STRUCTURAL PROCESS IN BRAZIL AS A MECHANISM FOR THE EFFECTIVENESS OF FUNDAMENTAL RIGHTS

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ABSTRACT: This paper intends, after a brief incursion into the institute of the structural process from its historical scope and conceptualization, to outline its characteristics, point out its legal bases and, to make it evident through the handling of the biphasic operating system within which it is inserted, that it is the potentially most efficient means for the realization of those fundamental rights that, when violated, are in need of a satisfactory implementation by the constitutionally competent entities. In spite of some commonly unreasonable criticisms regarding judicial activism and the intrusion of powers, notably by the raised and inevitable actuarial management of the Judiciary with evident consequences in the fiscal responsibility law and the formulation of public policies related to government programs. Finally, an incisive reflection on the pertinence of the appropriateness of this new procedural modality, as well as the need or not of positivization de lege ferenda, and in what contours, by the national legislator. The study is exploratory in nature, anchored in bibliographic material, as indicated in the references at the end.

KEYWORDS: Structural Process–Fundamental Rights–Judicial Activism–Public Policies

Introduction

Based on the paradigmatic case of Brown X Board of Education of Topeka, which took place in 1954 in the city of Topeka, Kansas, in the United States, in which little Linda Brown, a minor African-American student, was prevented from attending public school in the proximity to his residence due to the racial segregation policy in force in that country, the US Supreme Court ruled that school admission criterion practiced by the public education system was unconstitutional, determining that black children were equally accepted in schools attended by white children and vice versa.

This absolutely unprecedented judicial decision initiated a broad process of change in the entire public education system in that country, giving rise to what was called structural reform,

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precisely because the decision went beyond the limits of the eventual individual nature of the cause, as it was of facing an issue related to a fundamental right and which translated the solution of an institutional problem that was much more deeply rooted and complex than what could be answered by the exercise of typical jurisdiction (BILL OF RIGHTS INSTITUTE, 2022).

The concept was then perfected and the construction of this kind of process with an effective and satisfactory content was absorbed by the Brazilian legal community with the same purpose of meeting demands that are not found in the procedures set by the legislator, whatever the common and special rites in force, a response worthy of the verified violations of positive fundamental rights. Qualified by legal experts under the nomen juris of 'structural process', it found this, here in Brazilian lands, a fertile ground, although there is still no discipline of its own regulated from its own legislative design.

By absorbing several normative diplomas from a dialogic construction, the structural process deals with a specific category of object: the one that represents a structural problem that qualifies the nature of the demand to receive its special instrumentalization by the process of the same name (DIDIER, 2020).

Based on the possibility, as will be seen below, of adopting gears and instruments that are specific to it, the structural process unveils the possibility of calling for an innovative jurisdiction, whose decisions and intervention in the request and protagonism of the judge, gives it the seal of Judicial activism at the same time that it strengthens the guarantee of effectiveness both in the exercise and enjoyment of the right that is intended to be implemented, and gives credibility to the system that suffers the hardships of disrepute due to the lack of effectiveness and real implementation of its decisions.

It is true that like any innovative measure or idea, this one also causes strangeness, uncertainties and various questions of a legal, political and economic-budgetary nature.

However, considering its very recent management within our legal system, it is premature to issue a value judgment about it, which will only be viable after some time has elapsed with its experience and opportunity by the law handlers, the result of a maturation that will show its competence, mutatio mutandis, to compose the country's instrumental framework.

I. STRUCTURAL PROCESS: ORIGIN

As pointed out in the preamble, the structural process originates from a decision handed down by the US Supreme Court which, by judging in an unprecedented way an issue individually taken to the subsumption of the established norm, made it possible for its implementation in the real world to cause a process of behavioral change of such magnitude, to implement a fundamental right through a structural reform with positive social, educational and political repercussions (DIDIER, 2020).

