# THE LEGAL PROBLEM OF THE AUSTRIAN SCHOOL'S L&E AND ITS POSSIBLE SOLUTION IN THE METHODOLOGICAL TRIALISM OF KAREL ENGLIŠ

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***Abstract:*** *This article focuses on the methodological nature of the economic analysis of law as a distinct discipline between jurisprudence and economics. A brief introduction to the dualist character of the discipline shall be provided by demonstrating how its component legal and economic parts may be changed. Finally, these findings will be applied to the case of the Austrian school of economics, with brief inquiry into the work of Karel Engliš, whose ideas on the methodology of law and economics offer a viable alternative to the current natural law conception of the Austrian school's economic analysis of law.*

***Keywords:*** *Austrian school of economics, law and economics, Karel Engliš, methodology, legal positivism*

## INTRODUCTION

The economic analysis of law ("L&E" for short) is a unique and in many aspects specific part of legal discourse that is not widespread. In the Anglo-Saxon discourse in particular, "Law & Economics" literature is listed in the syllabi and compulsory reading lists of many legal courses, while in the European discourse, it is still more of a minor discipline, studied usually by economists rather than lawyers. In the sphere of Czech jurisprudence it has yet to emerge in a significant way, even though there are some publications by domestic authors who are focused on the economic analysis of law.[1]

These treatises usually understand the economic analysis of law in the way it was established by the Chicago law school, currently the dominant and most advanced body of knowledge, which is undoubtedly the most significant school of L&E with regard to both theoretical base and its influence. The discipline's very name was adopted from the *magnum opus* of Richard Posner,[2] the foremost theorist of the Chicago school's economic anal-

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[1] In particular, at the Faculty of Law of Masaryk University in Brno, where the main courses of business law and competition law include economic aspects of the subject, e.g., BEJČEK, J. a kol. *Obchodní právo, obecná část. Soutěžní právo [Commercial Law, General Part, Competition law]*. Praha: C. H. Beck, 2014; or in the field of competition law in particular NEJEZCHLEB, K., HAJNÁ, Z., BEJČEK, J. *Ekonomické metody v soutěžním právu [Economic Methods in Competition Law]*. Brno: PF MU, 2014, 299 p.; or ŠMEJKAL, V. *Podmínky podnikání v ČR v mezinárodním srovnání [Entreprenurial Conditions in the Czech Republic, International Comparison]*. Working papers CES VŠEM No. 9/2006. Apart from the above-mentioned, economic analysis of law can be found in several other works by Czech authors, e.g., RICHTER, T. *Použití a aplikace (mikro)ekonomické metodologie při interpretaci soukromého práva [Utilization and Application of the (Micro)economic Methodology in the Interpretation of Private Law]*. IES Working Paper No. 5/2008 or ŠÍMA, J. *Ekonomie a právo [Law and Economics]*. Praha: VŠE, 2004.

[2] POSNER, R. *Economic Analysis of Law*. 9th ed. New York: Wolters Kluwer, 2014.

ysis of law. The history of economic approach to law is however much more colourful and contains some more and less forgotten works and theories, that are based on different methodological foundations and theoretical assumptions and thus lead to different findings and conclusions.

After the last economic crisis of 2008–2009 the interest in these alternative conceptions of economic analysis of law began to grow. These alternatives were to be able to explain differently (and in a better way) the real workings of the economy and its human agents, as contrasted to mathematical-formalistic models of the Chicago school of economics. It's thus little surprise that the attention of some scholars turned to the Austrian school of economics and its analysis of legal phenomena. This school of economic thought is generally known for its dislike of superficially sophisticated mathematical models and for having its own unique methodology of research of human action and behaviour – praxeology, which is in short an axiomatic teleological theory of human action created through deductive reasoning. The economic findings and methodology of the school are a refreshing addition to the current discourse dominated by Neoclassical and Chicago paradigms. In the field of L&E its theories go well beyond economics and many contemporary authors apply the same methodological approach even more extensively and attempt to construct a general theory of law using the same process. This ambitious goal is, however, problematic in several aspects and not without controversy. The goal of this article is to provide a brief insight into the methodology of the economic analysis of law, as a field located in the penumbra area between the sphere of jurisprudence and economics. Then to briefly introduce the Austrian school's conception of the economic analysis of law, and finally to critically evaluate this conception, point out the problematic issues and suggest possible solutions to these issues.

In other words, the goal of the article is to demonstrate that L&E in general combines legal and economic methodological components, and that the potential benefits of the alternative and very interesting economic methodology of the Austrian school can be separated from natural law legal theory, which currently accompanies it in most cases, without any harm done to its unique character. And further to assert that a symbiotic relationship exists between the teleological conception of economic science and normativist approach to law, and that this relationship was earlier known and forgotten only due to an unfortunate course of historical events.

## 1. L&E METHODOLOGY

At the very beginning we shall briefly discuss in particular the methodological character of the economic analysis of law. The logical starting point is, therefore, the question of "what actually is the economic analysis of law?" The above-mentioned R. Posner explains the concept as *"the application of economics to the legal system across the board"*.[3] For the purposes of this article we may reformulate the definition, such that the economic analysis of the law is an ***analysis of legal phenomena using the methodology of economics***. With this somewhat clarified definition two new questions arise, given the very grammatical

[3] POSNER, R. *Economic Analysis of Law*. 7th ed. New York: Aspen Publishers, 2007, p. 23.

structure of the concept.[4] Although these questions are rarely discussed in the L&E discourse, they point to particularly interesting problems and to the basis of the whole comprehensive L&E structure. And even though most of the L&E inquiries do not explicitly mention these two questions and proceed straight to the (for the reader usually more interesting) particular practical issues and phenomena, these questions must always (even tacitly/implicitly) be answered at the starting point.

