

## THE JUSTIFICATION OF STATE INTERVENTION IN DISINCENTIVE TAXES UNDER THE “LENS” OF PATERNALISM

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### **Abstract**

Tax law has long played an important role as a useful tool not only for obtaining funding resources for public affairs, but also for guiding taxpayers' behaviours on relevant issues, such as the protection of collective health. One of the classic examples is that of taxes on foods considered harmful to human health (the so-called junk food) and today used by many national systems to discourage their consumption. In these cases, it is necessary and useful to understand whether this attitude of the State, which can in practice represent a real interference in the individual sphere, can be framed within the scope of so-called paternalistic interventions, that is, in those acts of extreme politics which, while tending - with "paternal" solicitude - to the progress and well-being of the governed, does not consider them capable of pursuing such goals autonomously. This paper aims to analyse these tax strategies in consideration of the major theories on the subject, in order to understand whether they can be legally considered legitimate in the face of the autonomy and freedom of private individuals to engage in even "self-harming" behaviours (eating, for example, unhealthy food). From this perspective, the work also carries out an evaluation of the concept of health, trying to understand whether it can be qualified (as already happens for the environment) as a common good that everyone is required to protect without engaging in egoistic behaviours that, due to this collective dimension, can produce harmful effects for the entire community.

**Keywords:** *Eating habits, obesity, fiscal instruments, paternalism, health, common good*

### **1. Introduction\***

In recent years, a heated debate has developed regarding the regulatory intervention of the State in the food sector, particularly when such intervention takes the form of taxation aimed at discouraging the consumption of products considered harmful to health. Although such measures do not explicitly prohibit the consumption of certain goods, they can nonetheless be perceived as a manifestation of state paternalism, that is, a form of interference by public institutions in the realm of individual autonomy.

In this context, reference is often made to the concept of the “nanny state”, a metaphor used to describe the attitude of a public authority that is so concerned with citizens’ well-being that it seeks to protect them from their own potentially harmful decisions. Although such intervention may be well-intentioned, it raises questions of both moral and legal nature, placing at the heart of the debate the tension between individual liberty and the State’s duty to protect public health.

### **2. Paternalism: concept and philosophical implications**

To fully understand this debate, it is necessary to clarify what is meant by paternalism. In political philosophy, paternalism refers to the attitude of the State or other authoritative entities that, in order to protect an individual from themselves, limit their personal freedom—even against their will.

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\* This paper is the result of research carried out within the research project: Innovation, Digitalisation and Sustainability for the Diffused Economy in Central Italy - Vitality - CUP: C43C22000380007 - code: ECS00000041.

This type of interference assumes that the public authority knows better than the individual what is good for them.

The philosopher Immanuel Kant (Kant, On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice, 1793) harshly criticized this model, defining the paternalistic state “*a government established on the principle of benevolence toward the people like that of a father toward his children - that is, a paternalistic government (imperium paternale), in which the subjects, like minor children who cannot distinguish between what is truly useful or harmful to them, are constrained to behave only passively, so as to wait only upon the judgement of the head of state as to how they should be happy and, as for his also willing their happiness, only upon his kindness – is the greatest despotism thinkable (a constitution that abrogates all the freedom of the subjects, who in that case have no rights at all)*”.

In other words, according to Kant, (Kant, 1784) this way of governing violates the fundamental principle of human dignity<sup>1</sup>, which is based on the rationality and autonomy of each person. In this perspective, paternalism stands in direct opposition to liberalism, which is one of the main political-philosophical doctrines of the modern age.

Liberalism can be defined as a school of thought that attributes paramount value to individual freedom, understood not only as the absence of coercion but also as the ability of the subject to determine themselves and make decisions based on their own judgment. This concept of freedom is closely linked to the recognition of a series of individual rights that must be guaranteed by the State, which, in the liberal view, is conceived as a “necessary evil”: useful to ensure order and justice, but to be limited as much as possible.

In this sense, liberalism promotes a vision of the human being as a rational individual, capable of understanding and pursuing their own good. Any form of interference by public authority in private choices is therefore viewed with suspicion, unless justified by the need to protect the rights of others. It is the famous statement by John Stuart Mill that guides this vision: “*the only purpose for which power can be rightfully exercised over any member of a civilized community, against their will, is to prevent harm to others*”. (Mill, 1991)

Although modern societies are founded on liberal-democratic principles, there are numerous examples of rules and measures that have clear paternalistic connotations. Consider, for example, laws that mandate the use of helmets for motorcyclists or seatbelts for drivers: these measures do not directly protect others but are designed to safeguard the life and physical integrity of those required to comply.

