

## **Enforcement system design in the judicial control of public policies: does the compliance and deterrence strategies works in this field?**

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### **ABSTRACT**

This article researches the suitable strategies to shape an enforcement system design in the judicial control of public policies. It should be noted that several strategies and theories on governance and responsive regulation have been developed in recent decades on law enforcement. It happens that, when it comes to the control and implementation of public policies by the Courts of Justice, this is not about just obey or not obey the law and makes it enforceable, it is about identifying and designing an effective enforcement system. To do so, this work confronts two kinds of approaches of enforcement: deterrence-based approach, which punish and discourage the defendant who intends to disobey the law, and compliance-based approach, that guide and cooperate with the defendant to gain accountability and enforcement of law. These new kinds of approaches must be reconciled and aggregated with the classic corrective justice enforcement techniques, which are only intended to repair or rectify abuse of rights from a private and individual perspective. It can be said that a long debate has already been set on this subject: it is not enough to a judge allows or denies the right of access to health services and education policies, for example, what it is necessary is to solve issues of distributive justice, to dialogue with others state powers, to monitor the implementation of judicial orders, to reorient those policies in the face of new facts and obstacles encountered in the implementation carried out and, even, to punish resistance made in bad faith to judicial orders. But, if these aspects have already been defined, others still need to be advanced: when the Courts of Justice should repair a damage, when they should punish and when they should guide and cooperate with the defendant in the matter of judicial control of public policies? That's the real question.

**Keywords:** Deterrence, compliance, enforcement, public policies, judicial control.

## 1. Introduction

The use of regulatory and governance strategies as a management tool can become an important mechanism in the judicial control of public policies.

In the Democratic State, the judge, who is classically abstentionist, is in the present more interventionist (BUCCI, 2006, p. 2). Unlike the Liberal State, merely guarantor of individual rights and freedoms, the Courts of Justice are now concerned not only with restraint of power, but with the practical realization of fundamental rights and guarantees, tasks that were usually preponderant before the Legislative and Executive Branch (WATANABE, 2011, p. 216). A new feature is given to the separation of powers, a more coordinated one with concerted acts between the Branches of State

This feature is now characterized by the unity of the power, that is, state power is one, only rationalized by the functional criterion. It is only a specialization of activities, now more coordinated, aimed at the operationalization of constitutionally purposes (VILLE, 1998, p. 104).

It happens that this kind of specialization and coordination of state activities to the accomplish the constitutionally purposes can design diverse judicial strategies to shape the procedure of control of public policies. The present investigation intends, according to the deductive method and through bibliographical research, studies the suitable strategies to shape an enforcement system design in the judicial control of public policies.

To do so, this work confronts two kinds of new approaches: deterrence-based approach, which discourages the defendant who intends to disobey the law, and compliance-based approach, that guide and cooperate with the defendant to gain accountability and enforcement of law. These approaches must be reconciled and aggregated with the classic corrective justice enforcement techniques, which are only intended to repair abuse of rights from a private and individual perspective, not bothering to dissuade the wrongdoer or cooperate with the wrongdoer. It is not proposed or suggested that there is a kind of competition between these judicial strategies between corrective, deterrent and cooperative enforcement. What is proposed is that the Courts of Justice make, in advance, a judgment of adequacy of each of these strategies in the case in judgment. When

the Courts of Justice should correct, when they should punish and when they should guide and cooperate with the defendant in the matter of judicial control of public policies? That's the real question.

## **2. Judicial control of public policies**

After World War II and the harmful practices of authoritarian regimes, it was realized that fundamental rights and guarantees needed a more consistent and unfailing foundation than the law.

According to the constitutional understanding coming from the French Revolution, the fundamental rights and guarantees, constitutionally foreseen, constituted guidelines for legislative production, but not binding directives. In this way, the concrete scope of the fundamental rights and guarantees was delimited or even abolished by the legislator according to the current political, social and economic guidelines (ZAGREBELSKY, 1999, p. 50).

If the Constitution did not present normative force, being only a suggestion to the legislator or a non-binding directive, the relations between individuals and between them and the State began to be regulated by law and to the extent of the law. This constitutional conception, although valid for the Liberal State of Law, forged under the influence of the French Revolution, was equally valid for the Authoritarian States (BARROSO, 2007, p. 217).

It is worth to say that the law could be instrumented for the establishment of a Authoritarian State, without more rigor and without any change in the constitutional order. A Authoritarian State therefore established itself using the same legal categories and institutes as existed before, in the Liberal State (ZAGREBELSKY, 1999, p. 50). This was paradoxical and inadmissible.

In a Democratic State of Right, the Constitution retakes its normative force and begins to radiate through all infraconstitutional law, with real exigibility, no longer as mere letter of political intentions or declaration of rights. Fundamental rights and guarantees become immediately enforceable. The question is how to demand and enforce them by the Courts of Justice? And what if the Courts of Justice could legitimately do it?

The recognition of imperativeness and the immediate exigibility of the fundamental rights and guarantees confer, at the same time, the possibility of direct access to the Courts of Justice as true subjective rights, independent of previous normative mediation by the Legislative Branch and by the Executive Branch. However, this activity carries with it obstacles of all kinds, especially the need for a judicial system of regulatory enforcement, a practice not commonly found in the Courts of Justice around the world.

