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Master thesis Applied Ethics

The freedom of prohibition

Banning drugs in a liberal democracy

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Abstract

This thesis offers an insight into whether drug prohibition laws can be justified within a liberal democracy. It offers a detailed outline of the values of drug prohibition laws, the values of a liberal democracy and whether all these values are compatible with one another. Guided by the liberal democratic theories of Rawls, Dworkin and Scanlon the arguments made by De Marneffe in favour of drug prohibition laws within a liberal democracy are being revised. This is done by arguing whether they are sound but also by complementing them and seeing whether they hold for every kind of drug instead of just cocaine and heroin. When it turns out this is not always the case the main argument on which all De Marneffe's other arguments rest is also being revised and later on discarded, meaning that his argumentation that justifies drug prohibition laws within a liberal democracy is no longer reasonable.

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Introduction

Today there is still much debate about how drug issues should be treated in liberal democracies. These debates and discussions, however, have not led to any definitive answers as to how to treat these issues. Liberal democratic countries were the first to impose drug prohibition laws, prohibiting the use and trade of any kind of drugs and strictly regulating drugs used for medical purposes. Since these laws have been around for decades, and a definitive answer to how drug issues should best be treated has still not come up, most liberal democracies cling to these drug prohibition laws frightened that abandoning these laws might make things worse. While liberal democracies were the first to implement drug prohibition laws they are also often characterized by pluralism and tolerance. Within a liberal democracy every individual should have certain rights and freedoms and be able to do or believe what he or she values in life. This view is based on the proposition that every human being is inviolable and has inherent dignity. Because of this, we can put question marks whether the prohibition of drug use is in line with the values of a liberal democracy because people are no longer able to make the choice whether they want to use drugs themselves. In this thesis, I therefore want to explore whether drug prohibition laws can be justified or not based on the values of a liberal democracy.

The academic literature already existing about the topic of drug prohibition is mostly based on a pragmatic view instead of a more philosophical view. Economists and free-market theorists such as Thomas Szasz (1996) and Milton Friedman (1998) have discussed this topic from a pragmatic perspective and many others have followed them giving answers to what the pros and cons of drug prohibition are for a society. What I want to add to this debate is both a pragmatic as well as a more philosophical intake on drug prohibition and whether it can be justified. I want to do this by looking at the values of a liberal democracy and see whether drug prohibition laws can be united with these values. For this, I will use a text by De Marneffe where different philosophical theories about liberal democratic values are used. The reason I use this text is that De Marneffe actually states the opposite of what many people supporting a liberal democracy would most likely support (based on the values of a liberal democracy). De Marneffe actually uses the values of a liberal democracy to show us that a liberal democracy can be in favour of drug prohibition laws without infringing upon the liberties and rights these liberal democracies should protect. Because his text gives a different perspective into this interesting debate I want to explore his arguments and whether they are strong and sound enough to justify drug prohibition laws. By doing this, I

want to connect philosophical arguments with pragmatic arguments to answer my main question: ‘Can drug prohibition laws be justified in a liberal democracy?’.

I will use several chapters to pave the way towards answering my main question. Firstly, I will show why drug use is understood to be a problem in modern-day society. Secondly, I will elaborate on how the first modern drug laws were enacted by liberal democracies themselves and spread internationally. Thirdly, I will explain what the values of a liberal democracy and these drug prohibition laws are and what these laws want to accomplish with their enactment. To see whether the values of a liberal democracy are being upheld by these laws I will draw on the text by De Marneffe. Fourthly, since De Marneffe’s arguments are based on the values of drug prohibition laws being carried out the way they are supposed to, accomplishing what they are meant to accomplish, I will discuss whether this is actually happening and if the basis for De Marneffe’s argument is solid. Lastly, I will conclude my remarks and see whether drug prohibition can be justified in a liberal democracy or not.

1. What are drugs?

In this chapter, I will explain what kind of drug definitions there are and which definition I will focus on during my thesis.

There are different definitions of drugs. A basic one is that a drug is a chemical that influences the biological function of somebody without providing hydration or nutrition (Kleinman, Caulkins, & Hawken, 2011, p. 1). In this definition, we can think of medicines that alter our bodily function to cure a malady. Another definition of drugs is that a drug is a substance that affects our brain, consciousness and mental processes. Here someone’s perception, consciousness, cognition and mood can be influenced and it can change the way the user experiences himself or herself and its surroundings (WHO, n.d.; Jellinek, 2016; Trimbo Institute, 2018). These drugs are also defined as psychoactive drugs. Another definition, that will be the focus of this thesis, is that of drugs that are psychoactive but whose mental effects are pleasant, helpful or interesting which leads to people taking them for other reasons than to cure some specific malady (Kleinman et al., 2011, p.1). These drugs are referred to by Kleinman et al. as abusable psychoactive drugs. Psychoactive drugs that are not abusable are for example certain antipsychotic drugs, these do not give pleasure or

interesting effects. They are used to help mend the effects of psychotic diseases and are not described as being ‘fun to take’. Abusable psychoactive drugs, however, are described as being ‘fun to take’ (Ibid.). In this thesis, I will refer to these abusable psychoactive drugs simply as ‘drugs’.

To make the idea of abusable psychoactive drugs more clear I will give a list of the different types of these ‘drugs’. There are three categories in which we can subdivide them. First, there are stimulants, also referred to as uppers. These drugs give the user an energetic feeling, such as cocaine, MDMA (XTC), speed, caffeine and nicotine. A second category is narcotics, also referred to as downers. These drugs give a relaxed, numbing and sleepy feeling, such as alcohol, benzodiazepines, ketamine, cannabis, GHB and opioids such as heroin and morphine. The last category is that of hallucinogens or ‘trippers’ which cause the user to hallucinate. The user is able to see, hear, feel and sometimes even smell the world around him or her differently than when not using the drug. In this category, we put drugs such as LSD, psilocybin (mushrooms), mescaline, peyote, ayahuasca, but also MDMA and cannabis can have hallucinogenic effects depending on the dosage (Kleinman et al., 2011, pp. 1-2; Jellinek, 2016, Trimbos Institute, 2018).

Not all drugs fit into just one of these categories. Some fit in multiple categories due to the fact that they can have multiple effects. For example, Cannabis which is a downer and a hallucinogen and MDMA which is an upper and a hallucinogen such as mentioned above.

Before I continue, I will state that within this thesis my focus will be on drugs that are abusable, psychoactive but most importantly, illicit. I will, thus, not focus on caffeine, alcohol or nicotine - while they might be mentioned in this thesis- but on illicit drugs that are considered illegal in most countries.

1.1 Why are drugs perceived as a problem?

Most drugs are made illicit because they are perceived as posing problems for society. There are three distinct issues that are mentioned when talking about drugs, these are: physiological toxicity, behavioural toxicity, and addiction. These problems make drugs and especially drug abuse a topic worth discussing.

The first problem, the problem of physiological toxicity, is the most considerable problem of drug abuse. This is the risk of sudden death from taking an overdose of drugs. With some drugs, this is easier done than with others depending on the dose being taken but it can also depend on the person taking the drug whether the risk of overdosing is higher or not. But besides an overdose, there is also another form of physiological toxicity. A person might take a dose of a specific drug that does not cause any damage when taken once or a few times but that could create damage when it is being used over a longer period of time such as several months or years. With these drugs, there might not be an overdose risk but they can be linked to serious health issues, think for example about tobacco in cigarettes. Even under good medical supervision drugs can pose a significant risk to your health, without good medical supervision the risk is even higher (Kleiman et al. 2011, p. 3).

Another problem is the problem of behavioural toxicity. This problem does not only impose risks to the person taking the drug but might also impose risks to others. Psychoactive drugs that change our mood and consciousness give a great risk of acting differently. People under the influence of these drugs might act ineptly, violently, foolishly or self-destructively. This means that these drugs might impose risks for people who are not engaging in it. Think for example about driving while under the influence of drugs (and, thus, also alcohol). It, however, depends on the type of drugs being taken how big the problem of behavioural toxicity is. True intoxicants are for example heroin, cocaine, alcohol, cannabis and methamphetamine, which can generate extreme behaviour depending on the dose being taken. The behaviour of the person taking these drugs might be very different from the behaviour that person would normally show when not under their influence (Idem., pp. 3-5). Other drugs, by contrast, are also psychoactive but do not intoxicate, such as caffeine or nicotine.

