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Penal Issues

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Repression of Use of Illegal Substances : an Assessment

In this paper, **Marie-Danièle Barré** *summarizes the trend in drug policies and in some penal policy indicators over the last ten-odd years. She recalls the specific contribution of CESDIP surveys on the penal repression of drug use. These show the interrelations between this particular offence and the professional logics in policing, along with the limits of its actual use, both as a signal tool for health agencies and as an instrument for criminal investigation.*

The history of the drawing up of the 1970 Bill criminalising the use of substances classified as drugs led Jacqueline Bernat de Célis[1] to speak of « a criminalisation not meant as such ». There was no lack of reasons advanced in support of the legitimacy of criminalising this behaviour, in which the victim is the offender: by ruling out use, the law would protect the weak against themselves by asserting a strong prohibition; it would serve to signal individuals to the health authorities; last, it would enable the law enforcement agencies to infiltrate drug networks. With use of cannabis soaring these days in France, calling into question the efficacy of the penal prohibition, what can be said about the penal response?

I - From the substance user as victim to the user who makes victims...

Substance use, an offense where the offender is the victim

The 1970 Act made the use, even when alone and in private, of any substance classified as a drug, a misdemeanour (*délit*), thus criminalising behaviour that can harm only its perpetrator. The nature of the substance and the type of use are immaterial, and no distinction is made between the misconduct represented by experimenting, and addiction. Users, perceived as victims and sick, and simultaneously as offenders, are offered help in the form of a Prosecutor-ordered treatment, which suspends prosecution. At present, since the March 5, 2007 Act, this order may be issued at later stages of the penal process, and in case of sentencing, even as an additional penalty. Until now, attempts to revise the law so as to make use a petty offense (*contravention*) and therefore not liable to be punished by a prison sentence, although seriously considered in the summer of 2003, have failed.

From the outset, the difficulty in articulating a dichotomously organised penal response – treatment order or prosecution – with complex diversified behaviour, has caused the issuance of many official instructions discriminating between various substances, types of use and stipulating how to handle use/resale.

Review of the legislation

Article L3421-1 of the Code of Public Health (CPH) makes substance use illegal and punishable by a one-year prison sentence and a 3,750 € fine, with possible exemption from prosecution. Other responses suspend or extinguish public prosecution: any kind of dismissal, preferably conditional, as well as a mediatory fine since 1998, extended to minors aged 13 or over by the March 5, 2007 Act.

Criminal justice prosecution as such may take the form of any rapid or simplified procedure. A guilty plea is possible, since the offence entails a prison sentence not exceeding 5 years. The sentence proposed is then half of the maximum one. Last, since the March 2007 act, the offence of use may be "subject to a simplified procedure", according to art. 495 of the Code of Criminal Procedure (CCP), in which the president of the court issues a criminal order (*ordonnance pénale*), which excludes the possibility of imprisonment. The simplified procedure does not apply if the offender was under age when the offence was committed.

There can be no discussion of the penal response without discussing the fringes of use. How can the user, for whom the law primarily seeks treatment, be distinguished from the dealer, whom it attempts to punish? Should resale to finance one's personal consumption be called dealing? Under which criminal provision should preparatory action prior to use (purchasing and possession) be prosecuted? The articles on trade in illegal substances are found in the criminal code (CC). Article 222-39 of the CC makes an offense of sale or offer for personal consumption (5 years imprisonment and a 75,000 € fine, 10 years for sale to a juvenile or on school or administrative premises – and since the March 5, 2007 act, in the vicinity of such premises). Article 222-37 makes possession, offering for sale and acquisition punishable with 10 years (and 7,500,000 €). The same sentences apply to the facilitation of use (through positive action).

The latest instruction from the Justice Department, dated April 8, 2005, modulates judicial responses by making distinctions based on both the type of use and the type of substance. For adults, responses – intended to be « systematic, appropriate, and diversified » – range between the following two extremes: simple dismissal when opportune, possible but « to be avoided, absolutely » and criminal prosecution, which « is appropriate for repeated users: treatment should be preferred however ». Last, instruction introduces thresholds – « defined so as not to overburden those courts receiving the most cases of drug use » – thresholds beneath which possession of a substance is dealt with as « use susceptible of a customs transaction », which is to say to be fined, with no criminal prosecution.

