

Law and Context, Scholten's Open System of Law and Legal Harmonisation

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DPSP Annual Volume 1 (2020)

ISSN: 2667-2790

Digital Paul Scholten Project

<https://paulscholten.eu/>



Keywords

autonomy theory, mirror theory, contextualism, harmonisation, legal culture

Article Info

Category: research

Research Question: Open System of Law

Reviewed by: Robert Knecht, Juha Karhu

Cite as: Husa, Jaakko. "Law and Context, Scholten's Open System of Law and Legal Harmonisation ". *DPSP Annual*, I: Research, Volume 1 (2020), 48-68.

Abstract

Most classical legal theories have problems dealing with the reality. Formalists, like Hans Kelsen, argue for autonomous position of law in its relation to the societal context. Legal realists challenge Kelsenian claim and deny law's separate and autonomous position from its societal and especially political context (i.e. law mirrors/reflects the society). Both of these opposite ends of legal theory have their counterparts in the theory of comparative law: the debate over legal transplants reflects the very same problem. According to the comparative law autonomy view, law does not reflect the society but has a great deal of autonomy in its relation to a society.

But, it is not necessary to opt for either of the extreme ends of this everlasting debate. Paul Scholten's theoretical idea about the open system of law offers in-between approach to the problem. Scholten's theory seems like an early version of systems theory which appears to be a kind of hybrid between the mirror-theory and autonomy-theory. Basically, systems theory suggest that legal systems do not mirror society in a simplistic way but rather integrate social facts and normative ideas into the system

