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Strategic litigation vs. structural litigation (of public interest): After all, names of the same institute for the defense of fundamental rights?*

Litígio estratégico x litígio estrutural (de interesse público): Ao fim e ao cabo, denominações de um mesmo instituto para a defesa de direitos fundamentais?

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Resumo

Litígio estratégico e litígio estrutural (de interesse público), ao fim e ao cabo, são denominações de um mesmo instituto para a defesa de direitos fundamentais? Este artigo se propõe a analisar o problema relacionado à confusão conceitual entre esses institutos, a partir do método hipotético-abdutivo de Charles S. Peirce, que possibilita identificar diferenças, com base nos efeitos práticos concebíveis. Para tanto, é realizada uma pesquisa bibliográfico-documental de caráter exploratório- descritivo sobre a origem, experiência e uso desses institutos, para tornar clara as ideias em torno desses litígios objetos de análise, superando obscuridades conceituais e desenvolvendo um estudo comparado original.

Palavras-chave: Direitos Fundamentais. Litígio Estratégico. Litígio Estrutural.

Abstract

Strategic litigation and structural litigation, after all, are denominations of the same institute for the protection of fundamental rights? This article aims to analyze the problem related to conceptual confusion between these institutes, based on Charles

S. Peirce's hypothetical-abductive method, which makes it possible to identify differences based on believable practical effects. To this end, exploratory-descriptive bibliographic-documental research is carried out on the origin, experience, and use of these institutes, to make clear the ideas surrounding these litigations, overcoming conceptual obscurities, and developing an original comparative study.

Keywords: *Fundamental rights. Strategic Litigation. Structural Litigation.*

1 Introduction

The expressions "structural litigation" and "strategic litigation" have gained space in the Brazilian and international debate, especially in discussions on jurisdictional control of public policies, and are often used as synonyms. As a rule, they are presented as themes that involve the

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protection of fundamental rights and, to some degree, the intervention of the Judiciary in complex social structures, in order to protect them. Making the ideas around these concepts clear can prevent their misunderstanding from harming the defense of fundamental rights, avoiding an inappropriate and inattentive application of the practical implications.

This article seeks to answer the following question: are strategic litigation and structural litigation (of public interest)[1], after all, denominations of the same institute for the defense of fundamental rights? To this end, the litigations in question will be analyzed from their conceivable practical effects[2], making use of the hypothetical-abductive pragmatic method, developed by Charles S. Peirce in "*How to make our ideas clear*" (1966). Abduction - also called hypothesis by Peirce - is an adequate scientific method to make ideas clear and overcome possible obscurities and confusions around certain concepts (Peirce, 2003, p. 232). The choice is justified, therefore, in order to eliminate the vagueness that permeates the debates raised about the two institutes in order to extract contributions that can help strengthen social struggles, which need to be aligned with specific strategies for the defense of fundamental rights.

In Brazil, in addition to the prejudice faced by issues involving human and fundamental rights, civil society organizations that strive to put these issues on the political agenda and thus turn the pyramid of privileges and exclusions upside down (Dora, 2016, p.11) face serious budgetary and organizational limitations, which delay, to a certain extent, the advances that could be obtained if these deficits did not exist. The balance between urgency and long-term impacts (typical of social transformations that involve facing multifaceted problems that have been rooted for decades in societies marked by extreme social inequality) is already an equation that naturally includes complex variables; The indetermination of important concepts in the field of these rights, in this sense, cannot be one more of them, under penalty of causing even more irreversible damage to the victims.

The research presents, therefore, an innovative proposal, which not only takes concepts seriously, but is concerned, first, with the practical effects that their precise and correct delimitation

[1] The "public interest" characteristic - which appears as an adjective of structural litigation - is justified by the fact that not all structural litigation is, in fact, of public interest, and there is the possibility that it appears as polycentric litigation that primarily involves private interests, such as the judicial reorganization process of companies (Vitorelli, 2018, p.12-13). The addition, therefore, seeks to make it explicit that the present study does not extend its investigation to conflicts involving private interests. Taking concepts seriously, in this sense, can avoid wasting future efforts and academic debates whose scope is to discuss specific aspects of structural litigation of public and private interest, giving the opportunity for research to be better directed.

[2] Peirce's pragmatic method "(...) it considers what effects certain practical behaviours may have which we conceive the object of our conception to have. Our conception of its effects constitutes the whole of our onception of the object." (Peirce, 1966, p.13).

can generate in the struggles for more social equality and empowerment of those who do not have a place and voice in the political agenda. The comparative method in law (Zweigert; Kötz, 1992) was also used in the present study, with the aim of scientifically supporting the search for similarities and differences between the disputes in question. Two objects can only be studied in a comparative way if they at least share a common characteristic (Müller-Chen *et al*., 2015, p. 425-426). In this work, fundamental rights stand out as a common denominator between structural litigation and strategic litigation to justify comparative research. In the end, based on the pragmatist maxim - which starts from the practical effects of a given object to, from then on, conceive its meaning (Peirce, 1966, p.15) - the aim is to fill the doctrinal gaps existing in the fields of Law that are most concerned with these themes, namely: Constitutional Law and Civil Procedural Law.

