



**PUSAT ANALISA KEBIJAKAN
HUKUM DAN EKONOMI**

*CENTER FOR ECONOMIC
ANALYSIS OF LAW AND POLICY*

UNITY BACK TO THE ROOTS

Oleh:

Dr. Maria G.S. Soetopo, B.Sc., M.B.A.

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“For the rational study of law, the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”¹

(Associate Justice of the U.S. Supreme Court, Oliver Wendell Holmes, 1897)

INTRODUCTION

Indonesia: famously known as an archipelago comprised of more than 17,000 islands. It is the fourth most populous country in the world with over 240 million people. Indonesia shares borders with Papua New Guinea, Timor Leste, and Malaysia; and it is a member of ASEAN and the G-20 major economies.

Not many people know that the Indonesian archipelago was a significant trading region for China and India dating back to the 7th Century. Vast in natural resources, Indonesia was able to attract foreign economies. With a history of more than 350 years under Dutch colonial rule, Indonesia was able to win its independence after World War II in 1945.

Despite the hundreds of diverse ethnic groups, languages, and religions, Indonesia was able to overcome its diversity through its motto of "Bhinneka Tunggal Ika," meaning "Unity in Diversity" under the nation's philosophy of "Pancasila," originating from an old Javanese word "panca" meaning five, and "sila" meaning principles. With this one philosophical word, Indonesia operates as a nation believing in the divinity of God; a just and civilized humanity; the unity of the country; democracy guided by representatives; and social justice for all of the people of Indonesia.²

The nation's ideology seemed somewhat idealistic considering the diverse members across the nation upholding their own cultures, beliefs, and

¹ Oliver Wendell Holmes, Jr., *The Path of The Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.*, Edited by Steven J. Burton, Cambridge University Press, 2000, p. 278-284

² http://en.wikipedia.org/wiki/Pancasila_politics

languages. And yet, this motto became a realistic groundwork for unity to establish a nation that has become the 16th largest economy in the world.³

Just as it was possible for the hundreds of communities in Indonesia to unite, it is also logical to believe that the different academic sciences in Indonesia can also unite and continue the dream of its founding fathers to maximize the welfare of Indonesia's society through sustained economic development.

Considering Indonesia's historical ability to unite, one would hope that it is not only possible to blend two major academic sciences—law and economics—but also apply and implement this blend for the benefit of Indonesian society.

In reference to the above, the blend of "law and economics" is elaborated in this paper as a means of reaching the same goal of Indonesia's 1945 Constitution: social welfare maximization.

I. BACKGROUND

"Law and economics" basically refers to the application of microeconomic analysis to legal problems. Dating back to the 1500s, this application has been a part of the non neo-classical approach to "law and economics" in Germany. This approach has been a part of the German Historical School of Economics, and has encompassed topics focussing on governance and public policy (*Staatswissenschaften*). Thus, non-neoclassical approaches have been used for the analysis of legal, administrative, and governance issues.

According to McCoubrey and White, an economic approach to law is an improved model of the "father of utilitarianism", Jeremy Bentham. Bentham's utilitarianism was described as a *telecific calculus*, referring to the concept of "the greatest happiness to the greatest number," which has a similar meaning to the common good.⁴

According to political philosopher, Tim Mulgan, the basic ideas of utilitarianism can also be found in the works of the "father of economics," Adam Smith, on society welfare. In relation to formulating laws, the ideology of utilitarianism is used as the basis to maximize happiness of the people.⁵

³ <http://en.wikipedia.org/wiki/Indonesia>

⁴ Hilaire McCoubrey, *Legal Theory*, (Hampshire and New York: Palgrave Macmillan), p. 276-277

⁵ Tim Mulgan, *Understanding Utilitarianism*, (Stocksfield: Acumen, 2007), p. 1

To integrate a complete ideology of utilitarianism, Bentham followed the philosophy of Adam Smith regarding a free market and believed that people should have the freedom to decide for themselves regarding what to buy and what to produce. According to Alain Marciano, Adam Smith and Jeremy Bentham were both founders of political economic philosophy. The two philosophers came from two different sciences, but they had one similar goal: welfare maximization of society.⁶

Throughout history, it has been shown that legal issues have economic dimensions.⁷ Conducting an analysis with an economic approach most often involves assumptions. One such assumption is that each individual is a rational maximizer of his/her satisfactions. The economic assumption is to believe that the rationality and motivation of human beings lead to human behavior. Because people are rationally self-interested beings, their actions are reflections of what they value.

