
QUICKSAND: ECONOMIC ANALYSIS OF LAW IN ROMANIAN CONSTITUTIONAL COURT DECISIONS

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Abstract: In the current absence of a well-structured framework for applying economic reasoning in the process of settling legal disputes, it is of no wonder that aspects of Law and Economics are being applied inadvertently by the Romanian judges. The Constitutional Court is not immune to this phenomenon in decisions such as those concerning the nature of social care support in Romania, or fiscal responsibility. The Court began to overreach its specific Constitutional mandate by delving into questions of policy, of regulatory opportunity. This behavior is mandated by a lack of specific economic principles agreed-upon by the basic social contract. In the context of a new Constitution, the jurisprudence of the German Federal Constitutional Court is extremely relevant, in its conclusion that a balance must be struck between the freedom of the legislature to regulate economic life and the restrictions that the Constitutional rights impose on the former. Thus, it is clearly implied that the choice of fundamental rights will inevitably translate into a choice of potential actions and attitudes that will be available in the context of economically governing a nation. This paper sets out to highlight these Constitutional arena legal struggles and their potential solutions, so that the quicksand can be overcome.

Keywords: Romanian Constitutional Court, German Federal Constitutional Court, Constitutional Court Decisions, economic policy, Economic Analysis of Law.

The following analysis is one of judicial activism. Should the Romanian Constitutional Court decide based mainly on economic parameters? Could it legally do so? We will examine a controversial decision of the Court in the matter of fiscal responsibility and social care support¹. The issue undergoing judicial (and at that same time a more broad social) debate was extremely sensitive, essentially concerning the rights of retiree citizens. The political implications of a decision regarding this broad category of Romanian citizens that represents a significant budgetary problem by straining the national financial resources (Croitoru, Alexandru, Toader, 2014, p. 184) but that represents a major source of democratic influence in the context of the national elections would be great regardless of the State power that were to tackle it. The legislature and the administration would be subjective because of their direct interest in keeping this significant pool of voters satisfied. At least in theory, it

¹ See Romanian Constitutional Court Decision No. 874 of the 25th of June 2010 concerning the unconstitutionality objection concerning the provisions of the Law enacting certain measures considered necessary in order to restore the budgetary balance, published in The Official Gazette of Romania No. 433 of the 28th of June 2010. Available online at <http://www.ccr.ro/ccrSearch/MainSearch/SearchForm.aspx> (last accessed October 9th, 2014)

would seem that a Constitutional Court could be more objective in deciding the matter at hand. But we will show that due to the way it is institutionally regulated, it does not pose any superior guarantees of independence in this case. The old age, imminent professional retirement rights and nomination procedure are all arguments in favor of our conclusion. And last but not least, the fact that the Romanian Constitutional framework does not entitle this group with the power to decide issues of pure economic nature, or to act with a significant degree of judicial activism, are supplementary arguments that support our claim that a dangerous decision was reached in this case.

Whenever constitutional judges are faced with questions exceeding pure legal analysis of the constitutional framework, it has been considered that they should let democracy prevail by allowing the legislature and the executive branch to exercise their specific functions (Easterbrook, 2002, p. 1404). The judges should not delve into matters that surpass the question of whether the legislature or the administration acted pursuant to the Constitutional rules. They should refrain from deciding upon the opportunity of such behavior (Bendor, 2011, p. 337).

Another line of reasoning is of extreme relevance to our current dilemma, and states that the judicial activism versus judicial restraint debate is actually not the crucial one. According to it, if a judge declares what the law is, or confirms the provisions of the law, he is nothing more than an instrument that enforces the latter. If he contradicts the law, he is acting in an illegitimate manner. Moreover, in this view judicial objectivity is seen as a prerequisite to judicial decision making. Judges are prohibited from imposing their personal opinions on society through their decisions (Barak, 2009, pp. 264-265). By exercising judicial constitutional review, the judges may only enforce or slightly broaden the scope of constitutional rights, in line with the intent of the fundamental document (Wolfe, 1997, p. 55).

The issue of constitutional judges (be they part of a Constitutional Court or a Supreme Court) acting in unexplainable manners (unbound by any legal principles), that is solely according to their personal and ideological preferences is not limited to lesser developed democracies. Even the United States Supreme Court often acts subjectively to say the least (Stone, 2012, p. 499). However, even legal errors resulting from ideological causes can eventually be overcome, as they are subject to subsequent evaluation (Piccard, Piccard, 2006, p. 4).

