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Drug Policies in Western Europe

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Edited by
Hans-Jörg Albrecht
and
Anton van Kalmthout

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Preface

Since the end of the 60's and the beginning of the 70's many countries in Europe and other parts of the world are confronted with a still growing problem of the use of narcotic drugs and drug trafficking, especially use of and trafficking in the so-called "hard drugs". Until today the attention has mainly focused on those aspects of the drug problem which are associated with public health and prevention, treatment and assistance of drug addicts. The role and the function of criminal law and criminal justice has only been partially subjected to scientific investigation and thorough discussion. But mutual relationship between the so-called drug problem on the one hand and criminal law or, more precisely, criminal policy and criminal justice at large on the other hand is becoming increasingly important. To mention only some examples, we may point to the increasing use of compulsory means in treating drug addicts, the problem of anonymous witnesses and under cover agents in processing drug offenders and triggering drug offences, the pressure put on national policies by international treaties such as the Single Convention or by international drug agencies leading to restrictions in attempts to develop national policies, in the freedom of traffic between people, in the constitutional right of self-determination. Other most relevant bottle-necks in this area are represented by capacity problems within the criminal justice and prison systems, the growing repressive character of internal policies in correctional institutions, the impact of drug law enforcement on principles of due process, the marginalization of minorities in our societies. In all these cases the role of drug policy is increasingly dominating. The influence on law enforcement, jurisdiction, investigation and prosecution policy as well as sentencing goes beyond the field of drugs and strikes on fundamental principles of our societies. Besides, the practical question arises: Doesn't the current drug policies stimulate so-called drug-related crime and particularly organized crime instead of repelling them? All these problems don't stop at the border of a certain country. On the contrary, in all Western countries one is confronted with identical issues. However, the way adopted to deal with these issues in contemporary societies reflects fundamental differences.

We therefore thought it valuable to have an opportunity to exchange views regarding drug policy not only on a political level, as can be observed usually, but on a scientific level. As in 1992 borders in Europe and border controls should fade away, the need to discuss these matters in a free and unbiased way becomes even more urgent. Both, the Tilburg University and the Max Planck Institute for Foreign and International Penal Law currently are engaged in research on drug problems. Research in the department for criminal law in Tilburg is centered around comparing Dutch drug laws with those of other European countries taking into account also international drug conventions. The Max Planck Institute for Foreign and International Penal Law has recently carried through a comparative study on drug laws in Western Europe focusing on principles and essentials in the attempt to identify major differences between currently enforced statutes. Today the Institute is engaged in another piece of research touching some problems of drug policies such as the basic conditions of organized crime and drug trafficking, especially the role of profits drawn from drug trafficking for the emergence and maintainance of organized crime, furthermore effects which can be expected from aiming at reduction of those profits. Therefore both institutions thought it worthwhile to exchange statements and views on drug policies, drug laws and criminological research done in these fields.

The conference has been successful. It goes without saying that the success is due to the readiness of the participants to deliver excellent papers on the state of legislation, legal research and social research in the respective countries. We express our deep gratitude to several institutions and individuals. The University of Tilburg has contributed a lot by helping in planning and organizing the conference as well as by co-funding. The Royal Academy of Sciences, the Dutch Ministry of Justice, the city of Tilburg, the National Foundation for Mental Health and Gouda Quint publishers have made available funds. Finally, Mr. Stijn Franken, assistant at the Law Faculty of the University of Tilburg, has invested help and expertise to a degree which guaranteed a smoothly running of the conference. Ms. Beate Lickert and Mrs. Corry Goris have typed the manuscript very carefully. Fast publication of the conference papers is due to their very careful work.

Freiburg i.Br. - Tilburg, July 1989

Hans-Jörg Albrecht
Anton van Kalmthout

Contents

Introduction

Hans-Jörg Albrecht, Anton van Kalmthout

One of the most remarkable features of the discussion of potential effects of the closing down of borders and giving up border controls in 1992 is the emphasis on illicit drugs, drug problems and organized crime engaged in drug trafficking. There are two assumptions implicit in this discussion. One hypothesizing that drug problems are problems imported from outside and another suggesting that there should be effective alternatives to former innereuropean border controls. Both assumptions seem to be questionnable, but they are still receiving considerable attention and support as can be shown by new legislation, coordinating initiatives on various levels of inter-governmental cooperation with still growing pressures on some countries which seem to keep on developping a drug policy of their own. Recent examples of exercising pressure can be drawn from the Netherlands, Spain, Denmark, countries which did not follow exactly in practice the mainstream of drug control in Europe. While deviation from mainstream policy occurs not that much with respect to formal legislative devices, differences can be rather observed in implementation of drug laws. The paradox that soft and also in some countries hard drugs may be purchased in small amounts without the risk of criminal prosecution and punishment although criminal statutes provide for criminal penalties seem to create rather big conflicts between European countries. The very same paradox can be observed with respect to environmental crimes or economic crimes, trafficking in women especially from Third-World countries. But in these areas tightening of crime control and strenghtening criminal law on an European level are not sought.

What is it what makes drugs and drug control that attractive for criminal law and criminal law enforcement? Why is escalation in control sought and what consequences are likely to result from increasing levels of repression for our soicieties in general and for drug problems in particular? What can be expected from a war on drugs? The answers to these questions are not readily available, they surely cannot be sought in a national framework only. Drugs, drug control and drug problems are international in nature today. So, answers to these questions can only be found in an international perspective. And obviously most

countries from the Western, industrialized sphere experience the very same problems with drugs and drug control. The reasons for this are easily revealed. The significance of distance and time has been reduced drastically. Exchange of ideas, products, and life styles is efficiently organized. Modern means of communication and transports serve to ty together all parts of the world. Industrial and post-industrial societies have to cope with the phenomenon of ever increasingly levels of free-time available for most members of society as well as with growing groups of individuals not bound to the sector of employment. Artificial stimuli have to replace natural stimuli in everyday life in order to satisfy recreational needs. Be it licit or illicit drugs, they fulfill needs obviously emerging with current ways of organizing society. Drugs may be used for various reasons. Self-medication, psychoactivation, sedation or search for religious or transcendental experiences, reduction of fear or coping with perceptions of hopelessness represent aims which are seen to be achieved by using drugs. These belief patterns are enforced and reenforced substantially by pharmaceutical industries which have promised and are still promising that psycho-substances are important in the attempt to cope with stress, to look for relief and to solve many other problems.

Attractiveness of drug control for criminal law and criminal law enforcement surely is due at least partially to the fact that interests on the part of users of illicit drugs cannot be organized efficiently, thus providing a sound basis for escalation of investments, accumulation of resources in various criminal justice agencies etc. As drug use currently is restricted to marginalized social groups restrictive forces are not likely to emerge. When at the beginning of this century especially the use of cocaine was widely spread in middle and upper class circles extent of control did not come near those levels observable today. Furthermore vested interests serve to maintain the rather high level of control. The development of a treatment market, of scientific interests, of control systems on national and international levels lead to a situation where a multitude of professions for different reasons are ready to preserve the status quo or to go on. The force stimulating this process of escalation is embedded in the overriding goal of todays drug policies, that is eradication and elimination of drug use and drug problems. In this respect an analogy can be drawn to general crime and deviance policies. In this areas it is recognized that such goals like achieving a state of complete conformity, law abideness where deviance or crime are virtually non-existent characterize totalitarian and authoritarian regimes, although it is also recognized that up to now these types of policies have only be successful in increasing repression, not in eradicating problems they aim at. Launching wars on drugs

seems to represent the natural consequence of these approaches to drugs and drug problems. War-like states do not require any more respect for civil laws, due process etc. Demon heroin is used to coordinate and unify all forces in society in the endeavour to suppress drug-related behaviour.

While one of the big current concerns on national and international levels of formulating and devicing drug policies and drug law obviously is the problem how to crack down on drug traffickers and the money involved in drug trafficking - which brings upon the need to invade other parts of societies in order to be able to identify drug money -, we should not forget that contemporay drug policies do not affect only users of hard drugs and that changes in criminal law and procedural law aiming at drugs probably will not be restricted to drug offenders. First of all we should also consider that most people in European societies but probably also in other parts of the world suspected to have committed a drug offence and sentenced on the basis of drug laws can be related to soft drugs. Although those people do not have any problems with AIDS, they are not a relevant clientel for professions engaging in treatment of addiction, they are making up the bulk of drug offenders and sometimes they seem to be forgotten when talking about drug problems and drug policies. Another point of interest concerns restrictability of drug-related changes in criminal and procedural law to the area of drug offences and drug offenders. As we know from other criminal law changes in terms of alleviating detection, prosecution and punishment devised for special offence or offender groups these are likely to be extended to the normal offender, too.

This leads to the escalatory potential embedded in the drug field. It is obvious that in the last decade developments in drug-related criminal law have had a major impact on the criminal law at large. It has served also to strengthen something like an integrative model of criminal justice binding all agencies and all organizations to one superordinate goal: eradication of drugs and drug problems. Traditional safeguards for restriction of power set up also by strict separation of organizations involved in the investigation of crime and processing offenders are in danger to erode. Polarization did result from these developments suppressing the view that there are a lot of different and differing options in controlling drugs. Traditional separation between police forces and secret services also is endangered. On the one hand police is adopting means formerly restricted to secret service, on the other hand barriers between police and secret services set up against information exchange break down.

Another point which should be mentioned in this context is international cooperation in the drug field dominated by police and partially touching issues of external politics as well as traditional principles of concentrating cooperation in

the area of criminal law within the judiciary. Uncontrolled exchange of information between national police agencies is growing rapidly predominantly justified with the need to fight terrorism and drug trafficking. Uncontrolled activities in multinational and mulitlateral investigation of drug offences are spreading with the increasing use of so-called liaison-agents or contact agents leading to the deployment of national police resources in other countries with partially seriously differing criminal justice systems. It is kind of strange to imagine e.g. German police officers are participating in tracing drug offenders from their home country in legal systems where either excessively high prison sentences can be expected or even the death penalty while the German constitution excludes explicitly the death penalty and extradition of German citizens.

It is rather clear that fields of control and state activities have been opened on the international level which are not regulated by law.

In these introductory remarks only some important points related to drug policy and drug law could be mentioned. But these are surely of common interest because they touch those areas which inevitably lead to the conclusion that national drug policies are intertwinned and interdependent what makes it quite difficult to develop and maintain independent and autonomous views and solutions to the problems. This is true in terms of developping ideas and theories on the one hand as well as in terms of organizing the reponse to drugs and drug-related crime. One of the main aims of this conference has been to overcome uniformization at least in theorizing and developping ideas. We wanted to make clear that there exists a range of options as to respond to drugs as well as different views of assessing and evaluating drug problems. Variation is meaningful, this is true not only for social science research in the technical sense but also for social development and social theory. But despite variation it should be possible to adhere to a core set of basic principles of devicing policy and implementing criminal law. This can be shown by the list of conclusions and recommendations which were the result of bringing together experts from different fields for a one week conference.

The attempt to gather systematic information on the current state and the prospects of national drug laws and drug policies as well as the consequences resulting herefrom was framed by a list of topics which should reflect the basic points of interest embedded in the field of drugs and drug control. Besides information on the current state of criminal law provisions concerning illegal drugs, with sepcial regard to the consumption and possession of soft and hard drugs as well as drug-related behaviour such as the selling of needles and other instruments for the consumption of drugs, advertising and fostering the use of

drugs etc., the focus has been on procedural aspects of drug law enforcement, for example: the use of undercover agents, anonymous witnesses, forfeiture of (alleged) drug money, collection and storing of information and evidence, the national and international exchange of information on drug offenders or people suspected to belong to drug trafficking groups by police and the public prosecutor, the role and status of provoking drug offences in implementing drug laws and in criminal procedure and the general legal position of drug offenders in the criminal justice system. Furthermore the role of private physicians in prescribing controlled drugs and their position in treatment of drug addicts has been considered. Attention has also been given to support programmes for drug addicts, ambulatory and otherwise, including particularly methadone maintenance programmes. As far as law enforcement characteristics are concerned the main topics were: waiving prosecution, sentencing, the prison regimes and prison capacity problems as well as enforced treatment and treatment as a penal measure. Going beyond the current state of drug laws and drug policy the prospects and the possible future of these fields have been made subject of comprehensive study and debate including essentially the current trends towards a reform of the present situation, the possibilities of legalizing the use of soft and hard drugs giving particular consideration to the legal status of the prescribing and consumption of medicines, gambling and the sale and use of alcohol and tobacco. In order to provide relevant empirical material, too, information and data on the epidemiological aspects of drug use, criminological research on the correlates of drug use and abuse as well as on the interrelationship between drug problems and drug control have been included in the agenda.

These issues are comprehensively dealt with in the national reports. The countries included concern: Austria (Fehérvary/Vienna), Belgium (Boutmans/Antwerpen), Denmark (Jepsen/Aarhus), England/Wales (Rutherford, Green/Southampton), Federal Republic of Germany (Albrecht/Freiburg, Scheerer/Hamburg), France (Bernat de Celis/Paris), Italy (Manna, Ricciardelli/Rome), The Netherlands (Anjewierden, van Atteveld/Tilburg, van Kalmthout/Tilburg), Spain (de la Cuesta/San Sebastian, Diez-Ripolles/Malaga), Switzerland (Schultz/Berne), USA (Wisotsky/Fort Lauderdale).

The national reports are preceeded by papers on general issues in drug policies.

Christie's (Norway) reflections on drugs deal with the reasons of the panic rage directed only towards illegal drugs while others even more dangerous although legal and accepted drugs are spared. As he argues that no social system seems to be able to accomodate more than one moral panic at a time, he predicts

that the drug panic will fade away in the near future and will be replaced by the panic AIDS.

Wiarda (The Netherlands) outlines the results of repressive strategies in drug control arguing that repressive and prohibitive approaches are counterproductive and have a criminogenic multiplier effect. He presents the results of a study on organized crime in the Netherlands focussing also on the role of drugs in this area.

Chatterjee (Great Britain) gives an overview on international drug conventions. He states that drug-based issues and problems are multidimensional, and that their effective resolution therefore requires multidisciplinary action at national, regional and international levels. In his opinion international drug conventions have their limits. They can recommend measures and the international institutions concerned may offer their cooperation in the promotion of an international cause.

Diez-Ripolles (Spain) reports on recent actions and plans developped by the European Parliament with regard to narcotic drugs. He summarizes that it is generally accepted that the emphasis should be on the reduction of demand by means of education, formation, information and rehabilitation. He concludes that in the European Parliament it is evident that there exists a great deal of suspicion about the indiscriminate acceptance of an arsenal of criminalizing techniques, penalties, growing police forces and legal devices as promoted e.g. by the United Nations.

Yodmani (Thailand) describes the problems associated with the implementation of UN-policies of bringing upon large scale changes in the customs, economy, social values, behaviour patterns of rural, sometimes tribal populations in a Third World country.

The volume ends with the conclusions and recommendations as developped during the conference as well as with a general overview on the current state of criminal law and drug control in Western Europe.

The Limitations of the International Drug Conventions

Dr. S.K. Chatterjee

Abstract

Drug-based issues and problems are multi-dimensional; their effective resolution therefore requires multi-disciplinary action at national, regional and international levels.

International Drug Conventions have their limits; they can recommend measures and the international institutions concerned offer their co-operation in the promotion of an international cause.

1. Introduction

International Conventions may be regarded as instruments of consensus among the contracting parties. Unless they have directly binding effect upon the national legislation of a contracting party, the acceptance and the ratification of a Convention, depend upon the political will of a State. In a democratic State, public opinion, pseudo or real, is expressed through the political will. It is therefore essential that the provisions of any international convention represent the true public opinion of States. In this article an attempt is made to establish, inter alia, that the quality of the opinions of contracting States determines the quality and limitations of international conventions.

Furthermore, drug-related Conventions, are subject to limitations due to the constant scientific advancement in the fields of medicine and pharmacology and also in international communications.

2. An Overview of the International Drug Conventions

There is little point in discussing the provisions of the international Drug Conventions in this article. The Contracting Parties are aware of these provisions; and it can safely be assumed that by now even the non-contracting parties are also familiar with them. The U.N. Drug Conventions, namely, the Single Convention on Narcotic Drugs, 1961 and the Convention on Psychotropic Substances, 1971, and the Protocols related to them, aim at fulfilling two very important objectives: control of the use and prevention of the abuse of drugs including psychotropic substances. Both the Conventions have made detailed provisions with a view to realising those objectives through the co-operation of the Contracting Parties. "Control" and "prevention" entail a host of things: controlling the production and manufacture, as the case may be, of drugs, and controlling the habit of drug addiction; prevention, on the other hand, demands effective treatment facilities including opportunities for the rehabilitation of drug addicts. However, "control" and "prevention" under the Conventions are related: in the absence of sufficient control of production and manufacture of drugs, they will remain available in abundace, thereby frustrating the preventive measures. Economic reality in certain countries makes the prospect of effective control of production, in particular, remote. Consequently, the incidence of illicit traffic in drugs rises, defeating the objectives of the Conventions. It is also the purpose of this article to identify some of the problems which may not be resolved by any international drug conventions.

On careful study it will appear that the International Drug Conventions in force, provided, in principle, for most of the important means of dealing with drug-related issues and problems as they became evident in the 1960s and 1970s, but drug-related problems are mounting and the international community has been experiencing even greater difficulties in dealing with them. Does this imply that the Drug Conventions have failed? They have not failed; this claim may be justified on two grounds: the purpose of the Drug Conventions, like that of any other international Convention, is to offer guidelines to their contracting parties on the basis of studies and research made by experts drawn from various jurisdictions, which function they have fulfilled; secondly, due to the varying conditions in contracting parties' jurisdictions, an appropriate implementation of the Convention provisions has not proved possible. It is in this latter aspect that drug issues and problems require re-consideration in the 1980s and 1990s, especially in relation to the causes of drug dependence. Even if the international Drug Conventions included all the issues and problems related to drug use and abuse, the following questions could still be raised.

To what extent do and can States implement these provisions? Do they have the resources, and if not, how may resources be provided? Are the existing resources appropriately utilised? Do all States assign drug issues and problems priority equal to other similar issues and problems? Do they consider the issues and problems in the same light as other issues and problems? There exist economic and cultural dimensions to drugs issues and problems;[1] they are looked at differently by different States.

In an attempt to achieve a degree of uniformity in respect of operative regulations and treatment of certain Convention provisions, the World Health Organization published in 1984 a document entitled "Guidelines for the Control of Narcotic and Psychotropic Substances in the Context of International Treaties."[2] Along the lines of the international Drug Conventions, this Guideline also emphasises, inter alia, the responsibilities of the Parties under the Conventions, the need for treatment and rehabilitation of drug-dependent persons, reduction of supply of drugs and effective law enforcement. The Guideline in fact elaborates the Convention provisions; it cannot go beyond that, because by so doing it would either encroach upon the sovereignty of States or disregard the actual difficulties experienced by various States in implementing the Convention provisions. To put it in another way, there exists an unbridgeable gulf between the Convention provisions and what States in reality can do to implement the Convention provisions. These provisions stand for the targets to be attained in tackling drug-related problems. In view of the varying conditions and circumstances, they may not be attained uniformly by the members of the international community. Additionally, the targets were determined by national policy-makers according to their contemporary understanding of drug-related issues and problems in the 1960s and 1970s. The change of attitude of contemporary societies particularly in respect of decriminalisation of drugs-users, which is of fundamental importance, was not therefore reflected in the Conventions.

However, both the Single Convention and the Convention on Psychotropic Substances require the Contracting Parties to give special attention to, and take all practicable measures for:

1. the prevention of abuse of drugs;
2. early identification, treatment, education, after-care etc.;

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1 See further Chatterjee, S.K.: Legal Aspects of International Drug Control. The Hague 1981, pp.3-5.

2 See Rexed, B., Edmondson, K., Khan, I., Samson, R.J.: Guidelines for the Control of Narcotic and Psychotropic Substances: In the Context of International Treaties. WHO publication, Geneva 1984.

3. the promotion of the training of personnel engaged in treatment and after-care etc. of drug-dependent persons;
4. assisting persons whose work so requires to gain an understanding of the problems of drug abuse and of its prevention; and
5. the establishment of regional centres for scientific research and education to combat the problems arising from the illicit use of and in drugs.[3]

Both the Conventions advocate manpower training as one of the factors of effective action against the abuse of controlled drugs and substances. In planning and implementing manpower training, countries can seek the expertise from various international organizations and especially from the World Health Organization.

An account of policies for health manpower training has already been published.[4] The health and manpower development programme of the World Health Organization deals with all aspects of manpower training, namely, (a) basic training;[5] (b) advanced professional and vocational training; and (c) continuing education.[6] Drug education of health personnel including doctors and nurses, enforcement officers and even students must be given a high priority by all States. It is not the function of the international Drug Conventions to explain in great detail as to how drug education should be imparted at various levels; they can only draw up a broad outline of the objectives of drug education; leaving the appropriate methods of implementing the objectives to States in accordance with their requirements and special circumstances.

Reduction of demand is believed to be one of the means of dealing with drug problems. The international Drug Conventions provide for the gradual abolition of production and manufacture by switching over to other commodities. Success in this respect depends upon two important factors: the availability of appropriate opportunities and the willingness and ability of a government to do so.[7] As to the first factor, the U.N. Fund for Drug Abuse Control (UNFDAC) since its establishment in 1971 has been providing assistance to various countries in an attempt to reduce the illicit supply of, demand for, and traffic in drugs.[8] The prospect of

3 Article 38 of the Single Convention on Narcotic Drugs and Article 20 of the Convention on Psychotropic Substances.

4 See Fulop, T., Romer, M.I.: International Development of Health Manpower Policy. WHO publication, Geneva 1982.

5 See further WHO Technical Report Series No.663. Training and Utilization of Auxiliary Personnel for Rural Health Teams in Developing Countries. Geneva 1979.

6 See WHO Regional Office for Europe: Continuing Education of Health Personnel and its Education. Geneva 1980.

7 See further Chatterjee, S.K.: Can Demand for Illicit Drugs be Reduced? Bulletin on Narcotics 2 (1987), pp.3-9, p.3.

8 See further Chatterjee, S.K.: op.cit. (note 7), pp.485 and 535-536.

having a skilled agricultural population facilitating the production of substitute commodities is remote, and succes in this respect is bound up with the social and cultural traditions in a country.[9]

Demand for illicit drugs remains rampant for another special reason. Drugs are objects of organised crime, the reward of which is large monetary profits. There are two apparent ways of dealing with this problem: drug education and strict law enforcement.[10] In so far as the former is concerned, the WHO Expert Committee on Mental Health[11] advocated the operation of professional training courses with a multidisciplinary approach.[12] In this connection the WHO Expert Committee on Drug Dependence observed that the general public "should be well-informed so as to allow the promotion of the necessary legislative, preventive and management programmes.... Educational measures may be directed towards changing the attitude of the community not only towards the use of dependence producing drugs in particular but also towards the use of drugs in general."[13]

In its Twentieth Report the said Committee urged that it would be necessary to "eliminate ignorance and misconceptions about drug effects", and to "improve understanding of the causes of problems associated with the non-medical use of dependence producing drugs, and of the effectiveness of various approaches and techniques in preventing these problems."[14]

The effectiveness of drug education programmes has not yet been adequately assessed by States. The U.N. Division of Narcotic Drugs has also emphasised the importance of drug education in reducing the demand for illicit drugs. It urged countries to collaborate "to ensure free flow of technical information to permit identification of regional trends and facilitate use of counter-measures as they are developed."[15] It also pointed out that "universities should be encouraged to include drug abuse prevention programmes in the curricula offered to medical students and professional health workers."[16] In recommending policy measures required for the prevention of drug abuse it included, inter alia, the following:

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9 See further Klerman, G.L.: Drugs and Social Values. International Journal of the Addictions 5 (1970), pp.313-319.

10 See paragraphs 3 and 4 of this article.

11 See WHO Technical Report Series No.363, 1967, pp.35 et seq. (Sec.3).

12 See WHO Technical Report Series No.478, 1971, p.38.

13 See WHO Technical Report Series No.460, 1970, p.33 (Sec.3.4.2).

14 See WHO Technical Report Series No.551, 1974; see also WHO Chronicle 1978, pp.97-101.

15 See International Strategy and Policies for Drug Control 1982; see also The United Nations and Drug Control 1982, pp.48-51.

16 Ibid.

"To provide, by national authorities, preventive educational programmes which stimulate interest in healthful activities and provide positive alternatives to drug taking which are consistent with the social values of each country."

"To provide, by national authorities, with regional and international support where appropriate, education and training for students, teachers, parents, magistrates and personnel of community welfare services and those dealing with youth problems and family health."

"To encourage dissemination of information, including school text books, with a view to promoting understanding among the general public of the harmful effects of drugs and of the risks associated with drug abuse, particularly among young people, as well as to discourage publications which stimulate drug abuse."[17]

The enormous economic gains available from illicit drug trafficking seem to provide an impetus to drug traffickers in various ways. "Despite the fact that drugs are abundantly available on the illicit market, suppliers operate as its very important controlling factor because of the intervention of legal constraints. Demand for drugs, on the other hand, does not necessarily depend on their price. The usual market forces really do not operate in a drug market in their traditional way. Drug suppliers dominate markets even though available supplies generally surpass the total demand at a given point in time."[18]

Law enforcement has its limits. "If drug abuse is deeply-rooted in societies, law enforcement measures can only operate as a deterrent to drug abuse and trafficking problems. Such measures, however, do not lead to eradication of the habit of drug abuse."[19]

"Given the technological advancement in communications and logistics systems as well as the enormous profits derived from illicit drug trafficking, it is most probable that traffickers will in the future attempt to increase both the illicit supply of and demand for drugs. It is also expected that traffickers will manage to produce new addiction-producing substances for the illicit market .... the reduction of the illicit demand for drugs can only be achieved by concurrent implementation of both stringent drug law enforcement measures and effective programmes for the prevention of drug abuse."[20]

Organised crime in relation to illicit trafficking in drugs is not a recent phenomenon, but it has become prominent only in recent years. It corrupts societies and institutions. Organised criminal activities are operated by extremely

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17 Ibid., p.16.
18 See Chatterjee, S.K.: op.cit. (note 7), p.4.
19 Ibid., p. 7.
20 Ibid., p. 3.

"smart" institutions; the extent of their operation is boundless; they are too powerful to be tackled by traditional methods of law enforcement. These institutions usually trade in hard drugs and deal with addicts and/or make decent human beings addicts or criminals. They foster three principal types of crime: they provide finance to drug-trafficking organizations; launder drug-based money and promote drug-addiction. Even professional people such as doctors, lawyers and accountants may also be involved whether directly or indirectly. Given the nature of drug-based organised crimes it will be impossible for any government acting alone to deal with them. Additionally, they have reached an unprecedented level of sophistication; therefore, very expert law enforcement officers are required to combat them.

The gravity of the problem has been identified by the United Nations in at least four important documents:

1. The Draft Convention against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities, 1984;
2. Draft Legal Guide on Electronic Fund Transfers;[21]
3. Strategy and Policies for Drug Control (Report of the Expert Group on Countermeasures to Drug Smuggling by Air and Sea);[22] and
4. Recommendations Regarding a Comprehensive Multi-disciplinary Outline of Future Activities Relevant to the Problem of Drug Abuse and Illicit Traffikking.[23]

Furthermore, in December 1983, the General Assembly of the United Nations adopted a resolution entitled International Campaign against Traffic in Drugs[24] and on December 14, 1984 the thirty-ninth session of the Assembly adopted the following resulutions:

21 See U.N. Doc. A/CN 9/ 250/Add. 3 dated 19 April 1984.
22 See U.N. Doc. E/CN/7/1986/II/Add. 3 dated 24 December 1985.
23 See U.N. Doc. A/Conf. 133/MC/L.1 (Part II) dated 25 June 1987.
24 See A/Res /38/122 of 16 December 1983.

- the International Campaign against Traffic in Narcotic Drugs;[25]
- the Declaration on the Control of Drug Trafficking and Drug Abuse;[26] and
- the Terms of Reference for the International Campaign against in Traffic Narcotic Drugs.[27]

The resolutions entitled International Campaign against Traffic in Narcotic Drugs are in reality an outcome of the International Drug Abuse Control Strategy.[28] At the thirty-ninth meeting of the General Assembly, the Secretary General submitted its report containing three very important elements which gave particular emphasis to the aim of promoting the international campaign against traffic in drugs.[29] They were:

- Establishment of co-ordination mechanisms for drug law enforcement in regions where these do not yet exist; and
- Measures designed to alleviate the special problems of transit States.

These recommendations are based on the relevant provisions of the Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances.[30] However, sadly, progress in implementing these resolutions has not been very satisfactory.[31]

3. Limitations of the International Drug Conventions

Legal measures alone may not effectively deal with the problems related to the abuse of controlled substances. The social and political atmosphere, unique to each country, may be such as to foster drug addiction, and it is not solely by law that an "unwholesome" socio-political atmosphere may be transformed into a "wholesome" socio-political atmosphere. The particular quality of the socio-political atmosphere in a given country should suggest the essentials of a national

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25 See A/Res/39/141.

26 See A/Res/39/142.

27 See A/Res/39/143.

28 See A.Res/37/168 of 17 December 1982. Official Records of the Economic and Social Council (1981) Supplement No. 4 (E/1981/24- Annex II).

29 See International Legal Materials 1985, p.1170.

30 See Article 31, paragraph 12 and Article 35 of the Single Convention on Narcotic Drugs, and Article 21 of the Convention on Psychotropic Substances.

31 See the Secretary-General's Report on International Campaign against Traffic in Drugs 1985, pp. 1170-1174.

drug policy. The Convention rules, in the main, are general rules, except for the provisions as to submission of statistical returns, estimates of drug requirements for medical and scientific purposes etc. by the Contracting Parties. Over the years State practice seems to have developed three different models on which most national policies are based: the legal model, the medical model, and the psychological model.

Whereas the legal model places importance on defining moral and juridical limits of medical use of drugs and enforcing available laws in the event of those limits being exceeded, the medical model presupposes that drug-dependence is essentially a disease, and therefore addicts or drug-dependent persons should be treated by medical and para-medical means which would eventually either cure such persons or reduce their demand for drugs. The psychological model, on the other hand, sees the addict against the background of his total life situation including the influential social factors in the environment, and attempts to cure the addict or the drug-dependent person by therapy and withdrawal from the environment. He is seen, primarily, as a product of his environment.[32]

It is to be emphasised that none of these models is, by itself, complete. A drug problem often requires a combined application of the three models. Therefore, all national policies should incorporate the essentials of the three models. However, even if a country has formed her national policy following this formula, it may be difficult for her to enforce that policy effectively due to lack of resources. Recources in this context are of two types: internal and external. Both types of resources consist of finance and expertise, including technical assistance. In the event of a country lacking sufficient financial resources, it may be possible for her to direct her available human resources internally in order to accord high priority to drug-related problems. Drug education both at school and university levels may be offered without entailing much extra cost.

It is appreciated that reduction of production and manufacture by introducing alternative industries, or by crop substitution, might require considerable expense and effort; but external resources, especially in the form of technical co-operation from the United Nations, are available.

Effective means of dealing with drug-based problems will include appropriate training of law enforcement officers, including customs officials, exchange of information across national boundaries and of course stringent legislation against drug trafficking. These issues can be dealt with at national and intergovernmental levels. In addition to establishing the U.N. Fund for Drug Abuse Control (UNFDAC) in 1971, the United Nations also set up a Central Training

32 See further Rexed et al.: op.cit. (note 2), p.59.

Unit for Law Enforcement Officers in 1972. Assistance in the following areas should facilitate detection and punishment of illicit drug traffickers:

(a) obtaining evidence which may be used by the courts of the requesting State;

(b) supplying intelligence rapidly; and

(c) a mutually supportive investigative system.

These may be achieved either at a bilateral or multilateral level. Co-operation at the inter-governmental level may be extended by the International Criminal Police Organization (INTERPOL), Customs Co-operation Council, International Maritime Organization, International Civil Aviation Organization, the Pompidou Group in the Council of Europe and the Commercial Crime Unit of the Commonwealth Secretariat.

Perhaps the European Convention on Mutual Assistance in Criminal Matters,[33] or, in the case of the British Commonwealth, the corresponding mutual judicial assistance programme, should be enforced more effectively.

Regional Task Forces may also be set up along the lines of the U.S. Task Forces.[34]

4. International Drug Conventions and National Drug Policies

The relationship between the international Drug Conventions, whether actual or in draft form, and national drug policies is an interesting one. Like all other international Conventions, international drug Conventions, are also the outcome of a general consensus of the participating States. The general consensus reached at international fora does not necessarily reflect the specific issues that may deserve special attention in a particular society or region. In the event of a region having unique conditions giving rise to the need for special treatment of drug-users, whether on a liberal or rigid basis, the responsibility lies with the national and/or regional policy-makers concerned to ensure the inclusion of

33 The European Convention on Mutual Assistance in Criminal Matters, 20 April 1959 and the Additional Protocol to the Convention of 17 March 1978 (see 17 International Legal Materials (1978) 801), entered into force respectively on 12 June, 1962 and 12 April, 1982; The European Convention on Extradition of 13 December 1957 and its two additional Protocols of 15 October 1975 and 17 March 1978 entered into force respectively on 18 April 1960, 20 August 1978 and 5 June 1983; The European Convention on the International Validity of Criminal Judgments of 28 May 1970 entered into force on 26 July 1974 (See 9 International Legal Materials, 1970, p.450).

34 See Annual Reports of the Organized Crime published by the Office of the Attorney-General, Washington D.C., 1980-1985.

special or unique provisions relating to those conditions. The same process applies to Conventions of both regional and international character. In a democratic society, responsible public opinion, expressed through various national agencies should form the basis for national policies. In this sense, the relationship between national policies and international Convention policies is domestic-international; where harmonisation of national policies is required, international Conventions can only offer general guidelines. Of course, where the national constitutional system acknowledges international Convention provisions as directly enforceable, the domestic-international process is transformed into an international-domestic process. Hence the need for well thought-out national and international policies.

State practice is the basis for Convention-provisions as it is for modifications of such provisions. In this respect, States are the primary actors of international or regional policy-making. On the other hand, if the attitudes of particular group of States are significantly different from what is conveyed generally in a U.N. resolution or Convention, those States can always decline to accept that resolution or Convention. Such is the position of the U.N. Convention on the Law of the Sea (III) and the General Assembly Resolution entitled the Charter of Economic Rights and Duties of States, 1974.[35]

In the case of drugs, narcotic, psychotropic or otherwise, the arguments for observing the provisions of Conventions seem to be overwhelming, specially for two reasons: first, given the nature of the commodity its abuse may not be controlled or prohibited by any State alone; second, illicit trafficking being a means of illicit supply of drugs, international co-operation, whether on a regional basis or on a truly international basis seems to be indispensable.

Although it should be re-iterated that a liberal treatment regime is highly desirable for drugs-users, nevertheless, an element of personal responsibility for the creation of that status should not be disregarded. However, a seperate regime for dealing with the indiscriminate illicit drug traffickers should be adopted. It is for the international community however to determine who should fall under which regime as it is for it to decide whether drugs, alcohol or coffee etc. should be subject to the same regime or they should not be under any regime at all.

35 See U.N. General Assembly Resolution 3281 (XXIX).

5. Conclusions

The U.N. Drug Conventions have considered most of the issues and problems relating to the use and abuse of drugs and psychotropic substances as they were presented before the U.N. by the international community during the 1960s and 1970s; but they have their limits. Given the complex nature of the drug-related problems, the Conventions cannot possibly include the latest ideas whether of treatment or drug education or of punishment especially at a time rapid scientific and technological advancement. The document entitled "A Comprehensive Multi-disciplinary Outline of Future Activities Relevant to the Problems of Drug Abuse and Illicit Trafficking, 1987" is a landmark in the history of drug control by the United Nations. It primarily suggests two things: first, that it is not by Convention provisions alone that drug-based problems can be resolved; and second, that these problems are multi-dimensional, and therefore require multi-disciplinary action. These are mere recommendations, but promotion of ideas, recommendation of guidelines and extension of co-operation are three of the most important functions that the U.N. can perform under its Charter.

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Current Trends on the Works of the European Parliament with Regard to Narcotic Drugs

Prof.Dr. J.L. Diez-Ripolles

An interesting debate took place recently (autumn 1986) in the European Parliament about what would be the most appropriate policy to deal with the drug problem. Because of the discussion of the Stewart-Clark report which had been commended to a commission of the aforesaid Parliament, there was an occasion to look at the other existing alternatives in a climate of widening perspectives which are found lacking in almost all international agencies and institutions today which deal with this problem. This lecture aims to describe and analyze the preliminary studies and the debate which gave rise to the Resolution on the drug problem, 9th October 1986.

We shall begin by studying the report of the commission of investigation, the so-called Stewart-Clark report, named after its author and we shall also look at the opinions of the minority as summarised in the annexes of the report.

The report assumes from the outset that the Community's policy on drugs has not been correct and that there is a need for change. In designing such a policy one must be realistic and accept that neither the supply nor the demand will ever completely disappear. Having established this premise it is to be admitted that the action taken up until now has been too traditional because of the lack of serious research into the ultimate causes of drug consumption. The adoption of a global approach is recommended which would tackle the whole chain of production, supply and demand of narcotics, especially considering that there is a lot of doubt as to where the real problem of drugs lies, whether in the supply or the demand. Leaving aside whether some day such a problem may be clarified, it would seem advisable that action on the demand should be of prime importance.

This would require great effort in the field of preventive education, rehabilitation and training. This effort, as distinct from state initiative will be in vain if not backed by society.

The opinion of the minority of the commission enlarges on these affirmations insisting on the necessity of standardising society's treatment of drug consumption and drug dependence given that it is a phenomenon which is deeply rooted in human culture from earliest times and it is not going to disappear. Having accepted this, the total failure of the current repressive policies of the countries of the Community is highlighted.

The report mentions an idea which frequently appears nowadays in all political-criminal reflections, that is, that the great power of the drug trafficking organizations and their capacity to shake the stability of the institutional life of countries makes one fear they will end up doing the same to the economic and financial system of the democratic world. In connection with the aforementioned, the report asks to what extent the depenalization of drug trafficking would be viable since it is clear that this would obviously substantially affect the profit level of the trafficker. After deploring such rigid attitudes where the question is not even considered, the discussion centres on whether depenalization would contribute to a reduction in the number of those consumers who are still controlled by the traffickers in those partial experiments of depenalization at the present time and the harmfulness and/or the production of dependence on substances, concluding that no type of narcotics should be legalised, that is, neither heroin, nor cocaine, nor cannabis considering the increase in the numbers of consumers which would result, the persistent interest of the traffickers under such conditions and the damage to health which would result. However, they are conscious that the necessity of modifying the aforementioned drug policies should stimulate further discussions.

The minority group of the commission clearly emphasises that the problem of drugs today does not lie in the consumption but rather in the above mentioned economic and institutional power of the multinational trafficking organizations. Such organizations will exist while there are repressive policies which are a source of the great profits from illegal trafficking. Therefore, after serious preparation, an international conference, financed by the EEC, should be held to study the viability of a policy of antiprohibition linked to informative campaigns about the risks of drug consumption and which would formulate recommendations which would be binding on countries of the Community according to terms laid down.

The report employs a concept of drugs which, on the one hand, is extremely lax (all chemical substances or those derived from plants which induce physical, mental or emotional change in the consumer) in as far as it does not require there to be dependence not even psychological. In fact, throughout the report, the subject of dependence is dealt with in a way which is confused and not very systematic, if not misleading. In some passages it is admitted that there is a lot of ignorance about the addictive potential of heroin and cocaine; however, heroin and barbiturates are accepted as producing physical dependence with a syndrome of abstinence and cocaine and amphetamines as producing psychological dependence although the effects of the former are sometimes described in a way which closely approximates that of physical dependence. They deny that LSD causes dependence but they are careful not to make any such affirmation as regards cannabis from which they claim, the majority of smokers do not suffer any ill effects; however, they go on to discuss the serious dangers that may be produced when it is mixed with crack or phencyclidine. On the other hand, the concept of what constitutes a drug must not be limited to whether or not it is illegal. Conceptually alcohol and tobacco are also drugs. They talk about the social repercussions of the former and the addictive capacity, as well as the lethal effects, of the latter which are higher than in any other drug, but it points out that they are to be omitted from this report as they need to be analyzed separately. This does not alter the fact that where, in other passages, they insist that all drug policies should concentrate on the danger of drug taking in general, proposing life styles and the benefits of a healthy life, they refer exclusively to the drugs dealt with in the report. The opinion of the minority is to advocate for a distinction between hard and soft drugs. In addition they reject separate treatment for legal and illegal drugs. It seems unreasonable that the production of alcohol, nicotine and the medicaments which alter consciousness, although being the most dangerous and widespread in Europe, are not prosecuted while others which are equally socially accepted in other societies, are.

The report reiterates time and time again that all efforts should be directed against the big time traffickers who should be shown no mercy. What is required is massive penal repression. The small traffickers or resellers should also be punished but in a different way because of the lesser importance of their conduct. As regards the drug addicts, no exceptions should be made in the punishment of crimes which are committed in connection with their addictive needs and equally they should be punished for the possession of drugs for their own use. As for the occasional consumers of drugs who are not addicts, no matter how aware you are of the negative effects that the application of the penal law has on

them - above all the risk of becoming a drug addict in prison and the fact of their integration in society - there is no waiver of the penalty for possession of drugs for personal use. At most they recommend a benevolent attitude towards the cannabis consumer so that sometimes a warning may be enough instead of a prison sentence. The aforementioned attitude should in no case extend to the cannabis trafficker.

The opinion of the minority is that neither the possession and consumption of whatever drug, nor the resale of small quantities should ever be punished.

The report proposes the introduction of new criminal offenses to deal with the acquisition, possession, consumption (sic) and the 'laundering' of assets which originate from drug commerce and warns the financial entities of the grave judicious consequences which would ensue from participation in such activities. It also mentions the idea of controlled delivery but not without complaining about the difficulties that the continental legal systems of a great number of member states would encounter or indeed the rivalries which would occur between different police forces. As for the penalties, it regrets the noticeable differences in terms of severity that are evident in the countries of the Community and proposes the introduction of the confiscation of the property of the trafficker. It notes the ambivalent attitude of society towards the drug consumer and especially the drug addict who is considered simultaneously to be the victim and the delinquent and proposes that where there are centres of rehabilitation addicts should be offered the alternative of going there instead of prison. This offer should be made widely available to small traffickers and consumers and the idea that drug addicts should never be sentenced to prison should also be considered.

Likewise the idea of freezing the assets of the trafficker is thought advisable and, for reasons of efficiency, this should be dictated by the judicial authorities at the same time as the accusation is made and the burden of proof as to where such assets have arisen should be on the trafficker. The differences between the various countries of the Community as regards extradition should disappear and it is recommended that a multilateral European agreement on drug offenses should be signed. It considers carefully the adoption of measures to improve police effectiveness far beyond the controlled delivery and proposes an increase in taxes on the production and trade of chemical products and the precursors used in the elaboration of drugs.

The report is especially emphatic with regard to the change in crop production in the producing countries and considers that the concessions of development aid, the loans from international financial organizations, and the particularly favorable commercial agreements should be denied to those countries who are

not disposed to collaborate. The opinion of the minority, whilst accepting the techniques of alternative crop cultivation, reject commercial or diplomatic intervention as a means of pressure remembering that on occasions it was precisely countries of the Community who first introduced such crops into these countries, that Europe has exported the problems derived from alcohol and medicaments and that putting pressure on other countries may involve disrupting activities in other cultures to solve problems which have nothing to do with them.

The report gives a lot of attention to the educative and formative activities which should always be based on real facts which are neither exaggerated nor linked to social prejudices and which suggest new styles or ways of life without drugs rather than frightening people about the harmful effects to health which result. Educational campaigns are proposed at all levels of teaching with special emphasis on primary and secondary schools. It is not considered a bad idea to start such education at an early age using merely emotional techniques as the children are not yet of an age to appreciate the advantages of a healthy life. Only later should they be educated from an intellectual standpoint taking into account individual peculiarities. Public information campaigns via the media, provided they are not alarmist or sensational, are thought to be of interest. The opinion of the minority points out that the education programmes should be directed at both legal and illegal drugs.

As regards treatment and rehabilitation the report is aware that disintoxication in itself is not enough but rather the drug addict must be re-integrated into society. In any case and as far as the former is concerned there should always be places available in centres to break the habit for any drug addict who wishes to be admitted and they should strive to get rid of all kinds of fear or distrust towards such centres. Therapeutic communities are considered useful even though one should not ignore the fact that they frequently exert excessive psychological pressure which means other alternatives should be available for those who reject such methods. Treatment with methadone is not thought to be useful because it leads to another type of dependence and lends itself to abuse. The fight against AIDS requires that sterilized syringes should be made available in whatever situation. The opinion of the minority on the other hand is that the administration of methadone is positive and the drug addict should not only be helped as regards treatment but also given information about the least harmful methods of drug taking.

We shouldn't conclude these references to the Stewart-Clark report without mentioning some opinions about the Spanish Criminal Policy on drugs which are hinted at or at times even clearly expressed. Thus Spain is seen as an example

of a country where the penalties imposed on traffickers are too light. In fact, this assertion is based on information which was not correct. It is also classed as one of the few European countries which have liberalised drugs for short periods of time and where the result of the experiment has been a disaster. They lament, with a degree of sarcasm, the difficulties of extradition from Spain. They doubt my country's ability to control strictly the external borders of the Community which come under its jurisdiction. It is true that Holland also comes in for criticism and in general there is a definite rejection of the continental legal system which is based on principles which are an obstacle to the new measures. The model to follow is undoubtedly England and to a lesser extent Germany and Italy. Throughout the whole report the somber omnipresence of the United States Criminal Policy is very much in evidence.

In the session which was held on 7th October 1986 the European Parliament discussed the Stewart-Clark report as well as the opinion of the minority. This is not the place to discuss the debate in detail, but it may be of interest to note the topics which were given most attention and in what way.

Throughout the whole debate it was evident that there was a continuous split between the parliamentary groups of the right who supported the Stewart-Clark report and the Socialist, Communist and Rainbow parliamentary groups who subscribed to the view of the minority. The split was also obvious in the interventions of various representatives of the executive bodies of the Community and the Council of Europe.

The groups on the right insisted on the necessity of a global view of the problem which would deal with both the supply and the demand. What is more they recognised that priority should be given to taking action about the demand and linked to this education and information rather than rehabilitation considering the limited effects of the latter. Only when the demand disappears will the fight against drugs be won.

However, this does not mean that repressive measures should be abandoned or that they should be limited to those who traffic drugs on a big scale. Thus they reject liberalization policies the failure of which, they claim, has been demonstrated in Holland and Spain. They reject the idea of impunity for the possession or consumption of whatever kind of drug including cannabis and even more strongly the sale of drugs on a small scale. They also consider the distinction between hard en soft drugs to be out of place. They are particularly irritated by the fact that the Dutch legal system is not in step with the majority of the countries in the Community. They seem to be particularly interested in the introduction of the offence of 'laundering' of assets which have been obtained from trafficking

and other connected activities. As for penalties, they suggest they should be made tougher and that the confiscation of property should be introduced. They consider the mildness of the penalties in Holland and the speed with which one can be released from prison for good conduct in Spain to be intolerable. In any case they consider the possibility of a clear distinction between big traffickers, small scale dealers and consumers.

They manifest their concern at the enforcement of the controls on the external borders of the Community with particular reference to Spain and Portugal and they assume, without any morals qualms but yet as regards effectiveness, the responsibility of bringing pressure to bear on the producing countries.

The left wings groups assume that the fundamentally repressive policy which has been followed up until now has shown itself, time and time again, to be inefficient. They quote, among other data, the estimated percentage of seizures as compared with the quantity of drugs consumed and the limited perspectives of an increase with the proposed new measures. It is necessary that such a policy, which after all is conditioned by the policies of the United States should be abandoned. The new policy should take into account that the main problem is the potential destabilizing economic power of the big drug trafficking organizations against whom there should be penal repression and the 'laundering' of assets obtained illegally should be made an offence; in any case, perhaps the best solution would be the legalization of trafficking since prohibition benefits such organizations. This alternative should be studied urgently. In any case the consumption and sale of small quantities of drugs should not be considered an offence; the legal reaction should depend on the distinction between hard and soft drugs. The Dutch policy is considered to be a success as far as these aspects are concerned as they have managed to reduce the consumption of soft drugs and stabilized the consumption of hard drugs (and there has been a reduction in the consumption of heroin). They are absolutely convinced that the most important thing in the fight against drugs is to take action within society to reduce demand and they think that as long as there is a distinction between legal and illegal drugs such action will not be effective. Legal drugs are much more dangerous to health at the present time. The proposed measures against the producing countries are at the very least, immoral.

After the discussions, the European Parliament passed a resolution on the drug problem on 9th October 1986. This was the result of a compromise between the parliamentary groups with the exception of the European Rights Group. After mentioning among other things that the policies followed by the member states up until now have done little towards repression, prevention and rehabilitation,

that the drug trafficking organizations constitute a phenomenon which goes far beyond the trafficking of drugs and that member states are reluctant to recognize the alarming levels that the drug problem has reached, they have submitted a draft resolution where they undertake among other measures, to:

1. Intervene in all stages of the drug problem from the production to the consumption underlining the illegality of drugs but they will hold a European conference to evaluate all the implications and effects of the trafficking and consumption of drugs.
2. To put pressure on producing countries, although treating them as equals and as part of a programme of general aid, to urge them to change to other crop cultivation.
3. To fight in a special way against criminal organizations which end up exerting institutional influence on states.
4. To adopt effective measures with regard to the 'laundering' of money.
5. To open the way to the freezing and confiscation of assets and to facilitate extradition agreements.
6. To improve preventive education in all walks of society. This is the most important strategy and should be linked to the development of attitudes of awareness towards consumer goods, drugs in general and medicaments.
7. To improve the rehabilitation and treatment of drug addicts.

These preceding pages highlight how the European Community is being infiltrated with the new repressive proposals of the United Nations but with important peculiarities. Thus there are important sectors who question the advisability of a policy of repression. In any case it is generally accepted that the emphasis should be on the reduction of the demand by means of programmes of education, formation, information and rehabilitation. Besides it is evident that there is a great deal of suspicion about the indiscriminate acceptance of the new arsenal of criminal behaviour, punishment, police and legal processes as organised by the United Nations despite the fact that some of these have received a welcoming echo.

Drug Policies in Western Europe

*J. Wiarda, LLM**

1. Preface

Lecturing about insufficiencies of the official repressive policies towards narcotics and advocating alternative strategies, easily causes a great deal of misunderstanding, especially when the speaker is a police chief in a city of some importance.

The first misunderstanding is that I should underestimate the gravity of the drug-problem. On the contrary I plea that we should do more about it and with a larger scope.

The second misunderstanding is that I should not be serious enough about keeping the rule of law. On the contrary keeping the law is a matter of such importance in a democratic society that it is irresponsible to stick to rules of law that cannot be kept. Arbitrariness and coincidence are too much characteristics of the efforts to keep such rules. And arbitrariness is the most serious menace to the concept of legitimacy.

The third misunderstanding is that I am not tough in fighting criminal organizations. On the contrary I aim at ultimately removing the real source of criminal profit: the prohibition of narcotics, which is world's most important criminogenic multiplier.

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* Superintendant of the municipal police Utrecht (The Netherlands)

2. Aspects of Government Policies

Government policies on
- gambling;
- use of alcohol;
- pornography;
- prostitution;
- use of drugs,

seem always to have fluctuated between repression and integration. Time and again the accent changes on the waves of cultural, economic and political movements. In my opinion, religion has also played an important role.

The main characteristic of the phenomena mentioned above is that they imply private as well as public behaviour. Sometimes prohibitive legislation aims at both, sometimes at public behaviour alone. The more legislation is based on morals, the more often private behaviour is implied. While it is clear that every law to some extent rests on morality, it is equally clear, that imposing moral rules by means of legislation goes beyond the limits of the rule of law. The law, in my opinion, has to be restricted to public behaviour and human interactions which have direct effects on public order.

The prohibition of any kind of behaviour means repression of all appearances of the behaviour defined as illegal.

Repression excludes social integration. When the use of drugs is labeled as illegal, any kind of information and education, other than "IT IS FORBIDDEN" is contrary to the letter and the meaning of the law.

Control is the total set of social mechanisms for regulating the undesirable features of the (international) community. Since prohibition and repression aim to eliminate these features, they exclude integration and control. Integration is the necessary condition for control.

Too much belief in the repression of human behaviour will ultimately lead to the suppression of human beings.

3. The Repressive Strategy has failed

In the opinion of international experts, illicit drugs account for 60 to 80% of the total criminal volume. The criminal volume world-wide is estimated at least at one

trillion US-dollars, and it seems to be growing faster than the volume of the official economy.

The global system of illicit narcotics is the most important factor causing the growth of the criminal economic volume. There are of course other important factors, for instance arms smuggling, gambling, prostitution and fraud on international trade regulations (E.C.-regulations).

Seizure and confiscation of illicit narcotics is growing, but has stabilised at a level of 3 to 5% of the total volume, in the opinion of experts. It is questionable whether a seizure of less than 5% is of any effect on the problems of:

- production, trafficking
- dealing and using.

World problems in relation to drugs are caused by the 95% not caught by police and customs and in consequence reach the users.

What if we succeeded in doubling the seizure of illicit narcotics? Would the effects be satisfactory if 10% was caught? I do not believe so. There is no really relevant difference whether 95% or 90% reaches the users.

And what would be the social and financial costs, if we nevertheless tried to do so? In that case I foresee a trebling or quadrupling of the financial costs, combined with a change in police tactics which comes near to the suppression of people, instead of diminishing undesirable social phenomena.

4. Effect of Repression on the Level of Crime

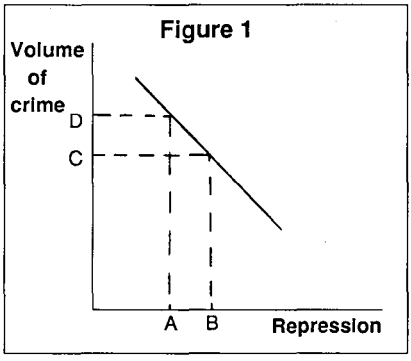
It is often supposed, that there is a direct connection between repression and the volume of crime.

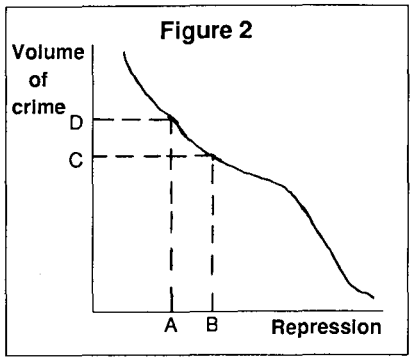
Will every increase of effort AB (see figure 1) result in a reduction of crime by the volume CD? This seems not to be correct. The line is not straight and the inclination is not constant.

We must assume, that every kind of crime has a specific diagram (see figure 2).

For a subject like drugs, I think we are somewhere in the rather flat sector of the diagram, at some distance from the steep parts of the diagram.

It is therefore most unlikely that an increase of repressive efforts would have a significant effect in reducing the volume of crime in the field of narcotics.





5. Effects of Repressive Strategy

The effects of the repressive strategy can be described as intentional or as unintentional, depending on the goals any government aims to achieve.

Confirmation/consolidation of the rules and norms is of great importance to society. Government and the police can repeatedly tell law-abiding citizens that the rule of law prevails. But:

Users are stigmatized. Users are marked as criminals. Therefore they do not fit into the daily life of the society they belong to. Behaviour is expected to be non-conformist, **and it is.** Users are the drop-outs of society. Society can simply be divided into "good guys" and "bad guys".

Seizure stabilizes local prices. Since there are several criminal organizations involved in illegal trafficking, they compete on the one hand, but on the other hand have an interest in having drugs taken out of the market in order to stabilize local prices.

Demolishing manufacturing facilities stabilizes the volume of production. As far as governments are involved in the growing and production of drugs they are in a position to have their army regulate the volume of production.

The more repression, the higher the prices, the greater the profits. More repression means more risks for criminal organizations (financial) and for individual criminals (imprisonment). The prices have to make up for the losses and potential losses. Greater risks therefore lead to a greater than proportional increase in prices. Profits will consequently be greater when criminal operations succeed. I assume that the incentive of potential profits outweighs the deterrent of the risk of being caught.

Police effectiveness is mainly dependent on

- chances and opportunities,
- skills and endurance, to seize every chance, to use opportunities and to get information.

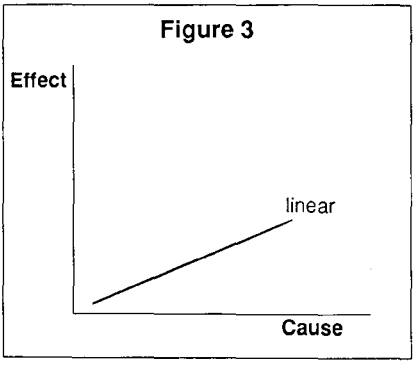
None of these, however, will be of any help without the appropriate information, coming from individual criminals and the criminal organizations involved.

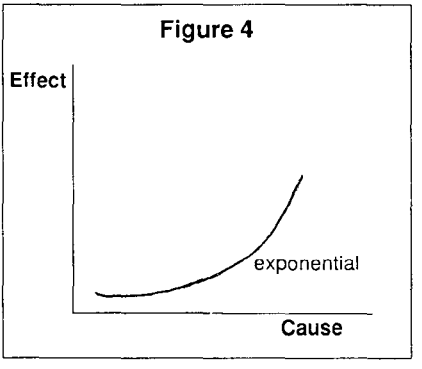
6. Prohibition of Drugs: A Criminogenic Multiplier

As long as there were no prohibitive laws on drugs, no criminality in this field existed. It is always useful to remember, that criminality by definition begins with legislature. While breaches of social and moral rules existed before the law was put in writing, they may have been a problem for society, but they were not a problem of criminality.

Once the production of the raw material, manufacturing, trafficking, trade, dealing and using of narcotics is prohibited, not only does crime in the field of drugs develop and increase, several other kinds of crime are fostered by drug-related criminality (see figure 3).

There is a striking similarity to the prohibition of alcohol in the USA in the 1920s and 1930s. It was also a multiplier of other crimes, and of criminal organizations, resulting from the profits of crime. Profits which had to be re-invested in even more criminal activities (see figure 4).





7. Criminal Organizations

The top-structure of criminal organizations can be compared to that of a holding company. It provides management, organization and financing, with a fairly wide range of criminal and semi-criminal products, like arms smuggling, drugs, prostitution, gambling and smuggling of human beings.

At the operational level there is a wider diversification of branches and products. It is almost as PETERS and WATERMAN describe in their famous book: In Search of Excellence: "Let the smaller production companies compete with one another. Then they will perform excellently".

This way of looking at criminal organizations makes it clear that the difference between them and the legal economy is thin ice, especially in the upper echelons. Strong interrelationships exist between legal business and the illegal (criminal) business.

This is not surprising. Criminal economy is part of the official economy and related to it.

8. Corruption

To bribe is easier than to kill. What's more, the risks of killing officials, especially police officers, are high. Corruption is the more sophisticated way.

The bigger the criminal volume as part of the legal economy, the greater the criminal involvement in legal business. And when officials are aware of that involvement, or ought to be, there is by definition a case of corruption. When the criminal volume increases, corruption will increase out of all proportions.

Public officials, especially police and customs officers, are the target of corruption.

Corruption has to be recognised as the first serious menace to Western democracies.

9. Organized Crime in the Netherlands

In the first three months of 1988 the Dutch police performed an analysis on all the information available on organized crime. The just then trained crime annalists of the 23 police-regions analyzed the information on the regional level. The next

step was to put that information together, in order to eliminate the doubles. The result of this exercise under the expert guidance of the police of Amsterdam numbered up to some 200 criminal groups, with the most important concentration in the region of Amsterdam and in the region of Eindhoven.

9.1. Number of Members

3% of these criminal groups seems to exist of more than 100 members.
Another 4% of more than 50 members.
20% of all groups does exist of more than 30 members.
40% does exist of more than 20 members.

9.2 Radius of Action

57% of the analyzed groups are involved in international ties.
It should be noticed that many of these international connections reach only over a rather short distance across the national borders.

9.3 Type of Crime

The main type of crime concerns drugs, directly followed by crime against property, fraud, firearms, vice and crime against the eco-system.

9.4 Criteria for the Level of Organization

In our analysis we use five different criteria to range the level of organization of criminal groups:

1. Hierarchy within the organization
2. Internal disciplinary system based on elimination and terror
3. Money laundering
4. Infiltration in politics, public administration, civil service and business-life
5. Involvement in more than one type of crime.

9.5 Level of Organization

2% of all criminal groups can be characterised by all five criteria
20% have three or more of these characteristics.

9.6 Recent Measures against Organized Crime

Nowadays investigation-teams have been formed to fight criminal groups on a regional and local level. For the proper investigation of criminal organizations working on a national or international scale teams are installed on a supra-regional level. The actual policy is aimed at an effective change of priorities of 1% of the total police budget for regional teams and an additional 1% for supra regional teams.

I believe that it is very important for the Dutch police to reorganise its forces in order to be equipped in a much better way to investigate criminal groups and to eliminate criminal organizations or branches of those organizations. It should, however, not seduce us to an unfounded believe in repression by the police aiming at change of social conditions.

10. Repression and the Police

Belief in repression leads to:

- more police;
- more police powers;
- more penetration of the police into society;
- and ultimately more interference by the police in social life and private life;
- but leaves us with the unsolved question:
  "quis custodiet ipsos custodes?". "Who is policing the police?"

I hope you will not misunderstand me.
I do not know when the number of police and the extent of police powers are balanced against social structure and crime. There is, however, no way back from a police force that has grown too strong, apart from **a revolution.**

11. Liberalization of Drugs

People often think that liberalization of drugs is utopian and undesirable. The comparison with alcohol and gambling can be of some help.

The only way to stop growth of criminality and criminal influence on normal life during the prohibition of alcohol in the United States of America was the liberalization of alcohol.

After the abolition of prohibition, criminal organizations went into gambling, on such a scale that it became a major problem, especially in the big cities, particularly New York. Again the solution chosen was a far-reaching liberalization of the laws on gambling.

After the decriminalization of gambling, criminal organizations turned to narcotics. The criminal market in narcotics developed step by step to today's volume.

Still we know that alcohol is a huge social and administrative problem. Fatalities caused by alcohol for instance are high. Those caused by traffic are higher. The figures for smoking are even higher still. Nevertheless, smoking and driving have never been regarded as problems to be solved by prohibitive legislation.

Based on these insights, it is in my opinion to be expected, almost predictable, that the world will see a trend towards the liberalization of narcotics. This liberalization will lead to a substantial breakdown of criminal organizations.

It is not the question if this will happen, but how, when it happens, man will be able to manage the social changes that will accompany the trend towards the integration and liberalization of drugs.

With regard to an eventual liberalization of drugs, three questions should be raised:

- What will the economic consequences be?
- Will criminal organizations develop alternative criminal markets?
- What will happen to the level of drug consumption?

As to the economic consequences, we must realise that the criminal part of the world's economic system is probably increasing. We should not wait until we cannot afford a liberalization any more for economic reasons.

Of course criminal organizations will turn to other markets, like illegal arms dealing, prostitution, gambling, etc. Until now I do not see an alternative market with a potential like the drug-market. This should mean unemployment in criminal organizations and that seems to be a contradiction in itself. We have, however, to consider the consequences of such a situation.

12. About the Level of Consumption in Case of Liberalization

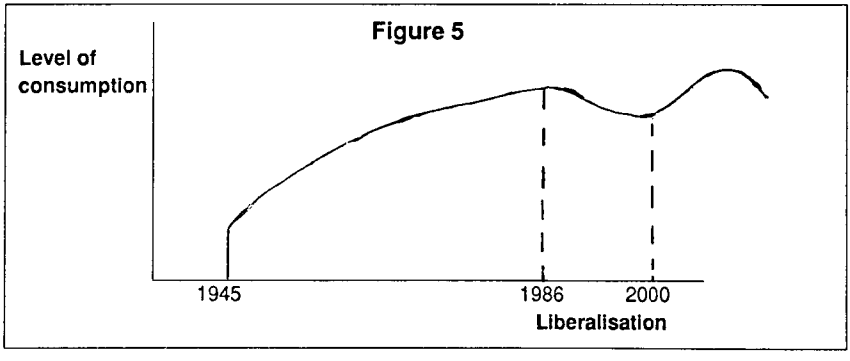
Until now there has been too little research on this matter. So nothing is certain in this field.

An important indication could be the following. As said earlier, about 95% of all illegal drugs reaches the users. Only about 10% of the total volume can be estimated with any accuracy. Consequently, it is not incorrect to conclude that the total volume reaches the users. After liberalization it would not be different. So why should the level of consumption increase?

A second indication is that when hashish and marijuana were de facto liberalised for users in the Netherlands, the prices sank and the level of consumption diminished. On what grounds can we be sure that it would be different in the case of some or most kinds of other drugs?

A third point could be that the rule of prohibitive law is of some importance in helping people to have a strong will not to use, or to kick drugs. There is quite an argument on the other hand, that the criminal scene of using is seductive. So the effect of these two factors, contrary to each other, will probably be to reduce the level of consumption.

I expect that a step by step process of liberalization would bring the level of consumption up only temporarily. After some time, within one or two generations, the global level would stabilize at a similar or lower level than it is today. It will depend mainly on the moment and on long-term and short-term cultural fluctuations. If, in figure 5, we start in 1995, the short-term effect would be called positive. In 2010 it would be negative. But who can predict the diagram? Much research based on simulation techniques has yet to be done.



The effects on the level of consumption depend on two factors. In the first place are of great importance the alternative policies in the fields of education, changing public opinion, public health and rehabilitation programs etc. To achieve effectiveness in this field seems almost as difficult as in the field of repressive policies. There seem, however, to be more opportunities. Repressive strategies exclude social integration, whereas the policies meant above include social integration.

The second factor is government-policy with regard to the supply side.

One policy could be not to intervene in any way. This free market would probably at length be manipulated by criminal organizations. One other policy could be to create an officially authorised supply system for instance related to the pharmaceutic circuit.

However, as long as the believe in a repressive policy prevails, the effort to develop integrative policies will be inadequate.

13. Conclusion

On a worldwide scale, the goals of repressive drug policies have not been achieved.It is not that we do not get anywhere, but the effects are negative both for society and individuals.
Therefore we need other goals:

1. How to integrate use of drugs in social life.
2. How to educate people with regard to drugs.
3. How to manage abuse, in terms of:
    - disturbance of public order;
    - damage to non-users.

International organizations, such as the

- United Nations and the
- European Community

are confronted with the challenge

- to find the answers to these three questions;
- and to stimulate the member states towards a step-by-step liberalization of drugs.

Reflections on Drugs

Prof.Dr. N. Christie

Cigarettes, liquor, coffee, cannabis, heroin, butter, they have two features in common. First, they are all potentially extremely dangerous substances. Secondly, most states make attempts, or have made such, to control them.

Cigarettes: we had a total ban in large parts of Europe. We had special police; in Russia traffickers in the substance were heavily punished, flogging and even death-penalty were applied. **Coffee**: Germany had a special police to control the problem, mostly to hinder tax evasion. **Alcohol**: many nations have had their prohibition, some still have it, and most have some sort of regulation. Cannabis and heroin, I will soon turn to that. And then to **butter**: health authorities beg the population to lay off. Animal fat is dangerous for the coronary system. Sicknesses here are a major source of death. But economic interests are against too strict regulations. The Common Market has its butter mountain. Through economic incentives for export the mountain has been reduced just this last year. The problem is exported away.

They are all dangerous. But it is the drug problem which at present is seen as the problem. Only here a panic rage.

Why?

Stated very simply:
Not because drugs are a more dangerous substance than the others. But because what we presently define as illegal drugs, up to now has been a more suitable target for both panic and for strict punitively based counterattacks than any other of these substances. It is only here that states declare a total war against the substance.

Why?

It is of course a reality behind the declaration of war. Drugs are dangerous. For many people. In many situations. Particularly in dry and gray societies as ours which

have forgotten ecstasy and celebrations. But dangerous are also cigarettes and alcohol and butter.

The basic difference, for our purposes, is that drugs are quite extraordinarily useful as the major enemy in a war situation.

This is so for several characteristics of drugs.

First: drugs are perfect **in their explanatory power.** The basic characteristic of human beings is need for understanding. One of the most helpful features of drugs is that they give us all an explanation of human misery. And they explain the continuation of misery. A part of the explanation is the idea of being captured by the drug. What else is addiction? An overpowering force.

This explanation is perfect **to the addict himself.** He cannot change. That is the message in so many of the preventive educational messages. Addiction. The power in these substances must be enormous since those selling them are punished to such extremes. One of my students is awaiting trial with the prospect of a prison sentence close to 21 years, which is the maximum for any crime in Norway. Drugs must be extremely strong since such amount of pain is needed to keep people away.

But this explanation is also perfect to the population in general and to politicians in particular. Welfare states should -according to their own theory- not exhibit misery. Many of them have been run by socialists for years. Street children, drop-outs, run-down people, according to theory they cannot exist. So, either the theory is wrong, or some unbeatable forces are in operation. Again drugs are perfect, they make the impossible understandable and they drug down any bad consciousness directed towards social inequalities and defects in societies which would have been perfect if only these drugs had not destroyed it all.

The war against drugs also has other advantages. A war makes you forget about the minor details. My estimate is that the alcohol situation has deteriorated dramatically in my country during the last ten years. All attention has been given to drugs. So, the drugs not called drugs have been left in peace, to the benefit of the liquor industry. A similar reasoning can be elaborated vis-à-vis the pharmaceutical industry. This is most clearly seen within the prisons. While the living conditions of prisoners are steadily deteriorating due to extreme measures to prevent the smuggling of illegal drugs into the prisons (a hopeless project), truck-loads of pharmaceutical products of the same basic type are legally provided within most prison systems.

Not only the general population is united, but also the politicians. In my country drugs have been a major factor in creating cohesion among politicians. The drug policy is an arena for the most extreme forms of overbidding in the introduction of stern measures. And it is mortally dangerous to show any softness. So, at last a

topic where they can be friends. My impression is that this is also the case on the international arena: on drugs most industrialized nations unite in one concerned family.

A last point on suitability: drugs are perfect for law and order. So dangerous a substance has to be tightly controlled. Usually bothersome restrictions based on civil rights concern become of negligible importance in a war situation. The use of drugs is correlated with other criminal activities. In a war situation carriers of "multi-deviance" can all be swept into the net. In a crisis situation the military forces get a sort of absolute power. This is close to what has happened to the police in the war against drugs.

Up to now drugs have been close to a perfect enemy. But recently things are changing. These changes will make drugs less suitable as major enemy and eventually create a situation where **the drug problem is on its way out**. This is my prediction and my belief. And I hope to increase the chances to make my prediction true by making my predictions public.

The grounds for my prediction are twofold. First:

No social system seems able to accommodate more than one panic at a time.

I have lived through many panics, particularly moral ones. The panic over youth behaviour, over hippies, over car thefts, over street violence, over youth hooliganism. But I must confess -at least in peace-time- none has been greater than the drug-panic.

The first reason why this panic now comes to its end, can be expressed in four letters: AIDS. The modern plague. Nothing can compete. In danger, in suitability. It is dangerous - as drugs also were. It has a potentiality for illness. And it is particularly suitable for a large sector of the establishment which up to recently has had a rather small role on the public arena. I have the moral entrepreneurs in mind. The Christians, the close-knit family protagonists, the anti-homosexuals, maybe also the basically anti-sexuals. All these combined with the medical establishment. It is an unbeatable alliance. They will take over the panic and keep it for some time. The drugs are losing priority to the plaque. It is fascinating to see the fight between the two types of moral entrepreneurs carried out in Scandinavia just now. The question of free needles to drug addicts is here still a big question, particularly in Sweden. The drug establishment perceives free needles as a moral defeat, as a sign of acceptance of drugs. Better AIDS than acceptance of needles and thereby drugs. Prisons function as a magnifier of irrationality. In prisons everywhere authorities still confiscate needles. In prisons, these cradles of AIDS, authorities are still doing their utmost to confiscate the very equipment which is the protection against AIDS. The alternative policy was of course to have big boxes of syringes and condoms all over all prisons. But they are not. Maybe it relates slightly to a

feeling that when it comes to criminals, it was not bad if they passed away. But these are exceptions. By and large the AIDS-panic steals the public arena. We have been discussing during the seminar that mass-media cannot accomplish to keep several panics running at the same time -or bring the old panic back every third week. My belief is that such panics do not have the same mobilizing effect. The same dish is not that good 10 days later.

The other reason for the prediction that the drug-problem is on its way out, is an economic-political one. But let me from the outset underline: I am predicting that the **drug-problem** is on its way out. **Not drugs**. Not necessarily. It is the meaning given to the substance I am talking about. Not the substance itself, even though I have to add that I also believe that reduced attention to the problem will reduce the use of the substance.

What I have in mind is that the costs of the present system of drug control gradually will become visible and thereafter unacceptable to the economic-political establishments within the Western world. I do not have in mind the direct control costs; policemen, judges, prison guards, nurses, treatment homes. Nor do I have in mind lost manpower by those using drugs in excesses. No, I have other costs in mind. Direct costs of two types.

First: the present drug control system increases an already existing tendency with two types of economies functioning at the same time. It is an official economy and one unofficial. This is nothing new. Italy is an old, established case for it. But drugs render it more visible, more strongly felt. The official money stream is heavily upset by the drug money. This will probably get the business establishments of the world to get really concerned and start questioning if the present methods are not slightly outdated - or rather irrational.

But not only the economy is being upset. So are also state politics. It is seen more and more clearly how politics and drugs are interlinked. In Burma, in Latin-America, in the old war in Vietnam. Drugs become tools for oppressors as well as freedom-fighters. The dangers to the generally established systems become visible, and again we might expect that centrally situated powers will take a fresh view on the problem.

And what will they see?

An answer to this brings me to a second general prediction, which runs as follows:

The economic-political establishment will -when they observe that drugs are really important for money and power - **move the property right to the drug problems away from Ministries of Social Welfare, Health and even Justice, and into the more important sectors of society. Those are the Ministries of Economy and Foreign Affairs**. In this move they will receive full support from the business establishment. Liberal or radical reformers who for years have been

fighting for drug reforms will - with some ambivalence - find themselves embraced by the far right. Social affairs, doctors and nurses, and the penal law establishment will get sour, but slowly be forced out of their having the monopoly in the ownership of the drug arena.

And what comes next?
Business will do what business is able and accustomed to do. **They will treat drugs as a commodity**. They will ask - and if they hesitate, we ought to help them to ask: what happens if we move the whole problem from the moral arena of total prohibition carried out through the institution of law and order and punishment, and instead tried to regulate both production and consumption **as we do with other products of somewhat similar nature?** They will soon conclude that we ought to get the whole problem converted from a hidden existence in the second economy into an open in the first - or ordinary - economy. To those with the present hegemony within this war arena, this will sound as a profanity. I agree. It is. Let that be quite clear - by comparing drugs with butter.

We have severe problems with butter in Europe. Doctors tell we ought to reduce the intake. Large consumption is extremely unhealthy. Heart and circulation troubles are a major cause of death. Drugs mean nothing, comparatively. But farmers have vested interests. They produce frenetically. The result is the butter mountain within the Common Market. We sell off to the Soviet Union. Not for military reasons, I hope. And the mountain is attached by economic-regulatory measures which in the long run, hopefully, will reduce the production of this highly dangerous substance.

The possibilities of success are not my point. My point is only the model. We have within the ordinary economic system thousands of regulatory mechanisms for coping with unwanted situations of unbalance. Drug researchers as well as drug politicians ought to turn to these areas to acquaint themselves with both the basic principles behind and with details in how it is done. And we might also activate our knowledge from fields very close to drug control. The battle around smoking is filled with interesting material - successes as well as defeats - on how to regulate that enormously dangerous substance. The pharmaceutical industry has for years been an object of study. BRAITHWAITE'S book (1984) on crime in the pharmaceutical industry is filled with insights on control possibilities. So is also the book by BRUUN and collaborators (1973) on the same topic. But most relevant is the fight around alcohol. Here, I can assure you, the Scandinavian countries can offer an abundance of examples of successes as well as defeats in regulating the substance. Maybe of particular relevance is our ability to create systems for sale of these products which makes it difficult to get them, but not impossible, and which indicates that it may be morally wrong, but not heroic to break with the regulations. I am not agitating

for Scandinavian alcohol regulations all over the world, but if drugs were to be brought slowly into the normal economy, then our alcohol-regulatory system might prove to be a good blue-print, at least in a stage of de-dramatization.

What would be the role of the international bodies which are today established to regulate drugs?

My suggestion is that they by and large might be dissolved. If drugs were treated as a product on a market, most of the money would leave the trade. Usual mechanisms for trade could be activated. It would be a need for high taxes on drugs. To reduce use. But not so high that organized crime once more got interested. Custom officers would keep control, as with alcohol. Attempts of smuggling would have to be punished, - as with diamonds or breach of currency regulations. So, police and courts would still work with some drug cases. Some would fly airplanes or drive cars under the influence of cocaine. They should be punished - as today with drunken drivers.

But international bodies would stop telling individual states what their menu of drugs ought to be. The cultural imperialism of the West in preserving our drug - alcohol - and prohibiting drugs foreign to us in these foreign countries would come to an end.

We would enter a slightly more sane society.

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Thailand's Policies and Measures on Narcotics Control

Ch. Yodmani *

1. Introduction

The problem of drug abuse has prevailed for decades in most parts of the world. Thailand, like many countries, has inevitably confronted the drug problem that is even worse than other countries in the Southeast Asian Region. The location of the country that is adjacent to the Golden Triangle, main opium producing source, has brought Thailand into the tragic situation. Thailand is burdened with the flow of illicit drugs coming directly from the Golden Triangle as well as the addiction of people within the country. The Royal Thai Government has strong intention to eradicate the drug problem. Stern measures against those involved with illicit drug trade and effective resolutions to help drug victims have been explored and experimented.

Drug problem in Thailand comprises not only the addiction among the people but also the problem of illicit narcotic plant cultivation as well as the problem of illicit drug trafficking.

Besides opium poppy cultivations, marihuana and kratom plant (botanical name-Mitragyna Speciosa KORTH) are also illegally grown. Opium poppy is cultivated by the hilltribes in the north whereas marihuana is widely cultivated in the northeast by the local people who are supported and protected by local tycoons while the kratom plant is grown in several provinces in the central region.

Illicit cultivation of narcotic plants is one of the most important factors that helps increase the drug supply and the spread of drug addiction in the country. Some of the opium are used by the hilltribes themselves, some are illicitly smuggled out to the world market and some are illicitly consumed by Thai people.

* Police Major General of the Office of the Narcotics Control Board

It is difficult to give the exact number of drug addicts but the statistics on number of drug addicts applying for treatment show that most of these drug addicts are in the age group of 21-35 years, 90% of the them were heroin addicts, followed by opium, marihuana, amphetamine and volatile substances, respectively. The spread of drugs varies in different parts of the country, but the area where drug epidemic is most severe is Bangkok.

2. Present Situation

1987 was another dynamic year for the narcotic situation in Thailand resulting from the bumper increase of opium poppy in the Golden Triangle. There has been a greater volume of illicit trading and trafficking. The demand for the precursors became high. Moreover, it was reported that some other kind of licit chemical could be used in place of acetic anhydride in producing heroin. This certainly has an effect on the narcotic situation in the future. As for marihuana, the large producing source was in the neighboring country. Marihuana was frequently smuggled through Thailand to the world market. This year, the amount of marihuana smuggling was more than those of the last 2 years. Furthermore, many illicit amphetamine laboratories were raided which led to the temporary cessation of distribution of psychotropic substances in the illegal market.

The year 1987 marked a significant increase in the neutralization of clandestine refineries; 11 heroin refineries along the Thai-Burmese border were raided. In addition, during the past 6 months, there have been 2 major seizures in which a great amount of heroin was seized. On October 20, 1987, police officers intercepted a big shipment of 680 kgs. of heroin base concealed in fishing trawler in the sea near Chumporn Province in southern Thailand. The shipment was being smuggled to Hong Kong with final destination in the United States. Another case occurred on February 10-12, 1988 when customs officers discovered 1,280 kgs. of no. 4 heroin which is the world largest quantity of heroin ever found in a single seizure. These seizures indicate the successful and effective enforcement action of Thai officers in the interception of heroin trafficking that came through Thai territory. They also signify the need for an increasingly sophisticated method for drug detection to keep pace with the increasing complexity of drug trafficking patterns.

3. Illicit Opium Production

Though Thai and Burmese governments have carried out a severe suppression operation on the illicit opium poppy cultivation, the illicit opium production in the Golden Triangle during the crop year 1986/1987 yielded about 800-1,000 tons compared to 500-600 tons of production during the crop year 1985-1986.

Most Thai hilltribes grow opium poppies for their own consumption, but there are some hilltribes who do it for commercial purpose. The Thai Government, therefore, uses both development and suppression measures to overcome this problem. Integrated rural development and crop replacement programs were introduced to the hilltribes in order to upgrade their living standard as well as to change their source of income from opium poppy to various cash crops. Due to these approaches, opium poppy cultivation areas were decreased year by year. From the amount of 100 tons/year of opium production in the past, it was decreased to about 20 tons/year at present. The eradication program led to the decrease of 4,245.2 acres of opium poppy cultivation area in the crop year 1985/1986 and 7,907.2 acres in the crop year 1986/1987.

4. Illegal Traffic of Chemicals

According to the Narcotics Law of Thailand, acetic anhydride and acetyl chloride are classified as narcotics; moreover, a free of control zone for ether and chloroform was declared in some provinces in the north and south. This resulted in the illegal traffic of these essential precursors.

At present, a trading or exchange system is used in the illicit traffic of chemicals. The chemical trafficker smuggled acetic anhydride from the south to the clandestine labs along Thai-Burmese border and exchange it with heroin instead of selling it for money. Then, they would smuggle heroin back from the south.

Ether, chloroform and alcohol, substances essential for heroin production, were usually available in the country and were illicitly smuggled to the clandestine refineries. Acetic anhydride, which was produced in European countries, was smuggled through the south of Thailand to the clandestine labs in the north.

As mentioned earlier, the increase of opium production in the Golden Triangle caused the high demand for chemicals essential for heroin production. The acetic anhydride smuggling in 1987 was reported highest in the past 5 years. The illegal chemicals were smuggled through the south of Thailand as well as through the sea port in Bangkok. In 1987, Thai officials confiscated 3,753.28 kgs. of acetic

anhydride. However, it is of great concern to discover that heroin producers turn to other uncontrolled chemicals which could be used in place of acetic anhydride in producing heroin. These replacing chemicals were Ethylidine Diacetate, Glacial Acetic Acid and Phosphorus Trichloride. This could be seen from the seizures of 669 kgs. of Glacial Acetic Acid and 400 kgs. of Phosphorus Trichloride during the raids of heroin refineries. This problem poses a new and serious challenge to enforcement efforts against drug trafficking.

5. Illicit Marihuana Production and Traffic

The marihuana eradication program has been launched continually since 1984. The marihuana cultivation during 1984-1986 was eradicated as shown in the table below:

Year	No. of provinces in the eradication program	Fresh marihuana eradicated (in tons)
1984	4 provinces	1.767
1985	13 provinces	1.113
1986	31 provinces	2.617

In 1987, 1,000 tons of fresh marihuana were destroyed under marihuana eradication program throughout the country.

Because the marihuana suppression and control was very intensive in the northeastern region, marihuana cultivation was rapidly expanded to other regions of Thailand. One other factor contributing to this expansion was that there was a severe eradication operation on marihuana cultivation in South America, therefore, the traffickers turned to smuggling more marihuana from Thailand to North America.

The marihuana cultivation area in Thailand was rapidly expanded because the climate in Thailand is suitable; marihuana can be grown well everywhere throughout the country. Moreover, the cultivators used the modern agricultural technology such as fertilizer and hormone to increase the production.

Provinces in the eastern sea coast (Rayong, Chantaburi and Chonburi provinces) as well as Klongtuei Sea Port in Bangkok were used as departure points for marihuana smuggling through sea route. The important destination for marihuana traffic was the United States of America.

In 1987, it was found that marihuana was smuggled in larger lots than those of the year 1985-1986. This was inferred from the seizure of 8.8 tons of marihuana and 11.86 tons of marihuana smuggled through sea route on 4 April 1987 and 28 June 1987 respectively.

6. Illicit Psychotropic Substances Production

As for psychotropic substances production in the past, methamphetamine was imported from foreign country for producing amphetamine tablets in Thailand. In 1975, the Law, which prohibited import and production of amphetamine, was enacted. This resulted in the change of procedure in the illegal amphetamine production. Ephedrine hydrochloride was used as the main ingredient and Taiwanese chemists were brought in to operate the clandestine labs.

There were 2 methods in amphetamine production. First, in a big laboratory, ephedrine hydrochloride was chemically transformed into methamphetamine hydrochloride and mixed with flour, caffeine, colour etc., then this mixture would be made into amphetamine tablets. From the raid of illegal amphetamine laboratories, it was usually found that the laboratories were operated by Taiwanese chemists. In the other method, the trafficker only brought in methamphetamine and produced amphetamine tablets from this substance. From the raid of an illicit amphetamine laboratory of this type, the officers found only the tablet making machine, and some chemicals which were used as mixture for making tablets.

At present, there are many illegal amphetamine laboratories in the central part of Thailand. Those laboratories produce methamphetamine and amphetamine tablets for distribution throughout the country. In 1986, only one illegal amphetamine laboratory was destroyed. In 1987, however, 10 illegal amphetamine laboratories were raided and the amount of 602.49 kgs. of amphetamine have been seized.

7. Government Policy

Recognizing the serious effect of drug abuse problems on social and economic stability, the Royal Thai Government has had strong policy to fight against the narcotics problem. Initially, narcotics control in Thailand emphasized drug suppression. Later on, it was realized that law enforcement alone could not cope with the problem effectively if other narcotic control measures namely, drug depen-

dent treatment, narcotic cultivation control and drug abuse prevention were not implemented simultaneously. The Thai Government therefore decided to run these programmes along with narcotic law enforcement. In 1976, the Narcotics Control Board (NCB) and the Office of the Narcotics Control Board (ONCB) were set up upon the promulgation of the Narcotics Control Act B.E. 2519 (1976). The ONCB is an agency under the Office of the Prime Minister acting as a national coordinating body in all matters pertaining to narcotic prevention and suppression as well as carrying out the assignments in accordance with the resolutions of the NCB. The NCB is chaired by the Prime Minister and composes of 6 ex-officio members i.e. Minister of Interior, Minister of Education, Minister of Public Health, Director-General of the Police Department, Director-General of the Customs Department, Director-General of the Public Prosecution Department and other qualified members up to six appointed by the cabinet with the Secretary-General of the NCB as member and secretary.

The NCB appointed various sub-committees to draw plans, supervise and coordinate the implementation of the plans in each field. These sub-committees are:

- Sub-Committee on Narcotics Law Enforcement.
- Sub-Committee on Preventive Education and Information.
- Sub-Committee on Treatment and Rehabilitation.
- Sub-Committee on Crop Cultivation Control.
- Advisory Sub-Committee on Legislation.

Strategies for Drug Control

In order to overcome the narcotic problem, the Royal Thai Government developed the two pronged strategy which provides a balanced and comprehensive approach. The first is supply reduction through law enforcement and narcotic crops control. The second is demand reduction through preventive education and treatment and rehabilitation. In addition, international cooperation is also encouraged.

8. Narcotics Cultivation Control

As it was mentioned earlier that 3 kinds of narcotic plants are cultivated in Thailand i.e. opium poppy, marihuana and kratom plant. Various measures are used to eradicate these narcotics plants. Eradication of marihuana and kratom plants by a cutting and burning method is carried out by local officers.

The Thai government never overlooked the problem of the opium poppy cultivation. The Opium Act which was enacted in 1929, prohibited the cultivation and possession of the opium poppy. However, most of the opium poppy growers are the hilltribes who live in the mountainous and remote areas which are difficult to reach and the lives of these hilltribes have long been involved with the opium both in economic and cultural aspects. In solving the problem of opium poppy cultivation, the Government had to assist the hilltribes to gradually reduce or stop growing opium poppy. A crops replacement programme which aimed at encouraging the hilltribes to grow other cash crops instead of opium poppy was introduced. Apart from the crop replacement programme, it was necessary to use integrated development measures such as the development of standard of living of the hilltribes particularly in terms of food, living quarters and medicine to reduce the opium poppy cultivation area. Most of the crop replacement and community development projects began with foreign aid of the United Nations and many other countries. After these projects take firm ground and the foreign aid ends, they will be handed over to the government agencies such as the Royal Forestry Department or the Public Welfare Department, the implementing agencies of the projects, to take care of the area with their own resources. The ONCB and concerned agencies have done a survey to collect all necessary baseline data in the poppy growing area and formulated a master plan to serve as proposal for foreign aid as well as guidelines for interested agencies. The objectives of this plan are to solve the problems of poverty, deforestation, poor education as well as health and sanitary conditions in the poppy growing area. When a fund is allocated, the project executing committee and the implementing agencies will set up the operational plan in details. After the development programmes have been launched for a period of time, if the hilltribes still grow opium poppy, the law enforcement measure will be used to eradicate the opium poppy cultivation. Each year a committee on eradication of opium poppy will be set up to consider the outcome of the opium poppy survey of that year and if it is found that the area of opium poppy cultivation increased, the committee will have those opium poppies eradicated.

The reduction of opium poppy cultivation area is the evidence of the achievement of this crop replacement and integrated development programme. The table below shows the opium production from the crop year 1983/1984 to 1986/1987.

Crop Year	Cultivation Area (acres)	Opium Production (tons) *
1983/84	17,333.2	35.55
1984/85	21,941.2	34.67
1985/86	10,316	25.89
1986/87	9,388.3	24.29

* The amount of opium production was calculated from the total area of opium poppy cultivation which was surveyed each year.

9. Narcotics Law Enforcement

Narcotics Law is considered a vital measure in reducing the supply of narcotic drugs. As it was mentioned earlier, Thailand has faced the flow of illicit drugs from the Golden Triangle. The drug traffickers use Thailand as a transit point and trafficking route for further distribution to the illicit world market. The Royal Thai Government has unceasingly exerted intensive interdiction activities to intercept the drug smuggling into and out of the country.

At present, there are 4 agencies that are directly responsible for the narcotics law enforcement all over the country i.e. Office of the Narcotics Control Board, Police Department, Customs Department and Office of the Food and Drug Administration.

In order to increase the effectiveness of narcotics law enforcement, major interdiction activities are implemented as follows:

9.1 Interception of Illicit Drug Trafficking

The ONCB has urged the concerned narcotics law enforcement agencies to take severe action against narcotics producers, financiers and traffickers. In addition, since the drug trafficking is operated as a worldwide network, the ONCB cooperates and co-ordinates with various concerned foreign agencies in the exchange of information and joint operations which led to several arrests of international narcotics traffickers. Due to severe suppression, many major drug offenders were arrested.

Year	No. of Cases	No. of Drug Offenders
1985	32,457	34,686
1986	33,674	35,947
1987	35,608	37,774

9.2 Suppression of Illicit Drug Sources

As mentioned earlier, Thailand faces the problem of opium poppy, marihuana and kratom plant cultivation. The narcotics law enforcement is used to eradicate marihuana and kratom plant cultivations. The ONCB coordinated with the Police Department in eradicating marihuana plants which were widely grown in the Northeast.

Apart from the eradication of narcotics crops, the attack against the heroin refineries along the border is also carried out. The destruction of 10 heroin refineries in 1986 and 11 refineries in 1987 led to a slow down of heroin production.

9.3 Laws and Legislation

The effective laws and legislation are important elements to support the work on narcotics control and to suppress illicit drug trafficking. The anti narcotics laws are kept under constant review to ensure that they are relevant and applicable to the ever changing situation of the narcotics problem. In 1986, a draft of a new Narcotics Act was finalized. This draft new Act is a review of the existing Narcotics Control Act. B.E. 2519 (1976). It is expected that with this new Narcotics Act, major drug traffickers including financiers, supporters and conspirators will be brought to justice. The Act also provides for measures on the forfeiture and confiscation of illegal assets of drug offenders as well as compulsory rehabilitation of drug dependents.

In addition to the narcotics laws, the Ordinances to facilitate the implementation of these laws are also issued when necessary by the Office of the Prime Minister.

9.4 Interception of Precursors

The Royal Government has intensified the interception of precursors that are essential for the narcotic drug production. These precursors are smuggled to the clandestine laboratories in the North. According to the Narcotics Control Act B.E.

2522 (1979), acetic anhydride and acetyl chloride are classified as narcotics of Schedule IV. Chemical free zone for ether and chloroform was also set up to cover 8 provinces in the North and 5 provinces in the South.

9.5 Destruction of the Seized Drugs

All of the seized drugs of cases which have gone through the final court procedure are burnt. So far, nine lots of seized drugs have been destroyed since 1977.

9.6 Development of Intelligence System

A Drugs Intelligence Centre was set up in the ONCB to serve as the centre for intelligence exchange and coordination. Computerization was introduced to increase capability of the Centre in 1983. More communication networks were established linking the main frame at the headquarters and the computer systems at various agencies concerned in narcotics law enforcement. New systems were also developed to support the narcotics law enforcement work such as immigration system, passport system, subject person index system etc.

10. Preventive Education and Information

In solving narcotics problems, one of the most important measures is narcotics prevention since it is a means to reduce the demand for drugs. Prevention is done through building up "immunity" in an individual of all levels and all ages to enable them to live a healthy life in the society without resorting to drugs.

Measures on narcotics prevention have been set up as follows:

1. Education-Models and methods on narcotics prevention are designed, developed and integrated into the education system. These models and methods are appropriate to each target group.
2. Information Dissemination - Narcotics Information is disseminated through various media such as personnel, group and mass media appropriate to the target groups. Besides, consultation services are provided.
3. Alternatives - Useful alternatives in the fields of health care, sports and vocation, etc. are provided with the objectives to help an individual

consider and choose the correct alternative to enhance quality of life instead of resorting to narcotic drugs.

4. Training - Curriculum and personnel development are done through the training of key personnel by using multiplying technique. These personnel will work on narcotics prevention in educational institutions and community.
5. Administration - This measure refers to the coordination and support of the ONCB to other agencies both government and private sectors that take part in narcotics prevention and control programmes.

In carrying a out preventive education and information program, 5 main target groups were set up, i.e. parents group, in-school-youth group, out-of-school youth group, community group and hilltribe group. The ONCB is directly responsible for parent-group, out-of-school youth group and community group. The in-school youth group is under the responsibility of the Ministry of Education and the hilltribes group is under the responsibility of the Public Welfare Department, Ministry of Interior.

11. Treatment and Rehabilitation

Treatment and rehabilitation is aimed at reducing the number of drug addicts as well as eliminating the loss resulting from the addicts' behaviour which has threatened social and economic stability and national security. The drug addicts will be helped to return to their society and useful life.

In Thailand, treatment procedures are divided into 4 stages as follows:

1. Pre-Admission is the preparation of drug addicts as well as their family and relatives to be ready before treatment.
2. Detoxification which consists of out-patient system and in-patient system.
3. Rehabilitation which is aimed at helping drug addicts to recover both physically and mentally as well as helping them to return to their society and live a useful life.
4. Follow-up which is aimed to follow up and assist drug addicts after undergoing 3 treatment stages.

The existing treatment system is carried out mostly on a voluntary basis. It composes of in-patient and out-patient programmes. At present, there are 132 certified treatment centres all over the country of which 111 centres are operated by the government and 21 centres are operated by the non-government agencies. In 1987, 57,000 drug addicts applied for treatment.

In addition, the Government through the Central Probation Office and the Observation and Protection Centres under the Ministry of Justice as well as the Corrections Department have provided treatment and rehabilitation for the convicts who are drug addicts. This also includes addicted juvenile delinquents who are on probation.

It is expected that in the near future, a new Narcotics Act which includes compulsory treatment will be promulgated. This new Act will help force more drug addicts to come out for treatment and rehabilitation.

Effort has been taken to explore more effective ways to help drug addicts. Considerable concern is given to the increasing number of recidivists. Both government and non-government agencies have put emphasis on rehabilitation and after-care. Rehabilitation service is extended and new models on rehabilitation are introduced such as the use of the therapeutic community approach, the out-patient rehabilitation, the utilization of religious institutions.

12. International Cooperation

Since one country alone cannot cope with the drug problem, Thailand has enhanced and extended her role in international cooperation. Thailand has maintained close co-operation and co-ordination with foreign countries including concerned international organizations. In return, cordial and generous responses have been received from those countries and international organizations.

a. Cooperation with International Organizations

The Royal Thai Government through the ONCB has worked closely with international organizations concerned in narcotics control such as ASEAN, the Colombo Plan Bureau through the Drug Advisory Programme, Interpol, the United Nations as well as international non-government organizations by conducting information and technical reports exchange, as well as carrying out the commitments which Thailand has with those international organizations.

b. Bilateral Cooperation

Thailand has always encouraged bilateral cooperation with various foreign countries in terms of exchange of information, data and technical reports on narcotics as well as operational cooperation on narcotics suppression. As a result, several major drug traffickers were arrested. At present, 14 countries namely, USA, Canada, United Kingdom and Hong Kong, Netherlands, Sweden, France, Italy, the Federal Republic of Germany, Australia, New Zealand, Indonesia, Japan and Spain have narcotics liaison officers stationed in their respective embassies in Bangkok. Interpol has also set up its regional office in Bangkok.

13. Future Trend

The policy and measures on narcotics control for the future will still be in line with the present one that is demand and supply reduction. However, since some specific problems emerged such as the marihuana cultivation, the amphetamine problem and the use of uncontrolled chemicals for heroin producing, special emphasis will be put on these new emerging problems.

In addition, the Government will also motivate the non-governmental organizations both domestic and foreign to give more participation to the narcotics control work such as in the field of drug prevention; more support is still needed for producing drug prevention materials to distribute drug information to the general public especially the youth. As for narcotic crops control, more assistance is still needed to extend the crop replacement and highland development programs to cover more areas. In the field of treatment and rehabilitation, rehabilitation service is still not sufficient to the need of the patients. This is an important part of treatment procedure as it will prepare the readiness of the patients before reintegrating into society.

International cooperation will also be promoted especially in the field of narcotic law enforcement as the present network of narcotic traffickers develops its trafficking methods to be more and more sophisticated; the only way to defeat them is through the concerted cooperation among every country throughout the world.

Drug Policy in Austria

Dr. J. Fehérváry

1. Legal Situation

The Drug Law of 1951 is one of the most often amended laws in Austria.[1] It has been decisively altered in 1971, 1980 and 1985, and adjusted to recent developments of drug delinquency. This law is now fully in line with the relevant international conventions[2] (The Hague Opium Convention of 1912, International Convention on Narcotics of 1931, the Narcotic Drugs Treaty of 1948, and the Single Convention on Narcotic Drugs 1961/1972).

The Drug Law is part of the penal supplementary laws. However, the penal provisions form only one portion of this law. The major portion governs the tasks of the Ministry of Health and is only of administrative nature. A minor part deals with advice, support and treatment of individual drug users. Another smaller portion covers co-operation and exchange of information between the various authorities and institutions in charge of the implementation of the law. These four parts have grown historically - and do not always harmonize.[3]

The Drug Law is supposed to regulate different processes:

a. Control of production, trade and distribution structures is monopolized. It lies solely with the government to decide, who produces, processes, transforms, acquires, imports, exports which quantities, and their distribution.

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1 See Kandler, R.: Die Suchtgiftgesetznovelle 1985 aus der Sicht der richterlichen Praxis. ÖJZ 42 (1987), p.134.

2 See Burgstaller, M.: Drogenstrafrecht in Österreich. ÖJZ 41 (1986), pp.520-528.

3 See Eisenbach-Stangl, I., Pilgram, A.: Der Konflikt zwischen Therapie und Strafe. Das Suchtgiftgesetz aus gesundheitspolitischer Sicht. Wien 1984, pp.7-12.

b. The use of certain substances is entirely prohibited, others are restricted to medical application only. Medical administration of narcotics is permitted as a supplementary measure in combination with other medicaments only and is subject of strict control.

c. Control of individuals violating the relevant norms is effected through penal sanctions and medical/psychiatric measures.

d. The funds provided for facilities offering treatment and rehabilitation to drug misusers are controlled by the government.

The Drug Law basically discriminates between "user" and "dealer". This distinction is one of the fundamental concepts of the Austrian Drug Law, which -oriented towards the deterrent effect upon a particular offender- is designed to differentiate the penal consequences, taking into account also criteria lying in the personality of the delinquent. The idea is to have dealers punished severely, but to subject drug consumers as far as possible to treatment and to help them in their resocialisation process, but to spare them punishment. However, consumption per se remains liable to prosecution.

Thus the legislator pursues differing intentions and attempts to fight drug delinquency with somewhat contradictory methods, and to reach health policy targets, i.e. on the one hand with legal repression and on the other hand with medical care, a regulation resulting from the political situation of the legislator. The legislator is in a dilemma between the demand of the public to punish, directed against the subculture of the drug scene, and the insight of the experts who do not expect much from criminalizing the issue.[4]

The legislator therefore pursues a dual strategy resulting in increasingly drastic penalties for drug-trafficking as a "price" for lesser punishability of drug misuse.[5] The fact that penalties are largely replaced by therapy, but that any type of drug consumption (unless medically administered) is still punishable, reflects clearly the very limited political freedom of action of the legislator. Although a drug addict is considered a sick person in need of therapy, is the consequence of "de-criminalizing" drug-consumption not taken.[6] Thus the Austrian Drug Law maintains the philosophy of "therapy - otherwise punishment".[7]

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4 See Dearing, A.: Österreich - Bericht. In: Meyer, J. (Ed.): Betäubungsmittelstrafrecht in Westeuropa. Freiburg 1987, p.503.

5 See Litzka, G.: Probleme der Suchtgiftgesetzgebung. Lecture given to the Wiener Juristische Gesellschaft, April 4th, 1983.

6 See Eisenbach-Stangl, I., Pilgram, A.: Zum Behandlungsgedanken im Strafrecht - Folgen und Probleme der Suchtgiftgesetznovelle 1980. Wien 1983, p.7.

7 See Eisenbach-Stangl, I., Pilgram, A.: Therapie sonst Strafe. Die Suchtgiftgesetznovelle 1980 und ihre Konsequenzen. Kriminalsoziologische Bibliografie 9 (1982), pp.221-240.

In reality is the contrast between dealer and consumer not that clear-cut. Many addicts act as "dealers" in order to be able to finance their dependence. They get into the vicious circle of addiction (sickness) and criminality. The concept of treatment that applies to the addict is in conflict with the repressive measures to be taken against dealers. This was taken into account by the legislator in the latest amendment and is a first step towards combining both strategies in cases of this type of "mixed" offenders, whereby therapy is assigned a certain priority.[8]

Narcotic drugs are in the Austrian Drug Law defined in the same way as in the Single Convention and these definitions are supplemented by listing some psychotropic substances.[9] The law does not distinguish between "hard" and "soft" drugs. But the legislator does however take into consideration nature of the drug and degree of dangerousness of various types of drugs,

a. when determining length of sentence,

b. by further qualifying the offence according to the elements "major quantity" or "minor quantity", and

c. in the provisions for probationary deferment of charges by the public prosecutor.[10]

The statutory definition of the offence on which the Austrian Drug Law is centered is given in section 12 of the Drug Law. This section contains following provisions: Anyone who produces, imports, exports, or distributes illicit drugs in **major quantities** is to be punished with a prison term of up to 5 years. A quantity of illicit drugs is regarded 'major', if passing on such a quantity would present extensive hazard to human life or health.

This general provision is further specified by several qualifying properties:

a. business-like trade and membership in a criminal gang (1 to 10 years),

b. being a member of a criminal gang and previous convicted for the same type of offence; or being a member of a large criminal organisation; or committing a drug offence with vast quantities of illicit drugs (1 to 15 years),

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8 See Bundesministerium für Justiz (Ministry of Justice): Erlaß vom 27-6-1985 betreffend die Suchtgiftgesetznovelle 1985. Justizamtsblatt 28 (1985).

9 See §1 Abs. 3 SGG and appendix IV and V to Suchtgiftverordnung 1979. Austria has not joint the Convention on Psychotropic Substances 1971, but the legal norms of the Austrian drug law (Suchtgiftgesetz and Suchgiftverordnung) are conform to the Convention on Psychotropic Substances.

10 See Foregger, E., Litzka, G.: Suchtgiftgesetz. Wien 1985, p.27.

c. being the head of a major criminal drug-organisation (10 to 20 years).

The statutory definition of the crime under section 12 of the Austrian Drug Law is further supplemented by sections 14 and 14a of the Drug Law, referring to related offences, i.e. conspiracy and gang-formation, and purchase or possession of major quantities of illicit drugs with the intent to distribute, respectively. If the details of case are not as outlined in section 12, 14, 14a of the Drug Law, the statutory definition as given in section 16 of the Drug Law would come into effect,stipulating that anyone, who produces, imports, exports, acquires, possesses, offers or provides others with illicit drugs, is to be punished with up to 6 months of imprisonment, or a fine of up to 360 daily rates.

Besides, there are two qualified types of offences with punitive sanctions of up to 3 years of imprisonment:

a. to render possible use of illicit drugs to a two-year younger person below age,

b. professional commission, membership in a criminal organisation.

The latter qualification will not lead to a more severe sanction, if the delinquent himself "is dependent on narcotic drugs and commits the offence solely for the purpose to procure himself illicit drugs or the financial means to purchase them for his own use".

This legal provision in particular meets with vigorous criticism on the part of law-court officials, because in their opinion "this renders possible for the dangerous dealer/trafficker to avoid harsher punishment by utilizing lack of evidence. Now almost every offender charged with drugs dealing/trafficking claims to be dependent on narcotic drugs and to have committed the offence solely to satisfy his own needs".

Judges therefore tend to reject "lenient sentences for professional or organized dealers/traffickers, who are themselves drug-dependent, not only with a view to crime prevention in general, but also with regard to the deterrent effect upon a particular offender, since especially this type of delinquent has to be committed to a detoxification clinic, and because especially in these case we know from experience that the longest-possible custody is desirable.

If detention terms are shorter, there is the risk that drug offenders are released too early and become recidivous".[11]

Differentiation between section 12 and section 16 of the Drug Law is made on the basis of the quantity of illicit drugs involved.[12] The marginal quantity which

11 See Kandler, R.: op.cit. (note 1), p.138.
12 See Foregger, E., Litzka, G.: op.cit. (note 10), pp.29-30, 11.

turns a petty offence into an aggravated offence has been determined in an expertise drawn up by the Council for Combatting Alcohol and Other Addictive Substances, a department of the Federal Ministry for Health and Environmental protection. Following standards for "major" quantities are given:

morphium	10 g
heroin	5 g
methadone	10 g
codeine and dihydrocodeine	30 g
cocaine	15 g
LSD	0.01 g
amphetamines	10 g
THC	20 g
marihuana with THC 0.25%-8%	250 g to 8 kg,
hashish with THC 2% - 13%	154 g to 1 kg
hashish-oil with THC 10%-30%	67 g to 200 g.

Trade with injection needles and other instruments is not restricted in Austria. Advertising misuse of illicit drugs - in particular in the mass media and in cinemas - is prohibited and subject to prosecution.[13]

2. Procedural Aspects

A special unit has been established within the Federal Ministry of the Interior with the task to combat national and international drug trafficking through undercover investigations and surveillance. These methods should help to identify in particular the masterminds and wire-pullers behind the scene or organized traffic, which would be virtually impossible through conventional methods. Undercover investigation, as practiced in Austria, means that a law enforcement officer, or police informant contacts a presumed drug-trafficker, poses as potential buyer inducing the suspect to sell him drugs, and to prove his guilt.

