RCMOS – Revista Científica Multidisciplinar O Saber. ISSN: 2675-9128. São Paulo-SP.

Ano VII, v.1 2026 | submissão: 25/10/2026 | aceito: 01/11/2026 | publicação: 06/11/2026

The role of the Public Defender's Office in structural litigation: expanding access to healthcare

A atuação da Defensoria Pública nos processos estruturais: ampliação do acesso à saúde

La actuación de la Defensoría Pública en los procesos estructurales: ampliación del acceso a la salud

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Abstract:
This article aims to present, albeit in an essayistic manner, an analysis of the role of the Public Defender's Office in collective legal protection through structural litigation. Using the deductive method, it seeks to examine the concept and issues inherent in structural litigation, its relevance and effectiveness within the Brazilian legal system, as well as how the actions of the Public Defender's Office, through the use of this legal instrument, contribute to expanding access to justice, particularly with regard to guaranteeing the fundamental right to health.

Keywords:
Public Defender's Office; Structural Litigation; Collective Legal Protection; Access to Justice; Right to Health.

Resumo:
O presente artigo tem como objetivo apresentar, ainda que de maneira ensaística, uma análise acerca da atuação da Defensoria Pública na tutela coletiva por meio dos processos estruturais. Pretende-se demonstrar, recorrendo ao método dedutivo de análise, o conceito e as questões inerentes aos processos estruturais, sua necessária e importante efetividade no ordenamento jurídico brasileiro e como a atuação defensorial, que se utiliza desse instrumento, contribui para a ampliação do acesso à justiça, em especial à garantia do direito fundamental à saúde.

Palavras-chave:
Defensoria Pública, Processos Estruturais, Tutela Coletiva, Acesso à Justiça, Direito a Saúde.

Resumen:
El presente artículo tiene como objetivo presentar, aunque de manera ensayística, un análisis de la actuación de la Defensoría Pública en la tutela colectiva mediante los procesos estructurales. Se pretende demostrar, recurriendo al método deductivo de análisis, el concepto y las cuestiones inherentes a los procesos estructurales, su necesaria e importante eficacia en el ordenamiento jurídico brasileño y cómo la actuación de la Defensoría, que utiliza este instrumento, contribuye a ampliar el acceso a la justicia, especialmente en lo relativo a la garantía del derecho fundamental a la salud.

Palabras clave:
Defensoría Pública; Procesos Estructurales; Tutela Colectiva; Acceso a la Justicia; Derecho a la Salud.

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1. Introduction

In addition to theoretical treatment, law must serve and adhere to the solution of practical problems. There is now a movement that regards individuals less and less in their particular sphere and more and more in the collective. Situations affecting a community are frequently reported, so that it resolves to unite with the aim of seeking protection for a common interest.

In view of this, discussions about collective litigation are expanding, which occurs when a group of people are harmed as a society and not personally and directly. The Brazilian collective proceedings is itself an instrument for access to justice in the fight against violations of fundamental rights.

In addition to conflict, another important indicator of collective litigation is complexity, which may also vary according to the circumstances of each case. There are collective disputes in which the claim is easily perceived by the entity with standing to represent the group, the infringed material right is clearly defined and the circumstances of the case do not give rise to doubt. In this case, it will be referred to as simple. [2]

On the other hand, there are structural disputes, which will be analysed in this research and are, in summary, according to the author Edilson Vitorelli, collective processes that seek to solve contemporary problems of a high degree of complexity and to reorganize the bureaucratic structure, whether public or private, that causes, encourages or enables the occurrence of a violation by the way it works. [3] Structural problems thus arise as a consequence of a state of affairs in need of restructuring.

As regards the fundamental right to health, the focus of this research, the construction of a hospital or the extension of its beds are examples of situations in which structural judicial proceedings can be an important instrument to assist in the implementation of public policies. If the issue is not merely individual, the structural litigation may be the option, as it concerns a problem that is collective.

The Public Defender's Office, an institution essential to justice whose primary purpose is to protect and enforce citizens' rights in accordance with the needs of vulnerable populations and constitutional principles, protects transindividual interests.

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[2] VITORELLI, Edilson. O devido processo legal coletivo: dos direitos aos litígios coletivos. São Paulo: RT, 2016. Capítulo 6.

[3] VITORELLI, Edilson. "Levando os conceitos a sério: processo estrutural, processo coletivo, processo estratégico e suas diferenças". Revista de Processo. São Paulo: Thomson Reuters, outubro/2018, vol. 284, p. 333-369

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Access to justice concerns the exercise of the rights guaranteed by law and is the main form of defence of other guarantees. Access to the fundamental right to health thus exceeds the limits of the mere possibility of bringing a claim before the courts and must be understood as the acquisition of the rights covered by the substantive and procedural legal order, ensuring the effective delivery of the protected legal asset with the greatest possible effectiveness.

In this study, the legal analysis of the importance of the Public Defender's role through structural litigation in ensuring access to healthcare in Brazil is considered.

As regards the variables that can be inferred from this research, it is important to emphasise that the legal and social reality has a great influence on this discussion, in particular as it considers that structural litigation are forms of procedural innovation aimed at solving basic stalemates of the Brazilian legal order.

This article will be based on theoretical-bibliographic research using the deductive method of analysis, which is why it focuses mainly on bibliographic consultation and the analysis of current legislation, articles and websites.