These questions are:

1. What is an economic methodology?
2. What are legal phenomena? or What is the content of the concept of law?

While it might often seem that these questions are a settled matter, in fact they are far from settled and disputes still exist as to what the correct answer is.

As mentioned earlier, the goal of this article is to point out the neglected fact that if we accept the clarified definition, what is today usually called the economic analysis of law is not the only approach to the discipline, and indeed alternative approaches exist. If we assume that at least the question of the concept of "analysis" is without any major controversy in the scientific and academic discourse, we are left with two parts of the concept of L&E that together form the whole of the discipline. In other words, if we use an everyday analogy, we can think of L&E as a functional whole built from the bricks of a children's toy building kit. On the one hand we can ask questions of a practical nature as to what the model is good for, whether it should be used (at all), or what the results of its usage are. These questions and their answers are of utmost importance in our world, where only limited time is at human disposal, and so the majority of L&E authors are concerned with them. Apart from these questions, different ones may, however, be asked. For example, what happens if we disassemble the model and change some of the building bricks? Will the result work better, worse, or not at all?

If we apply this to the field of L&E, most discourses (in both the legal and economics spheres) discuss the scope and limits of application of a particular model, or controversies that may be connected to it. This is typically the case of family and penal law, where often a certain caricature of Chicago school of L&E is employed, so the assumptions are distorted and interpreted in an *ad absurdum* manner, which provides a target for criticism as a result. Rarely is the very tool of analysis examined – i.e., the applied economic and legal methodology. It would, however, be a grave oversimplification to assume that there are no alternative options when it comes to economic methodology in particular and that the topic is therefore a closed one. Actually the very opposite seems to be true. There is no "single" economic science. The various streams and schools of economic science often differ sharply, there are a great many of these and their methodology represents the initial point of divergence. Contemporary mainstream economics, which is the most widely taught, is one such stream. The *most significant* one surely, but not *the sole* one.

[4] Analytically minded readers may note that apart from the two questions discussed in the paper, a third question exists: *What is an "analysis"?* Although the matter may represent an intriguing and immensely complex issue, it cannot be discussed here, so we take the matter as settled and understand the concept of "analysis" as expressing a detailed examination of the elements or structure of a selected topic, phenomena, or thing.

Similarly, many answers to the question of what law is can be found. In the field of jurisprudence one can find countless authors and explanations of this fundamental question, which accompanies the legal science from its very inception.[5] When it comes to providing the answer, traditionally two categories of legal thought existed – legal positivism and ius naturalism. While legal positivists assert that law is a system of valid legal norms and the validity of norms is determined purely by the legal order itself, natural law theorists assert that law is a system of legal norms, whose validity (or as is usually stated whose *in*validity or nullity) is determined by certain criteria of a non-legal or meta-legal nature. As shall be seen later on, the accepted legal methodology may have and often has an (overlooked) impact on the conclusions and proposals of a given school of L&E.

We shall now examine closely these methodological foundations and their theoretical rationale of both parts of L&E. It must be noted that given the legal focus and scope of this article, the economic part shall be referred to only in a very brief manner.

### 1.1 Legal Methodology

Given the nature of the subject of legal cognition, the normative character of legal phenomena is emphasised and legal scholars utilize mainly the classical instruments of interpretation (logical arguments, deductive reasoning, and derivation of conclusions from given premises – typically norms of a higher legal force or legal principles) and the comparative method. This approach basically reflects the normative character of the subject (law) of the science and can be found in the Czechoslovak and Czech tradition of jurisprudence as well. As was stated earlier, the major dividing line between legal scholars and their theories is the positivist/natural law dichotomy. Before continuing further, it must be stated that the topic is immensely comprehensive and complex with countless authors and some conceptions not explicitly belonging to either tradition (or attempts on their synthesis), so only a basic insight can be provided here.

### 1.2 Legal Positivism

Legal positivism is a very influential doctrine of legal thought which has been present in various forms during the entire history of western legal science, and is represented in both the continental and Anglo-Saxon traditions. While authors belonging to this tradition tend to differ in their views on minor aspects of legal problems, as far as major foundations are concerned, they are in agreement and from a methodological point of view they seem

[5] E.g., Kant's remark in the Critique of Pure Reason: *"Philosophy is swarming with mistaken definitions, especially those that actually contain elements for definition but are not yet complete. If one would not know what to do with a concept until one had defined it, then all philosophizing would be in a bad way. But since, however far the elements (of the analysis) reach, a good and secure use can always be made of them, even imperfect definitions, i.e., propositions that are not really definitions but are true and thus approximations to them, can be used with great advantage. In mathematics definitions belong ad esse, in philosophy ad melius esse. Attaining them is fine, but often very difficult.* ***Jurists are still searching for a definition of their concept of right.***" (emphasis J. H.) KANT, I. *Critique of Pure Reason.* Cambridge University Press, 1998, p. 639. It should also be noted that Kant distinguished between using the method of mathematics and philosophy, a distinction similar to the contemporary difference between methodologies of natural and social sciences. As we shall see later on, certain schools of legal and economic thought are based on this methodological distinction.

quite a homogenous group. With an acceptable degree of simplification, legal positivist science may be stated as concerned with the law as it is, not as it ought to be. The concept of law is thus becoming the fundamental point of the legal science, since it provides the answer to the question of what law is. The answer is then usually of a formal character, while the content of norms or rules tends to have little to no effect on their validity. Positivist legal theories also often aim to separate jurisprudence from non-legal elements, typically those of a moral or sociological nature. The most significant, crystal clear example of legal positivism can be found in the works of so-called normative legal science (or also the pure theory of law). This designation is usually used in connection with the ideas and theory of Hans Kelsen (1881–1973) and his compatriots, however another, Czechoslovak branch of the school existed that tends to be overlooked due to the unfortunate course of the history of the region. This closely related school was represented by František Weyr (1879–1951), Karel Engliš (1880–1961), or Zdeněk Neubauer (1901–1956).[6] Even though there are differences between single authors of this particular positivist tradition with regard to some particular questions (e.g., the role of legal sanction or the nature of legal principles[7]), the core ideas are similar, if not the same, and their commonly developed and used methodology is regarded by many as the pinnacle of legal positivist science. For the purposes of this article, we shall use the normativist point of view to represent the legal positivist stance, unless stated otherwise.

