



NATIONAL RESEARCH UNIVERSITY  
HIGHER SCHOOL OF ECONOMICS

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# **BETWEEN EFFICIENCY AND EFFECTIVENESS**

BASIC RESEARCH PROGRAM

WORKING PAPERS

SERIES: LAW  
WP BRP 31/LAW/2014

This Working Paper is an output of a research project implemented as part of the Basic Research Program at the National Research University Higher School of Economics (HSE). Any opinions or claims contained in this Working Paper do not necessarily reflect the views of HSE.

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## **BETWEEN EFFICIENCY AND EFFECTIVENESS<sup>2</sup>**

The main idea of this paper is that some sort of legal theory dealing with the law's social impact is an indispensable element of the legal profession in the time of late modernity. Can legal theory provide an adequate understanding of the social context of the application of law, relying solely on internal resources? If not, which interdisciplinary discourse is the best and why?

JEL Classification: K10.

Keywords: efficiency, effectiveness, social context of law, neoclassical economics, behavioral law and economics, Hart, Kelsen, Sunstein, Glaeser

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<sup>2</sup> This study was implemented in the framework of The Basic Research Program of the National Research University Higher School of Economics in 2013.

## Introduction

Why should lawyers study the social context of law and are they capable of doing this? These questions may seem absurd. But unfortunately they are not irrelevant or archaic. Unlike American post-realist jurisprudence, with its influential pragmatic emphasis, the continental legal profession is still resistant to attempts to integrate any sort of analysis of the social impact of law.

Historically, continental legal doctrine centered on problems of systematicity, or the internal coherence of the components of law. It was thought as the principle way of avoiding the indeterminacy problem and contributed considerably to the legitimation of the legal order. Later, as the faith in immutable legal truths and natural law rhetorics faded, the theme of legal validity of positive law became dominant. Path-dependence, combined with the rigidity of the scientific disciplinary matrix, was typical for old academic institutions traditionally suspicious of any sort of interdisciplinary hybridization. These factors limited the ability of the European legal tradition to face the challenges of time.

One can doubt the plausibility of such a viewpoint, marking this space in a Kelsenian fashion as “juridically irrelevant”. But nowadays such austere methodological purism is becoming more and more indefensible. One obvious reason for this is the growing instrumentalization of legal discourse. For good or bad, we have by now recognized that social reality can be modified as a result of the conscious legal intervention of government. That is why we have to integrate some problematic for the social context of law and recognize it in some way as a part of legal study. The most apparent here are, at least, two problems.

First of all, what about the contents of “legal intervention”, namely the role of purely legal considerations in elaborating these contents? Should the lawyers limit their role solely to the technicalities of drafting and procedural accuracy? Or should we take into account a simple and plain fact that each new statute is to be integrated within the framework of the preexisting legal order with its principles and restraints, as well as to meet the requirements of stability, intelligibility, and pre-visibility of legal contents?

Secondly, an inevitable consequence of legal instrumentalism is a special emphasis on the implementation of law. Indeed, when one treats legal rule as a societal goal in the statute form, one needs to understand how well the goal is being implemented. Here is the basic difference with the pre-modern “pre-statute” understanding of law. Here the problem of the degree of implementation of law into social practice could basically be omitted. At least in private law the contents of law were predominately generated by the courts – either directly as in the Anglo-American legal systems, or indirectly via the authoritative text of the Roman law and its adaptations by European legal

science – and reflected the existing social practices with no special task of their coercive transformation.

Another very important aspect of the problem has direct relevance to the countries of global periphery, using a term of world system theory. Perhaps an extensive citation from Brian Z. Tamanaha's book will be the best way to elucidate the problem: "Yap had a legal system, with a legislature, a handful of judges and attorneys, a small police department, and a complete legal code based in its entirety on law transplanted from the United States. But vast portions of the Code had never been applied, few lay people had any knowledge of the content of the laws or of the operations of the legal system, a large proportion of social problems were dealt with through traditional means without the participation of the state's legal system... Although the overwhelming majority of the populace lived in general disregard of the vast bulk of the rules of the legal system,... I worked there as a busy assistant attorney-general for almost two years".<sup>3</sup> Whatever it may be, we consider law solely as the authoritative text.

Moreover, here in Russia the problem has a special relevance. We have a good text of law, often identical to the best texts of the developed societies. But very often this has nothing to do with reality. Even more, it is often applied not strategically, but for purposes that are directly opposite to those for which similar rules are applied in Western democracies. Often these purposes have nothing to do with the rule of law.

In these circumstances, it becomes apparent for the relevance of legal implementation. In the following, I try to develop some of its implications.

## **The efficiency concept**

Currently only the law and economics have proposed a coherent theoretical concept of law's efficiency. The proposed concept is based on the theory of marginal utility, the sovereignty of homo economicus' preferences, and rational choice theory. The alternative evolution theory has not been developed into a sound and influential theory due to its internal discrepancies.<sup>4</sup> In this section I intend to answer the following question. Whether the current standing is a result of the random development of scientific research or is driven by a fundamental reason. Also, I am going to consider whether there are any meaningful alternatives to the law and economics' approach to the efficiency of legal structures.

