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FORUM FREIE GESELLSCHAFT  
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## CRITICAL ASPECTS ON DRUG PROHIBITION

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IT SEEMS TO BE COMMON SENSE nowadays that drug use shall be banned and fought. But by no means it is clear that this conviction bears a detailed consideration. This common sense approach is based on the conviction that drug use is bad in several ways and the solution for drug related problems could be prohibition. The question if prohibition can solve the drug related problems is going to be concerned in the second part of the essay. But before considering the advantages and disadvantages of prohibition it seems to be essential to treat the question of the right to prohibit drug use and whether such a right exists at all.

## 1. ETHICAL ASPECTS: THE RIGHT TO PROHIBITION

Examining the discussion of drug prohibition as purely philosophical notion it can be broken down into two positions: one arguing in favour of prohibition and the other against. It is the dispute between paternalism and communitarianism on the one side and individualism on the other. The prohibitionists argue that drug use harms both the user and society as a whole and therefore should be prevented whereas the individualistic approach is mainly based on the conviction of the individual's self-determination and bodily integrity. As a matter of simplification in order to be able to discuss the problem of prohibition as a purely philosophical consideration it may be assumed in this part of the essay that drug use generally harms the individual and brings burdens for society with it.

### 1.1. Prohibitionism

The prohibitionist approach is the globally prevailing approach of governments in dealing with drugs and drug related problems. It seems to be the unquestioned global common sense. For instance it is stated in a Political Declaration of the UN General Assembly, that '[d]rugs destroy lives and communities, undermine sustainable human development and generate crime.<sup>1</sup> Drugs would even be 'a grave threat to the health and well-being of all mankind, the independence of States, democracy, the stability of nations, the structure of all societies'.<sup>2</sup> The determining concerns behind this is the elimination or reduction of the obvious health-related harms associated with drug use, such as physical and psychological dependence, physical injury, death by overdose or suicide, hepatitis or HIV as well as the reduction of associated social and behavioural harms such as violence, child and spousal abuse, loss of motivation and productivity, intoxicated driving, the disturbance and degradation of the quality of life in neigh-

1 UN General Assembly 20<sup>th</sup> Special Session (10 June 1998) Political Declaration, New York: UN.

2 Ibid.

bourhoods, intimidation and crime.<sup>3</sup> Therefore it is fixed as a target to reach a drug-free world.<sup>4</sup> But all these statements only refer to illicit drugs, like narcotic and psychotropic substances, but not to socially accepted drugs, like alcohol or tobacco, and medically prescribed psychoactive drugs.

This entire position is founded on the paternalistic conviction that the state has the right to prevent individuals from harming themselves<sup>5</sup> on the one hand and on the communitarian consideration that the community is entitled to make use of the individual's capacities<sup>6</sup> and therefore the individual has the duty to make the best of his capacities. Paternalism means the conviction, that 'the state often can know the interests of individual citizens better than the citizens know them themselves, it stands in loco parentis as a permanent guardian of those interests even against the free choices of the persons whose interests they are.'<sup>7</sup> Since for communitarians an injured person has the positive right to be cared at the expenses of the public, the individual has the duty to take care for himself and the negative right to choose for himself is denied.<sup>8</sup> Therefore even suicide means social harm: 'If fifty thousand persons kill themselves every year by their own choice (...), then millions of dollars of tax money are not paid to the treasury, millions of dollars are paid out in social security and death benefits (...). Self caused deaths and injuries, in the aggregate, are a considerable public inconvenience.'<sup>9</sup> Especially referring to drug use, Feinberg states, '[a] nonproductive life devoted entirely to lotus-eating, opium smoking, or heroin shooting, in which all of one's waking moments are spent cultivating or enjoying dreamy euphoric states, may be "no one else's business", when one, or a hundred, or ten thousand self-supporting persons do it of their own free choice. But when ten percent of the whole population choose to live that way, the situation becomes parasitical and the situation approaches the threshold of serious public harm.'<sup>10</sup>

By virtue of the reflection that laws communicate and symbolise the values that the community holds dear, drugs could not be legalised.<sup>11</sup>

All in all the prohibitionist approach is based on the conviction, that drug use harms both, the individual and society and that it is the state's duty to protect the individual from himself as well as the society from inconveniences.