Similarly, the obligation to adopt safety measures in workplaces or during sports activities follows the same logic of risk prevention, even in the absence of immediate danger to third parties. In these cases, the legislator acts with a clear intent of beneficence, interfering with individual freedom in order to promote a good considered superior: the health and safety of the person.

### **3. Taxation and paternalism: the case of taxes on harmful foods**

A particularly emblematic case is that of nutritional taxes, i.e., levies specifically designed to discourage the consumption of foods with high caloric, sugar, or saturated fat content.<sup>2</sup> These measures are often presented as tools of preventive health policy<sup>3</sup>, but in essence, they affect the consumer's

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<sup>1</sup> In the *Metaphysics of Morals*, Kant argued that a paternalistic despotism can arise when government takes on legislative power “since it treats citizens as children”. Instead, a good patriotic government “*treats its subject as members of one family but it also treats them as citizens of the state, that is, in accordance with laws of their own independence: each is in possession of himself and is not dependent upon the absolute will of another alongside him or above him*”. (Kant, 1797)

<sup>2</sup> For this purpose, it can be implemented in two different practical ways: use of already existing tax instruments or modulation of the same based on concrete needs (reduction or increase in VAT applied on products, respectively, more or less healthy) or the introduction of new taxes that make the prices of the taxed products inclusive of the negative externalities deriving from them at an environmental and health level.

<sup>3</sup> The first *Global Nutrition Policy Review* (WHO, 2018) notes that 39 WHO member states have implemented fiscal policies of this kind (in particular, it highlights an increase in taxes on unhealthy foods and drinks or an increase in subsidies on healthy foods and drinks). As regard the effectiveness of this instrument, although there is (especially compared to the experience with sugary drinks) an inferiority of evidence (Hammer, 2018) on the application of this taxation to unhealthy foods (such as, for example, foods rich in saturated fats, trans fatty acids, sugars or salt), the available data (Niebylski et al., 2015) suggest a good percentage of contribution of the tax

freedom of choice, making certain types of food more expensive—and therefore less accessible. (Shughart, 2013)

To determine whether a measure qualifies as paternalistic, it is necessary to assess its adherence to several fundamental criteria:

- limitation of individual freedom or autonomy
- beneficial intent behind the intervention
- lack of consent from the affected individual

Once the conditions that define a paternalistic action have been identified, it is possible to understand whether it is possible to frame food taxes within this conceptual category. On this point, the recurrence in this form of taxation of the typical elements of paternalism described is indisputable, since, on the one hand, with regard to the element of the absence of consent, it constitutes one of the essential characteristics of taxation, and on the other, with regard to the benefit and limitation of individual freedom, it is even necessary for the typical effect of this measure (reduction of junk food consumption) to be fully realized. The dissuasive effect that food taxes assume as an essential justifying ratio, in fact, necessarily entails, under penalty of their ineffectiveness, a limitation of the recipient's decision-making sphere, more precisely declinable in a reduced possibility in the choice of food. This appears clearer if we consider the element of accessibility to food (which is a function of price and disposable income) as an aspect that conditions the food decisions of individuals (which corresponds to the English concept of affordability).

The problems of poor nutrition, as usually happens in the most developed countries, are in fact attributable, more than to the availability of food, to access to it, that is, to the possibility of affording to buy food. Despite the wide range of products and the widespread distribution of points of sale, some segments of the population, even if they want to, are unable to access healthy and quality foods, given that, normally, such products have higher prices.

This makes it almost automatic (or even indirectly imposed) to orient purchases towards less healthy choices, which, instead, have lower prices. That said, an increase in the cost of the product, resulting from taxation, although not representing a direct restriction on its consumption (ban or sanction) can represent, if this element (of accessibility) is considered, a suitable form of restriction on the sphere of self-determination of people in the food sector, preventing, in fact, the "incriminated" purchase by those who do not possess the economic capacity necessary to cope with it (in other words, as regards the effect produced, ban and taxation can be considered equivalent since for some the increase in price still prevents the purchase).

#### **4. Weak, moderate, and strong paternalism: a classification**

Legal and moral reflection on paternalism has led to the distinction of various forms of intervention, depending on their degree of coercion and their compatibility with individual freedom.

