

The 'war on drugs' has failed: Is decriminalisation of drug use a solution to the problem in South Africa?

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This article engages in the debate surrounding decriminalisation of drug use and whether this is a possible solution to the problem of drug use in South Africa – a question becoming more prevalent in global discussions about drug policy and its efficacy.

We argue that two aspects must be addressed when evaluating a policy: its philosophical justification and its efficacy. We find that criminalising drugs may be justified by the public harm principle, but it does not effectively achieve the purpose of preventing and decreasing drug use and associated burdens. Thus, we argue that prohibition is a constitutional limitation, but does not necessarily achieve its purpose in the least repressive or most effective way.

Finally, we suggest that a solution to the drug problem will have to address the health needs of the drug user and the context, particularly socio-economic, of drug use. Decriminalisation could theoretically do this by changing society's perception of drug users, thus helping to promote a human rights-based, public health-orientated approach to the drug problem in South Africa.

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'The War on Drugs has failed' is a statement made in a Global Commission Report on Drugs Policy, released in June 2011.¹ The report suggested that the current global approach of prohibiting drugs and punishing individual drug users is not only ineffective in addressing and lessening the drug problem, but also exacerbates the burden that drug abuse places on society. It advocated a public health-, human rights-based approach to the drug problem rather than a punitive one, as well as the decriminalisation of individual drug use within certain parameters.¹

Decriminalisation is not without its critics. It is a harm-reduction policy, and the nature of harm-reduction philosophies is controversial because they aim to make harmful actions 'safer', which implies acceptance of the action.

The 18th century utilitarian philosopher Jeremy Bentham proposed that the purpose of punishment is to deter an individual from committing actions which are perceived to detract from overall utility.² Will the decriminalisation of individual drug use result in a major deterrent being removed? James Q Wilson, who chaired the USA's National Advisory Commission on Drug Abuse Prevention in 1972 - 1973, protested that legalisation of the use, possession and trade of drugs would open the floodgates for even more widespread abuse. The same concern could be thought to apply to decriminalisation (removal of the penalty of criminalisation for the use of illegal drugs).³ However, in this paper we will not address the extremely negative impact that the 'war on drugs' in its current form has on society and individuals. The slippery slope argument in this case, as in many others, acts as an effective block to further informed discussion.

Proponents of decriminalisation do not aim to completely license drug use, but rather to attempt regulation from a different angle. The question of decriminalisation requires careful consideration within the context of specific countries, to ascertain its projected impact and whether it is a viable and practical solution. The greatest dilemma is the difficulty of knowing what the impact of decriminalisation will be before its implementation. This article proposes that there is sufficient evidence to ground a move away from the current prohibitive approach, and towards decriminalisation of individual drug use.

The drug situation in SA

The United Nations Office on Drugs and Crime (UNODC) country profile of South Africa describes the drug situation as follows: 'South Africa is a society in transition. Drug use correlates strongly with the pressures placed upon social capital by rapid modernisation and the decline in traditional social relationships and forms of family structure ... Another factor contributing to the increased prominence of illicit drug use in South African society is high unemployment.'⁴

Peltzer *et al.* suggest that changes in SA's political, economic and social structures have rendered its population more vulnerable to drug use.⁵ Apartheid may have played a role in preventing the importation of drugs such as heroin and cocaine, but SA's reintegration into the global community and market has made it fertile ground for importing drugs, thereby increasing supply.⁴ Geographically, it is also conveniently located as a trans-shipment point.⁶ Anti-narcotics aid to Africa, including SA, has increased greatly over the last few years, indicating increased acknowledgement of the problem.⁷ SA is

thought to be the largest synthetic drug consumer and producer in Africa⁸ and, moreover, drug-related crime has increased.⁹

The parties at the South African Second Biennial Substance-Abuse Summit offered their support to 'help advance all efforts towards combating the scourge of alcohol and substance abuse that is ravaging our communities'.¹⁰ Clearly South Africa has a drug problem that requires further attention.

Drug-use trends in SA

The lack of recent national drug-use surveys makes it difficult to determine the prevalence of drug abuse in SA. The most comprehensive and recent information comes from parts of surveys designed to gather other information, but which include questions about drug use, and from information about arrests and incarceration provided by the SA Police Service. The prevalence of drugs such as heroin, cocaine and cannabis seems lower in SA than in countries such as the USA and Australia.⁵ This may be due to SA's fairly recent integration into the global drug market, or simply reflect the difficulty of collecting accurate information due to the country's lack of infrastructure. But while SA may not have as severe a drug problem as some Western countries, it does not compare as well with other African states.

