Consequentialism in Law

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The proof of the pudding is in the eating, not in the cookery book.
– Aldous Huxley

This essay analyses the significance of consequentialism in legislation and legal adjudication. After a short discussion of legislative impact assessment, the debate on consequentialism in legal adjudication is presented in detail, making particular reference to the situation in Germany, Switzerland and Anglo-American countries. By way of exemplification, the discussion moves on to consider the application of the Hand rule in tort liability.

1 Introduction

In recent times, the law has appropriated consequentialism from two principal standpoints: that of economics, via economic analysis of law, and that of ecology, via environmental impact assessment and technology impact assessment.[1] This essay focuses primarily, but not exclusively, on the application of economic analysis concepts in law.

Whereas the principle of impact analysis during the regulatory process is generally undisputed, opinions are divided over the question of whether to allow consequential arguments to carry any weight in legal adjudication. If we accept that the application of law may involve an element of creating new law, and that the courts[2] thus assume a legislative function in certain areas, there is no avoiding the question of whether, in that case, they should not also consider the consequences of their decision during the deliberation process.

[1] Deckert, *Folgenorientierung*, p. 1.

[2] This also applies to the administrative authorities in a similar way.

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2 Consequentialism in the Regulatory Process

The instrument of legislative impact assessment is in use in the majority of countries today, albeit in varied ways. Since 1995, the OECD has recommended to its member countries to carry out a Regulatory Impact Analysis (RIA) as part of the legislative process. A priority OECD initiative towards that end is SIGMA (Support for Improvement in Governance and Management in Central and Eastern European Countries).[3] In the European Union, in the wake of the Mandelkern Report (2001) a plan was adopted to simplify and improve the regulatory framework. It prescribes an impact assessment for the most important legislative proposals.[4] In Germany, the procedure is set out in the "*Leitfaden zur Gesetzesfolgenabschätzung*", a guide to legislative impact assessment commissioned by the German federal government and published in July 2000.[5] In Austria, a reference manual entitled "*Was kostet ein Gesetz?*" ("What is the cost of a law?") was published in 1992, although it is rather business-administrative in thrust.[6] It is also becoming increasingly common for legislative impact assessment to apply the tools of economic analysis. In the United States, for example, cost-benefit analyses have long been standard practice in relation to major new regulations.

Since the year 2000, Switzerland has had its own instrument of regulatory impact assessment (*Regulierungsfolgenabschätzung*, RFA) at the Confederation level, which is informed by the OECD recommendations.[7] Its constitutional basis is given in Art. 170 of the Swiss Federal Constitution, according to which the Federal Assembly (the Swiss parliament) has to ensure scrutiny of the effectiveness of government measures.[8] The specific statutory hook for undertaking a prospective analysis of draft legislation is found in Art. 141 para. 2 lit. g of the Swiss Parliament Act. Under this provision, the notices to draft bills proposed by the Swiss Federal Council must include statements of impacts on the economy, society and the environment, insofar as substantial comments on these aspects can be made.

According to the decree and guidelines of the Swiss Federal Council of 15 September 1999, all legislation must therefore be subjected to an economic impact analysis before it is enacted. The analysis should include scrutiny of the following five points: (1) Necessity and possibility of state action; (2) Impacts on individual social groups; (3) Impacts on the whole economy; (4) Alternative regulations; (5) Expediency in enforcement. So far, regulatory impact assessment has

[3] Weigel, pp. 194 ff.

[4] Bundesministerium des Innern, Der Mandelkern-Bericht – Auf dem Weg zu besseren Gesetzen. On this approach, see also Andrea Hanisch, Institutionenökonomische Ansätze in der Folgenabschätzung der Europäischen Kommission.

[5] Carl Böhret and Götz Konzendorf, Leitfaden zur Gesetzesfolgenabschätzung; see id., Handbuch der Gesetzesfolgenabschätzung (GFA), also Matthias Dietrich, Folgenabschätzung von Gesetzen in Deutschland und Großbritannien.

[6] Weigel, p. 195.

[7] See OECD, Regulatory Impact Analysis.

[8] On the situation in Switzerland, cf. also Mader, pp. 100 ff.

essentially been used in Switzerland as a prospective means of analysis in the context of finalizing legislation at Confederation level. Supplementary use is made of another instrument, the small- and medium-sized enterprise compatibility test (*KMU-Verträglichkeitstest*). For major regulations, a cost-benefit analysis is also required.

The strength of *cost-benefit analysis* is that it attempts a comprehensive evaluation of the economic impacts of a measure or a project. But mention must be made of this method's weaknesses, too: the insistence on monetarization means that a financial value must be attached to all impacts, even those for which no market prices are available. Whilst it is relatively easy to evaluate costs in monetary terms, benefits must often be assessed using ad hoc reference data and rough approximations. These uncertainties produce valuations with rather broad margins of error, which can cast doubt on the meaningfulness of the results. Moreover, future costs and benefits must be discounted to a reference point in time. Here the choice of the discount rate has significant implications for the result.[9]

A further aspect to bear in mind is that under cost-benefit analysis, it makes no fundamental difference which social groups will be the beneficiaries of a legal regulation and who will have to bear the likely costs. It is sufficient if society's balance sheet is positive after all costs and benefits have been accounted for. In the terminology of welfare economics, what this means is that only the Kaldor-Hicks criterion for compensation needs to be satisfied.[10] It would therefore be desirable if, in every case, legal regulations were always analysed with regard to their impact on income distribution as well, to enable political decision-makers to arrive at a conclusive overall judgement.

3 Consequentialism in the Application of Law

Before discussing the consequences of judges' decisions, it is important to be clear about which type of consequences are meant here. A key distinction can be made between *legal consequences* and *real consequences*. According to Lübbe-Wolff, legal consequences are those consequences attached by legal provisions when certain preconditions are met. Real consequences, in contrast, are the *actual* consequences of the validity and application of legal provisions.[11] Real consequences can be further subdivided into the consequences for the parties directly affected by the judgement (*micro-level real consequences*) and consequences for the whole of society (*macro-level real consequences*).[12] A similar distinction is made between the

[9] On the questions surrounding cost-benefit analyses, see e.g. Lave, 'Benefit-Cost Analysis'. See also in the present volume Klaus Mathis, 'Discounting the Future?' and Balz Hammer, 'Valuing the Invaluable?'.

[10] For further details, see Mathis, pp. 56 ff.

[11] Lübbe-Wolff, p. 25.

[12] Thus van Aaken, pp. 171 f.; cf. also Wälde, p. 6. Sambuc, pp. 101 ff. talks about individual consequences and social consequences. On the whole dabate, cf. also Deckert, Folgenorientierung, pp. 115 ff.

direct consequences arising from the events of the case, and the consequences of the judgement's precedent effect on the future behaviour of the immediate parties and of all other norm-addressees[13].[14]

A further consideration is that the methodology of impact analysis consists of a *positive* and a *normative* element: the first step is to identify the expected impacts, and the second step is to evaluate these impacts. Impacts are not good or bad per se; the same impacts can be evaluated positively or negatively depending on values or party status. Identification of the impacts calls upon *sociological*, *technological or psychological knowledge* in particular; for the evaluation of the impacts, *normative criteria* are required.

