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DRUG OFFENCES

Abstract: Drug offences became a core element of criminal law in the 20th century, when the international prohibition of non-medical use of narcotic and psychotropic substances led to the world-wide criminalisation of many drug-related activities. This contribution discusses the history of drug offences. It brings into focus the definition of drug offences, both at the international and the national level, and outlines the great diversity of enforcement policies carried out throughout the world in order to eradicate drug abuse. This article also assesses the various justifications of drug offences. It expounds the limits and unintended consequences of drug criminalization and provides an overview of alternative policies, including harm reduction, decriminalization and legalization of drugs.

Keywords: Drugs, Prohibition, War on Drugs, Decriminalisation, Harm Reduction, Legalization

Introduction

Drug offences are late comers in the history of criminal justice. They only became a core element of criminal law in the 20th century after the international prohibition of non-medical use of narcotic and psychotropic substances led to the world-wide criminalisation of many drug-related activities. While the legal definition of drug offences is very much influenced by United Nations conventions, the domestic enforcement of prohibition varies greatly from one country to the other. The recourse to criminal law in the fight against drugs is rooted in a philanthropic project which aims at eradicating the use of specific psychoactive substances. This strategy led to unintended harmful consequences the magnitude of which forces more and more countries to contemplate alternatives to criminalisation.

This contribution summarizes the history of drug offences since the birth of modern drug prohibition until the most recent developments of the ‘war on drugs’. It then brings into focus the definition of drug offences, both at international and national level, and outline the great diversity of enforcement policies carried out throughout the world. This article also highlights the various justifications for drug offences. It assesses the effects of drug criminalization and provides an overview of other possible drug policies, including harm reduction, decriminalization and legalization of drugs.

I. History of drug offences

For much of human history mind-altering substances were geographically confined products, the use of which was restricted by limited availability, by religious and social rituals, and sometimes by law. Prohibition of drug use and drug trade backed by criminal sanction were established at various time in diverse legal traditions (e.g. prohibition of cannabis in Islamic jurisprudence in the 13th century, criminalisation of recreational opium in Chinese law in the 18th century...). By contrast Western law long abstained from exercising coercion to regulate recreational drug-related activities. Tobacco, coffee, opiates, cannabis, alcohol or coca became global commodities thanks to the rise of maritime European empires. Yet in an era of *laissez faire* economics with little control over private enterprise, the world's governments were mainly concerned with how best to tax the trade and not how to suppress it (Courtwright [2002] 165).

1. The birth of drug prohibition

In the course of the nineteenth century, gradual medico-technological advances gave rise to the framing of drugs as a regulatory concept (Seddon [2016]). Technical and corporatist developments in the fields of pharmacy, medicine and public health led to the formulation of a sharp distinction between the legitimate (medical) use and the illegitimate (recreational) abuse of intoxicating drugs. The objections to nonmedical drug use grew more vocal. Political action for the control of narcotics built upon a widespread fear in western elites about the harmfulness and the immorality of popular drug use. Tainted by racism and social prejudice this anxiety was harnessed by moral entrepreneurs who emphasised the association of particular substances with deviant groups or ethnic minorities (Courtwright [2002] 168-73). By the beginning of the twentieth century the movement to restrict the production, trade and use of psychoactive substances gained momentum, both at national and international levels. Contemporary drug offences were born out of this great historical about-face which precipitated the shift in priorities of western political elites from the promotion of intoxicants to their partial prohibition.

The criminalization of drug use and drug trafficking was a recursive process which involved national politics and international diplomacy. It emerged from a prohibitory impulse carried out at local and national level by temperance activists who viewed intoxicating substances as threats to individual health and collective morality. Governmental action was taken in the progressive belief that salutary social change should be made. Domestic legislation was passed in several countries in order to restrict the use and trade of recreational drugs through tax law, medical regulation, or new criminal offenses punishing public drug use and drug possession. In the first half of the 20th century, these laws targeted substances such as opiates, cocaine and cannabis but alcohol was also sometimes in governments' sights as evidenced by the so-called Noble Experiment: between 1920 and 1933, the manufacture and sale of intoxicating liquors was prohibited in all the territory of the United States (Martin [2020]).

