Revista da Faculdade de Direito do Sul de Minas

THE USE OF THE UNCONSTITUTIONAL STATE OF AFFAIRS IN BRAZIL: CONTRIBUTIONS TO ESTABLISH APPLICATION CRITERIA

A UTILIZAÇÃO DO ESTADO DE COISAS INCONSTITUCIONAL NO BRASIL: CONTRIBUIÇÕES PARA ESTABELECER CRITÉRIOS DE APLICAÇÃO

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ABSTRACT

Despite the reference to the Unconstitutional State of Affairs (USoA) in the trial of the precautionary measure of ADPF nº 347, the Supreme Federal Court of Brazil did not clarify which criteria should guide its application. Consequently, some problems may arise, such as its weakening, due to the possible indiscriminate use; lack of internal and external coherence in judicial decisions, since there are no uniform criteria of applicability, there is a risk that each magistrate will understand this practice of different way; and legal uncertainty, of not knowing precisely when the USoA may or may not be used. Thus, the purpose of this paper is to present the importance and the difficulties of establishing objective criteria for the use of USoA in future structural litigation. Furthermore, in order to contribute to the minimization of the identified problem, some initial criteria for the use of USoA are proposed, such as the exceptionality of the problem faced and the severity of the structural violation.

Keywords: Unconstitutional State of Affairs; Application criteria; Structural Remedies.

RESUMO

Apesar da expressa referência ao Estado de Coisas Inconstitucional (ECI) no julgamento da medida cautelar da ADPF nº 347, o Supremo Tribunal Federal não esclareceu quais critérios devem nortear sua aplicação. Consequentemente, alguns problemas podem surgir: enfraquecimento do instituto, pelo seu possível uso indiscriminado; falta de coerência interna e externa nas decisões judiciais, uma vez que se não há critérios uniformes de aplicabilidade, corre-se o risco de cada magistrado compreender essa prática de forma distinta; e a insegurança jurídica, por não se saber com precisão quando o ECI poderá ou não ser utilizado. À vista disso, a finalidade do presente artigo é apresentar a

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importância e as dificuldades de estabelecer critérios objetivos para a utilização do ECI em futuros processos estruturais. Além disso, visando contribuir com a minimização do problema identificado, propõe-se alguns critérios iniciais para a utilização do ECI, como a excepcionalidade do problema enfrentado e a gravidade da violação estrutural.

Palavras-chave: Estado de Coisas Inconstitucional; Critérios de aplicação; Remédios Estruturais.

INTRODUCTION

With the Mexican Constitution in 1917 and the Weimar Constitution in 1919, a new phase of constitutionalism began: the welfare state, whose duties are not restricted to respecting the citizens' individual freedoms, but also acting positively, "hands on", through public policies, to guarantee the fundamental rights enshrined in the constitutional text.

Alongside with the affirmation of social, economic and cultural rights ("DESCs"), so-called political omissions have also increased, resulting from the inertia of political powers in providing the public services that are necessary for their protection. Because of the lack of adequate public policies, many of the new rights came to be seen only as symbolic guarantees.

The Judiciary, then, started to use structural remedies, which aim to remove political powers from inertia and make it possible to overcome political omissions. Although it is widely known and studied in other countries, such as in the USA, Colombia and South Africa, the phenomenon of structural remedies is still new in Brazil, which only entered the academic spotlight in 2015, when the Supreme Court (Supremo Tribunal Federal, or simply, "STF") recognized the Unconstitutional State of Affairs ("USoA") of the Brazilian prison system, in ADPF nº 347/DF. Even though the final requests have not yet been judged, there have already been other attempts to use USoA in Brazil, such as ADPF No. 682, in which the Brazilian Bar Association (Ordem dos Advogados do Brasil, or simply, "OAB") tried to recognize USoA for higher legal education.

But attempts to use USoA gave rise to a few serious questions. What criteria should guide the application of USoA in Brazil? What are the risks of this lack of systematization? Are there guidelines to develop criteria for the use of USoA? These are fundamental questions that, so far, have not been adequately answered by academic literature and jurisprudence.

Without setting parameters for its use, the Colombian structural remedy can strengthen judicial solipsism and the production of inefficient decisions, which provide only palliative solutions to the problem. Thus, the purpose of this article is to highlight the need to set criteria for the use of USoA in the country, to reveal starting points for the systematization of these criteria.

To carry out this research, we focused on a bibliographic and documentary analysis as a methodology, which resulted in an inductive and comparative analysis, since

to carry out the necessary formulations, we searched for the main academic productions and judicial decisions related to structural processes, enabling the understanding of fundamental concepts to focus our research on. In addition, important Colombian cases in which the USoA was used were studied. It is worth highlighting the study of ruling T-153, in which the Unconstitutional State of Affairs of the Colombian prison system was recognized, and sentence T-25, paradigmatic for Colombian structural disputes and responsible for setting the requirements for the use of USoA.

The work is structured by initially presenting some conceptual considerations, elucidating the purpose of structural remedies, and clarifying the development of USoA in Colombia. Then, there is a brief presentation of the two attempts to recognize the USoA in Brazil, through concentrated control of constitutionality. Finally, concluding the work, the evidence from the Colombian and Brazilian experiences that the lack of criteria for the use of USoA can cause several problems, demonstrating how fruitful and necessary it is to establish conditions to apply USoA.

