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Interpreting the Rules of the Game

Abstract

After providing a brief overview of the economic theory of judicial decisions this paper presents an argument for why not only the economic theory of judicial decisions, but also the rational choice approach in general, most often fails in explaining decision-making. Work done within the paradigm of New Institutionalism is presented as a possible alternative. Within this paradigm judicial activity is conceptualized as the activity of „interpreting the rules of the game”, i.e. the institutions that frame the economic and political interaction in a society. Such a conceptualization of judicial interpretation and judicial decision-making would have to depart from rational choice modes of reasoning, and should instead focus on how human beings actually reason, learn and choose drawing from research in cognitive science.

I. Introduction

My aim in this paper is to give an account of the economic point of view of judicial decisions and their representation. I take it that there are two main interpretations of the notion of the „economic point of view”. It can either mean that there is a specific class of problems interesting for economists for which they have produced successful explanations and thus theoretical solutions. According to this interpretation, an account of the economic point of view of an issue is supposed to reproduce the successful explanations on the respective subject matter, i.e. markets, business, money and the like. Under this interpretation, my account would have to be very short indeed. Judicial decision-making is not a problem that is usually dealt with by economists since it does not constitute an economic problem proper, and it is therefore no surprise that such an account is virtually inexistent.

The „economic point of view”, however, can also mean that one tries to apply economics – as „the science which studies human behaviour as a relationship between scarce means which have alternative uses” (Robbins 1932) – to every manifestation of human behaviour. This has become, indeed, the most common interpretation used when the „economic perspective” of a problem is requested. The account of the economic point of view on judicial decisions in this sense can be quite a bit longer than on the first interpretation. In line with this view, section II of this paper gives a brief overview of what can be called the economic theory of judicial decisions. Section III presents an argument for why not only the economic theory of judicial decisions, but also the rational choice approach in general, most often fails in explaining decision-making. Section IV points to a possible alternative as has been emerging in work done within the paradigm of New Institutionalism. The aspiration here is not to develop an alternative theory to decision-making. It is the much more modest one of defining the locus of the judicial activity for „interpreting the rules of the game” in the broader framework of institutionalist theory. The paper ends with a short conclusion (Section V).

II. The Economic Theory of Judicial Decisions

The standard model for analyzing decision-making used by economists has been most vividly presented and defended in its formulation by Gary Becker.¹ According to this theory, human action is understood to consist in a rational choice between alternatives. The decision-making situation of the actor is described in reference to two elements: his preferences and his constraints. Both elements are strictly separate. The preferences contain the individual's notions of value, which are presumed to be stable. The constraints limit the scope of action, so that alternative courses of action are only possible within the constrained choice space. In accord with his preferences, the actor evaluates the alternatives that are available to him, e.g. he weighs the advantages and disadvantages, the costs and benefits of the alternatives and decides for those that promise the highest net benefit. The claim of this model is thus that human action is explainable on the basis of the interplay between preferences, constraints and the hypothesis of utility maximization. In the case of a rational choice under certainty, it is presumed that the agent knows all of his alternatives and all of the conditions of his environment, and that he knows the whole range of the possible outcomes connected with his decision (assumption of complete information). In the variant of the rational choice model under risk, it is presumed that the agent knows all the alternatives open to him, but avails only of a probability distribution over the possible outcomes of his action (assumption of incomplete information).² All such models presume that the agent is endowed with a perfect information-processing capacity so that she or he can accurately carry out the (expected) utility maximization calculus.

For the purpose of my argumentation, it is possible to ignore these and a series of other details of the model³ and to concentrate on essentials: all human action can – so runs the claim – be explained by the interplay between a stable system of preferences, the prevailing constraints and the hypothesis of utility maximization. In the words of one protagonist of this theory (Becker 1976, 14): „[...] I do not want to soften the impact of what I am saying in the interest of increasing its acceptability in the short run. I am saying that the economic approach provides a valuable unified framework for understanding *all* human behavior, although I recognize, of course, that much behavior is not yet understood, and that non-economic variables and the techniques and findings from other fields contribute significantly to the understanding of human behavior. [...] The heart of my argument is that human behavior is not

1 See Becker (1976) and the well-known article about “De Gustibus Non Est Disputandum” from Stigler and Becker (1977), reprinted in Becker (1996).

