

Rationality and legitimacy of the policy of repression in drug trafficking: a necessary provocation

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Photo César Rodrigues/Folha Imagem - 26.20.2001

A policeman holds part of the 1.2 tonnes of marijuana apprehended in Santo André (SP) and in Guarulhos (Greater SP), which had come from the state of Mato Grosso do sul.

Introduction

Drug consumption has accompanied man since time immemorial, with the first use of opium and *cannabis* recorded around 3000 B.C. (Luís Duarte Patrício *in* Almeida, 2003). The classification as licit and illicit drugs, however, is a relatively recent phenomenon and the sellers of licit drugs and the defenders of “a drug-free society” share a common interest: convincing smokers (of tobacco) and drinkers (of alcohol) that the use of such substances is different from using drugs (Kleiman, 1992), as though they had some pharmacological significance.

A study conducted by the Gordon S. Black Corporation (cited by Kleiman, 1992) concerning drug users who wound up as compulsive users

presented the following results: nicotine users were the most numerous and beyond from the standard: 59% of those who had previously smoked a cigarette reported that at some point they had become dependent. Smokable cocaine was at 22%, which means that one of every five users became a chronic user. Alcohol was at 17.1%, powdered cocaine, 16.6%, and marijuana, 13.7%.¹

Nothing is more appropriate than to begin by quoting Nietzsche (1978 – *Genealogy of Morals*, First Dissertation §2). In tracing the historical origin of the concept of good and evil, the much loved, and detested, philosopher, criticising a-historical analyses of morality, clarified what happened in relation to selfless, non-egoistic actions:

“Originally” – so he decreed – “selfless actions were praised and considered good for those for whom they were done, that is, those to whom they were useful; much later this origin of the praise was forgotten, and selfless actions, by the simple fact of having been customarily taken as good, were also felt to be good – as if they were in themselves something good.” It soon is perceived: this first deduction already contains all typical traces of the idiosyncrasy of English psychologists – there is “the utility,” “the forgetting,” “the habit” and finally “the error,” all serving as a basis for a valuing of which the superior man, up to now has taken as a source of pride, as though it were a privilege of man himself [...] Owing to this providence, starting in principle with the fact that the word “good” is not necessarily linked to “selfless” actions, the superstition desired by those genealogists of morals. It is only with the decline of aristocratic value judgements that this opposition between “egoistic” and “selfless” more and more imposed itself on human consciousness – to use my language it is, the instinct of the herd, which has finally overtaken the word (and the words).

The same inversion must have occurred with drugs. Once legally banished, the malignity of the drug came no longer to be in its toxicology, in its potential for the destruction of free reason, but rather, from its illicitness. It is the illicitness that turns the drug bad, that makes it the agent of evil: the violence associated with the consumption of drugs also suffers from this distortion. The addict who steals and, often injures and even kills a family member in order to get money to buy the drug, acts thus from guilt over the drug and not because he depends on a unique and powerful distribution network – which is the traffick. Soon it is the drug that is blamed for the family tragedy, for the violence, and not the manner by which the drug is distributed and the way society avoids facing – because it flees from – the abuse of drugs, the genesis of which is the compulsion to consume. To the point that many think that addicts will murder their families if there were a quantity of drug at their disposal that could free them from dealers.

Is it possible that addict’s aggression is only because he consumes drugs? Or, on the contrary, is it for not lack of money that he opts for

aggression? Obviously many clear-thinking people already make this distinction, but a majority of people continue to blame the drug for the violence, which implies considering that the drug is bad by itself, from which follows the justification for a shameful and stupid war that only takes lives and aggravates the problems.

The prohibition of drug commerce goes back to the end of the 19th century and the beginning of the 20th. According to Professor Oswaldo Coggiola (2006), the excessive consumption of opium by the English caused England to promote an international conference in Shanghai in 1909, with the participation of thirteen countries (The Opium Commission). The result was the International Convention of Opium, signed in the Hague in 1912, aimed at control of the production of narcotic drugs, a Convention to which Brazil committed itself but, in practice, tolerated “the elegant addictions” of the rich bohemians until 1921 when it passed the first prohibitionist law of opium, morphine, heroin and cocaine (Rodrigues, 2002). In 1914 the United States adopted the Harrison Narcotic Act, prohibiting the use of cocaine and heroin outside of medical control. Severe penalties against consumption were adopted in international conventions in the 1920s and 1930s.

