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Impoverished Autonomy by Aisling Ryan

PhD student, UCC School of Law

An essay response on the topic:

“Paternalism” in pensions – how far should the law go in regulating pensions saving behaviour.

Introduction

A pensions funding crisis is looming in Ireland. The law must take a more paternalistic approach to regulate pensions saving behaviour. Failure to impose laws to increase pension saving is financially unsustainable for the State and risks the welfare and well-being of individuals on retirement. A decent standard of living on retirement is not solely an individual concern but is a shared community goal. It is argued in this essay that there is justification for restricting individual autonomy for the collective good of a robust, sustainable pensions system.

This essay is divided into two parts. First, I will discuss the case for a paternalistic approach to regulating pensions saving behaviour, looking to the Netherlands as an inspirational model. Second, I will outline why a feminist approach to paternalistic pension laws is needed to take account of the gendered nature of the State.

PART ONE

Paternalism in pensions - why now?

Pensions funding crisis

The Irish State pension is funded on a ‘pay as you go’ (PAYG) basis. This means State pensions are paid for by current workers rather than from the saved contributions of current pensioners. There are currently five workers for every one pensioner in Ireland. By 2050 there will be just 2.3 workers for every pensioner.¹ In order to fund a PAYG pension system, there needs to be four workers for every pensioner. Therefore, the Irish State pension will not be sustainably funded by the workforce as the population ages. It is estimated that the State pension will “accumulate a potential deficit of up to €400 billion over the next 50 years.”²

There is also an issue in Ireland of adequacy. The State pension is intended to be supplemented with occupational pensions and private pensions.³ Despite Ireland’s disproportionately high number of occupational pension schemes, just over one third of private sector workers have a supplemental pension. This leaves individuals at risk of old-age poverty and has knock-on consequences for the State where population aging costs in areas such as healthcare and housing will further add to State liabilities.⁴

Libertarian paternalism

In recent years there has been a move towards ‘libertarian paternalism’ or ‘nudging’ as a mechanism for trying to ‘nudge’ individuals towards making better choices. Thaler and Sunstein developed this idea of libertarian paternalism; “[t]he claim is that, unlike traditional paternalism which rules out choices by compulsion or adds costs to the choices by coercion, nudges simply change the presentation of the choices in such a way that people were more likely to choose options that are best for them”.⁵ Thaler and Sunstein justify nudging on the basis that people do not make choices that are best for them, therefore the State should provide nudges towards better choices (such as saving for a pension). They describe nudging as the phenomenon of being steered towards a choice but add that no one is forced to act on the

¹ ‘A Roadmap for Pensions Reform 2018 -2023’, 6. Hereinafter “Roadmap”.

² Roadmap, 6.

³ Roadmap, 14.

⁴ Roadmap, 19.

⁵ ‘Paternalism’, Stanford Encyclopedia of Philosophy, (<https://plato.stanford.edu/entries/paternalism/>).

nudge.⁶ However, ‘libertarian paternalism’ is an oxymoron of sorts because there is no strong paternalistic element requiring the agent to choose the option they are being nudged towards. There is no mandatory element restricting the autonomy of individuals.

To date the Irish government has taken a libertarian paternalistic approach to pension saving behaviour in the second and third pillars. There have been nudges towards better pension saving behaviour through tax relief on pension contributions and the legal requirement for employers to provide access to a PRSA if there is no access to an occupational scheme. Nudging to date has failed to encourage 6 in 10 private sector employees to join occupational pension schemes.⁷ While people realise they should join a supplemental pension scheme or set up a personal retirement fund, nudging has been unsuccessful in overcoming inertia.⁸ Therefore it is time to rethink how the law approaches pension saving behaviour.

Traditional paternalism

‘Paternalism’ as understood by Dworkin is “*the interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced*”.⁹ Paternalism involves the following three elements:

1. limitation of a freedom;
2. that such limitation is imposed without consent of the agent; and
3. the limitation is imposed with the aim of improving the welfare of the agent.

