

The analysis of the effect of state paternalism on the private life of its members



Law

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Azam Bahmani

Islamic Azad University, Science and Research Branch, Tehran

ABSTRACT

This article seeks to investigate the conflicting effect of paternalistic attitudes of the State, especially the legal regulation of private life. Often, the State has undertaken certain roles through the issuance of rules and legal decisions in areas where Private Law and freedom of choice has dominated, such as private contracts. Due to the protectionist position of the State, legal regulation of private life has escalated. The Judiciary accurately answers questions posed daily in private orbit since it is taken into account as the only social actor capable of making its own decisions. Thus, this study attempts to examine the likely consequences of this state altruistic posture. It is worth noting that such a posture is authoritative in the meantime because individuals seem to be perpetually defenseless and decreases principles of Private Law. This, finally, could lead from a democratic system to an authoritarian one.

1. Introduction

Generally, the "state paternalism" is defined as the phenomenon in which the State plays the role of provider and guardian of its members who are considered weak and inappropriate to manage certain fields of their private life.

This manifestation of state power must be examined carefully as the member, who is considered perpetually defenseless and worthy of a state protection, now claims his autonomy of the will. Therefore, this can make a democratic system become authoritarian since one of the results of paternalism is the legal regulation of privacy. When the population accepts this state protection, it clearly relies on the State, especially on the judiciary, to find solution for the conflicts that could be decided in the private sphere.

A paternalistic relationship necessarily entails a hierarchical relationship, where the party, regarded more adept and qualified, protects a weak party like a father taking care of his child and watching his family. In addition, the will of the person being the target of protection is not taken into consideration since it is assumed in advance that he is incapable of making decisions, even if it is the only subject of his interest. It can be found in any kind of relationship, either in the workplace, in the family, and in the affective life. Therefore, it is possible to bring this idea of paternalism to the state orbit in which the State is in the position of protector and the other end (citizen) is in need of the specific protection. The crucial goal is to prevent prospective damages. Paternalism prevents damage in an individual or it provides her a benefit that he would not accomplish by herself.

2. How the State Paternalism Happens

Paternalism can embody itself in various ways, as the state paternalism, and the legal and judicial ones.

Paternalism should be regarded as genus and species as its act is likely to be demonstrated in different ways, not just through legal rules. Besides, we must regard judicial paternalism as the second species of the genus state paternalism. For judicial paternalism, also called "praetorian paternalism", the protection is provided by a judicial decision to a number of people under certain jurisdiction. Such protection is determined by the defenselessness of those people who are believed to be at a disadvantage in their everyday relationships. This kind of paternalism is prevalent in consumer and labor relationships.

To praetorian paternalism, the judge is regarded legitimate to decide in favor of the party believed to be weak. It usually happens without any legal basis, just by believing that in this way justice is being accomplished. A legal norm is subjected to a prior legislative process. However, despite being clearly protective, such previous data of norms are not accessible to the magistrate

at the time of the respective trial. Therefore, such decisions are based on the ideologies and beliefs of the judge. In such a situation, the judge tends to decide in favor of the one he regards most defenseless and deserving of protection. It usually is not in accordance with the legal system.

It is significant to contemplate on how the judicial paternalism, embodied by arbitrary decisions and the ideologies of the judge, is likely to be mean to society. It creates a false notion of justice and a scenario of legal doubt for the society it is supposed to protect. It is what we see when the State-Judge mitigates such principles, as the autonomy in contractual relations. Instead of looking for a contractual balance, it brings a lack of balance and anxiety.

These days, the means to accomplish an effective judgment has been examined much. It is regarded as the protection given by the judiciary in favor of the party who had his right broken by the other party. In this case, the idea of dealing with formalisms and rules is brought as a way to gain such effectiveness and finally justice. However, one must take into account that the suppression of formalities and particularly the suppression of rules should be investigated cautiously since they were created just as a way to gain justice.

Therefore, the proper process must be formally attended because the question cannot be left to a judge whose decisions are just in accordance with the interests of a small group which cause legal doubt for the society.

Besides, from the moment that the State, through the judiciary, begins to create standards for various specific cases submitted to it, or even starts executing public policies, there will be a clear violation of the principle of separation of powers. It should be noted that such functions are assigned to the Legislative and Executive respectively.

Thus, the production of standards apart, without appropriate legitimacy, describes the performance of a subjective and arbitrary act by the judiciary. It is a breaking of the law as the individual demonstrated herself through the standards produced by the Legislative power and the democratic State itself.

3. Critique on Paternalism

In paternalism, it is significant to discover the real need of acting in favor of a group considered defenseless in advance, and to find out what would be the target group of this state conduct.