It was about facing a demand of an institutional nature whose object overflowed from the concrete point of view, the mere private interest and right of the party that claimed it, transcending in an uncontained way to an entire group, community, class of people that for this affected, triggered the matrix that is in structural non-compliance, being for this motto, considered below the typical adversarial and individual process recommended by the typical legislation.

So much so that, for this reason, a movement for change began with the result that is currently seen, successful in the sense of definitively purging the criterion of racial segregation to the detriment of all Afro-descendants in Yankee territory, allowing an indistinct and isonomic.

Although even today there is no specific normative discipline formally pointing out the procedure, as would be expected, its construction elsewhere took place as the factual and legal developments took place, having as a contribution the available and applicable legislative framework of dialogic mode, weighed with the normative flexibility provided by the American legal system.

II. CONCEPT AND CHARACTERISTICS

Lacking a legal conceptualization, without an analytical definition or systematic categorization of this type of action by the Judiciary, the structural process is defined by the doctrine as being that aimed at protecting interests that do not exhaust themselves or are satisfied by a simple act, but "demand dialogue and cooperation throughout the procedure with the adoption of flexible measures that can be changed and adapted according to the factual circumstances". (LUCON, 2016).

Or whose litigation arises due to the violation resulting from the functioning of a bureaucratic structure, public or private, which, due to its context, requires an essential "restructuring of the functioning of the structure" (VITORELLI, 2018).

Didier (2020) states that the conceptualization of a structural process presupposes an identical undertaking regarding the structural problem, since this one is contained in that one.

So, considering that the structural problem is triggered by the existence of a state of structured nonconformity (disorganization), that is, a reality far from what is ideal or desired, it is a corollary of the reasoning since, due to its peculiarities, this is the specific object of the target process of the concept.

It is true, therefore, that the violation of rights that affect a large number of people or groups is evident, which are called radiated rights, in which decisions are aimed at promoting a substantial change, for the future, of a certain practice or institution (MEDINA, MOSSOI , 2020).

For Didier, a structural problem is not limited to issues involved in matters of fundamental rights and/or public policies, and can encompass an extreme of doubts, problems experienced in the private sphere, as in the case of bankruptcy or probate proceedings – referred to here only example title (DIDIER, 2020).

It is also worth considering that the structural process presupposes the need for judicial intervention to promote a reorganization or restructuring of the situation fully considered - this intervention is normally long-lasting and requires continuous monitoring.

The didactic intelligence of Vitorelli's argument allows us to have a very clear foundation of the structural root of this procedural type, and consequently the justification for the need for a deeper and more propositional approach:

> "The functioning of the structure is what causes, permits or perpetuates the violation that gives rise to class action litigation. Thus, if the violation is only removed, the problem can be solved in an apparent way, without empirically significant results, or momentarily, returning to repeat itself in the future." (VITORELLI, 2018, pp. 6, 7).

According to Didier (2020), we can point out as essential characteristics:

1 – structural problem: the existence of a structural problem is the reason for the structural process.

In order to qualify as such, the problem to be resolved must necessarily be of such a nature that it cannot be resolved with just a single act, such as a decision that certifies a right and imposes an obligation.

It requires more.

There is a need for judicial intervention to promote a reorganization or restructuring of the state of structural non-compliance, including continuous follow-up a posteriori, which allows qualifying bankruptcy and inventory processes, for example, as structural processes.

2 – type of decision: the decision rendered will define the mode, means and intensity of the restructuring, as well as the need for transition rules, such as a type of plan or project.

This is because the problem, to be solved, depending on its degree of complexity, will require the practice of several chained or connected acts, which consequently should be subject to prediction, with an evident expenditure of time for execution.

3 – consensus: admits self-composition, mediation, transaction, including adaptation of the process in light of the provisions of art. 190 of the Code of Civil Procedure (BRASIL, 2015c).

It can also occur in an extrajudicial sphere, within the scope of the Public Ministry based on a Civil Inquiry, Term of Commitment for Adjustment of Conduct and even Recommendation (SUPERIOR COURT OF JUSTICE, 2022).

