ISSN 2763-7867
https://doi.org/10.53798/suprema.2024.v4.n2.a327
Data de submissão: 2/3/2024
Data de aprovação: 23/6/2024

Structural Reform in America: understanding it through discrimination cases[1]

Reforma Estrutural nos Estados Unidos: entendendo-a por intermédio de casos de discriminação

Reforma Estructural en Estados Unidos: entendiéndola a través de casos de discriminación

Ricardo José Macêdo de Britto Pereira[2]
University Center UDF (Brasilia, DF, Brazil)
ORCID: https://orcid.org/0000-0003-4510-8894
E-mail: rjmbpereira@gmail.com

Hermano Martins Domingues[3]
Federal University of Minas Gerais (Belo Horizonte, Minas Gerais, Brazil)
ORCID: https://orcid.org/0009-0005-3283-7512
E-mail: hermano.domingues@gmail.com

Abstract

This paper delves into the conceptual aspects of structural reform in the United States and its application in discrimination cases. Such reform requires a prolonged and adaptable process to align with legal standards and dismantle inadequate structures fostering unlawful practices. Notably, structural reform involves multiple actors, diverging from the exclusive role of the Judiciary in problem resolution. The paper explores the roots of structural reform in the United States through literature review and case analysis, such as *Brown I* and *Brown II*, to understand how

[1] PEREIRA, Ricardo José Macêdo de Britto; DOMINGUES, Hermano Martins. Structural reform in America: understanding in through discrimination cases. **Suprema**: revista de estudos constitucionais, Brasília, v.4, n.2, p. 493-524, jul./dez. 2024. DOI: https://doi.org/10.53798/suprema.2024.v4.n2.a327.

[2] Full Professor PPGD UDF. Visiting Researcher School of Industrial and Labor Relations Cornell University (2017-2018). Ph.D Universidad Complutense de Madrid. Master of Laws Syracuse University. Master of Laws UNB. Retired Sub-General Prosecutor of the Federal Labor Prosecution Office (MPT). Currículo Lattes: http://lattes.cnpq.br/5151649835128510.

[3] Member of the Federal Labor Prosecution Office (MPT). Master of Laws degree (LLM), Syracuse University. Postgraduate degree in Public Law Candido Mendes University (UCAM). Juris Doctor (JD), Federal University of Minas Gerais (UFMG). Currículo Lattes: https://lattes.cnpq.br/4016102563806958.

[SUMÁRIO]

legal issues were adjudicated and whether the Supreme Court's rulings triggered broader societal changes. The discussion extends to cases of structural reform in employment discrimination, indicating successful instances but also setbacks, exemplified by a Supreme Court case on gender discrimination at Walmart.

Keywords
Structural reform; United States of America; Supreme Court; discrimination; workplace.

Contents

Resumo
Este trabalho explora os aspectos conceituais da reforma estrutural nos Estados Unidos e sua aplicação em casos de discriminação. Tal reforma requer um processo prolongado e adaptável para se alinhar aos padrões legais e desmantelar estruturas inadequadas que fomentam práticas ilícitas. Notadamente, a reforma estrutural envolve múltiplos atores, afastando-se do papel exclusivo do Poder Judiciário na resolução de problemas. O trabalho analisa as origens da reforma estrutural nos Estados Unidos por meio de revisão de literatura e análise de casos, como *Brown I* e *Brown II*, para compreender como as questões legais foram adjudicadas e se as decisões da Suprema Corte provocaram mudanças mais amplas na sociedade. A discussão se estende a casos de reforma estrutural contra discriminação no trabalho, indicando instâncias bem-sucedidas, mas também retrocessos, exemplificados por um caso da Suprema Corte sobre discriminação de gênero no *Walmart*.

Palavras-chave
Reforma estrutural; Estados Unidos da América; Suprema Corte; discriminação; local de trabalho.

Sumário

Resumen

Este artículo profundiza en los aspectos conceptuales de la reforma estructural en los Estados Unidos y su aplicación en casos de discriminación. Dicha reforma requiere un proceso prolongado y adaptable para alinearse con los estándares legales y desmantelar estructuras inadecuadas que fomentan prácticas ilícitas. Cabe destacar que la reforma estructural implica la participación de múltiples actores, apartándose del papel exclusivo del Poder Judicial en la resolución de problemas. El artículo explora los orígenes de la reforma estructural en los Estados Unidos por medio de la revisión de la literatura y análisis de casos, como *Brown I* y *Brown II*, para comprender cómo se adjudicaron las cuestiones legales y si las decisiones de la Corte Suprema provocaron cambios más amplios en la sociedad. La discusión se extiende a casos de reforma estructural en la discriminación laboral, señalando instancias exitosas, pero también contratiempos, ejemplificados por un caso de la Corte Suprema sobre discriminación de género en *Walmart*.

Palabras clave

Reforma estructural; Estados Unidos de la América; Suprema Corte; discriminación; local de trabajo.

Índice

1. Introduction

This paper aims to address the conceptual elements of structural reform, illustrating examples of its application in discrimination cases.

Structural reform, referred to as **structural litigation** in Brazil, involves situations in which an institution (public or private) causes, induces, or allows violations of rights that are produced by the way this institution works[4]. These structures, often upheld by cultural beliefs, require reform to align with legal standards. However, achieving this reform is not an immediate process; it demands prolonged

[4] VITORELLI, Edilson. Levando os Conceitos a Sério: processo estrutural, processo coletivo, processo estratégico e suas diferenças. **Revista de Processo**, São Paulo, v. 284, out. 2018, p. 341.

and adaptable procedures to dismantle old structures that perpetuate unlawful practices. This work is going to consider **structural injunction**, the court order that determines the reform of the institution; **structural reform**, the process in which the structural injunction is applied (more focused on the implementation of the decision); and **structural litigation**, the lawsuit that aims to reform the institution.

The notion of structural reform is not a recent development, tracing its origins back to the mid-20th century. Nevertheless, the approach of the Judiciary in handling and resolving structural conflicts differs from the traditional perspective, by which an illegal event is promptly remedied. The framework of structural reform appears to align more closely with the practice of Legislative and Executive powers based on policies rather than rules. Furthermore, the Judiciary is not the sole entity contributing to problem resolution. A distinctive feature of structural reform is its openness to involving other actors.

The apprehension of basic ideas of structural reforms must account for its origin and development in the United States. Employment discrimination is a field where the application of structural reform attracts judicial disputes and scholarship attention in that country. The study of these topics involves literature review and case analysis, and is divided into four parts. The first part describes the background of *Brown I* and *Brown II* to examine the structures of legal violations those cases faced. The second part introduces *Brown I* as the reference for the birth of structural reform. The third part analyzes *Brown II* and comments on whether the rule established by the Supreme Court was successful on its own or by triggering the engagement of the Legislature and Executive power, as well as social movements towards changes in society and the political arena. The final part investigates structural reforms in employment discrimination, indicating a prosperous case that illustrates procedures and outcomes of the structural reform, and a case involving a class action on gender discrimination at Walmart, in which the Court denied certification, which represented a setback in the implementation of civil rights through structural reforms.

Therefore, the purpose of this article is to compile conceptual elements of structural reform in the United States by examining its historical evolution and outcomes. Additionally, it aims to explore its application in the realm of employment discrimination to assess both its possibilities and challenges.

2. The background of the structural reform in the United States

Brown I[5] is a just chapter in a long history of the way America dealt with slavery and, after that, the integration of former slaves into society. The aggregation of former British colonies was only possible for a compromise on the slavery issue. Nonetheless, the slavery question almost literally divided the country into a secession war and continued to oppose the North and South in civil rights for African Americans throughout history.

When the Constitution of the United States was drafted, the new states had different economic and social structures. An agricultural economy moved by slave labor in the South, and manufacturing, overseas trade, and services, usually free labor, thrived with smaller properties in the North, known as New England[6].

The Constitution did not abolish slavery, and Congress was not granted the power to do it either. The further that it went was to allow Congress to outlaw the importation of slaves after 1808, excluding African American slaves from the concept of "men", as Burnham argues. Nonetheless, Southern delegates demanded that slaves be counted as citizens to determine the number of representatives in Congress, even though they would be treated as property, not human beings. The answer was a compromise that slaves would count as 3/5 of a free person for the matter of representation[7]; the embarrassment is so evident that the Constitution does not use the word "slave" but "other persons" or "person held to service of labor" to describe the African Americans enslaved[8].

