



Universal Principles of Foundations in Economic Analysis of Law Theory

Mas Anienda Tien F

Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia
Kentingan, Jl. Ir Sutami No.36, Kec. Jebres, Kota Surakarta, Jawa Tengah, Indonesia 57126
mas_anienda@student.uns.ac.id

Mohammad Jamin

Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia
Kentingan, Jl. Ir Sutami No.36, Kec. Jebres, Kota Surakarta, Jawa Tengah, Indonesia 57126
mohjamin@staaf.uns.ac.id

Yudho Taruno Murtanto

Faculty of Law, Universitas Sebelas Maret, Surakarta, Indonesia
Kentingan, Jl. Ir Sutami No.36, Kec. Jebres, Kota Surakarta, Jawa Tengah, Indonesia 57126
yudhotaruno@staff.uns.ac.id

Abstract- Several concepts are presented as an economic model for law, which can be applied to assess how national law is implemented. In this essay, the economic analysis of law is used to analyze the fundamental principles of Indonesian law, which have been completed in accordance with or contrary to their intended goals. Since 2001, foundation has been regarded as the official legal authority in Indonesian rules. This study highlights a principle that is modified in Foundation Law to minimize the cost of use for the general public as benefit recipients. As a law enforcement agency with social, human, and religious goals, foundation must be able to enhance interpersonal relationships or support the lives of others.. If economic study of law is to be believed, Indonesian legal reform implementation has not yet shown a suitable benefit in terms of maximizing social welfare.

Keywords: Foundation; economic theory of law; Legal entity

I. INTRODUCTION

One of the studies in legal studies that applies economic methods to law is economic analysis of law. This study aims to analyze the law with a macroeconomic theory approach. This thinking was initiated by Jeremy Bentham with the theory of utilitarianism, namely the behavior of people to get the greatest possible pleasure. Utilitarianism adherents think that systemic testing of people dealing with the law should be carried out and the results evaluated based on measures of social welfare realized.[1]

The American Realism movement led by Richard Posner as a Supreme Court judge developed Bentham's theory (utilitarianism theory). There are 3 basic things proposed by Posner in his economic analysis, First, the law of demand: second; use value in the form of happiness for consumers, third; high use value will be utilized by the market. Posner emphasizes that law can be a pioneer of human behavior change in the corridor of human law and economics.

Non-judicial aspects must be considered in the implementation of the law as well as its important economic character. The formation of laws requires enormous costs, when viewed from the benefits will be disproportionate. Inefficient laws will lead to injustice funds will have a direct impact on society. [2]

Foundation Law 16/2001 amended through law no. 28/2008 was formed tasked to ensure legal guarantee in the Foundation managerial. The background of Indonesian society is based on mutual cooperation and helping others, so the Foundation is considered to have advantages, namely the appropriate space for organizing social relationships the same as education, health and religion that cannot be found in other forms of business.

The reason the government passed the foundation law was because the practice of establishing foundations in Indonesia was very diverse and at that time did not require legality from the state. The foundation is a business entity that cannot be taxed, so its establishment is very easy. [3]

According with legislation, a foundation is a separate legal entity has separate assets that is intended to achieve social group, religious, and humanitarian goals, it is not a professional association. As a legal entity that is not profit-oriented or non-profit, but has goals that are social, spiritual and charitable in personality.

With the existence of the Foundations Law, within fundamentals, it wants foundation being real and its management is professional, so there are already legal rules that become a guide for those engaged in the foundation and as a guide for the community in general. The public can see how the life of foundations in Indonesia following the Foundation Law's passage.[4]

The dynamics show that after the passing of the Foundation Law, various legal issues arise in its implementation. When viewed from the purpose of the foundation, it should be able to help improve social welfare in Indonesia. Indonesia's poverty rate is still relatively high, with the foundation, the community can get help. It is not only the task of the government to overcome social problems in society. Community involvement through foundations will have a good impact if done in keeping with the goals outlined the foundation law.

In its implementation, problems related to the Foundation can be traced, among others:

- a. Who is the owner of the foundation
- b. Issues related to the purpose of the Foundation
- c. Foundation management issues including the transfer of ownership of Foundation property if the Foundation is dissolved
- d. Issues relating to financial irregularities of the Foundation
- e. Issues of authority and responsibility of Foundation organs

With various problems in the practice of foundations in Indonesia, whether the general principles of the current foundation law are still relevant when viewed from the view of the Economic Analysis of Law will be discussed.