The 1961 Unique Convention of the UN expanded the reach of prohibitionist measures, besides bureaucratizing the international regulatory structure of illicit drugs. This convention was incorporated within the Brazilian Judicial Orders by Decree n.54.216/1964, serving as an instrument for justifying the updating of domestic Brazilian legislation. This resulted in the toxicants law (Lei n.6.386/1976, recently revoked by Law n.11.343/2006), where “the procedure of treaty ratification, act of incorporation of an international agreement to the national legal order, became the fundamental instrument used for updating valid dispositions in the country,” furnishing the state “greater stratagems” for applying coercive devices to the traffickers, as in the example of the Geneva Conventions of 1931 and 1936 which justified the adoption of the Law-Decree n.891/38 (Rodrigues, 2002).

Furthermore this tricky strategy of convincing the national Parliament of the repressive policies is adopted by the United States, not only taking advantage of international treaties, but from the fact that, although the interventionist aura had dimmed within the United States, Latin-American states “took the general lines of repressive policy from Washington as their own, reproducing at the local level a prohibitionist position that shed the North-American aspects to become continental” (ibid, p.108). Thus according to Rodrigues, the utopia of the pluralist state projected onto the European model aided in the purging of the different, the deviant, the alternative.

The repression of the commerce and consumption of drugs aggravates the problem of violence, “being many times more prejudicial to society than the drugs themselves,” (Ivanissevich, 2002),² since it is a notorious fact that

parallel states would not yet have been created, in Rio de Janeiro, in Mexico and in Colômbia, at least, given the origin of “transversality.” The term transversality or intersection of criminals and legal institutions is from the former representative, Judge Denise Frossard, in an interview with *Tribuna da Imprensa* during the electoral campaign for the governor of the state of Rio in 2006, arguing against the idea of a parallel state to the extent that the transgressors of the law do not confront the state frontally, but in various ways co-opt public agents by complicity. Alba Zaluar (2002, p.33), in contrast, incorporating a study published in the magazine *Ciência Hoje [Science Today]* affirms that transnational organized crime “presently represents the greatest danger that governments need to confront to assure their stability and security.”

According to Rodrigues (2002), the unanimity around the urgency of combating drug traffic on the American continent, an unverifiable unanimity in institutional themes in the defense of democracy, human rights and the liberalization of commerce, is supported by moral bonds and medico-sanitary knowledge.

An economic study made by Becker & Murphy (2006) demonstrates that the more inelastic the demand for illicit drugs, or that the more inelastic the supply, the greater the increase in social cost for repressively reducing its production, which would be accomplished more efficiently through a monetary fee to reduce the demand by a price increase than the traditional system, even though the levy might have the inconvenience of tax evasion by some producers.

In turn, in the opinion of Senator Jefferson Perez (2003, p.8) in an interview in the magazine *Forum*,³ legalization of drug commerce requires on an international UN convention, which is where there is a question of the democratic legitimacy as well as deficiency of these international organs. Does the UN have the legitimacy to adopt repressive policies in regard to the commerce of drugs without hearing the populations of the countries that sign the conventions concerning the subject? Will these treaties be legitimized merely by parliamentary referendum? The crisis of the contemporary state and, in the case of Brazil, the growing question about the political-electoral system demonstrates that it is not so simple, to the point of Paulo Bonavides emphatically defending popular democracy as the only alternative to remove the state from the crisis of legitimacy in which it finds itself.

The fact is that the Brazilian government doesn't avoid the standardized policy of repression concerning drug commerce. The widely celebrated new Law of Drugs (Law n.11.343/2006) adopts a “dualistic theory of the penal system with rules of accusation and two-level procedurally guaranteed principles” (Bonho, 2006): but in practice, only the drug consumer is protected, in general children of the middle and upper class who shouldn't have a stained criminal record.

Alessandra Teixeira (2006), supported by various authors, states that the conjunction of repressive policies known as the war on drugs is most fully expressed through massive imprisonment. Conceived in the United States, this policy has been responsible for the control and massive incarceration of blacks, the poor, and illegal immigrants. Symptomatic of this point is the Mutual Cooperation Agreement for the Reduction of Demand, Prevention of Unauthorized Use and Combat for Prevention and against the Illicit Trade of Drugs, signed by the Brazilian Government and the North American Government on April 12, 1995 (promulgated by Decree n.2.242/1997) and renewed annually, in which memoranda expressly observe that the agreement requires statistical proof of increase in the number of prisons and sentences related to nervous-system drugs, so that the Federal Police will receive resources to buy equipment and training. It is not by chance that each time a dealer is arrested with a kilo of cocaine, the Federal Police calls the press and puts on a true *show*.

