

MEANINGFUL ENGAGEMENT: SOUTH AFRICAN CONTRIBUTIONS TO STRUCTURAL LITIGATION IN BRAZIL

COMPROMISSO SIGNIFICATIVO: CONTRIBUIÇÕES SUL- AFRICANAS PARA OS PROCESSOS ESTRUTURAIS NO BRASIL

COMPROMISO SIGNIFICATIVO: CONTRIBUCIONES SUDÁFRICAS A LOS PROCESOS ESTRUCTURALES EN BRASIL

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ABSTRACT

Objective: The purpose of this article is to analyze a structural remedy model developed

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by the Constitutional Court of South Africa, called Meaningful Engagement, which can minimize the impact of traditional objections to structural litigation, as it increases community participation and interinstitutional dialogue between the various actors responsible for the solution of the problem.

Methodology: As a research methodology, in addition to the traditional bibliographic research around the doctrine developed on the subject, a more in-depth analysis of the two paradigmatic cases that served as the basis for the development of the South African institute, Olivia Road and Joe Slovo, was carried out.

Results: It is concluded that are intrinsic and extrinsic reasons for seeking inspiration in the Meaningful Engagement model. The South African model, by valuing institutional dialogue and public participation, mitigates the usual criticisms to structural litigation.

Contributions: From the results, it is observed that: a) in dialogic structural remedies, affected communities are treated with dignity and can influence the formulation of public policies that concern them.; b) public participation guarantees the structural injunctions transparency and, to the judges, greater technical capacity, since only with the inclusion of the social segments affected by the problem that is intended to be overcome will the judge be able to produce measures consistent with the real needs the concrete case; c) finally, public participation and institutional dialogue also collaborate to mitigate the criticisms usually made of structural processes.

Keywords: Meaningful Engagement. South Africa. Structural Litigation. Structural Remedies.

RESUMO

Objetivo: O objetivo do presente artigo é analisar um modelo de remédio estrutural desenvolvido pela Corte Constitucional da África do Sul, denominado Compromisso Significativo, que pode minimizar o impacto das tradicionais objeções aos processos estruturais, pois aumenta a participação da comunidade e o diálogo interinstitucional entre os diversos atores responsáveis pela solução do problema.

Metodologia: Como metodologia de pesquisa, além da tradicional pesquisa bibliográfica em torno da doutrina desenvolvida sobre o assunto, realizou-se uma análise mais aprofundada de dois casos paradigmáticos que serviram de base para o desenvolvimento do instituto sul-africano, Olivia Road e Joe Slovo.

Resultados: Conclui-se que existem razões intrínsecas e extrínsecas para buscar inspiração no modelo do Compromisso Significativo. O modelo sul-africano, ao

valorizar o diálogo institucional e a participação pública, atenua as críticas usuais aos processos estruturais.

Contribuições: A partir dos resultados, observa-se que: a) nos remédios estruturais dialógicos, as comunidades afetadas são tratadas com dignidade e podem influenciar na formulação de políticas públicas que lhes digam respeito; b) a participação pública garante a transparência das liminares estruturais e, aos juízes, maior capacitação técnica, pois somente com a inclusão dos segmentos sociais, atingidos pelo problema que se pretende superar, o juiz poderá produzir medidas condizentes com as necessidades reais caso concreto; c) por fim, a participação pública e o diálogo institucional também colaboram para mitigar as críticas usualmente feitas aos processos estruturais.

Palavras-chave: África do Sul. Compromisso Significativo. Processo Estrutural. Remédios Estruturais.

RESUMEN

Objetivo: El propósito de este artículo es analizar un modelo de remedio estructural desarrollado por la Corte Constitucional de Sudáfrica, denominado Compromiso Significativo, que puede minimizar el impacto de las objeciones tradicionales a los procesos estructurales, ya que aumenta la participación comunitaria y el diálogo interinstitucional entre los diversos actores. responsable de solucionar el problema.

Metodología: Como metodología de investigación, además de la investigación bibliográfica tradicional en torno a la doctrina desarrollada sobre el tema, se realizó un análisis más profundo de dos casos paradigmáticos que sirvieron de base para el desarrollo del instituto sudafricano, Olivia Road y Joe Slovo, se llevo a cabo.

Resultados: Concluimos que existen razones intrínsecas y extrínsecas para buscar inspiración en el modelo de Compromiso Significativo. El modelo sudafricano, al valorar el diálogo institucional y la participación pública, mitiga las críticas habituales a los procesos estructurales.

Contribuciones: De los resultados se observa que: a) en los remedios estructurales dialógicos, las comunidades afectadas son tratadas con dignidad y pueden incidir en la formulación de las políticas públicas que les conciernen; b) la participación ciudadana garantiza la transparencia de las medidas cautelares y, a los jueces, una mayor formación técnica, ya que solo con la inclusión de los segmentos sociales, afectados por el problema que se pretende superar, el juez podrá producir medidas consistentes con las necesidades reales en un caso específico; c) finalmente, la participación ciudadana y el diálogo institucional también colaboran para mitigar las críticas que habitualmente se hacen a los procesos estructurales.

Palabras clave: Sudáfrica. Compromiso Significativo. Proceso estructural. Remedios estructurales.

1 INITIAL CONSIDERATIONS

Although there has been, in Brazil, a wide debate on the judicial control over public policies since the 1990s, the theme has gained a new dimension, both in the field of theoretical research and of practical implementations, since 2015. The reason for this was the ruling of a precautionary measure case, Claim of Non-compliance with a Fundamental Legal Precept (“Arguição de Descumprimento de Preceito Fundamental”, or simply “ADPF”) n. 347 / DF, where the debate on claims involving structural demands was explicitly mentioned by the Federal Supreme Court (“STF”).

Structural litigation is usually associated with the violation of social, economic and cultural rights (“DESCs”), because such rights involve complex social benefits mechanisms that impact the budget and the structure of public services, creating difficulties to be implemented. Problems with the effectiveness of these rights are very frequent, even in countries that enshrine them at constitutional level, since the mere fact of formally recognizing, declaring and providing for in legislation a beneficial right does not imply its immediate implementation. Through structural litigation, we seek to overcome a problem of massive disenfranchisement, usually of many individuals, through a process that involves the participation of several bodies with competence to act in that sector. Therefore, structural demands are considerably more complex disputes, in which the Judiciary plays a major role.

Precisely because it places judges in a prominent role, claims of a structural nature tend to be the subject to several objections. In general, the three most relevant criticisms can be indicated: the technical incapacity of the Judiciary to intervene in the scope of public policies, leading to the inefficiency of structural litigation; the threat to the principle of separation of powers; and the possibility of a backlash effect, in view of unwanted judicial intervention and the resulting political and social reaction.

Because of these criticisms, the judiciary, apparently, faces an insurmountable dilemma. On the one hand, by intervening directly in the formulation of public policies, even though it does not have the necessary technical capacity to reorganize the priorities of the public budget, and which contradicts the majority political will, putting the separation of powers at risk. On the other hand, by adopting a respectful posture, it can empty all the normative content of socioeconomic rights, leaving them dependent on the discretion of the Public Power, putting at risk the supremacy of the Constitution and making judicial protection difficult.

In the middle of these two extremes, ranging from total intervention to total deference, there are several intermediate possibilities for judicial action, which is

precisely what we intend to defend in the present work. The objective is to present the Meaningful Engagement, a structural remedy model developed by the Constitutional Court of South Africa, which can serve as a basis for the improvement of claims involving structural demands in Brazil. Because it is a dialogical and participative structural remedy, in which there is no hypertrophy of the Judiciary over other powers, Meaningful Engagement can contribute to the strengthening of participatory democracy.

As a research methodology, in addition to bibliographic analysis, the study of two paradigmatic cases for the development of Meaningful Engagement in South Africa: *Olivia Road* and *Joe Slovo*. Two cases were selected to show, with concrete examples, how a Constitutional Court managed to circumvent the objections usually presented to structural claims, and what contributions this structural remedy can offer to Brazil, with the necessary adaptations.

