

Consequence-based arguments in legal reasoning and the quality of law

Abstract

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Modern institutional and constitutional economics have contributed significantly to our understanding of how legal and political institutions interact with economic processes. More specifically, we have learned much about how different legal rules and regulations affect, and are affected by, economic development and the regulation of markets. No serious analysis of the process of economic growth (and decline) is possible without assessing the nature and functioning of institutions and norms framing economic processes. Besides theoretical insights, numerous comparative cross-country studies have provided empirical evidence on the economic effects of various characteristics of legal rules and institutions. Typical questions in this branch of literature are whether differences between legal “origins” or “families” such as common law or civil law have a significant impact on economic variables such as growth and welfare; whether globalization brings about the convergence of legal systems; or what the role of adjudication is in the adaptation of legal systems to rapidly changing circumstances.

This extensive body of literature on law as an institutional determinant of economic growth is partly inconclusive partly unpersuasive in an important aspect. Namely how, i.e. via which mechanisms “the quality of law” can impact on and matter for society. This paper argues that legal reasoning, in particular the role of consequence-based arguments in legal reasoning, is such a neglected mechanism. My main argument is that the extent and the way a legal system is open to “policy arguments” and “economic considerations” is an important variable among those “institutional determinants of the quality of law” which, in turn, have a crucial impact on variables which societies care about, be it the respect of human rights, the performance of their economic system or citizen’s welfare in general.

Methodologically, the goal of the paper is to link the jurisprudential discussion on comparative legal reasoning to another research line, the “legal origins” literature. While some claim that there is a “trans-Atlantic divergence in legal thought” or that national legal cultures are separated by deep-rooted differences of “mentalité”, others claim that globalization brings about convergence and the differences in legal doctrine and techniques are largely irrelevant anyway, considering the functional equivalence of the outcomes. If the question, in very general terms, concerns the convergence and divergence of legal systems in the context of globalization, this paper is dealing with a preliminary question of convergence and divergence: how does consequence-based reasoning matter for the quality of law? More precisely, how is legal change possible through adjudication in various legal contexts which are associated with different kinds of substantive problems but also embedded in different argumentative practices?

Legal reasoning, i.e. the way courts and other legal officials justify their decisions can be relevant in at least two ways. First, courts, especially higher or constitutional courts often take decisions which have large-scale systemic consequences. While legislative and administrative measures have been subject to open and often mandatory consequence-based control in most developed countries since

many years (“regulatory impact analysis”), the judicial branch seems to be much less accountable for the consequences of its decisions, even when these consequences are large-scale and immediate. On the other hand, even if the reasoning does not openly refer to or account for these consequences, such decisions are criticized in terms of their consequences in the public discourse. For instance, constitutional courts are sometimes criticised for extending the justiciability of economic and social rights “irresponsibly”, i.e. by neglecting the financial burdens on the national budget arising from interpreting such rights as justiciable.

Second, when courts attempt to justify their decisions with reference to expected consequences, serious problems emerge. The gist of my argument on this matter is that these problems are closely linked to a multi-faced, technical, institutional and normative feature of adjudication: the competence of courts. Competence has at least two, related, aspects: legitimacy and expertise.

As for expertise, consequence-based decision can be modelled as a three-step technical procedure.

Step	Question to be answered by the decision-maker	Difficulties
1. Identification	Which consequences (effects) matter?	Operationalisation
2. Measurement	What is the impact of the decision in these dimensions?	Information
3. Evaluation	Which decision has better consequences overall?	Trade-offs

In essence, a consequence-based judicial decision can be modelled as an exercise in optimisation under uncertainty. Ideally, a fully-informed rational decision-maker can solve this problem in an optimal way. Real-world courts, however, run into serious difficulties in each step. Due to radically insufficient information, time and technical expertise, decisions are based on various heuristics and rules of thumb. As the use of these heuristics is not always conscious and self-reflexive, competence also raises institutional and normative problems of transparency, justification, accountability or, in sum, legitimacy.

In general, legal reasoning is “an activity conducted within more or less vague or clear, implicit or explicit, normative canons. We distinguish between good and bad, more sound and less sound, relevant and irrelevant, acceptable or unacceptable arguments in relation to [...] legal disputation.”¹ Following Tony Honoré, I refer to these criteria or normative expectations as the *canon of acceptable arguments*. The canon arises out of a social practice among the legal community. By way of socialisation and introduction to the skills and knowledge of the profession members of any given legal community become enabled to deal with ordinary situations in a particular technical way, according to a specialized linguistic terminology. The canons limit the decision-maker institutionally and psychologically,² by requiring her to fit “within the framework”.

Looking at the role of consequence-based arguments in the canon of acceptable arguments of various legal cultures, one can observe important differences. As a matter of comparative “legal mapping”, the major legal cultures in the world (Continental,

¹ N. MacCormick *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press 1978), 12.

² MacCormick 1978: 34.

common law, and non-Western), national legal systems (American, English, German or French), particular legal areas (private, administrative, constitutional or criminal law), and judicial institutional roles (low-level and high-level courts) differ crucially along this dimension.

In the paper I discuss whether these differences stereotypically mentioned in the comparative legal scholarship are real, and if so, how relevant they are. I shall then focus on some specific legal contexts in which the answer to both questions is positive: social scientific insights or policy considerations are potentially relevant as legal arguments but legal reasoning does not openly account for them in every legal system under scrutiny. One such area can be constitutional adjudication on tax policy and social rights in various legal systems.

More generally, I shall raise the question whether the judicial adaptation of law only occurs in systems which give judges discretion and cultivate a judicial ideology of taking social (i.e. not strictly legal) consequences into account or this adaptation also occurs, albeit in more subtle ways, in such legal systems which bind judges more closely to rule-following. It may also turn out that by going further (stepping behind) one step we find that the question itself should be rephrased: the classification of legal systems along the dimension of more or less discretion is not informative enough on their adaptivity in specific, and the quality of law in general.

In modern democracies, the legitimacy of courts' decisions depends both on the substance of the argumentation and the way the argumentation is publicly justified. It is trivial that judges legitimately use consequence-based arguments when the law authorises them to do so. At least from a legal point of view, the opposite is also straightforward: without an explicit or implicit authorisation, judges are not allowed to recur to such arguments. It is a doctrinal or jurisprudential question whether and how an implicit authorisation can be inferred. On the other hand, it is a matter of philosophical or moral dispute whether such authorisation is also normatively desirable. From a policy perspective the question is one of institutional design: given that the indeterminacy of deductive reasoning in law seems inevitable,³ is it advisable to give a broad mandate for consequence-based judicial reasoning or not? How can judges be made accountable for their decisions? Would such a broad mandate lead to the politicization of the judiciary?

While a comparative analysis of legal reasoning is obviously relevant for the discussion whether and to what extent we can observe a convergence in the methodology (legal epistemology) of various legal cultures, recent comparative legal scholarship has showed that even criteria such as transparency or justifiability in terms of public reason are specific to certain legal cultures. In other systems legal discourse can be "bifurcated" (M. Lasser): while public reasoning is deductive or formalistic, well-formulated and reasonable consequence- (or policy- or fairness-)based arguments do play an important role in internal judicial discourses, semi-official doctrinal commentary. In addition, through more subtle mechanisms such as regulatory emulation, argumentative techniques also change in time, providing a complex pattern of convergence and divergence.

³ Cf. MacCormick 1978: 65-72.