

Structural Litigation: The Judiciary's New Frontier in Public Policy

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Structural litigation, like the structural injunctions seen in the United States, defies the traditional model of judicial power. Although Brazilian legislation does not provide for “structural proceedings”, this type of litigation has nonetheless come into the spotlight in recent years. The need for specific legislation to govern structural litigation has become increasingly evident, precisely because such cases seek to solve structural problems that cannot be resolved through traditional proceedings such as collective actions and individual lawsuits.

In response, the Federal Senate established a Commission of Jurists to prepare draft legislation. The Commission, chaired by Federal Judge Edilson Vitorelli, approved its final report on October 31, 2024.

Structural litigation is, essentially, a mechanism that allows the judicial branch to act in the reorganization of public policies, in collaboration with the public agents responsible for structuring more efficient solutions. Some of the main challenges in this type of litigation are the need for a detailed analysis of the conflict and its social impact, the preparation and implementation of a reorganization plan, and the assessment and monitoring of the results of the plan.

Although government's failure to act can make judicial control of public policies necessary, caution is essential. This type of intervention by the courts touches on the legislative and executive branches' powers to establish and implement public policy, requiring sensitivity on the part of the courts.

The need for a specific structural litigation proceeding also stems from the fact that the protection of fundamental rights in lawsuits brought by individuals does not always result in an effective solution for structural problems. Justice Og Fernandes, a member of Brazil's highest court in non-constitutional matters, the Superior Court of Justice, highlighted the problem in Appeal Resp 1.733.412/SP (2019). In that case, a child who was waiting for an opening in a state-funded daycare center went from 5th to 27th in line because openings had been filled in compliance with court orders obtained in individual lawsuits, illustrating the limits of individual actions in resolving systemic problems.

In short, solutions to structural problems have to contemplate everyone who is affected by the problem, with the participation of the government agencies involved and proposals for viable solutions to the social impacts generated by the problem. Structural litigation is complex by nature, and seeks profound change in bureaucratic structures. Clearly, specific rules are needed to guide this type of legal proceeding.

The Draft Legislation's Objectives: Simplicity and Effectiveness

The draft legislation proposes a set of objective, minimalist, and flexible rules to make structural litigation more effective. One important provision, which reflects the cooperative nature of the proceedings, is that the “structural action plan” is to be drawn up initially by “the person in charge of the activity at issue in the proceeding” (article 9§1), and, where appropriate, after “hearing persons and entities from the private and public sectors, along with representatives of the affected group” (article 9§2).

The structural action plan represents an important advance, because it provides a framework for designing solutions, which is lacking under current procedural law. According to the draft legislation, the plan must contain a diagnosis of the conflict, targets with qualitative and quantitative indicators, a timeline for implementation, and a program for monitoring implementation, together with those responsible for the monitoring work (article 9§3).

Although it involves complex social questions, the draft legislation is succinct and lays out an objective set of rules, which is essential in conducting this type of litigation. The next steps will be the transformation of the draft legislation into a Bill that will be submitted to the two chambers of Congress.

By establishing clear guidelines on how structural litigation will be conducted, the draft legislation not only acknowledges that such cases exist, but has the potential to ensure greater foreseeability in the resolution of disputes that involve structural litigation. If passed into law, the proposed rules could refine the judiciary's role in fostering better solutions to collective conflicts, through a collaborative approach that respects the division of powers between the judicial, legislative, and executive branches of government.

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