

Brief notes on structural decisions and environmental protection in the Brazilian law.

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Abstract. This article analysed the possibility of using structural decisions for environmental protection in the Brazilian law. In this context, it was examined the concept of structural decision, environmental protection as a fundamental right, the use of structural decisions for environmental protection and Brazilian cases. The research followed the hypothetical-deductive method, analysing scientific articles and specific bibliography. The research topic is relevant because the development of society contributed to the emergence of complex litigation that demand from the judiciary more than the traditional process can offer. That is why structural decisions are an important and modern topic of study. Also, the advance of human modernization emphasizes environmental protection as an important concern, plus environmental protection is a fundamental right in Brazilian Federal Constitution. The purpose of this study is to examine the possibility of environmental protection through structural decisions in Brazilian law and to analyse Brazilian cases that used structural decisions in the environment field. In conclusion, even that there is no specific law in Brazil that regulates the application of structural decisions, there are cases in which judges applied structural decisions, aiming a more adequate solution to the cases. It was also identified cases about environmental protection in which some authors believed structural decisions were applied and others do not. It was observed as well that the discussion about structural decisions, specially related with environmental protection, is still a new topic in Brazil, that is the reason why is it not possible to find a lot of material on the subject and further study on the subject is necessary.

Keywords. Structural decisions, public policies, environment, fundamental rights, civil procedural law.

1. Introduction

The modernization and development of society contributed with the emergence of complex litigation. In this manner, it is not possible to continue using just the traditional process. The complexity of new litigations demand new answers from Justice, so judiciary decisions will have more effectiveness for society. Thus, the study of structural decisions is important.

In order to resolve structural litigations, it is necessary modifications in the way society is organized. Sometimes, the judiciary needs to use extra measures so that its decisions have effects in the real world, not being restricted only to paper.

The environmental protection has also gained more attention nowadays. The urgency to protect the

planet and its remaining natural resources is a global concern. In Brazil, the right to ecologically balanced environment is at the Brazilian Federal Constitution as a fundamental right. However, even with the positivization of this protection, environmental violations keep happening and judiciary decisions do not have significant impact on environmental protection.

In other countries, structural decisions are used a lot, however, in Brazil, due to the absence of legal regulation on the subject, the judiciary still does not widely apply structural decisions.

The purpose of this article is to identify the possibility of using structural decisions to protect the environment in Brazilian procedural law.

The study will examine firsts the concept of structural decisions, then the environmental protection as a

fundamental right and the possibility of using structural decisions to protect the environment, finally, brief analysis of Brazilian cases.

It was used scientific articles and specific bibliography to do a literature review in order to analyse the possibility of using structural decisions in the environmental protection.

2. Methodology

The research followed the hypothetical-deductive method. It verified the doctrinal position in relation to the possibility of using structural decisions to environmental protection in Brazilian law.

It was examined the concept of structural decision, environmental protection as a fundamental right, the use of structural decisions for environmental protection and Brazilian cases.

The research topic is relevant because is modern and really social important. The development of society contributed to the emergence of complex litigation that demand from the judiciary more than the traditional process can offer. The judiciary decisions must be adequate to real cases and have practical results, so they can not be restricted to the traditional procedural form. The effective of fundamental rights is essential therefore the creation of modern tools that allowed the judiciary to achieve their goals is necessary, with structural decisions having an important role in this regard.

Also, the environmental protection, positive in the Brazilian Federal Constitution, is very important.

Thereby, the article will analyze, through selected reading, scientific articles and doctrines, the possibility of using structural decisions as a tool to protect the environment.

3. Results and discussion

This article will analyze the following topics: structural decisions, environmental protection and fundamental rights, structural decisions used as a form of environmental protection and Brazilian cases.

3.1 Structural decisions

The structural process occurs when a judge expands the judicial demand aiming the protection of constitutional values that are being violated. In order for this protection to occur, the judge makes a decision that involves the restructuring of the institution. Thus, based on one or more cases that reach the judge, it perceives the need to implement public policies that restructure a bureaucratic organization to solve the root of the problem. [1]

Structural decisions not only deal with the relationship between the parties, but go much further by stipulating solutions to litigation that affect all of society and change the structure of

private and governmental institutions. Thus, the judiciary sets rules that must be followed by the other state branches and private entities. The structural decision sets goals and plans for restructuring. [1]

Structural litigations are problems that arise from the way a bureaucratic structure is organized. Structural litigation can involve public or private institutions. A structural decision seeks reform of a department so that a fundamental right is guaranteed.

