

Structural decision: a new tool for public policy? ¹

Decisão estrutural: uma nova ferramenta para políticas públicas?

Carolina Martins Marinho*

Alessandra Gotti**

Abstract

This article is inserted in the discussions of judicialization of social rights and aims to analyze the application of a structural decision in judicial conflicts involving public policies with high repetitive demand, as in the case of the right to education. Based on theoretical conceptions that differentiate commutative and distributive demands and their characteristics and peculiarities, the application of these differences is explored in the decision of the practical case that occurred in the city of São Paulo (civil action No. 0150735-64.2008.8.26.0002), a decision called structural. Based on some results of this action, a reflection was made on the mechanisms used in the structural decision and how this tool was, potentially, capable of helping to improve a public policy. Despite the complexity of a structural decision, this article points out interesting aspects of how this process has been shown to be effective in inducing the improvement of a public policy with high repetitive demand, betting on a greater institutional articulation, which contributes to the reduction of judicialization and, above all, the progressive realization of a social right.

Keywords: Structural decision. Public policy. Judicialization. Right to education. Nursery education.

Resumo

Este artigo se insere nas discussões sobre judicialização de direitos sociais e tem por objetivo analisar a aplicação de uma decisão estrutural em conflitos judiciais envolvendo políticas públicas com elevada demanda repetitiva, como no caso do direito à educação. Partindo de concepções teóricas que diferem conflitos comutativos e distributivos e destringem suas características e peculiaridades, explora-se a aplicação dessas diferenças na decisão do caso prático ocorrido na cidade de São Paulo (ação civil nº 0150735-64.2008.8.26.0002), decisão esta chamada de estrutural. A partir de alguns dos resultados dessa ação, foi feita uma reflexão sobre os mecanismos utilizados na decisão estrutural e como esta ferramenta foi, potencialmente, capaz de auxiliar no aprimoramento de uma política pública. Em que pese a complexidade de uma decisão estrutural, este artigo aponta aspectos interessantes de como esse processo vem se mostrando eficaz para induzir o aprimoramento de uma política pública com elevada demanda repetitiva, apostando em uma maior articulação institucional, o que contribui para a redução da judicialização e, sobretudo, a progressiva concretização do direito social.

Palavras-chave: Decisão estrutural. Política pública. Judicialização. Direito à educação. Educação infantil (ou articulação institucional).

¹ Texto traduzido a partir de Inteligência Artificial.

* Orcid: <https://orcid.org/0000-0003-2515-0278> Doutora em Direito Constitucional (2018), Mestre em Filosofia e Teoria Geral Direito (2009) e Bacharel em Direito pela Universidade de São Paulo (2003). Professora Visitante do Bacharelado e da Pós-graduação em Políticas Públicas da Universidade Federal do ABC.

** Fundadora e Presidente Executiva do "Instituto Articule", Diretora Institucional e sócia do escritório "Hesketh Advogados" e Associada Efetiva do "Todos pela Educação". É doutora e mestre em Direito Constitucional pela PUC/SP, além de professora de Direitos Humanos por quase vinte anos. Atualmente é Conselheira Assessora da Coordenadoria da Infância do Tribunal de Justiça de São Paulo, atuando especialmente nas questões relacionadas ao acompanhamento da criação de novas vagas em creche na cidade de São Paulo, e, anteriormente, atuou como consultora da UNESCO e Câmara do Ensino Fundamental do Conselho Nacional de Educação. É também autora dos livros "Direitos Sociais: Fundamentos, marcos legais". Orcid: <https://orcid.org/0009-0005-8504-070X>

1 Introduction

The monitoring of the judicialization of the public policy of early childhood education in the city of São Paulo in the last twenty years and of the demands that claim the right to daycare and preschool education showed that, after an intense individual judicialization of the right to education, public education policy no longer responded adequately to judicial decisions. Another decision-making technique was required by the Judiciary to produce more effective results with a view to improving public policy on early childhood education in the city of São Paulo.

This article aims to analyze the benefits of adopting structural decisions for the resolution of conflicts involving public policies, in the light of the experience of the *leading case* of early childhood education in the city of São Paulo. In the search for a solution more in line with the nature and specificity of the distributive conflict, this case went beyond the limits of an individual analysis, under the vision of commutative justice, and sought, in the appreciation of the problem as a whole, a more efficient response for the improvement of the public education policy of access to the child segment.

As will be seen, distributive and commutative conflicts are different and require different litigation and resolution strategies, at the risk of being little or not at all effective in practice. The structural confrontation of the problem, in addition to requiring the expansion of the network of services and the improvement of the quality of the initial education offered, provided tools that induce inter-institutional dialogue, ensuring greater flexibility and transparency in educational policy. Decisions based on inter-institutional dialogue have the merit of promoting the necessary articulation between the main actors responsible for the execution and control of a given public policy, which facilitates the achievement of solutions that provide an apparently more effective response. Among the novelties of this case, it can be pointed out the holding of public hearings; the preparation of an action plan by the Executive Branch, with the definition of goals to be met within the previously stipulated deadlines; and the creation of an interdisciplinary Monitoring Committee, which meets every six months to discuss with the municipal management the progress in the fulfillment of the planned goals and the obstacles faced. These tools allowed the Judiciary to change its key to understanding and facing the problem with a social right, no longer in a rigid, bilateral and imposing way, but in a negotiated way, allowing to discuss failures and contingencies in the implementation of public policy.

