

What is a public health problem?

The Cases of Abortion and Drug Use

By Frédéric Orobon

Initially designed to protect the population, public health systems can lead to demands being made for personal rights. This process is illustrated by an unexpected comparison between the legalisation of abortion and the provision of safe spaces for drug consumption.

What is a Public Health System?

A public health system is a whole set of resources aimed at protecting a population against a public affliction. Infectious epidemics are the most familiar reasons for implementing such systems: the isolation of contagious individuals and vaccination are the public health systems that allow us to protect a population against such an affliction. By extension, the concept of an epidemic can also refer to “the accumulation over a short period of time of a certain number of serious human events: we might talk, for example, of a suicide epidemic”¹.

Since this last expression is somewhat polemical, we prefer to say that events that affect health and/or bring to light misgivings or disorder of some kind raise “public health issues” which deserve the attention of the general public and public authorities. Thus, suicides within a particular profession, teenage and/or unwanted pregnancies, obesity, road traffic deaths, smoking, occupational disease, the death of

¹ Charles Sournia, *Dictionnaire de santé publique*, éditions de santé, 1991, p. 141.

children by drowning... are all viewed as public health issues today, not necessarily due to the number of people affected by them, but mainly because of the mobilisation of various opinion makers. The 18,000 people killed on French roads in 1972 were not at the time viewed as being a public health issue. Likewise, the deaths due to asbestosis of people working with asbestos were not always seen as public health and social justice issues. Nowadays, in particular due to the consideration of what the life of an independent woman should look like, teenage pregnancies have become a public health issue, due to the fact that they hamper the future of the young girls affected by them and sometimes compromise their health, and also due to the costs that they can generate for the community.

We thus expect a public health system to provide answers to questions that have become objects of public concern, which can take the form of implementing an educational programme, creating rights, imposing obligations, or restricting freedoms. This is the logic that has led to the obligation to wear a seat belt when in a car, the limitation of the number of public spaces where smoking is permitted, the imposition of nutritional ratings on industrial food products, and also to the education of individuals regarding how their health partly depends on them.

From Abortion to the IVG². To Protect, or Grant a Right?

When, in her speech of 26 November 1974 in favour of decriminalising abortion, Simone Veil said: “There are three hundred thousand of them every year,” her aim was very much to show that clandestine abortions are a public health problem, the solution to which involves putting an end to their criminal prohibition. In this matter, the criminal prohibition, which is “openly flouted”, is counter-productive, since it does not allow the authorities to control or significantly reduce the practice it condemns. Abortion then becomes a practice that is at once clandestine, widespread, and dangerous.

² Translator’s Note: “IVG” stands for “Interruption Volontaire de Grossesse”, literally “Elective Termination of a Pregnancy” – the official French term for an abortion carried out at the wish of the pregnant woman rather than for purely medical reasons, sometimes referred to in English as an “elective abortion”. As English speakers would usually simply refer to “abortion” for what is meant by “IVG”, I have used this more familiar term throughout the translation, except in this title where “avortement” (“abortion”) is distinguished from “IVG” (“elective abortion”).

Furthermore, Simone Veil insisted on the fact that maintaining the criminal prohibition in this matter perpetuates injustice, since the women who could afford it went and had their abortions in England, where the practice had been legal since 1967, or, in France, in discreet and expensive clinics—or even, if they knew about them, within activist networks. Simone Veil’s approach led to the first article of Law No. 75-17 dated 17 January 1975³, which presented abortion less as a right than as an exemption to the principle of the right to life⁴. The foundation of this exemption was outlined further on, at the beginning of Section 1, which gave rise to Article L.162 of the Code de la santé publique, the French Public Health Code. This grants access to abortion to women whose pregnancy puts them in a “distressing situation”. Further down, Article L.162-8 gives legal permission to a doctor to not carry out the termination of a pregnancy in the name of its conscience clause,⁵ which enshrines the superiority of the “standard of personal conviction” over the civil standard⁶, or, to put it another way, which gives “full competence to religious commands”⁷. In these circumstances, the decriminalisation and then the legalisation of abortion, which became known as an elective termination of a pregnancy (IVG), are indeed conceived of as a public health system with a protective aim, rather than a personal right. In her speech from 26 November 1974, Simone Veil puts it as follows: “abortion must remain an exception, the last resort for hopeless situations”. Further on, in an attempt to convince hesitant parliamentarians faced with a system that could become the expression of a personal right for women, she declares, following the passage explaining why abortions will not be reimbursed by social security, that “while the law is general and therefore abstract, it is designed to apply to individual situations that are often distressing: that while it no longer prohibits, it does not create a right to abortion”.

Medical abortion in 1988, the extension in 2000 of the legal period for applying for a surgical abortion from 10 to 12 weeks of pregnancy, abortion being provided for free in 2013 and the removal in 2014 of the “distressing situation” condition were major

³ The legal framework studied in this article is the French one.

