The Reception of the Work of Paul Scholten in the Netherlands

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Abstract

The article illustrates Paul Scholten's role in the development of legal theory in the Netherlands, mainly regarding interpretation theory and practice. To this aim his theory on legal interpretation is compared to the legal doctrine in neighboring countries. Paul Scholten's way of thinking was not an anomaly in the legal culture that existed in the Europe of his time, in which more liberal and pragmatic ideas began to influence legal interpretation views after a period of legalism and strict adherence to the Wortlaut.

In the Netherlands, however, his position is extraordinary, Paul Scholten proves to hold an 'in between' or intermediary position between the positivism of the nineteenth and first part of the twentieth century and the more pragmatist and utilitarian views of the period thereafter.

In this article I will argue that particularly Paul Scholten's views on the role of language in legal interpretation are to be considered as new. His special role prevented Dutch legal interpretation from going too far in adopting modern pragmatist theories which sometimes almost totally abolished the role of written legal norms.

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1. Introduction

In this article I will present some observations on Paul Scholten, his ways of thinking and his influence on legal thinking, in the Netherlands. My aim is to position his thoughts in the context of modern legal discourse. In Dutch legal discourse up to now, the name and the work of Paul Scholten are considered highly important. This is astonishing if we keep in mind that Paul Scholten died shortly after World War II.

I will argue that this extraordinary position is related to his special role as an *“in between”* in the Netherland’s positivist/legalist legal thinking of the nineteenth century and the beginning of the twentieth century on the one hand, and pragmatism/realism of the period after him on the other. His position is also related to his *hermeneutic* predilection. For the time being he may have offered a full-fledged alternative for rough and absolutist pragmatism. He may also have been influenced by the “reliance theories” which became important in his time in Germany and Scandinavia, and which stressed the value of more society-oriented theory instead of the individual will of the legal contractor.[1]

More than most other Dutch legal thinkers, Paul Scholten widened his scope of attention to foreign literature.[2] His point of departure was the text of the law although he handled it in quite a new way.[3] The latter is connected to his intuitive openness to *new ways of thinking on language*, which highly influenced his views on the grammatical interpretation method as will be elaborated below.

Already in the thirties of the twentieth century Paul Scholten appeared to be remarkably sensitive for the truth and reality of the new way of thinking about language and its consequences for legal interpretation as became later apparent in the work of Wittgenstein. Besides, his clear and fluent writing was much better understandable than that of his contemporary E.M. Meijers.[4]

Meijers was a strong defender of the statute as the only source of law, whereas Paul Scholten thought that legal development was not only based on legislation, but also on case law and that case law was an equivalent source of law. According to Scholten, a huge part of the law is judge-made and new codification is therefore often

superfluous. A new Code of Civil Law was made after WO II,[5] but thanks to Scholten, judge-made law is presently still seen as a primary source of law, next to legislation.
The reasons mentioned above explain the importance of Paul Scholten for Dutch jurisprudence and case law. Good examples of jurists who until far in the twentieth century - and some of them until recently - regularly quoted Paul Scholten's work and commented on it are Van den Bergh, Wiarda, Schoordijk, Ter Heide and Van Dunné, of whom Schoordijk in particular has criticized many of Scholten's ideas.[6] Today, most legal students know Scholten's name, which still regularly appears in many articles and books on private law, legal theory and jurisprudence.
In my article, I will focus on legal interpretation, one of the fields where Scholten's influence has been paramount. In this context, special attention will be paid to some topics of his *General Method,*[7]which are connected to legal interpretation, like his views on a *closed versus an open legal system*, his view on *the judicial decision as aleap*, and his ideas about *criminal law*, with its *principle of legality and the ban on analogy.*

2. Legal interpretation

To understand the character of legal interpretation in the Netherlands, we will first have to position the Dutch jurisprudence in the tradition of Europe, both in time and in area. Then we will investigate more specifically the background of the dominant ideas concerning legal interpretation and legal method in the period in which Paul Scholten lived and worked. Moreover, the difference between the positivism of the famous Begriffsjurisprudence and later forms of positivism will be elaborated.

2.1 The tradition of legal interpretation in Europe

To really understand the development of legal interpretation in Europe one has to refer first to Stefan Vogenauer's magnificent work on the interpretation of law. With law I mean firstly the Statute but also law in its broad meaning of common law. Vogenauer[8] compares the history of jurisprudence in England and Wales (first volume) to that of the continent (second volume).[9] His study provides both a meticulous and an over-all view on legal interpretation to date. The book on England and Wales starts with four generally accepted theses on the legal interpretation of the countries involved, which will be investigated by Vogenauer. These theses or initial views held that: There is a fundamental difference between the manners of interpreting law in the two areas involved. This allegedly means (1) that in England and Wales there exists a much stronger binding to the words of the Laws (laws meaning here statutes and acts) i.e., to their *Wortlaut* or literal meaning and (2) that *grammatical interpretation* is valued much higher than the other interpretation criteria. This difference supposedly stems from a different legal culture in the areas mentioned. In England and Wales common law in the sense of non-written law was always an important source of law and on the continent this influence was negligible. The third thesis states that legal interpretation in England and Wales changed after England's entry into the European Union on January 1,1973. From this year on, the English judges show much more attention to a goal-oriented (teleological) interpretation method and the former Wortlaut criterion loses its paramount position. The fourth non-equality thesis argues that continental interpretation has always been of a higher quality than the English one.
In his book, Vogenauer has put these four theses in perspective. Important elements of the continental *ius commune* have always been used by the English courts. The procedure of legal interpretation was almost identical in both regions. Rules and maxims stemming from Roman and canonic law which were refined and reformulated by continental legists and canonists were literally adopted in England and Wales. The definition of equity which originated from the Glossatores was introduced there as

well, as were metaphors[10] on the meaning of legal concepts, interpretation categories like extensive, restrictive and declarative interpretation and the practice of interpretation according to equity or *Billigkeit*[11]

The theory of the *equity of a statute* therefore was according to Vogenauer narrowly related to the continental *Billigkeits*-interpretation, although this has long been denied by many authors. This narrow relation did not only exist at the universities but also in the daily praxis of the courts. Vogenauer concludes:

> Before the 19th century English law (practice) did not show any trace of an isolated mentality whatsoever. Even at the beginning of the era of the strict adherence to the Wortlaut the continental interpretative tradition was still considerably influencing English law.12

The conclusion of Volume II[13] is therefore that the manner of operation in interpreting laws by continental and English and Wales's courts is analogous and equal except for matters of detail. These minor differences are not more important than differences between the various countries of the continent. From the second third part of the nineteenth until the middle of the twentieth century, English courts highly contributed to the success of the Wortlaut-criterion. In this period of strict legal *Buchstabentreue* (strict adherence to the literal meaning of a word) they almost never deviated from the supposed clear and unequivocal legal text. This way of interpreting was, according to Vogenauer, not the consequence of the English theory of legal sources, which acknowledges up to now common law as a binding legal source alongside the law of statutes. The origin of this interpretation method was the result of constitutional and legal philosophical phenomena which had a great impact on both the continental interpretation and the one in England and Wales during the late 18th and 19th century. On the continent they led to the German *Begriffsjurisprudenz* and in France to the *école d'exégèse*.[14] Both in England and on the continent, the strict *Buchstabentreue* was a logical follow up of the formalist legal culture of that time (positivism).

Between the 13th and the 18th centrury, most of the English courts had adopted the same school of interpretation as the continent. Practically every rule of interpretation in this period went back to the roman-canonic *ius commune*. That is why England until the beginning of the 19th century was a province of that *ius commune* like Germany, France and the Netherlands.