Structural litigation involves violations that affect various social groups in different ways, so some people may have no interest in stopping the violations, because they are benefiting from them. Structural litigation involves multiple interests that may be in opposition to each other. [2]

Thus, structural litigation demands a complex analysis, and it is not possible to apply only traditional civil procedural rules. The traditional process is not ideal due to its complexity, long duration, and need for reorganization. [3]

In some cases, if the problem is only solved punctually, there is a risk that it will reoccur in the future, leading to the necessity of organizational restructuring. In this way, the judicial decision will not be a palliative. [3]

In the structural process, before establishing a judicial decision, it is necessary to hold public hearings to allow popular participation in the procedure. This allows all interests and portions of society to be heard. [4]

In the structural process first the structural litigation will be identified and then a structural decision will be established containing a plan of action, a schedule for monitoring and constant review of the plan. Thus, the judiciary assumes a supervisory function. [4]

The emergence of complex litigation in which it is not possible to identify the holders of the right, the exact claim, and the best way to enforce it, and where the demand depends on the control of public policies, makes it necessary to reconsider the existing procedural techniques. Structural litigation makes the judiciary assume a more prominent role. The judiciary has the task of giving meaning to the constitutional text based on concrete cases. Due to the complexity of human relationships, it is not possible for all cases of litigation to be regulated by the legislature. Therefore, a procedural model that is flexible and attends to the real demands of society is necessary. Allowing the judge innovative tools so that the judiciary decisions are truly put into practice. [3]

In practice, there is a constant violation of social rights due to the absence of public policies and structural failures. This affronts the fundamental rights established in the Constitution, and requires an immediate solution. When the judiciary makes decisions in these complex cases, it is also involving

various sectors of society that need to cooperate and change. [3]

The origin of structural decisions is 1950 and 1960, in the USA, with the case "Brown v. Board of Education", which was about segregation in public schools. In this case, the American Supreme Court started the process of changing the public educational system. [5]

Structural litigation was first conceptualized in the USA. Structural litigations are characterized by being mutable, requiring future legal claims and aiming to protect fundamental rights that have been violated on an continuous basis. The structural process differs from the individual process and the collective process, predominant in Brazil, given that they are complex and involve the restructuring of several areas. The judiciary, in pronouncing structural decisions, is acting in an unconventional way, but this is necessary so that the decisions can adapt to the reality of the conflicts. Structural decisions present measures of a prospective and mandatory nature, they expand the possibility of negotiation and of the participation of interested parties in the process, aiming at the reform of organizations. Therefore, in the context of structural decisions, the judiciary assumes a new role as a manager of social values. [6]

Not just any procedural system has the conditions to apply structural decisions. To apply structural decisions the country's judiciary system must be mature enough and the separation of powers must be minimally relaxed, in attention to the implementation of fundamental rights. The judiciary will influence public policy. With structural decisions the judiciary is influencing governmental actions. [7]

Some authors understand that the Brazilian legislation allows the structuring process, due to "artigo 21, §1, da Lei nº 13.655/2018". However, there is no specific legislation in Brazil on the structural process, which can generate legal uncertainty. [3]

The structural decision is not a definitive judgment of the complex litigation, it only recognizes the illegality of the situation and sets goals for a solution. [3]

3.2 Environmental protection and fundamentals rights

The 1988 Brazilian Federal Constitution determined the environment as a diffuse and collective right. That means the environment belongs to all society and is part of the third generation rights. This is the reason why environmental protection is so important.

The constitutional norms began to be organized prioritizing the life right at the expense of other fundamental rights. Thus, life is priority compared to development right, property right and private initiative. Also, the life right must guide the

environmental protection, because the environment guarantees the quality of human life. [8]

The right to ecologically balanced environment provides a healthy and dignified life in a quality surrounding, for the current and the future generations. Therefore, the environment must be protected and preserved. [9]

However, even with the protective legal provisions numerous environmental disasters occurred recently in Brazil, such as bushfires, oil spills and dam disasters. These environmental accidents impact the local biodiversity and the population living in the affected areas.