⁴ “The law guarantees the respect of all human beings from the start of life. This principle may only be breached in case of necessity and in accordance with the conditions defined by the present law.”

⁵ This clause still exists, and applies to all healthcare staff. Code de la santé publique (Public Health Code), Article L. 2212-8.

⁶ See Tatania GRÜNDLER, “La clause de conscience en matière d’IVG, un antidote contre la trahison ?” in *Droit et cultures* no. 74, 2017-2, p. 155-178. <http://journals.openedition.org/droitcultures/4329> viewed on 2 April 2018.

⁷ Jean CARBONNIER, “Les phénomènes d’internormativité” in *European Yearbook in Law and Sociology*, La Haye, Martinus Nijhoff, 1977, pp. 42-52. Jean CARBONNIER revisits this article in his *Essai sur les lois*, Paris, Répertoire du notariat Defrénois, 1995, p. 287-307. The passage quoted is on p. 305.

developments that modified the original law governing abortion. These gains were not made easily, and show that what was initially thought of as a protective public health system tended to become the promotion of a fully-fledged woman's right.

However, there are some provisions that prevent us from presenting abortion as a simple right of women to do what they like with their own bodies. Thus, the fact that the conscience clause is still included in the law, allowing practitioners to call upon it in order to avoid taking part in an abortion, the two compulsory consultations with written confirmation from the woman of her request, or the ethical qualification of abortion as the choice of a lesser evil against the greater evil of an unwanted and distressing pregnancy contribute to keeping abortion imbued with a certain seriousness.⁸ In order to change the status of abortion from a protective public health system to a system promoting a personal right, it is thus first necessary to guarantee access to it, which may require calling into question the practitioners' conscience clause. Secondly, promoting abortion as a system for promoting a personal right implies that we must define it as an expression of the right to safely exercise self-determination. The ethical justification of abortion as a lesser evil then loses its importance, as if it were disappearing from the field of public debate to remain nothing more, perhaps, than a personal question. From this perspective, we might then talk about a kind of "ethical neutralisation" of the abortion debate, which is equally necessary to promoting its justice.

The Case of Illegal Drugs

Recent developments in the legalisation of abortion enable us to conceive of the transition from a public health system to a system promoting a personal right. Could this development apply to other public health systems? The case of illegal drugs may at first sight seem rather far removed from that of abortion. And yet both of them call into question the framing of self-determination and the pertinence of the criminalisation of certain forms of personal behaviour.

Illegal drugs lead us back to the prohibitionist system that rests on Law No. 70-1320, dated 31 December 1970, which penalises simple drug use with a one year prison

⁸ Regarding the delicate, or perhaps even impossible normalisation of abortion despite the law governing and authorising it, see Jean-Yves Le NAOUR and Catherine VALENTI, *Histoire de l'avortement (XIXe-XXe siècle)*, Le Seuil, 2003.

sentence. While we do not accuse every single wine drinker of alcoholism, a drug user, even if they are not dependent on drugs, is viewed both as the sufferer of a disease who must be protected from themselves, and as a delinquent, who must be punished for their own good. This last expression, which suggests that a drug user, through their behaviour, loses their ability to define what is good for them, nevertheless remains ambiguous. Must the good of a drug user involve them abstaining from using any kind of drug, or exchanging the use of illegal drugs for legal ones such as alcohol and tobacco? The law has nothing to say on this point. However, it does leave the drug user the option of avoiding criminal proceedings if they submit to a therapeutic injunction. Viewed as suffering from a disease, they cannot be trusted to take a decision about themselves, and are therefore, as users, “placed under the supervision of the health authorities”⁹.

Despite their behaviour not directly causing any harm to others, criminal law views drug users as delinquents. As per Alain Ehrenberg’s analysis in *L’Individu incertain* (The Uncertain Individual), illegal drug users are considered to have pushed themselves to the margins of Republican citizenship, and to have only themselves to blame for their moral and political decline, lost as they are in and by their quest for pleasure. This is why, even if their consumption alone does not directly cause any harm to others, by retreating into their own pleasure to the detriment of their civic obligations, they are causing harm to the Republic itself. Pierre Marcilhacy, who at the time was the Senate law commission rapporteur, put it as follows when the Senate debated the bill: “drug users, due to the mere fact of the vice that they have adopted or had imposed on them, have lost a great part of their right to freedom”¹⁰. This is why they must be locked up or forced to undergo treatment, in order to (re)teach them to be free, by (re)teaching them that individual or collective pleasure cannot take precedence over one’s civic obligations. Abstinence then appears as their only road to salvation, and the therapeutic injunction is presented as the path to Republican redemption. It seems to us that we can identify here an echo to Chapter VII of Book I of Rousseau’s *Social Contract*, in which he explains that the wayward citizen who, by

⁹ This was thus how alcoholics who posed a risk to others were initially treated. Even if they do not fulfil this condition, Law No. 70-1320, dated 31 December 1970, provides for illegal drug users to be treated in this way.

