

Jumping Judges, Judicial Discovery of the Law

Niels van Manen

DPSP Annual Volume 1 (2020)

ISSN: 2667-2790

Digital Paul Scholten Project

<https://paulscholten.eu/>



Keywords

analogy, syllogism, idea of law, informal rules, intuition, law as an open system, refinement of law, subsumption

Article Info

Category: research

Research Question: Intuition

Reviewed by: Jeroen Chorus, Luciano Penteadó

Cite as: van Manen, Niels. "Jumping Judges, Judicial Discovery of the Law". *DPSP Annual*, I: Research, Volume 1 (2020), 18-37.

Abstract

This essay does not concern the question of how courts ought to decide cases. That is a normative question, from the field of legal theory, jurisprudence or the philosophy of law. Like Paul Scholten in his *General Method of Private Law*, the concern in this essay is a more factual approach, a sociological analysis. This essay is the result of professional involvement of some decades in the field of the sociology of law and some five years experience as a full time judge in the criminal branch of the Amsterdam Court of Appeal. This essay is in no way based on representative data. It is a report on my observations and my reflection thereof.

In the decades before the publication of the *General Method of Private Law* the dominant view (or the dominantly presented view) was that judges could apply the law mechanically. Therefore, preferences of the judges were unimportant. Scholten did attack this view. If preferences of judges are not important, one cannot doubt about the correctness of the decision. Scholten, as I myself perceived as a young legal scholar, was not only a well respected legal scholar but also, in his *General Method of Private Law*, putting exactly this Judicial Myth to an end. He even stated: in every decision the judge adds something to the positive law. This essay deals with