The final problem I will discuss is addiction. Addiction is: “an inability to stop doing or using something, especially something harmful” (Cambridge Dictionary, 2020). As Kleiman et al. (2011) describe, drug-taking can develop into a bad habit which is “a behaviour pattern that is difficult to break even once the person figures out the behaviour is a problem” (Ibid., p. 5). Addiction is the most severe form of a bad chronic drug habit. Milder forms are also called

“substance abuse or dependency disorder” in clinical terms. Drug addiction is just another form of unwanted habitual behaviour that can occur. However, some psychoactive drugs can have (also due to their physiological and psychological dependence) a strong tendency to create bad habits (Ibid.).

1.2 Drugs have always been available to people, why is there being spoken of a ‘drug problem’ nowadays?

“People have used chemicals to alter their state of mind since before there were written records. Wherever there is fruit or grain, there is the possibility of fermentation (...) (Kleiman, et al., 2011, p. xviii).

As Kleiman et al. state above, drugs are almost as ancient as human civilization. However, a lot has changed since the first experimentations with drugs. Technology, urbanization and industrialization have increased the damage drugs can do to the people taking them and others. New and more potent psychoactive drugs have been created, due to logistics and infrastructure drugs are distributed more easily to greater populations, and we are using automobiles and other types of technology that -when used by someone who is intoxicated- could easily harm other persons who are not under the influence. As Kleiman et al. say: “a Biblical drunkard wouldn’t have been driving an automobile” (Ibid., p. xix). Drugs are now distributed over greater populations that have nothing to do with the customs and cultures these drugs were once part of. These greater populations are now dealing with unfamiliar risks of unfamiliar drugs. Any traditional culture would not have had to deal with the hundreds of drugs we deal with in big cities today. They would only have a handful to choose from. This greater availability of multiple drugs raises the risk of overdoses when people combine several drugs (Ibid.).

Due to technology, the potency of drugs has increased. In England mead and beer were swapped for cheap and potent gin in the eighteenth century. And in the nineteenth century with the help of organic chemistry refined products derived from plants, such as morphine and cocaine, could be made. Also, potent synthetic and semisynthetic molecules such as amphetamines and heroin were created including hypodermic syringes to efficiently get drugs directly into the bloodstream to the

brain. Because of the increased potency of these drugs, a strong desire for taking them arose (Ibid., pp. xix - xx).

These increases in technology, urbanization and industrialization combined have fostered something nowadays called ‘the drug problem’. More people are using drugs with negative side effects for themselves, others and society. Following the WHO, psychoactive drug use without medical supervision is linked to significant health risks. These health risks also include the possible development of drug use disorders and addiction. These two can increase mortality and morbidity risks for people, it can lead to impairment in functioning as a person and can trigger substantial suffering. Due to these individual problems, there are also high costs to society involved, such as, increased health care expenditure, social welfare, costs related to the criminal justice system and other social consequences (WHO, n.d.). 271 million people were estimated to have used drugs globally in the year 2017. This estimate is 30 percent higher than it was back in 2009 when the number of people was estimated at 210 million (UNODC, 2019a, p. 7). That drug consumption has increased does not necessarily pose a problem, what does pose problems are the negative side effects attributed to drug use. Half a million deaths are estimated to be attributable to drug use annually. In 2017 the WHO estimated that this number was 585,000. Most of these deaths are due to Hepatitis C (from using dirty needles) and opioid use disorders (Ibid.). From the 270 million people that had used drugs in 2017, 35 million were estimated to suffer from drug use disorders and all the consequences that come with it (WHO, n.d.). The ‘drug problem’ thus gives great costs for users and for society itself.

Because the use of drugs comes with a lot of negative side effects many customs, religions and laws throughout history have created constraints on drug use. Nowadays state prohibitions, humanitarian concern, domestic statutes and international treaties cannot be thought away when it concerns drug abuse. Most of the distribution, sale, production and non-medical use of many drugs is either prohibited or controlled by law. Some drugs are more legally available than others depending on their risks to health and therapeutic usefulness (WHO, n.d.).

2. Drug law history

In this chapter, I will give a historical overview of drug laws and look at what the underlying values for imposing such laws are. The historical overview is quite long but the steps being taken are important to understand the underlying motivations for current drug laws.

As mentioned before, a human history that includes drug use dates back for a long time. However, the wide-scale prohibition concerning drugs is something that came up just around the start of the previous century. There have been drug prohibitions before this period such as prohibitions on alcohol in countries with Sharia law but from the 1900s the first wide-scale international drug prohibition laws came about. The process of the development of modern drug laws, as we know them today, started with the international community. Most drug prohibition laws in countries all over the world are a direct result of international developments concerning drug policies. National drug laws were deeply influenced by international drug treaties, mostly led by the US, and the emergence of a comprehensive international control system (Nuijten, 2013, p. 38).

The first-ever meeting of an international commission concerning drugs was held to discuss the opium trade and opium use. This was in Shanghai in 1909. On the initiative of the US, this commission came together to help mend problems linked to opium use in the European colonies. The head of the American delegation, bishop Brent, wanted harsher controls on production and trade of opium and wanted to prohibit recreational use. In his eyes, opium use was a great moral and social problem because it created poverty and good citizens would be seduced to behave badly (Ibid., pp. 39-40). The reason the US wanted more restrictions and prohibitions on drug use, trade and production was due to the fact that a great Chinese population had settled in the US who smoked opium. The government started to panic when the Chinese's opium use eventually started spreading to the 'white' population (Ibid., p. 40). The Shanghai Conference, however, wasn't a success due to the Netherlands and Great-Britain who voted against official restrictions due to their part in the opium trade.

In 1911 this led to the first International Opium Conference in The Hague and the International Opium Convention in 1912. This first international drug treaty did not only impose laws concerning opium but also morphine, heroin and cocaine. Because of the resistance of the Netherlands and Great-Britain during the Shanghai conference, the International Opium

Convention also took into account the economic interests of all parties involved. All parties were obligated to draft legislation that would allow cocaine, heroin and morphine to be used for medicinal use only. Also, the parties needed to check and control the producers and distributors of these substances.

After the First World War, the Opium Convention became a part of the treaty of Versailles in 1919 under the influence of the US and Great-Britain. This meant that the countries that wouldn't ratify the convention earlier or were not even present during the convention were now forced to cooperate and sign the treaty in the name of peace (Ibid., p. 41). After the war the League of Nations was established to prevent another world war and bring countries together to start a dialogue. All previous drug conventions were brought under this League of Nations (Ibid., p. 43).

In 1925 a revised version of the 1912 Opium Convention was drafted up. This revised version was even more strict and required a certification system so the international trade could be regulated more. This meant that for the import and export of the drugs mentioned before one had to have the right certificates which only manufacturers and traders could get if they had a permit. Also, the manufacture and trade were to be for medical and scientific purposes only. To analyse and control this new certification system the Permanent Central Opium Board was established. With all these steps an institutional control mechanism concerning drugs was created which would have a great impact on the drug policies of the parties involved (Ibid., p. 44).

The 'Convention for the Suppression of the Illicit Traffic in Dangerous Drugs' was established in 1936 to combat the illicit drug trade even more and equalize this across all nations involved in the treaty. These nations were obligated to draft up national legislation that contained high custodial sentences for whoever violated the Opium conventions. These nations also had to extradite these offenders to other countries (Ibid., p. 45). These legislations were mostly focused on criminalizing drug offenders.

