

WHY IS THE CONSUMPTION OF ILLEGAL DRUGS SO HARD TO REGULATE?

¿POR QUÉ EL CONSUMO DE DROGAS ILEGALES ES TAN DÍFICIL DE REGIULAR?

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Resumen

En este artículo se reflexiona sobre la eficacia del derecho como herramienta de gobierno en la reducción del consumo ilegal de drogas. Tiene por objeto contribuir a que las políticas públicas funcionen y se cuestiona si mejores resultados pueden alcanzarse incorporando teorías sobre el comportamiento humano al debate.

Se exploran argumentos normativos y prácticos para explicar el por qué cualquier tipo de regulación parece ser insuficiente en este contexto. Con el objeto de superar la ineficacia del derecho en la materia, se propone como estrategia complementaria la aplicación de un marco combinado entre las herramientas clásicas de gobierno y la incorporación de las ciencias del comportamiento a la materia.

Palabras Claves

Políticas públicas – Drogas – Regulación – Cumplimiento – Comportamiento – Legitimidad

Abstract

This article reflects on the efficacy of regulation as a tool of government for tackling illicit drug consumption. In so doing seeks to contribute to the debate about how to make policy work and asks whether better outcomes can be achieved by making other approaches such as behavioural science central to the project.

It explores a number of normative and policy reasons why regulation might fall short in this context. Thus, a complementary framework and a combined strategy between traditional and soft tools of governments are proposed to achieve better results.

Keywords

Policy – Illicit drugs – Regulation – Enforcement – Behaviour – Legitimacy

According to the United Nations Office on Drugs and Crime, the total number of illicit drug users around the globe was estimated at around 200 million people in 2006. Those rates are tantamount to 5 percent of the global population aged between 15 and 64.¹ On the other hand, the Latin American Commission on Drugs and Democracy has estimated that approximately 15 percent of drug users suffer from chronic dependency issues.²

To lift the veil of consumption issues, it seems sensible to shed light on some key definitions and precise a few stages within the drug market as a first step. The first distinction to be made is the one between licit and illicit drugs. In spite of a lack of legal differentiation, those are the widespread-terms to refer to those legal drugs that are limited to medical and scientific purposes and those which are illegal.³ It is important to set apart illegal drug production from its supply and consumption as three different stages comprising the drug market chain.⁴

States have had different ways to approach drug issues when designing their drug policy. Four basic models are set worldwide: prohibition (United States), decriminalization (Portugal), de-facto legalization (Netherlands) and legalization (Uruguay). Prohibition can be defined as banning something through regulation. Drug prohibition varies from one state to another in the type of substance banned (from soft to hard drugs) and the forbiddance degree. Thus, countries may punish with criminal penalties such as incarceration either all stages -from production to consumption- or solely some of them.⁵ Instead, the bedrock of decriminalization lies in the abstention of using criminal system institutions to deal with the production, commercialization and consumption of illegal drugs. Within the latter option, policies may include civil or administrative sanctions such as fines; taxation policies; age restrictions and quality standards, among others.⁶ In the case of de-facto legalization, practices such as drug consumption become socially accepted regardless of being officially prohibited. As a consequence, the criminal justice system fails to act in spite of having the power to do so.⁷ Finally, legalization refers to the complete removal of legal sanctions to all drug-related behaviour with no application of criminal or administrative penalties at all.⁸ The rationale is to obtain a strictly-regulated market. However, a drug-free-world seems more of a chimera than a realistic goal to achieve within any society.⁹

¹ United Nations Office on Drug and Crimes, World Drug Report (2006), 9. Available from <https://www.unodc.org/unodc/en/data-and-analysis/WDR-2006.html>. Accessed on 31 March 2016.

² Latin American Commission on Drugs and Democracy, Drugs and democracy: Toward a paradigm shift (2009), 19. Available from http://www.drogasedemocracia.org/Arquivos/declaracao_ingles_site.pdf. Accessed on March 31 2016.

