# Research Questions and Research Articles

## Introduction to Volume 2020

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### 1. Introduction

DPSP Annual is not oriented primarily at disseminating ideas, but at creating an open platform for a specific, highly specialized research. To keep focus research questions are formulated and articles have to be submitted to one of these research questions. The thirteen research articles of the first Volume 2020 all have their own approach and should be read on their own merits. Here, we focus on the way these articles contribute to the debate DPSP aims to stimulate and facilitate. The answers each article gives and the new questions the article evokes will be described below. The hope is that this will guide the submission of new articles.

Before turning to a description of how the different articles contribute to the research questions, I would like to make two remarks. My first remark concerns the dialogical nature of scholarly debate in the academic philosophy of life, which is fundamentally different from the formal structure of debate as it emerged in Deism. Crucial for a non-Deist conception of the world is the assumption that there is no correspondence between concepts and reality. This means that formal models used to describe, explain and prove will fail because the minor premise in these syllogistic models, i.e., the proposition: “this here is a ……,” is inherently problematic. This is the reason the academic model of old conceives a scholarly discussion as an itinerant, dialogical process. Each quest brings a new topic to the discussion platform, which makes it possible to define a number of formal steps for the purpose of bringing order and clarity to the discussion, but the quest is doomed at some point to get stuck in conceptual problems. A new starting point introduces

a new route, again facilitating a degree of order and clarity, and so on in an inexorable process. An all-encompassing view is simply not possible. At the same time, every voyage enhances one's conception of the world. The routes which DPSP research questions invite scholars to explore will overlap and a meta research question can at some point be proposed to generate a degree of order and clarity in the relationship between different research questions. In my second remark I would like to point out that the thirteen articles have helped tremendously in formulating the scope of the research. I could not have made most of the remarks I make below when I formulated the research questions in 2013-2015. They emerged from reading and analyzing these articles.

**2. Research question Intuition**

*Intuition is one of the main elements in Scholten's theory. Descriptions focusing on this element are welcomed.*

Submitted to this research question

- Niels van Manen, Jumping Judges, Judicial Discovery of Law.

- Niels van Manen -

Van Manen describes how judges jump from ice floe to ice floe, with each new ice floe slowly sinking so that the judge has to jump to the next ice floe every time a new legal question needs to be answered that has not yet been authoritatively decided upon. He refers in this respect to Scholten's *General Method* and Hart's *Concept of Law*. Both authors explain the difficulty in determining the minor premise by which a general rule must logically be applied to an individual case. As van Manen notes (footnote 31), Scholten argues that the problem of the minor term is always present, while Hart restricts it to hard cases. Van Manen draws upon his criminal law practice to show that a judge is often confronted with this problem, which leads to the phenomenon of jumping judges.

Van Manen observes that Hart attempts to solve the problem of the minor term by introducing secondary application rules, and that some decades later sociologists and anthropologists did the same with the introduction of informal rules. Van Manen argues that these attempts merely shift or even hide the problem and that application rules will in turn also be confronted with the same problem of the minor premise.

Van Manen suggests that Scholten should have been content with the conclusion that judges have nothing else to go on than their own intuition about law when they take a leap in making their final decision. He rejects Scholten's belief that Welt Geist and divine power are the only two possible sources of a meaningful whole constituted by all these individual intuitive leaps. Van Manen questions why only these two possibilities would exist, noting that Scholten's reference to Christian divine power would be meaningless to agnostic readers.

**2.a Possible themes for new article submissions to Intuition**

- Van Manen's criticism on secondary and informal rules underscores Scholten's view that every case is potentially a hard case. It seems important to discuss this further, especially because Hart's example of the hat and the church, which van Manen uses, refers directly to Rickert. Rickert argues that the meaning of concepts such as 'sermon' are experienced as the same by different individuals who on the basis of this alone constitute their membership in one specific congregation. Such 'meaning configurations' held in common by many persons within a people or an age, make it possible to 'discover,' for example, the real Greek or German spirit. Rickert thus developed, as he explained, his sociological method of Verstehen as an elaboration of Hegel's theory. [1] The main point here would seem to be the tautological foundation of the meaning configurations.

- Van Manen's image of the jumping judge is an external view which not only rejects the sociological assumption of shared experiences, but also the idea of a subjective truth. The main question here seems to be whether this view ends up in pure relativism or in a substantial view of intuition. Van Manen's practice as a judge plays an important role in the article. He doesn't give a description, however, of what intuition meant for him when deciding cases. Is intuition something like a black box? Did he sometimes toss a coin to decide a case? A further comparative analysis of different conceptions of intuition would be relevant in this respect.