Although in countries like Brazil, the Federal Government has a vast range of fields in which it can privately enact legislation (employment law, civil law, criminal law, procedural law[9]), in the United States, the States retained most of the Legislative power over significant property public services, schools, commerce between their frontiers, and most of the citizens' lives, and the Union can only enact legislation

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[5] U.S. Supreme Court. *Brown v. Bd. of Ed. of Topeka,* 347 U.S. 483 (1954).

[6] BURNHAM, W.; REED, Stephen F. **Introduction to the Law and Legal System of the United States**. 7ed. St. Paul: West Academic Publishing, 2021, p. 3.

[7] U.S. Constitution. art II, §2.

[8] BURNHAM, W.; REED, Stephen F. **Introduction to the Law and Legal System of the United States.** p. 7.

[9] Brazilian Constitution, article 22.

about the restrict hypothesis of Article 1, Section 8 of the Constitution, and the implied powers by the Constitution[10]. The powers not explicitly delegated to the Union for the Constitution were delegated to the States for the 11ª Amendment. This considerable amount of power to States was decisive after the Reconstruction when States used local legislation to segregate African Americans in Jim Crow Laws[11].

The issue reached the Supreme Court in *Dred Scott v. Sandford*[12], a case known as one of the most infamous cases of all time, and it harmed so much the Court in public opinion that a later chief justice, Charles Evan Hughes, famously called the decision the Courts' worst "self-inflicted wound"[13].

Dred Scott was an African American who descended from slaves and was enslaved since his birth. In 1834, he was brought by his master, a military doctor from the State of Missouri (in which slavery was lawful), to the State of Illinois (a free state) and later to Fort Snelling (current Minnesota, a free territory acquired from France), and then returned to Missouri and sold the plaintiff and his family[14]. The plaintiff claimed that he, his wife, and his daughters had become free by living in free states and were citizens of the State of Missouri, according to the Missouri Compromise[15]. The defendant argued that a) the Federal Court lacked jurisdiction because slaves were not entitled to sue in United States Courts; b) the plaintiff was his lawful property. The Missouri Supreme Court upheld slavery, and the Supreme Court granted certiorari.

The majority opinion written by Justice Taney held that: 1) slaves were property nor citizens and, therefore, were not entitled to government protection nor civil or political rights, including the right to sue[16]; 2) former slaves did not become citizens just by the act of being free from their masters; 3) There was State citizenship and Federal citizenship: states could grant citizenship to former slaves in their State constitution but this only granted citizenship into their borders and do not grant

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[10] U.S. Supreme Court. *McCulloch v. Maryland*. United States Supreme Court. 4 L. Ed. 579, 17 U.S. (4 Wheat.) 316 (1819).

[11] WOODWARD, C. Van. **The Strange Career of Jim Crow**. Oxford: Oxford University Press, 2002, p. 7.

[12] U.S. Supreme Court. *Dred Scott v. Sandford,* 60 U.S. (19 How.) 393 (1857).

[13] UROFSKY, Melvin I. Dred Scott decision. **Encyclopaedia Britannica**, 2024. Available at: https://www.britannica.com/event/Dred-Scott-decision. Last accessed on Feb. 2nd, 2024.

[14] U.S. Supreme Court. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 397-398 (1857).

[15] U.S. Supreme Court. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 400 (1857).

[16] U.S. Supreme Court. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 475-476 (1857).

them citizenship of the United States; 4) The Missouri Compromise of 1820 was unconstitutional, and Congress cannot free slaves within federal territories because it violates the right of property (5th Amendment)[17].

In the Aftermath of *Dred Scott*, the Country was led to a year of civil war from 1861 to 1865, which killed 620,000 soldiers, which, according to the National Park Service of the U.S., "is approximately equal to the total of American fatalities in the Revolutionary War, the War of 1812, the Mexican War, the Spanish American War, World War I, World War II, and the Korean War, combined"[18]. The rate of death incidence was six times that of World War II if compared with the size of the American population, and Confederate (Southerners) died three times more than their Yankee counterparts[19].

The reconstruction is considered the second foundation of the United States, even in grammatical terms. Before the Civil War, *Dread Scott* Court referred to the county in the plural as "the war in which the United States are engaged"; after it, "the United States" became a singular term[20]. In the period, new Amendments came to address the issue of slavery and discrimination against African Americans: the 13th Amendment prohibited slavery and involuntary servitude in the United States, and the 14th turned all people born in the United States into citizens, overruling Dread Scott and the Black Codes, the 15th Amendment also addressed the African American discrimination by outlawing States to deny the right to vote of former slaves[21].

In 1860, African Americans were excluded or separated in "Jim Crow" cars in railway cars, omnibuses, and steamboats; they were not allowed or secluded in remote corners of theaters and lecture halls; they could not check in at most hotels, restaurants or resorts, except as servants; they were educated in separated schools, punished in separated prisons, treated in separate hospitals, and buried in separated cemeteries[22]. In the reconstruction era, the Jim Crow system that already

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[17] U.S. Supreme Court. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 477-490 (1857)

[18] FAUST, Drew Gilpin. **Death and Dying**. U.S. National Park Service – U.S. Department of the Interior. Available at: https://www.nps.gov/articles/death-and-dying.htm. Accessed on 12 Feb. 2024.

[19] FAUST, Drew Gilpin. **Death and Dying**.

[20] STONE, Geoffrey R; SEIDMAN Jessica C.; SEIDMAN, Andrew R.; SUNSTEIN, Cass r.; TUSHNET, Mark; KARLAN, Pamela; TUSHNET, Rebecca and Laura. **Constitutional Law**. p. 474.

[21] U.S. Constitution. Amendment XV.

[22] WOODWARD, C. Van. **The Strange Career of Jim Crow**. p. 18-19.

existed in the North was transplanted to the South to prevent the integration of former slaves into society.

The Civil Rights Act of 1875 is a landmark of the Reconstruction because it tried to outlaw segregation. The Statute prevented racial discrimination in public facilities such as restaurants and transportation and criminalized the facilitation or denial of such accommodations or services based on color, race, or "previous condition of servitude"[23]. The violations were removed to Federal Courts, and people whose access was denied due to race would be entitled to monetary restitution[24].

Nonetheless, eight years after the Civil Rights Act of 1875, the Supreme Court ruled (8-1) in a consolidated case known as *The Civil Rights Cases* that the Fourteenth Amendment only applied to States, not private citizens, and did not grant Congress power to outlaw racial discrimination[25]. Individuals could commit crimes or civil wrongs violating civil rights, but they did not violate a constitutional right under the 13th and 14th Amendments[26]. Thus, the Civil Rights Act of 1865 was unconstitutional[27]. This case planted the seeds of *Plessy v. Ferguson*, and it is another example of how the Supreme Court played a major role in the institutionalization of segregation.

In *Plessy v. Ferguson*, Plessy was a citizen of the United States and a resident of Louisiana, a mixed descendant in a proportion of 1/8 African blood and 7/8 Caucasian blood, despite the mixture being not discernible in him. On June 7, 1892, he paid a first-class passage on a train and sat in the white race seat. After a refusal to leave the seat, he was ejected off the train and faced jail and criminal charges. Subsequently, he challenged the constitutionality of the General Assembly of Louisiana Act (a segregationist statute), which held that railroad-carrying passengers should provide separate but equal accommodations for white or colored races. On this precedent, the Supreme Court was called to answer whether legislation requiring white and colored persons to be furnished with separate but equal accommodations violated the 13th and 14th Amendments of the United States Constitution[28].

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[23] DONALD, David Herbert. **Charles Sumner and the Rights of Man**. New York: Random House, 1970, 595p.

[24] DONALD, David Herbert. **Charles Sumner and the Rights of Man**.

[25] U.S. Supreme Court. *The Civil Rights Cases: United States v. Stanley* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883).

[26] U.S. Supreme Court. *The Civil Rights Cases: United States v. Stanley* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883).

[27] U.S. Supreme Court. *The Civil Rights Cases: United States v. Stanley* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883).

[28] U.S. Supreme Court. *Plessy v. Ferguson*, 163 U.S. 537, 548-542 (1896).

