

Legal Pragmatism And The Illusion Of Neutrality In The Deconstruction Of Economic Fundamentalism In Richard Posner's Thought

Dwita Azzahra Nur Prawira; Hanifah Putri Pertiwi; Mohammad Alvi Pratama.
Fakultas Hukum, Universitas Paasundan. dwitaazzahra88@gmail.com

ABSTRACT: This article examines Richard A. Posner's thoughts on the relationship between law analyzed through economics, especially on how the approach of legal pragmatism and economic fundamentalism can create the illusion of legal neutrality according to Richard Posner's thoughts in his book entitled Economic Analysis of Law. In his book, Posner places efficiency as the main benchmark in evaluating legal rules, but this approach is considered to have the potential to ignore moral values, social justice, and historical and cultural contexts in legal practice that cannot be ignored. The study was conducted using a qualitative approach and literature study of Posner's works and other supporting scientific works. The results of the study show that although Posner succeeded in providing an evaluative framework based on economic rationality for the legal system, this Economic Approach to Law tends to side with the interests of high-income groups and is not completely neutral if applied without deep analysis. Posner himself eventually began to criticize his approach and opened up space for a more contextual and multidisciplinary perspective in understanding the law. The economic approach remains relevant, but it needs to be balanced with social and ethical considerations so that the law does not lose its essence as a guardian of justice.

KEYWORDS: Richard A. Posner, Economic Analysis of Law, Legal Pragmatism, Economic Fundamentalism, Legal Efficiency, Economic Approach to Law, Illusion of Neutrality, Utilitarianism.

ABSTRAK: Artikel ini mengkaji pemikiran Richard A. Posner mengenai hubungan antara hukum yang dianalisis melalui ilmu ekonomi, terutama tentang bagaimana pendekatan pragmatisme hukum dan fundamentalisme ekonomi dapat menciptakan ilusi netralitas hukum menurut pemikiran Richard Posner dalam bukunya yang berjudul *Economic Analysis of Law*. Dalam bukunya, Posner menempatkan efisiensi sebagai tolok ukur utama dalam mengevaluasi aturan hukum, namun pendekatan ini dianggap berpotensi mengabaikan nilai-nilai moral, keadilan sosial, dan konteks historis serta kultural dalam praktik hukum yang tidak bisa diabaikan begitu saja. Kajian dilakukan menggunakan pendekatan kualitatif dan studi literatur terhadap karya-karya Posner dan karya ilmiah pendukung lainnya. Hasil penelitian menunjukkan bahwa meskipun Posner berhasil memberikan kerangka evaluatif berbasis rasionalitas ekonomi terhadap sistem hukum, *Economic Approach to Law* ini cenderung berpihak pada kepentingan kelompok berdaya ekonomi tinggi dan tidak sepenuhnya netral jika diterapkan tanpa adanya analisa khusus. Posner sendiri

pada akhirnya mulai mengkritik pendekatannya dan membuka ruang bagi perspektif yang lebih kontekstual dan multidisipliner dalam memahami hukum. Pendekatan ekonomi tetap relevan, namun perlu diseimbangkan dengan pertimbangan sosial dan etis agar hukum tidak kehilangan esensinya sebagai penjaga keadilan.

KATA KUNCI: Richard A. Posner, Economic Analysis of Law, Pragmatisme Hukum, Fundamentalisme Ekonomi, Efisiensi Hukum, Economic Approach to Law, Ilusi Netralitas, Utilitarianisme.

I. PENDAHULUAN

One of the most influential figures in the development of the economic analysis of law is Richard A. Posner. His work has advanced the understanding and application of law in areas such as property rights, contracts, and regulation. Richard Allen Posner (born January 11, 1939) is an American legal scholar and retired United States Circuit Judge, who served on the United States Court of Appeals for the Seventh Circuit from 1981 to 2017.

