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Structural litigation, destabilization rights and trans-judicial cooperation networks: lessons from comparative constitutional law[1]

Litígios estruturais, direitos de desestabilização e redes de cooperação transjudicial: lições do direito constitucional comparado

Litigios estructurales, derechos de desestabilización y redes de cooperación transjudicial: lecciones del derecho constitucional comparado

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Abstract

This paper intends to present a comparative analysis of practices of structural litigation and reform, exploring the combination of both judicial and extrajudicial agencies, mechanisms and procedures. By specifying a destabilizing function that fundamental rights may take and comparing the reconstructive role that different actors may perform in cooperation, the study advances the hypothesis that the success of structural reforms rely both on the careful design of judicial decrees and revisable monitoring mechanisms (when courts are called upon action) and on the cooperation with trans-judicial agencies, such as administrative organs, the Public Prosecutor's Office or the Public Defenders' Offices. The Brazilian experience of judicial review is then placed within a wider context, covering both the American practice of structural injunctions of complex enforcement and akin Latin American experiences.

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[1] AMATO, Lucas Fucci. Structural litigation, destabilization rights and trans-judicial cooperation networks: lessons from comparative constitutional law. **Suprema**: revista de estudos constitucionais, Brasília, v. 5, n. especial, p. 419-444, 2025. DOI: https://doi.org/10.53798/suprema.2025.v5.nEspecial.a313.

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[SUMÁRIO]

Keywords
Structural litigation; structural injunction; destabilization rights; fundamental rights; judicial review.

Contents

Resumo
Este artigo pretende apresentar uma análise comparativa das práticas de litígio e reforma estrutural, explorando a combinação de agências, mecanismos e procedimentos judiciais e extrajudiciais. Especificando uma função desestabilizadora que os direitos fundamentais podem assumir e comparando o papel reconstrutor que diferentes atores podem desempenhar em cooperação, o estudo avança a hipótese de que o sucesso das reformas estruturais depende tanto da elaboração cuidadosa dos decretos judiciais e de mecanismos de monitoramento revisáveis (quando os tribunais são chamados a agir) quanto da cooperação com agências transjudiciais, como órgãos administrativos, o Ministério Público ou as Defensorias Públicas. A experiência brasileira de controle judicial é então colocada em um contexto mais amplo, abrangendo tanto a prática americana de injunções estruturais de execução complexa quanto experiências latino-americanas similares.

Palavras-chave
Litígios estruturais; injunção estrutural; direitos de desestabilização; direitos fundamentais; controle judicial de constitucionalidade.

Sumário

Resumen
Este trabajo pretende presentar un análisis comparativo de las prácticas de litigio y reforma estructural, explorando la combinación de agencias, mecanismos y procedimientos tanto judiciales como extrajudiciales. Al especificar la función desestabilizadora que pueden asumir los derechos fundamentales y comparar el

papel reconstructor que pueden desempeñar los distintos actores en la cooperación, el estudio avanza la hipótesis de que el éxito de las reformas estructurales depende tanto del diseño cuidadoso de los decretos judiciales y de los mecanismos de control revisables (cuando los tribunales están llamados a actuar) como de la cooperación con agencias extrajudiciales, como los órganos administrativos, el Ministerio Fiscal o las Defensorías Públicas. La experiencia brasileña de revisión judicial se sitúa entonces en un contexto más amplio, que abarca tanto la práctica estadounidense de las medidas cautelares estructurales de aplicación compleja como las experiencias latinoamericanas afines.

Palabras clave

Litigio estructural; requerimiento estructural; derechos de desestabilización; derechos fundamentales; control judicial de constitucionalidad.

Índice

1. Introduction

This paper aims at mapping practices of structural litigation and structural reform involving both judicial and extrajudicial arenas, procedures and mechanisms. It starts from pointing out to the paradigmatic trajectory of structural injunctions in the United States, since the middle of the 20th century, whose potentials and flaws led to two interesting pathways: specifications of the kind of judicial remedies and decrees apt to guarantee the implementation of the ordered structural reforms, but also its managerial revision and political support; or either the proposal of instituting 'destabilization rights' that would be implemented mainly by non-judicial agencies or by a new branch of government, a kind of 'reconstructive' power.

Secondly, the research points out to some other constitutional jurisdictions, focusing mainly on Latin America, and especially on Brazil. Here, despite the rising of instruments of judicial review since the 1988 Constitution, there isn't yet a writ or injunction properly designed for structural reforms. However, a network of organs and agencies that constitute 'functions essential to the Justice' (in the constitutional words) – or are even administrative organs internal to the judicial

branch – is innovating in performing a role of destabilization and reconstruction of oppressive setups.

Thirdly, the text centers on a typology of forms of judicial review, reflecting on the place of courts within a wider vision of decision-making arenas and agencies that can cooperate in structural reforms. This discussion may help to sustain the hypothesis advanced by this text: that the fine tuning of the judicial remedies and instruments, combined with a cooperation network involving 'trans-judicial' agencies and procedures, enables a learning process that can best guarantee both managerial efficiency and political support to advance structural interventions.

2. Structural injunctions in the American Constitutionalism and the conceptual proposal of 'destabilization rights'

The American exceptionalism in not recognizing social rights in the constitution (not to mention in binding human rights treaties)[3] is ironically counterbalanced by the development of perhaps the richest set of procedural mechanisms relating to civil rights, public law, class actions and public interest litigation. At the core of this practice are structural injunctions issued by federal judges. Through them, the judiciary acts within the internal structure of organizations such as schools, hospitals, asylums and prisons, reorganizing them.

Since the nineteenth century, different trends of constitutional argument and decision have been seen in the United States[4]. A first model, of divided and separated powers, in line with Montesquieu and the architects of the American constitution, considers that rights are best protected by inaction, by locks on fragmented centers of power – the counterbalancing effect between distinct state powers and state initiatives. From Marshall ('inventor' of judicial control of constitutionality in *Marbury v. Madison* in 1803[5]) until the Civil War (1860s), this was the hegemonic model. Afterwards, and until the first quarter of the 20th century, the fear of national

[3] KING, Jeff. Two ironies about american exceptionalism over social rights. **International Journal of Constitutional Law**, v. 12, n. 3, p. 572-602, 2014; GABEL, Shirley Gatenio. **A human rights-based approach to justice in social work practice**. Oxford: Oxford University Press, 2024. ch. 5.