## 1.2. Legalisation

The idea supporting the legalisation of drug use is diametrically opposed to the previous argumentation. It is based on the fundamental acknowledgement of the individual's liberty, saying that each individual has a sphere of privacy and liberty in which he can do whatever he wants to, as long as nobody else is harmed. According to that, everybody would have the right to use drugs, as long as it harms

3 O'Mahony, 'War on Drugs', p. 27; David Weisbrot, in: Lauterwein, *The Limits of Criminal Law*.

4 UN General Assembly 20<sup>th</sup> Special Session (10 June 1998) Political Declaration, New York: UN.

5 Feinberg, 'Harm to Self' p. 8.

6 Ibid., p. 22.

7 Ibid., p. 8.

8 Etzioni, 'The Spirit of Community', p. 25.

9 Feinberg, 'Harm to Self', p. 22.

10 Ibid.

11 Etzioni, 'The Spirit of Community', pp 47 – 49.

nobody else directly. That is why O'Mahony calls this approach 'the human rights perspective'<sup>12</sup>. It is clearly based on John Stuart Mill's harm principle: 'The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.'<sup>13</sup> This is an expression of the modern anthropology, considering humans as rational agents, as fertile sculptors of theirsefls – as 'plastes et factor'<sup>14</sup>. This modern anthropology is the initiation of individual liberty appreciating an individual private sphere, in which everybody has the right to develop his own personality regardless of others' or society's moral views. Of course an unrestrained liberty is not reconcilable with the the liberty of others, hence the only consistent understanding of individual liberty restrains it to the extend, that does not harm anybody else.<sup>15</sup> From this argumentation follows the conclusion that everybody is autonomous: 'Over himself, over his own body and mind, the individual is sovereign.'<sup>16</sup> This is the foundation of the individual's right to selfdetermination and bodily integrity, what John Locke names self-ownership: 'every man has a property in his own person. This nobody has any right to but himself.'<sup>17</sup> Within this argumentation it is clear, that the fact somebody hurts himself, cannot justify the outlawry of this behaviour. 'There is no room for entertaining any such question when a person's conduct affects the interests of no person behind himself (...) In all such cases there should be perfect freedom, legal and social, to do the actions and stand the consequences.'<sup>18</sup>

So obviously the mere fact of using drugs does not mean any harm to others. Somebody drinking alcohol, smoking marijuana, snorting cocaine or even injecting heroin does not harm anybody but himself. The opposite view – self-harming conduct as justification for state intervention – would lead 'straight down to the totalitarian cage, where people are prohibited from eating candy and are forced to eat yogurt "for their own good"'<sup>19</sup> and are provided with the proper amount of sun and propperly fitting shoes and false teeth, as Murray Rothbard states.<sup>20</sup>

But one argument of the prohibitionist position is, that drug use not only affects the user, but society as a whole by drug-related criminality, impaired productivity and increasing health care costs.

For the individualistic approach only the overt commission of a crime should be illegal and the way to combat crimes committed under the influence of drugs is to be more diligent about the crimes themselves, not to outlaw the drug.<sup>21</sup> As a matter of course any committed offense harming others in relation to drug use would still be illegal, but simply not the use itself, since it harms nobody else.

12 O'Mahony, 'War on Drugs', p. 21.

13 Mill, 'On Liberty', p. 13.

14 Picco della Mirandola, *Oration on the Dignity of Man*, .

15 Kant, 'Metaphysics of Morals'. pp. 23 – 26.

16 Mill, 'On Liberty', p. 13.

17 Locke, *Two Treatises of Government*, pp. 17 -18.

18 Mill, *On Liberty*, p. 110.

19 Rothbard, *For a New Liberty*, p. 125.

20 Ibid., p. 126.

21 Ibid.

### 1.3. Conclusion

Thomas Szasz, a psychiatrist and academic, states that society has to choose between two competing value systems: 'We could commit ourselves to the view that the state, the representative of many, is more important than the individual; that it therefore has the right, indeed the duty, to regulate the life of the individual in the best interests of the group. Or we could commit ourselves to the view that individual dignity and liberty are the supreme values of life, and that the foremost duty of the state is to protect and promote these values.'<sup>22</sup>

