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Abstract

This article proposes a new Article 31 to the Universal Declaration of Human Rights: “Everyone has the right to use psychotropic substances of one’s own choice”. To declare the freedom to use drugs a new human right is not self-evident from the point of view of liberal thinking, which provides space for individual freedom as well as for established custom and tradition. Moreover classical liberalism is biased against behavior that is felt to be “excessive”. Nevertheless the new human right would be timely. Human rights concern forms of behaviour which we regard as positive and enriching for our lives to such a degree, that we experience it as a violation of our personal dignity when we are forced to give them up. Drug use belongs in that category. Instead of being included in the category of murder and rape, drugs should be appreciated as a cultural asset, similar to religion and art. Despite the possibility of abuse, drugs provide its users with access to a unique inner field of experience, that would remain closed for ever without them. Standard objections such as the risks of addiction, and the alleged “unreality” of the drug experience are not conclusive. © 1999 Elsevier Science B.V. All rights reserved.

Keywords: Drug use; Human rights; Classical liberalism

1. Introduction

The call for the prohibition of drugs is most usually justified on medical and social grounds. It is an allegedly unavoidable measure aimed at preventing harm to users and, indirectly, to their environment and for that

reason it is pronounced legitimate. I dispute this point. In my opinion the war on drugs inevitably sharpens medical and social problems instead of alleviating them. Moreover, ironically prohibition has become the main source of present-day organised crime. But, apart from that, I am of the opinion that even if the ban were really harm-reductive it would still be unwarranted. I could quote John Stuart Mill’s well-known “harm princi-

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ple”, to the effect that the only legitimate purpose for which a civilized community may exercise power over one of its citizens is “to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant”. According to Mill, in the part which merely concerns himself the independence of the individual is “of right, absolute. Over himself, over his own body and mind, the individual is sovereign” (Mill, 1985a).

This principle has never been realised in full. One of the problems is that any act carries a risk of harm to others. There will, therefore, always be a category of acts falling under prohibition, which bring no inevitable damage to fellow citizens, but whose risk of damage to others will be considered unacceptably high. Speed limitations are a good example. A more fundamental problem is that the principle does not take into account the fact that societies establish numerous prohibitions which do not, or not exclusively, aim to prevent possible harm to others, but rather to increase the opposite, i.e. the welfare of the largest number of citizens. Here we are dealing with the logic of so-called “utilitarianism”: an increase in the welfare of the majority of citizens is deemed sufficient grounds to limit the freedom of movement of individual citizens. Rules of one-way traffic or the obligatory closure of shops at certain times of the day are examples. Finally Mill’s principle fundamentally excludes any kind of “paternalism”, any protecting of responsible citizens against themselves. Obligatory use of seat belts is unacceptable.

But despite such problems we can’t do without Mill’s principle. We could slightly reformulate it, to the effect that such acts as do not inherently cause harm to fellow citizens, may never be made subject to all-round prohibition, but may only, at most, be made subject to certain limitations. The worldwide ban on drugs is in conflict with this moder-

ated version of the harm principle too. The use of drugs does not belong to the category of acts, such as theft or murder that are inherently damaging to others. For that reason alone one should insist that neither considerations of harm reduction to third persons, nor social welfare nor paternalist motives could possibly provide sufficient grounds for categorical prohibition. At most, such considerations might be used to defend limited interventions. With this I could even end my plea against the prohibition of drugs. *Quod erat demonstrandum*. However, this would not be convincing, for the simple reason that even the above moderated version of Mill’s principle has not been commonly accepted as universally valid. Most citizens are not prepared to recognise a freedom principle of such scope as a basis for forming their communities.