### **3. Regulatory enforcement**

The traditional view of the enforcement of a judicial decision justified for a long time, and still justifies, the most varied and deep state interventions on the particular and on the State itself to grant full compliance with the orders issued by the Courts of Justice.

In order to demonstrate this, it is enough to remember the hypotheses of execution by subrogation, coercive fines and the countless moments in which the Judiciary Branch determined, under contempt of court, the acquisition of medicines not foreseen administratively, the restructuring of schools, the reform of prisons and hospitals.

It is common that the judge uses a forced execution, endowed with a disciplinary and sanctioning character, to enforce a judicial decision, enthusiastic to comply with the law. That kind of enforcement – a repressive one – assumes that the opposing party is resistant or recalcitrant in complying with the judicial decision, which would justify, therefore, the imposition of forced or substitutive measures to carry out the expected behavior, but not spontaneously carried out. The aim is to redress the violation of rights, in favor of the creditor, subordinating the will of the debtor. In this kind of enforcement, Walt (2006, p. 1301) points out that “corrective justice describes the moral obligation of repair: the person morally responsible for wrongfully harming another has a duty to compensate the person harmed”.

There is no problem in taking coercive measures to comply with judicial decisions. On several occasions there is in fact a resistance or recalcitrance of the defendant, requiring the Court to use its powers and prerogatives to obtain the full satisfaction of a plaintiff.

It should be noted, however, that more appropriate concepts of legal enforcement emerges, especially with regard to the implementation of judicial decisions involving public policies. Strategies aimed at deterring the wrongdoer, discouraging abusive behavior, and strategies aimed at cooperation, establishing a more negotiated relationship between the Courts of Justice, other Powers of the State and society, arisen strongly in this field (ODED, 2010, p. 1-2).

A deterrence-based approach, which discourages the defendant who intends to disobey of law, and compliance-based approach, that guide and cooperate with the defendant to gain accountability and enforcement of law, are sometimes more appropriate than the imposition of classical repressive, typical instrument of command. With this, it is necessary to know the strategies of a regulatory enforcement, instead of only holding the classic enforcement and sanctioning instruments of legal process.

The main purpose of the regulatory execution, to be carried out by the Courts of Justice, is the definition of norms, monitoring, supervision, control and evaluation of the implementation of public policies, in order to discourage abusive behavior or even to cooperate in the management of the public policy, object of the demand, guiding it to conform to the constitutional guidelines. The objective of the regulatory execution is mainly greater than that proposed by the classic theory of corrective justice, whose purpose is "rectifies the wrong that one person has done to another" (WEINRIB, 2002, p. 623) and "sees the remedy as corresponding to and undoing the wrong" (WEINRIB, 2002, p. 624), establishing an exact correspondence between the remedy and the violation of the law in a bipolar litigation (WEINRIB, 2002, p. 623).

In most cases, when it comes to the control of public policies, it is necessary to escape from the vision of corrective justice, very attached to the particularized relation between author and defendant. This is because, in this area, the controversy between author and defendant is often nothing more than a small part of a controversy related to the national, regional or sectorial public

policies that have developed in opposition to the constitutional guidelines. Traditional litigation gives way to a polycentric one.

Lianos (2013, p. 399) points out that “corrective justice creates duties to repair that apply at particular moments” and “is based on the idea of correlativity”. In the contrast, “public law litigation is by essence polycentric concept, because of the variety of interests to be considered”.

If public policy control is thought exclusively from the point of view of corrective justice, establishing an exact correspondence between the protection of the claimed damage and the violation of the right, what will happen is only a change of provider. The Legislative Branch and the Executive Branch, which are the classic managers and providers of public policies, will no longer be predominant in the control of public policy, and this activity will be exercised by the Judiciary, identifying as the new and last provider. It is no use, however, only to change the provider, it takes a new and a more concerted and coordinated approach among the branches of State.

Susan Sturm (1991, p. 1363) stresses that, in public law litigation, judges must:

...develop affirmative requirements to govern the defendant's efforts to eliminate the illegal conditions and practices. Because the judge is seeking to implement generally, articulated, aspirational norms in highly differentiated contexts. Liability norms do not dictate the content of remedy. Liability norms only provide goals and boundaries for the decision...does not, however dictate how those problems should be solved”

Among these new approaches, which should be reconciled and aggregated with classic corrective justice enforcement techniques (WEINRIB, 2002, p. 638), several strategies and theories on governance and responsive regulation have been developed in recent decades on law enforcement. In this field, attention should be drawn to deterrence-based approach and compliance-based approach as forms of enforcement of a decision.

#### **4. Two strategies: deterrence and compliance**

The idea of a regulatory enforcement aims to achieve not only accomplishment with laws, but also to control the quality and adequacy of results in light of constitutionally foreseen rights. In the field of public policy, the liability does not immediately correlate with the content of judicial

remedy, nor does it indicate the practical implementation of this right by the Judiciary Branch. That's why regulamentary strategy is essential.