First-time admissions to treatment centres for drug abuse have increased from two-thirds to three-quarters of all admissions to treatment centres.¹¹ This could be attributed to an increase in either substance abuse problems or the number of individuals seeking treatment. Heroin, over-the-counter drugs and cocaine have the highest readmission rates, and there has been a general trend showing an increase in heroin/cocaine admissions. The trend differs in the Western Cape, where there is an increase in methamphetamine (tik) admissions.

The average age of admissions ranges from 28 to 34. Across most sites, alcohol was reported as the primary substance of abuse and the mean age of alcohol admissions was 38 - 40 years. Most admissions under the age of 20 reported cannabis or cannabis/mandrax as their primary substance of abuse. The discussion surrounding decriminalisation is particularly relevant to this age group, who should not be considered obvious candidates for criminalisation. On the contrary, they could be perceived as a vulnerable group, and criminalisation will only serve to increase that vulnerability.

Most admissions for harder drugs such as cocaine and heroin were from the white population group, possibly because this is SA's wealthiest population group and these drugs cost more.

Socio-economic factors are a particularly relevant concern in SA. For example, in the Cape Flats, social deprivation is accompanied by high levels of violent crime, gangsterism and drug abuse.¹² However socio-economic factors are not the only causes of drug use, and other plausible reasons include social, religious and traditional or experimental use. The reasons for drug use are an important consideration when formulating drug policy.

The actual impact that the policy has on the individual's choice to use a drug must be evaluated. As MacCoun suggests, an addict who has used drugs for a long time is in the grip of physiological addiction

and, if they have never been caught, they are even less likely to be significantly affected by the threat of punishment. In contrast, a first-time 'social' drug user may be deterred by such a policy.¹³ The reasons for particular drug choices should inform a more nuanced drug policy.

A high rate of cases in which alcohol is the primary substance of abuse are admitted to treatment centres. The question is whether this is because alcohol is legal, and therefore easily accessible, or because those who suffer from alcohol dependence feel more comfortable seeking assistance than would a user of an illicit substance.

The varying harmfulness of different substances is another motivation for a more nuanced approach to drug policy, as referred to by Parry and Myers.¹⁴ For example, smoking could be more harmful than using cannabis, and yet cannabis is illegal on the grounds that it is harmful while tobacco is not.¹⁵

Degree of harmfulness, and whether criminalisation prevents drug users from seeking treatment, should be considered when addressing the evidential basis for and impact of drug policy.

Current policy

In SA, national prohibition, though generally accepted since the early-mid 19th century, was legislated in 1992 with the Drugs and Drugs Trafficking Act No. 140 of 1992. The Act provides for the prohibition of use, possession, dealing and manufacture of drugs,¹⁶ and forms part of the country's use-reduction strategy.

The Prevention of and Treatment for Substance Abuse Act, No. 70 of 2008 focuses on prevention, early intervention, treatment and reintegration programmes.¹⁷ However, while this Act has been assented to, it has not yet been promulgated. Despite its positive focus on assisting victims of substance dependence, it remains largely silent on protection against stigmatisation, except for stating in chapter 3 that services provided to a substance abuser must occur in an environment that 'prevents stigmatisation of service users'.¹⁶ The protection against stigmatisation of all substance abusers is a principle promoted in the Global Commission Report.¹

The National Drug Master Plan (NDMP 2006) details SA's drug policy, setting out 'the country's national policies and priorities in the quest to build a drug-free society and to fight substance abuse'.¹⁸

Justification for policy

A good policy will be philosophically or ethically justifiable as well as effective in achieving its purpose. One without the other is not sufficient. SA's drug policy must be evaluated on both counts.