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<sup>3</sup> Tamanaha B.Z. A General Jurisprudence of Law and Society.2001, PP. 145-146.

<sup>4</sup> Hoverkamp H. Knowledge about Welfare: Legal Realism and the Separation of Law and Economics. 84 Minnesota L. Rev.

The central methodological innovation of neoclassical economics is the interpretation of legal rule as only one of the factors that influence on the behavior of a rational utility-maximizer. A legal rule is regarded as an external (exogenous) restriction of human behavior, similar to other restrictions (e.g. market prices). An incentive effect of legal rule inducing the utility-maximizer to choose a certain behavior is the threat of sanctions that will take place if such a person opts for non-compliance with a rule. The sanction is a “price” to be paid for the choice of non-compliant behavior by a person who prefers such behavior to other options.

The focus on the choice of non-compliant behavior makes the law and economics methodology innovative and quite different from the mainstream legal positivist methodology. The latter assumes an automatic implementation of legal rules and ignores the social environment and social consequences of it. The law and economics reconsiders this assumption by treating a legal rule as being only one of the factors that a rational utility-maximizer takes into account. If a utility-maximizer decides that the utility arising from non-compliant behavior exceeds the “price” (being equal to the penalty for breaching a legal rule multiplied by the probability of its enforcement), he is expected to prefer non-compliant behavior. Here we have the classic methodology of the theory of marginal utility being applied: A rational person (capable of choosing the optimal way to achieve his or her goal in a given environment) chooses an optimal way to achieve his or her goal given the existing restrictions (such as market prices and other “prices”, including any restrictive legal rules).

The validity of the proposed theoretical framework depends on at least three focal assumptions.

- 1) People are deemed to be rational utility-maximizers, meaning that their goal is to maximize their income (utility) and they are capable of choosing the most optimal (the least cost-consuming in the given circumstances) way to achieve this goal.
- 2) Goals, internal preferences, and external (exogenous) restrictions are clearly segregated.
- 3) Preferences are constant and autonomous (i.e. determined only by the rational utility-maximizers), while restrictions are variable.

## **The possibility of an alternative approach**

The critique of these principal methodological assumptions (the rational utility-maximizer, the sovereignty of preferences, and the complete segregation of preferences from restrictions) might help us to construe the limits of non-economic approaches to the efficiency of law. In this respect, it is valuable to consider what effect the waiver or relaxation of these assumptions might have on the discussed theoretical paradigm.

The above assumptions make the rational reconstruction of human behavior feasible. They allow us to predict what changes in behavioral patterns will take place, if a legal rule is implemented. Once human behavior is regulated by the rule of utility maximization, it becomes possible to predict human reactions to changes in external circumstances, including changes in law. The segregation of the constant internal preferences from the variable external restrictions plays a key role in this prediction exercise.

If we accept the opposite methodological principle and assume that the internal preferences are variable, the situation is different. In the latter case, we have to recognize that changes in behavioral patterns might be driven not only by the external incentives and restrictions, but also by the changes in the internal preferences as well. As a result, the theory ceases to be able to explain and interpret any existing changes in behavioral patterns with a sufficient degree of certainty. Moreover, it ceases to predict any future changes and to identify the causes of these changes.

A waiver of the sovereignty of preferences as a methodological principle undermines the scientific character of the described theoretical paradigm, too. As we have explained above, this principle is driven by the failure to propose a meaningful universal and interpersonal theory of the genesis of preferences, whereas the failure itself is caused by the unscientific nature of interpersonal comparisons of utility.

The above suggests that the waiver of these three theoretical assumptions is hardly possible due to methodological reasons. Marginal utility theory and rational choice theory ensure the rationality and verifiability of the hypotheses of neoclassical economics. That said, it is still worth considering what non-economic alternatives there are to the law and economic concepts of efficiency. One could argue that, if the total waiver of the above assumptions is unfeasible, the alternative way is to relax these assumptions. Although the more we relax the assumptions, the less intelligible and verifiable a proposed theoretical concept is.

Let's assume that human preferences are variable to a certain extent and that the law is able to change these variable preferences. By making this assumption, we are effectively relaxing the claims for the sovereignty of preferences and for the complete segregation of the preferences from restrictions. A legal rule may influence a person's preferences by replacing his own behavioral preferences with the behavioral patterns embedded into that legal rule. Accordingly, the person in question chooses a certain behavior not on the basis of calculating costs and benefits arising from non-compliance with legal rules (the rational choice theory), but because he or she considers compliant behavior to be in line with his or her own preferences. Sociologists call this process an "in-

ternalization of norms”, a methodological approach that has been adopted by legal realists and some modern scholars.<sup>5</sup>

The idea that law may manipulate basic internal preferences is clearly a relaxation of the rigid methodological assumptions of the economic concept of efficiency. That said, this idea could still be used for the formation of alternative concepts of efficiency. In particular, it could be enjoined with the view that a legal rule is efficient when the goal of that legal rule is achieved to a certain extent, whereas such goal is set out by a lawmaker. The term “efficiency” is probably not the most appropriate one in this context because of its implications of neoclassical economics. Within the legal discourse we have a special term of “effectiveness”, denoting exactly what we mean in the current passage, namely the degree of achieving the goal of a legal rule.