The turn away from the strict - 19 century - interpretation rule of the English courts from the middle of the 20th century onwards, is however only for a small part a consequence of the influence of continental legal thinking. The real cause is a gradual change in legal thinking in England and Wales itself. The entry to the European Union of the British Kingdom only meant an acceleration of that development. European law played only a catalytic role in it. Vogenauer concludes that continental and English legal interpretation have always been of the same quality. Differences are minor. The only more principal point of divergence appears to be, I think, that in continental law *lex* (*written legal texts)* was always first while in common law countries the *judge* played the major role. This divergence has not led to tremendously different outcomes, however.

Gradually, and under the influence of the case law of the European Community the two areas have been developing similar systems. And as to the Netherlands, it may be clear by now that, particularly under Paul Scholten's influence, the law-creating task of the judge had been generally accepted in the Netherlands.[15] In this way Paul Scholten has proven to be an intermediary. The conclusion must therefore be that the systems of civil law and common law which were not as different as often has been thought, are in the last decennia permanently growing into each other's direction. The systems are of the same quality. They have no fundamentally contrasting theoretical bases. For Paul Scholten's work, this conclusion means that his legal heritage can be equally positioned in both the continental and the common law system.

For our aim it is important to detect what during the ages involved the judges took as the most important guidelines (or methods or canones) when interpreting and finding law. We can conclude with Vogenauer that departing from Roman law there have always been various interpretation methods. The strict era of primarily trusting on the *Wortlaut* of the legal texts specifically widely prevailed in the nineteenth century, both in England and on the continent. This was the age of strict literalism or *Ära der strikten Buchstabentreue*.[16] (strict adherence to the letter of the word). But before, in the thirteenth and fourteenth century, the *Wortlaut* had not been that important in England and Wales. It was not only the text of the law but also the will of the legislator that played an important role, next to equity (*Billigkeit*) and teleological considerations. From the beginning of the fifteenth century these considerations were collected under the name of equity.

Over the ages the pendulum swayed forth and back, from equity and teleological considerations in the highest position to periods when the *Wortlaut* was in higher esteem. It was not before the nineteenth century that the strict belief in *Wortlauttreue*[17] became manifest both in England and Wales and on the continent, resulting in or cooperating with positivism and legalism. In the twentieth century, the pendulum swayed back again and *Wortlaut* had again to give up its primary position. Paul Scholten lived at the end of the era of that legalism or positivism when the words of the law and their supposed strict and clear meaning had become extraordinarily important. This meant that in his time from the known interpretation methods, the grammatical interpretation was still considered the highest and primary one. The grammatical method used the so called '*Wortlaut*-theory'.

2.2 *Wortlaut* in two different forms of positivism

The *Wortlaut*-theory refers to the grammatical method, one of the old interpretation methods of Roman Law. We saw that in Germany but also in France and in England and Wales from the nineteenth century onwards and contrary to former times, when equity and other methods of interpretation had also been important, the literal or *Wortlaut*-method[18] has been valued as the most important of all interpretation tools.[19]

It is however important to note that the positivist conception of the relation between language and law which developed in the first part of the 19th century along with the enormous endeavor of codification (France) and the construction of a legal System (*Begriffs-pyramid* in Germany) still had a strong philosophical, hermeneutic tendency. In the last part of the 19th and the beginning of twentieth century the tendency of positivism grew more towards a pure description of law in its implementation of the new Code and the new Legal System. This latter form of positivism was then again attacked as legalism or positivism by authors with a more philosophical and hermeneutic, or a more pragmatist and social scientific tendency. This latter form of positivism and the disputes which attacked it from different angles forms the ambiance of Paul Scholten's theoretical work.

Friedrich Carl Von Savigny (1779-1861), the founder of the Historical School, remarked that legal jurisprudence is actually *philology*. He elaborated an interconnection between three of the interpretative approaches, which had already existed and been used for ages (in Roman Law e.g.): the grammatical, the historical and the systematic approach, the latter of which is also called construction. This interconnection established a new scientific method, in which the *Wortlaut* did not refer to the will of a legislator, but to a more objective meaning which had been established in a historical process.[20]

In his dissertation, Vranken[21] emphasizes that Von Savigny, when elaborating his canons of interpretation, was clearly under the influence of the hermeneutic Schleiermacher, who reformed hermeneutics with his "art"of understanding:

> Canons of interpretation are for Von Savigny not methods of explanation, where according to the needs of the subject the one has priority over the other, but they are elements, aspects, factors, which are of importance for the explanation and which must all be applied at the same time. 22

Von Savigny, following Schleiermacher, indeed emphasizes the aspect of art that is involved:

> Explanation as interpretation and clarification as a reconstruction of the essence (the inner thought) of the law is a kind of art which does not allow to be known or grasped by rules. 23

Only later, in part under the influence of the positivism of the second half of the nineteenth century, the canons of interpretation departed from that aspect of "art" and became elevated to independent methods of interpretation of a pure descriptive nature. As stated by Vranken, such methods of interpretation:

> can be employed to guarantee the correctness of a particular interpretation. One can also detect a return to the approach which came before Schleiermacher, namely that interpretation is only needed when the text is unclear. 24

2.3 New Hermeneutics

The attack on the positivism of the second half on the nineteenth century, which is Paul Scholten's main target, is partly informed by the old approach of the Historical School,[25] partly by the new ideas brought about by social sciences and pragmatism,[26] and partly by new forms of hermeneutics, which defended the opinion that an interpretation according to the *Wortlaut* is impossible and that interpretation is *always* needed, for every text. This new type of Hermeneutics in particular played an important role in the gradual abolishing of the grammatical interpretation after World War II.[27] Nowadays, analytic theories on language have affirmed the hermeneutic view that in interpreting a text the reader always brings his *Vorverständnis* which influences the meaning that he extracts from it. Wittgenstein developed a new semantic theory which liberated the meaning of concepts from the narrow armour of their wording.[28] With him the belief in the strict meaning of words (the *Buchstabentheorie* or *Buchstabentreue*) became obsolete. It is only after a very long struggle and a substantive period of time that these ideas were also accepted in legal theory.

In this respect Paul Scholten was an exception. His ideas on language and meaning show that he had already intuited the new development. In the Netherlands he seems to have been the only one. In his General Method he argues:

> The authority of the language is so big and so self-evident that there is no need to give further arguments for it. This view is in conflict with the nature of finding law as well as with the essence of language.

> [In conflict] with the nature of finding law. This "never requires the determination of the meaning of a provision on its own, but rather in the light of the actual relationship, either as it exists in reality or as it is imagined by the interpreter of the law. By this it can happen that something, which is clear in itself, i.e. which evokes the same conceptions for everybody who knows the common parlance, can become obscure when the facts which are presented are taken into account. To explain this K. G. Wurzel uses the following example from Jhering's Civilrechtfälle, which is quite revealing, even though it recalls the atmosphere of a study. The following legal provision seems clear: "a treasure belongs to the finder"; everybody knows what it means "to find" a treasure. However, take this case: A, B and C stroll alongside a small river. A sees a bag with money lying on the other side [of the river]. He tells this to the other two. B whistles for the dog of C, sending him to fetch the bag. The dog puts the bag at the feet of C. Who is the "finder"; A, B, or C?

