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# THE FUNDAMENTALS OF THE THEORY OF THE UNCONSTITUTIONAL STATE OF AFFAIRS: FROM (I)LEGITIMACY TO APPLICATION IN BRAZIL

***Kátia A. Pastori Terrin***
Doctoral Student in Law at PUC Paraná. Master in Business Law for UEL. Professor of the PUCPR Law course

**Abstract:** The Federal Supreme Court, through the Action of Non-compliance with Fundamental Precept number 347, elaborated by the Socialist and Freedom Party, addresses for the first time in the Brazilian constitutional jurisdiction the so-called "State of Unconstitutional Things". The institute originated in Colombia, in 1997, which, through its Constitutional Court, recognized the serious violation of the human rights of imprisoned citizens, with a patent omission by the State. For the development of this work, the deductive method of approach was adopted, combined with the monographic and historical procedure. For the development of the research, initially, the concept, origin and assumptions of the Unconstitutional State of Affairs are addressed, and an analysis of the sentences that applied the institute across the globe, through comparative law. It also seeks to analyze the ideas of Owen Fiss. It concludes by presenting perspectives on the institute in question, affirming its legitimacy in Brazil.
**Keywords**: Judicial activism. Comparative law. Fundamental rights. Structural Sentences.

## INTRODUCTION

The Unconstitutional State of Affairs (ECI) is a decision-making technique developed by the Colombian Constitutional Court (CCC), based on decision SU-559, of November 6, 1997, which aims to attack and overcome situations of serious, massive and systematic violations of fundamental rights, whose causes are of a structural nature, that is, result from structural failures in public policies adopted by the State power, demanding a joint action of several entities and State authorities.

In May 2015, in Brazil, an Argument of Non-compliance with a Fundamental Precept (ADPF) was filed by the Socialist and Freedom Party (PSOL), where the Federal Supreme Court (STF) was called upon to analyze the repeated omissions of the Executive Branch in relation to the systematic violation of fundamental precepts in the Brazilian penitentiary system. As a basis for formulating the ADPF, the inhuman, degrading and cruel character of Brazilian prisons was affirmed, which foment the increase in criminality and remove one of its essential objectives: the rehabilitation of the prisoner. Despite personality rights, which require respect for physical (physical body) and psychic (mind and conscience) safety, dealing with issues such as freedom, equality, solidarity and difference, themes arise regarding honor and the recognition of dignity human, in view of the inhuman nature of prisons, which directly affect their physical and emotional lives. The absence of legislative, budgetary and administrative measures that represent a "structural failure" to the rights of prisoners were also attacked, in addition to their expansion in recent years, making our country the 3rd largest prison population in the world.

Given all the above, the interest in the range of aspects that can be studied with the main theme is profound. With this, the intention of this work is to analyze the foundations and assumptions of the State of Unconstitutional State of Things from three points of view. As for the nature of the research, it will be applied, since it aims to generate knowledge for practical application, aimed at solving specific problems in society. On the other hand, from the angle of its objectives, the research will be essentially exploratory, and, from the point of view of its object, it will have to be qualitative, using bibliographical and documental research, in view of the preponderantly theoretical character of the study, having as privileged sources, the doctrine and existing national

and international norms. The research also addresses the concepts of judicialization and judicial activism, essential for understanding the subject and a brief analysis of structural protection. Finally, the debate on the ways to combat extreme violations of fundamental rights related to structural failures, seeking to analyze the intimate relationship between the ECI and structural sentences, which arises from the formulation and implementation of public policies aimed at overcoming of unconstitutional reality. The work ends, presenting the reflections extracted from the study.

## UNCONSTITUTIONAL STATE OF AFFAIRS: FROM THE EMERGENCY TO THE ASSUMPTIONS

The term "Unconstitutional State of Affairs" (ECI) emerged in Colombia in the mid-1990s, as a way of correcting, with the help of the Judiciary, serious and repeated violations of constitutionally guaranteed fundamental rights. The Colombian Constitutional Court (CCC) declared the ECI for the first time in 1997, through SU-559 and as this case developed, we have a sample of how the concept and essential assumptions of application of the institute in question flourished.

Dealing a little more in depth with SU-559, which recognized the unequal distribution of the educational subsidy from the National Fund for Social Provisions of the Magisterium among the different departments and municipalities of Colombia, explain:

> The Constitutional Court has the duty to collaborate harmoniously with the other organs of the State for the achievement of its purposes. In the same way that the news regarding the commission of a crime must be communicated to the competent authority, it is not clear why the notification must be omitted that a certain state of affairs is in violation of the Political Constitution. The duty to collaborate becomes imperative if the opportune administrative remedy can avoid the excessive use of the guardianship action. The resources available to the administration of justice are scarce. If urging diligent compliance with the constitutional obligations that weigh on a given authority contributes to reducing the number of constitutional cases, which would otherwise inexorably arise, said action also stands as a legitimate means through which the Court carries out its role of guardian of the integrity of the Constitution and the effectiveness of its mandates. If the state of affairs, which as such is not consistent with the Political Constitution, is directly related to the violation of fundamental rights, verified in a process of protection by the Constitutional Court, the notification of the existing regularity may be accompanied by a requirement specific or generic directed at the authorities in the sense of performing an action or refraining from doing so. In this event, it can be understood that the notification and the requirement make up the repertoire of orders that the Court can issue, at the review venue, in order to restore the fundamental order that has been broken. The circumstance that the state of affairs not only serves as the causal support for the iusfundamental injury examined, but also in relation to similar situations, cannot restrict the scope of the requirement that is formulated.

