

Private Law and State Paternalism: Too Much Legal Regulation of Private Life?

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Abstract. This article analyses the adverse effect of paternalistic attitudes adopted by the State, especially the legal regulation of private life. Often, the State has adopted certain positions, especially through the issuance of rules and legal decisions in areas where Private Law and freedom of choice has prevailed, such as private contracts. Due to a protectionist position adopted by the State, legal regulation of private life has increased. The Judiciary resolves questions that arise daily in private orbit precisely because it is considered as the only social actor able to implement its own decisions. In such a way, this study seeks to analyze the possible consequences of this state altruistic posture. It is interesting to note that such a posture is authoritative at the same time, since individuals are considered eternally vulnerable and minimizes principles of Private Law. This, ultimately, could lead from a democratic system to an authoritarian one.

1. Introduction

This study aims to analyze the phenomenon of judicial paternalism in its various facets, a practice that has gained importance in various legal systems today.

In general, the state paternalism can be understood as the phenomenon in which the State undertakes the role of provider and protector of its members. In various relations, its members are considered fragile and somehow unfit to act in the management of certain fields of their private life.

This manifestation of state power must be analyzed with caution since the individual, who is considered as a being eternally vulnerable and deserving of a state protection, now waives her autonomy of the will. This, ultimately, can lead a democratic system to become authoritarian. As one of the consequences of paternalism is the legal regulation of privacy. Accepting this state protection, apparently at no cost, the population relies on the State, especially on the judiciary, to resolve conflicts that could be decided in the private sphere.

Thus, this study will seek to analyze the possible consequences of such state position, apparently altruistic and, at the same time, regarded as authoritarian.

2. Understanding the Definition of Paternalism

To understand the word paternalism it is necessary to know its etymology.

The Latin word *pater* means father. Paternalism is closely linked to the idea of protection. The paternalistic relationship demands the existence of two poles, where one side is in a position of superiority and the other side is the one considered more fragile and receiving specific protection.

The understanding of the concept of paternalism is necessary to take into consideration that the upholder grants protection as a way of disability or deficiency compensation. In such situation it is taken for granted that the best is being done for the beneficiary.

Garcia characterizes paternalism from the lessons of Ruth Zimmerling:¹

There are four ideas on the teachings of Zimmerling that seem important to the theme of paternalism: the exercise of power is directed to obtain intentionally (I); behaviour of another (II); it is possible to exercise power through the exercise of influence (III); and the exercise of power implies responsibility on the part of those who exercise it, even when the power is exercised by means of exerting influence (IV). (Our translation)

Thus, a paternalistic relationship necessarily implies a hierarchical relationship, where the party, considered more capable and prepared, defers a protection to a weak party like a father protecting his child and guarding his family. Moreover, the will of the person who is the target of protection is not taken into account because it is conceived beforehand that she is unable to make decisions, even if it is the only subject of her interest.

It is noteworthy to see that paternalism can be seen in any kind of relationship, either in the workplace, in the family, in the affective life, requiring only that there is someone who feels able to protect one who she considers to be in a condition of need. It can occur even at the expense of the will of the protected person. Thus, it is possible to bring this idea of paternalism to the state orbit. In this case, the State is in the position of guarantor and the other end is worthy of the specific protection, i.e., the citizen. The main objective is the prevention of eventual damages.

Based on these parameters, paternalism can be conceptualized as the imposition of limits on the individual autonomy of a citizen considered the weakest part of the legal relationship, by one who stands in a position of guarantor. In the end, paternalism prevents damage in an individual or it affords her a benefit that she would not achieve alone.

¹ Garcia, M. A. (2005a) Justificación El Concepto y la del Paternalism. 2005a. Available at: <[Http://www.cervantesvirtual.com/servlet/SirveObras/34692842101236197543679/029113.pdf](http://www.cervantesvirtual.com/servlet/SirveObras/34692842101236197543679/029113.pdf)>. Access: 07 July, 2013, p. 269.

3. Brief History of State Interference with Private Life

The practice of state paternalism is recurrent in human history. Many States act paternalistically by means of having at its side much of the population, and hence to legitimate its government.

History shows that many societies go through various cycles accordingly to their wishes and needs. As a consequence, there will be greater or lesser state involvement in relationships clearly private.