> This doctrine is also in conflict with the essence of language. A word is a sign, it has a meaning, i.e. it represents an image, which is conceived of in the mind. But this image is not clear cut, is not always the same. Every concept has a hard core, but its boundaries are fluid. The more concrete a word is, the less vague it will be. But it is impossible to state of any word, which is used in legal provisions, i.e. rules with a general applicability, that it is completely clear and that the corresponding image is completely determinate. It is clear what a chair is; however, when it is forbidden to put chairs in a certain place, the question can arise if some piece of furniture, which can be used to sit upon (like a bench or a trestle table etc.) can be called a chair.(154-156)

One cannot but admire Scholten's insight in this difficult matter at that time and in that era.

3. Different Forms of Positivism

3.1 The first period of positivism: *Wortlaut* in the context of history and construction

In his dissertation, Vranken[29] emphasizes again and again that the methods of interpretation are actually *elements of a process of concretising* and that the *Sache Recht* (Paul Scholten: *gerechtigheid*) is one of those concretizing elements.[30] In this, again, Vrancken's views and those of Paul Scholten are remarkably similar, as also Paul Scholten considered the grammatical interpretation as merely one of the methods and even not necessarily the first one. Interpretation rules encompass, according to Vrancken, first of all the philological or grammatical interpretation[31] or interpretation "nach den Regeln der Sprache" (according to language rules). Secondly, there is the *historische Auslegung* (historical interpretation) and finally the *systematische Auslegung* (systematic interpretation or construction method).

This last method is specifically elaborated by Von Savigny and introduces the idea of system as a completely new idea in legal theory. He gave his method the name *logische* or *genetische Darstellung des Gedanken im Gesetz* (logical or genetic representation of the inner view of the law).[32]

In more modern times, four methods have been developed in Germany, namely that of the *Auslegung nach dem Wortlaut* or *grammatische Auslegung* (see above), the *systematische Auslegung* or *logische Auslegung* (idem), the *Auslegung nach der Entstehungsgeschichte*, or *genetisch-historische Auslegung (*interpretation according to the history of the law or genetic-historical interpretation*)*, and the *Auslegung nach dem Zweck des Gesetzes* or *teleologische Auslegung* (Interpretation according to the aim of the law or teleological interpretation).

Dutch doctrine - and also Paul Scholten – recognized the same methods under the names of grammatical, historical, systematic and teleological method. Although the functional or teleological method has been more and more frequently applied, this method was everywhere the most subject to dispute. It was, indeed, not yet found in the work of Von Savigny.[33]

In France, only two methods have been officially recognized[34], but the way they are used makes them almost similar to the canons which I mentioned above. They are the *interprétation grammaticale ou littérale* (the grammatical or literal interpretation), and the *interprétation logique* (logical interpretation) which encompasses the history, the system and the aim of the law. The last is new and the logical follow up of different and modern views is also present in France.

3.2. The second period of positivism: *Wortlaut* in the context of societal interests, aims and principles

The period of legalism or positivism definitely began in the second half of the nineteenth century, when Savigny was at the end of his career(he died in 1861), both on the continent and in England and Wales. This meant that the grammatical method became the most important one. When discovering the law, the judge was inclined to firstly use this method. Positivism and legalism could not do without it and until deep in the twentieth century this was the status quo.

We saw that Paul Scholten was an exception, but he certainly also was part of a much wider movement which criticized the too strictly applied formalism and saw the grammatical method as just one of the interpretation tools. In this, he continued the way interpretation had been done before the dawn of the literal rule, when equity (Billigkeit, *billijkheid*) and other interpretation criteria from outside the law

(*Aussergesetzliche Auslegungscriteria*) had been used to interpret legal provisions. By doing this, his views did not deviate from those of others like Gény and Stammler[35] whose work he was acquainted with. Moreover, Paul Scholten's theory was not in itself a strange phenomenon in the legal climate of Europe of the late nineteenth and twentieth century. On the continent and in the United States positivist thinking was gradually making place for more 'realist' and 'sociological' thinking methods.

In the Netherlands, however, Paul Scholten, was a pioneer, by working out in his General Method new ideas for practical legal use, read: interpretation. He explained that for a judge to decide well he should mitigate the importance of the literal wording of the statute and be open to general guiding norms and principles. In his General Method, Paul Scholten argued that in discovering the meaning of legal concepts the judge should always consider several aspects besides the grammatical interpretation, such as the system of the law, its history and factors like the aim of the provision (*ratio legis*) and its relation to the norms of the present society (*teleological interpretation)*.[36] In this Paul Scholten not only restricted the role of positivism, but also anticipated on the new theories that were developing in this era both in England/Wales and on the continent, that is the theories of pragmatism and realism. These new theories defended a view in which case-law became more goal-oriented, aiming at (among others) what was desirable for pragmatic ends.[37] Paul Scholten´s position in between positivism and these new theories was one of his unique merits.[38] Pragmatic and social ends as such were not the principles he favored most. For him *gerechtigheid* (justice, *die Sache Recht*) was and stayed the first, and he sought to find that *gerechtigheid* through the subjective or personal conscience of the judge.[39] The latter marks his role as one of the first "normative" thinkers. At the same time his normativism was sociologically and teleologically inspired:

> But the interpretation of an applicable provision is only partly determined by the regulations of the law, which form the context of it; this is also accomplished by the social relations themselves, to which the provision will be applied. Every regulation rests on the valuation of social interests, aims at influencing the actual social events. Its application is bound by the possibilities that are offered by the social life. This life is continuously changing. This makes it possible that the provision starts to refer to a domain for which it was not originally intended. The valuation has repercussions for its meaning. (145)

> The signification of a legal provision can only be determined on the basis of the relations between human beings. It does not have a separate existence, but holds only for actual relations. The written law determines these, which means that it prescribes what should be the case in a certain relationship, but at the same time the law is influenced by changes in this relationship. Therefore an interpretation is required that is in accordance with the aim of the provision, with the social situation in which it operates. The sociological or teleological interpretation claims its position [here]."(146)

4. The reception of Paul Scholten after World War II

4.1 Attack on Positivism in the beginning of the twentieth century: "Pragmatism" and "Realism" as new alternatives versus Scholten's mixed interpretation

In the beginning of the twentieth century, in particular in Germany, legal theorists and philosophers began to attack the primary position of the grammatical method much more fundamentally.[40] Most of all they opposed the so-called *Wortlautgrenze*, a supposed border which one should not trespass when applying the text of the law.

In Germany, this was the era of the *Wertungsjurisprudenz* (case law that is based on judicial valuation or weighing) which had become the successor of firstly the positivism of the *Begriffs*- and secondly the positivism of the *Interessenjurisprudenz* (case law according to the legal concepts and to the aim of the law respectively). In the United States, the famous Karl Llewellyn became a pioneer in the realist movement.[41] A more fundamental pragmatic realism began to dominate legal thinking in the second half of the twentieth century. In this pragmatism, the focus shifts from

text to *action*. [42] This implies that things never stay the same and that in practice – and thus also in legal practice – there is no certainty or truth which could be proven by scientific research, in the previously supposed - objective – way. Reality is changing all the time and is constructed mainly by action which constitutes its own truth. According to Schuyt[43] pragmatism developed in the United States as a revolt against the formalism and dogmatism of the previous era. Famous pragmatists were Dewey, Peirce, Holmes and William James. Social problems got more attention than before and in the legal sphere there was a shift to a more liberal and free finding of law. The legal interpreter, the judge, should not too firmly hold to the text of the law, which was thought to be only fragmentary and temporary. He had to find other, more 'supple' criteria as a basis for his decision. [44]