The difference between this alternative view and the economic approach to efficiency is in focus. The economic approach is focused on the consequences of a legal rule’s implementation. The alternative view is focused on to what extent the goal of a legal rule is achieved. The economic approach suggests a broader picture of law’s social context. If a legal rule is only treated as one of several external restrictions that a rational utility-maximizer counts when he decides whether to comply with the law or not, we are faced with a broader social picture than the one proposed by the alternative view, because the alternative efficiency concept is focused only on whether the behavior in question complies with the law or not (and to what extent).

Moreover, the real effect of a legal rule might not be in line with the goal of the lawmaker and might therefore incur some side-effects, if we consider people to be the rational utility-maximizers and if we accept that they have the autonomy to decide whether to obey the rule or not.

Once we accept the alternative approach to efficiency, we have to recognize the following. Although we might be able to assess the level of social obedience with a law, we are not capable of predicting all other social consequences of law. We simply lack the instruments allowing us to see the broader social picture of the utility-maximization principle. This principle is irrelevant to the alternative efficiency concept. Once we agree that the law is to some extent capable of moderating human preferences irrespective of human rationality, then we have to acknowledge that the theoretical concept of the efficiency of law is reduced to a purely statistic matter, especially regarding whether such moderation has been successful.

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<sup>5</sup> Sunstein C. Free Markets and Social Justice, PP. 13-104.

## Chances of integration within the legal positivism framework

At first glance, efficiency as a degree of goal achievement seems to be easily married with positivist views on the implementation of law. Within the positivist framework, effectiveness can be intelligible only as a degree of law implementation.<sup>6</sup> That said, the goal achievement concept is still quite different from positivist views on the efficiency of law.

Modern legal positivism, such as H.L.A. Hart's views, treats efficiency (being the level of factual obedience with the law) as a criterion separating law from other social practices. Also, from the perspective of positivists, efficiency is closely associated with coercive enforcement – the threat that sanctions from legal rules will be applied<sup>7</sup>. By contrast, the goal achievement concept relies on an internalization of the requirements of legal rules as people's own preferences. Internalization goes on irrespective of their rational analysis of benefits and disadvantages (like the threat of sanctions) of compliance or non-compliance with such legal rules. I will focus on this aspect later.

From the above follows another distinction between the goal achievement concept and positivist views on efficiency. From the perspective of positivists, efficiency is not quantifiable. It is not even clear whether obedience to all legal rules or only to a majority of them has to be taken into account when considering whether a rule is efficient. By contrast, from the perspective of the alternative concept of efficiency, the quantification of the level of goal achievement is a feasible and targeted procedure.

The formal definition of the effectiveness of law as the actual realization of a legal provision's goal is typical for the positivist models of law. The basic idea is that legal regulation is a process, within which the goals formulated by public authorities are realized in social practice.

At first sight, the very fact of raising a question regarding the link existing between the definition of the effectiveness of law and positivist legal theory looks absurd. In reality, positivist theory always centered on the study of "internal" problems of legal reality, with a focal point made on the study of structural aspects of law (the problems of structure and internal coordination of basic elements of law). Moreover, in many cases positivism was trying to escape from studying the interaction of the legal system and its social context. It treated the latter as "external" in relation to the legal system.

Nevertheless, legal positivism cannot escape the effectiveness problem. As a starting point, take the simplest version of positivist theory by Austin. It construes legal rule as an order of the sovereign. But the rule must possess a sufficient extent of effectiveness, which is having a good prospect of realization in social practice. Given the premises of legal positivism, the intended pur-

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<sup>6</sup> Эффективност' zakonodatelstva v ekonomicheskoy sfere. Otv. redactor Yu. A. Tihomirov. M. 2010. S. 40-54.

<sup>7</sup> Ibid.



pose of a legal rule is to “form” social practices. Unlike in the case of other normative social regulators, its only “advantage” is the availability of coercive state-supported enforcement. Then the question of the extent of its real enforcement in society – meaning its effectiveness – possesses the key meaning.

This thesis can be illustrated on the base of a quite complicated normative theory of law from H. Kelsen. Despite the extreme extent of formalism, Kelsen also fails to avoid contact of its theoretical construction with social practices. We know that the fundamental metaphor of normative theory is the idea of a pyramid of legal rules. Each rule “of a higher rank” constitutes the “source” of the legal reality of the corresponding norm of a lower rank. The basic rule (“constitution”) is located on the top of the pyramid. This is the basis of the legal nature of all other norms of the system, including private legal transactions. But what is the source of legal force in the main norm? Let's analyze this question at a more or less practical level. How can we understand that this is the main norm that has legal validity? Kelsen answers that this is possible to figure out only by determining the fact that the main norm is enforced – or possesses the quality of effectiveness.<sup>8</sup>

There is an interesting paradox here. The guru of normative theory did his best to immunize the law from society, but has failed to go without a reference to the factual in order to substantiate the normative. In other words, if law is a coercive mechanism, then there cannot be any law that does not possess the quality of effectiveness, which is understood as an increased capacity for realization in social practice.

