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A Critical Analysis of Drug Courts in Chile¹

Análisis crítico de los Tribunales de Drogas en Chile

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ABSTRACT: This paper is a critical study of the Drug Courts in Chile. To this end, it analyses the regulatory context in which they were created within the criminal legislation regarding illicit drug trafficking. Without questioning the merits of drug treatment, the idea that drug courts are a valid alternative to incarceration is here challenged. Rather, they widen the punitive net that complements the extreme punitiveness of criminal drug legislation. Furthermore, the eligibility requirements established in Chile's drug courts prevent many people who might need it from the possibility of accessing treatment, given that as they are presently structured, drug courts combine and confuse public health criteria with notions of dangerousness. In the conclusion, maintaining and even increasing the budget of drug treatment is recommended.

¹ This work is part of the project “Tribunales de Drogas. ¿Complemento o alternativa al punitivismo? Análisis crítico y propuestas de mejora para Chile”, sponsored by Universidad Central de Chile, Proyecto I+D, call 2021, and its responsible researcher is Dr. Silvio Cuneo.

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Nevertheless, the separation of criminal law assessments or charges from public health criteria is proposed. Likewise, as a public policy in criminal matters on drugs, it is recommended the decriminalisation of behaviours and the reduction of penalties in order to build a real path that is decriminalising and respectful of human dignity.

KEYWORDS: Drug Courts; drug treatment; voluntariness; War on Drugs; special positive prevention.

RESUMEN: *Este trabajo es un estudio crítico sobre los Tribunales de Drogas (TTD) en Chile. Para esto, se analiza el contexto normativo en el que nacen dentro de la legislación penal en materia de tráfico ilícito de estupefacientes. Sin perjuicio de valorar la existencia de tratamientos contra las drogas, cuestionamos que los TTD sean una alternativa al encarcelamiento. Más bien, se trata de un aumento de la red punitiva que sirve de complemento al punitivismo extremo en la legislación penal sobre drogas. Asimismo, por los requisitos de elegibilidad establecidos en los TTD chilenos, se impide la posibilidad de un tratamiento para muchas personas que podrían requerirlo, toda vez que en la forma actual los TTD combinan y confunden criterios de salud pública con nociones de peligrosidad. En las conclusiones recomendamos la mantención y el aumento presupuestario de los tratamientos contra las drogas. No obstante, sugerimos la separación de las valoraciones o imputaciones jurídico-penales de los criterios de salud pública. Asimismo, como política pública en materia penal sobre drogas, recomendamos la despenalización de conductas y la disminución de sanciones para construir un camino real descarceratorio y respetuoso de la dignidad humana.*

PALABRAS CLAVES: *Tribunales de drogas; tratamiento contra las drogas; voluntariedad; Guerra contra las Drogas; prevención especial positiva.*

1. INTRODUCTION

The goal of this study is to critically analyse the Drug Courts (Tribunales de Drogas – TTD), especially in Chile. Drug courts, far from being an institution with a long national tradition, have emerged as one more element in the imposition of hegemonic regimes that, within the framework of criminal drug control legislation, reproduce US criminal

policies. These exact same policies, and specifically the War on Drugs, are the main cause of mass imprisonment of people on low-income and the increase in female incarceration.⁴

Without undermining the critical analysis arising from a well-founded distrust of US intervention in Latin American criminal policies, after having spoken with various participants in the TTD (judges, prosecutors, public defenders, psychosocial teams and, especially, users), this paper intends supporting the idea of treatment itself and analysing its potential to soften the penal response. However, the extremely slim chance of defendants being able to access these treatments in Chile, as they have to comply with the requirements of the conditional suspension of proceedings (SCP),⁵ means that preference is given to those candidates that generally do not present a high-risk level of criminal involvement, which more often than not goes hand in hand with less problematic drug use. To a certain extent, the filters of the TTD may be extremely useful in order to see the varying results compared to the ones of those who failed to meet the requirements. The issue in this approach, as usual, is that mixing public health with criminal justice leads to a kind of treatment not based on a medical perspective, which everyone is entitled to, but rather founded on neo-positivist considerations on the grounds of criteria of dangerousness.

⁴ ALEXANDER, Michelle. *El color de la justicia. La nueva segregación racial en Estados Unidos*, traducción de Carmen Valle y Ethel Odriozola. Salamanca: Capitán Swing Libros, 2012, p. 12. En el mismo sentido ANTONY, Carmen. *Reflexiones sobre los procesos de criminalidad y criminalización de las mujeres de América Latina implicadas en delitos relacionados con drogas*, EN: FACIO, Alda y FRIES, Lorena (eds.). *Género y Derecho*. Santiago de Chile: LOM. 2002, pp. 511-516.

⁵ In Chile, the Conditional Suspension of Proceedings is an alternative solution that is regulated in articles 237 to 240 and 245 and 246 of the Code of Criminal Procedure. It implies the interruption of the punitive claim of the State during the trial, causing the suspension of the trial, in exchange for the voluntary acceptance by the accused of certain conditions that entail the affectation of some of their rights for a period of time. The formal requirements for the SCP (art. 237, second paragraph) are: a) That the sentence that may be imposed on the accused in the event of conviction does not exceed three years' imprisonment; and b) That the accused has not previously been convicted of a crime or simple offence.

It should be made now clear that TTDs in Chile do not exist neither legally nor constitutionally. TTDs, as we will see further down, were created in 2004 as a “pilot project” in the city of Valparaíso, and currently are working as a “programme” within the ordinary justice. They do not constitute a criminal sanction as such and, being limited to the SCP, are intended as an alternative to criminal proceedings.⁶ Without any judgment to this, in this article we refer generally to the “TTD” in Chile with the understanding that this functions rather as a “programme”.

Despite the criticisms highlighted throughout this paper, in the conclusions, we recommend the maintenance, and even the budgetary and case-specific increase, of drug treatment (with or without a form of TTD). Nevertheless, far from retaining the current restrictions on admission, we suggest extending treatment to those in need due to their addiction, even to convicted offenders, regardless of a possible high level of criminal involvement. We also recommend the separation of criminal law assessments or charges from public health criteria. Thus, although problematic drug use may be considered, when exercising criminal justice, as an element that has an impact on lower reprehensibility, we believe that combining public health with criminal justice criteria to be inappropriate.

On the other hand, it seems pertinent to inquire into the real functions that TTDs and, in general, the creation of new legal institutions may conceal. In this context, as well as TTDs, will we also have criminal courts for feminicides? other criminal courts for the environment? others for economic crimes? Were each of these courts not to have enough work, like any bureaucracy, they would invent it, because no bureaucracy commits suicide. On the other hand, these courts that require a “special status”, according to those who thrive on inventing

⁶ In fact, the conditional suspension of proceedings, as the usual way of agreeing drug treatment under Article 238(c) of the Code of Criminal Procedure, is a self-compositional form of conflict resolution which, in addition to requiring the consent of the accused and the Public Prosecutor's Office, in no case involves a criminal sanction since it does not constitute a penalty based on the criterion of guilt, nor a security measure based on the criterion of dangerousness. It is, therefore, an agreement between certain participants in the criminal proceedings, the merit of which lies in the fulfilment of certain conditions that put an early end to the criminal proceedings.

such “special statuses”, can only function in big and not in small cities. Furthermore, as we go higher up the courts, there is less specialisation, that is to say, “specialisation” is required in the lower courts and not in the higher that review what has been decided. And so on, all the way up to the Supreme Court, where the very few are supposed to know everything.

2. TREATMENT AND PUNISHMENT

The idea of punishment-treatment is linked to special prevention, a theory that represents an anthropological shift in punitive law. This theory has its roots in Lombrosian penal positivism and underlies the notion of clinical treatment, whereby the convicted person is seen as a human being with a deficiency, a subject to be treated, both of deficiencies as well behaviour.

Treatment requires *per se* individualisation of the offender, thereby necessarily creating a link to actor based criminal law, which is related to a totalitarian conception of society. This individualisation will be used with the aim of modifying the behaviour and values of the convicted individual, allowing people to be punished for who they are and not what they do, allowing judgements to be made on the basis of personal prejudices and stereotypes of a racial, socio-economic, lifestyle, ideological and/or political nature.

Criminal law focuses, for special prevention, on the idea of dangerousness of which crime is none other than a manifestation or symptom and its penalty the means, or better, a remedy, of social defence. Punishment-treatment is applied to the individual, which will aim at transforming the defiant subject in someone who no longer poses a danger for society. Therefore, dangerousness will be the criterion for determining the nature and length of the sentence. In other words, special prevention implies indeterminacy of punishment.

Within these doctrines, terms such as re-education, re-socialisation, re-adaptation, reincorporation, or social integration, are often used, “perhaps the most fashionable in contemporary penitentiary practice [which] with its sophisticated appearance of altruism and philanthropy,

constitutes the most fearsome and refined danger to human freedom and dignity in the penal sphere of our times”.⁷

These goals most of the time constitute mere declarations which have nothing to do with reality, since believing that prison can be rehabilitative only shows ignorance of what goes on inside its walls. Furthermore, seemingly inappropriate is the use of the prefix “re” (rehabilitation, re-education, reintegration, etc.), since, on the one hand, there are people with a sound education who commit crimes (in politics and the business world for example) and, on the other hand, the majority of those sentenced to prison are individuals who grew up on the edge of society lacking real alternatives to education or social facilitation; therefore it is paradoxical that they can be “re” educated or “re” habilitated. Rather, these concepts refer to a type of intervention that aims to adapt these people to a certain “way of being”, respectful of the prevailing social/legal order. This is even more contradictory, given that to this end people are subject to a “prison order” that is far from such an ideal social/legal order, as it is characterised by “widespread disregard for the law”.⁸ Another issue that is hardly considered by supporters of these theories is the cost and means required to actually implement rehabilitative penalties. In practice, prison, despite its extremely high costs, not only fails to provide the necessary tools to achieve this supposed rehabilitation, but also increases the criminal factors of those incarcerated. Therefore, it would be appropriate to ask the same society that expects to rehabilitate its convicts, whether each society has the criminals it deserves, that is to say, those it is capable of producing, and whether it is not that society that should

⁷ RIVACOBÁ, Manuel. *Violencia y justicia*. Valparaíso: Universidad de Valparaíso, 2012, p. 44.