Indeed it is this essential distinction between these two possibilities and there is no third way between them. Either the individuals liberty and privacy are respected as axiomatic values or they are not. To allow the state to punish and in fact regulate an individual and private behaviour that does not harm anybody means the opening of pandoras box, and is the first step on the road to Rothbard's totalitarian cage. Especially Feinbergs argumentation suggests that not only drug use but each individual behaviour that imposes increasing costs to the state should be prevented. In light of the high treatment costs of cardiac diseases, Rothbards instance of the prohibition of candies and the coercion to eat yogurt seems not to be farfetched. In fact this argument of increasing social costs should not be seen as one against self-harming behaviour, but instead one against the benevolent paternalism of public health care and the point of loss of the individual's productivity against the communitarian conviction that society is entitled to take advantage of the individual's capacities.

Another point is the inconsistency and moral ambiguity of the spurious distinction between illicit drugs and socially regulated drugs. The legal drugs often lead to addiction and cause worldwide more health-related harm than illicit drugs. Hence the prohibitionist approach fails to do justice to the greatly varying potentials for harm of different drugs and different forms of use. Regarding to minimally dangerous recreational drug use, prohibition can be seen as enforcing obedience to the law for its own sake rather than in order to avoid genuine harms.<sup>23</sup>

The simple fact that drug use might lead to criminal behaviour and harm cannot be a general justification for prohibition. This logic would lead to the prohibition of a lot of common activities which are statistically dangerous, and to the marginalisation of groups of society, which are statistically presumed to commit offenses. For instance states the U.S. National Report on Juvenile Offenders and Victims that by age 17 37 % of the youth had vandalized, 43 % had committed theft, and 27 % had committed an assault with the intent to seriously hurt the victim, with even higher numbers for male offenders and the highest for black and hispanic male adolescents.<sup>24</sup> Following the prohibitionist logic, that it is quite probable, that adolescents commit crimes, especially male blacks and hispanics, it should be concluded that it is justified to detain male adolescents belonging to ethnic minorities until the critical period is over. And the fact that every year more people die in traffic accidents than due drug-misuse would justify the prohibition of cars.<sup>25</sup> Finally the prohibitionist argument of avoiding risks for

22 Szasz, Thomas, 'The ethics of addiction' in (ed Coomber, R.) 'Drugs and Drug Use in Society', p. 381.

23 O'Mahony, 'War on Drugs', p 43.

24 2006 National Report on Juvenile Offenders and Victims, p. 80.

<http://www.ojjdp.gov/ojstatbb/nr2006/>

25 Ireland's National Police Service, Fatal Road Traffic Statistics – 1998 to 2012

<http://www.garda.ie/Documents/User/Road%20Traffic%20Fatalities%20-%202008%20to%202012.pdf;>

public health, in particular because of the higher risk of infection with HIV because of needle exchange would at the same time support the prohibition of homosexuality, because empirical examinations indicate that homosexual and bisexual men are far more likely to be infected with HIV than heterosexuals.<sup>26</sup> So the totalitarian cage would also make sure, that everybody pursues "healthy sexual behaviour".

When there is any respect for the individual's autonomy and self-determination, there has to be a sphere of privacy in which everybody is allowed to do what he or she pleases.

Taking these premises as clear and consistent guideline drug prohibition cannot be legitimate.

## 2. PRACTICAL ASPECTS: THE RECORD OF PROHIBITION

Eventhough drug prohibition might be illegitimate under philosophical considerations, it is worth to examine, whether the prohibitionist approach is effective and successful in reducing harm and drug-related crime. Therefor especially the Irish war on drugs will be inspected.