According to Vieira Júnior (2015, p. 17) the Unconstitutional State of Affairs was constituted through a jurisprudential construction of the Colombian Constitutional Court, which dealt with the subject for the first time in Sentencia de Unificación (SU) nº 559, of 1997. in question, the Constitutional Court verified that there was a general non-compliance with the social security rights of a group of 45 (forty-five) teachers from two Colombian municipalities and an even larger group that was affected by the situation. Thus, the Court declared the

existence of an unconstitutional state of affairs and through this determined that the municipalities involved find a solution to the unconstitutionality within a reasonable period.

From the guardianship action filed by Délfida Carrascal Sandoval and others, against the Municipality of Maria La Baja and Zambrano (Bolívar), it is stated:

> On the one hand, it is a general problem that affects a significant number of teachers in the country and whose causes are related to the disorderly and irrational implementation of educational policy. On the other hand, the protection action commits two municipalities that, due to lack of resources, have not effectively complied with their obligations towards the educators who have instituted the protection action.

It is clear that, if in the case in question, the Colombian Court decided only against the defendant authorities (town hall and municipalities), the solution would not be reached, since the root of the problem was in the national policy of redistribution of resources. The unconstitutionality was in the structure itself, and not just a result of certain isolated acts by public authorities or constitutional norms.

Thus, according to Campos (2016, p. 97) the Colombian Constitutional Court acts to protect not an individual fundamental right, but the entire system of fundamental rights, its objective dimension, derived not from a specific and expressive constitutional statement of an order to legislate, but of the constitution as a whole. The declaration of the Unconstitutional State of Affairs presents itself, this way, as a "legal mechanism" marked by the "presence of a much more socially active constitutional judge, more committed to the search for profound solutions to the structural problems" that "rebound on the enjoyment of of fundamental rights". A constitutional judge who will go beyond the resolution of particular cases and "takes on a true dimension of statesmanship, standing out as an agent of transformation", whose decisions require "the coordinated action of different public authorities" aimed at overcoming violations of fundamental rights.

In this case, then, some fundamental guidelines emerge, as it is not a question of protecting individual rights, but the objective dimension in the face of a massive and generalized violation that stems not only from an authority, but from the operating structure itself.

Garcia Jaramillo (apud CAMPOS, 2016, p. 186) says:

> The doctrine of the judicial creation of the unconstitutional State of Affairs emerged as a judicial response to the need to reduce, in certain cases, the dramatic separation between the consecrations of normativity and social reality in a country that is so particularly guaranteeing in its norms and unequal in its reality.

It is important to point out, before continuing the study on the subject, that more than knowing the label "Unconstitutional State of Affairs", it is of paramount importance to know its procedure, given that the Colombian Constitutional Court has already used the same procedure without calling. lo of Unconstitutional State of Affairs.

Given this understanding, the next step is to recognize the historical evolution of this institute. Luis Ricardo Gómez Pinto (apud CAMPOS, 2016, p. 163-164) points out three distinct phases of the institute up to the present day. The first phase is called the "stage of constitutional enlightenment", which reached the decisions on the María la Baja and Zambrano cases and lasted from 1997 to 2000; the second phase became known as "constitutional tenebrism", between the years 2000 to 2004; and finally, the third phase, called the "rebirth stage".

It is true that in the second half of the 1990s, the ECI institute was still underdeveloped, and the authors who deal with this subject in Colombia are unanimous in saying that it was the discovery phase and also the one of greatest devaluation of the institute, since many times, the Court affirmed that there was a State of Things, without the need to declare a situation of violent unconstitutionality, until arriving, then, in the two cases of greater reference on the subject, which contributed to the improvement of the institute, and which will be discussed here.

The first case of greater repercussion is the Colombian Penitentiary System (T—153/1998), which began as a demand from only two Colombian prisons: the National Penitentiary of Bogodá and BellaVista of Medellín, but which, when analyzing further the case, he realized that the problem was with the entire prison system, and not just those two prisons in particular.

