

INTRODUCING, DEFINING AND BALANCING 'AUTONOMY V. PATERNALISM'

Willem H. van Boom* and Anthony Ogus**

1 Introducing the Theme

Autonomy is generally regarded as the fundamental right of individuals to shape their own future through voluntary action. In private law, it is associated with freedom of contract and the concept of *casum sentit dominus* (the loss lies where it falls). As such, it is opposed to legal paternalism, briefly defined as instances in which legislation or the courts interfere with the individual's decision-making process on the grounds that otherwise decisions will not be made in the individual's own best interests.

Traditionally, legislation protecting the estate of minors and mentally disabled individuals against the consequences of their actions is considered the prime example of paternalism.¹ However, such protection against the risks of succumbing to weakness and extortionary practices is nowadays ubiquitous in Western society. The level of protection differs from domain to domain. The prohibition of trading in humans as a commodity – ranging from slavery to prostitution and selling organs – seems to have little in common with restrictions on freedom of contract in marital and family issues or with gambling regulation, but the essential commonality is the substitution of voluntary individual decision-making with the decision that the legislator or court finds the most appropriate.

Obviously, there is no strict definition of paternalism. Indeed, the definitions used may provide an indication of the author's own views. If paternalism is defined in terms of governments assuming the power to determine what is best for citizens because the latter cannot be trusted to make decisions in their own best interests, it may be concluded that the author is somewhat sceptical of such state intervention.²

Some define paternalism as coercive intervention with the behaviour of individuals in order to prevent them from causing harm to themselves.³ Some authors focus on the grounds of justification for intervention as the defining element in paternalism: state intervention is paternalistic if it purports to increase the individual's welfare and happiness or to further his or her interests, needs and values.⁴

The authority for interfering is thought by some to lie in the mere coercive powers of the state,⁵ whereas others take a more sophisticated approach by arguing that paternalism may be founded on a hypothetical contract with the individual.⁶

2 Defining Paternalism

As far as terminology is concerned, different subcategorisations are used.⁷ 'Pure paternalism' is distinguished from 'impure paternalism', where the former is aimed

* Professor of Law at the Erasmus School of Law, Erasmus University Rotterdam.

** Professor of Fundamentals of Private Law at Erasmus University Rotterdam; Emeritus Professor of Law at the University of Manchester.

¹ E. Zamir, 'The Efficiency of Paternalism' (1998) 84 *Virginia L. Rev.* 238, n. 25.

² A. Ogus, *Costs and Cautionary Tales – Economic Insights for the Law* (2006) at 83.

³ E.G. Valdés, 'On Justifying Legal Paternalism' (1990) *Ratio Juris* 173 ff.

⁴ G. Dworkin, 'Paternalism' in R.A. Wasserstrom (ed.), *Morality and the Law* (1971) at 108. Cf. Zamir, above n. 1, at 236.

⁵ D. Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41 *Maryland L. Rev.* 563 at 572.

⁶ Ogus, above n. 2, at 234.

⁷ Further categories to be found in G. Dworkin, 'Moral Paternalism' (2005) 24 *Law and Philosophy* 305 ff.

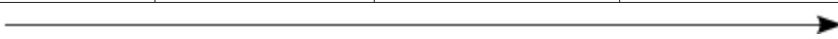
directly at the person that is assumed to be in need of protection whereas the latter calls for the intervention of a gatekeeper. ‘Impure paternalism’, therefore, involves not only the protectee but also a third party who owes a legal duty to ensure the protectee is separated from a source of danger.⁸ Here we can think of the bartender who is legally obliged not to sell alcohol to a person under a certain age or an already intoxicated customer.

Another categorisation relates to the distinction between ‘strong paternalism’ and ‘weak paternalism’. Weak paternalism refers to soft state intervention aimed at educating and informing and influencing the decision-making process, thus ‘nudging’ individuals towards what are perceived to be better outcomes. Law is often used as an instrument to this end – e.g., information duties and the duty to frame information in a certain fashion – and is considered an alternative to state information campaigns and so forth.

