

“Designing Compliance Beyond Coercion: The Renaissance of Positive Sanctions in Contemporary Law-Making”

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This lecture investigates the concept of "positive sanctions" and the so-called "promotional function" of law, examining the extent to which normative instruments grounded in incentives, rewards, facilitation, and behavioural steering—rather than in coercion and punishment—have assumed a central and increasingly pervasive role in contemporary legal systems. Drawing on the seminal theoretical framework who linked the emergence of positive sanctions to the transition from the liberal state's protective-repressive model to the welfare state's promotional paradigm, the lecture extends and updates that framework to account for regulatory phenomena that have gained prominence in the twenty-first century. As a starting point "positive sanction" is minimally defined as any technique, instrument, or mechanism that does not aim at remedying or preventing socially undesirable conduct, but rather at promoting, facilitating, encouraging, or supporting the performance of socially desirable actions, whether ex ante or ex post. The methodological approach is both analytical and functional: the lecture scrutinises three paradigmatic case studies of non-binding, non-coercive regulatory instruments with a global reach—nudging, Better Regulation (BeR), and non-binding judicial precedent—selected because they operate across the classical triad of legislative, executive, and judicial power and pervade both the public and the private spheres.

The analysis of nudging engages with the behavioural economics literature originating from Thaler and Sunstein's choice architecture model, exploring how insights from behavioural science are deployed to steer individual decision-making without resorting to prohibitions or significant alterations of economic incentives, while also acknowledging the moral and political non-neutrality of such interventions, including the risks of manipulative "sludging". The discussion of Better Regulation traces the phenomenon's institutional genesis within the OECD and European Union policy frameworks, documenting its evolution into a meta-regulatory apparatus that seeks to improve legislative quality, reduce administrative burdens, and enhance stakeholder participation through evidence-based, transparent, and proportionate regulatory tools.

The examination of non-binding precedents demonstrates that normativity and bindingness are not coextensive, and that the authority of judicial precedent

operates along a spectrum of degrees rather than as a binary all-or-nothing proposition, with sanctions for non-compliance typically attaching indirectly through mechanisms such as judicial error, lack of reasoning, and appellate review. On the theoretical plane, the lecture engages with the longstanding jurisprudential debate on the relationship between law, sanctions, and coercion—from Kelsen's pure theory to Hart's contingency thesis and Raz's elaboration thereof—arguing that, while a legal system without sanctions is logically conceivable, all historically existing legal orders have relied on sanctions as functional instruments for securing compliance with norms. The analysis further explores the latent models of the individual that underpin different regulatory strategies, from the "bad man" to the rational economic agent to the "puzzled person," revealing how both positive and negative sanctions reflect the coexistence of conformity and pathology in any functioning legal system.

The lecture concludes that positive sanctions and non-coercive regulatory instruments are effective complements to, but cannot serve as complete substitutes for, traditional coercive enforcement: their efficacy derives precisely from their operation within the institutional framework of a coercive legal system, in which coercion functions as an extreme ratio.

This finding carries significant implications for legislators, policy makers, and regulatory designers, suggesting that the optimal architecture of compliance combines promotional and repressive instruments in a calibrated dosage responsive to context, legal culture, and the evolving complexity of contemporary governance.