> In judgments SU-559 of 1997 and T-068 of 1998, this Corporation has made use of the figure of the unconstitutional state of affairs in order to seek a remedy for situations of violation of fundamental rights that are of a general nature - in so much so that they affect a multitude of people -, and whose causes are of a structural nature - that is to say, that, as a rule, they do not originate exclusively in the demanded authority and, therefore, their solution requires the joint action of different entities. Under these conditions, the Court has considered that given that thousands of people are in the same situation and that if they all resorted to guardianship they could unnecessarily congest the administration of justice, the best thing to do is to issue orders to the official institutions. competent authorities in order for them to put their powers into action to eliminate this unconstitutional state of affairs.
>
> Colombian prisons are characterized by overcrowding, serious deficiencies in terms of public and welfare services, the rule of violence, extortion and corruption, and the lack of opportunities and means for the re-socialization of inmates. Razón assists the Ombudsman's Office when it concludes that prisons have become mere warehouses for people. This situation fully complies with the definition of the unconstitutional state of affairs. And from there a flagrant violation of a range of fundamental rights of inmates in Colombian prisons can be deduced, such as dignity, life and personal integrity, the rights to family, health, work and presumption of innocence, etc.

Arruda (2016) explains that the Colombian Constitutional Court, when analyzing the problem of the Prison System, noticed the chaos and the great human rights violations of that community in question. It is clear that the entire structure suffered from overcrowding and unworthy and degrading conditions, conditions that violated fundamental rights.

Vieira Júnior (2015, p. 17) explains that the Court found that the framework of non-compliance with fundamental rights was widespread. Overcrowding and the dominance of violence in penitentiaries were national ills, the responsibility of a large group of authorities.

The court then realized that it would not be enough just to resolve the demand of the two prisons in question, it would only serve to maintain them and would not actually solve the problem. A structural measure was needed, a systemic intervention. (CAMPOS, 2016). The court then determined orders of a structural nature, so that Congress, the Executive Branch, together with local entities, would formulate plans for the restructuring of prisons and new public policies to overcome that situation.

The decision was a failure and everyone points to this, as the court failed to monitor the process, it did not retain jurisdiction over the case and the system continued with the same problems. Carlos Alexandre (2016)

teaches that the court's error in the case of the prison system was issuing orders without any follow-up or dialogue in the implementation phase.

In the words of Campos (2015):

> Monitoring, involved in public hearings and with the broad participation of civil society, allows judges to know whether democratic institutions are progressing or whether blockages have persisted. Acting this way, instead of judicial supremacy, the courts, through flexible structural remedies and under supervision, promote broad dialogue between institutions and society. Flexible orders accompanied by monitoring can therefore be superior to detailed and rigid orders not only from a democratic and political perspective, but also in terms of desired results. Hence, judicial behavior of this kind has both democratic virtues and pragmatic advantages.

The lesson was learned and the Case of Forced Displacement of People within Colombian Territory Due to Urban Violence (T-025/2004) portrays very well the evolution of the mechanism.

At this point, it is worth noting that the most important decision of the Colombian Constitutional Court regarding the recognition of ECI was judgment T-025, of January 22, 2004, in which the Colombian Court addressed the problem of displaced. According to the report Consolidation of what? Report on displacement, armed conflict and human rights in Colombia in 2010, prepared by the Consultancy for Human Rights and Displacement (Codhes), respectively between 1985 and 2010, at least five million people were displaced in Colombian territory due to violence urban. In other words, 11.42% of the total Colombian population (which is approximately 12 out of every 100 Colombians) was forced to move, leaving their homes and jobs, due to the constant threat to life or physical integrity. According to data from the Commission for Monitoring Public Policy on Forced Displacement, the majority of the displaced now live in indigence and poverty. Of the people registered in the Unique Registry of Displaced Population (RUPD), 97.6% live below the poverty line. Among those not enrolled, the proportion is 96%.

Carlos Alexandre (2015) portrays that:

> In Judgment T-025, of 2004, the CCC examined, at once, 108 requests for guardianship made by 1,150 displaced families. Most of this population was made up of vulnerable people, such as female heads of households, minors, ethnic minorities and the elderly. They argued that the rights to housing, health, education and work were absolutely non-existent, and the victims lacked the minimum to survive. The Court concludes that the main factors that characterize the ECI are present: the permanent and massive violation of fundamental rights, the omission of different state actors that both implies this violation and maintains it, the involvement of a large number of affected people and the need to the solution to be reached by the joint and coordinated action of several bodies.

The Court, when analyzing it, identified the same assumptions as in the previous case, that the problem was not just that of the plaintiffs, but involved 92% of the displaced people and it was found that they did not have coverage of basic rights during the displacement. It was also noticed that the topic was completely off the Colombian political agenda, it was a topic ignored by society as a whole and with a total absence of public policies, even though Colombia had already been notified by international organizations about the problem (forced displacement also occurs in countries like Africa and South Asia), and the Colombian authorities continued inertia, without solving the problem.