As it can be deduced from the concept of paternalism, a rule of this nature is formulated according to an individual level and a violation of the individual freedom through limiting his interests. By the way, there is no opportunity to refuse this protective remedy.

On the contrary, with regard to judicial paternalism, is it legitimate a judge acknowledges the interest of a party simply because she is considered worthy of protection? In other words, is it legitimate to force citizens to make certain decisions or to undergo other decisions made by the government, under the pretext that such decision would be appropriate for her? In all these cases, she may be a person adept and free, and usually she disagrees with such kind of protection or does not make such a decision. This is related to the limits of state interference in a plainly private life. Of course, the legal rules, issued based on the legislative process, are enriched with imperative and forceful power, and show the will of the majority - without regard for individual desire or free will.

The forcefulness is not a feature of any kind of rule. The rules of a religious nature, such as forbidding the use of birth control methods or even considering marriage as a permanent institution are compulsory. But such rules must be obeyed by those who take part in such a group. However, those who disagree with the beliefs of a particular religion can just walk away from that group and therefore there is no need to notice such determinations. On the contrary, judicial decisions have the obligatory and forceful characteristics, and so must be observed and obeyed by all those involved in that jurisdictional provision.

Such caution and prudence does not exist in the relationship between individual and State. The State is a paternalistic entity, so the citizen already has a predetermined orientation for some of their choices. Of course, to presume a paternalistic stance the State is free from certain concerns which are regarded natural.

History shows that it may appear more beneficial for a State to take some paternalistic policies, since they prove less expensive, rather than consolidating the State as a welfare one. The welfare State takes certain responsibilities considering labor, social issues, economics and political affairs that put loads on the public coffers. In addition, by taking a paternalistic stance, whether through judicial decisions or even by legal standards, the State assigns to the society such expenditures and responsibilities. And it is accurately this scenario that shows its authoritarianism, as such practices, clearly altruistic, are set on society.

What is clearly advantageous can become harmful. The Labor laws are a good instance of this. The severity in benefit of the worker regarded defenseless, often prohibits the creation of new jobs or even the progress of a career. On the contrary, the more the judiciary meddles in private affairs and makes decisions for the citizen, the less the individuals will experience freedom. This situation will cause the citizen to be in a position of slavery and passivity before the State. Thus, it is significant to seriously think about the possible consequences resulting from a paternalistic policy.

6. Proposing a Legitimate Paternalism

Recently, the study of paternalism has become more pertinent in several States, especially Iran. To resolve questions about the legitimacy of paternalism, Martinelli takes several aspects of legal paternalism into account, and concludes that in a legitimate

paternalistic relationship, a party must be vulnerable. The vulnerability can show itself in several ways. It may be related to a lack of cognitive development, to inadequate information, coercion, fraud or some distinct characteristics of the person. In the last hypothesis, certain characteristics make the person weaker in certain relationships, such as women, the disabled and the elderly.

Therefore, to be regarded a legitimate paternalism, the vulnerability has to be real, i.e., due to the incapability of the individual to make her own decisions the State would be empowered to take certain actions. However, this vulnerability has to be assessed cautiously to not turn into a virtuous cycle and involve again the error of paternalism itself, being the target of criticism. Actually, an elderly person may have some limited mobility and hence be in need of some paternalistic protection, such as preferential banking service.

7. Conclusion

As mentioned before, the paternalistic policies promoted by the State may be adverse and of no use as it may lead to the removal of the very freedom of the individual.

Consequently, paternalism may be regarded as one aspect of authoritarianism, in which a person or an institution performs a power over a particular person or group under the disguise of a congenial act. Indeed, it may be aimed to achieve a different purpose.

Besides, by taking a paternalistic stance, whether through judicial decisions or even by legal standards, the State gives to society the expenses and duties that were naturally appointed to itself. Again the authoritarian bias of this practice is disclosed since some consequences are set on the society. In addition, such consequences were not set on the society at first.

The legal regulation of private life, i.e., the engagement of the judiciary in any kind of attempts in hope of getting a keen paternal protection from the State-Judge produces a scenario of legal doubt as well as a general displeasure since only one group would benefit from such decisions. It is actually possible to think that these clearly altruistic postures can increase popularity rates.

The major objective to be accomplished is to unite with the society. A paternalistic State is thought as a family father whose authority is not questioned. Therefore, the authority performed by the State should not be questioned through its government.

In fact, paternalistic practices show doubt by the State as to the power and capability of the individuals to make decisions and to be responsible by their own acts. In the final analysis, it shows a camouflaged authoritarianism.

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