The relevance of the subject, combined with the fact that it is a recent subject of great practical relevance, leads to many inquiries by legal practitioners, leading to a major change in the way in which collective law and access to healthcare are looked at.

2. Access to justice and the Public Defender’s Office

Initially, it is necessary to establish the history and development of the Public Defender’s Office in Brazil, an institution which over the years has made efforts to reduce inequalities between individuals by extending public policies to ensure the necessary protection of those who often find themselves on the margins of society.

Regarding access to justice, the role of lawyer Joaquim Nabuco de Araújo, president of the Instituto dos Advogados Brasileiros, stands out: from 1870 onwards, he began to advocate legal assistance for the poor. A profound debate on the need to implement the fundamental principles of human protection through the consolidation of measures capable of ensuring legal certainty and predictability has thus begun.

The 1950s were responsible for strengthening the idea that the State should provide legal assistance. The Federal Constitution of 1934 was the first to provide for legal assistance to those in need, fulfilling Nabuco's claim almost a century later.

The 1970s were marked, also and mainly, by the Florence Project, coordinated by Mauro Cappelletti and Bryan Garth. It was intended to discuss accessibility to justice, and three

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renewing waves/movements were proposed in order to make justice more accessible. Cappelletti and Garth identified three major obstacles to access to justice, namely the problem of court costs, the problem of the parties' possibilities and the one specifically related to collective rights.

The first wave, which was essential for the development of public legal assistance, identified the difficulty of providing legal assistance to the poor and needy. The obstacle at the time was economic, social and cultural. This move was related to expanding access to justice for economically disadvantaged persons, enabling them to have access to the judiciary even without being able to hire a private lawyer or pay the costs of the proceedings.

At the international level, the San José de Costa Rica Pact of 1978 dealt with the issue and provided for the need for the State to provide all defendants with an advocate for the protection and defence of their rights. In Brazil, Law no. 1.060/50 was a way of condensing this matter in the statutory level, responding to this first move to establish rules for the granting of judicial assistance to those in need.

In addition, Complementary Law No 80/94, which regulated the Public Defender's Office of the Union, the Federal District and the Territories, prescribing general rules for the organisation of the institution in the States, was also a record of the influence of the first wave in Brazil.

Three important systems were developed from the ideas of this first movement. The Judicare system of legal assistance, which prevailed in Brazil until the promulgation of the 1988 Federal Constitution, is described as:

> (...) a system through which legal aid is established as a right for all persons who meet the conditions laid down by law. Private lawyers are then paid by the State. The purpose of the judicare system is to provide low-income litigants with the same representation they would have if they could afford a lawyer. Ideally, the only distinction should concern where the fee statement is sent. The State, rather than the client, receives it. [4]

The pro bono system, also called charitable, is one based on the practice of charitable advocacy, that is, it is summed up in the lawyer who provides solidarity to the client and enters for free, without any state remuneration.

In order to overcome the obstacles of the previous models, the third system, called the salarided staff model, also known as the public system, is highlighted, in which lawyers are paid by the State to provide legal assistance to those in need on an exclusively dedicated basis.

[4] CAPPELLETTI, Mauro; GARTH, Bryant. Acesso à Justiça. Translated by Ellen Gracie Northfleet. Porto Alegre: Fabris, 1988, p. 35.

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It is therefore one which has an employed body composed of public servants paid by the State, that is to say, there is an institution responsible for defence. This is the model adopted by the current Brazilian Federal Constitution.

The Federal Constitution of 1988 was the first in Brazil to establish that the State shall provide full and free legal assistance to those who prove insufficient resources (Article 5 LXXIV, CF) in place of mere judicial assistance, creating, for this purpose, the Public Defender's Office, an institution essential to the judicial function of the State, as provided for in Article 134 of the Constitution.

It is worth mentioning here that even before the 1988 Federal Constitution, several States already had a similar service to the Public Defender's Office, such as Rio de Janeiro, which in 1954 created the office of Public Defender. [5] However, it did not have the same scope and support as the current model of public legal assistance, since it established a different legal assistance system than what is constitutionally prescribed today. [6]

With the constitutional establishment of the Public Defender's Office, most of the difficulties outlined by Cappelletti and Garth are overcome. It is the consolidation of an institutionalised model of public legal assistance as a social policy.

The Public Defender's Office must provide comprehensive and free legal assistance to those who demonstrate insufficient resources. However, it must safeguard the rights and interests of all persons in need, considering financial need as well as disadvantage and vulnerability arising from other circumstances.

On the other hand, the second movement of Cappelletti and Garth was concerned with collective legal protection, with representation in diffuse and collective rights. They emphasised that where rights involving several persons in the same particular case are concerned, they can be legally represented in order to facilitate access to justice.

In this context, collective action arises, which aims to resolve the representation of diffuse interests by allowing a litigant to represent an entire class of people in a particular case and thus eliminating the need to create a permanent organisation. [7]

[5] MORAES, Humberto Peña de; SILVA, José Fontenelle Teixeira de. Assistência Judiciária: sua gênese, sua história e a função protetiva do Estado. 2ª ed. Rio de Janeiro: Liber Juris, 1984, p. 122.

[6] GIUDICELLI, Gustavo Barbosa. A Defensoria Pública nos 30 anos de Constituição Federal: consolidação, desafios e perspectivas/Gustavo Barbosa Giudicelli. – Rio de Janeiro: Lumen Juris, 2018, p. 67

[7] CAPPELLETTI, Mauro; GARTH, Bryant. Acesso à Justiça. Translated by Ellen Gracie Northfleet. Porto Alegre: Fabris, 1988, p. 60.