As to reference to drug trafficking, the Federal Constitution establishes in Art. 5º, chapter XLIII, that such crimes are considered unbailable and not susceptible to grace or amnesty, which demonstrates in a clear manner the extent of disapproval concerning the use of narcotic substances. The repression of drug traffic has no other end than to interfere with the freedom of citizens, preventing them from having access to specific drugs under the justification that such substances, besides provoking dependency, create numerous social disruptions.

In the weight of this, however, the normative force of the Federal Constitution – and this is the preoccupation of the jurist and the constitutionalist in the first place -, the tangible factors of power can't be ignored (Ferdinand Lassale). Constitutional myths, with all their utopian expression, should in some manner be aligned with reality, so that not only the Constitution, as a piece of paper, but all the apparatus of the state can avoid being delegitimized with a consequent process of anomie, to use the expression of the sociologist Durkheim.

A judicial order that closes its eyes to the habits and uses of a people is fated to generate more conflicts than it pacifies in terms of social relations. The lesson, somewhat neglected by the Brazilian Academy, brought forth by Oliveira Viana (1999, v.I, p.43-4), following Del Vecchio, - (what is in the Code is a right; but not all rights are in the Code) -, and also influenced by the culturalism of Sílvio Romero, is that

the new social sciences give, today, in effect, a large and fundamental role, in the determination of judicial norms, to the activities elaborated by its own society, spontaneously developed outside and independent of the *technical* activity of the official legislative bodies. The right that arises in this spontaneous activity of society is the right-of-custom, the right of the mass of people that the elite, always, unknown to or disdained by them, at times are obligated to recognize it and legalize, to incorporate, as Gurvitch says.

After so much spilling of blood in the repression of the drug trade, after the imprisonment of almost an entire battalion of the police force of Rio de Janeiro (the most recent incident, in September, 2007) and the inhumanely overcrowded prison population due to the imprisonment of dealers, whose degrading conditions affront the constitutional principle of dignity of human beings, this is more than time to analyze the question in the light of Constitutional right, without prejudice and without fear. We are convinced that the democratic state of law is threatened, and this threat, different from that indicated by the media, is not caused by the drug dealers, but, rather, by the way the cultural phenomenon of using drugs is treated.

The first question that we ask is whether a law that is contrary to reason, contrary to the facts of evidence, notoriously incapable of stopping and reducing the state of things that it is meant to prevent, is legitimate? Can legitimacy exist without rationality?

According to Silva Franco (*in* Capez, 2004, p.47),

in a democratic state of law, simple formal respect for the principle of legality is not sufficient. There is, in reality, within this principle, a dimension of content that cannot be disdained nor maintained secondarily. The Penal Law can't be addressed from different standpoints, in a democratic and pluralistic society, neither for the protection of unimportant goods, of insignificant things, of little worth, nor the imposition of ethical or moral convictions nor of a certain and officially defined morality, nor in the punishment of domestic concerns, for personal reasons.

Fernando Capez (2004, p.47) argues that

the creation of penal types that are an affront to the dignity of the human being collide frontally with one of the foundations of the democratic state of law on which the Federative Republic of Brazil is constituted according to Art. 1º, III, of the Federal Constitution. For this reason the modern conception of the Penal law should not be dissociated from a social vision, which seeks *justification in the legitimacy of the penal norm*. (Our italics).

Concerning the analysis of the prohibitionist justifications of the commerce of illicit drugs, in particular the commerce of marijuana and cocaine, using as a tool the theory of communicative action of Habermas, according to which the norms should be imposed by understanding, presupposing that the subject is a rational being, of good faith, who interacts with others involved with those norms in the communicative process of their creation, we can verify from this plane that the legislative process in this area is far removed from both consensus and good reasoning. Reasonability as proposed by Rawls (1999), a consensus by juxtaposition in which the public's interests outweigh the individual's, also seems not to have been taken into account, except in an equivocal form. According to Habermas (1997, v.1,

p.309-10), the democratic process bears the burden of legitimization, where the judicial order derives its legitimacy from the idea of self-determination, such that the theory of social contracts is replaced by discourse in conformity with the judicial community. Therefore “the communicative presuppositions and the conditions of the process of democratic formation of opinion and will are the only source of legitimization” (ibid, p.310).

For Günther (2004), the definition of the relationship between action, norm and situation constitutes one of the principal problems in social theory. And he proposes a “weak version” of the universalizing principle: “a norm is valid if its consequences and the collateral effects of its observance can be accepted by all, *under the same circumstances*, in accord with the interests of each one individually.”(Our italics). Habermas’s universalizing principle wants to signify that, in order to be valid, a norm has to fulfill the expectation of satisfaction

such that the respective consequences and the respective collateral effects, which result from its *general* fulfillment in the satisfaction of the interests of *each* individual, could be accepted by *all* of those involved (in preference to the effects of known alternative options for regulation). (Habermas, *in* Günther, 2004)

Thus we question to what extent the prohibitive laws and repression of the commerce and use of illicit drugs, especially marijuana and cocaine, are accepted by society, in considering the various collateral effects of the prohibitionist and repressive policies.