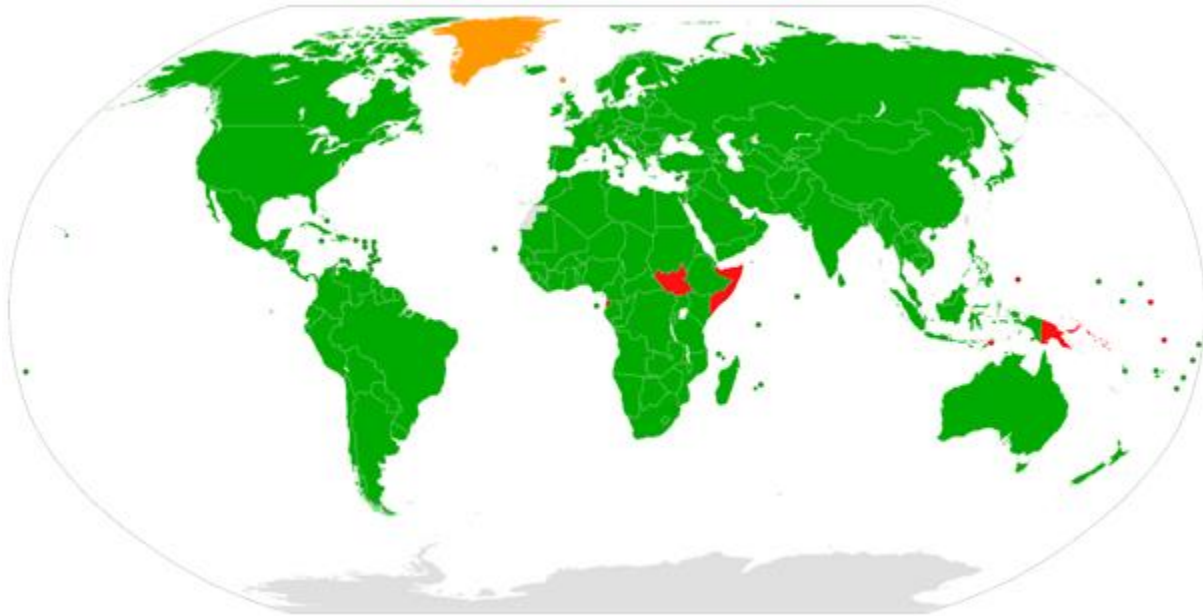
The United Nations that was established after the Second World War took over the role of the League of Nations. This meant that all the previous drug treaties were now housed under the United Nations. Within the UN the United States had a great deal of influence which made their moral and repressive views prominent from the beginning (Ibid., p. 50). The great influence of the US within the UN was mostly due to the weakened position of the European member states after the

Second World War. Member states such as The Netherlands and Great-Britain lost their colonies during this period which meant their share in the manufacture and distribution of opium, cocaine, heroin and morphine was gone. This also meant they had no arguments left to oppose the repressive legislation that the US wanted to impose. As a result, there would be extra measures, higher penalties and better international cooperation for tackling the illicit drug business. Due to the Second World War, the control on international distribution and production had been lost. The Commission on Narcotic Drugs (CND) was supposed to catch up on all these lost years of drug regulation and control (Ibid., p.50).

In 1961 all previous drug treaties would be united under the Single Convention on Narcotic Drugs which would replace the previous international drug treaties and make it a coherent whole and fundamental for national and international drug law (Ibid., p. 51). This convention, however, only deals with narcotics. In 1971, therefore, the Convention on Psychotropic Substances came about to add new substances that were unknown or not thought of before to be put on the list of illicit substances. These substances are hallucinogens and stimulants such as LSD, psilocybin, MDMA and amphetamines. But also benzodiazepines that were first used as sleeping aid or anaesthetic were put on the list of psychotropic substances. This made the production, distribution but also the possession of these substances illegal (Ibid., pp. 53-54). In 1988 the final touch was being laid by drafting up the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which would supplement the Single Convention and the Convention on Psychotropic Substances. This convention would help sharpen international legislation against the illegal drug trade. With this convention member states could now also confiscate goods and profits that were acquired by the illegal drug trade. The view on criminalizing possession, trade and the manufacturing of drugs continued in this convention (Ibid., p. 54).

Image 1 shows in green all the member states where this convention is being upheld, red are non-parties and orange are countries where the convention is not being upheld. As you can see almost all the countries in the world have signed to uphold this convention.

Image 1



(Wikipedia, 2013).

To make sure all the member states follow these international drug conventions the International Narcotic Control Board (INCB) was established. As an official organ of the United Nations, the INCB has the power to boycott other countries' import and export of legal drugs and raw materials. In this case, the INCB could stop the supply of legal medicine to countries that do not adhere to the international drug conventions. This measure, however, is so drastic that it has never been used (Ibid., p. 53). All the drug conventions together form a strict international policy regarding drugs. The UN member states that signed these conventions have given up part of their sovereignty within the system of international states. The INCB and CNB make it hard to reform drug policies from a criminalizing and repressive viewpoint to public health viewpoint. The CND puts new drugs on the lists of the drug convention that make these drugs illegal. However, there is not a well-institutionalized process to get drugs off these lists or to put them on lists with less strict sanctions. This means that drugs that have been put on the lists of the strict and repressive conventions cannot be taken off. Drugs that were put on these lists due to moral arguments and outdated scientific research now will stay on these lists without any hope they might be transferred to lists with fewer sanctions. Not even when new scientific knowledge might point in this direction (Ibid., pp. 55-56). Because of this, UN member states get into a difficult situation when wanting to alter their drug

laws. But because these conventions leave room for interpretation some alterations can be made, think for example of the toleration policy in The Netherlands.

2.1 Values of drug policy

The Single Convention on Narcotic Drugs of 1961, that included all former drug treaties, was drafted up with the idea to protect humans against the dangerous effects of drugs. Kleiman et al. (2011) mentioned these effects can be physiological and behavioural toxicity but most importantly, and what this convention was based on, addiction (Nuijten, 2013, p. 51). Drug addiction is viewed as a danger to the individual and as a social and economic danger to humanity (Overheid.nl, April 25, 1988). Within the Single Convention on Narcotic Drugs, it is stated that the parties are “concerned with the health and welfare of mankind” and that with this treaty this health and welfare/well-being have to be protected (Ibid.).

The international drug laws as imposed by the UN were mostly established by countries that are considered liberal democracies to safeguard our health and well-being. But is drug prohibition the ultimate form of drug law for liberal democracies? Is it in line with their values? As mentioned above these laws were drafted up a long time ago and nowadays the UN has so much power that it is hard to abandon these laws. To further my thesis, I will now look at what the initial values of a liberal democracy and drug prohibition laws (safeguarding health and well-being) are and how they can be defined.

3. Values of a liberal democracy and drug prohibitions

In the previous chapter, we saw that liberal democracies, as well as other UN member countries, have been influenced by the UN to create drug laws that would prohibit all drugs and make their use, possession, trade and manufacture illegal. In this chapter, I will go into what the initial values of liberal democracies and the drug laws as imposed by the UN are.

A liberal democracy is “a democracy committed, first, to the proposition that each and every human being has inherent dignity and is inviolable and, second, to certain human rights against

government – that is, against lawmakers and other government officials – such as the right to freedom of religion” (Perry, 2010, p. 10).

Within a liberal democracy, the rights and liberties of individuals are most important. In the legal system of liberal democracies, these rights and liberties are therefore written down as laws and entrenched in their constitution (Ibid., p. 61). Because in a liberal democracy every human being is viewed as having inherent dignity and being inviolable, these rights and liberties are universal for all citizens and express positive as well as negative liberties. A positive liberty is the possibility to act to one’s own free will and a negative liberty is the freedom from interference or external restraint (Carter, 2019). A positive liberty is, for example, freedom of expression, with which people can decide for themselves how they want to express their thoughts. A negative liberty is, for example, freedom from arbitrary arrest and exile where someone is protected from being interfered with by someone else, in this case being arrested without a reason.

Following from the previous chapter it becomes clear that drug prohibitions as enforced by the UN were made to safeguard citizens by making sure their well-being and health are protected. Now the question still remains how we define well-being and health.

