

Law and Context

Scholten's Open System of Law and Legal Harmonisation

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Abstract

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

But, it is not necessary to opt for either of the extreme ends of this everlasting debate. Paul Scholten's theoretical idea about the open system of law offers in-between approach to the problem. Scholten's theory seems like an early version of systems theory which appears to be a kind of hybrid between the mirror-theory and autonomy-theory. Basically, systems theory suggest that legal systems do not mirror society in a simplistic way but rather integrate social facts and normative ideas into the system through law itself via actors like legislators and judges. In other words, context of law is taken into account but it is done on the preconditions set by law itself. Accordingly, external ideas and practices like morality and values are channelled to the legal system. This seems to be the case with Scholten's idea about the open system of law.

In this paper the question of legal-cultural harmonization in Europe, from the point of view of Scholten's key theoretical ideas, is addressed. The approach in this paper is that of comparative legal theory which is a kind of contextual legal theory that takes into account the inevitable relationships between legal theories with their own cultural and societal contexts. The main focus of the paper is centred on the tension between the unity and diversity of European legal culture.

Keywords

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

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1. Outset

A well known philosophical and supposedly ancient Roman argument, of Aristotelian nature, claims that, "Where the human being is, there is a society. Where there is a society, there is law. Therefore: where the human being is, there is law." ¹ This maxim is well known but not distinctly acknowledged in the world of modern legal theory. Of course, no one denies the link between law and human being but the exact nature of this fundamental relationship has been quite tricky to outline. All classical legal theories have ineptitudes when dealing with reality. So-called formalists, like *Hans Kelsen* in his *Reine Rechtslehre*, argue for the autonomous position of the legal system and law in their relation to societal context. Kelsen was, however, not blind to the sociological dimensions of law. But, he chose to underline the legal scientific view and the normative approach which was purified from societal connections (legal system *ought* to do as a logical system without these social or political contacts with the outside reality). ² Others, mainly so-called legal realists, challenge the Kelsenian endeavour for law's separate and autonomous position away from its societal and especially political context.

Both of these opposite ends of legal theory have their counterparts in the theory of comparative law: the debate over legal transplants reflects an identical problem. For *Alan Watson*, the autonomy of law has been as important as it has for Kelsen. According to this view, law does not reflect a society but has a great deal or perhaps even complete autonomy in its relation to society. Watson is not a legal theoretician but a legal historian whose expertise is Roman law. However, much of the work of Watson is indirectly involved in the legal theoretical debate concerning the autonomy of legal system and law. Watson has argued over and over again that law does not mirror a society but actually changes because of internal reasons and in such a manner that the so-called legal

transplants have a key role in this legal change.³

Notwithstanding, since the times of *Montesquieu* for the major part of comparative theoreticians the mirror theory has been favoured more. According to the mirror theory the legal system (or laws of a country) reflects the environmental and social forces of the surroundings. In its varied versions, the mirror theory conceives law basically to be a mirror of society's customs, morals and culture.⁴ But, Watson's legal theoretical autonomy claim sweeps wide and seems to go to considerable lengths in its tendency to underline law's autonomy:

to a large extent law possesses a life and vitality of its own; there is no extremely close, natural or inevitable relationship between law, legal structures, instruments and rules on the one hand and the needs and desires and political economy of the ruling elite or of members of the particular society on the other hand.⁵

Now, it is not necessary to opt for either of the opposing ends in this everlasting debate. *Paul Scholten's* theoretical idea about the open system of law seems to offer an in-between approach to the conundrum. His views also constitute an intriguing intersection between legal theory and the theory of comparative law. Scholten's theory seems like an early version of the systems theory which, in turn, seems to be some kind of a hybrid between the mirror-theory and autonomy-theory. Basically, the systems theory seems to allude that legal systems do not mirror society in a simplistic way but, instead, integrate social facts and normative ideas into the system through law itself via actors like legislators or judges. In other words, the context of law is taken into account but it is done on the preconditions set by law itself. External ideas and practices like morality and values are channelled to the legal system (rules which are already formally valid and in force). For contemporary readers, this seems to be the case with Scholten's pivotal idea about the open system of law.

This author is not a Scholten-specialist by any standards but a Finnish scholar with very little prior knowledge of Scholten's theory and its significance to the Dutch legal thinking. Scholten is not known in the Nordic countries but in the Netherlands he seems to be a prominent figure in civil law and legal theory. Curiously though, as a national legal character, Scholten greatly resembles Finnish civil law professor and legal theoretician *Simo Zitting* (1915-2012) who was not officially a legal philosopher at all. He is not known outside Finland because of the language barrier but even in the 2000s he is still regarded as one of the most influential legal thinkers and doctrinal civil law authorities of the 1900s. He inspired many later theoreticians of which *Aulis Aarnio* is probably the best known internationally.

Basically, the present author's assumptive take on Scholten's view is that his point of view is regarded essentially as a systemic, realist and pragmatist view of legal system i.e. not constructed as a distinct philosophy of law but rather as a kind of internal view on the

function of the judge as a part of a larger systemic whole within the context of general civil law. In this paper I will address the question of legal harmonisation in Europe from the point of view of Scholten's key theoretical ideas. The approach in this paper is that of comparative legal theory which is a kind of contextual legal theory that takes into account the inevitable relationships between legal theories with their own cultural and societal contexts.⁶ Also, some contextual comparisons with Nordic jurisprudential thinking, especially *Alf Ross*, will also take place in order to cast light on particular dimensions of Scholten's theory.⁷ Yet, the main focus in the final argument of this paper is placed on the tension between the unity and diversity of the European legal culture.