The structure of the work was built in three parts. The first explored the concept of strategic litigation, in order to understand: a) what strategic litigation is; b) the difference between strategic litigation and common litigation; and c) why and when to litigate strategically. The second, in turn, investigated what structural litigation (of public interest) is, ascertaining: a) its concept and main characteristics; b) its origin with the decision of the Supreme Court of the United States in *Brown v. Board of Education*; c) the difference between individual actions and structural litigation. Also on this occasion, the strategic and structural litigations were compared, in order to understand if, in fact, they are similar or different (and to what extent they are). In the third and last part, finally, it was analyzed how making the ideas clear about the disputes in question can contribute to the defense of fundamental rights, after all, investigating structural and strategic disputes means, to a greater or lesser degree - depending on the emphasis applied - to study the justice system, the majority instances, the organized civil society and, above all, a point capable of translating fundamental rights into reality: public policies.

The imbrication of these themes inserts the present work in a broader and multifaceted debate, which not only gives rise to new fronts of study, but also revisits old clashes, with the jurisdictional control of public policies - as well as the objections presented about judicial review - being one of them. The possibility of obtaining social changes through the Judiciary brings the need for a rereading of the role exercised by the jurisdiction in its traditional form of *dispute resolution* (Fiss, 2003, p. 51) and the understanding of that the process can have different effects and with greater repercussions in the social space, leaving its classic logic.

2 Strategic litigation: Concept and characteristics

Since the redemocratization of Latin American countries, in the second half of the twentieth century, some civil society organizations have adopted strategic litigation as a tool to strengthen the struggles for the expansion of rights, especially fundamental rights, interacting with what is called the judicialization of social relations. Strategic litigation consists of a practice aimed at transforming social reality, with the scope of conveying constitutional issues that have not been given due treatment by the government, seeking to give visibility to the object of claim and achieve the recognition or expansion of the content of the right through the proper ordinary channels. It uses the Judiciary as a *locus* of political deliberation and invites the other constitutional actors, together with society, to dialogue.

Through emblematic cases, strategically chosen by groups of organized society (who seek to have their right recognized), the State's jurisdictional activity is provoked in order to achieve a significant effect on public policies, legislation and/or society. In this way, it generates an impact on the justice system in general from a concrete case and enables the interference of a wide range of actors in the process, since the demands are of public interest. It is understood, therefore, to be a practice aimed at protecting fundamental rights and claiming the reorganization of institutions that cause violations of the rights of individuals due to structural flaws and poor *performance* in the exercise of their attributions.

In summary, the practice boils down to: 1) first, a high-impact case is chosen, whose violated right is usually of a collective nature; 2) subsequently, the case in question is strategically judicialized, betting on the symbolic value of the Judiciary as an arena for deliberation and decision-making whose impacts transcend the *inter-party* effects and create precedents for similar cases; 3) finally, a sentence is awaited that meets the expected objectives, which fluctuate depending on the demand, and may vary between: formulation or reform of public policies; legal reforms; social awareness; empowerment of vulnerable groups; denunciation of massive violations of fundamental rights, among others. Strategic litigation thus generates an impact on the justice system in general from a concrete case and enables the interference of a wide range of actors in the process, since the demands are of public interest.

The differential, which allows the litigation to be categorized as "strategic", stems from the fact that the judicialization of the emblematic case does not always necessarily aim at the victory associated with the full merit of the request. In these cases, the judicial provocation can already be considered successful when the matter produces some type of impact on society, regardless of whether the claim is accepted by the Judiciary. In other words: it is strategic

because it aims, primarily, to boost the dialogue on the controversial topic and, circumstantially, to reflect in positive law a new vision of the world (Valle, 2016, p. 23).

Thus, at first, *strategic litigation* redirects certain social claims (especially those of high moral disagreement) to the Judiciary, so that it acts as an articulating agent of the public debate to, in a second moment, return the debate to democratic channels. It is understood, therefore, that the role played by judges in this scenario is to catalyze agendas that are not receiving due treatment by the Government. After all, it is not uncommon, for reasons of convenience, operational and/or budgetary difficulties, or even for lack of consensus for the formation of the majority necessary for specific deliberation, political instances prefer to assume the cost of inertia rather than the burden of deliberation, because they believe that the former is more advantageous than the latter.

Still about its characteristics, it is worth noting that this tool can be used in a preventive or corrective way. In the first, it is used as a precautionary measure to prevent or avoid harm to human rights, especially when there is no scientific data to prove the consequences of a given action. The repressive manner, in turn, is used as a corrective vehicle, that is, when a certain violation of human rights already exists and what is sought is full reparation for the damage caused. Notwithstanding the existence of this institute in the two modalities presented, it is emphasized that, even when used in a repressive manner, strategic litigation aims to repair not only the injury that occurred in the past, but also to eliminate the continuous threat to fundamental rights.

It explores, therefore, the interaction between citizens and political and constitutional agents, bringing to the daily life of collective life the struggle for the application of the constitutional text. It bets on the mobilization of citizens and social movements for the transformation of social reality and allows the incorporation of vulnerable groups into the constitutional debate.

2.1 Differentiation from common litigation to strategic litigation

It is important that there is a delimitation of the hypotheses for the use of strategic litigation, in order to avoid the false impression that its practice can be applied in any way and in any case, which would contribute to the misunderstanding and vulgarization of the institute, harming the full development of its potentialities. This tool should not be used in cases that can be decided through a simple judicial decision, but only when faced with complex demands – especially those of a structuring nature – which, by their nature, involve several variables and require the action of a wide range of social actors. These are demands of public interest,

which call for complex, gradual and prolonged changes, making the process of the judicial process even more time-consuming and expensive.