The Colombian response to political omissions: the Unconstitutional States of Affairs

From the context of the Welfare State, strengthened after the Second World War, a broad positivism of fundamental rights started to show in new Constitutions[1], which included matters that until then were not considered to be typically constitutional. Concomitantly with this process, researchers started to study the objective dimension of fundamental rights, capable of binding the State to constantly act in favor of its effectiveness.

In this scenario, the concept of political omission emerged. It is not a normative vacuum, representing the complete absence of infraconstitutional rules aimed at the realization of fundamental rights. As Marmelstein explains[2], the political omission can be understood as the lack of public policies necessary for the protection of constitutionally guaranteed rights, causing them profound and repeated violations by the Public Power.

In view of these omissions, the affected population segments end up resorting to the Judiciary, to identify a solution to state inertia[3]. Because of this, the collective structural processes of public interest emerge, seeking to modify the structure and performance of certain public institutions to resolve complex disputes, involving multiple

[1] BEATTY, David M. *A essência do Estado de direito*. Tradução de Ana Aguiar Cotrim. São Paulo: WMF Martins Fontes, 2014. p. 216.

[2] MARMELSTEIN, George. A eficácia incompleta das normas constitucionais: desfazendo um mal-entendido sobre o parâmetro normativo das omissões inconstitucionais. *Revista Jurídica da Fa7*. Fortaleza, v. 12, n. 1, p. 10-28, 2015a. p. 25

[3] FERRAZ, Octavio Luiz Motta. Between activism and deference: social rights adjudication in the Brazilian Supreme Federal Tribunal. *In*: GARCÍA, Helena Alviar; KLARE, Karl; WILLIAMS, Lucy A. (Ed***.)***. *Social and Economic Rights in Theory and Practice:* Critical Inquiries. Nova York: Routledge Research In Human Rights Law, 2014. p. 121-137.

interests[4]. As Salazar and Meireles clarify[5], typical issues of structural litigation involve different values of society; not only there are competing interests at stake, but also the possibility that the legal spheres of third parties, which are not part of the conflict, are affected by the court decision[6].

In this type of litigation, the Judiciary has issued rulings or structural remedies that have enabled judicial intervention within the scope of the Public Administration[7]. They function as real access keys, opening the doors of public policies to the Judiciary[8]. According to Campos[9], these jurisdictional provisions are commands to achieve real institutional changes, constituting an in-depth intervention in the structure of public policies. This way, they are oriented towards a future perspective, and not only in the short term, preventing the sentence from becoming a bigger problem than the original[10].

Structural remedies are diverse, enabling different degrees of judicial intervention and having different application criteria. In the United States, the use of structural injunctions became known, which enabled more rigid interventions by the Judiciary[11]. On the other hand, in South Africa, the Constitutional Court developed what they call Meaningful Engagement, a structural remedy of a dialogical character[12]. Colombia, on the other hand, essential to this study, developed the Unconstitutional State of Affairs.

The first case in which the Colombian Court used this institute was in the Sentencia de Unificacion SU. 559/97, judged in 1997. The case was about the attempt to drain the National Fund for Social Benefits of Teaching by the cities of Zambrano and Maira de La Baja, which violated the social security rights of forty-five teachers. Teachers, for several years, contributed 5% of their income to a social security fund, however, they did not receive the due consideration, being hampered by the omission of municipal agents[13]. Thus, Colombian cities, by not affiliating and paying the necessary contributions so that

[4] VITORELLI, Edilson. Levando os conceitos a sério: processo estrutural, processo coletivo, processo estratégico e suas diferenças. *Revista de Processo*. [S.l.], v. 284, p. 333-369, out. 2018. p. 341.
[5] SALAZAR, Rodrigo; MEIRELES, Edilton. Decisões estruturais e acesso à justiça. *Revista Cidadania e Acesso à Justiça*. [S.l.], v. 3, n. 2, p. 21-38, 2 dez. 2017. p. 32.
[6] ARENHART, Sérgio Cruz. Processo multipolar, participação e representação de interesses concorrentes. In: ARENHART, Sérgio Cruz; JOBIM, Marco Félix (Org.). *Processos estruturais*. Salvador: JusPodivm, 2017. p. 423-448; p. 423-424.
[7] PUGA, Mariela G.. *Litigio Estructural*. 2013. 329f. Tese (Doutorado) – Faculdade de Direito, Universidade de Buenos Aires, Buenos Aires, 2013. p. 256-257.
[8] SERAFIM, Matheus Casimiro Gomes; FRANÇA, Eduarda Peixoto da Cunha; NÓBREGA, Flavianne Fernanda Bitencourt. Processos estruturais e direito à moradia no Sul Global: contribuições das experiências sul-africana e colombiana. *Revista Opinião Jurídica*. Fortaleza, v. 19, n. 32, p. 148-183, 2021. p. 155.
[9] CAMPOS, Carlos Alexandre de Azevedo. *Estado de Coisas Inconstitucional*. Salvador: JusPodivm, 2016. p. 189.
[10] SALAZAR, Rodrigo; MEIRELES, Edilton. *Op. cit*., p. 32.
[11] JOBIM, Marco Félix. *Medidas Estruturantes*: da Suprema Corte Estadunidense ao Supremo Tribunal Federal. Porto Alegre: Livraria do Advogado Editora, 2013.
[12] RAY, Brian. *Engaging with Social Rights:* Procedure, Participation, and Democracy in South Africa's Second Wave. Cambridge: Cambridge University Press, 2016. p. 115.
[13] MARMELSTEIN, George. O Estado de Coisas Inconstitucional: uma análise panorâmica. In: OLIVEIRA, Pedro Augusto de; LEAL, Gabriel Prado (Org.). *Diálogo Jurídicos Luso-Brasileiros Volume 1 perspectivas atuais de Direto Público*: o Direito em tempos de crise. Salvador: Faculdade Baiana de Direito, 2015b. p. 241-264; p. 242.

teachers could enjoy their fundamental rights to health and social assistance, violated their fundamental rights[14].

