What the economic analysis of law can't do - pitfalls and practical implications

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Abstract

In the last decades, the influence of the economic approach to law has expanded constantly, sometimes alarmingly so, efficiency and utility considerations steeping deep into the fabric of all aspects pertaining to the creation and application of law. Following a brief overview of the economic analysis of law, with references to utilitarianism, the Chicago School and their modern spin-offs, this article will attempt to convey the limitations that such an approach inevitably presents and some of its the practical consequences in the legal field. The main tenant is that the economic analysis of law is neither applicable to all subject matters, nor is it ideologically-neutral. The methodological instruments used for this research include, inter alia, the comparative method and case studies of both legislation and jurisprudence. The Covid-19 crisis of 2020 will inevitably augment the importance of the economic factors in shaping future public policies and legislation. The tendency to prioritise the economic considerations will prove difficult to resist for governments confronted with receding economies, rising public debt and social pressures of various origins. Therefore, we consider that a realistic debate on the pitfalls of the economic approach to law is necessary and serves not merely theoretical purposes, but practical ones as well.

Keywords: *the economic analysis of law, legal system, Chicago School, utilitarianism, public policies, value system, covid crisis*.

JEL Classification: K10, K22

1. Introduction

In the last decades, the influence of the economic approach has been constantly expanding in all the aspects of the social life, reflecting an alarming global trend in the contemporary world and a shift in the hierarchy of moral values. The 'market' values and criteria such as efficiency and utility tend to obscure and even to replace non-market values like social solidarity, equity or civic engagement, changing the allocation of resources within society. The law, as intrinsic part of the social reality, cannot evade these influences, more and more discernible in the activities of law creation and enforcement.

What does the economic analysis of law actually mean? This expression is susceptible of two different, yet complementary uses: in a broad sense, the economic analysis of law (hereinafter *brevitatis causa* referred to as AED) may include any analysis of the law, of its institutions and norms, which uses the conceptual instruments of the science of economics; in a narrow sense, AED refers to a school

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of thought, initiated by the economists of the Chicago School in the sixties, with a significant theoretical and practical impact in contract law, torts, competition law in the American legal system. The main tenants of this School will be presented in Section 3.

The ideas advanced by the Chicago School have their origin in utilitarianism, as put forward by Jeremy Bentham, John Stuart Mill and Herbert Spencer, in the time-honoured fashion of the Anglo-Saxon empiricism. The Chicago School has taken over from utilitarianism some key tenets such as the welfare maximization, the principles of efficiency and of optimal resource allocation, and, together with the transactional cost-benefit analysis, has applied them to the law and its institutions. We therefore deem important for methodological purposes to precede our exposé with a brief overview of the key aspects of the utilitarian theories, especially since the critiques levelled at those theories could be applied to the Chicago School as well.

In spite of all the financial, political and social crises which took place from 1960s onwards, in spite of a paradigm change in the economies of the Western states – the shift from an economy based on production to an economy based on services (*post-industrial societies*, as they are commonly referred to[2]), in spite of all the events that showed the consequences of deregulated markets and watered down the optimism of the supporters of the trickle-down effect of globalisation, the appeal of the AED has not decreased. On the contrary, it has evolved into some interesting modern avatars.

At the beginning of the 2000s, stemming yet again from the circle of the economics scholarship and the Chicago School, a new trend in the analysis of law was gaining speed, this time borrowing concepts from the comparative law, such as the criterion of belonging to a legal family (otherwise known as the "*Legal origins thesis*"), which has since enjoyed international recognition from prestigious financial institutions. For instance, the World Bank compiles its annual reports on the attractiveness of the business environment in a country using, among other standards, the legal origins thesis. The criticism levelled at this trend will be analysed separately, in the final section dedicated to the theoretical foundations of the AED.

The presentation of these schools of thought will be followed by two examples of the normative economic analysis of law in real life context, in order to illustrate the advantages and discontents that such an analysis presents, depending on the circumstances in which it is used, and will serve to introduce some synthetic conclusions in the final section of this paper.

2. Postulates of utilitarianism and their assessment

Jeremy Bentham (1748-1832), the English jurist and philosopher regarded as the founder of the utilitarianism, an ardent promoter of major legal reforms in the

[2] The expression *"post-industrial societies*" can be traced back to a 1973 book, *The Coming of Post-Industrial Society* written by Daniel Bell *(*1919-2011), a well-known American sociologist and professor of sociology at Harvard and Columbia Universities.