⁸ In this respect, BOVINO points out that it is often said that prison is a „law-less“ space and that this can mean at least two things, either that it is an area not regulated by law or that it is an area of generalised non-compliance with the law. The author is inclined towards the latter. BOVINO, Alberto. Control judicial de la privación de libertad y derechos humanos. *Revista Jurídica*, Guayaquil, n. 17, pp. 1-23, 2004. Available at: <https://www.revistajuridica-online.com/2004/01/el-control-judicial-de-la-privacion-de-libertad-y-derechos-humanos/> Consulted on: 11th May 2021.

be resocialised and with what qualifications and aptitude it can then expect to resocialise individuals.⁹

Without any judgment to the criticism previously raised, it is not less true that the resocialising thought has the merit of denouncing the stigmatising and criminal effects of certain punishments – such as life imprisonment –, the uselessness of short-term deprivation of liberty and, above all, of having provided a legal-philosophical basis for a criminal policy that should be oriented towards the individual and his or her fundamental rights. Equally, any attempt of resocialisation – if the aim is for this to be successful – must have all the necessary agreement of the offended, which mitigates the possible dehumanising effects that the idea of punishment-treatment may have.¹⁰

With the emergence of field work from the 1940s onwards,¹¹ special positive prevention, being no longer able to be totally disconnected

⁹ RIVACOBÁ, Manuel. *Violencia y justicia*. Valparaíso: Universidad de Valparaíso, 2012. p. 44 y ss. The same idea is also developed in: RIVACOBÁ, Manuel. *Función y aplicación de la pena*. Buenos Aires: Depalma, 1993; y RIVACOBÁ, Manuel. *Hacia una nueva concepción de la pena*. Lima: Grijley, 1995.

¹⁰ Though the literature on theories of the end of punishment is not exhaustive in this article, for a critical analysis on the matter, it is useful to see: VON HIRSCH, Andrew y MAHER, Lisa. Should penal rehabilitationism be revived? *Criminal Justice Ethics*, vol.11, n. 1, pp. 25-30, 1992, y BARATTA, Alessandro. Resocialización o control social: por un concepto crítico de “reintegración social” del condenado. En: BARATTA, Alessandro (ed.) *Criminología y sistema penal: compilación in memoriam*. Montevideo-Buenos Aires: BdeF, 2004, pp. 376 ss. Among the Chilean doctrine, together with the already mentioned texts by Rivacoba, the following can be consulted: CURY URZÚA, Enrique. *La prevención especial como límite de la pena*, EN: ADPCP, XLI, fasc. 3, pp. 685-702, 1998. Highlighting novel aspects of rehabilitation: ROTMAN, Edgardo. *Beyond Punishment: A New View on the Rehabilitation of Criminal Offenders (Contributions in Criminology and Penology)*. New York: Greenwood Press, 1990. For a modern análisis that seek to reconcile theoretical and empirical aspects of positive prevention, see: ROBINSON, Paul. *Principios distributivos del Derecho penal*, traducción e introducción de Manuel Cancio e Iñigo Ortiz de Urbina. Marcial Pons, Madrid-Barcelona-Buenos Aires: Marcial Pons, 2012, y ROBINSON, Paul H. y CAHILL, Michael T. *Law without justice: why criminal law doesn't give people what they deserve*. Oxford: Oxford University Press, 2006.

¹¹ The pioneering analysis belong to CLEMMER and his conception of imprisonment, CLEMMER, Donald. *The prison community*. New York: Rinehart & Winston, 1958. Subsequently, the work of Goffman stands out: GOFFMAN,

with reality, changed its original perspective and abandoned a vision purely focused on the need for clinically treating the offender, to place more emphasis on the social deficiencies motivating or explaining criminal behaviour.

These new rehabilitative concepts were at the forefront of the American penal system until the 1970s¹², as they could offer many advantages in contrast with retribution, which was not intended to serve any social end. However, the weakening of the social state meant a transformation of the penal system, leaving behind the rehabilitative ideal. This change was accompanied by the adoption of neo liberal systems, where social deregulation, the increase of wage precarity and job instability went hand in hand with the rise of the punitive or authoritarian state, which is far removed from rehabilitative goals.¹³

Beckett y Western argue that the social expenditure and expenditure in the penal system are inversely related, as they are ways of managing the excluded sectors of the labour market, and that this relationship is empirically demonstrated from 1995 onwards in the USA.¹⁴ The neoliberal system which professes economic deregulation, generates

Erving. Internados. Ensayos sobre la situación social de los enfermos mentales, translated by María Oyuela, Buenos Aires: Talleres Gráficos Color Efe, 1992; GOFFMAN, Erving. *Asylums. Le istituzioni totali: i meccanismi dell'esclusione e della violenza*. Torino: Edizioni di Comunità, 1968. Then those of GOZZANO, Mario. *Compendio di psichiatria clinica e criminológica*. Turin: Rosenberg & Sellier, 1971; and more recently those of GONIN, Daniel. *La santé incarcérée. Médecine et conditions de vie en détention*. Paris: l'Archipel, 2000 and LIEBLING, Alison and MARUNA, Shadd. (eds.). *The effects of imprisonment*. Devon: Willan Publishing, 2005.

¹² GARLAND, David. *La cultura del control: crimen y orden social en la sociedad contemporánea*, traducción Máximo Sozzo. Barcelona: Gedisa, 2005, pp. 27-32.

¹³ WACQUANT, Loïc. *Las cárceles de la miseria*, traducción de Horacio Pons. Buenos Aires: Manantial, 2000, pp. 94-98., y WACQUANT, Loïc. *Parola D'onore: Tolleranza Zero. La trasformazione dello stato penale nella società neoliberale*, traducción de Massimiliano Guareschi, Milano: Feltrinelli, 2000, pp. 38 y ss.

¹⁴ LARRAURI, Elena. La economía política del castigo. *Revista Electrónica de Ciencia Penal y Criminología*, España, v. 11, n. 06, pp. 1-22, 2009, p. 8. Available at: <http://criminnet.ugr.es/recpc/11/recpc11-06.pdf> Consultated on: 10th May 2021.

penal over-regulation. The consequences produced by the dismantling of the social state, chiefly material insecurity among the lower classes, lead to an over-investment in prisons as an instrument of oppression and social control.

According to Garland¹⁵, the penal system characteristic of the welfare state (*penal welfare complex*), does not see crime as an amorality of the perpetrator, but as a manifestation of a social problem resulting from an industrial, class-based and unequal society.¹⁶ This system of welfarist punishments seeks, rather than reproaching the individual behaviour of the perpetrator of a crime, to correct the offender, providing him with tools to reintegrate him socially. The very idea of resocialisation encompasses that of treatment, which, as the 20th century progressed, became more and more scientific and contributed to the development of a penal language. “This is the case of *reformatories*, correctional institutes and associations, therapies, therapists and prison guards”.¹⁷ The rehabilitative ideal as well as its necessary consequence of indeterminate sentences, were widespread and strong in the United States, but not in continental Europe.¹⁸

Welfarism was characterised by an enormous trust in the operators of the penal system who were considered to be specialists in policies aimed at the rehabilitation of convicts. Thus, such operators had extensive powers to determine the type of sentence, classify the convicts, evaluate the possibility of an early release, assess the need for more or less intense supervision, and so on. The opinion of expert operators in the penal system became more of a deciding factor than that of the judicial authority. The type of sentencing and benefits of the convicts lay in the

¹⁵ (1999 y 2005) GARLAND, David. *Castigo y sociedad moderna*, traducción Berta Ruiz de la Concha. México: Siglo XXI editores, 1999, pp. 19-20, and GARLAND, David. *La cultura del control: crimen y orden social en la sociedad contemporánea*, translated by Máximo Sozzo. Barcelona: Gedisa, 2005, pp. 75-80.

¹⁶ GARLAND, David. *Castigo y sociedad moderna*, traducción Berta Ruiz de la Concha. México: Siglo XXI editores, 1999.

¹⁷ ZYSMAN, Diego. *Sociología del castigo. Genealogía de la determinación de la pena*. Buenos Aires: Ediciones Didot, 2012, p. 231.

¹⁸ ZYSMAN, Diego. *Castigo y determinación de la pena en los Estados Unidos. Un estudio sobre las United States Sentencing Guidelines*. Madrid: Marcial Pons, 2013, p. 285

hands of probation officers¹⁹, social workers, psychologists, psychiatrists, educators and social reformers, etc.²⁰

With the welfarism context, the liberal view that punishment was of less use than treatment, that imprisonment was counterproductive and that the death penalty was irrational prevailed over the conservative view of the deterrent power of harsh sentences and the need for longer custodial sentences and the death penalty.²¹ This welfare state and claims to rehabilitate offenders were based on a discourse that was aware of social inequalities and understood that the real causes of crime were to be found within the social context, especially in the deprivation suffered by the most vulnerable sectors.

With the crumbling of the welfare state and the loss of job security, a new poverty emerges as a consequence of mass unemployment and of broad sectors oscillating between labour instability and illegal work (often constituting a criminal offence). With the loss of stability, insecurity rises, and “risk” takes centre stage. This will no longer be eradicable and, therefore, mechanisms will have to be sought to minimise or distribute its effects.²² Within the criminal field, the idea of social co-responsibility in the origin of crime is left aside in order to focus primarily on the culpability of the individual. From this moment prevention (whether real or ideal) will no longer seek the transformation of the offender but will focus on making the offence less “profitable” for the perpetrator, who is assumed to be capable of making a rational choice.