Recognizing the seriousness of the situation, as well as the existence of similar cases throughout Colombia, the Constitutional Court guaranteed the specific affiliation of the plaintiffs to the pension fund. It also determined that municipalities in a similar situation to the res judicata remedy the unconstitutional omission within a reasonable time. Aware of the number of injured parties, the Court understood that it would be much less costly to grant a jurisdictional provision that included multiple situations, than to individually judge each of the lawsuits filed by the teachers[15].

According to Campos16, it is possible to divide the evolution of the USoA into two phases: a first phase, marked by inefficiency, whose paradigmatic case was sentence T-153, in which the Court recognized the USoA of the Colombian prison system; and a second phase, initiated with the T-25 sentence, characterized by the rigor in the identification of situations that truly reveal an USoA, as well as by a greater concern with the efficiency of the institute. For the purposes of this research, it is relevant to understand the context and implications of the T-25 ruling.

The T-25 ruling concerned a serious problem that Colombia faced at the time and still has social repercussions: the internally displaced, victims of the armed conflicts in the country, mainly between guerrillas and national military forces. In 2015, 6.9 million people were part of the concept of internally displaced persons in Colombia[17]. The issue requires efficient state action, since thousands of people leave their houses, going to other cities or to poorer neighborhoods in the cities in which they live.

In this scenario, the levels of marginalization increase, making it necessary to carry out public policies to protect this social group. Colombia, however, has adopted an inertial stance, revealing a situation of neglection for internally displaced persons. The number of Acción de Tutela filed against the Colombian State steadily increased. In its defense, Colombia claimed, among other things, that humanitarian aid would last for only three months, lack of budget availability and errors in requests for assistance[18].

Before T-25, the Colombian Court judged seventeen litigations on the situation of internally displaced persons, so it was aware of the institutional barriers that stood

[14] TEIXEIRA, Eliana Maria de Souza Franco; CICHOVSKI, Patricia Kristiana Blagitz. Estudo comparado das decisões da Corte Constitucional Colombiana e do Supremo Tribunal Federal na ADPF nº 347/DF. XXV *Congresso do CONPEDI*. Curitiba. Área: Constituição e Democracia II. p. 193-211, p. 195-196, 2016. Available at: https://www.conpedi.org.br/publicacoes/02q8agmu/z15hvb59/K2ZS6klEjiBDgCyA.pdf. Accessed on Aug. 18, 2020.

[15] VARGAS HERNÁNDEZ, Clara Inés. La garantía de la dimensión objetiva de los derechos fundamentales y labor del juez constitucional colombiano en sede de acción de tutela: El llamado "Estado de cosas inconstitucional". *Estudios Constitucionales*. [S.l.], v. 1, n. 1, 2003, p. 203-228. p. 214.

[16] CAMPOS, Carlos Alexandre de Azevedo. *Op. cit.*, p. 167.

[17] ESPINOSA, Manuel José Cepeda; LANDAU, David. *Colombian Constitutional Law*: Leading Cases. New York: Oxford University Press, 2017. p. 178.

[18] GARAVITO, César Rodríguez; FRANCO, Diana Rodríguez. El contexto: el desplazamiento forzado y la intervención de la Corte Constitucional (1995-2009). *In*: GARAVITO, César Rodríguez. *Más allá deldesplazamiento*: Políticas, derechos y superación del desplazamiento forzado en Colombia. Bogotá: Ediciones Uniandes, 2009. p. 14-37, p. 26.

between the guarantee of the fundamental rights and those people[19]. Based on these cases, the Court found two main problems that needed to be overcome for the decision rendered to achieve its objectives: the limited institutional capacity to implement policies already foreseen and the insufficient budget.

Concerned with the efficiency of judicial protection, the Constitutional Court adopted a more open and conversational stance than it had adopted in the judgment T-153. It chose not to set the details of the public policies that the political powers should carry out, determining the creation of a new regulatory framework for policies aimed at internally displaced persons. In addition, it demanded that the competent powers carried out the measures that were appropriate to them, which should be prioritized in the State's financial budget[20].

Another important aspect worthy of mention in ruling T-25 is that the Court has established means of judicial supervision of compliance with its determinations. In a ten-year period, more than twenty public hearings were held, with the presence of authorities and organized civil society. The Colombian Court used an inspection mechanism called Autos, a type of communication between the Judiciary and the other powers to clarify the measures that were being taken, as well as to set dates for hearings and request information or actions from the political powers[21]. Thus, the T-25 has managed to be an efficient jurisdictional provision.

Aware of the development of USoA in Colombia, we proceed to the analysis of how this structural remedy was received in Brazil.