3.3 Structural decisions used as a form of environmental protection

The ecologically balanced environment is a fundamental right, but it often ends up being violated. In order to guarantee constitutional values, it is possible for the judiciary to interfere in the organization of institutions, through structuring decisions.

The government should have means of prevention to preserve the environment, because the repair of ecological damage is time consuming and sometimes is not possible. The structural decision can be an important tool for the reorganization of the state with a view to greater environmental protection. [9]

The structural decisions can be used for environmental protection in either a repairment or preventive way. The structural process enables more efficiency and organization of the State, that violate ecologically balanced environment right. Given that structural decisions establish a plan to achieve the fundamental right, ensure the judiciary's supervision of the fulfillment of goals and present proposed solutions to problems that arise during the restructuring of the institution, this method is suitable for the protection of the environment. [9]

3.4 Cases

The case of Samarco, considered Brazil's biggest environmental disaster, occurred in Mariana, Minas Gerais, in 2015, with the collapse of the Fundão's Dam. The dam rupture caused the spilling of mineral waste into several rivers and the sea, causing loss of local biodiversity, death of local residents, loss of housing, loss of local commerce, loss of jobs, loss of historical and cultural patrimony, and harm to the region's indigenous people, among others.

The situation was considered complex, with several groups affected. Some authors argue that it is a case of structural litigation.

In the Samarco case, society was affected by environmental, economic and social impacts. Therefore, the case was classified as a complex litigation. Because it is a complex case it was not possible to initially determine the extent of the damage. As the traditional Brazilian civil procedure

requires that the plaintiff formulate a certain and determined claim, it would be necessary in this case to make this rule more flexible so that the plaintiff can adjust his claim as the case progresses. Mutable conditions constantly require new judicial decisions, especially when it comes to the application of public policies. [10]

The case known as "ACP do Carvão" occurred in Criciúma, Santa Catarina, in 1993, in an attempt to recover an area used for coal mining. As a result of this legal action, the defendant had to present a project of environmental recovery of the region, with an execution schedule. Because it was a complex case, the judiciary determined that the decision be executed in several phases. Currently, coal exploration occurs in a planned way with recovery plans for the affected areas. [9]

In all the cases cited above, the judiciary did not limit itself to making a decision based only on the facts of the concrete cases and affecting only the parties in the case; the judiciary made a decision that protected the constitutional rights that had been violated. Thus, the decision went beyond what the parties postulated and served society as well.

It can be observed that it is also possible to file an action that has as its initial objective the application of a structural decision, as occurred in the cases of the environmental disasters with the dams in Minas Gerais, because once identified the insufficiency of the institution to protect fundamental rights. [11]

On the other hand, there are authors who understand that the Samarco case and the "ACP do carvão" case did not have structural decisions. They argue that even though the litigations are complex, there was no restructuring of the entity that violated the environment. [12]

4. Conclusion

The modernization of society requires the development of Justice, because the traditional process is not appropriate for complex cases.

Structural litigations are problems that arise from the way a bureaucratic structure is organized. A structural decision seeks reform of a department so that a fundamental right is guaranteed

The Brazilian legislation allows the structural process. However, there is no specific law in Brazil regulating structural measures, which may cause legal insecurity. Even that there is no specific law that regulates the application of structural decisions, there are cases in which judges applied structural decisions.

The Brazilian Federal Constitution of 1988 establishes the right to a ecologically balanced environment as a fundamental right. The environment right is strongly related to human life right. However, even with the positivization of this protection, environmental violations keep

happening.

The structural decisions can be used for environmental protection in either a repairment or preventive way.

The "Samarco" and "ACP do Carvão" cases are about environmental protection. Some authors believe that structural decisions were applied in these cases; on the other hand, some authors believe that it was not.

It was observed as well that the discussion about structural decisions, specially related with environmental protection, is still a new topic in Brazil, that is the reason why is it not possible to find a lot of material on the subject and further study on the subject is necessary.

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