2. Open and Dynamic System of Law

Essentially, the key dilemma deals with the relation between law and society. The conundrum, so it seems, has changed little from the 1930s when Scholten's theory was originally formulated. Somehow both of the farthest ideas, mentioned above, seem quite extreme and alien to the realities of professional legal life: either law is (or it ought to be) a closed system or it merely slavishly reflects the surrounding society i.e. law is totally closed or fully open. Nevertheless, if we reject both of the extreme views, then, we must basically argue that legal system (i.e. law) is both closed and open – simultaneously. Scholten's pragmatist view seems to contain both elements by arguing that 1) law is a system, but 2) it is not a fully closed system. The key passage in *General Method of Private Law* maintains that law is an open system:

... 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.⁸

The theoretical basic idea behind this dynamic and open system is that moral values or ideas have an important role *de facto* for law and that these values percolate outside the statutory law in such cases where legal rules are being applied and judicial decisions are being made. Law is a system but it is not a hermetically sealed system because it is in *interaction* with its context through human actors of which judges are but a crucial craft.⁹ Scholten's theory is undoubtedly some kind of kindred spirit of later systems theory, but, it is not similar to the fully flexed systems theories like those of *Niklas Luhmann* or *Gunther Teubner*.¹⁰ However, virtually all these systems-based approaches seem to have the same fundamental idea according to which functional systems like legal systems are operationally closed i.e. only such communications which carry the function specific code may take part in the function system. Accordingly, only such communications which are deemed as legal may be able to reproduce the legal system. Yet, Scholten's view seems rather more flexible than those of more recent theoreticians because he did not underline the autopoietic nature of law but instead brought to the front the openness of law as a system.¹¹

Now, if Scholten's pragmatic systemic view is accepted, then, a legal system is not a static but a dynamic creature: even though no formal legal rules are added in the application of law, the system still keeps transforming. The change follows from the simple fact that each new decision actually adds to the system. There is constant non-legislative alteration going on. In other words, a legal system is both functional and dynamic as to its character. Importantly, in Scholten's focus is the judge as a human actor, not the system itself; the judge is the human actor who injects law's contextual surroundings into law itself. The point of view is internal in its relation to law. Now, this may not in fact be that distant from positivists like Hart and Kelsen because they also allow input from the outside. The key difference seems to be that Kelsen and Hart place much considerable weight on the question concerning valid law whereas Scholten seems to be more interested in the mental, spiritual and personal component which regards the judge's input into the system as a part of the application of law.¹²

Possibly, we might characterise Scholten's theory as a human actor-oriented judicial systems theory which looks from the inside and not from the outside point of view of a legal theorist or sociologist.¹³ In certain ways Scholten comes close to Scandinavian realist *Alf Ross*, who thought that law's normativity (the fact that it binds) ought to be explained by socio-psychological reactions of judges and citizens.¹⁴ The realism of legal theory for Ross was basically an attempt to conceive legal system and its laws as they really are and how they really operate.¹⁵ Ross was enchanted by the dilemma according to which law's normative strength was rooted in the various practices, insights and professional techniques of jurists, yet, at the same time law has inborn weakness because it cannot itself explain how judges actually perform legal reasoning i.e. how they derive normative statements on the basis of legal sources.¹⁶ For Ross, legal norms were directives operating in the minds of judges as psycho-socially binding rules.¹⁷

Scholten's key-focus seems to lie elsewhere than that of Ross' because Scholten took as his starting point the valid law without really asking where the binding force of law's validity was actually derived from.¹⁸ Scholten looks at especially judicial decisions and concentrates clearly on the systematic but open and dynamic nature of law. At the very heart of Scholten's legal theory lies the function of the judge and applying legal rules in concrete cases before the courts. Accordingly, he sees every judicial decision not only as an application of one specific legal rule but also as an application of multiple other legal rules. His core-argument concerning the legal system seems to be the unity of legal system: "legal system is a whole."¹⁹ In this sense, Scholten comes close to Luhmann and Teubner yet his theoretical framing is more down-to-earth and thus more accessible to a practical lawyer. Scholten, so it would seem, has a pinch more legal realism and lawyering pragmatism than the later versions of systems theory.²⁰ Instead of constructing the grand theory Scholten offers virtually hermeneutical description – being a precursory to the later views of *Dworkin* – about law and the role of the judge.

3. Law, Context and Harmonisation

To be sure, it is not the goal of this paper to make an in-depth analysis about Scholten's theory but rather to try to look at how some of his core-ideas may contribute to the present day discussion about legal-cultural harmonisation in Europe. If one supports the idea according to which legal system and law is autonomous from the societal context, then, legal harmonisation appears as an easy task because one needs only to bring about the changes in the formal law and the rest will follow. However, this naïve view is not supported by most because in the modern comparative legal theory the relationship between law and context is not conceived in this simplistic manner. If one supports the idea according to which law mirrors/reflects the society, then, one would have to make sure that the societal and factual differences between the Member States of the European Union would be minimized and then, accordingly, the similar formal legal rules would actually be able to create deep legal-cultural harmonisation.

Or, if one would support the extreme mirror-view like that of *Pierre Legrand*, then one would have to surrender because of the deep cultural legal differences between the major European legal cultures. In the theoretical sense we may see that the argument assumed by this view is that "law is fully determined by the context." Accordingly, Legrand has actually claimed that legal transplants are impossible because legal rules have deeper legal cultural meanings and also the "interpreter's epistemological assumptions which are themselves historically and culturally conditioned" have great importance.²¹ However, the answers provided by Scholten's, if you like, conciliatory theory may be able to navigate a sort of a middle way when it comes to the legal harmonisation in Europe. The problem of law's relation to its surroundings comes to surface when Member States deal with harmonisation: European Union law travels to the Member States and demands convergence between itself and the law of the system of the place it comes to.

