

IDPC Briefing Paper

Drug courts: Scope and challenges of an alternative to incarceration

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Executive Summary

Because of increases in the prison population and the resulting overcrowding, as well as the emerging consensus about the inappropriateness of criminal law as the first option for addressing the drug problem, alternatives to prison – and particularly the idea of drug courts – have gained ground in recent years. Drug courts are more than an institution, but are a model that can be implemented in different ways. Originally developed in the United States, they have been used in several countries around the world, with varying results.

The basic purpose of drug courts is to offer an alternative to incarceration, thus helping to reduce prison overcrowding, criminality and recidivism. The concept is that keeping people from going to prison for crimes related to problematic drug use reduces their exposure to criminal networks. When these individuals are offered treatment and other social services, they have a better chance of avoiding recidivism and reintegrating into society.

The model is based on four basic elements. First, a person who would otherwise be incarcerated for having committed a crime, and who admits to consuming drugs, benefits from the suspension of criminal proceedings or a sentence. Second, that person is offered treatment and sometimes other social services. Third, the treatment is established and supervised by a judge or court that is responsible for monitoring compliance with treatment conditions, conducting periodic testing to determine whether the person has used drugs, and organising status hearings. Fourth, in case of failure to comply with the conditions imposed by the drug court, sanctions are imposed that can include exclusion from the programme. Compliance, on the other hand, may be rewarded, and if treatment is successful, the sentence can be significantly reduced or lifted.

Despite its stated goals, the way in which the model has been implemented in various countries shows that it has serious limitations. The use of a judicial model, especially in the

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United States, means that drug courts tend to reproduce the selectivity characteristic to the criminal justice system, while the public health approach that should inspire it becomes secondary. In some cases, these courts may even increase pressure on the criminal justice system, because they sometimes contribute to an increase in arrests. In addition, when they lack sufficient funding, resources and a strong, consistent structure that guarantees access to appropriate and evidence-based treatment, drug courts tend to fail in achieving their objectives.

Now that drug courts are gaining attention in Latin America, with a push for widespread implementation of the model in the region, it is important to consider the model's limitations, as well as specific challenges for its implementation in the specific contexts of the countries in the region. This paper argues that because drug courts constitute an alternative to prison for drug-related crimes, they are an interesting model to consider. However, drug courts have serious limitations that raise questions about their feasibility. As a result, although some drug courts have apparently yielded good results in terms of recidivism and cost-effectiveness, the model's serious limitations, both theoretical and practical, suggest that it would be better for Latin American countries to explore other alternatives to incarceration. Governments should also conduct a broad range of reforms that will provide a wide range of accessible and evidence-based treatment programmes to address problems stemming from drug dependence without reproducing the problems of the classic prohibitionist-abstentionist model.

Introduction

In the past forty years, the “war on drugs” and the use of criminal law to wage that battle have contributed to a significant increase in the prison population in many countries around the world, particularly in Latin America. In Brazil, for example, the proportion of inmates jailed for drug

trafficking offenses rose from 9.1% of the total prison population in 2005 to 19.22% in 2009, while in Argentina it rose from 1% in 1985 to more than 27% in 2000. In Peru, drug offenders represent about 23% of the prison population and in Bolivia, 30%.¹ In those countries, a significant percentage of people are in prison for minor drug-related offenses. In Uruguay, for example, most cases involve possession of amounts close to what could be considered as possession for personal consumption. This situation has led to serious economic and human consequences – incarceration is a costly option that severely limits inmates' rights and exposes them to an environment conducive to greater violence and drug consumption.²

Given the empirical evidence that prison is neither the only nor the best alternative for addressing the drug problem, in recent years there has been growing international debate about the importance of elaborating viable and appropriate alternatives to incarceration. Among the alternatives most often discussed and implemented are drug courts or drug treatment courts, the main goal of which is to defer the court case or sentencing of drug offenders while they undergo a treatment programme supervised by a specialised court. Those who fail to comply with their treatment can be incarcerated. However, if they finish successfully, the sentence may be lifted or reduced.

