

Structural Litigation and Public Policy-making: Bill No. 3 of 2025

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Abstract

Bill No. 3 of 2025 is a proposed legislation responsible for setting the procedural aspects of structural litigation in Brazil. This type of litigation differs from ordinary causes due to their aim at resolving multifaceted claims via the restructuring of troubled institutions which, unable to efficiently provide services for the citizens and turn their rights into reality, often pose as the cause for many individual complaints. While at first, it may seem obvious that nipping the problem in the bud is better than just dealing with its undesirable consequences one by one, those problems often touch upon political problems that should be the object of discussion in political arenas rather than appreciation by unelected judicial bodies. In this paper, structural litigation is examined in the context of Bill No. 3 of 2025. It is proposed that these claims result in a type of policy-making by the Judiciary, which tips the scale on the separation of powers in their favour. The limits to which the Judicial Department can act in those scenarios are debated, and the non-adopting of the bill is defended in response to the inevitable exponential increase in judicial discretion in lieu of maintaining policy-making mostly at the Executive and Legislative powers, political by nature.

Keywords: Structural Litigation, Brazil, Bill No. 3, Public Policy

Introduction

Bill No. 3 of 2025 projects itself as a roadmap for structural litigation in Brazil. In its essence, it constitutes a legally imposed and legitimized procedure for restructuring flawed institutions through structural litigation, viewed as a judicial solution to antique and complex problems. Nevertheless, putting crucial aspects of policy-making in the Judicial Department's hands may not be the best solution, as it threatens checks and balances between branches of power.

Scarred by colonization and built over sexist and racist structures, Brazil's institutions are a reflection of the nation's past. Since 1988, the year that marked the end of a military dictatorship and the promulgation of the present Constitution, many fundamental rights have been granted to Brazilian citizens. To

fulfil those promises, countless public policies were enacted, and bureaucratic institutions were created to implement those choices. A public and universal healthcare system, looked upon by many other countries, and top-tier tuition-fee-free federal universities are just some prominent examples. However, those initiatives are not enough to make constitutional rights a reality for most people, and Brazilians still face medicine shortages, with 7% of the country's population illiterate (IBGE, 2022a). As a result, many citizens resort to judicial remedies to enforce their rights.

Concerning judicial litigation, there are two main types of claims to which individuals can resort: a singular lawsuit, suitable for targeting a specific demand, or a collective one, in which certain agents within society can file a claim on

behalf of different people or interest groups. In both scenarios, a specific, concrete situation is addressed, and the solution entails changing the negative outcomes of the *status quo*.

Nevertheless, many of those problems emerge from structural deficiencies that date back centuries, and treating their consequences case by case will never prevent them from happening again to other individuals or groups. In light of this, the concept of structural injunctions was carved. In those cases, the judiciary is not merely acting on a concrete cause, regardless of the number of interested individuals, but rather is supervising institutions to correct long-term deficiencies and, effectively, making public policy.

Recently, this model has been implemented in Brazil. Bill No. 3 of 2025, currently in Congress, establishes the parameters for structural litigation (Brasil, 2025a). The text emphasizes the procedure's flexibility and the need to construct, implement, and supervise an action plan. There is no linear procedure; rather, the lawsuit is finalized as the plan is put into action satisfactorily.

However, the proposed model for structural injunctions disregards the separation of powers, enabling the judiciary to further control the lawfully exercised discretion of the elected legislative and executive, and to challenge the constitutional limits of the democratic legitimacy of their actions. Besides that, it enhances litigation by bringing to judges discussions earlier (and better) occurred in the political field.

In this paper, structural litigation will be defined, along with its origins — both national and international. Further on, Bill No. 3 of 2025's content will be analyzed, as to whether it actually reflects the procedural standards for structural litigation, and if it does indeed constitute policy-making. Finally, the paper assesses the procedure's compatibility with the rule of law and constitutional values, ultimately arguing for or against its adoption.