18th century England, has pursued the transformation of law into an empirical science, focused not on philosophical speculations, on natural rights and other appealing fictions, but on the enhancement of public happiness. Starting with the assumption that human beings, *per se,* are selfish beings, who naturally seek pleasure and avoid pain, Bentham says that the human actions are motivated by self-interest, tempered by the principle of "sympathy" towards others, which insures the social coexistence, and that a human action could be classified as just or unjust, right or wrong if it contributes to the overall human happiness. It is thus formulated the principle of utility, later extended by Bentham from the individual to the whole society.

The principle of utility, as a social principle, becomes 'the greatest happiness for the greatest number'[3]. The measurement of happiness in practice implies a classification of the pleasures and pains, according to their "intensity", "duration", "certainty or uncertainty", "propinquity or remoteness" etc., these pleasures and pains being part of a *felicific calculus* and susceptible to be added, subtracted or multiplied. The answer to this complicated equation affects civil rights, the government involvement in the economy, the regulation of the civic duties and sanctions, the distribution of wealth in society. Paramount for the fairness of this algorithm is the principle of equality before the law, "*Everybody to count for one, nobody for more than one",* a goal which Bentham actively supported his whole life. The arithmetic of pleasures and pains he proposed will heavily influence – perhaps because of the pseudo-mathematic, 'scientific' flavour - an irresistible attraction on the English scholars who, afterwards, will have pondered over the act of government and the relationship between the citizen and the state.

Amongst these thinkers, a capital contribution to the development of the utilitarianism was made by John Stuart Mill (1806–1873), the most well-known figure of classical liberalism, who modified and refined the principle of utility proposed by Bentham by discriminating between higher and lower pleasures. Mill established a hierarchy of pleasures that should benefit from the protection offered by the law, foremost of which should be the individual freedom and security of life, considered in a broad, complex sense[4]. "It is quite compatible with the principle of utility to recognise the fact, that some kinds of pleasure are more desirable and more valuable than others."[5] Mill analysed the relation between the interest of majority and the interests of individuals, and also the relation between utility and justice[6].

As pointed out in the vast literature on utilitarianism, this particular school of thought - thorough its most brilliant exponents, Bentham and Mill, was at the beginning a progressive doctrine, principally because of the egalitarian premises on which it is based and its insistence that everyone's happiness matters equally.[7]

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[3] Georgescu, Șt., *Filosofia dreptului. O istorie a ideilor din ultimii 2500 de ani*, ALL Beck, Bucharest, 2001, p. 112.
[4] Ibid, pp. 116-117.
[5] Mill, John Stuart, "Utilitarismul", (in Romanian), Ed. Alternative, 1994, p. 20.
[6] Ibid, p. 66-97.
[7] Brink, David, *Mill's Moral and Political Philosophy*, Stanford Encyclopedia of Philosophy, available at https://plato.stanford.edu/ entries/mill-moral-political/, consulted on 1.10.2020.

The main criticism directed at this doctrine refers to the fact that its followers use the concept of happiness, difficult to quantify in practice, ambiguous in nature and liable to be interpreted through personal and political biases. Another important objection concerns the way in which the principle of utility – viewed as the greatest happiness for the greatest number – could lead to the tyranny of the majority, to the tyranny of numbers, objection that both Bentham and Mill tried to address[8].

As pointed above, perhaps because of its pseudo-mathematic flavour and of concepts such as 'happiness' and 'well-being', the influence of utilitarianism has spread beyond the realm of ethics and philosophy, entering deep into the science of economics through the Chicago School and, from there, spilling over into the legal doctrine.

3. The Chicago School

AED movement was initiated in the early sixties by a group of economists from the prestigious University of Chicago, which boosted, until 2018, no less than 13 Nobel Prize winners. Amongst the most influential names belonging to this School are those of Ronald Coase (Nobel Prize in Economics in 1991), Milton Friedman (Nobel Prize in Economics in 1976), George Stigler (Nobel Prize in Economics in 1986), Richard Posner, to mention but a handful of those known beyond the field of the economic science.

