ЕКОНОМИКА
ISSN 0350-137X, EISSN 2334-9190, UDK 338 (497,1)
Vol. 64, july-september 2018, № 3
P. 47-54

Dejan Matic[1]
University of Kragujevac,
Faculty of Law

Dusan Jerotijevic[2]
University Union "Nikola Tesla", Belgrade
Business and Law Faculty

SCIENTIFIC REVIEW ARTICLE
doi:10.5937/ekonomika1803047M
Received: May, 11, 2018
Accepted: August, 20, 2018

AKSIOLOGICAL ASPECTS OF ECONOMIC ANALYSIS OF LAW

Abstract

The paper analyzes the theoretical and legal considerations of the School of Economic Analysis of Law. As the significance of one theoretical thought can be measured, both by the influence of the same on the theory of law, as well as on contemporary social practice, then it can be without any doubt that in the last few decades, economic analysis of law is certainly the most influential approach in modern theory of law . This paper aims to investigate and subject to a critical analysis of the conceptual basis on which this teaching of law rests, while trying to provide an axiological assessment of them, bearing in mind a different value approach adopted by advocates of economic analysis of rights in relation to, in a condition, the usual value access to the law in general.

Key words: *theory of law, economic analysis of rights, utilitarianism, market, efficiency.*

JEL classification: *K00, K4*

АКСИОЛОШКИ АСПЕКТИ ЕКОНОМСКЕ АНАЛИЗЕ ПРАВА

Апстракт

У раду се анализирају теоријско-правна промишљања школе економске анализе права. Како се значај једног теоријскоправне мисли може мерити, како утицајем исте на саму теорију права, тако и на савремену друштвену праксу, онда се без много сумње може тврдити да, у последњих пар деценија, економска анализа права свакако представља готово најутицајнији приступ у модерној теорији права. Овај рад има за циљ да истражи и подвргне критичкој анализи идејне основе на којима ово учење о праву почива, истовремено покушавајући да пружи аксиолошку оцену истих, имајући у виду другачији вредносни приступ који усвајају заговорници економске анализе права у односу на, условно речено, уобичајени вредносни приступ праву уопште.

Кључне речи*: теорија права, економска анализа права, утилитаризам, тржиште, ефикасност.*

[1] dmatic@jura.kg.ac.rs

[2] dusanjerotijevic@gmail.com

Introduction

The concept of the theory of law can be determined in a variety of ways. During the development of legal thought, the conceptual definition of this cognitive discipline changed several times, sometimes reflecting substantive changes in its content, and sometimes not doing it in a complete way (Dvorkin, 2001, pp. 7-12). Without the intention, on this occasion, and at this place, we enter the genesis of this discipline, as well as the possibility of its conceptual equalization with the notion of legal science in the broadest sense, it should be noted only that under the theory of law we take special scientific discipline, clearly distinguishing from the concept of legal science, or jurisprudence, in the broadest sense, as a general scientific knowledge of law. In other words, more precisely, under the theory of law, in its basic, linguistic meaning, we mean the general doctrine of law, that is, the general, general scientific discipline whose subject of study is rightly defined and understood as a generic term, common to all specific rights in general. At first glance, it is quite obvious at one glance that in one of the basic tasks of such a certain scientific discipline it is necessary, among other things, to determine the connections between the law on the one hand and other social phenomena, on the other hand, ie determining and researching the sociality of the law, its effect to the society, as well as to the social factors of the process of creating and implementing rights. Bearing this in mind, it is quite clear that the importance of this discipline is in responding to the most complex issues that the current social moment puts before modern social and, therefore, legal, theory and practice, almost imperceptible, since it has exactly responded to you and influence the formation of practical, positive legal solutions. For these reasons, it is necessary to devote the full attention of critical analysis to those current directions in the theoretical thought, whose influence on positive regulation is quite clear. In doing so, it is also necessary to take into account the theoretical relationship that is established between law and economics, because in modern economic science there is a critical question about the traditional relations of people and institutions (Печичин, 2014, pp. 32). The reasons for this should be sought in the fact that theoretical innovations represent an attempt to give "adequate answers and solutions to the new changes" (Буквић and Павловић, 2014, pp. 2).