II. LITERATURE REVIEW

Establishing the Foundation's Purpose as a Private Legal Entity

Normally, foundation is instructed by a few persons or even by an individual, both in Indonesian and developing nations, by trying to mend a piece of somebody's heart from a single person or a few self-employed people, with a non-profit or sociocultural reason that does not prioritize profit, and with the support of mentors who are required to guide and care for all of it related to the foundation culture.[5]

One of the material requirements combined to develop a foundation is the fulfillment of a specific purpose. The goal must be culturally or ideological and must not be in opposition to the law, decency, public order, or interests. Profits or other material interests for the establishment could be the emphasis of this goal. Establishing a foundation also with prime purpose of working as a trade corporate concern is forbidden.[5]

Regulation Number 28 of the Year 2004 established the foundation as a private judicial entity with the social, religious, and humanitarian purposes in mind. Providing institutional and rudimentary understanding, foster care for orphan, care homes, home hospitals, polyclinics, and labs are examples of social goals. Establishing places of worship and receiving and redistributing alms are objective religious purposes. Humanitarian goals including helping those affected by natural disasters, supporting the impoverished and homeless, and safeguarding the environment for the future generations.[6]

Foundation Based in Social Justice Values

Of essence, norms and laws free of personal and group interests are the great way to describe the essence of justice in Pancasila. Consequently, Pancasila is ready to offer its own principles on justice in obtaining legal justice for the Indonesian people as it is the embodiment of truth in legal norms. Justice laws from Pancasila are expected to be able to transmit knowledge to the real concept of justice, which derives from our own nation and is not a heritage from other countries, right? In order for justice based on

Pancasila to be accomplished, it must be acknowledged and realized in Indonesian law, which protect the rights and obligations of every Indonesian people through legislation. [7]

As per Pancasila ideology, social justice seeks to create a balanced and peaceful state or society in which all citizens can aspire for a decent living and those in need should be helped. Consequently, in order to enforce social justice, the state must promote the general welfare, or the material and spiritual health of all of its citizens. [8]

The foundation was incorporated as a private limited legal entity with the objective of helping the community, which is social beings by nature, a place to help each other who are less fortunate in diverse ways. Nevertheless, the foundation's actions are not in line with the law. In practice, the foundation reflects social justice principles in line with the ideal goals of the Indonesian people, especially Pancasila.

Economic Analysis of Law Theory

Economic analysis of order details to either an economic or an economic-focused analysis of the law. Legal issues still are based on basic economic theories, reasonings, and considerations. This is to define the fundamental concepts of economic analysis of law, which is a more complete kind of economic analysis of law. In essence, the term "economic analysis of law" refers to a branch of study that examines the application of economics techniques to resolve legal disputes or other legal challenges in societies.[9]

Using economic principles to analysis is a valid method in the field of applied analysis. The concept of utility, advanced by Jeremi Benthem and John Stuart Mill, is emphasized in the utilitarian paradigm that led directly to this philosophy. The field of Economic Analysis of Law began in the common law nation of the United States. Judges are important in the Common Law system in establishing what is ultimately considered to be law.[10]

According to Posner, economics is the study of the ideal decisions wish to make. As this is an element of economics, law is fundamentally a system of rules or sanctions created to control behavior in people. This behavior essentially attempts to promote satisfaction. in need for the purpose of making legislation to be the development of the common welfare. According Cooter and Ulen, there are too many similarities and connections to behavior theories for legal science and economics to be kept apart from one another (scientific theories of behavior). In this respect, economics offers a normative framework for assessing laws and policies, with the purpose of accomplishing societal objectives through the use of law. Economics expects the establishment of a part.[11]

This essay will explore the performance of Indonesia's foundation law enforcement. Another essential point is that societal foundation issues are highly complicated and do not match with the objectives of legal foundations.

III. METHOD

This research is a doctrinal research that uses judicial references as guidelines and court decisions to analyze whether the current foundation law is still relevant to be used in Indonesia, especially in the perspective of economic analysis of law theory.[12].

IV. RESULT AND DISCUSSION

Legal Issues Foundation Law Development as legal Entity

The foundation is a container that legally has the nature of activities not to seek profit. However, in its development, many are used to carry out commercial activities. There are even foundations that actually enjoy the facilities provided by the government because of its privilege. Its existence is motivated by the need for an association that is legally recognized by state law whose purpose is to help the life of the community around the foundation.

