



The Montevideo Roadmap 2018-2030: Promoting the need for Legal Intervention to Tackle Non-Communicable Diseases?

by Callum Ross

Abstract

The recent declarations made by the World Health Organisation in the Montevideo Roadmap 2018-2030 suggest a reinvigorated willingness to explore how law can be used as a tool to combat the severe risk that non-communicable diseases pose to society. It will be argued throughout this note that the World Health Organisation are now encouraging governments to utilise legal instruments to tackle non-communicable diseases, which is the right approach to take. The issues of free personal choice and the 'nanny state' argument will be examined in relation to the question of whether governments should implement stronger legal interventions to prevent the harm of non-communicable diseases.

I. Introduction

This note submits that governments are obliged to combat non-communicable diseases ('NCDs'), despite the potential impact upon individual choice. This is submitted in light of the recently published Montevideo Roadmap 2018-2030, where the World Health Organisation ('WHO') acknowledges the need for governments to devote more effort to considering the role of law in NCD prevention.¹

It will also be argued that governments must adopt prevention strategies within the limits of trade law frameworks. By increasing scrutiny on the balancing act between legal governance and trade law frameworks, it is contended that NCD prevention strategies will be more successful, because there will be less opportunity for manufacturers to undermine policies.

II. The Obligation to Tackle NCDs

NCDs pose a serious risk to society, and as protectors of population health, governments are responsible for safeguarding society from such diseases.² This supports the submission that governments must take a leading role in tackling NCDs, despite potential restrictions on individual choice, because success requires an efficient multi-sectoral response.³

a. Creating conditions for Healthy Choices

In the Montevideo Roadmap, the WHO have recognised that nations must aim to "enhance policy and legal expertise to develop NCDs responses".⁴ On this basis, it is submitted that stronger legal interventions by governments are now justified to protect the interests of society, even if these interventions may limit individual choice. There are various considerations that support this contention.

¹ WHO, Montevideo Roadmap 2018-2030 on NCDs as a Sustainable Development Priority (WHO, October 2017), 7. <http://www.who.int/conferences/global-ncd-conference/Roadmap.pdf>

² WHO, Global Action Plan for the Prevention and Control of NCDs 2013-2020 (WHO, May 2013).

³ Montevideo (n 1) 1.

⁴ *ibid*, 7.

Firstly, stronger legal instruments must be used effectively by governments to promote healthy choices. Garde proposes that a “multi-sectoral response – or a ‘Health in All’, horizontal policy approach” is required to tackle NCDs effectively.⁵ Schneider, Gillespie and Thow agree with this, stating that to avoid an “excessively vertical focus and a limited ‘emergency’ mindset”, the multi-sectoral response suggested by Garde is necessary to effectively utilise legal interventions.⁶ Various legal tools have already been suggested as effective, such as Minimum Unit Pricing (‘MUP’) on alcohol. MUP has been shown to help reduce the consumption of alcohol and alcohol-related deaths.⁷ However, MUP is rarely utilised as part of multi-sectoral strategies despite strong evidence clarifying its effectiveness. This furthers the contention that stronger legal interventions such as MUP need to be utilised by governments to protect society from NCDs.

Furthermore, it must be recognised that law can change behaviour and impact positively upon individuals’ lives. This goes to the heart of whether a government should implement legislation that limits individual choice. Buchanan argues that “public health ethics is founded on a societal responsibility to protect and promote the health of the population as a whole”⁸. Clearly, if law can be utilised to change the behaviour of individuals to make healthier choices, then this is a compelling argument for governments to utilise stronger legal interventions.

Tying these arguments together, it must be highlighted that adopting legal measures to tackle NCDs is in the public interest. Here, it is necessary to differentiate between the public good, and the good of the individual. Where public health is concerned, to correctly “emphasise health as a political priority”, it is contended that the public good should be prioritised above individual concerns.⁹ Therefore, despite potential limitations on individual choice caused by public health legislation, it is argued that a “population-based perspective” entitles governments to utilise stronger legal interventions to tackle NCDs, providing legislation is justified in the public interest.¹⁰

b. The Obligation to Tackle versus Trade Law Frameworks

Although it is submitted that governments have an obligation to use stronger legal intervention to prevent NCDs, it is also contended that governments must adopt NCD laws within the constraints of trade law frameworks. At first glance this may appear like a severe handicap placed upon governments in the effective tackling of NCDs. However, it is argued that strong legal interventions can still be adopted. The Montevideo Roadmap highlights that “private sector” parties will attempt to “negatively influence” any legislation which impedes their profits, so governments should press ahead with legislation for the benefit of public health, without being put off by industry pressure.¹¹

