, who is constrained (notably through didactic duties towards the students) to consider the legal order as a kind of system. Then Scholten has written that law is not a completely logic whole and that one has to abandon the "vain" question of legal gaps. Here, it can be noticed again that Scholten is very near Kelsen. When Scholten has written (in 1931), that every legal decision is in the same time application and creation, Kelsen has said (in the 1945 *General Theory of Law and State*) that law creation is always law application.[14]

The consequence of such a conception of the "empirical legal order" (if one can use Weber's vocabulary) is that this legal order is ever changing. Scholten has preferred to use the words "un-ended system" or "open system" (rather than the more worrying word "undetermined"), but I think that the most important idea is that every decision (from a new statutory text to a single judgment, if one admits that this judgment is not a "routine" decision but something creating a new case law) is changing the legal order.

For a legal historian as me, it is noteworthy that: 1) Scholten has written that legal order is changing "daily,"[15] (what is the exact definition of positive law given by the 14th century canonist Johannes Andreae (« *et dicitur jus positivum quia cottidie ponitur, tollitur et mutatur* »);[16] 2) At this point of his argumentation, Scholten has quoted a 1928 Kelsen's text (*Die philosophischen Grundlagen der Naturerechtslehre und des Rechtspositivismus*),[17] considering that the legal system has to be thought as dynamic and not as static (Kelsen has even written in this text that the "positivity" of law lays in this conception). As a decisive sentence for legal history's methodology, Paul Scholten has written:

If the system is changing continuously it can only be understood in its change.[18]
In the next section (§ 18) Scholten has made a link between the methodology of legal history ("legal historical inquiry,"[19]) and this conception of a dynamic/open legal system with its outcomes for judges and lawyers. Despite the fact that Scholten wrote about private law (and especially Dutch private law of his time) and that he naturally defended the point of view of a civil law professor, I dare say that his conception of the ever changing legal order is the one of positivist legal historians and that one has to consider one consequence of this dynamic theory: legal orders are undetermined, always "in action" and impossible to seize exactly (as "law in books") at a determined time "t," because they will have changed at the time "t + 1. What we can try to seize is some moments of the change and the process of change.
Scholten was not directly interested in this question, because his conception of the open legal system was overall an argument to say that judges were the main agents of legal change. In this development Scholten made a distinction between the "purely legal historical enquiry" and his/our problem, what means the problem of the present interpreters of the law. Whoever has to decide a case (the judge or the lawyer) has to "adapt" his/her decision (as a new individual or general norm) to the past legal order and to justify his/her law finding through some logical links with the whole legal system. In this study about the analogies and the differences between the legal history inquiry and the judge's work, Scholten appears to me as a forerunner of the very important pages devoted to this problem by Hans-Georg Gadamer.[20] Gadamer also considers that the legal historian has not to decide a case like the judge, but he insists upon the fact that both the practising lawyer and the historian have to "construct the whole range" of the applications of the law (what means all the meanings given to the texts according their successive interpretations). Scholten has not developed at length the point of view of the legal historian, but I think that these very dense pages can be used today for a theory of legal change and for a methodological support of legal history.

3. Momentary and non-momentary legal system

I propose now, in a second stage, to discuss Scholtens's concept of "legal system" through a distinction (made by some interpreters of Herbert Hart like Raz, Alchourrón and Bulygin, Grabowski) between a momentary legal system (the set of rules that are valid in a determined space at a determined time) and a not momentary legal system (the historical succession of legal orders in a determined space). Raz was the first to propose, in his 1970 *The Concept of a Legal System* the notion of "momentary legal system" to qualify a legal order at a determined time (as something different of the legal order before the introduction of a new norm and different from the future legal order after another change in the applicable law on a determined territory).[21] Then, Bulygin (approved by Alchourrón) has made the distinction in 1982 between legal order and legal system: according the Argentinean theorists, a legal order would be a sequence (something not momentary) of legal systems (considered as momentary and changing with any new norm).[22] More recently, in his 2009- 2013 *Juristic Concept of the Validity of Statutory Law*, the Polish professor Andrzej Grabowski has proposed to reverse the order chosen by Bulygin and Alchourrón: according the common language of lawyers it seems more understandable to use "legal order" for the momentary set of rules at a determined time in a determined country and "legal system" about the non-momentary sequence of these set of rules.[23] I agree with this proposition and, for the reminder of my paper, I will use the word "legal order" for these empirical set of rules (which are nearly impossible to seize) and "legal system" for the abstract constructions we are making when we are describing domestic law or international law. This terminology seems to me in harmony with Paul Scholten's text

and his way to deal with Dutch (private) law as a "legal system," what meant for him a non-momentary set of rules and of decisions.

