

DRUG POLICY IN BRAZIL: REPRESSION, MORALISM AND INTERVENTION IN INDIVIDUAL FREEDOM

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Abstract

The aim of this article is to demonstrate that the theory of legal interest does not adequately justify the criminalization of drug use. According to the principles of criminal law, drug use is a self-harming behavior, and the alleged protection of public health is an argument that cannot be sustained. Therefore, the selective criminalization of the use of some drugs is a manifestation of legal moralism.

Keywords

Principles of criminal law. Theory of legal interest. Criminalization of drug

Summary

1. Introduction 2. Concept of drugs 3. Why prohibit? 4. Public health and individual health 5. Criminal law as an instrument of public health policy 6. Drug use and self-harm 7. Moralism and drug use 8. Conclusion

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1 INTRODUCTION

It is very difficult to find someone who does not use drugs. Many people consume alcoholic beverages, tobacco, prescribed drugs and other substances that cause changes in the body. Human beings have always been drug users; however, some have become targets of persecution and are considered illegal. Consequently, those who decide to use them carry the stigma of being a criminal.

Although drugs are widespread in practically all cultures, the state tries to control their consumption through criminal law. Some substances are authorized, others are prohibited and criminally repressed. Since every crime needs to have a democratic basis to be legitimate, it is necessary to point out what is intended to be protected when the consumption of some drugs is criminalized and what the criteria are for choosing which are prohibited and which are permitted.

Brazilian drug policy makes a legal distinction between trafficking and personal consumption, however, without establishing objective criteria. The use of some drugs continues to be a crime in Brazil (it is a crime to acquire, keep, have in storage, transport or carry, for personal use, drugs without authorization or in violation of legal or regulatory requirements) and the basis indicated by doctrine and the courts is the protection of public health. Nonetheless, there is no satisfactory definition of public health, nor a coherent explanation to

distinguish legal from illegal drugs. There is, therefore, a merely moralistic criterion that governs drug policy in the country.

2 CONCEPT OF DRUGS

According to the Brazilian Law 11,343/2006, drugs are substances or products capable of causing dependence, as specified by law or listed periodically by the Executive Branch of the Union. According to the World Health Organization (WHO), a drug is any substance not produced by the body that can act on the Central Nervous System (CNS) causing changes in its functioning.

Technically, drugs are chemical substances that affect the normal functioning of the body in general or of the brain. Not all drugs are illicit. Caffeine (found in coffee or Coca-Cola), nicotine (in cigarettes) and alcohol, for example, are technically legal drugs, although they are not usually called that. Medicines, prescribed by a doctor or purchased in pharmacies, are legal drugs that help us recover from illnesses; however, the way we use them can lead to a problematic relationship or even dependence².

Brazilian legislation separates legal drugs from illegal drugs. Resolution 344/1998 of the Brazilian Health Surveillance Agency

² Available at: <https://www.unodc.org/documents/lpo-brazil/Topics_drugs/Campanha-global-sobre-drogas/getthefacts11_PT_.pdf>. Access in: 20.08.2024.

(ANVISA) contains a list of substances considered illicit drugs and, together with other regulations, indicates circumstances in which they may be used. For example, the use of drugs, generally prohibited, in medical treatments, as long as the established requirements are met. Originally illicit drugs may, exceptionally, have their use authorized by the pertinent legislation.

There is also provision in art. 2 of Law 11,343/2006 for the prohibition, throughout the national territory, of drugs, as well as the planting, cultivation, harvesting and exploitation of plants and substrates from which drugs may be extracted or produced, except in the case of legal or regulatory authorization, as well as what is established in the Vienna Convention of the United Nations on Psychotropic Substances, of 1971, regarding plants for strictly ritualistic-religious use. Government may also authorize the planting, cultivation and harvesting of plants from which drugs can be extracted, exclusively for medicinal or scientific purposes, in a predetermined location and time frame, subject to inspection.