For example, MUP is considered a strong legal intervention in NCD prevention which is ethically and legally justified. Justification stems from the fact that MUP is a “highly targeted measure” aimed at specifically reducing harmful drinking.¹² This measure is ethically justifiable because MUP restricts the choice to consume harmful amounts of alcohol, thus helping to restrict an action that is “pervasively harmful to the populace”.¹³ Furthermore, MUP is legally justifiable in light of the *Scotch*

⁵ Amandine Garde, ‘The “Obesity Risk”: For an Effective Use of Law to Prevent Non-Communicable Diseases’ (2017) 8 *European Journal of Risk Regulation* 77, 79.

⁶ Carmen Schneider, James Gillespie and Anne Thow, ‘Generating Sustained Political Priority for Non-Communicable Diseases: Towards a Suitable Governance Model’ (2017) 8 *Global Policy* 364, 365.

⁷ Tim Stockwell *et al*, ‘The Raising of Minimum Alcohol Prices in Saskatchewan, Canada: Impacts on Consumption and Implications for Public Health’ (2012) 102 *American Journal of Public Health* 103, 107, Jinhui Zhao *et al*, ‘The Relationship Between Minimum Alcohol Prices, Outlet Densities and Alcohol-Attributable Deaths in British Columbia, 2002-09’ (2013) 108 *Addiction* 1059, 1064.

⁸ David Buchanan, ‘Autonomy, Paternalism, and Justice: Ethical Priorities in Public Health’ (2008) 98(1) *American Journal of Public Health* 15, 15.

⁹ Montevideo (n 1) 3.

¹⁰ Lawrence Gostin and Kieran Gostin, ‘A Broader Liberty: J.S. Mill, Paternalism and the Public’s Health’ (2009) 123 *Public Health* 214, 217.

¹¹ Montevideo (n 1) 3.

¹² Public Health England, ‘The Public Health Burden of Alcohol and the Effectiveness and Cost-Effectiveness of Alcohol Control Policies: An Evidence Review’ (Public Health England 2016) 7.

¹³ Gostin and Gostin (n 10) 220.

Whisky Association v Lord Advocate ruling.¹⁴ Therefore, with the “Government’s responsibility...[being] to the collective, as well as the individual”, a strong legal intervention such as MUP is justified providing the impact on individual choice is “reasonable compared with the benefits” of the restriction, which includes the reduction in alcohol-related deaths demonstrated by the evidence.¹⁵

There are further arguments as to why governments must intervene in the prevention of NCDs, despite the impact upon freedom of choice. Firstly, consumers are bombarded by manufacturer advertising, which can mean their choice is heavily influenced and not always 100% free.¹⁶ Therefore, it is submitted that legal intervention by governments is merely an attempt to allow individuals the opportunity to make healthy choices, “given the potential for manipulation” by manufacturer tactics.¹⁷

Secondly, anti-paternalists will point to the importance of autonomy to defend individual freedom from perceived paternalist legislation. However, autonomy is only useful if individuals have the requisite health to utilise it. By promoting health, autonomy increases, as people are better able to exercise their choices. Therefore, legal intervention results in “greater liberty” for society.¹⁸

The Montevideo Roadmap suggests that greater consideration needs to be given to legal intervention, and as this section argues, stronger legal interventions can be adopted within the constraints of trade law, and are demonstrated to be justified within the collective interest. With the backing of the WHO, such interventions should now be considered as part of a multi-sectoral strategy for NCD prevention by governments.

c. The Ineffective ‘Nanny State’ argument

This section will focus upon deconstructing the ethical criticisms waged against governments utilising strong legal interventions for NCD prevention. The most common criticism aimed at governments using legal intervention to promote health is the ‘nanny state’ argument. Wiley labels this phrase “a powerful framing device. It uses evocative language to bring to mind negative associations”.¹⁹ The phrase implicitly suggests that governments who use paternalistic legislation are attempting to control us. This is not the case. Governments are entitled to limit individual choice for the public good, providing the “burden on any individual [is]...reasonable compared with the benefits”.²⁰

Mill’s harm principle is often cited as the central test for whether legislation impacts upon freedom of choice.²¹ However, in agreement with Gostin and Gostin, this focus upon the individual is “unsatisfactory” because of the current “age of myriad risk that individuals and societies face”²². Therefore, it is submitted that Mill’s harm principle is an ineffective argument under the ‘nanny state’ slur. Simply put, no matter how individualistic a member of society is, if they make a decision that renders them injured, this injury is not simply borne by the individual, it also impacts the state, due to the individual’s dependency upon healthcare.²³ This rejection of the harm principle furthers the contention that NCD prevention legislation restricting individuals’ choice is necessary, providing it is justified.