Ronald Coase (1910-2013) was a professor of economics at the Faculty of Law from the University of Chicago. He is credited with the initiation of the AED movement through the publishing of his seminal paper "*The Problem of Social Costs*"[9]. Coase uses concepts from the economic science, such as efficiency, transaction costs, externalities, in conjunction with socio-legal concepts, such as adjudication of rights, equity, distribution of wealth, to assess the consequences of legal rules in practice. The Coasian theory is important for understanding how the common law courts allocate the property rights or the liability arising from contracts and torts or, generally speaking, how the wealth is distributed in a society. The distinction – utilitarian in nature – between *efficiency* and *equity* is explained by A. Mitchell Polinsky, a well-known professor of law and economics from Stanford University Law School, in the following terms: *efficiency* is the relationship between the aggregate benefits and the aggregate costs of a situation (viewed in simplified terms of monetary loss or gain), while the term *equity* concerns the distribution of income among individuals. Using the gastronomic metaphor of a sliced pie, he adds that "efficiency corresponds to the "size of the pie", while equity has to do with how it is sliced"[10].

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[8] Ibid, p. 121.

[9] Coase, R.H., *The Problem of Social Costs*, „Journal of Law and Economics", vol. 3, Oct. 1960, p. 1-44, available online at: http://www.colorado.edu/ibs/eb/alston/econ4504/readings/Coase,%20The%20Problem%20of%20Social%20Costs.pdf, consulted on 1.10.2020.

[10] Polinsky, A. M., *An Introduction to Law and Economy*, Wolters Kluwer, Law & Business, 4th ed, New York, 2011.

Another concept advanced by R.H. Coase refers to the *transaction costs*, which are inextricably linked to the allocation of property rights. These costs include, according to a widely used definition, the costs of arranging a contract *ex ante* and monitoring and enforcing it *ex post*, as opposed to production cost, which are the costs of executing the contract. To a large extent transaction costs are costs of relations between people and people, and production costs are costs of relations between people and things, but that is in consequence of their nature rather than a definition (it would not do as a definition – for example, the cost of personal services are production costs, but they do not necessarily involve things)."[11]

In a technical sense, the *transaction costs* include the costs of identifying and getting together with the parties one has to negotiate a particular situation, the costs of the negotiation process itself and the costs of enforcing the result of such negotiation. Coase dealt initially with a specific theme, assessing those business activities which have harmful effects on others and, consequently, the allocation of liability damages, drawing on a number of tort and nuisance cases adjudicated by the common law courts. Coase offered a novel approach to the process of court adjudication in the classic legal dilemma: if A has inflicted harm on B, how should one restrain A? The dilemma is illustrated with several examples, one of which refers to the case of a confectionery maker, whose noisy operating machine disturbs a private medical practice nearby. Coase claims that, in this instance, the courts are actually called upon to allocate 'the right to noise pollution', deciding if A should be allowed to harm B or B should be allowed to harm A. The transactional cost-benefits analyses should, according to Coase, be the center stone of the judicial adjudication, taking into account the costs of relocation of one of the parties, the projected rise or fall in income, all balanced against the objective of maximizing the benefits. If the transaction costs are positive (are not zero), "the efficient outcome may not occur under every legal rule. In these circumstances, the preferred legal rule is the rule that minimizes the effects of transaction costs".[12]

This idea will be used by the members of the Chicago School to analyze the impact of the government intervention in the economy using regulation. Important contributions in line with the coasian ideas have been put forward by Calabresi, Melamed and Richard Posner, especially in the field of torts law.

Richard Posner (n. 1939) is probably the most well-known exponent of the AED today. Jurist, ex judge at The United States Court of Appeals for the Seventh Circuit and economist, Posner has analysed the relation between law and economy throughout his prolific writings. Among those with a major impact on the legal field, known well beyond the sphere of the common law systems, special mention should be given to: the "Economic Analysis of Law", "The Problems of Jurisprudence" and "The Economics of Justice".

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[11] Matthews, R. C. O., *The Economics of Institutions and the Sources of Growth*, „The Economic Journal", vol. 96, no. 384, 1986, p. 906, available online la www.jstor.org/stable/2233164, consulted on 1.10.2020.

[12] Ibid, p. 907.

Posner shares the belief of Adam Smith in the role of the markets acting as an "invisible hand" in the regulation of the commercial relations. Starting with the utilitarian concept of happiness maximisation, but at the same time, trying to distance himself from it, he proposes as normative criterion the principle of efficiency, i.e. of wealth maximisation, viewed as the aggregate goods in a society, tangible and intangible, which could be evaluated in monetary terms, either by the willingness of a potential buyer to pay the highest price for a certain good or by the lowest price that a potential seller might be induced to accept for this good[13].