The foundation law's existence offers a basic for regulation :

1. regulations regarding foundation organs'

2. wealth management
3. Voluntary foundation management

Legal recognition of foundations, because the position of foundations is as a legal subject. Legal subjects are those who according to law have legal authority and have fulfilled the following requirements:

1. It's a gathering of people
2. Can carry out legal actions in legal relationships
3. Have your own wealth
4. Have a manager
5. Have meaning and purpose
6. Has legal standing
7. Have rights and obligations
8. Foundations can be sued and sued in court

Several important notes regarding the provisions in the foundation law, in their implementation they often give rise to different interpretations which have the potential to cause problems in their implementation.

1. The law on the Foundation still does not clearly regulate who actually owns the Foundation. Questioning the ownership of the Foundation, it must be interpreted from several articles even though these articles do not clearly regulate its ownership. The foundation cannot be owned by the founders because the founders have separated part of their wealth to belong to the Foundation's legal organization. The provisions in the Foundation Law have regulated the necessity of "separated wealth". The divided capital is meant to accomplish certain objectives in the domains of spiritual, social, and charitable efforts. Thus it can be said that the Foundation is essentially (i) wealth with the standing of a business which (ii) the reason for its existence is for a specific purpose.
2. Noting the nature of the Foundation above, it is appropriate that the Foundation Law emphasizes that the Foundation can create by designating a portion of their property as the foundation's founding capital. Likewise, the management is also not the owner because he is only appointed to manage the Foundation. The Foundation does not belong to the Supervisors, Management and or Trustees revealed, among others, from the Foundation Law's provisions. The position of the Trustees, administrators and supervisors is only as an organ representing the foundation because the Foundation is basically a "legal creation person" (artificial person) that can only perform legal acts with human mediation. There is a trusting relationship between the foundation and the organ that gives birth to a relationship of obligation for the organ and each of its members. The relationship of trust or "fiduciary relationship" between the Foundation and its organs means that the existence of organs is only to further the goals and interests of the Foundation.

Property is the main element that is separated from the property of the founders. The separation of assets is a legal act of the founder to dispose of his wealth. This has implications for his heirs. Because then the wealth becomes a legal entity, then thus no person or entity has the status as the owner of the Foundation.[13]

The legal consequences will also be the same when the Foundation is established by legal entities both private and public. If the establishment is carried out by a public legal entity, it must obtain approval from the parliament, the wealth originating from the state that is included in the Foundation will become the Foundation's assets.[14]

3. Paragraph (2) of Article 3 the Foundation Law is often the basis for thinking that foundations can establish business entities. With restrictions as stated in Foundation Law article 7, namely that the business activities that can be established are commercial organization whose operations align with the foundation's goals and purposes, while to make investments in various forms of business must be prospective with the provision that the entire investment is at most 25% of all existing assets but because the arrangement of the articles is far apart, it is often not readable requirements. In the Foundation Law's interpretation of article 8, the business activities are broad in scope, such as consumer protection, health, education, art.[13]

The field is related to humanity. The foundation in which it runs a business has a position:

- a. The Foundation has the role of founder

- b. The foundation acts as an investor in other business entities
- 4. According to article 6 of the Law, the foundation is obliged to pay all costs or fees incurred by organs of the foundation to be able to carry out the obligations of the foundation. This article must be given an explanation, whether what is meant by the costs incurred by the foundation's organs in order to carry out the foundation's duties includes when the management is the executor of activities or daily management? Because he is entitled to receive compensation or contra achievement. The provisions of this article of the Foundation Law state that if a Foundation organ performs work for the benefit of the foundation, the Foundation must pay the costs of carrying out the work.[15]
- 5. Section 8 of the Foundation Law does not provide an explanation of what is meant by social and humanitarian purposes, but provides provisions regarding business activities that can be carried out by the Foundation. The problem is who decides the purpose, objectives in line with the activities of the foundation. This is a preventive effort so that the foundation's activities do not deviate or violate the law. Activities in the social and humanitarian spheres are indistinguishable and those who know are the founders in accordance with the vision and mission of the foundation.[16]

Implementation of Law Foundations from the perspective of Economic Analysis of Law theory

Economic principles are used as a rational choice for legal analysis. Jeremy Bentham with the theory of utilitarianism or the principle of expediency underlies the theory of economic analysis of law. When the purpose of law is emphasized on justice and legal certainty, the principle of expediency mediates these two contradictory ideas.

The benefits of a law in the form of peace and tranquility for the community can be achieved through the law used as a tool. Economic / commercial activities are always based on legal acts bound by agreements that contain agreements, the purpose of the law[17] in the form of expediency is very necessary to be applied.

This analysis of expediency will assess the efficiency of decision-making and public policy based on the analysis of prices and profits obtained. The analysis requires that the implementation of activities related to economic law must contain benefits aimed at every business actor in a fair and balanced manner. Because considering that the law must bring benefits to the public as much as possible.