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This second wave led to Brazil's Public Civil Action Law (Law No. 7.347/85). In 2007, the law expressly recognised the Public Defender's Office's standing to bring public civil actions. Only Complementary Law No. 132/09, which amended Complementary Law No. 80/94, firmly established the promotion of public civil actions as one of the institution's functions. The obstacles previously encountered by the Public Defender's Office in collective proceedings therefore no longer have justification.

As far as the renewal movements are concerned, we must mention the third wave which advocates the need to create mechanisms to facilitate access to justice. In this context, an increase in extrajudicial action is proposed as a way to overcome legal and bureaucratic obstacles. In order to respond to this call, which was also social and to facilitate a simpler and more accessible justice, special courts were created, whose main objectives are speed, simplicity, informality and procedural economy.

In this sense and in addition to the previous moves, the third wave proposed by Cappelletti and Garth aims not only to promote access to the judiciary, but also to promote genuine access to justice by proposing that conflicts be resolved in the best possible way. To this end, it is proposed to use consensual and alternative dispute resolution methods, such as mediation and conciliation.

Effective access to justice may, in a particular case, be achieved through alternative methods rather than judicial relief or a court decision. Thus, alongside the necessary expansion of the range of entities entitled to bring collective proceedings before the Judiciary, express provision for their extrajudicial action in disputes is important.

This shows the importance of the Florence process in terms of access to justice, which is responsible for paradigm shifts in the way jurists and legislators think about justice, and has also been crucial to the growth and consolidation of the Public Defender's Office, which translates as the main means of access and guarantee of rights.

3. Collective protection of rights and the Public Defender's Office

In the last century, when the theme was access to justice, the focus of the legal institutions has always been on its implementation through the proposal of individual actions, resulting from the individualistic profile of the 1973 Code of Civil Procedure, which was still in force.

The development of the Collective Process in Brazil began with the Law on Popular Action (Lei nº 4.717/1965) and was followed by the important and pioneering Preproject of the

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Law on Public Civil Action (Law no. 7.347/85). With the advent of the Federal Constitution of 1988 and the Code of Civil Procedure of 2015, collective litigation began to play an even more important role in protecting the rights belonging to the collective. The CPC is articulated with the Constitution and the micro-system itself, so that it can be said that its application is no longer merely residual.

In addition, Recommendation No 76 of the National Council of Justice of 08/09/2020 provided: – Recommend, without prejudice to legally established preferences, priority for the processing and trial of class actions at all levels of jurisdiction – [8].

The presence of a collective dispute is verified when a group of people is injured as a society. Collective rights are subjective and fundamental, provided for in the statutory legislation and the Federal Constitution, and constitute entrenched constitutional provisions, although they are not expressly provided for in Article 60 (4) IV of the Federal Constitution. The traditional process is no longer efficient for the defence of trans-individual rights and interests, whose characteristics place them between the public and private interests.

With the First World War came second generation rights, which are social rights such as, for example, health, housing, education, work, social assistance, among others. From a technical point of view, social rights are factual and regulatory entitlements to state benefits.

The Federal Constitution provides for social rights which have both individual and collective dimensions. The fundamental right to health, provided for in Article 6 as a social security, is, for example, ensured individually and collectively through the exercise of certain public policies, government action programmes or a set of legally regulated procedures.

In the words of Tatiana Cury:

> (...) the right to health is the principal fundamental social right found in Brazil's Constitution, directly linked to the overarching principle governing the entire domestic legal system: the principle of human dignity, which is why this right deserves special treatment. [9]

The right to health is an inseparable consequence of the principle of human dignity and the right to life. It is, in fact, an indispensable guarantee of social rights and has been granted privileged status by the CF. Article 196 of the Federal Constitution is the standard that defines the right to health more transparently and thus provides:

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[8] DJe/CNJ nº 297/2020, de 10/09/2020, p. 15-17. Available at: <https://atos.cnj.jus.br/atos/detalhar/3462>. Accessed jan. de 2023.

[9] CURY, Ieda Tatiana. DIREITO FUNDAMENTAL À SAÚDE: Evolução, Normatização e Efetividade. Rio de Janeiro, Lumenjuris, 2005, p. XVII.

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> Health is a right of all and a duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other health problems and ensuring universal and equal access to actions and services for its promotion, protection, and recovery. [10]

The State's mission is to ensure the dignity of the human person through the realisation of constitutional rights in real situations. As regards the right to health, the State thus ceases to be a mere guarantor of individual rights and freedoms as it once was, in order to provide the conditions necessary for its exercise, and is the protagonist of positive benefits for second and third-dimensional rights that are implemented through State policies and actions.

The author José Cretella Júnior, citing Zanobini, stated that:

> **No other good in life brings individual and social interests together as clearly as health, that is, the physical well-being that comes from the perfect harmony of all the elements constituting the body and their proper functioning.** For the individual, health is a prerequisite and an indispensable condition for all economic and intellectual activity and all material or intellectual pleasure. Illness not only negates all these goods but also poses a more or less imminent danger to the individual's very existence and, in the most serious cases, is the determining cause of death. For society, the health of its members is an indispensable condition for its preservation, internal and external defence, general well-being, and all material, moral, and political progress. [11] (emphasis added)

The social right to health has individual and collective dimensions; having a collective dimension does not prevent its individual protection. Any legal situation with a collective aspect can therefore receive collective protection, which does not exclude individual protection.