The concept of H.L.A. Hart looks interesting in the context under consideration. It is more difficult to identify in it the same structural interrelations that determine dependence of the prevailing understanding of effectiveness upon the general positivist orientation of contemporary legal doctrine. But here we also find certain grounds allowing us diagnose the existence of such a relation. First of all, the theory of “secondary” norms refers to the concept prevailing in positivism, in accordance with which law is an institutionalized coercion. It is secondary legal norms that determine the institutions that possess the capacity to compel the subjects to behave in a certain way. We should take into account that the existence of these secondary norms is a constituent feature of law. Then it becomes clear that the system of prescriptions, which has no intent to guarantee the efficient enforcement of such prescriptions, cannot possess the quality of law.

The model of conflict resolution in the following case provides the indirect proof of this thesis. Take a case where, as the result of a revolution, two legal orders – an old one and a new one – co-exist and compete on the same territory. In this case the priority must belong to the legal order that is more efficient. This idea looks interesting in at least two aspects. First, here we see the same

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<sup>8</sup> Tamanaha B.Z. A General Jurisprudence of Law and Society.2001, P.P. 143-144

logic, which was found in the theory of Kelsen: reference to effectiveness as ultima ratio. Second, it is possible to diagnose that the basis of the concept of legal system contains a monistic idea: pluralism and coexistence of several legal systems at the same time are impossible, and this thesis directly results from the concept of law as an “efficient social control”.

Thus the problem of “effectiveness of law” nevertheless goes together with legal positivism. Legal rules represent particular governmental will (commands of sovereign). They express certain arbitrary chosen goals of governmental policy. In that case, the key problem of the theory of law as such would be the degree of precision, completeness, and uniformity of realization of such goals in practice. Precisely that constitutes the basis of the traditional understanding of effectiveness.

Therefore, there is the necessary connection between theoretical constructions of “pure” positivism, whatever the form of its expression may be, and the idea of the effectiveness of law.

Nevertheless it should be pointed out that the concept of effectiveness of legal rules as the degree of achievement of their goals is not completely compatible with the core premises of the theory of legal positivism. The theory of legal positivism is rather skeptical towards the idea of teleology in law. According to the theory of legal positivism, we cannot integrate any teleological considerations in the process of interpretation and applications of legal rules completely. Teleology limits the scope of the deductive model for applying legal rules. Teleological interpretation, for example, can block the application of legal rules based solely on their literal meaning in favor of an application based on the goals of legal rules. This leaves much room for judicial discretion, using balancing of interests, which makes the result less predictable and far more susceptible to the influence of extralegal (moral, political) considerations.

At the same time, the theory of legal positivism cannot absolutely ignore teleological considerations by the process of applying legal rules. Many legal positivists treat the process of the law’s application (including interpretation of legal texts) as understanding the intention of lawgivers. In that case we must acknowledge that the intention of the lawgiver may not in each case coincide with the literal meaning of the authoritative legal text. When the conflict arises, what will prevail – the literal meaning or the genuine goal of the lawgiver? This tension stands for the fact of a sort of ambivalence with which the theory of legal positivism treats the problem of effectiveness of law.

As a matter of fact, contemporary legal positivists endorse the legal realist understanding of the effectiveness-concept (effectiveness as a degree of realization of an enactment’s goal). But in far more sterile form devoid of its skeptical overtones. The main objective of the legal realists’ project was to annihilate the deductive model of applying law by introducing into the process some considerations that exceed the literal meaning of authoritative legal text. Contemporary legal posi-

tivism utilizes the category of goal only so far as it does not contradict to the values of predictability and “fidelity to law” considerations.

First of all, we must point out a well-known semantic uncertainty of the positivist concept of effectiveness. The issue is that a requirement of the global effectiveness of legal system, which is understood as a factual and considerably wide and systematic observation of requirements of legal prescriptions in the appropriate society, is both a necessary condition for the existence of a legal system and very hard for empirical verification. It is necessary to emphasize that we do not mean absolutely natural, cognitive limitations, which go together with all social “dimensions” (such as those appearing in the course of formation and processing statistical data), the point is the complicity of construing the definition of effectiveness of law that is formulated within the framework of the contemporary positivist tradition.

What does this “factual observation of requirements of legal prescriptions” as a “condition of existence” of the legal system mean? Is it about the necessity to determine the effectiveness of each prescription of law or it is possible to be limited to the statement of fact that in an appropriate society the trend to observe legal prescriptions en bloc prevails? In the last case it is not clear how to “measure” this practice of routine observation. Shall we talk about the routine observation of the majority of prescriptions of the system, or shall we select as a point of criterion the necessity of observation of prescriptions by the majority of subjects, whose behavior the appropriate prescriptions intend to regulate? What is the extent of “non-observance”, which, from the standpoint of the appropriate system of rules, is admissible in order to qualify it as a legal system?

These questions do not receive clear answers from the followers of contemporary legal positivism. All we get is quite uncertain statements about the “general” nature of lawful behavior – about the existence of a certain “minimal” level of observance, below which it is impossible to diagnose the legal nature of a corresponding system of rules. But a more precise definition of this minimal level is still lacking.

This is not pure accident. The point is that the concept of effectiveness in its traditional positivist version is impossible for quantification and, therefore, for empirical verification. It is not designated for any sort of operationalization, first of all because of its essentialist nature.