I come back to Paul Scholten's text, because the development of his section 17 concerns exactly the question of the "identity" of legal systems, which has been more recently questioned by Raz, Bulygin, Alchourrón and Grabowski. What does one mean when one speaks of the "Dutch legal system," of the "French legal system" or of the "European legal system"? Generally speaking, one is speaking about the non-momentary legal system he is trying to describe at the present time, not at the instant "t" (it is quite impossible) but in a rather short time (this year, this month…). Every lawyer is trying to identify the positive law through a selection of statutory laws and of case law, which makes a distinction between what is important in recent new decisions (what has really changed the law) and what consists in "routine" decisions without real impact. Is not it also the work of the legal history when she/he tries to study past legal systems (again, it is impossible to describe past legal orders, we cannot say what was Roman law in a precise day of the first century B.C.)?

4. How to evaluate the impact of legal change

In this enquiry about the important and un-important changes, Paul Scholten has made a current but important remark: in some cases, especially in front of innovative (or revolutionary) statutory laws, one uses to speak of a "break," a "cut" or a shift in the law ("the law may seem to show sharp incisions,"[24]); whereas one considers that some statements have lasted for a long time with the same meaning in judgments. It can be said the same thing about "leading cases" (overruling the precedents) and mechanical "case law" (reproducing old solutions).

Scholten's does not develop this questioning. He only expresses some doubts about a complete legal revolution making a *tabula rasa* of the past legal order. The law "remains bound by what the centuries have contributed to it" is the conclusive remark of this section. Legal historians can draw many consequences of these statements. It is not so clear to say what is a revolutionary statutory law or an innovative case law and what is a turning point in legal history. In some cases, legal historians have to take account of political revolutions (the American, the French and the Soviet Revolutions are the most well known, but one can speak about a "Roman Revolution" with the establishment of Augustus' Empire, of a "Papal Revolution," of the Reformation as a Revolution according the famous books from Ronald Syme and Harold Berman[25]). Here the problem is to determine if these political revolutions have suppressed or replaced all the legal rules of the *Ancien Régime* and there are obvious differences between the Roman and the Soviet Revolution! Legal historians have to make and develop a whole enquiry about revolutions through a distinction between political and legal revolution. For the history of the twentieth century, for example, it is very important to consider whether the decolonization process has provoked or not the creation of completely new "legal systems" (in many cases, some rules of the colonial legal order have been kept, for a short or a longer time) and if the development of international and European law has provoked a legal revolution in domestic systems.

In the majority of cases, which are not revolutionary ones, legal systems seem to "evolve" through incremental changes, according a rather slow or relatively moderate rhythm. One has been accustomed - including Niklas Luhmann in his theory of law as an "autopoietic" system[26] - to imagine a legal system (for example Dutch Law) as a big machinery, moving in the time with the loss of some removed pieces and the adjunction of new ones (sometimes large parts of this machinery as the new Civil Code). This scheme is not exactly the one proposed by Scholten, because in 1931 the Dutch writer was more sensitive to the judicial decisions that have changed the meanings of the 1838 Civil Code articles than to the process of re-codification.

Scholten's scheme is an "open" system, not only because it changes daily, but also because it is quite impossible to describe it as a machine, what mines a corporeal, movable and determined object. Judicial decisions are not really pieces of the machine but a very large set of meanings officially decided (with a power to enforce these meanings) by the judges.