[1] Bernat de Celis J., 1996, *Drogues : consommation interdite. La genèse de la loi du 31 décembre 1970*, Paris, l'Harmattan.

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The justice system is therefore in a position to provide a penal response mitigated with social and health ingredients, while attempting to stem the tide of referred use cases, and simplify their processing. Such a response should not interfere with criminal investigations, on trafficking in particular, in a context where the very foundation of this victimless incrimination seems to need bolstering.

Substance use, an offence possibly involving other victims

Support for criminalisation of substance use mostly takes the following two forms: on the one hand, the argument of combating trafficking often advanced by criminal police agencies; on the other, the assertion that behind the user often looms an offender. Research conducted at the CESDIP has qualified these allegations on both points. It has shown, firstly, that while user criminalisation may be used to combat dealing and trafficking, it is also used to control some kinds of deviants[2]; secondly, that the link between substance use and property crime, observed at the court level and measured by police criminal records, was an outcome of policing and court working methods[3]; and last, that even if a number of users are involved in both use cases and property crime as measured by police criminal records, they only represent a minority of those identified by the survey as offenders[4].

The same arguments about the possible causal link between drug abuse and offending have been broadly used to further harm reduction policies (HR), which, conversely, implied that criminal law-enforcement take the back seat so as to give users access to treatment. At the start, HR is not the outcome of a law, but leans on ethical values. According to this position, although the law has been broken, it is more important to deal with the resulting negative consequences than with the illegality itself. The June 1999 Ministry of Justice instruction took this into account by stipulating that « arresting individuals exclusively on the count of drug use is prohibited in the immediate vicinity of lower-threshold or syringe-exchange facilities », and that « in all locations, the mere fact of possessing a syringe should not be viewed as sufficient indication of offending, causing the person to be arrested ». Last, the August 9, 2004 Act on public health policy, in which HR was first written into a legislative text, lists its objectives as follows (article L 3121-4) : « the harm reduction policy for drug users aims at preventing the transmission of infections, death by overdose of an injected intravenous drug and the social and psychological damage entailed by addiction to substances classified as drugs ». The HR approach, by acknowledging consumption and aiming at accompanying it to increase infection prevention, is thus extended to the prevention of social damage, including crime.

In the last analysis, the rhetoric of risk and of the principle of precaution, deployed on the basis of alleged causal links between « drug abuse » and « offending », has promoted the idea that substance use is an offence causing a risk for others.

Substance use, a risk for others?

Highway safety was the first context to be used. The February 3, 2002 and June 12, 2003 acts, using articles L 235-1 and L 235-5 of the Highway Code, stipulate that « *any person driving a vehicle... whereas blood tests prove the use by that person of any substance or plant classed as a drug is punishable by 2 years in prison and a 4,500 € fine* » ; that person may also rightfully have half of the original number of driver's license points removed, and the sentence may be increased in case of homicide or unintentional injury; additional penalties are defined.

Later, the context was broadened: the March 5, 2007 law increases the sentences for a series of felonies and misdemeanours, when the offence was committed « when obviously drunk or under the obvious empire of narcotic substances ».

In conclusion, « deliberate endangering of others » by the use of illegal substances clearly broadens the foundations legitimating the penal repression of substance use. However, by specifying those particular circumstances in which use is an aggravating factor, the law introduces the idea that use may be more or less serious in different instances: by showing the seriousness of some cases, it tends to weaken the more general case.

Thus, in the case of drug use, we find the development of both a hierarchy within the penal norm, and a hierarchy between norms, requiring that the penal norm take the back seat to health risk norms in HR situations[5]. One wonders whether the prohibition as an overriding principle has been weakened, or conversely, whether the « situational » penal norm has been reinforced.

II - What do administrative statistics say about penal repression of substance use?