Drugs are always present in life. These substances are used for celebrations, health treatments, altering psychological states, moments of pleasure, among others. It would be very hypocritical to claim that drugs can be eliminated from society or that there can be total control over their consumption. Whether drugs are legal, or illegal is decided by the state, without coherent criteria.

3 WHY PROHIBIT?

In order to understand the predominantly prohibitive nature of drug policy in Brazil, the topic is limited to doctrinal and case law opinions. Traditional doctrine usually points to public health as a legal asset protected by the prohibitionist norm. However, there is no mention of what public health is or how it can be affected when someone uses drugs. There are, at most, some inferences that “the possession of narcotics represents a danger to the entire community, and not just to those who carry and use the drug. The addicted person, besides to harming their own health, can become violent, cause various types of accidents and, even, in the face of the need to support their addiction, commit crimes against property or of another nature. For these reasons, we understand that there is no unconstitutionality in the provision”³.

The crime is not consuming the drug and engaging in subsequent harmful behavior. What the user may do after consuming is not covered by the criminal norm. On the other hand, anyone who commits an illegal act under the influence of drugs may be charged with other crimes (homicide, bodily harm, endangerment, theft, robbery) with an aggravated penalty.

The state's selectivity in prohibiting the consumption of certain drugs and the acceptance of others is noticeable. Alcohol and tobacco are the main examples of tolerated drugs, which, not so long ago, were

³ GONÇALVES 2016, 101.

encouraged by the advertising market. Regarding alcohol, the World and Pan American Health Organizations (WHO and PAHO) state:

“Alcohol, a psychoactive substance with addictive properties, has been widely used in many cultures for centuries. Its harmful use has a significant impact on the burden of disease, as well as a social and economic burden on societies. Alcohol affects individuals and societies in many ways, and its effects are determined by the volume consumed, the patterns of consumption and, on rare occasions, the quality of the alcohol.

The harmful use of alcohol can also result in harm to others, such as family members, friends, work colleagues or strangers. In addition, the harmful use of alcohol results in a significant social, economic and health burden.

Alcohol consumption is a causal factor in more than 200 diseases and injuries. It is associated with the risk of developing health problems such as mental and behavioral disorders, including alcohol dependence, serious non-communicable diseases such as

liver cirrhosis, some cancers and cardiovascular diseases, as well as injuries resulting from violence and road traffic accidents.

A significant proportion of the disease burden attributable to alcohol consumption arises from intentional and unintentional injuries, including those caused by road traffic accidents, violence and suicide. Fatal alcohol-related injuries tend to occur in relatively younger age groups.

The most recent causal links are those between harmful use of alcohol and the incidence of infectious diseases such as tuberculosis and HIV/AIDS. Alcohol consumption by pregnant women can cause fetal alcohol syndrome and complications in preterm birth.”⁴

Alcohol is a harmful substance not only to the health of the person who consumes it, but also to other people, whether they are in the perpetrator's circle of friends or those who do not even know him. Just think of the cases of domestic violence against women and traffic accidents caused by drunk drivers. In addition, there are financial

⁴ Available at: <<https://www.paho.org/pt/topicos/alcool>>. Access in: 20.08.2024.

costs to the Brazilian Unified Health System: it is estimated that outpatient and hospital care for diseases related to alcohol consumption costs US\$8,300,000.00 (eight million and three hundred thousand dollars) annually. Similarly, a study conducted by the Oswaldo Cruz Foundation indicated that, in 2011, problems resulting from smoking cost the Unified Health System more than R\$23,000,000,000.00 (twenty-three billion reais)⁵.

The selectivity of illicit drugs is demonstrated by Tiago Filippo:

“It is worth mentioning that the commonly accepted expression of war on drugs actually means war on some types of drugs, understood as ‘any substances capable of altering the state of consciousness or behavior’. Therefore, while certain drugs such as alcohol and tobacco are not affected by the global punitive discourse, it aggressively targets other types of substances, more or less harmful than those, in which there are scientifically secure parameters of the harmful

⁵ PINTO 2015.

potential of the prohibited drugs, justifying criminal intervention”⁶.

