The Utility of Legal Theory for the Adjudication of the Law

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1. The question of the utility of the theory of law for the adjudication of the law, in other words, for the judge, spontaneously evokes the abundant literature in the field of legal theory, which deals with the adjudication of the law by the judge, and more particularly the literature regarding the interpretation of the law.

The methodology of the adjudication of the law has traditionally been one of the 'classical' domains of legal theory, the utility of which for the judicial adjudication will not be questioned by anyone.

However, the theory of law has more to offer. There are quite some other points in which legal theory can be of direct utility for the judge who is in the exercise of his office.

2. In this exposition I shall try to give a survey of these points, illustrating each of them with the help of one or more examples. My attention will primarily go to the civil judge. The conclusions however will apply in most cases to any judge, including the criminal judge, as well as the military and the administrative judge. The question of the specific utility of legal theory for the criminal judge is further examined in the article of D. Victor.

1. A better insight in the law

3. One of the central objectives of legal theory is to provide a better insight in the law and in the legal phenomena. In an interdisciplinary approach, the theory of law attempts to situate the law in a broader context than mere legal dogmatics, in view of the broadest possible explanation of the law. Legal theory thus goes beyond legal dogmatics, which is essentially limited to the description and the systematization of the law.

4. On a first, rather abstract level the theory of law can for instance analyse the nature and the structure of legal rules, and their normative character in particular. Such an analysis is ostensibly a matter of purely theoretical importance and without direct relevance to concrete legal questions.

However, every time the judge interprets the law the said theoretical analysis can supply him with necessary information to interpret law, especially when the

grammatical method is used. Quite a few legal rules show a purely descriptive formulation, though they were meant to be normative by the legislator. E.g. article 12 of the Belgian Commercial Code provides: ''Of every marriage contract where either husband or wife is a merchant, a certified copy will be sent within a month of the date on the contract, to every court of justice in the jurisdiction of which the merchant spouse has been entered in the commercial register''. The wording ''will be sent'' (in Dutch: ''wordt gezonden'') in this legal text must be interpreted as ''shall be sent'' (in Dutch: ''moet gezonden worden'').

A theoretical analysis of the linguistic formulation of legal rules enables the judge, who has to interpret an apparently descriptive legal text, to answer the question as to what extent a seemingly purely descriptive phrase can be read as a normative provision.

5. The analysis of the nature of legal rules can be of an immediate and practical importance for the judge in other situations as well. Thus article 14 of the Belgian law dealing with the Raad van State (Conseil d'Etat) provides that the said Raad van State can annihilate regulations emanating from administrative authorities. With ''regulations'' is meant decisions that formulate a rule of law and that have a wide range of application.[1] When a judge has to settle in a concrete case whether or not a decision formulates a legal rule and whether this legal rule has a wide range of application, he will inevitably have to rely on a theory about the nature of the rule of law. In this context we can ask the question whether a legal norm is not abstract by definition, in other words always has a wide range of application, so that a'legal rule' with a limited scope would in fact not be a legal rule at all, but only the application of another legal rule, in a concrete situation.[2] In this way, putting up a traffic sign prohibiting traffic at one definite place, would not be considered as a 'concrete' rule of law with a limited range of application,[3] but as laying down the modalities under which another comprehensive general rule could apply.

6. On a second, even more concrete level, the theory of law is able to provide the judge with useful supplements to legal dogmatics, by analysing the legal notions and legal institutions. In this field as well does the theory of law aim at explaining the law, mainly via an interdisciplinary approach, which is supplementary to the description and systematization by legal dogmatics of the said legal technique.

The notion of property will, for instance, be described in legal dogmatics on the basis of the legislation in force, on the basis also of the case law and the commentary on it in jurisprudence.

In most cases all this will probably suffice to enable the judge to give a satisfactory and solid solution to the problems that have been submitted to him. Nevertheless, a more comprehensive, and for instance historical and economic definition of property would often allow for a more adequate shade of the strictly logical solution of legal dogmatics.