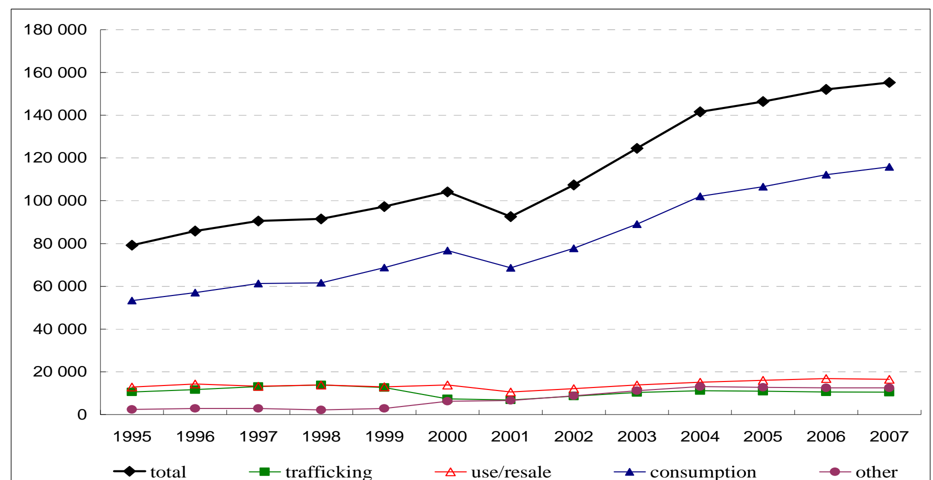
Criminal police statistics

Arrests by the police (*interpellations*), mostly for use of cannabis, appear in low number in comparison to the extent of the phenomenon, depend on the ups and downs of policing activity, and generate « police records ».

First, we note that the use of illegal substances is quite widespread, at least in the case of cannabis, as shown by general population surveys conducted by the OFDT (*Observatoire Français des Drogues et des Toxicomanies*), the French monitoring centre for drugs and drug addiction[6]. Moreover, the OFDT researchers, using variables describing the substance, socio-professional category, sex and geographic origin of cannabis users, have shown that the structure of their population, as uncovered by the general population self-report surveys, is not reflected in the structure of the arrested consumers as evidenced in the FNAILS, the National Register of Drug Offenses.

Use (consumption), which constitutes the majority of drug offenses (DO), shapes the curve for total arrests (*cf.* figure 1). This curve has risen sharply since 1995 (the average annual rate of growth is estimated at 6 %), with most of the growth due to arrests for use. The weight of this category increases over time, rising from 67 % in 1995 to 75 % in 2007 and in 9 out of 10 cases, it involves cannabis. Another category is growing significantly: the item « other », getting larger than the item « trafficking ». Now « other » includes provocation to use, for instance, but also any form of trafficking in prescriptions. The most recent forms of trafficking, linked to the development of substitution treatments, may therefore elude the heading under which they are supposed to come.

Figure 1. Persons suspected of DO, per type of DO offenses



Source : *Aspects de la criminalité et de la délinquance constatées en France, d'après les statistiques de police judiciaire*, ministère de l'Intérieur. Paris, La Documentation Française.

[2] BARRÉ M.D., GODEFROY Th., *et al.*, 2000, Consumers of Illicit Substances in Police Records, *Penal Issues*, XIII, 1, 1-4.

[3] BARRÉ M.D., 1995, Drug Abuse and Crime. What are we measuring, what is the issue?, *Penal Issues*, VIII, 3, 1-4.

[4] BARRÉ M.D., 2001, Drug-users, Offenders and Police Suspects, *Penal Issues*, XIV, 3, 1-4.

[5] BARRÉ M.D., BÉNEC'H-LE ROUX P., 2004, Preventive Policy for Drug Users: Strained Norms, *Penal Issues*, XVII, 5, 1-4.

[6] 1.2 million regular consumers of cannabis (at least 10 times a month) among people aged 12 to 75, in 2005 (*http://www.ofdt.fr*).

In 2001 an inflexion interrupts the growth of the curve, otherwise constant since 1995. This is no doubt due to a shift in police work, induced by the June 15, 2000 Act on the presumption of innocence and victims' rights. Indeed, while the total number of persons suspected of felonies and misdemeanours increased in 2001, the number of individuals placed in police custody declined overall by 8 % in 2001, and by 20 % for DO in particular, and even a little more for use/resale and especially use. The implementation of new working methods may have reduced the overall number of arrests and charges, especially those resulting from proactive policing. A strong upsurge between 2002 and 2004 compensated for the 2001 drop, after which the rise continued slightly less sharply.