Obviously, this dismantling of the ideal of rehabilitation did not come out of the blue. Penal policies aiming at rehabilitation or resocialisation have always had their detractors. The most conservative and reactionary sectors have constantly argued that prison should have a

¹⁹ For us parole. Occurs when a convicted person is allowed to serve his or her sentence on release under certain conditions.

²⁰ GARLAND, David. *La cultura del control: crimen y orden social en la sociedad contemporánea*, translation Máximo Sozzo. Barcelona: Gedisa, 2005, pp. 83-84.

²¹ GARLAND, David. *La cultura del control: crimen y orden social en la sociedad contemporánea*, translation Máximo Sozzo. Barcelona: Gedisa, 2005, p. 86.

²² BRANDARIZ, José Ángel. *El gobierno de la penalidad. La complejidad de la política criminal contemporánea*. Madrid: Dykinson, 2014.

punitive and not a rehabilitative function, since, if in our society honest and innocent people exist on the one side and bad and dishonest on the other, prison should serve to protect the former from the latter, locking the criminal inside four walls for as long as possible.²³ With the arrival in power of Margaret Thatcher²⁴ in Great Britain (1979) and Ronald Reagan (1981) in the United States a decisive shift took place, away from interventionist state and welfarist policies towards tougher criminal legislation far removed from correctionalist ideas. These conservative groups (right wing realism), critical of the ideal of rehabilitation, identify themselves with the idea of “law and order” and with the “criminology of the other”.²⁵

From the 1960s onwards, criticism also emerged from more progressive sectors. These are based on the ineffectiveness of the treatments that were intended to reintegrate convicts and that ended up giving legitimacy to prison, which, as a total institution - they argue - produces harmful effects on those who experience it. Furthermore, they understood that indeterminate sentences mask a system of total injustice that inflicts harshest punishments on the most vulnerable sectors of society, especially the poor and blacks. This criticism was aiming at limiting arbitrariness and denouncing the hypocrisy that was surrounding the “correctional” paradigm. Thus, reprobation of the “rehabilitation ideal” quickly began to spread in American academic circles, essentially because the very rationale of rehabilitation evidenced an insurmountable contradiction, since rehabilitative responses would inevitably fail to get to the root causes, because they intervene after the damage has been done. In other words, they respond to the consequences rather than the cause.²⁶

²³ WILSON, James. *Thinking About Crime*, 2^a ed. Nueva York: Basis Books, Nueva York, 1983.

²⁴ Margaret Thatcher, after being elected, started a campaign to reintroduce the death penalty and tougher criminal penalties.

²⁵ ZYSMAN, Diego. *Sociología del castigo. Genealogía de la determinación de la pena*. Buenos Aires: Ediciones Didot, 2012, p. 260.

²⁶ GARLAND, David. *La cultura del control: crimen y orden social en la sociedad contemporánea*, translated by Máximo Sozzo. Barcelona: Gedisa, 2005, p. 89. Literature and cinema also warned us of the dangers of special prevention and punishment-treatment with “A Clockwork Orange”, a novel by Anthony Burgess made into a film by Stanley Kubrick, showing how cruel and

This does not mean, as we will see below, that we are against the existence of treatment in general and drug treatment in particular. Quite the opposite, in fact. We believe that such treatments are extremely necessary and that the advantages that they can bring are priceless. However, we believe that the mixing of the criminal justice and health system has complex consequences. Among these, the efficiency of these treatments is usually appraised more in terms of non-recidivism and lower costs compared to imprisonment, rather than in relation to the improvement of physical and mental health indicators of the people who access them.²⁷ To summarise, it appears to be extremely hazardous to unite or confuse criminal-legal criteria, which should not disregard culpability as reproachability, with those of a clinical nature, which must be based on the individual need for treatment. In the same light, lucid are the words of Morris, for whom: “[i]njustice and inefficiency invariably flow from any mixture of the criminal law and the mental health powers of the state. Each is sufficient by itself to strike a fair balance between liberty and authority; each has its own interest in potential constituents; when mixed together, they only add up to the possibility of injustice”.²⁸

3. ACCEPTANCE OF RESPONSIBILITY AND NEED FOR TREATMENT

We previously examined how rehabilitative theories and the treatments they advocate, regardless of the intentions of those who support them, seek to modify lifestyles, habits and customs. However

dehumanising resocialising treatment could be. We analyse this film from a legal-criminal perspective in “Stanley Kubrick y las doctrinas preventivistas” in CUNEO, Silvio. *Cine y Derecho penal*, Valencia: Editorial Tirant lo Blanch, 2019, pp. 77-80.

²⁷ See: FUNDACIÓN PAZ CIUDADANA. *Evaluación de impacto y costo-beneficio de los tribunales de tratamiento de drogas en Chile*. 2018. Available at: <https://pazciudadana.cl/biblioteca/reinsercion/evaluacion-de-impacto-y-costo-beneficio-de-los-tribunales-de-tratamiento-de-drogas-en-chile/> Consulted on: 14th May 2021.

²⁸ Cite on: MONAHAN, John. *El futuro de la gestión del riesgo de violencia*. EN: TONRY, Michaels (ed.) *El futuro del encarcelamiento*. Nueva York: Oxford University Press, 2003, p. 237.

altruistic they may appear to be, this change in behaviour is not freely chosen by the defendant, as it is not possible to speak of freedom when the alternative to treatment consists of a penal response.

Treatments against drug addiction are often not entirely voluntary, as those in treatment have often been heavily pressured into entering treatment. However, it is extremely different when the acceptance of treatment is the result of pressure from parents, partners, other family members or friends,²⁹ than when such pressure is exerted by the state, where acceptance of treatment is out of fear of criminal prosecution and, eventually, imprisonment.

We are aware that prison is a highly risky as far as personal safety is concerned. Studies on intra-prison violence confirm Elías Neumann's opinion that in Latin American prisons "one does not go To serve a punishment, but to be punished daily and continuously".³⁰ Under

²⁹ LÓPEZ describes what may be a differentiating aspect between the two types of pressure. When the person is under pressure from family members, this does not close the dimension of choice on the part of the subject, as long as the therapeutic space offers the possibility of addressing this tension. The process of accompaniment involves allowing the patient to take responsibility for their subjective position in relation to their substance use, which requires a time of decanting and dialogue within the system. Thus, the subject will be able to choose any of the alternatives presented to him/her, including the rejection of the demand coming from significant third parties. See: LÓPEZ, Cristián. La decisión de entrar a un tratamiento de adicciones: motivación propia e influencia de terceros. *Terapia Psicológica*, Santiago, v. 27, n. 1, pp. 119-127, 2009. <http://dx.doi.org/10.4067/S0718-48082009000100012>

³⁰ NEUMAN, Elías. *El abuso de poder en las cárceles latinoamericanas*. p. 54. Available at: <http://www.ehu.eus/documents/1736829/2029681/08+-+Abuso+de+poder+carceles.pdf> Accessed on: 10 May 2021. In the Chilean case, a recent United Nations report states that Chile is the country with the highest rate of deaths in the intra-prison context in Latin America. UNODC. *Global study on homicide 2019*. Available at: <https://www.unodc.org/unodc/en/data-and-analysis/global-study-on-homicide.html> Accessed on: 10 May 2021. On a comparative level, a prison survey (2013) in six Latin American countries showed that Chile is the country where most people report being beaten inside their prisons, with around 26% of them reporting that they were beaten. Of these, 66% say that prison staff are responsible for the beatings. SÁNCHEZ, Mauricio and PIÑOL, Diego. *Condiciones de vida en los centros de privación de libertad en Chile*. Santiago de Chile: Instituto de Asuntos Públicos, Universidad de Chile, 2015, p. 33. Available at: <https://www>.

criminal threat, it is at least questionable to speak of voluntariness in the acceptance of treatment.³¹

On the other hand, the lack of access to treatment for problematic drug use is particularly acute in the US. According to a study conducted in 2016, there are almost seven and a half million people affected by illegal drug dependency and only 28% of those receive treatment,³² which generates a perverse result, since the simplest and cheapest way to access treatment is precisely via the drug court,³³ which would encourage accepting criminal responsibility, that is, giving up basic rights - such as the presumption of innocence - in order to treat an addiction.³⁴

cesc.uchile.cl/docs/CESC_condiciones_centros_privacion.pdf Accessed on: 10th May 2021.

³¹ There is strong evidence pointing to the importance of intrinsic motivation (doing something because it is valued in itself and not because of external motivations or pressures) in relation to this type of treatment, as it is associated with improved participation in behaviour change, performance, health and well-being. DECI, Edward and RYAN, Richard. Facilitating Optimal Motivation and Psychological Well-Being Across Life's Domains, *Canadian Psychology*, vol. 49, n. 1, pp. 14-23. 2008. <https://doi.org/10.1037/0708-5591.49.1.14> Along these lines, self-determination theory proposes that intrinsic motivation is facilitated when social contexts support people's need for autonomy by considering their perspective, minimising external controls and providing opportunities to exercise choice. WILD, Cameron, CUNNINGHAM, John. and RYAN, Richard. Social pressure, coercion, and client engagement at treatment entry: A self-determination theory perspective. *Addictive Behaviors*, v. 31, pp. 1858-1872, 2006. <https://doi.org/10.1016/j.addbeh.2006.01.002> Some authors point out that, at best, such volitionality could be constructed as part of the process, but always depending on how the process is carried out. See: WEXLER, David and KING, Michael. Promoting legal and social responsiveness to rehabilitation: the role of therapeutic justice, IN: COOPER, Caroline (ed.). *Drug Treatment Courts: An International Response for Drug Dependent Offenders*. Washington D.C.: OAS, 2013, pp. 21-46, p. 38.