2 I cannot consider the various models of what is known as the economics of uncertainty or the economics of information, because only the principle is of concern here. For a complete overview see Wessling (1991, ch. III).

3 For a complete presentation of the model see Kirchgässner (2000, ch. 2).

compartmentalized, sometimes based on maximizing, sometimes not, sometimes motivated by stable preferences, sometimes by volatile ones, sometimes resulting in an optimal accumulation of information, sometimes not. Rather, all human behavior can be viewed as involving participants who maximize their utility from a stable set of preferences and accumulate an optimal amount of information and other inputs in a variety of markets.”

How exactly the utility function is specified is of less importance. In regard to the judicial decisions that are at stake here, it is not a valid criticism to state that judges are not normally⁴ guided by monetary incentives when they are making their decisions. The reply to this usual criticism is that the arguments in the utility function need not be of a monetary nature, but that other arguments, equally or more important for predicting decision outcomes – typically non-monetary in nature – enter the utility function of judges. Thus, the reply goes, even if one would like to save the term „economic” for only those cases in which the arguments of the utility function are of monetary nature, one can nevertheless use the same kind of approach, only differing by assuming non-monetary incentives. Even if a *strictly economic theory of judicial decisions* fails to obtain in this case, one can plausibly speak of a *rational choice theory of judicial decisions*, and this seems to apply very well to the case of interest here. It is the logic that is important, not the concrete specification of the model. So in their influential textbook on Law and Economics, Cooter and Ulen contend (2004, p. 433): „[...] it can be argued that while procedural rules impose constraints upon courts, within these boundaries, juries and judges reason just like rational, economic decision-makers. Procedural rules describe a framework whose justification is not necessarily economic, but within that framework *the economic logic operates*” [Emphasis added, C.M.].

What are we to think about this suggestion? Is the economic logic of the rational choice approach really so successful in explaining the decision-making process of judges? I think that the answer to this question is negative. The reason is not specifically related to judicial decision-making, but is more fundamental. I would like to argue that it has to do with a principal confusion that underlies the rational choice theory more generally, and the use of the rationality postulate more specifically. I want to show that the use of the rationality hypothesis, both in the philosophical discussion as well as in the social scientific discussion, is problematic. More specifically, I want to argue that what rational choice theorists quite often offer is a rational reconstruction of actions rather than a genuine explanation or prediction of actions. I will start with an account of the philosophical discussion on the role of rationality in explaining action, before I move on to the rationality hypothesis as it is usually employed in economics and the other social sciences.

4 There are of course cases that judges can be plausibly modeled to be guided by monetary incentives in their decisions. This is true for some historical periods, but also today: It is well-known that in Los Angeles, for example, a private alternative to a public trial exists, since parties can agree to “rent” a retired judge to decide their case, and his decision is registered with the state court and has the full effect of a decision in public court.

III. Why A Rational Reconstruction is Not An Explanation

For many decades philosophical discussions have been dominated by approaches that stress the role of motives, reasons and intentions in the explanations of action offered. More recently, however, those approaches seem to have gained dominance in which an action is supposed to be explained not if the reasons and the intentions of the actor are identified, but only if an additional assumption about his rationality is made.⁵ The increasing role that rationality is credited with in explanations of action should be positively assessed because it specifies a *mechanism* that is supposed to transform mental states into actions. By specifying a mechanism, it is possible to connect diverse mental states with one another and to bring the complexity of the process more precisely to expression. I would nevertheless, like to relativize the importance of this generally positive development, because of a fundamental confusion in the respective discussion.