Structural Problems, Structural Litigation, and Structural Injunctions

First, it is important to characterize and differentiate structural problems, structural litigation and structural injunctions. Structural problem is a term that describes a continuous and permanent state of structural disorganization and non-conformity with the rule of law, with illicit implications (Didier Jr and Zaneti Jr, 2020). Rather than an individual issue or even a collection of unitary concerns, it is a collective problem intrinsically tied to malfunctioning and/or harmful institutions, understood not only as formal organizational branches of the government, but also as private entities that either have a major public interest or are essential to the functioning of society (Vitorelli, 2018).

In turn, structural litigation refers to any judicial dispute that aims to resolve a structural problem by restructuring a bureaucratic structure or the institution regarded as the root of said problem (Vitorelli, 2018). Instead of treating the inevitable individual or collective consequences of the issue, concretely deduced before the court, its cause is resolved, since it is assumed that the threat or harm posed by those bureaucratic organizations to the effectiveness of constitutional rights cannot be eliminated but with the reform of those institutions (Didier Jr and Zaneti Jr, 2020). Thus, they differ from ordinary judicial remedies precisely because the whole institutional structure is object of ruling, not only what meets the eye in the form of a right violation.

As an example for better understanding, it is useful to address a concrete situation where both a singular or a structural claim could emerge: reiterated medicine shortages on public healthcare. When a citizen needs to obtain a certain medication ordinarily distributed through public healthcare that, for some reason, should be but is not available, they will resort to judicial measures. Before the court, the plaintiff can deduce why they believe the medication should be given to them, as well

as prove that their request has been denied. If pertinent, as a cause of action, they can also deem inapplicable or simply invalid (unconstitutional) a norm that prevents them from accessing this specific medicine.

When ruling, if the court grants the request, it may order the public healthcare system, or even certain agencies or agents within, to provide the claimant with the medication. It can also declare the relevant norm unconstitutional, purging it from the legal system, and, based on that, accept the plaintiff's claim.

However, in this type of demand, the Judicial Department will not inquire the administrative reasons why the shortage occurred, let alone directly order the government to reform the distribution system to prevent others from being similarly affected. No case alike of medicine shortages will be addressed *ex officio* just because they represent a similar narrative which falls under the same rationale. There goes public policy and the management of administrative structures operating under budgetary constraints.

Those issues may appear on the reasoning of the decision, but they will make no more than an *obiter dictum*, a judge's pronouncement or opinion not necessary for the conclusion adopted and, therefore, with no binding nature (Peixoto, 2025). The result, as such, is only to compel the healthcare system to supply the claimant with the medicine (however it may happen internally), based on the right they have to it or on the inapplicability or unconstitutionality of the norm that was preventing them from accessing it.

Even if there was a larger problem, which affected many citizens, a class action could be proposed by legal representatives to ensure enough medicine in a certain distribution center or at all. Still in this scenario, there would be a concrete situation deduced (one with many interested parts, true), and the judiciary could condemn the healthcare system

to provide the medication and make it available for all, but not decide upon how to internally restructure the system to make that happen.

Nevertheless, if it was a structural litigation, the reasoning and the result would be intrinsically different. The claim would not be to specifically provide the medication, but to restructure the system in order to prevent unlawful shortages in general. Consequently, the ruling would encompass identifying deficiencies and direct orders on how to manage and resolve them — an arguably political decision, thus potentially leading to judicial activism.

This type of litigation has its own attributes, some of which are essential to its characterization as structural. Those are (i) to target a structural problem, (ii) to aim the implementation of an ideal state of things through the restructuring of an institution, substituting the disconformity state that characterizes the structural problem, and to have (iii) a dual-phase procedure (problem identification and solution implementation), (iv) a flexible course, and (v) an emphasized negotiated character (Didier Jr and Zaneti Jr, 2020). It is usually multipolar, collective, and complex (Dos Santos, 2021).