This consensual nature allows classifying the structural process as one of the alternative modalities of conflict resolution, which, depending on the form, can be qualified as peaceful (MEDINA, MOSSOI, 2020).

4 – intrinsic flexibility: considering the lack of legal formality in the absence of specific provision, it is possible to adopt atypical forms of third-party intervention and executive measures, change the litigious object (request), and use mechanisms of judicial cooperation.

5 – biphasic procedure: processing takes place in two major phases.

At first, similar to the cognitive phase of the common procedure, it ranges from the initial distribution to the issuing of a decision that delimits the structural problem, establishing the goal or plan to be pursued (it is the decision-principle).

The second phase, equivalent to complying with the sentence, refers to the restructuring itself, with the implementation of the plan through various decisions.

Because of this characteristic, added to the purpose of the structural process, permanent inspection and evaluation is necessary.

In addition to these, others are pointed out, which although typical, are not essential from his point of view:

1 – multipolarity: admits a multiple number of litigants, depending only on the existence or not of interest, and the relevant admission judgment of the magistrate to avoid procedural turmoil.

2 – collectivity: it may or may not be a demand of a collective nature.

3 – complexity: structural process may or may not deal with a structural problem of complex bias.

In turn, Vitorelli differs from the above provision in the following points, justifying:

1 – It is the nature of the structural problem to be of an institutional nature, with the purpose of implementing a fundamental right and/or public policy, it only being sufficient - once the issue of the matter is overcome - that there is a non-compliance or illegality to be remedied or restructured.

As a corollary, in terms of the substantive law that it aims to meet, private processes such as bankruptcy and inventory, despite the complexity and compliance with other requirements, cannot be called structural.

2 – as a consequence of the previous consideration, taking into account the institutionality of the structural problem, which presumably will come from a defined group of subjects or not, the demand will always be collective and complex, therefore the items pointed out as typical but not essential for Didier, on the contrary, they are essential for Vitorelli, for whom "all structural litigation is an irradiated collective litigation", since it affects individuals, subgroups or diverse groups, without there being a shared social perspective among them (VITORELLI, 2018; SUPERIOR TRIBUNAL DE JUSTIÇA, 2022).

It is also worth mentioning, as an additional feature, that a structuring process pursues the utterance of an equally structuring decision, with execution bearing the same profile (MEDINA, MOSSOI, 2020).

Its main purpose is to provide the winning claimant with the certainty that whoever 'wins' effectively 'takes', contrary to the common sense belief that often 'whoever wins does not take'. (SUPERIOR COURT OF JUSTICE, 2022).

III. LEGAL BASIS

There is no legal provision for the structural process within the Brazilian legal system, as in the United States.

As one of the microsystems engendered, in this case by doctrine and jurisprudence, its applicability becomes possible through the interpretation and handling of the recent procedural legislation available, through a dialogical incursion between Law 13.105/2015 (BRASIL, 2015c), and other disciplinary diplomas of collective processes, obviously with the necessary adaptations.

Our Civil Procedure Code is flexible and allows, for example, procedure fragmentation.

But there is evidence of interest on the part of the legislator in this matter, given the incipient nature of the proposal for a Bill currently being processed by the National Congress under nº 8.058/2014 (BRASIL, 2014d), aiming to regulate "the control and intervention in public policies by the Judiciary Power" provided in art. 2, sole paragraph, that this process will have "structural characteristics, in order to facilitate the institutional dialogue between the Powers" (VITORELLI, 2018).

IV. BIPHASIC PROCEDURE

As mentioned in the introduction, the systematization of the structural process necessarily follows two phases:

1- In the first phase, the verification of the structural problem and identification of the goal to be reached, through the elaboration by the magistrate, of a norm-principle with the launch of plan or project for achievement, which in turn has a programmatic vocation (LUCON, 2016).