When law travels or when it is being borrowed or transported elsewhere we can see legal transfer taking place. This also brings to the surface the question concerning the nature of these kinds of transfers. Today these questions are more timely than what they used to be. We have more legal transfers than before because transfers are heralded by such international or even supranational large scale harmonisation projects as that of the European Union's. It has become almost impossible to maintain that legal transplants or legal transfers would not actually take place. Without a shadow of a doubt, in the European Union legal sphere convergence has been the case. However, this positive law convergence has not lead to abandoning the mirror-argument but rather it has led to refinement of the argument and now what is being claimed is that rules/norms (as written entities) do travel but legal cultures and their accompanying epistemological assumptions do not travel or in other words there can be no genuine (cultural) transportability of law.²² We can see this paradigmatic shift also in the vocabulary of legal transfers which are nowadays not only known as transplants but also, to name a couple of possible

conceptualizations, “legal transpositions” or “legal translations.”²³

Now, if we regard Scholten’s theory as down-to-earth judiciary oriented systems theory of law and if we accept the legal-theoretical view it maintains, then we must also challenge the idea according to which legal transfers can be done simply by creating new positive rules which are supposed to create predetermined and uniform behaviour among the recipient Member States.²⁴ If legal systems are open towards their own cultural surroundings, then, identical positive rules in different legal cultural surroundings of various Member States will certainly not suffice if the goal is genuine legal cultural convergence.

But what do we mean by ‘harmonisation’? When we talk about legal harmonisation we are actually dealing with the question of convergence of law.²⁵ This question has stirred much debate. The debate actually reflects, to an extent, the views concerning the question of the relationship between legal system (or just law) with its societal context and surroundings. Basically, if we deal with the European Union law then harmonisation refers to an attempt to create a consistent European whole of law. This kind of harmonisation has been an important concept for the EU integration because it has consisted mainly of the creation of common standards across the internal market. In practice, harmonisation in the EU has meant cooperation between governments to make national legal systems more uniform and coherent (in harmonised areas of law) in order to gain legal uniformity of Member States to facilitate free trade and protect citizens. Typical European harmonisation efforts have been civil code, constitutional Treaties, principles, and fundamental rights. Crucially, as a process, harmonisation brings about unity but does *not* require a complete or total uniformity.²⁶

Yet, it has been noted that convergence or harmonisation cannot be achieved by formal law only. This is in line with Scholten’s view that suggests that legal systems are open as to their nature which seems to imply that one should not disregard the legal cultural divergence between the Member States. *Geoffrey Samuel* has deduced that there

is the danger of thinking that harmonisation of law can be achieved through the production of European codes. Such codes would simply act as a superficial structure.²⁷

Samuel’s idea goes roughly along the Scholten’s line and is applicable to the question about deep level legal harmonisation. However, if one accepts the autonomous view and thinks that judges are a bit like *Montesquieu*’s machine merely uttering the meaning of law, then the view according to which deep-level legal harmonisation needs only legislation makes sense. But, if one accepts the open systemic view of law, then one has to give considerable weight to the differences and to the diversity of legal cultures that exists among the 28 Member States. But there is more to this since today’s European legal sphere is legally pluralistic i.e. there are many overlapping normative orders in Europe which create differing contexts for law.²⁸ If we follow this argument, then, the European Union

legal system as an open system of law is open not only towards the European Union but also to the national legal cultures of the Member States. As a result, we seem to have a situation where there is no common European legal culture and, in turn, one that appears to prevent demanding harmonising exercises.

The above said seems to end in a cul-de-sac and reduces the question of European legal culture into either political or endless legal-theoretical debate between two different views about the societal context and legal system. Yet, there may be ways out of this deadlock. One of the possible exits might be offered by a kaleidoscopic view of European legal cultures.

4. Kaleidoscopic View of Law and Open System

The idea of looking at the law and at different theoretical ways to conceive it as a kaleidoscope is an intriguing but little used legal theoretical metaphor.²⁹ Nevertheless, with some modification it may also fit together with Scholten's theory. Basically, a kaleidoscope is a device with a circle of mirrors containing loose, coloured objects and bits of glass, through which one looks. When looking into one end, light enters the other end and creates colourful patterns due to the reflections of the mirrors. As a metaphor, it refers to a series of changing phases or events i.e. a kaleidoscope of illusions. Moreover, we may speak of *a kaleidoscope of law*. Law, in this context, means law in a broad general sense, not law in relation to any specific legal system or other defined bodies of rules whether they be domestic, international or supranational.

The core idea of this metaphor is to conceive that there is no single 'right' view of law, i.e. there is nothing in the law/legal sphere which would exclude cultural variety. Concurrently, we have different forms of laws like indigenous laws, religious laws, professional laws, Western laws, African laws etc. So, to use the idea of a kaleidoscope means to embrace the legal pluralism instead of trying to conceive law from one culturally fixed angle only.[30] It is important to stress that this metaphoric approach does not imply surrendering to full relativism: a kaleidoscope creates different images of law but it is still limiting other ways of grasping law even while it allows variations. From the European point of view this makes sense for the significance of legal cultural diversity is embraced. A kaleidoscopic view on law regards all legal systems as open systems in their relation to their contexts. So, the plurality of law is seen in the different images by the kaleidoscope.

