Jumping Judges

Judicial discovery of the law

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DPSP Annual
Volume 1 (2020)

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 the usefulness of concepts like secondary rules, informal rules and general principles. The example of the changing meaning of the unus testis, nullus testis-rule is used to clarify the instability of positive law, giving way to a tentative analysis of different sources for judicial decisions.

Keywords

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

Cite as

van Manen, Niels. Jumping Judges: Judicial discovery of the law. DPSP Annual, I: Research, Volume 1 (2020), 18-37.

Article Info

Research question · Intuition
Reviewed by: Jeroen Chorus, Luciano Penteado
Volume 1 (2020)

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1. Introduction

This essay [1] does not concern the question of how courts ought to decide cases. That is a normative question. The focus in this essay is on a more factual approach, like the one Paul Scholten used in the *General Method of Private Law*. [2] Therefore, this essay is more a sociological analysis, based on a professional involvement extending over 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 'Court of Appeal.' of Amsterdam. [3] It is not a quantitative or qualitative study, but a report of my observations and my reflections on them. I should clarify first that in the Netherlands, different from other judicial systems, there is no possibility for one judge to formulate a dissenting or concurring opinion. There is, what I have called, the 'secret of the courtroom,' [4] a confidentiality inside the court building, in social gatherings, and even when the media interviews a 'press judge.' [5] The internal debate of a Chamber is never allowed to be brought outside the Chamber, although sometimes the rejection of an alternative is (or has to be) published in a decision, especially if it was part of the defence.

Paul Scholten, in his *General Method of Private Law* (first edition 1931), tried to analyze the way judges reach their conclusions , in my view in an empirical way, meaning that his analysis was not meant to be a normative theory of how courts ought to decide cases. His starting point did not differ that much from my own in this essay. It is apparent, however, that the *General Method of Private Law* did not originate in some kind of a vacuum, either international or personal.

1.1 International

In the 19th century, from about 1870 onwards, a new civil code that had to be introduced in Germany, was subject of a legal-scientific debate. Before it came into force in 1900, its implementation was preceded by a long and intensive debate about, among others, the question of whether or not the regulation of *legal* matters that were not yet foreseen in statutes implied the creation of new laws or merely the uncovering of already existing law,

hidden somewhere and now brought to the conscious knowledge of the law and legal scholars. One example used in the debate in Germany stems from Roman law. A person who is a guest on a ship drops a wineglass belonging to the owner of the ship. If it falls on the floor and breaks, the law obliges this guest to compensate the owner, according to Roman law. If, on the other hand, it falls over the side and disappears into the sea, the law does not prescribe any compensation. There are two solutions for a judge (or even for the legislator): analogous reasoning, so compensation is required; or refinement of the law, so no compensation is required. [6] That is a *legal* question. The question from a theoretical point of view in those days was: is a new rule added or is an already existing but hidden rule uncovered? This debate echoed in the Netherlands since some Dutch legal scholars found it fascinating. [7] The main question here is: Where is the law before it is known? In this essay, this question can be reframed as: How do judges decide? We must remember that since the 'General Principles Act' [8] was introduced in the Netherlands in 1830, judges have been prohibited from judging the inner value or the equity of a law (and from formulating general rules; articles 11 and 12). This 'General Principles Act' incorporated the idea of judges as machines (which is attributed to Montesquieu), applying legal rules and statutes, without any interference from their own factual, personal, moral, or political points of view. Scholten emphasized its long tradition, referring to Justinianus, Montesquieu, and Robespierre, [9] and argued that this was an untenable position.

1.2 Personal

The second part of the context was Scholten's personal point of view. In 1899 Scholten published his PhD thesis at the age of 24. He tried to formulate a common ground for legal liability without a basis in a contract or tort. I regard this PhD thesis as a serious quest by Scholten to add some general principle or rule, based on a variety of examples of legal liabilities apart from tort or contract. He failed, as he clearly admits in the conclusion. In 1899 he wrote that new concepts were needed. I can imagine that this "failure" became, so to speak, the basis for the revolutionary approach in the *General Method of Private Law* some 30 years later.

One of the central theses in the *General Method of Private Law* is Scholten's attack on the dominant view (or the dominantly presented view) – in his day – that judges could perform like Montesquieu's mouth of the law, mechanically, without any input of their own. If no such input is required, the correctness of the decision cannot be doubted. Scholten was not only a well respected legal scholar, he also put an end to exactly this Judicial Myth in his *General Method of Private Law*: there was no, and there could be no, neutral judge, lacking any influence on the legal outcome of a conflict in court (and therefore potentially replaceable by a machine like a computer). He went further: in every decision the judge adds something to the positive law.

2. Law as an Open System

This is what Scholten called: *law as an open system*. Even if Scholten was not the first to

present it in the Netherlands, then he at least made this point of view socially acceptable in the legal debate. Scholten claimed that judges were jumping to their conclusions and decisions. How did Scholten proceed to make his point? He attacked the judicial syllogism as a truthful representation of judicial decision-making. According to Scholten, the judicial syllogism runs as follows:

- **1)Maior** (if A then B)
- If someone illegally appropriates any good (in other words: is a thief),
- this person is to be punished
- **2) Minor** (A)
- Mary is a thief
- **3) Conclusion** (B)
- Mary is to be punished

This syllogism is simplified, but it is sufficient to clarify Scholten's perception of the pretended reasoning of judges. The maior is a general norm, in this case of criminal law. The criminal law is clear, at first glance. Theft is a crime, and thieves (persons committing such a crime) should be punished. [10] Scholten notes:

> The judgment is a syllogism, the maior – wherever we may find it – cannot be implied by the minor itself. [11]

and

> The minor is an act of the judge himself." [12]

Why? Because the judge decides whether or not Mary is a thief.