He also underlines the tendency of the common law courts to ground their decisions on considerations of economic efficiency, by adjudicating in a way that maximises profit. This tendency is allegedly linked to the pervading ideology of most of the common law countries, who emphasize the values of free markets. This particular view, that links the efficiency of rules and regulations to the prevalence of a certain ideology has been subject to a considerable amount of criticism, such as the fact that the principle of efficiency is less relevant to the constitutional law, for instance, or the objection that these are mainly ungrounded generalizations of the courts practice in the commercial law.

4. The legal origins thesis and the economic performance

The idea that the common law systems are more conducive to efficiency and profit maximisation than the civil law systems has been revived and put forward, at the beginning of 2000s, by a group of economists, collectively referred to as LLSV[14] (after the initials of the names of its members), determined to prove the impact which investor-friendly government regulations could have on the development and economic growth of a country. Analysing, based on multiple criteria, the economic performance of the countries, the LLSV group reached the conclusion that the common law systems offered a better protection of investors' rights, more flexibility of labour relations and a higher degree of judicial independence, compared to the civil law countries.

As mentioned above, the legal origins thesis has had a considerable impact in the analysis and assessment of the international economic policies, the World Bank itself adopting this stance in its ranking of the countries from the perspective of their attractiveness to the international investors. If in 2009, the top positions in this ranking were occupied, with the notable exception of the Scandinavian states, by the common law countries, the situation is not significantly altered today, except for the rather curious listing of Georgia on the 7th place, before the UK and immediately after the USA[15]. In these *Doing Business Reports*, the World Bank

[13] Posner, R.A., *The Economics of Justice*, p. 15, *apud*. Mathis, K., *Efficiency Instead of Justice?: Searching for the Philosophical Foundations of the Economic Analysis of Law*, Springer Science & Business Media, 2009, p. 146.

[14] For details, Michaels, Ralf, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Comparative Law*, „American Journal of Comparative Law", Volume 57, Issue 4, Fall 2009, pp. 765-95.

[15] https://www.doingbusiness.org/en/rankings, consulted on 1.10.2020.

assesses the impact of the most recent reforms in fiscal regulations, the protection of intellectual property and the fight against corruption in private and public sector. The World Bank underlines the relation between legislation – efficient result (*i.e.* higher degree of attractiveness for investors) in its latest document *Doing Business Report 2020*, using classical utilitarian terms:

"Those economies that score well on *Doing Business* tend to benefit from higher levels of entrepreneurial activity and lower levels of corruption. (…) Twenty-six economies became less business-friendly, introducing 31 regulatory changes that stifle efficiency and quality of regulation."[16]

This approach is a textbook example of what is usually called the economic analysis of competition law, as opposed to the normative economic analysis of law. Richard Posner explains the two main orientations in the AED, stating that: "The economic analysis of law has two branches, both of which date from the emergence of economics as a distinct field of scholarship in the eighteenth century. One branch, which dates back at least to Adam Smith, is the economic analysis of law regulating explicit markets – laws regulating 'the economic system' in the conventional sense. The other branch, while can be said to have originated with the work of Jeremy Bentham in the generation following Smith, is the economic analysis of laws regulating nonmarket behaviour – accidents, crimes, marriage, pollution, and the legal and political processes themselves."[17]

About the second orientation, Posner admits its checkered history and its re-emergence in the early sixties with the publication of the monography "The Economics of Discrimination" by Gary S. Becker (Nobel Prize for economics in 1992) and Coasian paper on social costs. Another important distinction is, according to Posner, between the normative AED and the positive AED, i.e. "between the use of economic analysis to argue for what should be and the use of economic analysis to explain what is or has been or to predict what will be."[18]

The proponents of the economic analysis of law do not deny the political and ideological base for their analyses, the obvious preference for the system of law to which they belong and the belief in the role of the markets as regulating factors of human activities, unhampered by the state intervention.

It is precisely this normative approach of AED that has gained momentum in the last decades, especially after the Fall of the Iron Curtain, insinuating itself into domains in which, until then, the economic considerations were marginal. This is explained by a major shift in the values of society, the commercial values, the values of markets eroding and sometimes displacing values such as equity, social solidarity, resilience, the willingness to contribute to a common cause. Analysing this trend, the reputed professor of philosophy and ethics from Harvard University, Michael Sandel, was highlighting the emergence of private schools or even of private jails in

[16] https://www.doingbusiness.org, consulted on 1.10.2020.

