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Independence of Mind: Moral reasoning and judgment in legal education

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Abstract

This article has as its central question how we can teach our students what judicial independence (at the individual level) means in practice and how we can teach them in developing an independent mind as a lawyer, with a sovereign voice. In doing so, the article explores the idea that law is about making decisions, referring to the work of Jerome Frank and Paul Scholten. This legal theoretical context allows me to introduce three important factors that we have to bear in mind if we seek to foster an education that prepares students for professional life: education as a means of coming into the world, education as a means of suspending judgement and education as a means of moral reasoning. Each are worked out. In the end, the strength of legal education lies in teaching our students legal consciousness: the ability to make judgments, forming opinions, taking a stance, acquire courage, and the responsibility that comes with it.

Keywords: moral reasoning, realism, legal education, legal consciousness, subjectivism

Introduction

The function of the judiciary lies in the administration of justice, which consists of judging individual cases and in doing so it contributes to the development of law. Considering the fluid boundaries amongst state powers, the judiciary is considered to be independent. The Dutch constitutional framework provides for this independence and can be visualised as overlapping constructs on three levels:

1. Independence at the institutional level

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2. Independence at the (hierarchical) organisational level

3. Independence at the individual level

Judicial independence is, at least in the formal sense, guaranteed by the way judges are appointed,[1] and the manner the administration of justice is managed and financed (including the salaries of judges), in which the Council for the Judiciary fulfils the role of intermediary.[2] Indeed, as an institution, the Dutch judiciary enjoys a high standing in Dutch society.[3] Nevertheless, the judiciary is as an organisation under financial pressure.[4] And surely this forms a threat to the independence of the judiciary as an institution. I suggest that this sketch is similar in other democratic countries based upon the rule of law.

But this is not the central question this essay seeks to address. It rather focuses on the independence of individual judges (and courts) in finding the law, how this demands a particular professional attitude and what this implies for legal education. Hence, the central question is how can we teach our students what judicial independence (at the individual level) means in practice and how we can teach them in developing an independent mind as a lawyer, with a sovereign voice.

Essentially, the essay ties in in with the discussion about the role of values in legal education. To what extent should these values be made explicit and how do they impact upon the development of the student as a future legal professional, as Ferris points out.[5] What is our role as educators? Indeed, there

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[1] See art. 117 of the Dutch Constitution. For an extensive review, see: P.M. van den Eijnden, *Onafhankelijkheid van de Rechter in Constitutioneel Perspectief (Staat en Recht nr. 3* (Kluwer 2011).

[2] See also: M.C. Burkens, H.R.B.M. Kummeling, B.P. Vermeulen & R.J.G.M. Widdershoven, *Beginselen van de Democratische Rechtsstaat*, (7th edn. Kluwer 2012.), 161.

[3] See the recent results of the Central Bureau of Statistics: << https://www.cbs.nl/nl-nl/nieuws/2018/22/meer-vertrouwen-in-elkaar-en-instituties>> (last accessed 14 February 2021).

[4] See, for example, the recent letter (September 2018) of the Dutch Association of the Administration of Justice (NVR): https://nvvr.org/uploads/afbeeldingen/20180914-brief-TK-en-MvRB-over-rechtspraak.pdf, and the letter send by a group of individual judges (November 2018) to the Mister for Justice and parliament: <<https://nos.nl/nieuwsuur/artikel/2258390-brandbrief-rechters-wij-vrezen-voor-de-toekomst-van-de-rechtspraak.html>> (last accessed 14 February 2021).

[5] Graham Ferris*, Uses of Values in Legal Education* (Intersentia 2015). See also the series of essays in the special issue of The Law Teacher on the issue, 'The Values of Common Law Legal Education' (2008) The Law Teacher, 42(3), 263-354.

is increasing legal education literature addressing ways of teaching law that goes beyond the case study method or the study of black latter law. A few examples of the last decade are the edited volumes *Affect and Legal Education*, *The Moral Imagination and the Legal Life* and *Academic Learning in Law*.[6]

Independence of individual judges

This is what we usually tell our students: we paint a formal picture of judicial independence and the administration of justice, without problematising this. In doing so, we take a positivist approach, in which we tend to teach students the model of subsumption, based on the case study method. We present students with a set of facts from which a legal question is distilled that is answered by reference to the law in the books, without critical reflection. James Boyd White succinctly put it like this:-[7]

> The implied contract between the student and teacher shifts focus: our insistence to the student that 'You are responsible for these texts [the law in the books] as you have never been responsible for anything in your life', all too frequently entails the acceptance of a correlative as well: 'and responsible for nothing else in the world'.

But do we do justice, in our education and our programmes and courses, to what it is to *judge*? How do judges make decisions – decisions that have, by necessity, an impact on persons that exist behind the parties in individual cases and have an impact on society as a whole?

An example: Urgenda

The Urgenda case is a good illustration. In 2015, the District Court of the Hague found the Dutch State liable in failing to implement measures to reduce sufficiently CO_2 emissions, which for industrialised countries is set at a

[6] Caroline Maughan & Paul Maharg, Affect and Legal Education. Emotion in Learning and Teaching the Law (Routledge 2011); Maksymilian Del Mar & Zenon Bankowski, The Moral Imagination and the Legal Life. Beyond Text in Legal Education (Routledge 2013); Bart van Klink & Ubaldus de Vries, Academic Learning in Law. Theoretical Positions, Teaching Experiments and Learning Experiences (Edward Elgar, 2016).
[7] James Boyd White, 'Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not to Be)' (1986) Journal of Legal Education, 36, 155-166.

minimum of 25%.[8] The court was quite explicit in its formulation. At paragraph 4.83 of the judgment, it states:-

Due to the severity of the consequences of climate change and the great risk of hazardous climate change occurring – without mitigating measures – the court concludes that the State has a duty of care to take mitigation measures. The circumstance that the Dutch contribution to the present global greenhouse gas emissions is currently small does not affect this.