To put it short, we have different conceptions of law and legal system in different legal cultures and this fact has now become part of theorising about law. For example, *Werner Menski* has modified legal theory for the purposes of a plurality-focused understanding of law, thus, challenging legal theories which claim universal validity.³¹ And, *William Twining* has injected comparative learning experience into legal theory and, thus, challenged some of the very basic assumptions about law in general.[32] Moreover, both of them underline the importance of placing law in its own cultural context which produces a great challenge to the idea of universal legal theory by adopting a broad unified conception

of law. Consequently, despite commonalities, there is also going to be diversity. Obviously, Menski's and Twining's contextual views about law are different from that of Scholten's. However, their underlying common feature is similar: law (or legal system) must be conceived in relation to its societal and cultural context i.e. law may be a system but not a closed system.

How do these views co-inside? Scholten's essential perspective was that of judicial decision making, his argument was that the law as it is (as a system i.e. legal system) can never completely determine judge's decision, and that a judge always has to add to the system in deciding a concrete case. The kaleidoscope theory basically argues that every legal system has its own legal cultural context. These two views fit together when they place a legal system in interaction with its surroundings and point out that legal actors like scholars or judges are not only dealing with legal system as a logical and normative (autonomous) creature but also as an open system which receives ethical and mental inputs. Or, put differently, a judge is a kind of a human-lens of the kaleidoscope who transmits and refracts the beam of law.

If we give significance to the context of law we must withdraw from the narrow concept of legal system and speak of *legal culture*. As a matter fact, the jurisprudential focus has moved from a legal system to a legal culture. Unfortunately, there is no clear-cut definition on what it actually means and, in fact, it seems that it is not used in a specifically coherent manner.[33] We may characterise legal culture as a kind of extra-plus of narrowly understood law. It brings forth the context of written rules, precedents and legal doctrines. From there it follows that when studying legal systems (comparatively) one needs much more than formal legal rules and institutions. Here we come rather close to Scholten's idea of law as an open and dynamic system. The quintessential idea is that there is more to law than only legal rules or legal institutions and that these things should be taken into account. Of relevance are, for instance, underlying values, beliefs, common ways of thinking and interests of lawyers, lawmakers as well as private citizens.[34] In short, legal culture requires placing law in societal and historical context and, thus, abandoning the narrow point of view of the autonomy theory.[35] This is in line with 'law in context' thinking albeit from a different angle. For Scholten, the judge is in a key position as a kind of a functional adapter between the spheres of social and legal. Altogether, the openness of a legal system is openness towards its social and ethical context.

Crucially, if one looks at so-called grand legal theories something sticks out: the mainstream legal theory seems not able to recognise pluralism and differences between legal cultures or, if you like, differences between contexts of the law. *Grundnorm* or the 'rule of recognition' theories are basically not open because they seek to define the content of law/legal system in an absolute manner. Grand legal theories prefer unity and, thus, seem insensitive to recognising the reality of law as an open system i.e. in connection with its cultural and societal surroundings. *Roger Cotterell* criticises grand legal theories by saying that,

Traditionally mainstream legal theory has set out to demonstrate unity or system in legal doctrine and legal thinking, and to portray legal regimes as relatively comprehensive, unified, and integrated normative structures.³⁶

This tendency is distinct in the theories of Hart and Kelsen but does not seem to apply well in the European Union's legal sphere. But, Scholten's approach seems to be on a more stable footing because it places law/legal system in (functional) interaction with its context. Moreover, the theory of open system of law recognises certain inborn limits:

Law is only valid within a certain time, within a certain circle of people..³⁷

Again, we can detect the extreme views: law is a closed system or law is a totally open system. Classical legal theories wish to establish *the* concept of law and to seek unity or even to establish universal truths about the nature of law, whereas the contextual approach hopes to demonstrate and underline the multiplicity of contexts and concepts of law.[38] Now, if we go back to Scholten it would appear that he does not seem to fit well into the picture of extremes. For him law is a systemic creature but a creature which is open to its context, and to be more precise, open *after* the law has been drafted and passed by legislature. Scholten's view allows external ideas like morality to be channelled into the system from the outside through the judge. However, the *ex post* legislative phase transfer takes place under the preconditions set by the legal system itself i.e. law does not merely mirror the surrounding society although a judge acts as an adapter between law and society injecting the outside world into the sphere of legal system while making legal judgements.

Of course, we may suspect how well Scholten himself was actually aware of legal diversity. Scholten was clearly aware of legal cultural differences and he, for example, stated that English judges are not so bound by positive law as Continental judges are.³⁹ He deemed it as an exaggeration to argue that "the law is at the mercy of the courts," and that adjudication would be independent from the more personal authority of the judge. Scholten recognised a certain amount of personal judicial authority and that there were different degrees of legal authority. For instance, 'finding law'⁴⁰ was about recognizing authoritative legal data including the case law.⁴¹ Yet, Scholten's 'law-finding' does not seem to be similar to Hart's recognition of valid law.

But, what does the above have to do with European harmonisation? The short answer is, rather much. If we choose to follow the realistic systemic view offered by Scholten, then, we must also abandon the simplified solutions when it comes to the question of European legal harmonisation. Besides, fully identical legal rules can hardly be the ultimate goal of European legal harmonisation. There is too much localism which cannot be explained away i.e. there will always be local variations in different areas of the European Union. Yet, to accept full divergence because of legal cultural differences seems to be overstretched. If we

take a good look around us we can actually detect rather much commonality between legal systems of the Member States.⁴² The evidence concerning the force of European Union law is simply too overwhelming in order to be ignored. In accordance, some kind of middle way might make sense. In fact, I believe that Scholten's views may offer fruitful ideas about the legal theoretical thinking upon which a plural and simultaneously unified legal entity may be possible. However, this would call adding pragmatist elements to the theoretical thinking about law. In this, Scholten's views and those of so-called Scandinavian realism may have certain similarities. But, what do we mean by a pragmatist way of theorising about the law?