We should question as well whether the prohibitionist laws and all the repressive policy brings more justice than the citizen would derive from the right to decide whether or not to smoke a marijuana cigarette, or to toast a kilo of cocaine in order to wreck his body.

For Rawls (1999),

justice is the first virtue of social institutions, just as truth is for philosophical systems. Thus in the way that theories should be rejected if they are not true, unjust law should be abolished. An injustice is tolerable only when it is necessary to prevent a greater injustice.

The new Drug Laws: Law n.11.343/2006

Primarily, a law intended to be modern was set within the National System of Public Policies about Drugs (art. 1º). It defines drug as a substance or product capable of causing dependency, as specified within the law or in list periodically updated by the Union’s Executive Power. It is the famous blank penal norm.

Article 2º of the Drugs Law prohibits the drugs, plantation, culture, harvesting and the exploitation of vegetables and byproducts from which

drugs can be extracted or produced, with reservation for eventual legal authorization, established by the Vienna Convention of the United Nations in 1971, concerning psychotropic substances, with respect to plants strictly used for ritualistic-religious purposes. In other words, whoever has the tea of Saint Daim remains free of any complication, except in the United States, which is not amenable to the topic, although the adepts of communion with the vegetable have recently reached a favorable ruling in the American justice system. But, in the case of Brazil, the question remains as to whether a society of marijuana smokers could found a religion and use the herb in their rituals. To which it seems, yes. They could even found a church. The Apostolic Church of Peace and Love, where the basis for the communion would be marijuana cigarettes. It could succeed well enough if it were to evoke the aforementioned Convention of the United Nations. Regarding the practice, reader-adepts of Carlos Castañeda and similar Toltec shamans, take care, since LSD has not been liberated.

Very well, the National System of Public Policy on Drugs (Sisnad) has as its proposal the prevention of improper use, attention and social reinsertion of users and those dependent on drugs, as well as repression of the unauthorized production and illicit trade of drugs, following eleven principles, among which the first, considered the most expansive, is “the respect for the fundamental rights of the human being, especially as to autonomy and freedom” (Art. 4º, I). A pause at this point. For it is here we begin to observe the incoherence of the law, which appears to be the work of people in favor of legalization of the commerce of drugs, but who lack sufficient courage to clearly show what they want.

First, the law says that one of the aims of Sisnad (art. 3º, I) is the prevention of improper use of drugs. And here it is not necessary to think of improper use of medicines, but, indeed, marijuana, cocaine, *crack* and the entire list published by the Department of Health. Thus, if the law speaks of improper use, it will imply a proper use, appropriate use, a tolerated use, a permitted use. Second, respect for the autonomy and freedom of the human being is one of the principles that Sisnad should observe. But who says that the citizen, using his autonomy and freedom, who wants to enjoy a marijuana cigarette or a paper of cocaine can do it freely without going to a dealer-supplier who is hunted by police charged with the duty of complying with a different requisite of Sisnad, the repression of drug traffic? In addition, “whoever acquires, puts away, has in deposit, transports or carries along, for personal use, drugs either unauthorized or undefined by legal or regulamentary determination will be subjected” (art. 28) to the severe penalty of *warnings about the effect of the drugs* (this is heavy!), community service (preferably where the dealers live!), and as an educational measure involvement in a program or educational course (the powder team with its college, master’s and Ph.D. degrees, be prepared to return to classes!).

In case the user caught with drugs refuses to comply with one of these severe penalties, the judge could subject him successively, to verbal admonishment or fine. Besides this – what a sad role assigned to the magistrate in this penal farce - , the judge will determine the Public Power to be put at the infractor's disposal, free of charge, a health establishment, preferably outpatient, for specialized treatment (art. 28, § 7º). But who says that the drug user needs specialized treatment? It would be the same to require a wine drinker – as in the case of this author –to be submit to a cardiologist for having drunk a glass of wine. And further, what is the logic of social reinsertion of the drug users, given one of Sisnad's aims? That the dependency on drugs becomes antisocial is comprehensible. It is sufficient to look at the case of alcoholics, who nearly always adopt antisocial behavior. The same can't be said of alcohol users. And frankly, whoever uses cocaine is sociable beyond reckoning. An end to legislative hypocrisy! Look, by the way, at the quantity of cocaine circulating in the halls of the National Congress in the book *A ética da malandragem* by the brilliant journalist Lúcio Vaz.