Finally, structural injunctions are judicial decisions arising from structural litigation that impose obligations to implement structural reform within an institution to resolve the previously identified structural problem (Didier Jr and Zaneti Jr, 2020; Dos Santos, 2021).

Structural litigation in Brazilian history

The leading case of structural litigation worldwide is *Brown v. Board of Education of Topeka* (I and II), decided upon by the United States Supreme Court in 1954 and 1955. It involved racial segregation in a public school in Topeka, Kansas, and led to a decision that restructured the whole country's educational system. While *Brown v. Board of Education of Topeka I* considered that state laws

establishing racial segregation in public schools were unconstitutional because they violated the Equal Protection Clause of the Fourteenth Amendment (US Supreme Court, 1954), *Brown v. Board of Education of Topeka II* further developed this idea setting forth the procedure courts nationwide should follow to effectively carry out desegregation (US Supreme Court, 1955).

The distinct character of this decision, which makes it structural, lies precisely on the second ruling. A nation's Judicial Department's duty is "to say what the law is", as those "who apply the rule to particular cases must, of necessity, expound and interpret the rule" (US Supreme Court, 1803). However, they do so by analyzing and deciding a singular case, concretely deduced before the court, regardless if it includes one or many plaintiffs or defendants. As a result, binding is only the norm resulting from such ruling, applicable to a concrete and well-defined situation, plus the reasons used to do so, which create a precedent that, unless later overruled, should apply to all similar cases thenceforth decided upon by lower courts.

In Brazil, it is no different. Whilst no illicit act nor unlawful and harmful conduct will be deprived of judicial analysis (article 5, section XXXV, Brasil, 1988), the jurisdictional function is exercised on demand and on the strict limits of the plaintiff's claim (article 492, Brasil, 2002). Also, the courts shall interpret and apply the law, but binding is only the result for the parties involved (articles 502 and 504, Brasil, 2015) and, under certain circumstances, the interpretation given to the norm. Yet, the administrative structure of the country's institutions is not directly addressed by the judiciary, whose concerns lie merely on the concrete consequences of the action of said institutions which may constitute a violation of rights.

In *Brown v. Board of Education of Topeka I*, a concrete ruling was made. The judicial precedent that stated the "separate but equal"

doctrine was overruled due to its now declared unconstitutionality, as were all other norms with the same rationale. Bown's particular right to attend a nonsegregated school in the public system was acknowledged.

However, in *Brown v. Board of Education of Topeka II*, there was not merely the decision of a case concrete and singularly deduced before a court or the interpretation and validity of a law. There were clear instructions for the restructuring of the system, including guidelines for inferior courts on how to deal with transition on the desegregation and weigh in public and private interests.

The difference from ordinary litigation, even class action, to structural in this case is precisely the direct order to effect change based on set directions and constant supervision. Schools all over the United States were forced to abolish segregation and adapt to the new reality, not because of the unconstitutionality of the norm that caused segregation (which would naturally cause administration to review its course of action on conducting the public educational system), but rather due to a direct judicial command that went as far as to prescribe guidelines on how to do so. About the decision, the *Moton School Story - Children of Courage Exhibition* (tied to the Moton Museum, n.d.) observes:

In this decision, the Court directed federal district courts to supervise the desegregation process in each affected community. These local courts were told to oversee changes in school systems and to ensure that desegregation proceeded "with all deliberate speed." The Court chose this deliberately cautious phrase as a compromise to account for local complexities, political resistance, and logistical concerns, especially in Southern states. [emphasis added]

Judicial precedents may cause significant change in a country's institution as an aftermath, specially those provenient from the Supreme Court. Nevertheless, its newness and structural character is attributed to the ability of directly, and not consequently, restructuring

an entire institution — despite the questionable administrative character of the decision, rather than merely limited to judicial functions.