This traditionally approach of legal dogmatics will in a number of cases however

offer little to go by. This is for instance the case when the judge has to face the concrete question whether or not the right of property is abused or when, for instance, a factory being occupied by the labourers, the right of property is confronted with certain other rights, such as the right of labour. In such a case the position of property in a historical, economic and general social perspective must be clearly defined.[4] It is typical and characteristic of the theory of law precisely not to confine itself to either a historical, or an economic, or a sociological study, but to try to synthesize these different aspects into a whole which makes it possible to give the fullest possible explanation of the concept of property, which transcends a strictly historical or a strictly economic approach.

A clear example of such an approach, typical of the theory of law, can be found in the study by the Dutch jurist W. J. Slagter about 'Juristic and Economic Property'.[5] With regard to the right of property Slagter ascertains that four shifts took place in the past one hundred years: a shift from private to public law, a shift from real estate to personal (movable) property, a diminishing importance of the law of things to the benefit of an increasing importance of the law of contracts, and also a shift of the functions within property.

With the latter shift we can again distinguish four shifting aspects: from unearned income to earned income, from property meant as a form of investment to property meant for use, from property of things (either movable or unmovable) to property of claims on individuals (including the possession of securities) and finally from private property to collective property (partnerships, associations, corporate bodies). On the strength of a number of other considerations Slagter further concludes that the notion 'property law' is nothing else but 'an object owned by a subject', so that we cannot speak of restrictions of property, but only of restrictions of the legal effects of property.[6]

It is obvious that all these considerations can be very clarifying for the judge, when for instance he has to judge whether or not there is abuse of right with regard to a property right, or when he has to weigh the right of property of the economic means of production against the right of labour of the employees of an enterprise.

In view of a solution to the latter problem it is for instance also useful to have an answer available to the question as to how far economic property and juristic property coincide. In this connection Slagter concludes in the above mentioned study that both concepts more readily coincide in certain branches of law, such as taxation law, rather than in other branches, such as civil law.[7] Slagter points out the practical importance of this question by referring to the following legal problem, on which among others the Dutch Supreme Court (Hoge Raad) had to pronounce a judgment. When in a marriage with community of property the husband buys (immovable) goods in his name, but with the means of the community or with the own property of his wife, the origin of the means is determinating to find out with whom the economic property lies.

Even if the juristic property does not necessarily coincide with the economic property, it may occur, as was decided by the Supreme Court,[8] that the question of the origin of the financial means is irrelevant and that consideration only goes to the person who concluded the purchase contract and who was supplied with the goods.

7. All these reflections exceed the framework of legal dogmatics. It is the task of the theory of law to examine this kind of problems in a systematic and coherent way, and with the help of a scientific method. This does not lead to a strict division between legal dogmatics and legal theory: the jurist can, as often happens, also concern himself with problems pertaining to legal theory. This awareness of the importance of general and more abstract questions is of course very positive. One only has to be aware of the fact that answering these questions pertaining to legal theory, requires a proper approach and method which differ from the approach and methods applied in the framework of legal dogmatics.[9]

8. In order to illustrate the practical importance for the judge of an analysis of legal concepts, I have extensively dealt with the example of the concept of property. It is obvious that a great number of similar cases can be quoted. Only think of the notion 'causality' in law. Many legal systems contain a legal text in the sense of article 1382 of the Belgian Civil Code, which provides that a person who through his fault causes damage to another person, is liable to indemnification. However, many problems arise when the judge has to interpret and give a concrete form to the concept 'cause': does it, for instance, have to be a conditio sine qua non? Only an analysis in the field of legal theory can throw a light on those problems.[10] It is impossible for the judge to make a well-funded choice between the various constructions in the field of legal dogmatics, when there is no theory that is based on the theory of law. Here again the theory of law is for the judge a useful and even necessary supplement to legal dogmatics.

What holds good for the analysis of legal concepts like 'property' or 'cause' applies to an even greater extent to the analysis of so-called vague concepts like 'equity', 'fault', 'good faith', and the like.

2. A clearer View on the Social Function of Law

9. If the judge wants to interpret and apply the law adequately, it is imperative that he should be able to situate this law in its social context, in other words that he should have a sound judgment of the function of law in society. To this end the judge has to consult the theory of law, which in turn will make an abundant use of research in the field of sociology of law.