- Van Manen criticizes Scholten's two alternatives of Weltgeist (Hegel) and divine power (Christian belief) and asks whether other possibilities exist. The main issue here seems to be whether (and if so, how) these two alternatives can be reconstructed as full contraries. At first sight it seems fully possible to believe in divine power and at the same time be a Hegelian who believes in a Weltgeist. Further elaboration of this issue is welcome.

**3. Research question Open System of Law**

*The idea of an open or dynamic system is one of the main elements in Scholten's theory. Descriptions focusing on this element are welcomed.*

Submitted to this research question

- Jean-Louis Halpérin, From a Legal Order to a Legal System, Scholten's Contribution to a Theory of Change.
- Jaakko Husa, Law and Context, Scholten's Open System of Law and Legal Harmonisation.

- Jean-Louis Halpérin -

Halpérin begins his article with the remark that Scholten's defense of the issues of 'subjective rights,' 'existence of legal principles above statutory laws,' and 'the importance

of the feeling of justice in the judge's decision' today seem old-fashioned and have been rejected by many legal positivists. He focuses on Scholten's idea of law as an open system to determine whether it is consistent with modern theories of legal change.

Halpérin follows Grabowski's definition of 'legal order' as a set of valid rules, and 'legal system' as an historical succession of legal orders. He believes that the dynamic system of Scholten can indeed be understood in terms of Gabrowski's conception of legal system, but that Scholten's view at the same time prevents establishment of an historical succession of legal orders. A revolutionary succession cannot be established because in Scholten's eyes the law remains bound by what centuries have contributed to it. Slow evolution through incremental changes, such as in the autopoetic system of Luhmann, is impossible because Scholten's understanding of law depends completely on the subjective arbitrary choice of authorities faced with deciding cases.

Halpérin's own view of legal change is that legal systems are so undetermined, and the evaluation of legal interpretations so subjective, that an enormous variety of trends results in different lines in different parts of the system evolving in contrary directions. Legal history cannot be seen as a global, one-voiced history of facts unfolding in a linear fashion. This view could, according to Halpérin, find methodological support in Scholten, were it not contradicted by Scholten's assumption of the existence of trends (block 270 GM).

- Jaakko Husa -

Husa concludes that in contemporary system theory (Luhmann, Teubner), systems are autopoietic, i.e., they only allow communications which carry the function-specific code of the system, while Scholten focuses on the judge as a human actor who brings new subjective elements from outside into the system. Husa points out that Kelsen's Grundnorm and Hart's rule of recognition seek to establish the validity of law in an absolute manner, rejecting Scholten's spiritual and personal component of the judge's input.

Husa investigates whether Scholten's idea of law as open system could work as a bridge in the contemporary debate about legal harmonization in Europe between the view of law as autonomous and the view that law mirrors/reflects society. In the first view, legal harmonization is a legislative task of adapting rules; in the second, legislation can only be effective where it is the result of a process of minimizing the societal and factual differences between the Member States.

Husa finds support in Scholten for his own kaleidoscopic view which moves from legal system to legal culture. This leads to a plurality of legal cultures, i.e., practices of scholars and judges who apply European rules in interaction with different societal and cultural contexts and thus add to these rules. Husa concludes, however, that Scholten's moral/theological approach fits neither in a formal approach nor in a mirror approach toward harmonization because of its focus on the individual, irrational decision of the judge. Scholten's dynamic open system does fit, however, with a jurisprudential way of

arriving at harmonization and could establish cultural pluralism as a distinctive feature of European legal culture. Husa argues that in this jurisprudential context Scholten's approach is a relevant reminder of the significance of Aristotle's concept of practical wisdom.

**3.a Possible themes for new article submissions to Open System of Law**

- Both Halpérin and Husa attempt to place Scholten's view in the contemporary positivist welfare theoretical framework, which is typified by an understanding of law as a set of rules aimed at progressive change and unification. Both authors are attracted to Scholten's subjectivism but conclude that it does not fit within this theoretical framework. Both authors seem to conclude that there is either a formal system or no system at all and merely a variety of histories/legal cultures. This conclusion presents a variety of issues for further exploration.

- What is the integrative process that results in a history or a legal culture? Is it a construct induced by the theoretical perspective of different historical/sociological researchers? Or is it induced by legal protocols for court dialogues and expert annotations of court decisions?