The first international conference convened to discuss narcotics was held in Shanghai in 1909. The sequence then ran from the passing of resolutions to the adoption of treaties and the setting up of → international organisations under the umbrella of the League of Nations and, later, the United Nations (McAllister [2000]). Initially, drug control treaties required neither the interdiction of intoxicating drugs nor their criminalisation. Instead they established commodity control through the creation and the regulation of a licit drug market restricted to medical and

scientific purposes with the ambition of monitoring supply and eliminating leakage. The underlying strategy of the first drug control conventions was that once excess supplies were eliminated from the licit market, drug abuse would dry up. Eventually, history proved this assumption naïve and the need for criminal law harmonization in order to suppress illicit activities emerged on the international agenda (Bruun et al [1975] 138-39).

2. The criminalization of drugs

The disconnect between drug control efforts and the social and medical issue of ‘addiction’ led to a hardening of the regime and the accommodation of the values of its most powerful stakeholders. The United States, which had long promoted the universalization of the prohibitionist policy it pursued at home (Musto [1999] ch 2), proved eager to harness the war on drugs as an instrument for advancing foreign policy interests and began to emphasize the danger of drug trafficking to national security (Andrea and Nadelmann [2008] 236). As drugs proved to be ‘suitable enemies’ for building consensus in international arenas, this was conducive to a shift towards a punitive rationality of international drug control. New treaties requiring penal action against illicit drug activities were negotiated. States were assigned the duty to treat or criminalize individual users and required to take action to reduce drug-related crime. In this process, the 1961 Single Convention on Narcotic Drugs can be regarded as a ‘watershed’ event: it was designed to replace all previous drug control treaties and marked a shift towards a stricter, more comprehensive and more repressive framework. The Single Convention was then followed by two other treaties: the 1971 Convention on Psychotropic Substances extended the prohibition to new synthetic substances and further restricted the legitimate purposes of drug use, and the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances significantly expanded the list of activities criminalized.

Progressively, international law has provided building blocks for a →transnational criminal law including substantive norms and procedural measures. This created a ratchet effect on states’ laws which had already criminalised illicit drug activities and conferred considerable legitimacy on the penal treatment of drug issues elsewhere. Eventually, states had little option but to ‘voluntarily’ transplant prohibitionist laws into their national jurisdictions: with various incentives for adherence to the drug control conventions, these sovereign decisions were sometimes imposed through a mix of diplomatic and political inducements (Boister [2003] 960). Today the international drug control regime displays a very strong degree of adherence with more than 180 nations parties to a series of three treaties which strongly influences the definition of drug offences in domestic criminal law.

II. Definition of drug offences

The international drug control regime restricts drug use and the drug trade to medical and scientific objectives and prohibits all recreational uses, it specifies the substances under control, and it defines what behaviours are punishable. The list of controlled substances is organised in several schedules annexed to the 1961 Single Convention and the 1971 Convention. In addition, the 1988 Trafficking Convention applies schedules to precursors that can be utilised in the illicit production of narcotic drugs and psychotropic substances. These lists can be modified according to the procedure stipulated in these conventions. The required control measures depend on this classification which itself depends on the presumed harmfulness of the classified substance. Among the many drugs included in the conventions (almost two hundred), the most

commonly used drugs are cannabis, opiates (e.g. opium, morphine, codeine, and heroin), cocaine, and amphetamine. Despite their dangers, neither tobacco nor alcohol are regulated by the U.N. drug control regime.

1. Scope of international law

International attitudes to drug offenses have been one of progressive net-widening and harsher punishment. This process reveals itself in the three successive treaties which form the bedrock of the current drug control regime (Boister [2001]). The 1961 Single Convention on Narcotic Drugs broadly identifies various behaviours for criminalisation such as the illicit cultivation, production, possession, distribution, and exportation of narcotics (Art. 36). The 1971 Convention on Psychotropic Substances opts for an open-ended approach by requiring that ‘any action contrary to a law or regulation adopted in pursuance of (...) this Convention’ shall be treated as ‘a punishable offence’ (Art. 22). Finally, the 1988 Convention against Illicit Traffic requires parties ‘to establish a modern code of criminal offences relating to the various aspects of illicit trafficking and to ensure that such illicit activities are dealt with as serious offences’ (United Nations, 1998, at 48). In order to pursue this project, the 1988 Convention enumerates new criminal conducts such as property conversion and → money laundering. It ambitiously enlarges the circle of criminal liability to include all persons who induce, assist, shelter or finance the illicit consumption of drugs, and criminalizes drug users themselves. Last but not least, the Convention introduced provisions to seize the assets of drug traffickers. It also facilitates international judicial co-operation with respect to enforcement and prosecution of offenders and provides for → controlled deliveries and the → extradition of major traffickers. All three conventions provide penological guidelines expressing a pursuit of greater severity as serious drug-related offences are ‘liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty’ (Art. 36, 1961 Single Convention; Art. 22, 1971 Convention; Art. 3, 1988 Convention). Other provisions are intended to ensure that the offences established are matched by appropriately severe penalties so as to have the desired deterring and punitive effects.