[17] Posner, Richard A., *Some Uses and Abuses of Economics in Law*, 46 „University of Chicago Law Review" 281 (1979), p. 281-282, available online at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2864&context=journal_articles, consulted on 1.10.2020.

[18] Ibid, p. 285.

the US, the use of private military subcontractors in the wars in Iraq and Afghanistan, the paid surrogate motherhood, the market instituted by the European System for Trading the Carbon Emissions (EU ETS), which deals with the "right to pollute within certain limits"[19] etc.

The consequences of the enormous prestige enjoyed by the markets today, as an efficient factor for resource allocation, and the pervasiveness of the commercial values in the most sensitive layers of the collective conscience were summed up by Sandel as follows: "As a result, without quite realizing it, without ever deciding to do so, we drifted from ***having*** a market economy to ***being*** a market society"[20].

The problem raised by Sandel is this: in today's society, should there be things that money cannot buy or should not buy, such as citizenship, education, marriage, civic duties? Using examples from the domestic and international life, Sandel opposes strong ethical arguments to the economic approach based on its two main coordinates – the libertarianism, on one hand, advocating the freedom of choice and consensual transactions, and utilitarianism, on the other hand, implying the efficient allocation of resources that maximizes the well-being in society. The efficient allocation of resources does not mean an equitable distribution of them and could lead to an increase in social inequalities. The market mentality, which turns everything – tangible and intangible – into commodities, has a very high potential for corruption, for degrading their value and, in practice, more often than not leads to results contrary to the principle of efficiency. An illustration of the eroding character of the markets regards the system of blood collection in the US and UK. In USA, the human blood is regarded as a commodity and could be 'bought' from people to supplement unpaid voluntary donations, while in the UK the system is based on voluntary donations-only. The American blood banking system is always experiencing shortages, while the UK one based on unpaid donations functions more efficiently, thus contradicting the logic of the markets.[21]

This is also a problem that regards the legal system today: where should the economic analysis of law stop in its normative surge? Taking my cue from Sandel, I will illustrate with two examples the benefits and limitations of the AED approach, starting with the most recent one – the Covid crisis.

5. The economic analysis of law of the right to life. The covid crisis and utilitarian considerations

The outbreak of the Sars-Cov-19 pandemic has struck the European countries, unprepared to cope with it medically, psychologically, socially and economically. The high infection rate in Italy, at the beginning of 2020 and the high death toll caused by the virus have raised, to the medical personnel in the Italian Peninsula, a practical problem, as well as a very difficult ethical question: given the fact that the Intensive Care Unit (ICU) are insufficient for the patients in need of

[19] Sandel, Michael J., *What Money Can't Buy. The Moral Limits of Markets*, Penguin Books 2013, p. 7.
[20] Ibid, p. 10.
[21] Ibid, p. 122-125.

medical care (limited resources), who should be permitted to use the ventilation system in case of competing requests for the same equipment (morbid competition) and who should decide this (who performs the profiling and on what criteria)? Opinions of the Italian doctors reflected a reality in stark contradiction to the EU legal framework, as well as to the ECHR principles: the elderly patients, as well as those with co-morbidities should not be treated as having priority, no matter how serious their condition, the preference being given to the patients with higher chances of survival - chances assessed and decided upon by the medical doctors[22]. Similar opinions have been expressed in other countries hit hard by the pandemics, such as Spain and France.

From a regulatory perspective, the EU law is unequivocal: the derogations and limitations of the human rights in order to fight the pandemics cannot lead to a discrimination concerning medical care, endangering the right to life of a person, by preventing access to emergency medical care. Nevertheless, the analysis of the legal arguments invoked to authorize euthanasia and assisted suicide in some EU states, such as Belgium, Luxembourg, the Netherlands or Germany, may lead to "creative" legal solutions in a new pandemics' scenario.

In the Netherlands, for example, euthanasia and assisted suicide are allowed for adults, as well as for children above 12 years old, with theirs and their parents' consent, while a new law bill proposes to extend euthanasia for children between 1 and 12 years old, if terminally ill, so that they "will not suffer pointlessly"[23].