Proponents of drug courts argue that they are a viable alternative that addresses the drug problem more appropriately because within this system, drug use is considered a public health issue, and the person is given the possibility to receive treatment instead of a prison sentence. This would reduce prison overcrowding and avoid criminal recidivism by addressing the underlying factors of drug-related crime. Besides offering an alternative to incarceration, these courts are more cost-effective. The drug court model would also lower rates of recidivism and help reduce violence and crime in communities, as well as improve the family and social relationships of those who receive treatment.

Because of the advantages that some studies have attributed to drug courts, some countries have recently decided to adopt the model. The first country to do so was the United States, where there are currently more than 2,500 drug courts. Today, drug courts can also be found, for example, in England and Wales, Australia, Canada, Chile and parts of Brazil. Because of their growing popularity around the world, drug courts are increasingly promoted as a policy alternative in various Latin American countries.

This paper aims to contribute to the discussion of the advisability of adopting drug courts. In particular, it analyses the true scope of the model, recognising its limitations and obstacles to its implementation. The conceptual starting point is that addressing the drug problem requires alternatives to incarceration, particularly for people whose criminal behaviour is associated with drug dependence and those who play a minor role in trafficking networks, because prison does not offer an appropriate response to drug dependence, exposing instead minor offenders to criminal networks and promoting family disintegration. It is therefore essential to identify and develop alternatives to prison. When choosing a public policy option, however, it is necessary to analyse evidence about its possibilities, recognise its limitations and avoid possible pitfalls.

With regards to methodology, this paper is based on a review of secondary literature, in particular studies on the implementation of drug courts in England and Wales, Canada, Australia and the United States, and other longitudinal studies. It offers an overview of the issue, but also addresses limitations, especially on the danger of making gross generalisations on drug courts. The studies examined generally reflect significant methodological differences, which often make comparisons difficult. The quality of the studies available is also highly variable. Another factor which further complicates analysis is the fact that drug courts are more a model that offers guidelines for praxis than an institution with uniform characteristics – even

drug courts established in the same country may have very different procedures and structures. For example, although all drug courts offer treatment, the approaches, timeframes and procedures for treatment differ substantially; these make comparisons difficult and could be decisive factors in the initiative's success or failure. Despite these limitations, a review of these studies offers an important opportunity to carefully analyse whether drug courts are the best alternative for Latin America and identify factors for making informed decisions about their feasibility.

This paper is divided into three main parts. The first part offers an overview of drug courts, briefly describing their recent development, highlighting their main characteristics, as well as their diversity, and indicating the results of their implementation. The second part discusses the main problems drug courts tend to encounter and the criticism they have received around the world. The final section assesses the issues discussed in the previous sections, and offers some recommendations.

Overview of drug courts

This section analyses drug courts and how they operate, describing their basic approach and common conceptual and methodological assumptions, while highlighting the diversity of regulations that have been developed. It also briefly describes the courts' origin, goals, principal characteristics, key aspects related to their operation, and the outcomes of the implementation of the model in some countries.

The recent development of drug courts

Drug courts were first introduced in the United States in the late 1980s in an effort to find alternatives to incarceration for people who committed low-level drug-related crimes and showed signs of drug dependence. The first court was established in Florida in 1989, as an experiment by the Dade County,³ in response to

two phenomena associated with the so-called war on drugs – the huge increase in the number of court cases and of inmates incarcerated for minor drug-related offenses, which resulted in congestion in the criminal justice system and prison overcrowding, as well as high rates of recidivism.⁴

Following the theories of therapeutic jurisprudence developed by authors such as David Wexler and Bruce Winnick, the basic assumption of the nascent model was that judicial intervention could have a therapeutic effect and that judges should make an effort to leverage that effect.⁵ As a result, the drug court approach sees drug dependence as a health issue that has criminal consequences; treatment should therefore be offered first, and punishment should be secondary. The adversarial structure of the U.S. criminal justice system underwent a significant transformation with the drug court approach because the judge is not an impartial third party, but takes the lead on a treatment team.⁶ The initial idea was to offer intensive, community-based treatment aimed at rehabilitation, along with a supervised programme to avoid recidivism while the defendant was awaiting trial.⁷