Strong paternalism by nature is more interventionist. Its mission is not merely to inform or even to persuade but to ensure that individual behaviour that leads to adverse consequences is altered or stopped if necessary. It focuses on changing preferences rather than informing individuals of the pros and cons of their preferences.⁹ As such, it is associated with mandatory law.¹⁰ It is *ius cogens* rather than *ius dispositivum*.¹¹

In the law of contracts and torts, weak paternalism seems to be on the increase. By nudging the protectee in a certain direction it is thought that the law helps to overcome bounded rationality and the influence of biases, heuristics and cravings.¹² Rather than forbidding certain activities, information rules or default rules are construed in such a way as to help the individual make the decision that maximises his or her welfare. By using powerful warning signs, the owner of dangerous premises can nudge potential victims into avoiding the premises. By using default contract law rules, a legislator can nudge contracting parties in a specific direction if, in practice, these rules are never the subject of contract negotiations.¹³

By way of example, consider the following sliding scale between autonomy and paternalism in private law:

Autonomy		Weak paternalism: nudging	Strong paternalism: intervention
			
<i>Casum sentit dominus</i> (D.50, 17, 23)	Duty to inform against risks	Duty to warn against risks	Prohibition of certain acts, duty to intervene in personal sphere of other person
<i>Contracts are binding</i>	Information duties aimed at optimal informed decision-making	Cooling-off periods	Mandatory standards for content or conclusion of contract

Related to paternalism, but perhaps conceptually best kept distinct from it, are measures that, though intended to enhance individual welfare, are also aimed at social welfare generally. This is because the decisions made by the individual have spillover effects for the rest of society, or externalities, as they are sometimes called.¹⁴ Thus, for example, the mandatory wearing of seat belts in vehicles or the (usually softy) measures taken to

⁸ Dworkin, above n. 4, at 111.

⁹ G. Dworkin, ‘Paternalism’ in E.N. Zalta (ed.), *Stanford Encyclopedia of Philosophy* (2002) at 1.

¹⁰ Ogus, above n. 2, at 85.

¹¹ B. Rudden, ‘Ius Cogens, Ius Dispositivum’ (1980) 11 *Cambrian Law Review* 87 at 87 ff.

¹² On the concept of nudging, see e.g. R.H. Thaler and C.R. Sunstein, *Nudge – Improving Decisions About Health, Wealth, and Happiness* (2008) at 1 ff. Note that here we witness a cultural gap between the United States and Europe. Had Thaler and Sunstein originated from Europe, they would probably not have chosen the catchword ‘nudging’, as it would surely be associated with the cheeky ‘nudge nudge, wink wink’ Monty Python sketch.

¹³ C.R. Sunstein and R.H. Thaler, ‘Libertarian Paternalism is Not an Oxymoron’ (2003) 70 *U. Chi. L. Rev.* 1159 ff.

¹⁴ A. Ogus, *Regulation: Legal Form and Economic Theory* (1994) at 35-38.

curtail tobacco smoking may appear to be principally concerned with reducing the risk of harm for the individual concerned but can be justified by reference to the public purse, because most health care costs are borne by the community as a whole.¹⁵ Individual autonomy may thus be curtailed for the benefit of the greater good.¹⁶

3 Cost and Benefits of Autonomy and Paternalism

Appraising the relative costs and benefits of autonomy and paternalism is fraught with difficulties, but establishing a framework for this purpose can at least facilitate good policy-making.¹⁷ Take, first of all, the costs of paternalism. If mandatory paternalism is introduced without regulating price, the private party burdened with executing the paternalistic intervention (e.g. gatekeepers) will surely consider charging the protectee for the paternalism.¹⁸ Such transferral of cost may cause the price of the product to rise and may ultimately cause the product to become unaffordable for individuals on lower incomes.¹⁹ This mechanism in itself does not make paternalism the equivalent of redistribution,²⁰ unless the cost increase is distributed equally among all those buying the product.

Some other important costs of paternalism should also be mentioned. As regards hard paternalism, there will be some individuals who will lose out by being deprived of the ability to make alternative choices, because their preferences are different from those assumed by the legal policy-makers. Quite apart from this, there is also the possibility that the latter will make errors in deciding what is best for the individuals concerned, perhaps because of undue political pressures.

Such costs may be difficult to quantify, but it is still easier than measuring the benefits of paternalist measures. What does society gain by protecting the patrimonial interests of the weak and feeble? What does society gain by protecting inexperienced investors against market forces by imposing a duty on banks to check customers' financial situation?