Despite successive efforts to improve the Unified Health System (SUS), a public policy of comprehensive, universal and equitable care, it does not seem to be adequately equipped to meet all the needs that arise. The public administration has not been able to provide the right of access to health, so that for many users this constitutional guarantee has become the subject of a claim before the judiciary. It is therefore clear that the collective protection of the right to health is closely linked to its judicialization and is a growing phenomenon.

The importance of public health, taken collectively, especially as regards vaccines, can be demonstrated by the inconvenience of private purchase of immunizants, since these only make sense in a logic of free and comprehensive public distribution. Therefore, it is useless to make the vaccine available to a small paying group, as it only works if it is applied to a large number of people.

[10] BRASIL. Constituição (1988). Constituição da República Federativa do Brasil. Brasília: Senado, 1988.

[11] CRETELLA JÚNIOR, José. Comentários à Constituição de 1988. Rio de Janeiro: Forense Universitária, 2002, pág. 4331.

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However, the collective does not have full autonomy to act in collective actions and therefore sometimes relies on the collective legal entities to be represented in court. In this context, the Public Defender's Office presents itself as one of the main institutions with active legitimacy to facilitate greater access to justice for vulnerable citizens through collective actions in the field of health, being its constitutional duty and function, so that it acts in the realisation of rights linked to the effectiveness of fundamental safeguards.

At the 12th National Conference of the Brazilian Bar Association (OAB), held in October 1988, the jurist Saule Júnior asserted the need for the establishment of Public Defender's Offices in the States, drawing up the following judgment:

> The Public Defender's Office must provide legal assistance to make the population aware of its rights and the best means of securing them. In defending individual rights, it must explain and advise on the best way to conduct legal relationships with other individuals or legal entities governed by private or public law. (...) The Public Defender's Office will play an essential role in defending collective and diffuse interests, advising the community and its organisations and entities, such as residents' associations, transport users, consumer protection and environmental organisations, health and education councils, etc. [12]

In this regard, José Augusto Garcia de Sousa explains:

> Thus, the Public Defender's Office is now entirely at home in the collective sphere. Moreover, taking into account primarily social and political reasons—standing, it should be remembered, is far from being a matter merely subordinate to legal technique—the Public Defender's Office emerges as indispensable in this sphere. [13]

The Federal Constitution dealt with the Public Defender's Office in a single provision, Article 134, which in its caput provides:

> Art. 134. The Public Defender's Office is a permanent institution essential to the State's judicial function, responsible, as an expression and instrument of the democratic system, primarily for legal guidance, the promotion of human rights, and the comprehensive and free judicial and extrajudicial defence, at all levels, of the individual and collective rights of persons in need, pursuant to item LXXIV of Article 5 of this Federal Constitution.

The persons in need referred to in Article 5, item LXXIV, of the Constitution are not only those experiencing economic hardship. As legal scholarship has shown, the expression has more than one meaning, justifying the Public Defender's Office's work. It includes

[12] SAULE JUNIOR, Nelson. Democracia e poder judiciário. In: XII Conferência Nacional da OAB, 02 a 06/10/88. Painel n. 2 - Tese avulsa - Justiça Urgente. 1988, Porto Alegre. Anais. Porto Alegre: OAB, 1988. p. 742.

[13] SOUSA, José Augusto Garcia de. A legitimidade da Defensoria Pública para a Tutela dos Interesses Difusos (Uma Abordagem Positiva). In: Em defesa de um novo sistema de processos coletivos: estudos em homenagem à Ada Pelegrini Grinouver. São Paulo: Saraiva, 2010, p. 326.

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economically disadvantaged persons and those who are socially vulnerable in social and legal terms.

It is necessary to reflect on the reasonableness and efficiency that the collective purchase of healthcare materials can generate in the public administration. As regards hearing health, for example, according to information provided by the Public Defender's Office itself in the court case No 102415087.2016.8.26.0577 before the Court of Justice of the State of São Paulo, when the Public Authority purchases a hearing aid by way of a tender to be supplied to persons with a sensory disability, its cost is about R$ 900.00 for each device. This purchase, made through an individual lawsuit, costs an average of R$ 4,500.00 per device. [14]

Depriving the Public Defender's Office of the possibility of bringing collective proceedings removes important protection from disadvantaged populations, leaving them with unsatisfactory individual actions for damages, which are always inferior in quality to the preventive protection sought, particularly in public health.

Therefore, in order to enable access to justice in a substantial perspective, in recent years the Public Defender's Office has increasingly engaged in collective action. Given the legitimacy to act in the different types of actions, the Public Defender's Office is able to verify which are the most frequent requests, allowing it, even before external statistical studies are carried out, to verify the presence of a structural problem, initiate a structural litigation and thus modify the structures of public policies.

4. Structural litigation

The structural measures initially conceived in the United States in the 1950s and 1960s following the judgment of the United States Court in Brown v. Board of Education [15], arise as a possible response to disputes of public interest or those of high complexity.

What the collective process has most contemporary in its theory is the structural litigation. According to Prosecutor Edilson Vitorelli [16], structural disputes are those arising from the way in which the public structure allows or perpetuates the infringement of collective rights.