Our hypothesis is the following. Introducing the definition of effectiveness into positivist discourse resulted from two interconnected circumstances. First of all, from the necessity to provide a precise criterion, enabling them to extract legal norms from numerous social practices somehow conventionally related to the sphere of law. The necessity to provide a precise criterion is explained by the fact that formalization of the criterion of demarcation is mandatory for the positivist theory. The content of this criterion was taken from the idea about the function of law. Comparative effectiveness of law is determined by its coerciveness. Correspondingly, effectiveness (as the result of

coerciveness) is the most important feature of the law. Law is simply distinguished from other social norms by its special effectiveness. In other words, the law by its definition is an efficient way of realizing a political system that is designated to perform the function of social control.

But at this point the “function” of effectiveness in the positivist discourse gets exhausted. That is why positivists are not that sensitive to determining concrete parameters of effectiveness. The definition of effectiveness was introduced without the intent to study with its help the extent of realizing the goals of public authorities expressed in any concrete norm.

Actually we deal with an idea that it is enough just to use the legal mechanism of transformation of social reality and formulate the juridical norm aimed at the realization of a specific social goal. The rest will go automatically, and social reality will be automatically transformed in accordance with the intentions of the legislator – the social technologist. It is perfectly clear, since the law has more effectiveness “by definition” because of its compulsory nature.

But exactly this last implication of the positivist theory, on which the entire model of effectiveness has been built, is the most doubtful. Nowadays there are no reasons to doubt that the role of law in the system of social regulators has been seriously and systematically exaggerated, and this circumstance repeatedly resulted in unfavorable and “unforeseeable” social results. “Only a small part of behavioral acts, if it already exists, is being formed under the exclusive influence of law. On the contrary, one or another behavioral act often comes up as the result of action of several social regulators. The legal principle of *pacta sunt servanda* does not certainly (automatically) meet universal approval, but its observation in many cases is motivated by economic evaluation of the consequences of its breach. Any enforcement of law implies the appropriate motivation of its subjects, and only some of these motivations are formed under the influence of prescriptions of law and the threat of their compulsory enforcement. Compliance with the law by itself is not necessarily the measure of effectiveness for a legal system.

Thus the paradox is that contemporary legal positivism to the same extent implies the existence of the concept of effectiveness of law and blocks it. It implies the existence of the concept in question to such extent and insomuch as it insists on the distinguishing of law as an institutionally compulsory order. It blocks the concept to such an extent insomuch as it does not allow the possibility of existence of “inefficient” law.

This fact provides an explanation to the lack of sensibility of national jurisprudence, in which positivist comprehension of law keeps a leading position, to the problem of effectiveness of prescriptions of law as well as the opposition of the legal community to the initiatives connected with introducing into Russian legislative process the procedures of the regulatory impact of legal assessment.

To sum up, although at first glance the positivist concept of effectiveness and the goal achievement concept look similar, they are quite different in substance. This should be taken into account, if any theoretical conjunction of these two concepts is to be considered.

## **The Goal-Achievement Concept**

As I have shown above, a goal achievement concept might technically play an alternative role to the economic efficiency concept. Historically it was originated early enough, even earlier than the economic legal movement emerged. It can be traced from the beginning of the legal realism movement. However it has not become either popular or even a developed theoretical concept. What are the reasons for its failure to become a sound alternative to the economic efficiency theory?

Clearly there has been room for such an alternative. In the 20<sup>th</sup> century governments intensively interfered into economic activity, either relying on Keynesian economics or on socialistic economic models. Obviously this interference was backed by the law, and there was a demand in a supporting legal ideology and relevant theoretical instruments. The goal achievement concept works pretty well with that ideology of state intervention and dirigisme. Also, at least on a vocabulary level, this concept might be converged with mainstream legal positivism, although this convergence is nominal.

Moreover, a theoretical conjunction of the goal achievement efficiency with legal positivism supports a principal dogma of lawyers – a claim for autonomous nature of legal discourse. The widespread application of economic methods to non-economic social sciences (so called “economic imperialism”<sup>9</sup>) leads to a natural antagonism to these methods from traditional social scholars. If economic methods (such as microeconomic theories, game theory, and statistics) are considered to be more successful methods than the traditional ones because they explain the law better, then the current mainstream methods of legal analysis will become less popular and their supporters (both academics and commercial lawyers) will become jobless. Accordingly the ideology and concepts of economic analysis of law seems “toxic” to traditional lawyers. That said, it is also clear that nowadays lawyers cannot ignore the social context of law. In this respect, at least theoretically the goal achievement concept might play a role of compromise between the claim of legal discourse’s autonomy and a demand to understand the social context of law.

The goal achievement efficiency concept assumes that a political system may set out the goals for a legal system to achieve. This assumption looks innovative and controversial from the perspective of 19<sup>th</sup>-century legal formalists who believed in the “academic” codification of law and

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<sup>9</sup> See: Kirchgässner G. Homo Oeconomicus.1991.

neutral, non-political enforcement of law.<sup>10</sup> But it does not sound problematic to modern positivists who generally recognize that political procedures play a central role in the law-making process. Given how “toxic” and problematic the economic analysis of law is, it does not seem a difficult decision to traditional lawyers to accept the theoretical framework suggested by the goal achievement efficiency concept.

