Scholten's Reflections on Judges' Practices

An apology of the 'mystery' of the legal craft

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Abstract

Scholten's 'General Method' may be read as a 'Judge´s Mirror', comparable to the 'Mirrors' that have been written in the Middle Ages for the instruction of princes. His methodological writings depart from the central position of the judge as a craftsman: law is primarily something to be done. The duty of the judge relegates the 'irrational' act of 'doing justice' primarily to an 'inspired order of worth' (Boltanski & Thévenot 2006); in Scholten's conviction the conscientious judge standing up for his act, in the end, faces God alone. Meanwhile the judge is, however, subject to the 'civic' duty of giving a rational account but, as to the 'doing' of justice itself, this is of secondary importance. I evaluate the consequences of this position for Scholten's efforts to legitimate judges' decision-making as the performance of public justice.
In the second part of the paper I treat Scholten's account of legal decision-making as an early instance of reflection on legal practice and relate his account to recent social theories that make practices into a central focus of analysis. Much like Scholten's account, these theories are reluctant to attach significance to abstract rules and rather prioritise practices. Despite important points of accordance, it is Scholten's religious stance that in the end precludes a really social conception of judges' practices.

Keywords

Scholten, judge, legitimation, craftmanship, practice theory

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1. Introduction

Scholten's *General Method*[1] remains of great significance to those who want to reflect on the position of the judge in legal decision-making. A firm critic of legalism, Scholten attributes a great importance to the judge as the central actor in the legal system, to an extent that was at his times, and is nowadays still controversial. His legal-methodological argument testifies to an openness to historical and sociological considerations that was not unique and was also embraced by other legal authors of his times.[2] The level, however, to which he allows the dynamics of legal practice to be constitutive of the legal system was uncommonly high.

Scholten's position may at first sight recall that of the movements of free law (early 20th century Germany) and legal realism (the 1930s in the U.S.A), qualified by Schmidt as "instances of a transatlantic 'jurisprudence of life'," [3] but Scholten rejected their naturalism and founded his theory on a religious, Protestant conviction. It has inspired him to a turn away from fruits of the French Revolution, from the dominance of rationalism and from the separation of factual and moral matters. In this paper, though, I have approached his work without delving into his religious inspiration or evaluating his position in legal-methodological discussions. From my rather 'external' position as a sociologist of law, the *General Method* strikes me as an act of publicizing individual practices that are intrinsically hidden from the public view. I approach Scholten's work from two questions. First: how is his *public* account of judicial practices to be understood from a sociological perspective? And, second, to what extent can it be considered a sociologically *adequate* account of these practices? In reply to the first question, I refer to two genres of publications that may help to shed light on an answer: that of the *Speculum regum* ('Mirrors of princes'), mainly 12th-16th century instruction books for princes, and that of publicizing the 'mysteries' of crafts. As to the second question, I refer to recent social theories that make practices a central focus of analysis.

2. Mirrors and mysteries

Scholten's *General Method* stands as a contribution to an ongoing discussion on the methods of law, in which he takes position against dominant legalistic views. It is a massive plea for the crucial position in law of the *judge*, as the person who cannot hide

behind theorizing, but *has to do* law. And it is also a reflexive travel guide to judges on the roads in a complex legal landscape, written in the consciousness that they may afterwards refer to the guide but make their choices in other ways. Scholten does not provide for a ready to use route, he merely outlines, in particular in the sections 18-28 of the *General Method*, the places of importance that a judge might sensibly visit. In the end, every judge has to *find* his own route, in this landscape, to be sure, but partly by taking new directions, thereby re-creating the legal landscape.

Three characteristics of Scholten's account should be underlined, here. First, it brings into prominence the *personal* competencies of judges as conscientious *practical* experts in finding the right routes in the legal landscape. A *rational* account of choices made at a legal crossroads can only be *approximated*, and is regarded as a secondary, somewhat regrettable matter of worldly necessity. Second, his account nevertheless provides *advice* to judges how to orient themselves in this landscape. And finally, it thereby also intends to account for judges' decisions as instantiations of 'the rule of law'. It documents the tension between, on the one hand, personal duty and practical expertise that result in actions based on decision-making hidden to the public gaze, and, on the other hand, the important public consequences of these actions and decisions that require a public account of them. As such it may be compared to documents related to other instances of such a tension. Here I refer to two kinds of them: the 'Mirrors of Princes' and publications of the 'mystery of the trade'.