4 PUBLIC HEALTH AND INDIVIDUAL HEALTH

After all, what does the legislator intend to do when he criminalizes the possession of certain drugs for personal use? As a basic principle of criminal law, every crime must protect a legal interest that pre-exists the prohibitionist norm. Just as homicide is an attack on life and theft is an attack on the victim's property, the crime of possession of illicit drugs for personal use must protect something. The important question is to identify what this “something” is. Without a legitimate legal right, the only option left is for criminal law to be used as an instrument to impose certain behaviors and prevent the exercise of individual freedom.

Drug use is a self-harm. Those who consume these substances cause harm to their health, to a greater or lesser extent. There are drugs that drastically affect the person's body and others that cause milder changes. There are also harmful substances that are not considered illicit drugs but can be compared to them, such as sugar, which can trigger a series of problems, even causing some types of cancer.⁷

⁶ FILIPPO 2019, 131 – 174.

⁷ EPNER 2024.

To protect the health of the community, prohibition would only be coherent if all harmful substances were prohibited, which is impossible. Apparently, the legislator's concern is to impose what a person can or cannot consume. Public health is a complex system that cannot be protected by the excessive application of criminal law. Criminal law must have subsidiary application as in any social conflict.

Public health must be protected considering individual autonomy. According to the principle of autonomy, “the free individual choice of life plans and the adoption of ideals of human excellence are valuable” and the state and other individuals must not interfere in this choice or adoption, limiting themselves to outlining institutes that facilitate the individual pursuit of these life plans and the satisfaction of the ideals of virtue that each person holds, preventing mutual interference during such pursuit⁸.

Given individual autonomy, it is up to the law to guarantee the conditions for choice. The autonomous person must have access to the information necessary to make his/her decision and be free from coercion to express his/her will. Therefore, it is legitimate to criminalize the manipulation of information that may lead an individual to make a harmful choice or the use of violence and serious threats to inhibit the capacity for resistance.

⁸ SANTIAGO NINO 2007, 204.

5 CRIMINAL LAW AS AN INSTRUMENT OF PUBLIC HEALTH POLICY

When considering public health as a protected legal asset, it can be concluded that, in theory, Criminal law is used as an instrument to promote public health. Herein lies the contradiction. Several legal products, which can be easily purchased in regular stores, also cause harm to people's health. Consistency would require the state to also prohibit the purchase and consumption of these products. Furthermore, depending on the individual's physiological state, certain foods can cause irreparable damage to the body. Allergies and intolerances are complications that, if not properly monitored, lead to harmful consequences to health. In this area, it is not up to the legislator to impose what each individual can or cannot do with his or her life, since the only way to have total control is to impose an authoritarian regime.

Criminal laws can be an instrument to protect public health when criminalization affects “hetero-harmful behavior”, whether for individual or diffuse interests. Bodily harm (art. 129 of the Brazilian Criminal Code), for example, is based on conduct that causes harm to the physical integrity of the person without the consent of the person concerned; the crimes of arson and explosion (arts. 250 and 251 of the Brazilian Criminal Code) protect the health and life of undetermined persons. The incriminated behaviors are not practiced by the agent against himself, unlike the consumption of substances that exclusively affect the health of the consumer.

Drug use is still a criminal offense, as there is a behavior described in law as a delict and the imposition of a penalty, so much so that the effects of the conviction, recidivism and prescriptive period persist. Therefore, there was no decriminalization, nor depenalization by the Constitutional Court, as some authors have argued⁹. There were relaxations, but the conduct continued to be incriminated. And such a legislative measure does not violate the Federal Constitution, since the new penalties imposed are not prohibited by the Constitution¹⁰. As Nereu Giacomolli rightly argues,

“There was no decriminalization, but rather a decarceration, that is, a ban on the application of custodial sentences to drug users. There is no crime without punishment, but punishment is not only the deprivation of liberty. The penalties provided for in art. 5, XLVI, of the Federal Constitution of 1988 are the deprivation or restriction of liberty, loss of assets, fines, alternative social benefits and the suspension or prohibition of rights. The penal prohibition is in art. 5, XLVII of the Federal Constitution of 1988, that is,

⁹ GOMES 2006, 109.