The Court held that racial segregation does not prevent the equality of races if the accommodations are separate but equal, and the police power of the States grants this power. States can enact laws of segregation provided that they separate but do not deny the right to a citizen (like to be part of a jury). The 13th Amendment prevents slavery as involuntary servitude unless it is punishment for a crime, which is different from segregation of races. The 14th Amendment made colored Americans citizens of the US and granted equal protection and due process under the law. However, it did not change the nature of things and distinctions based on color because the races preferred to be separated, and the law could not change that. The Court also held that constitutional segregation in schools, transportation, the banishment of interracial marriages, and Jim Crow legislation in general were constitutional[29].

The *Plessy v. Ferguson* Court constitutionalized segregation and the use of the "separate but equal" doctrine to constitutionalize white supremacy. The decision came in a pack with other rulings between 1873 and 1898 that aimed to nullify the "equal protection clause" in the name of a "national reconciliation". It ended the dream of a reconstruction of the Country with equal citizenship[30]. The African American was held responsible for the war between North and South, and the reconciliation demanded a compromise of Black people's rights, which motivated the withdrawal of Union troops from the Southern states in 1877 and the rise of extremism[31].

The withdrawal of Union troops in 1877 also removed the last barrier from an intense backlash from white southerners. It led to the ascension of terrorist organizations like the KKK, which used lynching and violence to prevent the Black People's progress and then reverted the improvements of Reconstruction[32]. The KKK, in three years, killed a Black Congressman in Arkansas and three Black State Congressmen in South Carolina; 400 members also opened fire against a black protest in Georgia and promoted the "hunting" of Black people and massacres in other Southern States[33]. The capitulation to racism was strong and led Black Americans, especially in the South, to life conditions similar to previous slavery.

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[29] U.S. Supreme Court. *Plessy v. Ferguson*, 163 U.S. 537, 544-550 (1896)

[30] WOODWARD, C. Van. **The Strange Career of Jim Crow**. p. 70-71.

[31] WOODWARD, C. Van. **The Strange Career of Jim Crow**.p. 70-71.

[32] FONER, Eric. Reconstruction: United States history. **Encyclopaedia Britannica**, 2024. Available at: https://www.britannica.com/event/Reconstruction-United-States-history. Accessed on 16 Feb. 2024FONER, Eric. Reconstruction: United States history.

[33] VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos. p. 18-20.

3. *Brown* and the birth of structural reform

Brown I was a consolidation of class actions filed by Black Americans who were denied admission to their community's schools because of segregation[34]. Except for the Delaware Court, the claim was denied in the other four cases based on the "separate but equal" doctrine from *Plessy v. Ferguson*[35]. Those cases are essential to show what was going on before *Brown I*: Lower Courts had already been granting Black children the right to enroll in White schools, but on the basis that the facilities were not "equal", in other words, reaffirming *Plessy* rationale that "separate" had to be "equal", not denying it[36]. But what makes *Brown I* so special is that the Supreme Court was called to decide whether the equal protection clause under the 14th Amendment of the United States Constitution bars segregation in schools, even when the facilities are "equal"[37]. *Brown I* challenged the foundation of *Plessy* and the Jim Crow system.

According to Charles Ogletree, the attorney for the *Briggs v. Elliott*, one of the five cases in *Brown I*, was the famous civil rights activist Thurgood Marshall, who would become in 1967 the first African American justice of the Supreme Court. In this case, they used the famous study from Professor Kenneth B. Clark and his wife, Mamie Clark, placing two identical dolls (one white and the other black) in front of Black children. The children preferred the white doll over the black doll and picked the black doll as looking "bad". After that, when asked by the researchers, they said they identified themselves more with the black doll than the white one. Professor Clark was an expert witness in civil rights cases and used this test to explain the psychological harm the segregation brought to black children. Marshall used this research to demonstrate that continuous segregation in education was harmful in itself to black children, even if the amenities were "equal"[38].

The Court held in the opinion in *Brown I* that the 13th and 14th Amendments of the Constitution were meant to remove all distinctions under the law between people born or naturalized in the United States who were granted citizenship. The

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[34] U.S. Supreme Court. *Brown v. Board of Education of Topeka (Brown I)*, 347 U.S. 483, 487 (1954).

[35] U.S. Supreme Court. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

[36] OGLETREE, Charles J. **All deliberate speed:** reflections on the first half-century of Brown v. Board of Education. New York: W.W. Norton & Co., 2005, p. 8.

[37] U.S. Supreme Court. *Brown v. Board of Education of Topeka (Brown I)*, 347 U.S. 483, 493 (1954).

[38] OGLETREE, Charles J. **All deliberate speed:** reflections on the first half-century of Brown v. Board of Education. p. 4-5.

history of the 14th Amendment cannot be used to interpret it because public education was rudimentary after the war; most Black Americans were not educated, and their education was even forbidden by law in some states. Segregation of children in public schools, even when the facilities are "equal", deprives minority groups of opportunities because it creates a feeling of inferiority that affects the mental health and the educational process of black students irreversibly. The Court concluded that "in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"[39].

Brown I was succeeded by an era of challenges of racial relations in the USA that Woodward called the "second reconstruction"[40]. Civil rights movements arose to challenge segregation; the New Deal era has also been directed not only to problems such as depression and war but also to civil rights[41]. Rosa Parks was criminally convicted in 1955 for recusing giving her seat on the bus to a white man in Montgomery, Alabama, and the Black population rose to boycott the bus system[42]. After that episode, Martin Luther King Jr emerged as a Civil Rights movement leader pressuring for change, and in 1955, the Supreme Court outlawed bus segregation in *Browder v. Gayle*[43]. Consequently, *Brown I* is celebrated as one of the Supreme Court's most significant decisions until today. However, *Brown II*[44], which applied the constitutional principles of the former precedent, is often overlooked because of the frustration it brought to the Law community[45].

4. *Brown II*: facing reality and the limits of the rule of law

The Supreme Court was so conflicted during *Brown I* that it argued the case in one year and then reargued it in another year. On the reargument, the Justices asked

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[39] U.S. Supreme Court. *Brown v. Board of Education of Topeka (Brown I)*, 347 U.S. 483, 489-495 (1954).

[40] WOODWARD, C. Van. **The Strange Career of Jim Crow**. p. 134-136.

[41] WOODWARD, C. Van. **The Strange Career of Jim Crow**. p. 129.

[42] VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos**.** p. 30-31.

[43] VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos. p. 30-31.

[44] U.S. Supreme Court. *Brown v. Board of Education of Topeka (Brown II)*, 349 U.S. 294 (1955).

[45] ROSENBERG, G. Tilting at Windmills: Brown II and the hopeless quest to resolve deep-seated social conflict through litigation. **Law and Inequality:** A Journal of Theory and Practice, Vol. 24, Issue 1 (Winter 2006), 2006, p. 34.

the lawyers how the Court would implement a decree mandating integration: if it would determine that students had to be admitted to schools of their choice or if the Court should allow a "gradual adjustment"; also, who would oversee this process[46].

The plaintiff's attorneys urged the Court to end segregation immediately because of its effects on children or no later than September 1955, as Ogletree argues. On the other side, State's attorneys alleged that the end of segregation could lead to racial tension, violence, and even more radical arguments, such as that Black kids with lower IQs would be integrated into white schools, that many Black children were retarded, and that it would spread tuberculosis, and venereal diseases on White schools. Southern States' attorneys, especially from South Carolina, declared to Chief Justice Warren that they would not conform to a desegregation decree[47]. Charles Ogletree believes that those reasons, and the fear that neither Federal nor State governments would implement the decision in *Brown I*, led the Supreme Court not to end segregation immediately but to determine that it had to be done in a process with "all deliberated speed"[48].

Brown II was decided one year after *Brown I*, and the Supreme Court had already seen the decision's early social, political, and legal impacts. In the meantime, strong reactions from Southern states had already started, like an Editorial of the Daily News in Jackson, Mississippi, which editorializes that "human blood may stain Southern soil in many places because of this decision but the dark red stains of that blood will be on the marble steps of the United States Supreme Court building"[49]. Under this kind of pressure, the Court was called to address the appropriate remedies that should be taken to fulfill *Brown I*. The opinion was once again unanimous, and it started by reaffirming that racial discrimination in public education was unconstitutional to make clear that it was not reversing *Brown I*[50].

