

Structural Litigation and the Role of the Courts

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Abstract

This article aims to demonstrate that although structural litigation began in the US Supreme Court in the 1950s, it is now a common practice in courts around the world. To support this assertion, structural decisions from a wide range of courts in different countries and legal systems will be cited.

Keywords

Structural Litigation, Courts, Structuring Decision

1. Introduction

For several decades, structural decisions were restricted to judgments by the Supreme Court of the United States of America, mainly between the 1950s and the 1970s.

During this period, the cases known as *Brown v. Board of Education* (1954), *Brown v. Board of Education II* (1955), and *Holt v. Sarver* (1969) gained attention for the way they were judged, especially due to tougher measures to address structural problems in the United States (Jobim, 2024a)¹.

Three authors, still in the last century, around the 1970s, found, in their writings, a way to refer to how the actions of the American courts, especially the Supreme Court, were changing the way jurisdiction was exercised, as it had been known until then. These authors were Lon Fuller (Fuller & Winston, 1978)², Abram Chayes (Chayes, 1976), and Owen Fiss (Fiss, 2007).

The latter two, in particular, Abram Chayes with his theory on PIL (Public In-

¹To learn more about the work of the United States Supreme Court.

²Although Lon Fuller's text was published in the 1950s, as Owen Fiss explains. FISS, Owen. *Direito como razão pública: processo, jurisdição e sociedade*. 2ª edição. Tradução de Carlos Alberto de Salle. Curitiba: Juruá, 2017. p. 63.

terest Litigation), and Owen Fiss with his theory on Structural Injunctions³ or Structural Reform, gained traction not only in the United States but also in various courts around the world, which is the focus of this text, demonstrating that the phenomenon of structural problems or litigation is a global one.

2. Structural Litigation and Its Beginning: Supreme Court of the United States

Today, it is practically undisputed in legal doctrine that structural litigation originated from the decisions of the US Supreme Court in the second quarter of the 20th century, following the ruling in *Brown v. Board of Education of Topeka* in 1954 and, subsequently, in 1955 with *Brown II*. It was in the second phase of the *Brown* trial that the Court determined structural measures to end the policy of racial segregation in public schools in the United States, using the expression “with all deliberate speed” to emphasize the urgency that the policy of racial desegregation should have. Another notable case before the US Supreme Court that generated significant social repercussions and many achievements for the affected community is *Holt v. Sarver* from 1969 and the unconstitutional prison system of the State of Arkansas, as referred to in the research conducted by Jordão Violin (Violin, 2023).

However, especially in Brazil, it was thought in the early years of research that structural litigation was restricted to the United States, when, in fact, it has its epicenter only in the country’s highest court, migrating to many other countries and existing courts.

In judgments in courts in various countries, the problem of structural litigation is adjudicated under various names, such as structural litigation, public interest litigation, social action litigation, and the unconstitutional state of affairs, to mention only these nomenclatures, although the list is merely illustrative.

3. Structural Litigation and Other Courts

Although, as mentioned, structural problems or disputes have different forms of decision-making techniques for judgment, this article will use structural litigation (Arenhart et al., 2025)⁴ as a standard to refer to all other forms by which the topic is known around the world. This does not mean that other terms will not be referred to throughout the text, but, in the chapters, the expression is used as a way

³A preliminary concept of Structural Injunction can be analyzed in the writings of Fredie Didier Jr., Hermes Zaneti Jr., and Rafael Alexandria de Oliveira, who wrote: “Based on these specific situations, a structural injunction came to be defined as a decision that sought to implement structural reform in an entity, organization, or institution, with the aim of realizing a fundamental right, implementing a specific public policy, or resolving complex disputes.” In: DIDIER JR, Fredie; ZANETI JR, Hermes; OLIVEIRA, Rafal Alexandria de. Elements for a theory of the structural process applied to Brazilian law. *Journal of the Public Prosecutor’s Office of the State of Rio de Janeiro* No. 75, Jan./Mar. 2020. p. 103.

⁴The term “structural litigation” will be used in the text, since Brazil is the one that was chosen by the doctrine, by the Legislative and Judiciary Powers to address structural problems or disputes. To this end, we recommend: ARENHART, Sérgio Cruz; OSNA, Gustavo; JOBIM, Marco Félix. *Structural Process Course*. 3rd ed. São Paulo: Thomson Reuters Brasil, 2025.

to centralize the theorization in the thinking of Yale Sterling Professor Owen Fiss.