[14] Available at: <https://esaj.tjsp.jus.br/cpopg/show.do?processo.codigo=G1000A3U30000&processo.foro=577&processo.numero=1024150-87.2016.8.26.0577> Accessed jan de 2023.

[15] UNITED STATES COURTS. History - Brown v. Board of Education Re-enactment. Available at: <http://www.uscourts.gov/educational-resources/educational-activities/history-brown-v-board-education-re-enactment>. Accessed: jan. de 2023.

[16] VITORELLI, Edilson. Levando os conceitos a sério: processo estrutural, processo coletivo, processo estratégico e suas diferenças. In: Revista de Processo. São Paulo: Thomson Reuters, 2018, p. 104.

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The way in which collective actions are handled in Brazil is the subject of criticism by legal expert Sérgio Arenhart, who understands that:

> Collective legal protection in Brazil is not, strictly speaking, a technique allowing the community to express its will or interests. Rather, it authorises certain entities, acting as spokespersons for a community, to defend its interests. This protection, however, is provided in exactly the same way as the protection of individual interests. The procedural instruments are the same, the techniques are the same, and even the procedure designed is substantially the same as that employed to protect individual interests in the strict sense. (...) The individualistic logic of collective proceedings is so strong that often their subjection to the same principles governing individual proceedings is not even noticed. [17]

It should be noted that structural disputes involve public structures, affecting a larger and more substantial number of people. This is precisely why processes capable of dealing with social policies – which are of a high degree of complexity – cannot be guided by the classical regime of Brazilian civil procedure because they require greater breadth than the bipolar logic commonly used in individual processes. There is a need for the participation of society and for the expansion of the judiciary so that the whole problem can be more closely approached from its various perspectives.

This requires a redefinition of the adversarial principle. [18] This must be seen as the right to effectively influence the conviction of the judge, with the participation of the various segments that can contribute to the construction of the judicial decision, insofar as public policy is also aimed at the whole community.

Another characteristic of the structural litigation is its multipolarity, i.e. the existence of more than two poles of interest in conflict resolution. Unlike in the classical individual case, where there are two well-defined points of interest, in structural cases the disputes cover different interests of different groups or even of the whole community. [19]

A structural problem arises, for example, when a community's right to health is affected by the authorities' lack of a plan to control the Aedes aegypti mosquito. This may increase microcephaly cases in a region because of its possible relationship with the Zika virus, making a mosquito control plan important.

The judicialization of health is a phenomenon that contributes to the extraordinary increase in public spending, impacting the budget in order to comply with judicial decisions.

[17] ARENHART Sérgio Cruz. Processos estruturais no direito brasileiro: reflexões a partir do caso da ACP do carvão. RPC. 2015; 1(2): p. 3-4

[18] ZANETI JR., Hermes. Processo constitucional. Rio de Janeiro: Lumen Juris, 2007, p. 190 e ss.

[19] ARENHART, Sérgio Cruz. Processo multipolar, participação e representação de interesses concorrentes. In: ARENHART, Sérgio Cruz; JOBIM, Marco Félix (Org). Processos estruturais. 2ª ed. Salvador: Juspodivm, 2019, p. 800.

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This issue should therefore be restructured through the use of structural litigation, which involves the development of successive arrangements to ensure that the intended results are achieved without causing or minimising undesirable side effects, in particular because it is a complex and important issue.

Late implementation of public health, which is often diluted in several individual demands, diminishes the prospects for improvement in the effectiveness of services provided, causing a high degree of legal uncertainty for the community.

In structural proceedings, judicial intervention is necessarily continued, requiring constant monitoring and even adjustments so that structural reform can be implemented. The solutions to structural problems go beyond simple decisions on linear relations between the parties; diffuse responses and decisions oriented to a future perspective are required, generating an institutional restructuring, which helps to strengthen the constitutional rule of law.

In this regard, it is important to note that authors Fredie Didier Jr. and Hermes Zaneti Jr. cite Article 493 of the Code of Civil Procedure as an important device in understanding structural proceedings:

> By authorising and requiring judicial decisions to be adjusted to the current factual situation, the legislature tells judges to interpret the claim—and indeed the various expressions of interest and requests submitted throughout structural litigation—according to the circumstances prevailing when the decision is delivered, thereby making the rule of congruence more flexible. The dynamic changes in the factual circumstances of the disputes underlying structural litigation make Article 493 of the Code of Civil Procedure a fundamental tool allowing judges, during implementation of structural decisions, to adjust the course of enforcement to meet the current needs of those concerned. [20]

In this way, the structural decision-making approach proves to be an essential pathway, which has great procedural and legal and social potential to change the framework of weakness of the public health system in Brazil.

5. Structural decisions and the expansion of access to healthcare

Public policies are essential because of their efficacy in ensuring the fundamental rights of the community. Health-related policies are guided by the principles of universality and equity in access to services, the guidelines for decentralising management, the comprehensiveness of care and community participation in the organisation of a single system.

[20] DIDIER Junior F, ZANETI Junior H. Curso de direito processual civil – v. 4: processo coletivo. 11. ed. Salvador: JusPODIVM; 2017, p. 432/433.

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For Fabio Konder Comparato, public policy appears first and foremost as an organized set of rules and acts aimed at achieving a particular objective. [21]

State policies are therefore instruments for broadening access to justice which ensure that collective legal situations, protected by collective process, are designed not only to protect individuals but also to protect legal assets considered valuable by the legal order.