The main characteristic of the Liberal State of the nineteenth century is the minimal intervention in relations between individuals, based on the theoretical defense of individual freedom. This happens in various fields, such as economics, politics, religion, and private property. The scope of liberal ideology was reconciliation of formal freedom and security, as these were the main foundations of private law at the time.

The idea of private autonomy was precisely based on these foundations - a legitimate space that would allow the manifestation of the will. It is externalized mainly through contracts in the relations among individuals. Farias and Rosendal note:²

With the advent of the Liberal State, the coexistence was marked by utter indifference. It started with the adoption of a liberal constitutionalism and the French Civil Code of 1804, which occurred almost simultaneously. The epidemic of cleavage between State and society spread along Europe and later in Brazil. The dichotomy between public and private is part of a context in which the Constitution was the fundamental law of the State, while the Civil Code reflected the fundamental law of society [...] In its 18th Century profile civil law had solid foundations in asset protection. The property and the contracts formed the pillars of a system dedicated to the recognition and preservation of assets. Fundamental rights were materialized with the free establishment of special relations. It reflected the gap between public and private, before an absent State - an inactive spectator of the market game, which only manifested itself, ultimately, to preserve the rules of the game (our translation).

The State had no fertile ground to act paternalistically in this historical context. There was no justification for limiting the freedom of the individual, even a writ of prevention could not be issued against any other party.

Moreover, liberalism consisted of an economic theory that had as one of its main objectives to promote the free market, which was the way the contracts assumed great importance. It generated in turn a minimum participation of the State in private affairs. However, over time, liberalism failed to sustain and ensure freedom as it was idealized, since this freedom was experienced only by the bourgeois class. At this time, the defense of the right to freedom, equality and prosperity was given only in formal field.

² Farias; Rosendal; (2012) Curso de direito civil. Contratos. Teoria Geral e Contratos em Espécies. Juspodivm Volume 4 (Issue 2), p. 31

It is why private autonomy became increasingly mitigated in the face of inhuman and savage capitalism that marked the era. Consequently, the State began to be called to act in these distinctly private relationships in order to ensure safety and public order as Farias and Rosenvald stated :³

In the first decades of the 20th century, the Liberal State showed signs of fatigue. The “invisible hand” of the market was not able to resolve the urgent social questions, once there were no institutions to do so. The perception that the legal system should act to mitigate inequalities and free individuals needs led to the emergence of the interventionist welfare State. The second generation social rights no longer corresponded to a position of abstention by the State. On the contrary, this accomplishment was carried through positive benefits that granted protecting rights and conditions for the enjoyment of freedom (our translation).

Thus, in the 20th century occurs a transition – from the Liberal State to the Welfare State. The spectrum of activity of the State before the individual widens, because it began acting positively and no more in a neglecting way.

In this sense, Bonavides viewed that⁴

The Welfare State is effectively a superimposed transformation, because it surpassed the former Liberal State. [...]

When the State, coerced by the pressure of the masses and by the impatient claims of the fourth power, ensures, inside or outside the constitutional State, labor rights, social security, education and intervenes in the economy as a distributor, settings salaries, manipulating the currency and regulating prices, it can be called a Welfare State. It also is considered a Welfare State when combats unemployment, protects the sick, give to the employee and government workers homeownership, controls the professions, buys the production and finances exports. Furthermore, a Welfare State grants credit, establishes supply committees, provides individual needs, faces down economic crises and puts all social classes in closer dependence on its economic, political and social power. In short, its influence extends to almost all areas which before belonged largely to the area of individual initiative; right now it can justly be called a Welfare State (our translation).

In this context, the protective policies promoted by the State developed with great intensity. Thus, private autonomy gives way to public autonomy. Therefore, we conclude that a Welfare State is revealed as being the antithesis of a Liberal State, since the ideologies of both are antagonistic and are based on opposing ideas.

The figure of the citizen-customer emerges as the individual begins to rely on the State to obtain personal benefits. It is inferred from the work of Oliveira and Andrade⁵ :

³ Ibidem, p. 31.

⁴ Bonavides, P. (2007). Do Estado liberal ao Estado social. Malheiros (Issue 7), p. 184.

The society of the post-First War, the mass society, to use an expression consecrated by the 20th century sociology, is divided into civil society and the State. [...].

It is no longer a "neutral" Liberal State, far from social conflicts, but a State which assumes the role of an agent that manages the social reality and seeks even to establish different forms of life, imposing "public" guidance to "good life." The State of Social Welfare [...] aims to ensure capitalism through a proposed welfare. It involves an artificial maintenance of free competition and free enterprise, as well as the compensation of social inequalities through the provision of state services and certainty of social rights.