Here again, Scholten seems to me very near from Gadamer's conceptions, when he says that legal historian have not to only consider "rules" (i.e. statements) but also "decisions and actions."[27] Each legal statement (of course, constitutional and statutory laws, but also regulations and judicial decisions) has engendered (especially if it is enforced for a long time) a wide range of interpretations and the legal historian, as the judge, has to consider the whole range of these interpretations and the infinite possibilities to combine the different meanings of various statements. Because the system is open, it is also undetermined. As Scholten has written, the judge has to decide a case and, after looking back to the past (the past meanings of the rules he wants to apply), he decides something determined in the present ([28]). *Prima facie*, the situation of the legal historian is easier and Scholten has written that the legal historian only "ascertains" the past legal order (what could mean: the situation of the legal order at a moment "t"). But are we sure that the legal historian can "ascertain"[29] this historical point of the evolution of the legal system and, in a next step, find a "link in the chain"[30] and an "historical trend?"[31]

Scholten has expressed doubts about the fact that the "historical tradition" could rely on objective facts. Quoting Planiol as a good example of an introductive "historical enquiry" about every legal question, Scholten has noticed that the choice of the authorities, supposed to express the "tradition" (or the "legal culture"[32]), is always a subjective decision of contemporary writers.[33] This arbitrary decision is necessary to set a (judicial) decision. But the situation of the legal historian is different: he/she has not to decide a case and he/she can (or must?) use more objective criteria to determine which change has an "influence" on the legal system' evolution and which change was so innocuous not to provoke a shift in the identity of the legal system.[34] Scholten has not dealt with this problem, but his thought is a good point of departure for a methodological inquiry about these difficult questions: how to evaluate the impact of a legal change and how to determine the lasting features of a legal system, which could constitute (with its application on a given territory) its "identity"? It could be said, on the basis of Scholten's conceptions, that there are three stages in Law (i. e. in any set of rules applied to a determined territory or to a determined population): firstly, an "empirical legal order," which cannot be completely known (because it changes at every moment); secondly, a "legal order," which is constructed by the legal science (selecting the most important rulings and the more recent changes); thirdly, a "legal system," which is described (with many subjective interpretations of the non-temporary "nucleus" of legal orders through times) by the legal science and also could be the matter of a (difficult) enquiry for legal historians (determining what is changing very slowly in the legal statements and their interpretations).

5. Conclusion

At this point, I disagree with some of the ideas expressed by Scholten, as by many of his contemporary writers and even by many legal historians today. I do not think that legal historians can discover one “line” and one “linear trend” in the legal changes concerning a legal system. Legal systems are so undetermined and the evaluation of legal interpretations is so subjective that there is a great variety of various trends, as different lines in different parts of the system evolving in contrary directions, which change the same system at a determined time. Not only, as Scholten has pointed, legal history cannot be reduced to a history (or an addition of chronologies) of separated rules, but it cannot be (at the other extreme limit) a global (and one-voiced) history of legal systems. The recourse to the history of “institutions,” as proposed by Scholten and many others, is not solution to this problem. Perhaps, among the plurality of legal histories,[35] an intellectual or cultural history, taking account of conceptions developed by the legal science, including the recourse to “moral principles,” can be seen as a hommage to Paul Scholten’s legacy.

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[1]Scholten, *Partie Générale*. The edition used in the Digital Paul Scholten Project, which has a division in paragraphs to make references to the text comparable in different languages has a new title and doesn't have the Preface by Ripert. See side by side english-french https://paulscholten.eu/gm-english-french-in-progress-en/

[2]Llewellyn, *The Bramble Bush*.

[3]*General Method of Private Law*, block 42.

[4] Llewellyn has received some books, directly as a gift, from Kelsen.

[5]*General Method of Private Law*, block 48.

[6]Ibid., block 315/6.

[7]Ibid., block 142.

[8]Ibid., block 195.

[9]Ibid., block 225.

[10]Ibid., block 75–77.

[11]Ibid., block 84.

[12]Ibid., block. 302.

[13]Ibid., section. 17.

[14]Kelsen, *Théorie générale du droit et de l'État?; suivi de, La doctrine du droit naturel et le positivisme juridique*, 187.

[15]*General Method of Private Law*, block 303.

[16]Pennington, *The Prince and the Law, 1200-1600*, 88.

[17]Kelsen, *Théorie générale du droit et de l'État?; suivi de, La doctrine du droit naturel et le positivisme juridique*, 447.

[18]*General Method of Private Law*, block 304.

[19]Ibid., block 309.

[20]Gadamer, *Truth and Method*.