In Germany, the amendments of the Criminal Code dating from 2015, forbidding assisted suicide (legal until 2015), have been deemed unconstitutional at the beginning of this year, thus reverting to the previous situation, of non-criminalization of the deed, which also entails provisions for medical counselling and support[24].

Utilitarian considerations of efficiency (the allocation of financial and medical resources to the patients with the highest chances of survival) can be easily disguised, in governmental rhetoric, as humanitarian considerations: ending unnecessary sufferings, ensuring a dignified end of life, the right of a person to freely choose what they do with their life and body. The matter of the triage of the covid patients as well as that of the criteria according to which their access to ventilation systems is to be granted is governed by the national law in the EU, meaning that, in the future, some countries might regulate triage criteria invoking the humanitarian considerations above, using the same mechanisms which allowed euthanasia and assisted suicide. Furthermore, it cannot be excluded the creation of a "voluntary

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[22] *"Medicii din Italia fac triaje la sange: Tinerii au prioritate, pentru ca au cele mai mari sanse de supravietuire"*, Tuesday, 10 March 2020, time 16:18, Agerpress source, online: https://ziare.com/stiri/coronavirus/medicii-din-italia-fac-triaje-la-sange-tinerii-au-prioritate-pentru-ca-au-cele-mai-mari-sanse-de-supravietuire-1601065; *(Medical personnel engaged in drastic triage: the young have priority, because they have higher chances of survival).*

[23] *Netherlands backs euthanasia for terminally ill children under-12*, 14/10/2020, available online at: https://www.bbc.com/ news/world-europe-54538288, consulted on 1.10.2020.

[24] *Germany overturns ban on professionally assisted suicide*, 26/02/2020, available online at: https:// www.bbc.com/news/world-europe-51643306.

triage" system, by which the infected patients of a certain age or with co-morbidities should surrender their right to ventilation systems, voluntarily at first, to patients having better chances of survival.

The triage could also be made with the help of the artificial intelligence, based on a series of algorithms involving the statistical calculation of a patient's chances of survival, after the manual input of medical data into the system, possibly through facilitating the access to the data from the patient's health insurance card, and thus throwing a "veil of objectivity" on a profoundly ethical and economic decision of medical policy.

For now, the quest for legal and ethical grounding of the decisions to be made by public authorities in case of a crisis continues unabated, especially in the field of Practical Ethics, i.e. the branch of ethics interested in the practical implications of the regulations and their principles and, above all, in solving ethical conflicts. To the realm of practical ethics belong, for example, the case of an attorney faced with the problem of reconciling her commitment to a guilty client (a principle of loyalty) with her commitment to the truth (a principle of veracity), as well as the case of a doctor deciding who should have access to ventilation systems, in case of insufficient hospital resources. Utilitarianism gains more and more supporters among academic scholars, as shown by the opinions professed by some academics from Oxford University, Uehiro Centre for Practical Ethics, specialising in medical ethics: "In a pandemic, there is a strong ethical need to consider how to do the best overall"[25]. Utilitarianism, in their view, offers clear operational principles, which could help solve two important problems: on one hand, the matter of triage for covid patients and, on the other hand, the matter regarding the declaration of the State of Emergency and collateral lockdown measures, balanced against their economic effects, translated into job losses, economic recession, psychological problems following the lockdown[26] etc. The scholarly papers on practical ethics or philosophy have increased exponentially since the beginning of the pandemics, with arguments both for and against the utilitarian approach on the matter of how to handle the pandemic.

In our view, we believe that the healthcare system, which aims at protecting the fundamental right to life and to personal security should be excluded from any regulation based on utilitarian criteria and that, in such a case, the economic analysis of law should give precedence to non-economic considerations, such as the equal respect for the life of each human being and, consequently, equal access to medical treatment, regardless of age, co-morbidities, etc. Social solidarity does not mean sacrificing a part of the population for the overall good, but rather the commitment to act united in order to handle the situation, by respecting the sanitary measures, by making investments in the healthcare system, as well as in research and development.

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[25] Savulescu, Julian, Persson, Ingmar, Wilkinson, Dominic, *Utilitarianism and the pandemic*, „Bioethics", Volume 34, Issue 6, Special Issue: IAB 14th World Congress, pp. 620-632, open access at: https://onlinelibrary.wiley.com/doi/abs/10.1111/bioe.12771, consulted on 1.10.2020.