Utilitarianism and law

If the significance of a theoretical legal thought can be measured, both by the influence of the same on the very theory of law, as well as on contemporary social practice, then it can be without any doubt that in the last few decades, economic analysis of law is certainly the most influential approach in modern theory of law . This can undoubtedly be seen, as in conditionally speaking, with newer tertiary considerations in the field of delict, anti-cartal and commercial law, as well as by some theoretical analyzes devoted to some of the most complex issues of family, criminal and constitutional law, that is, the issue of human, civil and minority rights, and freedom (Bix, 2003, pp. 189). Considering the fact that some of the important representatives of this direction in contemporary theoretical thought take more than a significant judicial function in the United States, and in this way directly formulate the legal practice, the team becomes apparent the need for

a serious critical analysis dedicated to the basic , the basic settings of economic analysis of law (Bix, 2003, pp. 189). For this reason, this paper aims to investigate and subject to a critical analysis of the conceptual basis on which this teaching of law rests, while trying to provide an axiological assessment of them, and taking into account a somewhat different value approach adopted by advocates of economic analysis of law in relation on the contrary, a common value approach to the law in general.

It is commonly considered that economic analysis of rights, as an approach to observing and dispersing legal phenomena, is, to put it more precisely, a newer direction in the theoretical thought. Yet, in all likelihood, it seems that the roots of this approach to law seem to be somewhat deeper into the past. The first hints of what will be considered as an economic approach to law at the end of the twentieth century can be seen almost a hundred years earlier, at the end of the nineteenth century, in the part of the Austrian lawyer and economist Viktor Mataja during his consideration of the problem of compensation from the standpoint of the economy of 1888 (Sakalaš and Ledak-Kabok, 2011, pp. 119-120). In addition, it should also be noted that Oliver Vendel Holms, one of the pioneers and the most important representatives of functionalist jurisprudence, also, in his famous part of the Road Law, written in 1897, clearly and unequivocally points to the future importance of the economic approach in the analysis of legal phenomenon, or law, in general (Holmes, 1897, pp. 469). As time has shown, Holmes's predictions have fully come true, although it has taken more than seven decades for the truth to do it. However, whenever the beginning of such an approach is established, there can be no doubt that economic analysis of the law, ie the application of theories and empirical methods of economics to the basic institutions of the legal system, as Richard Pozner, one of the most influential members of this school, his ascent into, first, the American, and then the world theoretical thought, begins to experience the seventies of the last century (Posner, 1975, pp. 759). A detailed analysis of the attitudes of all contemporary representatives of this school would mean that this task would represent a task that significantly exceeds the goals and frameworks of this paper, and therefore, we will firstly just briefly outline some of the basic points of this thought on law, in order to turn to something more detailed critical analysis of the thinking of those authors who do not limit the application of economic methods exclusively to those branches of law which, in one way or another, are related to the corresponding economic phenomena (liability for damage, costs of proceedings and the like) they require that they must necessarily be included in the consideration of the notion of the law in general, that is, the right in itself and its basic elements.

The usual approach to legal reasoning, that is, making decisions in the application of law, that is, legal norms, implies the application of the so-called judicial syllogism, that is, the supersession of a specific factual situation under the general rule and the execution of the consequent conclusion by applying logic and analytical thinking. The choice of an adequate legal solution could also be based on a moral judgment, that is, on the basis of the valuation of what is just and what is not (Bix, 2003, pp. 190-191). In this latter case, it is already apparent at first glance that the relative nature of this reasoning is obvious, inevitably conditioned by the relative nature of the categories on which it rests, since an objective measure of value estimation is by itself simply not possible. Economic analysis of rights deviates from such, traditionally, traditional ways of legal reasoning, trying to provide the basis for the adoption of consensus-based legal decisions. The