[...]

The citizen of the times of the Liberal State is now seen as a client of the public administration that provides goods and services to her (our translation).

However, this monopolistic and paternalistic state posture is in crisis due to the lack of resources in complying with new social demands, considering that such expenses grew inversely to its own expected regular income.

The crisis of the Welfare State occurs as soon as the State takes on certain obligations and shall not satisfy them. Thus, given the difficulties faced by the Welfare State, it was necessary to create a new state model that could correct such distortions. Then comes the neoliberal ideology founded on new political and economic concepts aimed at strengthening capitalism. As seen, the history of the State and the society repeats cyclically, sometimes there is a demand for a minimum participation of the State, now ostensibly for a share of the state entity. Today, especially in Latin America, governments clearly choose paternalistic politics as a way to avoid the errors of the Welfare State and, at the same time, a form of seeking popular approval.

As we shall see in this paper, the adoption of paternalistic policies costs less if compared with the model of the Welfare State, and it also ensures, in a certain stent, popular support. Indeed, paternalistic policies have always been attractive to part of the population and, consequently, are used as a manner of manipulation by the State, leading often to an authoritarian State. Brazil has increasingly adopted such a stance, revealed mainly by various programs of the present government and numerous court decisions.

4. How the State Paternalism Occurs

Paternalism can be seen in various types of relationships. However, this study will turn its attention to the paternalism emanating from the State, whose target would be the citizens.

⁵ Oliveira C.; Andrade, M. (1998). Tutela jurisdiccional e estado democrático de direito: por uma compreensão constitucionalmente adequada do mandado de injunção. Del Rey, p. 40

Thus, the paternalism can manifest itself in different ways, as the state paternalism, itself, and the legal and judicial ones. For better understanding of this work, it is necessary to distinguish these different shapes of paternalism.

Paternalism should be considered as genus and species only for didactic purposes as a form of exemplification of the several aspects of the phenomenon on studying. The state paternalism can be seen as any action taken by the State in support of its individuals. Seen as vulnerable beings, the State establishes with the individuals a relationship in order to guarantee them protection against regarded evils. Thus, the state paternalism would therefore a genus of the institute under analysis, since its exercise may be manifested in various ways, not just through legal rules. In this context, the state paternalism, itself, emerges as species, as expounded by García⁶ :

In my opinion, state paternalism is considered any action carried out by an agency of the State. It will be considered a legal state paternalism only if the means for attaining its goal are legally recognized by the rule of law. Otherwise, other form of paternalism should be considered no-legal state paternalism. Here are some of them. First, the State provides economic incentives with paternalistic purposes.

Another example of this kind of paternalism is the implementation of the abandon of unhealthy lifestyles programs: Tobacco tax may be increased in order to complain with smoking cessation goals.

Thirdly, a set of facts points out that persuasion was the way used by the State to reach its purpose. For "persuasion" I do not mean "rational persuasion", but just to point out conditions where the State conceals relevant information or deceives the public. This includes a number of examples ranging from the more harmless, like the false radar traffic warning signs, to the most dangerous ones, such as the falsification of data regarding national economic indicators.

In Spain, for example, the public policy of preventing the use of drugs is not only based on criminal coercion. Other means of persuasion are widely used, such as advertising through mass media campaigns. These campaigns are conducted by advertising agencies, whose specialty is not to present the best arguments, but the most convincing ones. Moreover, these campaigns are not even focused rhetorically, not based on arguments, but on image and sound. They are led, ultimately, to generate a hostile response to drug use, a sort of conditioned reflex that says "NO" - which was the slogan of one of these campaigns (Our translation).

On the other hand, judicial paternalism is presented as the second species of this type of policy, considering that this state protection manifests itself through the legal rules issued by the State through the legislative process. To better understand this definition Sampaio Junior⁷ states that:

⁶ García, A.M. (2005b). El Concepto y la justificación del paternalismo. Available at: <<http://descargas.cervantesvirtual.com/servlet/SirveObras/doxa/46861618090253619754491/014591.pdf>>. Access: 07 jul. 2013, p. 458

⁷ Sampaio Junior, R. B. (2007). A Defesa do Consumidor e o Paternalismo Jurídico. Conpedi. Anais do XVI Congresso Nacional do Conpedi Volume 1, p. 4820.