The normativist school of legal thought understands law as a system of valid legal norms,[8] where the test of the legal nature or validity of a norm is in accordance with a legal criterion established by a superior norm[9] (this way the succession of norms can be traced back to the basic norm[10]). Closely connected to this understanding of the legal order is the normativist concept of legal norm, which is the cornerstone of the entire theory. The norm is defined as *"a statement of what ought to be"*,[11] which implies a fundamental difference between a factual statement and a norm, so consequently the distinction between the *"sein"* ("what is") and *"sollen"* ("what ought to be") modalities of statements is established, emphasised, and rigorously maintained through the whole body of the theory. This distinction, which originates from Kantian thought, leads to a conception of a norm as an

[6] WEYR, F. *Teorie práva [Theory of Law]*. Brno-Praha: Orbis, 1936; ENGLIŠ, K. *Malá logika [Theory of the Order of Thought]*. Praha: Melantrich, 1947; NEUBAUER, Z. *Státověda a theorie politiky [Theory of State and Politics]*. Praha: Jan Laichter, 1947.

[7] For a more detailed account of this issue see GERLOCH, A. Právní normy a právní principy [Legal Norms and Legal Principles]. In: *Místo normativní teorie v soudobém právním myšlení [Place of the Normative Theory in Contemporary Legal Thought]*. Brno: MU, 2003, pp. 112–116.

[8] E.g. WEYR, F. *Teorie práva [Theory of Law]*. Praha: Wolters Kluwer, 2015, p. 95.

[9] E.g. KELSEN, H. *Pure Theory of Law*. 2nd ed. New Jersey: Law Book Exchange, 2009, p. 193. This is the way Kelsen states his basic assertion of his famous theory: *"The reason for the validity of a norm can only be the validity of another norm."*

[10] To offer a solution to the problem of proceeding this way to the point of reaching the first norm (the historically first constitution) of the legal order, which cannot be practically derived from any other existing norm, Kelsen introduces the concept of Grundnorm. To solve this issue, the highest norm of the legal order (in the cases of modern legal order typically the constitution) derives its validity from the so-called Grundnorm – a higher norm which is only hypothetical and must be assumed. This norm may be stated for example as "People are obliged to behave according to the constitution." KELSEN, H. *Pure Theory of Law*. p. 200.

[11] E.g., NEUBAUER, Z. *Státověda a theorie politiky [Theory of State and Politics]*. Praha: Jan Laichter, 1947, p. 17.

act of will (*"willensakt"*), and thus always assumes the existence of the creator of the norm, whose will is reflected in the content of the norm, which may be in principle anything. By emphasizing the formal criteria of the validity of the norms, the normativist school (along with most other positivist schools) practically places the subject of the content of legal norms either outside of the main interest of the legal science or even outside its field altogether, thus taking the value- neutral stance. Therefore, it is up to the related fields of social science, just like the economic part of the L&E, to fill the gap and provide an answer to the question of the actual content of the legal norm.

### 1.3 Natural Law (Ius Natural)

On the other hand, theories of the natural law tradition make the affirmative answer to the question whether a norm has a legal character conditional upon a fulfilment of some superior criteria or rules (norms) that chronologically precede the legal norm and are of a non-legal, or perhaps sometimes more fittingly of a meta-legal, character. Often these norms tend to be of a theological nature (the law is, what's in accordance with God's will or the Commandments), naturalist nature (law is what derives from human nature)[12] or a moral nature (law is what is in accordance with morals). This may be of course restated in an inversed manner, what is contrary to the Commandments, human nature, and morals is not the law; and the assertion is usually made in this way. This restatement, however, doesn't change the fundamental principle of the theory, only the delimitation is more modest, by merely stating the limits to the positive law and refraining from prescribing the legally required behaviour itself. These superior derogatory rules or norms may sometimes be non-volitional, if they are not an act of will at all (naturalist theories), thus being of a "*sein*" modality (human nature *is* such and such, thus a particular norm of natural law is valid), or they may preserve the *"sollen*" modality, however attributing the norm-creating act of will to a non-human will (theological theories), thus it was God who willed the certain mode of behaviour prescribed by the norm. Finally in the case of moral criteria, the superior (derogative) norms are results of human acts of will, moral[13] rather than legal; this however in the end somehow blurs the distinction between the law and morals.[14] In any case, it may generally be said that according to the various particular teachings of natural law tradition, the legal character of a norm is not independent of its (substantive) content and natural law theories thus often tend to be connected to a certain ideological trend or school of thought.

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[12] E.g. ROTHBARD, M. N. *Etika svobody [Ethics of Liberty]*. Praha: Liberální institut, 2009, p. 49 et seq.

[13] E. g. FULLER, L. *Morálka práva [Morality of Law]*. Praha: Oikoymenh, 2009. If we regard justice as a moral phenomenon (or also a moral phenomenon), we may include the famous Radbruch formula as well. This formula uses the negative criterion formulation: *"The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice."* RADBRUCH, G. Statutory Lawlessness and Supra-Statutory Law (orig. pub. 1946) and Five Minutes of Legal Philosophy (orig, pub. 1945). Both in *Oxford Journal of Legal Studies*. 2006, Vol. 26, No. 1. See p. 7. Notice that the criterion deciding the deprivation of the norm of its legal character is *justice*, which itself is a moral phenomenon (or *also* a moral phenomenon).