Seeing the impacts and consequences of such rulings and because of the way they handled a single case by means of changing an entire system, the idea of structural litigation — and, therefore, structural injunctions — was carved, improved and spread worldwide. In Brazil, inspired by this decision, as well as by other nations' experience and academic debate over the matter, the interest on regulating and effectively using structural litigation as a form of restructuring the country's flawed institutions grew in recent years.

In 2014, Bill No. 8.058 was presented in the House of Representatives. It was probably the most successful attempt to establish a judicial procedure to address complex issues and intervene in public policy before Bill No. 3 (Vitorelli, 2018), and it illustrated that the topic was already a matter of public concern. However, the bill did not move forward, and the processing was last updated in 2018. This can be attributed to the particular circumstances of the time, when individuals were unsure of the proper extent of judicial control over the executive, as proved by the concerns of some mayors during a public audience discussing the bill (Palmieri, 2015).

Over the last few years, though, the Brazilian judiciary has been granted greater autonomy to act, and the well-defined legal boundaries on judicial discretion have been flexibilized in the name of morality and a subjective form of justice (Faria, 2025). Stable and rational juridic techniques have been replaced by open concepts, filled by the beliefs of whoever gets a say on the matter (Berizonce, 2010). This is a movement based on juridical populism in Brazil (Martins-Costa, 2025), whose most prominent example is the Bill No. 4 (Brasil, 2025b) — a bill already being processed in the Senate that proposes a major reform of Brazil's Civil Code. The proposed legislation includes

provisions that expand judges' discretion, exemplified by Article 927-B, which allows magistrates to determine the existence of strict liability for monetary compensation based on their own personal expertise.

In light of this, a policy window opened. A policy window, or opportunity for advocates of proposals to draw attention to their preferred public policy initiatives and push them into the government's agenda, is driven by changes in the political stream (i. e. in ideology, Congress composition, or government administration) or in the problem stream (i. e. how the problems are perceived in society, especially regarding current facts and circumstances) (Kingdon, 1984). As society is currently inclined toward juridical populism and individuals prefer the judiciary to reflect standards of justice rather than pure technical impartiality, an opportunity arose to adopt policies that allow greater judicial discretion and more open tools to resolve complex, highly political problems.

Along with this political stream shift, advocates of regulating structural injunctions were able to pair existing — and nowhere near new — social problems with the policy they wanted the government to decide on, pushing it onto the agenda during this window. Particular attention is paid to certain agents who can be categorized as policy entrepreneurs.

Kingdon (1984) defines policy entrepreneurs as “advocates who are willing to invest their resources - time, energy, reputation, money - to promote a position in return for anticipated future gain in the form of material, purposive, or solidary benefits” (Ibid.: 188). They are responsible for coupling problems to solutions in a favourable political environment, taking advantage of policy windows to materialize their preferred outcomes. Additionally, they are recognized for their persistence, political connections, and ability to be heard due to their expertise, leadership, or decision-making positions (Ibid.: 189-90). Regarding Bill No. 3

of 2025 (Brasil, 2025a), Edilson Vitorelli can be appointed as a key policy entrepreneur.

Responsible for aligning the problem and policy streams, he was the rapporteur for the Bill presented, and possesses all three key essential qualities of an entrepreneur. He is persistent; over the last eight years, he has written over 10 papers on the topic, including a book, now in its 6th edition (Vitorelli, 2025). He has political connections, as he is an ex-prosecutor and, now, a federal judge. Lastly, Edilson Vitorelli holds a PhD in Law from a renowned university in Brazil and is a visiting professor at Stanford Law School, which grants him a claim to a hearing, as he can represent jurists with propriety and ease.

Once those concerns made it onto the agenda, a jurist's commission was swiftly created in the Senate to draft a piece of procedural legislation for structural litigation. Within this committee, it is worth noting the role of an advocacy coalition, which accounted for such a rapidly conceived project — the commission was created in April 2024, and the project was ready less than seven months later. Out of the 22 people that were part of the committee — including prosecutors (not to mention the ex-Prosecutor General of the Republic), magistrates, judges, attorneys, a public servant on the Supreme Court, and a public defender —, 13 are insiders to the government and tied to the judiciary, being therefore interested in its expansion.

