

Drug Legalization? A French Perspective

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It could be time, in France, to re-open the debate on drug legalization. Criminalization of drug use and distribution has shown its limits, and unlike other countries nothing has really been done to provide a legal framework to drug use.

The long-standing international consensus on the criminalization of drugs has in recent years begun to appear more fragile. Over the past few years, the previously unassailable policy of drug criminalization has been undermined by a variety of specific efforts: the legalization of the coca leaf in Bolivia; controlled distribution of heroin programs in Switzerland and Canada; and the de-criminalization of recreational use of cannabis in a growing number of countries. What these efforts have in common is the (sometimes explicit) criticism of the prohibition of non-therapeutic drug use and distribution. The policy of drug criminalization, formulated in the first half of the 20th century by the international community and used subsequently to target a growing number of uncontrolled substances, has since appeared unable to respond adequately to illegal drug use. In particular, the War on Drugs waged since the 1980s has not had the results it promised. Beyond its inability to limit drug traffic and consumption, the health and public safety consequences associated with failed drug policies have provoked widespread criticism.

The War on Drugs and drug addiction has been the subject of many studies and has inspired an impressive body of multi-disciplinary research. But academic research often does not resonate with policy, especially when the subject is highly politicized. In France, the laudable intention of protecting citizens from the ravages of the drug trade has led to questionable rhetoric, which has succeeded in limiting the discussion to drug prohibition while ignoring research that might be critical of those policy positions. A review of these studies provides strong evidence of the limitations of a criminalizing drug policy and suggests a change of attitude towards the illegality of drug use. Contrary to its representation as a liberal fantasy, drug de-criminalization now seems the most sensible and compelling response to the social and health issues represented by drug use and distribution.

The Limitations of Penal Treatment for Drug Users

French law with regards to drug use is remarkably consistent: its rules have an essentially educative aim. The current laws are a symbolic bulwark against drugs and its penal aspects are thought of as a means for the education of citizens in general and drug users in

particular. Clearly expressed in legislative debates¹, in parliamentary reports² and in the government memoranda³ that have guided the evolution of drug law, this approach is based on the concept of penalties for drug use as incorporating both punitive and reformatory aspects. For example, drug users can be obliged, as part of a sentence, to take part in mandatory drug counseling. This treatment can be imposed by the public prosecutor, by the investigating magistrate or by the sentencing judge (art. L3423-1, L3424-1 and L3425-1 of the Public Health Code). The reformatory aspect of drug law is exemplified in a law enacted on the 5th of March, 2007 which requires offenders to follow an obligatory course for which the offender must pay focusing on the risks of drug use (art. R131-46 and R131-47 of the Penal Code). In the same spirit, a recent proposal was made to punish first-time users of substances classified as illegal with a fine "accompanied by the address and telephone numbers of the nearest addiction centre." While its incorporation into the Penal Code is not assured, this proposal is a more moderate response to first-time drug users who up to now have been subject to a possible one-year incarceration.

The plan to put penal institutions at the service of the treatment of drug addicts was very quickly thwarted by clinical realities and judicial practice. There has since been a clear failure to provide the appropriate care required by drug addicts. The objectives of court-ordered drug treatment have been greatly reduced and the Minister of Justice has officially admitted the weakness of the results⁴. Likewise, court ordered classes on the risks of drug use appear to have had limited effects on the behaviour of drug consumers⁵. By contrast penal instruments aiming at the repression of drug use have been the norm, in a climate encouraged by the judicial arsenal which can at all times be mobilized in the service of combatting drug use. Article L3421-1 of the Public Health Code, which punishes first-time drug use with « a one-year jail term and a fine of 3750 Euros » is indeed flanked by additional offences specifically addressing the user-seller (art. 222-39 of Penal Code) and those driving under the influence of illegal substances (art. L235-1 to L235-4 of the Highway Code).

This legal corpus, which defines drug use in terms of pathological deviance and views the Penal Code as an entry point for addict rehabilitation, has been aimed at curbing drug use in recent years⁶. Policies which have favoured intense police intervention and accelerated sentencing for drug offences have made the punishment of addiction an institutional reality.