The imposition of paternalistic laws requiring increased pension saving would indeed be a limitation of individual autonomy and intrusion on personal property rights. However, this essay argues that a paternalist approach is justified due to the pensions funding crisis outlined above. The aim of preventing old-age destitution and ensuring adequate funding for pensions justifies the enacting of paternalistic laws regulating pensions saving behaviour.

The Dutch model

Under the current Irish pensions system, people are too reliant on first pillar pension (both contributory and non-contributory). This essay looks to the Netherlands as an inspirational

⁶ Richard H Thaler and Cass R Sunstein, ‘Libertarian Paternalism’ (2003) 93 *The American Economic Review* 175.

⁷ Roadmap, 14.

⁸ Gordon L Clark and Janelle Knox-Hayes, ‘The “new” Paternalism, Consultation and Consent: Expectations of UK Participants in Defined Contribution and Self-Directed Retirement Savings Schemes’, *Pensions: An International Journal* Vol. 14, Iss 1 (Feb 2009) 58 – 74.

⁹ Gerald Dworkin, ‘PATERNALISM’ (1972) 56 *The Monist* 64.

model of spreading pension saving behaviour across multiple pillars. The 2019 Melbourne Mercer Global Pension Index ranks the Netherlands as the leading pensions system in the world.¹⁰ The Index uses three sub-indices to measure 37 pension systems: adequacy, sustainability and integrity.¹¹ The Dutch model spreads reliance across three pillars.

The three pillars of a multi-pillar pensions systems are:

- the first pillar: the old age State pension;
- the second pillar: occupational pension schemes; and
- the third pillar: individual pension products.

*“Multi-pillar pension systems seek to address a broad range of goals by combining public and private pensions”.*¹² The framework for the Roadmap is based on a multi-pillar approach.¹³

The impending pension funding crisis and the failure of individuals to engage in pensions saving across the three pillars justifies the imposition of more paternalistic laws to increase the number of people saving for retirement using the second and third pillars.

Mandatory second pillar contributions

A notably paternalistic characteristic of the Dutch model is that *“if the social partners decide to provide a pension scheme for their employees, the government can make a pension scheme mandatory for an entire sector or profession”*.¹⁴

Under the Dutch model, 91% of employees are members of a second pillar pension schemes. Further it is noted that; *“[t]he mandatory nature ensures industry-wide pension funds with sufficient economies of scale, enabling cost efficient management of the schemes”*.¹⁵

It is unclear when auto-enrolment will be implemented in Ireland but thought should be given to opt-out provisions. There is a case to be made for mandatory membership of occupational pension schemes akin to the Dutch model. This could be achieved through the establishment

¹⁰ Melbourne Mercer Global Pensions Index 2019 Report (<https://info.mercer.com/rs/521-DEV-513/images/MMGPI%202019%20Full%20Report.pdf>).

¹¹ *ibid*, 10.

¹² Sørensen, Billig, Lever, Menard and Settergren, ‘The interaction of pillars in multi-pillar pension systems: A comparison of Canada, Denmark, Netherlands and Sweden’, *International Social Security Review*, Vol. 69, 2/2016, 54.

¹³ Roadmap, 5.

¹⁴ Dutch Association of Industry-wide Pension Funds, ‘The Dutch Pensions System: an overview of the key aspects’. The term ‘social partners’ refers to representatives of both employers’ organisations and trade unions.

¹⁵ *ibid*, 14.

of industry specific master trusts to take account of the current trend of fixed-term contracts and tendency of younger workers to change employers more frequently.

In a further example of paternalistic pensions regulation, under the Dutch model lump sum commutation of second pillar pensions is not permitted. Employees must purchase an annuity on retirement (with exceptions in place for small annuities where administration costs outweigh the benefit of purchasing an annuity).¹⁶

State obligations and regulation

The imposition of paternalistic laws that mandate increased pension saving are an interference with the property rights of individuals. In taking a more paternalistic approach to pensions, there is an increased obligation on the State to ensure robust regulation to protect the funds of individuals. The justification for infringement of freedoms under Dworkin's model of paternalism is that it improves the welfare of the agent. If poor regulation leads to irreparable damage to pension fund proceeds, then the State will have forced its citizens to risk, or lose, a portion of their monthly earnings.