After 400 years of law and economics journey within European countries, the concept reached the U.S. in 1949. The year marked the time when attempts were made to analyze law with an economic theory. It started at the University of Chicago under a research program on antitrust regulations called the “Antitrust Project”. The purpose of this research project was to understand how legal rules influence the economy.⁸

In 1960, the *Journal of Law and Economics* published an article entitled “The Problem of the Social Cost” by Ronald Coase from the University of Chicago. Coase was a pioneer in the study of law and economics, and his article was about laws and regulations, and how they affected the economy.⁹

In his publication, *Economic Analysis of Law*, Richard Posner basically made the terms “law and economics” interchangeable with the term “economic analysis of law” (EAL). The two terms are the same concept. Posner defined economics as “the science of human choice in a world in which resources are limited in relation to human wants, explores and tests the implications of the assumption that man is a rational maximizer of his ends in life, his satisfactions,

⁶ *Law and Economics: A Reader*, Ed. Alain Marciano, (London and New York: Routledge, 2009), p. viii

⁷ *Ibid.*, p. 1

⁸ *Law and Economics: A Reader*, Ed. Alain Marciano, (London and New York: Routledge, 2009), p. 3

⁹ *Ibid.*, p. 4

and his self-interests.”¹⁰ Many people may not realize that the economic system consists of the very same people who are found in the legal, social, and political system. Therefore, their behaviors will be a general reflection of the entire system they live in.

There have been numerous prominent figures in "law and economics," such as the U.S. Court of Appeals for the Second Circuit judges, Learned Hand, Andrei Shleifer, and Guido Calabresi; the U.S. Court of Appeals for the Seventh Circuit judges, Frank Easterbrook and Richard Posner; Ronald Coase; Gary Becker; and scholars such as Robert Cooter, Henry Manne, William Landes, and A. Mitchell Polinsky.

EAL also developed in various directions from the application of game theory to legal problems. Other developments have been the incorporation of behavioral economics, and the increasing use of statistical and econometric models.

In comparison to other sciences, the study of economics has one advantage in which economists use as a tool called the "measuring rod of money."¹¹ This tool provides the ability to make an analysis with precision. As money is an important determinant of human behavior in modern societies, an analysis through money has considerable explanatory power, and the data is usually available and accessible. This makes it easier to examine a hypothesis.¹²

Using an economic method to analyze law is to explore how changes in the law effect the allocation and distribution of wealth in society. In turn, the analysis tries to find the influence of the economic system on law.¹³

In a free-market oriented economy, legal decision making has become vital. EAL has provided the foundation for a market approach to the legal decision-making process. Richard Posner stated,

“The economic science as a selected science that was made by rational actors who had self-interests in a world where resources are limited; the modern microeconomic analysis is

¹⁰ Richard A. Posner, *Economic Analysis of Law*, (New York: Wolters Kluwer & Business, Aspen Publisher, 2011), p. 3

¹¹ *Law and Economics: A Reader*, Ed Alain Marciano, *op.cit.*, p. 12

¹² *Ibid.*, p. 12-13

¹³ *Ibid.*, p. 18

that rational actors will try to maximize their wealth from the limited availability of resources.”¹⁴

Based on the assumption that a rational individual will maximize his own satisfaction, this assumption will be applied toward economic science into the field of law.

Posner further mentioned that in philosophy, the word *rationality* is the exercise of reason. Rationality is how people reach a conclusion efficiently and spontaneously. The rational decision is not just reasoned, but it is also considered optimal for achieving a goal or solving a problem.¹⁵

As self-interests exist in each human being, an effective legal system is required. The effectiveness refers to an efficient legal system benefitting both market participants and the economy as a whole. This statement is justified because the principles of law have a direct correlation with the economic value of moral principles; such as trustworthiness, consideration for others, charity, neighborliness, hard work, and avoidance of negligence and coercion.¹⁶