³² SOCIAL SCIENCE RESEARCH COUNCIL (SSRC). *Tribunales de tratamiento de drogas en las Américas*, 2019, p. 32. Available at: <https://s3.amazonaws.com/ssrc-static/%7BF7D9B319-2CF3-E811-A968-000D3A34AFA9%7D.pdf>. Consulted on: 10th May 2021.

³³ PHYSICIANS FOR HUMAN RIGHTS. *Neither Justice nor Treatment*, 2017. Available at: https://phr.org/wp-content/uploads/2017/06/phr_drug-courts_report_singlepages.pdf Consulted on: 14th May 2021.

³⁴ MARLOWE, Douglas y MEYER, William (eds.) *The Drug Court Judicial Benchbook*. Alexandria, VA: National Drug Court Institute, 2011. Available

Although consent to take part in drug treatment is not always an alternative to prison (in Chilean drug treatment courts-TTD, for example), this belief or ignorance means that it is precisely the fear of imprisonment that motivates a high number of subjects to accept participation in drug treatment courts. Therefore, the voluntary nature of the participation in the TTD is not just that.³⁵ A study undertaken in Chile in 2011 demonstrated that many of TTD participants enrolled without having clearly understood that they did not risk prison for their crimes and that the acceptance of treatment was often based on the misconception that they were avoiding incarceration.³⁶

Likewise, the disciplining spirit of the TTD reveals a state that intrudes into the lives of offenders, exerting pressure to normalise behaviour through the imposition of moral codes.³⁷ Referring to this paternalistic conception, Isaiah Berlin argues that what the state contemptuously does is to refer to an offender as follows: “If you will not discipline yourself, I must do it for you; and you cannot complain of lack of food, because the

at: https://www.ndci.org/sites/default/files/nadcp/14146_NDCI_Benchmark_v6.pdf Consulted on: 15th May 2021.

³⁵ This lack of voluntariness is comparable to negotiated justice in which defendants are forced to accept responsibility in order not to risk excessively severe penalties. LANGBEN draws a link between such plea bargains and medieval torture: “In twentieth-century America we have duplicated the main experience of medieval European criminal procedure: we have abandoned an adversarial system of attribution of guilt in favour of a non-adversarial system of concessions. We force the accused against whom probable cause has been established to confess guilt. To be sure, our means are much more considerate; we do not use the rack, the Spanish boot, or other instruments of leg-damaging torment. But like the Europeans of centuries ago who did use these machines, we make it terribly costly for an accused to claim the exercise of his right to the constitutional guarantee of previous trial.” Cited in: ZYSMAN, Diego. *Punishment and Sentencing in the United States. A study of the United States Sentencing Guidelines*. Madrid: Marcial Pons, 2013, p. 223.

³⁶ PIÑOL, Diego. et al. *Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile*. Santiago de Chile: Centro de Estudios en Seguridad Ciudadana, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 97.

³⁷ See: FOUCAULT, Michel. *Vigilar y castigar: nacimiento de la prisión*, traducción de Aurelio Garzón del Camino. México: Siglo XXI, 2002.

fact that you are in court is evidence that, as a child, a savage, an idiot, you are not ready for self-direction.”³⁸

The situation of TTDs is different depending on the context. Thus, in several US states, the only way to enter TTD is as a convicted offender, which, as we have seen, can press an offender to accept responsibility. In Chile, the situation is different, as the TTD operates only with respect to defendants who accept a conditional suspension of proceedings, which does not imply a criminal conviction. Although it appears to be positive that a conviction is not required for accessing drug treatment, as this does not encourage the acceptance of a conviction, it is also a limitation, as the criterion for admission to treatment should be the medical necessity of the treatment and not legal considerations such as the presence or absence of a criminal record. Therefore, the possibility to enter TTDs should be available to defendants, convicts and even recidivists.

In the United States, the association Physicians for Human Rights claim that the failure of TTDs is due to the fact that they provide treatment for those who do not necessarily need it, which in turn leaves patients requiring treatment without an opening. Therefore, Physicians for Human Rights critically refer to the TTDs with the slogan “neither justice nor treatment” since this system does not achieve either of these ends.³⁹

According to Miller, the combination of criminal justice and medical criteria of treatment, essentially incompatible, prevents the fulfilment of goals in both directions. The therapy, in other words, ignores the hostile and political quagmire that characterises the offender’s situation in favour of a personalised, exhortative model of individualised persuasion.⁴⁰ In a similar vein, Nolan warns that the medical nature of

³⁸ MILLER, Eric. Drug, Courts and The New Penology. *Stanford Law & Policy Review*, v. 20, n. 2, 2009, p. 132. Available at: <https://ssrn.com/abstract=1464353> Consulted on: May, 10th 2021.

³⁹ PHYSICIANS FOR HUMAN RIGHTS. Neither Justice nor Treatment, 2017, p. 2. Available at: https://phr.org/wp-content/uploads/2017/06/phr_drug-courts_report_singlepages.pdf Consulted on: May, 14th 2021; y DE REMENTERÍA, Ibán; SEPÚLVEDA, Eduardo y BARRA, Juan. *Los tribunales de tratamiento de drogas en Chile. Limitaciones y perspectivas*. Santiago de Chile: Aún Creemos en los Sueños, 2018, p. 34.

⁴⁰ MILLER, Eric. Drug, Courts and The New Penology. *Stanford Law & Policy Review*, v. 20, n. 2, 2009, p. 120. Available at: <https://ssrn.com/abstract=1464353>

drug treatment may recommend, regardless of the offence, a lengthy, invasive and potentially arduous treatment procedure.⁴¹

4. TTDs IN THE CONTEXT OF THE WAR ON DRUGS

The implementation of the War on Drugs, first in the United States and then in Latin America, has been socially and racially selective. In the US, “nothing has contributed more to the systematic and massive internment of people of colour in the United States than the War on Drugs”.⁴² The origin of this criminal policy has little to do with the scientific evidence that could support its effectiveness, but rather with populist decisions that gave great electoral gain to its promoters. As a war strategy

Consulted on: May, 10th 2021.

⁴¹ NOLAN, James. Redefining Criminal Courts: Problem-Solving and the Meaning of Justice. *American Criminal Law Review*, v. 40, n.4, 2003. pp. 1541-1566.

⁴² ALEXANDER, Michelle. The colour of justice. La nueva segregación racial en Estados Unidos, translated by Carmen Valle and Ethel Odriozola. Salamanca: Capitán Swing Libros, 2012, p. 12. In the same sense, Tonry understands that the increase in the mass incarceration of blacks is a direct consequence of the “War on Drugs” policies first promoted by Ronald Reagan and expanded by his successors. TONRY, Michael. Malign Neglect: Race Crime and Punishment in America. New York: Oxford University Press, 1995. For ALEXANDER “from the beginning the war on drugs had little to do with public concern with narcotics and more to do with public concern with race”. For this author, mass incarceration is a system of racial control that is not incompatible with current sensibilities because of its invisibility. The gato-paradesque premise formulated by Giuseppe Tomasi de Lampedusa helps us to understand American racial segregation: everything changes, so that everything stays the same. First it was slavery, then the era of segregation, and today it is the penal regime that surreptitiously maintains the racial caste system in American society. That racism is not explicit does not mean that it does not exist. The arguments and rationalisations for racial discrimination and exclusion have mutated, but the results have remained much the same. ALEXANDER, Michelle. The Colour of Justice. La nueva segregación racial en Estados Unidos, translated by Carmen Valle and Ethel Odriozola. Salamanca: Capitán Swing Libros, 2012, p. 86. On the War on Drugs, it is essential to read Rosa del Olmo, see: DEL OLMO, Rosa. La cara oculta de la droga. Bogotá: Temis, 1998; DEL OLMO, R. Drogas: ¿percepciones o realidad? Nuevo Foro Penal, v. 12, n. 47, pp. 94-108. 1990. Available at: <https://publicaciones.eafit.edu.co/index.php/nuevo-foro-penal/article/view/4133>. Consulted on: 14th May 2021

focused on poor neighbourhoods, it makes it easy to convict those involved, but it is highly inefficient in its fight against drug trafficking, since by locking up small-time dealers (or users) they are quickly replaced by others due to the huge demand for illegal drugs.⁴³

In 1971 President Nixon declared War on Drugs, announcing the need to restore the law and order policy,⁴⁴ declaring that drugs were a “modern curse of American youth”⁴⁵. Soon, the War on Drugs was imposed in Latin America, first in cocaine-producing countries such as Bolivia, Peru and Colombia, then in the rest of the continent with disproportionately punitive norms, contrary to the liberal principles of criminal law.⁴⁶

The effects obtained have not seen, as we have already mentioned, the reduction of trafficking activities, but the incarceration of the last links in the chain of trafficking and drug addicts.⁴⁷ It is paradoxical that

⁴³ On the substitution of traffickers, see MACCOUN, Robert and REUTER, Peter. *Drug War Heresies: Learning from Other Vices, Times, and Places*. New York: Cambridge University Press, 2001.

⁴⁴ SIMON, Jonathan. *Gobernar a través del delito*, traducción de V. Boschioli, Buenos Aires: Gedisa, 2011, p. 10.

⁴⁵ GALEN, Ted. *Bad Neighbor Policy. Washington's Futile War of Drugs in Latin America*. New York: Palgrave-Macmillan, 2003, p. 11.