2. A new human right

But in the course of several centuries it has been agreed to delimit certain spheres, where such a principle is recognised. There has been formulated a number of “human rights” of exceptional dignity, which are therefore worthy of special protection. Where these are at stake, restraining interventions by the government have been made subject to very strict limitations; and abolishing the respective rights is even impossible. They are inalienable. This has resulted in a division into two spheres, a “sacred” one of fundamental rights on the one hand, and on the other a second sphere where the “right” to do something only means that it is not prohibited at the time. According to the dominant opinion, the government need not take the moderated version of Mill’s principle into account in that second sphere. As long as procedures are correct the government has *carte blanche* to

annul an existing “right”. As long as there is no rule of one-way traffic in a certain street one has the right to traverse it by car in both directions. But if the city council decides to establish a ban on traffic in one direction one cannot accuse it of having violated a right. However, if a democratic government would decide to close down a newspaper it would be in considerable legal problems because the right to publish the paper is based on the fundamental right to freedom of opinion.

In some countries such as my own, the Netherlands, there does already exist a “right” to the use of drugs in the weak sense of the word. Production, trade and possession are punishable by law, but use is not. However, there does not exist a right to use in the second, hard sense of a fundamental right. If it so desired, the government can make the use of drugs punishable tomorrow without violating any formulated human right by doing so.

I should add that one can also differ in opinion on the question of just *how* sacred human rights really are. Article 4 of the Declaration of the Rights of Man and the Citizen of 1789 has it, that freedom consists in “being able to do anything that does not bring harm to others. Thus the exercise of the natural rights of each man has only such boundaries as would assure the enjoyment of those same rights to the other members of society”. This implies that, if human rights are involved, limitations on freedom are only acceptable with a view to avoiding harm to third parties. Protection of the individual against himself or the furthering of social welfare are insufficient grounds. In other words, here Mill’s principle would fully apply, even in its original form. This is the view that has been defended forcefully by Ronald Dworkin in his *Taking rights seriously*. John Rawls has also supported the thesis that fundamental freedoms may only be limited to

protect those of others, only to avoid a considerable risk of damage to fellow citizens, and never to increase the welfare of society.

However, this is not the only possible interpretation. Anyone who reads the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome in 1950, comes across a surprisingly long list of considerations allowing interventions in fundamental freedoms. Among them there are national security, the economic well-being of the country and the protection of morals; considerations which typically form part of utilitarian or paternalistic thinking. Yet this difference has less implications than one might assume. Whether or not one does or does not accept the interpretation that intervention in human rights is only acceptable on grounds of preventing harm to others, in both cases the formulation of a human right expresses an extremely serious commitment on the part of society. First, the burden of proof will always be on the side of the intervening government. When a fundamental right is at stake considerations like “better safe than sorry” are no longer valid. Second, even when one would allow limitation of a fundamental right on paternalistic or utilitarian grounds, limitation remains the maximum a government can do. Intervention can never be of such magnitude that a meaningful exercise of the respective human right is no longer possible. The citizen must always keep a wide space in which he can exercise that right.

In practice there does not always exist a clear boundary line between the two types of “right” mentioned. *De facto* rights can harden into human rights in the course of time. Many rights are not formulated as human rights as long as there is no need, since the government does not unduly limit the respective right in practice. There exists no fundamental right of citizens to practice

sports of their choice. However, if football, rugby, canoeing, mountaineering, bobsledding and autoracing would be banned as too hazardous, many would experience this as an essential violation of freedom, i.e. of a not yet formulated human right. In my opinion this is precisely the case with the use of drugs. If the international community had never established the total prohibition of drugs the formulation of a human right in this field would be a senseless operation. But it is paradoxically the war on drugs which has called forth the need of formulating such a new human right.

My argument in the present article will be that the freedom to use psychotropic substances of one's own choice should be formulated as a fundamental human right comparable with freedom of expression or of religion. It is not excluded that Article 12 of the Universal Declaration of Human Rights, which guarantees the "privacy" of the citizen, or Article 18, which entitles each citizen to manifest his "belief" in a "practice" of his choice, could be used to found a right of the use of psychotropic substances. But perhaps this would be considered too far-fetched. I would therefore make a plea to add a new Article 31 to the declaration: "Everyone has the right to use psychotropic substances of one's own choice". I will present my argument in the context of traditional liberal thinking, and also discuss the undoubtedly substantial psychological obstacles to accepting such a new right, as well as, finally, the far-reaching implications of such acceptance.

