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“Debiasing Through Law”: Review of the Paper by Christine Jolls and Cass R. Sunstein

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RESUMO

O artigo de Cristine Jolls e Cass R. Sunstein “Debiasing through law” é uma tentativa de compreender os efeitos da racionalidade limitada no comportamento humano, focando em possíveis implicações para políticas públicas que podem ser tomadas para evitar ou corrigir certos efeitos. Nesse sentido, os autores (a) se baseiam em evidências empíricas acerca do por que indivíduos (i) cometem erros de julgamento e (ii) desviam do comportamento previsto pelos modelos de utilidade esperada. Depois, eles (b) analisam criticamente políticas já propostas para resolver tais questões, como o “desenviesamento pelo processo” para, então, apresentar sua própria categoria de “desenviesamento pelo direito material”, explicando em detalhes sua aplicação ao direito do consumidor, direito contratual e outros ramos.

Palavras-chave: Racionalidade Limitada, Desenviesar, Direito Material.

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ABSTRACT

The article from Cristine Jolls and Cass R. Sunstein, “Debiasing through law”, is an attempt to understand the effects of bounded rationality on human behaviour, focusing on possible policy implications that might be taken to avoid or to correct certain of its effects. In order to do so, the authors (a) draw on existing empirical evidence of why individuals might (i) commit judgement errors, and (ii) deviate from behaviour foreseen by the expected utility models; they then (b) critically analyse already proposed policies for addressing these issues, such as “debiasing through procedural law”; to then present their own category of “debiasing through substantive law”, explaining in greater details its application to consumers’ law, contract law, and others.

Key words: Bounded Rationality, Debiasing, Substantive Law.

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The article from Cristine Jolls and Cass R. Sunstein, “Debiasing through law” (2006), is an attempt to understand the effects of bounded rationality on human behaviour, focusing on possible policy implications that might be taken to avoid or to correct certain of its effects. In order to do so, the authors (a) draw on existing empirical evidence of why individuals might (i) commit judgement errors, and (ii) deviate from behaviour foreseen by the expected utility models; they then (b) critically analyse already proposed policies for addressing these issues, such as “debiasing through procedural law”; to then present their own category of “debiasing through substantive law”, explaining in greater details its application to consumers’ law, contract law, and others.

As a starting point, the article explains the need for debiasing as a response to bounded rationality, which is supposed to assume, according to behaviour studies quoted by the authors, either the form of an error of judgement, or of deviation from expected utility theory. As a judgement error, biases can be divided into availability bias, i.e., the act of wrongly inferring a probability based on examples that come up in your mind as a response to a question (heuristic); hindsight bias, i.e., the tendency to “attach excessively high probabilities to events that ended up occurring”; and optimism bias, i.e., the “tendency [...] to believe that their own probability of facing a bad outcome is lower than it actually is” (p. 3). As a departure from expected utility models, possible biases include loss aversion, with people weighing losses more heavily than gains, and its correlated effects: (a) “endowment effect”, which leads people to evaluate an entitlement based on whether they have been assigned initial ownership or not; and also (b) “framing effect”, through which people respond differently based on how the same option is presented.

Moving to propositions for debiasing, the article analysis, concerning judgement errors, different suggestions offered by the literature on consumer and cooperative law, as well as, concerning deviation from expected utility models, the use of property and agency rules as an instrument for debiasing.

In the area of judgement errors, the existing literature has addressed the problem either as an issue of a limited understanding capacity of consumers, which could be dealt by legal provisions demanding the provision of additional information, or as an issue of optimism bias – leading consumers to underestimate their personal risk – which could be addressed by stricter liability rules or even commercialization bans. The substantial law approach broadcasted by the authors would be, according to them, “a sort of middle ground between [...] the... prescription of providing more information, [...] and [...] the strategy of heightened products liability standards or outright bans” (p.5). Following their words, this approach proposes to create legal instruments that “restructure” a person’s “environment” in a way that alters the “process by which they perceive the world around them” (ibid).