As for structuring, the article is divided into three main parts. In the second topic, some fundamental concepts for research are clarified, in addition to making a general assessment of the structural litigation in the country and the criticisms usually made to these demands. In the third topic, the South African experience in structural litigation is presented, focusing on two paradigmatic cases: *Olivia Road* and *Joe Slovo*. Finally, in the fourth topic, the intrinsic and extrinsic reasons for promoting greater community participation in resolving structural disputes are presented.

2 THE JUDICIARY'S RESPONSE TO POLITICAL OMISSIONS: STRUCTURAL LITIGATION, ITS RISKS AND ITS USE IN BRAZIL

From the establishment of the Welfare State, strengthened after the Second World War, fundamental rights began being adopted in new Constitutions (BEATTY, 2014, p. 216), which included matters that, until then, were not typically considered constitutional. In addition, the DESCs gained greater relevance, resuming the trend initiated by the Mexican Constitution, of 1917, and by the Constitution of Weimar, of 1919. Along with this process, the study of the objective dimension of fundamental rights began, which links government performance to the most diverse areas, imposing on the State the duty to act, constantly, in favor of their effectiveness (NASCIMENTO, 2016, p. 68).

The constitutional provision for an extensive list of rights was not sufficient, however, to ensure effectiveness. Unfortunately, the legal provision was predominantly symbolic. When dealing with the theme, Neves (1996, p. 325) explains that every Constitution has a symbolic dimension, designed to influence the social imaginary, consecrating values that are relevant to society; and, also, an instrumental dimension, which tries to conform, effectively, the underlying political and social reality. The real problem is not the existence of this double dimension, but the subordination of the first

to the second.

It is in this scenario that the concept of political omissions emerges. Here, there is no normative vacuum, that is, it is not a complete absence of ordinary legislation rules aimed at the fulfillment of fundamental rights. As Marmelstein (2015, p. 25) explains, these gaps can be understood as the lack of public policies necessary to protect constitutionally guaranteed rights, causing them to be profound and repeated violations by the Public Power.

In view of these omissions, the affected population segments often resort to the Judiciary, to avoid the effects of state inertia (FERRAZ, 2014, p. 121). Thus, structural demands arise, which are complex cases, that involve multiple interests, and seek to modify the structure of certain institutions, usually public institutions. As Salazar and Meireles and (2017, p. 32) clarify, typical issues of structural litigation involve different constitutional values, in the same way that, not only are several competing interests are at stake, but there is also the possibility that the legal spheres of third parties, which are not parties in the demand, are affected by the judicial decision (ARENHART, 2017, p. 423-424).

In recent years, with the proliferation of publications on the subject, a multiplicity of concepts, often poorly explained, have occupied the center of the debate on the subject. In works on the theme, it is common to find expressions such as structural litigation (ARENHART, 2013), structural remedies (PUGA, 2013), structural measures (JOBIM, 2013), structural ruling (CAMPOS, 2016), structural disputes (VITORELLI, 2018) and structural processes (GALDINO, 2020). What concepts guide this research? How have these processes been used in Brazil? What are the risks of its use? The next subtopics intend to answer these questions.

2.1 STRUCTURAL LITIGATION AS AN INSTRUMENT FOR TRANSFORMING STATUS QUO

While collective disputes are conflicts between legally relevant interests, where one of the parties is seen as a collective with rights or duties, structural collective disputes have these same characteristics, but with an important additional element: the rights of the collective are not violated by a specific action by the other party, but result from a state of affairs contrary to the law, whose change generally depends on the restructuring of a public policy, program or institution (VITORELLI, 2018, p. 340).

Structural disputes are characterized by an interconnection of particular interests in a complex mosaic, in such a way that it is only possible to attend to the particular interest after determining the general framework of the interests involved (PUGA, 2014, p. 48). In addition, there is the possibility that the legal spheres of third parties, which are not part of the conflict, are affected by the judicial decision that seeks to resolve it

(ARENHART, 2017, p. 423-424). For Galdino (2020, p. 239-241), these characteristics cause the structural processes to be multipolar or polycentric, that is, to have several competing centers of interest, which will be directly impacted by the judicial decision.

In his triple classification of collective disputes, Vitorelli¹ states that structural disputes are irradiated disputes, which implies two important characteristics. First, they have a high level of conflict, since the affected community is divided into subgroups, which may have competing interests and which will be affected in different ways by the judicial decision. In addition, they are highly complex, since there is a wide variety of legal solutions applicable to the specific case and which will impact the groups involved in different ways.

Structural disputes are a fact of reality, that is, they exist even though the law does not provide procedural instruments for them to be collectively protected (VIOLIN, 2019, p. 219). However, it is possible that the legal order allows the use of a specific type of collective process, capable of dealing with this type of dispute: the structural processes. Addressing the issue, Vitorelli explains:

Structural disputes are collective lawsuits in which, through jurisdictional action, the reorganization of a structure, public or private, is sought, which causes, promotes or makes possible the occurrence of a violation of rights, by the way it works, giving rise to structural disputes (VITORELLI, 2020, p. 60, unofficial translation)².

For the author, structural disputes have, as a starting point, the systematic violation of fundamental rights, but the objective is not only to repair the damage, but to promote a readjustment of the public policies necessary for the realization of the violated rights or structurally reorganize the institutions responsible for implementing them (VITORELLI, 2015, p. 564). In the traditional model of dispute, the binomial right-obligation operates: if the existence of a violation of a right is backed by evidence, the Judiciary determines its reparation. The indemnification of the affected population segments, however, does not meddle with the political omission and, consequently, does not prevent future violations (VITORELLI, 2015, p. 564). To solve the problem, structural disputes allow for tackling the origin of the dispute: the restructuring of a public institution.

We agree with Vitorelli that, usually, structural disputes imply the restructuring of a public institution. However, reducing the concept to such cases would make it

¹ For the author, based on the level of conflict and complexity, collective disputes can be classified into global disputes, local disputes and irradiated disputes (VITORELLI, 2020, p. 28-32).

² Original text: “O processo estrutural é um processo coletivo no qual se pretende, pela atuação jurisdicional, a reorganização de uma estrutura, pública ou privada, que causa, fomenta ou viabiliza a ocorrência de uma violação a direitos, pelo modo como funciona, originando um litígio estrutural” (VITORELLI, 2020, p. 60).

excessively restrictive, failing to encompass disputes that are usually associated with structural litigation, such as in the case of environmental damage caused by private entities. For this reason, we agree with Galdino (2020, p. 123), who argues that structural disputes are procedural instruments that seek to transform a state of things “A”, in which fundamental rights are violated, into a state of things “B”, in which rights are promoted. This usually implies a restructuring of a public institution, but not necessarily.

In this article, the term structural dispute, or structural litigation, will always refer to the collective structural dispute which concerns public interest, which can be understood as an ordered set of legal acts designed to obtain collective judicial protection, capable of gradually transforming a state of affairs A, violator of fundamental rights, in a state of affairs B, able to promote the rights that depend on it. The public interest in these processes stems from the fact that the community demands the realization of rights vis-à-vis the State, which usually implies a restructuring of public policies, programs or institutions.

Finally, a second important concept for this essay is “structural remedy”. According to Puga (2013, p. 256-257), structural remedies are understood as an integrated set of court ordered measures to solve a structural problem. A specific and isolated measure, rendered outside of a structural dispute, cannot be seen as a structural remedy, since it is composed of an interdependent series of measures. It is possible that a structural remedy has fixed basic characteristics and that, after being applied in several cases, it even receives a specific terminology. Examples include the Unconstitutional State of Affairs, developed in Colombia, and the Meaningful Engagement, developed in South Africa.

