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EFFICIENCY AS THE PRIMARY OBJECTIVE OF ECONOMIC ANALYSIS OF LEGAL NORMS

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Abstract: *Economic analysis of law, as one of the youngest sciences, with an interdisciplinary character, arose as a need to scientifically explain the consistent and justified application of law in practice by applying economic categories. Law in its long historical development became the subject of interest of economic science in the middle of the last century, and since then the theoretical concepts of economic analysis of law as a special science have been intensively developed in the field of interdisciplinarity. The basic issue that is of interest to economists and lawyers is "how useful is the economic analysis of law?". In answering this question, we must first recognize the basic achievements in the economic analysis of rights, which have been undoubtedly already established as principles.*

In their actions, theorists of law and economics do not contradict the already achieved values realized on the basis of the classical general theory of law and general economics, but strive to constitute a different angle of observation, different from the existing one, precisely on the above bases.

A significant starting point for understanding the Economic Analysis of Law is a set of concepts of economic categories applied in law. Certainly, efficiency occupies one of the central places in the economic analysis of law, the measurements of which are not extremely simple, especially in certain branches of law. In the paper, the authors discuss the concept of efficiency as the primary goal of the economic analysis of law, starting from the historical

foundation of the economic analysis of law and the early theories on which it developed as a science. The authors herewith provide an account of the achieved level of conceptualized modalities of economic efficiency of legal norms by analyzing the dominant concepts that represent already formed groups. In clarifying this term, the authors start from the analysis of the maximization of the usefulness of the use of resources, which can be interpreted in the broadest sense of the word. The initial concept defined in this way will provide us with the possibility of explaining maximization - efficiency as an economic category applied in the process of creating and applying legal documents. The starting position determined in this way inevitably causes the question of substitution of the principle of efficiency instead of the principle of justice and morality as known in the general theory of law. The correlation between these categories is very difficult to establish, especially if we take into account that these concepts are defined in the framework of classical sciences, but not in the sense of economic analysis of law.

Key word: *economic analysis, principle of efficiency, law and economics, maximization*

INTRODUCTION

Economic analysis of law as a science that has gradually developed, defined differently and, above all, disputed, was nevertheless constituted as an independent scientific discipline. What is agreed upon by the greatest number of theoreticians who deal with this scientific discipline is that Law and Economy (today the prevailing name of Economic analysis of law) implements economic laws in the analysis of legal rules (and rights) and effects in terms of economic theory. The economic analysis of the law seeks to create the possibility for the consistent and justified application of law in practice through the consistent application of economic reasoning. The largest number of theoreticians who study exclusively the general theory of law, in addition to all conceptual differences, strive to determine the essential aspects of the institution of law and start from the established positions that are indisputable among jurisprudence theoreticians. In contrast to them, theoreticians of the Economic Analysis of Law observe the legal norm and law as a whole from a different angle, different from the one that can be identified in the theory of jurisprudence, which is reduced to the research of law from the standpoint of legal practice through economic analysis. This point of view of the theoreticians of law and economics does not contradict the theorists of general legal theory, but bases its analysis on the real economic effects in the consistent application of law, that is, that the correct application of law can best be understood as a social mechanism for improving economic efficiency. In this sense, for theorists of economic analysis of law, legal norms (law - legislation - jurisprudence) represent the most suitable means in society for maximizing economic efficiency. If as a starting point we have the claim that theorists of law and economics do not see the importance of the legal institution, its uniqueness and place in society, but that they see it as a means to achieve certain economic goals, in that sense also the effectiveness of the legal norm, we can almost certainly point out that theorists of law and economics jurisprudence is viewed in a functional sense.

At the end of the last century and the beginning of this century, it was noticed that a greater number of authors dealt with the Economic Analysis of Law, but that the essence was mostly evident on theoretical axes, that is, on the definition of the Economic Analysis of Law and its basic institutions. The increased interest of theoreticians, both those who predominantly deal with the theory of economic analysis of law and others, has its justification. That justification should first of all be seen by a larger number of supporters and the increasingly frequent emphasis on understanding man as a rational being who strives to maximize profit. The desire to maximize profit as one of the dominant principles of modern economic thought has made the state more active in the function of realizing this principle, whether it is the lucrative activity of the state or the creation of a business environment, but also when it comes to other branches. law (contract law, criminal law, tort law and other aspects of law), applying principles and principles as an instrument in explaining the effects of law. At this point, it is necessary to mention that in addition to the efforts of theorists to establish and give rise to institutes of economic analysis of law within the framework of science, the state itself strives to apply the achieved results in practice by forming special bodies or organizational units within the framework of the state or entity that deal with the analysis of the effects of regulations - of the law (in this sense and by analyzing the economic effects of regulations). Therefore, the universality of the application of economic principles and principles in the explanation and analysis of legal rules tries to apply the theory of economic analysis of law in all legal areas in synergy with traditional legal principles based on justice and fairness.