[26] Ibid, pp. 623-624, p. 629.

6. Economic legislation without economic analysis – the case of Law no. 77/2016 on payment in kind of certain immovable properties in order to settle obligations undertaken through credit contracts

As argued in the previous section, the normative economic analysis of law raises the question of balance between the principle of economic efficiency, the maximisation of the overall well-being, on one hand, and the ethical and legal considerations of ensuring equal treatment and equal chances for all members of the society. If, in the example considered above, we were arguing for limiting the use of AED in the public healthcare sector, there are cases when the absence of efficiency considerations in commercial relations leads to serious economic dysfunctions, as well as to inequity between the parties concerned.

As an interesting and recent example for such a situation in the Romanian legal system could be put forward the case of the (in)famous Law no 77/2016 on the payment in kind of certain immovable properties in order to settle obligations undertaken through credit contracts. This law has created an avalanche of challenges of its constitutionality in court[27], conflicting jurisprudence, as well as countless successive amendments, the latest of which is Law no 52/2020, published in the Official Romanian Gazette no. 386 of 13th of May 2020.

The explanatory memorandum of this law is generous and invokes considerations of social policies. It states that: "The present Bill aims to protect the debtors of credit contracts from the abuse of the assignees of claims and, equally, to equitably share the risks of the devaluation of immovable properties between the creditor and debtor. (…) The present law project is in line with the ECHR legislation (ECHR, case 20/7/2004 – Bäck vs. Finland) and with the ECJ jurisprudence (case C-34/13, Kusionova), protecting the debtor's right to a family home.[28]" However, the devil is often in the details. The lacunar manner in which this law has been initially adopted might be explained not merely through the insufficient grasp of the legislative techniques, but rather through the fact that the Bill introduced in 2015 was adopted in April 2016 – an election year (Parliament elections having taken place later that year, in December).

This might be the only reasonable explanation for those articles in the initial form of the Bill, which were so manifestly to the disadvantage of the creditors, such as Article 11, declared in part unconstitutional, that stated: "For the purpose of balancing the risks from a credit contract and *from the devaluation of the immovable goods*, the present law governs both the credit contracts in force at the moment of its enactment and the credit contracts entered into after this date". The phrase *from the devaluation of the immovable goods* was declared unconstitutional in the Decision

[27] From the Summary of the Act, one can count, in the last 4 years that passed since the law was enacted, more than 80 challenges of its constitutionality, the vast majority of which were rejected by the Romanian Constitutional Court as having no merits or inadmissible. Summary available online at http://www.cdep.ro/pls/legis/legis_pck.htp_act?ida=136765&pag=2, consulted on 1.10.2020.

[28] http://www.cdep.ro/proiecte/2015/700/40/3/em951.pdf, consulted on 1.10.2020.

no. 623 /2016 of the Constitutional Court of Romania (CCR), the Court finding that: "the object of the contract consists in sums of money to be lent and not in immovable goods. If, under the provisions of Art.11, part I, the criterion for the devaluation of immovable goods that constitute the object of a security brought by the debtor is construed as an autonomous criterion, the result that follows is an infringement of the private property rights that a credit institution (the creditor) has over the sums of money lent to the debtor, thus in breach of Art. 44 of the Constitution. (…) The fact that the security brought to secure the credit has devalued bears no connection to the execution of the credit contract. This criterion might, however, be used in conjunction with the principle of equity as part of the rules of hardship, as set forth by the Civil Code of 1864. Therefore, the court will evaluate the unbalance between the obligations from a credit contract by employing this criterion too, when the credit contract has been entered into for the purpose of buying an immovable good."[29]

The clarification of the hardship rules, in the interpretation and enforcement of Law no. 77/2016 is the work of the Constitutional Court, blamed by some Romanian scholars that it has overreached its authority, taking on the role of an active legislator.

The criticism brought by the credit institutions to the Law no. 77/2016 are numerous, ranging from the infringement of the constitutional principle of non-retroactivity of law, the infringement of the principle of the binding force of the contracts (*pacta sunt servanda)*, to the infringement of the private property rights and the undiscriminatory protection of all the debtors that cannot repay their credit, regardless of whether they are *bona fide* or not.

