<https://helda.helsinki.fi>

Posner versus Kelsen : the challenges for scientific analysis of law

Malecka, Magdalena

2017-06

Malecka , M 2017 , ' Posner versus Kelsen : the challenges for scientific analysis of law ' ,
European Journal of Law and Economics , vol. 43 , no. 3 , pp. 495-516 . <https://doi.org/10.1007/s10657-016-9552-1>

<http://hdl.handle.net/10138/308708>

<https://doi.org/10.1007/s10657-016-9552-1>

acceptedVersion

Downloaded from Helda, University of Helsinki institutional repository.

This is an electronic reprint of the original article.

This reprint may differ from the original in pagination and typographic detail.

Please cite the original version.

Posner versus Kelsen: The challenges for scientific analysis of law

Magdalena Małecka

University of Helsinki

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.

A final version of this article has been published as: Małecka M., 2017, Kelsen vs. Posner. The challenges for scientific analysis of law, *European Journal of Law and Economics*: 495-516 and is available at Springer via DOI 10.1007/s10657-016-9552-1.

Key-words

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.

Acknowledgments

I thank the Finnish Center of Excellence in the Philosophy of the Social Sciences (TINT) for the financial support while finishing my work on the article. The work on the text was also possible thanks to the support of the Kosciuszko Foundation, as well as Poland's National Science Centre (individual research project no. DEC-2012/07/N/HS1/01560). I would like to express my greatest gratitude to Prof. Robert Piłat, who with remarkable patience and engagement accompanied my attempts to criticize economic analysis of law, as well as to Prof. Sławomira Wronkowska-Jaskiewicz who taught me to value the intellectual significance of legal positivism. Over the years, I learnt and benefited enormously from the intelligence and wisdom of them both. Last, but not least, I am very grateful for excellent and helpful comments of anonymous reviewers and of the editor of this special issue, Alain Marciano. All mistakes and deficiencies remain mine.

Bibliography

- Alexander G. (2002), Comparing the two legal realisms: American and Scandinavian, *Journal of American Comparative Law* 50, pp. 131-174
- Arlen, J., Talley, E. (eds.) (2008), *Experimental law and economics*, Cheltenham: Edward Elgar Publishing
- Calabresi G. (1975), Concerning cause and the law of torts. An essay for Harry Kalven, *The*

- University of Chicago Law Review 43, pp. 69-108
- Cartwright N., Hardie J. (2012), Evidence – based policy. A practical guide to doing it better, Oxford University Press
- Chiassoni P. (2013), Wiener realism [in:] d’Almeida L.D, Gardner J., Green L. (eds), Kelsen revisited. New essays on the pure theory of law, Hart Publishing, pp. 131-162
- Coase R. (1960), The problem of social cost, Journal of Law and Economics 3, pp. 1-44
- Cooter R. (1998), Expressive law and economics, Journal of Legal Studies 27 (2), pp. 55-79
- Cooter R., Ulen T. (2014), Law and Economics, Pearson online edition
- Cooter R., Porat A. (2014), Getting incentives right: improving torts, contracts, and restitution, Princeton University Press
- Demsetz H. (1967), Toward a theory of property rights, The American Economic Review 57 (2), pp. 347-359
- Duxbury N. (1992), The reinvention of American legal realism, Legal Studies 12 (2), pp. 137-177
- Ellickson R. (1989), The Case for Coase and Against Coaseanism, Yale Law Journal 99: 611-630
- Faralli C. (2005), The legacy of American legal realism, Scandinavian Studies in Law 48, pp. 75-81
- Fikentscher W. (1976), Methoden des Rechts in vergleichender Darstellung. Band III: Mitteleuropäischer Rechtskreis, Mohr Siebeck
- Harcourt B. (2012), The illusion of free markets. Punishment and the myth of natural order, Harvard University Press
- Galbiati R., Vertova P. (2010), How law affects behaviour: obligations, incentives and cooperative behaviour, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1615349
- Gneezy U., Rustichini A. (2000), A fine is a price, Journal of Legal Studies 29, pp. 1-17
- Green M.S. (2005), Legal realism as theory of law, William and Mary Law Review 46 (6), pp. 1915-2000
- Guthrie Ch. (2003), Prospect theory, risk preference, and the law, Northwestern University Law Review 97 (3), pp. 1115-1163
- Hammer S. (1999), A Neo-Kantian Theory of Legal Knowledge in Kelsen's Pure Theory of Law?, [in:] Paulson S., Litschewski Paulson B. (1998) [eds.], Normativity and norms. Critical perspectives on Kelsenian themes, Oxford: Clarendon Press, pp. 177-194
- Harnay S., Marciano A., (2009), Posner, economics and the law: from “law and economics” to an economic analysis of law, Journal of the History of Economic Thought 3 (2), pp. 215-232
- Hausman D. (1992), Essays on philosophy and economic methodology, Cambridge, New York:

Cambridge University Press

Horwitz M. (1992), *The transformation of American Law, 1870-1960: The crisis of legal orthodoxy*, Oxford: Oxford University Press

Jolls Ch., Sunstein C., Thaler R. (1998), A behavioral approach to law and economics, *Stanford Law Review* 50, pp. 1471-1550

Kelsen H. (1923/1998), Foreword to *Main problems in the theory of public law*, [reprinted in:] Paulson S., Litschewski Paulson B. (1998) [eds.], *Normativity and norms. Critical perspectives on Kelsenian themes*, Oxford: Clarendon Press, pp. 3-23

Kelsen H. (1959), On the basic norm, *California Law Review* 47 (1), pp. 107-110.

