

## Posner versus Kelsen: The challenges for scientific analysis of law

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### Abstract

Law & economics scholars claim, among other things, to provide explanations of how law impacts behaviour. The aim of this article is to shed light on the conceptual and methodological difficulties related to analysis of the impact that law has on behaviour. The analysis advanced in the paper takes as its starting point a commentary on Richard Posner's interpretation of Hans Kelsen's pure theory of law. The work of Kelsen is treated as a meta-theoretical analysis that reveals some of the presumptions of theoretical approaches to law that claim to be scientific and, in particular, that claim to scientifically analyse the law's influence on behaviour. The article concludes with a methodological proposal on how to approach the identified methodological challenges and conceptual tensions that law & economics contends with.

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Richard Posner, Hans Kelsen, law & economics, pure theory of law, scientific analysis of law and the law's impact

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### 1. Introduction

In his impressive oeuvre Judge Richard Posner engages with a wide range of intellectual traditions, topics, and approaches. Apart from the path-breaking works on law & economics (henceforth, L&E), Richard Posner has published i.a., on the reform of federal courts, law and literature, democracy and capitalism, the role of public intellectuals, sex's laws, countering terrorism, the US intelligence system and, last but not least, on problems of legal theory. Posner places the law & economics movement in dialogue with philosophical, jurisprudential, social scientific and political thought. In his book on pragmatism and law entitled *Law, pragmatism, and democracy* he devotes a chapter to discussing and reinterpreting the ideas and works of two Austrian scholars: Hans Kelsen and Friedrich Hayek. As he mentions in the introduction to his book, he familiarised himself with the

works of both authors on the occasion of giving a lecture in Vienna during a conference organized by the European Association for Law and Economics in 2001. Thus Richard Posner read Kelsen and Hayek from the perspective of a law & economics scholar.

The interpretation he offered may be surprising. In his original and imaginative essay Posner argues that Kelsen's pure theory of law "opens the space" for economic analysis of law, whereas the work of Hayek, the author of *Law, legislation and liberty*, doesn't allow for the analysis of law with the tools of economic theories. Although Posner's views on both Kelsen and Hayek are creatively provocative, I will focus solely on his interpretation of Kelsenian work<sup>1</sup>.

This text puts Posner and Kelsen in a renewed dialogue. While acknowledging Posner's originality in reading Kelsen, I demonstrate that reflecting on what Posner drew from Kelsen and what he omitted in his interpretation can be revealing for understanding the nature of the law & economics theoretical project. It should be clarified that I understand law & economics<sup>2</sup>, in accordance with the declarations of Posner himself, as a continuation of an approach to analysis of law that has its roots in American legal realism<sup>3</sup>. Kelsen was very well aware of the conceptual and theoretical difficulties and complexities that such analysis entails and his work can illuminate the law & economics project understood as the realist one. What makes Kelsen's work exceptional in legal scholarship is the fact that he offers an inquiry into the possibility of the scientific analysis of legal norms and of the legal system. And due to its epistemological and methodological character, Kelsen's theory can still be a point of reference for those who attempt to trace the presumptions of theoretical projects that aim at a similar objective – to analyse law and its impact in a scientific way. Law &

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<sup>1</sup> A reader interested in the commentary on Posner's reading of Hayek can consult Mestmäcker 2007.

<sup>2</sup> I would like to make a terminological note here. In the literature there is a distinction between law and economics and economic analysis of law (see: Marciano forthcoming; Harnay, Marciano 2009). In Alain Marciano's view law & economics, as initiated by the work of Ronald Coase, focuses on the ways in which legal rules affect economic system, whereas the economic analysis of law, inspired by Richard Posner, studies the functioning of the legal systems with the tools of economics. I find this distinction convincing, although in this text, following the linguistic practice in law & economics research, I treat expressions "law & economics" and "economic analysis of law" as synonyms. Moreover, in my analysis I treat law & economics movement as a theoretical attempt to analyse how individuals react to legal norms (this is in accordance with the understanding of the economic analysis of law advocated by Lewis Kornhauser (see: Kornhauser 2001)).

<sup>3</sup> American legal realism was an intellectual movement in American legal theory which developed at the beginning of the 19th century and flourished in the 1920s and 1930s, leaving a significant influence on jurisprudence in the United States. Its main achievements and claims are mentioned later in the text (section 4). See e.g.: "I defend a jurisprudence that is critical of formalism (less pejoratively, of traditional legalism), and that has affinities with legal realism" (Posner 1990: xii). "Two more routes of influence between Bentham and the law and economics movement remain to be traced. The first goes through welfare economics and the second through legal realism" (Posner 2005: 343). "And without legal realism it is hard to imagine Guido Calabresi(1961: 500-1) embarking on his project of rethinking the law of torts in light of economics. His first article on torts, although it does not explicitly attribute the economic approach that is adopts to legal realism, hints at realist antecedents" (Posner 2005: 345). Analysis of the relationship between American legal realism and law & economics can be found in Mercuro, Medema 2006 (chapter 1).

economics claims to be one of them<sup>4</sup>.

I treat Kelsen's work as a meta-theoretical analysis of the presumptions and conditions that a scientific theory of law should satisfy. I interpret his pure theory of law, as well as his comments on legal realism, as a set of claims on the methodology of analysing law and law's impact on behaviour. I argue that Kelsen's analysis can be reinterpreted as suggesting that at least three conditions should be satisfied when one wants to explain how law influences behaviour: what is the relationship between law and behaviour; whether law influences behaviour causally; and whether law that is a cause of changes in behaviour can be understood as a norm (or rather as a fact). Although L&E scholars claim to explain how people react to law and how behaviour is influenced by law, I show below that they fail to address these conditions for the analysis of the law's impact on behaviour. This weakens the methodological credibility of their analysis of the law's behavioral impact.

This paper starts with a concise overview of Kelsen's main findings (section 1) and of Posner's interpretation of Kelsen (section 2). Afterwards I point out the elements of Kelsenian theory that Posner leaves out in his reading of *Pure theory of law* as "opening the space" for economic analysis of law, along with what we can learn from this omission about the law & economics project<sup>5</sup>. I also show how both Posner's and Kelsen's understandings of scientific analysis of law differ (section 3). I treat L&E as a continuation of legal realism and as an approach interested in studying how law impacts behaviour<sup>6</sup>. In the next step, using insights from Kelsen's work, I analyse the conceptual difficulties that can be identified within law & economics, especially when understood as a theoretical attempt to provide explanations of how law impacts behaviour (section 4). I identify four quandaries of this kind. First, I show that if we understand the analysis of the law's impact on behaviour as analysis of the relationship between law and behaviour, then in L&E investigations one element of this relation ("law") becomes unspecified. Second, I argue that L&E scholars seem to

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<sup>4</sup> "To me the most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypotheses deduced from the theory, and empirical tests of the hypotheses. Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully" Posner 1989.