[4] TRIBE, Laurence Henry. The emerging reconnection of individual rights and institutional design: Federalism, bureaucracy, and due process of lawmaking. **Creighton Law Review**, Omaha, v. 10, n. 3, p. 433-449, 1977.

[5] UNITED STATES. Supreme Court. Marbury v. Madison. **US Reports**, v. 5, p. 137-180, 1964. Available at: https://tile.loc.gov/storage-services/service/ll/usrep/usrep005/usrep005137/usrep005137.pdf. Accessed on: 25 Apr. 2022.

'tyranny' led to a doctrine of implicit limitations on government, which firmly distinguished between the spheres of private, state and national power. The guideline was to prevent the government from interfering in a so-called invisible 'natural order of things' maintained by the common law rights of contract and property. In the wake of the economic crisis and the New Deal, these beliefs were discredited and freedom was then seen as a function of positive state action. Instead of policing government behavior by invoking inherent limitations, the judiciary then turned to protecting 'entrenched expectations' and ensuring the 'regularity of government' – presumably non-substantive, neutral and objective parameters, which proved to be empty and circular. After that, a model of 'pre-emption rights' came onto the scene. Its ambition was to define some islands of freedom immunized against state intervention. Some rights – such as freedom of expression and association, rights to political participation, religious autonomy and privacy and personality – were 'preferred'. In contrast to previous beliefs that these rights were part of a sphere beyond the state, economic transactions and the order of contract and property came to be seen as the product of an economic system and its institutions, not as a natural order beyond the reach of political action.

In the same period, the 'equal protection' model gained influence. Its focus is discrimination in 'state action'. The task is to pinpoint crucial areas of social structures that should be open to all, not allowing for 'non-rational' forms of distinction. Since the 1970s, however, the invocation of the federal judiciary for systematic reform has been criticized for its high standards. Before this skepticism, the great hope came from the Brown cases as a model of structural justice. Despite the realist's appraisals in the 1930's for judicial deference in face of the options taken by the elected branches (opposing the 'formalist' activism taken in face of the New Deal measures)[6], during the 1950's and 1960's the Supreme Court presided by Justice Warren became active in advancing social claims[7].

In fact, in *Brown I* (1954)[8], the Court only noted the violation of the precept of equality by the segregationist dynamics of the educational system (until then

[6] SOLAR CAYÓN, Jose Ignacio. **Política y derecho en la era del New Deal**: del formalismo al pragmatismo jurídico. Madrid: Dykinson, 2002. p. 135-153.

[7] HORWITZ, Morton J. **The Warren Court and the pursuit of justice**. New York: Hill and Wang, 1998; TUSHNET, Mark. **Weak courts, strong rights**: judicial review and social welfare entitlements in comparative constitutional law. Princeton: Princeton University Press, 2008.

[8] UNITED STATES. Supreme Court. Brown v. Board of Education of Topeka. **US Reports**, v. 347, p. 483-496, 1954. Available at: https://tile.loc.gov/storage-services/service/ll/usrep/usrep347/usrep347483/usrep347483.pdf. Accessed on: 25 Apr. 2022.

justified by the doctrine of 'separate but equal', stated by the same court in the end of the 19th century, after the abolition of slavery and the civil war[9]). Once the practice was unauthorized, it remained to be seen how it could be corrected. In the successive *Brown II* case (1955)[10], the court emphasized its illegitimacy to capture the democratic process by determining once and for all the correct solution; on the contrary, it left the question to be answered later with a myriad of federal district courts, with the determination that the state restructure the system with all due speed. Only successive civil rights laws throughout the 1960s legally cemented racial equality. Not just as a matter of principle, but with defined rules and sanctions, such as the suspension of federal funding for schools that persisted in discriminatory schemes.

The limits of the judicial function in dealing with the constitutional clause of equality before the law are revealing[11]. On the one hand, the arbitrariness of the doctrine emerged. Firstly, the doctrine of 'state action', by which it is understood that constitutional provisions are not applicable to relations between private individuals, unless some element of 'state action' is discernible (in the German tradition, a similar debate is taken under the discussion about horizontal, private or third-part effects of fundamental rights). The problem is that there is no social sphere that is not molded in some way by state law. On the other hand, there is the circumscription of the focus of the judgement of unconstitutionality in a list of 'suspect classifications': the most rigorous scrutiny is due to the incorporation into the law of differentiations by racial criteria; distinctions of sex and age give rise to an 'intermediate' suspicion, to which can be attached those relating to physical disability and sexual orientation. The justification is that these 'marked' attributes are innate, corporeal and not optional. That's why class distinctions remained outside the scope of affirmative action. The result was to produce a series of incongruities that benefited the economically best-placed representatives of those 'minorities' and then those workers included in trade union structures strong enough to support, defend and supervise anti-discriminatory measures. A large mass of people who were economically vulnerable, but not marked by the identities to be 'affirmed' through compensatory mechanisms, remained disadvantaged and helpless. With the limitations of procedural formality and judicial routine to thoroughly consider empirical issues and deal with

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[9] UNITED STATES. Supreme Court. Plessy v. Fergusson. **US Reports**, v. 163, p. 537-564, 1896. Available at: https://tile.loc.gov/storage-services/service/ll/usrep/usrep163/usrep163537/usrep163537.pdf. Accessed on: 25 Apr. 2022.

[10] UNITED STATES. Supreme Court. Brown v. Board of Education of Topeka. **US Reports**, v. 349, p. 294-301, 1955. Available at: https://tile.loc.gov/storage-services/service/ll/usrep/usrep349/usrep349294/usrep349294.pdf. Accessed on: 25 Apr. 2022.

