

Protecting health through courts; structural judgments¹

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The structural judgements theory was developed by various courts in Latin America like Colombia, and Dominican Republic. This theory has as its starting point the conception of the constitution as norms that are enforceable by courts. Structural judgements are judicial decisions that seek to solve generalized omissions in the satisfaction of human rights, caused by lack or faulty public policies. They generally impact provision of public services, such as health or education, with a collective and long-term dimension, so that they result in social changes. We analyze, as an example, the litigation on front labeling of foods in Mexico. This litigation got the food industry to add warnings about excess of sugar, fats, and salts in all products. Based on these decisions, we reflect on the challenges that structural judgments entail, what are the consequences of this judicial activism in the relation of courts with the executive and legislative branches of government. What are the challenges that this type of decision entail in terms of monitoring its compliance.

Introduction

Structural judgements are judicial decisions that seek to solve generalized omissions in the satisfaction of human rights, caused by lack or faulty public policies. They generally impact provision of public services, such as health or education, with a collective and long-term dimension, so that they result in social changes. Structural judgements theory was developed by various courts in Latin America like Colombia, and Costa Rica. They use as part of their inspiration the structural injunctions of the Civil Rights movements in the USA. This kind of decisions is a powerful tool for making changes in public policy that ensure human rights. We analyze, as an example, the litigation on front labeling of foods in Mexico. This litigation got the food industry to add warnings about excess of sugar, fats, and salts in all products. Based on these decisions, we reflect on the challenges of structural judgments. What are the consequences of this judicial activism in the relation of courts with the executive and legislative branches of government? What are the challenges that this type of decision entail in terms of monitoring its compliance?

Structural Judgments and public policy

Experts such as (Zaring, 1978, Buckberry-Joyce, 2023 and Armijo, 2003) define structural judgment refers to a decision that involves evaluating and ruling on the constitutionality and compatibility of with the fundamental regulations and public policies with the principles and framework of a legal system. It pertains to the analysis of the structure and organization of a policy to determine its adherence to constitutional principles and rights. Structural judgments are typically employed by constitutional courts or supreme courts to ensure the coherence and integrity of the legal system. They involve assessing the hierarchical relationship between laws, examining the distribution of powers among branches of government, and scrutinizing the compliance of legislation and public policy with the fundamental rights and principles enshrined in the constitution. These are judicial decisions

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that seek to solve generalized omissions in the satisfaction of human rights, that involve various agencies. They generally impact provisions of public services, such as health or education, with a collective and long-term dimension, so that they result in social changes. Structural rulings allow the State to comply with its international obligations in terms of social rights, particularly with respect to those groups that have historically been excluded and discriminated against, such as women, indigenous people, children, migrants, displaced persons, LGBTI+ communities, among others. Some emblematic structural judgments in Latin America are Costa Rica's Judgment 2011-13800², which recognizes the right of prisoners with diverse sexual orientation to obtain the benefit of intimate visits. Costa Rica's judgment 1154-96³, in which the Executive is ordered to continue the process of rehabilitation of the Río Azul's area polluted by a landfill and to reach its definitive closure with strict adherence to the measures that guarantee fundamental rights. Colombia T-760/08⁴ regarding the standards of public health services.

These structural judgments are inspired by the structural injunctions of the common law systems. The paradigmatic cases of the Civil Rights movement in the United States, such as *Brown vs Board of Education* (1954). Structural injunctions are court-ordered remedies that aim to address systemic or institutional problems in a legal or governmental framework. They go beyond addressing individual cases or specific violations and instead focus on reforming the underlying structures or practices that contribute to the violation of rights. Structural injunctions often involve broad and far-reaching remedies that can impact entire systems or institutions. They are typically used in cases where there is a pattern or practice of constitutional violations, such as in the areas of criminal justice, education, or voting rights. The purpose of structural injunctions is to bring about systemic change and prevent future violations by reforming policies, procedures, or practices. A more recent example of structural injunctions, in the United States, is *Citizens United v. Federal Election Commission* (2010), which held that corporations have the same free speech rights as individuals and can spend unlimited amounts of money on political campaigns.

These kinds of decisions, where courts analyze a public policy, that hinders or prevents the exercise of human rights have caused debate among experts and academics. The questions that have arisen are related to the consequences of this judicial activism in the relation of courts with the executive and legislative branches of government. Are courts properly equipped for evaluating a public policy? Is it acceptable that a non-democratically elected body is involved in these public decisions?

Professor Owen Fiss is in favor of using structural injunctions to address systemic injustices and ensure a meaningful and lasting change. He considers that traditional remedies, such as damages or individual injunctions, may not be sufficient to address widespread and entrenched problems. In contrast, structural injunctions can serve as a powerful tool to combat systemic inequalities and promote social justice by targeting the root causes of violations. In Fiss' opinion courts have a role in shaping and reforming institutions through structural injunctions to ensure that constitutional rights are protected and upheld for all individuals.