The first type of documents that I would like to refer to in relation to Scholten's *General Method* is that of the 'Mirrors of Princes'. As from the 12th century a relatively new literary genre began to develop, starting from the publication of *Speculum Regum* ('Mirror of Kings', 1183) by Godfrey of Viterbo.[4] Intended to provide for an instruction of the king in what we would now call a wise govern-ment policy, it can also be read as a legitimation of the prince-ly position of the king. The instruction consisted of a historical account of the good deeds of pre-decessors, stressing the task of the king, not as a warrior, but as a bringer of peace and harmony. It contains a kind of political theory, though presented in a format that intended to bridge the gap between an educated writer and a lay prince: that of instruction by illustration. The idea was that the king ought to be capable of an independent, wise judgment, ought to be able to distinguish between good and ill advice of his courtiers and able to act according to moral – originally in particular: Christian - standards, at a later stage (also) according to rational policy considerations.

Why was this advice published, and not (only) orally transmitted? Its publication suggests that it was not only the prince who was supposed to take example by the images presented in the mirror, but that the *Speculum* was directed at a wider audience at court. It was part of a practice of what has later been termed the *legitimation* of princely powers, of giving an account of the wisdom of princely decision-making as a reason for his subjects to support or accept his decisions. While the literature on 'legitimation' tends to focus upon the relation between rulers and *subjects*, Rodney Barker has argued that legitimation is

primarily directed at an *inner* circle of rulers and ad-ministrators. Legitimacy is a *dimension* of human action in relations in which some have power over others. Legitim-ation "is part of the activity of ruling, and as such contributes to both constituting and defining it."[5] It allows subjects to act in obedience, but still more important is that it makes ruling coherent to rulers *themselves*.[6]

A second type of documents that may help to position Scholten's work is related to the traditions of craft guilds in Western Europe. In the period between (roughly) the 13th and the start of the 19th century these were associations of craftsmen in the cities organizing themselves around specific - what we now tend to call - 'economic' activities, but covering a lot more aspects of common life than those that our current, restrictive term 'economic' allows for (religious duties, common meals, participating in funerals of members, supporting members who are sick, old, or unemployed). Although there have been important regional differences in, for instance, the economic importance of guilds and their type of relations with public authorities, one common element is that they cherished a specific field of usually technical expertise and that they organized the training of apprentices aspiring to member-ship of the trade. Instruction used to be given in the framework of the master-apprentice relation, orally and visually, by showing apprentices what materials to use, how to take care of their quality, how to work on them, etc.

In this respect the craft was considered to be the organized community of those with a common professional practice and the collective treasurer of a common expertise. The craft owed its status within the community to the common capacity to meet a specific part of public needs, while at the same time the internal affairs of the guild and its expertise itself were far from public. No minutes were token of the regular meetings of the guild members and members were strictly forbidden to reveal to outsiders anything discussed in them. The only written documents concerning guilds consisted of the rules laid down in their charters, whose public proclamation was a necessary condition to their enforceability towards 'outsiders'. The expertise of the guild was often referred to as the 'mystery of the trade'. Neither the internal organization of the affairs of the craft guild nor the transfer of this 'mysterical' expertise to apprentices had any affinity to publication, much less in written form. Nevertheless, as from the eighteenth century books start to be published in which 'insiders' explain to 'outsiders' what the expertise of the trade consists of.[7]

The question is, again: why this unexpected trend towards publicity? The books themselves are silent on this matter, so we must have recourse to a sociologically informed guess. A first answer would be that a new social context of awareness of interdependency and new requirements as to the way a societal organisation should account for its contribution to the commonwealth caused former ways of legitimating the position of guilds to lose their validity. And there were, secondly, new technical devices like the printing press that provided for new opportunities: books about the expertise of the crafts could show its complexity to a public of readers without really endangering the exclusivity of the guilds' knowledge base. The part of the expertise that 'really mattered' was still to an important

extent transferred within a practical framework: by the master's showing and the apprentices' doing what was 'correct' production in the trade.

The reason I refer to both these 'mirrors' and 'mysteries' in the context of Scholten's methodological writings, is that they exemplify accounts that try to bridge a gap between secrecy and publicity, between the in part essentially 'private', because intuitive, expert, anyway: *non-accountable* character of their activities, and the need nevertheless to account publicly for their importance and social impact. They are intended to reconcile position-bound convictions of high duties and privi-leged access to expertise, resulting in a desire to be left alone, with a perceived need to account for these practices in public. Stressing the importance of personal capacities of experts has met, in politics as well as social sciences, with the suspicion of being a way of experts to protect their power base. However, the need for a 'discretionary space' for public functionaries or authorities may be recognized in public discourse as well, for instance in current discussions on 'public craftsmanship' in 'frontline organisations'. The need for room of manoeuvring and the importance of personal leadership qualities of function-aries in that kind of organisations are set against the public duty of accounting for the legality of their actions.[8] Scholten is positioning the judge, deciding in private law matters, in such a 'frontline' position: he has only a restricted time to consider the situation, he cannot get away by saying he is not sure, he has to cut the knot, he is expected to *do* justice and he therefore has to *act*.[9]

