LECTURE - THE ECONOMIC ANALYSIS OF LAW IN BRAZIL

Ladies and gentlemen, this is a remarkable opportunity to discuss a recent, but very important change, in the study and practice of Law in Brazil. For a long time in my country, Law was seen as an isolated science, pure, able to bring in its own limits all the elements necessary for its understanding. This atomistic view, in my opinion, made jurists lose focus of their role. As they are too concerned with the definition of Law, its limits and its way of understanding, they have dedicated themselves to the creation of abstract theories and numerous categories that only interest academics, but not common people who wish to know their rights.

The good news is that things are changing. Increasingly, authors, legislators, and judges have been concerned with the analysis of the legal system in its social context, instead of studying Law as a laboratory experiment. Thus, the economic analysis of Law has been increasing, causing the judicial norm to be understood as a route to the behavior of individuals in their daily relationships. The new Brazilian jurist always asks, primarily, what goals does the norm intend to achieve. Then, he analyzes the structure of his own legal command and its sanctions in order to determine whether the incentives generated by it are correct to achieve the desired results. Furthermore, he investigates whether that norm did not produce unwanted side effects, which are often ignored by those who understand Law as an end in itself.

This new twist, however, is not free from criticism from traditionalists. The most common of them accuses the movement *Law & Economics* of reducing justice issues, which are essentially moral, to evaluations in terms of efficiency. Criticism is particularly paradoxical if we remember that it was Hans Kelsen, the precursor of the pure theory of law, who said that "justice is an irrational ideal" in his classic work "What is Justice?". Therefore, separating Law and Economics does not mean preserving the concern for justice.

I draw your attention also to the fact that efficiency and justice are not antagonistic concepts. Efficiency is reached when, in a given situation, there are still allocated resources available to meet, to the greatest extent possible, all the interests involved. This is called "Pareto optimal": increased satisfaction of an interest cannot be achieved without a decline in the satisfaction of the other. Various arrangements may be equally efficient, having the absence of evident expenditure in common. The preference between these arrangements, however, specifically in the field of Law, is to be defined by criteria of justice. As stated by Professor Mitchell Polinsky, efficiency makes the cake bigger; justice decides how the cake will be shared.

In my career as Justice of Brazil's Supreme Federal Court and as President of the Commission responsible for preparing the draft that in 2015 resulted in Brazil's new Civil Procedure Code, I have faced a number of complex legal issues that required this twofold analysis of efficiency and justice. In cases in which we can clearly examine the controversial issues under efficiency parameters, we need to decide if an expenditure, when

detected, would be in accordance with the legal system in effect. On the other hand, when the dispute cannot be assessed from the viewpoint of efficiency, it is the duty of the judge to apply the most appropriate justice principles to the case, in the light of fundamental rights and guarantees provided by the Constitution, by international treaties, and, not to say, taken from human reason itself.

In this sense, Brazil's Supreme Federal Court has recognized, in 2011, that the union between people of the same sex to constitute a family is worthy of judicial guardianship. This matter of law, as you can see, is not subject to examination in terms of efficiency. The committee has based itself on the strict criteria of justice in order to reach its conclusion, using the constitutional provision that guarantees "intimacy and privacy," the principle of isonomy and also natural law considerations. After all, it is not up to the right post, or to his authorities, to define which family models are admitted or the way in which each individual will seek their happiness.

Still in the context of Family Rights, in 2016 the Court stated the possibility of joint legal recognition of paternity for biological affiliation and for affective affiliation. The foundations were similar, covering human dignity, the right to pursuit happiness and isonomy. Based on the criteria of justice, not efficiency, the committee has recognized that the establishment of a hierarchy between species is forbidden.

In another case, which could hardly be decided only in the light of efficiency, the Supreme Federal Court has recognized that the criminal conviction of a woman who interrupted pregnancy of an anencephalic fetus

is not liable. At the trial, held in 2012, values such as sexual and reproductive freedom, the right to health, human dignity and the very concept of life were highlighted.

A year earlier, in 2011, the Court also rejected the criminalization of protests in favor of the decriminalization of cannabis sativa's trade, known as "marijuana marches". In this case, most important concepts were used for the Economy: the liberty of assembly, expression, and manifestation. As the economist Amartya Sen emphasizes, there was never an episode of endemic hunger in countries that guarantee fundamental liberties. The Judiciary is an essential institution for the preservation of these basic guarantees, which are indispensable to the development of any country. Note, therefore, that the criteria of justice invoked in the trial may be combined with the analysis of the legal system's efficiency as a whole.

In other cases judged by Brazil's Supreme Federal Court, economic considerations have gained more importance. One of them, considered in 2013, referred to the payment of debts of governments recognized by the Judiciary. Brazil's Constitution provides a privilege for Public Administration: in the case of a judicial sentence for payment of a certain amount, the debt is included in a row of government debts, which are honored in accordance with the provisions of the appropriation act. The privilege seems to have generated wrong incentives to governments, which accumulate huge debts without any provision for payment. In response to the problem, amendments were approved to the Constitution to allow almost indefinite postponement for the payment of debts. The last

amendment with this purpose permitted that the payment of liabilities, every year, was limited to a percentage of revenues collected between one and two percent. As the debt grows at a much higher proportion, it is not difficult to conclude that its full balance would never occur.