One difference between the traditional legal method and the economic method is whether the case is considered from a *retrospective* or a *prospective* point of view. From a lawyer's perspective, it is usual to assess a concrete case that has already occurred (the retrospective view). As far as the impacts of the judicial decision are concerned, the primary focus is then on the immediate micro-level real consequences. Macro-level real consequences are less commonly addressed.[15] From the economic perspective, however, the macro-level real consequences are of greatest interest, with specific regard to the judgement's precedent effect on the future behaviour of all addressees of the norm (the prospective view). The evaluation criterion in this case is *allocative efficiency.*

An example may serve to explain this: in tort liability, the jurist is concerned with settling a claim between the injurer and the injured party. The latter wants to be compensated for damage suffered as a result of a harmful incident that has occurred. From an economic perspective, the question is framed differently: what is the impact of the judgement on the future behaviour of potential injurers and injured parties, i.e. how will it affect their behaviour with regard to precautionary measures or activity levels, what costs and benefits arise and how does it change allocative efficiency or social welfare?

From a legal perspective, the fundamental question about impact analysis is which of the specified consequences are legally material for the judge; in other words, clarification is required as to which consequences the law is receptive to, and which ones may – or must – be taken into account in the application of law.[16] Of course, cases in which the law explicitly instructs the court to take certain consequences into account are unproblematic. In the other cases, the answer will hinge on whether taking decision-impacts into account is qualified as "*legal policy*", in

[13] In penal law, this is called special prevention and general prevention.

[14] Lübbe-Wolff, pp. 139 ff., similarly distinguishes between "decision-impacts" *(Entscheidungsfolgen)*, i.e. the impact on the parties when an authoritative judgement is pronounced (e.g. imprisonment, fines and their repercussions for convicted individuals and their families, etc.) and "adaptation-impacts" *(Adaptationsfolgen)*, i.e. the general influence of legal rules on behaviour.

[15] But there are certainly juristic concepts, such as the "public interest" or "proportionality", which presuppose the consideration of macro-societal interests or associated ends-means relations.

[16] Hoffmann-Riem, p. 38.

which case they would have no place in the "*legal*" reasoning of the courts, or whether they are deemed to be an element of the juristic programme of judgement and reasoning.[17]

Interestingly, this question is not only a prominent topic of debate in continental European law but in the Anglo-American world as well. The following essay will therefore outline both the discussion in the German-speaking literature and the equivalent controversy in the Anglo-American discourse.[18]

3.1 Arguments Against Considering Impacts

In the German-speaking world, Niklas Luhmann might be seen as the fiercest opponent of consequentialism in the application of law. Legal adjudication, in Luhmann's thinking, is *conditionally programmed* by the legislator. If certain conditions are fulfilled (facts amounting to breach of a legal provision) then a certain judgement has to be reached (the "if-then form").[19] In this way, highly complex matters can be resolved into congruently predictable judgements (stabilization of expectations).[20] Luhmann thus draws a line between programmed judgements (application of law) and programme-defining decisions (legislation). The apparent one-sidedness of conditional programmes can be corrected at higher decision-making levels by passing statutes and by modifying conditional programmes as a result of policy decisions made with particular goals in mind.[21]

Luhmann therefore rejects consequentialism in the application of law, reasoning that foisting socio-political consequentialism on a legal system runs the risk of compromising its dogmatic autonomy and disorientating it completely, turning it away from criteria that transcend the decision-making programme, indeed from any criteria except the consequences themselves.[22] He therefore argues in favour of relieving the application of law of the burden of responsibility for consequences:

> Such relief from full responsibility for consequences is necessary if the conditional programme's function, namely to give a reliable expectation of future sequences of events, is to be fulfilled. The principle of equality likewise cements this structure. Were the jurist to be made responsible for situation-specific consequences of his judgement, he would have to absorb and process completely different information in the adjudication process, he would have to develop a completely different style of work and examination, carry out forecasts,

[17] Neumann, 'Theorie', p. 234.

[18] The literature on the consequences problem has become enormously vast, and for this reason the following presentation makes no claim to exhaustiveness.

[19] Luhmann, *Rechtssoziologie*, p. 227.

[20] Luhmann, *Rechtssoziologie*, p. 229. Id., 'Argumentation', p. 29, sees the role of juristic argumentation as the means whereby the system reduces the individual's experience of surprise to a tolerable level.

[21] Luhmann, *Rechtssoziologie*, p. 234. On implementation of the conditional programming in the administration, see id., *Automation*, pp. 35 ff.

[22] Luhmann, *Rechtssystem*, p. 48.

> probability analyses, cost-effectiveness calculations and assessments of side-effects. This would render him an unpredictable element, and all the more so the more rationally he proceeded.[23]

Accordingly Luhmann advances three arguments against consequentialism in the application of law: the argument of *legal certainty*, the argument of *legal equality* and the argument of *overburdening the courts*. A fourth argument cited elsewhere is that consequentialism jeopardizes the *independence of the courts*.[24] For Luhmann, it is absolutely impossible to see how legal questions can be cross-referenced with sociological theories or the methods of empirical social research in the degree of detail necessary to reach a decision.[25]

Luhmann's critique suffers from a reliance on assertions or assumptions that are only set forth on an abstract level. It seems as if he has barely, if ever, given serious thought to how the consequentialism that he so vehemently criticizes might be envisaged in practice.[26] Quite clearly, he is labouring under the misapprehension of impact analysis as case-specific, unsystematic and randomistic. He fails to recognize that even for the purpose of an impact analysis, a case must not be treated as a unique event but must be seen as an exemplar of an entire genre of similar cases.[27] *Even impact analysis has to adhere to a defined schema and logic and should be channelled accordingly by means of dogmatic structures.* Moreover, it must always operate within the scope permitted by statutory definitions and legal consequences.[28] Accordingly, even when impact arguments are taken into account, a *constant and coherent ruling practice* will become settled. As long as consequentialism is kept within the bounds of these constraints, neither legal certainty nor legal equality nor the independence of the courts are in any jeopardy.

Only the argument of the possible *overburdening of the courts* represents a genuine problem. The problem is manifested not only on the cognitive but also on the normative level:[29] the first step is to identify the consequences, a task which in some instances may demand considerable sociological knowledge and involve substantial effort. Further factors to consider are that the courts are compelled to give judgements, and process economy dictates that cases should be settled within a useful time-frame. But even when all the consequences are known, they still have to be evaluated in the second step. Some consequences may be patently desirable or undesirable. Frequently, however, consequences arise which prove more debatable or which have positive impacts on certain parties and negative impacts on others, so that the net effect is unclear. Nevertheless, it is irrational to demand the complete abandonment of impact analysis because of these practical problems.

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[23] Luhmann, 'Methode', p. 4 (own trans.). Likewise id., *Ausdifferenzierung*, p. 276.