Having clarified the concepts that will guide the research, it remains to be seen how structural disputes have been used in Brazil.

2.2 STRUCTURAL DISPUTES IN BRAZIL

The discussion about the limits of jurisdictional intervention in the scope of public policies is not unprecedented in Brazil, nor are the structural disputes, which have been brought to the Constitutional Court for decades, mainly in the first and second instance (VITORELLI, 2020, p. 67). The real novelty is the theorizing about structural disputes and the study of how they can impact the judicial control of public policies, which grew considerably after the judgment of the precautionary measure of ADPF n° 347 / DF, in 2015.

The lawsuit was filed because of the chaotic reality of the Brazilian prison system. According to the National Prison Information Survey (INFOPEN), released in 2020 by the Ministry of Justice, between 2005 and 2019, the Brazilian prison population

doubled. There are 755,274 prisoners for 442,349 vacancies, causing a deficit of 312,925 vacancies. The situation is even more worrying when we consider the information that, of the total population incarcerated, 30.43% are provisional prisoners, that is, that they are still awaiting their judgment (BRAZIL, 2020a).

In view of this scenario, the Socialism and Freedom Party (Partido Socialismo e Liberdade, “PSOL”) filed ADPF no. 347/DF, in which it demanded, among other requests, the recognition of the Unconstitutional State of Affairs (USoA) of the Brazilian prison system³. The Court already had the understanding that the Judiciary could order prison reforms when detainees' rights were being systematically violated. This understanding was consolidated in the Case Extraordinary Recourse (Recurso Extraordinário, “RE”) no. 592,581, which stated the “Competence of the Judiciary to determine the Executive Branch to renovate prisons with the aim of ensuring the observance of fundamental rights of prisoners” (unofficial translation) (BRAZIL, 2015a).

Analyzing the precautionary requests, the rapporteur, Minister Marco Aurélio, determined that judges and courts, among other measures, establish, when possible, alternative sentences to imprisonment, and that the Federal Government allow access to the amounts accumulated in the National Penitentiary Fund (Fundo Penitenciário Nacional, “FUNPEN”), which must be used in favor of the purpose for which it was created, and that there should be no other new contingencies (VIEIRA JÚNIOR, 2015, p. 19).

What is most striking about the case, however, is its extensive list of demands. To try to overcome the prison system crisis, PSOL required STF to: declare the Unconstitutional State of Affairs in the prison system; determine that the Federal Government propose, in 3 months, a National Plan aiming to overcome the Unconstitutional State of Affairs in 3 years; that the Court receive the Plan, to ratify it or impose alternative or complementary measures; among other measures (BRAZIL, 2015b, p. 70-73).

While STF took a long time to decide the final demands, other attempts to use the USoA in the country appeared. On 05/07/2020, the Federal Council of the OAB filed ADPF No. 682, requesting the suspension of authorizations for the creation of new legal courses that have not yet started their operation, as well as vetoing the opening of new vacancies in private institutions. Among the demands submitted, the entity requires the Court to “Recognize the Unconstitutional State of Affairs regarding the situation of legal education, due to the systematic violation of the constitutional precept that guarantees the quality of higher legal education (art. 209, CF)” (BRASIL, 2020a, p. 70).

³ The “Estado de Coisas Inconstitucional” (“ECI”), here translated as “Unconstitutional State of Affairs” is a structural remedy used by the Constitutional Court of Colombia when there are a series of profound violations of the fundamental rights of a given population segment, resulting from actions and omissions by state agencies (CAMPOS, 2016, p. 189).

On May 15th, the rapporteur, Minister Ricardo Lewandowski, dismissed the claims, understanding that the OAB did not use the appropriate procedural instrument to defend its claims. It is interesting to note that, according to the rapporteur, one of the entity's mistakes was not to question a specific normative act, but only to show concern for educational policy in the country, challenging the opening of new legal courses (BRAZIL, 2020b, p. 6). For the minister, the ADPF is not the adequate means to seek the correction of current policies, even though their flaws and insufficiencies are evident. Interestingly, ADPF No. 347/DF also does not question normative, but political views, omissions, and that is exactly why it can be considered a structural process, enabling judicial intervention in the scope of public policies.

The most recent attempt to use the USoA occurred in ADPF no. 822, filed by 18 collective entities, questioning the federal government's health policies in dealing with the COVID-19 pandemic. The action's rapporteur, Minister Marco Aurélio, accepted the request to declare the Unconstitutional State of Affairs in the conduct of public policies aimed at realizing the rights to life and health (BRAZIL, 2021, p. 25). Thus, it determined federal entities, under the coordination of the Union, to take measures such as carrying out educational campaigns on ways to prevent the disease and distributing masks in areas of population concentration and a low percentage of adherence to preventive measures. After the rapporteur's vote, Minister Gilmar Mendes asked to see the case, suspending the judgment.

But there are other relevant structural actions in the STF that do not resort to the Unconstitutional State of Things. An important example is ADPF n° 635, also called the “ADPF of the favelas”, which questions the public security policy of the State of Rio de Janeiro, especially the growing lethality of police action in peripheral communities (BRAZIL, 2019). The action enabled a historic public hearing, on April 16 and 19, 2021, with the participation of representatives of social movements, organizations and entities related to human rights and victims of violence in the State.

Finally, it is important to note that the relevance of structural litigation did not go unnoticed during the pandemic. In May 2020, the Articulation of Indigenous Peoples of Brazil (“Articulação dos Povos Indígenas do Brasil”, or simply “APIB”) filed ADPF No. 709, which deals with two situations pertinent to the COVID-19 pandemic. First, it addresses the need to adopt measures to protect and promote the health of Isolated and Recent Contact Indigenous Peoples (“Povos Indígenas Isolados e de Recente Contato”, or “PIIRC”), as well as proposing broader measures aimed at Indigenous Peoples in general. The dispute has an eminently structural character, since it aims to change a state of affairs that violates fundamental rights, reordering the Federal Government’s action in the defense of Indigenous Peoples (BRAZIL, 2020c, p. 5-7).

A similar lawsuit is ADPF No. 742, also from 2020, filed against actions and

omissions by the federal government in relation to fighting the pandemic in quilombola communities (BRAZIL, 2020d). On 02/23/2021, the STF ruled on the action, determining that the Union draw up, within 30 days, a national plan to fight the COVID-19 pandemic, with provisions and protocols for the quilombola population. In addition, the Plenary determined that the Federal Government should establish, within 72 hours, an interdisciplinary and equal working group, with the purpose of debating, approving and monitoring the execution of the immunization plan, with members at least from the Ministry of Health; the Ministry of Women, Family and Human Rights; the Palmares Cultural Foundation; the Federal Public Defender's Office; the Federal Public Ministry; the National Human Rights Council; the Brazilian Association of Public Health; and representatives of quilombo communities.

Realizing the growing relevance of structural litigation and the possibility for the Judiciary to expand the judicial control of public policies, bills were proposed before the Legislative, to regulate the structural collective process in the country. We highlight Bill No. 8.058/2014, currently pending in the Brazilian House of Representatives, which intends to regulate judicial intervention in the scope of public policies, recognizing that, in these cases, the judicial process will have structural characteristics. Another example was the Senate Bill (PLS) No. 736/2015. In view of the risks arising from the misuse of the USoA by the STF, Senator Antônio Carlos Valadares proposed, on November 11, 2015, the referred bill, which, in addition to establishing objective assumptions to be observed by the Court to recognize the USoA, also determined that the recognition of this state of affairs would imply the celebration of a Meaningful Engagement between the Federal Government and the population segments affected by a structural dispute (BRASIL, 2015c).

The possibility of adopting USoA in Brazil has left many jurists worried, causing structural litigation to be viewed with suspicion and incredulity. After all, “The Judiciary does not make public policies. It acts only contingently” (STRECK; LIMA, 2015). Complementing this idea, Streck (2015) goes as far as stating that “What I mean is that, if the USoA thesis is feasible/correct, the word “structuring” may become an umbrella under which is everything that activists seek to achieve, from prisons to the minimum wage” (unofficial translation). In the next subtopic, the main criticisms usually made to structural litigation will be presented.