Irrespective of the judicial outcome for these charges, it should be remembered that they result in registration in a police data base, and thus become a record, which is notoriously key to the way people given a police check are dealt with.

Court statistics

The development of the judicial phase is difficult to grasp, concretely, and the magnitude of imprisonment seems to be quite variable.

The statistical description of the activity of public prosecutors' offices is very succinct. The DO reports are registered with the public prosecutor's office (PPO) according to an eight-item classification. The transition from the police nomenclature to the court nomenclature raises some problems. In 2005, for the PPO, possession of drugs represented close to half of the 110,000 bookings involving DO, and use about 40 % (according to unpublished sources). There is an obvious distortion between police statistics, in which use is the heaviest category, and PPO statistics, where « possession », liable to a 10-year prison sentence, is in the forefront. It is hard to see how the « possession » category can reach that size without including individuals suspected, at the police level, of mere use.

The second source of information pertains to dispatching: however, decisions are not ventilated according to the nature of the case. While we may assume that the number of (successful) treatment orders mentioned among the reasons for dismissal by the PPO really does correspond to DO cases, we cannot be as sure for the number of cases dismissed due to referral to a health-care programme. To illustrate this, in 2005 there were about 5,200 successful treatment orders and 12,000 referrals to a health, social or vocational facility.

Statistics from judicial records tell us about convictions: at this stage appears the final penal category of the offence, without any possibility of identifying the transformations undergone along the penal process, from the stage of police statistics on.

A guilty verdict can punish one or several offences. Only the main sentence is mentioned in statistics and when several offences receive a penalty, only the first, so called « main » offence, is included in statistics. In 2006, one third of all punished offences rank 2, 3 or 4. The reverse proportion is found for DO: 69 % of punished offences are not the main offence. The proportion is 53 % for use and 74 % for possession and purchasing: these offenses are often evoked as secondary or additional elements aggravating the case.

The following **table** pertains to use and possession-purchasing. In many countries where drug use as such is not an offence, the possession of small amounts is. It is important, then, to look at the profile of sentencing in both cases. This table shows the distribution (in percentages) of convictions, for all courts, according to sentences pronounced, divided into four categories: unsuspended imprisonment with or without partial suspension, prison sentence with complete suspension, fine, other sentences (alternatives to prison, educational measure, exemption from penalty). This distribution was studied at a ten-year interval: 1996 and 2006 (1995 was an amnesty year).

Sentences (all courts)	Use		Possession/purchasing	
	1996	2006	1996	2006
All sentences	**6 676**	**11 419**	**8 183**	**12 967**
Total (%)	**100 %**	**100 %**	**100 %**	**100 %**
Unsuspended imprisonment (including partial suspension)	30.1	16.0	43.8	42.7
Total suspension	41.5	32.9	38.4	36.1
Others	9.8	20.3	6.1	11.2
Fine	18.7	30.7	11.6	9.9

Source: *Statistiques des condamnations*, Paris, ministère de la Justice.