In contrast, Joyce Samuel has noted that since 1980 academia and policy makers in the United States have been increasingly skeptical of judicial efforts to evaluate and decide on policy matters. Emblematic of this emerging critique was Justice Lewis Powell, who noted "how often and how unequivocally" the Court had expressed its displeasure with serving as

² Supreme Court of Costa Rica judgment 2011-13800.

³ Supreme Court of Costa Rica judgment 1154-96.

⁴ The Constitutional Court of Colombia T-760/08.

“an open forum for the resolution of political or ideological disputes about the performance of government.”

Challenges of Structural judgments

Most of the detractors of structural injunction point out that there is a risk of judicial overreach or activism. When courts go beyond their traditional role of interpreting laws and start actively shaping policy or governance the balance of powers may be in danger. Striking the right balance between judicial intervention and respecting the separation of powers is crucial. Structural judgments may face resistance from stakeholders who perceive them as infringing on legislative or executive authority. This can lead to pushback, non-compliance, or challenges to the implementation of the judgment. This situation may affect the legitimacy of the courts thus judicial prudence must be exercised to ensure compliance. Another challenge is that courts are ill equipped to analyze public problems and the efficacy of public policy. Their decisions may have unintended consequences or create new challenges. They can disrupt existing systems and institutions, requiring careful consideration of the potential ramifications and ensuring appropriate safeguards.

Nevertheless, structural judgments have prevailed not only in the United States, but also in various courts in Latin America. (Gilles, 2003) has identified two modern preconditions for structural decisions: (1) a broad consensus among legal intellectuals that “some institutionalized practice is systematically depriving individuals of constitutional rights,” and (2) a sense that those violations are “intolerable in a just society.” (Sturn, 1993) agrees that structural injunctions can provide effective policy change. Judges have successfully monitored these changes and have ensured the transparency and accountability of the process.

Brown v Board of Education implementation took over 30 years in that sense (Resnik, 1982) has analyzed the role of judges as managers of structural judgments. Judges must impose rules, negotiate with the parties, appoint monitors, mobilize support, and use intervention to punish recalcitrant parties that are often resistant to judges establishing themselves as comprehensive reform administrators. Ensuring effective implementation of structural judgments can be challenging, particularly when they involve complex and wide-ranging reforms. Lack of resources, administrative capacity, or political will can hinder the proper execution of the Court’s decision.

Successful structural judgments are focused on concrete goals that defendants are expected to achieve, with specific measurement of performance (Gilles, 2003) This type of decisions are usually made with the help of interested parties. Also, plural committees can be established for the implementation and supervision of the decision. Periodic reports to the Court that ensure transparency and accountability are advisable.

Structural Judgments: A Mexican Success Case

One good example of structural judgments that resulted from the collaboration between civil society, regulators and the judiciary is the Mexican case of food’s front labelling. This litigation got the food industry to add warnings about excess of sugar, fats, and salts in all products. The Supreme Court’s decisions of these cases are a good example of structural judgments that achieve a change in policy to address an important human rights problem.

By 2020 more than 40% of Mexicans present obesity and approximately 75% of adults were classified as overweight. The prevalence of obesity among Mexican children and

adolescents aged 5-19 is also alarmingly high, with around 35% of this population group being overweight or obese (Aceves-Martins, 2016). Mexico is the 6th country in the world with more obesity and has one of the highest rates of type 2 diabetes globally. According to the International Diabetes Federation, in 2019, an estimated 13.1 million adults (between the ages of 20-79) were living with diabetes in Mexico. The prevalence of diabetes in adults was approximately 10.3% in 2019. It is worth noting that type 2 diabetes is strongly associated with obesity and unhealthy lifestyle factors. Diabetes and obesity have significant health implications and can lead to various complications and co-morbidities. Individuals with diabetes are at increased risk of cardiovascular disease, kidney disease, neuropathy, retinopathy, and lower limb amputations. These statistics showed that the health public policy on preventing this disease was not working. Experts insisted that the lack of regulations in nutrition information and publicity were part of the problem, (Tulchinsky, 2018). The high prevalence of diabetes and obesity in Mexico poses a substantial economic burden on the healthcare system and the economy. Direct medical costs associated with diabetes and obesity, including treatment and management of complications, are significant. Indirect costs, such as lost productivity and reduced quality of life, further contribute to the economic impact. These data and research showed that omissions in the regulation and the public policy were having grave consequences in people health and the health public system. (Barquera S, Campos-Nonato I, Aguilar-Salinas C, Lopez-Ridaura R, Arredondo A, Rivera-Dommarco J., 2013).