- weak paternalism applies only when the individual is unable to make informed decisions, for example due to ignorance, error, or diminished mental capacity.
- moderate paternalism is applied when the aim is to guide the individual toward more virtuous behaviour without significantly limiting their freedom of choice.
- strong paternalism intervenes even with competent and informed individuals, imposing real restrictions on their actions—even against their will.

Supporters of the primacy of decision-making autonomy believe that only those external interventions that are limited to verifying the real capacity for self-determination of the individuals involved (weak paternalism) or that direct them towards functional tools for achieving freely chosen goals (moderate paternalism) are justifiable. In this context, awareness campaigns represent one of the least controversial expressions of moderate paternalism. These initiatives fall within the Nudge theory (Thaler & Sunstein, 2009), which aims to influence individual decisions through mild and non-coercive incentives, aimed at favouring the individual's interest, without denying him the possibility of opting for alternative solutions.

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measures in question to the reduction of purchases and consumption of the affected foods (Dodd et al., 2020) and also to the encouragement, in this case for companies manufacturers, to the reformulation of products towards healthier recipes (WHO, 2022).

This theory (Sunstein, 2015) is based on the observation that individuals' decision-making processes are often subject to systematic distortions, linked to cognitive errors, information asymmetries and deviations from the criteria of classical economic rationality. Nudges, therefore, aim to correct these imperfections, operating through various tools: the so-called salient nudges, which affect the way in which alternatives are presented (for example, through the simplification of forms); information nudging, aimed at bridging the gap between subjective perception and objective reality, as well as clarifying the consequences of one's choices; and default rules, which exploit decisional inertia to promote behaviours deemed desirable (as in the case of automatic adherence to organ donation). (Miravalle, 2020)

Such interventions are generally considered compatible with a legal conception of freedom, understood as the right to self-determination. This is made possible by the inclusion of the freedom clause, according to which every gentle nudge must necessarily leave the individual with the concrete possibility of avoiding the effect of the intervention and choosing differently. In the absence of this possibility (the so-called opt-out clause), the intervention would lose its libertarian nature, configuring itself as a coercive imposition.

The evaluation of more incisive interventions, which provide for costs or sanctions to discourage certain behaviours, is decidedly more problematic. Such measures are configured as expressions of strong paternalism and imply a significant degree of heterodirection of individual choices, making them difficult to reconcile with the principle of freedom.

Based on a liberal perspective, every form of paternalism, regardless of its intensity, raises questions of legitimacy. The underlying assumption is that any interference constitutes an evil to be avoided, unless there are serious and compelling reasons, such as the protection of the rights or interests of others. Even the most influential liberal thinkers admit that individual autonomy should be limited only to the extent that this is necessary to protect the freedom or integrity of other subjects.

In this sense, even Kant, opposing, as mentioned, paternalism, affirmed that no one can be forced to be happy according to a model imposed by others, everyone must be able to pursue their own idea of happiness, if this does not compromise the freedom of others according to a universal law. Similarly, J.S. Mill argued that the intervention of authority is justified only when individual conduct causes damage to the interests of third parties. (Mill, 1991)

Considering these premises, many rules that appear to be inspired by charitable purposes or the protection of individual well-being, although they seem to be aimed exclusively at the protection of the recipient subject, can also be justified by the protection of public interests or third parties. It has been appropriately noted that there is not always a clear boundary between actions that fall exclusively on the agent and those that also involve others: the distinction between self-harming acts and acts harmful to third parties, although theoretically relevant, requires careful verification on a case-by-case basis. Consequently, if an interest other than that of the agent alone emerges, such rules do not necessarily conflict with the principles of liberalism but may be legitimate precisely by virtue of their function of protecting the interests of others.

## **5. Health as a common good: reflections considering article 32 of the Italian Constitution**

However, applying this consideration to the case being examined here, that is, the taxation relating to the consumption of products harmful to health, such a conclusion may be more difficult. As has been widely noted, the rationale justifying such taxes must be identified in the objective of protecting the health of individuals, which, by identifying a significant source of threat in the consumption of taxed products, may, in fact, find scientific benefit from reducing it. But how can the consumption of junk food affect a collective dimension and therefore, on this premise, be considered an admissible intervention by the State?

The answer to this question requires a reflection on the concept of health and on a possible configuration of the same in terms that are not only individualistic.