- Scholten defends a dualist mixture: law can *partly* be conceived as a set of rules, and formal systematization is relevant *to a certain extent*. Dualism does not fit in a scientific method of true and false. The question is therefore whether methods of formal ordering already existed before Deism introduced the idea of the purely formal system. Roman law in the classical period has always been praised for its formality and, for example, Weber struggled with how to categorize it in reference to formal rationality when developing his scheme of different forms of rationality. [2] In another publication Halpérin [3] follows the path of a less rigid understanding of ordering, while Husa with his cautious remark that Scholten's jurisprudential view could support harmonization in Europe and his reference to Aristotle in this context, also moves in this direction. Just as with respect to intuition, also here the question arises whether we then end up with relativism. And here again we are confronted with Scholten's 'Hegel or divine power' and the question of what a non-believer is to do with that issue. Digging into the metaphysical/ontological roots of dualism would seem unavoidable. [4]

- Jonas Cohn elaborated an open dialecticism which rejected Hegel's belief in progress: integration and disintegration occur simultaneously. Scholten refers to Cohn in a book he was working on when he died in 1946 and which was posthumously published as an unfinished essay in 1949. Scholten's dualism and dialecticism align with Cohn's view. Scholten's friend Kohnstamm referred to Cohn several times in 1926 when he developed his theological view of Personalism. [5] A comparative analysis of the differences and similarities between the views of Cohn, Kohnstamm and Scholten would be highly relevant. It is important to note in this respect that according to the Wikipedia entry about Cohn, Heidegger prevented Cohn – due to Cohn's open dialecticism - from returning to his old position at the university when he returned from his stay in London during the War. [6]

- Next to these big issues, there are also some smaller themes to be explored:

- A comparative analysis of Scholten's views on history and on Kelsen as expressed in *Collected Papers (VG 2 and VG 15) in relation to the remarks of Halpérin.*
- A comparative analysis of Scholten's views and the contemporaries to whom Halpérin and Husa refer, namely Llewellyn, Zitting and Ross.
- A discussion about the relationship between the ideas Halpérin characterized as old-fashioned (*i.e.,*'subjective rights,' 'existence of legal principles above statutory laws,' 'importance of the feeling of justice in the judge's decision') and the understanding of law as an open system.

**4. Research question Law and Emotion**

*Paul Scholten's General Method of Private Law is still one of the sources most cited by Dutch legal theorists who are interested in the cooperation between reason and emotion in the decision of the judge. The role of emotions in law seems to be a recurring theme and this research question focuses on how today's interest in the theme is similar or different from the way it played a role in ancient philosophy and in the nineteenth and twentieth centuries in the philosophy of the common and civil law traditions.*

Submitted to the research question *Law and Emotion*

Two authors (Maroney and Rapp) were invited to address this theme in direct connection with Aristotle without a required reference to Scholten. Three other authors submitted articles developing the theme in reference to the work of Scholten.

- Terry Maroney, Judicial Emotion as Vice or Virtue, Perspectives Both Ancient and New.
- Christof Rapp, Dispassionate Judges Encountering Hotheaded Aristotelians.
- Marco Gardini, Case-Based Reasoning and Formulary Procedure, A Guard against Individual Emotions.
- Nuno Coelho, Kelsen and Scholten on Reason and Emotion in Solving Cases.
- Luciano Penteado, Trembling Necessity and Analogy, Juridical Reason as Judgment by the Similar.

- Terry Maroney -

Maroney briefly describes the contours of the recent law and emotion movement of interdisciplinary scholarship, which began in the United States and has spread through Europe, the United Kingdom and Australia. A major part of the task of law and emotion scholars has been to find a language with which to persuade traditional legal theorists to understand emotions as something other than irrational. To find this language, Nussbaum, as one of the first, turned to Aristotle who in her view understood the cognitive nature of

emotions. So, e.g., the emotion of fear reflects the perception of an immediate and overwhelming physical danger, which sets the body in motion. In hindsight it is possible to appreciate emotions as correct or incorrect. Maroney is interested in teaching anger-management to judges, to teach them to become aware of their anger and to show it at the right time in an appropriate way.

- Christof Rapp -

Rapp argues that the idea that Aristotle would favor an angry judge rests on an extreme and implausible, anti-intellectualist reading of Aristotle. Living in a well-ordered city, being well-educated by parents and teachers, will according to Aristotle help make people virtuous. Virtuous people will be more able to rely on the appropriateness of their emotions. In this sense there is some interaction between emotions and reason. The idea of anger management suggests a form of direct control over emotions, as if Aristotle's virtue theory aims to provide tips for how to deal with inappropriate emotions. Aristotle's paradigm case is a moral agent who makes decisions concerning his own life and then acts on them. [7] Rapp argues that in reality a judge does not make decisions concerning his or her own life and happiness, nor does a judge act. Therefore, a judge does not qualify as a paradigmatic moral agent in an Aristotelian sense. This is even more so if you take into account that in ancient Greece it was common to have not a single judge but some hundred jurors of the Assembly.