2.3 WHEN THE JUDICIARY EXCEEDS ITS LIMITATIONS: INEFFICIENCY, SEPARATION OF POWERS AND BACKLASH EFFECT

The first issue raised against judicial intervention in the context of public policies is the classic argument that the Judiciary, in doing so, usurps the exclusive powers awarded to each political power. In the most rigid conception of the separation of

powers, “[...] there will always be an essential nucleus of the function that cannot be exercised except by the competent Power” (RAMOS, 2015, p. 118, unofficial translation). It was based on this argument, in fact, that many criticized the introduction of social rights in the new South African Constitution (RAY, 2016, p. 35). For the Judiciary to promote the effectiveness of these rights, it is inevitable that it will interfere, to some extent, within the scope of the Executive’s competence, which is why it would be better not to include them in the constitutional text.

The threat to the separation of powers is directly linked to the dilemma of the justiciability of DESCs. According to Michelman (2003, p. 16), it is common for the Judiciary, when assessing cases involving DESCs, to be held hostage to the dilemma of justiciability of socioeconomic rights and must choose between an activist or self-constraining stance, a decision that always leads to embarrassment or institutional discredit. On the one hand, the judicial body intervenes directly in the making of public policies, even though it does not have the necessary technical capacity to restructure public budget priorities. On the other hand, adopting a deferential posture, it can empty the normative content of DESCs, leaving them dependent on the discretion of the Public Power. For critics, the correct response to tension is a position of judicial self-restraint, avoiding decisions considered to be activist (VALLE, 2020, p. 128-129).

Second, there is the technical inability of members of the Judiciary, either to intervene and to formulate public policies, or to oversee their implementation. Jurisdictional bodies are composed of magistrates who have a legal academic background, not, in theory, gathering sufficient knowledge to compose budget restructurings or to analyze all the factors involved in the formulation of public policies. The same can be said of their advisors, who assist them in the legal basis of decisions, but are not, as a rule, experts in other essential areas of knowledge for the creation of adequate public policies.

As Arenhart (2017, p. 448) recalls, structural disputes involve an extensive list of complex economic, social and cultural issues, and it is not an easy task to design solutions to Executive omissions that originated the dispute. Thus, a unilateral action by the judicial body may not only violate the separation of powers, but lead to the application of palliative measures, which, at best, produce effects in the short term, but, ultimately, do not solve the problem.

There is also the second dimension of criticism, which questions the institutional capacity of the Judiciary to maintain supervision over the implementation of public policies, even those that originated from a structural dispute. Judges, already overwhelmed with cases, will not be able to embrace an entirely new competence: to personally oversee the implementation of a policy formulated by the Public Administration.

Finally, structural remedies might cause a backlash effect that may compromise

its efficiency. According to Kozicki (2015, p. 194), the term has been used to designate a strong reaction against judicial decisions considered excessively progressive, which can come from both society and the political powers that have been instituted, compromising the efficiency of the decision handed down. The phenomenon tends to occur when a decision differs considerably from the socially established norms or from the institutions in relation to which influential segments of the population maintain significant normative fidelity (VALLE, 2013, p. 9).

A recent example of the phenomenon in Brazil was the case of “vaquejada” (a cultural event similar to a rodeo). Vaquejada was declared unconstitutional by the STF by recognizing Law no. 15.299/2013 as invalid, which regulated activity in the State of Ceará and had its constitutionality questioned in ADI No. 4.983 (LOPES FILHO; CIDRÃO, 2018, p. 122-123). Reacting to the decision handed down in 2016, the National Congress approved Constitutional Amendment No. 96/2017, establishing that sports practices that use animals are not cruel, as long as they are a cultural manifestation (CARVALHO; MURAD, 2017, p. 35).

Despite the strength of the arguments presented by opponents of structural litigation, as well as examples of excessive judicial intervention that leads to inefficiency of decisions, the present study intends to demonstrate that the risks pointed out in this topic can be circumvented based on a participatory structural remedy model, similar to Meaningful Engagement.

3 THE SOUTH AFRICAN SOLUTION FOR STRUCTURAL DISPUTES: THE MEANINGFUL ENGAGEMENT

When analyzing the efficiency of judicial interventions for the fulfillment of socioeconomic rights, David Landau points out the importance of studying the South African experience. In his opinion, the performance of the country's Constitutional Court is an example of what should not be done in matters of structural litigation (LANDAU, 2012, p. 192). The author argues that deferential judicial decisions are not capable of obtaining decent results, failing to protect the most needy and marginalized social segments. For Landau (2012, p. 245-246), the solution is a firmer intervention by the Judiciary.

The purpose of this topic is to show why statements like Landau's are wrong, especially when denying the importance of an interinstitutional dialogue in the search for overcoming structural issues.

At first, we consider that it is important to study the South African constitutional experience, because it has been very rich in several fields, including structural disputes. But one cannot agree with Landau's claim that the South African model does not deserve to be an inspiration.

Landau's position is based on an older precedent, the Grootboom case⁴, disregarding other important later judgments. In this article, we study two cases that happened after Grootboom: Olivia Road and Joe Slovo. These two cases are fundamental for the understanding of what came to be known as Meaningful Engagement, an institute that was not the object of Landau's analysis.

When judging structural disputes, the South African Constitutional Court, although its approach to socioeconomic rights has varied over time⁵, has a clear profile of public policies intervention limits. It has always been more comfortable to promote the effectiveness of these rights in a dialogical way, pointing out the unconstitutionality of actions by the Public Power without, however, unilaterally determining the content of the public policies (RAY, 2016, p. 41-43). That is why Roux (2005, p. 76-77), analyzing the relationship between the Court and the political sectors, affirms that the court was successful in intervening in one of the most sacrosanct areas of the political sector: the formulation of policies public. And it was in an attempt to promote the efficiency of socioeconomic rights, while respecting the powers of the Executive, that the Court developed the Meaningful Engagement, analyzed here from the two paradigmatic cases already mentioned, starting with Olivia Road.

3.1 THE OLIVIA ROAD CASE AND THE ORIGIN OF THE MEANINGFUL ENGAGEMENT

Although the Meaningful Engagement is not only used to ensure the right to housing, its first use occurred in an eviction case, promoted by the city of Johannesburg.

Between 2002 and 2006, mass evictions on the outskirts of the city became common place (WILSON, 2011, p. 135), in order to carry out urban revitalization programs. As Cloete (2016, p. 78) explains, during the apartheid period, the South

⁴ It is an emblematic South African case, in which a community of 900 people was evicted from a private property, left without fixed housing and were forced to settle in improvised accommodation. The case was taken to the Constitutional Court, which determined that the Government should create and implement, according to available resources, a program aimed at fulfilling the right to access adequate housing, capable of aiding those who would be living in deplorable conditions (WESSON, 2004, *passim*).

⁵ Trying to understand the Court's role in litigation involving socioeconomic rights, Wilson and Dugard (2011, p. 35-36) divide the cases submitted to it into two groups, which they call the first and second wave of social disputes. In judging the cases of the first wave, the Court faced the task of establishing an interpretive paradigm that would enable the fulfillment of socioeconomic rights, while maintaining its institutional stability. The second wave of cases consolidate the process of proceduralization: the Court focuses more on promoting participatory democracy through litigation that deals with social rights, including the segments of the population affected by political omission in the process of formulating public policies. It is in this second phase that the Court develops the Meaningful Engagement, a dialogical structural remedy that includes the population segments affected in the resolution of the dispute.