The basis of Posner's EAL is his *efficiency theory* on the allocation of resources. He defined *efficiency* as "allocation of resources in which value is maximized." He stated that, "many of the doctrines and institutions of the legal system are best understood and explained as efforts to promote the efficient allocations of resources." Based on this statement, Posner developed his ideology of efficiency to what he referred to as the *wealth maximization theory of justice*, as he stated, "the most common meaning of justice is efficiency."¹⁷ The ultimate direct moral goal is wealth maximization.¹⁸ Posner described that wealth maximization is an *ethic of productivity and social cooperation*.¹⁹ The term *social cooperation* refers to the goal for wealth maximization which can only be

¹⁴ Richard A. Posner, *Economic Analysis of Law*, (New York: Wolters Kluwer & Business, Aspen Publisher, 2011), p. 44

¹⁵ Richard A. Posner, *Economic Analysis of Law*, *op.cit.*, p. 4

¹⁶ *Ibid*, p. 339

¹⁷ Nicholas Mercuro and Steven G. Medema, *Economics and The Law from Posner to Post-Modernism*, *op.cit.*, p. 59-60

¹⁸ Richard A. Posner, *The Problems of Jurisprudence*, (Cambridge, Massachusetts and London: Harvard University Press, 1990), p. 382

¹⁹ *Ibid*, p. 391

achieved through mutual efforts by society members and government officials chosen to carry out public service duties.²⁰

When Posner elaborated EAL in 1970, a mathematical formulation was found. The formulation used a prediction or assumption to guide how people will respond to legal rules. According to Posner, “economics has somewhat replaced justice as the dominant basis for the critique of law.”²¹ This is because EAL offers a methodology and terminologies which justice lacked for many years. The EAL methodology provides actual legal choices. The most important principle of EAL is to ask the following questions: (1) how much it will cost?; (2) who pays?; and (3) who ought to decide both questions?

As a result, law in the 21st Century has not only been cultivated into an independent science, but has developed into a multi-dimensional science in various fields; such as history, philosophy, psychology, sociology, politics, religion, and most of all, economics.²²

II. LEGISLATION AND ECONOMIC ANALYSIS

"A comprehensive economic analysis of law is required during the legislative process because legislation is based on the fundamental assumption that legislators are rational maximizers of their satisfactions, just like anyone else in society." (Richard Posner)²³

It would be ignorant for a society to believe that legislators are all objective when formulating laws. This perception leads to a conclusion that no one is purely motivated by public interests. Therefore, the formulation of laws must be taken into account seriously, objectively, and rationally. This process can only take place by using various techniques of EAL; such as Cost Benefit Analysis (CBA), Cost Effective Analysis (CEA), Sensitivity Analysis (SA), Risk Risk Analysis (RRA), Regulatory Impact Assessment (RIA), Cost Analysis (CA),

²⁰ Nicholas Mercuro and Steven G. Medema, *Economics and The Law from Posner to Post-Modernism*, *op.cit.*, p. 58

²¹ Richard A. Posner, *Ibid.*, p. 425

²² Nicholas Mercuro and Steven G. Medema, *Economics and The Law from Posner to Post-Modernism*, *op.cit.*, p. 12-13

²³ Richard A. Posner, *Ibid.*, p. 12

Cost Utility Analysis (CUA), and many other techniques dependent upon different issues or topics. The various techniques are illustrated as *Attachment A*.

CBA applies rules and regulations, and reveals the estimated risks. Thus, legal challenges and arguments are easily pointed out when resting on *quantitative* considerations, rather than only on *qualitative* considerations.²⁴ In order to analyze the society's wealth maximization as the objective of legislation, an effective method has to be applied within concrete and measured methodologies.²⁵

CBA's ultimate objective is evaluating the law by referring to an external method: the law's costs and benefits. As an analytical tool, CBA covers intensive and comprehensive matters while searching for variables to indicate economic efficiency. CBA quantifies the objectives of the law, and its ultimate goal is *maximization of benefits and minimization of costs*. Thus, the underlying ideology of CBA is the measure of quantification. It is a decisional tool that has been routinely applied in the political process by the executive, legislative, and judicial branches.

Mathew Adler and Eric Posner provided a technical definition of *maximization* and stated, "it captures all that needs to be captured for being able to choose systematically and cogently through pairwise comparisons."²⁶ The virtue of CBA is that it enables the analyst or decision maker to look at the situation globally. CBA also has the capacity to provide hints at the consequences of the actions of decision makers and evaluate a government action by comparing the "future" project with the "status quo" project.