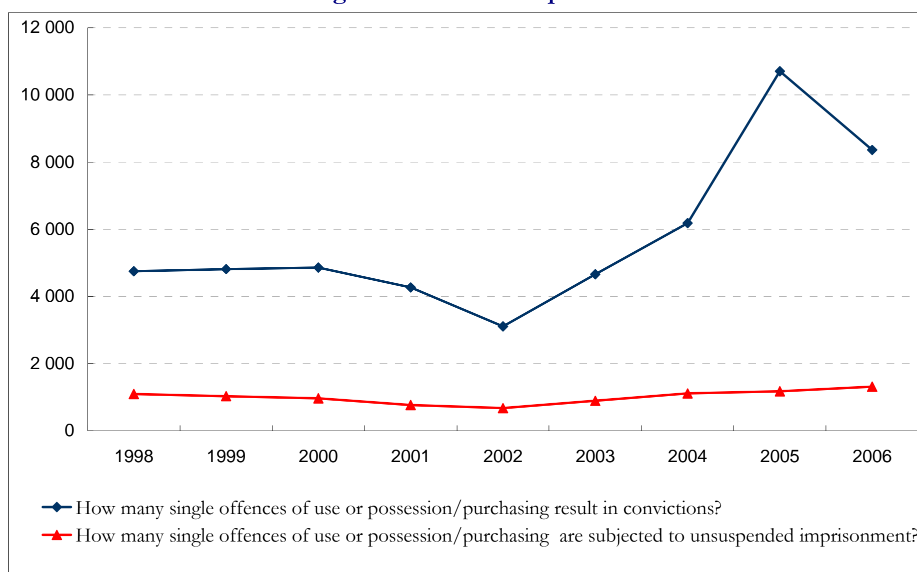
The number of convictions for use has risen sharply in 10 years (+ 71 %), but whereas imprisonment increased in absolute terms (+ 17 %), in relative terms it declined by 14 points for unsuspended imprisonment and by 9 points for total suspension, with more fines and other sentences.

The situation is not the same for possession/purchasing and preparatory action prior to use. For these offences, imprisonment was pronounced in about eight out of ten cases. The total number of sentences for possession/purchasing rose by 58 %, with a similar rise in prison sentences, so the relative weight of imprisonment, suspended or not, hardly changed, all in all, with a three-point drop in favour of « other » sentences. Prison sentences remain relatively numerous here, as opposed to what could be observed for use.

Is imprisonment the sentence meted out for a single offence of use or possession/purchasing?

How many single offenses of use or possession-purchasing are given sentences? And how many are sentenced to unsuspended imprisonment?

Figure 2. all offences punishable



Source: *Statistiques des condamnations*, Paris, ministère de la Justice, tables 13 and 17 (formatting: CESDIP/M.D. Barré).

The conviction curve shows two aberrant points: 2002 is an amnesty year, and there was a tallying problem in 2005. The Ministry of Justice statistics hesitated on the status of the mediatory fine. As of June 30, 2005, mediatory fines are counted with convictions (slightly over 30,000 sentences). In 2006 conversely, the counting rule changed: « mediatory fines mentioned onto the criminal record are not counted... since they are not convictions ». These changes in counting rules most probably account

for the peak observed in 2005, since use, frequently punished by a fine, is liable of a mediatory fine.

Aside from those two aberrant points, there is a noteworthy recent rise in convictions for a single offence of consumption or possession/purchasing.

Last, whereas unsuspended prison sentences are infrequent and decline at the beginning of the period, they increase considerably from 2003 (895 sentences) to 2006 (1,316 sentences). Research into the judicial handling of DO cases show these unsuspended prison sentences often to be the outcome of complex histories with a combination of redefinitions in legal categories and a tendency to drop prosecution of some offenses (illegal residence, dealing) while replacing them by a prosecution for consumption or possession. These are often cases where pretrial detention is involved. We may hypothesize that unsuspended imprisonment is sometimes used implicitly to punish offences serious enough to land on that penal track and which, although unproved, lead the court to such sentences[7].

These snapshots based on administrative statistics, show how interesting it would be to take a longitudinal view of these cases, as so many selection processes and significant series of redefinitions in legal categories operated throughout the criminal justice process.

Last, one wonders about the impact, on the number of prison sentences, of the recent law providing for minimum sentences for an offence directed at a behaviour that is, by nature, repetitive.

Conclusion

The extension of the sphere of activity of the *Mission Interministérielle de Lutte contre la Drogue et la Toxicomanie* (MILDT, Interdepartmental Mission for the Fight against Drugs and Drugs addiction) in 1998, to include « legal drugs » – alcohol and tobacco – considerably altered mental representations. In a risk management perspective at both the individual and the collective levels, emphasis has been placed on behaviour – there has even been recent talk of bringing in « pathological gaming » as well – rather than on psychoactive substances. This places public health issues in the forefront, and tends to reduce the legitimacy of the penal norms, barring the argument that penal repression may be a way of introducing drug consumers to treatment. The argument is not new ; it had already been advanced during parliamentary debates on the 1970 bill. Much has been written on the difficult articulation between the judicial and the health spheres, but before tackling this problem, two issues are left to be addressed: quantifying the various kinds of treatment orders; more qualitatively, determining which criteria govern the decisions to direct people to treatment. Here again, research done downstream in the criminal process raised those questions : the OFDT survey of « outpatient visits to the cannabis abuse clinics »[8] provides some very succinct descriptions of the population sent to the clinics by the PPO: this group turns out to pose fewer problems than the other patients attending the clinics without a court order.