The Supreme Federal Court, judging that the constitutional amendment was unconstitutional, decided that this system violates the Rule of Law, the Separation of Powers, the right to property and isonomy. From the perspective of an economic analysis of Law, the trial prevented the creation of misguided incentives for the maintenance of the government and the development of the economy. On the one hand, the benefit of non-payment of debts arising from the Judiciary's order encourages governments to not honor any of its debts, since it is the main mechanism for the recovery of credits is the judicial process. Knowing this fact, those who enter into a contract with the government will naturally include the risk of default in the price. Therefore, they lose the government and the taxpayers who finance them. Moreover, public officials, who are aware of the legal benefit, also have no incentive to repair any damage caused to private property. Individuals, in turn, have no incentive to produce when they can have the fruit of their labor subtracted by the State without reasonable time for repair. All this shows that the model introduced by the constitutional amendment was inefficient and indefensible in economic terms, which cannot be ignored by the applicator of the Law.

Also, the committee responsible for drafting the new Civil Procedure Code, under my presidency, was attentive to learnings from the science of

economics. And it could not be otherwise since the justice system is important for the development of the country, and is recognized by major international organizations. The Council of Europe established, in 2002, the European Commission for the Efficiency of Justice (CEPEJ), in their commitment to research, organize and propose solutions to the shortcomings of the judicial systems of member countries. On the other hand, the World Bank measures, in its Doing Business ranking, the procedural formalism, the judicial effectiveness and expedite the process in case of disputes over credits, protection of minority investors, enforcement of contracts and insolvency resolution. Therefore, we need to examine the contributions that the economic analysis of the process has to offer.

One of the most important aspects of the new Civil Procedure Code is the relevance given to alternative means of dispute resolution and self-mediation between the parties. According to the basic economic model process, the probability of an agreement depends on the relationship between the amount involved in the dispute, the optimism of the parties in relation to the outcome of any process, the costs of court litigation and the willingness of the parties to risks in addition to the strategic behavior of each of them - the object of analysis of game theories. Yet another portion of scholars, under the perspective of behavioral economics, questions the assumption that litigants act rationally to maximize their economic situation. For this line of thought, from empirical findings of the so-called "hedonic psychology", it would be possible to conclude that feelings of justice,

satisfaction, and perception of the damage that was caused can affect the provision of both parties for the agreement.

One of the empirical experiments that underlines this conclusion is the "ultimatum game": a subject called "proposer", is responsible for proposing the division of a sum of money between him and the "responder". If the division is not accepted, neither is entitled to the money. An economically rational responder would accept any division above zero since this is exactly the alternative you have left in case of a refusal. However, responders regularly refuse divisions that assign them less than thirty percent of the value; and proposers, in order to avoid this situation, often divide the amount equally. The application of this experiment to the context of agreement attempts has obtained similar results, favoring of the hypothesis of "sense of justice" as a determining element. An important data, at this point, is that the sense of justice usually varies with time, because of the so-called "hedonic treadmill." That is, the human mind is capable of adapting to new situations, whether they increase or diminish their well-being. One must be careful, however, so that the agreement negotiations do not create rancor between the parties. This is why the act of self-mediation should be undertaken with care, manner, and patience: the passing of time tends to increase the likelihood of an agreement.

In order to stimulate self-mediation based on these principles, the Code provides an audience for this end, prior to the defendant's manifestation, as well as other mechanisms to facilitate the consensual outcome. The creation of judicial centers for the resolution of consensual disputes is necessary since

they are responsible for developing programs to assist, guide and stimulate self-mediation. The application of negotiation techniques is expected, valuing a favorable environment for the agreement, and the establishment of guidelines for the professionalization of conciliators, mediators and private chambers of conciliation and mediation.

There is also the creation of a phase similar to the discovery of common law, so that the party may request that the Judiciary produces evidence before the process, so that prior knowledge of the facts may give better information to decide for the demand's judgment or not. Thus, it avoids that the excessive optimism of the individual becomes an unnecessary demand over the Judiciary shelves.

Another concern for the new Code, related to the economic analysis of Law, is the unification and stabilization of jurisprudence. Legal certainty as to the understanding of Courts draws not only the performance of the hierarchically inferior organs but also the extra procedural behavior of people involved in controversies whose solution has already been pacified by jurisprudence. The jurisprudential uncertainty prevents parties from adequately predicting the outcome of a demand in court, making it difficult to reach similar conclusions about the advantages of the judicial process and also over the area in which the terms of the agreement may vary while generating benefit to all parties involved. In the United States, where the enforceability of the precedents is valued, only two percent of the causes of automobile accidents, four percent of all civil cases in state courts and less

than two percent of federal civil cases are not solved by agreement, depending on the jurisdictional solution.

Brazil's Civil Procedure Code of 2015 also comes to use the legal expenses, fees and procedural sanctions as tools to prevent frivolous lawsuits, postponement of appeals and behaviors of parties that are inconsistent with the regular conduct of the proceedings. This is another factor that increases the likelihood of agreements. As Professor Steven Shavell from Harvard University states: litigation before the Judiciary creates an externality, insofar as private costs for demand are usually smaller than the social costs created by the new action and by the excess of lawsuits in Courts. The law, therefore, should provide mechanisms to produce an inhibitory effect (chilling effect) as regards to the unnecessary procedural expedients.

All of these experiences that I had the joy to face over the years demonstrate that efficiency and justice are complementary and not excluding concepts. The concrete decision of a complex legal issue may be the beginning of a massive injustice if it ignores the lens of economic analysis, such as in the treatment of a disease that can trigger other health problems, perhaps even worse ones. Similarly, Justice, as a public service, depends on proper management, in order for trials to be held with reasonable duration and costs. Improper management of the civil justice system can be as catastrophic as the mismanagement of the health system. We jurists, as well as doctors, have to use the greatest tools at our disposal and patients will be thankful.