This legal arsenal represents a dramatic extension of the criminalisation of drug-related behaviours. Yet its normative content remains partly indeterminate and has to be specified by national legislators. Indeed, the conventions are not self-executing. They do not create individual penal responsibility. Instead they establish an indirect system of interstate obligations which relies on states’ transposition of international provisions into domestic law. The skeleton of offences and of penalties set down in the conventions provides only a template which has to be fleshed out in the domestic law of the states parties. The vagueness of the international criminal provisions seems to have been a necessary condition for making them acceptable to negotiating parties with distinct systems of substantive and procedural law. The compromise accommodates different grammars of criminal law, especially in opposing civil and common law approaches. But this came at the cost of explicitness and the result has been relative legal ambiguity and very limited developments on the scope and conditions of criminal liability (e.g. elements of conduct, fault, criminal capacity...).

Owing to its open texture and its lack of precision, international drug control law can, at the most, claim to achieve loose harmonisation of domestic criminal laws, not to mention

sentencing policies. It is unclear even to what extent such a convergence is actually required by the treaties. For in addition to the indeterminacy of the criminal provisions, all three conventions include escape clauses which weaken their normative capacity. *Pacta sunt servanda* and the principle of effectiveness constrain all signatories to adopt a punitive-oriented legal framework. But a close look at the text reveals that, although formally binding, the penal provisions prove remarkably soft. Regardless of national reservations, states parties only have the obligation to criminalize enumerated conducts insofar as it does not violate their ‘constitutional principles’ and subject, in some cases, to ‘the basic concepts of (their) legal system’ (Art. 3(1)(c) and 3(2), 1988 Convention). The scope of international obligations is thus open to diverging interpretations and to national variations.

2. Drug offences in national legislations

The drugs conventions have an important impact on national legislations. Coupled with the official UN commentaries and the restrictive reading of the International Narcotics Control Board annual reports, they have contributed to the dissemination of a repressive model of drug policy. It is generally acknowledged among legal comparatists that transfers of norms are affected by local interests, mentalities and institutions. The impact of the same legal transplant can be very different from one setting to the other. It is therefore not surprising that in spite of a decades-old project to promote a transnational penal response to illicit drug activities, worldwide diversity still prevails. Not all states parties have criminalized the illicit use of controlled substances and drug possession for personal use is sometimes not considered a punishable offence. However, while the technicalities of the law on the books may vary from one country to the other, trafficking in controlled substances is illegal in all jurisdictions. With a few rare exceptions (i.e. cannabis legalisation in a handful of countries), all drug related activities with no scientific or medical purpose fall under the jurisdiction of domestic criminal legislation which defines drug offences along the lines of the U.N. conventions.

III. Enforcement of prohibition

Just as the hidden figures of drug offences makes it difficult to adduce presumptive numbers regarding their occurrence, it is impossible to precisely determine the degree of enforcement of narcotics legislation in a particular jurisdiction. It is however possible to distinguish between different types of enforcement policies. Indeed, national drug policies can range on a continuum from very punitive forms of drug prohibition to more tolerant and health-oriented approaches. In that respect, international obligations seem to be less of an influence than other local determinants such as cultural history, procedural traditions, policing and sentencing practices, and more generally, the role of expertise and the weight of medical science in framing public policy, the access of social movements to the locus of public power (Colson [2019]). The diversity in the enforcement of drug offences is clearly visible in the existing contrast between geographical regions.