The use of the Unconstitutional State of Affairs in Brazil

The number of studies made and published in Brazil on structural processes is growing. The grounds for these demands, however, are not new to the Federal Supreme Court ("STF", in Portuguese), which has already dealt, in many circumstances, with the possibility of Judiciary intervention within the scope of the political powers.

An important case brought to the STF, which contributed to establishing the legal basis for the development of structural processes and the use of USoA, was ADPF No. 45, in which the rapporteur, Minister Celso de Mello, presented the thesis that it would be possible to determine measures to be taken by the Executive when the minimum existential of the detainees in a prison establishment was being violated. In addition, the minister argued that the Executive and Legislative had not unrestricted freedom of action,

[19] MAIA, Isabelly Cysne Augusto. *Análise da ADPF nº 347 e da inadequabilidade do Estado de Coisas Inconstitucional para a efetivação dos serviços públicos: por novos protagonistas na esfera pública democrática.*

[20] *Idem*.

[21] GARAVITO, César Rodríguez; FRANCO, Diana Rodríguez. Juicio a la exclusion. *El impacto de los tribunales sobre los derechos sociales em el Sur Global*. Buenos Aires: Siglo Veintiuno Editores, 2015. p. 67.

and that the Judiciary was responsible for safeguarding the minimum existential threatened by state omissions[22].

Based on these arguments, the Court, in the RE 592,581, ruled that the Judiciary can determine that the Public Administration carry out emergency reforms in prisons to ensure the basic human treatment of the detainees. It is also in this sense the content of the General Repercussion Ruling ("Tema de Repercussão Geral") no. 220, which was originated by an Extraordinary Appeal. Through this statement, STF makes it clear that the Judiciary is competent to determine that the Executive carry out interventions in prisons, to ensure the observance of fundamental rights of prisoners[23].

Although these cases have led to greater judicial intervention in the elaboration and execution of public policies, the main milestone for structural processes was the reference to the Unconstitutional State of Affairs in the prison system, in the judgment of the precautionary measure of ADPF nº 347/DF in 2015[24]. Because of this ruling, the research on structural disputes and on the USoA has multiplied. The reason for this increase is the originality of the decision: for the first time, STF expressly recognized the use of a foreign structural remedy, designed to modify a set of public institutions.

Analyzing the precautionary requests, the rapporteur, Minister Marco Aurélio, determined that the judges and courts establish, when possible, alternative sentences to imprisonment, and that the Federal Government release the accumulated balance of the National Penitentiary Fund, abstaining from making new contingencies[25].

In the final requests, PSOL ("Partido Socialismo e Liberdade", plaintiff in the case) required, among other requests: that the STF recognize the Unconstitutional State of Affairs in the prison system; that the Federal Government elaborate and send to the STF, in 3 months maximum, a National Plan aiming at overcoming the USoA of the Brazilian prison system, within a period of three years; and that the STF decides on the National Plan, to ratify it or impose alternative or complementary measures that it finds necessary to overcome the crisis[26].

Although the lawsuit has not been tried yet, there are already other attempts to use USoA. On 05/07/2020, the Federal Council of OAB filed the ADPF No. 682, requesting

[22] BRAZIL. Supremo Tribunal Federal. Arguição de Descumprimento de Preceito Fundamental nº 45/DF. Relator: Ministro Celso de Mello. *Diário Oficial da União***.** Brasília, 2004. Available at: http://www.sbdp.org.br/arquivos/material/343_204%20ADPF%202045.pdf. Accessed on Abr. 17, 2020.

[23] BRAZIL. Supremo Tribunal Federal. Recurso Extraordinário nº 592.581. Relator: Ministro Ricardo Lewandowski. *Diário Oficial da União***.** Brasília, 2015a. Available at: http://www.stf.jus.br/portal/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=2637302&numeroProcesso=592581&classeProcesso=RE&numeroTema=220. Accessed on Abr. 17, 2020.

[24] SERAFIM, Matheus Casimiro Gomes. *Compromisso significativo*: contribuições sul-africanas para os processos estruturais no Brasil. Belo Horizonte: Fórum, 2021. p. 44-45.

[25] VIEIRA JUNIOR, Ronaldo Jorge Araújo. *Separação de Poderes, Estado de Coisas Inconstitucional e Compromisso Significativo*: novas balizas à atuação do Supremo Tribunal Federal. Brasília: Núcleo de Estudos e Pesquisas/CONLEG/Senado, Dezembro/2015 (Texto para Discussão nº 186), p. 19. Available at: www.senado.leg.br/estudos.

[26] BRAZIL. Supremo Tribunal Federal. Arguição de Descumprimento de Preceito Fundamental Nº 347/DF. Relator: Ministro Celso de Mello. *Diário Oficial da União*. Brasília, 2015b. p. 70-73. Available at: http://www.jota.info/wp-content/uploads/2015/05/ADPF-347.pdf. Accessed on Abr. 25, 2020.

the suspension of authorizations for the creation of Law Schools that have not yet started to operate, as well as vetoing the opening of new vacancies in private institutions. Among the claims submitted, the entity requires the Court to recognize the Unconstitutional State of Affairs due to the shaky situation of legal education, given the repeated violation of the constitutional precept that guarantees the quality of higher legal education in Brazil[27]. On May 15th, the rapporteur of the action, Minister Ricardo Lewandowski, denied following the ADPF, understanding that OAB did not use the appropriate procedural instrument to defend its claims.