The decision was affirmed on appeal and by the Dutch Supreme Court. This affirmation stressed the State's legal duty to protect the life of citizens, also in the long term, as it is enshrined in the European Convention of Human Rights (ECHR).[9] The decision is hailed as a triumph for the claimant – Urgenda – and the fight against climate change and its (social) consequences.[10] The decision is considered unexpected by many lawyers. Indeed, as Giesen says: the decision in first instance was a very "courageous decision of a judge who explored boundaries", and others considered the decision "revolutionary", in which courts did not avoid dealing with a politically volatile case.[11] At the same time, critics have argued that the courts overstepped their mark in this case, suggesting, as Hommes does, that the decision is a political decision by bringing climate change (and its consequences) within the realm of article 2

[8] District Court of The Hague, 24 June 2015 (Urgenda), ECLI:NL:RBDHA:2015:7196. This is the reference to the English translation. The authoritative Dutch version of the decision is archived under: ECLI:NL:RBDHA:2015:7145.

[9] Court of Appeal of The Hague, 9 October 2018 (Urgenda), ECLI:NL:GHDHA:2018:2610. This is the reference to the English translation. The authoritative Dutch version of the decision is archived under: ECLI:NL:GHDHA:2018:2591. Dutch Supreme Court, 20 December 2019 (Urgenda) ECLI:NL:HR:2019:2006. All decisions and related information can be found at << https://www.rechtspraak.nl/Bekende-rechtszaken/klimaatzaak-urgenda >> (last accessed 14 February 2021).

[10] Urgenda is a Dutch foundation that, according its website, aims "for a fast transition towards a sustainable society" <<https://www.urgenda.nl/>> (last accessed 14 February 2021).

[11] P. van den Dool & T. Ketelaar, 'Zit de rechter nu op de stoel van de politiek?' (2018) *NRC Handelsblad*, 10 October 2018. <<https://www.nrc.nl/nieuws/2018/10/10/zit-de-rechter-nu-op-de-stoel-van-de-politiek-a2417570>> (last accessed 14 February 2021).

and 8 of the European Convention, imposing positive obligations upon the state,[12] dictating policy.[13]

Consciousness of mind

The decision in the Urgenda case leads to many interesting legal questions.[14] One of these questions concerns the relationship between the judiciary on the one hand and the legislator and executive on the other. What is at stake is to what extent the judiciary can cross the fluid boundaries of executive and legislative power. Is the case an example of judicial activism in which political biases and particular world views play an important role in the administration of justice? Is the decision and example of judicial independence gone astray, impermissibly directing governmental policy, or an example of judicial courage?[15] Is it an example of legal realism *in extremis*?

How to think about the judges (such as in the Urgenda case) as independent minds? How to explain the thought processes that involve making choices and decisions that do not necessarily follow from the law directly or logically. In addressing these questions, the focus of this essay is first on the relationship between judicial independence and professional and ethical attitudes, and second on how to enshrine this in legal education. The strength of legal education should lie in teaching our students legal consciousness: the ability to make judgments, forming opinions and taking a stance and to acquire the

[12] W. Hommes, 'Het hof bedrijft politiek met Urgenda-uitspraak' (2018) *De Volkskrant*, 16 October 2018. <<https://www.volkskrant.nl/columns-opinie/het-hof-bedrijft-politiek-met-urgenda-uitspraak~b528c988>> (last accessed 14 February 2021).

[13] For a detailed analysis of the appeal court's decision, see: L. Burgers & T. Staal (2019) 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in Urgenda v The Netherlands, in: R.A. Wessel, W. Werner & B. Boutin (eds.) *Netherlands Yearbook of International Law 2018* (T.M.C. Asser Press 2019). See also: <<https://ssrn.com/abstract=3314008>> (last accessed: 14 February 2021).

[14] See, for example, questions concerning risk regulation: Elbert de Jong 'Urgenda: Rechterlijke Risicoregulering als Alternatief voor Risicoregulering door de Overheid' (2015) NTBR 46; health and safety risks through non-intervention, Roger Cox, 'Klimaat, Veiligheid en Recht' (2015) Cahiers Politiestudies 38, 197-233 (Cox was one of the lawyers for the claimant in Urgenda); public interest litigation, Liesbeth Enneking, Elbert de Jong, 'Regulering van Onzekere Risico's via Public Interest Litigation' (2014) NJB 1136, 1542-1551; and the complexity of harmful consequences of climate change, Tim Bleeker, 'Aansprakelijkheid voor Klimaatschade: een Driekoppige Draak' (2018) NTBR 2, 2-11.

[15] See for example Van Gestel & Loth for an insightful analysis; Marc Loth & Rob van Gestel (2015) 'Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0' (2015) NJB, 37, 2598-2605.

(judicial) courage, referring to Van Domselaar,[16] and the responsibility that comes with it.[17]

Finding the law, professional attitude and legal education

Sections 2 and 3 focus on individual judicial independence and the idea of "decisional choice" in finding the law. This is done by reference to legal theory, in particular the work of the American jurist Jerome Frank,[18] and the Dutch legal scholar and practitioner Paul Scholten.[19] Jerome Frank (1889-1957) was an American legal realist (and judge) who emphasised that "justice requires close attention to trial courts, to their judges, jurors and witnesses",[20] or in other words, to the surrounding context in which law is used, by whom and for which purpose. Scholten (1875-1946) was a Dutch legal scholar and practitioner writing around the same time as Frank. Scholten too stresses the importance of understanding why "a decision is made one way and not another, what the factors are which determine that decision".[21] Frank and Scholten find each other in the enclosed space of non-rationality – there where rational reasoning stops and a decision is or must be made. The realm of consciousness resides in this enclosed space. With non-rationality is meant that a decision does not follow from the facts and the law as if it were a (simple) syllogism – it also involves normative evaluation and hence a choice.