The Federal Ministeries of Justice, the Interior, Health and Environmental Protection are concurrently of the opinion that undercover investigation is permissible under Austrian law. Law enforcement and prosecution maintain the legal

13 §15 SGG.

view that this type is prohibited neither by the provisions of the Code of Criminal Procedure, nor the Penal Code, nor any other law.[14]

This attitude has been frequently criticised in the pertaining literature.[15] Objections are made to the effect that covert investigations are contradictory to the terms of section 25 of the Code of Criminal Procedure. According to this section "a security officer must not obtain supporting evidence or proof of guilt of a suspect by inducing this individual to undertake, continue or accomplish a punishable offence". Therefore undercover investigation is being considered a prohibited method of obtaining evidence.

The evaluation of evidence obtained through undercover investigation is according to current judicature permissible in a trial.

Undercover agents do not appear as witnesses before court. The security authorities have so far always refused to dispense the officers from the official secrecy.

Prolonged surveillance, in particular controlled delivery, is also being criticised with reference to section 25 of the Code of Criminal Procedure. The Supreme Court has ruled that prolonged surveillance does not violate this legal provision.

The conflict between official justifications and the doubts about the legality of covert investigation and prolonged surveillance, repeatedly expressed by defence attorneys in the respective literature, shows that the task to prosecute the handling of drugs causes problems which cannot be tackled without resorting to questionable methods. The police is confronted with the problem to intervene without the help of a genuine, i.e. complaining, victim, and to obtain evidence of an offence without the support of the victim. The necessity to employ illegitimate investigative methods has been provoked by the claim that an offence, that is to be investigated, exists - which is in itself illegitimate: the attempt to incriminate "victimless" behaviour naturally brings about a zone of obscurity which can only be cleared up with dubious means.[16]

Another controversial measure on the part of the authorities in their efforts to tackle the drugs problem is the right to search persons under the Drug Law. The Law of Criminal Procedure enables search of persons only in cases where a particular individual is suspected, requiring an appropriate court order, while under section 13a of the Drug Law, law enforcement officers at border control stations are entitled to search persons, their vehicles, suitcases, bags, etc., if

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14 See Foregger, E., Litzka, G.: op.cit. (note 10), p.35.

15 See Kandler, R.: op.cit. (note 1), p.138; Pilgram, A.: Die Kosten der Kriminalisierung des Drogenkonsums. In: Mader, R., Strotzka, H. (Eds.): Drogenpolitik zwischen Therapie und Strafe. Wien 1980, pp.117-146.

16 See Dearing, A.: op.cit. (note 4), p.535.

there is evidence or suspicion that illicit drugs are imported or exported at this site. Thus a law enforcement officer is for the first time given an original right to search persons without having concrete suspicion against the person involved. Strong suspicion directed against a certain place is sufficient.[17] Thus security officers are invested with search powers so far only granted to customs officials for customs checks.

Dual punishment - common practice until 1985 - under the Drug Law and under the Fiscal Law, has been almost eliminated by the latest amendment of the Drug Law. One had to realize that fiscal fines repeatedly frustrated the success of expensive therapies and only had to be financed from renewed drugs offences.

The philosophy of therapy is further gaining ground in cumulative imposition of prison terms and fines. In principle it is possible to impose in addition to the imprisonment sentence also fines (up to a certain maximum i.e. $ 160.000) for offences under section 12 of the Drug Law and for business-like and organised commission of an offence according to section 16 of the Drug Law.

The idea is that the fine surmounts the profit which the offender would have gained through his offence. If, however, such a fine would prevent re-integration of a drug-dependent offender, the court should refrain from imposing such a fine.

The same holds true for judgements to pay an amount equal to the drug offence proceeds imposed in cases, when the very drug which gave rise to the offence cannot be confiscated, because it was used up or destroyed, or if the proceeds thereof are inaccessible.

If motor-vehicles are used for illegal transports other than drugs, will they under Austrian criminal law not be declared forfeited. Not so under the Drug Law. Motor-vehicles that were used for transport of illicit drugs may be declared forfeited if the owner of the vehicle was aware that his vehicle was being used for illicit purposes. However, forfeiture is not imposed if inappropriate. In fact, many motor-vehicles belonging to drug-dealers have been confiscated. These vehicles are later used by the police, in particular for surveillance purposes and undercover investigations.

The concept of "crown witness" does not exist in the Austrian legal system.

The Austrian legislation does not contain specific regulations regarding wire-tapping if a drug offence is suspected.

Supply of fake drugs is not subject of specific sanctions under the Austrian Drug Law.

17 See Foregger, E., Litzka, G.: op.cit. (note 10), p.40.

3. Exchange of Information at National and International Level

In Austria the principle of official[18] and mandatory prosecution[19] prevails. Law enforcement authorities and their representatives are obliged to investigate all perceptions and information about punishable offences and to report them to the Public Prosecutor. The police is not entitled to make final dispositions on their own in cases of drug offences defined in sections 12 to 16 of the Drug Law.

The security authorities are furthermore obliged to inform the regional health authorities about all reports made to the Public Prosecutor for violations of sections 12, 14a and 16 of the Drug Law. Thus the appropriate medical measures, such as examination and treatment can be initiated at once. A tight network of information and interaction has been installed between law enforcement and justice authorities and health authorities.

According to the provisions of the Single Convention a Central Drugs Record Office has been established at the Federal Ministry for Health and Environmental Protection (at present attached to the Federal Chancellery). This record office files reports, in particular about all

- drug addicts (treatments/supervisions),
- charges under sections 12 to 16 of the Drug Law,
- deferments of complaints by the Public Prosecutor
- outcomes of court proceedings for offences under sections 12 to 16 of the Drug Law,
- court orders concerning confiscated property.

This Central Drug Records Office relays information in reply to inquiries from:

- law enforcement agencies, public prosecutor's offices, courts for criminal matters (in relation to drug cases only),
- Federal Ministries of Defence, the Interior, and Education,
- The United Nation Drugs Control Council and the UN-Narcotic Drugs Commission.

1700 cases of therapy and support given to drug-addicts were reported to the Central Drugs Records Office in 1986. Approximately 4.500 charges for violation

18 §2 StPO.
19 §34 StPO.

of the Drug Law and approximately 4.700 court judgements were registered, and approximately 3.200 inquiries by courts were dealt with.[20]

The Austrian security authorities co-operate closely with INTERPOL and with national police authorities of the neighboring countries. Exchange of intelligence in the field of drug-interventions is usually effected rapidly and directly. Austria is a permanent member of various international organisations (UN, European Commission) and international working groups for combatting drug delinquency, e.g. of the working groups "Suedost" (Munich) and "Suedwest" (Stuttgart). Specialists of security and justice authorities meet personally and thus find opportunity to promote informal exchange of information.

4. Special Procedural Provisions

4.1 Dismissal of Charge and Subsequent Transformation of Sentence

One of the essential concepts of the present Austrian legislation concerning illicit drugs is the enchancement of temporary deferment or probationary dismissal of the charge. In case of petty drugs offences the legislator follows the concept of "treatment instead of punishment". The possibility of dropping charges has met with wide approval and is frequently made use of.

Section 17 is one of the central provisions of the Austrian Drug Law. Under this provision the public prosecutor **has to** (obligatorily) defer the charges for two years under certain conditions, provided an individual was reported only for having acquired or possessed minor quantities of drugs for his own use. If the charged person manufactured, imported, exported, offered or gave to others minor quantities of drugs, the public prosecutor **may** (facultatively) defer the charge for reasons of deterrent effect upon the individual.

Prerequisites for a temporary deferment are:

1. Information from the Central Drugs Records Office at the Federal Ministry of Health and Environmental Protection,

20 Bundeskanzleramt, Sektion Volksgesundheit: Tätigkeitsbericht. Wien 1986, p.59.

2. an opinion from the regional health authority, whether,
   a. the charged person needs medical treatment or supervision, and
   b. treatment is possible and can be expected to be succesful under the prevailing circumstances.

Further prerequisites are that the individual concerned is willing to

1. undergo medical treatment or supervision, or
2. if necessary and advisable, would place himself under the supervision of a probation officer or an officially recognized institution.

The person concerned is notified of the temporary deferment of the charge, and the purpose of this measure is explained to him. Proceedings can be initiated any time if he so wishes.

For an assessment of the "minor quantity" the subjective criteria of the suspect, i.e. the degree of his addiction and the daily dose he requires has to be taken into consideration.

Additional dispositions need not necessarily be imposed, e.g. in cases of socially integrated occasional cannabis users.

Penal proceedings are to be initiated or continued, if the suspect is reported again for another drug offence within the probation period, or if the person concerned refuses to accept medical treatment or adequate support and help.

In other words, the law exercies a sort of "voluntary force" in order to motivate an addict to undergo therapy. This voluntary force has met with considerable success. In 1986 there were approx. 2.000 suspensions of charges with a probation period. The revocation quota is very low.[21]

Approx. 80% of the provisional suspensions of charges relate to hashish users. Only 10% of the police doctors think hashish consumers need therapy. Most of the hashish users themselves think they do not need treatment. Although the majority of charges against hashish users is dropped and no therapy is ordered, because it would be unfeasible and unnecessary, the legislator sticks to the principle of criminalisation, and at the same time propagates the concept "therapy instead of punishment". The reason for this is not that the lack of necessity to start therapy was not known, but because there is no other option, because reverting to punishment would seem highly dubious. For political reasons it appears at present unwise to candidly admit the current situation, which virtually amounts to a non-intervention, by de-criminalising at least cannabis use.

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21 See Bundeskanzleramt (Ed.): Drogen, Sucht und Therapie. Das Drogenproblem in Österreich und die Wege zu seiner Lösung. Wien 1987, p.28.

Therefore, in the near future will in most cases not take action, but will keep up as a facade a general punishability of drug use.[22]

The concept of therapy is further supported by the possibility of a subsequent later remission of the sentence, which was created by the 1985-amendment to the Drug Law. It has become possible to grant an addict a maximum suspension of two years of his prison term provided it does not exceed two years, if this would enable the convict to undergo medical treatment. If his therapy is successful, the court can subsequently mitigate his prison term through a conditional remission of his sentence.[23]

In practice, suspension of a sentence is granted quite frequently. However, the legal provisions are as too narrow and to be not in conformity with the intensions of the legislator. Not only necessary medical treatment should justify suspension of sentence and subsequent remission of the penalty, but also any type of action voluntarily taken by the addict aiming at a detoxification in one of acknowledged rehabilitation centres.[24]

4.2 Determination of Penalty

The development of the sanctions imposed by the courts reflects the dual strategy of the judicial drug policy. This dual strategy seeks on the one hand to punish as severely as possible grave cases of drug trafficking, but, on the other hand to spare, if possible, drug-addicts and the small-scale drug users, and to subject them to a comprehensive system of treatment, help and supervision.

A distinct change in the sanction pattern has been observed since 1978. Sentences imposed against dealers and traffickers are becoming increasingly harsher. Imprisonment sentences outnumber fines, while the proportion of unconditional imprisonment sentences of more than a year grew from 30% to more than 50% during the period 1975 to 1985. Sentences under section 16 of the Drug Law consisting in fines too have been imposed only half as often, but the remaining fines became in average much higher. About one third of those convicted under section 16 of the Drug Law were sentenced to a conditional prison term. The proportion of shorter prison terms of the total number of the conditional prison terms remained approximately the same. Adjudication in drug cases has become more stringent since 1980.

22 See Dearing, A.: op.cit. (note 4), p.520.
23 §23a SGG.
24 See Kandler, R.: op.cit. (note 1), p.135.

The development of lenght of sentences meted out by Austrian courts in drug cases from 1975 to 1984 is shown in Table 1 and Table 2.[25]

The penalties imposed in the Vienna area in 1984 for drug offences were analyzed in a dissertation.[26] It turned out that the average duration of unconditional imprisonment sentences amounted to about 18 months for non-organised offenders, while organised offenders were usually sentenced to more than 2 years. Organised smugglers too were in most cases sentenced to more than 2 years of imprisonment. Organised drug delinquents were never granted a remission of sentence, while socially integrated and not previously convicted persons frequently were granted conditional remission. Mediary traffickers and dealers are usually convicted to 1 to 2 years of imprisonment.

4.3 Execution of Sentence

The relatively largest worry and troubles of prisoners in Austrian jails come from drug delinquents. The share of drug offenders is estimated to be at present approx. 8%.[27] However, we do not possess precise statistics on these figures.

Many drug offenders are themselves drug-dependent. According to a study by the Federal Ministry for Health and Environmental Protection are about 300 to 500 of about in total 5.000 opiate-dependent Austrians permanently in prison. Most of them have become lawbreakers because they are addicts.[28] Imprisoned drug-addicts present special problems to the prison authorities.

The Special Institute for Drug-Dependent Offenders, founded in Vienna after the reform of the Penal Law in 1975 takes into account the double 'burden' of the drug user, being a patient and a criminal at the same time. This institute is both prison and therapy center and offers to a minority of drug addicts a way to evade imprisonment and also offers them a chance to get cured. In average there have been 90 inmates over the last few years. About half of them is under enforced treatment under section 22 of the Penal Code, while the other half is there voluntarily.

Section 22 of the Penal Code stipulates that an addict, who committed an offence in connection with his dependence, is to be taken to a therapy institute for drug-addicted delinquents, if there is reason to anticipate that he will in the future commit even more aggravated offences because of his addiction.

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25 See Lachmann, J.: Empirische Daten zur Verfolgung von Suchtgifttätern seit 1975. Öffentliche Sicherheit 51 (1986), p.9.

26 See Sicka, W.: Erscheinungsformen und gerichtliche Kontrolle des Verbrechens nach §12 Suchtgiftgesetz. Diss.iur. Univ. Wien 1987.

27 See Lachmann, J.: op.cit. (note 25), p.11.

28 See Bundeskanzleramt: op.cit. (note 21), p.31.

In practice this means a judicial order to undergo therapy in cases where sentences do not exceed two years. The individual concerned can be ordered to undergo treatment for a period of up to 2 years irrespective of the length of his sentence. That means, also if he was sentenced to a 6-months prison term, he will have to remain in custody of the above institute. For this reason the motivation of the person convicted to undergo medical treatment is very low, which results in little success of therapy and a high rate of recidivism.

The therapy of "voluntary" inmates is by far more successful.

This experience has led to have fewer and fewer persons convicted to a prison term under the Drug Law committed to this institute, as stipulated in section 22 of the Penal Code. In 1976 twelve percent of unconditional prison terms imposed on drug offenders were combined with commitment to the institute, by now it is only 1%.

5. Therapy Program

Drug use is sought to be suppressed primarily through penal control, and only secondarily through medical control, which to a large extent impairs the range and effect of medico-therapeutical measures.[29] However, the medical point of view has widely penetrated criminal justice (e.g. in determining the minor quantity for subjective needs, in granting respites, in taking into consideration addiction and dealing). There is a growing tendency to prefer medical measures to sanctional measures when a drug offender is drug-dependent. The "criminal" addict is bound over to the health services while remaining under the control of justice.

If, for instance, law enforcement agencies, schools or military authorities inform the regional health authority that an individual is suspected of drug misuse -there is no differentiation between use and abuse- it has to initiate an examination by a physician familiar with drug problems. The "suspect" is **obliged** to undergo medical examination. If it turns out that this person is drug-dependent and that therapy is indispensable, and that withdrawal treatment is possible and reasonable, the health authority will order, secure and monitor such a treatment. If however drug abuse but not yet addiction is stated and medical treatment does not appear requisite, then the health authority can order a possible and reasonable treatment only with the individuals consent.[30]

29 See Eisenbach-Stangl, I., Pilgram, A.: op.cit. (note 3), p.25.
30 §9 SGG.

Although refusal of consent as such is not subject to a sanction, it might indirectly result in judicial measures, because this way the prerequisites to drop the case conditionally do not longer prevail.

Compulsion to undergo treatment depends on the result of the medical examination, but this obligation exists only if such treatment is reasonable and not definitively futile. Out-patient treatment is always considered reasonable. The measures imposed have to be in a therapeutically adequate relation to the drug abuse. Verification of need of treatment and participation in the treatment are coupled to penal control.

The health authority is obliged to report all cases of verified drug abuse to the public prosecutor (section 84 of the Law of Criminal Procedure). The reporting can be accompanied by a suggestion to conditionally drop the case (section 11/1 of the Drug Law). In the same manner the health authority has to report to the public prosecutor, if a suspect persistently evades the required medical treatment. The health authorities are not able to cope with all the tasks in the field of health policy without any assistance and co-operation on the part of other services. Controlling measures taken by the health authorities do not just replace any penal sanctions by medical control. It is rather so that both sets of measures are linked together to a network, whereby judicial control enjoys priority over the others.

The concept of therapy exists parallel to the concept of criminalisation. Therefore it is vital to create the prerequisites for the required medical treatment or supervision and social support. The installation of therapy centers is of paramount importance. The authorities resort to specific therapeutical institutions and facilities that are devoted to help and support individuals with drug problems. If such institutions work efficiently they can become officially recognized by the Ministry of Health. Such a recognition is combined with a financial subsidy by the government. If subsidies are granted, the receiver has to place himself to a certain extent under governmental control.[31]

The institutions acknowledged so far differ widely in their organisation. Depending on their organisational structure they have different problems, work differently and offer different treatment methods. The majority of these institutions gives priority to the therapeutical aspect over the "controlling aspect". Data of voluntary clients are hardly ever reported to the health authorities, the duty to report according to section 84 of the Code of Criminal Procedure is neglected. Assigned patients are reported to the authorities only upon inquiry and in a very informal manner. Irregular showing up, relapses and offences are regarded rather as part of the therapeutical problems and as a reason to inform the authority.

31 §22 SGG.

When the treatment of an assigned patient is completed, the authority is informed. Only few institutions act as "long arm" of the health authorities and regard their therapeutical activities as controlling functions.[32]

Justice, security and health authorities co-operate primarily with out-patient institutions. The out-patient centers are mostly privately organised, but predominantly or entirely financed by the government. These approved facilities are in fact hardly controlled by the health authorities.

6. Legalisation Attempts

As in all other Western European countries has use of cannabis become fairly popular among young people. This has led to the demand to de-criminalise at least use and petty dealing with hashish.[33] Even those who favor de-criminalisation are fully convinced of the necessity of accompanying measures, such as therapeutical steps in case of abuse, preventive measures to avoid risk of road -and job accidents, preventive measures in general and information campaigns about the effect of hashish. They especially stress the futility and even detrimental effects of puntitive sanctions, in particular upon juvenile consumers, and the further consequences in form of isolation, destroyed career and stigmatisation, as well as the little harm that is done in comparison to legal consumption of alcohol and tobacco.[34]

The reason given by officials for maintaining the criminalisation of the use of cannabis was the stipulation laid down in the Single Convention. Moreover, the effects of alcohol abuse were already bad enough and would not justify toleration of further drugs. History has shown that the emergence of a new drug in the society does by no means lead to a decrease of the consumption of other socially already accepted drugs. On the contrary, the total consumption increases. Severe damages, occurring relatively seldom might rise through mass consumption. Because, if hashish is de-controlled we can anticipate industrially manufactured and even advertised products to appear on the market. Consumption rates would go up. In the interest of public health it is therefore desirable rather to further

32 See Eisenbach-Stangl, I., Pilgram, A.: op.cit. (note 6), pp.150-154.

33 See Eisenbach-Stangl, I., Pilgram, A.: Legalize it!? Argumentation für und gegen die Freigabe von Cannabis. Kriminalsoziologische Bibliografie 7 (1980), pp.1-17; Eisenbach-Stangl, I.: Alternative Cannabispolitik. In: Burian, W., Eisenbach-Stangl, I. (Eds.): Haschisch: Prohibition oder Legalisierung. Weinheim 1982, pp.169-183.

34 See Quensel, St.: Zur Ideologie des Cannabisverbots oder: Fragen einer rationalen Kriminalpolitik. In: Burian, W., Eisenbach-Stangl, I. (Eds.): Haschisch: Prohibition oder Legalisierung. Weinheim 1982, pp.136-153.

restrict use and sales promotion of licit drugs than to further liberalise other drugs.[35]

Besides, the detrimental consequences of marking young people as criminals could be countered by a more liberal application of the relevant penal law provisions.

Under the present political climate in Austria a de-criminalisation of the drug issue is not to be expected within the next few years. Leading figures of policy and society, as well as prosecution and jurisdiction representatives nourish the conviction that all medically unjustified tampering with drugs implies extreme risks and severe damage, and therefore calls for stringent control through criminal law. Hashish is not regarded as a harmless drug. By de-control hashish would no longer bear the image of a "subversive" drug. Hashish use would no longer be an adverture, an act of law-breaking. Many young people, who in the course of detaching themselves from their parents and the maturation process seek this sort of "adventure" and risk, whould then, unlike today, not take 'soft' drugs, but most likely switch to hard drugs right away.[36]

Until recently it was virtually impossible for drug-addicts to have doctors prescribe them drug-containing medicaments (Methadone, Heptadone). The AIDS-issue has certainly brought about a different approach.[37] The controversy about advantages and disadvantages of substitution programs is still going on.[38] A few officially approved Methadone-programs have already been carried out, but systematic evaluations of the results achieved have not been published yet.

7. Statistical Development of Drug Delinquency

In Austria drug delinquency was relatively low until 1968. From 1968 to 1974 a marked increase of the number of reported suspects was noted for the first time. Then the number stagnated. In 1978 a renewed noticable rise began that lasted until 1983. Since then there has been a reverse trend. The number of convicted persons was - with a certain delay- analogous to the number of suspected persons.

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35 See Bundeskanzleramt: op.cit. (note 21), pp.29-30.

36 Ibid., p.18.

37 See Quensel, St.: Zu den Auswirkungen von AIDS auf Drogenarbeit: Bieten sich Chancen? Wiener Zeitschrift für Suchtforschung 9 (1986), Nr.4, pp.27-33.

38 See Pernhaupt, G.: Methadon, die therapeutische Illusion. Wiener Zeitschrift für Suchtforschung 9 (1986), pp.17-25; Rittmansberger, R.: Überlegungen zur Einführung von Methadon-Programmen in Österreich. Wiener Zeitschrift für Suchtforschung 9 (1986), pp.26-28; Burian, W.: Welche Therapie ist besser? Überlegungen zur Therapie und zum gesellschaftlichen Setting der Drogenbehandlung. Wiener Zeitschrift für Suchtforschung 9 (1986), pp.61-65.

Table 1: Individuals suspected and convicted under the Drug Law. Absolute figures from 1975 to 1986[39]

Year	Suspected	Convicted
1975	2.387	686
1976	2.211	617
1977	2.409	836
1978	2.981	931
1979	3.326	979
1980	4.900	1.298
1981	5.804	1.803
1982	5.235	1.817
1983	5.423	1.917
1984	5.033	1.746
1985	4.932	1.403
1986	4.739	1.238

In average about one third of the persons reported will also be convicted. This rate has remained constant over several years. That harsher penalties were meted out during recent years, is not due to the fact that more aggravated crimes were reported, but that only those suspected of the most serious crimes were convicted and sentenced.

In 1986 16.8% of the persons reported and 24.5% of those convicted were charged with crimes under sections 12 and 14 of the Drug Law;[40] all others were charged with an offence. The proportion of individuals reported for crimes has become smaller. In 1981 the share of reported criminals still amounted to 23.2%. Among those convicted the proportion of crimes and offences has almost not changed.

Drug offences usually come to the notice of the police through their own investigative activities, and the number of reports is growing in correlation to the intensity of investigations. Along with budget cuts the number of special patrols deployed for combatting drug delinquency was reduced, which resulted in fewer charges.

The number of drug-related mortality cases reflects somewhat the drama of drug delinquency - this figure is not directly correlated to any controlling activities.

39 See Bundesministerium für Inneres 1987; Österreichisches Statistisches Zentralamt (Ed.): Gerichtliche Kriminalstatistik. Wien 1987.

40 See Bundesministerium für Inneres 1987.

Table 2: Drug-related deaths - 1975 to 1986

1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
20	17	18	23	30	57	34	31	26	46	58	46

Since 1981 the Public Prosecutor has to a far larger extent made use of the possibility of deferment of charges (section 17 of the Drug Law).[41]

Table 3: Temporary deferments of charges 1981 - 1986

Year	absolute figure	proportion of reported suspects
1981	1.259	21.7 %
1982	1.402	26.8 %
1983	1.337	24.7 %
1984	1.672	33.1 %
1985	1.631	33.1 %
1986	2.048	43.2 %

All cases of drugs delinquency that have come to notice of the authorities since 1982 are characterized by a higher proportion of older age groups. The share of 25- to 40-year old persons is growing considerably, while the share of youngsters is decreasing. The proportion of women is approximately 20% and has remained constant over the last years.

41 Bundesministerium für Inneres 1987, p. 155

Table 4: Proportions of age-groups and females of the total number of persons reported.

Age-group	1982	1983	1984	1985	1986
14 - 18	6.5	6.5	3.9	4.2	4.2
18 - 20	16.9	13.5	10.0	10.9	12.7
20 - 25	45.8	45.0	44.0	39.9	38.2
25 - 40	29.5	33.3	39.3	42.4	42.2
over 40	1.0	1.2	1.9	1.8	2.2
unidentified offenders	0.4	0.5	0.9	0.8	0.5
females	20.2	19.6	20.2	20.6	19.9
males	79.5	79.9	78.0	78.6	79.6
total number	5.235	5.423	5.053	4.932	4.739

In 1986 in total 5.176 drug offences have become known. The frequency number (known offences per 100.000 inhabitants) amounts to 68.2. The number of identified suspects per 100.000 inhabitants is 62.7, and the number of persons convicted and sentenced (per 100.000 inhabitants) is 16.4.

Foreign nationals play a significant role in the field of drug delinquency. In almost all cases of aggravated drug trafficking or smuggling were foreign nationals involved, playing a vital part. The proportion of foreign nationals in the total number of suspects amounted in 1986 only 5.7%, but the majority of these charges referred to aggravated drug offences.[42]

More than 50% of all drug offenders reported in 1986 were without employment, the proportion of pupils was 4.5%, of apprentices 4.4%, and of students 3.3%.

Consumption pattern of those reported has remained the same during the recent years in Austria, only use of cocaine has been slightly rising. The drugs still most often used are cannabis herb, cannabis resin and cannabis oil, accounting for 62% of all charges. Heroin places second with 26%, cocaine accounts for 4.8%, LSD for 4.5%, and finally various dependence-causing medical drugs.[43]

A public opinion poll among Austrians aged 15 to 40 years held in 1984 revealed following interesting results with regard to drug consumption habits and distribution of drugs.[44]

42 See Bundesministerium für Inneres 1987, p.5.

43 Ibid., p.58.

44 See Springer, A., Uhl, A., Maritsch, F.: Das Cannabisproblem in Österreich. Wiener Zeitschrift für Suchtforschung 10 (1987), pp.3-33.

At least 14.6% of all Austrians of this age-group have tried marihuana at least once. 8.4% of them tried it only once or twice, while 2.3% smoked pot at least twice, but were determined not to smoke hashish again. The remaining 3.9% had smoked hashish at least three times and was inclined to continue to do so.

The largest proportion of individuals with hashish-experience is found in urban areas, in the age-group 19 to 29. Youths up to 18 years and persons older than 35 years, have hardly any experience with hashish at all. Cannabis is still very popular among persons with secondary school leaving level and among males. For instance, in urban areas every second (47.7%) male secondary school graduate between 19 and 35 years has tried hashish once.

The average knowledge of individuals without any experience with hashish is so limited that 45% are not even familiar with the most fundamental differences between hashish and heroin. An exaggerated, fearful image of hashish is fairly common.

The attitude regarding legal control of use of hashish depends distinctly on the level of experience. But also a considerable number of persons without any knowledge about cannabis demands de-criminalisation of mere consumption of hemp-drugs. Stringent legal measures, partially harsher than the sanctions to be imposed according to the Drug Law anyway, are demanded for trading cannabis. It is striking that the medical treatment of cannabis-users is considered to be of great importance.

8. Summary

Austria's crime policy to tackle the drug problem pursues a dual strategy -on the one hand, to punish drug traffickers as severely as possible, in particular if they are not drug addicts themselves, and, on the other hand, to provide therapy and re-integration into society of addicts and small-scale consumers by creating a comprehensive system of treatment, help and supervision.

The most important stipulations of the Austrian Drug Law are:

1. Penal Law Provisions:

1.1 There is no differentiation between "hard" and "soft" drugs. However, nature and degree of dangerousness of the particular drug do have some significance for the legal definition of the quantity (such as major quantity, minor quantity) and the penalty meted out.

1.2 Possession, acquisition and supply of illicit drugs are in principle subject to prosecution and are punished with either an imprisonment term, or a fine of up to 360 daily rates.

1.3 More severe sentences are pronounced, if following aggravating circumstances prevail:

- up to 3 years of imprisonment:
  - supply (offering and procuring) of illicit drugs to youngsters (provided the adult is at least two years older than the person below age);
  - commission of the offence in a professional manner and in form of organized crime;
  - purchase and possession of a major quantity of illicit drugs with the intent to sell.
- up to 5 years of imprisonment:
  - Production, import, export and distribution of major quantities of illicit drugs, presenting a danger to life and health of individuals (grave drug offence);
  - conspiracy and gang formation with the aim to commit grave drug offences.
- 1 to 10 years of imprisonment:
  - Committing grave drug offences in a business-like manner and in form of organized crime.
- 1 to 15 year of imprisonment:
  - Committing a grave drug offence as a member of a criminal organization, or already previously convicted for a similar type of offence;
  - committing a grave drug offence involving very large quantities of illicit drugs.
- 10 to 20 years of imprisonment:
  - Commission of a grave drug offence as head of a major criminal organization.

1.4 In case of acquisition and possession of only a minor quantity of drugs will the case be deferred for a 2-year probation period,

- after obtaining information and opinions from the health authorities,
- in case of voluntary consent to undergo therapy, supervision and follow-up treatment, if considered necessary, feasible and reasonable.

1.5 Postponement of a sentence for drug offence is granted, if

- the respite is necessary for medical treatment,

- the penalty imposed does not exceed 2 years.

1.6 A grave drug offence committed abroad (section 12 of the Austrian Drug Law) shall be punished according to Austrian law, irrespective of the 'scene-of-crime'-concept, if the offence affects Austria in any way, or if the offender cannot be extradited (section 84/1/4 of the Austrian Penal Code).

1.7 Apart from imprisonment terms also a fine of a maximum of 2 million Austrian Schillings can be imposed as penalties for grave drug offences.

1.8 Supply of fake drugs is not subject of specific sanctions.

1.9 The Austrian Drug Law is with regard to classification of substances as "narcotic drugs" more or less in line with the Single Convention.

2. Procedural Aspects

2.1 Austrian jurisdiction permits use of evidence in penal proceedings that was obtained through 'undercover' investigations.

2.2 Prolonged surveillance is not prohibited by law.

2.3 The right of search can under the Drug Law be handled by far more generously than under the Law of Criminal Procedure. Police officers are allowed to search persons at border control stations without any concrete suspicion against the individual concerned. The suspicion that illicit drugs are imported or exported at this very site is sufficient.

2.4 Vehicles used for transport of illicit drugs may be declared forfeited.

2.5 Drugs that give rise to penal proceedings are confiscated. If confiscation is impossible, the proceeds are declared forfeited. If the proceeds are inaccessible, an adequate fine is imposed.

2.6 The concept of 'crown witness' does not exist in the Austrian legal system.

2.7 There are no specific regulations regarding wire tapping.

2.8 The principle of mandatory prosecution prevails.

3. Exchange of Information Between Justice and Health Authorities

3.1 A central file has been set up at the Ministry of Health, containing all important data relating to drugs offences. Upon request data are relayed to police and justice authorities, to the army and to international organizations.

3.2 Law enforcement agencies report all charges for drug offences to the regional health authorities to enable them to initiate necessary treatment and after-care.

4. Compulsory Medical Examination Treatment

Any person who is suspected of being a drug consumer is obliged to subject himself to medical examination. Addicts are obliged to undergo any necessary, feasible and reasonable therapy and supervision.

Refusal to co-operate is per se not liable to prosecution, but the individual concerned thus waives the possibility to have his case deferred by the Public Prosecutor. The costs for the required medical care and supervision are paid by the authorities, unless the addict would be treated under social security benefits anyway.

Private, but officially approved institutions and associations offering help and attention to individuals with drug problems are financed by the government.

One of the main concerns of Austria's policy regarding narcotic drugs is to treat the addict as a patient, while the trafficker is considered the real criminal and is being prosecuted with increasingly severe penalties.

However, the situation actually prevailing in the drugs milieu is nevertheless taken into consideration, too, since many addicts are also dealers in order to finance their addiction. The problem resulting from the contradiction between the need to punish on the one hand, and to cure on the other hand, is solved by giving priority to therapy.

Other concepts constituting the drugs policy in Austria -apart from control exercised by police and justice authorities, playing a decisive role in combatting drug abuse- consist in differentiated, well-balanced measures, adapted to specific requirements, such as information campaigns, prevention and therapy programmes.

Drugs delinquency markedly increased from 1980 to 1983. At the onset of this boom the drugs scene was first restricted to certain bars and meeting places in urban regions. Drug abuse gradually infiltrated the entire leisure time activities of the young population, and even spread to schools and to the army.

Distinct drug subcultures then emerged within many small towns and pastime facilities. Austria was no longer a mere transit country; drug abuse had reached western European standards.

During the last two years we have noticed a remarkable downward trend in drugs delinquency. Almost no more additional young people have fallen for hard drugs.

Drug abusers are restricted to a hard core, consisting mainly of incurable addicts with severe health and social problems, wasting considerable criminal energy to procure themselves their drugs.

Young people seem to be at present relatively immune against the drug ideology. Consumption of hard drugs is relatively low. The myth, still associated

with drugs some years ago, has apparently lost almost all its appeal to youngsters.

This development has mainly been the result of widespread and targeted health, education, information, prevention, crime and punishment policy. Other effective measures consisted in medical, paedagogical and psychotherapeutical, as well as law-enforcement initiatives implemented by the government. This positive tendency is also due to enhanced co-operation between courts, authorities, hospitals, schools and private rehabilitation centres. Centrainly also the AIDS issue has led to a new approach in this respect.

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The Situation in Belgium

Dr. E. Boutmans

1. Current State of Criminal Law[1]

The main source of criminal law provisions concerning illegal drugs is the "Act on the trafficking of poisonous, soporific, narcotic, disinfecting and antiseptic substances" (24 Feb. 1921, largely amended 9 July 1975, and further referred to as the 1921 Act). Together with a set of statutory instruments (in which the list of illegal drugs is laid down, according to international treaties) and combined with the general provisions in the Penal Code, it contains most of the applicable legal rules.

The 1975 reform was aimed mainly at:

- enhancing the sanctions to be applied to drug offenses (until 1975, the maximum imprisonment was of two years);
- offering mitigation or even exemption of punishment to drug offenders who denounce others;
- offering treatment or assistance to drug users, rather than punishment;
- adding 'psychotropic' substances to the list of illegal drugs.

The title of the Act might lead to think that the mere consumption or possession of illegal drugs is not a crime in this country, but this impression is wrong.

Indeed, the first section makes it an offence to import, export, manufacture, transport, possess, sell, offer to sell, deliver or acquire, whether on charge or free

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1 Main comments have been written by Brosens 1976-77 and several contributions to the collective work Strafrecht en Strafvordering; in French by Decourrière 1985, A more popular work, containing a sociological and a law section, was published by Luyten and Boutmans 1981.

of charge, the substances that are specified in a royal decree. (Ie. all narcotics, considered illegal internationally).

Courts consider use of illegal drugs as possessing or at least having acquired them, and therefore consider drug users as offenders.

A separate section in the Act refers to "group consumption" as a specific offence.

Neither the Act, nor the relevant decrees, make any difference between soft and hard drugs.

Several kinds of drug-related behaviour have also been declared a crime, or are to be considered punishable in virtue of the general provisions on complicity in the Penal Code.

This is, e.g., the case for:

- knowingly providing syringes or other instruments for the illegal consuming of drugs; (which explains no syringes can be distributed in prisons; but, since sale is not controlled as such, all pharmacists will sell them, even knowing the client is using heroin);
- acting as an intermediary in drugs transactions;
- procuring premises for the illegal use of narcotics (a section mainly applied to bar or public house owners who tolerate consumption);
- for a practitioner of a medical profession (including pharmacists, nurses and so on) abusing prescription, administration or deliverance of drugs containing substances that can cause, maintain or aggravate dependency;
- knowingly lending a car, money or whatever is used for transportation or acquirement of illegal drugs;
- inciting to use illegal drugs (I am not aware of cases to which this section was applied).

The Act also authorizes government to ban the growing of certain plants, but until now no such decree has been adopted.

The penalties for the above described offenses are:

- imprisonment of up to 5 years;
- and/or a fine up to 6 million Bfrs (= appr. 180,000 US $).

The imprisonment can be aggravated (up to 10 and in some cases up to 20 years) in the following cases: (**aggravating circumstances**)

- involvement of minors (majority being at 21);
- causing serious illness, invalidation or death;
- participation in a gang (organization).(But the Act does not describe what exactly is a gang, and courts have rather different appreciations on this item).
  (In case of aggravating circumstances, the **attempt** to commit an offence is punishable as such, but penalties are lower).

On top of the above mentioned main punishments, other penalties can be inflicted:

- deprivation of certain rights (the right to vote, to be elected, to testify under oath, to be guardian etc.);
- confiscation of the drugs, syringes, instruments, and all kinds of objects that have been used to commit the offence (cars have often been confiscated; also money);
- medical practitioners can be temporarily or lifelong denied the right of practicing;
- bars, public houses etc. where the offence was committed, can be closed, temporarily or for good (= in rem);
- the offender can be denied the right, temporarily or for his lifetime, to exploit a bar or public house or to participate in its running in any way (= in personam).
- the publication of the sentence can be ordered (but this is extremely rare).

Any person who commits an offence in Belgium, can be prosecuted here. An offence is considered having been committed in Belgium, not only when the corpus delicti is located in this country, but whenever any element (and it might be a minor one) is located here (e.g.: the payment takes place in Belgium; a car is hired here etc.).

Belgian citizens can be tried in Belgium, whenever they committed an offence abroad (on the condition that both legislations consider it an offence): it has occurred that Belgian people were prosecuted here for using drugs in Holland.

Foreign complies can be prosecuted in the same trial, or afterwards. (Preliminary title to the Criminal Procedures Code, s.7 and 11).

Extradition of Belgian citizens is not allowed.

2. Criminal Procedures

Little procedural legislation, specific to drug cases, has been introduced. Forfeiture is not considered here to be a procedural measure, but a penalty.

The only rules, specific to narcotics, are on home searches. Section 7 of the 1921 Act allows searching by police officers without a warrant in three cases:

- during business hours, in pharmacies where drugs can legally be sold or stored;
- at any time in premises being used for the fabrication, preparation, storing or laying up of drugs;
- at any time in premises (whether public or private), where group use takes place.

This in fact allows searching at any place where the police suspects drug parties to take place, or even where a couple is supposed to take drugs. These are very wide powers indeed, since any successful search will be legalized afterwards by its mere success. (And unsuccessful ones will seldom be discussed in courtrooms).

It should be taken into account that police searching powers under general criminal law are already very extended, as there is no need of a warrant in the following cases:

- when the dweller has consented to the entering of his house (and his consent does not have to be informed; nor is a written or even explicit consent necessary; pressing for consent is a very common practice); often the consent of one of the dwellers is considered sufficient, although this is not a general opinion;
- police is allowed to enter private homes, whenever the dweller was caught flagrante delicto.

Once the entering of private premises is lawful on any of these grounds, police is allowed to use any evidence they find there (including on totally different offenses, than the search was originated by).

The use of undercover agents, and its twin brothers such as police participation in minor (or even major) crimes, provocation to commit offenses etc., seems to have taken an official start in 1971 with the creation of a special Police Branch (the B.C.I.: Bureau voor Criminele Informatie), under the direct authority of the Minister of Justice. (The normal supervisor of criminal police being the prosecutor general in the resort of each court of appeal.) The B.C.I. was given the special mission to infiltrate organized crime, most specifically narcotic gangs. The new Branch was set up as part of a crusade, which also lead to the 1975 Act. Its examples were said to be American and British.

Around the same time, and partly out of rivalry with the new police force, another special department was created within the Rijkswacht (Gendarmerie), Belgium main national police. It was soon to be called "N(ationaal) B(ureau) voor D(rugs)", closely linked to the United States Drugs Enforcement Agency.

Both police forces turned into disaster. From the start several B.C.I.-officers became involved in organized crime. In a sensational trial in 1982, known as the François case, both forces saw high ranking officers convicted of illegal drugs trafficking, corruption, forgery etc.

One year after the trial, Prof. C. FIJNAUT, well known to this conference, published a book on it and on police infiltration policies.[2] It was widely read and certainly contributed to many debates on police techniques in drug enforcement cases at our courts. Solutions have neither been unanimous nor satisfactory, but the main problem is that policies do not seem to have changed a lot. Indeed, political and parliamentary leaders seem only remotely to be interested by the subject and leave the solution to the police-forces themselves, to the public prosecutors and to the courts.

No law, it is generally admitted, opposes police infiltration in criminal organizations. On the other hand, however, no law prescribes its rules nor sets its limits; no law authorizes police to participate in minor, let alone major, crimes. On the other hand the Criminal Procedures Code (section 29) puts public servants under the obligation to report on any offence they get to know of in the performance of their duties. This means infiltration, and certainly long term infiltration is always on the razor's edge! Public prosecutors will not intervene, except when accidents happen, but will not take any responsibility either.

2 C. Fijnaut 1983.

Police provocation is supposed to be illegal in Belgium. Courts, however, are neither very consistent in defining provocation, nor very diligent in detecting it.

Some judges seem to censure it only if the police has forced a person into committing a crime.[3] In that case, this person will be acquitted on the grounds of material law: i.e. because he has not willingly committed the offence. The appreciation of the degree of (moral or physical) coercion needed for an acquittal is very diverse.

Most writers on law consider this view to be wrong or at least too narrow. They see provocation into committing a crime as an unlawful police practice, leading to discharge, whenever the police has driven the offender to commit a crime, he would not has committed without their influence. A policeman, offering money to a person, who without this would not have acted in breach of the law (finding a dealer for instance), is provoking unlawfully, and therefore collecting evidence in a way these authors would not accept. Some courts, including the Supreme Court, seem to share this view.[4]

It is not unlawful for the police to follow a narcotics transaction, planned without any police intervention, tolerating its perpetration, waiting for the right moment to intervene.[5]

Neither is the evidence invalidated by the mere fact of police officers or informers having taken part in committing the offence, according to a Supreme Court decision:[6] participation is not to be assimilated to provocation.

The decisive criterium is whether the police has raised in the offender's mind the so called criminal intention. It is sometimes added that not only raising, but also encouraging a pre-existing intention is unlawful, so that room should always be left for the criminal intention to be abandoned. The discharge then is on procedural grounds (unlawful evidence), not on material grounds (innocence).

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3 Court of Appeal Liège, 8/1/1986, Jurisprudence de Liège, 1986, 231; Court of Appeal Brussels, 30/4/1986, Jurisprudence de Liège, 1986, 664; Court of Appeal Liège, 24/6/1986, Jurisprudence de Liège, 1986, 672.

4 Cass., 5/2/1985, Arresten van het Hof van Cassatie, 1984-85, 337. It was, however, a sentence dismissing grievance against a provocation plea, rejected by the Brussels Court of Appeal (19/11/1984. Rechtskundig Weekblad 1984-85, p.2563: French: Pasicrisie, 1985,II,p.37). In a 1979 sentence, the Supreme Court used more ambiguous words to dismiss a cassation plea: it referred to the "free will" of the offender not having been "influenced" (Cass. 7/2/1979, Rechts-kundig Weekblad 1979-80, p.902).

5 Court of Appeal Brussels, 22/5/1985, Pasicrisie 1985, II, p.138; C.A. Liège, 24/6/1986, Jurisprudence de Liège, 1986, 672; C.A. Brussels, 9/12/1976, Journal des Tribunaux 1977, p.457; C.A. Brussels, 9/11/1984 l.c)

6 Cass. 27/2/1985, Journal des Tribunaux 1985, p.728; Revue de Droit Pénal et de Crim. 1985, p.694; The Revue de Droit Pénal et de Crim. also reproduces the sentences by the lower courts in the same case (p.682 and p.688).

The major problem, however, is about evidence on the provocation: the defendant will very seldom be helped by police reports to prove his provocation plea, nor by the prosecutor. One should not forget that drug cases are handled by professional judges, without a jury intervening, and mostly on written evidence (police reports and interrogations). A common figure in police reports - and therefore in court rooms - is the escape of one or two unknown people, whose role in the narcotics deal remains undisclosed.[7] Although everyone, including the judge, suspects the fugitive(s) to be undercover policemen, there seems to be no way to identify them and/or to hear them as witnesses.

The defendant then will find his plea for acquittal, based on the unlawfulness of evidence rejected, as he fails to prove it.

However, some authors, and indeed some court decisions, are more indulgent with the defendant and relieve him of part of the burden of evidence. In their view, when the defendant gives plausible reasons to think he was lead into committing an offence by unlawful police methods, it is up to the prosecution to invalid this plea.[8] Whether an argument is to be considered plausible, is of course to be appreciated case by case.

No court, to my knowledge, has ever declared unlawful ex officio a prosecution, on provocation grounds.

Partly to allow undercover agents and police informers to act under protection of the law, and partly to incite "real" offenders to step out of the drugs scene, the 1921 Act has introduced a reduction or even exemption of punishment for offenders who inform the police.

- If they reveal, before any act of prosecution, the identities of (drugs) offenders or if they reveal the existence of such offenses (when they do not know the offenders'names), they will be exempted of punishment, if no aggravating circumstances apply to them; if these did occur, the offenders would still gain a very consistent reduction of (maximum) punishment (the maximum will be 2 years of imprisonment).

- If they disclose their information after a prosecution has been started, they will gain reduction (the maximum being as low as 3 months), only if no aggravating circumstances would apply.

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7 C.A. Antwerp, 2/12/1977, Rechtskundig Weekblad 1978-79, p.875; Corr. Tongeren, 9/11/1977, and 13/7/1977, Limburgs Rechtsleven, 1978, p.47 and 1979, p.215.

8 C.A.Brussels, 3/3/1987, Rechtskundig Weekblad 1987-88, p.640. However, accepting it in general, the court dismisses the plea in concreto. A. De Nauw, a major author on the subject, sustains the court's fundamental position in a comment under the sentence.

The Act does **not** require the disclosure to be about more serious offenses than the informer was involved in, nor does it even have to be about dealing! It is a common discussion in our courtrooms whether drug user A has been first to reveal that B, a friend of his, had also been using drugs, or whether it was the other way round. Indeed: exemption and mitigation are only for disclosing yet unknown information.

The latter clause has contributed very little to the dismantlement of major narcotic gangs, but it certainly has allowed the police to arrest lots of drugs users and street pushers. It has also lead to rather sordid debates in courtrooms. Judges in general do not appreciate "downward" disclosures (users by dealers). An escape is often found by asserting that the disclosures were not really new, or were not complete or not entirely sincere.
High Court approves this.[9]

The above described situation is not a healthy one. The rule of law is not well served by such vagueness about police powers, and even less by the absence of efficient judicial control.

On the other hand, the police could claim that they have seen a lot of work lost in spectacular, often unexpected, acquittals. The public prosecutors, in my view, do not assume their full responsibility in working out guidelines with the police, nor in enforcing the rule of law and the fairness of justice.

Often, police reports refer to anonymous or confidential information, sometimes relating entire statements.Police officers may be heard as witnesses in court rooms and asked - mostly by the defense - to reveal the source of their information. In such cases, they will appeal to professional privilege, invoking e.g. their informer's safety and be exempted of answering the question. Supreme Court does not consider this an unfair practice, since the information, obtained this way, can be freely discussed in court.[10]

It is true that a mere anonymous information, without other corroborating evidence, will not easily be accepted as sufficient to a conviction. It may however be at the origin of an investigation and be an excellent cover for unlawfully acquired evidence. Combined with other evidence, it may lead to a conviction.

Telephone tapping is unlawful in Belgium. Legislation, to authorize it, has been proposed, but the bill met considerable opposition. However, Belgian courts can

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9 Cass. 8/2/1984, Revue de Droit Pénal et de Crim. 1984, p.598.

10 Cass. 10/1/1978, Pasicrisie. 1978, I, p.525; Revue de Droit Pénal et de Crim. 1978, pp.697 and 1011; Court of Appeal Brussels, 9/12/1976, Journal des Tribunaux 1977, p.457.

take into account information obtained abroad by phone tapping, if this is a lawful practice in that country.[11]

A telephone tap could also easily be covered up by referring to anonymous information, obtained under privilege.

We have mentioned that Belgian law provides in confiscation as a supplementary penalty. This is based on section 42 of the general Criminal Code, which puts courts under the obligation to order confiscation:

- of the object of the offence, as well as objects having served to commit the offence, or that were designed to such a use, but on the condition, in all these cases, that they are the convict's property;

- of objects, that were generated (produced) by the offence.

In fact, illegal drugs are always confiscated, even when the suspect is discharged.[12] The 1921 Act also authorizes court to order confiscation of "vehicles, instruments, tools or objects, having served to commit (drug offenses) or that were designed to such use, or were the object of such offenses, even if they are not the convict's property".

Under these provisions, the forfeiture of money, used to buy narcotics (and therefore likely to be found in possession of the dealer), is authorized, as was decided in a recent Supreme Court decision.[13] Before the 1975 revision, this was considered illegal. Even under the new provisions, it would be unlawful to order forfeiture of large sums of money on the sole grounds that the convict is a dealer and gives no reasonable explanation for his wealth. A direct link between the offence and the money has to be proved.

The forfeiture of bank balances or other credits seems to be illegal. I am not aware of any case, wherein it has been ordered.

Nevertheless, the police does have the power to inspect bank accounts and derive evidence from it. They also have the right to seize all objects that can be useful to investigate the case, or that may be subject to later confiscation or forfeiture by court.

Often, money is thus temporarily seized and, even in cases where the judge cannot order its forfeiture, it might have an effect on the fine to be imposed.

A very clear act (20/4/1874) states: "Unless a person is caught flagrante delicto, no body search can be ordered", except by a court. This rule, it is agreed, only

11 Cass. 24/5/1983, Rechtskundig Weekblad 1984-85, p.1701
12 Cass.10/1/1939, Pasicrisie, 1939, I, p.15.
13 Cass. 4/7/1986, Revue de Droit Pénal et de Crim. 1986, p.910.

applies to searches on the intimate parts of the body. Cases of acquittal have occurred when the police had found drugs on people, after a search in their underwear, or after having them undressed. A recent Supreme Court[14] decision, however, allows such searches, even without any previous evidence of a crime having been committed. It is said that the 1874 Act only applies to medical examinations. The Court thus discards any protection against a practice that can reach far beyond reasonable police powers. In some cases this should be considered, in my view, as a degrading or humiliating treatment, to be banned on the basis of the European Treaty on Human Rights.

It is my impression that drugs cases are, in a way, a lab for new evidential techniques in a country where the Criminal Procedure Code is nearly two centuries old and has always been considered very incomplete and of poor quality. Many procedural rules we know today are purely founded on precedent (which officially is not considered a source of law), with recent influence of the European Treaty on Human Rights.

3. The Position of Physicians

We have mentioned above the section of the 1921 Act on abuse of medical prescription.

When are prescriptions to be considered an abuse?

Certainly, when the physician prescribes whatever a "patient" demands, without any real examination, or without objective need for the drug existing; or when he makes out prescriptions in blank.

Basically, however, prescriptions are a medical act and as such the doctor is free to prescribe whatever drug he thinks to be useful, as long as he acts without negligence or levity, in regard of medical science. Any prescription of a drug containing morphine, methadone etc. has to be justifiable on a medical basis. An official body, the P.G.C. ("Provinciale Gezondheids Commissie", i.e. Provincial Health Board) collects information on such prescriptions and has authority to interrogate doctors about their recipes, to warn or direct them (for instance if an addict is seeing several physicians); it can also denounce his behaviour to the state prosecutor and/or to the "Orde van Geneesheren", the statutory body of physicians (with disciplinary powers).

14 Cass. 27/10/1987, Revue de Droit Pénal et de Crim. 1988, p.197.

In general, this could provide for a thorough and efficient control on drug abuse via the medical professions. Nevertheless, the P.G.C. is understaffed and the "Orde" often more assiduous on materialistic items, and, maybe the principal objection, the control does not apply to such drugs as tranquilizers, most sleeping tablets and medicinal drugs in general. There are certainly more valium than heroin addicts.[15]

Does the penalization of prescription abuse exclude methadone or burgondin treatment for addicts? The matter has been widely discussed. A few years ago two spectacular trials involved doctors who had prescribed these drugs allegedly to long term heroin addicts. Although neither sentence banned the substitute treatment as a principle, both physicians were convicted.[16] They were found to have been gravely incautious by prescribing drugs without knowing the patients well, without thorough examinations, (one of them in group sessions), in some case doses had been going up gradually, the narcotics had partly found their way to black market etc.

Nevertheless, except for very short disintoxication periods, the prevailing opinion in the Belgian medical profession is not to administer methadone and other substitutes. Indeed the "Orde van Geneesheren" strongly advises against substitute treatment.

A recent statement[17] has it as follows:"During physical detoxification, it is of the utmost importance not to substitute addiction to one product for addiction to another. After the physical detoxification period a possible new need for medicinal support should be regarded very critically and, ... it should only be considered if a new dependency is not induced ... The administration of methadone or similar narcotic analgetics during physical detoxification can of course be useful or necessary but its doses, duration and form of administration should be strictly limited; optimal and justified treatment of this kind can only be done and managed in a hospital environment.... .

Ambulatory and/or long term administration of methadone or similar analgetics can only be therapeutically justified in exceptional cases. In such cases, this

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15 "Belgium holds a sad record with 50 doses of tranquillizer per head per year", it is said in a Rijkswacht publication (see note 23).

16 Corr. Brussels, 16/2/1984, Journal des Procès, 2/3/1984 (methadone: the Baudour case. The sentence is very extensively reasoned: the judges have clearly tried to give useful guidelines to physicians); Court of Appeal Brussels, 7/11/1985, Journal des Tribunaux 1986, p.371 (burgondin: the Nyström case) For a comment, see Casselman 1984, p.356).

17 Orde der Geneesheren, Provinciale Raad van Antwerpen, Mededelingen CII, 31 maart 1988. The statement itself bears no date. It was not the first guideline. In 1983 the Minister of Health sent a warning to all physicians (Revue de Droit Pénal et de Criminologie, 1983, p.170).

treatment should not be administered by a sole practitioner, whatever his qualification might be; a circumstantial report should be sent to the PGC and the "Orde"."

It is added, however, that "Multidisciplinary teams, specialising in care and treatment of addicts are allowed to set up programs with the use of special pharmacy. The protocol of the experiment should be previously approbated by an ethical committee within the "Orde van Geneesheren"."

Although a statement of the "Orde" has no legally binding force as such, it will often be considered as a scientific guideline. Most physicians seem to abide by it.[18] In fact, general practitioners may prefer not to have drug addicts as patients, to avoid problems.

4. Some Law Enforcement Characteristics

General criminal law assigns very large powers to the public prosecutor (Procureur des Konings/Procureur du Roi) in each district (there are 26 districts). In most cases they decide freely to prosecute or drop prosecution (sepot/classement sans suite), or they could even settle the matter by proposing the offender to pay a sum of money, instead of being brought before a court. General guidelines, if they at all exist, are not published.

In fact, they could depenalize personal use, or drop prosecution if the quantity of drugs involved was small or decide not to prosecute in cannabis cases at all.

Depenalizing drugs consumption is, however, certainly not what they have been doing. Although official statistics do not exist, waiving prosecution in drugs cases is uncommon. On the contrary, detention on remand is often demanded and obtained, sometimes even in relatively small cases.

Once the case is taken to court, several alternatives exist.
The court can suspend its sentence (opschorting/suspension), which means:

- a declaration of guilt;
- no punishment, but a mere warning;
- a clean record.

18 But the Rijkswacht writes that substitute therapy, although controversial, is frequent. It explicitly refers to one doctor (ref. note 23).

If within the period, stipulated by Court (within a range going from 1 to 5 years) the offender does not commit any new (serious) offence, the case is dismissed forever.

If within the probation period, he commits a new offence (whether related to drugs or not) the first case might be retrialed; retrial is compulsory if the new conviction brings along an imprisonment of more than 6 months; it is optional if the new conviction exceeds one month.

A sentence can only be "suspended" with the defendant's assent (because it implies a declaration of guilt).

The Court can pronounce a punishment and at the same time order its "entire or partial deferment" (uitstel - sursis).

This is in fact what in Britain would be called a suspended sentence; most barristers and the general public call it a conditional sentence.

It is a real punishment which will be entered in the convict's criminal record; but he will serve the "unconditional" part of the prison sentence only (or pay the unconditional part of the fine).

The "deferred" punishment will be carried out if the convict commits a new offence within the probation period (1 to 5 years) insofar the new offence is punished with an imprisonment exceeding 2 months.

Both decisions (suspending sentence or deferring its execution) can, only if the defendant agrees, be subject to special conditions (probatie) which are then controlled by a probation officer and the probation board.

In case of breach of probation conditions, the public prosecutor can order a new summons and the court can than decide to withdraw the suspension or the deferment.

It can, however, also make conditions more severe instead of withdrawing them.

Probation conditions could be to follow a detoxification treatment or to seek ambulatory assistance; to avoid certain places etc.

It is specific to drugs cases that, both for suspending sentence and for deferring its execution, the 1975 Act has disregarded previous convictions. If a defendant is a drugs user, he can be put under probation or even see the sentence suspended, whatever his criminal record might be.

This remains so if he was not solely a consumer; court can consider that selling drugs was not the main aspect of his case and that he was chiefly a user.

This section (9 of the 1975 Act) applies to drugs charges only; if the defendant has perpetrated other offenses (even to finance his drugs abuse) its use is limited (althought not always excluded)[19] and general criminal law then applies: suspen-

19 W. Brosens; De Nauw 1985.

sion is only possible if the defendant was never convicted to more than one month's imprisonment; deferment is possible only if he never incurred more than 6 months.

Finally, court can also pronounce the internment of a convict, whenever it finds him guilty but not accountable.

No punishment is inflicted then (at least in theory) but the defendant is referred, for an indefinite period of time, to a board ominously named "Social Defence Committee". This Committee has very wide powers to order the defendants relegation to one of the very ill-famed public institutes.

The Committee can, however, also allow internment in a psychiatric hospital, or ambulatory treatment; it can release the internee at any time, on parole or unconditionally.

The internment, being a court decision, can be appealed of; but the committee's decisions are considered to be mere implementation and no appeal is possible.

Internment of drug addicts has been ordered but it would be unfair to call it a frequently taken measure.

The most striking characteristic of Belgian criminal law might be the difference between the court's decision, whenever it really imposes imprisonment, and what is really done with this sentence. Indeed, short term imprisonment is under great practical pressure: prisons are overcrowded and this explains the non- execution of most sentences up to six months, at least to first offenders. Longer sentences are only partially executed, but no arithmetic solution seems to exist to the most important question every convict will ask: how long will my term finally be?

It seems that detention on remand, called provisional here, is often taking the place of imprisonment in virtue of a conviction; in other words, only convictions are really provisional!

Daily prison population in Belgium is constantly over 6,000, of whom 1/3 are on remand.[20]

Per year more than 22,000 people enter prison gates. (of whom nearly half are remanded)[21] Exact numbers on drugs consumers are not easily obtainable: it was said in a 1983 article that some 6% of daily prison population had to do with illegal drugs (4% of those remanded in custody). Some 70 detainee were considered to be real addicts.[22] These numbers, however, must have been increased since.[23]

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20 1/1/1985: 6,393 prisoners, of whom 1980 were remanded; 1/10/1986: 6,664 prisoners, of whom 2127 were remanded. (Answer by the Minister of Justice to a question by M.P.) (Vragen en Antwoorden, Kamer, 1987, p.2488; Fatik, sept. 1987, p.15).

21 Peters 1984, p.277.

22 Cosyns 1983, p.413.

23 The proportion of people sentenced for drugs offenses is said to be 19.53% in 1986, comparing to 2.10% in 1976, 1987).

As soon as an addict enters prison, his physical detoxification is enforced; he may receive short time methadone prescriptions or another substitute; no medium or long term substitutes are (officially at least) administered nor is any form of real assistance organized within prison.[24] Often, drugs abusers, who have been remanded in custody for a few weeks, are released without any form of follow-up.

5. Trends Towards a Reform

The only recent parliamentary bill, which seeks specifically to legislate on drugs, seems to be a Green M.P.'s proposition to abolish the entire 1921 Act.[25] In the explanatory memorandum the present Narcotics Act is said to be inefficient, dangerous and immoral; that's why the author proposes to abolish it, hoping the vacuum will give rise to a general and thorough debate on the issue. At the same time, however, and perhaps more to the point, Mr. PREUMONT proposed to put cannabis under the intoxicating liquors regime.

The general criminal legislation, however, is likely to undergo fundamental changes in the years to come. Indeed, a Royal Commissioner, Mr. LEGROS, deposited his report[26] some time ago, and raised quite a few eyebrows by proposing the final abolition of all imprisonment sentences under 6 months (thus making fines, proportionate to the convict's income, the main penalty for minor and medium offenses and introducing community service orders as an alternative). One of his most interesting proposals is to have an execution tribunal to decide most penitentiary matters that are at present under the competency of the Minister of Justice.

Whatever the merits of his draft may be, it is unlikely that it will ever become a piece of legislation as such; but it has stirred debate on criminal legislation reform and something is likely to come out of it.

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24 Cosyns, opus cited.

25 Introduced in the Chamber of Representatives by Ecolo's Mr.Preumont on 14/1/1987 (Parl.Stukken, Kamer, 1986-87, 730/1).

26 Legros 1985. Several comments were published, e.g.: De Smet 1986-87, p.705; Translated into French and published in the Revue de Droit Pénal et de Crim., 1987, p.109) The review Panopticon published a "Verslagboek" of a conference, held at Leuven 16/5/1987 (Sep./Dec. 1987).

6. Legalization?

Legalization of hard drugs seems to be a taboo in Belgium.

Legalization of cannabis is not, but its supporters are in minority position. Mr. Preumont's proposition, e.g., did not even stir the debate he clearly was hoping for. At present, the only way in this direction seems to be a silent depenalization, which could be realized by public prosecution offices. It is not to be expected on policy grounds, but for merely practical reasons: an overload of drugs cases clearly exists. This is, however, neither a very sure, nor, for the moment, a very likely way to change.

It seems therefore, that the border between Holland and Belgium will continue to be, for several years a real trap for consumers, who buy their drugs freely in a neighboring Dutch town but run great risks of being caught as soon as they cross over to Belgium.

Belgian authorities think repression is still the best prevention.

Whether this necessarily means that less marihuana is smoked in Belgium, than in other European countries is doubtful, although it is generally thought that the hard drugs problem is less serious in Belgium than, for instance, in Holland. The number of real addicts is estimated to be "a few thousand".[27]

Detoxification and rehabilitation centers do exist, but they are private, although subsidized. Part of their clients are mainly motivated by pending, or at least expected, criminal procedures. This is often given as the main argument against legalization.

The use of alcohol is of course legal in Belgium. It is mostly consumed under the form of beer, but since 1984 liquors can be sold in specially licensed bars (The previous 1921 Act only allowed sales in shops).

Public intoxication is a minor offence (nearly always punished with a small fine), and so is selling alcoholic beverages to drunken people (a well known barowners'offence) or to youngsters under 16 "without plausible reasons". Alcoholist are said to be approximately 300,000.[28]

As far as tobacco is concerned, its use was completely unrestricted until recent years. Starting September 1987, however, a ban on smoking in most official buildings (court rooms and prisons included) was ordered.

Just like alcohol, it still is an important source of tax income, as approximately 4 kg is smoked per head per year.

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27 By the Rijkswacht (See note 23).
28 See Rijkswacht (see note 23).

The organizing of gambling is limited to a few licensed casino's. A lively private sector, however, keeps police and public prosecutors at work. The owners generally allege their games require special skills, and therefore cannot be considered gambling.

Well, it must be said that they have a great skill at inventing new games and arguments at each occasion, but mostly courts reach a conviction after longer or shorter proceedings.

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Drug Policies in Denmark

Prof.Dr. J. Jepsen

1. Introduction

Danish and Dutch drug policies seem to have much in common, as have criminal and social policies in the two countries in general. If the common traits should be described in a few words, it might be with such positive phrases as "liberal attitudes", "a humanitarian concern for avoiding punishment as far as possible, in particular in the form of incarceration", and "an unwillingness to try to solve social problems through the penal system". The other side of the coin, however, is represented by repeated attacks from other countries on these policies for being too liberal, thereby creating a risk for Holland and Denmark to become havens for drug traffickers as well as for drug users, creating further risk that traffick and habits may spread to surrounding countries. Holland in general and Amsterdam in particular are seen as such havens for trafficking and distribution of drugs to surrounding countries.

The Swedes and Norwegians regularly reproach Denmark for its allegedly too liberal drug policies. A few years ago, Norway raised its maximum penalty for drug trafficking to 21 years' imprisonment, and has repeatedly exerted pressure on Denmark to raise its present maximum of 10 years. Furthermore both Sweden and Norway heavily criticize Denmark for allowing what is considered a free drug market in the so-called Free City of Christiania in Copenhagen. Not only has the trade in so-called hard drugs been criticized; also the dealing in cannabis publicly in the open squares of Christiania is seen as a threat to the attempts of the other Scandinavian countries to combat the importation and use of cannabis.

In Scandinavia there is a tradition for considerable legal cooperation and coordination of the penal systems, as well as of many other parts of legislation. This trend towards Nordic unity has been used to exert pressure on Denmark to

bring its drug legislation and -policy in line with the other Nordic countries. It has not, however, prevented the other Nordic countries from raising their drug penalties and sharpening their repressive policies, without attempting to secure Nordic unity in advance. In the matter of cannabis, Denmark is still sticking to its relatively liberal policies, as embodied particularly in the Attorney General's administrative order of 1969 (see e.g. VINDING KRUSE 1986, and in this volume). In relation to harder drugs, however, the strict and repressive policies of the other Nordic countries have parallels in Denmark, although the penalties used in court practice still are lower than in Sweden and considerably lower than those in Norway (see M. TIMME HANSEN 1984).

Furthermore, both in Holland and Denmark, there is a constant battle raging over drug policies. I understand that Holland is now envisaging a considerable expansion of its prison system, which may, at least in great part, be attributed to an increasing number of drug offenders in the Dutch penal system (DE HAAN 1986). So far, Denmark has avoided any major expansion of its prison capacity, but, as will be seen from **Table 1**, Denmark has experienced a constant rise in the number of drug offenders in its prisons, absolutely and relatively. This goes both for drug users (addicts), with or without drug convictions, and for drug offenders, who are not themselves drug users.

A battle between "hawks" and "doves" in Danish drug policy was won by the former around 1969, when the provision on drug trafficking (sect. 191) was introduced into the Danish Criminal Code. Since then repressiveness, although at a lower level, has been the main characteristic of Danish drug policy. The Danish "hawks" continue to dominate the debate and the practice of courts and police. Nevertheless, a mounting scepticism regarding the possibility of "eradicating" the drug problem in Denmark through repressive measures seems in evidence, although still in a quiet form. In Scandinavia, the publishing at about the same time, of BRUUN and CHRISTIE's "Den gode fiende" (The Ideal Enemy) and WINSLØW's "Narreskibet" (The Ship of Fools) in 1985 and 1984, respectively, has made a public issue out of the hitherto almost monolithic belief in repressive solutions. And today, in closed circles, policemen, prosecutors and a few judges express a growing awareness of the limited success of the repressive approach.

In addition, the concept of "control damage" has been introduced in Scandinavia and is getting growing attention, also in public institutions and statements by officials, although the major part of the police takes exception to the concept and tries to ignore the growing body of evidence of such damage. Two tendencies seem to be the result of this growing recognition: First, a growing reliance on the use of methadone as an adjunct to treatment. Second, more and more often

voices are raised in favour of reconsidering the prohibition of cannabis. Not only BRUUN and CHRISTIE, but also some semi-official voices are heard in favour of some form of legalization.[1]

Finally, the risk of extended damage to the legal system, in particular that part which may be summarized under the heading of due process, is becoming part of the official debate in legal circles, including some of the more liberal judges (see e.g. KALLEHAUGE 1984). Some of this concern has manifested itself around central procedural issues, such as e.g. the use of agents provocateurs, the use of anonymous witnesses, and the use of isolation in connection with detention before trial in drug cases.

The three latter issues have resulted in parliamentary action to curb some of the abuses and risks in this field, e.g. a change in the law in 1984 to reduce the use of extensive isolation[2] but with an exception for crimes with high maximum penalties, such as those provided for Criminal Code offenses regarding drug trafficking), a regulation of breaches of secrecy of communication (room bugging, wire tapping[3] and opening of letters) in 1985, a total prohibition of anonymous witnesses and a legal regulation concerning the use of agents in 1986.

In other words: There is in Denmark a growing concern about the monolithic reign of repression in drug policy, about the potential control-damages - on the legal system as well as on the nature of "the drug problem" itself - and about alternatives to the present state of affairs. Some of these developments seem to have clear parallels in other European countries.

Basic information on the legal aspects of drugs control in Denmark and on the practice of police, prosecution and courts has been provided in an article by the Danish lawyer and scholar SYSETTE VINDING KRUSE in the recently published Volume 8 of Scandinavian Studies in Criminology: Drugs and Drug Control in Scandinavia (Oslo, 1987), pp.34-52: Drug Criminality from a Legal

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1 E.g. the Consultant on Alcohol & Drugs of the Danish Ministry of Education, Mr. Peter Schiøler, in a Danish newspaper (Jyllands-Posten) on June 1st 1988 (a proposal which, however, evoked angry criticism).

2 By Act no.243 of June 8, 1978 the Code of Procedure had been changed so as to introduce judicial control with placement of persons detained awaiting trial (sect.770, subs.3). After further severe criticism of the extensive use of isolation (in particular in relation to drug cases), the code was changed again in 1984 (Act no.299 of June 6, 1984). Instead a new sect.770a was introduced so as to limit the use of isolation. First certain conditions were demanded to be present (a risk of collusion (subs.1), second (subs.2) it was stated that total isolation could not be used for a consecutive period of more than 8 weeks, **unless** the suspicion concerns an offence which according to the Criminal Code may carry a penalty of 6 years or more. This exception has become very important in cases of violation of sect.191, but the continued criticism of the use of isolation has led to a gradual decline in the actual application of isolation also in these cases already since 1981. Between 1981 and 1987 the total decline has been around 40%.

3 Wire tapping has taken a considerable upswing since 1975, expressly as a means to clear up drug cases. From 30 in 1975 and around 330 in 1982, the annual number of court orders allowing wire-tapping rose to around 700 in 1985. Of these a total of some 95% concerns drug cases. (Information from Preben Wilhjelm, Institute of Criminal Science, Copenhagen.)

Point of View. An excellent statement on the same topic is to be found in German in the Publication by the Max Planck Institut für Ausländisches und Internationales Strafrecht, Freiburg: Betäubungsmittelstrafrecht in Westeuropa (J.MEYER, Hrsg., 1987) in an article by JOHANNES KLAGES: Landesbericht, Dänemark (pp.169-220). Furthermore, in the former publication, the Danish sociologist JACOB WINSLØW 1987 has documented the risks to the health and lives of addicts which Danish regulation of drug abuse and the repressive policies have as unintended consequences - an important side of the control-damages.

For this reason, the following statements will only summarize the main points of the system of legal control and practice and take up some of the topics most relevant to the present conference along with some of the more heatedly debated issues in relation to Danish drug policies.

2. Current State of Criminal Law Provisions

The main provision in the Danish Criminal Code, sect.191, was introduced in 1969 with a maximum penalty of 6 years and amended in 1975 with a subsection (sect.191, subsect. 1, 2nd paragraph) on aggravating circumstances, carrying a maximum penalty of 10 years.

The section now reads as follows:

"§ 191 (1) Any person who, in contravention of the legislation on euphoriant drugs, supplies such drugs to a considerable number of persons, or in return for a large payment, or in any other particularly aggravating circumstances, shall be liable to imprisonment for any term not exceeding 6 years. If the supply relates to a considerable quantity of a particularly dangerous or harmful drug, or if the transfer of such a drug has otherwise been of a particularly dangerous character, the penalty may be increased to imprisonment for any term not exceeding 10 years.

(2) Similar punishment shall apply to any person who, in contravention of the legislation on euphoriant drugs, imports, exports, buys, distributes, receives, produces, manufactures or possesses such drugs with intention to supply them as mentioned in subsection (1) above."

Furthermore, in case of "particularly aggravating circumstances", where several instances of trafficking come up for adjudication at the same time, the maximum

penalty may be raised with up to one half, pursuant to sect. 88 of the Criminal Code, which reads as follows:

"§ 88 (1) If, by one or more acts, a person has committed several offenses, one common penalty shall be fixed for these offenses within the statutory range prescribed, or, if punishments with a different statutory range apply, within the highest maximum. In particularly aggravating circumstances, the penalty may exceed the most severe penalty prescribed for any of the offenses by up to a half."

In 1982 a new section 191a was added to the Criminal Code, providing special penalties for "receiving" in drug cases.
This section reads as follows:

"§ 191a Any person who receives or provides for himself or others a part of a profit obtained by contravention of section 191 of this Act, and any person who be storing, transporting, assisting in the disposal or in a similar manner acts in order to secure for another person the profit from such contravention, shall be liable to imprisonment for any term not exceeding 6 years."

Finally, section 16 of the Danish Criminal Code concerns offenders who were irresponsible at the time of the act due to "a condition of mental illness or a state of affairs comparable to mental illness on account of the consumption of alcohol or other intoxicants" (an exception to the main rule of mental illness as a circumstance excluding criminal responsibility):

"§ 16 (1)Persons who, at the time of the act, were irresponsible on account of mental illness or a state of affairs comparable to mental illness, or who are severely mentally defective, are not punishable. Provided that the accused was in a condition of mental illness or a state of affairs comparable to mental illness on account of the consumption of alcohol or other intoxicants, he may in special circumstances be punished.

(2) Persons who were slightly mentally defective, or in a condition comparable to being slightly mentally defective are not punishable, except in special circumstances."

As will be seen from the text of sect. 191 this section is built upon the (older) provisions in the "Euphoriant Drugs Act" of 1955 (with later amendments). In order to understand the structure of the legislative framework, a brief summary of this act (in S. VINDING KRUSE's terminology:"The Drug Control Act") is necessary. The following summary is from VINDING KRUSE (1987):

> "According to section 1 of this Act, the Minister of International Affairs is authorized to determine that drugs which, according to international agreements or in the discretion of the Medical and Health Board, present exceptional danger on account of their euphoriant qualities shall be prohibited in Denmark, unless the Minister expressly permits their use. Apart from transactions covered by such special permission, importation and exportation, sale, purchase, delivery, reception, production, manufacturing and possession of such drugs are prohibited. As the use of drugs normally implies previous possession, it is in principle an offence to be an (illegal) drug addict in Denmark.
>
> The exceptionally dangerous drugs mentioned are specified in a promulgation order. Among the most interesting drugs in the present connection may be mentioned cannabis, marihuana, heroin, opium meant for smoking, and LSD.
>
> Section 2 of the Act on Drug Control deals with a group of drugs that do not present exceptional danger, but only danger on account of their euphoriant qualities. These drugs are, for example, abalgin, opium, methadone, amphetamine, cocaine, and morphine. These drugs are only to be used for medical or scientific reasons, which means they may be purchased by the pharmacies and others with special permission, and buying and reception are allowed on a legal prescription. Otherwise import, export, sale, buying, delivery, reception, production, manufacturing, and possession of these drugs are prohibited. The penalty for violation of the Act is a fine, simple detention, or imprisonment not exceeding 2 years. Violations are punishable if committed intentionally or negligently."

As will be seen from the text of sect. 191 of the Criminal Code a legal distinction is made between "particularly dangerous or harmful drugs" and other (illegal) drugs. Similarly, the "Euphoriant Drugs Act" distinguishes between those which are totally prohibited as "exceptionally dangerous" and those which are only "dangerous". This, however, is a formal rather than a realistic distinction, since cannabis is included in the former category (because it has no legal use). In relation to the Criminal Code, however, cannabis is consistently regarded as less serious. The distinction between cannabis (the only illegal drug expressly regarded as "soft") and other ("hard") drugs is further explicated in the administrative ordinance of the Attorney General of 1969, the main points of which are summarized by S. VINDING KRUSE (1987) as follows:

> "Purchase, reception and possession of drugs shall be dealt with by the police with a warning, provided it concerns drugs exclusively for one's

own use. In the case of a second or subsequent, more serious crime and in the case of repeated possession of drugs other than cannabis, the offender shall be liable to a **fine**. The same applies to distribution or sale of minor quantities of cannabis, provided that the situation must be considered one of a single or a few isolated cases of distribution (e.g. among school fellows or in youth cliques). **Suspended sentence**, if necessary in connection with a supplementary fine, may be imposed for a first time sale of cannabis, when the total payment does not exceed 1,000 Kr., unless aggravating circumstances exist, as, for instance, distribution of considerable amounts to children under the age of 16. An ordinary penalty (i.e. normally imprisonment) may be imposed in cases which concern the distribution of other drugs, unless the circumstances (especially the age of the offender) speak in favour of a suspended sentence, if necessary with conditions of drug treatment. In these cases the charge is to be brought according to the Act on Drug Control.

If the criminal offence concern circulation (smuggling, buying etc.) of heroin or of other drugs apart from cannabis to a greater number of persons or in return for a considerable payment, a charge must be brought for an offence against section **191 of the Criminal Code**. Smuggling or distribution of cannabis shall only be dealt with under this provision in the case of commercially organized smuggling etc. of cannabis to an extent exceeding 10-15 kgs. In all the cases the drugs must be **seized** and **confiscated**."

This circular has been fundamental in the Danish penal policy in relation to drugs, as, for the purpose of prosecution and the penalty demands of the prosecutors, it draws an important line between cannabis and other drugs. It was promulgated in connection with the introduction of the 6-years' penalty in the Criminal Code in 1969 and presented to the legislature as a draft. This was the "price" which the law enforcement-oriented "hawks" had to pay in order to have the higher penalties introduced in the Criminal Code. Since 1969 it has been under repeated attacks from the "hawks", who want cannabis treated more harshly, in part because of assumed inherent damaging effects, in part from the "stepping stone"-hypothesis.

Denmark has no penalties for people who sell needles and other instruments for the consumption of drugs (including hash pipes) although such paraphernalia may be seized and confiscated in drug cases. Nor is there any penalty for "fostering the use of drugs". Advertising is only prohibited in so far as it concerns drugs which are alleged to have beneficial effects for health in line with medicines (fraudulent advertising of medical substances). On the contrary, needles and syringes are presently sold from a vending machine in central Copenhagen and one in Odense as a means to combat the spread of AIDS; in recent months a

total of 16.000 needles per month were handed out free of charge in Copenhagen alone.[4] They are still illegal in prison (contraband) and will there be seized and confiscated. A drive for free needles and syringes for prisoners- promoted by the official National Board on Alcohol and Drugs- has been turned down on several occasions by the prison authorities. They take the stand, that since drug use is illegal in prison (also), it is unacceptable to provide needles for the drug use (which is still an acknowledged fact, also in prison). It is now estimated that a total of 25% of i.v. addicts in prisons are HIV-infected.[5] This "double-morality"-stand has been under severe criticism, but is in reality (also) founded on the opposition from the prison guards who fear i.a. that needles and syringes may be used as weapons against them by HIV-infected inmates (a threat which is punishable and has in fact been punished in relation to threats against police officers).

The official Danish stand is, that the use of drugs as such is not and should not be punished in and of itself (whereas Sweden has recently made also the use of drugs punishable as of July 1st 1988). Possession, however, is illegal. The penalties for possession depend on the amount and the circumstances, i.e. whether the possession is an indication of trafficking, which is assumed when the case concerns large quantities. Historically, the ban on possession was seen as a way of lightening the burden of proof relating to sale etc., when such can not be otherwise proven. Still, even possession of 0,5 mg of heroin and 0,5 g of cannabis is regularly punished.

3. Procedural Aspects

The main events and rules in this matter concern the parliamentary regulations passed in 1985/86 after a heated debate. This legislation was preceded by a committee report[6] which was used as the basis for a proposal by the (right wing) Minister of Justice in 1986.[7] Whereas his proposals relating to breach of the secret of communication were passed without any major opposition,[8] the section of the proposal dealing with **agents provocateurs** was first postponed and later importantly modified in parliament. The most important practical result of the

4 Communication from Dr. Michael v.Magnus, Danish Health Directorate (Jyllands-Posten June 14, 1988).

5 Communication from Dr. Peter Jepsen, Copenhagen Ambulatorium for Drug Abusers at a meeting in Holstebro, Denmark (Politiken, May 26, 1988).

6 Betænkning nr.1023/1984: Politiets indgreb i meddelelseshemmeligheden og anvendelse af agenter. Afgivet af justitsministeriets strafferetsplejeudvalg.

7 Lovforslag nr.164 af 1/2/1985 om aendring af retsplejeloven og konkursloven.

8 Act. no.227 of June 6, 1985.

modification was that only policemen may be used as agents. In the police practices which had developed during the preceding years, various types of agents and informers had been used, some of them (former) drug offenders on parole. Whereas the opposition to "controlled delivery" was relatively minor, the regulations were framed in such a way as to avoid the police becoming participants in fostering drug offence or giving a drug offenses a more serious or wider character than would be the case, had the agent not intervened. Furthermore, the use of agents was now subjected to judicial control. The most important provisions read as follows:

> **Section 754a** of the Code of Procedure, as formulated by **Act no. 319 of June 4th, 1986:**
>
> "The police may not, as part of the investigation of an offence, contribute to the offering of assistance in or to measures aiming at inducing anyone to carry out or to continue the said offence, unless:
>
> 1. a specifically substantiated suspicion, that the offence is being committed or attempted, is present,
> 2. other measures of investigation will not be suitable for the securing of evidence in the matter, and
> 3. the investigation concerns an offence, punishable according to law with imprisonment of 6 years or more, or a violation of sect.289, subsect.2, second paragraph." ("Aggravated smuggling")
>
> **Section 754b**
>
> Such measures as mentioned in sect. 754a may not effectuate an increase in the extent or the seriousness of the offence,
>
> Subsect.2.
>
> Such measures may only be carried out by a police official. (author's translation.)

Furthermore, **sects.754c and d** provide, as a main rule, for a court order as basis for the measures and regulate the position of defense counsel in relation to knowledge about the measure.

Furthermore, against strong opposition from the right wing, the left side in Parliament in 1986 also managed to have an Act passed which outlawed totally the use of "anonymous witnesses", i.e. witnesses the names of whom were not to be known by the defendant, who was not even allowed insight in the statement presented by the witness. Only defense counsel was allowed such knowledge, but could not discuss it with his client. The relevant provision reads as follows:

> Section 848, subsect.2 of the Code of Procedure, as formulated by **Act no.321 of June 4th, 1986,** "Prohibition against Anonymous Witnesses":
>
> "When the defendant, pursuant to a decision under subsect.1, has not been present at the cross-examination of a witness or a co-defendant, he must, when re-admitted to the court room, be informed about who, during his absence, has been giving statement and about the contents of such statements, in so far as it concerns him." (author's translation.)

Before the act was passed, this procedural innovation had been accepted by a Supreme Court decision in a much discussed case.[9]

The act stopped this practice, although it was later slightly changed so that the list of witnesses with addresses could not be known to the defendant (only to the counsel for the defense). Instead, now, in cases where witnesses are afraid of giving testimony, the prosecution may provide the witness with a new identity and pay for a geographical relocation, a novelty which has been applied in drug cases as well as in cases against rocker gangs (the Danish section of Hell's Angels and the like). Incidentally the combination of drug trafficking with other types of illegal income for such gangs has been much discussed in Denmark, but so far only with a few cases where the prosecution has been able to demonstrate the involvement of gang members in drug trafficking. These cases present such difficulties of proof, that repeated demands have been made to dispense from traditional procedural guarantees in order to prosecute them effectively.

Thus, although some success has been achieved in halting the deterioration of due process, particularly in and through drug cases, police and prosecution still exert considerable pressure for expansion of such "untraditional investigation measures". The risks for due process which have been discussed in the literature in Denmark may be summarized on some main points, as seen in Table 2.

As will be seen, one further point of concern is the repeated allegations of defense attorneys, in particular in the greater Copenhagen area, that the level of proof accepted by the courts in drug cases is lower than the standards of evidence normally demanded in Danish courts. Judges have rallied to defend their practices by stressing the situation, that proof of guilt in drug cases is most often indirect evidence (KALLEHAUGE 1984), but the lack of precision of e.g. indictments and sentences, in particular as regards the amount of drugs involved, and the type of complicity presented by the participants still seem to be so wide as to justify criticisms relating to the limited "rule of law" in drug cases. (As an example, see the cases reported on pp.48-49 in S. VINDING KRUSE 1986). Furthermore,

9 Supreme Court decision of December 2, 1983 (Ugeskrift for Retsvaesen 1984.81 H).

the very wide definition of attempt under Danish law and the formulation of the relevant sections of the law make the defense of voluntarily desisting from attempt rarely applicable (see as an example the case cited by KRUSE 1986, pp.47-48).

In summary, the encroachments on due process, spearheaded by drug cases, are such serious threats (some of them already realized) to the rule of law, that only radical and unmistakable rules of procedure will be sufficient to halt the development and to counteract the risks of "control damage" to the legal system. Since such inventions seem to spread like cancer also in other European countries, a joint European effort should be undertaken to halt the development. It is, therefore, proposed that a recommendation should be made to prohibit totally the use of agents provocateurs in Europe and to prohibit the use of anonymous witnesses (which would involve also a protection of the gains already made under Danish procedural law). Furthermore, a general statement on the need to maintain traditional standards of proof also in drug cases would be appropriate.

4. The Role of Private Physicians

In Denmark, the general rule is that licensed physicians have a right to prescribe drugs in the course of medical treatment.

> "The Danish system of control of the distribution of pharmaceutical from producer/importer over physician and retail pharmacy to consumer dates back to the 1880s. In its present, partially highly effective form it is, however, only about 10 years old.
> All pharmaceutical -excepting over-the-counter products and drugs only available to particular physicians for (say) experimental purposes- are placed in one of three groups (denoted 'AA', 'A' and 'B' in the following). In principle the National Board of Health supervises the distribution of all pharmaceutical through its local State Medical Inspectors. In practice, however, it is the classification of a given pharmaceutical which effectively determines whether its distribution is controlled or not. I shall therefore give a brief description of the three control categories:
>
> To class AA belong all pharmaceutical containing the natural or synthetic opiates (excepting codeine) or the "strong" central stimulants in all but insignificant quantities. Among the rules governing the prescription of these pharmaceutical are that prescriptions may only be used once, and that they are to be made out on a particular form ('narcotics cheques'), copies of which have, since 1975, been fed into a national computer register.

To class A belong a large number of more or less toxic pharmaceutical such as anti-psychotic drugs, anorexics and 'strong' central stimulants, non-opiate analgesics such as dextropropoxyphene (Doloxene, Abalgin). Prescriptions for these pharmaceutical may also only be used once, but are not registered by the National Board of Health.

Finally, the pharmaceutical of class B include (among many other drugs) all common sedatives and hypnotic, first of all the benzodiazepines and, until recently, the barbiturates. Prescriptions for these drugs may be used repeatedly, at the intervals and as many times as specified by the physician on the prescription. The prescriptions are not registered in the national computer register.

Since the annual number of prescriptions in Denmark is counted in tens of millions, manually supervising which drugs a given doctor prescribes to which patients is obviously an impossible task. What can be supervised, however, is the prescription of drugs belonging to class AA, since these are registered in a computer register, from which summary lists are drawn every month.
This has made it practically possible for the local State Medical Inspectors to check how much each individual physician in his district is prescribing, and how much each individual patient in the district is receiving (and from which physicians - physicians and patients alike are identified on the prescriptions and later in the register by their civil registration numbers). Thus since 1975, it has been difficult -not to say impossible- for physicians to supply individual patients with non-therapeutic doses of pharmaceutical belonging to class AA without the knowledge of the National Board of Health and its local representatives. As regards the pharmaceutical belonging to class A and B, however, effective surveillance is, as mentioned, impossible under the present system. Accordingly such drugs as dextropropoxyphene, the benzodiazepines, and until recently, the barbiturates, are easily available for 'non-therapeutic' use among drug abusers, as it has proved impossible to stop all physicians from providing these drugs as 'substitute drugs' to drug abusers (cf WINSLØW & EGE 1983)."[10]

The idea is that the prescriptions of "particulary dangerous drugs" (AA) be regularly counted and scrutinized by the local Health Inspectors in order to locate physicians with too liberal prescription practices. These may then receive a warning, and in cases of repeated "ungovernability", their right to prescribe such medicines may be withdrawn. This type of control was used to some extent during a wave of over-prescription during the early 1950's, allegedly with good results

10 Summary from Winsløw (1986) pp.88-89.

(relating in particular to morphine type substances and amphetamines). During the 1970's, however, it seems that this control has been rather lax. In one case in Copenhagen a private physician for several years used methadone in rather large quantities and for a large number of addicts (totally 174 -see WINSLØW & EGE, 1983, p.50), allegedly in treatment by him. He was finally 1975 denied the right to prescribe methadone. However, his clientele still represented a great problem to the system, and they were transferred to other doctors and to a methadone clinic in Copenhagen. Both of these solutions were thought to be sound, but an investigation by WINSLØW & EGE 1983 revealed that the practice of methadone treatment by private physicians did not nearly live up to the demands of control and support which had been stipulated as part of the conditions for this type of treatment. Furthermore, the social support which, in line with the treatment model of VINCENT DOLE, was supposed to be an important and integral part of the methadone "solution", was not at all given in accordance with the guidelines, due to incapacity and attitudes among the social service officials in Copenhagen.

The use of methadone maintenance (and, to a lesser extent, methadone treatment) have been issues of heated discussions among treatment institutions and officials. The hope that large-scale methadone maintenance programmes might curb the accessory criminality of addicts and gradually take the profit motive away and thereby push professional, organized crime out of the drug trade, has not been fulfilled. A small-scale study by WINSLØW & EGE 1983 of methadone practice in Copenhagen showed that the reduction in the level of criminality among those participating in the programme could be estimated at around one third, but new criminality often led to exclusion from the programmes, so "high risk" cases were not included in the population. The reduction was certainly lower than expected, and some of the participants even increased their level of criminality. On the other hand, the study contributed to shattering the myth of the addict as a constantly craving, consuming and offending will-less machine. On the contrary, the study showed that even long-time addicts had other sources of income than crime (and prostitution), and that they had repeated periods of abstinence and drug-free life. Similarly, Balvig has shown that the far-ranging claims of the contribution of addicts to property crime could simply not be substantiated by the facts presented by crime statistics, including victimization

surveys. The addicts would simply have to commit three times or more of the total amount of theft in the year under study 1977.[11]

In another sense, however, Danish physicians have a dubious role in relation to drug abuse in Denmark. This has to do with the extremely high level of prescription of tranquilizers, pain-killers and sleeping medicines, which is in Denmark considerably higher than in the other Nordic countries (WESTERHOLM 1988). In other words, there seems to be considerable over-prescription of such drugs, most of it for the middle-aged, and in particular for women. It may then be seen as a reflexion of these medicine habits of the adults, when on two repeated occasions it has been found (E. LYHNE, S. SABROE 1986, CHRISTENSEN & HELGREN 1988) that school children aged 13-20 in local surveys of experience with drugs report that 13% have already had experience with tranquilizing medicines ("stesolid", valium and other benzodiazepines).

It should also be noted, that for years Danish physicians have prescribed two types of dextropropoxiphene (Abalginn and Doloxene) for arthritis and other similar ailments to old-age pensioners and others. These drugs are still used because of their alleged pain-relieving qualities, but critics have maintained that similar, non-dangerous alternatives might be used. The problem with these drugs is that the difference between the therapeutic dosage and the lethal dose is very narrow. Since these drugs have euphoriant effects and have become drugs of substitution for some addicts, due to the limited availability of heroin and other drugs of primary choice, they have been found to be (co)responsible for a large part of addicts' deaths (see Tables 3A and B). In particular when combined with alcohol - as some addicts do in order to achieve a kick - these drugs have a high risk of lethality with a dosage of as little as 6 standard dose pills. In spite of repeated criticism from experts (e.g. PETER EGE of the National Alcohol and Drugs Board) the authorities (The Central Health Authority) has refused until recently to remove them from the market (or just to subsume them under the

11 Balvig 1982 p.63 estimates that the net income of drug thieves from their thefts in 1977 would be a little over 42 mill. D.Kr., or one third of the total of 125 mill.D.Kr., which is the estimated net income of (registered) theft in 1977 out of a total theft worth 511 mill.D.Kr. A small-scale study by the Copenhagen police of cleared cases of property crimes in 1981 over a three-months' period showed, that 32% of these offenses had been committed by addicts. Of cleared cases of robbery, 25% of those in Copenhagen had been committed by addicts as compared to 16,6% in the country as a whole.

copy-control) from the view, that this would be an encroachment upon the free right of prescription of physicians.

After the appointment of a new Health Director, these drugs as July 1st. 1988 are classified under group AA ("copy control"), but still not prohibited.[12]

It has even been alleged that this unwillingness to control private physicians has its root in the economic interests and accompanying lobbying of the large Danish Medical Firm which produces and sells the drug.

Finally it should be noted, that during the 1940's and 50's, physicians quietly dispensed narcotics and other drugs of abuse to a small group of so-called "licensed addicts" on authorization from the Central Health Authority. These "classical morphinists" managed to maintain relatively non-deviant modes of life, a good deal of them being physicians themselves, physicians'wives or other medical personnel. Today the role of private physicians in treating addicts seems to be rather limited. In relation to methadone, the new guidelines just issued by the National Alcohol and Drug Board[13] recommend, that such administration should not be carried out by private physicians, but should be undertaken only under stricter control in connection with a limited number of well-functioning treatment institutions.

5. Support Programmes for Addicts

A number of support programmes do exist in Denmark, both ambulatory and otherwise, but their capacity is too low to cover the need. One the main issues in their models has been, whether drug-abstention should be a conditio sine qua non for participation in the programmes. This question has now been solved with the guidelines set out by the Drug Committee of the National Alcohol and Drugs Board in the publication "To meet man where he stands:" (1985) - the title of which indicates the revised attitude.

A number of untraditional - alternative - institutions sprang up during the 1960's and 70's which provided treatment or simply refuges for addicts, several of them manned by people without formal training in social work or treatment,

12 Communication from the new Health Director ("Det Fri Aktuelt", June 13, 1988). -Latest news: On June 20, 1988, the Health Director could, however, inform the press (Jyllands-Posten 21-6-1988), that the medical firms in question had appealed his decision to the Ministry of Health, which had postponed implementation of the copy-demand until a final decision has been reached. The Health Director expressed heavy criticism of the Danish medical industry for thus securing its economical interests at the expense of the drug abusers. He informed the press, that during 1987 a total of 66 deaths could be attributed to dextropropoxiphene, and that a further 618 persons had had to be treated for acute poisoning.

13 Alkohol- og Narkotikaradet 1988 (Alcohol- and Drug Council).

and some of them with a strong ideological over-tone. The methods applied and the opposition to traditional authorities they represented, generated strong scepticism and also outright hostility in the police, to the point where some of them felt harassed by the police, in particular in Copenhagen. Here the anti-drug squad - "the disorder police" -even harassed the staff and drug users of an inventive programme in the Copenhagen Police Youth Club ("Klub 47").

A wide array of alternative institutions, some of them engaged in street work, others providing treatment in the form of small-scale handicrafts and agriculture far from the city, have gradually become an integral part of the service system. The police - in particular a chief drug prosecutor in Copenhagen - have consistently maintained that they are manifestly inefficient. A large-scale study of the results of such institutions, compared with traditional prison regime showed no better results for the alternatives, and over-all very low rates of "success" (HOLSTEIN & JERSILD 1976). See also WINSLØW 1984, summarized in WINSLØW 1986, pp.92-100, with the estimate that the treatment system only reduces the addict population with at the most 6% per year. It should be added, that they all operate on a voluntary basis, and that Denmark has no institutions of the authoritarian type ad modum the Swedish Hassela-collective.

The Danish Criminal Code contains in section 49, subsect. 2, a provision for transfer of prisoners in need of treatment to treatment institutions outside the penal system, such as hospitals and other treatment facilities. This provision has, however, been used very modestly, in part because of simple questions of the financing (state vs. county and communal money), in part probably because of opposition on the part of officials of the central prison system against some of the more untraditional and ungovernable alternative institutions.

6. Law Enforcement Characteristics - Sentencing, Waiving Prosecution, Prison Capacity and Prison Regimes

Waiving of prosecution is a widely used measure in connection particularly with young offenders under sect. 723 of the Code of Procedure. It is rarely used in drug cases, however. The administrative ordinance of 1969 of the Attorney General (see S. VINDING KRUSE 1987, p.6 above) indicates certain minor instances when a warning may be used as the mildest sanction. Apart from that, abstention from prosecution may be used, when it is the opinion of the prosecution that proof sufficient for conviction is lacking.

The same administrative ordinance indicates the guidelines for the penalty demands of prosecutors, including the guidelines for use of conditional sentences (probation), which may be combined with conditions relating to treatment, including detoxification and placement in an institution. To a large extent the courts seem to follow these guidelines.

The level of sentences in drug cases depends on the type of drug involved, the quantity and strength (contents of the active drug), the type of offence (possession, buying, selling, import etc.) and the placement of the offender in the hierarchy. Furthermore, attention is given to the professional characteristics of the organization, the type of complicity and the prior record of the offender. Finally, it does have some influence whether the offence was committed for own supply (only) and whether the offender is addicted or not. The present relationship between type of drug, quantity of drug and type of offence is indicated in Table 4.

Table 5 presents an overview of Danish sentences in drug cases (more serious than fines), for the years 1979-1984. The table shows, that there has been an annual number of some 300 sentences heavier than fine under the Criminal Code. In addition, each year some 400-500 sentences have been passed annually (1981-84) under the Euphoriant Drugs Act - all in all, an average of some 700 sentences, of which the 25% was conditional (probation) (the majority of which were under the Euphoriant Drugs Act). It might be added that under the last-mentioned act, there was an average of 500 fines (in 1983 and 1984, however, some 800).

The development is reflected in Diagram 1, which shows that a decline in the number of cases known to the police during the years 1981-85 subsumed under the Criminal Code is outweighed by an increase in the number of cases subsumed under the Euphoriant Drugs Act. 11,4% of the suspects in 1986 were foreign citizens.

The delimitation between the Criminal Code, sect. 191, and the Euphoriant Drugs Act depends mainly upon the quantity in question. S. Vinding Kruse 1987 specifies the following quantities as justifying a charge under sect.191 of the Criminal Code (lower limit):

> "20-25 grams of heroin,
> 1500 morphine pills,
> 100-125 grams of pure morphine,
> 70-80 grams of morphine chloride,
> 10-15 kilograms of cannabis.
>
> That the charge is brought under sect. 191 does not, however,mean that the penalty will automatically exceed the upper limit of the Euphoriant

Drugs Act, which is imprisonment for 2 years. Out of the 128 cases decided under sect. 191, 60 sentences did not exceed 2 years' imprisonment, of which three were suspended sentences. The fixing of sentence under sect. 191 depends also on circumstances other than the quantity, e.g. where in the dealer network the accused is placed, the size of the profit, and the way in which the sale has taken place."

Possession is, in general, dealt with more leniently, but prison sentences for "pure" possession, also for own use, are used in some instances, although fines are more frequent. Also "haefte" (simple detention - a lower grade of imprisonment) and suspended sentences are used regularly. Two illustrative examples may be given (S. VINDING KRUSE 1987):

"The City Court of Copenhagen, 22. department B 248.1976.

A 31-year-old American was sentenced to 30 days of simple detention for buying approx. 4 grams of morphine chloride for his own use.

The City Court of Copenhagen, 23. department B 252.1977.

A 26-year-old man with a previous sentence for an offence against the Act on Drug Control (60 days' imprisonment) was sentenced to 30 days' imprisonment for having on three occasions possessed all in all approx. 1 gramme of amphetamine, approx. 2 grams of morphine chloride, 4 bottles of methadone, and the purchase of 1 grams of morphine chloride. Possession of even quite small quantities of drugs in prison normally results in simple detention (10-30 days)."

Among "soft drugs" cannabis is predominant, but a tightening up of the control of cannabis in later years is visible. Furthermore, the production of Danish hemp - be it for use as cannabis or for birds' seeds or textiles or for horticultural purposes - has now been completely outlawed in Denmark by a Supreme Court Decision upholding an administrative ordinance by the Central Health Authority. It is another instance of control system schizophrenia that the domestic cultivation of opium poppies has not been outlawed (for purely farm-economical reasons), although several instances have occurred where addicts have harvested the poppy heads for consumption as drugs - at times with considerable health damage as a result.

Among the "hard drugs", morphine, heroin and other opiates, including synthetic substitutes have been the main drugs of abuse and of law enforcement. Heroin is considered "particularly dangerous" (as is LSD, which has however declined in use, due to fear of bad trips among users). Also cocaine, which was

introduced in Denmark a few years ago, but which has never become popular due to its high price, is considered a hard drug. The number of seizures of drugs up to 1987 may be seen from Table 6 A-B, and the street level prices can be seen from Table 7 (Source: Annual Report of the Danish Police, 1987). Also the purity of drugs has been registered, see Table 8. As will be seen from the table, the purity of e.g. heroin varies greatly. As a result, several deaths of accidental overdoses have occurred, some of them, according to the police, concern intended killings of suspected informers, others are due simply to lack of knowledge and general laissez-faire attitudes among users.

In the Addendum the most recent information from the Danish police (1987) has been excerpted.

In the past two or three years amphetamine has entered the Danish drug scene in rather large quantities, most of it imported, other parts derived from legal sources, and in a few instances some of it produced at clandestine domestic laboratories. It has become a very popular drug among young persons, belonging or aspiring to "the jet set". It has recently, however, spread also among school kids, being preferred to beer or other types of alcohol, due to its euphoriant qualities and its relatively low price ("the poor man's cocaine"). Based upon a couple of statements from doctors, one of them a psychiatrist, well known for his otherwise liberal outlook on drug control, prosecution and courts have come to consider it as a hard drug in line with heroin. The expert statement of the said psychiatrist, that amphetamine is more dangerous than heroin has led prosecution and court practice to a consistently rising level of penalties for trafficking in amphetamines. This line on June 16, 1988, was confirmed by a Supreme Court decision. The said statement, however, might also be interpreted the other way: that amphetamine may be justly placed at the penalty level of heroin, while heroin should be punished more leniently, as it does not have the toxic and psychiatrically negative effects of amphetamine.

Danish court practice seems to evidence consistent inflation in the use of prison for drug trafficking, well in line with the "war on drugs" inspired by the USA and the campaign for "a drug-free society" launched by Sweden and Norway. The result may well be, since the upper limit of the penalty framework has now been hit several times in Denmark (see S. VINDING KRUSE 1987), that new demands will be put forward that Denmark raise its penalty limits to a level possibly like the Norwegian. In this way, renewed contagion by repressive control thinking may be the result.

The Danish Permanent Criminal Code Commission has recently, in connection with a general discussion of penalty levels in the Criminal Code, discussed the level of penalties in drug cases related to other penalties for major, serious

offenses. The Commission found no grounds for either raising or lowering the frames, nor for criticizing the penalties actually meted out (STRAFFELOVRADET 1987).

The number of drug-related offenders in Danish prisons is now high enough, however, and further increase will seriously jeopardize the chances of keeping the prison system within its present limit of roughly 3.500 inmates, including prisoners awaiting trial (of which a good deal are drug offenders who traditionally spend a good deal of their time in isolation awaiting confession). Furthermore, they represent a deviant and strange element in the prisons, since some of them are kept in separate wards (e.g. in the state prison of Vridsloselille), while others spend also their sentence in isolation, because of fear of sanctions from professional drug traffickers.

It is, therefore, proposed that a joint European drive be initiated to cut down on both the number and length of drug sentences. If this is done on a general level, reproach for lack of international solidarity will be less impressive. It ought to be possible to gain acceptance of the view, that drug-related sentences have simply gone out of hand, and that further increase will have no demonstrable effect in relation to general deterrence. Furthermore, information from Scandinavia (e.g. BODAL 1980), indicates that the persons populating the prisons with drug sentences are rarely the professional high-up financiers and "hintermänner" for whom the severe sentences were allegedly intended. In line with THOMAS MATHIESEN's proposal for "abandonment of all prisons by year 2010" (MATHIESEN 1988), I would make the much more modest proposal for a halving of all drug sentences by 1990. The realization of this proposal may not come easily, but one condition for its realization is, that it be put forward.

In connection with the pressing problem of spread of AIDS among drug users in prison, a proposal for the free availability of needles in prison might be of some impact on both a national and an international level. Finally the singling out of drug users as a special, discriminated inmate category should be abandoned.

7. Epidemiological Information

In Denmark, there is no repeated census of the number of drug users through representative surveys or by counts of persons in contact with various institutions. The number of 5-10.000 "hard core" (previously equal to regularly injecting) addicts is as imprecise as it is scientifically undocumented. Nevertheless, it is the figure upon which the authorities are acting - or not acting. The common view is,

that the rise in this number was halted some time in the early 70's, as evidenced by the constantly increasing average age of addicts in contact with treatment institutions. In recent years, however, a new "wave" of younger users may be on the way, but this wave is also countered by a gradual return to alcohol, or to alcohol in combination with some of legal or "soft" drugs, such as cannabis or medically prescribed pills ("pensioners'junk"). The impression - to some extent founded upon recent surveys among school kids in provincial towns in Jutland, on police sources and on anecdotal newspaper accounts - is that the spread of amphetamine in discotheques and bars is introducing a new group of customers, comparable to the experimenting youth groups who took to cannabis in the mid-1960's in connection with a "new life style" with ideological overtones. This time, however, the message is not flower-power, but self-presentation, competition and aggressiveness, smartness etc. The number of admissions to psychiatric hospitals with amphetamine-related psychoses has been reported as steeply rising (from 12 in 1986 to 28 in 1987),[14] and an information campaign is under way, with a view to avoid sensationalism which might stimulate curiosity.

A study of these phenomena in Scandinavia, and in particular of the relationship between the control system and control damages is presently being planned under the auspices of the Scandinavian Council on Alcohol and Drug Research (NAD), a study which will include national as well as joint Scandinavian problems and themes. With the books of WINSLØW and BRUUN & CHRISTIE, we have a foundation for a critical approach. The problem is getting the relevant persons and officials to read them and to understand them. This is a question not of science but of communication and ideology.