1. FOUNDATION OF THE ECONOMIC ANALYSIS OF LAW AS A SCIENTIFIC DISCIPLINE

Economic analysis of law as a modern interdisciplinary science represents a relatively new field of study, and as one of the founders of this science, Ronald Coase laid the foundations of economic analysis of law in his paper from 1960, "The Problem of Social Cost". Other theoreticians such as Calabresi, Trimarchio, etc. gave no less importance to the development of the Economic Analysis of Law, but the field of action was significantly expanded by the contribution of Paul Rubin on crime in 1968. Other names such as Williamson, Posner, Cooter, Shavell, Schafer and others should be added to this list of theorists of contemporary economic analysis of law. whose contribution to the establishment of Economic Analysis of Law as a scientific discipline is unquestionable. It is particularly interesting to mention the works of Richard Posner, theoretician of Law and Economics, as the main advocate of positive efficiency theory. In 1972, he published the first edition of the Economic Analysis of Law, organized a series of seminars for lawyers on economics and economists on law, and in that sense, as a judge, he influenced the development of thought about the necessity of applying the principle of economic efficiency when it comes to court proceedings and law in general mercy.

Some time earlier, until the 1960s and the creation of the first papers on the theory of economic analysis of law in the modern sense, various theorists of law and economics tried to give their contribution and claim why economists must study law and why lawyers must study economics. The subject of interest of both was of a limited character because economists were interested in the analysis of only those areas that governed economic relations: competition law; corporate law, tax law, etc. while jurists believed that economic theories could in no case explain the normative aspirations embodied in laws. This approach is a consequence of both of them keeping the primary focus on their disciplines as a condition of insufficient knowledge of the opposite scientific discipline. The first written documents that contained segments of economic thought in the general theory of law are also known. In his writings on criminal law, Becarri presented his economic point of view in 1767, and in 1789, "Bentham significantly developed the idea that legal sanctions can deter bad actions and that sanctions should be applied when they are effective as a deterrent but not when they are not." (as is the case with the mentally ill)".[1]

The central place in the economic analysis of law undoubtedly belongs to property as a legal and economic category. Property in terms of economic analysis of rights can be viewed as a set of rights with incentive effects[2] to maximize wealth. This is achieved in two ways: firstly, property achieves an efficient allocation between subjects, the basis of which is a set of rights arising from property legislation, and secondly, property rights as part of legislation puts owners in a situation where they have to "internalize social costs and benefits from alternative use goods they own."[3]

The modern era is characterized by a fairly good establishment of this scientific discipline, including several associations (primarily continental: European, Canadian, American) and other associations that fully or partially study this subject. There is also a significant number of relevant periodical literature that is published dealing with issues of economic analysis of law and a satisfactory presence of periodicals that exclusively deal with issues of economics or law. When it comes to the American area and part of Western Europe, the economic analysis of law is studied as a separate subject at numerous universities in postgraduate and undergraduate studies.

2. EFFICIENCY AS THE OBJECTIVE OF THE ECONOMIC ANALYSIS OF LAW

From a historical point of view, we are witnessing the growing influence of economics on law, that is, that the economic analysis of law is more visible, on the one hand and on the other, that it is very difficult to define the Economic Analysis of Law. One of the simplest and the ones that will not shed much light on the definition of Economic Analysis of Law is that it is an area of economic research that requires an essential knowledge of

1 Shavell, S., (2009), Temelji ekonomske analize prava, hrvatsko izdanje, Mate, Zagreb, p.4
2 Cooter, R. and Ulen, T., (2016), Law and Economics, 6th edition, Berkeley Law Books. Book 2. p.108
3 Cooter, R. and Ulen, T., (2016), Law and Economics, 6th edition, Berkeley Law Books. Book 2, p108

law. A more precise, and above all definition that we can better understand is that it is "the application of economic theory and econometric methods to examine the formation, structure, process and impact of laws and legal institutions".[4]