In the same period Dutch legal doctrine had developed further in the way Scholten had already prepared, and his way of thinking was not in the first place pragmatic. Schoordijk a hard core pragmatist himself even thinks that Paul Scholten was still a kind of legalist because Scholten thought that the text of the law was and should stay very important. It should be taken in mind however that thus Schoordijk applies a new insight in hindsight. In Paul Scholten's time society was still developing from a positivist way of thinking to a more goal- and norm-oriented law. Besides, the new theories of language certainly did not impair the importance of language in itself; they merely use different criteria to value it.Especially in jurisprudence, the text, in its various interpretations through time, stays important as a part of the *Vorverständnis* of legal interpreters.[45] Also Van den Bergh[46] points out that at first the influence of legal realism was rather restricted in the Netherlands because of Paul Scholten's legal theory that had proven to be suitable enough for legal practice.[47] In addition, in his book on the finding of law, Schoordijk[48] admits, that Paul Scholten was generally admired in his time and in the first decades after his death as well, mainly because of his methodology of interpreting, which was new and filled a lacuna.[49]

4.2 Legal theory around 1970

Only about twenty years after Scholten's dead, around 1970 the influence of pragmatism finally broke through. In the Netherlands, however, the term pragmatism has not been frequently used. We have seen above how Paul Scholten's view of mixed interpretation made it easy to incorporate many different – even opposite – factors. Dialectic and socio-teleological theory could thus easily be included. As suggested, Scholten's characteristic independent way of thinking, in which he included also hermeneutics,[50] may have temporarily prevented that the pragmatic theories gained an overall impact in the Netherlands. In his view, the highly theoretical modern ideas on language and the meaning of language were combined with the age-old *ius gentium* concept of *ius in causa positum* which means that the facts of a case are predominant in deciding it. His view was thus a highly practical tool to fill the gap between the obsolete theories of the past and the modern sociological and pragmatic theories.[51] In his General Method, Paul Scholten explains how the judge can participate in a new modus of interpreting the law in order to formulate judgments which are more than before in line with the needs of society and specifically by this also with the aim of the law, that is: *gerechtigheid* (justice or fairness or die *Sache Recht*).

In the course of these pragmatic new movements and theories on finding law the action perspective of the judge got new attention in Europe as well as in the United States.

In legal semantics[52] the German theory of the *Strukturierende Rechtslehre* became important, with authors such as Müller, Jeand'Heur and Busse.[53] In this theory, the role of the (text of the) law is replaced by the role of the judge in a new structure-giving deciding modus. The theory pays attention to various factors, which give

structure to the decision of the judge, such as: the influence of the *Sprachgemeinschaft* (accepted discourse) of jurists with their consensus on at least the history of interpreting the laws of their own system; the generally recognized needs of society at a certain moment. The *Geist* (inner sense and meaning) of international treaties and covenants (EVRM, ICCPR etc.) which govern the way these treaties should be explained after a weighing of the various principles involved, is an aspect that should not be underestimated in the new legal interpretation methodology. In this context, Paul Scholten, was a step stone in the evolution of these new directions although a very important one. His ideas, of course, were not the basis of the Strukturierende Rechtslehre nor was that theory known and normative for him. All these new ideas arose in approximately the same period that Wittgenstein formulated his ideas. They were apparently the result of new needs in all the sciences in which language plays a paramount role, and therefore also in jurisprudence.
For a more thorough investigation of the views of Paul Scholten, which have a special connection to his theory on language and related matters three areas appear to be of special importance:

- Open system: how can a legal theory which recognizes the importance of principles be constructed as a system and not end in chaos;

- Leap: how can a judge fill the gap between a “literal” wording of a text and a decision;

- Criminal law: how can the principle of legality be preserved despite its controversial implications. Below, I will formulate some thoughts which in my opinion may be used to analyze these three important views of Paul Scholten.

5. Open system versus closed system of law

Directly related to his views on the legal text and language are Paul Scholten’s views on an open system of law. When language is multi-interpretable and in a legal context dependent on the facts of the case, the law has to be thought as an open system, which means open to new influences and new decisions to be created by the judge. In his General Method, Paul Scholten states:

> The open system of the law. (…). A logically closed system of law is out of the question. There has been much fought over this, mostly using the expression: whether there are gaps (Lücken) in the law or not. But often this fight was a verbal dispute, it contained much misunderstanding; people did not always understand the same by gaps. (17)

> (…) In every finding of law there is logical exertion, binding to data; there is also always freedom. The difference between one case and another is only a difference in degree. (299)

> Only he who thinks that decisions can only be found by logical reasoning from a certain point onwards, a fixed given, from where one goes further step by step, can make an objection to this conclusion. Actually, however, we find them by assembling as many data as possible and then making the decision. The decision always involves a leap in the end.

> Anyone who has this insight understands also that the decision is never a deduction from a closed system. Nevertheless there is no doubt that the law forms a system, a whole of logically adequate provisions. But this system does not reveal gaps here and there due to the faulty work of human beings, but [rather] is incomplete by nature and cannot be complete, because it is the foundation of decisions, which themselves add something new to the system. I think this is expressed best, when we speak of an open system. (300)

> If this is the case, then it follows from this, that we should not understand the contradistinction between legislator and judge as a sharp demarcation: „the first creates law, the second maintains law, the first is free, the second is bound", but instead in such a way that for the first the freedom is primary, while for the second the binding is [primary]. In the creation of the new the first remains always bound to the maintenance of the old, while the second in the maintenance always adds also something new to the existing.

> This double character becomes clear, when we speak of an open system. The law is never „complete", it changes daily. Not only by legislation, the conscious creation of new law, [but] also by application. We can express this also in this way: the system has to be seen as „dynamic", not „static" (…)The doctrine of logical closure sees it as a static system, that remains unchanged as long as the legislator doesn't intervene. There lays its mistake. (302)

I think that these conclusions are almost self-evident. A closed system is directly connected to a belief in the strict meaning of legal texts (lex certa et stricta) whereas an open system allows and prescribes interpretation. And this interpretation is equally 'open' albeit under the conditions elaborated in this article.

6. The leap and conscience (*geweten*)

When the judge decides, he acts, and Paul Scholten compares this to a leap. He meant that a decision never directly stems from a text but that it always needs an intuition-based acting by the judge to reach a decision. Every act necessarily is irrational, he argues. Before deciding a case against the background of all the various criteria, the judge has to make a leap; a leap into uncertainty, into intuition, into our moral guiding principles, into "religion". For Paul Scholten, irrationalism was related to geweten (conscience) and religion, but it seems not to have been religion as such that formed the essence of his teachings on this subject. His view seems more to align with the view of William James on the varieties of religious experience:

> The truth is that in the metaphysical and religious sphere, articulate reasons are cogent for us only when our inarticulate feelings of reality have already been impressed in favor of the same conclusion[…] Our impulsive belief is here always what sets up the original body of truth, and our articulately verbalized philosophy is but its showy translation into formulas. The unreasoned and immediate assurance is the deep thing in us, the reasoned argument is but a surface exhibition. 54

I would therefore rather say that in Paul Scholten´s view the judge adds something to the reasoning in a kind of fluent continuum. Is that a leap? I do not think that the term itself is crucial as long as we understand what Paul Scholten meant.
In discussing the work of Kelsen, Paul Scholten stated that the logical thinking in legal science is not pure in itself:

> Legal science is only partly logical. Its structure is far more complicated than that. 55

Accordingly I would suggest that religion and intuition stem from the same source and that this merely implies that legal interpretation is always goal-oriented, i.e. oriented towards principles and norms which have to be weighed one against the other and that interpretation is therefore primarily directed at gerechtigheid whether it refers to logic, "rationality" or religion. It is interesting to note that currently in neurology and cognitive sciences it has become apparent that ratio never acts alone and that new attention is paid to the cognitive function of emotion.