Surely, the benefits must be found in some fundamental value of human autonomy. By turning to paternalism, the individual is protected in order to avoid a more catastrophic fate from materialising. However, this does not preclude an effort towards a more objective measurement. How much is society willing to spend (or forego in terms of welfare increases) in order to protect specific groups of individuals?

On the other hand, paternalism also has a political cost. In modern times, it is not consistent with political correctness. Politicians, courts and policy-makers do not like their products to be branded as interventionist and meddlesome, and the 'p-word' is almost always used in a pejorative sense when used in public debates.²¹ In reality, however, 'contrary to the prevailing rhetoric of policymakers (and much of the legal literature), the legal systems of all western liberal democracies contain innumerable paternalistic rules and doctrines.'²²

Therefore, the extent to which a given society is willing to allow paternalist intervention tells us a great deal about the dominant political philosophy. Unsurprisingly, the legal debate on paternalism in the United States of America differs substantially from the debate in Europe,²³ perhaps because individual autonomy and freedom of decision-making have deeper cultural and constitutional roots in the former compared to the latter.

¹⁵ However, care must be taken in using this argument, because, if, for example, curtailing smoking prolongs life, this can add to rather than diminish the health care costs borne by others.

¹⁶ Cf. Kennedy, above n. 5, at 633.

¹⁷ Zamir, above n. 1, at 229 ff.; A. Ogus, 'The Paradoxes of Legal Paternalism and How to Resolve Them' (2010) 30 *Legal Studies* 61 ff.

¹⁸ Cf. Kennedy, above n. 5, at 625.

¹⁹ Ogus, above n. 2, at 31, 227-228 and 252.

²⁰ On the relationship between paternalism and (re)distributive justice, see Ogus, above n. 2, at 220.

²¹ Ogus, above n. 17, at 63.

²² Zamir, above n. 1, at 285.

²³ See e.g. the (US) academic debate between O. Bar-Gill and R.A. Epstein, *Consumer Contracts: Behavioral Economics vs. Neoclassical Economics* (2007) at 1 ff.

4 The Rotterdam Workshop

Participants at the Rotterdam Workshop were invited to relate their articles to the theme discussed above. In this section, we briefly introduce their contributions to this and the next issue of the *Erasmus Law Review*.²⁴

In ‘Mandatory Contract Law: Functions and Principles in Light of the Proposal for a Directive on Consumer Rights’, *Gerhard Wagner* provides an overview of the relationship between autonomy and paternalism in contract law. From a comparative perspective, he finds it easier to locate a tradition of mandatory law (*ius cogens*) within the civil law culture than within that of common law. From the perspective of economic theory, he finds that strong justifications for mandatory law can be found, but not so easily in the case of paternalism. In the second half of the article, he discusses different instances of mandatory rules, considering justifications for them, particularly in the light of the proposed Directive on Consumer Rights, by reference to both paternalist protection and standardisation.

By analysing ‘The Role of Information Deficiencies in Contract Enforcement’, *Ann-Sophie Vandenberghe* essentially looks into the issue whether and to what extent duties to inform in contract law amount to paternalism. From the outset, it is clearly a difficult task to draw the line between information deficiencies of which the law will take account and those which it will disregard. Vandenberghe sets out the economic framework for determining when it is appropriate to shift responsibility for information deficiencies from one contracting party to the other. Moreover, she finds that intervention is warranted in cases where information deficiencies interfere with a special relationship of trust between the contracting parties. It seems that, in these trust relationships, the mere duty to inform may transform into a duty to give advice and sometimes even to prevent unnecessary risk-taking. The economic justification for and limitation of such duties and other regulatory interventions in the contracting process is to be found, Vandenberghe argues, in consumers’ tendency to ‘sign without reading’.

In ‘Consumer Bankruptcy: A Third Way between Autonomy and Paternalism in Private Law’, *Nick Huls* links the friction between autonomy and paternalism to consumer bankruptcy, against the backdrop of the introduction of American ideas of consumer bankruptcy in European continental civil law systems. Huls analyses the history of ‘bankruptcy waves’ and reflects on the next regulatory wave that the recent credit crisis can be expected to push forward. He then goes on to argue that consumer bankruptcy in Europe has evolved into an overt battleground for the competing interests of creditors and debtors.