The legislation drafting process in Indonesia actually involves a straightforward procedure. The proposed legislation can originate from either the government, or Dewan Perwakilan Rakyat (DPR) or the House of Representatives. The main issue in the legislation drafting procedure is the absence of an economic analysis for the proposed legislation. The drafting of legislation has been based primarily on three disciplinary sciences of philosophy, sociology, and judiciary.

²⁴ Richard A. Posner, *Economic Analysis of Law*, *op.cit.*, p. 512

²⁵ *Ibid.*, p.512

²⁶ Matthew D. Adler and Eric A. Posner, *Cost-Benefit Analysis: Legal, Economic, and Philosophical Perspectives*, (Chicago and London: The University of Chicago Press, 2001), p. 104

Although numerous legislations have been enacted since Indonesia's 1945 Constitution, a concrete and measured analytical tool has not been applied in the legislation making process. As a result, estimated consequences and projected impacts of the legislation are not revealed. *Illustrations B and C* show that an application of EAL can be implemented during specific phases of the legislation making process. Analyzing legislations or policies is an inseparable task of analyzing the impacts of such legislations or policies. Therefore, a decision-making tool, that has the capacity to provide concrete and measured analysis, is critically vital.

III. GLOBALIZATION AND ADMINISTRATIVE LAW

*"Law is not basically what is dedicated by political authority, or issued by the state...law is the mathematics of freedom."*²⁷
(Spinoza, 17th Century philosopher)

According to Jerry Evensky, a market resembles a *game*. In this game, all participants ask two common questions: "What will the rules of our game be?" and "What should my strategy be?" The participants ask questions about the *rules* because rules of the game define the *constitution* of the game. Any breach of the rules or constitution will enable self-interested participants to focus on *rule manipulation*. Such manipulation would lead to a *breakdown* of the entire game.²⁸

According to Robert W. Kolb, "the global financial market is increasingly interlinked, resulting in an extensively interconnected system."²⁹ *Globalization* is "the unintended result of the actions of billions of individuals from all parts of the world over the course of time."³⁰ Various market instruments are available for anyone in any nation to use. Other than money, there are instant electronic links with global guarantees and cross-border capital flows across nations. Through technology, one person is able to move funds to any part of the

²⁷ Tom Bingham, *op.cit.*, p. 67

²⁸ Jerry Evensky, *Adam Smith's Moral Philosophy: A Historical and Contemporary Perspective on Markets, Law, Ethics, and Culture*, *op.cit.*, p. 117-119

²⁹ *Lessons from the Financial Crisis: Causes, Consequences and Our Economic Future*, Ed. Robert W. Kolb, (New Jersey: John Wiley & Sons, Inc., 2011), p. 331

³⁰ *Bailouts: Public Money, Private Profit*, Ed. Robert E. Wright, (New York: Columbia University Press, 2010), p. 28

world with or without any human contact. Capital moves across the globe not by days, not by minutes, not even by seconds, but instantaneously.

According to Edmund Conway, there are five elements contributing to globalization:³¹

1. *Free Trade*: The lifting of major barriers and tariffs on imports and exports;
2. *Outsourcing*: Cheaper production of goods and services at overseas locations;
3. *Containerization*: The shipment of goods at cheaper costs and improved time;
4. *Liberalization*: Markets worldwide opening up with free flows of capital;
5. *Legal Harmonization*: Laws aligning among countries across the world.

Although Richard Posner, Jerry Evensky, and many other scholars believe that capitalism is the best economic system, capitalism is not a perfect concept. The imperfections are not the result of capitalism, but of the different types of individuals existing in society. The problems were actually about asymmetric information, not about capitalism.³²

Posner stated that, “capitalism is actually a system of a regulated market.” Without government regulations, a capitalistic economy would be unable to operate. The view was simple: in the absence of legal order, markets will not grow, and economies will fail. Therefore, the rule of law is inevitable with sustained growth. In fact, law must be built into the economic system prior to any economic development. This statement refers back to the aforementioned analogy between the terms *market* and *game*, through the two famous questions by market participants: “What are the rules of the game?” and “What should my strategy be?” Without the existence of the rule of law, no system is workable.³³

Global financial market players comprise various types of institutions located in all areas of the world. If financial panic is stimulated, a contagion

³¹ *Ibid.*, page 163-164

³² *Bailouts: Public Money, Private Profit*, Ed. Robert E. Wright, (New York: Columbia University Press, 2010), p. 27-29

