SWISS INSTITUTE OF COMPARATIVE LAW

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Use of Narcotic Drugs in Public Injection Rooms under Public International Law

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1. Relevant legal concepts

State-controlled public injection rooms are not expressly referred to in any of the relevant international conventions. It is thus necessary to determine, by way of a preliminary factual enquiry, the exact characteristics of such institutions that fall within the ambit of one or more of the conventions. As our Institute has no special expertise in that field, we rely entirely upon the description that appears on pages 1, 2 and 3 of the *Avis de droit concernant les "stations pour toxicomanes"* prepared by Professor Hans Schulz in June of 1989. Prof. Schulz describes the *Fixer-Stübli* as essentially providing socio-medical care and survival assistance to long-term drug addicts. Such persons are also permitted, under the supervision of medically trained staff and in good sanitary conditions, to inject themselves with drugs which they have brought with them. They cannot obtain drugs on the premises, as all forms of dealing and trafficking are strictly prohibited, the police being prepared to repress such activity at any time. There is also no question of the rooms being used for or in association with the cultivation, manufacture, import, export, or distribution of narcotic drugs or psychotropic substances or for managing the proceeds of drug trafficking. We therefore propose to proceed on the basis that the potentially illegal activities inherent to *Fixer-Stübli* are the consumption or use of drugs by long-term drug addicts and their possession of drugs for the purpose of their own personal use. This is also the basis upon which Prof. Schulz proceeded in his analysis of the conventions at pages 13 through 16 of his legal opinion. We will however, begin by examining those treaty provisions which expressly deal with the treatment of drug addicts and which are therefore the most specifically relevant to a legal analysis of the legality of *Fixer-Stübli*.

2. Provisions concerning the treatment of drug addiction

All three of the relevant international conventions contain provisions of an essentially programmatic nature which specifically refer to "drug abusers".

Art. 36, subpara. 1(b) and Art. 38 of the 1961 Convention, Art. 20 and Art. 22, subpara. 1(b) of the 1971 Convention and Art. 3, para. 4 of the 1988 Convention uniformly refer to the "treatment, education, aftercare, rehabilitation and social reintegration" of abusers. The obligations of States Parties in this respect are formulated in very flexible and vague terms. They are required to "take all practicable measures" for the benefit of abusers, but such measures are not further specified. Where criminal offences are committed by drug addicts, States have the option of resorting to these measures instead of, or in addition to, prosecution and punishment of the offenders. Whereas the 1961 and 1971 Conventions required that offenders be compulsorily subjected to such measures in default of prosecution, subparas. 4(c) and (d) of Art. 3 of the 1988 Convention are purely permissive: "... Parties may provide ... measures for the treatment," etc. The conformity of *Fixer-Stübli* with the conventions must therefore be considered by reference to those provisions of the conventions which specifically

refer to drug addicts, independently of whether States Parties are required to generally criminalise possession of drugs and psychotropic drugs for personal use.

The rather superficial provisions concerning drug addicts stand in stark contrast to the stated primary aims of the conventions, which are formulated in the preambles as preventing and combatting abuse of narcotic drugs and psychotropic substances and the public health and social problems which such abuse engenders. It was recognised, at least since 1971, that the existance of a demand for drugs among addicts is the root cause of international illicit traffic in drugs. The seventh paragraph of the 1988 Convention, which by its title is primarily concerned with illicit traffic, nevertheless accepts that it is also necessary to directly attack the problem of abuse. An effective response to the plight of drug addicts is accordingly essential to the realisation of the object and purpose of the Conventions and that object and purpose, as will be seen below, is also of importance for the interpretation of individual provisions in the Conventions.