³ Organization of American States, Scenarios for the Drug Problem in the Americas (2013), 15. Available from http://www.oas.org/documents/eng/press/Scenarios_Report.PDF. Accessed on 31 March 2016.

⁴ Jonathan Wolff, The regulation of recreational drugs: Philosophical argument and public policy (London: Department of Philosophy, University College London, 2007), 1.

⁵ J. A. Buxton; M. Haden and R. G. Mathias, "The control and regulation of currently illegal drugs" in The International Encyclopedia of Public Health 2 (2008), 9.

⁶ Organization of American States, Scenarios for the Drug Problem in the Americas (2013), 13-14.

⁷ Organization of American States, Scenarios for the Drug Problem...

⁸ Caitlin Elizabeth Hughes and Alex Stevens, "What can we learn from the Portuguese decriminalization of illicit drugs?" in "British Journal of Criminology (2010), 999.

⁹ Robert J. MacCoun and Peter Reuter, Drug war heresies: Learning from other vices, times, and places (Cambridge University Press, 2001), 408.

As a common ground and in spite of the specific system chosen, regulation can be found as a basic tool of government to oust drug issues. Therefore, this article will focus merely on why effort to restrain illicit drug consumption through any kind of regulation is so hard to achieve within any society. For this purpose, regulation will include all forms of laws, decrees or binding authority order regardless of the specific policy treatment taken by states. Section I analyzes why regulation as a tool of government falls short of tackling illicit drug consumption. In doing so and without pretending to be exhaustive, assesses some of the underlying reasons that are likely to be blocking better outcomes. While the second section focuses on nudging and thinking strategies as complementary frameworks to obtain better outcomes and evaluates a combined strategy between traditional and soft tools of governments.

I.- Regulation pitfalls to tackle drug consumption

Law is widely known as one of the most powerful tools of government when designing policy. Western legislation has a far-reaching impact on regulating a broad spectrum of activities related to finance, business and environment on behalf of public good (Becker 1968: 169).¹⁰ Likewise, some private aspects of individuals may face a variety of restrictions in sensitive areas such as family and health. Drug consumption is no exception. Shiner explains that drug policy contours have been driven by general ideas of what should be done and security has risen as a rallying banner to legitimise state intervention to avoid major threats.¹¹ Nevertheless, to comply with the law is not always an easy task.¹² When examining drug consumption data, there is a manifest lack of effectiveness in the paths taken so far. Tough enforcement techniques have demonstrated scarce impact¹³ and seem ineffective to control drug users.¹⁴ Using regulation as a tool to prevent drug consumption, therefore, seems hopeless¹⁵ since its sought purpose is not fulfilled.

It is possible to observe a variety of underlying causes that might help explain the gap between state effort to plummet drug consumption among its citizens and the seldom successfulness in outcomes reached so far. At the basis, we need to bear in mind the difficulties to make certain laws enforced¹⁶ and its variation among the specific kind of legislation.¹⁷ Particularly those in which the object regulated in the private sphere of individuals presents additional obstacles at the enforcement stage.¹⁸ When regulation points to address behaviour that is likely to be perpetrated in private spaces, it is hard to inquire who is really complying with the law and who is not. This partly obeys to entitlement issues.¹⁹

¹⁰ Gary S. Becker, "Crime and punishment: an economic approach" in *Journal of Political Economy* 76 (1968), 169.

¹¹ Michael Shiner, "British drug policy and the modern state: reconsidering the criminalisation thesis" in *Journal of Social Policy* 42, no. 03 (2013): 639.

¹² Gary S. Becker, "Crime and punishment: an economic approach... 169.

¹³ Lawrence W Sherman et al., "Deterrent effects of police raids on crack houses: A randomized, controlled experiment" in *Justice Quarterly* 12, no. 4 (1995).

¹⁴ Kenneth J. Meier, *The politics of sin: Drugs, alcohol and public policy* (ME Sharpe, 1994).

¹⁵ Don Weatherburn and Lind Bronwyn, "The impact of law enforcement activity on a heroin market" in *Addiction* 92, no. 5 (1997).