This is how the Court understood, by the way, when treating the case:

> Several elements confirm the existence of an unconstitutional state of affairs regarding the situation of the internally displaced population. In the first place, the seriousness of the situation of violation of rights faced by the displaced population was expressly recognized by the same legislator when defining the condition of displaced, and highlighting the massive violation of multiple rights. Secondly, another element that confirms the existence of an unconstitutional state of affairs in terms of forced displacement, is the high volume of protection actions presented by the displaced to obtain the different aids and the increase in them. Thirdly, the processes accumulated in the present protection action confirm this unconstitutional state of affairs and indicate that the violation of rights affects a good part of the displaced population, in multiple places of the national territory and that the authorities have omitted to adopt the required corrections. Fourth, the continued violation of such rights is not attributable to a single entity. Fifthly, the violation of the rights of the displaced rests on structural factors set forth in section 6 of this ruling, among which the lack of correspondence between what the regulations say and the means to comply with them stands out, an aspect that acquires a a special dimension when looking at the insufficiency of resources given the evolution of the displacement problem and the magnitude of the problem compared to the institutional capacity to respond promptly and effectively to it. In conclusion, the Court will formally declare the existence of an unconstitutional state of affairs regarding the living conditions of the internally displaced population. For this reason, both the national and territorial authorities, within the scope of their powers, will have to adopt the corrective measures that allow such a state of affairs to be overcome.

In this case, there is a massive and widespread violation of fundamental rights, resulting from the absence of public policies, structural flaws, inertia of public agents and will only be overcome with structural measures, moving public and even private organizations.

After stating said, the Court determined that public and periodic hearings be held together with civil society organizations to monitor and discuss the measures taken, to learn about their success and what would need to be revised. The court then retained jurisdiction over the case.

The Court also issued flexible structural orders and left the powers (legislative and executive) to formulate public policies, but defined parameters, deadlines and obligations for overcoming the framework of unconstitutionality. The content of public policies would be discussed by the responsible powers and never by the court, which guarantees the separation of powers. The key term for this process would be to recognize the Court as a catalyst (CAMPOS, 2016), as it does not directly formulate public policies, it only takes public agents out of inertia and sets deadlines for overcoming the violation frame.

It is clear, then, that the theory of the Unconstitutional State of Things was effectively consolidated, as demonstrated in the academic position in: "La Figura Del Estado De Cosas Inconstitucionales Como Mecanismo De Protección De Los Derechos Fundamentales De La Población Vulnerable En Colombia" published in the legal magazine Mario Alario D' Filippo (2016):

> This figure, despite its importance, is little known, there are very few studies that have been 4 done on this subject and the existing ones arose to a greater extent after ruling T-025 of 2004, which declared an unconstitutional state of affairs regarding the displaced population, therefore this article will go through the various states of affairs that have been declared to protect especially the vulnerable population of the country.

It is also worth mentioning the definition of *The Figure of the Unconstitutional State of Things* brought in the aforementioned article by Mario Alario D'Filippo:

> The figure of the State of unconstitutional things can be defined as a legal mechanism or technique created by the Constitutional Court, through which it declares that certain facts are openly contrary to the Constitution, for massively violating rights and principles enshrined in it, in Consequently, it urges the competent authorities, so that within the framework of their functions and within a reasonable term, they adopt the necessary measures to correct or overcome such state of affairs.

It is clear, when analyzing the cases described above, that the Court sought to harmonize the judicial activism revealed in the intervention on public policies with a proposal for institutional dialogues. Paul Rouleau and Linsey Sherman (2009, p. 171-206) argue that "flexible orders subject to supervisory jurisdiction" are preferable to "detailed orders subject to enforcement if violated". With flexible orders and dialogue on the implementation of measures, courts point out the unconstitutional state omission and the consequent massive violation of rights, set parameters and even deadlines for overcoming this state, but leave the technical choices of means to the other powers. Monitoring allows judges, once properly informed, to take measures capable of ensuring the implementation of orders, which contributes to superior solutions compared to eventual unilateral decisions. (Campos, 2015)

Nevertheless, Gravito (2010, p. 15) states:

> The court convened periodic public hearings, with the participation of state and social actors, to discuss the elaboration and implementation of new public policies, creating spaces for deliberation and alternative, innovative and potentially democratizing forms of judicial application of constitutional rights.

Finally, in the view of Campos (2016), more than a label, it is necessary to discuss the new postures of constitutional courts and/or Supreme Courts in the sense of procedural transformations aimed at bringing constitutional norms closer to concrete reality, for the effectiveness of fundamental rights.

## APPLICATION ASSUMPTIONS

The Unconstitutional State of Affairs, as previously defined, consists of a decision-making technique developed by the Colombian Constitutional Court to face and overcome situations involving serious and systematic violations of fundamental rights, which require coordinated action by various social actors.