³³ *What Caused The Financial Crisis*, Ed. Jeffrey Friedman, (Philadelphia: University of Pennsylvania Press: 2011), p. 293-294

usually reverberates into a currency crisis from one country to another. According to Paul Krugman, contagion effects could trigger a crisis in places with unexplained fundamental reasons.³⁴

Robert Kolb also mentioned that a systemic risk can occur due to a spillover effect from an initial shock. Direct causes may not be involved, and may not be the triggering factor.³⁵ Failures of large financial or non-financial firms can generate severe losses. Uncertainty is then created in other sectors that are potentially subject to the same shock. Schinasi described systemic risk as,³⁶

"The risk that a certain event will trigger a loss of economic value or confidence in the financial system that potentially result to significant harmful effects on the real economy. The danger of systemic risk events is that they are usually sudden and unexpected. The effects of systemic events include disruptions of the payment system credit flows, and destruction of asset values. Economic shocks usually follow and can also lead to negative externalities with severe disruptions in the entire financial system."

Systemic risk normally associates itself with a contagious loss of confidence spreading to all parts of the financial system beyond the original location of the shock.³⁷ One of the most destructive causes of systemic risk is market failure. Market participants believe that a market failure can cause a meltdown of the entire financial market system. When market failures occur, regulatory framework structures are also at fault.³⁸ Other elements causing systemic risk include when innovative financial products are traded in the global investment community. These innovative products have the ability to cause a significant increase in the number of institutional and individual investors participating in the global financial market.³⁹ As a result, the financial market will be increasingly prone to systemic risk problems. Therefore, systemic disturbances can occur or originate throughout the market linkages.

³⁴ *Currency Crisis*, Ed. Paul Krugman, (Chicago and London: The University of Chicago Press, 2000), p. 47-50

³⁵ *Lessons from the Financial Crisis: Causes, Consequences and Our Economic Future*, Ed. Robert W. Kold, (New Jersey: John Wiley & Sons, Inc., 2011), p. 463-464

³⁶ *Ibid.*, p. 339

³⁷ *Ibid.*

³⁸ Ed. Robert W. Kolb, *op.cit.*, p. 339-340

³⁹ *Ibid.*, p. 392

Financial crises date back to the early 1600s. Those early crises involved banking collapses, stock market collapses, and deep economic crises. Between 1870-2010, there was a total of 79 major banking crises in 14 developed countries; such as U.S., Canada, Australia, Denmark, France, Germany, Italy, Japan, the Netherlands, Norway, Spain, Sweden, Switzerland, and U.K. Out of the 79 major crises, there were five considered to be global financial crises as follows:⁴⁰ 1) the crash of 1873; 2) Baring-related crisis in the early 1890s; 3) the U.S. panic in 1907; 4) the Great Depression in the 1930s; and 5) the financial crisis of 2007.⁴¹

According to Robert E. Wright, there were also crises tied to real-estate and banking that occurred in Finland, France, Japan, Malaysia, Norway, Spain, Sweden, U.S., and Venezuela. During the 1980s, real estate losses were associated with banking problems in Argentina, Chile, Columbia, Ghana, Malaysia, Spain, U.S., and Yugoslavia. All of the mentioned crises had different causes from different sectors at different times across the globe.

The history of financial crisis corresponds to the "law and economics movement" in the world. The illustration is under Attachment D. The correlation shows there is a definite connection between rule making and the economy.

One of the purposes of jurisprudence is to analyze law and to identify the significance of the law for the society. It seeks the meaning of a particular rule and how it relates to law and the entire legal system. A particular law can trigger a domino effect to an entire economy within a modern State.

The development and evolution of institutions will have an impact to the performance of an economic system. As John Commons stated,

*"Economy influences law as the global economic system brings forth new challenges and complexities which require a legal change that has the ability to facilitate the evolution of the global market."*⁴²

⁴⁰ *Ibid.*, p. 12

⁴¹ *Ibid.*, p. 4

⁴² Nicholas Mercuro and Steven G. Medema, *Economics and The Law from Posner to Post-Modernism*, (New Jersey and West Sussex: Princeton University Press, 1997), p. 101-102

The perceptions of Commons statements describe the basic ideology of EAL. Any type of legal change should be the product of how law influences the economy, and how economy influences the law.