The American legal doctrine understands the legal paternalism as one of the possible forms of state regulation. Alongside the legal adoption of redistributive criteria and behavior-regulation, both aimed at restricting collective benefits. Through a set of rules, paternalism would aim to satisfy the best interest of individuals. Sometimes it imposes or restricts some conducts. For example, in labor law and consumer law one can find a tangle of rules that may prevent certain behaviors or impose different conducts. The goal is the best interest of the worker or consumer.

Finally, we must consider judicial paternalism as the second species of the genus state paternalism.

For judicial paternalism, also known as “praetorian paternalism”, it is understood as the protection granted by a judicial decision to a portion of people under certain jurisdiction. Such protection is determined by the vulnerability of such portion of people, in the belief that they would always be at a disadvantage in several relationships developed in their everyday life. This kind of paternalism is very common in consumer and labor relationships. Borges⁸ observes :

Searching for a “praetorian paternalism” is a judge role – she has to double efforts to reach this goal. Firstly, the judge tries hard to consider “incompetent” one of the parties, since the paternalistic intervention would be justified. In order to reach this goal it is taken great effort in many decisions in order to amplify the concept of consumer, since under the latter situation the paternalistic policy would be justifiable. In such a way, the basic incompetence would be recognized for some acts (our translation).

Thus, there are several forms found by the State to interfere in private relationships, originally as a way to protect the weak party, which may end up leading, ultimately, to a distinctly authoritarian stance. The jurisdiction that handles private life is directly linked to paternalism adopted by Courts.

Through this phenomenon the State-Judge presents herself as the only competent authority to apply the law and resolve questions that arise daily in private orbit. It is precisely because the State-Judge is the only social actor able to implement her own decisions. In this case, the father figure would be exercised by the judge. The judge would lead the trial in favor of the weaker part, believing that the inequality of procedural relationship would be being reduced.

In this context, the judiciary assumes a fatherly role and not a legal one, therefore taking on all types of demands, as teaches Sampaio Junior⁹ :

⁸ Borges, L. G. M. (2010). A Relação Jurídica de Consumo sob o Prisma do Paternalismo jurídico. Available at:

<<http://www.mcampos.br/posgraduacao/mestrado/dissertacoes/2011/luizguilhermeborgesrelacaojuridicaconsumosoprismapaternalismo1905.pdf>>. Access: 10 jul 2013, p. 48.

⁹ Sampaio Junior, R. B. (2009). Da Liberdade ao Controle: os Riscos do Novo Direito Civil Brasileiro. Puc Minas Virtual, p. 18.

In modern times, the tendency to legal monism granted the State the responsibility for all output and application of the law. Therefore, the previous instruments of control and pacification in traditional societies disappeared. The old foundations on which sat the structure of the power of society collapsed. The figures endowed with authority, capable of mediating a conflict and morally capable to resolve it have lost progressively the support of the inherent authority. A popular saying goes: "go to the bishop and make a complaint". It demonstrates what Gilberto Freyre meant when he defined a bishop reputation: "an ecclesiastical authority with most prestige than a civilian one, in which was formed the spirit of the peninsular people". As may be seen, this saying is outdated.

The complaints today are made directly to a judge, according to a court system properly structured. As a consequence, the mediation within the society itself is unsuccessful. It consolidates the judiciary as an organ able to settle controversies, even on account of being the only one with power to carry out such decisions (our translation).

This kind of paternalism is revealed to be even more pernicious than the legal paternalism. The paternalistic legal rules are promulgated by the legislative power in accordance with the legislative due process, in agreement with the Federal Constitution. Otherwise, such rules may be declared unconstitutional. It is a requirement considered a will of the people.

As to praetorian paternalism, the judge, himself, is considered legitimate to decide in favor of the party that is deemed to be fragile. It often occurs without any legal basis, simply by believing that in this way justice is being achieved. A legal norm is subjected to a prior legislative process (study committees, analyses etc.). However, although clearly protective, such previous data of norms are not available to the magistrate at the time of the respective trial. Thus, such decisions are based on ideologies and beliefs of the judge. In such a situation, the judge inclines to decide in favor of the one he considers most vulnerable and deserving of protection. It often is not in accordance with the legal system.