advocates of this school think their attitudes, essentially based on utilitarian concepts of maximizing general usefulness and happiness, while minimizing general pain and suffering (The New Encyclopædia Britannica, 1986, pp. 693). Without the intention that in this place and on this occasion it will enter into consideration of the various directions that have evolved over time in the framework of numerous utilitarian theories, the basic idea can, although the truth for the will, be somewhat simplified by explaining that seeking happiness and avoiding suffering universal and the usual characteristic of all people, and consequently, and since there is no objective criterion on the basis of which it would be possible to determine the preference of any wishes and needs in relation to the needs and desires of others as the only valid basis for bringing it all social decisions must use the one that consequently leads to the maximization of overall happiness, usefulness and pleasure, while minimizing the overall suffering in a society. At first glance, at least it seems to us that such an approach is difficult to offer an even more objective decision-making criterion than the previously stated value criterion, since it is, at the very least, extremely difficult, if that is, at all possible, , and then generalize by any method of abstracting the notion of happiness, pleasure, and suffering. It seems to us that in this way there is nothing else to do, that the arbitrariness of the value criterion, that is, ethics, change the impossibility of epistemology (Leff, 1974, pp. 453-456). However, regardless of the problem, it should be noted that the advocates of economic analysis of the law modify the above approach to a certain degree by resolving the essential inability to determine the human wishes that lead their happiness by reducing it to observing human behavior and choices that make up, all based on the first and the basic assumption that each person rationally maximizes his satisfaction (Posner, 1973, pp. 1). In other words, most people, in most cases, are guided by what they perceive as their own interest, and rational and rational, but not perfectly, choose the means to achieve it (Posner, 1973, pp. 5). Based on this, and according to the teachers of such a school, it is thought of the right, it is possible to draw some basic economic principles that are reduced to the conclusions on the reverse ratio of the price of goods and its availability, and the tendency of the resources to gravitate towards their highest value if their exchange is allowed (Posner, 1973, pp. 1-4). Also, efficiency is understood as a concept of a substantially technical nature which implies the utilization of resources in such a way that human satisfaction, that is, happiness, determined and measured by aggregated consumer readiness to pay for goods and services, is fully maximized, with the value also being denied by the readiness that the goods or services are paid (Posner, 1973, pp. 4). In this way, in consequence, the market becomes at the same time a means of determining human desires, as well as achieving them, that is, a means of increasing, maximizing both individual and general social happiness. Moreover, market transactions are virtually a symbol of a fair transaction, that is, a symbol of social justice, since they are based on the consent of the will and the autonomy of the decision-making of participants in them. Consequently, it could be concluded that this is, among other things, one of the main arguments in favor of the justification and correctness of economic analysis of law (Bix, 2003, pp. 193). It should also be pointed out that the market situation in which the transaction of resources, that is, the desired goods of any kind, is abolished in such a way that the position of at least one participant improves, while at the same time there is no deterioration of the position of other participants, among the defenders of such an approach to law, considers Pareto superior, in comparison with the market situation of

the previously given transactions. In other words, this is the so-called Pareto improvement. On the other hand, if there is no market transaction, that is, an allocation that can make Pareto superior to the new situation in relation to the existing one, then there can be talk of the existence of the so-called Pareto Optimum (Розен and Гејер, 2009, pp. 36-42). On this occasion, we should certainly not enter into a more detailed explanation of the notion of Pareto optimum, since such an annex would largely come out of the goals outlined in this paper, but it should also be pointed out that the conceptual determination of the optimality used in this sense does not in any way imply the situation that would be the best in comparison to all other situations in the given case, since the existence of more situations that can be Pareto is optimal, quite possibly. In other words, the conceptual definition of optimum, in this sense, deviates from the usual one. Leaving aside a certain one, it seems to me that there are serious observations that indicate that the application of Pareto efficiency, that is, the optimum, can lead to, or demand, solutions that are contrary to some basic social values, such as freedom or autonomy (Sen, 1970, pp. 152-157). It should be emphasized that advocates of economic analysis of the law seem to be fairly justified, claim that all voluntary market transactions, that is, transactions based on autonomy of will, necessarily without exception, necessarily lead to Pareto superior situations (Posner, 1979, pp. 132). At first glance it becomes apparent that such an approach can very hardly be applied to situations that do not characterize the autonomy of the will of the subjects that are in them, that is, the situations in which the apparatus that has the monopoly of physical coercion is withdrawn from the position of government. In other words, the situation relating to the creation and application of the law, Pareto efficiency, even very conditionally understood, as it seems to us, is not successfully applied. True to the will, even if the above claim for a moment is left aside, it must be acknowledged that even when it comes to transactions based on the autonomy of the will of the subjects involved in them, in real life, it is very difficult, if it is it is possible, at all possible, to find situations in which at least one subject is in a better position, and all other entities are in an equally favorable position than before the transaction. Of course, it is quite obvious that if the position of one entity after the transaction is improved and the position of other entities remains after the transaction is the same as before, we can actually talk about the relative deterioration of their position after the given transaction in question. Advocates of economic analysis of the law try to overcome this potential, although quite real difficulty, by applying the so-called Kaldor-Hicks analysis, which is reduced to the possibility of compensation that the entities that after a transaction could better offer those entities whose position has become worse or remained the same; so it became worse in relative terms. This especially if it is a transaction in which more or less significant, that is, direct or indirect influence has the state power through appropriate decisions. It is worth mentioning that here, in no case, this is not about the fact that the subjects whose improved position really compensate other, less fortunate subjects. In that case, it would be a Pareto superior situation. In fact, it is here that potential compensation could be paid off. Consequently, it can consequently be assumed that the position of all participants in the transaction could be relatively better than before (Bix, 2003, pp. 195).