It is therefore classified as a social protection action, although not every social protection action can be considered strategic litigation, as it focuses on the political-legal advancement of a constitutional issue that interests certain social groups, acting in the exercise of educational and persuasive mobilization campaigns around the rights put on the agenda. Therefore, the individual judicial intervention, in favor of a jurisdictional party "X", is not capable of pointing out the mistakes of the administrative action. The transformative nature sought by strategic litigation - with a corrective effect on the action matrix, extendable to other individual situations - is only possible from a structural intervention in the Administration's way of acting, which is only feasible in emblematic cases (Brinks; Forbath, 2010, p. 1945), capable of denouncing a picture of massive violation of fundamental rights.

Thus, despite the existence of other mechanisms and instruments of social protection, individual actions, in the vast majority of cases, do not call into question so markedly contents of political incidence that are normally structural (Brinks; Forbath, 2010, p. 1950), as emblematic cases, in turn, allow the establishment of positions, the reversal of certain court precedents, and the breaking of paradigms, reaching collective and, often, structuring solutions.

The chances of materializing collective rights, in this way, such as socioeconomic rights, are greater with strategic litigation, since the necessary measures for social transformation, in general, involve highly complex realities, whose confrontation requires ingenuity and art, as well as significant resources.

Notwithstanding the important role played by the Judiciary in this process, the relevance of the performance of lawyers is also highlighted, who, seeking to achieve alternative dispute solutions, see in the media tools and bet on constitutional jurisdiction as a fruitful path to achieve the desired transformations. Thus, lawyers who litigate in this area must be able to identify the antinomies and gaps in the domestic legal system and find solutions that go beyond the frontier of positive law.

Strategic litigation does not use *client-oriented* advocacy, which is typical of individual demands; it uses *issue-oriented* advocacy, aimed at the political-legal advancement of a constitutional issue of interest to a certain social group, which acts in the exercise of persuasive campaigns around a certain theme of fundamental rights (Cardoso, 2011, p. 41-42). In this sense, strategic litigation also has an informative and awareness-raising potential for society in general.

2.2 Why and when to litigate strategically?

The importance of litigating strategically can be seen when it is observed that, in the public space, many individuals claim their rights, but these claims are not organized, structured, and much less judicialized or pending legislative reform. Strategic litigation, in turn, brings these claims to the public agenda, reminding the constitutional actors of their roles and functions in the implementation of constitutional commitments. Social problems do not require the intervention of several entities, in a complex and coordinated set of actions. It is important because it fights the invisibility of certain social issues and operates in favor of democracy and the realization of fundamental rights.

It is not used for each and every case indistinctly, as not everyone does without this type of tool to achieve the intended claim. It should be reserved for serious situations, and it is necessary to keep in mind what is aimed at with the practice of this institute, as its purposes are variable and range from a legal reform or modification/creation of public policies, to the creation of a culture of human rights that helps in the construction of a true Democratic State of Law. Thus, before starting the process, it is interesting to reflect on: 1) the objectives to be pursued; 2) the feasibility of the chosen case causing the desired impacts (the case must be of public interest, denounce structural failures of the State and have the potential to cause positive consequences); 3) the type of resource to be used; 4) the position of judges around the law on which the litigation is concerned (Duque, 2014. p. 45).

It is important that the Brazilian academy debates strategic litigation so that lawyers and social groups know better the scope of this institute and use this tool in order to understand which demands related to fundamental rights can be explored and worked on in this type of litigation. It is an innovative and promising means of giving visibility to issues that are not receiving due treatment by the government, trusting in the transformative potential of the law to change social reality. Its use can result in: the awakening of new awareness, the empowerment of groups and social movements, the inclusion of issues on public agendas that, at first, were not prioritized, and the substantial strengthening of human and fundamental rights.

3 Structural litigation (public interest): Concept and characteristics

For Fiss (1979, p. 30), in the judgment of Brown v. Board of Education, a new form of adjudication emerged, called "structural *reform*". Brown was a case of public interest whose

central claim was the cessation of ethnic segregation in public schools in the United States, largely authorized by the doctrine of "separate *but equal",* upheld by the Supreme Court of the country in 1896 in the case "Plessy v. Ferguson" (Jobim, 2017, p. 563). This doctrine maintained that the simple fact of segregation – that is, of not allowing blacks to attend the same places as whites – would not infringe the right to equality, as long as everyone had access to public services of the same quality. In practice, there were considerable differences between the services offered to whites and blacks, especially in the southern states of the country.

The case was judged on May 17, 1954 by the Supreme Court of the country, which recognized that racial segregation in schools was unconstitutional because it violated the 14th amendment of the US Constitution. The techniques used by the Court allowed the emergence of structural injunctions, a adjudication model by which the Judiciary determines that political or administrative authorities formulate public policies aimed at the cessation of massive violations of fundamental rights (Arenhart, 2013, p. 390)[3]3. From Brown, similar lawsuits were filed with the aim of correcting flaws in the country's public policies that involved, for example, the treatment of people with mental illnesses, the degrading conditions in the United States prison system, the systematic violations of the rights of individuals to the detriment of abuses committed by police officers, and the segregation sanctioned by the states in the official housing policy (Weaver, 2004, p. 1617). The complete understanding of what "structural litigation" (of public interest) would be – being conceptualized here as systemic failures that massively violate fundamental rights and that may result directly from the action or omission of public or private institutions as well as from problems rooted in a given locality due to cultural, historical and social issues – requires a more complex explanation than that of strategic litigation. This is because the theme unfolds in denominations that are easily confused.