10. There are two aspects in the function of law in society: on the one hand the general objectives that are set by the legislator (if it concerns the law enacted by public authorities), and on the other hand the concrete working of law in the community. This concrete working can possibly run counter to the said objectives

or harmonize with them, or even be completely isolated from them.

11. An important question which requires an answer from the theory of law is the extent to which the law enacted by public authorities should play an active rather than a passive role versus the community: how much of this law is merely the 'legalization' of the law developed in the Community, and what is the extent of 'social engineering', by which is meant the guiding of the community by means of legislation. The aims of the legislator only play an important part in the latter case.

12. When the judge interprets an act in a teleological way, it is advisable that he should not only reckon with the aims that have, either explicitly or implicitly, been set by the legislator, but also with their concrete realization, in other words with the realizability of the said aims. For the judge does not slavishly apply a legal text, nor does a legal text lead a life of its own, independent of both the sender (the legislator) and the receivers (the legal subjects) of the norm. It is the judge's task to contribute to the realization of the aims of the legislator, through an adequate application of the law.

The effectiveness of the legal norm will greatly depend on and be influenced by the way in which this legal norm is interpreted and applied in case law.

13. However, the question to what extent the judge can decide whether an application does or does not realize the aims of the legislator adequately is itself a matter of dispute.

Again the judge will have to rely on the literature in the field of legal theory to find an answer to this question. By way of example we can here refer to an analysis by Hans-Martin Pawlowski, in which the author distinguishes three types of laws according to the (social) function they perform.[11]

A first type of laws means to make a choice between alternative solutions and theories, which keep case law divided. Here the law has a *normative function* in view of the unity of case law and of the equal treatment of the legal subjects. In the opinion of Pawlowski, the judge should enjoy a large freedom of interpretation with regard to this type of laws, should it appear that the choice offered by the legislator be somehow 'wrong'. In other words, this means that a higher priority should be given to finding a 'good' solution to legal conflicts, rather than provide a solution, which may be the same for everyone, but still less appropriate to solve legal conflicts. This latter choice is essentially a choice in the field of legal philosophy, which exceeds the scope of legal theory. It is however precisely the contribution of the theory of law to analyse the problems in such a way that this choice becomes clear. Consequently, the choice can be made consciously and with knowledge of facts, and further motivated correspondingly. Otherwise the judge, who lacks such an analysis, will often unconsciously and thus evidently not in an explicit way, let alone in a motivated way, make a legal-philosophical choice, when interpreting and applying the law in concrete situations.

A second type of laws in Pawlowski's analysis wants either to change or to

improve the existing law, for instance with the intention to adapt it to altered social circumstances. These laws aim at effecting a change. According to Pawlowski the judge enjoys a very restricted freedom of interpretation in testing the law for the realizability of the set objectives. In his opinion the legislator would already have made a deliberate choice not only in respect of the objectives, but also in respect of the means to reach them, which choice the judge should respect.

Finally, Pawlowski distinguishes a third type of laws, namely those with an organizing function, or, to use his own words, those *whose function it is to plan things*. It concerns all the laws that organize the realization of legal rules promulgated by the public authorities. Pawlowski says that all these laws are meant to organize the working of the legal system in a coherent and efficient way. Only a coordinated division of labour among the public authorities can enable them to steer the community efficiently by means of legislation. All kinds of rules concerning the assignment and the delimitation of competency are issued to this end. Consequently, when the judge interprets this kind of rules, he will have to take into accout their specific function.

I leave undiscussed here the questions whether Pawlowski's analysis is correct and how relevant his division is.[12] It is my only intention to demonstrate the utility and even the necessity of analyses in the field of legal theory, for the judge who carries out his task.

14. The question may arise whether the analysis of the function of law in society belongs to legal sociology rather than to legal theory. A straight answer can be given here: the function of law cannot only be studied from a sociological point of view, but also from e.g. a historical, psychological or economic perspective. It is precisely the task of legal theory to integrate these different perspectives together with the 'purely juristic' material into *a global analysis pertaining to legal theory*. A strictly sociological approach does for instance, not reveal how, under the influence of all sorts of factual circumstances, the function of certain legal rules can change in the course of years. As a case in point let me mention the liability law, where via the insurance technique an individualistically conceived liability for the effects of individual errors has evolved into a collectivistic spreading of risks, where the effects of individual errors are shifted on to the community.[13] This evolution has unmistakably influenced the case law, which in some cases first considers the insurance state of the insured parties before/when defining the individual liabilities.[14] Also in this case is it advisable that the judges should not only be guided by personal feelings and considerations, but that they should (be able to) rely on an objective investigation in the field of legal theory.