In view of the risks arising from the misuse of the USoA, Senator Antônio Carlos Valadares presented, on November 11, 2015, the Bill No. 736/2015[28], proposing that, in addition to establishing objective assumptions to be observed by the Court for the recognition of the USoA, also the recognition of this state of affairs would imply the celebration of a Meaningful Engagement between the Public Power and the affected population segments. Among the proposed criteria, are: identifying a massive, widespread and systematic violation of fundamental rights, perpetrated by the State, by action or inaction, which affects a significant number of people; lack of coordination between legislative, administrative, budgetary and judicial measures, which leads to the systematic violation of rights, the perpetuation or worsening of this situation; express provision, in the constitutional text, for public policies that need to be implemented[29].

Despite providing for some assumptions also recognized by the Colombian Court in sentence T-25, the Bill lacked conceptual precision, since it associated two very distinct structural remedies: the USoA, originated and applied in Colombia, and the Meaningful Engagement, developed by the Constitutional Court of South Africa. The Project was shelved in 2018, due to the end of the legislature, as prescribed in the art. 332 of the Internal Regulations of the Federal Senate.

In view of the two attempts to use the Colombian structural remedy, one can observe the importance of establishing guidelines for the recognition of USoA. The author of ADPF nº 682 even mentions some criteria, such as the demonstration of a clear massive violation of fundamental rights of a significant amount of people[30]. Even so, the mentioned criteria are unsystematic and too flexible, not solving the question about when it is possible to recognize the USoA.

The lack of criteria can trivialize the use of the structural remedy, giving rise to

[27] BRAZIL. Supremo Tribunal Federal. Arguição de Descumprimento de Preceito Fundamental nº 682. Petição inicial. Relator: Ministro Ricardo Lewandowski. Diário Oficial da União. Brasília, 2020a. Available at: https://www.jota.info/wp-content/uploads/2020/05/oab-suspensao-cursos-de-direito.pdf. Accessed on Mai.09, 2020.

[28] BRAZIL. *Projeto de Lei do Senado nº 736/2015*. Altera as Leis nº 9.882, de 3 de dezembro de 1999, e 13.105, de 16 de março de 2015, para estabelecer termos e limites ao exercício do controle concentrado e difuso de constitucionalidade pelo Supremo Tribunal Federal, dispor sobre o estado de coisas inconstitucional e o compromisso significativo. Brasília, 2015c. Available at https://www25.senado.leg.br/web/atividade/materias/-/materia/124010. Accessed on Jan. 02, 2020.

[29] BRAZIL. *Op. cit.*

[30] BRAZIL. *Op. Cit.*, p. 65.

criticisms such as those made by Lênio Streck[31], who affirms that the applicability of the Colombian model can strengthen judicial solipsism, allowing any part of the Brazilian reality to be declared unconstitutional by the STF. In the next topic, there are some criteria suggested to be used and fixed by the Court.

The necessary setting of criteria for the use of structural remedies

The importance of setting criteria for the use of the USoA lies in the fact that the structural measures are suitable for exceptional scenarios, especially when conflicting issues can only be solved through the restructuring of state bureaucracy, eliminating all threats to the effectiveness of the USoA constitutional provision. This type of action must be prioritized, therefore, when it is not possible to solve the problems by granting preventive or reparative orders, making it necessary to implement structural reforms.

Thus, according to Owen Fiss[32], in order for structural litigation to be constitutionally adequate, the bureaucratic arrangement needs fixing, so that the reorganization to be implemented by the Judiciary aims to bring this weakened structure back to constitutional limits.

The exceptionality of this institute, for César Rodríguez Garavito[33], is justified for three main reasons: 1. Considerable intervention by the Court in public policy processes involving the Government and Congress; 2. Limitations of the Constitutional Court to follow up on decisions involving the USoA recognition, since the recognition of USoA is not enough as a standalone measure, it must be monitored; 3. Considering that the USoA culminates in the recognition of an absolute failure of public policy and that the mechanisms for monitoring the measures set by the Judiciary can extend for years on end, requiring a significant portion of the Judiciary's budget.

At this point, it is imperative to consign the observations of Leonardo García Jaramillo[34], who states that in the absence of a precise conceptualization of such an exceptional institute, which was included in legislation in Colombia, remaining as a jurisprudential development since its idealization in the nineties, there are times when the existence of an USoA has been declared, without, however, visualizing the presence of a structural failure that justifies its recognition.

[31] STRECK, Lenio Luiz. Estado de Coisas Inconstitucional é uma nova forma de ativismo. *Revista Consultor Jurídico*. [S.l.], v. 24, 2015.

[32] FISS, Owen. *The civil rights injunction*. Bloomington: Índiana University.Indiana University Press, 1978. p. 11.

[33] GARAVITO, César Rodríguez. ¿Cuándo cesa el estado de cosas Inconstitucional del desplazamiento? Más allá del desplazamiento, o cómo superar un estado de cosas inconstitucional. In: GARAVITO, César Rodríguez. *Más allá del desplazamiento*: Políticas, derechos y superación del desplazamiento forzado em Colombia. Bogotá: Ediciones Uniandes, 2009. p. 434-492; p. 438.