Posner, a senior lecturer at the University of Chicago Law School, was named the 20th century's most cited legal expert by *The Journal of Legal Studies*. He is also the most referenced American legal professor in history as of 2021. He is regarded by many as one of the most important legal scholars in the US. Posner is renowned for his breadth of knowledge and his publications on subjects unrelated to law.

Many of his works cover topics such as animal rights, feminism, same-sex marriage, drug prohibition, Keynesian economics, law, literature, and academic moral philosophy. With nearly 40 books, Richard Posner has covered topics such as economics, as well as jurisprudence. Not only that, he has also written several other works such as *The Economic Analysis of Law*, *The Economics of Justice*, *Problems of Jurisprudence*, *Sex and Reason*, *Law, Pragmatism & Democracy*, and *The Crisis of Capitalist Democracy* are also some of the other books he has written. For many years, Posner has been known as a political conservative. However, in recent years, he has left the Republican Party and made more liberal decisions on abortion and same-sex marriage. Additionally, he notes in *A Failure of Capitalism* that the financial crisis of 2007 to 2008 led him to question the *laissez-faire* economic model, which is the basis of his law and economic theory.

Richard A. Posner talks about how the field of law and economics has helped solve real and possible problems related to efforts to create justice and order and provide legal protection for various community needs. The theory created by Richard A. Posner shows how human behavior is faced with the drive given by the legal and economic drives

that exist in society. Therefore, human behavior can be regulated by law through the corridor of human legal and economic behavior.

Talking about the economy as one of the things involved, in the book entitled *Economic Analysis of Law* by Richard Posner, explains through the author's perspective how one of the good legal output products is based on economic efficiency. He is a figure who initiated that economic efficiency is the best thing in assessing the quality of law. In his book, Posner rejects normative law enforcement because according to him law enforcement should not be assessed through morality, but he believes that good law enforcement is assessed from how well the law creates efficient and practical results.

He considers the law to be able to produce the most economically efficient benefits or results. His view is in line with how pragmatic thinking in law, which emphasizes more on the results and real impacts of a legal rule. Posner's rejection does not merely block all perspectives, but on the contrary, Posner actually offers this (pragmatic) approach, by viewing economic efficiency and maximum social benefits as the most perfect output, meaning that the resulting legal decision does not have to be the most moral decision.

However, this pragmatic approach produces a major problem that touches on the neutrality of law. What is meant by this is that Posner points to the concept of economics as the main benchmark in assessing the good and bad of the resulting law, which depicts as if the concept is an objective and universal form. Meanwhile, as is known, the economy is not a value-free object, because the economy is formed and run in a structure whose ideology is clearly inseparable from the influence of power and political interests. Thus, if the law is subject to the fundamentalist view of economic law, this kind of law causes the emergence of a neutral illusion. This gives the impression that the law is rational and free from values, but in reality it is not. The legal pragmatism offered by Posner seems to offer a solution that seems realistic and practical, but in fact it actually contains fundamental problems in understanding and enforcing the law itself.

I Wayan Sudira, Hasannudin Hidayat, M. Ali Fauzi in his journal entitled *Analysis of the Relevance of Richard Posner's Theory in the Development of Economic Law in Indonesia* (I Wayan Sudira, Hasannudin Hidayat, 2024), which is similar to our article stating that law and economics are two fields that are closely related in the life of modern society. Then, Irfan Hadi, Hasanudin Hidayat, in his journal entitled *The Relevance of Richard Posner's Theory in the Development of Economic Law in Indonesia* (2024), stated that behavioral law and economy or legal and economic behavior helps to concretize solutions and improve legal practices without cutting norms and teachings in legal science. The economic efficiency offered is important in determining the core aspects of regulation so that it is appropriate and appropriate (Irfan Hadi dan Hasannudin Hidayat, 2024). Finally, Addiarrahma, Illy Yanti, in the Journal entitled *According to the book "From Idealism to Pragmatism: Paradigm Shift in the Development of Islamic Economic Law in Indonesia"*, pragmatism criticizes everything that is metaphysical in the process of seeking truth. We need to use knowledge to answer ordinary, practical questions and help us adapt to our environment (Addiarrahman & Yanti, 2020).