[14] For a detailed account of this topic see in particular SOBEK, T. *Právní myšlení [Legal Thought]*. Praha: Ústav státu a práva AV ČR, 2011.

### 1.4 Legal Methodology and (mainstream) L&E

In the conclusion of this section it can be stated that with regard to the legal part of L&E basically two alternatives, or as said above "building bricks", exist. The legal positivist conception, which is value- and content-neutral, and the natural law conception, which understands the very concept of law as incorporating some non-legal criteria of the legal validity of legal norms.

If we regard L&E as a useful field of study because it allows for the creation of hypotheses about human behaviour in the light (or a shadow) of incentives provided by the legal order, a (scientifically) more appropriate basis for the discipline are the positivist theories. These seek to provide only an answer to the question of what law is, while leaving the answer to the question of what the law ought to be to other fields of social science, such as the economic part of L&E and its prescriptive proposals.[15] This is also an actual approach that can be found or traced in works of contemporary leading L&E authors who use the economic methodology of the Chicago school of economics and from a legal point of view explicitly accept the positivist conception[16] of law, or are not concerned with questions of legal methodology at all and, by not stating any natural-law constraints, implicitly accept the general positivist approach that it is the lawmaker who creates the legal norms and sets their content.

From a scholar's point of view, the greatest advantage of such an approach to L&E (legal positivist approach + clearly chosen economic methodology) is that it allows for a thorough examination and clear distinction as to why certain proposals are made, meaning being able to determine if these are based on a legal or economic rationale. As we shall see in the following paragraphs, the Austrian school's alternative conception of L&E chooses both legal and economic "building bricks" differently.

## 2. METHODOLOGICAL APPROACH OF THE AUSTRIAN SCHOOL TO L&E

The Austrian school of economics refuses to follow the example of natural sciences and instead builds its own unique methodology, unlike contemporary mainstream economics, which from a methodological point of view uses mostly the apparatus of natural sciences, incorporating the mathematical models, use of experiment and empirical inductive method.[17] This stems from the fundamental utilitarian conception of economics as a science, which is concerned with utility and its calculation, i.e., wealth. Briefly said, while mainstream economics believes that utility can be calculated and interpersonally compared, the

[15] As an economist might say, to the "normative" economic analysis of the law.

[16] POSNER, R. *Law, Pragmatism, Democracy*. Cambridge: Massachusetts, 2003, p. 251.

[17] Cf. *"In short, positive economics is, or can be, an 'objective' science, in precisely the same sense as any of the physical sciences."* FRIEDMAN, M. The Methodology of Positive Economics. In: Milton Friedman. *Essays on Positive Economics*. University of Chicago Press, 1966, p. 4; or *"The inability to conduct so-called 'controlled experiments' does not, in my view, reflect a basic difference between the social and physical sciences both because it is not peculiar to the social sciences – witness astronomy and because the distinction between a controlled experiment and uncontrolled experience is at best one of degree. No experiment can be completely controlled, and every experience is partly controlled, in the sense that some disturbing influences are relatively constant in the course of it."*, ibid., p. 10.

Austrian school accepts only that people act in their interest, but denies that utility can be calculated and interpersonally compared. While mainstream economics uses mathematical methods to calculate utility (or wealth), Austrians only construct general models that do not include any exact numbers. Given the scope and topic of this article, no further examination of mainstream economic methodology can be provided here; the most influential and significant authors of contemporary L&E, however, employ this methodology.[18] The following examination of the Austrian school's methodology is also very brief at best; for a detailed account, a thorough reading of the cited sources is recommended.[19]

The Austrian school is one of the better known alternative, or heterodox, schools of economics. Its long and rich history spans back to the 19th century and the publication of *Grundsätze der Volkswirtschaftslehre* by Austrian economist Carl Menger (1840–1921), the founder of the school. The tradition over several generations incorporated the ideas of many great economists and evolved into a specific branch of economics that uses a logical-deductive approach[20] in order to discover the laws of economics and to construct their hypotheses. For a Czech reader it is not without interest that given its central European origins, several Czech and Czechoslovak authors drew from the tradition.[21]

The best explanation and statement of this logical-deductive approach is set out in the works of Ludwig von Mises (1881–1973), who is historically probably the most influential author of the school, especially as far as the methodology is concerned (even though the foundations were laid by Carl Menger in his *Grundsätze der Volkswirtschaftslehre* and *Untersuchungen über die Methode der Sozialwissenschaften*). According to this deductive approach, economics is a science focused on purposeful human action and a part of wider science concerned with human behaviour in general, which Mises called praxeology. Mises pointed out that human action cannot be explained in terms of natural sciences, and that rather a different approach must be taken that focuses on the purpose of the action, not its physical proprieties. This different approach is based on "a priori" assumptions about human action, methodological individualism, and deductive reasoning and development of the former. Economics as understood by Austrian school authors is therefore a purely logical science that does not employ the empirical method.[22] As Mises himself

[18] E.g., Richard Posner, Ronald Coase, or Robert Cooter to mention just a few.

[19] E.g., the overview of the Austrian school's conception of the competition law is provided in BAŽANTOVÁ, I., HORYCH, J. Ekonomická analýza práva Rakouské školy s přihlédnutím k právu hospodářské soutěže [Economic Analysis of Law of the Austrian School with Regard to Competition Law]. In: Tomáš Gábriš a kol. *Nedogmatická právná veda [Non-dogmatic Legal Science]*. Praha: Wolters Kluwer, 2017, pp. 145–158.