[34] JARAMILLO, Leonardo García. La dotricna jurisprudencial del estado de cosas inconstitucional. Resposta Judicial a la necesidad de reducir la disociación entre las consagraciones de la normatividad y realidad social. In: JARAMILLO, Leonardo García. *Constitucionalismo deliberativo*. Estudio sobre el ideal deliberativo de la democracia y la dogmática constitucional del procedimento parlamentario. México: Universidad Nacional Autonoma de Mexico, 2015. p. 171-215, p. 191.

On the other hand, the author affirms that there are other occasions in which the occurrence of massive and repeated violation of rights that affect a plural number of people remains patent, without the Court determining the incidence of the institute. As an example of its affirmations, the USoA declaration case for the notary contest is consigned, which does not reflect a structural failure, while it cites the health case in Colombia, in which generic orders were issued in judgment T-760 in 2008, without, however, declaring the existence of the USoA, which would be fully applicable in the case in question[35].

The lack of criteria for the incidence of the Unconstitutional State of Affairs is not exclusively a Brazilian matter, since in Colombia, the cradle of rationalization of this practice, the lack of objectivity is also a problem. It happens that Colombian Law, by experiencing this practice for a longer time, has already been able to identify, through judicial action, some elements to be verified before the Constitutional Court carries out its intervention through the USoA, namely: 1. the massive violation and widespread of a plurality of constitutional rights that affect a significant number of people; 2. the omission of the authorities, in a prolonged period, in the fulfillment of their obligations in guaranteeing the rights of vulnerable populations; 3. the adoption of unconstitutional practices by the political powers; 4. the absence of the issuance of legislative, administrative or budgetary measures by the competent political powers, necessary to prevent the violation of rights; 5. the existence of a social problem whose solution was affected by the intervention of several institutions; 6. the coordination of actions, requiring resources that imply the provision of an additional budget; 7. the possibility of demand in which, if all individually affected persons sought the Judiciary, there would be a congestion in the functioning of the court[36].

Even though some criteria were outlined for the use of structural remedies in Colombia, what is observed is that these limits are still endowed with a high level of subjectivism, showing that, in reality, the Constitutional Court has wide discretion in declaring whether or not an Unconstitutional State of Affairs about a given situation, this discretion also extends to fixed remedies. In this sense, the Judiciary carries out activities distinct from its typical competence and starts to assess the circumstances, the problems of the citizens, devising solutions and establishing activities to be followed by the institutions[37]. Thus, although Colombia has been applying USoA since the 1990s, it still faces the difficulties from the lack of assumptions for its use.

Returning to the Brazilian reality, more precisely to the case of ADPF no. 347, it appears that Minister Marco Aurélio stated in his vote that the use of USoA should occur only in exceptional contexts, so that the rights to health, education and transportation, for example, cannot have their performance improved through the declaration of an Unconstitutional State of Affairs, since for these rights there are political and social

[35] JARAMILLO, Leonardo García. *Op. cit.*, p. 191.

[36] COLOMBIA. Sentencia T-025 de 2004. Disponível em: http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm. Accessed on: 11 jun. 2020.

[37] ZAMBRANO, Sonia Patricia Cortés. Poder Discrecional de la Corte Constitucional enel Estado de Cosas Inconstitucional. *Universidad Santo Tomas: Via Inveniendi Et Iudicandi*. [S.l.], v. 7, n. 2, jul. 2012. p. 30.

provisions, and such exceptional measures should apply only to rights that involve politically underrepresented populations, in absence of political interest[38].

It happens that in a previous moment of the same vote, Minister Marco Aurélio affirms, peremptorily, that there are difficulties in defining which public services may have their performance improved through the declaration of an Unconstitutional State of Affairs, and, in this point, he cites basic sanitation, public health, urban violence, elucidating that all of these could fit into this state of unconstitutionality and that the question would be to define from which level of violation of these fundamental rights the adoption of a structural measure would be possible[39].

Thus, an internal contradiction is perceived in the rapporteur's own understanding of which circumstances can give rise to the declaration of an USoA, since, at first, he recognized the possibility of declaring him about rights in which there is political interest, but that they are not being adequately rendered in factual reality. Further on, he adds that there is no need to talk about USoA on rights in which there is political interest for their realization. After all, on what situations is the incidence of USoA even applicable? About any and all rights that are being rendered in dissonance with constitutional requirements, or just those rights that focus on minority groups in which there is no political interest? This is a question that remains to be answered by our Constitutional Court.

We note that the rapporteur, in addition to not having discussed the dimensions of the institute, also did not indicate whether the Brazilian Judiciary accepts the criteria used in Colombia for the configuration of the USoA (although they are fragile) nor much less discussed some points of extreme relevance for the application of the structural remedy, such as: how long must the omission of political powers be verified in order for the USoA to be configured? Or, yet, health policy, for example, despite having greater political and social interest in its implementation, contemplates spheres of low political interest, such as breaking patents, thus, these other aspects of low political interest could have their effectiveness improved through USoA recognition, even though they are elements of a deeply regulated policy?

It is also perceived the lack of discussion about the role that the Judiciary will assume after the recognition of a USoA - if it will issue direct intervention commands in deficient public policy or if it will only approve eventual action plans proposed by the Executive and the Legislative - in addition to how the enforcement of ADPF no. 347 will take place or what elements must be present to declare the overcoming of this state of unconstitutionality.