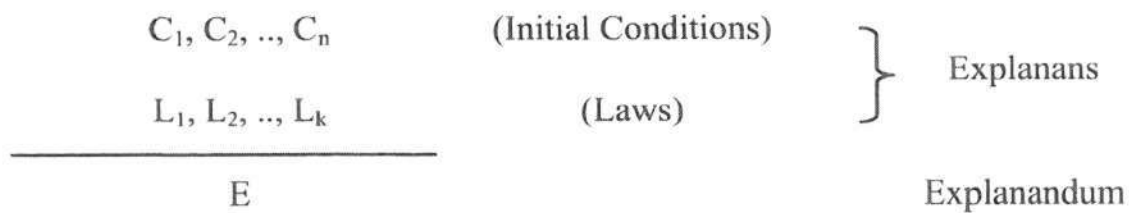
It is characteristic for the prevailing situation that even thinkers who are otherwise quite clear, such as Karl Popper, have caused more confusion than clarity in discussing the status of the rationality hypothesis. The „situational logic” propagated by Popper, for example, as the adequate method for the social sciences „consists in a sufficient analysis of the situation of the actor, in order to explain the action from the situation without the help of psychology” (Popper 1969/1993: 120 / trans. C.M.). Instead of suggesting that hypotheses on mental dispositions or mental states be tested, Popper pleads to introduce a rationality principle on the basis of which the situation of the actor is more adequately apprehended. This rationality principle is in fact an almost empty principle⁶ – albeit not a priori – and, beyond that, it is also

5 In this, it does not matter whether this explanation is viewed as causal or not. For an example, see Føllesdal (1982, 312): “In order for the intentional notions to make sense we must require enough rationality to let our pattern of explanation be reason explanation rather than merely causal explanation. We may permit all kinds of interferences of a merely causal kind, but in order to say that we deal with beliefs, desires, actions etc., rather than with mere physical phenomena, the underlying pattern of explanation must be reason explanation. That is, we must invoke rationality [...]” And recently, Searle (2001, 92): “There is a special logical feature of rational action explanations. Construed as causal explanations, they do not work. The causes are typically not sufficient to explain the action. Yet they are perfectly adequate as they stand. Their intelligibility requires that we think of them not as citing causes that determine an event, but as citing the reasons that a conscious rational agent acted on. The agent is a self. Agency plus the apparatus of rationality equals selfhood....”

6 See Popper (1963/1994, 169): “Thus there is only one animating law involved – the principle of acting appropriately to the situation; clearly an *almost empty* principle. It is known in the literature under the name ‘*rationality principle*’ [...]”

false.⁷ Nevertheless, one is bound to hold this false principle with low empirical content for methodological reasons. Every time that a theory is falsified it is necessary to make a methodological decision about which part of the theory is to be rejected or modified, and Popper's suggestion is to reject the other components of the theory and not the rationality principle. The reason is that we are primarily interested in adequately apprehending the situation, and we above all want to see whether the elements of the actor's situation have been correctly reconstructed and not whether the actor was rational or not.

To clarify Popper's thesis, keep in mind that an explanation is a deductive argument of the following type:



According to this model, the statement of the state of affairs to be explained, i.e. the explanandum, is explained by the fact that it is logically deduced from the conjunction of singular statements (the initial conditions) and from general statements (the laws).

In the case of situational logic, that statement that we call the explanandum describes human action. The situational elements serve as initial conditions, while the rationality principle plays the role of the general law.

SE_1, SE_2, \dots, SE_n	(Situational Elements)
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7 See Popper (1963/1994, 171): "You will remember my assertion that the rationality principle does not play the role of an empirical or psychological proposition and, more especially, that it is not treated in the social sciences as subject to any kind of test. Tests, when available, are used to test a particular model, a particular situational analysis – but not the general method of situational analysis, and not, for this reason, the rationality principle: to uphold this is part of the method. [...] Thus, if a test indicates that a certain model is less adequate than another one, then, since both operate with the rationality principle, we have no occasion to discard this principle.

This remark explains, I think, why the rationality principle has frequently been declared to be *a priori* valid. And indeed, what else could it be if it is not empirical?

This point is of considerable interest. Those who say that the rationality principle is *a priori* mean, of course, that it is *a priori* valid, or *a priori* true. But it seems to me quite clear that they must be wrong. For the rationality principle seems to me clearly false – even in its weakest zero formulation, which may be put like this: 'Agents always act in a manner appropriate to the situation in which they find themselves'."

R	(Rationality Principle)
A	(Human Action)

This deduction can also be conceived of as the following form of logical implication:

$$SE_1 \wedge SE_2 \wedge \dots \wedge SE_n \wedge R \vdash A$$

The conclusion, A, is deducible from the conjunction of the premises, e.g. from the situational elements and the principle of rationality. In case of a falsification, one can deduce from the negation of the conclusion the falsity of the conjunction of the premises such that the following applies:

$$\neg A \vdash \neg (SE_1 \wedge SE_2 \wedge \dots \wedge SE_n \wedge R)$$

With the help of DeMorgan's law one thus yields

$$\neg (SE_1 \wedge SE_2 \wedge \dots \wedge SE_n \wedge R) \vdash \neg SE_1 \vee \neg SE_2 \vee \dots \vee \neg SE_n \vee \neg R$$

In other words, the falsification can either affect the situational elements or the rationality principle. Popper pleads for a methodological decision according to which one should modify the situational elements, not the rationality principle.

Two objections can be raised against Popper's situational logic: (i) It is unclear how exactly one is supposed to identify the situational elements. Regarding this point Popper states: „[t]he situation is analyzed in such a way that what appear to be psychological moments such as, for example, desires, motives, memories and associations are transformed into situational elements. An agent with such and such desires is replaced by an agent who finds himself in a situation in which he is following such and such *objective* ends. An agent with such and such memories and associations is replaced by an agent who finds himself in a situation in which he is objectively endowed with such and such theories or with such and such information. This enables us, then, to understand his actions in the objective sense that we can say: I do in fact have other ends and other theories (than, for example, Charles the Great), but had I or you been in such and such a situation – whereby the situation includes aims and knowledge – then I, as well as you, would have acted the same way” (Popper 1969/1993: 120 f. / trans. C.M.). It is clear that the term ‘situation’ applies both to all the social and individual conditions and to all the mental states of the actor. The technique which could render all of these situational elements objectively identifiable remains unclear, especially since Popper does not want to allow the formulation of empirical hypotheses about them. (ii) If the principle of rational-

ity is almost empty and factually false, how is it then possible to apprehend human action nomologically and thus to explain it?⁸

The decisive weakness of the situational logic consists in the fact that it *confounds the explanation of an action with the rational reconstruction of an action*. It is one thing to apprehend an action nomologically and thus to explain it; it is another to reconstruct an action rationally *ex post facto*. In the first case, one develops law-like hypotheses to explain the action, because the fundamental elements of the action repeatedly appear in some invariable manner. In the second case, one is concerned with rationally reconstructing a unique action by specifying the relevant elements of it.

In explaining an action according to the above discussed schema, it is necessary that besides specifying the initial conditions, at least one or more law-like hypotheses is employed. The rationality hypothesis can be drawn on as one possibility. It is merely important that at least one general law be found in the explanans. According to the thesis of the structural identity (or the symmetry) of explanation and prediction, a scientific explanation differs from a scientific prediction in a pragmatic respect, not in its logical structure. In an explanation it is known that the action described in the conclusion has occurred, and one looks for the general laws and the special initial conditions needed to explain it. In predictions, the general laws and the special initial conditions are given, and one deduces the statement about the action in question from these before the time of its presumptive occurrence.⁹

A reconstruction of an action is to be differentiated from this sort of a genuine explanation of an action. In the reconstruction of an action, the action is described with the aid of specific or singular statements. These specific statements convey information about the mental states of the actor, e.g. about his desires, goals, beliefs, etc. The reconstruction of an action consists in formulating specific statements, which serve to explicate the meaning that is connected with this action. In other words, it involves the verbal representation of the event at hand, i.e. in this case of the action, with the help of informative descriptive sentences. The reconstruction of an action is of great scientific interest, and in many disciplines the main scientific problem consists in producing successful reconstructions.