8. Possibilities for Legalization

From the statements above most of the answer to this question should already be evident. While the right wing "hawks" for many years have dominated drug control policies in Denmark, there now seems to be at least a modest basis for revitalizing the discussion of control costs and alternatives to a repressive drug policy. As evidence of the official orientation of the National Council on Alcohol and Drugs, I might cite the items which the official Danish delegation tried to get support for at the UN Vienna Conference on drug policies in 1986. (The first four points did not meet with general approval in Vienna):

14 Information from Chief Psychiatrist Finn Jørgensen (Politiken, March 3, 1988).

1. To create a drug-free world is unrealistic. Thus the aim must be to reduce the costs (for society as well as for groups of citizens and single individuals) which drugs imply.
2. The balance among the elements of general drug policy must be framed in such a way that the drug users are not inflicted with more damages through the apparatus of control and penalization than through the use of the drugs themselves.
3. The goal of treatment of drug users is to reduce the harmful consequences of drug abuse as far as possible, and drug abstention is not necessarily a condition for treatment, and not at all the criterion for a successful treatment.
4. Drug users should - as part of the measures against AIDS -be provided unlimited and free access to clean syringes and needles.
5. Remove several of the even very extensive control measures in relation to the use of drugs in the workplaces of public and private employees.[15]

Implied in the above statements is a prediction, that attempts to legalize even "soft" drugs like cannabis - not to speak of "hard" drugs like heroin and amphetamine - will meet with heavy opposition even in Denmark. The hawks are still in power, and the public attitude to drug use and addiction is still very negative. Drug users are still useful as scapegoats for people feeling insecure in relation to the social development.

With the present financial situation in Denmark and with the predominant popular attitudes (where drug addicts range lowest on a "popularity scale" in a recent opinion poll of Danish preferences for people of various occupations, while policemen score second highest) there is little reason to expect major investments in alternatives to prison in the form of institutions, treatment programmes etc. Even the humanitarian argument has little chance of being respected. The economical argument, however, might be decisive. Penal reactions to the drug problem are not only inhumane. They are also inefficient and expensive, so the economic argument might be a way of opening up for a discussion of principles and values. After all, the idea that the economic basis strongly influences ideology, the state and its politics, is not new.

15 Letter of 21.8.1987 from Mogens Bjørnbak Hansen, Alcohol and Drug Council.

9. Addendum

The most recent information about the situation relating to trafficking and dealing in drugs stems from the Annual Report of the Central Police Unit (Rigspolitichefen) for 1987 (Copenhagen, 1988) - the following is an excerpt of the most pertinent information (own translation):

"The drug problems were, in 1987, also concentrated in the larger cities. The tendencies of later years towards a broader spreading of the drugs continued. Amphetamine in particular has been seized in a large number of police circuits.

Supply, demand and price for each group of drugs were relatively stable throughout 1987; amphetamine, however, rose again after a decline in prices at the end of 1986. ..." (see **Table 7**).

"Cannabis-abuse evidenced no change in relation to later years. .... Some 75% of the hashish were seized at the borders. The main part of the hashish was smuggled into Denmark from Holland via Western Germany, and large quantities passed Denmark in transit to Norway and Sweden. ..."

"The tendency of the 1985-analysis, which showed a strong decline in the courier traffick by plane directly from the producing countries and a rise in smuggling by train and motor vehicles via the borders, was further strengthened in 1987. There seem to be several factors behind this development, i.a. Holland's role as a centre for distribution, in particular to North Western Europe, seems increasingly prominent."

"From the larger producing countries -in particular Lebanon- the hash is smuggled almost exclusively by sea to Rotterdam, where it is delivered as ordinary container freight cargo."

"The loads are typically 2-6 tons at a time, as indicated by the seizures, which over the past few years have been around 35-40 tons, corresponding to at least 1/3 of the total European seizures per annum."

"Heroin abuse seems diminishing, in spite of ample supply, this is probably due partly to an increased poly-drug use with "legal" medical drugs, partly to an increasing number of abusers in methadone treatment or -maintenance, combined with a diminished number of new addicts. ..."

"The situation in relation to amphetamines is, as mentioned earlier, distinctly worsened in 1987. The drug - which must be considered extremely dangerous - is now present in most of the country. The abuse is extensive, not only in the traditional drug-abuser milieu, but also among totally new population groups.

.... The main part of the drug is smuggled out from Holland, but raw materials as well as clandestine laboratories also exist in Denmark. ..."

"The cocaine-situation seemed to be stable on a relatively low level throughout the year, but the problems in this field of abuse are difficult to assess, as the abuser population - as far as we know - consists mainly of persons who are not necessarily forced to commit crimes in order to buy the drugs. The large supply of amphetamines, which cost only of the price of cocaine, is also assumed to play a significant role."

"The statistics of seizures of cocaine have been fluctuating a great deal in recent years. The rise in 1987 has not changed the average price of some 2,000 D.Kr. per gramme."

The seizures in 1987 of narcotic drugs showed variable trends for the four main categories of drugs. Heroin dropped considerably, whereas cocaine, amphetamine and hashish rose considerably (see the figures and diagram in Tables 6 A-B).

"The development in seizures is probably to a large extent a reflection of the efforts of the control agencies, but may probably also - in particular in relation to the amphetamine-situation - provide indications of the development in the different categories of drugs. ..."

"The situation in relation to drug abusers:

"Apart from the mounting problems relating to amphetamine abuse and a probable reduction in heroin-abuse, 1987 evidences no significant changes in the drug abuser situation ..."....."

"Number of cases in 1987":

"In 1987, 1099 violations of sect. 191 of the Criminal Code were registered. This is a rise of 7.3% over 1986 (1024). From around 1983, the number of cases seems stabilized around 1.000....

The provision concerning "receiving" (sect. 191a) was introduced in the Criminal Code in 1982. It is still a minor category of cases. Thus in 1987, a total of 42 charges were dealt with, which was, however, the maximum until now.

As for the less serious drug violations (of the Euphoriant Drug Act), there was a rise of as much as 21.5% up to the maximum number of cases so far, i.e. 9.453 (1986: 7.783).

Of the persons charged, 13.3% were women (1986: 15.1%). Non-Danish subjects amounted to 13.9% (1986: 11.4%) of all persons charged."

Annex

Table 1: Inmates in Danish prisons & jails, 1970-1986
(Drug users and drug offenders included)
Source: Annual reports of the Department of Corrections

Year	Total occupancy abs.	Drug users abs.	%	Hereof "harder" drugs abs.	%	Drug offenders non users total	Danish	Europ.	Others
Apr.70	3958	329	10			28			
Aug.71	3528	575	16	301	52	37	14/38	4/11	19/51
May 72	3198	520	17	300	58	85	44/52	21/25	20/24
May 73	3311	549	17	*369	67	92	34/37	17/20	40/44
Jan.74	3637	721	20	503	70	110	48/44	20/18	42/38
Aug.74	3406	728	21	522	72	111	49/44	25/23	27/33
Aug.75	3134	560	18	378	68	121	52/43	25/21	44/36
Sep.77	2731	516	19	351	68				
Sep.78	2895	595	21	354	59,5	135	71/53		
Sep.79	2854	661	23	391	59,2	146	72/49	33/16	51/35
Oct.80	3421	767	22	393	21,2	191	97/51		
Nov.81	3600	872	24	**442	50,7	289	163/56		
Dec.82	3190	784	25	357	45,5	281	166/59		
Feb.84	3467	812	23	327	40,3	321	189/59		
Apr.85	3164	734	23	274	37,3	290	211/73		
Feb.86	3584	902	25	404	44,8	272	183	38	51

* Injecting
** Habitual use of other drugs than cannabis

Table 2: Risks of control-damages
effects on the legal system (due process)

A. **Winsløw (1984):**

1. Increased flow of information from police to social authorities.
2. Undue spread of telephone- and room-"tapping" to minor cases (due to untenable primary suspicions).
3. Unreasonable application of detention before trial, in particular combined with isolation of the detained, in order to produce confessions.
4. Increased application of agents provocateurs, first without legal provision, later with legal regulation.
5. An increased number of indictments with unacceptably low standards of precision in relation e.g. to the details of the accusation, the amount of drugs involved, time and place of crime etc.
6. A growing number of convictions with indirect proof (indices).

B. **Nebelong (1987):**

7. Risks of erroneous evaluation of evidence due to difficulties of interpretation of "taps" and translations.
8. Risk of "guilt by contagion" due to collective decisions (cases with many defendants).

C. **Vinding-Kruse (1985):**

9. Unreasonable extension of the concept of complicity.
10. Unreasonable limitation on the legal opportunity for impunity due to retraction from attempted offence.
11. Inflation of penalties, dis-proportionality.

D. **Jepsen:**

12. Attempts with new constructions, e.g. anonymous witnesses.
13. Risk of "contagion" of low standards of evidence on other types of cases.
14. Reduced "rule of law" in relation to special groups of (potential) offenders or other dissident groups, e.g. inhabitants of the "Free City" of Christiania.
15. Risks of police malpractice (e.g. policeman sentenced for theft during seizures in Christiania).
16. Derived effects on police, prosecution and courts ("contagion").
17. Derived effects on public attitudes towards criminal policy and the rule of law.

Table 3 A Narcotic deaths 1968-87

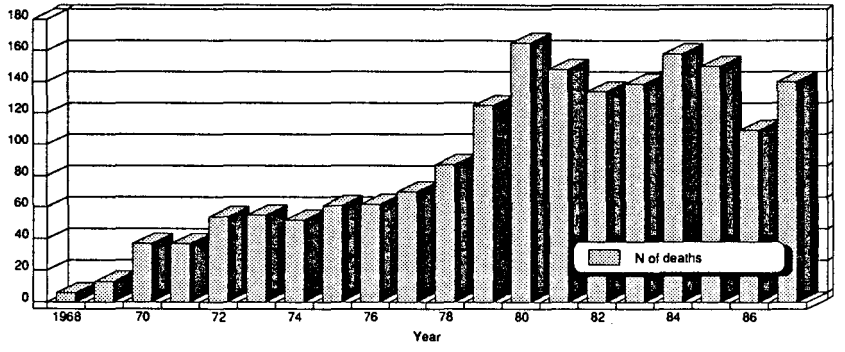

Table 3 B: Narcotic deaths and their causes

Year	Morphine compounds / synthetic morphine substitutes	Morphine compounds; synth. morphine substitutes & medicine (sleep / nerve / painrelieving)	Medicine (sleep / nerve / pain-relieving)	Deaths caused by misc. drugs / self-destruction
1968	1	-	1	4
1969	5	1	3	4
1970	11	2	8	16
1971	10	5	11	11
1972	25	6	12	11
1973	26	6	15	8
1974	20	8	19	5
1975	22	7	26	6
1976	9	12	29	12
1977	20	10	30	10
1978	42	11	26	8
1979	59	12	34	20
1980	89	21	40	15
1981	72	20	34	22
1982	65	13	36	20
1983	86	15	28	10
1984	101	13	25	19
1985	85	10	32	23
1986	65	12	17	15
1987		Forensic/chemical investigation not concluded		

Table 4: Recent court sentences (Copenhagen) - related to drug type, quantity and type of offence

1. Heroin:

K.B.	17.03.88	3 months imprisonment	sale of 11 grams of heroin
"	21.01.88	5 " "	" " 18,8 g " "
"	01.03.88	6 " "	possession of 25 g. "
"	07.04.88	9 " "	" " 64g. "
"	23.09.87	1 year "	" " 90g. "
"	21.01.88	1 " 3 months "	sale of 104 g. "
"	25.11.87	1 " 6 " "	smuggling(import)130 g."
"	20.11.87	2 years "	sale of 200 g. of "
"	25.02.88	3 " "	smuggling of 250 g. "
"	25.01.88	3 " "	sale of 200 g. "
Ø.L.	20.10.87	3 " 6 months "	smuggling of 1,4 kg. "

2. Cannabis (hashish):

K.B.	15.04.88	60 days imprisonment	possession of 912 g. of hash
"	19.01.88	4 months "	smuggling " 4 kg. " "
"	87	4 " "	" " 1,3 " " "
"	02.09.87	10 " "	possession " 13,9 " "
"	15.04.88	1 year "	smuggling " 11,6 " "
"	04.02.88	1 " "	" " 9,5 " "
"	02.09.87	1 year 6 months "	poss./sale " 30 " "
"	11.08.87	2 years 6 " "	smuggling " 45 " "
"	06.11.87	3 " 6 " "	sale " 26 " "

3. Amphetamines:

K.B.	18.01.88	3 months imprisonment	sale of 20 grams of amph.
"	10.03.88	4 " "	smuggling of 51 g. "
"	21.12.87	5 " "	sale " 80 g. "
"	24.08.87	10 " "	" " 176 g. "
"	15.01.88	1 year "	" " 150 g. "
"	12.01.88	1 " 3 months "	" " 250 g. "
"	22.09.88	1 " 8 " "	smuggling " 859 g. "
"	13.01.88	2 years "	'dealing' in 539 g. "
"	25.02.88	3 " "	smuggling of 2 kg. "

4. Cocaine:

K.B.	21.01.88	4 months imprisonment	smuggling of 23 g. of cocaine
"	14.07.87	1 year 3 months "	" " 99 g. " "
"	17.11.87	1 " 6 " "	" " 91 g. " "
"	14.12.87	3 " 6 " "	" "840 g. " "
"	08.03.88	5 " 6 " "	" " 2,5 kg. " "
"	07.03.88	6 years "	" " 2,481kg. " "

(Source: Information from the Copenhagen Narcotics Police.)

Table 5 A: Number of cases concerning violation of sect.191 of the Penal Code (gross illicit traffic in drugs) and Order on Euphoriant Drugs (in thousands)

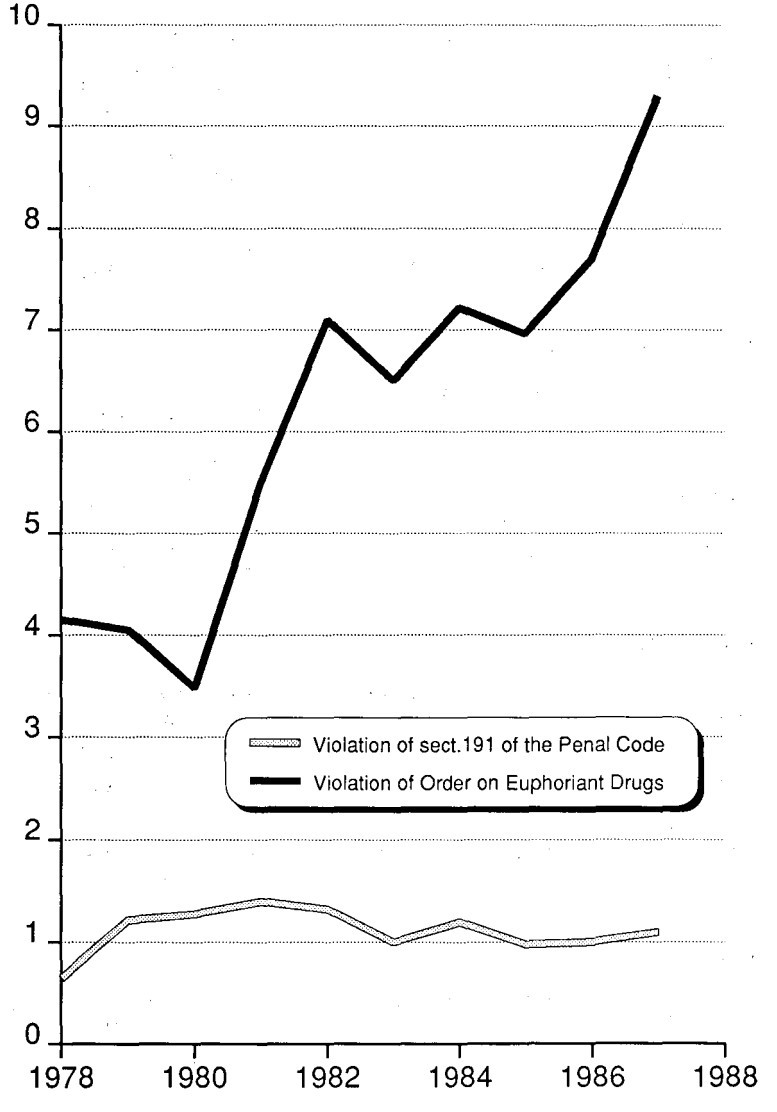

Table 5 B: Sentences under sect. 191 and 191a of the Criminal Code (Euphoriant Drugs Act offenses in brackets)

	1979	1980	1981	1982	1983	1984
1. Unconditional prison:						
Up to 30 days	2(12)	2(23)	-(34)	-(23)	4(38)	-(34)
31-60 days	13(49)	6(32)	7(55)	1(52)	5(46)	6(37)
2-3 months	7(15)	1(29)	6(29)	4(40)	6(52)	4(34)
3-4 months	7(17)	4(20)	2(29)	3(18)	3(27)	4(21)
4-6 months	10(31)	11(30)	11(40)	8(41)	11(32)	15(21)
6-9 months	19(20)	17(12)	19(30)	13(20)	18(11)	13(19)
9-12 months	50(15)	45(5)	42(11)	39(12)	40(11)	43(6)
12-18 months	34(9)	55(1)	64(6)	52(3)	41 -	35 -
18-24 months	26(3)	35 -	32(1)	31 -	30(3)	44 -
2-3 years	37(5)	43 -	50 -	50 -	40 -	34(2)
3-5 years	42 -	47 -	42 -	52 -	53 -	43(1)
5-8 years	8 -	11 -	4 -	30 -	21 -	17 -
8-12 years	1 -	- -	2 -	4 -	4 -	- (1)
Total	256(176)	277(152)	281(235)	287(209)	276(220)	258(176)
2. Unconditional "hæfte" (simple detention):						
	4(40)	1(38)	1(55)	- (72)	- (89)	1(101)
3. Conditional prison:						
	14(67)	7(53)	20(92)	14(100)	10(123)	23(101)
4. Conditional "hæfte" (simple detention):						
	- (19)	- (24)	- (40)	- (42)	- (44)	- (33)
5. Cond.sentence -: penalty:						
	1(35)	3(22)	3(37)	-(40)	-(37)	4(20)
Sent.-total	275(337)	288(289)	305(459)	301(463)	286(513)	286(431)

Table 6 A: Seizures

Narkotika	1979	1980	1981	1982	1983	1984	1985	1986	1987
Opium (g)	63	12844	379	610	180	3	42	6	0,7
Heroin (kg)				see graphic					
Methadon(ml)	2235	647	1152	574	225	2095	1333	2944	7542
Methadon tabl.(stk)	227	487	39	770	112	2653	574	2102	1404
Kokain(kg)				see graphic					
Amphetamin(kg)	0,2	0,2	4,3	2,3	6,9	2,0	4,0	10,2	56,2
LSD(doser)	104	405	300	446	152	265	35	76	110
Hash(kg)	1139	1375	1249	910	1735	658	510	472	1235
Marihuana (kg)	?	?	32	30	27	74	78,6	43,2	32,4
Cannabinol(kg)	0,2	7,3	3,8	1,4	8,5	0,1	0,5	1,1	0,8
DK Hampplanter(kg)	-	917	930	367	2168	3387	1149	1665	1007

Table 6b: Seizures of heroin and cocaine (in kg.)

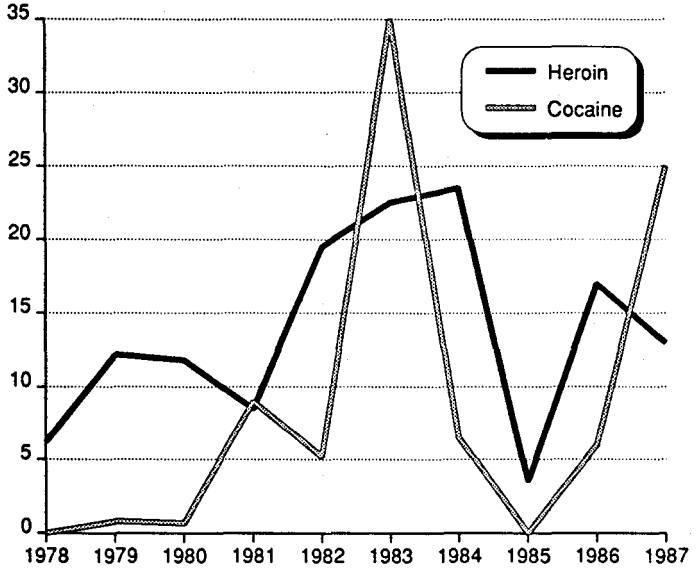

Table 7: Prices of drugs
(appr. price in kr. on the street in Copenhagen and Arhus)

	apr.82	may 83	febr. 84	febr. 85	febr. 86	dec. 86	dec.87
Heroin (1g)	2000	2500-3000	2000-2500	2500-3000	2500-3000	2500-3000	2000
Cocaine (1g)	2000	2500-3000	2000-2500	2000-2500	2000-2500	2500-3000	2000
Amphetamin (1g)	4000	8000	300-800	300-800	500-600	350-400	500
LSD (1tabl./trip)	30-50	30-50	40-60	40-60	*	ca. 40	*
Hash (1g)	45-60	50	45-60	45-60	ca. 50	ca. 50	50
Marih. (DK) (1g)	-	10-15	20-30	20-30	20-30	ca. 30	*

* Price unknown on account of very limited supply

Table 8: Analysis results concerning the strength of heroin marketed in the street

Year	Number of analyses	min / max strength	% contents of heroin, calculated as average value	median value[3]	estimated user's value[4]
1982	21	10-81%[1]	29,9	27,1	appr. 26
1983	26	0-77%[1]	32,8	23,5	" 24
1984	50	5-86%[2]	35,4	32,0	" 25
1985	102	5-85%[2]	27,0	26,0	" 25
1986	127	3-91%[2]	38,3	31,0	27,6

1. Collected in Greater Copenhagen.
2. Collected on national basis.
3. Heroin contents in the analysis/analyses placed half-way within the total number of analyses, ranged according to strength.
4. Average percentage, omitting analysis results above 50%.

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France's Policy Concerning Illegal Drug Users

Dr. J. Bernat de Celis

Introduction

An exhaustive study of the drug issue would have to enter into so many fields and to consider so many concepts that it is unthinkable in the framework of our work. When we talk about "drugs" in the Western world, we are generally refering only to exotic products, excluding a large amount of other substances susceptible of altering our state of consciousness. And when we talk about the "drug problem" we are refering to the increase in the consumption of these substances and of state intervention in this field. I have therefore limited my study to this aspect, by trying to present the rules, relatively new in France, governing the usage of narcotics and which constituted, when it was introduced, an exception to the traditional policy of non interference in private consumer behaviour.

It is the French law dated December 31, 1970 which decided that public authorities would be in charge of persons consuming certain types of drugs, by proclaiming at the beginning of its text that "All persons using in an illegal manner substances or plants classified as illegal drugs will be placed under the supervision of the health authorities" (article L.355-14 of the Public Health Code).

This statement gives the impression that the main object of this law is to medically assist these drug consumers. This impression is reinforced by the fact that it is found, with the other dispositions of the law that immediately follow it, in the section of the Public Health Code which deals with "the fight against social plagues". Thus the 1970 law declares that the "fight against drug-addiction" is placed in an epidemical framework, alongside the fight against tuberculosis, venereal diseases, cancer, mental illnesses and alcoholism.

However, the dispositions which follow this statement allow one to appreciate differently this law. For although it may be inserted in the Public Health Code, it is primarily a repressive view of the problem it is supposed to resolve. Since this law defines the "illegal usage of illegal drugs" as punishable behaviour (art. L.355-15 and 628-1, Public Health Code) the user of these drugs becomes a "delinquant" whose fate falls into the hands of the criminal system.

Although the health authorities are not obliged to inform the judiciary authorities in the case of a person coming directly to them (through the initiative of this person, or through the initiative of a doctor or social worker art. L.355, 18 to 21 of the Public Health Code), the public prosecutor,[1] here, as in all criminal matters, can initiate a public action. And only one restriction to his usual discretionary powers is not enough to prevent him from remaining in control of the affair.

The 1970 law does not, in fact, modify the public prosecutor's competence or authority in this field. It only adds to it by giving him the supplementary power of being able to order the person who has "illegally used illegal drugs to either follow a cure of disintoxication or to place himself under medical supervision" (art. L.628-1 Public Health Code). The public prosecutor has thus three options instead of two in the case of the illegal use of illegal drugs: to prosecute, to dismiss[2] or to place the person into the hands of the medical authorities. In this last case, it is evident that the health authorities are subordinate to the public prosecutor. First of all because they are ordered to care for the person designated by the criminal system. And secondly because they are obligated to inform the public prosecutor of all social and medical developments involving the person, particularly any interruption in the treatment.

The French law of 1970 (completed in 1986 and particularly in 1987) is hence a penal law as we shall verify by passing under review its provisions and observing the judiciary handling of these cases that it provokes. But we must also question the meaning and the extent of this law by attempting to go beyond the judiciary framework in which the official policy claims our subject belongs and looking at it from a societal point of view.

1 In France, it is the "procureur" who can prosecute; the "procureur" and his "substituts" make up the "parquet".

2 The "parquet" has the discretionary power to decide to prosecute or not by virtue of the "opportunity of the prosecution" rule.

1. The Law Applying to the Illegal Usage of illegal Drugs on French Territory

The illegal usage of certain drugs which are susceptible of causing dependance has been a criminal violation since 1953. But to have been legally accountable under the 1953 law the usage had to have been done "in a group". As the 1970 law has not maintained this condition, the illegal usage is now penally punishable in all cases.

1.1 The Crime of Usage

The crime of usage presents the following characteristics:

- The consumption of all substances or plants classified as illegal drugs is incriminated. French law does not make the difference between hard and soft drugs. Nor does it make the difference between drug "usage" and drug "abuse". A one-time user is theoretically as punishable as the proven drug addict.
- All substances susceptible of causing addiction are not classified as illegal drugs, only those products which are listed on Chart B.[3] These classifications are made by an executive decision, so that a ministerial order suffices to add a new product to this list.
- The "illegal usage of substances and plants classified as illegal drugs" is subjected to a prison term of two months to one year and/or a fine of 500 F.F. to 15.000 F.F. (art. L.628 Public Health Code)
- Other accessory or complimentary measures can, or in some cases must, be taken. The seizure or the confiscation of the incriminated substances is mandatory (art. 629 Public Health Code). The Court can prohibit the person from staying in a certain place (art. 44 Penal Code) or in the case of a non-French citizen, the Court can temporarily forbid the sojourn on French territory (art. L.630-1 Public Health Code).[4]

3 Tableau A lists toxic products, Tableau B, narcotics, and Tableau C, dangerous drugs (art. R.5149 Public Health Code).

4 From 2 to 5 years; the temporary interdiction of French territory means that the convicted person is automatically escorted to the border at the end of his sentence.

If the delinquent is operating an establishment[5] the Court can order its temporary closing,[6] and, when such a measure is appropriate, the suspension of food or liquor licence (art. 629-1 Public Health Code). It should be observed that since the law of December 31, 1987, an administrative closing of the establishment is equally possible.[7] Finally the Court can order the guilty party to follow a disintoxication cure or order him to place himself under medical supervision (art. 628-1,1 Public Health Code).[8]

- Fiscal penalties, entirely independant of those just indicated, are enforced for the illegal usage of illegal drugs. Customs authorities demand the automatic application of these sanctions as soon as the commencement of action. Since all illegal substances are considered to come from outside the French territory and must have been therefore smuggled in, all persons condemned for this violation are considered, ipso facto, guilty also of contraband and are subjected to fiscal fines ranging up to four times the value of the incriminated merchandise (and that even in the case a person found guilty but not sentenced to a punishment).

- Other dispositions of the law can aggravate these penalties:

  - These penalties are doubled in the case of a multiple offender;

  - Preventive detention, which should not be applied in this field since the maximum of the prison term possible does not exceed two years, can be used here in the case of a person having been caught in the incriminating act. In the case of multiple offenders this measure can be applied since the prison sentence possible goes beyond two years;

  - If the incriminated person, when he has been imprisoned, is allowed to leave prison during this pretrial period, he is subjected to bail by the Customs Code since he is also incriminated of contraband (art. 364 Customs Code);

- On the other hand, the entrance into the criminal system can be avoided under certain circumstances. The 1970 law determines three other moments where a

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5 The law specifies "hotels, furnished houses, pensions, bars, restaurants, clubs, clubs houses, dance halls, entertainment halls and their annexes, or any other place opened to, or used by the public".

6 This measure can be ordered for a maximum of six months by the instructing magistrate, or for a period of three months to five years by the trial judge.

7 See note 11.

8 The doctor or the medical establishment in charge of the disintoxication cure or the medical supervisor is directly named by the judge. There is no mention here of the health authorities supervision.

possible medical assistance can take charge of the person concerned, but it is only during the pretrial period that this choice stops the prosecution proceedings. The circumstances are the following:

- the person has never before been convicted of illegal usage of illegal drugs, and he can show a certificate proving that since the incriminated act he has spontaniously followed a disintoxication cure; the public prosecutor has to dismiss all charges against him.

- in all other cases, the person has not followed a cure or it was not his first offense, the public prosecutor is free to prosecute with the already mentioned possibiltity of a therapeutic injunction. This injunction suspends all criminal proceedings. If this person who finds himself under the medical authorities effectively conforms to the prescribed treatment, the charges must here again be dropped. But, for this disposition to be applied there must first be a voluntary withdrawal of the public prosecutor. And it is only in this case that one can talk of a medical assistance being an alternative to the penal system.

The instructing magistrate, the juvenile magistrate and the trial judge can also order the persons concerned by the law to follow medical treatment (art. L.628, 2 and 3 Public Health Code). But this decision is taken during criminal proceedings and thus, does not, in principle, inluence them. The trial judge can, of course, decide not to sentence a person found guilty, but in France the fact that he was recognized guilty of the offense is recorded on the convicted person's record and will therefore have an effect in the future. The convicted person, on the other hand, who does not follow the medical assistance ordered can be sentenced to the same penalties as that of the user (art. L.628-1).

Such is the legal framework determined by the 1970 law for the illegal user of illegal drugs and still in practice today. Let us look now at the actual judiciary treatment of these cases.

1.2. Judiciary Treatment

Although the 1970 law made a clear distinction between the illegal use of illegal drugs and the trafficking of such substances it proved to be very impractical when faced with the case of "user-dealer". This is very frequent in the case of the person who is taking what one calls hard drugs and who is dependent on them, due to the prices of these substances in the underground market.

The tendency of the Courts under this law was to consider this person as a dealer and to apply the more severe penalties of this violation which range from two to ten years for a certain category of these incriminations or from ten to twinty years for another category and/or a fine 5.000 to 5.000.000 F.F.

The law of January 17, 1986 provided for the violation of "minor trafficking", punishing this offense with a one to five years prison term and/or a fine of 5.000 to 500.000 F.F. This should have eliminated the radical distinction between the "user" and the "dealer". Nevertheless, this law does not define anymore than the 1970 law does the nature or the quantity of the substances incriminated so that there still does not exist a firm line between "major" and "minor" trafficking. The Courts remain therefore relatively free to apply to the "user-dealer" measures concerning traffcking.[9] So that the "user-dealer" can be subjected to the many and severe penalties of trafficking. Besides the principal penalties already mentioned, he is also subjected to all sorts of other measures and is in general exposed to an abnormal treatment of his offense. The rules that are attached to "crime" are applied to "trafficking" although the law defines these violations as "délits".[10] Special powers are given to the police and the instructing magistrate in these cases.[11]

It is too early to know how the texts of 1986 and 1987 have modified the application of the law, but we do have some interesting statistical data for the year 1981 provided by a study done by Perez-Diaz examining the period before these reforms.[12] This study, comprising the entire French court system, allows us to look at the legal application of the law during the pretrial and the trial period. It demonstrates the following:

- That the application of the law is not uniformed. There are large discrepancies between public prosecuting departments and between the courts sentencings.

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9 The incrimination created by the law of 1986, in a way legalized the tendency of the courts to assimilate the "user-dealer" to the dealer. It incriminates the act of "selling or offering illegal drugs (to someone) for personal consumption".

10 French criminal law has three categories of violation: the "crime", the "délit" and the "contravention". This division is made according to the severity of the possible penalty attached to the offense. The courts and the criminal proceedings are different in each case. The 1970 law put the violations of "usage" and "trafficking" into the second category of severity, that of the "délit" but has a tendency to apply to them rules which are normally reserved for "crimes" which is the category containing the most serious offenses. For example the maximum prison sentence that can normally be given to a "délit" is five years, but the "délit" of "trafficking" in the case of a person having already been convicted is punishable to up to forty years.

11 See annex.

12 See Perez-Diaz, Cl.: The diversity of local criminal policies concerning the repression of the usage and the trafficking of illegal drugs. Sciences Sociales et Santé 1983; Gortais, J., Perez-Diaz, Cl.: Stupéfiants et Justice pénale. Paris 1983.

- That there were three types of incriminations (although the third had not yet been provided for by the law), "usage", "trafficking" and "trafficking-usage". The order of the terms in this third violation shows the inclination of the judiciary authorities to assimilate the "consumer-dealer" to the dealer.
- In 1981 nearly 15.000 persons were prosecuted under the law of 1970: 12% for "trafficking", 42% for "usage" and 46% for "trafficking-usage". Thus 88% of the persons prosecuted were themselves drug users, a little more than 13.000.
- Therapeutic injunctions were ordered by the public prosecutor in 28% of the cases incriminated for "usage", while in another 16% of these, the charges were dropped. 56% of these cases were prosecuted.
- Therapeutic injunctions were used in only 4% of the cases incriminated for "trafficking-usage".
- Nearly 8.000 persons were judged and convicted in 1981: 20% for "trafficking", 34% for simple "usage", and 46% for "traffickingusage". Prison terms were inflicted in all cases convicted of "trafficking". Half of the pesons convicted of "traffickingusage" were also sentenced to prison. Although those convicted simply of the "usage" of illegal drugs were usually sentenced to suspended prison terms, half of them received nonsuspended prison sentences. Therefore, nearly 2.000 illegal drug users were convicted to imprisonment. The author of the study pointed out that the number of prison terms, with nonsuspended sentences, was much higher here than in all other cases involving "délits".
- Therapeutic cures were rarely ordered by the trial judges, only 2% in 1981.

Having looked at the law and its application, we shall now try to see the social implications of this problem.

2. Social Implications

This study of the law of 1970 concerning "illegal users of illegal drugs" and the application of this law by the legal authorities leads to one fundamental commentary; there exists a considerable gap between the will to strongly intervene manifested by the law-makers in the past and the present, and the actual limited amount of action in this field. A recent presidential candidate spoke of there being 800.000 "drug addicts" in France today. (He was refering, as is common usage,

exclusively to the illegal users of illegal drugs). This number, which is incertain, shows the distance which exists, in the mind even of this political figure, between the reality of the social problem and the judiciary efforts charged with resolving it. As we have seen, in 1981 15.000 individuals were charged under the law concerning illegal drugs, of these 4.000 were ordered to follow a medical treatment, and nearly 2.000 were convicted to prison.

One must not minimize the importance of these figures, but accentuate it. Particularly since the penitentiary system's inability to absorb these individuals is causing a real problem. In certain French prisons, 1/3 of the places are filled by drug users either convicted or waiting for trial. So that the paradoxical nature of the situation must be emphasized. On the one hand there is the enormous amount of energy used by the criminal system in this field, on the other, the marginal character of its intervention with regard to the vastness of the problem it is supposed to be resolving. There is little doubt therefore of the relative incapacity of the criminal system to deal with this problem in spite of its intense efforts in this domain and one must try, when possible, to place it back in a social context.

It would be useless to pretend to comprehend the whole of the problem, but through some of its symptoms one can try to apprehend a part of it. A recent congress of the French Association of Criminology, held last month in Montpellier, probably reflected the more enlightened positions concerning the drug policy put into place by the 1970 law and reactivated by the Chirac administration between 1986 and 1988. Personnally, I was rather surprised by the sort of consensus against this policy which unveiled itself throughout the workshops. Naturally, the existing criminal framework was not put into question. And though no one supported the idea that prisons were a good way of treating "drug addicts", one did hear from time to time the custoumary argument unholding the symbolic value of the penal system. But these arguments were far from preponderant and were buried under by the vigorous criticisms of the policies, made by the very people who are to apply them.

Even the members of the legal professions after one workshop proclaimed that "the less the judiciary authorities do the better it will be".

They stressed the importance of an experiment that had taken place in Nimes.[13] The public prosecutor avoided using his power of injunction which is in all cases the intervention by the authorities into the life of a person. Instead he informally encouraged those denounced to him to follow medical treatment. Unfortunately, an order from the justice department put an end to what seemed to have been a very effective effort. The central judiciary authorities are rather consistant here. A public prosecutor of another French jurisdiction[14] was brought before a disciplinary

13 French city on the Rhône.
14 Valence, also on the Rhône.

committee for having dared to state in an opening session speach that the systematic use of repression in drug addiction matters must be stopped. This resistance among the judiciary authorities themselves, even though it is seen in only a minority of them, is a sign of the growing consciousness of the perverse effects of this law.

Representatives from the medical and social fields have for their part strongly denounced the concept of putting medical treatment into legal categories. Their field experience has allowed them to establish their own approach to the problem. An approach having little or nothing to do with legal counterpart. In fact, for them:

- One must first take into consideration the sufferings of those who need help, and not the trouble caused to a theoretical public order by the number of "drug addicts". This point of view puts the importance on the person, not the substance. Each case, having its own past and its own motivations, merits to be followed.

- Not every drug usage implies addiction -most drug users, whether they use illegal or legal drugs, are integrated into the society.

- A detoxification cure has not a chance of being effective if the person concerned does not enter it voluntarily. On the other hand if the cure is not followed up by post-cure assistance, it usually will not be effective. Finally, all treatments are long and one should expect the person to slip back from time to time during the cure.

Members of the medical and social professions have therefore denounced the stereotype of the "drug addict" created by the 1970 law, which was qualified by one of them as a "bent law". They have also implicitely confirmed the reduced application of the law when compared with their own activity of helping people and their families in need due to drugs.

They have also questioned their own intervention.

The evolution in their "welcome centers" demonstrates the tendency to distance these problems from the medical and psychiatric world, in favor of community responses.

Nevertheless it was meaningful that the terms "drug addiction" and "drug addict" were adopted by everyone (except one notorious participant) at the Montpellier congress. So while everyone was trying to distance their approaches from the criminal law, they were all using these artificial categories created by it, as a starting point for all further consideration.

This testifies to the impact the 1970 law has on us today. The terms "drug addiction" and "drug addict" are part of the language used by specialists and even by the most radical opponants among them. They have also crept into our everyday language due to the media. So among users of substances susceptible of altering one's consciousness, there is one group that is isolated, treated apart. During the congress, a Montopellier newspaper headline read: "Drug addicts, prison or hospital?" No one asks this question when speaking about people who drink alcoholic beverages or those who smoke tobacco. Only those who use narcotics are necessarily sick or criminal; the state having a right to interfere in their lives.

Thus the constraints and labels imposed on certain "addicts" and not on others is a sort of social consecration of the legal discrimination, which is certainly a victory for the law of 1970.

An unfortunate victory when one considers that not only was the problem unsatisfactorily resolved by this law - a fact which the people who work in this area realize today - but it was incorrectly conceived by the law-makers - a fact which many have forgotten. The preliminary work which preceeded the voting in of the law, the cultural, scientific, ideologic and political context of the times, demonstrated that the decision-makers acted hastily and in a preconceived manner. They neglected certain points of view which, if had been taken into consideration, would have advised them not to separate the user of narcotics from the rest of the population. They would have allowed them to appreciate differently the social problem which was then in the making.

But they had many pressures put on them. There was the United States which was pushing them to sign the Convention of 1961. There were the events of 1968 which were revealing the conflict between the generations and creating a fear among the old that France's youth would be drawn into the hippie movement. There was the press which dramatized a few deaths from overdose. And, of course, there was the blind conviction -not based on any proof but deeply rooted into the law makers minds- of the disuasive powers of penal sanctions.

We are thus faced today with a difficult problem, since it is internationally founded on false premises. How can we now go from a discriminatory and unwarranted penal handling of this problem to a more rational policy taking into account Human Rights?

Perhaps the answer is in the societal movement which we are beginning to notice in some places in France. A movement which is trying to take charge of these problems, trying to take over from the authorities and repressive tradition. And perhaps it is at an international congress such as this one, that we can hope to see the start of a policy on drugs more in conformity with a democratic concept of social relations.

3. Additional Remarks

- The selling of syringes and needles is free in France since May 1987. The prohibition was left then for one year as an "experiment". That law is considered to go on in force.
  The provocation to use illegal drugs is punished by a 1 to 5 years prison term and/or a fine of 5.000 to 500.000 F.F. It is to notice the extension of this incrimination to

  - the provocation which had no effect, and

  - to the case of substances which are supposed to be narcotics or to produce the effect expected from narcotics, when really they are not or they do not.

  The incitation to use, keep or deal with illegal drugs within publications intended for youths is punishable by one month to one year and/or a fine of 1.500 to 15.000 F.F. (law of 1987).

- It is not said in the text of the law, but it is known that undercover policemen introduce themselves in the groups who are supposed to drug themselves, pretending to smoke with them. It has been judged by the Supreme Court that these agents are not likely to be prosecuted as drug customers.
  The money coming from drug traffic is confiscated, and since a law of 1987, all properties of the drug dealers condemned for "trafficking" may be confiscated. Since the same law, there is an incrimination which punished the encovering of the money coming from drug traffic.
  The position of the offender doesn't change in these matters. But what the law calls "délit" - that is to say in some manner a minor offense - is treated as a "crime" - a major offense, more severely without giving the offender the procedural protection the normal rules are supposed to bring him.

- Private physicians can prescribe treatments that include illegal substances, but they have to precise the object of such a prescription - say which illness it is for. Moreover, this type of prescription must be ordered on a special notebook (a countervail book); the physician who prescribes it cannot repeat the prescription within a period of 7 days. On the other hand, the chemist is compelled to write on a sealed register the name and address of the customer.
  As a matter of fact, it is known that in big cities like Paris, drug-users usually go and visit several physicians during the week, varying also the chemist they

present the prescription to. They can obtain then all the narcotics they need. This is possible due to the French social security system (freedom to choose the physician you like and to change him any time you want)

- There are 180 centers for drug-addicts and/or their family in France (to inform them, to listen to them, to orientate them, and in few cases to accomodate them). There are 800 beds in whole France, at the present time, for drug-addicts. Some of these beds may be found in special establishments, some others are reserved in psychiatric hospitals, mental desease clinics or general hospitals. By now, the no-specialised establishements do not like to mix up drug-addicts with the "normal" population of their own. So it is rather difficult for a drug addict to really have a therapeutic treatment in a closed establishment. Most of the times, they follow up what the 1970 French law calls a "medical control" - that is to say a very incontrolled way to be helped.
  It is to be stressed that there is a big tension in France between the health authorities and the judiciary ones (fomented by the law itself). The latter don't trust the medical professions (it is why they prefer a prison sentence to a therapeutic measure) and the former have not accepted to give to the public prosecutor, a real account of which kind of treatment they decide in each case. They only communicate him the dates in which the interested persons have come to them. In other words, the collaboration settled by the 1970 law between the health authorities and the judiciary ones doesn't work.

- In 5 prisons of France - 3 near Paris, 1 in Lyon, 1 in Marseille - there is a special sector reserved for drug-addicts. Otherwhere, all the prisoners are mixed up. One estimates that between one third up to half of the French prisoners are linked with the drug problem, whether they are consumers of dealers or whether they have been incarcerated for another offense (robbery, etc.).

- There is a contradictory position in France presently about the possibility of a reform. Among the official agents who have to deal concretely with the drug taking problem as defined by the law, there is a growing consciousness of the inability of the penal system to deal with this problem - but there is too a general negation to imagine the law could be taken off.
  There are now so many structures and so many agents whose working statute depends on the situation created by the penal law that it would (will) be very hard to withdraw this law as a whole.
  But the growing consciousness of the perversity of the law may lend to an indirect shift of its application. For example, at a policy level, more importance is given now to "preventive" programs. We have noted the recent liberalisation

of the needless.
We can also see that in some jurisdictions, there is no prosecution at all concerning the simple use of "soft" drugs (a distinction not recognised by the French law).

Annex

The disposition of the 1970 law, completed by the law dated December 31, 1987, concerning the trafficking of illegal drugs was inserted into the Public Health Code in Book II entitled "Restrictions on the commerce of certain substances or of certain objects". They are the following:

1. The Penalties:

- All violations of the measures concerning the transportation, the offering, the selling, the acquiring, the use, the culture of substances or poisonous plants classified as illegal drugs are punishable to a prison sentence ranging from two to ten years and/or fine from 5.000 to 5.000.000 F.F. When the violation consists of the importation, the exportation, the production and the fabrication of such products the prison sentence is from ten to twenty years (art. L.627 Public Health Code)

- Those who facilitate the usage of these substances, onerously or gratuitously, by either supplying the premises or by any other manner, and those who obtain these products by the use of false medical prescription or prescription of "complaisance" are also punishable of a prison term of two to five years.

- This minimum of two years is brought up to five years in the case of assisting a minor (under 21 years old) to use these products or when the deliverance of these products was consciously done with the use of false medical prescriptions or prescriptions of "complaisance".

- Besides the penalties already mentioned for drug "usage" the court, in the case of drug "trafficking", can pronounce the suspension (from five to ten years) of certain civil rights of the person convicted, the suspension (for a maximum of

three years) of his passport, the prohibition for the convicted person to practice the profession which favored the incriminated act, and in the case of non-French citizens, the permanent interdiction of French territory.

- One must finally mention that provoking one of these violations and particularly the consumption of illegal drugs is punished by a 1 to 5 years prison term and/or a fine of 5.000 to 500.000 F.F. (art. L. 630 Public Health Code). This incrimination extends itself 1) to the simple favorable presentation of substances which are supposed to have the effects of narcotics whether they actually have or not; 2) to the provocation which had no real effect. This text aims particularly at provocation by the media (art. L.630 Public Health Code).

2. The Legal System Applicable to these Violations:

There are numerous anomalies:

- The tentative of "trafficking" is punished as the offense itself, as is the conspiracy to commit said offenses. These dispositions are usually reserved to "crimes"(refer to note 10).

- In the case of a person who had previously been convicted, the sentence is doubled.

- Other extraordinary measures: A person can be held before being charged up to four days. Under certain conditions searches and seizures can be practiced also at night.

- The abnormal character of the "délit" of trafficking has been aggravated by the 1987 law. The public prosecutor has up to ten years to commence an action (it is usually only five years for "délit") and the convicted person can begin to serve his sentence up to twenty years after it was handed down (normally ten years)(art. L.627-6 Public Health Code, Law, Dec. 31, 1987). The law prolonged the time a person can be held in virtue of "contrainte par corps". It modified the rules concerning the cumulation of offenses by making it more difficult to pronounce cumulative sentences (art. L.630-3 Public Health Code, Law, Dec. 31, 1987).

3. Re-enforcement of Repressive Measures:

- Other provisions of the 1987 law have aggravated in other ways the repressive system put into place in 1970.

- by creating new violations: the incitation to use, to keep or to deal in illegal drugs (art 14 of the law which modifies the law concerning the publications intended for youths) is punishable by one month to one year of prison and/or to a fine of 1.500 to 15.000 F.F.; to assist or to try to assist in the covering up of the illegal origine of the resources received for drug traffic, or to help make a financial placement of these resources, or to dissimulate or convert the product of this offense is all subject to a prison term from two to ten years and/or a fine of 5.000 to 500.000 F.F. (art. L.627,3 Public Health Code).

- by introducing aggravating circumstances in the "délit" of "minor trafficking" created in 1986 in the case of these illegal drugs being offered or sold to minors, or in educational or administrative institutions; the sentence changed from one to five years to two to ten years.

- The 1987 law gives more authority to customs officers, to instructing magistrates and to the courts; custom officers have now the right to search ships beyond French territorial waters and they can obtain from the court the authorisation to proceed with a medical search of the person suspected of concealing illegal drugs while passing through the border; instructing judges to place conservatory measures on the property of the person charged with drug trafficking to guarantee all possible fines and legal fees (art. L.627-4 Public Health Code); and the courts can now confiscate all property owned by the convicted person (art. L.629 Public Health Code).

- the non respect of the interdiction to exercise the profession which favored the incriminated act is now punished by six months to two years of prison and/or a fine of 3.600 to 60.000 F.F.

4. Other Exceptional Measures:

The law of Dec. 31, 1987 creates still two more exceptional measures:

- It provides for all the violations, "trafficking", "minor trafficking" and "usage" the possibility of pronouncing the administrative closing of the place where the incriminated act took place for either a period of three months when the order

comes from the "préfet" or up to one year when the order comes from the "ministre de l'intérieur". The non respect of this measure is subject to a prison term going from six days to two months and/or a fine of 3.000 to 15.000 F.F.

- It institutes a stay of sentence for the persons who, having conspired in the traffic of drugs, prevent the accomplishment of the offense and identify other persons involved, by denouncing the act to either the penal or the administrative authirities. The sentence of the convicted dealer is reduced to half if he helps identify other guilty parties (art. L.627-6 Public Health Code).

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Killing the Ill ?

Heroin and AIDS in West Germany

Dr. S. Scheerer

1. Introduction

1.1. **Drug Problems** are affecting all contemporary societies and within each society, they are affecting a sizeable minority or even the majority of citizens. In the case of the Federal Republic of Germany (FRG), estimates of the number of opiate addicts vary between 40,000 and 100,000 persons. This is a relatively small minority in a country of more than 60,000,000 inhabitants. And it remains a minority even considering the fact that opiate addiction usually constitutes a serious difficulty for the addicted persons' parents, siblings and partners, too.

But heroin is by far not the only drug that constitutes a problem for users, addicts, and their social environment. Just add some 300,000 persons addicted to pharmaceutical drugs, about 1,000,000 alcoholics, and all those persons close to them, who are constantly suffering with and under the dependency syndrome to see that about 1 in every 60 inhabitants is physically dependent of a drug, and that certainly no less than 1in every 20 inhabitants is at least indirectly affected by drug problems.

As a rule, cannabis consumption is also seen as part of the drug problems -a view that adds some 1,000,000 to 3,000,000 persons to the list. And in spite of claims made by the cigarette industry that their products have nothing in common with drugs, the pharmacology of nicotine as well as the adverse effects of cigarettes on the human organism tell a different story. There are about 18,000,000 cigarette smokers in the FRG. While their habit exerts much less stress on their surroundings than the average opiate dependency (but creates additional risks through passive smoking), statistics show a markedly reduced life expectancy, increased excess mortality rate and a high risk of respiratory

ailments, coronary diseases and other complications for smokers (cf. KÖRNER 1985, p.7; HESS 1987, pp.64-90).
While not all cigarette smokers (nor all cannabis, cocaine or even heroin users; cf. ZINBERG 1984) show signs of dependency from their respective drugs, there can be no doubt that drug consumption for all the desired effectsit may produce also brings along serious adverse effects, thus constituting a serious syndrome of difficulties both for users and their immediate surroundings as well as for larger social entities (e.g. sick leaves in industry) and state administrations (e.g. social services and extra costs within the criminal justice system).

No doubt drug problems exist. And they are manifold. Many addicts suffer from addiction. Even more drug users suffer from drug-related organic complications - some of them unknowingly. Others suffer from criminal prosecution and/or social discrimination. And while some cocaine-users in non-deviant subcultures may happen not to suffer under any of the above, the majority of those persons involved in heavy opiate, alcohol, tobacco or pharmaceutical drug use do suffer either one or - more frequently - a combination of these difficulties.

It goes without saying that there is a considerable gulf between legal and illegal drugs and their respective potential dangers in public opinion, a gulf that is the most visible expression of the non-congruent visions of drug problems between affected individuals, vested interests, state administrators, scientists, and others. As a matter of fact, the dominant discours on drugs as led by government agencies and the media as well as their "organic" intellectuals bears little resemblance to the perspective of those affected and that of scientific investigation.

The way how a drug problem is being defined by no means is an **acte gratuit**, since any decision on this level implies some policy outputs and excludes others. The following example - the definition of the core of the problem in matters of AIDS and methadone -is not only an example, but wants to call attention to the invisible death of the German heroin scene.

1.2. **This paper,** if it was concerned with the most pressing quantitative drug problems in the FRG, would treat cigarette smoking or alcohol consumption, not the prospect of the heroin scene. But it picks out the minute problem of AIDS and the heroin scene, not because of the danger that the disease might spread to the average population, but because of a qualitative aspect - the extinction of a part of society that functions as a paria group, and is discernible from the majority, through stigma, neglect and AIDS.

2. Heroin Policy Bottlenecks

West German heroin policy is a strictly prohibitive one, and as such it is in accordance with the provisions of the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol. The Single Convention wants "to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs" (art. 4, c). It wants "to ensure the availability of narcotic drugs" for "the relief of pain and suffering" and to combat "addiction to narcotic drugs" which "constitute a serious evil for the individual and is fraught with social and economic danger to mankind" (Preamble). Since heroin is not considered necessary for the relief of pain in medical practice, the drug is completely banned from German soil.

However, this ban on heroin has given rise to a number of undesirable side-effects:

(1) Neglect of cancer patients. The ban of heroin and the overall restrictive policy towards strong analgesics made hospital doctors often too reluctant to prescribe opiates to cancer patients and others in the extremely painful final stages of their respective diseases. In the FRG, only 15% of doctors are willing to prescribe opiates to patients suffering severe pain. Only about 5% of patients with severe (chronic) symptoms of pain are getting opiates. Until August 1986, even out-patients with extreme pain had to go get their prescriptions of opiates daily - since then doctors have been allowed to prescribe for a whole week. But the deep-rooted fear of creating an opiate addiction in patients, and the fear of getting into trouble with the law, is still leading doctors to deliver negligent maltreatment to pain patients. According to reports delivered to the 5th World Congress on Pain, Hamburg, August 1987 (VENTAFRIDDA, ZENZ; cf. Frankfurter Allgemeine Zeitung, Aug. 19, 1987; Die Zeit, Aug. 21, 1987) opiate legislation in the FRG is responsible for the insufficient treatment of about 100,000 patients with chronic states of severe pain.

(2) Destructive effects on the rule of law. The creation of organized crime in turn provokes departures from the rule of law in the name of a more effective combat against crime. Police powers are being enhanced, in particular with regard to the right to search and enter. The principles of fair trial are being eroded through informants and under-cover agents. And although "these practices were originally confined to drug offenses, they are now spreading throughout the entire criminal justice system. This is exceptionally dangerous

for a democratic society. First, because private individuals no longer have any inducement to obey the law if the law enforcement officers themselves ignore the law when it suits them. That harms rather than benefits crime prevention. Second, because law enforcement organizations which decide to operate outside the bounds of the law are in fact out of control. Since they have lost their integrity, they become a greater threat to a democratic society than the very evil they are trying to eradicate" (RÜTER 1986, p.164).

(3) Creation of a Black Market. Prohibition is a bet on complete success. If it does not work all the way, it creates a shadowy zone of enterprise which is not all accessible to quality and price control nor to trust legislation and other instruments of regulative policy. In the FRG, the prohibition policy did not succeed, but did indeed create this black market economy. It served as the vital precondition for the establishment of an underworld that makes enormous profits by international trafficking and national dealing, which is connected with other illegal activities (arms trafficking), and which sells products of low quality and high price and health risk to consumers who because of their addiction and because of their "illegality" are unable to call for help, thus being jointly responsible with the overall prohibition policy for the social destructiveness of heroin in Germany (cf. PILGRAM 1980).

(4) Descrimination of drug users. The history of the prohibition of "dangerous" drugs is not only the story of how spread of this class of drugs could be slowed down and confined to relatively small segments of society, but it is also the story of broken careers and bereaved young families, of loneliness and disappointment, social exclusion and penal prosecution of those who could or would not sacrifice their habit to the imposed normative order of society. It is the story of an excess mortality that is not medically, but socially induced, of physical wreckage and outright damnation which shows how easily the ill are cast as culprits by both the medical profession and the public at large. While deterring an unspecifiable number of persons from turning to opiates or even cannabis, this policy of concerted discrimination keeps those who constitute the "core" of the drug scenes back from changing their lifestyles, stabilizes their "deviant carreers" by fostering secondary deviance, and finally drives them either into treatment conditions that emphasize to patients that they are ignorant, guilty failures, or into misery, despair and suicide (cf. DAMMANN and SCHEERER 1986).

In this part of the paper I shall try to describe the impact the new disease called AIDS (Acquired Human Immune Deficiency Syndrome) is presently having on

the West German drug scene, as far as this scene is connected to the illegal drug heroin.

While the origins of the disease have not yet been pinpointed beyond reasonable doubt there is some clarity about its first spread, or should one say its epidemiological take-off. And even more has been done within the relatively short time of only seven years that the disease has been known. While it took at least two decades until Robert Koch's discovery of the bacillus of tuberculosis (1882) and hence the infectiousness of the disease was universally acknowledged, it became soon clear that the "gay-related syndrome" how AIDS used to be called in the beginning, was in fact the final stage of a disease that builds upon a retrovirus infection.

Once discovered, the virus bore different labels until experts agreed to call it HIV (Human Immunodeficiency Virus). The more important question was how one could stop its spread. Happily, researchers found out, the virus is not transmitted as easily as let's say the hepatitis-B-virus (0,3% vs. 25%; cf. FRANKENBERG 1988, p.19). It is, indeed, not transmitted easily at all, which makes protection and even a medium-term victory over the disease a real possibility.

The virus is being transmitted by parenteral macro-inoculation. This means that oral consumption of the virus is not enough to be infected. There has to be direct insertion of the virus into the body fluid, preferably the blood system, and the amount inserted has to be substantial (different are the cases of infectious diseases which only require micro-inoculation for transmittal). Therefore, virus concentration in body fluids other than sperm and blood is - except for extreme cases - not enough to transmit the infection.

Such a macro-inoculation can happen in the treatment of haemophilia (if blood donors were infected), during pregnancy and during childbirth (if the mother is infected), extremely rarely in medical practice (until 1987 in 9 cases worldwide; cf. SIGUSCH 1987, p.16), and with a higher probability in vaginal sexual intercourse. While important questions about the exact transmission of the virus are still to be resolved (cf. SIGUSCH 1987, p.16) there is unanimity about the fact that "receptive (passive) anal sexual practices" are showing a high positive correlation with seropositivity (SIGUSCH 1987, p.16). In other words: anal intercourse is most dangerous for the uninfected "passive" part, if the "active" partner is infected and does not use condomes. The infectiousness seems to be less dramatic in the opposite case (infected "passive" and non-infected "active" partner in anal intercourse), but in this case a certain danger is of course also given - a danger that becomes an epidemiological factor of importance if the

"passive" infected partner changes "active" partners frequently. Insofar male prostitutes who by their very profession have an especially high frequency of different partners are not only the most vulnerable to be infected, but - once they have the virus - they also become a source of infection. (As far as vaginal intercourse is concerned, an infected woman is less likely to give the virus to a man than an infected man is to give it to a woman. But, maybe because of a specific structure of the mucous membrane of the bowels, the most common type of heterosexual intercourse is generally less likely to transmit the infection, and fellatio and cunnilingus are, in this order, even less likely still.)
Since the knowledge has spread (especially among homosexuals) that the motor of the epidemic are infected "active" partners who transmit the virus by having anal intercourse with non-infected "passive" partners (be they male of female), sexual practices and even lifestyle elements within the gay subculture have changed considerably thus contributing to a marked slowdown in the expansion of the HIV-infection.

The only non-sexual transmission of the infection that (after the cleaning of the Western blood banks) is still of utmost importance in the Western world is the infection by way of so-called needle-sharing. In this case, one syringe is being used to apply two injections. An infected heroin user applies heroin intravenously and then hands the needle over to a second, not-infected user, usually a friend/fiancé/wife/husband. Although the virus with the name HIV-I cannot survive when exposed to air (HIV-2 seems to survive quite some time, even days, though) small blood particles that remain within the syringe seem to be enough to perform a macro-inoculation in the body of the recipient. They can infect a non-infected person and they can re-infect an already infected person.

Roughly one distinguishes three stages of the HIV-infection:

(1) Latency

A few days after infection there may appear light skin responses which are often not being noticed by the affected person. During the first weeks (and maybe up to 6 months) the infected person does not yet show anti-bodies in blood tests, but is even at this early stage possibly already infectious. During this phase the person can develop meningitis, meningo-encephalitis or other neuro-manifestations. When blood tests show serological positivity the person still remains healthy during this period of latency. This situation then may remain unchanged for a shorter or longer time, possibly for up to 16 or even more years.

(2) Lymphadenopathosyndrome (LAS)

A tumefaction of lymphatic nodes and a number of so-called unspecific symptoms, diarrhea etc.; in Frankfurt, this stage is being divided into two sub-categories, 2a and 2b, with a number of objective data (e.g. a ratio between helper- and suppressor-cells of below .5) indicating when a person reaches 2b. Oral candidiasis is taken as an important indicator for progressed immune deficiency.

Within two years, about every second patient who showed symptoms of stage 2a crossed over to stage 2b. And also about every second person who had been classified 2b had changed to

(3) AIDS/the Complete Clinical Picture

The complete syndrome of AIDS - the disease counted by the WHO - is characterized by severe opportunistic infections like pneumocystis-carinii and/or a Karposi sarcoma, and others. 95% of all the patients showing this syndrome died within three years from that time on (cf. SINGHARTINGER 1987).

For every "full" case of AIDS (as counted by the WHO), the FRG's official record which is kept at the Bundesgesundheitsamt/Berlin there are 90 to 100 cases of registered HIV-infections (as of 1st March 1988, the ratio was 1,848: 14,898 certain identifications and about 3,500 probable cases; Frankfurter Rundschau, 2nd April 1988). The ratio between full cases of AIDS and the immediately preceding stage (tumefaction of lymphatic nodes) is believed to be at 1:10.

The World Health Organization set up a cumulative record of AIDS cases. By the end of May, 1987, this worldwide cumulative record showed more than 51,000 cases of AIDS, a figure that rose to more than 85,000 until the end of March, 1988. It is a peculiarity of this record to sum up all cases of AIDS over the years without deleting those who die from the record or limiting the statistics to cases that were reported within a given period (e.g. one year). While this method of keeping track of the disease on a statistical level does a lot to emphasize the toll the HIV-infection takes, one should bear in mind that the WHO's list only contains cases of AIDS, i.e. of the full clinical syndrome which is the final stage of life for people who fell prey to an HIV-infection. The number of HIV-infections itself is not being counted by the WHO nor is there unanimity about the two vital questions in this context: does everybody whose blood is HIV-positive get AIDS? How long does it take from the HIV-infection to AIDS?

In the FRG AIDS cases accumulated as follows:

Date	Cases of AIDS	Thereof Dead
May, 1983	23	-
June, 1984	76	31
May, 1985	180	76
May, 1986	488	246
May, 1987	1,089	499
Feb., 1988	1,848	

Source: Singhartinger (1987, 23; Frankfurter Rundschau 2 Apr. 1988)

In the beginning of the epidemic heroin users made up but a small fraction of those who found themselves infected with the virus. But this situation changed dramatically. While the spread of the infection was slowing down among gays, it increased among i.v. heroin users.

In the United States, where i.v. drug users used to make up only about 15% of the infected population, their rate has risen to now above 35% within a period of six years. There, infected needles are now considered the most dangerous channel of infections. The majority of addicts are black or hispanic, ill-respected minorities living under miserable socio-economic and hygienic conditions. While middle-class homosexuals are in the focus of attention, the reality looks different, with blacks and hispanics accounting for 54% of all New York HIV-infected persons - a figure that is heading towards 60 and 70% at the time being. Of all infected females in New York city 83% belong to these discriminated ethnic minorities (Frankfurter Allgemeine Zeitung, June 6, 1987).

In the FRG, there is an even more marked shift ahead. Already now i.v. heroin users account for 7,6% of all registered AIDS cases. A figure that rises to 8,6% when homosexual i.v. drug users - people belonging to both of the major risk groups - are added. These figures reflect the official state of affaires as of July 31st, 1987. But they do not yet allow a prognosis. In order to establish such a prognosis one has to know something about the progress the epidemic makes within the specific group and about tendencies and possibilities of counteracting the spread of the disease within the specific group.

And as far as we know today, there is no reason to stay calm about the group of i.v. heroin users. There are two especially disquieting facts that overshadow the relatively low percentage of i.v. heroin users among all registered AIDS cases - factors that make AIDS the most probably cause of death among i.v. drug users for the future.

There is no group in the whole population with a higher prevalence of HIV-infections. While of all homosexuals only a small fraction is seropositive, a high proportion of all i.v. heroin users is seropositive. Empirical studies are suggesting a prevalence of HIV-infections among i.v. drug users of about 25% (cf. HECKMANN and SEYRER 1987, p.341). But these figures were ragmentary glances at the 1985 situation. Figures relating to the year 1983 showed a prevalence of only about 10%, while some more recent figures (1986) are suggesting a prevalence of 37,2% (cf. HARMS et al., cited in: Heckmann/Seyrer 1987, p.341). As a result HECKMANN and SEYRER (1987, p.337) reached the conclusion that prevalence of HIV-infections is increasing more rapidly among i.v. drug users than within any other social group.

Seropositivity shows marked positive correlations with prison experience and prostitution as well as needle-sharing. Needle-sharing, anal and vaginal intercourse are considered the main channels of infection within this scene.

4. Methadone and Public Policy

What can be done about the bottlenecks of present-day drugs policy in the FRG? With view to the AIDS question it is evident that a better availability of syringes as well as medical information about prevention possibilities would contribute to a lessening of risks and maybe to a slowdown of the infection's progress within this population.

Can the drug scene overcome the AIDS threat by means of syringes and condomes, information and self-help? Theoretically speaking: yes.

If the infected stopped sharing their needles with non-infected, if the infected practiced safer sex, then the infection could get under control and the heroin scene could survive.

1. **Needle sharing**. But things aren't that easy in practice. As far as the common use of syringes is concerned, this is a complex matter. The real reasons for needle-sharing are not well known. Therefore one does not really know if increased availability of needles would really solve the problem. There may be emotional factors involved, expressive values of togetherness and common fate that let addicted couples share their needles. Possibly, they would continue doing so even if there were two or more needles available at the time of the fix. Another reason could be not the availability of enough needles (as is usually believed) but the shortage of heroin. A couple may secure just one pack of heroin, a tiny

portion, in the streets. In that case they are more likely to fill it all in one syringe and split the fix instead of dividing the little they have into two syringes. Consequently, we do not really know just how much of a difference the increased availability of needles would make. Chances are, of course, that such a step would - to a degree yet unknown - reduce the probability and frequency of infection risks on the scene.

2. **Safer sex.** We do not know very much about sexual relations of heroin addicts, but it takes no effort to imagine that at least both male and female heroin prostitutes are not in a strong and influential bargaining position when engaging in sexual intercourse. Their chances to protect themselves from infection are not very good, to say the least.

Once infected, and that risk is certainly much higher for pimps, their very way of securing the money they need for their supply of the drug is a constant risk of infection to others.

More important still the general health condition of the street junky makes her/him much more susceptible to infectious diseases than the average non-addicted person. And the junkie's life situation provides for less than the minimum amount of resources needed for such things as self-help, self-organization, defense of collective interests. Such a thing as a junkiebond - existing in the Netherlands - has therefore as of now not been an effective possibility in West Germany.

Self-help, the autonomous organization of junkies, is threatened with penal prosecution as soon as it deviates from heteronomous means and goals of narcotics policy. This creates a double-bind situation for junkies. While on the one hand they are being kept from full citizenship (a known junkie is not allowed to work as a civil servant, and would probably be kicked out of any private corporation as well), and even from organizing themselves, the public policy of AIDS prevention counts exactly on such things as self-help and autonomous prevention. **Au fond** it is this double-bind that is killing them.

For all practical purposes it is illusionary to propose what from a theoretical point of view would indeed be a democratic solution to the double-bind-situation, namely an end to the social and legal discrimination of hitherto illegal drug cultures.

But there is a possibility that has recently been proposed in the FRG by scholars such as ALBRECHT (1986, p.32) and medical doctors (BSCHOR 1987, also see: Deutsches Ärzteblatt Feb. 2nd, Sept. 10, Dec. 10, 1987; Feb. 4, 1988; Deutsche Medizinische Wochenschrift June 5, 1987; Medical Tribune April 1987/November 1987). This possibility - the substitution of i.v. heroin use by oral intake of methadone - has long been recognized, even before AIDS, as an

acceptable treatment on an international level, but pioneers who introduced the treatment into the FRG in the early and mid-seventies (LOTZE et al. in Hannover, KAPUSTE in Munich) encountered stiff opposition by the doctor's professional organizations, and, if they did not bow to the order they received from their Ärztekammer, they faced criminal charges.

Methadone frees the addict of the compulsion to use heroin and relieves him of the necessity or habit to inject the opiate intravenously. The addict can prevent the AIDS infection - as far as it is transmitted by needles - by going on using a drug without using needles. From a preventive point of view this method is especially practical because it does not link AIDS prevention and abstinence from the difficult-to-reach healing of addiction of the morphine type. The social medical approach which underlies this kind of treatment allows the addict to stabilize his life and personal environment, his hygiene, general physical and emotional situation, and therefore to improve the state of his immune system, too.

It is interesting to see what a difference methadone treatment makes for addicts as far as AIDS is concerned. Those addicts who - in countries where methadone treatment is available - have been in such programs for a number of years today show a markedly lower rate of infection than those who have not.

A recent report from Bergamo, Italy, shows that HIV-anti-bodies were found in 53% of drug addicts who were hospitalized for other reasons than AIDS. 41% of arrested addicts were also seropositive. As were 43% of addicts in therapeutic communities. In sharp contrast to these figures, the rate of seropositive drug addicts was on 28% in methadone-patients. The report concludes: "These data suggest that the spread of the HTLV III virus had started in Bergamo some 2 years later compared with the larger city of Milan (...). Moreover, (...) data confirm that methadone treatment may help in preventing HTLV III virus diffusion since drug abusers on such a program usually stop intravenous heroin self-administration"..... (TIDONE et al. 1987, p.485).

This report from Italy reinforces US findings (SCHUSTER 1987, p.2270) "that fewer than 10% of heroin addicts who entered methadone maintenance treatment programs in New York City prior to 1978 are antibody positive for the human immunodeficiency virus, compared with 60% of heroin addicts who did not enter treatment."

As Robert G. NEWMAN of New York's Beth Israel Medical Center (1987: 20) - probably the world's leading clinical expert in question of methadone treatment - said, these figures cannot be seen as anything else than an "unequivocal and impressive proof for the effect methadone can have on AIDS".

Of course, diffusion of the virus has progressed to such a point in the FRG that results like those cited are impossible to reach even if methadone were introduced on a more than symbolic scale still this year.

But even so it could help to reduce intravenous drug use and to slow down diffusion of AIDS among addicts. Moreover, it has been shown that methadone patients are much more open-minded for safer sex practices than street junkies (cf. NEWMAN 1988).

Those already infected can stabilize their situation and stay alive longer than without methadone - maybe for a decade or more.

But all of this would require a thorough shift in the German medical professions' and the federal government's policy which as of now is strictly anti-methadone, notwithstanding this treatment's potential to save not only the lives of many individuals but the lives of all those who are constituting the present-day heroin scene in Germany, its deviant and unpleasant-to-look-on lifestyle, its deviating norms and values, and its twisted romanticism.

So, in the end it all seems to get down to a matter of taste. There are always a few liberals who project their unfulfilled hopes and desires into the most rejected classes of society and who are always close to worshipping the marginalized as the incarnation of purity and radicalism. And then there are the majority of people whose common sense tells them that junkies are not better than anybody else and that who does not work shall not eat. The majority's point of view is linked with the social scientist's analysis that the extinction of the heroin scene would not bring down an important pillar of society but rather clean it of a group that is one of the most superfluous from a productive point of view. Society will go on existing - without the heroin scene maybe better than with it, as many may think.

So the German heroin scene will die. It will die because through the refusal to admit methadone treatment, policy makers are putting it under conditions of life that are conducive to lead to partial or complete physical destruction of all junkies. After they will have vanished from the face of the earth, some liberal social historian may find out that this policy constituted all the objective elements of the offence called genocide, and which reads in the German penal code: 220a Völkermord. (1) Wer in der Absicht, eine nationale, rassische, religiöse oder durch ihr Volkstum bestimmte Gruppe als solche ganz oder teilweise zu zerstören, 1 ..., 2..., 3. die Gruppe unter Lebensbedingungen stellt, die geeignet sind, deren körperliche Zerstörung ganz oder teilweise herbeizuführen, 4..., 5..., wird mit lebenslanger Freiheitsstrafe bestraft. - But were those junkies a nation, a race, a religious group or definable by their national characteristics? No. And is it true that the annihilation of West German junkies was planned and purposefully conducted with specific intent? No. So it will have been no genocide when

one day in the not too distant future the heroin scene will have died.

They will just have been killed by default.

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Drug Policy in the Federal Republic of Germany

Dr. H.-J. Albrecht

1. Legislation

1.1 History and Development of Drug Law

The origins of criminal legislation in the area of drugs can be traced back to the first decades of the 20th century in Germany. The so-called opium-law of 1929[1] represents the first major legislative effort to control drugs which were produced by German pharmaceutical companies and were used fairly unrestricted as medicines but also as recreational substances, e.g. cannabis cigarettes.[2] The Opium law emphasized opium and opium derivates and can be considered as the first step towards a criminal law based model of drug control. While only minor changes occurred with respect to these statutes for approximately 40 years, the year 1971 brought upon a considerable shift in drug policy with a completely new piece of legislation (the name of which, Act on Narcotics or Betäubungsmittelgesetz, is pointing today towards narcotics in general). The Act on Narcotics has been revised again in 1981,[3] the hitherto last major reform of

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1 Gesetz über den Verkehr mit Betäubungsmitteln (Opiumgesetz), 10th December 1929 (Reichsgesetzblatt I, p.215.

2 E.g. Merck's Morphine or the cough remedy heroin, see Scheerer, S.: Die Genese der Betäubungsmittelgesetze in der Bundesrepublik Deutschland und in den Niederlanden. Göttingen 1982.

3 Gesetz über den Verkehr mit Betäubungsmitteln (Betäubungsmittelgesetz), 28th July 1981 (Bundesgesetzblatt I, p.681), see with respect to the development of the Law on Narcotics Scheerer, S.: Die Genese der Betäubungsmittelgesetze in der Bundesrepublik Deutschland und in den Niederlanden. Göttingen 1982.

drug laws in the Federal Republic of Germany. The development of drug laws in the Federal Republic of Germany can be characterized by five major changes:[4]

a) **Maximum penalties** have been **increased** (for serious drug crimes) up to 10 years in 1971 and up to 15 years in 1981, with 15 years representing the maximum term of imprisonment possible in the Federal Republic of Germany (besides life imprisonment).

b) The **range of punishable acts** has been **enlarged** with upgrading acts representing mere attempts or participation at independent criminal offences (which in turn triggers interests in criminalizing acts of participation in these acts formerly merely participating in nature).

c) The **scope** of **drugs** falling under the law on narcotics has been **widened**.

d) **Flexibility** has been adopted by not defining explicitly in the Narcotics Act controlled drugs, but referring in the statute to a list of drugs annexed to the statute which can be extended any time to other substances without legislative activities and involvement of parliament. Ordinances of the federal government are sufficient to bring any drug under the control of drug laws.

e) An attempt has been made to **separate drug addicts** from **non-addicted drug offenders** by providing the possibility to dismiss criminal cases if an addict agrees to be treated in a licensed treatment unit or to suspend a prison sentence under the same condition.

As the basic interest which should be protected by means of narcotic criminal law concerns "public health" and official prohibitive policy aims at achieving a drug-free world and to eradicate drug based dangers to public health completely, a large potential of escalation is embedded in the process of drug control. The potential of escalation rises from the fact that drug problems will be permanently available and therefore will permanently create stimuli to strengthen efforts to control drugs although there exist more or less inflexible elements in the field which may not be modified by any type of drug policy. First of all, it is evident that the demand for psychoactive substances was always present and can be observed in any society. Drugs fulfill different functions, among these are also positive ones. Secondly, knowledge on the techniques to produce legal and illegal drugs as well as knowledge on the effects of drugs has spread everywhere and is virtually available for everybody. There is no reason to believe that this knowledge may be eradicated completely. Thirdly, the emergence of modern types of communication and transportation has caused the weakening of ties between different drugs and cultures. Conditions of dispersion of drugs could only be modified in exchange of drastical restrictions of mobility. None of these

4 Albrecht, H.-J.: Bundesrepublik Deutschland. In: Meyer, J. (Ed.): Betäubungsmittelstrafrecht in Westeuropa. Eine rechtsvergleichende Untersuchung im Auftrag des Bundeskriminalamtes. Freiburg 1987, pp.63-168.

conditions may be subjected to massive state interventions bound exclusively to the aim of drug control without affecting seriously other important values in terms of e.g. economic exchange and civil rights.

Today, drug policy in the Federal Republic of Germany is centered around the prohibitive, criminal law based approach to drug problems. Other models of drug control have been outweighed by criminal law and range far below the prohibitive, repressive approach.[5]

1.2 The Current State of German Drug Law

The main features of the drug law currently in force in the Federal Republic of Germany concern the following:

First of all it should be noted that drugs are divided into three classes of controlled substances (§ 1 Law on Narcotics and annexes I-III). These differences do not implicate differentiation as far as penalties provided for possession, trafficking etc. are concerned, but are important only for the range of legal use of drugs in the areas of medicine, science etc. The first class of drugs concerns drugs which may not be trafficked nor prescribed at all. The most important drugs falling under this category are heroin, marijuana, hashish and other cannabis derivates, LSD, Mescalin. The second class concerns drugs which may be trafficked licitly, although they may not be prescribed by physicians (e.g. codein, methadone). The third class covers drugs (e.g. opium, morphine) which may be trafficked licitly and prescribed by physicians. This type of differentiation is rather based on the current use which is made of drugs in the medical and public health field than on assessments of dangerousness or the addictive power of the drugs involved. No difference is made between soft and hard drugs in the German Act on Narcotics.

While the basic definition of so-called "ordinary" drug offences (§ 29 I Act on Narcotics) encompasses production, trafficking, importing, exporting, acquiring, selling, possession, transfer, purchase, advertising, financing drug trafficking, trafficking and commerce in narcotics, public announcement of opportunities to

5 See Kaiser, G.: Präventionsmodelle des Betäubungsmittelrechts im internationalen Strafrechtsvergleich. In: Institute of Comparative Law, Waseda University (Ed.): Recht in Ost und West. Tokyo 1988, pp.911-925 for the different models of drug control.

purchase or consume drugs, illegal prescription of controlled drugs by physicians or illegal supply by pharmacists, the **mere use of drugs** is excluded from the range of punishable acts, although it is difficult to imagine drug consumption without violating drug law, e.g. possession, acquiring etc.[6] These "ordinary" drug offences are punishable by imprisonment of up to 4 years or a fine of up to 360 day fines. It should be noted that "trafficking" in "look-alikes" or selling and supply of substances which are pretended to be real drugs are treated as drug offences, too. (§ 29 VI Narcotics Act).

Ordinary drug offences may be exempted from punishment if only minor amounts of drugs are involved and the drugs are intended for personal use (§ 29 V Narcotics Act). Certain aggravating circumstances increase the minimum penalty to 1 year and the maximum penalty up to 15 years (§ 29 III Narcotics Law). Those aggravating circumstances concern endangering the health of several pesons, supply of drugs to children or juveniles under the age of 18, professional drug trafficking and most important drug trafficking, possession or supply of drugs if considerable amounts (the wording of the law says: "non-minor amount") are involved. Superior court rulings have gone into defining what considerable amounts of drugs are like: 7,5 gramms of cannabis (tetrahydrocanibol), 1,5 gramms of heroin (hydrochlorid), 5 gramms of cocaine (hydrochlorid), and 10 gramms of pure amphetamine are considered to represent considerable amounts of drugs, setting minimum penalties to 1 year imprisonment.[7]. On the other hand, 0,15 gramms of heroin, 300 microgramms of cocaine and up to 6 gramms of hashish are considered to be minor amounts of drugs allowing exemptions from punishment according to § 29 V Narcotics Act.[8]
The minimum penalty is further raised to 2 years imprisonment (§ 30 I Narcotics Act) in the case of organized drug trafficking, importation of considerable amounts of drugs, if supply of drugs has caused negligently the death of a drug using person or if drugs are professionally supplied to children or juveniles.

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6 In most cases consumption means at the same time possession of drugs. Moreover a person who consumes drugs must have acquired them in some way and, when considering that drugs are commonly used in groups, will also give drugs to others. As acquiring drugs and giving drugs to other persons are criminal acts according to the Law on Narcotics, we can think only of very rare exemptions which constitute non-criminal use of drugs, see e.g. Oberlandesgericht Düsseldorf Strafverteidiger 1985, p.282: Holding a joint just to inhale once does not mean possession of hashish; or Landgericht München Strafverteidiger 1984, p.77: A shot of heroin applied by someone else does not mean possession of heroin.

7 Bundesgerichtshof Neue Zeitschrift für Strafrecht 1984, p.556; Bundesgerichtshof Neue Juristische Wochenschrift 1984, p.675; Bundesgerichtshof Strafsachen vol.33, p.133; Bundesgerichtshof Monatsschrift für Deutsches Recht 1985, p.687.

8 Bundesgerichtshof Neue Zeitschrift für Strafrecht 1982, p.425; Bayerisches Oberstes Landesgericht Neue Zeitschrift für Strafrecht 1982, p.472; see for a complete overview Körner, H.H.: Betäubungsmittelgesetz. Deutsches und internationales Betäubungsmittelrecht. 2nd ed., München 1985, § 29.

Another element, characterizing to some degree German drug law is embedded in the concept of so-called **"world crimes"**. (§ 6 No.5 German Penal Code). The concept of "world crimes" leads to extending German jurisdiction to all over the world in the case of drug trafficking (as well as to some other crimes). So, drug trafficking committed somewhere outside the Federal Republic of Germany can be punished according to German drug laws independent from the offender's nationality if the offender is caught in the Federal Republic of Germany or expelled to the Federal Republic of Germany. Recently, use of this permission in the case of a Dutch citizen whom German authorities suspected to be heavily engaged in the supply of hasish in the Netherlands (not on the territory of the Federal Republic of Germany), became the source of serious conflicts between Dutch and German governments. The said Dutch citizen spent his holidays in Spain. A Dutch public prosecutor obviously not satisfied with the Dutch approach to drug control informed German officials about this fact. German authorities then applied for extradition to the Federal Republic of Germany which was granted by the Spanish government. In the subsequent trial the Dutch citizen was sentenced to long term imprisonment because of drug offences committed exclusively on Dutch territory.[9]

As the 1981 revision of the Law on Narcotics has been based on the concept of the iron fist vis-à-vis drug traffickers and the velvet glove vis-à-vis mere drug addicts, German drug law knows provisions aiming at replacing imprisonment by treatment. If a prison sentence does not exceed two years or is not expected to exceed two years, a case can be dismissed or punishment postponed provided that an addict is involved and that he undergoes treatment voluntarily. But acceptable and licensed treatment facilities must provide for "prison-like" restrictions during treatment.

1.3 Drug Law Reform

As far as plans for future legislation and reform in the field of drug laws are concerned, attention must be drawn to the following points:

First of all, in accordance with U.N. based considerations and the recently published U.N. convention on money laundring activities and receiving drug money should be criminalized in the near future.[10]

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9 See Rüter, C.F.: Drogenbekämpfung in den Niederlanden. Ein Königreich als Aussteiger. Zeitschrift für die gesamte Strafrechtswissenschaft 100 (1988), pp.385-404.

10 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted at Vienna on 19th December 1988; for a thorough discussion of national and international perspectives on money laundering and forfeiture of drug profits see Meyer, J. (Ed.): Gewinnabschöpfung in Westeuropa. Wiesbaden 1989.

Secondly, there is a strong push towards revising forfeiture statutes which, according to plans developped in the Ministry of the Interior and in the German Federal Bureau of Criminal Investigations should be similar to those adopted in England and elsewhere. But as forfeiture laws based on reversal of the burden of proof surely could not be adapted to basic principles of German criminal law and would be regarded to violate German Constitution, the Ministry of Justice as well as legal scholars are heading towards other options. A somewhat more lenient model of forfeiture is based on some compromise between the principle of presumption of innocence and reversal of burden of proof: if an offender's assets or money are seized, the offender is not obliged to full proof of licit sources but he has to give some reasonable explanation which in turn obliges the public prosecutor to proove that the money or the items seized stem from drug offences. But even this milder type of forfeiture law seems to be unconstitutional. Still another proposal concerns introduction of a financial penalty which is not based on the day-fine system (which is not a suitable tool in forfeiting drug proceeds, because the size of one day fine unit may be based on legal income only) but is planned to cover all assets of an offender found guilty of drug trafficking or other serious drug crimes (and sentenced to imprisonment of at least 2 years). The upper limit of the financial penalty is not fixed and may amount to the total value of all assets and property of the offender. The value of assets and property may be estimated. As any criminal penalty must be matched to the seriousness of the offence and guilt of the offender it is thought of a sentencing device enabling the court to split the sentence into imprisonment on the one hand and the financial penalty on the other hand, which together must add up to just and proportional punishment.[11] Other suggestions for revising forfeiture laws consist of just clearing existing statutes of some obstacles which seem to create problems in implementing existing laws.[12]

One of those problems said to hinder police in cutting down drug trafficking refers to the time-limits set today: although police and public prosecutors are basicly allowed to seize money which they suspect to be drug money, evidence that this money represents actually proceeds from drug offences must be available two weeks after seizure of the money. It goes without saying that in many cases serious difficulties with respect to this requirement arise.

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11 Albrecht, H.-J.: Bundesrepublik Deutschland. In: Meyer, J. (Ed.): Gewinnabschöpfung in Westeuropa. Wiesbaden 1989; Meyer, J.: Rechtsvergleichender Querschnitt. In: Meyer, J. (Ed.): Gewinnabschöpfung in Westeuropa. Wiesbaden 1989.

12 Albrecht, H.-J.: Bundesrepublik Deutschland. In: Meyer, J. (Ed.): Gewinnabschöpfung in Westeuropa. Wiesbaden 1989.

Obviously the reform movement points to the introduction of the **financial penalty** as outlined above. A draft framed by the Ministry of Justice is supposed to pass parliament in 1989.[13] According to this draft, a criminal court **may** mete out a financial penalty if a drug offender is to be sentenced to imprisonment of 2 years or more. But basically introduction of the financial penalty will be associated with legal problems similar to those pointed out with respect to forfeiture based on reversal of proof. If the amount of the financial penalty in the case of drug offences should cover all assets and property of an offender and should be fixed independently from the profits stemming from the drug offence which is tried, the problem of violation of the principle of innocence indirectly rises again. Although the financial penalty explicitly is not conceived as a punishment for offences which cannot be cleared completely, and therefore cannot be tried but as a punishment for those offences which are tried, when fixing the size of the financial penalty it will be nevertheless necessary to take into account the seriousness of the offence. If this is not done the principle of punishment proportionate to the guilt of the offender as expressed also in the offence itself would be violated. Then, either the value of the provision is limited when taking seriously the principle of individual guilt and courts will have to refrain from meting out financial penalties, or punishment is excessive and can be justified only by extending to crimes which were not subjected to a regular trial. A second problem concerns the constitutionally granted right of property. It seems obvious that deprivation of all assets and property affects the core elements of this constitutional right and that such an intervention must be regarded to violate the general principle of proportionality. Moreover, in accordance with supreme court rulings criminal penalties must not have desintegrative effects but have to promote rehabilitation and integration. But confiscative penalties in fact aim at complete destruction of an individual's economic basis and therefore are designed to marginalize an offender, at least in terms of economy.

Thirdly, proposals address control and criminalization of production and trafficking in substances necessary to produce heroin or cocaine. But obviously there does not seem to exist that much interest in taking up such proposals in the parliament, which might be explained by the fact that the pharmaceutical industry in the Federal Republic of Germany is strongly engaged in producing these types of substances.[14]

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13 Recht. Informationen des Bundesministers der Justiz. No.4, July/August 1988, pp.60-61; Meyer, J.: Rechtsvergleichender Querschnitt. In: Meyer, J. (Ed.): Gewinnabschöpfung in Westeuropa. Wiesbaden 1989.

14 Körner, H.H.: Betäubungsmittelgesetz. Deutsches und internationales Betäubungsmittelrecht. 2nd ed., München 1985, pp.1.

Another piece of legislative reform is not directly related to drug laws but surely will have a strong impact on drug control, too. A recently drafted statute on exchange of information between secret service and police allows almost uncontrolled and unlimited exchange of information basically leading to a situation where strict separation between police (with executive powers and limited means of investigation) on the one hand and secret service (wide possibilities of hidden investigations etc., no executive power) is not possible anymore.[15] Although police in the Federal Republic of Germany currently may use unconventional methods of investigation with respect to a rather wide range of serious offences, including drug offences, there exist two restrictions which will fall away: The first restriction concerns certain types of investigative techniques, e.g. use of bugs, the second, even more important restriction concerns reasonable suspicion against an individual as a prerequisite for launching investigations, reasonable suspicion that a crime has been committed which must be present if police decide to investigate. Secret services are not restricted in this respect but have large discretionary powers in deciding where to deploy investigative resources. So, exchange of information could lead to considerable increases in power on both sides, which could be detrimental to the current balance of power in society.

1.4 Legalization of Drugs

The legalization issue, although discussed in the 60ies and 70ies, may be said to have faded away in the 80ies. Besides some (hard core) academics favouring liberal ways of drug control and opposing prohibition, there do not exist organized efforts, pushing for complete legalization of drugs. The latest proposals to decriminalize at least soft drugs, voiced within a more or less organized context, can be dated back to 1986, where at the triannual meeting of the Association for Youth Courts and Juvenile Court Aid such a recommendation has been made which finally did not receive much attention.[16] But nevertheless the apparently poor outcome of the prohibitive approach to drugs and the rather new threat of AIDS seem to encourage the search for new ways to deal with problems associated with drug dependencies.[17] Today, programmes which allow free and legal access to syringes and needles exist nationwide, although needle exchange

15 See the critical statements in Bull, H.-P.: Sicherheit durch Gesetz? Baden-Baden 1987.

16 Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen (Ed.): Und wenn es immer weniger werden. München 1987.

17 See e.g. Gundlach, H.: Das Drogenproblem, das Methadon und die Polizei. Der Kriminalist 21 (1989), pp.178-182; Kreuzer, A.: Therapie und Strafe. Versuch einer Zwischenbilanz zur Drogenpolitik und zum Betäubungsmittelgesetz von 1981. Neue Juristische Wochenschrift 42 (1989), pp.1505-1512; Reuband, K.-H.: Drogenstatistik 1987. Neue Trends und Problemlagen. Die Situation des Drogengebrauchs in der zweiten Hälfte der 80er Jahre. In: Jahrbuch 1989 zur Frage der Suchtgefahren. Hamburg 1988, pp.41-104.

programmes have not been accepted in the prison system. Substantial portions of offenders found guilty and imprisoned still concern drug addicts who, in order to maintain their drug use are engaged in selling drugs.[18] Recently the Mayor of Hamburg suggested to think about heroin maintenance programs as part of a strategy deviced to break up the monopoly in the drug market held by organized criminal groups and to take away the pressure put mainly on drug users.[19] The Green party has also brought up the drug policy issue in the Federal as well as in State Parliaments. Under the headline "Disarmament in the war on drugs - decriminalization of drug use, reduction of drug criminality, extension of support schemes for drug addicts", the Green Party applied in the Federal Parliament formally for a revision of the Law on Narcotics. The motion emphasizes the need for decriminalizing drug use, especially behaviour necessarily preceding drug use (purchase, possession).[20] But what seems to be more promising in terms of broad condition-building are efforts to reduce the rather high level of penalties in practice and to cut down the still enormous pressure on soft drugs[21] by reallocating the investigative resources and making wider use of dismissing cases involving soft drugs. Although it does not seem yet to be necessary with respect to the Federal Republic of Germany, the issue of legalization should be evaluated and considered not only under the perspective of the potential impact on the life and the world of the drug user, but also with respect to the effects, legalization may have on other organized or individual crime activities. Potential side effects of legalization should be considered, too, as far as dislocation of organized and individual crime and disruptive effects in terms of unemployment on certain groups, communities or nations at large are concerned. The end of the prohibition era in the United States demonstrates at least the apparent capability of organized crime to invest in other vices, immoralities or crime. Considering the vast amounts of money which are derived from drug trafficking on the different levels of distribution of drugs we might furthermore be induced to ask whether criminal

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18 Bericht der Bundesregierung über die Rechtsprechung nach den strafrechtlichen Vorschriften des Betäubungsmittelgesetzes in den Jahren 1985-1987 (11.4.1989), Bundestags-Drucks.11/4329 where data on drug cases, covering the period between 1985 and 1987 show that approximately 80% of drug offenders concern drug users.

19 Der Spiegel No.29, 1989, pp.27-30 "Hamburgs Erster Bürgermeister Henning Voscherau (SPD) über Senatspläne zur staatlichen Drogenvergabe".

20 See Die Grünen im Bundestag: Antrag zur "Abrüstung im Drogenkrieg. Entkriminalisierung des Drogenkonsums, Verringerung der Kriminalität und Förderung von Hilfsangeboten", Bonn 6.7.1989; see also Antrag der Fraktion der Grünen betreffend akzeptierende Drogenpolitik in the Hessian Parliament, 3.1.1989, which stresses also the importance of decriminalization of drug use but is adding the proposition to legalize soft drugs.

21 See Bericht der Bundesregierung über die Rechtsprechung nach den strafrechtlichen Vorschriften des Betäubungsmittelgesetzes in den Jahren 1985-1987, 11.4.1989, Bundestags-Drucks.11/4329: The report demonstrates that 14% of all drug related court sentences concern amounts of cannabis of 5 gramms or less. Out of these every fifth has received a suspended or unsuspended prison sentence.

activities aiming at compensation of a sudden decline of drug profits could outweigh the benefits of legalization in terms of decreases in the number of property crimes committed by drug addicts.

2. Procedural Aspects of Drug Law Enforcement

The German Act on Narcotics provides for the possibility to make a drug offender a **"crown witness"** (breaking thus with the still prevailing principle of legality in criminal law). The Crown witness may avoid punishment or receive more lenient punishment if supporting police and public prosecutor in clearing other drug offences (§ 31 Law on Narcotics).[22] This provision was restricted to drug offences up to 1989, but in the meantime the concept of the crown witness was extended to acts of terrorism.[23]

Wire-tapping, mail surveyance, provoking drug crimes, undercover agents and informants may be used in the investigation of drug offences. Explicit provisions in procedural laws cover wire-tapping (§ 100a No.4 Criminal Procedure Code) and mail surveyance, which are not specific for drug offences but cover a multitude of serious crimes in the case of wire-tapping and all criminal offences in the case of surveyance and seizure of mail (§ 99 Criminal Procedure Code). While the search of premises during nighttime in general is restricted, these restrictions do not apply in the case of premises which are known as places of dealing in drugs (§ 104 Criminal Procedure Code). Finally, pretrial detention may be ordered in serious cases of drug offences not only under the regular conditions of the risks of escape or obstruction of the course of justice but also if there are reasons to assume that serious drug offences will be continued (§ 112a Criminal Procedure Code, which determines additional prerequisites). Techniques of provoking drug crimes (buy and bust), controlled delivery of drugs etc. can be used although statutes do not exist. Marginal restrictions in the use of provocation and undercover agents have been introduced through court rulings and informal guidelines set up by the public prosecutor's office and Ministries of the Interior. So, e.g. juveniles may not be hired as informers and triggering the

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22 Research on the implementation of the crown witness concept in crug cases demonstrates very clearly that this provision did not result in major advances in drug investigation, see Jaeger, M.: Der Kronzeuge unter besonderer Berücksichtigung von § 31 BtMG. Jur.Diss. Freiburg 1986, pp.129: The crown witness provision is used very rarely only. It is estimated that approximately 4% of all those cases where the crown witness provision has been used, clearing of the case was due to the crown witness.

23 The extension of the concept of the crown witness to acts of terrorism is part of the so-called "security laws" which went into force 16.6.1989, Bundesgesetzblatt I, p.1059.

"completely innocent" into drug crimes by means of considerable police efforts in terms of offering large amounts of moneys etc. is not allowed. In extreme cases where these guidelines and principles have been grossly violated punishment may be excluded according to rulings of the Bundesgerichtshof (Supreme Court) although regularly mitigating circumstances in sentencing are considered only, if police participation in the drug offence is assessed to have had played a major, causal role.[24]

The identity of hidden informers or undercover agents serving as witnesses or providing evidence has to be disclosed in the courtroom. Anonymity during the trial basically is not possible.[25] But police nevertheless may not disclose the identity of informers or agents provocateurs to the court. In these cases, the problem arises whether the court may hear police officers who have heard the informer before as a witness. There is an ongoing debate on this issue but courts are rather ready to rely on the witness of hearsaying and to accept not disclosing the identity by police.[26]

The attempt to integrate treatment devices into criminal law has lead to special provisions in the law on narcotics dealing with drug addicts. The provisions (§§ 35, 37 Law on Narcotics) provide the possibility for the public prosecutor to dismiss a case conditionally if the crime committed deserves not more than 2 years imprisonment, if the addict undergoes treatment and if it can be assumed that treatment will be successful. Under the very same conditions a prison sentence of not more than 2 years may be suspended. Treatment must be applied in an institution where the offender is subjected to severe restrictions (prison like conditions). These provisions which were introduced under the headline of "treatment instead of punishment" did not result in any practical relevance. In the year 1987 24 cases were dismissed by the public prosecutor's office,[27] between 1985 and 1987 2-6% of prison sentences where drug addicts were involved have

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24 Bundesgerichtshof Neue Zeitschrift für Strafrecht 1984, p.178, Bundesgerichtshof Neue Juristische Wochenschrift 1984, p.2302.

25 Bundesgerichtshof Strafverteidiger 1983, p.490.

26 Bundesgerichtshof Neue Juristische Wochenschrift 1985, p.984.

27 Albrecht, H.-J.: Bundesrepublik Deutschland. In: Meyer, J. (Ed.): Betäubungsmittelstrafrecht in Westeuropa. Eine rechtsvergleichende Untersuchung im Auftrag des Bundeskriminalamts. Freiburg 1987, pp.63-168, p.120; Statistisches Bundesamt: Staatsanwaltschaftsstatistik 1987. Wiesbaden 1988.

been suspended in order to allow treatment.[28] With respect to suspension of imprisonment of not more than 2 years in exchange for treatment obviously most of the cases dealt with in this way include partial serving of the prison sentence with a subsequent treatment period which means that the treatment option is used as an alternative to regular parole.[29]

Another major change with respect to procedural aspects of drug law enforcement occurred at the front end of the process. As drug crimes are basically victimless crimes where reporting by victims or the public cannot be expected police and public prosecutor must rely on proactive, aggressive techniques of policing and control. The traditional, reactive strategy of police is not useful in tracing suspects because it is centered around crime reporting by victims or the public. Ordinary legal procedural requirements such as some degree of suspicion from the perspective of proactive policing therefore represent an obstacle. Therefore, the trend is towards investigative techniques and information sampling which allow identification of suspects and provide the factual basis for initial suspicion which in turn is a prerequisite for the commencement of regular criminal proceedings. It goes without saying that these strategies will lead to new problems (on the national and the international level) especially with respect to proper controls of information sampling and information sharing.

3. Prescription of Controlled Drugs by Physicians and Methadone Maintenance

The prescription of drugs covered by the Act on Narcotics is basically illegal in the case of those substances listed in annexes I and II of the Act on Narcotics. For those drugs which may be subscribed by physicians an ordinance states that

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28 Bericht der Bundesregierung über die Rechtsprechung nach den strafrechtlichen Vorschriften des Betäubungsmittelgesetzes in den Jahren 1985-1987 (11.4.1989), Bundestags-Drucks. 11/4329.

29 Albrecht, H.-J.: Bundesrepublik Deutschland. In: Meyer, J. (Ed.): Betäubungsmittelstrafrecht in Westeuropa. Eine rechtsvergleichende Untersuchung im Auftrag des Bundeskriminalamts. Freiburg 1987, pp.63-168, p.121; Bericht der Bundesregierung über die Erfahrungen mit dem Gesetz zur Neuordnung des Betäubungsmittelrechts, Bundestags-Drucks. 10/843, p.36; Bericht der Bundesregierung über die Rechtsprechung nach den strafrechtlichen Vorschriften des Betäubungsmittelgesetzes in den Jahren 1985-1987 (11.4.1989), Bundestags-Drucks. 11/4329.

prescription of drugs on the one hand must conform to the state of arts in medicine and on the other hand must fulfill a need which cannot be satisfied otherwise. As the professional organizations of physicians on the one hand are opposing fiercely drug maintenance programmes in the case of drug addicts,[30] and on the other hand professions involved in drug treatment in the Federal Republic of Germany strongly support the abstinence model of drug treatment, prescribing drugs to an addict for reasons of maintenance only is regarded to be a criminal offence. Individual drug maintenance is tolerated as a short-term device with the purpose to guide the drug addict into abstinence therapy. Some physicians who provided drugs to addicts on a permanent basis or attempted to organize small scale maintenance programs have been prosecuted and sentenced throughout the 70ies and 80ies. Recently, some methadone maintenance programs organized and run by state agencies have been introduced, primarily as a result of the fear of AIDS in the states of Hamburg, Nordrhein-Westfalen and Niedersachsen.[31] These programs are strongly opposed by 1. all other state governments, many of them announcing that they will not follow in implementing methadone programs, 2. professional organizations of physicians as well as 3. other treatment professions which obviously defend, at least partially, vested interests in terms of drug free treatment institutions. As methadone or similar drugs can be prescribed only by physicians, and social workers, psychologists and similar professions make up the bulk of treatment staff, while physicians are rather desinterested in addicts perceived to be an unattractive clientel, fear of loss of interest in abstinence programs and loss of resources is plausible as one cause of resistance to methadone maintenance.

The primary concern in the North-Rhine Westfalia methadone maintenance program is the control of the spread of AIDS. As prevalence of HIV seems to be rather high (between 6% and 44%, dependent on region and population

30 See e.g. Daunderer, M.: Kein Methadon für AIDS-kranke Fixer. München Medizinische Wochenschrift 130 (1989), p.118; Heinrich, K.: Schlußwort. München Medizinische Wochenschrift 130 (1988), pp.18-21; Landesärztekammer Hessen: Mitteilung der Landesärztekammer zur Drogensicht, Ersatzdrogen und Methadonbehandlung. Hessisches Ärzteblatt 72 (1988), p.49; Marx, H.: Methadonpraxis in Europa. Weinheim 1987; Ministerium für Arbeit, Gesundheit, Familie und Sozialordnung Baden-Württemberg: Das Methadonprogramm im Schweizer Kanton Zürich - Ein Modell? Stuttgart 1988; Niedersächsisches Ärzteblatt 61 (1988), pp.32-33.

31 Hellbrand, J.: Methadon. Chance oder Illusion? Der Einsatz von Methadon in der Drogen- und AIDS-Hilfe am Beispiel Nordrhein-Westfalens. Bad Godesberg 1988; "Schnipkoweit gibt 'grünes Licht' für Methadon". In: Niedersächsisches Ärzteblatt 61 (1988), pp.32-33; Kühne, H.H.: Methadon: Letzte Hilfe im Drogenelend? Zeitschrift für Rechtspolitik 22 (1989), pp.1-4; Hippel, v.E.: Drogen- und AIDS-Bekämpfung durch Methadonprogramme? Zeitschrift für Rechtspolitik 21 (1988), pp.289-293.

studied),[32] efforts indeed should be vested to reduce the health risks among intravenous drug users.

4. What are the Results of Drug Law Enforcement?

As in most other countries, drug control in the Federal Republic of Germany has been institutionalized through establishing special investigative police units on local, state and federal levels.[33] Resources have been and still are concentrated in these units. Furthermore, the Federal Bureau of Investigation has funds to provide technical and other support in Third World drug producing countries with the purpose to strengthen the repressive drug control approach within those nations.[34] Liaison officers have been placed in the most important drug producing countries in order to alleviate information exchange. The most significant indicator for the virtual explosion in the number of drug law enforcement staff should be seen to be the mere number of people suspected and sentenced on the basis of the Law on Narcotics. While in the 60ies less than 1.000 suspects showed up in police statistics, the figure increased to more than 50.000 in the 80ies (remaining fairly stable at approximately 60.000 until the mid-80ies and rising sharply since 1987, 1988: 84.998). While approximately 100 persons have been sentenced annually on the basis of opium law in the early 60ies, almost 20.000 are sentenced each year in the mid-80ies on the basis of the Act on Narcotics (1987: 19.796). Effects on the prison system can be observed, too. In the 60ies, drug offenders were virtually non-existent in the prison system. In the 80ies, every 10th prisoner has received a sentence because of drug law violations while the rate of drug offenders in the female prison population approximates 30%.Prison overload problems in the first half of the 80ies were at least partially due to a sharp increase in long prison sentences meted out in drug cases. While the proportion of prison sentences of 2 years and more because of drug offences amounted to 10% in

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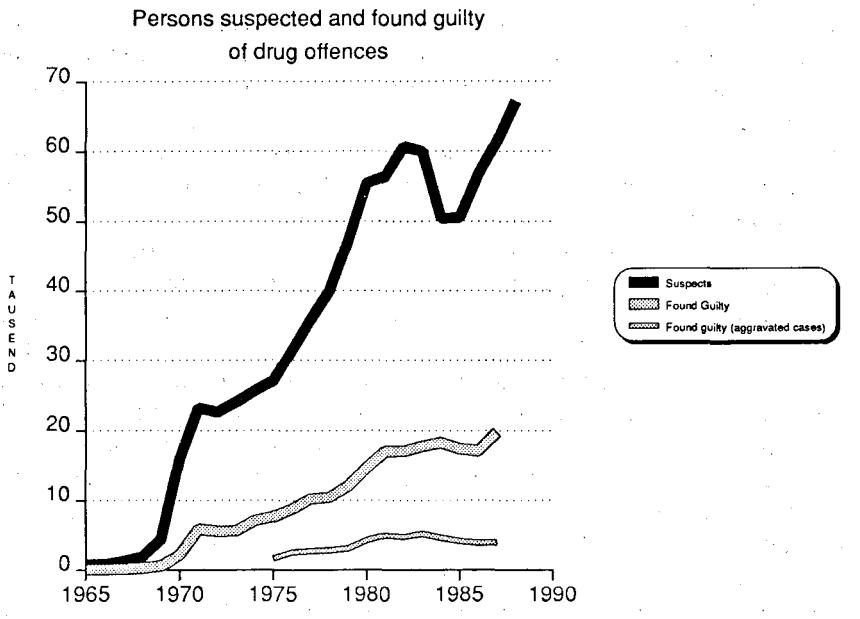
32 See Maas, G.: AIDS in Nordrhein-Westfalen. Bekämpfung und Aufklärung. Westfälisches Ärzteblatt 40 (1986), pp.696-698 (6-14% HIV prevalence); Interministerielle Arbeitsgruppe AIDS (Ed.): Bericht der Interministeriellen Arbeitsgruppe AIDS. München 1986, pp.15 (19% HIV prevalence); Cule, G. et al.: Zunahme der Prävalenz von Antikörpern gegen LAV-HTLV-III bei Drogenabhängigen in der Bundesrepublik Deutschland. Deutsche Medizinische Wochenschrift 111 (1986), pp.567-570 (24% HIV-prevalence); Gürtler, L.G. et al.: AIDS. Virologische und epidemiologische Aspekte. Münchner Medizinische Wochenschrift 128 (1986), pp.267-269 (22-30% HIV-prevalence); Püschel, K. et al.: Entwicklung der HIV-I-Antikörperprävalenz bei Rauschgifttoten in Berlin und Hamburg. AIDS Forschung 3 (1988), pp.452-454 (16-44% HIV-prevalence).

33 Kreuzer, A.: Drogen und Delinquenz. Wiesbaden 1975; Bundeskriminalamt (Ed.): Polizeiliche Drogenbekämpfung. Wiesbaden 1981.