A significant starting point for understanding the Economic Analysis of Law is a set of concepts of economic categories applied in law. Certainly, efficiency occupies one of the central places in the economic analysis of law, the measurements of which are not extremely simple in certain branches of law, but it also represents the primary goal of the economic analysis of law. Efficiency, understood in the economic theoretical sense, first of all "implies that resources are used in the use where their value is greatest."[5] Here we should keep in mind the maximization of the usefulness of the use of resources in the broadest sense of the word. The maximization of utility applied in law is that the possibility of applying the concept of wealth maximization (efficiency) has been created in the evaluation of legal systems. American theoretician of economic analysis of law and controversial judge Posner also advocates this starting point. According to Posner, who defines wealth exclusively in the monetary system "as a value in dollars or dollar equivalents", the starting point is the question of how much people are willing to pay for something, that is, how much they are willing to give up something if they own it.[6] In this sense, Posner states that money, as wealth registered on the market, is the only indicator of wealth maximization. In other words, the starting point defined in this way implies that "the sum of all tangible and intangible goods and services is weighted by prices, namely: the supply price (what people are willing to pay for goods they do not have) and the demand price (what people are looking for in order to sell what they have possess)."[7] This necessarily implies that in law when it is not possible to apply the market, the competent institutions (eg courts) must "imitate" the market and assume what the parties really wanted to be marketable. Starting from this claim, Posner does not limit himself to the explicit market, but also examines the implicit market where services that can be sold on explicit markets are sold. In this way, the wealth maximization criterion is established by which the monetary assessment of goods and services is carried out. Another point Posner points to is his consideration of hypothetical markets, defining them "as those markets in which high transaction costs prevent individuals from willingly transacting with each other and thus preventing efficient transactions from occurring."[8], this has to be taken as a rule in the event that individuals are forced into involuntary transactions

4 Mew, M., (2007), Economic Analysis of Law: Uses & Limitations, The economic review, Seinan Gakuin University Academic Research Institute

5 Jovanović, A., (2008), Teorijske osnove ekonomske analize prava, Pravni fakultet Univerziteta u Beogadu, Beograd, str 28

6 Posner, R., (1979), Utilitarianism, Economics, and Legal Theory, The Journal of Legal Studies,Vol. 8, No. 1, The University of Chicago Press, p.119

7 Posner, R., (1995). The Problem of Jurisprudence, Harvard University Press, Cambridge, Massachusetts, London, England, p.356

8 Marciano, A. (2018). Posner, Richard. In: Marciano, A., Ramello, G. (eds) Encyclopedia of Law and Economics. Springer, New York, NY. https://doi.org/10.1007/978-1-4614-7883-6_727-1, pp

when it comes to accidents, in which case the injured party and the injured party enter into a transaction that they are forced into, i.e. which is not voluntary. For a third party (a court or other forum), the determination of compensation for the injured party, taking into account that it is a hypothetical market, is a condition for the transaction to actually take place, thus achieving an efficient allocation of resources.

Another point of departure for efficiency, if it is taken into account that efficiency is the maximization of well-being, is that the maximization of well-being is conditioned by an effective law: of the alternatively determined legal solutions, on the occasion of a certain concrete event, the one that maximizes wealth should be considered the most favorable. This understanding of efficiency, although described in a way that seems very simple and comprehensible for concretization in application, is to a large extent still abstract and even problematic precisely because of the "immeasurable usefulness".

The starting point of Pareto efficiency is that changes in society benefit at least one person, that is, when the utility of that person increases, but at the same time the utility of any other person does not decrease. Pareto efficiency is applicable in society to the extent that provides maximum utility, that is, when improvements can no longer be made in the sense of increasing utility for one - not decreasing utility for another. First of all, Pareto efficiency, as a neutral concept of questioning efficiency, shows us the consequences of the application of legal rules on society as a whole and on individuals. Or, according to Jovanović A. "Pareto efficiency implies that the system is optimal if within its framework resources are used in such a way that no different allocation of resources can increase the production of any good, i.e. improve the position of any individual in the distribution, without decreasing the production of another good, that is, it does not worsen the position of another individual in the distribution."[9] The concept of Pareto efficiency established in this way seems very clear and applicable in those areas where there is autonomy of will (voluntary transactions of market participants) when everyone is enabled to enjoy more utility. For each participant in such transactions, an improvement has been achieved, in which case Pareto efficiency is easily measurable because maximization has been achieved for the participants. On the other hand, it also seems to be a simple explanation when it comes to health, social work, education, and other public services, which achieves Pareto efficiency because for each individual, and society as a whole, it represents an improvement in the Pareto sense. But the problem arises when explaining the financing of those services, mainly through public tax collection, and in that sense there are certain difficulties in formulating efficiency in the Pareto sense. Therefore, when it comes to the autonomy of the will, Pareto efficiency is applicable in the case of voluntary transactions (contractual law), but not those that involve the participation of third parties (persons who have not given their consent and who directly or indirectly suffer certain consequences or legal status).