African government managed to segregate the black population within the urban space. While the white minority generally lived closer to city centers, most of the black population lived in the outskirts of the city. Therefore, in these places, it was common to find thousands of people living in buildings unsuitable for housing. With the establishment of the democratic regime, one of the main concerns of the government, both national and municipal, was to promote the restructuring of these residences, providing decent housing for the marginalized social segment.

For the Johannesburg government, eviction was a necessary measure, given the unsanitary conditions in which residential buildings in the region were found. In the city's regeneration plan, published in 2004, it is possible to verify some of the factual motivation for the plan: buildings in poor condition, an increase in housing in unsanitary conditions and an increase in crime rating in these areas (RAY, 2016, p. 111). According to Ray (2016, p. 111), evictions reached more than 67,000 people.

The plans developed by the city, however, erred on an important point: in its 53 pages, there was no discussion on what would happen to the evicted residents, or how Section 26⁶ of the Constitution would be respected (RAY, 2016, p. 111). Instead, the plan focused mainly on obtaining private investments for its fulfillment and on formulating ways to promote the appreciation of properties in the region. In addition to ignoring the condition of the population that would lose their homes, the plan aimed to identify new legal means that would make evictions faster and more effective. Greater speed in this process diminished the possibility of opposition by the residents, who lacked knowledge and resources to legally challenge the actions of the Public Power (RAY, 2016, p. 111).

Olivia Road begins when the city of Johannesburg files a lawsuit at the Witwatersrand Regional Court⁷, requesting judicial authorization to evict an additional 400 residents of buildings that would be restructured. The Regional Court rejected the eviction request from the municipal government, understanding that the city violated section 26 of the Constitution, which ensures the right to housing, since it intended to evict residents without providing alternative shelter (SOUTH AFRICA, 2008, p. 3). The municipal government appealed the decision to the Supreme Court of Appeals ("SCA"), which reversed and concluded that the evictions were constitutional. For the benefit of

⁶ "26. Housing.- (1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions." (SOUTH AFRICA, 1996, p. 1255).

⁷ The High Courts occupy the second judicial instance in South Africa, with jurisdiction in a geographically delimited area. The Supreme Court of Appeal ("SCA") is equivalent to the District Court in the United States of America. Located in Bloemfontein, SCA is the last resort for discussions on non-constitutional legislation matters, whose decisions are binding on all lower courts (SAMPAIO, 2016, p. 87).

the residents, SCA only determined that the city had a duty to provide shelter for those who lost their residence (SOUTH AFRICA, 2008, p. 2).

By appealing the SCA's decision, the residents were able to take the suit to the Constitutional Court, which accepted the case in May, 2007. On August 30, the Court issued the first order for a Meaningful Engagement to be made between the parties. The decision, written by Judge Zakeria Yacoob, determined that:

The City of Johannesburg and the applicants are required to engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned (SOUTH AFRICA, 2008, p. 5).

After talking for a few months, the parties reached a partial agreement. Among other determinations, the municipal government agreed not to carry out the eviction and implement measures that would improve the buildings and the lives of its residents, such as cleaning the residential area, providing access to water and basic sanitation (LIEBENBERG, 2012, p. 15). The city also agreed to renovate several other buildings located on the outskirts of the city, providing essential public services for residents of the region, as well as limiting any rental fees to no more than 25% of the occupants' monthly income. Finally, the government agreed to continue the dialogue in the long term, seeking solutions to housing problems (SERAFIM; FRANÇA; NÓBREGA, 2021, p. 159).

After the end of the first phase of negotiations, the parties returned to the Court, seeking not only the approval of the agreed terms, but also a decision on the adequacy of the agreement to the requirements presented in the Grootboom case. To the surprise of both sides, in its final decision, the Court did not ponder on this issue. Instead, it prioritized the formalization of the Meaningful Engagement as a constitutional requirement to be applied to all future eviction cases (FUO, 2015, p. 186-187). The Court, at the time, listed four characteristics that should accompany the structural remedy.

First, the Engagement must follow a standard of reasonability, being flexible and adaptable to the specific context of each case (LIEBENBERG, 2012, p. 16). As the Court itself expressed in its judgment, "It may in some circumstances be reasonable to make permanent housing available and, in others, to provide no housing at all. The possibilities between these extremes are almost endless" (SOUTH AFRICA, 2008, p. 12).

Second, whenever a large-scale public policy, such as an urban regeneration plan, can negatively affect a segment of the population, the municipality must carry out the Engagement at the very beginning of the planning, that is, the dialogue with the affected

citizens must not only start at the judicial level, but at the public policy planning stage itself. The Court recognized that this requirement involves the development of state bodies capable of conducting these dialogues, which will incur in costs to the government. Even so, the government has an obligation to invest resources in carrying out the Engagement before the litigation phase is even possible. This way, the affected groups went from passive recipients of rights to active participants that help shape public policies and decisions that have a direct impact on their lives (MAHOMEDY, 2019, p. 23).

Third, the Court recognized the vulnerability of the citizens affected by the evictions and the need for specialized representation. To deal with this imbalance of powers between the population and the government, it stated that civil society groups, active in the defense of the fundamental rights affected, have an important constitutional role to play. Thus, “Civil society organizations that support the peoples’ claims should preferably facilitate the engagement process in every possible way” (SOUTH AFRICA, 2008. p. 12). The technical knowledge that these groups have is essential for the negotiations to be successful (RAY, 2011, p. 122).

Finally, the Court determined that the government must develop and maintain a public archive on each Engagement, so that the Judiciary can subsequently analyze not only the outcome of the negotiations, but the very procedure used to promote dialogue between the parties. It emphasized that secrecy would be counterproductive to ensure the efficiency of the process, stressing that these records would allow the Judiciary to assess whether the municipality has taken all necessary measures to reach an agreement with the affected groups. In the Court's view, the failure to carry out the Engagement, regardless of substantial considerations regarding the public policy to be developed by the municipal government, may, in itself, be sufficient reason to deny an eviction request (SOUTH AFRICA, 2008, p. 14).

3.2 THE JOE SLOVO CASE AND STRONG MEANINGFUL ENGAGEMENT

The other one considered paradigmatic that contributed to the improvement of the Meaningful Engagement was the Joe Slovo case, whose relevant aspects will be explained here.

In 2008, the city of Cape Town started the implementation of the N2 Gateway, an urban development project designed to build low-cost houses that offer adequate living conditions (MCLEAN, 2010, p. 224). The project was part of the Breaking New Ground (BNG)⁸ policy, adopted by South Africa in 2004, to improve the homes of the

⁸ The BNG is the name given to South African government plan, created in 2004, with the aim of eradicating informal housing in the country, in the shortest possible time. Based on it, several urban restructuring policies were developed to reform informal settlements, as in the case of Joe Slovo

country's poorest areas, in response to the Grootboom case (RAY, 2016, p. 119).

Joe Slovo was one of the largest informal settlements in the city of Cape Town, a true symbol of marginalization, economic exclusion and social inequality (CHENWI, 2014, p. 188). Their occupation started in the 1990s, and, as Kotzé (2016, p. 77-78) explains, the houses in the community were precarious, built with flammable materials and lacked basic public services, such as access to water and basic sanitation.

Generally, reforms such as those proposed by the N2 Gateway project do not require the removal of residents, they are carried out with their presence on site. In this case, however, the government opted for broader reform, which would require the displacement of Joe Slovo residents to the Delft region.

Before beginning the relocations, the municipal government held meetings with residents of the community. The purpose was not to achieve a solution to the problem, since the plan was laid out and ready for implementation, but to clarify what had been decided and how the plan would be implemented. Many residents agreed with the plan, given that the city and the company responsible for urban regeneration, Tubelhisha Homes, ensured that most residents could return to Joe Slovo, paying much lower rents (PILLAY, 2012, p. 724). But when the first of the three phases of the project was completed, none of the new houses were made available to the former residents.

