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OLAVO HAMILTON

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OLAVO HAMILTON AYRES FREIRE DE ANDRADE
Lawyer, Professor (UERN), Ph.D. in Law (UnB).

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OWL
EDITORA JURÍDICA

OWL – EDITORA JURÍDICA
Rua Princesa Isabel, 888, Cidade Alta
Natal-RN
Brasil
CEP 59.025-400.
editora@owl.etc.br • www.owl.etc.br

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1. Constitutional law. 2. War on drugs.

To my mother, Maria Ayres.

It's not pretty to legalize marijuana, but giving people to the drug traffickers is worse. The only healthy addiction is love.
Pepe Mujica

TABLE OF CONTENTS

FIGURES

TABLES

PREFACE

I was delighted to receive Olavo Hamilton's invitation to write a preface to this book. Statements to this effect so frequently open prefaces that they have become a *cliché*, but I have no alternative. This is not only because I supervised the author's dissertation for his Master in Law degree at the Federal University of Rio Grande do Norte, now offered to readers in book form.

From the moment the author first told me of his plans to carry out his academic research project, I responded critically and posed questions of all kinds, starting with the argument that the subject-matter he had in mind was both extremely controversial and required a multidisciplinary approach.

The reason, let the reader be warned at once, is that the author does not discuss whether criminalization of drugs use is or is not constitutional, or the argument that no crime can be committed without the presence of offensiveness, which entails the conclusion that self-harm cannot be the object of a criminal charge. This is not the book's focus. It is a work of scientific research that goes far beyond this perspective.

In no uncertain terms, the author advocates state regulation of the sale of drugs. In other words, he sets out to demonstrate that because the policy in place treats the question as if it were a *war* and the enemy were the drug traffickers, the penal statutes that flow from it echo what a certain school of thought calls *criminal law for the enemy*, are unsuited to a democratic constitutional system, and do not comply with the *principle of*

proportionality, because they have failed to achieve their purpose of reducing the supply and consumption of drugs as well as the illegal drug trade. This failure reveals their *ineffectiveness*, not least because there is a more appropriate way to deal with the problem.

A perfunctory, acritical examination suggests it is wrong to advocate the decriminalization of drug production and sale, given that as anyone knows the many negative effects of the consumption of all kinds of narcotic substances, especially by young people, are the greatest social evil of recent times. That was the first impression I had when Olavo Hamilton introduced himself and told me about the subject of the dissertation he wanted to write under my supervision. I did not like the subject.

I was skeptical and told him so. I was immediately struck by his self-confidence, precise reasoning and detailed knowledge of the subject, as well as the vast bibliography with which he was familiar even before he began to write. The intellectual honesty, academic integrity and commitment to scientific research of this master's student (as he then was) gave me comfort to expound my critical view.

I should confess that strictly speaking this critical view of mine was certainly due to a preconception (or should that be a prejudice?) resulting from my reading of studies with a diametrically opposite slant. My perception of the problem, centered on the knowledge that as a corridor for shipments of Colombian cocaine to the United States and Europe, Brazil has for some time been the world's second-largest consumer market, accounting for consumption of some 250,000kg of cocaine per year (estimated in 2007). According to UN data, annual drug sales were earning between US$600 billion and US$800 billion in 2006. Organized crime, to which the illegal drug trade is central, alongside arms smuggling and corruption, turns over global sums corresponding to three times Brazil's GDP, making it one of the largest financial undertakings in the world. Global banking systems and capital markets assure the circulation and laundering of this drug-

contaminated money, which has grave social consequences and fuels violence.

Given these truths, the *war on drugs* should be the right policy for the state to eradicate or reduce drug consumption. However, as shown by the author, drug consumption has steadily increased even though countries have followed this policy for the past hundred years.

One truth is indisputable. If drugs are evil, they have never been so abundant, cheap and, worse still, accessible, despite the repressive instruments used by states. Drug consumption was once somewhat marginalized, owing especially to synthetic drugs, but has now become a permissible social event. The problem, however, does not reside merely in the ineffectiveness of this policy to reduce or control consumption. It is even more devastating. This official approach to the problem has had drastic side-effects. It has bolstered corruption at every level, and it has fueled violence because criminal organizations have armed themselves mightily to face the *war on drugs*, even as this very war led to a massive increase in the prison population.

This policy also gave rise to the incarceration of women, which has risen worldwide at a higher rate than for men. Such women have been led to commit crimes mainly by submission to the authority of their husbands or partners. About 90% of the female prison population derives from the drug trade. Imprisonment of women has also left thousands of children parentless.

As noted, this official policy has paradoxically made the drug trade one of the world's most profitable activities, which in turn has led to the emergence of sophisticated organizations with sufficient economic and financial power to challenge the state itself, establishing a parallel power not only through action that subverts public order but also through the provision of welfare services.

A clarification is in order here, before moving on. The author makes no case for drug consumption. On the contrary, he stresses that drugs are harmful to health, and goes further by showing that they are also a social problem requiring treatment by the state. Indeed, the crux of this book is precisely the question of the form of treatment and the means that should be used by the state to address the problem.

After an interesting historical outline of the emergence and culture of drug consumption in society, the author contextualizes the *war on drugs* and then demonstrates that despite its financial cost, estimated to have reached trillions of dollars, and despite the millions of people incarcerated worldwide and the lives lost during the battles fought in this war without end, neither supply nor demand has been reduced, and public safety problems that concern us all have been created. Drugs have become a backdrop for crime and criminals in general, from petty thieves to organized mafias.

Supported by this truth made clear by his scientific investigation, the author returns to the doctrine of the principle of proportionality outlined at the start of the book, with the aim of showing through a discussion of concrete experience and comparative law that this *treatment* of drugs is not only *inept* but also *unnecessary*, because there are other effective ways of dealing with the problem.

Furthermore, by presenting scientific studies and thought-provoking charts, the author successfully demonstrates that the damage done by the consumption of illegal drugs and the harmful effects of legal drugs, such as tobacco and alcohol, are highly similar. In conjunction with the argument that the state could easily opt for more effective means of tackling the problem, he concludes that there are no grounds for such disparate treatment by the law. Thus, the *war on drugs* does not comply with the principle of proportionality, he insists, and is not a reasonable policy in

terms of the three classical criteria: *suitability, necessity*, and *proportionality in the narrow sense*.

Notwithstanding this conclusion, the author advances by offering a personal contribution to the discussion in the shape of a fourth criterion for gauging the reasonableness of a criminal law, which he formulates as *less social offensiveness*. He argues that even if a criminal law is deemed reasonable in terms of *necessity*, *suitability* and *proportionality in the narrow sense*, it is crucial to analyze whether the consequences of prohibiting or criminalizing the behavior concerned are worse than the said behavior itself. He states categorically that "in addition to causing harm to the general public, the present criminal treatment of drugs prevents the problems relating to public health and safety from being adequately addressed".

As shown by the above summary, the author's scientific approach is singular, and he unfolds it in clear prose that is easily understood and at the same time profound. One may not agree with all his conclusions, but the book undeniably raises disturbing concerns over the truths it reveals and demonstrates that the *war on drugs* is a mistake, a historical error that sooner or later will be acknowledged, not just by anyone who undertakes a serious scientific investigation on the subject like the author, but also by laypeople.

The question that arises then is this: If the policy in place is not the most suitable, what action should be taken? Is the solution decriminalization of the drug trade and its regulation by the state, along the same lines as alcohol and tobacco? This is the solution Olavo Hamilton advocates in this fine book. While the book has made a decisive contribution to my taking a broader view of the issue, I sincerely do not know whether regulating the production and sale of drugs of all kinds is the most effective measure to be taken by the state.

Even if a law is passed to bring about such regulation, and the state is given a monopoly on the production and sale of some or even all drugs,

there will be a black market, and it will of course have to be suppressed, albeit by means of civil, i.e. non-criminal, law.

But the issue is very much on the agenda, especially because of the initiative taken by Uruguay, which recently regulated the production and sale of marijuana. In response to the negative repercussions of this measure on the part of the "official" international community, including Brazil, Uruguay's President Mujica Cordano wisely asked the world in an interview to let his country go ahead with this "experiment".

Furthermore, according to the media both at home and abroad the United States, which leads the policy based on repression, is gradually loosening the rules, to the extent that some US states allow the production and sale of certain drugs.

All this shows how topical is the subject of this book, how timely its publication, and how necessary its perusal.

Natal, December 2013.

Walter Nunes da Silva Júnior
Federal judge. PhD in Constitutional Law, Federal University of Pernambuco (2006). Member of the National Council of Justice (2009-2011). Inspecting Judge of the Federal Prison in Mossoró. Professor, Federal University of Rio Grande do Norte.

1 INTRODUCTION

Throughout the history of our species, we human beings have displayed the need to use narcotic substances for a wide variety of reasons. Recreational drugs have always been with us since the very beginnings of civilization.

Nevertheless, many drugs are illicit according to criminal law, which bans their sale and even their consumption.

Laws criminalizing drugs evolved into what has become known as the *war on drugs*, starting in the 1970s in the United States, where narcotic substances were deemed to be a threat to national security and hence had to be repressed on the home front, while similar public policies were exported to other countries.

Thus, the *war on drugs* is a campaign of prohibition and international military intervention waged by the US government with the aid of several other countries and with the explicit aim of defining and reducing the illegal drug trade. Its main front is criminalization of the use and sale of psychoactive substances considered illicit.

Because it directly affects the sphere of individual freedom in the name of the collective interest, the ban on drugs, especially in criminal law, must be submitted to an assessment of proportionality in order to gauge its constitutionality by weighing fundamental values. To this end, the first step is understanding the *principle of proportionality* as systematized in German constitutional doctrine.

In order to understand the *principle of proportionality* correctly, it will be necessary to view it in the historical context of its development in the legal cultures of nations, from the very first notion to the much later idea of the control of state administrative activity and finally to its present doctrinal status.

It will then be necessary to perceive its link with fundamental rights, inasmuch as it entails the weighing of constitutionally valued goods mutually considered, and to understand its systematization in terms of subprinciples that give it force and content.

Given the nature of this study and its place in the field of constitutional penal law, it is also important to note the specific manifestations of the *principle of proportionality* when criminal laws are assessed according to this criterion.

Thus, I will investigate whether the classical division of the *principle of proportionality*, in terms of the conflict between individual interests (freedom) and collective interests (effective protection of rights), is sufficient to conclude that a criminal law is constitutional or whether it must be supplemented by including a new subprinciple that considers the conflicts produced among the various collective interests by penal law itself.

With the aim of understanding the *principle of proportionality*, therefore, the second chapter covers its historical evolution and present constitutional position, dissecting its content and structure through the perception of its elements, i.e. the subprinciples that give it form.

Having understood the *principle of proportionality*, but before assessing the criminal laws that ban drugs on this criterion in order to gauge their constitutionality, it will be necessary to investigate the relationship between drugs and humanity, their position in the civilization process, and what they represent for society today. To do this, I will describe the main licit and illicit drugs, their history, their relationship with humans in the

civilization process, and their present position with regard to mass consumption.

It is also important to for the reader to understand the *war on drugs* in depth, starting with the fact that it consists of three distinct phases: (1) a predominantly moral phase, in which combating drugs is considered a *principle*; (2) an objective phase, in which the *war on drugs* is seen as a *means* to solve the problems caused by substance abuse; and (3) a repressive phase, in which the *war on drugs* becomes an *end* in itself.

The discussion will also cover its legal basis, its effects on the culture and history of nations, and the treatment given to it by the international community. This analysis is necessary because it is impossible to separate the fight against drugs from its legal basis in the criminalization of narcotic substances considered illicit. Thus, the *war on drugs* will be gauged in terms of proportionality, just like the criminal laws that ban drugs.

The outcomes of this repressive policy will also be evaluated in terms of whether the policy has achieved its goals, and the effects it has had on individuals and society. To find out how effective the *war on drugs* has been, it will be necessary to see whether it has reduced the supply of drugs considered illicit, demand for drugs, and the crimes and social harm associated with drugs.

The third chapter therefore covers the history of drugs and their relationship with humanity, the *war on drugs* in its three phases, its outcomes, and its legal basis.

Having understood the *principle of proportionality* in its various dimensions, and the *war on drugs* in all its aspects, I must next submit the legislation that criminalizes drugs to the reasonableness test in order to appraise its constitutionality. Drug criminalization is the crux of the *war on drugs*, so that testing the constitutionality of the legislation on which criminalization is based means testing anti-drug policy as a whole.

Criminal legislation is evaluated in the abstract according to the subprinciples that give form and content to the principle of proportionality, so that it can be considered proportional and hence constitutional if it is shown to be: *suitable*, fulfilling its stated purpose; *necessary*, there being no less restrictive means to achieve this purpose; *proportional in the narrow sense*, where the severity of the penalty is equivalent to the harm it is intended to prevent; and *less socially offensive*, provided its consequences for society are less harmful than the evils it aims to avoid.

Drug criminalization, the legal basis for the *war on drugs*, is supposed to protect public health and safety in three ways: (1) by reducing the supply of narcotic substances considered illicit; (2) by reducing demand for drugs; and (3) by mitigating the harm deriving from drugs. Analysis of its utility and hence *suitability* will therefore be systematized on the basis of these three goals.

Investigation of the *necessity* of laws that ban and criminalize the consumption and sale of drugs will focus on verifying whether public health and safety can be protected by any equally effective legal or administrative mechanism apart from incrimination (which is more burdensome to the individual).

It is important to note that finding alternatives to drug criminalization is no easy task. The problem lies not in proving the effectiveness of other methods than criminalization, but in the ethical bias that typically contaminates drug-related discussions and decision making.

The moral bias underlying the criminalization of drugs results in the strategy of concentrating efforts on coercion and repression, at the expense of actions designed to address in a genuine manner the issues relating to public health and safety, insofar as they are affected by the abuse of illicit substances. This is why there have been so few experiences in which the state's frontline public policy moves in the opposite direction to banning and criminalizing drugs (or even in parallel via some alternative).

However, despite the scarcity of policies that focus on addressing the public health problems caused by drug consumption, the few that do exist are worth studying: they include decriminalization, diversification, syringe exchange, and medical treatments based on drug prescription or substitution, which are capable of mitigating the risk of death by overdose and exposure to drug-related diseases. Programs of this kind derive from "harm reduction" policies, which focus on combating not drugs but their consequences. Here the book outlines alternatives to criminalization implemented in Switzerland, the Netherlands, Uruguay, the United Kingdom and Portugal, highlighting their results.

This book does not set out to investigate the constitutionality of drug criminalization in connection with the specific argument about prohibiting punishment for self-harm, whose necessity is questioned by legal doctrine. The investigation of proportionality is based on general criteria and considers both the use and sale of drugs.

As for *proportionality in the narrow sense*, the third element of the *principle of proportionality*, the investigation will focus on analyzing the isonomy of penalties relating to the use or sale of illegal drugs by comparing them with the legal treatment of other drugs and the potential harm intrinsic to each one.

Strictly speaking, it can be averred that the reasonableness of the laws that criminalize drugs deemed illicit is conditional upon (1) a demonstration that the punishment imposed in the abstract is proportional to the gravity of the harm done to society (public health and safety); (2) proof of this proportionality based on an analysis of other crimes and laws protecting legal goods within the same system; and (3) weighing or assessment of fairness by comparing the treatment in criminal law of other narcotic substances based on the potential harm intrinsic to each one.

However, to find out whether the first two conditions are met, it is necessary to analyze, albeit in the abstract, each specific law that

criminalizes conduct relating to illicit drugs in its specific social context and legal system. Such an assessment is evidently not pertinent to this book, which is about a far less specific subject, but the first two parameters can be investigated in future research of a more restricted nature.

As for the third condition, an assessment of *proportionality in the narrow sense* based on the principle of fair and equitable treatment, which means verifying whether the criminalization of drugs matches the risks inherent in such substances (legal and banned) is pertinent to the present scientific investigation, owing to its general nature. This is because the *war on drugs* is uniform throughout the international community: almost all states ban the same drugs with few variations, and the list of narcotics considered illegal in Russia is exactly the same as that in force in Brazil, Switzerland, Mongolia and Mexico, for example.

Similarly, the risks inherent in each drug, legal or illegal, are practically the same in every society and culture. Ecstasy is just as harmful to public health and safety in Italy as in the United States.

For this reason, a general analysis regarding the *proportionality in the narrow sense* of the criminal laws on which the *war on drugs* is based is possible using the above criterion, i.e. whether criminalization due to the harm intrinsic to drugs is fair and equitable.

To this end, I will examine scientific studies that classify drugs according to their potential social harmfulness in order to see whether the penalties for drug-related crimes are proportional to the inherent risks and whether criminalization itself complies with this criterion.

I will also investigate whether criminalization, as the legal basis for the *war on drugs*, results in harm to society that outweighs the benefits of protection for public health and safety, in order to gauge proportionality in terms of the social offensiveness of criminalization.

Thus, the fourth chapter submits the criminal laws that support the *war on drugs*, discussed in the third, to the *principle of proportionality* on

which the second focuses, in order to investigate their reasonableness and consequently their constitutionality.

The scientific investigation centers on constitutional law, particularly in juxtaposition to criminal law, notwithstanding the criminological, historical, sociological, economic and biomedical treatment given to the subject to assure the book's multidisciplinary contents.

2 THE PRINCIPLE OF PROPORTIONALITY

To understand the *principle of proportionality* correctly, it is necessary to begin by examining its historical emergence in the context of the legal culture developed by various nations, from the earliest notion and later the idea of controlling the state's administrative activity to the current doctrine that assures its constitutional status and function.

It is also necessary to note the link between the *principle of proportionality* and fundamental rights, insofar as the principle is used to give appropriate weight to each constitutionally valued good as against any other, and to understand how it is systematized and oriented by subprinciples that give it force and content.

Given the nature of this investigation, in the field of constitutional penal law, it is equally important to take into account the specific manifestations of the *principle of proportionality* when criminal laws are subjected to the proportionality test.

2.1 FROM ANTIQUITY TO CONSTITUTIONAL COURTS

The notion of proportionality can be said to permeate *lex talionis*, albeit evidently not yet raised to the level of a legal principle.[1] The dogma of "an eye for an eye, a tooth for a tooth" became the keystone of *lex talionis* over time and meant making punishment strictly proportional to the injury received, as far as was possible. Retribution (which restricted individual freedom in the name of the general interest) would be possible only if it were suited to the gravity of the offence.

Lex talionis was the first response to the question of how to establish the quality of the punishment to be imposed and is found in all ancient legal orders, including the Code of Hammurabi, the Bible, and the Laws of the Twelve Tables (Gomes 2003).

Willis Santiago Guerra Filho (2002) sets out to show that the idea of proportionality began to take shape at the birth of the modern rule-of-law state, which in his view occurred in 1215 with the Magna Charta. According to this author, the concept of *Verhältnismäßigkeit*, a technical term current in German public law and legal theory, and akin to that of *proportionality*, referring to a limitation of state power to guarantee the citizen's physical and moral integrity, originates with the modern rule-of-law state supported by a Constitution in a document that formalizes the intent to maintain a balance among the various powers that form the state, and mutual respect

[1] In the opposite direction, Dimoulis & Martins (2011) argue that it is a methodological mistake to seek the origins of the *principle of proportionality* in the *Code of Hammurabi* (that reproduced *lex talionis*), since in their view to do so would be to misunderstand the real purpose of the idea, which is not to inquire whether people behave rationally and, for example, whether lawmakers establish moderate penalties for offenses they consider moderate and severe penalties for crimes deemed severe, but to serve as a reliable legal instrument to resolve the concrete problem of the limitations of infraconstitutional legislators. Despite the technical rigor of their argument, it cannot be denied that emphasis on fitting the punishment to the crime is at the heart of at least one of the elements of the *principle of proportionality* (*proportionality in the narrow sense*). Thus, *lex talionis* can be considered a prototype of this principle.

between the state and the individuals submitted to it, who are acknowledged to have certain inalienable fundamental rights. A frequently cited historical milestone for the emergence of this type of political formation is England's Magna Charta of 1215, in which the above idea figures with great clarity, when it establishes that "for a trivial offense a free man shall be fined only in proportion to the degree of his offense, and for a serious offense correspondingly, but not so heavily as to deprive him of his livelihood".

In an identical direction, the Supreme Court of the United States recognizes that the *principle of proportionality* was present in Magna Charta, applied by English courts for centuries, and reproduced in the English Bill of Rights and the Eighth Amendment to the US Constitution (1791), which states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted":

> The principle of proportionality is deeply rooted in common law jurisprudence. It was expressed in Magna Charta, applied by the English courts for centuries, and repeated in the English Bill of Rights in language that was adopted in the Eighth Amendment. When the Framers of the Eighth Amendment adopted this language, they adopted the principle of proportionality that was implicit in it. (Solem v. Helm 1983)

In Latin Europe, meanwhile, proportionality arose in the eighteenth century, also linked to the idea of limiting power. At that time, it was frequently used in administrative and criminal law (Pedra 2006).

Imbued with Enlightenment ideas, Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, addressed the *principle of proportionality* in his discussion of crime and punishment. Although he had already touched on the subject in *Lettres persanes* (1721), Montesquieu's most important contribution to the construction of criminal law was contained in his best-known work, *De l'esprit des lois* (1748), the first to deal specifically with the necessity of proportionality between crime and punishment (Gomes 2003).

Montesquieu advocated fixed sentences in order to prevent the abuse of judicial discretion where judges meted out punishments according to arbitrary power. He also argued that excessively severe penalties were unnecessary in moderate states, that light penalties could more easily influence the spirit of the inhabitants, and that a good legislator is less bent upon punishing than preventing crimes. The quality of the penalty and the sentiment of moral disapproval associated with it should function as an instrument of prevention, rather than the severity of the adversity that constitutes the punishment itself (Gomes 2003). Severe punishment is fitter for despotic government, whose principle is terror.[2] [3]

Besides Montesquieu, Cesare Bonesana, Marquis of Beccaria,[4] and his book *Dei delitti e delle pene* are a historical reference for the idea of proportionality between crime and punishment.[5] Accompanying the ideas of the Enlightenment under the influence of Montesquieu (Silva Júnior 2015), Beccaria made a significant contribution to the *principle of proportionality* by starting the discussion about the extent to which a given human action should be classified as criminal and delineating a number of

[2] "La sévérité des peines convient mieux au gouvernement despotique, dont le principe est la terreur, qu'à la monarchie et à la république, qui ont pour ressort l'honneur et la vertu" (Montesquieu 1748, 1550).

[3] The point to be noted and valued in this respect is the clarity of Montesquieu's formulation of the penal problem in its articulations relating to those who wield the power to punish, the foundations of law itself, the link between crime and punishment, the foundations of criminal quantification, the reasonableness of penalties, the relevance of probative techniques in criminal cases, and the relationship between suppression of crime and the degree of human freedom. The importance of *De l'espirit des lois* specifically to the initial formation of the principle of proportionality in criminal law is also significant and indeed the work was a starting-point for later authors (Gomes 2003).

[4] Walter Nunes da Silva Júnior (2015) stresses Beccaria's importance to the formation of thinking in criminal law as it is today, asserting that although he was not a jurist, much less recognized as such, his essay in philosophy of law is impressive because its ideas were so far ahead of their time. Many of the principles formulated in his monumental work are still fully applicable today.

[5] For Beccaria (2009), the means employed by the law to prevent crimes should become stronger as offenses become more contrary to the public good and may become more common, imposing a proportionality between crime and punishment.

hypotheses in which the penalty becomes ill-suited to the prevention of future offences (Gomes 2003). He also proposed criteria for deciding which punishment should correspond to each crime, although he advocated not mathematical precision in the stipulation of penalties, but the calculation of probabilities in terms of political arithmetic (Silva Júnior 2015).

Beccaria transposed the liberal democratic conception of the state devised and disseminated by Enlightenment thinkers to the sphere of criminal law, which he viewed as an instrument at the service of the citizen more than of the state. From his liberal democratic standpoint, criminal law comprised a set of norms that protected human rights against the excesses the state might commit or wish to commit in the name of keeping order (Silva Júnior 2015).

Despite the magnitude of Montesquieu's and Beccaria's teachings, it was in administrative law that the *principle of proportionality* was first established, functioning in the eighteenth century as a measure of legitimacy for the exercise of police power and interference by public authorities in the private realm (Pedra 2006).

The idea of proportionality as a principle was systematized in the transmutation of the police state into the rule-of-law state, as a constraint on the coercive power of government, police power: its exercise should remain limited to the just proportion between the objectives of the actions taken by public authorities and the means to those ends (Siqueira Castro 1989).

In sum, the *principle of proportionality* emerged in administrative law, at a time when the theory of natural law was flourishing, as a constraint on the state's police power designed to avert measures considered undesirably restrictive of individual rights (Barros 2003).

Thus, at its inception the *principle of proportionality* was intended to curtail the power of the executive branch of government and was considered a counterweight to administrative restrictions on individual freedom (Pedra 2006).

In the eighteenth century, therefore, it was held to be a suprapositive norm in the theory of the state. Similarly, in the nineteenth century it was introduced into the sphere of administrative law as a general principle of the right to police, and was later elevated to the status of a constitutional principle (Pedra 2006).

As noted earlier, its inclusion in the 1791 US Bill of Rights and the Eighth Amendment to the US Constitution is evidence that proportionality had by then been raised to the status of a constitutional principle. The US Supreme Court has since based many of its decisions on this principle.

In the early twentieth century the *principle of proportionality* was constantly present in Supreme Court jurisprudence. For example, in *Weems v. United States* (1910), judged in May 1910, the Court confronted a statute of the criminal law with the Eighth Amendment, acknowledging the submission of legislative discretionary power to the notion of proportionality in the establishment of penalties and in choosing the types of conduct to be defined as crimes. The general conclusion established that punishment should be "graduated and proportioned to the offense" (in multiple respects). In reaching this conclusion, the Court laid down four paradigms.

First, the Court interpreted the prohibition of cruel and unusual punishment as imposing on the legislature the duty of proportioning punishment according to the nature of the crime, and on the judiciary the duty of determining whether punishments have been properly apportioned in a particular statute. If not, the judiciary must decline to enforce it.

Second, the Court established that this duty of apportionment requires the legislature not only to institute penalties according to the gravity of the crimes on which it legislates, but also to take into account the penal laws and punishments existing in the states of the Union, so as to prevent distortions among the criminal systems in place in different jurisdictions.

Third, the duty of proportionality imposed by the cruel and unusual punishment clause not only controls the exertion of legislative power as to modes of punishment but also addresses the legislature's motives in defining and punishing crimes, and therefore gives courts the power to refuse to enforce a particular law if in their opinion the lawmaking power was insufficiently impelled by the desire to reform criminals. A penalty incapable of doing so should be considered unconstitutional.

Fourth, the ban on cruel and unusual punishment does not merely limit the legislative power to fix the punishment for crime by imposing the duty of proportionality, but allows the courts to supervise the exercise of legislative discretion as to the adequacy of punishment, thereby empowering them to refuse to enforce laws if they judge the punishment too severe.

Although the proportionality discussed in this judgment is limited to *proportionality in the narrow sense*, only one of three classical aspects of the principle, it nevertheless coincides with the idea of reasonableness present in US constitutional culture.

It is important to note that this may be why Brazilian doctrinal and jurisprudential tradition rightly refrains from distinguishing between proportionality, which originated in German law, and reasonableness, which is typical of US legal theory.

Despite their different origins and development, proportionality and reasonableness harbor the same underlying values: rationality, fairness, adequate measure, common sense, and rejection of arbitrary or capricious acts. Hence the two concepts are close enough to be interchangeable (Barroso 2009), and it is unnecessary to distinguish between them. Instead, they should be treated as adjacent manifestations of one and the same phenomenon.

Nevertheless, while its presence in US law since the advent of the Eighth Amendment cannot be denied, the *principle of proportionality* with

the systematization and extent it has today was framed by the German constitutional school and constructed in the context of German doctrine and jurisprudence, and is widely accepted in the legal systems of continental Europe (Silva Júnior 2015). In the German Constitution it is considered an unwritten constitutional principle, deriving from the democratic rule of law (Ramos Tavares 2005).

In sum, judgment according to proportionality is a solid component of contemporary constitutional legal reasoning, originally developed in doctrinal terms by the jurisprudence of Germany's Federal Constitutional Court starting in the 1950s, immediately welcomed by German legal theorists, and exported to several other countries (Dimoulis & Martins 2011).

In the same train of thought, Virgílio Afonso da Silva (2002) explains that the proportionality rule for the control of laws that restrict fundamental rights began as a development of the German Constitutional Court's jurisprudence and is neither a mere proposition vaguely suggesting that state acts should be reasonable, nor a simple analysis of the relationship between means and ends.

Before long, this new reading of the *principle of proportionality* influenced legal doctrine in other countries and was incorporated by the constitutional jurisprudence of innumerable states and by the European Court of Human Rights (Steinmetz 2001).

Widespread incorporation and generalized application of the *principle of proportionality* in Germany, and from there in a swathe of countries, can be understood as resulting from a climate prepared by the discussions of legal philosophy that took place after World War Two. The horrors of the Nazi regime, perpetrated under the mantle of the law, highlighted the value dimension of law and the need to seek the criteria for its correct application elsewhere apart from the legislature (Guerra Filho 2002).

Paulo Bonavides (2004) confirms this idea, asserting that constitutional application of the *principle of proportionality* in Germany (and also in Switzerland) following World War Two became so broad as to appear in more than 150 judicial decisions after the advent of the Basic Law (*Grundgesetz*, 1949), especially thanks to the jurisdiction of the Constitutional Court.

Thus, it can be said that the shift in control of the executive's discretionary power via its administrative acts to control of judicial discretion, which is submitted to the Constitution, forged today's understanding of the *principle of proportionality*. The law became the instrument for enforcement of the Constitution and hence had to be submitted to the control of proportionality.

According to this rationale based on enforcement, the law's position with regard to the Constitution is no different in general terms from the hierarchical normative relationship between laws and the administrative acts that enforce them. There is no more discretion regarding the enforcement of a legal norm than there is discretion regarding administrative acts, and legislative discretion is also circumscribed to a problem of enforcement by the legislator of the more or less detailed precepts in the Constitution (Canotilho 1994).

Thus, the concept of discretion in the sphere of legislation entails both freedom and constraint, so that the power to make laws is granted to legislators within limits established by the Constitution (Mendes 2001).

This line of reasoning is the basis for the main impact of the *principle of proportionality* on fundamental rights today,[6] as a constitutional criterion of value that determines the maximum extent to which the state

[6] It is unnecessary to distinguish between *fundamental* and *human rights* because both are usually treated as one and the same category of rights. In short, fundamental rights can be considered a generic name for universal human rights and the rights of national citizens (Linhares 2002).

can impose restrictions on citizens in the individual sphere in order to achieve its ends (Gomes 2003).

Lawmakers are tied to fundamental rights in the sense that they have a duty to observe and respect them when passing laws with abstract general rules, and this requirement is directly linked to the emergence of the idea of proportionality in constitutional law, since fundamental rights guarantee individual freedom and therefore represent obstacles to the state's actions to satisfy collective interests (Dimoulis & Martins 2011).

Thus, according to the German Constitutional Court, or *Bundesverfassungsgericht*, the means used by the legislature should be suitable and necessary to the achievement of the desired ends. The means are *suitable* if using them makes achievement of the desired ends possible, and *necessary* if the legislature has at its disposal no other means that are equally effective while being less restrictive of fundamental rights (Mendes 2001).

Following this historical evolution of the *principle of proportionality*, the stage has been reached in which individuals in a constitutional state must be protected against unnecessary or excessive intervention that imposes more than the burden required to protect the collective interest (Gomes 2003), so that a law is unconstitutional if other measures can be found that are unequivocally less harmful (Mendes 2001).

In respect of fundamental rights, therefore, the *principle of proportionality* serves to balance or weigh the legal goods protected by the Constitution. This postulate flows from the constitutional rule of law insofar as it acts as an instrument against arbitrariness and excess.

This is because it is to be assumed that fundamental rights would become mere programmatic statements if there were no possibility of constitutional jurisdiction, with its power to control the constitutionality of laws and judicial decisions. This is the novel territory of action for the *principle of proportionality* (Gomes 2003).

Hence the important role of constitutional courts like Germany's in analyzing the scope of restrictions to fundamental rights to ensure that each and every constraint on a freedom guaranteed by a fundamental right is *suitable*, *necessary* and *proportional* (in the narrow sense) to the protection of a legal good that is at least of equal value (Gomes 2003).

Fittingly, this is the context for use of the *principle of proportionality* in criminal law as well. In the process of verifying the constitutionality of criminal laws (subject to the legal reserve rule), it proves insufficient to entertain the idea that limiting fundamental rights is justified only by the need to preserve the legal goods protected by such laws. There is far more to consider, on pain of endangering individual rights acknowledged to be fundamental, merely in order to protect collective goods and interests.