¹⁶ Peter John, *Making Policy Work* (Taylor & Francis, 2011), 19.

¹⁷ Gary S. Becker, "Crime and punishment: an economic approach... 169.

¹⁸ Peter John, *Making Policy Work*... 28.

¹⁹ Guido Calabresi and A. Douglas Melamed, "Property rules, liability rules, and inalienability: one view of the cathedral" in *Harvard Law Review* (1972), 1089.

Law regulates situations in which third parties might be negatively affected by actions perpetrated by others.²⁰ Linking both ideas, a third party is usually entitled to make the law enforced by having the right to do so and requiring the state to intervene through its authority to either prevent or limit unfair situations or compensate them if necessary for the harm inflicted. However, in the drug field, third parties are unlikely to be directly affected or threatened by one's personal choice of using many of the current illegal drugs for recreational purposes.²¹ They have little to gain from denouncing such behaviour as they are not directly harmed or affected by it. In this regards, the legal system works as a complex incentive structure that takes costs and benefits into account. When assessed, if benefits weigh more, it is simpler to obtain the envisaged conduct.²² Conversely, one can hold that where gains are limited, it is harder to have such behaviour denounced. Thus, it is tough to get high rates of compliance when regulating activities taking place in private spaces due to a lack of entitlement to make the law enforced. In addition, particularly in the drug field, benefits are not strong enough to deter users from consumption nor to make parties want to enforce the law.

On the other hand, public expenditure, especially in prohibitionist systems is extremely high. A report by the President's Commission on Law Enforcement and Administration of Justice stated that in the United States the economic cost of crime deferred depended on the type of crime.²³ For instance, crimes against persons amounted to 815 millions of dollars; crimes against property to 3,932 and crimes related to illegal goods and services to 8,075. Specifically, the gross income from expenditure on various kinds of illegal consumption, amounted to over 8 billion dollars, whereas the value of crimes against property amounted to almost 4 billion dollars.²⁴ In the United States, the US Border Patrol assigns 15% of its total expenditure to drug enforcement each year. Data from 2002 in Sweden and from 2003 in the Netherlands show that among drug policy expenditure as a whole, including prevention, treatment, harm reduction and enforcement, the latter -which includes policing, courts, detention and alternative sanctions- is the most expensive item. Regardless of the weakness of the existing data to obtain accurate measures, expenditure in enforcement seems to be significantly superior.²⁵

Given the high costs for the state to display the public apparatus to ensure enforcement and the aggravating circumstances that third parties might not be truly interested in its compliance, the remaining alternative is that the consumer itself wishes to comply with the law in a way they deem fit to do so. Even though it is for a supposed common gain or public purpose, the latter is unlikely to occur when the regulated matter is one's private space. Jonathan Wolff explains this effect as a self-ownership argument based on libertarian principles and the Millian position. To the extent that one's personal choice does not harm third parties, "*one has the right to put whatever one wishes to into one's own body*".²⁶ Moreover, intrusive interventions when no or little harm to third parties can be

²⁰ John S. Mill, "On Liberty" in *Utilitarianism and Other Writings* (M. Warnock, 1962).

²¹ Jonathan Wolff, The regulation of recreational drugs: Philosophical argument and public policy, 1.

²² Gary S. Becker, "Crime and punishment: an economic approach".

²³ President's Commission on Law Enforcement, & Administration of Justice, *The Challenge of Crime in a Free Society: A Report* (Washington, US Government Printing Office (1967), 44. Available from <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>. Accessed on 31 March 2016.

²⁴ Gary S. Becker, "Crime and punishment: an economic approach"... 171.

²⁵ Peter Reuter, "What drug policies cost. Estimating government drug policy expenditures" in *Addiction* 101, no. 3 (2006): 317-321.