In contemporary reality, dominated by a strong methodological individualism and economic liberalism, health is treated as a mere individual subjective right, to be exercised and managed in a completely selfish manner. In addressing the topic under discussion, however, reference cannot be made to the health emergency that emerged from recent pandemic events. In fact, it clearly shows how, in

certain contexts, the action of the individual can concretely impact the multitude. The domination of the reasons of public health and health protection exercised at the time of COVID-19 on a supra-individual dimension makes it necessary to emphasize not only the constitutional recognition of the essentiality of the right to health, but also, and, for what is of interest here, perhaps above all, the concept of "*interest of the community*" also referred to in art. 32 of the Italian Constitution. (Constitution of the Italian Republic)

Understanding health in terms of community means thinking of it as something that cannot be considered independent of social relations between members of society, since it qualifies the latter in a cooperative and sharing sense. This does not mean depriving the concept of the egocentric aspect that, physiologically, characterizes it, but placing the emphasis on the importance of a management that, even if entrusted to the individual, must be shared and, precisely, shared.

This is a reasoning certainly consistent with the systematic structure of the constitutional text which, as seen previously, favours a social conception of the individual, based on a generic duty of solidarity towards others and institutions, it clearly emerges how the active situations (rights) and the passive ones (duties) are inextricably correlated with each other, so that the former can be said to be legitimate only by virtue of the latter. The individual is, that is, inserted in a social dimension. The latter must not be thought of as an isolated entity in the surrounding environment, but in "*a community dimension that forces him to deal with otherness and interests despite his own selfish and hedonistic individuality*" (Grossi, 2006). Man is a free individual, but he is also a member of a community: freedom exists to be played in a system of relationships in which we bind ourselves to each other and become a community. Rights are, therefore, founded on "belonging" to social groups, to the community with consequent limitation of the rights themselves.

## **6. The social costs of disease: a further justification for fiscal intervention**

One of the most frequently cited arguments in favour of paternalistic policies in health care is economic. In public health systems, the cost of medical treatment is borne by the community. If an individual engages in behaviour that knowingly exposes them to preventable illnesses, they contribute to increased public spending, thereby shifting the consequences of their choices onto other citizens.

This concept highlights the need to consider the systemic impact of individual choices. The reference to the collective dimension of health just examined allows, then, to provide such taxes with a solid justification also from a purely economic - fiscal point of view, connecting them to the principle of contributory capacity (i.e. the principle through which the tax burden is distributed among the citizens of a State based on the economic capacity of each of them). In the described perspective, the non-individualistic importance of the concept can be addressed from a double perspective: on the one hand, the vulnerability of the self in the face of certain challenges, such that the consideration of the individual in a cooperative sense must be considered more suitable for the purposes of better protection of public health (if everyone, in their individual sphere, collaborates towards a common objective, achieving it becomes less arduous) and, on the other, and this is the most relevant point for the analysis we are about to do, the need to consider the health choices individually taken as of immanent relevance also for the rest of the community, as they imply negative (or positive) effects on it. If, at first glance, it might seem difficult to trace the first of the meanings examined back to the legal basis of nutritional taxes, since obesity and overweight cannot be classified - unlike the Covid-19 (Villani, 2020) virus - as communicable diseases, for whose "fight" the need to form a common front is essential, this might appear easier to implement where, instead, the factual importance of the aforementioned choices comes to the fore from the, certainly more concrete, health perspective. Although, in fact, health and health care, as is known, refer to different and non-coinciding goods, it can certainly be said that the protection of the former, pursued with public instruments, becomes an essential prerequisite for the enjoyment of the latter. The two factors, that is, although not corresponding, are interconnected; delegating health care to healthcare facilities tout court, without this being accompanied by an equal individual activity aimed at mitigating the effects of citizens' less than virtuous behaviour, means depriving the individual of responsibility and, at the same time, burdening the hospital system, which is unfortunately already collapsing.

As mentioned, where healthcare costs are met in full or in part by the community, risky behaviour ends up not being discouraged and, therefore, its prevalence increases. In other words, the

system of collective financing of healthcare services would end up contributing to the creation of problems that it is, instead, called upon to solve. This is naturally inefficient and the cost of this de-responsibilizing effect can only be recovered through constraints that limit it or additional costs that allow the squandered resources to be recovered.