[11] UNGER, Roberto Mangabeira. Part II: The Critical Legal Studies Movement. *In*: UNGER, Roberto Mangabeira. **The Critical Legal Studies Movement**: another time, a greater task. London: Verso, 2015 [1982]. p. 127-143.

effectiveness (choosing alternative means), the courts are bound by the contingencies of doctrinal argument and political mobilization[12], on which social consensus and judicial support for progressive measures taken against political powers – and crystallized social practices – ultimately depend.

Structural injunctions spread to cover various sectors and organizations – reorganizing electoral and school systems, hospitals, prisons, companies, etc. – but ended up in crisis from the 1980s onwards[13]. Two main factors are pointed to for this crisis: the judiciary's operational overload with the task, which requires more bureaucratic and technical means than the typical routine tasks of the organization (for example, capabilities for evaluating, planning and executing medium-term interventions in a given organization, policy or procedure); the lack of legitimacy that a power not directly elected would have to interfere, with extended discretion, in public policies and private practices. Moreover, an important point is that the very organization that is the target of the intervention has in-depth knowledge of its routines and structural flaws; therefore, the judicial procedure may not be effective if it simply decrees corrective measures externally, imposing them from the top down.

Two paths would be taken from the American experience: a revision of the procedural frameworks for structural injunctions or even the proposal of a new branch or agency of government charged with this task. In the first line, one should note that a judicial decree of a 'complex enforcement' suit can be either[14]: (a) a scheme, a general framework for a compliant practice, leaving the convicted person the choices on how to follow the guidelines; (b) a plan, specifying a model for the reordered practice, beyond which the court must define further details (those it cannot determine beforehand) when supervising implementation; (c) or a takeover, when the organization is temporarily taken over by a body of experts in order to repair its practices and return it fixed (as in business judicial recovery).

In fact, in this case of a systematic violation, the court does not fulfil its obligation to enforce the rules if it simply leaves the measure to be taken to the

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[12] KLARMAN, Michael J. Brown, racial change, and the civil rights movement. **Virginia Law Review**, Charlottesville, v. 80, n. 1, p. 7-150, 1994.

[13] WEAVER, Russell L. The rise and decline of structural remedies. **The San Diego Law Review**, v. 41, n. 4, p. 1617-1632, 2004; TUSHNET, Mark. "Sir, yes, sir!": the Courts, Congress and structural injunctions. **Constitutional Commentary**, v. 20, n. 1, p. 189-203, 2003.

[14] SARGENTICH, Lewis Daniel. **Complex enforcement**. Cambridge, MA: Harvard Law School, 1978. Draft; SARGENTICH, Lewis Daniel. Dispute-settlement and enforcement. *In*: SARGENTICH, Lewis Daniel. **Advanced civil procedure**: class actions and injunctions. Cambridge, MA: Harvard Law School, 1981. Course materials (mimeographed).

discretion of the condemned organization. But the design and implementation of structural reforms requires more than a formalistic (rule-based) or idealistic (principle-based) interpretation of the law and a justification for condemnation or acquittal. It is a practice of institutional construction and reconstruction. Rules – manifested in words in statutes, case law and codes of conduct – are aggregated at the level of institutions; then the surrounding expectations need to be articulated and taken into account. The solutions presented by a reform plan cannot be arbitrary; they require justification, the listing of reasons, but are irremediably contingent and opposed to functionally equivalent options. Empirical considerations about available resources, technical information and probabilistic judgements need to be coupled to normative requirements, to the presentation of an ideal vision supported by the law. There will be cycles of decision-making, implementation, monitoring and the resolution of disputes that emerge in the course of these very phases. Access to the budget needed to carry out reforms can be an obstacle, and will depend on political channels and disputes or collaboration among powers.

The traditional implementation processes were characterized by[15] very detailed judicial decrees, based on consensual policy objectives; monitoring mechanisms with little dependence on the parties; erratic execution mechanisms, leaving the initiative to the sanctioned actors, but with little control and low sensitivity to both the information generated in the course of compliance and the bureaucratic obstacles to change; implementation plans without clarity on their content and function. The judiciary entered into a commitment to relax the effectiveness of the intervention so as not to use up its entire stock of authority. On the other hand, it was proposed that the formulation of the decree should consider not only substantive guidelines, but also critical factors such as costs, bureaucratic capacity and political feasibility; the court would have to familiarize itself with the sanctioned area, probably requiring technical advice. Implementation also depends on the engagement of various groups, both internal and external, rather than being left solely to an appointed manager.

As for monitoring, it is important to have unrestricted access to records and people in the sanctioned organization and to define performance parameters and targets, including quantitative ones, which can be measured in the course of implementation. A full-time panel of experts would be the most suitable monitoring body, among other options such as lay committees, advocates for the sanctioned organization or ombudsmen. Delegating enforcement to a panel of experts is the

[15] NOTES: implementation problems in institutional reform litigation. **Harvard Law Review**, v. 91, n. 2, p. 428-463, 1977.

most realistic solution in terms of the court's time and costs. But effectiveness will depend on the monitoring and enforcement body being given substantial authority and resources. The court can also appoint its own authority, with defined support staff, to carry out the monitoring and enforcement functions, or share them with another separate monitoring body, such as a panel of experts.

As far as dispute resolution is concerned, it depends on the court devoting substantial time to the task, or on the effective functioning of monitoring bodies as the first instance for processing complaints and disputes. It will be more difficult to arbitrate conflicts of competence and responsibility between agencies and bureaucratic bodies. Self-composition, mediation or arbitration can work under the supervision of an authority designated by the court.

Finally, or above all, the implementation plan should inform about the conditions and resources actually available for reform, determining the applicable remedies and defining the role of each actor, such as trade unions, parliament and civil organizations. The plan must be flexible enough to change strategies throughout implementation, when it must be periodically updated and adjusted. The design of the plan will have to rely on dedicated full-time staff, experts and authorities. It is not judicial improvisation.