### 2.1. Preface

To understand drug-related crime, it is necessary to distinguish between inherent and non-inherent drug-related crime. Inherent drug crime is that arising from the conviction, that drug use is a wrong, such as possession, supply, manufacture and cultivation of illicit drugs. Most of them are essentially victimless, police-defined offences.<sup>27</sup> Non-inherent drug crime is that, which is outlawed not only by drug legislation and the committed wrong is not intrinsic to the drug use itself. Goldstein has categorised three different links between drugs and non-inherent drug-related crime:

1. through pharmacological effects on brain and behaviour;
2. through the 'economic compulsive' need to support continued drug use;
3. through 'the systemic violence' associated with the control of markets, transactions, debt collection, and supply and distribution networks.<sup>28</sup>

Both international and Irish research indicate that the economic need to pay for the drugs and coercion associated with organised drug gangs account for most recorded 'non-inherent' drug-related crime.<sup>29</sup> When inherent drug crime is excluded, much drug-related crime can be attributed to the black market in drugs, that is to the illegal nature of the drugs trade, rather than to the psychological and physical effects of drug-taking as such.<sup>30</sup>

European Monitoring Centre for Drugs and Drug Addiction, Country Overview: Ireland.

<http://www.emcdda.europa.eu/publications/country-overviews/ie>

26 Centers for Disease Control and Prevention, "Today's HIV/AIDS Epidemic", 2013, p. 3.  
<http://www.cdc.gov/nchhstp/newsroom/docs/HIVFactSheets/TodaysEpidemic-508.pdf>

27 O'Mahony, 'War on Drugs', p 47.

28 Goldstein, 'The drugs-violence nexus: a tripartite conceptual framework' 493 – 506.

29 O'Mahony, 'War on Drugs', p. 53.

30 Ibid.

The black market in drugs is obviously the result of prohibitionist policies; the hyperinflated cost of illegal drugs drives much acquisitive crime and the immense potential profits of the black market in drugs drive the financial and violent 'systemic' crime of drug gangs. Referring to this categorisation it is to note, that only the first category regards to the drug use itself and the second and third category are more likely results of the prohibition.

## 2.2. The Irish War on Drugs

Ireland is concuting as many other countries a war on drugs. Its initiation was the Misuse of Drugs Act (1977) outlawing certain psychoactiv substances and thereby creating numerous 'inherent' drug-related offences, what led by the mid 1980s to a rabid drugs culture in Irish prisons.<sup>31</sup> The 1984 amendment to the Misuse of Drugs Act was the first of many pieces of legislation designed to strengthen the powers of law enforcement against drugs offenders and increase punishments for 'inherent' drug offences. A maximum life sentence was introduced for importation and supply of illegal drugs as well as medical and social assessments of addicted offenders. This was the beginning of a bifurcation, in which an ever harsher approach would be taken against dealers, whilst maintaining a relatively lenient approach to the drug users, who are seen as their victims.<sup>32</sup> During the 1990s criminality reached historically high levels, especially drug-related acquisitive crime what convinced government that dramatic action had to be taken to tackle the drug problem. Since 1996 there has been a major expansion of drug services and harm reductionist interventions.<sup>33</sup> The following legislative changes were mainly intended to toughen the response to drug crime and increase powers of the police forming a more punitive, deterrent and condemnatory approach under the heading of supply reduction what led to a remarkable increase of almost 50 % in the numbers held in prison between 1996 and 2000 and many of these prisoners were drug users.<sup>34</sup> On the other hand, new schemes for treatment-based diversion of drug-addicted offenders have been established but have only been very small scale. The perhaps most significant, single, law enforcement initiative following 1996 was the introduction of the Criminal Assets Bureau, which tackles organised crime by freezing and confiscating assets. It has had considerable success, but the gangs are adopting their behaviour and strategies to the methods of the Bureau.<sup>35</sup>

The question remains, how efficient and succesful all in all the Irish war on drugs has been.

No serious argument can be made questioning the fact that there is a great amount of 'non-inherent' drug-related crime in Ireland.<sup>36</sup> Some important data arises from studies of the incarcerated. A 2005 survey examining the psychiatric condition of Irish prisoners estimated 58.8 % of male sentenced prisoners had a drug dependency problem and 45.1 % an alcohol dependency problem.<sup>37</sup> A national survey found that 52 % had used heroin.<sup>38</sup> Often these prisoners were not convicted for drug offences but

<sup>31</sup> Ibid., pp 82 – 83.