[24] Luhmann, *Rechtssoziologie*, p. 232. See also id., *Ausdifferenzierung*, pp. 140 ff. and pp. 275 ff.

[25] Luhmann, *Rechtssystem*, p. 9.

[26] Koch and Rüßmann, p. 234.

[27] Koch and Rüßmann, p. 234.

[28] Rottleuthner, pp. 114 f.

[29] Seiler, *Rechtsanwendung*, pp. 57 ff.

Rather, the aim must be to carry out the impact analysis as far as possible.[30] Taking account of sociological knowledge undoubtedly represents progress compared to the often-criticized commonsense theories of judges.[31]

Esser finds Luhmann's idea of programmed application of law not only wrong but highly dangerous:

> The total systemic autonomy of the law, on the other hand, prohibits any critical reflection by the interpreter upon the conditions and motivations of his predisposition and thus also prevents any rational verification and delivers the legal system, for all its ideological insulation and autonomous comportment, into the arms of political manipulation.[32]

Another critical voice is Rhinow's, who contends that Luhmann's view is based on *outdated judicial ideas* and that it obscures rather than enriches the legal theoretical debate;[33] the law to be applied is not in fact a gapless, ready-made "programme", he argues, and therefore the concretization process cannot be interpreted primarily as programmed judgement, because those responsible for applying the law are themselves also producers of valid law.[34]

Despite a longstanding tradition of consequentialism in Anglo-American law,[35] eminent critics have been equally outspoken on the matter of consequentialism in the application of law. One is Ronald Dworkin, who in "Hard Cases" (1975)[36] draws a distinction between "principles" and "policies" (the latter being arguments in the interests of the common good or collective goals) and calls for courts to confine themselves strictly to arguments of principle, even when ruling on hard cases, because arguments based on policy goals are the preserve of the legislator.[37] According to Dworkin, rights can be derived from principles whereas arguments based on policy goals cannot:[38]

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[30] Koch and Rüßmann, p. 235. Approaches to this are found in Martina R. Deckert, 'Praktische Durchführbarkeit folgenorientierter Rechtsanwendung – Auf dem Weg zu einer folgenorientierten Rechtswissenschaft'.

[31] Cf. Rottleuthner, pp. 115 f.

[32] Esser, *Vorverständnis*, p. 141, see also pp. 205 ff. On the concept of predisposition, see Section 3.2, below.

[33] Indeed, Luhmann does appear to base his view on Montesquieu's long-superseded idea that the judges are only a subsumption machine or "la bouche qui prononce les paroles de la loi" (Montesquieu, XI, 6). On this, see also Regina Ogorek, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert*. Grimm, pp. 140 f., also points out that in addition to classic conditional norms, it is increasingly common – particularly in public law – to encounter usually vaguely-formulated *final norms* (goal specifications, policy programmes). This is quite plainly another circumstance that has reinforced the necessity of the consequentialist view in legal dogmatics (cf. Sommermann, p. 53). See also Klaus Hopt, 'Finale Regelungen, Experiment und Datenverarbeitung in Recht und Gesetzgebung'.

[34] Rhinow, p. 256.

[35] On which, see Section 3.2 below.

[36] Dworkin, *TRS*, pp. 81 ff.

[37] Dworkin, *TRS*, p. 85; Watkins-Bienz, p. 83. See also Bittner, pp. 227 ff.; Wolf, pp. 364 ff.; Harris, pp. 201 ff.

[38] Harris, p. 201.

> Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole. The argument in favor of a subsidy for aircraft manufacturers, that the subsidy will protect national defense, is an argument of policy. Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right. The argument in favor of anti-discrimination statutes, that a minority has a right to equal respect and concern, is an argument of principle.[39]

Judges are always bound to the law in determining the content of legal norms, according to Dworkin, and must not create new law themselves; nor do they have any discretion.[40] According to his "rights thesis" the law can be conceived of as a system of individual rights, which are to be enforced with the help of judicial rulings in favour of one party or another, and within which one party always has the right to win the legal dispute, even in hard cases.[41] Linked to this is the "one right answer thesis" which claims that even in hard cases, the courts can and must deliver the sole and only right judgement.[42]

Dworkin demonstrates how the judge's role should be envisaged within his model by invoking Hercules, a fictive judge endowed with superhuman intellectual abilities;[43] the one and only right answer exists even in hard cases, he asserts, and can be identified by a judge endowed with Herculean abilities. If a judge believes the law to be incomplete, incoherent or imprecise, then the limits of his intellectual capacity are to blame and not any putative imperfection of the law.[44] H. L. A. Hart sums up Dworkin's theory and its implications for adjudication superbly as follows:

> [A] judge who thus steps into the areas of what he calls policy, as distinct from principles determining individual rights, is treading forbidden ground reserved for the elected legislature. This is so because for him not only is the law a gapless system, but it is a gapless system of rights or entitlements, determining what people are entitled to have as a matter of distributive justice, not what they should have because it is to the public advantage that they should have it.[45]

In justification of this rejection of policy arguments in legal adjudication, the principal arguments put forward by Dworkin are democracy, retroactivity and coherence. According to the *democracy argument*, judges are not generally elected by the people, or at least are not answerable to the electorate in the same way as the legislature, and consequently they are not legitimized to make new law.[46] In the *retroactivity argument*, Dworkin points out that it would be an outrage if a party lost

[39] Dworkin, *TRS*, p. 82.

[40] Greenawalt, 'Discretion', p. 361.

[41] Dworkin, *TRS*, pp. 81 ff.; Watkins-Bienz, p. 83.

[42] Dworkin, *TRS*, pp. 279 ff., and id., *MP*, pp. 119 ff. A critique of the obviously dubious one-right-answer thesis is superfluous here. See e.g. Ott, pp. 183 ff.; Watkins-Bienz, pp. 117 ff.; Bittner, pp. 233 ff.; Auer, pp. 85 ff.

[43] Dworkin, *TRS*, pp. 105 ff., and id., *LE*, pp. 239 ff.

[44] Hart, p. 183.

[45] Hart, p. 141.

[46] Dworkin, *TRS*, p. 84.

an action for breaching a duty that had only been imposed upon them *ex post facto*.[47] Finally, Dworkin fears that the admissibility of policy arguments would result in a *loss of coherence* in adjudication. Application of law in the case of principles arguments must be in harmony with previous cases, which guarantees equal treatment, he argues, whereas the achievement of particular policy goals does not necessarily require any such equal treatment.[48]

In Dworkin's model, a court that practices coherent application of the principles and concludes that a plaintiff has a claim for damages for negligent medical treatment is not allowed to be influenced by the policy argument that such actions drive up the costs of precautionary measures in the healthcare system to exorbitant levels.[49] Hence, the court – and this is the significant conclusion for the question of consequentialism – has to decide solely on who is entitled to what rights, but must refrain from considering the real consequences of its judgement for the parties affected and for society.