15. The analysis of the social function of the law is closely bound up with the analysis of the structure of the legal system. The theory of the 'double legal order' by Paul Scholten shows that the latter analysis can be of direct practical utility to the judge.[15]

When legal acts are performed they are determined by two legal orders: on the one hand the state legal order, whereby the public authorities define which legal effects be linked to which legal acts, on the other hand a private legal order that has been established by the parties concerned, and in which they create law themselves. According to Scholten, one legal order can not coincide with another.

It is obvious that such an analysis, pertaining to the theory of law, can play an important role in the judicial interpretation of legal acts, but it can also help to solve other legal problems. Gude Oly quotes in her review of Scholten's theory[16] the following examples: the function of the cause in the case of agreements, the gentleman's agreement as a civil agreement, the validity of agreements that offend compelling price regulations.

3. A Reflection on the Role and the Task of the Judge

16. Of all the literature on legal theory, the part dealing with the task of the judge may by far have the largest appeal on the judge. In fact, the judge's position in society and more in particular his relation to the legislator will to a large extent help to determine the way the judge applies and interprets the law.

As a matter of fact, literature reveals that for many judges and former judges this is their favourite topic when they are writing books or articles in the field of the theory and philosophy of law. I therefore assume that the usefulness of legal theory for the judge may be considered self-evident when that legal theory sets out specifically to reflect on the role and the task of the judge. For example, the conception the judge has of his role may have concrete implications for the way he administers justice. But even apart from this, it may be considered a matter of course for an intellectual to reflect every now and then on his professional — as well as his non-professional — activities. Not only acting, but also the ability to think and talk about this acting distinguishes man from other living creatures.

Moreover, an intellectual may be expected to try and carry out these reflections in the most systematic and scientific way possible.

It is the very task of legal theory to contribute to this process, whenever reflections are being made on law, legal institutions and lawyers.

Assuming that the benévolent reader will relieve me from the necessity of further evidencing the usefulness of legal theory for the judge, as far as reflections on the role and the task of the latter are concerned, I'd like to confine myself to a short survey of a number of important topics which are being, or can be studied by legal theory.

17. The question of the judge's role in society can to a large extent be reduced to the question of the relationship between judge and legislator on the one hand, and that between judge and legal subjects on the other. In fact, it's much more a matter of a tripartite relationship between legislator, judge and legal subjects than of two,

mutually independent relationships. The philosophy of law is looking for an answer to the question 'Which attitude must the judge adopt?'.

Legal theory, for its part, is concerned with such questions as 'To what extent can a judge more or less freely determine his attitude towards the legislator within the context of a given legal system?', 'What factors can influence an independent, respectively slavish, attitude of the judge vis-a-vis the legislator?', 'In how far does a specific branch of law, a particular problem area of law, a certain category of legal rules, link up with a specific task of the judge?', 'Which are, in view of a specific policy-option with regard to the legal system, the best ways to define the tasks of the legislator and the judge in order to ensure an efficient and smooth operation of the legal system?'.

18. Concerning the judge's independence, the theory of law will have to analyse in the first place what sort of independence is involved: with respect to which persons, groups or institutions should the judge be independent in order to be able to perform his task without having his decisions affected adversely?

Subsequently, the means with which to best achieve this independence will have to be looked into.

Also the judge's authority can be the object of a similar analysis to be conducted along the lines of legal theory: is a judge's authority based on the authority of his function and its allied power, rather than on the way in which judges accomplish their tasks individually? What role does a sound, respectively weak motivation of judicial decisions play in this? Is the authority of the Bench consolidated or weakened by the expression of dissenting and concurring opinions?