The use of regulatory strategy as a management tool can become an important mechanism in the judicial control of public policies, because is able to: (i) involve parties and non-parties in the deliberative process of public litigation; (ii) considerer remedial alternatives support by facts and specific technical knowledge of the participants; (iii) develop of a remedy that is reasonably calculated to redress violations in each of the areas identified by Courts; (iv) brainstorm on possible solutions, selecting a remedy that best accommodate interests and norms in light of the factual records and coordinating with Executive and Legislative Branches; and, finally, (v) monitor the results, to maintain or to reorient those policies in the face of new facts and obstacles encountered in the implementation carried out by Courts (STURM, 1991, p. 1430).

Enforcement, in this scenario, is prospective (FISS, 1979, p. 48).

From this reasoning, it is necessary to focus on possible approaches to correcting the illegal and abusive practices. This possible approach is deterrence approach or, otherwise, the compliance approach, to gain accountability and enforcement of a judicial decision. It is not a question of exclusive approaches, but rather of making a judgment on the adequacy of each of them according to the circumstances of the case.

Deterrence approach, as explained by Oded (2010, p. 2), perceives people and institutions as opportunists, willing to comply with the law to the extent that they can maximize their goals. In this way, the enforcement system must be designed in such a way as to induce the subject to adopt behavior that complies with the law, discouraging abusive practice. "For that reason, the deterrence approach endorses penal, accusatory, and adversarial styles of enforcement, which go harsh on lawbreakers" (ODED, 2010, p. 2).

In this context, it is not enough to restore or repair an individual abuse, but rather to discourage abusive behavior. To do so, the offender must internalize and assume responsibility for the practice, even if his illegal act is not subject to individual persecution by the victim or even if the individual compensation of the offended person is very small. It is necessary to internalize the negative externalities, that is, the social, environmental, economic costs of a breach of fundamental

rights and guarantees. The institution is not allowed to privatize its advantages and objectives in the detriment of the law, socializing the losses. An enforcement system should prevent or avoid that.

As long as it is profitable to breach the law, the law will continue to be violated and judicial decisions will be disregarded. To avoid this, it is necessary to deprive the beneficiary of the advantages of abuse from a macro perspective. An example of this is the imposition of collective redress in cases of massive violations of human rights in prisons, even though individual reparations are prosecuted by prisoners held in conditions of unworthiness. In the same way, Inter-American Court of Human Rights, in the *case Awas Tingni v. Nicaragua*, find that the State of Nicaragua must repair immaterial damages, for the benefit of the Mayagna (Sumo) Awas Tingni Community.

On the contrary, compliance approach, according with Oded (2010, p. 2), perceives people and institutions as moral agents. In his words, they have:

...a law-abiding nature which directs them to obey the law just because it is a law". Law-breaking should not be solely explained by profitmaximization considerations. Instead, various alternative reasons, such as honest mistakes, accidents, and misinterpretation of the law should be considered. Hence, the compliance approach promotes a conciliatory style of enforcement. It rests on the belief that compliance can be best achieved by persuasion rather than by a threat of sanctions. The compliance approach accentuates cooperation rather than confrontation, and conciliation rather than coercion (ODED, 2010, p. 2).

In this approach, the judge becomes a collaborator, assuming the responsibility to investigate the possible reasons why a certain public policy has not been adequately implemented by the competent institutions. In order to do so, the magistrate may (i) request hearings from members of certain groups affected by abusive practices, (ii) form panels of experts on technical matters, (iii) identify the interests involved and the possible impacts of a decision, (iv) to stimulate stakeholders to develop possible solutions and alternatives, reconciling possible antagonistic interests in the group.

Laycock (2012) explains that it is common practice in public law litigation to ask the parties to submit remedial plans, and for many reasons, Courts of Justice tend to agree with defendants proposal. In this case, remedies are commonly negotiated and, occasionally, important legislative committees are involved in this negotiations.

This is what happened in *Missouri v. Jenkins*, a case about school segregation: "negotiated and defendant proposed remedies are more likely to work than fully litigated remedies, because the

court cannot implement a remedy without the cooperation of defendants and staff who run the school (or any other institution)” (LAYCOCK, 2012)

Both approaches – deterrence and compliance approach – are valid ones. It is not possible to say in perspective whether there is one better than the other. Both are management tools for judicial enforcement of public policies. What is to be done, in the face of these possible approaches, is a judgment of adequacy, in the circumstances of the concrete case. If the solution will be punitive/dissuasive or conciliatory/ cooperative, it is a question of analyzing the contours of the litigation and the behavior of defendant.

To define these contours, it can be said that the Courts of Justice must identify the character of the claim and the defendant's behavioral, based on two main questions : the target institution's of illegal actions shows what kind of behavior? They need advisory and guidance to implement a public policy? Or they are tough litigators, who seek to maximize their own goals, socializing the damages, sometimes insusceptible to individual compensation? It is these questions, which reveal the behavior of the offender, that allow the Courts of Justice to define the appropriate approach to be adopted in public law litigation: deterrence approach or compliance approach.

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