- Marco Gardini -

Gardini recognizes a close relationship with Roman law in Scholten's *General Method*, which he exemplifies in the footnotes. The Romans (between 200 BC and 250 AD) introduced a two-stage procedure for civil law disputes. The first phase of the judicial process was held before a magistrate (praetor) and was devoted to reaching mutual agreement by the parties about the choice of the facts and the formula in the Edict of the praetor by which the dispute would be addressed. Formulas were different from commands or prescriptions. Only two possible outcomes of the case could be formulated: 'if it appears that…, condemn' and 'if it does not appear that…., absolve.' In this way the judge and the law were protected from the impact of emotions. The second phase was held in front of a private citizen who assessed and evaluated the facts as a judge. Any external circumstances, such as misconduct of the judge or mendacity of witnesses, were dealt with in separate proceedings. The sons of Constantine I permanently abolished the formula procedure, declaring that cases should be decided by applying rules directly and without the mediation of formulas which had begun to be perceived as insidious traps.

- Nuno Coelho -

Coelho compares Kelsen and Scholten and the role they ascribe to emotions in legal decision making. Both thinkers recognize an inescapable non-rational ingredient - will and/or emotion - in legal decision making. Kelsen recognizes two phases in the process of

judging: 1) establishing a set of possible interpretations, and 2) making a choice between these possible meanings. According to Kelsen, rationality can only play a legitimate role in the first phase. The second phase could be decided by any method, including ideology, emotions or simply throwing dice. Scholten, however, makes no demarcation in phases and argues that rationality and emotions are mixed into all dimensions of the proceedings used to arrive at a legal decision. In Coelho's view Scholten concurs with Kelsen that, objectively speaking, one can see arbitrariness at work in the judicial decision. Yet Scholten emphasizes that legal theory should be transparent about the judge's task and how this task is founded on the judge's human responsibility for the act of judging.

- Luciano Penteado -

Penteado explains that an interpreter of a legal rule has to accept that things we call similar are similar in many respects, but not in all. While positivist legal theory envisages the interpreter in a world of necessary laws and absolute similarities, Penteado sees the interpreter as confronted with a world of trembling necessity. The context of legal reasoning is much larger than only the perceived similarities between a concrete case and a general rule to be applied, as it also encompasses foundations, consequences, similarities to other cases and so on. Penteado refers in this respect to von Savigny, who argued that the interpretation of law is not learned by theory but through practice, i.e., by studying previous interpretations, comparable to a painter learning how to paint by studying pictures. Interpretation has much more to do with craftsmanship (techné) than with knowledge (episteme). Jurists must guide their affection to be aware of the diversity of their senses and of the multiplicity of applicable rules. This task can be optimized if the person who decides gets accustomed to it in the sense that he or she develops the ability to decide well, a kind of inclination, which is related to emotion. This can be observed in other fields of human experience as well, such as in music, literature and painting, where organization in styles, tendencies and schools is provided by resemblance of attitude, and not by strict intellectual standards.

**4.a Possible themes for new article submissions to Law and Emotion**

- The theme Law and Emotion deliberately places Scholten's theory in the wider context of Aristotle's theory. The question of whether this is a good fit is paramount. Especially relevant in this respect are contributions about the differences between Aristotelianism and Christianity and the implications of these differences for legal theory.

- Another important theme is the difference between two possible interpretations of Aristotle's view of moral agency. Rapp argues that Aristotle's moral agent makes decisions concerning his own life. Another interpretation, referring to Nicomachean Ethics, [8] is that of the father in the household and of the statesman as two paradigmatic examples of moral agent, which would mean that central to the idea of a moral agent is 'to take responsibility - authority – over others.'

- It would be relevant for DPSP research when – as a follow-up on the article of Marco Gardini - the Aristotelian philosophy of life would be used as a research perspective for a comparison between the ancient law of Athens, the law of Rome and the conception of formal law of the Historical School.