Economic Analysis of Law does two things: it projects the behavior required to comply with legal rules, assuming rational actors, and it evaluates the outcomes in terms of clearly defined social welfare measures. Therefore, legal analysis is usually viewed from an economic perspective. This is because legal analysis is concerned with the consequences, entities, or social values of particular legal rules. In other words, legal analysis specifically investigates particular legal rules or institutions rather than making general claims about the nature of law (Butarbutar et al., 2023).

The development of Economic Analysis of Law in the current era extends to every use of economic principles to legal problems and public policy. Since his book entitled *Economic Analysis of Law* was first published in 1973, Posner has been a major mover in the field of law and economics. He developed the theory of economics and post-Coasian science, different from other legal and economic experts. One interesting

thing about Posner's work is that he continues to develop his analysis normatively and empirically. This is because the focus of legal studies in economic legal analysis is greater than the analysis of economic predetermination. In addition, legal analysis is a legal analysis that expands the dimensions of law with the help of economics (Lutfi et al.,).

In this article, the author focuses on two main things related to Richard Posner's thoughts on legal pragmatism and economic fundamentalism. First, about how the perspective of legal pragmatism put forward by Posner can actually create the illusion of neutrality in the legal system in contrast to its goal of maintaining neutrality. Then second, about the extent to which economic fundamentalism in Posner's thoughts has the potential to ignore social values and norms and justice that should be the basis for the formation and application of law in all areas of life. This article aims to examine and criticize these two aspects, as well as explore the implications of the dominance of the economic perspective.

The purpose of this study is to examine in depth Richard Posner's thoughts on legal pragmatism and economic fundamentalism. This study also attempts to show how legal pragmatism promoted by Posner can create the illusion of neutrality in the application of law, whereas behind it there is a strong influence of the dominant economic ideology. Then, this study aims to explore the extent to which economic fundamentalism according to Posner ignores the social and justice aspects that should be the basis for legal practice. Therefore, the main purpose of this research and writing of this article is to provide an understanding and mapping of Posner's thoughts and the limitations of Posner's legal and economic pragmatism along with their impact on more substantial and just legal values.

II. METODE

This study uses a qualitative approach method, which focuses on understanding Richard Posner's thoughts, especially regarding legal

pragmatism and economic fundamentalism in the field of law. Then, the type of research used is juridical-philosophical, by studying law not only from a normative perspective (written rules), but also from the perspective of thought and philosophy that underlies it. In this article, the author tries to understand more about how Posner sees the relationship between the two aspects of law and economics, and how these ideas can be reviewed with a deconstruction approach.

The data sources used are divided into two, namely primary data sources, namely Richard Posner's relevant original works, and secondary data sources, namely books, journals, articles, and other writings that discuss Posner's thoughts on Economics and Law. Data collection was carried out using the library study method. The author read and reviewed several books, articles, and writings related to Richard Posner's thoughts on Legal Pragmatism and Economic Fundamentalism which cause the illusion of neutrality. The process in this method is carried out with the aim of uniting thoughts that can be used as study and interpretation materials, both from the legal and economic sides explained by Posner, as well as his Philosophy.

III. HASIL PENELITIAN & PEMBAHASAN

Economic analysis of law is a way of understanding, interpreting, and evaluating law and legal institutions using economic concepts and techniques. The goal of this analysis is to explain how legal rules affect economic behavior and to evaluate the rules on the basis of economic efficiency.. (Humanize Lawyer, 2024). A new branch that is gaining popularity among legal scholars is the Economic Approach to Law, which has found much interest in Richard A. Posner's legal literature.