On the American continent, the ‘war on drugs’ had a very repressive tone until recently. In the →USA the eradication of drug supply and drug use has been pursued with an increasing punitive fervour since the 1970’s (Reuter [2013]). →Penal populism and moral panic over drugs led to significantly increased penalties and the use of mandatory punishment which fuelled mass incarceration of racial minority drug offenders in the 80’s and 90’s. Drug courts

which were designed to monitor offenders' abstinence and compliance with individualized treatment did not counterbalance this increase punitiveness as they have expanded the involvement of criminal justice into the lives of low-level offenders. This emphasis on law enforcement was exported to the South as Latin America and Caribbean countries turned out to be focal points of the US effort to reduce the supply of drugs for the American market. In exchange for billions of dollars in anti-drug assistance programmes the region has faithfully followed the US strategy. With few exceptions, Latin America countries have established severe drug prohibition regimes which favour harsh criminal sanctions and ever-increasing sentences (Labate et al [2016]). As a result, people imprisoned for drug related offences now make up for a sizeable group of the prison population. In →Canada, the emphasis was also overwhelmingly on law enforcement even though the emphasis on treatment and prevention was always more present and the number of drug arrests and the length of drug sentences significantly lower than in the US. While the 'war on drug' ideology has a lasting impact on American penal policies, the last decade has seen a softening of this approach. Incarceration rates remain high in the Americas but governments in the northern hemisphere are now considering more public-health based approach while Latin and Caribbean countries increasingly voice concerns over the price of punitive drug policies. In spite of this, and despite the legalization of cannabis in a number of American states, the dominance of law enforcement in drug policy remains predominant.

Diverging from the US model, European countries have explored a less punitive path to enforcement. A policy discourse and a legal attitude that favor treating and reintegrating drug users rather than depriving them of their liberty has been developing at the level of the European Union and its Member States (Colson and Bergeron [2017]; id. [2020]). While the legitimacy of harsh repression for drug-trafficking or drug-money-laundering is supported by the European Union, a cultural model for drug policy is also emerging in European states on the political acceptability of harm-reduction measures. Meanwhile cannabis policy is also evolving, although not as fast as in America. Medicinal cannabis is increasingly making inroads in the field of conventional medicine and several jurisdictions have been developing tolerant policies regarding recreational cannabis. This observation does not extend, though, to →Russia and the former USSR republics where a punitive response rooted in the Soviet past remains the predominant driver of drug policy.

Just as in America or in Europe, the content of drug offences and the policy of enforcement in Africa, Asia and Oceania are the product of global influences and international law as well as the result of specific national trajectories. At the risk of cultural reductionism (keeping in mind the existence of national exceptions and the state of flux of many domestic drug policies) it is possible to affirm that Muslim and Asian countries have leaned towards a conservative and reactionary prohibitionist model (Ghiabi [2018]). Diversity must not be overlooked as some of these countries provides harm reduction services (e.g. Morocco, Iran...) while others do not (e.g. Saudi Arabia, Cambodia...). Yet when voluntary treatment is available, it is oriented towards abstinence and not for maintenance purpose. Other drug control measures include the commitment to compulsory drug detention facilities which resemble prisons or labour camps (e.g. Vietnam, Lao...) and the emphasis usually remains on drug suppression through punitive

policies. This includes the imposition of corporal punishment — such as caning, lashing or whipping — on drug traffickers but also on drug users.

Capital punishment is the most extreme punishment for drug offences. In 2021, only a handful of countries actively execute people for drug offence (China, Iran, Saudi Arabia and Singapore) but more than 30 states still apply the →death penalty to drug offenders, sometimes as a mandatory sanction. Although the United Nations Office on Drugs and Crime, the International Narcotics Control and other key international bodies have opposed the use of capital punishment for drug offences, it seems that the international drug control regime has contributed to the normalization of this sanction in a number of countries (Sander and Lines [2018]). Indeed, far from reflecting a long-standing domestic legislation, the increasingly punitive response to drug offense is for many of the states which execute drug offenders a modern legal development that can be linked to the adoption of the 1988 Convention, a treaty which invites states to use penal sanction as the primary tool for drug suppression. Moreover, the very repressive tone of the international drug control regime has been said to encourage some governments to fight the war on drugs outside the bounds of law, the most dramatic example being the thousands of extrajudicial executions of accused drug users or traffickers across the Philippines under the government of President Rodrigo Duterte (Reyes [2016]).