<sup>5</sup> It is of course infeasible to address the whole corpus of L&E works in one paper. That's why I treat Posner's views and claims, as being formulated by a founder of the movement, as representative for L&E. The challenge of this type of analysis lies in a fact that Posner's ideas have evolved over time and claims about his understanding of the economic analysis of law should be related to the periods of when they were formulated. I indicate these differences, when appropriate. However, I'm trying to present the views on economics analysis of law, on the presumed notion of law in L&E, on the impact of law, that are shared by most mainstream and canonical writers on the topic. For this reason, in order to reconstruct this mainstream view, I refer sometimes to other classical L&E works.

<sup>6</sup> See also: Kornhauser 2001, who claims that "the behavioral claim is central to the [law&economics] enterprise". According to Kornhauser, the behavioural claim is a claim that people respond to legal rules and that this behavioural response can be explained on the ground of economics.

understand law as a factual, not normative factor that influences behaviour, although they do not manage to completely eliminate the understanding of law as a norm from their analysis and they are inconsistent in treating law as being a fact and a norm at the same time. Third, explanation of the behavioural impact of law requires clarification on whether law as a factor of a behavioural change stands in a causal relationship to behaviour. Such clarification is missing in L&E works. Fourth, I argue that the idea of the law ‘mimicking’ the market brings L&E close to the natural law tradition. This leads to a tension between the claim that there is a natural order of human behaviour that should be mimicked by law and the postulate to intervene (through law) into the realm of people’s behaviour (sections 4.1 – 4.4.). I conclude with a methodological proposal on how to approach the identified conceptual difficulties.

## 1. Kelsen’s project of pure theory of law

Hans Kelsen’s main (although not only<sup>7</sup>) contribution to legal scholarship lies in his pursuit of a project of the pure theory of law. He understood the pure theory of law as an autonomous theory/science of law<sup>8</sup> – that is, a theory which is free from any “alien elements” (Kelsen 1960/1967: 1). He claimed that “the pure theory of law undertakes to delimit cognition against these disciplines [psychology, sociology, ethics, political theory – MM], not because it ignores and denies the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines (methodological syncretism) which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter” (Kelsen 1960/1967: 1). For Kelsen, the autonomous character of legal theory should guarantee that its subject matter is law – understood as a system of valid legal norms. For him, the purity of legal theory meant also an independence from, as he calls it, the “sociological” point of view, which treats law as a natural, factual phenomenon – as well as from doctrines of natural law which reduce legal theory to the formulation of ethical and political postulates (see: Kelsen 1923 (1998): 3-4).

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<sup>7</sup> Kelsen also contributed to the theory of state and international law, constitutional law, he wrote i.a., about legal interpretation, adjudication, sovereignty, forms of government, forms of organization, logic of norms, principle of retribution and of causality, as well as on post-secular thought (see: posthumously published *Secular religion*). It should be noted here that Kelsen scholars point out and agree that his pure theory underwent several phases of development. Paulson differentiates three of them: critical constructivism, a classical phase and a sceptical phase (Paulson 1998).

<sup>8</sup> I use the term legal science and legal theory here as synonyms. There is, however, a discussion in the literature whether Kelsen used the term “legal science” in an ambiguous way and meant by it also academic studies of positive law – see: Appendix I to Kelsen 1934/1992: 127-129.

According to Kelsen, legal science, as “an analytical description of positive law as a system of valid norms, is however, no less empirical than natural science restricted to a material given by experience” (Kelsen 1949/2006: 163). The theory of law is empirical in the sense that it is a description of the valid norms of a given legal order. Legal norms are for Kelsen hypothetical judgments and they are reconstructed on the ground of legal theory. The statements of legal science may be compared to laws of nature, since both are general hypothetic statements. “The difference lies in the sense in which consequence is connected with the condition” (Kelsen 1949/2006: 164). Laws of nature link a certain event as a cause with another one as an effect, whereas the statements of legal science link legal condition with legal consequence. This link is called by Kelsen the imputation: a specific lawfulness of law, which corresponds to the “causal lawfulness of nature” (Kelsen 1923 (1998): 7). Kelsen was aware that law, as an act (or series of acts) of human conduct, has its natural<sup>9</sup> dimension – it “seems at least partly to be rooted in nature” (Kelsen 1960/1967: 2). A legal norm is a specific “scheme of interpretation” of the acts of human conduct or human behaviour. “The judgment that an act of human behaviour, performed in time and space, is ‘legal’ (or ‘illegal’) is the result of a specific, namely normative, interpretation” (Kelsen 1960/1967: 4). He argued that what makes a natural event legal or illegal is not its facticity (the fact that it is governed by causal laws), but the way in which legal norm confers “meaning” to the event, the way in which it interprets the event. “The possible content of the norm, however, is the same as the possible content of an actual event, for the norm refers in its content to this actual event, above all, human behaviour” (Kelsen 1934/1992: 12).

According to Kelsen, legal order is a normative order of human behaviour – a system of norms that regulates behaviour. The legal order commands certain behaviour by ascribing a coercive act to the opposite behaviour. Thus it is a coercive order. Moreover, according to Kelsen, sanctions influence behaviour and motivate it, but such a motivating impact is only a possible, not a necessary function of law. The behaviour which is required by law may correspond to the legal requirement also for other than legal reasons – e.g., religious, or moral ones. Kelsen also points out that the establishment of a legal order which is aimed at regulating behaviour presupposes that human will is determinable causally. Since the function of a legal order is to influence people’s behaviour in a way which is prescribed by the order, it must be assumed by a lawmaker that legal norms turn into possible motives which determine people’s will to behave in accordance with the norms. “Only because normative order inserts itself in the causal process does the order fulfil its social function. And only on the basis of a normative order that presupposes such causality with respect to the will of the human

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<sup>9</sup> By “natural” Kelsen meant being governed by causal laws (see, for instance: Kelsen 1934/1992: 10). Furthermore, it should be emphasized that Kelsen endorsed a distinction between normative and natural sciences – sciences of norms and sciences of causality. The former are directed to sphere of ought, whereas the latter – that which is given, to factual phenomena.

beings subject to it, is imputation possible” (Kelsen 1960/1967: 94).

Kelsen emphasizes that the unique existence of a norm, the way in which a norm is given, “in contradistinction to natural reality, existing in space and time” (Kelsen 1934/1992: 12), is its validity. According to Kelsen, fact cannot be the reason for the validity. “From the circumstance that something is cannot follow that something ought to be; and that something ought to be cannot be a reason that something is” (Kelsen 1960/1967: 193). Only the norm can be the reason for the validity. The norm which is a reason of another norm is the “higher” norm. Since the search for the reason of validity cannot go indefinitely, it must end and presuppose the highest norm in a system. Such a highest norm is the basic norm, which is the source for the validity of all norms that belong to the same legal order. Kelsen claims that the basic norm has a status of a transcendent, logical presupposition.