The theory of economic analysis of law becomes a bridge of thought to resolve an issue in the legal sector by describing the understanding as conveyed by and different legal opinions to create a satisfaction (satisfaction) and increase a sense of happiness (maximization of happiness). Economic considerations, but still prioritize the element of justice as one of legal objectives that conducting an analysis. So that based on the results of this thought will create a justice that becomes an economic standard based on value, utility, and efficiency which is also based on human rationality.[18]

According to Posner, regulations in the economic sector must meet the following criteria in providing benefits: [18]

1. Regulations will function if they are implemented in economic activities that produce benefits in welfare.
2. The regulations implemented produce both monetary and non-monetary benefits.

In the era of economic globalization, the role of law is very important so that the economy can run well. From an economic point of view, the existence of law must be progressive, effective, efficient and responsive to the times. An economic analysis approach is needed to answer whether the presence of laws concerning the economy is in accordance with its objectives.

Foundations are established to facilitate the collection of a number of people who are organized which in terms of activities or activities are non-profit social. Therefore, the purpose of the foundation is not commercial, but to help or improve the lives of others.

Presidential Regulation No. 13/2013 on the Implementation of the Principle of Recognizing Beneficial Owners of Corporations, the beneficiaries are individuals who meet the criteria in section 5 (1):

- a. The foundation's articles of association state that the initial wealth must be more than 25%.
- b. The beneficial owner has full authority to appoint and dismiss foundation organs

- c. Has a strong influence to control the foundation, without having to get prior authorization from anyone.
- d. Enjoy directly what has been produced by the foundation
- e. He is the direct owner of the funds deposited, as well as those included to the foundation

The above provisions are added to the criteria in paragraph 2:

Individuals who meet the criteria in clause 1 letter c, letter d and letter e are individuals who do not meet the criteria in clause 1 point a and point b.

The universal principles of foundations are reflected in Law Number 16 of 2001, namely:

- a. Principles of Foundation Independence as a Legal Entity
This independence is shown on the wealth separated to accomplish specific objectives in religious, social and humanitarian domains that do not have participants like cooperatives. The consequence of the law is that the wealth of the Foundation is apart from the founders own fortunes. In addition, the Foundation is an independent legal subject that does not depend on the existence of Foundation organs. Foundation organs are not owners of the Foundation but as managers of the Foundation's survival. Foundation organs are fully in responsible to manage wealth to fulfill the goals and objectives .
- b. The principle of openness in all activities carried out by the foundation.
Article 52 paragraph 2 the foundation is obliged to publish a summary of financial statements in a daily Indonesian language newspaper so that it can be known by the public.
The idea of being transparent with the public about what has been done by the foundation. Fulfillment of the board's obligation to make an annual report, make a balance sheet that has been audited professionally..
- c. Principle of accountability
The foundation uses its annual report as a means of reporting to the public, contributors and third parties. This is one way that the accountability principle is applied to the foundation's management. This principle also shows management accountability which is the most important thing in the foundation's managerial credibility.
- d. Nonprofit Principles
Foundations are also organizations that do not create profits for both founders and managers. What is more appropriate is the benefit with the establishment of the foundation either social or in accordance with the objectives. As a non-profit organization, it does not mean that it cannot benefit at all. The profits obtained are only used to cover the costs incurred from the foundation's operational activities

Indonesia regulates community organizations in Law Number 17 of 2013. Article 1 (1) Community Organizations are those that the community forms based on common needs, wants, interest, activities and objectives to engage in development in order to accomplish goals. A country based on Pancasila.

If related to foundations, then foundations are the most ideal form of legal entity to carry out development roles and functions. The Foundation has independence, is run professionally, democratically and meets the principles of openness and accountability. [9]

Legal certainty is needed to anticipate and calculate risks. Legal certainty will support the resilience of a country's economy.[10] The government must be responsible for making the law authoritative by responding to and following up on the opinions and desires of economic experts. Law is expected to play its role as a guiding, guiding factor and creating a conducive climate in the economic sector.

V. CONCLUSION

The foundation's creation maybe acknowledged by the public as a private judicial entity with spiritual, social and philanthropic goals. Foundations can aid the community and government with provisions as defined by Law Number 16 of 2001, not just for seeking non-profit or profit. Running the Foundation in line with its goals and purposes is an endeavor to provide the community as a whole legal certainty and particularly to the beneficiaries. Legal clarity will also have an impact on the Indonesian economy's resiliency.