7. Criminal law

Criminal law is according to Paul Scholten compulsory law which applies stricter rules than complementary law, although in his view both types of law belong to the common law (*gemene recht)*, that is law concerning the conduct of ordinary citizens instead of constitutional law.[56] For Paul Scholten criminal law and civil law (*privaatrecht*) are both parts of the general ius commune and he does not understand the two as very different. He opposes thus the generally held view that in criminal law the legality principle requires a prohibition of analogy.
Paul Scholten argues:

> Analogical application is application, but at the same time it is the creation of something new. When one realizes, as we saw in the preceding section, that interpretation and (application by) analogy are merging, do not differ from each other fundamentally, and that further on, as was pointed out in the sections 10 and following, we certainly can establish the data of the interpretation and their relative value, but can never give conclusive rules as to when the one method has to be used and when the other, that there is therefore also room for an autonomous judgment of the judge, then it is clear that the same is true for the interpretation. Doubtlessly Burckhardt is right, when he says: „Zwischen Ergänzung eines Rechtssatzes, Ausdehnung eines gegebenen Rechtssatzes nach Analogie und Auslegung ist nur ein Unterscheid des Grades. (298)

The fact that in general theorists in criminal law stubbornly adhere to this 'non-existent difference'', has according to Paul Scholten a dual origin :

> The fact that people nevertheless cling so desperately to this non-existent difference has a two-fold cause. Firstly it is due to the importance it is thought to have for the criminal law. In the criminal law it is said that analogy is forbidden, while extensive interpretation is admitted. However the examples of extensive interpretation, given by the advocates of this conception, could just as well be called examples of analogy. In pure grammatical terms a telephone is not a telegraph, fruits from the garden are not fruits from the field, someone who is sleeping is not someone who is unconscious, etc. The attempts made at the 'Juristenvergadering' (meeting of the association of Dutch jurists) in 1922, to determine whether the theft of electricity is punishable according to art. 310 'W.v.S' (penal code) or forbidden analogy, showed nothing but hopeless confusion. And one may not argue against this that a distinction should not be rejected simply because there are borderline cases, where the distinct concepts overlap. This is only true when it is really possible to make a fundamental separation, when a criterion can be formulated. This is missing here. (278)

Not only Paul Scholten's views but the views of all modern legal thinkers find their summit-test in criminal law. This test has to do with the principle of legality of which it is generally accepted that it is a paramount principle even though it is not easy to interpret.[57] Until a few decades ago, criminal lawyers held that they were forced to strictly interpret the legal texts because the perpetrator of the unlawful act had to know precisely what a provision meant in order to adapt his/her future behavior to it.[58]
In the Netherlands, the principle of legality has been expressed in the Dutch Criminal Code (*Wetboek van Strafrecht*) article 1 and in article 16 of the Constitution. We can also find it in article 7 of EVRM (ECHR) and article 15 of IVBPR (ICCPR). The principle is based on the conception that strictly constructed legal provisions can provide legal certainty and the second basic assumption is that those legal provisions have democratic value because provisions based on statutes imply that the citizens through the parliament have assented to it. I will confine myself to the first basic assumption. It is this aspect which is already clearly formulated by Paul Scholten, who fully acknowledged the consequences of it for criminal law.
The new language views e.g. the linguistic theory of Wittgenstein endorse Paul Scholten's view. It is clear that a language theory cannot be restricted to some legal texts (private law for example).[59] Therefore it is not possible to make an exception for criminal law because of its unique principle of legality. A language theory is generally valid or not. If it is not valid it has to be abolished.
As we have seen, legal texts cannot provide absolute clarity and security because every text has to be interpreted. Reason is that all legal provisions comprise general concepts and that a general concept is never clear of its own.[60] The legislator cannot foresee which cases will come up in practice and society is always confronted with changing circumstances also of the legal system. Because of this variability of reality a general concept is never automatically applicable and there has to be a mediating institute of persons who are appointed and thus have the authority to elucidate the general concepts for the practice of judicial development.
In most civilized countries that mediating institute nowadays is the judge. He is the one who has to interpret the law in such a way that it is on the one hand in accordance with its text and the legal system involved but on the other also with developments in society and with the changing views in that society, views about justice (*gerechtigheid*) for instance. We could not do without judges as legal interpreters and automatically therefore creators of law.
In criminal law, as in civil law, we use the tools of the so-called interpretation methods which were discussed by Paul Scholten in his methodology, and which we have discussed above. The idea that criminal law has to be an exception is generally

formulated as the requirement that for criminal law there exists the special prohibition of analogical interpretation, while extensive interpretation is allowed. Both the analogical and extensive interpretation-modes are actually linked to the grammatical method and - as we have seen - in present European doctrine they are therefore considered as more and more obsolete.

In more recent times and especially also under the influence of the verdicts of the European Court for the protection of Human Rights in Straatsburg, new criteria have however been formulated to uphold a different type of legal certainty, which has nowadays more the character of the principle of trust (*vertrouwensbeginsel*). Criteria of foreseeability and accessibility have taken the role of the *lex certaet stricta* (the clear and strict law) of before.[61] Therefore, the supposed difference in current judicial practice between civil law and criminal law regarding interpretation should not be overestimated. Moreover, I want to stress, that criminal lawyers themselves have found solutions for interpretation problems with the *Wortlaut*, without – so it seems – having known what exactly their problem was or even that they had a problem whatsoever. They introduced the so called "general conditions for criminal liability*", (algemene voorwaarden van strafbaarheid*) i.e. *verwijtbaarheid* (blameworthiness) and *schuld* (culpa) which have to be fulfilled next to the completion of the legal provision in order to make the perpetrator punishable. Apart from that, they also apply the so called "unwritten justifications and excuses" (ongeschreven rechtvaardigingsgronden en schulduitsluitingsgronden).[62] The phenomenon is an escape from the strict adherence to the wording of the penal provision. The criminal judge cannot fairly decide without such an escape. And in this way, criminal law appears to possess its own remedy-principles to avoid unfairness and to arrive at a result which is comparable to the *billijkheid* (equity) and *goede trouw* (good faith) of civil law.

All these remedies use meta-norms or 'principles and policies'[63] to mitigate the unfair consequences of a strict application of the grammatical interpretation. These so-called *principles and policies* which in practice have been used and are still being used under other names in the modern case law of Europe and the US, should be regarded as guiding tools for a judge to decide well. Here again Paul Scholten appears to be the guide who has already applied these principles more than seventy years ago, albeit in his favorite terms of justice (*gerechtigheid*) and also love or charity (*liefde*). Paul Scholten's principles and policies are actually ethical standards, playing a major role in countries which adhere to the rule of law. For practical use in current times, however, those principles have to be analyzed and differentiated because *gerechtigheid* is too broad a principle for the average judge to apply, and nobody possesses the pure conscience and capability to know exactly what *gerechtigheid* is, let alone what the difference is between good and evil. The legal text and its history can be used as an important elucidating element here, and it is this element, which has disappeared from the view of hard core pragmatists.