- There is clearly confusion about Aristotle's concept of rationality which needs further elaboration. Aristotle distinguishes [9] between 1) the scientific rationality of demonstration and deduction with respect to invariable things, 2) the calculative or deliberative intellect concerning variable things and 3) desire, which is irrational. Although in practice it is often not possible to distinguish these three types, it is important to keep the analytical distinction between them in mind when trying to understand the characteristics of intuition. When Maroney shows interest in anger management by judges, she is referring to the first type of rationality: knowledge of rules like medicine, i.e., 'this treatment will have that effect.' Penteado does not refer to emotions but to type 2 rationality. He explains that imagination founds the conceptualization of decisions. This is what Aristotle calls intuition. Like Aristotle, Penteado refers to art for this imaginative power to conceptualize. [10]

- Emotion concerns sensations which cause movement in the body. Often sensations cause movements in opposite directions. It is desire which determines the way emotions are enacted. Humans are gregarious animals, and this seems to make it adequate to understand desire in terms of a drive for love and leadership. According to Aristotle desire is spirit i.e., the capacity of the soul to love and hate, to command, to be affectionate, indomitable and independent. [11] To Aristotle desire is the irrational side in people, which gives them a free spirit but keeps them illiterate and unorganized. The rational side of people makes them literate and skillful but brings them at the same time into a state of continuous subjugation and slavery. Greek political organization should aim to achieve a midpoint between these two opposites. [12] Coelho astutely observes that the element of desire is missing in Kelsen. It is typical for the Neo-Kantian sociological philosophy of life to ignore authority and judgment. In Athens legal judgment was organized as a public contest between the two possible, equally legitimate positions in a conflict, which were carefully elaborated in the proceedings of the Council. Especially relevant in reference to Scholten's view on the judicial decision as an act is a comparison between the ancient concept of desire and the Christian concept of love.

**5. Research question New Perspectives on Law and Reality**

*Paul Scholten was one of the great exponents of the typical European civil law tradition. He integrated his traditional view within the rising positivism of the 19th century by elaborating the role of the judge. Articles are invited in this research category that describe the new ideas about the role of the judge which emerged after World War II with the development of the welfare state and to compare these with Scholten's ideas.*

Submitted to the research question *New Perspectives on Law and Reality*

The Third DPSP Symposium was combined with a workshop on the open access created to Hartono's Indonesian translation of *General Method*. Contributions from Indonesia were therefore emphasized. Four contributions are revised keynote speeches; one contribution is a revised paper for the workshop.

- Upik Djalins, Paul Scholten and the Founding of the Batavia Rechtsschool
- Shidarta, In Search of Scholten's Legacy, The Meaning of the Method of Rechtsvinding for the Current Indonesian Legal Discourse
- Robert Knegt, Scholten's Reflections on Judges' Practices, An Apology of the Mystery of the Legal Craft
- Marjanne Termorhuizen-Arts, The Reception of the Work of Paul Scholten in the Netherlands
- Tristam Moeliono, Reappraising Paul Scholten, His Influence on the Development of a National Legal System in Indonesia

- Upik Djalins -

Djalins is interested in what she calls the philosophical DNA in the founding of the Batavia Rechtshogeschool in 1924. To find this DNA she does a close reading of Paul Scholten's first philosophical essay of 1915 (VG 2). She asks in particular whether Scholten fits into the framework of the Neo-Kantian Baden school and concludes that this is partly the case to the extent of Scholten's agreement with Rickert that the idea of law cannot be separated from a multiplicity of personal and societal philosophies of life. Scholten departs from Rickert, however, with his attention to the practice of law. Scholten believed that law is about the way philosophies of life are put into practice at a given time and place. When the conceptions of the citizens are not taken into account in establishing rules, it will be impossible for them to recognize these rules as law. Scholten rejects the empirical truth-claim of sociological and historical science and rejects Stammler's idea of an ideal, universally applicable law drawn from reason or rational thought. As a consequence, legal education must necessarily be linked to an understanding and knowledge of local socio-cultural conditions. Djalins characterizes Scholten's deeply philosophical involvement in the founding of the Batavia Rechtshogeschool as instituting a pedagogical tradition that nurtures autonomy and encourages students to think for themselves. Many of the school's graduates were relevant in the later anticolonial upheaval in Indonesian history.

- Shidarta -

Shidarta explains how Scholten's views – especially his theory on law finding (rechtsvinding) –influenced the first generation of Indonesian jurists and contributed to the first format of the Indonesian legal system. He gives an overview of the way Scholten's views were further elaborated by Dutch and Indonesian authors and the translation work which was involved. He shows how in this process Scholten's theory of law finding was disentangled from the broader scope of legal science that Scholten developed in *De Structuur der Rechstswetenschap*

(VG 15), and how something which was a small part of a bigger picture became an elaborate scheme of discovery and justification with his disciples. To investigate the contemporary meaning of Scholten's ideas on law finding, Shidarta discusses a case in which Scholten admirer Bernard Arief Sidharta was invited to court to appear as an expert witness. Arief declared later in an interview that the judge had misunderstood his testimony. Shidarta's conclusion is that the idea of the passive judge predominates in the institutional/political structure of Indonesia and that too little attention is given to the creative activity of judging. Shidarta emphasizes that every case requires the judge to consult many sources in order to take account of doctrine, history, common parlance, the system and social values in the process of finding law. This includes scholarly adapted editions of court decisions which are not only not available in contemporary Indonesia, but even the need for such a source is not publicly accepted.