3. Liberalism and new human rights

From the point of view of traditional liberal thought it is not at all self-evident to accept a new human right, even if that would seem obvious from the perspective of civil

liberty. Liberalism is characterised by a curious paradox. This political philosophy attaches great value to the capabilities of people to find their own way, and it is suspicious of ambitious plans to reconstruct society according to a pre-conceived model. For instance in the work of Friedrich Hayek we find this faith in "spontaneous 'formations'", in "the growth of the undesigned", as well as an outspoken revulsion regarding the desire to subject everything to an organising Reason, in a very pronounced way (Hayek, 1976a). Now the problem is that human society knows *grosso modo* two kinds of spontaneously evolved phenomena, namely the free individual, and institutions and traditions which grew gradually, of which nobody knows the origin anymore, but which have proved their value. Both the dissident and the self-evident right of custom have therefore a natural place in the liberal spectrum. This is the reason why this philosophy finds room for so diverging thinkers as John Locke and Edmund Burke, the moralist Adam Smith or the free thinking Dworkin.

This diversity may be a blessing in itself, but there arises a problem at the point where the individual urge for freedom takes a new form which conflicts with custom and tradition. Which side will liberalism then choose? The answer is never clear in advance. On the one hand all friends of freedom disapprove strongly from a government which holds the experimenting citizen in check. But on the other hand the formulation of new rights, with all its profound implications, smells disturbingly of the total reconstruction of society. Should that which was not allowed for so long, now be declared inviolate? Would that be a sensible decision? In the course of time sacred "rights" of citizens have been formulated in one area after another, whereupon the legitimacy of social intervention in these spheres has become strictly limited. Why

should we add the use of drugs to those areas where the unyielding logic of individual “rights” reigns supreme?

Why indeed, would be the response of many liberals. And not only because of concern with the mental and physical health risks of the use of drugs, but also because of moral considerations. Adam Smith was the one to have given liberal moral philosophy its most classical formulation. He saw the virtue of justice, which forbids citizens to harm one another, as the basis of all morality—as its “grammar”. But next to that he recognised a number of other virtues which allegedly provided behaviour with added elegance. Inspired by St. Paul and the Stoa this representative of the Scottish Enlightenment attached great value to propriety, prudence, and benevolence. In *The Theory of Moral Sentiments* we meet a restrained and moderate citizen. He will never subject himself to his own passions, but strives passionately only for self-control. Smith was also of the opinion that the only virtue the government might legitimately enforce was justice, the “main pillar” upholding any society. The other virtues remained in the voluntary sphere. They were a matter of good taste (Smith, 1984). However, that being so, Smith’s morality, which in adapted form seems to determine to this day what the *mainstream* citizenry considers to be decent, is surely not conducive to elevating to the status of a human right something that is associated with excess.

This moral aspect of the matter undoubtedly presents a serious obstacle to even considering the acceptance of the use of drugs as a human right. Drug culture is in many cases indeed “excessive”. And although the average citizen knows and appreciates the intoxication caused by alcohol only too well, the cultural distance between the world of drug users and that of the non-users is a vast one.

Even in those cases when there is no question of addiction or disease, the modest citizen does not appreciate the drug culture. Recreational use, the spiritually inspired trip or the dance parties of the ecstasy aficionado makes him suspicious rather than interested. One of the consequences of this is a marked indifference to the violation of the private sphere of the drug user by the police or the justice department. Because one defines drugs as an evil it is not regarded as humiliating that it is punishable by law to have a gram of amphetamines in one’s house. It is not even felt as an injustice when the most outrageous sentences are meted out to people for consuming or possessing drugs. The world of the drug user is so far removed from that of the ordinary citizen that in this case the latter loses his or her normal sensitivity to injustice. The Dutch philosopher of law Paul Cliteur has noted in another context that such a moral blind spot is not unusual. Before the recognition of a specific right is a fact, public opinion often considers it for a long time to be simply ridiculous, and its violation to be irrelevant. That was, for an example, originally also the case when for the legal equality of women was argued (Cliteur, 1997).