The *rational reconstruction* of an action is a sub-category of a reconstruction of an action. Not only does it contain specific statements about the mental states of the actors; beyond that, it also employs statements that presume the rationality of the actors. The statements about the rationality of the actors can of course be formulated in different ways. In those cases in which the statements about the rationality are formulated tautologically, in the rational reconstruction, besides the specific statements about the mental states of the actors, one also finds a tautology. That is the first characteristic of a rational reconstruction. The second is: a rational reconstruc-

8 For an excellent treatment of Popper's situational logic, with extensive references to all the relevant passages in his opus, see Böhm (2002).

9 For more details on the thesis of the structural identity of explanation and prediction, with a discussion of an array of objections, see Hempel (1965, 364-376), Stegmüller (1983, ch. II) and Gemtos (2004, 243 ff.).

tion is only possible *ex-post-facto*. Hence, it is only possible to rationally reconstruct an action after that action has already taken place. These two characteristics differentiate a rational reconstruction from a real explanation. The former does not contain any law-like hypotheses, so naturally the thesis of the structural identity of explanation and prediction is not valid for it either. To this extent, the rational reconstruction is simply a specific type of a reconstruction of an action.

The basic idea of situational logic, which is to be found in rudimentary form in the work of Max Weber,¹⁰ consists in eliminating all mental phenomena from the explanation of an action. Introducing the rationality principle as a substitute for law-like hypotheses about mental phenomena, such as desires, beliefs, memory, etc., thus leads to tautologizing the rationality principle, and as a result, the action cannot be explained but only rationally reconstructed. The same applies to the rational model, which is now most often applied in the social sciences. In principle, it is only a refinement and further development of the rationality principle, which Weber, Popper and others introduced to the discussion. The most characteristic use of this rationality model is expressed in Gary Becker's theory of rational choice, which we have summarized in section II and which in one form or another is not only applied to economics, but also to sociology, political science, legal studies and other social scientific disciplines.

We have seen that the essential claim of this model is that all human action can be explained by the interplay between a stable system of preferences, the prevailing constraints and the hypothesis of utility maximization. In my view, this claim cannot be maintained. In the construction of the rational model, the actors' preferences are normally specified in a utility function; and independently of which additional – in fact very questionable – presuppositions are made about the more specific character of the preferences, they are clearly meant to serve as initial conditions in the aforementioned schema. The same applies for the prevailing constraints, which limit the actor's alternatives: they serve to specify his environmental situation, and they are also clearly meant to be initial conditions. To explain an action, at the very least one needs one law-like hypothesis, and in the rational choice theory the utility maximization hypothesis can assume this role. „Man is eternally a utility-maximizer, in his home, in his office – be in public or private –, in his church, in his scientific work, in short, everywhere” (Stigler 1981: 188). It is clear that in this, and in many other cases, the utility maximization hypothesis is formulated tautologically. A statement can only have empirical content if it excludes at least one logical possibility. The utility maximization hypothesis, however, is often treated in such a way that no logical possibility is excluded, and it thus ends up being a tautology. Such a methodological treatment of the interplay between preferences, restrictions and the utility

10 See Weber (1922/1985, 428 ff.). The similarity to Popper's situational logic is well-expressed in the following quotation: “Similarly the rational deliberation of an actor as to whether the results of a given proposed course of action will or will not promote certain specific interests, and the corresponding decision, do not become one bit more understandable by taking ‘psychological’ considerations into account.” Weber (1922/1985, 559/ 1978/19).

maximization hypothesis can only result in the rational reconstruction of an action and not in the explanation of an action.¹¹

This thus presents us with a case analogous to that of situational logic, only in a somewhat more refined form. The theory of rational choice leads to a *reconstruction* of the actor's situation with the help of preferences and constraints; beyond that, with the help of the utility maximization hypothesis, the theory leads to a *rational reconstruction* of the situation, albeit not to an explanation. For every conceivable action it is possible to specify *ex post* the actor's preferences and constraints according to the available information, and then to postulate that the actor made the best of the situation, given his constraints and preferences.