⁴⁶ CUNEO, Silvio and OXMAN, Nicolás. Origin and consequences of the war on drugs. from the United States to Andean countries. *Revista Brasileira de Políticas Públicas*, v. 11, n. 1, 2021, pp. 451-469. <https://doi.org/10.5102/rbpp.v11i1.6960> On the War on Drugs in the United States, in addition to the bibliography cited above, see the documentaries: Amendment XIII, 2016, directed by Ava DuVernay and Crack: Cocaine, Corruption & Conspiracy, 2020, directed by Stanley Nelson. Both are available on Netflix and Youtube

⁴⁷ Closely linked to the electoral profitability of punitivism in anti-drug legislation, the figure of “el narco” serves to justify the imposition of inefficient public policies. In general, the crime of drug trafficking at the end of the chain is exaggeratedly conspicuous and boisterous. Unlike other crimes in which the perpetrators seek to go unnoticed, it is not uncommon for drug trafficking crimes to involve shooting into the air and even throwing fireworks with various symbolisms. In this way, drug trafficking crimes generate enormous visibility, which means that many people, especially those who live with “narcos”, rightly feel tired and intimidated. However, the prosecution of substitutable subjects keeps the trafficking going, making everything more dangerous and turning the trafficking itself into a far more lethal activity than the drugs themselves. Thus, the War on Drugs, rather than solving public

a policy that aims at justifying itself by promoting the defence of public health has opposite effects. Often small-scale trafficking forms part of the activities of addicted users, especially those who have problems financing their addiction. However, the law itself themselves presume anyone possessing or transporting drugs is trafficking, overturning the burden of proof and violating the presumption of innocence.

Usually in politics, and legislating criminal policy models, it is more important to appear to be concerned than to adequately deal with the problems. Hence, legislation is passed without thinking about the real impact of the legislation itself. Surely no one would deliberately acknowledge, when voting for a drug control law, that they expect it will lead to an increase in the incarceration of the poor and instead maintain widespread impunity for those who enrich themselves from trafficking activity. Nor do the promoters of criminal policy seem to address the harmful effects of imprisonment, including the level of drug use, prison violence and recidivism rates.⁴⁸

policy problems, generates more violence, and the drastic sanctions applied by virtue of these laws do not diminish the activity, since the waiting line of candidates for the trafficking business seems infinite. In this regard, DAMMERT's column is illustrative in that it calls for a change in the focus of criminal prosecution of drug trafficking offences. DAMMERT, Lucía, "¿Avance del narco? 2020". Available at: <https://www.theclinic.cl/2020/05/29/columna-de-lucia-dammert-avance-del-narco/> Consulted on: 14th May 2021.

⁴⁸ In Chile, the studies that have measured the level of drug use in the prison population mostly seek to determine the likelihood of the criminal risk that drugs bring with them. To do so, they investigate, for example, whether the convicted offenders used drugs on the day they committed the crime, or they try to determine the prevalence of drug use during their lifetime prior to entering prison. See: VALENZUELA, Eduardo and LARROULET, Pilar. *La relación droga y delito: Una estimación de la fracción atribuible*. Estudios Públicos, n. 119, pp. 33-62. Available at: https://www.cepchile.cl/cep/site/artic/20160304/asocfile/20160304095323/rev119_valenzuela_larroulet.pdf Consulted on: May, 17th 2021; CONSEJO NACIONAL PARA EL CONTROL DE ESTUPEFACIENTES. CONACE. *II Estudio Nacional de Drogas en Población Penal*. Santiago de Chile. 2007; and CÁCERES, Javiera. *Consumo de Drogas en Detenidos. Aplicación de la Metodología I-ADAM en Chile*. Santiago de Chile: Fundación Paz Ciudadana, 2010. Available at: https://biblioteca.cejamericas.org/bitstream/handle/2015/460/pub_20110623110234.pdf?sequence=1&isAllowed=y Accessed 17 May 2021. In contrast, there are few Chilean studies that have examined the level of consumption within penal units. Among these, SÁNCHEZ and PIÑOL state that 20.5% of the total

A particularly sensitive matter regarding the effects of this war is the imprisonment of women.⁴⁹ Selectivity in women prisoners operates by locking up a very vulnerable group that for the main part shares three characteristics: they are women without power nor influence, usually imprisoned for drug trafficking offences; they have lived in poverty; and a high proportion belongs to ethnic minority groups.⁵⁰

According to Antony, the constraints of motherhood prevent women from finding or keeping their jobs, which explains why they sometimes choose to engage in drug trafficking activities.⁵¹ Due to the disadvantaged status of women, it is normal that their activity in the traffic

number of persons surveyed deprived of liberty in Chile reported having consumed drugs or alcohol during the last month of imprisonment (marijuana being the substance with the highest prevalence level), figures considerably higher than those reported by the study in samples from countries such as Argentina, Peru, Brazil and Mexico. SÁNCHEZ, Mauricio and PIÑOL, Diego. *Condiciones de vida en los centros de privación de libertad en Chile*. Santiago de Chile: Instituto de Asuntos Públicos, Universidad de Chile, 2015, p. 28. Available at: https://www.cesc.uchile.cl/docs/CESC_condiciones_centros_privacion.pdf Accessed on: 10 May 2021. Comparatively, however, there is ample evidence regarding the impact of prison on drug use, on the initiation of new drugs, and on a range of dynamics and crimes associated with trafficking and corruption within prison. See: CREWE, Ben. Prisoner society in the age of hard drugs. *Punishment and society*, v. 7, n. 4, pp. 457-481, 2005. <https://doi.org/10.1177/1462474505057122>; BOYS, Annabel et al. Drug use and initiation in prison: results from a national prison survey in England and Wales. *Addiction*, v. 97, n. 12, pp. 1551 – 1560, 2002. <https://doi.org/10.1046/j.1360-0443.2002.00229.x>

⁴⁹ See: CHESNEY-LIND, Meda. *The Female Offender: Girls, Women and Crime*. New York: Sage Publications, 2003; y RIVERA, Iñaki. *La cuestión carcelaria. Historia, Epistemología, Derecho y Política penitenciaria. Volumen I*; con prólogo de Roberto Bergalli y Massimo Pavarini, 2ª ed. Buenos Aires: Editores del Puerto, 2009, p. 264.

⁵⁰ CARLEN, Pat. Cited in RIVERA, Iñaki. *La cuestión carcelaria. Historia, Epistemología, Derecho y Política penitenciaria. Volumen I*; con prólogo de Roberto Bergalli y Massimo Pavarini, 2ª ed. Buenos Aires: Editores del Puerto, 2009, p. 264.

⁵¹ ANTONY, Carmen. Reflexiones sobre los procesos de criminalidad y criminalización de las mujeres de América Latina implicadas en delitos relacionados con drogas, EN: FACIO, Alda y FRIES, Lorena (eds.). *Género y Derecho*. Santiago de Chile: LOM. 2002, pp 511-516, 2002, p. 512.

corresponds to subordinate and highly visible tasks,⁵² which makes them easily replaceable and apprehended.

Within this context of punitiveness without respect for basic principles such as proportionality, the presumption of innocence and respect for fundamental freedoms, in the legislation on illicit drug trafficking, it is curious that the legislator, again imposing US criminal policies, proposes a supposedly alternative path such as the existence of drug courts for an insignificant number of cases in relation to the high number of people prosecuted and imprisoned by the War on Drugs.⁵³ Its implementation and operation will be discussed below.

5. GENESIS OF THE TTD IN CHILE (THE CURIOUS ALLIANCE)

Before analysing the genesis of the TTDs in Chile, we would like to raise several points with the sole purpose of questioning the declared intentions of the promoters of the TTDs and suggesting possible unstated justifications for their implementation.

It appears difficult to understand what is intended by the introduction of the TTDs in Chile. As we have already pointed out, these are, yet again, impositions of systems born in the United States. TTDs may primarily fulfil the symbolic role of showing that it is not only about punishing but also about welcoming and protecting offenders with drug dependence problems. Even if, mainly due to an eligibility filter, this is a very slim possibility and its implementation is excessively onerous, the intention is to show a friendly side to anti-drug legislation.⁵⁴

⁵² MAQUEDA, M. Luisa. *Razones y sinrazones para una criminología feminista*. Madrid: Dykinson, 2014, p. 247.

⁵³ In 2020 alone, there were 29,010 drug law charges brought by the Public Prosecutor's Office, of which 7,691 were convicted (26%) and 1,330 (4.6%) were subject to a conditional suspension of proceedings. Statistical Bulletin January-December 2020, National Prosecutor's Office. Available at: <http://www.fiscaliadechile.cl/Fiscalia/estadisticas/index.do> Consulted on: 20th May 2021.

⁵⁴ We spoke to two TTD judges in Chile and both agree that, while there are good results in individual cases, the programme is very incomplete and both

According to Jonathan Simon, TTDs, rather than an alternative to incarceration, have succeeded in expanding judicial control by adapting to a new metric of “rule by crime” and the strategy of accountability.⁵⁵ For David Garland, this is a feature associated with the new penology in which courts are involved in public-private partnerships with providers of various treatments and funding sources.⁵⁶

All the previously discussed issues seek to question the reality of the intentions expressed by TTDs promoters in Chile. Just as no one should trust the good intentions of US participation in the development of drug control laws in Latin America, neither should we be naïve at the national level when we see that the intervention of the *Fundación Paz Ciudadana* (FPC) plays such a crucial role in the creation of public policies on crime and drug control in particular. Indeed, TTDs in Chile were first created in 2004, in a pilot project in Valparaíso with the participation of the US Embassy and the FPC.⁵⁷ It appears impossible not to link the

would prefer treatment to be carried out by medical agencies led by professionals with expertise in addiction-related problems.

⁵⁵ SIMON, Jonathan. *Gobernar a través del delito*, traducción de V. Boschirolí, Buenos Aires: Gedisa, 2011, pp. 13-18.

⁵⁶ GARLAND, David. *Castigar y asistir. Una historia de las estrategias penales y sociales del siglo XX*, traducción de Elena Odriozola. México: Siglo XXI editores, 2018, p. 287.