Let us consider a shop in Amsterdam, selling women's fashion. The shop owner has decided that the women working in the shop have to wear the shop's goods. Mary, an employee, leaves the shop at 6 o'clock, as she does every evening, in a hurry. She is still wearing the shop's clothes. Next day she appears in her own clothes. Some days later she leaves again in the shop's clothes. The owner reports this to the police as a theft and asks to have his employee Mary prosecuted. Is she stealing? Is she a thief? [13] Mary claims that she is just careless and negligent by not returning the shop's clothes to the shop. She states that she intended to return the clothes, but she did not do so in reality. In court, her legal counselor claims that Mary is a more or less professional athlete who goes to the gym for training immediately after returning home from work, after a quick change of clothes, so it is understandable that she forgets to return those clothes. Suppose there is proof that Mary is indeed a more or less professional athlete. Is her claim plausible? This is what judges in

the criminal branch have to decide. Judges easily jump to the conclusion that having, holding, and keeping the clothes (goods) in one's possession for some period of time, even hours, implies illegal appropriation. Intention is hardly an argument. If seeing a gun at your feet in a car is not sufficient for a conviction of a felony, holding it in your hand for some seconds definitely is. But beware: for the jumping judges, the bar is not very high in cases of drugs, guns, 'fencing' [14] and whitewashing. However, I must add, even if it is decided that Mary is a thief, a judge still has more decisions to make before the conclusion is reached that Mary ought to be punished. Questions like self-defense and insanity are involved in the step from the minor to the conclusion.

The minor in the syllogism poses many problems for us. One of the most intriguing ones is the non-existence of a border between the factual and normative character of the concepts used. In the case of theft, the character of a concept can shift from empirical to legal-normative, and back again. In Dutch legal theory I can point to the words 'any good' [15] in the maior in regard of theft. [16] Until 1921 the only possible object of theft was considered to be a material good. Electricity was not regarded as a material good, though it was suggested (but not accepted by the 'Supreme Court') that electrons were actually stolen, and therefore material goods. In 1921, however, the 'Supreme Court' decided that the concept 'any good' was no longer an empirical concept (material, concrete) but had shifted into a normative concept that was in need of further legal reasoning and decisions. Since the case of stealing electricity, 'a good' became an asset, something worth money. So it shifted again and became an empirical concept once more. Then in 1982 the 'Dutch Supreme Court' [17] was confronted with the question of whether or not 'scriptural money' [18] could be the object of 'misappropriation.' [19] Yes, it can, according to the 'Supreme Court,' pointing out the social function of 'money on a giro account.' [20] However, new cases were presented. The concept 'any good' shifted again into a legal-normative question: Are computer data and programs something, which can be stolen or misappropriated by copying, although the 'good' itself still remains at the disposition of the original owner? In this case, for the 'Supreme Court' the decisive point was that the person who initially had factual power over the good necessarily lost this factual power if another also obtained factual power over it. [21] Recently, the character shifted again when the 'Supreme Court' had to decide whether or not a virtual asset, like crediting a personal cell phone account through the telephone of an employer, could qualify as 'a good'. Even virtual values in computer games [22] became a possible object of theft in criminal law. [23] The structure of the arguments resembles the case of the guest on the ship who drops a glass into the water. Here, it is necessary to see that the concept 'any good' shifts back and forth from an empirical to a normative concept, implying every now and then the need to take judicial decisions on ambiguous matters.

These decisions are by no means self-evident. The judicial decision adds to the positive law. Judges are indeed not merely applying law, as Scholten argued correctly. However, he did not hold that judges were freely jumping to their decisions:

> Applying law is not the correct term for the determination of what is actual law between the parties, neither forming nor creating law, but the old term ‘rechtsvinding. [24]

> Law exists, but it has to be found, the finding comprises the new. [25]

Not creating law, but finding law. That means that the law, until that moment unknown, did exist somewhere. The encroaching questions are: Where? How?

3. Hart and Judicial Discretion

In 1961, some 30 years after Scholten, H.L.A. Hart published his internationally very influential *The Concept of Law,* stating in its preface that his book can be regarded both as an essay in analytical jurisprudence:

> …for it is concerned with the clarification of the general framework of legal thought…”, and as “…an essay in descriptive sociology. [26]

Hart posed comparable questions (analytical) to Scholten, concerning the meaning of a rule (and concepts), the decisions of judges, and the extent to which a precedent is to be regarded as a precedent. Hart used the more or less similar term ‘discretion’ (like Scholten’s *law as an open system*) since normative statements like statutes or precedents are unclear and uncertain, and the individual judge has to decide in what way the rule or concept is applicable. Hart elaborated on’ examples of the prohibition of behavior. [27] I can clarify my point by using one of them.

1. On Sunday, a man enters a church with his son and orders him, “Any man entering a church has to take off his hat.” [a]
2. The son, 15 years old, answers, “My baseball cap, too?”
3. “Please, Carl, stop being so obnoxious. Do like me.” The man takes off his hat. [b]
4. “Should I use my right hand, like you do, father, or may I use my left?”
5. The father swipes the baseball cap off his son’s head, with some force’.

In this example the father first tries to explain a general rule by *stating* it [no. 1, a]. Realizing his failure, he continues by *showing* his son how to behave [no. 3, b]. The son’s first question (no. 2) reveals the weakness of the general rule approach [a] and the second question (no. 4) reveals the weakness of the case law approach [b]. Many other questions could be asked in both [a] and [b], like: Only on Sundays? Is Carl already a man? Girls too? How should a man behave when entering a synagogue or a mosque? And what about the safety helmets of workers doing some repairs in the church? What about tourists?