In addition, legal theory can investigate how a trial by jury operates in comparison with a trial by judges; or jurisdiction by lay-judges in comparison with jurisdiction by professional judges only; what the relationship is between the judge and the public prosecutor, between the judge and the parties, between the judge and the lawyers, etc.

19. To conclude, I'd like to point out an aspect of the judge's reflection on his role and task where, in my opinion, the theory of law may make a major contribution. I mean the relativization of the way in which the judge accomplishes his task. Relativization in the sense of criticism of ideology.

The notion of criticism of ideology is being used here in a neutral sense, without any pejorative connotation. The idea is to indicate which personal views of the judge are likely to influence the judicial decisions. In the interpretation of facts, in the interpretation of the law, in the interpretation of so-called vague notions, the judge nearly always has an appreciatory competence. In all these cases, the judge's decision will be based partly, albeit usually for a very restricted part, on his personal views. It is the task of legal theory to find out where these personal views can play a role, which role they play and what his conception of man and society is. Subsequently, the representativity of this conception of man and society can be

checked against the conception the average citizen has of man and society.

The next stage in this criticism of ideology is the inquiry into class-justice.[17]

Finally, another aspect of the relativizing task of the theory of law is the attention that can be given to the views judges have of themselves and of their task,[18] and of the question to which degree these views correspond to reality.

4. A Contribution to a Well-Funded and Coherent Theory on the Sources of Law

20. Before the judge can start to interpret and apply the law, he must be able to ascertain with a maximum of certainty what rules can be considered as valid rules of law. It follows that the judge must have at his disposal a theory on the sources of law. In case law, such a theory is partly being set up in the course of years. In the majority of cases, judges do not experience the question of the sources of the law as problematic. Here, a theory concerning the sources of law is only implicitly, and in most cases even unconsciously, present. When, on the other hand, the judge is confronted with cases which are experienced as problematic, an ad hoc solution will have to be found which, at least, is not incompatible with the general, implicitly accepted theory. In the same way as the case law helps to develop the legal system on the level of legal dogmatics by way of numerous interpretations and appreciations of legal rules, it will casuistically, on the level of the theory of law, set up a theory concerning the sources of law.

But in very much the same way as legal dogmatics have to describe, systematize, eventually approve, differentiate or reject these casuistic solutions of the case law afterwards, the theory of law will have to describe, systematize and evaluate the theory on legal sources that is actually being put into practice in the process of judicial administration.

The theory of law will have to develop this theory on the sources of law into, or check it against, a well-funded and consistent theory, which will offer the judge something more reliable to go by.

21. The theory of law may for instance study the extent to which certain relations between common and statute law in a certain society are more or less efficient, more or less democratic, more or less in correspondence with prevailing political theories. Legal theory examines which social, ideological, philosophical and historical factors influence the choice between possible legal sources.

The theory of law may examine to what extent processes of lawmaking can completely be controlled by legislation, to what extent legislation may counteract certain trends and interpretations in case law, to what extent legal sources are themselves determined by socio-economic relations and conditions in society, to what extent statute law and common law may be legitimized within for instance a western democratic conception of the state. It also studies within what boundaries the judicial administration is to function as an autonomous source of law in our

western societies, to what extent judicial lawmaking 'contra legem' is possible and legitimate within a given society, what the role of legal dogmatics could be in judicial lawmaking, to what extent efficient, legislative policies are possible and what problems may arise in this connection, what the potential role is of general principles of law, or of common law in a presentday western legal system.

Other theoretical problems in connection with legal sources are: the problem of the validity of law in time, the problem of transitional law, the issue of the adage 'cessante ratione legis cessat lex ipsa' (i.e. the relation between the ground and the validity of a given law) and the topic of legal flaws.

22. The theory of law can also make a major contribution with respect to the differentiation of the value of certain sources of law, which analyses these sources on the basis of their ideological content. This involves the carrying out of an inquiry into the conception of man and society, which is implicitly present in a given legislation, in case law, in common law, in general principles of justice or rules of equity.

23. As far as *legislation* is concerned, such an inquiry can, for example, be useful for the judge in case of a systematic interpretation, more in particular when a given rule taken from, for example, labour law is being interpreted in the light of one or more rules taken from civil law. When it becomes apparent that the economic, sociological and ideological function of both branches of law and the historical context from which they originate, vary considerably,[19] they will loose a lot of their value as a context for a mutual, systematic interpretation.