[20] The designation of methodological approaches is taken from LOUŽEK, M. *Spor o metodu [The Method Dispute]*. Praha: Karolinum, 2001, 234 p.

[21] Probably the greatest example is Karel Engliš, Czech economics and law theorist. Although Engliš sometimes found himself in opposition to particular ideas of the Austrian school, his teleological methodological conception of economic science is surprisingly similar to the praxeology of the Austrian school as stated by Ludwig von Mises and actually predates its better known counterpart. For a more detailed account of this aspect see BAŽANTOVÁ, I. Czech Economist Karel Engliš and his Relation to the Austrian School in the First Half of the 20th Century. *Prague Economic Papers*. 2016, Vol. 25, No. 2, pp. 234–246.

[22] *"Neither experimental verification nor experimental falsification of a general proposition are possible in this field."* MISES, L. *Human Action, a Treatise on Economics*. The scholar's edition, Auburn: Ludwig von Mises Institute, 1998, p. 31.

put it: *"Praxeology – and consequently economics too – is a deductive system. It draws its strength from the starting point of its deductions, from the category of action. No economic theorem can be considered sound that is not solidly fastened upon this foundation by an irrefutable chain of reasoning*" … *"The empirical sciences start from singular events and proceed from the unique and individual to the more universal. Their treatment is subject to specialization. They can deal with segments without paying attention to the whole field. The economist must never be a specialist. In dealing with any problem he must always fix his glance upon the whole system."*[23]

This approach thus effectively constructs tautological schemes of human action, where the conclusions are included in its very premises (the "a priori" assumptions about human behaviour – axioms). The fundamental axiom according to Mises is the "human beings act" axiom. Using deductive reasoning, he states on the grounds of the assumed fact, that people act purposefully, the basic laws of economics like the law of marginal utility, the existence of temporal preference of an individual or the subjective theory of value. This approach was then adopted by his successors, for example F. A. Hayek (1899-1992), who emphasised that while natural sciences rightly use the traditional scientific apparatus of classification enabling them to distinguish between elements and phenomena according to their optical, physical, or chemical properties and when creating hypotheses proceed using the inductive method, the field of social sciences is a different sphere and the teleological deductive approach should be used instead.[24] This brief introduction will suffice for the purposes of this article, as it illustrates sufficiently the fundamentally different methodology of economic science used by the Austrian school. We can now proceed to the contemporary L&E conception of this tradition.

### 2.1 Contemporary L&E authors of the Austrian school and Murray Rothbard in particular

The contemporary authors of the Austrian school basically accept the above-mentioned logical-deductive methodology of economics and use empirical facts only to illustrate their argument.[25] The following part of the article focuses on the work of Murray N. Rothbard (1926–1995), a very specific author belonging to the sixth generation of the school. As he is apparently nowadays the most influential he may be used as a readily available example, however the conclusions are applicable to any theory that shares the same methodology, especially the legal part.

While Rothbard shares the general Austrian view on human action, what sets him apart from earlier authors of the Austrian school (especially Hayek) are his radical conclusions

[23] MISES, L. *Human Action, a Treatise on Economics.* pp. 68–69.

[24] *"If we wish, we could say that all these objects are defined not in the terms of their 'real' properties but in the terms of opinions people hold about them. In short, in the social sciences the things are what people think they are. Money is money, a word is a word, a cosmetic is a cosmetic, if and because somebody thinks they are."* HAYEK, F. A. *Individualism and Economic Order.* Paperback edition 1980. University of Chicago Press, 1948, p. 60. It should be noted that later in his life Hayek accepted a limited role for the empirical analysis in the field of economics – in the cases of the statements about acquiring knowledge.

[25] Cf. ROTHBARD, M. N. *Peníze v rukou státu [What has Government done to our Money?].* Praha: Liberální institut, 2001.

about economic (and legal) phenomena and consequent practical policy proposals that stem from these conclusions. Given that Rothbard uses the same methodology, these radically different conclusions and proposals must be caused by some other factor. Given the dual character of L&E and the economic part being the same, we shall now examine the legal part of his methodology more closely.

Rothbard (and his followers) typically emphasise the connection between economics and other social sciences and their integration into a single science about human action or behaviour. This was originally Mises' idea, however unlike Mises, Rothbard is much more thorough in this aspect and this is reflected in a very different approach to the sphere of jurisprudence. Unlike Mises and the earlier mentioned Chicago school authors, who employed such legal methodology that allowed them to fill the content of legal norms using rules which stem from paradigm and knowledge of their economic science, Rothbard picks a natural law theory and puts it into the mix. His natural law theory is then designated as a result of rational application of the same teleological (or as an Austrian might prefer "praxeological") methodology to the sphere of jurisprudence. A distinct, purely legal, normological or normativist methodology, like the Pure Theory of Law, is denied and ruled out. Law is a social phenomenon that according to the Austrian dualism of scientific cognition (natural sciences – empirical method, social science – deductive method) belongs to the sphere of praxeology. In other words, law is given by human nature itself[26] and can be discovered by anyone using human reason.[27]

This absolute and imperial understanding of the source of legal cognition – there is only one "true" or "ideal" legal order, which is included in the very essence of a human being – allows for an objective answer to the question of "what is law" even in the absence of a norm-creator. One does not need the lawmaker to set the law, since it already exists in the nature of human beings. The Kantian dualism of "*sein*" and "*sollen*" is therefore denied and the question "what ought to be the law" does not logically make sense. Law is no longer an expression of will, in other words of "what ought to be", but instead it exists objectively – i.e., it "is". As we will see later on, this is an extremely important point for both the theory and practice.