Promising methods of executing the structural injunctions and managerially complex reforms try to offer an alternative[16] to the model of reform centered on the court and hierarchically commanded by it, subordinating those sanctioned to implement the directive planning of judges. This practice raises technical, administrative and legitimizing deficiencies. On the other hand, leaving the reformed institutions to the pure market choice of their users is simply not solving the problem. Since it is the organization being suited that has the technical knowledge and local know-how, it is better for the court to leave the choice of means relatively undetermined. But at the same time, comparative performance standards (benchmarking) should ensure the quality of administrative decisions. The constitutional scrutiny of the situation to be reformed and the corrective process under monitoring should be reserved for the court, as should the definition of objectives and targets and the ongoing supervision of performance. The remedial means and processes employed directly are

[16] SABEL, Charles; SIMON, William H. Destabilization rights: how public law litigation succeeds. **Harvard Law Review**, v. 117, n. 4, p. 1015-1101, 2004; LIEBMAN, James S.; SABEL, Charles F. A public laboratory Dewey barely imagined: the emerging model of school governance and legal reform. **New York University Review of Law & Social Change**, v. 28, n. 2, p. 183-304, 2003.

within the scope of the sanctioned organization. By stigmatizing it, the court must make room for more stakeholders to have a voice in reordering collective practices.

Concerning the proposal that the task of complex enforcement should be given to a new organ, agency or even branch of government, Unger[17] suggests the *sui generis* nature of this type of intervention, not described among the classic functions of any branch. Structural interventions are at a first sight tasks similar to those programmed by the legislature in a general and abstract way and carried out by the public administration in the implementation of public policies; however, at the same time they are localized, temporary, one-off interventions to correct flaws in a policy, procedure or organization, either public or private. These interventions are punctual, like judicial decisions, but their structural nature requires extended limits on discretion and even a longer duration, until the defective practices are reorganized. The theoretical solution, then, is that 'destabilization rights' should be specified as claims aimed at this type of localized but structural corrective intervention in an organization, procedure or policy, in the name of bringing it into line with the ideals and rights proclaimed by the law, especially by the Constitution. This new task should be processed by a new power or agency of state, which could be called the 'reconstructive branch' or power.

3. Beyond the American experience

Structural injunctions have not remained a specific feature of American law. They have taken on equivalent forms in Latin America, Asia and Africa. In India, the Supreme Court is known to have inferred since the 1970's its powers of judicial review (even of constitutional amendments, through the 'basic structure doctrine'), not explicitly addressed on the letter of 1949 Constitution[18]. That Court also has addressed social rights through civil rights (such as the 'right to life'), in the absence of textual norms on the former, and then (with deeper statutory bases in recent

[17] UNGER, Roberto Mangabeira. **Democracy realized**: the progressive alternative. London: Verso, 1998. p. 228-229; UNGER, Roberto Mangabeira. **What should legal analysis become?** London: Verso, 1996. p. 30-33; UNGER, Roberto Mangabeira. **False necessity**: anti-necessitarian social theory in the service of radical democracy: from politics, a work in constructive social theory. 2. ed. London: Verso, 2001. p. 451, 530-535; UNGER, Roberto Mangabeira. Part II: The critical legal studies movement. *In*: UNGER, Roberto Mangabeira. **The critical legal studies movement**: another time, a greater task. London: Verso, 2015. p. 127-143.

[18] MEHTA, Pratap Bhanu. The inner conflict of constitutionalism: judicial review and the 'basic structure'. *In*: HASAN, Zoya; SRIDHARAN, E.; SUDARSHAN, R. (ed.). **India's living constitution**: ideas, practices, controversies. Delhi: Permanent Black, 2002. p. 179-206.

years), restricted its very court-centric approach to a more 'inter-institutional' dynamics in the concretization of social rights[19]. There, for instance[20], public interest litigation has been stimulated, especially since the 1980s and by the Supreme Court, which expanded constitutional remedies, developing them on the border between jurisdiction and administration. Thus, it redefined the *locus standi*, creating its own broad concept of 'public', allowed the representation in good faith of third parties in a position of deprivation that prevented them from claiming judicial protection, and accepted the activation of jurisdiction by unformulated means, such as letters ('epistolary jurisdiction'). The Supreme Court has therefore expanded its role in safeguarding fundamental rights, promoting access to justice for vulnerable groups and making decisions on social policy, governance and the fight against corruption. To what extent popular participation can be stimulated by this dynamic, and to what extent the court should be the oracle guaranteeing substantive constitutional justice, are questions that have emerged in this recent history.

In Colombia, a special doctrine and case law on the 'unconstitutional state of affairs' has developed. Problems with the implementation and impact of judicial activity have arisen, for example, in the treatment of rights injured by forced displacement, which has historically victimized peasant, indigenous and black populations. The Colombian constitutional court carried out corrective intervention in this area for six years. When studying this case, observers[21] pointed out that, within the constitutional framework of the democracies that now exist, judicial activism has proved to be an appropriate response to unblocking public policies that implement constitutional rights. They also noted that structural solutions have the potential to include deliberation and participation by those involved and victimized. In addition to the instrumental effects, in directly or indirectly solving problems, the jurisdiction has achieved symbolic effectiveness, by awakening government and public opinion to the issue, becoming a gateway for mobilizing civil society organizations and structuring control mechanisms in the sector being judged. Intergovernmental coordination among agencies at different levels of government

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[19] MUKHERJEE, Gaurav. The Supreme Court of India and the inter-institutional dynamics of legislated social rights. **VRÜ Verfassung und Recht in Übersee**, v. 53, n. 4, p. 411-437, 2021; SETHI, Amal. The justiciability of economic, social and cultural rights in India. *In*: NUSSBERGER, Angelika; LANDAU, David (ed.). **The justiciability of economic, social and cultural rights**. Bruxelles: Intersentia, 2023. p. 483-503.

[20] SEN, Sarbani. The 'public interest' in India: contestation and confrontation before the Supreme Court. **Diogenes**, v. 60, n. 3-4, p. 27-44, 2013.

[21] RODRÍGUEZ GARAVITO, César; RODRÍGUEZ FRANCO, Diana. **Cortes y cambio social**: cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia. Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia, 2010.

remained problematic, and the implementation of public policies remained regionally uneven in the immediate aftermath of the case. Ensuring the sustainability of reform and reconstruction activity beyond the short term, therefore, remained a challenge for inter-institutional coordination in the face of a resistant socio-political structure.