Carl's first question of "My baseball cap, too?" resembles the examples above about *any good* and *theft*.

By adding more and more questions, Carl, obnoxious as he is, will confront his father with the fact that both the general rule [a] and the case law-like behavioral example [b] are creating too much uncertainty and therefore are useless as a behavioral norm.

Since the authority of Carl's father is weakened by his son's difficult questions, he could turn to the priest or minister as a more competent authority, somewhere between man and god, earth and heaven. However, Carl's father used the general *ultimum remedium* of any authority instead: violence, to prove his competence (no. 5).

Hart concludes that

i) in hard cases, general rules cannot be applied directly, mechanically, to concrete, specific situations without additional considerations [a], while

ii) at the same time, a concrete, specific example has no meaning in other concrete, specific situations without any further information, since it is impossible to construct a general rule directly, mechanically, from one (or some) concrete, specific situation, and since all concrete, specific situations do differ more or less [b].

I am using my example of *Carl and his cap* to refer to a series of comparable fundamental problems. I could have used other examples, like *Mary and her mother*. Both the mother and Mary are wearing a black skirt. The mother, keeping her knees firmly together, states (as a rule) that a decent woman always keeps her knees together [a] or commands Mary to do as she does, pointing at her knees [b], and Mary, obnoxious as she is, asks if this applies while riding a bicycle and sitting on a toilet, too, [a] or only when wearing a black skirt [b]. However, by adding the example of *Mary and her mother* to the example of *Carl and his cap*, it is obvious that I'm trying to prove on a more abstract level that the example of *Carl and his cap* could be regarded as the general rule (like [a]), and even that it is possible to formulate a general rule by using concrete cases (like [b]). But the general rule I'm trying to formulate and explain is that formulating directly applicable general rules is impossible. That, all in all, is a contradiction.

Hart tried to solve the unpredictability of legal meanings of concepts and decisions by introducing *secondary* rules. [28] *Primary* rules, [29] in his view, require human beings to do or to abstain from certain actions, whether they wish to or not.

> Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations. [30]

So, according to Hart, primary rules regulate (or attempt to regulate) the social actions of

all persons addressed, by proclaiming obligations - amongst others - while secondary rules are *rules of recognition* (establishing primary rules), *rules of change* (avoiding the static character), and *rules of adjudication* (limiting the inefficiency of any rule). [31] They must contain norms about legality and legitimacy. We must note that Hart's distinction between primarily rules and secondary rules is not very self-evident for the legislator and for judges. As a judge, I cannot ever decide without taking account of Hart's secondary rules. For a judge, Hart's secondary rules for civilians are to a large extent part of the judge's primary rules. For the legislator a comparable argument holds true.

It is remarkable that Scholten realized that there are secondary rules, although he did not use this term. He notes already in § 1:

> It is of course possible to ask which authority is competent to set the rule and why it has this competence, but these are questions with which the one who wants to study the private law is not concerned; these are questions of 'constitutional law. [32]

For Hart, they are part of his concept of law. In this way, Hart is to be considered more a sociologist of law and Scholten a private law scholar, apparently without an urge to go beyond judicial decision-making. And we, both as judges and as civilians, can ask every time: why is this rule binding for me, and what is the legality of the authority?

There is, however, a rather intriguing question about these secondary rules of Hart: how is it conceivable that secondary rules can be directly applicable, thus supporting the applicability of the primary rules (which are not directly applicable)? Can we assume that secondary rules do not suffer the same uncertainty that primary rules do? Are they not in need of further information, evaluative decisions and discretion as well? There is no argument available – as far as I can conceive – that the secondary rules do not. Judges have to decide not only with regard to primary rules, but also with regard to secondary rules, given the concrete facts and circumstances of a case, by legal sophistication, extensive interpretation or analogous reasoning whether or not these secondary rules are violated or applicable.

About half a century after the publication of *The Concept of Law*, sociologists of law and anthropologists of law introduced and started using the concept of *informal rules*. [33] Informal rules were used at first to clarify the way civil servants were applying the law. Knowing the critique by Scholten and Hart on the mechanical applicability of primary rules (and in my view: secondary rules, too), we might wonder if informal rules can bridge the shortcomings of primary (formal) rules? Three possible critiques should be mentioned here. *Firstly*, informal rules are generally derived from a limited number of empirical observations. There is no rational or reasonable account for these generalizing conclusions, especially not in a normative sense. This critique refers to the first secondary rule principle of Hart. *Secondly*, it is hardly possible to know how those informal rules do change, since

they are informal. This refers to the second secondary rule of Hart. It could be that these informal rules are merely changed through and in social action. Again, normative questions of legality and legitimacy are involved. *Thirdly*, how is the effectiveness or ineffectiveness of those informal rules to be limited? This refers to the third secondary rule principle of Hart.

Therefore, the informal rule is something between an empirical rule and a normative rule, between how people do behave and how they are supposed to behave. There is no guarantee that any actual practice is right, better, or more just. So in order to accept these informal rules, we need something else, another set of rules. All of Hart's remarks about the uncertainty of primary rules apply in the same way to secondary rules and even more so to informal rules.

Scholten concentrated on the uncertainty of the law, limited to primary rules. Hart tried to solve the problem of the uncertainty of primary rules but merely shifted and even hid the problem by introducing secondary rules. The introduction of informal rules implies that somewhere, behind or underneath secondary rules, we could claim that there are informal rules that could perform or realize what primary rules and secondary rules cannot.

4. Scholten and General Principles

Given the extensive debate on the importance of general principles in finding or creating law, a thorough analysis is far beyond the scope of this essay. However, as Scholten has already paid attention to the possibilities of the use of general principles, a short review is useful.