¹⁰ GRECO FILHO 2009, 127-128.

death, life imprisonment, forced labor, banishment and cruelty. Therefore, the measures provided for in art. 28 of Law 11.343/2006 are penalties, but their consequences are different from those provided for in the Criminal Code”¹¹.

Therefore, there is a prohibitive penal norm that affects a person's liberty in order to prevent harm. It is a form of pure or direct paternalism. There has already been a decision that understood that the prohibition of personal use has an objective that goes beyond the user: to protect public health, avoiding the accumulation of people affected by the drug and the consequent collapse of the health system¹². This argument is not convincing for two reasons. First, the chaos in public health caused by the widespread use of the drug is an unproven assumption; second, even if public health reaches a critical state, the result is remote in relation to individual use.

There is no other basis other than the paternalistic prohibition of the user. Drug use is self-harm, which affects only the user. In the words of Salo de Carvalho, “forgetting the concrete subject to create abstract rhetorical mechanisms to legitimize the hypotheses of punishment for users produces significant violence to the constitutional core that

¹¹ GIACOMOLLI 2008, 181 – 204.

¹² Among other decisions: STJ, REsp 694042/RS, j. 10.05.2005.

supports criminal law”¹³. The author continues by stating that “the secularization of criminal law and procedure, the result of the constitutional acceptance of the values of pluralism and tolerance for diversity, shields the individual from undue interventions in the sphere of interiority”¹⁴.

In Brazil, Extraordinary Appeal 635.659/SP, from the Constitutional Court, had as its object the constitutionality of art. 28 of the Drug Law. Initially, the Reporting Judge, Gilmar Mendes, had adopted the position that drug use was nothing more than self-harm and, therefore, could not be a crime. His vote included the decriminalization of possession of all drugs. However, there was a change in his understanding to restrict the decision to marijuana and to suggest objective criteria to distinguish between drug dealers and users. Other Judges also recognized the need to differentiate between drug use and drug trafficking only for marijuana as well.

Finally, the Appeal was judged, and, by majority, it was decided that it is legitimate to distinguish between users and drug dealers:

“The Supreme Federal Court ruled that possessing small amounts of marijuana for personal use (40 grams or 6 plants) is still prohibited but is not a crime.

¹³ CARVALHO 2007, 254.

¹⁴ CARVALHO 2007, 256.

Therefore, in the case analyzed, the person convicted of possessing 3 grams of marijuana for personal use was acquitted of the crime. The decision is based on the rights to privacy and individual liberty (art. 5, X, of the Federal Constitution). It also recognizes that treating the use of marijuana as a crime encourages criminal activities associated with drug trafficking but does not reduce consumption. (...)

Since the Drug Law did not define the amount of marijuana that characterizes personal use, currently, the Police, the Public Prosecutor's Office and the Judiciary assess in each case whether the accused should be considered user or drug dealer. The lack of a precise criterion means that the law is applied unequally. While white and middle-class young people are more likely to be considered users, it is more common for poor, black and brown young people to be considered drug dealers. To avoid this, the STF defined a clear and objective criterion: as a general rule, anyone who has up to 40 grams, or 6 marijuana plants should be considered a

user. This rule will be in effect until the National Congress creates a new law on the subject. This criterion is not absolute, but a relative presumption that can be dismissed if it is proven that the drug was not intended for personal consumption. For example: if a person is found by the police with less than 40 grams of marijuana, but is found with packaging, scales or sales records, they may be arrested for trafficking”¹⁵.