3.1 Well-being

Well-being can be defined as the following: “the state of being happy, healthy, or prosperous” (Merriam-Webster, n.d. a). However, there is a more philosophical definition for this term described by Derek Parfit. Following Parfit (1984), well-being could be described by answering the following question: “*What would be the best for someone, or would be most in this person’s interests, or would make this person’s life go, for him, as well as possible?*” (p. 493). What is important here is that well-being is measured by how well a person’s life is going for that specific person. There are several theories that try to answer the question of what well-being is. Hedonistic theories mention that well-being is what makes someone’s life happiest. Desire-fulfilment theories mention that improving a person’s well-being is being done by fulfilling their desires. And Objective list theory mentions that there are objectively things that are good or bad for you and, thus, influence your well-being (Parfit, 1984, Appendix 1).

For this thesis, I will, however, not focus on one of the theories mentioned above but on another theory: Amartya Sen's Capability Approach. The reason why I choose this theory is that it is in line with the values of a liberal democracy. Within the capability approach, human autonomy and freedom are essential to achieve well-being. This human autonomy and freedom are also key-values within the liberal democracy. Within the capability approach, these values are already central in the two normative claims that it upholds. The first claim is that the freedom to achieve well-being is of primary importance. The second is that this freedom to achieve well-being should be understood in terms of people's capabilities. These capabilities are their actual opportunities to be able to do and be what they have reason to value (Robeyns, 2011). The Capability Approach gives an answer to the question: What information should we have to be able to judge how well a person's life is going or has gone for that specific person? The freedom to achieve well-being shows itself in the form of being able to do or to be what one values in life and therefore what kind of life one is able to lead (Ibid., §1).

Two concepts are central to the Capability Approach: functionings and capabilities. A functioning is described by Sen as follows: "*A functioning is an achievement of a person: what he or she manages to do or to be, and any such functioning reflects, as it were, a part of the state of that person*" (Sen, 1990, p. 44). It reflects a person's 'beings and doings' which are states humans can be in and activities that they can undertake. A being could, for example, be: healthy, nourished, nurtured, employed, literate, mobile, respected, hated, etc. Everything that a person can be. A doing is everything that a person is able to do, such as: buy food, take care of their children, buy clothes or use great amounts of energy. These are just some examples. Functionings are neutral in the sense that they do not give away whether a being or doing is considered good or bad. Functionings constitute a person's life and by assessing these constituent elements they are also fundamental for evaluating a person's well-being. This does, however, mean that these functionings should be things that humans are capable of doing, a functioning cannot be; being invisible or flying like superman (Robeyns, 2011, §2.1).

A Capability "*reflects a person's freedom to choose between different ways of living. It reflects the various combinations of functionings (doings and beings) he or she can achieve. It takes a certain view of living as a combination of various "doings and beings"*" (Sen, p. 44). Capabilities

are a person's *opportunities* or *freedoms* to achieve functionings. The ability to be able to choose between different functionings (ways of living). The difference between a functioning and a capability lies in the achievement of something on the one hand and the opportunities or freedoms from which a person can choose on the other (Robeyns, 2011, §2.1).

The ultimate ends in the capability approach are these capabilities. It could, therefore, be said that by using this approach policies and other changes are being evaluated by their impact on a person's capabilities and their actual functionings (Ibid., §2.3).

3.2 Health

To define the value of health, I chose the Dispositional theory formulated by Sander Werkhoven (2019). Following Werkhoven health can be understood in terms of what someone can do, what an organism is capable of. He states that it is evident that pathology incapacitates, which means it diminishes the scope of what an actor is capable of doing (Ibid., pp. 929-930). To clarify the point that pathology reduces what an organism is capable of doing Werkhoven says we should turn to dispositions. A disposition is a property of an object that is defined on the basis of its manifestation under certain conditions. Werkhoven gives the example of wine glasses and ceramic cups that have the dispositional property of 'fragility' because they shatter under certain conditions, for example, if they fall out of someone's hand (Ibid.). Pathology can be understood as the loss of particular dispositions, and recovery as reacquiring these dispositions (Ibid., p. 932). What is important is that these dispositions are understood as dispositions of an organism as a whole. The reason for this is that dispositions of parts can change easily without affecting the disposition as a whole, which means these part-changes usually don't contribute to impairments or improvements of health. An example of this is when one cell dies this cell changes in terms of its dispositional properties but it does not make an organism pathological (Ibid., p. 931). Werkhoven notes that there has been a long history that associates health with phenotypical and behavioural normality. He, however, says that we should not look at dispositions that are *normal* given the reference class but we should look at the dispositional set of a specific organism and compare this to the *maximum* dispositional set of the reference class it belongs to (Ibid., p. 932). This is because every organism has limitations of what it can do, there are restrictions on the activities an organism can perform

given its species (Ibid). A dog can run better than a dandelion but this does not mean that the dog is healthier than the dandelion. A newborn baby cannot do much of the things that an adult is able to do (talk, walk) but this does not mean that the adult is healthier than the baby. This is why it is important to look at the reference class an organism belongs to.

The reason why I chose this theory as a definition of health is that it resembles a lot of the same features as the capability approach. Health is here understood in terms of what one can do, what one is able to do. This means that it is measured in terms of which functionings and capabilities a person has. In both theories, health and well-being are increased when a person has more functionings and capabilities. In the case of Werkhoven, these functionings and capabilities are what a person is able to do, what their set of dispositions is, compared to the maximum set of dispositions of its reference group (functionings and capabilities). A woman in her late 30's should, for example, be able to do physically and mentally what is maximally achievable for a woman in her late 30's.

To be able to do something means having the freedom to do something, in the case of Werkhoven this means freedom from disease. This need for freedom is also in line with the values of a liberal democracy. Within a liberal democracy a person is viewed as inviolable and having inherent dignity. It is, therefore, important for a person to have the freedom to do and be what they value in life. Being healthy brings someone one step closer to having this freedom.

4. Can we justify drug prohibitions based on the values of a liberal democracy?

As described earlier, a liberal democracy views human beings as having inherent dignity and being inviolable. which is why they have basic rights and liberties to protect them. A liberal democracy should always protect these rights and liberties of individuals.

To see whether certain rights and liberties are being impaired because of drug prohibitions, I will draw on a text by De Marneffe (1996). In the drug prohibition debate, from a liberal democratic point of view, there are three positions that can be distinguished from one another. The first position, which is most common, is the side against drug prohibition laws and thus for the free use of drugs. The second position is the side where drug laws are used to not completely ban drugs but

to control them in a way that does not harm society. The third position, which is least common from the liberal democratic viewpoint, is the side in favour of drug prohibition laws.

The reason why I use De Marneffe's text is that he favours the third position, which is for the prohibition of drugs. By using his text I want to see how he thinks drug prohibition laws can be supported and whether this holds for all kinds of drugs.

De Marneffe takes a liberal democracy as a framework to argue whether drug control laws can be morally justifiable or not. Whether we have a right to use drugs or not. He looks at the basic argument of drug prohibition, that it safeguards our health and safety/well-being, and states that if we accept this argument as being sound then the only reason why a law would be morally impermissible is if it restricts basic rights and liberties and if it would violate some moral principle or rule that every citizen within the liberal democracy would have (Ibid., p.231). If the majority of the citizens would support drug prohibitions, the argument for these drug prohibitions is sound and the government does not infringe upon citizens' basic rights and liberties when enacting this law, drug prohibition is justified (Ibid., p. 233). To argue for this De Marneffe looks at drug prohibition laws and whether these laws are compatible with the above-mentioned conceptions. He does this by taking the theories of Rawls, Dworkin and Scanlon and applying drug prohibition laws to these theories. If drug prohibitions do not violate the limits as identified by these theories, no one's rights are violated and these prohibitions are morally permissible.

