

# SHOULD THE USE OF NARCOTICS HAVE BEEN MADE AN OFFENCE ?

A research project conducted by Jacqueline Bernat de Celis at the CESDIP<sup>1</sup> analyses the stakes involved in the passing of the December 1970 law which creates a new offence, constituting article L.628 of the Code of Public health. The analysis deals with the actors involved as well as the reasons behind their decision to take legislative action. One of the first steps is the identification of the actors. Another consists of detecting the motivations resulting in the formulation of a social problem : drug abuse.

The first question is legitimate in that although the Parliament passed the bill criminalizing the use of narcotics, it seems to have remained in the background, relatively speaking, in the drafting of the text. This is not surprising, in itself, since under the Fifth Republic legislative initiative is rarely in the hands of the people who vote the laws. What is most noteworthy, however, is the rapidity with which the two chambers passed the bill.

One outstanding fact uncovered by this research is that the maturing process within the administration was immediately revealing of the formulation of the problem. Indeed, a controversy developed between the ministries of Health and of Justice, in which the arguments feeding the subsequent turns taken by the controversy took shape. At this point, the main conceptions of the law-maker's task were crystallized with respect to "drugs", the societal role of this issue, the profile of offenders and the prophylactic role of the law.

## AUTHORS OF THE BILL

Methodologically speaking, the genealogy of the bill was studied through work in the archives of the two ministerial departments involved, as well as through interviews with the two co-authors of the text.

Examination of the parliamentary origins of the new legislation was followed by an investigation of its extra-parliamentary roots.

### The parliamentary origins of the text

A first report by the legislative committee of the National Assembly had decided to maintain criminalization of collective use of narcotics and to extend its sphere of action. As opposed to another congressional committee (on cultural, family and social affairs), which wished to include individual use, this committee and its spokesman did not recommend any further criminalization.

1 - The present article summarizes the first two parts of Jacqueline Bernat de Celis' research report : *Fallait-il créer un délit d'usage illicite de stupéfiants ? (une étude de sociologie législative)*, *Déviante et contrôle social*, CESDIP, 1992, n° 54. In the last part, the author pushes her analysis further through a systematic study of subsequent attempts to challenge article L.628 of the Code of Public health (one attempt in 1977-78, followed by a second one in 1986-87).

13 Later, a second report by the latter committee opted for the criminalization of individual use of narcotics, thus reversing its position : the fact is that in the meantime, two government amendments to the original bill had considerably modified the latter. These amendments involved the introduction of a general heading criminalizing the private use of narcotics. The change in position of the spokesman of the committee, who was initially opposed to this extension of the scope of the new law, was particularly remarkable.

Furthermore, it was quite advantageous for the government to include its text in the draft under discussion by the committee. Thanks to this procedure, the contents were not subjected to the Council of State, thus avoiding the risk of parliamentary censure. This practice is indicative of the preeminence of the executive over the legislative process, in France.

Consequently, both of the committees involved defended a text that was not theirs, an understandable situation given the political majority of the time.

### The extraparliamentary background

The study of the procedure leading to the passing of the December 31, 1970 law cannot be confined to the peregrinations of its journey through the two chambers. Its true roots may be found in some projects formulated both by the Ministry of Health and by the Ministry of Justice.

The Ministry of Justice viewed the future legislation as aimed at controlling crime. Conversely, the objective of the Ministry of Health was of a therapeutic nature. The need for legal action was viewed from different optics, then, by these two departments.

The concern of officials of the Ministry of Health was not so much the punishment of offenders as the systematic, compulsory treatment of patients, without their necessarily being brought to court.

From this point on, an unformulated "conflict" was gradually to come to a head. At first, the views of the department of Health seem to have prevailed without any arbitration between the two apparently irreconcilable positions. In the last analysis, the compromise solution drawn up by the Prime Minister's office left the unspoken controversy intact, since it confined itself to requesting that the ministry of Justice harmonize the two positions but did not choose between them.

The leading argument advanced by the Ministry of Justice - the validity of criminalization - lent weight to the text amending the original version of the bill. The only concession to the aims of the Ministry of Health resides in the title of the Government's amendments : *a bill promulgating health measures for combatting drug abuse and punitive action against trafficking and illegal use of toxic substances*.

Consequently, the main actor behind the formulation of the law seems to have been the Justice department. And yet, a number of actors were present on the scene, since the Health department, convinced that it had influenced its content, endorsed the bill while the legislative committee of the

National Assembly accepted it despite its previous recommendation of a very different text, and the minister of Health in person defended it before Parliament, which passed it without any qualms.

However, the government's repressive objective was not in step with the conclusions advanced simultaneously by experts. Two international conferences were devoted to drug abuse during the month of June 1970, including a gathering of European ministers of Justice. Their conclusions pointed to the inadequacy of criminal law alone as a response to the drug abuse situation.

In spite of these expert opinions, the authors of the bill justified their option by the fact that positive law was already repressive in this arena (the public use of certain substances has been a crime since 1916). This was a deliberate attempt to achieve legislative "coherence" grounded on punishment.

### THE LAW-MAKERS' INTENTIONS

The law-makers, or rather the co-authors of the December 31, 1970 law, gave their response to "drug abuse" in a climate that incited other actors to intervene. The latter exerted their influence at the beginning of the process leading to the drafting of the bill. It was they who created a climate conducive to the work of the co-authors of the bill.

The Ministry of the Interior was in the forefront in this respect. As early as 1969, it had expressed the desire for stronger punishment of consumers of narcotics.

Similarly, parliamentary questions on the "drug" problem incited the Government to take legislative action.

14 The decision to pass a law gradually took shape, then. At the same time, a number of experts who took part in the controversy (physicians, psychologists, police officers, judges) had been very cautious, and relativized the impact of legislative action. Further, the people who strongly favored coercitive action to halt the drug "scourge", and among them some members of the Parliament, were not convinced that such action would be really effective. It is in fact a belief in the prophylactic function of law and punishment which led different actors to invoke the need to resort to a text, the exemplarity of which would clarify the definition of a social order coherent with a natural morality.

What was sought, then, was not so much the creation of an offence and of punishment, but the upholding of a cohesive social bond.

The above discussion points to a two-sided process, including both those actors who "produced" the new criminalization and wthe type of implementation of norm-production by these actors.

The way this norm was enacted is also revealing of a bureaucratic type of law-making. In fact the essential legislative choices are made while the process is in the hands of the administration.

Last, the consequences of these choices, reinforced by subsequent laws (criminalization of users, heavier sentences for drug trafficking, exceptions to the limits on police custody) are felt strongly at present. One example is the rising number of prison inmates. In addition, the present need to control the AIDS epidemic makes punishment an inappropriate response, in that it fosters the multiplication of risks : the fight against "drug abuse" marginalizes users and hinders the implementation of health measures designed to combat this disease.

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