A comparative study of the constitutional experiences of Colombia, India and South Africa highlights three critical success factors for destabilization and reconstruction[22]. Firstly: the content of the rights that give rise to a particular judgement issued by the court is important; 'strong' rights are those whose content is determined as the provision of essential means of basic well-being. Secondly, the type of judicial remedy matters; 'moderate' remedies are those relatively open-ended court orders that leave the details of defining public policies to the government, but set deadlines and procedures for government action. The third element that contributes to the effectiveness of this type of judicial action is strong monitoring, encompassing continuous follow-up decisions to check on the progress of the measures; incentives for compliance by public authorities; and the involvement of various 'interested parties' (stakeholders) in a process of public deliberation and problem-solving around rights violations (which compensates for shortcomings in the legitimacy and technical knowledge of the judicial authority).

Since 2015 the Brazilian Federal Supreme Court has been provoked to decide about some 'unconstitutional state of affairs', through abstract control via Claims of Non-compliance with a Fundamental Precept (ADPFs) in themes such as the prison system, the creation of new law faculties, deforestation in the Amazon, the tax system, the health policy during the Covid-19 pandemic, the costing of the healthcare system, police violence against black people and the situation of homeless population. Considering this scenario, some authors point out that judges need not only to take primary-order decisions about the suited cases, but also second-order decisions about when and how to decide. In such a line of thought, they suggest five requirements for filtering the actions that require structural judicial intervention: 1) a serious violation of fundamental rights; 2) the specific nature of the intervention demanded; 3) a vulnerable or minority group as the victim to be addresses by

[22] RODRÍGUEZ GARAVITO, César; RODRÍGUEZ FRANCO, Diana. **Radical deprivation on trial**: the impact of socioeconomic rights in the Global South. Cambridge: Cambridge University Press, 2015.

litigation; 4) a permanent inertia on the part of the public authorities; and 5) the judicial subsidiarity in comparison with other branches or agencies[23].

Despite this recent pressure towards the institutionalization of structural actions and the doctrinal[24] and jurisdictional[25] underpinnings on this matter, Brazil has not yet procedural instruments analogous to the 'structural injunctions' of 'complex enforcement' in the U.S. law[26]. The closest guarantee to this would be the writ of injunction ('mandado de injunção', art. 5, LXXI, Federal Constitution, regulated by Law 13.300/2016): a judicial order for the legislator to remedy its omission to regulate rules that are not fully effective and which, until they are regulated, make it impossible to exercise fundamental rights. While the writ of mandamus ('mandado de segurança') has been subjected to a long and winding deployment since the beginning of the Republic[27] (in the 19th century) and is directed towards protecting the citizen against an abusive exercise of power by public authorities, the writ of injunction is a more recent innovation directed to fill the gap of a norm that would be needed to regulate the exercise or effective fruition of fundamental rights. If since the 1988 Constitution the Supreme Court has taken a self-contained approach in filling 'unconstitutional omissions'[28], its recent development has been seen as

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[23] CASIMIRO, Matheus; FRANÇA, Eduarda Peixoto da Cunha. Decidindo quando intervir: critérios para identificar ações estruturais prioritárias. **Revista Estudos Institucionais**, v. 10, n. 2, p. 661-688, 2024.

[24] *E.g.* ARENHART, Sergio Cruz; OSNA, Gustavo; JOBIM, Marco Félix. **Curso de processo estrutural**. 2. ed. São Paulo: Revista dos Tribunais, 2022.

[25] The Supreme Federal Court (though the leading case of Extraordinary Appeal RE 684612) established in 2023 a thesis in General Repercussion Topic 698, on the "Limits on the Judiciary Power to order the State to make obligations, consisting of holding public tenders, hiring civil servants and carrying out works that meet the social right to health, to which the Constitution of the Republic guarantees special protection": "1. The intervention of the Judiciary in public policies aimed at the realization of fundamental rights, in the event of the absence or serious deficiency of the service, does not violate the principle of the separation of powers. 2. The judicial decision, as a rule, instead of determining specific measures, must point out the objectives to be achieved and order the Public Administration to present a plan and/or the appropriate means to achieve the result. 3. In the case of healthcare services, the shortage of professionals can be met by a public tender or, for example, by relocating human resources and hiring social organizations (OS) and civil society organizations of public interest (OSCIP)".

[26] There, injunction became the primary remedy in civil rights litigation, but then emerged a discussion about other available remedies which, depending on the context, would be best suited for advancing judicial action. See FISS, Owen M. **The civil rights injunction**. Bloomington: Indiana University Press, 1978.

[27] SANTOS, Gabriel Faustino. **A construção do mandado de segurança**: por uma história das dimensões jurídicas da justiça no Brasil republicano (1891-1937). 2018. Dissertação (Mestrado em Direito) – Universidade Federal de Uberlândia, Uberlândia, 2018; SANTOS, Gabriel Faustino. **The invention of the Mandado de segurança**: protecting rights and (re)building the state in the Vargas Era (Brazil 1934-1945). Macerata: Edizioni Università di Macerata, 2023.

[28] PEREIRA, David da Silva. **Jurisprudência e política no Supremo Tribunal Federal**: omissão inconstitucional nas decisões de mandado de injunção (1988-2010). 2013. Tese (Doutorado em Ciências Políticas) – Universidade Estadual de Campinas, Campinas, 2013.

a strengthening of the Court's role of balancing interests though abstract judicial review (taking some precedence over legislative politics)[29], but the focus of that writ of injunction has been on a restricted and corporatist set of themes, such as retirement and social security, labor rights, public servants' rights[30].

However, like the abstract control of unconstitutional omission, these are actions by the Judiciary at the normative level: either with a judicial filling of the normative gap (through analogy and 'manipulative' or 'additive' judicial decrees) or with a notification to the legislator to regulate a constitutional norm, these instruments are not directly aimed to the administrative reordering of an organization or procedure. In order to promote such a reordering, notes Unger[31], the writ injunction would have to be radically remodeled, to the point of giving rise to a new 'destabilizing' or 'reconstructive' constitutional writ or guarantee; such a judicial instrument would have to be under the competence of the entire judiciary (and not just the higher courts), to cover in its range the protection of all rights (and not just constitutional freedoms) and to authorize the judiciary not only to notify the omission to other powers, but to coordinate itself, with the necessary financial and human resources, the punctual structural interventions in the renitently unconstitutional situation diagnosed.