5. Pragmatic Jurisprudential View?

Up to this point the pragmatist or utilitarian argument concerning the European Union's legal sphere has been presented in favour of the regional or international harmonisation of law. Comparative law normally supports, at least by implication, this view and it has been a technical method which has offered tools for the comparative process of harmonisation.⁴³ However, there is also another type of pragmatist legal thinking which has been attached normally to Nordic law and legal culture which has been described as pragmatic as to its nature.⁴⁴ This specific form of pragmatism seems to have been an elemental part of the Nordic jurisprudence, yet it is also a legal mentality of not engaging in abstract and systemic grand constructions but rather towards practical and policy-oriented thinking.

Now, it is not referred here to the legal theory of Scandinavian realism which has been important in Nordic countries but rather to the general jurisprudential mentality.⁴⁵ Ross placed crucial importance on the role of the judge and the psycho-social element of judicial decision-making (normative joint ideology of judges).⁴⁶ Scholten went further by thinking that every judicial decision is ultimately a kind of an irrational 'jump'⁴⁷: a judicial decision is always finally a jump.⁴⁸ This jump requires a kind of personal involvement and it flows not from the law but from a judge's 'moral part of spiritual life'.⁴⁹ However, there is a catch here. For Scholten the role of Christian 'belief'⁵⁰ or 'conviction'⁵¹ seems like crucial while channelling morality to legal decisions.⁵² Even while Scholten does not seem to express explicitly the role of Christianity it would appear that it was some kind of a general value base for him.⁵³ This differs drastically from the basic tenets of Scandinavian realism which are based on value-nihilism (*värdenihilism*) and, for Ross especially, on ethical relativism.⁵⁴ Notwithstanding, the possible religiousness of Scholten's theory has very little to do with his theoretical fruitfulness and it would be very unfair to truncate the discussion over his theory into a question of religious belief.

For Ross, the professional judge-ideology without any Christian backing whatsoever counted, whereas Scholten based the judge-ideology more upon the judicial 'conscience.'^[55] Ross seems to underline somehow the rational character of judicial decisions whereas Scholten underlines that the final 'jump' is ultimately

always an irrational moment in the judicial decision-making.⁵⁶

Notwithstanding, both ways of thinking give room to the individual judicial intuition which seems not to fit well with formalism or in the strict systems theory.⁵⁷ And, when giving room for law's normativity the mirror-theory does not seem to apply. This kind of pragmatic (Dutch-Nordic) thinking fits methodologically with the plurality of law today because it admits that no formal or doctrinal system can ever actually determine – if we place judicial decision in the centre – how the judge must decide.⁵⁸ Moreover, it is probably no accident that Scholten and Ross were both not purely theoreticians but also experts in doctrinal fields of law (civil law and constitutional law).

However, pragmatism may refer more specifically to certain strands of philosophical thinking like the 1800s American movement in philosophy or it may refer to legal theories like the already mentioned Scandinavian realism. However, if we leave all that aside, we can see that basically pragmatism is a practical approach to problems i.e. practical problem-solving. This kind of common-sense pragmatism means basing one's decisions on practical factors and considerations, rather than dwelling on deeply theoretical notions like the views of systems theory or distinctly normative premises like the urge to create uniform European law or the purity of a legal system in general. In this respect, general jurisprudential pragmatism undoubtedly shares certain dimensions of philosophical realism and pragmatism, yet, it is not attached to those approaches. In sum, Scholten's key ideas seem to offer three kinds of pragmatist cornerstones: 1) law's systemic feature is recognised but legal system is not deemed to be closed, 2) a legal system both mirrors its context but has some element of autonomy too, and 3) a legal system is about logic but there is room for intuition/irrational elements too.⁵⁹ And, in this particular sense I would like to label Scholten's thinking about law also as a *pragmatist pragmatic* theory of legal system. A prime demonstration of this pragmatic approach is the ability to see that 'law-finding' is a logical work bound by legal data and yet there is also judicial freedom.⁶⁰

Now, it might be prudent to bring forth a few words of reservation. It would not appear that Scholten's view was actually close to the substantive content of Scandinavian realism. Scholten's stress-points seemed to be on the systemic nature of law whereas Scandinavian realism viewed law fundamentally primarily as a social phenomenon and Scandinavian theorists were interested in how the law functions in society. For Nordic scholars like *Ross* the question of the rationality of legal knowledge was the key objective of legal science. And, a major undercurrent of Scandinavian realism reflects a general belief in enacted laws as a rational means of engineering society.⁶¹ Scholten focuses elsewhere and takes law's normativity as his starting point; for him law was a systemic but not totally logical whole; he looks from inside the system whereas Scandinavian realists looked from outside the system.

However, if one compares the mentality of Nordic legal thinking and that of Scholten we

may find a common point which may be crucial. It has to do with the size of the States.⁶² In a global view Nordic countries and the Netherlands are small States and if we take seriously the idea put forward by *Montesquieu* about the significance of political geography, then, we see certain commonalities emerging. Systems theory in its fully developed autopoietic version came from Germany whereas Kelsen's formalism came from the Germanic legal culture. Many other influential legal theories these days originate from the Anglo-Saxon legal culture: as names like *Dworkin* and *Hart* indicate. Extending this idea, I risk assuming that Scholten's pragmatic and realist systems theory may also be a by-product of more general Dutch legal culture i.e. instead of a Constitutional Court or Supreme Federal Court there is Hoge Raad etc. Ultimately, this seems to imply that the context of theorising about the law seems to be reflected in the very substance of legal theories themselves. Or in other words, not only law but also legal theories are cognitively open systems.