The same remark applies when within the same branch of law more recent laws are being interpreted in the light of older laws and it becomes possible to establish an ideological shift there too.

24. As far as case law is concerned, the value of a judicial decision as a precedent will be adversely affected as this decision is based to a considerable extent on the personal conception of man and society of the judges involved.

This conception can be tested by the theory of law on two accounts: first of all, its concurrence with the prevailing conception of man and society, and secondly, the concurrence of the judge's conception of man and society with the facts. The first aspect needs no further elucidation: the judge's opinion will be considered authoritative only when it is representative to a certain degree.

I'd like to draw special attention to the second aspect. A conception of man and society always includes both views of reality and value-judgments of this reality.

Value-judgments of reality cannot be checked against this reality. At best, these value-judgments can be tested for their consistency and coherence. However, what can be checked is in how far a person's understanding of reality appears to line up with this reality. It appears from various studies in the field of legal theory that such considerations quite regularly play a role in the argumentation of judicial decisions.[20] Invariably they are statements of a psychological, sociological, or other

such nature which, in principle, are always liable to be tested empirically, but which are considered by the judge, often unduly so, as a sufficiently incontestable fact, as 'common knowledge', or as an assessment which derives from the 'general experience of life' and which should not be tested any further.[21]

25. What applies to legislation and case law as sources of law, applies to an even greater extent to the other legal sources like, for example, the general principles of law or equity. In these cases, the 'legal source' ultimately is nothing else than an ideological contention of the judge. It is true that this ideological contention vis-à-vis the 'general principles of law' is based partly on the prevailing legal system, but in any case it remains an *interpretation* of this legal system which can, in principle, always be debated.[22]

It is precisely the task of the theory of law in this respect, to indicate where norms and value-judgments are being expressed which cannot be deduced from the legal system straight off, but which are, at least partly, drawn from the judge's own conception of man and society.

5. A Methodology concerning the Application of the Law

26. As was suggested in the introduction, the methodology concerning the application of the law is pre-eminently the domain where the theory of law by tradition is considered useful to the judge. Further elaboration of this point therefore seems unnecessary. Still, a number of considerations must be made.

27. In circles of practising lawyers, the problems concerning the judge's application and interpretation of the law are considered to relate to a domain where one can fruitfully venture into theoretical research. Often, however, one confines oneself to observations of a general nature, to personal opinions or comments on concrete judicial decisions, without engaging in real, scientific research in the field of legal theory. It is therefore not the importance for the judge of research into the judicial application and administration of the law that should be underlined, but rather the importance of *a sound method in the field of legal theory* by which to study the problems relating to the judicial application and interpretation of the law.

28. It should also be noted that a carefully elaborated *theory of legislation* can prove very important for the methodology of the judge's application and interpretation of the law. For example, in order to get to know the legislator's intention in a methodically justified way, it is indeed essential to have a clear and correct view of the way in which legislation comes into being. The method of lawmaking and the method of the application of the law are therefore closely interrelated.

This also means that, indirectly, the method of lawmaking — which will not be considered any further here (I refer to the contributions by Brouwer and Frändberg) — is useful to the judge.

29. As to the general methodology concerning the application of the law, the following topics may be mentioned: The question whether positive and objective results are possible in the field of legal methods, the logic of judicial decisions, the psychology of judicial decisions, the sociology of judicial decisions, the relationship between the interpretation of fact and of law, the distinction between judicial decisions 'secundum legem', 'praeter legem' and 'contra legem', the structure of a judicial decision, the applicability of decision theories to judicial decisions, the impact of the consequences of the application of the law to the orientation of this application, the use of sociology as an aid to legal interpretation and application, etc.

Furthermore, the following aspects of the problems concerning the application and interpretation of the law can be distinguished: the interpretation of the law, the flaws in the law, the autonomies in the law, the application of 'vague norms' and 'vague notions', the interpretation of facts, the interpretation of legal transactions of private law, and the judicial argumentation in general. It would lead us too far to go into a detailed discussion of each of these aspects. Suffice it to point out the numerous topics of research in the field of the methodology concerning the application of the law.