Since they first appeared, drug courts have evolved significantly around the world. There have been three key phases to their development. The first one can be characterised as a phase of internal consolidation in the United States, from the emergence of the model until the late 1990s. By 1999, more than 472 drug courts had been established in the United States,⁸ and significant organisational development had occurred. For example, the National Association of Drug Court Professionals (NADCP) was founded in 1994 by drug court pioneers in the country.⁹

The second phase is characterised by a time of expansion into other English-speaking countries, such as Canada, the United Kingdom and Australia. In Australia, the first pilot drug court was established in New South Wales in 1998. Pilot projects were later implemented in other

districts. In Queensland, the first pilot drug court programme was implemented in 2000, and the courts were later established as a permanent mechanism in August 2005. In Scotland, the first drug court was established as a pilot project in Glasgow in October 2001, and a second pilot programme started in Fife in September 2002.¹⁰ In England and Wales, the government developed a five-year strategy (2004-2009) for developing a broad set of initiatives to reduce drug-related crime. A pilot drug court was implemented in 2005 as part of the strategy. Its goal was to reduce the commission of drug-related crimes through better understanding of the needs and motivations of people referred to the court, in order to reach greater commitment to treatment and higher levels of compliance with sentences.¹¹

During the third phase, the model expanded to Latin America and countries with different legal systems and languages, such as Chile, Brazil and Jamaica. In Brazil, for example, at least four states have established a model of courts within the country's Therapeutic Justice Programme. These include São Paulo, Pernambuco, Rio de Janeiro and Rio Grande de Sul. In Rio de Janeiro, there are twenty courts for adults and ten for juveniles, while in Rio Grande, there are nine courts for adults and three for juveniles.¹²

In the United States alone, there are currently more than 2,500 drug courts and another 1,200 specialised courts. The former handle cases of men and women who have committed drug-related offenses, while the latter target specific groups.¹³ For example, some drug courts are specialised in tribal healing or target specific groups, such as juveniles, families, veterans, etc. In countries like Canada, Australia and the United Kingdom, drug courts are not widespread, but have become extremely important.

General objectives

The drug court model has two key objectives. The first objective is to keep people who have committed minor drug offenses and

show signs of drug dependence out of prison. Potential beneficiaries are offered the option of undergoing treatment, but have to meet other conditions such as periodic random drug tests, to make the suspension of the criminal proceedings or sentence permanent. The objective is to reduce recidivism among drug court beneficiaries; the key assumption being that treating drug dependence can reduce the risk that the person will commit another crime.

The second key objective is to reduce criminal justice system overload and prison overcrowding and keep people, especially those with no criminal record, away from a prison environment where they might come into easier contact with criminal networks and increase their drug use. This was noted in a recent CICAD document on the relevance of drug courts.¹⁴

Successful treatment can also help enable people to seek employment and attain a degree of stability that would make them less likely to commit another crime, hence contributing to lower rates of recidivism. Drug courts may also be an important way of reducing violence associated with drug consumption in communities.

Principal characteristics and overview of the operation of drug courts

Although drug courts share a common perspective, there are significant differences between those that have been developed so far, both in their design and the way they operate. Drug courts do share the same outlook and objectives – they are conceived as an alternative to prison for minor drug-related crimes. People referred to these courts do not receive a sentence, or the sentence is suspended as long as they comply with conditions set by the drug court, which generally consist of treatment for drug dependence. If they fail to meet those conditions, however, or if the treatment fails, they must serve a prison sentence.

Treatment is a second common element of the drug courts model. The basic idea of drug courts is to offer people who have committed low-level drug-related offences some type of treatment for a certain period of time. The underlying assumption is that drug dependence is one of the factors associated with the commission of crimes, and treatment is therefore expected to help reduce one risk factor related to certain crimes. If the person undergoes treatment and stops using drugs, without going to prison, he or she is expected to be better prepared to reintegrate into society, find employment and attain a certain degree of stability that will make the commission of future crimes less likely.