¹ See the parliamentary debates preceding the vote on the law enacted on December 31, 1970 "concerning public health measures in the battle against drug addiction and the suppression of trafficking and illegal use of toxic substance" (loi du 31 décembre 1970 *relative aux mesures sanitaires de lutte contre la toxicomanie et à la répression du trafic et de l'usage illicite des substances vénéneuses*): Assemblée Nationale, session of June 29, 1970, JO, pp. 6394-6402 and pp. 3302- 3328; and Sénat, session of November 3, 1970, JO, pp. 1710-1731. Many of the law's provisions remain in force today.

² See the Investigative report on drug addiction (*Rapport d'information sur les toxicomanies*) of the Fact-Finding Commission on Drug Addiction (*Mission d'information sur les toxicomanies*) filed on June 29, 2011 with the office of the National Assembly and the office of the Senate, and especially sections III, A, 2 on the impossibility of legalizing drug use, and III, A, 3 on the necessity of ensuring the effectiveness of the prohibition.

³ Thus the memorandum of February 16, 2012 "concerning the improvement of the judicial treatment of drug use" (circulaire du 16 février 2012 relative à l'amélioration du traitement judiciaire de l'usage de produits stupéfiants) indicates that "maintaining the enforcement of laws against drug use is an essential component of the policy of prevention in regards to addictive behavior".

⁴ See the previously cited memorandum, which states that "the current measures of court-ordered therapy suffer from a lack of effectiveness", p.5.

⁵ For an initial assessment, see I. Obradovic, "Les stages de sensibilisation aux dangers de l'usage de produits stupéfiants", *Tendances*, n° 81, OFDT, 2012.

⁶ J.-P. Jean, "La répression aggravée des usagers de stupéfiants depuis la loi du 5 mars 2007", *Archives de politique criminelle*, 2009/1 n° 31, p. 145.

Criminal penalties for drug offences are frequently administered in a random manner due to the high volume of offences and the absence of victims bringing the offences to the attention of the authorities. But the over-all number of convictions has seen a distinct rise⁷. Every year several hundred are given jail time for drug use and several thousand incur a criminal record for the same offence. As for police arrests for drug offences, these are numbered by hundreds of thousands. These measures have not succeeded in stemming the tide of increased drug use. On the contrary, despite its repressive regime, among European countries France has some of the highest levels of drug use, notably amongst youth⁸. The failure of current drug strategies is characterized by the inability to articulate an ideal rehabilitative penal policy within the context of the politics of harm reduction.

Decriminalizing Drug Consumption to Reduce Health Risk

The policy of harm reduction associated with drug use is based on straightforward reasoning: « while it is preferable not to use drugs, if, nevertheless, there are users, then these must be encouraged to consume the least dangerous drugs in the most secure environment possible. »⁹ To this end, authorization must be given for the distribution of sterile injection materials, drug substitutes and the establishment of suitable injection sites, as well as first aid treatment available for the addict. Given the successful reduction of health risks through application of this model, which originally emerged without judicial support and frequently at the margins of legality, even the most reticent members of parliament have begun to give their consent. The principle of reducing health risks for users was established in law on the 9th August 2004, a statute that has as its main scope the prevention of « the social and psychological damages associated with addiction » (art. L3121-4 of the Public Health Code). This legal recognition of the health and mental risks associated with addiction is a « paradigm shift » for public policy¹⁰: it privileges safe practices for drug use at the expense of abstinence by way of detoxification. As such, the institutionalization of the reduction of the health risks of addiction undermines the ideal of the eradication of drugs and raises questions of juridical coherence.

How can the law confer legal status to practices designed to safely deliver drugs to users when the use of those drugs remains illegal? If the legal paradox is sometimes ignored, at other times it is resolved by the prioritization of situational standards: criminalization diminishes in relation to an increase in the health risk¹¹. But the contradiction between harm reduction and prohibition of drug use remains. Thus the government of François Fillon refused to experiment with safe injections sites (quickly termed « shooting galleries » in the media) despite the positive expert assessment of Inserm¹², reasoning that the priority is

⁷ I. Obradovic, “La réponse pénale à l’usage de stupéfiants”, *Tendances*, n° 72, OFDT, 2010.