On the other hand, one may evaluate how the Brazilian experience since the 1980s has moved in a direction aligned with the tasks of 'destabilizing' structural injustices and rebuilding practices and institutions, even though a new branch of government has not been created[32]. Legislation on trans-individual rights – from Law 7.347/1985 (Public Civil Action) to the Consumer Protection Code (Law 8.078/1990), including the constitutionalization in 1988 of a wide range of individual, collective and even diffuse rights and guarantees – combined with the new role of the Public Prosecutor's Office in protecting these rights and the organization of Public Defenders' Offices, would have created a network of 'reconstructive'

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[29] MACHADO, Luiz Felipe da Mata. **O mandado de injunção e a abstrativização do exercício da jurisdição constitucional**. 2016. Dissertação (Mestrado em Direito) - Universidade de Brasília, Brasília, 2016.

[30] RIBEIRO, Leandro Molhano; ARGUELHES, Diego Werneck. Nem evolução, nem renascimento?: contingência e captura corporativa em três décadas de mandado de injunção. **Revista de Informação Legislativa**, v. 55, n. 219, p. 103-132, 2018.

[31] UNGER, Roberto Mangabeira. [Palestra no HLS Legal Symposium]. *In*: HARVARD LAW BRAZILIAN ASSOCIATION LEGAL SYMPOSIUM, 26 Apr. 2018, Cambridge, MA. [**Anais...**]. 1 vídeo (48 min). Disponível em: https://www.youtube.com/watch?v=HyH-6jTxsto. Acesso em: 26 set. 2022.

[32] AMATO, Lucas Fucci. **Inovações constitucionais**: direitos e poderes. Belo Horizonte: Casa do Direito, 2018. p. 158-173.

organizations and procedures in the country with functions similar to those of destabilizing rights. Therefore, we could analyze the Brazilian experience as the emergence of a cooperation network involving occasionally structural litigation or collective claims in face of courts, but mainly the role of para-judicial or trans-judicial organs and agencies.

The restructuring and organization of these public bodies or agencies 'essential to justice' (in the terms of 1988 Constitution) has already been analyzed from the perspective of the concept of 'destabilization rights'. This is the case, for example, with the work of the Labor Prosecutor's Office in combating situations analogous to slave labor, in structural remedial intervention in cases of child labor or widespread moral harassment, or in cases of any reluctant and massive disregard for labor rights by employers[33]. Outside of public law, the very creation of the judicial recovery institute (Law 11.101/2005) incorporates the proposal of an independent administrator, appointed by the judiciary, who can reorganize a certain business company in crisis, in view of the collective interest in preserving the business, positioning bankruptcy as an extreme solution.

The innovations presented by the Brazilian legal system since the 1980s in terms of fundamental rights, judicial procedures and the 'functions essential to justice' have been combined with a series of reforms in the judiciary, most notably Constitutional Amendment 45/2004, which established the National Council of Justice (CNJ, 'Conselho Nacional de Justiça'). This can also be analyzed as a reconstructing organ of the Judicial branch itself[34], aimed at correcting the structural flaws that prevent the effective fruition of the fundamental rights of access to justice and effective and speedy judicial provision (art. 5, XXXV and LXXVIII, Federal Constitution). Thus, in this case we have a functional equivalent to a 'destabilization' right working through a 'reconstructive' organ internal to the judiciary, but with the power to manifest itself in the creation of public policies, under the terms of art. 103, I of the CNJ's Internal Regulations. Here one may identify precisely an

[33] CARVALHO JR., Pedro Lino. **Direito e imaginação institucional em Roberto Mangabeira Unger**. Salvador: EDUFBA, 2020. p. 177-197; CARVALHO JR., Pedro Lino; MARTINEZ, Luciano. O processo estrutural no combate ao assédio moral na esfera trabalhista. **Revista dos Tribunais**, v. 110, n. 1033, p. 327-343, 2021.

[34] LIMA, Jordana Ferreira; AMATO, Lucas Fucci. Destabilizing barriers to the effective access to justice: the National Council of Justice as a reconstructing organ of brazilian Judiciary. *In*: FONSECA, Gabriel Ferreira; AMATO, Lucas Fucci; BARROS, Marco Loschiavo (org.). **Contemporary socio-legal studies**: empirical and global perspectives. 1. ed. São Paulo: Faculdade de Direito, Universidade de São Paulo, 2023. p. 562-590. Available at: https://www.livrosabertos.abcd.usp.br/portaldelivrosUSP/catalog/book/995. Accessed on 12 Feb. 2024.

experimentalist profile[35], based on trial and error, in the CNJ's work as a formulator of judicial public policies; this organizational style and the support of technical and technological expertise (for example, in terms of statistics and jurimetrics) aim to enable and legitimize the organ to deal with the traditionalism, opacity and corporatist self-closure of the judicial power.

4. Structural action within constitutional jurisdiction: role and constraints

The syncretic or hybrid institutional setup of many Latin American experiences of judicial review – the Brazilian case in particular – is constituted by a combination of American diffuse judicial review with a singular development of remedies, instruments and decrees concerning abstract judicial review. Latin America provided a singular and innovative approach to the 'Kelsenian' model of constitutional courts[36], combining it with the American design of a Supreme Court.

Just as it did not constitutionalized social rights (although it did build public welfare and assistance systems), the United States maintained a Madisonian system of government designed to make structural changes more difficult, preserving deadlocks between the elected branches[37]. When deadlocks arise, given the decision-making omissions by either of those branches, the paralyses programmed by the 'checks and balances' technique and the fear of instability generated by an external arbiter (the people, who could be consulted through plebiscites, referenda or earlier elections), courts may take on a moderating role, performing the specifically political work of taking collectively binding decisions. Then the Judiciary is burdened with 'polycentric tasks'.