Disappointed with the promises that were not kept, the residents organized formal and informal protests, with the objective of preventing the N2 Gateway from proceeding. Trying to get around the situation, the city of Cape Town appealed to the High Court, to ensure the eviction of the residents. The Court ordered that reallocations should continue and also affirmed that the municipal government had already devoted enough effort to dialogue with residents (KOTZÉ, 2016, p. 79).

Based on this decision, residents appealed directly to the Constitutional Court, which produced two decisions on the case. The first, decided on 2009, called Joe Slovo I, took into account that, unlike Olivia Road, in Joe Slovo, the relocation of residents was part of a public policy specifically aimed at ensuring the residents' right to housing, guaranteeing them also a temporary home (RADEBE, 2013, p. 130). Thus, the Court authorized the relocation of residents, however, before the N2 Gateway could proceed, it would be necessary to make a Meaningful Engagement between the community and the city, to decide the best way to implement the project.

In using the Meaningful Engagement, the Court did not act naively, taking two main precautions. First, it set parameters and objectives that should guide the negotiations of the parties. The list of goals to be achieved included:

First, this Court's order imposes an obligation upon the respondents to ensure that 70% of the new homes to be built on the site of the Joe Slovo

(ÁFRICA DO SUL, 2004).

informal settlement are allocated to those people who are currently resident there or who were resident there but moved away after the N2 Gateway Housing Project had been launched. Secondly, this Court's order specifies the quality of the temporary accommodation in which the occupiers will be housed after the eviction; and thirdly, this Court's order requires an ongoing process of engagement between the residents and the respondents concerning the relocation process (SOUTH AFRICA, 2008, p. 3).

Second, the Court decided to retain its jurisdiction over the case, requiring the parties to report on the progress and results of the dialogue, allowing them, if there was any illegality in the process, to return to the Court to request their interference. Ray (2016, p. 121) explains that the two measures were adopted to pressure the city of Cape Town to maintain an effective dialogue with the affected community and for the municipal government to reconsider the decision to relocate them to Delft. By adopting an overseeing posture, setting goals to be achieved, the Court developed what Williams (2014, p. 830) calls strong Meaningful Engagement.

When the dialogue with the residents began, the city of Cape Town decided to review its position. In view of the parameters established by the Court, it concluded that it would be feasible to proceed with the N2 Gateway without having to remove the residents from their homes, making all the necessary improvements with the residents in their homes (CHENWI, 2014, p. 190). It is important to note that this was the residents' desire since the beginning of the dispute. Analyzing the outcome of the case, Pillay (2012, p. 750) argues that the substantial interpretation of the right to housing, with detailed specifications that should be followed by the municipal government, and the retention of jurisdiction to oversee the negotiations, set the grounds for the positive result achieved. This way, the Court was able not only to promote dialogue between the parties, but, indirectly, to pressure the municipal government to review its initial decision.

Thus, since there was no longer a need to relocate residents and the other reforms promised by the Government would be carried out with them in their homes, the Court, in 2011, decided to revoke the authorization for the eviction of residents, since it would no longer be needed. This case became known as Joe Slovo II (SOUTH AFRICA, 2011) and ended the threat of eviction.

4 CONTRIBUTIONS OF MEANINGFULL ENGAGEMENT TO BRAZIL: THE IMPORTANCE OF PUBLIC PARTICIPATION IN STRUCTURAL PROCESSES

In this last topic, we investigate the contributions that the South African example can provide for structural litigation in Brazil. When studying the Olivia Road and Joe Slovo cases, we emphasized that the inclusion of the affected social group in the

resolution of the structural dispute is a central characteristic to the Meaningful Engagement. Thus, starting from the two cases presented, the intrinsic and extrinsic reasons were analyzed to justify the importance of democratizing structural litigation.

4.1 THE INTRINSIC VALUE: THE EXPANSION OF THE DELIBERATIVE PUBLIC SPACE

The idea of a deliberative public space was consolidated in the Modern Age, especially after the bourgeois revolutions of the 18th century, since in the Middle Ages there was no clear differentiation between the public and the private (GRAU, 1997, p. 21-22). Habermas explains that the bourgeois public sphere can be understood as the public government meeting private people to discuss issues of public interest, but that generated repercussions in the exchange of goods (HABERMAS, 2003, p. 42). The public space was perceived as the forum where private people forced the State to legitimize itself in the face of public opinion, trying to interfere in the formation of state will and in public policy decisions (HABERMAS, 2003, p. 40).

However, the bourgeois public space created a practical contradiction. In theory, the expression “public space” would have two meanings: an environment in which universal interests are considered, common to all; and a wide accessibility forum, open to those interested in following and participating in public discussions (SILVA, 2002, p. 13). As Guedes (2010, p. 3) points out, however, the public sphere was made up of mostly male and elite actors, becoming “a space dedicated to owners’ representation, universalizing only their private interests”⁹ (informal translation). Thus, the construction of the bourgeois public space favored the exclusion of certain groups that did not integrate the hegemonic social interests.

For a long time, the conception of the public sphere contributed to the exclusion of certain groups, since it was seen as a unitary deliberative environment. However, Habermas (1997), at the end of the last century, started to emphasize a conception of pluralistic public space, contributing to the reflection and study of the peripheral or partial public spheres. Regarding the theme, Guedes explains:

The public sphere is no longer seen as a unitary and indivisible element of society or as a passive sounding board of the dominant culture. Instead, a diversity of discussion forums coexist with a general public sphere, still dominated by the interests of the mass media and of the capital¹⁰ (GUEDES, 2010, p. 5).

⁹ Original text: “Espaço de representação dos proprietários, universalizava unicamente os interesses particulares desses”.

¹⁰Original text: “A esfera pública deixa de ser vista como um elemento unitário e indivisível da sociedade ou como uma caixa de ressonância passiva da cultura dominante. Ao invés disso, uma diversidade de fóruns de discussão convive com uma esfera pública geral, ainda dominada pelos interesses dos meios

Thus, there are several partial deliberative public environments, capable of contributing to the discussion of issues and interests that are underrepresented in traditional deliberative forums, such as parliament. Although the legislature has the competence to enact laws, partial spheres can collaborate with the protection of groups with little political representation, drawing the attention of society and political powers to serious problems faced by these social segments.

And here we see the first contribution that the democratization of structural litigation, fostered by Meaningful Engagement and similar participatory remedies, can offer. When dealing with the theme, Liebenberg (2018, p. 626) states that the participation of affected social groups in the formulation of public policies has an intrinsic value, as it allows historically marginalized and economically excluded groups to have political expression and, effectively, influence the public decision-making process. To deepen participatory democracy, it is necessary that citizens be given the opportunity to act in public institutions in their country, influencing the formulation of policies that directly affect their community, and that includes the judicial instance (HELLER, 2009, p. 130-131).

In a model of deliberative and participatory democracy, the Courts both protect constitutionally guaranteed fundamental rights and try to preserve the conditions for a fair participation in the decision-making processes that allow for the fulfillment of fundamental rights, as in the formulation of public policies (GARGARELLA, 2014, p. 106-108). In the same sense, Liebenberg seems to agree with the idea that the Judiciary can function as a partial deliberative public space, protecting the dignity of the affected groups and enabling their participation:

At their best, courts can become an institutionalised site for hearing marginalised voices and according deliberative attention to their human rights claims. Through the public, institutional character of litigation, these voices can be amplified and channelled into the formal structures of political decision making and policy formulation (LIEBENBERG, 2012, p. 11).

The jurisprudence on Meaningful Engagement makes clear that the institute is closely related to participatory democracy. The 1996 South African Constitution seeks to promote it by encouraging citizens to engage in public deliberations that may affect their lives (AUGUS, 2018, p. 19-20). There is an understanding that the right to be heard in the public decision-making process is particularly important for members of groups that are victims of social, economic and political marginalization (LIEBENBERG, 2018, p. 624-625). As Judge Zakeria Yacoob pointed out in the Olivia Road case opinion, vulnerable groups harmed by a structural problem cannot be treated as a collective without power, on the contrary, they should be encouraged to participate

proactively in resolving the structural dispute (SOUTH AFRICA, 2008, p. 13-14).