Section 4 seeks to integrate the two approaches on judicial decision making, and addresses the question how we can and should teach our students if we take seriously that decision-making – coming to judgments – entails more than applying rules to facts. It involves a process of *moral* reasoning as well as

[16] Iris van Domselaar, 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship' (2015) NJLP (1), 24-46.
[17] To note: legal consciousness here is not meant as a socio-legal concept, referring to how a social group experiences law in society; see for example: P. Ewick & S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998).
[18] Jerome Frank, *Law and the Modern Mind* (Transaction, 2009).
[19] Paul Scholten, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands Burgerlijk recht: Algemeen Deel* (Tjeenk Wilink 1931), Preface [*v*]. The Digital Paul Scholten Project works on a full English translation of Scholten's work; see: << https://www.paulscholten.eu/>> (last accessed 14 February 2021). In this contribution, that translation, referred to as *General Part*, is used (unless otherwise indicated). It refers to the paragraph in the English translation and to the [*page number*] in the original Dutch edition of 1931.
[20] S.A. Beatty. 'On Legal Realism – Some Basic Ideas of Jerome Frank' (1959) *Alabama Law Review*, 12(2), 239-253, 239.
[21] Scholten 1931, n 19, Preface. [*v*].

rational reasoning. Section 4 spells out a didactic of moral reasoning. Decision-making is an intrinsic trait of any professional who is called upon to make decisions at the detriment to or for the benefit of others. What is our task as legal philosophers and educators here? Is it enough that we teach the theory, or should we do more and explore with students what it is to act, decide and take responsibility?[22]

Finding law: Frank

Legal realism

American legal realism, as Schauer noted in Twining's *Karl Llewellyn and the Realist Movement*, is "contested terrain" about what is central to the realist claim.[23] Is it the relative importance of facts in adjudication, the sequencing of decision making and justification, the personality of the judge or the observation that law is indeterminate and instrumental? Other perspectives on realism consider it an empirical and external method of examining law and what lawyers do. More recent, in the tradition of critical legal studies, realism challenges law's assumed neutrality. Be that as it may, the core of legal realism, arguably, is that it takes issue with the old positivist view that adjudication is the application of rules to facts. Obviously, this sells legal positivism short, in particular when we consider the immense impact of people like Herbert Hart. At the same time, it could be argued that some of the realist insights may have paved the way for Hart's *The Concept of Law*.[24] Realism fills the gap of positivism as it addresses that what lies beneath law or is concealed by it.

It is not the aim to provide an analysis of the realist movement. Rather, I focus on one exponent – Jerome Frank – to try to illustrate the central theme of my contribution, *viz.* what it is to find the law and how to cope with the (professional) responsibility that comes with it. As Twining noted, *Law and the*

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[22] To be sure, it is not the aim of this contribution to give a critical analysis of law's indeterminacy, I take that as a given.

[23] William Twining, *Karl Llewellyn and the Realist Movement* (2nd edn. Cambridge University Press 2012), with a foreword by Frederick Schauer, ix.

[24] Hart observes in Chapter VII legal realism's rule scepticism but does so in the context of the open texture of law and the idea that, in any event, judges reach decisions "by genuine effort to conform to rules consciously taken as guiding standards of decision or, if intuitively reached, are justified by rules which the judge was antecedently disposed to observe and whose relevance to the case at hand would generally be acknowledged" – H.L.A. Hart, *The Concept of Law* (2nd edn. OUP 1994), 141. See also Schauer, in Twining (2012), xxiv (note 48 in the text).

Modern Mind is not without controversy, considering its polemic and provocative claims.[25] But, I have selected Frank predominantly because Frank, like Scholten, emphasises a normative element, showing that adjudication involves selection, evaluation and choice without these being accounted for in a logical way. It shows that in adjudication there is more at stake, of which students should be aware when studying law and judicial decisions.

Frank's realism

Reading *Law and the Modern Mind*, the four questions central to the realist movement (as mentioned above) are addressed by Frank:

- The relative importance of facts in adjudication,
- The sequencing of decision making and justification,
- The personality of the judge and other biases, and
- Law as indeterminate and instrumental

Frank is sceptical, to say the least, about the positivist view on adjudication: "in theory, the judge begins with some rule or principle of law as his premise, applies this premise to the facts, and thus arrives at his decision".[26] In doing so, Frank rejects the idea of legal certainty, considering it a legal myth.[27] The law, is per definition "vague and variable" as it deals with "human relations in their most complicated aspects"; and Frank considers this of "immense social value".[28] Indeed, law deals with social interaction and provides a normative framework for expectations and their disappointments in respect of social interdependency.[29] The law allows for redress when an expectation – respect my property, commit to the contract, reduce co_2 emissions as agreed – is violated or disappointed. But it falls short of stipulating when exactly property is not respected, when a contract is not committed to, when agreements are not met. The facts, and their evaluation, here are key rather than the law. Frank

[25] Twining 2012, n 23, 71.
[26] Frank 2009, n 18,101.
[27] Frank partially explains this myth by reference to child psychology and the "father-as-infallible-judge", see Frank (2009), 19, inspired, in his time, by the work of Freud and Piaget.
[28] Frank 2009, n 18, 6-7.
[29] Cf. Niklas Luhmann, *Law as a Social System* (2004 OUP), 142 ff.

argues that a judicial decision depends to a large extent upon what a judge "believes to be the facts of a case" and it makes Frank a fact sceptic as he observes himself.[30] It is incorrect in his view to consider adjudication as the mere application of a rule to the facts. It is also incorrect to take facts at face value, as if they were data. Rather, a trial court finding or establishing the facts involves "a multitude of elusive factors" such as mistaken or contradictory witnesses and (hidden or unconscious) prejudices and biases.[31] It leads him to conclude that "[t]he law, therefore, consists of decisions, not rules".[32] Frank does not dismiss rules. He considers rules to be "among the many sources to which judges go in making the law of the case tried before them".[33]