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[35] ROSILHO, André Janjácomo. O poder normativo do CNJ: um caminho para se pensar o experimentalismo institucional. **Revista Brasileira de Estudos Constitucionais**, v. 1, p. 141-160, 2011.

[36] GONÇALVES, Francysco Pablo Feitosa. As origens latino-americanas do controle concentrado de constitucionalidade. **Revista Direito GV**, São Paulo, v. 19, p. 1-35, 2023.

[37] UNGER, Roberto Mangabeira. **False necessity**: anti-necessitarian social theory in the service of radical democracy. p. xci-xcvi, 454-457.

The term 'polycentric' comes from a study by Michael Polanyi[38] on money as a means of social expression of complex and subjective desires, difficult to measure by any other objective standard, and thus as a tool for the rational distribution of goods. In order to define the distribution of income that would increase the satisfaction of one without depressing the state of another, we would have to proceed by successive approximations, considering at each stage a center of needs (a person, a robot) and adjusting it in relation to others, and so on, with new readjustments. This is, after all, a 'polycentric' problem. Lon Fuller[39] applied, by analogy, to the public sphere of law – rights and duties – what Polanyi had said about the public sphere of economics: the market and its logic of pricing and matching demand and supply.

Fuller's example is the hypothesis that, in a communist system, the definition of prices and salaries would be managed by the courts, which would have to change these rules according to variations in supply and demand. It would be a polycentric task, evoking the image of a network that needs to distribute tensions between its various nodes and that is dynamically subjected to changing pressures, acquiring various forms. Courts can only manage these complex situations in a precarious and provisional way – and even then, when they move towards mixed techniques, moderating authoritative judgement by forms of negotiation and codetermination with the parties who have specific knowledge, but also an interest in the case.

The anchoring of judges in public opinion and the consequent translation of every policy demand into a rights controversy leads to a capture of the government process by one of its agents – precisely the one who, instead of managing crises and uncertainties, should be the guarantor of case law integrity and, in this way, of the soundness of democratic deliberation and the correctness of government choices in relation to the parameters of the rule of law, such as transparency, non-contradiction and isonomy[40]. As the periphery of politics, the courts should not capture politics, but rather catalyze public dialogue, alerting public opinion to illegalities and omissions and putting pressure on the political powers to take their decisions. If the lack of legislative density and administrative concreteness makes the case undecidable – except by referring to general formulas and commonplaces that easily lend

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[38] POLANYI, Michael. Profits and polycentricity. *In*: POLANYI, Michael. **The logic of liberty**: reflections and rejoinders. Indianapolis: Liberty Fund, 1951. p. 170-188.

[39] FULLER, Lon Luvois. The forms and limits of adjudication. **Harvard Law Review**, v. 92, n. 2, p. 394-404, Dec. 1978.

[40] ELY, John Hart. **Democracy and distrust**: a theory of judicial review. Cambridge, MA: Harvard University Press, 1980; AMATO, Lucas Fucci. Formalismo jurídico: ascensão, declínio e renascimento. **Suprema**: revista de estudos constitucionais, v. 2, n. 1, p. 255-285, jan./jun. 2022.

themselves to opening up judicial argumentation to a free play of weak analogies, moralizing sophistry and ideological conflagration – it demands not Herculean fundamental solutions, but institutional redefinition. In order to carry out this task, judges would have to turn the interpretative material in their hands, reconfiguring the very framework under which this body of law is to be interpreted and applied. Therefore, in a framework not just of the separation of powers, but of the democratic rule of law, differentiated in a number of ways (between political and legal, administrative and judicial, democratic and technical procedures), the judicial decision of hard cases must be largely inconclusive – that is, it must refer them to the decision-making arenas favorable to deliberation, to the inclusive expression of consensus between the parties involved and interested, and to the complex formation of consensus at the intersection of participatory, representative and technical processes.

It is necessary to consider the variety of institutional performances that the courts can adopt when controlling constitutionality and passing judgement on fundamental rights, particularly economic and social rights that are not individually or collectively attributed (access to services and benefits outside of the universalist criteria programmed by public policy and implemented by the administration). Considering the institutional variability of the centers of the political and legal systems, there are alternative forms of organization of the political powers enshrined in the presidentialism/ parliamentarism difference (and a continuum of mixed forms), as well as the changing modes of 'interaction' between the political branches and the courts; these modes can be represented by the difference between weak and strong varieties of judicial control or review, or between judicial activism and self-restraint.

A typology of judicial action in the field of public rights highlights at least six models, which can even be pragmatically integrated by the same court[41]: a 'catalytic' court, which develops different parameters of intervention for different series of cases, selectively adopting the various styles of action. The first and most traditional model is that of 'deferential' judicial review, the self-restraint of the courts in the face of political powers. Here the core of the legal system seeks interpretative restraint when determining obligations to implement rights. It is understood that the core of the political system is better equipped, in normative and cognitive terms, to decide on the means of protecting, respecting, promoting and realizing rights that are only generically set out by constitutional principles. The two basic types of expectations that make up the structure of society and its institutions are involved here. Rights

[41] YOUNG, Katharine G. **Constituting economic and social rights**. Oxford: Oxford University Press, 2012. ch. 5.

are institutions with a broad load of normativity – hence the extensive debate on 'moral rights'. On the other hand, the ways of implementing the respective policies bring the technical challenge of comparing alternative means and choosing the most effective procedures – a cognitive problem.

Beyond what can be advanced by a more or less formalist interpretation, the court believes it cannot decide; after all, its métier is not to define how to carry out finalistic programs, but only to apply rules, conditional programs, and impose on public authorities the obligations defined therein, and to the extent previously defined. As individual rights are usually conditionally programmed (as rules with well-defined hypothesis and consequences), they are the focus of judicial activity. As for collective or 'diffuse' rights, the courts need to transform them into conditional programs: by specifying the purposes sustained by principles in terms of a situational and contextual setup constrained by the case being judged (and not taking the wider evaluative considerations as in constitutional or legislative drafting); and by adopting an informed but discretionary choice among alternative means of implementation (the judges having the guarantees of not being politically or legally liable for the content of their decisions)[42]. In a deferential approach, judges would only urge the political powers to take some measure or invalidate measures considered unreasonable, disproportionate, insufficient or inadequate, without proposing specific measures, acting then only as a 'negative legislator'.

