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ORIGINAL PAPER

Tullock on the common law: a loose-cannon iconoclast in action?

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Abstract Gordon Tullock has been celebrated as an innovative thinker in many areas of public choice. He was also among the first to analyze the law based on the economic approach, yet, his contributions to Law and Economics have been met with skepticism or even outright ignorance. In this paper, I focus on Tullock's papers dealing with the common law and argue that they contain important insights that have been ignored in the debate regarding legal origins.

Keywords Law and Economics · Legal Origins · Jury · Adversary versus Inquisitorial Procedure · Arbitration

JEL Classification K00 · K40

1 Introduction

Gordon Tullock is rightfully called a pioneer in various areas of public choice such as the theory of bureaucracy, the theory of rent seeking, contests/auctions, the theory of autocracy, and, of course, constitutional political economy. But he can also be considered a pioneer of Law and Economics. He did not only pen the first monograph on the topic ("*The Logic of the Law*") in 1971—two years before Posner's "Economic Analysis of Law" appeared—but also had contributions to the inaugural issues of both the *International Review of Law and Economics* as well as the *European Journal of Law and Economics*.

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Yet, where many of his ideas set the path for lots of subsequent research in public choice, only few Law and Economics scholars might be aware of his various contributions to their field. A simple look at some numbers drawn from Google Scholar will suffice to illustrate my point: According to that website, the *Calculus of Consent* has been cited 9874 times, the paper initiating the debate about rent seeking (*Welfare Costs of Tariffs*) 3962 times, his *Politics of Bureaucracy* still a very noteworthy 1741 times. Compare this to *The Logic of the Law* with 179 citations. Comparing this number with that for Posner's monograph makes it very clear that Tullock really did not have much of an impact on the development of Law and Economics: Posner's book secures more than 13,000 citations to date (all citation numbers as of November 4, 2016).

In a sense, chances that scholars would take note of the book in 1971 were fairly high because the *Journal of Economic Issues* published not only one, but four reviews of it. Then again, they were extremely critical and full of ridicule and mockery. Todd Lowry (1972: 112) had this to say: "As it is, his trivial treatment of serious problems without reference to the vast body of informed legal literature guarantees that his work will have no impact upon the mainstream of legal thought." In their joint review, E.K. Hunt and Howard Sherman expressed a wish (1972: 117): "If this is social science, then God save us from social scientists." Arthur Miller went one step further (1972: 117): "It is one of the more forgettable books of the day, and deserves a review only because it may help to consign it to a well-merited oblivion."

In a sense, then, the bad wishes of these critics have come true. In a volume in honor of Gordon Tullock that appeared in the late 1980s, there are also three contributions on his work in Law and Economics. All three contributors are aware of the limited success Tullock had in this area and are out to speculate about possible reasons. Goetz suspects that to be successful in the market of legal ideas, one better helps to uncover the rationale of existing legal rules or, even better, uncover the underlying structure behind the rules. Tullock, however, prefers to criticize some of the institutions held very dearly by many U.S. legal scholars. They might have come to "… view Tullock as a loose-cannon iconoclast …" (Goetz 1987: 173).

It is not really a challenge to add more potential reasons for the (relative) nonsuccess of Tullock in Law and Economics: The structure of *The Logic of the Law* is unconventional, to say the least. The first chapter of the part on Criminal Law is entitled "Motor Vehicle Offenses and Tax Evasion", two criminal offenses that are probably better dealt with separately. The part on Criminal Law continues with two chapters both entitled "Jurisprudence". A good editor, or any editor, would have served Tullock very well here. Chapters themselves often do not have any apparent structure below the chapter level. Tullock's writing is often extremely associative and full of digressions that lead nowhere. He makes many assertions often referring to personal experience ("my professor at law school") but without references. Arguments by his opponents are frequently labeled as "naïve" to dismiss them.

Whereas these are issues of academic practice, one can, of course, also quarrel with many of his substantive assertions. The central idea on which *The Logic of the*

Law is built is flawed: It is Tullock's intention to deduce legal principles not from ethics, but from a strictly utilitarian approach to the law. I am not the first to note that this is a non-starter since utilitarianism is a specific kind of ethics.[1] Many other points could also be taken issue with, e.g., his defense of plea bargaining, his very narrow view on legal aid, etc.