In practice then, Frank argues that in adjudication the reverse takes place: the judge comes first with a conclusion tentatively formulated and then looks for a premise to substantiate the conclusion, to either affirm or reject the conclusion. The tentative conclusion is an initial *intuition* as to what the outcome should be, based on the facts of the case and how these are evaluated by the judge (as if he were a "witness").[34] Critics regard this position as nihilistic and relativistic, ignoring altogether the role and value of rules and principles.[35] It sells Frank short. True, it is an instrumental view on law and adjudication but there is merit in his contention that rules and principles serve as justification for the conclusions tentatively reached – as non-exclusive sources. Indeed, the strength in the contention lies in how judges deal with the non-rational initial inclination as to how a case should (or could) be decided and facts are evaluated and weighed, rather than suggesting, as critics do, that Frank places "intuition above reason and therefore brute instinct above reflection".[36]

Hunches and hunch-producers

A judge, in reaching a decision, makes a judgment and like other judgments, judicial judgments "are worked out backward from conclusions tentatively

[30] Frank 2009, n 18,xxiv.
[31] Ibid, xxiv-xxv.
[32] Ibid, 138.
[33] Ibid, 137.
[34] Ibid, xxxv, citing his own opinion in *In re J.P. Linahan*, 138 F. (2d) 650, 652-654.
[35] For an overview, see: N. Duxbury, 'Jerome Frank and the Legacy of Legal Realism' (1991) *Journal of Law and Society* 8(2), 175-205.
[36] Ibid , 194, referring to Harris, R.C. (1936) 'Idealism Emergent in Jurisprudence' (1936) *Tulane Law Review* 10, 169-187.

formulated".[37] It goes against how we view adjudication when we *read* the written decision – these opinions are written in the syllogistic style:[38]

They picture the judge applying the rules and principles (usually derived from opinions in earlier cases) as his major premise, employing the facts of the case as the minor premise, and then coming to his judgment by process of pure reasoning.

Referring to Hutcheson (a US federal judge of the early twentieth century), Frank argues that judicial decisions are based upon hunches. Hutcheson: "[t]he judge really decides by feeling and not by judgment, by hunching and not by ratiocination, such ratiocination appears only in the opinion".[39] Thus, decisions, based on conclusions tentatively formulated imply decisions that are initially based and driven by "hunches". The consequence is that "the way in which the judge gets his hunches is the key to the judicial process".[40]

These hunches are produced by or emanate from different sources. Frank first refers to the rules and principles (the written law). These constitute the normative framework that guides a judge in accounting for his tentative conclusion. But there are other sources that are more introspective and refer to judge's "political, economic and moral prejudices".[41] Frank, though, is critical of referring to such crude and wide categories and suggests that these prejudices – when it comes to the hunch – are interconnected with distinctly personal biases. The first category of prejudices express themselves and become meaningful in connection with these "idiosyncratic biases".[42] Furthermore, these personal biases play a role as to the judge's "sympathies and antipathies" in respect to the persons involved – parties, attorneys, witnesses, etc.[43] Indeed, as Frank observes, a judge is in many ways a witness

[37] Frank 2009, n 18, 109.
[38] Ibid, 111.
[39] Ibid, 112, citing J.C. Hutcheson, 'The Judgment Intuitive: The Function of the Hunch in Judicial Decisions' (1929) *Cornell Law Quarterly* 4(2), 274-288. Discussed also in Duxbury (1991), 184. Duxbury reports that Hutcheson, in his turn, borrowed the idea of the hunch from Rabelais – the 16th Century French satirist, probably in *Gargantua and Pantagruel*, book 2 (chapter 10-14). I used the Dutch translation by J.M. Vermeer-Pardoen: Rabelais, *Gargantua en Pantagruel* (Van Gennep, 1999). In fact, reading the text, I think Hutcheson refers to judge Bridlegoose's trial, book 3 (chapter 41).
[40] Ibid, 112.
[41] Ibid, 113-114.
[42] Ibid, 114.
[43] Ibid, 115. Witnesses too, make judgments, often erroneous; see, for example, E.F. Loftus, *Eyewitness Testimony* (1996 Harvard University Press).

of what happens in his or her court, which means that "the determination of facts is no mechanical act", as witnesses make judgments too when recalling events.[44]

The uncomfortable conclusion seems to be as follows:[45]

> The peculiar traits, disposition, biases and habits of the particular judge will, then, often determine what he decides to be the law. […] To know the judge's hunch producers which make the law we must know thoroughly that complicated congeries we loosely call the judge's personality.

The question is whether this seemingly uncomfortable conclusion leads to another conclusion, which is that law is essentially arbitrary and at the mercy of the discretion of a judge as an autonomous law giver. One could easily understand Frank in this way, and dismiss his argument as nihilistic, holding on to the basic legal myth of subsumption. But Frank argues that a judge's discretion is "the life of the law" and removing his discretion implies removing its creativity.[46] Frank comes with a warning though, so to speak. If judicial discretion (fed by hunches, extrinsic and idiosyncratic biases) is the life and soul of the law, it demands something of judges: constant self-reflection and introspection, critical self-awareness and ethical integrity. Frank:[47]

> The honest, well-trained judge with the completest possible knowledge of the character of his powers and of his own prejudices and weaknesses is the best guarantee of justice.

It is *this* aspect of self-awareness – consciousness – that plays an important role in the work of Paul Scholten, to which we can turn now.

Finding law: Paul Scholten

Paul Scholten takes a different perspective on law – Scholten cannot be considered a legal realist in the American tradition. His portrait of law is less instrumental in colour and tends to be more reflexive and existential, although he too refers to the initial intuition, where a judge takes note of the facts and

[44] Ibid, 118.
[45] Ibid, 119-220.
[46] Ibid, 149.
[47] Ibid, 148.