In these scenario civil society organizations started promoting the use of front labeling for soft drinks and sugary food. Front labeling, also known as front-of-package labeling, refers to the practice of displaying key nutritional information or warnings on the front of food and beverage packaging. It is intended to provide consumers with quick and easily understandable information about the nutritional content or potential health risks associated with the product, without any respond of the regulators. To respond to the omissions various organizations presented amparos before federal courts. These litigations confronted big opposition from the industry and elusive attitudes from the regulators. Various organizations and individuals filed amparo cases to challenge the lack of clear and informative labeling on food products and to advocate for the regulation of publicity directed to children, as well as an increase of taxes for that industry. These cases argued that the absence of adequate labeling, infringed upon consumers' right to information, health, and a healthy environment. In 2015, the civil organization Consumer's Power filed an amparo case against Coca-Cola, arguing that the company's marketing practices did not adequately inform consumers about the health risks associated with sugary beverages. The Supreme Court ruled in favor of Consumer's Power, stating that companies have an obligation to provide clear and accurate information to consumers about the nutritional content and health risks of their products. As a result, new regulation was issued establishing front labeling requirements.

In response the soft drink industry reacted filing more than 120 amparos against the new regulation⁵. The cases went all the way to the Supreme Court, AR 358/2022⁶. The Court upheld the constitutionality of the regulation. The decision analyzes the public policy and establish that the mechanism chosen by the legislator is ideal, considering that the frontal warning labelling system is effective in giving information to the consumer in a truthful, fast, and clear way by pointing out only the ingredients that the product has in excess, so that people can decide to buy it or not. The Court upheld the constitutionality of the measure including the tax impose on certain types of sugar. They considered that it was a constitutionally valid purpose. The tax contained in the provisions seeks to implement a legislative measure through

⁵ Pan American Health Organization.

https://iris.paho.org/bitstream/handle/10665.2/18391/9789275118719_eng.pdf?sequence=1&isAllowed=y

⁶ Supreme Court of Justice of the Nation, Mexico, AR 358/2022.

which overweight and obesity are combated as a generalized public health problem. This being an immediate purpose that is supported in article 4, third and fourth paragraphs of the Constitution. Furthermore, the mediate purpose sought with these measures is that the State guarantees to every person the right to nutritious food, sufficient and of quality, in addition to the fact that through this measure government seeks to make effective the right to protection of health. Thus, the tax is justifiable since not only it is within the powers of the legislator to make effective the rights to food and health protection through the instruments at its disposal, but the use of fiscal measure was suggested by international organizations World Health Organization and Pan American Health Organization.

Even though traditionally in amparo cases decisions are limited by article 75 of the Amparo Law that establishes that the complaint shall be assessed as it appears proven, the fact is that when analyzing the constitutionality of a public policy, that impacts human rights, like in these cases, more and more federal judges refer to expert opinions and international documents and investigations that may have not been taken into consideration when issuing the combatted norm but are relevant to determine its constitutionality. They justify this type of analysis on Article 1 of the Constitution that allows *a pro homine* interpretation. This principle establishes that when a decision involves violations of human rights the interpretation should consider the Constitution and the international treaties to which the Mexican State is part. Additionally, the decision render should evaluate which actions are better to guarantee the exercise of the right in dispute. This principle has allowed the Court to analyze public policy and render a structural judgement that effectively impacts the regulation and promotes public policy change.

In the case of front labeling the Supreme Court's decision resulted in a massive reformulation of products. The industries themselves have reported changes in up to 56% of products. To avoid warning seals, the number of sugars, fats, sodium and/or calories was decreased in products of important industries such as Nestlé, Coca-Cola, Bimbo, PepsiCo, Kellogg's, and Lala. Also, a restriction of animated characters in children's products with front labeling has been successfully imposed. For example, in sugary drinks aimed at girls and boys, 39% had characters in March 2020 and by July of 2023 the percentage dropped to practically 0. (Duran, Regina & Asmitia, Edalith & Rivera, Juan & Barquera, Simón & Tolentino-Mayo, Lizbeth., 2022).

It is worth mentioning that this process had not happened in our country before, with any other regulation. This success was possible not only with the amparo that ordered the new regulation, but with the join work of civil society and agencies to designed it, and the continuous collaboration with the Court by providing expert opinions and international document to back up the structural judgments. The decisions resulted not only in the front labeling, but also in the evaluation of the impact of the measure and the later change in the content of sugar, salt, and saturated fats of many products.

Final thoughts

Structural judgment is a collective endeavor. Frequently, the decision is not the actual solution to the omissions on guarantee a human right, but only the beginning of a joint effort among public and private agents. When the decisions are rendered, the work begins. The legitimacy of the Court will depend on the implementation of the measures ordered and the results obtained. This implementation requires the collaboration of various government agencies, corporations, as well as civil society. As in the front labelling case, it might require more than one decision to achieve the changes in public policy and regulation required to

overcome the problem. Supervision is also indispensable, although it might come not only from the judiciary, that might be ill equipped for measuring the impact of a public policy, but with the collaboration from civil society, representatives, journalist, and independent agencies.

Structural judgments should not be understood as an infringement on other branches of government. As in every case court must be prudent when exercising the power to establish the law of the land. Nevertheless, when they are presented with generalized omissions in the satisfaction of human rights, caused by lack or faulty public policies, it is also their duty to establish and effective remedy.

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