Hart's criticism of Dworkin's model is that a judge ruling on a new case must seek a general principle that could explain both the rulings on past cases of the same kind as well as the new case. He contends that a variety of principles are quite likely to be found which fit the past rulings but which would deliver different solutions to the new case.[50] Consequently, determining the right answer is not just a problem of knowledge. Even a judge equipped with superhuman qualities like Hercules could not determine the one right answer in these circumstances. Let us also recall Kelsen's even earlier warning that the fiction of the single correct interpretation of a legal norm should be avoided:

> Jurisprudential interpretation must take the utmost care to avoid the fiction that a legal norm only ever admits of one interpretation, which is the 'correct' one. That is a fiction used by traditional jurisprudence to uphold the ideal of legal certainty. In view of the ambiguity of most legal norms, this ideal can only approximately be realized.[51]

Finally, Hart points out that Dworkin's staunch rejection of any consideration of societal consequences during legal adjudication would conflict with the views held by many jurists, and was just an expression of Dworkin's hostility to utilitarianism:

> This exclusion of 'policy considerations' will, I think, again run counter to the convictions of many lawyers that it is perfectly proper and indeed at times necessary for judges to take account of the impact of their decisions on the general community welfare. [. . .] Professor Dworkin's exclusion of such considerations from the judge's purview is part of the general hostility to utilitarianism that characterizes his work [. . .].[52]

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[47] Dworkin, *TRS*, p. 84.

[48] Dworkin, *TRS*, p. 88.

[49] Harris, p. 202.

[50] Hart, p. 139.

[51] Kelsen, *RR*, p. 353 (own trans.).

[52] Hart, p. 141. On Dworkin's reply to Hart's criticism, see the appendix in Dworkin, *TRS*, pp. 292 ff.

Neil MacCormick is another who disagrees with Dworkin's strict separation of principles and policy goals, seeing them not as opponents but, on the contrary, interrelating forces:

> [T]he spheres of principle and of policy are not distinct and mutually opposed, but irretrievably interlocking [. . .]. To articulate the desirability of some general policy-goal is to state a principle. To state a principle is to frame a possible policy-goal.[53]

According to MacCormick, arguments of rightness and the pursuit of goals are two sides of the same coin because the values of the legal order are an expression of the prevailing policy.[54] Likewise, Greenawalt comes to the conclusion that the distinction between principles and policy goals is blurred when every policy goal can be transformed into a legal principle and vice versa.[55]

To sum up, the main arguments that can be advanced against impact analysis in the application of law are the courts' *lack of legitimation and functionality* and the *risks to legal security and legal equality.*[56] The widespread hostility to considering impacts among lawyers may also stem from an *unholy alliance between conservative and progressive jurists.* The former fear that consequentialism, acting as a Trojan horse, might smuggle extra-legal and policy arguments into the citadel of juristic reasoning, and thereby soften up traditional dogmatics. The latter see consequentialism as opening the floodgates for utilitarian arguments, which could be used to justify sacrificing individual rights for the sake of pursuing societal goals, particularly when backed by cost-arguments.

3.2 Arguments in Favour of Considering Impacts

Auer points out that it is not just practically but also theoretically impossible to delimit "legal" from "legal policy" arguments (i.e. from consequentialist ethical and sociological arguments beyond the narrow bounds of statutory and intralegal assessments). Hence, no class of legally binding arguments can be isolated from the general societal discourse,[57] she claims, quoting support from Hans Kelsen and Josef Esser, among others.

Kelsen commented on this issue in the essay "*Wer soll der Hüter der Verfassung sein?*" (Who shall be the guardian of the constitution?; 1931), as follows:

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[53] MacCormick, *Legal Reasoning*, pp. 263 f.

[54] MacCormick, 'Legal Decisions', p. 257. Similarly, Hiebaum, p. 86, who asserts that "every principles argument owes its persuasiveness to some, albeit unquestioned, 'policy orientation'." (own trans.).

[55] Greenawalt, 'Policy', pp. 1013 f. On Dworkin's reply to Greenawalt's criticism, see the appendix in Dworkin, TRS, pp. 294 ff.

[56] For a synopsis, see also e.g. Deckert, *Folgenorientierung*, pp. 13 ff.; Eidenmüller, pp. 414 ff.; Koch and Rüßmann, p. 227.

[57] Auer, p. 81.

> The opinion that only legislation but not the 'real' administration of justice is political is just as wrong as the opinion that only legislation is productive law-creation, whereas the judicial process is only reproductive application of law. [. . .] By empowering the judge within certain boundaries to weigh opposing interests and rule in favour of one or the other, the legislator confers on him an authority to create law, which is a power that gives the judicial function the same 'political' character, though not to such a high extent, as the legislator's. Between the political character of legislation and that of the administration of justice there is only a quantitative, not a qualitative difference.[58]

Esser points out the issue of "predisposition" in the judicial interpretation of legal norms.[59] He is not referring to the personal social experience in which a judge grew up – and must also account for, of course – but means "predisposition" in the hermeneutic sense of some unavoidable anticipation regarding the question of meaning and outcome which is characteristic of a practical science.[60] Consequently he considers the idea of a value-neutral dogmatics to be naïve:

> It has a coarsening and distorting effect if one seeks to attribute these elements of [the judge's] convictions to the categories of 'legal policy' and 'legal dogmatic' truth. Such keywords conceal the connectedness and the interplay of these decision-elements in the forming of convictions. [. . .] One is thereby failing to recognize that, as a matter of principle, in every decision 'according to positive law' both forces of legal consciousness exert an influence on the adjudication process: The striving for a 'true-to-life' and 'reasonable' decision in the light of the practical constraints and the demand of justice for legitimate expectations and conscientious responsibility for the preservation of a legal system, the stability of which only permits development in 'small steps'.[61]

Further, Podlech and Sambuc also express support for impact analysis up to a point. Podlech shares Esser's view that value-free application of law is non-existent or barely exists. From this he infers that for any assessment, a discussion must take place of the societal consequences of that assessment in terms of its rightness or wrongness and its acceptability to society. What he hopes for is a gain in rationality through this procedure, because it ensures that the arena of legal debate on the problem of value judgements is not left solely to irrational positions.[62] Sambuc argues that norms developed in the judicial process can be legitimized through the quality of their outcomes and/or through justification of their objectives. In this regard, the consideration of impacts could contribute to the quality of judicial rule-making by enabling a goal-instrumental pursuit of regulatory objectives, although without providing sufficient justification per se for the regulatory goals, i.e. the value preferences. Nevertheless, in his view, consideration of impacts could contribute to the justification of regulatory goals since they would be a means of determining whether

[58] Kelsen, 'Verfassung', p. 67. Here he is referring particularly, though not exclusively, to the constitutional judicial process.

[59] Esser, *Vorverständnis*, pp. 136 ff.

[60] Esser, 'Möglichkeiten', pp. 101 f.

[61] Esser, *Vorverständnis*, pp. 151 f. (own trans.).