Also, the economic analysis of law generally is unfortunately perceived as too pro-market, economically conservative, and a value-loaded theoretical discourse (pro-market bias),<sup>11</sup> whereas the goal achievement efficiency concept has a “proper” pro-government flavor that might attract the antagonists of “market fundamentalism”.

As I have shown above, there has been enough demand in the development of the goal achievement efficiency concept at least during the last hundred years. However, this concept remains to be underdeveloped and germinal. Why?

There are several theoretical obstacles that block the development of goal achievement efficiency concept. The first blocking element is the strong normative claim of this efficiency concept. Once we recognize that the law can manipulate basic human preferences, we have to acknowledge that we need criteria to tell when and to what extent such manipulation is justified. In absence of such criteria, it is not clear when an adjustment of human preferences is appropriate. The legal realists faced this criteria problem also. They believed that the development of social sciences would overcome this problem by articulating an objective criteria suggesting when socially undesirable (being objectively undesirable) human preferences shall be adjusted. However, the development of social sciences has not proposed such criteria.

Remarkably, it was the Soviet Union’s aggressive and active social reform theory that was based on a belief in the potential articulation of the objective criteria discussed above. Although the Soviet legal scholars did not set out a coherent and intelligible theory in this respect, they clearly claimed that a “legal regulation of social relationships” in a socialist society should be derived from the knowledge of objective laws of social development.<sup>12</sup>

Modern western legal science has developed some rhetorical techniques that are supposed to justify an active manipulation of human preferences through legal mechanisms. For example, it is generally recognized that the application of law is not automatic (irrespective of some opposite views of legal positivists) and the manipulation may not reach their goal. Accordingly, some legal

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<sup>10</sup> Schroeder J. *Recht als Wissenschaft*. 2001.

<sup>11</sup> Kelman M. *Consumption Theory, Production Theory, and Ideology in the Coase Theorem* // 52 S. Cal. L. Rev. (1979).

<sup>12</sup> In USSR, the rigid ideological censorship of social sciences blocked the development of a sound theory on this matter. That said, the Marxist theoretical framework seems capable to produce such theory. At least this can be suggested on the premise of some of the ideas of Evgeny B. Pashukanis. But Pashukanis’ tragic life evidenced that within totalitarian regimes such theories can be developed only to a certain extent.

rules might turn out to be inefficient. However, as Sunstein suggests, the manipulation remains to be justified, because the legal rules (even inefficient ones) pass along a message of what socially desirable behavior looks like and, thus, the rules play an at least educatory role.<sup>13</sup>

That said, it is still a question as to how within a pluralistic society paradigm to find criteria for when public intervention into individual autonomy is justified. Once we acknowledge that the social sciences have failed to develop such criteria, the only way seems to rely on consensus criteria.<sup>14</sup> But even if we agree that a consensus on these controversial issues (state and society, society and individual freedom, etc.) is achievable, there is no guarantee that a consensus driven decision is the correct one and that it will be efficiently implanted into a certain social practice in question.

Another concern with the goal achievement efficiency concept is that this concept has inherited the weakness of the internalization theory. As discussed above, the manipulation of human preferences through law is based on the idea that the behavioral patterns suggested by a law can be internalized by people. Following internalization, people obey the law not because of their fear of sanctions for breaching the law, but because they think that such a behavioral pattern is natural. But the process of internalization (if any) remains unclear. Originally the internalization theory was developed in sociology (E. Durkheim, T. Parsons) to explain the mechanism of social integration.<sup>15</sup> However, on a micro-social level, the process of acceptance by individuals of a set of norms or values established by other people or a group remains to be a grey area. It is especially unclear how the internalization theory can be explained in light of the social changes that may lead to the very dramatic changes in social norms. If the people from their childhood have internalized a certain set of norms or values, there should be no place for social changes in general and for conflicts in particular. This model of the “individual being just a passive recipient of norms and values backed by society” looks very controversial once it is consistently applied to the spheres where instrumental rationality dominates, such as in economics or law.<sup>16</sup>

This weakness of the internalization theory has a direct impact on the goal achievement efficiency concept. The internalization theory tries to explain how human preferences might be adjusted without taking into account any rationality concerns, such as weighing the benefits and disadvantages of compliance or non-compliance with a legal rule. But it does not suggest when such adjustment is achievable and when it is not. Accordingly, the core question of the efficiency theory remains unresolved. The conjunction of the internalization theory with the theory of manipulating human preferences by the law only offers a tautology - the ability to adjust individual preferences

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<sup>13</sup> Sunstein, P. 92

<sup>14</sup> Op. Cit.

<sup>15</sup> Vanberg V. Die Zwei Soziologien.1975

<sup>16</sup> Vangerg V. Rules and Choice in Economics.1994.

is justified by the ability to adjust individual consciousness. However, this change in terminology does not bring us closer to resolving the discussed theoretical problem.