For Kelsen validity should be differentiated from its effectiveness – that is, from the fact that a norm is obeyed and followed by its addressees. Effectiveness of a legal order is a condition for validity, “in the sense that a legal order as well as single norm cannot be regarded as valid if they cease to be effective” (Kelsen 1960/1967: 212). The reason for validity is a basic norm, not the effectiveness of the legal order. Norms of the legal order are valid because the basic norm is presupposed to be valid, but they are valid as long as this legal order is effective.

## 2. Posner’s reading of Kelsen

In his essay Posner aims at identifying those elements of Kelsen’s theory of law which “open[] the space for economic analysis, and in particular for the use of economics by judges in a wide range of cases that come before them” (Posner 2003b: 251). Posner argues that Kelsen’s seminal work *Pure theory of law*, “its intellectual style, the method (...) is closer to that of the Vienna Circle, and hence to logical positivism, than to that of Kant<sup>10</sup>” (Posner 2003b: 251). According to Posner, what pure theory of law and economic theory (as well as economic analysis of law) have in common is that they take “science as the model of objective inquiry” (Posner 2003b: 252).

The vast part of Posner’s essay concerns the reconstruction and the summary of Kelsen’s main claims about the concept of law, the legal system, the notions of validity and of effectiveness. I don’t comment on these fragments here, as they are not meant to be the main contribution made by Posner. Posner also discusses some of Kelsen’s views and he defends him against some critics. Thus, his summary has features of an original commentary. However, the main aim of his essay is to show

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<sup>10</sup> Here Posner discusses the widely accepted interpretation of Kelsen as a Neo-Kantian scholar – see: Paulson 1992, Hammer 1999

that the pure theory of law opens a space for economic analysis of law and this is also a thesis that interests me here. For Posner the way in which Kelsen understood judicial adjudication allows for integrating economics with law. Kelsen defines a legal system as a system of competence norms (“Law is an assignment of competences” (Posner 2003b: 266)). Owing to this, as both Kelsen and Posner stipulate, judges are authorized to adjudicate: they are authorized by the (competence) norm to decide cases. Judges decide cases either by deriving a concrete norm, which is the basis of a judicial decision, from the content of a higher norm in the system, or by creating such a norm if there is no higher norm that could guide a judge in a particular case. This possibility of creating a norm by judges inspires Posner to claim that judges can base their decisions on “materials supplied by economics, social science, and so on...” (Posner 2003b: 270). According to Posner, Kelsen “implicitly licenses judges to use economics and other social sciences (...) by making clear that law does not dictate the outcome of judicial decisions” (Posner 2003b: 270). This is the core of Posner’s claim that Kelsen’s pure theory of law is open to the economic analysis of law. As we can see the argument presented by Posner in his essay on Kelsen (and Hayek) is not especially subtle theoretically. Posner simply notices that Kelsen’s understanding of adjudication leaves space for judicial freedom and creativity and this observation leads Posner to state that while deciding cases, when no higher norm could guide a judge, he can make a decision informed by economics<sup>11</sup>. Below I show how reading Kelsen in a more theoretical vein can enlighten us about the challenges of bringing economics to law – the challenges Posner is silent about.

Posner argues that the affinity between Kelsen and L&E lies in formulating a postulate of scientific analysis of law. Indeed, similarities can be seen in a way in which Kelsen and Posner criticize legal scholarship and want to distance themselves from jurisprudential analysis by proposing a novel, scientific approach. In other texts Posner argues that legal scholarship, based on the idea that principles of law can be inferred from judicial opinions and that the knowledge of law consists of what these opinions contain, is not scientific “in the modern sense at any rate” (Posner 1987: 762), as well as it “does not fit comfortably into today’s scholarly *Zeitgeist*” (Posner 1987: 773). Posner claims that without relying on insights from social sciences legal scholarship cannot address the complex problems faced by contemporary societies (Posner 2001: 3).

Kelsen differentiated legal dogmatics<sup>12</sup> from his pure theory of law. He claimed that the former provides a systematic analysis and interpretation of a particular legal system, whereas the latter

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<sup>11</sup> It should be noted here that here Posner does not elaborate on the way in which judges decide cases on the basis of economics. Insights on this can be found in his other works on the topic (see e.g., Posner 1983, Posner 1984).

<sup>12</sup> Legal dogmatics is a discipline that deals with systematization of basic legal concepts and conceptualization of legal problems. The term “legal dogmatics” comes from the continental tradition and was introduced by Rudolph von Jhering – see: Fikentscher 1976: 228.

is a general legal theory. However, Kelsen, opposite to Posner, criticized “traditional” scholars in legal scholarship for “borrowing from other [social scientific – MM] disciplines (...) in order to enhance their scholarly reputation” (Kelsen 1934/1992: 7), what resulted in impossibility of developing a legal science with its own subject matter. In addition, both are concerned with the developments in modern science of their time and address it as an important challenge, but also as a chance for the studies on law. In the next section I discuss how the way in which law & economics responds to this challenge differs from Kelsenian theory and that it is less theoretically and methodologically subtle from Kelsen’s analysis. Afterwards I indicate that the ideas of Kelsen that Posner leaves out in his interpretation can help us to disclose the presumptions of law & economics, and I indicate the conceptual and methodological difficulties the scientific analysis of law and its impact, as understood by L&E scholars, faces.

### 3. Interpreting Posner’s reading of Kelsen – what Posner left unsaid

The crucial feature and aim of Kelsen’s work is to establish legal theory as an autonomous discipline – a discipline with its own subject matter, distinguishable and separate from other scientific disciplines. This aim is related to his attempt to analyse law as a legal norm, a normative phenomenon. Kelsen argues that law explained on the basis of other scientific disciplines is analysed as a fact, as a regular pattern of behaviour, and as such is subject to causal explanations. Thus if one wants to analyse law as a phenomenon that is not factual, but normative, one has to analyse it as a valid norm. Pure theory of law is a response to this challenge. It specifies conditions under which law can be known and analysed as a valid norm.

Law & economics, as well as legal theory as Posner understands it (see: Posner 2001), is a reversal of Kelsen’s postulate. For Posner, legal theory is a “study of law (...) using the methods of scientific and humanistic inquiry to enlarge our knowledge of the legal system” (Posner 1987: 779). For Posner an application of economics to analysis of legal system is a part of legal theory and thus it is anything but autonomous in Kelsenian sense. My point here is not, of course, to criticize Posner for not endorsing Kelsen’s understanding of the status of legal theory. Posner rejects a vision of legal theory as autonomous (Posner 1997). Furthermore, he seems to believe that studies on law become scientific when a scientific discipline (economics) is brought to the previously unscientific legal field (legal scholarship). For both Kelsen and Posner the question of scientificity consists in the possibility of providing a positive analysis of law, one free from metaphysical and political commitments. However, Kelsen is also interested in establishing a legal science free from influences of other



sciences, and whose subject matter<sup>13</sup> is law as a system of valid norms. Below I argue that in his non-autonomous understanding of law & economics and legal theory, Posner fails to specify the ‘legal’ component of the subject matter of L&E and legal theory.