To prevent this from happening, the means of protecting the legal goods with a constitutional basis must be submitted to certain constraints. Mere reference to the prohibition of abuse is insufficient. These constraints include other criteria for appraising limitations to fundamental rights, such as *suitability*, *necessity* and *proportionality*, all elements of the *principle of proportionality* (Gomes 2003).

In sum, the *principle of proportionality* today is an axiom of constitutional law, the corollary of constitutionality, a canon of the rule of law, and a rule that curbs unlimited state action in the framework of the juridicity of each legitimate system of authority (Bonavides 2004).

Whenever a constitutional state is obliged to restrict individual freedom in order to satisfy a general interest, recourse to the *principle of proportionality* is imperative, not least as a means of controlling administrative and legislative acts.

2.2 THE PRINCIPLE OF PROPORTIONALITY AND CONSTITUTIONAL INTERPRETATION

A principle is understood here as the foundation of a legal system, its core precept that radiates into all other rules, filling them with meaning and intellection. By virtue of its centrality, a principle is also an interpretative criterion.

Considering that rules and principles are kinds of norms, Canotilho (1998) seeks to distinguish between them on the following basis: (a) the difference in the degree of abstraction – norms with a high degree of abstraction, those that are hardest to concretize, are principles, whereas norms with a lower degree of abstraction and a higher degree of concreteness are rules; (b) the difference in the degree of determinability when they are applied to concrete cases – principles, precisely because they are more abstract, require intervention by legal operators so that they can be applied in concrete cases. The legislator or judge must intervene to concretize a principle, to make the principle concrete. In contrast, rules can be applied directly; (c) the fundamental role played by principles in the system of sources of law – principles are norms of great relevance to the legal order, either because they occupy a hierarchically superior position in the system of sources of law (e.g. constitutional principles), or because they are structurally important to the legal system (e.g. the rule-of-law principle); (d) the proximity of principles to the idea of law – principles are the maxims of the legal system, oriented by the ideal of justice or by the idea of law; principles are the legal order's glue in the sense that judicial decisions are subordinate to them; (e) the normogenetic nature of principles – principles are the reasons that underlie the rules.

Indeed, principles can never be applied as rules, on pain of producing injustices that subvert the belief in juridicity, the Constitution and the legal order itself (Carvalho Netto 1998). In accordance with the

reasoning developed by Canotilho, moreover, proportionality clearly figures among the norms held to be principles, and in light of the definitions set forth above it can be defined as a normative maxim deriving from the principal structure of the norms and attributiveness of law, and dependent upon the conflict between material legal goods and the structuring power of the relations between means and ends, whose function is to establish a measure between concretely correlated legal goods (Ávila 1999).

Given both its evaluative force and its position in the context of the constitutional state, therefore, transgressing a legal axiom is far more serious than violating a norm of a more concrete nature.

To abuse a principle is to offend against not only a specific mandatory precept (typical of violations of rules) but an entire system of precepts, undermining their fundamental values. It is the most severe form of illegality or unconstitutionality (Bandeira de Mello 2002).

This violation is even graver when it occurs in the ambit of the *principle of proportionality*, given that this axiom is so tightly interwoven with fundamental rights[7] and hence occupies a privileged position in the constitutional interpretation process.

Besides serving as one of the pillars of the legal order, as noted in the previous section, the *principle of proportionality* also plays an important interpretive role, insofar as it helps orient exegetes in the pursuit of the most reasonable solutions to the concrete cases brought before them.

Proportionality is of proven usefulness in resolving a wide array of practical questions, not only in law and its many branches, but also in other

[7] Although it is unnecessary to conceptualize or define *fundamental rights*, it is important to note the view formulated by Menelick de Carvalho Netto (2003), according to which they are "historical achievements, socially created evolutionary acquisitions, institutionalized rights in an improbable, complex society", deriving from "a society that is differentiating and specializing to be able to reproduce itself at such a high degree of complexity that it requires the invention of human rights, of fundamental rights".

disciplines, whenever the most suitable means to a given end needs to be found (Guerra Filho 2002).

One of the most useful applications potentially contained in the *principle of proportionality* is its deployment as an instrument of interpretation whenever there is, or appears to be, a conflict between fundamental rights,[8] in which case it is well-suited to the search for a concrete solution (Bonavides 2004).

Moreover, one of the central tenets of fundamental rights theory is that defining them entails recourse to the maxim of proportionality and its three classical elements (*suitability*, *necessity*, and *proportionality in the narrow sense*). The reverse is also true: the principles-based character of fundamental rights derives logically from the maxim of proportionality (Alexy 2008).

Fundamental rights act as citizens' defense rights in two ways: on an objective legal plane, they serve as norms of negative competence for public authorities, basically prohibiting state interference in the individual legal sphere, and on a subjective legal plane they entail the power to exercise fundamental rights positively (positive liberty) and to demand omission by public authorities in order to prevent harmful aggression by the state (negative liberty) (Canotilho 1998).

For this very reason, proportionality is not only an important, if not *the* most important, fundamental legal principle, but can be considered a veritable argumentative *topos*, inasmuch as it expresses thinking accepted as correct, fair and reasonable (Guerra Filho 2002).

Modern constitutional law understands human rights as the essence of the legal order. In the same vein, the *constitutional principle of*

[8] Fundamental rights may collide in two ways: first, the exercise of one fundamental right may collide with the exercise of another (collision between fundamental rights); second, the exercise of a fundamental right may collide with the need to protect a constitutionally protected collective or state good (collision between fundamental rights and other constitutional values) (Farias 2000).

proportionality plays a crucial role – that of balancing the legal goods protected by the Constitution. It acts as a buffer against the immoderate exercise of power, not least by the legislature itself. It does this by means of constitutional review.

Alongside this connection with fundamental rights, the *principle of proportionality* also connects with so-called collisions between constitutional goods, values or principles. In this context, its requirements represent a general method for resolving conflicts between principles, in the sense of conflicts between norms which, unlike conflicts between rules, are resolved not by repealing or teleologically reducing one of the norms in conflict or by explicitating different fields of application for each norm, but by balancing, i.e. weighing the relative importance of each of the two norms, which in theory are both applicable and suitable as the foundation for decisions, but in opposite directions. In the latter case, the *principle of proportionality* is applied to establish the relative weights of different constitutional goods (HC 104339 2012).

On this topic, Luis Afonso Heck (1995) says the *Bundesverfassungsgericht* tends to apply the *principle of proportionality* in conjunction with the prohibition of excess, as both derive from fundamental rights. According to him, the German Constitutional Court also understands the proportionality precept, together with the prohibition of excess, as resulting from the essence of fundamental rights. Because they are defensive rights, they have a distinctly recognizable proportionality content; the jurisprudence developed in interpreting and applying them includes practicable, and generally recognized, criteria for the control of state intervention, such as the proportionality precept. In this context, it requires protection for the individual against unnecessary and excessive interventions. A law should not burden the citizen more intensely than is absolutely necessary to protect the public interest. State intervention must

therefore be suitable and necessary to achieve the desired end, and must not overburden those affected in terms of what can be demanded of them.[9]

Thus to review the constitutionality of a law that restricts individual rights, freedoms and guarantees, it is necessary – since the merits of political choice are not at issue – to question the causes and ends of the law as well as the measure of restriction by means of constitutional principles, above all proportionality (Gomes 2003).

In sum, it can be said that in dealing with a restriction to a fundamental right or a conflict between constitutional principles, it is necessary to establish the relative weight of each by applying the rules proper to the *principle of proportionality* (HC 104339 2012).

In criminal cases, where the practical consequences of the application of a law affect the individual sphere directly and profoundly, it is self-evidently necessary to take greater pains to weigh proportionality between the constitutional goods involved, such as life, public safety or property, and liberty (primarily affected by criminal law), image, honor or human dignity (secondarily affected).

The Spanish Constitutional Court (*Tribunal Constitucional de España*) (Sentencia 55 1996) has sedimented this idea in several decisions, repeatedly declaring that deployment of the *principle of proportionality* is especially important when an individual is sentenced to prison, because the extreme restriction of liberty entailed in the forced confinement of a citizen is justifiable only when absolutely necessary for the protection of a collective legal good and only to that extent.

[9] Along the same lines, Gilmar Ferreira Mendes (2004) says legal doctrine views as a typical manifestation of excessive legislative power any violation of the principle of proportionality (Verhältnismässigkeitsprinzip) or the prohibition of excess (Übermassverbot), revealed through inconsistency, incongruence and unreasonableness or discrepancies between means and ends. German constitutional law regards the principle of proportionality (Verhältnismässigkeit) and the prohibition of excess (Übermassverbot) as unwritten constitutional norms deriving from the rule of law.

Analyzing the constitutionality of legislative acts via the *principle of proportionality* requires a painstaking method, especially to investigate the satisfaction of its elements: *suitability*; *necessity*; and *proportionality in the narrow sense*. This is the classical structure of the *principle of proportionality*.

However, these elements are insufficient in the sphere of criminal law, where the consequences of prohibiting certain kinds of behavior necessarily affect society in its entirety and not merely those involved in criminal activity (aggressors and defenders).

It is also necessary to take into account not just the consequences of the proscribed act whose prohibition has been violated, but the effects of the prohibition itself. There are undoubtedly prohibitions that in themselves represent a greater evil than what they prohibit.

Similarly, it must be borne in mind that while criminal laws are intended to serve the collective interest they may have negative effects not only on individual rights (measurable in terms of *necessity* and *proportionality in the narrow sense*) but also on society as a whole. There may be situations in which, despite their intention of protecting social goods and interests, the lawmakers both limit individual rights and end up harming society itself as a side-effect.

Proportionality appraised using the classical criteria (*suitability*, *necessity* and *proportionality in the narrow sense*) cannot reliably balance the benefits to society from a particular criminal law against the harm that may be done by that same law, because the scope of these criteria is insufficient.

In what follows, therefore, I propose the inclusion of *less social offensiveness* as a mandatory additional element in the appraisal of proportionality.

2.3 ELEMENTS OF THE PRINCIPLE OF PROPORTIONALITY

Given that the *principle of proportionality* conditions and regulates the exercise of the lawmaking function, so as to prevent or at least hinder the abuse of fundamental rights by means of the law, it is important to begin by understanding its content in order to determine how it is used to control the production of laws. Analysis of the elements of the *principle of proportionality* may detect substantive legal flaws from a different perspective than the traditional approach concerned merely with the formal logical constitutionality of laws (Pedra 2006).

The examination of the *principle of proportionality* as developed in German law and reproduced in other legal orders is a process successively comprising classification (*suitability*), elimination (*necessity*) and axiology (*proportionality in the narrow sense*), and hence characterized by progressive tapering (Dimoulis e Martins 2011).

The content of the *principle of proportionality* consists of the subprinciples *suitability*, *necessity* and *proportionality in the narrow sense*. *Suitability*, understood as a parameter to guide the legislator's conduct when limitations to fundamental rights are at stake, translates the requirement that means must be suited to ends; the assumption underlying *necessity* is that any restrictive measure must be indispensable to conservation of that or another fundamental right and cannot be replaced by an equally effective measure that is less restrictive; *proportionality in the narrow sense* weighs restrictions against results so as to ensure the burden is fairly distributed (Barros 2003).

As already mentioned, the degree of *social offensiveness* must be included as a fourth element of the *principle of proportionality*. To sum up before detailing each of these four elements: a law is *suitable* if it achieves the desired end, *necessary* if less burdensome means to the same end are not

available, *proportionate in the narrow sense* if the intensity of the punishment imposed on the individual is equivalent to the harm it aims to prevent (retribution), and *less socially offensive* if its consequences for society are less harmful than the evils it aims to avoid.

2.3.1 Suitability

Judging the *suitability* of a law to achieving the proposed end from the standpoint of proportionality should be the first step in verifying observance of the *principle of proportionality* (Pedra 2006). A law deemed unsuitable or unfit for purpose is an empty intention that should never have been put on the statute book.

The element of *suitability* should be understood as referring to the right means to achieve an end based on the public interest (Bonavides 2004). Legislative measures taken in pursuit of collective interests must be *suitable* to achieving such ends. In order to verify compliance with this requirement, it is necessary to seek convincing evidence that the act of government concerned is fit for the purpose stated in its preamble (Canotilho 1998).

A law is therefore *suitable* if it embodies a connection, grounded in proven hypotheses regarding empirical reality, between the state of affairs brought about by the intervention and the state of affairs in which its purpose can be considered achieved. Any measures taken by the state that do not make such a connection in an empirically provable manner are considered disproportionate and hence unconstitutional (Dimoulis & Martins 2011).

Suitability is appraised by verifying the law's efficiency in achieving the stated purpose. It should be noted that this does not mean investigating any possible side-effects of state interference for society, but

rather certifying specifically that the results of such intervention are those foreseen.

It is also important to stress that analyzing this connection as it pertains to *suitability* excludes any examination of the efficacy of the means chosen to achieve the desired end. This question, which concerns the choice of the best means, the means least burdensome for the individual or for individual rights, pertains to the content of the element *necessity*. Given that the *principle of proportionality* is understood as a parameter for the conduct of the lawmaker, whenever limitations to fundamental rights are imposed the *suitability* of means to ends represents the requirement that any legislative measure must be appropriate to the proposed purpose. If not, it must be considered unconstitutional (Pedra 2006).

Situating the question of *suitability* as an element of the *principle of proportionality* in the field of criminal law, Mariângela Gama de Magalhães Gomes (2003) explains that the effectiveness of a law correlates closely with its fitness of purpose inasmuch as this criterion indicates precisely that the legitimacy of criminal laws is bound up with their capacity to be respected by their addressees, or alternatively their capacity to protect legal goods of a constitutional nature.

In accordance with the alternative route proposed by Gomes (2003), it is preferable to conclude that the *suitability* of a criminal law is appraised by judging whether it is capable of protecting the constitutional good it is designed to protect, since criminal laws should be considered means (albeit the ultimate means) to protect the legal goods guaranteed by the Constitution and not ends in themselves.

This analysis consists of evaluating the likelihood that incrimination will actually play the proposed role of protecting these legal goods (Gomes 2003). The state is obliged to ensure that the criminal laws are fit for purpose, because these interfere with individual freedom. It is not the citizen's obligation, because the citizen is the holder of fundamental rights

(Dimoulis & Martins 2011) counterpoised by the goods protected by the criminal laws.

Thus, for example, a law on criminal homicide will be *suitable* only if it is effectively capable of protecting the right to life, which is by definition a fundamental right.

Similarly, a law that prohibits and punishes the sale of narcotic substances will be *suitable* only if it is capable of protecting collective safety by preventing drug abuse that impairs public health (or at least mitigating the harm intrinsic to narcotics). In both cases, if the conclusion is that the law is not fit for purpose, then it must be considered disproportionate and hence unconstitutional.

This is because criminal laws are legitimate only when the intervention they embody is shown to be useful (Mir Puig 2002). As for the question of when their utility should be appraised on the grounds of proportionality, the answer defended by Gomes (2003) is that their utility and fitness for purpose are largely gauged in terms of the way in which they are received by society and the degree to which individual behaviors conform to the values they make explicit. This does not mean, however, that the *suitability* of a criminal law cannot be appraised until it has come into force, since this can be done by prognostic judgment.

Thus, it is possible that at the time of its passage a law may embody, or appear to embody, a suitable connection between means and ends while at the same time proving unfit for purpose in terms of the program established by the Constitution and hence *unsuitable* (Pedra 2006).

2.3.2 Necessity

The second element of the *principle of proportionality* is *necessity*, according to which a legislative measure should not exceed the limits indispensable to achievement of its purpose. The assumption underlying this element is that a restrictive law must be necessary to protect a fundamental right and not substitutable by another that is equally effective and less onerous to individual rights (Pedra 2006).

Thus, the element *necessity* requires that the individual has the right to the smallest possible disadvantage. It requires proof that no other means to certain ends can be found that is less onerous for the citizen (Canotilho 1998). It requires evidence that the measure is the best viable way to fulfill the proposed aim at the lowest cost to the individual and that its cost-benefit ratio preserves individual rights as much as possible (Stumm 1995).

However, if the conclusion is that a law is unenforceable or unnecessary and fails to comply with the *principle of proportionality*, it is important to be able to point to another measure that is less deleterious and equally capable of achieving at least the same outcome (Pedra 2006).

Moreover, the analysis of *necessity* does not impose the manner in which an end is to be achieved, merely rejecting a means as harmful compared with another measure capable of producing analogous results (Branco 2009).

Obviously, such considerations regarding *necessity* will entail a comparison with means deemed *suitable*. The most *suitable* or fit for purpose will be the measure that best fulfills the criterion of *necessity*.

This is because the requirement of *suitability* is intrinsic to the element *necessity*. Only a law considered fit to achieve a constitutional end should be deemed enforceable, since only what is suitable can be necessary, but what is necessary cannot be unsuitable (Mendes 2004).

Nevertheless, it should be stressed that an appraisal of *necessity* as an element of proportionality is far more discerning if it restricts the number of *suitable* measures that are fit to be proportional. From this standpoint, Dimoulis & Martins (2011) regard the element *necessity* as decisive to the analysis of proportionality.

Consistently with the intent of assuring the criterion of proportionality, i.e. protecting the freedom guaranteed by fundamental rights as much as possible, the subcriterion of the necessity of the means chosen and utilized is decisive. This subcriterion enables deeper and more demanding control in the sense of deciding whether the means utilized is ultimately proportional to the end pursued (Dimoulis & Martins 2011).

According to the same authors, indeed, the examination of *suitability*, however useful as part of a dogmatic construction, can lead to the acceptance of strongly repressive means. In the case of a firm that pollutes the environment, for example, it would be *suitable* for the legislator to set as a penalty the definitive cancellation of its license to operate, given that this would ensure that the firm would never pollute again. Similarly, if an employee unjustifiably fails to turn up for work one day, the legal provision allowing the employer to dismiss this employee for just cause would be *suitable* to ensure that the employee could never again commit the same offense. And if the death penalty were permitted in Brazil, as it still is in some countries, its legal imposition for any offense or misdemeanor would have to be considered *suitable* as a means to prevent future transgressions (Dimoulis & Martins 2011).

This shows that the examination of suitability allows a wide array of interventive means to be accepted, incurring the risk of permitting measures that intuitively seem disproportionate (Dimoulis & Martins 2011).

Dimoulis & Martins (2011) also propose the satisfaction of two conditions for a measure to be deemed necessary: (a) the alternative must be less onerous for the holder of the fundamental right that is limited by the

measure in question, so that means that are both equally or more onerous and suitable can be set aside (less gravity requirement); (b) the alternative must have similar efficacy to that of the means chosen by the state authority, which passed the suitability test, leading to the state of affairs in which the end can be considered achieved. Put another way, the less burdensome alternative means should be as suitable as the more onerous means chosen by the state authority, and also as suitable as any other means that are less burdensome than that chosen by the state authority (equal suitability requirement).

Finally, in an elucidating synthesis they argue that, of all the means that enable lawful purposes to be achieved, only the one that least restricts fundamental rights will be necessary. All the others are unnecessary because they are disproportionate. If the lawmaker (or the state body that applies the law within the scope of its competence) has chosen a more costly means than necessary, its choice should be considered unconstitutional (Dimoulis & Martins 2011).

Analyzing the element *necessity* in the criminal sphere, it can be said to rest on the constitutional requirement that the interest to be protected, the good legally safeguarded by a criminal law, should be sufficiently important to justify a limitation of individual freedom in the collective interest.[10]

Punitive intervention is the social control technique most harmful to the citizen's freedom and dignity, so that the principle of necessity means it should be used only in the last resort (Ferrajoli 2006). It would be better if the benefits attributed to criminal laws could be obtained in a less socially

[10] Brazil's highest non-constitutional appellate court, the *Superior Tribunal de Justiça* (AgRg REsp 887240 2007), has ruled that respect for the legal goods protected by criminal laws is primarily in the interest of society as a whole, that the state's power to impose penalties is manifestly legitimate, and that their effectiveness meets a social need. In the same direction, Claus Roxin (2001) argues that criminal laws assure infra-state peace and a minimally fair distribution of goods, thereby guaranteeing the basis for individuals to develop their personality freely, one of the essential tasks of the social rule-of-law state.

onerous manner (Roxin 2001) and if criminal laws applied only to the fields of human activity in which other forms of protection prove insufficient. Thus, the huge number of crime types, governing topics that should more fittingly be classified in other branches of law, can only entail hypertrophy in the sphere of criminal law, making the criminal justice system slow and ineffectual, so that it loses the public's trust (I. L. Carvalho 1996).

Framers of infraconstitutional laws should therefore be aware of two distinct moments. The first consists of identifying the legal goods that can be elevated to the category of penal legal goods. This means asking which goods require protection by criminal laws. The second consists of analyzing the extent to which a particular good identified as worthy of protection actually can be protected by criminal laws. This means asking which modes of attack genuinely require a recourse to penal law (Gomes 2003).

In other words, only constitutionally valued goods, absolutely relevant to the realization of fundamental rights, are authorized to be protected by criminal laws.

This does not exhaust the content of *necessity* as an element of the *principle of proportionality* in the criminal law context. In addition to all the above, it must also be demonstrated that the fundamental good concerned cannot be protected by any other means than criminal law.

Thus, intervention of a penal nature is constitutionally justified only when an important legal good is protected and no alternative that entails less harm to the individual is available under the circumstances (Yacobucci 2002).

Only by combining these two facets of *necessity* is it possible to appraise the proportionality of a criminal law. Penal intervention therefore requires the existence of an offense or aggression against a good that is essential to the full development of society (Gomes 2003). This is what can be called minimal intervention.

Beccaria (2009) expressed the idea well with the metaphor that the legislator must be a skillful architect who knows how to employ all forces that may contribute to the solidity of the building and weaken all those that may ruin it.

Thus, any possible restriction or limitation of individual freedom should always be weighed against the guarantees enshrined in the Constitution. This requirement is all the more evident in the case of interference by criminal law (Gomes 2003).

In the penal sphere, therefore, more weight should be given to the element *necessity* than is ordinarily the case in other branches of law, since in apparent conflicts between the fundamental rights taken into account in appraising proportionality the postulate of liberty will always be on one of the opposite scales.

For example, the law on homicide will be *necessary* only (1) if it is demonstrated that the legally protected good, life, is one of the goods elevated to the category of fundamental rights, essential to the full development of society; and (2) if it is demonstrated that this fundamental good cannot be protected by any other means than criminal law.

Similarly, the law that bans and criminalizes the sale of narcotics will be *necessary* only (1) if it is demonstrated that public health and safety, which are legally protected goods, are among those constitutionally considered essential to the full development of society; and (2) if it is demonstrated that drug abuse prevention (or at least mitigation of the harmful effects of narcotics) cannot be prevented by any other means than incrimination.

Once again, it can be said that in both cases if the conclusion is that the law is unnecessary to achieve the desired ends then it is disproportionate and hence unconstitutional.

2.3.3 Proportionality in the narrow sense

To appraise *proportionality in the narrow sense* as an element of the *principle of proportionality*, the intensity with which a fundamental right is restricted by a law is weighed against the importance of realizing the fundamental right whose protection is the rationale for introducing the law in question (Silva 2002).

The evaluation of *proportionality in the narrow sense* should also consider how the restrictive law concerned is received by individuals in the sphere of freedom and the extent to which it limits their fundamental rights.

This is because *suitability* and *necessity* are not sufficient to verify the constitutionality of a restrictive law designed to achieve a given purpose in safeguarding the collective interest: the law may entail excessive harm to the fundamental rights of the individual concerned, in which case it is disproportionate (Pedra 2006).

Appraising *suitability* and *necessity* is often insufficient to determine the justice or injustice of a restrictive measure in a specific situation, precisely because it may be excessively onerous for the affected individual, in which case it is incompatible with the idea of fair measure. Thus, the principle of proportionality in the narrow sense, complementing the principles of suitability and necessity, is of paramount importance to indicate whether the means utilized are reasonably proportionate to the ends pursued. The idea of a balance between values and goods is highly esteemed (Barros 2003).

In a concrete case, therefore, it is necessary to determine whether the outcome of a law designed to safeguard the legitimate interests of society (interests of a constitutional nature) restricts the citizen's fundamental rights to an extent deemed more than reasonable.

In the sphere of criminal law, the appraisal of *proportionality in the narrow sense* as an element of the *principle of proportionality* entails an

investigation of the correlation between the offense and the associated punishment. The *principle of proportionality* requires a judgment that weighs the good that is harmed or endangered (gravity of the fact) against the good of which someone may be deprived (gravity of the sentence). Whenever these elements are strongly misbalanced, an unacceptable disproportion is established as a result. Thus, the *principle of proportionality* rejects the establishment of legal penalties (abstract proportionality) and the imposition of sentences (concrete proportionality) that lack a value-based correlation with the crime committed in its overall significance. It should therefore be used by both lawmakers, who should establish punishments abstractly proportionate to the gravity of the crime, and judges, whose sentences should be proportionate to the concrete gravity of the crimes committed (Franco 2007).

The axiom that the punishment should fit the crime is one of the earliest postulates of criminal law, admirably systematized by Beccaria (2009), according to whom it is in the common interest not only that crimes not be committed, but that the crimes most harmful to society should be the rarest. The more contrary the crime is to the public good and the more commonplace it may become, therefore, the more powerful should be the means used by the law to deter crime.

The criterion for measuring criminal responsibility and hence the penalty is not the offender's intention or the gravity of the act, but the harm to society resulting from the offense committed (Bruno 1978). In other words, the proportionality that should guide lawmakers when they draft criminal laws is not confined to classifying this or that behavior as a criminal offense, but also includes grading the possible penalties (Gomes 2003). They may even reach the conclusion that no penalty at all would be reasonable.

Given the preeminent value placed on personal liberty in the Constitution, and the principle that any restriction of liberty, especially

when accompanied by a penal sanction, is allowed only to counterbalance the harm done to a constitutionally significant value, constraints on this fundamental right must be proportional to the importance of the constitutional good attacked (Gomes 2003).

For example, a criminal law that protects the right to life should restrict the offender's liberty far more severely than a law against stealing property without violence or grave threat.

The same applies to the intensity of the punitive intervention: the more severely the penalty affects the individual in the legal sphere, the stronger the requirement to demonstrate the relevance of the public interest (Gomes 2003) and the harm done to it by the crime committed.

Lastly, it is important to note that this weighing or balancing of values between the good protected by a criminal law and the severity of the punishment abstractly stipulated in that same law is not sufficient. It is also necessary to appraise proportionality *stricto sensu* in a systemic interpretation of criminal law, so that crime types, the goods protected by the laws and the penalties they prescribe are mutually considered in order to avoid any disproportion not only between crime and punishment, but also between all of the crimes and punishments stipulated within the same system.

Yet more is required: it is necessary to verify whether the type of behavior abstractly deemed harmful to society is analogous to another type that is equally harmful but not considered criminal. If the law treated analogous situations asymmetrically in this manner, it would not be fair or just because it would not be strictly proportionate. Unequal treatment is limited by the proportionality requirement.

Ensuring that isonomy (equal rights under the law) is compatible with other constitutionally guaranteed interests entails recourse to proportionality. Only when this is understood is it possible to achieve a balance between the different values to be preserved (Barroso 1999).

This is indeed the understanding expressed by the Supreme Court of the United States in *Solem v. Helm* (1983). This judgment, which is now paradigmatic,[11] established objective criteria for appraising the proportionality of sanctions that included a thorough comparison of the severity of sentences for different crimes because they are part of the same system, or at least this is what can be inferred:

> The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century. In several cases, the Court has applied the principle to invalidate criminal sentences. [...] And the Court often has recognized that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. [...]
>
> A court's proportionality analysis under the Eighth Amendment should be guided by objective criteria.
>
> (a) Criteria that have been recognized in this Court's prior cases include (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.
>
> (b) Courts are competent to judge the gravity of an offense, at least on a relative scale. Comparisons can be made in light of the harm caused or threatened to the victim or to society, and the culpability of the offender. There are generally accepted criteria for comparing the severity of different crimes, despite the difficulties courts face in attempting to draw distinctions between similar crimes.
>
> (c) Courts are also able to compare different sentences. For sentences of imprisonment, the problem is one of line-drawing. Decisions of this kind, although troubling, are not

[11] According to the Helm test, established since *Solem v. Helm* (1983), legislators and judges should appraise the proportionality of a criminal law and consequently its constitutionality using three parameters: (1) a comparison of the gravity of the offense with the harshness of the penalty; (2) a comparison of the sentences imposed on other criminals in the same jurisdiction; and (3) a comparison of the sentences imposed for commission of the same crime in other jurisdictions.

> unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts. (Solem v. Helm 1983)

Although the above judgment was addressed to other judges, the objective criteria it establishes for appraising the proportionality of penalties in concrete cases also apply to legislators in dealing with penal sanctions in the abstract.

Thus, in addition to the ideal proportion between the gravity of the offense and the penalty stipulated in the abstract, it is necessary to consider penalties for crimes as part of a complex system, and hence subject to weighing and balancing in comparison to other crimes, violated goods and penalties classified as such within the legal order. Only thus will it be possible to appraise *proportionality in the narrow sense*.

2.3.4 Less social offensiveness as an element of the principle of proportionality

The analysis of the *principle of proportionality*, especially in the sphere of criminal law, is not exhausted by the appraisal of the three classical elements (*suitability*, *necessity* and *proportionality in the narrow sense*). To these must be added a fourth element: the degree of *social offensiveness*.

To judge whether a measure is *less socially offensive*, it is necessary to verify whether the consequences of prohibiting a type of behavior by means of a criminal law (even if that law is deemed to meet the criteria of *necessity*, *suitability* and *proportionality in the narrow sense*) are themselves more harmful than the consequences of the behavior to be prohibited.

In this sense, while not referring to *less social offensiveness* as an element of the *principle of proportionality* or even using such terminology, Italy's Constitutional Court, the *Corte costituzionale della Repubblica Italiana*, ruled unconstitutional a criminal law that resulted in disproportionately greater harm to society than a violation of the right protected by that same law (Sentenza 341 1994).

Although *Sentenza 341*, delivered in 1994 to consolidate previous decisions (Sentenza 409 1989, Sentenza 343 1993, Sentenza 422 1993), acknowledges that the legislative branch is responsible for proscribing types of behavior and for judiciously determining the quantity and quality of the respective penalties, and that as a rule the judiciary should not involve itself in these "moral choices", it nevertheless argues based on its own jurisprudence that the Constitutional Court should review the legislators' use of their discretionary judgment with regard to "reasonable limits".

> In ordine a questo complessivo orientamento si può osservare in primo luogo come il principio secondo cui appartiene alla discrezionalità del legislatore la determinazione della quantità e qualità della sanzione penale costituisce un dato costante della giurisprudenza costituzionale che deve essere riconfermato: non spetta infatti alla Corte rimodulare le scelte punitive effettuate dal legislatore, né stabilire quantificazioni sanzionatorie. Tuttavia, come è stato sottolineato soprattutto nella giurisprudenza più recente, alla Corte rimane il compito di verificare che l'uso della discrezionalità legislativa in materia rispetti il limite della ragionevolezza. (Sentenza 341 1994)

Referring to the principles of equality and proportionality, it notes that the requirement that the punishment be proportionate to the negative value of the crime committed is in both the individual's and society's interest.

> In particolare, con la sentenza n. 409 del 1989 la Corte ha definitivamente chiarito che 'il principio di uguaglianza, di cui all'art. 3, primo comma, della Costituzione, esige che la pena sia proporzionata al disvalore del fatto illecito commesso, in

> modo che il sistema sanzionatorio adempia nel contempo alla funzione di difesa sociale ed a quella di tutela delle posizioni individuali; .. le valutazioni all'uopo necessarie rientrano nell'ambito del potere discrezionale del legislatore, il cui esercizio può essere censurato, sotto il profilo della legittimità costituzionale, soltanto nei casi in cui non sia stato rispettato il limite della ragionevolezza' (v. pure nello stesso senso sentenze nn. 343 e 422 del 1993). (Sentenza 341 1994)

The continuation of this logical reasoning reveals the exact content of *less social offensiveness* proposed here as an element of the *principle of proportionality*. The Court declared that the *principle of proportionality* in criminal law is equivalent to denying the legitimacy of incriminations that may well be suitable in terms of achieving the proposed ends, yet in themselves produce injury to the individual[12] or society[13] that is disproportionately greater than the advantages obtained or anticipated.