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[46] OGLETREE, Charles J. **All deliberate speed:** reflections on the first half-century of Brown v. Board of Education. New York: W.W. Norton & Co., 2005, p. 8.

[47] ROSENBERG, G. Tilting at Windmills: Brown II and the hopeless quest to resolve deep-seated social conflict through litigation. **Law and Inequality:** A Journal of Theory and Practice, Vol. 24, Issue 1 (Winter 2006), 2006, p. 32.

[48] OGLETREE, Charles J. **All deliberate speed:** reflections on the first half-century of Brown v. Board of Education. p. 10.

[49] GILL, Ann M. The Supreme Court's Rhetoric of Legitimization. *In* ROUNTREE, Clarke. Brown v. **Board of education at fifty:** a rhetorical perspective. Oxford: Lexington Books, 2004., p.143-170, p. 144.

[50] U.S. Supreme Court. *Brown v. Board of Education of Topeka (Brown II)*, 349 U.S. 294, 298 (1955).

The Court held in *Brown II* that ending segregation would require what would be called later a **structural reform** of the existing educational system. School authorities should identify, elucidate, and solve the desegregation issues and elaborate a plan of which path they intend to follow. Local authorities would have the burden of proof to show that this plan is consistent with public interest and good faith. The local Federal Courts, closer to the problem, would oversee the plan's implementation but guided by equitable principles, not only by the Law. Using equity allows Courts to assess the issues and have flexibility in shaping remedies specific to the case. Courts would consider problems in administration, transportation system, staff, revision of school districts, and attendance areas to assess if the plans were fulfilling the goal of promoting admissions without racial basis. The local courts would retain jurisdiction over the desegregation process until it was finished. A polemical part of the opinion was the final decree, in which the Court did not give any due date to end the desegregation process and just remanded the cases for supervision of the lower Federal Courts "with all deliberate speed"[51].

Brown II was a compromise because even the Justices who were more engaged in desegregation did not want to issue an order they could not enforce, according to Ann Gill. The Court tried to show strength in the unanimity of the opinion. Still, the judgment was inadequate short, told "what" would have to be done, but now "how"; cited little legal theory or precedent, and showed unusual deference to local authorities (the very violators of the constitutional principles in *Brown*) that would have to "full implement" the decision with "good faith". The Court also stepped out of the supervision of the process, delegating it to local District Court Judges. Ann Gill asserts that this delegation delayed the processes because many local federal judges had political connections with Senators who would sign the "Southern Manifesto" in the future. A Mississippi attorney said that they could not ask for anything better than a native local federal judge to oversee the process and that they would consider 100 years as a feasible time for desegregation for them[52].

Ann Gill believes that the language of the Court and the expression "all deliberated speed" striped the Court from its authority and showed that the enforcement would be weak, strengthening Southern's massive resistance against its implementation. Charles Ogletree also considers that the lack of implementation in *Brown II* is partly a responsibility of *Brown*'s II Court because the term "all deliberate speed"

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[51] U.S. Supreme Court. *Brown v. Board of Education of Topeka (Brown II)*, 349 U.S. 294, 299-301 (1955).

[52] GILL, Ann M. The Supreme Court's Rhetoric of Legitimization. *In* ROUNTREE, Clarke. Brown v. **Board of education at fifty:** a rhetorical perspective. p.143-170, p. 153-154.

was culturally associated with "speed thee slowly" found in Sir Thomas Elyot's 1545 introduction of the word maturity in the English language[53]. It was also used in cases like *Virginia v. West Virginia* in 1912 in contexts that have shown that the action should be taken slowly[54].

Rosemberg, on the other hand, observes that the language used by the Court in *Brown II* did not matter because there was insufficient support for desegregation at that time[55]. A legalist critic of the words used in the decision misses a broader political, social, and economic context in which there was no support for implementation 1) in Congress; 2) by President Eisenhower; 3) In State legislation; 4) local courts; 5) southern governs; 6) private groups (who contributed for the election of pro-segregation representatives); 7) the broad use of violence as deterrence of segregation, and the existence of terrorist groups as the KKK to prevent it[56]. Rosemberg's criticism is consistent and supported by a gathering of data and facts, which led to upholding his belief that questioning the wording in *Brown II* is a romantical reproach that ignores the world in which the Supreme Court exists. Even if the Supreme Court demanded immediate desegregation, it would not have been upheld in 1955.

Violin observes a procedural change in *Brown II*: instead of being a mere spectator of the polycentric litigation, the judge became a creator and manager of complex remedies that required continuous follow-up[57]. This shift enabled structural reform of institutions such as schools, prisons, electoral districts, asylums, police stations, and more[58]. This structural reform was done through modern class actions (after 1966), engagement of civil rights movements, new legislation, and changes in American society that will be examined from now on.

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[53] OGLETREE, Charles J. **All deliberate speed:** reflections on the first half-century of Brown v. Board of Education. p. 10-11.

[54] OGLETREE, Charles J. **All deliberate speed: reflections on the first half-century of Brown v. Board of Education**. p. 10-13.

[55] ROSENBERG, G. Tilting at Windmills: Brown II and the hopeless quest to resolve deep-seated social conflict through litigation. p. 33.

[56] ROSENBERG, G. Tilting at Windmills: Brown II and the hopeless quest to resolve deep-seated social conflict through litigation. p. 31-37.

[57] VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos. p. 56.

[58] VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos. p. 56.

Edilson Vitorelli explains that *Brown II* was a compromise to achieve a unanimous opinion against desegregation because Chief Justice Warren knew that the existence of dissents would weaken the rule of law. The Court did not demand immediate desegregation nor gave a due date to local authorities to comply with the decision. Also, it did not provide standards for District Judges to assess the implementation of desegregation, which led them to experiment with ways to reform the educational system through injunctions and the use of equity. Thus, the use of injunctions in American Law, which was restricted in the first part of the XX century, became the most significant procedural way to promote civil rights. *Brown I* was not prosecuted as a structural reform, but its implementation demanded it to overcome the local resistance to end segregation[59].

Owen Fiss introduces in the American the concept of **structural injunction** as the one that "seeks to effectuate the reorganization of an ongoing social institution"[60]. It was different from the **preventive injunction** (used to prevent an act against the law from occurring in the future) and the **reparative injunction** (compels the defendant to repair wrongdoings of the past). American law has seen structural injunctions in historical moments. Still, the use of them by civil rights movements implementing *Brown* gave legitimacy and social prominence to structural injunction, which was used after for other claims, such as the reform of asylums and prisons[61]. Thus, according to the author, *Brown I* and *II* were the birth of modern structural litigation and structural reform as a way to implement and enforce the Supreme Court's ruling.

Edilson Vitorelli developed a concept of **structural litigation** examining Brazilian Law in which structural litigation is searched through class actions filed by public institutions (Prosecution Office, States, Union, Cities, Public Defenders), associations, and unions[62]. Structural litigation is a collective action in which the goal is to reform a bureaucratic institution, which can be public or private, that causes, induces, or allows violations of rights that are produced by the way this institution works[63]. This proceeding was shaped to address the cause of damages not only by an isolated fact but also by the way an institution works, creating irradiated

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[59] VITORELLI, Edilson. **Processo estrutural:** teoria e prática. p.89.

[60] FISS, Owen. **The civil rights injunction**. Bloomington/London: Indiana University Press, 1978, p.7.

[61] FISS, Owen. **The civil rights injunction**. p.9-10.

[62] Article 1º of the Brazilian Public Federal Civil Action Law of 1985.

[63] VITORELLI, Edilson. Levando os Conceitos a Sério: processo estrutural, processo coletivo, processo estratégico e suas diferenças. p. 341.

conflicts. Those are conflicts in which 1) the damage is substantial for the involved parties, and they are divided into subgroups; 2) there is no solidarity between the subgroups involved; 3) the subgroups are affected in different ways; 4) the nature of the conflicts is polycentric, so the solution of the problem of one subgroup does not automatically benefit the other groups; 5) Law protects several centers of interests, but does not provide a simple solution for the whole issue[64].