There is another concern with the goal achievement efficiency concept. Its reliance on internalization undermines the coherence of its claim to be a legal theory. It is questionable whether internalization (being an uncritical acceptance of values and rules) can be accounted as a phenomenon that can be meaningfully studied by legal science. Originally the internalization is a phenomenon of socialization that is being studied by sociology and social psychology.<sup>17</sup> It is therefore unclear as to what makes this phenomenon relevant to legal science and how these phenomena can be coherently incorporated into the corpus of legal concepts.

Also, nowadays it is clear that the social experiments with the manipulation of individual or social conciseness are simply dangerous. The Soviet experiment was exemplary dangerous in this respect. It was a Cyclopean attempt to use the state enforcement mechanism<sup>18</sup> in order to change “wrong” egoistic human preferences.

## **Another variation of the concept**

Another option in search of the discourse that can be regarded as a foundation for the social impact assessment of law is psychology. So-called behavioral law and economics became a very popular research program within the relatively short period of a decade or so. The core of its research program is linking theoretical insights about the cognitive imperfections of economic agents and how they influence the market, elaborated by behavioral economics, with specific legal policy proposals of how to regulate the markets to correct these imperfections, providing these proposals with some socio-legal rhetoric of justification.

The behavioral economist's object of attack is the core postulates of neoclassical economics. They are skeptical of the rational choice theory, theoretical demarcation between incentives and restrictions, and equilibrium analysis. The neoclassical model of rational maximization is considered to be inadequate because of the “bounded rationality” of real market agents.<sup>19</sup> In fact, behavioral economics has elaborated a catalogue of cognitive imperfections, limiting the perfect rationality of economic agents.

Taking this critique of rational maximization as a point of departure, legal scholars of behavioral law and economics formulated a sort of legal policy program with very sensitive paternal-

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<sup>17</sup> Tyler T.R. *Why People Obey the Law*. 1990.

<sup>18</sup> The law and the manipulation of individual or social conciseness are colliding concepts. In this respect it is worth noting that E. Pashukanis believed that in socialism the law would be replaced with technical regulation based on the principles of expediency. See: Pashukanis E.B. *Izbrannye raboti po marksistsko-leninskoy obshey teorii prava i gosudarstva*.1981.

<sup>19</sup> Simon D. *Models of Man*. 1957



ist and state interventionist overtones. The point is very clear: Given the situation of cognitive imperfections that limit rationality and the "quality of choice" in the market, the government should correct these imperfections for the sake of the very "freedom of choice". This stratagem was coined as "libertarian paternalism". The rhetoric of the term implies that "this time" paternalism is soft because it serves the very idea of the autonomy of the market agent, not some totalitarian orthodoxy.<sup>20</sup>

The legal policy program of libertarian paternalism to the day consists of several *de lege ferenda* proposals aiming at the correction of the cognitive weaknesses of market agents. These weaknesses are treated as a major obstacle to the revealing of their "true" preferences (sin taxes, cooling periods, and manipulations with default rules in labor contracts).

Can we say that psychological impediment does better than sociological? The first that occurs is a lack of theory. One can criticize harshly the neoclassical synthesis and its legal "pendant", Chicago-style law and economics, but one cannot deny the existence of the overarching theory, elaborated in a nearly Popperian fashion, making it general, simple, and falsifiable. In contrast, the behavioral theory consists of several manifestations of what is supposed to be "human cognitive imperfections" conjugated with the rhetoric of libertarian paternalism, serving to be the sole theoretical justification.

The second problem with behavioral law and economics is the serious flaws in the justification of state interventionism. The very notion of a "true" preference is highly contestable precisely because of its heteronomous implications. The standard neoclassical theory of revealed preferences is purely formal. It postulates that with the very act of choosing *x*, one reveals that he or she will be better with *x*. But "after ruling out revealed preferences as expressions of true preferences, the behaviorist lacks a coherent principle to identify welfare-maximizing choices"<sup>21</sup>. That is why "the behaviorist theory claims empirical proof of the internal inconsistency of choices, but cannot offer an empirical basis for identifying which choice represents one's 'true' preferences"<sup>22</sup>. The only possible way out is to impose some theoretical construction of what must be a "true" preference (for example, to favor long-run *ex ante* preferences).

Remembering the long history of attempts to "correct" humans and bring happiness to the world, can we be sure that this time social constructivists "reveal" their own preferences? The problem is a pretty old and very well known. The theory of revealed preferences was the final say in this long story, bringing it to end, simply by eliminating. To my mind, this occurred not only for tractability reasons (to make the contents of the economics quantifiable), but also because of the so-called

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<sup>20</sup> Sunstein C.R., Thaler Richard H. *Libertarian Paternalism Is Not An Oxymoron*. 20 *U. Chi. L. Rev.* (2003). Thaler R. H., Sunstein C.R. *Libertarian Paternalism*. 93 *Am. Econ. Rev.* (2003).