[62] Podlech, p. 209.

prospective decision-impacts were compatible or incompatible with values and legal principles already positivized in law.[63]

Deckert points out in her study that widespread dissatisfaction with the merits and options of the conventional legal doctrine of methods is by no means insignificant as a rationale for consequentialism. The classical *canones* were in many cases inadequate to the task of providing orientation. The greatest dissatisfaction centres on the fact that observance of the individual interpretation criteria leads to different outcomes, and that no binding hierarchy exists according to the prevailing view.[64] She suspects that the standard practice amounts to choosing the interpretative outcome that leads to a satisfactory result on a case-by-case basis.[65]

Rüthers places particular emphasis on the unavoidability of considering impacts in the scope of *judicial development of law*,[66] because this inevitably means rule-making, and hence, engaging in legal policy. This would have two significant consequences: on the one hand, purely logical thought geared towards conceptual classification and differentiation is not sufficient to fulfil the legal policy function of dogmatics in the development of law. Dogmatics at its core is always influenced by values and worldview, according to Rüthers.[67] On the other hand, *active engagement in legal policy* also means *responsibility for impacts* and implies a requirement to weigh the consequences when putting forward dogmatic concepts and principles. Dogmatic statements are also instruments for shaping reality. For this reason, the predictable consequences of the shaping process cannot be disregarded and should be examined with reference to social interdependencies and findings from the economic and social sciences.[68]

Neumann rightly talks about the *Janus-headed nature* of legal reasoning: on the one hand this is highly authority-based (bound by the authority of the law, but also by the significance of precedents and the "prevailing opinion"). On the other hand, reasoning is becoming increasingly consequentialist, i.e. with reference to the expected impacts of the judgement.[69] Neumann demands that general impact considerations which would be of import to the judgement should be made transparent. This demand for honesty of methods must not, however, be misunderstood as eschewing law-based reasoning. Even where the judge is primarily striving for an appropriate rather than a legalistic judgement, his decision and his reasoning are still bound to the criteria laid down by law.[70] Neumann further asserts that the development from a "covert" to an "open" form of judicial reasoning, as demanded and

[63] Sambuc, p. 139.

[64] Deckert, 'Auslegung', p. 481; on the hierarchy question, see also Larenz, p. 345.

[65] Deckert, 'Auslegung', p. 481; see also Engisch, p. 101.

[66] See for example Rolf Wank, *Grenzen richterlicher Rechtsfortbildung*.

[67] Rüthers, *Rechtstheorie*, p. 214.

[68] Rüthers, *Rechtstheorie*, p. 214.

[69] Neumann, *Argumentationslehre*, p. 112.

[70] Neumann, *Argumentationslehre*, p. 6.

to some degree already diagnosed by Kriele[71] and Esser[72] has already taken place to an astoundingly broad extent.[73]

In Switzerland, Arthur Meier-Hayoz had previously dealt with the role of the judge in his habilitation thesis "*Der Richter als Gesetzgeber*" (The judge as legislator; 1951). In this he drew attention to the value problem, pointing out particularly that in the concrete case it was difficult to draw a line between statutory and judicial value-assessment:

> Considered in the abstract it can [. . .] be said that the demarcation criterion between interpretation of law and supplementation of law resides in the fact that the decisive means-end aspects can be derived from the law in the former case and in the latter case must be found by the judge in his own appraisal of the interests. In the concrete case, however, where does this borderline lie between the goal defined by statute and the goal to be defined by the judge? *The distinction of principle between statutory and judicial value-assessment often vanishes when applied to concrete cases, and much of the time can barely be drawn.*[74]

Further, in his commentary on Art. 1 of the Swiss Civil Code, in addition to the grammatical, systematic, teleological and historical element Meier-Hayoz also postulates consideration of the "*realistic element*" in interpretation.[75] Although the field of vision seems somewhat narrowly confined to the question of practicability,[76] the realistic argument represents an aspect of impact analysis:

> Consideration must be given to the realia, to the actual circumstances in which the statute is rooted and which it is intended to regulate, those of the material-physical and those of the intellectual-spiritual world: economy and science, nature and technology, customs and traditions, and above all society's views and values. [. . .] The interpretation must also be realistic in the sense that it [. . .] strives for easy realizability (practicability) of the law.[77]

Furthermore, mention should be made of the consideration of equity ("*Billigkeit*"), referred to explicitly in Article 4 of the Swiss Civil Code. The equity decision is intended to correct any outrageous outcome of the judgement in the

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[71] See Martin Kriele, 'Offene und verdeckte Urteilsgründe'. According to Kriele, p. 117, for the legitimacy of the judicial decision the "prerequisite is that legal foundational research successfully exposes the covert judgements underlying the discussion, i.e. the basis for assessing reasonableness." (Own trans.).

[72] See Josef Esser, *Juristisches Argumentieren im Wandel des Rechtsfindungskonzepts unseres Jahrhunderts*. Esser complains that the grounds for judgements hardly reflected the course of the argumentation (p. 9), and calls for the use of "rhetorical means of open discourse and pre-dogmatic arguments" (p. 31).

[73] Neumann, *Argumentationslehre*, p. 117.

[74] Meier-Hayoz, *Richter*, p. 58 (own trans., author's emphasis).

[75] Meier-Hayoz, *BK*, Art. 1 N 210 ff. Id., *BK* Art. 1 N 179, relying on Friedrich Carl von Savigny, who distinguished between the four interpretative elements of "grammatical", "logical", "historical" and "systematic", and adding to them the "teleological element" and the demand to consider the "internal value of the outcome". See von Savigny, pp. 213 ff., pp. 216 ff. and p. 225.

[76] On this, cf. Mathis and Anderhub, pp. 306 ff.

[77] Meier-Hayoz, *BK*, Art. 1 N 211 and N 213 (own trans.).

individual case.[78] Here again, the impact of the judgement – if only for the parties concerned – is the operative criterion.

Furthermore, Rhinow has stood up for consequentialism from an early stage. Decisions of the legislature and judiciary were, in his view, not only legitimized through procedures but also through their alignment with and continuous review against criteria of correctness:

> The structural openness of the system of norms and the corresponding integration of justice considerations and elements of social reality within the process of legal realization do not relieve the legal practitioner of responsibility for consequences but, on the contrary, make the consideration of particular norm-relevant consequences of his decision an actual duty.[79]

He concludes that impact analysis is not only an instrument for the rationalization of rule-making, but is developing into a central legitimation factor which judge-made law, in the absence of other means of legitimation – such as democratic legitimation from the legislature – depends upon. Thus, consequentialism has a function as a postulate for overcoming a structural deficit in the legitimation of judge-made law.[80]

Biaggini notes that the Swiss doctrine of method as well as Swiss practice affirms consideration of the general impact of judgements. The evaluation of results, i.e. the concern to ensure a reasonable outcome, rightly belongs to the recognized rules of interpretation. The precedent effect of every judicial decision also suggests not only acquiescing to consequentialism but making it the judge's duty.[81] However, Biaggini is another who refers to the problem of overburdening the courts with the determination of general facts and the possible consequences of law-developing rulings, since the procedural rules of the courts are not set up to mobilize extralegal expertise.[82] The questionable issue is not therefore whether the judge should be allowed to make reference to consequences, *but whether he should be allowed to develop the law if he is unable to assess the consequences*.[83]

More recently in Switzerland, Feller in particular has engaged with impact assessment in judicial practice.[84] Other than in the judicial development of law, he also locates certain consequentialist approaches in the different interpretation elements, particularly the teleological element.[85] In addition, he comes to the

[78] On this, cf. Mathis and Anderhub, pp. 302 ff.