In the wider L&E context this approach leads to somewhat controversial conclusions, especially in the field of family law,[28] penal law,[29] and antimonopoly law.[30] We must, how-

[26] This understanding of law is shared by other contemporary Austrian school authors. E. g. *"the law is contained in human nature, though it is discovered and consolidated in an evolutionary manner, in terms of precedent and, mainly, doctrine." … "Law is evolutionary and rests on custom, and hence, it precedes and is independent of the state, and it does not require, for its definition and discovery, any agency with a monopoly on coercion."* DE SOTO, J. H. Classical Liberalism vs. Anarchocapitalism. In: J. G. Hülsmann – S. Kinsella (eds.). *Property, Freedom and Society. Essays in Honour of Hans-Hermann Hoppe.* Auburn: Ludwig von Mises Institute, 2009, p. 165.

[27] ROTHBARD, M. N. *Etika svobody [Ethics of Liberty]*. Praha: Liberální institut, 2009, p. 64.

[28] E.g., the right of a parent to let his child die of starvation, to reach maturity and acquire full legal capacity by "running away from home" or general property right-like character of the parenthood, e.g., the right to sell and buy it. See ROTHBARD, M. N. *Etika svobody*. pp. 145–153.

[29] E.g. the legality of such behaviour that is currently understood as offences of extortion (blackmailing) or defamation (slander) ROTHBARD, M. N. *Etika svobody*. pp. 169–175.

[30] In short, antimonopoly (or antitrust) regulation is completely ruled out. ROTHBARD, M. *Ekonomie státních zásahů [Economics of State Intervention]*. Praha: Liberální institut, 2005, p. 149.

ever, keep in mind that these conclusions stem from both the economic and legal parts of L&E, or from different elements of the one unitary social science (praxeology), if one accepts such a notion. This means that the market for children is desirable not only because it is economically efficient, but also because it is based on the grounds of the absolute property rights-like conception of all rights, including parental ones. For the field of economic competition and antimonopoly or antitrust law a similar rationale applies and utter refusal of the legal regulation of competition is based not only on the understanding of economic efficiency, which was worked out by many authors – Mises, Hayek, Kirzner to name but a few (who would not necessarily agree with Rothbard on the matter) – but also on the absolute understanding of property rights and freedom of association.

Thus the modern Austrian take on L&E resulted in a unique and somehow controversial set of knowledge and proposals. There are, however, some problematic points which need to be examined more closely.

## 3. THE PROBLEM OF LEGAL REASONING

In the first place, we shall turn our attention to its legal methodology and conception of jurisprudence as a part of praxeology. Given the sophisticated and unique economic methodology of the Austrian school, one would expect the same effort to be put into incorporating the law into the sphere of praxeology. However, this is not the case and no explanation is given, especially concerning the fact of the different nature of the teleological and normative order of thought. While the teleological concept of a purposeful action (as a relation between: purpose →→ means) is apparently a useful one for the sphere of economics, its extension into the sphere of normative sciences fails to respect the distinction between *"sein"* and *"sollen"* ("is" and "ought to"). While it is indeed possible to evaluate teleologically the effect of norms on actual human behaviour, i.e., de facto human ideas or perception of norms, which is exactly what the economic analysis of law (including the Austrian branch) in the end aims to do after all, we must always distinguish between an incentive which stems from the perceived idea of the norm and the norm itself. As mentioned earlier, the in/validity of the norm must always be judged on the basis of normative or normologic reasoning.

The conception of law as a phenomenon (or more precisely its content) that may be deduced teleologically or praxeologically from human nature constitutes a breach of the Kantian dualism – it means deducing an "ought to" of the norm from an "is" of the real world. Law and its norms are however always reflections of a will (the "ought to" modality always requires a will by its very definition) and thus are not discovered by reason, but created by an act of human will. We cannot deduce how things *ought to* be from how they *are*. This is a grave methodological error. Rothbardian theory does not deal with this argument, does not explain why it is possible to ignore the distinction, even though at the same time Rothbard himself explicitly labels Kelsen's critique of natural law as "typical".[31] Yet he fails to demonstrate clearly in what respect is this "typical" positivist argument in-

[31] ROTHBARD, M. N. *Etika svobody*. p. 50.

valid. The second legal methodological error is the failure to keep the distinction of law and morality. Rothbard (and his followers) combined law and morality and created a mix which he called "the ethics of liberty", which was apparently a part of praxeology and which aimed to surpass what we today understand as the legal order and morality. This reflects a misunderstanding of the specific natures of law and morality, which are indeed both different normative orders. Blending them into one unitary order is incorrect and may even be dangerous, because, apart from their fundamentally different nature, if we accept the simple equation "law = morality" there is logically no moral corrective to the authority of law as every single piece of law is *ex definitione* moral.[32] This cannot be regarded a desirable state without causing a major controversy among legal scholars and lawyers in general, and rightly so.

We may now ask why these scholars would choose to follow the natural law path, and moreover such an ambitious one, when it comes to what it actually claims. One suggested explanation may be that this theory allows the existence of law (as far as the concept is appropriate in the context of the ethics of liberty and praxeology) without a primary norm-creating subject (i.e., the state). Given their anarchist beliefs they found natural law theories more appealing, because they at least seem to offer the possibility of the existence of law without the state – if we have the (one, proper) law, which can be discovered by anyone's reason, we don't need a unifying lawmaker, whose will would establish the common legal order. This order stems from human nature itself. The state is therefore unnecessary and people may legally work just fine in the "every man is his own lawyer" mode or the mode of the competition of legal/security agencies that offer the enforcement of the (same – natural) law as a service. It should be noted that in practice these agencies will face the very same question of "what is the law" and the same irresolvable quest of creating an "ought to" of the norm from the "is" of the actual world.[33] They may claim that they are merely discovering the existing (natural) law to justify their decisions about the cases, but in fact they will be creating individual norms using their will which they will also enforce.