34 Albrecht, H.-J.: Strafrechtsvereinheitlichung in Westeuropa - dargestellt anhand des Betäubungsmittelstrafrechts. In: Berliner Strafverteidiger e.V. (Ed.): 9. Strafverteidigertag. Berlin 1986, pp.41-71.



1976, in 1987 21% of all prison sentences of 2 years or more were related to drug offences.

Basically, analysis of police data on drug offences and drug offenders shows that hashish and marihuana are outweighing hard drugs (they make up approximately three fourth of all drug cases known to the police). Furthermore, most drug offenders (two thirds) came into contact with authorities because of possession of drugs. On the other hand, police data demonstrate that law enforcement is preoccupied with small amounts of drugs. Analysis of police data from the state of Baden-Württemberg shows that less than 1% of drug cases involved is said by police to represent considerable amounts of drugs (i.e.: more than 100 gramms of heroin or cocaine or more than 5 kg of hashish). A report from Hamburg says that in the year 1988 in the city of Hamburg 21% of all heroin cases involved trafficking and selling of heroin, most of these cases involving small scale distribution of heroin by addicts.[35] A recently published federal government report on criminal justice and illegal drugs[36] demonstrates very clearly that the criminal

35 Gundlach, H.: Das Drogenproblem, das Methadon und die Polizei. Der Kriminalist 21 (1989), pp.178-182, p.178.

36 Bericht der Bundesregierung über die Rechtsprechung nach den strafrechtlichen Vorschriften des Betäubungsmittelgesetzes in den Jahren 1985-1987, 11.4.1989, Bundestags-Drucks.11/4329.

justice system is focussing on small drug cases. Approximately **80%** of all cases dealt with by police between 1985 and 1987 concern **small amounts of drugs** which were intended for **personal use** only. The report gives insight into the court practice, too. It is evident that drug offenders addicted to drugs receive sentences of imprisonment and that approximately 14% of criminal sentences meted out in the case of drug offences concern amounts of cannabis of up to 5 gramms. Even more conclusive is the fact that 20% of those offenders where up to 5 gramms of cannabis were involved received prison sentences.

Analysis of data on the prison population of the state of Hessen in the mid-eighties shows that approximately one third of offenders imprisoned because of drug offences are addicts and that approximately half of those offenders imprisoned because of trafficking of more than 500 gramms of any drug (but especially cocaine) concerns the typical carrier of drugs. The bulk of imprisoned drug offenders today is characterized thus either by drug addiction or by low level drug trafficking. Sentencing is rather harsh, although approximately 40% of drug offenders receive fines. On the other hand, 11% of drug offenders in 1987 were sentenced to more than two years imprisonment. In a comparative perspective it is quite interesting to know that in the case of serious environmental crimes sentences of immediate imprisonment are practically unknown. Finally, the last aspect of law enforcement concerns its prison regimes. Drug addicts are by way of ordinances generally excluded from open prison settings, furloughs and work release programmes, which makes inconsistencies in the overall structure of sentencing even more pronounced. Prison regimes in general seem to become tougher following attempts to cut down drug smuggling in the prison system.

5. Epidemiological Aspects

With respect to the epidemiological situation of drug use in the FRG, sources of information can be found in official data on the one hand (police statistics, court statistics, statistics on admission to treatment institution) as well as data gathered in interviews. Prevalence rates of cannabis uses are obviously fairly stable at a 10%-level since the mid-70ies.[37] These data are based on survey research on juveniles and young adults and suggest that most users do not develop drug using habits. The group of chronic drug users and intravenous drug users is rather small. Although research on this group must be considered to be rather difficult,

37 Bundesminister für Jugend, Familie und Gesundheit (Ed.): Konsum und Mißbrauch von Alkohol, illegalen Drogen, Medikamenten und Tabakwaren durch junge Menschen. Bonn 1983.

estimates based on different methodological approaches to the chronic user put the number of these drug users at approximately 50.000 (mainly intravenous drug users).[38] Longitudinal data on attitudes on drugs show that the rate of juveniles and young adults evaluating soft and hard drugs positively is declining since the mid-70ies. While in 1976 36% of juveniles and young adults (aged 14-25) thought it possible to try hashish themselves, in 1986 just 19% agreed with the proposition (corresponding rates for heroin: 1976: 3%; 1986: 1%; cocaine 1976: 15%; 1986: 5%).[39]

It goes without saying that licit drugs are much more common among young people and while less than 1% can be said to be endangered by illicit drugs in terms of chronic or intravenous use, 7% must be regarded to run the risk of developing alcohol problems.

Use of illicit drugs seems to be stable and probably is rather on the decrease in the 80ies, we might expect that treatment interests and the focus of control will turn back to licit drugs such as alcohol and tobacco. There seems to exist a slight trend into the right direction. Alcohol prevention programmes in the industrial sector are rapidly spreading, making use of aggressive methods of identifying clients.[40] In general, tolerance towards alcohol and tobacco seems to be declining. Although there is no reason to believe that alcohol and tobacco will display similar careers as hashish and opiates, vested interests in treatment and control of drugs are not easily confined to those areas where they originally were rooted.

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38 Bericht der Bundesregierung über die gegenwärtige Situation des Mißbrauchs von Alkohol, illegalen Drogen und Medikamenten in der Bundesrepublik Deutschland und die Ausführungsaktionsprogramme des Bundes und der Länder zu Eindämmung und Verhütung des Alkoholmißbrauchs. Bundestags-Drucks.10/5856 (less than 50.000 drug addicts); Bundesminister für Jugend, Familie und Gesundheit (Ed.): Konsum und Mißbrauch von Alkohol, illegalen Drogen, Medikamenten und Tabakwaren durch junge Menschen. Bonn 1983 (50.000-60.000 drug addicts).

39 Reuband, K.-H.: Drogenstatistik 1987. Neue Trends und Problemlagen. Die Situation des Drogengebrauchs in der zweiten Hälfte der 80er Jahre. Deutsche Hauptstelle gegen die Suchtgefahren, Info-Dienst 88. November 1988, pp.37-74.

40 Albrecht, H.-J.: Präventionsprogramme im Betrieb: Eine neue Form sozialer Kontrolle am Arbeitsplatz? Drogalkohol 1988, pp.37-57.

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The Limitations and Formalities of Criminal Law Provisions Concerning Narcotics: Considerations on Legislation in Italy

Dr. A. Manna and Dr. E. Barone Ricciardelli

1. Current State of Criminal Law Provisions concerning Illegal Drugs in Italy

1.1 The Consumption and Possession of Soft Drugs

1.1.1 The Pre-existent Situation: The 1954 Legislation

In order to fully understand the current state of Italian legislation concerning on the one hand the battle against drug pushing and, on the other, the methods adopted to deal with the abuser, and to place this situation correctly amongst other European legislation, it is necessary to make some brief considerations on the first organic legislative provisions in this field in Italy: the law of 22-10-1954 n.1041.

Given the topic of this paper, some reference to the 1954 legislation, if only brief, is nevertheless important. This law took up a position on criminal policy which is very different to, if not the complete opposite of the current law of 22-12-1975 n.685 which governs the problem of narcotics today.[1] In fact, in little over twenty years, the situation has passed from a globally punitive outlook upon the entire drug "cycle", from production through pushing and finally to consumption, and has, as will shortly be demonstrated, now reached the point where drug

1 Cfr. Simeone, A., Pezzinga, A.: Il codice degli stupefacenti, Piacenza 1972 passim.

trafficking and pushing on the one hand, is distinguished from consumption on the other. The consumer is now considered a "patient" as opposed to a "criminal".

The fundamental problem posed by the previous law was its tendency to consider the "drug" phenomenon globally with penalties dealt out to any unauthorized person who purchased, sold, passed on, exported, imported or was **howsoever found in possession** of substances or compounds included in the list of narcotics laid out under article 6, 4th comma of the 1954 law. Thus the abuser, the patient under more meritorious criminological stances,[2] was subject to the same punishments as those exacted for large-scale drug pushing.

Moreover this "punitive" legislative stance with regard to the abuser, also placed parents in particular, but in general all those involved "ab esterno" from the drug scene, in a serious dilemma: they were left with the choice of pressing charges, which would ultimately lead to the abuser's imprisonment, or of maintaining a silence which would also render any attempt to rescue the addict impossible.[3] So, the last link in this chain of tragedy was, in the abstract, as punishable as the first and the far more dangerous.

Noteworthy efforts were made in this sphere by doctrinal study and jurisprudence.[4] The latter worked through numerous appeals to the Constitutional Court for violation of article 3 of the Constitution, which upholds the principle of equality in the eyes of the law, by article 6 of the 1954 law. Nevertheless in a much cited sentence of 19/01/1972 n.9[5] the Constitutional Court declared that the question of constitutional illegality of article 6 was clearly unfounded because the rationale of law 1041/54 was that it considered the narcotics pusher and the abuser in the same way. This sentence came despite vows from authoritative doctrines which had tried to render possession of narcotics unpunishable through interpretative means.[6] This situation did however undergo some change when law n.685, 1975 came into force.

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2 Manna, A.: L'imputabilità del tossicodipendente. Rilievi critici, Riv.It.Med.Leg. 1986, p.1032.

3 Relazione Commissioni Giustizia e Sanità Senato alla legge 22/12/75 n.685, Atti Senato VI Leg. stampato n.4-819 A.

4 Tra gli altri, Pannain, R. : La detenzione di stupefacenti per uso proprio, Arch.Pen. 1957,II, 233; Nuvolone, P.: Le intossicazio ni voluttuarie nella prospettiva penale. In: Le intossicazio ni voluttuarie nella società italiana, Milano 1965, pp.435.

5 Corte Cost. 19 gennaio 1972 n. 9 in Giur.Cost., 1972,I, pp.27.

6 Manna, A.: Problemi Constituzionali e prospettive della detenzione, importazione e coltivazione di stupefacenti. Giur. Cost. 1982, I 1905.

1.1.2 Current Legislation concerning the Control of Traffic and Consumption of Narcotic Substances

Current Italian legislation concerning narcotics takes a different stance regarding both past regulations and also regulations governing the same sphere in other European countries. With regard to the former legislation the situation has passed from a uniform, repressive treatment of abuser and pusher, to a clear cut distinction of these two positions. With regard to other European nations such an approach to the drug problem presents some original aspects which are not to be found, in the same **dimensions**, in foreign legislation. We will attempt to clarify our position below.

The rationale of the 1954 law where, as we have said, article 6 incriminated the whole of the drug cycle, was that the pusher and abuser were put on an equal footing under the same "threat of punishment", both were considered criminals. The difference in the present 1975 law lies in its approach to the problem of blocking the phenomenon of drug trafficking. The difference can be found in the distinction which is made on a general, abstract level within the "drug cycle" between pusher and abuser, in that the latter is not subject to punishment.

While article 71, through a "cascade" formulation, not only punishes any activities linked to drug pushing, but also those linked to the possession of **substantial** quantities of narcotics,[7] article 80 provides real and proper exemption from penalty for the possession or purchase of drugs of personal non-therapeutic use, and article 72 provides a lesser case in point for persons performing the same activities found under article 71 but with modest quantities of drugs.

From all the preparatory work[8] it can be seen that in 1975 the Italian legislators immediately emphasised the tendencies of the new approach regarding the drug problem: "making a clear distinction between the trafficker and the consumer, especially as far as regards penal regulations".[9] Essentially the habitual drug abuser is no longer considered a criminal to be dealt with using instruments of strict control, but he/she is regarded as a patient to be cured, rehabilitated and reintroduced into society.[10] The instances not subject to punishment in the 2nd

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7 Art.71 L. 22/12/75 n.685 "Chiunque senza autorizzazione, produce, fabbrica, estrae, offre, pone in vendita, distribuisce, acquista, cede o riceve a qualsiasi titolo, procura ad altri transporta, importa, esporta, passa in transito o illecitamen te detiene, fuori dalle ipositesi previste dagli articoli 72 e 80, sostanze stupefacenti o psicotrope ..è punito ... .

8 Cfr.Ricciotti, R.: Gli stupefacenti. Padova 1981, pp.97.

9 Relazione, Atti Senato VI Leg. stampato n.4-819-A.

10 Ricciotti, R.: op.ult.cit., p.98.

comma of article 80 introduce a new aspect in that it is set out in general and abstract terms. This is contrary to what may be found in some European countries where, when faced with a generic system of punishment regarding the whole drug cycle, the option of exempting the abuser from punishment is left to the discretion of the organ of judgement.[11]

Thus, at a level of general prevention, the use of the threat of punishment towards the large- and small-scale pusher has been opted for, with persons purchasing or in possession of modest amounts of narcotics being exempt from punishment. This does not imply the liberation of drug abuse in that, under the provisions of article 80, the seizure and confiscation of the modest quantities of drugs in the possession of the abuser is enforced. At the very least this would appear to be inclined towards the illegality of the case in point, although this can no longer be considered an offence. Moreover, it should be emphasised that for persons subject to the case in point under article 80, special sanitary provisions may be made to enable their rehabilitation; this will be further dealt with in more depth below.[12]

Though in case of refusal to comply, a court order for forced hospitalization may be invoked,[13] the effective realization of such assistance does not in any way modify the instance not subject to punishment under article 80 2nd comma. The latter is enforced above and beyond any de-toxication **treatment** of the addict.

Besides the subject exempt from punishment for consumption and possession of modest quantities of narcotics, article 80 also provides an identical case in point for therapeutic purposes. Essentially such a provision presupposes that the subject in question requires drugs as part of his cure, but that he procured the drugs illegally. In such an event we have a case of justification of behaviour,

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11 Meyer, J.: Comparative Analysis, "Four legal models can be distinguished according to the extent and type of privilege, although the models do have certain common features. The model of Statutory Exemption from Punishment (Spain, Italy and Greece). The second model has developed in those countries where case law and prosecutorial authorities permit the possession and purchase of drugs for personal use within certain established limits (Denmark, England). A third model is the Statutorily Foreseen Potential Exemption from Punishment Model (Federal Republic of Germany, Portugal, Belgium). The systematic distinction between crimes involving consumption and the significantly milder penalties for the latter can be viewed as the fourth model (France, Luxembourg). In Meyer, J. (Ed.): Betäubungsmittelstrafrecht in Westeuropa, Freiburg i.Br. 1987, pp.795.

12 Cfr. Cap. IV pp.24.

13 Art.100 c.3 "L'autorità giudiziaria, premessi gli opportuni accertamenti e sentito in ogni caso l'interessato e il competente centro medico e di assistenza sociale, qualora ravvisi la necessità del trattamento medico ed assistenziale, dispone con suo decreto il ricovero ospedaliero, con esclusione degli ospedali psichiatrici, se assolutamente necessario, o le opportune cure ambulatoriali o domiciliari".

in that the legislator deems that the circumstances warrant the purchase and possession of narcotics, even though procured illegally.

This case of justification of behaviour may be applied to the extent that it prohibits seizure of the narcotics, as long as these do not greatly exceed the addict's immediate therapeutic needs. Thus there is a hypothesis of a true balance of values, between that of health (governed by article 32 of the Constitution) and that of public security which is impaired by the circulation of drugs. In this case moreover, the precedence of the value of personal health over that of public security is apparent.[14] This may be deduced from the fact that only the amount of drugs which substantially exceeds that required for immediate therapeutic use may be seized and confiscated. The lack of any anti-jurisdiction concerning the elements provided in the 1st comma of article 80 would appear to derive from the fact that behaviour inspired by therapeutic motives is deemed inoffensive. It should be further noted that also under the authority of the abrogated 1954 law the jurisprudence of the Court of Cassation appeared to tend towards the legality of possession of minimal doses.[15]

The Court of Cassation law interpreted the 1st comma of article 80 in such a way that if the use of a particular drug was to be considered therapeutic, and therefore comes under justified behaviour, a medical prescription was required, or the subject should at least be undergoing a course of therapeutic treatment.[16] It can however be stated that if on the one hand the Italian system can be considered avant garde as far as the treatment of drug abusers is concerned, on the other it does pose the following two problems: what is the precise interpretation of a "modest quantity"?, and; how can article 71 of the law be applied when in certain instances it would signify a real **absolute presumption of drug pushing** in cases where the drug is held in quantities which exceed the modest quantity of article 80? This norm has led to some perplexity in legal and doctrinal terms over the definition of the concept of a modest quantity of drugs held.[17] The importance of this definition derives from the provisions in article 71 and 72 which

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14 L'art.32 Cost. afferma "La Republica tutela la salute come fondamentale diritto dell'individuo e interesse della collettività ...".

15 Cfr. Sellaroli, G.: La nuova disciplina della detenzione di stupefacenti per uso personale, Riv.it.dir.proc.pen., 1977, pp.951, p.961.

16 Corte di Cassazione sez.I 21/5/77 n.658. In: Di Gennaro, G.: La droga. Controllo del traffico e recupero dei drogati. Milano 1982, p.275.

17 Cfr. Di Gennaro, op.ult.cit. p.268; in dottrina, tra gli altri, Santacroce, G.: Profili giuridici dell'attuale disciplina in materia di stupefacenti e sostanze psicotrope. Temi Romana, 1977, I, pp.I.; Sellaroli, G.: La nuova disciplina della detenzione di stupefacenti per uso personale. Riv. italiana di procedura penale, 1977, pp.951.

provide serious penalties for the traffic and possession of large quantities of narcotics, with a scale of penalties laid out in direct relation to how **moderate** the quantity of substances employed may be considered.[18]

In 1975 the legislators did pose the problem of how the moderate quantity of narcotics was to be defined. Indeed some proposals were made to the Preparatory Work Committee. The suggestions tended to draw a definition from temporal criteria, for example the quantity necessary for weekly consumption as may be found in Austrian legislation,[19] but the opinion which prevailed adopted a different criterion for an effective means of definition[20] in part due to the arbitrary nature of actually fixing, in general and in abstract terms, a quantity which could be considered moderate.

It was thus considered preferable to leave the effective application of this provision up to the discretion of the judge. Be that as it may, this "granting of responsibility" has led to numerous doubts as to the Constitutional legitimacy of article 80 because of the elusiveness of the term "modest" and thus to the contrast between it and article 25 2nd comma of the Constitution, based on an improved doctrine.

This article extends further to cover the instance not subject to punishment, apart from that treated in the provisions of impeachment, as far as regards definition.[21][22]

The Constitutional Court negated the validity of such queries presented by magistrates concerned with judgments based on the inadmissibility of the instances presented regarding justification; from the preparatory work it may be seen that the legislators adopted a particular definition of quantities exempt from penalty in the case of personal possession so as to "operate a discrimination between producers and traffickers on the one hand, and small-time pushers and abusers on the other. Realization of this objective would not have been possible with indications of fixed quantities, because of the overriding necessity to evaluate each case in point individually with reference to the variable elements".[23]

Nonetheless, despite the intentions of the legislators, the provisions in question may be considered essentially imprecise due to the vagueness of the terminology employed by the legislators themselves. This may have the effect of placing the abuser or small-scale pusher at risk, and subject them to the different

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18 Cfr. Di Gennaro, op.ult.cit. p.233-234; Passacantando, Note critiche sulla nuova legge in materia di sostanze stupefacenti. Giust.pen., 1978, II, pp.184.

19 Cfr. la Legge austriaca del 1951, art.9a.

20 Cfr. Relazione Commissione Giustizia e Sanità al Senato. In: Ricciotti, R.: op.cit. p.104.

21 Corte Constituzionale, sent. 170 del 1982, p. I dell'originale.

22 Cfr. Palazzo, F.C.: Note sulla detenzione di sostanze stupefacenti per uso personale. Riv. it., 1976, pp.216.

23 Ibid. p.3 and 4.

stances that the law may adopt regarding the criteria for assessing a modest quantity.[24]

The doctrine which treats this theme proposes that the legislative provisions should be interpreted with the support of other provisions of the 1975 law: those under articles 43 and 98.

Article 43 concerns the obligations of medical doctors and veterinary surgeons in prescribing narcotics to persons for therapeutic purposes. Here it is laid out that each prescription must be limited to only one preparation and may only be of a dosage required for a cure lasting no more than eight days. Thus, if this is the maximum time limit of a prescription for narcotics for therapeutic purposes, and considering that the quantity which would substantially exceed the therapeutic requirements are to be taken from the possession of the addict, it may be considered "a fortiori" that this is the maximum temporal "ceiling" for narcotics supplies for non-therapeutic use.[25] Therefore we have a return to a temporal criterion, though this is repudiated at the level of provision formulation.

This temporal limit cannot however suffice with regard to giving a normative interpretation of the concept of a "modest quantity". The daily requirements of any drug can vary from individual to individual depending on the level of addiction, or the specific toxicological properties of the substances administered. For this purpose reference to the 2nd comma of article 98 may be proved useful. This governs the intervention of a magistrate for the verification of facts which under article 80 permit the application of the instance not subject to punishment. Technical ascertainment upon which the magistrate's decision is to be based, must be founded prevalently on the toxic properties of the subjects possession **with regard to the physio-psychic personality of the person found in possession**. It is the same legislative rationale that considers the narcotics abusers as patients and not criminals, that supports the hypothesis in determining the moderation of the quantity of substances held, in which the "physio-psychic" personality of the holder is one of the deciding factors. This is the part of the provision which cannot ever be defined generally and in the abstract in legal terms because this would necessitate some reference to a positive case. So article 98, applied together with article 43, can provide a key to interpreting the "moderation" of the substances held, in order that punishment may not be imposed. By means

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24 Corte di Cassazione, sez. I 30 novembre 1976, "la detenzione di 70 g.di hashish ... non può considerarsi modica quantità", Giust. pen., 1977, II, p.310; Corte di Cassazione sez. I 7/6/76, non modico un quantitativo di g. 3,5 di eroina, ibid; Tribunale penale di Genova, sent. 1790/76, modico il quantitativo di dieci dosi di eroina, Chiozza-Malcontenti, Orientamenti della giurisprudenza genovese in tema di "modiche quantità" di sostanza stupefacenti, Riv.it., 1978, pp.274.

25 Cfr. Talia: L'individuazione del concetto di modica quantità di sostanze stupefacenti negli artt.72 e 80 della legge 1975 n.685, **Giust.pen.**, 1980, II, pp.187; Bertone: Il limite normativo della interpretazione delle modiche quantità di stupefacenti. Napoli 1981, pp.90.

of an interpretation from within the legislative system and above all by reference to the law's rationale illustrated above, it is possible to lend some support to the unquestionable vagueness of the term employed.

As has previously been pointed out the rationale of law 685/1975 is the distinction it makes, or at least tends towards, between drug pushing and abuse, the former is impeachable, while the latter is exempt from punishment.

If all the above is accepted as true, then there must arise some perplexity over article 71 of this law, where the pusher and abuser are subject to the same punishment if quantities no longer accepted as moderate are involved. The distinction between the matter in hand, the possession of modest quantities of narcotics which is not subject to punishment if the aforesaid are held for personal use, and the same behaviour but for the use of third parties is not repeated here, and thus the latter is subject to punishment.[26]

Through appeals to the system of presumption, various solutions have been proposed in doctrine and jurisprudence[27] in order to avoid the evident contradiction arising from the treatment of possession of substantial quantities of narcotics and small-scale pushing as identical instances "quod poenam", despite the distinction made between the small- and large-scale pusher in article 71.

In particular, if the quantity of narcotics held cannot be considered modest ex article 80, we have a **presumption of drug pushing**, and this therefore renders any proof that the subject held the drugs for personal use ineffective ("presunzione iuris et de iure"), and moreover, the quantity of the substances held leads to the supposition that the subject intended holding the substances for a third party and non-therapeutic use. In instances where the quantities held are of a larger quantity than that which would come under the provision of article 80, then the only factor which decides application of article 71 or 72 is, after all, the assessment of the quantity concerned. The ends for which the substances are held are, in this case of no importance whatsoever.[28]

And yet an appeal to the system of presumption only serves to accentuate and not diminish the impact of the creation of a so-called criminal law of suspicion.[29] This leads to an interpretation of the provisions regarding possession under articles 71 and 72 as a criminal case in point based merely upon the

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26 Art.71 I Co. "Chiunque senza autorizzazione produce, fabbrica ... pone in vendita, cede, ... o illecitamente detiene ...; art.72 "Chiunque, fuori dalle ipotesi previste dall' art.80, senza autorizzazione o comunque illecitamente, detiene, trasporta, offre, acquista, pone in vendita, vende, distribuisce o cede, a qualsiasi titolo, anche gratuito modiche quantità di sostanze stupefacenti, ... è punito ... .

27 Palazzo, F.C.: op.ult.cit., p.219; Santacroce, G.: op.ult.cit., p.3; in giurisprudenza, Trib.Grosseto, 19/1/77, Giust.pen., 1977, II, pp.311. Trib.Verona, 3/10/78, Giur.merito 1979, II, pp.1219.

28 Manna, A.: op.ult.cit., p.1906.

29 Centro Nazionale di prevenzione e difesa sociale: Problemi generali del diritto penale-Contributo alla riforma (s cura di G. Vassalli). Milano 1982, pp.41.

activity which is suspected.[30] The equal treatment "quod poenam" of the activities of persons in possession of substantial, not modest, quantities of narcotic substances and of pushers who market similar quantities thus remains unjust. This injustice has suscitated numerous questions upon Constitutional illegitimacy through violation of article 3 of the Constitution by article 71 of this law. With sentence n. 170/1982 the Constitutional Court declared the appeal in question to be unfounded due to the objective danger inherent in the possession of substantial quantities for personal use. According to the Court's reasoning, impeachment of such activities derives from their being a potential source of crime.[31]

Nevertheless it would appear that the true motives behind this refusal to abrogate article 71 lie in the legislative vacuum which would result, and the consequent legality of the accumulation of drug supplies surplus to those for personal use.

The contradictions in the 1975 law remain obvious. The Court could not resolve the situation, for the option available would have resulted in a total waiving of penalization for the possession of drugs, regardless of the quantity or motives behind possession. Indeed, even if this thesis was championed by the most combattant doctrine,[32] it would have brought about a significant distortion of the rationale of the 1975 law which has in fact permitted the exemption of penalty for possession for personal use, though only within the restricted limits of article 80.

1.2 Drug-related Behaviour such as the Selling of Needles and Other Instruments for the Consumption of Drugs

While the legislative system established in 1975 deals in depth with the obligations of medical practitioners and pharmacists with regard to supplying narcotics to abusers, it provides no measures which may regulate the sale of needles or other instruments linked to drug consumption.

Essentially the sale or marketing of needles or other instruments which due to their technical characteristics could be utilized by drug consumers or producers, is not considered a dangerous activity, and therefore repression, or even control of such activity is seen as unnecessary. However, following conviction for activities punishable under articles 71 and 72, article 79 does provide for seizure of both the substances and the means employed in committing the offence. So,

30 Sellaroli, G.:: Irrazionalità vecchie e nuove nella disciplina della detenzione di stupefacenti per uso personale. Giur.it. 1977, II, p.191.

31 Manna, A.: Problemi constituzionali, op. cit., 1912.

32 Pannain, B. et al.: Psicofarmacodipendenza e nuova normativa. Arch.pen. 1976, I, pp.465, p.476.

even though the provisions under article 79 can lead to uncertainty over the vagueness in understanding how far the case in point may extend, there is no doubt that it is only possible to seize instruments linked to drug abuse after conviction for illegal activities (possession of modest quantities of drugs for personal use may also come under this provision, as they can be seized, though their consumption is not subject to penalization). However, in other instances the sale and circulation of these articles remains a free activity,[33] in part to avoid further broadening criminal law of suspicion.

1.3 Advertising and Fostering the Use of Drugs

Articles 76 and 78 of the law deal with fostering the consumption of drug and advertising drug use, though it should be noted that article 73 penalizes certain behaviour which wilfully facilitates the consumption of narcotics.[34]

Art. 78. "La propaganda pubblicitaria di qualsiasi preparazione o sostanza comprese nelle tabelle previste dall'art. 12 è vietata."

Art. 73. "Chiunque adibisce o consente che sia adibito un locale pubblico o un circolo privato di qualsiasi specie, a luogo di convegno di persone che ivi si danno all'uso di sostanze stupefacenti o psicotrope ...è punito ...."

The legislative rationale of this series of articles is unquestionable: activity of proselytism towards, or of in any way fostering, the use of drugs is to be punished, in that it puts the value of personal health at risk.

Various theories have been developed around the subject of induction to narcotics consumption as a means of rebelling against the normal values of society.[35] Such activities are in fact punished in order to put a stop to the propagation of drugs, an activity which, supported by ideologies and by their persuasive nature, may lead a person to consume narcotic substances.

The actual punishment of the aforementioned activity poses some problems regarding the assessment of what actual danger the judicial good, protected by law, is put in. There is essentially some doubt as to whether such activity does in fact **induce** the person to take the drug, or whether it is not actually capable

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33 Cfr. le nuove proposte di legge, postea, p.45 ss.

34 Art. 76. "Chiunque induce una persona all'uso illecito di sostanze stupefacenti o psicotrope ... o svolge attività di proselitismo, sia pubblicamente che in privato per l'uso illecito di dette sostanze .. è punito ... . Le stesse pene si applicano a chiunque ... favorisce l'uso delle sostanze stupefacenti o psicotrope indicate nella prima parte .."

35 Solivetti, L.M.: Perchè la droga. Milano 1983, p.2; Mantovani, F.: Ideologie della droga e politica antidroga, Revista de la Facultad de Derecho Universidad Complutense. Estudios de Derecho Penal en homenaje al Professor Luis Jimenez de Asua. Madrid 1986, p.411.

of bringing about a change in the personality of the potential user, and in this case does not place his/her health at risk.[36]

The most recent Italian doctrines pose the problem of the constitutionality of offenses which present an **abstract risk**, that is to say, whether there is not simply the tendency to repress mere disobedience of penal regulations, even when this is not accompanied by any actual exposure to danger of a protected value.[37] However we should also consider the impossibility of otherwise punishing certain juridical values without bringing protection to the threshold of an assessment of the abstract danger inherent in a particular activity.

Particularly in the case of crimes such as instigation to commit an offence, induction to consume and fostering are also forms of this particular type of criminal behaviour, and here it is necessary to establish an objective and concrete factor of danger to the value of health. If this is not the case, we run the risk of resolving penal repression with an inadmissible limitation of the ideological-political liberties which are guaranteed by the Constitution. What is necessary above all is a concrete verification of the danger of activities which publicise narcotics, to avoid the possibility of trespassing into the realms of an unacceptable repression of the liberty of expression of thought.

2. Procedural Aspects of Drug Law Enforcement

2.1 The Use of Under-Cover Agents

Law n.685 of 1975 deals very marginally with the procedural aspects of the drug phenomenon. The question is thus implicitly passed into the sphere of the general Italian penal procedural regulations.

As far as regards the phenomenon of under-cover agents, in our country this comes under the problem of "agent provocateur" which are seen as a specific form of instigation to commit an offence.[38] As a general rule, jurisprudence is agreed upon the non-responsibility of the provocatory agents in that it recognizes their conduct (as long as they form part of the police of the judiciary) as a necessary part of fulfilling their duty regarding a specific norm within the system,

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36 Cfr. Art.8, e Legge (del 10 febbraio 1973) concernente la vendita delle sostanze medicinali e la lotta contro la tossicomania.

37 Cfr. Fiandaca, G., Musco, E. (Ed.): Diritto penale. Parte generale. Bologna 1985, pp.85.

38 Cfr. Fiandaca, G., Musco, E. (Ed.): Manuale di diritto penale. Parte generale, op.cit., p.266; Antolisei, F.:: Manuale di diritto penale. Parte generale. Milano. 1982, 9 ed., p.490.

article 219 of the Procedural Penal Code under which the police is obliged to ensure the proof of the crime and seek the guilty party. The predominant doctrine[39] however holds the opinion that "as he has no fraudulent intentions the provocatory agent can not be punished each time he may have acted with the principle objective of bringing the guilty parties to the Law, and may not even have accepted the risk of actually committing the crime[40]". So it is extremely important to establish the limits within which the activity of the **"infiltrator"** of criminal organizations set up to sell narcotics may be considered acceptable. This serves to avoid the possibility that a certain activity which inspires criminal activity where previously there was none, is considered as being within the realms of duty.

2.2 Anonymous Witnesses

In Italian law anonymous writing or witnesses borne by persons unwilling to reveal their identity are not taken into consideration. The combination set out under articles 8 and 141 of the Procedural Penal Code[41] offers a clear idea of how anonymous information is not only unusable in a court, but cannot even serve to begin penal proceedings. Therefore proceedings can only commence with an action which has an identifiable author in that: "anonymous testimony can, if taken into consideration, determine the greater damage, exploiting the inevitable uncertainty of the initial moments when faced with information about a crime... ."[42]

2.3 The Defendant Who Becomes Witness

Article 82 of the 1975 law introduces some aspects which are exceptions to the normal rules of penal procedure. This article obliges persons not subject to punishment ex art.80, for possession of modest quantities of narcotics,[43] to

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39 Cfr. Mantovani, F.: Diritto Penale. Padova 1979, p.473.

40 Fiandaca-Musco:op.ult.loc.cit.

41 Art.8 c.p.p.4co."Quando si tratta di delazioni anonime si applica la disposizione dell'art.141 c.p.p.", art.141 c.p.p."Gli scritti anonimi non possono essere uniti agli atti del procedimento, nè può farsene alcun uso processuale, salvo che constituiscano corpo del reato, ovvero provengano comunque dal reato".

42 Corso, P.: Notizie anonime e processo penale. Padova 1977, p.182.

43 Art.82, "In deroga agli articoli 348 e 465 del codice di procedura penale, coloro che sono stati dichiarati non punibili per avere agito nelle condizioni di cui all'articolo 80, hanno il dovere di deporre come testimoni nei processi relativi ai fatti che comunque possone portare all'individuazione delle persone o delle organizzazioni criminose che illecitamente producono, fabbricano, importano, esportano, vendono o altrimenti cedono o detengono sostanze stupefacenti o psicotrope".

testify, the objective being to identify the persons or criminal organizations involved in drug trafficking.

The Italian Procedural Penal Code sets out, both for instruction and for judgement (articles 348 and 465 respectively), that defendants in one crime cannot become witnesses to it or to crimes connected to it even if they have been acquitted or condemned, and any testimony they may give is to be annulled. If their acquittal is made in judgement that the defendant did not commit the offence or that the offence did not occur the above norms do not apply. The rationale behind this exclusion of the duty to testify could go back to the brocard "nemo tenetur se detegere", and the exception regarding those individuals acquitted because they did not commit the offence or because the offence was not committed, is due to the fact that in such cases the acquitted can feel him or herself morally free to bear witness as he/she has no further interests in obscuring the truth.[44]

Such a derogation represents a serious exception to the fundamental principals of the trial. The gravity of the motives which, in 1975, led the legislator to enforce this transformation of the defendant into witness is therefore evident: the seriousness of the increasing diffusion of drugs. One of the motives behind the decision to de-penalize the consumer of modest quantities of narcotics, was the attempt to break the circle of silence surrounding the drug phenomenon.[45]

It should nevertheless be noted that the obligation to testify, as derogation of normal principles of penal procedure, is subject to both objective and subjective limitations. Persons bound to testify can only be those declared not subject to punishment ex article 80. Moreover testimony must concern facts which may assist in the identification of persons or subjects involved in activities set out in the final part of the article, i.e. the traffic of narcotics.

Even after these considerations, the contradiction latent in law 685/75 is obvious: the consumer of modest quantities of narcotics, not subject to punishment, can be incriminated for reticence if he/she does not tell the truth[46] regarding facts about which he/she is obliged to testify.

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44 Cfr. Di Gennaro, op.cit., p.282.

45 Di Gennaro, op.ult.loc.cit.

46 Art.359 c.p.p., "Se il testimone rifiuta di deporre senza legittimo motivo o se vi è fondato motivo di ritenere che egli abbia affermato il falso o negato il vero ovvero taciuto in tutto o in parte ciò che sa intorno ai fatti sui quali è esaminato, il giudice può nuovamente ammonirlo circa la responsabilità penale alla quale si espone e ordinare che sia trattenuto in arresto provvisorio fino a che venga richiamato nello stesso giorno o nel giorno immediatamente successivo".

2.4 The Forfeiture of (Alleged) Drug Money

As far as concerns the possibility of confiscating money deriving from the criminal activity of drug trafficking, it is necessary to refer to both article 240 of the Italian Procedural Penal Code which in the first comma provides for the confiscation of anything which is the product or profit from the crime, and to article 79 of law 685/75 which in the last comma provides for the confiscation of the substances together with the means in any way utilized to commit the crime. A sentence from the Court of Cassation, n. 2944 of 16/3/1978 affirmed in a very deliberate manner, that it was possible to confiscate money as a product of the criminal activity, and reference was in fact made to both article 79 and article 240 of the Procedural Penal Code.[47]

2.5 The Impact of Drug Provoked Crimes

The impact of crimes provoked by drugs is highly significant in Italy. The mass media continuously offers programmes and articles on crimes provoked by persons involved in the abuse of narcotics. It has been calculated that criminal charges brought for behaviour ratified as connected to drugs doubled from 1982 to 1984.[48] According to a report by the Commission of experts based on research commissioned by the Lazio Regional Council and the Province and Municipality of Rome on crime in the area under the administration of the above bodies, the percentage of crimes committed under the particular conditions of drug addicts represent almost the whole sphere of the so-called microcrime.[49] This is not all, it has been calculated that 74% of bank or shop robberies, 65% of burglaries and 98% of thefts with murder are committed by persons involved in drug abuse.[50]

The enormity of the phenomenon requires two directions of reflection: on the one hand whether the addict should be considered a chargeable subject and, on the other, how should the addict be found guilty of a crime be **"dealt with"**.

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47 Corte di Cassazione, sez. I 16 marzo 1978 n.2944, in Di Gennaro, op.cit., p.261.

48 Statistiche annuali della Direzione generale della Polizia criminale, Servizio centrale anti-droga del Ministero degli Interni - Attività di prevenzione e repressione svolta dalla Polizia di Stato, dall'arma dei Carabinieri e dalla Guardia di Finanza nel settore degli stupefacenti - pubblicazioni degli anni 1982-1983-1984. In: Rossi, E.: Tossicodipendenti in carcere in Psichiatria. Tossicodipendenze. Perizia, (a cura di Basaglia-Giannichedda). Milano 1987, p.255.

49 Circa il 92% degli scippi, 88% dei furti su auto, 54% dei furti di auto, 68% dei furti in appartamento, Rapporto della Commissione sulla diffusione della droga nel Lazio e a Roma, ined. ma presentata in Roma il 15/3/88, parz.pubb.su L'Espresso n.8-9 6/3/88, p.8.

50 Rapporto, cit.op.ult.cit.

According to present norms and the rationale of the authors of the 1930 Penal Code, the effect of drugs has the same bearing on the charge ability of a person as the effect of alcohol.[51] Such an equalization between habitual stupefaction ex article 94 and chronic narcotics intoxication ex article 95 has certainly influenced the stance of doctrinal study and jurisprudence. According to the latter, in order to be suffering a chronic narcotics intoxication with a consequent application of articles 88 and 89 of the Penal Code (where in the case of total or partial mental addiction charges may not be brought), "a permanent pathological alteration" must be verified, "This alone ... is sufficient to render the evidence of a true psychic illness unquestionable".[52] Basically the present Italian system is based upon criminal policy reasoning, derived from the concept, apparent in the preparatory work, that the consumption of alcohol or drugs is a more a **vice** than an **illness**. Nevertheless the problem must be posed as to whether such an outlook adapted to the legislative rationale of the 1954 law, which totally repressed the drug phenomenon by considering the abuser as a criminal, is in keeping with the present norms which, in article 80, clearly consider the addict as suffering from an illness.

An attempt must therefore be made to define the concept of drug addiction in a separate way from that of chronic alcohol intoxication which would imply a permanent pathological alteration of the psyche. Recent studies[53] have revealed that drug addiction is "a chronic or periodic state of intoxication damaging to the individual and to society, which is a consequence of the repeated use of natural or synthetic chemical substances, its characteristics are:

1. the uncontrollable desire to persist in the administration of the substance and thus to procure it at any cost;
2. the tendency to increase the dosage (tolerance);
3. the psychological and sometimes physical dependence on the effects of the substance."[54]

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51 Art. 94 Ico. "Quando il reato è commesso in stato di ubriachezza e questa è abituale, la pena è aumentata.", 2co "Agli effetti della legge penale, è considerato ubriaco abituale chi è dedito all'uso delle bevande alcooliche e in stato frequente di ubriachezza." L'aggravamento di pena è previsto anche per chi è dedito all'uso degli stupefacenti e commette un reato, art. 94 3co; art.95 "Per i fatti commessi in stato di cronica intossicazione prodotta da alcool o da sostanze stupefacenti, si applicano le disposizioni contenute negli articoli 88 e 89 c.p.; art.88 "Non è imputabile chi, nel momento in cui ha commesso il fatto, era, per infermità, in tale stato di mente da escludere la capacità di intendere o di volere".

52 Corte di Cassazione sez.II, sent.n.1284 del 2 febbraio 1984, Riv.162588.

53 Cfr. Manna, A.: L'imputabilità del tossicodipendente: rilievi critici. Riv.it.med.leg. 1986, pp.1026, p.1032.

54 White, I.: Clinical characteristics of addictions. In: Amer.J.Med. 14 (1953), pp.558-565.

The U.S. National Research Council has produced analogous findings.[55] However, if it is possible to utilize the concept of drug addiction to distinguish between articles 94 and 95 of the Penal Code so as to avoid aggravation of the punishment provided for in the former for the habitual consumption of narcotics, then it should be noted that not all the substances provoke addiction. So, in the case of repeated consumption of other compounds it would be impossible to fall back on the concept of addiction as an instance not subject to punishment, with a consequent aggravation of the penalty for the guilty party ex article 94. The legislator of the 1930 Penal Code thus founded the theme of imputability on the system of **fictio juris**, in order to negate the influence of the state of psychological alteration due to the consumption of narcotics. Here there is an obvious intent to repress, in that it was held that prison was also the best method, in terms of general prevention, to deal with these subjects. The present legislator has not yet felt the need to modify the point on imputability of the Penal Code. It has, however, been realized that the criminal drug addict cannot be treated in the same way as a common criminal.

Thus the contribution of the **executive phase** which, through various legislative motions[56] offers the addict who has committed a crime a **choice** between punishment and treatment. Contrary to the processes in other countries, where the system falls back on a conditional suspension of the sentence,[57] the means adopted has been the measure of alternative detention, i.e. trial care with the Social Services. The difference between the 1986 and 1987 laws lies in the **extension** of the benefit to include not only the subjects who have already begun a recovery programme, but also those who intend to begin one. The positive

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55 Fraser, I.: Addiction to analgesic and barbiturates. In: Pharmacol.Rev. 3 (1950), pp.355-397.

56 Art.47 bis.L.26 luglio 1975 n.354 cosi modificato dall'art.12 L.10 ottobre 1986 n.663 "Se la pena detentiva inflitta entro il limite di cui al comma I dell'articolo 47 (Tre anni), deve essere eseguita nei confronti di persona tossicodipendente o alcooldipendente che abbia in corso un programma di recupero o che ad esso intenda sottoporsi, l'interessato può chiedere in ogni momento di essere affidato in prova al servizio sociale per proseguire o intraprendere l'attività terapeutica sulla base di un programma da lui concordato con una unità sanitaria locale o con uno degli enti, associazioni, cooperative o privati ....".

57 Cfr. Proyecto de Ley espanôl. Organica de reforma del Codigo Penal en materia de tráfico ilegal de Drogas, Texto aprobado por el Senado, Articulo tercero: "Aun cuando no concurrieren las condiciones previstas en el articulo anterior, el Juez o Tribunal podrá aplicar el beneficio de la remision condicional a los condenados a penas de privacion de libertad cuya duracion no exceda de dos anôs, que hubieren cometido el hecho delectivo por motivo de su dependencia de las drogas toxicas, estupefacientes o substancias psicotropicas ...";cfr. anche il parag.37 BtMG tedesco che prevede l'interruzione provvisoria del procedimento per il reo tossicodipendente che abbia intenzione di sottoporsi ad una terapia di recupero.

outcome of the care period cancels out the penalty and any other penal effect, a negative outcome provokes a revocation of the alternative measure.

Thus the Italian legislator comes into conformity with European legislation creating a so-called "scissor" system,[58] in the sense that the heavy punishment for pushing is countered by the waiving of imprisonment in the case of addicts who wish to undergo rehabilitation treatment.

However, the system does introduce some perplexities, both because the punishment for pushing often appears disproportionate to the actual wrong of the fact and therefore tends to assume a symbolic value, and because the drug addict does not have the true freedom of choice[59] which is one of the essential factors for a positive outcome of the treatment,[60] the choice is in all respects a "compulsory" one. The real problem is that the subject has committed a crime which demands the use of compulsory methods. Nevertheless one gets the impression that the possibility of falling back on the alternative is only a "temporary measure", in force until the imputability section is completely revised, and the problem can thus be placed in the more suitable area of security measures.

3. The Role of Private Doctors In Prescribing Controlled Drugs

Italian legislation on narcotics has imposed a series of obligations on doctors regarding the controls on prescription of drugs for therapeutic use.

These controls forbid, amongst other things, the Health Directors of hospitals, surgeries, institutes and nursing homes in general to purchase a substantially greater quantity of narcotic substances than that normally required by the institute, as laid out in article 42.

Moreover, as we have already seen with regard to the definition of the concept of a "modest quantity", article 43 requires that the doctors prescribing narcotics

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58 Cfr. Hassemer, W.: La prevenzione nel diritto penale. Dei Delitti e delle Pene 3 (1986), p.424.

59 Modona, N.: Premessa al commento della legge 22/4/85 n.144. La legislazione penale 1 (1986), p.22.

60 Art.47 L.26/7/75 n.354,c.II "L'affidamento è revocato qualora il comportamento del soggetto, contrario alla legge o alle prescrizioni dettate, appaia incompatibile con la prosecuzione della prova", c.12 "L'esito positivo del periodo di prova estingue la pena e ogni altro effetto penale".

for therapeutic purposes do not prescribe more daily doses than for a period of up to eight days. Violation of these regulations, which do not effect the obligations of the personal doctor for drug prescription,[61] is punishable only with a fine, and therefore, under the recent law of 24/12/1981, has been depenalized to administrative illegality. Under the reign of law n.706 of 24/12/1975 the situation was different. Indeed any law concerning the discipline of production, trade, and use of narcotic substances and compounds was expressly excluded from depenalization. So, until 1981 both the prescription of drug doses which exceeded eight days' requirements, and the storage of a quantity of drugs which substantially exceeded that necessary for treatment, was considered an offence.

After the law of 24/11/1981, **only** the possession of quantities not considered to be modest was considered a serious action and therefore deserving punishment.

Ultimately the actions of a doctor who prescribes doses above those required for eight days, are no longer seen by the legislator as damaging the objective good of the welfare he/she is responsible for, as are the actions of doctors holding quantities of drugs which appreciably exceed those necessary for treatment.

4. Support Programmes For Drug Addicts

4.1 Ambulatory or Otherwise; with Particular Reference to the Penal System

The Italian law of 1975 delineates a special apprcach to the problem of therapy for a drug addict who, as we have already seen, is not subject to punishment if he/she possesses or purchases modest quantities of narcotics for personal use. It is expressly forbidden to offer drug addicts therapy and rehabilitation programmes in psychological hospitals and it is set down that any treatment programmes must be carried out in normal hospitals. Document XI of the law is expressly dedicated to preventive, curative and rehabilitative processes. In article 95 is recognition of the addict's right to choose to undergo diagnostic tests and therapy in the hospital or clinic of his/her own choice; moreover the individual's right to withhold his/her identity prevails over the potential interest of the State in

61 Art.43 L.22 dicembre 1975 n.685 "I medici chirurgici ed i medici veterinari che prescrivono preparazioni di cui alle tabelle I, II, III previste dall'articolo 12, debbono indicare chiaramente nelle ricette previste dal comma secondo del presente articolo, che devono essere scritte con mezzo indelebile, il cognome, il nome e la residenza dell'ammalato al quale le rilasciano ovvero del proprietario dell'animale ammalato; segnarvi in tutte lettere la dose prescritta e la indicazione del modo e dei tempi di somministrazione; apporre sulla prescrizione stessa la data e la firma".

knowing, in the interests of public security, which individuals are involved in the consumption of drugs.

It should nevertheless be stated that the health services have a precise obligation to indicate persons whose medical check ups reveal them to be addicts to one of the regional centres provided for under article 90.[62] The interested party is however to be notified of his option to undergo treatment and maintains his anonymity. Thus the legislator tries to persuade the drug abuser to enter a therapy programme, with the guarantee that it remains unnecessary to provide any personal details; in cases where persons are unwilling to undergo treatment, however, compulsory hospitalization may be enforced by a magistrate's order. Indeed, when the Court ascertains that the drug abuser does not wish to undergo treatment, even upon the doctor's invitation, and when the need for therapy is recognized, the Court can order hospitalization for an unlimited period, that which is necessary for the recovery and the reintroduction of the addict into society.

Ultimately the Court can take measures which restrict personal liberty, i.e. hospitalization, based upon the presupposition that the individual is not subject to punishment under article 80 of the 1975 law, and without any guarantee of an effective defence due to the very nature of the procedure.[63]

The contradiction in the present law is blatant. On the one hand it provides depenalization for the use of narcotics, while on the other, where consumption is presumed, it obliges the Court to order actions which restrict personal liberty. The choice of legislative policy made by the legislator in 1975 is clear: provision of an instance not subject to punishment for the consumption of narcotics, but **imposition** of rehabilitative therapy to safeguard the individual's health, even at the cost of eliminating his/her personal liberty. And yet, if this is true, then it is even more important that the principle of safeguarding the option of technical defence for the interested party should be protected. The balance between the two aforementioned values appears both very delicate and very difficult to resolve. The legislator in 1975 did not however take this into consideration,and, for the sake of rapidity, respect for the technical debate was sacrificed. On this subject, the question of the Constitutional illegitimacy of article 100 of this law, regarding

62 Art.96 legge 685/75 "L'esercente la professione medica che visuta o assiste persona che fa uso personale non terapeutico di sostanze stupefacenti o psicotrope deve farne segnalazione ad uno dei centri di cui all'articolo 90. L'esercente la professione medica, prima di procedere alla segnalazione, deve interpellare l'interessato se intende sottoporsi a cura conservando o meno l'anonimato secondo le disposizioni dell'articolo precedente".

63 Art.99, "Il pretore che riceve le segnalazioni di cui agli articoli 96 e 97, nonchè nella ipotesi prevista dal terzo comma del precedente articolo, sentito l'interessato e assunte, se necessario, le opportune informazioni, qualora ne accerti la necessità e l'urgenza, adotta, con decreto motivato, i provvedimenti indicati nell'articolo 100 e in ogni caso trasmette immediatamente gli atti al tribunale competente".

articles 13 and 24 of the Constitution, has been raised:[64] "there is no provision for the compulsory technical assistance of a defendant in the procedure relative to those Court actions which may result in orders restricting personal liberty." The Constitutional Court declared the appeal unfounded, basing its opinion upon specific jurisprudence where the unviolable right of defence as guaranteed by article 24 of the Constitution does not require that its practice be disciplined in an identical manner in every type of procedure and in every phase of a trial.[65] **It must nevertheless and above all be asked how an administrative procedure is permitted to limit the personal liberty of an individual.**

Indeed, "such compulsory actions have diminished in number (since the law came into force), to the extent that we can report that in Italy the treatment of addiction to opiates is almost always carried out on a voluntary basis with the guarantee of anonymity".[66]

Lastly it is necessary to examine the characteristics of the therapy and rehabilitation programmes of drug addicts, in order to establish the fact that they are emerging within the Italian legislative panorama, in part also with reference to the recent perspectives on liberalization (or rather the controlled distribution of hard drugs).

The main guideline governing the treatment programmes for the addict is the **duty to ensure therapy**, i.e. the doctor's **duty** to provide treatment which has effective **therapeutic** effects.

Starting from such a premise, the doubt arises as to whether treatment which consists of the controlled administration of heroin, morphine or methadone falls in line with the aforementioned therapeutic duties. Recent studies have shown that the maintenance treatment of drug addicts by means of heroin, morphine or other opiates employed to prevent the effects of a withdrawal crisis, determines the "tolerance" level and the consequent need for the addict to constantly increase his/her dose to create the same effects gained initially with minimal doses.[67]

This type of treatment does not eliminate the addict's need to take in drugs at an ever increasing rate.[68]

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64 Di Gennaro, op.cit., p.327.

65 Corte Constituzionale, sent.n.160 del 1982.

66 Ferracuti, B.: Aspetti giuridici, amministrativi e penali delle tossicodipendenze, considerazioni critiche e metodolo giche sulla liceità ed efficacia del trattamento In: AA.VV., Alcoolismo, tossicodipendenze e criminalità. Milano 1988, p.117.

67 Dole: Addictive behaviour. Scientific American 243 (1980), pp.138-150.

68 Sesso-Fucci-Quaranta-De Francisci-Manna: Il problema della somministrazione di stupefacenti ai drogati in relazione al problema del dovere di terapia. Intervento all'International Congress on Drugs and Alcohol, Gerusalemme 13-18 settembre 1981. In: Annali di diritto della medicina 1984 (in corso di pubblicazione), p.16.

So, even if maintenance therapy has the effect of halting or attenuating the criminal phenomenon on the one hand, on the other it has a no good effect on the health of the patient.[69]

The same may be said for the use of methadone. It is a well known fact[70] that treatment with this substance involves administering substantial doses which block the addicts desire for other drugs and, as specialists working with a programme for the cure of addicts with the methadone method[71] have admitted the treatment programme give many problems. In order to eliminate the desire to take in heroin the "methadone maintenance" programme consists of a permanent, life-time regime with foreseeable consequences upon the health of the patients undergoing the treatment.[72] The duty of ensuring therapy is therefore not fulfilled, as it would be through the battle against the biological mechanisms which provoke the pathology of drug intake.

Following recent medical discoveries, there is now the possibility of detoxicating the addict by means of non-opiate medicines which succeed in avoiding the addiction syndrome or in eliminating it.

Qualified research has revealed that the immediate cause of the withdrawal crisis and thus of the addicts need to take action to procure the drug, lies in the hyperactivity of the noradrenergic neurons which is induced by a lack of endorphine or encephaline caused in turn by the prolonged intake of opiates and isogens into the human organism.[73]

It has been proved that clonadine, a non-opiate medicine is suitable for halting the hyperactivity of the noradrenergic neurons, fundamental cause of the withdrawal syndrome.[74]

The validity of this substance in the detoxicating treatment of the addict has been shown by the positive results achieved after administration to some patients.[75]

At the present stage in pharmaceutical research the clonidine treatment can

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69 Sesso-Fucci-Quaranta-De Francisci-Manna: op.ult.cit., p.13.

70 Dole, Nyswander: A medical treatment for diacetylmorphine addiction. J.A.M.A. 193 (1965), pp.646-650.

71 Dole: 1980.

72 Sesso-Fucci-Quaranta-De Francisci-Manna 1984, p.7.

73 Gold, M.G., Redmond, J.F., Kleber, H.: Clonidine bloks acute opiate withdrawal symptoms. The Lancet 1978, II, p.601.

74 De Benedetti, Massaro, Robertelli, Vincenzi: La clonidina nella terapia delle tossicomanie. Federazione Medica 1980, pp.38-80; Piperno, Sacchetti, Fanfoni, Biagi: Considerazioni sui diversi impieghi terapeutici della clonidina. Contributo personale. Acta medica latina I (1980), pp.116-119; Masini-Luciani-Blandina, Mannaioni: Clonidine and naloxone for rapid opiate detoxication: comparison between treatments. Clinical toxicology 9 (1981).

75 Masini, Luciani, Blandina, Mannaioni: op.cit.l.c.

be considered a slightly improved therapy compared to treatment with opiates. It does not create dependence, has no negative side effects and gives rapid reliable results of detoxication. Thus therapies that the doctor has to follow as part of his/her duty in the detoxication of addicts without or after the withdrawal syndrome, must either be carried out by means of non-opiate medicines, or by non-pharmacological means, which according to data from medical science, are, or will be, effective methods.

Furthermore the Italian Ministry of Health has explicitly declared in two decrees (7th August and 10 October 1980 respectively): "pharmacological treatment with products producing an analgesic-analcoholic effect should be considered as subsidiary courses of action, **dictated by necessity**".[76]

4.2 Therapeutic Communities

As a parallel to medical treatment, another form of "dealing with" the drug addict is being developed in Italy. Proponents of this form of treatment hope to undertake programmes which find a way out from drugs: the therapeutic communities.[77]

This attempt is based on different suppositions than those upon which the chemical-pharmacological method is founded. Indeed, according to the most fervent supporters of the proposal, an addict's reintroduction into society cannot come about **only** through pharmacological treatment, but **also** through work and above all life in a community with the constant assistance of specialists. The attempts to create alternative welfare structures, which deserve some attention for a variety of motives, cannot be exempted from a few, brief, critical considerations on the therapeutic methods they adopt, especially regarding the restrictions of personal liberty imposed by some of the directors of these communities.[78]

If the basic factor in the successful recovery of an addict is the voluntary decision to undergo treatment, then any form of coercion would render therapy useless. It should be stated that if the value of health is to prevail over that of personal liberty, then such actions can be considered justifiable. The basic problem is to find the balance between the two values, both of which are protected by the Constitution.

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76 Cfr.art.I, comma I, del decreto 7 agosto 1980 (Gazz.Uff. II agosto 1980 n.219, p.6771) e 5 cpv. del preambolo del decreto 10 ottobre 1980 (Gazz.Uff. 13 ottobre 1980, n.281, p.8604).

77 Gelmini, P.: Struttura, regole ed obiettivi di una comunità terapeutica. In: AA.VV. La droga. Ancona 1981, pp.181.

78 Bozzo, B.: L'anomalia e la norma. Antigone I, 1985.

5. Law Enforcement Characteristics of Topics such as Sentencing, Waiving Prosecutions, Prison Capacity and Internal Prison Regime

Italian legislation on narcotics has a different approach to the drug problem than that of other European countries.[79] Although in almost all regulations the consumption of narcotics is not subject to punishment, in only a few countries is the exemption from penalty established in general and abstract, and therefore not subject to single legislative decisions.[80] Thus our legislator does not consider the consumption or the purchase of modest quantities of drug for personal use **deserving of punishment**, even if, as we have already seen,[81] the case in point of article 80 creates several interpretive problems as far as regards a total definition of "modest quantity". The total "liberalization" of the consumption of narcotics has not, however, been realized. In the very same article there are provisions for the seizure and confiscation of the drugs held which to all effects means the activity is treated as illegal, even though not subject to punishment.

As far as regards the problem of crimes committed under the influence of narcotics, the Italian legislator adopts the stance of providing the choice of **treatment instead of punishment**, not under the phase of recognition of the crime, but in the executive phase of passing sentence. So prosecution is not waived, but when the sentence is passed the interested party can express the choice to undergo rehabilitation treatment and will then be placed under the care of the social services. This possibility is available under two conditions, the subject must choose the option, and the sentence passed cannot be over a total of detention for three years imprisonment. According to some parts of the doctrine this type of choice between imprisonment and being placed in the care of the social services is in fact a false alternative in that: "The choice is not free but is instrumental in the opportunity offered to avoid the worst option i.e. imprisonment".[82]

However, even though such a procedure could in effect appear to be a pretence, the rationale must be agreed with: the attempt to propose an alternative to prison to persons who faced with a sentence of detention, are truly convinced about, and motivated to follow a social recovery programme by means of suitable therapy. It should be noted that the period spent in the care of the social services counts as detention as long as the treatment has a positive outcome. Indeed it

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79 Cfr. Meyer, J.: op.ult.cit.
80 Cfr. la legge spagnola del 1987 art.3.
81 Cfr. cap.I nota n.17.
82 Modona, N.: Premessa commento L.21/6/1985, n.297. Legislazione penale, 1986, I, p.22.

is expressly set down that if the behaviour of the subject appears to be incompatible with the progress of the treatment, in that he/she acts against the law or the indications laid down by the judge regarding the care period, then the programme is revoked. In the case of a positive outcome the period of care cancels out the sentence period and any other penal effects.[83]

Apart from criticisms of such a regulation,[84] it should also be revealed that Italian legislation regarding narcotics introduces two approaches to the drug problem. As far as regards consumption of modest quantities for personal use, a policy of not punishing, **in a general and abstract sense**, such behaviour has been opted for. Considering instead the treatment of subjects involved in offenses connected to the state of drug addiction, the first method has not been chosen, perhaps due to the "conservative" motives of the Penal Code,[85] instead a system of "waiving reclusion" has been adopted through placing the subject in the care of the social services if he/she so chooses.[86] For the latter aspect each case must be individually assessed in order to determine the particular type of measures necessary for the guilty party who truly intends to mend his ways.

At this point it is necessary to examine the prison's capacity as a place of recovery for the addict, besides being a compensational "space" for criminal activity. As a preliminary it should be noted that when the substitute measure of placing the subject in the care of the social services is not possible, article 4 of the law of 21/6/1985 requires that the therapeutic treatment for recovery should be carried out within the structure of the prison.

Furthermore, article 84 of law 685/75 provides that any prisoner in preventive custody or serving his/her sentence who is a habitual drug or alcohol abuser, must receive the necessary therapy, necessary for his rehabilitation within suitable equipped sections of the prison. The problem of the addict in prison is a very serious one; there are two alternatives: isolation of the addict from the other prisoners, thus running the risk of creating a form of ghetto, and having them considered as patients, different from the others, or; introducing them into the normal prison circuit with certain failure of any type of therapeutic programme, due to the proximity of elements who, with their minds set on the possibility of

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83 Art.47 1. 26/7/75, n.354 dispone al c.12 "L'esito positivo del periodo di prova estingue la pena e ogni altro effetto penale".

84 Fassone, E.: Commento art.4 ter. L.21/6/85, n.297. Legislazione penale, I/1986, p.46.

85 Vedi sopra p.20-22.

86 Art.47 bis. L.26/7/1975, n.354, c.I "Se la pena detentiva inflitta entro il limite di cui al comma I dell'articolo 47 (Tre anni) deve essere inflitta nei confronti di persona tossicodipendente o alcooldipendente che abbia in corso un programma di recupero o che ad esso intenda sottoporsi l'interessato può chiedere in ogni momento di essere affidato in prova al servizio sociale ...".

easy profits in the future, could bring the ex-addict back to the state of need created by his/her desire for the drug.

Moreover it has been revealed that 71% of Italian prison institutions do not have specialized staff nor suitable facilities for accommodating the addicts, who often show violent behaviour in their refusal of their state of imprisonment.[87] It can thus be assumed that at this moment in time there are very few drug addicts who would have the opportunity of receiving suitable care and treatment in departments of a prison.

Nevertheless we must return to the problem posed initially; if it were possible to carry out rehabilitative treatment in prison, with trained personnel and external conventions with regional hospital directors, in what way would it be possible to introduce the addict into the prison and at the same time avoid his/her contact with the criminal hierarchies there? The creation of special sections where the addicts could be isolated would be contrary to the prison reform spirit of 1975, under which an integration of the diverse personalities is a necessary factor in the effective treatment of prisoners. By creating ghettoes the addict would be reduced to be no more than a patient, and would suffer a consequent feeling of no longer being responsible for any treatment programmes other than clinical ones.[88]

On this subject a possible hypothesis could be a different way of considering the prison-drug addict relationship, within the American model known **Stay'n Out.**[89] Through such a system the prison could take on the role of an immediate emergency area for addicts who have committed offenses and, consequently, a period of preparation for the interested parties who would then have the possibility of undergoing a rehabilitative programme in a therapeutic community.

To conclude, the relationship prison-prosecuted addict is one of the most difficult and delicate to resolve. It is necessary to respect the **demands** of security and the objectives set out in the 1975 prison reform on the one hand, and the factors necessary for the recovery of the addict which necessitates maintenance of a certain distance from other persons involved in the traffic of drugs.

6. Recent Tendencies in Legislative Reform

Before considering the recent Italian law proposals for modifications to law 685/75, it is necessary to reflect briefly upon the global decisions opted for in

87 Rossi, E.: Tossicodipendenti in carcere. In: Psichiatria, tossico dipendenze, perizia, a cura di Basaglia e Giannichedda. CRS, Milano 1987, p.271.

88 Modona, N.: op.ult.cit., p.29.

89 Modona, N.: op.loc.ult.cit.

penal policy concerning narcotics, in order to seek out the most valid regulations on the subject. In Italy the exclusive recourse to penal sanctions for the total repression of the narcotic phenomenon was represented by the 1954 norms.[90] Though this was the first global legislative contribution on this matter, the 1954 law was not completely satisfactory, due to the fact that it in fact neglected to consider the problem of the abuser, and punished him/her as it punished the pusher. Thus the "patient" and "criminal" were rendered equal in the eyes of the law "quod poenam". It was in fact through refusal of this "pan-punitive" concept that a far-reaching reform based on two directives was born. On the one hand law 685/75 which was one of the first in Europe to introduce a general instance not subject to punishment for the abuser, while maintaining the "threat of punishment" for the pusher. On the other hand the recent reform of prison orders in 1986, which established the alternative of "treatment instead of punishment" for the convicted addict who wished to undergo rehabilitative treatment.

Thus we have the establishment of a system which, criticisms regarding internal "contradictions"[91] aside, provides an example of legislative policy on narcotics.

On an international level we can observe the development of initiatives tending towards a total repression of both drug consumption and pushing,[92] and the elimination of any possible distinction between soft and hard drugs.

A return to "pan-penalization" is therefore apparent, and can also be seen on a European scale, perhaps dictated by the high emotive charge which is the response to the unquestionable gravity of the spread of narcotics throughout the world. Yet, one must ask, can a system based on "emotivity" and on the symbolic power of regulations respond to the general principles of penal law? Essentially, a return to the past would mean a return to the concept of a purely repressive penal system. Instead, and here is the crux of the matter, penal law must act in the ambit of general prevention, that is, as an extreme ratium after trying and failing with alternative methods of care. At present in Italy law proposals as a whole appear to be oriented towards a broader depenalization and liberalization of consumption, at least as far as concerns "soft" drugs.

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90 Cfr. antea, cap. I.

91 Cfr. antea.

92 Cfr. Diez Ripolles, J.L.: La politica sobre drogas en Espana, a la luz de las tendencias internacionales. Evolucion reciente. Annuario de Derecho Penal y Ciencias Penales. "Podemos considerar a las resoluciones 39/141 y 39/142 de la Asamblea General de las Naciones Unidas, adoptadas el 14 de diciembre de 1984, como el inicio de una nuova politica sobre drogas del citado organismo que va a poseer caracteres peculiares respecto a las etapas anteriores. (...) Interesante resulta destacar, igualmente, la ausencia de distinciones entre la demanda y el consumo de drogas por un lado y su produccion y trafico por otro, a la hora de calificar todos esos comportamentos como actividades ilicitas y criminales, necesitadas de prevencion y de sancion", p.348.

A tendency directed towards the penal repression of consumption as an activity which, at least potentially, leads to an increase in the supply of drugs in Italy[93] can however be noted.

Thus, to conclude, the opinion prevails, at least in the greater part of proposals, that the law 1975 law should be improved. This position therefore runs counter to international movements, with the refusal to return to the "pan-penalization" of the phenomenon known as "drugs".

7. The Possibility of Legalizing the Use of Soft and Hard Drugs

When considering the possibility of legalizing the use of hard drugs a distinction must be made between total liberalization, and their administration or controlled distribution. There is no reference made to the possibility of liberalizing the use of hard drugs in proposals to reform the present law. This is in part because there is the tendency to retain the formula of depenalization for the personal use of modest quantities of narcotics which actually comes from law 685/75. It would be necessary to make a case apart for proposals of the controlled administration of heroin. Such motions[94] essentially revolved around the outlook of the anglo-

93 Cfr. Proposta di legge n.1852, presentata alla Camera dei Deputati il 3 luglio 1980, art.10 (art. 80 quater legge 685/75) "Chiunque in luogo pubblico o aperto al pubblico è colto in stato di inebetimento per l'assunzione di sostanze stupefacenti o psicotrope, è punito con l'arresto fino a sei mesi o con l'ammenda da lire cinquantamila a lire due milioni"; Proposta di legge di iniziativa popolare sul tema "Norme penali contro il traffico degli stupefacenti e trattamento dei tossicodipendenti": ad opera della LE.N.A.D. (Lega Nazionale Antidroga), art. I "Chiunque, senza autorizzazione, fabbrica, estrae, coltiva, produce, detiene, offre, pone in vendita, acquista, vende, distribuisce, cede, riceve, procura ad altri, trasporta, importa, esporta, passa in transito nel territorio dello Stato, a quilsiasi titolo, sostanze stupefacenti di cui alle tabelle I, II, IV dell'art.12 della legge 22/12/1975 n.685, è punito con la reclusione da 6 a 12 anni. La pena è della reclusione da 4 a 8 anni quando il fatto ha per oggetto modiche quantità e l'attività è esercitata in modo non abituale".

94 Disegno di Legge n.1191, VIII legislatura, comunicato alla presidenza del Senato della Repubblica il 27 novembre 1980, art.3,"L'eroina corrispondente alla deniminazione scientifica di diacetil-morfina è inclusa nella farmacopea ufficiale della Repubblica italiana. La prescrizione medica e la somministrazione della predetta sostanze possono avvenire esclusivamente secondo le modalità previste dalla presente legge"., in Atti Parlamentari VIII Leg. Senato, n.1191; Proposta di Legge n.1982, VIII legislatura, presentata alla Camera dei Deputati il 28 agosto 1980, art.46, "Per il periodo di un anno dall'entrata in vigore della presente legge, il Ministero della Sanità, sentito l'Istituto superiore di sanità e le Regioni interessate, può autorizzare in determinati servizi delle Unità sanitarie locali, in particolari casi e comunque nei confronti di soggetti la cui tossicodipendenza sia accertata, la sperimentazione con il consenso dei tossicodipendenti o dietro loro esplicita richiesta, della somministrazione diretta e controllata di sostanze oppiacee naturali o di loro sostitutivi", in Atti Parlamentari Camera dei Deputati VIII leg.n.1982.

saxon system, previously experienced up to the end of the 1900s, where doctors could legally prescribe opiates to their addicted patients.[95] The chief objective behind this proposal can be seen as the desire to put an end to the so-called "black-market",with a consequent block in the profits gained by the large criminal organizations involved. People have considered however that this objective was not completely achieved by the anglo-saxon system. With a diminishing black market and a consequent improvement of the quality of the substances employed, came the birth of a so-called "grey market", in other words, the illegal sale of the substance remaining after the addict's administration of the drug, or else the doctor's administration of quantities exceeding those necessary for the patient's treatment.

People have also noted that the proposal of creating special centres where heroin would be administered, does, as revealed by the proposals themselves, offer the possibility to check on the correct use of the substance on the one hand, but, on the other, it has limitations in that it prevents the addict from living a normal life due to his/her constant need to turn to these centres for the "daily fix".[96] The most radical motions, those more closely linked to the anglo-saxon system, have developed from this point, with proposals of the distribution of drugs in pharmacies subject to their inclusion in the Official Pharmacopoeia, and upon presentation of a prescription by a private or health service doctor.[97] Distribution in this manner however, people have noted, while offering the advantage of permitting the addict to organise his/her own time, does present an increased risk of incorrect usage of the substance.[98] The divergence in the opinions has until now impeded the conversion in law of these purposes - even if the problem has been reported to the mass-media attention also recently.

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95 Cfr. Solivetti, L.M.: Il problema della somministrazione legale della droga nell'esperienza britannica. Rassegna penitenziaria criminologica. 1980, 1-2, p.154.

96 Cfr. Prima, F.: Tossicodipendenze e legislazione: un'analisi comparata delle proposte di modifica della legge 22/12/1975 N.685. Sociologia del diritto, I, 1982, p.128.

97 Disegno di Legge n.579, VIII legislatura, comunicato alla Presidenza del Senato il 13 dicembre 1979, art.5 (Art.70 quinquies L.685/75), "Sulla base degli accertamenti, il servizio pubblico nel cui territorio la persona risiede rilascia, su richiesta dell'interessato, una tessera personale, conforme al modello previsto dall'allegato A alla presente legge, valida per non più di tre mesi e rinnovabile anche prima della scadenza previ nuovi accertamenti. Il possesso della tessera autorizza a richiedere direttamente in farmacia una quantità di sostanze stupefacenti e psicotrope indicata nella tessera. E' tuttavia consentito rivolgersi a un medico di fiducia il quale può rilasciare una ricetta nei modi e secondo le forme previste dall'articolo 43, annullando le caselle corrispondenti ai giorni di efficacia della ricetta", in Atti Parlamentari Senato della Repubblica, VIII legislatura, n.579.

98 Prina, op.cit., p.128.

In the light of what has already been stated concerning recent progress made in the field of pharmaceuticals with the discovery of substances which succeed in blocking withdrawal symptoms without provoking addiction,[99] one must ask-though the rationale of the projects was completely different-if the controlled administration of opiates (heroin, methadone) is still the best way as therapeutic system. This solution could be considered feasible as long as the research continues in order to discover the **perfect substance** to adopt in treatment, the possible key to the "clinical" solution to the problem of drug addiction.

A little better reception have instead found those legal projects which aim at liberalizing soft drugs, ie. cannabis indica.[100] The assimilation of soft drugs together with "hard" drugs appears to be based on a fundamental cultural reasoning: the absence of the use of drugs as a part of Western culture, but the tolerance of alcohol and tobacco, which are of course produced by this culture. No mention was made in law 685/75 or in the various law proposals[101] of the inherent danger of the substances regarding their addictive properties.[102] As some research has pointed out, if the concept of drugs is to be associated with that of addiction, and if soft drugs do not provoke such effects while the damage they cause is the same as that of "tolerated" substances, then it should follow that there are no obstacles in the way of liberalizing "cannabis indica" due to the very fact that it has no damaging effect on health.[103] Looking at it from a different angle, Penal Law in this sector would risk offering a purely "moralizing" efficacy. That is to say, it would be a **guide** to human behaviour and its **wrongness** which, as a mere means of social control, would be contrary to the modern concepts which currently prevail in this branch of law. Going back to an analysis of the Italian law projects, it can be said that following and contrary to the so-called season of liberalization typical of the cultural phase of "faith" in special prevention,

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99 Cfr. antea, p.30-31.

100 Disegno di Legge n.313 VIII legislatura, comunicato alla presidenza del Senato della Repubblica il 6 ottobre 1979, art.I, "E'soppresso il n. 2 del primo comma dell'articolo 12 della legge 22 dicembre 1975 n.685 (tabella II) (nella tabella II devono essere indicate: la cannabis indica, i prodotti da essa ottenuti, le sostanze ottenibili per sintesi o semisintesi che siano ad essi riconducibili per struttura chimica o per effetto farmacologico, ad eccezione di quelle previste nella lettera f) della tabella I; b) le preparazioni contenet le sostanze di cui alla lettera precedente). Sono altresi soppresse dall'art.26 della medesima legge le parole "di piante di canapa indiana". E' altresi soppresso ogni altro riferimento alla tabella II) nel titolo VIII ed in ogni altra disposizione contenuta nella legge suddetta", in Atti Parlimentari VIII legislatura Senato della Repubblica, n.313.

101 Prina, op.cit., p.114.

102 Cfr. Diez Ripolles, op.cit., p.387.

103 Cfr., tra gli altri, Rapporto della New York Academy of Science; Chronic Cannabis USA (1976), Settimo Rapporto del National Institute on Drug Abuse: Marihuana and Health (1978), i cui dati principali sono riportati nella relazione al Disegno di Legge n.579, **cit.**; vedi però **contra**, sui danni dall'uso della marihuana, Relazione della Commissione parlamentare sugli stupefacenti della Camera dei Rappresentanti degli Stati Uniti (luglio 1979), in Senato della Repubblica - Servizio studi Ufficio documentazioni e ricerche, La legislazione straniera sulla droga, III, Roma 1980, p.295.

and in particular in re-education, there has come a "return" to what is considered the primary need for general prevention. In such an outlook therapeutic requirements, though justified, are included within a decidedly repressive framework.

In the context of repression of the drug phenomenon, we can note a law proposal (M.S.I.) which theoretically tends towards depenalizing the consumption of drugs, but in fact, with the provision of administrative sanctions for the adult drug consumer, returns to the concept of penalizing the entire drug phenomena. This also applies to the LE.N.A.D. (National Anti-Drug League) law project, where, regarding the proposal which later became law of the "treatment instead of punishment" formula,[104] we can witness the reappropriation of all the phases of the drug cycle into Penal Law procedures, with the consequent abolition of article 80 of law 685/75. The LE.N.A.D. project almost seems to anticipate the recent tendencies apparent on an international scale towards a "pan-penalization" of the drug phenomenon, but fortunately it has not been accepted by the Italian legislator, while "treatment instead of punishment" has. This last aspect can also come under some criticism for its lack of respect for the individual's wishes. However it is a solution which takes into consideration not only the fact that the subject has committed an offence, but, **for the time being at least**, also offers a better solution than the ever more improbable return to the olden days. In general, it can be pointed out that for the question of drugs as, for example, for that of the mentally ill, it is difficult to find an ontological valid solution. Any remedy, however, is influenced by the historical circumstances surrounding its formulation. A single text has eventually been drawn from the law projects examined, which is at the present time being studied in Parliament, and which only contains some partial modifications to the legislation now in force. The decree law of 24/1/1984 proposed by the government and still under parliamentary examination pays particular attention to halting international drug trafficking and to the provision of facilities for the support, recovery and social rehabilitation of addicts.[105]

The recognition of the role played by the therapeutic communities as a "social" vehicle for the addict's way out of the drug rings and their reintroduction into society is worthy of note. With regard to halting international trafficking, particular

104 Art.6,3co., proposta LE.N.A.D., "Il PM, il giudice istruttore, o il Pretore, quando ricorre l'ipotesi di cui al I comma, o quando verifica che il reato di cui al 2 comma è stato commesso direttamente o indirettamente in connessione con la tossicodipendenza, anche al solo fine di procurarsi il denaro per l'acquisto della sostanza stupefacente, e l'imputato risulta tossicodipendente, dichiara l'immediata sospensione del procedimento se i fatti non appaiono di particolare gravità e per i quali comunque la pena in concreto può essere contenuta nel limite dei tre anni di reclusione e ove non si tratti di reati contro l'incolumità fisica." Art.7.Ico., "Le persone nei cui confronti il procedimento penale è sospeso ai sensi dell'articolo precedente, sono dichiarate non punibili quando si sottopongono al trattamento socio-sanitario stabilito dal giudice a norma degli artt. di cui al capo II di questa legge."; cfr.l'art.47 bis L.26/7/75 n.354 cit.

105 Cfr. Lilliu, L.: La droga. Analisi socio-giuridica. Milano 1988, p.237.

attention is dedicated to cooperation between the Italian and foreign police forces, and, as part of a concerted effort with the countries concerned, to subsidies to be offered to coca and poppy farmers in return for the cultivation of alternative crops.

To conclude, an analysis of the reform projects concerning the narcotics legislation now in force; shows that the present tendency **is** that of reforming law 685/75, without, until now, a big consideration of the proposals emerging on an international level which tend towards a total repression of the drug phenomenon, but instead with an attempt, where it is possible, to effectuate a progressive liberalization of above all the substances which do not have the addictive properties which endanger human health, and anyway to extent the "treatment instead of punishment" system more and more.

8. Epidemiological Aspects of Drug Use

Criminological research into to the correlation between the use and abuse of drugs, considering the interdependence of the problems and the control of drugs.

Depth studies have been carried out to develop the most realistic picture of diffusion in various countries and to examine how far the drug phenomenon is tied to the severity of the laws. As far as regards the gravity of the problem, bearing in mind the analogies and geographic, socio-cultural characteristics of each area, this would appear to be more or less similar in all the countries examined.[106] while there are differences in the results on how the legislative systems operate.

In Italy the problem would appear to be extremely serious, and yet here there is one of the most lenient punitive systems in force. The complete system however operates at only an intermediate level of efficiency, as in Italy the whole range of legislative activity regarding the drug phenomenon is perceived as being stricter than it actually is.

From this research into the problem of the epidemic diffusion of narcotics, it would appear that there tends to be an aggravation of the phenomenon whenever a punitive system is less severe, whereas efficiency increases where the system actions are harder.

When we refer to the severity of a system, we are clearly not referring to one which is heavily repressive, but to the way in which it is **perceived**.

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106 Il quadro preso in considerazione dalla ricerca comprende: Argentina, Brasile, Costarica, Giappone, Giordania, Italia, Malesia, New York State, Singapore e Svezia, cfr. Ferracuti, B.: Droga, Criminalità e Sistemi Sociolegali. Roma 1983, pp.189.

It has been possible to affirm that, despite apparent quantitative or formal differences in drug abuse in various countries, the addicts themselves show a large measure of affinity on a social, psychological and cultural level.

The socio-juridical systems of prevention, control, repression and treatment, vary widely in the countries studied, but the differences are more apparent than real, especially with regard to treatment.

It was further observed that the spread of drugs is less serious not in countries where the system is objectively more severe, but where this severity is **perceived** more clearly. This would lead to the conclusion that the level of information in circulation about the legal system is of great importance.[107]

The correlation between drug abuse and criminal behaviour, has been shown to be very close. However this is not so much dependent on the type of drug used by the criminal, as on the general spreading of crime on the one hand, and the formal aspects of drug addiction on the other.

As far as Italy is concerned, we can say that the phenomenon really only appeared in the latter half of the seventies. The huge appearance of drugs in those years can perhaps be considered in relation to the youth uprisings as the substances used were marihuana, L.S.D. and amphetamines, and at the time there was the widespread opinion that the human psyche could be liberated by broadening the limits of consciousness. It was the disappointments that followed that led to the diffusion of other types of drugs.

It is a sad fact that the phenomenon of juvenile addiction now extends over a wide area. In Italy it appears that there are over one hundred thousand subjects addicted to hard drugs, in particular heroin, and many more sporadically consume drugs. The figures for marihuana and hashish are very high, particularly among males from 14 - 30 years of age.

The phenomenon is particularly widespread in large cities, but the situation in the provincial cities is also giving cause for alarm.

The gravity of the situation caused by the diffusion of drugs can be seen in the increased figures for deaths through drug abuse. In a comparison of the period 1973 - 1981 with the three year period from 1984 - 1986 we can see that in the first period 735 of such deaths were recorded,[108] with an average of 81 per year, while in the second period the average rose to 233, an increase of 300%.[109]

Another significant problem is that of persons arrested for crimes connected with drug abuse. Indeed, over half of these are pushers and the percentage has been rising constantly since the research was presented.

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107 Ferracuti, B.: op.ult.cit., pp.190-191.
108 Ibid., p.211.
109 Cfr. Lilliu, op.cit., p.41.

Official data referring to 1980 reveals the percentage of crimes committed under the influence of narcotics to be very low.[110] Nevertheless experts agree that in recent years there has been a parallel increase in certain criminal behaviour and the spreading of drugs.

In the past few years, however, the situation has developed to the point where it is totally unacceptable for a civilised country.[111] It is from this data that the desperate urgency of the problem of dealing with the convicted addict emerges; in Italy, as in other countries which each have their own procedural methods, the problem is resolved through the alternative of "treatment instead of punishment".

9. Conclusion: Towards a Liberalization

From an analysis of Italian legislation concerning narcotics which makes a comparison with the recent international tendencies and with other Europeans norms, the following conclusions may be drawn.

Our legislation was among the first in Europe to lay down a general and abstract case not subject to punishment for the possession of modest quantities of drugs for personal use. Thus there was the attempt to create a distinction between the patient and the pusher. The legislative rationale for the 1975 Law continued to prevail in the 1986 norm with the introduction of the choice between treatment or punishment for the convicted drug addict who declares him/herself willing to begin a course of detoxification.

Italian legislation is essentially based on a different concept from that underpinning recent international proposals ie. It devotes more attention to the special preventive function of Penal Law than to its purely repressive function.

What, therefore, are the implications for the legislator of the future?

The Conference in which we took part, showed clearly, in general, preventive terms the failure of a system founded on "prohibition". This type of system which emerged around the turn of the century, and applied to alcohol for a period in the U.S.A., is still with us today but with results which are, to say the least worrying.

Instead of producing some form of general or even special-preventive effect, it has led to an increase in criminal phenomena, in turn bringing about an increase in rigidity in legislation which, as can be noted in the U.S.A. in particular,[112] becomes a never ending upward spiral.

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110 Ferracuti, B. 1983, pp.219-220.

111 Cfr.nota 49.

112 Cfr. Wisotsky, M.: Recent Developments in the U.S.War on Drugs, prepared for the International Conference on Drug Policy at the Catholic University of Brabant in Tilburg, Netherlands, May 29, 1988, 1 ss (dattil).

From one point of view "prohibition" brought prosperity to the large criminal organizations which make their fortunes from the over-pricing of the substances due to the often exacerbated penal risk, in addition to the risk of business.

The overall effect is undoubtedly criminogenous, almost to the point of becoming a catalyst. Paradoxically it has also benefitted some producer countries: poor states living off a black economy.

It is obvious that the governments of these countries do not **formally** accept this side of their economy; in fact they generally adopt extremely repressive measures which may even include capital punishment,[113] and attempt to follow all possible routes towards a progressive agricultural conversion of the land dedicated to opium cultivation.

Nevertheless it is also clear that the criminal organizations in fact often succeed in avoiding these highly repressive systems and may actually profit from the "cost" of prohibition. Another point to be noted is the danger of possible links between criminal organizations and political "lobbies" with further risk of corruption which may even reach as far as the police force.[114]

One of the major victims of this system is the addict, forced to remain at the mercy of the pushers, and obliged to find increasingly large sums of money, often resorting to criminal activity, to purchase the substances at costs inflated by the illegal market. This is also the source of considerable financial and often moral damage to addicts' families, often reduced to poverty in their desperate attempt to help their sick relative. A further phenomenon witnessed is the **escalation** of repression, which also has its influence on legislation.

The U.S.A. provides a clear example of this whole situation.[115] Here, not only have there been recent proposals that the police forces work side by side with the armed forces in the "battle" against drugs,[116] but also even now, there are systems in operation which could, to say the least, be defined as "extra-ordinem", certainly from a European outlook. Aircraft carry out aerial photography of cocaine plantations, and even satellites such as Spacelab are also used. Confiscation is practiced extensively, under which huge yachts may be sequestered, even if the only finding is a few grams of the substances concerned, or even the stub of a cigarette containing Indian hemp, intended for personal use or at the very most for group use.

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113 Chavalit Yodmani: Lecture at the Int. Conference cit, June 1, 1988 (Secretary General of the Office of the Narcotics Control Board, Thailand).

114 Wiarda: Lecture at the Int. Conference, loc.ult.cit. (Chief Superintendent of Police in Utrecht).

115 Wisotsky, M.: op.loc.ult.cit.; ID, The American war on drugs, a lesson for Europe?, lecture at the Int. Conference, cit., June 3, 1988.

116 V. anche Guaita, Esercito contro i trafficanti, in Il Messaggero, 7/6/1988, p.3.

Further to this is the suggestion which has recently been reproposed that capital punishment should be introduced for large-scale pushers.[117] On the same subject there is the aforementioned project for new standards for legislation regarding narcotics, presented by the United Nations with the principle objective of **unifying** the legislation of all the member states with a resulting penal policy of a definitely repressive nature.

At this point the question may be asked as to what are the actual general-preventive results of a policy of "prohibition". It is well-known that the legitimacy of a system (penal) is in fact measured in terms of its "efficacy" (power of dissuasion) and thus in the prevention of further criminal activity (the so-called Principle of the punishment fitting the crime, or an effective punishment).[118]

From statistics available it is apparent that the U.S.A. for example, the main nation upholding this "approach" to the problem, there is not only no decrease in the consumption or traffic of drugs, but also there is a considerable and alarming increase in such activity connected to cocaine in particular.[119] This would explain, though not justify, the need to resort to increasingly repressive measures of control.

If this is in fact the case, then the failure and above all the loss of "legitimacy" of systems tied to prohibition is clear. Such systems have not only failed to produce the results hoped for, but have gone as far as to provoke effects which can only be described as criminogenous.

Thus, considering the fundamental failure of traditional methods, it is necessary to find **other** instruments of control instead of persisting in the idea of "repression". Some interesting perspectives tending towards a **liberalization** of the drug market emerged unanimously from the Conference.

Such proposals do not of course mean **total** liberty in this sector, but rather the replacement of traditional penal control with a different type of control of an administrative nature. This would be similar to that relating to the sale of other substances which are just as dangerous to health, such as tobacco and in particular alcohol.[120]

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117 Mozione del sen. D'Amato, non bocciata preliminarmente dal Senato degli Stati Uniti d'America. cfr. Riotta, Droga, una guerra Americana, in Corriere della Sera, 19/5/1988, p.4.

118 Cfr., per tutti, Roxin, Franz von Liszt und die kriminalpolitische Konzeption des Alternativentwurfes, in ZStW, 1969, pp.613 and pp.620,622; nonchè, nella dottrina italiana, Angioni: Contenuto e funzioni del concetto di bene giuridico. Milano 1983, pp.255.

119 L'import è ad es. passato dalle "40 metric tons" del 1980/81 alle "143 metric tons" (cioè tonnellate) del 1986/87. Cfr. le statistiche riportate da Wisotsky, M.: Recent, etc. cit., allegato. Per la statistica in materia di stupefacenti riguardante l'Italia e altrettanto non incoraggiante, v. il Messaggero, cit.

120 Cosi ad es., Christie, Some grave concerns vis-à-vis the international drug policy, Lecture at the Int. Conference, cit., June 3, 1988.

It has in fact been pointed out that the State cannot in fact **"prohibit"** the consumption of substances which put an individual's health at risk. Individual health is a right protected by the constitution, and as such also has its opposite, that is the right to non-health: it is the adult, capable individual's **freedom of choice** which must permit him/her to decide whether to adopt a lifestyle which is beneficial to his/her health or detrimental to it.[121] "Prohibition" in this sector would however have no effect, a fact which has been appreciated by many legislation which as we have seen have depenalized consumption.

It is however necessary to take things further: the intermediate system, the so-called "scissor system", presents various contradictions, particularly in legislative terms. Italian legislation offers an illustration of this problem both in the rather "vague" application of the case not subject to punishment, and the fact that legislation is obliged to resort to forms of presumption **iuris et di iure** which despite their unacceptability are nevertheless typical of a Penal Law of "suspicion".

The current fundamental problem is therefore the phenomenon of drug-pushing, and the correlative, desirable elimination of prohibition. Again this does not imply the acceptance of the so-called "Drug-free society", but the replacement of penal control of the sale of drugs which has proved ineffective and also damaging with an administrative type of control, the content and extension of which obviously be up to the discretion of the single legislator.

The question remains, however, of how much space this "new" system should devote to Penal Law.

In this regard the recent proposal of an authoritative Spanish doctrine appears worthy of consideration.[122] The proposal in fact tends towards maintenance of penal control for certain, well defined, **new** cases in point. This refers to the sale of narcotic substances to **minors**, to **persons exempt from conviction** or to persons **against their wishes**. In these cases the criminal activity would come under offenses against personal, or preferably moral, liberty. Other cases in point would concern the sale of adulterated narcotics, and this would consist of an offence which we could classify under those against public safety, along with many other types of fraud, e.g. those defined under "foodstuffs".

Penal control would therefore be limited only to certain new criminal hypotheses against moral liberty or public safety, while the main control would be in the hands of the administrative authorities.

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121 Cfr. Manna, A.: Profili penalistici del trattamento medico-chirurgico. Milano 1984, pp.67.

122 Diez-Ripolles, J.L.: Drug Policies in Western Europe. Spanish paper II, Lecture a the Int. Conference cit., pp.1; ID, La Politica sobre drogas en Espana, etc., loc.ult.cit.

All told this is an extremely ambitious project which, **in the short term**, would probably be difficult to put into operation, not only because of tendencies in the opposite direction manifested in the United Nations headquarters, but also because a liberalization policy requires as broad an agreement as possible between states, in order to avoid suffering the trafficking and other criminal activity which would be tied to any states intent on maintaining "prohibition". This is true to such an extent that at the Conference, in the recommendations of the final sitting, there emerged some "intermediate" proposals, that is, some suggestions which could be adopted immediately within the regulations of single states.[123]

This cannot however detract from the fact that the "perverse" effects of a system tied to "prohibition" must, by their very nature, lead to questions on the lasting "legitimacy" of such a system, in fact placed in doubt by its "inefficiency".

123 Le Recommendations risultano infatti cosi suddivise: a) Recommendations that address the general international situation; b) Measures that may immediately be taken at the national level.

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Current Trends in Dutch Opium Legislation

O. Anjewierden, LL.M. and Drs. J.M.A. van Atteveld LL.M.

Introduction

In this article some judicial aspects of the Dutch drug legislation are described and commented on. In selecting the topics in this article we have taken into account the contents of the contribution of A.M. van Kalmthout about the Dutch drug policies in this book.

1. The Opium Act: A Historical Outline

The origins of the current Opium Act date back to 1928. After The Netherlands, together with other states, had joined the International Opium Treaty on the 19th of February 1925 in Geneva,[1] the Dutch Opium Act needed to be made consistent with the provisions of this treaty. This was done by introducing the current 1928 Act.[2] Compared to the Opium Act of 1919, this new Act added cocaine to the list of prohibited drugs and penalized the importation, exportation and transit of (Indian) hemp products, a drug that did not fall under any prohibition rule until then.

In 1953 the Opium Act was again reformed.[3] The maximum sentence for drug crimes was raised from one year to four years' imprisonment. Not only the

1 This treaty substantially contributed to the Opium Convention of 1912, on which the 1919 Act was based.

2 The Act of May 12, 1928, Staatsblad (Stb.) 167, became effective on October 1, 1928.

3 These reforms came about after The Netherlands ratified the Protocol for amending the Treaty against the traffic in narcotic drugs in New York, on December 11, 1946.

importation, exportation and transit of hemp products, but also possession and consumption of hemp were made criminal offenses.

Until 1976 the Opium Act remained unchanged. This can be explained from the fact that there were hardly any drug crimes registered, neither with regard to drug traffic nor with regard to drug use. So far the Opium Act[4] played a minor role in the everyday practice of law enforcement.

However, in 1976 the Opium Act underwent a fundamental change, which can still be found back in the current Act. The inadequacy of the Act became clear through the ever-increasing rate of drug(-related) crimes. The foundations of these changes and of further trends in Dutch drug policy were laid down in a report of a working party on narcotics.[5] This working party made a number of important recommendations,[6] among which the urge for a legal distinction between drugs with unacceptable risks on the one hand and hemp products on the other, commonly referred to as hard drugs and soft drugs respectively. This recommendation was motivated by referring to the difference in pharmacological effects between the two drug categories. Furthermore, the report stated that drug legislation would certainly lose prestige if such an obvious difference would not be reflected in the laws. The working party also urged for more facilities to experiment with drug legislation and support programmes for drug addicts. It was suggested to examine the effects of an - experimental - legalization of soft drug traffic and -use in a particular area for a particular period of time.[7] In order to test the possibility of socially accepted drug use, support programmes should also include experiments with free distribution of drugs.[8] The results of these experiments should lead to well-founded recommendations for law reforms. Finally, the working party advised to make every effort to have these changes implemented on an international level, in particular by making the Single Convention consistent with the recommendations and the findings of the report. The majority of these recommendations, though more or less adapted, has been incorporated in the 1976 amendment.[9]

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4 In 1966 there were only 50 persons convicted under the Opium Act. In the years that followed this number increased to 653 in 1972. See Meijerink, K.H.: Recht en verdovende middelen. 's-Gravenhage 1974.

5 Achtergronden en risico's van druggebruik, Rapport van de werkgroep Verdovende Middelen (also called Rapport Baan, after its chairman), Staatsuitgeverij, 's-Gravenhage 1972.

6 l.c. p.63 et.seq. See pp.67-78 for criminal justice policy.

7 Rapport l.c. p.73.

8 Rapport l.c. p.69.

9 See Memorie van Toelichting to the amendment of the Opium Act and other relevant statutory provisions, Kamerstukken Tweede Kamer 1974/75, 13407, nrs 1-3, p.13.

2. The Present Drug Legislation

Rules and regulations with regard to drugs have never really been codified. Dutch drug legislation consists of a variety of relevant laws and regulations. The most important provisions are laid down in the Opium Act and the international treaties and will be discussed first. Other relevant provisions will be treated in the context of specific sections relating to drugs.[10]

2.1 International Treaties on Drugs

The Netherlands have joined a number of international drug treaties, the most important one being the Single Convention on Narcotic Drugs of 1961.[11] This treaty replaced as many as nine international agreements on drugs, into which The Netherlands had entered so far. Only in 1987 The Netherlands joined the Protocol to amend the Single Convention of 1972.[12] Although the Government has expressed its intention to do so, the Convention on psychotropic drugs of 1971[13] has not been entered into yet, because entry would require an amendment of the Opium Act.[14] It is also expected that The Netherlands will join the Convention against illicit traffic in narcotic drugs and psychotropic substances,[15] especially since they have actively contributed towards the making of this agreement. Essential to Dutch drug legislation is, finally, the Schengen Agreement.[16] Under this agreement The Netherlands are committed to bring drug legislation into line with that of the surrounding countries before 1990. This should

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10 Among the most relevant acts with regard to drug legislation are: Wet op de geneesmiddelenvoorziening July 28, 1958 Stb. 408 and other law enforcing provisions; Wegenverkeerswet December 13, 1935 Stb. 554, sections 26, 35 and 36; Algemene Wet inzake douane en accijnzen 1961 Stb. 31, Wetboek van Strafrecht en Strafvordering; Diergeneesmiddelenwet, Wet Uitoefening Diergeneeskunde; Wet Gevaarlijke Stoffen sections 1, 3, 4 and 7; Gezondheidswet; Uitleveringswet; Veiligheidswet 1934 Stb. 1934, 352. See Cremers Bijzondere Strafwetten (Arnhem) for: Besluiten op grond van de Opium Wet.

11 Single Convention on Narcotic Drugs, New York March 30, 1961, Trb 1963, 81. The Convention became operative in The Netherlands on August 15, 1965, introduced in the Act of March 2, 1964, Stb. 111.

12 Protocol to amend the Single Convention on Narcotic Drugs (1961) of March 25, 1972, Trb. 1980, 184, introduced in the act of November 19, 1986, Stb. 720 and became effective on June 28, 1987, Trb. 1987, 89.

13 Treaty on psychotropic drugs, Vienna, March 25, 1971.

14 See the budget of the Ministry of Justice 1988, Kamerstukken Tweede Kamer, 1987/88, 20.200 Chapter VI, nr.2 p.27.

15 See the Ministry of Justice Budget, l.c. pp.27-28. Press release nr.1774 of the Ministry of Justice on June 19, 1987, p.3. See also the article "Vertrouwen in Drugsbeleid" in Trouw, February 20, 1988.

16 The Schengen Agreement (Akkoord van Schengen), concluded between The Netherlands, Belgium, Luxembourg, Federal Republic of Germany and France, involves the gradual abolition of customs formalities on the communal borders.

be considered as a prelude to the aim of the E.C. member-states to realize a communal market by the end of 1992, as defined in the E.C. treaty.[17] More importantly the Schengen Agreement commits The Netherlands to more efficiently coordinate[18] the fight against the traffic in illicit drugs. This should de facto lead to a harmonization of European drug policies, as stated in a letter of the state secretary of foreign affairs to the (Dutch) House of Parliament.[19] The commitments of the so-called Schengen-countries have caused them to mutually exert pressure in order to strengthen negotiations on the fulfillment of their obligations. International pressure was also exerted before the Schengen Agreement came about, when Dutch drug policy with regard to the "Kokerjuffer" (see section 3.2.1 for more details on the "Kokerjuffer") was heavily criticized by both West-German and Swedish authorities. To what extent Dutch drug policy has been or will be influenced by international criticism may only be guessed at. Recent statements of the minister of justice[20] as well as police action in several internationally eye-catching cases, however, suggest that there is a growing tendency to submit to foreign pressure. How else can we satisfactorily explain the obvious inconsistencies in the drugs policy pursued so far?

2.2 The Opium Act

2.2.1 Distinction Between Hard and Soft Drugs and the Respective Sanctions

With regard to drug crimes the Opium Act makes a distinction between hard drugs and soft drugs.[21] The same distinction can be found in list I and II added to the Opium Act. These lists give an exhaustive account of the drugs that fall under the operation of the Act. Section 2 penalizes the import, export, preparation, sale, delivery, distribution, transport, possession and manufacturing of hard drugs, as defined in list I. The same does section 3 with criminal acts relating to soft drugs

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17 Section 8a of the E.E.C. treaty of March 25, 1957, Rome, Trb. 1957, 91. This section has been added to the E.E.C. treaty by deed and ratified on February 17 and 28, 1986, Tractatenblad (Tbr. 1986, 63.

18 Cf. sections 8 and 19 of the Schengen agreement.

19 Letter of the state secretary of foreign affairs to the chairman of the Dutch Lower House of January 7, 1988, in which he referred to the Schengen agreement. Kamerstukken Tweede Kamer, 1987-1988, 19326, nr.7.

20 NCR-Handelsblad of June 18, 1986, "Raad van Europa; harder optreden tegen drugshandel". Parool of June 4, 1987, "Softdrugsbeleid wordt strenger". See also the report of the UCV (Uitgebreide Commissievergadering) 81 (June 15, 1987) of the permanent committee of the ministry of justice.

21 See sections 2 and 3 for list I and II of the Opium Act.

referred to in list II. In section 10 and 11 the same differentiation is applied with regard to sentencing. As for hard drugs the maximum sentence varies from four years' imprisonment and/or a fine of the 4th category[22] for possession to twelve years' imprisonment and/or a fine of the 5th category for import or export. Up to 1 year imprisonment or a fine of the 3th category is imposed on those who possess or import and export small quantities of hard drugs for personal consumption. If these offenses are committed by negligence, the punishment is detention up to six months or a fine of the 4th category.

Possession of soft drugs is punished with a maximum of two years' imprisonment and/or a fine of the 5th category, whereas import and export of soft drugs is punished with four years' imprisonment and/or a fine of the 4th category. Possession of a quantity of soft drugs of less than 30 grams[23] is punished up to one month detention or a fine of the 2nd category. There is a category of criminal offenses[24] that carry a fine of the next higher category, in case the value of the objects that proceed - either wholly or partly - from the offence or were used to commit the offence, exceed a quarter of the maximum fine on that offence.

2.2.2 Fostering the Use of Drugs

Under section 3b of the Opium Act fostering the use of drugs is made subject to prosecution.[25] Any public announcement with the intent to stimulate the sale, delivery or distribution of a drug as defined in sections 2 and 3 is forbidden. Since this section had not been incorporated in the initial government proposal[26] (it ended up in the final bill after relevant amendments), it does not include explanatory notes, nor is it commented on in the guidelines for the prosecution and

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22 Section 23,4 of the Dutch Criminal Code gives the following categories of fines:
1st category : 5 to 500 guilders
2nd category: 5 to 5,000 guilders
3th category: 5 to 10,000 guilders
4th category: 5 to 25,000 guilders
5th category: 5 to 100,000 guilders
6th category: 5 to 1,000,000 guilders.

23 Due to an omission of the legislator this does not apply to the import or export of less than 30 grams of soft drugs.

24 Most importantly: import, export, sale and possession of hard drugs and soft drugs and preparatory acts with regard to the import, export, sale and possession of hard drugs. See section 12 of the Opium Act.

25 In line with the Single Convention, par.2 of this section makes an exception for fostering for medical and scientific purposes.

26 The amendment of June 23, 1976, Stb. 424.

criminal investigation.[27] According to these guidelines fostering is an offence of such an exceptional nature that each case requires consultation with public prosecution and police authorities whether to prosecute or not. In accordance with the purpose of the Opium Act, the term "announcement" should be seen in a broad perspective. Any kind of announcement, spoken, written or otherwise, is judged by its apparent implication. The broad interpretation of this section can be illustrated by the case of the "Hash-museum" in Amsterdam. This museum was opened in 1986 and in it various kinds of drugs (rendered unfit for use by chemicals) and instruments needed for drug use were on display. The minister of justice declared the very existence of this museum sheer madness. In a parliamentary debate[28] he further stated that the section on fostering the use of drugs with the intent to sell, deliver or distribute drugs also applies to the press release issued by the hash museum to announce its opening. The interpretation of the word "announcement" referred to in section 3b of the Opium Act is, however, subject to arbitrariness; it is common knowledge that the area where the hash museum is located has coffee-shops on every corner; the well-known yellow signs with the hemp leaf indicate that soft drugs are being sold there.[29] No action is taken against these coffee-shops by virtue of section 3b. It is also remarkable that only a week before the police raid, the public prosecutor referred to it as a ludic initiative that fitted into Amsterdam traditions. After the minister had expressed his negative feelings about the hash museum, the public prosecutor decided to raid the place. The only possible explanation for this inconsistent policy is the fact that Amsterdam needs to be protected against international criticism,[30] because after three days the museum was open to the public again.

2.2.3 Forfeiture of Drug Profits

The forfeiture of objects and profits proceeding from drug offenses is not provided for by the Opium Act. There is a general provision in the Dutch penal code that deals with forfeiture.[31] The Opium Act only allows (for) the forfeiture of the objects

27 See 3a of the guidelines for the prosecution and investigation authorities with regard to criminal offenses under the Opium Act, Staatscourant 1980, 137: "Geen richtlijnen voor sommige strafbare feiten".

28 Questions of member of parliament Lankhorst about the prosecution policy with regard to the hash museum in Amsterdam, Kamerstukken nr. 654, 1986-1987.

29 Neither did the authorities interfere with the public advertisements for the Bulldog coffeeshops on trams of the city transport company.

30 See also Trouw of April 4, 1987: "Hasjmuseum moet wijken voor goede naam in buitenland".

31 Ss. 33-35 of the Dutch penal code deal with forfeiture; ss. 36a-36c deal with seizure of illegal profits.

and illegal gains referred to in the act.[32] It is possible for the Court to oblige a culprit to restitute the value of the illegal gains to the state, even in case of a discharge or a waiving prosecution, provided that a penal offence has been committed. Dependant on whether the accused is convicted or not, the Court may impose both restitution and a custodial or other sentence. It is typical for the Dutch sentencing system that even if the accused is not convicted he may still be sentenced to restitute the value of his illegal gains. The (additional) sentence of forfeiture, on the other hand, may only be imposed in case the accused is convicted. Apart from the earnings, illegal profits also include the amount of money saved because of these illegal acts.

There is a growing tendency to apply the section on forfeiture in drug cases. The above-mentioned section 12 of the Opium Act also deals - albeit in disguise - with the forfeiture of drug profits. Technically it refers to a sentence, namely a fine of the next higher category that may be imposed on certain conditions. Because of the nature of these conditions, the section also allows the forfeiture of drug profits, as the following example illustrates: a person is convicted for dealing heroin,[33] as a result of which he made a profit of 26,000 guilders. The maximum fine for dealing heroin is 100,000 guilders.[34] Under section 12 of the Act a fine of the next higher category (i.e. up to 1.000.000 guilders) may be imposed. In this case the severity of the sentence depends on the amount of profits the dealer made. In this way the court interpreted a sanction as a measure to prune away drug profits, without the necessity to prove that the accused has actually earned (more) profits from the drug offenses. In this case application of section 12 implies that the maximum fine may be multiplied by nine. This shows that the problem of drug profits is more efficiently dealt with by applying section 12 rather than using reversal of the burden of proof. Besides, the latter does not fit into the Dutch sentencing system, because it affects the rights of the accused in an unverifiable way.