There is an absolute lack of parameter in the STF about what should be the conditions for the use of the Unconstitutional State of Affairs. In fact, some Ministers do not appear to have firm positions on the contours that this institute must assume, as is the case of Minister Marco Aurélio, described above.

[38] BRAZIL. *Op. Cit*, p. 33.
[39] BRAZIL. *Op. cit*., p. 30.

Aiming to provide greater objectivity to the use of structural remedies in Brazil, Bill no. 736 was proposed in 2015, which brought the Unconstitutional State of Affairs closer to the Meaningful Engagement, determining that, when the USoA is recognized, it is up to the Judiciary to set the guidelines for overcoming this situation of massive violation of fundamental rights, motivating the dialogue between the competent political powers for the formulation of the appropriate public policy and monitoring the execution of the assumed obligations. Bill no. 736 of 2015 also established the objective criteria to be considered for the recognition of an Unconstitutional State of Affairs. It so happens that this bill was shelved in 2018, due to the end of the legislature, as prescribed in Art. 332 of the Internal Regulations of the Federal Senate.

Currently, there is no project pending before the Legislative Branch aimed at regulating the use of structural remedies. For this reason, we propose that this practice be used exceptionally and, preferably, in the context of collective actions and not in actions of concentrated control of constitutionality, whose legitimate assets are limited. It should also be noted that the improvement in the quality of public services tends to be achieved through changes in public management and in the democratic model of representation, since these measures enable the expansion of popular participation in decision-making processes, the increase in levels of control and, consequently, the correction of investment deviations.

It is believed that the solution of the problem discussed in the present work goes through the need to reinforce administration, controls and social participation in the deliberative process, since, as it is a political problem, exclusively legal solutions will not be enough. In parallel, it is also argued that judicial intervention through structural remedies must take place. The difficulty lies in establishing the contours of how this intervention should take place.

To better elucidate the proposition of how such an intervention should occur, Jeremy Waldron's writings and productions will be used. The choice of author is justified by the fact that he is one of the most combative researchers to judicial intervention in legislative proposals, manifesting himself in a very harsh way to the control of constitutionality in its strong modality. Thus, because it is understood that structural demands constitute a kind of constitutionality control, not over normative acts, but over factual reality, it is understood that Waldron's writings can greatly help in the construction of the criteria that are expected to be fixed.

Furthermore, it is intended to demonstrate that when talking about the relationship between the Judiciary and the Executive, Jeremy Waldron admits a greater intervention by the Judiciary in the perspective of control, but always seeking to rescue the democratic primacy in this relationship. Hence, the intervention of the Judiciary would be limited to the legal provisions. Therefore, it is understood that his writings can contribute to the identification of some guiding assumptions of the relationship between the Powers within the scope of structural demands. When recognizing that the Colombian system does not have fixed parameters for the use of this procedural strategy, we sought other theories, more objective and based on solid and recognized research.

Therefore, it is proposed, based on Waldron's[40] ideas that because there is a close congruence between individual rights and democracy, the holder of a right, whose enforcement has not been prioritized by the political sphere, cannot be concerned with addressing preferences of the majority as if they were selfish choices, made by predators who want the minority to succumb, but equally, a system that purports to be democratic cannot ignore the fact that minority classes have rights and these must be guaranteed. All of this reveals the need to respect individual morals, which is one of the constitutive pillars of democracy.

Thus, the struggle established in a structural process must not be a confrontation between majorities and minorities or between democracy and activism, but, in fact, it must be a mechanism that ensures the return of the performance of the administration to the prescriptions of the rule of law, because it is only with the return to the path of legislation that the democratic balance will be restored. The intervention to be carried out by the Judiciary Power must stick to the substantial aspect of the rule of law, as proposed by Waldron, ensuring that not only the Political Powers expose their perspectives in the legal proceedings, but also ensuring that the groups affected with inefficient public action can be effectively heard during the procedural process[41].

All structural demands must be guided in the light of the articulated governance subprinciple[42], so that each of the constitutional powers can dialogue with each other, in search of the appropriate alternatives for the realization of individual rights. The result of the structural demand, the ruling itself, cannot predict interventions that are contrary to the law, nor can it authorize procedures that fall short of normative standards. After all, the role of the Judiciary is not to create a new public policy, but to ensure that public policy, as originally articulated, can be implemented.

At this point, it is important to clarify the concept of articulated governance, described by Jeremy Waldron in his article "Separations of Powers in thought and practice". On the subject, it is proposed that the constitutionally constituted powers should act in an articulated and integrated manner, so that each one acts in a sequenced manner, with the Legislative elaborating rules that are applicable to all, followed by the Executive's action implementing the legislative determinations and, at the end of the chain, we would have the Judiciary, assuring a performance different from the law[43].

Waldron points out that the principle of separation of powers leaves us with an important warning about the risks of simplifying governance. For the author, the separation of powers does not only have the function of indicating how the powers should be shared among the different institutions, but he alerts us that the political options of

[40] WALDRON, Jeremy. *Law and Disagreement*. Oxford: Clarendon Press, 2004. p. 282.
[41] LIEBENBERG, Sandra. Participatory Justice in Social Rights Adjudication. *Human Rights Law Review*. [S.l.], v. 18, n. 4, p.623-649, nov. 2018. p. 625.
[42] WALDRON, Jeremy. Separation of Powers in Thought and Practice. *Boston College Law Review*. v. 54. ed. 2, 2013. p. 434-435.
[43] *Idem*.

government must be articulated through successive phases of governance, each one of them maintaining their own integrity[44].