In my opinion, De Marneffe's approach falls short when we look at drug prohibition because he only applies it to the prohibition of cocaine and heroin. I, therefore, want to supplement his theory by also including other types of drugs, from uppers to downers to psychedelics, and see whether his argument holds. The first theory De Marneffe uses for his argument is the theory of basic liberties by Rawls, which I will now elaborate more on.

4.1 Rawls' basic liberties

Rawls views each person as “possessing an inviolability founded on justice that even the welfare of society as a whole cannot override” (Ibid., p. 233). Because of this inviolability, people should have basic liberties and there is a ‘priority of liberty’: basic liberties may only be limited to secure the system of basic liberty as a whole, not to support social values other than liberty (Ibid.).

According to Rawls a liberal conception of justice has three essential principles. The first principle is that all citizens have an equal claim to certain basic liberties. The second principle is that the recognition and protection of basic liberties have priority over the promotion of other values. The third principle is that every citizen should have enough material means to exercise these basic liberties. In a liberal democracy, following Rawls, these principles should hold (Ibid., p. 234).

Rawls made a list of basic liberties, which are the following: freedom of thought; liberty of conscience; freedom of association; freedom of the person; freedom from arbitrary arrest and seizure; and political liberty (Ibid.). All these liberties on Rawls’ list are seen as basic for two reasons. Firstly, because they have been associated with the idea of a constitutional democracy for many years. Secondly, because for citizens to fully develop and exercise their moral powers of sensing justice and pursuing a conception of the good the government has to protect and recognize these liberties. New basic liberties can also be added to the list when they satisfy these conditions (Ibid., p. 235).

Because Rawls does not go into the specifics of what these liberties entail, De Marneffe interprets them himself. According to him, freedom of thought can be seen as the freedom to believe what someone finds rational to believe about what can be perceived as true and false, right and wrong, good and bad, and being able to discuss these beliefs freely with others in public and private. Liberty of conscience is perceived as having the freedom to act in line with the obligations someone believes to have in light of a reasonable religion or moral doctrine that one follows. Freedom of the person goes into the essential conditions of every person being inviolable and independent. They must, therefore, have freedom from personal violation by being able to not do certain things against their will, freedom from enslavement and freedom to have personal property. Freedom from arbitrary arrest and seizure can be interpreted as the right to be treated in accordance with the rules of ‘due process law’. Political liberty can be interpreted as the freedom to form

political parties, to run for office, to vote, to express political opinions and to put pressure on and consult with the government and other political officials (Ibid., p. 234). Now the question arises whether using drugs for recreational purposes can be seen as an expression of one of these liberties or not.

De Marneffe's argument here is that the recreational use of drugs may be prohibited because it does not fall under the above mentioned basic liberties. However, his focus is on the use of cocaine and heroin for recreational use. He does not look at other downers, uppers or psychedelics. I will now look at these basic liberties and see whether the recreational use of drugs still does not fit into this category.

I agree with De Marneffe that the prohibition of drugs for recreational use does not prohibit someone from believing what they want to believe, and does not impair their 'freedom of thought'. I do think that using (especially psychedelic) drugs can help certain people to change old beliefs or find new beliefs, but I don't think that this falls into the category of freedom of thought because it does not contribute first-hand to the freedom given to people to believe what they want to believe. It influences their beliefs but not their freedom to believe.

For 'liberty of conscience', De Marneffe states that a person that is prohibited from using drugs is not prohibited to act in line with the obligations he or she believes to have in light of a reasonable religion or moral doctrine that one follows. With this, I disagree. In some religions, the use of psychedelics is part of their rituals. For instance, the Santo Daime church that originated in Brazil, which has now become an international church with its branches in many countries (including the Netherlands), uses ayahuasca for its religious rituals. By prohibiting the use of drugs people from this church are also prohibited from acting in line with the obligations they have in light of their religion: the ritual use of ayahuasca (Hanegraaff, 2001, p. 85). This means that their liberty of conscience is being restricted.

For 'freedom of the person', De Marneffe states that the prohibition of recreational drug use does not violate someone's mental or bodily integrity. I agree with this insofar as these prohibitions do not make people slaves or prohibit them from having personal property, but I do disagree with whether it violates people personally. When you criminalize drugs you also criminalize drug users. This means that people who use drugs are vulnerable to police harassment and interference, public

searches, strip and cavity searches, being arrested and being imprisoned. These things can all be seen as violations of bodily integrity (INPUD, 2014, p. 2). Now one can ask the question: why is the violation of bodily integrity with this crime different than for other crimes? The difference is that when you are suspected of having used drugs you can be arrested without evidence and without having to be caught in the act of using drugs. With other crimes, there is usually already evidence against you or you have been seen doing something illegal. Once you've already been arrested and brought to the police station the police start gathering evidence whether you have actually used drugs or not by doing a blood, urine or saliva test. What this means is that someone's bodily integrity is already being violated by arresting and testing them against their will before they are even being charged with a crime. This occurs in many countries, even countries considered to be liberal democracies, such as Sweden (Ibid.). This violation of bodily integrity goes for the use of all drugs, heroin and cocaine as well as psychedelics and other uppers and downers. The way these drug users are being brought to police stations to get drug tests can also be seen as a violation of the 'freedom from arbitrary arrest and seizure'. This is because the police arrest and detain drug users without following the same processes that many other citizens enjoy (Ibid.). Freedom of the person and freedom from arbitrary arrest and seizure are, thus, in my view not adequately protected when we implement drug prohibition laws.

For 'political liberty', I do agree with De Marneffe that the prohibition to use drugs recreationally does not influence this basic liberty. A person that is prohibited from using drugs is not being denied their political liberties.

In conclusion, it can be said that De Marneffe's argument does not completely hold. For both liberty of conscience, freedom of person and freedom from arbitrary arrest and seizure, we can put question marks whether these exclude the recreational use of drugs as a basic liberty and whether these liberties are still being adequately protected when we implement drug prohibition laws. To further the argumentation, I will now look at the second theory that De Marneffe uses to see whether drug prohibition laws can be justified, which is Dworkin's theory of the right to moral independence.

4.2 Dworkin's moral independence

Dworkin's right to moral independence can be described as a right of a person "not to suffer disadvantage in the distribution of social goods and opportunities, including disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble and wrong" (Ibid., p. 236). This right is based on another right that a government should treat its citizens with equal concern and respect. Therefore, it must not limit our liberty for the reasons that our welfare is of less concern than that of our fellows or that our conception of what is good is less worthy of respect. Legislation may, thus, not limit our liberty when it views our judgement about what the right way for us to live our lives is as ignoble and wrong or when it views our conception of the good as unworthy of equal respect (Ibid.).

What De Marneffe tries to find out in this section of his text is whether drug control laws, justified by the standard argument, violate this right to moral independence. He interprets Dworkin's moral independence as a right that would prohibit legislation that limits a person's liberty due to it being based, explicitly or implicitly, on the judgement that what people aim to do while exercising this liberty is base or degrading or inherently unworthy of pursuit, while people pursuing these aims can reasonably deny these judgements (Ibid., pp. 236-237). 'Base' can be understood as "lacking or indicating the lack of higher qualities of mind or spirit" (Merriam-Webster, n.d. b). To give an example of when the right of moral independence is being violated, De Marneffe mentions anti-sodomy laws. These laws are based upon the judgement that homosexual relationships are not worthy of pursuit because they are viewed as base or degrading, while people engaged in these relations can easily deny these judgements (Ibid., p. 237).

De Marneffe concludes his argument about drug prohibition laws in this section by saying that people who support these laws may do so *partly* because they judge drug use as intrinsically degrading. In his view, the right to moral independence is, however, only violated when the *only* motivation for these laws relies upon this judgement. He states that the standard argument for justifying drug prohibitions gives a motivation that does not rely on such judgements, which are the safeguarding of health, safety and well-being. This is why he views drug prohibitions, that are

justified by the standard argument, as being compatible with the right to moral independence (Ibid., p. 239).