According to the Colombian Constitutional Court, in Judgment T-025/04, the following stand out among the factors considered by the Colombian court to define the existence of the unconstitutional state of affairs: i) the massive and generalized violation of several fundamental rights that affect a significant number of people; ii) the prolonged failure by the authorities to fulfill their obligations to guarantee these rights; iii) the non-adoption of legislative, administrative or budgetary measures necessary to avoid the violation of rights; iv) the existence of a social problem whose solution requires the intervention of several entities, requires the adoption of a complex and coordinated set of actions, as well as committing significant budgetary resources; v) the possibility of crowding the Judiciary with repetitive actions concerning the same violations of rights.

The Constitutional Court, through this decision technique, recognizes the effectiveness of the ECI and imposes on other powers and entities of the State the adoption of measures in order to overcome the massive violation of fundamental rights. These decisions can be classified

as structural litigation (structural cases), which are characterized by: a) affecting a large number of people; b) involve several state entities responsible for systematic failures in the public policies adopted; c) imply complex enforcement orders, whereby the magistrate imposes the adoption of coordinated measures to protect the entire affected population, not just the plaintiffs in the specific case (GARAVITO, 2010).

For Carlos Alexandre de Azevedo Campos (2015):

> When declaring the State of Things Unconstitutional, the court affirms that there is an intolerable picture of massive violation of fundamental rights, resulting from commissive and omissive acts practiced by different public authorities, aggravated by the continued inertia of these same authorities, so that only structural transformations of the performance of the Public Power can modify the unconstitutional situation. In view of the exceptional gravity of the situation, the court asserts itself legitimated to interfere in the formulation and implementation of public policies and in the allocation of budgetary resources and to coordinate the concrete measures necessary to overcome the state of unconstitutionality.

The ECI can be seen as the expression of the protection of fundamental rights in its objective dimension, since its recognition entails mandates of actions and duties of protection of fundamental rights by the State (HERNÁNDEZ, 2003, p. 203-228).

In slightly more synthetic terms, Lima (2015) points out that by declaring the State of Things Unconstitutional, the Judiciary admits the existence of a structural, massive and generalized violation of fundamental rights against a group of vulnerable people (or who are outside the political agenda) and requires the adoption of effective measures involving responsible bodies to solve the problem.

## COMPARATIVE LAW

When it comes to the application of the Unconstitutional State of Affairs in Comparative Law, it cannot be said that the structural interventions of the courts have been something very common in this field. David Landau (2015, p. 407) states that these "measures are costly, require time, demand a certain amount of legal and political skills on the part of judges, and only seem to work well in certain political contexts."

It is important to emphasize that the Unconstitutional State of Affairs is not an exclusive procedure of the Colombian Constitutional Court. In the 1950s, the United States decided the Case of Brown v. Board of Education of Topeka, opting for the end of racial segregation in Public Education in the Southern States. In Argentina, recently with the Case Mendoza y otros vs. Argentina, which deals with the large-scale pollution of an argentine river that posed a serious risk to the health of local populations, and the Court was then asked to resolve this case, and stated that it did not have the specific capacity to do so, but declared that it had an obligation to do so. political powers to move, that is, to catalyze movements to overcome the massive violation of fundamental rights. It was there, then, that the court summoned experts on the subject, politicians and members of civil society and began to deliberate on the measures. (BERGALLO, 2014)

In India, the paradigm case was the fight against hunger, where the Court was constantly asked about the problem of hunger, which is endemic in India, and upon analysis, the Court discovered that there was a deficiency in the economic policy of grain distribution, and finally, it ended up intervening in this policy, but always deliberating with the other powers, and determining the creation of a non-governmental body for monitoring and

reporting the implementation of the new measures retaining jurisdiction. (VILHENA, 2013)

In Peru, the Constitutional Court declared ECI in three major cases. The first, in File Number 2579-2003HD/TC, known as the "Arellano Serquen case", of April 6, 2004. The second case, in File Number 3149-2004-AC/TC, of January 20, 2005, involved individual rights of teachers that were being violated by authorities from the Ministries of Economy and Finance and Education, and finally, in File Number 03426-2008-PHC/TC of August 26, 2010, which dealt with the lack of public policies for the treatment and rehabilitation of the mental health of people in State criminal custody

## STRUCTURAL SENTENCES

After analyzing the main cases involving the application of the Unconstitutional State of Affairs, the examination of the assumptions reveals a connection with the so-called "structural suit", which can also be defined as the key point of this entire discussion, as these Structural sentences are based on dialogue and transformations. (FISS, 1978)

The highlighted paradigm case is known as Brown v. Board of Education (1954), a judgment of the US Supreme Court on the basis of a class action filed against the municipality of Topeka (Kansas), thirteen parents complained against the policy of racial segregation allowed in elementary schools in the city. After a wide debate, the Supreme Court, in a decision, concluded that the contested practice was unconstitutional, for violating the Fourteenth Amendment to the US Constitution, putting an end to the hitherto authorized practice of the doctrine of "separated but equal"[1]. The arguments were based on the American Constitution, on the clause called "the equal protection of the laws", thus requiring racial integration in schools. There was a need for a large-scale reform of the Public Education Institution, moving away from a dual system, that is, schools for whites and schools for blacks, towards a single, integrated system.