Therefore, let us see how incompatible Sisnad's aims are: on the one side, to prevent the improper use of drugs, respecting the freedom and autonomy of the user to whom, however, even if the warning penalty results in a simple scolding by the judge, the use of drugs is not authorized; second, repressing the unauthorized production (no authorization exists for anyone up to the present moment) and the illicit traffic of drugs, having as one of its principles integration with national and international strategies for prevention of improper drug use, attention to and social reinsertion of users and drug dependents and repression of its unauthorized production and their illicit dealing (art. 4º, inc. VII). In sum, the law intends to conciliate the irreconcilable. And perhaps it is a work of a highly dialectical Marxist mind which under the pressure of tension or stress (the word in fashion), the struggle of contrary forces to arrive at a new synthesis, that thought it for the good to create this crazy salad. And since the conservative representatives that are illiterate in terms of Marxist dialectic accepted the passing of a law that, in spirit, seems very favorable to legalization but, in practice, only supports a terrible hypocrisy: which is to condemn thousands of people to imprisonment for drug traffic, without speaking of the deaths that are a risk of the activity, while the top guys of the middle and upper class, a majority in the number, will be scolded by the judge and advised to have outpatient treatment.

Soon society will see the need to reformulate current Drug Law due to its contradictory principles and unreconcilable objectives of this novel normative instrument, whether to increase the repression of the drug users which is inadvisable, whether for regulating, at once, this billion dollar commerce, the fact is that this is the great merit of the law in art. 5º, paragraph II. Sisnad has as objectives “promoting the construction and socialization of knowledge about drugs in the country.” May God prevent



Small grower shows a marijuana plant from his field on one of the islands of the São Francisco river, close to Cabrobó, located in the far west of the state of Pernambuco.

every middle school student ever trying a marijuana cigarette before knowing the formula of trans-tetrahydrocannabinol: this is what the new drug Law seems to promise. And this article, let me make quite clear, is not about drugs but rather the damage from prohibition, repression and imprisonment of drug dealers. In order to know about drugs, my advice to anyone is to enter a course of Pharmacology, Chemistry, Biology or Agronomy. It is quite enough for a society so proud of its chemistry, to have transformed half a dozen substances into true super-fetishized demons.

Finally, but not exhaustively, the most infamous of the Drug Law, Art. 33, establishes the penalty of five to fifteen years of prison and from 500 to 1,500 days/fine for whoever “imports, exports, sends, prepares, produces, manufactures, acquires, exposes for sale, offers, has in storage, transports, bring along, puts away, prescribes, ministers, delivers for consumption, or supplies drugs, even freely, without authorization or outside legal or regulated agreement,” a penalty that could be increased from a sixth to two-thirds (art. 40) if the nature, the origin of the substance or the product apprehended and the circumstances of the case provide evidence of there being the fact of transnationality involved in the infringement.

Whoever has seen the film *Maria cheia de Graça* [*Maria full of Grace*] knows that the poor young women of Colombia, not to mention Latin America, transport the drug in their intestines and genitals, with a double risk: of dying and of being jailed and paying for a *crime* that, in principle, is a crime of the middle or bourgeois class, both end-consumers and consumer-dealers of drugs. And we have not yet spoken of the consumption of cocaine:

the gold mine of the drug trade. What the poor consume disgracefully – and is the point most advanced in favor of maximum restriction – is the dregs of cocaine, *crack*, another of the afflictions created for the repression of drug dealing.

Why is the penalty of imprisonment of dealers unjust? For various reasons: first, it doesn't stop the trade, second, the ones who are jailed, with one exception or another, are the poor soldiers and drug workers, third, once the penalty is set, qualifying the crime, authorities have the obligation to repress and apply the degrading apparatus of the state – what Representative Denise Frossard called the transversality of the state – and even those authorities conscious of their duty end up being threatened and many times murdered by compliance with an irrational law; fourth, even if all the dealers were jailed, rich and poor, there would still exist people willing to pay for the drug and, consequently, suppliers willing to attend to the demand; fifth, overpopulated jails are a direct result of the repression of drug trafficking with all the stigmas they carry, including the connection to gangs that oriented toward other types of infractions, like assault, kidnappings and murder. All this notwithstanding, even the Drug Law would confer the same penalty to the dealer that is given to the user, the severe warning by his excellency, the Magistrate - even so, the Law would be irrational in maintaining the illegality of an unceasing commerce against which there is no repression able to prevent the users of Copacabana (Rio de Janeiro) and Aldeota (Fortaleza) from unpunishable use of cocaine in festival events, in which is weighed the law which speaks of social reinsertion, as if the drug user lives in isolation

Penal State *versus* the myth of the democratic state of law

After the nazi-fascist tragedy many have already spoken of and published about the psychology of crazy statist and the crazies who become statist.