IV. Justification of drug offences

The Preamble of the Single Convention on Narcotic Drugs states that the use of the criminal justice system in the fight against drugs is grounded in a shared concern for the ‘health and welfare of humanity’. This philanthropic ideal is combined with a threat-based language which justifies punitive enforcement as part of a crusade against drug addiction: ‘a serious evil for the individual’ and a ‘social and economic danger to mankind’. The official commentaries of the international instruments governing the matter note that each party is left with ‘considerable flexibility in determining how best, in the light of its moral, cultural and legal traditions, to secure the required goal’ (United Nations [1998] 60). States are merely obliged to criminalize and punish certain types of conduct, i.e. to make them a criminal offence punishable by ‘adequate punishment’ (Art. 36, 1961 Single Convention on Narcotic Drugs) with deliberate reference to custodial sentences. The treaties also expressly authorize the states parties to provide for ‘alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare’ (Art. 3, 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances). Thus, deterrence, rehabilitation and just desert can be used as →theories on punishment to justify the criminalisation of drug related activities. The purpose and intensity of the criminal sanction vary from country to country, depending on the degree of tolerance towards certain forms of recreational drug use and, more generally, on collective representations of illicit drugs and institutional practices that give meaning to their punishment.

In general, the objectives of drug prohibition are the prevention of the detrimental effects associated with drug abuse. This policy is often associated with a ‘drug free world’ narrative which claims to protect both drug users and non-users. Reduction in prevalence is to be attained through criminalisation of drug use and behaviours preliminary to drug use (e.g. importation, acquisition, and possession of drugs). This approach raises difficult questions as it requires

states to punish the voluntary exchange, among adults, of legally proscribed goods. Such offences are victimless crimes in the sense that they do not result in anyone's feeling that they have been directly injured. Whereas violent crimes or property crimes cause harm to individuals who can subsequently ask for the protection of criminal law, drug offences do not have direct victims liable to bring them to the attention of the authorities. While this specific feature does not preclude punishment, it requires a special type of justification for legislation.

The language of classical liberalism can hardly serve as a basis for the prohibition of drugs as demonstrated by John Stuart Mill's famous harm principle. According to Mill, 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'. It can certainly be argued that serious harms arise from drug use (e.g. intoxication, weakening of family relationships, reduced productivity...) but these are either self-inflicted and willingly endured, or indirect and putative. Without any direct and palpable harm caused to others, the criminalisation of drug related activities requires the adoption of a different theoretical framework (Heinze [2012] 472-74).

While historically the moral argument according to which drug use is per se immoral played a crucial role in the prohibition of drugs, legal moralism is now rarely used to justify this policy. There is indeed no general consensus on the morality of psychoactive substances consumption and its ability to enhance mental capacity or its consumption simply for pleasure. Antiliberal doctrines such as communitarianism or legal paternalism provide a stronger ground for prohibition. While communitarian theories consider that civil society is entitled to eliminate evil, including in its most private forms, in order to induce people to live a good life, legal paternalism assumes that the government should protect individuals against their will, especially when their behaviour (e.g. drug abuse) interfere with their capacity for autonomy. Eventually utilitarianism provides strong reasons to criminalise drug activities on the ground that they threaten society as a whole from the detrimental effects of drug use (e.g. intoxication-induced crimes, crimes related to obtaining drugs...).

Communitarianism, paternalism and utilitarianism provide powerful arguments in favour of the criminalisation of drug-related activities, especially as these doctrines can draw on the widely-shared assumption that undesirable behaviours can be eliminated through legal prohibition, or on the alleged connection between drug abuse and various forms of predatory crime. Yet the advocates of criminalisation tend to overlook the cost and the difficulty associated with the enforcement of laws preventing citizens from engaging in private behaviours in the absence of complaining victims (Block [2015]). Furthermore, in order to be properly justified drug criminalisation needs to be put to the reality test. On the one hand, it becomes necessary to properly assess the harmfulness of drugs compared to other legal substances and practices in order to appreciate the consistency of prohibition. On the other hand, all the effects of criminalisation, both on drug users and on society as a whole, including its possible side-effects, need to be taken into account in order to determine the pros and cons of such a policy. However virtuous the doctrine of drugs prohibition, criminalisation can hardly be ethically justified if it is not supported by empirical evidence (Bush [2012] 873).