It is in this context that, at the end of this article, I would like to refer to the end of Van Dunné's article on the relation of pragmatism, the theory of functional law and Paul Scholten. Van Dunné quotes the latter, who argued that the law is not only norm but also a social phenomenon.[64] Van Dunné rephrases these words however by: Law is not only a social phenomenon but also norm. Van Dunné thus nevertheless affirms Paul Scholten's theory as formulated in his General Method. In Paul Scholten's opinion, a legal decision does not "hang in the air" and cannot be entirely disconnected from its roots. The text of the law, the system of the law and its history are important elements of these roots, which should be investigated in order to reach a fair and acceptable decision. It is not only society that has to be kept in mind.[65]

8. Conclusion

It can be concluded that Paul Scholten was indeed a pioneer. He was unique because he intuited a different approach for the finding of law which was needed in the context of his time. In this he anticipated the new language theory of particularly Wittgenstein, which held that the meaning of concepts changes in time depending on the aim of semantic interpretation and the context of their use. Paul Scholten tried to bring a halt to the overqualified grammatical interpretation method of the era before him, stemming from positivism and legalism. For criminal law, he challenged the illusion that strict adherence to the legal text can create real certainty and can be upheld by a strict demarcation between extensive interpretation and analogy. These views have been overtaken by most modern and international courts.

Moreover, aligning with hermeneutic theories, Paul Scholten stressed the importance of justice (*die Sache Recht* or *gerechtigheid*) in interpreting legal terms and used that aim as his primary principle next to other evaluation criteria of the new teleological interpretation methodology. The latter were forebodes of the mainly sociology-oriented principles and policies of the pragmatist school that were introduced in the Netherlands around 1970, some decades after Scholten's death in 1946.

Apart from these interpretation criteria, which had the risk of completely obsoleting the role of language for the finding of law, Paul Scholten argued - also thanks to hermeneutics - that a legal decision can never fully abstain from the text, history and system of the law, because these constitute the knowledge and intuition which a judge applies – willingly or unwillingly and even unconsciously – when preparing a judicial decision. They are indeed part of his *Vorverständnis*.

In relation to legal interpretation, Paul Scholten on the one hand mitigated the role of language and opposed legalism. On the other hand, he defended the importance of language in its context and thus postponed the rise of a more volatile pragmatism.

In relation to his most valued principles, Paul Scholten's *geweten* (conscience) and *gerechtigheid* (justice) are higher or meta principles, albeit of a very personal and not everywhere accepted character, based on a personal belief and a bond with God which alas are not bestowed on everyone.

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1 Dunné, *Normatief uitgelegd. Verzameling privaatrechtelijke opstellen*. 666.

2 Dunné. 432 (on the role of the Highest Dutch court, the *Hoge Raad*): “In our rather indolent country a text book seems to be more directed to maintaining than to developing law. To look further than the country’s borders - although they are not very far away in this small country - appears to be also a taboo, let alone to watch further than dogmatic borders.” (My translation of: “Een handboek lijkt in ons gezapige land toch al meer gericht op handhaven te zijn, dan op de ontwikkeling van het recht. Het over de landsgrenzen kijken, in vele windstreken slechts op enkele uren rijden afstand, is ook nog steeds taboe, om over dogmatische grenzen maar te zwijgen.”)

3 Schoordijk, *Realistische en pragmatische rechtsvinding*. blames him for still holding on to the text of the law, but this reproach is not fair. See below section 4.1.

4 E. M. Meijers (1880 - 1974) is considered an outstanding jurist in the Netherlands, particularly because of his pioneer-function for the Dutch New Civil Code (NBW or Nieuw Burgerlijk Wetboek) which Meijers designed from 1947 onwards.

5 On January 1 1992, finally, the larger part of the NBW has been implemented.

6 Schoordijk, *Realistische en pragmatische rechtsvinding*.: passim. J. ter Heide, “Staat En Anti-Staat, Evolutie of Revolutie?”For the works of the others compare the bibliography.

7 'General Method.' , which is the English translation of the first chapter of Scholten, *Algemeen Deel*.

8 Vogenauer (1968) is affiliated to the Max Planck Institute for European Legal History at Frankfurt am Main. He held the statutory chair in Comparative Law at the University of Oxford from 2003 to 2015, has been awarded the Max Weber Prize of the Bavarian Academy of Sciences and Humanities and the Otto Hahn medal of the Max Planck Society in 2002, as well as the 2008 Prize of the German Legal History Conference. In 2012 a Humboldt Award was conferred upon him in recognition of his

lifetime achievements in research. He works mostly in the areas of European legal history, comparative law and transnational private law. He has a particular interest in legal transfers in the common law world, the history of EU law and the comparative history of legal method.

9Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*.

10 A metaphor is for example the comparison of the essence of the meaning of a (legal) concept with the core (or pip) of fruit, and its further, more vague meanings with the skin. The aspects of meaning as it were fan out from the core meaning to the periphery.

11Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*.: 1325-1333.

12 My translation of "Von einer Insularität des englischen Rechts kann vor dem 19. Jahrhundert keine Rede sein. Selbst am Beginn des Zeitalters der strengen Buchstabentreue wirkte die kontinentale Auslegungstradition noch in das englische Recht hinein." (Vogenauer.: 1325)

13Vogenauer.: 1334.

14 For both see Schoordijk, *Realistische en pragmatische rechtsvinding*.: 183 *ff*, the parts on the various law systems mentioned above.

15 Among others Dunné, *Normatief uitgelegd. Verzameling privaatrechtelijke opstellen*.: passim.

16 Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*.: 682 *ff*, 685, 872 *ff*. *Buchstabentreue* as opposed to the doctrine of the equity of the statute (early fifteenth century), p 685 *ff*.

17 *Wortlauttreue* is the same as *Buchstabentreue*: strict adherence to the literal meaning or "letter" of the word or term.

18 Next to the narrowly related historical and systematic (construction) approach.

19 Also compare Termorshuizen-Arts, *Legal Semantics*.:106 *ff*., 189 *ff*. As to the grammatical method, since Von Savigny, this method is considered to be directly related to the historical method and the construction or systematic approach.

20 See for a further explanation of this interconnection, not only for Von Savigny in Germany, but also for Austin in England Huppes-Cluysenaer, "Van Een Analytische Naar Een Funktionele Rechtsopvatting (II)."

21 Vranken, J.B.M., until recently professor at Tilburg University in Civil Law, Civil Procedural Law and Legal Methodology, is in a way the successor of Paul Scholten because he wrote a General Part on private law in the so-called "Asser-series" as well or even three parts, but partially they have different subjects: .1.Vranken, *Algemeen Deel*.; 2. Vranken, *Algemeen Deel, een vervolg*.; 3. Vranken, *Algemeen deel*. The three books can be read next to each other though. Vranken's book is not a rebuttal of Paul Scholten's view.

22 Vranken, *Kritiek en methode in de rechtsvinding*.: 230.

23 "Die Rekonstruktion des dem Gesetze innewohnenden Gedankens (ist) eine Kunst, die sich ebensowenig als irgend eine andere, durch Regeln mitteilen oder erwerben lässt", quoted in Vranken., 230, who refers to Savigny, *System des heutigen römischen Rechts*. , p 211 e.v..

24 Vranken, *Kritiek en methode in de rechtsvinding*.:230 (his dissertation on the hermeneutic views (Gadamer) and its influence on legal interpretation).

25 For example the distinction between subjective and objective meaning of words. *General Method* par.141

26 See for the teleological method Scholten, "General Method.": 449.

27 Schoordijk, *Realistische en pragmatische rechtsvinding*.:207 *ff*. Particularly on the role of the German legal theoretician Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgarantien der richterlichen Entscheidungspraxis*.

28 Compare Wittgenstein, *Philosophical Investigations*. / Termorshuizen-Arts, *Legal Semantics*./ Schoordijk, *Realistische en pragmatische rechtsvinding*.