The reason for the Master Plan and South African Drug Policy in general is stated as follows:

- 'Sections 10 to 12(1) of Chapter 2 of the Constitution of the Republic of South Africa, grant citizens the right to have their dignity respected and protected, the right to life, and the right to freedom and security.'
- 'To realise these rights the South African Government is committed to reducing both the supply of illegal drugs and the demand for them through a wide range of actions and programmes.'¹⁷

The reason SA has a drug policy is to protect the rights of its citizens. Substance abuse endangers those rights collectively, and so the individual's 'right' to use drugs is considered justifiably limited in terms of section 36 of the Constitution. This is supported by the Constitutional Court case *Prince v. President of the Law Society of the Cape of Good Hope*.¹⁹ The appellant, a member of the Rastafari religion, sought permission to use cannabis in exercising his right to religious freedom. The panel was closely divided, but it was held that the blanket prohibition of cannabis was a justifiable limitation, possibly due to the high prevalence of cannabis use in the country. This article proposes to re-open the debate regarding the concept of prohibition of cannabis (and possibly other substances) and whether it is a justifiable limitation.

In the Master Plan, the Department of Social Development expresses the problem of drug abuse as follows: 'The scourge of substance abuse continues to ravage our communities, families and, particularly, our youth; the more so, as it goes hand-in-hand with poverty, crime, reduced productivity, unemployment, dysfunctional family life, escalation of chronic diseases and premature death.'¹⁷

South Africa's current drug policy is largely motivated by the concern that substance abuse is a danger to society and, on many counts, a 'social pathology'.¹⁷ Substance abuse can be construed as an action harmful to others as well as the individual. The state is required to intervene to protect the rights of its citizens. The limits and justification for state interference in individual behaviour is a branch of political philosophy which is often discussed in light of the harm principle, of which John Stuart Mill was the initial proponent, particularly in his essay *On Liberty*, published in 1860.

Mill formulated the harm principle as follows: 'The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical, or moral, is not a sufficient warrant The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is of right absolute. Over himself, over his own body and mind the individual is sovereign.'²⁰

Mill explicitly states that 'this doctrine is meant only to apply to human beings in the maturity of their faculties'. This will be referred to as the private harm principle.

The private harm principle alone is not sufficient justification for the prohibition of drug use

Prohibiting drug use would be justified according to this formulation of the harm principle if it could be shown that the act of taking a drug would cause harm to someone else. This article will work from Feinberg's conception of harm as the violation of an interest.²¹ This could encompass physical, emotional, psychological and social interests, and perhaps even moral interests. As it stands, the term describes a spectrum of actions, from those which elicit feelings of moral repulsion, to those which directly result in an individual suffering physical harm at the hands of an intoxicated person. The term is therefore too broad, and so we introduce distinctions between direct/indirect harm, and actual/potential harm. For an action to be considered harmful, it should be directly so and should

constitute actual harm, or an almost indubitable potential for harm. In other words, the action itself must be what violates the interest of another individual.

In the instance of substance abuse, the harm is predominantly of an indirect nature. It is hard to imagine a scenario in which the actual act of ingesting a drug might harm another individual. We tend to think it is the effect that the drug has on that individual that results in harm being done to others. For this reason the individual harm principle should not be considered sufficient justification for a prohibition policy.

However, Mill acknowledges a concern regarding the private harm principle, asserting that 'No man is isolated', and therefore every action is an 'other-regarding' action. While Mill is concerned with each human being's duty to other human beings, especially children, he does not think this is sufficient reason for a policy of prohibition regarding actions which cause neglect, or failure to fulfil one's duty to society. It is the harm to society which is justly punished, but not that which leads to it.

Thus a father who fails to provide an education for his child because he is a drug addict should be looked upon with the same disapprobation as a father who neglects to provide for his child because he has lost all his money in a poor investment. In the same way that someone who causes an accident while driving under the influence of cannabis should be punished, but for the act of driving under the influence of cannabis, not for the act of taking cannabis.

When harm has come to society through a substance abuser's habits, it is the harm that should be the subject of prohibition and retribution, rather than the act which has the potential to cause the harm. Drug use may be indirectly responsible for causing harm to society, but this does not warrant prohibiting the action of taking a drug.

It is also important to consider the degree of harm caused by different drugs. It might be justifiable to impose more stringent restrictions on a drug which incites violent behaviour in the individual who has taken it, but this wouldn't apply equally to a drug such as cannabis.

Drug use as a public harm

Justification for SA drug policy seems to derive from the fact that drug use constitutes a public harm. Mill acknowledges that one of the undisputed functions of the state is to take precautions against crime being committed. This is captured by the public harm principle, according to which the state is justified in limiting the rights of individuals on the grounds that their actions will undermine institutional practices and regulatory systems.²⁰ This is echoed in the idea of a constitutional limitation of a right and seems to be SA's stance on drug policy, exemplified in and supported by the *Prince v. President* case. The prohibition of cannabis was held to be constitutional, despite limiting the rights of certain individuals and groups who profess to use it for reasons that are otherwise constitutionally supported. It seems that the public harm principle, in line with the Constitution, provides at least partial justification for the prohibition of cannabis in SA.