The third shared element is that, although treatment is meant to offer an alternative to prison, the model remains strongly judicial. The essential structure of drug courts is that of a court of law, in which one or more judges are responsible for making key decisions about the person referred to the court. Besides the judge, there is generally a prosecutor who presents the case, and a defence attorney who represents the interests of the person referred to the court. Although their purpose is not necessarily to engage in trial proceedings to establish liability, they operate with the mind-set of a court. Nevertheless, unlike ordinary criminal courts, drug courts include other key stakeholders, such as treatment service providers, social workers and experts in related disciplines, who take an interdisciplinary approach to the case. Some drug courts even require that judges have expertise in drug dependence and treatment, for a more specialised handling of cases. The pilot drug courts in England and Wales, for example, emphasize the importance training for judges on drug dependence and communication with the people brought before the courts, to maximise the motivation of people receiving treatment.¹⁵

A fourth common element is the existence of a system of rewards and punishments related to compliance with treatment. These include

periodic random testing to determine if the person has used drugs during treatment, and status hearings to establish whether or not the person under the drug court's jurisdiction is complying with the treatment programme. A person who does not comply with his/her treatment or stops showing up for tests and hearings receives a punishment, which can consist of losing his/her freedom for short periods of time, while the criminal proceedings or sentence remain suspended. If, at the end of the established treatment period, the person has not completed treatment successfully, the criminal proceedings continue and the corresponding sentence is imposed.

Several differentiating characteristics also stand out. One key characteristic of drug courts is their diversity – rather than being a standard institution, drug court models vary from country to country and even between regions in the same country. Some studies consider this to be a strength, as it allows the courts to adapt to each area's specific characteristics (McIvor et al., 2006). However, this poses significant challenges when it comes to evaluating the courts' actual scope and limitations, because it is not always possible to make generalisations about their operation and outcomes.

In this briefing, we have grouped some of the main differences in the structure and operation of the drug courts under five basic criteria: i) the structure of the court and the types of stakeholders involved; ii) the profile of the people who tend to be chosen as beneficiaries of the drug courts' services; iii) the procedure generally followed from the time a person is sent to the drug court, including a system of rewards and punishments; iv) the type of treatment offered and its duration; and v) the existence of other social services that supplement treatment.

Regarding the first point, drug courts take different forms. Some operate with individual judges, while others have panels of judges who make joint decisions. While some drug courts

are specially created institutions with specific functions and independent budgets, in some countries, criminal judges who are responsible for establishing and monitoring the treatment of beneficiaries, also continue to perform their regular duties. That is the case in Australia, where certain judges receive special training in drug court methodology, but maintain their jurisdictions and continue to handle their regular criminal caseload. English drug courts operate in a similar way – they are conceived as a special programme established within regular courts in districts with a high prevalence of low-level drug-related crime. Instead of individual judges, however, these courts are operated by panels of judges that rotate to ensure continuity in the intervention. In fact, the three crucial aspects of the programme in England and Wales include specialisation, continuity and training, which are considered key to ensuring the beneficiary's commitment to compliance.¹⁶

Another important difference in structure and staffing is the degree of coordination with other institutions and programmes. Although the model may be based on the need to coordinate with other entities, particularly in the area of health, drug courts do not all achieve the same level of coordination. Depending on the services offered by the programme, drug courts may involve many people from different fields, such as social workers and health professionals.

In most cases, both men and women are referred to drug courts, although in practice more men than women are referred to the courts. Only a small percentage of courts specialises in either men or women. Through a review of available studies, however, it is impossible to determine whether drug courts take different approaches for men and women, and address societal gender roles which would tend to give women primary childcare responsibility. These gender constructs can be important factors in the success of the treatment, but it seems that institutions do not take these factors into account, or studies do not highlight them.