The first important concept for the understanding of structural litigation (of public interest) is that of "Adjudication", which consists of the "social process through which judges give meaning to public values" (Fiss, 1979, p. 30).

The term "*adjudication*" is common in the English-language literature to designate the activity carried out by the Judiciary in the resolution of conflicts. In Brazil, the term is more used in possession and property relations (such as compulsory adjudication), but its extension

[3] It is true that overcoming a doctrine rooted in the country's culture would not be simple and would require a series of measures to be carried out in the long term, as well as the restructuring of the public education system as a whole, so that despite having recognized the right of black children to receive education equal to that offered to white children, The decision did not set out how that objective should be achieved. It was only with the judgment of another lawsuit, called Brown II, that it was determined that the regional courts "would have broad powers of *Equity* to achieve the desideratum of removing the segregation of schools in practice, developing and imposing public policies for this purpose and having financial resources to do so" (Dalla; Côrtes, 2014, p.234).

to the same meaning used in the English language is correct. The judge, when deciding a given case, applies the rule to the specific case by adjudicating – that is, attributing – one solution, among other possible ones, to the controversy in question.

Structural reform, in turn, is a type of adjudication, whose distinctive characteristics are the constitutional nature of the public values discussed and the specific scope of the judge is to try to give concrete meaning to constitutional values through the restructuring of state bureaucracies (Fiss, 1979, p. 8). In providing for this concept, the author starts from the premise that the operation of large organizations – and not just isolated acts of individuals inside or outside these structures – can affect social life in various ways and that, on certain occasions, fundamental rights cannot be adequately ensured without direct intervention in institutional arrangements (Fiss, 1979, p. 9). The definition presented by the author, therefore, is broadly related to those structural disputes that are of public interest.

The judicial process of a structural nature is "one in which the judge, facing a state bureaucracy with regard to constitutional values, is responsible for restructuring the organization to eliminate the threat imposed on such values by the existing institutional arrangements" (Fiss, 1979, p. 9). The morphology of the structural process, still in this sense, can be defined as follows: 1) polycentric structure of the parts; 2) prospective concern of the guardianship; 3) object of the process constructed by the parties and the judge; 4) continuous participation of the Court in the process of developing and implementing the measure. Its focus, in this regard, shifts from the reparation of a specific violation of the right to the restructuring of the transgressive state of affairs. The function of structural processes is to destabilize the *status quo*, operating as an initial milestone towards a new state of affairs, bringing to the public the debate on the existing violation of rights and generating the empowerment of the society involved in the litigation with the delivery of the structural decision.

Injunctions - which do not have an exact correspondence in the Brazilian system, but can be translated as "structuring measures" - are the means by which these reconstruction directives are transmitted (Fiss, 1979, p. 19). In American law, it consists of a judicial measure that prohibits the defendant from practicing or determines that he performs a certain act. Usually, such a judicial measure has a preventive character, since it is not only intended to repair past wrongdoings, but to avoid future damages (Fiss, 1979, p. 19).

Thus, while litigating strategically is an action, structural litigation is an object of adjudication, arising from a concrete reality. In general, although the denomination is used to describe problems of a public nature, structural litigation is not restricted to this sphere, but also has ramifications in the private sphere. The present work, however, will only mention "structural litigation" of public interest,

since it is understood that only when it assumes this characteristic does it have points in common with "strategic litigation".

3.1 Practical differences between structural litigation and ordinary litigation

Structural litigation arises as a response to the insufficiency of individual judicial protection, seeking to restructure a certain social organization or public policy and consequently materialize socially relevant rights and interests. They work, for example, by inverting the logic present in the Brazilian jurisdiction: they prioritize collective provision and the public interest, as opposed to individual and private protection (Fachin; Schinemann, 2018, p. 225).

A civil action, a priori, is thought of as a private controversy between plaintiff and defendant, so that the legal architecture is formulated from two unitary, diametrically opposed interests, to be decided from a logic in which "the winner takes all" (Roach, 1976, p. 1282). Notwithstanding the existence of the possibility of third parties interfering in the process in order to protect their interests, such intersections are a true exception to the rule, treated by the courts and parties as something even unwanted (Shapiro, 1968, p. 721). The basis of this model is the thought of individualistic and patrimonialist lines, in which the principles of freedom, private property and legal certainty prevail (Mitidiero, 2010, p. 182), understanding the civil procedure as a mere private matter between the parties (Venturi, 2007, p. 27).

The adjudication, therefore, is designed with the intention of administration and disposition of individual assets, unconcerned with the protection of social and meta-individual order (Mitidiero, 2010, p. 184). This type of reasoning cultivates a polarized abstraction of social relations and assumes that the interests of the parties are diametrically opposites, that it is necessary to decree a "winner" and a "loser" and that the possible interests of consideration are only those brought to the process.

As it is a demand that involves public policies, however, there is a risk of ignoring the adjacent interests (of third parties and of the State itself as a whole) and creating considerable contradictions between various decisions. Even if it is a collective lawsuit, it is necessary that it is not a mere declaration of the "victory" of a winning collectivity against the State, so that there is an effective protection of the rights arising from structural litigation of public interest.