Faced with the deferential court, it seems that one need for a more 'activist' court – capable of proposing (or imposing) measures beyond the strict interpretation of the constitution and statutes – would be precisely to broaden its legitimacy base. And one of the means seems to be to procedurally integrate organizations typical of the political system, or even to seek a 'dialogue' with the political branches, a codetermination of measures to implement the law, rather than imposing a decision on the legislative and executive powers. Faced with the question that the implementation of rights enters the field of authority and knowledge of the political powers, 'activist' courts respond with the procedural integration of political organizations into judicial decision-making itself. Apart from the deferential court, the other courts presented in the typology we are discussing seem to opt in some way for a similar solution of bringing politics closer together.

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[42] LUHMANN, Niklas. **Law as a social system**. Translated by Klaus A. Ziegert. Oxford: Oxford University Press, 2004. p. 196-203; LUHMANN, Niklas. **Fin y racionalidad en los sistemas**: sobre la función de los fines en los sistemas sociales. Translated by Jaime Nicolás Muñiz. Madrid: Nacional, 1983. ch. 4 and 5; LUHMANN, Niklas. **A sociological theory of law**. Translated by Elizabeth King-Utz and Martin Albrow. 2nd. ed. New York: Routledge, 2014. p. 174-85.

Therefore, the second model of judicial action in judgements on fundamental rights is a court that is not deferential to political powers and administrative discretion, but practices 'peremptory' control. The scrutiny of legislation and public policy is rigorous and the court has three options: to judge the rules or measures as constitutional, as unconstitutional and invalid or to use interpretative mechanisms such as establishing an interpretation in accordance with the constitution, declaring partial unconstitutionality without revising the text or even modalities of judicial legislation in the event of a legislative omission in the regulation of a constitutional provision (*e.g.* additive judicial decrees).

The third type of judicial action is that of 'institutional dialogue' or 'conversational' judicial review, whereby the courts seek to distribute the scope of the decision throughout formal and informal channels of consultation and negotiation with the political powers. The paradigmatic case is that of 'weak' judicial review[43], in which the court makes a provisional decision that can then be overturned by parliamentary deliberation. The control of consistency with protected rights is then combined with the last word (provisional, at least in that decision-making cycle) of political representation.

The fourth and fifth modalities are that of bureaucratic and centralized judicial control over processes of restructuring organizations, rules and procedures (the example of the classic structural injunction in the Brown cases), and its experimentalist counterpart, which replaces the dynamic of top-down judicial command and control by the coordinated supervision, enabling the sanctioned agents themselves to reconstruct their practices in accordance to the legal and constitutional parameters defined in the ruling.

As for the possibility of the same constitutional court adopting hybrid models in a sixth, 'catalytic' approach – in other words, varying its ruling profile according to demand – the court needs to develop a political sensibility, overcoming selectivity in terms of types of rights, weighing up the interests affected (with attention to the extent of the impact on the most vulnerable and unprotected sections of the population) and negotiating with the political powers, starting from a position of reinforcing the representative decision-making arenas, and only progressively dosing the measure of judicial command. For example, from the deferential position of negative legislator, the court will only move to a weak control of constitutionality,

[43] WALDRON, Jeremy. The core of the case against judicial review. **The Yale Law Journal**, v. 115, n. 6, p. 1346-1406, 2006.

with the reopening of the final decision to parliament, if this control is necessary to awaken political inertia; and it will only move to stronger judicial control or even restructuring intervention if there is a complete blockage and a vacuum of agents more capable of taking collectively binding decisions or leading the localized repair of a systematically unconstitutional practice. This situational leadership of the court in relation to constitutional concretization and the promotion of the effective enjoyment of rights will depend on variables in the political history and constitutional culture of each country – variables that ensure that judges, and the Supreme Court in particular, have the confidence necessary for there to be a presumed consensus to support this prerogative to choose, depending on the case, in a customized way, how to act and to what extent to act. The scenario also changes if constitutional institutions add or reinforce the option of semi-direct democracy mechanisms, through which popular sovereignty can express itself without outsourcing the expression of its will to either politicians or judges.

5. Conclusion

The specification of a 'destabilizing' function that constitutional rights may take and the generalization of 'reconstructive' procedures that may channel this performance allow us to map the institutional diversity that is opened for structural reforms. The American experience with structural injunctions showed that sometimes courts were led to "move too far, too fast, and too coercively", with very detailed decrees that denigrated their political authority, instead of generating support by legislative or executive action[44]. This conclusion is supported by the Latin American trajectory in dealing with structural litigation. When the judicial branch is called upon action, the refined design of the measures decreed, the search for political support within and outside the Judiciary itself, and the backing of experts available to monitor and correct the implementation of the reforms throughout the own course of managing it seem to be critical factors of success, avoiding both judicial backtracking to a defensive and oversight position and the backlash by the counter-attack by other public and private mechanisms[45].

[44] JEFFRIES, John C., Jr.; RUTHERGLEN, George A. Structural reform revisited. **California Law Review**, Los Angeles, v. 95, 2007. p. 1421.

[45] GLADYS PUGA, Mariela. El caso estructural en América Latina. **Suprema:** revista de estudos constitucionais, Brasília, v. 3, n. 2, p. 21-49, 2023.

Finally, the Brazilian experience itself shows the emergence of a trans-judicial cooperation network with functions of destabilizing localized structural routines renitently opposed to fundamental rights; instead of having courts as the only branch monopolizing the role of 'reconstructing' those practices, procedures and organizations in compliance with the constitution, structural litigation can be accessed as a tool besides non-judicial strategies, including the roles of the Public Prosecutor's Offices, the Public Defenders' Offices and even organs internal to established branches, such as the National Council of Justice, with its managerial and corrective functions towards the judicial power.

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