Granting all the deficits of Tullock's work in Law and Economics, why could it still be rewarding to have a serious look at these writings? I propose, first, to look at some of his most central points of critique regarding the legal system of the U.S. Starting with *The Logic of the Law*, Tullock established himself as one of the most fervent critiques of the Common Law. Decades after the book first appeared, La Porta et al. (e.g. 1999; 2008) set out to argue—contrary Tullock—that countries belonging to the common law tradition enjoyed numerous advantages over those belonging to the civil law tradition. The more recent debate all but ignored Tullock's insights. I propose to read Tullock's contributions in hindsight, i.e. knowing of the later debate. I will look at the institution of trial by jury as well as adversary versus inquisitorial procedure. I will also remind us of a reference standard that Tullock proposed quite frequently for evaluating the various institutions he was dealing with, namely private arbitration where it is the parties who have the power to choose the procedure, but also the law, the judges (i.e. the arbitrators), the venue, and so forth.

This paper ends with a plea for analyzing the law more seriously in the lines of public choice and, in particular, constitutional political economy than has been done to date, including by Tullock himself.

2 A fresh look at the debate on legal origins

The debate about the effects of different legal origins on economic outcomes has been one of the most intense ones of the last decade. Putting an end to the debate, La Porta et al. (2008) propose to think of legal origins as styles of social control of various aspects of life, in particular economic life. Fairly early in the debate and distinguishing between common law, socialist law and three different civil law families (French, German, Scandinavian), La Porta et al. found (1999: 261) that

> Compared to common law countries, French origin countries are sharply more interventionist (have higher tax rates, less secure property rights and worse regulation). They also have less efficient governments, as measured by bureaucratic delays and tax compliance, though not the corruption score. French origin countries pay relatively higher wages to bureaucrats than common law countries do, though this does not buy them greater government efficiency. French origin countries fall behind common law countries in public good provision: they have higher infant mortality, lower school attainment, higher illiteracy rates, and lower infrastructure quality…. As predicted by the political theory then, the state-building intent incorporated into the design of

[1] Besides the reviews already cited above, this point is also made by Rose-Ackerman 1987.

> the French legal system translates, many decades later, into significantly more interventionist and less efficient government, less political freedom, and evidently less provision of basic public goods.

It seems fair to summarize this view as the "superiority-of-the-common-law" position. Tullock, in turn, published papers like "Defending the Napoleonic Code over the Common Law" or simply "Why I prefer Napoléon". For reasons elaborated upon in greater detail later in this paper, it seems justified to coin his position the "superiority-of-the-civil-law" view. In this paper—and following most of the literature—the common law is assumed to encompass both trial by jury (in particular in criminal law) and adversary—as opposed to inquisitorial—procedure. La Porta and his co-authors are economists, most of them with a background in civil law countries that are not performing too well (La Porta originates from Argentina, Lopez de Silanes from Mexico and Shleifer from Russia). Tullock was a lawyer with first-hand experience in the common law jurisdiction that was his primary target, namely the U.S. One attempt to understand their respective positions could be to mention the-grass-is-always-greener fallacy (Demsetz 1969) and to ask whether all of them suffer from it.

Since Gordon Tullock believed the jury system not only inferior as such but was of the view that many other weaknesses in common law procedure are only a consequence of the jury system, his critique of the jury system is summarized in the next subsection. The subsequent subsection deals with some more procedural differences between common and civil law, namely with adversary versus inquisitorial procedure as well as with the prevalence of oral as opposed to written elements in court procedure. The section closes with a brief discussion of a possible benchmark against which actual court proceedings can be compared.

2.1 The jury

> I have always wondered why it should be such a privilege to be tried by a group of complete amateurs who have not been specially trained. (Tullock 2005: 81)
>
> If we confine ourselves to problems of accuracy, it really is quite hard to think of a mechanism that we would anticipate would be less accurate than a random selection of individuals who know nothing about the matter. (Tullock 2005: 349)
>
> Juries typically consist, therefore, of individuals of below average intelligence, of below average income, and of below average productivity. They are made up disproportionately of the old, the lame, and the unemployed. (Tullock 2005: 428)

These three citations are taken from three different publications by Tullock, namely *The Logic of the Law*, *Research in Law and Policy Studies*, and *The Case Against the Common Law*, respectively. They give a good impression of Tullock's reservations regarding the jury system. He develops his criticism of the jury in essentially two steps: he first tries to collect the strongest arguments in favor of the

jury, simply to dismiss them right away. In a second step, he proceeds to present a number of arguments that speak directly against that institution.