From a legislative sociology standpoint, the opportuneness of maintaining provisions criminalising drug consumption, for 35 years now, in spite of the attacks they have been subjected to, their sporadic enforcement, and the great disparity in practices, may be questioned. Michel van de Kerchove has pointed out that when a society is very divided on whether or not some issue devolves on criminal justice, the existence of such legal provisions satisfies some people and their non-enforcement satisfies the others[9]. Thus, the rules are « formally and symbolically maintained, without any attempt to ensure their effective enforcement ». Actually, we have seen it could not be contended that the law is not enforced. Rather, the situation seems much like what Christine Lazerges, in her analysis of the law on soliciting, calls a « declarative » law: it carries an incantatory function, an accompanying vagueness and the attendant arrangements with repressive action[10].

As mentioned above, the internal logic of policing makes the criminalisation of drug consumption a resource through which the police constitute a reservoir of « *clients* ». While use of this resource may poison the population's relations with the police inasmuch as suspecting drug offences is often the excuse for identity checks, it also forces the justice system to deal with the heavy load of bookings. Determination to provide a rapid, appropriate response to every offence, including mere drug consumption, combined with the multiplication of procedural tools for penal processing initiated in recent years, is most probably paving new penal tracks for the growing tide of arrested drug consumers, which tracks researchers must keep under scrutiny.

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[8] These outpatient clinics were set up in 2004, with at least one per *département* (OBRADOVIC I., 2006, Initial assessment of outpatient visits to the cannabis abuse clinics, *Tendances*, 50 ; OBRADOVIC I., 2006, *Enquête sur les personnes accueillies en consultation cannabis en 2005*, Saint-Denis-la-Plaine, OFDT, 109).

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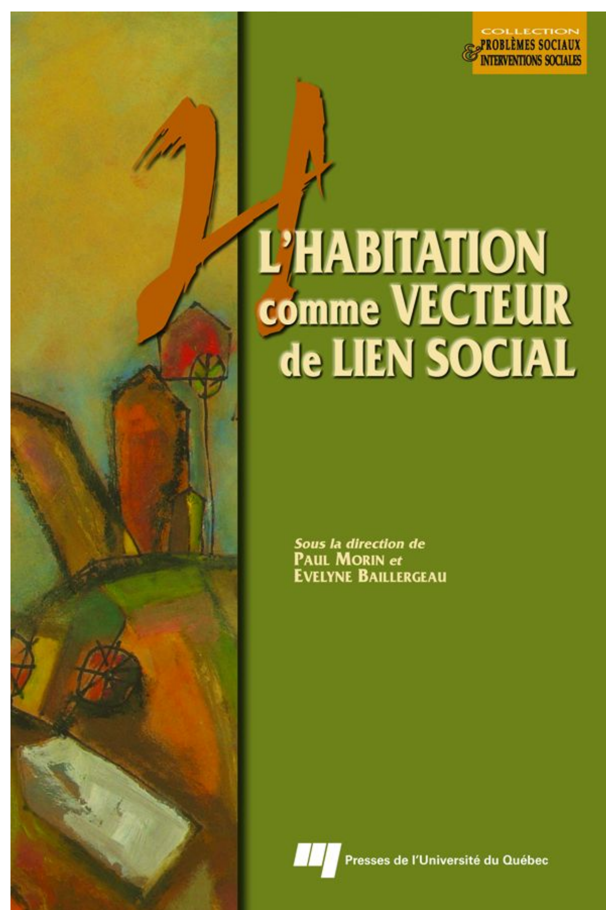

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