In that sense, general legal propositions could make use of both the tendency of people to be influenced by availability bias, as well as framing, in a sort of giving the negative effect of biases a taste of their own medicine. For example, availability heuristics could be used for consumer protection through the disclosure of the negative outcomes from use of a particular product, rather than providing a general warning as it is usually the case with cigarettes packages. In this sense, the authors propose that “the law might require that the real life story of an accident or injury be printed in large type and displayed prominently” (p. 7). However, in order to be effective, this approach should be limited to certain products, and the law should also avoid overstating the severity of the displayed outcome, as a means not to overload consumers. Legal rules could make use of framing, as well, in order to determine firms to identify and use certain negative effects over other possible

positive consequences associated with alternative uses of their products. In general, the approach proposed by the authors of substantive law debiasing attempts to ensure that “consumers have a more accurate understanding of the risks associated with particular products”, avoiding more restrictive measures that limit consumers choice, such as banning products. In the area of corporate law, as a means to overcome optimism bias by the board of directors, this approach would, for instance, recommend the number of outside directors to be raised, instead of removing certain decisions from the inside directors, as it has been argued by the literature.

In the area of deviations from expected utility theory, the paper focuses its attention on the endowment effect, which is then addressed through property law, as well as agency law. From a property rules perspective, the authors analysed the liability rules of intellectual property law in the United States and the European Union. Drawing on studies that concluded that the willingness to accept falls to the level of willingness to accept under a liability rules system, they advocate the view that liability rules, as a form of “incomplete ownership” (p.11), might reduce biases caused by the endowment effect, as is the case in the EU. However, due to the current state of the literature, the authors affirm that it is still unclear whether a device that allows for a choice between property rules to liability rules would also lead to the same result, as right holders might not perceive the change as affecting their property right, thus maintaining willingness to accept at higher levels.

Another instrument to fight the endowment effect is agency law. According to empirical data provided by the authors, the excess of the willingness to accept usually occurs in situations in which persons act on their individual capacity, opposition to situations in which they act in a business agent context. Agents, according to the study, tend to personally have less at stake in the outcome of the transaction, allowing them to determine the price closer to the willingness to pay. This finding suggests, as a policy measure, that the endowment effect can be reduced if substantial law is to determine an agency structure to the relationship between firms and their managers.

The authors consider that policy makers have three basic choices when dealing with bounded rationality: insulating measures, debiasing through law, and omission. As a general premise, the paper advocates that debiasing through law, whether substantial or procedural, offers a better response to bounded rationality problems than “insulating” approaches, that is, those that explicitly limit the capacity of the parties to negotiate, or even prohibit certain products. This is particularly true in situations in which omission or insulating measures might lead to large welfare losses, to the restriction of one’s opportunity to make choices, and to the interference in the choice of those that did not suffer from the bias in the first place. However, some concerns should also be raised. Firstly, as debiasing measures are in itself an attempt to bias, they might influence those who did not previously show bounded rationality. Secondly, there is the risk of overshooting, i.e., the debiasing measure would be so strong as to cause biases in the opposite direction, transforming, for instance, risk aversion into risk seeking behaviour. Thirdly, governments might in fact be manipulating citizens according to its own objectives, or, following a public choice approach, according to the interests of powerful lobbying groups - furthermore, and related to that - policy makers themselves might be subjected to bias when designing or applying debiasing measures.

All in all, the paper advocates that issues of bounded rationality, such as optimism bias and the endowment effect, can be addressed by legal substantial rules. This approach seems to differ from policies that have already been taken in the direction of limiting the individual capacity of choice, in an attempt to prevent the biased behaviour of occurring, or of simply providing consumers with more information, without explicitly determining a hierarchy to the information to be displayed in a

product. In the opinion of the authors, the positive results of legal substantial debiasing would outweigh possible negative effects, such as overshooting.

In my opinion, the issue sheds light on economic concepts that are oversimplified by standard approaches, such as the issue of individual autonomy and rational choice. In addition, the paper draws on different attempts by others to understand the economic problems of cognition biases and their related policy measures, only as to develop its own critics to these approaches and to develop its own perspective of the matter, i.e., the debiasing through substantial law. Moreover, the ideas of the paper could arguably be applied to other areas of law, other than domestic consumer's and corporate law. For instance, in the area of international trade law, in order for trade restrictive measures to be justified under article XX of the GATT, they have to be proven to be the least trade restrictive among alternatives reasonably available to the country. In that sense, labelling of products are preferred to trade bans, in order to preserve some level of competitiveness between products, leaving the final decision to consumers. Economically, labelling is usually justified under the concept of externality, but the findings of behaviour law on cognitive bias and debiasing could provide some interesting insights to the discussion.

1. Referências

Jolls, C., & Sunstein, C. R. (2006). Debiasing through Law. *The Journal of Legal Studies*, 35(1), pp. 199-242.