Brown II is known as the first and more characteristic case of structural injunction for having all the characteristics of what was later called public interest litigation: 1) a polycentric issue; 2) complex and formed by different subgroups; 3) related to the human rights; 4) which implementation requires the reform of an institution through a court-based proceeding with the cooperation of the parties[65]. Although criticized, the Court's decisions to demand local authorities to elaborate plans that would be oversized by federal courts established the basis for a structural reform through equity and structural injunctions. Jordão Violin believes that *Brown* sparked movements like the Civil Rights Act and the birth of modern class actions in the new Rule 23 in the 1966 reform of the Federal Rules of Civil Procedure (FRCP)[66].

Antonio Gidi also sees Brown and the need to implement mass policies of desegregation as one of the major issues that culminated in the Reform of Rule 23 in 1966. The 1938 Class Action Rule 23 was problematical for several reasons, but mainly because it did not establish a clear standard for the *res judicata* binds the absent parties, which is essential for civil rights litigation. They became incompatible with changes that American society was facing, from an individual model litigation (focused on monetary damages) to a massified model that addressed social disputes through injunctions and class actions[67]. Flávia Funck shows that the shifting from an individual model of civil procedure to a collective one was also happening in other parts of the world in what Cappelletti and Garth called the "second wave" of access

[64] VITORELLI, Edilson. Levando os Conceitos a Sério: processo estrutural, processo coletivo, processo estratégico e suas diferenças. p. 336-340.

[65] VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos. p. 33.

[66] VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos. p. 29-45.

[67] GIDI, Antonio. **A Class Action como Instrumento de Tutela Coletiva dos Direitos:** as ações coletivas em uma perspectiva comparada.p. 57-60.

to Justice in 1960-1970. After 1980, the movement reached Brazil, and it culminated in the Public Civil Action Law of 1985 and the Consumer Code of 1990[68].

After the 1966 Reform, the procedural and substantial law influenced each other in a dialect and symbiotic process to construct a new concept of mass litigation, as Antonio Gidi argues[69]. The new class action became so popular that, only 5 years after the reform, the number of class actions has quadrupled[70]. Rule 23(b)(2) class actions were the channel for structural reform because just one individual had the procedural tools to fight against discrimination against the whole group (*res judicata* could bind absent members)[71]. In the 80s, more than 600 school districts were controlled by Judges through class actions, which shows the power of structural injunctions in social reform[72].

However, the aftermath of *Brown II* was not successful. Neither the Legislative nor the Executive supported *Brown II* in its early aftermath, not even a compromise to a gradual desegregation. In 1956, 101 members of Congress attacked *Brown* in a document known as the "Southern Manifesto". They affirmed the precedent was unconstitutional, an exercise of "naked power" with "no legal basis", and promised to use all lawful means to reverse the Court's ruling and prevent the use of force on its implementation[73]. State legislatures also resisted the decision, and in Alabama, Georgia, Mississippi, South Carolina, and Virginia, 42 pieces of pro-segregation legislation at the beginning of 1956, in a strategy of "mass resistance" to the decision and to supposedly preserve the "Southern way of life"[74].

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[68] FUNCK, Flávia Bornéo. **Direitos Individuais Homogêneos:** elementos para uma definição em dois planos. Passo Fundo: conhecer, 2023, p. 61-65.

[69] GIDI, Antonio. **A Class Action como Instrumento de Tutela Coletiva dos Direitos:** as ações coletivas em uma perspectiva comparada. p.61.

[70] GIDI, Antonio. **A Class Action como Instrumento de Tutela Coletiva dos Direitos:** as ações coletivas em uma perspectiva comparada.p. 60.

[71] VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos. p. 43-44.

[72] VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos. p. 44.

[73] ROSENBERG, G. Tilting at Windmills: Brown II and the hopeless quest to resolve deep-seated social conflict through litigation. p. 34.

[74] GILL, Ann M. The Supreme Court's Rhetoric of Legitimization. *In* ROUNTREE, Clarke. Brown v. **Board of education at fifty:** a rhetorical perspective. p.143-170, p. 147.

President Eisenhower never used his prestige as a World War II hero to uphold the *Brown I* and II decisions. He made a few pronouncements about the decision, and none praised it[75]. He is also believed to have told Chief Justice Warren in a dinner that the "[Southern Whites] are not bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes"[76]. After that, he added that "it was difficult through law and through force to change a man's heart"[77]. Roy Wilkins, the Executive Director of the NAACP, summarized the President's inaction: "if he had fought World War II the way he fought civil rights, we would all be speaking German today"[78].

Consequently, the *Brown II* desegregation process was not launched. The progress was found just in States that wanted to comply with the Court's ruling: in the 1963-64 school year, less than 1% of African American children were in schools with whites in the Southern States of the Old Confederacy[79], except for Texas and Tennessee[80].

The opposition to the decision was ruthless. The Supreme Court avoided speaking directly in desegregation disputes unless it was an unbearable challenge to the Court authority in a prolonged violation of constitutional principles[81]. Those were the circumstances in *Cooper v. Aron*[82], the first time a State used its troops to defy a Supreme Court's decision[83].

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[75] GILL, Ann M. The Supreme Court's Rhetoric of Legitimization. *In* ROUNTREE, Clarke. Brown v. **Board of education at fifty:** a rhetorical perspective. p.143-170, p. 147.

[76] OGLETREE, Charles J. **All deliberate speed:** reflections on the first half-century of Brown v. Board of Education. p. 4.

[77] OGLETREE, Charles J. **All deliberate speed:** reflections on the first half-century of Brown v. Board of Education. p. 10.

[78] ROSENBERG, G. Tilting at Windmills: Brown II and the hopeless quest to resolve deep-seated social conflict through litigation. p. 34.

[79] The Old Confederacy was formed by Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

[80] ROSENBERG, Gerald N. The hollow hope can courts bring about social change? 3. Ed. Chicago: The University of Chicago Press, 2023, p. 60.

[81] GILL, Ann M. The Supreme Court's Rhetoric of Legitimization. *In* ROUNTREE, Clarke. Brown v. **Board of education at fifty:** a rhetorical perspective. p.143-170, p. 147.

[82] U.S. Supreme Court. *Cooper v. Aaron*. United States Supreme Court. 358 U.S. 1 (1958).

[83] GILL, Ann M. The Supreme Court's Rhetoric of Legitimization. *In* ROUNTREE, Clarke. Brown v. **Board of education at fifty:** a rhetorical perspective. p.143-170, p. 149.

In *Cooper*, nine black students tried to enroll in 1957 at Central High in Little Rock, Arkansas. Those students had a federal district court ordering their admission, but Governor Orval Faubus gave orders to the Arkansas National to prevent them from entering the school, which led President Eisenhower to order federal troops to be available to enforce desegregation in Little Rock, according to Ogletree. After that, Governor Faubus articulated with the Legislative and called a local referendum, which produced a vote of 19,470 to 7,561 in favor of closing public schools and giving the money to private segregated schools to prevent desegregation[84].

The Little Rock school board, represented by Cooper (plaintiff), sued to postpone the desegregation plan in Arkansas due to the circumstances, and the district court granted relief. The court of appeals reversed, and the Supreme Court granted certiorari. In the end, Marshal and the NAACP prevailed with the Supreme Court having to invoke *Marbury*, that the Federal Constitution was the "supreme law of the land", that the Supreme Court has the authority to say "what the law is", and that state's officials (and Governors), and Legislators were bound by the Court's decisions[85].

Rosenberg collects statistics that show that the desegregation only started to work in the 70s, when almost 20 years after *Brown I*. In 1972, more than 91% of African American school children of the eleven Southern states were in integrated schools. Some scholars believe that the effort worked after the Court changed its language and demanded desegregation promptly in cases like Cooper v. Aroon, Griffin v. County *School Board*, and others. However, Gerald Rosenberg criticizes this view as court-centered and defends that the desegregation plans advanced because of a broad change in the political, social, and economic context. He thinks that action by Congress in Title VI of the 1964 Civil Rights Act and in the 1965 Elementary & Secondary Education Act was more efficient than the Court's rulings because those Statutes allowed the Executive to threaten to cut funds for segregated public state schools. To prove this theory, Rosenberg uses the statistics that show that in the 1963-64 school year, 10 years after Brown, only 1,2% of African American children were in desegregated schools; in the 1972-73 school year, just a few years after the statutes cited, the number skyrocketed to 91%. The new legislation was also supported by a desire of Southern States to attract industry, which would require

[84] OGLETREE, Charles J. **All deliberate speed:** reflections on the first half-century of Brown v. Board of Education. p. 12-13.