The liberalization movement in the early 1980s resulted in massive economic growth, but also economic decline. Because of the frequencies of financial crises occurring in major developed and emerging economies, the disciplines of Administrative Law and Economics have experienced newfound challenges in adjusting to the Globalization era.

According to Giulio Napolitano in his publication, *The Role of the State in (and after) the Financial Crisis: New Challenges for Administrative Law*, he stated that, “the State has a new economic role that will have a new political accountability model.”⁴³ The result was the rise of the biggest system of Administrative Law in history. The U.S. has shown its expansion of the Regulatory State with an economic and social dimension. In the European countries, the government began nationalizing banks and establishing economic programs in various financial markets. The financial crisis basically gave the legitimacy, command, and control system to the public. Institutions were not dismantled. On the contrary, the State rescued and helped the institutions because they were originally created by the society.⁴⁴

In the age of globalization, Administrative Law adjusted itself and focussed on economic progressiveness. In the last few decades, the State passed acts and statutes to stabilize financial institutions to restore confidence in the financial market. Measures were implemented in order to address the liquidity crisis of financial intermediaries, to create a better institutional infrastructure, and to guarantee the accountability of the State during bailout operations.⁴⁵ Thus, the Administrative Law has considered the significance of discretionary authority within the government and independent regulatory institutions. Furthermore, Elliott stated,⁴⁶

⁴³ Giulio Napolitano, *The Role of The State in (And After) The Financial Crisis: New Challenges for Administrative Law*, Yale Law School: May 2009, p. 2

⁴⁴ Giulio Napolitano, *The Role of The State in (And After) The Financial Crisis: New Challenges for Administrative Law*, Yale Law School: May 2009, p. 2

⁴⁵ *Ibid.*, p. 4

⁴⁶ Mark Elliott, *Administrative Law: Text and Materials*, Ed. Jack Beatson and Martin Matthews, 4th ed., (New York: Oxford University Press, 2011), p. 111

“Discretionary power is the inevitable concomitant of an interventionist state; such power is one of the principal instruments by which such intervention occurs. This follows because it is clearly impossible for Parliament to make legislative provision for each and every situation which may arise in the course of the ongoing implementation of policy.”

Elliott also mentioned, “while legislation may set out the general policy and establish the central principles and criteria by reference to which the policy is to be operated, the existence of discretion is inevitable.” In public policies, specifically in the financial market and economic policies, decisions must be taken based on individual cases.⁴⁷

The role of the State has expanded over the last hundred years. Thus, the use of discretionary power has exploded through various forms.

The principle of Administrative Law has proven that it is not an immovable rule. The Parliament intends the power to be exercised only by the decision maker specified in the legislation. Elliott stressed the fact that once discretion is exercised, the decision is justifiably legitimate. If the Parliament has specified that a particular agency has the right to make the decision, then the will of the Parliament must prevail. This is based on the ideology that *Parliament is sovereign*. The policies of the decision maker should be legitimate because the decision makers, who were designated in the legislation, were chosen because of its institutional ability and expertise. The objective of discretionary power is that the decision maker is given full authority to respond to a particular situation.⁴⁸

According to Bingham, “when the legislative has enacted statutory regulations to a specific officer or an institution to make a particular decision, the Parliament does not empower anyone else.”⁴⁹ The global financial crisis entails complexities that have evolved in the financial market. The government is faced with daily challenges of keeping up with the rapid changes of the financial market. Sudden developments can occur at anytime, anywhere from any sector, or any country of the global market.

⁴⁷ Mark Elliott, *Administrative Law: Text and Materials*, Ed. Jack Beatson and Martin Matthews, 4th ed., (New York: Oxford University Press, 2011), p. 111

⁴⁸ *Ibid.*, p. 167-168

⁴⁹ Tom Bingham, *The Rule of Law*, (London: Penguin Books, 2010), p. 60-61

In addition, economic emergencies do not only change the role of the State and its relationship with the markets, but also the organization of the State and the constitutional justification of the three branches of government. Due to the nature of economy and financial market, sudden choices and decisions have to be made requiring a wide margin of discretion to the decision maker. The discretion is exercised by officials or institutions that have been chosen based on their trustworthiness.