For the purposes of this legal opinion, much therefore depends upon the issue of how best to care for drug abusers and how to induce them into rehabilitation. The 1961 and 1971 Conventions simply ask for the rehabilitation and social reintegration of addicts, without indicating how these objectives should be attained. Art. 14 of the 1988 Convention is entitled, "Measures to ... eliminate illicit demand for narcotic drugs and psychotropic substances" and might be expected to contain concrete policy choices. Unfortunately, para. 4 simply exhorts States Parties to "adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic" and the choice of such measures is left entirely to the discretion of States Parties. No guidance at all is provided to the persons who must decide whether or not state-controlled public injection rooms are conducive to the rehabilitation and social reintegration of addicts, to the reduction of human suffering and to the elimination of financial incentives for illicit traffic. This is indeed not a legal question at all, in the sense that medical experts, social workers and health policy makers are much better equipped than lawyers to provide reliable responses. Our Institute is certainly not in any position to provide a concrete response. The recent letter of the International Narcotics Control Board addressed to the Danish Minister for Health must be read in the same light. The operative third paragraph, considering public injection rooms, is an opinion on drug policy, reflecting certain implicit policy choices as to optimal policing practice and socio-medical treatment of drug users. It is neither a statement of public international law, nor, in the quality of an opinion of the INCB, itself legally binding upon Denmark or any other State.

On the other hand, a substantive answer might be found in the actual practice of States in respect of drug addicts. According to subpara. 3(b) of Art. 31 of the Vienna Convention on the Law of Treaties, the subsequent practice of States in the application of their treaty obligations should be taken into account when interpretating the treaty, if that practice shows that the Parties substantially agree on its meaning. It could therefore be worthwhile to make enquiries in other European States to determine whether they promote or tollerate institutions similar to the Swiss *Fixer-Stübli* in the context of their drug policies. Para. 4 of Art. 14 of the 1988 Convention specifies that States may rely upon the initiatives of non-governmental agencies and private efforts in this field and may make bilateral or regional arrangements with other States. Should it appear that almost all States in the region are following the same policy, either in favour of or against the maintenance of public injection rooms, this would provide a basis for an internationally uniform interpretation of the otherwise ambiguous terms of the conventions on that subject.

Going beyond state obligations to provide for drug addicts under public health law, we will now proceed to consider state obligations concerning possession and use of drugs under criminal law generally.

3. Possession for personal use under the 1961 Convention

The concepts of use and possession of drugs first appear in Art. 4 of the 1961 Convention, as amended. Paragraph (c) of this provision, headed "General Obligations", obliges States Parties to limit by law the use and possession of drugs to medical and scientific purposes exclusively. We draw attention in this context to our finding, in the chapter headed "UNO Konventionen" in our *Gutachten über medizinische Anwendung von Betäubungsmitteln* of 1 November 1999, that the definition of "medical and scientific purposes" has not been determined under public international law, with the result that its interpretation is left to individual States. Under Art. 4(c), it would therefore be possible for Switzerland to determine that the possession and consumption of drugs in *Fixer-Stübli* fall within the meaning of "use and possession for a medical purpose" and to allow possession and consumption to that limited extent. However, the obligation set out in Art. 4(c) is expressly "[s]ubject to the provisions of this Convention", so it is necessary to continue our enquiry before coming to any definite conclusion.

None of the other articles of the Convention refer to the use or consumption of drugs. Art. 33 of the 1961 Convention, expressed in very concise terms, is specific to the possession of drugs. According to this provision, States Parties are obliged to prohibit possession "except under legal authority". This must logically mean that States Parties are obliged to pass some legislation dealing with possession of drugs. However, the scope of the legal authority for possession which such legislation may confer is not specified. Thus, it is permissible for States to legalize possession in any circumstances which do not detract from the object and purpose of the Convention. The only other express reference to possession of drugs appears in para. 1(a) of Art. 36, where States Parties are obliged to make it a punishable offence. However, this obligation only applies in so far as the possession can be characterised as "contrary to the provisions of this Convention". In the result, this provision simply refers back to Art. 33 and does not add anything of substance.

We are thus left with the question of whether legalisation of the simple possession of drugs for the purpose of personal consumption in an environment of socio-medical care would contradict the object and purpose of the Convention. This is a question which Prof. Schulz addressed in the form of a careful study of the *travaux préparatoires* to the Convention and we agree with his conclusion: the essential aim of measures to be taken under both Art. 33 and Art. 36 is to combat illicit drug trafficking. Nevertheless, attention should also be drawn to the general observations of States Parties set out in the preamble to the 1961 Convention. The Parties recognise that drug addiction "constitutes a serious evil for the individual", feel themselves to be under a "duty to prevent and combat this evil", desire to "limit ... drugs to medical and scientific use" and provide for cooperation and controls on drugs at the international level. These formulations could lead one to argue, contrary to Prof. Schulz' analysis, that personal possession and use of drugs by final consumers is the root cause of all illicit traffic and that its legalisation would therefore necessarily contradict the object and purpose of the Convention. On the other hand, that argument is of limited relevance to public injection rooms, which tolerate drug use and associated possession of drugs in an environment