⁸ See the surveys and information available on the website of the French Monitoring Center for Drugs and Drug Addiction, as well as the statistical charts available on the website of the European Monitoring Center for Drugs and Drug Addiction.

⁹ A. Coppel, “La réduction des risques liés à l’usage de drogues, stratégie de changement des politiques à l’égard des drogues”, in R. Colson (dir.), *La prohibition des drogues : Regards croisés sur un interdit juridique*, Rennes, Presses universitaires de Rennes, 2005, p. 121. For a comprehensive view on the subject, consult the collaborative study of the French National Institute of Health and Medical Research (INSERM) published in 2010: *Réduction des risques chez les usagers de drogues*.

¹⁰ On the history of this “paradigm shift”, see H. Bergeron, *L’État et la toxicomanie : Histoire d’une singularité française*, Paris, PUF, 1999.

¹¹ A memorandum of June 17, 1999 “concerning judicial responses to drug addiction” (circulaire du 17 juin 1999 relative aux réponses judiciaires aux toxicomanies) thus envisages that “taking subjects in for questioning only for drug use in proximity to ‘doorstep services’ and needle exchange sites is to be prohibited”.

¹² See the previously cited collaborative study of INSERM, note 70, pp. 209-231.

« reducing, not facilitating, drug consumption »¹³. Although there is welcome news from the new Health Minister, Marisol Touraine, indicating the possible creation of experimental injection sites¹⁴, one must also recognize that the political decision creates a legal conflict which results in the *de facto* decriminalization of drug use.

With decriminalization, once a criminal penalty is not sought, a merely nominal infraction can be retained; alternatively, the legal prohibition could be abolished altogether. In both cases, the creation of a criminal infraction for drug use in public would be useful; this would be based on the requirements of public order and compatible with harm reduction. Unless the development of a priority of public health and safety is to be sacrificed to education by criminalization, legal coherence requires the repeal of article L3421-1 of the Public Health Code which punishes drug use with « one-year imprisonment and a 3750 Euro fine. » This reform would place French legislation in line with the majority of European Union countries with regards to use of cannabis and would emphasize health and safety as a cornerstone of the fight against drugs. Decriminalizing drug usage, however, while it favours the reduction of the social and health risks of drug use, will have no impact in diminishing the public safety concerns associated with drug trafficking. An effective challenge to the criminality of drug trafficking implies the legalization of the production and distribution of drugs.

Legalizing the Sale of Drugs to Reduce Criminality

Though the connection between criminality and illicit substances has been well established from a statistical point of view, the relationship is both complex and counterintuitive¹⁵. The violence associated with the drug trade has been partially attributed to the suppression of sellers and traffickers and the absence of market regulation, which are direct consequences of criminalization¹⁶. It is impossible to say what impact the legalization of drug production and distribution of certain illegal drugs would have on criminality. So far, no one has attempted a national experiment. A comparative study with the legalization of alcohol in post-Prohibition America poses methodological problems.

Several models for legalization are conceivable, each with different consequences on crime associated with illegal substances: complete legalization of all illegal drugs, leaving them subject only to the law of supply and demand would have very different consequences from the legalization of select illegal substances controlled by a state monopoly and structured by the health system¹⁷. A general rise in drug consumption cannot be excluded but neither is it certain: an analysis of the tolerance policies in the Netherlands demonstrates that the sale of cannabis in coffee shops has not produced an increase in use amongst the general population¹⁸. On the contrary, it is probable that the regulation of production and distribution

¹³ “M. Fillon s'oppose aux salles d'injection de drogues”, *Le Monde*, August 13, 2010.

¹⁴ “Marisol Touraine favorable aux salles de consommation d'ici à fin 2012”, *Le Monde*, October 22, 2012.

¹⁵ S. Brochu, *Drogue et criminalité. Une relation complexe*, Montréal, PUM, 2006. Note also volume 16 (2007/2) of *Drugs in Focus*, the newsletter published by the European Monitoring Centre for Drugs and Drug Addiction, specifically devoted to this question.