[85] U.S. Supreme Court. *Cooper v. Aaron*. United States Supreme Court. 358, 360 U.S. 1 (1958).

a peaceful desegregated school system, and the cultural changes promoted by the action of the Civil rights movement[86].

Violin agrees in part with Rosemberg, adding that Title IV and VI of the 1964 Civil Rights Act granted the Attorney General the power to sue demanding desegregation, which removed the burden from individual students. Also, the Court would have determined the desegregation with "all deliberated speed" as a strategy while the political conditions were not favorable to support the decision; when the social context changed and Congress approved the Civil Rights Act, it could use more assertive measures against the violators of the orders[87].

Nonetheless, Violin disagrees with Rosemberg, saying that Brown's decisions were useless. Structural litigation was not meant to change society's values or the law; it was only meant to make institutions comply with existing values. Thus, it is only intended to change facts, not the social-cultural context in which the society is inserted. The possibility of backlash from other branches of government to structural injunctions is not a problem but a good thing: it works as a check and balances system to prevent an abuse of discretion of the Judiciary. The author defends its point of view and the importance of structural litigation, showing that a resegregation process started in the 80ts when the Judiciary started to take off structural injunctions because it believed that there was no more need for intervention. In 1988, the percentage of African American children studying in majority-white schools was 43,5%, and in 1998, it was 32,7%, a similar rate to the beginning of the 70s[88].

Scott Cummings partly agrees with Rosenberg, believing that courts lack the tools to enforce major structural reforms and that aggressive changes through court decisions are more likely to lead to backlash than Congress. But Cummings interpreted the Court decision as a part of a major process, considering that social movements change culture and politics, and later, the Supreme Court decisions changed to support the new consensus that social movements have produced. Also, policies implemented by the Legislative can also lack implementation, and this issue is not exclusive of the Court's rulings. Political scientists produced "court impact"

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[86] ROSENBERG, G. Tilting at Windmills: Brown II and the hopeless quest to resolve deep-seated social conflict through litigation. p. 39.

[87] VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos. p. 88-89.

[88] VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos. Tese (Doutorado em Direito) – Programa de Pós-graduação em Direito, Universidade Federal do Paraná. Curitiba, 2019, p. 100.

studies after *Brown* showing that Court's decisions were disregarded and showed the "law in the books is different from law action"[89].

Scott Cummings defends that the 1964 Civil Rights Act was important for desegregation but the Supreme Court only fully committed itself to it, changing from a "all deliberate speed formula" to "wiping out segregation root and branch" in 1968 decision in *Green v. School Board of New Kent*. Desegregation also reached its peak in 1988 due to resources devoted by the Department of Justice to enforcement of the orders. However, Reagan and Bush Administrations promoted attacks on desegregation orders and, in 1991, the Supreme Court authorized the end of desegregation plans. Resegregation was caused not only by this backlash but also by residential segregation and other political changes outside the scope of Courts, which led the segregation back to indexes like 1968, which compromised Rosemberg's claim that the Legislative reform was a spark for desegregation. Thus, he proposes shifting the social change from Court-centered proceedings to a broad social change through the organization of social movements to the best course of action in each case. He does not want to discard social change through the judiciary, but he believes that this alternative must be balanced with the other ones available to choose the better path[90].

5. Structural reform to prevent and eliminate second-generation employment discrimination

Both sets of *Brown* cases, I and II, were grounded in the 14º Amendment, which, like most constitutional amendments, is addressed against state action. Due to this characteristic of the United States legal system, structural reforms primarily targeted public institutions rather than private entities. However, following the Brown decision and the civil rights movements, structural reforms against discrimination in private relationships became viable through the Civil Rights Act of 1964. Title VII prohibits discrimination in employment relationships for private companies with 15 or more employees based on race, color, religion, sex, or national origin.

The protections against discrimination apply from the hiring process to the termination of the employment relationship, encompassing conditions, terms,

[89] CUMMINGS, Scott L. Rethinking the Foundational Critiques of Lawyers in Social Movements. p. 1999-2002.

[90] CUMMINGS, Scott L. Rethinking the Foundational Critiques of Lawyers in Social Movements. p. 2003-2004.

compensation, privileges, and promotion. The act also established the Equal Employment Opportunity Commission (EEOC), a federal agency empowered to enforce Title VII and eliminate unlawful discrimination in the workplace[91].

A claim involving employment discrimination can be based on two different theories: disparate treatment, which involves intentional discrimination, and disparate impact, which refers to unintentional discrimination. Both types of litigation have distinct patterns of proof and remedies but can support the same claim. Such claims can be initiated by a single employee or on behalf of multiple litigants in case of systemic litigation, where conscious or unconscious discrimination is ingrained in the culture and structure of the organization.

Systemic discrimination lawsuits can be brought by the government, through the Department of Justice or EEOC, on behalf of employees who suffered unlawful discrimination or by private litigators representing a group. In the latter case, the procedure must adhere to the Federal Rule of Civil Procedure 23 requirements for class actions, which comprehend numerosity, commonality, typicality, and adequacy of representation. Courts scrutinize whether these requirements are satisfied to certify the class action, which is the decision indicating that the action meets the conditions to proceed. After class certification, considering the risks for the defendant, the probability of settling the case increases. It is important to note that class lawsuits filed by the government need not comply with these requirements, only private class actions are subject to them[92].

Susan Sturm introduces a structural approach to what she refers to as second-generation employment discrimination, which denotes discrimination resulting "from patterns of interaction, informal norms, networking, mentoring, and evaluation." It involves various actors, including courts, employees, and mediators, facilitating a comprehensive resolution of complex problems in the workplace[93].

Direct and intentional discrimination has been supplanted by structures influencing the internal decision-making processes and interactions in the workplace,

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[91] VODANOVICH, Stephen J. and RUPP, Deborah E. **Employment Discrimination**: A Concise Review of the Legal Landscape. New York: Oxford University Press, 2022.

[92] SEINER, Joseph A. **Employment Discrimination**: Procedure, Principles, and Practice. New York: Wolters Kluwer, 2019.

[93] STURM, Susan. Second Generation Employment Discrimination: A structural Approach. **Columbia Law Review**. 101, 458, 2001, p. 458.

driven by conscious or unconscious bias, within a framework that marginalizes groups in a non-dominant or less favorable position. In contrast to direct and intentional discrimination, second-generation discrimination is less visible and more challenging to identify. Even workplace policies against discrimination do not guarantee an environment free from second-generation discrimination. Moreover, flexible and decentralized organizations are not always immune to second-generation discrimination and may amplify the problem instead[94].

While the resolution of first-generation discrimination relied on the courts, tackling second-generation discrimination proved more complex through a judicial decree. A highly specific rule may fail to capture the variety and multiplicity of factors contributing to indirect and unintentional discrimination. Conversely, an overly broad rule may be inadequate in addressing each component of second-generation discrimination according to various contexts[95].

Therefore, the structural approach advocated by Sturm "encourages the development of institutions and process to enact general norms in particular contexts. 'Legality' emerges from an interactive process of information gathering, problem identification, remediation, and evaluation". In this process, not only courts perform a crucial role, but employers and non-governmental actors also have important functions as "intermediaries in translating and mediating between formal law and workplace practice"[96].

This problem-solving process requires an accurate identification of the problem in its legal and organizational realms; a gathering and flow of relevant information; and the development of individual and institutional aptitude to offer responses and participate in constructing and assessing potential solutions. Imposed rules, unilaterally crafted and from the outside, are not compatible with engaging multiple actors committed to their efforts in reaching solutions for the problems.

In the problem-solving process, the Judiciary functions as an energizer that stimulates movement, not by determining the rules and remedies as usual, but by creating incentives in a pedagogic fashion for the employer to identify and implement procedures and routines that prevent or remove second-generation discrimination.

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[94] STURM, Susan. Second Generation Employment Discrimination: A structural Approach. p. 458.

[95] STURM, Susan. Second Generation Employment Discrimination: A structural Approach. p. 458.

[96] STURM, Susan. Second Generation Employment Discrimination: A structural Approach., p. 463 e 465.

Engagement, hard work, and success in this regard can be rewarded by avoiding liability in the future. Conversely, a simulated or forged process to maintain second-generation discrimination untouched will not exempt liability[97].