²⁶ Jonathan Wolff, The regulation of recreational drugs: Philosophical argument and public... 9.

observed, may be seen as illegitimate, which in turn affects enforcement effectiveness.²⁷ Regulation should be sensitive to the individual's sensation of legitimacy: the more legitimacy, the more reasonable to expect positive outcomes.²⁸ In my opinion this argument goes in line with the proportionality principle that should be observed when designing regulation and with a human-rights-centered approach respecting the individual. Tough drug control systems interfere with the right to privacy and are related to violations of an individual's liberty and personal integrity. Likewise, harsh regulation is likely to deepen social damage through the stigmatization and marginalization of drug users.²⁹ Conversely, to recover from drug problematic usage, reintegration into society and removing employment obstacles are key.³⁰

Another powerful motive underlying the disappointing performance of law in regulating drug consumption is that by mandating a specific behaviour the causes of such conduct are not addressed at all.³¹ This is cross-cutting to all drug control systems. Non-problematic consumption of illegal drugs can find its roots in group pressure or lifestyle choice,³² whereas addiction can be influenced by factors such as an individual's psychology,³³ physiology³⁴ and social elements alike.³⁵ Law is not actually meant to address causes; however, a comprehensive approach might help improve outcomes. Doing more in certain areas, less in others and even differently sometimes has been suggested.³⁶

Given the previous scenario, normative and policy reasons are observed to hinder law as a successful tool of government to regulate drug consumption. In the former, entitlement and proportionality issues alongside human rights concerns and a general sense of lack of legitimacy in intrusive state interventions can be included. In the latter, high public expenditure and practical enforcement difficulties are core. Moreover, insufficient motivation and incentives to change an individual's behaviour make regulation fall short.

Solely normative tools, therefore, are not effective to shape or guide an individual's behaviour.³⁷ Especially in contexts where there is a low risk of detection, citizens' cooperation will be the necessary compliment to make law work.³⁸

²⁷ Lawrence D. Bobo and Victor Thompson, "Unfair by design: The war on drugs, race, and the legitimacy of the criminal justice system" in *Social Research* (2006), 467.

²⁸ Peter John, *Making Policy Work...* 19, 36.

²⁹ Damon Barrett, "Security, development and human rights: Normative, legal and policy challenges for the international drug control system" in *International Journal of Drug Policy*, 21, no.2 (2010).

³⁰ United Kingdom Drug Policy Commission, *The UK drug policy commission recovery consensus group: A vision of recovery* (London, UKDPC, 2008), 6. Available from http://www.ukdpc.org.uk/wp-content/uploads/Policy%20report%20-%20A%20vision%20of%20recovery_%20UKDPC%20recovery%20consensus%20group.pdf. Accessed on 31 March 2016.

³¹ Julian Buchanan, "Missing Links? Problem drug use and social exclusion" in *Probation Journal* 51, no. 4 (2004), 390.

³² Peter John, *Making Policy Work...* 24.

³³ Edward J. Khantzian, "Reflections on treating addictive disorders: A psychodynamic perspective" in *The American Journal on Addictions* 21, no. 3 (2012): 275.

³⁴ Robert West, "Towards a comprehensive theory of addiction" in *Drugs and Alcohol Today* 6, no. 1 (2006).

³⁵ Julian Buchanan, *Missing Links? Problem drug use and social exclusion*, 390.

³⁶ Robert J. MacCoun and Peter Reuter, *Drug war heresies: Learning from other vices...* 408.

³⁷ Peter John, *Making Policy Work...* 19.

³⁸ Peter John, *Making Policy Work...* 24.