In one respect a fundamental right to the use of psychotropic substances of one’s choice would be easily acceptable. It would concern a new “classical” right, a pure individual right comparable with the freedom of association and of opinion. The new right would demand abstention from the government, and no positive action, such as is implied in the right to work or education. So, on what grounds would we formulate the new right? The first question here is: from which considerations would the present, existing fundamental rights follow? There exists no generally accepted, mathematically correct answer to this question, but the works of important thinkers in this field and the texts

of treaties and conventions do give us an indication. In the Universal Declaration of Human Rights the existence of freedom in a society is linked to the inherent “dignity” and equality before the law of all people. In what sense, then, does lack of freedom violate human dignity?

Some classical rights are of a purely protective nature. The right to “life, liberty and the security of person” ties down a government that would intend for whatever reason to violate its citizens. The rejection of slavery and torture falls within this category. But other rights, such as the freedom of thought, of religion or of association have a more positive, more assertive significance. Not only is one free to choose one’s religion, one is also free to manifest it in a self-chosen form of worship. Not only are thoughts free, one also has the right to express them. The right to respect for one’s privacy implies that anyone may actually shape their life as they prefer. The concept of the rights of man proceeds from the assumption that it belongs to the essence of a “dignified” existence to be granted the opportunity to form and show oneself in the way one prefers, by giving one’s own life a color in accordance with one’s own feelings and ideals. In sum, every person has the right not only to be, but also to become what they are. It is unworthy to be forced to become someone other than one’s real self.

Various liberal thinkers have attempted to provide this thought with a foundation in the collective human interest. Mill, Hayek, and Rawls have stressed that societies in which citizens can develop their own “plan of life” (Rawls, 1986) are richer than closed societies, because they open up more developmental possibilities. The experiment plays a larger role. Hayek calls the “experimentation with a style of living” explicitly an argument for freedom. You should not prevent others from

going down a road you yourself find disgusting. Nobody knows the future, and how often has something been decried that later appeared unexpectedly beneficial? (Hayek, 1976b) In this context Mill has pointed to the fatal role of the “despotism of custom” as an obstacle to progress (Mill, 1985b). This argument reminds us of the theory of evolution. Progress is best served by an infinite variety of blind mutations. Apart from many failures this process produces time and again surprisingly viable species which would not even have been considered had the process been a regulated one. He who believes himself to serve progress by limiting diversity makes therefore a tragic mistake. But, leaving this point aside, individual people experience it simply as a violation of their dignity when the possibility to shape their lives according to their own plan is taken away from them. In that sense the cause of freedom does not need the argument of the interest of society.

4. The use of psychotropic substances as a human right

The formulated human rights are considered to cover those areas that are experienced by citizens as essential for the shaping of their lives. They concern those areas where a denial of the freedom of choice is experienced as evidently offensive to their feeling of individual dignity. So, does the use of psychotropic substances also belong to this sphere? The question I raise here is not that of whether one has “the right to mainline oneself to death”. This consideration too can be defended on good grounds. What is more, Mill’s principle as I have reformulated it above suggests a positive answer to the question. But this approach will never result in the acceptance of a new human right. Human rights are solemn things. They are concerned

with specific liberties which we regard as positive, as possibly enriching the lives of the individual—even if a right can also be abused. The question I raise is therefore another one: can it be a sensible, meaningful choice for people to use drugs? Is it possible to decide on good grounds to give cocaine or LSD a fixed place in one's life?

It would not be incoherent in itself to answer this question positively, and at the same time to recognize fully the serious risks which the taking of drugs might entail. To deny the risks is irresponsible, but to recognize them is not sufficient grounds to disprove the possibly positive significance of drug use. By way of comparison, were we to ask ourselves whether a fundamental right to practice "sports of one's choice" should be formulated, risk of injury—and the even life-threatening character of some sports—would play a role, but not a decisive one. Put somewhat differently: these are considerations relevant to the way the right would be applied, but not to whether it should be formulated.