It is undeniable that the role reserved for courts around the globe in the 21st century has changed radically from the powers they had in earlier times (Linke & Jobim, 2022)⁵. Constitutionalism, which has been the subject of great debate throughout history, especially since its triumph in the 19th century, has been increasingly modified at an intense and rapid pace, which means that a new (or new proposals for) constitutionalism is always the subject of discussion(s), creating areas of effectiveness, efficiency, and efficacy in constitutional texts so that they can transform the reality of those most in need.

With the intention of demonstrating how courts have undergone significant changes, particularly in protecting individuals from radical (Rodríguez-Garavito & Rodríguez-Frando, 2015)⁶ deprivations of human and fundamental rights, a number of courts will be selected to demonstrate, based on the protection they provide, that this has been verified in practice.

In the Constitutional Chamber of the Supreme Court of Justice of Costa Rica (Bonilla, 2018), examples of structural decisions include ruling 5934-1997 and interlocutory resolution 0504-I-1997, which were decisive for the policy on care for HIV patients; ruling 14639-2006, for the reactivation of the organ transplant program (based on Law No. 7, 409 of 1984 and Executive Decree 24, 605-S); ruling 15737-2008, which addressed the issue of universal vaccination against pneumococcus and rotavirus for children and adults, the latter benefiting most from vote No. 8339-2009; Judgment 4621-2013, which dealt with the elimination of the waiting list due to systematic delays at Dr. Calderón Guardia Hospital for surgery; Judgment 6852-2012, which deals with the implementation of the digital health system; Rulings 7484-2000, 11765-2012, 7274-2014, 10800-2014, 12963-2015, 12541-2016, 11504-2017, and 10290-2018, which address problems in the prison system; Judgment 7163-2012, whose theme involved the use of objective criteria for public competitive examinations; and Judgment 2016008983.

The Peruvian Constitutional Court is the supreme body for interpreting and enforcing the Constitution. One of the most well-known structural cases heard by the Court is *Lambayeque v. Arellano Serquén*, involving the vulnerability of the right to access information through habeas data, given the failure of the National Council of the Magistracy (CNM) to provide public documentation related to the position of Vocal Superior del Distrito de Lambayeque. Marco Félix Jobim and

⁵To understand a little more about the role of the courts.

⁶Abstract of the book: This book is an empirical study of contributions by courts in the Global South to comparative constitutionalism. It offers an analytical framework for understanding these constitutional innovations and illustrates them with a qualitative study of the most ambitious case in constitutional adjudication in Latin America over the last decade: the Colombian Constitutional Court's structural injunction affecting the rights of over five million internally displaced people and its implementation process. Although the ruling (known as T25) was handed down in 2004, its monitoring process continues. This book traces the case's evolution from its origin to its effects on policy, politics and public opinion. It also compares the implementation and effects of T25 with those of other rulings on the rights to health, food, housing, and prison overcrowding in Colombia, India and South Africa. The study's insights will be of interest to scholars of comparative constitutionalism in Latin America, Africa and Asia.

Luana Steffens (Jobim & Steffens, 2022) point out the structural guidelines dictated by the Court for the CNM to comply with constitutionally guaranteed access, thus demonstrating the structural nature of the litigation and the decision itself.

The Colombian Constitutional Court is an institution of the judicial branch of government, created in 1991 and duly established in 1992, with the objective of safeguarding the integrity and supremacy of the Constitution. One of the most emblematic structural cases tried in the Court is that of the forced displacement of people by Sentence T-025/04, which deals with a widespread situation of violations of the rights of people who left their homes to preserve their survival due to internal armed conflicts or their rural modules. According to Eduarda Peixoto da Cunha França (França, 2022), the internal dispute involved everyone, from the government to drug traffickers at war, with a severe impact on the poorest and most vulnerable population.

The Supreme Court of India is the highest judicial authority and the highest court in the Republic, with the power of judicial review of legislation and, as a result, it has the final say on many legal matters. Chandrachud (Chandrachud, 2022) cites, as an example of structural judgment in the Court, the case of the 2G Spectrum and Coalgate, which represents the top of the chain of decisions in the Indian Court and is similar in nature, as it involves complaints about the Government's allocation of natural resources and procedural flaws, largely due to transparency issues. The author reports a series of continuing mandamus cases, ranging from explanations about the leakage of confidential matters and the appointment of a special team to assist in the investigation to the extension of deadlines for the submission of reports and other orders considering the nature of the problem(s) to be addressed.