In this perspective, Engagement is seen as a fundamental instrument for strengthening participatory democracy. After all, its use requires that the Public Administration and the community listen to each other, in order to reach common points. The communities involved must be considered as integral parts of the process of construction of the policies that will be adopted, with the Government being obliged to carry out what it has agreed with these groups. Thus, it is believed participatory remedies similar to Engagement can encourage an environment where people are treated with respect and dignity (MAKABA, 2018, p. 65), having their vision considered in the construction of policies.

Therefore, in the first place, public participation in structural litigation has an intrinsic value, since it allows the reintegration of minority and vulnerable groups, insufficiently protected by the State, in the deliberative public sphere. In a plural society, with a diversity of partial public spheres, the Judiciary can provide opportunities for the manifestation and influence of social groups affected by a serious structural dispute, generally lacking the political strength to resolve it by other means, which may influence the construction the action plan to transform the state of affairs that violates fundamental rights (SERAFIM; ALBUQUERQUE, 2020, p. 314).

4.2 EXTRINSIC VALUES: PRACTICAL ADVANTAGES FOR THE DEMOCRATIZATION OF STRUCTURAL PROCESSES

In addition to the intrinsic value of public participation in structural litigation, there are also practical reasons that justify it (STURM, 1993, p. 996-997). Here, the three main advantages will be highlighted: the epistemic gain, the destabilizing effect, and the promotion of public transparency.

The first advantage is the epistemic gain. The participation of the groups affected by the structural dispute allows new perspectives to be analyzed in the deliberation on which policies should be adopted, contributing to improve the quality of the measures that will be implemented. This way, participation would not only mitigate the concern with the separation of powers, since the Judiciary would not unilaterally formulate the measures to be adopted, but it would also reduce the concern with the judges' technical incapacity, since they would expand their base of information through the participation of the affected groups (MAHOMEDY, 2019, p. 20).

In deliberative environments, in which there is a plurality of ideas, each individual can communicate their experiences and insights to the other, that may complement those of the other, making the group, as a whole, have an important epistemic gain to support the decisions that will be taken (WALDRON, 2003, p. 143). This is even more relevant in structural processes, since in unilateral interventions, in

which the affected groups are not heard, chances are the real causes of the problem will not be addressed, and only temporary and palliative measures will be adopted.

The epistemic gain referred to here is directly linked to coping with blind spots in legislative production and public policies. When dealing with the theme, Dixon (2007, p. 402-403) states that there are three main blind spots: the application, since the Legislative and the Executive, when drafting a law or other normative act, fail to foresee all the consequences arising from its application; the perspective, since during the drafting of laws and public policies, the perspectives of vulnerable and marginalized groups, generally not very influential in political forums, may not be adequately considered; and, finally, the inertia, when the Public Power remains apathetic in the face of a problem that compromises the fundamental rights of certain segments.

According to Scott and Sturm (2006, p. 575), the Judiciary has the role of catalyst in facing these blind spots. Due to its role as enforcer of normative acts and its relative political independence, it can analyze the consequences arising from legislation after its drafting, use legal language to defend the rights of minority and underrepresented groups and identify situations of serious violations to fundamental rights, drawing the attention of the Legislative and the Executive to these issues.

In this perspective, public participation can favor blind spots confrontation. The judge need not presume what the greatest needs of the affected group are, allowing the group itself to express its interests. Consequently, the courts become a source of communication of ideas, promoting the exchange of information between parties who would hardly dialogue, without being the creators of these ideas or the instance that will determine which ones will be accepted (SCOTT; STURM, 2006, p. 571- 572).

The Joe Slovo case is a good example of how the Public Administration can ignore the epistemic gain resulting from dialogue with the affected group. Before the judicial phase, the Cape Town municipal government refused to engage in a meaningful dialogue with the community that would be evicted (MCLEAN, 2010, p. 237). While the group requested that the reforms be carried out without eviction, the Public Administration denied the adequacy of this possibility. After the judicialization of the case and the structural decision of the Constitutional Court, the municipal government revised its position, giving up on carrying out the eviction and opting to carry out the reforms in situ (LIEBENBERG, 2012, p. 24-25). As Mahomed (2019, p. 55) points out, the real opening of the municipality to listen to the affected group could have prevented years of litigation, making life easier for Joe Slovo's residents, who would have access to decent housing more quickly, and reduced Government spending on judicialization of the dispute.

The second practical advantage of popular participation is the opening of bureaucratic institutions, traditionally closed to citizens' social control, to the inflows of social groups that will be affected by state policies.

This is possible because, in participatory structural processes, fundamental rights play the role of destabilizing the status quo by having institutions that fail to comply with their constitutional duties open to the affected segments. Unger (1987, p. 530-531) presents the concept of destabilization rights, which can be understood as keys of access to public institutions that, chronically, fail to fulfill their obligations and are relatively isolated from popular political control. Complementing this definition, the author states:

Destabilization rights protect the citizen's interest in breaking open the large-scale organizations or the extended areas of social practice that remain closed to the destabilizing effects of ordinary conflict and thereby sustain insulated hierarchies of power and advantage. The combination of immunity rights with destabilization rights gives legal expression to the central institutional mechanism of the whole constitutional plan. The destabilization entitlement ties the collective interest in ensuring that all institutions and practices can be criticized and revised to the individual interest in avoiding oppression (UNGER, 1987, p. 530).

The idea of destabilization rights contributes significantly to structural processes, especially when these disputes are observed from the perspective of democratic experimentalism (SABEL; SIMON, 2004, p. 1020). In the experimentalist model, the courts abandon their traditional role of last resort in deciding the meaning of the Constitution, seeking to stimulate dialogical processes with the Legislative, with the Executive and with the social segments affected by state action (LIEBENBERG, 2014, p. 237). According to RAY (2016, p. 115), Meaningful Engagement is a structural remedy that fits the experimentalist proposal.

Structural litigation, when conducted according to the experimentalist perspective, exposes public institutions to popular evaluation; enables the participation of the affected social segments in the construction of public policies; and reinforces the responsibility of the political sectors vis-à-vis the citizens, since the Public Power must justify its choices to the groups affected by its decisions. As Cristóvam (2016, p. 164) explains, citizens have a fundamental right to a “Public Administration that is, at the same time, transparent and dialogical in its actions, but also probable and impartial in its relations”¹¹. And this is precisely the main effect of destabilization rights (GREER; RAUSCHER, 2011, p. 222).

A recent Brazilian case is a good example of the destabilizing potential of participatory structural measures. ADPF No. 709, which addresses the Federal Government’s omissions in protecting indigenous communities during the COVID-19 pandemic. In the judgment of the precautionary measure, confirmed by the Court on

¹¹Original text: “Administração Pública que seja, a um só tempo, transparente e dialógica nas suas ações, mas também proba e imparcial nas suas relações”.

May 8, 2020, the rapporteur, Minister Luís Roberto Barroso, established some important measures for the protection of indigenous groups: creation of sanitary barriers that prevent the entry of third parties in the territories of the PIIRC; creation of a head quarter for the management of actions to combat the pandemic regarding peoples in isolation; the need to prepare and monitor a COVID-19 Coping Plan for indigenous peoples, with the participation of the National Human Rights Council, the National Indian Foundation (FUNAI), the Oswaldo Cruz Foundation, and the Indigenous Health Working Group the Brazilian Association of Collective Health (ABRASCO) and representatives of indigenous communities (BRAZIL, 2020b, p. 33-35).