3. The General Method as an account of the mystery of the judicial craft

Let me set out in more detail why I consider Scholten's methodological account as both a *Judges' Mirror* and an account of the 'mystery' of the judicial craft, starting with the latter (the *Mirror* will return in § 5). The essential element of Scholten's perspective is the position that he accords to the judge: the judge has *the* central position in law. Everything lawyers and legal scientists do, is derived from and is secondary to the central activity of judges:

> All lawyers' work is actual or virtual judges' work. 10

He emphasizes law's character of an art - the '*ars boni et aequi*'[11] ('the art of goodness and equity') – and treats judges' activity of 'doing law' primarily as acts of craftmanship. His model of the judge is that of an experienced craftsman with a weighty duty, who has developed both expertise and a 'feeling' for what decision 'the case requires', and who is always conscientiously ready to perform the act of judgment.

If we compare the 'judicial craft' to that of those who are traditionally seen as craftsmen (for instance a joiner or a painter), the following five elements light up as characteristic of Scholten's account:

3.1 Law is a practice

Law is primarily something being *done* by judges. What is expected of a judge is a deed. The judge decides, his decision is an *act*. In Dutch judicial decrees the transition from consideration to dictum, Scholten notes, is marked by the words 'Doing justice' (*'Recht doende')*, stressing the performative character of the decision as a declaration of will: this is how it should be.[12]

3.2 Every act is creative

No judicial decision can be reduced to the mere 'application' of existing rules, there is always a creative element in it:

> every decision, also those which are so-called done according to the wording of the law, are at the same time application and creation.13

A craftsman's duty is to be always attentive to what his materials require to get at a good result. The judge, likewise, should be attentive to the real complex of relations, including its local customs, in which his decision should make sense.

Against positivist claims to the contrary, Scholten maintains that there can be no prefigured, fixed hierarchy of sources of law. It is for the *judge* to decide on the relevance and weight of different sources. It is important to realize that the *relevance* of the facts that make up a case is already part of the dialectics of life and legal system in which the judge operates.[14] In support of this view Scholten refers to the reported fact that local chiefs in Indonesia

> were not able to communicate the content of the 'adatrecht' (local law), when they could not empathize in an actual case and were not required to decide it.15

If the judge's conscientious judgment on what ought to be done seems to run up against compulsory legal provisions, these provisions should not beforehand block a judge's performance of his duty of 'doing justice', but he is always bound to argue for the fit between his judgment and the legal system.

A craftsman has, as a member of the collective of the guild, a duty to work according to the traditions of his trade but at the same time to be open to the discovery of new ways of attaining what his craft stands for. According to Scholten the creative work of the judge is an art as well: that of *doing* justice (the *ars boni et aequi*). While an art is defined by an ongoing *endeavour*, its works, even the new ones, are accounted for in terms of what *has been already there*. What may be perceived as new in a judge's decision is yet

accounted for in terms of what justice had already been requiring. In the same way that cabinets in new artistic styles are part of what constitutes the joiners' craft, so are, in Scholten's view, innovative decisions in concrete cases (the works of art of judges) included in the system of law.

The responsibility to make (creative) choices as to 'what to do' is, to different extent, inherent in arts in general, and these choices are "irrational" in the sense that they can never be reduced to an 'application' of rules (of art). It has, however, been suggested that judges' actions would need to be opposed to those of crafts-men.[16] The actions of craftsmen would, in Aristotelian terms, be instances of *technè*, merely oriented at producing objects. Judges' decisions, on the contrary, would be based on *phronesis* and be more comprehensive, more adjusted to specific conditions, more based on experience of life than on skills. The main point of this opposition would be the *evaluation* of actions, rather than the way they are being produced. Actions of craftsmen, it is argued, could be evaluated rather unambiguously, in particular in relation to predefined functional requirements (a shoe ought to fit), while those based on *phronesis* would be subject to a more complicated evaluation. I would argue that the difference is less clear-cut: in this argument crafts are being tacitly identified with the standard production of ready-made commodities, while in fact they have considerably differed in the scope of technical and social conditions they had to reckon with. A joiner, for instance, may construct shrines, armchairs or sofas adjusted to specific conditions and wishes of clients; his skills may suggest him to do so with creative variation of stylistic elements; in that he orients himself to the prevailing technical repertoires of his craft brothers, as well as to his social position within the craft and within the city, etcetera. The really important difference is rather, as Scholten has argued, in the public authority position of the judge that urges him (and not so the joiner) to found his decision on a *generalizing* logical argumentation that refers to recognized legal sources. Nevertheless, the judge's decision-making remains primarily an art:

> The intellectual justification of the conscientious decision, however necessary it may be for us, doesn't pertain to its essence.17

3.3 *Craftsman's evidence ('just looking at it makes immediately evident what one should do')*

The quality of a craftsman is often said to consist in his capacity to just take a look at the factual problematic situation to immediately know what he should evidently do about it. The craftsman is an efficient, skilled and competent mediator between the 'objective' world and human aims of bringing some kind of functional, new order into this world. This is a statement both about the entanglement of human action with complex, factual situations, and about the human capacity to (learn how to) handle these. It concerns a craftsman's capacity 'to see and immediately know what to do' that Scholten also ascribes to (experienced) judges:

> not everyone, indeed, has this capacity to see and nobody acquires it without pains. ‘Speaking’ cases 18, in which everybody hears what they ask for, are rare. Experience, acquired in the best way by comparing the multitudinous nuances offered by reality, sharpens the insight. (…) [To experienced judges it may happen that in an apparently clear case] nevertheless suddenly the doubt arises: would this indeed be right, isn’t there something in the case which is different and which rules out application? (…) How could this be possible if not the case had pointed this out to them?19

This capacity therefore goes along with according a much more predominant significance to ‘the facts’ than usual in accounts of legal decision-making:

> the one who takes note of the facts has a solution in mind which he deems right at first sight, a solution which has to be tested and cannot be accepted as long as a place for it in the system has not been found, a logical justification in terms of a rule, but which for the time being satis-fies him, fits the case so to speak. How else would we be allowed to say that the case has come into its own right? In my eyes this is the true core of the so-called law of reality.20

In this sense, it is the case itself that partly determines the decision. To the one who sees it, the case itself can present the solution. As a joiner, assigned to make a chair that is functional and beautiful, just knows how to treat his materials, so a judge, aware of his assignment to do justice, just knows how to do justice to the case at hand. Unlike a joiner, however, he is required to publicly account, afterwards, for how his actions fit into the system of law.

3.4 Expertise is a dynamic, ‘open’ system of practice-related knowledge

Reference to the ‘knowledge base’ of crafts acknowledges the links of current practices with their socio-technical history, but might lead us astray by suggesting a fixity that is not there: craftmen’s practices bring new applications, new techniques, new styles that constantly change or add to this ‘base’. Just like innovations of joiners or confectioners add to, and may partly change the practical knowledge base of their trade, so do practical legal decisions add to the legal system. Decisions of judges are likewise taking part in a systematic whole of rules *and* actions. The legal craft, however, is a *public* craft, and its actions intend to have an impact on the future relations of *citizens*. Therefore judges’ decisions are required to be *explicitly* accounted for in terms of the systematic knowledge base. In view of this partly public character, and of the dynamics of law, in which practical decisions permanently contribute to the change of the system, Scholten characterizes law as an *open system*. Decisions of judges permanently contribute to the development of the system itself.[21]

3.5 Striving for perfection

Members of a craft guild did share, not only a somehow privileged business position, but also the conviction of the honour of their collective position and of the honourable duties that their position entailed. It would not be correct to downplay this as merely a way of

closing the ranks. An aspir-ation to ‘the good’ can be regarded - despite social sciences’ efforts to cut it out of their theories[22] - an important element of any social action, and it definitely is important in that of the members of craft guilds. Scholten regards a collective strive as an essential element of the practice of law as well:

> however much it may be bound, law would not be law if it was not oriented toward something, if there was no aspiration toward something which we imagine.23

All of the five elements mentioned above testify to the craftsman-like position that Scholten accords to the judge, in the craftsman’s practice of ‘doing justice’. What make this craft peculiar, are the judge’s authority to impose his decision on citizens and his concomitant duty of publicly accounting for it.

4. The irrationality of judges’ decisions and their legitimate place in the system of law

Scholten considers every legal decision to be *both* ‘irrational’ *and* part of the rational system of law. How does he combine both statements in an account of judges’ practices that should convince both judges and citizens? Irrationality is a statement on the process by which a competent judge *comes to decide* on what is to be done. From the complementary perspective of the judge’s public *accounting* for the decision, this irrationality is part of its ‘context of discovery’ (as against the ‘context of justification’ of accounting). By the term ‘irrational’ Scholten seems to point at two different features of the decision:

The *irreducible* character of the judge’s evaluative finding what he has to *do*, the famous ‘leap’ that Scholten considers to be an essential element of every kind of praxis:

> In the end [the decision of the judge] is a leap, just like any deed, any moral judgment is.24

As such it is a practical judgment on ‘is’ *and* ‘ought’ at the same time.[25] Its character of a judgment of *conscience*: a judge can only decide if he is himself conscientiously convinced of its rightness. The authority of his office charges him with a personal, individual accountability (Scholten beliefs: ultimately to God) that hides itself from a public view and is to that extent ‘irrational’.