[79] Rhinow, p. 256 (own trans.).

[80] Rhinow, pp. 256 f.

[81] Biaggini, pp. 395 f.

[82] Biaggini, p. 395.

[83] Biaggini, p. 396.

[84] For a concise synopsis, see also Schluep, N 2954 ff.

[85] Feller, pp. 11 ff. and p. 131. Others, e.g. Koch and Rüßmann, pp. 230 ff., want to locate consequentialism within objective-teleological interpretation. Deckert, *Folgenorientierung*, p. 55, on the other hand sees no place for consequentialist interpretation in the classic canon of methods, but notes that in practice, at least in the guise of the *ratio legis*, consequence analyses are indeed undertaken.

significant conclusion that if the statute permits several solutions, the judiciary should consider the impacts of its decision in analogous application of Art. 1 para. 2 of the Swiss Civil Code.[86] This states that impact considerations should be taken into the body of argumentation particularly when a choice has to be made between different, contradictory interpretations.[87] As in Germany, prevailing doctrine and adjudication reject a firm hierarchy of interpretation elements. The Swiss Federal Court calls this "*pragmatic methodological pluralism*":

> Interpretation of the law has to be guided by the thought that wording alone does not constitute the legal norm, but only the law itself, understood and concretized with reference to facts. What is required is the factually correct decision within the normative framework, aimed at a satisfactory outcome derived from the *ratio legis*. In this regard, the Federal Court adheres to a pragmatic methodological pluralism and deliberately refrains from subjecting the individual interpretation elements to a hierarchical order of priorities.[88]

The consequences argument could thus serve as a *meta rule* for determining the hierarchy of the nominally equal-ranking, interpretation elements in the adjudicated case.

The Swiss constitutional law textbook "*Schweizerisches Bundesstaatsrecht*" might accurately sum up the body of opinion in Switzerland:

> The weighting of the different interpretation elements in the individual case contains an *element of valuation.* In this regard, the adjudicating body must also have regard for the outcome of the interpretation: in choosing from among the available interpretations, one of its aims must be a *satisfactory, reasonable and practicable outcome.* This is the remit and the endeavour – whether consciously or unconsciously, overtly or covertly – of every responsible legal adjudicator. If the adjudicating authorities want to be more than mere subsumption machines, they bear a share of the responsibility for meaningful judgements.[89]

The "outcome of the interpretation"[90] certainly might be a reference to the legal consequences and the directly linked micro-level real consequences, but

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[86] Feller, p. 134.

[87] Gächter, p. 188.

[88] BGE 134 IV 297, E. 4.3.1, p. 302 (own trans.).

[89] Häfelin, Haller and Keller, N 135 (own trans.).

[90] The reverse deduction from the result is not unproblematic. Clearly there is no skill in hitting the bull's-eye by painting the rings around the bullet hole. It is possible, however, that the "great skill" lies precisely in using the application and construction of dogmatic devices to steer the result in a certain direction with apparently logical stringency. Cf. Kriele, p. 110, with the demand for disclosure of the true grounds for decisions (pp. 116 f.). Coles, p. 185, even claims that regardless of whether the judge refers directly to consequences or relies on dogmatic concepts, institutions or theories which, in their current meaning, are determined by analysis of consequences, the influence of impact considerations on judicial decisions can be proven. Seiler, *Einführung*, p. 222, considers it to be a perfectly legitimate procedure, initially to decide a question intuitively and subsequently to examine the result on the basis of the interpretation elements after the manner of a rationality and plausibility test. The important thing is openness to departing from the intuitively-found result rather than insistence on upholding it at all costs. And Sambuc, p. 111, rightly points out that analyses of consequences should not open up a pathway to a desirable result which circumvents established statutory authorities. On the danger of disregarding this principle, see Bernd Rüthers, *Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus*.

the macro-level real consequences are not necessarily ruled out either.[91] Thus, Forstmoser and Vogt demand that consideration of impacts be undertaken as part of interpretation, also giving regard to the precedent effect of the judgement and its wider implications beyond the individual case.[92] Wherever a court finds itself operating within the scope of permissible judicial law-finding, it should embark on consideration of the consequences, also giving due regard to the breadth of impact of an envisaged judgement in its deliberations.[93] Kramer calls for the judge, if his decision is not or only very vaguely "conditionally programmed" by the legislator, not to hide behind imaginary "fundamental principles" (*Grundwertungen*) of the legal order or fictional elements of legal provisions (*Tatbestandsfiktionen*) but should, just like the legislator, consciously justify these in autonomous terms. This is held up not only as a requirement of *methodological honesty* but also as the only way that a judicial ruling can become *accessible to discussion and acceptance.*[94]

As already mentioned, there is a long tradition of consequentialism in the Anglo-American world. An early proponent was Oliver Wendell Holmes in his essay "The Path of the Law" (1897), in which he strongly advocated consideration of consequences in the application of law, and turned his back on rigid formalism:

> Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.[95]

Holmes wanted to overcome rigid formalism and traditional dogmas, and in their place, urged consideration of the goals and the choice of means to attain these goals. Holmes was also thinking particularly of economic analysis methods:

> I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics.[96]

Hart even talks about a "revolt against formalism" in which Holmes was joined by the philosopher John Dewey and the economist Thorsten Veblen.[97] Hart reports that lawyers in America consequently waved goodbye to the idea that legal thought

[91] On the concepts of micro-level and macro-level real consequences, see the beginning of Section 3.

[92] Forstmoser and Vogt, § 19 N 113.

[93] Forstmoser and Vogt, § 19 N 115.

[94] Kramer, p. 218.

[95] Holmes, p. 466.

[96] Holmes, p. 474.