It might be claimed that the uncertainties can be solved by introducing and using general principles. Scholten was aware of this argument but denied the possible contribution of general principles to alleviate the uncertainties.

> Direct application through subsuming a case under a principle is not possible, for this the principle must firstly turn into a rule by adding a more concrete content. When forming such rules principles will clash: one will push in this direction, the other in that direction. The principle is therefore not law, but no law can be understood without these principles. They are the orientations which our moral judgment requires from the law, general conceptions, with all the arbitrariness which their general character brings about, but which still cannot be missed. 34

Scholten discards the solution that principles can do what rules cannot. However, he distinguishes two kinds of principles, one lower and one higher. The lower are rather general, making it impossible to simply apply them to cases. The higher express nothing more than that certain fundamental moral requirements also have to be obeyed in the law (like the principle of honesty). The higher kind is not only more general than the lower, it is also esteemed more highly.

> (In the process of) finding law the lower will have to give way to the higher. Accordingly, they are evident in a different way, the one will be immediately evident to everybody, the other only to those who know the system throughout. [35]

For Scholten, general principles were not to be regarded as a unidirectional guide to judicial decisions. General principles cannot bind a judge if they are both mutually conflicting and co-existing. If they are not binding, they are not very relevant. A judge needs to have a set of rules to decide which general principle of a set of apparently conflicting general principles is to take precedence. If there are no rules of hierarchy, general principles cannot help with making the right decision. They can only legitimize any decision. So how does the judge decide? How does the judge jump?

5. Scholten and Intuition

The results of my quest – so far – are not very convincing. Rules, commands, general principles, all of them force the judge to jump when making a decision. In the last pages of the *General Method of Private Law*, Scholten writes:

> Also the judge, who intuitively 'sees' the decision immediately after the case is presented to him, even though he doesn't know precisely yet, how he will motivate it, uses his knowledge of law – his complete experience in this intuitive view. [36]

The way in which the legal-rational and the individual-intuitive relate was hidden in the person of the judge according to Scholten: neither reason nor intuition took priority. He argued that the intuitive, moral step is the only possibility within the legal system. It is possible that another judge would decide in a different way, but for this judge any other solution is impossible since it is a decision rooted in his conscience. [37] The judge could be wrong. We could add that judges are rather often wrong, i.e. every time the courts of appeal and the Supreme Court do decide differently than the previous instance. For Scholten, the argument does not conclude with his claim that intuition makes the judge 'see' the decision immediately. Intuition and the individual conscience have an origin – in his opinion – which gives them an authoritative power, paramount to the individual. Scholten distinguishes two possibilities in this respect:

> … either an idea, the 'idea of law,' [38] one of the forms in which the world spirit realizes itself, can be guiding here, or the conscience is subordinated to a higher power, who, revealed as Person in Creation and History, confronts the individual and the community with his unconditional claims. [39]

The first possibility refers – according to Scholten – to idealism, especially in its Hegelian-Pantheistic form; the second possibility is the requirement of Christian faith.

For someone who doesn't have any such faith in an objective, [40] divine power

transcending the human, faith cannot be the guide (at least at a conscious level), free from misunderstandings (unless one presumes that 'God's language and concepts are understandable for humans, without doubt or mistake). There are too many mistakes, too many different solutions, too many different legal cultures. Intuition is not a God-given insight and does not originate in the idea of law. In a global world we know that certain behaviors, like homosexual contacts or adultery or euthanasia, are regarded as felonies in some countries while in other countries they are not. These differences extend to the kind of punishment, or even prosecution. Neither the idea of law nor divine knowledge can explain these differences.

The idea of law, as one of the forms in which the world spirit or God realizes itself, should be stable if it has a divine source. However, even in the Netherlands, there have been considerable changes in the law over just a few decades.

One example concerning the demands of evidence can illustrate the lurching of judicial decisions. The *unus testis, nullus testis* rule [41] states that there has to be more than one piece of evidence and if there are more pieces, those pieces should not stem from just one source, like the victim. Some decades ago that rule, rigidly applied, meant that suspects of rape and child abuse were almost free from prosecution and conviction as often the victim is the only witness, apart from the accused. The fact that the victim is the only source of evidence is crucial, especially in cases where the accused is denying the felony. Other evidence is often based on the information the victim passed to a relative or a friend. The impossibility of convictions did lead to more reservation in applying the *unus testis* rule, offering more protection and recognition of the victim. Hearsay, and thus an *indirect witness* was accepted, generally to testify about the emotional state of mind of the victim shortly afterwards, and about the sincerity of the victim's account. And then, due to the European Court of Human Rights, the interpretation of the *unus testis* rule was again applied in a more rigid way. [42] The use of statements of *indirect witnesses* was no longer allowed, since the victim was the only source of the knowledge of those indirect witnesses (2009). [43] In one case (2010), even the statement of the victim of child abuse, aged 8 years old, containing details that she could not have known otherwise was in need of supporting evidence, so the defendant was not convicted. [44] The 'Supreme Court' did indeed accept an *unus testis* defence in a case where the victim told her story, in tears, to the mother of her best friend shortly after the abuse (2013). [45] It seems clear: *unus testis* is *nullus testis*. However, in 2010 the Dutch Supreme Court did not regard the *unus testis* rule violated when the Court of Appeal used the statements of the victim as one piece of evidence and that of her mother as a second piece of evidence, although the knowledge of the mother was based on a telephone call to her daughter, the victim, who was at that time, shortly after the abuse, in tears and very upset. [46] In 2013 the Supreme Court accepted once more an 'indirect witness' in a case of child abuse. It referred to the Opinion of the Advocate General, which stated that the victim, after she had made an incriminating statement to her mother regarding the accused, kept a diary at the request of her mother, consisting of two

pages, written in 20 minutes, that the father subsequently turned over to the police. [47] There is no way to regard these last two decisions of the 'Supreme Court' as being in line with the other decisions and the previously mentioned one of the European Court of Human Rights. A more important aspect in the light of this essay is how can intuition lead, in so few years, to such far-reaching changes if it was based on the idea of law or God? All of these decisions derive from the Dutch Supreme Court, which can be assumed to be familiar with its own past decisions.