"has a solution in mind which he deems right at first sight".[48] Scholten has had a great influence in the Dutch understanding of the methodology of private law and its administration. Scholten's theory rests on three anchors, as previously explained by Hartendorp & Wagenaar.[49] The first anchor refers to the idea that the rule is given through the decision. The second anchor is the idea that finding law is the result of both a rational and a non-rational (moral) process. The third anchor concerns the leap of faith (the "jump") that precedes the ultimate decision.

With the rule, a decision is not a given

Scholten, like Frank, rejects the simple notion that the administration of justice is the mere application of the rule to the facts, even though this might have been the idea of the legislator at the time of the great codification in the late nineteenth century. Echoes of this formalist idea are still found in Dutch law. Scholten points to the General Provisions Act, that states in art. 11 that the judge must administer the law according to the written law and art. 13, that the judge can be prosecuted for refusing to administer law ("*regtsweigering*") under the pretext that the (written) law is silent, dark or incomplete. In respect of cassation too, it is visible. The Dutch Supreme Court will set aside a lower court decision if the law is violated or the law is applied incorrectly, and not because "a ruling […]is in any general sense unjust".[50]

But with the rule, the decision is not a given. Scholten argues that "[t]he rule is given simultaneously *with* the decision. The decision itself has an autonomous meaning".[51] Finding the law is *more* than applying the law but does not entail creating law. Scholten provides two reasons for this. The first is that in finding the law the facts of the case are, by necessity, evaluated. When are the facts such that it can be established they amount to, for example, a lack of good faith, a violation of public decency or reasonableness?[52] The second is that in finding the law a choice must be made which rules to apply. To bring the facts under the relevant rule is more complicated than it seems or the law (the Code) can

[48] Scholten 1931, n 19, par. 26 [*160*].
[49] Following: R.C. Hartendorp & H. Wagenaar, 'De praktische rechter. De opmerkelijke relevantie van Paul Scholten voor een eigentijdse rechtsvindingstheorie' (2004) R *& R* [now referred to as *NJLP*], 1 60-89, 62.
[50] Scholten 1931, n 19, par. 1 [*2*]. See also art. 79 of the Dutch Judicial Organisation Act (Wet RO).
[51] Ibid, par. 2 [*11*]. Emphasis in the original.
[52] Ibid, par. 2 [*10-11*].

foresee. Finding law is more than the "logical work of subsuming the facts under the rule"; it entails an "intuitive choice" of evaluation and selection.[53] These choices of evaluation and selection are not rule-based but are found in case law; in judicial decisions that are entitled to an "autonomous normative position" vis-a-vis the written rule.[54]

Interpretation, analogy and refinement

More is needed in finding the law, when it comes to the administration of justice. This "more" (evaluation and selection) has a rational element as well as an element that appeals to consciousness – to the independence of mind – which calls for a leap of faith (the "jump" as Scholten calls it) and addressed below. The rational element refers to the logical activity in respect of understanding and explaining the law within the factual context of the case at hand.[55] It is the (only) activity students are subjected to in most of their positive law courses.

The law demands interpretation, how perverse ("*perversio*") some might consider this to be.[56] Legal scholarship contributes to spell out the methodology of interpreting and explaining the law. In analysing case law, we traditionally distinguish four different methods of interpretation: grammatical, historic, systematic and teleological. Lawyers employ these methods but, as Scholten questions, to what extent do lawyers account for what they are doing when explaining and applying the law (why employing this or that method?) and whether they can do what they do – what or who authorises them to do what they choose? In other words, Scholten stresses the point that lawyers who are called upon to decide, also decide how to apply the law, deciding (intuitively) upon a method of interpretation to fit the outcome: is it a logical consideration or "is the choice made on some grounds other than intellectual ones?",[57] amounting to a process of rationalisation as Frank would have it?

Furthermore, in explaining or interpreting the law something else happens. Explaining the law, using interpretation, may lead to an analogy, where a legal

[53] Ibid, par. 2 [*13 and 14*].
[54] Ibid, par. 2 [*14*].
[55] Most of Scholten's analysis in the *General Part* is concerned with this rational aspect; an extensive summary lies outside the scope of this contribution.
[56] Scholten refers to Justinianus: interpretation was given only to the "*augusto auctoritas*" of the emperor, cf. Codex I, 17, 2, 21. See Scholten 1931, n 19, par. 1 [*3*].
[57] Ibid, par. 1 [*5*].

rule designed for a particular set of circumstances, is used for another set of circumstances and, in effect, broadening the scope of the written rule in question. Again, the question arises as to what we mean with this analogy and whether it is justified and if so, why. The same can be asked in respect of the contrary, in cases where the written rule is restricted ("refinement"[58]). In the end, Scholten makes the point that in respect of interpretation, analogy and refinement something "quite different takes place than simply subsuming a case under a rule which lays ready for use in the law".[59] Again, finding the law – administrating law – is much more than a simple logical procedure of the syllogism.

Leap of faith

Thus, Scholten shows that a concrete legal relation not merely depends on the rules but also on decisions. And these decisions cannot be found through the model of subsumption of rules (legal reasoning). Each time a decision is made, the realm of rules and reasoning is transcended by the realm of Conscience (moral reasoning). In the end, the decision is anchored in the judge's Conscience from where he or she "jumps" to the conclusion (the judicial decision). Scholten:-[60]

> I think that there is more than merely observation and logical argument in every scientific judgment, but in any case, the judicial judgment is more than that — it can never be reduced to those two. It is not a scientific proposition, but a declaration of will: this is how it should be. In the end it is a leap, just like any deed, any moral judgment is.

This is how it shall be!