A year later, faced with complaints from several schools regarding the difficulties in implementing the new non-discrimination policy, and the absurd resistance of some members of society, including local governors, in famous cases such as Little Rock (1957) the Supreme The US court was forced to re-examine the issue, leading to the decision known as Brown v. Board of Education II.

In that decision, the US Supreme Court, in view of the resistance of many states to comply with the new framework established by the first decision, decided that the implementation of the order of non-segregation of black children in schools must be done through the progressive adoption of measures to eliminate the obstacles created by discrimination, under the supervision of local courts. In short, the order of the Supreme Court, considering the great difficulties encountered in immediately satisfying the postulated right and the variety of problems faced by local schools, authorized the creation of plans (the execution of which would be accompanied by the local Judiciary) to overcome the framework of violation of fundamental rights and serious unconstitutionality. These plans would take time and would need to conform to the peculiarities of each place. Thus, a decision more adherent to the reality of each place was achieved. As a result, Brown's second phase was more successful in its implementation.

Describing this new procedural framework, Owen Fiss (1978) makes some observations and formulates a new category of so-called "injunctions", and for the author, the Brown case teaches that one cannot have an a

1 Present in the case: Plessy v. Ferguson, 163 U. S. 537 (1896).

priori conception of adequate and legitimate remedies for certain rights, there is the usefulness of seeing the need to implement these rights, observing the substance. For Owen Fiss (1978), form must follow substance, under penalty of rights being left without remedies.

When the Court began to adopt structural measures to overcome the situation, it did so because of necessity, legitimacy then came from necessity itself. In these cases, *"injunctions"* simply reparative or preventive measures would not succeed in removing that frame of unconstitutionality, it would be necessary to *"injunctions"* to transform these malfunctioning institutions of government. There was a need for structural reforms and he then began to formulate the concept of the so-called *"public law litigation"* in the United States, which more than preventing or remedying, sought to transform. (FISS, 1978) Abram Chayes (1976, p.1302), when dealing with *"public law litigation"*, asserts that courts are not called upon to resolve claims between individuals under private law, but rather over large-scale social changes, programs and public policies.

Campos (2016), states that structural sentences seek to remove the continuity of the violation of fundamental rights, from transformative remedies, which change the system and bankrupt institutions, are not mere obligations to do but structural measures that modify the structure in operation. Then comes the very concept of *"structural injunctions"*.

Owen Fiss (1978) explains, based on litigation in the 1950s and 1960s involving the United States, the so-called *"structural injunctions"*, saying:

> For some time, Law has embraced a pluralism in relation to injunctions, accepting the idea that there are categories or species of injunctions. But, for the most part, diversity has been very limited - content to distinguish between interlocutory and definitive, or even mandatory or prohibitory injunctions. I would like to expand the classification and introduce three new categories: the preventive injunction, which seeks to prohibit some specific acts or series of acts from taking place in the future; the reparatory injunction, which obliges the defendant to engage in a course of action that seeks to correct the effects of a wrong past; and the structural injunction, which seeks to effect the reorganization of an existing social institution.

Campos (2016), goes back to the idea that structural litigation is, in essence, a "public law litigation", and links the Unconstitutional State of Affairs to the establishment of stuctural remedies (structural remedies).

Here it must be clear that flexible/ structural remedies are modeled by the courts to be complied with, supplying the framework of omissions, leaving margins for legislative creation and execution to be outlined and advanced by other powers, with their own capacities. As the Colombian cases demonstrate throughout the evolution of the ECI, these flexible orders issued by the court will be better enforced if the implementation phase of the decision is monitored and followed up. The judges, who declare the validity of the ECI, but leave margins of choice to the other powers regarding the adequate way to overcome the frames of unconstitutionality, must retain jurisdiction over the success of the chosen means. In acting this way, the role of the Court is both to set the state machine in motion (extinguishing state inertia) and to articulate the harmony of this movement (functioning as a catalyst, as the doctrine in general calls it). This way, the court does not become a "maker" of public policies, the judge behaves like an "institutional coordinator", and in no way invades the legitimacy of other powers.

Moving now to an analysis within the Brazilian jurisdiction, the framework of massive violation of fundamental rights may result from systematic and persistent actions and omissions by public authorities through the lack of coordination and dialogue between the powers. This fact, which was very well proven, when in the oral arguments of the judgment of ADPF 347, one of the requests was the release of billions and billions from the National Penitentiary Fund (FunPen), and the Advocacy-General of the Union (AGU), in In his speech, he said that it would be pointless to ask the Union to release the fund, as the States did not have public policies for the application of this money. The Representative of the States, the Attorney of the State of São Paulo in Brasília, Thiago Sombra, stated that the States could not obtain approval of their public policies by the Union due to the bureaucratic rigor and absurd technical requirements of the Union itself.