[21]*The Concept of a Legal System*, 34.

[22]*Análisis lógico y Derecho*, 196.

[23]Grabowski, *Juristic Concept of the Validity of Statutory Law a Critique of Contemporary Legal Nonpositivism*, 259.

[24]*General Method of Private Law*, block 304.

[25]Syme, *The Roman Revolution*.; Berman, *Law and Revolution*.

[26]Luhmann, *Law as a Social System*, 91.

[27]*General Method of Private Law*, block 326.

[28]Ibid., block 25.

[29]Ibid., block 324.

[30]Ibid., block 307.

[31]Ibid., block 315.

[32] To compare with the text from Jaakko Husa, *Law and Context* on the website.

[33]*General Method of Private Law*, block 322.

[34]Ibid., block 325.

[35]Halpérin, "Le droit et ses histoires."

Acknowledgements

Paper presented at the Paul Scholten Symposium, Amsterdam 15 November 2013

Reviews

Pierre Brunet

-the quality of the contribution. The content of the articles can vary from simple translation or information to fundamental scientific abstraction. This means that the reviewer is asked to judge if the submitted article conforms to the technical and scientific standards suited for the specific type of the contribution. From my point of view, the paper conforms perfectly to the technical and scientific standards suited for the specific type of the contribution. The bibliography is rich and very well informed. The materials used are relevant and mixing past and present. The demonstration is very easily followed and the conclusion is clear. -the relation between the article and the research question. Does the article contribute to the research question? This not only asks for a judgment about the article, but also about the research question. The contributive value of the article could be that it becomes clear that the research question should be elaborated or changed altogether. The research question is about the concept of a legal system and the paper aims at investigating the concept used by Scholten and confronting it to modern concepts (Alchourrón and Bulygin, Grabowski). Then the great question is the one of the identity of legal system. The paper succeeds in clarifying Scholten's concept. No doubt that the article highly contributes to the research question. Furthermore, it is a very good way of investigating in both history of legal thought and legal theory.

Oliver W. Lembcke

The text is a scholarly written manuscript which I have read with pleasure. In general, I think, it will be a valuable contribution to the project. There are only a few comments which may be helpful to improve the text. The internal structure of the text is somewhat confusing. Obviously, Halpérin intends to introduce, at least, a two part structure ("I propose now, in a second stage…"), but the relation between these two parts should be spelled out more clearly. This holds also true for the research question. Maybe a helpful indication is the following: The text is quite short but makes nevertheless several references to Kelsen, Gadamer, Hart, Luhmann etc. However, the impression is that, at least, some of these references are rather due to associative thinking than to a powerful argument. It would be helpful to have a guiding line of argumentation that makes each of the comparison (between Scholten and the other authors) more insightful and convincing. The concept of a 'legal revolution' is somewhat vague and not well connected to Scholten. Firstly, the concept itself needs to be clarified, at least, in the sense whether or not it is useful to differentiate between legal and political revolutions. Halpérin seems to think so, but his text provides not evidence for such a claim. And it may be a very difficult undertaking, not the least for the reasons Scholten himself seems to be aware of and which relate, in the end, to the concept of legal change. In other words: what would be valid criteria for defining a 'legal revolution' in contrast to legal change. And why is this concept necessary to understand Scholten's approach (which seems to me well-equipped to deal with the problem of legal change). The difference between 'formal categories' and 'moral principles' is announced in the abstract as important for the analysis. But it does not seem to play a prominent role in the argument that follows. In last word on accuracy: Before publication, I recommend to have it checked in terms of spelling, grammar etc. Already at the level of not-strict scrutiny, it was not difficult to detect some minor

mistakes; and some of them may lead to a negative impression on the side of the reader: e.g., it is Merkl (not Merki) and Hans-Georg Gadamer (not Georg).

author's response

I am grateful to both reviewers for their useful advice. I have tried to correct the formal mistakes concerning some family names. It seems to me difficult to develop a sketch about the very pertinent statements I have found in Paul Scholten's Introduction: the ideas that law is a set of legislative rules and of judgments, that every legal order is changing at any time and that it is difficult to propose a study of legal systems without a kind of simplification. For this reason I prefer not to change the text with the risk to develop my own conceptions rather than to contribute to the discussion about Scholten.