Kouz's market interaction and subjective rights

It is simply not possible to circumvent the work of prominent economist Richard Coese in considering the economic analysis of rights, bearing in mind the impact his work has left on the views of the School of Economic Analysis of Law (Coase, 1960, pp. 1-44). His attitudes dedicated to, essentially, the interaction of the market and subjective rights, can be simplified through his consideration and criticism of Pigu's position on the necessity of economic subjects, through the intervention of state-legal regulations, to compensate for costs incurred by other subjects, as well as through his thoughts on the impact the initial distribution of subjective rights to their titles on their subsequent distribution (Coase, 1960, pp. 1-19). When it comes to the first issue, Kouz believes that it is simply not possible to determine in advance a damaging entity, that is, it creates additional costs, advocating a view of the reciprocity of causing costs, that is, of understanding that the additional costs are the result of a kind of combination of activities of all concerned entities (Coase, 1960, pp. 2). As for the second issue, Kouz argues that the original, initial distribution of subjective rights to their titles has no effect on the subsequent distribution of the same, and consequently on activities that will result in the same, or their protection, since they will be given rights in the end, they are distributed exactly to those subjects that value them the most, ie those subjects whose greatest economic interest is to possess them (Coase, 1960, pp. 31-34). This is actually the essence of Kouz's theorem. However, the truth is, it is applicable only in the case of a simplified theoretical model in which there are no so-called transaction costs, which in reality is simply not and can not be the case, as Kouz itself clearly and unambiguously points out (Coase, 1960, pp. 15).

Conclusion

Already, on the basis of everything already stated, the axiological positions from which the advocates of the economic analysis of the rights can appear are clearly visible. If such an approach could and should only be adopted when it comes to trade, procedural or delictal law, it seems to us that its application in the area of criminal or constitutional law, or human rights, civil and minority rights, is more than questionable. The reasons for our position are multiple. First of all, it should be noted that utilitarianism, by itself, can be, whether or not with such an approach, is a valid and legitimate value basis for theoretical reflections on law, like any other value or ideological platform. The attitude of the school of economic analysis of law, as it does at least to the authors of these lines, undoubtedly rest, in its deepest basis, precisely on this philosophical premise. How many of the most influential authors, and in that regard, we have in mind Richard Pozner, have consistently denied these basics, and the derivation of attitudes is almost obvious (Posner, 1979, pp. 104-107). Of course, there is no doubt that here in any way it is not a matter of simply taking over the original value bases by the advocates of the economic analysis of the law, or the inspiration of the members of this school with the foundations of utilitarianism, but rather in a certain, in a certain way, a simplified materialization of utilitarian ideas (Hart, 1977, pp. 987-988). In other words, we consider that one can not speak of applied utilitarianism in the case of a school of economic analysis