<sup>32</sup> Ibid., p. 84

<sup>33</sup> Ibid., p. 89.

<sup>34</sup> Ibid., pp. 92 – 93.

<sup>35</sup> Ibid., pp. 98 – 100.

<sup>36</sup> Ibid., p. 57.

<sup>37</sup> Kennedy, Monks, Curtin, Wright, Linehan, Duffy, 'Mental Illnes in Irish Prisoners', p. 60.

<sup>38</sup> Hannoh, Kelleher, Friel, 'General Healthcare Study of the Irish Prisoner Population'.

for various crimes of theft and they often claimed that they had committed a huge number of acquisitive offences and admitted that they had been motivated mainly by the need to fund their drug habit.<sup>39</sup> A Garda Síochána Research Unit study provides that 43 % of all solved crimes in Dublin between 1995 and 1996 were committed by 'hard drug users' with particularly high figures for acquisitive crime.<sup>40</sup> Hard drug users were responsible for most burglary (83 %), robbery (82 %), mugging (82 %) and larcency from the person (84 %). These figures strongly confirm the drugs/crime nexus, especially with respect to 'economic compulsive' crime. But 'economic compulsive' crime overlaps with 'systemic' crime. Many addicts are recruited into the importation/distribution network at a low level in order to be provided with drugs.<sup>41</sup> But also the higher levels of organised crime have flourished with a drug trade probably worth more than €1 billion. Violent gangs are involved especially in the distribution, which have made huge illegal profits and introduced a climate of violence and intimidation new to the Irish scene.<sup>42</sup> In June 1996, one such a gang organised the murder of the well-known investigative journalist, Veronica Guerin, who was working to expose their operations.<sup>43</sup> In the year before this murder, there were 12 gangland assassinations of criminally involved victims and none of these cases led to the conviction of a culprit. Since that time especially the amount of homicides using firearms has risen with most of them being drug-related.<sup>44</sup>

In the latest national survey, 27.2 % of the respondents reported the use of any illicit drug during their lifetime.<sup>45</sup> Surely it can not be argued, that prohibition causes drug abuse. But apparently the prohibition regime cannot prevent it as well. But the outlawry and marginalisation of drugs pushed them at the vulnerable, underclass communities and by promoting silence and secrecy around drugs greatly facilitated drug pushers and cleared the way for opiate drugs to rapidly gain a powerful grip on vulnerable communities, as in the heroin epidemic between 1978 and 1983.<sup>46</sup> The prohibited nature of drug use also contributed to the increase in acquisitive crime and therefore serious criminality. The prohibition also labels drug users as criminals and therefore promotes deviant behaviour, what might become a self-fulfilling prophecy. But most importantly prohibition contributes to the extent of 'economic compulsive' crime through its price pushing effect on the cost of drugs to the consumer and through the consequent acceleration of acquisitive crime to pay for drugs. Prohibition raises prices by creating artificial scarcity and forcing the trade into a criminally controlled, black market. These high prices reflect the organisational and physical difficulties and the legal risks attached to the production, importation and distribution of banned substances. It reflects the very real dangers posed by rival criminals operating in this lawless domain. Furthermore it is incontrovertible that most drug-related 'systemic' crime is fuelled directly by the opportunities for illegal gains created by prohibition. It has fostered the

39 O'Mahony, 'Drugs, crime and punishment', pp. 3 – 35.

40 Keogh, 'Illicit Drug Use', p. X.

41 D'Arcy, 'Drugs and Community', pp. 19 – 62.

42 O'Mahony, 'War on Drugs', p. 60.

43 Ibid.

44 Ibid., p. 61.

45 European Monitoring Centre for Drugs and Drug Addiction, Country Overview: Ireland.

<http://www.emcdda.europa.eu/publications/country-overviews/ie>

46 O'Mahony, 'War on Drugs', p. 151 f.

growth of reckless and brutal gangs and a progressive cycle of increasing violence.<sup>47</sup> Even though prohibition may not be a sufficient explanation for this complex criminal subculture, but it was a necessary precondition for it.