of socio-medical care and only by persons who are already addicted and would therefore consume drugs in any environment. That drug use is not generally prohibited by the Convention, reinforces this view. As explained under point 2, above, none of the operative provisions of the Convention place restrictions on how individual States choose to combat the evil of addiction, within a medicalised environment, at the national level. The Convention's general prohibition of possession of drugs should accordingly be understood as referring to possession for one of the purposes specifically outlawed by the Convention, such as exportation, distribution or sale. Possession for the purpose of personal consumption only is excluded. Whichever view is taken, States remain free to permit possession of drugs for personal use, either generally under Art. 33, or at least for medical purposes under Art. 4(c).

It should be noted that Prof. Schulz' legal opinion relies heavily, in this context, upon the Commentaries prepared by the United Nations Secretariat, which we have characterised in our study of 1 November 1999 as having no legal force. The passages from the Commentaries which Prof. Schulz cited however, refer to the *travaux préparatoires*, which, under Art. 32 of the Vienna Convention on the Law of Treaties, may be referred to in order to avoid manifestly absurd or unreasonable interpretations of conventions. To interpret the 1961 Convention on Narcotic Drugs as prohibiting all possession of drugs while allowing personal use would be unreasonable, as it is practically impossible for someone to use drugs without possessing them. In fairness to Prof. Schulz, it should also be said that his legal opinion was essentially concerned with questions of Swiss domestic law, referring to and interpreting the 1961 Convention only because it has overriding force within the domestic legal system. Our analysis, on the other hand, is concerned purely with public international law.

4. Possession for personal use under the 1971 Convention

The 1971 Convention on Psychotropic substances creates two quite distinct regimes of legal regulation of the use and possession of such substances.

Art. 7 sets out very strict standards in respect of Schedule I psychotropic substances. States Parties are obliged to restrict their use to "very limited medical purposes by duly authorised persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them", to quote para. (a) in relevant part. States Parties are obliged to prohibit their possession unless obtained "under a special licence or prior autorization", to quote para. (b) in relevant part. It is very difficult to see how the tolerance of possession and use by drug addicts in a *Fixer-Stübli* could be acceptable under these provisions.

On the other hand, Arts. 4 and 5 set out standards in respect of Schedule II, III and IV psychotropic substances which are noticably more relaxed than those appearing in the 1961 Convention. The basic policy is that States Parties should restrict possession and use to medical and scientific purposes. However, this restriction is to be imposed "by such measures as [each State] considers appropriate". It is further subject to the exceptions set out in Art. 4, the first of which is relevant here, in that it allows for international travellers to carry small quantities with them for personal use. It would be very odd if other persons were to be prohibited from possessing equivalent quantities just because they do not travel internationally. It is therefore reasonable to conclude that States are not obliged by the Convention to prohibit possession for personal use. Para. 3 of Art. 5, which, like Art. 33 of the 1961 Convention, provides for possession to be governed by law, should be interpreted as

simply observing the desirability of legislative action on this point, instead of obliging States to pass legislation defining the limits of authorised possession.

The application of the 1971 Convention to the maintenance of *Fixer-Stübli* is thus quite straight-forward: States Parties retain the power to permit possession and use of most psychotropic substances in such an environment, but must prohibit possession and use of Schedule I psychotropic substances there, as these facilities do not meet the strict standards set by Art. 7.

5. Possession for personal use under the 1988 Convention

Art. 3 of the 1988 Convention on Illicit Traffic contains very detailed obligations for States Parties to criminalise, prosecute and punish a wide range of activities associated with drug trafficking. Subpara. 4(a) requires that the imposable penalties should be quite severe. Para. 6 concerns the related issue, having great practical relevance for the present opinion, of discretion in the prosecution of offences. States Parties are required to introduce measures which will encourage the relevant officials to exercise their discretionary powers in favour of prosecution, so as to intensify the enforcement of drug laws and deter potential offenders.