- Robert Knegt -

Knegt compares Scholten's *General Method* with two traditions of publishing: the mirrors and the mysteries. 'Mirrors for princes' formed a tradition of books in the twelfth to sixteenth centuries which provided instruction to rulers. The mysteries of guild crafts were traditionally kept secret, but books explaining these mysteries started to be published in the eighteenth century. Knegt asks what it was that prompted these books to be published. Comparing the mirrors and mysteries with Scholten's approach, Knegt shows how these accounts, just like General Method, are attempts to bridge a gap between the essentially 'private', intuitive, expert, non-accountable character of activities and the wish or need to nevertheless account publicly for the importance and social impact of these activities. Knegt describes how in practice-oriented social theories – especially in ethnomethodology which draws on linguistics – insights have been developed which align well with Scholten's description of the legal practice. Knegt also specifies the difference between this practice-oriented social theory and Scholten's view: Scholten rejects the shared character of practices, which practice-oriented social theory assumes, the latter rejects Scholten's description of the judge in terms of individual accountability to God.

- Marjanne Termorshuizen -Arts -

Termorshuizen – Arts follows the lead provided by Vogenauer's study of the history of legal interpretation in England and Wales and on the European continent. She concludes that through the ages the pendulum has swung back and forth, from equity and teleological considerations to periods when the Wortlaut was in higher esteem. It was not until the nineteenth century that the strict belief in Wortlauttreue was manifested in all three areas, resulting in or cooperating with positivism and legalism. Termorshuizen distinguishes two different forms of positivism. In the first half of the century, von Savigny (of the historical school) developed a scientific method which via an interconnection between three interpretative approaches (grammatical, historical and systematic) constructed an objective meaning of law which purported to reveal itself in history. In the second half of the

nineteenth century interpretation no longer referred to reconstructing such a self-propelling dynamic of law but took on a purely descriptive nature. This descriptive positivism is the target of Scholten's attack on positivism. Scholten developed a non-radical intermediate position, according to Termorshuizen, based on his way of thinking in continuities, of seeing law as partly logical and partly illogical, and the judicial decision as partly rational and partly irrational. Scholten thus prepared a smooth transition to contemporary legal theory.

- Tristam Moeliono -

Moeliono focuses on the late 1990's in Indonesia, when Scholten's name was largely forgotten and few could access his works. His work was rediscovered by B. Arief Sidharta, but Sidharta's reading of Scholten was colored by the influence of two other legal scholars, Meuwissen and Soediman. The most important point in Scholten's work, in Moeliono's view, is Scholten's belief about pre-existing ideas about law, conceptualized by both judges and legislators. Legal science and legal practice are intertwined in this process of conceptualization and this is how law stays in close relationship to the societal needs of a given time and place. According to Moeliono, Sidharta takes Scholten's point but changes it by relating it to the abstract process of the development of a *Volkgeist* (Meuwissen) and to the national ideology of Indonesian independence expressed in the formula of Pancasila, which rejects individualism and liberalism (Soediman). Moeliono shows that Scholten explicitly rejects the idea of a legal conscience of a nation capable of speaking with a clear voice. Only when individuals as legislators and judges conceptualize their ideas about law in their own national language in an attempt to meet concrete social needs, can a true national legal doctrine emerge in a scholarly discourse. The abstract approach – either theoretical or political, may appear scientific but has nothing to do with law.

**5.a. Possible themes for new article submissions to New Perspectives on Law and Reality**

- It is interesting to note that the theme of legitimacy, which was dominant in the discussions about Paul Scholten in the second half of the twentieth century, is not dominant in these articles on new perspectives. Rather, in all articles we see a renewed interest in ideas about a collective spirit in historical/societal processes, taking into account Rickert's modernization of historical school ideas (von Savingy and Hegel). A new battleground looms with respect to individual agency and the development of legal doctrine, criticizing the shift in the legal doctrine from the individual view concerning concrete conflicts to general abstract ideas about societal processes. The further elaboration of this battleground, given below, will indicate the relevant points for discussion here.