With this idea of governance articulated as a subprinciple of the separation of powers, Waldron approaches the categorization of institutional dialogue developed by Conrado Hubner, who warns that the defense of institutional dialogues breaks the traditional logic that the powers only control a few aspects of each other, establishing that they can - indeed, they must - deliberate jointly in the search for decisions that are more effective by conferring the most different perspectives on an institutional voice[45].

This categorization allows the advance of a second idea developed by Waldron. While the author is internationally recognized for his ideas against the strong judicial review, constructing arguments that aim to remove the interference of the Judiciary on the deliberations of the Legislative Power, one has that he is not so critically opposed to the judicial review on acts of public administration. For him, despite the Executive Power having its main credentials in the elective process, it is undisputed that this Power is subject to the Rule of Law. Thus, it is up to the Judiciary to intervene in cases where administrative performance is distancing itself from the rule of law[46].

In addition to this idea, it is important to note that Waldron's view of the judicial control of administrative acts is not limited to a formal control of legality. What the author proposes is that when carrying out the control, the Judiciary should stick to a certain substantial procedure, which will contribute to a maximization of the space in which the democratic deliberative process can operate[47].

Therefore, the following aspects are proposed as criteria for the use of structural remedies: 1. Treating exceptional situations, in which the solution to the dispute is not in the issuance of preventive or remedial orders; 2. Situation of absolute dissonance between the normative provision and the constitutional text, to the point of the social group, unable to enjoy a certain right, to have their dignity harmed; 3. Judicial action is based on the rule of law and articulated governance, so that legality is observed, promoting an appreciation of public policy, already outlined by the competent constituted Powers, guaranteeing its enforceability.

Conclusion

It is concluded that, despite being recent in the national legal history, the Unconstitutional State of Affairs, as legal structural ruling, has been an institute welcomed by the Judiciary, so much so that there is already news of two concentrated control actions that used the USoA expressly in its grounds, as outlined in this work.

[44] WALDRON, Jeremy. *Op. cit.*, p. 467-468.
[45] MENDES, Conrado Hubner. *Direitos fundamentais, separação de poderes e deliberação.* 2008. 224f. Tese (Doutorado) -Curso de Ciência Política, Universidade de São Paulo, São Paulo, 2008. p. 190.
[46] WALDRON, Jeremy. The Core of the Case Against Judicial Review. *The Yale Law Journal*. p. 1346-1407, 2006. p. 1346-1348.
[47] WALDRON, Jeremy. The Rule of Law and the Importance of Procedure. *Public law & legal theory research paper series*. 2010. p. 2.

The use of this structural remedy, however, must be exceptional, given that it is an instrument that results in a significant influence on politics and public choices, and there are even circumstances in which the USoA authorized the complete reformulation of public policy. Thus, structural remedies result in a strengthening of the Judiciary, linked to a process of disregarding administrative options. It remains clear that the establishment of criteria and conditions of possibility for the use of structural remedies is essential to minimize abusive and contradictory actions.

There are, however, complex issues surrounding the setting of these criteria, among them the fact that in Colombian law itself, the initial pole of structuring the USoA, there are no firm criteria for when this instrument should be applied and what, precisely, should be the method of implementation by the Judiciary.

Therefore, the proposal of the present work focused on presenting, in an initial way, the difficulty in using structural rulings, with emphasis on the USoA, due to the lack of criteria to guide the use of this practice. Thus, it was proposed, based on the view of Jeremy Waldron, who proclaims the importance of deliberative political instances and the need to preserve the separation of powers, so that administrative decisions are observed, the observance of three central criteria for the use of structural remedies, which are: 1. Treating exceptional situations, in which the solution of the dispute is not in the issuance of preventive or reparative orders; 2. Situation of absolute dissonance between the normative provision and the constitutional text, to the point of the social group, unable to enjoy a certain right, to have their dignity harmed; 3. Judicial action is based on the rule of law and articulated governance, so that legality is observed, promoting an appreciation of public policy, already outlined by the competent constituted Powers, guaranteeing its enforceability.

Of these criteria, the first two are umbilically related to the interpretation that the Judiciary might have of the social phenomenon. The assessment of the lack of other possible measures to solve the problem and the verification of incongruity between the constitutional text and the factual reality will oversee this constitutional power, which has institutional competence to perceive this type of disagreement between rule and fact.

It appears that the suggested exceptionality differs from that proposed by Minister Marco Aurélio in his vote at ADPF nº 347, since it is understood that structural remedies can be applied to the most diverse social rights, if the situation of unconstitutionality cannot be solved through other mechanisms already provided for in the Civil Procedure Code.

The last proposed criterion, in turn, imposes limits on judicial action, insofar as the intervention to be implemented in structural demands must observe legality, as well as allow a dialogue between the Powers involved, undertaking a dialogue between institutions, as the theoretical framework adopted by the present work.

Finally, the need for structural sentences to have an internal argumentative logic is reinforced, so that the judges are aligned with their perceptions about the phenomenon, which contributes to the reduction of subjectivism that the first two criteria proposed

may seem to suggest, as well as they must also enjoy an external logic, so that they are aligned with the other nuclei of the legal system.

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Data de Recebimento: 23/09/2020
Data de Aprovação: 22/01/2021