V. Limits of prohibition

The worldwide criminalisation of drug activities has been criticized in the light of the poor results of the drug control regime. Indeed, although regularly reaffirmed by the international community in hortatory political declarations (e.g. UNODC [2016]), the ambitious objective of significantly reducing both the illicit supply of, and the demand for, drugs appears more than ever out of reach. United Nations agencies have implicitly acknowledged this failure in the last decade, avoiding any claim of success; the global situation is now described as expanding both with regard to the prevalence of illicit drug use and with regard to illicit drug markets. In the meantime, the number of people using drugs has risen 22 per cent in the past decade while drug production and drug trafficking are thriving (UNODC [2021] Booklet 2, 2). This diagnosis of policy failure is all the more worrisome as the control of psychoactive drugs by means of criminal law is facing new challenges such as the rise of new psychoactive substances and the development of drug cryptomarkets.

1. New challenges to prohibition

Until the last decade, legislative control targeted a relatively small number of drugs under the umbrella of the UN treaties. In the 2000s, the rapid emergence of new drugs, the dangers of which were largely unknown, showed that the traditional legal framework were not able to cope with these so-called ‘legal highs’. The criminalisation of these new psychoactive substances led to a ‘cat and mouse’ game with vendors avoiding the law by marketing new products as ‘research chemicals’. This led to unintended consequences such as the proliferation of a new generation of substances, not yet controlled, and more harmful retail sales (from high street shops to street dealers). Since then, wide ranging ‘blanket’ bans covering possible future variants of controlled substances and faster risk assessment processes are among the policy responses which have been used to stem the advance of new psychoactive substances. While the emergence of new psychoactive substances resulted in the criminalization of drug related activities being extended and tightened, the legacy of this policy is disputed (Measham [2020] 346-48). Widening the net of criminalisation may have contributed to reduce availability and prevalence of use, but it also blurred the boundaries between licit and illicit markets.

Since the early 2010s, the development of drug markets on the dark web has created a new challenge to drug policy. New online marketplaces have been created which allow anonymous selling and buying of controlled substances. These markets only account for a minor part of illegal transactions of narcotics - \$315 million annually according to the United Nations Office on Drug and Crime (UNODC [2021], Booklet 1, 24) – but they are growing rapidly and their accessibility is widening. The fight against online markets requires massive investment in digital expertise in addition to undercover tactics. Even so, it is unclear if a traditional prohibitionist strategy has the potential for containing these new developments of the drug trade. On the one hand, while spectacular police operations led to the closure of some digital platforms (e.g. Silk Road), these were quickly replaced and drug cryptomarkets display a strong resiliency thanks to continuous technological innovation. On the other hand, there is the risk that efficient law enforcement interventions on the online market lead to a displacement of this drug trade offline, with a risk of increased violence (Shortis et al [2020] 369-73).

Uncertainties about the proper tactics to fight new psychoactive substances and drug cryptomarkets are only two examples which illustrate the increasing doubts about the law enforcement strategies which prioritise criminalisation of drug-related activities in order to eradicate them. In addition to their disappointing results, leaders of the international drug control system have acknowledged some malign consequences of the criminological model propagated by global prohibition.

2. Unintended consequences of criminalization

In 2008, the executive director of the United Nations Office on Drug and Crime, Antonio Maria Costa, the United Nations drug czar, listed several unintended consequences of the system (Commission on Narcotic Drugs [2008]). The first one is the creation of ‘a huge *criminal black market* that now thrives in order to get prohibited substances from producers to consumers’. The second one relates to the displacement of public health policy to the background as public security and law enforcement is perceived as the primary way of solving drug issues. The third unintended consequence has to do with *geographical displacement*, the so-called *balloon effect* which links tighter controls on production in one place to increase in other places. ‘*Substance displacement*’ is the fourth consequence: the stringent control of one drug moves suppliers and users to other psychoactive substances which are sometimes more dangerous. Last but not least, the fifth unintended consequence is the ‘marginalization of drug users’: ‘a system appears to have been created in which those who fall into the web of addiction find themselves excluded and marginalized from the social mainstream, tainted with a moral stigma, and often unable to find treatment even when they may be motivated to want it’. Domestic and international efforts to control illicit drugs thus proved to have severe human rights consequences (Lines [2017]), among which arbitrary detention under the guise of ‘drug treatment’, the denial of due process rights in the context of drug cases, and the denial of the right to health for drug users by prohibiting access to effective HIV prevention measures.