The entire Romanian Constitutional framework was geared towards a judicial error in this case. First of all, according to article 143 of the Constitution, the judges must have

graduated law and must have at least eighteen years of experience in juridical or academic activities. Being old law specialists raises two concerns. They are on one hand biased towards issuing decisions in favor of social care recipients, as they are close to retirement age². Being long time legal specialists also makes them immune to a deep and specialized understanding of the intricacies of economic mechanisms, making them prone to errors whenever trying to steer away from strictly legal considerations and into the territory of economic opportunity as was the case in the decision we are currently analyzing.

The nomination procedure creates very politically-dependent courts, despite the previously-mentioned experience requirements that are inadequate to prevent this from happening. According to article 142 of the Constitution, three of the judges are appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania. Obviously, even if they are selected from a pool of applicants with considerable experience in the legal field (which is not uncommon in the high political circles of Romania), they will have a good connection (to say the least) to the political arena and to the electoral stake that concerns their electors – the sentiment of the Romanian electorate. However, up to this point in the evolution of the Constitutional framework, it has sadly been considered the best measure that would minimize democratic objections as to the transfer of the power to guard the gates of constitutional legitimacy from its source, the people, to its guardians (Pinelli, 2007, p. 34).

What is most troubling about Romanian Constitutional Court Decision No. 874 of the 25th of June 2010 concerning the unconstitutionality objection concerning the provisions of the Law enacting certain measures considered necessary in order to restore the budgetary balance is the motivation that indiscriminately reducing the salaries of the entire public administration with 25% is a democratic, sound and necessary measure that will allow for the safeguarding of the Romanian State. However, in the absence of any Constitutional provision to support it, the Court at the same time holds that the difficulties of the State's social care budget cannot be opposed to the right to pensions, in the sense that the latter cannot be diminished, even temporarily, because the constitutional right to a pension cannot be influenced by the faulty administering of the budget by the State.

² Please see the website of the Romanian Constitutional Court - <http://www.ccr.ro> (last accessed on October 9th, 2014) - for the age of each member. At least seven out of the nine can be considered to approach the national legal retirement age.

The sustainability of the State budget allocated for pensions depends decisively on the evolution of the national economy (Socol, Marinaş, Socol, Dascălu, 2011, p. 230). Pensions are a result of the performant management of the State. They are a direct result of the latter. The funds cannot be paid unless the latter allows for it (Ciuraru-Andrica, 2012, p. 19). The Romanian Constitutional Court began to overreach its specific Constitutional mandate and started to analyze questions of policy, of regulatory opportunity. This behavior is mandated by a lack of specific economic principles agreed-upon by the basic social contract. In the context of a new Constitution, the jurisprudence of the German Federal Constitutional Court in this regard is extremely relevant, in its conclusion that a balance must be struck between the freedom of the legislature to regulate economic life and the restrictions that the Constitutional rights impose on the former – thus, it is clearly implied that the choice of fundamental rights will inevitably translate into a choice of potential actions/ attitudes that will be available in the context of economically governing a nation (K.A.S., 2013, pp. 47-48).

We have shown that the Romanian Constitutional framework is extremely vague in regulating the manner in which Constitutional judges interact with the other powers of state and in describing the tools at their disposal or in setting the standards for the primary wielders of those specific tools. The specific reference value that influences every national pension is a question of economic policy, not one of constitutionality. The Romanian Constitution does not currently expressly allow for economic adjustments to be made in dire situations, and so has left the question open for Constitutional debate. It has been correctly noticed that regarding this matter we should follow the example of the German Constitution, which allows for the ensuring of budgetary balance. This can only be achieved by counter-balancing the constant increases in public salaries and pensions stemming from performant years with cuts in times of economic crises or excessive budgetary deficits (Paul, 2010). Thus, it is a condemnable fact that the constitutional court judges decided to take on the role of the executive in the case undergoing scrutiny, as they substituted their own view of the correct or preferable solution in their decision rather than remain within the boundaries of reviewing the lawfulness of the matter they were asked to judge upon (French, 2009, p. 11).

Navigating the quicksand at hand will not be an easy task. A coordinated effort of normative economic analysis of law proposals, their enactment and the subsequent constant application of the analysis tools in the day to day activity of the constitutional interpreters will have to be achieved in order for legal decisions to constitute sound economic ones as well. Also, the constant application can only be a result of the competence to properly apply

economic reasoning whenever trying to tackle complex legal issues that affect economic outcomes. A delicate balance must be struck, as we are not requesting a system of constitutional economists that disregard the rule of law, just the same as we condemn pure jurists that have an unhealthy disregard for the economic pains of the nations they are charged to help defend. The journey ahead is long and difficult, but its successful completion could yield great economic efficiency benefits. A new Constitution worthy of its twenty-first century origin will have to try to tackle all of these issues head-on. This analysis is but a mere signal that is meant to spark the lighting of the long path ahead.

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