However, paternalistic laws are never *partly* based on the belief that the way people live their lives in a specific moment is bad/unworthy and should be changed. It is the *main* argument of paternalism. Paternalism is described as the interference of a government or an individual with another person which goes against the other person's will and is mainly motivated by the claim that this person needs this interference because they will be better off or protected from harm (Dworkin, 2016). Paternalism is, thus, used to protect people from certain choices that are viewed as unworthy of pursuit and base. In the case of anti-sodomy laws paternalism can also be used to protect people from making choices that are not only viewed as unworthy of pursuit and base but also as degrading.

In the case of drug prohibition, the state/government knows better what is good for you than you yourself. If we take this into consideration it could be said that paternalistic laws are always in some ways degrading because they don't view individuals as being rational enough to make their own good choices. This goes against the idea that human beings have inherent dignity and are inviolable.

But this is exactly what De Marneffe tries to go around because this means that we could never accept a paternalistic law. De Marneffe, therefore, tries to find a middle way to analyse these laws. He tries to do this by looking at these laws and seeing whether the *only* argument for these laws is based on the idea that the act being prohibited is viewed as base, degrading or unworthy of pursuit, such as with anti-sodomy laws. Following him, we cannot blindly accept Dworkin's argument because this would mean we could never fully justify paternalistic legislation. For De Marneffe the standard argument provides proof that the argument for drug prohibitions is not solely based on the idea that drug use is base or degrading and, therefore, unworthy of pursuit which means they can be justified because they do not violate the right to moral independence. But how do we know that the initial idea behind these laws wasn't based on the view that drug use is base and degrading and unworthy of pursuit?

If we look at the initial ideas and arguments for modern drug prohibitions, they were based on the view that the use of drugs leads to addiction and that addiction is an evil for the individual and a

social and economic danger for humanity (Overheid.nl, April 25, 1988). If these harsh ideas are at the basis of drug prohibitions as we know them today it can be said that they were initially based on the idea that people make a really bad decision for themselves if they use drugs (as drugs are an evil for the individual because they lead to addiction), which is why the government needed to step in because they knew better what is best for a person than the persons themselves. This means these laws are initially based on the idea that drug use is base and degrading and, therefore, unworthy of pursuit, while people that use drugs recreationally can easily deny these judgements. This is because drug use, as said above, is inherently linked to addiction while people that use drugs recreationally can easily deny the judgements that drug use is something evil that turns you into an addict.

Now De Marneffe could react to this by saying that the arguments and ideas for drug prohibition might have changed over time and that drug use is no longer viewed as something evil. This, though, can be challenged when we look at the contrasts between the punishments people get when we compare one *paternalistic* law with another. In his text, De Marneffe claims that in the end drug prohibition laws are not so different from laws where you are forced to wear a motorcycle helmet. Both laws are, as De Marneffe describes, paternalistic and, therefore, used to protect the person using the drugs or riding the motorcycle from harm. These laws are in their best interests. The major difference, however, is the punishment you get when not abiding by these laws. When you ride without a helmet on a motorcycle in most countries the greatest penalty you can get is a fine, for drug use or buying drugs in most liberal democratic countries, people still get prison sentences (UK, France, Sweden, Norway Finland). This goes especially for the drugs mentioned in his text: cocaine and heroin. Because of this sharp contrast in sentencing, I believe drug prohibition laws are still based on the idea that drug use (or at least of some types of drugs) is base and unworthy of pursuit and maybe even degrading. While people using (most of these) drugs recreationally can easily deny these judgements. If the use of drugs was simply viewed as violating the safeguarding of people's health and well-being because people might hurt themselves, which is the same for other paternalistic laws including motor helmet and seatbelt laws, then why are the sentences so contrasting? I believe these sentences are so contrasting not only due to differences in people's health and well-being but due to the way these acts are judged: as base, degrading and unworthy of pursuit. This could for example be due to ideas about drug use being linked to criminality or poverty, influencing the judgements of drug use being base, degrading and unworthy

of pursuit. With this in mind, I believe that drug prohibitions do violate the right to moral independence and can, thus, not be justified in light of this theory.

Now since I looked at the harshness of the penalties people get for certain actions as a reference, the question can be asked if this does not also go for major offences such as murder and rape where the penalties are also very high. If these laws are based on the idea that these actions are base or degrading do they then not also violate the right to moral independence? The simple answer to this is no. This is because the person breaking these laws cannot easily deny these judgements because these actions are meant to hurt another person, which the majority of people will view as wrong. For paternalistic laws, this is different because these are based on how the person might hurt themselves and not others. To sum up, I have argued that drug laws are not only based on the standard argument but also on the view that drug use is base or degrading while recreational users can easily deny these claims because they might be based on the problems that *can* be linked to drug use (such as poverty, criminality and addiction) and not on the actual use. The right to moral independence is, therefore, in my view being violated by drug prohibition laws.

4.3 Scanlon's contractualism

As the last theory for the liberal democracy framework, De Marneffe uses Scanlon's contractualism. Scanlon says that "an act is wrong if its performance under the circumstances would be disallowed by any system of rules for the general regulation of behaviour which no one could reasonably reject as a basis for informed, unforced general agreement" (Ibid., p. 239).

This contractualist theory of rights means that an individual has a right to be free from certain forms of government interference when this interference would be disallowed by any system of rules that generally regulates government conduct and no one could reasonably reject (Ibid.).

De Marneffe wants to see whether government interference related to the recreational use of heroin or cocaine would be disallowed by such a system of rules. I want to see whether such government interference concerning the recreational use of *any* illicit drugs would be disallowed by such a system of rules. Before he goes further into the contractualist theory, De Marneffe first considers the theory of rights that Scanlon came up with independently of his contractualist theory (Ibid.,

pp. 239-240). In this theory of rights, a person has a right against government interference when a rule that prohibits such interference is necessary and feasible. Such a rule is necessary when it adequately protects some important interest and feasible when it does not impose unacceptable costs on other important interests (Ibid., p. 240). De Marneffe takes the example of the right to freedom of political expression which prohibits government interference. By prohibiting government interference with political expression important interests such as expressing our political views are protected and no unacceptable costs on other important interests are imposed, which makes this right necessary and feasible (Ibid.). De Marneffe uses Scanlon's theory of rights to guide him as a method to identify rights within a contractualist framework. When rules that prohibit government interference are necessary and feasible then it makes no sense for people to reject these rules as part of a system of rules that are used for the general regulation of the government. This theory of rights will be used to define the issue of drug use and whether drug prohibition laws can be justified. If drug prohibition laws are disallowed by a system of rules that are used for the regulation of governmental conduct that no person can reasonably reject, they are not justified (Ibid.).

We have a right against government interference when this is necessary to protect important interests without posing any unacceptable costs on other important interests. To test a form of government interference such as drug prohibition laws De Marneffe drafts up four (important) interests that are typically linked with recreational drug use. If these interests are inadequately protected due to drug prohibition laws we have a right against such laws. These four interests are interests in exercising personal autonomy (living one's own life in one's own way), interests in mental and spiritual development, interests in enjoyable recreation and, interests in experiencing feelings of euphoria. When these interests are still protected while the government interferes by prohibiting the recreational use of drugs, then people have no right against this government interference (Ibid., p. 240).

The first interest is the interest in exercising personal autonomy which means being able to live life the way you see fit. This bases itself on whether drug laws that interfere with our choices can be justified. De Marneffe responds to this interest by saying that exercising personal autonomy should be adequately protected by a system of rules. These rules are: (1) a rule that forbids a government from limiting basic liberties for other reasons than to strengthen the system of basic

liberty; (2) a rule that forbids a government from restricting liberties which are non-basic without sufficient reason as interpreted as moral independence; (3) a rule that forbids a government from prohibiting a certain activity when in doing so does not protect important interests or is unable to protect these important interests without unnecessary costs. These rules, De Marneffe states, give the value of personal autonomy a certain weight that every citizen of a democracy would reasonably be expected to accept (Ibid., p. 241). Whether this is the case I will conclude later on because this is the overall argument for his text.