Gerson F. Rosa and Erika M. de Carvalho are incisive in stating that “the criminalization of possession of drugs for personal use would only be justified if we accepted the construction made by Günther Jakobs when he dealt with the Criminal law of the citizen and the enemy”. The authors state that “with regard to the criminal-legal treatment of self-harm and self-destructive behaviors, the application of the principles of minimum intervention and, especially, of the harmfulness of legal assets prevents a state, no matter how paternalistic it may be, from expanding its scope of action to the point of applying a criminal penalty to behaviors whose relevance does not exceed the limits of its own individual interest”¹⁶.

¹⁵<<https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE635659Tema506informaosociedaderev.LCFSP20h10.pdf>>. Acesso em: 27/06/2024.

¹⁶ ROSA 2012, 327 - 381.

For pure paternalism, interference in the behavior of a group of people to protect them from their own conduct is justifiable. The person who suffers the restriction of freedom is the beneficiary himself. Pure paternalism, also called direct paternalism, acts on individuals who presumably behave in a self-harmful manner. There is a coincidence between the subject who benefits and the one who suffers the restriction. A common example is the rule that requires the use of seat belts to protect the user himself, that is, the user does not have the freedom to choose not to use the belt for his own good.

In contrast, impure paternalism, also called indirect paternalism, legitimizes interference in the behavior of a group of people to protect others who are not part of that group. A very didactic example is the enactment of a law that prohibited the production of cigarettes with the aim of protecting the health of smokers. State would be acting indirectly in a paternalistic way, since it would affect manufacturers with the purpose of restricting the freedom of choice of smokers, who would encounter difficulties in purchasing cigarettes. If, on the contrary, the law prohibited anyone from smoking, we would have a case of direct paternalism, since smokers would have their freedom restricted for their own good.

6 DRUG USE AND SELF-HARM

The consumption of harmful substances is a self-harming behavior. Those who consume them cause harm to themselves. However, there are other dangers involved that legitimize the application of

criminal law? The premise is that harm to oneself is not enough to criminalize a conduct, so it is up to the doctrine and jurisprudence to investigate further whether there are sufficient grounds for maintaining the crime.

Firstly, reference should be made to proximate and remote injuries. Proximate, or immediate, injuries are those directly linked to the prohibited behavior; remote, or mediate, injuries are consequences of immediate injuries. For example, homicide has the immediate injury of the victim's death, however, the economic and emotional consequences of this death are the mediate injuries. Crimes, in general, can be analyzed from these two perspectives when analyzing the disvalue of the result. Just to emphasize the idea, when a person has their cell phone stolen, there is immediate financial damage. However, other types of damage can be caused, such as the theft of funds from bank accounts, the improper use of apps, the loss of time to cancel the service and purchase another device, among others.

By making this distinction with drug use, we come closer to many prohibitionist arguments. Drug use causes immediate harm, which is harm to individual health, to a greater or lesser extent. However, remote injuries tend to have greater weight in the debates on criminalization: family conflicts, financial losses, illicit behavior caused by drugs, violence generated by drug trafficking, among others.

It is important to emphasize, once again, that art. 28 of the Drug Law does not include, among the criminalized behaviors, the circumstances before and after possession of the substance. There are

no references to what the user can do under the influence of drugs, nor to the chain of drug trafficking. The legislation refers the interpreter to other provisions in these cases: drug trafficking has its own penal norm and crimes committed under the influence of these substances, whether legal or illegal, also receive their own treatment. Article 28, therefore, is limited to the agent's self-harm.

Luciano Anderson de Souza explains that:

“In the case of the conduct studied, it is usually only asserted that the legal asset protected is public health, but there is no plausible justification for this. In other words, it is not satisfactorily established to what extent the collective physical and psychological health – whether of a determined or undetermined number of people – is affected by an action that, in theory, denotes the possibility of harming exclusively the perpetrator of this same action”¹⁷.