Although drug courts generally target people who have committed minor crimes and who show signs of drug dependence, variations in target groups can be significant. Some courts accept cases involving repeat offenders who are dependent and have committed violent crimes, while others only accept people with no criminal record who have committed non-violent crimes related to possession, street dealing and use. In the United States, for example, some studies show that drug courts have generally focused on users. Courts that receive federal funds, in particular, exclude repeat offenders and anyone who has committed a violent crime.¹⁷ In contrast, in countries like Australia, the courts accept repeat offenders and people accused of relatively serious crimes, although they specifically exclude people accused of sex crimes, crimes involving personal violence, and participation in large-scale trafficking. In Canada, drug courts accept repeat offenders, even in cases involving violent crimes, as long as they have not been accused of personal violence.¹⁸

In any case, it is assumed that those people who met the eligibility criteria for drug courts submit to the court's jurisdiction voluntarily. In Australia's MERIT (*Magistrates Early Referral Into Treatment*) Programme, for example, a person must consent voluntarily to be a programme beneficiary.¹⁹ Beneficiaries, therefore, are people who could choose to serve the sentence imposed by an ordinary criminal court, but who decide instead to seek treatment within the framework of a drug court. Another characteristic of these courts and their procedures is that they do not seek to establish the offender's guilt, because the offenders would generally have already confessed the crime they were accused of. This reinforces the idea that treatment is voluntary, rather than coercive. However, some critics of the model claim that defining this form of treatment as voluntary is difficult, because if the person rejects it, fails to complete treatment or to comply with the conditions set out by the court, he/she will be incarcerated, with no other alternatives.

The drug court model has also been adapted to people with specific profiles. For example, as indicated above, besides courts for adults, there are juvenile courts that are generally guided by the same treatment principles, courts for veterans and courts for families. At least 10% of drug courts in the United States are for veterans.²⁰

With regards to procedures, there are significant differences in how people are referred to the programme, the type of suspension of ordinary court proceedings that is offered, and the system of rewards and punishments. In some courts, the prosecutor is the only one who can refer cases to the courts, and referrals tend to be highly discretionary, while in others, such as New Zealand, where the courts operate only for juveniles, various people involved in the criminal case can request referral, including the police or the defence attorney.²¹

Regarding the type of suspension, although all drug courts imply that the criminal proceedings are suspended, the courts tend to choose one of two alternatives. One option is to defer or postpone criminal prosecution; this is known as pre-judicial measures. In these procedures, the beneficiaries of treatment are referred to the drug court before being sentenced, and their crimes are only investigated if they do not complete the programme. The other option is for programmes to take effect after sentencing. These programmes generally require that the person admit guilt. In that case, although a sentence is imposed, it is generally suspended as long as the person is in the programme. If the programme is completed successfully, the sentence can be reduced, suspended or, in some cases, even expunged from the person's criminal record.²²

The system of rewards and punishment, which is an integral part of drug court procedures, is also important. Despite slight variations, the following structure is generally adopted: ongoing random testing to determine if the person has used drugs again, followed by hearings to evaluate

the degree of compliance with treatment. In case of non-compliance, the judge(s) decide(s) on corrective measures. The sanctions most often imposed consist of temporary loss of freedom, such as few days in prison, and a write-up in the person's criminal record which is taken into account in subsequent hearings. If there are various incidents of non-compliance or if the person gives up treatment, he or she may be excluded from the programme – this is the harshest punishment. In that case, besides losing access to treatment, the criminal case is resumed or the previously imposed sentence is carried out, depending on the procedure used by the court. In some cases, the sentence may not be suspended or lifted, but may be reduced. This is another reason for critics to argue that the decision to undergo treatment may not be entirely voluntary, since there is an underlying element of coercion to ensure success – the loss of freedom.

The types of treatment offered by drug courts usually consist of abstinence-based treatment. Some courts, however, offer substitution treatment, with the possibility of offering people substitute medication for the substances they used, to help them manage their behaviour and withdrawal effects. This is the approach undertaken in Scotland.²³ This type of treatment is particularly noteworthy since it has a significant scientific base and is being considered internationally as offering better results in terms of treatment outcomes. The provision of a treatment based on solid scientific evidence is crucial, because a person who has received inadequate treatment, even if successful, faces a greater chance of relapse and/or of returning to drug-related crime.

There are significant differences regarding which other social services are included in drug court programmes. Although the original idea of these courts was to offer the elements necessary to ensure the person's complete reintegration into community life, in practice supplemental services have often been considerably reduced.