A classic example that helps to understand the topic in a practical way is the judicialization of health. In Brazil, there are thousands of individual decisions that, together, represent a considerable impact on the allocation of State resources (Barroso, 2010, p. 37). Data from July 2017, in an article published by Folha de São Paulo, show that, among 118.6 thousand

decisions that condemned the state to supply medicines, only 474 were non-complied with, denoting a very low rate of non-compliance and revealing an action (Fachin; Schinemann, 2018, p. 140), perhaps, not very judicious in the adjudication of benefit rights vis-à-vis the State, which does not consider, above all, two negative aspects: a) the economic impact of the granting of benefit provisions; b) the lack of capacity of the measure to really solve the health problem in the country; c) the violation of the principle of equality, since, despite the fact that the plaintiff's situation is similar that of other individuals, only the one who has judicialized will have the opportunity to see his right protected.

It is understood that the taking of palliative and individualized measures, which are only concerned with combating the consequences of structural violations, are incapable of remedying the true causes of the problem. In this sense, the structural judicial process of public interest is presented as a tool available to both the magistrate and those entitled to propose collective actions, understood as "the one in which the judge, facing a state bureaucracy with regard to constitutional values, is responsible for restructuring the organization to eliminate the threat imposed on such values by the existing institutional arrangements" (Fiss, 1979, p. 9).

While, in this way, individual actions are restricted to repairing the damage suffered by one of the procedural parties, structural processes, which deal with structural litigation of public interest, have a prospective character. Furthermore, while the former are restricted to protecting the right of a single individual – the one who has access to the information and conditions necessary to bear the costs and procedural slowness – the latter seek to protect the right of the community and design, remodel or implement public policies that benefit the community as a whole.

Some central points about structural disputes, therefore, are: 1) rights violations are not punctual and isolated – they are dynamic and ongoing -; 2) individuals whose rights are being violated may not be part of the judicial process directly, but will be affected by the consequences of the judgment; 3) the center of concern of this type of problem is not specific conducts that disregarded rights, but the very context in which they occur; 4) more important than determining who is responsible for the act/omission that violates rights is to think about how the situation can be resolved and how the efforts to make this happen can be subdivided (in the event that there is more than one institution that is causing the damage/violation);

5) the reparation of the damage does not occur by the simple concession (in the event that the claim is judged to be valid) of a certain provision, since the causality of the problem is complex, and it is necessary that, in fact, the judge plays a role of articulator and mediator so that the problem can be solved.

4 How can making clear the differentiation between strategic litigation and structural litigation (public interest) contribute in practice to the defence of fundamental rights?

From the exposition of the characteristics and concepts of the litigations in question, the result was obtained that structural disputes of public interest and strategic litigation are different. This is because while the first is a complex, deep-rooted problem that demands, for its solution, the design, adjustment or implementation of a public policy, the second is a type of litigation that aims to overcome a certain state of affairs that violates fundamental rights through the judicialization of an emblematic case.

To know the peculiarities of the institutes in question, through the pragmatic method applied to law (Nóbrega, 2007, p. 58) can contribute to the defense of fundamental rights because: a) adequate and aware of structural litigation can collaborate to mitigate the erratic and individualized litigation of social problems and, consequently, focus on collective redress; b) the perception of the complexity and polycentricity of structural litigation denounces failures in public policies and possible omissions of the majority instances in adjusting them or inertia in implementing them; c) the confrontation of structural litigation, however costly it may seem at first, complies with the scope of the 1988 Constitution in the sense of seeking social transformations to get off the ground; d) strategic litigation can give rise to a judicial sentence with material, symbolic, direct or indirect effects (Rodríguez; Franco, 2010, p. 15); e) the use of paradigmatic cases to try to bring about a change in jurisprudence or public policies can draw attention to a serious problem that was previously imperceptible or neglected by the population, contributing to a better direction in social struggles; f) the strategically judicialized problem can become a "human rights problem" and, therefore, be observed with more caution by the majority instances, by society as a whole, and have international repercussions - such as, for example, a lawsuit filed with the Inter-American Court of Human Rights, which would give even greater prominence to the problem in question -; g) strategic litigation is a tool capable of empowering civil society to demand the consolidation of its rights, especially given that violators of fundamental rights are "increasingly well advised by lawyers and prepared to lead the conflict on several fronts" (Araújo, 2016, p. 8).

Also in this sense, it is worth mentioning that the practice of strategic litigation to denounce structural litigation can be an important technique in overcoming problems that violate - massively and repeatedly - fundamental rights. Knowing what the characteristics of structural litigation are is important to be able to describe their complexity and developments in initial petitions in order to demonstrate to the judge that the problem in question is urgent

and needs to be addressed, as well as for jurists and academics interested in the subject to direct their efforts towards producing research aimed at recognition, reporting, identification of consequences and possible solutions that can be adopted in order to overcome it. On the other hand, studying the right moment, the favorable institutional and political conditions, as well as the emblematic case that can, in fact, impact the perspective from which a situation that violates fundamental rights has been faced, can be decisive in overcoming structural flaws and in provoking advances that could not be obtained for years, if they continued to depend on the interest of political bodies.

The above points do not forget the fact that both institutes seem to bet too much on the role of the Judiciary, and it is necessary that it has a considerable degree of independence and accessibility so that strategic litigation has its claim met and structural litigation is, in fact, resolved through sentences. The theme of jurisdictional control of public policies, as previously argued, is always on the agenda in the doctrinal and academic discussions that permeate the litigations under study[4].