> Infatti, più in generale, 'il principio di proporzionalità .. nel campo del diritto penale equivale a negare legittimità alle incriminazioni che, anche se presumibilmente idonee a raggiungere finalità statuali di prevenzione, producono, attraverso la pena, danni all'individuo (ai suoi diritti fondamentali) ed alla società sproporzionatamente maggiori dei vantaggi ottenuti (o da ottenere) da quest'ultima con la tutela dei beni e valori offesi dalle predette incriminazioni'. (Sentenza 341 1994)

Indeed, the analysis of the harm done directly to society by a criminal law as a result of the prohibition itself, or even of the penalty, is not part of the content of the classical elements of the *principle of proportionality* (*suitability*, *necessity* and *proportionality in the narrow sense*).

As noted above, a criminal law will be *suitable* if it is fit to protect the good it aims to protect, thus achieving the proposed purpose; *necessary* if there is no other means that is both less onerous to individual liberty and

[12] Pertaining to appraisal of the element *proportionality in the narrow sense*.
[13] Pertaining to appraisal of the degree of *social offensiveness*.

capable of protecting the good in question; *proportionate in the narrow sense* if the penalty imposed is proportionate to the severity of the crime committed and symmetrical with the other incriminations provided for by the penal system. The goods weighed up via these three criteria correspond to the good protected by the criminal law (social interest) and liberty (individual).

Goods that are set against each other yet above all interest society cannot be weighed up using the classical criteria of the *principle of proportionality*.

Even if a criminal law is *suitable*, *necessary* and *strictly proportionate*, it may intrinsically produce social harm that rivals the benefits deriving from it. Analyzing *suitability*, *necessity* and *proportionality in the narrow sense* leaves out any appraisal of this cost-benefit ratio.

Some offenses harm legal goods that are protected by criminal law and yet affect society in ways that differ from those the laws against them were designed to prevent, by the effect of the law itself. In such situations there is a permanent need to weigh all the social consequences of the laws concerned and to appraise the extent to which those consequences make leaving the crime types in question on the statute book disadvantageous (Gomes 2003).

Hence the importance of considering, especially in criminal cases, a fourth element of the *principle of proportionality* that weighs the social benefits produced by a criminal law against the harm it may cause to society. The criterion of *less social offensiveness* serves precisely this purpose.

Thus, complementing the appraisal of proportionality using the classical elements (*suitability*, *necessity* and *proportionality*), a criminal law will be *less socially offensive* if its social consequences are less severe than the harm it is designed to avoid.

Analysis of the degree of *social offensiveness* should not be confused with the appraisal of *suitability*, since the latter does not entail weighing the potential side-effects of state interference for society, but consists merely of examining whether the interference is likely to have the expected results.

Nor does its content relate to the subprinciple of *necessity*, which seeks out among the available means that which places the smallest burden on individual rights and does not examine the consequences of the measure for society.

Weighing the harm done by the state's retribution imposed on the citizen against the harm done to society by commission of the crime, which is typical of the appraisal of *proportionality in the narrow sense*, also fails to encompass the undesirable social consequences of the law.

The issue of the banning of abortion can be used as an example to show why *suitability*, *necessity* and *proportionality in the narrow sense* do not exhaust the *principle of proportionality*.

The criminalization of abortion can be said to be *suitable* as a means of reducing the number of voluntary interruptions of pregnancy with destruction of the fetus; *necessary* to the protection of the right to life for the unborn in light of the inefficacy of this protection through any other branch of law apart from criminal law; and *proportionate in the narrow sense* because the penalty imposed is compatible with the gravity of the crime,[14] when considered in the context of the penal system as a whole.

However, the banning of abortion is itself a serious public health problem because of the many clandestine or "backyard" abortions to which it gives rise.

[14] The purpose of this book is not served by a detailed analysis of each of these elements as they apply to the criminalization of abortion. The summary should be taken as a starting-point for the argument that follows.

As if this were not enough, Steven D. Levitt and Stephen J. Dubner (2011) find a correlation between the legalization of abortion wherever it has been adopted and a decrease in crime rates. Citing research conducted in Eastern Europe and Scandinavia between 1930 and the 1960s, they state:

> Researchers found that in the instances where the woman was denied an abortion, she often resented her baby and failed to provide it with a good home. Even when controlling for the income, age, education, and health of the mother, the researchers found that these children too were more likely to become criminals. (Levitt & Dubner 2011, 1809)

They also set out to explain the sharp drop in crime that occurred in the United States in the 1990s as a consequence of the decriminalization of abortion by the Supreme Court in *Roe v. Wade* (1973):

> One study has shown that the typical child who went unborn in the earliest years of legalized abortion would have been 50 percent more likely than average to live in poverty; he would have also been 60 percent more likely to grow up with just one parent. These two factors—childhood poverty and a single-parent household—are among the strongest predictors that a child will have a criminal future. Growing up in a single-parent home roughly doubles a child's propensity to commit crime. So does having a teenage mother. Another study has shown that low maternal education is the single most powerful factor leading to criminality. [...]
>
> Perhaps the most dramatic effect of legalized abortion, however, and one that would take years to reveal itself, was its impact on crime. In the early 1990s, just as the first cohort of children born after Roe v. Wade was hitting its late teen years—the years during which young men enter their criminal prime—the rate of crime began to fall. What this cohort was missing, of course, were the children who stood the greatest chance of becoming criminals. And the crime rate continued to fall as an entire generation came of age minus the children whose mothers had not wanted to bring a child into the world. Legalized abortion led to less unwantedness; unwantedness leads to high crime; legalized abortion, therefore, led to less crime. (Levitt & Dubner 2011, 1837/1846)

In light of the above, the abortion ban could have had a different outcome in the sphere of criminal law. It could have been found unconstitutional if the social interests protected by criminalization had been weighed against the social interests violated by that same criminalization.

Appraisal of *less social offensiveness* would have covered ground that lies outside the scope of the other elements of the *principle of proportionality* (*suitability*, *necessity* and *proportionality in the narrow sense*).

Another relevant point is the criminogenic effect on society of some criminal laws. Where abortion is illegal, for example, a pregnant woman who decides to have an abortion is likely to seek help, almost certainly from someone with the expertise to perform the abortion. The difficulty of aborting a fetus without help practically forces the woman, who is about to commit a crime, to procure the assistance of another person who has the requisite know-how, or can at least provide some kind of support. Third parties who provide services to perform a desired abortion are also breaking the law and are therefore considered criminals (Gomes 2003).

The prohibition of gambling in Brazil, including the popular unofficial lottery known as *Jogo do Bicho*,[15] which is considered a misdemeanor rather than a felony, is another example of a criminogenic law that has severely negative effects for society. Serious crimes are committed

[15] *Jogo do Bicho* is an illegal numbers game invented in 1892 by Baron João Batista Viana Drummond, founder and proprietor of the Rio de Janeiro Zoo in Vila Isabel. Drummond created the lottery using pictures of animals to attract visitors to the zoo, but its 25 animals soon "escaped" to become part of daily life in the city. Rio had been the nation's capital since 1889 and now became the capital of *Jogo do Bicho*. The rise of the animal lottery coincided with a period of unbridled financial speculation and gambling on the stock exchange in the early years of the Republic. Retailers in crisis had started raffling consumer goods to pull in business. Drummond followed suit, each day drawing by lot a picture of one of his 25 animals and awarding cash prizes to punters who bought tickets showing the right animal. Outside the baron's control, the first bookmakers (*banqueiros*) associated the animals with numbers and took bets on the numbers as a gambling activity in its own right. This initiative attracted multitudes of punters, transforming *Jogo do Bicho* into today's still illegal but hugely popular "institution" (Benatte 2008).

to sustain this illegal activity and justify the revenue obtained thereby, including money laundering, fraud, extortion, soliciting and paying bribes, and illegal remittance, among many others.

Nevertheless, the criminal law that bans *Jogo do Bicho* would easily pass the test of *suitability*, *necessity* and *proportionality in the narrow sense*. It would be deemed constitutional on the basis of these elements. The same cannot be said of the outcome of an analysis of the element *less social offensiveness*.

A demonstration could run as follows: (1) prohibition by a criminal law mitigates the effects of *Jogo do Bicho* – the law is *suitable*; (2) mere administrative measures would not be as efficient – the law is *necessary*; (3) the penalties imposed on offenders are reasonable in the context of the penal system of which they are part – the law is *proportionate in the narrow sense*.

An appraisal based on the classical *principle of proportionality*, therefore, could conclude that the criminal law that bans *Jogo do Bicho* is reasonable. However, the inclusion of a fourth element, that of *less social offensiveness*, would entail weighing the social costs of the law against its social benefits, and the conclusion would certainly be that the law is disproportionate and hence unconstitutional.

Thus, when appraising the proportionality of a criminal law, it is imperative to analyze the law's costs and benefits by weighing its actual or desired benefits to society against the harm it may potentially cause.

3 THE WAR ON DRUGS

In order to appraise the constitutionality of criminal laws that ban narcotic substances and their compliance with the *principle of proportionality*, as this book sets out to do, it is necessary first and foremost to understand the relationship between drugs and humanity, their place in the process of civilization and what they represent for society today.

It is also important to grasp exactly what is meant by the *war on drugs*, its legal basis, and its relationship with the proportionality rule. This means analyzing its normative foundations, its impact on the culture and history of the countries affected, and its treatment by the international community.

This is because it is impossible to dissociate the fight against drugs from its foundation in law, which is the criminalization of narcotic substances considered illicit. Thus analyzing a criminal law that bans such substances in terms of its proportionality is the same as analyzing the *war on drugs* in terms of its proportionality.

To this end it is also necessary to analyze the outcome of this repressive policy: whether its goals have been achieved, its effects on individuals, and its social consequences.

3.1 BRIEF CONSIDERATIONS ON DRUGS

A drug is defined as any natural or synthetic substance which, when introduced into a living organism, may modify one or more of its functions (UN 2007).

As a species, humanity exhibits a unique propensity to seek out mind-altering substances and often to persist in their use, despite the inherent risks (Iversen 2016). Humans everywhere have always used drugs. Every tribe or nation has tried its own. Drugs have been a common phenomenon ever since humans first appeared on Earth, from wine in southern Europe, vodka and whisky in northern Europe, to hemp and opium in Asia, and coca and hallucinogens in South America. The pursuit of inebriation, whether natural or chemical, or as a concrete artificial state, is a universal fact. Drugs were and still are used in medicine, magic and religious ritual, as an escape from reality or part of an endeavor to solve problems, as a reflection of an inability to relate to others, or simply for pleasure (Escudero Moratalla & Frígola Vallina 1996).

Drugs have been present in all civilizations (or at least all those that have left historical records). In most of them there was more than one kind of drug. Alcohol has been consumed by all of them.

3.1.1 Alcoholic beverages

Alcoholic beverages, the oldest of recreational drugs (Iversen 2016), have accompanied the entire history of civilization. The oldest record of the consumption of alcohol dates from 5,000-5,400 BCE. Discovered in 1968, it is a pottery jar from Iran containing residues of wine (McGovern, et al. 1996).

Alcohol has been used for recreational or dietary reasons, as a safe way to drink water, as an ingredient in medicines or remedies, as a tranquillizer or aphrodisiac, in religious rites, and even as a source of artistic inspiration.

Consumption of alcoholic beverages is so deeply rooted in the culture of all peoples that the latest scientific research on the subject measures not numbers of users, but numbers of teetotallers. Worldwide, only 48% of the adult population[16] has never consumed alcohol. Teetotallers are scarcest in the Americas and Europe, accounting for 18.9% and 20.6% of the adult population respectively (WHO 2014).

The fact that alcoholic beverages are bound up with the cultures of all peoples is the main reason why the drug has resisted attempts to outlaw it and even to regulate it more strictly. The campaigns waged against the consumption of alcohol and other drugs in the late nineteenth and early twentieth century were very similar. The same moral arguments wielded against narcotics were used to condemn alcohol. Over time, however, alcoholic beverages have not faced the same legal obstacles as other drugs.

David T. Courtwright (2002) attributes this resistance and what he calls alcohol's privileged status to the interests of the western nations that long ruled supreme in the world's economic and diplomatic arenas. He takes as an example early twentieth-century France, where the alcohol industry (producers, retailers, transporters, cork manufacturers etc.) assured the livelihoods of some 5 million people or 13% of the population. He also cites Russia, where government revenue from taxes levied on the alcoholic beverage industry was equivalent to the entire military budget. The same was true of all western nations and many colonial governments in Africa and Asia. Opium, on the other hand, gradually declined in importance, especially in the British Empire. The trade in opium from India and China

[16] "Adult" is defined here as 15 years old or more.

faded in the late nineteenth and early twentieth century, mitigating British resistance to its regulation and later prohibition.

The production of wine, beer and spirits is one of the world's largest industries, with annual sales of more than US$1 trillion in 2015 (Iversen 2016). However, far more than the economic dimension is at stake: alcohol, like tobacco, has always been part of the lives of the most prominent figures, who hold the real power to decide which substances are considered harmful to society and which are absolutely acceptable. The same goes for "opinion formers" – artists, teachers, journalists etc.[17]

In other words, social acceptance of alcohol relates more to culture, economics, taxation and power than to its official legal status.

Today the consumption of alcoholic beverages represents a serious social risk, contributing significantly to rising rates of ill health, death and disease worldwide. In 2012 alone, some 3.3 million people died as a result of alcohol consumption, corresponding to 5.9% of all global deaths. Among men, 7.6% of deaths were attributed to the use of alcohol that same year. The drug is estimated to have caused the loss of 139 million years of human life to premature death, poor health and disability (WHO 2014).

[17] "The more liberal treatment of alcohol and tobacco also reflects the personal habits of influential leaders and celebrities. Historically, these have often worked to undermine drug strictures. It was Peter the Great, tutored abroad in the ways of smoking, who rescinded the Russian ban on tobacco. The snuff-taking Pope Benedict XIII performed similar offices for the Church. (The Vatican opened its own tobacco factory in 1790.) Leaders' vices had a way of becoming the official vices, the devil's corollary of *cujus regio, ejus religio*. If not legally sanctioned, they were at least more likely to be tolerated. The Chinese campaign against opium, for example, made less progress in areas where key officials themselves indulged. The personal use of alcohol and tobacco, as well as caffeine, was extremely widespread among western politicians in the first half of the twentieth century. Picture Churchill, Roosevelt, and Stalin seated together at Yalta: hardly a crew to do battle against alcohol and tobacco. Harry Anslinger, who smoked and drank Jack Daniels ('cheers you up on a bad day'), ended up with a cane and an oxygen tank. The professional classes were hardly more abstemious, particularly with respect to tobacco. So long as ministers, teachers, businessmen, captains of industry, and socialites promoted smoking by their example, Harvey Wiley complained, 'the habit will not be regarded as a moral obliquity'" (Courtwright 2002, 3366).

Despite their inherent risks, alcoholic beverages are an increasingly solid part of the culture of most nations, associated as they are with social activities of all kinds, from recreation and socialization to religious rites.

3.1.2 Cannabis

Another age-old drug is hemp, which originated on the steppes of Turkistan in a region that now corresponds to the Central Asian republics and northwestern China and where it still grows wild, especially between Kazakhstan and Kyrgystan, in an area of some 150,000 hectares. It was present in Egyptian and Assyrian culture (Labrousse 2011). For 6,000 years it has been used by humans for various purposes and is therefore considered a valuable and versatile crop. It produces a potent drug as well as cooking oil, edible seeds, forage, and fiber for rope, canvas and fishing nets. For a long time it was used in textiles for the Chinese masses, while silk was reserved for clothing for the rich (Courtwright 2002).

In Asia cannabis was integrated into the rituals of Hinduism and later of Buddhism, accompanying the latter throughout its diffusion phase. In the first and second centuries CE, the Romans used hemp in large-scale production of rigging for their ships (Labrousse 2011).

From the seventh century, the spread of Islam played a key role in propagating cannabis, which by then had already been integrated into Muslim culture. Indeed, Muslim traders introduced it throughout the Middle East. From the eleventh century they took it to Sub-Saharan Africa and Morocco (Labrousse 2011).

Nevertheless, Muslims had a contradictory relationship with cannabis, either using it in rituals distant from their dogmas, which almost led to prohibition, or tolerating and making widespread use of the drug. This

contradiction was partly due to its association with Sufism,[18] which used it for mystical purposes considered dubious by the orthodox authorities. Despite sporadic attempts to wipe out plantations of cannabis, by the mid-sixteenth century cultivation of the plant and production of cannabinoids was well established, especially in the Nile delta. Not long afterward, Arab merchants succeeded in selling cannabis along the east coast of Africa, from where it spread to the central and southern parts of the continent. The use of this psychoactive substance, in contrast with tobacco, flourished among the Khoikhoi, San and other peoples of southern Africa well before contact with Europeans (Courtwright 2002).

In Western Europe it was condemned in the fifteenth century by the Catholic Church and then became marginalized, unlike other substances accepted by society and religion, such as wine and beer (Labrousse 2011), although this did not prevent its expansion on the continent or its use for other purposes.

In short, cannabis had spread throughout practically all the Old World as Columbus and his three ships with their hemp rigging and hemp canvas sails left Palos de La Frontera early on August 3, 1492 (Courtwright 2002).

In the same perspective, Napoleon Bonaparte's expedition to Egypt in the eighteenth century helped popularize cannabis among physicians and writers (Labrousse 2011). It was grown in Spain's colonies between the sixteenth and nineteenth centuries (Courtwright 2002). Scholars and the curious imported it into Britain from India in the eighteenth century. The British introduced the crop to Jamaica with the aim of producing hemp fiber. From the mid-nineteenth century on, African slaves on the island used cannabis for ritualistic and recreational purposes (Labrousse 2011).

[18] Sufism is a mystical and contemplative current in Islam. Its followers seek an intimate, direct and intense relationship with God through chanting, music and dance, considered illegal in Sharia by several Muslim countries.

Cannabis came to Brazil with the slaves brought from Angola, who began growing the crop on sugar plantations after 1549 between rows of cane with the permissions of their masters, the plantation owners. The Angolans called it *maconha*. In this context, some Indians and mestizos started to use it for a wide array of medicinal and recreational purposes, and as a stimulant and to make hemp ropes and clothing. The Northeast absorbed the *maconha* culture more than any other Brazilian region (Courtwright 2002).

From Jamaica, cannabis went to Mexico, where the peasants called it *marijuana*. It crossed the border into the United States in the early twentieth century, brought by immigrants from Mexico and seamen from the Caribbean (Labrousse 2011).

More precisely, the habit of smoking marijuana took root in the United States with the arrival of over a million Mexican workers, who entered the Southwest in the first decades of the twentieth century. Tens of thousands spread out through the Midwest as far as Chicago, working on building sites and railroads, in factories and mills. At the same time, marijuana was spreading north and east of New Orleans, where Caribbean and South American seamen had introduced it around 1910. The cigarette culture, which habituated Americans to absorbing drugs through their lungs, facilitated the spread of marijuana smoking, and by then there was an abundant domestic supply. In Tennessee, convict laborers dried and smoked the flowering tops of the "weed" (wild cannabis) they found growing beside the road. Even the inmates of San Quentin grew their own "pot" inside the prison (Courtwright 2002).

Cannabis later became illegal and was taken up by the hippy movement, an offshoot of the Beat movement (Iversen 2016), which was fashionable among intellectuals in the 1950s. Media exposure of hippy culture aroused interest among the young, above all owing to disenchantment with the Vietnam war, suburban materialism, and

segregation. Marijuana became a symbol of rebellion, popular among high-school students and undergraduates. Acceptance was so widespread that an estimated 55 million Americans had tried some form of cannabis by 1979, including two-thirds of those aged 18-25. It attracted most notice in the United States but quickly became a worldwide phenomenon (Courtwright 2002).

Cannabinoids can be obtained today in three types of psychoactive substances: marijuana, hashish, and hashish (or hash) oil. Marijuana refers to the dried leaves, flowers, stems and seeds of the hemp plant, *Cannabis sativa*, and has a THC[19] content of 0.5%-5%. Hashish is a paste made from the resin found in the flowering tops and upper leaves of the cannabis plant, with THC at 10%-20%. Hash oil is extracted from cannabis using organic solvents and can contain levels of THC as high as 85%.

Marijuana is currently the world's most consumed illegal drug, with some 182 million users (UNODC 2015). However, the risks of cannabis consumption are far lower than those offered by cocaine and opiates, as cannabis is a mild psychoactive substance and does not cause physical dependence (Honório, Arroio & Ferreira da Silva 2006),[20] as opiates do. Even in terms of psychological dependence, its potential is low compared with cocaine and opiates; the harm done by consuming cannabis is equivalent to that caused by tobacco, which is perceptible in the long run.

[19] Acronym for tetrahydrocannabinol, the primary psychoactive ingredient.

[20] In the opposite direction in terms of distinguishing between mental and physical dependence, Salo de Carvalho (2007) argues that the traditional division between these two forms of dependence is erroneous and is a legacy of Cartesian dualism, i.e. the split between reason/consciousness (*res cogitans*) and nature/body (*res extensa*). Today it is impossible to conceive of merely physical or mental dependence, as if one were less serious than the other and hence more controllable by the subject, or as if body and mind did not comprise an integrated whole in which one "depends" on the other.

3.1.3 Tobacco

Smoking tobacco is the second most popular form of recreational drug use (Iversen 2016) after alcohol. According to some authors, it was present in the ancient East, but its most widely recognized origin is circumscribed to America. The Maya were the first to use tobacco leaves for smoking and already did so 4,000 years ago (Corrêa de Carvalho 2007).

When the Spanish conquistadors reached the New World, in 1492, they met Indians in Tabago, now Haiti (Corrêa de Carvalho 2007), who appeared to enjoy inhaling the smoke from leaves rolled up into cylinders and burning at one end (Alfonso Sanjuan & Ibañez Lopez 1992).[21] Christopher Colombus brought the plant and the habit to Europe, and it spread rapidly (Iversen 2016) to the rest of the world.

Imagining that tobacco might have therapeutic properties, the conquerors of Spanish America took seeds of the plant to Europe in the early sixteenth century. The Spanish cultivated it in Prussia and the Philippines, from where it spread to China (Corrêa de Carvalho 2007).

Between the late sixteenth century and the early seventeenth century, the Portuguese began growing tobacco in West Africa, alongside corn, beans, sweet potatoes and other New World crops. Between 1590 and 1610, Portugal introduced tobacco to India, Java, Japan, and the region that is now Iran. From India it spread to Ceylon, from Iran to Central Asia, from Japan to Korea, from China to Tibet and Siberia, and from Java to Malaysia and New Guinea. By 1620 tobacco was a global crop (Courtwright 2002).

Despite restrictive measures in some countries, its use spread rapidly, especially in Europe. Governments later replaced prohibition with control and taxation (Cortes Blanco 2002). When the cigarette machine was

[21] "Europeans learned of tobacco in 1492, when two members of Columbus's party observed Tainos Indians smoking leaves rolled into large cigars. Subsequent contacts revealed that Indians also chewed and sniffed the drug, methods of administration that one day would be emulated by millions of Europeans" (Courtwright 2002, 288).

invented in 1855, tobacco consumption rose sharply and industrialization bolstered the commercial power of tobacco companies, especially in the United States, Europe, Turkey and China (Corrêa de Carvalho 2007). Ironically, early cigarette manufacturers advertised the health benefits of smoking (Iversen 2016).

More than alcohol, tobacco won immunity by virtue of the cultures and economic and tax interests of the diplomatically most influential nations, so that its proscription has never been put on the international community's agenda in a serious and effective manner.

The tobacco industry's economic impact and the global scale of its operations gave this drug a measure of immunity. Mass production of cigarettes led to strong growth in consumption, while deepening dependence and boosting profitability. All this occurred before the harmful effects of their use were suggested or proven. In the US alone the tobacco business involved more than 70 million smokers and 2 million shareholders, farmers, factory workers, retailers, publishers, broadcasters, and others who depended directly or indirectly on tobacco (Courtwright 2002).

As cultivation and consumption spread to the developing countries, the economic importance of tobacco steadily increased. By 1983, world production and distribution provided more than 18 million full-time jobs. If workers' family members are included in the calculation, plus part-time and seasonal laborers, some 100 million depended on tobacco for their livelihoods (Courtwright 2002).

According to estimates, by the mid-1990s there were about 1.1 billion smokers worldwide (a third of the population aged more than 15), and annual cigarette consumption totaled 5.5 trillion (Courtwright 2002).

According to the World Health Organization (WHO), around 6 million people die each year from tobacco-related diseases, including 600,000 passive smokers (non-smokers exposed to second-hand cigarette

smoke). Furthermore, smoking causes hundreds of billions of dollars in economic damage annually (WHO 2011).

Regulatory alternatives are viable, including heavy taxes on cigarette production and sales (WHO 2015). Research suggests that in China alone a rise in cigarette tax to 75% of the retail price would prevent some 3.5 million deaths due to smoking between 2015 and 2050 (Levy & Rodríguez-Buño 2014). In France, sharp successive price rises have caused a decline in tobacco consumption and hence in deaths from lung cancer (Hill 2013, Beck, et al. 2011).

3.1.4 Opium and its derivatives

Opiates (alkaloids derived from the opium poppy) and opioids (synthetic and partly synthetic drugs, such as meperidine and methadone) are the class of drugs least understood by the general public. Opium is the dried sap of the unripe seed capsule of the opium poppy, *Papaver somniferum*, which the Sumerians of Mesopotamia called the "flower of joy". Humans have used it for 6,000 years, for medicinal and recreational purposes.[22]

[22] "The natural opiates include opium itself and tinctures of opium (such as paregoric or laudenum), morphine, and codeine. Other opiates include heroin, a semisynthetic opiate made by adding two acetyl groups to morphine, and fully synthetic opiates, which make up a very long list indeed. They include hydrocodone, propoxyphene, methadone, and the fentanyls. Opiates have several properties that make them invaluable in medicine. Substitutes exist for these but, realistically, nothing works better or is less damaging than the opiates. Opiates have three characteristics that make them important to the medical field. First, they are analgesics. They are wonderful pain killers, and tend to operate on dull pain better than on sharp pains. They work to reduce the sensory input of pain in the brain, and also operate on the emotional response to pain, making it easier to tolerate. A second property is that they are antitussive, meaning they reduce coughing. Third, they operate directly on the intestinal wall to reduce peristaltic activity (rhythmic muscle contractions), making them great treatments for diarrhea. Unfortunately, the opiates are also addictive drugs. They induce a physiological response to their use, which eventually produces a physical dependence and, because they also dull the mind to difficult situations in life, a psychological craving. The craving for their use is the real problem. Addicts have a very difficult time not returning to opiates even after they have succeeded in overcoming a physical dependence because they experience intense psychological cravings for the drug effects. The same mechanism in the brain (activation of the mu receptor) that dulls pain produces these cravings" (Rowe 2006, 247).

No banned substance has as many medicinal uses as opioids. Natural opiates include paregoric elixir (used as a painkiller and to treat diarrhea), morphine[23] (a potent pain reliever and the substance from which heroin is derived), and codeine (for pain relief and cough suppression). However, their administration entails a risk for the patient since opium causes physical and psychological dependence.

Opium originated somewhere between the western Mediterranean and Asia Minor. It was appreciated by all the great civilizations of antiquity, from Egypt, Greece and Rome to China and elsewhere. In the Middle Ages the Arabs made the drug known in the most distant regions, thanks to their extensive trading networks. Cultivation of the opium poppy in India began in the ninth century, following invasion by Muslim Arabs and Persians. At the height of the Mughal Empire in India (1526-1707), poppy growing and opium production became a state monopoly. In the eighteenth century, it came under the control of the London-based East India Company, which encouraged the Chinese to consume opium with the aim of increasing its profit and financing its purchases of tea and silk (Labrousse 2011).

In the nineteenth century most of the world's opium was produced in India (including modern Pakistan), Persia (Iran) and Afghanistan. A large proportion was shipped to China. In this context, by 1839 the Chinese Empire had concluded that opium addiction was a major problem and

[23] Specifically with regard to morphine, David T. Courtwright (2002, 672) says it "is the principal psychoactive alkaloid of opium. The German pharmacist Friedrich Sertürner worked on its isolation in 1803-1805, publishing his results in a short note in 1805. The significance of his findings was not generally understood until he published a longer piece in Annalen der Physik in 1817. Commercial production began when Heinrich Emanuel Merck, founder of the pharmaceutical dynasty, undertook it in 1827. By then Sertürner had moved on to other projects, among them the improvement of military firearms. A multi-talented but erratic man who may have become addicted to his own discovery, Sertürner faded into obscurity after his death in 1841, only to have his reputation revived during World War I. His contributions to alkaloidal chemistry were widely recognized, as was morphine's indispensability in treating the maimed and wounded".

Emperor Tao Kuang ordered a strict ban on imports of the drug (Rowe 2006).

To maintain the opium trade, Great Britain declared war on China (Labrousse 2011). The war ended in 1842 with the defeat of China, which was forced to cede Hong Kong to British control (Rowe 2006, Labrousse 2011).

Peace was not lasting. The Second Opium War was fought between 1856 and 1860 over western demands for expansion of opium markets (Rowe 2006). This time France also took part (Labrousse 2011). The Chinese were again defeated and opium imports to China were legalized.

At the start of the twentieth century, imbued by the ideology of ridding China of foreign influence, the Chinese government once more sought to ban opium imports. Troops were again sent to China and the Chinese were again unable to compete with modern armed forces. The opium trade was saved for the third time. This meant the end of the Ching dynasty for all practical purposes. However, public opinion in both Europe and the United States turned against the policy of forcing China to accept an opium trade it clearly did not want. By 1908, Britain and China reached an agreement that allowed China to restrict opium imports (Rowe 2006).

It has been estimated that more than a quarter of the Chinese population were addicted to opium at the end of the nineteenth century (Rowe 2006), configuring the greatest collective intoxication in history. The scourge was eradicated only after the Communists came to power in 1949 (Labrousse 2011).

In the United States, use of opium and its derivatives also increased steadily during the nineteenth century, partly owing to growing numbers of Chinese immigrants, who took their opium smoking habit with them. Some of the increase in opium use happened because Americans adopted the habit as well. However, much addiction was iatrogenic – inadvertently induced

by medical treatment (Rowe 2006). Constant use of opiates led to dependence.

Health professionals did not consider this a problem, as opiates were not seen as dangerous and their negative effects were not known. Physicians themselves were the largest group of white males who used opiates, and no social stigma was attached to the addiction until opium and its derivatives were banned (Rowe 2006).

According to the United Nations, 32.4 million people currently use opioids worldwide, while the number of opiate users is estimated at 16.5 million (UNODC 2015).

3.1.5 Coca

The leaves of the coca plant (*Erythroxylum coca*), a symbol of divinity for the Inca (Iversen 2016), are still widely chewed in South America.

Coca growing remains practically the monopoly of three Andean countries: Bolivia, Peru and Colombia. For some 5,000 years, coca has been closely linked to the identity of the indigenous people of the Andean uplands, who use it for medicinal, cultural and ritual purposes (Labrousse 2011), and as a stimulant and hunger suppressant.

The Spanish colonizers initially considered the Inca's sacred plant to be "an invention of the devil", yet encouraged its production when they saw its effect as a stimulant on the peasants and miners in the territories that were to become Peru and Bolivia. In Colombia, where in contrast indigenous people account for less than 3% of the total population, coca was grown only for self-consumption until the 1970s (Labrousse 2011).

The primary alkaloid in coca leaves was isolated by German chemist Albert Niemann in 1860. He named the substance cocaine and described the process of isolation in his doctoral thesis for the University of Göttingen in Germany, entitled *Über eine neue organische Base in den Cocablättern*.

Two years later, the Darmstadt branch of Merck in Germany, which had pioneered morphine production, began producing small amounts of cocaine, mostly for sale to researchers (Courtwright 2002). It also marketed lozenges containing cocaine, claiming that they gave a "silvery quality" to the singing voice (Iversen 2016).

Its use spread gradually from then on. In 1963, Corsican pharmacist Angelo Mariani patented a preparation of coca extract and red wine, which he marketed as a tonic, digestive and cure-all. *Vin Mariani* became an international sensation whose fame was based not only on the belief that it was good for the consumer's health and youth but also on celebrity endorsement. Even Pope Leo XIII appreciated the beverage and was one of the celebrities who appeared in advertisements for it.[24]

Coca-Cola, which appeared in 1885, was inspired by the success of *Vin Mariani* and originally contained alcohol, coca extract and caffeine. The latter is the only one of the originally ingredients left in the drink.[25]

[24] "[...] a Corsican pharmacist, Angelo Mariani, patented a preparation of coca extract and Bordeaux wine. Promoted by a campaign keyed to youth, health, and celebrity endorsement, Vin Mariani enjoyed international success as a tonic beverage. By 1884 the company had diversified into other coca products, including liqueurs, lozenges, and Thé Mariani, a coca infusion that helped Ulysses S. Grant complete his memoirs before succumbing to cancer. The success of Mariani's products inspired imitations, Coca-Cola among them, and encouraged investigation of the plant's therapeutic potential" (Courtwright 2002, 883).