6. Conclusion

This paper has explored some of the key dimensions of Paul Scholten's legal theory as it was formulated in the *Algemeen deel* in 1931. It has concluded that Scholten's view of law as an open system seems to reduce the gap between the autonomous theories and mirror theories by accepting the systemic and semi-autonomous position of legal system and also accepting that this system is never a closed system. If we follow this line of argumentation, then, it is important to place law in its context but it is equally important to acknowledge a certain amount of independency from the societal and cultural context. There is room for both logic and judicial freedom – simultaneously. This seems to contain a strong legal theoretical and pragmatic message concerning the debate over legal unity and diversity within the European Union legal sphere: because law is always to an extent an open system and because judges are forced to make some kind of irrational jumps when entering into decisions it would not make sense to try to reach for complete uniformity in the culturally diverse legal Europe. Total uniformity would require total contextual similarity which does not give a realistic view of the European legal sphere.

Yet, it would not be quite right to maintain that Scholten's view would exclude legal harmonisation. This is because it underlines the dynamic nature of law as a system. In other words, if the legal integration goes gradually deeper and deeper in a situation where the contexts of law become similar in the Member States, then, it might be possible that in the long run there will be more and more legal-cultural uniformity too. However, this seems to be an argument which speaks for gradual and legal culturally oriented paths towards harmonisation. To make it utterly simple: more directives and less directly binding European Union law. Furthermore, this would mean admitting that cultural pluralism is in fact a distinctive feature of what we can label as European legal culture. Then again, whether this diversity-view is a politically viable route to choose is quite another question even though there can be no doubt of the pragmatic attractiveness of certain key parts of Scholten's legal theory. And, perhaps it should not be forgotten that plurality creates more

dynamics than a statistically unified legal system.⁶³ To conclude, Scholten's pragmatist and realist approach may still have relevance for European lawyers as a reminder of the significance of practical wisdom (Aristotle's ????????).⁶⁴

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Dictionary

- belief. “geloof,”
- conscience. “geweten,”
- conviction. “overtuiging,”
- finding law. “rechtsvind
- moral part of spiritual life. “zedelijk deel van ons geestesleven,”

[1] The usual formulation is in Latin: *Ubi homo, ibi societas. Ubi societas, ibi ius. Ergo: ubi homo, ibi ius*. However, one seldom sees any source for this axiom: sometimes it is attributed to *Ulpianus* or *Cicero*, sometimes to *Hugo Grotius*. In any case, it has been in extensive use by modern lawyers especially within the fields of international law and legal philosophy/theory.

[2] Kelsen separated in his *Reine Rechtslehre* values from reality which is very different from Scholten. Kelsen based his ideas on the fundamental separation of ought (*Sollen*) and is (*Sein*) which “in Zwei verschiedene Sphären fallen” (19). The ontological foundation of separation between “empirischen Welt” and “eine andere Welt, die Welt der Dinge an Sich” (103) is crucial for the “purity” of this theory. Yet, even Kelsen was forced to open up his theory to reality in his Grundnorm-assumption (203-209). However, it is not argued here that this distinction would have been unknown to Scholten. The point is, rather, that

Kelsen's theory was distinctively normative as to its nature.

[3] Watson, *Society and Legal Change*.

[4] Of mirror theory and its critique see e.g. Brian Z. Tamanaha *A General Jurisprudence of Law and Society*, 51–76.

[5] Watson, "Comparative Law and Legal Change," 314–15.

[6] For argument on this kind of contextual approach see Husa, "Kaleidoscopic Cultural Views," 2013, 199. This approach underlines that it is "very difficult to be truly free of the subconscious effect of one's own legal culture or at least those legal cultures best known to the theoretician: some shreds of prejudices and bias seems to be so resilient that they cannot be eradicated from the way one does legal theory...cultural immersion in one's own law is rooted too deep to be ignored."

[7] The fact that Scholten in block 416 actually refers to Ross has no significance here because he was citing early Ross and early Ross (or in Scholten's words "bij een jongeren schrijver") is different from late Ross.

[8] *General Method of Private Law*, block 300.

[9] Scholten dealt specifically with law already in force although he was distinctly aware that law is also an expression of the wills of specific persons or to be more precise "The law is an expression of the will of certain agencies of the State, charged with legislation." *Ibid.*, block 172. Yet, Scholten was not fully happy with this view and he underlined the fact that every new piece of legislation becomes part of the written legal system itself. For him it was the systematic side of law that was of importance; he understood law "as a unity without any contradiction." *Ibid.*, block 185.

[10] For this approach to law in general, see e.g. Teubner, *Autopoietic Law*.

[11] Michailakis, "Law as an Autopoietic System (Review Essay)."

[12] E.g. Hart underlines the validity of legal system and so-called "rule of recognition." According to him: "to say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system" (Hart, *The Concept of Law*, 103. Now, for Scholten it is not so much about recognition of valid law but rather, ultimately, taking the irrational jump and injecting personal mental and spiritual energy into the work of judge (see later ch 5).

[13] To be sure, for Scholten it is impossible to speak of any logical closeness of law. *General Method of Private Law*, block 100.

[14] About Scandinavian realism in general see e.g. Strang, "Two Generations of Scandinavian Legal Realists." 62-82.