2- In the second phase, the executive acts are carried out to implement what has been decided, with a sequence of cascading judicial decisions aimed at the desired restructuring pari passu, as inspection and updating unfold.

Vitorelli maintains the existence of a cyclical and spiraling proposal for understanding the portrait that the executive phase forms.

To this end, and in a very didactic way, it points to the existence of four levels within the second phase:

1 – Diagnosis of the dispute, and how it can be resolved.

2 – solution plan.

3 – implementation of the intervention.

4 – the implementation is monitored so that a new diagnosis of the post-intervention reality emerges, from which a new plan will be drawn up, with a new implementation, new monitoring, which may result in a new diagnosis and so on.

In a true cycle of spirals that will only come to an end with the consummated reconstruction (SUPERIOR COURT OF JUSTICE, 2022).

With this, there is a feasible improvement in reality, as claims are met and gaps are investigated in a timely and immediate manner, providing opportunities for defining indicators at the same pace as they are laid bare.

There is, therefore, a notorious overlap between the knowledge process and its respective implementation, both are united in a single body, because at the same time that it implements, the judge becomes aware of the situation again, being able to issue a new decision with an axiological character.

Therefore, it is true to say that, as Vitorelli mentioned, both are helices of the same spiral that makes the social problem that brought the case to the intervention of the Judiciary, advance towards a progressively more appropriate solution and that allows the evolution of the object of the investigation. action. (SUPERIOR COURT OF JUSTICE, 2022).

This structuring execution phase will end up observing, very often, what art. 536 of the Code of Civil Procedure (BRASIL, 2015c), which establishes a skillful instrument for the management of executive measures that goes beyond an exhaustive and predictable role by the executed, freed from a legally defined model, which is advocated by the doctrine as a principle of atypicality of executive measures (MEDINA, MOSSOI, 2020).

V. BRAZILIAN EXPERIENCES

The Special Appeal nº 1.854.842/CE[1] processed before the Superior Court of Justice was the first dispute in the national territory that expressly recognized that the case was a structural problem, admitting, consequently, its existence in the legal world of the country.

[1] CIVIL. CIVIL PROCEDURE. PUBLIC CIVIL ACTION. INSTITUTIONAL ACCOMMODATION OF MINORS FOR A PERIOD ABOVE THE LEGAL CEILING. MORAL DAMAGES. JUDGMENT OF INJUNCTION DISMISSAL OF THE APPLICATION. IMPOSSIBILITY. REPETITIVE QUESTION THAT WAS NOT THE SUBJECT OF BINDING PRECEDENT. EXISTENCE OF NUMEROUS PUBLIC CIVIL ACTIONS IN THE COURT REGARDING THE SUBJECT. IRRELEVANCE. RESTRICTIVE INTERPRETATION OF THE AUTHORIZING HYPOTHESES OF THE PREMATURE JUDGMENT. PUBLIC CIVIL ACTION INVOLVING LITIGATION OF A STRUCTURAL NATURE. NEED FOR PROBATIONAL DELAY. INCOMPATIBILITY, AS A RULE, WITH THE JUDGMENT OF PRELIMINARY DISMISSAL OF THE APPLICATION OR WITH AN EARLY JUDGMENT ON THE MERITS. STRUCTURAL PROCESS. COMPLEX, PLURIFATORIAL AND POLYCENTRIC NATURE. UNSUSCETIBILITY OF RESOLUTION

Such recognition was given by the verification of its complex, multifactorial and polycentric nature, insusceptible of resolution by the current civil procedure, in the adversarial and individual molds (BRASIL, 2020a).

The structural problem brought before the court sought compensation for moral damage suffered by minors kept in an institutional shelter for an excessive period, allegedly caused by the omission of the public entity.