Thus, it is not uncommon for judicial decisions to be able to anticipate issues that should receive collective solutions through legislative means, relegating parliamentary procedures for public decision-making, which, since they require the formation of majorities whose composition is not simple, are necessarily slower (Fonte, 2017, p. 34). Therefore, in view of the deviations to which the political process is subject, courts have, in fact, the prerogative to function as channelers and catalysts for important debates involving the protection of fundamental rights of so-called "vulnerable" groups.

It is worth noting, however, that the efficiency of the process (its success), as well as the expectations that are created around it, should not start from unrealistic maximizations, but from pragmatic analyses of the socio-political conjuncture in which it is inserted. Both the act of litigating strategically and overcoming structural litigation involve, essentially, political practices - since they almost always imply tragic choices in the allocation of public budget - and it is necessary to consider not only the role that the judge plays in the procedure, but also the role of all those directly or indirectly involved in the *case under consideration.*

Thus, the confrontation of structural litigation through strategic litigation has the potential to foster dialogical practices between the Powers and organized civil society, since the

[4] In Brazil, this occurs, above all, due to: a) the possibility of submitting any issue to the Judiciary due to the access to justice clause; b) expansion of the list of legitimates to provoke concentrated constitutional jurisdiction, as well as the collective protection of rights – managed by the Public Prosecutor's Office and other legitimate constitutional actors -; c) the possibility that all judges – even those of the first instance – carry out the control of the constitutionality of administrative rules and acts; d) the fact that the 1988 Constitution established programmatic and open norms, leaving a certain margin of discretion to those who interpret them (Fonte, 2017, p. 34).

complexity of polycentric problems, in most cases, denotes the need for co-participatory actions, not being the isolated jurisdictional provision is sufficient. Thus, courts can play a catalytic role in scenarios of institutional blockages (Valle, 2016, p.15), making problems that were previously neglected become problems considered urgent, especially because they involve massive violations of fundamental rights.

After the kick-off, however, it is necessary for judges to seek to make room for the action of the Executive and Legislative Branches, as well as for organized civil society, through, for example, public hearings and the institute of amicus curiae (Almeida, 2019, p. 700). This is what is called "dialogical activism" (Rodríguez, 2016, p. 15), a judicial posture that is more attentive to the consequences of the decision and the need to insert, in the process, actors who are indispensable to social transformations, in view of the insufficiency of law and solipsistic judicial activity to deal with issues involving public policies. This codependence and awareness that the task of guarding the Constitution is everyone's responsibility (Fisher, 1988, p. 23), can bring results and social transformations in less time and in a more precise way, since each participant would act according to his *or her expertise*.

In addition, litigation in the judicial sphere can offer better results when articulated with other political tactics, being understood as part of a coordinated strategy that makes sense, especially outside the justice system, in societal spaces that need to be strengthened (Osorio, 2019, p. 587). The actions of the courts, therefore, are "(...) just one of the many different types of resources and constraints that shape the terms of power struggles between conflicting groups" (McCann, 1994, p. 13). The challenge for civil society and for the entities of the justice system - which work with the Executive, Legislative and Judiciary branches - is to define the best set of tools capable of maximizing results in the field of social, economic and cultural rights - including in the pre-procedural phase. From another perspective, the question lies in knowing how the politicization of the law and the Judiciary in contemporary democracies can contribute to the litigation and mobilization for rights being, in addition to a legal tool, a political tool for social change.

There are no miracle remedies that allow a court, a court or a judge of first instance, for example, to transform reality through monocratic action - not even when this demand comes through strategic litigation or through the delivery of a sentence that denounces structural litigation of public interest - especially considering that the realization of fundamental rights requires a continuous procedure of improvement that involves both the system of justice, as to the majority instances and organized civil society. Social transformations are only feasible through shared efforts among a wide range of actors, without which the judicial decision

would most likely have a merely declaratory nature.

5 Conclusion

The scope of this work was to clarify the ideas about the concepts of structural litigation of public interest and strategic litigation, seeking to investigate, in addition, the practical implications of this distinction in order to understand how these institutes can contribute to the defense of fundamental rights. Thus, the first two stages of the work were aimed at delimiting the concepts, analyzing the developments and mapping the peculiarities of the litigation in question. Once the indeterminacy on the subject has been overcome, it was observed and explained how the litigations under study can contribute to discussions involving fundamental rights or to their own defense.

Thus, it was observed that structural litigation of public interest and strategic litigation, based on the comparative study developed, based on the pragmatic method, are different. The comparative analysis presupposes a common point to be justified (Müller-Chen *et al.,* 2015, p. 425-426), so that, at the beginning of the research, the comparison was justified by the fact that both disputes are related to a state of affairs that violates fundamental rights, which was confirmed and ratified at the end of the study.

Public policies and the Judiciary also appear, most of the time, as points of intersection between these disputes, but a structural litigation of public interest will not always be judicialized and resolved by means of a structural sentence (it is possible that it will be resolved spontaneously, for example, by the Public Administration and/or the Legislative Branch) and a strategic litigation will not always aim at the review or implementation of public policies (as it may also aim at a change in jurisprudence or an improvement in legislation).

From the analysis, it was concluded that: strategic litigation consists of the act of judicializing a certain demand in order to obtain a change in social reality; while structural litigation consists of the problem that is intended to be overcome, and may, if judicialized, give rise to a structural process in which the Judiciary may determine structuring measures, if it is willing to proceed with the demand.

