

SOCIAL PROTECTION THROUGH CONTRACT LAW? A CASE FOR AN INTERDISCIPLINARY APPROACH

Paper proposal for the “Dritte Tagung für WissenschaftlerInnen in der disziplinenübergreifenden REchtsforschung”, 17-18 Sep 2010, Berlin

*Péter CSERNE**

With the case of social protection in contract law as a starting point, the paper suggests a number of methodological points regarding the proper scope of the non-doctrinal analysis of legal issues.

By the end of the 20th century, the idea that the state has to provide help to its citizens in vulnerable situations has become an unquestioned part of European political and legal thought. In recent years, however, the regulation of contracts and the apparent tension between individual autonomy and legal paternalism have raised a renewed interest in legal academia. This has several reasons: practical ones related to the revision of the consumer *aquis* and the harmonization of contract law in the EU, as well as theoretical ones, related to philosophical and methodological problems involved in the justification of limits to freedom of contract. More specifically, the question has been raised whether the anti-paternalist stance of liberal political philosophy (based on individual autonomy) and of economic theory (based on “consumer sovereignty”) remains valid in light of the empirical evidence provided by psychological research that not only (at least one of) the contracting individuals but also the legislator/regulator is imperfectly rational or not fully informed. In other words, does empirical research provide a good reason to exchange the anti-paternalism inherent in modern contract law theory for “anti-anti-paternalism”, “libertarian paternalism” or another version of a limited and critical version of paternalism? How can these findings change the justifiability and the extent of the limits to freedom of contract in modern legal systems? And what can be learned from this case about interdisciplinarity in legal studies?

As far as the more general problem: the uses and abuses of inter- and multidisciplinary research in jurisprudence is concerned, the paper shall argue along the following lines. In the complex interrelations of empirical research, theoretical models and philosophical questions, multilateral translation and learning seems not only fruitful but necessary. Legal policy should be informed by empirical and theoretical research on human decision making and judgment. If we want to understand and/or criticize the rationale behind legal rules then what law regulates in this or that way has to be critically examined and evaluated from an outside perspective, i.e. from a not strictly legal point of view.

First, if law is meant to influence human behaviour, it has to rely on the results of empirical (behavioural and social) sciences. To the extent that legal scholars are

* research fellow, Tilburg Law and Economics Center (TILEC), Tilburg University, The Netherlands. E-mail: peter.cserne@uvt.nl

interested in the effects of law on human behaviour, empirical and theoretical research on human decision making and judgment is relevant for law. As I shall elaborate in the paper, in the past few decades, there has been systematic research on the psychology of individual judgment and decision making; both jurisprudence and legal policy should be informed by this research. For instance, it is impossible to answer from a purely legal perspective how the law should regulate the legally required degree of voluntariness of contract formation or the criteria for the judicial control of standard form contracts. Rather, it should rely on empirical research about (and a theory of) human behaviour.

With regard to the justification of paternalism, psychological insights show that the issue is an “uneasy case” – outright anti-paternalism should not be replaced by uncritical paternalism. Arguably, if rational autonomous choice is accepted as a normative ideal, especially for contracts, law should counterfactually slightly “overshoot” with its assumptions of rationality in order not to simply map and thus stabilize biases but to leave space for learning and development.

Although the discussion about the optimal form and degree of social protection in law seems to end up in an empirically oriented pragmatic balancing of interests (or costs and benefits), the idea to take empirical science as the foundation of law and legal scholarship involves both philosophical and practical difficulties.

Empirical research is not only inherently inconclusive but in itself it does not provide a normative standard for regulation either. This normative standard is the subject of a different kind of discussion. As for the pragmatic constraints, legal discourse has some autonomy that does not allow a direct codification of the results of empirical research. Whether these interdisciplinary insights are more relevant for legal policy or for legal scholarship is not evident. Much depends on the self-understanding (definition, purpose, methods) of legal scholarship itself. Ultimately, however, law is a practical enterprise of guiding human behaviour: here pragmatism and simple rules are needed, time constraints are strict, resources are limited and experimentation is exceptional. These factors, among others, set some limits to the usefulness of philosophy, economics, and psychology in jurisprudence and legal policy.