The partial solution in the Pareto efficiency system leaves open the question of what to do in cases where at least one member of society finds himself in a state of deterioration

9 Jovanović, A., (2008), Teorijske osnove ekonomske analize prava, Pravni fakultet Univerziteta u Beogadu, Beograd, p.30

through the application of general policy measures or laws. The fact that any general social action (introduction of a new tax, increase of an already existing one, etc.) can lead to an improvement for a certain group or individual, but can also lead to a worsening of the situation at least for an individual, requires a significantly different approach than the one we had in the Pareto efficiency system. The answer to this question is given by the Kaldor-Hicks efficiency system, which is quite similar to the Pareto efficiency system (but complements it to a considerable extent), so it is also known as the Pareto-Wicksell criterion. This system, also known as the compensatory test, is based on the efficiency review criteria contained in the Pareto system of efficiency when a change causes an improvement in the position of some but at the same time causes a deterioration in the position of others. Utility understood in this way exists in the sense of efficiency when the improvement is disproportionate to the deterioration, that is, the utility in the economic sense is greater than the deterioration. The usefulness of one group and/or individual is greater than the loss of others (or an individual) and can be compensated from the usefulness of persons who have increased benefit. By further measures, when such improvements can no longer be made, the situation is considered efficient in terms of the Kaldor-Hicks compensation test.[10] Compensation for loss should be taken conditionally, as an abstract concept, not as an obligation for actual compensation for loss from the improvement of an individual and/or group. Thus, the Kaldor-Hicks efficiency measurement system is optimal if the abstract difference between improvement and deterioration is maximized.[11] In contrast to the Pareto efficiency system, the Kaldor-Hicks efficiency measurement system is easier to achieve in practice, because even when we take into account the autonomy of the will (example of a contractual relationship) but also other branches of law (taxes, health, education, social policy, criminal law) this system efficiency measurements is applicable in practice. The compensation method is effective if the compensation actually occurs and if by increasing the benefits of some, the loss of others can be effectively ensured to the extent that the initial state before the changes occurred is reached. The theory raises another question in connection with this, and that is whether the changes that will follow when the law is changed (by changing the law, making court decisions, economic policy measures, etc.) will necessarily be socially and ethically desirable, and whether the economic theory analysis of law can give an answer to this question. The theory of economic analysis of law "can only answer the question of whether the new legal regulation will establish an efficient allocation of resources, i.e. what are the costs of changing the existing legal regulation, and not whether this new allocation of resources and distribution of wealth is ethically desirable".[12]

10 Stelmach J., Brożek B., Załuski W., 2007, Dziesięć wykładów o ekonomii prawa, Wolters Kluwer, Warszawa, p.35

11 Tomasz Famulski, (2017), Economic Efficiency in Economic Analysis of Law, Journal of Finance and Financial Law, vol. 3(15), p.36

12 Jovanović, A., (2008), Teorijske osnove ekonomske analize prava, Pravni fakultet Univerziteta u Beogadu, Beograd, p.32

A different approach to efficiency measurement is found by proponents of marginal analysis as a method that focuses on researching the costs that have been incurred and the benefits that the respective measure has for the final effect. We can show this method in the simplest way as the use of certain resources that are made to achieve a certain benefit as the ultimate goal. According to this system, each activity, which inevitably requires the use of certain resources, is considered efficient as long as it exceeds the costs. If the costs exceed the benefits, such activities are considered ineffective or unprofitable. For example, incentive measures for foreign investors in a country are justified as long as the market gain of the foreign investor is greater than the resources provided as an incentive, otherwise, if the incentives are much higher than the market gain in that sense, we cannot talk about efficiency in the sense of marginal cost. The essence of marginal efficiency analysis is to find the point at which the ratio of resource use to benefit output is as high as possible. The further increase of resources that result in a disproportionately smaller or even negligible increase in social benefits is also considered inefficient in the sense of marginal analysis.

There are a large number of theoreticians who tried to define and determine the criteria for measuring efficiency in the economic analysis of law. For some of them, the constitution of new directions for determining efficiency is imperative, and some have approached the redefinition and completion of already existing partially acceptable definitions. One interesting theory about the understanding of efficiency in the economic analysis of law was given by Richard Zerbe, a professor at the University of Washington. As a basis for understanding efficiency in the economic analysis of law, Zerbe emphasizes the fact that "the definition of efficiency must be feasible in practice, theoretically correct and ethical".[13] Zerbe takes the Kaldor-Hicks concept of defining efficiency as a starting point in his definition of efficiency in the economic analysis of law, adding certain elements that he believes are missing. With this, Zerbe builds on the existing Calder Hicks concept by including "a measure that would provide better information about public will".[14] Establishing a significantly different, more sophisticated definition of efficiency in the economic analysis of law, he introduces seven new axioms that enable clear theoretical determination, consistent application in practice by applying ethics in order to overcome exclusively economic standards.