After all, scenarios in which judges decide to adopt self-contained or deferential positions cannot be discarded, considering that the variables inherent - to a greater or lesser extent - to the structural process of public interest (such as: complexity, delay, operational cost and the (un)availability of the actors involved to dialogue to reach a consensus on the measures that

need to be taken), imply the assumption of a role that magistrates are not used to playing and that can interfere in their authority or independence in the political-institutional scenario of the place in which they are inserted, in addition to raising the ever-present criticisms about the jurisdictional control of public policies and judicial activism.

References

ALMEIDA, Eloísa Machado de. Institutional capacities of amici curiae briefs in the Supreme Court: accessibility, admissibility and influence. **Law and Praxis Journal**, Rio de Janeiro, v. 10, n. 1, p. 678-707, 2019. Available at: https://www.e-publicacoes.uerj.br/index.php/revistaceaju/article/view/39502. Accessed on: 19 Apr. 2020.

ARAÚJO, Ana Valéria. Strengthening civil society also means empowering it to defend its rights. *In*: ARAÚJO, Ana Valéria *et al*. (ed.). **Strategic litigation in human rights**: experiences and reflections. São Paulo: FGV Law School, 2016. p. 8-10.

ARENHART, Sérgio Cruz. Structural decisions in Brazilian civil procedural law. **Revista de Processo,** São Paulo, v. 225, n.75, p. 389-410, 2013.

BARROSO, Luís Roberto. Constitution, democracy and judicial supremacy: law and politics in contemporary Brazil. **Revista Jurídica da Presidência**, Brasília, v. 12, n. 96, p. 05-43, 2010. Available at: https:// revistajuridica.presidencia.gov.br/index.php/saj/article/view/230. Accessed on: 20 Apr. 2020.

BRINKS, Daniel; GAURI, Varun. Sobre triángulos y diálogos: nuevos paradigmas em la intervención judicial sobre el derecho a la salud. *In*: GARGARELLA, Roberto (ed.). **Por una justicia dialógica**: el poder judicial como promotor de la deliberación democrática. Buenos Aires: Siglo Veintiuno, 2014. p. 93-320.

BRINKS, Daniel M.; FORBATH, William. Social and economic rights in Latin America: Constitutional Courts and the prospects for pro-poor interventions. **Texas Law Review,** Texas, v. 89, n.7, p.1993-1954, 2010. Available at: https://repositories.lib.utexas.edu/handle/2152/22488. Accessed on: 19 Apr. 2020.

CABALLERO, Jackeline Saravia; FERNÁNDEZ, Andrea Rodríguez. Los desplazados forzados internos en el estado de cosas inconstitucional, un asunto pendiente. **Prolegómenos Derechos y Valores**, Bogotá, v. 18, n. 35, p. 121-134, enero/jun. 2015. Available at: https://www.redalyc.org/pdf/876/87638077007.pdf. Accessed on: 02 mar. 2020.

CAMPOS, Carlos Alexandre de Azevedo. **Unconstitutional state of affairs**. Salvador: Juspodium, 2016.

CARDOSO, Evorah. Life cycle of strategic litigation in the inter-American human rights system: difficulties and opportunities for non-state actors. **Revista Electrónica del Instituto de Investigaciones Ambrosio L. Gioja**, Buenos Aires, year 5, n. Especial, p. 363-378, 2011. Available at: http://bibliotecavirtual. cebrap.org.br/arquivos/272_artigo.pdf. Accessed on: 23 mar. 2020.

CARVALHO, Sandra; BAKER, Eduardo. Experiences of strategic litigation in the Inter-American System for the Protection of Human Rights. **International Journal of Human Rights**, São Paulo, v. 11, n. 20, p. 465-475, jun./dez. 2014. Available at: https://sur.conectas.org/wp-content/uploads/2017/11/sur20-pt-sandra-carvalho-eduardo-baker.pdf. Accessed on: 1 Feb. 2020.

DALLA, Humberto; CÔRTES, Victor Augusto Passos Villani. The structuring measures and the effectiveness of judicial decisions in the Brazilian legal system. **Electronic Journal of Procedural Law**, Rio de Janeiro, v. 13, n. 13, p. 229-258, 2014. Available at: https://www.e-publicacoes.uerj.br/index.php/redp/article/view/11920/9333. Accessed on: 23 mar. 2020.

DANTAS, Eduardo Sousa. Structural actions, fundamental rights and the unconstitutional state of affairs. **Digital Journal Constitution and Guarantee of Rights**, Natal, v. 9, n. 2, p. 155-176, 2016. Available at: https:// periodicos.ufrn.br/constituicaoegarantiadedireitos/article/view/12258. Accessed on: 15 mar. 2020.

DÍAZ, Ana Milena Coral; TORO, Beatriz Londoño; ÁVILA, Lina Marcela Muñoz. El concepto de litigio estratégico en América Latina: 1990-2010. **Vniversitas**, Bogotá, v. 59, n. 121, p. 49-76, 2010. Available at: https://revistas.javeriana.edu.co/index.php/vnijuri/article/view/14413. Accessed on: 12 mar. 2020.

DUQUE, César. ¿Por qué un litigio estratégico en derechos humanos?. **Aportes Andinos,** Quito, n. 35, p. 9-23, dic. 2014. Available at: https://repositorio.uasb.edu.ec/handle/10644/4430. Accessed on: 13 de mar. 2020.

DORA, Ana Denise. The human rights agenda transforms the pyramid of privileges and exclusions. *In*: ARAÚJO, Ana Valéria *et al*. **Strategic litigation in human rights**: experiences and reflections. São Paulo: FGV Law School, 2016. p.11-14.