In both aspects ‘irrational’ seems to be used in the Weberian sense of a qualification of actions that are ‘not *accounted for* by reference to general rules’.[26] This does not mean that Scholten would deny the importance of rules altogether. He criticizes theories (he refers to Isay 1929) that completely separate the ‘context of justification’ from the intuitive discovery of right solutions. The fact that reasons for a decision are only formulated afterwards “doesn’t mean that these reasons had not already played a contributive role within the decision, or intuitive glance, the judge [immediately] had.”[27] In the process of acquiring experience the systematic character of law sediments into the cognitive and

motivational constit-ution of judges. Nevertheless, the ‘essence’ of the judge’s decision on what has to be done is ‘irrational’.

While it is definite to Scholten that making a legal decision involves a leap and an act of conscience that are ‘irrational’, the judge is also subjected to an uncontested duty to *justify* the decision in *legal-rational* terms, which flows from the collective character of legal conscience. We do perceive the latter as an inner force that imposes itself upon us, Scholten argues, but we know that it develops in a never ending dialogue within a community. Legal thinking is thinking in community[28] and therefore an intuitively made decision has to stand the test of giving a legal-rational account of it, both as a check on the intuitive judgment in behalf of the judge himself, and in order to publicly account for it, in view of its intended impact on relations between citizens, and in order to allow it to be incorporated in the system of law.[29]

He actually goes one step further and takes the rather axiomatic standpoint that all law, even if not yet formulated, is already systematic.[30] In his exposition of the ‘structure of legal science’ in 1945 he welcomes and embraces the achievements of linguistics and presents law as a comparable reflective knowledge of the order of our juris*diction*.[31] As in language, completely new sentences may be formulated, but the way of speaking and thinking is already systematic.:

> The rule does not yet decide on the concrete decision in a case, but once the decision has been made, it is incorporated into the whole (…). There is a constant dialectics also between decision and rule: the decision comes from the rule, yet exists apart from it and becomes a basis of new rules. A legal judgment is always a judgment on a particular relation between people, though at the same time always a judgment within a certain community; no matter how individual, it is always more than individual. The decision is linked as much to a specific case as to the community within which legal rights are established.32

Language and law are cognate matters, they differ mainly in the authorit-ative character of the latter:

> persons are, while speaking, bound to the language system. It is a reality, just like that of law, which only exists in what is spoken or written, yet logically precedes as a unity all speaking.33

> We must, nevertheless, recognize the phenomenon of speaking in a non-systematic way, that in the way of speaking the system changes. (…) The system is compelling, but not absolutely (…), [it is] an ‘open’ system. It is dynamic, not static. It would, however, be a misunderstanding of the dialectics of our thinking, if one would, on these grounds, deny the systematic itself. (…) in language there is no authority, but in law there is. (..) In language an authority that really sanctions incorrect speaking, is failing.34

From the perspective of legitimation, what distinguishes Scholten’s approach is its appeal to inspiration in the *doing justice* of the judge (and in moral action generally). The deed of

pronouncing judgment may appear to be an *individual* matter of conscience of the judge, but the 'jump' to performance, that it implies, is being accounted for as a general feature of human action. In this sense Scholten accounts for the individual performative act of the judge in terms that invoke a *common* order, religiously constituted. I use the distinction that Boltanski & Thévenot (2006)[35] have made between six different 'common worlds' as a framework to clarify this. They studied social interactions as well as reflexive accounts of 'good' interactions, looking for 'ways of establishing equivalences among beings'. They distilled six mutually incommensurable orders that I list here with (for reasons of brevity) only a minor character-ization: *inspired* (based on passion, creativity), *domestic* (trust, authority), *civic* (equality, solidarity), *opinion* (recogn-ition, celebrity) , *market* (exchange, desire) and *industrial* (functionality, expertise) orders. In terms of this model the remarkable aspect of Scholten's approach is not that he recognizes the (domestic) aspects of the public authority of the judge nor his (civic) duty of argumentation in legal terms, but that he appeals to a common 'inspired' passion and creativity that is itself 'irrational', even if its outcome can, and has to be accounted for in rational, legal terms. Boltanski & Thévenot elucidate the social character of this 'irrationality', an element of judicial decision-making that Scholten may be regarded to account for by writing the *General Method*.