An examination of all drug- and alcohol related homicides in New York found, that 74 % of homicides fell into the 'systemic' category, that is killing intended to protect drugs market position or profits, 4 % were primarily 'economic compulsive', that is killing occurring during robbery or burglary and only 14 % were 'psychopharmacological' in nature, that is they were attributable to emotional and behavioural changes induced by the psychoactive substance.<sup>48</sup> Also crime involving less serious forms of violence mostly falls into Goldstein's second 'economic copulsive' category, since most of the proceeds of such relatively minor acquisitive crimes are immediately expended on drugs.<sup>49</sup> There is also a great amount of non-violent 'non-inherent' drug related crimes, which are clearly 'systemic', such as tax evasion, money laundering and similar drug-related financial crimes as well as bribery and corruption. An interesting point is, that while the immense profits of illegal drug distribution fuel 'systemic' crime and violence, a typical and highly significant aspect of this phenomenon is that drug distribution systemic violence tends to occur in socially disorganized and marginalised areas, where resort to violence in dispute resolution is quite customary.<sup>50</sup> These are areas where 'formal and informal social control is absent or ineffective, which traditionally have high rates of interpersonal violence and which are economically disadvantaged'.<sup>51</sup>

### 2.3. Summary

Naturally the inherent drug-related crime is created only by the prohibitionist conviction. But also the main part of the non-inherent drug-related crime is caused by the outlawry of drugs. Most of the 'economic compulsive' crime and the entire 'systemic' crime is due to the high costs and therefore the possibility of high profits for violent and reckless gangs on the black market caused by prohibition. Crimes as a result of the effect the drug has on the individuals thought processes and behaviour, so those which were intended to be combatted by the war on drugs are, compared to the other categories, markedly low. Furthermore prohibition relocates the problem especially to marginalised social areas and groups. At the same time the outlawry makes an effective information about safe use and specific harm prevention impossible. After all it labels an inoffensive behaviour as criminal and thereby marginalises drug users.

<sup>47</sup> Ibid. p. 153 f.

<sup>48</sup> Goldstein, 'Drug-related homicide in New York, 1984 and 1988'.

<sup>49</sup> Mahony, 'War on Drugs', p. 54.

<sup>50</sup> Collins, J. A., 'Summary thoughts about drugs and violence', in: De La Rosa, Lambert, Gropper, 'Drugs and Violence: Causes, Correlates and Consequences', pp. 265 – 275.

<sup>51</sup> Ibid.

## CONCLUSION

As the first part of the essay has shown, there can be no sound foundation for drug prohibition in a society that respects individual's autonomy and self-determination. Because punishing and regulating an inoffensive behaviour is a negation of the individual's sphere of liberty and a distinguishing feature of authoritarian societies. In this regard there is no third way between liberty and serfdom – either the individual's sphere of liberty, in which according to Mill, Locke and Kant everybody is allowed to do whatever he pleases, as far as nobody else is hurt, is respected as an axiomatic value or it is not. A logically consistent application of the paternalistic and communitarian principles driving the prohibitionist approach would lead to the marginalisation of specific groups of society and to the outlawry of several common activities, which could be seen either as dangerous for the individual or as burdensome for society and would end in a totalitarian cage.

But drug prohibition is not only illegitimate. As the second part of the essay has shown, it apparently causes more problems, crime, violence and harm than it could prevent. The war on drugs was started to combat the non-inherent drug-related crime caused by pharmacological effects of the drugs on brain and behaviour. But it is not only, that it established the inherent drug-related crime, by this it also caused most of the contemporary 'economic compulsive' crime because of the hyperinflated costs reflecting the organisational and physical difficulties and the legal risks of the black market. At the same time the possibility of immense profits on the black market drive violent gangs to the 'systemic crime'. Considering that the crime of the two latter categories is to the greatest extent a result of the prohibitionist policy and the crime caused by the drug-use itself is markedly low, it has to be stated that the war on drugs has done more harm than good. That is why, even following the paternalistic and communitarian harm-reducing principles that drug prohibition should be condemned. Beyond this prohibition burdens the inconveniences of drug-use to the anyway disprivileged and marginalised groups of society and labels an inoffensive behaviour as criminal.

Facing these conclusions a reconsideration of drugs, drug-related problems and prohibition becomes mandatory.

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