In his essay on Kelsen, Posner emphasizes the importance of integrating economics with law through adjudication. In this picture judges are expected to take judicial decisions i.a., by referring to economics. Metaphorically speaking, in this view economics enters law (legal practice) through the courtroom by providing lawyers with the knowledge about judicial judgments’ economic consequences.

Neither here nor in his work on legal theory does Posner reflect on the theoretical challenges related to the integration of scientific disciplines. And this is what makes his project different from Kelsen’s. Kelsen was aware of the direction of development and disciplinary specialisation of modern science and his concern about a scientific approach to law was related to his reflections on the status of a legal theory as a scientific discipline. That is why he was interested in providing an account of the legal sciences’ ‘lawfulness’ (*Gesetzlichkeit*) that would be parallel to the lawfulness of laws of nature provided by natural sciences<sup>14</sup>. Kelsen believed that for legal theory to become a science it should be able to provide statements whose epistemological status is analogous to the status of laws provided in the sciences of his time. Posner limits his reflections on the relations between disciplines to the postulates of employing methods of other disciplines to the analysis of legal system. Furthermore, he doesn’t provide any account of the legal system and its characteristics and treats it as a given, unproblematic, well-defined data that can be somehow identified and treated as an element of *explanandum* of explanations performed with the use of the social scientific disciplines and theories of all kinds.

The two key questions Kelsen addresses – namely, the question of the science of law as an autonomous scientific discipline, and the question of a scientific treatment of legal valid norms – are

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<sup>13</sup> By ‘subject matter’ I mean a domain of a legal theory, that is, the type of phenomena, or relationships between them, that are explained on the ground of a legal theory.

<sup>14</sup> This is Kelsen’s voice in the debate that started in the humanities in the 19th century and has often been called the “naturalism – anti-naturalism” dispute. It concerned the method of humanities and social sciences (*Geisteswissenschaften*). The debate followed the emancipation of the social sciences from philosophy. The founders of the newly emerged disciplines (Auguste Comte, John Stuart Mill, Hippolyte Taine) formulated strong naturalistic claims – namely, that the social sciences have the same subject matter as the natural sciences. German philosophers of humanities reacted to such naturalistic tendencies present in i.a., sociology, psychology, anthropology and claimed that the humanities and social sciences differ from natural sciences with respect to the type of approach to the examined subject. Windelband (1984) claimed that the humanities represent an idiographic approach which is interested in the analysis of concrete and specific (historical) facts (in contrast to natural sciences which aim at formulation of general and abstract laws). It has also been indicated that the social and natural sciences represent two types of empirical sciences, ones which have different subject matters: the subject matter of sciences about nature is nature, whereas the subject matter of sciences about culture is culture, as well as that both types of sciences examine reality in a different way (by general notions – natural sciences, or specific/individual notions – historical sciences) (Rickert 1896).

ones Posner does not address. For Posner sees them as unproblematic, being of the opinion that legal theory should avoid ‘philosophical’ attempts to provide a concept of law. He identifies the project of an autonomous legal inquiry simply with the dogmatic analysis limited to the study of legal cases (Posner 1987: 762) and with “the internal perspective of the legal professional adequate to the solution even of the practical problems of law” (Posner 2001: 2). Nevertheless, I would like to argue that even if law & economics scholars don’t bother themselves with the problems of how to study legal norms and the way in which these norms address behaviour, it doesn’t mean that they don’t face methodological problems related to this very issue<sup>15</sup>. And they face them because one of the aims of law & economics is to analyse the impact that legal norms have on behaviour. The next section demonstrates these difficulties and this challenge as Kelsen compellingly and demandingly indicated them in his discussion of the flaws and limitations of legal realism.

#### 4. Law & economics interpreted through Kelsen’s theoretical framework

As mentioned in the introduction, Kelsen’s theory can be treated as a theory that “makes explicit both its own and other theories’ meta-theoretical premises and assumptions: and indeed Kelsen’s doctrine of basic norm consists precisely in an attempt to render explicit the presupposition on which knowledge of the law qua normative order ultimately depends” (Chiassoni 2013: 138). In this text I employ a similar interpretation of Kelsen’s work. I do not intend to analyse and discuss here the accuracy of Kelsen’s claims about the architecture of the legal system, the status of a basic norm, the feasibility of a project of an autonomous legal theory. I treat his work as a meta-theoretical analysis. In other words, I treat Kelsenian analysis as an insightful source of reflections on the presumptions and conditions that a scientific theory of law’s impact should satisfy. Furthermore, I argue that Kelsen’s work is rich in remarks that can be used in analysing the way in which law (legal order) influences behaviour. This means that Kelsen’s theory can illuminate law & economics scholarship, treated as an attempt to provide a realist analysis of law and its behavioural impact.

Law & economics can be treated as a continuation of the realist approach to law<sup>16</sup>. Indeed, if

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<sup>15</sup> Recently, Elisabeth Krecke has written about the same essay of Posner and she is also pointing out that bringing Kelsen’s ideas to law&economics, can reveal and make explicit “a series of fundamental interrogations or methodological issues that are usually either taken for granted or considered irrelevant, and hence ignored by (...) Law and Economics” (Krecke 2015: 191).

<sup>16</sup> There is a discussion in legal theory whether legal realists built a school, a movement, or whether they rather have formulated a project for an approach to law. It is also discussed whether legal realism has influenced theoretical thinking or rather legal practice (see: Horwitz 1992, Faralli 2005, Green 2005). Nevertheless, one can indicate certain ideas, claims, and postulates accepted by the authors recognized as proponents of American legal realism (Karl Llewellyn, Oliver W. Holmes, John Ch. Gray, Herman Oliphant, Jerome Frank). Most of these authors share views concerning rule scepticism, theory of adjudication, prediction and decision theory of

we compare the claims and postulates of American legal realism with those of law & economics, many analogies between them can be found. Proponents of both approaches are interested in analysing, explaining, and predicting the influence and impact that law has on behaviour. In attempts to analyse the behavioural impact of law, proponents of legal realism and of law & economics refer to methods and theories of social sciences. They believe that law may be investigated on the basis of scientific disciplines different from jurisprudence or legal theory, since legal theory does not form an autonomous discipline. Law & economics provides arguments to criticize "traditional" jurisprudence for its unscientific, intuitive, and dogmatic character. Similar critical arguments have been formulated by legal realists against methods used in legal practice and jurisprudence. Economic analysis of law, as well as American legal realism theorists understand law mostly in a non-normative way: proponents of law & economics as an incentive, realists – as a decision of judges or officials.