Taxation is another way to forfeit gains proceeding from drug crimes. Under the Dutch tax system it is possible to levy tax on illegal import, trade and profits.[35] On the other hand, the cost of illegal behaviour is a tax deductible item.[36] Apart from taxation on illegal trade, section 18 of the Dutch tax laws (Algemene Wet Rijksbelasting) further allows for a 100% tax increase as a means to fine

32 See section 13a of the Opium Act.
33 Violation of section 2 par.1 under B of the Opium Act.
34 Ex section 10 par.3 of the Opium Act, a fine of the 5th degree.
35 Illegal behaviour connected to drugs, weapons, blackmail, gambling and prostitution.
36 E.g. bribes, hush money, black money and fines imposed by a criminal court.

someone.[37] Application of section 18 with regard to drug traffic has been much criticized, particularly by P.J. WATTEL.[38] In his opinion taxation on drug traffic is inconsistent[39] with the arguments put forward in the European Jurisprudence.[40] Furthermore, he believes that taxation will only preserve a high price level of drugs and, as a result, a lucrative drug market. It should also be noted that section 12 of the Opium Act and taxation may cumulate and thus give way to severe sentences for drug traffic.

A frequently recurring problem is the fact that a large part of the drug profits is channeled abroad, which make them inaccessible for the courts. This is why The Netherlands are involved in the preparations of a new treaty against the illicit traffic of narcotic and psychotropic drugs, which allows for forfeiture of drug money in foreign countries.

2.2.4 Penalization of Preparatory Acts

The penalization of preparatory acts with regard to drug offenses, as specified in section 10a of the Opium Act[41] is unique for Dutch criminal legislation. Section 10a declares to be a preparatory act: to procure, provoke, or help a person to commit a drug offence, or to provide the opportunity, the means or the information necessary to commit a drug offence, and also to have available means of transport, objects, substances or funds etc., of which the suspect should or ought to know that they were intended to commit a drug offence with. In the explanatory statement it is specified that section 10a may only be applied if the culprit had the intention to commit a drug offence. Due to the unique character of this section as well as to the unfamiliarity with it, its effects can only become clear in practice. The introduction of these provisions has been heavily criticized. It is thought not to be in line with Dutch criminal justice and, according to HAENTJENS,[42] it was

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37 On June 19, 1985 the Dutch Supreme Court decided that this tax increase should be considered as a penal measure and that the system of imposing tax increases could be tested against the provisions referred to in section 6 of the European Treaty on Human Rights and Fundamental Freedom (Rome, 1950).

38 Wattèl, P.J.: Belastingheffing van de onderwereld; het EG-hof en de drugshandel. In: Weekblad voor fiscaal recht 1987/5767, March 26, 1987.

39 Only with regard to hard drugs. Contrary to the European Court, Wattèl makes an exception for the traffic in soft drugs.

40 European Court of Justice, February 5, 1981, case 50/80 (Horvath), Jurisprudence 1981, p.385; European Court of Justice, October 26, 1982, cases 221/81 (Wolf) and 240/81 (Einberger I), Jurisprudence 1982, pp.3681-3699; European Court of Justice, February 28, 1984, case 294/82 (Einberger II), Jurisprudence 1984, p.1177.

41 For a detailed definition of a preparatory act see section 10a, introduced on September 4, 1985, Stb. 495. See also Memorie van Toelichting, Kamerstukken Tweede Kamer, 1984/85, 17975.

42 See for example Haentjens, R.C.P.: Is de voorgestelde wijziging van de Opiumwet een straf-rechtelijk monstrum? In: DD 14 (1984) nr. 1 pp.32-49.

just a gesture towards foreign countries. It is obvious, however, that section 10a has profound implications for the investigation and criminal justice policy, that will be discussed below.

3. Guidelines for the Prosecution of Drug Offenses

Provisions for the investigation and prosecution of drug offenses are not only formulated in international treaties and the Opium Act, but also in guidelines for the public prosecution. These guidelines prescribe the criminal justice policy to be pursued by police and prosecution authorities in case of drug offenses under the Opium Act.[43]

3.1 Priorities

The guidelines indicate as a matter of priority what should be the major aim of the investigation and prosecution authorities. It is the expediency principle in Dutch law that allows for establishing priorities. Top priority is given to proceedings against importation, exportation and traffic in hard drugs and soft drugs. The consumption of drugs, on the other hand, is reduced to a matter of minor concern.

3.2 Guidelines in Practice

Apart from giving priorities, the guidelines were also aimed at realizing a consistent investigation and prosecution policy. An inquiry had shown that almost each district court followed a different prosecution and sentencing policy with regard to drug offenses. A working party[44] was set up and issued a report in June 1987. Its conclusion was that the courts used a more flexible interpretation of the

43 Guidelines for the prosecution and investigation authorities with regard to criminal offenses under the Opium Act, published in the Staatscourant 1980, 137. The guidelines were introduced by the Procurators-General in the Dutch courts.

44 Werkgroep vooronderzoek vervolgings- en straftoemetingsbeleid inzake Opiumwetdelicten, supervised by attorney-general De Beaufort. Its report from June 1987 dealt with the investigation, prosecution and criminal proceedings with regard to criminal offenses referred to in the Opium Act.

guidelines, which was considered rational and in line with the Dutch situation. The working party, therefore, recommended to revise the guidelines according to this more flexible approach. In spite of the report, however, a meeting of procurators-general, who had assigned the working party, decided[45] to see to a more strict application of the guidelines as well as to heavier sentences for offenses related to soft drugs. The findings of the working party were not further discussed.[46] The consequences of this decision were not long due. Coffeeshops of the Bulldog-chain,[47] where the sale of soft drugs had been tolerated for years, were suddenly raided by the police. Yet the minister of justice, referring to the text of the guidelines, most emphatically denied[48] that the prosecution policy had changed. His reference to the guidelines is remarkable, since the above-mentioned working party De Beaufort had concluded that there was a vast difference between the prosecution practice and the prosecution guidelines. The police raids caused a parliamentary discussion[49] on the effects of the Schengen agreement and the international pressure on the Dutch drugs policy. The Minister of Justice had to admit that the drugs policy had been subject to international pressure, but kept denying that this had resulted in a change of policy. The police actions against the Bulldog-concern and the hash museum are, in our view, fine examples to show that the Dutch authorities pursue an inconsistent policy with regard to the drug problem.

3.2.1 The House Dealer and the "Kokerjuffer"

The special status of a so-called house dealer is officially recognized in the guidelines, particularly in the chapter on small-scale dealing of hemp products and house dealers. According to the guidelines a house dealer is a person who has been entrusted to deal in hemp products in a youth centre. He remains punishable under the Opium Act, but will not be prosecuted unless he ignores the guidelines and the jurisprudence or unless he trades provocatively or openly advertises his wares. The case of the "Kokerjuffer" (a youth centre in Enschede) caused a discussion on whether the institution of a house dealer conflicts with

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45 In their meeting of August 27, 1987. See 'Weergave van de belangrijkste besproken onderwerpen in de vergadering van de procureurs-generaal gehouden op 27 augustus 1987.'

46 See Anjewierden, O., van Atteveld, J.M.A.: Te weinig aandacht voor het rapport van de werkgroep de Beaufort. in Proces, February 1988, pp. 33-43.

47 On November 10, 1987 in Amsterdam.

48 Parliamentary debate instigated by member of parliament Wolffensperger on the police actions against seven Bulldog coffee-shops in Amsterdam; Kamerstukken, nr.223, 1987-1988.

49 Again instigated by member of parliament Wolffensperger on the police actions against a number of Bulldog coffee-shops; Kamerstukken nr. 224, 1987-1988.

the international treaties. In the "Kokerjuffer" there was a house dealer, who worked in compliance with the rules referred to in the guidelines and the jurisprudence. Since Enschede is a border community, not only Dutch but also West-German youth came to buy soft drugs in the "Kokerjuffer". This led to strong protests by Swedish and West-German authorities, and even to a official complaint to the INCB of the United Nations. In its report[50] the Commission stated that the Dutch drug legislation was in line with the international commitments as specified in the Single Convention. At first the commission made reservations to the institution of a house dealer, but they were sufficiently refuted by the Dutch authorities. Up to now there are still house dealers employed in several youth centres. This is, under the circumstances, the best way, to separate markets for soft drugs and hard drugs.

4. Investigation of Crimes under the Opium Act

Drug trafficking is considered to be responsible for the increase in crime rates over the past two decades. Therefore, the prosecution of traffickers has been accorded high priority. In the fight against the drug trade the authorities have come to believe that they are dealing with a type of crime that is hard to combat. Drug traffickers are often very well-organized and operating on an international level, while using the most advanced techniques to continue their business. Dutch police officers, on the other hand, are operating on a national, sometimes even regional level and are bound by the Dutch code of criminal procedure, which they consider out of date. As a result, the fight against drug trafficking is not as effective as they would like it to be. In order to improve things, police authorities have suggested other, less regular, methods of investigation, among which observation[51] and short-term infiltration in a criminal scene.[52] Since investigation methods are not provided for by the law, police is in principle allowed to choose freely between a variety of techniques. This has led to discussions about whether the extended police powers could stand the test of criticism, especially with regard to section 1 of the code of criminal proceedings, which only allows for criminal

50 United Nations, International Narcotics Control Board, INCB report (3) NETH A of June 3 1983.

51 This technique involves the observation of persons (and/or premises) without their knowledge, in order to obtain information that may lead to the investigation of a criminal offence.

52 As compared to long-term infiltration which involves the participation of a police officer in a criminal scene or organization for a long period of time, in order to gain a clear understanding of the organization. This technique entails substantial risks for the undercover agent and is, therefore, never used.

proceedings within the concepts of legality.[53] Short-term infiltration is the most controversial investigation technique; it usually involves the participation of a police officer in a so-called pseudo-deal, thus creating an appropriate moment for his fellow-officers to arrest the dealer.

Even after the courts declared[54] the evidence obtained through undercover investigation to be lawful, the "pseudo-deal" is still considered as a dubious method of investigation, also by police officers.[55] Consequently the public prosecutor decided to examine whether the "pseudo-deal" constitutes a lawful means of investigation. He concluded[56] that the "pseudo-deal" means an essential weapon in the fight against drug traffic, but that its application should be made subject to the following conditions:

- the undercover agent is not allowed to instigate the suspect to offenses other than to which the intent of the suspect was directed beforehand. In other words: the undercover agent is not allowed to instigate the suspect to commit criminal offenses.
- infiltration is only allowed after consultation with and with the approval of public prosecutor.
- the nature[57] of the offence should justify the use of undercover agents and the more regular investigation methods should be expected to be less effective.

These conditions are designed to reduce the number of infiltration actions, to minimize the risks for the undercover agents and to bring about nationwide consistency in the application of the infiltration technique. What the public prosecutor failed to do was finding a solution to the legal complications; for as long as investigation methods are not explicitly provided for by the law,[58] the

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53 See Simmelink, J.B.H.M.: De Rechtstaatsgedachte achter artikel 1 Sv. Gedachten over de betekenis van art.1 Sv. voor het handelen van de overheid in de opsporingsfase. Arnhem 1987; Mevis, B.: Preventieve observatie geobserveerd. In: Delikt en Delinkwent 18 (1988), nr.3, pp.219-226; van Veen, Th.W.: Verdacht, maar nog niet verdacht. In: RM Themis 1987, pp.421-423 and also Boek, J., Nijboer H.: Vigilat ut requiescant. In: Recht en Kritiek, pp.342-354.

54 HR (Dutch Supreme Court) November 1, 1983, NJ 1984, 586; HR January 1984, NJ 1984, 405.

55 See Blaauw, J.A.: Bestrijding handel verdovende middelen: een hopeloze zaak. In: Algemeen Politieblad 1980, pp.283-302; Sietsma, K.J.H.H.: Bestrijding handel in verdovende middelen: een andere benadering. In: Algemeen Politieblad 1980, pp.411-422; Josephus Jitta, P.A.O.: De undercover-agent. In: Delikt en Delinkwent 1980, pp.469-486; Haentjens, R.C.P.: Controle op undercoveractiviteiten. In: Delikt en Delinkwent 1986, pp.469-486.

56 Infiltratie als opsporingsmiddel, Kamerstukken Tweede Kamer 19328, nr.1, 1985-1986.

57 E.g. serious offenses, like organized or professional crime.

58 The minister seems not to be in favour of introducing statutory provisions with regard to infiltration (see Kamerstukken Tweede Kamer 19328 nr.2).

lawfulness of the above-mentioned police actions will be rightly subject to criticism.

5. Anonymous Witnesses

The drug problem has not only led to an increase in crime rates, but it is also held responsible for the growing aggressiveness in criminal behaviour. A considerable proportion of the homicides committed are related to the drug trade and the disturbing fact is that drug traffic organizations are more and more involved in other categories of crime, which causes an uninterrupted spread of aggressive behaviour.[59]

As a result, people are reluctant to give evidence in court for fear of retaliation. They will only do so if their anonymity is guaranteed. Under Dutch law, however, witnesses are obliged to reveal their identity when giving testimony. This also applies to undercover agents, which would make them useless for further infiltration actions. During preliminary investigations it is, therefore, allowed for witnesses/undercover agents to give anonymous evidence before the examining judge or criminal investigator. Evidence thus obtained is added to the file, so that the witness does not have to appear before the court. In this construction it is, technically speaking, the file of the criminal investigator that serves as evidence and not the statements of the witness/undercover agent. The Supreme Court of The Netherlands had adopted this construction as early as 1926, when it declared a "hear-say" statement to be legal.[60] The use of anonymous witnesses in the Dutch legal system is, however, open to fundamental objections.[61] First, the legislator has explicitly ruled out the "hear-say" statements. Secondly, in order to guarantee the anonymity of witnesses, proceedings have to be violated, for it is impossible for the defence to hear the witness/undercover agent, nor is the court able to test the reliability of the evidence. The court entirely depends on the

59 See Samenleving en Criminaliteit, Kamerstukken Tweede Kamer 18995, nrs 1-2, p.23.

60 HR December 20 1026, NJ 1927, p.85.

61 See also: Schalken, T.M.: De strafrechter en de anonieme getuigen; enige conflicterende beginselen in het Nederlandse strafproces. In: Beginselen, Arnhem 1981, pp.325-343; Schalken, T.M.: Bedreigde getuige en bedreigde rechtstaat. In: Trema 1986, pp.291-303; Nijboer, H.: De anonieme informant als getuige in het strafprocesrecht. In: Recht en Kritiek 1980; Remmelink, J.: Bedreigde getuigen, verantwoordelijk voor mensen. Arnhem 1985, pp.129-143; Spronken, T.: Anonieme getuigen in strafzaken; verdediging in verdrukking. In: Nederlands Juristenblad 1988, pp.77-82.

judgement of those who heard the witness, i.e. the examining judge or the criminal investigator, which is in fact incompatible with the independence of the courts. Because anonymous evidence is hard to verify, the prosecution and police are inclined to use it, even in less serious cases. There is every reason for cautiousness, because a widespread use of anonymous witnesses will only bring us one step nearer to closed-door trials. Despite these objections of principle the court has accepted the use of anonymous witnesses,[62] because not accepting this practice would mean a loss of important evidence. A working party of the Nederlandse Vereniging voor Rechtspraak[63] (Dutch judiciary association) as well as a government-founded commission[64] agreed that anonymous evidence is acceptable, provided that the interests of the defence are sufficiently taken into consideration. It is to be expected that the use of anonymous witnesses will be given a legal framework in the near future.

6. The Position of Private Physicians

In accordance with the Single Convention Dutch law permits the preparation, prescription, distribution and possession of drugs for medical purposes. These legal transactions are, however, submitted to strict regulations in order to prevent the drugs from leaking out to illegal circuits. The Opium Act offers a complex system of exemptions and permissions based on existing medical legislation,[65] which reserves the prescription of drugs to those who are legally authorized to practice medicine. Private physicians may make unlimited use of this regulation, whereas dentists, obstetricians and veterinary surgeons are submitted to certain restrictions. All of them are committed to act in compliance with the professional standards referred to in the medical disciplinary rules;[66] in other words, the prescription of medicines and narcotic drugs is only allowed on medical grounds.

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62 HR February 5, 1980, NJ 1980, 319; HR May 4, 1980, NJ 1982, 268; HR November 18, 1980, NJ 1981, 125; HR March 17, 1981, 382; HR September 25, 1984, NJ 1985, 426 and 427; HR March 19, 1985, NJ 1985, 702; District court in Assen May 29, 1985, NJ 1985, 640.

63 The association's report is entitled 'De bedreigde getuige', in: Trema exclusief 7, 6(1983).

64 The commission's report is entitled 'De bedreigde getuige', commission Remmelink, 's-Gravenhage 1986.

65 Wet op de geneesmiddelenvoorziening (Stb. 1958, 408); Wet regelende de uitoefening der geneeskunst (Stb. 1865, 60); Wet regeling der bevoegdheid van de arts, tandarts en apotheker, verloskundige en apothekersbediende (Stb. 1878, 222).

66 As referred in section 1 of the Medische Tuchtwet, Stb. 1928, 222.

Under sections 6,2 and 3a of the Opium Act the distribution of drugs prescribed by the above mentioned medical professionals is exclusively reserved to pharmaceutical chemists, who are legally entitled to practice chemistry. Chemists may only administer the drug on production of a written prescription.[67] Under section 4,1 of the Opium Act prescriptions have to comply with detailed requirements.[68]

The above-described system of drug distribution for medical purposes became effective in 1976, as part of the 1976 amendment of the Opium Act. The amendment was the result of a new drug policy, that was designed to fight drugs abuse in two ways: first, by expanding the scope of the Opium Act,[69] and secondly, by providing support programmes based on the concept of an integrated, multi-disciplinary treatment of drug users.[70] These support programmes were developed to serve a dual purpose; first, to make the user kick the habit, and secondly, to improve his physical condition and social behaviour without the necessity of detoxification.

In order to provide successful addiction programmes, it was necessary to establish legal provisions to submit the prescription of substitutes, such as methadone, to conditions that would guarantee an integrated treatment of the drug user. Section 6,3 of the Opium Act introduced the possibility to allocate institutions, where such a treatment should take place.[71] This section also allows the institutions to prescribe substitutes for heroin, notably methadone. Methadone, like heroin, is an illegal drug referred to in the Opium Act. The choice of methadone was hardly based on the existing drugs legislation but rather on considerations of policy.

By encouraging institutionalized care for drug addicts the legislator also aimed to reduce the role of private physicians in the treatment of drug users. In several policy documents[72] he expressed his concern about the fact that the supply of methadone was almost entirely controlled by individual physicians, which interfered with the idea of an integrated treatment of drug addicts. The treatment of drug addicts should take place in institutionalized organizations. Still physicians retained their authority to prescribe drugs referred to in the Opium Act, which gave rise to a struggle of competence between physicians and institutions.

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67 Provision on the supply of prescribed drug; October 18, 1976, Stb. 1976, 508.
68 Provision on the prescription of drugs; October 12, 1976, Staatscourant 1976, 201.
69 See 1 and 2.2 of this paper.
70 See: 'Achtergronden en risico's van drugsgebruik', Kamerstukken Tweede Kamer 11742, nr.2.
71 Kamerstukken Tweede Kamer 13407, nr.7, p.25
72 Among which: Kamerstukken Tweede Kamer 11742, nr.8, 4.1.7.

A fine example of this struggle is the "Rauwerda-case". In March 1981 all physicians in The Netherlands received a letter (the so-called methadone-letter)[73] from the Dutch state health inspectorate. The physicians were advised not to treat drug addicts, unless there was no special institution nearby or unless the institution had insufficient capacity. The majority of physicians followed this advice, except Mr. Rauwerda, a family doctor from the province of Groningen; he kept prescribing methadone to drug users. In reply he received another letter from the health inspectorate in his district, urging him to stop prescribing methadone. In case he would not act upon the advice, the inspectorate would ask the pharmaceutical chemists to refuse Rauwerda's prescriptions. As Rauwerda continued, the chemists granted the request of the inspectorate and no longer honored his methadone prescriptions.

In the legal proceedings that followed Rauwerda claimed that the refusal of his prescription causes him to suffer unlawful damage. Finally the Dutch Supreme Court decided in his favour and further stated[74] that physicians should be fully entitled to prescribe any drug that they consider necessary on medical grounds and that chemists are not allowed to refuse the supply of the prescribed drugs. In order to have some control over the administration of drugs, chemists are permitted to divide the quantity of the drugs prescribed into smaller doses. The Supreme Court also declared the inspectorate's procedure to be unlawful. The inspectorate should restrict itself to its main task, namely to bring cases of undesirable (medical) behaviour before a disciplinary council. More importantly, the Supreme Court's decision in the "Rauwerda-case" means a further consolidation of the exclusive position of physicians with regard to the supply of (illicit) drugs on medical grounds.

It is obvious, from the above, that the position of physicians has remained unaffected under the law. Recent developments, however, have reduced their share in the care of drugs addicts. In keeping with the government policy, the treatment of drug users has almost entirely been taken over by special institutions.

8. Alcohol and Tobacco

Although the pharmaceutical effects (addiction, damage to health) of alcohol and tobacco do not essentially differ from drugs referred to in the Opium Act, they fall

73 Letter to all Dutch physicians about ambulatory treatment of drug addicts, March 1981.
74 HR June 27, 1986, nr.12.690 (not published).

outside the scope of the Opium Act. There is a growing tendency to include alcohol and tobacco in the discussions about the drugs problem.[75]

Advocates of the legalization of drugs frequently refer to the legal status of alcohol and tobacco to sustain their arguments. For this reason we consider it useful to give an overview of the rules and regulations concerning alcohol and tobacco.

8.1 Alcohol

The legislation on alcohol has a long history. By the end of the nineteenth century the increasing consumption of alcohol called for statutory provisions[76] on the sale of spirits. Alcohol abuse became a social problem, for which the authorities have felt responsible ever since.

Rules for the distribution of spirits for personal consumption are laid down in the (Drank- en Horeca) Act of 1964.[77] Under the Act the sale of spirits for on-site consumption (e.g. in a licenced bar) and the retail trade in spirits (+15%) for consumption elsewhere is submitted to a system of licenses. Light alcoholic drinks (less than 15%;notably beers and wines) for consumption outside the premises are free on sale. The production of as well as the wholesale trade in alcoholic drinks fall beyond the scope of the Act.

Before a licence to sell spirits is granted, a number of conditions have to be fulfilled. First, there is an age limit and secondly, evidence of good behaviour must be given. The premises, where the sale takes place, should be equipped according to certain standards and finally, the managers must have a licence to establish a business as well as a proof of creditworthiness.[78] Since the city councils are entitled to grant licenses, the alcohol policy has become an important issue in local politics.

Knowing that the consumption of alcohol is not without risks, the system of licenses is based on the concept of protection. The Act aims to:

- protect the public health
- protect the public against so-called impulse buying
- protect youngsters

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75 As explicitly stated in the preface of the Telderstichting study 'Hard-drug beleid', Geschrift 44, 1981.

76 Act of June 28, 1881 (Rankwet), Stb. 97.

77 Act of October 7, 1964, Stb. 1964, 386.

78 The condition of creditworthiness is expected to be abolished. See: Kamerstukken Tweede Kamer 19743.

- protect public order, security and morals.

It seems, however, that the regulating and protective measures have not been very successful. The Netherlands are faced with the problem of more off-licence shops, more alcohol consumption per head of population and a growing number of alcoholics. Road accidents and violent offenses are often alcohol-related. And what about the enormous financial burden on health care institutions that deal with alcohol problems, to say nothing about the loss of productivity because of alcohol abuse.

The following figures illustrate the proportions of the problem: alcohol consumption has increased from 3,6 liters in 1960 to 10,4 in 1985 per head of population, whereas the percentage of drinkers remained unchanged (85%). This shows that more alcohol has been consumed per 'drinker'. It is estimated that 500,000 to 750,000 people suffer from a serious drinking problem.[79] Drunken driving has become a widespread problem; in 1970 9195 cases of drunk driving were reported to the police, compared to 35950 in 1985. In 1975 6.5% of the road accidents were alcohol-related, compared to 9.2% in 1981. The percentage of fatal accidents, due to alcohol abuse, rose to 15% in 1981.[80]

These alarming figures caused the government to pursue a more repressive policy with regard to alcohol. New laws are being prepared[81] and other measures are or will be taken to facilitate the arrest of drunk drivers. Among these measures are:

- to reduce the number of outlets, e.g. football stadiums and petrol stations.
- to improve educational campaigns, esp. in schools.
- to set up better support programmes for alcoholics.
- to sharpen up the system of licenses laid down in the 1964 Act.
- to prohibit commercials on radio and television and
- to introduce the use of breath test equipment in the legislation on road traffic.

These and other measures are expected to reduce the alcohol consumption to acceptable proportions.

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79 Source: Zwart, W.M.: Alcohol, tabak en drugs. Een statistisch rapport. Stichting voor wetenschappelijk onderzoek van alcohol en druggebruik (SWOAD), Amsterdam 1985; Kamerstukken Tweede Kamer 19243 and 19500.

80 Kamerstukken Tweede Kamer 19243, nrs 2-3, p.15.

81 The Act of October 31, 1986 to amend the Drank en Horecawet (Stb. 1964, 386), Stb. 1986, 591; Kamerstukken Tweede Kamer 19743.

8.2 Tobacco

It seems to have taken us a long time to become aware of the damaging effects with regard to smoking. Until recently the production, distribution and sale of tobacco were not submitted to any special statutory provision. Even after the damaging effects of smoking had been sufficiently proven, there seemed to be no need for adequate legislation. This can be explained from the fact that the majority of the population consisted of smokers, who did not sense any noticeable damage as a result of their habit. For it is true that the harmful effects of smoking only become evident in the long term. Another reason is that cigarettes are excisable goods, that considerably contribute to economic activity and public funds. It was not until the 22nd of February 1980 that the Minister of Justice announced legal provisions with regard to tobacco consumption. Tobacco commercials on radio and television were no longer permitted.[82] On the 29th of April 1981[83] he further decided that the tar and nicotine content should be specified on the packaging of cigarettes, and also that a warning of the Ministry of Public Health should be included, saying that smoking affects the health. These decisions were made mainly to deter young smokers.

As a result of the findings of a commission[84] the government introduced the Act on tobacco on the 21st of November 1984.[85] The main goals of the Act were to reduce tobacco consumption and to protect young persons as well as non-smokers. The government explicitly stated that it did not seek a total ban on smoking, for the habit of smoking has become too deeply rooted in our culture. It was also admitted that a ban on smoking would be undesirable from a fiscal point of view and would endanger the jobs of thousands of people. Through excises the treasury receives millions of guilders a year to finance valuable and necessary purposes.[86]

Among the provisions dealt with in the 1984 Act are:

- to maintain the ban on commercials on radio and television and to make advertisements through other media subject to certain conditions;

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82 Provisions of February 22, 1980, Staatscourant 1980, 40.

83 Provision of April 29, 1981, Stb. 1981, 329; most recently amended on December 9, 1986, Stb. 1986, 642.

84 The commission was assigned on July 4, 1979 and advised the minister on January 27, 1981.

85 The Tabakswet includes provisions to reduce tobacco consumption, especially to protect non-smokers, Act of March 10, 1988, **Stb.** 342 (the Act is not yet effective; August 1988).

86 As stated in the Memorie van Toelichting, Kamerstukken Tweede Kamer 18749, nr.3, p.7.

- to prohibit the sale of tobacco in institutions for health care, social work, sports, cultural education and schools and other institutions as indicated by the Minister;
- to provide facilities in public buildings in such a way that people are not troubled by tobacco consumption. The Minister is further entitled to apply this rule to private institutions as well.

9. Gambling

Dutch courts as well as institutions for social care are more and more confronted with the problem of compulsive gambling.[87] Compulsive gambling is in many respects comparable to drug addiction. A compulsive gambler, like a junkie, is often forced to steal the money needed for his addiction. He also suffers from identical withdrawal symptoms, when he tries to kick his habit. Even the number of compulsive gamblers is almost as high as that of drug addicts: circa 20.000.[88]

Until 1964 the Dutch legislator dealt with gambling in a rather ideological way. Gambling was considered as a sad phenomenon, that meant both an offence against public decency and a threat to mental health. Therefore, gambling was made punishable not counting several, strictly regulated, exception provisions.[89] After 1964 the legislator gradually changed his attitude towards gambling, as reflected in a new act on gambling[90] and following amendments.[91] The ideological approach was finally abandoned to make way for a more pragmatic approach. Since the appropriate system of prohibitive rules failed to reduce compulsive gambling, the legislator was more inclined to look upon it as a social reality. The ideological approach had caused gamblers to move to illegal scenes with all the associated side effects. Legal gambling was now given more facilities, whereas the gambling system was submitted to a number of licenses. The aim was to have

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87 Volkskrant 20-8-1987: Afkickende gokker zweet en krijgt trillende handen; Volkskrant 21-8-1987: Justitie weet geen weg met crimineel gedrag gokker. Volkskrant June 21, 1988: Winst nodig voor hulp gokverslaafde.

88 Report: Kansspelen als riskante gewoonte, Hermkens, et. al., on the authority of the Raad voor de Casinospelen, The Hague, May 1988.

89 Rules and regulations on gambling were divided over various Acts, such as the Loterijwet, de Totalisatorwet and the Dutch penal code.

90 The Act concerning games of chance (Wet op de Kansspelen), December 1964, Stb. 1964, 483.

91 Among which: act of July 2, 1974, Stb. 1974, 441, which allowed for the Lotto (Dutch lottery) and for casino's to be opened. The act of November 13, 1985, Stb. 1985, 600 on paying gambling machines.

more control over the gambling system in order to prevent damages caused by excrescences.[92]

Given the similarities between drug addiction and compulsive gambling, it seems advisable to examine the possibilities of applying the same pragmatic approach to drug legislation.

10. Legalization

10.1 Possibilities of Legalization

The possibilities of legalization can be classified in the following categories.

The most radical possibility is to repeal the Opium Act and to replace it with provisions comparable to the existing legislation on the distribution of medicines or alcohol and the law concerning games of chance. A less far-reaching possibility would be to find ways to realize partial legalization within the framework of the current legislation (both national and international). There is much diversity of opinion in The Netherlands on whether the Single Convention provides enough room for partial legalization. We believe that the international treaties leave sufficient room for legalization of possession of drugs for personal consumption. Some Western-European countries, notably Spain and Italy, have seized this opportunity to reform their laws. Up to now The Netherlands have not done so.[93]

The third possibility for legalization is a matter of policy. The expedience principle, that is valid in the Netherlands, allows the prosecution authorities to forbear from prosecution with regard to certain criminal offenses, including drug offenses. Research shows that 50% of the crimes involving possession of drugs[94] for personal consumption has not been prosecuted (almost 100% of the cases involving possession of less than 30 grams of hashish has not been prosecuted).[95] This proves that a certain degree of legalization can also be realized through prosecution policies.

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92 Kamerstukken Tweede Kamer 11549, nr.3, p.5.

93 van Atteveld, J.M.A.: Het Nederlandse drugsbeleid in vergelijking met andere West-europese landen: liberaal? Tijdschrift voor Alcohol en Drugs en andere psychotrope stoffen 14 (1988) nr.1.

94 That is: 45% for hard drugs and 76% for possession of up to 50 grams soft drugs.

95 See: WODC-report, Vervolging en strafvordering bij Opiumdelicten.

10.2 Political Will to Legalize

The answer to the question whether there is a firm political will to legalize drugs depends largely on the group of people who are confronted with this particular question and on the degree of legalization involved.

At present the number of people in The Netherlands, who consider full legalization as a desirable and practical goal, is rather small. There is a growing number of people, including police and judicial authorities,[96] who advocate legalization of possession of drugs for personal consumption within the bounds of the Single Convention. In governmental circles, however, partial legalization does not seem to be an issue in future policy.

As it is, only the Public Prosecution seems to be able, through its prosecution policy, to realize (partial) legalization . As stated above, possession for personal use of hemp products has to a large extend been legalized due to prosecution policy; through prosecution policy this could also be done with the possession for personal use of hard drugs. Prosecution authorities are certainly able to come to a more radical legalization of drugs possession.

Although a growing number of people are in favour of this last mentioned method of legalizing the possession of drugs, there is hardly been any active contribution from the part of the government. It rather seems to us that the government wants to slow down trends in that direction.

In conclusion we can say that there is hardly any reason for optimism about the developments towards normalization of the drug problem in The Netherlands. As yet, we expect that the present way of dealing with the drug issue, the penal approach, will retain priority over alternative (non-criminal) legislative measures.

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96 Volkskrant May 1, 1987: Groninger commissaris acht straf voor gebruiker hard-drugs zinloos; NRC-Handelsblad November 11, 1986, Gratis levering heroïne beter voor gezondheid verslaafde. Also Report of the working-party De Beaufort.

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Characteristics of Drug Policy in the Netherlands

A.M. van Kalmthout

1. Introduction

From an international perspective, the Netherlands occupy an exceptional position as far as its drug policy is concerned, especially when compared to the United States, Sweden, France and West Germany. Dutch policy with regard to the fight against the use of and the (retail) trade in soft drugs as well as the attitude towards hard drug users is seen as to differ essentially from other Western European policies, to such an extent that this policy is continuously subject to international criticism and pressure. It is doubtful, however, if the consequent political and moral indignation is always based on a clear and objective understanding of the actual situation. The discussion on the drug problem and the reaction from society tend to be strongly emotional and are often based on distorted and incoherent information and prejudice. The negative image is to a considerable degree brought about by law and order politicians and the popular mass media and the visual entertainment industry, that are more interested in sensational drug horror stories than in a down-to-earth approach and analysis of both the negative and the positive aspects that are connected with the use of legal as well as illegal drugs. It is notably those politicians, mass media and entertainment industry that keep on creating and preserving the image of each user of illegal drugs being an addict, regardless what kind of drug is concerned, and each addict in his turn being a parasitizing, depraved junkie, injecting or sniffing himself to death and providing for his needs as an addict by continuously committing crimes. The real state of things doesn't fit in this image: a great deal of the drug users, including users of hard drugs and even those whose earnings are not that high, is capable to deal with drugs in a recreative

way, without falling into criminal behavior and without causing themselves serious harm.[1]

Of course, this is not to say that no serious risks are connected with improper use of drugs, nor that the uncontrolled provision of drugs that are not tested for quality doesn't mean a possible threat for public health. But in this respect the illegal drugs don't differ from the so-called legal drugs. From a rational and objective view, therefore, there is no justification for creating notably the users of illegal drugs in a different way than the users of legal drugs. But in a way of thinking that is fostered by sensation, panic and intolerance, there is no place for rationality, objectivity or relativity. The only thing that fits in this view is a line of thinking in terms of criminal repression and prohibition, and of criminalization and marginalization of the drug users. The present international drug policy, dominated by the United States, is characterized by this thinking in terms of "war on drugs". This policy is characterized not only by a blind faith in the infallibility of the own combative strategy, but also, at the same time, by an execration and disqualification of any national policy that tries to approach the social and individual problems that are connected with drugs in a different way. A striking example is the criticism from abroad on the Dutch drug policy. Resolutely and systematically the Netherlands are depicted by the foreign mass media and law and order politicians as "the Drug Mecca", as "Sodom and Gomorra", or, in the words of PEARCE, a member of the European Parliament, as the "Cesspit " of Europe.[2] Nevertheless, the Dutch drug policy is indeed a match for the repressive policy of the other West European countries as far as the penalization and the prosecution, trial and punishing of the commercial trade in drugs and the so-called drug-related crimes are concerned. If these disqualifications suggest an indulgent and tolerant attitude of the judiciale authorities towards the illegal import and

1 See for example Kaplan, J.: The hardest drug. Chicago, London 1983 and Cohen, P.: Cocaïne en Cannabis. Tijdschrift voor Criminologie 1987, p.244. Interesting in this respect is a survey among 160 non-deviant coke users, presented in 1987 by Cohen. One of the conclusions from this survey is that the use of cocaine in the group investigated by him is less alarming than was generally supposed. For instance, it turns out that 88% of the users of cocaine used less than half a gram a week, whereas only 1,9% used more than 2,5 gram. In the period of the most intense use these percentages were 48,2% and 20,7% respectively. From the figures about the most recent use arises the following picture: 23% has stopped by now, 67% uses less than 0,5 gram and only 1,9% uses more than 2,5 gram a week. Cohen's conclusion is that the image of cocaine as being an addictive substance is exaggerated. Also the findings of a medical research carried out among a number of the users were that the recreative use of cocaine hasn't shown as yet any demonstrable harmful physical effect. See Cohen, P.: Cocaïne use in Amsterdam, in non-deviant subcultures. Preliminary results of a research held in February, March and April 1987. Amsterdam 1987.

2 See European Parliament: Verbatim report of proceedings 6.10.1986-10.10.1986, p.48.

export, this is belied by the facts as well.[3] The only point in which the Dutch policy distinguishes itself substantially from that of most other West European countries is that this policy, as far as the treatment of drug users is concerned, is not primarily based on prohibition, criminalization and marginalization, but on tolerance, assistance and prevention. Despite all foreign criticism on this policy, the results of it don't seem to justify in the least the disqualifications cited above.

For that matter, it is striking that by now, under the threat of the new panic "AIDS", the Dutch policy of prevention and assistance begins to get some response and official recognition abroad as well.

In the following paragraphs, I will discuss more in detail the backgrounds of the Dutch drug policy and its realization in practice. In particular, I will pay attention to the Dutch policy as regards the use and possession of soft drugs and the methadone supply programs, because in this very respect the Dutch policy distinguishes itself from that of many other countries.

2. What Preceded the Present Policy of Law Enforcement?

Some twenty years ago, when Dutch society was for the first time confronted with a drug problem, it was generally believed a threat of such epidemic proportions that should be eliminated with all available means, either legislative or non-legislative. Rather than fighting drug abuse, as is the case with real epidemies with socio-medical measures, the emphasis was put on prohibition and penal measures. Police and judicial authorities took severe action against both users, producers and dealers. In this line of policy hardly any attention was paid to the social, economic and psychological problems, that are often so closely connected with the use of hard drugs. To the extent that support programs were offered, they generally took place within the compulsory scope of criminal law and they were almost exclusively focused on the detoxification. Gradually, however, questions arose as to whether this harsh, undifferentiated, simplistic and repressive policy was either useful or legitimate. These questions led to the recommendation of a multidisciplinary working party on narcotics to fundamentally reform

3 For instance, according to written information of the Dutch Central Statistical Office, in 1986 the following amounts of illegal drugs were confiscated: cocaïne: 390 kilogram, heroin: 460 kilogram, soft drugs: 40.000 kilogram, amphetamine: 102 kilogram, LSD: 546 doses. With regard to this point see also: Rüter, C.F.: Die strafrechtliche Drogenbekämpfung in den Niederlanden. Zeitschrift für die gesamte Strafrechtswissenschaft 1987, pp.401-402.

the current 1976 Opium Act.[4] The amendment legislation initiated a drastic reversal of policy with regard to drug consumption and traffic. From then on, drug policy has been based on three pillars:

1. strict observation of the Opium Act as far as the manufacture of or traffic in illicit drugs is concerned (notably hard drugs) and a strict observation of the Dutch Penal Code as far as drug-related crimes are concerned;
2. not taking any action against possession of small quantities of soft or hard drugs for personal consumption, and tolerating the consumption of and traffic in soft drugs in certain youth centres;
3. offering a wide scale of support programs to addicts with the main object to prevent and relieve the risks of drug use for the addict, his immediate environment and society as a whole.[5]

If we consider today the nature and proportions of the drug problem in The Netherlands, we cannot but conclude that the majority of ominous prophecies in the early seventies has not come true. Drug consumption has not spread "epidemically" and the use of soft drugs has decreased considerably due to the liberalizing effects of the 1976 amendment of the Opium Act. The degree of heroin consumption has remained virtually unchanged for years and now seems controllable.[6] There is, however, no reason to trivialize the drug problem. The question is: what is the real problem, drug use or the consequent criminal justice policy? Contrary to what was excepted and assumed some twenty years ago, it is not drug use itself but rather the criminalization of drug consumption that seems to confront the government and society with an increasing number of uncontrollable socio-economic and moral dilemmas. The Dutch government feels pressure from two directions: on the one hand, there are domestic authorities that insist on the introduction of the same liberal laisser-faire policy with regard to hard drugs as the current soft drugs policy (which means leaving the prohibitionist position in the fight against drugs); on the other hand, there are international treaties,

4 In 1972 the working party published a report entitled "Achtergronden en risico's van druggebruik" (Backgrounds and risks of the use of drugs), which laid the foundations for the drug policy ever since.

5 See the publication of the Dutch Ministry of Welfare, Health and Cultural Affairs: Policy on drug users, Fact-Sheet 19-E-1985, p.1.

6 There are reliable estimations starting from a total of 15,000-20,000 hard drug addicts in the Netherlands in 1985. See also the Dutch Ministry of Welfare, Health and Cultural Affairs: op.cit. (note 5), p.2., and van den Wijngaart, G.F.: Heroin use in the Netherlands. American Journal of Drug Alcohol Abuse 14 (1988), p.126. Recent studies on hard drug use in Rotterdam and Amsterdam even estimate this number 30% lower. This seems to be connected with the fact that the amount of newcomers in the drug scene is dropping considerably in recent years. This is also indicated by the increase of the average age of the heroin users, that in recent studies is estimated at about 30. See Stichting Intraval, Harddrugs en Criminaliteit (Hard drugs and Criminality) (1989) and Jellinekcentrum, Jaarverslag (Annual report) (1988).

international organizations for combatting drugs and foreign governments, urging the Netherlands to adapt its different drug policy to international standards. Further in this article I will return to this problem, which seems as yet unsolvable.

3. The Current Drug Policy

As already mentioned above the present Dutch drug policy is based on three pillars: repressive action against trafficking, particularly in hard drugs; de facto legalization of consumption of and retail trade in soft drugs;and realization of an extended network of facilities for addict support. Emphasis was laid rather on minimizing the risks of drug use for both users and society than on fighting drug consumption.[7] Dutch experiences and research[8] have shown that the risks or damaging effects of drug use depend to a great extent on the nature of the users as well as on the circumstances under which consumption takes place. It is only partly true that these risks are caused by the psychotomimetic effects of the drug.

Both the 1976 reform of the Opium Act and the guidelines for the prosecution reflect the main objective of Dutch drug policy, namely reducing the risks of drug consumption. In the Act as well as in the guidelines distinction is made between drugs with unacceptable risks (heroin, cocaïne, LSD, amphetamine, hash oil) and traditional hemp products (hashish, marihuana). This distinction is essential to the present differentiated policy with regard to the politics of criminal law.

3.1 Policy with Regard to Soft Drugs

In the 1976 reform of the Opium Act for the first time a distinction was made between hemp products as being drugs with less serious risks and drugs with unacceptable risks. Hemp products were given a separate set of rules within criminal law. While offenses involving hard drugs were punished more severely, from 1976 onward a decriminalization policy was adopted with regard to the trade in and possession of small quantities of soft drugs. Possession of, internal trade

7 See also the Dutch Ministry of Welfare, Health and Cultural Affairs: op.cit. (note 5), p.1; Memorandum: Hulpverlening aan drugsverslaafden (Support for drug addicts), p.4 and Handelingen Tweede Kamer 1982-1983, UCV 45, June 13, 1983, p.18.

8 An important research in this aspect is done by Janssen, O., Swierstra, K.: Heroïnegebruikers in Nederland, een typologie van levensstijlen (Heroin users in the Netherlands, a typology of life styles). Groningen 1982. In 1986 a follow-up study appeared under the title Swierstra, K., Janssen, O., Janssen, J.H.: De Reproductie van het heroïnegebruik onder nieuwe lichtingen heroïnegebruikers in Nederland, deel II (The reproduction of heroin use among new crops of heroin users in the Netherlands, part II). Groningen 1986.

in, or the manufacturing of less than 30 grams of hemp products was now considered a minor offence. The maximum sentence for soft drugs was reduced from two years' imprisonment to 1 month detention or a maximum fine of 5000 guilders (section 11 of the Opium Act). The main reasons behind this decriminalization policy were:

1. legitimate doubts about the damaging effects of hemp products,
2. legitimate doubts about the so-called stepping-stone theory,
3. the aim to separate markets for soft drugs and hard drugs. Political efforts to bring about a total decriminalization of soft drugs (including so-called housedealers) failed. The main obstacle was the Single Convention of New York 1961, which did not allow for such a radical line of policy.

In practice, however, soft drugs are de facto legalized; it hardly ever occurs that officially punishable acts like the possession of, manufacture of or trade in soft drugs, are either prosecuted or sentenced. It is the expediency principle in Dutch law that allows the prosecution wide discretionary powers to drop charges in case prosecution is of no avail to society or in case prosecution may cause even more damage than the criminal act itself. Therefore, there are guidelines for the prosecution to decide in cases of frequently recurring criminal behavior, such as drug offenses. These guidelines indicate as a matter of priority what should be the major aim of the investigation and prosecution authorities. The guidelines for the prosecution also reflect the public interest in the prosecution and sentencing of a particular criminal act. After the "de-emotionalization and de-dramatization of the discussion on cannabis" of the last decade the public interest doesn't seem to be interested in the use of criminal law with regard to soft drugs. In the guidelines for the prosecution the investigation and prosecution of criminal acts relating to soft drugs have been given such low priority that one could in fact speak of an acceptance, if not de facto legalization of soft drugs.[9] Not only the user of soft drugs has been accepted, but also the coffeeshops and housedealers in youth homes, provided that the latter operate according to the agreements made with the authorities. Nowadays only large-scale dealing is sentenced, although there seems to be a change, since the court of Utrecht decided to drop charges against a dealer in soft drugs. The court considered it illogical and inconsistent to sentence the dealer and leave users and housedealers unpunished. The judge involved couldn't understand why we uphold the principle

9 These guidelines date from July 18, 1980 and were published in the Nederlandse Staatscourant 1980, nr. 137, p.7.

of equality, while some yards away from this court hashish are freely available.[10]

What has been the result of this decriminalization and liberalization policy? Unlike what one would expect, the use of soft drugs did not increase. On the contrary! Although there is no certainty about a causal connection, it is remarkable that since the liberalization and de facto legalization in 1976 the use of soft drugs fell substantially. Various researches have come independently to this conclusion.[11]

Particularly the number of young people using soft drugs has decreased. In 1976 3% of 15-16 years old and 10% of 17-18 years old occasionally used hashish or marihuana. In 1983 these percentages were 2% and 6% respectively.From the age group between 10 and 18 years old, in 1984 well over 4% had used cannabis at any time. About 50% of these groups still use cannabis, albeit that 65% of the present users take hashish or marihuana once a month or even less often. Only one in every thousand is a daily user.[12] In a recent retrospective from prevalence studies on twenty years of soft drug use in the Netherlands, KORF too came to the conclusion that "within a few years after the 'drug explosion' at the end of the sixties the prevalence of illicit drug use among youth Dutch citizens had more or less stabilized. Approximately 12% of the adolescents (15-34 years) had ever used illicit drugs, mainly cannabis and ca 1% smokes hashish or marihuana more than once a week. Only a very small minority of the young adolescents ever used illicit drugs (15-16 years: 2-3%) and about one fifth of the young adults (20 years of age and older). School and household surveys hardly report the use of other illicit drugs (LSD, heroin, cocaïne, etc.)."[13]

In practice, none of the medical, psychological or social effects that were said to be connected with soft drug consumption in the early seventies, seem to have developed. As far as soft drugs are concerned, it seems reasonable to conclude that the drug policy since 1976 has been successful.

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10 See De Volkskrant of July 1, 1986; Cutting department of the Dutch Ministry of Justice 1986, p.481.

11 For an overview of these researches see the paper of the Ministry of Justice: Cannabis Consumption in The Netherlands (1984) and the study of Korf, D.J.: Twintig jaar softdrug-gebruik in Nederland: een terugblik vanuit prevalentiestudies (Twenty years soft drug use in the Netherlands (A retrospective from prevalence studies). Tijdschrift voor Alcohol, Drugs en andere Psychotrope Stoffen (1988), pp.81-89.

12 See Sijlbing, G.: Het gebruik van drugs, alcohol en tabak (The use of drugs, alcoholics and tobacco). Stichting Wetenschappelijk onderzoek van Alcohol- en Druggebruik. Amsterdam 1984; de Wal, H.J.V.: Smoking, drinking and cannabis use. Amsterdam 1978: Engelsman, E.L.: Het Nederlandse drugbeleid in West-Europees perspectief (Dutch drug policy in Western European perspective). In: Groenhuijsen, M.S., van Kalmthout, A.M.: Nederlands drugsbeleid in West-europees perspectief. Arnhem 1989, p.139.

13 See Korf, D.J.: op.cit. (note 11), pp.81-89.

3.2 Policy with Regard to Hard Drugs

With regard to hard drugs a totally different line of policy has been pursued. In 1976 the sentences for hard drugs increased considerably. Particularly sentences for internal and international trafficking were brought into line with Western European standards, i.e. set at higher levels: the sentence for trade in heroin and cocaïne, for example, was tripled from a maximum of four to a maximum of twelve years imprisonment and/or a fine of 100,000 guilders, in some cases even a million guilders (section 10 par. 4 of the Opium Act).[14] The sentences for possession of or import/export of small quantities of hard drugs for personal use remained relatively lenient: a maximum of 1 year imprisonment or a fine of 10,000 guilders (section 10 par. 5 of the Opium Act).[15] All punishable acts involving personal have a lower priority in terms of investigation and prosecution. Emphasis is put rather on addict support, theoretically speaking that is. In practice it turns out that harsh, selective and repressive action is taken against the small user of hard drugs, not through strict observation of the Opium Act but rather on the basis of the Dutch Criminal Code. Officially the charge is seldom violation of the Opium Act, because personal is not punishable under Dutch law; more often the charge is based on other criminal behavior, directly related to drug: theft, fraud, receiving, robbery. In such cases measures like detention on remand, prison sentences or suspended sentences are primarily aimed at a compulsive detoxification of the addict. The charge concerns theft and receiving in most cases. Dutch research learns that theft and receiving accounts for 42% of the illegal activities committed by seriously addicted persons.[16] This illegal behavior cannot be seen separately from what used to be the main object of the drug policy, namely reducing of, manufacture of and traffic in drugs.

In the fight against the primary drug problems (caused by drug itself) emphasis is put more and more on the secondary drug problems. The latter are mainly caused by the social context in which takes place and the consequent reaction of society.

Isn't it about time that we ask ourselves if law enforcement as a remedy for the drug problem is not worse than the disease itself?

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14 In case the value of the objects that proceed - either wholly or partly - from the offence or were used to commit the offence, exceeds the amount of 25,000 guilders, a maximum fine of one million guilders may be imposed (section 12 of the Opium Act).

15 The Act does not specify the maximum quantity allowed for personal consumption. In practice, the authorities allow a very small quantity (0,5 gram) for personal use. This quantity is also mentioned in the guidelines for investigation and prosecution policy with regard to criminal offenses under the Opium Act, Staatscourant 1980, nr.137, p.7.

16 See Hoekstra, J.C.: De illegale heroïnemarkt (The illegal heroin market). Economisch-Statistische Berichten 19/26-12-1984. Other illegal activities were: dealing in heroin or mediating in heroin traffic (33%), dealing in other drugs (9%), receiving, fraud, forgery of cheques, robbery (9%), prostitution (6%), pimps and gambling (2%).

One of the central ideas behind the Dutch drug policy has always been that the process of criminalization should not cause more damage than drug abuse itself. Despite international criticism this idea has been consistently and successfully applied with regard to soft drugs.

In the discussion on hard drugs, however, this idea seems to have disappeared from the agenda. This is caused by the increasingly repressive, sometimes even draconian, means of combatting drug abuse. The foundations of Dutch criminal justice system are in the process of being undermined and sacrificed to "an obsessional concern with drugs".[17] To illustrate this, I only have to refer to the fact that a number of so-called preparatory acts have been made punishable, which is in fact alien to Dutch criminal law. The concepts of a fair trial are seriously affected as well, for example by making use of undercover agents, anonymous witnesses and informants, unlawful arrests and searches, telephone tapping and the indirect investigation duty of citizens.[18]

Even if one is prepared to overlook these objections and considers it sensible to replace the "due process model" with the "crime control model" to serve the purpose of combatting drug abuse, one cannot get round an analysis and evaluation of the intentional and actual effects of this "war on drugs". The facts should be self-evident and they should cause us to carefully consider the question whether we should continue a policy that seems to be disastrous; disastrous, for a number of reasons: first, because this policy, however repressive it may be, will have no substantial effect on the availability or the price of illegal drugs.[19] Secondly, because it is partly the illegal sphere, in which drug is forced to take place, that accounts for the deaths and infections among drug users: it is because of this illegal sphere that there is no quality control, that no sterile hypodermic syringes are used, and that there is an enormous increase in drug related crime and prostitution. Thirdly, because drug abuse takes place among those who occupy a relatively weak socio-economic position in our society. Drug abuse is embedded in a number of social problems, like dilapidation, unemployment, discrimination of - ethnic - minorities and, finally, social exclusion.[20] Now the

17 See Silvis, J.: Rechtshandhaving met onaanvaardbaar risico (Law enforcement with unacceptable risks). Tijdschrift voor Criminologie 1984, pp.168-179; Engelsman, E.L., Wever, L.J.S.: Drugsbeleid: is het middel erger dan de kwaal? (Drug policy: is the cure worse than the disease?). Tijdschrift voor Alcohol, Drugs en andere Psychotrope Stoffen 2 (1986), pp.74-82.

18 See Silvis, J.: Strafrecht en drugs (1975-1985) (Criminal Law and drugs 1975-1985). Tijdschrift voor Alcohol, Drugs en andere Psychotrope Stoffen 1986, pp.50-55.

19 This is the conclusion of the American Rand Corporation, which examined the predictable effects of a more intensive fight against drugs. See Polich, J.M. et al.: Strategies for controlling adolescent drug use. Santa Monica/CA., Rand Corporation 1984.

20 See Nota 2000: Over de ontwikkeling van gezondheidsbeleid: feiten, beschouwingen en beleidsvoornemens (Note 2000: On the development of health policy: facts,views and policy plans). Tweede Kamer der Staten-Genaraal, Kamerstuk 19500 (Parliamentory paper 19500). Den Haag 1986.

proportion of addicts among persons of Surinam origin (180.000) and among persons with a Moluccan background (30.000) is already estimated to be 2%, while the second generation youths (Turkish, Moroccan) is an additional risk group. [21] The current and, as I fear, future policy will inevitably lead to a further marginalization of vulnerable groups in our society. And finally, Dutch policy of law enforcement is disastrous because the criminal justice system has become totally blocked up and cannot handle, neither financially nor quantitatively, the enormous flood of drug cases.[22] The number of unconditional prison sentences for drug crimes includes nearly 10% of all unconditional prison sentences, while the total term makes up some 30% of the total term of Penal Code Crimes.[23] Today 50% of all prisoners are in some way connected with drug crime and almost one third of the prisoners is or becomes addicted during detention. In some prisons more than two third of the prisoners is addicted to hard drugs.[24] These figures will only become worse, when the plans for extending prison capacity will be realized, for more than 60% of this extra prison capacity (an approximate 4,000 cells) will be accounted for by drug offenses.[25] Another aspect is that the drug market operates according to common economic rules and principles. It is a mere illusion to believe that the supply of drugs can be efficiently cut off. It is more likely that the international mafia will benefit from a continuation of the present drug policy. As professor RÜTER said during the congress "100 years of Dutch Penal Code", it is the present drug policy that cultivates an international mafia with an enormous financial power and a highly developed criminal organization that enables it to infiltrate in legal corporations and governments and threatens to corrupt the roots of our society.[26] Or, to quote a report of the Judicial Committee of the Council of Europe: "Police, civil servants and prison guards can be

21 See van den Wijngaart, G.F.: op.cit. (note 6), p.127. Also the study "Hard drugs and Criminality in Rotterdam", mentioned above, confirms that insofar as there is talk of a new increase in the number of drug users, it especially includes young Moroccans.

22 See especially the departmental Note "Samenleving en Criminaliteit, een beleidsplan voor de komende jaren" (Society and Criminality, a policy plan for coming years) (1985) in which this issue is dealt with.

23 See Centraal Bureau voor de Statistiek (Dutch Central Statistical Office): Criminaliteit en Strafrechtspleging (Criminality and Criminal Law Procedure) (1987) and Interdepartementale Stuurgroep Alcohol-en Drugbeleid (Interdepartemental Steering Committee for the Policy on Alcoholics and Drugs) (ISAD): Heroverweging 1986 Drug- en alcohoholbeleid (Reconsideration 1986 of policy on Drugs and Alcoholics, (1986), annex 6, p.5-6.

24 See Interdepartementale Stuurgroep Alcohol- en Drugbeleid (ISAD): Drugbeleid in beweging (Drug policy in motion). Den Haag 1985, p.11; Erkelens, L.H.: Drugvrije detentie: nieuwe ontwikkelingen in het penitentiair drugbeleid. (Drugless detention). Balans 6 (1986), p.13 and the Report "Drugvrije detentie (Drugless detention) (1985).

25 See Structuurplan Penitentiaire Capaciteit (Masterplan Penitentiary Capacity) 1985.

26 Rüter, C.F.: Drugs and the criminal Law in the Netherlands. In: van Dijk, J. et al. (Eds.): Criminal Law in action; An overview of current issues in Western societies, p.160.

corrupted, members of government and even the judicial system and the courts can be bribed".[27]

It is against this background that one should assess the ever increasing demand in the Netherlands to change the present policy and to embark on a more rational and more effective approach of the drug problem. This demand is not only heard in academic circles but also from highplaced police officers, judges and public prosecutors. Also in the recently published report of the Dutch Scientific Council for Governmental Policy the negative effects of the present repressive-criminal approach towards the hard drugs issue are enlarged upon in detail and are critized. However, the Council thinks that **at this moment** the only plausible solution - decriminalization - can not be realized yet, because notably "the international character of the hard drug trade and of the of hard drugs allows the Netherlands hardly any room to follow an approach that is fundamentally different from that of other states".[28] Senior officials of the Ministries of Justice and Health[29] have urged for a new policy, focused on integration and normalization of the drug problem and on destigmatization and demythologization of the users; this means according to VAN DEN WIJNGAART that "drug users should be treated as far as possible as 'normal' people, who are given 'normal' opportunities and of whom 'normal' demands are made. This means that drug users or even addicts should not be primarily regarded as criminals, nor as dependent helpless patients. Drug users have to face their responsibilities, too. It is obvious that many of them have, to a certain extent, consciously chosen their lifestyle".[30]

In a rational and consistent drug policy the role of criminal law should be as modest as it is with regard to other problematic social phenomena, like gambling, alcohol, tranquilizers, traffic, pornography and prostitution. For there is no justification for the fact that while these ways of conduct are not made punishable by criminal law - for good reasons, by the way -, the possession and purchase of "illegal" drugs still are, although the former are much more harmful for public and individual health than the latter. This dissimilarity is one of the most irrational and

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27 Vrij Nederland, 47th volume, nr.37, September 13, 1986, p.1.

28 See Wetenschappelijke Raad voor het Regeringsbeleid: Rechtshandhaving (Law Enforcement). Rapporten aan de Regering, nr.35, Den Haag 1988, p.121-139.

29 See also Engelsman, E.L., Wever, L.J.S.: op.cit (note 17).; Wever, L.J.S.: Drug problems and drug policy in the Netherlands, paper prepared for the WHO-workshop on the prevention and treatment of drug dependence. Brussels 1983; Engelsman, E.L.: Drug policy: is the cure wordse than the disease? To a process of normalization of drug problems. Proceedings of the 15th International Institute on Prevention and Treatment of Drug Dependence. Rotterdam 1987, pp.36-38. See also the Interdepartemental Steering Committee Alcohol- en Drugsbeleid (ISAD): op.cit. (note 24).

30 Van den Wijngaart, G.F.: op.cit. (note 6), pp.132-133.

incomprehensible aspects of the present approach of the drug problem. To quote ENGELSMAN: "The higher the number of people that die of a drug, the lower the extent to which the drug is a legal taboo".[31] In this respect the facts are obvious: every year 17,000 people die in the Netherlands as a result of smoking, setting aside the non-lethal physical disorders. Every year 2,000 persons die as a direct result of alcoholics, while 500,000 to 750,000 people have serious problems with controlling their alcohol consumption. An estimated 100,000 to 140,000 persons in the Netherlands are so-called problematic gamblers, of whom 20,000 are heavily addicted. An estimated 14,000 to 20,000 persons are seriously addicted to tranquilizers and barbiturates. Just take benzodiapezines: every year some hundreds of millions of pills are sold of it. Compared with all these figures, the estimated number of hard drug addicts and the yearly number of some 65 lethal drug cases pale into insignificance.[32]

This does not imply a radical legalization. Full legalization of drugs seems in a internationaal perspective as yet an unrealistic ambition. Moreover, insofar as legalization implied an uncontrolled and unrestricted supply of hard drugs, that would be just as inconvenient as if it were the case with the so-called legal hard drugs. There is every reason, however, to depenalize the possession and purchase for own and to subject it to a regimen that is similar to that for legal drugs. That time has not come yet, though. What could be realized at short notice, is what JANSSEN and SWIERSTRA called "a gradual process of cultural integration of heroin".[33] This means that the problem of addiction remains, but that it could be reduced from a community problem to a problem of the individual addict. That would make us look at the problem from a different angle. Contributions towards gradual integration of heroin are: de facto decriminalization of possession and purchase for personal (like soft drugs); quality check; availability of clean hypodermic syringes; intensive prevention and information programs; controlled supply to heroin users, preferably integrated in support programs. An important step towards integration has been made in Amsterdam, where experiments with morphine supply took place, and in 50 other Dutch cities, where free methadone supply and needle exchange programs seem to be generally accepted.

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31 Engelsman, E.L.: op.cit. (note 12), p.137.

32 These figures are taken from: Hermkens, P.L.J. et al.: Kansspelen als riskante gewoonte (Gambling as a risky habit). Den Haag 1988; van de Craats, J.: Vrouwen en het gebruik van kalmerende middelen en slaapmiddelen (Women and the use of tranquilizers and sedatives). NVAAG, LOP-reeks, nr.3. Utrecht 1988; the special issue "Addiction" of the periodical Dienblad nr.3 (1987).

33 Janssen, O., Swierstra, K.: Uitgangspunten voor een integraal heroïnebeleid (Starting points for an integral heroin policy). Criminologisch Instjituut Rijksuniversiteit Groningen. Groningen 1983.

3.3 Support Programs, Especially Methadone Supply

This brings us to the third pillar that constitutes the present drug policy in the Netherlands: support programs. After years of ideological discussions and controversies between social workers and the ministries involved, there now seems to be a consensus on how addiction programs should be organized in our country.[34] Today the approach of drug addicts is no longer based on one theory or methodology exclusively. It is commonly agreed that drug users should be offered a wide range of differentiated support programs in order to solve the specific problem of each addict.[35] Emphasis is put on ambulatory programs, which are offered within one institution.[36]

Ambulatory treatment should not be isolated from what is undertaken by other institutions and/or persons in the vicinity of the addict.

An important feature of the assistance of addicts in the Netherlands is that it, unlike most other countries, only takes place on a voluntary basis. Dutch law only allows compulsory confinement and compulsory treatment when it concerns mentally disturbed persons.Addiction is not considered as such. This is one of the main reasons why the accent of the assistance is on ambulatory and not on intramural programs.

However, this doesn't alter the fact that in recent years there is an increasing tendency to force addicts towards a "voluntary" admission and treatment in a therapeutic drug centre, with criminal sanctions as the "big stick". The Dutch Penal Code, the Dutch Code of Criminal Procedure and some other laws offer many opportunities for that, like the conditional waiving of the procedure and the suspended sentence. In both cases, the condition is imposed that the addict

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34 For a history of the methadone programs see van den Wijngaart, G.F.: Methadon: geschiedenis en toepassing van een drug (History and application of a drug). MandblatGeestelijke Volksgezondheid 1989.

35 The present government policy with regard to addict programmes is based on the following documents: 1. Nota uitgangspunten voor een beleid inzake de drughulpverlening aan drugsverslaafden (Note containing starting points for a policy concerning support programs for drug addicts) (1977); 2. Nota inzake de situatie van de zwaar verslaafden (Note concerning the situation of the heavily addicted) (1978); 3. Hulpverlening aan drugsverslaafden (Assistance to drug addicts) (1981); 4. Drugbeleid in beweging; naar een normalisering van de drugproblematiek, op.cit. (1985); 5. Dwang en drang in de hulpverlening aan verslaafden (Compulsion and pressure in the assistance to addicts) (1988).

36 Example: in 1984 ambulatory programmes reached about 6,000 of the heroin addicts. The semi-institutionalized programmes, among which day care, had an approximate 2,000 clients registered. Intramural aid was given to 250 clients, a surprisingly low number which can be explained from the fact that compulsive treatment is not allowed under Dutch law. The above figures are derived from Sengers, W., Klomp, R.: Onderwijsreader heroineverslaving (Educational Reader Heroin addiction). Erasmus Universiteit 1985, p.41.

subjects himself to a treatment. In an increasing degree, too, prison sentences are imposed, because this offers the opportunity to transfer addicts to a drug rehabilitation centre.

Another means of forcing addicted detainees "with a gentle hand" towards a detoxification program is by setting up so-called drug free (prison) wards, and by granting, in addition to the obligations, certain privileges to detainees who choose for a stay in such a ward.[37] As mentioned earlier in this article, one of the main objects of the present drug policy is to prevent and to relieve the risks of drug use for the addict himself, not to fight against drug use as such or take action against individuals because they use drugs. However, this object, which is in fact at odds with the growing emphasis on law enforcement, is still retained in an unreduced form in the practice of addict support.

Today support programs are no longer aimed at detoxification or withdrawal, but rather at improving the physical condition and social behavior of the addict. The programs are not intended to give treatment, but rather to give guidance; addicts are given shelter, financial and emotional support and facilities for educational projects and supervised housing projects. Essential to Dutch drug aid is the distribution of substitutes, which takes place, whenever possible, within the framework of differentiated addiction programs. It is often argued that free distribution of substitutes is tantamount to exorcising the devil with Beelzebub. This would only be right if support programs would be merely restricted to the supply of methadon but that is no longer the case.

It is not the intention of this article to discuss in great length the varied and differentiated practice of drug aid. Therefore I refer to the appendix, which gives a description of the organizational set-up of drug aid in a medium-sized city in The Netherlands. I will confine myself here to a survey of the aspects of free distribution of substitutes, which is an essential part of ambulatory programs.

Free distribution of substitutes almost always concerns methadone, whether combined with other drugs or not. Until now the distribution of heroin has been rejected by the government although some countries are convinced of the opposite.[38] There are some experiments with the distribution of morphine to chronic addicts. For an evaluation of this experiment, I refer to the publications

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37 With regard to this, see the Note mentioned above, called "Dwang en drang in de hulpverlening" and the Note of the Jellinek Centre, called "Onvrijwillige behandeling en strafvervangende behandeling drugsverslaafden" (Involuntary treatment and treatment of addicts as a substitute for punishment), published November 1987.

38 See "Legale verstrekking van heroïne" (Legal supply of heroin). Appendix of the letter of the State Secretary of Health of April 15, 1983, Parliamentary Paper 17867, nr.1 and UCV, June 13, 1983, p.20 et seq.

by DERKS and DAANSEN.[39] Other experiments involve free distribution of a very potent drug: LAAM (levo-Alfa-Acetylmethadol). The results of this experiment are not yet known.

Though on a small scale, methadone was distributed in the Netherlands already at the end of the sixties. After publication of two policy documents on addict support in 1977 and 1978 the number and the extent of methadone programs quickly expanded. Gradually these programs lost traces of the theories of DOLE and NIJSWANDER. The American methadone programs, unlike the Dutch system, are restricted by the stringent regulations of the Food and Drug Administration. The Dutch were able to develop a wide range of programs, objectives and methodologies. There are, for example, programs that are exclusively aimed at detoxification or programs based on a maintenance therapy with a fully unconditional distribution. There are accessible programs which aim to stabilize the addiction or in other words: "to improve the physical condition and social behavior or those heroin addicts, who have no tendency whatsoever to break out of their drug dependence or are not able to do so as a result of mental disorder or serious social problems".[40] In large cities the methadone can be taken in a mobile "methadone bus".[41]

There are also less accessible programs, in which the addicts are intensively checked on additional and which are focused on full social reintegration. The duration of programs may also differ; there are short programs lasting up to 6 weeks, medium long programs up to six months and programs for an unlimited period, among which, for example, maintenance therapies.

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39 Derks, J., Daansen, P.: Injizierbare Opiatverabreichung zur Behandlung chronischer Drogenabhängiger - das Amsterdammer Morphium-Experiment. Kriminologisches Journal 1 (1984) pp.39-49 and Derks, J.: The Amsterdam morphine-dispensing experiment. In: Proceedings 15th International Institute of the Prevention and Treatment of Drug Dependence. Rotterdam 1987, pp.160-164.

40 van Epen, J.H.: Compendium drugverslaving en alcoholisme (Compendium drug addiction and alcoholism). Amsterdam, Brussels 1978, p.101.

41 This "methadone bus" program is described by van den Wijngaart as follows :"The advantage of a methadone maintenance program from a mobile bus is that it does not cause a great annoyance to people in a specific area. This is why the optimal capacity of a dispensing program is 20-25 clients. The methadone bus has a number of fixed halts in town, at specified times, for clients to receive their methadone. Liquid methadone must be used immediately on the spot. The atmosphere in and around the bus is generally peaceful. The program is only open to registered clients on a regular base after central intake and selection. Methadone is not given to unknown transients. The methadone bus has the appearance of a normal bus, but the inside has been fitted up as a tiny health center. There is running water, heating, a lavatory, a kitchenette, and a corner where one can wait, talk, and drink coffee. Dealing or using drugs or aggressive behavior is not tolerated. In addition to the bus driver, the crew often consists of a nurse and a social worker. If necessary, they can make a referral to the central clinic for an appointment with a physician or social worker. A bus program has a lot of advantages over an immovable program in a health center or clinic. The bus can reach people in certain neighborhoods that are otherwise hard to contact. The number of clients in a specific location can be kept small to prevent fringe effects. Especially in prosperous quarters, the expenses on a mobile bus are less than for a immovable property". See van den Wijngaart, G.F.: op.cit. (note 6), p.128.

There are day and evening programs, especially for addicts who work or go to school. Especially designed programs are available for ethnic minorities or extremely problematic addicts.[42]

In some case the addicts are merely provided with the methadone, but usually they have to consume their daily doses under supervision. An important advantage of these differentiated and varied programs is that each client can be treated according to his individual needs. To achieve this all types of drug aid should take place in one and the same institution, which must be closely connected with a network of drug-free facilities. This is called the circuit/mosaic model, which is now being developed in most Dutch cities. An example is given in the appendix.

Today approximately some 70 or 80% of all drug addicts have some contact with a drug assistance centre. About half of them is supplied with methadone, including distribution through semi-institutionalized and intramural programs.[43] An obvious question would be: what are the results of the various methadone programs so far and on which concrete empiric facts are the current programs based? Unlikely as it may seem, the answer is: we don't know. In spite of the fact that we have more than fifteen years' experience in methadone programs, we have to conclude that the distribution of methadone is still in an experimental stage. Unlike the Americans, the Dutch hardly have come up with any reliable and profound research results of the effects of methadone programs.

Still we have enough experience in the field and published so many articles on the subject, that it is very well possible - with all proper reserves - to draw a few tentative conclusions. In random order I give the following:

It has turned out that addicts who are given methadone are not feeling less inclined to kick the habit. Most addicts dream of a drug-free future and they keep asking for help when they try to get off the drug. It is remarkable that many addicts who may choose between structured, demanding programs and less structured programs, keep preferring a harsh treatment. It is clear that they want more than just methadone. It is because of a lack of stimulus that a considerable number of addicts are far too long engaged in half-hearted attempts to get off the drug.[44]

It has turned out a groundless fear that the supply of substitutes would cause an increase in the number of addicts. For years the number of addicts in the

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42 See Buisman, W.R.: De ontwikkeling van de methadonverstrekking in Nederland (The development of the supply of methadone in the Netherlands). Tijdschrift voor Alcoholisme, Drugs en andere Psychotrope Stoffen 1, (januari 1983), pp.24-29.

43 Distribution takes place in specialized institutions, health services, hospitals, medical practices (e.g. in penitentiaries). See Buisman, W.R.: op.cit. (note 42), p.24.

44 See Noordlander, E.: Intentional and unintentional effects of the Dutch methadone system. In: Proceedings of the 15th International Institute on the Prevention and Treatment of Drug Dependence. Rotterdam 1987, pp.50-51.

Netherlands has remained virtually unchanged. There are even indications that this number is decreasing.

A remarkable fact is that the new American drugs, like Angel Dust and Fentanyl have hardly found acceptance in the Netherlands. As said the Minister of Justice in his speech at the United Nations Conference in Vienna (1987): "Crack-use is a rarity. The use of amphetamines and LSD has almost dropped to zero. There has no solvent abuse been reported, nor the abuse of new types of illicit drugs".[45] According to NOORDLANDER, a pre-eminent Dutch expert, there are indications that, among other things, the availability of methadone has prevented addicts to use these destructive drugs.[46]

As the Americans have found out too, there are strong indications that the maintenance distribution of methadone has a relatively positive effect on the combined use of opiates and stimulants (e.g. cocaïne). Still the number of heroin addicts who use more than one drug, has not dropped spectacularly. This is because methadone has hardly any or no restraining effect at all on the combined use of opiates and tranquilizers, usually prescribed by family doctors.[47]

An important aspect of the daily methadone supply is that it allows for a regular contact with clients. In many cases methadone distribution is a means rather than a purpose in itself. In the Drug Assistance Foundation of Tilburg as described in appendix I, emphasis is put on good diagnostics and on planning a differentiated support program for each client. This program should include medical, psychotherapeutic and psycho-social help, training, rehabilitation and relation therapy; it should also stimulate the addict toward a more stable existence, whether with or without drugs. A fruitful aspect of methadone distribution is that it enables addicts to continue their daily work in a normal way. In Tilburg 15% to 20% of the clients attend daytime classes or have a job. Experience shows that without methadone supply this percentage would be far less high.

There are strong indications that methadone distribution has a positive effect on crime rates. This can be explained by the fact that methadone supply reduces the proportion of heroin use and consequently the number of drug-related crime. A research conducted in 1984 shows a 86% reduction of the average heroin during continuation of methadone distribution.[48] It is unknown to what extent crime rates are affected and whether this percentage can be compared to the

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45 See Staatscourant (Gazette) nr.116., 22 juni 1987.pp.2-3.

46 Noordlander, E.: op.cit. (note 44), p.51.

47 See Wever, L.J.S.: Effecten van methadon-onderhoudsprogramma's (Effects of maintenance programs with methadone). Tijdschrift voor Alcoholisme, Drugs en andere Psychotrope Stoffen 2 (februari 1985), p.90.

48 See Hoekstra, J.C.: De illegale heroïnemarkt (The market of illegal heroin). Economisch-Statistische Berichten 19/26-12-1984.

high American figures.[49] A survey by HOEKSTRA, published in 1987, shows that a scenario in which 80% more supply of methadone takes place, as well as 50% less police action against drug dealers, results in a decline of the average heroin consumption with 19% and a decline of the average amount of money acquired from illegal sources with 55%.[50] It seems plausible, though, that the supply of methadone especially leads to a decrease in the crime rate if it concerns drug users for whom the marginal life style is no more attractive, relatively speaking. To put it positively, take for example LEUW's words: "For those (populations of) drug users who are motivated to knock off the junkie existence".[51]

Methadone programs make it possible to involve both the addict and his family in the treatment. Parents are often very relieved when their child is registered in a program. As soon as the addict is no longer hunting for the drug and not feeling the pressure of compulsive detoxification, peace will return in the family.

The distribution of substitutes seems to be a substantial contribution toward the demythologization and normalization of drug use. Heroin is beginning to lose its magic, mythical image and the stereotype of a pitiful degenerate, who just has to steal and therefore may count on general consideration, is beginning to fade. The addict may choose between methadone and stealing. If he prefers the latter, he has to accept the responsibility and the consequences of his behavior. This clear choice has, according to NOORDLANDER, brought clarification in the hitherto confusing mixture of addiction and crime.

An important effect of the support programs that have been set up surrounding the supply of methadone is that they offer a convenient infrastructure for a succesful AIDS prevention policy. In addition to methadone supply and psychosocial assistance, AIDS prevention has become an ever more important part of support programs in recent years. Besides intensive public information campaigns - for example by means of a pamphlet about "Safe Drug Use", that has been distributed on a large scale and in several languages - an essential role in this prevention policy is played by notably the so-called needle exchange programs.

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49 See National Institute on Drug Abuse: Research on the treatment of narcotic addiction. Washington D.C. 1983. This research mentions a 80% drop in all crimes and a 50% drop in serious offenses.

50 Hoekstra, J.C.: Het traceren van de effecten van heroïnebeleid (Tracing the effects of heroin policy). Tijdschrift voor Alcohol, Drugs en andere Psychotrope Stoffen 1 (januari 1988), pp.12-21.

51 Leuw, E.: Heroïnegebruik, criminaliteit en de mogelijke effecten van methadonverstrekking (Heroin use, criminality, and the possible effects of methadone supply). Tijdschrift voor Criminologie 1986, p.132.

In Amsterdam and Rotterdam taken apart, where about 50% of the addicts live, in 1987 approximately 1 million clean needles were supplied in exchange for the handing back of the used needles.[52] The results of this policy that has been developed together with the drug users' organizations or "junkie unions" seem to bee very succesful: not only is in the Netherlands the percentage of AIDS patients who are intravenous drug users relatively low (4,5 to 8% in 1988)[53] when compared to other Western countries, but also does it seem that the criticism heard abroad that this needle exchange would stimulate the drug use is belied by the facts.

All in all it is a common belief, of both social workers and politicians, that the advantaged of methadone supply largely outweigh the disadvantages. It is however not possible to given a final judgement until the current programs will be thoroughly evaluated.

4. Finally

From the preceding it may be clear that nor the present criminal law policy nor the methadone distribution has brought about a solution to the hard drug problem. It rather seems as if heroin - and maybe soon of other drugs remains an unsolvable problem. However, it is a political decision whether we want to approach this problem in a different way than other, equally unsolvable, problems in our society. As yet I don't believe that a more humane and rational and a less emotional and marginalizing approach of the drug problem is within the bounds of the possible. The opposite seems to be the case.Instead of enlarging the policy of normalization and cultural integration of drug consumption, the Dutch government seems to conform, in an increasing degree, to the agreement made within the framework of the United Nations and the Council of Europe for harmonization of the legislation on drugs and for cooperation in the field of investigation, prosecution and punishment of drug crimes. The consequence is that the Dutch government, in the wake of other West European countries, stands increasingly under pressure to give up its pragmatic policy and to join the international repressive approach.

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52 See "Nota AIDS en druggebruik" (Note on AIDS and drug use) of the municipality of Amsterdam (1988) and de Boer, N.: Rotterdamse spuitenomruilautomaat succes (Rotterdam needle exchange dispenser succesful). Welzijnsweekblad 19 (12 mei 1989), p.6.

53 These data are taken from the statement of the Dutch delegation at the meeting of the Commission on Narcotic Drugs in Vienna, February 1988, which values the percentage of AIDS patients who are intravenous drug users at 4,5% and the Note "Aids en druggebruikers" op.cit. (note 52), which mentions a percentage of 8%.

The first effects of this yielding to the international pressure are clean already: Under the terms of the so-called Schengen Convention[54], aiming at closing down the borders between the Benelux Countries, Germany and France, for example, the Dutch government has to investigate and prosecute once again the selling of soft drugs in coffee shops, has to stop the therapeutic assistance to foreign drug users and has to extradite foreign addicts to their own judicial authorities.[55] Also the fact that the Dutch government signed without delay the new UN-Treaty against the illegal trade in narcotics and psychotropic drugs indicates that it at least in part is giving up the policy pursued so far. Insofar as a hardening of the drug policy restricted itself to the immoral wholesaler, one would be able to acquiesce in it. Experience learns, however, that this is not the case. In practice it is not the wholesalers, but the drug useres, addicted retailers and unsuspecting, ignorant drug couriers from the Third World countries that are the target of the police and judicial hunt for drugs and that forms the greater part of the present prison population.

As a result of this (enforced) change of course the problem will become less controllable and cause more criminalization and marginalization of the most vulnerable groups in our society. The expected demographic developments are pointing in the same direction. In the governmental report "2000" and the report from the Council on Youth Policy "Youth with and without future", both mentioned above, it is expected that the socio-economic gaps between individuals will only get wider in the next decades. Poverty will be particularly concentrated in the inner cities and drug use is expected to increase among the allochtonous communities. Unlike twenty years ago, when drug took place within alternative youth movements, it is now embedded in a number of social problems, like unemployment, dilapidation, social exclusion. To attack these social problems with a repressive criminal policy is only really trying to exorcise the devil with Beelzebub.

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54 See Tractatenblad 1985, nr.102 and 1986, nr.34 and Parliamentary paper 19326.
55 See Nederlands Juristenblad (Dutch Jurists'Journal) 1989, pp.621-622.

ANNEX

The following is an illustration of an ambulatory drug aid project in the Netherlands: the Stichting Drug Hulpverlening Tilburg (Tilburg Drug Assistance Foundation).

Introduction

After years of ideological discussions and controversies between social workers and the ministries involved, there now seems to be a consensus on how addiction programs should be organized in our country. Today the approach of drug addicts is no longer based on one theory or methodology exclusively. It is commonly agreed that drug users should be offered a wide range of differentiated support programs in order to solve the specific problem of each addict. Emphasis is put on ambulatory programs which are offered within one institution. Ambulatory treatment should not be isolated from what is undertaken by other institutions and/or persons in the vicinity of the addict.

One of the most recent projects has been started in the Dutch city of Tilburg. This project can be seen as the result of a great number of drug aid experiments that have been carried out in the Netherlands over the past fifteen years. The drug program that will be described below is, therefore, an illustration of the general approach of the drug problem in a medium-sized Dutch city in accordance with the government policy for ambulatory care.

The city of Tilburg

Like all comparable provincial towns, Tilburg is faced with an equally serious drug problem. The city has a population of 150,000, of whom 350-450 (2-3 per 1000) are estimated to be using regularly hard drugs, especially heroin. Unlike the United States, the Netherlands have not been confronted with a serious cocaïne problem so far.

In an economic sense, the city has suffered a lot from the collapse of the textile industry. This collapse has not only caused unemployment (20%), but also a demolished city centre, which had been dominated by textile factories for years. The local authorities have realized a number of new-construction projects to fill up the gaps. Tilburg is gradually emerging from a long period of depression and decline. It is expected that by renovating the city centre and by attracting new industries the city will regain full strength again before 2000.

Still, it can not be denied that high unemployment figures have an adverse effect on the fight against drugs.

The origins of the Foundation

Years ago social workers in addiction care as well as local politicians and officials agreed that addiction programs needed to be improved. Many people dealt with addicts, but what they lacked was a targeted, integral policy. There was no effective cooperation between the various institutions, some institutions were lacking management, control and vision, and each institution followed a different methodology. There was no consultation among police and judicial authorities, local health services and other social welfare institutions. As a result, society suffered more and more from inconveniences, like theft and illegal drug traffic and the addicts themselves bitterly complained about the quality of the programs. There was every reason for those responsible to take active measures.

After various fruitless attempts by commissions, working parties, and steering committees to bring about changes, the city council of Tilburg appointed a new interim committee on May 1, 1985. This committee was assigned to set up an entirely new organization for drug aid, in which all types of ambulatory treatment should be integrated. With support of a professional management consultant the committee succeeded in founding an institution that can offer consistent programs to its clients, i.e. the addicts.The reason for this success is that the committee has observed a set of fundamental rules that should apply to drug aid itself as well as to its structure.

Features

In the development of the organizational form, the policy guidelines and the conditions to which drug aid should comply, the committee took account of the following principles and considerations.

1. The addict is **responsible for his/her addiction.** If he/she does not want help, he will not get help.
2. The consequence of hard drug addiction is a psychological process of satisfying needs. Addicts will do everything to take the fastest way to satisfy their needs. This makes them fundamentally **unreliable**, as long as they are addicted. As VAN EEPEN, a Dutch psychiatrist and expert in the field, has put it: The essence of the junkie-syndrome is that the

addict sees and judges his fellowmen in only one way: they only test them by the criterion of usefulness. Junkies squeeze their fellowmen.

3. The social worker is permanently seduced by the addict into co-responsibility, understanding and "therapeutic corruption". The organization will have to make conditions to protect their workers (and also the addicts) against this little game of addiction.

4. Therefore it is necessary to develop a **circuit**, a sound system of agreements, planning and evaluation between drug aid institutions within a certain area. Such a circuit will prevent the addict to play off social workers and institutions against one another.

5. For the benefit of the development of a good policy, and in order to avoid overlap and to improve the "product", emphasis is put on **evaluation** through a rigid registration system.

6. The various functions in the organization should be unambiguous and devoid of conflicting interests. The clients should not be given opposite expectations.

7. In principle the organization will leave matters of civil order to the responsability of police and judicial authorities.

8. Full detoxification can be made easier, when it is possible for the addict to reintegrate in society. The family of the addict can be of great help. Rehabilitation programs are of vital importance.

In combination with more general organizational requirements, these rules have led to a far-reaching differentiation in the functions, the objective and the types of treatment. Differentiations and specializations of functions call for an intensification of co-ordination and management. All this will be anchored in an unambiguous and structured circuit of organizations and institutions for hard-drug addicts.

Objective

The main objective of the institution can be described as follows: to support the client in finding his or her own place, if possible as an independent one, in society, with or without the addiction. Starting point is the addict him (her)self and his/her environment. If the addict lacks a social environment, the institution will try to reintegrate the addict in a social circuit. This requires a subtle approach of both the target group and the individual situation of the addict.

The means that are being used to realize this objective can be summed up in three points:

1. Stimulating the ability to cope independently.
2. Gaining a form of control over the addiction.
3. Gradually cutting back the addiction.

The ability to cope independently is being stimulated particularly by:
offering all sorts of activities that require a personal contribution from the addicts;
stimulating the use of the regular facilities offered by our society;
stimulating the renewal or retention of the addicts' contacts with his/her family and friends outside the drug scene.

Target group

The addiction programs are basically intended for each hard drug addict. As a basis, the following groups are distinguished:
high-risk groups;
those who have just begun to use drugs;
addicts;
terminal addicts;
addicts from ethnic minorities.

Programs

The Foundation offers three different types of direct drug aid.

1. **Methadone supply** on different hours, geared to the following distinction in population: on the one hand, a. clients who only want methadone and nothing else, on the other hand, clients who undergo therapeutic treatment, whether or not combined with urine analysis on addictional drug use.
2. **Care:** addicts are offered help with material problems and they may choose between a variety of activities (sports, games, coffee hours, workshops).
3. **Treatment:** through certain procedures addicts can be registered in ambulatory programs. A wide range of therapeutic methods is available, as for example family and clinical group therapy, behaviour therapy and therapies based on the therapeutic models of AUSLOSS and STANTON and TODD. Also the acupuncture treatment can be applied.

Apart from this, the organisation has a fourth function: registration. The registration procedures are fully separated from the rest of the organizational structure. The main tasks are:
Professional registration, diagnostics, medical examination, planning of a treatment, and "first aid".
Internal reference to a methadone unit, care unit or therapeutic unit.
External reference to intramural care (therapeutic units).
To set up and update a sound registration system.
To decide whether or not to change from one unit to another is possible only with the approval of the registration team.

In other words: The registration team has its own responsibility with regard to registering clients and it constantly controls the practice and the quality of the registration procedures.

This implies a strict separation of responsibilities and functions of the workers in the organization. Workers in drug aid programs have changed from all-rounders (they used to do everything, from registration, therapy and care to reference and rehabilitation) to specialists: Each one occupies an unambiguous and clearly defined field, so the client knows what to expect from who.

Methadone supply

Methadone supply is only possible by means of the physician's prescription, according to one of the following indications.

1. Methadone as a means of support in the process of detoxification from heroin or other opiates, in which it helps to alleviate the most serious withdrawal symptoms but certainly does not eliminate them completely. The client must of course be clearly informed of this.
2. Methadone as a substitute for heroin or other opiates, with the intention to withdraw the client from the illegal drug scene, eventually as a preparation for detoxification. On applying this indication it is essential to be cautious as to whether the desired aim is actually achieved or not.
3. Methadone as a substitute for heroin or other opiates in order to achieve that the client's social abilities and functioning will improve. This may imply that the client is enabled to acquire (and keep) a permanent job or that the "necessity" to engage in criminal acts is removed. This means that on applying this indication the possibility of additional use of heroin is accepted.

Based on these indications methadone distribution can be divided in three types of programs:

1. A short detoxification program (3 to 5 weeks).
2. A longer detoxification program (1 to 6 months).
3. A maintenance program.

Detoxification programs impose on the addict certain conditions with regard to his drug use and also include urine analyses in order to check the addict on additional drug use. Those who supply methadone do not have any therapeutic responsability: Their function is to observe their client, his physical condition as well as his behaviour.

Some practical aspects

Before an addict can be admitted to a detoxification program,an appointment must be made with a member of the intake team. During the intake period a social and medical investigation is started and often psychological tests are carried out, so as to arrive at an eventual referral.

Then each client is assigned to his/her own contact either within the assistance team or within the treating team.

Clients who qualify for treatment must have made it clear that they want to bring about a change in their lives. They must be able to deep appointments and to discuss their problems. In many cases the client's environment is involved in the treatment.

At first the assistance is not clearly aimed at bringing about a change, but at personality building.

Outward look and behaviour receive very practical attention as well as the elementary needs of both the group of clients and their environment and the society as a whole. There is for instance a living room available in the morning for five days of the week. The clients can have coffee there, they are warm and dry and they have a possibility to be "off the street", instead of being urged to hang around all day.

For those who want them, meals are provided three times a week. Each time two clients have to see to the shopping, others wash up and a financial contribution is provided by them.

For another group there are sports activities. The idea is that through the introduction to various forms of sport the interest in the care of the body is increased, which may result in a wish to join a local sportsclub.

Moreover, videos are played, activities in the field of creativity are stimulated and incidental activities are organised, all of which are meant to increase the client's spheres of interest and personal initiative.

However hard one is trying to get everybody to function independently, the group of clients requires constant care and attention.

An example of this is the aids prevention program, in the framework of which activities have been developed in conjunction with the council's health service. Information sessions are organized regularly. All clients can come and exchange used needles for clean ones. From time to time condoms are being supplied to keep the attention focussed on the prevention of aids. The Foundation not especially examines clients for sero-positivity; the efforts are exclusively aimed at prevention.

Some figures

The Drug Assistance Foundation is a private organization which is partly subsidized by the town council and partly by the national government. The board of the Foundation is formed by interested citizens; some of them have been invited by the council, and partly also by the staff of the organization.The Foundation has 24 paid staff members filling 16 full- time posts. The costs amount to 1.4 million guilders a year, of which 600,000 is paid by the city and 800,000 by the government. The average number of clients is about 300 yearly.

In the early part of 1987 the Foundation got a second building, so that methadone programs and support programs could take place separately from the registration and therapy. Another advantage of the extended accomodation is that concentration of addicts at the same time and at the same place can be avoided.

Organizational structure

The organization can be divided into 4 units: a methadone unit, a care unit, a therapy unit and a registration unit. Each unit is run by a team of workers and each team has a worker with additional co-ordinating tasks or a full-time co-ordinator. The care unit, for example, has a full-time co-ordinator. Alle the units are supervised by a manager, who is assisted by a small secretariat and one staff member.

The staff further consists of one medical doctor, 2 psychologists, 3 methadone suppliers, 5 social workers, 2 group workers, 2 nurses, 1 doorkeeper and 1 streetworker.

The circuit in practice

Since the Foundation doesn't offer all types of support and doesn't bear judicial or police responsibilities either, it can not function without co-operation with the following organizations.

1. Huize Poels, a general crisis centre in Tilburg, frequently visited by addicts. In addition to (former) psychiatric patients, alcoholics and people in crisis situations, some addicts come to Huize Poels for peace and rest and a bed for the night. With the help of a co-operation contract and a temporary worker, paid by the Foundation, the exact function and position of Huize Poels should be clearly defined in the near future. The contract and the extra worker contribute to the realization of a uniform registration procedure and reference policy etc.
2. The organization "Hulp aan Drugsverslaafden" (HAD) (Assistance to Drugs Addicts) in Oirschot (a village near Tilburg), an intramural therapeutic unit. If registration is required/wanted, clients will be referred to HAD in most cases. Again the purpose is uniformity in registration and reference procedures. Most addicts stay in a therapeutic unit for more than a year (24 hours a day).
3. Police.
4. Probation and after-care services.
5. Street corner work: ambulatory social work for underprivileged youth. Street corner work deals a lot with addicts. It has initiated a project for lunch time shelter for addicts, which will be continued by the Drug Assistance Foundation.
6. "Work and Education", a project of the city of Tilburg aimed at reintegration, in jobs or in schools, for addicts and non-addicts. A part of the rehabilitation programs will be integrated in this project.

As recommended by the city council a drug policy evaluation platform has been founded, in which the following persons and institutions are participating:
the chief superintendant of police;
the board of the Drug Assistance Foundation;
the board of the Foundation "Jeugd- en Jongerenwerk", a foundation aimed at helping and supporting youngsters and juveniles;

the chairman of the local association of general practitioners;
the management of Huize Poels;
the probation and after-care service;
the regional health service (GGD-Midden-Brabant);
the board of the regional ambulatory mental health service (RIAGG);
the local alderman for sports and public health.
This platform is mainly initiated in order to be able to exchange experiences, to inform each other and to create consistency to such an extent, that the drug aid circuit can operate in the best possible way.

Summary

The way the drug assistance nowadays has been organized in Tilburg seems to be a satisfying answer to the drug problem in this city. This is because of the new approach of the drug assistance, that has the following characteristics:
more differentiation of tasks and functions of workers; more specialization;
strict separation of roles and responsibilities of workers;
permanent, structured, internal evaluation through control and intermediary functions of a registration team;
a highly developed circuit;
management control on execution;
a reliable registration system;
co-operation with other institutions dealing with addicts;
the commitment from politicians and officials through a platform;
a non-moralistic, down-to-earth approach of the addict, who is after all responsible for his own life, especially for a life without drugs.

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The Present Spanish Drug Criminal Policy

Prof.Dr. J. L. de la Cuesta

1. Introduction

Until 1983 the Spanish Penal Code controlled crime of illegal drug traffic in article 344. This article proceeded from the reform of the Penal Code of 1971 (which followed the ratification by Spain of the most important international agreements) and described an extensive list of punishable conducts related with toxic drugs or narcotics, that covered from cultivation to possession, donation or traffic. Furthermore, with the object of avoiding that punishable conduct escapes from its definition, it permitted the employment of an open formula that would allow the punishment for "any means" of promotion, favoring or facilitation of drug use. This extensive description of punishable conducts was completed by an excessive judicial arbitration. Judges were able to vary in the determination of the penalty from between six months (and one day) to twenty years of imprisonment. In addition, they were authorized to close establishments for periods of one month to one year and international recidivism was also considered.

This situation was greatly modified by the reform of the Penal Code of June 25, 1983, which, without producing "any depenalization whatsoever", simplified the definition of punishable conduct and limited judicial arbitration.[1] At the same time, it reduced the foreseen penalties.[2] Nevertheless, this reform has lasted very short time. The Act of March 24, 1988 has again hardened the Penal Code, extending the definition of punishable behaviour, increasing the penalties and introducing eight new articles. In order to better comprehend the significance of

1 Boix Reig, J., Mira Benavent, J.: La reforma penal en relación con la problemática de la droga (Análisis jurisprudencial). In: Problemática juridica y psicosocial de las drogas. Valencia 1987, pp.105 et seq.

2 Critically Llorens Borras, J.A.: La droga y su problemática actual. Madrid 1986, p.109.

the last reform we shall begin with an explanation of the characteristics of the penal policies starting in 1983.

2. Characteristic of the Reform of 1983

The reform of 1983 entailed an important revision of the control of crime of drug traffic in Spain.

In the first place, it introduced into the Penal Code a distinction that until that time had remained unknown: the separation between **hard drugs** (for the Penal Code, those "which cause serious damage to health") and **soft drugs**. If up until 1983 the Penal Code treated all behaviour dealing with any type of illegal drugs in the same manner, starting from that reform, even though they may continue being illegal substances and therefore subject to penal provisions, the penalties to be imposed changed considerably. While in the case of crimes dealing with soft drugs the basic penalties changed to varying from one month (and one day) to six months of imprisonment, in case of behaviour dealing with hard drugs, the penalties to be imposed were those of imprisonment from six months (and one day) to six years and a fine of 30,000 to 1,500,000 pesetas.

This distinction in the penal treatment of drugs according to their seriousness was complemented by a better definition for punishable conduct, divided into two sections: for one part, the promotion, favoring or facilitation of illegal consumption of drugs through the acts of cultivation, fabrication or traffic, and, for the other part, the possession directed to traffic.

The simplification of the description of punishable behaviour allowed to consider "unpunished" a series of conduct previously penalized by the Penal Code. This was the case of **donation**, which, since it did not contain the lucrative content exacted by the term "traffic",[3] was considered by a major part of the doctrine in the margin of the Penal Code. However, the Public Prosecutor's Office and the High Court understood that the "common" concept of traffic did not exact this lucrative content and could cover all transfer of drugs from one person to another, including gratis transfers. For this reason they continued to punish this

3 Arroyo, L.: Aspectos penales del tráfico de drogas. In: Poder Judicial 11 (1984), p.23; Barbero Santos, M.: El fenómeno de la droga en Espana. Aspectos penales. In: Gedächtnisschrift für Hilde Kaufmann. Berlin 1986, p.839; Torio Lopez, A.: Problemas político-criminales en matéria de drogaddición. In: Delitos contra la salud pública. Tráfico ilegal de drogas tóxicas o estupefacientes. Valencia 1977.

behaviour and even condemned the mere passing of a cigarette among a group of consumers (S. March 15, 1985), something that in 1980 (S. October 20, 1980, from the Special Court of Social Danger and Rehabilitation) was already (and reasonably) declared not to have any penal meaning.

In like manner, other acts were left out of article 344 of the Penal Code, such as **propaganda** for drug use,[4] **mediation** in traffic (either directly or through premises) and for illegal consumption, even when they could be penalized by the Code in general in the form of foreseen participation.

Furthermore, the reform of 1983 assumed legally the jurisprudential position maintained since the decision of October 31, 1973[5] of declaring unpunished, although not necessarily legal,[6] those acts of **possession** of drugs with the intention of personal use (and those neither destined for traffic nor for personal use), punishing only possession with the intention of traffic. Of course determining whether or not the possession was with the intention of traffic, was very problematic and gave rise to the use of diverse criteria, among those the amount in possession, the drug's form of presentation, the possession of instrumental for its distribution .... These criteria sometimes operated as a base for presumptions against the accused and were heavily criticized by the doctrine,[7] which reminded that as the law stands, it is the Prosecutor who is responsible for proving the charge and not the responsibility of the accused to disprove accusations which lack foundation. With respect to the amount, it was considered convenient[8] to set

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4 About the agreement on its punishment, Garcia Pablos, A.: Bases para una politica criminal de la droga. In: La problemática de la droga en Espana (Análisis y propuestas politico-criminales). Madrid 1986 pp.39 et seq.

5 Cobo Del Rosal, M.: Consideraciones generales sobre el denominado tráfico ilegal de drogas tóxicas o estupefacientes. In: Delitos contra la salud pública. Tráfico ilegal de drogas tóxicas o estupefacientes. Valencia 1977, p.158; Conde Pumpido Ferreiro, C.: El tratamiento penal del tráfico de drogas: las nuevas cuestiones. In: La problemática de la droga en Espana. Análisis y propuestas politico-criminales. Madrid 1986, pp.119 et seq.; Garcia Pablos, A.: op.cit. (note 4), p.367; Quintero Olivares, G.: El fundamento de la reacción punitiva en el tráfico de drogas y los delitos relativos al mismo. In: Drogas: aspectos jurídicos y médico-legales. Faculty of Law, Palma de Mallorca 1986, p.171; Vercher Noguera, A.: Calificación jurídica de la tenencia o posesión de drogas o estupefacientes. In: Cuadernos de Política Criminal 21 (1983), pp.761 et seq.

6 Jiminez Villarejo, J.: En torno a la penalización del consumo y posesión de drogas ilegales. In: Estudios jurídicos en homenaje al profesor Luis Jiménez de Asúa. Revista de la Facultad de Derecho de la Universidad Complutense, monogrf. 11, 1986, p.417.

7 Arroyo, L.: op.cit. (note 3), p.23; Boix Reig, J., Mira Benavent, J.: op.cit. (note 1), pp.127 et seq.; Prieto Rodriguez, J.I.: El delito de tráfico y el consumo de drogas en el ordenamiento jurídico-penal espanol. Barcelona 1986, pp.212 et seq.; Rey Huidobro, L.F.: El delito de tráfico de estupefacientes. Su inserción en el ordenamiento espanol. Madrid 1987, pp.116 et seq.; Vives Anton, T.S.: Presupuestos constitucionales de la prevención y represión del tráfico de drogas tóxicas y estupefacientes. In: Problemática jurídica y psicosocial de las drogas. Valencia 1987, pp.256 et seq.

8 Arroyo, L.: op.cit. (note 3), p.23; critically, Garcia Pablos, A.: op.cit. (note 4), p.388. For Boix Reig and Mira Benavent this would be acceptable as long as it did not suppose a new inversion of the burden of proof.

norms on the limits of impunity by substance that would correspond to the amount necessary for the consumption by a drug addict for approximately three days.[9]

Also outside the scope of the application of the Penal Code remained, naturally,[10] the **use** of drugs, which, however, the Penal Code continued classifying as "illegal". It was in this case an illegality without sanction because the administrative normative did not foresee any sanctionary response for this behaviour either. Rey Huidobro[11] understood, however, that the public consumption of drugs could constitute a misdemeanour against the public order (art.567,3 of the Penal Code).

With respect to the indicated basic behaviours, the Penal Code constructed a series of **aggravations**: diffusion of drugs among minors of less than 18 years old or in educational centres, military units or penitentiary institutions; membership of the subject in an organization dedicated to the diffusion of drugs; possession of an amount of "notorious importance".[12] The penalties of imprisonment were then raised to imprisonment from six years (and one day) to twelve years, for hard drugs, and imprisonment from six months (and one day) to six years in the rest of the cases. In addition, the penalty was aggravated when the guilty party was a physician or a person who held a degree in health, a pharmacist or his assistant, or a public official that abused his profession (the penalty of disqualification was added). Finally, in extremely serious cases and when the act took place in a public establishment or was carried out by the managers, administrators or employees of organizations dedicated (even if only in part) to traffic, a series of measures was imposed: closure, dissolution or suspension of the company (or its premises) and the suspension of activities, permitting the Public Administration to intervene "in order to safeguard the rights of the workers". Due to faulty wording of the Penal Code, it was argued in these cases whether or not the penalty could be newly aggravated. In the case that it could be[13] the penalty became twelve years (and one day) to twenty years for hard drugs, and six years (and one day) to twelve years for other offenses.

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9 Jiminez Villarejo, J.: op.cit. (note 6), p.420, proposed an amount between twice the daily dose and that consumed in three days as maximum.

10 Jiminez Villarejo, J.: op.cit. (note 6), pp.410 et seq. From the constitutional perspective, Vives Anton, T.S.: op.cit. (note 7), p.250.

11 Rey Huidobro, L.F.: op.cit. (note 7), pp. et seq. and 94 et seq.

12 E.g. 1 kg. hashish; 68-80 gr. heroin; 172 gr; 397 doses LSD. V. High Court Decisions of January 28, 1987, December 16, 1986, November 8, 1985 and November 12, 1985.

13 In favour of this interpretation, Beristain, A.: Delito de tráfico ilegal de drogas (art.344 del Código Penal). In: Comentarios a la legislación penal (dirigidos por M. Cobo del Rosal), T.V., vol.2. Madrid 1985, p.875; Rodriguez Devesa, J.M.: Derecho penal espanol. Parte especial, 9th ed. Madrid 1983, pp.1030 et seq. Opposing Lorenzo Salgado, J.M.: Titulo XIV. Delitos contra la seguridad colectiva. Capitulo III. De los delitos contra la salud pública. In: Documentación Jurídica 1983a, p.980.

Obviously, the doctrine, at the same time that it emphasized the virtues of the reform, also pointed out its defects. In particular, in the case of aggravations it criticized the use of the term "diffusion".[14] It also indicated the omission of groups other than minors of less than 18 years in need of greater protection, such as the incapacitated[15] or drug addicts in periods of treatment and/or rehabilitation.[16] Other points criticized were the references to educational centres, because of redundancy, and military units and penitentiary centres, for lack of necessity.[17]

Also criticized was the Act's poor definition of the amount of "notorious importance", a concept that the Public Prosecutor's Office, in 1984, tried to define more clearly. Regarding "extreme seriousness", the vagueness of the concept and the faulty wording of the Penal Code made this aggravation especially unsatisfactory.[18]

Finally, in complying with the obligations assumed by Spain in the signed international documents, article 344 referred to the effect of international recidivism, in cases of convictions from foreign courts "for crimes of equal importance". The provision was to combine with the universal competence in matters involving drugs granted to the Spanish Courts by the Organic Law of Judicial Power.

Nevertheless, this disposition presented great difficulty in its application and compliance due to the absence of an international register of criminal records,[19] the diversity of known penal systems - which made it advisable that the cases be limited to those which had actually respected the basic principles of Spanish Law - and the very problems derived from the literal tenor of the article.[20]

The doctrinal criticisms did not remain in the pure dictation of article 344 of the Penal Code, which, in addition, conflicted with the normative of smuggling approximating double sanction.[21]

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14 Del Toro, A.: Tráfico de drogas. In: Revista Juridica de Cataluna 1980, p.112. This term even gave rise to a Consultation to the General Prosecutor on July 12, 1985.

15 Fernandez Albor, A.: Otra vez sobre la droga: Que resuelve la reciente reforma del articulo 344? In: La problemática de la droga Espana (Análisis y propuestas politico-criminales). Madrid 1986, p. 20; Lorenzo Salgado, J.M.: Las drogas en el ordenamiento penal espanol, 2nd ed. Barcelona 1983; Prieto Rodriguez, J.I.: op.cit. (note 7), p.265.

16 Carbonell, J.C.: Consideraciones técnico-juridicas en torno al delito de tráfico de drogas. In: La problemática de la droga en Espana (Análisis y propuestas politico-criminales). Madrid 1986, p.347.

17 Arroyo, L.: op.cit. (note 3), p.24.

18 Beristain, A.: op.cit. (note 13), p.875.

19 Lorenzo Salgado, J.M.: op.cit. (note 13), p.981; Rodriguez Devesa, J.M.: op.cit. (note 13), p.1032.

20 Diez Sanchez, J.J.: La reincidencia internacional (especial referencia al Código Penal espanol). In: Problemática juridica y psicosocial de la droga. Valencia 1987, pp.213 et seq.

21 See Arroyo, L.: op.cit. (note 3), p.25; Barbero Santos, M.: op.cit. (note 3), pp.840 et seq.; Beristain, A.: op.cit. (note 13), pp.789 et seq.; Boix Reig, J., Mira Benavent, J.: op.cit. (note 1), p.143; Carbonell, J.C.: op.cit. (note 16), p.350; Marin Castan: Acerca de la doble tipicidad del tráfico de drogas. La ley, 17 July 1984,; Prieto Rodriguez, J.I.: op.cit. (note 7), p.432; Rey Huidobro, L.F.: op.cit. (note 7), pp.260 et seq.; Rodriguez Ramos, L.: Contrabando de drogas? Actualidad Penal 18 (1987).