VI. REFERENCES

- [1] F. Fitriah, A. Faisal, and W. Endah, “Pengaruh Metode Economic Analysis of Law dalam Perkembangan Kebijakan Pencegahan Tindak Pidana Pencucian Uang,” *Halu Oleo Law Review*, vol. 6, no. 1, pp. 82–92, 2022.
- [2] S. W. Jatmikowati, M. Isnaeni, E. Prasetyawati, and N. Krisnadi, “Reconstruction of Regulations Regarding Foundation in Indonesia Based on Legal Guarantee Valuens,” *International Journal of Multicultural and Multireligious Understanding*, vol. 9, no. 4, pp. 342–348, 2022.
- [3] S. Margono, *Badan Hukum Yayasan*. Bandung: Pustaka Reka Cipta, 2015.
- [4] G. Suparmono, *Hukum Yayasan*. Bandung: Rineka Cipta, 2008.
- [5] B. Anwar, “Kedudukan Yayasan di Indonesia: Eksistensi, Tujuan dan Tanggung Jawab Yayasan,” *Kencana. Jakarta*, 2010.
- [6] G. E. A. Sambodeside, “KAJIAN HUKUM YAYASAN SEBAGAI BADAN HUKUM PRIVATE MENURUT UNDANG-UNDANG NOMOR 28 TAHUN 2004 TENTANG YAYASAN,” *LEX PRIVATUM*, vol. 6, no. 2, 2018.
- [7] F. I. Febriansyah, “Keadilan Berdasarkan Pancasila Sebagai Dasar Filosofis Dan Ideologis Bangsa,” *DiH: Jurnal Ilmu Hukum*, vol. 13, no. 25, 2017, doi: 10.30996/dih.v13i25.1545.
- [8] Surajiyo, “Keadilan dalam sistem hukum pancasila,” *IKRA-ITH HUMANIORA : Jurnal Sosial dan Humaniora*, vol. 2, no. 3, 2018.
- [9] A. Prasetya, Y. E. Sigalingging, and A. P. A. Santoso, “PERAN HUKUM DALAM PEMBANGUNAN DENGAN PENDEKATAN ECONOMIC ANALYSIS OF LAW,” *JISIP (Jurnal Ilmu Sosial dan Pendidikan)*, vol. 7, no. 1, 2023, doi: 10.58258/jisip.v7i1.4126.
- [10] V. Sereida, “FROM THE RULE OF LAW TO ECONOMIC EFFICIENCY AND INCREASING LEVEL OF LIVING: ECONOMIC AND LEGAL ANALYSIS (THE THEORETICAL ASPECT),” *Science and Innovation*, vol. 18, no. 6, 2022, doi: 10.15407/scine18.06.046.
- [11] R. Nordin, A. Waris, and M. A. Witbrodt, “Law and economics: A new dimension in market regulation,” *International Business Management*, vol. 6, no. 2, 2012, doi: 10.3923/ibm.2012.158.167.
- [12] P. M. Marzuki, *Penelitian Hukum*. Jakarta: Kencana, 2019.
- [13] Y. S. Simamora, “KARAKTERISTIK, PENGELOLAAN DAN PEMERIKSAAN BADAN HUKUM YAYASAN DI INDONESIA,” *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional*, vol. 1, no. 2, 2012, doi: 10.33331/rechtsvinding.v1i2.95.
- [14] S. Sunarmi, “Legal Standing Yayasan sebagai Badan Hukum,” *Talenta Conference Series: Local Wisdom, Social, and Arts (LWSA)*, vol. 1, no. 1, 2018, doi: 10.32734/lwsa.v1i1.174.
- [15] Robi Krisna, “Tinjauan Hukum Pendirian Yayasan Sebagai Badan Hukum Ditinjau Dari Undang-Undang Nomor 28 Tahun 2004,” *Jurnal sosial dan ekonomi*, vol. 2, no. 1, 2021.
- [16] Murni and A. Gani, “Tanggung Jawab Hukum Kepada Pengurus Yayasan Terhadap Failednya,” *Pionir LPPM Universitas Asahan*, vol. 6, no. 1, 2020.
- [17] S. Fajar, “Efisiensi Ekonomi Sebagai Remedy Hukum,” *DIH, Jurnal Ilmu Hukum*, vol. 9, no. 18, pp. 85–92, 2013.
- [18] F. Fajar, *Economic Analysis Of Law Seri Analisis Keekonomian tentang Hukum*. Jakarta: Kencana, 12AD.

Open Access This chapter is licensed under the terms of the Creative Commons Attribution-NonCommercial 4.0 International License (<http://creativecommons.org/licenses/by-nc/4.0/>), which permits any noncommercial use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