So what are the strongest arguments in favor of the jury? Tullock describes them as (1) making tyranny impossible, (2) making corruption within the judiciary less likely, and (3) increasing the likelihood that judicial decisions will be made in accordance with the popular will—or simply "democracy" (2005: 80; but see also ibid: 345ff.).[2] Tyranny would be made impossible because a would-be tyrant could rely significantly less on jurors than on judges whose incomes depend directly on him. Using the court system to fight any kind of opposition would, hence, be more difficult with a jury system.

Tullock does not cite him, but this argument goes back at least to the English 18th century jurist Sir William Blackstone (1791: book 3, chapter 23) who wrote of the jury as "the glory of English law" and claimed that it put "a strong … barrier between the liberties of the people and the prerogatives of the Crown." Judges would be under the tutelage of the Crown and it is the jury that protects individuals from the prerogatives of the state. Tullock grants that the argument might have merit in principle but dismisses it as only of historic importance. The protection of despotism would primarily be relevant regarding criminal law. According to Tullock (2005: 81), it is difficult to see how liberty could be put at risk by allowing contract partners to litigate in front of professional judges.

Bribing jurors is more difficult than bribing judges. The identity of jurors is usually not known ex ante, approaching them once their identity is known is very risky. They cannot build up a reputation for accepting bribes since they essentially play a one-shot game. This argument is dismissed as "more or less irrelevant" today (2005: 345) and Tullock asserts that it should not be impossible to design institutions such that judges have few or no incentives to accept bribes. Beyond the assertion, he does not tell the reader how exactly this could be done.

Tullock rephrases the third argument in a later publication ("*Research in Law and Policy Studies*"). It would boil down to preferring a government of ethics over a government of law. He rebuts the argument by saying that it would be preferable to have the law such that it can be enforced by courts rather than having two separate codes, namely one of law and one of ethics (ibid.). In a sense, Tullock is echoing some ideas of Tocqueville (1835) here, again without an explicit reference. Tocqueville proposed to analyze the jury in two different ways, namely as a political institution and as a judicial institution and claimed that the former was a lot more important than the latter. As a political institution, it would be a very important tool to realize people's sovereignty.

Tullock moves on to make two arguments in favor of judges over jurors. Judges receive lots of training; in addition, they can be expected to be more intelligent than the average juror. This would make them less prone to manipulation by trial lawyers. Tullock further believes that the selection process of jurors is highly problematic. They would often be chosen on the basis of utterly incomplete voter registration lists. People with high opportunity costs would usually manage to avoid

[2] For Tullock's contributions to Law and Economics, I am relying on volume 9 of his Selected Works as edited by Charles Rowley.

the service which would then lead to jurors being of low intelligence, low income, and low productivity—as clearly stated in one of the citations at the beginning of this section.

In his writings against the jury system, Tullock probably had in mind primarily the United States. This is understandable not only because Tullock was most familiar with the U.S. judicial system but also because it is, indeed, the judicial system in the world relying by far the most on juries. But with countries other than the U.S. in mind, dismissing some of the arguments in favor of the jury might be premature. After all, in many countries tyranny is an imminent possibility and corrupt judges are the rule, rather than the exception.

A number of years back, I tried to empirically assess some of the hypotheses regarding the effects of juries. The fact that the hypotheses I wanted to test are almost completely in line with Tullock's arguments in favor of the jury show that he did, indeed, choose to describe the most conventional arguments in its favor. Testing these hypotheses empirically proved to be a lot more cumbersome than initially assumed: although there are many fervent defenders who are ready to testify regarding the advantages of jury systems over judges (especially in the U.S. it seems), there is close to no empirical evidence on a cross country basis. So my challenge consisted of collecting data both on the legal institutions in as many countries as possible as on their actual use. I ended up with data on up to 80 countries spread all over the world (Voigt 2009).

In Voigt (2009), three hypotheses are put to an empirical test. The tested hypotheses are fairly close to some of the arguments advanced by Tullock. They are: Compared to countries without juries, countries with jury systems enjoy (1) factually more independent judiciaries; (2) less corrupt judiciaries; and (3) a higher quality of governance. All these hypotheses are very broad—and somewhat coarse. The results are very sobering for the defenders of trial by jury. Using a number of standard control variables, no statistically significant relationship between trial by jury and judicial independence can be established. The same holds true for the association between trial by jury and judicial corruption or for the quality of governance, measured in a variety of ways.

To sum up: it proved impossible to identify any of the advantages that have been named by proponents of trial by jury empirically. I am almost certain that Tullock would interpret these empirical insights as evidence supporting his critique of the jury system.

2.2 Adversary versus inquisitorial procedure

> Our procedure, in general, descends from the Middle Ages, when illiteracy was common. It seems that this is the only available explanation for the fact that this procedure is primarily oral (Tullock 2005: 74).
>
> I shall merely establish a theoretical structure for the analysis of the two systems and present a strong argument that the inquisitorial system is better (Tullock 2005: 291).

Again, Tullock is very outspoken about this feature of the judicial system. He argues that the adversary procedure as practiced in the U.S.—and common law countries more generally—has lots of disadvantages whereas the procedure used on the Continent, the so-called inquisitorial procedure, would have many advantages. Tullock believes that the difference can be reduced to the question who dominates the procedure in court: the lawyers (in the adversarial system) or the judges (in the inquisitorial one).

What are Tullock's main arguments against the adversarial and in favor of the inquisitorial procedure? First, the quality of the chosen lawyers is a lot more important under the adversarial procedure. If the two sides in conflict do not manage to secure the services of lawyers of exactly identical quality, this could very well lead to bias in the final verdicts (2005: 86). Second, court room strategy is a lot more important under the adversarial system. Again, this is unlikely to increase the probability that the final decision is in accordance with the facts (ibid.: 86f).

Third, relying on a simple model, he shows that under adversarial systems, parties are led to spend too many resources on the procedure, implying a waste of resources. He goes on and adds that not only too many resources are spent on the overall procedure, but substantially more are spent on the "wrong" cause under the adversarial procedure. Assuming that one party is right and the other is wrong, and further assuming that judges are interested in finding the "right" decision, Tullock asks what share of the resources are spent on finding the "right" decision. Assuming that 90% of all resources are spent on lawyers under the adversarial system (and only 10% on the judge), this would imply that only 55% of all resources are invested into finding the "right" decision. Assuming that 90% of all resources are spent on judges under the inquisitorial system, this would imply that 95% of all resources are invested into the "right" decision (2005: 292ff).[3]

Given all these supposed advantages of the inquisitorial system, Tullock feels he needs to advance an argument explaining why the adversarial one is still in use in the U.S. The argument is rent-seeking. The very many lawyers in the U.S. would constitute a very powerful lobby preventing any improvement of the system. There is some controversy over how to count the number of lawyers correctly. Should all the graduates from law school be counted? Should only those included who work as lawyers? Or should only those included who work in private law firms? Be that as it may, there seems to be consensus that the U.S. has more lawyers per capita than (almost) any other country in the world. Magee (2010) reports that the U.S. has 3.65 lawyers per 1000 inhabitants. Compare this to Germany (1.34), Switzerland (1.07), or France (0.64). But do lawyers also constitute a powerful lobby group? If their sheer number in Congress is indicative of their influence, the answer must surely be yes. In 1978, 67 of the U.S. senators were lawyers. They hence secured a 2/3 majority in the U.S. Senate and it seems very well possible that lawyers are sufficiently influential to prevent change toward an inquisitorial system.