In the margin of the aforementioned article, the Penal Code did not have any specific disposition referring to the **penal responsibility of the drug addict**, perpetrator of crimes because of his dependency, or, in particular, to the offering of **incentives** or **alternatives** in the case of the drug user's submission to **treatment**. As a consequence, in the general absence of means of avoiding punitive sanctions, the destiny of the majority of delinquent drug addicts, if found to have partial or complete responsibility, was prison.[22]

The situation was the same for those drug addicts considered "dangerous" and liable to suffer measures, who, in the absence of adequate centres,[23] also found themselves in penitentiary institutions. In addition, the state of drug addicts in Spanish prisons was (and continues to be) deplorable,[24] partly due to the lack of application of the legal dispositions and requirements relative to this type of internment. In view of all this a reform was urgently called for.

The possible comparative injustice that supposed certain substances may appear to be illegal drugs while products perfectly capable of being classified as drugs from a general perspective, in spite of their noxiousness, equal or superior to that of some legal drugs, remained in the margin of Criminal Law allowed certain specialists[25] to propose the depenalization (not necessarily the legalization) of traffic of the drugs that do not cause "serious damage to health", in addition to considering that those which do not cause any degree of damage to health - and one author pointed out that since an important part of soft drugs can be classified as being innocuous[26] - were already excluded from the Penal Code.[27]

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22 de La Cuesta Arzamendi, J.L.: La resocialización del toxicómano delincuente. Aspectos de Derecho Penal y Penitenciario. Report presented to the II. Congreso Mundial Vasco. Congreso de Drogodependencias. San Sebastián, September 1987 (in print).

23 Bueno Arus, F.: Las drogas y el derecho penal espanol. La Ley, 12 December 1986, p.6; Moro Benito, J.A.: Resignación social y tratamiento de los drogadictos. La ley, n.1.786, 28th August 1987, p.1.

24 Beristain, A.: op.cit. (note 13), pp.61 et seq.; Garcia Valdes, C.: La droga y la institución penitenciaria. Alcalá de Henares 1983; Del Rosa Blasco, B.: El tratamiento de los toxicómanos en las instituciones penitenciarias. Cuadernos de Politica Criminal 25 (1985), pp.19 et seq.

25 Gimbernat Ordeig, E.: Estudios de derecho penal. Madrid 1976, p.49; Gonzalez Zorrilla, C.: Droga y cuestión criminal. El pensamiento criminológico II, Barcelona 1983, pp.209 et seq.; Lamo De Espinosa, E.: Contra la nuevo prohibición: los límites del derecho penal en materia de tráfico y consumo de estupefacientes. Boletín de Información del Ministerio de Justicia, n.1.303, 1983, p.20; Luzos Pena, D.M.: Tráfico y consumo de drogas. La reforma penal: cuatro cuestiones fundamentales. Madrid 1982, p.67; Munoz Conde, F.: Derecho Penal. Parte Especial, 6th ed. Sevilla 1985, p.428; Quintero Olivares, G.: El fundamento de la reacción punitiva en al tráfico de drogas y los delitos relativos al mismo. Drogas: aspectos jurídicos y médico-legales. Faculty of Law, Palma de Mallorca 1986, pp.180 et seq.

26 Carbonell, J.C.: op.cit. (note 16), p.352.

27 Conde Pumpido Ferreiro, C.: El tratamiento penal del tráfico de drogas: las nuevas cuestiones. La problemática de la droga en Espana. Análisis y propuestas politico-criminales. Madrid, p.132; Garcia Pablos, A.: op.cit. (note 4), p.388; Lorenzo Salgado, J.M.: Las drogas en el ordenamiento penal espanol, 2nd ed. Barcelona 1983, p.40; Prieto Rodriguez, J.I.: op.cit. (note 7), pp.133 and 175.

For his part, DIEZ RIPOLLES has recently proposed the abolition of article 344 of the Penal Code because of its incompatibility with the present constitutional system that would only admit the punishment of some drug-related behaviours: some grave breaches of administrative regulations in this matter, the crimes against freedom (if, for example, the drug is diffused among incapable persons or persons undergoing processes of detoxification or rehabilitation) or crimes against socio-economic order (in the case of large organizations).[28]

The subject, which seams to be clear from the perspective of individual health (in Spanish Criminal Law self-injury is not punished), is, nevertheless, difficult to solve from the perspective of the protection of public health, juridical good or value protected - although not exclusively - by the Penal Code. The harmfulness of these substances is known and confirmed throughout the world (however, the use of alcohol and tobacco is only met by attempts of restriction by educational campaigns of health and prevention). This also poses problems in the international field: it would go against the compromises assumed by Spain through international agreements that should have been denounced in the light of article 96,1 and 2 of the Constitution.[29]

The "resounding failure"[30] of the systematic criminalizing policy which has even counterproductive effects, "criminogenous",[31] and great social and economic consequences (discredit of the law for its lack of application, strengthening of the black market, increase of marginalism - not always created by drugs[32] - and the subjection of drug addicts to international traffickers,[33] whose tentacles are often able to "control" institutional responses themselves), could advise, however, a revision of the present situation.[34] Especially when the everyday practical application of the Penal Code says more relating to juridically

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28 Diez-Ripolles, J.L.: La politica sobre drogas en Espana a la luz de las tendencias internacionales. Evolución reciente. Anuario de Derecho Penal 1987, pp.391 et seq. See also Bustos Ramirez, J.: Manual de derecho penal, parte especial. Barcelona 1986, pp.277 et seq.

29 Luzos Pena, D.M.: op.cit. (note 25), p.67.

30 Diez Ripolles, J.L.: op.cit. (note 28), p.388; Garcia Pablos, A.: op.cit. (note 4), pp.357 et seq.; Prieto Rodriguez, J.I.: op.cit. (note 7), p.437; Rodriguez Ramos, L.: Iniciación al consumo de drogas. In: La problemática de la droga en Espana (Análisis y propuestas político criminales). Madrid 1986, p.293.

31 Lamo De Espinosa, E.: op.cit. (note 25), p.13.

32 Cadoret et al.: An adoption study of genetics and environmental factor in drug abuse. Archivs of General Psychiatry 43 (1986), pp.1121 et seq.; Jaffe, H.J.: Drug addiction and drug abuse. The pharmacological basis of therapeutics, 7th ed., New York 1985, p.542.

33 Funes, J., Gonzalez, C.: Imágenes sociales, politico criminal y proceso terapéutico en las drogodependencias. Comunidad y Drogas 3 (1987), pp.21 et seq.; Prieto Rodriguez, J.I.: op.cit. (note 7), pp.74 et seq.

34 Critically, Beristain, A.: Pro y contra de la legalización de las drogas. In: Actualidad Penal 41 (1987).

oriented public safety - "criminality derived from or associated with drugs"[35] - than with public health. Big traffickers, those who present the greatest danger to public health, seldom are the object of penal intervention. On the contrary, this operates as a pure "repressive illusion"[36] and focuses on small traffickers and, most of all, on the user-trafficker[37] - the one who, in order to obtain his daily dose of hard drugs deals in other substances - and also on the drug addicts, who, because of their dependency, to obtain the dose or the means to acquire it, commit serious violent crimes against property. Nevertheless, public unsafely derived from drugs has very little to do - at least - with the consumption of those drugs referred to as "soft drugs"[38] and the same could be said for their traffic if it were to be depenalized. Furthermore, an option of this kind could be a first step in the reform towards a new drug policy, would difficult the continuity between hard and soft drugs, hindering the confusion between the two, and would favour the most effectiveness of the prosecution of the most serious conduct without criminalizing many sectors of the population, especially the young people,[39] among whom the consumption of soft drugs is really very widespread.

3. The Reform of 1988

None of this has been followed by the last reform of March 1988. On the contrary, the new reform, with a strongly repressive orientation - the Preamble itself speaks of the "aim of strengthening the function of prevention", after having justified the reform because of the insufficiency of article 344 to "confront the plurality and heterogeneity of criminal manifestations that arise in the complex world of drugs" -, divides the contents of ancient article 344 between this one and six additional new articles and, at the same time, introduces two other provisions: one dealing with receiving and the other with conditional remission of imprison-

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35 Garcia Pablos, A.: op.cit. (note 4), p.362.

36 Gonzalez Zorrilla, C.: Drogas y control social. Poder y Control, núm.2, Drogas y Psiquiatría 1987a, pp.56 et seq.

37 Prieto Rodriguez, J.I.: op.cit. (note 7), pp.310 et seq.

38 Opposing, however, Mato Reboredo, J.M.: Droga y criminalidad en Espana. Estudios penales y criminológicos, IV, Santiago de Compostela 1981, p.109. In detail requesting more study in that respect, Jiminez Villarejo, J.: Las drogodependencias y su incidencia en la criminalidad. In: Beristain, A., de la Cuesta, J.L. (Eds.): Las drogas en la socieded actual y nuevos horizontes en criminología. San Sebastián 1985, p.147.

39 Gonzalez Zorrilla, C.: Drogas y control social. In: Poder y Control, núm.2, Drogas y Psiquiatría, 1987a, pp.49 et seq.; De Leo, G.: La toxicodependencia de los jóvenes: construcción del problema social y modelos interpretativos. Poder y Control, núm.2, Drogas y Psiquiatria 1987, pp.15 et seq.

ment for those subjects who may have committed the criminal act due to their dependency on toxic drugs, narcotics or psychotropic substances.

To study the new reform - which has been accompanied by the creation of the Special Public Prosecutor's Office for the prevention and repression of illegal traffic of drugs - we shall divide it into three parts: in the first two, we shall deal with the new criminal figures in the area of drug traffic and receiving and, later, we shall examine the regulations of conditional remission of imprisonment.

3.1 Drug Trafficking

The characteristics of the new reform dealing with drug trafficking are the following:

- First, the big **extension of possible criminal conduct.**

In the description of punishable conduct the reform follows the double way opened in 1983: promotion, favoring or facilitation of illegal consumption, for one part, and possession with the determined purposes, for the other.

Now, if in 1983 the combination of the effects of promotion, favoring or facilitation of illegal consumption with the requirement of acts of cultivation, fabrication or traffic permitted a better delimitation of the scope of punishable conduct, the new article 344 changes the literal tenor and along with the aforementioned acts introduces the possibility of committing this crime in "any other way". This produces a fracture of the previous delimitation, extends unjustifiably the scope of punishable conduct against juridical security and approximates once again the text of the article 344 preceding 1983, which brought about so many criticisms in the doctrine. Certainly, this new wording will permit to include basic assumptions until now argued (such as donation) or excluded: propaganda, mediation in traffic, facilitation of premises or means of traffic or illegal consumption ... Nevertheless, it should be observed that the aforementioned conducts are assumed to be participation in crimes of traffic, not of perpetration, and the respect of the basic rules of Criminal Law should prevent penalties to become equal.

The extension of the definition of punishable conduct also repercutes in the sanction of possession, until now only punishable if directed to traffic. The new article 344, after the acts of cultivation, fabrication or traffic and "any other acts" that may promote, favour or facilitate illegal consumption, declares equally punishable possession with "that intention". The new wording does not permit

the clear distinction of whether the punished act is the possession with intention of cultivation, fabrication or traffic, which is done to promote, favour or facilitate the illegal consumption by others (the most logical interpretation) or both, and increases the possibilities of an immeasurable advance of punishment of preparatory acts, far from the protected juridical interest. Also, as BACIGALUPO indicated[40] on commenting on the text of the preceding article 344, the provision related with possession, because of its simplicity, will determine the "superfluity" of the previous provisions of favoring. Finally, the detachment of possession from intention of traffic will permit not only to prosecute even the possession of seeds for cultivation (in particular, if they are included in the concept of drugs), but also any possession, up to possession for personal use (also, then, the consumption is "illegal"). Nevertheless, it is to assume that the jurisprudence will not break the interpretative line maintained since 1973 and possession not directed to traffic will remain out of the Criminal Law.

- The general extension of punishable conducts is equally accompanied by the inclusion of **new aggravations**.

The Penal Code maintains the ancient qualifications (art. 344 bis a): diffusion among minors of 18 years old, in educational centres, military units or penitentiary establishments, membership in an organization, amount of notorious importance. These are distributed in different numbers of the new articles, their literal tenor is modified and the ones referring to organizations and the amount of drugs are widened: the organizations may be only transitory and dedicated to the diffusion of these substances or products only occasionally and the amount loses its exclusive relationship with possession directed to traffic and can aggravate all punishable behaviour.

In addition to the previously recognized aggravations, new are taken into account: facilitation to the mentally handicapped, execution of the act in public establishments, adulteration, manipulation or mixing of substances "increasing possible damage to health", the perpetrator's rank of authority, physician, public officer, social worker, member of an educational staff or educator. Before the reform, the perpetrator's position was only considered with the object of the application of the penalty of disqualification and referred to public officers and physicians. This last concept has also been extended by the reform: besides

40 Bacigalupo, E.: Problemas dogmáticos del delito de tráfico ilegal de drogas (art.344). In: La problemática de la droga en Espana (Análisis y propuestas politico criminales), Madrid 1986, pp.104 et seq.

physicians, persons with health degrees, pharmacists and their assistants, are also included psychologists and veterinarians (art. 344 bis, c, II).

Therefore, in spite of their disputable character (for the redundancy that some of them suppose), the reform maintains the recognized aggravations, introducing, in general, the ones requested by the doctrine. Nevertheless, the equalling of very unlike assumptions on a same aggravating level calls attention. They would have justified separate treatment. More advisable would have been to limit the raising of the degree of the penalty in cases that may determine greater danger to public health or the affectation of a new juridical good of sufficient significance and leave the rest of the cases to be aggravated in the framework of the basic penalty, imposed, if necessary, in the maximum level.

Moreover, the Penal Code establishes a second degree aggravation for cases of extreme seriousness (this vague formula is maintained) or when the managers, administrators or employees of the aforementioned organizations are involved. It must be brought to attention that the reform clears up in a repressive manner the doubts that arose in 1983 and constructs this aggravation as a second degree one, added on top of those of article 344 bis a).

- The main recognized purpose of the reform is the repressive aggravation. It is obtained besides through the explained extension of the definition of punishable conduct, through the **raising of the foreseen penalties.**

In this manner, the basic provision continues to distinguish, with respect to the penalties, between "substances that cause serious damage to health" and the rest of the cases and imposes penalties of two years, four months (and one day) to eight years of imprisonment and a fine of one million to one hundred million pesetas for conduct dealing with hard drugs. For conducts dealing with soft drugs, four months (and one day) to four years and two months, and a fine of 500 thousand to 50 million pesetas can be imposed. These penalties are raised for the first degree aggravations and once again, another degree, in cases of extreme seriousness and for acts committed by managers, administrators or employees of organizations or persons in charge of/or employees of public establishments. In this last case the judicial authority is authorized to order the dissolution of the organization or the permanent closure of its premises or its establishments open to the public, the suspension of the activities of the organization or closure of the establishments open to public for periods of six months to three years and the prohibition to realize those activities, commercial operations or business in which the crime may have been facilitated or concealed, for a period of two months until

two years. The reform disregards, in any case, the reference to the intervention of the company in order to safeguard the rights of the workers.

When the acts are committed by a physician, public officer, social worker or educator in the performance of their duties, profession or occupation, the penalty of disqualification is also imposed and is converted to absolute if it is the Authority or its agents that carry out the act.

Finally, a rule is included to determine the fines, which requires that attention should be given to "the final economic value of the product or, if it should be appropriate, the compensation or profit obtained by the guilty or that may have been obtained" and it is provided a specific normative for the confiscation of the instruments of the crime: vehicles, ships, aircrafts and other property and effects, as well as obtained profits, "whatever may be the transformations that may have been able to occur", as long as they do not belong to a third party not responsible for the crime. To guarantee the effectiveness of the confiscation, the judges are authorized to seize these properties, effects and instruments and put them in bond "from the moment of the first proceedings".

By the way of commentary, and disregarding details, one must begin by pointing out the unacceptability of the technique of aggravation that is used and, above all, that of the raising of penalties, which, accentuating the mistaken repressive policy, comes to violate the principle of proportionality,[41] especially in the cases of aggravation where the raising of the degree permits the imposition of penalties up to minor reclusion in its minimum level (14 years and 8 months) for conduct of "hard drugs" traffic, which may incur in one of the first degree aggravations, and/or penalties of between 14 years, 8 months (and one day) and 23 years and 4 months if, additionally, one of the second degree aggravations is applied. One should keep in mind that the penalties of reclusion - from 12 years (and one day) - are, in principle, reserved by the Penal Code for the most serious crimes against life, corporal integrity and sexual freedom. Hence, the foresight of a similar penalty for a crime only dangerous to public health cannot be considered anything but excessive, even when the demands of general prevention may be very urgent.

Another critical point is the double aggravation foreseen for authorities, physicians, public officials, social workers and educators, unless the initial elevation is applied when the acts are committed outside the duties of the profession - which does not seem very correct - and the penalty of disqualification is added when the acts are carried out in the framework of public, official and/or professional activities. In my opinion, it would have been more advisable to unify this treatment and, instead of imposing a penalty of superior degree and

41 In the same sense, previously, Vives Anton, T.S.: op.cit. (note 7), p.255.

also a disqualification, opt for the maximum level of the base penalty along with disqualification, as the Penal Code does for those who sell damaging medicines, if they were to be pharmacists or their assistants, or in the crime of abortion.

Regarding fines, if the normative that orders its measurement by the final value of the product or the compensation or profit obtained (or to be obtained) must be applauded, the foresight of such some high minimums (one million pesetas for hard drugs, five hundred thousand for soft drugs) needs to be criticized. They are unnecessary once having established that criteria of measurement. It should also be criticized that, due to the convict's lack of resources, they will simply result, in many cases, in an increase of up to six months of imprisonment, except the cases in which the imprisonment penalty is already for more than six years in which (art. 91 Penal Code) not paying will not have any effect whatsoever.

The normative regulating confiscation comes, finally, to satisfy an extended doctrinal demand,[42] that responds to an important international concern[43] of improving the effectiveness of the struggle against organized crime. The formula of exclusion of confiscation when the goods (the Penal Code should have added "really") "belong to a third person not responsible for the crime" permits an application more in accordance with the Criminal Law principles than that which is supposed on an international level. The possibility of judicially seizing and bounding of property will permit the guarantee of its effectiveness. In any case, one must observe, first, the extension that this kind of seizure order assumes, second, its distance with the general concept of confiscation of the Penal Code and the approximation that operates to the inadmissible general confiscation of property,[44] something that perhaps is unnecessary in view of the new specific criteria of measurement of the penalty of fines already mentioned.

- The review of the reform of 1988 should not, finally, fail to point out many **omissions**.

In fact, the legislators have not taken advantage of the reform to introduce into the Penal Code certain criteria and safety devices that would allow for the clearing up of the concepts of drugs (perhaps the list that includes the international agreements are thought to be sufficient in that respect), to better distinguish between soft and hard drugs, to define cases of "extreme seriousness" and

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42 Stampa Braun, J.M.: Medidas legislativas contra la criminalidad organizada. Drogas: aspectos jurídicos y médico-legales. Palma de Mallorca 1987, pp.253 et seq.

43 Diez Ripolles, J.L.: op.cit. (note 28), pp.351 and 396.

44 Diez Ripolles, J.L.: op.cit. (note 28), p.397.

amounts of "notorious importance", to improve the dictate of the aggravation relative to international recidivism, which is maintained practically unchanged .... but, most of all, the new articles 344 et seq. of the Penal Code completely forget the conflict between the provisions of the Penal Code and those of the legislation on contraband and, mainly, the very important problem of how many traffic with very small amounts to assure the addicts own personal use is allowed, which calls for a specific normative of excuse or mitigation of responsibility in order to permit the imposition of a penalty of a lesser degree, as the Preliminary Proposal of a new Code (1983) provided.[45]

These omissions, along with the repressive escalation that the reform supposes and the previous criticisms, permit to judge very negatively the last reform.

3.2 Receiving and Drugs

Beside the new articles about drug traffic, the reform of 1988 has introduced into the Penal Code a specific provision for the applicability of the penalties for receiving (a figure that, by definition, limits its scope to crimes against property) to those assumed to be exploitation of the profits or gains of the traffic, fraudulent and with the knowledge of the perpetration of a crime of drug traffic. This was an exigency more and more extended by the doctrine and repeated,[62]an international level.[46]

The new article 546 bis f), with full applicability of the new rules relative to confiscation, punishes with imprisonment from six months (and one day) to six years and a fine of a million to one hundred million - penalties that can be raised in degree for those with habitual crimes or belonging to organizations - the conscious reception, acquisition or exploitation, for himself or for a third person, of the profits derived from crimes of drug traffic. In cases of habituality or membership in an organization the penalty of disqualification for the carrying out of a profession or running of an industry and the closure of the establishment, definitive or for a period of six months to six years, are also ordered.

The regulation covers onerous acquisition as well as gratis. In respect of the formulation used, "the knowledge of the perpetration of a crime" of drug traffic should be interpreted in the sense that, in fact, it is proven, without using unconstitutional assumptions against the guilty, that the "receiver" knew that the profits or gains came from the committing of crimes concretely known to him. It must be pointed out, nevertheless, the inappropriateness of the foreseen penalties (six months - and one day - to six years imprisonment and a fine of one million

45 Lorenzo Salgado, J.M.: op.cit. (note 13).
46 Diez Ripolles, J.L.: op.cit. (note 28), pp.352 and 386 et seq.

to one hundred million pesetas) which may be in some cases superior to the provided for the crimes committed (think, for example, on traffic of soft drugs - four months to four years and two months imprisonment and a fine of five hundred thousand to fifty million pesetas).

In addition, as Diez Ripolles indicated,[47] it is advisable not to forget the problems that the regulation of the new article can cause: possible extension of the concept of receiving in the line of the rejectable substitute receiving (through the reference to profits), solution to offer when the receiving has been agreed upon beforehand (in principle, according to the jurisprudence, perpetration or participation in a crime of drug traffic) and consequences dealing with the scope of the application of the figure of concealment (article 17,2 of the Penal Code).

4. Conditional Remission of the Penalty and Drug Addiction

Until the reform of 1988, the Penal Code did not have any specific disposition regarding alternatives to imprisonment sentences for delinquent drug addicts. Obviously, the general norms were applicable to them; among these, the dispositions about conditional remission, as long as they complied with the general requirements stated in article 93: first offence - except in case or previous imprudence (or rehabilitation) - and principal (or subsidiary for not having paid a fine) penalty to imprisonment not exceeding one year (two years in cases of incomplete excuse or mitigation for minors - 16 to 18 years old - or other especially qualificated). In those cases, according to the age of the offender, his criminal record, the nature of the act and other circumstances, the judges could apply the conditional remission of the penalty during a probation period from two to five years. In the margin of the Penal Code, the unconstitutional Law of social danger and rehabilitation established the applicable measures for dangerous drug addicts and the penitentiary legislation - after obligating penitentiary establishments to submit destined installations to the psychiatric supervision and attention of drug addicts and create among hospital establishments, centres of departments for them - permitted (and permits) the Penitentiary Administration to send convicts classified third degree-treatment with problems of drug addiction to extrapenitentiary institutions (public or private), as long as the subject consents and formally swears to observe the regime of the institutions and the checks by the directive centre.

47 Diez-Ripolles, J.L.: op.cit. (note 28), pp.395 et seq.

The precariousness of the Penal Code regarding the offering of alternatives to imprisonment was especially serious in the case of drug addicts and the demand growed for the offering of real "legal" alternatives and incentives[48] for treatment,[49] in the line of comparative Criminal Law[50] and that demanded by international agreements. Faced with the lack of these means, there were attempts to find solutions through other normatives of the Penal Code, such as those which regulate the measures to adopt regarding the partially imputable mentally deranged - even though in the case of drug addicts the judges normally appreciate a transitory incomplete mental disorder (not mentally deranged) - or those regarding minors of less than 18 years of age, proceeding adopted, for example, by the Provincial Audience of Guipuzcoa to submit to continuation of treatment, in an open regime in the institution "Ametsagana", those who had committed a crime being less than 18 years old.

Perhaps as pretended compensation to the mistaken repressive increase that the other dispositions cause and as a rationalization and humanization of the penal reaction,[51] the reform of 1988 has incorporated into the Penal Code, as "one of the most important changes", according to the Preamble of the Act itself, a new article, article 93 bis, directed at the offering of "juridical-penal treatment specifically for the single criminological figure of the drug dependent person that takes part in a criminal act as a means of supporting his habit of drug dependency".

This new article permits judges or courts to apply the conditional remission - that depends on the condition that the subject commits no crimes nor abandons the treatment - to those convicted to sentences up to two years of imprisonment who committed the criminal act because of their drug dependency, if the declared sentence proved the situation of drug dependency and that the criminal conduct was product of such situation. It is also to certify sufficiently by a properly accredited or confirmed centre or service that the convict has broken his habit or is undergoing treatment for that purpose in the moment of conceding the benefit

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48 Mantovani, F.: Ideologie della droga e politica antidroga. Estudios Jurídicos en homenaje al profesor Luis Jiménez de Asúa. Revista de la Facultad de Derecho de la Universitad Complutense, monogrf.11, 1986, p.450; Prieto Rodriguez, J.I.: op.cit. (note 7), pp.409 et seq.

49 Fernandez Albor, A.: op.cit. (note 15), pp.27 et seq.; Funes, J., Gonzalez, C.: op.cit. (note 33), pp.25 et seq.; Garcia Pablos, A.: op.cit. (note 4), pp.27 et seq.; Rey Huidobro, L.F.: op.cit. (note 7), pp.308 et seq.

50 For a general view, Porter, L., Arif, A., Curran, W.: Legislation on treatment of drug and alcohol dependent persons. Geneva 1983.

51 Gonzalez Zorrilla, C.: Suspensión condicional de la pena y drogodependencias. Las contradicciones de una reforma anunciada. Report presented to the II. Congreso Mundial Vasco. Congreso de Drogodependencias, San Sebastián. September, 1987 (in print), p.63.

and that the subject is not a recidivist nor has he previously benefited the conditional remission.

The new article does not deserve a positive judgement,[52] because it does not truly constitute the "change" announced by the Preamble of the reform and it is difficult that it will contribute to "substantially improving" the present situation of lack of alternatives to prison.

First of all, the Penal Code already foresaw (and foresees) the applicability of conditional remission in cases of incomplete excuse or of very qualified attenuations, hence, the only change the new provision introduces will be to extend the possibility of conditional remission up to two years in the cases when analogic attenuation enters in force.

Furthermore, the new article 93 bis - which because of the new penalties will be difficult to apply to crimes of drug traffic committed by drug addicts because of their dependency (this would have justified an extension of the time framework of sentences susceptible to conditional remission) -, also demands compliance to requirements that are unrecognized and stricter than those generally foreseen. This brings up the question of what will happen in the cases that the drug addict could benefit from the general provisions and not from the provisions especially approved for them. In effect, the initial reference of the new article to the non applicability of the foreseen generally conditions is, in reality, "deceptive": is it extending the possibilities to speak of "not being a recidivist" instead of "having committed a crime for the first time"? It is true that the two expressions do not indicate the same thing and sometimes the new requirement will be wider than the general one. If, however, it is kept in mind that the general regulation of conditional remission does not except from this benefit the cases of previous imprudence conviction, the reference to "recidivism" can be occasionally a stricter condition than the general one. In addition, the new article, too severely, shuts the doors to conditional remission (without any temporal limit) to those who may have benefitted from it previously.

The new requirements, however, go further. The situation of drug dependency and the fact that the crime was committed because of it, must be proved in the judgement and this will not always be easy. It is necessary that the convicted, an accredited or confirmed centre or service, certify the breaking of habit or the submission to treatment and the judicial authority must control the regular compliance and development of the treatment (one must imagine - the law does not say it - that they must also control the conditions in which the treatment is carried out). Finally, the condition for remission is not only not to commit crimes during the test period (whose extent is not indicated), but also not to abandon

52 De La Cuesta Arzamendi, J.L.: op.cit. (note 22); Gonzalez Zorrilla, C.: op.cit. (note 51).

treatment (it should be understood "definitely", consider that there is no treatment without weakening, relapses.....) and acridiate dishabituation, so that if, in spite of all this, it is not achieved, the subject must complete the sentence. In short, what we have before us is a specific regulation of the conditional remission of the sentence of delinquent drug addicts that, because of the concern for giving it guarantees to avoid its "unjust and abusive use" (Preamble), instead of extending the present legislation's general provisions, has introduced new and greater requirements that make its success doubtful.

It should also be pointed out that the way that has been followed is not the most advisable. The application of the new provision appears in principle potentially very unequal (it is enough to think that members of more unfortunate social sectors will always have a worse prognoses and less possibilities of access to treatment centres).[53] This could also cause important negative effects probably not desired by the legislators,[54] such as the criminogenous and toxicogenous effects derived from the image that drug addiction opens, for the delinquent, new possibilities of avoiding prison and that delinquency is, for the drug addict, the most direct route to access to treatment. In this line, it would have been much more acceptable to introduce into the Penal Code, beside alcohol intoxication, among the attentuating circumstances, the intoxication by drugs, not directed to commit a crime, in line with the Preliminary Proposal of Penal Code (1983) - which would have favored the unifying of jurisprudential criteria - and its mention in the framework of conditional remission to allow its extension to penalties of deprivation of freedom of up to two years (or more if its extension were to be accepted further on than the present regulation). All of it authorizing the judge or court competence to set some rules of conduct during the probation period.

In addition, the reform should be considered absolutely insufficient in this area. It is lacking any regulation of the relationship between judicial power and treatment centres (procedures to follow, to whom the initiative belongs ...) - which is able to make the reform worthless. If there was a true will to offer legal alternatives to penal intervention for the drug addicts who want to be rehabilitated, the means were not that of conditional remission, that always comes too late, in the moment of the sentence, but, instead, that of the provision of procedural ways of renunciation or conditional suspension of the process or, at least, as in preventive prison, of considering as imprisonment time, the time passed in treatment in accredited centres that satisfy determined conditions. All of this in the framework of a complete reform of the present legislation, offering authentic rehabilitation programs, more possibilities of extension of the suspension of the

53 Gonzalez Zorrilla, C.: op.cit. (note 36), p.63.
54 Gonzalez Zorrilla, C.: op.cit. (note 51).

sentence and probation or substitution of the penalty not only for the drug addicts, but for all delinquents. And obviously, without prejudice of the corresponding "incentives"[55] penitentiary or not, for those interned in prison - according to Jimenez Villarejo[56] "perhaps more than 60% .... have drug problems or are declared addicts"- who seek treatment sincerely and voluntarily[57] and with the passing to third degree of treatment and/or parole or access to intermediary and half-way centres for those convicts, already detoxified, who may continue the programs in freedom with enough guarantees.[58]

5. Conclusion

After the parenthesis opened by the reform of 1983, in 1988 the Penal Code has come back to approximate the characteristics that informed the previous drug legislation. In effect, the sought for intensification of the repressive policy, at the same time as it has extended the penal intervention, has fallen into similar defects to those attributed to the text approved in 1971: lack of precision in the definition of punishable conduct and excessive judicial arbitration in the determination of the penalty, that greatly infringes on the principle of proportionality.

The regulation of the conditional remission of the punishment, put forth as a counterweight to the new repressive escalation, only apparently produces the mentioned effect. The concern for guaranteeing a non-fraudulent application and respecting "the general prevention aims" (Preamble to the reform) has turned to the legislation to establish a series of requirements and specific limits that, upon supposing a specific discipline of the conditional remission for drug addicts, probably more than open will close some of the few doors already opened.

The reform of 1983, in spite of its defects and the problems it created to the Spanish State from an international perspective, was applauded by the doctrine for the rationalization that it supposed in distinguishing the penal treatment between hard and soft drugs and expressly decriminalising possession with the intention of traffic. In the case of the last reform of 1988, the approximation produced in the treatment of the two types of drugs and the risks of unmeasured extension of punishable conduct, along with the shortcomings of the new regulation of conditional remission allow to venture an almost unanimous disapproval

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55 Mantovani, F.: op.cit. (note 48), p.450; Prieto Rodriguez, J.I.: op.cit. (note 7), pp.409 et seq.
56 Jimenez Villarejo, J.: op.cit. (note 6), p.63.
57 Fernandez Albor, A.: op.cit. (note 15), pp.27 et seq.; Garcia Pablos, A.: op.cit. (note 4), 1986, pp.389 et seq.
58 Funes, J., Gonzalez, C.: op.cit. (note 33), pp.25 et seq.

by the doctrine, including those who, like the last reform does, share the idea that a coherent policy of struggle against drug dependency must base itself on a strongly repressive policy.

6. Annex

Legislative activity of Spanish autonomous communities. Special consideration of Catalonia and the Basque country.

Until here we have considered the Spanish drug penal policy. Now, in spite of international efforts to centre the intervention against illegal drugs in the repressive scope, more and more it is believed that it is very difficult to hope for the success of Criminal Law in an undertaking in which it has "neither the first nor last word",[59] and, if instead of repression, that in reality, rarely becomes powerful, and generally takes itself out on the "poor fellow" and without necessarily renouncing pretence of government control of the course of drugs,[60] should not be granted the preventive attempt, deterrent of consumption and the articulation of effective means of aid and reinsertion of delinquent drug addicts, especially the young.[61]

The matter seems urgent and in need of an immediate answer and in Spain has begun to be manifested in diverse manners: from the activity of the Central Government and, most of all, in the framework of the autonomous communities.

The Act of 1967 being obsolete - greatly inapplicable and absolutely surpassed[62] - it is necessary to mention at the State level the **National Drug Plan**,[63] The **Plan**, which itself has no normative value and in which take part diverse ministries, the autonomous communities, the Army and the local administration, adresses the drug problem (including alcohol, more doubtful tobacco, even when it specially emphasizes illegal drugs) in a calm and non-alarmist manner. It aims at empowering the articulation of an integral policy of health education and well being that conscious of the social factors that influence drug dependency, surrounds the preventive interventions in respect to the reduction of consumption and offering of drugs. The first one, through action over populations at risk,

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59 Vives Anton, T.S.: op.cit. (note 7), p.248. Also, Barbero Santos, M.: op.cit. (note 3), p.843; Castillo Castillo: La función social del castigo: el caso de la prohibición legal del consumo de droga. In: La problemática de la droga en Espana (Análisis y propuestas politico-criminales). Madrid 1986, pp.154 et seq.; Pastor, S.: Heroína y política criminal. Un enfoque alternativo. In: La problemática de la droga en Espana (Análisis y propuestas político-criminales). Madrid 1986, pp.225 et seq.

60 Garcia Pablos, A.: op.cit. (note 4), pp.358 et seq. Opposing, Abarca Junco: Un problema de politica-criminal: la penalizacion internacional de los estupefacientes. In: Boletin Revista Facultad de Derecho UNED 8 (1986), p.228.

61 Diez Ripolles, J.L.: op.cit. (note 28), pp.387 et seq.; Garcia Pablos, A.: op.cit. (note 4), pp.386 et seq.; Quintero Olivares, G.: op.cit. (note 5), pp.174, 182 and 184; Torio Lopez, A.: op.cit. (note 3), pp.510 et seq.

62 Prieto Rodriguez, J.I.: op.cit. (note 7), p.83; Llorens Borras, J.A.: op.cit. (note 2), p.102.

63 A summary in Diez Ripolles, J.L.: op.cit. (note 28), pp.367 et seq. The text can be consulted in Legislación sobre drogas, Madrid 1986, pp. 799 et seq.

especially in the juvenile area. In respect of the offering of drugs the Plan centers its actions in the need of a reform and aggravation of the penal legislation the present proceedings for traffickers and the opening of channels of temporary suspension of the sentences in the case of drug addicts. Assistance is conceived as intervention of a psycho-social type based on the voluntary acceptance by the drug addict and aimed at abstinence and social reinsertion. Temporary programs of maintenance with methadone or other medications are exceptionally admitted and it is thought that the therapeutic offer must be diversified, based on the complementarily of health services and social services and of the empowering of the general networks of assistance services, with only exceptionally creation of specific networks, and putting into use alternative formulas to internment through assistance in the family and community. In the area of reinsertion, the principle of integration is maintained, without prejudicing the rights of citizens and unlike groups. The value of the role of non-profit private initiative properly accredited and controlled organizations is raised. Finally, other activities of support are described, such as training of staff and the development of information and research, as well as measures to develop specific collectives: juvenile delinquents, prisoners and the Armed Forces. approved by the Council of Ministers of July 24, 1985, and the dispositions given in the area of development of therapeutic treatment, in particular, **Methadone Treatment.**[64]

Nevertheless it is especially interesting to point out here the activity of the autonomous communities that, in addition to participating in the National Plan, with their own programs and having approved norms concerning therapeutic treatment in their territories, in some cases, have gone further to achieve a coherent and comprehensive policy in the area of drug dependency and have presented to their own Parliaments bills for the prevention, assistance and reinsertion. This is the case particularly of the Basque and Catalonian Communities. In effect, in 1985, Catalonia approved an Act that regulates prevention and assistance in relation to substances that cause dependency. Regarding the Basque Country, the Bill for prevention, assistance and reinsertion related to drug

64 The application of these treatments calls for the drawing up of a therapeutic plan properly connected with the public health services and that establishes the systems of prescription, as well as centres and services (public or private, but non profit) authorized for it. Collegiate organs are constituted with joint representation of the State and the Autonomous Communities and with the power to approve individual therapeutic plans, to evaluate information, to resolve controversies and, in general, to apply the present norms and establish a registry of patients. More in detail, the administration of methadone is provided for opiate addicts, in principle older than 18 years, with at least three years of dependency and organic complications that advise it, not serious multiple addictions or serious psychiatric pathology and who have completed at least two treatments free of drugs. The dosage is set at a maximum of 40 mg. a day (except on cases of special authorization), administered in the treatment centre or service itself, during the first three months, and after that period, possible prescription of dosage for up to three days (with a maximum of 1.5 mgs. a day).

addictions was published in the Official Bulletin of its Parliament on February 23, 1988. Given the importance of both texts, we shall briefly comment on their contents and characteristics.

The objective of both texts is to obtain a preventive instrument, based on an institutional action, effective and rational in the framework of the competencies of these communities, which may operate with an accentuated pedagogical character in order to build a less uniform social model and in favour of change in behaviour and habits of life.

Consequently both of these share a combined comprehensive approach. That is, they try to cover the problem put forth by all drugs, apart from their legal or illegal character, the only possible approach[65] for "a credible social action in the matter". That does not prevent, however, in the case of the Catalonian Act, differentiated legal treatment (according to groups of substances) of the prevention and assistance. The Bill of Basque Act, however, only does regarding prevention, not in the cases of assistance and reinsertion, were only detailed specific references are included for some narcotics.

The comprehensive approach also manifests in the will to establish the basic framework of intervention of the Autonomous community, in its diverges scopes of competence. This is especially obvious in the Bill of the Basque Act, not so in the case of Catalonia, whose Act has an accentuated health-oriented character.

Obviously we cannot begin here to examine and comment on the articles of both texts and we shall limit ourselves to pointing out the most outstanding characteristics. In this sense, it can be said that, along with the pedagogical character and the combined comprehensive approach, the most important defining features of both texts -in particular the Basque text, more modern and complete-, are the following:

- Conception of the phenomena of drug dependence as a social phenomena (and not purely individual), a public-health related problem that affects the society in its whole and not just drug addicts, as separate groups from the same. Consequently,
- Integral answer to the problem of drug addiction as a whole, from the general structures of health, education, culture, social services.... in order to normalize the vision of drugs related questions.

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65 See Calafat Far: La prevención de las drogas: Teoria y práctica. In: Drogas: aspectos juridicos y médico-legales. Faculty of Law, Palma de Mallorca 1986, pp.151 et seq.; Diez Ripolles, J.L.: op.cit. (note 28); Tongue, A.: The combined or comprehensive approach to alcohol and drug related problems (paper). OMS 1985.

- Priority of preventive policy, which orients and makes citizens conscious of behaviours most in accordance with health. Administrative intervention in control of illegal drugs (fundamentally, although not only, alcohol and tobacco) which are submitted to great restrictions regarding publicity, promotion, supply, sale and consumption. Intervention regarding social conditions favoring the appearance of drug addiction.
- Preference in the field of assistance of the ordering and functional restructuring of existing resources, on a focus not based on the condition of the drug addict, but on the answers to health, social and educational problems caused by people who suffer from drug addiction and in cooperation within public services and offers derived from the social initiative.
- Voluntary character of treatment based on adequate information about services, requirements and demands of the same. Confidentiality and free selection of options of treatment.
- Preferential attention in the community treatment by the way of ambulatory systems and partial hospitalization and house calls. Specific programs for persons interned in penitentiary centres and minors subject to juvenile jurisdiction.
- Support of the social reinsertion of ex-drug addicts from the application of general programs to special networks, without prejudicing the specifics that proceed. Special assistance and social orientation for the detained delinquent.
- Interinstitutional compromise integrated in the different levels of the Public Administration, with the determination of the specific competences of each level and planification on a government level.
- Recognition and support of the role of social initiative that may act cooperatively with public institutions and comply with requirements demanded by the normative.

In any case, these texts of the Autonomous Communities should be considered of very great importance. The absence of autonomous competencies on a penal level impedes the Autonomous Communities from legislating in the matter. However, the two texts accept the necessity of a penal policy against networks of illegal drugs whose application, in the case of the Basque Bill, should be primarily oriented to the initial steps, the great dealers and the traffic of the most dangerous and toxic substances and those of greater capacity and speed of production of dependency. At the same time, multiple prohibitions are introduced, sanctioned by more or less severity, regarding legal drugs. However, the in-

sistence in more rational approaches of drug addiction, the tendency to normalize the problem that they pose and the compromise and social interchange that they plan to achieve in the treatment of drug addicts deserve to be valued in a very positive manner.

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Principles of a New Drug Policy in Western Europe from a Spanish Point of View

Prof. Dr. J.L. Diez-Ripolles

1. In the context in which we are working, we should start off from a concept of "drugs" which refers to substances, the fundamental characteristic of which, apart from the eventual direct damage to health, is that they produce dependence to those who consume them. It is this consequence which makes it specific and requires a separate treatment of the social phenomenon of trafficking and consumption of certain substances. The instruments of Spanish legislative and social policy making, both central and autonomous, as well as the Spanish Penal Doctrine have taken this, with conviction, as their starting point.[1] The same cannot be said about the Convention on psychotropic substances of 1971, article 2.4.a)II of which allows for the inclusion of substances which have not been proven to be addictive, and this is in fact taking place,[2] nor about the Stewart-Clark report which gave rise to the position of the European Parliament[3] and this despite the fact that the definitions of the W.H.O. revolve round the idea of dependence.

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1 As in the Plan Nacional sobre drogas, which was passed on 24th July 1985 and is at present being applied (see "Legislación sobre drogas", Tecnos, 1986, pp.800-801), and in the Ley de la Comunidad autónoma de Cataluna of 25th July 1985 (see Diari oficial de la Generalitat de Catalunya, no.572 of 7-8-1985, Préambulo and art.3), as well as almost all of Spanish doctrine, summarised in Diez-Ripolles, J.L.: La politica sobre drogas en Espana a la luz de las tendencias internacionales. Evolución reciente. In: Anuario de Derecho penal y Ciencias penales 1987, p.373.

2 For example, see the reasons for the proposals to include five new substances in the Convention as contained in Document E/CN.7/1987/11 of 2nd December 1986 of the United Nations Commission on narcotic drugs.

3 See paragraphs 30-34, 45, 54-56, 119, 246 of the Informe Stewart-Clark (D.A2-114-/86 series A. of 2nd October 1986. Session documents European Parliament. European Communities).

Besides it is necessary, because of the complex nature of their effects, to distinguish between those which produce physical and psychical dependence or only the latter. Within the former opiates, alcohol and barbiturates should be included, within the second amphetamines, inhalants and derivatives of coca and, considerably further down the scale and not even evidencing psychical dependence as is the case of tobacco, derivatives of cannabis and hallucinogenic substances. Similar distinctions to the ones we have just made are frequent in Spanish penal doctrine,[4] while the Stewart-Clark report avoids drawing conclusions as regards the greater or lesser dependence created by drugs, and the United Nations to an even lesser extent.[5]

2. The repeated allusions to the normalization or rationalization of society's view of drugs often stops halfway: an attitude of resignation, derived from the fact that drug-taking has taken root in every type of culture, and the conviction that they will never disappear completely in our society, is not enough.[6] It is necessary to develop the distinction between the use and abuse of drugs and to consider the former as behaviour which might be viewed as positive in as far as it foments personal autorealization and the possibilities of intersubjective communication.[7]

3. The policy of distinguishing between legal and illegal drugs should be dropped as soon as possible. Such a distinction is not justified on the grounds of their addictive capacity nor by the danger they present to health. Neither is there any relevant diversity in the guidelines which favour one rather than another beyond those linked to the differentiating fact of prohibition. Assertions that certain drugs have become deeply rooted in our society no longer hold weight since the internationalization of drug policies which was called for by all: the distinction becomes a new form of cultural and economic oppression by the powerful countries which, simultaneously force the suppression of trafficking and consumption of drugs which are inherent in certain cultures but alien to their own, while they encourage the consumption of new drugs which are proper to western culture. On the other hand, the evident similarities of both types of drugs

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4 See Diez-Ripolles, J.L. and the doctrine quoted by same, op.cit (note 1). p.374.

5 See paragraphs 30-34, 246, 45, 54-56, 119 of the Informe Stewart-Clark op.cit., and its analysis as well as that of the recent documents of the United Nations on this point in Diez-Ripolles, J.L.: op.cit. (note 1), p.348 et seq., 358.

6 A state of opinion which is very generalised in the documents of the European Parliament (Informe Stewart-Clark. op.cit. paragraph 248 and the opinion of the minority on p.96), Spanish official judicial and administrative circles (Plan Nacional sobre drogas op.cit. p.800) and Spanish doctrine (see the doctrine quoted by Diez-Ripolles, J.L.: op.cit. (note 1), pp.374-375).

7 Along the same lines Beristain Ipina: Delitos de trafico ilegal de drogas. In: La reforma del Codigo penal of 1983. Tomo V. Vol.2. Edersa 1985 p.803; Prieto Rodriguez, J.I.: El delito de trafico y el consumo de drogas en el ordenamiento jurido penal espanol. Bosch 1986 pp.3-4, 441.

makes it extremely difficult for any preventive policy which wants to maintain the distinction to function effectively. The different consequences that consumers of one or another type of drugs experience as regards their integration in society is simply a reflection of the difference in the way they are treated by the law. This unifying view is gathering ground in European regional documents[8] and in the Spanish documents[9] but as yet they have not settled anything definite in all the legislative and executive sectors.

The tendency to a common policy brings with it the risk that it will be the policy which is at present followed for illegal drugs that will be adopted as the model and will generalise not the penal repression but the application of harsh measures of control of trafficking and consumption to legal drugs, and indeed this policy is already being outlined in certain Spanish autonomous communities[10] and even recently at national level.[11] The opposite position should be adopted: it is the policy of prevention with respect to legal drugs which is currently in use in other countries with great success that should condition a joint policy on drugs.

4. I share the widespread opinion that the drug phenomenon can only be successfully tackled within the framework of an integrated policy at all stages from the production or cultivation to the consumption. As to how to influence throughout the whole of this process, I think that the repressive policy which has been basically followed up until now, apart from any other objections, has clearly demonstrated its failure. The emphasis should be on preventive measures and offers of assistance which would affect the demand and not the supply which is what has been happening with the policy of repression. In saying this I am merely reflecting a widespread feeling in European legal circles[12] and in the

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8 Clearly the opinion of the minority of the Informe Stewart-Clark op.cit. p.96 and various interventions of representatives of the Parliamentary groups of the left in the debate which took place as a result of the aforementioned report in the Full Meeting of the European Parliament on 7th October 1986 (Débats du Parlement européen. Document no.2-343).

9 As Informe de la Comisión especial de Investigación sobre el tráfico y consumo de drogas en Espana. Boletin Oficial de las Cortes Generales. Senado. II Legislatura. Serie I no.206 of 25-11-85 pp.8276-8278. In Spanish doctrine (see quotations in Diez-Ripolles, J.L.: op.cit. (note 1), p.378) there is frequent mention of the distorting effects for prevention which result from the different approach to legal and illegal drugs.

10 Especially, Ley de la Comunidad autónoma de Cataluna of 25th July 1985, arts.15 y ff. and Proyecto de ley on prevention, assistance and reinsertion as regards drug dependence and which is being dealt with in el Parlamento Vasco at this time.

11 See the R.D. of 4th of March 1988.

12 Likewise Informe Stewart-Clark op.cit. paragraphs 153 and 24, numerous interventions of representatives of all the groups during the debate on the aforementioned Informe in the Full Sitting of the European Parliament (Débats du Parlement Européen op.cit.), which resulted in an express mention in point 12 of the draft resolution submitted to the Council of Ministers of the European Communities via the "Resolución sobre el problema de la droga" adopted by the European Parliament on 9th October 1986 (Diario Official de las Comunidades no. C283 of 10-11-86).

various Spanish administrative levels which have been analyzed.[13] The aforesaid approach clashes head on with the current policy of the United Nations which is clearly geared towards repression of the supply.[14] Its influence has been felt in Spanish and European circles and has reinforced those sectors of opinion and those European countries which give more importance to the idea of putting repressive policies into first place.

In Spain, the strengthening of the repressive tendencies of the United Nations has coincided with a moment of special hope in the preventive options based at a practical level on the National Plan on Drug. The progressive acceptance in our country of such international trends,[15] together with certain misunderstandings and unjust reproaches directed at the Spanish legislation in European forums,[16] have been directly responsible for the setback in the option of prevention which is clearly seen in the recent penal reform in a country which had not yet thoroughly tried out the alternative of prevention nor had it reaped the fruits claimed by other countries previously. The aforementioned reform implies, given the close connection between the different aspects involved, putting into danger the achievements which were being obtained by methods of prevention and assistance as

13 As Informe de la Comisión especial de investigación sobre el tráfico y consumo de drogas en Espana. op.cit. pp.8279-8281; Comisión de Sanidad y Seguridad social del Senado. Comparecencia del Delegado del Gobierno para el Plan nacional sobre drogas. Diario de sesiones del Senado. Cortes Generales. III Legislatura no.7 of 4-11-86 pp.8, 12, 18, 19. The idea of opting for an approach of prevention rather than repression is widespread in Spanish doctrine. See the quotations collected by Diez-Ripolles, J.L.: op.cit. (note 1), p.376.

14 In this respect, it is very illustrative to follow the documents which, in accordance with the Resolution of the General Assembly of the United Nations 39/141 of 14th December 1984, are emanating from the Commission on Narcotic Drugs of the Economic and Social Council, with the idea of preparing a new Convention against narcotrafficking. Very significant at the present time are the documents entitled: "Iniciación de la elaboración de un proyecto de convención contra el narcotráfico". (Document E/CN.7/1985/19 of 14th January 1985) and "Aplicación y elaboración de instrumentos internacionales sobre la fiscalización de estupefacientes y sustancias psicotrópicas" (Document E/CN.7/1987/2 of 17th June 1986), which contains a preliminary draft of the new Convention against narcotrafficking, and which has been checked by a group of experts, whose findings are stated in the Documents E/CN.7/1988/2 Part. II and IV. It is only in the last two documents that the possibility of measures towards rehabilitation begin to appear (art.2.2 of the revised text of the Convention draft).

15 At official level such acceptance has undoubtedly influenced the affirmations of the Minister of Health and Consumer Affairs made when appearing before the Comisión de Política Social y de empleo del Congreso de las Diputados of 14th May 1987 (Diario de sesiones del Congreso de las Diputados. Cortes Generales. III Legislatura no.133. pp.4982 et seq.), which make continual reference to the change in legislative policy on drugs especially evident in the agencies of the United Nations and the Council of Europe, which clearly opt for repression, and to which Spanish official, judicial and administrative circles diligently want to adapt. (See especially pp.4985, 4986, 4989, 4990, 4991, 4995, 4997, 5001, 5002, 5015).

16 As in the Informe Stewart-Clark and the parliamentary groups of the right in the debate following the presentation of the aforesaid report whose criticism concentrated on the drug policies of Holland and Spain. See a summary of them in Diez-Ripolles, J.L.: op.cit. (note 1), pp.361-362. The government delegate for the National Plan on Drugs, appearing before the Senate in November 1986 (Comisión de Sanidad y Seguridad social del Senado op.cit. pp.20-21), recognized the bad image that other European Governments have of Spain's drug policy, in many cases due to mistaken information. On the other, in May 1987, once the change in Spain's drug policy had taken place, the Minister of Health and Consumer Affairs, appearing in the Congreso de los Diputados, denied that such mistrusts in Europe had ever existed. (Comisión de Política Social y de empleo.op.cit. p.4997).

expounded in the National Drug Plan and which are often incompatible with the intense repression which is now established.

5. As to the contents of the greater part of the measures of prevention and assistance with regard to the demand, there is widespread agreement in the various Spanish and European documents as a result of the experience gathered in different countries. It should not be forgotten however, that the efficiency in the reduction of the demand is directly related to the capacity to integrate the problem within an offer of a way of life built on personal autonomy and with society playing an active non-institutional role and with the general improvement in living conditions.[17] There are certain measures however, which are controversial: no attempt should be made at preventive education of the very young, which of necessity, is based on emotional factors thus abusing the capacity for personal autodetermination which is not yet developed, not even at the lowest operative levels, not to mention the possible counter-productive effects in later life.[18] It is equally important to establish carefully the limits which should be respected with regard to any assistance given whether towards disintoxication or rehabilitation: included here should be the observance of the right to differ, rejecting patterns of value beyond those which are strictly necessary to break the dependence.[19] In the same way, care should be taken with regard to the methods of treatment of the therapeutic communities which are too pressurizing on occasions.[20] Very rigid interpretations of the concept of assistance should be avoided but assistance should include information about, and the supply of, utensils to insure the least harmful form of taking drugs without actually promoting them.[21]

In any case the policy of prevention and assistance outlined in Spain, at the present time is in line with the most modern European trends.

6. Apart from the question of the greater or lesser emphasis given to prevention or assistance there is the additional question of the advisability of getting rid of the repressive penal approach or of substantially changing its form. This topic, as was to be expected did not find support in the United Nations, who are only interested in increasing repression, but it is given serious consideration in the

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17 As in Informe Stewart-Clark op.cit. paragraph 44 and minority opinion p.99; Informe de la Comisión especial de investigación sobre el tráfico y consumo de drogas en España. op.cit. pp.8280, 8282; Plan nacional sobre drogas. op.cit. pp.802-804.

18 Such a proposal was enthusiastically received however by the Informe Stewart-Clark. op.cit. parag.155-157.

19 Likewise clearly in the Informe de la Comisión especial ..: op.cit. p.8288; Plan nacional sobre drogas op.cit. pp.805-806; Proyecto de ley which is in the process of becoming law in the Parlamento Vasco.

20 Likewise Informe Stewart-Clark op.cit. parag.211 et seq.; Informe de la Comisión especial ... op.cit. p.8289.

21 In the same way the opinion of the minority of the Informe Stewart-Clark op.cit. p.99.

European Parliament.[22] Unfortunately, global outlines of depenalization are expressly rejected by the Spanish official documents[23] and they are given a poor representation in the doctrine.[24] This was understandable, until recently, because Spain felt itself to be under pressure on an international scale after the clear priority given in 1983 to the approach which advocated prevention and assistance and the limited liberalization which was clearly exaggerated and misinterpreted in the European forums. The fact that Spain has opted for an approach giving priority to repression in most recent times explains the lack of actual official pronouncements in this respect.

The depenalization in the aforementioned European forums is presented in terms of efficacy: it is obvious that the drug problem today is not only mainly a problem of the harm caused by consumption but rather the emergence of powerful drug trafficking organizations which affect, or are going to affect the institutional organization of many different states and even the whole of the democratic world; an idea which is also frequent in the agencies of the United Nations.[25] The question in the European Parliament revolves round whether depenalization would drastically reduce the benefits to the drug traffickers and thus deprive them of their economic and institutional power. This alternative has been rejected for the present by a majority although no final decision has been taken.[26]

I disagree to a great extent with the arguments on which the ineffectiveness of such measures is based or predicted: to claim that depenalization would not

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22 Likewise the Informe Stewart-Clark op.cit. paragraphs 116-123 raises such a possibility but it is rejected although further discussion on this point is proposed, while the opinion of the minority (informe Stewart-Clark op.cit. pp.95,96,98), more disposed to this solution, proposes convening an international conference to study the viability of antiprohibitionist policy linked to informative campaigns on the risks of drug consumption. The discussion in favour or against the legalization of drug trafficking continued into the Full Sitting of the European Parliament. (See Debats du Parlement européen. op.cit.), and gave rise to the inclusion, in the draft resolution submitted for approval to the Council of Ministers of the European Communities, of a commitment to convene an European conference "to study all the effects and implications of drug consumption in order to evaluate among other things, the activities of criminal organizations and in particular, the social and physical consequences of drugs". (see "Resolución sobre el problema de la droga". op.cit.).

23 If, in the Informe de la Comisión especial of the Senate and in the Plan Nacional de drogas op.cit. the absence of references to the alternative of removing penalization is striking, in the appearance of the Minister of Health and Consumer Affairs in the Comisión de Politica social y empleo del Congreso de los Diputados op.cit. pp.4989, 5001 there are explicit declarations against, in line with the change in policy reported.

24 See opinions to this effect collected in Diez-Ripolles, J.L.: op.cit. (note 1), pp.376-377.

25 Likewise Informe Stewart-Clark op.cit. parag.6 and opinion of the minority op.cit. p.95. Likewise Iniciación de la elaboración de un proyecto de Convención ... op.cit. Préambulo.

26 See Informe Stewart-Clark op.cit. paragraphs 116 to 123 and the opinion of the minority op.cit. p.98. The question was also amply discussed in the Full Sitting of the European Parliament (see Débats du Parlement européen ... op.cit.).

contribute to a diminution in the number of consumers but would rather contribute to an increase, is to forget that such a criminal policy is basically aimed at depriving the drug traffickers of their power and not at reducing consumption; a goal which it is suggested could be achieved by preventive measures which, it is possible to imagine, could be more efficient in the long run if they were not weighed down by a background of repression or by opposing promotional campaigns which are heavily financed by the drug traffickers. The disqualification of the limited experience of depenalization in countries such as Holland comes into conflict with opposing appraisals.[27] Deep down what holds back such an alternative is the lack of sufficient political energy to explain to the public the advantages, in the medium to long term, which would be derived from the depenalization of drug trafficking and a policy of prevention and to have sufficient conviction to face up to the predictable periods of impatience which would emerge in society until the effects of such an option came to be appreciated, with the political cost that this would bring with it.

The problem, however, should not only be analyzed exclusively in terms of effectiveness. It is also necessary to view it as a question of principle. To do this, it is necessary to ask oneself what is the juridical good that one wants to protect. In a pluralised society it is not admissible to consider the moral health of the citizens in this way, as however is indicated in the present day international agreements and repeated again in the agencies of the United Nations,[28] even though accompanied by other benefits; if the problem lays only in this, there would be no doubt as to depenalization and, at most, the introduction of certain soft measures of social pressure (strict supervision, spatial restrictions ...) as, in my opinion, is being done with regard to certain activities which are tolerated but not fully accepted by society (pornography, illicit gaming....).

The most widespread opinion that what is being especially protected is public health should be reconsidered.[29] In the first place because penal protection of public health is based (with the single exception of the offence of the drug-trafficking) on the idea of not impairing the health of a majority who do not want to suffer such impairments or of not preventing improvements in the health of those who do not want to be prevented from obtaining them. Apart from this, it is

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27 Which is especially observable in the various interventions noted in the Full Sitting of the European Parliament (See Débats ... op.cit.) and also in Informe Stewart-Clark op.cit. parag.118-119.

28 See the preambles of the Single Convention in 1961 and of the Convention on Psychotropic Substances in 1971 (In "Legislación sobre drogas". op.cit. pp.201, 267) Likewise the Resolutions 39/141 and 39/142 of the General Assembly of the United Nations.

29 The consideration of public health as the predominant juridical good is very widespread in Spanish doctrine (see Diez-Ripolles, J.L.: op.cit. (note 1), p.378).

unacceptable to make an analogy with infectious diseases affirming that we are faced with a problem of collective health in which case the propagator's consent to the harm caused would be irrelevant. As in any case, we are dealing with substances that are similar to those included in other offenses against public health, they should be liable to similar penal treatment which is aimed at insuring administrative control of their production and sale as well as controlling the quality in line with that which was indicated recently, by another Spanish writer[30] and with the aggravated case of the adulteration of drugs which has just been introduced into the Spanish Penal Code.[31]

In the second place, because one is progressively coming round to the idea that what is most decisive is not the direct damage to health but rather the consumer's loss of personal autonomy. This evolution towards its being considered as an offence against individual liberty, although also evident in Europe, is clearly detected in Spain where the very concept of drugs, the criteria for distinguishing between hard and soft drugs, the serious categories referring to minors and also to specific centres, the new cases referring to people with diminished or no imputability or who are undergoing disintoxication or rehabilitation treatment, the impunity of the consumers .... are built around the idea of the loss of liberty. Although the doctrine[32] and certain official documents[33] are conscious of this dimension, only one author has proposed political-criminal action which would be in consequence.[34] In my opinion, apart from the penal treatment proposed in the last paragraph, they should include, in offenses against individual liberty certain categories which would punish drug trafficking involving people who lack sufficient freedom of decision and consequently their consent would not be considered valid. It should allude to minors but also to adults with diminished or no imputability who are in a situation where they can be taken advantage of or who are under intense psychical pressure, to those who are undergoing processes of disintoxication or rehabilitation or to those who are obviously suffering the consequences of physical dependence and for as long as such a situation may last. Distinctions or cases of impunity should be established according to the class or intensity of the dependence produced by the substance. In any case all trafficking between free adults should be free from punishment.[35]

30 As Bustos Ramírez, J.: Manual de Derecho penal. Parte Especial. Ariel 1986 p.378.

31 See new art.344 bis a) 5 of the Spanish Penal Code.

32 See the Spanish doctrine in this respect summarized by Diez-Ripolles, J.L.: op.cit. (note 1), p.379.

33 As in Informe de la Comisión especial ... op.cit. p.8280; Plan nacional sobre drogas op.cit. p.802.

34 As Bustos Ramírez, J.: op.cit. (note 30), pp.277-278.

35 The reform of the Spanish Penal Code in 1988 introduced or consolidated aggravating circumstances which deal with some of these situations of absence of liberty (see art.344 bis a) but without giving up penalization of trafficking between free adults.

Undoubtedly these penal offenses will basically affect the levels of trafficking closest to the consumer.

The high levels of narcotrafficking call for diverse penal treatment. Above all, they will be the most directly affected by the types of control included in the offenses against public health. It is, however, also necessary to draw attention to the consequences of the widespread opinion in the international forums about the institutional threat that the drug trafficking organizations present. This implies moving into the realms of the offenses against socio-economic order, a possibility which has only been hinted at by some Spanish authors.[36] The controversy in Spain as to what extent socio-economic order should be seen as an object of protection within the penal-juridical scope is well known.[37] For our purposes it is irrelevant, because even assuming the strictest concept, the behaviour to which we are referring is still covered. In effect, it is a question of monopolistic or oligopolistic behaviour which has repercussions in all areas of free competition from mechanisms of price determination to the safeguarding of the rights of the consumer and brings with it a massive violation of the laws of contraband and exchange controls, not to mention the more generic effects on the financial system. It is necessary therefore to facilitate penal measures which consider the criminal activities of the narcotrafficking organizations from this perspective, instead of resigning oneself to the inoperant aggravating circumstances in penal juridical fields which do not respond to the real characteristics of this criminality.

My proposal suggests depenalization in principle of the controlled trafficking of drugs but which should continue to be punished in as far as it offends against individual liberty or socio-economic order. Such an option would satisfy both the need to protect juridical interests and to find more effective solutions to the problem.

7. If, abandoning the idea of a global approach to the possible form of the repressive alternative, we take as our starting point the present-day situation and deal with possible partial modifications, draw attention to the frontal opposition between the United Nations agencies, who are advocating a widening of the concept of cannabis, or between these and the majority of the European Parlia-

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36 As García Pablos Molina, A.: Bases para una politica criminal de la droga. In: La problemática de la droga en Espana. Edersa 1986, p.376; Beristain Ipina: Dimensiones histórica, económica y política de las drogas en la Criminología crítica. In: Delitos contra la salud pública. Universidad de Valencia 1977, p.59; Boix Reig, J., Mira Benavent, J.: La reforma penal en relación con la problemática de la droga. In: Drogas: Aspectos juridicos y medico-lagels. Faculty of law, Palma de Mallorca 1986, p.15.

37 See the compilation of the different doctrinal pronouncements in Diez-Ripolles, J.L.: op.cit. (note 1), p.392.

ment who refuse to make a distinction between soft and hard drugs,[38] and the attitude of the minority of the aforementioned Parliament and that of the Spanish official and doctrinal documents which strongly advocate the maintenance of such a distinction,[39] going as far on occasions in important Spanish doctrinal sectors,[40] as to put partially into practice or to call for the depenalization of cannabis trafficking. I think that the distinction between one class of drugs and another is not only in keeping with the different degrees of gravity of their trafficking but also with the realistic view of the problem, free from exaggerations and irrationalities, which is called for if a policy of prevention is to be successful. Apart from that, the distinction given that it revolves round the production of dependence as well as the depenalization of those soft drugs which are not thought to cause dependence, is in line with the aforementioned idea of adapting at least part of these precepts to the idea of protecting individual liberty.

8. The persistence in the Spanish official, jurisprudential and doctrinal documents in maintaining the impunity of consumption and the activities directly linked to it, a position shared by another European country and the minority of the European Parliament,[41] I consider to be fully in accord with those juridical interests which should be protected: the right to use drugs cannot be denied nor should we act against the victim of the promotion of drug abuse. Apart from this, the different treatment of consumers no matter whether or not they are addicts is an idea and practice which is generalised with different intensity throughout the whole of Europe.

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38 With respect to the former (see art.1 e of the preliminary draft of the new Convention (Document E/CN.7/1987.2), and the modification proposed by the group of experts who, although evading express mention of such an amplification, facilitate it by substituting the term "substances" for "drugs" with regard to the list of the Convention of 1961 (Document E/CN.7/1988/2 (part II). As regards the second see the lack of references to the distinction in the documents of the United Nations, and the refusal to distinguish between hard and soft drugs in the Informe Stewart-Clark op.cit. paragraphs 119-122, corroborated by the attitude of the parliamentary groups of the right in the Full Sitting of the European Parliament (see "Débats ..." op.cit.).

39 As the opinion of the minority of the Informe Stewart-Clark op.cit. p.98; likewise parliamentary groups of the left in the Full Sitting of the European Parliament (see "Débats ..." op.cit.). In Spain, Informe de la Comisión especial...." op.cit. p.8283; Plan nacional sobre drogas op.cit. p.804; and the greater part of the doctrine, which indicates besides that jurisprudence has been using such a distinction for some time assessing the penalty. (see Diez-Ripolles, J.L.: op.cit. (note 1), pp.380-381).

40 With regard to Spain, see the numerous criminalists who are against penalising cannabis trafficking, even with an analysis of lege lata, and not only with one of lege ferenda (in the first case they are not backed up by the jurisprudence), in Diez-Ripolles, J.L.: op.cit. (note 1), p.381.

41 As Informe de la Comisión especial ...." op.cit. p.8283; appearance of the Government delegate for the Plan nacional sobre drogas, before the Comisión de Sanidad and Seguridad social of the Senate op.cit. p.21. Spanish doctrine is resolute and practically unanimous on this point which has been supported by jurisprudence from the seventies at least (see Diez-Ripolles, J.L.: op.cit. (note 1), pp.383-384). Along the same lines, the opinion of the minority of the Informe Stewart-Clark op.cit. p.98 and the parliamentary groups of the left in the Full Sitting of the European Parliament (see Débats ... op.cit.).

In as far as the trafficker acts to satisfy his necessities which result from his dependence, he should be treated in the same way as the drug addicted consumer. At any rate, the transcendency of his behaviour on other people, except for far-reaching legal reforms which would discriminate according to the type of person towards whom he directs his activities, calls for a penalty which is not too severe and which offers him penal alternatives which revolve round the idea of overcoming his dependency.Arriving at the same conclusion, but by different routes, we find the Spanish doctrinal and official forums as illustrated in the latest reform and the proposals of the European Parliament; both also offer occasionally proposals which merely suggest depenalization.[42] It has taken time for penal substitutes to appear in the draft of a new United Nations Convention.[43]

9. The aims of the United Nations to widen the concept of what should be understood by "trafficking" go beyond what is advisable in as far as they intend to include behaviour which lacks all the usual features of commercial activity.[44] The Spanish law which after the 1983 reform was particularly careful to omit non-commercial activities, has introduced a new regulation in 1988 which permits the punishment of all types of conduct which promote, favour or facilitate drug consumption and gives consequently disproportionate scope for punishment and moreover it violates the principle of juridical security.[45] The appropriate thing to do would be to start with a concept of trafficking which corresponds to the present-day systems of marketing techniques which would mean that both onerous deplacements as well as gratuitous deplacements which were made with the purpose of creating or enlarging the market should be included. The other gratuitous deplacements would go unpunished. Propaganda activities which do not use the system of donations are difficult to include in the concept of trafficking although one could force an interpretation in this respect.

A regulation in accordance with the aforementioned political-criminal proposals would penalise the cultivation and manufacture only in so far as they had given rise to offenses against socio-economic order or to offenses against the

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42 As Informe de la Comisión especial..... op.cit. p.8283; Plan nacional sobre drogas. op.cit. p.805; Diez-Ripolles, J.L.: op.cit. (note 1), p.385 summarizing the numerous opinions of Spanish doctrine in this respect. Such pretensions have found an echo of response in the reform of 1988, in accordance with article 93 bis. Also Informe Stewart-Clark op.cit. paragraphs 10,108,110,111 and the opinion of the minority. Ibidem. p.98.

43 This did not happen until the reform of the draft Convention by a group of experts in October 1987 (see revised text of the draft in Document E/CN.7/1987/2 (Part II), art.2.2 c).

44 See the allusions to "delivery on any terms whatsoever" and to "facilitating of the aforementioned operations or activities" in art.I.i. of the preliminary Convention draft (Document E/CN.7/1987/2), or to the former and that related to it of "possession of any controlled substance for the purpose of any of the foregoing activities", mentioned in the revised text of the group of experts (Document E/CN.7/1988/2 (Part II).

45 See art. 344 of the Penal Code after the reform of 1988.

penal control of public health, because of the way in which these operations had been carried out. The same would happen with trafficking where, consequently, the punishment of deceptive advertising techniques should not be forgotten and measures to protect individual liberty in the sense already explained should also be included.

10. The new types of offenses proposed by the agencies of the United Nations should be carefully studied.[46]

In the first place, classing as an autonomous offence the preparatory acts for the manufacture or distribution or the possession of the materials or equipment **intended** for the production or illegal manufacture of narcotic drugs or psychotropic substances[47] makes it liable, above all, to the type of criticism which is normal in all autonomous punishments of preparatory acts of this type, that is, that the excessive distance which separates such preparatory acts from the damage to the juridical good makes it difficult to talk about endangering the good; besides, the lack of definite agreement on subjective exigencies and the obvious difficulty of obtaining proof given the varied destinations of such materials or equipment, (think of an encapsulating machine) make one fear the principles of juridical security and legality would not be respected if such a precept were to be applied. In any case, the punishment of such preparatory acts is inconsequent considering an intermediate phase between these and the production or manufacture of narcotic drugs or psychotropic substances, that is to say, the production, distribution or possession of the chemical raw materials from which the narcotic drugs or psychotropic substances are obtained, are only subject to administrative control;[48] the counter-argument as to their being used to obtain legal products is equally valid for the materials and equipment that one wants to penalise; the Convention Draft itself proves that it is possible to be more consequent by their wanting to enlarge the concept of cannabis to include the seeds which are absolutely necessary for its cultivation.[49] Because of all that has been said, it is not surprising that there has been little response to this proposal to widen the scope of the punishment in European forums and even outside them.

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46 We shall use the documents which contain the preliminary draft of the Convention and the revised text of that draft as drawn up by a group of experts (Documents E/CN.7/1987/2 and E/CN.7/1988/2 (Part II. IV).

47 See art. 2.1.b) of the preliminary draft, and 2.1. a)ii, b)ii of the revised text. This latest text restricts prohibited conduct by requiring that the subject be aware of the illicit destination of such materials and equipment.

48 As in the preliminary draft, art.8.

49 See art.1.e) of the preliminary draft and of the revised text and supra note. The group of experts have realised this contradiction and have included, at the last moment, in the concept of illicit trafficking, the "traffic in specific chemicals contrary to article 8 of the present Convention" (see revised text art.1h), which does not seem to be the best form of solving this contradiction. The right thing to do would be to eliminate the autonomous punishment of these preparatory acts.

As far as Spain is concerned, its introduction would go against the generalised opinion that the possession of seeds, plants, raw materials..... to cultivate or manufacture drugs is not punishable and should continue not to be so, in our legal code.[50]

With respect to the new attitudes towards receiving, consisting of the acquisition, possession, transference or laundering of a product derived directly or indirectly from illegal trafficking, it must be admitted that they were welcomed in European circles provided that the receiver was aware that the product had come from illegal trafficking.[51] This type of receiving has the following peculiarities with respect to the usual concept of receiving in our legislation: in the first place it should answer the hypothetical case of substitute receiving not covered in 546 bis a) on a good number of occasions, given that what is being considered is not only the receiving of the "effects" of the offence, that is to say, the monetary sums obtained from the trafficking of drugs, but also the good obtained with this money; it is in this sense that the concept of "product" and the reference to that which is derived "directly or indirectly" from trafficking, are used.[52] On the other hand, the juridical good which is protected is not the same as that of the offence, the effects of which benefit the receiver because this receiving cannot be said to be damaging public health.[53] Likewise, the limit suggesting that the basic offence must be one against "economic goods" would not be respected because nowadays the basic offence is against public health and only a very wide concept of "economic goods" would allow such a thing.[54] All the aforementioned has not

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50 As Conde Pupido, C.: El tratamiento penal del tráfico de drogas: Las nuevas cuestiones. In: La problemática de la droga en Espana. Edersa 1986, p.125 in an analysis previous to the reform of 1988 but which is still valid after this reform.

51 See art.2.1c of the preliminary draft, and 2.1. a)iii, b)i of the revised text in which the aforementioned subjective element is alluded to. As for Europe, very significant countries offered observations on the preliminary draft, precisely accepting these new criminal offenses provided the corresponding subjective element be introduced (see Documents E.CN.7/1987/2 Add. 1 and 2). The Informe Stewart-Clark also accepts these measures op.cit. pp.103-106, and they were considered to be desirable in various interventions in the Full Sitting of the European Parliament ("Débats du Parlement européen" op.cit.) to the point that they were specifically alluded to in the "Resolutión sobre el problema de la droga" which were adopted after the debates of the aforementioned Parliament (see Diario oficial de las Comunidades europeas. op.cit.).

52 The concept of "product" disappears in the revised text, but the description of prohibited conduct supposes a study in depth of the idea of including acts of concealment of the profits from trafficking. In general, against substitute receiving in Spain, Bajo Fernández: Manual de derecho penal. Parte Especial II. Ceura 1987, p.334; Rodríguez Devesa, J.M.: Derecho penal espanol. Parte Especial, 9th Edition 1983, p.546; Bustos Ramírez, J.: op.cit. (note 30), p.249.

53 This requisite of relative equivalence of both juridical goods is insisted upon by, among others, Bajo Fernández: op.cit. (note 52), pp.391-392; Munoz Conde, F.: Derecho Penal. Parte Especial. Universidad de Sevilla 1985, p.314.

54 Such an inclusion would be rejected by, Bajo Fernández: op.cit. (note 52), p.344; Rodríguez Devesa, J.M.: op.cit. (note 52), p.545; Martos Nunes, J.A.: El delito de receptación. Montecarvo 1985, p.195 et seq.; Rodriguez Mourullo, G.: Comentarias al Codigo penal. I. Ariel, 1976, p.921. It might perhaps be accepted by Bustos Ramírez, J.: op.cit. (note 30), p.249-250; Munoz Conde, F.: op.cit. (note 53), p.316.

prevented the introduction into the Spanish Penal Code in 1988 of a precept which to a large extent includes the proposals of the United Nations on this point and which gives rise to a specific hypothesis of receiving.[55] In any case the necessity one feels to create some concept similar to that of receiving as well as the last two differences which occur when faced with 546 bis a) remind us of the inadequate consideration of these offenses (when it is a question of high levels of trafficking) as offenses against public health and not against socio-economic order.

On the other hand leaving aside the widening of punishment which substitute receiving would involve, it will be usual in cases of this type that the receiving, whether alone or with others, will have been agreed on beforehand in which case jurisprudence will not apply the new penal offence but rather that of commission or participation in the trafficking of drugs.[56]

Lastly, there remains that which is related to the new regulation concerning degrees of participation and execution of these offenses and which implies a disproportionate advancement of the barriers of penal protection. In the first place punishment of merely "counselling the commission of any offence" is put forward as distinct from the other preparatory acts, conspiracy and abetting, which are also penalised and likewise punished without being integrated into the different degrees of participation, which are also punished. In the second place, as all these types of punishable behaviour refer both to the offence of drug trafficking and to autonomous offenses which involve certain preparatory acts or receiving, the scope of punishability is enormously strengthened. On the other hand, such a reference cannot be made by having recourse to the generic rules of the Code on degrees of execution or participation because by virtue of article 55 it is not possible to accept the punishment of preparatory acts to autonomous preparatory acts or the receiving of a specific type of receiving although participation in autonomous preparatory acts or different degrees of execution in cases of autonomous participation is possible;[57] the general principles of the code would again have to be stretched in order to create specific precepts. Despite the poor response that this proposal of the United Nations has had in any circle, alleging

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55 See the new article 546 bis f) of the Spanish Penal Code.

56 See the jurisprudential position in Munoz Conde, F.: op.cit. (note 53), p.314; Bajo Fernández: op.cit. (note 52), p.338.

57 See the punishment proposals for these types of conduct in art.2.1.d) of the preliminary draft and in art.2.1 b)iii of the revised text. As to what art.55 of our Penal Code implies see Rodríguez Mourullo, G.: Comentarios al Codigo penal. Tomo I. pp.140-162 and Tomo II. p.240. However, although it is not a case which is exactly the same since it relates two autonomous offenses, the receiving of goods from receiving is accepted by doctrine and jurisprudence: Rodríguez Devesa, J.M.: op.cit. (note 52), p.544; Bajo Fernández: op.cit. (note 52), p.334; Martos Nunez, J.A.: op.cit. (note 54), p.199-202.

that the generic rules of participation and execution are enough,[58] the Spanish reform of 1988 has indirectly accepted it by accentuating, with its new description of punishable behaviour, especially by including the terms 'promote, favour, facilitate', the punishment of types of behaviour which are far removed from the damage to the juridical good of public health.

11. The toughening up of the present penalties as proposed by the United Nations agencies has received qualified support.[59] Indeed, references to the fact that fines should be in proportion to the amount of the profits obtained and that prison sentences should be sufficiently intimidating are reasonable in medium or high levels of trafficking, even though the volume of profits obtained today is so great that it is difficult for any penalty, no matter how great, to be considered intimidating and constitutes therefore yet another argument in favour of the new repressive approach in the sense we have indicated. What does not seem justified now is the claim that all cases of drug trafficking should be considered as serious offenses liable to the corresponding penalties or to be excluded from the usual penal alternatives or penitentiary benefits; such an attitude which has been rejected by many European countries,[60] and rightly so, suggests that the different gravity of the acts should not be evaluated and, besides, it is not very efficient. The specific and in general more generous regulation of probation for toxic dependent delinquents, was introduced in Spain in 1988 and reflects this attitude of differentiation which is characteristic of the European countries.[61]

The discussion, however, has centred on the proposal to introduce an extensive regulation of seizure and forfeiture of proceeds obtained from illicit trafficking.[62] This would mean, first of all, creating a specific concept of forfeiture, as distinct from that contained in art. 48 of the Penal Code which does not include the benefit or gain obtained from the commission of the offence, and which will be similar to that adopted in article 393.[63] Such an amplification which is in general supported by some authors for all forfeiture[64] would come up against the

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58 See the observations of the various countries on the preliminary draft of the Convention (Documents E/CN.7/1987/2/Add. 1 and 2).

59 The toughening up proposal is found in art.2.2 of the preliminary draft and in art.2.2 and 2.4 of the revised text. See a summary of the different countries' observations on this point of the preliminary draft, in Diez-Ripolles, J.L.: op.cit. (note 1), p.355. Likewise, Informe Stewart-Clark, op.cit. paragraphs 10, 108 and ff; and the various interventions in the Full Sitting of the European Parliament (see Débats du Parlement européen. op.cit.).

60 See the European references to the previous note.

61 See art.93 bis introduced into the Spanish Penal reform of 1988.

62 See the proposals in this respect in art.3 of the preliminary draft and of the revised text.

63 See Manzanares Samaniego, J.L.: Las penas patrimoniales en el Codigo penal espanol. Bosch 1983, pp.265-267; Córdoba Roda, J.: Comentarios al Codigo penal. Tomo II, Ariel 1976, p.196; Landrove Díaz: Las consecuencias jurídicas de delito. Tecnos, 1985, p.114.

64 See Manzanares Samaniego, J.L.: op.cit. (note 64), p.352.

great fears which arise in our juridical system whenever any norm might approximate general confiscation;[65] fears which explain that not even with the present strict regulations of forfeiture all its possibilities are exhausted.[66] Without doubt, forfeiture so interpreted will allow the procedural measures which the United Nations call 'freezing' and 'seizure' to be linked to the form of seizure, contained in articles 589 and ff. of the Law of Criminal Procedure, since it will be a question of ensuring the responsibility of the perpetrator at least as far as the penal responsibilities resulting from forfeiture are concerned.[67]

The fears that this disputable amplification of the concept of forfeiture and seizure gives rise to, are seen to be notably reinforced, as can be appreciated by the reactions of certain European countries,[68] upon observing the poor guarantees which are offered in its application: it is intended that the seizure may be decreed by non-judicial authorities and that the seizure and forfeiture may be imposed by civil judicial authorities. It is accepted that there will be an extensive use of presumptions or of the inversion of the burden of proof to prove whether the proceeds have come from illicit trafficking and if the accused was aware of it..... and, as if that was not enough, it permits the forfeiture with respect to goods or rights of persons who have not been convicted, nor even prosecuted, if the court thinks that there is sufficient proof that they knew the origin of the product. All these possibilities remove once and for all the proposal of basic principles with regard to forfeiture and seizure as, to mention a few, the impossibility of applying forfeiture to a person who is not guilty of the offence, or the impossibility of imposing forfeiture of goods belonging to a person who has not proved that he is not criminally responsible.[69]

Once the lack of the aforementioned guarantees has been rectified, we might find ourselves with a penal sanction which is adequate for medium and high levels of trafficking. The Spanish legislator understood it in this way in 1988 and was

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65 On forfeiture as a specific type of confiscation in short special confiscation, see Manzanares Samaniego, J.L.: op.cit. (note 64), p.251.

66 On the disuse of forfeiture in many cases where it could be applied, see Córdoba Roda, J.: op.cit. (note 63), p.198; Landrove Díaz: op.cit. (note 63), p.113.

67 In any case, one should not forget the new alteration in the concepts of forfeiture and seizure which the proposed regulation implies by including in the concept of "proceeds", which is object of the forfeiture, strictly pecuniary elements and by the previous seizure having to refer not only to "responsabilidades pecuniarias" as our law of procedure says at the present.

68 See the observations presented by different countries on the preliminary draft, in Documents E/CN.7/1987/2/Add. 1 and 2, and its systematization in Diez-Ripolles, J.L.: op.cit. (note 1), p.355.

69 Contrary to what is proposed in the preliminary draft, the revised text has opened way to the possibility of the interested parties maintaining, if their internal legislation so requires, all activities within the framework of criminal jurisdiction and it has eliminated the presumptions, although not the inversion of the onus of proof nor, with sufficient clarity, the forfeiture of goods of persons who have not been convicted or even prosecuted. See art.3 of the revised text. Remember the basic principles of forfeiture as quoted in the text Manzanares Samaniego, J.L.: op.cit. (note 64), pp.278-280, 353; Córdoba Roda, J.: op.cit. (note 63), p.199.

respectful of the basic principles of forfeiture and seizure that we have just referred to.[70]

12. As regards the strengthening of other procedural mechanisms, beyond the idea of seizure, as the strengthening of the principle of world justice, the establishing of dissuasive terms of prescription, or the easing of principles which limit extradition, which have been proposed by the United Nations, there is strong reticence in European circles with regard to the last two.[71] In short, as regards extradition, there is an awareness of the necessity to harmonize its functioning and frequency in Europe but logically there does not seem to be any inclination to ignore the principles laboriously established in the European Extradition Convention.[72] In Spain, the principle of world justice for these offenses is accepted in article 23.4. of the organic Law of the Judiciary, while the undermining of the aforementioned principles limiting extradition would go against the recent law of passive extradition of 1985.[73]

13. A form of police activity which is being especially debated at this time is that of "controlled delivery". The United Nations' proposal has been the object of suspicion in quite a few countries, in the first place because they want to insure that the initiative and control reside in the country where the acts are taking place and in the second place because it comes into conflict with certain legal difficulties in the so-called continental juridical system.[74] In fact, police abstention in these cases supposes, in principle, a violation of specific police duties, as contained in the penal procedural and organic laws,[75] which could even cause in cases where an offence could be prevented, complicity by omission if it is thought, possible in general and where the position and duty as guarantor

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70 See art.344 bis e) of the Spanish Penal Code after the 1988 reform.

71 See art.2.7 and 4 of the preliminary draft, and 2.5, 2 bis and 4 of the revised text. See the observations of the European Countries on the proposals of the preliminary draft in Documents E/CN.7/1987/2/Add. 1 and 2.

72 See an analysis of these in Cerezo Mir, J.: Curso de Derecho penal espanol. Parte General 1. Introducción. Teoría jurídica del delito, 3 Edición 1985, pp.221-233. See equally the Informe Stewart-Clark, op.cit. paragraphs 92 and 93, and the "Resolución sobre el problema de la droga", op.cit. of the European Parliament.

73 See Cerezo Mir, J.: op.cit. (note 72), pp.234-239.

74 See art. 1 d) and 7 of the preliminary draft, observations of the different countries on the introduction of such a technique (Documents E/CN.7/1987/2/Add. 1 and 2) and art.1d) and 7 of the revised text which weakens to a great extent the introduction of this technique, which has been reformulated, in opposition to the preliminary draft, in a very generic way. The Informe Stewart-Clark supports the system of controlled delivery, op.cit. paragraphs 132 and 133.

75 See art.282, 284 and 492 in connection with 490 of the Code of Criminal Procedure, likewise art.5 of the Law of the Police and Security Forces, among others.

apply.[76] However, should reasons of efficacy advise and judicial authorization be sought, there are or at least there should not be any insolvable legal obstacles for its inclusion in our legal code. In any case we are not faced with a supposed case of police provocation which should be resolved by other channels, because to accept as a general rule induction by omission is debatable and even more so in this case.[77]

The proposals to board ships flying a foreign flag on the high seas is understandably viewed with suspicion by countries who are worried about the possible abuses to national sovereignty which could arise if a procedure is not agreed on which without weakening its effectiveness would offer sufficient guarantees in that respect.[78]

The reiterated affirmation in the Spanish official documents that it is necessary to pursue the small trafficker considering the outcry of society which is provoked by his apparent impunity and the necessity to maintain public security,[79] as well as being liable to criticisms referring to the real object of protection in the trafficking of drugs and which have already been mentioned, means, if they continue to act in this way, a rough use of the mechanisms of intimidation in general and in the end, a vicious circle will be created since the problem of public security and dropping out of society are closely linked to excessive penal persecution of drug trafficking and the repercussions that this has for trafficking and consumption at the lowest levels.

14. As for the new measures of control and monitoring, leaving aside Penal law, the techniques of crop substitution cannot take place, as has been repeatedly suggested however in the European Parliament, by indirect coercive means.[80] This means forgetting the consumer countries' share of the responsibility for dissemination of such crops and what is more important for the generalization in

76 See on complicity by omission, Jescheck, H.-H., Mir Puig: Tratado de Derecho Penal. Parte General, Vol.II. Bosch 1981, pp.858, 863, 967 and 976-977 with abundant German and Spanish legal and bibliographical references.

77 See Jescheck, H.-H., Mir Puig: op.cit. (note 76), pp.981-962, 975 and Mir Puig: Derecho Penal. Parte General 1985, pp.345-347.

78 See such suggestions in art.12 of the preliminary draft and of the revised text. See likewise the observations of many countries on this point in Documents E/CN.7/1987/2/Add. 1 and 2.

79 As Informe de la Comisión especial ... op.cit. pp.8286-8287; Plan nacional sobre drogas. op.cit. pp.829-831. Comisión de Política Social y de empleo del Congreso de Diputados. op.cit. p.4989.

80 As the Informe Stewart-Clark op.cit. paragraphs 63,69,70, and 72 and the parliamentary groups of the right in the Full Sitting of the European Parliament when the report was discussed (see Débats du Parlement européen, op.cit.).

such countries of the so-called legal drugs and also it is an attempt against their culture, not to mention arguments which have all been mentioned already in the European Parliament.[81]

The proposal formulated by the United Nations to impose sanctions on commercial carriers who do not take reasonable precautions to prevent their means of transport being used for illicit trafficking has been received with great caution. In fact, it is not clear that they are administrative sanctions and not penal ones and that it may mean the beginning of penalties for imprudence in drug trafficking.[82]

The monitoring of the trade of materials and equipment which could be used for the manufacture of drugs which the United Nations proposes ex novo has been rejected by the industrialised countries. It would mean reinforcing the progressive attention given to preparatory acts which are even further removed from the damage to the juridical good.[83]

81 See the opinion of the minority in the Informe Stewart-Clark, op.cit. p.97 and what was said by the parliamentary groups of the left in the Full Sitting of the European Parliament (Ibidem).

82 See art. 11 of the preliminary draft, the observations of different countries on such an article (Documents E/CN.7/1987/2/Add. 1 and 2), and the subsequent reformulation in the revised text which evades specific reference to sanctions (art.11).

83 See art.9 of the preliminary draft and of the revised text.

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Drug Policy in Sweden

Dr. A. Solarz

1. Introduction

From a pharmacological point of view, all drugs interact with the living organism regardless of how or why they are used or what they are called. All drugs have multiple effects and these vary depending on the dose level and on the individual. Individuals are different physiologically, psychologically and socially.

All drugs are dangerous for some individuals at some dosage level under some circumstances. Some are more dangerous at lower dosage levels for some individuals than others are.

The effects of drugs used are independent of whether they are used legally or illegally. Taking an unknown substance in an unknown quantity alone or in combination with another substance increases the normal risks involved in using drugs.

Psychoactive drugs have some attributes which result from the substance-related variables (nature of the drug, size of dose, route of administration), from user-related factors (biological factors, life style), and from setting. The most well-known attributes are tolerance and abstinence reactions.

For every drug there is an effective dose, a toxic dose, and a lethal dose. This is why drug use and misuse are treated as risky behaviour. Many other behaviours, however, are dangerous as well. The question is, therefore, what kind of risks we are prepared to take and what price we are willing to pay to minimize risk we choose to be exposed to. These issues give rise to both moral and evaluation questions: how to estimate the extent of the risky behaviour for the individual and society and what should be done to minimize the danger. The control by the society always evokes questions of a moral nature. Has the society

the right to interfere in private acts? Has the individual the right to damage himself? When and with which instruments may the society step in to protect the individual from self-destruction?

The drug control policy is associated with different actions, but primarily with prohibition and punishment (penalties). In different countries drug-policy strategies and practical measures are used in the fight against drug abuse and illicit trafficking. This is also the case in Sweden.

2. The Narcotic Drugs Act and Sanctions in Sweden

There are three basic laws that regulate Swedish drug control:

- The Smuggling of Goods Act, SGA (Varusmugglingslagen, SFS 1960:118)
- The Narcotic Drugs Ordinance (Narkotikaförordningen, SFS 1962:704)
- The Narcotic Drugs Act, NDA (Narkotikastrafflagen, SFS 1968:64), as well as ordinances containing provisions relating to hypodermic syringes and needles (Förordning (1968:70) med vissa bestämmelser om injektionssprutor och kanyler).

Regulations established by the Chief Public Prosecutor also play an important role in the use of waivers of prosecution for drug offenses.

The original Narcotic Drugs Act of 1968 stipulated a maximum sentence of two years' imprisonment for drug offenses. Today, the Narcotic Drugs Act (revised 1985:9) specifies sanctions against the manufacture, distribution, sale (even assistance), and possession of drugs. Classified according to their seriousness, the offenses are to be met with the following sanctions:

- minor drug offenses: fines, or a maximum of six months' imprisonment
- simple drug offenses: from six months to a maximum of three years' imprisonment
- serious drug offenses: imprisonment for a minimum of two years and a maximum of ten years.

The same sanctions are stipulated in the Smuggling of Goods Act (1960:418, amendment 1985:10) for similar categories of offenses.

Unlawful sale of or supplying a syringe or a needle is punished by fines or to a maximum of one year's imprisonment.

Advertising of narcotic drugs is not forbidden by law.

3. The Main Characteristics of the Swedish Drug Policy

3.1 The Scope of Control

3.1.1 Narcotic drugs are controlled by means of regulations of the manufacture and production of drugs and on prescription procedures. If the patient is unknown to the person filling out a prescription, the patient shall be required to show identification. The person filling the prescription may demand that identification is made at the pharmacy when the prescription is filled out. Moreover, pharmacy personnel always have the possibility and right to demand proper identification. The regulations also state that narcotic substances are to be prescribed on a special form which limits how many tablets may be prescribed; the amount is also to be written with both figures and words.

3.1.2 The Narcotic Drugs Act covers all feasible forms of processing or trading in drugs. Distribution and sales, production, possession with the intention of distributing and selling, procuring, processing, packaging, transportation, storing, and negotiation of contacts between sellers and buyers, as well as possession are criminal acts according to this Act (1968: pp.64). Despite the fact that the law forbids distribution of sterile syringes to drug addicts, a group of physicians in Lund decided to prescribe sterile syringes to hard-core intravenous addicts ("mainliners") in order to limit the spread of the HIV-epidemic among addicts. This procedure has so far been limited to south Sweden. This action-group claims to have made contact with previously unknown addicts and to have succeeded in convincing some to submit to drug treatment.

The consumption of narcotics without possession has until recently not been punishable. The government's bill on the criminalization of consumption itself (without possession) has been sent to the parliamentary Judicial Committee. The discussion will concern whether the proposed fines-penalties will be supplemented with custodial sentences.

3.1.3 In 1968, the maximum penalty for serious drug crimes was raised to four years, and in 1972, to 10 years of imprisonment. In 1981, 1983 and 1985, new adjustments were made in the penalties for drug crimes. The penalties that apply to drug crimes under the NDA also apply to the corresponding drug smuggling crimes.

3.1.4 The organization of the police has been adapted to the fight against drugs (every county now has a drug unit). The number of police who are assigned

primarily to drug cases has risen from 31 in 1965 to 523 in 1984-1986. The efforts of the police against drug crimes is reflected in the debate on whether societal measures should be primarily directed against the serious drug criminality or against drug abusers/addicts. The first-named strategy is based on the theory that a decrease in the supply of drugs will influence the dimensions of drug abuse. According to this theory, a lack of drugs may contribute to a sharp decrease in the use of drugs. The second strategy is based on the theory that the principle cause of drug abuse is the abusers themselves. The demand for drugs influences the scope of the illegal distribution. It is impossible to stop the supply as long as there are abusers who need drugs. The huge profits to be gained mean that when some drug dealers are arrested, they are merely replaced by new ones, regardless of the risks. The police have varied their strategy during different periods and at times have put the emphasis on combatting the supply of drugs, and at other times on reducing the demand for drugs.

Drug criminality is a so-called surveillance crime, that is, it is discovered through the efforts of the police. The police has therefore developed new techniques, including new unconventional surveillance methods.

The government has outlined some principles that the police must follow concerning the use of unconventional surveillance methods:

- The police may never commit a criminal act for the purpose of investigating or exposing a crime.
- The police may never provoke or otherwise induce or persuade someone to commit a crime or enter into a criminal activity.
- The police must never fail to take prescribed measures against crime or against a person suspected of crime, for surveillance purposes. In practice, though, the police is allowed to use certain forms of infiltration and to use informers and disinformation. It is even allowed for the police to pose as purchasers of drugs in order to confiscate drugs and to obtain evidence of crimes. Decisions in these cases should be made by the prosecutor.

3.1.5 According to a major ruling by the Chief Public Prosecutor about the application of the drug laws, it was decided to break with earlier practice and make possession of even the smallest quantities of drugs subject to prosecution. This is in practice an extension of the punishable domain. The narcotic drugs statistics contain many instances of possession and conveyance of small quantities, which were earlier not treated as offenses.

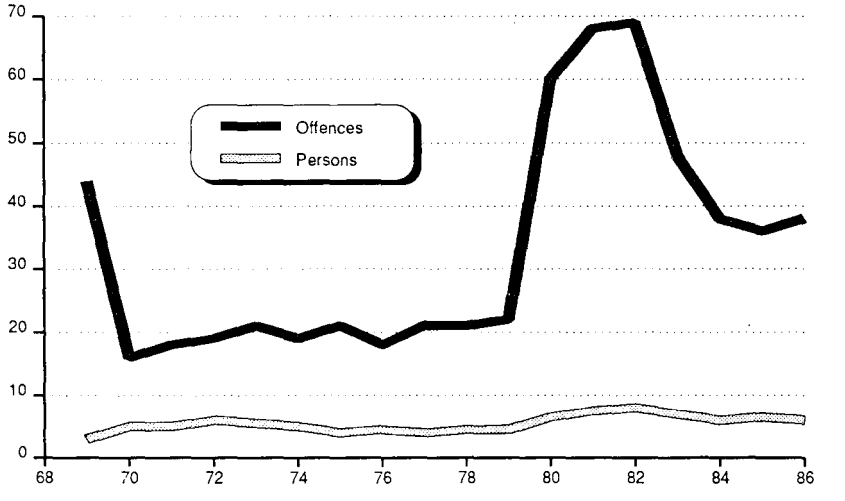
Apart from persons who occasionally use drugs, there is a large group of habitual addicts. The latter, who often commit breaches of the law, are largely known to and have been registered by the police. The police appears in the first place to take action against them and detect "new" crimes committed by them. To a certain extent this affects the number of reported drug offenses.

Another factor which affects the criminal statistics is when a series of offenses is cleared up at the same time. When the police clears up a certain drug crime this may also lead to the clearing up of other, earlier, drug crimes committed by the same person. This means that the police will attempt to investigate earlier possession or distribution of drugs. As support for this practice, it may be mentioned that in the police district of Märsta 29 NDA offenses were spread among 40 suspects in 1980. In 1982, in the same district, the figures were 2,314 spread among 48 suspects. Similarly, one Swedish offender was credited for 3,378 NDA offenses.

Finally, there is a series of other factors that are also important here such as changes in drug habits, the scope of drug abuse, the number of waivers of prosecution, and changes in legislation.

The result was an increase of the number of persons suspected of NDA offenses and recorded NDA offenses as well as mainly during 1980-1982 as it is seen in figure 1.

Figure 1: Number of offenses and suspected persons (in thousands)



The downswing from 1983-1985 can be explained by fewer series-clearances, greater difficulties for police to discover minor drug offenses, and a drop in drug abuse among young people.

The efforts against drug crimes have, naturally enough, resulted in an increased number of deprivations of liberty. This is shown in table 1.

Table 1:

Length of sentence	Number 1975	Changes 1975-1986 Age 15-24	25-39	40-	Total	Number 1986
- 2 months	94	+ 91	+ 206	+ 28	+ 325	419
3- 6 months	315	- 14	+ 197	+ 44	+ 227	542
7-12 months	316	- 43	+ 121	+ 34	+ 112	428
13-24 months	158	- 35	+ 62	+ 10	+ 37	195
25- months	95	- 6	+ 72	+ 37	+ 103	198
Total	978	- 7	+ 658	+ 153	+ 804	1.782

The number of prison sentences doubled from 978 in 1975 to 1.782 in 1986, mainly in the range 3-6 months. About every three drug offenders in 1986 were sentenced to prison.

3.1.6 In 1986, the average prison sentence received was 5.3 months for simple drug offenses (1) and 40 months for serious offenses (3). Further, 37 percent of the 142 sentences that led to imprisonment of longer than 4 years were for serious drug offenses or serious smuggling.

3.1.7 Half of the new admissions to prisons are classified as drug abusers (about 3500). Drug abusers or those convicted of drug crimes are more often than others placed in special blocks (where stricter rules are applied). Young first-time offenders without a record of drug abuse may be assigned to a special drug-free facility. Inmates who are motivated for treatment are placed in drug-free wings. Persons sentenced for drug crimes are subject to special rules when they receive visitors; for example, their visitors and the inmate must undergo a complete body search. Similarly, further restrictions in the form of letters and telephone censure or urine specimens may be enacted.

Only the sentences for murder, aggravated robbery, and aggravated arson are harsher than those for serious drug offenses.

It is worth noting that 9 of 10 prison sentences for drug offenses do not involve serious drug offenses and that the drug most often involved is cannabis.

3.1.8 Compulsory treatment may be used for both alcohol and drug abusers. There are special rules for compulsory treatment of adult abusers and for children and young people, under 18 and 20 years old. Moreover, compulsory commitments may be made to psychiatric hospitals on the grounds of drug abuse.

About 3000 patients are discharged each year with the diagnosis of drug abuse (3% of all patients). About 1100-2000 persons are compulsorily admitted to treatment for drug abuse, and in 1985, 2558 children and young people who were subjected to measures under the Social Services Act or the Care of Young Persons Act were discharged.

3.2 The Drug Situation

3.2.1 Cannabis accounts for 63 percent of the drug substances in Swedish criminal proceedings. Even in the serious criminality, cannabis accounts for 38 percent of the drug substances in the criminal proceedings. Stimulants, mainly amphetamines, are involved in about 29 percent of the cases, and opiates and tranquilizers in 4 percent each. Cocaine appeared in about 30 court sentences in 1986 and LSD only very rarely (6 cases 1986).

3.2.2 Possession is the most common drug offence. Sixty-eight percent of the drug offenses in 1986 (excluding waivers of prosecution) were for possession only. Smuggling (when even small or tiny amounts are involved) account for 9 percent. Seven cases of manufacturing resulted in court sentences. The remaining offenses concerned sales and distribution of drugs.

3.2.3 Serious drug offenses are relatively few. Sixty percent of the drug offenses was seen as minor, 36 percent as intermediate, and 4 percent as serious. The percentage of serious drug offenses dropped from 385 (9%) to 256 (4%). In the determination of whether a drug offence is minor, simple, or serious, such factors as quantity and type of drug, ruthlessness, and degree of professionalism are weighed.

The smaller quantities appear most often and the larger amounts very seldom.

3.2.4 Drug offenses are not increasing among the lower age brackets. The proportion of 15-17 years-olds has dropped from 7 to 2 percent among all drug offenders since 1975, and 18-24 years-olds have dropped from 60 to 35 percent

during the same period, while the 25-39 years-olds increased from 30 to 56 percent. Available information about drug habits in our schools and among conscripts supports the hypothesis that drug offenses dropped during the period 1983-1987 as a result of a reduced drug consumption among certain groups of young people. The statistics then do not support the notion that drug criminality is making inroads into lower and lower age groups. Instead, they indicate a systematic shift upwards in age. The trend among young people between 15 and 24 years old indicate that drug abuse in this group is not increasing.

3.2.5 The increase in recent years has levelled off. A total of 6,069 persons were found guilty in 1986 (including waivers of prosecution, prosecutorial fines, and court sentences). This is a decrease of 26 percent compared with 1981-1982 (8,200 each year).

3.2.6 The proportion of women has remained stable at about 14 percent.

3.2.7 In summary, it can be stated that the drug problem has been the subject of lively debate in Sweden since the end of the 1960s. During the period 1968-May 1986, 360 motions were proposed on this problem in the parliament. Fifty-two percent of these were aimed at tougher control measures, 33 percent at treatment and information, and 15 percent at other questions.

Most of the motions were proposed during the years 1984/85, a period when all of the statistical data pointed towards a decrease in drug criminality and drug use among school children and conscript, primarily among the youngest age groups. In 1985, further tightening of the rules were added to the drug legislation.

How can this development be explained? In order to illustrate this phenomenon, it is necessary to outline the factors that are significant for the development of the control of drugs.

4. Factors Influencing Drug Policy

4.1 State of Art

The drug question is an interdisciplinary subject that extends over the natural sciences (medicine, pharmacology, psychiatry, biology) and the humanities (sociology, criminology, ethnography). The state of the art of knowledge and the communication of research findings is an important element in the designing of the control process.

Basic research in the drug question is insufficiently developed and has not yet led to any clear results. An excellent example is that of the effects of cannabis use on health.

We know something about the expected psychological effects and about the individual receptivity of drugs or the road to heavy abuse. Control agencies and some experts in the drug question, however, accept scientifically questionable statements as clear and unequivocal.

Missing are tenable theories about why people become drug abusers. Basic factors such as dependence, tolerance and abstinence symptoms are explained with dozens of biological, psycho-social and bio-psychosocial theories. Proponents of various control measures thus are able to base their measures on whatever explanatory model best suits their approach to the issue. There are few epidemiological studies of normal populations with differentiated drug habits. Politicians often use research results from studies of selected groups and established drug abusers.

4.2 Legal versus Illegal

Psycho-active effects characterize all types of psychopharmaceutics, regardless of whether they are classified as legal or illegal. Social marginalization, criminality, high mortality rates and certain diseases, common among a selected group of heavy drug abusers are most likely the result of illegal handling of the drugs. These effects are seldom observed among consumers of legal drugs. My study "Drugs, Criminality and Control" of 50,457 conscripts' drug habits and criminality, revealed a clear difference between the criminal record of those who use the so-called legal psychopharmaceutics and those who have used several narcotic substances - primarily, illegal drugs. In the latter group, the proportion of persons with criminal records is two times greater (42-50%) than in the former group (about 25%). Those who use so-called legal narcotics also have a lower level of criminalization compared with the group of alcohol abusers. The proportion of persons with a criminal record for the entire population is 30%.

All drugs have multiple effects or side effects beyond those for which they are taken or prescribed. The effects of both at moderate dose levels are highly dependent on non-drug related factors. At high dose levels, and for some individuals at much lower levels, all drugs may be dangerous. Some legal drugs have been demonstrated to produce a statistically significant increase in the occurrence of chromosome. When taken during certain critical periods of pregnancy, they produce a statistically significant increase in the occurrence of fetal deformities. Certain legally used drugs may produce physiological dependence. The same drugs used illegally have the same effects (NOWLIS 1975).

There is only one difference. Most of the substances available outside of normal legal channels are often not the substance they are supposed to be, or they are contaminated with other substances. Taking an unknown substance in an unknown amount alone or in combination with another substance increases the normal risks involved in drug use, especially when the individuals has little knowledge or understanding of the effect of drugs.

4.3 Mass Media and the Public Debate on Drug Misuse

Mass media has contributed to the spread of nonfactual information about the effects of drugs, high mortality, ill-health, ways in and out of abuse, drugs as a criminogenic factor, and the etiology of drug abuse.

