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Incorporation of the Premises of Structural Litigation by the Brazilian Federal Supreme Court in the Adjutication of Structural Disputes*

La incorporación de los presupuestos de los procesos estructurales por el Supremo Tribunal Federal en el juicio de litigios estructurales

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Abstract: The study examines the incorporation of the premises of structural litigation theory by the Brazilian Federal Supreme Court (STF) in decisions under monitoring by the Center for Complex Structural Litigation - Nupec (ADPFs 347, 635, and 709). Adopting a deductive approach and an analytical procedural method, theoretical contributions related to disputes, processes, and structural decisions are initially addressed, including a list of the premises of structural process theory. The article explores the internal restructurings that the Brazilian Federal Supreme Court has implemented

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to adjust judicial procedures to handle structural disputes in the absence of regulation on structural processes in Brazil. Finally, based on the premises of structural processes identified at the beginning of the study, the contents of Brazilian Federal Supreme Court decisions are analyzed, with the aim of verifying whether they incorporate the elements of structural processes. We conclude that the three decisions analyzed incorporate a dialogical perspective (both between institutions and between the parties involved and the state), prioritize the participation of affected groups in the formulation of fair and effective decisions, apply an experimentalist approach, apply mechanisms for monitoring the implementation and effectiveness of the decision, and, on some occasions, involve a legal-cultural translation of structural experiences and remedies from other countries by learning from similar cases judged by courts elsewhere and adapting those standards to the Brazilian context.

Keywords: Structural disputes; structural litigation; Brazilian Federal Supreme Court (STF); Center for Complex Structural Litigation (Nupec); incorporation of elements of structural litigation in the face of a lack of legislative regulations

Resumen: El estudio analiza la incorporación de los presupuestos de la teoría de los procesos estructurales por parte del Supremo Tribunal Federal (STF) en las decisiones en etapa de seguimiento por el Núcleo de Procesos Estructurales y Complejos - Nupec (ADPF 347, 635 y 709). Para tanto, adoptando el método de enfoque deductivo y el método de procedimiento analítico, se abordan los aportes teóricos sobre los litigios, los procesos y las decisiones estructurales, enumerando los presupuestos de la teoría de los procesos estructurales. Se exploran cuáles fueron las reestructuraciones internas que el Tribunal Supremo Federal implementó con el fin de ajustar los procedimientos judiciales de tratamiento de los litigios estructurales ante la falta de regulación legislativa de los procesos estructurales en Brasil. Por último, tomando como base los presupuestos de los procesos estructurales identificados al inicio del estudio, se analiza el contenido de las decisiones del Supremo Tribunal Federal con la intención de verificar si estas respetan e incorporan los elementos básicos de los procesos estructurales. De este análisis se concluye que las tres decisiones incorporan una perspectiva dialógica (tanto institucional como de las partes con el Poder Público), priorizan la participación de los grupos afectados en la construcción de decisiones justas y efectivas, aplican una actuación experimentalista, agregan mecanismos de seguimiento de la implementación y efectividad de la decisión y, en algunas ocasiones, realizan una traducción jurídico-cultural de experiencias y remedios estructurales extranjeros, aprendiendo de casos similares ya juzgados por Cortes de otros países, adaptando estos estándares a la realidad brasileña.

Palabras clave: litigios estructurales, procesos estructurales, Supremo Tribunal Federal, Núcleo de Procesos Estructurales y Complejos, incorporación de elementos de los litigios estructurales ante la falta de reglamentación normativa

I. INTRODUCTION

Structural disputes play a crucial role in overcoming structural problems by encouraging those involved to expand their individual outlooks and focus on combating systemic flaws that violate human rights and perpetuate situations of inequality and injustice on a collective scale.

Due to the complexity of structural problems and the transformative impact this type of litigation hopes to achieve, the judicial procedure adopted must necessarily be adapted to the foundational premises of such distinct attempts to overcome situations where reality does not conform to the law.

Considering this, as well as the current absence of regulation of structural litigation processes in the Brazilian legal system and the recent restructuring efforts within the Brazilian Federal Supreme Court to accommodate structural disputes, the following question arises: do the measures established by the Brazilian Federal Supreme Court to adjudicate structural disputes within its jurisdiction adhere to the guiding premises of structural processes?

Using a deductive approach, an analytical procedure, and bibliographic and jurisprudential research, this study aims to: 1) Understand the role of structural disputes in seeking to overcome structural problems, considering the specificities and characteristics of the structural processes and decisions that drive structural changes, and listing some elementary premises of the theory of structural process; 2) Explore how the Brazilian Federal Supreme Court has internally restructured its judicial procedure for handling structural disputes in the absence of regulation of structural processes by the national legal system; and 3) Identify, based on decisions under monitoring by the Center for Complex Structural Litigation - Nupec (ADPFs 347, 635, and 709), whether the highest Brazilian court has incorporated the inherent premises of structural processes into its adjudication of structural disputes within its jurisdiction.

II. STRUCTURAL DISPUTES, PROCESSES, AND DECISIONS: UNDERSTANDING CONCEPTS AND LISTING PREMISES FOR OVERCOMING STRUCTURAL PROBLEMS

In cases of inherent infringement of fundamental human rights in the ways public and/or private institutions operate, there is an increasing trend of structural disputes being brought before the judiciary, with demands for structural litigation aimed at effecting substantive transformations to address systematic rights violations.

Intending to conceptualize such conflicts of a structural nature, França (2022a, p. 407, authors' translation) notes that: "Structural disputes are complex issues that, in order to be resolved, require the adjustment or implementation of public policies and/or the restructuring of state institutions whose operating methods (or negligence) violate fundamental rights."

Thus, the utility of this type of claim in terms of combating deficits in the formulation of public policies is acknowledged, enabling the pursuit of adequate defense of rights through the proper formulation of public policies. When the State fails to implement public policies, the Judiciary, which is also responsible for ensuring constitutional precepts are respected and enforced, can and should intervene to ensure the fulfillment of such objectives. This does not imply overruling the other branches of government, but rather ensuring that what was determined by the constitutional legislators comes to pass. If the Judiciary fails to act on the failures it identifies, it would be providing inadequate protection of rights, running counter to the principle of sufficient protection, given that it is its responsibility to ensure fundamental rights are upheld (Santos, 2021, p. 25).

Seeking to define structural disputes, Puga lists the seven characteristics most commonly used in the literature to identify this type of litigation: 1) The involvement of various procedural agents; 2) The cases involve a group of affected individuals who do not directly participate in the judicial process but are represented by other members of the group or by legally authorized third parties; 3) The problem has a root cause that leads to a cascading violation of rights. Generally, this cause originates from a legal norm, a policy or practice (public or private), or a social condition or situation that harms interests in a systemic or structural manner, although not always uniformly; 4) The operationalization of a state or bureaucratic institution that serves as the context for the rights-violating social situation or condition; 5) The claimants assert values and/or demand rights of an economic, social, or cultural nature; 6) The claims involve the distribution of goods and resources; and 7) The issuance of a judicial decision that encompasses a series of orders

that must be continuously implemented and executed long-term (Puga, 2014, pp. 45-46).

Given these constitutive elements, which highlight the inherent complexity of structural disputes, the judicial responses required will be equally complex. If the goal is simply that the violation cease, a temporary apparent solution to the problem can be found; however, the situation may recur in the future (Vitorelli, 2022, p. 287).

This point underlines the importance, in such cases, of the decision being distinct from the traditional model, including diffuse responses of a prospective nature, and involving the implementation of measures outlined in the decision that extend over time and aim to achieve truly transformative outcomes for the entire community (Fiss, 1979, p. 2). The judicialization of a structural dispute, therefore, "seeks to eradicate the root causes of the conflict rather than merely addressing its resulting consequences. Therefore, a structural litigation process aims to reconstruct a particular state of affairs, rather than to eliminate, repair, or punish isolated behaviors" (França, 2022a, p. 407, authors' translation).

It is not uncommon for the Judiciary, when dealing with complex claims such as those related to the judicialization of public policies, to employ more traditional, quick, and individualistic resolution models, and thus be less effective in terms of solving the structural problem. By overlooking a broader (structural) perspective that considers the root causes rather than just the consequences, remedies capable of combating the structural flaw from a collective standpoint are not developed. This leads to a selective guarantee of fundamental rights only for those individuals who possess the knowledge and financial resources to pursue their interests judicially (França, 2022a, p. 400).

The inadequacy of the traditional process model (which is liberal and individualistic in nature) for resolving structural disputes also stems from the fact that these actions do not aim to challenge an isolated act of violation and restore a status quo, but rather to question the institutionalization and reproduction of factors that lead to structural violation, as well as to demand the reorganization of the structure/agency in order to prevent the repetition of wrongdoings with the same cause (França, 2022a, p. 405).

At this point the question arises: what is the appropriate judicial procedure to provide solutions in this type of claim? Drawing on the American theory—which originated the debate on the theme of structural disputes—Owen Fiss (2017, p. 120) contends that structural litigation is a judicial instrument through which the judge, confronting a bureaucratic structure that undermines constitutionally protected

values, undertakes the task of restructuring institutional arrangements to eliminate the threat to rights.

However, definition of the procedural framework for conducting this structural process will depend on the nature of the dispute being addressed (e.g., prison overcrowding, public daycare slots, structural discrimination, police lethality, environmental crises, etc.). Additionally, it may be necessary to combine more than one structural procedure, that is, to generate, approve, and implement a structural plan, all within a highly democratic environment where dialogue between the branches of government and civil society is a reality (Jobim, 2022, p. 857).

In view of this, litigation to address structural problems demands a new form of judicial action, but not only that, it also requires reformulation of the traditional mode of providing judicial protection, a shift in the emphasis of the judicial procedure to a more active role which includes empowering the parties involved, invoking close cooperation to resolve the structural conflict, and encouraging broad participation and dialogue between those involved and civil society (Santos, 2021, pp. 69-70).

Structural litigation, due to its complexity, is resolved in stages, following a cyclical and spiral procedure. This model embodies the continuous process of construction and reconstruction inherent in the resolution of structural disputes through structural decisions. Consequently, such cases are not resolved through a linear decision-making process; rather, the process allows for setbacks, revisions, and alternative measures beyond those initially established (Vitorelli, 2022, pp. 296-297).

According to Vitorelli (p. 297), the cyclical and spiral path of the judicial procedure for resolving structural litigation[1] involves six stages:

1. understanding the characteristics of the litigation in all its complexity and conflict, allowing different interest groups to be heard, with respect for the polycentric nature of the litigation;
2. developing a plan to alter the functioning of the structure, in a document or through various agreements or court orders, with the goal of changing its undesirable behavior;
3. implementing this plan, either compulsorily or through negotiation;
4. evaluating the results of the implementation to ensure the social outcome intended at the start of the process–correcting

1 "Structural litigation is a type of litigation where the violation challenged arises from the operations of a bureaucratic structure, whether public or private, and, due to the characteristics of the context in which it occurs, resolution requires the restructuring of the functioning of that structure. [...] Structural cases are legal actions aimed at restructuring a public or private institution whose behavior causes, fosters, or enables structural litigation" (Vitorelli, 2018, pp. 340-347, authors' translation).

the violation and achieving conditions that prevent its future recurrence–occurs;

5. revising the plan based on the evaluated results to address aspects initially unrecognized or to mitigate unforeseen side effects;
6. implementing the revised plan, which restarts the cycle which continues until the litigation is resolved, meaning, in the context of structural litigation, until the social result deemed appropriate given the circumstances of the conflict is achieved (p. 297, authors' translation).

In contrast, Didier Jr., Zaneti Jr. and Oliveira (2020, p. 65) argue that structural litigation is a bifurcated process, which involves initial recognition and definition of the structural problem, followed by definition of the necessary restructuring plan. Arenhart (2013, p. 394), meanwhile, maintains that structural processes involve cascading decisions; from the initial generic and broad decision, a chain of new decisions subsequently emerges, along with more specific measures that advance the protection of the rights initially recognized. Synthesizing the concepts, structural litigation refers to complex problems that must be addressed through a structural process, in which the Judiciary issues a decision outlining structural remedies intended to resolve the situation involving human and fundamental rights violations. The theory of structural processes entails various types of remedies, such as "structural injunctions" (from the U.S. Supreme Court), the "unconstitutional state of affairs" (from the Constitutional Court of Colombia), and "meaningful engagement" (from the Constitutional Court of South Africa) (Machado Segundo & Serafim, 2022, p. 94).

To briefly expand on these remedies, which originated from the jurisprudence of different constitutional courts, "structural injunctions" are issued by the Supreme Court of the United States, and are aimed at remedying systemic problems with broad social impact. Cases typically involve constitutional interpretation and may result in the restructuring of governmental institutions or the implementation of public policies through judicial action. The structural injunction, in the American context, originated as a judicial mechanism aimed at eliminating racial segregation in schools. It emerged as federal judges sought to implement the Supreme Court's 1954 decision in *Brown v. Board of Education*, which mandated the transformation of segregated school systems into unitary and non-racial systems (Fiss, 2022, p. 35).

However, due to its success, it ended up being used in other cases as well. According to Owen Fiss (2022), "by the late 1960s lawyers and judges sought to use the lessons learned in school desegregation cases in other domains. As a result, the remedy crafted in school cases was

employed to reform hospitals, police departments, housing authorities, and prisons" (p. 35).

Considering that the structural judicial process aims to eradicate an ongoing threat to constitutional values through the issuance of structural injunctions, they act as a formal mechanism through which the Court issues directives on how this goal should be achieved, and aim to eliminate the possibility of persistence or recurrence of the violation in the future (Fiss, 1978, p. 11). As such, structural injunctions are not static; they are subject to amendment based on the needs and factual development of the case, which means that:

> the judge maintains a continuous relationship with the institution over a significant period of time. There is no easy, one-shot method of reconstructing an institution; a series of interventions are inevitable, for the defendants' performance must be evaluated, and new directions issued, time and time again. Structural injunctions entail a process of continuous interaction (p. 28).

Therefore, sanctions are issued through supplemental decrees, whereby "in each cycle of the supplemental relief process, the remedial obligation is defined with greater and greater specificity" (p. 36). Thus, the judicial approach to the structural problem is prospective, meaning this type of measure is particularly important in structural reforms.

The "unconstitutional state of affairs", meanwhile, is a doctrine of the Constitutional Court of Colombia aimed at addressing situations involving widespread and systemic rights violations; that is, by declaring an unconstitutional state of affairs, the Constitutional Court of Colombia is asserting that a certain situation entails serious human rights violations, which are typically addressed in comparative constitutionalism under the term "structural cases" (Garavito, 2009, p. 435). Given the extent of the problem, instead of focusing on cases individually, the Court chooses to declare an "unconstitutional state of affairs"—based on certain criteria established in the jurisprudence of the Colombian Court itself[2]

2 Broocke (2021) outlines six criteria defined in the jurisprudence of the Constitutional Court of Colombia, emphasizing that these are not exhaustive or necessarily concurrent, and that the Court may recognize other circumstances in its judgment of future cases. According to the author: "Based on the factual determination of certain indicative circumstances the Court defines whether structural litigation constitutes an ECI [unconstitutional state of affairs], with the factors to be assessed having been established in its own jurisprudence as follows: i) massive and widespread violation of various constitutional rights affecting a significant number of people; ii) prolonged failure by authorities to fulfill their obligations to ensure these rights; iii) adoption of unconstitutional practices, such as incorporating the action for protection as part of the procedure to guarantee the violated right; iv) failure to issue the necessary legislative, administrative, or budgetary measures to prevent the violation of rights; v) the existence of a social problem whose resolution involves the intervention of multiple entities, requires a complex and coordinated set of actions, and demands a level of resources which necessitate a significant additional budgetary effort; and vi) if all affected individuals resorted to the action for protection to obtain their rights, it would result in massive judicial congestion" (p. 36, authors' translation).

—thereby acknowledging the deterioration of a particular sector and pressuring the government to adopt comprehensive measures to address the violations, and to benefit those individuals who were affected by the rights violations resulting from the "unconstitutional state of affairs" but who did not seek legal protection.

This can be observed in practice in Ruling T-025/2004 of the Constitutional Court of Colombia. On that occasion, the Court—reviewing and aggregating 108 *tutela* actions filed in 22 cities across the country by 1,150 displaced families—declared that the situation of internally displaced persons constituted an "unconstitutional state of affairs", resulting from the failure of the state to fulfill its duty of protection (Garavito & Franco, 2015, p. 64).

The decision not only acknowledged the human rights violations but also mandated that the effects of the ruling extend to all displaced persons, regardless of whether they had filed a *tutela* action. Seeking a comprehensive approach to the problem, the Colombian Court issued several orders specifically mandating that the State develop a plan to address the "unconstitutional state of affairs". The Court also committed to monitoring the State's compliance with the provisions of Ruling T-25. To this end, it employed various tools, including conducting public hearings and technical sessions, creating a special compliance monitoring board, and issuing monitoring orders (Garavito & Franco, 2015, pp. 66-67).

The declaration of an "unconstitutional state of affairs" has a practical purpose and, due to the legal and political nature of this doctrine, requires constant monitoring to ensure the effectiveness of the judicial mechanisms to address the unconstitutional situation. Regarding the legal and political function of the "unconstitutional state of affairs", César Rodríguez Garavito (2009, p. 438) identifies its pragmatic nature as its main characteristic. The recognition of an "unconstitutional state of affairs" has a practical purpose, in that it essentially seeks to compel the state to create, implement, fund, and evaluate the public policies necessary to address the massive violation of rights that led to this declaration. It also requires continuous monitoring of all "unconstitutional states of affairs" to ensure that the ruling declaring it is effective and fosters collaboration among the various public and private actors involved in structural cases.

This brief description of the doctrine of the "unconstitutional state of affairs" demonstrates its suitability for addressing structural litigations. Additionally, the primacy of the judicial tools inherent to structural processes is noteworthy, as well as the enhanced institutional and social dialogue, the increased participation of various stakeholders in the process, the ongoing monitoring of compliance with the judicial

decision after issuance of the ruling, and the extension of the decision's effects beyond an individual case.

Finally, it is necessary to explore the "meaningful engagement" tool used by the Constitutional Court of South Africa, by means of which the Judiciary "functions as a driving force that rouses political powers from inertia, promoting a dialogue between judicial and administrative entities, including in this process the population segments affected by State inertia" (Serafim, 2019, p. 109, authors' translation). In a manner very similar to the declaration of an "unconstitutional state of affairs" by the Constitutional Court of Colombia, the theory of "meaningful engagement" aims to foster the development of solutions through collaboration between public authorities and society. To this end, the Court acts as the coordinator of this dialogue, promoting cooperation between public authorities and social actors in the joint creation of structural measures designed to overcome the unconstitutional situation. According to Broocke (2021), this model of judicial action "brings forth a model of dialogic judicial activism, compatible with the idea of 'experimentalist regulation'" (p. 57, authors' translation).

An example of a ruling by the Constitutional Court of South Africa in which the theory of "meaningful engagement" was applied is the *Olivia Road* case, a legal dispute involving approximately 400 residents of informal settlements on the outskirts of Johannesburg. These individuals faced the threat of eviction due to the poor and unsafe conditions of the buildings they inhabited, a controversy that reached the Constitutional Court of South Africa. Prior to the ruling, the Court issued a provisional order requiring the parties involved to "meaningfully engage" to resolve their differences and difficulties based on constitutional values, with the aim of improving the habitability of the buildings and jointly developing a concrete plan for permanent housing. This judicial order reconfigured the power dynamics between the occupants and the public authorities, as it recognized that this vulnerable population had rights, including the right to participate democratically in decision-making (Broocke, 2021, p. 56).

Once the residents and the municipal government committed to dialogue, the parties reached a partial agreement after a number of months. Through this agreement, the municipality committed to suspending the eviction and implementing measures to improve the buildings and the quality of life of the residents, including cleaning the residential areas, providing access to water, and ensuring basic sanitation (Casimiro, 2022, p. 32).

In this context, the Constitutional Court took on the responsibility of facilitating dialogue and managing the structural aspects of the process, and the encouragement to "meaningfully engage" expedited

the implementation of obligations related to economic and social rights. This approach has proven effective in reconciling the various interests involved in decision-making, fostering proactive and honest dialogue among the parties. Additionally, the Constitutional Court plays the role of facilitator in managing structural procedures, defining the general objectives, fostering constructive dialogue, overseeing the judicial implementation of agreements, and setting deadlines for the provision of necessary information (Broocke, 2022, p. 45).

Despite the similarities between the South African and Colombian theories, there is a substantial difference between them. According to Broocke (2021, p. 56), unlike the "unconstitutional state of affairs", "meaningful engagement" does not involve mechanisms for monitoring compliance with the provisions of the ruling. In the Colombian context, such mechanisms serve as the basis for the issuance of supplementary measures during the enforcement phase of the judicial decision.

In consideration of the valuable doctrinal contributions of all these theories, the path to developing a model of structural procedure that accommodates the local specificities of Brazil while encompassing the central ideas of structural processes from around the world should entail several actions, all aimed at ensuring the adequate resolution of structural disputes, such as: 1) Promoting broad social participation in the structural process and prioritizing judicial action guided by democratic experimentalism; 2) Critically importing experiences and structural remedies from abroad; and, 3) Incorporating mechanisms for monitoring and supervising the effectiveness of compliance with the actions set forth in the structural decision.

Regarding democratic experimentalism, this theory arose in American doctrine in articles like Charles F. Sabel and William H. Simon's "Destabilization Rights: How Public Law Litigation Succeeds", published by the Harvard Law Review in 2004. Seeking to adapt the theory to the Brazilian context, Lanza (2022, p. 181) argues that experimentalism is a judicial method aimed at implementing court decisions, based on premises such as consensus, broad participation by the parties and stakeholders, and ensuring court proceedings are transparent and public. The author asserts that the experimentalist method is compatible with the Brazilian legal system—especially since the enactment of the Civil Procedure Code of 2015—by adopting the same logic that justifies the adaptation of structural process theory to the Brazilian legal context, namely that: "the underlying premises and doctrinal foundations are the same. After all, experimentalism is intended to be a model used 'within' a structural process, meaning it is a part of that process" (Lanza, 2022, p. 181, authors' translation).

It has been observed that, in terms of democratic experimentalism, in other countries participation by civil society is an essential element in the development of the structural process, necessary to overcome antidemocratic objections and claims of a lack of institutional capacity on the part of the Judiciary to propel social transformations. In this vein, Jobim (2022) argues that a model of structural process theory "would, therefore, involve democratic construction of a procedural law that encompasses, initially, the possibility of dialogue between the Judiciary, the Executive, the Legislature, and Civil Society" (p. 862, authors' translation).

This arena for participation and dialogue also significantly contributes to overcoming the view of structural judicial interventions as undemocratic and lacking the power to effectively alter social reality due to judges' lack of technical knowledge. On this point, Garavito and Franco (2015, pp. 240-241), aligning with the proposals in favor of democratic experimentalism and dialogical activism in reformulating the logic of judicial interventions in this type of process, argue that this stance has the potential to overcome these objections[3].

When considering experimentalism as an adequate method for conducting a structural dispute process, it is important to note that the essence of experimentalism consists of: negotiation between the parties, with the possibility of integrating other interested individuals and experts into the deliberations; judicial intervention of the "rolling rule" type, meaning a decision that establishes basic rules but has a provisional nature, so that such measures can be continuously reassessed, including constant participation by the involved parties to evaluate the effectiveness of the adopted measures; and transparency, ensuring the measures adopted based on the "rolling rule" are made public, thus guaranteeing oversight of compliance with the structural measures plan (Sabel & Simon, 2017, pp. 60-71 and 73).

Therefore, the importance of incorporating democratic experimentalism into judicial practice is evident, not only prioritizing continuous dialogue between the Judiciary and political powers but also integrating the population affected by state negligence into the judicial discussion, fostering their broad inclusion in the deliberative process aimed

3 "These interventions respond to the objection about the judges' lack of technical knowledge. By monitoring compliance with their rulings through a follow-up process that involves not only public officials, but also a wide variety of actors with relevant knowledge (professional associations, NGOs, victims' organizations, academic experts, among others), dialogic courts can promote the collaborative search for solutions or, at least, a public discussion of possible actions. The direct and indirect effects that can arise from this dialogue include the unblocking of public policy processes, improved coordination between previously disjointed public agencies, and the development of public policies framed in a language of rights. These changes, in turn, can prevent the indiscriminate judicialization of conflicts" (Garavito & Franco, 2015, p. 241).

at mitigating political omissions (Machado Segundo & Serafim, 2022, p. 99).

Moreover, this dialogical dimension will characterize the construction of the experimentalist decision, as it is crucial that alternatives, trials, and errors be consistently discussed among the involved parties:

> whenever a particular case involves structural issues of public interest, the measures taken by the authorities and other involved actors must be experimental and complex. If there is no room for the cycle of "attempt → failure; attempt → success; attempt → discovery of new paths," the desired solution can never be achieved. This is because matters related to public policies, by their nature, depend on unpredictable and contingent variables that can only be identified in practice and at the time of their implementation or adjustment (França, 2022b, p. 406, authors' translation).

Although models involving democratic experimentalism and structural remedies have been successful in countries around the world, the importation of such processes must be conducted critically. As highlighted by Machado Segundo and Serafim (2022, p. 99), in comparative studies the application of the inductive principle must be scrutinized, meaning that the mere identification of effective decisions in other jurisdictions cannot ensure the effectiveness of the structural remedy in a context different from its origin. In this process, it is necessary to consider the (legal/political/historical/social) context in which that structural remedy was conceived, and adapt it to the needs of the new reality in which it will be implemented.

The risk of an uncritical transplant of foreign structural experiences is evident, as will be discussed further, in the presence of traits of this decontextualized inductive reasoning in the content of Brazilian Federal Senate (Senado Federal) Bill no. 736/2015, which seeks to incorporate, in their entirety and without critical readjustment, structural remedies from the Constitutional Courts of Colombia and South Africa.

The implementation of a structural decision needs to be monitored, either through oversight carried out by the Judiciary or by an expert panel responsible for it, in order to measure progress and setbacks in addressing the problem and, if necessary, to request the Judiciary to review or establish new structural remedies. In this regard, according to Osuna (2015, pp. 114-115), the implementation of the decision relies on periodic and public monitoring mechanisms. Thus, by preserving "in order to maintain their jurisdiction over the case after sentencing, dialogic courts often issue new decisions in light of the progress and setbacks of the process, and encourage discussion among the actors in the case in public and deliberative hearings".

Imposing discipline on structural litigation within Brazilian legislation is no simple task. In addition to the points listed above, obstacles exist related to the need for restructuring in the application of certain legal principles (such as the principle of demand, the flexibility of judicial procedure, and party cooperation), as well as greater economic expenditure and funding, not only for the litigation process itself but also for the phase of monitoring compliance with structural decisions (Mossoi & Medina, 2020, p. 267).

If the absence of specific regulation has generated problems, paradoxically, deficient standardization can be equally detrimental. This is because a rigid procedural process in structural litigation, the incorporation of a procedural framework that obligates the Court to establish overly rigid, rigorous, and unilateral structural remedies, and the lack of mechanisms to effectively monitor compliance with the decision, can jeopardize the effectiveness of structural litigation processes in Brazil.

Specifically regarding procedural rigidity, it is worth emphasizing that the procedure through which structural litigation unfolds needs to be imbued with flexibility. This is because strictly delimiting procedural intricacies for this type of litigation beforehand implies ignoring the fact that structural disputes have distinct objects, thus varied procedures are required to address each case (Didier Jr. *et al*., 2020, p. 53).

In contrast to the criticisms directed towards regulation, minimal standardization specifically addressing structural claims could contribute to predictability and legal certainty in the application of structural judicial techniques (Bockenek, 2022, p. 32). It is worth noting the legislative progress in this regard with the enactment of the new provisions of Law no. 13,665/2018, the "Introduction to Brazilian Law" Statute (LINDB in Portuguese), which details the precepts to be followed and applied by judges and administrators in their activities, especially in the context of disputes, conflicts, and structural processes. Among the aspects addressed in the LINDB, the consequentialism of judicial decisions and the establishment of public consultations as a tool for democratic participation in the judicial decision-making process stand out (Bockenek, 2022, p. 35).

It is evident that the theory of structural processes for structural disputes still has a long way to go. Many aspects of the traditional model of civil procedural law still need to be reinterpreted (such as those involving claims, parties, res judicata, standing, evidence, judgment, and enforcement) to accommodate the procedural requirements of structural litigation (Arenhart, 2013).

Moreover, beyond the reinterpretation of traditional legal institutions and legislation to accommodate this new procedure, there is a need for

a shift in the mindset of those involved in structural litigation (with emphasis on the Judiciary, the Public Prosecution Service, and the Public Defender's Office). They must adopt new tools, techniques, and even a new way of thinking about structural litigation in their daily practices. The enactment of laws is useless in the absence of a genuine political determination to promote change, accompanied by staff training, development of technical skills, and improvement of the appropriate infrastructure (Santos, 2021, p. 15).

After discussing some of the essential concepts and assumptions required to understand how structural disputes should be processed judicially, the next step is to analyze how the Brazilian Federal Supreme Court (STF) has dealt with this lack of regulation on the subject and provided solutions to structural disputes within its jurisdiction.

III. THE ABSENCE OF LEGISLATIVE REGULATION OF STRUCTURAL LITIGATION AND THE NEED FOR INTERNAL RESTRUCTURING OF THE BRAZILIAN FEDERAL SUPREME COURT'S JUDICIAL PROCEDURES FOR HANDLING STRUCTURAL DISPUTES

Due to the increase in debates on structural disputes and litigation processes in Brazil since 2014, three bills[4] have been introduced with the intention of providing the groundwork for structural litigation in Brazil.

The pioneers spearheading this work were the proceduralists Ada Pellegrini Grinover and Kazuo Watanabe, affiliated with the Brazilian Center for Judicial Studies and Research, who were the main parties responsible for drafting the text of Bill (PL) No. 8,058/2014, subsequently introduced in the Chamber of Deputies by Federal Deputy Paulo Teixeira.

This bill aimed to implement a procedure to control judicial interventions in public policy matters. Although not its main focus[5], it ended up touching on the topic of structural litigation, not only by foreseeing characteristic elements of structural disputes but also because structural litigation is an effective means of reviewing and correcting possible omissions and/or inadequacies in public policies. When public policies are inadequate, they restrict fundamental rights, which can lead to systemic violation of human rights.

4 In addition to these previously presented bills, on March 4, 2024, the Brazilian Federal Senate established a commission composed of 15 jurists responsible for drafting a new proposal for a preliminary draft of a Structural Litigation Process Law in Brazil within 180 days (Ato do presidente no. 03/2024, 2024).

5 The term "structural" is mentioned only once in the Bill, in Article 2, paragraph 1, item I, which establishes that the special process for judicial review of public policies will be imbued with structural characteristics, aiming to promote institutional dialogue among the branches of government (Projeto de Lei n° 8.058, 2014, p. 2).

However, in 2023 Bill no. 8,058/2014 was archived at the end of the legislative term, having failed to achieve significant success in the task of creating structural operational standards to guide judicial interventions in public policies.

In 2015, with "Claim of Non-compliance with a Fundamental Precept" (ADPF in Portuguese) Ruling no. 347 and the declaration of an "unconstitutional state of affairs" (ECI in Portuguese) in Brazilian prisons, concerns grew regarding inappropriate use of the ECI by the Brazilian Federal Supreme Court. In view of this, Senator Antonio Carlos Valadares introduced Senate Bill no. 736/2015, aiming to establish requirements for and limits on judicial reviews of the constitutionality (both concentrated and diffuse) of public policies by the Brazilian Federal Supreme Court, as well as to regulate the declaration of "unconstitutional states of affairs" and the issuance of orders for "meaningful engagement" by the Court to affected groups and those safeguarding rights through structural litigation (Projeto de Lei do Senado N° 736, 2015, p. 7).

Still, as noted by Casimiro, França, and Nóbrega (2023a, p. 442), this Senate Bill (PLS) has an evident flaw, in that it attempts to combine distinct structural remedies, namely the "unconstitutional state of affairs" (ECI) developed by the Constitutional Court of Colombia and "meaningful engagement", which originated in the South African Constitutional Court. There is no obstacle to the use of such structural remedies within the Brazilian jurisdiction, as previously observed, as the ECI recognizes systemic violations and pressures the State to find solutions to structural problems, emphasizing the need for the State to continuously fulfill rights through public policies and the dialogical integration of affected groups. However, the incorporation of these new institutions must be carried out critically and based on evidence, with the decision-making standards of other countries adapted to the reality to which they will be transported, all based on an effective legal-cultural translation of the procedural model (Lima & Serafim, 2021, pp. 209-210).

After numerous debates and years of research on the development of structural litigation processes in Brazil, in 2021, the Ada Pellegrini Grinover Bill was introduced in the Chamber of Deputies (Bill no. 1,641/21, a replacement for Bills 4,441/20 and 4,778/20)[6], proposing a new Law on Public Interest Litigation (Lei da Ação Civil Pública). This bill is related to our theme, as public interest litigation represents a

6 By the time this research was being concluded, Bill no. 1,641/2021 had been combined with Bill No. 4,441/2020 and was in the process of being considered by the Committee on Constitution and Justice and Citizenship.

valuable procedural instrument for seeking the resolution of structural disputes by the Judiciary[7].

Although legislative proposals have not achieved effective progress in establishing minimum standards to be taken as guidelines for structural litigation, in practice, courts and judges in the country—especially those under the scope of the Brazilian Federal Supreme Court (STF)—attentive to doctrinal developments and facing the emerging need to address structural disputes, have independently incorporated special parameters for the handling of structural disputes through the avenue of structural litigation.

An example of this is Resolution 790/2022 of the Brazilian Federal Supreme Court (STF), dated December 22, 2022, through which the highest Brazilian court incorporated, for the first time, a differentiated procedure for handling structural disputes within its jurisdiction. The Resolution established the "Center for Alternative Dispute Resolution of the Brazilian Federal Supreme Court" (Cesal/STF), which was integrated into the "Center for Coordination and Support for Structural Demands and Complex Litigation" (Cadec/STF in Portuguese) (Resolução n. 790, 2022, p. 2).

This center was responsible for assisting, when so requested by the Rapporteur for the case (Article 4), in resolving structural claims and complex disputes under the jurisdiction of the Brazilian Federal Supreme Court. This meant that the structural problems outlined in actions referred to the Cadec/STF underwent detailed analysis in order to define the measures, including goals and deadlines, required to manage the issue appropriately (Article 5) (Resolução n. 790, 2022, pp. 2-3)[8].

Furthermore, it is noteworthy that Resolution 790/2022 has advanced in aspects that the previously analyzed Senate Bills did not thoroughly explore. This is the case, for example, with the provision of Article 6, which stipulated that that the issue should be periodically reassessed (within a maximum period of six months). Despite its significant contribution

7 One example of this is the Public Interest Litigation (ACP) regarding coal, which addressed environmental protections in a coal mining area of Criciúma, Santa Catarina, aiming to develop and implement an environmental recovery plan in the area. For an analysis of the case through the lens of structural litigation, see Arenhart (2017).

8 Before its elimination, the Cadec/STF even participated in Brazilian Extraordinary Appeal 1.366.243/SC, which concerned recognition of the general repercussions of the passive legitimacy of the Union and the jurisdiction of the Federal Courts in disputes concerning the supply of medications registered with the National Health Surveillance Agency (ANVISA) but not standardized in the Unified Health System (SUS). According to the decision: "Referring the case to the Center for Coordination and Support for Structural Demands and Complex Litigations (Cadec/STF) would prioritize alignment of the need for federal participation in cases involving non-standardized medications under the SUS (Unified Health System) with the facilitation of access to justice and free legal aid. Additionally, it would enhance the institutional dialogue of the Judiciary both in terms of facilitating the conciliatory and interventionist measures inherent to complex litigations and involving other public and private bodies as well as civil society in the search for solutions" (Ato Regulamentar interno que altera o Regulamento da Secretaria do Supremo Tribunal Federal, 2023, p. 3, authors' translation).

to the handling of this type of litigation, the structure established by Resolution 790/2022 was abolished in 2023 during Minister Luís Roberto Barroso's term as president of the Court and replaced and enhanced with the creation of the Jurisdiction Support Advisory (AAJ in Portuguese), which operates alongside the Center for Complex Structural Litigation (Núcleo de Processos Estruturais e Complexos - Nupec in Portuguese)[9]. According to Article 17, paragraph 1, item I of the current Regulations of the Secretariat of the STF, Nupec is responsible for assisting in the identification and processing of structural and complex actions. Additionally, it is tasked with preparing opinions and technical notes on cases with economic and social impact, integrating monitoring bodies for structural actions, and assisting in the development of indicators for monitoring, evaluating, and analyzing the effectiveness of the measures adopted (Regulamento da Secretaria do Supremo Tribunal Federal, 2024, p. 13).

The significant innovation brought about by the creation of Nupec is its role in developing indicators for measuring the effectiveness of the measures established through processes, as well as its support in supervising and monitoring the implementation phase of decisions, including the possibility of establishing monitoring bodies to handle each structural process in a tailored manner (Ato Regulamentar interno que altera o Regulamento da Secretaria do Supremo Tribunal Federal, 2023, pp. 2-3).

The positive impacts of the renewed structure are already evident, particularly regarding transparency, an inherent characteristic of structural processes. This is demonstrated by the inclusion of a dedicated space on the Brazilian Federal Supreme Court's website for the Center for Complex Structural Litigation to record its ongoing and completed actions. Currently (with data from October 2023 to February 2024), the platform states that Nupec has been involved in: three processes in the monitoring phase (ADPFs 347, 635, and 709); 22 technical hearings and meetings; the issuance of 16 technical notes, and the provision of

9 Court President Minister Luís Roberto Barroso, in an administrative regulatory act, presented a proposal for restructuring and the creation of the Constitutional Jurisdiction Support Advisory (AAJ), arguing that the abolition of Cesal did not pose a risk nor ignore the emerging issue of structural disputes. Instead, according to the President of the STF: "The new advisory body will structure, expand, and enhance the current Center for Alternative Dispute Resolution (Cesal in Portuguese), equipping it with an interdisciplinary team suitable for its extensive functions. [...] Considering the increase in the number of structural cases coming before the Supreme Federal Court (STF) and the growing demand for consensual methods to resolve conflicts, there is a recognized need to significantly expand the team responsible and transform these centers into one specific administrative unit, tasked with providing specialized support for the judicial process, at the request of the Presidency and the Offices" (Ato Regulamentar interno que altera o Regulamento da Secretaria do Supremo Tribunal Federal, 2023, p. 2, authors' translation).

assistance in 16 structural/complex decisions[10] (Núcleo de Processos Estruturais Complexos – NUPEC, 2024).

However, it is important to highlight that even before Resolution 790/2022 addressed the issue under the scope of the Brazilian Federal Supreme Court, ordinary courts were already facing claims related to structural problems. This led them to seek, to the extent possible according to the delimitation of their competencies, to create judicial mechanisms to address the particularities of these actions in the absence of specific regulations and the inadequacy of the traditional model of bipolar litigation for addressing structural problems.

An example of this is the 6th Regional Federal Court, which, on October 6, 2022 (before the publication of Resolution 790/2022), incorporated into its Internal Regulations the creation of a Deputy Coordinator for Structural Claims and Special Projects, to serve as a support to the Court in structural claims (Regimento interno do Tribunal Regional Federal da 6ª Região, 2022, p. 34).

With a similar aim of providing a foundation for addressing structural demands within its jurisdiction—prior to the initiative of the 6th Regional Federal Court—the Conciliation System Coordination Office (Sistcon in Portuguese) of the 4th Regional Federal Court, through Ordinance 49/2022, dated January 31, 2022, created the Office of Coordination of Support for Structural Demands, with the main objective of assisting jurisdictional units in addressing complex disputes, preferably through consensual means (Portaria n° 49, 2022, p. 1).

Like the Brazilian Federal Supreme Court, the 4th Regional Federal Court maintains a website where it lists structural processes submitted to Sistcon and those assisted by the Office of Coordination of Support for Structural Claims (which is currently engaged in nine ongoing claims). Additionally, the website highlights the pioneering nature of the initiative, its main objectives, and prospects for the future of addressing structural claims[11] (Sistema de Conciliação da 4ª Região - Demandas Estruturais, 2023).

10 More recently, during a review of this study on May 27, 2024, it was noticed that these numbers have increased. Up to this date, Nupec had been involved in: seven processes in the monitoring phase (ADPFs 347, 635, 709, 743, 746, 760, and 857); 31 hearings and technical meetings; the issuance of 19 technical notes, and the provision of assistance in 19 structural/complex decisions (Núcleo de Processos Estruturais Complexos – NUPEC, 2024).

11 "The goal of the Structural Litigation Commission of the 4th Regional Federal Court is to support judges in developing structural litigation techniques to be applied to ongoing cases, as well as to disseminate the results of the application of these techniques in judicial processes. The pioneering nature of this initiative involves challenges both in terms of obstacles and the limits of applicability. However, the experience laboratory for structural claims is not new to the judiciary and is already established. Certainly, progress in studying procedural techniques will yield better results than the absence of any technique and the continued processing of cases in a non-structural, individualized manner without an overarching commitment to public policy, or without addressing complex claims effectively. In this context, new tools and functions for legal practitioners involved in judicial processes can be subject to evaluation, study, research, and theoretical-practical investigation to determine the extent to which the

The distinct approaches adopted by the 4th and 6th Regional Federal Courts is evident. While the 6th Regional Federal Court focused on the creation of a coordination office tasked with monitoring structural disputes within the judicial sphere, the ordinance issued by the 4th Regional Federal Court includes the stipulation that these claims should preferably be addressed using consensual means when possible. This dialogical dimension and the possibility of consensual resolution of disputes, both judicially and extrajudicially, are typical of structural processes and are closely aligned with the provision of Article 2a, III of Senate Bill No. 1,641/2021[12]. In such scenarios, if the Senate Bill is approved, the 4th Regional Federal Court will already be practically familiar with consensual dispute resolution in structural litigation, as it has already established a specialized center within the conciliation system dedicated to addressing structural demands. However, it will still require standards to guide its actions in the adversarial resolution of structural claims. Therefore, replication of this experience by other courts is recommended in order to provide stakeholders with the option of using consensual means to develop solutions to structural conflicts.

In light of the aforementioned, it is evident that the absence of regulatory norms for structural processes in Brazil has not hindered their recognition by the Judiciary; on the contrary, it has led to intense developments in terms of the protection of rights being sought through structural litigation. It is undeniable that both the Brazilian Federal Supreme Court and lower courts have made efforts to develop internal regulations to assist court staff and judges in handling structural processes, recognizing that traditional judicial procedures established in civil procedural law are insufficient for this type of claim. Structural disputes require complex reorganization of the functioning structures of the Judiciary. Moreover, such disputes demand the incorporation into adjudication practices of assumptions inherent in the theory of structural processes, which will be analyzed further below to identify whether they should be incorporated into the practice of the Brazilian Federal Supreme Court.

judicialization of public policy, with its challenges and potential, meets or fails to meet the demands of citizens and society through structural litigation. Furthermore, transparency, communication, and public values and interests are also assessed through the adoption of new procedural practices, which are always guided by the judiciary's mission and values, aiming for effective and concrete results for society as a whole" (Sistema de Conciliação da 4ª Região - Demandas Estruturais, 2023, authors' translation).

12 Art. 2. Collective protection is governed by the following principles, among others: III - Prevention and consensual and integral resolution of collective conflicts, whether judicially or extrajudicially, through methods such as conciliation, mediation, negotiation, and other means considered appropriate for consensual resolution" (Projeto de Lei n° 1.641, 2021, p. 01, authors' translation).

IV. AN ANALYSIS OF THE INCORPORATION OF PREMISES INHERENT TO STRUCTURAL PROCESSES INTO THE BRAZILIAN FEDERAL SUPREME COURT'S ADJUDICATION OF STRUCTURAL DISPUTES

During the initial stage of this study, three elements were identified that, from the theoretical perspective adopted in this work, provide the foundations for the appropriate development of structural processes: 1) Promotion of broad social participation in structural processes and the primacy of judicial action based on democratic experimentalism and dialogue; 2) Critical importation of structural experiences and remedies from other countries; and 3) Incorporation of mechanisms for monitoring and ensuring the effectiveness of compliance with the actions provided for in the structural decision[13].

Given these doctrinal elements and the restructuring carried out by the Brazilian Federal Supreme Court to accommodate structural disputes in the absence of minimum legislative standards on the subject in the Brazilian legal system, an aim of this article is to explore whether the decisions of the Brazilian Federal Supreme Court which are monitored by the Center for Complex Structural Litigation of the Brazilian Federal Supreme Court (ADPFs 635, 709, and 347)[14] have incorporated these assumptions.

IV.1. Claim of Non-compliance with a Fundamental Precept 347

ADPF 347 stands as one of the major milestones concerning this theme, as the resulting decision sparked much academic legal writing on structural disputes and the "unconstitutional state of affairs" (ECI) in the country. The case deals with the violation of human and fundamental rights resulting from the degrading situation in the Brazilian prison system, where overcrowding, homicide, torture, sexual violence, lack of minimum health and hygiene conditions, absence of water, lack of access to legal assistance, and the control of criminal organizations within this environment make the execution of sentences and rehabilitation unachievable (Projeto de Lei do Senado n° 736, 2015, p. 5).

13 Consonant with the identification of these assumptions, Mello (2024) recognizes several additional elements essential to structural processes: "Without procedural flexibility, broad participation by all parties involved, experimentalism, transparency, and accountability, the judiciary cannot effectively address the complexity of structural cases" (2024, p. 369, authors' translation).

14 As highlighted by Patrícia Perrone Campos Mello (2024, p. 366), these three cases exemplify structural processes in the Brazilian Federal Supreme Court. Furthermore, they share some similarities, as they all: deal with massive human rights violations caused by systemic failures in the formulation and/or implementation of a public policy aimed at protecting vulnerable or stigmatized groups; involve actions or omissions by various public authorities, and require a judicial stance not yet practiced by the Brazilian Federal Supreme Court.

The Brazilian Federal Supreme Court granted interim relief, acknowledging that the situation in the national prison system constitutes an "unconstitutional state of affairs" (ECI) resulting from the state's inaction in the face of the structural problem that causes widespread violation of fundamental rights. This situation requires the establishment of flexible, adaptable structural measures that undergo constant monitoring by the Brazilian Federal Supreme Court and other government agencies, as well as by affected groups of individuals (Projeto de Lei do Senado n° 736, 2015, p. 36).

In the decision, Rapporteur Minister Marco Aurélio further highlighted that the case constitutes a structural dispute, and in such contexts there arises a need for the implementation of public policies or the adoption of corrective measures to existing public policies that fail to achieve their intended objectives. These actions include the allocation of budgetary resources, adjustments in institutional arrangements, and new interpretations and application of criminal laws. In summary, it is imperative to promote a comprehensive set of structural changes, which encompasses the broad participation of government authorities, due to their systemic responsibility in the face of the shortcomings of state actions (Projeto de Lei do Senado n° 736, 2015, p. 29).

In our search for evidence of the assumptions of structural processes in the decision, we begin with an examination of the importation of structural experiences and remedies from other countries, specifically the importation of the "unconstitutional state of affairs" structural remedy from the Constitutional Court of Colombia (CCC) (Albuquerque & Serafim, 2020, p. 649).

Colombia confronted, and continues to confront, structural problems like those of the Brazilian prison system. This prompted the CCC, through Judgment T-153 of 1998, to implement judicial measures aimed at reformulating prison policies in the country. However, the stance of that Court proved insufficient, resulting in a decision of a palliative nature[15] due to the excessive rigidity and unilateralism of the measures imposed, failure to address the root cause of the problem, and the absence of mechanisms to monitor compliance with the judicial decision.

Seeking to apply the ECI to restructure the Brazilian prison system, Colombia's Judgment T-153 was used by the petitioner of ADPF 347 as an argument to justify the application of the ECI to their case. However, this argument overlooked two issues: 1) the unsatisfactory

15 The inefficiency of Judgment T-153 is evidenced by the persistence of the unconstitutional state of affairs even after the decision, leading to subsequent recognition of the unconstitutional state of affairs in the prison system in two additional judgments, T-338 of 2013 and T-162 of 2015.

results and failure of the decision to provide solutions to the problem in the Colombian context; and 2) the attempt to uncritically transplant the theory, by means of the principle of induction, without rigorously adapting the model of the structural remedy to the legal and factual reality of Brazil. Additionally, the petitioner of ADPF 347 made identical requests to those requested in Judgment T-153 (Machado Segundo & Serafim, 2022, pp. 102-103).

It is important to note that authors such as Machado Segundo and Serafim (2022, p. 103), Magalhães (2019, pp. 31-32), and Vieira and Bezerra (2016, p. 221) have a highly critical view of how the ECI was recognized by the Brazilian constitutional court. In the case of ADPF 347, "it becomes clear that the importation of the ECI can occur uncritically, based on inductive reasoning, without proper observation of the context in which it was produced and without the necessary accommodations to the Brazilian reality" (Machado Segundo & Serafim, 2022, p. 104, authors' translation).

Focusing on the fact that the ECI was incorporated into the decision without an institutional redesign or the development of assertive criteria for identifying an ECI, Magalhães (2019) argues that the content of ADPF 347 reveals:

> that the characterization of the assumptions justifying the declaration of an ECI (unconstitutional state of affairs) in Brazil is inconsistent; the precautionary measures granted are ineffective, there is an unjustified delay in the judgment of the merits, the authorities have provided narrow responses of the same nature as traditionally developed policies in Brazil, and the ability of a supreme court to change a factual state of affairs through law is questioned (p. 31, authors' translation).

Despite this, there is no doubt about the appropriateness and importance of recognizing and applying the ECI to solve the structural problem of prisons; however, according to Vieira and Bezerra (2016), the way this doctrine is crafted can jeopardize the effectiveness of the theory, since:

> acceptance of the "Unconstitutional State of Affairs" by Brazilian doctrine and jurisprudence, without considering the urgent need for a profound institutional redesign — not only of the STF's decision-making process but also of our prison policy, through the creation of new mechanisms for deliberative participation, monitoring, and social control — ultimately undermines it. Furthermore, it should not be overlooked that, regardless of the origin, the incorporation of new ideas and legal mechanisms requires substantial preliminary social and institutional support to ensure their operability and effectiveness (p. 221, authors' translation).

On the other hand, the decision acknowledges the need for dialogue, not only institutional but also with civil society. However, despite catalyzing this dialogue and overseeing the effectiveness of the measures to be adopted to correct public policies, the Brazilian Federal Supreme Court does not assume the responsibility of delimiting the specific content of these policies or detailing the means necessary to achieve the intended result. Its role is limited to acting as an "institutional coordinator" of changes in public policy with an "unblocking effect"[16] (Projeto de Lei do Senado n° 736, 2015, p. 37).

In his opinion, Rapporteur Minister Marco Aurélio delimits the responsibilities of the Court[17] in the face of the unconstitutional state of affairs in the prison system. The Minister argues that it is the Court's responsibility to awaken the other public authorities from a state of inertia, to encourage the implementation of public policies, to promote political and social dialogue about the situation, as well as to monitor the process of implementation of the measures in order to ensure their effectiveness in solving the problem. Additionally, in support of the experimentalist model, the Rapporteur Minister states that: "flexible orders under monitoring prevent judicial supremacy while promoting the institutional integration envisioned by Minister Gilmar Mendes, formulated within the framework of cooperative constitutionalism" (Projeto de Lei do Senado n° 736, 2015, p. 37, authors' translation).

Considering this point, a strong alignment with the experimentalist approach to structural litigation is observable, as the Brazilian Federal Supreme Court encourages political deliberation among the parties and including civil society on the problem, establishes flexible measures, and takes responsibility for monitoring and measuring the effectiveness of the solutions implemented.

Regarding democratic experimentalism and the incorporation of mechanisms to monitor and ensure the effectiveness of the actions prescribed in the structural decision, the decision mentions that it is the responsibility of the Brazilian Federal Supreme Court to coordinate the actions of government agencies in implementing the measures, as well as to evaluate the effectiveness of the solutions adopted (Projeto de Lei do Senado n° 736, 2015, p. 36). In a new decision issued on October 4, 2023, the Brazilian Federal Supreme Court noted that the structural litigation process will follow a two-phase model—in line with the model

16 As noted by Magalhães (2019), "In the case of the prison population, two institutional blockages exist: a) parliamentary underrepresentation (prisoners cannot vote or be elected) and b) the unpopularity of these individuals (there is no political priority for public spending on them, meaning they constitute a socially disregarded minority)" (p. 8, authors' translation).

17 At this point, the Minister's concern regarding the issue of judicial self-restraint, respect for the Legislature, and the separation of powers, is perceptible. Although these topics are relevant to the discussion about the legitimacy and limits of the Supreme Court's actions, these themes are beyond the scope of this study, which focuses on structural litigation.

proposed by Didier Jr., Zaneti Jr., and Oliveira (2020, p. 65)—endowed with flexibility and characterized by extensive institutional and social dialogue[18] (Ato Regulamentar interno que altera o Regulamento da Secretaria do Supremo Tribunal Federal, 2023, p. 5).

For the purpose of mitigating the situation, the Brazilian Federal Supreme Court stipulated that the Union, the States, and the Federal District, together with the National Council of Justice (Conselho Nacional de Justiça - CNJ in Portuguese), should jointly develop (within six months) and execute (within three years) plans aimed at solving the structural problem. Such plans would be subject to the approval of the Brazilian Federal Supreme Court, and their implementation would be monitored by the CNJ, with additional supervision by the organs of the Brazilian Federal Supreme Court (Ato Regulamentar interno que altera o Regulamento da Secretaria do Supremo Tribunal Federal, 2023, pp. 331-332).

Based on the central axes defined by the Brazilian Federal Supreme Court decision for the elaboration of the National Plan to Address the "unconstitutional state of affairs" in Brazilian prisons[19], on April 29 and 30, 2024, the National Council of Justice (CNJ)—through the Department of Monitoring and Oversight of the Penitentiary System and the System of Execution of Socioeducational Measures of the National Council of Justice (DMF in Portuguese)—and the Ministry of Justice and Public Security—through the National Secretariat of Penitentiary Policies (SENAPPEN in Portuguese)—held a public hearing to gather proposals concerning the elaboration, implementation, monitoring, and evaluation of the National Plan required by ADPF 347.

Both physical and virtual hearings were held, allowing interested parties to participate providing they registered beforehand. The target audience included institutes, research groups, and laboratories linked to higher education institutions, civil society organizations, social movements,

18 "4. Such processes involve a two-phase, dialogical, and flexible solution, consisting of: a first phase, recognizing the state of constitutional non-compliance and the goals to be achieved; and a second phase, detailing the measures, approving them, and monitoring the execution of the decision. 5. Promoting interinstitutional and social dialogue legitimizes judicial intervention in public policy matters, incorporating the participation of other branches of government, experts, and the community in crafting the solution, while considering the distinct institutional capacities of each" (Ato Regulamentar interno que altera o Regulamento da Secretaria do Supremo Tribunal Federal, 2023, p. 5, authors' translation).

19 "11. The national plan must encompass the logical framework of a structured public policy, involving various agencies and entities, and must adhere to the objectives and measures outlined in the ruling, which include: (i) controlling prison overcrowding, improving quality, and increasing capacity; (ii) promoting alternative measures to incarceration; and (iii) enhancing controls over release and regime progression. The plan should also define monitoring, evaluation, and effectiveness indicators, as well as the necessary and available resources for its implementation and the associated positive and negative risks. The DMF/CNJ, under the supervision of the STF, will be responsible for monitoring its execution and for the necessary regulations, while the Court will retain jurisdiction in cases of impasse or matters involving reserved jurisdiction" (Ato Regulamentar interno que altera o Regulamento da Secretaria do Supremo Tribunal Federal, 2023, p. 7, authors' translation).

associations of family members, professional associations, entities representing the Judiciary and the justice system, the Executive, and the Legislature, as well as any interested individuals. The next steps include elaboration of the plan, its approval by the Brazilian Federal Supreme Court, and, if approved, a monitored implementation phase under the responsibility of the CNJ and the STF (Audiência Pública para Elaboração, Implementação, Monitoramento e Avaliação do Plano Nacional previsto na ADPF n. 347, 2024).

Despite the criticism, it is possible to perceive in communications from the Brazilian Federal Supreme Court an aim to learn from and reuse experiences from other countries (although often not in the most appropriate manner, that is, by uncritically transplanting structural remedies instead of conducting a cultural- legal translation of these models), seeking to incorporate new models of judicial protection in order to adapt judicial procedures to provide better responses to structural claims. Similarly, the focus on institutional and social dialogue in the process of building adequate and effective judicial solutions is evident, as well as a latent concern with the implementation phase of the decision, one of the crucial points of experimentalist theory.

IV.2. Claim of Non-compliance with a Fundamental Precept 635

Claim of Non-compliance with a Fundamental Precept 635 arose from a situation of violation of human and fundamental rights due to violent police raids and high lethality in the favelas of Rio de Janeiro. It is important to highlight that this situation had previously been addressed by the Inter-American Court of Human Rights (IACHR) in its ruling on the Nova Brasília Favela vs. Brazil Case (2017)[20]. On that occasion, the IACHR ordered the Brazilian State to develop a plan to reduce police lethality, a measure that was not carried out. Daniel Sarmento and João Gabriel Madeira Pontes, lawyers for the PSB, which is party to the "ADPF das Favelas" (as it became popularly known), point out that in the face of this recalcitrant stance regarding compliance with the IACHR's decision, concrete action by the Brazilian Federal Supreme Court is necessary, as it has greater proximity and the capacity to demand action by the State, "especially when considering the weakness of mechanisms for enforcing international decisions. Moreover, in human rights matters, the relationship between international and domestic jurisdiction should be one of complementarity and synergy,

20 According to Osmo e Fanti (2021), "unlike what happened with the ruling from the Inter-American Court of Human Rights, the ADPF directly addresses the connection between police violence and racism, both in the initial petition and especially after the entry of *amici curiae*, with this being one of its central elements from the perspective of the different actors involved" (p. 2120, authors' translation).

rather than reciprocal exclusion" (Sarmento & Pontes, 2023, p. 192, authors' translation).

In its ruling on ADPF 635, the abovementioned plan is referenced and ordered by the Brazilian Federal Supreme Court, including an obligation to engage in genuine dialogue and monitoring of the conventionality of the precedent of the Inter-American Court. The ruling's summary of ADPF 635 states that:

> 2. Although there was already an order from the Inter-American Court to adopt a plan to reduce police lethality, the delay in complying with the decision was exacerbated by the restriction of police operations, as the State did not have a standardized proportionality framework for defining cases of absolute necessity. This justifies reassessment of the precautionary measure to require the development, with a requirement for participation by civil society, of a plan that includes objective measures, specific timelines, and the allocation of the necessary resources for its implementation (Resolução n. 790, 2022, p. 3, authors' translation).

ADPF 635, addressing the structural violence in the favelas of Rio de Janeiro[21], is a clear example of a decision by the Brazilian Federal Supreme Court that encompasses the inherent assumptions of structural litigation, pointing towards a trend of the highest Brazilian court using the method of democratic experimentalism for the resolution of structural disputes. It adopts a judicial approach that recognizes the complexity of structural processes and is not restricted to rigid and predefined jurisdictional approaches, and incorporates experimental decision-making techniques adapted to the needs of the factual situation. In fact, the structural nature of the claim was expressly recognized in the decision, as in a passage from Justice Gilmar Mendes' opinion where he asserts that the action "presents all the characteristics of a structural action. Indeed, in constitutional doctrine, structural actions are understood as those aimed at correcting structural failures in public policies that violate the fundamental rights and guarantees of a significant number of people" (Resolução n. 790, 2022, pp. 494-495, authors' translation).

Minister Luiz Fux, attentive to the specificities of judicial handling of structural litigation, highlights the inherent particularities of this type of claim, stating that:

21 For Sarmento and Pontes (2023), despite the action proceeding without a forecast for a definitive judgment, significant successes have already been achieved through ADPF, such as the inclusion of favela collectives and mothers of victims of police violence in the constitutional process before the Brazilian Federal Supreme Court and the significant reduction in police violence rates following the granting of the first precautionary measures in the action. According to the authors, the voices of the population "are being heard in a central institution of Brazilian democracy, which, unfortunately, is still quite uncommon. This inclusion of often silenced and marginalized voices in the constitutional debate is, in itself, an achievment" (p. 186, authors' translation).

> The case under review qualifies as structural litigation, which requires: (1) more flexible decision-making techniques based on dialogue and cooperation; (2) assigning the responsibility for formulating the plan to the government, with a set deadline and allocation of resources, combined with the Court's retention of jurisdiction to dynamically monitor the progress of alignment of the public security policy of Rio de Janeiro with the Constitution and the laws of the country. Finally, the Court's monitoring of adherence to the guidelines set forth involves: (1) periodic submission of information by the authorities involved; (2) public hearings (Resolução n. 790, 2022, p. 520, authors' translation).

This passage touches on the experimentalist leanings of the Brazilian Federal Supreme Court's decision, as it embraces central ideas of the theory such as the issuance of flexible and provisional judicial measures (subject to supplementation or modification in accordance with the factual situation), the participation of and ongoing dialogue between interested parties, and the continuous review and monitoring of the effectiveness of the established judicial measures, all underpinned by transparency and openness towards society in general, through the holding of periodic public hearings and the primacy of ensuring effective public participation in all phases of the structural process.

Therefore, it is noteworthy that the judicial management of this structural dispute involved a process characterized by broad participation and social oversight by the parties involved and interested in the case, especially in public hearings (held on April 16 and 19, 2021) organized to discuss the plan to reduce police lethality and gather suggestions from affected members of civil society (Resolução n. 790, 2022, pp. 24-25).

Although the interventions of *amici curiae* and the contributions of civil society in such public hearings[22] are often not strongly reflected in arguments supporting the decision, this is not the case with ADPF 635. In it, it is possible to observe the arguments delivered during the public hearings reflected in the votes and decisions, highlighting the protagonism of the affected population in the constitutional action of the *ADPF das Favelas*, as well as the active participation of *amici curiae* in the process, including the formulation of petitions (Sarmento & Pontes, 2023, p. 193).

Beyond the protagonism and empowerment of the population, this process entails dialogue between society, groups of affected individuals, and public/police institutions, as the decision requires the government to create a plan aimed at reducing police lethality, which will subsequently be reviewed by the Judicial Observatory of Citizen Police, whose

22 To learn more about public hearings within the scope of the Brazilian Federal Supreme Court's activities, see Leal (2014).

creation was proposed by the Brazilian Federal Supreme Court (STF)—linked to the National Council of Justice (CNJ)—and which should include representatives from the STF, the police force, and civil society, as well as researchers, who will be responsible for "assisting the Court in evaluating the plan to be presented by the State of Rio de Janeiro and, moreover, proposing solutions and adjustments that may be necessary" (Resolução n. 790, 2022, pp. 68-528, authors' translation).

In addition to dialogue, the decision also highlights the necessity for the Brazilian Federal Supreme Court (STF) to not only implement flexible judicial measures aimed at remedying the situation but also to supervise compliance with the decision and ensure the effectiveness of the measures throughout their implementation (Resolução n. 790, 2022).

In order to perform this monitoring and continuous reassessment, the case was referred, in November 2023, for ongoing monitoring to the Center for Complex Structural Litigation (Núcleo de Processos Estruturais e Complexos - Nupec) of the Brazilian Federal Supreme Court (STF), which was tasked with preparing opinions and technical notes (indeed, it had already done so in 2023 when it appended technical note 05/2023/NUPEC/SG/STF)[23] and establishing a monitoring panel to assist in monitoring, evaluating, and ensuring the effectiveness of the judicial measures mandated.

A passage from Justice Gilmar Mendes' opinion exemplifies the concern of the Brazilian Federal Supreme Court with recognizing the issuance of flexible, adaptable judicial decisions—the subsequent granting of measures initially denied demonstrates the flexibility of this decision[24]—as an elemental characteristic of this type of claim, to be subject to constant monitoring and reassessment in light of all potential impacts (desired or undesired):

> It is worth noting that, in structural actions, the Federal Supreme Court has adopted a cautious stance, allowing for the eventual revision of decisions. Initially, the judgment takes the form of a precautionary measure, with the merits remaining open, including the possibility of public hearings and debates. In this specific case, the Court endorsed the precautionary measure and is now considering its expansion in

23 This technical note addressed the stage of compliance with the measures established in ADPF 635 and the possible actions to be implemented to enhance the mechanisms for monitoring, evaluating, and ensuring the effectiveness of the ongoing measures.

24 A decision handed down by the Brazilian Federal Supreme Court (STF) on February 3, 2022, stipulated new precautionary measures regarding the obligation of the State of Rio de Janeiro to: 1) develop a plan aimed at reducing police lethality within 90 days; 2) create a working group on Citizen Police at the Human Rights Observatory, part of the National Council of Justice; 3) adopt new guidelines regarding the approaches to be used in home searches; 4) provide ambulances during police operations; and 5) install GPS equipment and audio and video recording systems in police vehicles and on the uniforms of security agents, with subsequent digital storage of the respective files, within 180 days (Resolução n. 790, 2022, pp. 5-8).

> declaratory motions (which also highlights the reconfiguration of declaratory motions in structural actions). Therefore, the case will remain open for ongoing review of its consequences (Resolução n. 790, 2022, p. 496, authors' translation).

In a critical analysis of the Brazilian Federal Supreme Court's (STF) positions on the Claim of Non-compliance with a Fundamental Precept (ADPF), and aiming to identify the essential points for successful transformation of the unconstitutional situation, Lopes highlights that:

> The ADPF of the Favelas, as strategic litigation aimed at achieving social transformation through a structural process, may be a suitable and valid (legally and democratically) and effective (socially) means of overcoming the unconstitutional state of affairs related to institutional violence in Rio de Janeiro. The essential conditions for this are the retention of jurisdiction over the execution of the plan and the creation of monitoring mechanisms for the implementation of precautionary measures and indicators to assess the progress of the plan in overcoming the ECI. The Court should also seriously consider using incentives to encourage cooperation and sanctions to overcome potential resistance (Lopes, 2023, pp. 266-267, authors' translation).

At this point, regarding the mechanisms for monitoring the progress of the implementation of established measures, it is worth noting that not only the creation of the Judicial Observatory for Citizen Police, but also the internal restructuring of the Brazilian Federal Supreme Court (STF) and the establishment of the Nupec, serve this supervisory purpose, thereby increasing the likelihood of effective monitoring of compliance with the decisions issued in structural litigation processes. In light of the above, the situation can be perceived as an "unconstitutional state of affairs" as evidenced in the opinion of Reporting Justice Luiz Edson Fachin (Resolução n. 790, 2022, pp. 124-126).

Despite this recognition being based on ADPF 347, it is evident that the structural remedy in ADPF 635 was handled differently. As previously argued on other occasions, and reaffirmed in this analysis, in ADPF 635 the Brazilian Federal Supreme Court (STF) did not perform an uncritical transplant of the CCC's ECI model but rather a legal-cultural translation of that procedural model. This involved adapting standards from another country and incorporating other strategies as necessary given the specific case and the Brazilian reality. These included the creation of the Judicial Observatory on Citizen Police, the holding of public hearings, the order for development of a plan to reduce police lethality by the State, and the referral of the case to the Center for Complex Structural Litigation (Nupec) of the Brazilian Federal Supreme Court (STF) for constant monitoring.

Therefore, it can be observed that, in addition to encompassing the basic assumptions of structural litigation such as deliberation among interested parties, the expansion of institutional dialogue with civil society, an experimentalist approach, and the implementation of mechanisms for monitoring the decision, the decision also effectively incorporates a reinterpretation of the ECI. It learns from the model developed by the CCC but adapts it to the specific needs of the Brazilian reality, which did not occur in the decision on ADPF 347.

IV.3. Claim of Non-compliance with a Fundamental Precept 709

The Covid-19 pandemic posed significant challenges regarding protection of the right to health of minorities and groups in vulnerable situations, especially indigenous peoples, who were at a higher risk of contagion due to their forced contact with invaders of indigenous territories and their low immune resistance. This situation was addressed in ADPF 709, which recognized that the violation of the right to health of the indigenous population stemmed from the lack of territorial protection for those peoples, and sought to remedy this by imposing a duty to create a plan incorporating sanitary barriers and the prevention of illegal invasions of territory and, consequently, reducing the exposure of indigenous peoples to the Covid-19 virus (ADPF 709: Ação Declaratória de Preceito Fundamental n° 709, 2020, p. 6).

In the context of precautionary measures, the Brazilian Federal Supreme Court (STF) ordered that structural measures be taken to protect isolated or recently contacted indigenous peoples, including development of a plan to establish sanitary barriers preventing entry by third parties to these inhabited territories. Additionally, the Court ordered that a Supervisory Board be established to monitor the planning of sanitary barriers and assist in managing pandemic response actions in indigenous territories. This Board was to be composed of representatives from indigenous communities and members of the Federal Public Defender's Office and the Office of the Attorney General. For indigenous peoples in general, the Court ordered that a Covid-19 Response and Monitoring Plan for Indigenous Peoples be developed to prevent and reduce virus transmission (ADPF 709: Ação Declaratória de Preceito Fundamental n° 709, 2020, p. 6).

The Brazilian Federal Supreme Court (STF) further emphasized that the development of the Covid-19 Response and Monitoring Plan, which would subsequently be subject to the Court's approval, should involve robust participation and dialogic cooperation between competent public authorities and representatives of indigenous peoples. Additionally, this process should include the participation and contributions of the Public

Prosecutor's Office, the Public Defender's Office, the National Council of Justice, the National Human Rights Council, and other institutions capable of offering different perspectives to aid development of the plan (ADPF 709: Ação Declaratória de Preceito Fundamental n° 709, 2020, p. 50).

It is notable that the decision shows the clear influence of the experimentalist approach, as well as the incorporation of dialogical logic to guide the structural process, entailing an aim to expand the dialogue between the public authorities, the affected groups, and other actors with technical knowledge on the subject. In this regard, Mello (2024, p. 371, authors' translation) argues that the decision promoted "the creation of a microinstitutionality aimed at fostering dialogue among these actors and ensuring the development of structural measures that would inevitably be endowed with experimentalism."

In contrast, Leal and Alves (2023, p. 72-74), despite identifying the characteristic features of structural judgments (broad dialogue, the participation of indigenous peoples, public hearings, and the integration of *amici curiae*), disagree that the measures ordered in the STF decision are structural in nature, arguing that the provision for the installation of health barriers "lacks the power to address the structural causes that lead to structural discrimination against Indigenous peoples. This is a temporary measure implemented due to the pandemic, which is why the protection granted should not necessarily be seen as a structural measure" (p. 66, authors' translation).

However, this does not compromise the experimentalist nature of the decision, which is evidenced in factors such as the novelty of the measures adopted, the robust debates that informed the development of the plan to address the situation, and the adaptations to the plan that were implemented even after it was approved by the Brazilian Federal Supreme Court:

> Several versions of the plans were presented until they were partially approved by the Court. Subsequently, the Court also ordered that a monitoring plan be developed, including the creation of indicators to measure the execution of the original plans. New precautionary decisions were later issued in specific situations where it became necessary to reinforce the Court's decisions (Mello, 2024, p. 371, authors' translation).

As such, ADPF 709 shows traces of the influence of the American experimentalist approach of Sabel and Simon, such as a concern to engage in dialogue with the parties involved—exemplified by the creation of the Supervisory Board, indicating the Brazilian Federal Supreme Court's desire to integrate the affected group into the process

of devising solutions to the problem—the establishment of emergency measures to protect the vulnerable group, and the promotion of transparency in the actions of the Public Administration (Casimiro *et al.*, 2023b, p. 286).

It is noteworthy that the Brazilian Federal Supreme Court (STF), mindful of the recommended approach to conducting structural litigation, did not take on the responsibility to develop plans and establish strategies for reformulating indigenous health public policies. Instead, it merely ordered that the stakeholders engage in discussions and propose changes, subsequently homologating them. In this manner, the STF did not take on roles beyond its expertise, instead acting solely as a facilitator of dialogue and an "unblocker", while remaining responsible for monitoring the implementation of the plans set forth by the parties and ensuring their effectiveness (Mello, 2024, p. 370).

Regarding the monitoring mechanisms for the implementation phase of the decision, the Plan to Combat and Monitor Covid-19 among Brazilian Indigenous Peoples, and oversight of actions related to the restriction of entry to indigenous lands, it is noteworthy that this task has been periodically carried out by the Ministry of Indigenous Peoples. The ministry issues quarterly monitoring reports for ADPF 709, and as of October 14, 2023, 10 reports had already been issued (Ministério dos Povos Indígenas, 2023). This oversight also falls within the purview of the Brazilian Federal Supreme Court, which, by delegating the action to the Center for Complex Structural Litigation (Nupec) of the STF, has been monitoring the progress of the strategies contained in the plan to combat the structural problem[25] and overseeing its effectiveness (Núcleo de Processos Estruturais Complexos – NUPEC, 2024b).

In terms of importing theories or structural remedies from other countries, it is noteworthy that despite the mention of jurisprudential experiences in Colombia[26] and the similarity with structural measures of U.S. origin, there was no explicit incorporation of these models of structural remedies in the case of ADPF 709.

Therefore, from the analysis of the decision, it can be inferred that the judgment incorporated the prerequisites of promoting broad

25 It is important to emphasize that three plans to address the situation were rejected by the Rapporteur Minister before a strategy deemed to address the majority of the points outlined in the decision was presented.

26 Indeed, Leal and Alves (2023) note that the Supervisory Board implemented in accordance with the ADPF 709 decision does not resemble the typical monitoring mechanisms detailed in decisions by the Colombian Constitutional Court: "This is because the Supervisory Board does not correspond to a special monitoring board integrated into the Court itself, but rather to a policy developed by the Executive Branch through Joint Ordinance no. 4,094/2018 of the Ministry of Health and Funai [the National Indigenous People's Foundation], as stipulated in Article 12. Therefore, the Supervisory Board was established based on and is governed by a federal regulation, with the Supreme Federal Court (STF) merely responsible for the judicial implementation of the federal norm" (pp. 66-67, authors' translation).

social participation and prioritizing collaborative dialogue among parties and stakeholders in the construction of plans to address the issue. Notwithstanding the absence of clear indications of explicit incorporation of structural experiences/remedies from other countries, the decision involves an experimentalist approach, as it not only gives primacy to more flexible measures which are subject to reevaluation and reformulation, but also lists atypical strategies for resolving the problem, stipulating that these should be based on debate and active consideration of the views of the affected group. It should also be noted that the structure of the Brazilian Federal Supreme Court (STF) and the efforts of the Ministry of Indigenous Peoples have addressed the need to monitor and oversee implementation of the Covid-19 Response and Monitoring Plan, ensuring the effectiveness of the decision.

V. CONCLUSION

Structural disputes arise from attempts to address complex structural problems resulting from the inadequate operationalization of a bureaucratic structure that, through action or omission, violates human rights on a collective scale. When judicialized, such disputes are welcomed and handled using a structural (collective/prospective/corrective) procedure, distinct from the traditional (individual/compensatory) model of conflict resolution. Such structural procedures give rise to court decisions that, by stipulating that structural measures be taken, aim to correct the root cause of the problem, resulting in the process not concluding with the issuance of the ruling; on the contrary, an important part of the decision-making process extends into the "after".

Although the topic has not seen significant advancements in terms of legislation by the Legislature, the Brazilian Federal Supreme Court has not shied away from its duty to provide responses and protect constitutionally guaranteed rights in the face of situations involving structural violation which are brought to its attention through structural litigation. Indeed, the highest Brazilian court, as well as other ordinary courts, has redesigned its internal structures with the aim of properly accepting and dealing with these highly complex cases. Currently, the Brazilian Federal Supreme Court has a specific committee dedicated to this function, the Center for Complex Structural Litigation (Nupec), which plays a fundamental role in identifying and monitoring structural claims, overseeing cases even after the related decision has been issued.

In the initial stages of this study, certain essential procedural elements and conditions necessary for the adequate processing of structural disputes were identified. Structural processes entail prerequisites such as dialogue, both institutional and between public institutions, the

affected collectives and civil society, in order to create a dialogically democratic environment, which is the hallmark of this type of judicial procedure. In conducting these processes, the Court takes an innovative and transformative stance, incorporating into its jurisprudence an experimentalist vision that enables the formulation of structural decisions based on a high level of participation by affected groups, experts in the field, and other stakeholders who can contribute to the development of effective judicial measures to solve the structural problem.

As we have seen, the development of structural processes in regions of the globe that still have little experience handling structural disputes can entail courts learning from and incorporating experiences, remedies, and protection standards developed by courts in other countries, but it is important that this involve a legal-cultural translation of such procedural models which adapts them to the reality of the target country. Finally, considering that a structural decision does not conclude the case but rather inaugurates a new phase of the process, it is important to note that the incorporation of mechanisms for monitoring the effectiveness of and ensuring compliance with the actions provided for in the decision are also key elements in the proper handling of structural processes.

To answer the research question, it can be stated that most of the measures established by the Brazilian Federal Supreme Court, in its rulings on the structural disputes that remain under the oversight of Nupec, follow the basic assumptions of the theory of structural processes. All three cases analyzed involved a high level of dialogue, with affected groups given the opportunity to be effectively heard within the process and have their views on the problem considered during the construction of the judicial decision. It is evident that the Brazilian Federal Supreme Court has adopted a stance which leans towards democratic experimentalism, increasing the dialogue and social participation involved in this type of process as well as recognizing the need for constant reassessment of the effectiveness of the judicial measures issued, and not considering the case concluded once the sentence is issued. Moreover, the influence of other countries' experiences with structural processes is evident, with successful (as in ADPF 635) and not so successful (as in ADPF 347) importation of such models. In other cases other countries' experiences have not been directly incorporated into the Brazilian decision as such, but served as argumentative reinforcement for the model developed by the Brazilian Federal Supreme Court to handle structural demands. Finally, regarding the incorporation of mechanisms to monitor the effectiveness of the decisions issued by the Brazilian Federal Supreme Court, all structural actions analyzed are under the responsibility of Nupec, a working group which represents a valuable contribution to the phase of monitoring of the implementation and effectiveness of the

structural measures detailed in the decision, thus contributing to the consolidation of this model in the country.

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