This fact proves the lack of coordination between and dialogue between the powers and public agents. There is then the need for a third party to intermediate and coordinate these lines and this lack of coordination.

To better understand the subject, the case of massacres and violence in the Penitentiary Complex of Pedrinhas, in Maranhão, illustrates this passage well. After the national and even international scandal of deaths and violations inside the prison, the government released millions of FunPen for the improvements, expansions and improvement of the prison system of Pedrinhas. A year later, the government of the State of Maranhão returned the full and corrected amount to the Union, claiming that it would not have guarantees of future resources for the maintenance and functioning of the prison, including for feeding the prisoners. Which demonstrates a total lack of dialogue between the powers.

After identifying the assumptions that characterize the Unconstitutional State of Affairs and analyzing the most important cases for the understanding of the institute, it must be clear that much more than verifying the existence of a structural dispute, it is also necessary to think about a systematic dynamic, and the possibilities of repairing cases of massive and generalized violations of fundamental rights, involving the powers, their capacities and responsible public agents, and at the same time respecting the constitutional prerogatives of independence and harmony between them, and the creation of limited public policies for budgetary reasons.

## JUDICIALIZATION OF POLITICS, JUDICIAL ACTIVISM AND THE UNCONSTITUTIONAL STATE OF AFFAIRS: DISTINCTION AND RELATIONSHIP BETWEEN INSTITUTES

It is clear that, in order to achieve the ECI's aim, the Court is not limited to handing down orthodox decisions, since its mission, at first, is to overcome political and institutional obstacles, expanding deliberations and dialogue for the solution of the structuring dispute. The court acts by engendering a kind of "structural judicial activism" (CAMPOS, Carlos Alexandre de A. 2014) supposedly legitimized by the presence of political and institutional blockades.

On Judicial Activism, which consists of a proactive action by the Judiciary in the face of political issues, without being provoked, he conceptualized a homeland doctrinaire in a Seminar held by the OAB as:

> A form of creative constitutional interpretation, which can reach the constitutionalization of rights, so it can be said that it is a special form of interpretation

> that is also constructive (…) where there is no political decision, it is necessary to solve the problem; more than that, where there is a fundamental right and its majority, the Judiciary needs to intervene. (SILVA, 2014)

For Professor Dirley da Cunha Junior, activism will only exist if there is a judicialization of politics, while for Luiz Roberto Barroso the two "are cousins, come from the same family, go to the same places, but do not have the same origins" (BARROSO, 2015).

Regarding the Judicialization of Politics, it is an institute of North American origin, born with the policy the global expansion of judicial Power (LIMA, 2007: 224) elaborated by Tate and Vallinder, occurring when the Judiciary analyzes a question of a political nature, constitutionally foreseen and that is brought to it for appreciation through an individual, through a claim that is filed by him, for having a Fundamental Right of his injured by the Public Power itself.

The Minister of the Federal Supreme Court (STF), Luiz Roberto Barroso, takes the same path:

Judicialization, in the Brazilian context, is a fact, a circumstance arising from the constitutional model adopted, and not a deliberate exercise of political will. In all the cases referred to above, the Judiciary decided because that was what it had to do with no alternative. (BARROSO, 2015)

In the view of those who defend the unconstitutional state of affairs, as a result of this massive offense against fundamental rights, a new activism emerges, capable of overcoming political and institutional obstacles through a constitutional jurisdiction that goes far beyond its traditional instruments, imposing a heterodoxy of judicial remedies, but without the Court losing sight of its own limitations.

For Cláudio Alexandre de Azevedo Campos "it is a structural activism, aiming to overcome political and institutional blockages, and to increase deliberation and dialogue about causes and solutions of the Unconstitutional State of Affairs."

About this new activism, analyzing the ECI recognized by the Constitutional Court of Colombia, Gravito and Franco, say:

> The new judicial activism, therefore, starts from the verification of recurring situations of institutional or political blockade that prevent the realization of rights. In these cases, frequent in contemporary democracies, the judiciary, although it is not the ideal instance or is equipped with all the tools to fulfill the task, appears as the only State organ with the independence and power to shake such stagnation. In short, if judicial activism operates in the circumstances and through the appropriate mechanisms, its effects, instead of being anti-democratic, are dynamizing and promoting democracy.

In this line of thought, the Court does not play the role of creator of public policies, but of an institutional coordinator, which contains the blocking effect (GRAVITO, César Rodríguez; FRANCO, Diana Rodríguez), interfering in budgetary choices and in the formulation, implementation and evaluation of public policies, however, without detailing them, which would be the responsibility of the other powers, but under the direction of the Constitutional Court.