[25] On the origins of *Coca-Cola* and the changes it has undergone in the last 130 years, Antonio Escohotado (2002, 458-459) says it was invented by J. S. Pemberton, a druggist who sold it as a tonic and painkiller out of his store in Atlanta, Georgia. In 1885 he registered the product as *French Wine of Coca, Ideal Tonic,* clearly intending to take advantage of the market opened up by *Vin Mariani*, albeit inaccurately referring to *coca* instead of *cocaine*. A year later Atlanta introduced Prohibition, so Pemberton had to replace the wine in his recipe with extract of kola, which contains caffeine, as well as including citrus essences for extra flavor and carbonated instead of still water. He began advertising it to his local clientele as an "Intellectual Beverage and Temperance Drink". Its success enabled him to sell his patent for *Coca-Cola* in 1891 to businessman A. Grigs Candler, who founded the *Coca-Cola Company*.

With the discovery of cocaine in the second half of the nineteenth century, the leading German and Dutch pharmaceutical companies began importing significant amounts of coca leaves from plantations in Peru and Bolivia (Labrousse 2011).

By 1890 some negative aspects of cocaine had been recognized (Rowe 2006), and its powerful addictive properties were beginning to become apparent (Iversen 2016). Abuse of cocaine was by now a big-city problem: the drug was much sought after by Montreal pickpockets, Montmartre prostitutes in Paris, West End actresses in London, and even university students in Berlin (Courtwright 2002).

Besides its inherently addictive properties, today cocaine abuse is known to produce a severe paranoid reaction, which is indistinguishable from the psychotic state resulting from a functional mental disorder and may take weeks to rectify itself after discontinuation of the drug (Rowe 2006).

However, cocaine had already become popular in the late nineteenth century and aroused the interest of many researchers, including Sigmund Freud. Based on his own experience with the drug, as well as observations by others, he professed optimism about its potential to counteract nervous debility, indigestion, cachexia, morphine addiction, alcoholism, high-altitude asthma, and impotence.[26]

In the early twentieth century, the Dutch promoted coca cultivation on Java, then its colony. Within a few years, the island was to become the

[26] "Sigmund Freud's well-known 1884 paper, 'Über Coca,' was a boosterish review of the existing literature on the drug. Noting coca's persistent use as an adjunct to Indian labor and the promising findings from his own and others' self-experiments, he professed optimism about its potential to counteract nervous debility, indigestion, cachexia (wasting), morphine addiction, alcoholism, high-altitude asthma, and impotence. (Andean *coqueros* reportedly sustained a high degree of potency into old age.) Freud also hinted at cocaine's use as a local anesthetic. To his regret, he did not follow up on the suggestion. Carl Koller won international fame when, a little later in 1884, he demonstrated cocaine's ability to numb the cornea. In an age when cataract removal was likened to a red-hot needle in the eye, the discovery was a godsend. Other demonstrations of cocaine's anesthetic properties, including spinal block, soon followed" (Courtwright 2002, 888).

world's leading producer. At the same time, Japan began growing coca on Taiwan. Asian production therefore enabled the German, Dutch and Japanese pharmeutical industries to respond, between 1910 and 1940, to the first major wave of consumer demand for cocaine seen at the time on a global scale (Labrousse 2011).

Following the global ban on cocaine achieved by three international conventions between 1946 and 1961, Colombia and Bolivia became leaders of the illegal trade in the drug in the 1970s, while Western Europe and the United States became the main consumer markets.

Crack, a mixture of cocaine paste with sodium bicarbonate, appeared in the 1980s. Cheaper and more powerful than cocaine, crack quickly became popular among the poorest Americans:

> Cocaine had never been a big seller in the ghetto: it was too expensive. But that was before the invention of crack. This new product was ideal for a low-income, street-level customer. Because it required such a tiny amount of pure cocaine, one hit of crack cost only a few dollars. Its powerful high reached the brain in just a few seconds—and then faded fast, sending the user back for more. From the outset, crack was bound to be a huge success. (Levitt & Dubner 2011, 1468)

There are an estimated 17 million cocaine users in the world today (UNODC 2015).

3.1.6 Lysergic acid (LSD)

LSD, an acronym derived from the German *Lysergsäurediethylamid* (lysergic acid diethylamide), was discovered accidentally by Swiss chemist Albert Hofmann in 1938 in the Sandoz Laboratories in Basel. It is a crystalline compound derived from *Claviceps purpurea*, an ergot fungus that grows on rye.

Although it is administered in minute doses of 50-100 micrograms (making it practically atoxic), LSD is the most powerful hallucinogen known to humanity, causing illusions, enhanced sensory perception, paranoia, altered experience of time and space, ecstasy, euphoria, panic, anxiety, and even psychosis. Its effects can last eight to twelve hours (Hofmann 2005).

There are no reports of death due directly to the use of this substance. However, scientific studies show that psychosis (transient or even chronic) is an important effect associated with LSD, occurring in between 0.08% (Cohen 1960) and 0,9% of users (Malleson 1971).

3.1.7 Other illegal drugs

Despite international efforts to combat the proliferation of drugs throughout the twentieth century, especially in its last three decades, conventional drugs became steadily more popular, at the same time as new drugs were presented to humanity and rapidly incorporated into contemporary culture. They include ecstasy, mescaline and methamphetamine, to cite only a few examples.

Ecstasy's active principle is MDMA,[27] registered by German pharmaceutical company Merck in 1919 as an appetite suppressant. It is a psychoactive drug that acts directly on the brain to cause euphoria, a sense of wellbeing, and altered sensory perception. Recreational use began in the 1970s in the United States, where it was banned in 1985.

According to estimates, 7.5 million people aged 15-34, or about 5.5% of this age group, have taken ecstasy in Europe alone (Fletcher, et al. 2010).

[27] Methylenedioxymethamphetamine.

Methamphetamine is a central nervous system stimulant that induces dependence after only a few uses. Its main effects are euphoria and a heightening of emotion, sensory perception and sexual arousal.

Mescaline is a natural hallucinogen obtained from the peyote cactus (*Lophophora williamsii*). Although it was first isolated in 1896 and already familiar to many pre-Columbian cultures, it was not widely used until the 1960s. Its main effect is hallucination.

All the above must be considered alongside the drugs that had traditionally occupied a significant space in the customs of peoples and in the daily lives of individuals. It is estimated that almost a quarter of a billion people between the ages of 15 and 64 years (246 million, or 1 in 20 people in this age group) used an illicit drug in 2013. Of these, some 27 million are considered problem or high-risk drug users (UNODC 2015), meaning they have developed problems relating to illicit drug consumption, such as addiction and the diseases it causes, acts of violence etc.

3.2 WAR AS PRINCIPLE, MEANS AND END

The so-called *war on drugs* consists of an international ban and military intervention campaign, undertaken by the United States government with assistance from several other countries, and with the stated aim of defining and curtailing illegal drug trading (Cockburn & St. Clair 1998). Its main weapon is criminalization of the use and distribution or sale of banned psychoactive substances.

In fact, the *war on drugs* in the international sphere is synonymous with the history of the battle against narcotics waged by the US based on the moral sentiment prevailing in American society, although the results of this battle are felt worldwide.

The initiative includes a set of US public policies designed to discourage the production, distribution and consumption of illegal drugs. The phrase *war on drugs* was first used in 1971 by President Richard Nixon and later popularized by the media (Dufton 2006).

Drugs were redefined as a threat to national security and said to warrant an approach grounded above all in repression at home and the export of policies to other countries (Woodiwiss 2005). Nixon solemnly declared that drug abuse was US public enemy number one and that a new, all-out offensive was necessary to fight and defeat this enemy (Nutt 2012).

It also cannot be denied that the *war on drugs* represents one of the ways in which US hegemonic power over the international community is wielded,[28] inasmuch as it has ended up dictating legislative and procedural standards for the battle waged against substances considered illegal.[29]

Historically speaking, the *war on drugs* can be said to have unfolded in three distinct phases: (1) a predominantly moral phase, in which combating drugs is considered a *principle*; (2) an objective phase, in which the *war on drugs* is seen as a *means* to solve the problems caused by substance abuse; and (3) a repressive phase, in which the *war on drugs* becomes an *end* in itself.

Although the moral argument was the foundation for all three phases, the first was presented both as a basis and as objective. In the initial

[28] According to Mike Ruppert (Klotter 2001, 59): "There is no war on drugs and there never will be... because the so-called war on drugs is not about drugs. It's about money. It's also about power. And it's about race."

[29] In this sense, interest in Prohibition is due to its hegemonic influence on policymaking and the underlying concepts regarding banned substances. This influence is extensive to Brazil. The ban on drugs was radicalized after World War Two and during the Cold War (1947-89) as part of the framework of international relations on drugs mediated by the UN. During this period, the military dictatorship in Brazil (1964-84) offered a favorable territory for intensification of anti-drug repression. The critical literature displays a consensus in identifying the US as the leader and prime mover in establishing a set of medical and legal definitions in the twentieth century that traced a rigid frontier between "legal" and "illegal" substances. This approach became central to the aggressive US foreign policy on the issue and a repressive tendency in social policymaking in Brazil (Lima 2009, 22/165).

phase combating drugs aimed to protect the ethics threatened by the deviational habit of drug consumption.

3.2.1 War as a principle

Although the phrase *war on drugs* was coined in 1971 by Richard Nixon, the policies implemented by the Nixon administration, as embodied in the *Comprehensive Drug Abuse Prevention and Control Act of 1970,* represented a development of US drug prohibition policies first established in 1906 by the *Pure Food and Drug Act*.

Even earlier, however, as a social and historical precedent the Prohibitionist mindset spread to various arenas of US civil society in the second half of the nineteenth century. The Prohibition Party was founded in 1869. At that time many societies and leagues were set up, including the New York Society for the Suppression of Vice (1873), the Woman's Christian Temperance Union (1874), and the Anti Saloon League (1893). In academia, entities such as the Scientific Temperance Federation (1906) were set up to study the problem and propose science-based solutions. Publishing houses and journals dedicated exclusively to the topic guided the debate about the need to ban alcoholic beverages, which became nationwide in scope. The temperance movement also linked up with other social movements then on the rise, such as the campaign for women's suffrage and antitrust campaigns (Ribeiro 2013).

Prohibitionism as a political system was born in Ohio from an alliance of local churches whose platform called for the outlawing of alcohol production and distribution (typically associated with gambling, prostitution and dancing, all of which were condemned by puritan doctrine) as the cause

of the moral and physical degradation to which they believed the US had succumbed (Ribeiro 2013).

This movement laid a social foundation, but there is a consensus in the literature that the 1906 Pure Food and Drug Act was the first major national government intervention against the sale and consumption of drugs. The act enabled the government to institute public control aimed at banning the circulation of adulterated products or products that posed a health hazard, and required that ingredients be listed on the packaging of all foods and drugs (Lima 2009).

The act contained no bans, nor did it call for public policies to combat specific substances, but the basis for government intervention was established via the resulting regulatory framework, which legalized substances that were already widely used. The justification was protection for the general public. While protecting consumers by requiring manufacturers to supply information proving purity, for example, it also inaugurated an interventionist stance that was unprecedented in the lives of American citizens. For the first time, in connection with all such substances, the liberal tradition of free commerce was exposed to rules that did not criminalize the most widely used drugs in the US, but placed them under state control, affecting citizens,[30] albeit indirectly (Rodrigues 2004).

In the international arena, meanwhile, delegates from 13 countries met in Shanghai as the International Opium Commission in 1909 to deal with the problem of Indian opium, which was widely used in China.

On the Shanghai Commission, Rowe (2006) acknowledges the element of "political window dressing" but notes that its intent was to prohibit opium imports and use of the drug for "other than medicinal

[30] "Foolishly, we embrace the state's 'prescrib[ing] to us our medicine and diet' as fulfilling its enlightened duty, guaranteeing us our 'right' to health instead of rejecting it as a crass deprivation of our right to our bodies and to the drugs we want" (Szasz 1996, 5).

purposes." He also notes that there was already concern about possible "unintended consequences" of the ban for US society.[31]

The First International Opium Conference convened in 1911 at The Hague produced the 1912 International Opium Convention, which regulated the production and sale of morphine, heroin and cocaine.

A few years later, the US passed the first law that in practice effectively restricted the distribution and use of specific drugs. This was the *Harrison Narcotics Tax Act of 1914*,[32] [33] which regulated and taxed the production, importation and distribution of opioids and derivatives of cocaine, criminalizing any sale or prescription of such drugs that broke the

[31] "The year 1909 brought the first federal regulation to narcotic drugs. President Theodore Roosevelt convened the Shanghai Opium Commission ostensibly in order to aid the Chinese Empire in dealing with their opium problem. To some degree, it appears to be political window dressing. The act was debated and passed as Public Law 221 while the Shanghai Commission was in session in February 1909. It was 'an act to prohibit the importation and use of opium for other than medicinal purposes'. In other words, its purpose was to prevent the importing of opium for use in opium dens. The debate on the bill (HR 27427) was notably brief. The bill was introduced by Sereno Payne of New York in the House of Representatives. Quick passage was urged so that the hand of the resident could be strengthened for dealing with the Shanghai Commission and its recommendations. The only real objections to the bill concerned not the intent to ban opium smoking in the United States but whether the ban would have unintended consequences. In what today can only be described as ironically prescient, Representative Warren Keifer of Ohio worried the bill might have the effect of promoting manufacturing of opium in the United States and Representative Joseph Gaines of West Virginia suggested it might merely stimulate illegal imports (i.e., a black market). In the end, these arguments did not hold sway and the bill was passed without objection" (Rowe 2006, 362).

[32] The Harrison Narcotics Tax Act of 1914 gave the state powers and jurisdiction to say "scientifically" which drugs were hazardous and required strict control by the bureaucratic apparatus, and which were inoffensive and could be freely traded and consumed. It made a medical prescription mandatory for the purchase of medications containing ingredients listed as hazardous, especially opiates and cocaine preparations (Rodrigues 2004).

[33] It is worth noting the historical context for the Harrison Narcotics Tax Act within the moral, political and commercial climate prevailing in 1914, the year the Great War broke out. On the home front, a significant number of representatives of the US temperance movement in Congress, including the Prohibition Party, alongside the eugenics and "race hygiene" movements and the vested interests of the US medical and pharmacy professions, created the conditions for passage of the Act in 1914. On the international front, the Act was presented as a response by US society to its undertakings under the International Opium Convention and the establishment of the first national medical and legal framework to regulate drugs in the western world (Lima 2009).

rules. This law empowered the state to decide "scientifically" which substances were dangerous and hence required strict control by the bureaucratic apparatus, and which were inoffensive and could be freely marketed and consumed. It made a doctor's prescription mandatory for the purchase of medications whose ingredients were classed as harmful, especially derivatives of opium and cocaine (Rodrigues 2004). Doctors could prescribe them as part of the treatment for certain diseases but were prohibited from doing so for addicts.

Despite its apparent focus on tax and regulation, its real aim was to reduce the consumption and free movement of drugs. The moral argument was the core of the ban introduced by the Act.

Indeed, a report by the Senate Ways & Means Committee and above all the debate on the floor of the House of Representatives prior to passage of the Act show that its main purpose was to prevent the use of opium and its derivatives in the US.[34]

[34] "Several authors have suggested that the intent of the act was merely to regulate trade and collect a tax. Brecher (1972), for instance, suggests such an interpretation. However, if you read the committee reports prior to the debate on the House floor and the debate itself, a very different picture arises. In the report of the Committee on Finance (Ways and Means Committee, in Senate Reports, Vol. 1, of the 63rd Congress, 2nd Session on Senate Bill 6552, report #258, pp. 3–4), the debate decried the rapid increase of opiate use in the United States. In comparing the United States to Europe, it was noted that five European countries with a total population of 164 million used less than 50,000 pounds of opium annually. The United States, on the other hand, with a population of 90 million, imported 400,000 pounds per annum. Between 1870 and 1909, the population of the United States rose 133 percent, but opium use in the same period rose 351 percent. One senator noted in the record, 'There has been in this country an almost shameless traffic in these drugs. Criminal classes have been created, and the use of the drugs, with much accompanying moral and economic degradation, is widespread among the upper classes of society.' The basic goal of the report was to suggest that federal tax regulations be passed to support the various states so that the nonmedical traffic in opium could be reduced. The debate on the House floor is even more instructive. This can be found on pages 2191 to 2211 of Volume 50, Number 3 of the 1913 Congressional Record. This was, after all, a tax act, so someone asked whether the purpose of the law was to raise revenue. Harrison answered, 'The purpose of this Bill can hardly be said to raise revenue, because it prohibits the importation of something upon which we have heretofore collected revenue.' It had been reported that in the previous fifty years the United States had collected $27 million in import duties on opium. Later, he added, 'We are not attempting to collect revenue, but to regulate commerce.' Representative Thomas Sisson noted, 'The purpose of this Bill—and we are all in sympathy with it—is to prevent the use of opium in the United States, destructive as it is to human happiness and human life'" (Rowe 2006, 381).

The fount of the *1914 Harrison Narcotics Tax Act* was the puritanical moral basis of US society. It marked the first empowerment of the state to control practices relating to the use of opium, coca leaves, and coca salts and their derivatives and preparations by means of an articulation of medicine, law and the national treasury (Lima 2009).

Not long afterward, the *Eighteenth Amendment to the US Constitution* effectively established the prohibition of alcoholic beverages in the US by declaring illegal the production, transport and sale of alcohol (though not consumption or private possession).[35] It was rejected by Connecticut and Rhode Island, but ratified by all other states on January 16, 1919, and entered into force on January 17, 1920.

Also in 1920, the *National Prohibition Act*, known informally as the Volstead Act, enforced the *Eighteenth Amendment* by prohibiting the production, distribution and sale of alcoholic beverages throughout the US and stipulating penalties for infringement.

In the minds of its advocates, the *Great Prohibition Era* thus begun would suppress vice and restore dignity and moral rectitude to US citizens. The legislation represented both a victory for the puritans in US society and the advent of the nanny state via widespread acceptance of the government's right to control and intervene in individual and collective behavior. The "Dry Law", as it became known, led directly to the official emergence of organized crime in the US. The legal framework that supposedly protected the nation against the evils of vice was also an encouragement to the free practice of criminal activities. Illegality enabled the US mafia to become stronger and prosper (Rodrigues 2004).

Even Albert Einstein, who visited New York briefly during the Prohibition Era, in the year he was awarded the Nobel Prize in Physics

[35] The Eighteenth Amendment was passed by the Senate on August 1,1917, with 65 votes for and 20 against. The House of Representatives followed suit by 282 ayes to 128 noes on December 17, 1917.

(1921), felt obliged to speak out incisively against the danger of a stringent law that cannot be enforced and therefore results in an increase in crime. According to Einstein, the government's credibility had been considerably undermined by the Eighteenth Amendment and the National Prohibition Act:

> The prestige of government has undoubtedly been lowered considerably by the Prohibition law. For nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced. It is an open secret that the dangerous increase of crime in this country is closely connected with this. (Einstein 2007, 40-41)[36]

The ban on alcoholic beverages remained in force for 13 years and was abolished on December 5, 1933, when the Twenty-First Amendment repealed the Eighteenth.

There were clear contradictions between US foreign policy relating to drug control and the laws in force internally. Ironically enough, while on the domestic front the US acknowledged the failure of the ban on the production and sale of alcoholic beverages (and only for this kind of substance), in international relations it more intensely pursued ways of combating drugs that originated in peripheral economies or were somehow linked to industrialization in the European countries, with which it was involved in a major trade dispute.

Cross-border initiatives to control specific substances replicated the new international division of power, which was strengthened by the consolidation of America's world leadership – especially in the distinction made between drugs considered legal and part of the culture of the hegemonic countries (alcohol and tobacco, for example), and drugs

[36] Albert Einstein's thinking does not differ from that espoused by Beccaria (2009), according to whom even a cursory look at history shows that disorder grows as the boundaries of empires expand. As patriotic sentiment correspondingly wanes, there is a growth in the motives for crime insofar as each individual has an interest in that very disorder: therefore, the need to stiffen the punishments continually increases.

considered illegal, which originated in the traditions of nations with less influence in international relations (Lima 2009).

In this historical context, in 1935 President Franklin D. Roosevelt publicly supported adoption by the states of the *Uniform State Narcotic Drug Act*, signed into law a year earlier. The purpose of the Act was to make the laws banning the sale and use of drugs classed as narcotics – precisely those not linked to US culture – uniform in all states. The ethical argument underpinned the legal framework.

Alongside growing domestic prohibition, the US, which had played a central role since the start of the twentieth century in the international agreements and organizations that dealt with drugs and drug trafficking (Woodiwiss 2005), advanced in international proscription.

Confirming its proactive stance and leadership in combating narcotics, the US imposed its ideology at the 1931 Geneva Conference, obtaining a commitment from the participating states (with the exception of a few European countries) to take measures against the production and distribution of dangerous drugs within their own respective borders.

The *Marihuana Tax Act* was passed in 1937. Personal and therapeutic use of cannabis, hemp or marijuana remained legal. Ironically, the law introduced a symbolic tax of one dollar per paid commercial or medicinal activity involving the substance, while imposing a fine of 2,000 dollars and/or five years imprisonment for any infringement of the Act itself or of its implementing legislation, which was highly complex and invasive of privacy. For example, whenever a doctor, dentist or vet prescribed cannabis a detailed report had to be sent to the Treasury on the patient's personal characteristics, their diseases and the reasons for the prescription, as well as other information often required in particular cases. Mere omission was penalized, but full compliance with the rules was impracticable for any user, professional or company.

Some authors argue that the aim of the Act was to destroy the hemp industry (French & Manzanárez 2004) and protect[37] the paper pulp[38] and synthetic fiber businesses (Gerber 2004). The fact is that hemp fiber is an excellent raw material for the manufacturing of paper[39] and fabric. The invention of new extraction techniques had made it a viable and cheaper alternative to pulp (Rowe 2006).

In the US during the 1930s, cannabis was associated with certain ethic groups, especially Mexican workers. At the same time, while still under the shadow of the Great Depression, US citizens who resided in Southern states lobbied congressmen to solve the problem of Mexican immigration, who in their view were competing for the few jobs still available. The upshot was mass repatriation of Mexican workers (Rowe 2006).

[37] "Methods of compulsion and suppression have always been used in political life, but in most cases these methods have aimed at material results. Even the most fearsome methods of despotism were confined to forcing individuals to submit to certain laws of action. They were not concerned with feelings, values or thoughts. Current political myths proceed in a radically different manner. They neither prohibit nor require certain actions. They set out to change people in order to regulate and control their actions. Individuals are defeated and subjugated many times before they understand what is happening. In the estheticizing of the normative social order, information techniques and knowledge are used in association with the techniques and knowledge of applied psychology. The mass media, subliminal messages, illogical associations loaded with affects, emotionalism, irrationality travestied as reason, uncriticality. Domination by subjectivity, by "the head". Induction of proactive conformism: individuals as unconscious agents of the interests of the system to the detriment of themselves or of the true members of society and the species" (Machado 2005, 2).

[38] According to Rowe (2006, 220), the history of the Marihuana Tax Act is the story of three figures who for personal reasons were decisive in the banning of cannabis: "To at least some extent, the history of this legislation is also a story of personalities. Three people in particular had major impacts on the early development of drug policies. They were Hamilton Wright, William Randolph Hearst, and, most notably, Harry J. Anslinger. All were driven by personal agendas and any truth or evidence that conflicted with those agendas was discarded".

[39] Hemp was first used to make paper about 100 years BCE.

A ferocious campaign against marijuana and its users was waged by media mogul and paper pulp maker William Randolph Hearst,[40] who used his many newspapers and other media outlets to boost the already massive wave of xenophobia, associating the drug with violence and degenerate behavior.[41] Moralism was again uppermost.

While Hearst's intentions cannot be clearly deciphered, his campaign against marijuana was decisive[42] [43] for the advent of the *1937*

[40] An influential and controversial personality, immortalized in the motion picture *Citizen Kane* (Welles 1941), written, produced and directed by Orson Welles, who also played the lead role. It has several times been voted the best American movie ever in polls conducted by the American Film Institute (2007).

[41] The penal system always acts selectively and selects according to the stereotypes fabricated by the mass media. These stereotypes permit the cataloguing of the criminals who match the image that corresponds to the fabricated description, leaving out other kinds of criminal – white-collar criminals, gold-collar criminals, traffic criminals etc. (Zaffaroni 1991).

[42] The power to control the flow of information is the power to control how human beings think. The ability to determine, direct and select information can become a source of power comparable to that of the owners of large-scale natural, technological and economic resources (Machado 2005).

[43] "Hearst was a publishing giant in the 1930s and 1940s and began a campaign in his newspapers to denounce marijuana. His reasons for doing so are unclear, but it has been proposed that it was done to protect his holdings in the paper industry (Herer, 2000). The hemp plant is an excellent source of fiber for pulp paper products. With the invention of a decorticating machine, the cost of raw materials for producing paper from hemp was roughly half the cost of producing it from trees. Since Hearst had large holdings in the wood pulp paper industry, hemp posed a serious financial threat. Was this the real reason Hearst joined the battle against marijuana? It is probably impossible to say for sure, and the actual reasons behind his campaign are probably not important anymore. What is important is that he controlled the content of a number of important newspapers and he used that leverage to spread antimarijuana propaganda. Hearst's newspaper holdings were impressive and included the *San Francisco Examiner* (from 1887), the *New York Morning Journal* (1895), the *Evening Journal* (1896), the *Chicago Examiner* (1902), and the *Boston American* (1904). He also owned magazines, including *Cosmopolitan* and *Harper's Bazaar*. At its height, his readership extended to 30 million readers and his fortune to $220 million, much of which was lost in the Great Depression" (Rowe 2006, 573).

Marihuana Tax Act and the ban on hemp, which ended up benefiting his business activities. [44]

Moving ahead, the *Narcotics Control Act of 1956* tightened the control of marijuana still further in the US, supporting criminalization of the use and distribution of the drug and its active ingredient.

The ban on marijuana is still in place even today. Since then its negative image has been intensified by prohibition rather than any ill effects it may have on society.

Also under US influence, a conference in New York attended by 73 countries produced the *Single Convention on Narcotic Drugs* on March 30, 1961. It was called Single because it consolidated the existing drug control laws and updated or broadened their scope. The treaties it superseded ranged from the 1912 International Opium Convention to the 1953 New York Opium Protocol (Lima 2009).

The 1961 Single Convention thus became the most comprehensive international treaty on narcotics (Lima 2009). Its 51 articles list the drugs it controls and classify them according to their properties; prescribe surveillance and control measures, establishing special restrictions for drugs deemed particularly dangerous; regulate the inclusion of new narcotics that should be controlled; empower the United Nations to ensure compliance; establish the measures to be taken domestically against the drug trade,

[44] "One possible reason why empirical evidence concerning marijuana was ignored in favor of dramatic (and nonsensical) characterizations and stories such as those above, is that several of the individuals involved in creating concern over marijuana use had ulterior motives for their actions. In 1930, the Bureau of Narcotics was formed within the U.S. Treasury Department. Harry Anslinger was appointed director by the Secretary of the Treasury, Andrew Mellon, who also happened to be Anslinger's uncle (by marriage) and owner of the Mellon Bank. Mellon Bank was one of the DuPont Corporation's banks. DuPont was a major timber and paper company. These players also had close links to William Randolph Hearst, another timber and paper mogul who published several large newspapers. Hearst used his newspapers to crusade against marijuana and this benefited its paper manufacturing division and Hearst's plans for widespread use of polyester, both of which were threatened by hemp. DuPont also had just developed nylon, which also was threatened by hemp" (Robinson e Scherlen 2007, 407).

requiring states to assist each other in this regard; prescribe penalties for infringement, calling for adequate punishment for all intentional offenses against the Convention in the shape of cultivation, production, distribution and possession of proscribed drugs; and recommend medical treatment and rehabilitation for drug abusers.

It can be concluded that the punitive prohibitionist model is grounded in two principles: a moral-cum-religious principle that imposes abstinence as the only possibility for drugs; and a social hygienist principle that establishes the ideal of a drug-free world. Together they determine the prohibition of any form of use, purchase, sale or production of psychotropics deemed illicit, defining such conduct as criminal (Ribeiro 2013).

3.2.2 War as a means

To return to the question of US domestic policy and its imposition on other states, although US drug control philosophy was refined in the early 1960s, even so there was no fundamental break at that time with the essence of the previous policy, which was based on an irrational conviction of moral integrity prevailing in that country in the early twentieth century. President Richard Nixon preserved the old dogma that it was feasible to rid the country of drugs. In his view, a constant domestic effort should be combined with eternal vigilance abroad. He made combating drugs one of his priorities and determined the involvement, cooperation and support of all government departments and agencies in this regard (Woodiwiss 2005).

To tighten control of substances considered illicit, he declared a *war on drugs* and sponsored the *Comprehensive Drug Abuse Prevention and Control Act of 1970*, which not only regulated and classified substances on the basis of their intrinsic potential for dependence and abuse, but also

consolidated all previous laws regarding the identification and proscription of drugs considered illegal.

The Act empowered the Drug Enforcement Administration (DEA), an agency of the US Justice Department, to propose which drugs should be controlled and to what extent.

Nixon moved the debate on drugs definitively into the field of ethics by justifying his policy of waging a *war on drugs* as a fight against evil to rid the world of narcotics. His war was to be waged on two fronts: curtailing production and combating demand by means of coercion through criminal law (Nutt 2012).

Although the moral argument remained very strong, during this period the *war on drugs* was framed in objective terms. As war, it pursued an end: eliminating all illicit drugs. The *war on drugs* was the *means*.

A memorandum dated September 29, 1969, and sent by Henry Kissinger, then Nixon's National Security Adviser, to Secretary of State William P. Rogers sums up the essence of US policy regarding the *war on drugs*, still in effect today. "The President is convinced that the problem of narcotics addiction in the US has reached proportions constituting a threat to our national stability," Kissinger said in the memo. "Most narcotics are grown and processed in foreign countries and smuggled into the US; this is particularly true of heroin. Under these circumstances, the President considers that any country facilitating, or in any way contributing to, international traffic in heroin is committing an act inimical to the United States" (Woodiwiss 2005).

Kissinger's memo said Rogers should "recommend as soon as possible an action program that will make emphatically clear to those countries growing opium poppies that their non-medicinal cultivation must be stopped; and to those countries manufacturing finished heroin that their illicit laboratories must be closed." It went on to urge Rogers to "consider methods of positive persuasion, including financial incentives for

cooperation on the control of heroin traffic, as well as those of retaliation, in the event that any country refuses to cooperate".

In the same direction, Nixon secured passage of the *Narcotics Control Trade Act of 1974*, which was to have a damaging impact on the international community in the ensuing decades. In brief, the Act subjected drug-producing or drug-transit countries that failed to cooperate with US drug prohibition policies to various sanctions, including the withdrawal of US aid and increases in duties and tariffs. In other words, other countries had to comply with US narcotics policy and become its allies in the *war on drugs* or suffer economic losses (Woodiwiss 2005).

After Nixon, Presidents Gerald Ford and Jimmy Carter[45] continued to combat drugs along the same lines and with the same biases as their predecessors, sustaining the war Nixon had declared. Similarly, the international community continued to follow US prohibition policy.

3.2.3 War as an end

The 1980s were an emblematic period for adoption of the US approach to combating crime by a large number of sovereign states,[46] but this emulation was even greater with regard to drugs. When Ronald Reagan took office as US President in 1981, his inauguration speech emphasized his determination to intensify the *war on drugs* and announced that he would take up arms against narcotics (French & Manzanárez 2004).

[45] Ironically, an article entitled "Call Off the Global Drug War" by Jimmy Carter (2011), published in *The New York Times* on June 16, 2011, criticized the *war on drugs* and acknowledged its failure.

[46] On this phenomenon, its origin and cause, as well as its effects on Brazil, see Abramovay & Batista (2010).

Under his administration the penalties for drug trafficking were made more severe and confiscation of assets used for or acquired through trafficking became the rule (French & Manzanárez 2004).

During Reagan's two terms, US laws on drug use and distribution were stepped up, and US armed forces became directly involved in the *war on drugs*. In addition, the US government took a more rigid stance toward drug trafficking in the diplomatic sphere, imposing economic sanctions on Latin American countries, which it accused of being responsible for most of the drug problem, although in actual fact the main driver of the problem was strong demand in the US and Western Europe rather than the producer countries, which *merely* met this demand (Hagen 2002).

In 1989, President George W. Bush introduced the *First National Drug Control Strategy*, expanding the regulation of illicit drugs and standardizing anti-drug trafficking strategies. The Bush administration also extended militarization of the *war on drugs* on a global scale, rapidly expanding military cooperation with cocaine-producing countries. As a mere illustration of what this represented, between 1988 and 1991 the budget allocation for this effort jumped from U$5 million to U$150 million. This was the so-called *Andean Strategy*, consisting of technical and military support for campaigns against drug trafficking (Hagen 2002).