This uncompromising assessment, which has been confirmed by many research findings (Reuter [2009]), strengthens the thesis that global prohibition has led to some sort of ‘criminal iatrogenesis’, the ‘harmful results of well-intentioned crime control practice’ through a process of ‘deviancy amplification’ (Bowling [2011]). These unintended, if not unexpected, consequences have sometimes turned drug prohibition into a ‘self-fulfilling prophecy’ as punitive drug laws have produced the public health and criminogenic consequences that fuel public fears and moral condemnations, and thus the need for punitive prohibition.

More generally, a comparative and historical perspective on normalised drug use in various communities around the world raises questions about the cultural colonialism associated with global prohibition. From the beginning, the list of controlled substances, and the definition of deviance they convey, bore testament to the cultural and racial prejudices of the moral entrepreneurs who promoted their interdiction in the early 20th century. Synthetic substances produced in industrial nations eventually joined the ranks of the scheduled drugs of the people of Asia, Africa and Latin America. Yet some still detect a western ethnocentric bias and a neo-colonial aspect of the international drug control conventions (Daniels et al [2021]). Without a doubt, the universalising statements on the intrinsic evil of drugs overlook the existence of

contexts where traditional forms of drug use provide an integrative and positive contribution to group solidarity and community structure.

VI. Alternatives to criminalization

The principle established by the international community, according to which recreational use and trade in a number of psychoactive substances must be prohibited remains firmly established but the long-standing international consensus on the criminalization of drugs is weakening. The disappointing results of repressive policies leads more and more states to defect from a strictly penal model (Bewley-Taylor [2012]; Boister [2016]). Alongside harm reduction interventions, decriminalisation of drug use is applied in a growing number of countries and some jurisdictions have even crossed the Rubicon of legalisation.

1. Harm reduction

The harm reduction movement originally refers to a variety of interventions which aim to minimise the negative health impact associated with drug use (Rhodes and Hedrich [2010]). This includes services such as drug consumption rooms, needle and syringe programmes, opiates substitution programmes, drug checking, and the provision of information on safer drug use. While harm reduction might seek to prevent or end drug abuse, its main objective is to reduce the risks associated with drug use, not to end it. Harm reduction acknowledges that some people use drugs and that they must be encouraged to consume the least dangerous drugs in the most secure environment possible. In its strongest version, harm reduction aims to improve drug laws and law enforcement practices, so that they are not detrimental to drug users and their communities.

Harm reduction interventions emerged in the 1980s in Western cities confronted with the dramatic consequences of increasing heroin use. Once a controversial approach, it has evolved into a central pillar of drug policy in Europe. Given the successful reduction of health risks through application of this model, it was eventually endorsed in the policy positions of UN bodies involved with international drug control and it has now spread to all continents.

While harm reduction measures can fit into a prohibitionist framework and does not exclude criminalisation of drug related activities, it raises questions of juridical coherence. How can the law confer legal status to practices designed to safely deliver drugs to users when the use of those drugs remains illegal? This requires at the very least the setting of legal exceptions in order to exempt helpers from punishment (e.g. when providing syringes to persons using illegally obtained heroin). Taking harm reduction seriously leads to prioritizing safe practices for drug use at the expense of abstinence by way of detoxification. As such, the institutionalization of the reduction of the health risks of addiction undermines the ideal of the eradication of drugs and is often combined with the decriminalisation of drug use.

2. Decriminalization

The most obvious alternative to criminalisation of drug related activities is → decriminalisation. It consists in reducing or eliminating penalties for specific offenses. Although this process can theoretically affect any kind of drug crime, it usually applies to the offense of drug use or to the possession of modest amounts of controlled substances, and more rarely, to low-level offences in the drug trade. Reasons which justify such reforms are manifold. They include the rising

costs of mass incarceration, the growing evidence of the counterproductive consequences of criminal justice in the fight against drug abuse, and the commitment to personal autonomy. Substituting a non-criminal response for a criminal response is also often conceived as a way to better connect drug users with healthcare and social services.

Decriminalisation of drug use and drug possession can take many forms (Eastwood et al [2016]; Stevens et al [2022]). It can be limited to simple depenalization when drug possession remains in criminal legislation but the punishment can be removed on the basis of specific criteria (e.g. amount and type of drug, age of the offender, repeat offense...). While depenalization can be the result of changes in practice or procedure, such as deprioritizing the policing of drug possession (*de facto* decriminalization), full decriminalization requires a change in the law (*de jure* decriminalization) carried out either by the legislator or by the superior courts. It consists in the complete removal of drug use and drug possession from criminal legislation. In this case, other types of response can be sometimes used by the police or by the court in lieu of criminal sanction (e.g. civil or administrative penalties).