Scholten presumes law to be a coherent unity; he assumes that, just as one can get well versed in a language by using it, speaking law in a practical context can make it self-evident what decision is right. The legal conscience of the judge is a *shared* conscience, like Durkheim's *conscience collective*.It presupposes the existence of a to some degree homogeneous community. But what if societal complexity increases and different languages are being spoken? Scholten does make room for customary law as one of the sources that a judge should take into account – but rather as a dialect within the one language of law. As diversities in society increase, the self-evidence of this legal conscience, and of what the judge-craftsman should do decreases, and Scholten's account of the role of (the only one) legal conscience in legal decision-making gets more problematic.

5. Legitimating the position of judges by way of accounts of legal methods

In the first section I referred to the literary genre of the 'Mirrors of Princes', publications that at the face of it held advice primarily to the king, but can be regarded as at the same time directed at those around, and partly dependent upon him, and as accounting for the authority that has been accorded to him. One might even argue that *publicizing* this advice is in fact part and parcel of a process of investing him with this authority in the first place. I proposed that it could be useful to read Scholten's *General Method* from the perspective of this tradition.

Read as such, the *General Method* is both an account of judges' methods and an apology of the 'mystery' of their craft. Law is primarily a *doing* and the judge is presented as the primary actor of the scene, though in uncomfortable company with law-makers as play-writers and with legal scientists as screen-writers and reviewers. Like the position of the

king of the ‘Mirrors of Princes’, that of the judge has a touch of priesthood; the authority he is invested with both rests on, and supports his privileged capacity to ‘do justice’. The inspired ‘leap’ that the ‘doing’ implies, is beyond rationality, but on this side the judge’s position is that of the privileged interpreter of a legal order that is presented as already systematic of itself. His judgments, like those of the king, are ‘personal’, moral, they have an impact on subjects *and*, above that, they add to the ‘open system’ of law.

The experience that judges develop in an enduring practice of legal decisions provides them, like craftsmen, with an intuition which allows them to be perfect mediators between facts (the particular complexity of a concrete figuration of human relations) and a judgment and decision on both how these relations *are* and what they *ought* to be(come). The public character of the legal craft binds judges to the duty to account for decisions in terms of legal rules, but their primary duty is to ‘do justice’ according to what, they (should) feel, is the only possible right decision. Scholten’s account of legal methods can thus be read as an apology of the inspired freedom and craftsmanship of judges, as a ‘Mirror of Judges’. It states the inevitable discretion of a public authority, while at the same time explicating how he has to position himself in a field of compet-ing forces, in a landscape of legal barriers, easy ways and pitfalls. It is a reflection on the position of the judge, an advice to judges and other legal professionals, but can be read too as a legitimation of the practices of judges in society.

6. The General Method as a reflexive account of legal practices

The *General Method* has been written, Scholten announces in the ‘Preface’ of the book, to offer a reflexive account of the methods that legal decision-makers in private law matters follow. In this enterprise too the *Is* and the *Ought* are not far apart. The *General Method* can therefore be read (a) as an *advice* to legal decision-makers, (b) as a *legitimat-ion* of their practices to both themselves and other readers, but also in part (c) as an attempt to give an adequate *reconstruction* of what judges actually are doing. In this last interpretation, as an account of actual decision-making, its contents may be evaluated against a background of practice-oriented sociological theories of social action.

Scholten approaches legal decision-making from an utterly *practical* perspective, recognizing the *dynamics* of processes in a field of knowledge in which others are predominantly longing for fixity. He in particular rejects giving legal norms the self-evident primacy in relation to behaviour that legal positivism as well as socio-logical functionalism tended to accord them. On the other hand, however, his criticism of theories of rule-governed human practices is not inspired by a “hunter of myth”-like realism (as claimed by Legal Realism and by sociologists) but rather by a particular legal-theological position that includes a conception of the judge as an individual, conscience-driven, primarily *moral* decision-maker.[36]

Both legal and social theories have for a long time reasoned from the basic idea that rules causally precede actual behaviour, either in the normative form of deduction of ‘knowing

what to do' from general, abstract rules, or in the descriptive-analytical form of in part cognitively acquired dispositions (by way of 'internalisation') to act in accordance with social (and at least in part: legal) rules. In *legal* science this rule-causes-behaviour-model has been contested by the free law (*Freirecht*) movement at the start of the twentieth century and by theorists who, in the wake of that movement, argued that rules could not guide, but only be used after-wards to justify legal decisions.