Probably an intellectually more honest alternative would be to openly admit that in a stateless society, the "law" may have any content and what matters in the end is if the given individual accepts the norm as binding for himself and especially if he continues to do so as time passes – i.e., if he still accepts the norm even when it is more beneficial for him not to. Without having valid universal procedural norms that regulate the further creation of norms, there is no way to solve the issue of derogation and hierarchy of the norms. Accepting such an order (even if it was a purely procedural one; even a simple rule of *"lex*

[32] For a more detailed inquiry into this issue, see SOBEK, T. *Právní myšlení.*

[33] It is probably worthwhile noting that while various authors of this tradition claim that they discovered the real (and common to all people) "natural law" using their reason (which is also common to all people), their respective results tend to differ. The question of the possibility of selling oneself into slavery is a typical example. While Rothbard claims it is not possible as such a contract would breach inalienable rights of the person, other authors (e.g., Walter Block) of the same tradition claim such a prohibition would breach the freedom of will principle and thus it is possible to sell oneself into slavery. If the character of natural law is indeed absolute and unique, how is this divergence on such a fundamental issue even in such an extremely limited group of people possible? As Justice James Iredell famously stated in the landmark Calder v. Bull case of 1798: *"[t]he ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject*".

*posteriori derogat lex priori*") by such a stateless society would then require an act of will of some institution independent on constitutive individuals (otherwise it would be again only a "personal" norm of these individuals and they might change it at any given moment)[34] that will establish this norm and potentially enforce it. This is close to the notion of the state, however ultra-minimal (a single norm), which then invalidates the original argument about not needing the state to have law. But as stated above, the proposed natural law solution does not solve the question of what is law, it merely pushes the problem along to the agencies to make up their own laws (and possibly claim this "law" is a reflection of the natural one). It therefore seems that a stateless society is not compatible with the ability of being able to clearly and reliably determine if a legal norm is valid or not.

## 4. KAREL ENGLIŠ AND HIS CONCEPTION OF L&E METHODOLOGY

As we have seen, contemporary Austrian L&E faces several legal issues which are left unresolved by its adherents. It is not, however, necessary to throw the baby (of their economic methodology) out with the bathwater (of their legal methodology). It is possible to save the praxeology for the wide field of human action and still evade the absolute, over-the-top application to the normative phenomena. Historically such an approach appeared in the so-called Brno school of economics (and law) as several authors of the Faculty of Law of Masaryk University in Brno focused on issues of legal and economic methodology. The most significant one is without a doubt Karel Engliš. Although Engliš does not use the term "economic analysis of law" his conception of the teleological analysis of the effect of norms on human behaviour[35] is basically a very similar discipline, if not the same altogether.

Even though Engliš was later known as a renowned economist, his graduate degree and formal education was in law and jurisprudence, as was then a common practice for the countries of the former Austrian-Hungarian empire (just like the case of F. A. Hayek). Thus while Engliš focused mainly on economic problems and theories, his legal education ensured he would always keep in mind the legal aspects of social phenomena as well. Being skilled both in law and economics also allowed Engliš to bridge the gap between both disciplines. And even though his focus was on economics, he contributed to the contemporary questions of jurisprudence as well; being an adherent to the normativist theory of law, he had great respect for the work of Hans Kelsen and his great friend František Weyr. Nevertheless, Engliš regarded their theories as only part of a wider legal science in general, because the normativist theory tended to overlook the teleological aspect of social phe-

[34] We must keep in mind that there is no (legal) reason why currently accepted principles (and norms) of interpretation and law in general should still be accepted as legally binding in the hypothetical stateless society. Of course they might, but not necessarily always and not necessarily by everyone as there is no primary lawmaker to make them *the law for everyone.*

[35] See ENGLIŠ, K. *Teleologie jako forma vědeckého poznání [Teleology as a Form of Scientific Cognition]*. Praha: F. Topič, 1930, pp. 31–32; and ENGLIŠ, K. *Soustava národního hospodářství [System of National Economy]*. Praha: Melantrich, 1938, p. 640 – "*If we are to fully understand the legal order, we cannot perceive the law only from the normative point of view (from the duty-bound subject's perspective), but also from a teleological point of view (from the perspective of the state as a norm-creating entity).*"

nomena.[36] This was of utmost importance, since Engliš, similarly to Ludwig von Mises, perceived the phenomenon of human action as a teleological issue and consequently economics as a teleological science, which should therefore use a methodology completely different from that of natural sciences. While there may exist some minor differences between Engliš's teleology and Mises' praxeology, the general idea of explaining human action through the relation purpose means is common to both authors, just as is their opinion that such a method is the proper one for the realm of economics. In order to incorporate all these ideas into a single complex theory of scientific cognition and reasoning, Engliš came up with the idea of a cognitive order, which is basically a way in which the human mind perceives and processes facts and incentives. Engliš discovered that there are in principle three ways that the human mind processes perceived facts, three kinds of cognitive orders.[37] First is the ontological order of reasoning, which is concerned with things as they are; this order is based on the notion of causality. Second is the teleological order of reasoning, which is concerned with purposes, particularly purposeful human action. This order is based on the notion of the relationship between a goal and the means of its achievement. The third order of reasoning is the normological order of reasoning, which is concerned purely with norms and is based on the notion of validity. Taken together, these cognitive orders offer a complete account of human cognition and reasoning, which Engliš called the thought order. However fascinating and original, this magnificent contribution to the philosophy of science and methodology of both law and economics was not allowed to flourish, as Engliš was branded a reactionary by the ascending communist regime and forced out of the academic sphere, to be half forgotten during the forty years of the communist regime. However, his contribution to the issues discussed in this article is potentially very significant and surely deserves attention.