Lack of access to justice is a social problem because it has a direct influence on the degree to which citizens have access to basic rights, which determines the flow of collective conflicts. Access to justice is thus a truly fundamental constitutional principle, precisely because it enables democracy to be built up in a fair and equal way and, therefore, through its exercise, other fundamental rights can be ensured. [22]

In Cândido Dinamarco's view:

> Access to justice represents more than entering proceedings and accessing the means they offer. Or, in Kazuo Watanabe's words: the problem of access to justice cannot be studied within the narrow limits of access to existing judicial bodies. It is not merely a matter of enabling access to justice as a State institution, but of enabling access to a just legal order. [23]

In this sense, access to justice includes the instruction that must be given to the population so that it can know its laws, participate in social movements and situations that directly affect it, in a conscious way, thus exercising citizenship in a full and participatory way.

Structuring decisions seek to restructure public policies in order to realize socially relevant rights or interests. A structural decision is, therefore, one which seeks to implement a structural reform in an entity, organisation or institution with a view to the realisation of a fundamental right, the implementation of a particular public policy or the settlement of complex disputes.

The complexity involved in structural problems, processes and decisions is not necessarily that of complex legal proposals or situations involving multiple facts, but rather the complexity resulting from the collision of multiple social interests.

Didier Junior and Zaneti Junior thus point out about the structural decision that:

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[21] COMPARATO, Fabio Konder. Ensaio Sobre O Juízo de Constitucionalidade de Políticas Públicas. Brasília. Revista de informação legislativa a. 35 n 138. 1998. Pag 45

[22] TRISTÃO, Martins Ivan; FACHIN, Zulmar. O acesso à justiça como direito fundamental e a construção da democracia pelos meios alternativos de solução de conflitos. Scientia Iuris. Londrina, v. 13, p. 47-64, 2009, p. 53.

[23] RODRIGUES, Horácio Wanderlei. Acesso à justiça no direito processual brasileiro. São Paulo: Acadêmica, 1994. p. 29.

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> It normally prescribes a legal norm with open-ended content; often its provision indicates an outcome to be achieved—a goal, an objective—thus assuming, in this respect, the deontic structure of a principle-based norm intended to promote a particular state of affairs. But it does more: **it structures how that outcome is to be achieved, determining the conduct that must be followed or avoided for the provision to be complied with and the outcome achieved**—thus assuming, in this respect, the deontic structure of a rule-based norm. [24] (emphasis added)

In the structural proceedings, the judge shall set a target to be achieved and a deadline for achieving it. The judiciary may monitor and assess whether the measures are being adopted over time and monitor their implementation, including reassessing the measures where appropriate, as they are structural issues of public interest where the conflict is rooted in the institutions themselves, in their own functioning and how they develop.

Following the approach of this research, it should be pointed out that health is a fundamental right expressly provided for in the Constitution, and the constituent legislature opted for the establishment of a Unified Health System (SUS). Implementation of the right to health requires concrete action by the State through the implementation of public policies, including the National Medicines Policy (NMP).

NMP seeks, inter alia, to safeguard the principle of equity in order to ensure the availability of safe, effective and quality medicines by promoting rational use by healthcare professionals and users.

Despite this State policy, the principle that judicial review cannot be excluded, together with weaknesses in the public health system, means that access to essential medicines is frequently addressed by Brazilian courts. They recognise that this aspect of the right to health cannot be denied to citizens. Numerous repeated claims concern the issue, as shown by the rulings below:

> WRIT OF MANDAMUS. PROVISION OF MEDICATION. RIGHT TO HEALTH. ADMISSIBILITY. ORDER TO PROVIDE MEDICATION. WRIT GRANTED.
> 1 – Settled case law establishes that, where a request concerns medication essential to the health of a financially disadvantaged person with a serious disease, as in the present case, proceedings may be brought against any of the federative entities—the Union, the State, or the Municipality—which are jointly and severally liable.
> 2 – A mere assertion of financial incapacity by the public authorities, based on the doctrine of the limits of available resources, cannot obstruct the realisation of fundamental rights.
> 3 – Writ granted. [25]
>
> INTERNAL APPEAL IN AN EXTRAORDINARY APPEAL. CONSTITUTIONAL LAW AND CIVIL PROCEDURE. RIGHT TO HEALTH (ARTICLE 196, FEDERAL

[24] DIDIER Junior F, ZANETI Junior H. Curso de direito processual civil – v. 4: processo coletivo. 11. ed. Salvador: JusPODIVM; 2017, p. 426.

[25] TJPI | Mandado de Segurança Nº 2016.0001.005632-3 | Relator: Des. Hilo de Almeida Sousa | Tribunal Pleno | Data de Julgamento: 02/02/2017.