In *social* theory an important strand of criticism of the rule-causes-behaviour-model has been inspired by the achievements of linguistics. In 'ethnomethodology' Harold Garfinkel and others criticized the implicit scientific postulate of rationality in the explanation of social behaviour: the presupposition that social order would be the result of rational choices of individuals, and that it would be sociology's task to predefine the social world and then formulate non-indexical scientific laws in the way the natural sciences are doing that.[37] Ethnomethodologists argued that this approach is at odds with how day-to-day social action is going on and looked instead at social order as something that is ceaselessly being *produced*, stressing instead indexicality, the context-bound character of understanding social action, as a key phenomenon of social life. Order and intelligibility of actions are a local accomplishment; the methods by which actions are performed provide for their intelligibility.

More recently, and building to an important extent upon this ethnomethodological body of theory, several sociologists have made efforts to develop theories that highlight the primacy of practical capacities developed and performed in figurations of interdependency of 'members' of social entities.[38] Against theories that focus on the idea that 'behaviour is following rules', these theories tend to highlight the priority of practices over rules. In important respects they are based upon elements that already figured in Scholten's 'practical turn'. Four of these elements may here be mentioned:

- The field of *practices* is treated as the place where to study what is happening and changing in the subject of study;
- The activities in these fields build upon *shared* practices and/or understandings and it is interactions, skills and interpretations that determine orders *qua* features of practice. The way that those involved in a practice orient their action to each other (instead of reducing everything to individual 'rational choice') is considered an essential feature of social action. Learning what a practice is and enacting it are inseparable.[39]
- The capacity of *rationality* to bring order is *devaluated*, rationality is rather seen as an epi-phenomenon of practices.[40] It is not deemed possible to 'catch' human action in abstract, rule-like formulations.
- Practices are to be analysed as *open sets* of non-regularized action, organized by practical abilities, rules and an *engagement* with the world in which *Is* and *Ought* are being connected.[41]

The common element in all these theoretical enterprises is an effort to account both for the develop-ment of practical abilities or capacities of 'members' that are primarily constitutive of practices, and for the process by which the actions that flow from using these capacities in practices are made intelligible to others and are accounted for in terms that can be shared (as 'sensible' or 'rational'). Indis-solubly connected to this is the additional effort to treat both as moments in a 'dialectical process' (Scholten)[42] or 'hermeneutic cycle'. It is typically in the conception of this latter relation that theories within this strand diverge. Mechanisms that mediate between both can, to mention just two of them, consist in the development of a neural structure in the brain under the influence of social sanctions on behaviour, in which a normative figuration is in this way 'sedimented'; or in the development of 'dispositions and representations' socially kept up by a permanent process of anticipation of sanctions.[43]

Scholten would have stressed the indissoluble connection of what is indicated by *Is* and *Ought* in practices; it is possible to make an analytical distinction, but in practice they are interwoven. Laurent Thévenot criticizes sociology for having forgotten about this. Sociology's efforts to reduce 'norm' to a descriptive term (for instance 'counterfactually stabilized expectations of behaviour'[44]) ignores the *engagement* of social actors, their fundamental 'preoccupation with the good' that always takes part in practical action.[45] In this way Thévenot arrives to a position comparable to Scholten's.

The affinity – at least in the elaboration – between Scholten's approach of legal decision-making and these practice-oriented social theories (about which I had to be short) seems to be obvious, except for a certain ambivalence as to the second of the elements mentioned above: the 'shared' character of practices. Scholten's religious conviction makes him stress the personal account-ability of individual man and pay less attention to a social inter-pret-ation of judges as interconnected decision-makers. By his individual accountability to God, the judge is doomed to appear as a solipsist in a way that social theory would never accept.

7. Conclusions

Scholten's *General Method* is a contribution to legal methodology in private law that stands out by its openness towards practical contexts of judicial decision-making, and by the central significance it accords to the conscientious judge in the dynamics of the legal system. I have interpreted his account in light of two traditions: that of revealing the 'mystery of the trade' and that of the 'Mirrors of Princes'. The *General Method* can then fruitfully be read, first, as an account of the *craftsmanship* of judges. I have set out a number of elements that typify judicial decision-making as a craft. It can secondly be read, like the *Mirrors*, as both an instruction into, and legitimation of judges' practices. In terms of Boltanski & Thévenots 'six orders of establishing equivalences' it is an apology of the *inspired* character of judicial action, paying due respect to the *civic* duty of accounting for it in legal-rational terms. In a third interpretation, as a reconstructive account of how

judges do actually operate, it is a predecessor of social theories which have (as Scholten had) reservations as to the significance of abstract rules and rather prioritise *practices*. Its stress on the dynamics of practices, seeing rationality as rather an epiphenomenon of practices and its attention to the indissoluble normative element in social action constitute remarkable points of accordance with practice-oriented social theories. Scholten's religious stance, however, prevents a really social conception of judges' practices.

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1 Huppes-Cluysenaer et al., ‘General Method’.