Perhaps they have not probed the theme of irrationality deeply enough. Would it be possible to identify in a given power structure irrational factors that, dressed up as defense of public order, bear more social dissociation, conflict, anomie, inarticulateness and illegitimacy of the constituted authorities? To what extent do such factors have a life of their own and what is the foundation for their cyclic perpetuation?

Among legal theories of the law is the dogma that the judge should not exercise a judicial function in a manner contrary to the law is dominant. With some limitations it is allowed that the judge can, eventually, judge against an inferior hierarchical law with its basis in the Constitution, that is, the highest Law. But that judge doesn't have the power to judge the text of the Constitution unconstitutional. The Supreme Federal Court (STF), in the case of Brazil, always makes its interpretation in conformity with the Constitution, in its breadth, pondering and supposing norms and principles that eventually can enter into conflict according to the principles of reasonability and proportionality.

What should a specific court do if one of its judges frees people imprisoned in conditions flagrantly contrary to the dignity of human beings? I go back to the case of a judge from Minas Gerais, Livingston Machado, who freed all the prisoners under his jurisdiction who were being kept in inhuman conditions. What did the court do in this case,? It went to the text of the Constitution to seek as a basis for the imprisonment the principle of supremacy of the public interest, the guarantee of public order and the constitutional right to security, the duty of the state. As to the dignity of the human being, perhaps worth an official letter to the competent authority with responsibility for the prison system.

What would happen if, from one moment to another, all the Brazilian judges with penal jurisdiction were to decide to free the prisoners who are in undignified conditions out of compliance with the Law of Penal execution?

Social panic is the phrase that would apply. Perhaps it is rather for this – from an instinct for preserving its institutions, the State Judicial institution and the state as a whole – that the courts, invoking judicial security, prefer to tolerate the violation of human rights.

The question we should ask is if the cost-benefit relation of incarceration of thousands of people in undignified conditions is greater than the cost-benefit relation (risks, damages and benefits) that society would have if all were freed from jail, without this necessarily implying a lack of other mechanisms of punishment and reparation.

We can consider the case of an assailant who, with a gun, steals a person's car without injury. Jailed he will become embittered, at the least, from five years in prison. From a basis in the idea of justice and from application of principle of the dignity of the human being, a foundation of the democratic state of law, for what reason might a the judge not be able to apply a penalty different from that determined by the Penal Code, for example, a penalty of restoration of damages, more an indemnification, with the obligation of not only being occupied, studying and working?

The judge can't do any of this, even if he particularly might think the Penal Code extremely unjust in the face of the total inefficacy of the prison structure. The principle of separation of functions (powers) forbids such Magistrate voluntarism.

Then, the question that arises is, in the name of the dogma of the separation of functions, should we tolerate situations that frontally insult one of the foundations of the Republic.

And, once again the principle of judicial security surfaces. If, therefore, the principle of judicial security has the condition of maintaining the state in a conservative line (self preservation), from what irrationality, in the name of preservation, do we not act in a more pragmatic way to increase the legitimacy of the state?

As to legitimacy, the Parliament is the most well-regarded of all

government powers. But should the Parliament be empowered by the people, by means of the representation effected via the electoral process, to legislate, to approve laws that are unjust and contrary to the people's customs?

Perhaps there no other way exists for maintaining a minimum of organicism, of coordination and unity of judicial order, other than by recognizing the strength and authority of Parliament, even with major distortions of the electoral model in the choice of the members of any particular Parliament.

And if it is thus, the democratic state of law and all its conforming principles signify no more than mythology, as comprehensible as the myth of St. Sebastian, dependent on faith and the stance of the incredulous.

We arrive then at the frontier of politics with law, as a system of norms, without forgetting that the law is nothing more than an instrument of those politics. Myths are necessary for the continuance of the human species. And with them their primary instrument: speech, oratory, the repetition by oracles and priests of the foundations of contemporary mythology.

Without constitutional mythology we would not have even the minimum of assured basic rights. The normative strength of the Constitution resides in great part in the capacity of society to make the principles and foundations of a democratic state of law reverberate.

We should not be deluded, however: there is a punitive wave in the air that threatens the bases of contemporary democracy. And repression of the drug trade constitutes, at least in our mind, the main political justification in the advance against human rights.