The decision is an act.[61] It nests in the judge's moral conscience for which he or she takes responsibility. Scholten stresses this point of responsibility, explaining that the decision is perhaps not the only possibility that fits within the legal system and perhaps another judge would have come to a different

[58] Ibid, par. 1 [*5*].
[59] Ibid, par. 1 [*7*].
[60] Ibid, par. 28 [*172*].
[61] Akin to want Frank refers to as a judge "reaching a decision, is making a judgment", Frank 2009, n 18, 108.

decision, but for the judge, *this* judge, because it is a decision of conscience, the decision is the only option left, excluding all other options.

Scholten says that the conscience is fed by (his) Christian faith and he seems to reject the notion that conscience is or should be fed by a "conception of idealism" (seen by Scholten in "Hegelian-pantheistic form").[62] I agree with Dunné that, nowadays, it is less important what conscience refers to and by what it is fed. The point is that judicial decisions entail more than observation and logical argumentation.[63] It is, as Borst argues,[64] Scholten's dialectic of subjective and objective factors. In this respect, Scholten resembles Frank but where Frank considers subjective factors to reside in the personality of the judge, Scholten emphasises the judge's conscience as subjective factor.

Independence of mind – teaching law

Scholten's view on judicial thinking and acting is powerful and dramatic, whereas Frank's view is disturbing and challenging. Both views bring home that there is something at stake when deciding cases. In a sense, each judicial decision causes harm (as well as relief). The act has impact: losing or winning custody, recovery of damages or not, freedom or incarceration, life or death, climate change, the list is endless. How to expose students to this aspect of law – that law implies making decisions and that there is something at stake?

To perform the act – to decide and take responsibility cannot be done light-heartedly – it takes courage. For two reasons: it takes courage as the decision is taken in relative uncertainty (of knowing to be right or wrong). It also takes courage as the act of the decision is also one of vulnerability – open to criticism, by the media, the public, peers and legal scholars. That's perhaps why the judge is "disguised", presented as a functionary and his or her decision being cloaked in legal language and form. But, at the same time, his or her Independence here implies also loneliness, in bearing the burden of the consequences of the judicial act.

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[62] Scholten 1931, n 19, par. 28 [*178*].
[63] J. Van Dunné, 'Recht en Cultuur. Lof der Oppervlakkigheid'?, in: A.G. Castermans, Jac. Hijma, K.J.O. Jansen, P. Memelink, H.J. Snijders & C.J.J.M. Stolker (eds.), *Ex Libris Hans Nieuwenhuis* (Kluwer 2009), 171-185, 174.
[64] W. Borst. W. (2019) 'De Dialectiek bij Paul Scholten: Haar Aard, Oorsprong en Bronnen' (2019) NJLP 48(1), 48-65, 63.

Courage, or judicial courage, to use Iris van Domselaar's concept, is virtuous. It is not the courage of a war hero, but the courage, following Kant, that resides within the intellectual dimension: "the one who dares to speak up in public life".[65] Projecting this on a judge, Van Domselaar concludes that:-[66]

> A courageous judge simply has the inner strength to remain stoical and do his virtuous duty even if it has repercussions for him such as criticism, unpopularity, or loneliness.

So how can we understand judicial independence, considering the work of Jerome Frank, Paul Scholten and the virtue of judicial courage? It is clear, at least to this author, that independence is much more than a formal construct, constitutionally enshrined and illuminated by symbols and rituals. Judicial independence at the individual level amounts to a particular *professional attitude* that entails courage, introspection and critical self-awareness, as well knowledge of the law and its procedures and rituals.

When looking at legal education, three important factors should be borne in mind if we seek to foster an education that prepares students for professional life with an independence of mind and a sovereign voice:

- Education as a means of coming into the world
- Education as a means of suspending judgment
- Education as a means of moral reasoning

Education as a means of coming into the world

Gert Biesta considers education to consist of three overlapping elements: qualification, socialisation and subjectification. Biesta's pedagogy underpins, philosophically this author's view on education, in which we teach students not merely to become lawyers, qualified and socialised to fit the realm of legal practice but also to become free and responsible adults, able to deal with the

[65] Iris van Domselaar, 'Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship' (2015) NJLP 44(1), 24-46, 32.
[66] Ibid, 32.

world and its challenges. In doing so, Biesta connects education with freedom, democracy and the rule of law.[67]

In teaching law, we tend to stress the importance of analytical skills. We teach students to analyse the case, evaluate the given facts and distil the legal question that is at stake. We then teach them to analyse the law and seek out the principle of rule that underpins the case and how this rule or principle is dealt with in case law. It sets students up to develop an answer to the legal question of the case. And then we move on to the next case dealing with a different legal concept. While doing so, we "socialise" students within the legal realm – students become lawyers. In our education we stress the importance of qualification and socialisation.

We tend to ignore the importance of "subjectification", which Biesta worked out in *Beyond Learning: Democratic Education for a Human Future*.[68] With subjectification Biesta describes the way in which education (also legal education) should contribute to the learning process in which "newcomers come into the world as unique, singular beings".[69] He warns that without paying attention to this aspect of education, education is merely an instrument of social reproduction.[70] What is needed for this, is attention to the importance of *Erziehung* rather than *Bildung*. The latter is geared towards the formation of persons (subjects) based on a particular ideal image (for example that of Von Humboldt). But Biesta points out that becoming a person also means "*wanting to be a person*", a unique, singular being. A person, here, means the way in which a human exists and tries to (want to) be a person, to act in freedom, based upon choices we can make, while acknowledging responsibility for our actions.[71] What is at stake is "to encourage [students] to take up the challenge of their being-a-person and assist them in discovering what is involved".[72]

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[67] Worked out in Gert J.J. Biesta*, The Beautiful Risk of Education* (Paradigm, 2013).
[68] (Routledge, 2006).
[69] See: Gert J.J. Biesta, *Tijd voor Pedagogiek*, Oratie Universiteit voor Humanistiek, Utrecht, 2018; see: https://www.uvh.nl/actueel/april-2018/tijd-voor-pedagogiek-download-oratie-gert-biesta?sresult=1686081706&swords=biesta (last accessed 14 February 2021).
[70] Consider here Duncan Kennedy's thesis that legal education encompasses "ideological training for willing service in the hierarchies of the corporate welfare state"; Duncan Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) Journal of Legal Education, 591, 591.
[71] Biesta 2018, n 69, 20.
[72] Ibid, 21.