2 During the first decades of the 19th century several legal authors favoured the adoption of sociological knowledge into legal theory, in Germany and the Netherlands, for instance: Hamaker, “Recht, wet en rechter’.”; Sinzheimer, “Die Soziologische Methode in Der Privatrechtswissenschaft.”; Wurzel, *Das Juristische Denken*.

3 Schmidt, “Law, Modernity, Crisis: German Free Lawyers, American Legal Realists, and the Transatlantic Turn to ‘Life’, 1903-1933.”

4 Berges, *Die Fürstenspiegel Des Höhen Und Späten Mittelalters*.; Mulder-Bakker, “Het Vorstenspiegelgenre in Oudheid En Middeleeuwen.”

5 Barker, *Legitimating Identities: The Self-Presentation of Rulers and Subjects*.: 30.

6 Barker.: 37. As to the relation between legitimacy and compliance he states that legitimation is a [facilitating] dimension of compliance : “We do not comply *because* we

legitimate compliance. But we cannot readily comply *unless* we legitimate compliance (p. 118).

7 Prak, “An Artisan ‘revolution’ in Late Medieval and Early Modern Europe?”.

8 Hartman and Tops, *Frontlijnsturing: Uitvoering Op de Publieke Werkvloer van de Stad*.; Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*.

9 ‘General Method’., § 28, 505.

10 Scholten, “De Structuur Der Rechtswetenschap.”, 454 (block 38) (original 1945, 32): “ieder eigenlijk juristenwerk [is] werkelijk of gedacht rechterswerk”.

11 455 (original 1945 ,33)

12 ‘General Method’., § 28, 507.

13 ‘General Method’., § 17, 299 .

14 ‘General Method’., § 28, 502, 506.

15 ‘General Method’., § 27, 494 (emphasis in the original).

16 For instance J. Dunne (1993), cited by Hartendorp and Wagenaar, “De Praktische Rechter. De Opmerkelijke Relevantie van Paul Scholten Voor Een Eigentijdse Rechtsvindingstheorie.” (83).

17 ‘General Method’., § 28, 519.

18 ‘General Method’., § 26, 475 translated as ‘cases that “speak”’.

19 ‘General Method’., § 26, 475.

20 ‘General Method’., § 26, 469 (in Dutch “recht der werkelijkheid”).

21 ‘General Method’., § 17, 301-2 .

22 Thévenot, “Pragmatic Regimes Governing the Engagement with the World.”: 59.

23 ‘General Method’., § 17, 304.

24 ‘General Method’., § 28, 506; Scholten, “De Structuur Der Rechtswetenschap.”: 454 (block 38)(original 1945, 32).

25 Scholten, “De Structuur Der Rechtswetenschap.”: 439 (block 11)(original 1945, 11).

26 Weber, *Economy and Society*.: 656-8.

27 ‘General Method’., § 28, 518.

28 Scholten, “De Structuur Der Rechtswetenschap.”, 448 (block 28)(original 1945, 24).

29 “[the judgment] has to rest on authority — it therefore has to be possible to justify it logically” (‘General Method’., § 28, 506).

30 Scholten, “De Structuur Der Rechtswetenschap.”: 442 (block 16/17)(original 1945, 16).

31 Explicitly in Scholten.: 445-451 (block 21-34) (original 1945, 19-27).

32 Scholten.: 443 (block 18) (original 1945, 16, translation RK).

33 Scholten.: 446 (block 24)(original 1945, 21, translation RK).

34 Scholten.: 447- 448 (block 26-27)(original 1945, 22-23 , translation RK).

35 Boltanski and Thévenot, *On Justification: Economies of Worth*.

36 Slootweg, “Over de Grondslag van de Beslissing.”; about the sociologist as a ‘hunter of myth’: Elias, *What Is Sociology?*: ch. 2.

37 In particular: Garfinkel, *Studies in Ethnomethodology*.

38 Among others Barnes, “Practice as Collective Action.”; Collins, *Interaction Ritual Chains*.; Schatzki, “'Introduction’ & ‘Practice Mind-Ed Orders.’”

39 Barnes, “Practice as Collective Action.”: 25.

40 Schatzki, “'Introduction’ & ‘Practice Mind-Ed Orders.’”: 2-5.

41 Thévenot, “Pragmatic Regimes Governing the Engagement with the World.”: 60.

42 Scholten, “De Structuur Der Rechtswetenschap.”: 438 (original 1945, 10).

43 Elder-Vass, *The Causal Power of Social Structures*.; ‘sedimented’ is my term.

44 Luhmann, *Rechtssoziologie*.

45 Thévenot, “Pragmatic Regimes Governing the Engagement with the World.”: 59-60.

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