Tullock moves on to rebut a possible argument against the inquisitorial system: In it, the role of the judges is central. To get good decisions, they need to be

[3] It is the function of models to simplify. This model can, however, be criticized for overdoing it on various grounds.

motivated—and that might not be the case. But Tullock points out that career paths in Europe are such that they are motivated and continues (ibid: 302): "But the undermotivation is more extreme with respect to the jury and the Anglo-Saxon judge than with respect to the European judge." Civil law judges are career judges. They often begin their careers right after having finished law school. Entry is usually based on grades, promotion on merit. Advancement in the judicial hierarchy hence depends on outperforming one's colleagues which is why Tullock can claim that judges in civil law systems are sufficiently motivated.

In the first of the two quotes at the beginning of this section, Tullock mentions one particular trait of the common law procedure, namely that it emphasizes oral over written statements. In their study on courts across the world, Djankov et al. (2003) also inquire into the degree to which court proceedings rely on written elements and construct an indicator to make the degree across different systems comparable. Their numbers show that the mean value attributed to written procedures in common law countries is significantly lower than those calculated for both French as well as German civil law systems. By implication, then, systems relying on adversarial procedures tend to rely more on oral elements and systems relying more on inquisitorial procedures more on written elements. This is also in accordance with intuition: a system in which the conflicting parties are responsible for presenting the evidence for the case at hand must rely on the conflicting parties all being present at the same time at the court house. That this is correlated with heavy reliance on oral elements is, hence, no surprise. Tullock develops this observation into a critique. The necessity that most of the actors involved (the parties, their lawyers, the witnesses, the decision makers) have to be present at the same time would make the organization of trials not only cumbersome but would also constitute a waste of resources.

The study by Djankov et al. (2003) on courts actually goes far beyond the question whether procedures are conducted primarily in an oral or written manner. They rely on seven dimensions to operationalize the degree of what they call procedural formalism and written versus oral is just one of them.[4] Their list was inspired by Shapiro's (1981) simple triadic model in which a dispute among neighbors is solved informally by a neutral third party. This kind of dispute settlement works without any formalized procedures. Djankov et al. use it as their benchmark to evaluate the degree of procedural formalism found in existing legal systems. They are highly critical regarding formalism and suspect that additional formality is always to the benefit of government in the sense that it allocates more power and control over the judicial process to government. To give an example: In case government is unhappy with a court decision and wants to challenge it on a higher court level, written documents are essential. So this would be one decisive reason why governments insist on written procedures in the first place. To constrain the influence of government on judicial processes, Djankov et al. (2003) are in favor

[4] The other six are (1) professionals vs. laymen; (2) legal justification, (3) statutory regulation of evidence, (4) comprehensive appeal procedures, (5) engagement formalities, and (6) independent procedural actions.

of a minimum level of procedural formalism. It turns out that procedural formalism in common law countries is significantly lower than in civil law countries.

The position of Djankov et al. (2003) is diametrically opposed to Tullock's, at least with regard to the written versus oral dimension. Based on a sample of 67 countries and the period from 1985 until 2003, Hayo and Voigt (2014) take these competing positions to the data and run an empirical test asking whether procedural formalism is detrimental to growth—as Djankov et al. (2003) would have it—or not. With regard to written procedures, it turns out that they are significantly associated with economic growth; countries with more written procedures realizing higher rates. It would seem that in modern economies, judicial problems are often quite complex and drawing on Shapiro's neighborhood model is not helpful. This finding thus supports Tullock's position again. Regarding the relationship between the common law and economic growth more generally, Hayo and Voigt (ibid.) do not find a significant association. More specifically, using a simple general-to-specific model-search strategy with standard variables to explain differences in growth rates (such as initial GDP, investment to GDP ratio, population growth etc.) common law fails to survive model selection. I conclude that Tullock's general skepticism toward the common law is well founded.

2.3 Arbitration as indicator for legal preferences

In his writings, Tullock repeatedly uses an interesting standard of reference to evaluate the relative quality of particular legal institutions, such as the jury or adversarial procedure. He refers to situations in which the actors in a conflict can choose the procedures themselves. This is regularly the case in arbitration: the contracting parties are free to choose the substantive law on which they want to base their contract, the procedural law to be applied, the venue to be used in case conflicts arise, and so forth. By studying the choices of contracting parties, we can, hence, learn something on their preferences regarding various aspects of the legal system. For example, Tullock points out (2005: 348) that he is not aware of any case of arbitration in which the concerned parties would have chosen a jury. Members of arbitration panels are often not trained in the law, but in those cases they are regularly experts in that specific industry. Tullock concludes that this is a clear indication that concerned parties prefer to be judged by specialists rather than by non-specialists such as jurors.