The second interest is the recreational use of drugs for expanding our consciousness. Since De Marneffe only focuses on the use of cocaine and heroin he believes that since these drugs don't 'expand our consciousness' with their general effects their prohibition does not impair this interest. He, however, doesn't look at other drugs but does recognize that psychedelics might promote spiritual and mental development in some ways. He, however, mentions that in no major religions drugs are used to expand one's consciousness and that without drugs people still have opportunities to expand their consciousness (Ibid.). However, for smaller (minority) religious groups such as Rastafarians, devotees of the Hindu god Indra and the before mentioned devotees of Santo Daime, drug use is a way for them to connect with the divine and develop themselves spiritually. In Rastafarian religion as well as in the worshipping of the god Indra marijuana is used to hail their god and is made sacred (Benard, 2007, p. 95). De Marneffe believes that since drug use is not present in the major religions and there are other ways in which people can develop spiritually and mentally that drug prohibition would not violate this interest. However, this is only based on the major religions and leaves out minority religions such as mentioned above, which might be dependent on their sacred drugs to worship their God or Gods. For people that follow these religions, it would thwart their way of developing spiritually and mentally because this is what they believe in. Of course, there are also other ways of developing spiritually and mentally without the use of drugs, but the prohibition of drugs, also for religious purposes, does prevent the spiritual and mental development of these specific minority religious groups. Since people are free to believe what they believe, we cannot give them an alternative for their beliefs or compensate for the spiritual and mental development they would get. This means that in some situations this interest is not being protected and a rule against government interference (in this case drug prohibition) would be justified.

The last two interests De Marneffe mentions are the interest of enjoyable recreation and the interest of experiencing euphoria. Drugs give a strong sensation of euphoria and the government prohibiting drugs would threaten this euphoric and enjoyable experience. However, since there are enough other options to experience euphoria and enjoyable recreation this interest is still protected even if drugs are banned. No rule is needed to prohibit the government from interfering with the recreational use of drugs to protect our interests in enjoyable recreation and euphoria (De Marneffe, 1996, p. 242). Even though the exact feelings of euphoria and enjoyable recreation cannot be mimicked there are still alternatives to experience these feelings, I, therefore, agree with De Marneffe that these interests would not be impaired when prohibiting drugs. There are still other substances that can intoxicate a person, such as alcohol. Now one might say that this goes against my argument mentioned above for the interest of spiritual and mental development where there are also alternatives to achieve this. The difference, however, is that an alternative ritual could maybe give you the same feelings afterwards as the old ones, but this is not what is at stake here. It is not necessarily the feeling the devotees get by performing this ritual but the feelings they think their God or Gods get when performing this ritual for them. If they believe that their God(s) will only be pleased when using drugs then an alternative cannot be given.

What De Marneffe tries to achieve in his text is to research whether we have an autonomous right to use drugs or not by seeing if drug prohibition laws impair important interests or liberties as mentioned by Rawls, Dworkin and Scanlon. De Marneffe himself says that drug prohibition laws do not violate our rights and liberties as proposed by these theorists and can, therefore, be justified. I disagree with him on certain points. I think that drug prohibition laws violate the freedom of conscience, the freedom of person, the freedom from arbitrary arrest, the right to moral independence and the interest in recreational use to expand our consciousness. And by violating these rights and liberties it also violates the interest in personal autonomy.

With this, I have argued that drug prohibition laws are not always compatible with all the aspects of the theories as presented by Rawls, Dworkin and Scanlon. De Marneffe's main argument is that if drug prohibitions do not violate the limits as identified by these theories, no one's rights are violated and these prohibitions are morally permissible. Based on the assumption that the standard argument for drug prohibition holds. Now the question arises: Is it equally true that if drug prohibitions do violate one of the limits as identified by these theories, one's rights are violated

and these prohibitions are morally impermissible? If drug prohibition laws fail on one aspect of the above-mentioned theories is it then permissible to discard them? This would be so if drug prohibition laws would prevent us from achieving general important goals in life or specific goals in life that are important to certain people. For pleasure and recreation, we know that this is not always the case because people also have other choice options to achieve this. Which means they can still achieve their goal. A goal that *is* being prevented by prohibiting drugs is the goal of spiritual growth or expression when someone is related to a specific religion. As mentioned before, a person cannot simply abandon their religion and seek spiritual growth elsewhere because it is a matter of belief. However, this still does not answer the question whether we can discard drug prohibition laws completely based on the above. A way in which we can answer this question is by seeing if De Marneffe's main argument, on which all his other arguments are based on, is valid. This argument is the standard argument for drug prohibition which states that drug prohibition laws protect our health and wellbeing. To see whether drug prohibition can be justified altogether we should take it one step further and see whether the standard argument is sound in the first place.

5. The standard argument revisited

As mentioned by De Marneffe as well as by myself, the main argument for drug prohibition laws is that it protects our health and well-being. I will now see whether this is the case if we look at health and well-being as measured by the capability approach and dispositional theory.

5.1 The Capability Approach: Well-being

To give a small recap; this approach is driven by the idea that the more people are capable of, the more freedom they have to achieve what they value in life, the more their well-being increases. This shows itself in the functionings (doings and beings) and capabilities (choice options) one possesses. Do drug prohibition laws contribute to or limit our capabilities?

This approach is interesting because it focuses on the actor's ability to choose between different things. This freedom of choice is what increases their well-being. An actor should have the

freedom to access different choice options that influence its life. If we apply this to drug legislation we could say that because our freedom of choice is taken away, our well-being is being decreased. But we could also say that because of drug legislation people will be more in control of their lives because they have less chance of behavioural toxicity, physiological toxicity and addiction. Because they have more control over their lives they might be better at achieving even more freedom of choice. It, however, depends on the values of the person itself. In some cultures and religions, drug use such as ayahuasca or marijuana is part of its ancient rituals and outspoken culture. Banning these drugs would diminish their freedom of choice and therefore their capabilities and functionings. But in other cultures, people that use drugs could be seen as social outcasts and be frowned upon. Due to this stigma, they might have less freedom of choice, capabilities and functionings and drug prohibition might help turn this around. It is therefore uncertain if drug prohibition would be favourable or not when taking the capability approach into account because this might differ per person and culture. As Sen says, it is about people being able to achieve what *they* value in life. Capabilities are, however, in my view also related to health. If you are healthy you could be better able to do the things you value in life, therefore health might also be an important factor in analysing whether drug laws influence our well-being. Below I will discuss how drug prohibition laws influence our health.

5.2 Dispositional theory: Health

Werkhoven describes health as being able/having the freedom to do the things that are maximally possible for a person in reference to their reference group. If we apply this to drug prohibition laws these laws are supposed to make sure that by prohibiting drugs our health does not decrease as a result of these drugs or the drug prohibition laws themselves. These laws should, thus, safeguard our ability to achieve what is maximally possible in reference to our reference group. Now the question arises if this is the case? De Marneffe's argumentation is based on these laws being able to safeguard our well-being and health, but this is not always the case. There are four points I want to address where this has not been the case and by discussing these points I want to show that drug prohibition laws have not always done what they are supposed to do.

The first point that I want to discuss is the fact that drug use and deaths/loss of health have not declined since drug prohibition laws were implemented. Since 1991, when the first modern drug prohibition laws started to be implemented, we can see a rise in the number of deaths and “healthy” life lost (DALY’s) every year up until the present day (UNODC, 2019a, p. 20). This can be due to overdoses and mental illnesses linked to drug use but also to people becoming vectors of infectious diseases. Some drugs such as Heroin, Cocaine, Methamphetamine, Ketamine, Ecstasy and PCP, can be administered by injecting a needle containing these substances directly into someone’s artery, which gives heroin users a higher risk of getting HIV or the Hepatitis-C virus. Because of the illicit status of drugs, it resulted in users sharing needles with one another. This was due to the lack of accessibility to clean needles for regular people who do not work inside the healthcare system and lack of education about safe needle use. Because drugs are illicit, governments first did not invest in needle programs or education programs because they wanted people to stop using the drugs altogether and not help them use drugs more safely. By sharing these needles people started infecting themselves and others with infectious diseases, as mentioned above, often leading to a great decline in their health or even death (Kleiman et al., 2011, p. 17). Worldwide more than 11 million people inject drugs, 1.4 million of them are living with HIV and 5.6 million are living with Hepatitis-C. 1.2 million people are living with both Hepatitis-C and HIV (UNODC, 2019b, p. 19). Also, the overall amount of drug users has grown and is still not declining (UNODC, 2019a, p. 9). Since drug prohibition laws have become more international after first being implemented in western liberal democracies, as I have mentioned in one of the first chapters, the demand for drugs and issues concerning drug use have not declined but have increased or stayed steady over the years. Hence, there is no evidence that drug prohibition laws actually cause a decrease in the use of drugs.