In the U.S., Administrative Law has granted “legal protection” for the Secretary through the Economic Emergency Stabilization Act of 2008 (EESA). In this Act, any decision of the Secretary was committed to agency discretion and was non-reviewable by any court of law or administrative agency.⁵⁰

In support of the legislative body, the Administrative Court condones the new economic role of the State. Administrative judges have the responsibility to protect various interests without slowing down or paralyzing the urgent and necessary decisions to be taken. Administrative Law has become the “backbone of protection both for the recipients of these decisions and for the entire economic system.”⁵¹

According to Jerry Evensky, “Law is a part of an evolving simultaneous system of institutions and individuals.”⁵² In the age of globalization, these institutions and individuals have created the most integrated and complex global financial market with extensive cross-border operation.

IV. BLENDING LAW AND ECONOMICS

Administrative Law worldwide is experiencing new challenges due to the profound economic role of the State.⁵³ In order for Indonesia to be sustainable, the legal system must be improved, starting with the legislation making process.

Establishment of an Oversight Committee in the Legislative Branch should be taken into consideration. The Committee should comprise of senior economists and legal scholars that have the capacity to utilize the appropriate

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, p. 23-24

⁵² Jerry Evensky, *Adam Smith's Moral Philosophy*, *op.cit.*, p. 82-83

⁵³ Giulio Napolitano, *The Role of The State in (And After) The Financial Crisis: New Challenges for Administrative Law*, Yale Law School: May 2009, p. 2

techniques of economic analysis of drafting legislations. In order to implement economic analysis, an explicit requirement of the discipline of economy needs to be clearly stated. The mentioned requirement can be inserted in the Explanation Section of Law No. 12 Year 2011 on Establishment of Laws and Regulations. The insertion of the discipline of economy is based on Chapter II, Article 6, Section (2) which essentially stipulates the ability to include other norms or principles; and Chapter V, Article 57, Sections (1) and (2) regarding the technical requirements of an academic research paper. On Attachment I, under Point (2), Chapter IV of the academic research paper stipulated that legislations have to be based on the foundations of philosophy, sociology, and judiciary. A fourth element of the foundation of economy must be explicitly stated in order for EAL to be applied in the legislation making process. The element on economics is legally justified based on Chapter XIV, Article 3, Section (4) of Indonesia's 1945 Constitution. EAL and its tools will be able to provide the checks and balances necessary between the legislative and executive branches during the formation of laws. The diagram on the insertion of EAL is illustrated under Attachments E and F.

As in the U.S., the President of R.I. requires an establishment of the Office of President that consists qualified and expert senior economists and legal scholars to apply economic analysis of all legislations, rules, and policies to ensure that the net benefits must exceed the costs of the Administration's courses of action. The Office of the President requires an efficient analytical framework for the formulation of laws to indicate social welfare maximization.

CONCLUSION

Throughout the 400 years of financial crisis, the financial market has shown its ability to generate maximum growth not through hardcore laws, but through national and international ethical codes of conduct.⁵⁴ Clear and explicit laws together with a self-disciplined market culture will lead to an efficient and productive globalized financial market, resulting in social welfare maximization. Financial markets are, by their nature, resilient when they are not strictly confined by compliance, but by ethics.

⁵⁴ Abayomi A. Alawode and Mohammed Al Sade, "What is Financial Stability?", Central Bank of Bahrain: Financial Stability Paper Series No. 1, March 2008, p. 5-6

Suggestions mentioned above can be justified and implemented by applying EAL to determine efficiency and impacts; and that benefits outweigh the costs; thus, provide social welfare maximization. The legislation drafters are the individuals who understand the essence of the legislation. Legislation drafters design the provisions of the draft, and they put together the legislation's words. Legislation drafters inevitably serve not only as communicator, but also as participants in the process of determining the policy's operative content. Those who drafted the provisions determine who does what to implement the new law. Consequently, the drafters have a crucial role in the process. Should the enactment of a law prove to be ineffectively implemented, the legislation drafters have an important share of responsibility.

Designing legislation requires an adequate economic analysis which requires estimating the quantitative, as well as the qualitative, social costs and benefits. The assessment of implementing the law must include an analysis of probable social impacts in terms of economic costs and benefits.

The "law and economics movement" has been in existence for more than 400 years. During the same period, numerous financial crises occurred in different parts of the countries across the globe. The two main sciences have proven to be inseparable, especially in modern societies. As the world experiences uncertainties during the globalization era, it is up for any developing or developed country to unite the sciences of law and economics to reach a common goal: social welfare maximization.