6. Conflicting Solutions

Although there is 'confidentiality of the courtroom', implying that debates in the Chamber may not be quoted anywhere else, it is understandable that every now and then judges do have highly conflicting opinions. As far as I know, there is no recent research in the Netherlands in the sociology or psychology of law on this topic. On the basis of my own experience as a judge, I will try to formulate some sources that could lead to debates in the Chamber and, at the same time, some causes in what direction judges jump. [48]

6.1 Legal knowledge

Without any doubt, legal knowledge of the law and statutes, the decisions of the 'Supreme Court' and other courts as well as the doctrine is important. Generally, judges do not decide *contra legem*, although for example the first favorable decisions on euthanasia seem to have been *contra legem*. There are various ways to use legal sophistication in a legitimate way, especially if the defence chooses the right instruments. But we are still confronted with the finding of law and the judicial jump, as Scholten wrote. There is always the choice between analogy, refinement of law, and an *argumentum a contrario*, [49] as was the case in dropping the glass into the sea, Carl's baseball cap, 'any good' and the *unus testis*- questions.

However, the law is not unimportant for a judge. Is that surprising? Very often, in difficult cases, a good judicial clerk will add the decisions of the 'Supreme Court' or pages of handbooks to the judge's dossier. Judges pay attention to those decisions. Sometimes one of the judges of a Chamber brings along a decision of the 'Supreme Court' in a very similar case. The Dutch Supreme Court often hesitates to formulate a general rule, however, stressing that the concrete facts and circumstances are decisive. It is up to the courts and the courts of appeal to determine these concrete facts and circumstances. In such a case, it is left to the judge to decide whether or not the specific concrete facts and circumstances differ from the ones that formed the case the 'Supreme Court' already decided upon, or coincide.

6.2 Personal history of the judges

The source of debates in the Chamber is sometimes rooted in personal motives. It is said that there is a distinction between judges who were legal councilors before becoming a judge and those who were not. Other judges received, for example, additional training as a

magistrate and might have worked as a public prosecutor. And undoubtedly, judges support different political parties. All of these elements lead to moral convictions. Thus, the personal history of the judge can definitely be relevant in conflicts about the rights of the defendant and the legal councilor.

One illustrative example is the occurrence of a procedural defect, which is very relevant since such a defect could lead to the inadmissibility of the public prosecutor. There are three normative decisions to be taken in the case of a procedural defect made by the police, by the public prosecutor, and even by a judge.

1. 'the interest that the violated rule serves';
2. 'the seriousness of the procedural defect'; and
3. 'the disadvantage caused by the procedural defect'. [50]

The second and third decisions imply normative judgments, as may the first one. A simple, mechanical application of a rule is impossible. The judiciary can decide in four ways: the inadmissibility of the public prosecutor, exclusion from evidence, mitigation of the penalty, [51] or merely the declaration of the procedural defect in the verdict.

In reality, the issue is even more complex. In the first decision the *Schutznorm* (adopted in the Dutch doctrine but originally German) plays a role: if the interest/value that has been violated was not meant to serve the interests of the defendant, the *Schutznorm* prevents the defendant from benefitting from the procedural defect. [52] Let us look at an example. [53] In the Netherlands, a special authorization from a judge is needed to conduct a search of a house. Only with such a special authorization is the police allowed to open the door of a kitchen cabinet [54] or to remove a pipe. If, on the other hand, the police enters a house in order to arrest someone, merely an authorization from a high-ranking police officer is needed, but the police is only allowed to 'look around searchingly', not to 'search' and thus not to open that kitchen cabinet. In our example, the police entered a house with the permission of the person opening the front door of the house, and smelled marihuana. Three Germans were present in the house, apparently as buyers. They pointed to the accused as being the seller of the drugs. The police found some 6 kg of hashish and marihuana on the ground floor of the house and in the basement just by looking around searchingly. But in addition, one of the police officers removed a waste air pipe in the basement and found another 5 kg of hashish. The defendant declared that he did not live in that part of the house and did not use the basement. The 'Supreme Court' decided that the 'Court of Appeal' correctly argued that the violated norm [55] (i.e. the special authorization to search) did not aim to defend the interests of the defendant (since he was not renting or using the basement). So he was convicted for the possession of *both* 6 kg of marihuana and hashish *and* 5 kg of hashish (the greater the amount, the severer the sentence). But notice: the accused did live in the house; he rented a room and was co-user of the living room, kitchen and bathroom, but not of the basement. And he was convicted for the drugs found by "searching" in the basement.

We could argue that the norm that the procedural defect violated (the illegal search that revealed the hidden drugs in the basement of the house) was meant to protect his interests too, since he was living in the house, although according to the judges, he was not renting or using the basement. But how, then, could he be convicted for the possession of the drugs hidden in the basement if he did not rent or use the basement? Debate is possible. How do judges decide? Remember: with regard to drugs and guns and fencing and whitewashing, in the practice of criminal law the rights of the accused/defendant are often disregarded.

Crime fighters will tend to limit the interests protected by the violated norm, while judges with more compassion for the rights of defendant will reach the conclusion of a relevant violation more easily.