<sup>21</sup> Wright J.D., Ginsburg D.H. *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*//106 *Northw. U. L.Rev.*, P.29

<sup>22</sup> *Op. Cit.*

knowledge problem. Given the very context-dependence of market transactions, which is a focus of analysis for behavioral economists and legal scholars, one cannot impose the universal criteria of rationality on the participants and be sure that he is right. “Thus, even if the paternalist has better theoretical knowledge about cognitive and behavioral biases, it will be of little use unless he has considerable local knowledge about a specific individual’s preferences, self-control problems, available options, and so forth”.<sup>23</sup>

There is a curious paradox in the theory of behavioral law and economics: human cognitive infrastructure is imperfect and that is a reason to entitle government to correct these imperfections authoritatively. But what about the government’s ability to reveal “true” preferences? Is the government omniscient and capable of processing enormous amounts of information acquired somewhat miraculously? Where I live, the question is purely rhetorical.

Edward Glaeser wrote in this respect: “The real case for laissez-faire is not that the individual is perfect, but that the state will do worse than the private individual, and the strength of this case has always relied more on the fallibility of the state than on the perfection of markets.” Human experience, especially the history of the 20<sup>th</sup> century, shows that “Individuals may procrastinate and foolishly invest, but they tend not to voluntarily enroll in concentration camps.”<sup>24</sup>

Imagine the amount and quality of information to be gathered and processed, as well as computations to be made. “Behaviorists must assume regulators will simultaneously be able to (1) identify the distribution of individuals’ true preferences, (2) access reliable empirical data sufficient to identify departures from rational choice, (3) interpret those data accurately, and (4) design and implement policies so the reduction in errors works a net increase in welfare”.<sup>25</sup>

More than that, precisely the political sector is exposed to all these cognitive imperfections, and behavioral economists suggest that “individuals who choose to go into politics may be particularly prone to over optimism and are likely to be fairly aggressive. Both political villains (Hitler, Stalin, Mao) and heroes (Churchill, Roosevelt) of the 20<sup>th</sup> century are hardly models of clear thinking and emotional balance”.<sup>26</sup>

This is the third point, bringing us back to the first. Setting aside for a moment the knowledge problem, the fact is that you cannot make any good prediction without a good theory.

But what does it mean to have a good theory in the relevant setting? Let us try to point out the basic difference between neoclassical economics and behavioral economics. “The marriage of

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<sup>23</sup> Rizzo M.J., Whitman D.G. The Knowledge Problem of New Paternalism, 2009 BYU L. Rev. 4, P.919.

<sup>24</sup> Glaeser E. L. Psychology And The Market. Harvard Institute of Economic Research. Discussion Paper 2023. December 2003. P. 19. Available at: <http://post.economics.harvard.edu/hier/2003papers/2003list.html>

<sup>25</sup> Rizzo M.J., Whitman D.G. The Knowledge Problem of New Paternalism, 2009 BYU L. Rev. 4, P. 910.

<sup>26</sup> Glaeser, P.20

the equilibrium condition (which generates prices) and the incentive principle (which dictates the response to prices) provides economics with its ability to predict equilibrium quantities”.<sup>27</sup>

Behavioral economics stresses the importance of situational and cognitive factors that block the full rationality of economic agents and, most importantly, limit their capacity to respond to prices correctly. “The power of local, situational factors means that some people will not be detached enough to respond to higher returns in one activity or asset”.<sup>28</sup> In other words, according to behavioral economists, people respond to more than just prices.

The problem is that this insight alone, even when true, does not provide us with a theory that can generate some predictions about human behavior. “Thus, if behavioral economics is to outperform price theory, its superiority must be proven by its greater predictive power, not merely by the assertion that its underlying assumptions are more ‘realistic’”.<sup>29</sup>

Everything influences everything and one cannot make human behavior intelligible without some general framework. “To avoid the problem of infinite regress (a situation was supplied because the supplier was influenced by some other situation), models must be generated that link exogenous factors with supply. To provide a model that explains supply as the result of exogenous factors, we will almost surely be led back to simple economic reasoning that links supply to returns and returns to market structure”.<sup>30</sup>

The basic reason for all this is the simple and plain fact that economics has the tools to analyze and understand aggregates. “The equilibrium concept, where heterogeneous actors interact and create aggregate outcomes that are wildly different from the outcomes that would occur if people were in isolation, can serve as the starting point for understanding psychological aggregates.”<sup>31</sup>

## Conclusions

1. Contemporary legal science cannot limit its scope of research solely to the problems of legal validity, the technicalities of drafting and implementing laws, the internal coherence of legal contents, and procedural intricacies of every sort. The level of societal complexity, instrumentalization of law, globalization, and growing cross-cultural legal transplantation phenomenon require the integration of social context of legal

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<sup>27</sup> Glaeser, P. 7

<sup>28</sup> Glaeser, P. 8

<sup>29</sup> Wright J. D. & Ginburg D. Behavioral Law and Economics: Its Origins, Fatal Flows, and Implications for Liberty // 106 Northwestern U. L. Rev. 2012

<sup>30</sup> Glaeser, P. 11

<sup>31</sup> Glaeser, P.12

problems into the legal discourse and a widening of applying of interdisciplinary techniques.

2. Up to now only neoclassical economic theory provides us with a general framework, enabling coherent analysis of the efficiency of law. This is primarily due to the fact that it disposes of a special technique of analyzing aggregates.
3. Attempts to generate better results by relying on sociology and psychology have failed, primarily because of a common inability to analyze aggregates.
4. Legal science is unable to provide a coherent and predictive theory for the effectiveness of law, relying solely on its internal resources.

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