Hans Kelsen was engaged in the discussion on legal realism<sup>17</sup>. In the article *A 'realistic' theory of law and the pure theory of law* Kelsen discusses the ideas of his former student, Alf Ross, and argues that pure theory of law addresses the issue of law's impact, law's effectiveness, in a way more theoretically sound from the realist approaches. He points out that realists face the following problems: they don't manage to completely eliminate legal norms, understood as valid, authoritative requirements, from their analyses; they fall into contradiction when they understand law as a norm and as a fact at the same time; and they don't address correctly the issue of effectiveness of law as a correspondence between two elements – the law and the behaviour that corresponds to the law. Below I will demonstrate that neither is law & economics free from similar conceptual problems. In my critique of law & economics made with the use of Kelsen's ideas, I will however go beyond his response to Alf Ross.

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law, non-normative character of legal norms, postulate of relying on social sciences in attempts to explain and predict impact of law. However, see e.g.: Duxbury 1992 and Leiter 2002 who discuss whether these main claims can be attributed to legal realism without making a mistake of serious misinterpretation of the works of legal realists.

<sup>17</sup> It should be noted that he was discussing mainly with the Scandinavian version of legal realism. The most distinguished proponents of Scandinavian legal realism are: Alf Ross, Axel Hägerström, Karl Olivecrona. Proponents of Scandinavian legal realism criticized legal idealism in jurisprudence, they claimed that legal duties and rights do not exist in any real sense, but are only expressions of feelings of entitlement or obligation. They proposed to develop scientific analysis of law that conceives of legal norms in terms of behavioural regularities. See e.g.: works comparing American and Scandinavian legal realism – Martin 1997, Alexander 2002. Both versions of legal realism were interested in explaining the way in which law impacts behaviour. For this reason the comments of Kelsen on studying the legal impact by Scandinavian legal realists can be also used for analysing and criticizing the American branch and its intellectual successors.

#### 4.1. The subject matter of studies: law

The starting point of Kelsen's analysis is a rather uncontroversial statement, mentioned already several times, that the subject matter of a positive science of law is and should be a valid law. His legal theory provides a definition and characteristics of this subject matter. He argues that in order to define and conceive of law as a valid norm one has to presuppose the basic norm<sup>18</sup> and that legal theory makes this presupposition explicit. No matter whether we agree with his approach to providing an account of law, it is difficult to question the very idea that it is law that should be the subject matter of legal science and that legal science should specify its subject matter.

The aim of law & economics scholars is not to provide an account of law, but to analyse law's influence. Law & economics scholars are interested in analysing what the economic consequences of law are and how law influences people's decisions and behaviours. Economics is brought to law in order to provide explanations and predictions of these consequences and impact<sup>19</sup>. Posner, defending pragmatic positions, deliberately avoids giving a definition of law, claiming that "law" is an open-textured and interpretative term. For instance, Posner claims that "'law' (or 'philosophy', or 'democracy', or 'religion'), has neither a fixed intension nor a fixed extension: that is, it cannot be defined or the complete set of things to which it applies enumerated" (Posner 1990: 368). This means for him that the sense and meaning of the term "law" changes, depending for instance on the way in which the community understands it. Nevertheless, if one declares interest in the analysis of the influence of law, one should indicate under which sense and meaning he/she analyses law and its impact (even if that meaning is not, or cannot be, fixed). In other words, one should formulate at least a nominal definition of law<sup>20</sup>.

Law & economics scholars often claim that law incentivizes people's behaviour (see: Posner 1977:6; Demsetz 1967: 348; Korobkin, Ulen 2000: 1958; Paces, Visscher 2011: 4-5; Posner 1998: 4<sup>21</sup>). They don't really clarify what they mean by "incentive", nor whether law is an incentive, or

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<sup>18</sup> The basic norm is the highest norm of a legal system that grants its validity. This norm is, however, only a presupposition. The basic norm is presupposed to be valid in juristic thinking, as a reason for validity of the whole legal system. See: Kelsen 1959.

<sup>19</sup> "The great appeal of law and economics has been its use of a coherent theory of human decision-making (rational choice theory) to examine legal rules and institutions" (Ulen 1999: 790). "To understand how people behave in an uncertain world, and to make viable recommendations about how the law should try to shape that behaviour, legal scholars must employ, even if only implicitly, a model or theory of decision-making" (Guthrie 2003: 1115). Economics "can predict the effect of legal rules on value and efficiency, in their strict technical senses, and on the existing distribution of income and wealth" Posner 1998: 15.

<sup>20</sup> A nominal definition is a definition that states a meaning that a certain word has in a given language.

<sup>21</sup> „The concept of man as a rational maximizer of his self-interest implies that people respond to incentives – that if a person's surroundings change in such a way that could increase his satisfactions by altering his

whether it creates incentives (both claims can be found in law & economics literature – compare e.g., Cooter, Ulen 2014: 9 and Cooter, Porat 2014: 1). In ordinary language the term “incentive” means “a thing that motivates or encourages someone to do something” (see: *Oxford English Dictionary*). This meaning enables us to understand incentive as something (e.g., a factor) that has its influence/impact on something else. Such an understanding is well in accordance with L&E usage of it, since L&E scholars declare interest in analysing the impact that law has on behaviour. This can further mean that they are examining a certain kind of relation which occurs between law and behaviour and that their claims about law creating incentives, or being an incentive, can be explicated as a claim that law is a factor which stays in a relation of impacting/influencing to behaviour.

Thus the domain (subject matter) of L&E may be characterized as one which includes relational state of affairs  $\langle a, b, C \rangle$ , in which  $a$  stands for law (all objects from the set of laws),  $b$  for behaviour (all objects from the set of behaviours), whereas  $C$  for a relation of influencing between  $a$  and  $b$ . The problem is, however, that L&E scholars deliberately do not clarify how they understand law – that is, what kind of objects or factors law is (whether it is a norm, a fact of specific kind etc.). This means that at least one element of the relation that L&E subject matter consists of remains unspecified. L&E scholars do not formulate definitions of law. However, they seem to identify law with some kind of factor that influences behaviour. This factor is mostly understood as the non-normative one. The next section shows why this can be problematic.

#### 4.2. Law as a norm vs. law as a fact

Kelsen examined in his work the approach to studying law that he called “sociological”. He thereby meant the empirical studies of law that treat law as a regularity in/pattern of behaviour (thus legal realism can be treated also as a type of the sociological approach in Kelsen’s sense). According to Kelsen the sociological analysis identifies law with a certain fact, a phenomenon occurring in the reality that is subject to causal explanations. It is important to note that he didn’t rule out a possibility of analysing law in this way. What he insisted upon was that analysis of law as a fact, as a regularity of behaviour, doesn’t address the way in which law, as a requirement to behave in a particular way, addresses behaviour.