Thus, it is important to reflect on how the judicial paternalism, manifested by arbitrary decisions and the ideologies of the judge, may be perverse to society. It brings with it the false notion of justice and as a consequence, creates a scenario of legal uncertainty for the society which 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 seeking a contractual balance, it brings a lack of balance and insecurity.

Theodoro Jr. states¹⁰:

A review of the contract by the courts on behalf of the ethical-social principles cannot be discretionary neither paternalistic. The judge, himself, cannot transform the fragile party into a superpower one, transmuting it into a dictator of the convention destination. This does not promote a rebalancing, but rather an imbalance in the opposite

¹⁰ Theodoro Jr. H.(2004). Direitos do Consumidor: a Busca de um Ponto de Equilíbrio entre as Garantias do Código de Defesa do Consumidor e os Princípios Gerais do Direito Civil e do Direito Processual Civil. Forense (Issue 4), p. 19.

direction. If the weakest part could be cumulated with a disproportionate judicial protection, the contractor who started stronger would be placed in an inferior instance. An error would be corrected oddly - an injustice with another injustice. Of course, it is inappropriate in regard to contract fairness.

Part of the population is attracted to this type of decision, believing that it could be beneficial in a particular case, as it has been to a neighbor, a friend or relative in another similar case. In this case, traditional principles of the Law, such as the autonomy in contracts, are disregarded by the judge to house one of the parties. Such protection is arbitrary and unfounded. It just demonstrates its paternalistic nature. These judges do not take into consideration the fact that protecting a specific party the whole society will bear the loss suffered by the defeated party. Thus, when a health insurance plan is ordered to cover a treatment not contracted by the user, the insurance company will seek a way to share the burden with the whole society. As an immediate solution the health plan will have to increase the cost of the health plan of the whole group and/or reduce the remuneration of its physicians. Either way, the whole society will bear the consequences resulting from an isolated decision that only benefited a small group.

Recently, the Court of Minas Gerais¹¹ cancelled a water service suspension. The water company had suspended the service due to non-payment. According to the Court decision, the default consumer had a social work since she took care of countless dogs in her home. It should be noted that if the plaintiff was decided to take care of more than 35 dogs at her residence, it was necessary that she had the minimum conditions to do so. But it did not occur, and it must be kept in mind that the plaintiff herself confessed she had failed to pay the bills on time.

This decision is clearly paternalistic and does not conform to the doctrines of the Contractual Law and the Law of Obligations. Furthermore, it will bring numerous consequences that ultimately harm the society itself. As a direct consequence, the concessionaire of the public service will seek a way to distribute its prejudice through its consumers, for example, by increasing its rate.

In contractual sphere, it is worth remembering the judgment rendered in the first instance in Rio de Janeiro.¹² The plaintiff pleaded compensation for moral and material loss due to the loss of 95% of the amount invested in a fund application. The request was granted on the grounds it was unacceptable that an investor could lose almost all the capital invested. It was not taken into account the level of training or clarification of the investor, but only the loss of an investment of risk.¹³

Examining this decision, it is possible to infer that the judge did not take into account the consequences of the economic order that his trial would cause, neither its harmful consequences that it could bring to the parties. Indeed, it was not imposed any responsibility on the prevailing party in the face of its operations. She freely opted for a risky investment, but did not bear the consequences of her choice and still was compensated for the damage she suffered. There is no doubt that the investment was

¹¹ *Agravo de Instrumento* (Interlocutory Appeal) n. 1.0287.12.002923-9/001, Mars, 14th, 2013.

¹² *Ação de Indenização* (Action for damages) n. 1999.001.141054-2 of the 33th Civil Court of Rio de Janeiro.

¹³ The Civil Court of Rio de Janeiro reversed judgment in June, 27th, 2007 (Apellate Review n. 0150007-36.1999.8.19.0001 (2007.001.05059). The final decision regarding this matter will be taken by a higher Court.

made based on her freedom of choice, and her responsibility was clearly rejected by the trial.

It is a clear violation of the freedom-responsibility binomial by the group that deserved the paternalistic protection. This binomial violation shows as a consequence, sharply and even arbitrary, a setting of uncertainty regarding the private relationships. This kind of decision, increasingly common in the Brazilian courts, promotes the idea of legal regulation of private life. Thus, as a direct effect it is possible to cite the mitigation of freedom of choice and, consequently, the release of any liability as a result of an unsuccessful choice. As an indirect effect, note the filing of numerous actions as a way of obtaining a non-legal and paternalistic protection. Every day thousands of claims are filed with the clear purpose of receiving paternal protection, totally divorced from the formalities and rules of the process and the Law.