[97] Hart, p. 130. In the continental European system, however – despite the Free Law School *(Freirechtsschule)* and Jurisprudence of Interests *(Interessenjurisprudenz)* – these ideas have not prevailed.

was independent of policy and social reality.[98] "The Path of the Law" was published one year before William James' ground-breaking first essay on pragmatism, "Philosophical Conceptions and Practical Results" (1898), according to which the only test of an idea was to examine its practical consequences.[99] This essay marked the beginning of the pragmatic movement in the United States, the term "pragmatism" being attributed to Charles Sanders Peirce.[100]

John Dewey defended the view that consequentialism increased legal certainty rather than diminishing it. In view of the rapid pace of social change, he believed, it is difficult to fit new facts into old categories. The consequence of this was irrationality and unpredictability in legal decisions:[101]

> [T]o claim that old forms are ready at hand that cover every case and that may be applied by formal syllogizing is to pretend to a certainty and regularity which cannot exist in fact. The effect of the pretension is to increase practical uncertainty and social instability.[102]

Therefore, in order to address this problem, legal decisions should be made with their consequences in mind. This pragmatic instrumentalism gained ground in the USA and culminated in Karl Llewellyn's "The Common Law Tradition" (1960).[103]

More recently, Neil MacCormick is another who refers to the necessity of considering consequences. He rejects any one-sided mode of deliberation, whether it be informed only by consequences or only by the "correctness" of the decision. Instead he favours a middle way, in which consequences have a certain role to play.[104]

> So I reject both extremes and entertain only the middle view that some kinds and some ranges of consequences must be relevant to the justification of decisions. [...] I conclude that some element of consequentialist reasoning must be present in any sound decisionmaking process, in any satisfactory mode of practical deliberation.[105]

Although a judicial judgement is based on legal principles, this alone is not sufficient for complete legitimation of the judgement. It also has to be tested against various other factors including its consequences.[106] For MacCormick, the consequentialist argument seems to relate more to normative consequences, i.e. the repercussions of a judgement on later judgements and on other legal rules.[107] He mentions a number of criteria that should be applied:

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[98] Horwitz, p. 142.
[99] James, p. 434; Horwitz, p. 142.
[100] James, p. 406.
[101] MacCormick, 'Legal Decisions', pp. 241 f.
[102] Dewey, p. 26.
[103] MacCormick, 'Legal Decisions', p. 242.
[104] MacCormick, 'Legal Decisions', pp. 239 f.
[105] MacCormick, 'Legal Decisions', p. 240.
[106] MacCormick, *Legal Reasoning*, p. 250.
[107] Rudden, pp. 193 f.

> It involves multiple criteria, which must include at least 'justice', 'common sense', 'public policy', and 'legal expediency'.[108]

But on that basis, particularly in the stipulation of public policy and expediency as criteria, real consequences are brought within the scope of the test as well.

3.3 Implications for Legal Practice

As this analysis shows, a blanket rejection of the consideration of consequences in legal adjudication is unconvincing. Interestingly, the discussion is played out in the different legal cultures of the German-speaking and the Anglo-American world in a similar way. Application of the law is not merely application of pre-existing rules but frequently also has a law-creating component. *It is therefore impossible to maintain a strict separation between legal and legal policy arguments.*

In summary, it can therefore be concluded that whenever appliers of the law find themselves making law (*modo legislatoris*), they are subject to the same *responsibility for consequences* as the legislator, a responsibility that can only be fulfilled by carrying out the relevant impact assessments. This applies specifically to judicial development of law and – at least in hard cases – to the interpretation of legal norms as well, particularly when a choice has to be made between two contradictory interpretations.

If, as a result, consequential arguments flow into the judicial decision process, it follows that the corresponding *grounds for decisions must be disclosed.* This is not only a requirement of methodological honesty and transparency, but is also necessary because it makes judgements easier to understand and discuss. In this way, impact analysis may not only improve the quality of judgements but also *increase the legitimacy of the application of the law*.

4 The Example of the "Hand Rule"

One famous example of the use of economic reasoning tools in the application of law is known as the "Hand rule", named after Learned Hand, an American federal judge. In a judgement delivered in 1947, he formulated an economic method for determining the efficient standard of care, which has passed into the literature as the *Learned Hand formula* or the *Hand rule*. The case on which he was ruling hinged on whether the owner of a barge could be made liable for leaving it unattended for several hours. During this time the barge had broken free from its mooring and gone on to collide with another vessel. Judge Hand explained in his judgement:

> [T]here is no general rule to determine when the absence of a barge or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from

[108] MacCormick, *Legal Reasoning*, pp. 252 f.

> her moorings. [. . .] It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her, the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.[109]

In stating the reasons for the judgement, Judge Hand concretized these points in a mathematical formula. If B represents the costs of the injurer's precautions, P the probability of damage and L the likely magnitude of damage, then there is a tortious liability for negligence as long as $B < P * L$. Under the Hand rule, liability for negligence begins at precisely the point where the expected value of damage exceeds the cost of avoidance. If the cost of avoidance would amount to more than the expected value of the potential damage, on the other hand, then no such liability arises for failing to take the corresponding precautions. In more general terms, according to the Hand rule, a particular action is only required if it is efficient, i.e. if it generates more benefits than costs for society.[110]

4.1 The Consequences Paradox

At first glance, the Hand rule appears to be an extremely practical rule for determining negligence, because the court can set the standard of care individually for each liability case, so that due regard is paid to the special circumstances of the particular case.[111] This practice allows the potential injurer to better gauge the likelihood of liability for negligence, and to make the appropriate choice between desisting from some dangerous activity or, instead, spending a proportionate sum on precautions. In this sense, the Hand rule is an efficient liability rule because overall it contributes to minimizing the societal costs of damages and the avoidance of damages.

Problems can arise, however, when it comes to the question of how to quantify the relevant consequences. The court has to assess *ex post* whether the injurer has assessed the risk of his behaviour *ex ante* and has spent a proportionate sum on precautions. It can be decisive for liability whether only the direct consequences of the particular case (i.e. the micro-level real consequences) are taken into consideration, or whether wider-ranging consequences for society (i.e. the macro-level real consequences) are factored in. This can lead to a paradox, as the following example illustrates.[112]

Imagine that a car driver ignores a red traffic signal in order to get a person with a life-threatening injury to the hospital in time. The costs of the accident thus caused are 40. The benefit arising from saving the injured person amounts to 50.

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[109] United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[110] For a more detailed discussion, see Mathis, pp. 97 ff.

[111] Cooter and Ulen, pp. 351 f.

[112] The following example presupposes fault-based liability on the part of the driver.

On the basis of these figures, crossing the red light and saving the injured person is efficient from the driver's point of view. Applying the Hand rule to these data, the court would not deem the driver's behaviour to be negligent, and would find no liability.[113]

However, if we now assume that this court judgement brings forth further-reaching consequences for society as a whole – for example, if it leads to a general deterioration in compliance with traffic laws by other drivers – then in fact the court ought to take these consequential costs into account, both in its calculation and in reaching its decision. If these consequential costs to society amount to 20, for instance, the total costs would be 60 and would then outweigh the benefit of 50. Under the Hand rule, the driver of the vehicle would then have breached his duty of care, and would be held liable.[114]

Herein lies the *paradox of consequences*: as shown, under a *judgement A*, which only takes account of the costs arising from accident, the injurer would not be liable. At the same time, a consequence of the liability-dismissing judgement A would be a general drop in compliance with the rules of the road, for which reason society would incur consequential costs of 20 in total. Now the court might want to take these societal costs into consideration as well, and would then determine that the new total costs of 60 were now higher than the anticipated benefit of 50. On that basis, the court applying the Hand rule ought to come to the conclusion that the injurer had acted negligently and that it should pronounce *judgement B*, holding him liable. If the court went on to review this judgement B with regard to its consequential costs to society, it would now find that there were none. The liability-finding judgement B – unlike judgement A – would not result in worse compliance with traffic rules. In the absence of consequential costs to society, the judgement would revert back to the liability-dismissing judgement A, whereupon the ensuing consequential costs to society from this judgement A would justify reinstatement of the liability-finding judgement B, and so on. This instance of circular logic stems from the fact that the consequential costs are dependent on the given judgement, while the given judgement in each case depends on whether or not society incurs consequential costs.[115]

To solve this problem, Fletcher proposes a strict differentiation between the "consequences of the act being judged" and the "consequences of the act of judging".[116] Based on this distinction, he postulates two solutions: the societal consequences of the individual case (i.e. the macro-level real consequences) should not be considered when determining the standard of due care, unless they are extraordinarily high.