It is no coincidence, in fact, that authoritative doctrine has hypothesized, with reference to nutritional taxes, a sort of "qualified contributory capacity" (Uricchio, 2014) consisting of savings, albeit eventual and future, of public healthcare spending. Those who consume products containing substances capable of causing obesity and overweight (and the pathologies connected to them) damage, with their "avoidable" behaviour, since it is related to food capable of providing little or no nutritional value, a good that, instead, it is in everyone's interest to be used altruistically, thereby increasing the expense necessary for the treatment of such pathologies. In other words, it is a superficial and avoidable worsening, since it is connected to treatments that, through good individual prevention, could well be avoided and instead leave room for those that, due to unavoidable disease conditions, must necessarily be considered priorities. In light of this, it appears that the taxes in question have a position of advantage that some doctrine identifies with the ability to pay, and that this can be linked, exactly to what happens, moreover, for environmental taxes, to the selfish behaviour described, which, with specific reference to the aspect of the burden of care, can well constitute a source of greater tax burdens.

### Conclusions

The debate between individual freedom and collective protection does not lend itself to simplistic solutions. A liberal society cannot accept any form of coercive intervention, but it is equally clear that individual autonomy cannot be exercised irresponsibly or destructively towards the community. Recognition of the right to health as a fundamental good also implies an obligation for each person not to cause harm to others, directly or indirectly.

The compromise between these two poles is found in a vision of freedom as relational freedom, which does not isolate the individual but places him in a context of social relations, rights and duties.

In this context, the taxation of harmful food products, assuming the contours of state paternalism, risks slipping, if not justified by concrete needs to protect the interests (also) of third parties, towards a completely arbitrary interference, incompatible with the principles underlying the Italian constitutional order.

The considerations made in this work show that the introduction of nutrition taxes can be justified in a coherent and well-founded way only if interpreted in the light of a shared conception of health, understood not only as an individual right but also as a collective interest. The habitual consumption of high-calorie foods, even if it does not cause immediate damage to others, contributes to the increase of chronic and degenerative diseases which, in addition to representing a harm to the health of the consumer, they have a significant impact on the sustainability of the health system, representing a substantial cost to public expenditure.

### Bibliography

- Dodd, R. *et al.* (2020). Effectiveness and feasibility of taxing salt and foods high in sodium: a systematic review of the evidence. *Advances in nutrition*, 1616-1630.
- Grossi, P. (2006). *Società, diritto, stato: un recupero per il diritto*. Milano.
- Hammer, M. (2018). Taxing Sugar-Sweetened Beverages: A Bittersweet Solution. *Bulletin for International Taxation*.
- Constitution of the Italian Republic (entered into force on 1 January 1948), Part I "Rights and duties of citizens", Title II "Ethical and social relations", Art. 32.
- Kant, I. (1784). An Answer to the Question: What Is Enlightenment? *Practical Philosophy*, 17-22.
- Kant, I. (1793). On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice. *Practical Philosophy*, 279-309.
- Kant, I. (1797). The Metaphysics of Morals. *Practical Philosophy*, 353-604.
- Mill, J. S. (1991). On liberty and other essays. *Oxford University Press*.
- Miravalle, M. (2020). Gli orizzonti della teoria del nudging sulla normatività: verso un diritto senza sanzioni? *BioLaw Journal*, 441-461.

- Niebylski, M.L. *et al.* (2015). Healthy food subsidies and unhealthy food taxation: A systematic review of the evidence. *Nutrition*, 787-795.
- Shughart, W. F. (2013). Teoria economica dello Stato-mamma. In M. Trovato, *Obesità e tasse. Perché serve l'educazione, non il fisco*. Torino. 35-60.
- Sunstein, C. (2015). *Effetto Nudge. La politica del paternalismo libertario*. Milano.
- Thaler, R., & Sunstein, C. (2009). *Nudge. La spinta gentile. La nuova strategia per migliorare le nostre decisioni su denaro, salute, felicità*. Milano.
- Uricchio, A. (2014). La tassazione degli stili alimentari e la capacità contributiva. *L'evoluzione del sistema fiscale e il principio di capacità contributiva*. Padova. 473-502.
- Villani, S. (2020). Spunti per un nuovo approccio ai problemi dello sviluppo sostenibile e della tassazione nell'era del Covid-19. *Ambientediritto.it*, 1-46.
- WHO. (2018). *Global Nutrition Policy Review 2016–2017: country progress in creating enabling policy environments for promoting healthy diets and nutrition*, 34-100
- WHO. (2022). *Fiscal policies to promote healthy diets: policy brief*, 6-10.