⁵⁷ SOCIAL SCIENCE RESEARCH COUNCIL (SSRC). Drug Treatment Courts in the Americas, 2019, p. 48. Available at: <https://s3.amazonaws.com/ssrc-static/%7BF7D9B319-2CF3-E811-A968-000D3A34AFA9%7D.pdf> Accessed on: 10 May 2021. In 1992, at the beginning of the new democracy, under the presidency of Agustín Edwards, a non-profit institution called *Paz Ciudadana* was born. Edwards was a powerful businessman and journalist, owner of *El Mercurio Sociedad Anónima* and played a fundamental role in the overthrow of the government of President Salvador Allende. From the declassification of secret cables in 2014 by the United States, it has been proven that Edwards was financed by the CIA to collaborate with the creation of an environment that would destabilise democracy and the constitutional government. In this way, the businessman facilitated the creation of a climate conducive to justifying the coup d'état. One of the declassified reports refers to the “Covert Action (of the United States) in Chile 1963-1973” and acknowledges that: In addition to funding political parties [...] the Forty Committee approved large sums to support the opposition media and thus maintain a relentless opposition campaign. The CIA spent \$1.5 million to support *El Mercurio*, the country's leading newspaper and the most important channel of propaganda

participation in this agreement between FPC and the US government to the role that *El Mercurio* and the CIA played in the Chilean coop in 1973.⁵⁸

To conclude this section, and without wishing to question the TTDs merely because of their promoters, we have doubts as to why public bodies, whose participation seems justified, are signing the Convention that creates the TTDs in Chile together with two entities (the US Embassy and the FPC) both of which have serious murky pasts.

6. OPERATION OF TTD'S IN CHILE⁵⁹

First and foremost, we appreciate that TTDs in Chile, unlike in numerous states of the US, do not require the acceptance of responsibility

against Allende. After knowing the dark past of the president and founder of *Paz Ciudadana*, it is chilling to see how he is once again involved with the United States (formerly the CIA, now the embassy) in defining the future of Chilean men and women. For a full analysis of the early years of the FPC, see: RAMOS, Marcela and GUZMÁN, Juan. *La guerra y la paz ciudadana*. Santiago de Chile: LOM, 2000.

⁵⁸ The Foundation's early zeal in stigmatising the offender as a stereotype of a poor, uneducated young man with Lombrosian traits is also striking. The Foundation could well dedicate itself to the study of other, more complex crimes that its members should be familiar with from their own experience, such as Carlos Delano (businessman convicted of tax fraud), Bernardino Piñera (priest accused of sexual abuse), Enrique Montero (former under-secretary during the dictatorship), etc. Over the years, the Foundation has been cloaked in scholars to hide its essence as a communications platform at the service of business interests, to disguise itself as a centre for the study of crime (something similar happens in the US with the Manhattan Institute, the doctrines of the Broken Windows, etc.). Somehow, this link between marginality and crime is functional for its own members to divert attention from millionaire crimes. It is no coincidence that the Foundation's top management includes powerful politicians who have held important positions in the governments of the last 30 years, such as former minister Javiera Blanco, former parliamentarian and minister Alberto Espina, and former president Ricardo Lagos, among others.

⁵⁹ Although the main objective of this research is to undertake a critical analysis of the TTDs, especially the ones in Chile, it is important to mention a situation that, though different, can be linked to the addressed problem.

In Chile, the offence of trafficking in small quantities, contemplated in Article 4 of Law No. 20.000, has been the subject of heated debate as to whether it is necessary to determine the percentage of purity of the drug in order to

or a prior conviction, which prevents a defendant from being pressured to accept responsibility in order to benefit from treatment. However, and for above-mentioned reasons, it is possible that convicts and defendants who have not been able to access DST (TTDs) may be those most in need of treatment.

On the other hand, a problem at the root of TTDs is the difficulty of establishing a link between the commission of crime and drug use. While there is evidence of an association between the two variables,⁶⁰

be convicted. Although the jurisprudence of the Supreme Court has changed, lately, there has recently been a growing consensus that, in the case of chemical drugs, a determination of drug purity is required. With this regard, in the Chilean Supreme Court it is possible to observe this logic in a ruling (8th recital) which indicates that “...without the determination of percentage of purity and, therefore, the possible modification with some “cutting” substances, it is not possible to define whether what is seized is truly harmful to the health of all citizens, effectively endangering the legal right protected by the legislator, since the only thing accredited was that the appellants carried a dose of ‘something’ in which there was cocaine, but in a proportion and with a potential for harm that is unknown in the act and which must therefore be presumed, a reasoning that violates basic principles of an accusatory system such as the one that governs us”. SCS Rol N° 4215-12. This matter is also linked with the discussion on the real impact that drug trafficking has on the legal good of “Public Health”, which, more than a collective good, can be understood, according to Roland Hefendehl- has the “sum of the individual legal goods”. See: HRZIC, Boris. Comentario de la SCS de 25 de julio de 2012 (Rol. N° 4215-2012). En: AA.VV. *Revista Doctrina y Jurisprudencia Penal* N° 13. *Ley de Drogas (N° 20.000) I Parte*. Santiago: Editorial Thomson Reuters, pp. 107-119, 2013, p. 118. The following can also be consulted: RODRÍGUEZ, Manuel. Jurisprudencia de la Corte Suprema del trienio 2016-2018 sobre aspectos sustantivos de la Ley N° 20.000. *Revista Jurídica del Ministerio Público*, n. 75, pp. 77-155, 2019; RODRÍGUEZ, Manuel. Determinación de la pureza de la planta de cannabis sativa en el delito del artículo 8 de la Ley N° 20.000: Caminando en círculos. EN: CÁRDENAS, Claudia, GUZMÁN DALBORA, José Luis y VARGAS, Tatiana (Coords.) *XVI Jornadas chilenas de Derecho Penal y Ciencias Penales. En homenaje a sus fundadores*. Valencia: Tirant lo Blanch, pp. 67-84, 2021; y RETTIG, Mauricio. Naturaleza jurídica del delito del tráfico ilícito de pequeñas cantidades de sustancias o drogas estupefacientes o psicotrópicas. En: AA.VV. *Revista Doctrina y Jurisprudencia Penal* N° 13. *Ley de Drogas (N° 20.000) I Parte*. Santiago: Editorial Thomson Reuters, pp. 53-84, 2013.

⁶⁰ See STEVENS, Alex., TRACE, M. and BEWLEY-TAYLOR, D.R. (2005). *Reducing drug related crime: An overview of the global evidence. Report five*. Beckley Foundation: Oxford, 2005.

questions remain as to how to interpret this association. Some models suggests that drugs *cause* criminal behaviour or vice versa. Others suggest that both drug use and crime are the result of other underlying factors such as poverty and social exclusion. And it has also been argued that it is actually a spurious relationship, i.e. they simply coexist, but there is no causal relationship. It is also clear that there are many people who use drugs and do not break the law, and there are others who do without ever having used drugs.⁶¹

Apart from what studies in general can demonstrate about the relationship between the two variables, it is altogether a different matter demonstrating how this relationship has worked at the moment of committing a crime in one particular individual. This is of great forensic complexity and has implications regarding how such conduct is judged, given that, “while most addicts are criminally responsible for criminal conduct committed in connection with their addiction, addiction can in some cases undermine a person’s freedom to control his or her conduct”.⁶² Such considerations are part of those involved in deciding whether a referral to a TTD is appropriate, and this is precisely why specialised professionals are required.

As already mentioned, in Chile there are no “specialised” drug courts, but they operate as a programme within the ordinary justice system in the Guarantee Courts⁶³ through a special form of alternative

⁶¹ The classic author who has categorised these possible causal relationships is: GOLDSTEIN, Paul. The drugs/violence nexus: A tripartite conceptual framework. *Journal of Drug Issues*, v. 15, n. 4, 1985, pp. 493-506.

⁶² It is necessary to differentiate between the drug addict (intoxication, withdrawal, addiction) who commits crime as a direct result of the effects of the drug (pharmacological assumption) or by its absence (functional delinquency) from the drug offender, who often presents as an underlying cause an antisocial or narcissistic disorder, as well as a criminal history, in which drug use is an incidental event. See: ESBEC, Enrique. Violence and mental disorder. *Cuadernos de Derecho Judicial*, n. 8, 2005, pp. 57-154; and ECHEBURÚA, Enrique. FERNÁNDEZ-MONTALVO, Javier. Male batterers with and without psychopathy: An exploratory study in Spanish prisons. *International Journal of Offender Therapy and Comparative Criminology*, n. 51, 2007, pp. 254-263.

⁶³ The Gurantee Courts are criminal courts in Chile created by the Criminal Procedure Reform of 2000.

exit, meaning the conditional suspension of proceedings, which can only be applied to offenders without a criminal record or pending conditional suspensions, for crimes carrying a sentence of no more than three years imprisonment. That is to say, eligibility criteria are such that only a limited number of defendants are eligible for TTDs.

TTDs in Chile include a judge, who has the primary role, a prosecutor from the Public Prosecutor's Office, a defence lawyer, a psycho-social team, and a coordinator in charge of the programme.⁶⁴ It is the prosecutor or the defence lawyer who identifies the potential candidate. Then, where appropriate, a psychiatrist conducts an assessment of problematic drug use and its link to the crime under investigation. Afterwards, the prosecutor together with the psycho-social team and the defence lawyer, discuss a plan where both the possible treatment and the patient's eligibility requirements are analysed. The issues discussed at this meeting will prove key to determining the conditions for the hearing during which the conditional suspension of proceedings will be declared. After the conditional suspension hearing, the participant receives a treatment plan to be provided by a public or private body. This body provides information to the psycho-social team and monthly hearings are held, presided over by a judge, to analyse the treatment and determine new goals. At the end of the programme, a final hearing is held.⁶⁵

Eligibility of candidates is reserved exclusively for first-time perpetrators of low-level offences, meaning those most in need of drug treatment are possibly excluded. This occurs specifically because the eligibility of candidates for treatment does not only respond to clinical criteria, but also, as an initial filter, to requirements linked to dangerousness. Therefore, on the one hand, the profile of people participating in TTDs is inconsistent with those who really need to follow such treatments,

⁶⁴ REBOLLEDO, Lorena. El rol del fiscal en los tribunales de tratamiento de drogas, EN: Tribunales de Tratamiento de Drogas en Chile, Material educativo. In: DROPELMANN, Catalina (ed.). Santiago de Chile: Fundación Paz Ciudadana, pp. 88-96, 2010, p. 141.