In his book entitled *Economic Analysis of Law*, Richard A. Posner views law as a social system that can and should be analyzed using economic tools. According to him, law is not merely a normative domain that upholds abstract principles of justice or morality, but rather a practical mechanism for allocating resources effectively. Richard A. Posner views law as a social system that can and should be analyzed

using economic tools in his book entitled *Economic Analysis of Law*. As he says, law is not merely a normative domain that upholds abstract principles of morality or justice, but more than that it is a practical way to organize resources efficiently.

According to him, *Economic Analysis of Law* is an application of basic economic principles to understand, explain and evaluate what has been regulated. In Posner's view, law and economics do not stand alone, but are interrelated because law is a tool to allocate all things efficiently. Posner said;

“Economic is the science of rational choice in a world, our world, in which resources are limited in relation to human wants... the task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life, his satisfactions, what we shall call his ‘self-interest,’”

which means that humans act on the basis of incentives and aim to maximize satisfaction, and law can be seen as a system that creates or changes these actions to achieve efficiency (Richard Posner, 1986).

Posner explains that the role of law needs to pay attention to three essences, namely the essence of value, utility and efficiency. Posner defines efficiency as the maximum utilization of the value contained in resources. Furthermore, Posner states that many institutional doctrines of the legal system are best understood and explained in an effort to increase resource efficiency, and that the Common Law system is best described as a system designed to maximize the social welfare of society (Azizah, 2015).

As mentioned Utilitarian concept is the basis of economic analysis of law. Jeremy Bentham is the one who started this idea. Utilitarian comes from "utility", which is something that produces profit, pleasure, goodness, happiness, or prevents suffering, evil, unhappiness (Bentham, n.d. 1789). If Utilitarianism emphasizes the element of greatest happiness, then economic analysis of law looks at it from the perspective of efficiency in choosing legal rules, namely minimizing social costs for certain activities (Lutfi et al., 2017). Posner added that the idea of legal economic analysis can be used as a way to solve legal problems by

presenting various legal definitions and assumptions to get an idea of the satisfaction desired by society.

Quoted from Scientific Articles (Prasetya et al., 2023), Legal economic analysis is more similar to the form of legal and economic analysis, which usually includes a thorough examination of the elements or structures of legal and economic sciences. Legal economic analysis mainly relies on the elaboration and interpretation of law and economics through the process of fusion of correlated elements. Economic analysis began to be used in an effort to view, translate, and explore the expansion of the legal dimension. The disciplines of law and economics in practice also have a close correspondence (Isyunanda, 2022), Because economics stems from the study of human rationality, it can be used as a tool to predict behavior, including irrational human actions, it helps us understand what sets of legal rules exist and what should exist.

Legal economic analysis uses economics as a basis for analyzing the rules and laws that apply in a particular society to determine how effective a legal system is. The use of economics allows the initiators of legal economic analysis to draw conclusions about human desires, legal consequences, and how the most appropriate legal arrangements are. Analysis of various curve models, which can be done in economics with the right formula, is used to make predictions about various possibilities related to the implementation of the law. As a result, it is easier to be scientifically responsible for the theories used in the application of legal and economic theories.

In his book entitled *The Economics of Justice*, Richard Posner also emphasizes the importance of economic factors in the legal system. He puts forward his view that "legal logic, in many but not all cases, seems to lead to economic logic," (R. Posner, 1981). For some, the cost-benefit ratio is not always fair, but the legal economic analysis approach does. Therefore, legal economic analysis includes:

1. Transactions Cost Economy, this assesses the effectiveness of legal regulations, which are mostly related to private law.

2. New Economic Institution, this does not mean companies, governments, or banks; it means human action, including formal laws, informal customs, and traditions.
3. With its microeconomic and trade approach, the "Public Choice" Theory deals with the process of democratic decision-making. This theory investigates the phenomenon of "rent seeking", the coalition of majority owners, and the way votes are traded in legislative and ownership councils.