BY ADVERSARIAL AND INDIVIDUAL CIVIL PROCEEDINGS. INDISPENSIBILITY OF THE COLLABORATION AND PARTICIPATION OF THE STATE AND CIVIL SOCIETY IN THE CONSTRUCTION OF SOLUTIONS FOR STRUCTURAL LITIGATION, THROUGH A BROAD CONTRADICTORY AND CONTRIBUTION OF ALL POTENTIAL ACHIEVEMENTS AND BENEFICIARIES OF THE STRUCTURING MEASURE. NEED TO PROVIDE DIFFERENT JURISDICTIONAL RELIEF AND ADHERING TO THE SPECIFICATIONS OF THE MATERIAL LAW DISPLAYED IN THE CAUSE, ALTHOUGH THE PROPER PROCEDURAL RULES FOR THE RESOLUTION OF STRUCTURAL DISPUTES DO NOT EXIST IN BRAZIL. CANCELLATION OF THE PROCESS SINCE THE NOTICE, WITH DETERMINATION OF INSTRUCTION AND REJUDGMENT OF THE CAUSE, HARMFUL THE EXAMINATION OF THE OTHER ISSUES. 1- Action filed on 01/25/2016. Special appeal filed on 05/28/2018. Assigned to cabinet on 12/9/2019. 2- The purpose of the appeal is to define whether, in a public civil action that deals with the institutional reception of a minor for a period longer than that established by law, the judgment of preliminary injunction or the anticipated judgment of the request is admissible, especially when, despite the repetition of the matter, there is no legal thesis fixed in incident of resolution of repetitive demands or in incident of assumption of competence. 3- Differently from the treatment given to the matter in the revoked CPC/73, in the new CPC, the preliminary injunction of the request based on the understanding signed by the court in which the process on the repetitive question is being processed is no longer allowed, requiring , on the contrary, that there has been prior pacification of the disputed legal issue within the scope of the Courts, materialized in certain types of binding precedents, namely: STF or STJ summary; TJ's summary on local law; thesis signed in repetitive resources, in incident of resolution of repetitive demands or in incident of assumption of competence. 4- Since it is a rule that limits the full exercise of fundamental rights of a procedural nature, in particular the contradictory and ample defense, the hypotheses authorizing the judgment of preliminary injunction of the request must be interpreted restrictively, not being able to give them scope greater than that textually indicated by the legislator in art. 332 of the new CPC. 5- Likewise, so that the judge can resolve the merit outright and in favor of the defendant, or even so that there is an early judgment of the merit immediately after the defendant is summoned, it is essential that the case does not demand ample probative delay, which is not consistent with the public civil action in which it is intended to discuss the illegality of institutional care for minors for a period above the legal maximum and the possible moral damages that may result from long-term care, as these are contentious issues of a nature structural. 6- Litigations of a structural nature, such as the public civil action that deals with the institutional reception of a minor for a period above the ceiling provided for by law, ordinarily reveal conflicts of a complex, multifactorial and polycentric nature, insusceptible of adequate solution by civil procedure classic and traditional, essentially adversarial and individual in nature. 7- For the proper resolution of structural disputes, it is necessary that the decision on the merits be constructed in a collaborative and democratic environment, through effective understanding, participation and consideration of the facts, arguments, possibilities and limitations of the State in relation to the aspirations of civil society adequately represented in the process, for example, by the amicus curiae and by the Public Defender's Office in the function of vulnerable costs, allowing that judicial processes of this nature, which reveal the deepest social ills and the darkest faces of the excluded, be used for the construction of paths, bridges and solutions that aim at the definitive resolution of the structural conflict in a broad sense. 8- In the hypothesis, although there is not, in Brazil, the culture and the adequate legal framework to deal correctly with the actions that demand structuring and concerted measures, one cannot deny the judicial protection minimally adequate to the litigation of structural nature, being impracticable, as a rule, that conflicts of this social, political, legal and cultural magnitude are resolved in a preliminary or anticipated manner, without exhaustive instruction and without collective participation, on the simple grounds that the State does not meet the necessary conditions for the implementation of public policies and actions aimed at resolving, or at least minimizing, the damage resulting from the institutional reception of minors for a period longer than that stipulated by the ECA. 9- Provided the special appeal to annul the process from the citation and determine that the cause is regularly instructed and rejudged, the examination of the alleged violation of the other legal provisions of the ECA indicated in the appeal reasons is impaired. 10 - Special appeal known and provided, to annul the process from the citation and determine that the 1st degree judge adopt the measures of procedural adaptation and instructional exhaustion appropriate to the hypothesis. (STJ - REsp: 1854842 CE 2019/0160746-3, Rapporteur: Minister NANCY ANDRIGHI, Judgment Date: 06/02/2020, T3 - THIRD CLASS, Publication Date: DJe 06/04/2020).