¹⁶ D. Werb *et al.*, “Effect of drug law enforcement on drug market violence: A systematic review”, *International Journal of Drug Policy*, 2011, n° 22, pp. 87-94.

¹⁷ For a detailed discussion and analysis of the different judicial models for drug law enforcement, see F. Caballero, Y. Bisiou, *Droit de la drogue*, Paris, Dalloz, 2000, especially the chapter devoted to theories of drug law, pp. 94-164.

¹⁸ M. Wouters, A. Benschop, M. van Laar, D.J. Korf, “Cannabis use and proximity to coffee shops in the Netherlands”, *European Journal of Criminology*, 2012, vol. 9(4), pp. 337-353.

of substances today consumed in massive quantities despite their illegality would result in the weakening of the lucrative criminal enterprise that is of the drug trade. Bringing drugs into the legal economy would reduce the violence associated with the drug trade and would guarantee the quality of merchandise whose origins would be known.

The legalization of all or even of certain illegal substances is not imminent in France. Such developments would require as their precondition the evolution of international law in a direction which the political realities of the United Nations cannot at present encourage, at least not in the short term¹⁹. But global security issues posed by the increased wealth and militarization of drug mafias in addition to the recognition of the negative effects of drug criminalization on human rights and public health have spurred the growth of international calls for an end to the War on Drugs²⁰. In France a recent report produced by a Parliamentary working party headed by the ex-Minister of Interior, Daniel Vaillant, proposed the experimental legalization of cannabis within a strictly controlled official context as a method of combatting the consumption of the drug²¹. This perspective, which claims to provide a concrete response to the safety concerns of drug trafficking in high-crime neighbourhoods, is not, however, unanimously endorsed by the Socialist Party²². But it does show growing awareness, especially by those most engaged by public safety concerns, of the impossibility of reconciling the criminalization of drugs consumed in great quantities and the reduction of criminality.

Conclusion

Wishing to maintain the symbolic prohibition of drugs based on the prevailing conviction that it is preferable to live without drugs is respectable, but it is irresponsible to envisage a legal response which undermines attempts to address the acute public health and safety concerns posed by the consumption and trafficking of drugs.

Legal prohibition will acquire a coherent meaning only when it is the product of a general consensus with clear social goals and is accompanied by the rigorous application of law. Currently, both practice and theory are defective. Drug use in great quantities and its indulgent representation by mass media attest to an existing social norm very different from the expectations of the law. The industrial dimension to the production and trafficking of drugs, in the face of decades of police and judicial intervention, has exhausted all hopes of sufficient and significant penal effects.

¹⁹ Signs of such an evolution are nonetheless discernible: D.R. Bewley-Taylor, *International Drug Control: Consensus Fractured*, Cambridge, CUP, 2012.

²⁰ See for example, the reports of the Global Commission on Drug Policy, which brings together a number of ex-heads of state and high-ranking officials from around the world; or the Vienna Declaration made public by an international association of experts in public health following the XVIII International AIDS Conference.

²¹ D. Vaillant *et al.*, *Légalisation contrôlée du cannabis. Pour mieux lutter contre le cannabis : Sortir de l'hypocrisie*, National Assembly, XIII legislature, July 2011, XIIIe législature, Juillet 2011.

²² The current minister of the Interior, Manuel Valls, appears to be fiercely opposed to this view: "Some of my friends on the left — according to a very liberal way of thinking, I might add — propose legalisation pure and simple. I am absolutely opposed to this. (. . .) As a progressive who aspires only to the emancipation of individuals, I cannot agree to tolerate the legalisation of a new drug. Any substance that contributes to human alienation is a heresy in my view. Legalization would be a moral and philosophical defeat for the left", M. Valls, *Sécurité : La gauche peut tout changer*, Ed. Du Moment, 2011, pp. 138-139.

This impasse explains converging developments pointing to a change of attitude towards the criminalization of drug use seen around the world. Referenda in favour of the legalization of cannabis use in the states of Colorado and Washington are an example of such attitudes. One can only hope that these changes will help persuade the French political class to initiate a debate which it has refused to entertain for such a long time .

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