Nowadays, much has been discussed about the means to achieve an effective judgment. It is understood broadly as the protection provided by the judiciary in favor of the party who had her right broken by the other party. In this scenario, the idea of overcoming formalisms and even rules is raised as a way to obtain such effectiveness and hence justice. However, one must take into consideration that the suppression of formalities and particularly the suppression of rules should be analyzed with extreme caution, due to the fact that they were created just as a way to achieve justice.

The due process must be formally observed, since the question cannot be left to a judge whose decisions just comply with the interests of a small group and creates legal uncertainty 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.

Therefore, the production of standards apart, without proper legitimacy, characterizes the performance of a subjective and arbitrary act by the judiciary. It is a violation, since the individual manifested herself through the standards produced by the Legislative power and the democratic State itself.

5. Critique on Paternalism

In relation to paternalism, it is important to find out the real need to act to the benefit of a group beforehand considered vulnerable, and what would be the target group of this state conduct.

As it may be inferred from the concept of paternalism, a rule of this nature is formulated based on an individual level, a breach of the individual freedom, by the limitation of her interests. By the way, the opportunity to refuse this protective remedy is not granted. On the other hand, with regard to judicial paternalism, is it legitimate a judge acknowledges the interest of a party simply because she is considered worthy of protection?

What is questioned is whether it is legitimate to compel citizens to make certain decisions or to undergo other decisions issued by the government, under the pretext that such decision would be good for her. In all these cases, she may be a person capable and free, and very often she does not agree with that kind of protection or would not make such a decision. Anyway, this topic is related to the limits of state interference in a distinctly private sphere. Indeed, the legal rules, issued in accordance with the

legislative process, are endowed with imperative and coercive power, and represent the will of the majority - without regard for individual desire or volition.

The compulsoriness is not a characteristic of any type of rule. The rules of a religious nature, such as prohibiting the use of contraceptives or even considering marriage as an indissoluble institution are mandatory. But such rules must be respected by those who participate in such a group. However, those who did not agree with the tenets of a particular religion can just walk away from that group and therefore does not need to observe such determinations. On the other hand, judicial decisions have the imperative and coercive characteristics, and so must be observed and adhered to by all those involved in that jurisdictional provision.

Such discretion does not exist in the relationship between individual and State. The State is a paternalistic entity, so the citizen has already a predetermined orientation for some of their choices. Indeed, to assume a paternalistic stance the State is free from certain burdens which are considered natural.

History reveals that for a State it may seem more advantageous to take some paternalistic policies, precisely because they prove less costly, rather than consolidating the State as a welfare one. The welfare State assumes certain responsibilities regarding labor, social issues, economics and political affairs that impose burden on the public coffers. Moreover, by adopting a paternalistic stance, whether through judicial decisions or even by legal standards, the State transfers to society such expenditures and responsibilities. And it is precisely this scenario that reveals its authoritarianism, since such practices, apparently altruistic, are imposed on society.

What is apparently beneficial can become counterproductive. The Labor laws exemplify this. The strictness in favor of the worker, who is always considered vulnerable, often prevents the creation of new jobs or even the evolution of a career. On the other hand, the more the judiciary interferes in private affairs and make decisions for the citizen, the individuals will experience less freedom. This situation will lead the citizen to a position of servitude and passivity before the State. Therefore, it is necessary to ponder over the possible consequences resulting from a paternalistic policy.

6. The Proposal of a Legitimate Paternalism

In recent times the study of paternalism has become more relevant in several States, including Brazil. In order to respond to questions about the legitimacy of paternalism, Martinelli ¹⁴, takes into consideration several aspects of legal paternalism, focusing his study in criminal law, and concludes that:

In a legitimate paternalistic relationship, in principle, a party must be vulnerable. The vulnerability can manifest itself in many ways. It may be related to a lack of cognitive development, to insufficient information, coercion, fraud or some peculiar characteristic of the person. In the last hypothesis, certain peculiarities make the person

¹⁴ Martinelli, J. P. O. (2010). Paternalismo Jurídico-Penal. Available at: <<http://www.teses.usp.br/teses/disponiveis/2/2136/tde-27012011-113618/pt-br.php>> Access: 01 jul. 2013, p. 263.