According to Posner, legal pragmatism is seen from the fact that it places efficiency as the main goal of every legal policy. Posner assesses the effectiveness of rules in almost all branches of law, be it contracts, criminal, torts, or property, based on how much the rules can reduce transaction costs, reduce conflict, and achieve optimal results. In criminal law, for example, it is explained that punishment must be designed so that criminal acts are not financially profitable for those who commit them (R. Posner, 2003).

But this method has significant theoretical consequences. To measure the value or preference of an individual towards a legal right or policy, the economic analysis of law relies on the concept of willingness to pay. Therefore, individuals with greater financial resources will have a greater say in the structure of legal values. This method, in situations where there is inequality in the distribution of wealth, implicitly emphasizes the interests of the rich and ignores the interests of the poor, who do not have the economic capacity to express their desires in the form of exchange value. The efficiency approach offered by Posner is described as neutral, scientific, and objective, but in reality it contains an ideology that supports the current economic situation. This is the so-called illusion of neutrality, namely the belief that the law can be considered without moral or political considerations, even though it actually contains hidden biases that originate from its economic basis.

However, Posner himself gradually began to question the economic approach he had created. He showed that the assumptions of economic theory about human rationality oversimplified the complexity of human behavior. Posner argued that the economic approach failed to

account for the emotional, historical, and cultural dimensions inherent in legal practice in areas such as family, criminal, or constitutional law. In addition, Posner recognized that the goal of efficiency was not the only goal of law, that is, stability, procedural justice, and the protection of basic rights were components of legal considerations that could not be ignored simply because they could not be measured economically.

Not only did Posner begin to realize his own thinking, but Political Economists in general often reject that the makers of legal rules can be associated with any purpose. This is especially true because legal rules are not made by someone who has unilateral power to control what is in them (Kornhauser, 2022). Therefore, in Posner's own thinking, there is a process of deconstruction of economic fundamentalism.

Although he was a pioneer of the economic approach to law, Posner also paved the way for criticizing the approach from within. He no longer positions efficiency as the sole standard of legal evaluation, but rather as one of many factors that must be considered in a balanced manner. This indicates that Posner's legal thinking does not stop at the dogma of efficiency, but rather develops into a more contextual approach and is aware of the limitations of economic analysis in explaining the complexity of the legal system.

Because basically, the characteristics that can be taken from the fundamental principles of the Economic Analysis of Law school also aim at the reciprocal relationship between price and the amount needed (the Law of Demand), Increasing (maximizing) needs (happiness, pleasure, and satisfaction), Needs tend to move towards valuable things (behavioral theory), and can evaluate laws and policies. He also stated that an overly complex and flexible economic law model can lose its predictive ability because it can no longer be tested empirically. (Drs. Achmad Ridwan Tentowi, M.H., Dr. T. Subarsyah Sumadikara, S.H., Roely Panggabean, S.H., 2016).

IV. KESIMPULAN

Economic analysis of law uses economic principles and techniques to understand and evaluate legal rules with the aim of increasing efficiency. A precursor to this approach, Richard A. Posner argued that law should be seen as a social tool for the effective distribution of resources, not merely as a system of rules or abstract morality. He argued that the effectiveness of law in various fields, such as contracts, criminal law, property, and tort, can be assessed using economic principles such as individual rationality, efficiency, value, and utility.

This concept is a theory of utilitarianism, which emphasizes the results in the form of the greatest happiness or benefit. However, Posner changed this approach to assess based on minimizing social costs. This Economic Analysis of Law only uses ideas such as transaction economics, public election theory, and institutional economics. The economic approach to law is considered scientific and neutral, but it has some weaknesses because it benefits the wealthier group. They often ignore procedural justice, moral principles, and other social factors.

Posner then changed his perspective by realizing that the goal of efficiency is not the only goal of law. He recognized that emotional, cultural, historical, and basic rights elements are also important and cannot always be explained economically. Therefore, the economic approach to law must be used critically and not be the only basis for assessing law. Posner allows for a more contextual, balanced, and multidimensional approach.

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