How is it possible to introduce elements of "subjectification" in legal education? The first step is in taking distance and *suspend* judgment.

Education as a means of suspending judgment

Our task as legal philosophers is not merely to teach the theory, such as that of Scholten or Frank, Hart, Dworkin, etc. We should do more and explore with students what it is to act and take responsibility, what it is to be self-reflexive and being able to embrace the uncertainty of one's conscience to figure out what is the right thing to do when reasoning ultimately stops.

I think we can if and when we create room for introspection and critical self-awareness, in addition to the study of law through the case study method and the training of what it is to be a lawyer.[73] Studying is also a process of self-realisation (cf. Biesta). Students have the privilege to study and think in a separate place, which we call the university. Following Van Klink & De Vries, who refer to Oakeshott, learning is:[74]

> liberal, not in the political sense but in the existential sense of 'liberated' or 'freed': at least for a couple of years, learners do not have to worry too much about 'satisfying contingent wants'. What the university offers, is 'the gift of an interval'.

Within this interval, students can "suspend judgment", and are subjected, following Gert Biesta,[75] to the processes of qualification, socialisation and subjectification (self-realisation). Qualification then, refers to learning the law through the case study method, whereas socialisation refers to thinking like a lawyer and the necessary toolkit that comes with it. Subjectification goes

[73] To a large extent this applies to the whole of academia and, hence, the importance of the humanities who traditionally are in the position to foster the *Bildung* and *Erziehung* element of university education: how to challenge students to come into the world (Biesta 2018, note 71).
[74] B. van Klink & B. de Vries, 'Skeptical Legal Education – How to Develop a Critical Attitude' (2016) Law & Method, 3(2), 37-52, 38, citing Michael Oakeshott, *The Voice of Liberal Learning* (Liberty Fund 2001). See also the views of Roger Burridge and Julian Webb on liberal legal education as "an enterprise of intellectual development"; Roger Burridge & Julian Webb, 'The values of common law legal education reprised' (2008), The Law Teacher, 42(3), 263-269, 264.
[75] Biesta 2018, n 69.

beyond this and involves the process of self-realisation through critical philosophical and social reflection.

In stressing the process of self-realisation, Van Klink & De Vries go beyond the interval of Oakeshott's and emphasise the importance of moral and intellectual integrity of legal education, which we refer to as skeptical legal education:-[76]

> Skeptical legal education stresses the importance of conversation, discussion and suspended judgment and in doing so it promotes the students' critical potential. A skeptical attitude starts with the intellectual awareness that knowledge claims cannot be taken for granted but must continuously be questioned in order to properly understand and use them in a critical way, and to do so from a detached point of view rather than on the basis of a particular political ideology.

Skeptical legal education goes beyond the study of law and seeks to contribute to students finding their own voice in the legal debate, being able to become reflective on how they understand law and its normative context. Legal theory and philosophy have an important role in this process of self-realisation, preparing a student to come to judgment and for them to figure out what kind of lawyer-citizen he or she seeks to be.

Moral reasoning is one way to contribute to self-realisation. How can moral reasoning be integrated in legal education?

Education as a means of moral reasoning

In the English language, we refer to the judicial function as the administration of *justice*. It implies, arguably, that this goes beyond the mere application of rules to facts and involves, as both Frank and Scholten illustrate, an evaluation – a normative evaluation. This normative evaluation entails two approaches of moral reasoning.

The first approach is exposing students to how to understand law from the point of view of *legal theory*. Theories like positivism and realism, but also natural law theory or critical legal studies, worked out by thinkers like Scholten and

[76] Van Klink & De Vries 2016, 49. The concept of skeptical legal education is worked out in Bart van Klink, 'Knowledge and Aphasia. What Is the Use of Skeptical Legal Education', in: Van Klink & De Vries 2016, 15-34.

Frank, Fuller, Kennedy, Hart and Dworkin and many others show their worth as they challenge students to discover their position vis-à-vis law: am I, as a point of departure, more of a positivist or a realist? Am I conscious of the non-rational or normative element in decision-making? Do I recognise that decisions are based upon conclusions tentatively formulated? This discovery cannot be done my merely teaching theory – out of context. Rather, it should be taught in the context of positive law and is an aspect of what Biesta calls an engaged science of action and involvement ("*handelingswetenschap*").[77]

At Utrecht University, for example, but not only there, students are exposed to legal theory in a particular way.[78] In the *Foundations of law* course, we introduce students to positivism, natural law theory and realism, by reference to the well-known *Case of the Speluncean Explorers*, developed by Lon Fuller.[79] We ask them to take position and discuss why they take this position. It is followed by an essay assignment in which they are confronted with another fictional case – the *Terror* case, developed as a play by Von Schirach.[80] This fictional case involves a German fighter pilot who intercepts a passenger plane that is hijacked by terrorists. The terrorists seek to crash the plane into a football stadium full of people. German law prohibits taking down a plane in these circumstances. The pilot nevertheless shoots the plane to avert a greater tragedy. The question is whether the pilot should be prosecuted and convicted. Students were asked to take position vis-à-vis the law and the facts from either a positivist or realist perspective. Exposing students to such a classical dilemma helps students to understand real-world dilemmas, such as the one the courts were confronted with in the Urgenda case mentioned above. It shows them that such a dilemma does not have a "quick fix" but that a different perspective on law (and the dilemma) leads to different conclusions.