The Public Prosecutor's Office of Ceará then filed a Public Civil Action, which was deemed extinct in light of the magistrate's conclusion that the problem was multifactorial, and that the judicial process was not intended to meet this end.

In the appeal considered by the Court, the Superior Court of Justice unanimously granted the special appeal, rejecting the understanding of the first instance, and as a corollary, annulling the decision, determining a return to the Court of origin for instruction and other procedural measures, on the grounds of that the Judiciary cannot avoid deciding, on the grounds that the case dealt with a complex problem.

This decision was taken based on the literature so far available on the structural process recognizing this nature (BRASIL, 2020a).

There is also the Argument of Non-compliance with a Fundamental Precept 709, which deals with the issue of coping with COVID-19 by indigenous peoples, pointed out by the Union's failure to prepare a plan or program of emergency measures for viral containment with the incorporation of sanitary barriers (BRASIL, 2020b).

In this demand, the granting of the precautionary measure proved to be just the triggering element of subsequent measures that within the structural context evidenced, still in execution at the time of writing this work, has been receiving attention and guidance by the Judiciary for the effective reconstruction of a state of affairs absolutely far from reality, given the recognition of the violation of human rights of indigenous peoples in relation to federal action in the face of COVID 19, and the inertia of the other established powers in relation to their official institutional duty.

By majority, the Court endorsed the injunction partially granted days before.

The reading of the procedural progress points to the offer of restructuring plans during the executive procedural phase, with the main lines of what should be the object of content being guided, even in the decision that endorses it.

For the purposes of temporal setting, it is worth clarifying that at the time of preparation of this work, the last plan is in its Fifth Version, according to the decision issued by Minister Roberto Barroso on 06/16/2021, in which he determined the presentation of the “Fifth Version of the Plan General Confrontation with COVID-19 for Indigenous Peoples", which goes hand in hand with the "Governance and Monitoring Plan" (Monitoring Plan), which evidently translates a classic example of effective judicial activism (FEDERAL SUPREME COURT, 2022).

Other examples of structural decisions can be found in environmental law, as in the cases of Mariana and Brumadinho (MEDINA, MOSSOI, 2020), implemented through measures provided for in the execution plan, namely:

> “[...] resettlement of affected families; the depollution of rivers and tributaries where the tailings were dumped; the punishment, in its various aspects, of the mining companies involved; taking measures to protect existing dams and contain new disasters” MEDINA, MOSSOI, 2020, p. 8).

VI.JUDICIAL ACTIVISM

After verifying the inertia of the Legislative Power and the omission of the Executive Power, the obligation for the Judiciary Power arises in both cases, when called upon to do so, to act in individual or collective processes (as in the case of the structural process).

This phenomenon is called judicial activism (MEDINA, MOSSOI, 2020).

This actuarial protagonism can be positive or negative depending on the case and the conduct of the magistrate, since said intervention in a balanced way has shown good results, such as those mentioned above in the judicial decisions contained in this work.

The sore point, therefore, is the equalization of this expedient so that the results do not fall short of the purpose, characterizing an inefficiency of the measure with reinforcement of the weakening of the law or the public policy that should be implemented; or if there is an excess, there is evidence of some kind of abuse or misuse of power that is just as harmful.