In the above-mentioned decision, the Court rejects the criticism regarding the retroactivity and the infringement of the property rights and instates the criterion of social utility for the purpose of evaluating whether a credit contract should be maintained or terminated, underlining the role that the judicial courts play in this respect." (…) "(T)he adaptation of the contract to the new circumstances during its performance means the preservation of its social utility, more specifically means that it allows the performance of the contract to continue by recalibrating the performance. The evaluation of the risk should be considered globally, analysing at least the quality of training and the legal and economic knowledge of the parties [the dichotomy between a consumer and a professional], the level of the duties and obligations under the contract, the risk already undertaken from the beginning of the contract, and the new economic conditions that affect the will of the contracting parties and the social utility of the credit contract".

As could be observed from the above statement, the Court juggles with utilitarian arguments (the criterion of the social utility of the contract, without specifying how the said utility should be assessed, this task falling to the ordinary judicial courts), but also with equity considerations.

The checkered history of this Law has continued with the enactment, in 2019, of an Act for its amendment, declared in part unconstitutional during the

[29] http://legislatie.just.ro/Public/DetaliiDocumentAfis/185785, consulted on 1.10.2020.

process of pre-enactment screening of the legislative procedure in the Decision no. 731/2019. The unconstitutional articles were again manifestly detrimental to the credit institutions, affecting even the procedural rules on the burden of proof that state that the person who makes a claim before the court has to prove it, stating in the Article ($1^{\wedge 3}$) that: "It falls to the creditor the burden to prove before the court that the debtor who has requested the *datio in solutum* does not fulfil the conditions of admissibility, including the hardship situation".

The Odyssey of this Law is far from over, in May 2020 another Act for its amendment being enacted - the Law no. 52/2000. The Parliament finally clarifies the conditions of hardship, ensuring the conformity of the Law with the Constitution.

It is worth mentioning the fact that among the criticism levelled at the Amendment Bill for Law no. 77/2016 was the fact that it was not accompanied by the impact study on its economic consequences, as required by Article 30 (1) of the Law no. 24/2000 concerning the legislative technique for the elaboration of normative acts, the Constitutional Court stating that the Law itself was not accompanied by any impact study to begin with, when was first enacted in 2016.

From this presentation, it is safe to draw the conclusion that ignoring the economic analysis of the legislation enacted to regulate economic relations can lead to legislative dysfunctions and to the diminished impact of the regulations.

7. Conclusions

As shown in the examples above, the economic analysis of law yields different results, depending on the context in which it is used. Our assessment is that AED represents a valuable tool for evaluating the efficiency of the legislation in the economic law and, when used with other criteria, is susceptible to help with the elaboration of public policies in those fields that, traditionally, do not belong to the economic domain.

However, because of the utilitarian tendency to emphasize the quantitative aspects and to operate with tangible goods, expressed in monetary terms, AED tends to ignore the non-tangible social values or even to 'monetize' them, corrupting their nature. From this point of view, through the sheer simplicity of the solutions it provides, the economic analysis will continue to draw followers from all spectrum of the political decisions-makers.

For instance, in the near future will be interesting to observe, in case an efficient anti-covid vaccine becomes available, how it will be distributed amongst the citizens and the criteria based on which this distribution will take place: one's profession (the argument of social utility), the age (positive discrimination) or other considerations. The utilitarian arguments will be invoked more and more frequently, as the economic crisis following the pandemic will unfold and the governments will be faced yet again with the dilemma of the prioritisation of values: the health wellbeing of the citizens or the economic revival. This dilemma is at present dealt with by most of the states by alternating compulsory lockdown (total or partial), when the contamination rate surges above a certain level, with the lifting of the

restrictions (especially during holidays).

Perhaps would be best that AED should remain merely a tool and not be invested with the dignity of a doctrine, founded on coordinates that prescribe a certain type of result for the analysis, such as: a liberal ideology or, in the last decades, a neo-liberal one, the faith (contradicted by the financial crises of 1998 and 2008) in the self-regulatory capacity of the markets, the optimism that the globalization will lead to the trickle-down effect, to the dispersion of economic benefits to the most vulnerable parts of society.

The impact pf AED cannot be denied, nor should be underestimated, and the jurists from the civil law systems (especially those from the Romanian legal order) should be prepared to use the AED responsibly, as an instrument for improving the legislation and for monitoring the efficiency of regulation, without relegating to secondary positions the fundamental rights and liberties, the equity and the role of the law as a factor for social cohesion.

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