Statements about these issues are often built on findings of selected research and have a direct influence on the development of drug control. An example is the considerable attention that mass media devotes to almost every drug-related death, and the lack of attention to alcohol-related deaths, despite the fact that the latter are ten times as numerous. During the period 1980-1985, more than 400-500 deaths were registered each year when alcoholism (code ICO 303) was given as the underlying cause, and between 1000 and 1200 cases where alcoholism was reported as the contributory cause. More than 600 alcohol-related deaths with alcohol as the underlying cause should be added to this, and over 200 cases of alcohol-poisoning. However, between 16 and 26 deaths were noted from drug addiction and abuse of drugs (Statistics Sweden: Dödsorsaker (Causes of Death) 1980, 1981, 1982, 1983, 1984 and 1985).

It is maintained that the official statistics on drug-related causes of death in Sweden are probably under-reported. It is however widely known that the under-reporting and difficulties in defining causes of death also apply to alcohol-related deaths.

4.4 A False Picture of the Extent of Drug Misuse

It is very difficult to measure the extent of an illegal activity such as drug-taking. It is also obvious that the number of reported drug offenses cannot be said to reflect the real drug criminality, mainly because of the high dark figure. The number of reported crimes in the criminal statistics depends on several factors such as the activity of the law enforcement and the concept of a drug offence. When the police, for instance, clears up a certain drug crime, they also attempt to investigate previous possession or distribution of drugs. As a result, some

offenders are credited with hundreds of drug offenses. The amount of recorded narcotic drug offenses therefore is a feeble indicator of the picture of drug criminality and drug misuse. To get an idea of the drug situation, it is necessary to follow trend developments of many indicators under longer time periods.

The decreasing trend of different indicators over the past 4-5 years seems to be a sign that drug abuse among the young generation has started to decline in scope. In spite of this, the media has consequently reported figures and facts indicating an increasing trend.

4.5 Unrealistic Aim

It is impractical to think in the unrealistic terms of achieving a drug-free society as it has been proclaimed in the Scandinavian countries. This is simply an impossible goal to reach, as man's historical experience with an increasing variety of psychoactive substances has shown. When this goal is combined with a belief and often an exaggerated conviction that the solution to the drug problem has to be based on stricter law enforcement, the logical consequence is the increase of penalties for use, possession, and sales of psychoactive substances.

Experiences from other countries where the penalties are very severe, however, show that the price paid for such a solution is very high. Nor has it had a dramatically successful impact in terms of drug misuse (see BRECHER 1986).

A similar development towards a harsher drug policy is seen in Sweden. The philosophy that higher penalties will cause that current users abandon drugs and be deterred from experimenting with them, dominates the Swedish control policy of the past decade. The only problem is that the day after the penalties for drug offenses are altered, new changes in the legislation are demanded. Every failure or misfortune with the current drug policy is given the simple explanation that it has resulted from the slackness of law enforcement and from the too liberal legislation.

4.6 The State of Public Knowledge

The public knowledge about drugs is mainly influenced by the views convey the law enforcement branch, television programming, and newspapers. Fourteen years ago, one newspaper reporter who has written extensively about drug issues observed:

"I think we in the media are to blame for compounding the drug stereotypes that have been foisted off on the public since the 1930s. We have accepted every

police and law enforcement statement about drugs without question. We have failed to explore the culture of the drug user fairly, and we have failed to dispassionately explore the entire phenomenon of drug use (ALLAN PARACHINI as quoted in ROBERT P. BOMBAY, Major Newspaper Coverage of Drug Issues, Washington, D.C. 1974)".

This observation is topical even nowadays. It is reasonable to assume that the way in which newspapers and television cover the drug issue has an impact on public opinion, which is prepared to accept all kinds of measures for achieving a drug-free society. It also influences the development of drug policy in our country.

4.7 The International Conventions and Outlines

Attitudes toward drug issues found in international documents can be questioned. The classification of the controlled substances included in schedules I and II as well as in schedules I-IV of the Single Convention on Narcotic Drugs 1961 and the Convention of Psychotropic Substances 1971 seems to be based on results of old research. Another example is the Report of the Main Committee with 410 recommendations and activities relevant to the problem of drug abuse (A/conf. 133 MC/6.1 (Part II) 25 June 1987). The document included many unnecessary actions of a technical nature and the results of political discussions. Such documents have a long impact on the national drug policies.

5. Drug Abuse and Criminality

It is evident that drug abusers often commit crimes against the Narcotic Drugs Act and the Smuggling of Goods Act, involving drugs. This is principally a result of the criminalization of drug trafficking and possession in different forms.

Another more perceptible connection between drug abuse and criminality is when drug abusers commit other types of crimes such as crimes against property and against persons. In such cases, it seems that the drug abuse generates the criminal activity. There are different points of view concerning drug abuse as a criminogenic factor. Political debates often reveal a simplified view of drugs as causes of crime.

The causal connection between drug abuse and criminality should be seen as a more complicated phenomenon. To be able to study this connection, it is important to have a more discriminating view of the abuse career, as a process

of development from experimental, occasional and habitual abuse to freedom from abuse.

In my longitudinal study "Drugs, Criminality and Control" based on a survey of all Swedish conscripts in 1970, data regarding drug habits, social background (such as upbringing, school, personal relationships), criminality and others were obtained. In all, 50,457 men were conscripted for compulsory military service. Of these, 67% was born in 1951, 22% in 1950, 10% in 1949 and the rest in other years.

The questionnaires contained specific questions on the use of alcohol and controlled substances. The cohort was followed up in different national registers and as well as in the national register of persons found guilty of criminal acts during the period 1966-1985. The population has been divided in seven subgroups according to the intensity of drug consumption as shown in table 2.

Table 2: Persons found guilty of various offences, 1966-1988, by drug-use

Sub-group	Drug intensity How many times	(1) Proportion of the whole population N	%	(2) Found guilty for offenses. Proportion of pop. (1) N	%
1	Never used	41 277	81.81	10 937	26.5
2	1 (test use)	1 946	3.86	633	32.5
3	2-4 (experimentation use)	1 591	3.15	704	47.25
4	5-10 " "	898	1.78	456	50.8
5	11-50 (regular use)	912	1.81	503	55.2
6	50 or injection(heavy use)	1 007	2.00	737	73.2
7	No answer	2 736	5.42	872	31.9
	Missing data	90	0.18	47	0.3
	Total	50 457	100.00	14 889	29.5

Of the persons found guilty (group 6), 4,95% counts for about 12% of all 40,743 offenses (offenses against the Narcotic Drug Act incl.) committed by the studied population during 1966-1985. Excluding offenses against the Narcotic Drug Act, this group would account for about 11% of all offenses.

The mentioned table does not show the connection between alcohol consumption and criminality. This aspect has been analyzed in table 3 where the population is divided into subgroups according to alcohol consumption levels.

Table 3: Persons found guilty of various offences, 1966-1985 by alcohol-use intensity

Sub group	Alcohol consumption intensity converted to pure alcohol	(1) Proportion of the whole population N	%	(2) Found guilty for offences. Proportion of pop. (2) N	%
1	No alcohol use	1 765	3.5	353	20.0
2	< 50 cl	9 970	19.76	2 118	21.24
3	50-150 cl	11 973	23.73	3 065	25.60
4	150-300 cl	10 482	20.77	3 074	29.33
5	300-500 cl	8 061	15.98	3 132	38.85
6	500-1 000 cl	2 564	5.08	1 286	50.16
7	1 000-2 500 cl	864	1.71	587	67.94
8	No answer	3 012	5.97	552	18.33
9	No data	1 766	3.50	722	40.88
	Total	50 047	100.00	14 889	29.5

Table 3 also indicates that the proportion of criminals is highest in group 7 which has a consumption of 1000-2500 centiliters of pure alcohol per year.

The conclusion from the part of the study described above is that criminality is increasing in the subgroups with higher drug intensity (controlled substances and alcohol resp.). On the other hand, not all heavy drug abusers are noted for their criminality. Around 27% of the heaviest drug abusers are not registered for delinquent behaviour during the 15 years of follow-up. An essential question when analyzing the correlation between criminality and drug abuse is the time sequence. Does drug abuse precede criminality or does criminality precede drug abuse?

In an earlier pilot study (Narkotikautvecklingen 1983), I have shown that for 50% of those who had committed other crimes, the **first offence** was not a drug offence.

Moreover, 60% of the group with a drug offence as the first crime have period not been reported for other criminality **during the six-years' study**. The hypothesis is: Only a part of the population suspected of drug offenses is involved in a large part of some types of the other criminality.

As shown in my current study "Drugs, Criminality and Control", heavy drug abusers are responsible for 10% of the entire criminality, though the percentage in some crimes such as serious forgery, burglary and theft, unlawful driving, and receiving of stolen goods is 15-20%. Higher figures were found among alcohol

users and misusers: subsample 5 (300-500 cl pure alcohol). They were also responsible for a larger part of the registered criminality than were the heavy abusers of controlled substances.

Many researchers (TAYLOR, ALBRIGHT 1981; INCIARDI 1980) have come to the conclusion that crimes correlated to drugs often precede the use of drugs. Similar conclusions were reached by JOHANSSON, BJERVER (1982) in a study of drug abuse, social conditions, and criminality in a population of 510 persons on remand in Stockholm. Their study covers both drug and alcohol abuse. In 56% of the cases it was found that drug abuse (controlled drugs and alcohol) had preceded criminality and that criminality had preceded drug abuse in 38%. Their conclusion is that nothing in the resulting data points unambiguously to abuse as a cause of criminality despite the existence of a certain statistical relation. Other factors appear to be the cause of both phenomena.

Apart from the drug intensity, the type of drug and the phase in the abuser's career may also have some significance for criminal activity. There is therefore reason to make a more thorough analysis of the connection between drugs and criminality. The problem involved should be more clearly specified. Those aspects will be further analyzed in my current project "Drugs, Criminality and Control".

6. Conclusions

Everyone is in agreement that it is important to decrease consumption of all drugs, including those designated as narcotics. The discussion concerns which methods and strategies that should be used to reach this goal. Experiences from Sweden have shown that even without criminalization of consumption, drug abuse has not increased over the past five years. The fear of punishment is the motive given least often to the question of why one tries or why one stops consuming drugs. This is clear from several previous studies. In my study "Drugs, Criminality and Control" of 41,000 registered conscripts, 0.7% of the respondents gave this reason.

The phenomenon of drug use is extremely complex and there is no magic solution which will wipe out drug abuse from our reality. We must accept the fact that drug use in one or another form will always be with us as it always has been present in human history. The general goal - a totally drug-free society - is therefore unrealistic.

A realistic approach is the development of methods to limit the consumption of all harmful drugs and the ensuring that drug users do not seriously harm themselves or others.

On the other hand, the legalization approach, the idea of making drugs free or under less controlled forms available is currently unrealistic and impossible.

Through legalization, a powerful message would be sent to potential users that drug misuse is acceptable. We have little weak evidence that a legalization policy would lead to a decrease in drug consumption. Another reason against the legalization approach is that the narcotic syndicates have built up a well-organized, effective distribution structure. Those syndicates would use the new situation to extend the distribution and availability of the controlled substances.

A third argument is the very strong public opinion against any legalization policy, at least in Sweden.

The preventive drug control and treatment measures must be differentiated more and adapted to the etiological variations for why people, and especially young people, turn to drug abuse. About this question, however, our knowledge is lacking.

Some drug habits develop rather early and are often symptoms of deviant or criminal tendencies in these boys or girls. Indications of such a development can even be observed among 14-16 years-olds. Therefore, it is important early on to convey knowledge and information about how anxiety-producing situations can be gotten through without drugs, how a life-style can be formed which makes drugs unnecessary, and how one handles emotionally impossible situations without alcohol or drug intoxication. Even conditions of revolt, disappointment, and the like, can be dealt with without the help of drugs.

Achieving drug abstinence among heavy drug abusers is much more difficult than rearing children to drug abstinence. To view those who use drugs as criminals is damaging. The drug-abuse problem can be defined as a complicated and differentiated problem. Those who find themselves in the risk zone and those who need curative treatment require other measures and various methods. Moreover, there is a need to accumulate more basic knowledge about the causes of drug abuse and the effects of drugs before we can neutralize the simplified pictures/images that are spread by various means in the society.

The etiological aspect, that is, which factors determine whether a person will develop substance abuse, is of great significance for the design of the drug policy strategies. When it concerns use of drugs, there are dozens of explanatory models at present where several scientific disciplines with various perspectives are concerned.

Most people who live in similar circumstances do not start using drugs. Is there a biochemical explanation? Many people are exposed to drugs such as alcohol, but there are still only a few who end up dependent on alcohol. Why? Does the social learning theory explain drug consumption? One weakness in the social learning psychological models - according to the critics - is that they do not take into consideration the interplay between biological and psychological factors. Nor do other approaches such as epidemic theory, sub-cultures, peer-group relationships and so on, solve the riddle. More interdisciplinary knowledge is needed in order to answer the question of why some people easily progress into substance abuse and have a difficult time stopping the abuse. It is clear that we cannot wait for more knowledge before enacting any control measures. However, it is important not to use control methods which damage drug abusers more than using drugs does.

Therefore, it is justified with our present level of knowledge to limit the penal control to the area concerning the illegal production and distribution.

The consumption of drugs, on the other hand, should not be seen as a criminal action. Prevention here must be based on long-term input of a medical, pedagogical, or social nature. In some exceptional cases, such as in the case of advanced heroin abuse, legal distribution of methadone under strictly controlled medical routines cannot be avoided.

Policies for controlling drugs have much in common with moralistic values. An effective control strategy however is due mostly to how much knowledge we have about the basic questions.

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Drugs and Drug Politics in Switzerland

Prof.em.Dr.iur.Dr.iur.h.c. H. Schultz

Preliminary Remarks

On Swiss law in general

To inform of Swiss law is not so easy as it still competes to the 26 cantons to legislate on important matters. Though the Penal Code as well as the Drug Act are parts of the federal law, legislation on criminal procedure, the law of police, public sanitation and welfare are cantonal matters. In some great cantons, as Berne or Zurich, the cantons and great cities have their own police forces that may follow different policies concerning drugs. Thus it is impossible to give reliable and detailed information of all drugs concerning issues. Things may differ from canton to canton and from one city to another.[1]

On the epidemical aspects of drugs use

Drug use in Switzerland seems to follow the same trends as in other countries that give reliable information. Since 1960 convictions for drug offences rose from 11 to 5,797 in 1986; drug offenses known to the police have risen from almost 5,000 in 1974 to 15,815 in 1986. Consuming drugs is taken up by younger and younger persons and the use of hard drugs, as heroin and recently cocaine, is more frequent. It may be taken for granted that the number of those using drugs is by far much higher than that of those detected by the police. In 1987 197 deaths attributed to drugs have been reported. Committing common crimes as thefts,

1 Information on Swiss drug situation is given by Heine, G.: Schweiz. In: Meyer, J. (Ed.): Betäubungsmittel-Strafrecht in Westeuropa. Eine rechtsvergleichende Untersuchung im Auftrag des Bundes-Kriminalamtes. Beiträge und Materialien aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht Freiburg. Freiburg i.Br. 1987, p.559-654.

burglaries and robberies, to get drugs or the money to acquire them are frequent. Using illegal drugs is considered to be an important problem in Switzerland. Public concern about it is proved by interventions in federal, cantonal and communal parliaments as well as by publications in the daily press, to say nothing of scientific journals.

The Meaning of the Word "Drug"

The word "drug" as used in this paper means a stuff in the sense of Swiss Drug Act sect. 1 that is subdued to the regulations of this act.

1. Criminal Law Provisions

The first Swiss law on drugs dates from October 2, 1924.[2] It has been superseded by the act of October 3, 1951,[3] still in force but thoroughly reformed by acts of December 15, 1968, adopting Swiss law to the Unified Convention of 1961, and March 3, 1975.[4]

As it stands Swiss law on drugs follows the lines given by the 1961 convention. Changes since 1951 made punishments more and more severe though some measures to facilitate rehabilitation of drug-addicts have been introduced as well.

Swiss law deals with drugs in two ways. Drug Act sect. 1 § 2 declares to be drugs in the sense of the law all stuffs that have the effect to create addiction as morphine, cocaine and cannabis do. §§ 2 and 3 give examples of such stuffs, naming hallucinogens and amphetamines. § 4 bides the Federal Health Office to dress a list of these stuffs in the sense of sect.1 §§ 2 and 3. Substances mentioned in the list may be given to a patient only if the rules of medical science command it. Sect.11. Sect.8, however, forbids strictly all producing, transmitting, dealing with and medical use of some stuffs as heroin, LSD 25, hashish and opium used for smoking.

The law of 1951 punished illegal production, handling and possession of and any dealing with drugs with imprisonment up to two years or a fine up to

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2 Vereinigte Sammlung der Bundesgesetze und Verordnungen 1848-1947, vol. 4, p.434.

3 Bundesgesetz über die Betäubungsmittel, AS 1952, 241, SR 812.121.

4 AS 1970 9, 1975 1220. An insignificant change was realised by a federal law of December 14, 1984, altering sect. 27 § 2, saying that illegal import or export of drugs was no more to be punished as a fiscal offence although, AS 1985 412.

30,000 frs. Preparing these offenses was to be punished the same way.[5] No distinction was made between hard and soft drugs. If the offence was committed by negligence the punishment was detention up to three months or a fine up to 10,000 frs. If the culprit, however, had acted by passion for lucre and if the offence was a serious one, hard labour[6] up to five years could be given.[7] Sect.20 provides the same punishments as in sect.19 for acts against the control system introduced by said act, illegal administration of drugs by medical persons and falsification of prescriptions. Thus maximum punishment for a severe drug offence is the same as for intentional homicide in the sense of CPS sect.111 or kidnapping, sect.185 § 1.

In 1975 cultivating plants giving alcaloids or hashish, financing or aiding to finance illegal drug transactions,[8] fostering the use of drugs by a public announcement and making public opportunities to get or to consume drugs were made an offence as well. The ordinary penalty was brought up to three years of imprisonment or a fine up to 40,000 frs.[9] In serious cases the offender may be sentenced to 20 years of hard labour and not less than one year, combined with a fine up to 1,000,000 frs.

According to Drug Act sect.19 § 2 revised, an offence is serious if

- such a quantity of drugs is involved that the health of many people is endangered. The Swiss Federal Tribunal, having taken the advice of medical experts, decided on September 21, 1983, that 20 persons are many people in that sense and it determined the quantities of the most frequently used drugs that suffice to have this effect, thus for instance 12 gr. of heroin, 18 gr. of cocaine, 4 kg. of hashish;[10]

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5 Thus changing currency in order to buy or to import drugs, BGE of July 7, 1987, Die Praxis des Bundesgerichts, Basle, vol.76 nr.272.

6 A federal law of March 18, 1971, AS 1971, 777, abolished all differences between imprisonment and hard labour excepted their duration.

7 Drug Act sect.19 §§ 1 and 2.

8 Making laundering any crime gotten money or other values an offence is in discussion in Switzerland.

9 According to SPC sect.50 § 2 if the law provides imprisonment or fines both punishments may be combined.

10 According to BGE 112 (1986) IV, 109, criticised in ZBJV 124 (1988) p.14, 7b; BGE 113 (1987) IV, 32, holding 36 gr. amphetamine such a quantity independent of the group of persons concerned, decisive is the smallest amount that, independent of the way of administering it, may create that danger.
For critic of this jurisprudence see also Lucchini, R.: Les difficultés d'une définition de la quantité minime dans la législation sur les stupéfiants. In: Sociologie pluraliste et pluralisme sociologique. Mélanges Maurice Erard. Neuchâtel 1986, pp.143; Jenny, G.: Der Begriff der Gesundheitsgefahr in Art.19 Ziff. 2 lit.a. BetmG. Eine Kritik der neuesten Rechtsprechung. In: Kind, H., Lichtensteiger, W., Weiss, I. (Eds.): Drogenprobleme aus psychiatrischer, pharmakologischer und juristischer Sicht. Beihefte zur Zeitschrift für Schweizerisches Recht Heft 1. Basel 1982, pp.97.

- the offender is member of a gang that has been formed for illegal drug traffic, two persons may form a gang;[11]

- someone realises by professional illegal drug-dealing a great turn-over or makes considerable returns.

If the offence is due to negligence the culprit may be punished with imprisonment up to one year or a fine up to 40,000 frs. according to sect.19 new § 3.

Sect.19 new § 4 allows Swiss authorities to prosecute him who has committed an offence in the sense of sect.19 §§ 1 and 2 in a foreign country, if the offender is arrested in Switzerland and not extradited to another country provided that the offence is punishable in the state were it has been committed.

Up to 1975 Swiss drug law did not punish consuming drugs as such. But on December 19, 1969, the Federal Tribunal though admitting that the use of drugs was by itself no offence, held that the user had to be punished because before consuming drugs he had necessarily to accomplish a forbidden act such as getting or possessing a drug not given on medical prescription.[12] Instead of saying that if using drugs was no offence by itself all acts necessary to prepare consume must not be punished as well, the Court held to be punished a student who had let his girl-friend put a cigarette with marihuana in his mouth..... .

This jurisprudence was criticised[13] and gave rise to a dispute in the preparation of the 1975 reform of the Drug Act if the consumer had to be punished or not. The efforts to convince Parliament that consumers should be safe from penal sanctions failed. Luckily the new sect.19a of the Drug Act made consuming a minor offence to be punished by detention up to three months or a fine up to 5,000 frs. The same punishment is provided for all illegal activities preparing ones own consummation of drugs.

According to SPC sect.104 § 1 aiding such offenses is not punishable. Thus procuring needles to a fixer is no offence.

Prosecution of consumers may be abandoned if its a petty offence and an admonishment can be given. No penal prosecution is necessary if the consumer is treated under medical supervision, but Drug Act, sect.89 § 3 bids to take up again penal prosecution if the offender breaks off his treatment. According to SPC sect.44 § 6 a drug-addict consumer may be sentenced to be transferred to a

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11 According to BGE 78 (1952) IV, 234, interpreting the same notion as used in SCP sect.139 § 2, dealing with robbery.

12 BGE 95 (1969) IV, 179, departing from BGE 86 (1960) IV, 54.

13 Schultz, H.: ZBJV 106 (1970) 375, p.3; Schultz, H.: Die strafrechtliche Behandlung der Betäubungsmittel. SJZ 1972, p.234; Weiss, I.: Zur Anwendung der Strafbestimmungen des revidierten Betäubungsmittelgesetzes. ZStrR 95 (1978) pp.192.

special institution to be cured.[14] Drug Act sect.19b declares to be no offence all otherwise punishable acts necessary to procure one's own consuming of drugs or the consuming with another person.

Compared with the way the Courts interpreted the original Drug law the reformed Drug Act is better. The draw-back is that even this law exposes the drug-user to criminal prosecution and criminalises him though in a slight manner, to say nothing of the fact that one cannot get drugs without coming in touch with illegal drug traffic. Thus the drug user cannot help to get in touch with a criminal milieu.

A drug offender's responsibility is judged by the usual standards given by CPS sect.10 and 11. Thus offenders may be declared to have been not responsible or of limited responsibility as a consequence of drug use, indeterminated measures according to CPS sect.43 or 44 may been taken.

A most important weapon in the campaign against illegal drug traffic is offered by the sanction provided by SPC sect.58. § 1 litt. a allows to confiscate objects or values that are the product of an offense or should have served to commit it. The law says that confiscation is possible even if no individual accused can be convicted. Thus confiscation is possible if the accused is insane or cannot be arrested or if in the case of a corporate crime the person responsible for it cannot be identified. The illegal gains of the corporation can be then confiscated and it is not necessary to introduce criminal responsibility of corporations. It suffices to prove that a drug offence has been committed and that the value in question is the product of it. Besides that, all objects that have served to commit the offence, e.g. a motor car with safe places to hide drugs, may be confiscated as well.

If in the time of the proceedings the offender has spent the product of his crime, SPC sect.58 § 4 obliges him to restitute the value of the crime product to the state. Anyhow the Federal Tribunal allows to lessen the sum to be paid back if otherwise the social reintegration of the convicted would be endangered.[15]

All cantonal criminal procedures allow to seize objects and values to prepare a confiscation.

The reformed Drug Act sect.24 empowers Swiss authorities to seize and confiscate objects and values being the product of drug offenses even if the offence has been committed in a foreign country and if the offender cannot be prosecuted in Switzerland.

A law of December 14, 1984[16] said that illegally importing drugs is to be punished as a drug offence only.

14 See 4 here after.

15 BGE 104 (1978) IV, 229, 105 (1979) IV, 23, 106 (1980) IV, 10, 237.

16 AS 1985, 409, in force since January 1, 1985, abolishing to punish him who illegally imports drugs for not having paid custom duties and a special tax on the turnover.

2. Procedural Aspects

Federal procedural rules are rare as criminal procedure competes to the cantons. But Drug Act 23 § 2, introduced in 1975, says that an officer who himself or by another person accepts the offer of drugs or drugs is not to be punished even if he does not declare his identity. Therefore the use of under-cover agents is lawful in drug-matters. Recently the Federal Tribunal held that the use of such agents is licit even if a cantonal law on criminal procedure does not provide such proceedings.[17]

There should be no doubt that it is against the law to provoke a crime in order to catch the provoked offender. Doubtful is only if the agent-provocateur may be prosecuted for instigation.[18] If such an agent had been at work Swiss jurisprudence is contradictory as to the way the provoked offender has to be dealt with. A Basle Court gave an acquittal,[19] the Zurich Court gave a milder punishment.[20] The Basle solution is to be preferred.

Another debated question is that of an under-cover agent's evidence. It is disputed if another person whom he told his story may be called up as a witness to give evidence about what he has heard from the agent. I think this proceedings deprive the accused of his right to examine the credibility of the under-cover-agent and to put questions to him. ECHR sect.6 § 1, principle of fair trial, and § 3 d, stand against such proceedings.[21] Anonymous witnesses are not allowed in Swiss law. Crown-witnesses are unknown. Wire-tapping is permitted as in other criminal procedures concerning serious offenses if the very restrictive condi are tions of CPS sect.179 octies are given, if the proceeding orderer by this section is followed and if a judge permitted wire-tapping.

It may be added that Switzerland gives rather often judicial assistance to other countries in drugs affairs. It is unnecessary to insist on the fact that drug offenses are extraditable crimes with the exception of consuming and that extradition is granted quite often for such crimes. Besides that information may be given as is

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17 BGE 112 (1986) Ia, 21, c. 3 and 4.

18 Advocating punishing Schultz, H.: Einführung in den Allgemeinen Teil des Strafrechts, 1. Band: Die allgemeinen Voraussetzungen der kriminalgerechtlichen Sanktionen. 4th.ed., Berne 1982, pp.295; contrary Hauser, R., Rehberg, J.: Grundriss Strafrecht I Verbrechenslehre, 3.rd ed. Zurich 1983, § 17 3b, p.96; Noll, P.: Schweizerisches Strafrecht Allgemeiner Teil I Allgemeine Voraussetzungen der Strafbarkeit. 2nd. ed. by Trechsel, S.: Zurich 1986, § 303 i, p.180; Riklin, F.: Lockspitzelproblematik, recht 1986, pp.44; Stratenwerth, G.: Schweizerisches Strafrecht Allgemeiner Teil I: Die Straftat. Berne 1982, § 13, nr.103 and 104.

19 Basler Juristische Mitteilungen 1984, 258.

20 Unpublished sentence of Zurich High Court of October 19, 1984.

21 Same opinion Zurich Court of Cassation on May 5, 1986, SJZ 1986, 283, nr.45, with dissenting opinion, approved by Donatsch, A.: Die Anonymität der Tatzeugen und der Zeugen vom Hörensagen. ZStrR 104 (1987), p.397.

necessary to facilitate the proceedings in the requesting state, even about Swiss banking accounts or any other relation of a person concerned by the proceedings with a Swiss bank. The accused or another person cannot invoke the famous bank secret to have international judicial assistance in criminal matters refused, a criminal prosecution and an international proceeding to further such a prosecution prevailing. Swiss authorities not only give the necessary information on banking operations but they block the accounts if it is asked for, seize the values on these accounts and transmit them to the requesting state to confiscate them, according to Swiss Act on international judicial assistance in criminal matters of March 20, 1981, especially sect.63 and 74.[22] The frequency of such proceedings may be explained by the fact that many criminals erroneously believe that Swiss bank secret holds tight against criminal investigations, a widespread error.

General information on drug criminality is collected by a special branch of the Swiss federal police, according to sect.17 of the 1961 Convention. Communications in the press on serious cases of drug traffic show that collaboration between Swiss and foreign public prosecutors is intense.

Thus the position of a drug offender is the same as that of any other person brought to trial.[23] It does not seem probable, the independence of the judges let clone, that the commenting by the press of grave drug crimes works a special effect. As a rule mass-media do not reveal the name of the accused and judgement will be given a certain time after the detection of the offence and its public discussion.

3. Law Enforcement Characteristics

Regular criminal statistics began in Switzerland in 1946. But they give and analyze convicted persons and their offenses only. Statistics of drug offenders known to the police are available from 1971 on. But even the statistics of convicted persons show that drug offenses were for a long time of no importance in Switzerland. The number of persons convicted in virtue of the Drug Act were:[24]

22 SR 351.1.

23 Special problems may arise as some drug addicts are not mentally sane when proceedings begin; see Weiss, I.: Betrachtungen zum strafprozessualen Aspekt der Betäubungsmittel-Gesetzgebung. ZStR 99 (1982), pp.110.

24 Schweizerisches Zentralpolizeibureau/Eidgenössisches Statistisches Amt: Schweizerische Kriminalstatistik 1960, Berne 1962, tab.28, p.76; Eidgenössisches Statistisches Amt: Die Strafurteile in der Schweiz 1970, Berne 1972, tab.32, 33, pp.92,96; Bundesamt für Statistik: Die Strafurteile in der Schweiz 1980. Berne 1982, tab.36, p.78; dito 1984, Berne 1986, tab.21, 31, pp.46,70; including up to 1970 juveniles from 15 to 18 years, from 1971 onward persons older than 18 years only.

Year	Switzer-land	Cantons (-Town) Zurich	Berne	Waadt	Basle	Geneva	Hard labour
1960	11						
1970	1158	268	142	65	135	35	0
1980	5995	1687	743	720	334	209	83
1984	10456	2852	1357	1091	328	358	9

The statistic of drug offenders known to the police, kept by the Federal Office of Statistics, shows that far more persons are prosecuted than convicted for a drug offence. In 1986 15,356 persons were prosecuted for drug offenses but only 5,797 were convicted.[25] They reveal that most of these persons, about 2/3, were prosecuted for having consumed drugs, about 3/5 were accusing of having dealt with drugs and consumed them, but 1/20 were prosecuted for having dealt with drugs only. Of all persons convicted for drug offences, however, in 1986 only 35% were punished but for using drugs, 49% were convicted for consuming drugs and dealing and 15% for dealing alone. It must be stretched out that 60% of all persons convicted for consuming drugs alone have been convicted for another deed that does not fall under the Drug Act.[26] If these persons would have been prosecuted for consuming drugs alone criminal proceedings might have been abandoned in many cases. The conviction is then due to the fact that other than drug offenses have been prosecuted that did not allow to abandon prosecution.

These figures show that many consumers of drugs have been taken up by the police but according to Drug Act sect.15a prosecution has been waved in many cases probably combined with an admonishment. Statistics of these proceedings are not available. It is no question that this way of handling the problem of drug consumers is to be welcomed but to abolish punishment of consumers is to be preferred.

Another positive side of the Swiss sentencing system is the fact that a great part of prison sentences for drug offenses, 62.6% in 1986,[27] are conditional sentences. In 1984 449 sentences gave a fine only.[28] On the other hand dealers are given long-term sentences, especially if their offence has been a serious one in the sense of Drug Act sect.19 § 2. The sentences go up to ten years of

25 Communication by Federal Office of Statistics of February 17, 1988.

26 As in n.21.

27 As in n.21; data on August 5, 1987. Conditional sentences may be given for deprivation of liberty up to 18 months, SPC sect.41 § 1 al.1.

28 Bundesamt für Statistik: Die Strafurteile in der Schweiz 1984: Berne 1986, tab.21, p.46.

imprisonment and more though the persons convicted are small fishes concerned with the transportation of drugs, but not the heads of the traffic organizations. In 1987 sentences given for drug offenses only and for drug offenses and other ones run

up to	3 months	802
from	3 to 6 months	317
	6 to 12 months	286
	12 to 18 months	362
	18 months to 2 years	162
	2 to 3 years	202
	3 to 5 years	125
	5 to 10 years	43
	10 to 15 years	4
	15 to 20 years	5
	lifelong	1[29]

It may be added that if Swiss prisons are overcrowded that is due to a certain extent to the hard sentences given to drug dealers.

There are no special prisons for drug offenders. These prisoners rise serious problems for the Swiss prisons as up to 40% of the inmates of long-term institutions are drug consumers. The necessity to prevent drugs to be brought into prisons leads to a stricter control of all inmates and their visitors. Arrangements are made that a drug-addict prisoner who during his stay in prison wants to be cured may be transferred to a special institution for drug addicts.[30]

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29 As in n.21, data on August 5,1987.
The life term must have been given for a person convicted for drug offenses and murder, SPC sect.112.
Conditional release is possible if 2/3 of the sentence or 15 years of a life term have been served, SPC sect.38.
Recent examples of long term sentences: 7 and 4 years for two Turks who had brought in four times about 4 kg heroin from Italy to Switzerland, NZZ January 16/7, 1988 nr.12, p.13; 12 years of prison for a Turk who had in two times brought 4,3 kg heroin from Turkey to Switzerland, ibid. p.53; 4 years for a Turk having imported 3 kg heroin from Turkey, NZZ February 4, 1988, nr.28, p.11; 7 to 10 years imprisonment for three Tamils having sold about 2 kg heroin smuggled from Bombay, NZZ February 19, nr.41, p.9; 4 years for an Italian, NZZ February 24, nr.45, p.9; 16 years for an Portuguese for having imported 15.3 kg heroin, NZZ February 25, 1988, nr.46, p.51. The list may be continued ..... Obviously these judgments concerned but small fishes: poor couriers of drugs.

30 According to sect. 2 of Verordnung 3 zum Schweizerischen Strafgesetzbuch of December 16, 1985, AS 1985, 1941, SR 311.03, see 4 here-after. As to the situation in Swiss penitentiary institutions see: Wohin mit den drogensüchtigen Straftätern? Contributions by Dr.med. Ruedi Osterwalder, psychiatrist, Fritz Werren, director of Thorberg prison, Adrian Muff, director of a rehabilitation centre; ZStrR 100 (1983), pp.159,171,177.

4. Support Programmes for Drug-Addicts

SPC sect.44 § 6 enables the judge to commit a person sentenced for an offence in connection with the offenders drug addiction for a period up to two years to a special institution to be cured. This sanction is no punishment but an indeterminated sentence (mesure de sûreté). The execution of the prison sentence is postponed. Sect.104 § 2 says that in the case of a minor offence (contravention) such a measure is only permitted if the law expressly says so. Therefore Drug Act sect.19a § 4 provides that SPC sect.44 may be applied to the drug-addict consumer though he is committing a minor offence only.

The sanction according to SPC sect.44 § 6 is executed in an appropriate establishment. There exist no special institutions incorporated in the penitentiary system for the execution of such a sanction. According to the circumstances of the case it will be executed in a psychiatric clinic or a special institution for drug-addicts may it be a statal or a private one.

Conditional release is possible and will be granted as soon as possible. If it fails the convicted may be brought back to the institution for a period not exceeding two years. This proceeding may be repeated, but according to SPC sect.45 § 3 al.6 the whole staying in the institution may not exceed six years. If the conditional released commits new offenses the executing authority can bring him back to the institution or to have the suspended prison sentence to be executed. In petty cases admonishment may be given and the period of probation be prolonged. If the cure is successful the competent authority communicates this to the judge who may order the suspended prison sentence to be executed. But SPC sect.43 § 5 al.1 says that the suspension has not to be revoked if the execution of the prison sentence would endanger the success of the treatment.

Instead of committing the drug-addict to an institution, ambulatory treatment may be given if the circumstances are favorable. SPC sect.43 § 1 al.1 permits ambulatory treatment if the delinquent is not dangerous for other persons. This treatment may be ordered especially if the offender began a treatment before being sentenced and if it may be said that he will continue it. According to SPC sect.43 § 2 al.2 the execution of a prison sentence may be suspended to take account of the kind of ambulatory treatment. It were to be preferred to suspend the execution of a prison sentence in all cases of ambulatory treatment. To evade this difficulty Swiss courts quite often combine a farm prison sentence with ambulatory treatment. Though the law as it stands allows such a combination of

punishment with an indeterminated sentence it should not be done, for it is very difficult to give an appropriate ambulatory treatment in a prison.[31] If ambulatory treatment fails the convicted may be placed in an institution for the cure of drug-addicts or the prison sentence may be executed. If the ambulatory treatment has been successful the judge has to decide upon the execution of the postponed prison sentence. As a rule he should refrain from ordering the execution as it might endanger the success of the treatment.

Sect.15a, introduced in 1975, bides the cantons to organize counselling on drug abuse and the necessary medical or other care for drug-addicts and to facilitate their professional and social reintegration. Private organizations may be asked for help. Sect.15 § 1 allows officials, doctors and pharmaceutical chemists to report drug-addicts to institutions taking care of such persons without giving off an official or professional secret in the sense of SPC sect.320 and 321. Sect.397a of the Swiss Civil Code permits to transfer a drug-addict in need of medical care to an appropriate institution independent of the fact that he has committed an offence.

There exist many institutions giving help to drug addicts.[32] As according to the Swiss Constitution health services compete to the cantons it is impossible to give an account of all the different ways this help is offered to drug-addicts. There is no unit de doctrine. Some institutions accept but persons that come by their own, other think it better that the drug-addict is forced by some legal procedure to begin a treatment.

Even police methods are very different from one canton to another. Thus in the city of Berne an organization "Contact" runs a tearoom open four times a week for four hours and where all these times members of "Contact" are present. There syringes are available and shooting up is allowed, but no dealing is tolerated. The syringes must be given back. The room where shooting up is allowed may be entered by five persons at most and is controlled by the members of "Contact". Bernese authorities tolerate, up to now, this tea-room and "Contact" is in regular contact with these officials, it is even question of opening a second such place.[33] In Zurich however such a possibility to shoot up drugs is not given.[34]

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31 See Knab, R.: Der Massnahmenvollzug gemäss StrGB art.43 und die Möglichkeiten der Psychotherapie. ZStrR 95 (1978), pp.143; Rauchfleisch, U.: Die ambulante psychiatrische Behandlung nach StrGB art.43 im Urteil von Richtern und Psychotherapeuten. ZStrR 102 (1985), pp.176.

32 The Drug Report (Drogen in der Schweiz; Jahresbericht der Kantone 1984) issued by the Federal Health Office indicates 187, mainly small institutions for stationary treatment of drug-addicts with 500 places. Newer figures are not available.

33 Contact,: Perspektiven zur Drogenarbeit und Drogenpolitik der Stiftung Contact-Bern, May 14, 1987, and information given by Jörg Signer.

34 NZZ February 1, nr.25, p.29.

5. The Role of Private Physicians

Drug Act sect.11 empowers physicians, veterinary surgeons and dentists to administer drugs for medical use if the rules of medical science say this to be necessary. Sect.15a, introduced in 1975, § 5 bids the cantons to submit administering drugs for curing drug-addicts to a special permission.

The Report on Methadon[35] issued in April 1984 by the Federal Health Office tells that on September 1, 1983, 1183 patients were treated by private physicians with methadon. In 1985 1303 patients underwent such a treatment.[36] The report gives very detailed recommendations how such a treatment has to be given.[37]

Some cantons, thus Berne, issued the necessary rules in an ordinance given by the cantonal government.[38] Other cantons, such as Zurich, issued guide-lines for the administration of methadon.[39] These cantonal rules keep in the lines given by the federal methadon-report. They say what drug-addicts may be given a methadon cure and how methadon is to be administered. A recent, not published judgement of the Federal Court of October 20, 1987[40] held that cantonal guide-lines are not identical with the rules of medical science. Drug Act sect.11 speaks of that may permit to depart from these guide-lines under special circumstances, e.g. instead of handling over the dose for one day only to give the dose for two days on week-end or for an even longer holiday-time at the end of a treatment. If a drug-addict under methadon treatment goes to prison in the canton of Berne the treatment is continued if the deprivation of liberty does not exceed thirty days. If the prison sentence is for a longer term the prisoner is set free from methadon in the first 10 to 15 days of his incarceration under medical supervision.[41] In the canton of Zurich the situation seems to be similar though no such terms are given.[42]

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35 Methadonbericht. Suchtmittelersatz in der Behandlung Heroinabhängiger in der Schweiz; Beilage zum Bulletin des Bundesamtes für Gesundheitswesen, 3, May 5, 1984, p.18. A new edition is in preparation.

36 Information given by Federal Health Office on February 16, 1988.

37 Op.cit. n.31, p.25 s.

38 Verordnung zum Bundesgesetz über die Betäubungsmittel of May 1, 1985, sect.8 and 9.

39 Guide-lines of Zurich Health Department of September 19, 1978, revised on June 9, 1987.

40 Reported by Roberto Bernhard, Schweizerische Ärztezeitung 1988, p.266.

41 Information given by Bernese cantonal physician and cantonal pharmaceutical chemist on February 23, 1988.

42 Information by Zurich cantonal physician on February 18, 1988.

The results of methadon cures seem to be promising. Social reintegration of addicts undergoing such a treatment are, on the whole, better than that undergoing other treatments though sporadic use of drugs is not seldom.[43]

It is not possible to ascertain the number of patients receiving drugs in another treatment than that for drug-addiction. In the canton of Zurich long-term treatments using drugs should be reported to the cantonal physician. Though about 2200 physicians practise in this canton in 1986 5 and in 1987 14 such treatments only have been reported. The cantonal physician thinks the real number of such treatments to be much higher.[44] The Bernese cantonal physician and the cantonal pharmaceutical chemist say that it is impossible to indicate the figure of such treatments that will be rather frequent.[45]

6. Reform Trends

The last reform of Swiss drug law dates from 1975. Parliament then discussed liberalization of drug consume. But these efforts failed. Luckily the new sect.19a makes consuming a minor offence and permits to abandon prosecution giving a warning. According to the information first given by the Federal Health Office there is no reform of the Drug Act under the way nor is it in preparation. Then it became known by a leak that the Swiss Commission on drugs examines if the Drug Act is to be reformed, but one does not know what reforms are thought of.[46]

Thus the official way to face the drug problem in Switzerland is still that of using criminal law against consumers and, of course, against dealing with drugs. Anyhow, as statistics show[47] the consumers are dealt with leniently by abandoning prosecution and at most a warning. This may be due to an upcoming tendency to tolerate drug consume, especially of hashish. It is obvious that the attempt to cope with the problem of drugs by the means of criminal law did not succeed. All efforts of the police, public prosecutors, judges and penitentiary institutions did not curb the drug wave. On the contrary: drug consuming is more and more wide spread.

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43 See Uchtenhagen, A., Zimmer-Höfler, D. et al.: Heroinabhängige und ihre "normalen" Altersgenossen. Berne 1985, on a research observing during two years 248 heroin addicts, 71 treated with methadon, 101 living in therapeutic communities, 56 in prison and 20 in psychiatric clinics. The reports of the cantons on methadon treatment in 1985 confirm these findings, information as in n.31.

44 Information as in n.42.

45 Information as in n.41.

46 NZZ 9/3/1988, nr.57, p.22.

47 See 3. here before.

Nonobstanding this official attitude a great number of private, semi-official and official institutions give advice and help to drug-consumers and especially drug-addicts.[48]

Thus the official policy towards drugs is not all. It seems that the public opinion begins to gather that criminal law is not the answer to the problem. The fact that methadon treatment is officially approved and recommended shows that the drug policy does not stick to the alternative abstinence or punishment. Controlled use even of drugs by socially adapted persons seems to be more and more tolerated as is the controlled use of the so-called legal drugs.

This attitude is the only correct one if one considers that only the production of and dealing with absinth are forbidden even by sect. 32 of the Swiss Constitution and to be punished with imprisonment up to two years or a fine up to 3,000 frs[49] as well as the production of potato spirits.[50] All other alcoholic drinks, however, are free on sale for adult persons. There is not even a quantitative limit for getting them notobstanding the fact that one estimates in Switzerland about 100,000 alcohol-addicts and that the detrimental consequences of exaggerated tobacco smoking are well known.

Of course there is a certain official control of the so-called legal drugs, as selling of cigarettes contributes to finance the statal insurance of old persons, producing spirits depends on a licence[51] and selling of alcoholic drinks needs a special permission and that pubs may be forbidden to sell spirits before certain hours. There are, however, no obstacles to get alcoholic drinks. Thus the strict regime of drugs comes near to a social hypocrisy. In once the saying that criminal law is the first cause of criminality is true then in the case of punishing all drug consume.

The thrift in Swiss public opinion to a more tolerant handling the drug problem is revealed by critics of Swiss drug law and proposals for its reform. The Zurich psychiatrist professor HANS KIND published recently an article advocating a

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48 See 4. here before.

49 Bundesgesetz betreffend das Absinthverbot of June 24, 1910, SR 817.451.1, sect.3 § 1; if the offender acts by negligence he may be punished with imprisonment up to 6 months and/or a fine up to 1,000 frs. or with a fine alone.

50 The legal handling of potato spirit is somewhat difficult to be understood. According to sect.4 of Bundesgesetz über gebrannte Wasser (federal law of June 21, 1932, on spirits) SR 680, production of this spirit may be conceded but the federal administration of alcohol does not give such a permission as production of potatoes is helped by subsidies. Therefore producing potato spirit is to be punished as producing it without licence according to sect. 52 leg.cit. with punishment up to 6 months and/or a fine up to 20,000 frs, eventually 10 times the amount of the free withdrawn if this is more than 20,000 frs.

51 Recently occurred the only more serious case of illegal producing spirit ending with the sentencing the head of the offenders to 20 months imprisonment and a fine of 150,000 frs; NZZ 12/4/1988, nr.84, p.9.

more liberal regulation of drug-consume.[52] The Zurich section of the rather conservative radical-democratic party held discussions on this problem and introduced working groups for it.[53] Under the auspices of Pro Juventute a Drug Charter was issued in 1987 pointing out that every addict is a person in need and deserves help before all. The Charter advocates to abolish the distinction between legal and illegal drugs.

Semi-official statements go in the same direction. In January 1984 an assembly on drug-addicts in the penitentiary system pleaded for decriminalization of drug consume.[54] A working group on drug-addicts in prison pleaded in October 1985 for a partial liberalization of drug consumers.[55] In 1986 PIERRE JOSET and PETER ALBRECHT published a revised version of the penal dispositions of the Swiss Drug Act.[56] Its most important innovations are the reduction of punishment in sect.19 § 1 to three years of imprisonment and in § 2 to five years of hard labour and a new version of sect.19a declaring consuming of drugs and all otherwise forbidden acts preparing one's own use not to be punishable at all. This line was approved, the maximum of penalties excepted, by the Swiss Union of drug experts in autumn 1986.[57] In my project of the General Part of the Swiss Penal Code of March 1985.[58] I did not propose incisive changements of SPC sect.44, especially § 6. I pointed out that a reform of the Drug Act was necessary to progress in that matter. The only innovation of sect.44 is to widen the range of institutions where drug-addicts might be sent to for treatment as homes and great families. Besides that ambulatory treatment shall in every case be combined with suspension of the prison sentence.

It seems to me that decriminalization of drug users from a certain age on should be the aim of a reform of the Drug Act. I freely admit that, when I first wrote

52 Kind, H.: Die Gefährlichkeit der Drogen und die heutige Drogenpolitik. NZZ June 22/3, 1985, nr.142, p.39, and answering objections to his proposals Die Drogenpolitik neu überdenken, NZZ September 3, 1985, nr.203, p.31. See also Kind, H.: Kulturelle und soziale Bedingungen des Drogenkonsums. In: Kind, H., Lichtensteiger, W., Weiss, I.: op.cit. (note 10), p.11; same: Sucht und Missbrauch, das Problem der süchtigen Persönlichkeit, ibid. p.19; same: Therapeutische und administrative Massnahmen zur Bekämpfung der Drogenabhängigkeit, ibid. p.51.

53 NZZ November 18, 1987, nr.268, p.83.

54 Fachtagung Drogenabhängige im Strafvollzug, January 18/9, 1984 Gottlieb-Duttweiler-Institut, see Federal Office of Justice, Informationen über den Straf- und Massnahmenvollzug 1984, 2/1984, p.29.

55 Report of October 1985, p.16.

56 Joset, P., Albrecht, P.: Entwurf einer lèalen Drogenpolitik: Die Revision des Betäubungsmittelgesetz. Zeitschrift für Schweizerisches Recht 1986 I, pp.243.

57 Verein Schweizerischer Drogenfachleute: Perspektiven einer neuen Drogenpolitik. Revisionsentwurf der Arbeitsgruppe "Revision des Betäubungsmittelgesetzes" des Vereins Schweizerischer Drogenfachleute. Zurich 1986.

58 Schultz, H.: Bericht und Vorentwurf zur Revision des Allgemeinen Teils und des Dritten Buches "Einführung und Anwendung des Gesetzes" des Schweizerischen Strafgesetzbuches. Berne 1987. The project, drafted by order of the Federal Department of Justice and Police, is actually examine by a group of experts, convoked by said department in 1987.

about these problems in 1972,[59] I thought as many did that a clear cut distinction between consumers and dealers could be made. Experience showed that this was not possible. A great part of consumers must deal with drugs to get the money to pay the high prices for drugs they want to consume. This is, however, the consequence of the actual situation making drug consume and getting drugs for consume illegal, thus rising the prices for drugs, to say nothing of their quality. Therefore this experience does not shaken my conviction that decriminalization of drug consume is the thing to be done, combined with a system to get officially drugs of good quality at a decent price. Production and handling of and dealing with drugs outside the legal system has to be punished severely.

Permitting drug consume but from a certain age on may lead to illegal dealing providing younger people with drugs. But this draw-back has to be accepted considering the advantages of decriminalization of drug use in general. When under this system drugs can be obtained legally the hardship of procuring them illegally to younger persons, as rising of the prices, should not be too grave.

It may be remembered that the Message to the Drug Act of 1951 reads as follows:

> Contrary to the attempts to deter drug-addicts by severe punishment, it seems more just to consider addiction not as a crime or a misdemeanour but as an illness. Addicted persons have to be given medical treatment; besides that adequate prophylactic measures have to be taken to exclude the abuse of drugs.[60]

The Message thus laid down a principle that does not hold good only as long as only persons of the medical professions and some of their patients were in danger of becoming drug-addicts as it was in the Fifties.

Letting use of drugs unpunished would bring the drug law in accordance with modern principles of criminal law: Human behaviour is to be punished only if it damages or might bring damage to another person or the whole society. But behaviour that compromises but its author does not fall in the scope of criminal law. This principle was defended by THOMAS OF AQUINO when he answered the question "Utrum ad legem humanam pertineat omnia vitia prohibere" saying that punishment was only indicated respecting:

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59 Schultz, H.: Die strafrechtliche Bekämpfung der Betäubungsmittel. SJZ 1972, pp.229.
60 Message of April 9, 1951, BBl 1951 I, p.829, translated by author.

> graviora, a quibus possibile est maiorem partem multitudinis abstinere, et praecipue quae sunt ad nocendum aliorum, sine quorum prohibitione societas humana conservari non potest, sicut prohibentur lege humana homicidia, furta et huius modi.[61]

As Switzerland is party to the Unified Convention[62] it must be examined if decriminalization of drug consume is compatible with this convention. Sect.36 § 1 obliges the partners of the covenant to punish all kind of producing and handling of and dealing with any stuff dealt with by the convention. Though this obligation is given in a most detailed way nothing is said of consuming drugs. It seems fair to interpret said disposition as aiming at the repression of illegal production of drugs, traffic with them and all acts preparing or facilitating these acts, and that the same hold true for the possessing of drugs as mentioned in sect.33 and 36 § 1 of the convention. This interpretation seems all the more correct as sect.36 follows sect.34 on measures of control and supervision and sect.35 on combatting illegal drug traffic. It may be added that the Message of the Swiss Federal Council to parliament of March 20, 1968,[63] concerning said convention, says nothing of the consumer when discussing sect.33 and 36 § 1. Dealing with possession in the sense of sect.33 the Message speaks only of persons with a special permission to store drugs.

But even if decriminalization of drug consume is compatible with the said convention it is not possible for a singly country to do that by itself, to say nothing of a small country as Switzerland. Else it would become a spot of highest attraction to the whole world's drug users.

What is to be aimed at is a concerted international action combined with a campaign of explanation of the true social and individual causes of addiction demonstrating the illusion to combat drug use by the means of the criminal law. It must be pointed out what are the deplorable consequences of the actual system: It makes drug traffic most profitable. The bosses of drug traffic seem to become a political power of international influence. The most respectable and serious Neue Züricher Zeitung published recently a leader "Drugs or democracy in South-America?".[64] It ends with the words:

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61 S. Aquinatis, Th.: Summa theologica de Rubeis, Billuart et aliorum notus selectis ornata, Tomus II, ed. XXIII, Pars 1a 2ae, quest. XCVI Art. II, conclusio; Vatikan 1940, p.546.

62 For a discussion of international regulations on drugs see Weiss, I.: Die Schweizerische Betäubungsmittel-Gesetzgebung in ihrer Entwicklung. Ein Überblick anhand der internationalen Betäubungsmittelkontrolle. In: Kind, H., Lichtensteiger, W., Weiss, I.: op.cit. (note 10), p.63; Weiss, I.: Drogen, Enthaltsamkeit oder Mässigkeit statt Prohibition. ZStrR 103 (1986), p.409.

63 Botschaft des Bundesrates an die Bundesversammlung über die Genehmigung des Einheits-Übereinkommens über die Betäubungsmittel, BBl 1968 I, p.757.

64 NZZ February 20/1, 1988, nr.42, p.I, written by Christoph Mühlemann; translated by author.

> May it be true or not, it may be still an utopia that drug traffickers take over wholes regimes or dead-beat statal economies; but one cannot overlook warning signs. Not even the single true democracy in Central-America, Costa-Rica, is safe against this influence; the capital San José is one of the most important **places** for washing **money coming from drug traffic**. The prospects are unconformable for Latin-America as well as for the United States.

It is to be expected that the most hard resistance against a reform of drug law will not come from those who hold criminal law and police action the best way to combat drug abuse, pointing out the fact that prosecuting consumers to give them a warning may prevent them from further drug consume. The hardest resistance will come, though not openly, from those who actually take heavy profits from drug traffic fearing to lose gain and influence. This resistance will be all the more difficult to overcome as drug consume is connected with the economic problems of the producing countries that are a part of the Third World. This resistance can be overcome only if adequate help is given to these countries permitting to substitute the rising of other products than coca or papaver.

Though difficulties to change the actual deplorable situation are great and are to be expected to come from very different opponents the draw-backs of the drug law as it stands are so evident that a change must be tried.

Men must learn to accept the fact man seems to be a species that needs in certain situations, going from the desire of religious extasy to the wish to escape misery, some kind of mood altering stuff as history and ethnography show. Punishment is not the way to keep men back from searching the artificial paradises Charles Baudelaire wrote about. Men must be helped that they are not coming in a situation to look for this escape and if they did they must be helped to find the way to a socially tolerable way of living. But they are not to be punished for having put on stake their own existence.

Abbreviations

AS	Amtliche Sammlung des Bundesrechts, Berne (official collection of Federal law), cited by year and page.
BBl	Bundesblatt, Berne, cited by year, volume, page.
BGE	Entscheidungen des Bundesgerichtes amtliche Sammlung (Decisions of the Federal Tribunal, official edition), Lausanne, cited by volume, year, part, page.
c.	consideration.
NZZ	Neue Züricher Zeitung, Zurich, cited by date, number, page.
SJZ	Schweizerische Juristenzeitung, Zurich, cited by year, page.
SPC	Swiss Penal Code, Federal Law of December 21, 1937, amended SR 311.
SR	Systematisch Sammlung des Bundesrechts (systematic collection of Federal Law), Berne.
ZBJV	Zeitschrift des Bernischen Juristenvereins (publication of the Bernese association of lawyers), Berne, cited by volume year, page.
ZStrR	Schweizerische Zeitschrift für Strafrecht (Swiss review of criminal law) Berne, cited by volume, year, page.

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Illegal Drugs and British Criminal Justice Policy

Prof.Dr. A. Rutherford and Dr. P. Green

1. Introduction

The shifting emphasis from a "medical" to a "crime control" model in dealing with illegal drugs in Britain since the 1960s has implications that extend to criminal policy generally. By providing new powers for the investigation and prosecution of illegal drugs offenses, the boundaries of criminal justice intervention have been widened. Along with certain other offenses, notably those arising with respect to terrorism, the crime control approach to illegal drugs serves as a pathfinder for broader criminal justice innovations.

The paper begins by considering whether the shift from the medical to the penal approach marks a departure or is more appropriately regarded as a new emphasis. In the second section, several consequences of the penal approach to drugs for criminal justice policy and practice are considered. Finally, some implications for criminal policy of current sentencing practice, including the early use of the Drug Trafficking Offenses Act 1986, are reviewed.

With British legislation on illegal drugs assuming in the 1980s the "extraordinary" character of anti-terrorist legislation it is tempting to hark back to a more enlightened period when the control of drug abuse appeared to be rested with the medical profession, concerned about the health and welfare of the individual. British drugs control policy between 1920 and the mid 1960s had been hailed by many observers as both enlightened and far-sighted in its perceived non-penal and treatment oriented approach. The image of the British "medico-centric" (to use GERRY STIMSON's term) system is embodied in the following statement by EDWIN SCHUR, who energetically argued for the reform of U.S. policy along British lines:

> "There is practically no illicit traffic in opiates because the legal provision of low cost drugs ... has largely eliminated the profit incentives supporting such a traffic. Similarly ... serious addict crime is almost non-existent. The addict need not become a thief or a prostitute in order to support his habit... British policy has also inhibited the development of an addict subculture. The addict is not subjected to a continuous struggle for economic survival and for drug supplies nor need he constantly attempt to maximise his anonymity and mobility. There is relatively little need for group support and actual contact with other addicts may be slight (SCHUR 1963, pp.154)".

Recent work on the historical and political development of British drugs policy, however, suggests that the dichotomy so frequently posited between the medical and penal models by admirers of the "British System", was overdrawn. And as BERRIDGE maintains, the fact that the "British System" was used polemically by American reformers who sought to liberalise U.S. drug policy in the 1960s, obscured the penal and control components of the British system which had always existed (BERRIDGE 1984, p.17). The control aspect of British policy, downplayed by commentators like SCHUR, operated at two fundamental levels. First, maintenance prescribing, the key feature of the "British System", only applied in the case of heroin and other opiates. For users of other illegal drugs the crime control approach applied. Secondly, as SMART has argued, the medicalization of drug addiction provided a pre-requisite for the later penal conceptualization of the problem. SMART suggests

> "... that the identification of a physical "disease" was an essential element in the transformation of an individual evil into a "scientifically" identified threat to the fabric of society". It is therefore not surprising that the medical profession's solution to drug addiction shared many features of the penal approach. In 1983, for example, the Royal College of Physicians Committee on Drug addiction proposed that persons identified as drug addicts receive two years of compulsory treatment followed by regular compulsory re-examination. (SMART 1984, pp.35).

An examination of the historical development of British drug policies highlights the often complementary nature of the relationship between medical and penal control, demonstrating the logic of the development toward a primarily penal solution to drug misuse, culminating in the Misuse of Drugs Act 1971 and the Drug Trafficking Offenses Act 1986.

In the 1920s the medical profession was able to successfully assert its conceptualization of drug control in government policy. When in the early 1920s the Home Office attempted to emulate the American penal approach to drug

control by proposing penalties for both addicts and prescribing doctors it was fiercely resisted by the medical fraternity. As a consequence, in 1924 the ROLLESTON Committee was appointed to investigate and advise,

> "as to the circumstances, if any in which the supply of morphine and heroin to persons suffering from addiction to these drugs may be regarded as medically advisable, and as to the precautions ... that medical practitioners administering or prescribing morphine and heroin should adopt for the avoidance of abuse and to suggest any administrative measures that seem expedient for seeing such observance of such precautions" (ROLLESTON 1926, para. 11).

The Committee's membership was entirely drawn from the medical profession, and its report essentially gave rise to the international understanding of the "British System". The ROLLESTON Committee's main recommendation that "a prescription shall only be given by a duly qualified medical practitioner when required for purposes of medical treatment" firmly established the role of the medical profession in British drugs policy for almost forty years.

What exactly, however, was the nature of the problem to be controlled? The work of BEAN (1974), BERRIDGE (1984) and others suggests that the ROLLESTON Committee was essentially responding to a **non** problem. The report, in many respects, offered no change to the existing pattern of control and BEAN describes it

> "as a typically laissez faire document which posed a solution to a problem when there was no problem there in the first place" (BEAN 1974, p.68).

In many respects the ROLLESTON report merely reaffirmed the relationship which existed between medical practitioners and a small number of middle class addicts. Doctors were now legally entitled to supply any amount of heroin and morphine to maintain the addictions of their clients. BERRIDGE suggests that:

> "Medical humanitarianism was maintained only so long as there was a limited, middle class and respectable addict clientele. The overtly repressive response of 1916-24 was abandoned in part because the amount of drug use it proposed to contain was slight and lower class use minimal."

British controls, BERRIDGE concludes,

> "did not lead to small numbers. They were the result and not the cause of them" (BERRIDGE 1984, p.28).

The issue of drug misuse was not seriously re-examined until 1959 when an interdepartmental committee, the BRAIN Committee, was established. Renewed interest in drug misuse had been prompted by changing patterns of narcotic consumption. Between 1953 and 1959 the number of known opiate addicts had increased by 80 percent (although the actual numbers were still relatively low, up from 290 to 454). Furthermore there appeared to be a new kind of user: the young, non-therapeutic, working class male. The BRAIN Committee, however endorsed the Rolleston approach that the minimal addiction to dangerous drugs which then existed required no new controls (WHITAKER 1987, p.41). Five years later, in July 1964, the Committee was reconvened under pressure of a continued increase in the number of heroin addicts known to the Home Office (between 1961 and 1964 the number of known addicts had increased from 470 to 753). The public image of drug takers was also undergoing a change. The media frequently reported drugs-horror stories and drug users were presented as no longer sick and helpless victims to be pitied but as "unrepentant youth subcultures" challenging the moral fabric of society (WHITAKER 1987, p.41). In the context of a new mood of youth protest, drug users saw themselves as engaging in positive lifestyles. They rejected the disease conception of addiction and publicly asserted the positive aspects and hedonistic pleasures of drug use. Concomitantly the definition of drug addiction adopted by the BRAIN Committee changed. In its first report the Committee had identified addiction as "an expression of mental disorder". By the second report the addict was described as "a sick person provided he does not resort to criminal acts" (WHITAKER 1987, p.41). The transference of control from being primarily medical to primarily penal was now underway.

When the Labour M.P. RENEE SHORT introduced a House of Commons debate on drug abuse in 1966 she captured the growing ideological conception of drug use which underlaid and motivated the development of penal responses to the problem. It was, she declared "A hellish story of escalation from pep pills to mainline heroin, and escalation can change an apparently happy, balanced, open faced youngster into a furtive liar willing to cheat and commit violence, or to prostitute himself or herself, in order to get the drugs which he craves physically and psychologically with such dreadful compulsion".[1] The terms of reference of the reconvened BRAIN Committee were to consider whether in the light of recent experiences the advice they gave in 1961 in relation to the prescribing of addictive drugs by doctors needed to be revised, and if so to make recommendations. The main focus of the Committee's attention was heroin and cocaine, as well as the need to curb a small number of medical practitioners who had been prescribing

1 Parl. Debs., H.C., 3rd August 1966, 733, col.643.

excessive quantities of the drugs which in turn were being sold to other addicts. The Committee recommended treatment centres for addicts which it hoped would restrict the supply of hard drugs. As a result the freedom of the medical profession was to be sharply curtailed, with only doctors who worked in treatment centres being able to legally prescribe, administer and supply heroin and cocaine.

These recommendations were given force in the Dangerous Drugs Act 1967. In addition, this statute provided a requirement on the part of all doctors to notify suspected addicts to the Home Office, complete with personal particulars. The 1967 Act, however, represented more than a curtailment of the power and authority of the medical profession in relation to drug abuse. The BRAIN Committee's second report had voiced major scepticism about the ability of treatment to cure addiction and had stated: "Indeed it is generally recognized that the prognosis for the severely addicted is not very hopeful so that some patients may have to remain indefinitely under the care of treatment centres." Police powers of search and obtaining evidence were extended to enable police to search and detain, without a warrant, a person whom a police officer had "reasonable grounds to suspect is in possession of a controlled drug". The Act also provided for heavier sentences to be passed for drug offenses. Illegal drugs had become regarded as a problem of special magnitude and the 1967 Act marked a further staging post in the development of a fully crime control approach.

Much of the literature on British drugs policy locates the Misuse of Drugs Act 1971 as a watershed in terms of the transition from the medical to the penal approach to drug control policy. The foregoing discussion suggests that criminalization represented less a fundamental break with past practice than a new emphasis. The 1971 statute was important, however, in that it did represent a total commitment to crime control policy. The treatment of addicts was barely an issue; criminalization was to be rigorously pursued as the main means of stemming what was now becoming to be more widely considered as a threat of frightening proportions.

Introduced by the Labour Government and reintroduced in similar form by the new Conservative Administration, the Misuse of Drugs Bill received all party support for its attempt to consolidate all previous drugs legislation. The Act abolished the artificial distinction between narcotics and other drugs; it distinguished between the possession and trafficking of drugs; and it sought to eliminate overprescribing by prohibiting doctors from prescribing certain drugs. The statute divided drugs into three classes for the purpose of punishment: possession of Class A drugs (heroin, other opiates, LSD, cocaine etc.[2]) had a maximum penalty of 7 years imprisonment; possession of Class B drugs (can-

2 "Designer drugs" were added as Class A drugs with effect from April 1, 1986.

nabis, cannabis resin etc.) could result in 5 years and possession of Class C drugs - 2 years. Thus while penalties for possession of amphetamines and LSD rose by 3 and 5 years respectively, the penalties for possessing cannabis decreased from 10 to 5 years, and heroin from 10 years to 7 years. These reductions in maximum penalties must be seen in the context of the new statutory distinction between possession and trafficking. Trafficking in Class A drugs now carried a maximum penalty of 14 years imprisonment.

Criticisms raised in Parliament arose primarily in relation to the government's classification of cannabis as a Class B drug and while there was virtually no support for its legalization, there were suggestions that it be classified separately with much lighter penalties attached. A few members of the medical profession were scape-goated throughout the debates as the cause of the problem. As one Member saw it the bill was "the result of the failure and shortcomings of some members of the general medical council and the medical profession".[3] Substantive criticisms of the bill were few and lamely made. The acknowledged failure of the medical profession served to justify the lack of criticism that met the overtly penal road now being taken. Only WILLIAM DEEDES (who had chaired the Advisory Committee on Drug Dependence sub-committee on powers of arrest and search) cautioned against the consequences of the penal road to drugs control. "America" he warned, "had Draconian penalties for the misuse of dangerous drugs - heroin, marijuana, the lot - and she had tried hard to enforce them, yet abuse in America has spread like an oil fire in a timber shed...."[4]. ERIC DEAKINS warned the House that the Bill was likely to increase crime, arguing that restricting even further the availability of drugs would succeed only in forcing the price of black market drugs higher. Other critics (and they were few) focused on the lack of provisions for safeguarding civil liberties. A contentious aspect in this regard was the retention of the 1967 powers of search and arrest, yet challenge was barely raised. A lone voice was that of Mr. CLINTON DAVIS:

> "I believe that in our democratic society we must zealously guard our civil liberties ... and I am rather worried that this Bill in its present form falls far short of doing that. Those who are aimed at in the Bill are those who are often not really able to look after themselves when subject to arrest, often they are depressed and confused and not really able to understand the judges rules, sometimes unable to understand questions put by police officers ... it is essential when we are dealing with a matter as emotive as this, and where a great deal of hysteria can be so easily engendered, that we always have

3 Mr. Eric Ogden, Parl. Debs., H.C., 25 March 1970, Vol.798, col.1806.
4 Parl. Debs., H.C., 25 March 1970, Vol.798, col.1462.

> regard to the civil liberties of the minority of people who may be very adversely prejudiced if these rights are not established".[5]

More common was the call for harsher sentencing, for the establishment of specialist police drug units, for concerted efforts by agencies of control, penal, medical and social, to stamp out "the squalid creatures who peddle destruction to the young."[6]

Yet the ease with which the Misuse of Drugs Bill passed into law in 1971 belies the general concerns it aroused outside Parliament. Evidence that had been received by Advisory Committee on Drug Dependence sub-committee on the Powers of Search and Arrest, from Release (a watchdog organization on drugs issues), the National Council of Civil Liberties, the Law Society and from the Principal Probation Officers Conference demonstrates the strength of opposition to increasingly severe drugs control policies. Release, in its submission, was concerned about the dangers of adopting repressive legal measures against young drug users, advocating instead the adoption of social and medical solutions. Release also expressed anxieties about police abuse of existing law such as the withholding of bail, denial of the right to contact parents and solicitors, and the holding of suspects for several hours before bringing charges (HOME OFFICE 1970: 20). Concerned about police interpretation of "reasonable grounds for search", Release recommended that:

> No premises occupied by the accused or possession (e.g. a car) owned by the accused should be searched by police without the presence of the accused and that the accused should be given a reasonable opportunity to ask a further person to be present at such searches in addition to police officers and himself (HOME OFFICE 1970, p.21).

NCCL argued that the stop-and-search powers of the Dangerous Drugs Act 1967 had not received adequate parliamentary consideration and as a result had been used for purposes other than those strictly intended, such as random searches in public places. Like Release, NCCL's evidence concluded that police regularly held long hair, unconventional dress, and youth to be "reasonable grounds" for search. NCCL recommended that the power introduced by the Dangerous Drugs Act 1967 to stop and search be withdrawn. As an additional safeguard they also recommended that "the law should be revised to specify the person to be searched on the warrant, which should also include the names of the police officers concerned" (HOME OFFICE 1970, p.23). NCCL argued that these

5 Parl. Debs., H.C., 16 July 1970, Vol.803, col.1842.
6 Mr. Peter Hardy, Parl. Debs., H.C., 16 July 1970, Vol.803, col.1773.

powers merely exacerbated the already antagonistic relationship which existed between young people and the police, and provided the police with ever greater opportunity to abuse civil liberties.

Evidence submitted by the Association of Chief Police Officers was particularly influential in the Committee's majority report (a minority of three members consistently supported NCCL, Release and Law Society recommendations), which was published in 1970. In brief, the chief constables held that without the arrest and search powers granted to them by the 1967 Act they would be unable to control drug trafficking and addiction. Any limitation to their powers, they claimed, would lead to a major increase in drug offenses and would be interpreted as governmental lack of concern about drug misuse. On the question of search warrants, A.C.P.O. totally opposed suggestions of limiting the validity of a warrant from one month to one week or of naming the persons to be searched on the warrant, as well as any restrictions on their power to seize documents and other articles (HOME OFFICE 1970, pp.30-32).

The sub-committee considered a number of the proposals concerned with safeguarding civil liberties. On the question of whether the statutory powers of search should be abolished the majority argued:

> "... given the special difficulties of detecting illegal trafficking and possession of controlled drugs, it would be against the public interest to tie the hands of the police in such a way that the police become unduly concerned with the possibility of complaint for wrongful arrest would prejudice the proper exercise of their duties and functions as regards drug offenders" (HOME OFFICE 1970, pp.41).

What these "special difficulties" were was not explained but it demonstrates the special and grave qualities now being attributed to drug offenses which could therefore justify measures which had little room for the consideration of civil liberties.

The majority report rejected the Law Society's proposal that if a suspect were released or acquitted after search and arrest then the police should be ordered to produce a statement of the reasons for the arrest in writing. The only concession which the majority of the sub-committee made to the non-police evidence before them was to recommend that dress and hairstyle be excluded as sole grounds for suspicion. The minority view forwarded "reasonable grounds" for search or arrest, to be more narrowly defined, excluding, e.g., the fact that the person searched, appeared to be the kind of person who is often found in the possession of drugs or that s/he was found in a public place late at night. This safeguard was, however, rejected on the grounds that "we do not believe that it

is any more practicable to define negative than positive grounds for suspicion, simply because the factors influencing a police officer's judgement cannot be reduced to simple formulae..." (HOME OFFICE 1970, 126, p.43).

The Advisory Committee also rejected a proposal to differentiate police powers by nature of the drugs involved. The suggestion was that a police officer should not have the power to search on the basis that there is no reasonable suspicion of heroin involvement. Such a proposal the committee argued "would be such a drastic restriction of the present powers of the police that for all practical purposes their powers to stop and search would be taken away (ibid.: p.45). The sub-committee rejected NCCL's proposal that an observer be present during searches on the grounds that this,

> "would raise issues of confidence and responsibility affecting the whole conduct of police activity, for which no general justification has been offered to us" (HOME OFFICE 1970, p.46).

The report of the Advisory Committee and the subsequent debate in Parliament on the Misuse of Drugs Bill 1971, represented the abandonment of the "addict as victim" conceptualization. The addict was to be separated from the trafficker in terms of severity of punishment but the penal model was otherwise to be applied without distinction. Writing in 1986, ARNOLD TREBACH comments that Britain's "basically decent drug abuse system remained intact. That essence, though, is under assault from proponents of an international war on drugs" (TREBACH 1986, p.218). TREBACH appears to have underestimated the degree of policy change that occurred in Britain after the late 1960s.

The perceived gravity of the drugs problem, its growth and location in the late 60s early 70s in the midst of widespread youth protest and counter culture, the "failure" of treatment, and the logic of the penal argument which had always underpinned British policy ensured that as narcotics became more readily available and more widely used it would be dealt with through increased resort to the crime control approach.

2. Some Effects of the Crime Control Approach to Drugs

Five effects of the heightened penal approach to illegal drugs in Britain are explored. While these effects are not necessarily unique to the area of illegal drugs, taken together they do pose an acute dilemma concerning the limits of the criminal law in a free society.

2.1 The Diversion of Law Enforcement Resources

There has been a steady increase in the number of police specialists on drugs investigations.[7] By 1988 there were some 1500 police officers, drugs specialists in England and Wales. The high profile enjoyed by drugs enforcement has been at the expense of manpower resources in other areas of law enforcement such as fraud.

There are also expensive resource implications of particular requirements, e.g. the protection of informers with respect to the police and within the prison system. There has been a sharp increase in the number of persons, sentenced for drugs offenses, held in the prison system. Between 1979-86 this number rose by about 300% from 711 to 2825. Sentence lengths also rose, between 1982-87 from 23.5 months to 28.2 months.[8] The proportionate use of custody between 1982-87 rose from 3% to 5% in magistrates' courts, and from 57% to 65% in the Crown Courts (for this latter category, over all offenses having increased from 52% to 54%).

It is also clear that courts are likely to recommend deportation in cases where defendants are subject to immigration controls and that the Home Office is ready to accept such recommendations (and indeed to take such action in cases where the court has not made a recommendation).

2.2 The Inherent Threat to Civil Liberties

The pro-active nature of much drugs law enforcement work carries severe dangers for the infringement of civil liberties. Undercover work, the use of informers, telephone and mail interception and shades of entrapment are all aspects of this area of investigation by police and other agencies.

2.3 The Encouragement of Organized Crime

Heavy law enforcement increases the risks for persons involved in illegal activities concerning drugs and thereby encourages a more business like approach to the production and distribution of drugs. Organization, in this sense, may or may not involve "organized crime" in the Mafia tradition. The strengthening grip by organized crime on the narcotics industry (especially evidenced in the United

7 See generally, Tackling Drug Misuse: A Summary of the Government's strategy, Home Office, 1986, esp. pp.12-14.

8 These data refer to adult males at the Crown Court compared with an increase from 16.6 to 18.9 months for all indictable offenses. See Tables 3 and 4.

States) has profound consequences. Given the huge amounts of money involved in the illegal drugs industry there is a perennial threat of corruption of police and other law enforcement officials.[9]

2.4 The Focus on Cannabis

In 1986 of 26442 known drugs offenders in the United Kingdom, 19049 (72%) were for cannabis and of these 16435 were for unlawful possession. Of the 3886 custodial sentences imposed, 53% were for cannabis, with an average sentence length of 13.8 months (compared with an overall average sentence length of 19.7 months). As shown in Table 5, 32% of the total custodial sentences for drugs offenders were for cannabis possession.

2.5 The Impact on Public Order

Law enforcement activities with respect to drugs may reduce confidence in the police among particular categories of the population. Given the thrust of police activities this result is especially likely to arise with respect to minority groups and young people. Some police officers have begun to question whether the risk of civil unrest is a price worth paying.[10]

3. Sentencing Policy and Practice

Between 1982-87 there was a distinct shift towards more severe sentencing of persons convicted of drugs offenses. This severity is clear with respect both to the proportion of custodial sentences and length of sentences imposed. Furthermore, trafficking offenses receiving sentences of over five years imprisonment were among the offenses which, it was decided in 1983, were not to be generally eligible for parole.

The sentencing of drugs offenses is one of the areas where the Court of Appeal has acted to establish general starting points. That a more standardized approach was required was highlighted in a rare study of British sentencing practice. In the pilot study it was found, for example, that in one instance the judge said that while the offence merited 21 months the sentence would be 15 months

9 See '"Rivalry and corruption" hampering drugs fight', The Independent, May 13, 1988.
10 See 'Shifting battle lines in the War on Drugs', The Guardian, 19 April 1988.

because of mitigating factors. However, his average sentence for that weight of cannabis was 12 months. In another case, the judge claimed to have reduced a sentence from 30 to 18 months because of the offender's social problems but his average sentence for that weight was within the 15-18 months bracket (ASHWORTH et al. 1984, p.51). The draft report of the study was reviewed by LORD LANE, the Lord Chief Justice, during 1981 and he decided that the study should not proceed. Issues raised in the report, however, may have been in Lord Lane's mind when he constructed the Court of Appeal's decision in **Aramah.**[11] This guideline judgement stated that for the importation of Class A drugs, where the values were of around £1 million or more, sentences of 12 to 14 years were appropriate. For supply, there may be cases where similar sentences are required but that seldom would a sentence of less than three years be appropriate. For Class B cases, large scale importation and supply of cannabis would justify sentences in the region of ten years. Regarding possession, the level of precision in the guidelines declined. Custody might be the proper course for many Class A possessions, whereas fines would be the more appropriate course where Class B possessions were dealt with.[12] Four years later the Court of Appeal, taking note of the **Controlled Drugs (Penalties) Act** 1985 increased some of the suggested maximum penalties.[13] For example, where drugs valued at around £1 million were involved the sentence should be 14 years and upwards.[14] The amendments to the guidelines were confined to Class A drugs, and to cases involving substantial amounts.[15]

4. Forfeiture

Prior to 1986, the principal forfeiture powers open to the courts were contained in the **Misuse of Drugs Act** 1971 (s.27) and in the **Powers of the Courts Act** 1973 (s.43). Under the 1971 statute, the money at issue must be related to the offence for which conviction was obtained. It is not sufficient for the sentencer to

11 Aramah, Crim. L.R. (1983) 271.

12 The Aramah guidelines have been criticized as "a needlessly incomplete framework" leaving the sentencer to gauge for himself the proper effect of other factors (Ashworth, 1983, p.523).

13 The Controlled Drugs (Penalties) Act 1985 arose from an announcement by the Government in October 1984 that it intended to increase the maximum penalty for trafficking in Class A drugs from 14 years to life and in the event gave its support to a private member's bill that effected this change. The Act became operational on 16 September 1985.

14 Billenski Crim L.R. (1987) 782.

15 See Daly; Whyte Crim. L.R. (1988) 258.

disbelieve the defendant's account of where the money came from. The Court of Appeal has consistently ruled that this remains the statutory intent even where the offender admits that the money is the proceeds of earlier drug trafficking.[16] However, it is open to the court to decide that the money represented the offender's working capital to be used to purchase future supplies of drugs and thereby falling under the **Powers of the Courts Act** 1973.

It was, however, the "Operation Julie" case, dealt with at Bristol Crown Court in 1978, when several persons received long prison sentences for conspiracy to manufacture and sell LSD, which prompted demands for statutory action. In this case, the judge ordered that certain assets, amounting to £750,000 in the hands of those sentenced, be forfeited under the Misuse of Drugs Act 1971. This order was confirmed by the Court of Appeal[17] but was overturned by the House of Lords.[18] The House of Lords ruled, "with considerable regret", that the courts did not have the powers to strip "drug traffickers of the total profits of their unlawful enterprises". One of the developments that followed the House of Lords decision was the setting up of a committee by the HOWARD League for Penal Reform under the chairmanship of Mr. JUSTICE HODGSON to examine the scope for confiscation powers. The HODGSON Committee's working principle was that resort to imprisonment could be justified only to the extent that the exaction of pecuniary penalties in the form either of victim redress or the confiscation of the profit of crime is inadequate. "The aim must be to construct a system of redress that is adequate to obviate as far as possible the necessity of resort to the sanction of imprisonment" (HODGSON 1984, pp.6).

> "Orders for the payment of money or transfer of property should be taken into account in calculating the sentences. Our approach to these orders has positive roots in our belief in the intrinsic value of redressing a wrong but it also has negative foundations. Prison is expensive, degrading and mainly harmful. In our view particularly when, as in most property crimes, offenders do not present a danger of violence, it ought to be used much more rarely than it is" (HODGSON 1984, p.36).

The committee held, that with reference to persons convicted of drug trafficking, any confiscation order should be taken into account so as the length of the sentence of imprisonment, although not taking its place altogether. It recommended that the power be reserved for offenses where the street value of the

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16 See e.g., Llewellyn 7 Cr. App. R. (S.) (1985) 228; Cox 8 Cr. App. R. (S.) (1986) 384; Sims, Crim. L.R. (1988) 186.

17 R.v.Kemp and Others 69 Cr. App. R. (1979) 470.

18 R.v.Cuthbertson A.C. (1981) 470.

drugs was in excess of (say) £100,000 and that it should not be directed to "mere carriers or retailers".

However, the eventual statute, the **Drug Trafficking Offenses Act** 1986 takes no account of this approach. Indeed, the legislation specifies that the court leave the order out of account in determining the appropriate sentence or other manner of dealing with the defendant. This approach received the enthusiastic endorsement by the Labour Party whose spokesman, ROBIN CORBETT, said at Committee stage:

> "It is important that we see confiscation orders as being in addition to any goal sentence which a court may impose upon anyone convicted of drug trafficking. None of us wants misunderstandings in the sense that because someone has coughed up assets, he will get a lighter sentence."[19]

Far from regarding the new confiscation and related powers as a means to reduce the use of imprisonment, the Act provides heavy periods of additional imprisonment for failure to pay any amount exceeding £10,000. For example, an amount of between £10-20,000 attracts 12 months imprisonment and an amount exceeding £1 million attracts 10 years. Two new offenses were created by the legislation, namely assisting another to retain the benefit of drug trafficking and the offence of prejudicing an investigation (carrying maxima of 14 and 5 years respectively). During the debate on the Bill's Second Reading, the Home Secretary was reminded by a Liberal Member, ALEX CARLILE of the HODGSON Committee's emphasis on reducing imprisonment. Mr. HURD replied: "There is an argument for that, as one would expect with a proposal that came from the HOWARD League. We will think hard about it, although not necessarily from the point of view which Mr. JUSTICE HODGSON argued. I suggest we postpone that discussion to another day and concentrate tonight on this Bill which deals only with drug offenses".

The Act adopts the view of the majority of the HODGSON Committee that in determining the amount to be confiscated, traditional rules about where the burden of proof be placed should be reversed. A majority of the Committee felt that "anyone convicted of wholesale trafficking in drugs should be liable to face more stringent investigation than would be appropriate for other forms of offending, on the grounds that "trafficking in hard drugs inflicts such terrible social harm and is by its nature, so difficult to detect, that when a wholesaler is caught and

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19 Mr. Corbett also remarked:"It would be a good way to inaugurate the Bill if regulations made it possible for a confiscation order to be at least considered in respect of Blenheim Palace because that might drive some lessons home in a good many heads." H.C. Standing Committee, 28-1-1986, col.15.

convicted condign measures are justified to ensure that he enters prison stripped of all his ill-gotten gains" (HODGSON 1984, pp.82.). Three members, however, felt that the principles of criminal procedure are tested most strongly where defendants are unpopular or have been accused of the most offensive behaviour and that they should withstand the test of criminal procedure.

There were faint echoes of these concerns in the Second Reading debate in the House of Commons. For example, Sir EDWARD GARDNER, Conservative chairman of the Home Affairs Select Committee stated: "I am sensitive about that 'reversal of the onus of proof' and could become hostile were it not for my understanding and others' understanding of the gravity of the problem. The Bill will try to solve the problem, so I give it my unqualified support." ALEX CARLILE, who was the only Member to raise doubts about the thrust of the Bill, shared these worries but supported the clause as "this is not a reversal of burden of proof relating to guilt: it is a reversal of burden of proof relating to a procedural and sentencing matter, and in that context, in my view it can be justified."

A further pressure for draconian confiscation powers came from an enquiry into the misuse of hard drugs by the House of Commons Select Committee on Home Affairs. In May 1985 the Committee published an interim report, at the suggestion of Mr. DAVID MELLOR (Home Office minister and chairman of the Interdepartmental Ministerial Group of Drug Misuse), so as "to help the Government decide on early legislation to meet the approaching threat of increased drug trafficking." The report opened by presenting the Committee's conclusions arising from a visit to the United States by several of its members. The Committee were somewhat guarded about their sources and explained that, "no summary is contained of the views expressed to us abroad since these were expressed in confidence." All that is revealed is that visits were made to the United States (New York, Washington D.C. and Miami) and also to the Netherlands (Amsterdam and The Hague). The "findings" included:

- 12 million Americans "regularly use" cocaine;
- There are 5000 new cocaine addicts each day "mainly from the wealthy and successful middle and upper middle classes who spend up to $3000 each a week to satisfy their craving." Total consumption of cocaine is "as much as $39 billion."
- "It is believed that up to 60% of all property crime is committed as a result of the need to fund drug-taking" (HOME AFFAIRS COMMITTEE 1985, p.3).
- "The progression in addiction from marijuana to hard drugs such as cocaine and heroin is so clear in America that we met no-one there with any experience

in drug abuse who would contemplate the legalising of marijuana. We were disturbed, however, by the suspicion of a trend towards concentrating resources against hard drugs at the expense of action against marijuana" (HOME AFFAIRS COMMITTEE 1985, p.6).

It was data of this type that persuaded the Committee, "that unless immediate and effective action is taken Britain and Europe stand to inherit the American drug problem in less than five years. We see this as the most serious peacetime threat to our national well-being" (HOME AFFAIRS COMMITTEE 1985, p.3). The Committee went on to provide a graphic elaboration: "Western society is faced by a warlike threat from the hard drugs industry... It is in the U.S. that the real battle is being waged.... Given that the richest nation on earth has now mobilized its resources to the maximum possible extent against the drug-traffickers, we found it frightening to be told that they aimed to do no more than 'hold the line...'" (HOME AFFAIRS COMMITTEE 1985, p.5).

These considerations led the Committee to recommend that, "the ruthlessness of the big drug dealers must be met by equally ruthless penalties once they are caught, tried and convicted." As one aspect of this approach, the Committee turned to the profits of drug trafficking. "The American practice, which we unhesitatingly support, is to give the courts draconian powers in both civil and criminal law to strip drug dealers of all the assets acquired from their dealings in drugs" (HOME AFFAIRS COMMITTEE 1985, p.6).

The Drug Trafficking Offenses Bill was published towards the end of the Committee's deliberations, in November 1985. The Committee's Interim Report was indeed useful to the Government, as DAVID MELLOR told the Committee in January 1986:

> "Certainly it was a great encouragement to me and to the Home Secretary when we received your Interim Report, because I think it showed that exposed to the same data as we have been exposed to, which is really both the situation here in the United Kingdom and the deeply troubling situation in the United States, your recommendations were very much in line with **our** feeling that there needed to be forthright action on a broad front, but particularly that we needed to address the question of the seizure of assets, having regard to the very large amounts of money that can be made out of this trade. There is no doubt that it was a great encouragement that this was an unanimous Report, and that there were representatives of both major parties on the Committee. That, I think, helped us in feeling that the climate was right for a fairly radical look at our procedures" (HOME AFFAIRS COMMITTEE 1986, p.143).

Mr. MELLOR later thanked the Committee for, "the amount of interest and care that has gone into your deliberations - because it helps create the climate within which we in the Government, charged with those responsibilities, can keep this issue up and give it the significance that we know that it deserves" (HOME AFFAIRS COMMITTEE 1986, p.157).

The following are among the main provisions of the **Drug Trafficking Offenses Act** 1986:

- The sentencing judge is mandated by the legislation to inquire whether the individual has benefited from drug trafficking and if so to order that such benefits be confiscated. The Act sets no lower cash value limit, whereas the Hodgson report had urged: "We are not here speaking of mere couriers or retailers but of their employers, and we believe that any new investigating procedures should be limited to those convicted of supplying hard drugs in substantial amounts. The requirement should be conviction of supplying Class A or B to a street value of perhaps as much as £100,000" (HODGSON 1984, p.83) In addition to placing no lower limit, the Act embraces Class C drugs (which includes various amphetamines).
- There is an equation of proceeds with profits. The HODGSON Report had in mind the confiscation of net profits, but the statute states that, "the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards. The court is to assume, unless the defendant can show otherwise, that any property held by him since his conviction or transferred to him at anytime over the six years prior to the commencement of proceedings were proceeds of drug trafficking."
- It is for the defendant to prove that his property is not to be presumed to be the proceeds of drug trafficking. Significantly, this power extends beyond the offence where a conviction has been obtained to other offenses from which the defendant may have profited. These offenses, however, do not have to be proved. As ANDREW NICOL (who was a member of the HODGSON Committee) has noted "The purpose of these innovations is to assume that the defendant has committed other offenses from which he has profited ... proof that a person has committed one offence should not give grounds for assuming that he has committed another" (NICOL, unpublished paper, 1985).
- No account is taken of the defendant's means or the needs of his family or other commitments. A gift is caught by the Act if it was made by the defendant at any time since the beginning of the period of six years ending when proceedings were instituted against him.

Regarding the new offence of assisting drug trafficking the prosecution need only show that the defendant knows or suspects that the person helped "carries on or has carried on drug trafficking or has benefited from drug trafficking." The burden is on the defendant to prove that he did not know or suspect that the arrangements related to any person's proceeds of drug trafficking.

Subsequently the editor of **The Criminal Law Review** observed that 'among the supposed principles of English Criminal Justice which suffer reversals in this Act are the presumption of innocence, the principle of **mens rea** for serious offenses, and the principle that offenders be dealt with only for offence(s) before the court'.[20]

5. Case Study of a London Crown Court

The crown court centre was opened in June 1986 and takes most of the drugs cases initiated at Heathrow Airport. Eight courts are in operation and between them they deal with 20-30 drugs cases (mostly trafficking) each week. The court's approach is to always impose a custodial sentence.[21] This approach, building upon **Aramah**, finds expression in the Court's senior probation officer attaching the following statement to Social Enquiry Reports to be completed in Customs Evasion Cases: "The Court of Appeal Guidelines are adhered to and an immediate custodial sentence is inevitable for the illegal importation of drugs, irrespective of the class and quantity of drug or the circumstances of the defendant. Your report could affect the length of that custodial sentence." The probation staff regard themselves as powerless to influence the custodial decisions in these cases. Whereas probation officers interview all persons convicted at the court, they write reports only on those who are either British or resident in Britain. Reports are not prepared on foreign nationals who represent at least half of those convicted for drugs trafficking.

There is pressure within the judiciary to maintain the custodial sentencing approach. When one judge passed a suspended sentence in a case involving the importation of cannabis he was called before the presiding judge, "spoken to" and removed from hearing drugs cases for approximately six weeks. There are, however, sentencing disparities, as illustrated by the following two cases dealt with by the same judge.

20 Crim. L.R. (1986) 577. Aspects of the Act's approach have been extended to the general jurisdiction of the criminal courts by the Criminal Justice Act 1988, but with greater sensitivity to 'the supposed principles'.

21 Of 299 persons sentenced during 1987, 291 received sentences of immediate custody, in the remaining eight cases a suspended prison sentence was imposed.

Case One

Two defendants, woman aged 19, man aged 23 - she carried 500g cocaine strapped to her underwear, he was her minder (both black and from the West Indies)

- both pleaded not guilty
- she received 6 years youth custody; he received 9 years prison.
  No mitigating factors applied in the case of the young man. For the young woman the only mitigation the judge accepted was that she was an unsophisticated courier under some pressure (her baby's life had been threatened) though not the court decided amounting to duress. In sentencing them both, the judge stressed the consequences of their offence for England and the seriousness of the crime. It was a deterrent sentence but the judge did not know how widely, if at all, English sentences were publicised abroad.

Case Two

One defendant (46 year old Columbian national spoke no English) swallowed 118 packages of cocaine (600 grams street value £90,218) and carried them from Columbia to England via Germany. His payment was to be £2,000.

- pleaded guilty
- received a sentence of three and a half years (which because the sentence is not more than five years he will be eligible to parole)
- points of mitigation raised by defence which were influential in sentence were (a) he was a courier and courier only (first trip out of Columbia); (b) "most importantly" he pleaded guilty; (c) has not benefited from trafficking in any way; (d) his wife and four children eating only once a day.

Case 2 immediately followed Case 1 and there was some talk within the court that the effect of the very harsh sentences in Case 1 (the young woman collapsed and screamed hysterically for approximately fifteen minutes) may have influenced the lighter sentence. More probably, according to probation staff, remorse was shown and the Columbian was not doing it for personal gain but for his family. The guilty plea was certainly the major factor.

In Case 2 the question of confiscation arose but was rejected on the grounds that there were no assets due to drug trafficking. Costs of only £200 (less than what the Columbian was carrying) were awarded. Low costs appeared to be

influenced by the fact that the Columbian had sent some money, while in custody to Columbia for the education of his children, this money had however been stolen in the post.[22]

All foreign nationals, convicted of drugs trafficking offenses, are recommended for deportation on completion of their prison sentence. Very few appeals against deportation are successful.[23]

Between January 12, 1987, when the Drugs Trafficking Offenses Act 1986, took effect, and January 1, 1988, 49 confiscation orders were made by the Court under the statute. All these cases were handled by Customs and Excise (with the Crown Prosecution Service handling possession and supply cases), which is not required to apply for a confiscation order, but very frequently do. A senior court official stated that he did not know of a case where Customs and Excise had applied for an order and it had not been granted.

The separation between confiscation and sentence has caused severe problems, including lengthy delay on remand. The costs involved can outweigh the value of the confiscation order. As a result, a senior court official reported, that there was a movement away from confiscation towards costs for the prosecution and the original forfeiture powers. The point was made that any assets that are confiscated go to the Treasury whereas prosecution costs go to Customs and Excise. However, court data suggest that confiscation orders are still being made at the same rate and often involving small amounts.

The deciding factor as to which sort of order to apply seems to largely depend on the amount of money held by the courier. The larger the amount the more likely it will be subject to a confiscation order. It is, however, clear from the court data that the amounts in the 49 cases were relatively small. Nineteen were for amounts of £200 or less and eighteen for amounts of over £200 and up to £500. Of the remaining 12 cases, only two more for amounts of over £5,000 (one of these was for £163,000).[24]

The 1980's has certainly seen a hardening of the crime control approach to illegal drugs in Britain. Further legislation, together with considerable increases in resources to law enforcement agencies has occurred with little dissent. Until 1988 there seemed to be every indication that Britain would simply go further down this road. However, recently there are some signs of some reassessment. Drug-advice workers report a shift in attitudes among middle and senior police

22 According to Customs and Excise solicitors, his three year sentence was "the holiday". They believed he could be murdered by drug barons immediately on his return.

23 Of the 299 persons sentenced during 1987, 146 were recommended by the courts for deportation.

24 Of a subsample of 15 cases (where data were available) in only 3 cases did the street value of the drugs exceed £100,000. In 6 cases the value was put at less than £20,000.

management towards a less zealously pursued law and order approach.[25] Economic considerations are being given greater recognition. As noted in a Home Office report, "Reducing illicit drug consumption through law enforcement and prevention programmes is itself a costly exercise and these costs need to be compared to the benefits such programmes yield in terms of reduction in the external costs of drug misuse" (WAGSTAFF and MAYNARD 1988, p.4). The general health risks posed by AIDS has been a factor,[26] but there also seems to be a growing sense that the criminal law is further than ever from achieving any sort of victory on illegal drugs. Although politicians have continued to steer clear, there have been calls for a radical reconsideration, mostly from the moderate political right. For example, in May 1988, **THE INDEPENDENT** urged: "After a decade in which increasingly Draconian penalties have coincided with a seemingly inexorable rise in drug abuse, something more than aggressive but unthinking rhetoric would be welcome."[27]

Britain, has gone a long way down the tunnel before, perhaps, appreciating that there may, after all, be no light at the other end.

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25 The Guardian, 19 April 1988.

26 The Advisory Council on the Misuse of Drugs stated in 1988: "We have no hesitation in concluding that the spread of HIV is a greater danger to individual and public health than drug misuse". (Department of Health and Social Security, 1988, p.17) The Council also concluded that "a change in professional and public attitudes to drug misuse is necessary as attitudes and policies which lead to drug misusers remaining hidden will impair the effectiveness of measures to combat the spread of HIV" (ibid., p.18).

27 The Independent, 20 May 1988; see also The Independent, 9 May 1988. These sentiments found an echo in The Spectator (11 June 1988) and in The Economist (2 April 1988) but were dismissed by the liberal Guardian as "winsome simplicities". (The Guardian, 14 June 1988) The role of "moral conservatives in any reformulation of drug control policy may be crucial as Scheerer (1978) has suggested.

Annex

Table 1: Number of persons dealt with for illegal drugs and action taken (U.K.)

	1976	1980	1985	1986
Informal warnings/no action	252	451	1005	1089
Compounded	-	-	362	324
Cautioned	272	219	3624	4352
Found not guilty	799	1182	1864	1726
Sentenced	12482	16919	22972	18951
Total	13805	18791	29827	266442

Source: **Statistics of the Misuse of Drugs, United Kingdom 1986**, Home Office Statistical Bulletin, 28/87 September 1987.

Table 2: Formal cautioning and guilty findings at all courts (males) England and Wales

	(a) Total indictable offenses of cautions/ guilt findings	(b) Formal cautions	(c) Column(b) as % of (a) %	(d) Drugs offenses cautions/ guilt findings	(e) Drugs offenses formal	(f) Column(e) as % of (d) %
1982	487.5	78.5	16.1	15.5	0.4	2.6
1986	432.8	98.7	22.8	18.6	3.9	21.0
1987	449.8	114.1	25.4	19.9	-	-

Based on Tables 5.1 and 5.11 of **Criminal Statistics, England and Wales 1986**, Cm.233, 1987.

Table 3: Proportionate use of immediate imprisonment, Crown Court

Year	**males aged 21 and over**		**females aged 21 and over***	
	total indict. off.	drugs offenses	total indict. off.	drugs off.
1982	52	57	25	38
1983	52	59	26	51
1984	53	65	27	52
1985	55	69	29	51
1986	56	67	29	50
1987 (est.)	54	65	-	-

Source: **Criminal Statistics, England and Wales 1986**, Cm.233, 1987. (* Crown Court)

Table 4: Average sentence length imposed in the Crown Court

Year	**males aged 21 and over**		**females aged 21 and over**	
	total indict. off.	drugs offenses	total indict. off.	drugs off.
1982	16.6	23.5	10.7	18.0
1983	16.6	28.1	12.1	21.2
1984	16.6	27.7	12.5	20.6
1985	17.3	27.6	12.5	19.8
1986	18.3	29.8	14.2	23.6
1987 (est.)	18.9	28.2	-	-

Source: **Criminal Statistics, England and Wales, 1986**, Cm.233, 1987.

Table 5: Persons dealt with for offenses involving cannabis (U.K.)

Of the 3886 persons who received immediate prison sentences for drugs offenses in 1986 2073 were for cannabis (53%) with an average sentence length of 13.8 months (compared with an overall average sentence length of 19.7 months).

Of the 26442 persons dealt with in 1986, 19049 (72%) involved cannabis; and of these 16435 were for possession. The breakdown of how they were dealt with was:

Cautions	4014
Discharge	938
Probation	616
Community Service	353
Fine	8605
DC	63
Immediate custody	1210
Suspended sentence	443
Other	193

Source: **Statistics of the Misuse of Drugs, United Kingdom 1986**, Home Office Statistical Bulletin, 28/87 September 1987.

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Recent Developments in the U.S. War on Drugs

Prof.Dr. S. Wisotsky

"The history of the narcotics legislation in the country reveals the determination of congress to turn the screw of the criminal machinery --detection, prosecution and punishment-- tighter and tighter".

The U.S. Supreme Court in
Albernaz v. United States,
450 U.S. 333, 343 (1981)

The War on Drugs began on October 2, 1982 with a radio address by President REAGAN to the Nation: "The mood towards drugs is changing in this country and the momentum is with us. We are making no excuses for drugs --hard, soft, or otherwise. Drugs are bad and we are going after them".[1] Twelve days later, the President followed with an "unshakable" commitment "to do what is necessary to end the drug menace" and "to cripple the power of the mob in America".[2]

This was not the first War on Drugs. President NIXON had done the same in 1971. In a message to Congress he had described drug abuse as a "national emergency", declared drugs to be "public enemy number one" and called for a "total offensive".[3]

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1 President's Radio Address to the Nation, 18 Weekly Comp. Pres. Doc. 1249, 1249 Oct. 2, 1982 [hereinafter Radio Address].

2 President's Message Announcing Federal Initiatives Against Drug Trafficking and Organized Crime, 18 Weekly Comp. Pres. Doc. 1311, 1313-14 Oct. 14, 1982.

3 Epstein, E.: Agency of Fear 1973, p.179 ,1977.

First Drug War or not, the President's statement about the mood of the country seemed accurate. At the time of his October, 1982 speeches, some 3,000 parents groups had already organized nationwide under the umbrella of the National Federation of Parents for Drug Free Youth.[4] Within the Government, the House Select Committee[5] and the Attorney General's Task Force on Violent Crime[6] had urged the President to declare War on Drugs.

The President's October 14 speech called for, and got more, of nearly everything:[7] (1) more personnel-1020 law enforcement agents for the Drug Enforcement Agency (DEA), Federal Bureau of Investigation (FBI), and other agencies, 200 Assistant United States Attorneys, and 340 clerical staff; (2) more aggressive law enforcement - creating 12 (later 13) regional prosecutorial task forces across the nation "to identify, investigate, and prosecute members of high-level drug trafficking enterprises, and to destroy the operations of those organizations;" (3) more money --$127.5 million in additional funding and a substantial reallocation of the existing million budget from prevention, treatment, and research programs to law enforcement programs; (4) more prison bed space --the addition of 1260 beds at 11 federal prisons to accommodate the increase in drug offenders to be incarcerated; (5) more stringent laws --a "legislative offensive designed to win approval of reforms" with respect to bail, sentencing, criminal forfeiture, and the exclusionary rule; (6) better interagency coordination --bringing together all federal law enforcement agencies in "a comprehensive attack on drug trafficking and organized crime" under a Cabinet-level committee chaired by the Attorney General; (7) improved federal-state coordination, including federal assistance to state agencies by training their agents.

Energized by this hardening attitude toward illegal drugs, the Administration acted aggressively, mobilizing an impressive array of federal bureaucracies and resources in a coordinated, although futile, attack on the supply of illegal drugs--principally cocaine, marijuana, and heroin. The Administration hired hundreds of drug agents and cut through bureaucratic rivalries with greater vigour than any

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4 Gonzales: The War on Drugs: A Special Report. In: Playboy, Apr. 1982, p.134.

5 House Select Committee on Narcotics Abuse and Control, H.R. Rep. No.418, pp.1-2, 97th Cong., 2d Sess.50 1982. Congress has likened the drug smugglers to an invading army, complete with generals, soldiers, and an armada that operates over the unpatrolled coastline and unmonitored airspace of the United States. See Note, Fourth Amendment and Posse Comitatus Act Restrictions on Military Involvement in Federal Law Enforcement, 54 Geo. Wash. L. rev.404,417 & nn. 140-42 1986.

6 Attorney General's Task Force on Violent Crime, Final Report 28 1981.

7 The call for the augmentation of drug enforcement resources was not unprecedented. Under the Nixon Administration, a buildup in the size and scope of the federal drug enforcement bureaucracy also occurred. At the end of June 1968, the Bureau of Narcotics and Dangerous Drugs had 615 agents. By June 1970, this number had increased to over 900. Legislation had also authorized the addition of at least 300 more agents during 1971. See H.R. Rep. No. 1444, 91st Cong., 2d Sess. 18 reprinted in 1970 U.S. Code Cong. & Admin. News 4566, 4584.

Administration before it. It acted to streamline operations and compel more cooperation among enforcement agencies. It placed the FBI in charge of the Drug Enforcement Administration (DEA) and gave it major drug enforcement responsibility for the first time in its history.[8] And, as the centerpiece of its prosecutorial strategy, it fielded a network of Organized Crime Drug Enforcement Task Forces in thirteen "core" cities across the nation.[9]

To stop drugs from entering the country, the Administration attempted to erect a contemporary anti-drug version of the Maginot Line with the National Narcotics Border Interdiction System (NNBIS), an intelligence network designed to coordinate surveillance and interdiction efforts along the entire 96,000-mile border of the United States. As part of that initiative, NNBIS floated radar balloons in the skies over Miami, the Florida Keys, and even the Bahamas to protect the nation's perimeter against drug smuggling incursions.[10]

The CIA joined the war effort by supplying intelligence about foreign drug sources, and NASA assisted with satellite-based surveillance of coca and marijuana crops under cultivation.[11] The Administration also initiated financial investigations, aided by computerized data banks and staffed by Treasury agents specially trained to trace money laundering operations.[12] The State Department pressured foreign governments to eradicate illegal coca and marijuana plants and financed pilot programs to provide peasant farmers with alternative cash crops.[13] Mutual assistant treaties to expose "dirty" money secreted in tax haven nations and to extradite defendants accused of drug conspiracies against the laws of the United States were concluded.[14]

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8 See 28 C.F.R. 0.85(a), 0.102 1986. Authority for federal drug law enforcement is distributed among several agencies, including the DEA, the Customs Service, the Coast Guard, the FBI, and the IRS. Supporting roles are played by the Immigration and Naturalization Service, the CIA, and the Department of Defense. See Strategy Council on Drug Abuse, Federal Strategy for Prevention of Drug Abuse and Drug Trafficking 74 1982; see also Office of Technology Assessment, U.S. Congress, the Border War on Drugs 33-39 1987 [hereinafter Border War].

9 See Organized Crime Drug Enforcement Task Forces: Goals and Objectives. In: 11 Drug Enforcement 6 1984; Maitland: President Gives Plan to Combat Drug Networks. In: N.Y. Times, Oct. 15, 1982 A, p.1, col.2.

10 See Gibson: Anti-Smuggling System Would Have CIA Links. In: Ft. Lauderdale News & Sun-Sentinel, June 18, 1983, A, p.1, col.3. See also Office of Technology Assessment, U.S. Congress, the Border War on Drugs 33-39 1987 [hereinafter "Border War"].

11 See Coates, DeLama: Satellite Spying on Narcotics Operations Is a Promising Tool for Drug Task Force. In: Miami Herald, Jan. 23, 1983, p.11A, col.1.