¹⁰ Opinion presented in the name of the Commission des lois constitutionnelles, de la législation, du suffrage universel, du Règlement d’administration générale (Commission on Constitutional Laws, on Legislation, on Universal Suffrage, on the General Administration Regulations), Sénat (French Senate), Annex to the Protocol of 27 October 1970, p. 4. Quoted by Alain EHRENBURG, “Comment vivre avec les drogues ?” *Communications*, 1996, p. 7.

retreating into his own individuality, might refuse to acknowledge and obey the will of the community and the law that embodies it, will be “forced to be free”.

The policy of risk reduction, which did not start in France until 1987¹¹ with the free sale of syringes in pharmacies, and which France decided to follow at a late stage, was governed by the epidemic risk of AIDS. The public authorities understood that it was more the difficulty of accessing syringes, which at the time could only be obtained upon medical prescription, than a lack of awareness among drug users of the risks involved that was driving them to share their syringes. This practice condemned them to death, while amplifying the spread of AIDS. The free sale, followed by the free access to syringes in vending machines were thus very much a protective public health system that had the aim of controlling an infectious epidemic. The aim of this policy was not to enshrine some sort of right to take drugs, but it did nevertheless recognise that people who consume illegal injectable drugs, who are not really considered worthy of demanding a right to do so, must however be able to do it without it endangering their health too much, or that of any other people with whom they might have sexual relations.

Just like the legislation of abortion arose out of sanitary considerations, since clandestine abortions exposed women to too many risks, likewise, lower-risk drug-taking spaces push further the policy of reducing the risks connected to the consumption of illegal drugs. They provide consumers with a space that shelters them from street violence, with sterile equipment for injections, paramedical staff that is attentive to the health of these consumers and able to act quickly in case of overdose, as well as social workers who can intervene to give addicted users the option of “reintegrating social norms”¹². Seen from this perspective, low risk consumption spaces, which are most improperly described as “shooting-up rooms”, are thus part of a social control approach, though they do not aim to be places of imprisonment. They are part of a protective public health system, while containing elements of a demand for a personal right to consume drugs at low risk, in the name of self-exploration, in the name of relieving the suffering induced by withdrawal, but also in the name of pursuing one’s own gratification, which is the starting point of any drug consumption.

¹¹ In the Netherlands, the free sale of syringes dates back to 1985, following a joint initiative in 1984 by the Rotterdam town council and local user associations, who were recognised as political stakeholders.

¹² In the words of the Groupement Romand d’Études des Addictions (Swiss Francophone Group for the Study of Addiction), which openly acknowledges this aspect of social control. See http://www.salledeconsoommation.fr/_media/salles-consommation-grea-2012.pdf

Drawing a parallel with abortion is thus far from incongruous, since both cases raise the question of the counter-productivity of criminal prohibition and, in both cases, we are dealing with an approach aimed at reducing risk that can imply a demand for a personal right. However, while abortion outlines a legal framework including the demand for a personal right, the policy of risk reduction applied to narcotics does not recognise any right to consume them outside of a very specific space.

Conclusion

The comparison of the two public health systems, one relating to abortion and the other to the consumption of drugs is thus well-founded, if we consider that both of them are characteristic of approaches in which safe self-determination must take priority over the preoccupation of upholding the public justification of a lesser evil. The defence of abortion as a personal right requires us to dissociate the issue of safety from that of an ethical evaluation of abortion. Or rather, it is by referring the ethical qualification of abortion back to the realm of the private that we highlight that what must take priority in accessing a service are the criteria of safety and justice.

In quite a similar way, low risk consumption spaces can imply a demand for the right to consume drugs at low risk. This implies that here too the question of whether taking drugs is a good idea or not is removed from public debate, to become nothing more than a personal question. However the question of psychotropic effects, of the toxicity of products and their effects on health, the question of associated risks—for example, the prevention of the risk of dehydration in the case of the consumption of amphetamines—the question of modes of consumption... must all be made public, in particular as objects of information.

In these conditions, the question of drugs can be the object of a kind of “ethical neutralisation” as long as the rights of others not to suffer any harm due to this consumption are also respected and protected. In the case of drugs, it is precisely a persistent resistance to this operation of “ethical neutralisation”, reinforced by the desire to assert that drugs are an evil in themselves, and by the fact that drugs users are not viewed as justified in demanding a right to consumption, which still serves as a justification for the maintenance of the criminalisation of the consumption of illegal drugs. However, the case of abortion, which has revealed to us that a criminal

prohibition can, under certain circumstances, be counter-productive, should have made it clear to us that it is essentially the fact of keeping this activity clandestine that makes such behaviour dangerous.

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