Engliš understands the issue of scientific methodology and cognition as a matter of acquiring knowledge using different orders of cognition. He is unique in the aspect that instead of the traditional Kantian duality (is x ought to) or inductive x deductive dichotomy (as seen in the *Methodenstreit* of economics), he develops a triad of modalities of scientific cognition with these being the ontological, teleological, and normative modalities of cognition and reasoning. Engliš thus refuses the exclusive application of the ontological apparatus to all fields of human science,[38] i.e., universal causal reasoning of natural sciences in the terms of cause → effect (the empirical-inductive method), and instead regards the

[36] ENGLIŠ, K. Kritika normativní theorie [Critique of Normative Theory]. In: O. Weinberger – V. Kubeš (ed.). *Brněnská škola právní teorie (normativní teorie) [Brno School of Legal Theory (normative theory)]*. Praha: Karolinum, 2003, p. 204.

[37] ENGLIŠ, K. *Malá logika*. pp. 39–50.

[38] *"The great successes of natural sciences, which were established on the basis of (almost exclusively) ontological way of cognition and reasoning, led to the impression that this way of reasoning is the only proper one and other sciences therefore also sought to succeed this way. However, all problems of law, economics, ethics etc., were not solvable from the point of view of this way of cognition. From this again and again the 'methodological problem' arose, which led to the development of the teleological and normological way of cognition, because only using the teleological reasoning is the order visible and only using the normological reasoning is the validity of norms visible just as the accordance of one's behaviour with them. Knowledge acquired this way couldn't be put into a single system together with ontological knowledge and thus began the separate legal and economic branches of the science."* ENGLIŠ, K. *Malá logika*. p. 339.

teleological reasoning in terms of purpose → means (the logical-deductive method) as a primary way of thought for the field of social sciences. However, the teleological sphere of social sciences is not exclusive, as it is accompanied by the sphere of normative reasoning, which is used in the cases of normative sciences (law and ethics). Engliš's conception of the methodology of science can thus be seen as a methodological combination of F. A. Hayek[39] and H. Kelsen (or more precisely F. Weyr). Using his trialist conception, Engliš incorporates in a convincing manner the objections of the Austrians regarding the use of the method of natural sciences in the field of social sciences, while avoiding the over-extensive application of teleological method to fields of normative (or normological) sciences, which are granted their own methodology. This way his conception of L&E (or the "teleological analysis of the effect of norms on human behaviour" as he might have said) does not suffer from the criticism aimed at the Austrian natural law theories and their methodological cocktail.

Therefore, the foundations of a promising tradition that was largely forgotten only due to an unfavourable course of history can be found in the works of Karel Engliš. The abovementioned also confirms the earlier assertion about the dual methodological character of the L&E as such, meaning the legal and economic parts of L&E can be interchanged and combined in various manners. In the case of Karel Engliš, the combination of normativist legal theory and the teleological conception of economics leads to a theory significantly less imperative in the economic aspect when compared to the Chicago school of economics and in the legal aspect when compared to the Austrian school. The main achievement of Engliš is thus his unique and convincing trialist conception of scientific methodology, through which he connected the teleological economic world of economists and the normative legal world of lawyers.

## CONCLUSION

The main theses of this article are firstly that the economic analysis of law ("L&E") has a dual character as far as the methodology is concerned, with this unique character stemming from it being on the very borderline between jurisprudence and economics. Given the many existing schools of both legal and economic thought, various legal and economic parts can be combined together producing very different results. When conducting research in the field of L&E, we should always bear in mind that we must answer either implicitly or explicitly the two fundamental questions, i.e., the question of what is law and the question of what is economic methodology. Different answers to these questions con-

[39] Cf. *"The terms of purpose and means thus do not rest with the given items, but* ***with the mind of the reasoning man.****"* (the emphasis is original) in ENGLIŠ, K. *Soustava národního hospodářství*. p. 6.; and *"These concepts* (of social sciences, note by J. H.) *are also not merely abstractions of the kind we use in all physical sciences; they abstract from all the physical properties of the things themselves. They are all instances of what are sometimes called 'teleological concepts', that is, they can be defined only by indicating relations between three terms : a purpose, somebody who holds that purpose and an object which the person thinks to be a suitable means for that purpose. If we wish, we could say that all these objects are defined not in terms of their 'real' properties but in terms of opinions people hold about them."* HAYEK, F. A. *Individualism and Economic Order*, Chicago: University of Chicago Press, 1948, pp. 59–60.

stitute the very initial point of divergence between many authors, who in some cases even belong to the same school of thought and yet reach very different conclusions.

Secondly, the application of the abovementioned to the case of the Austrian school's L&E leads to the conclusion that it is possible to preserve the potential benefits of the school's original economic methodology while abandoning the effort to unify all fields of the social sciences into a single unintelligible science which from the methodological point of view raises major controversies. The alternative is to replace the natural law theory and methodology with a less controversial, positivist, value- and content-free legal theory (even a normativist one, as was demonstrated in the example of Karel Engliš) and keep the teleogical/praxeological methodology for the economic part of L&E.

Finally, for a Czech reader the brief inquiry into the work of a Czech author may be of some interest, given that his ideas represent some of the best of Czech literature on the methodology of jurisprudence and economics. Engliš's work is a unique and valuable contribution to theory of law and economics both when taken together and separately, and therefore deserves much more attention than it is currently receiving.

Just as there is no single homogeneous economics and no single homogeneous jurisprudence, there cannot be one single homogeneous "economic analysis of law". The alternatives to the currently dominant Chicago school of L&E are so interesting that it would be a shame to lose sight of them completely and focus only on the development of the contemporary mainstream. The Austrian school may undoubtedly represent one such alternative, maybe even the most promising one. It is not necessary to damage this potential by insistence on the methodologically unstable and controversial foundations of its current legal theory.