The declaration of an Unconstitutional State of Affairs and its succeeding court orders lead the constitutional judge to interfere in typically executive and legislative functions, "including that of establishing budgetary requirements". (NAGEL 1978, p. 662). One can thus speak of structural judicial activism. (CAMPOS 2014, p. 314-322) These aspects generate serious accusations of democratic and even institutional illegitimacy of judicial

action. However, given the seriousness of the ECI, these objections must be rejected, because judicial action can lead to overcoming political and institutional blockages and increase dialogue in society and between powers. Fulfilling these tasks, structural judicial activism contains an important dialogical dimension, therefore, legitimate. (GRAVITO, César Rodríguez; FRANCO, Diana Op. cit., p. 332-338)

The ECI, as explained above, is always the result of concrete situations of parliamentary or administrative paralysis on certain matters. Structural judicial activism thus proves to be the only instrument to overcome blockages and make the state machine work. For Campos (2016) when it comes to applying the validity of an ECI, insurmountable political and institutional disagreements operate, the lack of coordination and dialogue between State bodies, legislative blind spots, fears of political costs and lack of interest in representing certain minority or marginalized social groups. In this scenario of structural flaws and legislative and administrative omissions, democratic and institutional objections to structural judicial activism make little practical sense.

Campos (2016) also explains that in addition to overcoming political and institutional blockages, structural judicial intervention can have the effect of increasing deliberation and dialogue about causes and solutions of the ECI. It can provoke reactions and social mobilizations around the implementation of the necessary measures, change public opinion about the seriousness of rights violations and, with that, positively influence the behavior of political actors. Rather than replacing popular debate, structural judicial activism will serve to broaden the channels of social mobilization.

## "FLEXIBLE STRUCTURAL REMEDIES" AND JUDICIAL MONITORING

For Alexandre Campos (2016, p. 99) the Unconstitutional State of Affairs is rooted in the "structural remedies" of the United States, with the view that the judge must interfere in budget choices and in the cycles of formulation, implementation and evaluation of public policies, making use of orders that, at the same time, resize these cycles and allow better structural coordination. It is extremely important to emphasize and understand that the judge does not go into detailing the policies, but rather formulates flexible orders, the execution of which will be subject to continuous monitoring, for example, through periodic public hearings, with the participation of sectors of civil society. and responsible public authorities, which in no way breaks with the idea of separation between powers (executive, legislative and judiciary).

Therefore, it is about flexible remedies, which are modeled by the courts to be complied with, leaving margins for legislative creation and execution to be outlined and advanced by the other powers. The judges, who declare the ECI, but leave margins of choice to the other powers about the appropriate way to overcome this state, must retain jurisdiction over the success of the chosen means. Realizing this, the role of the Court becomes clear, which is both to set the state machine in motion and to articulate the harmony of this movement.

For Campos, in his doctoral thesis "From Unconstitutionality by Omission to the Unconstitutional State of Things", states that:

> The role of a court is to set the state machine in motion and to articulate harmony in that movement. The declaration of an "Unconstitutional State of Affairs" leads the judge to act as an institutional coordinator. Judicial activism is the only instrument to overcome blockages and make the state machine work.

Furthermore, it is clear that by adopting the procedure of flexible orders and under constant monitoring, the participation and decision-making margins of the different political and social actors on how to overcome structural problems are maintained. By acting this way, instead of judicial supremacy, the courts encourage dialogue between institutions and, above all, society, promoting gains in the practical and democratic effectiveness of decisions.

## CONCLUSION

The Unconstitutional State of Affairs has as the cradle the Colombian Constitutional Court, which has already recognized the institute in some cases. In Brazil it is a widely discussed thesis, which was addressed by the jurist Daniel Sarmento in the petition of ADPF, number: 347/DF, known as Partido Socialismo e Liberdade x União, in which he well addressed the deficiency of the Penitentiary System in Brazil and the violation of the rights and fundamental guarantees, and the essential requirements for the characterization of the institute in question commented. Although there are important institutional differences between the STF and the CCC, the practice of declaring the ECI and formulating structural orders, flexible and under monitoring, becomes a good way for the Higher Court to start dealing with these structural flaws that are harmful to effectiveness of the fundamental rights of Brazilians.

During the development of this work, the concept and assumptions that characterize the Unconstitutional State of Things were approached through the deductive method. Then, after analyzing the most important cases in which the institute in question was applied, the idea of structural sentences arises, which were discussed based on the ideas of Owen Fiss, and during the development of the theme, it was possible to demonstrate the intimate connection between the ECI and structural sentences, aimed at overcoming violations of fundamental rights.

Finally, we sought to demonstrate, through comparative law, that the ECI is not an exclusive phenomenon of Colombia, but that it is present in several countries around the globe. This work is justified by its high theoretical value and because it reflects the new Brazilian constitutionalism. In addition, it is opportune to think about mechanisms for adopting the Theory of the Unconstitutional State of Affairs with a view to the effectiveness and implementation of constitutionally protected fundamental rights, so that, in the end, it can be demonstrated the harmonization and maintenance of the Democratic State of Law.

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