At the same time, Art. 3 makes a patently clear distinction between "possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption" under para. 2 and the other activities which are to be criminalised under para. 1. Most State obligations in the field of criminal law, in particular those appearing in paras. 3, 5, 7, 8 and 9 of Art. 3, extend only to offences falling within the scope of para. 1. Similarly, the related obligations of States Parties set out in Arts. 5, 6, 7, 8, 9 and 11 are limited by express reference to para. 1 of Art. 3. The general intention appearing from these provisions read together is that States Parties accept strict obligations in respect of para. 1 offences, but retain much greater discretion in respect of para. 2 offences.

A similar intention appears from a careful reading of the terms of para. 2 of Art. 3, which first obliges States Parties to characterise the acts of possession, purchase or cultivation for personal consumption as criminal offences, but then immediately states that this obligation to impose criminal sanctions exists only in so far as the relevant activities are "contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention". One must conclude that the detailed provisions of the 1988 Convention merely go no further than to specifically identify some of the measures required of States by the earlier conventions in general terms, so that our conclusions on the meaning of the earlier conventions, as set out above, remain valid. This conclusion is strongly reinforced by Art. 25 of the 1988 Convention, stating that it is not intended to derogate from any of the rights enjoyed by States Parties under the earlier conventions, which includes the right to individually decide how possession for personal consumption should be dealt with. Para. 2 of Art. 3 indeed begins by stating that the requirement which it poses is entirely "[s]ubject to [the] constitutional principles and the basic concepts of [the] legal system" of each State Party. Upon ratification of the 1988 Convention, reservations or interpretative declarations were introduced by Austria, Bolivia (in respect of raw coca leaves only), Colombia, Germany and the Netherlands to the effect that they therefore retain the right to decide, as a matter of national policy, whether or not to implement para. 2 of Art. 3. The Netherlands in addition declared its understanding that para. 6 allows States a greater degree of discretion on whether to prosecute offences under para. 2 than in respect of offences under para. 1. To date, the only objection lodged in respect of any of these declarations is that of the United States,

complaining that Colombia's declaration attempts to subordinate all of its obligations under the Convention to its own constitution and domestic laws. Given that the United States had itself previously declared that its own constitutional requirements take precedence over its treaty obligations, this objection cannot be taken very seriously.

In summary, the 1988 Convention does not oblige States to adopt uniform measures in the criminalisation, prosecution and punishment of persons found to be in possession of narcotic drugs or psychotropic substances for personal use. States Parties are obliged by paras. 2 and 4 of Art. 3 to address this matter, but retain the freedom to individually decide on the exact policies to be adopted. This conclusion results, in strict law, from a textual analysis of the 1988 Convention and from consideration of related instruments made by certain States Parties, as foreseen by para. 1 and subpara. 2(b) respectively of the Vienna Convention on the Law of Treaties. Prof. Schulz's intuitive explanation, at the very top of page 16 of his legal opinion, that para. 2 of Art. 3 only indicates the reprehensible nature of drug use so as to ensure legal consistency, is convincing.

6. Conclusion

The texts of the relevant international conventions do not provide any guidance on the essential question of whether or not public injection rooms are in fact conducive to the rehabilitation and social reintegration of drug addicts in the short term and to the reduction of human suffering and the elimination of financial incentives for illicit traffic in the long term. The actual practice of States Parties in this respect could provide some guidance, if it is substantially uniform. If not, it must be concluded that States Parties retain the freedom to make their own policy choices on the tolerance of *Fixer-Stübli*. States Parties are not obliged by the conventions to prosecute and punish the possession and consumption of drugs (other than those psychotropic substances which are listed in Schedule I to the 1971 Convention) by addicts in *Fixer-Stübli*. This conclusion is subject only to the caveat that activities which counteract the object and purpose of the conventions must not be tollerated, but that is simply to restate the question of the underlying socio-medical utility of public injection rooms.

We hope that the above observations will be of assistance to you. We would be very interested in seeing the results of your enquiries as to the relevant socio-medical policies adopted in other countries. Should you require any clarification of the legal aspects of the subject, please do not hesitate to contact us again.

Please find enclosed, as requested, a reprint of our *Gutachten über medizinische Anwendung von Betäubungsmitteln* of 1 November 1999. The chapters have been renumbered so that the document begins with the chapter entitled, "UNO Konventionen".

Sincerely yours

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