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> CONSTITUTION). PROVISION OF MEDICATION. JOINT AND SEVERAL LIABILITY OF FEDERATIVE ENTITIES. JOINDER TO PROCEEDINGS. TRANSFER TO THE FEDERAL COURTS. DILATORY MEASURE. INADMISSIBILITY.
> 1. Article 196 of the Federal Constitution imposes a State duty to implement public policies ensuring effective public access to measures reducing disease risks and to measures necessary to protect citizens and restore their health.
> 2. The State must create the means to provide medical and hospital services and medication, as well as implement preventive public policies, with the federative entities guaranteeing the necessary budgetary resources (Articles 23, II, and 198, § 1, of the Federal Constitution).
> 3. Receiving medication from the State is a fundamental right. Applicants may claim it from any federative entity, provided that their need and inability to pay with their own resources are demonstrated. Once these requirements are met, the federative entity must act in a spirit of solidarity to give effect to the constitutionally guaranteed right, rather than create legal obstacles to delay appropriate judicial relief.
> 4. In this case, the State of Santa Catarina's request to join the Union to the proceedings is merely dilatory, bringing no benefit to the proceedings while delaying their resolution. It is an unconstitutional means of preventing access to medication needed to restore the respondent's health.
> 5. Internal appeal in the extraordinary appeal dismissed. [26]

> CONSTITUTIONAL LAW. EXTRAORDINARY APPEAL INVOLVING GENERAL REPERCUSSION. MEDICINES NOT REGISTERED WITH ANVISA. PROVISION BY COURT ORDER IS INADMISSIBLE, EXCEPT WHERE THERE IS AN UNREASONABLE DELAY IN EXAMINING THE REGISTRATION APPLICATION. (...) For medicines with proven efficacy and safety and completed testing, but not yet registered with ANVISA, provision by court order is absolutely exceptional and may occur only where ANVISA has unreasonably delayed examining the application beyond the period established by Law No. 13.411/2016. Even then, proof that three requirements are cumulatively met is necessary:
> (i) an application for registration in Brazil exists, except for orphan medicines for rare and ultra-rare diseases;
> (ii) the requested medicine is registered with reputable foreign regulatory agencies, such as those in the United States, European Union, and Japan;
> and (iii) no therapeutic substitute is registered with ANVISA. Furthermore, because the basic premise of the State's obligation is the agency's delay, actions seeking medicines without ANVISA registration must necessarily be brought against the Union. [27]

The large number of individual cases seeking the same legal protection conceals the real problem, which is structural: national public health policy. In this way, they demonstrate that public policies aimed at the supply of medicines present structural problems, difficulties and challenges, involving judges, academics, legal scholars, as well as society as a whole. They should therefore be called upon to develop solutions that contribute to the improvement of this public system by discussing how health resources should be distributed in the country.

The structural decision-making approach, in accordance with national doctrine and case law, is one of the main ways of changing the framework of weakness of the public health system in Brazil, as well as contributing to the improvement of the NMP in order to ensure the effective

[26] STF, RE 607381, 1ª Turma, 31/05/2011 rel. Min. Luiz Fux

[27] STF. Plenário. RE 657718/MG, rel. orig. Min. Marco Aurélio, red. p/ o ac. Min. Roberto Barroso, julgado em 22/5/2019 (repercussão geral)

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realisation of the right to health, giving it its real meaning and giving it effective application in the practical sphere of civilian life. [28]

The need arises to institutionalize the channels of communication between the community and the public administration to improve health services through structural litigation, which, as already mentioned in this paper, are also present in the extrajudicial spheres.

Intervention in public policies uses coercive mechanisms that reduce refusals to supply medicines through SUS. The Code of Civil Procedure provides several mechanisms that can be used in structural litigation, such as procedural agreements, consensus among participants, dialogue between the judge and everyone involved, and public hearings.

In addition, it should be noted that the court's remark concerning the procedure aimed at improving the conditions of a particular public hospital was addressed by one of the structural issues surrounding the structure of public health:

> CIVIL PROCEDURE. ADMINISTRATIVE LAW. SPECIAL APPEAL. **PUBLIC CIVIL ACTION. RENOVATION AND IMPROVEMENTS AT A PUBLIC HOSPITAL.** JUDICIAL REVIEW OF PUBLIC POLICIES. GENERIC ASSERTION OF INADMISSIBILITY. UNFOUNDED. **STRUCTURAL LITIGATION. MULTIPLE AND COMPLEX CLAIMS.** ADMISSIBILITY. EXAMINATION OF SPECIFIC VIOLATIONS OF LAW. FAILURE TO ADDRESS ISSUES. NULLITY.
> 1. Judicial review of public policies is possible in principle, albeit in exceptional circumstances. Although the administrator's primary role in implementing them must be respected, discretion gives way to choices already made by the legislature, which bind the implementing authority and authorise judicial examination of their implementation.
> 2. Multiple and complex claims do not automatically imply an intention to replace the administrator. Rather, they reflect the claimant's care in pursuing structural intervention, which also requires the Judiciary to manage the case differently.
> 3. **In structural litigation, the claim should be understood as seeking to change the state of affairs giving rise to rights violations, rather than addressing isolated violations of law. Repeated litigation over such violations may result in even greater interference with administrative discretion than that supposedly avoided by favouring individual actions.**
> 4. In this case, a generic assertion that judicial intervention in healthcare failures is impossible constitutes an actual failure by the lower court to address the legal provisions invoked. If maintained, that failure may prevent the parties from accessing higher courts.
> 5. Special appeal granted, ordering the case to be returned to the court of origin to remedy the defect. [29] (emphasis added)

The Public Defender's Office has great potential for action in structural actions in the field of health. The Superior Court of Justice has ruled that the institution also has the right to

[28] CHAGAS, R. Rezende; FERREIRA, A. Pacheco; NICOLITT, A. Luiz; OLIVEIRA, M.H.Barros. Decisões estruturais em demandas judiciais por medicamentos. Available at: <https://doi.org/10.1590/0103-11042019S409>. Accessed jan de 2023.