of the law, but rather of a vulgar-materialist approach basically an idealistic basis of utilitarians. I am just Pozner, the truth for the will, quite openly and unequivocally, as best as possible confirming the correctness of our attitude, by determining the wealth, or its maximization, expressed in money, specifically dollars, as the basic principle of society, and therefore the first system , respectively, in general (Posner, 1979, pp. 119-120). Although, as he himself points out, the conceptual identity between the utilitarian concept of happiness and the concept of wealth expressed in money is, at least, more than doubtful, it is difficult to challenge a kind of materialistic concretization, both by the nature of the heavily determined value categories of utilitarians, as well as their subsequent realizations in reality (Posner, 1979, pp. 121). A certain difference that can be perceived in a somewhat different view of social reality, which is definitely indubitable, represents, as it seems to us, nothing else but an inevitable consequence caused by differences between materialistic and idealistic approaches and nothing more than that. In addition, it should be noted that the maximization of wealth, on the contrary, can serve as an ethical basis, but the so-called traditional values characteristic of the common understanding of rights, no matter how they are derived from such an ethical basis, remain only postulated, since, the nature of things, in the case of their derivative character, they can not make an ethical basis by themselves, but only a mere means for its realization (Posner, 1979, pp. 122-127). Whether society and, therefore, the right, whose ethical minimum represents the tendency to maximize wealth, is the ideal to strive for, the question is quite different.

There is no doubt that such an approach to the understanding of the law and its institutes represents a fundamental innovation of the idea of the right to which we are accustomed. It must not be mistaken for the notion that the notion of law can be represented through the prism of a set of values that are contained in its essence, and therefore the law necessarily and consequently presents, among other things, more than a system of certain values, such as justice, justice, morality, security, order, peace, and so on. The School of Economic Analysis of Law, when considering the legal system, exclusively assesses the effects of legal rules on the efficient allocation of resources, without any interest in the problem of morality, or the ethical consequences of these effects. Whether the right, and therefore the society as a whole, based on such ethical foundations, will represent a valid basis for the development of a prosperous democratic community based on the strict and strict respect for all human, civil and minority rights in some future time, remains to be seen. However, after all that has been said up to now, we are inclined to consider that the so-called essential ethical minimum of a society, and hence the right, in the nature of the matter, can neither, nor can it rest solely on the similious materialistic settings based on the increase in money.

References

Bix, B. (2003). Jurisprudence: *Theory and context*. Sweet & Maxwell. London.

Coase, R. H. (1960). *The Problem of Social Cost*. in Journal of Law and Economics, Vol. 3. The University of Chicago Press. Chicago.

Dvorkin, R. (2001). *Suština individualnih prava*. Službeni list SRJ – CID. Beograd – Podgorica.

Hart, H. L. A. (1977) *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*. in Georgia Law Review, Vol. 11, no. 5. University of Georgia School of Law. Athens.

Holmes, O. W. Jr. (1897). *The Path of the Law*. in Harvard Law Review, Vol. 10. The Harvard Law Review Association. Cambridge.

Leff, A. (1974). *Economic Analysis of Law: Some Realism About Nominalism*. in Virginia Law Review, Vol. 60. The Virginia Law Review Association. Charlottesville.

Posner, R. (1973). *Economic Analysis of Law*. Little Brown and Company. Boston.

Posner, R. (1975). *The Economic approach to Law*. in Texas Law Review, no. 53. University of Texas School of Law. Austin.

Posner, R. (1979). *Utilitarianism, Economics, and Legal Theory*. in The Journal of Legal Studies, Vol. 8, no. 1. The University of Chicago Press. Chicago.

Sakalaš, Ž. and Ledak-Kabok, K. (2011). *Neki uvodni aspekti ekonomske analize prava*. in Škola biznisa, no. 2/2011. Visoka poslovna škola strukovnih studija u Novom Sadu. Novi Sad.

Sen, A. K. (1970). *The Impossibility of a Paretian Liberal*. in Journal of Political Economy. Vol. 78, no. 1. The University of Chicago Press. Chicago.

The New Encyclopædia Britannica (2005) 15th Edition. Vol. 12. Encyclopædia Britannica Inc. Chicago/ London/ New Delhi/ Paris/ Seoul/ Sydney/ Taipei/ Tokyo.

Буквић, Р. and Павловић, Р. (2014). *Неокласична економска теорија и проблеми економског развоја*. in Journal Економика, Vol. 60, july-september 2014, no. 3. Ниш.

Мала енциклопедија Просвета: општа енциклопедија (1986). IV издање, Књига 3, Просвета. Београд.

Печечин, Н. (2014). *Структурно-морална основа економске активности*. in Journal Економика, Vol. 60, april-june 2014, no. 2. Ниш.

Розен, Х. С. and Гејер, Т. (2009) *Јавне финансије*. Београд: Центар за издавачку делатност Економског факултета у Београду.