On February 4th, 2025, Bill No. 3 of 2025 (Brasil, 2025a) was officially published in the Senate's Diary, marking the beginning of its legislative process, and the context outlined above indicates that the bill is nothing but a result of the proactive engagement of key actors operating within a particularly favourable set of circumstances.

Bill No. 3 of 2025, Structural Litigation and the Policy-Cycle

Moving to the proposed legislation itself, it can be divided into three parts. First, Articles 1

through 4 give a general overview of the procedure. Overall principles and competence are stated, and the term 'structural problem' is defined. In turn, Articles 5 to 12 define the procedural aspects of the litigation, while Articles 13 to 16 are final dispositions, such as other situations in which the legislation may apply and the bill's initial validity date.

In short, the established procedure is as follows: (i) the author files a claim, in which moment they can inform the structural nature of the litigation (Brasil, 2025a: Article 5); (ii) the defendant is notified to respond, opportunity in which they can also address the presence of structural character or lack thereof (Brasil, 2025a: Article 5, §2º); (iii) the dispute is recognized as a structural one, either by judicial ruling or by consensus between the parties (Brasil, 2025a: Article 6); (iv) the judge refers the parties to the drafting of a detailed step-by-step plan to resolve the issue, concerned at all times with actively hearing any interest groups (Brasil, 2025a: Article 9); (v) the plan implementation is constantly supervised, and the draft is revised if necessary (Brasil, 2025a: Articles 9, §4º, and 11); and (iv) the dispute ends whenever proven that the proper measures to ensure protection of the violated rights have been adopted (Brasil, 2025a: Article 11).

All characteristics identified by academics as determinants for a structural litigation to be characterized as such are present in the bill. Flexibility and consensuality are indeed stated as principles of structural litigation in Article 2, clauses I, III, VII, and X. Also, there are two distinct phases in the procedure: (i) the recognition of the structural character of the problem, which can be either by judicial ruling or by consensual agreement as per Articles 5 to 7, and (ii) the elaboration and constant rewriting of a plan to restructure the faulty institution and resolve the issue, as per Articles 9 and 11.

Most importantly, it is structured to mimic the policy cycle, underlining the idea that structural litigation encompasses political decisions and is a form of policy-making by the judiciary. The policy cycle is a methodological tool used for the study of public policy that simplifies the utterly complex policy-making process, dividing it into five steps: agenda setting (choice of which concerns will effectively become problems and be addressed by the decision-makers), policy formulation (proposal of solutions that address the raised problem), decision making (choice of a course of action by an authoritative body), policy implementation (putting solutions into effect), and monitoring and evaluating (process of information and redesign) (Howlett et al., 2009).

When a claim is filed, the problem to be addressed by the authoritative actors is delimited, representing the entering of a concern into the official governmental agenda. Drafting a plan is similar to policy formulation, while the formal approval of the plan by the judiciary is comparable to the decision-making process of authoritative government bodies. The issue of mandatory decisions to fulfill the plan and the performance of such decisions, whether voluntary or enforced, represents policy implementation. Lastly, the constant monitoring and evaluation of the plan and of whether the objectives are being achieved are consistent with the last phase of the policy cycle, as the judicial procedure is finalized only once the judiciary has determined that the objectives are satisfied.

It is worth noting that the policy cycle, being just a methodological tool, in reality exceeds merely input and output stages, extending to monitoring and evaluative activities after outcomes have materialized (Ibid.: 9). As pointed out by deLeon (1992), “policy design represents more than just a product or a new policy. It is a continuous process of both information and action by which policies are proposed and adjusted.” (Ibid.: 400). This

overlap of steps in actual policy-making is also mimicked in the designed structural injunctions. Under Bill No. 3 of 2025, there is expressly provided for constant monitoring and evaluation, and the plan must be adjusted to reflect those results to best achieve the desired outcome and to correctly and satisfactorily restructure the faulty institution.