6.3 Social impact

Every now and then there are decisions with a high social impact. Take this example. The 'mayor' [56] of Amsterdam is the authority in regard to public order. The law [57] offers the mayor the possibility to decide that a person who violates local rules [58] can be prohibited from a well-defined area of the town: 'Dealer Nuisance Areas' [59]. There are three degrees of these bans: 24 hours, 14 days and 3 months. The person has to have committed one (or some) less severe offences before the next level can be applied. The 14-day and 3-month bans are actually signed by the mayor personally, as prescribed. However, the much more frequently used 24-hour bans are generally issued by police officers, although the law does not permit the mayor to mandate this authority. The 'Supreme Court' decided in the case of *Ridderkerk* in 2012 that ignoring such a ban, issued by a police officer in a small community, was not a felony since a police officer does not have the legal competence to impose one. [60] A similar case was presented to the Amsterdam 'Court of Appeal'. [61] Following the 'Supreme Court' in the case of *Ridderkerk* would imply a very considerable additional burden for the 'mayor' of Amsterdam: signing all 24-hour bans. Was that acceptable? In the end, purely legal reasoning was decisive for the 'Court of Appeal': since the 'Municipality Act' explicitly excludes the possibility that a mayor 'authorizes' [62] other persons, like police officers, to impose any order regarding the public order, the 'Court of Appeal' decided that it had to be the 'mayor' himself to issue such a ban. However, the 'Supreme Court' recently decided in the appeal of this case that the mayor can authorize police officers, overturning the decision of the Amsterdam 'Court of Appeal', although the 'Supreme Court' was quoting the relevant article of the 'Municipality Act' correctly. [63]

This suggests that the social impact of the decision will have been a very relevant consideration for the 'Supreme Court'. This poses a serious question: is a judge responsible for the social effect of existing legislation? Ought a judge, in view of the social effects, decide contra legem? Or should one opt for the point of view: change the law or change the practice.

However, there are exceptions. Take, for example, insanity. Many defendants nowadays are

refusing to cooperate with a psychiatric evaluation. What should be done if a defendant, accused of several extremely violent rapes of drug-addicted prostitutes but without a recent psychiatric report, refuses psychiatric evaluation and examination, in fear of a hospital order of a judge, leading to a long, very long stay in a forensic psychiatric center? Psychiatric treatment might be the better solution, although its duration is undefined and therefore unacceptable in the eyes of the defendant. A judge will then search the limits of the legal possibilities, for the sake of the accused, the potential future victims, and society.

6.4 Uncertainty of evidence

The final category for judicial jumping to be treated here is the uncertainty caused by contradictory evidence. Let us take, for example, a case of digital child pornography. The data on the hard disk of the computer of the defendant proved that child pornographic pictures were stored on the hard disk on different occasions in 2010. The defendant claims that someone else put those pictures on his hard disk after he took it for repair to a shop in the summer of 2011 (that is not impossible, if the system date of the computer is changed to an earlier date). But how probable is it that an employee of a shop repairing computers would change the system date several times, and then download these pornographic pictures, and then call the police after discovering these pictures while making a back-up of the hard disk? If that were the case, there should be some reason for the employee to frame the owner of the hard disk.

Buruma, a former criminal law professor and now a member of the Dutch Supreme Court, asked rhetorically, being at that time still a professor:

> As a judge, one should be able to explain why three witnesses giving Al Capone an alibi are less credible than one vibrant witness. How is this possible, without falling into rather vacuous platitudes? [64]

Knigge, 'Prosecutor General' [65] of the Dutch Supreme Court, stated that the explanation in the choice of contradictory evidence will often have

> … a rather apodictic character. Of course, the court, in many cases, will not be able to explain why some witnesses are more credible than the negative statement of the accused" [66]

or some of the statements of some other witness, I might add.

In cases of contradictory evidence, the judge has to decide what pieces of evidence are to be used. She has to take many human actions for granted as being normal, and thus disregard alternative stories of the defence or accused (in his/her view apparently unlikely, improbable, unreasonable or even paranoid). In reality, many explanations are possible. But these alternative explanations should be concrete and verifiable, at least more or less.

7. Final remarks

And thus judges jump. The observations presented can be expanded but should be sufficient for this essay. We could use a metaphor of jumping from ice floe to ice floe, slowly sinking and therefore jumping to the next ice floe every time a new legal question, not yet authoritatively decided upon, is being considered. It is true that social interactions will always create new situations, new circumstances, and new uncertainties. All of this jumping seems rather defective and subjective. Let me return to Scholten. I quote his final words in the first edition of his *GeneralMethod of Private Law*:

> But it is better to accept that which is defective and subjective, than to gape at an appearance of objectivity and certainty, which is nothing more than show and doesn't hold out against criticism. None of this alters the fact that the person who pronounced the decision is objectively bound by it. [67]

That might hold true for the person who pronounced the decision; others, like the accused, the victim or the public prosecutor, and society in general, should also be convinced. That is a matter of legitimacy and legitimization. There is no end to this quest on how judges jump, not yet, and perhaps never. However, the quest should continue.

One last question: Why did Scholten write these final lines about the *Worldgeist* (idea of law) or the Divine power? Why did he feel obliged to point at just these two alternatives as sources of intuition and the finding of law? Both transcend vacillating and fallible mortals, like us. Scholten seeks to legitimize judicial decisions as impersonal, as his predecessors did by claiming merely mechanistic subsuming. However, we must not forget that the judge is all too human.

