

The Rise of Law and Economics in the Brazilian Supreme Court

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Long Abstract

Law and Economics is often regarded as the “most important development” in legal scholarship and practice worldwide.² Originating in the United States, it has spread across the globe, influencing the formulation of public policies and the interpretation of Law. This article focuses on the spread and influence of economic reasoning in the Brazilian Judiciary, particularly in the country’s Supreme Court.

As noted by literature, the courts have played a key role in the diffusion of economic analysis, even before it gained prominence in academic circles.³ Despite previously suffering long criticism for their “economic myopia”⁴ and lack of concern for the consequences of their decisions, this has changed: now, judges have intensified their use of economic principles, incorporating them into their decision-making processes.

The relationship between Brazilian Justice and Law and Economics became profound and gained institutional roots. In 2021, a new resolution from the National Council of Justice made it mandatory for aspiring judges to be tested on Law and Economics, Pragmatism, and Behavioral Economics.⁵ More recently, the President of the Brazilian Supreme Court appointed an economist – a former member of the Brazilian Competition Authority (CADE) – to join his team, signaling a commitment to incorporating economic expertise into the highest echelons of Brazilian Justice.⁶

While legal scholars have noted this recent prominence of Law and Economics as the rise of economic analysis in the Judiciary, I argue that this movement is not entirely new, but rather a transformation of the *selection* of existing economic ideas. Put differently, I claim that the nature of economic ideas used in Brazilian Justice has evolved, reflecting changes in societal values and political ideologies.

In this sense, economic analysis of law has always been present in the courts; what has changed is the *type* of economic analysis that has been employed. While previously economic analysis of Law was associated with heterodoxy and concerned with values more closely related to developmentalism, it now has taken on more orthodox tones. I sustain that these shifts are

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² ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 6 (Berkeley Law Books, 6th ed. 2016).

³ Mariana Pargendler & Bruno Salama, *Law and Economics in the Civil Law World: The Case of Brazilian Courts*, 90 *TUL. L. REV.* 439 (2015).

⁴ CHRISTIANE LELES REZENDE, *PACTA SUNT SERVANDA? QUEBRA DOS CONTRATOS DE SOJA VERDE* (Doctoral Thesis, USP, 2008).

⁵ CONSELHO NACIONAL DE JUSTIÇA, Resolução nº 423 de 2021.

⁶ Luísa Martins & Isadora Peron, *Barroso inova e contrata economista para equipe no STF*, *VALOR ECONÔMICO*, <https://valor.globo.com/politica/noticia/2023/08/28/barroso-inova-e-contrata-economista-para-equipe-no-stf.ghtml> (last visited Sep 30, 2023).

connected to underlying political developments. Particularly in the case of the recent rise of Law and Economics, this can be seen as a result of the growth of liberal and libertarian ideas during the Bolsonaro administration.⁷

This article documents this transformation through an empirical analysis of the Brazilian Supreme Court jurisprudence. By examining how economic reasoning has been applied in various cases and how it has evolved, we can gain insights into the changing nature of economic ideas within Brazilian Justice.

In addition to documenting this evolution, we reflect on the implications of adopting economic ideas in legal decision-making. Recent literature in the United States has analyzed the growing use of economic reasoning in judicial decisions.⁸ Scholars identify a tendency for more orthodox approaches, exemplified by rulings tending to favor business to the detriment of regulatory agencies; and establishing longer criminal sentences.⁹

The article is structured as follows. Part I examines the evolution of economic ideas within the Supreme Court. This section delves into the historical progression of economic thought within the Court, tracing its development through an analysis of relevant cases and citations to economists. Part II provides a contextualization of the recent development of Law and Economics in Brazil, dissecting its primary drivers, and encompassing the political and intellectual forces that have propelled this within the Brazilian legal landscape. It also involves mapping the nature and frequency of questions related to Law and Economics in admission exams for the Judiciary. Part III quantifies the use of Law and Economics within the Supreme Court, tracking the usage of economic terms, and identifying citations to economists and Law and Economics scholars within court decisions. Additionally, it illustrates instances where Law and Economics have played a decisive role in the outcomes of significant cases, highlighting its practical application within the judicial system. I conclude by reflecting on the functions and consequences brought about by the incorporation of economic reasoning into judicial decisions, considering both its potential benefits and potential pitfalls within the Brazilian legal context.

⁷ See Camila Rocha de Oliveira, 'MENOS MARX, MAIS MISES': UMA GÊNESE DA NOVA DIREITA BRASILEIRA (2006-2018) (Doctoral thesis, USP, 2019).

⁸ See Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Impact of Law and Economics on American Justice*, National Bureau of Economic Research Working Paper 29788 (2022). See also Siying Cao, QUANTIFYING ECONOMIC REASONING IN COURT: JUDGE ECONOMICS SOPHISTICATION AND PRO-BUSINESS ORIENTATION (Doctoral Thesis, Chicago, 2020).

⁹ *Id.*