Thanks to the flexibility of the United Nations conventions, a few countries never criminalised drug use in spite of their prohibition. Others have decriminalized drug possession since the early 1970s, the Netherlands being at the forefront of this movement with an early tolerance to cannabis low level trade and local *de facto* decriminalization of hard drugs. In the past 20 years, many more countries have shifted away from repressive policies and moved towards decriminalization. Portugal is the most well-known example as it officially decriminalised the use, possession and acquisition of all illicit drugs in 2001. In 2021, 50 countries have implemented policy alternatives to the criminalisation of drug possession for personal use including Australia, Costa-Rica, the Czech Republic, Germany, Mexico, Switzerland...

Decriminalisation policies come with various consequences. The literature which examines the results of changes in user sanction generally emphasizes that the short-term effects of decriminalisation on drug use prevalence are modest, if not undetectable. While the reduction of sanctions is often conceived as a means to promote human rights, public health and social justice, it sometimes leads to an increase of the number of people caught in the web of state institutions. This happens when a broader part of drug users are subject to less severe (e.g. administrative instead of criminal sanction) but more systematic control measures. Added to the fact that decriminalization has no impact in diminishing the public safety concerns associated with drug trafficking, such unintended consequences explain why some countries have decided to go one step further and fully regulate the production and distribution of some previously illicit drugs.

3. Legalization

Sometimes caricatured as a libertarian or a hippie phantasy, drug legalization cannot be equated with →abolitionism or uncontrolled liberalization but is better encapsulated in the concept of regulation (Global Commission on Drug Policy [2018]). While legalization implies allowing the non-medical use of drugs as well as their production and distribution for recreational purpose, it also requires the establishment of rules similar to those applicable to legal drugs such as alcohol or tobacco. The legalization of drugs requires the regulation of all the elements of a legal market from licensing procedures for producers to the vetting and training of vendors. The

products themselves must also be regulated: their potency and quality as well as their packaging. Eventually, access and availability to drugs are subject to regulatory control. This requires rules on age restriction and on the location, appearance and opening hours of outlets where drugs can be legally bought. The marketing, branding and promotion of drugs would also be subject to regulation. Thus, if the legalization of drugs implies the suppression of drug offenses, it requires their replacement by new regulatory offenses the purpose of which is to effectively sanction any breach of the complex regulatory apparatus which necessarily come with the end of prohibition.

An expected benefit of legalization lies in the reduction of drug-related crime. Though the connection between criminality and illicit substances has been well established from a statistical point of view, the relationship is both complex and counterintuitive. The violence associated with the drug trade has been largely attributed to the suppression of sellers and traffickers and the absence of market regulation, which are direct consequences of criminalization (Werb [2011]). Bringing drugs into the legal economy would reduce the violence associated with the drug trade. It would guarantee the quality of merchandise whose origins would be known and controlled. In this perspective, legalization is also considered a means to reduce the risks taken by drug users, especially those most harmed by punitive drug-enforcement efforts. However, when substances are legal (alcohol, tobacco), one can expect a higher rate of use. Legalisation may lead to a rise in drug consumption and possibly of use-related-harms but this may not be inevitable. On the one hand, stringent regulation does not necessarily lead to increased drug availability but enables instead greater control over which drugs are available, where and how. On the other hand, even if legalization leads to a higher prevalence of drug use (number of drug users), it can nonetheless lead to a reduction of overall harm to users and nonusers.

Complete legalization of all illegal drugs, leaving them subject only to the law of supply and demand would have very different consequences from the regulation of select illegal substances controlled by a state monopoly and structured by the health system. Among various models, proponents of legalisation sometimes distinguish between medical prescription for the riskiest drugs (e.g. heroin assisted treatment day clinics in Switzerland) and licensed retail or licensed premises subject to strict conditions for lower-risk drugs (e.g. cannabis ‘coffee shops’). Regulation of non-medical use of narcotics remains the exception but more and more states have embraced legalization of cannabis as a viable option after decades of criminalization: calls to abolish drug offences and to establish alternative regulatory regimes for drug control are now heard in more and more regions of the world.

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