II.- Complementary framework to achieve better outcomes

Where lowering illicit drug consumption rates is the target, a proposed long-term solution is to reduce the demand.³⁹ Thus, in certain situations, enticing behaviour towards the desired direction, may improve policy outcomes. This might include modifying some human beliefs and values,⁴⁰ understanding what motivates people and what drives their behaviour.⁴¹ In this line of thoughts, strategies such as nudging⁴² and thinking,⁴³ both relying on Simon's bounded rationality idea,⁴⁴ have emerged in the past decade. On the one hand, nudge strategies focus on information and hints to help people choose in a better way for themselves and society,⁴⁵ without banning any options nor substantively changing their economic behaviour.⁴⁶ Thus, the idea is to influence choices through the inclusion of a variety of soft touches such as positive reinforcement and indirect suggestions to shift the architecture of their personal and collective preferences.⁴⁷ Think strategies instead, entail the creation of new institutional spaces in which citizens publicly deliberate the dimensions of their actions in issues of public concern.⁴⁸ The aim is to obtain their voluntary cooperation when understanding the consequences of their choices. This will enable citizens to own their decisions, which in turn, will improve policy quality.⁴⁹ In addition to the previous described techniques, the mnemonic MINDSPACE -messenger, incentives, norms, defaults, salience, priming, affect, commitments, ego- has been outlined to create a possible framework to use for behavioural change.⁵⁰ Therefore, the suggestion is to interplay with all factors that impact behaviour applying insights from psychology, behavioural science and economics to policy-making processes. The idea is whether to change minds or change contexts in the decision-making process. The former is reached by influencing the way in which people think through information and incentives and the latter focuses on alterations in the environment within which citizens decide.⁵¹

Nevertheless, nudging and MINDSPACE proposals have not been exempt of critiques. The toughest ones have focused on the lack of effectiveness for long-term decisions due to the confusion between models of behaviour and theories of change⁵² and in highlighting possible ethical issues in their application. Arguments go from a biased and

³⁹ Latin American Commission on Drugs and Democracy, *Drugs and democracy: Toward a paradigm shift*, 10.

⁴⁰ Peter John, *Making Policy Work...* 5.

⁴¹ Peter John et al., *Nudge, nudge, think, think: Experimenting with ways to change civic behaviour* (A&C Black, 2011), 9.

⁴² Richard H. Thaler and C. R. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* (New Haven: Yale University Press, 2008).

⁴³ Peter John et al., *Nudge, nudge, think, think: Experimenting with ways...*

⁴⁴ Herbert A. Simon, "Bounded rationality and organizational learning" in *Organization science* 2, no. 1 (1991).

⁴⁵ Peter John et al., *Nudge, nudge, think, think: Experimenting with ways...* 9-10.

⁴⁶ Theresa M. Marteau et al., *Judging nudging: can nudging improve population health?* In *BMJ* no. 342, d228 (2011).

⁴⁷ Chris Bonell et al., "One nudge forward, two steps back" in *BMJ* no. 342 (2011), 1, 2.

⁴⁸ Peter John et al., *Nudge, nudge, think, think: Experimenting with ways...* 11.

⁴⁹ Peter John, *Making Policy Work...* 134.

⁵⁰ Paul Dolan et al., "Influencing behaviour: The mindspace way" in *Journal of Economic Psychology* 33, no. 1 (2011), 66.

⁵¹ Paul Dolan et al., "Influencing behavior: The mindscape..." 264

⁵² Andrew Darnton, "Reference report: An overview of behaviour change models and their uses" in UK: Government Social Research Behaviour Change Knowledge Review (2008), 11.

paternalistic approach⁵³ to psychological manipulation.⁵⁴

For liberal sectors it is not sufficient to rely on the contradiction of a soft or libertarian paternalism to justify the application of such measures. Negative connotations are linked to depriving citizens of their freedom of choice and having a third party decide what is better for them instead. Detractors argue there is no agreement on what welfare is when nudging practices take place, so cultural homogeneity and biased ideas towards valuing higher welfare than freedom can be observed.⁵⁵ Conversely, positive effects of caring about others and responsibility are argued in defense of these strategies.⁵⁶

Which approach is better from an ethical perspective will depend on the ethical principles one holds. If paternalism is in accordance with one's line of thoughts, there should be no objections, especially where interventions are proven to work. Alternatively, if freedom of choice is deemed as more important than the risk of making bad decisions, it is dubious to obtain the will to implement these strategies.⁵⁷ However, no neutral design exists and taking a policy option without framing it is unavoidable.⁵⁸ Much of how things are done will depend on the government's political preferences in a given time.⁵⁹ However, a slightly different question will be if whether or not changing behaviour to achieve better policy outcomes is a legitimate role of the state to assume or not. In my opinion, where general principles of efficacy and efficiency within the public structure can be detected, grounds for justifying the use of these strategies in a cross-border way can be found. Especially where there is a general consensus within a society to achieve collective ends.