[15] One can find, however, many similarities which seem to be somehow "realist" views

of law. To mention one example, Ross *On Law and Justice*, 50. thinks that, “It is merely empty words if legal writers insist on upholding a rule as ‘valid law’, admitting that practice ‘wrongly’ follows a different rule.” Scholten, *General Method of Private Law*, block 344 says along similar lines of thinking that “If it is stated further that in our polity case law clearly is not a source of law, I will answer that this word gives rise to confusion.”(Original Danish text by Ross is formulated a bit differently because it also contains a reference to the French exegetic school which lacks from the English text, and the original text also talks of admitting the difference only in the footnote “i en fotnode meddeles,” Ross, *Om ret og retfaerdighed*, 64–65. Ross, *On Law and Justice*.

[16] But, also Scholten was aware of this problem; law was a positive rule but also a prescriptive rule “at the same time it is prescriptive rule, which only has validity when the requirement to obey is recognized by the person who seeks the law in a concrete case.” *General Method of Private Law*, block 265.

[17] Ross, *On Law and Justice*, 29. “...norms are effectively complied with because they are felt to be socially binding”, the original Danish version *Om ret og retfaerdighed*, 42. is not quite the same for it underlines that the notions of legal directives connect people’s minds and because of this connection the rules may effectively direct the actions of people (judges) “at de tilsvarende handleforestillinger opleves som forbindende i menneskers sind og effektivitet dirigerer deres handlinger.”

[18] *General Method of Private Law*, block 265: “ In this book, in which we did not examine the binding force of law, but took it as a starting point.”

[19] *Ibid.*, block 196: “ Every judicial decision is not only the application of the rule, which is being directly enforced, but also of many others: the legal order is a unity.”

[20] It would appear that Scholten’s work has been experienced particularly useful for practicing (Dutch) lawyers because his view was realistic and pragmatist without being instrumental. Cf. Hartendorp and Wagenaar, “Bijdragen - De praktische rechter. De opmerkelijke relevantie van Paul Scholten voor een eigentijdse rechtsvindingstheorie,” 61.

[21] Legrand, “The Impossibility of ‘Legal Transplants,’” 114.

[22] This view seems to be the key-idea in Legrand’s article Legrand, “On the Singularity of Law.” ‘On the Singularity of Law’, 47 *Harvard International Law Journal* (2006) 517-530.

[23] See O’ru’cu?, “Law as Transposition.” and Langer, “From Legal Transplants to Legal Translations.”.

[24] Basically, this is the argument presented by Gunther Teubner in his much-cited article Teubner, “Legal Irritants.”

[25] Yet, there are certain differences because harmonisation usually refers to the active

attempt of pursuing uniformity through enacting legislation. Convergence is more like a result which may also take place as a kind of natural convergence of law through the use of harmonized principles.

[26] For making a distinction between convergence, unification, harmonisation and legal integration, see Smits, “Convergence of Private Law in Europe,” 220.

[27] Samuel, “Epistemology and Comparative Law,” 72. Samuel actually claims that harmonisation as such has more to do with legal ideology than with legal arguments.

[28] See more details Husa, “The Method Is Dead, Long Live the Methods,” 258–263.

[29] For a fully elaborated argument about the kaleidoscopic legal theoretical view see Husa, “Kaleidoscopic Cultural Views,” 2013.

[30] The present situation is described by Esin Öricü: “today, ‘law’, spans the range of positive law and then moves to non-state law, rules, custom and tradition”, O?ru?cu?, “Developing Comparative Law,” 60.

[31] Menski, *Comparative Law in a Global Context*.

[32] Twining, *General Jurisprudence*.

[33] See for more detailed discussion Nelken, “Using the Concept of Legal Culture,” 2. “But the concept of legal culture is certainly not a simple one. Not only is it used in a variety of ways, some authors have even suggested that it is so misleading that it should be abandoned.”

[34] Cottrell, “Comparative Law and Legal Culture,” 710–711.

[35] This means that law and legal systems are “embedded in larger framework of social structure and culture that constitute and reveal the place of law in society”, Nelken, “Legal Culture,” 375. David Nelken, ‘Legal Culture’, in *Elgar Encyclopedia of Comparative Law*, ed. Jan Smits (Edward Elgar, Cheltenham/Northampton, 2006) pp. 372-381, at 375.

[36] “Comparative Law and Legal Culture,” 727.

[37] *General Method of Private Law*, block 301: “Law is only valid within a certain time, within a certain circle of people”. See also the second chapter of Scholten’s *Algemeen Deel*, I : 180. starts with: “Ieder system van recht geldt alleen op een bepaald oogenblik binnen de grenzen van het territoir van een bepaalden Staat.”

[38] However, if one looks at how legal theory/jurisprudence has been constructed in England, the Nordic countries and Germany from the 19th century, one thing becomes clear: theories were crafted for national doctrinal or practical purposes. See Lobban, “Theory and Practice in the Development of the Nineteenth Century Common Law.”, Lyles, “Tradition, Conviction or Necessity?.” and Schröder, “Das Verhältnis von Rechtswissenschaft.”

[39] Scholten says that “the English judge is not so bound as is often presented, the continental not so at liberty”. *General Method of Private Law*, block 336. He also holds, that in England the judge places precedent above legislation but in the Netherlands it is different. *Ibid.*, block 350. It might be useful to remind that the English law has a quite different approach to positive law than what is the case in Continental Europe. Geoffrey Samuel says that “even if legislation is now by far the most important source of law, the circumstances of a case are always of primary importance,” Samuel, *A Short Introduction to the Common Law*, 2.

[40]“rechtsvinding.”