Kelsen H. (1960/1967), *Pure theory of law*, Berkeley, Los Angeles: University of California Press

Kelsen H. (1934/1992), *Introduction to the problems of legal theory*, Oxford University Press

Kelsen H. (1949/2006), *General theory of law and state*, Transaction Publishers

Kelsen H. (1960/2013), A 'realistic' theory of law and the pure theory of law: remarks on Alf Ross's *On Law and Justice*, [reprinted in:] d'Almeida L.D, Gardner J., Green L. (eds) (2013), *Kelsen revisited. New essays on the pure theory of law*, Hart Publishing, pp. 195-221

Kornhauser L. (2001/2011), The economic analysis of law, *Stanford Encyclopedia of Philosophy*

Korobkin R., Ulen T. (2000), Law and behavioural science: removing rationality assumption from law and economics, *California Law Review* (88), pp. 1051-1144

Krecke E. (2015), Posnerian economic analysis of law and Kelsenian legal positivism: how similar are they?, *History of Economic Ideas* 22(3), pp. 167-193.

Landes W.M., Posner R. (1983), Causation in tort law: an economic approach, *Journal of Legal Studies* 12, pp. 109-134

Leiter B. (2002), *American legal realism*, University of Texas Public Law and Legal Theory Research Paper No. 042

Marciano A. (forthcoming), *Economic Analysis of Law*, *Encyclopaedia of Law and Economics*, Springer

Martin M. (1997), *Scandinavian and American Legal Realism*, New York: P. Lang

Mestmäcker E.-J. (2007), A legal theory without law. Posner v. Hayek on economic analysis of law, *Mohr Siebeck*

Medema S., Zerbe R. (1999), The Coase Theorem, [in:] *Encyclopedia of law and economics*, Bouckaert B., Geest de B. (eds.), pp. 836 – 892

Mercuro N., Medema S. (2006), *Economics and the law. From Posner to post-modernism and beyond*,

Princeton University Press

Pacess A., Visscher L. (2011), Law and economics – methodology, [in:] *Interdisciplinary Research into Law*, Klink van B., Taekem S. (eds.), Berlin: Mohr, pp. 85- 107 (cited on the basis of the electronic version <http://repub.eur.nl/res/pub/31466/>)

Paulson S. (1992), The Neo-Kantian dimension of Kelsen's Pure Theory of Law, *Oxford Legal Studies* 12 (3): 311-332

Paulson S. (1998), Introduction [in:] Paulson S., Litschewski Paulson B. (1998) [eds.], *Normativity and norms. Critical perspectives on Kelsenian themes*, Oxford: Clarendon Press, pp. 3-23

Posner R. (1977), *Economic analysis of law*, Boston: Little, Brown, 2nd edition

Posner R. (1983), *The economics of justice*, Harvard University Press

Posner R. (1984), Wealth maximization and judicial decision making, *International Review of Law and Economics* 4 (2), pp. 131-135

Posner R. (1987), The decline of law as an autonomous discipline: 1962-1987, *Harvard Law Review* 100 (4), pp. 761-780

Posner R. (1989), Foreword, [in:] *Essays in law and economics: corporations, accident prevention and compensation for losses*, Faure M., van den Bergh R. (eds.), Antwerpen: Maklu

Posner R. (1990), *The problems of jurisprudence*, Cambridge, London: Harvard University Press

Posner R. (1998), *Economic analysis of law*, Fifth edition, Aspen Publishers Wolters Kluwer Company

Posner R. (2001), *Frontiers of legal theory*, Harvard University Press

Posner R. (2003a), Introduction, [in:] *Law, pragmatism, and democracy*, Harvard University Press

Posner R. (2003b), Kelsen versus Hayek: pragmatism, economics, and democracy, [in:] *Law, pragmatism, and democracy*, Harvard University Press

Posner R. (2005), The law and economics movement: from Bentham to Becker, [in:] *The Origins of Law and Economics: essays by the founding fathers*, Parisi F., Rowley Ch. (eds.), Cheltenham, Northampton: Elgar

Pound R. (1910), Law in books and law in action, *American Law Review* 44, pp. 12-36

Rickert H. (1896), *Die Grenzen der naturwissenschaftlichen Begriffsbildung. Eine logische Einleitung in die historischen Wissenschaften*, Tübingen

Shavell S. (1980), An analysis of causation and the scope of liability in the law of torts, *The Journal of Legal Studies* 9, pp. 464-516

Sunstein C.R. (2000) (ed.), *Behavioral Law and Economics*, Cambridge University Press.

Ulen T. (1999), Rational choice theory in law and economics, [in:] Encyclopedia of law and economics, Bouckaert B., Geest de B. (eds.), pp. 790- 818

Ulen, T. (2014), The importance of behavioral law, [in:] The Oxford Handbook of Behavioral Economics and the Law, Zamir, E., Teichman, D. (eds.), Oxford University Press.

Weimer D., Vinning A. (2011), Policy analysis, Pearson Education

Windelband W. (1984), Historia a przyrodoznawstwo, [in:] Neokantyzm, Borowicz-Sierocka B., Karkowski C. (eds.), Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego