

The Doctrine of “Structural Litigation” in Brazil: Modifying the Structure of Traditional Civil Procedure

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Abstract

This writing provides an overview of some important aspects relating to the study of the structural litigation in Brazilian law. Much remains to be said, but, with the advent of the commission of jurists that will prepare a draft law on this topic, the importance of paying attention to this subject is increasingly evident.

Keywords

Brazilian Law, Structural Litigation, Civil Procedure, Structural Problems

1. Introduction

Over the last few years, the study of the so-called “structural litigation” has become increasingly widespread in Brazilian legal studies (Osna, 2020: pp. 251-278; Mendonça, 2023; Roque et al., 2024)¹. Far from being simple, this topic demands sensitivity from all scholars and legal professional; it brings, in its essence, what is desired of civil procedural law throughout the world: the need for legal procedure to effectively fulfill its purpose, that is, to deliver in an adequate, effective and timely manner the results sought by the parties (Marinoni, 2006: pp. 133-134; Pisani, 2006: pp. 32-33).

With the recent installation by the Brazilian Federal Senate of a committee of

¹In Brazil alone, there are more than 100 books published on the subject, by the most varied publishers. Confirming this: JOBIM, Marco Felix. Desafio... *Instagram*. In: https://www.instagram.com/p/C_LCeqRxVI6/. The author of the research carried out at the previously mentioned website, together with other jurists, points out that we are currently talking about an era of structural litigation in Brazil.

jurists to draw up a draft to regulate the issue², there will be a new wave of debates on this subject in Brazil, and the contributions that will be made as a result of this moment deserve attention from the national and international legal community.

For this reason, this article aims to give a brief introduction on the subject from the perspective of Brazilian law, pointing out inspirations, outlines and contributions from national scholars, in order to allow foreign readers to better understand the matter.

2. The Context Behind the Structural Litigation Doctrine

In order to understand the structural litigation in Brazilian law, it is necessary to first comprehend some scholarly trends that have been established in Brazil.

First, traditional procedures (marked by a polarization between the plaintiff and the defendant and by exaggerated formalism) were perceived as insufficient, even in the context of collective claims, because they were unable to provide an effective judicial protection (Aras, 2024). Even though the Federal Constitution of Brazil, in its article 5, XXXV, establishes that “the law shall not exclude any injury or threat to a right from the appreciation of the Judiciary”, over the years, especially in the context of overly complex litigation (Lima, 2015: pp. 253-258), it was observed that the aforementioned constitutional rule needed a procedural system that was capable of protecting a wide variation of injuries and threats. The scenario of a rigid, extremely formal and time-consuming judicial process was no longer acceptable and therefore called for changes.

The Brazilian procedural scenario can be defined as follows: the process in the trial court is processed under the analysis of a single judge, who will decide and, from his decisions, it is possible to file an appeal to a court, in which the analysis will be carried out by a collegial body (Alvim, 2009; Wambier, 2015)³. Considering the rigid structure of our system, very much based on guarantees and control of possible excesses by the magistrate in the first instance, the last century ended up being marked by a struggle by Brazilian academics to overcome the bottleneck effect in our system in relation to access to justice (Mitidiero, 2016: pp. 1773-1785)⁴. Hence, in parallel with the development of less rigid notions of

²About the subject:

<https://www12.senado.leg.br/noticias/materias/2024/06/13/senado-instala-comissao-de-juristas-para-sugerir-regulacao-de-processo-estrutural#:~:text=O%20Senado%20instalou%20nesta%20quinta,geral%20da%20Rep%C3%ABlica%20Augusto%20Aras>.

³Here is an excellent analysis of Brazilian Procedural Law written in a foreign language: ALVIM, Teresa Arruda. At outline of Brazilian Civil Procedure. *Revista de Processo*, n° 168, ano 34, fevereiro, 2009, passim. Regarding the changes resulting from the edition of the new civil procedure code, reading the following text becomes relevant: WAMBIER, Teresa Arruda Alvim. Le novità del codice di procedura civile brasiliano. *Rivista Trimestrale di Diritto e Procedura Civile*. Anno LXIX, Fasc. 4, 2015, passim.

⁴Regarding the ideology that permeated the Brazilian civil procedure code prior to the current one, the analysis carried out by Daniel Mitidiero in: MITIDIERO, Daniel. Per la Storia del Processo: sulla Formazione del Codice di Procedura Civile Brasiliano del 1973. In: *Scritti in onore di Nicola Picardi. Tomo II*. Pisa: Pacini Giuridica, 2016, pp. 1773-1785.

procedure, a set of differentiated procedures were also established (creation of new collective actions, summary procedures that are here called “juizados especiais”, more recent establishment of numerous goals for the magistrate etc.) (Arenhart, 2017: pp. 15-36).

However, as Ovídio Araújo Baptista da Silva, a renowned Brazilian jurist, has said, to solve the problem of national civil procedure, it is not enough just to change rules. We need to change the structure (Silva, 2008: pp. 2-3). Without a change that affects the foundations that underpin the traditional litigation system in Brazil, any specific alteration to certain institutes would not be enough to provide effective normative force of art. 5, XXXV, of the Brazilian Constitution.

Second, with the consolidation of the idea that the right to access the courts through solid national doctrine that served as a starting point—one of the great exponents of which was undoubtedly Luiz Guilherme Marinoni (Marinoni, 2006: pp. 133-134; Marinoni, 2015: pp. 915-917)—national legal studies, also inspired by foreign legal systems, began to establish the lines that today, together, with occasional disagreements, form the whole set of visions that gave rise to the doctrine of the structural litigation in Brazil. Among the many authors who have contributed effectively in this area (Góes, 2024: pp. 323-341; Mossoi & Medina, 2020: pp. 255-276; Andréa, 2024: pp. 245-263; Andréa et al., 2024; Möller & França, 2024; Silva, 2021: pp. 223-242; Galdino, 2019; Saraiva, 2018; Nery & Berestinas, 2022: pp. 17-51; França & Casimiro, 2023: pp. 265-289; Nadal, 2024: pp. 271-292; Mello, 2024: pp. 365-392), we can mention Sérgio Cruz Arenhart (Arenhart, 2013: pp. 389-410; Arenhart, 2015: pp. 211-229; Arenhart & Osan, 2022; Arenhart et al., 2022: pp. 239-259), Edilson Vitorelli (Vitorelli, 2018a: pp. 333-369; Vitorelli, 2018b: pp. 147-177; Vitorelli, 2024), Marco Félix Jobim (Jobim, 2012; Arenhart et al., 2022), Gustavo Osna (Osna, 2022b; Osna, 2020: pp. 251-278; Osna, 2022a: pp. 239-259; Balazeiro & Osna, 2024), Hermes Zaneti Jr. (Didier Jr. et al., 2020; Madureira & Júnior, 2020: pp. 555-576), Fredie Didier Jr. (Didier Jr. et al., 2020) and Alexandre Freitas Câmara (Câmara, 2023: pp. 277-298).

3. Fundamental Concepts for Understanding the Structural Litigation in Brazil

After the brief but necessary contextualization made earlier, we will now move on to the study of some relevant concepts for understanding the structural litigation in Brazilian law. As the reader will be able to tell, the purpose of this article is not to explain a single position on the subject, but rather to expose the most diverse existing views, all of which deserve reflection.

However, there are a number of understandings regarding the essential characteristics of the structural process in Brazil and this text will not aim to investigate all of them, not least because such an endeavor would require countless pages. In this essay, we will try to point out at least three characteristics that are apparently present in most of the national expositions on the subject.

3.1. Procedural Flexibility

In the context of a structural litigation, it is unanimous that a flexible procedure is necessary, through techniques that allow procedural rites to be more malleable (Arenhart et al., 2022) and compliant to a structural problem.

There is therefore a need to change certain ways of understanding the procedure, overcoming eminently formalist notions (Arenhart et al., 2022). Without that, it will be very difficult to implement one efficient legal system of structural litigation in Brazil.

3.2. Reorganization of a Structure: The Observation of a State of Affairs and the Search for a Future State of Affairs

The fact that the Brazilian structural litigation serves to reorganize procedures that, in themselves, give rise to so-called structural problems also seems to be something that is not subject to much disagreement (Vitorelli, 2018a: pp. 333-369; Câmara, 2023: pp. 277-298; Andréa, 2024: pp. 245-263). In fact, the current Rapporteur of the Commission of Jurists that will draw up the preliminary draft of the Structural Process Law in Brazil has listed the challenges of the structural process, in summary, as having to deal with the complexity of the dispute, allowing for the varied interests involved; defining a plan for modifying the problem; the compulsory or negotiated implementation of this plan; the evaluation of the results; among others (Vitorelli, 2018a: pp. 333-369).

According to Matheus Galdino, the aim of the structural process is precisely the transition between states of affairs. A certain state of affairs is verified, a future state of affairs is established and, through the judicial process, the goal is to transition (Galdino, 2019: p. 152). Because of this, the purpose is precisely to reorganize structures, so as to make it possible to change the *status quo* that causes damage to legal assets (Santos, 2024)⁵.

3.3. Multiple Interests

Although it is possible to academically consider the existence of structural processes without multiple direct stakeholders, so as not to give rise to a polarization in the process (Galdino, 2019: pp. 146-147), it is still impossible to rule out the fact that the multiplicity of interests is a striking feature of structural litigation.

In this type of case, we are not dealing with a simple issue which, by its nature, would only be of interest to one plaintiff or one defendant. It is a dispute involving a state of affairs, which needs to be adequately protected by the procedure (Fu, 2023)⁶, in the light of art. 5°. XXXV of the Federal Constitution

⁵But the situation is not so simple, especially in a complex context such as public service. Regarding some debates on aspects of regulation in this area, it is worth reading the following text: SANTOS, Leonardo Antonacci Barone. Renewal on Public Service Theory on Brazilian Law. *Beijing Law Review*. Vol. 15, n° 2, June 2024, passim.

⁶Reflecting on the topic, in the context of the law of China and other countries, the following text is very important: FU, Qianru. On the Relationship between the Representative und the Represented in Representative Litigation. *Beijing Law Review*, vol. 14, N. 4, December, 2023, passim.

(Vitorelli & Barros, 2024: pp. 79-360)⁷.

4. Conclusion: Why Is the Structural Litigation So Relevant to Civil Procedural Law and Should It Serve as an Example to the World?

The structural process tends to operate on premises that are different from those of traditional civil procedure. As Arenhart, Osna and Jobim point out, it involves a shift in ideological premises, which inevitably makes this institute operate in a different way (Arenhart et al., 2022).

Overall, a paradigm shift is required. All of this has a single purpose: to enable an effective protection of rights, in line with global trends to safeguard the right to effective judicial protection. Therefore, the procedure cannot be an excuse for denying judicial protection. By changing the way we think about the premises that classically govern the traditional procedure in Brazil, it is possible to move towards a range of procedures and techniques that effectively guarantee access to justice in this country.

The problem of effective judicial protection is not exclusive to Brazilian law. It is a global challenge, and the structural process in our country will undoubtedly become a paradigm to be followed and studied by other legal systems, especially as it deals with the arduous challenges that a territory of continental dimensions has in terms of effective access to justice.

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Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

References

- Alvim, T. A. (2009). At Outline of Brazilian Civil Procedure. *Revista de Processo*, No. 168, 243-254.
- Andréa, G. F. M. (2024). Processo estrutural dos desastres: Uma teoria para a tutela adequada de prevenção e repressão dos desastres. *Revista de Processo*, 352, 251-274.
- Andréa, G. F. M., França, E. P. da C., & Casimiro, M. (2024). A viabilidade do processo estrutural e seus três principais obstáculos: Demora, competência e efetividade. *Revista de Processo*, 351, 245-263.
- Aras, A. (2024). Processos estruturais são uma maneira prática e responsável de resolver problemas estruturais. *Estadão*, 24.

⁷In Brazil, a work dedicated especially to the study of techniques for expanding society's participation in complex litigation, including structural litigation, is the following: VITORELLI, Edilson; BARROS, José Ourismar. *Processo Coletivo e Direito à Participação—Técnicas de Atuação Interativa em Litígios Complexos*. 2. ed. rev., atual. e ampl. São Paulo: Editora JusPodivm, 2024, 79-360.

- Arenhart, S. C. (2013). Decisões estruturais no direito processual civil brasileiro. *Revista de Processo*, 225, 389-410.
- Arenhart, S. C. (2015). Processos estruturais no direito brasileiro: Reflexões a partir do caso da ACP do carvão. *Revista de Processo Comparado*, 2, 211-229.
- Arenhart, S. C. (2017). Acesso à justiça: Relatório brasileiro. *Revista de Processo Comparado*, 6, 15-36.
- Arenhart, S. C., & Osna, G. (2022). Desmistificando os processos estruturais—“Processos estruturais” e “segurança jurídica”. *Revista de Processo*, 330, 239-259.
- Arenhart, S. C., Osna, G., & Jobim, M. F. (2022). *Curso de processo estrutural* (2nd ed.). em e-book baseada na 2. ed. Impressa, Thomson Reuters Brasil.
- Balazeiro, A. B., & Osna, G. (2024). Atuação jurisdicional em estruturas patológicas e efeito transformador do processo. *Consultor Jurídico*, 17.
- Câmara, A. F. (2023). Processo reestruturante de família. *Revista de Processo*, 338, 277-298.
- Didier Jr., F., Zaneti Jr., H., & Oliveira, R. A. (2020). Elementos para uma teoria do processo estrutural aplicada ao processo civil brasileiro. *Revista do Ministério Público do Estado do Rio de Janeiro*, No. 75, 45-81.
- França, E. P. da C., & Casimiro, M. (2023). Processo estrutural e a proteção dos direitos socioeconômicos e culturais: Apontamentos normativos para a implementação progressiva do mínimo existencial. *Revista de Processo*, 336, 265-289.
- Fu, Q. (2023). On the Relationship between the Representative und the Represented in Representative Litigation. *Beijing Law Review*, 14, 2184-2197.
<https://doi.org/10.4236/blr.2023.144120>
- Galdino, M. S. (2019). *Elementos para uma compreensão tipológica dos processos estruturais*. Dissertação de Mestrado-Universidade Federal da Bahia, Faculdade de Direito.
- Góes, G. S. F. (2024). Processos estruturais, modulação e o tema 698 do Supremo Tribunal Federal. *Revista de Processo*, 349, 323-341.
- Jobim, M. F. (2012). *As medidas estruturantes e a legitimidade democrática do Supremo Tribunal Federal para sua implementação*. Tese de Doutorado, Faculdade de Direito da PUCRS.
- Lima, E. V. D. (2015). *O devido processo legal coletivo: Representação, participação e efetividade da tutela jurisdicional*. Tese de doutorado, Faculdade de Direito da Universidade Federal do Paraná.
- Madureira, C., & Júnior, H. Z. (2020). Covid-19 e tutela jurisdicional: A doutrina dos processos estruturais como método e o dever processual de diálogo como limite. *Direitos Fundamentais & Justiça*, 14, 555-576. <https://doi.org/10.30899/df.v14i42.867>
- Marinoni, L. G. (2006). *Curso de Processo civil, volume 1: Teoria geral do processo*. Revista dos Tribunais.
- Marinoni, L. G. (2015). L'insufficienza di tutela normativa al diritto fondamentale di azione. *Rivista Trimestrale di Diritto E procedura Civile*, 69, 915-924.
- Mello, P. P. C. de (2024). Os processos estruturais no Supremo Tribunal Federal: Repensando o processo constitucional e sua intervenção em políticas públicas. *Revista de Processo*, 365-392.
- Mendonça, P. V. de C. (2023). Pode-se dizer que é o maior momento do processo estrutural no Brasil? *Consultor jurídico*, 06 de setembro de.
- Mitidiero, D. (2016). Per la Storia del Processo: Sulla Formazione del Codice di Procedura Civile Brasiliano del 1973. In *Scritti in onore di Nicola Picardi. Tomo II* (pp.

- 1773-1786). Pacini Giuridica.
- Möller, G. S., & França, E. P. da C. (2024). Desvelando as técnicas estruturais para a proteção de direitos fundamentais no Brasil: Uma análise comparada a partir do caso Grootboom. *Revista de Processo*, 49, 223-250.
- Mossoi, A. C., & Medina, J. M. G. (2020). Os obstáculos ao processo estrutural e decisões estruturais no direito brasileiro. *Revista dos Tribunais*, 1018, 255-276.
- Nadal, C. P. (2024). A segurança-continuidade enquanto instrumento aos processos estruturais: O abandono da lógica da imutabilidade. *Revista de Processo*, 348, 271-292.
- Nery, A. L., & Berestinas, M. F. (2022). Da possibilidade de resolução extrajudicial de litígios estruturais por meio da celebração e do cumprimento do compromisso de ajustamento de conduta estrutural. *Revista de Direito Privado*, 112, 17-51.
- Osna, G. (2020). Acertando problemas complexos: O “praticismo” e os “processos estruturais”. *Revista de Direito Administrativo*, 279, 251-278.
<https://doi.org/10.12660/rda.v279.2020.82013>
- Osna, G. (2022a). Desmistificando os processos estruturais—“processos estruturais” e “segurança jurídica”. *Revista de Processo*, 330, 239-259.
- Osna, G. (2022b). Nem “tudo”, nem “nada”—Decisões estruturais e efeitos jurisdicionais complexos. In S. C. Arenhart, & M. F. Jobim (Eds.), *Processos estruturais* (pp. 645-666). Editora Juspodivm.
- Pisani, A. P. (2006). *Lezioni di Diritto Processuale Civile* (5ª ed.). Jovene editore.
- Roque, A. V., Junior, Z. D. de O., & Jobim, M. F. (2024). *A era dos processos estruturais*. Migalhas, 2 de setembro de.
<https://www.migalhas.com.br/coluna/tendencias-do-processo-civil/414421/a-era-dos-processos-estruturais>
- Santos, L. A. B. (2024). Renewal on Public Service Theory on Brazilian Law. *Beijing Law Review*, 15, 516-551. <https://doi.org/10.4236/blr.2024.152033>
- Saraiva, C. B. (2018). *Condução dialógica dos processos estruturais no Supremo Tribunal Federal*. Monografia, Programa de Graduação em Direito da UFBA.
- Silva, O. A. (2008). Baptista da. Da função à estrutura. *Revista de Processo*, 158, 9-19.
- Silva, P. F. R. da. (2021). Processos estruturais como instrumento para efetivação de direitos. *Revista da AGU*, 20, 223-242.
<https://doi.org/10.25109/2525-328X.v.20.n.04.2021.2704>
- Vitorelli, E. (2018a). Levando os conceitos a sério: Processo estrutural, processo coletivo, processo estratégico e suas diferenças. *Revista de Processo*, 284, 333-369.
- Vitorelli, E. (2018b). Processo estrutural e processo de interesse público: Esclarecimentos conceituais. *Revista Iberoamericana de Derecho Procesal*, 7, 147-177.
- Vitorelli, E. (2024). *Processo civil estrutural: Teoria e prática* (5ª ed.). Editora JusPodivm.
- Vitorelli, E., & Barros, J. O. (2024). *Processo Coletivo e Direito à Participação-Técnicas de Atuação Interativa em Litígios Complexos* (2nd ed. rev., atual. e ampl.). Editora JusPodivm.
- Wambier, T. A. A. (2015). Le novità del codice di procedura civile brasiliano. *Rivista Trimestrale di Diritto e Procedura Civile*, 69, 1233-1242.