One of the reasons why this theory is so appealing is certainly that it entails a mathematical formulation that justifiably gives the view of theoretical precision.¹² The choice calculi that are part of the theory are deductively developed axiomatic systems. Such calculi can, of course, be interpreted in different ways – for example, also empirically. Thus, for example, Boolean algebra can be interpreted as a propositional logic and thus as logically true; that, however, does not preclude it from also being interpreted empirically. Interpreting it as a circuit algebra – that is as an algebra of certain electric circuits, which is the basis for computer technology – constitutes one such empirical interpretation. Something similar applies to the action calculi: their empirical import does not originate in the uninterpreted, deductively developed axiomatic system, but in the interpretation of this system, i.e. in the propositions that bring the terms and postulates of the axiomatic system into connection with real objects and facts and specify them empirically.¹³ The interpretation of the maximization calculus under constraints and the other calculi of choice that Becker, Stigler and most rational choice theorists offer is, however, generally very narrow and thus only suitable for post-hoc rationalizations.

In sum, it should be clear that the rational-theoretical approach – both in the form of the situational logic and in the form of the rational choice model that dominates the social sciences today – shows some serious defects. The reason is that the rationality principle is most often made completely untestable, and it is thus unable to capture human action nomologically. The rationality principle's only contribution is that it offers a special type of reconstruction of an action – namely, a rational reconstruction. This is true of all those cases in which the approach is applied and thus also in the case of judicial decisions.

11 On the tautological danger see Tietzel's (1988) important article. Becker (1976, 7) also discusses the tautological danger of his approach, but he makes the same mistake as Popper – namely of equating a rational reconstruction with an explanation.

12 A very good introduction for readers not versed in mathematics is offered in Heap et al. (1992), chapter 1.

13 See Hempel's (1952, 34 ff.) remarks, which are still the most precise available.

IV. The Alternative: Judicial Decisions from the Perspective of the New Institutionalism

There are, of course, further problems with the use of the rationality hypothesis that I cannot deal with here. The most important is that even when the rationality hypothesis is treated as a law-like statement, it fails to explain actions, as its repeated falsification by accumulated empirical evidence shows.¹⁴ In our present context, however, there is probably an even more fundamental reason why the framework of the rational choice theory is inappropriate: A substantial part of the judicial activity consists in the *interpretation* of the legal order, i.e. the interpretation and evaluation of legal documents. Rational choice theory is not designed to treat this issue, however, since it is meant to give an account of decision-making and choice, and it assumes, as we have seen, one way or the other, that all relevant knowledge needed in order to make the decision is already available and that the information-processing capacity of the chooser is perfect or nearly perfect. The activity of interpretation, however, has more to do with issues pertaining to the psychology of perception and the understanding of linguistic expressions than with the process of decision-making proper.

That is not to deny that judicial decisions are also made, of course; and even less is it to neglect the obvious fact that they are a constitutive part of what judges do. Judicial activity, however, is a complex activity, including the interpretation of legal documents, the critical evaluation of arguments and the application of rules to concrete cases. In order to come to grips with this complex process, an approach must be employed that, while paying due attention to the decision-making aspect, also adequately conceptualizes the process of interpreting legal rules. This can only be done if the issue of the *mental representations* is taken seriously. This need to employ richer psychological models in order to accommodate the complexity of the process of judicial activity has been increasingly acknowledged in the literature, and there are a array of attempts pointing in this direction.¹⁵ What I would like to accomplish in the remainder of this paper is the modest task of defining the locus of the judicial activity of „interpreting the rules of the game” in the broader framework of New Institutionalism, an emerging paradigm in the social sciences¹⁶.

In contrast to standard economic analysis, which assumes institutions as given, the main focus of institutional economics, old and new,¹⁷ has been on how the institutional framework of a society structures exchange and market relationships. In standard microeconomic theory, the market is usually conceptualized as an exchange

14 For details, see Mantzavinos (2005, ch. 5).

15 Notably by Gerd Gigerenzer (e.g. 2004), Christoph Engel (e.g. 2005) and others.

16 Judicial activity played also a prominent role in the so-called Old Institutionalism, especially in the work of J.R.Commons. See for example Commons (1934/1961).