In ‘Regulating Consumer Demand in Insurance Markets’, *Daniel Schwarcz* concentrates on the problems of understanding consumer behaviour in relation to the choice of insurance contracts. Although he recognises that a limited understanding of the complexities involved in risk phenomena may justify interventionist measures by reference to paternalism, there is a need to develop a deeper understanding of the role that insurance plays in the emotional life of individuals. This topic has been neglected in the literature. Using examples, such as the demand for insurance against small risks and non-pecuniary losses or for excessively low deductibles, he speculates on how appropriately designed disclosure rules might succeed in discriminating between those individuals who make these choices as a result of cognitive errors and those who might have good emotional reasons for them.

In issue 3:2 of the *Erasmus Law Review*, we will continue our exploratory expedition at the crossroads between autonomy and paternalism.

In ‘Contracts and Capabilities: An Evolutionary Perspective on the Autonomy-Paternalism Debate’, *Simon Deakin*, adopts a broad evolutionary theoretical approach to contracts. Drawing on the writings of Gintis, which foster such an approach, he considers that paternalism is only one strand in a more complex web of justifications for selectivity and discrimination in the enforcement of contracts. He argues that

²⁴ Note that the contributions of Wagner, Vandenberghe, Huls and Schwarcz appear in this issue of the *Erasmus Law Review* (3:1) and that the contributions of Waddams, Deakin, Bar-Gill & Ferrari and Winkel will appear in the next issue (3:2).

capability theory provides a surer way of understanding interventionist measures than the autonomy-paternalism dichotomy, because, rather than concentrating exclusively on the individual and rationality, it takes account of the evolution of the market and its functions in promoting general welfare. In other words, it is necessary to understand the interaction between the dual systems of market and law in order to apply norms of societal coordination to contractual relationships. To illustrate this thesis, Deakin examines the history of labour law and the justifications for the regulation of employment contracts.

The article by *Stephen Waddams*, 'Autonomy and Paternalism from a Common Law Perspective: Setting Aside Disadvantageous Transactions', explores the roots and developments of various doctrines protecting disadvantaged parties in the English law of contract, with some reference to the Draft Common Frame of Reference. He successively reviews the relevant principles, including those governing consideration, specific performance, relief of forfeiture in mortgages, penalty clauses, undue influence and unconscionability, and then considers possible rationalisations for them. He concludes that although autonomy and paternalism have been important factors, other considerations have influenced the courts, particularly public policy. Examples of this include considerations relating to the unreasonable restraint of trade, the requirement of legitimate interest to enforce contracts and, finally, the doctrine of unjust enrichment.

In their contribution, entitled 'Informing Consumers About Themselves', *Oren Bar-Gill* and *Franco Ferrari* focus on mistakes typically made by consumers that are often invoked to justify paternalist interventions, both hard and soft. They argue that insufficient attention has so far been given to what they call 'use-pattern mistakes', i.e. mistakes that are made when consumers use products or services that are purchased. Such mistakes are often exploited by suppliers, leading to even greater losses. The authors discuss different methods of combating the problem and argue for better systems of mandatory disclosure, with suppliers being obliged to highlight information about aspects that are typically misperceived by consumers.

Finally, in 'Forms of Imposed Protection in Legal History, Especially in Roman Law', *Laurens Winkel* traces the origins of paternalism back to early Roman family law in the so-called Twelve Tables. Indeed, several forms of imposed protection can be found in legislation concerning gifts, in decrees of the Senate and in praetorian legal remedies. Moreover, Winkel shows that contract law was also a source of protective measures, in so far as good faith played a role in this area, and that the concept of 'mistake of law' gave birth to special rules of paternalism. Winkel then addresses the wider reception of Roman law, concluding that, although the oldest forms of imposed protection are to be found in family law, the broad idea of protection has, from the Middle Ages onwards, gradually spread to all parts of patrimonial law in continental legal systems.

Obviously, these fine contributions to the *Erasmus Law Review* do not provide a definitive answer to the 'autonomy v. paternalism' debate. What they do provide, however, is a thought-provoking addition to the debate and a deepened understanding of the considerations that underlie policy choices made in Europe and elsewhere in the private law domain and beyond. Finally, we would like to thank the contributors for the enjoyable discussions we had with them, the Erasmus School of Law research programme on Behavioural Approaches to Contract and Tort²⁵ for hosting the Rotterdam workshop and, last but not least, the *Erasmus Law Review* for providing a much-appreciated academic platform.

²⁵ See: <<http://www.behaviouralapproaches.eu>>.