We also should not be deluded by the strength of the discourse: the rhetoric, including the defense of human rights and of the democratic state of law, is also used to justify, in practice, policies for combating organized crime, from which follows inevitably repression of the drug trade, without consideration concerning the study of the marketing reality that it imposes – the demand for drugs – nor the freedom of adults in decisions concerning the ingestion of this or that narcotic substance.

Conclusion

Paul Gahlinger, author of the book *Illegal drugs*, states that “the best means of dealing with drugs is to do what we have already done with fire arms: you can buy a gun if you can prove that you are going to use it with good intent and have the capacity to manage it without danger” (*Superinteressante*, ed.230, set. 2006, p.20-3). In other words, the psychiatrist is in favor of restriction of the sale of drugs, but not prohibition.

The analogy with arms, made by Gahlinger, could not be more appropriate for convincing a Brazilian who voted for disarmament to become engaged in the idea of legalization or regulation of drug commerce. Here, even though going beyond the thesis of non-prohibition of the commerce

and possession of arms, is diffused the idea that everybody is incompetent to manage a pistol, except delinquents and police. Equivalently we can say that the treatment of drugs is a matter affecting the two special interests: dealers – who are rarely addicted, while they may be eventual users –; and the police, who fight the traffick.

The truth, difficult, however, is that drug addiction has other social and behavioral causes. Drugs are only one of the many possibilities of escape that the individual finds in a consumer society, replaceable by any other source of narcissistic pleasure such as compulsive sex and compulsive consumption.

The dealer, in the face of the demonization of drugs, is clothed perfectly in the figure of the enemy, while the users are nearly always considered poor defenseless victims, or when they are more, irresponsible expensive buyers whom society should protect by requiring from the state a firm hand of the police apparatus to exterminate once and for all the diabolical commerce of illicit drugs.

Responsibility for the circulation of drugs lies not with the dealer but, indeed, with the user. In turn, the repression of the users, although it would be more coherent than the present legal war on drugs, would aggravate the destabilizing of the state of law. Imagine a martial law that condemns to death everyone who was proven to be a user of marijuana and cocaine. Or, to be theoretically more humanistic, a sentence of five years in prison in a regime closed to any and all users. Where would we put all the people? And who would pay for so many prisons and penitentiaries? This, without taking into account the mother's tears, the children, the loss of human talent and the creation of new animals from overloaded cells.

Finally, a good word about the present drug laws: hopefully they can serve as a wake-up call for society, making it conscious that there is no other road to safeguarding human dignity and the democratic state of law, other than learning to live with habits of drug addiction. And that we should never see the tragedy of the War of Canudos repeated in Rio de Janeiro, something that I fear, above all, if the National Army is compelled to enter in the fight against the drug trade as occurred when the Army was called in the 19th century to suppress an uprising of religious fanatics which ended with the near total destruction of the civil population of the Bahian settlement of Canudos.

Notes

1. Gordon Black, in a personal communication, based on a study of Tracking of Group Attitudes (in Partnership). By contrast, a long-term study demonstrated much lower rates of progression in intensive use among a group of cocaine users, with only 5 to 10% of the first-time users turning into weekly users and only 10 to 25% of weekly users turning into compulsive users. See Erickson & Alexander (1989) (*in* Kleiman, 1992).

- 2 Reflections about a highly profitable industry. Extensive material published in *Ciência Hoje [Science Today]* following the repercussion of an article in the British magazine *The Economist*, July/August 2001.
3. Jefferson Perez in an interview in the magazine *Forum* (n.12, 2003, p.8). Available at: <www.cefetsp.br/edu/esu/entrevistajeffersonperes.html>. Access at: 5.17.2004.

Bibliography

ALMEIDA, P. da R. A política criminal antidrogas no Brasil: tendência deslegitimadora do Direito Penal. *Jus Navigandi*, Teresina, ano 8, n.131, 14 de nov. 2003. Disponível em: <<http://jus2.uol.com.br/doutrina/texto.asp?id=4486>>. Acesso em: 29.3.2006.

BECKER, G. S.; MURPHY, K. M. The market for illegal goods: the case of drugs. *Journal of Political Economy*, v.114, n.1, 2006. Disponível em: <www.journals.uchicago.edu/JPE>. Acesso em: 1º.3.2006.

BONHO, L. T. Noções introdutórias sobre o direito penal do inimigo. *Jus Navigandi*, Teresina, ano 10, n.1048, 15 maio 2006. Disponível em: <<http://jus2.uol.com.br/doutrina/texto.asp?id=8439>>. Acesso em: 23.8.2007.