12 For a description of Operation Greenback, the prototype money-laundering investigation, see Financial Investigation of Drug Trafficking: Hearing before the House Select Comm. on Narcotics Abuse and Control, 97th Cong., 1st Sess.65 1981.

13 See International Narcotics Control: Hearings before the House Comm. on Foreign Affairs, 97th Cong., 2d Sess.156 1982; International Narcotics Trafficking: Hearings before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. 201-02 1981.

14 See generally President's Commission on Organized Crime: America's habit: Drug Abuse, Drug Trafficking and Organized Crime, 412-19 1986.

The Government also literally militarized what had previously been only a rhetorical war by deploying the armed forces of the United States in drug enforcement operations. The Department of Defense provided pursuit planes, helicopters, and other equipment to civilian enforcement agencies, while Navy E-2C "Hawkeye" radar planes patrolled the coastal skies in search of smuggling aircraft and ships.[15] The Coast Guard, receiving new cutters and more personnel, intensified its customary task of interdicting drug-carrying vessels at sea. Finally, for the first time in American history, Navy vessels, including a nuclear-powered aircraft carrier, began to interdict --and in one case fired upon-- drug smuggling ships in international waters.[16] On a purely technical level, the Administration could rightly claim some success in focusing the resources of the federal government in a historically large and single-minded attack on the drug supply.

What were the results of this extraordinary enforcement program? It set new records in every category of measurement --drug seizures, investigations, indictments, arrests, convictions, and asset forfeitures. For example, DEA, FBI and Customs seized nearly one-half billion dollars in drug-related assets in FY 1986.[17] DEA, FBI and other federal agencies seized over 100,000 lbs. of cocaine in FY 1986.[18] Despite the Administration's accumulation of impressive statistics, the black market in drugs, especially cocaine, grew to record size. In 1980, the supply of cocaine to the U.S. was estimated at 40 metric tons; by 1986 it had risen to 140 tons. As a result of this abundant supply, prices fell dramatically. In 1980, a kilo of cocaine cost $55,000 delivered in Miami; by 1986, it had fallen below $20,000. In 1980, a gram of cocaine cost $100 an averaged 12% purity at street level. By 1986, the price had fallen to $60 and the purity had risen to 50%.[19] Around the nation, the crack trade was marketed in $10 vials.[20] Officially, more than 22 million Americans have tried cocaine; roughly 5.8 million report having used it during the month preceding the 1985 National Household Survey,[21] cocaine-related hospital emergencies rose from 4,277 in 1982 to 9,946 in 1985.[22]

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15 Starita: Radar Planes to Hunt Drugs in S. Florida. In: Miami Herald, Mar. 13, 1982, p.1B, col.5.

16 Stein: Naval Task Force Enlists in Drug War. In: Miami Herald, aug. 24, 1983, p.13A, col.4; Balmaseda: Navy Bullets Riddle Pot-Smuggling Ship. In: Miami Herald, July 17, 1983, p.1A, col.5.

17 National Drug Policy Board, "Federal Drug Enforcement Progress Report, 1986" Exhibit II-2, pp.19-20 [hereinafter "Progress Report"].

18 Id., Exhibit III-1, pp.74-78.

19 Data on price, purity and supply are taken from the annual reports of the National Narcotics Intelligence Consumers Committee called "The Supply of Illicit Drugs to the U.S. from Foreign and Domestic Sources".

20 Progress Report, p. 7.

21 Id. at 5.

22 Id. at 6.

As if to mock the aggressive efforts of the War on Drugs, this rapid market growth occurred in the face of President REAGAN's doubling and redoubling of the federal anti-drug enforcement budget from $645 million in fiscal year 1981 to over $4 billion in fiscal year 1987.[23] This budgetary expansion seems all the more remarkable when compared to the equivalent budget for fiscal year 1969 of $73.5 million.[24] The social "return" on the extra billions spent during that time has been a drug abuse problem of historic magnitude, accompanied by a drug trafficking parasite of international dimensions. This point is crucial. It is not simply that the War on Drugs has failed to work; it has in many respects made things worse. It has spun a spider's web of black market pathologies, including roughly 25% of all urban homicides, corruption of public officials, street crime by addicts, and subversive "narcoterrorist" alliances between Latin American guerrillas and drug traffickers. In the streets of the nation's major cities, violent gangs of young drug thugs engage in turf wars and open shoot-outs with automatic weapons. Corruption pervades local police departments and foreign governments. Some Latin American and Caribbean nations have been effectively captured by drug traffickers.

Of course, all of this was and is utterly predictable. It is a function of money. Drug law must yield to a higher law: the law of the market place, the law of supply and demand. The attack on the drug supply through an aggressive program of enforcement at each step -- interdiction, arrest, prosecution, and punishment -- results in what Stanford Law School Professor HERBERT PACKER has called a "crime tariff."[25] The crime tariff is what the seller must charge the buyer in order to monetize the risk he takes in breaking the law. The criminal law thereby maintains hyper-inflated prices for illegal drugs in the black market. For example, a $60 ounce of pure pharmaceutical cocaine becomes worth $3,000 if sold in the black market. This type of law enforcement succeeds to some unknown but probably slight extent in making drugs less available -- to the extent that demand is elastic or sensitive to price, but it also pumps vast sums of money into the black market, more than $100 billion per year by government estimate.[26] The flow of

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23 Congressional Research Service, Library of Congress, Drug Abuse Prevention and Control: budget Authority for Federal Programs, FY 1986-FY 1988 [IP334D] (Feb. 27, 1987). The Office of Technology Assessment concluded, in Border War at 3:.
Despite a doubling of Federal expenditures on interdiction over the past five years, the quantity of drugs smuggled into the United States is greater than ever..... There is no clear correlation between the level of expenditures or effort devoted to interdiction and the long-term availability of illegally imported drugs in the domestic market.

24 Select Committee on Narcotics Abuse and Control, 95th Cong., 2d Sess., 2 Congressional Resource Guide to the Federal Effort on Narcotic Abuse and Control 250 (Comm. Print 1976).

25 Packer,H.: The Limits of the Criminal Sanction. Stanford University Press, 277-82 1968.

26 House Select Committee on Narcotics Abuse and Control Annual Report for the Year 1984, H.R. Rep. No.1199, 98th Cong., 2d Sess. 9 1985.

these illegal billions through the underground economy generates pernicious pathologies that harm the security and well-being of the U.S. and its allies.

Confronted by these threatening developments, both the public and the politicians predictably react in fear and anger. The specters of uncontrolled and uncontrollable drug abuse and black marketeering lead to frustrated reaction against the drug trade. The zeal to "turn the screw" on the "merchants of misery, destruction and death" leads directly to the adoption of stringent, punitive measures that aggrandize governmental powers at the expense of individual liberties.

This reactive, almost reflexive growth of governmental power and the correlative squelching of personal liberty form the framework for the next section of this Essay. It focuses on two closely related if not inseparable phenomena: (1) the Government's sustained attack, motivated by the perceived imperatives of drug enforcement, on traditional protections afforded to criminal defendants under the Bill of Rights, and (2) the gradual but perceptible rise of "Big Brotherism" against the public at large in the form of investigative detentions, eavesdropping, surveillance, monitoring, and other intrusive enforcement methods.

Perhaps it will be difficult for those not familiar with the U.S. legal system to understand the degree to which the War on Drugs has diminished the position of the criminal defendant, especially in drug cases. Perhaps by focusing on several of the most important of the many changes that have been made, one will begin to appreciate the severity of the restrictions in the rights of those accused of crime.

First, let us consider pre-trial detention. I am told that in Europe pre-trial detention is commonplace and that the Napoleonic Code does not so freely accept the Anglo-American practice of a right to pre-trial liberty. So it is important to understand that in the U.S., the law has always favored pre-trial release, creating a right to pre-trial release (on bail or other conditions) except in capital cases where "the proof was evident or the presumption great". This was changed radically by the Comprehensive Crime Control Act of 1984,[27] which not only authorized pre-trial detention but created a statutory **presumption** in favour of it in any case in which the defendant was charged with a drug offence punishable by ten years or more in prison.[28] Although the presumption is rebuttable, in the first seven months of the act, the Government won 704 motions for pre-trial detention while defendants won only 185.[29]

Another major erosion in the rights of defendants is the more permissive use of illegally seized evidence. Since 1914, the Fourth Amendment to the U.S.

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27 Pub. L. No.98-473 tit. II, ch.1, 203(a), 98 Stat.1976 1984 (codified at 18 U.S.C. 3142 (Supp. 1986)).

28 18 U.S.C. 3142(e) (Supp.1986).

29 Kennedy: Foreword to Symposium on the Crime Control Act of 1984. In: 22nd American Criminal Law Review vi, viii n.4 1985.

constitution has been interpreted to exclude evidence obtained by federal law enforcement authorities as a result of an illegal search and seizure. Many states voluntarily adhered to that ruling, and in 1961 the remaining states were required to do so by the decision of the Supreme Court in **Mapp v. Ohio**, 367 U.S. 643 (1961). But under the relentless pressure of drug prosecutions and the frequent attempts of Congress to overturn or restrict the effect of what is called the exclusionary rule, the Courts have whittled away at the protections afforded to individual privacy. This is especially significant because in the U.S. constitutional system, the Courts are an independent branch of Government and their interpretations of the constitution are supreme to those of the legislative branch. Again I believe this marks a significant difference with the legislative supremacy characteristic of most parliamentary democracies.

Notwithstanding that traditional independence, over the last five years the Courts have in effect joined the war on drugs. The U.S. Supreme Court, for example, gave its approval to just about every challenged drug enforcement technique. The Court upheld the power of drug agents to use the airport drug courier profile to stop and detain and question citizens without probable cause;[30] to subject a travellers luggage to a sniffing examination by drug detector dogs without probable cause;[31] to make warrantless searches of automobiles and closed containers therein;[32] to conduct surveillance of suspects by placing transmitters or beepers in containers in vehicles;[33] to search at will cause ships in inland waterways;[34] and to obtain a search warrant based on an undisclosed informants tip.[35] The Supreme Court also adopted a good faith exception to the exclusionary rule for searches pursuant to a defective warrant.[36] It authorized

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30 Florida v. Royer, 460 U.S. 491,493 1983; see also United States v. Montoya, 473 U.S.531 1985; Florida v. Rodriquez, 469 U.S. 1, 5 1984. Drug courier profiles vary from airport to airport, but all are based on informal compilation of common traits associated with drug smugglers; they have been criticized for allowing impermissible intrusions on fourth amendment rights based solely on an agent's "hunch". See Note, "Drug Courier Profiles in Airport Stops", 14 S.U.L. Rev. 315, pp.316-17 & n.23 1984. For further criticisms, See Note, "Search and seizure: Defining the Outer Boundaries of the Drug Courier Profile", 17 Creighton L. Rev. 973 1985.

31 United States v. Place, 462 U.S. 696, 706 1983.

32 United States v. Ross, 456 U.S. 798, 821 1982; see also Colorado v. Bertine, 107 S. Ct.738 1987.

33 United States v. Knotts, 460 U.S. 276,282 1983.

34 United States v. Villamonte-Marquez, 462 U.S. 579,593 1983.

35 Illinois v. Gates, 462 U.S. 213 1983. Gates rejected the principles of probable cause determination established in Aquilar v. Texas, 378 U.S. 108 1964, and Spinelli v. United States, 393 U.S. 410 1969, in favour of a more loosely structured "totality of the circumstances" test. Gates, 462 U.S. at 230.

36 United States v. Leon, 468 U.S. 897, 905 1984. To similar effect are Illinois v. Krull, 107 S.Ct. 1160 1987, and Maryland v. Garrison, 107 S.Ct. 1013 1987. For criticism of the good faith exception, see 1 W.LaFave, Search and Seizure: A treatise on the Fourth Amendment 1.3(c)-(d), at 51, pp.58-59 1987 (arguing that the Leon Court overestimated the costs of adherence to the exclusionary rule based on "intuition, hunches, and occasional pieces of partial and often inconclusive data").

warrantless searches of open fields and barns adjacent to a residence.[37] It significantly enlarged the powers of police to stop, question and detain drivers of vehicles on the highways on suspicion less than probable cause[38] or with no suspicion at all at fixed checkpoints or road blocks.[39] The courts also validated warrantless aerial surveillance that is airplanes overflights of private property,[40] the warrantless search of a motor home occupied as a residence,[41] and the warrantless search of a public school student.[42] In the realm of search and seizure, there is hardly a case that the Government failed to win.

Now it may be that the practices that I have described would be lawful in Europe and would raise no eyebrows here. But that is beside the point; in the U.S. such practices were not previously held lawful. The significance, then, is in the change itself, which has occurred under the increasing pressures to crack down on drugs.

One final example of the crackdown atmosphere prevailing in the U.S. comes from the Anti-Drug Abuse Act, of 1986[43] in which Congress not only created new crimes but added to the penalties which already existed. The effect of the Act is that drug crimes now rank among the most seriously punished offenses in the United States Criminal Code. For example, the act provides minimum penalties of five and ten years in prison depending upon drug and weight involved; in the case of possession with intent to distribute five kilograms of cocaine, the penalty is a minimum of ten years up to a maximum of life imprisonment. Even as little as five grams of cocaine base requires not less than five years in prison and a maximum of forty years. In both cases, the range of penalties rises to a minimum of 20 years to a maximum of life if death or serious bodily injury results from the use of such substances. It should be emphasized that these penalties apply to **first time** drug offenders; those with a prior state or federal drug conviction must receive a mandatory life term under these circumstances.

The fact that these penalties are so severe, more stringent in fact than sentences typically meted out to robbers or rapists, illustrates one of the themes of this paper: people in the U.S. are so fearful and angry about their inability to contain drug trafficking that they are resorting to desperation measures. That

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37 United States v. Dunn, 107 S.Ct. 1134 1987 (barn); Oliver v. United States, 466 U.S. 170 1984 (open fields).

38 United States v. Sharpe, 470 U.S. 675 1985.

39 Texas v. Brown, 460 U.S. 730 1983.

40 California v. Ciraolo, 106 S.Ct. 1809, 1813 1986.

41 California v. Carney, 471 U.S. 386, 390 1985.

42 New Jersey v. T.L.O., 469 U.S. 325,333 1985.

43 Pub. L. No. 99-570, reprinted in 1986 U.S. Code Cong & Admin News (No. 10A) (codified as amended in scattered sections of U.S.C.).

atmosphere is perhaps best conveyed by the judicial opinion of a respected federal judge in Miami who, in an order denying bail pending appeal, condemned drug dealers as "merchants of misery, destruction and death" whose greed has wrought "hideous evil" and "unimaginable sorrow" upon the nation. Their crimes, he wrote, are "unforgivable".[44] With that kind of hostility, it becomes a natural constitutional extension to act as though the ends justify the means; thus, traditional constitutional and statutory protections for individual rights can be discarded. One Congressman in fact complained about the extent to which legal protections interfered with the prosecution of drug cases: "In the War on Narcotics we have met the enemy and he is the U.S. code. I have never seen such a maze of laws and hangups..... ."[45] In that spirit, and the spirit of the angry judge, whom I just quoted, the measures I have described to you, along with dozens of others, such as forfeiture of defense attorney's fees as contraband have become "logical" in an endless cycle of crackdowns and failures.Perhaps if these repressive measures applied only to drug defendants, who could be dismissed as an alien "them", few would care and fewer still would protest. But this kind of reactionary force can not be contained, cannot apply only to those accused of drug crime. In fact, the tentacles of drug enforcement have already spread out to reach into the lives of ordinary people, not just to those involved in the drug underworld. These intrusions into the lives of civilian society take many forms. One of the most obvious is the rapid proliferation of mandatory drug testing of employees and job applicants in the U.S. Civil Service[46] and in the private sector as well; some 40% of the Fortune 500 companies now subject their applicants or employees to urinalysis.[47] On rationale for requiring that urinalysis be predicated upon individual suspicion is the not-unlikely possibility of a false positive result: Two Navy doctors were almost drummed out of the service [in 1984] because they tested positive for morphine, the result of having eaten too many poppy seed bagels. Indeed, the Navy program has seen huge errors -- over 4,000 men and women were recalled at full back pay [in 1985] because they were discharged on the basis of a (false positive).[48] Surveillance is on the increase in the form of wiretaps

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44 United States v. Miranda, 442 F. Supp. 786,795 (S.D. Fla. 1977).

45 Financial Investigation of Drug Trafficking: Hearings before the House Select Comm. on Narcotics Abuse and Control, 97th Cong., 1st Sess. 58 1981 (statement of Congressman Hutto).

46 President's Message Announcing the Goals and Objectives of the National Campaign Against Drug Abuse, 22 Weekly Comp. Pres. Doc. 1040, 1041 Aug. 4, 1986.

47 General Dynamics, General Motors, Greyhound, E.F. Hutton, IBM, Mobil, The New York Times, The Teamsters and United Auto Workers are but a few of the enterprises that have recently instituted some type of workplace drug testing. Ross, "Drug Testing at Work Spreading -- and Likely to Spread Further", L.A. Daily J., June 6, 1985, p.4, col.3; see also Kaufman, The Battle over Drug Testing, N.Y. Times, Oct. 19, 1986, 6 (Magazine), p.52. See generally, "Testing for Drugs in the American Workplace", 11 Nova L.Rev. 291 1987; Wisotsky, S.: The Ideology of Drug Testing. In: 11 Nova L.J. 763 1987.

48 See Ross, supra.

and the maintenance of 1.5 million names in NADDIS, a drug investigative data bank. On a daily basis, the War on Drugs hampers the mobility of travellers, who are subjected to road blocks, detained for questioning at airports, and whose luggage can be diverted for sniffing by drug detector dogs.

The latest repressive anti-drug initiative to emerge from Washington is called "zero tolerance". It means, in a nutshell, cracking down on drug users in order to reduce "the demand side of the equation". One manifestation of this policy occurs in the criminal prosecution of travellers found at border crossings in possession of personal use of amounts of drugs; formerly, they were simply fined and released. Another example is the seizure and forfeiture of cars, planes or of boats of persons found in possession of small amounts of illegal drugs; these forfeited assets in effect impose massive fines far greater than would ordinarily be imposed upon a criminal conviction for drug possession; but as civil forfeiture is in **rem**, no prosecution is required at all. There are many other ways, beyond the scope of this paper, that the War on Drugs has constricted the free play of civil liberties in the U.S.

In 1987, the United States celebrated the bicentennial of its Constitution. The framers of the Constitution were animated by the spirit of WILLIAM PITT's dictum that "unlimited power is apt to corrupt the minds of those who possess it".[49] They therefore created a constitutional structure in which governmental power was limited in the first instance and constrained in the second by the system of checks and balances. The Bill of Rights, the first 10 amendments to the Constitution, were added in 1791 to further secure personal freedom from governmental oppression.

The War on Drugs has substantially undermined the American tradition of limited government and personal autonomy. Since the early 1980's, the prevailing attitude, both within Government and in the broader society, has been that the crackdown on drugs is so imperative that extraordinary measures are justified.

The Current Situation: Polarization

Election year politics continues to ratchet the war on drugs machinery tighter and tighter. Although it has not been finally adopted, during the month of April, 1988, the senate voted 93-0 to adopt the Anti Drug Abuse Act of 1988, creating a $2.6 billion special reserve fund for anti-drug programs over and above the regular annual budget of 4 billion dollars. As noted above, the 4 billion dollar budget

49 Speech, Case of Wilkes Jan. 9, 1770.

represents a four-fold increase in the level of funding that prevailed when the war on drugs was declared. The frustration of Congress with drug producing nations of Latin America, particularly General NORIEGA in Panama, has produced a number of proposals involving the use of military force to destroy coca crops or to capture fugitives from U.S. drug charges. Other stringent proposals call for shooting drug planes out of the sky. The President on April 19 "call[ed] upon the House and Senate to vote promptly on my bill providing for capital punishment when a death results from drug dealing, and when a..... law enforcement officer is murdered". As we get closer to the November election, one can predict with confidence that more of these proposals will surface and that their extremist nature will increase.[50]

But at the same time there is a very interesting development in the opposite direction. Respected journalists, nationally syndicated columnists and other opinion leaders have begun to break ranks with the War on Drugs, in some cases suggesting that it should be abandoned altogether. Here are some notable examples. DAVID BOAZ, Vice President for public policy at the Washington, D.C.-based CATO Institute, described by the press as a "libertarian think tank" wrote an op-ed piece for the New York Times (March 17) "Let's Quit the Drug War". In it he denounced the war on drugs as "unwinnable" and destructive to other values such as civil liberties and advocated a "withdrawal" from the war. EDWARD M. YODER, Jr. of the Washington Post Writers Group called the war on drugs "dumb" and compared it to the prohibition of alcohol for "encouraging and enriching mobsters" (March 4, 1988). TRAVIS CHARBENEAU, writing in "Newsday" paper (March 24, 1988) wrote an article to the same effect. On March 10, 1988, RICHARD COHEN of the Los Angeles Times Syndicate published a piece endorsing the idea of a plan for the government distribution of drugs in order to "recognize the drug problem is with us to stay -- a social and medical problem, but not necessarily a law enforcement one. We've been making war on drugs long enough. It's time we started making sense instead."

This sample of articles shows[51] the beginning of the emergence of a significant body of opinion opposed to the war on drugs. What is perhaps even more significant is that the opposition transcends the liberal/conservative split. Traditionally, conservatives have advocated strict law enforcement and liberals have

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50 The Drug Enforcement Report of June 23, 1988, (p.2) reports that a House Republican Task Force has introduced a bill calling for confiscation of 25% of the adjusted gross income and net assets of anyone caught possessing illegal substances. It would also cut off federal highway funds to states that do not suspend drivers' licenses of persons convicted of using drugs.

51 Even comic strips have entered the debate by satirizing the War on Drugs. The weekly syndicated strip "Bloom County", for example, drew irony by portraying campaign contributions from drug smugglers to anti-drug candidates for political office as a way to keep drug prices high April 18, 1988.

been identified with a permissive approach to the drug issue. Now highly respected conservative spokesmen have also begun to dissent from the War on Drugs.

Even before the recent spate of articles described above, prominent conservative columnist WILLIAM F. BUCKLEY, Jr. had reversed his position and advocated the legalization of drugs as the only effective course of governmental action. Nobel Prize-winning economist MILTON FRIEDMAN has made a number of public statements advocating more market-oriented approaches to the regulation of drugs. **National Review Magazine**, the most prominent organ of conservative opinion, through its editor RICHARD VIGILANTE, published a piece (Dec. 5, 1986) exposing the Anti Drug Abuse Act of 1986 as a manifestation of public panic and criticizing the intrusiveness of drug testing and other enforcement measures. He also rejected the war on drugs as intolerant and politically unwise: "Embracing the drug hysteria requires a rejection of essential conservative principles". In the same issue of NR is an article by RICHARD C. COWAN entitled "How the Narcs Created Crack" arguing as follows: "Any realistic approach to the drug problem must begin with the legalization of small scale cultivation and sale of marijuana so that is separated from the other, more dangerous drugs". ... "We need not fear that if we stop the lying and hypocrisy, the American people are going to destroy themselves with drugs".

This debate has attracted the attention of the mainstream media. Time Magazine ran a cover story on the debate called "Thinking the Unthinkable" (May 30, 1988). Newsweek did a similar piece. The New York Times and the Miami Herald both ran front page stories on the same subject in this time frame. Clearly, the challenge to the monopoly status of the War on Drugs is gaining ground. Nothing approaching this level of dissent has been seen or heard since the War on Drugs started.

So the situation in the U.S. is highly polarized. On the one hand, the war on drugs continues to escalate to ever higher levels. The Department of Justice submitted its proposed 1989 federal budget asking for a 14% increase over the current fiscal year. "Significant new resources will be put into the fight against drug trafficking, as well as prison facilities to house the sharply higher numbers of people now being convicted of drug related offenses", Deputy Attorney General ARNOLD BURNS said at a press briefing. In February the House Foreign Affairs Committee Task Force and International Narcotics Control demanded of the State Department that the U.S. impose sanctions against Colombia, Peru, Bolivia and other Latin American countries in order to force them to intensify their drug enforcement efforts. On the other hand, potentially influential commentators from different points along the political spectrum have begun to denounce the war on

drugs quite vocally, calling it futile and destructive. Whether this will spill go over to the political sector remains to be seen. Certainly, it will be a very long process.

But already there are several indications that the process may in fact be under way. For example, the ABA Journal (Jan. 1, 1988) reports that the New York County Lawyers Association Committee on Law Reform published a report advocating the decriminalization of heroin, cocaine and marijuana. Also in New York, State Senate JOSEPH L. GALIBER, from a district in the Bronx, introduced on April 18 a bill in the New York State legislature to decriminalize the possession, distribution, sale, and use of all forms of controlled substances under the aegis of a State Controlled Substance Authority. On a May 10, 1988 broadcast of ABC's "Nightline", the Mayor of Baltimore called for congressional hearings to study the issue.

There are also pressures beginning to come from abroad. For example on February 23, 1988 the Attorney General of Colombia said in a telephone interview in the Miami Herald that Colombia's battle against drug trafficking rings have been a failure, calling it "useless". He suggested that legalizing the drug trade is something that the government "may have to consider" in the future. Also, the Economist Magazine ran a cover story (April 2-8) called "Getting Gangsters out of Drugs", advocating the legalized and taxed distribution of controlled substances. El Pais, the most influential Spanish newspaper, recommended "La legalizacion de la droga" in an editorial (May 22, 1988).

In the Structure of Scientific Revolutions, THOMAS S. KUHN argued that "the process by which a new candidate for paradigm replaces its predecessors" occurs "only after persistent failure to solve a noteworthy puzzle has given rise to crisis" (pp.144-145). There is little doubt that perception that the war on drugs is a failure has spread significantly. It also appears that people are beginning to understand that a war on drugs necessarily breeds violence and corruption. At some point, we may well reach KUHN's stage of persistent failure and crisis. If so, the war on drugs will be dislodged as the only conceivable paradigm for the control of drugs in the U.S. In searching for a new model of regulation, the Dutch System has much to teach us and deserves serious study immediately.

Annex

The reader who wants to study U.S. drug policy in depth is advised to consult the extensive bibliography at p. 263 of **Breaking the Impasse in the War on Drugs** (London: Westport Publications, 1986). For convenience, reprinted below is a short introductory bibliography taken in part from a Nova Law Centre Symposium "The War on Drugs: In Search of a Breakthrough", 11 Nova L.J. 891, 1050 (1987):

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European Perspectives on Drug Policies

Hans-Jörg Albrecht, Anton van Kalmthout

1. Introduction

The use of illegal drugs and drug addiction are perceived to rank among the most important social problems in virtually all countries of Europe. So are the drug policies deviced to control the spread of drugs. It seems clear that the prohibitive approach to drug control is dominating today everywhere with international treaties and international cooperation pushing towards unification and harmonization of prohibitive policies.[1] We observe today still a growing concentration on criminalizing certain kinds of drugs and narcotics sparing the traditionally tolerated drugs deeply rooted in the European drug culture such as alcohol and tobacco. However, we may notice that alcohol as well as tobacco and coffee went through the same process of control with criminalization and the use of harsh penalties in history.[2] Basically, we observe perception of the very same dangers associated with these drugs as is the case today with soft and hard illegal drugs. Nevertheless, the approach to control alcohol, tobacco and medicaments differs dramatically from that which is adopted nowadays in the sphere of cannabis and opiates. But slowly policies with respect to traditional drugs are changing. It is obvious that the use of alcohol, tobacco and medicaments is evaluated more and more according to the dangers inherent in the use of these substances. Thus, we see changes in the legal drinking age in North America, a growing concern for smoking tobacco in public buildings and special places. Partially control of

1 See for a comparative overview Meyer, J. (Ed.): Betäubungsmittelstrafrecht in Westeuropa. Freiburg 1987.

2 Mäkelä, K. et al.: Alcohol, society, and the state. A comparative study of alcohol control. Toronto 1981; Hess, H.: Rauchen. Geschichte, Geschäfte, Gefahren. Frankfurt, New York 1987; Thamm, B.G.: Drogenfreigabe - Kapitulation oder Ausweg? Hilden 1989.

tobacco already is backed up by administrative fines. Although the basic reason for implementing legal restrictions on smoking is to avoid health risks for non-smokers, societies have become more sensible for the health risks tobacco and alcohol cause for the user himself or herself. Despite these changes the differences in control models adopted for alcohol, tobacco, medicaments on the one hand and illegal drugs on the other hand are enormous and not likely to vanish completely. With respect to alcohol, tobacco and medicaments, the focus is on prevention, regulation, quality control and taxation, the substances are integrated in the white market as well as in treatment and health systems. What has been made visible in the last decades are the dramatic costs and risks which can be associated with consumption of alcohol, tobacco and medicines. Costs of these substances in terms of premature death and health damages, in terms of economic losses, e.g. work productivity and in terms of risks for other non-consuming people are outweighing by far those which presumably are caused by illegal drugs including the most potent drugs such as heroin and crack.[3]

Obviously most nations have **not adopted** a **consistent policy** with respect to drugs at large and the question which must be put forward here is whether there is a need for consistency in drug control. While it has been argued that societies were and are never consistent in their approaches to drugs,[4] and consistency therefore cannot be used in framing drug policies, it has to be acknowledged that societies are not completely free to make differences. It goes without saying that all drugs cannot be treated the same way because there exist differences in the effects of drugs, in the social environments, in the cultural integration and functions of drugs. But if the main argument concerns public health and if public health is used to justify harsh prohibitive policies affecting also the user of drugs, there should be at least some limits to differential treatment of drugs which cause undeniably less dangers to public health.

2. Drug Problems in Western Europe

It is difficult to assess drug problems in terms of effects and consequences due to the drug itself. Obviously the consequences of drug use are not of a mere pharmacological nature but are dependent on the social environment, the kind of drug control adopted, the quality of the drug, the reasons or motivations

3 See e.g. Bundesamt für Gesundheitswesen (Ed.): Drogenbericht. Bern 1983, p.32.
4 Kaplan, J.: The hardest drug. Heroin and public policy. Chicago, London 1983.

underlying the use of drugs, the way drugs are used etc. Analysis of drug problems therefore must sharply distinguish between problems or dangers and risks connected directly with the drug on the one hand and consequences which can be attributed to other variables independent from the substance itself. As a consequence, costs associated with drugs themselves and drugs associated with control of drugs must be analyzed separately. Evaluation of drug policy thus must be based upon weighing these costs (and benefits) against each other.

Alcohol and tobacco are so far the drugs best known to cause physiological (and irreversible) damages after certain periods of use and a certain level of use. Opiates create risks in terms of overdose problems but the use of opiates does not cause physiological problems if properly used and applicated and if the substance is pure.[5] In fact, most health problems and health risks known to occur in heroin or opiate scenes seem to be triggered by control and conditions in the scenes which are framed by the way the drug is controlled. In general, questions must address: Which drug problems are caused by the substance itself and which problems are caused by substance control? But the **core problem** with respect to any use of drug concerns chronic consumption or "drug misuse" (e.g. daily use or using drugs several times a week). Although experiences with drugs of any kind are relatively wide-spread, chronic consumption of drugs is restricted to small groups of people.

Based on current research, it may be concluded that the rate of chronic users will not exceed 1% in Western European countries (see for an overview of research table 4c). But the use of drugs, also chronic use will not develop inevitably into a full blown drug problem. This is obviously true not only for the so-called soft drugs but also in the case of opiates which have produced strong and efficient myths with respect to entering drug careers and chances to exit from those careers.

Even in the case of heroin use, occasional consumption and controlled use seem to be more wide-spread than conventional wisdom assumes.[6] As in the case of other addictive substances, heroin addiction emerges after a certain period of permanent consumption. There is not much known about the process of entering drug careers and commencing chronic use of drugs. But precise information why people continue drug use (especially if the first contacts with

5 Russi, E.W.: Opiatmißbrauch. Medizinische Komplikationen. Stuttgart 1986, p.4.

6 Harding, W.M., Zinberg, N.E.: Occasional opiate use. In: Meelo, N.K. (Ed.): Advances in substance abuse. Behavioural and biological research. Research Annual. Greenwich, London 1983, pp.27-61; Zinberg, N.E.: Drug, set, and setting: The basis for controlled intoxicant use. Yale Univesity Press 1984; Bovelle, E.I., Taylor, A.: Conclusions and implications. In: Hanson, B., Beschner, G., Walters, J.M., Bovelle, E.I. (Eds.): Life with heroin. Voices from the inner city. Lexington, Toronto 1985, pp.175-185.

drugs are of a rather negative nature) could inform about those mechanisms which are efficient in entering drug subcultures and hardening patterns of use. Longitudinal studies on the development of drug careers demonstrate that one time consumption or occasional use outweigh by far chronic consumption.[7] Furthermore, it can be shown that the assumption "once an addict, always an addict" is not supported by research. Substantial proportions of groups of chronic heroin users quit heroin use after a more or less extended period of consumption. This is even true under the condition of legal access to heroin as English experiences show.[8] Despite the easy access to heroin in drug clinics approx. 40% of those heroin users have quitted heroin use after approx. 10 years. Exiting from opiate careers and recovering from drug addiction occur more often without organized help and support than is expected. The dominating myth of heroin as an enslaving substance which does not leave the opiate using person any meaningful behavioural option may even turn out to be counterproductive. Such a myth distracts from the fact that obviously properties of the drug itself an less dramatic and perhaps less important than are social and psychological triggers of relapses or continuing in drug use.

Research on the development of drug use demonstrates also that the first contact with legal and illegal drugs occurs predominantly in the peer group. Thus, drug epidemics develop along peer relationships and the ordinary network of everyday contacts.[9] Furthermore, the risk of seducing other persons into drug use obviously is restricted to the very beginning of heroin consumption while those deeply involved in drug scenes and heroin use are less likely to transmit the "disease".[10]

Little is known about who among those using illegal drugs at least once, will develop drug problems either in terms of chronic use or in terms of social, psychological or physiological problems. Although correlates of chronic drug use such as psychological or psychiatric disorders, poor school performance, broken family, are regularly found and described in research, these correlates seem to be not specific but refer to more or less the same set of variables which are described with respect to criminal behaviour or other types of deviant behaviour.

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7 Silbereisen, R.K., Kastner, P.: Entwicklung von Drogengebrauch - Drogengebrauch als Entwicklung? Berichte aus der Arbeitsgruppe TUDROP Jugendforschung, 26/83. Berlin 1983.

8 Stimson, G.V., Oppenheimer, E.: Heroin addiction. Treatment and control in Britain. London, New York 1982, pp.229-235.

9 Parker, H., Bakx, K., Newcombe, R.: Living with heroin. Philadelphia 1988, pp.46-47; Pearson, G.: The new heroin users. Oxford 1987, pp.9-10; Hunt, L.G., Chambers, C.D.: The heroin epidemics. A study of heroin use in the United States, 1965-1975. New York et al. 1976; Pearson, G., Gilman, M., McIver, S.: Young people and heroin. An examination of heroin use in the north of England. Aldershot 1987, p.38.

10 Berger, H., Reuband, K.-H., Witlitzek, U.: Wege in die Heroinabhängigkeit. Zur Entwicklung abweichender Karrieren. München 1980.

Consequences of drug use so far have been differentiated only in the occasional or one time use on the one hand and chronic use on the other hand. But chronic use may be assigned the status of a shopping basket variable only. It serves as a camouflage which may cover a wide range of problems and negative consequences of drug consumption. Negative consequences may occur in terms of acute intoxication, physiological effects of long-term use, psychological effects of long-term use, in terms of problems caused by the way the drug is applicated or in terms of the addictive potential of specific drugs. Insofar, assessment of risks of drug consumption is a problematic endeavour because negative outcomes of drug use are regularly confounded with effects of drug control. But it seems clear that the danger of overdose is primarily associated with opiates, alcohol, cocaine, amphetamines and medicaments while physiological consequences of chronic consumption are to be expected especially in the case of alcohol and tobacco. With respect to long-term use of heroin and cocaine especially deterioritation of the immune system has been found. The way drugs are consumed brings upon serious problems in the case of intravenous injection, problems in terms of transmission of diseases in the case of needle-sharing (AIDS), in terms of diseases caused by the use of non-sterilized needles and the consequences of unadequate use of needles. The addictive potential of opiates is rather large, the same is true for alcohol and tobacco. On the other hand, opiates do not seem to have direct physiological consequences when adequately applied. Soft drugs such as cannabis obviously are associated only with psychological disorders after heavy longterm use.

3. The Current State of Drug Laws in Western Europe and in the United States

All European nations have adopted prohibitive models of controlling drugs relying heavily but to a varying degree on criminal law (see for a summary tables 1a-m and 2).

In **Austria** the penal provisions make up only a small part of the Drug Law, whereas the major part of this law governs the tasks of the Ministry of Health which is only of administrative nature. The Austrian Drug Law basically discriminates between user and dealer, having the idea to punish dealers severely, but to subject the drug consumer as far as possible to treatment instead of punish-

ment. This distinction is in reality not that clear-cut, as many addicts act as dealers in order to finance their addiction.

In Austria production, import, export, acquisition, possession, offering or provision is punished with up to 6 months' imprisonment or a fine. In case of rendering possible use to juveniles, or of being a member of a criminal gang the maximum imprisonment is 3 years.

Since the latest reform of the Drug Law in 1985, production, import, export and distribution of illicit drugs in **major quantities** have been punished with a prison term of up to 5 years. A quantity is regarded "major", if passing on such a quantity would present extensive hazard to human life or health (this quantity is for example defined to be 5 g in the case of heroin, 15 g in the case of cocaine and 0.01 g in the case of LSD). The maximum penalty is raised up to 10 years in case of business-like trade or membership of a criminal gang. The maximum term of imprisonment is 15 years' imprisonment if a drug offender is member of a criminal organization and previously convicted for the same type of offence, or is member of a large criminal organization, or has committed a drug offence with vast quantities of illicit drugs. Finally, in case of the offender being the head of a criminal organization, the maximum penalty is 20 years of imprisonment.

The treatment approach is receiving strong support in the Austrian Drug Law by providing the basis for enforced medical examination and enforced treatment. If someone is suspected to (ab)use drugs, he may be subjected to a medical examination and if the examination proves the fact of drug abuse the drug offender may be ordered to undergo treatment. If the medical examination or treatment is refused, the prerequisites to drop the case conditionally do not longer prevail which often results in judicial measures.

In **Belgium** drug laws do not make any difference between hard and soft drugs nor are drug users privileged in terms of more lenient punishment. Possession, import, export, manufacture, transport, selling, delivering or acquiring is punished with a maximum imprisonment of 5 years and/or a fine. The same punishment is provided for several kinds of drug-related behaviour as knowingly providing syringes, acting as an intermediary in drugs-transactions or procuring premises for the illegal use of drugs.

In case of particularly aggravating circumstances (involvement of juveniles, illnesses or death resulting from drug abuse or participation in a criminal organization) the maximum punishment is 20 years' imprisonment. Besides, profits of drugs-transactions can be confiscated. Cooperation with judicial authorities in terms of identification of other drug offenders or providing the basis for clearing

other drug offences, may eventually lead to a reduction or even exemption of punishment.

Despite pressure from Norway and Sweden, **Denmark** is still sticking to a relatively liberal policy regarding soft drugs (cannabis). As hard drugs are concerned, the repressive approach of Norway and Sweden is more or less followed.

In case of supply to a considerable number of persons, import, export, selling, distribution, receiving, production, manufacturing or possession, the maximum term of imprisonment is 6 years. The same punishment is provided for those who receive or provide profits for illegal drugs-transactions or in any other way help to secure the profits. The maximum penalty is increased to 10 years of imprisonment when a considerable amount (e.g. 20 g of heroin, 10 kg of cannabis) of a particularly dangerous drug (heroin, marihuana, LSD for example) is concerned, or the transfer of such drugs is in any other way particularly dangerous. In case of particularly aggravating circumstances, these penalties may be raised with up to one half of the basic sentence available.

Consumption and possession exclusively for one's own use is mostly dealt with a warning or a fine. Prosecution-circulars draw the important line between cannabis and other drugs.

In the **Federal Republic of Germany**, the development of criminal drug laws is characterized by two amendments in 1971 and 1981 which first of all increased penalties provided for drug offences rather drastically. So, for the most serious drug offences, e.g. trafficking and possession of large amounts of drugs, the maximum penalty has been raised up to 15 years imprisonment. On the other hand, addicted drug offenders now have the opportunity to apply for a treatment option instead of any prison sentence not exceeding 2 years. Currently draft penal statutes are discussed which aim at criminalization of money laundering (drug profits only), criminalization of trafficking of substances necessary in producing heroin, cocaine, amphetamine etc. (e.g. Ephedrin, Ergometrin, 1-Phenyl-2-Propanon etc.). Furthermore, a new financial penalty, according to plans in the Ministry of Justice, should be introduced in order to facilitate the seizure of drug money.[11]

Controlled substances in **France** are divided by law into three categories underlying different minimum and maximum penalties. All substances classified

11 See (also for a comparative overview) Meyer, J.: Gewinnabschöpfung bei Betäubungsmitteldelikten. Rechtsvergleichender Querschnitt und rechtspolitische Empfehlungen. Wiesbaden 1989.

as illegal drugs are listed in the same chart, in which no distinction is made between hard and soft drugs.

Consumption of these illegal drugs is incriminated by French Law and punished with imprisonment of 2 months to 1 year and/or a fine. Drug offenders transporting, possessing, offering etc. are subject to a minimum term of imprisonment of 2 years and a maximum term of 10 years. In order to eliminate the problem of the "user-dealer", a 1986 Law provided for the violation of "minor trafficking", punishing this offence with a 1 to 5 years' prison term and/or a fine. Enforced treatment may be ordered in France, either by the court or by the public prosecutor. Official data show that treatment is rarely ordered by the court.

Italian criminal law not only makes a difference between hard drugs and soft drugs, but also between consumer and trafficker in as far as the consumer is not seen as a criminal but as a patient who should not be punished. Addicts who possess or purchase drugs with the intent to consume are excluded from punishability if only minor amounts are involved. Judicial decisions are usually based on the assumption that amounts drug users consume per day should be regarded to be minor.

Ordinary drug offences are nevertheless threatened with severe punishments: the minimum term of imprisonment for offences involving hard drugs is 4 years, the maximum term is 15 years and for offences involving soft drugs the minimum term of imprisonment is 2 years and the maximum 6 years. Drug offences involving delivery of drugs to juveniles, large quantities of drugs or organized crime activities are treated even more harshly, as in the most serious cases the minimum penalty is 20 years' imprisonment.

Compulsory treatment may be ordered by the Italian magistrates, but the addict's rights are well defended.

Recent tendencies, more or less provoked by the mass media, are directed towards a penal repression of the consumption of drugs. Currently, a draft is discussed which aims at introduction of life imprisonment for certain aggravated drug offences as well as making purchase and possession of minor amounts of drugs for personal use a crime.[12]

Drug laws in the **Netherlands** differentiate between soft and hard drugs as well as between different drug offenders within these categories of drugs providing various ranges of penalties. As for hard drugs the maximum sentence varies from 4 years' imprisonment and/or a fine for possession to 12 years' imprison-

12 Relazione al disegno di legge recante aggiornamenti, modifiche ed integrazioni della legge 22 dicembre 1965 N.685.

ment and/or a fine for import or export. Possession of soft drugs is punished with a maximum of 2 years' imprisonment and/or a fine, whereas import and export are punished with 4 years' imprisonment and/or a fine. In case of minor amounts the penalties are reduced. Because of the expediency principle in Dutch criminal law and the guidelines resulting from that principle, priorities are made in investigation and prosecution activities. These priorities have de facto legalized the use and consumption of both soft and hard drugs.

The penalization of preparatory acts with regard to drug offences is unique for Dutch criminal law, though drug policy may be a precedent for other fields of criminal law. The European integration in 1992 and the Schengen-agreement exert pressure on the Netherlands to bring drug legislation into line with that of the surrounding countries.

Treatment of drug addicts in the Netherlands has developed to a differentiated approach of the addiction which is able to react on individual problems and needs, but is also as far as possible integrated in one centre. Methadone-programmes play an important role in the treatment-programmes.

In the past decades there has been a steady increase in **Norway** in maximum penalties for drug offenders. Serious drug crimes as sale and trafficking may now be punished with a maximum prison term of 15 years. In case of special aggravating circumstances there is an additional maximum penalty of 21 years. The Ministry of Justice has now sent out a proposal on criminalization of "drug-related receiving". This hardening of the repressive climate is also clear from the relatively high priority being given to the fight against drug-related crime in the prosecution and sentencing policy.

Most penal sanctions regarding drug crimes have been transferred from the Drug Act into the Penal Code in order to strengthen the repressive policy.

Spanish drug legislation underwent some significant changes in recent years, especially in 1983 and 1988. The 1983 reform introduced in Spanish drug legislation the distinction between hard drugs ("causing serious damage to health") and soft drugs, as well as a distinction between promotion, favouring or facilitation of consumption of drugs (through acts of cultivation, fabrication, traffic, etc.) on the one hand, and, on the other hand, possession directed to traffic. The use of drugs and possession with the intention of personal use were declared unpunished.

Though some critics thought the 1983 reform not liberal enough, the 1988 reform has a strongly repressive orientation. In the first place the scope of criminal conduct is broadened by adjusting "in any other way" to the acts that promote,

favour or facilitate the consumption of drugs. Besides, the reform introduces new aggravations as for instance the profession of physician, public officer and social worker, and adulteration. The reform maintains the ancient aggravatory circumstances as diffusion of drugs among juveniles, in educational centres and military units, membership of a criminal organization and amounts of "notorious importance". Next to these basic aggravations, the reform established a second degree aggravation for cases of extreme seriousness.

Criminal offences relating to soft drugs have since the 1988 reform been punished with imprisonment of 2 years and 4 months to 8 years. Penalties for offences dealing with soft drugs are raised to 4 months to 4 years and 2 month's imprisonment. Basic aggravatory circumstances lead to a maximum punishment of 14 years and 8 months' imprisonment, whereas a second degree aggravation has a maximum of 23 years and 4 months' imprisonment. The latest reform also introduces the punishability of receiving of profits of drugs transactions. The only "compensation" in the 1988 reform is the opportunity of an alternative to imprisonment in the form of a conditional remission, more or less combined with treatment. This regulation has however met with a great criticism.

Drug offenders in **Sweden**, having committed ordinary drug offences may be punished with imprisonment of up to 3 years or a fine. In petty cases the punishment shall only be a fine.

The maximum penalty for serious drug offences is 10 years' imprisonment. An offence is considered serious if large amounts of drugs are involved, if large scale or professional activities are concerned, or if the offence is of a particularly dangerous nature. The consumption of illegal drugs without possession has not been punishable until recently, but a government's bill on criminalization of consumption (sic) has been sent to parliament. According to guidelines of the Chief Public Prosecutor possession of even the smallest quantities of drugs is now subject to prosecution, which was earlier not treated as an offence. An addict may be subjected to enforced treatment in Sweden if there are serious dangers for himself or others if remaining untreated. Recent drug policy shows a further strengthening of the repressive crime control model.

Illegal production, handling and possession of and any dealing with drugs in **Switzerland** is punished with a maximum penalty of 3 years or a fine. In serious cases the offender may be sentenced to 20 years of hard labour and not less than 1 year, or a fine. An offence is serious if such a quantity is involved that the health of many people is endangered (for instance: 12 g heroin, 18 g cocaine and

12 kg hasish) or if the offender is member of a criminal organization or has received great profits.

Since the 1975 reform of the Drug Act consumption of illegal drugs is criminalized and punished with detention up to 3 months and/or a fine.

Convicted addicts may be conditionally released if they are cured in a special institution for a period up to 2 years. Besides there are many institutions in Switzerland who give ambulatory treatment to addicts (also those in prison).

Since the Misuse of Drugs Act 1971 the policy concerning illegal drugs in the **United Kingdom** has represented a total commitment to the "crime control policy". The Misuse of Drugs Act differentiates 3 classes of illegal drugs (class A: hard drugs; class B: soft drugs; class C: certain synthetic substances). Possession of these drugs is punished with respectively 7, 5 and 2 years' imprisonment. As far as production, cultivation, sale and possession with the intent to supply are concerned, maximum penalties are 14 years if class A or Bödrugs are involved and 5 years in the case of class C-drugs. Although there are no exemptions from punishability, addicts may be supplied with methadone or heroin in treatment centres. Drug policy nowadays in the United Kingdom shows a strengthening of the crime control model. The Drug Trafficking Offences Act 1986 extends e.g. the confiscation powers, additional imprisonment and introduces 2 new offences (assistance to retain the benefits of drug trafficking and prejudice of an investigation). Official reports unhesitatingly support the American War on Drugs.

Since President Reagan declared the War on Drugs, there has been a steady increase in personnel-rates, aggressive drug laws, prisons, and, most important, the budget for law enforcement programs. Nearly every official agency in the **United States** joined the War on Drugs, as the FBI, CIA, Nasa and even the Department of the Defense, did for example.

Though new records were set in every category of measurement as drug seizures, arrests and forfeitures, the black market in drugs grew to record size, prices fell drastically and the defendant's rights were seriously attacked. In case of serious drug offences pre-trial detention was authorized in 1984, an unknown phenomena till then in the United States. Besides, illegally seized evidence is accepted more and more in the courts, and just about every challenged drug enforcement technique has been approved.

Finally, the maximum punishments for drug offences were raised enormously, and the minimal punishment is now 5 to 10 years' imprisonment. The punishment

for as little as 5 g of cocaine varies e.g. from 5 to 40 years. In case of serious drug crimes the death penalty has been introduced.

4. Enforcing Drug Laws

Putting the focus on complete eradication of drug problems and drug use in general has led to putting the emphasis in investigating and processing drug cases on the issue of efficiency while the rule of law and procedural safeguards are more and more regarded to create obstacles in the "war against drugs". This may be observed at different stages of the criminal justice process. The use of undercover agents, the adoption of secret service measures in the context of police forces thereby threatens basic principles of the war of law. The first problem which has to be mentioned concerns that traditionally only reasonable suspicion that a crime has been committed is regarded to justify initiation of police investigations. But measures adopted for the investigation of drug offences aim at tracing potential drug offenders. So, the problem arises which criteria should be fulfilled before police may use proactive strategies which are designed to reach the state of reasonable suspicion. Should e.g. the mere (although plausible) assumption be sufficient that somewhere probably drug offences are committed? So far, virtually in all criminal justice systems, the use of undercover agents, techniques such as controlled deliveries, mail and phone surveyance, anonymous witnesses is tolerated and accepted. With the exception of Denmark and Switzerland, the use of undercover agents and the agent provocateur is not regulated by statutes but left to the discretion of police or public prosecutors.

Growing concern for drug offences has led to an ever increasing cooperation between national police forces.[13] We may even observe tendencies to establish intergovernmental bodies, e.g. TREVI, which, besides others, coordinate police efforts in controlling drugs. Basically, this development points to a growing significance of the police and executive powers in general because courts and other justice systems usually are not involved in this type of cooperation. Furthermore, judiciary and other types of control in the field of international cooperation are merely developed.

Enforcing drug laws has brought upon problems of capacity and overload in the court and in the prison system. As drug offenders usually receive rather severe sentences, their proportion at the overall prison population is rather high. Sentenced drug offenders have in the 70ies and in the 80ies contributed to the

13 Fijnaut, C., Hermans, R.H. (Eds.): Police-cooperation in Europe. Lochem 1987.

rise in the prison population in most European countries. Consequences of these changes in the structure of prison populations can be seen also in the hardening of prison regimes.

5. Consequences of Prohibition

Obviously the use of a prohibitive model of drug control and the reliance on segregation of drugs lead inevitably to the emergence of black markets which means loss of certain means of control available in white markets. Prostitution, alcohol and gambling may be cited as historical and partially current examples of black market problems or problems of a hidden but nonetheless powerful economy. It goes without saying that black markets are governed by economic rules as are white markets. Current prohibitive drug policies in Europe are justified by assuming that the supply side of drugs should be controlled by severe criminal penalties while the demand side should rather be reached and manipulated by means of prevention, education or treatment (although they seem to develop tendencies, e.g. in Italy, to reintroduce punishment as an option to deal with addicts or users). In general, the drug markets in Europe do not seem to have been affected that much through penal sanctions and treatment. Supply has even increased over the last two decades, demand at least remained stable and evidence suggests that just 5-10% of illegal drugs are seized and taken out of the market. On the other hand, prices of different drugs do not seem to have changed in the 80ies. So, while supply and demand are rather stable, the escalation in repressive action in the last two decades had consequences in other fields. First of all, we may mention the emergence or organized crime which has taken over production, importation and trafficking of drugs. Amateurs and small scale smugglers have been pushed out of the market through increasing pressure and risk of being apprehended. Professionalization and organization of drug trafficking so far are a rational response to the very same process on the control side; although the development may not be interpreted in terms of simple cause-effects. Prohibition affects first of all the demand side, that is the user. It is evident that the criminal justice systems throughout Europe deal predominantly with **drug users**, most of them **users of so-called soft drugs**. Obviously, it was not possible to concentrate criminal justice resources on the supply side and to keep users in the treatment system. Other effects of prohibitive policies concern the health risks for the chronic opiate user. Most of the drug related deaths observed in European countries stem from the group of heroin users. Heroin

related deaths regularly are the result of overdosing the drug which in turn is at least partially a result of prohibition. Overdoses occur after periods of pre-trial detention or imprisonment or after changes in the supply. Furthermore, prohibition enforces lifestyles in the drug using groups which are characterized through investing most of the time in drug procuring activities. Such lifestyles are not compatible with conventional social positions or social roles, they even lead to malnutrition etc. Property crime and prostitution are triggered by black markets. Although these consequences of prohibition may be interpreted as costs, on the other hand they may serve as tools to convey a powerful message that drug use inevitably leads to disastrous life conditions and extreme health risks which in turn may actually serve to deter potential drug users.

6. Future Developments in Drug Policies

Although everyone is in agreement that it is important to decrease use of all drugs, opinions become increasingly conflicting with respect to methods and strategies that should be used to reach this goal. The phenomenon of drug use is extremely complex and surely there will be no magic solution which will wipe out drug abuse in our societies. The fact has to be accepted that drug use in one or in another form will always be present as it always has been present in human history. The general goal, that is a totally drug-free society, therefore is unrealistic. Such a goal even may serve to escalate repression and may lead to "wars", which after all means a more or less law-less situation. A realistic approach points to attempts to develop methods to limit the consumption of all harmful drugs on the one hand while ensuring that drug users do not seriously harm themselves or others and are not harmed by control.

There exist different options in framing drug policies. Besides complete legalisation of all illegal drugs, one could imagine partial removal of prohibition with differentiating between high risk and low risk drugs (differentiation which is made e.g. with respect to soft and hard liquor). A third option could be a system of licensing and prescription enabling legal access to hard and addictive drugs for addicts (e.g. in the context of drug clinics) while the prohibitive system should preclude non-addicted persons from having opportunities to use drugs.

Decriminalization of drug related behaviour could be restricted to consumption and those types of behaviour which are prerequisites for consumption, e.g. purchase, possession etc. Partial decriminalization of drug use furthermore could be restricted to limited amount of drugs. Finally, alternative drug policies may be

based upon the currently available "treatment instead of punishment" options with extending these options for drug addicts or drug using persons.

The topic of legalizing drugs has been a virtual taboo for a long time. Demands for legalizing drugs have been put forward usually through groups interested the use of drugs. But currently propositions may be heard again which aim at legalizing drugs and organizing production and distribution the same way as it is the case for alcohol and tobacco. Well-respected journals have paid attention to the topic of legalizing.[14] The legalization proposition today is based upon the argument that a system of prohibition is causing side effects and costs in terms of providing opportunities for organized crime, in terms of triggering property crime and harming communities, in terms of vast illegal profits and their reinvestment in legal markets, in terms of corruption, costs which are said to outweigh by far positive consequences of prohibition. Thus, the argument may be labelled rather conservative.[15] The argument is backed up by the suggestion that in the case of integration of today's illegal drugs funds could be raised through taxing and could be used for treating problems of addiction or other negative effects of drug use. Furthermore, it is argued that in a system of legalized drugs control of the quality of drugs could reduce the extent of medical problems, property crime and prostitution.

In Switzerland, the government of Berne has submitted a proposal to decriminalize to the federal Swiss legislative body. It is suggested to decriminalize the use of opiates and behaviour which is a prerequisite for consumption (purchase, possession etc.). Furthermore, it is suggested to decriminalize soft drugs (cannabis, hashish) completely.[16] Similar propositions have been raised in the Federal Republic of Germany within the Green Party.[17]

How can the proposition to legalize all drugs indiscriminately be assessed? The problem which emerges in the endeavour to evaluate abolitionist political approaches respectively repressive and prohibitive approaches to drug control concerns primarily to **forecast how drug use** on the one hand and drug related problems on the other hand will **develop in the case of legalization.** What is feared most is that opiate use may increase as tobacco and alcohol consumption has increased in modern industrial societies. But to forecast developments in the

14 See the overview in Thamm, B.G.: Drogenfreigabe - Kapitulation oder Ausweg? Hilden 1989, pp.338-340; Economist, 2.4.1988; American Bar Association Journal 1989, pp.36-37.

15 Dorn, N., South, N.: Reconciling policy and practice. In: Dorn, N., South, N. (Eds.): A land fit for heroin? Drug policies, prevention and practice. Houndmills et al. 1987, pp.146-169.

16 Antrag des Regierungsrats des Kantons Bern vom 28.9.1988; The Drug Committee of the Swiss Federal Government has suggested, too, to legalize purchase and possession of small amounts of drugs for personal use.

17 See the motion "Abrüstung im Drogenkrieg, Entkriminalisierung des Drogenkonsums, Verringerung der Kriminalität und Förderung von Hilfsangeboten", put forward by the Green Party in the Federal Parliament.

use of any drug is extremely difficult. On the one hand, experiences from history which might be used in forecasting are not available. Times when opiates could be purchased freely are rather far behind us and do not allow to draw conclusions which are valid for today's societies. On the other hand those experiences which are made in other cultures with coca, cannabis and opiates may not be transferred to post industrial societies because drugs are applicated in other ways than they are in industrial societies (e.g. smoking of opium vs. intravenous application of heroin; chewing of coca leaves vs. sniffing of cocaine), because motivation of using drugs are different as well as cultural integration of those drugs. Finally, we may make use of experiences with epidemic distribution of heroin consumption in certain subgroups of the population, e.g. among U.S. soldiers during the Vietnam war in order to test certain assumption on exiting from opiate use, but those experiences do not help in solving problems of forecasting. Obviously, the situation of soldiers returning from Vietnam was characterized by reintegration into civil life, associated therefore with a rather radical break in those circumstances which were associated with initiation into heroin consumption. More evidence is available with respect to soft drugs, as soft drug legislation shows up with a rather high degree of international variation which ranges from legalization to complete prohibition. The differences with respect to criminalization of possession and use of marihuana and hashish may be used as a quasi experiment which enables to demonstrate the development in soft drug consumption under different legal conditions. Research on the consequences of different approaches to control of soft drugs evidently demonstrates that these differences in criminal law are not associated with different patterns of use.[18] Cannabis consumption rates in the Netherlands obviously are not higher than corresponding rates in the Federal Republic of Germany although in the Netherlands since 1976 sale and purchase of small amounts of cannabis are at least de facto decriminalized.[19] Furthermore, Dutch experiences do not lend support to the hypothesis that changes in the opportunity level with respect to cannabis may lead to changes in the field of hard drugs.[20] Besides the problems associated with attempts to forecast drug using patterns, the problem of forecasting drug related problems under the condition of legal access to drugs arises. It seems evident that the nature of drug problems in a system of legal access to drugs would differ from that observable today in the prohibition system. Health deterioration as can be

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18 National Research Council: An analysis of marihuana policy. National Academy of Sciences, Washington 1982, pp.12-13.

19 See Albrecht, H.-J.: Landesbericht Deutschland. In: Meyer, J. (Ed.): Betäubungsmittelstrafrecht in Westeuropa. Freiburg 1987, pp.63-126.

20 Rüter, C.F.: Drogenbekämpfung in den Niederlanden. Zeitschrift für die gesamte Strafrechtswissenschaft 100 (1988), pp.385-404.

observed in the heroin community today, surely could not be eliminated completely but at least reduced drastically. The drug/crime relationship as well as other conduct triggered by high-priced black market drugs could be reduced, too. On the other hand, illegal profits and the basis of organized crime probably would be affected only in a system of complete legalization. Partial legalization or decriminalization of the user were not well suited to eliminate black markets. Even legal prescription of drugs to addicts in clinics etc. should not be regarded to be an adequate tool in the attempt to eliminate black markets. Although it seems reasonable to think about splitting the market and to satisfy the unelastic demand for heroin by legal prescription while prohibition (and high prices) would be limited to newcomers to drugs, it is questionable whether two markets (with totally different levels of prices) could be separated permanently. Under ordinary economic conditions (of free markets), this does not seem to be plausible. Strict separation of markets could be maintained only if controlling legally prescribed drugs intensively. But intense controls aiming at avoiding diversion with legally prescribed drugs to the black market can be assumed to result in addicts seeking supply of drugs again in the black market. On the other hand e.g. the way of supplying legally heroin to addicts which was suitable to divert heroin probably would result in a closed treatment program because of the short term effects of heroin. In general, forecasting the development of drug problems and drug using patterns under different control systems seems to be virtually impossible. Then, the problem arises how to decide upon which drug policy should be adopted. It goes without saying that certain types of experiences should not be made at all in today's societies. So, learning from experience may not be an option advisable in the field of illegal drugs. On the other hand, we observe that the current prohibitive drug policy brings upon a heavy burden for the user, especially for the heroin user. Therefore, we may put forward the question whether any drug policy which must accept physical, psychological and social deterioration of drug users may be justified ethically. After all, it is evenly problematic to assume that others or society benefit from these consequences of prohibition. Although a stable consensus on drug policies will probably never be achieved and furthermore, a drug policy model where costs and benefits are well-balanced permanently does not seem to be a realistic expectation, the drug control approach adopted today throughout Western Europe should be rethought. Basically, when framing drug policies, it should be acknowledged that criminal law in general must be a last resort because criminal law may be assigned only marginal effects in coping with any type of social problem. At least in the drug field, this understanding of criminal law is in danger to erode and to be forgotten.

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Table 1a: Current Legislation in Western Europe: **Austria**

ordinary drug offences	punishment provided for ordinary drug offence	"privileged offences"	punishment provided for privileged drug offences	aggravated cases of drug offences	exceptional cirumstances which exclude punishment
§ 12 Narcotics Law: production, import, export or distribution of a major quantity of narcotics which endangers health or life of other persons on a large scale	maximum imprisonment 5 years and a fine up to 1 million Austrian Shilling	**§ 16 Narcotics Law:** production, import, export, acquiring, possession or providing others with illicit drugs	maximum imprisonment 6 months or a fine up to 360 day rates	**§ 16 Narcotics Law:** professional commission, membership in a criminal organisation, providing opportunities to consume narcotics to two years younger juveniles (under 18): maximum imprisonment: but only if the offender is not dependent on narcotics and does not commit the offence just for procuring himself narcotics or financing his consumption	-/-
				§ 12 Narcotics Law: business-like trade and membership in a criminal gang: 1 to 10 years of imprisonment and fine up to 2 million Austrian Shilling	1 to 15 years imprisonment and a fine up to 2 million Austrian Shilling
				membership in a criminal gang and previous conviction for the same type of offence or membership in a large criminal organization or committing a drug offence with a vast quantity: →	Committing an aggravated drug offence as a leader of a major criminal drug organisation: 10 to 20 years of imprisonment and a fine up to 2 million Austrian Shilling

Table 1b: Current Legislation in Western Europe: **Belgium**

ordinary drug offences	punishment provided for ordinary drug offence	"privileged offences"	punishment provided for privileged drug offences	aggravated cases of drug offences	exceptional cirumstances which exclude punishment
§ 1 Statute Concerning Narcotics, July 9, 1975: • possession, export, import, production, sale, procuring, offering, acquiring, consumption, facilitating consumption	• 3 months - 5 years and/or fine	all penalties can be reduced under the legal minimum if "mitigating circumstances" are found by the judge (up to the court's discretion)	fine and/or imprisonment up to 3 months	any violation of § 1, if 16-17 years olds are involved, if bodily harm or disability was caused: 5-10 years in the case of recidivism: 10-15 years if 12-15 years olds are involved, if drug trafficking is part of organized crime activities, if death results from the offence: 10 to 15 years, in the case of recidivism: 15-20 years if minors under the age of 12 are involved, if the offender had a leading role in a criminal organization: 15 to 20 years	-/-
• in the case of recidivism (within a period of 5 years)	• 3 months - 10 years and/or a fine				

Table 1c: Current Legislation in Western Europe: **Denmark**

ordinary drug offences	punishment provided for ordinary drug offence	"privileged offences"	punishment provided for privileged drug offences	aggravated cases of drug offences	exceptional cirumstances which exclude punishment
Euphoriant Drugs Act (EDA) **Section 1:** lists drugs which are totally prohibited **Section 2:** drugs which are only allowed for medical or scientific purposes for drugs under Sections 1 and 2 unauthorized import, export, sale, buying, delivery: reception production, manufactoring, and possession are punishable	fine: simple detention (minimum 7 days), maximum 6 months or imprisonment up to 2 years	-/-	-/-	aggravated cases: Section 191 of the Criminal Code: **Subsection 1:** in contravention of the legislation on euphoriant drugs, supplying drugs to a considerable number of persons or in return for a large payment, or in any othr particularly aggravating circumstances: imprisonment up to 6 years if the supply relates to a considerable quantity of a particularly harmful drug, or if the transfer of such drug has otherwise been of a particularly dangerous character: imprisonment up to 10 years **Subsection 2:** similar penalties to anyone who (illegally) imports, exports, buys, distributes, receives, produces, manufactures or possesses such drugs with intention to supply them as mentioned in subsection 1. →	-/- **Section 191A:** receiving or providing for oneself or others a part of the profits obtained in contravention of Section 191, or by storing, transporting, assisting in the disposal or in a similar manner acts to secure for another person the profit from such contravention: imprisonment up to 6 years

Table 1d: Current Legislation in Western Europe: **England**

ordinary drug offences	punishment provided for ordinary drug offence	"privileged offences"	punishment provided for privileged drug offences	aggravated cases of drug offences	exceptional cirumstances which exclude punishment
• possession: hard drugs (class A)	• maximum imprisonment: 7 years or a fine	-/-	-/-	-/-	methadone-heroin programmes
• soft drugs (class B)	• maximum imprisonment: 5 years or a fine				
• soft drugs (class c)	• maximum imprisonment: 2 years or a fine				
• manufacturing, production, trafficking, possession of narcotics with the intent of trafficking (class A)	• maximum imprisonment: life imprisonment or a fine				
• (class (B)	• maximum imprisonment: 14 years or a fine				
• (class C)	• maximum imprisonment: 5 years or a fine				
• cultivation of Cannabis	• maximum imprisonment: 14 years or a fine				
• consumption of opiates, frequenting places where opiates are consumed, possession of opium-pipes and other opium related utensils	• maximum imprisonment: 14 years or a fine				
• occupant or manager of premises permitting production, supply, offering to supply drugs, preparing opium, smoking Cannabis or opium: classes A, B:	• maximum imprisonment: 14 years or a fine	in addition to whatever other sentence is imposed, assets deemed to be the proceeds of drug trafficking may be confiscated. Burden of proof is reversed so that the offender must prove that any assets received during the last 5 years are not the proceeds of drug trafficking			
• class C:	• maximum imprisonment: 5 years or a fine				

Table 1e: Current Legislation in Western Europe: **France**

ordinary drug offences	punishment provided for ordinary drug offence	"privileged offences"	punishment provided for privileged drug offences	aggravated cases of drug offences	exceptional circumstances which exclude punishment
Art.627 Code de la Santé Publique: • transport, offering, sale, acquiring, cultivation, facilitating consumption of others. • In the case of recidivism: • import: export, production, fabrication • In the case of recidivism: • selling or offering illegal drugs to someone for personal use	• 2-10 years of imprisonment and/or a fine of 5.000 to 50.000.000 Francs • 4-20 years • 10-20 years of imprisonment and/or the same fine as above • 20-40 years of imprisonment and/or a fine of 5.000 to 500.000 Francs • 1-5 years imprisonment and/or a fine of 5000 to 500.000 Francs + (customs): - fiscal fine - confiscation of the product + possible accessory measures - suspension of civil rights - suspension of passport (up to 3 years) - prohibition to practice the profession which favoured the incriminated act - permanent interdiction of French territory (to foreigners) - closing of establishment + (law of 1987): - confiscation of all properties owned by the convicted person	Art.628 Code de la Santé Publique: • illegal use of substances and plants classified as illegal drugs • in case of recidivism	• 2 months - 1 year and/or a fine • 4 months - 2 years + fiscal fines + confiscation of the product + possible accessory measures - suspension of civil rights - prohibition to stay in a certain place - temporary interdiction of French territory (to foreigners) + (law of 1987) administrative closing of the establishment which facilitated the drug use	facilitating the consumption by juveniles under the age of 21: 5-10 years imprisonment **law of 1987:** selling or offering illegal drugs for personal use to minors, or in educational or administrative institutions: 2 to 10 years of imprisonment	**law of 1987:** + offenders who, having conspired in the trafficking of illegal drugs, prevent the accomplishment of the offence and identify other persons involved + sentence of the convicted dealer reduced to half, if he helps to identify other guilty parts

Table 1f: Current Legislation in Western Europe: **Federal Republic of Germany**

ordinary drug offences	punishment provided for ordinary drug offence	"privileged offences"	punishment provided for privileged drug offences	aggravated cases of drug offences	exceptional cirumstances which exclude punishment
§ 29 I Law on Narcotics: cultivation, production, possession, purchase, selling, procuring, import, export, acquiring, dealing, trafficking in general, financing drug trafficking, transfer of drugs, advertising, illegal supply by medical staff or pharmacists, illegal prescription by physicians, public announcement or providing the opportunity for purchasing or consuming drugs, fraudulous obtaining prescription of drugs	1 month to 4 years of imprisonment or a fine (5-360 day fine units)	-/-	-/-	production, trafficking, import, export, dealing etc. if committed commercially; if several persons' health was endangered by certain drug offences; if drugs are given to children or juveniles; if trafficking or possession concern non-negligable quantities of drugs; 1-15 years imprisonment. Cultivation, production and trafficking of drugs by any members of a criminal organization; commercial-like selling of drugs to juveniles; negligently causing the death of somebody by supplying drugs; import of drugs involving considerable amounts: 2-15 years imprisonment	-/-

Table 1g: Current Legislation in Western Europe: **Italy**

ordinary drug offences	punishment provided for ordinary drug offence	"privileged offences"	punishment provided for privileged drug offences	aggravated cases of drug offences	exceptional circumstances which exclude punishment
Art.71 Narcotics Law: • production, offering, selling, distribution, purchase, procuring, transport, import, export, transit, possession, keeping: in the case of hard drugs (list I or III) • in the case of soft drugs (list II or IV) • offering opportunities to consume drugs	• 4-15 years of imprisonment and fine 6.000.000 - 200.000.00 Lires • 2-6 years of imprisonment and fine 4.000.000 - 100.000.000 Lires • 3-10 years of imprisonment	• possession, purchase, selling etc. (see Art.71) of hard drugs, if minor quantities are involved only for personal use (§ 72) • in the case of minor quantities of soft drugs (§ 72)	• 2-6 years of imprisonment and fine of 200 mille - 16 million Lires • 1-4 years of imprisonment and fine of 200 mille - 12 million Lires	• delivering, selling narcotics to juveniles; if a criminal organization is involved: if drug offenders are armed: penalties are increased from one third to half of the regular punishment • if large quantities are involved: penalties are increased from half up to two third of the regular punishment (maximum imprisonment 25 years) • in the case of organized drug trafficking: minimum imprisonment: 15 years and fine of 100 - 400 million Lires • if the acts described in Art.71 illegally are committed by an authorized person: minimum penalty 4 years imprisonment, maximum 10 years imprisonment and fine of 20 million - 200 million Lires • if the criminal organization has more than 10 members or if members of the organization are armed: minimum imprisonment: 20 years	• acquirement and distribution of narcotics for personal use if minor quantities are involved (minor quantities correspond to those doses, which addicts consume per day) (Art.80)*

Table 1h: Current Legislation in Western Europe: **The Netherlands**

ordinary drug offences	punishment provided for ordinary drug offence	"privileged offences"	punishment provided for privileged drug offences	aggravated cases of drug offences	exceptional cirumstances which exclude punishment
• **Art.11 Opiumwet:** "soft drugs": manufacturing, selling, procuring, transport, production, advertisement, possession, keeping • import/export	• maximum imprisonment: 2 years and/or a fine up to 100.000 Guilders	• if quantities less then 31 grams are involved • possession, import, export: if minor quantities for personal use only are involved • if the crime is committed unintentionally	• imprisonment up to 1 month or a fine up to 5.000 Guilders • imprisonment up to 1 year or a fine up to 10.000 Guilders • imprisonment up to 1 month or a fine up to 5.000 Guilders	if the value of the drugs or the profits of the illegal "drug acts" exceeds 1/4 of the legal maximum of the fine, a fine of a higher category may be imposed. For example: fines up to 100.000 Guilders may be replaced by fines up to 1.000.000 Guilders (Art.12 Opiumwet)	Art.10A not applicable when the drugs involved are of small quantity, destinated for personal use only
• **Art.10 Opiumwet:** "hard drugs": keeping, possession, forging prescirption allowing the procurement of narcotics, advertisement • manufacturing, selling, transport, production, delivering, preparing • import/export	• maximum imprisonment: 4 years and/or a fine up to 25.000 Guilders • maximum imprisonment: 4 years and/or a fine up to 50.000 Guilders • maximum imprisonment: 8 years and/or a fine up to 100.000 Guilders • 12 years and/or a fine up to 100.000 Guilders				
• **Art.10A Opiumwet:** organising or promoting the import/export, manufacturing, production, preparing, selling, delivering or transport of "hard drugs"	• imprisonment up to 6 years and/or a fine				
• **Art.13 Sect.3 Opiumwet:** organising, promoting, participating or trying to import or export within or outside the Dutch territory and the author does not stay in Dutch territory when doing it	• imprisonment up to 12 years and/or a fine				

Table 1i: Current Legislation in Western Europe: **Norway**

ordinary drug offences	punishment provided for ordinary drug offence	"privileged offences"	punishment provided for privileged drug offences	aggravated cases of drug offences	exceptional cirumstances which exclude punishment
Art.162A Penal Code:		-/-	-/-	under specially aggravated circumstances, the punishment is the same when the punishable offence relates to marketing drugs not regarded as narcotics; maximum imprisonment up to 21 years	-/-
• unlawfully processes, imports, exports, acquires, stores, forwards or transfers substances which are... regarded as narcotic drugs	• imprisonment up to 2 years and/or a fine				
• serious drugs offences, attached to the type of substance involved, the quantity and the nature of the offence	• imprisonment up to 10 years and/or a fine				
• the offence involved a very considerable quantity	• 3 to 15 years imprisonment and/or a fine			attempted infringement is punishable as an accomplished offence.	
• committing a drug offence by negligence	• up to 2 years imprisonment and/or a fine				
Art.43B relating to the medical goods and poisons Act:					
• any person who intentionally or by negligence violates this Act or regulations, prohibitions or orders issued by virtue of this Act is punishable by imprisonm. up to 3 months and/or a fine	• imprisonment up to 3 months and/or a fine				
• if the punishable offence relates to manufacture, import, export, transit, delivery, ... or possession of narcotics, (Part VI of the Act) the offender is punishable by	• imprisonment up to 2 years or a fine. Both punishments can be inflicted when the offfence is not punishable under Art.162 Penal Code				
• confiscation of goods or the value of goods which are in violation of the irrespective of criminal proceedings having been instituted on the possibility of instituting such proceedings against anybody					

Table 1k: Current Legislation in Western Europe: **Spain**

ordinary drug offences	punishment provided for ordinary drug offence	aggravated cases of drug offences	exceptional cirumstances which exclude punishment
Art.344 Penal Code Those who execute acts of cultivation, elaboration or trafficking or in any other way promote, favour or facilitate the illegal consumption of toxic drugs, narcotics or psychotropic substances; and those who possess those substances with those aims: • in the case of narcotics which bring upon serious harm to health • in all other cases	• 28 months minimum up to 8 years imprisonment and a fine from 1 million to 100 million Pesetas • 4 months minimum up to 50 months imprisonment and a fine from 500.000 to 50 million Pesetas	**Art.344bis a): "first degree aggravations"** • distribution of drugs to minors or less than 18 years old or psychically handicapped or introduction of diffusion in education centers, military establishments or penitentiary centers • commission of the act in establishments open to public by the responsible or employees (possibility of closure of the premises, suspension or prohibition of the activities) • amount of notorious importance • distribution among persons subjected to processes of detoxification or rehabilitation • adulteration, mixture or manipulation of drugs, increasing the possible damage to health • appartenance to an organization, even if transitory, dedicated to the diffusion of these substances, even if only occasionally • quality of the offender or authority, public servant, social worker, educator (penalty of disqualifications added) **Penalty:** • soft drugs: 4 years and 2 months, minimum to 10 years and a fine of 500.000 till 75 million • hard drugs: 8 years to 14 years and 8 months and fine **Art.344bis b): "second degree aggravations":** • when the conducts are extremely grave • when the authors are chiefs, administrators or persons charged of the organizations (possibility of closure of the premises, suspension or prohibition of the activities): **Penalty:** • soft drugs: 10 years to 17 years and 4 months and a fine from 500.000 till 112.5 million Pesetas • hard drugs: 14 years, 8 months to 23 years, 4 months and a fine from 1 million to 225 million Pesetas **Art.344bis f):** recidivism provision applies to foreign sentences, too **Art.546bis g):** receiving or acquiring or making use of the effects of a drug offence for oneself or a third one: punishment: 6 months (and one day) to 6 years imprisonment and a fine from 1 million to 100 million Pesetas • In case of aggravating circumstances like: 1) habitually 2) appartenance to an organization 3) cases of especial gravity, the penalty is 6 years, 1 to 12 years and a fine from 1 million to 150 million Pesetas, and accessory sanctions (like prohibition to exert ones profession)	-/-

Table 1l: Current Legislation in Western Europe: **Sweden**

ordinary drug offences	punishment provided for ordinary drug offence	"privileged offences"	punishment provided for privileged drug offences	aggravated cases of drug offences	exceptional cirumstances which exclude punishment
§ 1 Narcotics Law, § 1 Law on Penalties for the Smuggling of Goods: transferring, manufacturing, acquiring for the purpose of transfer, procuring, processing packages, transport, keeping of narcotics which are not intended for personal use, offering narcotics for sale, keeping or conveying payment for narcotics, mediating contacts between dealer and urchaser, possession of narcotics	maximum imprisonment: 3 years	if the offence pursuant to § 1 is judged to be a petty offence	fine or imprisonment up to 6 months	in "serious cases", especially if: large quantities of narcotics are involved, if the offence has constituted a step in professional activities, if the offence was particularly dangerous or of an unscrupulous nature: 2-10 years, import, export in serious cases: 2-10 years of imprisonment	age (very young or very old); seriously damaged while committing an offence, serious disease

Table 1m: Current Legislation in Western Europe: **Switzerland**

ordinary drug offences	punishment provided for ordinary drug offence	"privileged offences"	punishment provided for privileged drug offences	aggravated cases of drug offences	exceptional cirumstances which exclude punishment
§ 19 Narcotics Law: cultivation, production, manufacturing, keeping, distributing, mediating, acquiring, prescribing, offering, transport, import, export, possession, sale, financing, mediating financial means for drug trafficking, public instigation to consume narcotics or public announcement of places where narcotics can be acquired or consumed	3 days-3 years of imprisonment or a fine	**Art.19a Narcotics Law:** consuming narcotics or any offence according to § 19 Narcotics Law if it is aimed to secure consumption needs of the offender	1 day-3 months or a fine	in "aggravated cases", especially if a quantity of narcotics is concerned which may endanger the health of "many persons", if the offender is a member of a criminal organization, if the offence was part of business-like drug trafficking where large quantities of narcotics were traded or large profits resulted from drug trafficking: 1-20 years of imprisonment	**Art.19b Narcotics Law:** any preparatory acts which would enable the offender to consume narcotics himself (including sale of narcotis) if only minor quantities were involved Methadone programmes

Table 2:

Country	Related offences	Punishment provided for related offences	particulars concerning procedural aspects of drug offences - stop and search procedures	particulars concerning procedural aspects of drug offences - dismissal of drug cases, dropping charges
Austria	• public instigation or public approval of drug use (§ 15) • conspiracy or gang formation and purchase or possession of a major quantity of narcotics with the intent to distribute (§ 14,a)	• imprisonment up to 6 months or a fine of 360 day rates • imprisonment up to 3 years		the public prosecutor has to defer the charge for two years if it involves possession or acquisition of a minor quantity of narcotics for own use; he may defer the charge for two years if it involves manufacture, import, export, offering or possessing on a minor quantity of narcotics conditions for it are: information and opinions from the health authorities and voluntary consent to undergo therapy, supervision, and follow-up treatment, if considered necessary, feasible and reasonable
Belgium			Art.7, § 3 Narcotics Law: judiciary police may search any premises which are used to produce, manufacture, keep drugs or those premises where people come together to consume drugs	the public prosecutor's office may dismiss any cases (principle of opportunity): An offender will not be punished if he, before any prosecution, cooperates with the authorities and cooperation results in the detection of other drug cases or the arrest of drug offenders, and if the punishment provided by law for the actual drug offence does not exceed 5 years: in serious drug cases punishment may be reduced to 3 months-2 years In case of "cooperation" once prosecution has been started: reduction of punishment maximum from 5 years to 3 months; no reduction if normal maximum exceeds 5 years

Denmark	• illegal drugs or the proceeds from illegal sale or such drugs may be seized and confiscated • wire-tapping, roombugging etc. may be used in cases pursuant to sections 191 and 191a • police officials only may be used as undercoveragents in drug cases, purusant to judicial review (sections 754a and 754b of the Code of Procedure which state detailed conditions)	
England	a person may be stopped and searched by the police without judicial permit if there is enough evidence that the suspect has drugs on him; premises may be searched after obtaining a judicial permit which may be granted on the basis of information on oath that there is a reasonable ground for suspecting a drug offence	the public prosecutor's office may dismiss any drug case (principle of opportunity)

France	• public instigation to drug use, glorification of drug use Art.630 Code de Santé Publique • Art.627 Code de Santé Publique: obtaining illegal drugs by the way of false medical prescriptions or prescriptions of complaisance • (Law of 1987) to assist or try to assist in the covering of the illegal origin of the resources received for drug-traffics to help make a financial placement of these resources; to dissimulate or convert the product of this offence	• 1-5 years imprisonment and/or a fine of 5.000 to 500.000 Francs • 2-5 years of imprisonment and/or a fine • 2-10 years of imprisonment and/or a fine of 5.000 to 500.000 Frances (tentative and conspiracy to commit these offences are punished as the offence itself)	search of premises during the night in the case of Art.627 Narcotics Law. Police custody can be extended up to 4 days by order of the public prosector or the court (Art.627-1). (Law of 1987) the custom officers can search ships beyond French territorial waters; and proceed (with court authorisation) to body searches	the public prosecutor must dismiss the case if a first offender undergoes treatment (Art.628-1) the public prosecutor has up to 10 years to start any action (normally up to 5 years). The conflicted person can begin to serve a drug sentence up to 20 years after it was handed down (normally 10 years) Law of 1987 The closing of an establishment where drug offences have been committed may be an administrative measure (up to 3 months or up to 1 year according to the authority) The mistrusting judges may put confiscatory measures on the properties of the offender
FRG	trafficking in look-alikes	1 month to 4 years imprisonment or a fine	a person suspected having committed a crime according to § I, 1, 4, 10, III, § 30 I Narcotics Law may be sent to pre-trial detention, whereby the order of a pre-trial detention is justified if it can be assumed that the suspect will recidivate (§ 112 a I No.2 Procedural Law); search of premises during the night is allowed in serious cases (§ 104 II Procedural Law); telephone wires may be tapped in serious drug cases	§ 29 V Narcotics Law, if the drug offence involves only minor quantities and if the drugs are for personal use only, charges may be dropped. § 31 Narcotics Law: charges may be dropped if the suspect cooperates with the judicial or police authorities and if cooperation results in the clearing of other drug cases. § 37 Narcotics Law: a drug case can be dismissed if there is reason to assume that the sentence will not exceed 2 years of imprisonment **and** if the suspect agrees to a certain period of treatment and if offender is not likely to recidivate
Italy	public advertisement	• 1 month - 3 years	in drug cases suspects are to be detained prior to the trial	

Netherlands	fostering the selling, delivering or distribution of soft and hard drugs by public announcement in an offence, except in the case of medical or scientific purposes (Art.3b Opiumwet)	imprisonment up to 6 months or fine up to 25.000 Guilders (Art.10 Opiumwet)	Art.9 Opiumwet: police have access at any time to vehicles and premises, where it is known that drugs are kept. Appartments may be searched under these circumstances if it is ordered by a police officer all investigation officers have the competence when serious suspicions exist to search the body (cavities included) and clothes of all suspects of a drug crime the use of under-cover agents, anonymous witnesses, although not regulated by law, has been adopted by the Supreme Court	the public prosecutor's office may dismiss any drug case (principle of opportunity). In the guidelines for the prosecution and investigation authorities (published in the Staatscourant 1983, 137), are summed up which kind of drug offences should get some priority. Crimes with a low priority are "de facto" legalized. Low priority is given to crimes, relating to the consumption of drugs, dealing under special circumstances (so-called house-dealers) and crimes relating to soft drugs
Norway	accessory to a drug offence	punishment as otherwise provided		the public prosecutor and the judge have the competence not to prosecute, resp. not to handle each case, but to transfer the case to the Child Welfare Committee or to waive - conditionally or unconditionally - the prosecution. In cases of drugs offences these competences are used very rarely.
Spain	public advertisement	1 month - 3 years imprisonment	• Art.344bis e: forfeiture and seizure of the vehicles, ships, planes and any goods, or effects which have served for the commission of crimes and also the gains obtained, no matter the transformations that can be experimented by them • in drug cases suspects are to be detained prior to the trial	

Sweden	illegal import of syringes and needles illegal trade in syringes or needles	imprisonment up to 2 years imprisonment up to 1 year or a fine		any drug case can be dismissed (principle of opportunity)
Switzerland			Section 23, § 2, introduced March 20, 1975 permits using undercover-agents to accept drugs	Art.19a IV Narcotics Law: charges can be dropped if the offender undergoes treatment, but only in drug cases defined by Art.19a Narcotics Law

Table 3a:

enforced treatment	special prisons for drug addicts only	police recorded drug offences total / per 100.000		suspects registered by the police total / per 100.000		convicted drug offenders total / per 100.000		death resulting from drug abuse total / per 100.000	
Austria									
if there is enough reason to suspect that somebody is abusing drugs, he may be subjected to a medical examination and if he is assessed to be addicted to drugs, treatment can be carried through (§§ 8, 9, 10 Narcotics Law)	special imprisonment "Wien Favoriten"	1986: 68	1986: 5157	1986: 4347	1986 58	1986: 1238	1986: 16	1986: 46	1986: 0.6
Belgium	-/-	1986: 4324	1986: 44	-/-		-/-	-/-	1984: 33 (including medicaments)	1984: 0.3
Denmark									
not specifically for drug offenders, but may be used for persons who are: 1) psychotic and 2a) at present a danger for the lives or health of themselves or others, or 2b) if the prospects for cure will be significantly reduced, if they are not treated in a psychiatric hospital. The provisions are to be found in the 1938 Act on the mentally ill	no, but special parts for drug offenders in one prison	absolute 1982: Criminal Code: 1854 absolute 1987: CC: 1141 Divided by 15 years 1982: 219 1987: 263 Euphoriants Drugs Act: 17101 EDA: 9953		absolute 1987: CC: 1487 EDA: 9696 divided by >>15 years: 1987: 265		1982: CC: 1374 EDA: 9368 divided by >>15 years: 222		1982: 134 1987: 140	1982: 3.3 1987: 3.3

Table 3b:

enforced treatment	special prisons for drug addicts only	police recorded drug offences total / per 100.000		suspects registered by the police total / per 100.000		convicted drug offenders total / per 100.000		death resulting from drug abuse total / per 100.000	
England		1986: 26442		1986: 21318		1986: 1895		ca. 200 per year (in the eighties)	0.6
France Art.628 Narcotics Law: Drug users may be offered to follow a therapeutic treatment by the public prosecutor (who must stop then the prosecution), or be subjected to treatment by order of the court		1986: 29750	54	1986: 29750	54	1986: 15276	1986: 28	668 (including medicaments)	1.2
FRG compulsory treatment as a general penal measure may be ordered - if a serious crime has been committed unter the influence of alcohol or other narcotic substances and - if future serious crimes are likely to be committed under influence	no	1987: 74894	122.5	1987: 61388	100.4	1987: 17130	1987: 32.5	1987: 442	1987: 0.72

Table 3c:

enforced treatment	special prisons for drug addicts only	police recorded drug offences total / per 100.000	suspects registered by the police total / per 100.000	convicted drug offenders total / per 100.000	death resulting from drug abuse total / per 100.000
Italy	yes	1987: 21590 36.5		1985: 2782 1985: 4.8	1987: 505 1987: 0.8
Netherlands compulsory treatment as a penalty or a penal measure does not exist. As a quasi-compulsory measure treatment is possible as a special condition (e.g. conditional sentence, conditional leave, conditional waiving of the prosecution), also addicts under special circumstances can be transfered from a prison to a treatment center	no special prisons for drug addicts only. In some remand centres and prisons exist special departments for drug addicts and special drug free departments	1986: 5395 45 1987: 5399		1987: 1778 (hard drugs) 316 (soft drugs) total 2094 1987: 16.4	1986: 64 0.45
Norway	no	1986: 4583 109	investigated 1986: 3249 77.8 charged 1986: 1975 47.5	1986: 2035 49	1987: 60 1987: 1.4
Spain compulsory treatment as a penal sanction does not exist. Possible is however treatment as a condition to the suspended sentence, but only if the convicted consents (93 bis CP)	no	1986: 13773 36	1986: 19203 51	80.000 are convicted in 1986 for drug-relating crimes of which 70 % drug consumer and 15 % heroin-addicts 8 % of the prison population in Spain are drug consumers	1987 200 1987 0.59

Table 3d:

enforced treatment	special prisons for drug addicts only	police recorded drug offences total / per 100.000	suspects registered by the police total / per 100.000	convicted drug offenders total / per 100.000	death resulting from drug abuse total / per 100.000
Sweden					
statute concerning treatment of alcoholics and drug users 81981), § 2: a drug addict may be institutionalized and treated without consent if he may endanger his health (§ 3)	-/-	1986: 37568 450	1986: 35042 419	1986: 5685 68	1986: 65 0.77
Switzerland					
Art.19a V Narcotics Law: the court may order institutionalization and treatment if somebody is suspected to be addicted to drugs	no	1986: 15815 243	1986: 15815 243	1984: 160	1987: 197 3.0

Table 4a: Research results concerning rates of prevalence and incidence of narcotics use in different European countries

	Cross national comparison of anti-anxiety/sedative drug use in national samples (18 years and older) Balker et al.		National research	Estimated number of addicts
	past year prevalence (% of total sample)	regular daily use during 12 months or more (% of users)		
Austria	-	-	**Springer/Uhl/Maritsch 1987:** region: Austria, population studied (repr. sample of all Austrian 15-40 years old): 14.6% have experienced marihuana at least once, among those 8.4% have tried only once or twice, while 2.3% have smoked at least three times and do not wish to smoke it again, 3.9% have smoked at least three times and have got a positive attitude towards it **Eisenbach-Stangl 1983:** region: Vienna, population studied (juveniles, 15-17 years old): ever used illegal drugs: 11 %; ever used hashish: 3.7%; ever used opiates/heroin: 1%; ever used tranquillizers/cerebral stimulants (amphetamines): 3,8% **Kryspin-Exner 1981:** region: Tyrol, population studied (students, 14-21 years old): ever used illegal drugs: 5% **Knollmayer/Speiser 1971:** region: Austria, population studied (students, 15-17 years old): ever used illegal drugs: 3% **Kleiter et al. 1974:** region: Salzburg, population studied (students, 16-17 years old): ever used illegal drugs: apprentices: 20%; lower grade secondary school students: 12%; frequent use: apprentices: 3%; lower grade secondary school students: 1%	-
Belgium	17.6%	33.2%	**Junger-Tas 1972:** region: Bruxelles, population studied (students, 16-21 years old): ever used illegal drugs: 10.6%; ever used drugs more than 10 x: 0.9% **1980:** sample of 1964 people 17-23 years old: ca. 7% have used Cannabis at least once; 3.2% other illegal drugs (Cinus op: 20 ans à 20 ans de l'an 2000, crédit communal de Belgique 1980)	-
Denmark	11.9%	10.9%	**E. Lyhe and S. Sabrue (1986):** sample of students (including some over 19) in Randers: Cannabis/ever tried: 14%; sniffing: 3%; Benzodiazepines: 10%; "speed": 1%; Morphine etc.: 0.5%; hallucinogenes: 0.4%	-

Table 4b: Research results concerning rates of prevalence and incidence of narcotics use in different European countries

England	11.2%	27.4%	**Linken 1968:** region: London, population studied (students): habitual Cannabis users: 4% **Edwards et al. 1976:** region: England, population studied (students): ever used Cannabis: 32%	50.000 (ca. 0.1%)
France	15.9%	31.5%	**Davidson/Choquet 1980:** region: Paris, Bretagne, Bouches du Rhône, population studied (students): ever used illegal drugs: males: 7.8%; females: 6.4%	
FRG	11%	14.1%	**Hamburg 1971:** population studied (students, 14-19 years old): ever used illegal drugs: 23%; frequent users: 13% **Wetz 1972:** region: Köln 1971, population studied (students, 14-19 years old): ever used illegal drugs: 33% **Täschner/Wanke 1972:** region: Schleswig-Holstein, population studied (students): ever used illegal drugs: 8% **Villmow/Stephan 1983:** 14-25 years old males; drug use in the year preceding interview (1973), region 1: middle-sized city: 9%; region 2: (1976): state of Baden-Württemberg: 8,6% **Reuband 1977:** region: Hamburg, population studied (students, 14-19 years old): ever used illegal drugs: 13,5% **Ministry of Health etc. 1983:** region: FRG, population studied (juveniles, 12-24 years old): ever used illegal drugs: 9,7%; currently using drugs: 4%; daily users: 0,4%; frequent injections or consumption of opiates: 0,1% **Sacks/Harten 1988:** region: Schleswig-Holstein, population studied (12-24 years old); ever used illegal drugs: 10%; ever used cannabis: 9%; used illegal drugs during last 6 months: 4,7%; used illegal drugs more than 50 times: 1% **Reuband 1988:** region: FRG, population studied (14-25 years old); attitudes towards drug use: (if somebody would offer me drugs, I would probably try it) hashish 1976: 36%; 1982: 23%; 1986: 19%; heroin 1976: 3%; 1982: 1%; 1986: 1%; cocaine 1976: 15%; 1982: 7%; 1986: 5%	50.000-60.000 ca. 0,1% of the population

Table 4c: Research results concerning rates of prevalence and incidence of narcotics use in different European countries

Italy	11.5%	14.2%	**UNSDRI 1976:** region: Milan (1972): population studied: students (university): ever used drugs: 16.1%; currently using drugs: 4%; ever used opiates: 0.4% **Gius/Nazor 1982:** region: Trento, population studied (students): occasional users: 5%; habitual drug users: 0.9% **Avico et al. 1983:** region: Italy, population studied (recruits): actual opiate users: 1980: 1.6%; 1982: 2.1%	
Netherlands	7.4%	22.5%	**Buikhuisen/Timmerman 1974:** population studied (students): ever used Cannabis: 21% **van der Wal 1978:** population studied: juveniles, 12-18 years old, region: Utrecht; ever used Cannabis: 3%; current Cannabis users: 1% **G. Sylbing 1984:** the use of drugs, alcohol and tobacco; sample of 1306 youngsters from 15-24 years. Ever used Cannabis or Marihuana: yes, occasionally: 9%; often: 3%; **van der Wal 1985:** population studied: 24989 juveniles 10-18 years; ever used Cannabis: 4,3%; current Cannabis users: 2% **Life time prevalence of Cannabis-use (= ever used):** 15-16 years / 17-18 years / 15-24 years research 1976: 3% / 10% / not studied research 1983: 2% / 6% / 12% research 1987: - / - / 6,7%; **Frequency of the Cannabis use of the current users in 1983:** frequency / n / % of current users / % of the total (1306) daily: 7 / 10 / 0.5 several times/week: 10 / 14 / 0.8 once a week: 4 / 6 / 0.3 several times/month: 12 / 17 / 0.9 once a month: 6 / 8 / 0.5 once a month: 32 / 45 / 2.4 total: 71 / 100 / 5.4	17.000-20.000

Table 4d: Research results concerning rates of prevalence and incidence of narcotics use in different European countries

Norway			**National Institute for Alcohol Research 1988:** 1980 1981 1982 1983 1984 1985 1986 1987 1988 ever used cannabis 19.5% 22.5% 21.5% 19.8% 21.8% 20.0% 16.3% 17.7% 16.7% ever used LSD 0.6% 1.2% 1.4% 0.9% 0.6% 0.9% 0.6% 0.7% 0.5% ever used opiates 1.7% 1.2% 1.3% 1.6% 1.4% 1.4% 0.6% 1.5% 0.9% ever injected drugs 0.7% 0.8% 1.1% 1.9% 0.7% 1.4% 0.6% 0.8% 0.7%	
Spain	14.2%	26.5%	**Plan Nacional; Ministerio del Interior - de Gral de la Policia; J. Navarro et al. 1985:** El consumo de drogas en España, Ministerio de trabajo y seguridad social y Cruz Roja: 1984: Cannabis: ever used: 21.3 = 6.403.000 habitually used: 6.1 = 1.824.000 amphetamines: ever used: 11.3 = 3.386.000 habitually used: 1.9 = 571.000 cocaine: ever used: 3.7 = 1.112.000 habitually used: 0.3 = 83.000 heroin: ever used: 1.8 = 542.000 habitually used: 0.4 = 125.000 hallucinogenes: ever used: 2.6 = 1.311.000 habitually used: 0.1 = 22.000 **Grupo de Orientación 1980:** region: Madrid, population studied (students, 12-16 years old): ever used illegal drugs: 9.9%; ever used Cannabis: 5.8%; habitual Cannabis users: 0.6%; ever used LSD: 0.4%; ever injected drugs: 0.1%; habitually injecting drugs: 0.05%	80.000-125.000 (= ca. 0.2-0.3% of the population); Cannabis consumer: 1.2-1.8 million (1985) (= 3.16-4.74%)
Sweden	8.6%	6.2	**Pub 1965-1966:** region: Sweden, population studied (representative: population sample): ever used illegal drugs: 2% **Board of Education 1971:** region: Sweden, population studied (students, 15-16 years old): ever used illegal drugs: 15% **National Research Institute 1971:** region: Sweden, population studied (recruits): ever used illegal drugs: 15.6% **Board of Education 1981:** region: Sweden, population studied (students, 15-16 years old): ever used illegal drugs: 9% (**1986**: 5%) **National Research Institute 1981:** region: Sweden, population studied (recruits): ever used illegal drugs: 17.2% (**1986**: 7%)	10.000-14.000 (= ca. 0.15% of the population)

Table 4e: Research results concerning rates of prevalence and incidence of narcotics use in different European countries

Switzerland	14.6%	7.1%	**Binder 1971:** region: Zürich, population studied (adolescents, 19-20 years old): ever used Cannabis: males: 23%; females: 14%; ever used opiates: males: 3.1%; females: 1.6%; **Hornung 1977/78:** region: Zürich, population studied (juveniles, adolescents, 15-24 years old): ever used Cannabis: males: 28.6%; females: 18.1%; ever used opiates: males: 3.8%; females: 2.1% **Müller 1981:** region Switzerland, population studied (juveniles, adolescents, 15-24 years old): ever used Cannabis: males: 24.9%; females: 24.9%; ever used opiates: males: 3.0%; females: 4.0% **Binder 1978:** region: Zurich population studied (juveniles, 19-20 years old): ever used Cannabis: males: 19.8%; females: 17.2%; ever used opiates: males: 3.3%; females: 1.9%; ever used opiaes 10 x or more: males: 1.0%; females: 0.3% **Müller 1988:** region: Switzerland (15-24 years old) 1987: ever used Cannabis: males:22%; females:19%; region Waadt, population studied: students (15-16 years old): ever used Cannabis:8,4%; LSD:0,9%; opiates:0,4%; cocaine: 1,3%; respondents knowing where to get Cannabis: 37%; heroin/cocaine:22%	0.2% of the population

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Table 5: Sentencing outcomes in drug cases (adults only)

					length of prison sentence			
country	**year**	**fines**	**imprison-ment**	**suspended of row 2**	**≤ 12 months**	**1 - 5 years**	**5 years**	**total (N)**
Austria[1]	1981 (%)	38.5	59.2	45.1	77.8	22.0	0.2	1666
	1986 (%)	40.6	56.5	56.3	75.4	23.4	1.2	1204
Belgium	1983 (N)	224	752	542	≤ 2 years: 172	2 years: 172		976
Denmark	CC+EDA 1982 (N)	500	fine+imprisonm. (uncond.) 496; uncond.deten-tion 72	cond.imprisonm. +cond.detention 186; conditional sentence no penality fixed 40	sentences total excl. fines 764; unconditional 274	1-2 years uncond. 84; 2-5 years un-cond. 102	5-10 years uncond. 54	
England	1986 (N)	informal warning no action 9225	compounded 4801	cautioned 1383	2805	1714	282	16900
	(%)	54.6	28.4	28.8	58.4	35.7	5.9	100
France	(N)	918[3]	2630[4]	2928[5]	1821	693	116	6476
	(%)	14,2	40,6		69,3	26,3	1,8	
FRG	1986 (N)	6318	7150	4244	4046	2943	159	13468
	(%)	46,9	53,1	59,4	56,6	41,23	2,2	
Italy	1985 (N)					2553	221	2774
Netherlands	1987 (N)	440	1449	205	ca.950	1-3 years ca.350	3 years ca.140	2094
Norway[7]	1986 (N)	766	1250	619	<12 months 1078[6]	1-3 years 109	over 3 years 64	1251
	(%)	38	62	49,5	86,2	8,7	5,1	

country	year	fines	imprison-ment	suspended of row 2	length of prison sentence ≤ 12 months	1 - 5 years	5 years	total (N)
Sweden	1986[2] (%)	37,0	32,0	other sanctions 3,8	79,5	19,2	other types of imprisonment or care 1,1	2043 sentenced to imprisonment
Switzerland	1984	12,9	86,6	60,8	92,4 of row 2 80,0 of all sentences	not available	not available	3470

Legend:
1 adults ≥ 21 years only
2 adults ≥ 15 years only
3 only unconditional fines
4 unsuspended prison sentences only
5 other sanctions than fine and immediate imprisonment (e.g. suspended prison sentences, community service etc.)
6 suspended sentence 12; transfer to Child Welfare Commitee 7
7 Penal code and act to medical goods and poisons

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Conclusions

Legal and illegal drugs have several basic siminlarities. The distinctions drawn between them today are a result of various historical conditions. The distinctions are not based on the innate character of the various substances. Alcohol, tabacco, some medicins, and many other drugs may create serious health problems in our societies, and it is important to control their use.

The results of the system of prohibition and of severe penal measures against the totally forbidden substances, are poor compared to the costs. The "control costs" are mounting and threaten internal peace and the preservation of central values of human rights in many countries. Examples of "control costs" are: consolidation of organized crime, the undermining of the principles of legality and due process and the diversion of scarce law enforcement resources. The huge amount of money circulating in the drug trade threatens international economic and political stability.

In view of this situation, the participants of the seminar are of the opinion that the international community must commence now the work of analysing the possiblities for bringing the total prohibition within this field to an end and create instead control systems similar to those used vis a vis other potentially harmful substances. Emphasis ought instead to be put on prevention through general health education and the encouraging of a sound life-style.

As an interim-step the group would suggest a considerable reduction in the punishment level. The use of capital punishment for drug dealing ought immediately to be brought to a stop. Personal use and the possession for that use should not be punished.

International treaties should promote the creation of alternative forms of control of those which are applied today with such limited success and with such severe costs.

Recommendations

1. Drugs are to be considered those substances that produce dependence to those who consume them. Because of the complex nature of their effects it is necessary to distinguish between those who produce physical and psychological dependence or only the latter.

2. The policy of distinguishing between legal and illegal drugs should be dropped as soon as possible. Such a distinction is not justified on the grounds of their addictiv capacity nor by the danger they present to health. Assertions that only certain drugs have become deeply rooted in our society no longer hold weight since the internationalisation of drug policies which was called for by all.

3. The repressive policy which has been basically followed up until now has clearly demonstrated its failure. The emphasis should be on preventive measures and offers of assistance which would affect the demand and not the supply, which is what has been happening, with the policy of repression.

4. It is obvious that the drug problem today is not only mainly a problem of the harm caused by consumption but rather the emergence of powerful drug trafficker organizations which affect, or are going to affect the institutional organization of many different States and even the whole of the democratic world.

5. Depenalisation would drastically reduce the benefits of the drug traffickers and thus deprive them of their economic and institutional power. The preventive measures could be more efficient in the long run if they were not weighed down by a background of repression.

6. As in any case we are dealing with substances that are similar to those included in other offences against public health, they should be liable to similar penal treatment which is aimed at ensuring administrative control of their production and sale as well as controlling their quality.

7. The weight of opinion today is that what is most decisive is not a damage to health but rather the consumers loss of personal autonomy. Drugs trafficking involving people who lack sufficient freedom of decision should be included

between the offences against the personal liberty. In other words all trafficking between free adults should be free from punishment.

8. The high levels of drugtrafficking call for a different penal approach. In effect it is a question of monopolistic or oligopolistic behaviour which has repercussions in all areas of free competition from mechanisms of price determinations to the safeguarding of the rights of the consumer. It brings with it a massive violation of the laws of contraband and exchange controls, not to mention the general effects on the financial system. It is necessary therefore to facilitate penal measures which consider the criminal activities of the drugs trafficking organizations as offences against the socioeconomic order, as any other illegal organization, regardless whether they deal in drugs, arms or any illegal subject.
Our proposal suggests depenalization in principle of the controlled trafficking of drugs, but which should continue to be punished in as far as it offends against individual liberty or the socioeconomic order.

9. It is necessary to make a distinction in the penal treatment between soft and hard drugs. This distinction is not only in keeping with the different degrees of harm of the drugs. It is also in line with a realistic view of the problem, free from exaggerations and irrationalities, which is called for if a policy of prevention is to be successful, apart from the idea of protecting individual liberty.

10. Consumption and all the activities directly linked to it should not be punished.

11. In as far as a trafficker acts to satisfy his own needs which result from his dependence, he should be offered alternatives to punishment aiming at overcoming his dependency.

12. We have to use a concept of trafficking which corresponds to the present day systems of marketing techniques. This would mean that both transactions, paid or gratuitous transactions made with the goal of creating or enlarging the market should be punished. Other gratuitous transfers should go unpunished.

13. The possibilities of using anonymous witnesses, crown witnesses and undercover agents should be restricted or even suppressed.

14. We dissent from the Draft proposal as developed for the United Nations in as far it classes as an autonomous offence preparatory acts for the manufacture or

distribution or the possession of the materials or equipment intended for the production or illegal manufacture of narcotic drugs or psychotropic substances.

15. We recommend that the approach of the United Nations and other international bodies in the construction of conventions strongly adhere to the principles of due process and legality.

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