The Plurinational Constitutional Court of Bolivia has the mission of ensuring the supremacy of the Constitution, exercising constitutional control to guarantee respect for and enforcement of constitutional rights and guarantees within the context of a pluralistic justice system, in accordance with constitutional values and principles. One of the most recognized structural cases judged by the Court is Ruling 0572/2014, dated March 10, 2014, involving the Takana El Turi Manupare II indigenous community and addressing the violation of the right to housing and shelter through intimidation with firearms by the land concessionaire Miguel Ruiz Cambero, as pointed out by Andrea Carrion Hurtado, María Elena Acosta Maldonado, and Fernando Casado Gutiérrez (Hurtado et al., 2019).

The issue of structural decisions in courts seems to be an endless research topic. The courts already listed and some of their cases mapped are still only a small sample of what structural litigation represents in the world. Just as an example, Marco Félix Jobim (Jobim, 2024b) has also recorded structural actions in the following courts: the Constitutional Court of Ecuador, the Supreme Court of Justice of Venezuela, the Constitutional Court of South Africa, the Supreme Court of Canada, the Supreme Court of Argentina, the Supreme Court of Bangladesh, the Supreme Court of Pakistan, the Supreme Court of the Philippines, the Australian

Supreme Court, the Supreme Court of Kenya, the Italian Constitutional Court, the Supreme Court of Uganda, the Chilean Constitutional Court, the Constitutional Court of Taiwan Region, the Inter-American Court of Human Rights, the European Court of Human Rights, and the Federal Supreme Court in Brazil, among other countries that are still under investigation (Jobim, 2024c).

Just to provide some context regarding the structural role of one of Brazil's courts, the Federal Supreme Court is the highest body of the Brazilian Judiciary, responsible for upholding the Constitution of the Federative Republic of Brazil, in accordance with Article 102 of the Constitution. Carlos Alexandre de Azevedo Campos (Campos, 2022), one of the leading experts on the subject in Brazil, reports that, in the Federal Supreme Court, in addition to the judgment of ADPF 347 and the declaration of the State of Unconstitutionality of the Brazilian prison system, he points out, by way of example, other forms of action in cases involving structural failures, such as ADPF 822, ADPF 866, ADPF 786, ADPF 655, and ADPF 743. One of the most well-known cases tried in the Federal Supreme Court is ADPF 635, or ADPF das Favelas. The Court partially approved, based on the lawsuit filed, a plan for the State of Rio de Janeiro to reduce police lethality. Initially, the Court's Plenary had determined that a plan should be drawn up to retake areas occupied by criminal organizations in Rio de Janeiro that were being investigated by the Federal Police for crimes and human rights violations.

From the examples cited in various courts around the world, a certain pattern can be observed in the existing structural problems. Housing, food, health, culture, segregation, the prison system, and other issues tend to be repeated, which is no different in the Brazilian Judiciary. This does not in any way limit action in structural cases that may exist in a wide range of areas, both in public administration and in private life.

4. Final Considerations

As can be seen from the research conducted, courts in a wide variety of countries and contexts use decision-making techniques to act in cases of radical deprivation of rights—better known as litigation, conflicts, or structural problems.

Although it began in the U.S. Supreme Court with the Brown I and Brown II cases, what is referred to in Brazil as structural proceedings spread throughout the world in the decades following the Brown ruling.

The topic has been widely debated in Brazil, with the National Congress, in 2024, concerned with the still lack of infra-constitutional legislation on the subject, appointing a commission of jurists to draft a bill on structural proceedings, which is currently undergoing legislative proceedings under number PL 03/2025⁷.

One fact that is completely clear in this text is that the phenomenon of structural injunctions has been debated for at least the last 70 years and has reached

⁷On this topic, see: ARENHART, Sérgio Cruz; OSNA, Gustavo; JOBIM, Marco Félix. *Structural Process Course*. 3rd ed. São Paulo: Thomson Reuters Brasil, 2025; VITORELLI, Edilson. *Structural civil procedure: theory and practice*. 6th ed. São Paulo: JusPodivm, 2025.

global levels for at least the last 40 years. It is time for a comparative study of the subject so that there can be a more accurate debate on global constitutionalism and structural problems and, perhaps, how different nations can unite around the issue.

Brazil, having been one of the last countries to study and implement structural injunctions in its system, is now at the forefront of global doctrine, serving as an example for other countries, as learning about the subject late allowed it to refute what was wrong, improve what was right, and propose innovations in areas where nothing existed before.

Although far from a comprehensive approach to the subject (quite the contrary, very illustrative at this point), an attempt was made to prove the importance and relevance of the subject, which is why the study will be of significant importance for new researchers to go beyond the research currently published.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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