One last remark. We could ask whether or not intuition is actually the final answer. If intuition is based on, grounded in f.g. the *Worldgeist* or the divine power [68], then intuition is merely a bridge between the *Worldgeist* or the divine power and the human, the judge. In that case it would be more useful to concentrate on the *Worldgeist* or the divine power, and limit thinking about intuition to mistakes, biases or possibilities for ameliorating of this bridge. If, on the other hand, intuition *is* the final answer or is to be regarded as the final answer, the final cause, then there is nothing more to say.

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Dictionary

- authorizes. “mandateert,”
- constitutional law. “staatsrecht,”
- Court of appeal. “Gerechtshof (hof),”
- dealer nuisance areas. “dealer overlast gebieden,”
- the disadvantage caused by the procedural defect. “nadeel dat door het verzuim is veroorzaakt,”

- fencing. “heling,”
- finding law. “rechtsvinding,”
- good. “goed,”
- idea of law. “rechts-idee,”
- the interest that the violated rule serves. “belang dat het geschonden voorschrift dient,”
- liberal or extensive interpretation. “ruime of extensieve interpretatie,”
- mayor. “burgemeester,”
- misappropriation. “verduistering,”
- money on a giro account. “giraal geld,”
- press judge. “persrechter,”
- prosecutor general. “procureur generaal,”
- prosecutor-general. “advocaat-generaal,”
- secret of the court. “geheim van de raadkamer,”
- the seriousness of the procedural defect. “ernst van het verzuim,”
- supreme court. “hoge raad,”
- theft. “diefstal,”

Cases

- ECLI: none (HR 23-05-1921 (Elektriciteitsarrest)).
- ECLI:NL:GHSGR:2001:BV5322.
- ECLI:NL:HR:1982:AC1987.
- ECLI:NL:HR:2003:AH9998.
- ECLI:NL:HR:2003:AL6238.
- ECLI:NL:HR:2006:AU9130.
- ECLI:NL:HR:2009:BG7746.
- ECLI:NL:HR:2009:BH3704.
- ECLI:NL:HR:2009:BJ9895.
- ECLI:NL:HR:2010:BK2094.
- ECLI:NL:HR:2010:BL0655.
- ECLI:NL:HR:2010:BL1493.
- ECLI:NL:HR:2010:BM2452.
- ECLI:NL:HR:2010:BN1728.
- ECLI:NL:HR:2010:BO8202.

- ECLI: none (EHRM 15-12-2011, appl.nr. 267766/05 en 22228/06)
- ECLI:NL:HR:2012:BQ9251.
- ECLI:NL:HR:2012:BW5164.
- ECLI:NL:HR:2012:BX4439.
- ECLI:NL:HR:2013:1742.
- ECLI:NL:HR:2013:1158.
- ECLI:NL:PHR:2013:1160.
- ECLI:NL:PHR:2013:1267.
- ECLI:NL:GHAMS:2013: BZ1517.
- ECLI:NL:HR:2013:BZ1890

Legislation

- Dutch Code of Criminal Procedure. *Wetboek van Strafvordering*,
- Dutch Criminal Code. *Wetboek van Strafrecht*,
- *European Convention on Human Rights*,
- General municipal bye-laws. *Algemene Plaatselijke Verordening*,
- General Provisions Act. *Wet Houdende Algemene Bepalingen van Wetgeving*,
- Municipality Act. *Gemeentewet*,
- Regulation Traffic Rules and Traffic Signs. *Reglement Verkeersregels en Verkeerstekens 1990*,

Institutions

NJ, Law Report. “Journal Publishing Important Judicial Decisions,”

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[1] This essay is to be regarded as Part II of an earlier essay: van Manen, “Rechterlijke Rechtsvinding en Intuïtie.” An authorized translation of it can be found at http: //papers.ssrn.com/sol3/papers.cfm?abstract_id=1582662

[2] See Scholten, “General Method of Private Law.” , which is the English translation of the first chapter of Paul Scholten, Algemeen Deel.

[3] “Gerechtshof (Hof).”

[4] “Geheim van de Raadkamer.” See also: van Manen, “The Secret of the Court in the Netherlands.”

[5] “persrechter.”

[6] In this essay the liberal or extensive interpretation, “Ruime of Extensieve Interpretatie.”

of Scholten is left out, “General Method of Private Law,” block 275.

[7] In 1903 Meijers wrote in his thesis, “Dogmatische rechtswetenschap”, that the meaning of law as a system was partly independent of the social reality and thus also partly dependent on this social reality. Seven years later in 1910, Meijers elaborated on the causes and effects of this dependency of law on social reality in his inaugural speech in Leyden, *De taak der rechtswetenschap ten aanzien der vrije rechtsspraak*., referring positively to Zitelmann’s *Lücken im Recht*.

[8] *Wet Houdende Algemene Bepalingen van Wetgeving*.

[9] “General Method of Private Law,” block 12, 9, 14.

[10] Even in a world without legally based private property, theft is possible: usurpation of a collective good as private good will be crime, too, in that case

[11] Scholten, “General Method of Private Law,” block 465.

[12] Ibid., block 298.

[13] Mary could be prosecuted not only for theft, “Diefstal”, but as an alternative for misappropriation, “Verduistering”. This doesn’t change the argument.

[14] “heling.”

[15] “goed.”

[16] ECLI: none (HR 23-05-1921 (Elektriciteitsarrest). See *NJ* 1921, 564. The European way of dating (day-month-year) is used in this essay. NJ, “Law Report, journal publishing important judicial decisions.”

[17] “Hoge Raad.”

[18] “giraal geld.”

[19] “Verduistering.” ECLI:NL:HR:1982:AC1987. In this paragraph, I make no distinction between theft and misappropriation, and borrow some of the cases from Egbert Dommering, “De door het recht bestuurde wereld is altijd virtueel geweest”.

[20] “giraal geld.”