The inclusion of representatives of indigenous communities and technical institutions in the elaboration of the action plan is a measure similar to those adopted in South Africa and aligned with the experimentalist perspective, capable of promoting the destabilizing effect (SERAFIM, 2021, p. 136-138). As the applicants claimed in their initials, indigenous peoples, in addition to an immunological and socio-cultural vulnerability, are also politically vulnerable, since they are minority groups and are insufficiently represented in the political spheres. “As a result, indigenous communities would face enormous difficulties in having their interests covered by the majority bodies and would have very low access to all types of essential public services, such as: education, basic sanitation and health”¹² (BRAZIL, 2020b, p. 6).

If participatory measures like this are implemented not only in the construction of the plan, but during its execution and monitoring, ADPF No. 709 may have a wide destabilizing effect, opening the state bureaucracy to inflows from indigenous communities and institutions that act in its defense.

It is important to note that the destabilizing effect also contributes to reducing the chances of a backlash effect. The public institution whose performance is questioned needs to dialogue with the affected group and with the Judiciary, justifying the decisions it will take. On the one hand, the measures to be carried out will not be imposed unilaterally by the Judiciary, largely preserving the powers of the Public Administration. On the other hand, the structural process exposes the institution to public scrutiny, making it difficult for it to simply refuse to collaborate with the resolution of the structural problem.

Therefore, participatory remedies, such as the Meaningful Engagement, make the fundamental rights violated in a structural dispute function as destabilization rights, that is, keys of access to entrenched bureaucratic institutions, whose performance directly affects the life and interests of the community, without that the reciprocal is true. In

¹²Original text: “Em razão disso, as comunidades indígenas enfrentariam enorme dificuldade em ter os seus interesses contemplados nas instâncias majoritárias e teriam baixíssimo acesso a todo tipo de serviços públicos essenciais, tais como a educação, o saneamento básico e a saúde”.

view of structural litigation, the public institution involved will need to readjust its performance, not only in solving the structural problem that originated the lawsuit, but also in future cases, in order to avoid further litigation (SWANEPOEL, 2017, p. 41). Thus, the destabilizing effect allows the status quo to be questioned by vulnerable groups, whose efforts to change through traditional political channels are often ineffective.

Finally, the third practical advantage of participatory remedies is the transparency of state action, a fundamental value in a Democratic State of Law that is attentive to its responsibilities towards citizens. The Brazilian Constitution, in its art. 37, caput, establishes transparency as a fundamental principle of direct and indirect Public Administration, and in its §3º, II, determines that users of public services can have access to administrative records and information about government acts. Meanwhile, art. 163-A determines that the federated entities must make their accounting, budgetary and fiscal information, and data available. It is common, however, that decisions about how certain structural problems will be resolved are not publicized or justified, especially for the affected community.

Even if administrative decisions are taken on a technical and informed manner, and the state is competent to take them, it is important to justify these choices to groups that will endure them, especially when faced with a drastic choice, where the interests of social segment will be prioritized over others. As Mureinik (1994, p. 32) points out, it is expected that every exercise of power is justified, so that the solution given by the government is sustained by the force of arguments and not by the force of fear inspired by the state command. As Sabel and Simon (2004, p. 1071-1072) point out, structural processes, especially when conducted under the experimentalist perspective, can contribute to state transparency in two perspectives: as an accountability standard and as a learning tool.

Transparency, therefore, is achieved through the creation of the obligation for the Public Power to justify, for the Judiciary and for the affected community, why it is making certain choices. Espinosa (2012, p. 16), analyzing the meaning of accountability, explains that the term expresses the idea of control, inspection and responsibility of the Public Power for their actions and choices. With the use of participatory structural remedies, the Public Administration, in the construction of the action plan, needs to present to the affected community and the institutions that assist them which measures were considered to solve the problem, which ones should be chosen and why the chosen one is the best option possible, within the budgetary possibilities of the State.

Scott and Sturm (2006, p. 582-583) argue that the judiciary can make public managers reflect on their choices, questioning their opinions based on prejudices or unfounded opinions, making them responsible for the consequences of their decisions. In exercising this function, the Judiciary recognizes that it cannot replace the

administrative bodies, reviewing all the factual grounds and making the final decisions on the subject. But it is not restricted to deference. The judge must analyze whether the decision-making body has adopted a qualified source of information, capable of providing trustworthy data. According to the authors, judicial inspection may require three important qualities of technical administrative decisions: excellence, independence, and transparency (SCOTT; STURM, 2006, p. 583-584). For democratic reasons, a public body is not bound by the opinion of a technician, but it must present reasons to dismiss it, and these reasons must be at a level of relevance similar to the technical reasons that have been disregarded.

The Olivia Road case illustrates how participatory remedies can promote the transparency of state choices. In determining the achievement of the Meaningful Engagement, the Constitutional Court stressed the need for the parties to expose their perspectives and interests in a dialogue aimed at solving the problem faced (SOUTH AFRICA, 2008, p. 10). Consequently, both the public authorities should listen and consider the arguments of the affected group, as well as present the reasons why they wanted to carry out the eviction, what alternative measures they could propose and why was the chosen one the most appropriate, promoting the transparency of their decisions and accountability in the face of the community. As Judge Zakeeria Yacoob pointed out, “Finally it must be mentioned that secrecy is counter-productive to the process of engagement. The constitutional value of openness is inimical to secrecy” (SOUTH AFRICA, 2008, p. 14).

In summary, the participation of the affected community in the resolution of the structural dispute, in addition to having an intrinsic value, can: contribute to the quality of the decisions that will be taken; opening entrenched bureaucratic institutions to social control; promote the transparency of Public Administration; and mitigate the criticisms usually made to structural litigation.

5 FINAL CONSIDERATIONS

The judicial enforcement of social, economic and cultural rights is marked by a paradox: if DESCs cannot be implemented by judicial bodies, they face the risk of being transformed into mere political rhetoric. On the other hand, if these rights are enforceable in the judicial system, there is a risk of displacement of political, social, legislative, and executive decisions to the Judiciary.

This paradox, however, can be minimized if it is recognized that there is no absolute dichotomy between broad and unrestricted judicial activism and total deference to political action. It is possible to promote the effectiveness of social welfare rights, while respecting separation of powers, especially if a structural litigation model more open to community participation and interinstitutional dialogue is developed.

The Meaningful Engagement, a structural remedy developed by the Constitutional Court of South Africa, can be a starting point to build a model that moves in that direction. In the South African model, the participation of the population segments affected by political omissions is sought, with intrinsic and extrinsic advantages.

On the one hand, affected communities are treated with dignity and can influence the formulation of public policies that concern them. Thus, the affected social groups are seen not only as objects of state action, but as partners in building solutions to the problems faced.

On the other hand, there are instrumental reasons for promoting public participation. As seen, there is an epistemic gain in the decision-making process, since more points of view will be considered and, consequently, there is a greater chance of identifying the real causes of the problem. In addition, there is greater transparency in state action, which needs to publicly justify its decisions, and the chance of the Government's commitment to resolving the demand increases. After all, the measures to be carried out will not be imposed by the Judiciary, but built, through dialogue, with the affected population segments.

Finally, public participation and institutional dialogue also collaborate to mitigate the criticisms usually made of structural processes. Concern about the separation of powers is lessened, as the judiciary will not formulate the details of the policies to be implemented. The technical incapacity is compensated by the institutional dialogue and the wide participation of the affected group, which expands the epistemic basis for the judge's decision making. The destabilizing effect and transparency make it more difficult to have a backlash effect, since the state institution is open to public and judicial scrutiny.

In this sense, the Meaningful Engagement can minimize the three central criticisms that are usually made to structural processes. The use of a structural dialogical remedy avoids the violation of the separation of powers, mitigates concerns about the Judiciary's technical inability to formulate public policies and reduces the chances of a backlash effect.

Even if differences are recognized in the Brazilian legal and social reality, when compared to the South African reality, it is believed that the South African example can contribute to the improvement of structural processes in Brazil and deserves greater attention on the part of Brazilian jurists who want to rethink the role of the people in contemporary constitutionalism.

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NOTA

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