A couple of years back—and in complete ignorance of Tullock's contributions to Law and Economics—I published a paper essentially relying on Tullock's benchmark idea but drawing on international arbitration as an indicator for the adequacy of various substantive and procedural aspects for international merchants. In international commerce, the contracting parties are generally free to agree on the substantive law that suits their interests best. We assume that rational actors are interested in the best possible ex ante protection of their property rights. If French law does not adequately protect private property rights, we would not expect international traders to choose it as their substantive law. Correspondingly, if common law offers a better basis to conduct business, we would expect them to choose a substantive law out of this legal family to structure their interactions. In

Voigt (2008), I analyze a subset of all cases in which the parties have the right to choose substantive law, namely those cases containing an explicit arbitration clause.

The bulk of international arbitration cases is managed by only a dozen organizations spread around the globe. Yet, almost all of these organizations are reluctant to publish detailed data concerning choice-of-law questions a fact already deplored by Tullock (2005: 353) with regard to commercial arbitration. Still, the little available empirical evidence is sufficient to shed some doubt on the hypothesis that follows from the legal origin discussion. According to it, merchants that are afraid of interventionist legal systems should prefer common law over civil law. But I find that U.S. American law is chosen less frequently than expected and French, but also Swiss law, are chosen more frequently than could be expected. On the basis of the available empirical evidence, the following conclusion seems warranted: if merchants choose the substantive law that suits their interests best and U.S. American law is chosen less frequently than French or Swiss law, this indicates that U.S. law is perceived as less attractive than its competitors.[5] Again, Tullock's position receives support from the data.

3 Future steps for research: then and now

In his writings on Law and Economics, Tullock repeatedly deplores the poor state of knowledge in this field. In a paper that first appeared in 1980, he had this to say (2005: 303): "The whole field of legal research has been dominated by essentially unscientific techniques … This chapter has been an effort to set the matter on a sound theoretical basis. Without further research, particularly empirical research, it is not possible to be certain that the Continental system is better than the Anglo-Saxon, but the presumption is surely in that direction." In this section, I am picking up two contributions by Tullock, namely *Two Kinds of Legal Efficiency* which first appeared in 1980, and *Optimal Procedure*, a chapter from *Trials on Trial*, which also first appeared in 1980. Here, some fundamental issues of Law and Economics are at stake. Rather than focus on the empirical questions, I will stress the normative ones here.

In *Two Kinds of Efficiency*, Tullock (2005: 263) points out that there are two very different kinds of efficiency issues with the law: "The first is whether the law itself is well designed to achieve goals that society regards as desirable. The second is whether the process of enforcing the law is efficient." He goes on claiming that process efficiency raises few problems and defines efficient legal institutions in Paretian terms. He finally criticizes how naïvely the insights of the Coase theorem have been accepted and warns of an ad hoc view regarding the underlying (transaction) costs. None of this is original or innovative. But on the opening page of the chapter, Tullock (ibid.) makes a very interesting observation, namely that: "As far as I know, no one has ever questioned the desirability of efficiency in the process of law enforcement, though if a law itself is undesirable, poor enforcement may be

[5] In Voigt (2008), a number of caveats to this conclusion are discussed.

preferable." Unfortunately, Tullock only gives an example for what he has in mind and does not delve any deeper into the issue.

Many issues are at stake here. Prima facie, the possibility pointed out by Tullock seems only reasonable. Then again, who is to decide that the law itself is undesirable? Based on what kind of legitimacy drawing on what criteria? Could bureaucrats simply ignore legislation and become, hence, unaccountable? Or would they only ignore legislation after having received a bribe from an interested party (a practice known as "greasing the wheels")? Or would judges simply ignore legislation in their judgments? But wouldn't that be endorsing the common law which Tullock has been fighting against throughout?