Taking policy-making out of the Executive’s hands leads to an inversion of constitutionally defined roles. In this context, the Judiciary may become responsible for functions that are essentially administrative in nature, blurring the boundaries between branches of government and creating uncertainty on who is indeed the legitimized actor for inherently political decisions.

Judiciary as the new public policy-maker and the boundaries of judicial discretion

The doctrine of separation of powers, earlier defended by Montesquieu (1748 (2001)), suggests that, in order to safeguard individual liberties and protect against tyranny, the main functions of the state — to produce laws, carry on a determined project of state action, and judge illicit behaviour — must be attributed to different individuals (Benwell and Gay, 2011). Otherwise, “apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner (...) the life and liberty of the subject would be exposed to arbitrary control (...) (and) the judge might behave with violence and oppression.” (Montesquieu, 1748 (2001): 173).

In Brazil, the separation of powers is a constitutional provision contained in an entrenchment clause (Brasil, 1988: Article 60, § 4º). The Legislative, Executive, and Judiciary are recognized as independent institutions (Brasil, 1988: Article 2), with their own attributions and financial autonomy, and are mainly responsible respectively for law formulation, administrative functions, and law enforcement. As such, a project of statal action

is designed, implemented, and — if necessary — coercively imposed.

To choose a course of action is to make public policy, and public policy is a key aspect of state administration. To use Thomas Dye's classical definition, public policy is "anything a government chooses to do or not to do" (Dye, 1972 apud Howlett et al., 2009). As a result, it is carried out primarily by the Executive and the Legislative (Berizonce, 2010), legitimate representatives of the people, as staffed by elections, and responsible for general administrative functions. Only exceptionally, when there is a dysfunction in the normal state of things and the Executive and Legislative fail to adopt the necessary measures to materialize fundamental rights, the judiciary is allowed to design public policy (ADPF No. 45, 2004; Zaneti Jr., 2013).

This is justified by the fact that in a democratic country, the choices made by the government — however political or ideological they might be — must be a direct representation of the people's will. This will is manifested indirectly, as the citizens elect those who compose the government, notably the executive and the legislative powers, who, in turn, are responsible for making the decisions, being the main actors in the decision-making phase of the policy-making process. The judiciary, on the contrary, has a countermajoritarian character, exercising a "guarantee function" (Zaneti Jr, 2013) — that is, it does not act in the name of the prevailing group, but precisely against it to preserve the constitutional rights of the oppressed minority (Berizonce, 2010).

When the subject is structural litigation, notably as set out in Bill No. 3, maintaining policy-making primarily in the Executive's and the Legislative's hands becomes an obstacle. As already mentioned, this type of litigation represents judicial control over public policy and effectively gives the judiciary design tools and decision-making power in policy-making. It inverts the logic of administration and

control, government and guarantee functions. Instead of interpreting the norm and applying it, or addressing the conformity of an organization's outputs with the rights that they are supposed to guarantee, the judges would be ruling on the institution's internal proceedings to conform it to their liking.

Once the judiciary is staffed not by elections but by public competition, the institution's legitimacy is jeopardized. Judges are to have certain prerogatives particular to regularly elected politicians, such as decisions on funding. The government has a limited amount of resources, meaning that it cannot materialize all rights to their maximum extent at the same time, and strategic decisions on what to prioritize are ultimately political — and, therefore, must not come from the judiciary, which is not responsible for proposing or approving the government's budget (prerogatives from the Executive and the Legislative, respectively (Brasil, 1988: Articles 48, II and 84, XXIII)).

In response to this concern, Fiss (2008) alleges that the democratic legitimacy of structural injunctions derives "from the unique competence of the judiciary, guided by the strictures of public reason, to give concrete meaning to our constitutional values" (Ibid.: 767). Further, Zaneti Jr. (2013) argues that the legislative omission transfers to judges the responsibility for designing public policy, and, as constitutionally guaranteed rights are not conditioned on efficacy and are immediately juridicizable, there is space for judicial activism. The legitimacy to do so derives from the constitution itself, along with the necessary provocation by the plaintiff.