In addition, the relative freedom and flexibility that are inherent to this type of process, open up a series of possibilities to the judge, from changing the order of the request (suffice it to provide the parties with a timely manifestation in prestige to the contradictory), to the "delivery of a judicial decision adjusted to the current reality of the facts, making the rule of congruence more flexible" (MEDINA, MOSSOI, 2020), based on art. 493 of the Code of Civil Procedure (BRASIL, 2015c).

VII. DOES THE STRUCTURAL PROCESS FACTOR AN INTROMISSION OF POWERS?

Analyzing the structural process necessarily challenges the scholar to face the question surrounding the occurrence or not of interpenetration of powers during the execution of the restructuring decision-making process.

Yes, because by acting on legislative and executive gaps and omissions in matters related to fundamental rights and public policies, it is evident that the Judiciary, through the decisions and orchestration of the solution plan in the executive phase, will have an active performance that will have direct repercussions on several fronts outside its constitutional vocation, acting as a substitute for the entity institutionally responsible for the act.

Upon the given decision-making command, the target administrator is granted, within the scope of the Executive Branch, a legitimized license to observe the Fiscal Responsibility Law, the annual spending ceiling both for the management of priorities, and for the possibility of exceeding the limits of the annual budget, in addition to the inevitable alteration of the order of execution or selection of the project, without any kind of penalty to the manager for being covered by the court order issued in compliance with the structuring plan.

In the field of the Legislative Power, the structuring decision due to its obligation already represents in itself a certain appropriation of representativeness and elaboration of a legislative nature, since as a rule-principle fruit of the jurisdictional activity, it will make its command mandatory just like a text arising from regular working legiferant.

Said interference in a competence that does not belong to him, could in fact be pointed out as undesirable, however, a change of perspective on the issue may end up with a different conclusion.

When considering the opposite form of solution, that is, through the distribution of individual demands that promptly meet the same common axis problem, a countless number of actions will be processed, with the need for judicial action by judges, prosecutors, public servants, whose decisions can be diverse, generating a conflict of interests manifested by jurisprudential divergences to be conducted in different rhythms and ways up to the Superior Courts of the country.

In addition, socially, a hitherto non-existent social problem is triggered, an amoral and open 'privilege' that can benefit those who have filed a lawsuit to the detriment of those who, for

whatever reason, have not, making it seem to those who are victorious that they have obtained a solution, but that is only illusory given that there was only a dropper management of the problem.

A practical example of this is reported by Vittorelli when he talks about access to a day care center in the public network, or dispensing medication through the Health Unic System.

The fact that the citizen has successfully achieved, judicially, the object of his claim by an individual action, does not eliminate the violation perpetrated, rather, it only deepens the inequalities and promotes the disorganization of the public service that was intended to improve, because by passing ahead someone who was at the end of the queue (through an injunction), the person who would be the next beneficiary is conditioned to the opposite situation, with evident social damage (VITORELLI, 2018).

Certainly, this way of resolving disputes of a collective and structuring nature based on individual proceedings is counterproductive and ineffective.

What the example above also proposes for reflection is the fact that today there is a strong judicial intrusion in other powers by the jurisdictional body.

This reality is inevitable and irreversible.

Taking advantage of the same reference, court orders that individually determine the availability of vacancies in the public education network, the supply of drugs, or a vacancy in a hospital unit of the Unified Health System, or any other procedure, represent this:

> "When structural problems are dealt with in individual processes, any priority criteria collapse into a 'first come first served' approach. Whoever seeks jurisdiction first will be served. There is therefore only an illusion of victory. You only win in the process, not in solving the problem." (VITORELLI, 2018, p. 9).

Therefore, the question is not whether there will be an interference, because this is current, the question is how, and in what way it will happen in an equitable and egalitarian way without undesirable side effects.