[113] Fletcher, p. 191.

[114] Fletcher, p. 191.

[115] Note that this is a constructed example, however, and the assumption that judgement A would lead to generally lower compliance with the rules of the road is especially questionable. If drivers only cross red lights *in comparable instances*, the problem does not arise.

[116] Fletcher, p. 193.

Alternatively, the more radical solution would be never to consider the macro-level real consequences when assessing a concrete case.[117]

4.2 The Bilateralism Critique

An objection to the Hand rule is that this liability rule rests solely on the criterion of efficiency, in that it attempts *ex ante* to define the optimum extent of precautions for potential injurers and injured parties and to offload the damage onto the party which could have avoided it with the minimum burden.[118] The aim is thus to set the right incentives for cost-effective behaviour and hence to maximize social welfare.[119] In this sense, the Hand rule is intended to have a purely deterrent function (preventative effect).

Coleman levels the criticism, known as the *bilateralism critique*, that the economic analysis of law is incapable of explaining the normative relationship between the injured party and the injurer: all it is doing is applying *ex ante* analysis of hypothetical damages-cases from the viewpoint of cost and risk minimization. In point of fact, however, a court has to rule *ex post* on real damages-cases involving two very concrete parties who stand in a normative relationship with one another based on the case at issue:[120]

> The problem that confronts economic analysis, or any entirely forward-looking theory of tort law, is that it seems to ignore the point that litigants are brought together in a case because one alleges that the other has harmed her in a way she had no right to do. Litigants do not come to court in order to provide the judge with an opportunity to pursue or refine his vision of optimal risk reduction policy.[121]

For Coleman it is the concept of corrective justice that best explains the relationship between the injurer and the injured party.[122] But instead of taking its orientation from corrective justice, which is predicated on the bilateral nature of the legal relationship, economic analysis of law pursues a social goal, that of promoting efficiency.[123]

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[117] Fletcher, pp. 193 f.

[118] Coleman, *Practice*, p. 14. Calabresi, pp. 136 ff., refers in this context to the "cheapest cost avoider".

[119] Coleman, *Practice*, p. 13. For a more detailed discussion, see Mathis, pp. 166 ff.

[120] Coleman, *Practice*, pp. 16 ff.

[121] Coleman, *Practice*, p. 17.

[122] Similar reasoning is followed by Ernest J. Weinrib, *The Idea of Private Law*; Benjamin Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts', and Martin Stone, 'On the Idea of Private Law'. On the same theme, see Jules Coleman, 'Tort Law and the Demands of Corrective Justice', and Stephen R. Perry, 'Comment on Coleman: Corrective Justice'.

[123] Associated with this, according to Coleman, is the unassailable belief in the state as the engine of social change. Coleman, 'Costs', p. 344.

Interestingly, Dworkin considers the Hand rule to be compatible with his theory and disputes that it is used in pursuit of a collective goal. As he frames it, it is just a mechanism for the reconciliation of rights:

> Since Hand's test [and similar arguments] are methods of compromising competing rights, they consider only the welfare of those whose abstract rights are at stake. They do not provide room for costs or benefits to the community at large, except as these are reflected in the welfare of those whose rights are in question. [. . .] Hand's formula, and more sophisticated variations, are not arguments of that character; they do not subordinate an individual right to some collective goal, but provide a mechanism for compromising competing claims of abstract right.[124]

If one goes along with Dworkin's model, this would rebut the bilateralism critique – at least for the Hand rule – because, clearly, no collective goal whatsoever would be pursued. Not only that, but at the same time the standard of due care would be defined with reference to the benefits and costs of the affected parties only (i.e. the micro-level real consequences), which would also avoid the paradox of consequences mentioned above. Unfortunately, though, Dworkin's reasoning is unpersuasive, for even if the only the benefits and costs of the affected parties were taken into account, there is no rationalizing away the fact that the Hand rule is pursuing allocative efficiency – albeit imperfectly, since it does not include all social benefits and costs – as a collective goal.

4.3 Approaches in Swiss Liability Law

Swiss liability law distinguishes between fault-based liability *(Verschuldenshaftung)* and objective or causal liability *(Kausalhaftung)*.[125] The most important non-contractual fault-based liability is provided for in Article 41 of the Swiss Code of Obligations, according to which the liability rests with the party who unlawfully, whether wilfully or negligently, causes damage to another.

In Swiss doctrine and judicial practice, both intent and negligence are subsumed within the concept of fault. According to the traditional view, negligence is understood to mean that a person of sound mind has not acted with the degree of diligence that the average reasonable person would have exercised in the same circumstances. What this definition does not determine is how diligently an average reasonable person would act in these precise circumstances.[126] However, before a court can deliberate on the matter of fault in a concrete case, it needs a standard of care by which to define reasonable behaviour.

The Hand rule is one possible reference that might be used in order to determine how the average reasonable person would behave in the same situation. If so, the concept of the average reasonable person would correspond to the economic

[124] Dworkin, *TRS*, pp. 99 f.

[125] Roberto, § 3 N 34.

[126] Bieri, p. 289.

construct of *homo economicus*.[127] It is further noted that economic considerations in Swiss liability law are not entirely new. For example, despite the provision on causal liability in Article 58 of the Code of Obligations, the duty of diligence of a building or construction-owner is not unlimited, since the acceptability of maintenance measures to prevent construction defects is determined by comparing the corresponding costs with the benefit produced.[128]

Kramer argues emphatically in favour of considering economic factors when concretizing the key liability-law concept of negligence, referring explicitly to the Hand rule.[129] According to the Swiss federal judge Hansjörg Seiler and to Laurent Bieri, the Hand rule could already be applied *de lege lata* in Swiss liability law.[130] If the courts do not follow this opinion, it would be necessary to amend Article 41 of the Code of Obligations *de lege ferenda* as required, in order to anchor the Hand rule explicitly in statute as a standard of care for the assessment of fault.

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[127] On this concept, see Mathis, pp. 21 ff.

[128] Rey, N 1057, with further references to the doctrine and judicial practice. According to Roberto, § 11 N 401, an upkeep defect *(Werkmangel)* is always found when the costs of the safety measures are lower in total than the scale of potential damage multiplied by the probability of the occurrence of such damage.

[129] Kramer, p. 235.

[130] Seiler, 'Sicherheit', p. 150; Bieri, p. 296.

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