Conclusions

Given the described context illicit drug consumption is hard to regulate. For policy-makers, the first step should be to check whether the chosen policy to implement is likely to impact according to the sought outcomes. To protect health, to drop drug consumption (either recreational, abusive or problematic) or to reduce addiction, are all different goals unlikely to be reached effectively in the same manner and with the same tool of government. No unique solution can be suggested for doing so. Solely using the tool of law seems insufficient. On the one hand, law falls short in managing behaviour. On the other, it should be targeted at controllable conducts, which is not an easy task in the use of drugs.⁶⁰ Instead, directing efforts to focus solely on changing behaviour seem helpful but not enough because too much attention is put on individuals and not on the system as a whole.

⁵³ Jan Schnellenbach, "Nudges and norms: On the political economy of soft paternalism" in *European Journal of Political Economy* 28, no. 2 (2012), 266.

⁵⁴ Daniel M. Hausman and Brynn Welch, "Debate: To Nudge or Not to Nudge" in *Journal of Political Philosophy* 18, no. 1 (2010): 135-136.

⁵⁵ Gregory Mitchell, "Libertarian paternalism is an oxymoron" in *Northwestern University Law Review* 99, no. 3 (2005), 1260-1261.

⁵⁶ Signild Vallgård, "Nudge—A new and better way to improve health?" in *Health policy* 104, no. 2 (2012), 201.

⁵⁷ Signild Vallgård, "Nudge—A new and better way to improve health?" in *Health...* 202.

⁵⁸ Richard H. Thaler and C. R. Sunstein, *Nudge: Improving Decisions about Health, Wealth...* 10-11.

⁵⁹ Nancy E. Kass, "An ethics framework for public health" in *American journal of public health* 91, no. 11 (2001), 1782.

⁶⁰ Peter John, *Making Policy Work...* 25.

Regardless of each tool's limitations, the application of a combination of techniques is suggested. When regulating sensitive issues but where enforcement is difficult and behaviour unlikely to be shifted, law should focus on the following points to attempt compliance improvements: legitimacy of state intervention when restricting liberty in the name of other collective goods and proportionality considerations to validate the degree of interference. The remaining challenge, though, will be to find consensus as to where a significant burden is such to justify intervention in one's private life. In addition, complimentary soft tools such as nudging, information, deliberation and persuasion,⁶¹ might be strategies worth improving the effectiveness in diminishing drug consumption. The application of soft tools might help to support compliance and legitimate regulation through bridging the dialogue between authorities and citizens while working alongside. As an on-going challenge remains to convince detractors of the application of these policies since their ultimate implementation will depend on politicians' idea of appropriateness for doing so. A persuasive perspective will suggest to support these new strategies with scientific evidence showing successful outcomes and frame these strategies as encouraging people to develop social responsibility.

Furthermore, if avoidance in consumption cannot be achieved, at least states can try to impact the catalyst conditions for demanding drugs.⁶² Among them, we can find restriction in opportunities and social exclusion experienced prior to developing drug problems.⁶³ Thus, a variety of non-drug related policies such as educational opportunities, public housing, unemployment benefits and physical and mental health support can be improved and might help to affect outcomes.⁶⁴ Notwithstanding, policy outputs can be easily shifted to try new paths. However, policy outcomes are hard to change. After all, and despite all efforts, political systems have no control over the variety of factors that influence results.⁶⁵

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⁶¹ Peter John, Making Policy Work... 33.

⁶² Robert J. MacCoun and Peter Reuter, Drug war heresies: Learning from other vices... 408.

⁶³ Julian Buchanan, Missing Links? Problem drug use and social exclusion... 391, 396.

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⁶⁵ Peter John, Making Policy Work... 4.

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