- Djalins calls for attention to the influence of Rickert as someone with whom Scholten both agrees and disagrees. She explains that Scholten's departure from Rickert can be found in the philosophical insight which was foundational for Scholten's ideas about legal education: to awaken in people the drive for personal autonomy. Djalins describes how the

educational methods of the Hogeschool seem to have fueled the drive in Indonesia's youth to fight for political independence from the Netherlands. But, as Moeliono describes, after independence the public interest was turned toward the development of 'a Volksgeist'. The emergence of a progressive overall perspective concerning the amelioration of social life ignored the need – as Moeliono formulates it - for participants in legal proceedings to conceptualize the issues at stake in their own language. In the dialogues in court, the participants not only stress the importance of their personal conception of the conflict, but at the same time conceptualize the other party's conception of the conflict and envisage different possible judgments.

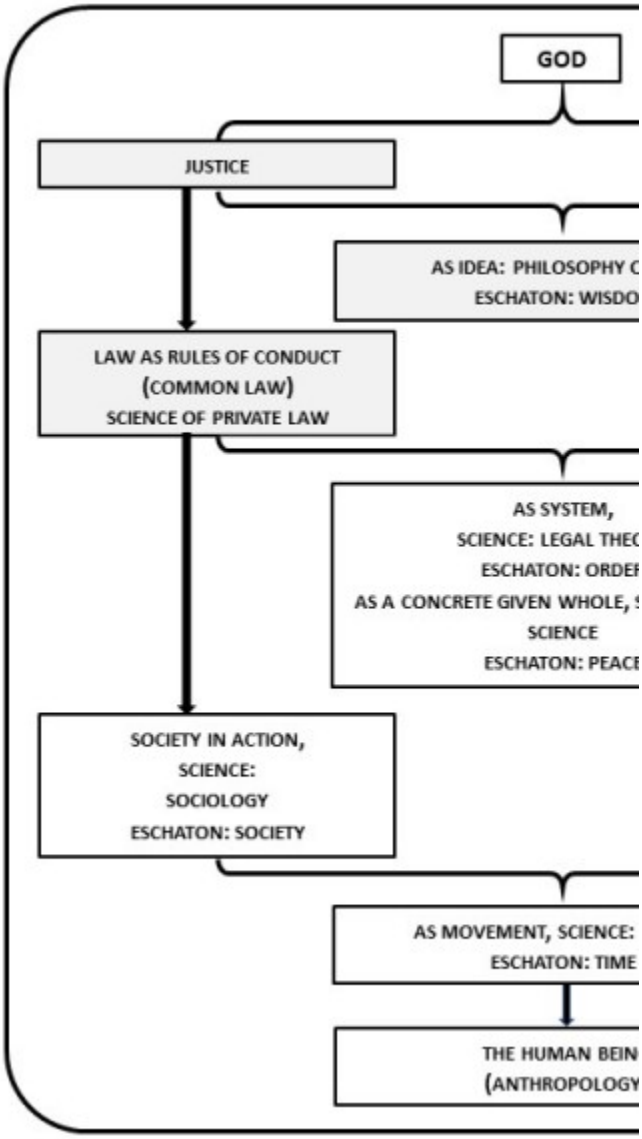
- Termorshuizen-Arts describes Scholten as a continuous or dualist thinker who was capable of absorbing and digesting the main trends of the legal theory of his time and was therefore a forerunner of the hermeneutical legal theory of our time. It is important to note here that Rickert not only explicitly argued for his own dualism, accepting rationality and the irrationality of intuition, but also referred to many other schools in the humanities which do the same, such as the pragmatism of James to which Termorshuizen also refers. [13] As also Knegt notes, many recent developments in social theory pay attention to the intuitive aspects in practices. Knegt also explains, however, the main difference between these new developments and Scholten's view: contemporary social theory accepts the idea of shared practices and emphasizes the need of making these practices publicly intelligible. The focus on being intelligible to the public leads to descriptions that conceptualize practices in terms of progressive advance to collective goals. Scholten's dualism does not reject such a general account, but defends the primordial position of legal practice and its protocols to provide a stage for the exchange of self-related conceptualizations in conflicts which are then publicly evaluated by a third party, who takes a position on the values involved, first with regard to the parties and only in second instance with regard to more general concerns.

- Eyes from far see better. In a simple but instructive way Shidarta shows how the later reception of Scholten's ideas brought a radical eradication of Scholten's dualist way of thinking. Scholten's dualism understands law as a highly complex phenomenon of different practices and theoretical ideas. Shidarta refers to the scheme Scholten made of this complexity in his essay *Structuur der Rechtswetenschap*, [14]and shows how legal theory, while still referring to Scholten, has reduced his view to a very minor part of this complexity. (See the scheme below and the part which is colored gray). It seems of great importance to reconsider this reduction.