Pensions regulation requires long-term prudent fiscal planning rather than short-term populist policies. The suggestion that emerged during recent Government formation talks to allow first-time buyers to draw down €20,000 from personal pension pots for house deposits demonstrates a worrying lack of prudence or foresight from our law-makers.¹⁷ The Programme for Government also agrees to “[m]aintain the State Pension as the bedrock of the Irish pension system”.¹⁸ It is regrettable that there is not increased emphasis in the Programme for Government on the multi-pillar model and that the provisions relating to auto-enrolment are vague. The Programme for Government sets out that the introduction of auto-enrolment in Ireland will be gradual, “[t]aking account of the exceptional strain both employers and employees are now under”.¹⁹

The reversal of the decision to raise the State pension age to 67 Ireland will cost the State €220 million each year, increasing year on year with an aging population that is living longer.²⁰ The

¹⁶ *ibid*, 29.

¹⁷ Eoin Burke-Kennedy, ‘Raiding pension pots the latest harebrained solution to property crisis’ (*The Irish Times*) (<https://www.irishtimes.com/business/economy/raiding-pension-pots-the-latest-harebrained-solution-to-property-crisis-1.4274954>).

¹⁸ Programme for Government – Our Shared Future, 2020, 75.

¹⁹ *ibid*.

²⁰ State Pensions Party Comparison, (*thejournal.ie*) (<https://www.thejournal.ie/state-pensions-party-comparison-4972097-Jan2020/>).

decision may also increase liabilities of defined benefit schemes where the normal retirement age is linked to the State pension age. In taking a more paternalistic approach to pensions law to increase pension saving behaviour, our law-makers need to provide long-term clarity and certainty to employees and employers to facilitate pension planning across the three pillars.

PART TWO

The need for a feminist approach to paternalistic pension laws

Gender gap

Women are overrepresented in pension poverty figures.²¹ Across the EU, 20.2% of women over sixty-five are at risk of pensioner poverty compared with 14.6% of men.²² ERSI figures show that the pension gender gap in Ireland is 35%.²³ The average pension per week for Irish men is €433 compared to €280 for women.²⁴ This is not surprising when “[t]ypical male working patterns are still predominantly the reference point for the calculation of pension entitlements”.²⁵ In implementing more paternalistic laws to regulate pension saving behaviour, it is vital that the State takes a feminist approach to ensure equity in reformed pension saving structures.

It is argued that the case for libertarian paternalism prioritises the male experience.²⁶ Nudging has been criticised for failing to take account of gender and context.²⁷ It does not take account of the diversity of workforces:

*“In a world of individualised risk, responsibility and choice, some individuals are likely to be worse off in old age not because they make less rational decisions than others in similar situations, although this might sometimes be true, but because the context of their retirement planning is very different.”*²⁸

In Part One, I looked to the Dutch example of paternalism leading to increased pension saving through mandatory contributions to second pillar occupational pension schemes across

²¹ Liam Foster, Ruby Chau and Sam Yu, ‘The Impact of Defamilisation Measures on Gender and Pensions: A Comparison between the UK and Seven Other European Countries’ (2017) 25 *The Journal of Poverty and Social Justice*; Bristol 199.

²² *ibid.*

²³ Fiona Reddan, ‘Irish Women Retire on €153 a Week Less than Men – ESRI’ (*The Irish Times*) (<https://www.irishtimes.com/business/personal-finance/irish-women-retire-on-153-a-week-less-than-men-esri-1.4014072>).

²⁴ *ibid.*, 23.

²⁵ Foster, Chau and Yu (n 21), 202.

²⁶ Jessica Pykett, ‘The New Maternal State: The Gendered Politics of Governing through Behaviour Change’ (2012) 44 *Antipode* 217.

²⁷ Kendra Strauss, ‘Re-Engaging with Rationality in Economic Geography: Behavioural Approaches and the Importance of Context in Decision-Making’ (2008) 8 *Journal of Economic Geography* 137.