[29] STJ, REsp 1733412 / SP (2017/0241253-0), Rel. Min. OG FERNANDES, SEGUNDA TURMA, DJe 20/09/2019.

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bring a civil action against the abusive increase in health plans for the elderly. It is therefore possible to defend those in need, even outside the scope of the SUS, as follows:

> APPEAL TO RESOLVE DIVERGENT RULINGS IN A SPECIAL APPEAL ARISING FROM AN APPEAL AGAINST A NON-UNANIMOUS DECISION. CIVIL PROCEDURE. STANDING OF THE PUBLIC DEFENDER'S OFFICE TO BRING A PUBLIC CIVIL ACTION ON BEHALF OF OLDER PERSONS. HEALTH INSURANCE PLAN. AGE-RELATED PREMIUM INCREASE ALLEGED TO BE ABUSIVE. PROTECTION OF HOMOGENEOUS INDIVIDUAL INTERESTS. DEFENCE OF PERSONS IN NEED, INCLUDING BOTH THOSE LACKING FINANCIAL RESOURCES AND THOSE IN A POSITION OF LEGAL VULNERABILITY. APPEAL TO RESOLVE DIVERGENT RULINGS GRANTED. (...)
> 2. The Public Defender's Office primarily provides legal assistance and defence to economically disadvantaged persons. However, it also assists persons in a position of legal vulnerability who do not necessarily lack financial resources, for example when acting as the special curator provided for in Article 9, item II, of the Code of Civil Procedure, or as court-appointed defence counsel in criminal proceedings under Article 265 of the Code of Criminal Procedure.
> 3. **The fundamental right protected here is among the most important: the right to health. Furthermore, the group of potentially injured consumers consists of older persons, whose vulnerability is already recognised by the Federal Constitution.** Article 230, under Chapter VII of Title VIII ("The Family, Children, Adolescents, Young People, and Older Persons"), provides: "The family, society, and the State have a duty to support older persons, ensuring their participation in the community, defending their dignity and well-being, and guaranteeing their right to life." (...) [30] (emphasis added)

Structural processes in the field of health face challenges for the effective guarantee of fundamental rights, since, with respect to social rights, their realization depends not only on a failure to do so, but also on a failure of the State to do so, through the implementation of public policies that require material and human resources.

Brazilian case-law demonstrates a propensity to give effect to the fundamental right to health, mainly through structural class actions aimed at encompassing the situation in its various aspects and nuances. Court proceedings have not been confined to individual cases, in which the decision generally benefits only a particular person.

Access to health is an issue involving the right to development and to life and must be implemented through the structural litigation. In this way, the judiciary exercises its true role as a State, implementing public policies through dialogue with other Powers and private entities, and supervising the effective exercise of protected rights.

[30] STJ. EMBARGOS DE DIVERGÊNCIA EM RESP Nº 1.192.577 - RS (2014/0246972-3). Rel. Min. LAURITA VAZ. Data do julgamento: 21 de outubro de 2015.

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6. Conclusion

The overcrowding of the judiciary with complex individual cases which repeatedly deal with the same question of law makes the problem of the inefficiency of adjudicating cases dealing with structural disputes through individual or collective non-structural actions increasingly apparent.

This study sought to demonstrate the existence in collective law of so-called structural litigation, instruments capable of ensuring the planning and implementation of public policies, particularly in the field of health law. Structuring decisions must be consistently implemented in order to compel the State to plan and implement State policies that guarantee minimum rights for the population.

The importance of the Public Defender's role in defending the right to health through structural collective processes has been made clear in the study. We could not imagine the pursuit of equality, protection of life and physical integrity without seeing its link to the right to health.

The Public Defender's Office, an institution essential to justice and democratic order, has been rationally exercising collective judicial and extrajudicial protection for the people in need. Its legitimacy to defend collective interests in a broad sense is a consequence of the new constitutional profile of the institution, which is the result of the current social and legal reality.

It is also the State's responsibility not only not to infringe the right to health, but also its obligation to implement it by monitoring public policies pursued by the executive. The structural litigation for requests for better access and quality of public health brings the legitimate parties closer to ensuring their fundamental rights and reduces the number of individual requests, thus easing the judicial system.

It was concluded that access to justice is a fundamental right which goes beyond mere access to the judiciary. It is a mechanism conducive to the creation of a project for the rehabilitation of a social system which is infringing a fundamental right. In the field of public health, the judiciary has attained a high degree of prominence, making the judiciary one of the main building blocks of public health policies.

The use of collective actions that manage structural decisions does not represent the overcoming of individual demands, but has significant advantages, among which is the possibility of an effective improvement of public health policy. The objective of the structural litigation is therefore to plan the basis of a system in accordance with the provisions of the Federal Constitution and to ensure that it is gradually and truly implemented.

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Finally, it is important to note that this is not a definitive answer to the question. The structural litigation is an appropriate way to start the debate on fundamental rights in structural disputes, particularly in matters of public health, but since it is a new definition of part of the collective processes, there is still much to be discussed on the subject, which has influence in several other areas of law. However, it is understood so far that the structural litigation and structural decisions are an excellent way to achieve the real right to health.

In short, it is argued that the subject of this study should be further promoted in academic debate, allowing greater dissemination and discussion of the theory of the structural litigation, which can thus contribute to broadening access to justice, thereby bringing tangible benefits to society as a whole.

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