On the one hand, a number of thorough studies in the field of legal theory are available, which will prove useful to the judge. On the other hand, there are numerous problems in the field of legal theory which are still to be looked into carefully.

6. Conclusion

30. As appears from this concise survey and from the few examples that have been elaborated more in detail, the theory of law implicitly makes its impact felt in numerous judicial decisions and in the judge's performance in general.

Much of what has been mentioned here as pertaining to the theory of law can be frequently traced in papers on legal dogmatics, in the form of 'general considerations'. However, where this occurs, it is insufficiently acknowledged that these 'considerations' are in fact of a different nature from that of legal dogmatics. The different nature is that of legal theory, which is an independent science with a methodology of its own[23]. The consequence is that questions of legal theory and answers to these questions are elaborated unsystematically in the classical literature on legal dogmatics. And it is this literature which, normally speaking, the judge will consult, also when faced with problems of legal theory.

This implies that, in judicial practice, one relies often too heavily on theories that show a lack of scientific elaboration or verification, or that certain problems of legal theory are being unduly considered as questions relating to the 'philosophy of law', unsuited for scientific study and to which anyone, according to his own understanding and conviction, could give an answer.

31. Two conclusions can be drawn from all this, one for legal practicians and one for legal theorists.

Legal practicians, and in this case judges, should appreciate more that certain (legal) problems involve aspects of the theory of law and that a scientific approach of these questions can provide more satisfactory answers.

Legal theorists should conduct more practice-oriented research, where their approach should not exclusively be inspired by a purely scientific interest, but should also take into account the needs of legal practicians, in this case judges. This also means that the findings of research in legal theory should be reflected in publications edited in such a way that they are as accessible to the practician as the average literature on legal dogmatics.

[1] LAMBRECHTS, W., 'Raad van State, waarheen? ('Conseil d'Etat, whereto?'), *Rechtskundig Weekblad* 1970—71, 245.

[2] See on this subject: VAN WIJK, H. D., *De norm is per definitie abstract (The norm is by definition abstract)* Kluwer, Deventer, 1971; BELINFANTE, A. D., *Kort begrip van het administratief recht (Epitome of administrative Law)* Samsom, Alphen aan den Rijn, 1968.

[3] Here as well could we rightly speak of a legal rule with a wide range of application, when the 'parking prohibition' is general, in the sense that it applies to all motorists in abstracto.

[4] See for instance: VAN NESTE, F., 'Onbehagen omtrent de eigendom' ('Discomfort about property'), *Rechtskundig* Weekblad 1975—76, 2601—2612; KNIEPER, R., 'Eigentum und Vertrag', *Kritische Justiz* 1977, 147—167.

[5] SLAGTER, W. J., *Juridische en economische eigendom (Juristic and Economic Property)*, Kluwer, Deventer, 1968, 66 pages.

[6] SLAGTER, W. J., *o.c.*, 18.

[7] SLAGTER, W. J., *o.c.*, 35.

[8] Hoge Raad, 18th December 1964, *Nederlandse Jurisprudentie* 1964, 158.

[9] Unless the questions and methods of the Theory of Law are knowingly integrated in a kind of renovated, 'empirical' Legal Dogmatics. In my opinion this is an Überforderung both for legal dogmatics and for the theory of law, and it is advisable to keep separated these two essentially different angles of incidence.

[10] See for example: VAN QUICKENBORNE, M., De oorzakelijkheid in het recht van de burgerlijke aansprakelijkheid (Causality in the law of civil liability), Gent, 1972; HART, H. L. A. and HONORE, A. M., *Causation in the Law,* Oxford, 1959; VAN SCHELLEN, J., *Juridische causaliteit (Juridical Causality)*, Deventer, 1972.

[11] PAWLOWSKI, H.-M., 'Die drei Funktionen des staatlichen Gesetzes', *Rechtstheorie* 1981, 9—27.