FACHIN, Melina Girardi; SCHINEMANN, Caio Cesar Bueno. Structuring decisions in the Brazilian constitutional jurisdiction: procedural criteria for the judicial protection of benefit rights. **Journal of Institutional Studies**, Rio de Janeiro, v. 4, n. 1, p. 211-246, 2018. Available at: https://estudosinstitucionais.com/REI/ article/view/247 . Accessed on: 21 Apr. 2020.

FFISHER, Louis. **Constitutional dialogues**: interpretation as political process. Princeton: Princeton University Press, 1988.

FISS, Owen. The forms of justice. **Harvard Law Review**, Cambridge, v. 93, n.1, p. 1-58, 1979. Available at: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2201&context=fss_papers. Accessed on: 19 Apr. 2020.

COLLUCCI, Cláudia. Seriously ill patients win in court, but expensive medicines stall in the SUS. **Folha de São Paulo**, São Paulo, 16 jul. 2017. Available at: https://www1.folha.uol.com.br/cotidiano/2017/07/1901633-serious-patients-win-in-justice-but-expensive-remedies-travam-no-sus.shtml. Accessed on: June 20, 2020.
FONTE, Felipe de Melo. **Public policies and fundamental rights**. Rio de Janeiro: Saraiva, 2017.

GRAZIADEI, Michele. Comparative Law as the study of transplants and receptions. *In*: REIMANN, Mathias; ZIMMERMANN, Reinhard (ed.). **The Oxford handbook of comparative law**. Cambridge: Oxford University Press, 2019. p.440-474.

JOBIM, Marcos Félix; ROCHA, Marcelo Hugo. Structuring measures: origin in Brown v. Board of Education. *In*: ARENHART, Sérgio Cruz; JOBIM, Marco Félix (ed.). **Structural processes**. Salvador: JusPodivm, 2017. p.563-582.

MCCANN, Michael W. **Rights at work:** pay equity reform and the politics of legal mobilization. Chicago: University of Chicago Press, 1994.

MITIDIERO, Daniel. The processualism and the formation of the Buzaid Code. **Revista de Processo**, São Paulo, v. 183, n.183, 165-194, 2010.

MÜLLER-CHEN, Markus *et al.* Annex: guidelines for writing a paper in comparative private law. *In*: CHEN- MULLER, Markus; MULLER, Christoph; LUCHINGER, Corinne (ed.). **Comparative private law**. Switzerland: Dike, 2015. p. 425-433.

NÓBREGA, Flavianne Fernanda Bitencourt. **A method for the investigation of consequences:** the pragmatic logic of C.S. Peirce's abduction applied to law. João Pessoa: Ideia, 2013.

OSORIO, Leticia Marques. Strategic litigation in human rights: challenges and opportunities for litigating organizations. **Law and Praxis Journal**, Rio de Janeiro, v. 10, n.1, p. 571-592, 2019. Available at: https://www.e-publicacoes.uerj.br/index.php/revistaceaju/article/view/39377. Accessed on: 20 Apr. 2020.

PEIRCE, Charles S. How to make our ideas clear. *In*: WEINER, Philip P. **Charles S. Peirce:** selected writings. New York: Dover, 1966. p.1-20.

PEIRCE, Charles S. Pragmatism and abduction. *In*: PEIRCE, Charles S. **Semiótica**. São Paulo: Perspectiva, 2003. p. 230-255.

ROACH, Kent. The challenges of crafting remedies for violations of socio-economic rights. **Harvard Law Review**, Cambridge, v. 89, n.1, p. 1281-1316, 1976.

RODRÍGUEZ GARAVITO, César *et al.* The dialogical activism and the impact of the falls on social rights. **Revista Argentina de Teoría Jurídica,** Buenos Aires, v. 14, n. 2, p. 1-27, dez. 2016.

RODRÍGUEZ-GARAVITO, César A.; FRANCO, Diana Rodríguez. **Cortes y cambio social:** cómo la Corte Constitucional transformó el desplazamiento forzado en Colombia. Bogotá: Dejusticia, 2010.

SHAPIRO, David L. Some thoughts on intervention before courts, agencies and arbitrators. **Harvard Law Review,** Cambridge, v. 81, n. 4, p. 721-737, fev. 1968.

VALLE, Vanice Lírio do. Unconstitutional state of affairs and institutional blockages: challenges for the construction of the appropriate response. *In*: BOLOGNA, Carlos;

BONIZZATO, Luigi; MAIA, Fabiana (ed.). **Institutional theory and contemporary constitutionalism**. Curitiba: Juruá, 2016. p.1-28.

VENTURI, Elton. **Collective civil procedure:** the jurisdictional protection of diffuse, collective and homogeneous individual rights in Brazil: perspectives of a Brazilian Code of Collective Proceedings. São Paulo: Malheiros Editores, 2007.

VITORELLI, Edilson. Taking the concepts seriously: structural process, collective process, strategic process and their differences. **Revista de Processo**, São Paulo, v. 284, n. 28, p. 333-369, jan. 2018.

WEAVER, Russell L. The rise and decline of structural remedies. **San Diego Law Review**, San Diego, v. 41, n.1, p. 1617-1650, 2004. Available at: https://digital.sandiego.edu/sdlr/vol41/iss4/11/ . Accessed on: 12 Apr. 2020.

ZWEIGERT, Konrad; KÖTZ, huh. **Introduction to comparative law**. Oxford: Oxford University Press, 1992.

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