⁶⁵ PIÑOL, Diego. *et al. Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile*. Santiago de Chile: CESC, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 76.

and, on the other hand, the profile of the participants is not the most suitable in relation to the objectives of TTDs.⁶⁶ It is at this point that one of the main problems of combining criminal justice and health criteria becomes apparent.

Ultimately, it is a costly system that, at best, achieves modest results and does not necessarily target those most in need of treatment from a health perspective. Therefore, “it is valid to ask how much it effectively contributes to the reduction of recidivism and how real the drug-crime link is when the cases dealt with correspond to minor offences committed by people who are not habitual offenders”.⁶⁷

While it is possible that TTD users do require such treatment, from a clinical point of view, the problem is created by setting up filters that leave out others who also need it. From a public health policy perspective, all that require (or *want*) such treatment should have access it,⁶⁸ and if prioritisation is required (given the limited resources), such prioritisation should also be based on health criteria (severity of use, vital risk, other concomitant health problems, history of adherence, etc.) and not on the basis of dangerousness. On the other hand, it is absurd to think that it would be possible to identify (regardless of the seriousness of the offence and/or penalty) those where a positive relationship between drug use and the commission of the offence is demonstrated, not only because this relationship is highly disputed, but also because criminal

⁶⁶ PIÑOL, Diego. et al. Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile. Santiago de Chile: Centro de Estudios en Seguridad Ciudadana, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 57.

⁶⁷ PIÑOL, Diego. et al. Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile. Santiago de Chile: Centro de Estudios en Seguridad Ciudadana, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 33.

⁶⁸ In 2018, for adults aged 18-64, only 66,986 (10%) of the total Chilean population reported problematic use of alcohol and other drugs were effectively treated. In 2019, 649,160 people reported problematic use of alcohol and other drugs; however, during 2020, a total of 28,300 people were attended to in treatment programmes nationwide. MINISTRY OF THE INTERIOR AND PUBLIC SECURITY. Estrategia nacional de drogas 2021-2030, p. 62. Available at: <https://www.senda.gob.cl/wp-content/uploads/2021/02/Estrategia-Nacional-de-Drogas-version-web.pdf> Consulted on: 20th May 2021.

causality is too complex a matter to be determined solely on the basis of the drug use variable.

Another problem with treatment is that it does not assist participants in finding employment or training. Many of the participants are in a socially vulnerable situation and lack a support network.⁶⁹ To think that drug treatment alone can reduce recidivism is to fail to understand the psychosocial complexity that surrounds most drug users.

While it is true that the objectives of the TTDs in Chile to reduce drug use and recidivism are rather modest, they are nonetheless important. Even when treatment serves to rehabilitate only one person, we can argue that it will have been worthwhile.⁷⁰ However, from a public health point of view, access to treatment for problematic drug use should be a universal right and guaranteed by the state, and not determined by criteria of prioritisation or targeting based on cost.

Following the above, we can summarise and compare the advantages and disadvantages of the current model of TTD in Chile. This will be done on two levels. The first level is related to a macro-structural perspective, linked to the insertion of drug trafficking in the framework of the criminal justice system, public security, criminal policy and public policies as a whole. The second level -microstructural-, that observes the possible benefits and risks both in the operating systems

⁶⁹ PIÑOL, Diego. et al. Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile. Santiago de Chile: Centro de Estudios en Seguridad Ciudadana, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 92.

⁷⁰ A user who successfully graduated from the Viña del Mar TTD was interviewed and told us that he values the opportunity he had and, more than the TTD itself, the possibility of being able to receive psychological therapy. The user had a marijuana addiction problem. Possibly, in his own words, he did not require treatment for his addiction. However, the TTD allowed him to have psychological support, which represented for him a possibility of understanding many things and positive reinforcement. When asked about what he thinks of the eligibility requirements, he says he agrees because “while it helps those who need the least help, it helps those who have the best chance of successful treatment”. He also points out that “a more complicated addict would not be able to get off drugs as easily”. In conclusion, the user believes that the TTD is well designed because it prioritises modifying what is possible to modify.

of the implementing institution, as well as in relation to the individual impact, i.e with regards to the subjects that are users of this model.

As per the macrostructural level, it is possible to note that TTDs in Chile effectively pose a valid effort towards opening alternative responses on behalf of a juridical penal system and criminal policy. From this point of view, they constitute a valid attempt since – at least on the basis of their manifested intentions – they go against a legislative and state policy that in the last decades has been strongly marked by an increase in the punitive nature of the penal system. Thus, TTDs not only focus in the administration of punishment as a reactive policy, but also aim to understand and intervene in some or part of the root causes of crime. One advantage of this aspect is that the model has led to the involvement of other areas of public policy – such as the health sector – in the response towards the problem. This manner of understanding and approaching the problems appears to be more promising, insofar as it can effectively deal with the social complexity that underlies the various forms of criminality.

However, his broadening of the horizon of possibilities that TTDs seem to offer is obscured by the way in which the model is implemented. We are not dealing with areas of public policy that complement each other - at the same level - to tackle a problem, where each one contributes its competences and expertise. Rather TTDs promote a model where one area of public policy – such as health – remains subordinated to another area, such as criminal justice. Therefore, as we already mentioned, health criteria end up not counting as much as penal criteria and the contribution of health professionals remains restricted to the narrow margin (user selection criteria, time limits, etc.) imposed by legal operators.

This demonstrates in practice that the political criminal orientation does not renounce to its fundamentally repressive conception, and within this line, TTDs can even up serving to “whiten” the system, showing its best appearance while making invisible corruption, the impunity of big drug traffickers, the neighbourhood and prison violence generated by illegal drug markets and the incarceration of the poor, especially women. All of this is a consequence - to a large extent - of the political and criminal orientation of Law 20.000.

On the other hand, also at a macrostructural level, the option that TTDs offers, has not resulted in Chile in a reduction of imprisonment

rates. Demonstrating that this model operates more as an expansion mechanism of the penal network, at best with a marginal impact in terms of an alternative criminal policy proposal. Therefore, drug addiction in Chile, especially within the younger population, continues to be a primary issue of public health, that requires solid policies, appropriate budgets, relevant targeting criteria and effective intervention models.⁷¹ In this regard, we believe that access to treatment for problematic drug use, should be a universally granted right.

Finally, we observe that the budgetary investment that TTDs in Chile represent, does not commensurate with its results and benefits,⁷² which rightfully generates doubts as per the way this model has been conceived and designed.

Regarding the microstructural level, we can point out as advantages of the Chilean model, the fact that a conviction is not necessary to access TTDs, as this avoids promoting the acceptance of sentences that could end up being more onerous.

The incorporation of health professional in the model is also a success, despite the limits above analysed. Within the same context, we do not oppose a priori against the contribution of the private sector towards the design and evaluation of those programmes, as long as it is not them who impose political and crime orientation to be followed.

With regard to the disadvantages, although the fact that this programme takes place within the framework of the SCP is beneficial for the reasons already mentioned, it also implies limitations with regard to those who can access its eventual benefits. In practice, a very limited number of users are targeted, and not necessarily those that – according to health criteria – are in most need. On the other hand, the existence

⁷¹ Véase: ORGANIZACIÓN DE ESTADOS AMERICANOS (OEA). Informe sobre el Consumo de Drogas en las Américas 2019 Available at.: <http://www.cicad.oas.org/oid/Informe%20sobre%20el%20consumo%20de%20drogas%20en%20las%20Am%C3%A9ricas%202019.pdf> Consulted on: 16 de marzo 2022, pp. 58 y ss.

⁷² Véase: FUNDACIÓN PAZ CIUDADANA. Evaluación de impacto y costo-beneficio de los tribunales de tratamiento de drogas en Chile. 2018. Available at: <https://pazciudadana.cl/biblioteca/reinsercion/evaluacion-de-impacto-y-costo-beneficio-de-los-tribunales-de-tratamiento-de-drogas-en-chile/> Consulted on: 14 de mayo 2021, pp. 58 y ss.

itself of alternatives to the “criminal treatment”, can discourage the justice system from considering drug consumption as a ground for lesser criminal liability and, as a consequence, from diversifying the response towards genuine alternatives outside the criminal justice system.

Other disadvantages of the model, although not exclusive of the Chilean experience, but rather of TTDs’ functioning system itself, are the difficulties caused by the “voluntary-obligation” tension in relation to the user’s participation. The logic of intervention under a coercive premises represents obstacles both for its therapeutic and penal supervision goals. It places its subjects in a complex position, adding confusion in a psychological scenario already surely chaotic enough, and whose timing is not adapted to their needs, but to those of the justice system.

Finally, evidence demonstrates that the intervention in population with a problematic drug consumption should not only focus on the “drug”, but should open paths towards the resolution of more complex issues that are played in the emotial, family, educational, work and community area. However, TTDs appear to focus on a model that is still too clinic – individualistic. Here it can be noticed, for example, an interesting contribution that the private sector could make, collaborating with the possibility of access to effective educational and employment alternatives.

In summary, the comparison of the benefits and disadvantages of Chileans TTDs, both at a macro as well as microstructural level, shows poor results in favour of the current model. Further to the improvements that could be done, these ideas could lead to a rethinking of the criminal policy orientations that underlie them.