Drug use is a self-harm that affects only the user. Therefore, the apparently most viable path is to understand that the consumption of

¹⁷ SOUZA 2011, 167 – 186.

these substances implies the exercise of the individual's autonomy. Any form of criminal-legal paternalism to protect the subject of consensual self-harm is unacceptable if this implies impediment to the exercise of autonomy. The occasional user, who does not suffer from addiction, is aware of and knows what is best for him/herself and can continue to use the drug autonomously¹⁸. The addicted user, on the other hand, must receive appropriate medical treatment, far removed from criminal law. In this context, the criminalization of possession of drugs for personal use represents the state's interference in individual freedom through criminal law. Criminal law, here, is not applied to the protection of third-party legal assets; it is about protecting the holder of the legal asset against himself. Restricting a person's freedom to prevent him from causing harm to his own physical integrity and life is a paternalistic attitude, as if the state were a father taking care of a child who does not know how to make his own decisions.

7 MORALISM AND DRUG USE

The criteria for distinguishing between legal and illegal drugs are not the potential harms they can cause. Highly harmful substances can be legally consumed, and the health of consumers will be considerably affected. Dogmatically, the protection of the legal interest of public health is insufficient to legitimize the criminalization of certain drugs and the legalization of others. Therefore, the basis that remains to separate legality from illegality is moralism.

¹⁸ PRADO 2016, 67 – 108.

Moralism assumes that moral considerations always precede considerations of other kinds in determining whether an act should be obligatory or prohibited and that the fact that an act should be obligatory or prohibited takes precedence over all other facts in determining what we should do. No distinction is made between conduct that affects a private or collective interest, since certain moral values are above any other reference¹⁹. This is why the moralist condemns some behaviors that do not go beyond the individual sphere of the person himself and, further, supports their criminalization.

For legal moralism, a rule that prohibits immoral behavior or encourages moral conduct is legitimate, regardless of whether there is danger or harm. For Devlin, one of the greatest defenders of legal moralism, immorality, for the purposes of law, is anything that an honorable and upright person would presumably consider immoral. Any immorality is capable of damaging society and affecting it to a greater or lesser extent, and this would justify the intervention of the law. Morality involves collective and private interests, and the biggest problem is reconciling them²⁰.

Every crime has a share of immorality, however, mere immoralities, singly, cannot be grounds for criminalization. In legal moralism, the intention is to prohibit strictly immoral behavior, even if there is no

¹⁹ PHILIPS 1987, 133.

²⁰ DEVLIN 1968, 15-16.

harm, thus affecting acts committed by capable adults²¹. Prohibiting one drug and authorizing others, without considering the potential harm, is a moral issue, since the risk to the user's health persists in all cases. We can't compare the status of drinking an award-winning whiskey to smoking a marijuana cigarette. The expression "pothead" is used with prejudice, much more than that of "drunk", for example.

8 CONCLUSION

Society lives with drugs and will hardly ever be free of them. There is no way for the State to control people and impose a standard of living without these substances. The main argument for prohibiting certain drugs is to protect public health, however, there are substances that are very harmful to people's health and are tolerated. There is selectivity in distinguishing between legal and illegal drugs, without objective criteria.

Occasional drug users, who are capable of discerning their actions, suffer undue restrictions on their freedom when prohibited from using them. These interventions are paternalistic measures that are not justified. Those who need help from the state are the addicted users - those who lack self-control - however, treatment cannot be of a criminal nature. The use of narcotics is nothing more than a medical issue, which should be linked to a public health policy and never to a security policy.

²¹ LYRA 2014, 13 – 35.

An unjustifiable repressive irrationalism is engendered, which only serves to, contradictorily, aggravate the problem. In this way, it is necessary to recognize that the violence generated by the criminal treatment of the issue is far greater than the violence that is sought to be combated through criminalization, which, specifically regarding drug users, is completely unsustainable, since, as pointed out above, they only harm themselves²².

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²² SOUZA 2011, 167 - 186.

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