In order to report on this innovative experience and some of its results, this article will be subdivided into five themes: 1) Brief considerations on the public policy of access to early

education in the city of São Paulo; 2) The judicialization of the right to early childhood education in the city of São Paulo: from the recognition of access to early childhood education as a subjective public right to the problems of individual judicialization; 3) Commutative conflict x distributive conflict: nature and specificities of educational demands; 4) The collective effort of the different social actors in the search for a solution to the collective problem; 5) The proposed solution and some of the results presented. Conclusions.

2 Brief considerations on the public policy of access to early childhood education in the city of São Paulo²

The political demand for access to quality daycare centers and kindergartens is an old struggle of social movements in the city of São Paulo, which have been articulated since the 70s (Rosemberg; Fields; Haddad, 1991). Even before the process of redemocratization and the constitutional regulation of educational rights, daycare centers were already a reality in the city of São Paulo. However, they were offered to the poorest families by philanthropic entities or those associated with the government, in a disorderly and discontinuous manner, without pedagogical programming and with more welfare than educational purposes (Campos, 2006).

The 1988 Federal Constitution did not establish early childhood education as a priority³, despite the consolidated understanding in the educational field of the importance of this segment for the physical, cognitive and social development of children (Campos; Haddad, 1992; Kramer, 2006; Fields; 2006).

In the city of São Paulo, in particular, early childhood education was only integrated into the Municipal Department of Education in 2001, when it ceased to be part of the Social Assistance Secretariat, in a context of municipalization of primary education, stimulated by funds from the Fund for the Maintenance of the Development of Primary Education and the Valorization of Teaching (FUNDEF) (Oliveira, 2009).

In 2006, Constitutional Amendment 53/2006 included part of initial education (preschool) in the Fund for the Maintenance and Development of Basic Education and the Valorization of Education Professionals (FUNDEB), with the aim of supporting the expansion

² For more detailed explanations, see Marinho (2018).

³ Thus, until the end of the 90s, initial education did not have the same constitutional *rank* as primary education, considered a subjective public right.

of the municipal government in the children's segment. The 2007 data⁴ on early childhood education in the city of São Paulo indicate that only 19% of the population from zero to three years of age had access to daycare centers and 80% of the population from four to six years of age had access to preschool education (Infocidade, 2007). Data from 2012 show that the supply of vacancies in early childhood education has expanded, covering 43% of the population from zero to three years old in kindergartens and 90% of the population from four to five years old in preschool (Infocidade and Fundação Seade, 2012). Even so, the expansion of initial education offered by the municipality fell short of the minimum legal frameworks established, which provided for a minimum of 50% of places in daycare centers for children from zero to three years of age by the end of 2011 (National Education Plan, Law No. 10.172/2001, target 1.3.1) and 100% access to preschool education for children aged four and five. of Constitutional Amendment 59/2009.

Regarding the financing of education in the city of São Paulo, reports from the Municipal Court of Accounts (TCM) have already pointed to irregularities in municipal investments, with investments below the minimum provided for in the regulatory levels (which is 31% of income from taxes, including those from transfers, according to Article 208 of the Organic Law of the Municipality of São Paulo). In this sense, Gotti and Ximenes (2018) report the application of only 23.55% of the amount collected in fiscal year 2007 (TC No. 72,002,112815.08-56) and 24.12% in fiscal year 2010 (TC No. 72,000,923/11-24).

Specifically in relation to early education, Gotti and Ximenes (2018) emphasize the failure to comply with the planning for the expansion of early education units, provided for in the regulations of the 2006-2009 Multiannual Plan, highlighting the lack of planning by the municipality, the diversion of funds planned for early education to meet other obligations; the expansion through agreements with private entities without guaranteeing the standards quality of the public network, among other measures. Thus, as can be seen, the municipal government did not commit itself to investing, in initial education, what is necessary for the physical and cognitive development of children, as recommended by educational research. The neglect of this segment in the political sphere led many social actors to seek answers to the omission of the public administrator in the Judiciary. However, as will be seen, the road to justice was also long, marked by achievements and setbacks.

⁴ The publication of data on the supply and demand of early childhood education was made mandatory for the city of São Paulo with Law No. 14.124/2006, as a result of popular pressure for more accurate information on this segment of education.

⁵ As a result of Constitutional Reforms 53/2006 and 59/2009, preschool education began to cover only children aged four and five and 100% of students became compulsory as of 2016.

3 The judicialization of the right to early childhood education in the city of São Paulo: from the recognition of access to early childhood education as a subjective public right to the problems of individual judicialization

In the mid-1980s and early 1990s, Brazil structured a normative microsystem of collective proceedings (Didier Junior and Zanetti Junior, 2012), which brought to the Brazilian legal system a set of material and procedural rules for the defense of diffuse, collective or homogeneous individual interests, such as the Law on Public Civil Action (Law No. 7347/85), Consumer Protection Code (Law No. 8078/90), Statute of Children and Adolescents (Law No. 8069/80), among others. These norms allowed the Judiciary to address collective problems, such as many of those proposed for social rights.

Despite the provision of some procedural rules for the enforcement of collective demands for social rights, collective actions were not very successful in the 90s, either due to a lack of habit and culture, or due to the lack of adequate tools to deal with collective demands of a distributive nature (Lopes, 1999).

In this regard, in 1996 a specialized prosecutor's office was created to deal with homogeneous, collective or diffuse individual interests in the Public Prosecutor's Office of São Paulo (MPSP): the Prosecutor's Office for the Defense of Diffuse and Collective Interests of Children and Youth of the Capital (Normative Law No. 97 - PGJ, of 09/12/1996, repealed by Normative Act No. 730/2012) with the purpose of encompassing educational actions that requested vacancies in nurseries or kindergartens for a group of children.

However, the claims filed show that the prevailing understanding at that time was that the collective request for access to education, i.e. the provision of public initial education services to parents who wished to enroll their children in the following school year, was understood to be impossible because it was a "future request" that, As such, it had not been breached, despite the demonstration of surveys that indicated a deficit of almost 200 thousand vacancies in initial education at that time. The opening of new vacancies was considered an act of discretion of the public administration in which the Judiciary could not intervene.

When public civil actions began to claim access to public education for children as homogeneous individual interests (containing lists of specific children), the understanding of the magistrates began to change: the thesis that children who wanted to access early childhood

education had subjective public rights began to be accepted by the Judiciary. Despite divergent conceptions about access to early childhood education or whether it is not a subjective public right, in many cases the claims were considered well-founded and the children mentioned in public civil actions were able to enroll in the public school system (Marinho, 2009).

In 2005, the understanding of early childhood education as a subjective public right was consolidated by the Federal Supreme Court (STF), in Extraordinary Appeal No. 410.715-5/SP and No. 436.996, both drafted by Judge Celso de Mello. From that moment on, the judicialization of the right to early childhood education in the city of São Paulo became more and more extensive.

In 2013, the State Public Defender's Office reported that it obtained about 12,000 vacancies per year in daycare centers and preschools in the city of São Paulo through lawsuits⁶. This was already pointed out as a problem due to the lack of equal treatment (Lopes, 2006; Marinho, 2009) among children in need of places in early childhood education, has intensified with the massification of requests for access to early childhood education.

Gotti and Ximenes (2018) and Côrrea (2014) report that, in addition to the ineffectiveness of the measure (since the judicial determination could not open vacancies and could not overcrowd the existing classes, under penalty of compromising the quality of education), it was unfair, since it privileged children whose parents had access to the Judiciary, to the detriment of the criteria of social vulnerability and need used by the Government.

4 Commutative conflict x distributive conflict: nature and specificities of educational demands

To better understand these issues, it is necessary to address some distinctions between what is called distributive justice and commutative justice, their conflicts, and how it applies to educational norms.

In succinct lines, it is said that the metric of fairness applicable to the distribution of the commons is distributive,

The rule and virtue of the equal (proportional) distribution of: (a) common things (not produced by anyone); b) things produced in common; (c) authority and power-freedom (which by definition are social), with their respective responsibilities and rewards; (d) incentives for socially relevant and desired individual talents (although

⁶ Check it out at: <http://educacao.uol.com.br/noticias/2013/08/29/em-sp-12-mil-vagas-em-creches-foam-prenchidas-por-ordem-judicial.htm>. Access date: 5 sets. 2014.

in capitalist society the talent to earn money is the talent par excellence) (Lopes, 2006, 127-128).

Conflicts of a distributive nature have a polycentric (Fuller, 1978) or plurilateral character, that is, the distribution or appropriation of these goods individually impacts on the totality of the availability of these public goods. To illustrate this type of conflict, Fuller exemplifies it with the hypothetical determination, in a socialist regime, that all wages and prices are set by the Judiciary. This task could not be satisfactorily accomplished through the use of traditional adjudicatory methods. First, because the Court moves very slowly to deal with the sudden change in the economic scenario. Second, because the methods of allocation are not sufficient to deal with the complexity of the repercussions arising from the change in all prices and wages. The increase in the price of aluminium, for example, can affect demand in various ways, and consequently the price of thirty types of steel, twenty types of plastic, a multitude of woods, other metals, etc. Each of these individual effects can have complex repercussions on the economy.

In a case such as the one denounced above, it is simply impossible to allow each party to have a significant participation in the evidentiary phase. It should be noted that the problem is not only the large number of affected parts. The key point is that each of the possible solutions (i.e., a five-cent raise, a four-cent raise, etc.) will have a different impact and redefine the "affected parts" in an instant. One can visualize this type of situation as a "spider's web". A pull of a wire will distribute the voltages in a complex pattern across the network. Most likely, doubling the original traction will not only double each of the resulting initial stresses, but it can also create a different pattern of stresses. This is a polycentric conflict because it has several centers: each cable crossing is a different center of voltage distribution (Kenneth, 2001

Conflicts of this nature require, on the part of the Judiciary, not only the mastery of the applicable legal norms, but also detailed and qualified technical information on the intricate facets of the specific problem it faces. It requires, above all, dialogue between the main actors involved so that there is a resolution and effective and lasting solutions are proposed (Gotti, 2019).

Commutative justice, on the other hand, has its equity metric in the exchange relations between the parties, defined by pre-established parameters based on the *status quo*: the relationships of lawful or illicit, creditor or debtor, due or not due, right or wrong, in short, the binary relationships that are established and restrict the parties present in the conflict (Lopes, 2006).

Throughout the Middle Ages and modernity, the Judiciary has moved away from distributive conflicts, restricting itself to commutative conflicts, with the legislative and executive powers being in charge of deliberating on the distribution of public goods, carried out through public policies (Lopes, 2004). However, with the insertion of distributive provisions in contemporary norms, a new role for the Judiciary has been demanded, generating much discussion about the limits and insufficiencies of judicial interventions in decisions that, in principle, would be in the political and not the legal sphere. Educational standards and social rights are a typical example of this problem.

Unlike the controversies of a commutative right, which are marked by opposing, bilateral, retroactive and limited interests between the parties that make up the lawsuit, advocating for a judicial remedy that compensates or repairs the damage suffered; the distributive conflicts that arise from a public order deal with the participation of a common good and involve not only the interests of the parties that make up the lawsuit, but also the interests of the parties that make up the lawsuit. but in a broad and amorphous way, it reaches the interest of all (Chayes, 1976). They are prospective conflicts, whose remedies require *ad hoc measures*, negotiated and shaped in the courts so that the litigation achieves a fair and effective result (Chayes, 1976).

Educational norms are provided for in the Federal Constitution both in the form of a subjective public right (art. 208, para. 1) demanded individually, and a social right (art. 6 and arts. 205 et seq.). The individual enforceability of an educational right in a commutative manner revealed a limit: judicial intervention no longer produced effective results and, what is worse, it distorted the logic and criteria of public policy, producing more inequality because the precautionary measures granted changed the order of the waiting list. This finding pointed to the need to address the issue no longer in a commutative way, but in the light of its distributive nature, as a public policy, based on techniques and tools that allow a broader analysis of the situation and the formulation of a flexible judicial intervention, capable of circumventing the contingencies and factual limitations that arise in the execution of a public policy. But this transition from the individual to the collective did not take place in a simple way, it was necessary to link the efforts of different actors, jurists and non-jurists, so that the problem could be raised, reflected on and faced in the judicial field from a new approach.

5 The effort of the different social actors in the search for a solution to the collective problem

Faced with the recurrent problems of access in public policy for early education, in 2007, civil society organizations⁷ articulated and launched the Childcare for All Movement (MCT). This movement mapped the lack of vacancies in early childhood education in some areas of the city of São Paulo and promoted social and political mobilization actions in the city to obtain from the municipal government a proposal to improve the offer of public policies for early childhood education (Rizzi; Ximenes, 2014).

However, in the absence of satisfactory responses from the municipality, in 2008 the members of the MCT proposed a civil public action requesting the Judiciary to oblige the municipality to build educational units to serve the 736 children who were included in the initial education and to develop a plan for the expansion and construction of vacancies in the public policy of initial education (Process No. 0150735-64.2008.8.26.0002). in accordance with the minimum quality levels defined in the National Education Plan (Law No. 10.172/2001 (Rizzi; Ximenes, 2014), allocating the necessary budgetary resources for this purpose.

In addition to the national and international legal norms violated (Federal Constitution: articles 205 and 208, VI; Law on Guidelines and Bases of Education: Article 30, paragraphs I and II; 2001 National Education Plan Act: Article 2 and target 1.3.1; Statute of the Child and Adolescent: Articles 4, 53 and 54, International Covenant on Economic, Social and Cultural Rights – UN, American Convention on Human Rights and Protocol of San Salvador – OAS, among others) the initial petition presented graphs and tables with data on the city and opinions of the MTC highlighting the municipal omissions in the planning and adequate compliance with the minimum percentages of investments necessary for the public initial education network, especially in areas of high social vulnerability in the municipality. Even so, there were many legal challenges present in this class action to demonstrate to the Judiciary both the legal and due nature of the requested provision, as well as the legal possibility of facing the problem raised through appropriate tools to resolve it. After all, in a lawsuit advocating intervention in a public policy, the Judiciary is not asked for compensation for past damage, but for future

⁷ Educational Action: Advice, Research and Information (Action in Justice Project); Campo Limpo Center for Human Rights and Popular Education (CDHEP); Padre Josimo Tavares Citizenship Institute; Casa dos Meninos; Lidas Institute; Jardim Irene Forum and International Association of Interests for Humanity Jardim Emilio Carlos and Irene.

action, which must be implemented by the public administration, in accordance with the planning and funds available.

How can we adapt operational concepts in force in our jurisdiction (demand, inertia, congruence, impartiality, participation of the parties, *res judicata*), which were designed and structured for individual claims (commutative), to apply them to a case whose logic is different (distributive)? It is no longer a model in which damage is compensated with compensation, but a discussion whose decision will impact the distribution of public goods in a given society: greater investments in the area of education will require budget cuts in other areas of the public budget; The request does not refer to a past situation, but implies future actions, which will be modified according to contingencies and needs; The parties are not only those who filed the lawsuit, but a series of actors who have a direct interest in the issue and are not included in the initial pole of the lawsuit. In short, how to adapt concepts and procedural tools structured from a bipolar perspective (Salles, 1999; Costa, 2015; Gotti, 2019; Arenhart; Marinoni, 2014; Ferraro, 2015; Vitorelli, 2015; Arenhart, 2017) for a more flexible proposal that responds to the complexities of a public policy? How to operate the transition from the limits imposed by current operational concepts to the adoption of techniques and tools that allow overcoming some of these limits?

The cultural barrier, as Lopes (1999) says, means that Brazilian courts are not used to dealing with distributive conflicts. In this sense, in the first instance, the public civil action (File No. 0150735-64.2008.8.26.0002) was extinguished without a trial on the merits because the magistrate understood that the request was impossible. The plaintiffs appealed and obtained a favorable response: the legal possibility of bringing the aforementioned lawsuit was recognized. The action went back to the lower court for a new trial. However, in 2012, the lawsuit was dismissed, since the magistrate understood that the matter was at the discretion of the Executive Branch and there was no room for interventions. The plaintiffs appealed again, insisting on the request for the construction of classrooms and the elaboration of a plan for the expansion of initial education vacancies (Rizzi; Ximenes, 2014).

Overcoming this limit of interpretation and possibilities about what the law is was a first step that the litigants faced. To understand how this transition took place, it is necessary to note that, in parallel to the MCT's legal action, the problem of the lack of vacancies in daycare centers grew in the public debate.

In 2012, a group of legal and non-legal actors met to discuss the problem of access to early childhood education in the city of São Paulo. This group, called GTIEI (Inter-institutional Working Group on Early Childhood Education), was formed informally by both civil society

organizations (such as Ação Educativa and the Education Working Group of the Rede Nossa São Paulo), as well as law firms (such as Hesketh Advogados and Rubens Naves Santos Júnior Advogados), as well as by members of the Public Power (such as representatives of the State Public Prosecutor's Office and the State Public Defender's Office) (Rizzi; Ximenes, 2014).

Aware of the high number of demands that were already requesting vacancies in early education, as well as extrajudicial attempts (through the Terms of Adjustment of Conduct, proposed by the Public Prosecutor's Office), the GTIEI began to work with the proposal of a structural intervention in public policy, along the lines already carried out in international experiences. as in Argentina, Colombia or the United States, for example.

To make this type of intervention viable, they organized several events: they drafted a technical report (Gotti; Ximenes, 2018) exposing the limitation of individual actions, the need for structural action, as well as international examples and some technical issues; held thematic workshops with Prosecutors and Public Defenders to draw attention to the inadequacy of the individual litigation standard and propose a new way of acting; proposed a dialogue with the new political management that the Municipality of São Paulo (PMSP) assumed in 2013 (Corrêa, 2014); as well as, on the eve of the appeal judgment (Case No. 0150735-64.2008.8.26.0002) in the Court of Justice of São Paulo (TJSP), they met with the Reporting Judge, Dr. Samuel Alves de Melo Jr, with the purpose of sensitizing him to the problem of access to early education in the city.

The dialogue with the Reporting Judge allowed the GTIEI not only to demonstrate a strong contradiction that occurred in the courts (the Judiciary accepted access to early education as a right required individually, but did not accept it when it was structurally alleged, despite the existence of express rules that imposed on the Public Power the duty to adequately plan and structure public policy), but also as well as allowing a new approach to the specific case.

The judgment of the appeal was transformed into a proceeding and, based on this fact, the first public hearing held by the TJSP in a specific case was held, bringing together experts from various areas (in initial education; in social rights; in budget; in procedural issues, among others), representatives of various sectors of the municipality (Municipal Secretary of Education, Attorney General of the Municipality, members of the Guardianship Councils), civil society entities, parents, councilors and other interested parties.

The holding of the public hearing and the work of the GTIEI allowed the Court not only to understand more broadly how the problem was posed in relation to the atomized judicialization of the right to education, but also allowed the judges to appropriate new

techniques and tools to resolve the problem in a way more in line with the complexity of the request.

After the public hearing, and before the ruling of the Special Chamber of the TJSP, an attempt was made to reach an agreement with the municipal government. However, as the city government already foresaw the opening of 150,000 new vacancies in early education in its Metas Program (2013-2016, Fernando Haddad's administration), and this expansion was linked to a commitment to expand the collection of municipal taxes, as well as alliances with the federal and state governments and agreements with private companies, He did not want to legally commit to the opening of 150 thousand vacancies, proposing only 40 thousand vacancies to enter into an agreement. In addition, the municipality did not want to commit to respecting the quality parameters provided by the National Council of Education (CNE), arguing that the parameters that would guide the quality of education in the municipality were being created by the Municipal Council of Education.

After the failed attempt at conciliation, in December 2013, the TJSP condemned the municipality of São Paulo to a collective-structural decision: it determined the elaboration of an expansion plan for the creation of at least 150,000 vacancies in nurseries and kindergartens, with at least 105,000 in nurseries, in the period from 2014 to 2016. in order to eliminate the waiting list, guarantee the quality of the education offered in the terms of the standards of the CNE and, complementarily, of the Municipal Council of Education, also determining the inclusion in the budget proposal of the expansion of the educational network related to initial education according to the determined expansion. In addition, in an unprecedented way, it entrusted the Coordinator of Children and Youth with the monitoring of the creation of vacancies, with the assistance of a Monitoring Committee with representation from the justice system, organized civil society and specialists.

6 The proposed solution and some of its results presented

The structural conviction handed down was marked by innovations, as judges began to admit tools that not only allowed for expanded cognition about the structural problem at hand, but also ensured flexibility in implementation. Thus, the obligation to create vacancies and a plan to expand them were linked to different deadlines for the fulfillment of the obligation in stages. In addition, the obligation was established for the municipality to submit biannual reports to the Coordination of Children and Youth of the TJSP and to the Monitoring

Committee, which allows the implementations and limitations of the expansion in the public policy for children to be monitored by specialists.

In its initial composition, until the second public hearing in 2017, the Monitoring Committee was composed of both applicants (Ação Educativa; Vila Clara Active Community Association; Center for Human Rights and Popular Education of Campo Limpo; Padre Josimo Tavares Citizenship Institute), as well as by members of the GTIEI (Special Action Group on Education of the MPSP – GTIEI; Public Defender's Office of the State of São Paulo; Education Working Group of the Nossa São Paulo Network; Rubens Naves Santos Junior - Rubens Naves; and Hesketh Advogados - Alessandra Gotti and Ana Cláudia Pires Teixeira), as well as social movements and civil society entities (Municipal Forum of Early Education; São Paulo Forum on Early Childhood Education; and Negri – Center for Gender, Race and Age Studies). The range of representation present in this Committee allows for a greater breadth of TJSP's knowledge on specific issues, allowing for a more qualified discussion on the complexities of a public policy.

The ruling also established, as said, the obligation of the city council to insert funds in the draft budget for the expansion of the early education network, in order to guarantee the implementation of the decision. To ensure greater control of budgeted and fulfilled expenditures, MTC members were included in the Monitoring Committee and began monitoring this issue after the second public hearing.

As can be seen, the judgment of this structural case by the TJSP was innovative: it sought to readjust the bipolar jurisdictional framework to the distributive requirements of social rights norms, admitting, through general principles, the use of techniques and tools that could reconfigure the traditional rigidity of the bipolar framework, opening up new institutional possibilities for the treatment of social rights.

In parallel to the appeals presented, the mayor's office began to dialogue with the TJSP's Coordination of Children and Youth and with the Monitoring Committee, guaranteeing greater transparency and accountability to the public policy of access to early education in the city of São Paulo.

In these meetings, the mayor's office presented in detail how it planned to open the 150 thousand vacancies throughout its administration, as well as where it would obtain the resources for the implementation of its planning: in addition to the construction of new spaces, agreements and alliances, the reuse of spaces in public buildings that were underutilized was also planned. To make this expansion viable, the mayor's office pointed out both the increase in the Urban

Property and Land Tax (IPTU) (Law No. 15,889/13), as well as the agreements with the Ministry of Education and the state government.

In addition to demonstrating how the expansion of vacancies was implemented over time, the mayor's office discussed with the Committee and the Coordination of Children and Youth of the TJSP the contingencies and difficulties that compromised or delayed the initial planning, such as complications in the expropriation and bidding of projects and works, difficulties in concluding agreements, environmental limitations, the fall in the expectation of municipal revenues⁸, as well as a scenario of economic recession in the country, among others.

In December 2016, the city's EOL system noted the addition of 101,877 new education enrollments in the early education network, the largest expansion in the early education network ever undertaken in the city of São Paulo. However, the expansion did not occur with the creation of new vacancies in the direct network, but through a strong expansion of agreements with the indirect educational network (almost 80% of vacancies).

Despite the efforts and advances of political management, access to and quality of early childhood education continued to be problematic in the city of São Paulo. In this regard, at the end of December 2016, the Committee explained to the Coordination of Children and Youth and the Judge Rapporteur of the action the importance of taking stock of the results achieved in the administration of Fernando Haddad (2013-2016) and renegotiating the goals to be achieved in terms of access and quality of education. so efforts to improve with subsequent management would continue.

Thus, in June 2017, a second public hearing was held with experts, members of the Monitoring Committee and the Coordination Committee for Children and Youth, users of the school system and representatives of the city's new administrative management (2017-2020, João Agripino da Costa Doria Junior administration) to discuss what had already been implemented and what remained to be observed.

According to the balance presented by the plaintiffs in the new public hearing, attached to the file, in the period 2013-2016, 89,249 vacancies were created, 72,814 in nurseries and 16,435 in kindergartens (Ximenes; Gotti, 2018). The expansion was effective in solving the problem of the waiting list in preschool, but it was not enough to eliminate the deficit of vacancies in daycare centers.

⁸ The Special Body of the TJSP prohibited the increase in the property tax approved in 2013. Check it out: "The São Paulo justice system prohibits the increase of the IPTU in 2014". Available in: http://g1.globo.com/sao-paulo/noticia/2013/12/justica-de-sp-barra-aumento-do-iptu-em-2014_.html. Access date: 2 Mar. 2017.

In September 2017, an agreement was signed between the mayor's office and the plaintiffs of the public civil action, within the scope of the Coordination of Children and Youth of the TJSP, in which the city committed to the indices of access and quality of education: to offer more than 85 thousand new vacancies, prioritizing the districts with the greatest demand; observe criteria related to infrastructure (existence of an outdoor area uncovered for recreational and pedagogical activities); reducing the number of groups of children in the same setting and the education/child ratio; Carry out continuous training of teachers in the direct and affiliated network.

In December 2017, the demand for preschool vacancies was reduced to zero, and in December 2020, the queue for daycare centers in São Paulo was reduced to zero⁹, according to the Municipal Education Secretariat in the report submitted to the TJSP. From December 2016 to December 2020, the municipal offer of nurseries generated 91,240 new enrolments, fulfilling several commitments made in the agreement signed in 2017. Thus, this expansion prioritized the 10 most vulnerable districts, began to observe in its agreements the need to have an outdoor area for children's recreation, reduced the number of children's groups in the same environment and sought to observe the average number of children per educator (although it did not manage to reduce it). This case is not over yet and is still unfolding. There are still challenges to be faced, especially in terms of quality, but it is a fact that progress has been made in public policy on access to early childhood education in the city of São Paulo.

7 Conclusions

This case study that is being developed in São Paulo brings interesting findings. A first point to observe refers to the new tools that are now admitted by the TJSP through general principles, such as the holding of public hearings, a Monitoring Committee and deferred deadlines for the implementation of the results.

These tools allowed the examination of complex issues that develop in the implementation of a public policy to be monitored and evaluated by the Judiciary, guaranteeing flexibility and means to expand knowledge about the structural problem. They also allowed the Judiciary to change its key to understanding and confronting the problem with a social right, no

⁹ Given that data on the demand for daycare centers varies throughout the school year and we are living through a period of pandemic, this information that the demand for daycare centers has reached zero in the city of São Paulo needs to be monitored and verified more accurately in the future, as the demand for daycare centers may have been skewed by parents' fear of seeking a place in education of their children at this time of high transmission and contagion of COVID-19.

longer in a rigid, bilateral and imposing way, but in a negotiated way, allowing the failures and contingencies to be rearranged in the implementation of public policy, allowing the policy to be improved and gradually observed by the public authorities.

A second point to observe is the expansion of transparency and accountability of administrative management in relation to public policy on early education, ensuring greater supervision over its expansion in the city and a greater capacity to respond to the needs of the most vulnerable population, which does not always find an echo in the discretionary choices of administrators.

Finally, this case also reveals a new possibility of acting when one is in a chronic situation, with high repetitive demand and problems to implement. Certainly, because it is an intervention in a public policy, it is a complex case, which mobilizes several actors and sometimes requires a redistribution of public investments to achieve the minimum goals projected for the success of the intervention. Despite its complexity, the adoption of the structural decision in the case that is the subject of this article proved to be an effective technique to induce the improvement of the public policy on access to early education, with high repetitive demand, and contributed to the progressive realization of access to this social right. However, if the technique seems interesting for the improvement of a public policy, on the other hand, the question is how much and how this tool can and should be used in other similar public policies.

References

ARENHART, Sérgio Cruz. Multipolar process, participation and representation of opposing interests. *In*: ARENHART, Sérgio Cruz; Jobim, Marco Félix (ed.). **Structural processes**. Salvador: JusPodivm, 2017. pp. 423-448.

ARENHART, Sérgio Cruz; MARINONI, Luiz Guilherme. Collective Litigation and Due Process of Law: The Brazilian Experience. **International Journal of Procedural Law**, [s. l.], v. 4/2014/01, p. 1-23, 2014. Available at: <https://ssrn.com/abstract=2469345>. Access date: 20 Feb. 2018.

CAMPOS, María Malta. Early childhood education, achievements and challenges. *In*: SANTOS, Emerson (org.). **Rewriting Education** : Proposals for a Better Brazil. São Paulo: Attica: Scipione, 2006. Available at: <http://www.idis.org.br/wp-content/uploads/2014/04/Educacao-Infantil.pdf>. Access date: 15 Mar. 2017. pp. 91-102.

CAMPOS, María Malta; HADDAD, Lenira. Early childhood education: growing and appearing. **Caderno de Pesquisa**, São Paulo, n. 80, p. 11-20, fev. 1992. Available at: <http://www.fcc.org.br/pesquisa/publicacoes/cp/arquivos/311.pdf>. Access date: 10 Mar. 2017.

CHAYES, Abram. The role of the judge in public law litigation. **Harvard Law Review**, [s. l.], v. 89, n. 7, p. 1281-1316, 1976. Available at: <https://www.jstor.org/stable/1340256>. Access date: 20 out. 2017.

CORRÊA, Luíza. A. **The judicialization of the public policy of early childhood education in the Court of Justice of São Paulo**. 2014. Dissertation (Master of Laws) - University of São Paulo School of Law, São Paulo, 2014. Available at: <http://www.teses.usp.br/teses/disponiveis/2/2134/tde-02122015-074746/pt-br.php>. Access date: 02 Aug. 2018.

COSTA, Suzana Henriques da. Judicial control of public policies: national report (Brazil), 2015. **Revista do Ministério Público do Rio de Janeiro**, Rio de Janeiro, n. 57, p. 207-243, Jul./Sep. 2015. Available in: https://www.mprj.mp.br/documents/20184/1277781/Susana_Henriques_da_Costa.pdf. Access date: 20 Mar. 2018.

DIDIER JUNIOR, Fred; ZANETI JUNIOR, Hermes. **Course on Civil Procedural Law: collective process**. 7. ed. Salvador: JusPodivm, 2012. verse 4.

FERRARO, Marcella Pereira. **From the bipolar process to a collective-structural process**. 2015. Dissertation (Master of Laws) – Graduate Program in Law, Federal University of Paraná, Curitiba, 2015. Available at: <https://acervodigital.ufpr.br/bitstream/handle/1884/39322/R%20-%20D%20-%20MARCELLA%20PEREIRA%20FERRARO.pdf;sequence=2>. Access date: 20 Sep. 2018.