3. EFFICIENCY AS A SUBSTITUTE OF JUSTICE

What justice is for lawyers in the theory of legal sciences, efficiency is for economists in the theory of economic sciences. Among the theoreticians who study the legality of the economic analysis of law, the prevailing view is that it is very difficult to establish

13 Zerbe R.O., (2001), Economic Efficiency in Law and Economics, Edward Elgar, Cheltenham–Northampton

14 Tomasz Famulski, (2017), Economic Efficiency in Economic Analysis of Law, Journal of Finance and Financial Law, vol. 3(15), p.33

a correlation between justice, understood as the supreme moral principle in law, and efficiency in the sense of economic analysis. Difficulties that exist are difficult to overcome, especially if it is taken into account that the definition of terms is processed within the scope of the science in which they originated, but not together in the context of the economic analysis of law. Taking into account the concept of well-being, i.e. the maximization of utility, we lose the effect of moral procedural justice. Exclusive one-sided approach, e.g. of the concept of efficiency, which tends to maximize utility, we ignore the fact that in such an intention there may be a violation of moral norms and legal regulations (a thief increases his wealth by permanent activities, maximizes his utility by violating the law, by failing to fulfill his obligation for an act performed by one contractual party, he increases his wealth). When it comes to Pareto efficiency, one group of authors points out that it does not contain the criterion of "distributive justice", but at the same time it is a mechanism for fair distribution. Robert Coote, who believes that distributive justice is absolutely irrelevant when it comes to private law, or that it is applicable only when it comes to other branches of law (tax law, social welfare, etc.), takes a different view on the introduction of corrective and distributive justice. Another group of authors advocates the view that welfare maximization is the only parameter that should be evaluated, and that the evaluation of legal rules from the point of view of justice is undesirable and redundant, and that it is Pareto efficiency (increasing welfare for some without worsening it for others) that makes this approach possible. Posner believes that the Kaldor-Hicks approach best reflects the relationship between efficiency and justice. Starting from the position of wealth maximization that can be measured in money, Posner states that "willingness to pay is a better measure than utility because it is expressed in money, while there is no satisfactory unit for utility."[15]

Certainly, the issue of the relationship between efficiency and justice in the economic analysis of law occupies a very important place, which is often dominated by extremely antagonistic views of certain groups of theorists or individuals. In such a "complicated" mutual relationship, establishing a mutually acceptable correlation between efficiency and justice as a moral category is not an easy task at all, and it is certain that the theory of economic analysis of law in the future will strive to bring these two phenomena into mutual correlation or at least bring them closer.

CONSLUSION

The fact is that in the second half of the last century, and especially at the beginning of this century, the influence of economics on law is more than evident. That process continues to expand and penetrate almost all segments of law when creating and applying the law. The attempt to define efficiency in the economic analysis of law is not an easy task, both in terms of abstract theoretical determination and concrete application in practice.

15 Mathis K., 2009, Efficiency Instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law, Springer, pp. 145-157

Sometimes it seems that numerous theoretical starting points on the application of efficiency in the economic analysis of law form completely defined concepts, but the fact is that not a single theoretical concept provides a clear and complete determination of efficiency in the analysis of legal institutions. Provided that there is no generally accepted opinion on the concept of efficiency in the analysis of legal regulations, this in no way diminishes the importance and efforts of theorists when trying to define it. Although the positions are sometimes extremely opposed to the concept, they still contain a minimum of common starting point. The scope of the economic analysis of rights in the creation of policies is limited, but it still provides an opportunity for creators to assess the impact on society. This limitation partly stems from the assumption that the law has already determined the basic determinants and that as such they do not leave enough room for a different conceptual approach. It is almost certain that the development of the economic analysis of law goes in the direction of "reconciling" these two hitherto incompatible concepts, in order to establish the functional goals of the law. The results of the application of economic efficiency in law are not identical in all branches of law. It is easier to apply it in areas that have a direct effect on the creation of economic relations (commercial law, tax system, etc.) and much more difficult in other areas (court proceedings, education, health care, etc.), but it is certain that it contributes to the creation of public politics in areas that do not belong to the domain of economy.

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