In seeking to give a definition of drugs, the English language provides me with something of a problem. In Dutch they can be easily defined as "roesmiddelen", substances which cause a "roes". The word "roes" refers in general to "being under the influence" of psychotropic substances. It means as much as intoxication, but without the negative, "toxic" connotation of that latter word, and without the suggestion of alcohol. The English "high" in the substantive is also close to it, but without the latter's suggestion of being caused specifically by hallucinogenic or stimulant substances. In what follows I will use these terms, but for lack of a better one.

So, if we define drugs as substances which cause a "high", the question of a possibly positive significance of the use of drugs comes down to the question of what the state of being "high" entails. In our Western cul-

ture the "high" is usually appreciated more or less negatively, regrettably, in my opinion. The phenomenon of the "high" belongs to the essence of the human condition. We know of no culture in which substances inducing a "high" do not take an important place. Together with fields like religion, sports and art it forms a part of the "other world". The French philosopher Georges Bataille has described human society as divided into two large areas, namely the one which he calls the "profane" world, the "world of labor and intellect," and the "sacred" world, the irrational sphere (Bataille, 1994). With the Dutch historian Johan Huizinga we might also say that the "high" belongs to the world of "play." The first world is the strong pillar on which our order rests. If it is corroded, society disintegrates. But we cannot do without the second one either. We have an interesting dialectic here. The irrational sphere which seems in conflict with our orderly daily existence, is in fact a prop for the latter. The reason for this paradox is simple: a life without "play", a life without the "sacred" in the above wide sense of the word cannot be lived. In sum, the "high" belongs to a broad category of marginal, capricious, unpredictable but indispensable phenomena of human society. It should modestly know its place, but whoever denies it its place will pay dearly for it.

And while the "intoxication" induced by drugs belongs to that one, broad, irrational sphere of human existence, it is at the same time unique. The artificially induced "high" forms a directly provoked alteration of our state of mind, i.e. unprovoked by our own activity or by external impressions. To use a somewhat unlegant metaphor: drugs grab the mind directly by the throat. It is true that all activities in the irrational sphere may induce sensations similar to a "high" on occasion: protracted meditation, ecstatic dancing,

violent sex, a marathon, the individual or collective experience of the Holy Spirit, climbing a perilous mountain. Adrenaline, endorphins, and all the other drugs the body itself produces, do their work. But being drunken with joy, does not make one really drunken. Drugs have, as it were, branched out from the other irrational spheres of human existence and developed one of its aspects—the “high”—to perfection. Drugs are of value to the user only in a very limited field, but in that field they are irreplaceable. Their capacity to induce a “high” is unmatched both in variety and intensity. As far as this aspect is concerned, they are to the other irrational spheres as the blowlamp is to a candle.

Instead of being included in the category of murder and rape, drugs should be appreciated as a cultural asset, similar to religion and art¹. In the “high” an inner field of experience is opened up that would remain closed for ever without mind-altering substances. Temporary but drastic changes in the mind are produced that one could never experience without drugs, just like there is no substitute for a loving relation or a parachute jump. The induced feeling can be wild and ecstatic, or soft and empathic. The experience can be spiritual, oppressive, or alienating, or on the contrary endlessly serene. The user can “go through the roof,” observe a colour never before observed or feel a cosmic ‘nothing’ on his own skin but everyone who has ever used LSD or ecstasy knows that the experience is unique, and that they who claim that they can reach the same effect just as well “in another way”, simply do not know what they are talking about. Now the fact is that a great many citizens of all countries of the world feel deeply attracted to this type of

experience. They experience it as fascinating and valuable, and as an essential part of their lives that they would not want to miss. Countless of their number have given the mind-altering experience a fixed place in their life’s plan. And they experience the ban on it as just as violating to their individual dignity as a prohibition on choosing their own religion would be. It forces them to become someone else in an aspect of their lives that they consider essential. There is, therefore, every reason to proceed to formulating the new human right.