Sturm provides examples of cases where successful problem resolution was achieved by adopting this structural approach. One such case is the *Home Depot* case. Home Depot embraced a philosophy of a family entrepreneurship, encouraging individuals to enhance their home independently. The company also implemented a decentralized and non-bureaucratic management strategy. The corporation's business, which focused on construction and renovations, was traditionally associated with the male societal role[98].

In 1995, a group of female employees filed a class action lawsuit, contending discrimination in company's process, including hiring, promotion, and compensation. Following class certification, the court initiated a mediation process to reach a global settlement, involving various actors. The parties ultimately settled the case for $87.5 million, and the Consent Decree issued provided injunctive relief mandating changes in Home Depot's personal practices to ensure equal opportunities to all. The decree also aimed to increase the number of women in certain positions, following a plan implemented over the subsequent five years.

A system of accountability, not reliant on rules but on technology, information, and systematization of discretion, was developed to align with the company's decentralized and non-bureaucratic management style. Job information and requirements were made transparent, fostering openness in the hiring and promotion process. Over time, the participation of women and minority groups saw a significant increase. Consequently, the Court ordered the termination of the Consent Decree before the scheduled five-year term[99].

With this and other examples, Sturm demonstrates the viability of the structural approach, which emphasizes problem-solving procedures constructed with the participation of experts not only in legal matters but also in other areas, as well as involving employees themselves. This approach is not grounded in rules imposed from outside. The Judiciary functions more as a conductor than an authority invested

[97] STURM, Susan. Second Generation Employment Discrimination: A structural Approach. p. 483.

[98] STURM, Susan. Second Generation Employment Discrimination: A structural Approach. p. 483.

[99] STURM, Susan. Second Generation Employment Discrimination: A structural Approach. p. 483. See also https://clearinghouse.net/case/9471.

solely in adjudicating the case. Compliance is assessed over time, considering not only the outcomes but also the effort and seriousness in effecting tangible changes to eliminate second-generation discrimination.

The Walmart case, on the contrary, represents a setback in the structural reform. Female employees of Wal-Mart filed a class action against their employer, asserting that the supervisors' decisions were biased in favor of men and discriminatory against women, in violation of Title VII of the Civil Rights of 1964. The plaintiffs, representing approximately one and a half million former and current female employees nationwide, sought declaratory and injunctive relief, punitive damages, and back pay. The evidence presented included statistical data illustrating gender disparities, anecdotal reports from female employees, and a sociologist opinion stating that Wal-Mart "was vulnerable to gender discrimination"[100].

Plaintiffs moved to certify a class comprising all women employed by Wal-Mart since December 26, 1998. Wal-Mart denied any discriminatory practices, challenging the results of the data and studies through countervailing statistical and other evidence. The defendant also alleged that the class could not have been certified under Rule 23(b)(2) because it limited the company's right to present statutory defenses.

The District Court certified the class, finding the requirements of Rule 23(a) and 23(b)(2) to be met and deeming declaratory and injunctive reliefs appropriated to the case. The District Court ordered notice to be given to class members, allowing them to exercise the right to opt out. The Ninth Circuit affirmed, emphasizing that the plaintiffs satisfied the commonality requirement in Rule 23(a)(2) and certification under Rule 23(b)(2), because back pay claim did not predominate over the declaratory and injunctive pleadings. Additionally, the class action did not deprive the defendant of its rights. Punitive damages was remanded for further consideration[101].

The Supreme Court reversed the decision, addressing two debated issues: whether the commonality requirement was met, and whether backpay would allow class certification under Rule 23(b)(2), which specifically refers to injunctive and declaratory relief. In an opinion written by Justice Scalia, the Court answered both issues with a "no", the first one by a majority 5 to 4, and the second, by a unanimous decision.

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[100] U.S. Supreme Court. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004). p. 2553-2554

[101] U.S. Supreme Court, 474 F.3d 1214.

The majority's analysis of the commonality issue included the statement: "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. Califano v. Yamasaki, 442 U. S. 682, 700–701 (1979)'"[102]. The argument to deny commonality centered on the impracticality of consolidating numerous employment situations in one suit without a common link. The class action, in this case, would not result in a common answer to address the various forms of alleged discrimination.

According to the majority opinion, the plaintiffs failed to prove the existence of a discrimination policy adopted by the company that resulted in the same kind of injuries for over one million of former and current women employees. On the contrary, the opinion stated: "Wal-Mart's announced policy forbids sex discrimination, and the company has penalties for denials of equal employment opportunity"[103].

The dissent noted that the majority was introducing a sort of predominance requirement similar to Rule 23(b)(3) for certifying a class under 23 (b)(2) and criticized the majority for adopting an approach that emphasized "dissimilarities" rather than the common question. This approach, according to the dissert, caused the Court "to train its attention on what distinguishes individual class members, rather than on what unites them"[104].

The Dukes decision embodies this paradox. The intricate discussion on employment discrimination within the context of complex litigation left many doubts unresolved instead of providing precise answers. This subtype Rule 23(b)(2) is referred to as the mandatory class action because individuals do not have the option to opt out. This strong connection between mandatory class action and civil rights has led some courts to require only the allegation that the rights holders seek injunctive relief, without specifying the content[105]. The behavior of the offender is considered from the perspective of the group, emphasizing "rather than piecemeal litigation. If the court decides in favor of the class, all class members can rely on the resulting injunction or declaration. If the court decides in favor of the defendant, all class members are bounded by to that result"[106].

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[102] U.S. Supreme Court. *Wal-Mart Stores, Inc. v. Dukes et al*. 131 S. Ct. 2541, 2550 (2011).

[103] U.S. Supreme Court. *Wal-Mart Stores, Inc. v. Dukes et al*. 131 S. Ct. 2541, 2553-2554 (2011).

[104] U.S. Supreme Court. *Wal-Mart Stores, Inc. v. Dukes et al*. 131 S. Ct. 2541, 2567 (2011).

[105] MARCUS, David. The Public Interest Class Action, 104 **Geo. L.J.** 777, 2016.

[106] CARROLL, Maureen. Class Action Myopia, 65 **Duke L.J.**, 2016, p. 843.

Empowering people with the possibility "to achieve extraordinary outcomes through the court system" gave a dimension of public interest to the class action as an instrument of "growth of statutory rights and constitutional claims". The provision of appropriate relief to the class has become an essential tool for enjoying civil rights "in areas such as education, housing, public accommodations, and employment"[107].

Catherine R. Albiston criticizes the majority opinion for assigning weight to the Walmart non-discriminatory policy as evidence to disprove existence of intentional discrimination, thus undermining the support for the systemic disparate treatment claim and dismissing an alternative viable disparate impact claim. The Court did not consider the difference in how the organization expresses its policy and whether it is implemented by managers in a way that disguises discrimination. Albiston points out that "organizational policies that symbolize attention to civil rights laws have become widely accepted as evidence of actual compliance with those laws, whether or not those policies are effective"[108].

Inequality is viewed as a deviation of the individual supervisor, not reflective of the organization's structure, and practices are assumed to be always neutral. However, several studies indicate the existence of institutional bias that requires structural reform with the engagement of the employer to eliminate, rather than allow the functioning of these structures and practices that enable discrimination in the workplace. In this sense, the focus must shift from individual agency to structural or systemic factors[109].

6. Conclusion

Structural reform represents an innovative approach to addressing complex litigation, aiming to provide solutions beyond the conventional remedies offered by the Judiciary. The genesis of structural reform lies in the enduring inequality within the United States, persisting despite constitutional amendments that abolished slavery and ensured equal protection. While *Brown I* proclaimed the end of racial segregation in schools, the eradication of segregation proved unattainable through traditional judicial adjudication. Segregated structures had become deeply ingrained

[107] CARROLL, Maureen. Class Action Myopia. P. 843.

[108] ALBISTON, Catherine R. Structure, Agency, and Working Law. **Law & Social Inquiry**. Vol. 44, Issue 4, 1221-1230, 2019, p. 1223.

[109] ALBISTON, Catherine R. Structure, Agency, and Working Law. p. 1231.

in schools and other public spaces, perpetuating the legacy of the "separated but equal" doctrine for years.