17 For an informative review, see Rutherford (1994).

process between consumers and firms that are interacting under different competitive conditions, mainly captured by the theoretical notion of market forms, and the analysis focuses on how prices and quantities of goods are generated in equilibrium. Traditional price theory does not deny that the market is always constrained by rules, both moral and legal. It assumes, however, that the definition and enforcement of institutions are exogenous, and it concentrates on describing market forms and market structures and their effects on economic behavior. It is obvious that in accord with this picture the judge and his decisions do not have any role to play: It is not just that the issue of the interpretation of the legal rules is neglected; in fact, there are not even legal rules to start with.

The main message of institutional economics is that the *ceteris paribus* clause of traditional microeconomics is impermissible, because of the simple fact that economic behavior is not determined exclusively, or even primarily, by the market form or the market structure. When consumers and entrepreneurs begin participating in and exchanging on the market, and competing with each other, they are already socialized individuals, sharing a large number of social rules. Market participants are not a-historical creatures with ordered preferences, who maximize their utility under price and income constraints. During the socialization processes, the individuals who later become the entrepreneurs of economic theory have learnt the conventions, moral rules and social norms of the society in which they live. When founding companies, the entrepreneurs are already familiar with the legal rules, and they have learned the degree to which the state protects or infringes on their property rights. They are already the „legal persons” of legal theory. Because they have gone through the same learning history, the entrepreneurs share the same formal and informal institutions, i.e. the rules of the competitive game that make them the specific actors of the specific economic game they are engaged in (Mantzavinos 2001).

In this picture, then, economic life is fundamentally seen to be structured by the prevailing institutions, and, following the lead of Douglass North, institutions are commonly conceptualized as the „rules of the game” (North 1990). Furthermore, there is much work in all social sciences, notably political science, sociology, law, anthropology and organizational studies, in which the idea of institutions as the rules of the game has gained footing. Thus, in the emerging paradigm of New Institutionalism in the social sciences, there is a fundamental acknowledgment of the role of institutions as rules not only of the economic game, but, more broadly, also of the social and political game.¹⁸ It is, in other words, acknowledged that the systematic integration of the institutional framework into the study of the economic, political and societal game leads to a series of insights that differ from those in which the institutional framework is not paid attention to.

It is in this broader framework that, in my view, judicial activity can be most fruitfully theorized in social scientific terms. If one takes these new developments

18 Just to name one example from the different disciplines, see North (2005) for economics, Hall and Soskice (2001) for political economy, Knight (1992) for political science, Powell and DiMaggio (1991) for sociology, Ensminger (1992) for anthropology, Ellickson (1990) for law and March (1999) for organizational studies.

seriously, it is only natural to try to develop a theory of judicial activity as the activity of „interpreting the rules of the game”, the relevant empirical question being what form this activity takes with respect to different games, e.g. the economic, the political, the organizational, etc. We are far from possessing this kind of theory, but it seems that appropriately modeling the mental representations of the judges that ultimately give rise to different kinds of interpretations of the prevailing institutions as the rules of the game is a *conditio sine qua non* for its development. Such a conceptualization of judicial interpretation and judicial decision-making would definitely have to depart from rational choice modes of reasoning, and should instead focus on how human beings actually reason, learn and choose in the alternative framework that has elsewhere been termed „cognitive institutionalism” (Mantzavinos, North and Shariq 2004).

V. Conclusion

In conclusion, the analysis in this paper should make it obvious that the economic theory of judicial decisions has some serious defects, which underline the need for a good portion of skepticism about its usefulness for explanatory purposes. Since judicial activity is a complex activity involving the interpretation of legal documents, the critical evaluation of arguments and the application of rules to concrete cases, it can only be adequately dealt – this is the main message of the paper – if the formation of mental representations of judges in different settings is seriously addressed. Judicial activity, as the interpretation of the legal rules of the game, is, I have suggested, the proper lens through which one should view what judges do – a lens that, if used, could lead to a theory of judicial activity being an integral part of the new institutionalist framework in the social sciences.

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