This without forgetting the fact that since the judicial environment is a space for the exercise of citizenship due to solutions built with consensus, dialogue, and the active participation of society, it is presumed that the deliberations are, therefore, the result of its participation in the form of directly, and not represented by elected officials (DIDIER, 2020).

Therefore, lucubrations to dissent do not prosper.

Assuming that interference exists and that it is a post-modern development of national jurisdiction, it deserves a balanced alignment of the solution plan in comparison with those involved and recipients of the measures, in order to mitigate the impacts, with a view to a transition as smooth as possible (SUPERIOR COURT OF JUSTICE, 2022).

VIII. THE STRUCTURAL PROCESS AS A MEANS OF IMPLEMENTING FUNDAMENTAL RIGHTS

Considering the concept and characteristics that determine it, admitting its possibility even at the expense of express provision of law, and evidenced by national and foreign experiences that it is the best way to recompose a state of nonconformity of things due to structural deficiency, the Structural process is currently presented as the best procedural instrument of a collective nature to ensure and implement a fundamental right that may be being violated or dependent on effectiveness by some affirmative action.

Although the structural process is approached as a means of meeting fundamental rights and public policies in a dichotomous way, legally considered, it is right to point out that the latter are also a form, albeit of a political nature, of programmatic and pragmatic action by the state entity, to promote the former, that is, in this is contained.

And hence one of the structural problems, as the State is legally obliged to guarantee, by omission it starts to violate.

Therefore, an objective look shows that, in fact, the intention must be the prestige of fundamental rights, the great core of the raison d'être of public policy.

Thus, and it is known that their distance from the Brazilian social fabric is abysmal, even though it is strategically raised to the status of constitutional guarantee, it is seen that the greatest violations of fundamental rights, in this line of analysis, are perpetrated by the State itself.

Therefore, only a command of the same or greater scope has the power to proactively impel the state machine to act in accordance with the law, which legitimizes, in this case, the action of the Judiciary due to the system of checks and balances (MONTESQUIEU, 2019).

Furthermore, given the characteristics and nature of the rights that are intended to be enforced, the current civil procedure is inefficient both due to the prestige of litigation and the lack of mechanisms that make a judicial decision a reality.

And this is the greatest merit of the structural process.

Its second aspect of executive nature, coated with the vocation for the concrete result of the decision-making process, makes it the most appropriate instrument for success in terms of a tangible change in the scenario of non-compliance, as it overcomes the superficiality of the problem, promoting a true deconstruction and institutional reconstruction, which serves not only an individual or group, but the entire community (DIDIER, 2020).

CONCLUSION

The realization of fundamental rights is a decisive measure for building a strong, safe society that holds its own values and identities.

However, factors external and internal to the national context, which may or may not be consequential of the political ideologies of the powers that be, added to the perennial social, political and economic changes, end up, in a certain way, hindering an adequate attendance and implementation of these rights, generating an evident mismatch or, as technically reported by the aforementioned authors, a state of non-compliance which in turn constitutes an act or situation that violates these same rights.

Because fundamental rights are viscerally linked to the dignity and sense of added value inherent in each one, their violation, whether by omissive or commissive act, deeply affects human beings and, in most cases, is the root of a reasonable luck of the evils that end up being prosecuted.

A solution that in this sense, in fact and in law, is much more than a merely palliative, individual, and formal measure, and that produces effects felt and appropriated by society, inhabits the common ideal.

In this compass, the structural process emerges as an incipient and promising undertaking in the Brazilian legal scenario, endowed with pragmatic purposes and elements, with an internationally successful history, and which offers the individual, through the active and balanced performance of the Judiciary, a procedural tool capable of reversing a state of affairs that violates rights precisely because it elides the consequence by eliminating the cause.

Thus, both the established law and the body that implements it are given prestige, giving society the guarantee that the citizen's going to the Judiciary is not just about obtaining a favorable decision, but rather, the certainty that their right will be made effective, safeguarded, protected from political articulations and which will have a potential real and transformative effect on society as a whole.

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