¹⁴ [2017] UKSC 76. <http://www.bailii.org/uk/cases/UKSC/2017/76.html>

¹⁵ Gostin and Gostin (n 10) 217, Zhao *et al* (n 7) 1064.

¹⁶ Michael Rothschild, ‘Carrots, Sticks, and Promises: A Conceptual Framework for the Management of Public Health and Social Issue Behaviours’ (1999) 63(4) *Journal of Marketing* 24, 29.

¹⁷ Bryan Thomas and Lawrence Gostin, ‘Tackling the Global NCD Crisis: Innovations in Law and Governance’ (2013) 41 *The Journal of Law, Medicine & Ethics* 16, 20.

¹⁸ Gostin and Gostin (n 10) 217.

¹⁹ Lindsay Wiley, Micah Berman and Doug Blanke, ‘Who’s Your Nanny? Choice, Paternalism and Public Health in the Age of Personal Responsibility’ (2013) 41(1) *Journal of Law, Medicine and Ethics* 88, 90.

²⁰ Gostin and Gostin (n 10) 215.

²¹ John Stuart Mill, ‘On Liberty’ in J Gray and G Smith (eds), *On Liberty in Focus* (Routledge 1991) 72-107.

²² Gostin and Gostin (n 10) 215.

²³ *ibid*, 216.

This approach has been supported in case law. In *Jacobson v. Massachusetts*, it was recognised that people are “subjected to all kinds of restraints” to maintain public health.²⁴ Further, in *City of Little Rock v Smith*, it was held that “private rights...must yield in the interest of the public security”.²⁵ Clearly, providing the benefits of limiting choice outweigh the detriments of limitation, then governments have an obligation to combat NCDs despite restriction on individual choice. Arguably this underpins the declaration at Montevideo to “explore the relationship between NCDs and the law”.²⁶

There are two further arguments that highlight the inadequacy of the term ‘nanny state’. Firstly, Merry highlights that poorer families usually buy cheaper - and thus healthier - food.²⁷ Here, Merry demonstrates how lower socioeconomic classes are pressed into making unhealthy choices because of financial hardship. Therefore, it is submitted that due to the “potential for manipulation” by manufacturers, it is socially just to use stronger legal interventions to improve the health outcomes of those who are disempowered.²⁸ Taking this further still, it is suggested that this legislative approach is not paternalistic at all, because it merely allows for informed choices by individuals, as opposed to limiting their actual choice.

Secondly, while the ‘nanny state’ idea suggests the importance of educating children on healthy choices, it misses the point that both education and protection of populations are needed in tandem to create a truly sustainable society. Thus, following the ‘nanny state’ argument would mean that governments would fail to deliver on the truly necessary actions to address the NCD crisis, which would mean a failure to discharge their responsibilities to the population. Thus, the ‘nanny state’ argument is somewhat irresponsible.

III. Conclusion

In conclusion, it has been submitted that there is an obligation on governments to utilise stronger legal interventions to tackle NCDs, even if this limits individuals’ choices. It has been demonstrated that there is a need for multi-sectoral responses to NCD issues, to ensure creation of cohesive strategies that cannot be undermined. In considering the recent Montevideo Roadmap, there appears for the first time a real willingness by the WHO to engage with strong legal interventions within the public health discourse, to attempt to prevent NCDs.

Finally, the ethical criticisms of legal intervention for NCD prevention have been addressed, with the ‘nanny state’ defence ultimately being rejected. It has been argued that the individual cannot come above society, simply because of a self-righteous notion of entitlement to autonomy, because even “the independent individualist, helmetless and free on the open road, becomes the most dependent of individuals in the spinal injury ward”.²⁹ Therefore, it is submitted that governments have an obligation to use stronger legal interventions to tackle NCDs, despite the potential restriction to individual choice.

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²⁴ (1905) 197 U.S. 11. <https://supreme.justia.com/cases/federal/us/197/11/>

²⁵ 163 S.W.2d 705 (Ark. 1942). <https://www.courtlistener.com/opinion/3267670/city-of-little-rock-v-smith/>

²⁶ Montevideo (n 1) 7.

²⁷ Michael Merry, ‘Paternalism, Obesity, and Tolerable Levels of Risk’ (2012) 20(1) Democracy and Education 1, 5.

²⁸ Thomas and Gostin (n 17) 20.

²⁹ Gostin and Gostin (n 10) 216.