However, even though the judiciary cannot omit itself from safeguarding fundamental rights (Brasil, 1988: Article 5, XXXV), it must not be put in the position of the main decision-maker regarding major administrative decisions. An institution designed to cushion democracy from abuse by administrators

cannot become the main administrator itself. After all, “the Judiciary does not have the task of designing public policies, but rather of confronting the design of adopted policies with the applicable legal standards and — in the event of discrepancies — referring the issue to the competent authorities.” (Berizonce, 2010: 73-74). Yet, if unelected judges, who may be beholden to powerful interest groups, can just take the lead on policy decision-making, then those rights of the minority become optional and not rights at all.

Also, although it is provoked by an individual or group, the scope and consequences of a structural litigation are so broad that it is not possible to properly delimit the issue, an essential characteristic of judicial demands. As already mentioned, the judiciary only acts when provoked, and exactly on the limits of such provocation. If it is not possible to precisely define the controversy and the claim, the principle of acting solely on demand in a specific, concrete situation is compromised.

Moreover, this raises concerns about the limits of judicial action. Administrative discretion can be defined as the faculty that the law attributes to public administrators to appreciate the case at hand, according to opportunity and convenience, and to choose between two or more courses of action, both equally as valid (Di Pietro, 2012). Limited by the principles of legality and need for reason and motivation, it constitutes a barrier to judicial appreciation.

However, the judiciary has already been given the prerogative of intervening in administrative decisions, being it by interpreting open legal concepts, or by virtue of the constitutionalization of administrative law — the assumption that constitutional values have a minimum binding effect, deriving directly from the Constitution, enforceable regardless of suplementar legislation or administrative acts, and therefore guaranteed directly by judicial decisions (Di Pietro, 2012). This is exemplified by the binding legal precedent No.

665, from Brazil’s Superior Court of Justice (Brasil, 2023), which allowed judges to interfere with administrative discretion so long as there is manifest disproportionality in the sanction administratively imposed.

By enabling formal policymaking and correction upfront, structural litigation tips the scales in each power’s ability to fiscalize the other. Too much power is concentrated in the judiciary, and the checks-and-balances doctrine is unable to function properly and prevent abuses.

Lastly, it enhances litigation by bringing to judges discussions previously — and better — had in political arenas, increasing litigiousness and diminishing alternative conflict-resolution methods. This is particularly problematic for Brazil due to its slow, overloaded, and bureaucratic judiciary (there are 76 million lawsuits in progress as of July 2025 (CNJ, 2025), compared to a population of just over 200 million people (IBGE, 2022b)), which gets even more clogged and increase the difficulty for people in need to access the judiciary and materialize their rights.

Conclusion

Guardians of the law, the judiciary cannot turn a blind eye to the ongoing violation of fundamental rights. It is their duty to give concrete meaning to poetic constitutional promises and to serve as the primary barrier against the abuse of power. Judicial intervention in public policy is not new. Interference in administrative discretion has been around for quite some time, and the barrier of judicial action is obscure, as represented by the term “manifest disproportionality” mentioned above.

However, formalizing a direct channel for intervention legitimates the unadvised actions of judges in duties that are supposed to be performed by elected politicians. It is to put them in a position of the primary actors for administration functions, which is inadequate given that there are alternative coercive

mechanisms for judges to use in response to the other power's omissions. In those terms, passing a bill that enables the judiciary to be the decision-maker in public policy is not only illegitimate but also does not correspond to the project of a democratic state being built.

political movement that seized a policy window, whose consequences are so severe for the fragile and delicate balance among the branches of government that may ultimately undermine the effectiveness of the constitutional promise itself.

As such, the bill should not be adopted. It is but the result of a carefully orchestrated

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