5. Possible objections

It is not uncommon in this connection to claim that the emotions experienced under the influence of drugs cannot be of genuine significance because they are “not real”. They are supposed to constitute an “escape” into a deceitful surrogate world. I think this is a shaky thesis. On the same grounds one would have to advise against visiting the cinema or the theater. And do novels not constitute a dream world in which one can leave rigid reality for a moment? One should even be wise to avoid museums because, whatever is presented to us in there, is not the “real” world. The fact that for some drugs have indeed the function of an escape from a reality where they are unable to find their way is not sufficient grounds to dramatize the “intoxicating” experience as such as a fearful escape. For those in need of a comparison: for most users drugs have the function of a “vacation”. In its long existence humankind has never been content with the existing. But it has not only made efforts to improve the world, on top of that it has been permanently engaged in the construction of a second, dream world into which it can temporarily withdraw. Besides “intoxicating” substances

¹ In the case of wine and other alcoholic drinks this is already the case.

religion and art have in particular fulfilled this important function. Ironically it is precisely the “non-real” nature of the drugs experience which points to its positive significance.

Moreover, in another sense the feelings artificially induced by drugs are “real” enough, that is, at least as real as those which are for instance called forth by a work of art of a scene of nature. These emotions too are being “artificially”, externally induced, and as a consequence you feel them fading away quickly when you leave the museum or the scenic area. But at the moment when they were experienced they were real enough; and you continue afterwards to appreciate what you have experienced. The drug induced “high” is comparable with this. Even though the feeling is induced, it is at the same time an authentic experience, one of a temporary nature but of lasting significance.

But the greatest obstacle to recognizing the use of psychotropic substances of one’s choice as a right of man is the standard association of these substances with “addiction”. The concept of rights is based on the recognition of the sovereign freedom of choice of the individual. Addiction, however, implies that the individual has lost this freedom to choose. From this perspective a right as defended by me would be paradoxical, comparable with a right to sell oneself into slavery. However, firstly, the great majority of users of drugs—“hard” as well as “soft”—never get addicted. Secondly, addiction is always a relative phenomenon, as those addicted to tobacco know very well. The corrosion of the will is not of a generalized nature, but remains limited to those areas that touch on the use of the respective substance. Furthermore, within those areas too that corrosion remains a relative one. It means that to stop using, if one would so wish, demands a more than average effort of

the will. But it never requires an effort of an unlimited size. Even the addict is never a slave. The argument that a fundamental right on the use of psychotropic substances contradicts the very concept of fundamental rights is therefore false.

6. Consequences

What would be the consequences of the acceptance of the new human right? There will be no absolute freedom. To begin with, the harm principle refers to responsible people; consequently it leaves room for age limits to selling and buying. Furthermore rules to prevent harm to fellow citizens, such as those now already obtaining in the case of alcohol and participation in traffic, would be developed.

The formulation of the new right would certainly give rise to a debate on the question of whether the paternalistic principle would thereupon have to be abandoned completely. The use of all drugs—including of course, tobacco, tranquillizers, and alcohol—involves serious risks for the mental and physical health of the user. So, would it be acceptable under the new condition to continue prohibiting at least some psychotropic substances whose risk to the health would be considered unacceptably high? Those who defend the radical interpretation of human rights will declare all bans on drugs unacceptable, including for instance on a substance which would definitely cause Parkinson’s disease in a user within a few weeks time. Others, who would not go so far, might propose to legalize all those drugs of which sensible use is possible, i.e. of which a mode of use with relatively small risks is possible—a criterion which is easily met by all drugs now widely used in the world. However, one thing would be out of the question after the formu-

lation of a new human right on the use of psychotropic substances *of one's choice*. And that would be to continue to interpret the concept of "unacceptable risk" so broadly that substances like amphetamine, heroin, cocaine, LSD, and ecstasy would simply remain prohibited. That would be out the question because such an approach would make the new right a farce instead of a seriously undertaken commitment.

The second important consequence of acceptance of a fundamental right on the use of drugs would be that to prohibit the production, trade, and possession of such substances would also be out of the question. This way of escape for the opponents of drugs would be irrevocably cut off. For this too would make the formulation of the new right an empty farce. If one recognises freedom of opinion as a human right one cannot at the same time make the production of paper and the trade in radios and television sets a crim-

inal offence. In sum, the recognition of the new right would inevitably mean the end of the whole *war on drugs*.

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