The efficacy of the limitation

A policy may be justified in principle, but rendered pointless because it fails to achieve its purpose, and to achieve it in the least restrictive

way as required by our Constitution: 'The rights encoded in the Bill of Rights may be limited in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including ... less restrictive means to achieve the purpose.'²²

Is the restrictive nature of SA's drug policy justified by the fact that it is successfully addressing the drug problem, or that it is the approach most likely to be successful? Another way of phrasing this could be to ask: Is criminalisation the most appropriate way of dealing with the drug problem in SA?

Proponents of decriminalisation argue that criminalisation is not adequately addressing the problem, and offer several reasons for why it is not an appropriate response:

- Drug use is a vice, not a crime.²³
- Drug users who are criminalised are denied rights which they shouldn't necessarily be denied.
- Criminalisation results in marginalisation and stigmatisation, which impede successful reintegration of drug addicts into society.¹
- Current policy is not evidence based. For example, studies have shown that alcohol and nicotine are both ranked as more harmful than cannabis, and yet they are not prohibited as cannabis is.¹⁴
- The actual effect that a prohibition policy has on potential drug users is uncertain. It may not play as significant a role in deterring them as hoped.¹³
- Punishing someone who is physiologically dependent on a substance by incarceration is unlikely to have a significant long-term impact on the individual's future use.²⁴
- Punishing the individual impedes treatment and rehabilitation.

Collective global effort

According to the UNODC Country Profile from 2002, the policy of the SA Police Service at the time was to focus specifically on large-scale drug busts and to turn a blind eye to minor offences involving possession and use of small amounts of cannabis.⁴ This suggests that SA has applied *de facto* decriminalisation of cannabis in the past, although it is unclear whether this is still applied in the approach towards individual cannabis users.

In order to direct repressive measures at drug trafficking, it is necessary for the effort to be global, given the porous borders of many countries and ease of international transport. SA is a signatory to The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which dictates its involvement with the international community in terms of curbing drug trafficking. This involvement requires that South Africa remain apprised of the development of new thoughts, conventions and declarations dealing with the drug problem on an international level. A failed drug policy in one country has global implications. Therefore South Africa should not turn a blind eye to the concept of decriminalisation but move towards policy which adopts a human rights-based public health approach. This will align the country with changes in global thinking surrounding drug policy.¹⁴

Is decriminalisation the solution in SA?

Decriminalisation is not the solution to SA's drug problem, but rather part of the solution. The solution in its entirety will be one that sets out to create a social, political and economic environment in which the individual is empowered to choose to refrain from substance abuse. However, decriminalisation has the potential to lessen the marginalisation of drug users and so bring about a cohesive effort in dealing with the drug problem that impacts on all members of society. Further, criminalising an individual who is dependent on a substance is unlikely to change their drug-use behaviour.

A purely legal approach to the drug problem cannot be successful. A true solution will address a variety of factors, including educating the youth and protecting against stigmatisation and marginalisation. Most importantly, it will involve action on the part of the government, particularly in meeting the health needs of addicts and creating environments that are not conducive to drug use. Parry and Myers emphasise the importance of reaching consensus on who ought to take the leadership role in the development and implementation of drug policy, and suggest a single agent should take responsibility and be held accountable by citizens and parliament.¹⁴

Conclusion

The current policy of drug prohibition may be philosophically justified on the grounds of the public harm principle; however, it has been shown that it is not a policy which is effectively achieving its purpose in the least repressive way. Many problems arise out of the current policy, which requires continuous re-evaluation. Therefore the SA government should start to re-evaluate drug policy, as called upon by the Global Commission in June 2011. Decriminalisation is a proposed solution to many of the problems that arise out of current policy, and is being brought to the attention of leaders around the world. As SA has its part to play in addressing the international drug problem, its leaders should also begin a process of evidence-based re-evaluation of the national drug policy and the efficacy of its application. This will include the development of a nuanced policy, part of which should entail the decriminalisation of individual drug use within certain parameters, and a willingness to approach the problem from the perspective of a compassionate society.

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