In the United States, structural reform is a suitable process for reshaping public institutions, given that the 14th Amendment does not regulate private relationships. However, following the enactment of the Civil Rights Act of 1964, the prohibition of discrimination was expanded to encompass spaces not under control of public authorities but managed by private entrepreneurs. The field of employment discrimination serves as an illustration of how structural reform operates in this context. Broadly speaking, workplace discrimination is a structurally unlawful practice that is challenging to detect. Addressing the issue requires more than targeting discrete events; rather, the underlying structure supporting discriminatory practices must be dismantled. The process to achieve this outcome is time-consuming and does not adhere to externally imposed rules. The Judiciary acts as a coordinator, facilitating and encouraging the participation of various actors involved in the workplace routines and experts to collaboratively construct a viable resolution.

The *Home Depot* case illustrates how structural reform operates in the realm of employment discrimination. In a certified class action, the Judiciary steered the case toward a comprehensive settlement, involving a mediator and other participants. The Consent Decree contained a structural injunction, granting Home Depot 5-year period to implement procedures and routines aimed at eradicating workplace discrimination. Prior to the deadline, the Judiciary confirmed Home Depot's compliance with the decree, thereby concluding the case.

If the *Home Depot* case represented a successful instance of structural reform, the *Walmart* case marked a setback in the potential of structural reform. This was because the Supreme Court understood that the plaintiffs failed to meet the requirements for class certification, citing a lack of proof of gender discrimination and pointing to the company's adoption of an anti-discrimination policy. However, a policy against discrimination does not guarantee a discrimination-free environment. It is essential to scrutinize whether supervisors are actively working to eliminate or prevent discrimination.

As a result, while structural reform has progressed as a more adaptable and inclusive approach to address structural litigation, it still encounters resistance in its widespread implementation. Meanwhile, structural litigation persists when confronted through traditional adjudication methods. A regular preventive injunction will not stop more sophisticated discrimination actions, such as second-generation

employment discrimination, if the institution in which the practices are found is not reformed and aligned with the law.

Therefore, it is possible to assume that structural litigation and structural reform through courts have boundaries that courts alone can hardly overcome. However, any police from other branches of government could have implementation issues, especially when it wants to change the *status quo*. Also, structural reform via Courts is part of a bigger process of change, and the enforcement of the rule of law aims at changing unlawful structures. If it is not always the best answer for every social problem, its potential can not be discarded.

References

ALBISTON, Catherine R. Structure, Agency, and Working Law. **Law & Social Inquiry**. Vol. 44, Issue 4, 1221-1230, 2019.

BURNHAM, W.; REED, Stephen F. **Introduction to the Law and Legal System of the United States**. 7ed. St. Paul: West Academic Publishing, 2021, 1366 p.

CARROLL, Maureen. Class Action Myopia, 65 **Duke L.J.** 843, 2016.

CUMMINGS, Scott L. Rethinking the foundational critiques of lawyers in social movements (Colloquium: Civil Litigation Ethics at a Time of Vanishing Trials). **Fordham Law Review**, Vol. 85, Issue 5 (April 2017), pp. 1987-2016, available at https://escholarship.org/uc/item/39p3h3w5. Accessed on 25 Jan. 2024.

DONALD, David Herbert. **Charles Sumner and the Rights of Man**. New York: Random House, 1970, 595p.

FAUST, Drew Gilpin. **Death and Dying**. U.S. National Park Service – U.S. Department of the Interior. Available at: https://www.nps.gov/articles/death-and-dying.htm. Accessed on 12 Feb. 2024.

FERNANDES, João Renda Leal. **O "Mito EUA":** um país sem Direitos Trabalhistas?. 2. Ed. São Paulo: Juspodivm, 2023, p. 59-61.

FISS, Owen. **The civil rights injunction**. Bloomington/London: Indiana University Press, 1978, 117p.

FONER, Eric. Reconstruction: United States history. **Encyclopaedia Britannica**, 2024. Available at: https://www.britannica.com/event/Reconstruction-United-States-history. Accessed on 16 Feb. 2024.

FUNCK, Flávia Bornéo. **Direitos Individuais Homogêneos: elementos para uma definição em dois planos**. Passo Fundo: conhecer, 2023, 252p.

GIDI, Antonio. **A Class Action como Instrumento de Tutela Coletiva dos Direitos:** as ações coletivas em uma perspectiva comparada. São Paulo: Revista dos Tribunais, 2007. 525 p.

GILL, Ann M. The Supreme Court's Rhetoric of Legitimization. *In* ROUNTREE, Clarke. **Brown v. Board of education at fifty: a rhetorical perspective**. Oxford: Lexington Books, 2004.

OGLETREE, Charles J. **All deliberate speed:** reflections on the first half-century of Brown v. Board of Education. New York: W.W. Norton & Co., 2005.

MALVEAUX, Suzette M. The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today, 6 U. **Kan. L.Rev.** 325, 2017.

MARCUS, David. The Public Interest Class Action, 104 **Geo. L.J.** 777, 2016.

UROFSKY, Melvin I. Dred Scott decision. **Encyclopaedia Britannica**, 2024. Available at: https://www.britannica.com/event/Dred-Scott-decision. Last accessed on Feb. 2nd, 2024.

ROSENBERG, Gerald N. **The hollow hope can courts bring about social change?** 3. Ed. Chicago: The University of Chicago Press, 2023, 713p.

ROSENBERG, G. Tilting at Windmills: Brown II and the hopeless quest to resolve deep-seated social conflict through litigation. **Law and Inequality: A Journal of Theory and Practice**, Vol. 24, Issue 1, 2006. Available at: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2921&context=journal_articles. Accessed on: 25 Jan. 2024.

STONE, Geoffrey R; SEIDMAN Jessica C.; SEIDMAN, Andrew R.; SUNSTEIN, Cass r.; TUSHNET, Mark; KARLAN, Pamela; TUSHNET, Rebecca and Laura. **Constitutional Law**. 8ed. Frederick: Wolters Kluwer, 2017.

STURM, Susan. Second Generation Employment Discrimination: A structural Approach. **Columbia Law Review**. 101, 458, 2001.

U.S. **Rules Enabling Act**. 28 U.S.C. § 2071-2077. Washington: June 19, 1934.

VIOLIN, Jordão. **Processos estruturais em perspectiva comparada:** a experiência norte-americana na resolução de litígios policêntricos. Tese (Doutorado em Direito) – Programa de Pós-graduação em Direito, Universidade Federal do Paraná. Curitiba, 2019.

VITORELLI, Edilson. **Processo estrutural:** teoria e prática. 5ed. São Paulo: Editora JusPodivm, 2024.

VITORELLI, Edilson. Levando os conceitos a sério: processo estrutural, processo coletivo, processo estratégico e suas diferenças. **Revista de Processo**, São Paulo, v. 284, p. 333-369, out. 2018.

WOODWARD, C. Vann. **The strange career of Jim Crow**. Oxford: Oxford University Press, 2002. 272 p.

Cases list

U.S. Supreme Court. *Butchers' Benevolent Assn. of New Orleans v. Crescent City Livestock Landing & Slaughterhouse Co.* 83 U.S. (16 Wall.) 36, 21 L. Ed. 394 (1873).

U.S. Supreme Court. *Brown v. Board of Education of Topeka (Brown I)*, 347 U.S. 483 (1954).

U.S. Supreme Court. *Brown v. Board of Education of Topeka (Brown II)*, 349 U.S. 294 (1955).

U.S. Supreme Court. *Cooper v. Aaron*. United States Supreme Court. 358 U.S. 1 (1958).

U.S. Supreme Court. *Dred Scott v. Sandford*. United States Supreme Court. 60 U.S. (19 How.) 393 (1857).

U.S. Supreme Court. *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004).

U.S. Court of Appeals for the Fourth Circuit. *Griffin v. County School Board*. 363 F.2d 206, cert. denied, 385 U.S. 960 (1966).

U.S. Supreme Court. *Marbury v. Madison*, United States Supreme Court, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

U.S. Supreme Court. *McCulloch v. Maryland*. United States Supreme Court. 4 L. Ed. 579, 17 U.S. (4 Wheat.) 316 (1819).

U.S. Supreme Court. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

U.S. Supreme Court. *The Civil Rights Cases: United States v. Stanley* 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883).

U.S. Supreme Court. *Wal-Mart Stores, Inc. v. Dukes et al*. 131 S. Ct. 2541, 2550 (2011).