FULLER, Lon L. The forms and limits of the award. **Harvard Law Review**, [s. l.], v. 92, n. 2, p. 353-409, 1978. Available at: <https://www.jstor.org/stable/1340368>. Access date: 20 out. 2017.

GOTTI, Alessandra. **Social rights in the courts: mechanisms for measuring results and monitoring social regression**. 2009. Thesis (Doctorate in Law) – School of Law, Pontifical Catholic University of São Paulo, São Paulo, 2009. Available in: <https://repositorio.pucsp.br/jspui/handle/handle/8836>. Access date: 11 Nov. 2017.

GOTTI, Alessandra. **Social rights: foundations, legal regime, implementation and measurement of results**. São Paulo: Saraiva, 2012.

GOTTI, Alessandra. A new strategy to overcome the lack of vacancies in daycare centers. **Estadão**, São Paulo, 16 years ago. 2017. Olho na Educação Blog. Available at: <https://educacao.estadao.com.br/blogs/educacao-e-etc/audiencias-de-conciliacao-uma-nova-estrategia-para-superar-a-falta-de-vagas-em-creches-2/>. Access date: Aug 16 Year 2017.

GOTTI, Alessandra. Strategic protection of social rights. *In*: ANTONIAZZI, Mariela Morales; VON BOGDANDY, Armin; PIOVESAN, Flávia (ed.). **Transformative Constitutionalism, Inclusion, and Social Rights: Challenges of the Latin American Ius Constitutionale Commune in the Light of International Economic Law**. Salvador: Editora JusPodivm, 2019. pp. 571-592.

GOTTI, Alessandra; XIMENES, Salomão. Proposal for structural litigation to solve the deficit of vacancies in early childhood education. *In*: RANIERI, Nina Beatriz Stocco; ALVEZ, Ângela Limongi Alvarenga (ed.). **Right to education and rights in education: in a multidisciplinary perspective**. São Paulo: UNESCO Chair in the Right to Education at the University of São Paulo - USP, 2018. pp. 365-399. Available at: <http://unesdoc.unesco.org/images/0026/002627/262765por.pdf>. Date of consultation: 07 Jan. 2019.

KRAMER, Sonia. Children from 0 to 6 years old in educational policies in Brazil: initial education and/or is fundamental. **Educação e Sociedade**, Campinas, v. 27, n. 96 – Especial, p. 797-818, outside. 2006. Available at: <http://www.cedes.unicamp.br>. Access date: 21 Feb. 2018.

LOPES, José Reinaldo de Lima. **The word and the law**. São Paulo: Editora 34, 2004.

LOPES, José Reinaldo de Lima. **Social rights: theory and practice**. São Paulo: Method, 2006.

LOPES, José Reinaldo de Lima. Social rights and the courts. *In*: WILHELMSSON, Thomas; HURRI, Samuli (org). **From dissonance to meaning: expectations of the welfare state, privatization and private law**. Vermont: Ashgate Publishing Company, 1999. pp. 567-592.

MARINHO, Carolina Martins. **Justiciability of social rights: analysis of judgements on the right to education from the point of view of institutional capacity**. 2009. Dissertation (Master of Laws) – School of Law, University of São Paulo, São Paulo, 2009. Available at: <https://teses.usp.br/teses/disponiveis/2/2139/tde-03052010-131241/pt-br.php>. Access date: 18 Nov. 2018.

MARINHO, Carolina Martins. **Judicialization of Social Rights and Structural Processes: Reflections for the Brazilian Jurisdiction in the Light of the North American Experience**. 2018. Thesis (Doctorate in Law) - School of Law, University of São Paulo, São Paulo, 2018. Available at: <https://www.teses.usp.br/teses/disponiveis/2/2134/tde-21082020-153930/pt-br.php>. Access date: 21 Mar. 2020.

OLIVEIRA, Clenilde Martins. The municipalization of education in the state of São Paulo. *In*: Congresso Nacional de Educación (Educere), 9; Psychopedagogy Meeting of Southern Brazil, 3, 2009. **Annals [...]**element. Curitiba: PUC-PR, 2009. pp. 3232-3243. Available at: http://educere.bruc.com.br/arquivo/pdf2009/2793_1389.pdf. Access date: 15 Mar. 2017.

RIZZI, Ester; XIMENES, Salomão. Strategic Litigation for Changing the Pattern of Decision-Making in Social Rights: Collective Actions on Early Childhood Education in São Paulo. *In*: ENCONTRO DA ASSOCIAÇÃO NACIONAL DE DIREITOS HUMANOS, PESQUISA E PÓS-GRADUAÇÃO, 8., 2014, São Paulo. **Annals [...]**element. São Paulo: ANDHEP, April 2014. Pp. 2471-2492. Available at: <http://andhep.org.br/anais/arquivos/VIIIencontro/GT10.pdf>. Access date: 23 Sep. 2018.

ROSEMBERG, Fulvia; CAMPOS, María Malta; HADDAD, Lenira. **The network of daycare centers in the city of São Paulo**. São Paulo: Carlos Chagas Foundation, Department of Educational Research, 1991. Available at: <https://publicacoes.fcc.org.br/textosfcc/article/view/2422/2380>. Accessed: 03 May. 2020.

SALLES, Carlos Alberto de. **Judicial application in environmental matters**. São Paulo: Revista dos Tribunais