While discussing Ross’ ideas, Kelsen pointed out that attempts at eliminating the normative understanding of law from realists’ analysis are never made in a consistent way. As it happens, realists treat law in both ways – as a norm and as a fact. And if they would like to be consistent in their

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behaviour, he will do so” Posner 1998: 4. Thus, it is claimed in L&E that economics can be applied to law because law is an incentive and rational agents respond to it in a way that maximizes their self-interest (utility).

reductionist approach, they should be able to eliminate completely the normative terms from their analysis<sup>22</sup>.

Similar inconsistency is present in L&E works. As mentioned above, L&E protagonists treat law as a factor that influences people's decision to behave in a way that corresponds to the behaviour required by law. This factor is mostly a factual one – it is a non-normative (e.g., material, economic, financial) stimulus that is supposed to be processed by individuals through utility considerations. It is best to understand this non-normative aspect of law in L&E by looking at L&E proponents view on motivations out of which addressees of law act: in L&E analysis people's behaviour corresponds to the behaviour required by law not because people treat legal requirement as a reason to act, but because they have economic motives to behave so. Thus it could be argued that L&E is a reductionist approach to law that eliminates considerations of normativity of legal norms from its investigations. This is not really the case, however.

At the origins of law & economics<sup>23</sup>, in the seminal article of Coase on the problem of social cost<sup>24</sup>, we find a remark that there are conditions under which law operates as a normative requirement: in certain situations it can be expected that one will behave in accordance with the legal regulations issued by 'government', simply because they are legal requirements introduced by an authority. This way of thinking is present in L&E analyses of market failures and legal remedies to them.

Coase in his famous analysis is concerned "with those actions of business firms which have harmful effects on others" (Coase 1960: 1). Further he explains that the point of his interest is to analyse whom should the legal system allow to harm from the efficiency perspective. He claims that

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<sup>22</sup> Kelsen remarks that when Ross wants to eliminate the normativity (validity) of law from his analysis he identifies it with "interested behaviour attitude having the stamp of validity" (Ross cited after Kelsen 1960/2013: 206). However, this behaviour "consists in the fact that those individuals who create and apply the legal sanction-stipulating norms are regarded by legal subjects as being 'competent' to create and apply the law (...). To hold the 'opinion' or 'belief' that such individuals are 'competent' to establish and apply the law is to 'respect' them as authorities" (Kelsen 1960/2013: 206). Kelsen shows that Ross cannot define the normativity (validity) of law in a way that will lead to complete elimination of normativity in his sense. While Ross attempts to do so, he presumes an understanding of 'authority' and of 'competence' as having a binding force that makes people to respect them. Thus he is not able to eliminate the notion of validity and replace it by pure descriptions of behaviour.

<sup>23</sup> Although, as already mentioned, I agree with Alain Marciano that we can differentiate between law & economics and economic analysis of law and that Coase's works represent the former, whereas Posner's – the latter (see: Marciano forthcoming; Harnay, Marciano 2009), here I treat Coase's text as a source of inspiration for both approaches to study relationships between law and economics, and especially for justifying introduction of laws understood as coercive legal norms in order to deal with market failures.

<sup>24</sup> The seminal paper of Ronald Coase *The problem of social cost* (Coase 1960) has been discussed and interpreted by legal, economic, and law & economics scholars since publication more than half a century ago. It has been viewed as a text which laid the foundations for the development of economic analysis of law. There is plenty of discussion on Coasian ideas, as well as plenty of their interpretations and extensions. For a review of discussions and bibliography see: Medema, Zerbe 1999.

no matter whether we are dealing with systems which establish legal liability for damage or not, the final allocation of resources will be optimal if “the pricing system works smoothly” (Coase 1960: 1), which means that costs of transactions between actors are zero. People will act out of economic incentives and calculate costs and benefits created by “pricing systems”, as Coase calls them, no matter whether they act in a system with or without legal liability for damage. This leads him to the conclusion that law is not necessary to regulate people’s behaviour as they will always achieve an optimal and least costly solution – through bargaining with each other. However, if certain conditions are met (if transaction costs appear), then calculations of costs and benefits can lead individuals to attain the allocations of resources that are inefficient (from the perspective of a society). In this situation various social arrangements for dealing with harmful effects of individuals’ actions should be considered. One such social arrangement is government regulation. “The government may impose regulations which state what people must, or must not do, and which have to be obeyed. Thus, the government (...) may, to deal with the problem of smoke nuisance, decree that certain methods of production should or should not be used” (Coase 1960: 17).

What is most important to note here is the inconsistency present in the analysis of human behaviour in response to law. In the scenarios analysed by Coase under the assumption of zero transaction costs, law as a valid norm (that imposes a liability for damage) doesn’t have a behavioural and motivational impact. People’s behaviour is analysed there as being a result of considerations of costs and benefits of certain actions. However, when Coase analyses the governmental intervention, he examines situations when law is introduced to coerce people. This means that Coase assumes that there are circumstances when law can operate as a norm and can impact behaviour due to the fact that it is an authoritative (valid) requirement to behave in a certain way. Law as a legal norm is not eliminated from L&E analyses. The normative and coercive understanding of law is present in the economic analyses of law that identify market failures and justify legal interventions to correct them (see: Weimer, Vining 2010: 71-112), as well as in those that identify inefficiencies and propose law as a remedy to them<sup>25</sup>.

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<sup>25</sup> The inconsistency in assuming two ways in which law operate – as an incentive and as a coercive norm – analysed on the example of the Coase’s work can be also traced in Posner’s studies. For instance, while discussing notions of Pareto and Kaldor-Hicks efficiency Posner writes “A coerced exchange, with the legal system later trying to guess whether the exchange increased or reduced efficiency, is a less efficient method of allocating resources than a market transaction – where market transactions are feasible. But often they are not, and then the choice is between a necessarily crude system of legally regulated forced exchanges and the even greater inefficiencies of forbidding all forces exchanges, which could mean all exchanges, as all have some third-party effects” Posner 1998: 16. It should be noted that also Robert Ellickson notices inconsistency in Coase’s work, as well as, if not mostly, in the commentaries on Coase. Ellickson remarks that in fact Coase believed that law may affect the allocation of resources – for him an entitlement will tend to “stick” where it is originally allocated when the costs of transferring the entitlement would exceed the parties (positive) gains from trading it (Ellickson 1989: 626). My analysis, although stresses inconsistency as well, emphasizes rather that in L&E we face two incompatible views on how law operates.