Owing to escalation of the war on drugs, the number of people sentenced to imprisonment in the US for drug-related crimes increased fifteenfold between 1980 and 2000 (Levitt & Dubner 2011).

There were no significant changes in the treatment of drug prohibition policy in the US and the policy imposed on other countries under Presidents Clinton,[47] Bush and Obama. The *war on drugs* has proceeded on a global scale.

[47] Bill Clinton criticizes the *war on drugs* in a recent documentary called *Breaking the Taboo* (Andrade, et al. 2011).

All that has changed in the last two decades is that the *war on drugs* has filled the gap left by the end of the *Cold War*, appropriating all the fears and prejudices proper to the latter. Thus:

> On the other hand, to some in the United States, the drug war replaced the cold war, standing at the intersection between domestic fears and foreign threats. Politics at home pushed Clinton into the war on drugs as much as the threat from abroad. (Hagen 2002, 15)

It has also appropriated the entire power structure and international influence created by the US in its struggle against Communism.

This huge influence has dictated the legislative conduct of other countries, their public policies on drugs, their use of military force, and even the decisions of their courts.

The priorities of the US criminal justice system, as well as the US model of criminalization and penal persecution, have been exported around the world. Foreign governments yield to US pressure, stimulus and examples, introducing new criminal laws on drug trafficking, money laundering, privileged trade and organized crime, and changing their rules on financial and trade secrecy and their penal procedural codes in order to comply with the policies imposed on them. Their police forces copy US techniques of investigation, while their courts of law and lawmakers follow suit by providing the necessary legal permission. Foreign governments channel substantial law enforcement and military resources into suppressing the production and distribution of illicit drugs. Generally speaking, the US supplies the models and other states implement them (Nadelmann 1993).

Thus, the *war on drugs* is a US geopolitical strategy to occupy, dominate and control the peripheries. It has military implications because it often acts as a pretext for sending troops, indoctrinating and coopting the military elites of the peripheries in order to align them with US interests, and precluding nationalist discourse in favor of resisting imperialism. History shows the success of this strategy of influencing members of key

local sectors by means of apparently inoffensive indoctrination (Santos Júnior 2016).

The influence of what the *Global Commission on Drug Policy* (2011, 8) called "drug control imperialism" intervenes in typically local affairs, dictating patterns of behavior that often conflict with the culture, history and self-determination of peoples, even going as far as criminalizing historical traditions:

> A current example of this process (what may be described as 'drug control imperialism') can be observed with the proposal by the Bolivian government to remove the practice of coca leaf chewing from the sections of the 1961 Convention that prohibit all non-medical uses. Despite the fact that successive studies have shown that the indigenous practice of coca leaf chewing is associated with none of the harms of international cocaine markets, and that a clear majority of the Bolivian population (and neighboring countries) support this change, many of the rich 'cocaine consumer' countries (led by the US) have formally objected to the amendment. (Global Commission on Drug Policy 2011, 8)

This escalation of the *war on drugs* and its resulting militarization is the context for Brazil's Presidential Decree 5144 (Brasil 2004), which implemented the "Law on the Downing of Aircraft" [*Lei do Abate*] (Brasil 1998): this empowered the air force to use whatever means it deemed necessary to force an aircraft to land and, having exhausted the coercive means permitted by law in the event of refusal, to classify it as hostile and down or destroy it. Although this law does not refer specifically to drugs, the desire to shoot down planes used by drug barons was the motivation for the decree in question.

Indeed, Decree 5144 (Brasil 2004) establishes the procedures to be followed with regard to hostile planes or aircraft suspected of drug trafficking, bearing in mind that they may represent a threat to public safety. Aircraft suspected of drug trafficking that do not comply with the required

coercive procedures will be classed as hostile and subject to destructive measures.

The power to down planes and the competent authority for doing so point to the warlike nature of the prevailing strategy for combating narcotics and, once again, show that tackling the drug problem is treated as a war.

An even more striking example is the death penalty for drug trafficking in countries such as China, Vietnam, Singapore, Iran, Indonesia, Malaysia and Saudi Arabia (Karam 2009), resulting from intensification of the *war on drugs*.

Thus, the most emblematic aspect of this period, which began with Ronald Reagan and continues today, is the new face of the *war on drugs*.[48] The moral argument continues to underpin popular support, as in the first phase, and the declared objectives remain those relating to the eradication of narcotics, as in the second phase.

However, given the impossibility of defeating the drug traffickers, the *war on drugs* seems to have become an end in itself. In the name of human rights, humanitarian intervention, combating Communism, terrorism or drugs, upholding democracy etc., the US has always resorted to war as a means of wielding and at the same time consolidating its hegemonic power.[49]

The Cold War no longer required substantial investment in the early 1980s and came to an end with the fall of the Berlin wall at the end of the decade. US military efforts needed a new argument. The upshot was militarization of the *war on drugs*.

[48] Since the 1980s the US has used the campaign against drugs as the central axis of its policy for the continent. It has disseminated such terms as "narcoguerrilla' and "narcoterrorism", in a clear symbiosis of its "external enemies". Drugs have become the axis of national security policies in countries that kowtow to Washington, while financial capital and the new international division of labor force them to be producers of these valuable commodities. The Andean countries have become brutalized markets for residual retailing of illicit drugs (Batista 2003, 12).

[49] See the in-depth discussion in Jelsma et al. (2007).

This is how the *war on drugs* continues today: with strong ethical rhetoric and the declared objective of mitigating drug trafficking and consumption until they are eliminated, but nevertheless neither more nor less than an end in itself.

Not even the new motivation for US militarization, the *war on terror*, a new argument for the wielding of political, military and economic hegemony, has been able to brake the fight against narcotic substances made illicit. This is because the many years of prohibition, the propaganda about combating drug traffickers, the ethical content systematically inserted and reinforced into the question of use, and the mistaken association of certain drugs with the phenomenon of urban violence prevent governments and societies from taking a rational stance. Instead they prefer to persist with a war that has been lost but still represents a moral doctrine and above all a form of domination.

3.2.4 Legal basis for the war on drugs

Criminalization of the use of and trade in psychoactive substances considered harmful to individuals and society has always been the legal basis for the *war on drugs*. In addition, criminalization has also been the method and main front for the fight against drugs. Besides being a method, criminalization has become a result – a response to the moralism with which the issue of drugs is imbued. In other words, in accordance with the ethical argument, criminalization is the kernel of the *war on drugs* and without it the war would be meaningless.

The prohibitionist criminal model adopted in the *war on drugs* is grounded in what Gunther Jakobs (2012) calls *enemy criminal law* (*Feindstrafrecht*), according to which in situations that expose society to a

grave danger the state may deny to a certain category of criminal – the enemy – the guarantees inherent in *criminal law of the citizen* (*Bürgerstrafrecht*), so that only state coercion is appropriate in such cases.

This is the rationale behind the idea of *enemy criminal law*. People who have rights and duties are bound by the law, whereas relations with enemies are governed not by laws, but by coercion. However, all laws depend on authorization to use coercion and the most intense form of coercion is that of criminal law. Hence it could be argued that any punishment or even any legitimate defense is directed against an enemy. Such an argument would by no means be new. On the contrary, it has been put forward by eminent philosophers in the past, especially those who see the foundation for the state as a social contract and define a criminal act as one that breaches the contract, so that the perpetrator can no longer enjoy its benefits and from that moment on is no longer bound by legal relations to the other members of society. Thus, Rousseau says any *lawbreaker* who attacks society ceases to be a *member* of the state through his crime, which amounts to an act of war or treason. As a result, the *offender* is punished not as a citizen but as an *enemy* (Jakobs 2012).

According to this idea, *criminal law of the citizen* means guarantees and rights for all, while *enemy criminal law* applies to traitors who subvert the legal order and are capable of the most dangerous actions against society.

Criminal law, the argument continues, recognizes two poles or tendencies in its rules and regulations. On one hand, there is the treatment given to citizens, which consists of waiting for them to externalize their conduct before reacting to confirm the normative structure of society; and on the other hand, there is the treatment given to enemies, who are intercepted in a prior state and combated for their dangerousness. *Criminal law of the citizen* maintains the norms in force, while *enemy criminal law*

(in the broad sense, including emergency security laws) combats danger (Jakobs 2012).

According to this idea, the enemy must be met with violence, a state monopoly, to which its enemies are subject even before they perform the act for which they are considered hostile.

When the criminal is the enemy, crime is not combated by conventional legal means but through *war* – justified by the principle of criminal law for the enemy: "when dealing with the enemy, only physical coercion will do, until war breaks out" (Jakobs 2012, 317).

This is exactly what happened in the case of drugs when Nixon declared that drug abuse was US public enemy number one (Nutt 2012), justifying a new all-out offensive on a global scale with the support of the United Nations and its member states.

The criminalizing prohibitionism that targets drugs made illicit and is expressed in the *war on drugs* policy explicitly manifests in the very name of the policy the military parameters that orient the current globalized expansion of punitive power, exacerbating the damage, suffering and mistakes caused by this advance of the penal system against those chosen to be its "enemies" (Karam 2009).

Any possibility of solving the problem by other means is rejected. Not even criminal law with due process is recognized as capable of mitigating the drug problem. Violence as state monopoly must be invoked against the enemy. "Whoever wins the war dictates the rules and the loser must submit to them" (Jakobs 2012, 395).

Acts of war are justified by the need to eliminate danger. The philosophy of the *war on drugs* accords perfectly with the views of Jakobs (2012, 376), according to whom the reaction of the legal order to this type of crime is characterized, analogously to the distinction Kant makes between the state of civil society and the state of nature, by the circumstance that it is primarily a matter not of compensating for the violation of a rule

but of eliminating a danger: punishability advances a long way into the ambit of preparation, and punishment is geared to security against future acts instead of penalizing committed acts.

Thus, the *war on drugs* instituted on a global scale was grounded in *enemy criminal law* and built from ethico-moral standards[50] by the force of the foreign policy of a hegemonic state. And so, it continues, with no prospect of peace or at least an honorable way out. Indeed, it continues without presenting the results once promised but no longer expected and long forgotten.

> Effective policymaking requires a clear articulation of the policy's objectives. The 1961 UN Single Convention on Narcotic Drugs made it clear that the ultimate objective of the system was the improvement of the 'health and welfare of mankind'.
>
> This reminds us that drug policies were initially developed and implemented in the hope of achieving outcomes in terms of a reduction in harms to individuals and society – less crime, better health, and more economic and social development. However, we have primarily been measuring our success in the war on drugs by entirely different measures – those that report on processes, such as the number of arrests, the amounts seized, or the harshness of punishments. These indicators may tell us how tough we are being, but they do not tell us how successful we are in improving the 'health and welfare of mankind'. (Global Commission on Drug Policy 2011, 5)

Its legal basis, the penal norm that criminalizes narcotic drugs, will be scrutinized in terms of the principle of proportionality in a moment. First, however, we must examine the results achieved by the *war on drugs*.

[50] Prevailing in US society.

3.3 RESULTS OF THE WAR ON DRUGS

As we have seen, the *war on drugs* is a campaign of prohibition and international military intervention grounded in *enemy criminal law* and waged by the United States of America with the assistance of several other countries. Its stated aim is to define and reduce the illegal trade in drugs (Cockburn & St. Clair 1998) in order gradually to mitigate the associated evils until they are eradicated.

Criminalization of the use and sale of drugs is at one and the same time the rationale, method and result of the *war on drugs*.

However, the *war on drugs* has been very costly in every sense. Therefore, as stressed by Nutt (2012), we have a duty to discover whether it has achieved its goals. To evaluate the success of these policies, he says, we must answer three questions: Has the *war on drugs* reduced the supply of illegal narcotics? Has it reduced demand for such drugs? Has it reduced the harm done by them?

Any scientific study that sets out to answer these questions will arrive at only one unequivocal result: the *war on drugs* has failed. When the 1961 Single Convention was signed in New York, and ten years later in the historical context in which Nixon declared war on drugs, many people thought harsh repression of drug use and implementation of public policies against those responsible for drug production, distribution and consumption would lead to a decline in the black market until it was totally eradicated and the world was completely rid of drugs (Global Commission on Drug Policy 2011).

The actual outcome has been the extreme opposite: exponential growth in the international market for illegal substances, which is controlled by organized crime (Commission of the European Communities 2009).

The US homicide rate measured for the last century (1900-2000) correlates directly with investment in the campaign against narcotics,

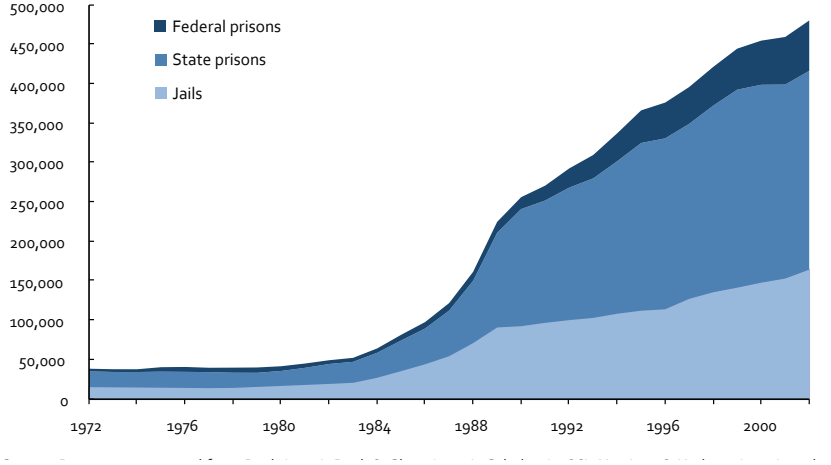
showing that historically speaking any increase in the budget for the *war on drugs* has almost always resulted in an increase in the rate of crimes against life (Werb, et al. 2010).

As a consequence of decades of severe prohibition in the US, while the number of people incarcerated for crimes of all kinds in the 1980s rose 28%, imprisonments for drug-related offenses soared 120% compared with the previous decade (Austin & McVey 1989).

In Brazil, 26% of the male prison population comprised men convicted of drug trafficking in 2016. As for women serving prison sentences for the same offense, the proportion was impressive: 62% of the female prison population, in the same year, had been convicted of drug trafficking (DEPEN 2016).

An analysis of incarcerations for drug-related offenses between 1972, when the *war on drugs* began, and 2002 shows that in the US alone the number of prisoners rose tenfold from less than 50,000 to almost 500,000. The US situation is clearly illustrated in this graph reproduced from Werb et al. (2010, 19):

Graph 1. Estimated number of adults incarcerated for drug law violations in the United States, 1972-2002



The situation in other countries is no different. Around 2 million people are currently in prison for drug-related offenses. This is about a quarter of the total prison population, yet neither demand for illicit substances nor their supply shows any sign of falling. Most prisoners are small drug dealers not directly linked to violent crime (Nutt 2012).

Besides growth in the prison population, treating the issue by means of criminal law has had another negative consequence: it converts users and addicts into criminals because possession of controlled substances for one's own use is also criminalized. This phenomenon can be observed from the start of the ban on narcotic substances considered illicit. Criminalization of drug use achieved the feat of making mere addicts into criminal addicts (Rowe 2006).

It is estimated that since the onset of the *war on drugs* countries have spent between U$1 trillion and U$2.5 trillion (Nutt 2012) in the eradication of production, repression of traffickers and criminalization of users. Yet this vast amount of money has failed to reduce the supply, let alone the consumption, of banned drugs. Apparent successes won on a small scale, such as the elimination of specific sources of production, have invariably been offset by the emergence of other criminal organizations and the migration of production to other areas (Global Commission on Drug Policy 2011).

Drug traffickers and their criminal organizations are constantly moving and morphing to avoid law enforcement, always seeking new sources of raw material and intermediate goods, new export routes, and new markets. The secrecy required by their outlaw status itself prevents them from organizing transparently and with a clearly defined structure in which the lower ranks know who their leaders are, what they do and how they operate (Woodiwiss 2005).

Moreover, however astronomical the sums spent by states in the *war on drugs*, they will always be dwarfed by the vast flow of funds available to

drug traffickers. The annual retail takings of the illicit drug industry are estimated to be on the order of U$400 billion, equivalent to about 8% of total world trade at the end of the 1990s (Lima 2009).

Similar figures for the value of the illegal drug trade are mentioned by Nutt (2012), according to whom its annual turnover amounts to about £300 billion or 1% of the world economy, in which it is the second-largest industry, losing only to the oil industry.

It goes without saying that when such a vast amount of cash corresponding to 1% of the global economy is handled by criminal organizations who use a wide array of front companies, tax havens and even entire countries to make it appear legal, it does serious harm to the international financial system, which is already volatile owing to inherent speculation and doubly so thanks to its submission to the nefarious interests of drug traffickers.[51]

Following the same central thread, several scientific studies show that the greater the investment in combating the drug trade, the riskier and more profitable it becomes. In this sense, the expansion of the *war on drugs* almost always leads to a rise in the number of people who are willing to take the risk in exchange for the profit to be made. One such study is worth quoting at length:

> The present systematic review suggests that drug law enforcement interventions are unlikely to reduce drug-related violence. Instead, and contrary to the conventional wisdom that increasing drug law enforcement will reduce violence, the existing scientific evidence strongly suggests that drug prohibition likely contributes to drug market violence and higher homicide rates. On the basis of these findings, it is

[51] "Drugs money is laundered through front companies and tax havens, and then integrated back into the mainstream banking system so that criminal organizations can have access to 'legitimate funds'. A number of different techniques are used, such as small-scale electronic transfers and false invoicing: it's been estimated that in Panama there is a £1 billion gap every year between money entering and goods exported, with the difference plugged with the proceeds of various sorts of crime, primarily drug trafficking" (Nutt 2012, 276).

> reasonable to infer that increasingly sophisticated methods of disrupting drug distribution networks may increase levels of drug-related violence.
>
> The association between increased drug law enforcement funding and drug market violence may seem counter-intuitive. However, in many of the studies reviewed here, experts delineated certain causative mechanisms that may explain this association. Specifically, research has shown that by removing key players from the lucrative illegal drug market, drug law enforcement may have the perverse effect of creating significant financial incentives for other individuals to fill this vacuum by entering the market. (Werb, et al. 2010, 15)

While drug law enforcement has intensified, the production of banned drugs has become simpler, more rational, and considerably cheaper. Expertise in producing, refining, adulterating and distributing these drugs has developed far more swiftly than law enforcement methods and resources. More importantly, the profit margin on production, smuggling and distribution has enabled a small group at the top of the drug traffic pyramid to make a fortune, especially in countries with governments weakened by conflict or corruption. And, of course, the global ban on drugs has provided a financial basis for organized crime (Woodiwiss 2005).

It can safely be concluded, therefore, that the criminalization of illicit drug production and distribution has not had the promised effect of reducing supply.

It has also failed to reduce demand, albeit for different reasons. Not even making users into criminals has stopped more and more of them from buying narcotics.

In a column written for the *Washington Post,* George Will (2009)[52] quoted *The Economist*'s estimate that more than 200 million people, or about 5% of the world population, are users of illegal drugs. The percentage

[52] George Frederick Will is a writer, journalist and columnist. He won the 1977 Pulitzer Prize for Commentary and was called the "most powerful journalist in the US" by the *Wall Street Journal* in 1986 (D'Evelyn 1986).

is exactly the same as in the 1990s, despite the US$40 billion spent by the US government every year on controlling illicit substances in its own territory and those of other countries. According to the same author, 1.5 million US citizens are arrested annually for drug-related offenses and half a million are sent to prison:

> *The Economist* magazine says this means that more than 200 million people - almost 5 percent of the world's adult population - take illegal drugs, the same proportion as a decade ago. The annual U.S. bill for attempting to diminish the supply of drugs is $40 billion. Of the 1.5 million Americans arrested each year on drug offenses, half a million are incarcerated. 'Tougher drug laws are the main reason why one in five black American men spend some time behind bars,' the *Economist* said in March. (Will 2009)

Indeed, between 1998 and 2008, a period when international repression of the drug trade became particularly intense, the number of consumers of opium-derived substances rose 34.5% from 12.9 million to 17.35 million, the number of cocaine users rose 27% from 13.4 million to 17 million, and the number of cannabis users rose 8.5% from 147.4 million to 160 million (Global Commission on Drug Policy 2011).

Thus, repression and criminalization do not correlate with drug use. Citizens subject to tough laws that make criminals of drug users do not consume less than those subject to more flexible laws that do not define drug use as a crime. Not even cultural differences explain this phenomenon.

In defending this idea, Will (2009) refers to the examples of Sweden and Norway, which can be said to have the same cultural trait regarding respect for legality. Although Sweden's anti-drug laws are tougher, and Norway is far more liberal, their rates of illicit drug use are the same. Moreover, he notes, the most striking progress in curtailing drug use has been achieved precisely with regard to tobacco, a drug with far more addictive power than illegal substances.

Nor can decades of prohibition and criminalization be said to have reduced the harm caused by or related to drugs. The priority given to repressive action against users has the negative effect of hindering access to public health measures capable of minimizing the number of deaths from drug-related diseases, such as contamination by HIV, and from drug overdoses, as well as other problems inherent in drug addiction. Insisting on ineffectual action to repress and criminalize drug use wastes a huge amount of public money that could be invested in action to reduce demand and address the harm done by drugs (Global Commission on Drug Policy 2011), as is the case with alcohol and tobacco.

A similar conclusion is drawn by Nutt (2012), according to whom millions of injectable drug users are infected with HIV and just as many are at risk of being infected by the virus. Preventive measures, such as distributing disposable needles, for example, cannot be introduced in several countries because of the prohibition of these very drugs and the criminalization of their users. Criminalization is intended to mitigate the damage inherent in drugs but has produced the opposite effect.

This discussion about the consequences of the *war on drugs* is not recent. The above conclusions are identical to those of the *Wickersham Commission* (1929-31) set up by US President Herbert Hoover to evaluate law enforcement in the Prohibition era. The experience of the ban on alcohol in the historical context of the 1920s and early 1930s can and should serve as a parameter for the *war on drugs*:

> The constant cheapening and simplification of production of alcohol and of alcoholic drinks, the improvement in quality of what may be made by illicit means, the diffusion of knowledge as to how to produce liquor and the perfection of organization of unlawful manufacture and distribution have developed faster than the means of enforcement. But of even more significance is the margin of profit in smuggling liquor, in diversion of industrial alcohol, in illicit distilling and brewing, in bootlegging, and in the manufacture and sale of products of which the bulk goes into illicit or doubtfully

> lawful making of liquor. This profit makes possible systematic and organized violation of the National Prohibition Act on a large scale and offers rewards on a par with the most important legitimate industries. It makes lavish expenditure in corruption possible. It puts heavy temptation in the way of everyone engaged in enforcement or administration of the law. It affords a financial basis for organized crime. (National Commission on Law Observance and Enforcement 1931, 92)

As a result of its inherent criminalization, even though it has consumed at least US$1 trillion, cost the lives of hundreds of thousands of people and incarcerated millions, the *war on drugs* can be said not to have reduced the supply of narcotic substances considered illicit or the demand for drugs or the damage caused by drugs:

> [...] punitive approaches have unequivocally failed in their goal to extinguish the market. Worse, these approaches have led to devastating health and social consequences for people who use drugs, other actors in the drugs trade and wider society. On a daily basis, significant human rights abuses are carried out in the name of drug control, from the use of the death penalty and extrajudicial killings, to torture, police brutality and inhumane drug treatment programs. (Global Commission on Drug Policy 2016, 11)

Nevertheless, despite the evident failure of criminalization embodied in the *war on drugs*, society and global and national policymakers remain extremely reluctant to acknowledge the bankruptcy of the repressive strategies deployed and to discuss more efficient and humane alternatives. A methodological review is an urgent necessity. It should start with recognition that the drug problem is a set of interlinked health and social challenges to be managed rather than a war to be won (Global Commission on Drug Policy 2011).

4 SUBMITTING THE CRIMINALIZATION OF DRUGS TO THE PRINCIPLE OF PROPORTIONALITY

Having explored the *principle of proportionality* in its four dimensions,[53] and the *war on drugs* in its three phases, I must now submit the legislation that criminalizes drugs to the reasonableness test in order to appraise its constitutionality.

As already noted, criminalization, especially of trafficking, is the crux of the *war on drugs*, so that testing the constitutionality of the legislation on which criminalization is based means testing anti-drug policy as a whole.

The test will not be applied to any specific laws (be they Brazilian, American, Italian or whatever), but in general,[54] so as to serve as a parameter for future scientific studies with a more specific focus. Nor will it be confined to a specific type of criminal offense in isolation (drug consumption, for example), but it will encompass the entire complex of drug-related proscribed and criminalized behaviors, from drug use all the way (and above all) to drug trafficking.

[53] The three classical elements (*necessity*, *suitability*, and *proportionality in the narrow sense*) and the fourth proposed herein (*less social offensiveness*).
[54] Not least because the laws that ban drugs in almost all countries are highly similar because they are based on the international treaties referring to drug control.

4.1 THE UNFITNESS OF DRUG CRIMINALIZATION

As we have seen, whether a law is fit or *suitable* to achieve the proposed ends, as an element of proportionality, is the first consideration when testing it for constitutionality.

To be fit for purpose or *suitable*, a law must make a connection, grounded in proven hypotheses regarding empirical reality, between the state of affairs produced by intervention and the state of affairs in which the law can be deemed to have achieved its purpose. Any measures taken by the state that do not entail such an empirically provable connection are considered disproportionate and hence unconstitutional (Dimoulis & Martins 2011).

Thus, the starting-point for verifying the constitutionality of the *war on drugs*, embodied in the criminal laws that ban narcotics and grounded in the philosophy of criminal law for the enemy, is the investigation of its practical results. This is equivalent to asking whether criminalization of drugs has delivered the intended result.

The result to be considered is protection of public health and safety, the legal and constitutional goods that the criminal laws in question are intended to safeguard. It bears repeating that a criminal law is deemed *suitable* if it is capable of protecting the fundamental legal good it is designed to safeguard, given that criminal laws should be considered a means, a last resort, to protect constitutionally guaranteed legal goods, and not an end in themselves decoupled from any practical purpose.

This assessment must be based on the way society has received the law that bans drugs.[55] In other words, its basis is the outcome of the *war on drugs*. Assessing proportionality through a prognostic judgment, which is

[55] While allowing prognostic analysis, Mariângela Gama de Magalhães Gomes (2003) argues that the *suitability* of a law is assessed in terms of how the law is received by society as demonstrated by the extent to which people's behavior conforms to the values it expresses.

typical of legislative action, is unnecessary in the context of prohibition: a century of experience in combating illicit substances is surely sufficient for a concrete analysis, making abstract considerations irrelevant.

Thus, if it can be shown that by banning drug use, production and trade criminal laws have served to mitigate the ills caused by drug consumption, then the laws will be proved *suitable*. Conversely, if the laws are shown to be useless to achieve protection of the constitutional good they are intended to protect, then it must be concluded that they are not fit for purpose or suitable[56], and that they are therefore disproportionate and unconstitutional.

Criminalization of narcotics, the legal basis for the *war on drugs*, aims to protect public health and safety in three ways: (1) by reducing the supply of narcotic substances considered illicit; (2) by reducing demand for drugs; and (3) by mitigating the damage done by drugs. Thus, the analysis of its utility necessary to assess its *suitability* must be systematized in accordance with this compartmentalization. Similarly: "Drug policies must be based on solid empirical and scientific evidence. The primary measure of success should be the reduction of harm to the health, security and welfare of individuals and society" (Global Commission on Drug Policy 2011, 5).

As noted in the previous chapter, despite having consumed at least a trillion dollars, cost the lives of thousands of people and incarcerated millions, the criminalization in which the *war on drugs* is grounded (1) has not reduced the supply of narcotics, (2) has not reduced demand for drugs, and (3) has not mitigated the damage done by drugs. A similar argument is presented by Nutt (2012, 280):

> After forty years, thousands killed, millions imprisoned, and $1 trillion spent (or $2.5 trillion depending on who you ask), we are still no closer to controlling either the supply- or demand-side of the illicit drug trade. Government

[56] Criminal laws are legitimate only if their intervention is shown to be useful (Mir Puig 2002).

> interventions on the supply side are seen as a cost of business, like a tax rather than a serious threat; and the billions spent on DARE programs and locking up users haven't stopped the inexorable rise of drug use in most parts of the world. In its own terms, the War on Drugs has failed, and the evidence shows it was also the wrong strategy for harm reduction. The intentional and perverse effects of the war have spread disease, held back medical research, brought the law into disrepute, and ruined the lives of millions.

Besides failing to achieve its aims to date, there is no prospect that in the near or distant future the criminalization of drugs will fulfill its constitutional mission of protecting public safety and health.[57]

Since the 1950s, when the United Nations implemented a global drug prohibition system, much has been learned about the nature and patterns of drug production, distribution, use and dependence, and about the effectiveness of attempts to reduce these problems. It is perfectly understandable that over half a century ago the architects of the system would place faith in the concept of eradicating drug production and use (Global Commission on Drug Policy 2011). The limited evidence available at the time perhaps justified a prognostic assessment in favor of the utility of that criminalization and hence the *suitability* argument.[58]

However, experience has unequivocally shown the failure of the strategy of criminalizing drug use and distribution, so that a concrete

[57] "Ignoring tobacco and alcohol for the moment, a unitary enforcement approach might be considered a reasonable social policy for illicit drugs if it had any realistic hope of success. However, it does not. Despite spending many resources on eliminating illicit drugs, very little evidence that we have any chance of winning the "War on Drugs" exists. The record is long and dismal – failure. But it doesn't have to be that way. Some alternative strategies have a much greater chance of success than the current ones" (Rowe 2006, 197).

[58] An important aspect of prognostic assessment is its limits, since it is impossible during the lawmaking process to foresee all the outcomes of criminal laws, which are fated to adapt to society over time. The sticking-point of the question is the possibility that lawmakers are mistaken about the outcomes of their analysis and the consequences of their errors for assessment of the laws' proportionality (Gomes 2003).

assessment of its utility must necessarily conclude for its unsuitability, given that it has proved incapable of achieving its purpose. Thus:

> There is no excuse, however, for ignoring the evidence and experience accumulated since then. Drug policies and strategies at all levels too often continue to be driven by ideological perspectives, or political convenience, and pay too little attention to the complexities of the drug market, drug use and drug addiction. (Global Commission on Drug Policy 2011, 5)

As shown in a previous chapter, specifically the one about the results of the *war on drugs*, the greater the investment in combating the circulation of drugs, the riskier drug trafficking becomes and profit increases proportionally. In other words, intensification of the *war on drugs* almost always leads to a rise in the number of people willing to run the risk of trading in drugs in exchange for the profit to be made from the activity. Indeed, Gomes (2003) stresses that making the sale of drugs a crime merely restricts supply, increases the risk assumed by the seller and drives up the price of the banned substances. It might be supposed that rising prices would lead to lower sales, but experience shows that this is not the case: people continue to buy drugs even if they have to steal, for example, to pay the high prices charged.

Furthermore, as noted by Rowe (2006, 1784), the profits from the drug trade are so high that in the twisted minds of traffickers they compensate for the probability of a future jail sentence, and criminalizing an activity which is itself extremely risky does not sufficiently deter them from pursuing it:

> The profits in the drug trade are so high that paying for criminal acts with a prison term is part of the price that they figure into their personal equations up front. Second, drug criminals fear one another far more than they fear the police; the police have to give them due process, but other dealers will simply kill them. Third, where else can they make this much money? If the competitive business practices of their rivals

> (murder, extortion, and kidnapping) fail to deter the drug trafficker, what chance does a long jail term have? It would take prison terms of such lengths or other punishments insupportable in a democracy to have much of an impact on the typical drug dealer. (Rowe 2006, 1784)

Hence the law's unfitness for purpose. It has also failed to curtail demand for drugs. Banning drugs and criminalizing the user has not proved a suitable way to prevent people from buying them. Even though drug use is a criminal offense, 5.5% of the world's adult population use some illicit drug at least once a year.

Statistical evidence appears to show that the law's effects on drug users is the same as its impact on trafficking: investment in combating drugs is accompanied by a rise in consumption.

As noted earlier, in the period 1998-2008, when the international fight against drugs reached a peak, the number of users of substances derived from opium jumped 34.5% from 12.9 million to 17.35 million, the number of cocaine users rose 27% from 13.4 million to 17 million, and the number of marijuana users increased 8.5% from 147.4 million to 160 million.

