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Judicial conformity versus dissidence: an economic analysis of judicial precedent

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Abstract

The individual decision made by a judge does not only reflect his personal preferences about a case but also the expected response of the judicial community to the decision. We propose an analysis of judicial attitudes towards precedent based on the adoption externalities associated with legal rules. The situation is modelled as a coordination problem within a sequential game of two periods in which judges play a bandwagon strategy.

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1. Introduction

Why do judges stick to established precedents? Or, alternatively, why do they decide to innovate and depart from the precedents? These questions have been largely discussed in the Law and Economics literature since the seminal paper by Landes and Posner (1976). They nonetheless remain important especially when the precedent is not binding as is the case, for instance, when there are no hierarchical but horizontal relationships between different courts. The purpose of this article is to analyse the attitude of judges towards the precedents when they are not obliged to adhere to these rules. We propose an approach of judicial decision-making in which personal motives, that is the type—legalist or policy-oriented—of the decision maker, are not the only explaining variable of the attitude of judges towards precedent. The point has been developed previously by Miceli and Cosgel, (1994), who

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build upon the idea that judges are interested in the reception of their decisions by observers of the legal process and model how not only private motives but also reputational concerns influence judicial decision-making. The argument is resumed further by [Bueno de Mesquita and Stephenson \(2002\)](#) in an analysis which also puts forward that judicial decision-making decisively depends on what other judges want. However, their paper merely focuses on vertical communication between lower (trial) judges and high (appellate) judges. The literature on social norms provides a number of promising elements allowing to extend the analysis of judicial interdependence to the interactions between agents located at the same hierarchical level. Again, the persistence of social norms, especially when confronted with other rules, is explained by the combined effects of personal opinions and the attitude of other individuals. This is the argument put forward in a recent paper by [Kahan \(2000\)](#) to analyse the “sticky norms problem”, which “occurs when the prevalence of a social norm makes decision makers reluctant to carry out a law intended to change that norm” ([Kahan, 2000](#), p. 1). Kahan shows that social influence leads to self-reinforcing movements either towards the enforcement or the non-enforcement of the (new) law against the (prevalent) norm.

Following up this line of reasoning, we argue that judicial behaviours cannot be fully understood as resulting from a strictly individual calculus, based upon personal tastes about the case at hand, but that interdependence between judges in their decision-making process and conformity with the profession also have to be taken into account. However, we depart from Kahan’s approach in several points. First, Kahan’s explanation is restricted to the process through which a law exogenously created by a legislator is susceptible to replace a norm, while our model also deals with the creation of new rules by judges. Second, and more important, Kahan treats the propensity to conform as exogenous—a given feature of human psychology. Now, even if this may be acceptable in the case of social norms, it is far from being obvious that judges—rational agents, as usually assumed—simply conform to what their colleagues do. More precisely, to assume that judges tend to conform to what their colleagues do solves, at least partially, the problem of using a precedent rather than creating a new rule when hearing a case. In different words, it is not only important to explain how private elements combine with “social” or professional factors to understand the attitude of judges towards precedents, but also to account for this tendency to conform to what others do. In our paper, we discuss the tendency to conform as the result of a cost–benefit analysis. We then propose to endogenise the attitude of judges towards precedent. For this purpose, we refer to the concept of adoption externalities.

The latter concept has not been frequently used in law and economics to analyse judicial supply. A notable exception is [Ogus’ recent paper \(2002\)](#) in which network externalities are used to study legal culture. However, his approach does not apply to the attitude of judges towards precedent. The concept of adoption externalities is never used or explicitly mentioned in Kahan’s analysis of judicial behaviours either. However, we believe that it may be helpful to understand the attitude of judges in relation to the precedent principle. Indeed, we argue that the adoption externalities associated with an existing but not binding rule may induce judges to follow it when its value for a judge depends on his personal preferences as well as on the number of other judges also using it. We also demonstrate that a judge may still have an incentive to deviate from the precedent and to sacrifice the corresponding adoption externalities whenever his expected individual gain is sufficient

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