29 Vranken, *Kritiek en methode in de rechtsvinding*.: 230, 291, 308 *ff.* and in particular 247 *ff*.

30 See also Barendrecht, *Recht als model van rechtvaardigheid*. on *Sache Recht* (the law in its essence) and *gerechtigheid* (justice, fairness).

31 In German as well as in Dutch the word grammatical relates to the Greek *to gramma*, that is: according to the letter, literally, according to what is written.

32 Savigny, *Juristische Methodenlehre, nach der Ausarbeitung des Jakob Grimm*.

33 Busse, *Juristische Semantik. Grundfragen der juristischen Interpretationstheorie in sprachwissenschaftlicher Sicht*.: 24 *ff*.

34 Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*.: 234.

35 Gény in *Méthode d'interprétation et sources en droit privé positif*. advocated: *La libre recherche scientifique du social*, a new method of finding of law in which "the social" was the new aim (criterion) of interpretation. His work was also influential in the United States (Roscoe Pound, Cardozo). Stammler in Stammler, *Rechtsphilosophische Abhandlungen und Vorträge*. sought *Gerechtigkeit* (justice) based on an objective method (see for both the bibliography).

36 Compare Scholten, 'General Method'.: 150.

37 Compare Schoordijk, *Realistische en pragmatische rechtsvinding*. " a juridical decision has to have *werfkracht, i.e. a decision has to be* attractive and convincing." See 18,43,53,255.

38 Not accidentally, Paul Scholten, as an annotator, was one of the leading figures in changing the case law of the Dutch Supreme Court. He challenged the distinction between the so-called "automatically clear" and "automatically unclear" [*op eigen kracht duidelijke* resp. *op eigen kracht onduidelijke*) elements of legal provisions. This distinction was false, argued Paul Scholten and in the New Code of Private Law it has indeed been annulled. See Blokhuis-Scholten and Lubbers, "Uit PS in NJ."

39 Compare Scholten, '13. Rechtsbeginselen'./ Scholten, 'General Method'. section 15 (243) ff.

40 Compare Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgarantien der richterlichen Entscheidungspraxis*./ Wank, *Die Auslegung von Gesetzen*. /Schiffauer, "Wortbedeutung und Rechtserkenntnis."/ Jeand'Heur, *Sprachliches Referenzverhalten Bei Der Juristischen Entscheidingstätigkeit*./ Müller, *Untersuchungen zur Rechtslinguistik*. / Müller, *Strukturierende Rechtslehre*./ Müller and Christensen, *Juristische Methodik*./ Busse, *Juristische Semantik. Grundfragen der juristischen Interpretationstheorie in sprachwissenschaftlicher Sicht*.

41 Compare Schoordijk 2014 on American law: 65 ff.

42'*Pragma* means *daad*, *handeling*, act and action.

43 Compare Schuyt 1979:871 ff.

44 Also see Evans, *William Faulkner, William James, and the American Pragmatic Tradition*.: 7 *ff*. on Faulkner and James, who argues that there is no reality without subjectivity. Here we could find a relation to Paul Scholten but in this article I do not intend to elaborate on it.

45 Compare Müller, Jeand'Heur, Busse, footnote 40.

46 Bergh, *Geleerd Recht, een geschiedenis van de Europese rechtswetenschap in vogelvlucht*.: 140 *ff*.

47 Also compare Schoordijk, *Realistische en pragmatische rechtsvinding*.: 62.

48 Schoordijk. passim.

49 Noted admirers were Eggens, *Iets over de Ontwikkeling van Het Privaatrechtelijk Denken in de Laaste Halve Eeuw. Rede Uitgesproken Bij de Aanvaarding van Het Hoogleeraarsambt Aan de Rechtshoogeschool Te Batavia, 16 Mei 1935*., Hijmans, *Het recht der werkelijkheid. Rede uitgesproken bij de aanvaarding van het hoogleeraarsambt aan de Universiteit van Amsterdam, op den 31sten October 1910*., Dunné, *Normatief uitgelegd. Verzameling privaatrechtelijke opstellen*., and Wiarda,

Drie typen van rechtsvinding. to mention a few names of well-known Dutch jurists in mainly the twentieth century.

50 Dunné, *Normatief uitgelegd. Verzameling privaatrechtelijke opstellen*.

51 Dutch legal theory also knew the so called *functionele rechtsleer* (theory of the functional law) of Ter Heide, actually a variant/alternative reading of the works of Wittgenstein, but not a very fruitful one according to Dunné.: 666 *ff*.

52 Termorshuizen-Arts, *Legal Semantics*.

53 See footnote 40.

54 William James, 2002: 61-62.

55 Scholten, '15. De Structuur Der Rechtswetenschap'., 433*ff.*

56 Scholten, 'General Method.': 133.

57 See for a further elaboration Termorshuizen-Arts, *Legal Semantics*.: 189 *ff*.

58 Rozemond, "Waar Ligt de Grens van Het Legaliteitsbeginsel?" passim.

59 This view is further elaborated in Termorshuizen-Arts, *Legal Semantics*.:106*ff*, 134*ff*, 192*ff*.

60 The minor is never given. Scholten, 'General Method.': 299.

61 Rozemond, "Waar Ligt de Grens van Het Legaliteitsbeginsel?"/Rozemond, *De methode van het materiële strafrecht*.

62 Remmelink and Hazewinkel-Suringa, *Mr. D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse strafrecht*.:343 *ff*.

63 The term has been coined by the author in Termorshuizen-Arts, *Legal Semantics*.: 142*ff*, 201*ff*.

64 Scholten, '2. Recht En Levensbeschouwing'., 154; Dunné, *Normatief uitgelegd. Verzameling privaatrechtelijke opstellen*.

65 Compare the development of jurisprudence in the United States where realists like Roscoe Pound and Cardozo were very impressed by Gény's legal theory (*La libre recherche scientifique du social*) until also the social aim as an interpretation criterion had to recede and make place for new insights (intuitism first and so on; and so on).

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Revised version of the keynote speech delivered at the Third Paul Scholten Symposium concerning New Perspectives on Law and Reality. 27 November 2015.

Reviews

Rogier Hartendorp

Termorshuizen describes Scholten's contribution to the development of legal theory in The Netherlands. The author's central thesis is that Scholten's work about legal interpretation is unique and should be considered as an intermediary position between the 19th century's positivist/legalist tradition and nowadays' pragmatic/hermeneutic based theory. After she has introduced the main elements of Scholten's work (section 1), the author gives an overview of the development of interpretation methods (section 2), the development of positivism/legalism (section 3) and the reception of different elements of Scholten's work in Dutch doctrine after World War II (section 4). I endorse Termorshuizen's conclusion that Scholten's most important contribution to the development of legal theory is his thoughts about different interpretation methods and the fundamental reframing of the relationship between judicial decision making and the law. The law cannot be considered as a closed system, as legal positivists do. It is an open system which is constantly under the influence of social developments. Therefore, in the process of legal interpretation and decisioning, the law is not simply applied, on the basis of fast and hard rules.