¹⁴ Id., p. 264.

more fragile in certain relationships, such as women, the disabled and the elderly (our translation).

Thus, according to the mentioned author, to be considered a legitimate paternalism, the vulnerability has to be real, i.e., due to the inability of the individual to make her own decisions the State would be authorized to take certain measures. However, this vulnerability has to be evaluated carefully to not turn into a vicious cycle and involve again the error of paternalism itself, being the target of criticism. Indeed, an elderly person may have some restricted mobility and thus be entitled to some paternalistic protection, such as preferential banking service.

On the other hand, a rule that prohibits a senior citizen to choose her civil marriage system (art. 1641 of the Civil Code of 2002) does not deserve praise. Surely, an elder cannot be prevented from choosing the course of her life simply based on her age. In these cases, other factors should be investigated, such as if the senility brings losses of psychic order that reduces her discernment.

On the legitimacy of legal paternalism Martinelli¹⁵ goes on:

Criminal law can act paternalistically in legal protection, provided certain requirements. First, the legal aspects must be fundamental to the preservation of individual autonomy. Second, the individual who suffers the restriction on her freedom cannot be autonomous. If there is autonomy, legitimacy is not lawful in criminal law to prevent its exercise. Third, legal protection must be able to guarantee the autonomy of the individual presently and in the future.

Finally, autonomy must be understood individually, considering the historical life of each one. The values of each person, regarding her acquired experiences, must be appraised and respected without imposing standards of behaviour. The human beings must be respected individually. Their way of life needs protection and guarantee of autonomy, since the rights of third parties are preserved. Criminal law never can intervene in the individual sphere if there is no a compelling reason to do so (our translation).

So, if in the Criminal Law the state intervention should be an *ultima ratio* intervention, in Private Law, where the autonomy of the will is one of its main pillars, the state intervention should be analyzed with even greater caution. Moreover, the judiciary is not authorized to assume the protection of a party, acting as one of her attorneys, a detriment to its own legal system. As a good example, we cite a recent decision of the Brazilian Superior Court of Justice that respected the *pacta sunt servanda* in a private business contract (RESP n. 936.741/GO, of 03-nov-2011). The facts of the case involved the sale of soybeans between private parties. The price of the soybeans raised and the buyer sued for the application of the “theory of unpredictability”. The Superior Court took the position that such theory is not applicable to such a private business contract. In other words, the buyer has to deal with the risk of not having the profits predicted at the time when the deal was closed. Therefore the scope of private law is strengthened by that decision against a State Paternalistic view. We have had

other decisions of the same court, in the field of electronic banking contracts that also applies private law in a less paternalistic approach even in cases involving consumers.¹⁶

7. Conclusion

As amply demonstrated in our work, the paternalistic policies promoted by the State may be harmful and worthless, since it may lead to the elimination of the very freedom of the individual.

As a result, paternalism may be seen as one facet of authoritarianism, in which a person or an institution exercises a power over a particular person or group under the guise of a gracious act. As a matter of fact, it may actually be intended to reach a different purpose.

Moreover, by adopting a paternalistic stance, whether through judicial decisions or even by legal standards, the State transfers to society expenses and responsibilities that were naturally assigned to itself. Again the authoritarian bias of this practice is revealed, because some consequences are imposed on the society. Moreover, such consequences were not imposed on the society at first.

The legal regulation of private life, i.e., the involvement of the judiciary in any kind of demand in hopes of getting an eager paternal protection from the State-Judge generates a scenario of legal uncertainty. It also generates a general dissatisfaction, since only one group would be the beneficiary of such decisions. Indeed, it is possible to realize that these apparently altruistic postures are capable of increasing popularity rates.

The main goal to be achieved is to ally with the society. A paternalistic State is understood as a family father, whose authority is not questioned. So, the authority exercised by the State should not be questioned through its government.

Therefore, as shown, in fact, paternalistic practices, demonstrate disbelief by the State as to the strength and capacity of the individuals to make choices and be responsible by their own acts. It reveals, in the final analysis, a disguised authoritarianism. Fortunately, as we demonstrated in the last item of this article, a counter movement is identified in decisions that respect more liberal principles of private law in contracts where the parties take risks inherent to their businesses.

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¹⁶ See ROHRMANN, Carlos A. and CAMPOS, M.A.M. A comparative analysis of legal electronic contracts in Brazil. *Int. J. Private Law*, Vol. 4, No. 2, 2011, p. 249.