²⁸ *ibid.*, 151.

particular industries. While mandatory membership of occupational pension schemes would greatly increase pension saving behaviour, such an approach is a neoliberal prioritisation of market values over caring responsibilities. A National Women's Council of Ireland (NWCI) report notes that mandatory supplemental pensions could "*exacerbate rather than mitigate gender inequalities*".²⁹ In reimagining our pensions model, there needs to be an element of credit redistribution to ensure caring work is valued. The NWCI report notes that pension reform must build in compensation for the disproportionate length of time women spend caregiving and the wider inequality women experience in the labour market. The NWCI recommend further investment in the State pension to achieve pension justice. It would also be prudent to increase private pension saving simultaneously in order to enhance the sustainability and adequacy of Irish pensions.

The Dutch model as a feminist framework

Pensions are enablers of a community goal aimed at ensuring people do not end up destitute on retirement. The Netherlands is a leading example of solidarity and community when it comes to pensions. A key aim of the Dutch government is "*to create solidarity through compulsory participation*".³⁰ In taking a paternalistic approach to pension saving behaviour, a mandatory contribution towards the Dutch first pillar pension is withheld from the wages of employed people and deducted from the benefits of those in receipt of welfare.³¹ By deducting contributions from unemployment payments the Dutch government is ensuring all individuals are in some way contributing towards retirement, normalising pension saving behaviour across society.

This community-based approach towards relieving old age poverty is more fitting with an inclusive future for pensions saving behaviour. The Dutch model also accounts for the lived reality of many individuals who may not be making employment-based contributions to a pension due to caring responsibilities or difficulty in accessing employment. Another notable feature of the Dutch system is that there is no expectation that the first pillar pension is an adequate pension for retirement on its own. It is intended to be supplemented with second or third pillar pensions.

²⁹ NWCI, 'Pensions: What Women Want', report published May 2008 (https://www.nwci.ie/download/pdf/pensions_publication_final.pdf).

³⁰ 'The Dutch Association of Industry-wide Pension Funds, 'The Dutch Pensions System: an overview of the key aspects', 14.

³¹ EUROPA, 'Short introduction to the Pensions system in the Netherlands', (2013).

In the Netherlands industry-wide pension schemes are set up with equal trustee representation from employees and employers.³² As well as reducing administration costs, industry-wide schemes are more suitable for modern work practices whereby people change jobs more regularly than previous generations. Industry-wide schemes can reduce the number of small deferred pensions left behind in occupational pension schemes that can be difficult and expensive to administer. There are proposals for multi-employer pension structures in the Roadmap auto-enrolment proposals but further specification on these would be welcome. With increased regulation on the horizon following implementation of IORP II, it is expected that there will be migration of company schemes to master trusts which could be incorporated into future auto-enrolment mechanisms.

Considering the Dutch model outlined above, there is a strong case to be made for restricting opt-out provisions in Irish auto-enrolment schemes. It is the mandatory nature of contributions in the Netherlands that creates solidarity and social ‘buy-in’ to the system. It is problematic that under the proposals in the Roadmap, employees who earn less than €20,000 per year will not be automatically enrolled.³³ This will widen the pension poverty gap. In implementing paternalistic laws to regulate pension saving behaviour due regard must be had to the inequalities that exist in Irish society.

³² The Dutch Association of Industry-wide Pension Funds, ‘The Dutch Pensions System: an overview of the key aspects’, 11.

³³ Roadmap, 17.

Conclusion

In this essay I have outlined the case for a paternalistic and feminist approach to pensions. This essay acknowledges the objections to paternalism in limiting the freedom of the individual but outlines why such an approach is necessary due to over reliance on the first pillar State pension and low membership rate of private sector employees in occupational pension schemes.

The adequacy and sustainability of the Irish pensions system would be bolstered by increased saving across the three pillars. However, this essay also outlined the need for paternalistic laws to take account of the gendered nature of the State. One of the benefits of a feminist approach to paternalistic pension laws is that it takes account of the lived experience of wider society including atypical working practices and care obligations.

The law must go further in regulating pensions saving behaviour. Paternalistic laws, feminist values and dedication to long-term regulation over party politics are urgently required to achieve a sustainably funded pensions system and protect against pensioner poverty.