- The contributions from the Indonesian authors bring home that in new states even more than in old states, the general welfare theoretical approach of social theory has inhibited the flourishing of practices which are foundational for a non-radical attitude to conflicts. From their work it becomes apparent that legal theory can gain a lot by re-reading Scholten's collected papers. I will follow their lead by choosing *Recht en Levensbeschouwing* and *Structuur der Rechtswetenschap* as the first essays to translate into

English.

Scheme on p. 467 of Paul Scholten: Structuur der Rechtswetenschap




## Bibliography


- Aristotle. “Nicomachean Ethics.” In *The complete works of Aristotle: the revised Oxford translation*, translated by Ross, W. D. and J.O. Urmson, Vol. II. Princeton, N.J.: Princeton University Press, 1984.
- ———. “Politics.” In *The complete works of Aristotle: the revised Oxford translation*, translated by Jowett, B, Vol. II. Princeton, N.J.: Princeton University Press, 1984.
- Borst, Wim. “De dialectiek bij Paul Scholten: haar aard, oorsprong en bronnen.” *Netherlands Journal of Legal Philosophy* 48, no. 1 (2019): 48–65.

- Camus, Albert. *The Rebel*. London: Penguin Books, 2013.
- Cohn, Jonas. *Theorie der Dialektik: Formenlehre der Philosophie*. Darmstadt: Wiss. Buchges., 1965.
- Halpérin, Jean-Louis. “Lex Posterior Derogat Priori, Lex Specialis Derogat Generali Jalons Pour Une Histoire Des Conflits de Normes Centrée Sur Ces Deux Solutions Concurrentes.” *Tijdschrift Voor Rechtsgeschiedenis / Revue d’Histoire Du Droit / The Legal History Review* 80, no. 3–4 (January 1, 2012): 353–97. https://doi.org/10.1163/15718190-000A1212.
- Huppes-Cluysenaer, E.A. “Turning the State into a Household; From Judicial Law to Administrative Law.” In *Legality, Legitimacy and Modernity: Reconsidering Max Weber’s Concept of Domination*, edited by E.A. Huppes-Cluysenaer, R. Knegt, and O.W. Lembcke, 125–55. ’s-Gravenhage: Reed Business, 2008.
- Kohnstamm, Philipp Abraham. *Het waarheidsprobleem: grondleggende kritiek van het christelijk waarheidsbewustzijn*. Haarlem: Tjeenk Willink, 1926.
- Rickert, Heinrich. *Die Philosophie des Lebens, Darstellung und Kritik der philosophischen Modeströmungen unserer Zeit, von Heinrich Rickert.* Tübingen: J.C.B. Mohr, 1920. https://www.gleichsatz.de/b-u-t/begin/rick22c.html.
- ———. *The Limits of Concept Formation in Natural Science: A Logical Introduction to the Historical Sciences*. Translated by Guy Oakes. Cambridge University Press, 1986.
- Scholten, Paul. “15. De Structuur Der Rechtswetenschap.” In *Verzamelde Geschriften van Prof. Mr. Paul Scholten*, I:432–70. Zwolle: Tjeenk Willink, 1949.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[1] Rickert, *The Limits of Concept Formation in Natural Science*., 150 ff and 181ff.

[2] Huppes-Cluysenaer, “Turning the State into a Household; From Judicial Law to Administrative Law.”

[3] Halpérin, “Lex Posterior Derogat Priori, Lex Specialis Derogat Generali Jalons Pour Une Histoire Des Conflits de Normes Centrée Sur Ces Deux Solutions Concurrentes.”

[4] See for a preliminary study of Scholten’s dualism Borst, “De dialectiek bij Paul Scholten.”

[5] Referentie naar Cohn, *Theorie der Dialektik*. Kohnstamm, *Het waarheidsprobleem*.

[6] https://de.wikipedia.org/wiki/Jonas_Cohn

[7] Aristotle, “Nicomachean Ethics.”, *EN* , II, 4, 1105a28-33

[8] *EN*, VI,5,1140a24-b12.

[9] *EN*, VI,1, 1138b36-1139b2.

[10] *EN* VI,7and 8, 1141a9-34 and 1142a25-30

[11] Scholten speaks of the rebel in human nature. “De Structuur Der Rechtswetenschap.”, 469, (paulscholten.eu, block 64.) Compare also Camus, *The Rebel*.

[12] Aristotle, “Politics.”, Pol, VII,7, 1327b20-1328a19.

[13] Rickert, *Die Philosophie des Lebens*., XIII, 25.

[14] Scholten, “De Structuur Der Rechtswetenschap.”, 467 (paulscholten.eu block 60)