[21] This argument would have been more understandable had the ‘Supreme Court’ used the words *exclusive power* instead of *factual power*.

[22] ECLI:NL:HR:2012:BQ9251.

[23] See Egbert Dommering “De door het recht bestuurde wereld is altijd virtueel geweest”.

[24] finding law, “rechtsvinding.”

[25] “General Method of Private Law,” block 51. See for other examples, block 192, 197,

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[26] Hart, *The Concept of Law*, 1970.

[27] In the Netherlands, there is a state regulation for most foreseeable conflicts. For example, the exemption for the police from obligations, under certain circumstances, is regulated in artt. 29 and 91 of the Traffic Rules and Traffic Signs Regulations, *Reglement Verkeersregels en Verkeerstekens 1990*.

[28] In opposition to Austin (and his "law is the command of the sovereign, control and sanctions"), Hart is convinced that the distinction between law on the one hand and the other normative system of beliefs, attitudes and social actions on the other is a question of secondary rules.

[29] The term *primary norm* is already to be found on p. 2 where Hart is quoting Kelsen.

[30] *The Concept of Law*, 1970, 79 (my italics, NFvM).

[31] Ibid., 92–4. I will not go into the matter of whether or not Hart is right to limit this need for discretion to *hard cases*. Hard cases is a category that in Hart's view seems to represent only a minority of all cases. Scholten, on the contrary, thought that the judge must unavoidably jump in every decision. He argued that all judicial decisions add new law, by finding the law. Discretion is, however, not identical to gap filling.

[32] "Staatsrecht" "General Method of Private Law," block 7.

[33] See e.g. Knegt, "Regels en redelijkheid in de bijstandsverlening." and Aalders, *Regeltoepassing in de ambtelijke praktijk van Hinderwet- en Bouwtoezichtafdeling*., although the concept of informal rules has been critized in a fundamental way, too (see Huppes-Cluysenaer, "Informal Rules Do Not Exist.". Sometimes related concepts are used, like legal culture. See e.g. David Nelken, "Rethinking Legal Culture." and Nelken, "Three Problems in Employing the Concept of Legal Culture."

[34] "General Method of Private Law," block 252.

[35] Ibid., block 260.

[36] Ibid., block 520.

[37] Ibid., block 526,529.

[38] "Rechts-Idee."

[39] "General Method of Private Law," block 530.

[40] As I am.

[41] Article 342, 2 of the Dutch Code of Criminal Procedure, *Wetboek van Strafvordering*.

[42] ECLI: none (EHRM 15-12-2011, appl.nr. 267766/05 en 22228/06).

[43] ECLI:NL:HR:2009:BH3704. And related: ECLI:NL:HR:2009:BG7746.

[44] ECLI:NL:HR:2010:BM2452. Related: ECLI:NL:HR:2010:BK2094. In another case (ECLI:NL:HR:2010:BN1728.) the 'Supreme Court' accepted as additional evidence that the victim, 9 years of age, recognized the defendant the next day on the street. What evidence is this?

[45] ECLI:NL:HR:2013:BZ1890.

[46] ECLI:NL:HR:2010:BL1493.

[47] ECLI: NL: PHR: 2013:1158.The opinion of the Advocate General of 20-08-2013 was published as ECLI:NL:PHR: 2013: 1160.

[48] It could be the case that, for individual judges, ambition plays a role: firm attitudes might favor promotion.

[49] "General Method of Private Law," section. 15,16.

[50] "belang dat het geschonden voorschrift dient."; "ernst van het verzuim." and "nadeel dat door het verzuim is veroorzaakt."; Art. 359a of Dutch Criminal Code, *Wetboek van Strafrecht*.

[51] ECLI:NL:HR:2009:BJ9895., cf. ECLI:NL:GHSGR:2001:BV5322. and ECLI:NL:HR:2012:BX4439.

[52] For example ECLI:NL:HR:2010:BL0655.

[54] Recently:ECLI:NL:HR:2010:BO8202 . In this case, the police knew that there were drugs in the kitchen cabinet before entering the house. Older: ECLI:NL:HR:2003:AL6238. and ECLI:NL:HR:2003:AH9998

[55] *European Convention on Human Rights*. Art 8: guarantees the right to respect for private and family life, implying the right to respect one's home. Since the defendant did not rent or use the basement, he could not invoke this right to respect one's home.

[56] "burgemeester."

[57] Art. 172 jo. 177 Municipality Act, *Gemeentewet*.

[58] General municipal bye-laws, *Algemene Plaatselijke Verordening*.

[59] "dealer overlast gebieden."

[60] Art. 184 Dutch Criminal Code, *Wetboek van Strafrecht*. ECLI:NL:HR:2012:BW5164.

[61] ECLI: GHAMS:2013:BZ1517. The Prosecutor General, "Procureur Generaal" at the 'Supreme Court' advised the 'Supreme Court' to confirm the decision of the Amsterdam 'Court of Appeal': ECLI:NL:PHR:2013:1267. The 'Supreme Court' decided on December 10, 2013: ECLI:NL:HR:2013:1742.

[62] “mandateert.”

[63] ECLI:NL:HR:2006:AU9130.

[64] Ibid. My translation, NFvM.

[65] “Advocaat-Generaal.”

[66] Quoted by Buruma in nr 13. My translation, NFvM.

[67] “General Method of Private Law,” block 529.

[68] In these days neuroscientists offer another alternative, like in previous times Freudians or Marxists.

Acknowledgements

Revision of a paper, which was originally presented at the Paul Scholten Symposium, Amsterdam 15 November 2013. Compared to the first submitted version of this essay, the current version has been substantially adjusted as a result of new insights and constructive critics.