From law & economics works one can infer that they understand law both as an incentive and as a legal norm. Furthermore, despite the growing interest in social norms<sup>26</sup>, it is never clarified within L&E how law as a legal norm differs from norms of a different type (e.g., from social or moral norms), and especially how the ways in which these norms address and influence behaviour differ. This is exactly the problem that Kelsen was worried about – that without providing a precise and theoretical account of law we are not addressing specific features of it and in result we end up analysing phenomena (factual, or even normative) that may be distinct from law. It is important to note that for Kelsen, the positivist, this specificity is not a mysterious, intrinsic, metaphysical feature of law. What makes legal norms distinct from norms of different type is that they are valid and validity means a way in which law addresses those whose behaviour it regulates.

#### 4.3. The issue of effectiveness and the issue of causation

The distinction between law as a fact and law as a norm is related also to the distinction between effectiveness and validity. Effectiveness of law means the impact that law has on behaviour, the fact that law is influencing its addressees. This type of factual impact is one of the main focuses of law & economics. Kelsen criticized the realists' approaches to law for confusing law's validity with its effectiveness. The distinction between legal validity and legal effectiveness is "the unavoidable consequence of the fact that law qua norm – that is, legal validity, law's specific existence – is an Ought and not an Is, and that effectiveness, understood as the fact that people's conduct corresponds to the legal norm, implies a relation between law and this factual conduct (for a relation can obtain only between two non-identical elements)" (Kelsen 1960/2013: 205). Contrary to legal realists, L&E scholars do not claim that legal validity should be reduced to the law's effectiveness. As they do not subscribe to any account of law, they also don't focus on the validity of law. However, the cited fragment of Kelsen's polemics with Ross points out that the analysis of effectiveness of law presupposes the analysis of a relation between "law and factual conduct". This is exactly the same thought that I was defending in section 4.1. on the subject matter of law & economics. If law & economics is interested in explaining and predicting the behavioural impact of law, it means that it focuses on a relation between law and behaviour. As mentioned above, one of the elements of this relation – law – becomes theoretically unspecified in the L&E works.

Furthermore, the idea that law can impact behaviour presupposes a causal link occurring

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<sup>26</sup> For instance, Posner analyses social norms and emphasizes that economics and psychology of norm-directed behaviour offer the most appropriate way of explaining how social norms operate and influence behaviour (Posner 2001: 288-315).



between law and behaviour. Since it is claimed by L&E scholars that the function of law is to influence behaviour, the analyses of law's impact are made under the premise that there is a causal link between law and behaviour. L&E scholars presume a kind of causal relation between law and behaviour, without clarifying their understanding of causality. Dismissal of the issue of causality may be related to the trend present in neoclassical economics under the influence of neo-positivist philosophy<sup>27</sup>. Although one may find few L&E analyses concerning causality issue, L&E scholars are interested in it only in the context of *ex post* ascribing responsibility to an agent for his/her actions (or results of his/her actions), especially in tort law – (see: Calabresi 1975, Landes, Posner 1983, Shavell 1980). However, such analyses do not concern a relation between law and behaviour. In the contexts of analysing the behavioural impact of law it is the perspective *ex ante* that is crucial: examination of how subjects change behaviour in reaction to law and to what extent those changes may be predicted. Without clarifying the nature of this relation, proponents of L&E cannot formulate any recommendations or predictions concerning the impact of law on behaviours in a justified way– that is, in a way which is not merely a supposition that introduction of a norm X will result in behaviour Y<sup>28</sup>.

Kelsen was aware of the challenge that the analysis of causality brings to any scientific account of law. He understood that law has its “natural dimension”, as he calls it. For Kelsen law is a coercive order of human behaviour that is “partly rooted in nature”. Therefore law can be a cause of behavioural changes. Moreover, in order to be effective law should be such a cause. However, his understanding of legal theory excluded analysis of this causal relationship from the agenda of pure theory of law. He postulated the ontological dualism of Is and Ought, and introduced the principle of imputation as an analogue of the principle of causality in the sphere of legal norms. For Kelsen the sphere of facts and the sphere of legal norms are two parallel ontological realities that can both be analysed in a scientific way through general hypothetical statements; in the case of the former sphere – by the statement stating the occurrence of the causal relationship, in the case of the latter – of the relationship of an imputation. Kelsen realized that these two spheres interact with each other, but are

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<sup>27</sup> Hume's critique of causal relation has influenced i.a., dismissal of the notion of causality from contemporary statistical data analysis, as well as from social sciences, influenced by logical empiricism (which reduced causal relations between events to regularities of their occurrence, or to temporal asymmetry between them) – see: Hausman 1992. However, since the 1980s one may observe in philosophy and the methodology of science a revival of interest in causality. See e.g.: Cartwright 2007, Pearl 2000, Spirtes, Glymour, Scheines 1993.

<sup>28</sup> This point is similar to the contemporary research pursued under the label of “evidence based policy” (Cartwright, Hardie 2012). The aim of the evidence based policy is to provide conditions that the evidence should fulfil in order to be used in the reasoning concerning the effectiveness of a policy (whether a policy will work in a given context and situation). It has been stressed in the realm of the evidence based policy that the predictions of policy effectiveness are causal claims, since in policy-making it is presumed that the proposed policy, if implemented, will cause an improvement in the targeted outcome. The challenging and important question, not seriously addressed in law & economics, is whether law can be understood as a cause of behavioural change and how law (legal norm) could be a component of causal principles.

not reducible to each other and cannot be explained by terms and principles used to explain each of the sphere. Even if one doesn't want to accept as strong such ontological commitments as those of Kelsen's (dualism of Is and Ought), one should clarify, while explaining the behavioural impact of law, whether law that is a factor of a behavioural change stands in a causal relationship to behaviour.

#### 4.4. Affinities to natural law

Kelsen viewed the pure theory of law as a third way, as a theory that could be an alternative for both natural law theories and for 'sociological' theories.

Posner in his essay on Kelsen and Hayek admits that one more possible way in which economics could inform law is through the concept of natural law<sup>29</sup>. As Posner is aware of Kelsen's critique of natural law tradition, he does not elaborate on the affinities to natural law in the essay in question that is meant to analyse similarities between L&E and pure theory of law. However, Posner's claim about affinities between economics, natural law, and positive law can be also supported by his remarks on legal theory<sup>30</sup>, as well as on Bentham's relevance for law & economics movement. Posner mentions that, according to Bentham, "nature has placed mankind under the governance of two sovereign masters, pain and pleasure... They govern us in all we do, in all we say, in all we think". Further he states: "Another name for pain, as I have said, is cost; and for pleasure, benefit; so Bentham is claiming that all people, all the time, in all their activities, base their action (and words, and thoughts) on cost-benefit analysis" (Posner 2005: 341-342). I would like to demonstrate that the affinities with natural law constitute one more source of conceptual problems of L&E that can be understood through the Kelsenian framework.