In the same direction, Gomes (2003) points out that even the rising prices of drugs due to criminalization have failed to curtail demand, demonstrating once again the evident unsuitability of criminalization. A more detailed analysis of the activity of drug trafficking reinforces this argument, she continues. In order to understand what this type of offense involves, it is necessary to consider first of all that trade in general comprises voluntary transactions between sellers and buyers, and that both the former and the latter pursue satisfaction of their desire. Demand for a certain good may vary according to changes in one or more factors that influence economic relations, such as consumer preference or purchasing power, the price of the good itself or of substitute or complementary goods, its quality, and so on. Thus, demand elasticity is analyzed according to its mutability in

response to these variations. A rise in prices leads to a fall in demand only when demand is elastic. While people who are willing to pay a certain price for a car are normally unwilling to buy when the price suddenly doubles, in the case of certain goods, such as pharmaceuticals, salt or drugs, the desire to buy is so strong that price does not influence decisions.

Moreover, the factors that influence an individual's decision to start using drugs have more to do with fashion, peer influence and socioeconomic context than the legal status of drugs, the risk of detection or government prevention messages (Global Commission on Drug Policy 2011).

Even anti-drug campaigns in the mass media fail to achieve their intent. At best they are ineffective, and they may well be counter-productive.[59]

Just as it has failed to curtail supply or demand for illicit substances, the *war on drugs* has also failed to mitigate the damage done to health by abusive consumption. In this regard the outcome has been even worse and is in fact the opposite of the intended result.

According to Fernando Henrique Cardoso (2011), all the available evidence shows that punitive measures alone cannot reduce consumption however harsh they may be. Worse still, they have pernicious effects in many cases. For example, stigmatization of drug users, fear of the police and the risk of imprisonment make access to treatment more difficult.

As already noted, prioritizing repressive action against drug users hinders public health measures to reduce the number of deaths due to drug-related diseases (e.g. contamination by HIV) and overdoses, as well as other adverse consequences of addiction.

[59] See Davoli, Simon & Griffiths (2010, 437): "It would be naive to suggest that modern drug policies are solely directed by a cold assessment of the scientific evidence for effectiveness. Many examples can be cited to demonstrate that this is not the case – for instance, the investment of large sums of money in anti-drug mass media campaigns where there is growing evidence that this approach is at best ineffective, and at worst counter-productive".

Persisting with ineffective action, such as repression and criminalization, results in a huge waste of public money that could be used to fund effective action that would tend to reduce demand and drug-related harm.

Preventive measures, such as the distribution of disposable needles, for example, cannot be taken in many countries owing to the prohibition and criminalization of drugs.

Criminalization also has another severely harmful effect on users' health, which is to make consumption much more dangerous owing to the lack of control and regulation inherent in any clandestine or illegal activity. Not least among these hazards is the circulation of impure drugs and of narcotics that are often blended with substances that are even more dangerous to the human organism.

Thus, if the aim is to mitigate the harm done by drug use, legalization followed by regulation would be a *suitable* approach from a prognostic standpoint, instead of criminalization (O. H. Andrade 2016).

Regulation of drugs would result in real public health benefits. When users are obliged to buy drugs from unregulated sources, they never know exactly what they are receiving and cannot be sure of the potential effects of the substances they buy. A heroin addict may expect to obtain a package that is 20% pure, but receive one that is actually half or twice as pure. Calculating the dose for optimal effect becomes problematic (Rowe 2006).

Furthermore, when drug users buy heroin, for example, it is almost sure to have been adulterated with products that can be far more harmful. Last but not least, users may not have access to clean needles for injection, and this problem also represents a major health hazard, due not to the drug itself but to the ban on heroin and other drugs. If they were legalized and regulated, users could buy them from reputable pharmaceutical companies,

would know exactly what they were taking, and would no doubt have access to sterile modes of delivery (Rowe 2006).

It is also true that the key factors in the development of problematic patterns of use (addiction, related diseases, violence etc.) have more to do with childhood trauma or neglect, harsh living conditions, social marginalization and emotional problems (factors that cannot be suppressed by criminal law) than with moral weakness or hedonism (Global Commission on Drug Policy 2011).

Thus, the history of drug criminalization demonstrates its utter unsuitability as a means of protecting public health and safety, clearly showing the importance of the underlying moral argument to the continuation of the *war on drugs*, despite its complete failure.

Issues of an eminently moral nature may give rise to government measures tending to regulate drugs, inferences about the character of drug users, social disapproval and other such reactions, but can never be the raison d'être of criminal legislation.

Laws are of no use to punish immorality. They serve only to guarantee justice. Thus, they should be just rather than ethical. Prohibitionism is based on the moralism that "legitimates" the *war on drugs* as the result of an "ethical imperative", decoupling the nature of drugs from the social effects of their consumption (Pizano 2013).

The meaning of the word crime cannot be defined ethically. Its definition must be pragmatic. Thus Darrow (1922) defines crime as "an act forbidden by the law of the land, and one which is considered sufficiently serious to warrant providing penalties for its commission", adding that it "does not necessarily follow that this act is either good or bad".

The *ultima ratio* of criminal law is the protection of a constitutionally guaranteed good, not a mere value judgment (subjective, seasonal and territorial) about human behavior. The laws must be suitable

to afford the proposed protection. For this very reason, despite the taboos and sanctity that permeates discussion about drugs,

> Political leaders and public figures should have the courage to articulate publicly what many of them acknowledge privately: that the evidence overwhelmingly demonstrates that repressive strategies will not solve the drug problem, and that the war on drugs has not, and cannot, be won. Governments do have the power to pursue a mix of policies that are appropriate to their own situation, and manage the problems caused by drug markets and drug use in a way that has a much more positive impact on the level of related crime, as well as social and health harms. (Global Commission on Drug Policy 2011, 10)

Regardless of legalization or criminalization, people will continue to buy narcotic substances. Whether they will do so in a coffee shop (from a barista) or a ghetto (from a criminal sporting an AK-47) is a political decision.

In fine, it can safely be said that criminal laws banning everything about drugs from their use to their trafficking, and are the basis for the *war on drugs*, are unfit for purpose and for this very reason do not comply with the *principle of proportionality*.

4.2 THE UNNECESSARINESS OF THE CRIMINAL TREATMENT OF DRUGS

Strictly speaking, the conclusion that criminal law is not fit for purpose in this case and that it is therefore disproportionate should exhaust this investigation of its constitutionality, since its necessity has to be discussed in terms of the means considered suitable.

However, for present didactic purposes it is relevant to continue examining the reasonableness of the criminal treatment to which drugs are subjected in order to decide whether the criminal laws concerned embody

each element of the *principle of proportionality.* The next step is the analysis of their *necessity*.

Among all the suitable means to the ends the law is intended to achieve, only those that least impede the exercise of fundamental rights can be considered *necessary*. All other means, however respectable, must be considered unnecessary and hence disproportionate. If the lawmakers have chosen more onerous means than necessary, their choice must be considered unenforceable, hence disproportionate, and for this reason unconstitutional (Dimoulis e Martins 2011).

The element *necessity* establishes the idea that citizens are entitled to the least possible disadvantage and hence requires a demonstration that no other means less onerous to the individual could be used to achieve the ends concerned (Canotilho 1998).

Thus, any legal measure can be considered disproportionate if: (1) there is an alternative that is less costly to the individual; and (2) the alternative is at least as efficient as the more burdensome measure.

In the same direction, Cruz (2010) argues that demonstrating necessity requires first analyzing whether there are equally appropriate alternative means to contribute to the attainment of the constitutionally legitimate goal from all possible perspectives, especially effectiveness, timeliness and probability, and second verifying that the alternative and equally or more appropriate means will have a less negative impact on fundamental rights.

In the sphere of criminal law, the analysis of the element *necessity* is based on the constitutional requirement that the interest to be protected, the legal good to be safeguarded by the law, must be sufficiently important to justify a limitation of individual freedom in the collective interest.

As we have seen, this is because punitive intervention is the social control technique that most heavily constricts the citizen’s liberty and

dignity, so that the principle of *necessity* requires that it be used only as an extreme remedy (Ferrajoli 2006).

In this line of reasoning, albeit aligning *suitability* with *necessity* as they relate to the principle of minimum intervention, Bitencourt (2008) states that this concept, also known as *ultima ratio*, orients and limits the state's power to incriminate, establishing that the *criminalization* of any specific conduct is legitimate only if it is the necessary means to protect a specific legal good. If other forms of punishment or other means of social control prove sufficient to protect the good in question, then the criminalization of such conduct is unsuitable and unnecessary. If civil or administrative measures suffice to restore a violated legal order, they should be used instead of prosecution. Hence criminal law should be the *ultima ratio*, i.e. should be used only if other branches of the law are found incapable of providing adequate protection for goods essential to the lives of individuals and to society itself.

Only constitutionally valued goods, absolutely relevant to the fulfillment of fundamental rights, can be protected by means of criminal law. Moreover, it must be shown that the fundamental right in question could not be protected by any other mechanism than criminal law, which by nature is the *ultima ratio*.

As already noted, only when these two facets of *necessity* are combined can a criminal law be considered proportional. Thus a law that bans and criminalizes the sale of narcotic substances, as the legal basis for the *war on drugs*, is *necessary* only if (1) public health and safety, as goods protected by the law concerned, are shown to be among the goods protected by the constitution and essential to the full development of society; and (2) it is also demonstrated that these goods cannot be protected as efficiently by any other legal or administrative mechanism apart from incrimination (which is more burdensome to the individual).

Based on these premises, it can immediately be said, without any need for further reflection, that public health and safety are constitutionally guaranteed rights directly deriving from human dignity, and that the first criterion for the necessity of the law that bans and criminalizes drugs is met.

As for the second criterion, which requires the existence of a means less burdensome than criminalization and at least as efficient to mitigate the public health and safety problems caused by abusive consumption of drugs, a more detailed analysis is needed.

It is important to bear in mind that finding an alternative to the criminalization of drugs is no easy task. The problem lies not in proving the efficacy of other methods than criminal treatment of drugs, but in the ethical or moral bias that typically contaminates discussions and decisions relating to this topic.

In this regard, we should heed the warning voiced by Rowe (2006) that in the *war on drugs* actions justified by a moral position, such as harsh prison sentences for using or selling illicit substances, are considered effective while any rational possibility is rejected.[60] [61]

Similarly, Davoli, Simon & Griffiths (2010, 437) have this to say on the moral argument that pervades the discussion of drugs as distinct from the question of public health:

[60] "Many people agree that we are either losing or have already lost that war. Very few people suggest we are winning or have any realistic hope of winning it. The reasons for this are varied, but mostly it seems to be because we consistently confuse a moral stance ('let's get tough on drugs') with measures of effectiveness. Any action that supports a moral position, such as harsh prison sentences for using or selling an illicit drug, is seen as effective while any other possibility is rejected. The result is a social policy that leads us to pour money down a rat hole with no end in sight" (Rowe 2006, 164).

[61] This is due to the idiosyncracy of the legal system. It cannot be argued that as lived phenomena with all their nuances the laws produced by legislators are absolutely rational. This perception has significant implications regarding their effectiveness. The contradictions or internal paradoxes inherent in human beings create corresponding external contradictions, which have increasingly strong effects on society today, as can be seen from the exacerbation of necessity and violence. The law reflects these contradictions (Machado 2005).

> Interventions towards substance use and dependence have always been topics of discussion well beyond the public health arena. Ethical issues relating to the use of drugs have influenced the objectives and aims of interventions, both preventive and therapeutic. Indeed, the historical development of drug policy is often represented as an ongoing debate between a moral position in which drug use is portrayed as 'criminal' and 'deviant' and a public health position where drug users are seen as in need of treatment and help.

The moral bias underlying the criminalization of drugs results in an erroneous strategy of concentrating efforts on coercion[62] and repression,[63] at the expense of actions designed to address in a genuine manner the issues relating to public health and safety insofar as they are affected by the abuse of illicit substances.

This is why there have been so few experiences in which the state's frontline public policy moves in the opposite direction to, or even a different direction from, banning and criminalizing drugs.[64]

However, despite the scarcity of policies that focus on addressing the public health problems caused by drug consumption, the few that do exist are worth mentioning: they include syringe exchange,[65] medical treatment based on methadone and buprenorphine[66] (WHO, UNODC &

[62] Typical of enemy criminal law.
[63] Consisting of the *war on drugs.*
[64] The same concern is expressed by the Global Commission on Drug Policy (2011, 9): "With their strong focus on law enforcement and punishment, it is not surprising that the leading institutions in the implementation of the drug control system have been the police, border control and military authorities directed by Ministries of Justice, Security or Interior. At the multilateral level, regional or United Nations structures are also dominated by these interests. Although governments have increasingly recognized that law enforcement strategies for drug control need to be integrated into a broader approach with social and public health programs, the structures for policymaking, budget allocation, and implementation have not modernized at the same pace. These institutional dynamics obstruct objective and evidence-based policymaking. This is more than a theoretical problem – repeated studies have demonstrated that governments achieve much greater financial and social benefit for their communities by investing in health and social programs, rather than investing in supply reduction and law enforcement activities. However, in most countries, the vast majority of available resources are spent on the enforcement of drug laws and the punishment of people who use drugs".
[65] A program whereby used syringes are exchanged for new syringes.
[66] Substances that substitute for heroin with less risk to health.

UNAIDS 2012), and even heroin prescription, all of which are capable of mitigating the risk of death by overdose, HIV contamination, and other blood-borne infections (EMCDDA 2010).

Such programs derive from "harm reduction" policies, which focus not on combating drugs but on combating their consequences. Some states have gone further and decriminalized drugs at the user level. Europe has pioneered measures of this kind, which aim to reduce the harm done by drugs.[67]

Harm reduction policies prioritize the public health perspective, where the imperative is to reduce the immediate harm caused by abusive consumption of narcotic substances, but this does not mean the states that adopt such policies have relinquished coercion and repression to combat the supply of drugs.

[67] "From a European policy perspective, where Member States' domestic policies differ, the question of definition is an important one; or conversely, an important area for flexibility in interpretation. A fundamental position of current European drug policy is support for the international drug control conventions, and no European country would regard its policies as out of step with the leeway given to States to interpret their obligations in this respect. Harm reduction as mainstream in Europe is therefore viewed by policymakers as compatible with a balanced approach, which also includes support for vigorous supply reduction measures. This is not to say that policymakers have ignored the argument that harms can result from the drug control system. Recognition of this fact can be seen, for instance, in a shift in emphasis in which a distinction is now commonly made between those who traffic and trade in drugs, and those who consume them. It is reflected in policies that attempt to divert those with drug problems from the criminal justice system towards treatment or that introduce more lenient penalties for the personal use of drugs. These developments have, however, largely taken place within a policy debate on how the costs of drug control can be minimized and the benefits maximized. The reduction of harm is clearly part of this agenda, but this is usually implicit rather than explicit and harm reduction is most commonly discussed in the context of HIV risk reduction, not criminal justice policies. A strong argument can be made that the absence of an explicit common definition of what constitutes 'harm reduction' at the EU level has facilitated the mainstreaming of the concept against a background where there is considerable diversity in respect to national and local policies and actions. And when events have forced the adoption of a working definition the approach has usually been a relatively restricted one: for example, explicitly listing measures targeting HIV risk behaviour among drug injectors" (Davoli, Simon & Griffiths 2010, 438).

In fact, these measures do not represent a change of stance toward traffickers, which is a mistake.[68] Rather they represent a change of attitude toward users, who are treated as patients and may succeed in ridding themselves of the stigma of being criminals.[69]

However, although all the evidence demonstrates the efficiency of harm reduction policies, many governments still refuse to take such measures for fear of being perceived as complicit in or lenient toward drug use by improving the health of consumers. They prefer to persist with an illogical approach: "sacrificing the health and welfare of one group of citizens when effective health protection measures are available is unacceptable, and increases the risks faced by the wider community" (Global Commission on Drug Policy 2011, 5).

While harm reduction does not at present represent opposition to drug proscription and criminalization (the legislative measure whose necessity is investigated here), it can be considered an alternative that leads toward the same objective: mitigating the damage to public health and safety caused by the abusive consumption of narcotics.

If it is found that this alternative to criminalization is at least as efficient and effective as criminal laws that ban drugs, the latter must be considered unnecessary and hence disproportionate.

[68] Harm reduction policies could advance even further if they also considered traffickers worthy of alternative treatment instead of punishment as criminals. Mitigation of risks would be more significant if the sale of illicit drugs were treated, like their use, as a social problem that can be addressed outside the sphere of criminal law. Treating users as patients reduces the risks to individuals who consume drugs. If the state took the same approach to traffickers, it would be able to minimize the social damage due to drug-related crime.

[69] Although drug use continues to be considered criminal conduct in most countries with harm reduction programs.

4.2.1 Switzerland's harm reduction program

Switzerland provides the first example. In the late 1980s, consumption of injectable drugs grew alarmingly there, at the same time as the number of new HIV infections. The strategy chosen to mitigate this looming public health and safety problem was the engagement of the public health sector instead of the criminalization of users.

Until the advent of AIDS, Switzerland had a conservative drug policy based on criminalization and strong police repression targeting users and dealers (Killias & Aebi 2000), in the most quintessential embodiment of the *war on drugs*. With the advance of HIV/AIDS and inherent contamination via needle sharing by drug users, this coercive approach was replaced by action focusing on the health of addicts.

Although it did not decriminalize drug use or drug selling, the Swiss government created medically supervised safe injection rooms where users can consume their drugs without having to resort to traffickers or risk consuming impure drugs, and are offered the assistance of social workers. In the same location the authorities distribute disposable syringes, and since 1992 addicts who meet certain conditions can take prescription heroin treatment. All this reduces the risks inherent in drug consumption.

Switzerland's harm reduction program relating to injectable drugs used a low-threshold strategy under which few constraints were imposed on users of the treatment and other services offered by the program. For example, they were not required to stop consuming any particular drug in exchange for admission to the program, although abstinence was one of its goals.

Heroin substitution and prescription[70] had a significant impact on demand for illegal heroin because the program focused on especially

[70] Heroin prescription usually works better than substitution with methadone, which is safer but does not give pleasure and hence does not satisfy psychological dependence.

problematic users, i.e. heavy consumers representing 10%-15% of the total but accounting for a substantial proportion of the demand (30%-60%). Demand for other drugs also fell as a result of the program.[71]

Indeed, police records show that the numbers of patients in the program who were contacted by the police for use or possession of heroin during the first six months of treatment decreased by 68% in comparison to the six months preceding the treatment. When the comparison is extended to periods of 24 months before and after admission to the program, the decrease is 71% (Killias & Aebi 2000).

The same decrease was observed even with regard to cocaine (not part of the substitution or prescription policy). Individuals who did not use cocaine over the previous six months represented only 15% of the heroin users in the program, but the proportion increased progressively to 28% six months after admission, 35% after 12 months and, finally, 41% after 18 months (Killias & Aebi 2000).

About 43% of the heroin addicts in the program admitted to hard drugs trafficking in the six months prior to admission. This dropped to 10% during the first six months of treatment and to 6% during the last twelve months (Killias & Aebi 2000).

Killias & Aebi (2000, 96) conclude their scientific study of the results of the Swiss harm reduction policy by stressing that the prescription heroin program removed addicts from the market and tended to reduce their

[71] These facts are reported by Killias & Aebi (2000, 88): "Since heroin substitution tends to reach especially problematic users, i.e., heavy consumers, and assuming that 3,000 addicts represent 10% to 15% of Switzerland's heroin users, it does not seem unrealistic to speculate that they may account for 30% to 60% of the demand for heroin on illegal markets. [...] The question arises as to how the market will react to a drop in demand of such proportions. One possible strategy might be to promote new drugs, or those which are currently less popular in Switzerland, such as cocaine. It is difficult to assess whether such strategies will be successful, as displacement effects are always hard to study, whatever the offense to be prevented and the possible 'alternative' crimes might be. The data collected so far tend to show, however, a decline not only of nonprescribed heroin consumption, but also of other illicit drugs".

need to engage in criminal activities associated with the market for illegal drugs:

> The Swiss heroin prescription program was targeted at hard-core drug users with very well established heroin habits. These people were heavily engaged in both drug dealing and other forms of crime. They also served as a link between importers, few of whom were Swiss, and the primarily Swiss users. As these hard-core users found a steady, legal means for addressing their addiction, they reduced their illicit drug use. This reduced their need to deal in heroin and engage in other criminal activities. Thus, the program had three effects on the drug market:
>
> It substantially reduced the consumption among the heaviest users, and this reduction in demand affected the viability of the market.
>
> It reduced levels of other criminal activity associated with the market.
>
> By removing local addicts and dealers, Swiss casual users found it difficult to make contact with sellers.

Despite the progress achieved by such public programs in Switzerland, in 2004 its parliament rejected the decriminalization of cannabis and in a 2008 referendum its voters approved making the heroin program permanent, but rejected the decriminalization of cannabis.

4.2.2 Prevention through diversification in the United Kingdom

In 1999, the United Kingdom implemented a public policy to prevent the use of narcotic substances via a program that offers treatment for dependence to problematic drug users who have committed crimes instead of a prison sentence. Repeat offending has fallen as a result.

The number of offenses committed by the addicts admitted to the program fell 48% in the year after starting treatment compared with the year before starting treatment (Millar, et al. 2008).

The treatment reduces the prison population by converting convicts into patients of the health services. While the prison sentence for some crimes cannot be commuted, part of the sentence can be served on parole on condition that the offender enrolls for the treatment program.

Measures of this kind can be considered a viable alternative, coinciding with what Roxin (2001, 466) defines as "diversification". According to him, where decriminalization is impossible (e.g. burglary) the drawbacks of criminalization can be avoided by means of alternatives to formal conviction by a judge. Such methods of diversification are frequently used Germany, where both judges and prosecutors can close a case or abandon prosecution if the offense is deemed minor and prosecution is not in the public interest. This can be done even in cases involving offenses of medium gravity, provided the defendant provides services of use to the community, such as donating to the Red Cross or redressing harm. These methods of diversification are currently used in almost half of all German criminal cases and have considerably reduced the amount of prison sentences. This kind of response to crime is likely to be a key element of criminal law in future.

In sum, the alternative approach used in the UK, consisting of treatment instead of a prison sentence with the aim of mitigating the effects of addiction, resulted in a reduction in drug-related crime, in the prison population and in public spending on criminal prosecution. It therefore proved effective as a measure to protect public health and safety.

4.2.3 Risk reduction in the Netherlands

Many people believe Dutch public policy on drugs is in the forefront of decriminalization and should be considered paradigmatic, but in fact this is not the case. Marijuana is the only drug banned by the international community that can be sold in the Netherlands, and even so only by licensed venues (coffee shops) and only in small amounts.[72] All other forms of dealing in this drug remain a criminal offense. Thus, it cannot be said that marijuana has been legalized in the Netherlands.[73]

The Dutch policy on drugs is in fact similar to the Swiss policy and in many respects it is less liberal than Portugal's. Nevertheless, the alternative measures introduced by the Netherlands have resulted in significant progress for public health and safety.

The Dutch harm reduction program encompasses needle or syringe exchange, prescription of methadone and heroin to treat dependence, drug consumption rooms, and medical supervision.

Prescription of heroin as part of the treatment program has cut the amount of petty crime, reduced disturbances of public order, and had positive effects on the health of people who want to overcome heroin dependence (Global Commission on Drug Policy 2011).

The program does not prescribe cocaine or entail any treatment for cocaine addicts. As a result, cocaine consumption is slightly higher than the European average: about 5% of adults in the Netherlands have used cocaine and 2% have done so recently. In the US about 14.5% of the population aged more than 12 have used cocaine at least once.

[72] Coffee shops are not allowed to sell more than 5 grams of marijuana to the same person at any one time, or to sell other drugs, or to sell to tourists or under-18s.
[73] For example, possession of marijuana outside a licensed venue is an offense for which the penalty is a fine.

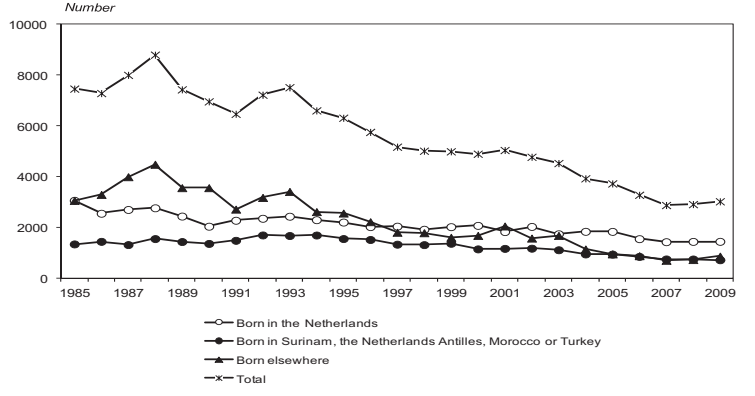
For a comparative picture of the situation in the Netherlands regarding consumption of cocaine by adults aged 15-64, we can turn to the following survey by the Netherlands National Drug Monitor (2011, 64):

Table 1. Use of cocaine by adult population: comparison of Netherlands with other European countries.

Country	Year	Ever use	Recent use
Spain	2007/2008	8.3%	3.1%
Italy	2008	7.0%	2.1%
Ireland	2006/2007	5.3%	1.7%
The Netherlands	2009	5.2%	1.2%
Sweden	2008	3.3%	0.5%
Norway	2004	2.7%	0.8%
France	2005	2.6%	0.6%
Austria	2008	2.2%	0.9%
Portugal	2007	1.9%	0.6%
Finland	2006	1.1%	0.5%
Greece	2004	0.7%	0.1%

According to data published by the Netherlands National Drug Monitor (2011, 80), there has been a significant decrease in consumption of opioids, on which the Dutch harm reduction program focuses, especially in terms of the number of problematic users (addicts, diseased, violent or disturbed):

Graph 2. Problem opiate users in Amsterdam (1985-2009), by origin.



The effectiveness of the Dutch harm reduction program can also be seen if the number of problem users of "hard drugs"[74] is compared with those of other European countries, again according to the Netherlands National Drug Monitor (2011, 82):

Table 2. Problem users of hard drugs in European countries.

Country	Year	Number per thousand inhabitants aged 15 to 64 years	
		Central estimate	Lower limit - Upper limit[I]
U.K.	2003-2007	10.0	9.8 – 10.4
Italy	2007	9.8	9.5 – 10.1
Luxembourg	2007	7.7	6.5 – 9.9
Denmark	2005	7.5	7.1 – 8.0
Ireland	2006	7.2	6.2 – 8.1
Portugal	2005	-	4.3 – 7.4
Sweden	2007	4.9	-
France	2008	4.8	3.7 – 6.5
Finland	2005	4.8	4.2 – 5.5
Austria	2007	4.1	4.0 - 4.3
Norway	2008	3	2.1 – 3.9
Greece	2008	2.7	2.3 – 3.1
Germany	2008	-	1.8 – 2.5
Netherlands	2008	1.6	1.56 – 1.64
Spain	2006	1.35	1.3 – 1.4

The data presented above is important not only because it shows the progress achieved by the Netherlands compared with other countries in terms of numbers of consumers of hard drugs, thanks to its focus on treating dependence rather than incarcerating users, but above all in light of the number of problem users.

This is because the number of ordinary users, i.e. those who are neither addicted nor diseased, violent etc. in connection with drug use, is

[74] Under Dutch law, hard drugs are those that pose an "unacceptable risk" to society, such as heroin, cocaine, amphetamines, LSD and ecstasy.

less important than the number of problem users whose addiction is a direct burden for public health and safety.

Thus, any measure that reduces the number of problem users should be considered effective in combating the harm done by drugs even if produces an increase in the number of non-problem users.

Improvements have also come from the needle or syringe exchange program and medical prescription of methadone or heroin, which have significantly reduced HIV infection due to inadequate drug use.[75]

In sum, the Dutch harm reduction program has proved effective in cutting the number of opiate users, the damage to health caused by drug consumption, the number of overdose deaths[76] and the amount of HIV infection due to unsafe drug use. Moreover, by assuring adequate treatment of addicts, it has addressed the problem of addiction based on respect for human dignity.

Thus, although it is not a substitute for drug criminalization, the Dutch harm reduction policy can legitimately be considered a more effective approach than criminalization.

[75] "The second source of data on HIV is the Amsterdam Cohort Study. In this longitudinal study, a sharp drop has been found over the past 20 years in the percentage of HIV positive drug users, in particular, young drug users (< 30 years old when included in the study). The incidence of new HIV diagnoses among ever injectors has dropped from 8.5 per 100 person years in 1986 to around 0 since 2000, with a slight rise in 2005, when two injecting drug users tested HIV-positive. Up to and including 2009, no new HIV infections were subsequently recorded […]. The decline in the transmission of HIV among drug users can be partially explained by the decline in injecting and needle and syringe sharing, although high-risk sexual behavior still occurs. The decline in new cases of HIV among drug users contrasts with a slight increase in cases of HIV seen among males who have sexual relations with males. Among this group, the sexual risk is still increasing […]. Participation in both easily accessible methadone programmes and needle exchange programmes reduces the chance of HIV (and Hepatitis C) infection" (Netherlands National Drug Monitor 2011, 91).

[76] The number of overdose deaths in the Netherlands is the lowest in Europe.

4.2.4 Decriminalization of drug use and harm reduction in Portugal

Drug consumption is banned in Portugal,[77] but the purchase, possession and consumption of any narcotic substance has ceased to be treated as the *ultima ratio* of criminal law since July 1, 2001, thanks to the passage of Law 030/2000.

This law (Portugal 2000) makes drug use, acquisition and possession for the holder's own use[78] a misdemeanor or administrative offense punishable by a fine. Cases are judged by a panel of social workers, psychologists and lawyers called the Drug Dependence Dissuasion Commission, attached to the Health Ministry.

The fine cannot be imposed if the offender requests assistance from public or private health services, and the treatment must be administered anonymously.

According to Fernando Henrique Cardoso (2011), when Portugal decriminalized drug use it operated a paradigm shift by opting for an effective civic policy based on respect for human dignity, instead of persisting with ineffectual if not counterproductive repressive measures.

The logic of Portugal's option for decriminalization matches the proposal formulated by Roxin (2001), according to which decriminalization makes sense from two vantage-points: (1) to eliminate criminal laws that are not required to maintain social peace, applying only to behavior that affect morals, religion, political correctness or the offenders themselves without causing harm to society; (2) when the same degree of protection

[77] Legalization is not possible owing to the international treaties under which Portugal, like many other countries, is obliged to combat drugs. This conclusion can be found in Domosławski (2011).

[78] Defined as not more than the amount needed for an individual's average consumption in 10 days, which according to the law is 25 g for marijuana, 5 g for hashish, 2 g for cocaine, 1 g for heroin, and 10 pills for LSD or ecstasy.

cannot be achieved by other means, even if there is a possibility of harm to society.

Once drug use has been decriminalized, government can implement more vigorous programs for needle and syringe exchange, prescription of methadone as a substitute for heroin, psychiatric and psychological treatment, and social assistance.

While Switzerland adopted a low-threshold approach to admission to its harm reduction program, Portugal's was even more effective thanks to decriminalization. When drug use is not a crime, users do not feel intimidated or forced to seek help from the state even when all they want is methadone prescription and they have no intention of being cured of their addiction.

This is why larger numbers entered the harm reduction program in Portugal than in the Netherlands or Switzerland: in 2010, for example, some 40,000 addicts submitted to treatment under the program (Domosławski 2011).

As a result, although the number of adult drug users rose moderately overall in Portugal, the alternative measures succeeded in reducing the numbers of drug-related crimes committed by problematic and teenage users, expenditure on law enforcement, prisons and lawsuits, deaths relating to opiate use and infectious diseases, and demand for heroin (Hughes & Stevens 2010).

Another positive outcome of Portugal's harm reduction policy is the decrease in the number of people infected with HIV due to unsafe injectable drug use. In 2000 there were 2,758 new diagnoses of HIV infection, of which 1,430 (52%) were in drug users, compared with 1,774 and 352 (22%) respectively in 2008 (Domosławski 2011). The downtrend has continued since then.

It is also important to note the behavior of demand for drugs following the decriminalization of consumption. The number of users was

expected to rise significantly but this did not happen. There was a moderate increase for most drugs (Malinowska-Sempruch 2011) and even this growth was basically confined to adults (Hughes & Stevens 2010).

The small growth in drug consumption in Portugal, after drug use was decriminalized, is no different from the reality in other European countries where drug use is still a crime, showing that Portugal's legal innovation not only represented an advance in the prison and judicial spheres, but was not responsible for a material increase in drug consumption.

This is what can be deduced from the next table, taken from a study by Hughes & Stevens (2010, 1007) in a comparison of drug use by individuals aged 15-64 in Portugal, Spain and Italy for the period 2011-07.