But it is not enough to only introduce students to legal theory. If we take seriously the idea that there is more at stake in legal decision-making – the administration of justice – and that this involves a leap of faith or, recalling

[77] Biesta 2017, n 69, 11. It is difficult to find an English expression but Biesta refers to pedagogy as an engaged science of acting and involvement.
[78] There seems to be a cluster of law schools in the Netherlands (Utrecht University, Tilburg University, the Free University Amsterdam and University of Amsterdam), that expose students to legal theory in more or less the same way: in context with positive law – as an instrument to understand law better.
[79] Lon L. Fuller, 'The Case of the Speluncean Explorers' (1949) Harvard Law Review 62(4), 1-28.
[80] F. von Schirach, *Terror* (trnsl: D. Tushingham, Faber & Faber 2017).

Frank, a judge who knows him- or herself,[81] students should be challenged to explore and discover the moral foundations of law in order to discover the variety of normative positions that exist. The Case of the Speluncean Explores teaches students perspectives on understanding law but does not address an understanding of the moral basis of, in this case, the absolute or relative value of life which, in the end is instrumental to evaluate what to do with the accused. Political philosophy can address this, when we explore, for example, utilitarian theory, Kantian liberalism or Aristotelian ethics.

This is the second perspective of moral reasoning.

One way of exposing students to *this* type of moral reasoning is explained by Michael Sandel in *Justice. What's the Right Thing to Do?*[82] In it, he explores theories of justice by reference to all kinds of moral dilemmas. Each time, the central question is whether a just society should seek (through law) to promote the virtue of its citizens, their general welfare or should the law be neutral about conceptions of virtue and general welfare and let citizens be free to choose the best way to live. Sandel engages the reader (and his students) with these dilemmas pointing to a thought process in four steps.[83] It very much resembles Frank's idea of a conclusion tentatively formulated (the hunch) and Scholten's leap of consciousness. Indeed, it is a didactic of moral reasoning:

a) The dilemma

b) Initial conviction

c) Reflection and confusion

d) Reconsideration

The first step is being confronted with a dilemma, such as in the Terror case, and trying to understand the dilemma. This involves, as the second step, an initial conviction or a conclusion tentatively formulated: of course, the pilot should *not* be convicted, he saved many lives albeit at the cost of other lives. This may be a valid conviction to have. But Sandel points out the importance to discover the underlying principle of this conviction. This requires the study of philosophy, for example utilitarian theory (Mill, Bentham). Students

[81] Frank 2009, n 18, 148.
[82] Michael J. Sandel, Justice. What's the Right Thing to Do? (Penguin 2019).
[83] Ibid, 27-28.

discover that the principle underneath the conviction lies in the notion that the moral worth of an act exists in its utility – promoting the general welfare of society for example; saving 30,000 at the cost of 300 passengers is surely a better outcome. Or is it? If we change the scenario, we could get uncomfortable with our initial conviction and start questioning the principle. We discover that human life perhaps has some absolute value, worth protecting; that we can't use people as a means to an end. We discover another principle (Kantian ethics). It is this all-important third step: a critical analysis of our initial conviction through philosophical investigation. It allows students to contrast and compare different ethical positions with an aim to formulate an ever-developing philosophical world view. And as an academic exercise, we can, as a fourth step, ask them to finalise their excursions and take position by reaffirming or rejecting the original position, while being aware of the consequences. Nothing is at stake – true judgment is still suspended. But students should also realise and do realise, that once in a position of responsibility – when they *have* to decide, as a judge or in some other capacity, something *is* at stake. For this process of investigation and discovery, Sandel says we need an interlocutor – to create dialogue.[84]

It is this (philosophical dialogue) which we should integrate in our courses and programmes with an aim to contribute to "honest, well-trained [law students] with the completest possible knowledge of the character of [their] powers, prejudices and weaknesses".[85] To be sure, Sandel's four-step approach is actually a particular didactic tool for moral reasoning. It is somewhat similar to tools developed by the psychologist James Rest – the Four Components Model,[86] or educational theorist David Kolb's Experiential Learning Cycle,[87] albeit that Sandel does not put experience (of students) centrally.[88]

[84] See for an educational experiment: Ubaldus de Vries, 'Law & Lounge: An Experiment on Student Self-Organization and Critique as Skeptical Reflexivity', in: Van Klink & De Vries 2016, 267-287.
[85] Frank 2009, n 18, 148.
[86] J.R. Rest, D. Narvaez, M. Bebeau & S. Thoma, *Postconventional Moral Thinking: A Neo-Kohlbergian Approach* (Lawrence Erlbaum Ass. 1999).
[87] David Kolb, Experiential Learning Experience as the Source of Learning and Development (Prentice Hall 1984).
[88] How to give shape to the dialogue in the classroom is the object of a further essay.

Conclusion

The Urgenda case shows that law and the administration of justice is more than the application of rules to facts. The case can be situated in the enclosed space of non-rationality – there where reason or reasoning stops and a decision is or must be made. The realm of consciousness resides in this enclosed space and where law is found. It remains guessing to what extent the idiosyncratic biases played a role as well as the (philosophical) world view of the judges involved. What the case shows, though, is an independence of mind and consciousness cloaked in legal argumentation. The court – its judges – spoke with a sovereign voice. It is this aspect this essay sought to address: the question how we can teach students to find the law on the basis of a developing independent voice in the legal debate, where they are conscious that in law there is something at stake. That, when their study is over, when the interval has passed, and they come into the world, they are aware of their societal responsibility based on a normative position as to what it is to act – to make decisions that have an impact on the lives of others. Legal theory and philosophy are instrumental to this endeavour. It is our task, in the words of Gert Biesta, to facilitate students to come into the world. It is *Erziehung* which is at stake: to encourage our students to take up the challenge of their 'person-to-be' and facilitate them in this discovery.[89]

[89] Biesta 2018, n 69, 21.