When Posner reflects on the descriptive and normative aspects of EAL, he uses the metaphor of 'mimicking' the market by law to spell out the function of law. "The most ambitious theoretical aspect of the economic approach to law has been the proposal of a unified economic theory of law in which law's function is understood to be to facilitate the operation of free markets and, in areas where the costs of market transactions are prohibitive, to "mimic the market" by decreeing the outcome that the market could be expected to produce if market transactions were feasible. It thus has both descriptive, or explanatory, and normative, or reformist, aspects" (Posner 2001: 5). The idea of

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<sup>29</sup> "So natural law is out as a positive theory of law and with it, by the way, any possibility of equating law to economics (...) But no one has ever tried to go quite that far in integrating the disciplines and we'll see that Kelsen's concept of law leaves plenty of room for economic principles to inform law" (Posner 2003b: 254).

<sup>30</sup> "I am also not a strong' legal positivist, as Holmes was; indeed, I resist the effort to dichotomize positive and natural law" (Posner 1990: 32).

‘mimicking the market’ brings another analogy to the natural law tradition<sup>31</sup>. The market is presented here as a natural order that legal rules should imitate in order to bring outcomes that are similar to the function of the order. In this picture economics gives us knowledge about the way in which this natural order is functioning, and as such is a basis for legal and policy recommendations.

This view on the naturalness of markets leads to a conceptual problem that lies in tension between the claim that there is an order of the market that should be mimicked by law and the idea that law can be a tool of intervention. If the analogy between natural law and economic laws that inform about the functioning of markets proves adequate, then the role of law would be to ‘mimic’ the ‘natural’ order of markets. In this view, law that would regulate against the ‘natural’ tendencies would cease to be efficient. But this further means that in the realm of L&E it would hardly be conceivable to think about law as an instrument of intervention (especially if it can be argued that a notion of intervention entails countervailing the ‘natural’ tendencies and regularities). Such a consequence would also stand in contradiction to the L&E postulate to refer to economics, that explains how people behave, in order to provide legal and policy interventions and recommendations.

Kelsen observes a similar puzzle in his analysis of the natural law tradition. “Natural law claims absolute validity and, therefore, in harmony with its pure idea, it presents itself as a permanent, unchangeable order. Positive law, on the other hand, with its merely hypothetical-relative validity is, inherently, an infinitely changeable order which can adjust itself to conditions as they change in space and time. An analysis of its specific methods shows that, again and again, natural-law theory has been inclined, directly or indirectly, to abandon or weaken the postulate of immutability. In this fashion attempts are made to bridge the boundary line between the two systems.” Kelsen continues: “Whenever natural law has to be realized, whenever its norms, like positive law, are immediately brought to bear upon the real conditions of social life which they are meant to determine, i.e., whenever they are to be applied to concrete cases, the question arises whether natural law can maintain its existence disassociated from positivity, whether its very idea permits the existence of a system of norms distinct from, and independent of, positive law. The question is whether natural law as such is at all possible” (Kelsen 1949/2006: 397). In other words, what Kelsen says here is this: the order that is perceived as natural and immutable, but also as a source of normativity for law, has to be somehow translated into and expressed through legal norms. But if so, then the behaviour is influenced by the positive norms as valid requirements to behave in a particular way. Kelsen argues

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<sup>31</sup> Compare the similar claim made by Harcourt (2012) who argues that the idea of „natural order” was introduced to the field of political economy in the mid-eighteenth century and meant that economic exchange constitutes a system that autonomously can achieve equilibrium without government intervention or outside interference. In the 19th and 20th century this idea was transformed into the concept of the inherent efficiency of markets. Harcourt shows how, through Bentham, the idea of natural order so understood travelled to Chicago School economics.

that if we understand law as a requirement that is a result (“meaning” in Kelsen’s terms) of an act of will of an authoritative entity, then we also acknowledge that it addresses behaviour by requiring from addressees of legal norms to behave in a way stated by a legal norm. This means that it is inconceivable that law has an impact on behaviour as a coercive order and an expression of or an imitation of a natural order at the same time. Natural law that becomes a content of a legal norm influences behaviour as a legal norm. If this weren’t the case, then positive law would be just a superfluous redundancy over the natural laws. This is another way of expressing the conceptual difficulty in thinking about law as ‘mimicking’ a ‘natural order’ and simultaneously operating as a coercive order that intervenes into behaviour and is a cause of behavioural change.

Conclusions: Towards an analysis of the behavioural impact of law

The aim of this paper is to demonstrate some conceptual and methodological difficulties that the proponents of the economic analysis of law are facing.

Posner’s interpretation of Kelsen has inspired me to use Kelsen’s ideas in order to analyse law & economics as a realist theory that aims at providing explanations and predictions of law’s impact. I am not defending Kelsen’s pure theory of law. I treat it as an epistemological theory that reveals presumptions of other theoretical approaches to law that claim to be scientific and, in particular, that claim to scientifically analyse law’s influence on behaviour. Although Kelsen’s pure theory of law doesn’t provide explanation of law’s behavioural impact, his work is rich in analyses that can be interpreted as setting the conditions that a theory of law’s impact should satisfy.

The problems that I identify here stem from the deficiency of L&E in specifying the subject matter of its analyses, that is, in providing characteristics of a ‘legal’ element of the relation between law and behaviour. This is further complicated by the fact that L&E scholars do not propose a consistent account of analysing human behaviour in legal settings as being caused by or responsive to only non-normative factors. In fact they implicitly admit in some places that law under certain conditions can function as a coercive norm that influences behaviours due to the fact that it is a valid authoritative requirement to behave in a particular way. This means that in their works one can find a view on behaviour as being responsive to normative factors, and not only to non-normative incentives. The problem is, however, that they do not provide a theoretical account that could explain how and why people’s decisions can be driven by legal norms.

Kelsen’s analyses commented on in this text can serve as a basis for formulating conditions that a theory explaining behavioural impact of law should satisfy. Such a theory should at least specify a type of relation between law and behaviour that it is explaining, as well as provide theoretical

characteristics of the elements of this relation. It doesn't mean that law has to be understood and analysed as a norm, but if it is not, then normative considerations should be eliminated completely from the explanations of behavioural impact of law. In the next step such a theory should clarify whether the relation between law and behaviour is a causal one. And again, if a theorist claims that this relation is not causal, then he/she should explain how the law's impact on behaviour (and thus law's interventions into behaviour) can be analysed without presuming a causal link between law and behaviour.

Recently we observe attempts to improve the explanatory and predictive power of law & economics by providing more psychologically 'realistic' accounts of human behaviour. These attempts led to the development of behavioural law & economics (see e.g., Jolls, Sunstein, Thaler 1998; Sunstein 2000; Ulen 2014). The hope is that this behavioural approach will help us to better understand the way in which law influences behaviour. This paper intends to show that the most fundamental problems that law & economics faces are of a conceptual and methodological nature. Before looking into a new psychological theory, it should first be clarified what type of relation occurs between law and behaviour, how its elements could be operationalized, and whether the relation in question is a causal one.

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