[41]Scholten: It may be an exaggeration when an American author¹⁵⁵ says, that the law is at the mercy of the courts, however the statement demonstrates the autonomous authority of the judge. There are different degrees of authority. Finding law means the establishment of law in actuality on the basis of data which are acknowledged as authoritative. The case law also belongs to this. *General Method of Private Law*, block 345.

[42] Of course there may also be several different legal cultures within a geographical area like for example Scotland or Canada (both mixing common law and civil law). However, this internal dimension is left out of this paper.

[43]Glenn, “The Aims of Comparative Law,” 70.

[44]Zweigert and Kötz, *Introduction to Comparative Law*, 277.

[45] Obviously Scandinavian realism has been important for jurisprudence in Nordic countries but the ideas have also been thoroughly criticised because of their tendency to reduce legal knowledge to a kind of empirical knowledge concerning psychological and social facts. See e.g. Bjarup, “The Philosophy of Scandinavian Legal Realism.” Jes Bjarup, ‘The Philosophy of Scandinavian Legal Realism’, 18 *Ratio Juris* (2005) 1-15.

[46]Dalberg-Larsen, “Alf Ross and the Sociology of Law,” 44.: “joint ideology, adopted by all of them as part of their own individual ideology.” Here only “late” Ross is taken into account because “early” Ross was a Kelsenian as his doctoral dissertation “Theorie der Rechtsquellen.” clearly shows. Later, he was more inspired by the thoughts of the founder of Scandinavian realism Axel Hägerström (1868-1939). See for more details about Hägerström Lyles, *A call for scientific purity: Axel Hägerström’s critique of legal science*.

[47]“sprong.”

[48]*General Method of Private Law*, block 300 “The decision always involves a leap in the end.” This idea of a jump or leap goes through the *General Method of Private Law*: “et is ten slotte een sprong, gelijk iedere daad, ieder zedelijk oordeel dat is”) i.e. as every moral judgment is a jump, so it is a judicial decision too (block 506 English-Dutch original). Moreover, for Scholten these judicial decisions are ultimately irrational as to their character (block 507) “In zoover is ieder rechtsoordeel irrationeel”). About the ‘sprong’ see

Roermund, “Sprongen bij Scholten.” and Hartendorp and Wagenaar, “Bijdragen - De praktische rechter. De opmerkelijke relevantie van Paul Scholten voor een eigentijdse rechtsvindingstheorie,” 75–76.

[49] block 507 “moral part of our spiritual life”. The whole context of citation: “Thou shalt” or “thou shalt not”, “thou may “or “thou may not”, this is the core of any judicial judgment, even of the judicial decrees which are declaratory or constitutive. Such words can only be uttered by him, who is convinced of it in his own conscience. The legal judgment is rooted in the moral part of our spiritual life; a good judge always desires to impose that which he can justify in his own conscience”.

[50]“geloof.”

[51]“overtuiging.”

[52]*General Method of Private Law*, block 268- 271 and 530. About the religious basic-motivation of Scholten see e.g. Hengstmengel, “Paul Scholten en Herman Dooyeweerd: het gesprek dat nooit plaatsvond,” 27–29.

[53] E.g. *General Method of Private Law* ends with the words “Christan belief”. (block 530) Yet, it might be the case that Scholten was – plain and simple – more interested in the old *prudentia* as opposed to *scientia*.

[54]Tolonen, “Några Synpunkter På Den Skandinaviska Rättsrealism,” 23.

[55]“geweten.”

[56] In the words of Soeharno, “Over rechterlijke intuïtie. Paul Scholtens intuïtieleer en een alternatief model van Aristoteles,” 237.: “altijd een irrationeel moment van de rechterlijke beslissing” .

[57] About Scholten’s intuitive judicial element see e.g. Soeharno, “Over rechterlijke intuïtie. Paul Scholtens intuïtieleer en een alternatief model van Aristoteles.” Ross, *On Law and Justice*, 44. speaks of “emotional intuition” as being one of the factors for when a judge makes a decision in a case. But, Ross *Ibid.*, 59. distances from morality – in line with the general nihilist tendency of Scandinavian realism –which is different from Scholten.

[58] See also Smits, *Omstreden Rechtswetenschap*, 96–98. Smits refers also to *Herman Schoordijk* who claims that the legal system forces a judge to make his value judgments and previous judgments into a state of harmony. Interestingly, the original Dutch version mentions also Scholten, but the English version Smits, *The Mind and Method of the Legal Academic*, 61.) leaves Scholten out .

[59] The ‘jump’ of a judge may be irrational but Scholten *General Method of Private Law*, block 508, also points out that is possible to justify the judgement logically (“het moet logisch *verantwoord* kunnen worden”) by reasoning given to a certain community (“een bepaalde gemeenschap”) and “in this sense every judgement is *rational*” (“in zooverre is

ieder rechtsoordeel rationeel”).

[60]Ibid., block 299, “In every finding of law there is logical exertion, binding to data; there is also always freedom.”

[61]Husa, Nuotio, and Pihlajama?ki, “Nordic Law--between Tradition and Dynamism,” 32–33.

[62]Hondius, “Legal Science in a Small State.”

[63] We may find a theoretical parallel here: Hartendorp and Wagenaar point out that “The rational and irrational elements of such judgments are in a dialectical relationship (*dialektische verhouding*) to each other”Hartendorp and Wagenaar, “Bijdragen - De praktische rechter. De opmerkelijke relevantie van Paul Scholten voor een eigentijdse rechtsvindingstheorie,” 82.

[64] Cf. Ibid., 86–88.underlining the practical wisdom/praktische wijsheid/phronesis dimensions of Scholten’s theory. See for a larger discussion Husa, “The False Dichotomy between Theory and Practice.”

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