CONCLUSIONS AND SUGGESTIONS

Although TTDs have been promoted as an alternative to incarceration and a public policy that would reduce prison overcrowding and, at the same time, treat drug users more like patients than offenders, the truth is that rather than being a real alternative to incarceration, they have been shown to be complementary to it.

It also does not seem appropriate, given the received training, that those in charge of such treatment should be judges and that broad

powers should be given to prosecutors from the Public Prosecutor's Office. For neither judges nor prosecutors have the necessary tools to fulfil this task. While there is no doubt that they often participate with great motivation and sincere concern for patients, the relevant decisions and direction of such treatment should be made by health professionals with specific expertise in drug addiction issues. Furthermore, limiting treatments to legal deadlines may lead to having to stop treatments earlier than recommended or having them extended longer than necessary.

The US version of TTDs is not an alternative to incarceration, as defendants remain involved in criminal proceedings for the duration of their treatment and may, in numerous cases, remain incarcerated for longer than they would have been if they had opted for the regular criminal process. On the other hand, TTDs may expand the punitive network by requiring a guilty plea as a condition for access to TTDs.⁷³

In the Chilean version, TTDs cannot be an effective instrument reducing imprisonment. Their contribution is minimal without having a real impact on criminal policy and their existence is more useful and functional to those who implement public policies, wanting to show a human face within a cruel system that encourages mass incarceration, particularly increasing the imprisonment of women. Furthermore, the high costs of TTDs, make it an inefficient system in relation to its outcomes⁷⁴ and, given the low number of admissions to TTDs, do not justify them as a public policy.⁷⁵

⁷³ SOCIAL SCIENCE RESEARCH COUNCIL (SSRC). *Tribunales de tratamiento de drogas en las Américas*, 2019, p. 45. Available at: <https://s3.amazonaws.com/ssrc-static/%7BF7D9B319-2CF3-E811-A968-000D3A34AFA9%7D.pdf> Consulted on: May, 10th 2021.

⁷⁴ SOCIAL SCIENCE RESEARCH COUNCIL (SSRC). *Tribunales de tratamiento de drogas en las Américas*, 2019, pp. 2 y 3. Available at: <https://s3.amazonaws.com/ssrc-static/%7BF7D9B319-2CF3-E811-A968-000D3A34AFA9%7D.pdf> Consulted on: May, 10th 2021.

⁷⁵ PIÑOL, Diego et al. *Estudio de evaluación de implementación, proceso y resultados del modelo tribunales de tratamiento de drogas bajo supervisión judicial aplicado en Chile*. Santiago de Chile: CESC, Instituto de Asuntos Públicos, Universidad de Chile, 2011, p. 120. Several studies have shown that other types of drug treatment are more effective than drug treatment courts, see: LEE, Stephanie, et al. *Return on Investment: Evidence-Based Options to Improve Statewide Outcomes Olympia*: Washington State Institute for Public

Any attempt at an alternative to mass incarceration is to be found neither in the creation of “alternative” penalties nor in the creation of therapeutic justice, but rather in the decriminalisation of behaviour. For example, decriminalising the consumption and possession of some drugs, or the relaxation of penalties for behaviour and the understanding that the sale of drugs is often an activity linked to the consumption itself, which is necessary to finance it. Several studies conclude that the problem of consumption should not be considered a crime.⁷⁶ However, in Chile, by virtue of the presumption of criminal liability under Law No. 20,000 on drug control, consumption is also considered a trafficking activity, since drug possession is presumed to be for the purpose of trafficking, and the accused must prove personal consumption in the near future, which, in any case, is also punishable under criminal law as a misdemeanor.⁷⁷

Furthermore, we insist that when the drug users’ financial situation does allow them to support their addiction, the sale of drugs, in many cases, should be considered as an addiction-related action and not as a trafficking activity. Otherwise, rather than protecting the legal good of “public health”, we end up punishing the very victims of drugs. And, given the selective essence of criminal law, legislation will be harsher for those who are more vulnerable and permissive for those who are financially better off.

As a proposal, we would like to suggest, first of all, that it is not opportune to confuse justice criteria with public health criteria. This does not mean that both purposes (ensuring justice and protecting public

Policy, 2012; and SEVIGNY, Eric, FULEIHAN, Brian and FERDIK, Frank. Do Drug Courts Reduce the Use of Incarceration? A Meta-Analysis. *Journal of Criminal Justice*, n. 41. 2013, pp. 416-425. <https://doi.org/10.1016/j.jcrimjus.2013.06.005>

⁷⁶ PÉREZ Catalina (coord.) *Justicia desmedida: Proporcionalidad y delitos de drogas en América Latina*. Ciudad de México: Editorial Fontamara, 2012.

⁷⁷ Although the illegal drug trafficking is punished with relatively high custodial sentences due to its criminal nature, it is no less true that, by virtue of Article 8 of Law No. 20.000, if the offenders proves exclusive personal use or consumption in the near future, such conduct is considered a “misdemeanour” and not a “crime”, and is therefore punishable by fines, attendance at rehabilitation programmes, or the development of activities in aid of the community.

health) should not be pursued, but it should be undertaken by following the paths best suited to the attainment of each objective. Our proposal, broadly speaking, recommends less punishment and more treatment, but both objectives should be pursued along separate lines. Drug treatment should be increased, but not be made dependent on, or offered as an alternative to, criminal prosecution.⁷⁸ To conclude, we would like to summarise our proposal in three main key points:

1. Decriminalise behaviours:

Consumption and trafficking behaviour should be decriminalised, especially when it may be an ancillary activity to consumption itself.

This first point belongs to a more global theory that seeks the decriminalisation of various offences and the search for non-criminal responses to situations of lesser harm. It is also expected that for criminal offences, imprisonment will be limited only to those behaviours that are extremely harmful to the protected legal interests, prioritising other types of sanctions where possible. Mass imprisonment and overcrowding are not a natural fatality. They are the result of misguided policies that, with social and often racial biases, massively imprison human beings in undignified conditions without obtaining, with this, a decrease in crime levels, but rather, generating criminogenic behaviours among convicts.

⁷⁸ Interestingly, Miller proposes incorporating a jury into TTDs. In this way, Miller believes, the relationship between, on the one hand, a judge and, on the other, an offender-consumer and the community, is replaced by a system with democratic participation of the community with the offender to be rehabilitated. Moreover, in this way, for Miller, it could contribute to an empowerment of community participation MILLER, Eric. *Drug, Courts and The New Penology*. *Stanford Law & Policy Review*, v. 20, n. 2, 2009, pp. 135 and 136. Available at: <https://ssrn.com/abstract=1464353> Consulted on: 10th May 2021; and FUNG, Archon. *Empowered participation: reinventing urban democracy*, 2005. Available at: https://www.researchgate.net/publication/228382837_Empowered_Participation_Reinventing_Urban_Democracy#fullTextFileContent Consulted on: May, 18th 2021. On excessive costs over traditional justice, see: MEEKINS, Tamar. *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*. *Berkeley Journal of Criminal Law*, v. 12. 2007, pp. 75-126; and MEEKINS, Tamar. "Specialized Justice: The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm. *Suffolk University Law Review*, v. XL, n. 1. 2006, pp. 1-55.

Therefore, there are multiple alternatives that could be implemented to reduce mass imprisonment and, with this, build a more human society.⁷⁹

The problems linked to drug use, including that of sale by users, should be treated as a public health problem, adopting public health criteria, taking into account specific needs related to patients' gender, age, culture, ethnicity, needs, etc.⁸⁰

In the case of offences perpetrated by minors with problematic drug use, penal sanctions should be avoided due to the stigmatising effects they generate⁸¹ and referral to drug treatment outside the criminal justice system should be made.

2. Reduce penalties:

We propose radical changes to establish a less harsh system of penalties, especially for those behaviours linked to drug use and drug dealing. The myth of the War on Drugs as a solution to the drug trafficking problem must be dispelled. In this light, we can observe how in the US, the effects of the war on drugs have not been to reduce trafficking or consumption, but rather to increase incarceration, which has not proven to be an effective tool for reducing crime or violence.

3. Increasing drug treatment provision:

Drug treatment should be made more available to those in need without being used as a supposed alternative to the penal system. Notwithstanding this, the criminal justice system can be an ideal place

⁷⁹ RIVERA, Iñaki. *La cuestión carcelaria. Historia, Epistemología, Derecho y Política penitenciaria. Volumen I*; con prólogo de Roberto Bergalli y Massimo Pavarini, 2ª ed. Buenos Aires: Editores del Puerto, 2009; RIVERA, Iñaki, *Descarcelación, principios para una política pública de reducción de la cárcel (desde un garantismo radical)*. Valencia: Tirant lo Blanch, 2018, pp. 231-235; CUNEO, Silvio. *El encarcelamiento masivo*. Buenos Aires: Didot, 2017; CUNEO, Silvio. *Cárceles y pobreza. Distorsiones del populismo penal*. Santiago de Chile: Uqbar, 2018.

⁸⁰ It is essential to establish penal policies that result in the reduction of imprisonment of mothers who are in charge of their children, since in Chile, as a general rule, it is women who take care of their children and imprisonment implies the confinement or abandonment of minors. This exception could also be considered in the case of fathers who care for their children.

⁸¹ On the effects of labelling that a criminal sanction can have on adolescents, see LARRAURI, Elena. *La herencia de la criminología crítica*, 2nd ed. Mexico: Siglo XXI, 1992.

to detect drug use problems, both in the case of defendants, convicted offenders and even victims. In no case should problematic drug use be used as a criterion to impose harsher sentences or impede obtaining prison benefits. Surreptitiously, problematic drug use often results in a poor qualification for parole or other prison benefits. Drug treatment should be a right for those who need it, be considered an essential health benefit and a social right, and the criterion for admission should be no other than the need for treatment, based on a public health approach, and not the fulfilment of eligibility requirements that relate to solely low dangerousness.

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