Table 3. Percentage of adult population in Portugal, Spain and Italy who used drugs in 12 months prior to survey, 2001 and 2007

Drug	Nation								
	Portugal			Spain			Italy		
	2001	2007	Change	2001	2007	Change	2001	2007	Change
Hashish	3,3%	3,6%	0,3%	9,7%	10,1%	0,4%	6,2%	14,6%	8,4%
Cocaine	0,3%	0,6%	0,3%	2,2%	3,1%	0,5%	1,1%	2,2%	1,1%
Ecstasy	0,4%	0,4%	0%	1,9%	1,2%	-0,7%	0,2%	0,6%	0,4%
Amphetamines	0,1%	0,2%	0,1%	1,2%	0,9%	-0,3%	0,1%	0,4%	0,3%

The situation with regard to drug use is no different in other countries of the European Union. Decriminalization of drug possession for personal use in Portugal did not have a negative impact on rates of illegal consumption (Hughes & Stevens 2010).

It must therefore be recognized that in Portugal, the Netherlands, the UK and Switzerland alternatives to criminalization have proved more effective in protecting public health and safety than a complete ban on drugs under criminal law, both achieving a better outcome and costing the state less while preserving fundamental rights.

4.2.5 The experience of Uruguay

To live is to experiment, said Uruguayan President José Alberto Mujica Cordano, popularly known as *Pepe Mujica*, with humor and probably intending a pun (BBC 2014), on legalizing marijuana in December 2013.

Although Uruguay's "experiment" is recent, so that accurate estimates of its effects on public health and safety are practically impossible, besides the fact that it is confined to marijuana, its approach deserves the world's attention and has proved a viable alternative to the policy of criminalizing and banning drugs.

Declaring that actions tending to protect, promote and improve public health through a policy designed to minimize risk and reduce the harm done by consumption of marijuana were in the public interest, and with the aim of providing adequate information, education and prevention of the harmful consequences and effects of drug use as well as treatment, rehabilitation and social reinsertion of problem drug users (Uruguay 2013), the state took over control (from drug traffickers) and regulation of the activities of importing, exporting, planting, cultivating, harvesting, producing, acquiring in any way, storing, selling and distributing cannabis and its byproducts, both directly and through licensed institutions.

The overt aim is to protect the citizens of Uruguay from the risks inherent in users' links to illegal dealers, seeking through state intervention to address the devastating public health, social and economic consequences of problematic drug use, and to reduce the incidence of drug trafficking and organized crime.

The law also established the Cannabis Regulation & Control Institute (IRCCA) to regulate the planting, cultivation, harvesting, production, processing, warehousing, distribution and sale of cannabis, and

to promote and propose actions tending to reduce the risks and harm associated with problematic use of the drug.

Home growing of marijuana therefore became legal as long as it was for personal or household use by over-18s. This was defined as up to six cannabis plants yielding a maximum of 480g per year.

The law also empowers the executive to authorize, and the IRCCA to control, user clubs with 15-45 members to grow up to 99 cannabis plants, with a maximum yield proportional to the number of members and in accordance with an agreement enabling non-medicinal use of a specified amount.

An important measure also included in the law (Uruguay 2013) is the licensing of pharmacies to sell marijuana for non-medicinal purposes, enabling users who are not able to or interested in growing the plant and are not members of licensed clubs to buy the drug legally.

The law prohibits all forms of recreational marijuana advertising, promotion, marketing and sponsorship.

The law's immediate effects were clearly perceived in Uruguay and included the end of marijuana trafficking, humanization and destigmatization of users, and less risk and harm associated with the use of this specific drug.

However, the overall impact on public health and safety, which are always sensitive in the long term, cannot yet be measured with scientific accuracy, above all because legalization is recent.

What can be averred without a shadow of doubt is that legalization of marijuana in Uruguay has not led to a significant rise in consumption of this drug. A recent study by Uruguay's National Drug Board (JND) (Uruguay 2015), an arm of the Office of the President, shows that 9.3% of the adult population had used marijuana in the previous 12 months (data for 2014) compared with 8.3% in 2011. This was the smallest increase in 14

years. Thus, the most serious argument against legalization, which is that use will increase, has not been borne out in the Uruguayan case.

It is therefore important that the international community and sovereign states keep a close eye on Uruguay's courageous experiment and learn from its new aspects to address the issue.

4.2.6 Alternative measures and their effectiveness compared with criminalization

As seen, any law that bans and criminalizes the sale and use of narcotics, as the legal basis for the war on drugs, will be *necessary* only (1) if it is demonstrated that public health and safety, which are legally protected goods, are among those constitutionally considered essential to the full development of society; and (2) if it is demonstrated that these goods cannot be protected as effectively by any administrative or legal means other than incrimination (which is more burdensome to the individual).

Considering that public health and safety are goods protected by the constitutional order, it is fitting to ask: Can these goods be protected by alternative means as effectively as by criminal law?

It should be stressed that the measures implemented by the Swiss, Dutch and British governments do not counter the criminalization of drug trafficking or drug use. As for the public policy implemented in Portugal, despite decriminalization of users, narcotic drugs are still banned and trafficking is still a crime. Decriminalization of marijuana in Uruguay is a specific experiment limited to a single drug, besides being very recent.

However, the results achieved by these countries demonstrate that it is possible to advance farther. Alternative harm reduction policies should be introduced not in parallel with criminalization but in opposition to and as a substitute for the criminal treatment meted out to drugs and drug users.

Although the alternative measures implemented in the four European countries in question to mitigate the public health and safety problems associated with unsafe drug use are timid and limited by the ban on narcotic substances, which necessarily remains in place,[79] they are more effective than criminal laws intended to achieve the same ends.

It can be concluded that the criminalization of drugs is less effective at protecting these constitutional goods (public health and safety) than harm reduction policies. They cost the state more in economic terms, cost the citizen more in penal terms, and do not achieve the same results. Experience has demonstrated this.

From the financial standpoint, the huge amount of economic resources expended owing to the *war on drugs*, whose legal basis is criminalization, could be channeled into prevention and treatment programs. Tackling the drug problem in the sphere of education has proved more productive than a retributive penal approach. Implementing risk reduction measures as opposed to criminalizing drugs is equivalent to guaranteeing human dignity.[80]

According to the same reasoning, with emphasis on human dignity it can be said that drug policies should be based on respect for human rights

[79] Because of international treaties.

[80] In this direction, Rowe (2006, 229) emphasizes economic efficiency: "[…] we should reapportion monies currently allocated to fight the 'War on Drugs' out of our current wasteful efforts at interdiction and into prevention and treatment programs. Interdiction involves eliminating the flow of illicit drugs, from the growing fields of the crops or the laboratories at which they are made to the user/purchaser on the street. We have not done a very good job at this and, in my opinion, we have no reason to think we ever will. Prevention, largely dependent on education, should be used to convince people not to experiment with dangerous drugs. Every potential addict who chooses not to start lessens the burden on society; this is surely the most efficient use of public monies. This approach also minimizes drug-induced damage. Providing adequately funded treatment for those who are already using drugs would also be far more productive in terms of reducing the impact of illicit drug abuse than would massive attempts at interdiction. After all, when fewer people use a given substance, the trafficking of that substance will decline naturally without any particular effort on the part of the public or law enforcement. In other words, attacking the demand side of the equation is likely to solve the interdiction problem, while continuing to spend heavily on interdiction is just wasting money".

and protection of public health. It is necessary to end the stigmatization and marginalization of people who use drugs and those involved in the lowest levels of drug cultivation, production and distribution. It is imperative to treat people with drug dependence (due to addiction or for economic reasons) as patients and not as criminals (Global Commission on Drug Policy 2011).

Continuing to think along these lines, with emphasis on rationality, Moratalla & Vallina (1996) argue that drugs are essentially a form of escape. Trying to separate people from drugs by means of repressive laws is an indirect solution. It would be more rational to reform the social structure, the vital archetype and the education of citizens to make the motivations leading to abusive consumption disappear. The same eminently personal motivations coincide in a large number of individuals, so that addiction can be seen as a social phenomenon. People seek alcoholic beverages as a consequence of their natural tendency to desire an artificial state of happiness, self-confidence, euphoria and well-being. Substances are at the service of humanity as a means of relief and social communication, a material source of dreams, and a necessary decoupling from quotidian ways of thinking and living.

It can also be averred, in prognostic mode,[81] that harm reduction programs would be far more effective in an environment of drug

[81] If *necessity* can be invoked prognostically to limit fundamental rights, the same is permitted in order to refute the use of criminal law if there is a measure that is less harmful to the rights of citizens.

legalization. If drugs are banned they cannot be prescribed for non-therapeutic purposes, even if such purposes are those of the state.[82]

Demand for drugs will always be met, either by dealers or by the government. Supply by the latter mitigates the risks inherent in consumption and affords an opportunity to treat addiction. Regulation, which already applies to alcohol and tobacco, is a less burdensome alternative than criminalization, even when applied more strictly. Control of production and distribution can also be an alternative to interdiction.

Regulation as an alternative proves more *suitable* than the clandestine consumption and distribution of drugs proper to prohibition (O. H. Andrade 2016). In this context, while acknowledging that legalization may increase the number of drug users and addicts, Rowe (2006, 2637) cites a survey conducted by the University of Maryland, also mentioned by Gray (1998, 291), according to which high-school students say it is easier to acquire marijuana than alcohol:

> One of the classic arguments against legalization is that if a drug were legal, then more and more people would use it. It is very difficult to refute this argument when we consider the widespread use of alcohol and tobacco. However, when we look deeper into that criticism, what seems to worry people most is that youths, or teenagers, will be using dangerous drugs at higher and higher rates, creating a nation of addicts. A partial answer to that particular argument is found in a survey done by the University of Maryland […]. High school students reported the most difficult drug to obtain was not marijuana but alcohol (not that alcohol is all that difficult to

[82] On this subject: "[…] many countries still react to people dependent on drugs with punishment and stigmatization. In reality, drug dependence is a complex health condition that has a mixture of causes – social, psychological and physical (including, for example, harsh living conditions, or a history of personal trauma or emotional problems). Trying to manage this complex condition through punishment is ineffective – much greater success can be achieved by providing a range of evidence-based drug treatment services. Countries that have treated citizens dependent on drugs as patients in need of treatment, instead of criminals deserving of punishment, have demonstrated extremely positive results in crime reduction, health improvement, and overcoming dependence" (Global Commission on Drug Policy 2011, 6).

> obtain). Why would marijuana be easier to get than a drug that virtually permeates our society? The answer is obvious: alcohol distribution is controlled through government-regulated businesses, but those who control the distribution of marijuana are not so constrained. (Rowe 2006, 2637)

However, decriminalizing drug use, production and marketing, or even considering criminalization and prohibition unconstitutional, requires reflection on the proportionality of the alternative measure proposed. This means asking whether legalization (or decriminalization) is likely to reduce demand, consumption and the associated risks.

Obviously, both legalization or decriminalization and finding unconstitutional any criminal law that bans drugs must take into account the consequences of lifting restrictions. In this case, proportionality is assessed prognostically, so that suitable and necessary measures can be taken to mitigate the problems caused by drugs, especially with regard to public health and safety.

It would not be in the public interest, especially as far as public health and safety are concerned, simply to legalize or decriminalize the consumption, production and selling of all narcotics without implementing alternative measures capable of effectively mitigating the inherent risks to a significant extent. In other words, regulation would have to be concurrent with decriminalization.

In this regard it is reasonable to point out that the international community and sovereign states have ample successful experience in controlling and regulating dangerous drugs without the need to ban or criminalize them. Alcohol and tobacco are the most evident examples.

Allowing free use of drugs currently deemed illegal could be accompanied by a series of restrictions, which even while limiting their use, production and sale would satisfy the *principle of proportionality*, as is already the case with alcohol and tobacco.

As for users, the consumption of drugs currently deemed illegal would be limited to the home or other private venues and banned in public or freely accessible places. Infringement of this condition would be classed as a misdemeanor or administrative offense. This type of limitation already applies to smoking, albeit less strictly and extensively.

It would be prohibited to perform certain activities while under the influence of narcotics, such as driving, working etc., and infringement of this rule would be punished with the same penalties as drunk driving, for example.

As for production and sale, the restrictions currently applicable to pharmaceuticals, alcoholic beverages and tobacco are suitable experiences for comparison when proposing a regulatory framework for decriminalized drugs.

Control of drug composition and purity could be based on the same parameters as those already used for pharmaceuticals. As is already the case with alcohol and tobacco, sale to children would be prohibited. And as is the case with cigarettes and some medications, advertising would not be allowed.

Production and sale in non-compliance with the rules would be prohibited, just as it is now for alcohol, tobacco and controlled medical drugs. However, as with alcohol and tobacco, it would not be a serious problem, given the discouragement of clandestine activity caused by the fall in prices due to free competition and legalization, which would rid this activity of organized crime.

Taxation could be based on that of the tobacco industry, which pays U$133 billion in taxes every year worldwide. Of this total, less than U$1 billion is currently used in anti-tobacco measures (WHO 2011). Taxes levied on legalized drugs would be entirely invested in harm reduction programs.

In fine, a comparison of the criminal laws that ban the use and sale of drugs to protect public health and safety with the alternative means at the state's disposal, already tried and tested (or at least proposed in detail), shows unquestionably that criminalization is unnecessary. The conclusion therefore is that the criminal laws are disproportionate and hence unconstitutional.

4.3 THE DISPROPORTIONALITY OF DRUG CRIMINALIZATION IN THE NARROW SENSE

According to Silva (2002), the element *proportionality stricto sensu*, which gives content to the eponymous principle, consists of weighing the degree to which a fundamental right is restricted against the importance of fulfilling the fundamental right that collides with it and serves as rationale for the restrictive measure concerned.

In the sphere of criminal law, the assessment of narrow or strict *proportionality* is pertinent to an investigation of the correlation between crime and punishment.

Proportionality in the narrow sense requires a judgment that weighs the relationship between the constitutional good that is endangered or harmed (gravity of the fact) against the good (liberty) of which someone may be deprived (gravity of the punishment). Whenever there is an imbalance in this relationship, then there is disproportion (Franco 2007). Proportionality must be judged by balancing the coerciveness of the punishment against the ends pursued by criminal law (Hassemer 1984).

This has two consequences: (1) the legislative branch must establish penalties that are proportional in theory to the gravity of the crime, if criminal laws are not to be considered unconstitutional; (2) the judiciary

must sentence convicted criminals to penalties that are proportional to the concrete gravity of the crimes committed (Franco 2007).

As already noted, this weighing of values must concern not only the good protected by the criminal law in question and the quantity of the punishment established in theory by the same law, but also proportionality *stricto sensu,* in a systemic interpretation of criminal law in which the types of crime, the goods protected by the respective laws and the respective punishments are mutually considered, in order to avoid disproportionality not only between a specific crime and its specific punishment but also between all crimes and punishment in the context of the entire system.[83]

It is also necessary to verify whether the type of conduct held in theory to be harmful to society is analogous to any other type of conduct that is equally harmful but not considered a crime. It would not be fair or *proportional in the narrow sense* for the law to treat analogous situations asymmetrically.

Thus, besides the ideal proportion between the gravity of the crime and the punishment applicable in theory, it is necessary to consider the penalties for crimes as part of a complex system requiring that they be weighed against other crimes, violated goods and penalties that are part of the legal order. Only thus can *proportionality in the narrow sense* be assessed.

In light of the above, it can be averred that the reasonableness of the law that criminalizes drugs deemed illicit is conditional upon (1) a demonstration that the punishment imposed in the abstract is proportional to the gravity of the harm done to society (public health and safety); (2)

[83] Beccaria (2009, 665) treats the subject as follows: "If two unequally harmful crimes are each awarded the same punishment, then would-be miscreants will not fear a worse punishment for the more serious crime and will tend to commit the latter if it holds greater advantage for them; and unequal distribution of punishments will produce the contradiction, which is as well-known as it is frequent, that the laws will have to punish the crimes they themselves have caused".

proof of this proportionality based on an analysis of other crimes and laws protecting legal goods within the same system; and (3) weighing or assessment of fairness by comparing the treatment in criminal law of other narcotic substances based on the potential harm intrinsic to each one.

To find out whether the first two conditions are met, it is necessary to analyze, albeit in the abstract, the specific law that criminalizes conduct relating to illicit drugs (possession for own use and dealing, for example) in the specific social context and the specific legal system of which it is part.

Thus assessing the proportionality *stricto sensu* of the law that penalizes the sale of drugs in Argentina, for example, entails first and foremost (1) analyzing whether the harm caused by selling drugs in that specific society is compatible with the punishment stipulated in the abstract by that specific law, and (2) analyzing Argentina's criminal law to weigh systemically the law penalizing drug dealing against the same country's other criminal laws, the penalties for other crimes and the legal goods protected in that country.

Such an assessment is evidently not pertinent to this book, which is about a far less specific subject, but the first two parameters can be investigated in future research of a more restricted nature.

As for the third condition, an assessment of *proportionality in the narrow sense* based on the principle of fair and equitable treatment, which means verifying whether the criminalization of drugs matches the risks inherent in such substances (legal and banned) is pertinent to the present scientific investigation owing to its general nature.

Because the *war on drugs* is uniform throughout the international community, almost all states ban the same drugs with few variations, and the list of narcotics considered illegal in Portugal is exactly the same as that in force in the US, Japan, India, Australia or Sudan.

Similarly, the risks inherent in each drug, legal or illegal, are practically the same in every society and culture. Crack is considered just as harmful to public safety in China and Sweden as in Brazil.

For this reason, a general analysis regarding the *proportionality in the narrow sense* of the criminal laws on which the war on drugs is based is possible using the above criterion, i.e. whether criminalization due to the harm intrinsic to drugs is fair and equitable.

Reasonableness requires, from the angle of *proportionality in the narrow sense*, that punishments be proportional to the harm done to society. With regard to the criminalization of drugs, this means penalties must have a certain relationship to the risks proper to narcotic substances by their very nature.

In other words, theoretically speaking the damage to society deriving from drugs justifies[84] their criminalization, while the extent of such damage affords a measure of the penalties. Each drug has its own harmful potential, so that criminalized drugs and the respective penalties must be weighed via a comparison with other drugs and their respective risks. Rowe (2006, 2403) puts it thus:

> The first step in deciding whether some substance should be legalized is to understand the actual effects of that substance. It is not going to be enough to understand how a given drug alters our mental state; we must also assess damage, both potential and actual, to the individual user and to the social structure. When looking at the user, we also have to remember that damage does not have to be restricted to physical damage—psychological, emotional, and even spiritual damage needs to be considered as well. Likewise, damage to society can cover a lot of ground, such as the impact of drugged drivers, disruption of the family, lost work days, health care costs, crime, etc.

[84] Abstracting the previous point relating to *suitability* and *necessity*.

Thus, the establishment in the abstract of similar penalties applicable to drug trafficking, even when the substances sold offer different levels of risk to society, does not meet the criterion of *proportionality in the narrow sense.* A law determining the same punishment for those who sell marijuana and those who sell heroin is not proportional.[85]

An even worse infringement of *proportionality* occurs when a criminal law bans a particular drug, while another narcotic substance is legal and merely subject to administrative control even though it is more harmful to individuals and society.

Given that some drugs are legal and others are banned and subjected to criminal treatment, it is necessary to verify the harmful potential of each one in order to analyze the proportionality in the narrow sense of the criminal laws applicable to some.

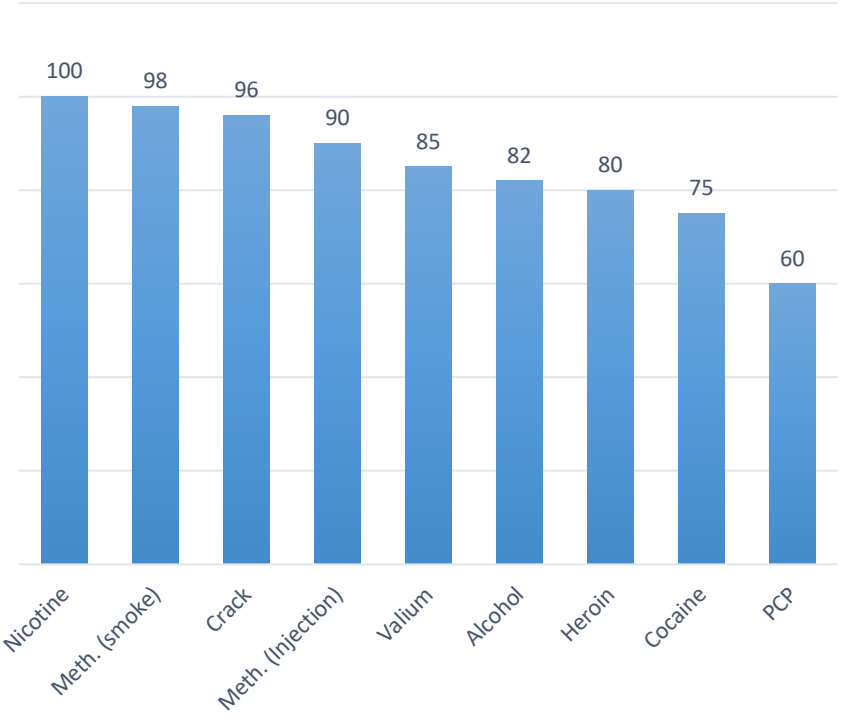
Several studies have been performed to measure all the kinds of damage drugs can do to individuals and society, some focusing on a single aspect and others expounding a broader analysis, but all appear to indicate the same results.

The potential to transform the user into an addict, for example, is one of the criteria most frequently used in scientific studies of the harm done by drugs and one of the arguments most often used to justify prohibition.

Hanson, Venturelli & Fleckenstein (2012) set out in a scientific study[86] to estimate the potential to cause psychological dependence[87] inherent in certain drugs (legal and illegal). The results are summarized in Graph 3.

[85] Considering that the harmful potential of opioids is far greater than that of cannabinoids.
[86] A description of the methodology used would not match the purpose of this section.
[87] Rowe (2006) argues that what genuinely determines the behavior of addicts in pursuit of a drug is psychological dependence rather than physical dependence.

Graph 3. Potential addictiveness of drugs (0-100)



* Marijuana, ecstasy, mescaline and LSD scored less than 20.

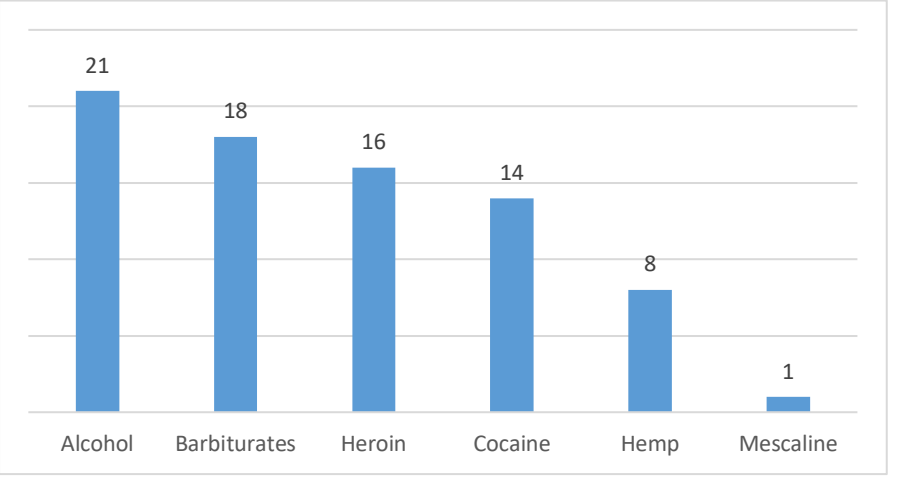
However, while the potential to make users dependent is one of the most relevant criteria in assessing the risks inherent in each drug, a more detailed investigation is required if other aspects are to be mutually weighed.

More than half a century ago, Seevers (1958) proposed a classification of drug risk based on six criteria: tolerance,[88] physical dependence, psychological dependence, physical deterioration, and anti-social behavior. Each criterion was rated 0-4, so that the risk inherent in

[88] In the sense of the amount of a given drug that can safely be tolerated by the human organism.

each drug was classified on a scale from 0 to 24. The results are summarized in Graph 4.

Graph 4. Risks inherent in narcotic substances (0-24)



The findings of Hanson, Venturelli & Fleckenstein (2012) and those of Seevers (1958) concern the harm suffered by drug users due to drug consumption. Both studies are significant contributions to knowledge of the risks intrinsic to drugs, but they do not materially influence the assessment of proportionality, because the damage or harm to be considered for the purposes of protection by criminal law is harm to society, not harm to the user. Self-harm should not be punished.[89]

Nevertheless, their findings are unquestionably relevant to the proportionality of legislative or administrative measures such as those governing drug control, regulation, taxation etc. They are also important because they demystify the ethical argument, given that some socially acceptable drugs (e.g. alcohol and tobacco) are more harmful than some banned drugs.

[89] At least not by criminal penalties.

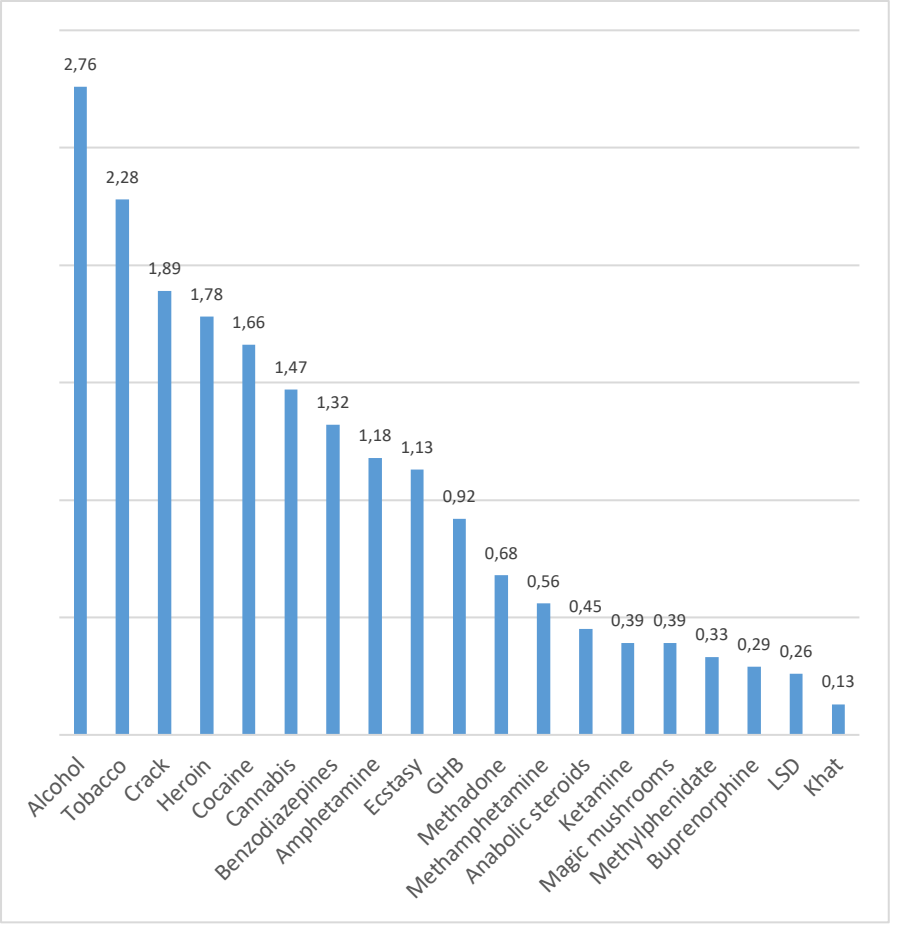
The most suitable parameters for present purposes, however, can be taken from van Amsterdam, Opperhuizen, Koeter & van den Brink (2010), who studied the individual and social harm associated with drugs. A group of 19 experts appraised the harmful effects of 17 illegal drugs and two legal drugs, with reference to technical data collected in the Netherlands and in the scientific literature, focusing on such criteria as acute and chronic toxicity, addictive potential, and social harm. The potential harmfulness of these drugs to individuals and society was rated on a scale from 0 to 3. The full results (van Amsterdam, et al. 2010, 204) are shown in Table 4.

Table 4. Mean scores given by 19 experts to assess the harmfulness of 19 drugs at the individual and population level.

	Mean harm score		Physical harm			Depen-dence	Social harm		
	individual level	population level	mean physical harm	acute toxicity	chronic toxicity		individual level	population level	difference
Crack cocaine	2.63	2.41	2.51	2.39	2.63	2.82	2.55	1.89	0.66
Heroin	2.53	2.30	2.20	2.37	2.03	2.89	2.50	1.78	0.72
Tobacco	2.20	2.27	1.71	0.53	2.89	2.82	2.06	2.28	-0.22
Alcohol	2.16	2.36	2.18	1.89	2.47	2.13	2.16	2.76	-0.61
Methamphetamine	2.06	1.67	2.11	2.03	2.18	2.24	1.84	0.56	1.29
Cocaine	2.06	1.93	2.00	1.95	2.05	2.13	2.05	1.66	0.39
Methadone	1.94	1.68	1.68	1.95	1.42	2.68	1.42	0.68	0.73
Amphetamine	1.84	1.64	1.80	1.71	1.89	1.95	1.76	1.18	0.58
GHB	1.53	1.32	1.32	1.84	0.79	1.71	1.55	0.92	0.63
Benzodiazepines	1.33	1.36	0.87	0.97	0.76	1.89	1.24	1.32	-0.08
Buprenorphine	1.31	1.00	0.99	1.21	0.76	1.71	1.24	0.29	0.95
Cannabis	1.19	1.26	1.18	0.84	1.53	1.13	1.26	1.47	-0.21
Ketamine	1.07	0.82	1.24	1.55	0.92	0.84	1.13	0.39	0.74
Ecstasy	1.06	1.03	1.34	1.34	1.34	0.61	1.24	1.13	0.11
Methylphenidate	0.85	0.69	0.88	0.92	0.83	0.86	0.81	0.33	0.47
Anabolic steroids	0.78	0.67	0.84	0.45	1.24	0.71	0.79	0.45	0.34
Khat	0.66	0.52	0.67	0.39	0.95	0.76	0.55	0.13	0.42
LSD	0.65	0.46	1.08	1.47	0.68	0.03	0.84	0.26	0.58
Magic mushrooms	0.40	0.31	0.51	0.89	0.13	0.03	0.66	0.39	0.26

In these results, the part relevant to the present analysis of *proportionality in the narrow sense* is the column dealing specifically with social harm to the general population, since as noted earlier the physical or social harm to the legal good experienced by the user should not be the object of protection by criminal laws. In this case, the results are as shown in Graph 5.

Graph 5. Potential harmfulness of drugs at the population level.



Thus, in the study cited, the substances that cause the most social harm to the general population are alcohol and tobacco, precisely those with legal status.