In *Optimal Procedure*, Tullock (2005: 274) deals with the social cost of litigation varying the assumptions regarding court efficiency and the accuracy of the court. What caught my attention in this chapter was the explicit attempt to tradeoff two desirable traits of courts against each other, namely cost and accuracy. The field of Law and Economics has been growing steadily ever since Tullock wrote these two chapters, but my impression is that these two issues did not quite receive the attention they deserve. In other words: Tullock identified important issues, did not really deal with them in depth himself, but also failed to convince others of their relevance. Here, I just want to make another case for the importance of these issues.

In a paper surveying the literature on the determinants of court efficiency (Voigt 2016), I argue that the predominant concern of most of the literature is with technical efficiency, and that allocative efficiency is often neglected altogether. Analyses concerning allocative efficiency presuppose a developed normative theory. Under scarce resources, there will be court delay which implies various costs ("justice delayed is justice denied"). But if fast courts lead to an outward shift of the demand curve for court time, the question whether there is an optimal degree of court delay needs to be dealt with. To date, it has basically been ignored (see Gravelle 1990 for an exception). Further, it appears plausible that optimal delay is not identical for the various types of cases; how does the reduced freedom of a suspect waiting in prison for his trial compare with two business firms that await a court decision on their quarrel about the interpretation of their contract?

Other normative issues that need to be dealt with include the question what the optimal number of correct—and by implication also—wrong decisions is? If the probability to err is a function of the budget, then the question can be framed differently; namely how much money should we allocate to the courts? What is the optimal number of courts? More specifically, we can ask how many different specialized courts a country should have, and how many instances each of these would have. What percentage of the court budget should be spent on the lowest court level, what percentage on the highest level? In Law and Economics, it is well established that court decisions have two dimensions, namely a private good and a public good one. Supposedly, the private good component will be more important in the lowest echelon, whereas the public good component will be more relevant in the top courts of a country. So, in order to ascertain budgets, some exchange rate between the value of the private good to the value of the public good aspect is needed.

Empirically, faster courts have not been found to produce lower quality decisions (measured by the percentage of cases appealed on the next level). Yet, it is obvious that at least past a certain threshold there must be some tradeoff between speed and quality. How should the two be balanced against each other? And further: what is the optimal size of a court, a court district, etc.? Here, the issue of returns to scale is relevant, but also possible difficulties in reaching the next court. In other words: we are dealing with a tradeoff between efficiency and access. What are the relevant considerations here? Still further, many courts the world over fulfill many non-adjudicative functions like land registry and firm registry. Is the judiciary really the cheapest cost provider of these functions or could it make sense to put them with other offices?

Now, these questions were not explicitly raised by Tullock. But they are very much in the spirit of Tullock's approach toward Law and Economics. To date, little effort has been spent on finding convincing answers to them. This shows that many, even very fundamental, questions remain on the table of Law and Economics.

4 Conclusions and open questions

This paper shows that Gordon Tullock did make valuable contributions to Law and Economics. It shows that many of his ideas—be it the critique of the common law, ideas on how to improve the judicial procedure, but also some basic normative issues—are still relevant today and deserve closer scrutiny. Picking up on the question formulated in the sub title of this paper, it does not seem that we are dealing with a loose-cannon iconoclast in action.

Rereading Tullock's contributions to Law and Economics and the reception they received, one observation was quite striking: (almost) nobody explicitly groups Tullock's writings on constitutional political economy into the economic analysis of law. Tullock himself probably did not do so either. In *The Logic of the Law*, he takes an explicitly Benthamite utilitarian position. *The Calculus of Consent*, however, relies on a different foundation: it is based on a social contract view according to which unanimous consent regarding basic rules is desirable. This ensures, of course, that people are not solely bearers of utility and the happiness of the largest number cannot simply be maximized. It is astonishing that he makes no reference at all to his constitutional thinking in any of the Law and Economics writings. In my view, Law and Economics based on social contract thinking clearly remains a desideratum.

Tullock does refer to some of his public choice writings like, e.g., explaining the persistence of the adversarial system by pointing at the successful lobbying of lawyers in the United States. But there is still much thinking in Law and Economics that simply ignores public choice or political economy aspects. One reason for this could be the relative obscurity of Tullock in the Law and Economics community. Incorporating more insights from public choice into Law and Economics therefore remains a desideratum.

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