The second point I want to discuss is that instead of drug use being treated as a public health issue in countries where drugs are fully prohibited, it is being treated as a criminal/legal issue. This has resulted in the rapid increase in incarceration rates which impacts the physical and mental health of the people being put behind bars. Because the use and selling of drugs is a crime that is being done completely off the radar, law enforcement becomes an ugly process. In most crimes there is a crime against someone else, this means that there is often a witness. In the drug trade both the seller and the user don’t want to be discovered which makes this form of crime more masked than other forms (Kleiman et al., 2011, p. 17). Because this form of crime is harder to discover law

enforcement has to use intrusive measures for gathering evidence and even detecting the crime in the first place. This is being done by paying informants, doing undercover operations, technical surveillance such as wiretapping or placing cameras. Every person linked to the drug trade is a person that law enforcement wants to keep off the streets. However, every minor drug dealer that is imprisoned gets easily replaced as long as there is still demand for their supply. This has led to massive incarceration. In the US alone about 500,000 people are behind bars for breaking drug laws. This is about 20% of all the prisoners in the US (Ibid.). However, the US is not the only country that uses prison sentences to lock away drug offenders. Also, other countries such as Sweden, France, The UK, Finland and Norway still use prison sentences to deal with drug offenders (European Monitoring Centre for Drugs and Drug Addiction, May 13, 2019). The money used to incarcerate all these people could also be used for social and health services to actually help them with their drug problems. In prison drug problems often go untreated and even within prison users keep using drugs (UNODC, 2019a, P. 1&7). People in prison tend to be associated with higher levels of infectious diseases than surrounding communities. Prison is a high-risk environment for drug users, in particular, the ones who inject drugs, due to the high levels of infectious diseases and often the absence of treatment services and prevention for drug addiction and infectious diseases (Ibid., Pp. 31-32).

The third point I want to discuss is the problem of illicit markets and their influence on the product being sold. In most illicit markets it is uncertain what is actually bought and sold which means people don't actually know what they are putting inside of their bodies. Drug prohibition laws that disallow use and trade also make it harder for someone to get their drugs tested. Because the government doesn't want its people to use drugs in the first place there are, most of the time, no places where you can get your drugs tested. This is a problem because illicit drug markets are not as regulated and consumer-friendly as legal markets. With illicit drugs, you can never really know what you buy unless you get it tested. It could be adulterated, diluted or mislabelled leading to the increase of toxic effects or maybe even increasing the risk of addiction (Ibid., p. 16). In Amsterdam, there has been the case of the 'cokekiller' Flip S. who sold white heroin as cocaine resulting in the deaths of several people (NOS, November 29, 2014). Also in the UK, there have been cases of deaths due to fentanyl being added to other substances such as heroin, making it more potent but also more lethal since fentanyl can be deadly even in very small doses (BBC, January 4, 2020).

The last point I want to discuss is also linked to the illicit market that has originated around illicit drugs. Illicit markets do not function along the lines of regular markets. Because the goods that are being sold and bought in these markets are illegal, the buyers and sellers cannot resolve their disputes by going to the police or going to court. This, in turn, leads to these people resolving their disputes the old fashioned way, by using violence. Most of the time this is done by using firearms. This results in a lot of innocent as well as not so innocent casualties making the social problems that are being linked to these illicit markets comparable to or even greater than the problem of drug abuse itself (Ibid., p. 16).

Drawing on the points mentioned above, it becomes clear that drug prohibition laws have decreased people's health in several ways. These laws have made some people less able to do what is maximally achievable for them in reference to their reference group. This is done by infectious diseases, absence of drug treatment and prevention programs due to being incarcerated, physiological toxicity and even death. What this also means is that people are one step further from being able to achieve what they value in life. They have less freedom to do what they want. This lack of freedom influences their health, capabilities and functionings and can as well be seen as a lack of liberal democratic values. Since every human being in a liberal democracy is viewed as being inviolable and having inherent dignity freedom should play an important role in their lives.

To sum up, I have argued that drug prohibition does not do what it promises because it does not always safeguard our health or well-being. Well-being is measured by the choices and values of the individual itself and might, therefore, be difficult to measure in a positive or negative way linked to drug prohibition laws. However, health is also an important factor in being able to do what one values in life. This means that when someone's health declines one's capabilities might also decline. As argued above, drug prohibition laws do not protect our well-being and health in the way they should and, therefore, fall short in what they are meant to achieve. If people are addicted, wounded, handicapped or dead due to the consequences of drug prohibition laws then they also have fewer dispositions than is maximally possible for their reference group (humans) and are less able to do what they might value in life. This shows us that a full prohibition, as most countries have implemented today, does not work the way it should. Drug prohibition laws are too focused on everything concerning drugs as being criminal instead of treating it as a public health issue. What we, however, *should* do is a topic for further investigation. To name one alternative to

drug prohibition laws we could look at Portugal. Portugal has decriminalized the use of all drugs since 2001. Decriminalization means that sanctions under criminal law are removed and replaced with optional use of administrative sanctions such as court-ordered therapeutic responses or civil fines (Hughes & Stevens, 2010, p. 999). In Portugal, there is evidence that decriminalizing drugs has helped to mend drug problems such as problematic use, drug-related harms and criminal justice overcrowding without leading to major increases in drug use (Ibid.). This is one alternative to drug prohibition. However, it is still uncertain if this would work for other countries with different cultures, religions and traditions. Also, it has done nothing for treating the problems that are linked to the illicit markets in drugs, which still exist.

Since drug prohibition laws have existed we have had all the problems that I have mentioned in this chapter. If we keep adhering to these laws these problems might always stay present in society. In my view, we need to change our approach if we wish to resolve these problems. In Portugal the problems related to drugs did not increase drastically but mostly stayed the same, this means that there are feasible alternatives for prohibition that can have the same outcome or even better outcomes. The only uncertainty is which approach would work best for which country, but we won't know until we try.

Conclusion

What I wanted to show in this thesis is not which policy we should be administering but rather which policy we should not be administering. As I have argued, drug prohibition is not always in line with the values of a liberal democracy if we look at the theories of Rawls, Dworkin and Scanlon. However, is this enough to discard drug prohibition all together? To make my argument more complete I wanted to show that the overall argument in favour of drug prohibition, that it safeguards our well-being and health, also falls short. Prohibition has been around for a long time and has spread internationally without acquiring the results it wants to obtain. This means that it is failing its objectives. Drug prohibition, thus, does not adhere to its own values as well as some of the values of a liberal democracy. With this being said it becomes clear that drug prohibition is not suited anymore to 'treat' the modern drug issues we have today and can no longer be justified within a liberal democracy. Within this thesis, I am not claiming that we should legalize all drugs and make it a legal free market. But what I am saying is that we should be looking for alternatives to mend the drug issues in countries by, for example, decriminalizing drug use as I have mentioned above. This might not take away the problems of the illicit market but it does take away a lot of the problems drug users face. In Portugal, this has happened making drug users better off without making anyone else exceptionally worse off if we must believe the statistics. If we can find alternatives for drug prohibition laws that do not make the situation worse and might even make the situation better in some aspects I believe we should be open to the possibilities.

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