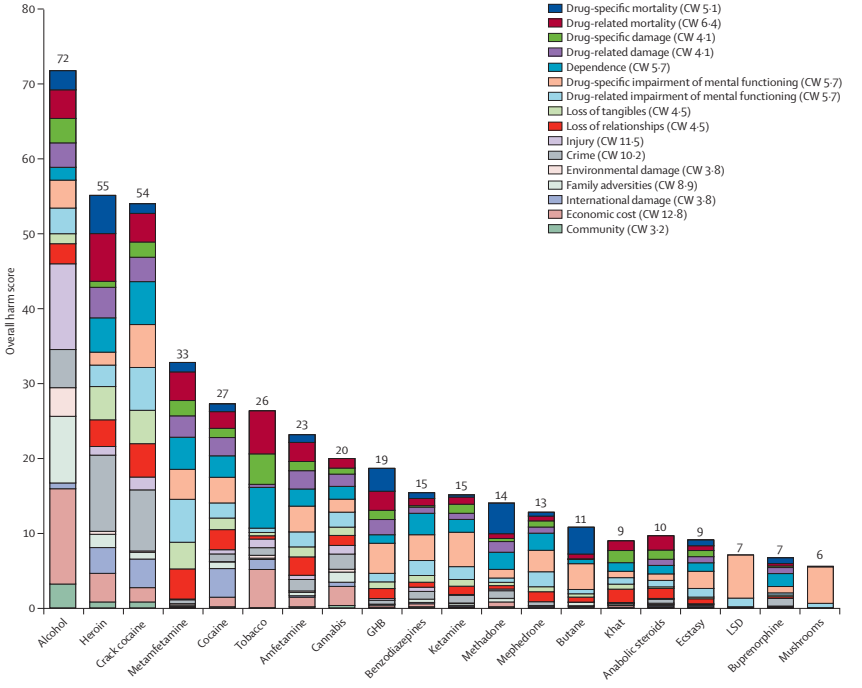
Also with regard to the harm intrinsic to drugs, another scientific study to be taken into account is Nutt, King & Phillips (2010), which used 16 criteria (nine at the individual level and seven at the population level) to estimate the risks inherent in 20 different types of drug.[90]

Scores assigned to each of these criteria with regard to each specific mutually considered drug were established using multi-criteria decision

[90] "Drug-specific mortality - Intrinsic lethality of the drug expressed as ratio of lethal dose and standard dose (for adults). Drug-related mortality - The extent to which life is shortened by the use of the drug (excludes drug-specific mortality)—eg, road traffic accidents, lung cancers, HIV, suicide. Drug-specific damage - Drug-specific damage to physical health—eg, cirrhosis, seizures, strokes, cardiomyopathy, stomach ulcers. Drug-related damage - Drug-related damage to physical health, including consequences of, for example, sexual unwanted activities and self-harm, blood-borne viruses, emphysema, and damage from cutting agents. Dependence - The extent to which a drug creates a propensity or urge to continue to use despite adverse consequences (ICD 10 or DSM IV). Drug-specific impairment of mental functioning - Drug-specific impairment of mental functioning—eg, amfetamine-induced psychosis, ketamine intoxication. Drug-related impairment of mental functioning - Drug-related impairment of mental functioning—eg, mood disorders secondary to drug-user's lifestyle or drug use. Loss of tangibles - Extent of loss of tangible things (eg, income, housing, job, educational achievements, criminal record, imprisonment). Loss of relationships - Extent of loss of relationship with family and friends. Injury - Extent to which the use of a drug increases the chance of injuries to others both directly and indirectly—eg, violence (including domestic violence), traffic accident, fetal harm, drug waste, secondary transmission of blood-borne viruses. Crime - Extent to which the use of a drug involves or leads to an increase in volume of acquisitive crime (beyond the use-of-drug act) directly or indirectly (at the population level, not the individual level). Environmental damage - Extent to which the use and production of a drug causes environmental damage locally—eg, toxic waste from amfetamine factories, discarded needles. Family adversities Extent to which the use of a drug causes family adversities— eg, family breakdown, economic wellbeing, emotional wellbeing, future prospects of children, child neglect. International damage - Extent to which the use of a drug in the UK contributes to damage internationally—eg, deforestation, destabilisation of countries, international crime, new markets. Economic cost - Extent to which the use of a drug causes direct costs to the country (eg, health care, police, prisons, social services, customs, insurance, crime) and indirect costs (eg, loss of productivity, absenteeism). Community - Extent to which the use of a drug creates decline in social cohesion and decline in the reputation of the community" (Nutt, King & Phillips 2010, 1560).

analysis (MCDA)[91] [92] and added up to obtain overall harm scores, as shown in Graph 6 (Nutt, King & Phillips 2010, 1563):

Graph 6. Drugs scored for harmfulness, by criterion and overall result



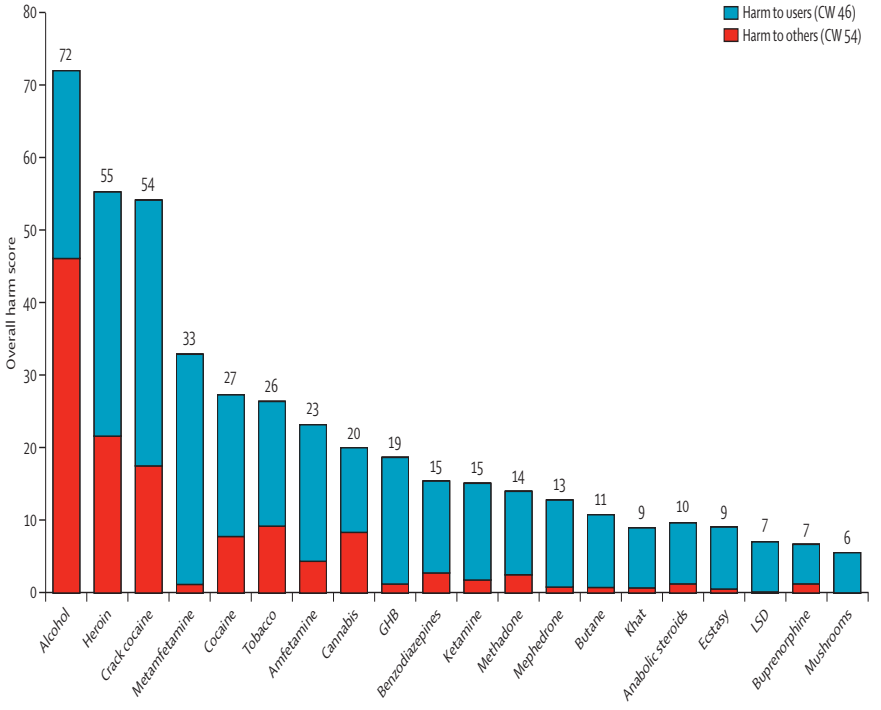
This graph plots the contribution of each of the 16 criteria to the overall harmfulness intrinsic to the drugs covered by the study. The next

[91] Multi-criteria decision analysis (MCDA) consists of a set of techniques to help decision makers (individuals, groups, committees of technicians or executives etc.) make decisions on complex problems by evaluating and choosing alternative solutions according to different criteria and vantage-points (Jannuzzi, Miranda & Silva 2009, 71).

[92] "Multi-criteria decision analysis (MCDA) is a technique often used in situations where a decision needs to take into account different sorts of information, and where there are so many dimensions that conclusions can't easily be drawn from simple discussion. MCDA breaks down an issue into different criteria, and then compares those criteria with each other to assess their relative importance. These criteria can include both objective measures and subjective value judgements, and can incorporate an element of uncertainty" (Nutt 2012, 35-36).

chart (Graph 7) shows the scores for the nine criteria used to estimate the harmfulness of the same drugs at the individual level (harm to users) and the seven criteria used to estimate their harmfulness at the population level (harm to others) (Nutt, King & Phillips 2010, 1561).

Graph 7. Drugs scored for harmfulness to users and society.



Considering harm at the individual and population levels together, alcohol and tobacco, both of which are legal substances, were the first and sixth most dangerous respectively out of the 20 drugs covered by the study.

Considering only harm at the population level, alcohol again came first (by an even wider margin in this case), while tobacco came fourth (ahead of cannabis, cocaine, ecstasy, methadone and LSD).

In fact, alcohol[93] and tobacco feature among the drugs that are most harmful to society in all the studies mentioned so far.

Even in terms of such criteria of potential harm to users as death and disease indirectly resulting from drug use, the numbers for alcohol and tobacco are high enough to configure harm to society in general.

For example, over 3% of worldwide deaths were alcohol-related in 2000 (Rehma, et al. 2003), and 6 million people die from tobacco-related causes every year, including 600,000 passive smokers (WHO 2011).[94] These numbers show that the harm done to users of these two substances cannot genuinely be distinguished from the risks they pose to society.

If two of the most harmful drugs to society are legal, it is even clearer that the prohibition and criminal treatment on which the *war on*

[93] Rowe (2006, 2427) is eloquent on the harmfulness of alcohol: "In sharp contrast to tobacco, alcohol damages society as much as it does individuals. It does so by producing dysfunctional family units, violence, accidents of all kinds, lost work days, and crime. Even public health care costs are much higher for alcohol problems. In addition to the great psychological damage produced by alcohol abuse, the physical damage is extensive as well. The diseases of alcoholism, added together, constitute the third leading cause of death in the United States. These include cirrhosis of the liver, gastrointestinal disorders (ranging from ulcers to a malabsorption syndrome that leaves one incapable of absorbing vitamin B from foods), pancreatitis, brain damage, and various cancers. Cirrhosis of the liver constitutes the eighth leading cause of death in the United States and the third leading cause of death in forty- to forty-four-year-old white males. Other sources cause liver disease, but it is likely that 80 percent or more of these deaths are due to excess alcohol consumption. Entire textbooks have been written on the problems of alcoholism and alcohol abuse. Despite all we know about the damages and dangers inherent in excess drinking, it seems very unlikely that we will return to prohibition. One primary reason for this is that the people who make and enforce the laws are just as likely as anyone else in the public to use this drug, and the majority of people not only use it to some degree, but use it safely without damaging themselves or others".

[94] Rowe (2006, 2414) has this to say on the harmfulness of tobacco: "Tobacco use causes great physical damage at the individual level. Everyone knows of the link to lung cancer. Research shows that tobacco use increases the risk of lung cancer by a factor of about 25:1 and probably causes 95 percent of all lung cancer deaths. It also increases the risk of most other cancers. One estimate is that 47 percent of all cancer deaths of whatever kind are caused by tobacco usage. More important, it is responsible for about half of all cardiovascular disease deaths on an annual basis. When added all up, smoking causes about 20 percent of adult deaths in the United States in addition to numerous nonfatal diseases (Leistikow, 2000). Health care for cancer, and cardiovascular and pulmonary diseases caused by smoking costs tens of billions of dollars per year".

drugs is based has to be rationalized in moral and political terms and cannot remotely be justified by the technical and scientific data available on the harmfulness of drugs of all kinds.

Criminalization is not based on the harm drugs cause to society but on society's moral perception of drugs. Alcohol and tobacco are legal for political reasons, not because they are inoffensive, which they most certainly are not. Similarly, banned drugs are illegal for political reasons and not merely because they are harmful. The current approach to drugs is not *proportional*. It would be *proportional* only if it applied equally to all recreational or addictive substances (Rowe 2006).

One particular substance causes massive levels of health problems of all kinds and hundreds of thousands of premature deaths annually yet is legal in any amount for any adult. The only restrictions involve where and at what age it can be used. Another substance that is legal for all adults is widely acknowledged as the number-one drug problem throughout the world. When sufficiently abused it destroys the body and causes death. Even when not heavily abused, it causes aberrant behavior that can ruin families and harm society in general. They are tobacco and alcohol respectively (Rowe 2006). Meanwhile, less harmful substances are illegal.

In sum, considerations of equitable treatment and a comparison between the legal treatment afforded alcohol and tobacco and the treatment of other drugs based on their intrinsic harmfulness lead irrefutably to the conclusion that the criminalization of drugs does not fulfill the requirement of *proportionality in the narrow sense* and is therefore unconstitutional.

4.4 CRIMINALIZATION AND LESS SOCIAL OFFENSIVENESS

Assessing the reasonableness of the laws that criminalize drugs cannot be confined to the three classical criteria (*suitability*, *necessity* and *proportionality in the narrow sense*), but should also extend to the criterion of *less social offensiveness*, proposed here as the fourth element of the *principle of proportionality*.

As noted earlier, to decide whether criminalization of drugs is *less socially offensive* it is necessary to investigate whether its consequences for society are less harmful than the evils it aims to avoid, even if they meet the criteria of *necessity*, *suitability* and *proportionality in the narrow sense*.

Thus, a criminal law may be *suitable*, *necessary* and *proportional in the narrow sense* and yet disproportionate if it harms more than benefits society.

This appraisal of the harm a criminal law may do to society directly as a result of prohibition or the penalty for infringing it is not part of the content of the classical elements of the *principle of proportionality*.

As shown above, a criminal law is *suitable* if it is fit to protect the good it is supposed to protect, fulfilling its stated purpose; *necessary* if there is no other means less restrictive of individual freedom to protect the good concerned; *proportional in the narrow sense* if the penalty for breach is compatible with the gravity of the crime and symmetrical with the penalties for other crimes in the same criminal law system. The goods weighed using these three criteria are that protected by the law (in the public interest) and freedom (for the individual).

It is therefore impossible to use the three classical criteria of the *principle of proportionality* to weigh goods that are mainly in the public interest, albeit counterposed. In other words, a criminal law may be *suitable*,

necessary and *proportional in the narrow sense* and yet sufficiently harmful to society to cancel out the benefits it is supposed to provide.

The degree of *social offensiveness* is the criterion used to assess this cost-benefit relationship, which is ignored by the analysis of *suitability*, *necessity* and *proportionality in the narrow sense*.

In the present context, this means investigating whether the criminalization of drugs on which the *war on drugs* is legally based has been more harmful to society than protective of public health and safety. Here it is important to bear in mind the results of the *war on drugs* and the criminalization at its core:

> 1. The growth of a 'huge criminal black market', financed by the risk-escalated profits of supplying international demand for illicit drugs.
> 2. Extensive policy displacement, the result of using scarce resources to fund a vast law enforcement effort intended to address this criminal market.
> 3. Geographical displacement, often known as 'the balloon effect', whereby drug production shifts location to avoid the attentions of law enforcement.
> 4. Substance displacement, or the movement of consumers to new substances when their previous drug of choice becomes difficult to obtain, for instance through law enforcement pressure.
> 5. The perception and treatment of drug users, who are stigmatized, marginalized and excluded. (Global Commission on Drug Policy 2011, 9)[95]

This harm to society derives from criminalization itself. Some legislative measures have a strong criminogenic effect and bring about effects in society that are the opposite of the intended benefits. The laws that

[95] In the same direction: "The ways in which the drug control system has been implemented have had several unintended consequences: the criminal black market, policy displacement, geographical displacement, substance displacement and the marginalization of users" (Costa 2008, 19).

criminalize drugs belong to such a group inasmuch as they promote various crimes associated with drug dealing.

According to Moratalla & Vallina (1996), drug criminalization corrupts more than it corrects, because it aggravates the problems of marginalization by leading young people who do not cause social problems to become problematic citizens and also by opening the door to certain crimes (falsities, coercions, homicides etc).

Drug criminalization "makes societies and governments blind to the great variety of reasons why people use drugs either in a controlled or a problematic way" (Dreifuss 2016, 5). Making drug use a crime has made mere addicts into criminal addicts (Rowe 2006). Drug criminalization has afforded profitable opportunities for criminal organizations involved in activities that support drug trafficking, such as people trafficking (a slavery-like practice), corruption, kidnapping, terrorism (Nutt 2012), money laundering etc.

The criminalization of drugs and drug dealing has contributed to greater militarization both of the state as repressive actor and of the drug traffickers, resulting in rising numbers of homicides relating to this black market. For example, as a result of the war on Colombia's drug cartels, one in every thousand Colombians was murdered in 1991: this is three times Brazil's or Mexico's homicide rate, and ten times the US rate for the same period (Werb, et al. 2010).

More recently, violent crime rates increased sharply after the launch of an intensive counternarcotics campaign throughout Mexico in 2006, and some 17,000 drug trafficking-related homicides were reported between 2006 and 2010 (Werb, et al. 2010). In addition, Mexican drug cartels are responsible for other criminal activities, such as kidnapping, forgery and extortion (Nutt 2012).

The illegality of drug dealing is the main driver of drug-related violence. Legal and regulated product markets, albeit not without problems,

cannot offer the same opportunities for organized crime to make vast profits, challenge the legitimacy of sovereign governments, and in some cases fund insurgency and terrorism (Global Commission on Drug Policy 2011).

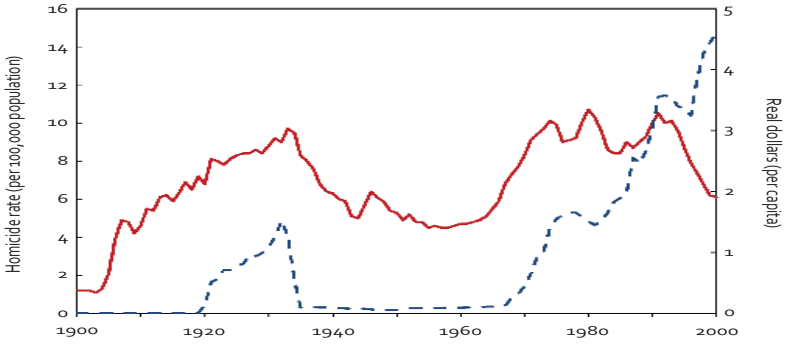
As if this were not enough, government action to combat drugs is equally harmful to society (Rowe 2006), largely owing to a lack of criteria for the establishment of laws that criminalize drugs and the state's indifference to the social consequences of such legislative measures.

Poorly designed laws increase the level of violence, intimidation and corruption associated with drug markets. Law enforcement agencies and drug trafficking organizations become embroiled in a kind of arms race inherent in the war itself, in which greater enforcement efforts lead to a similar increase in the strength and violence of the traffickers (Global Commission on Drug Policy 2011).

Urban violence, another side-effect of drug criminalization, appears directly related to the *war on drugs* rather than drugs themselves, so that the more resources are invested in combating drugs the more insecure society becomes.

Graph 8, taken from Werb et al. (2010, 14), shows the direct proportion between US investment in the war on drugs and the US homicide rate in the period 1900-2000, corroborating the argument set out here.

Graph 8. US homicide rate (solid line) and investment in combating alcohol and illegal drugs (dotted line), 1900-2000



This chart is the product of a scientific investigation into the consequences of drug prohibition, especially violence, evidencing the worst effects of the *war on drugs* and criminalization policies.

On the criminogenic nature of the laws that ban certain drugs, Gomes (2003) argues that criminalizing drug dealing endangers the legal good the laws are supposed to protect by creating public health problems that are more severe than those they were designed to combat or avoid. Users are forced to buy drugs clandestinely and face not just the risk inherent in the drugs they wish to consume, but also the concrete possibility that these are adulterated and contain all kinds of impurities, which make them far more hazardous to health than the pure versions. Not to mention the fact that when consumers are placed outside the law it is harder for public health programs to reach this important part of the population.

Owing to the criminogenic nature of drug prohibition, 2 million people are in prison worldwide for drug-related offenses, or a quarter of the total prison population, yet the supply of and demand for illegal drugs have not decreased one jot. Most are small-time dealers not directly linked to any violent activity.[96] The situation today, with regard to drug prohibition and its consequences, moved Ferrajoli (1993) to advocate repeal of what he considers an absurd and criminogenic drug law.

Another kind of harm to society due to criminalization is the difficulty of establishing new public policies based on risk reduction measures while drug users are treated as outlaws.

Control of drug production and distribution, as well as regulation of drug sales – measures that would mitigate the social harm caused by drugs,

[96] Malinowska-Sempruch (2011, 7) develops the argument thus: "Prisons worldwide are filled with people incarcerated on drug-related charges, many of whom were driven to drugs or drug dealing by addiction or poverty. High incarceration levels not only have a negative impact on those who are incarcerated, but also place huge economic burdens on their families and societies. Frequently, the punishment is vastly disproportionate, with lengthy prison stays handed out for minor offenses."

are impossible in the present environment of prohibition and criminalization.

In other words, in addition to causing harm to the general public, the present criminal treatment of drugs prevents the problems relating to public health and safety from being adequately addressed.[97]

When the *war on drugs* was declared, its aim was to mitigate the harm to public health and safety associated with abusive consumption of narcotics. Criminal law was supposed to protect these two constitutionally guaranteed legal goods.

However, besides increasing the harm done to public health and safety, drug prohibition and criminalization have caused serious problems in the sphere of public safety, another constitutionally guaranteed legal good. Drugs once represented a major problem for humanity. Today they are at the root of two: "It is time for States to assume their full responsibility and to remove drugs from the hands of organized crime. It is time to take control" (Dreifuss 2016, 6).

It can therefore be concluded that criminal drug laws do not meet the criterion of *less social offensiveness*, are disproportionate also in this regard, and hence are unconstitutional.

[97] Prohibition and criminalization targeting drugs made illegal conceals the failure of their explicit objectives, hiding paradoxes such as the increased risks and harm to health, misleadingly presented as the object of protection, and promotes violence into the bargain (Karam 2009).

5 CONCLUSIONS

The notion of proportionality already permeated *lex talionis*, although it was not yet raised to the level of a legal principle. The dogma of "an eye for an eye, a tooth for a tooth" became the keystone of that statute over time and was embodied in the endeavor to make punishment strictly proportional to the harm suffered, as far as was possible. Since the penalty restricted individual freedom to protect the general interest, it could not be imposed unless it was commensurate with the damage done.

The *principle of proportionality*, albeit limited to what is now called *proportionality in the narrow sense*, was already present in the Magna Charta, applied by English courts for centuries, and reproduced in the Bill of Rights and the Eighth Amendment to the US Constitution (1791).

The idea of proportionality as a principle was systematized in the transition from police state to rule-of-law state, submitting governmental measures to its weighing procedure.

However, with the systematization and extent it has today, divided as it is into subprinciples that give it content and power, the *principle of proportionality* was framed by the German constitutional school and resulted from a climate prepared by the discussions of legal philosophy that took place after the World War Two. The law must seek

legitimacy in other sources besides itself: the weighing of fundamental values expressed in the judgment of reasonableness was one of the criteria used to appraise the constitutionality of legislative measures. This idea was promptly received by legal doctrine in a wide array of states.

Thus, besides serving as one of the pillars of the legal order, the *principle of proportionality* also plays an important interpretive role, insofar as it helps orient judges in their pursuit of the most reasonable solutions to the concrete cases brought before them, especially when collisions with fundamental rights are being analyzed. For this reason, legal doctrine considers it the most important fundamental legal principle.

As systematized by German doctrine, the *principle of proportionality* has three dimensions, represented by the elements *suitability*, *necessity* and *proportionality in the narrow sense*. In brief, a law can be said to be *suitable* if it achieves the desired end, *necessary* if less burdensome means to the same end are not available, and *proportionate in the narrow sense* if the intensity of the punishment imposed on the individual is equivalent to the harm it aims to prevent (retribution). The legal goods weighed by these three criteria correspond to the social interest protected by the criminal law in question, and individual freedom.

In criminal cases, where the practical consequences of the application of a law affect the individual sphere directly and profoundly, it is necessary to take greater pains to weigh proportionality between the constitutional goods involved, such as life, public safety, property etc. counterposed to liberty. Thus, the *principle of proportionality* is imbued with greater force in the sphere of constitutional criminal law.

Based on this perception, a novel criterion for assessing the proportionality and hence the constitutionality of laws is presented. The innovation consists of the affirmation that in analyzing the *principle of proportionality* it is not enough, above all in criminal law, to address the three classic elements (*suitability*, *necessity* and *proportionality in the narrow sense*): to these must be added *less social offensiveness*.

To judge whether a measure is *less socially offensive*, it is necessary to verify whether the consequences of restricting freedom by means of a criminal law (even if that law is deemed to meet the criteria of *necessity*, *suitability* and *proportionality in the narrow sense*) are themselves more harmful than the consequences of the behavior the law is designed to prohibit.

The law is *less socially offensive* if its consequences for society are less damaging than the evils it aims to avoid. Thus, the appraisal of this element entails weighing the collective interests protected by the law against the collective interests injured by the same law.

This weighing cannot be performed using the three classical elements of the *principle of proportionality*, which take into account the good protected by a criminal law (in the collective interest) in counterposition to the fundamental good harmed by the same law, which is liberty (of an individual nature). The classical criteria of proportionality cannot be used to weigh goods that are of equal interest to society, albeit counterposed.

In short, whenever the constitutionality of a law is appraised using the *principle of proportionality*, it is necessary to use a fourth parameter, which is *less social offensiveness*.

With regard to the *war on drugs*, it is important to note that drugs have been present in all civilizations – several kinds of drugs in most cases, and alcoholic beverages in all cases.

The *war on drugs* comprises three distinct phases: (1) a predominantly moral phase in which combating drugs is considered a *principle*; (2) an objective phase in which the *war on drugs* is seen as a *means* to solve the problems caused by substance abuse; and (3) a repressive phase in which the *war on drugs* becomes an *end* in itself.

It is also important to note that the history of the *war on drugs* is the history of the war on drugs waged by the United States of America. Whatever was prohibited in the US was made illegal by other countries, which imported their regulations via international public law mechanisms.

Although the moral argument was foundational for all three phases, in the first phase it was also presented as the goal. Initially the aim of the ban on drugs was said to be the protection of morality against the threat posed by deviant behavior in the form of drug consumption.

In the first phase, involving criminalization as a *principle*, puritanical social groups armed with moralistic rhetoric based on Christian ideals of an evangelical slant imposed on society a standard of behavior with which drugs were incompatible and must be banned. The scant instrumentality of this imposition was irrelevant. What mattered in this first phase was positivation of the morality they advocated.

During this period, based on the moral standard then predominant in the US, the law prohibited the consumption of opium (under the 1912 International Opium Convention and the Harrison Narcotics Tax Act of 1914), alcohol (under the Eighteenth Amendment in 1919 and the National Prohibition Act of 1920), relegalized in 1933, marijuana (under the Marihuana Tax Act of 1937), and several other drugs (under the Single Convention on Narcotic Drugs, done at New York on March 30, 1961).

After this phase, in which the control of substances considered illicit intensified, the *war on drugs* began, now as a way of forcing a reduction in consumption until its extinction, with the Comprehensive Drug Abuse Prevention and Control Act of 1970, which not only regulated and classified medical drugs on the basis of their intrinsic potential for dependence and abuse, but also consolidated all previous laws regarding the identification and proscription of drugs considered illegal. The *war on drugs* (the phrase was coined in this period) evolved to become the means whereby consumption was to be mitigated.

Intensification of the ban on drugs as a promise to steadily mitigate demand and supply, typical of the second phase (criminalization as *means*), was clearly a case of legislation designed to demonstrate the state's capacity for action to solve a complex problem involving multiple actors and a diversity of interests, with repercussions that were directly experienced by society.

As a response to the challenge of solving difficult problems in public health and safety, constitutional goods supposedly protected by the prohibition of drugs, and to the social pressures deriving therefrom, the state began to increase the severity of the applicable criminal laws, making the respective crimes more comprehensive and making punishment for them heavier. Similarly, in the international sphere, with the introduction of treaties that reflected this militaristic stance. All this in response to public outrage.

However, given the impossibility of defeating the drug traffickers, the *war on drugs* became an end in itself in the 1980s.

In the name of human rights, humanitarian intervention, combating communism or drugs, defending democracy etc., the US always resorts to war as a means of wielding and at the same time reinforcing its hegemonic power.

At the start of the 1980s, the Cold War no longer required significant investment and this period of history ended with the fall of the Berlin Wall at the end of the decade. US military efforts needed a new argument.

The *war on drugs* provided the new argument. This resulted in militarization of the *war on drugs* and the emergence of international conflicts due to the global activities of drug traffickers. The phenomenon is still with us today.

From the beginning the legal basis of the *war on drugs* was criminalization of the use and sale of narcotic substances considered illicit.

The prohibitionist criminal model adopted in the *war on drugs* is grounded in enemy criminal law (*Feindstrafrecht*), according to which in situations that expose society to a grave danger the state may deny to a certain category of criminal – the enemy – the guarantees inherent in criminal law for the citizen (*Bürgerstrafrecht*), so that only state coercion is appropriate in such cases.

In combating drugs, any possibility of solving the problem by other methods was ruled out. Not even rights-based criminal law was recognized as capable of mitigating the drug problem. Violence, a state monopoly, must be invoked against its enemies – drugs, their producers, traffickers and users.

As a result of its inherent criminalization, even though it has consumed trillions of dollars, cost the lives of thousands and incarcerated millions, the *war on drugs* can be said not to have reduced the supply of narcotic substances considered illicit or the demand for drugs or the damage caused by drugs. It is an obvious failure.

Having explored the *principle of proportionality* in its four dimensions, and the *war on drugs* in terms of its three phases as well as

its legal basis, I have been able to submit the laws that criminalize drugs to a test of constitutionality based on the reasonableness criterion.

Verification of the proportionality of the criminal laws that ban narcotics entailed appraising the reasonableness of the *war on drugs*, since the former is the legal basis for the latter.

For a law that criminalizes drugs to be considered proportional, and hence constitutional, it must be *suitable*, *necessary*, *proportional in the narrow sense*, and *less socially offensive*.

The aim of such laws is to protect public health and safety by (1) reducing the supply of drugs considered illicit, (2) reducing demand for such drugs, and (3) mitigating the damage done by them.

Given that they do not meet any of these criteria, the criminal laws that serve as the basis for the *war on drugs* can be said without question to be unfit for purpose and non-compliant with the *principle of proportionality*.

With regard to the second element, laws banning and criminalizing narcotics as the legal basis for the *war on drugs* are deemed necessary only if it is demonstrated (1) that public health and safety, as legally protected goods, are among those constitutionally considered essential to the full development of society, and (2) that these goods cannot be protected by any equally effective administrative or legal mechanism other than criminalization, which is more burdensome for the individual.

Public health and safety are constitutionally guaranteed rights deriving directly from human dignity, so the first criterion for *necessity* is met.

As for the second criterion, a study of harm reduction policies implemented in some countries as an alternative to criminalization that mitigates the public health and safety problems deriving from inadequate

use of drugs, shows that although these policies are timid and limited by the continuing prohibition of drugs due to international treaties, they are more effective than criminal laws used for the same purpose.

Thus, the criminalization of drugs is less effective as a means of protecting constitutional goods (public health and safety) than harm reduction policies. It is more costly to the state in economic terms and to citizens owing to criminalization itself, and it does not obtain the same results. Thus, criminal laws that ban drugs are neither necessary nor proportional. Consequently, they are unconstitutional.

Appraising criminal laws that ban drugs considered illicit in terms of *proportionality in the narrow sense* also entails analyzing isonomy (equal rights under the law) by comparing them with the legal treatment of other drugs and the potential harm intrinsic to each one.

This means that a law does not comply with the *principle of proportionality* if it criminalizes a given drug while another drug that is more harmful to people and society is legal and subject only to administrative regulation.

An analysis of scientific studies that have investigated and classified the potential harm inherent in the main drugs consumed by humans, legal and illegal, shows that alcohol and tobacco are the most harmful to individuals and to society.

Assuming that criminalization should be based not on whether the behavior concerned is morally acceptable but on the harm it inflicts on society, the criminalization of drugs that are less harmful than legal drugs is disproportionate and hence unconstitutional.

The same conclusion is reached by an analysis of the subprinciple *less social offensiveness*, which in examining the penal treatment given to narcotics as a legal basis for the *war on drugs* finds that it harms society more than it protects public health and safety,

concluding that criminalization is more socially offensive than the proscribed harmful activity.

Criminalization of drugs has resulted in growth of the criminal black market, circulation of unsafe drugs, investment of public funds in repression instead of risk mitigation, stigmatization and marginalization of users, public insecurity, an increase in the number of homicides etc.

Thus, although the *war on drugs* is supposed to protect the public interest (public health and safety), the fact that its legal basis is the criminalization of drugs and drug use harms society in various ways, so that the side-effects are greater than the benefits obtained.

It must be concluded that criminal laws banning drugs do not meet the criterion of *less social offensiveness*, and that in this respect too they are disproportionate and hence unconstitutional.

In sum, the *war on drugs* and its legal manifestation are neither suitable, nor necessary, nor proportional in the narrow sense, nor socially less offensive, and do not comply with the *principle of proportionality*.

However, decriminalizing drugs, both with regard to their use and with regard to their production and sale, or even considering a criminal ban on drugs unconstitutional, requires thinking about the proportionality of the alternative. The question is therefore whether legalization (or decriminalization) of drugs would be an effective means of reducing demand, consumption and the associated risks.

Both legalization or decriminalization of drugs and the finding that criminal laws banning drugs are unconstitutional must take into account the consequences of liberalization. In this case, proportionality must be appraised in prognostic terms, taking into consideration the necessity of suitable measures to mitigate drug-related problems, especially with regard to public health and safety.

It would not be in the public interest, especially as regards health and safety, simply to legalize or decriminalize the consumption, production and sale of all drugs without implementing alternative measures capable of substantially mitigating the risk inherent in drugs. Thus, regulation and liberalization should be concurrent.

In this respect, the international community and sovereign states have plenty of experience in successfully controlling and regulating dangerous drugs without the need to ban or criminalize them. Alcohol and tobacco are the most conspicuous examples.

Liberalization of drugs, currently considered illicit, should be accompanied by a number of restrictions that limit the freedom to use, produce and sell drugs while also complying with the *principle of proportionality*, as is already the case with alcoholic beverages and tobacco.

With regard to use, the consumption of currently illegal drugs would be restricted to the privacy of the home and hence would not be permitted in public or freely accessible places. Non-compliance with this restriction would be an infringement of an administrative nature. Tobacco is already subject to a similar restriction, albeit less rigorous and extensive.

Certain activities would be banned for anyone under the effect of a drug, such as driving, working, and so on, and infringement of this ban would be punished with the same penalties as drunk driving.

With regard to production and sale, the restrictions currently applicable to pharmaceuticals, alcoholic beverages and tobacco are suitable experiences for the purposes of developing a regulatory framework for decriminalized drugs.

Control of drug composition and purity could be based on the parameters used for pharmaceuticals. As is already the case with alcohol

and tobacco, sale to minors would be prohibited. And as for cigarettes and some medications, advertising would not be allowed.

Production and sale in breach of the rules would be prohibited, just as it is now for alcohol, tobacco and controlled medical drugs. However, as with alcohol and tobacco, it would not be a serious problem, given the discouragement of clandestine activity caused by the fall in prices due to free competition and legalization, which would rid this activity of organized crime.

Thus, the legalization of drugs would comply with the *principle of proportionality* and end the *war on drugs*, resulting in benefits for public health and safety.

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