CAPEZ, F. *Curso de Direito Penal*. Parte Geral. 7.ed. São Paulo: Saraiva, 2004. v.1. 561p.

COGGIOLA, O. O comércio de drogas hoje. *Olho da História*, n.4, 2006. Disponível em: <www.oohodahistoria.org>. Acesso em: 24.8.2007.

ERICKSON, P. G.; ALEXANDER, B. K. Cocaine and Addictive Liability. *Social Pharmacology*, v.3, p.249-70, 1989.

GÜNTHER, K. *Teoria da argumentação no Direito e na Moral*: justificação e aplicação. Trad. Cláudio Molz; introdução à edição brasileira Luiz Moreira. São Paulo: Landy, 2004.

HABERMAS, J. *Direito e democracia*. Entre facticidade e validade. Trad. Flávio Beno Siebeneichler. Rio de Janeiro: Tempo Brasileiro, 1997. v.1. Tradução de: *Fakzität und geltung*. Beiträge zur diskurstheorie des reichs und des demokratische rechtstaats. 4. ed.

IVANISSEVICH, A. Reflexões sobre uma indústria altamente rentável. *Ciência Hoje*, v.31, p.181, abril 2002.

KLEIMAN, M. A. R. *Against excess: Drug Policy for Results*. New York: BASIC BOOKS, 1992. DISPONÍVEL EM: <WWW.SPSPR.UCLA.EDU/FACULTY/KLEIMAN/BOOK>. ACESSO EM: 2005.

MORAIS, P. C. de C. *Drogas: criminalização, alternativas e tendências legislativas brasileiras*. Disponível em: <www.crisp.ufmg.br/art_drogas_criminalizacao.pdf> (ver também site da Câmara dos Deputados).

NIETZSCHE, F. *Obras incompletas*. Seleção de textos de Gerard Lebrun. Trad. e notas de Rubens Rodrigues Torres Filho. Posfácio de Antonio Candido de Mello e Souza. 2.ed. São Paulo: Abril Cultural, 1978. (*Genealogia da moral*, p.299).

RAWLS, J. *A theory of justice*. Oxford University Press, Rev. Edition. 538 p. Capítulo 1, 1999. Disponível em: <<http://books.google.com/books>>.

RODRIGUES, T. M. S. A infundável guerra americana: Brasil, EUA e o narcotráfico no continente. *São Paulo em Perspectiva*, v.16, n.2, p.102-11, 2002. Disponível em: <www.scielo.br>. Acesso em: 30.7.2006.

TEIXEIRA, A. *Do sujeito de direito ao Estado de exceção: o percurso contemporâneo do sistema penitenciário brasileiro*. São Paulo, 2006. Tese (Doutorado) - Faculdade de Filosofia, Letras e Ciências Humanas, Universidade de São Paulo.

YABIKU, R. M. Os princípios do direito público e o Estado: a dialética dos interesses públicos e dos interesses privados na teoria da justiça de John Rawls e na teoria da ação comunicativa de Jürgen Habermas. *Jus Navigandi*, Teresina, ano 9, n.742, 16 jul. 2005. Disponível em: <<http://jus2.uol.com.br/doutrina/texto.asp?id=7010>>. Acesso em: 26.8.2007.

VIANA, O. *Instituições políticas brasileiras*. Brasília: Conselho Editorial do Senado Federal, 1999. v.I., 591p. (Coleção Biblioteca Básica Brasileira).

ZALUAR, A. Um panorama no Brasil e no mundo. *Ciência Hoje*, v.31, p.181, abril 2002.

ABSTRACT – This article discusses the failure of current policy concerning so-called “illicit drugs.” There are more taboos based on sanitary and medical assumptions mixed with moral precepts and prejudices about the danger of drug addiction than real knowledge and effective action. Evidence shows that treating drug intake and the drug trade as a police matter, as a crime, or even as conduct decriminalized for the consumer but over-penalizing, stigmatizing and demonizing the drug dealers does not contribute to the reduction of consumption nor create a world free of drugs, as desired by the United Nations. Besides wasting great amounts of public money and thousands of human lives year after year the “war on drugs” led by the United States of America does not take into account human dignity. Rationality is absent and the legitimacy of such policy is damaged in light of crises of authority, repression-generated violence, corruption and overcrowded prisons. These are menaces to the democratic state of Law and we fear that the Brazilian state will repeat the tragedy of Canudos occurred when the Army was called in the 19th century to suppress an uprising of religious fanatics which ended with the near total destruction of the civil population of the Bahian settlement of Canudos.

KEYWORDS: Illicit Drugs, Dealears, Democracy, Prohibition, Legalization.

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