[12] Compare for instance: BORUCKA-ARCTOWA, M., *Die gesellschaftliche Wirkung des Rechts,* Duncker & Humblot, Berlin 1975, 181 pages; BORUCKA-ARCTOWA, M., 'Die gesellschaftlichen Funktionen des Rechts in der Doktrin und im Lichte empirischer Forschungen', *Rechtstheorie* 1981, 159—176; LUHMANN, N., *Rechtssoziologia,* 2 vol., Rohwohlt, Reinbek bei Hamburg, 1972, 382 pages; LEGAZ Y LACAMBRA, L., a.o., *Die Funktionen des Rechts,* A.R.S.P. Beiheft nr. 8, Franz Steiner Verlag, Wiesbaden, 1974, 124 pages; ORIANNE, P., *Introduction au système juridique,* Bruylant, Brussels 1982, p. 259—302 ('Les fonctions sociétales du droit'); RAZ J., 'On the Functions of Law' in: *Oxford Essays in Jurisprudence,* SIMPSON, A. W. B. (ed.), 278—304.

[13] See with regard to this for example; VOEGELI, W., 'Funktionswandel des Delikts- und Schadensrechts', *Kritische Justiz*, 1980, 135—155.

[14] See: VAN GERVEN, W., 'De invloed van de verzekering op het verbintenissenrecht', ('The impact of insurance on the law of contracts'), *Rechtskundig Weekblad,* 1962—63, 777—792.

[15] SCHOLTEN, P., 'Convenances vainquent loi', in: *Verzamelde Geschriften van Paul Scholten (Collected Writings by Paul Scholten)*, Zwolle, 1980, part 3, 196—212; OLY, G., 'Dubbele Rechtsorde' ('Double Legal Order'), *Weekblad voor Privaatrecht Notariaat en Registratie,* 1981, 85—90.

[16] OLY, G., 'Dubbele Rechtsorde', *Weekblad voor Privaatrecht Notariaat en Registratie,* 1981, 88—90.

[17] ROTTLEUTHNER, H., ''Klassenjustiz?'', *Kritische Justiz,* 1969, 1—2 RASEHORN, T., ''Von der Klassenjustiz zum Ende der Justiz'', *Kritische Justiz,* 1969, 273—283.

[18] BOETTCHER, H.-E., ''Zum Selbstverständnis gewerkschaftlich organisierter Richter und Staatsanwälte'', *Kritische Justiz*, 1981, 172—181.

[19] Compare, e.g.: BLANKE, T., 'Probleme einer Theorie des Arbeitsrechts'', *Kritische Justiz,* 1973, 349—360; and: ARNAUD, A.-J., *Essai d'analyse structurale du code civil francais,* L.G.D.J., Paris, 1973, 182 pp.

[20] JOST, F., *''Soziologische Feststellungen in der Rechtsprechung des Bundesgerichtshofs in Zivilsachen''*, Duncker und Humblot, Berlin, 1979, 186 pp; VAN HOECKE, M., *''Mens- en maatschappijbeeld van de rechter''* (The Judge's Conception of Man and Society), Ghent, 1975, 111 pp.

[21] Examples: ''Die Lebenswirklichkeit lehrt, dass ein bestehendes Vertrauen zwischen *verschiedenen Personen nicht nur dadurch zerstört werden kann, dass sich eine von ihnen* nachweisbar eines underlichen Verhaltens gegenüber den anderen schuldig macht, sondern auch dadurch, dass sie schuldhaft den begründeten Verdacht eines solchen Verhaltens erweckt.'' (Bundesgerichtshof, quoted by: JOST, F., *o.c.,* 146)
''Seldom has in the dead of winter, a brewer's van, which supplies the local customers, been fully loaded'' (Ghent Court of Appeal, 24-10-1972, quoted by VAN HOECKE, M., *o.c.,* 91).
''When faced with two depositions made by the same person, one should preferably give credit to the first one, which is usually more spontaneous and less inspired by self-defence''. (Ghent Court of Appeal, 12-10-1972, quoted by VAN HOECKE, M., *o.c.,* 94).

[22] See GERARD, PH., ''Droit, égalité et idéologie. *Contribution à l'étude critique des principes généraux du droit'',* Publications des Facultés Universitaires Saint-Louis, Brussels, 1982, 488 pp.

[23] For this topic I refer to: M. Van Hoeche, What is Legal Theory?, Leuven, Accio, 1985.