Instead, a judge finds the law, and in this process, he or she is oriented on the meaning of the law in a concrete case and on the effect of his or her decision for the parties involved and society in general. Termorshuizen demonstrates convincingly that Scholten's non-radical 'in between' position is the innovatory aspect of Scholten's theory. The following quote of Scholten is exemplary for this approach: "In every finding of law there is logical exertion, binding to data; there is also always freedom. The difference between one case and another is only a difference in degree. Only he who thinks that decisions can only be found by logical reasoning from a certain point onwards, a fixed given, from where one goes further step by step, can make an objection to this conclusion. Actually, however, we find them by assembling as many data as possible and then making the decision. The decision always involves a leap in the end." In Scholten's vision, legal interpretation is logic and intuition; legal norms and social context. Termorshuizen adverts to the striking similarity between Scholten's theory on legal decisioning, more specifically his idea about the leap (sprong), and Wittgenstein's semantic theory, which is also very valuable for legal interpretation. "How am I able to obey a rule?", wonders Wittgenstein. "[I]f this is not a question about causes, then it is about the justification for my following the rule in the way I do. If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: "This is simply what I do."" Wittgenstein is considered to be one of the most influential philosophers of his time. It is not clear whether Scholten was familiar with his philosophy. In any case, Scholten did not refer to Wittgenstein's early work, and, more important, Wittgenstein unfolded his ideas about the application of (semantic) rules in Philosphical Investigations. This work was published in 1953, almost a decade after Scholten's death. One may wonder how Scholten was influenced by Wittgenstein. Or, that's also an option, could it be that both theories were developed independently? It would be interesting if the author would have shared her ideas on this issue in her article. It is overly clear that the author has a great admiration for Scholten's work. I share this esteem, with many others. The plain language that Scholten used makes that his writings, and especially Algemeen Deel, is nowadays still read by scholars, students and legal practitioners. The risk of such admiration is that some thoughts are unjustly attributed to Scholten. I have some hesitations about Termorshuizen's proposition that Scholten's theory also includes hermeneutics. She does not clarify which part of Scholten's thoughts should be considered as hermeneutical. The reference in footnote 50 is not specific enough and can, therefore, not be considered as a source for this claim. Scholten did argue, like hermeneutic thinkers do, that the law is not self-clarifying and always subject to interpretation. But that does not make his theory hermeneutic. In my humble opinion, the element Vorverständnis, in different forms presented by Gadamer, Esser, Larenz and, in our country, Van Dunné and Vranken in 60's and 70's, distinguishes hermeneutics from other (earlier) interpretation theories. Putting forward such a strong claim, Termorshuizen should have provided more substantiated arguments.

Klaas Rozemond

In her article *The Reception of the Work of Paul Scholten in the Netherlands* Marjanne Termorshuizen-Arts shows the great influence of Paul Scholten's General Method on Dutch legal thinking, first and foremost on legal thinking in private law, but also in criminal law. Scholten's ideas on grammatical, historical, systematic and teleological interpretation are common knowledge for every lawyer and legal scholar in the Netherlands, as are his ideas on the importance of the facts of the case in legal reasoning (ius in causa positum) and his ideas on the role of normative principles and the conscience of the judge in legal reasoning. The importance of Paul Scholten's ideas can first of all be found in his anti-positivistic idea that the meaning of the law cannot be restricted to the literal meaning of the text of the law and the historical

purposes of the legislator. The meaning of the law is a matter of interpretation of the law from the perspective of the judge and the principles he or she believes in on the basis of his or her conscience. From that perspective Scholten's views can be called hermeneutic in the sense that interpretation is not a matter of establishing objective facts about the literal meaning of the law and the historical purposes of the legislator. It is also a matter of attributing meaning to the law on the basis of the moral principles of the judge. There is, however, a problematic aspect in Scholten's idea of meaning. According to Scholten attributing meaning to the law is in its final moment a matter of the conscience of the judge. Scholten is of the opinion that the judge has to choose between a Christian and a Hegelian view on the meaning of the law. That choice is problematic in a society which is based on the separation between church and state. In such a society the law should be based on secular principles like the principle of equality or equal worth of persons (perhaps this principle can be deduced from Christianity or Hegelianism, but such a deduction should not be its most basic foundation). In her article Marjanne Termorshuizen-Arts does not confront this problem in Scholten's work, but she could do this by analyzing the recent reception of his work in Dutch legal theory by legal philosophers such as Bob Brouwer, Arend Soeteman, Cees Maris, Pauline Westerman and Carel Smith. This reception consists of a comparison between the work of Paul Scholten and the legal philosophy of Ronald Dworkin. The works of Scholten and Dworkin show a remarkable similarity on the importance of moral principles in legal reasoning and the hermeneutic approach of judges in attributing meaning to the law on the basis of these principles. Dworkin's idea of constructive interpretation can be compared to Scholten's idea of construction as the expression of this process of attributing meaning to the law. The most important difference between Scholten and Dworkin is the fact that Dworkin does not think that the final meaning of the law can be found in the conscience of the judge and her or his belief in Christian principles or Hegelian philosophy. According to Dworkin the most basic principles of the law are political principles that can be found in the legal constitution of a society. Legal reasoning is a matter of attributing meaning to the law on the basis of these principles which are shared by the members of a society with a constitution expressing these principles. The comparison between Scholten and Dworkin is an important part of recent work in Dutch legal theory. Through the work of Dworkin the ideas of Scholten are revalued in Dutch legal thinking and this comparison forms a link between modern legal theory and the work of Scholten. It shows the modernity and actuality of his work, but also the problematic aspect of his Christian thinking and his ideas on the conscience of the judge (see for instance De actualiteit van Paul Scholten, Ars Aequi 1995 and the articles of Soeteman and Brouwer in Rechtbeginselen, Ars Aequi, oktober 1991). So this is my main point of critique on the article of Marjanne Termorshuizen-Arts: she does a wonderful job in showing the roots of Scholten's work in the legal thinking of the nineteenth century and the influence of his work on the Dutch legal thinking of the twentieth century, but she could add to her article a review of his influence on recent legal philosophy in the Netherlands in the form of a comparison of his work with the legal philosophy of Ronald Dworkin and the way Dworkin and Scholten are linked in recent work by Durch legal philosophers.

author's response

I am grateful to the reviewers for their comments and would like to indicate how they inspire me. Rogier Hartendorp asks for more detailed information on the putative influence of Wittgenstein's language theory on Scholten. As already suggested by Hartendorp himself, I think that the new ideas about the meaning of concepts as ascribed to Wittgenstein in particular, were fruits of the new philosophy of those days. Paul Scholten was an authentic and independent thinker who certainly not only

intuited, but also studied the new aspects of semantics which became apparent as a - I would almost say – logical suit of previous approaches, which were no longer sufficient and convincing in the nineteenth and first half of the twentieth century. Further research of this heritage would be very interesting. As to the role of hermeneutics in Scholten's work, I quote the other reviewer's remarks on the sense of hermeneutics i.e. the attribution of meaning to the law: "on the basis of the moral principles of the judge". The latter is a reference to the second aspect of hermeneutical Vorverständnis namely the task of finding a just and ethical solution, pointing to Sache Recht or Gerechtigheid. The first aspect I would describe – in line with Vranken (1978:240) - as the knowledge on the basis of which the judge operates as a consequence of his legal training and practical experience. The reviewer, Klaas Rozemond, points at Scholten's personal religious completion of his understanding of the Sache Recht and the possible draw backs of such a stance in scientific discourse. I think this is not the place to elaborate this, even though it is of great importance for the contemporary relevance of Scholten's view. Here I only want to emphasize that in my opinion the religious completion does not impair Paul Scholten's thoughts on the value and importance of ethics. A comparison with the work of Dworkin could be attractive to elaborate this further. This would particularly be so when also other important modern Dutch legal theorists, like Smith, Maris, Soeteman, Brouwer, Westermann and Rozemond himself as adherents of Dworkin's ideas could be included in that comparison. Maybe I will save this for a new article!