Because drug courts differ significantly around the world, it is difficult to determine the average cost of their operation and the budgetary implications of a government decision to promote the creation of such courts. Nevertheless, it is clear from available studies that more services and greater institutional capacity require more resources, but also yield better results. Therefore, if the model is to be truly effective, its financial stability must be guaranteed.

Outcomes of drug courts

Despite differences between the various drug court systems implemented around the world, proponents of the model believe they are appropriate for decreasing drug use among their beneficiaries, while helping to reduce prison overcrowding and recidivism, resulting in an overall outcome that is more positive than would be achieved by incarceration. They also argue that the model yields better results in terms of costs and benefits because drug courts require less investment than imprisonment and lead to better outcomes. The question, then, is what results have the existing drug courts actually achieved. This section will examine some of the outcomes highlighted in available studies.

There are many methodological difficulties in evaluating drug court outcomes. Available studies are generally carried out by the courts themselves or implementing authorities, which could compromise the objectivity of the findings. Another problematic issue is the fact that all studies use different methodologies and have differing degrees of depth, with different variables and samples that are not necessarily comparable. Some studies, for example, do not include control groups, while others do so but do not always control the relevant variables that could make a significant difference in the results. It is therefore difficult to make generalisations about the drug courts' outcomes. This is the case in Canada,²⁴ for example, and even in the United States.

Nevertheless, a general review of available studies shows that drug courts have had mixed outcomes. While some courts tend to be successful – with lower recidivism rates than ordinary judicial proceedings, a decrease in overcrowding and improvements in managing dependent users – others have not had such effects. Therefore, some drug courts seem to work better than others.²⁵

To examine the general outcomes of drug courts, this paper reviewed some relatively recent, well-accepted meta-analyses involving an extensive range of studies with methodological strengths, as well as a longitudinal analysis. Such an analysis made it possible to identify common variables that allow broad generalisations about the operation of drug courts.

According to these studies, drug courts have lower recidivism rates than the traditional criminal justice system. In analysing 54 studies from the United States, Canada and Australia, Latimer, Morton-Bourgon and Chrétien found that most of these studies concluded that drug courts had a positive impact on recidivism. Only 10 of the studies indicated a negative impact. The authors conclude that drug courts can reduce recidivism by 14%.²⁶ Similar meta-analyses have found a reduction of recidivism of 8%.²⁷ Shaffer's study of 60 studies of drug courts in the United States indicates a rate of 9%.²⁸ Although these results may be consistent in indicating a reduction in recidivism rates, it should be noted that these results all originate from a comparison with the traditional criminal justice system. There is no comparison made with other policy alternatives, such as community-based treatment. Nevertheless, these results do indicate the importance of this alternative to incarceration.²⁹

As the study by Latimer, Morton-Bourgon and Chrétien also indicates, these results usually fail to consider the drug courts' high dropout rate, which generally reaches around 45%.³⁰ Similarly, the results rarely take into account the differences in the studies' monitoring periods –

the shorter the follow-up period, the better the results tend to be in terms of recidivism.³¹

Shaffer also highlights some factors that may help increase the capacity of drug courts in reducing recidivism. For example, drug courts are more effective when the treatment lasts a minimum of eight months. The most effective ones tend to range from eight to sixteen months.³² Latimer's study includes similar conclusions.³³ Shaffer's study also finds that the courts that have the best results are those that use a pre-judicial model, followed by the post-judicial one, while those that use mixed models (a combination of the two) appear to have no positive impact on recidivism. According to those findings, the most effective drug courts are those that impose immediate, consistent sanctions as a consequence of treatment failures.³⁴ Regarding effectiveness, the study finds that drug courts should guarantee that the programmes and services offered meet the participants' specific needs, which means that they should offer more flexible models, and that the form and frequency of contact with the court should be adjusted to the beneficiary's risk level.³⁵ This is a general call to adapt procedures, services, sanctions and rewards to the specific characteristics of the offender, in order to ensure that the system has a better impact on the person's recovery process.

In addition to having an impact on the rates of recidivism, drug courts can have a positive effect on costs. A meta-analysis conducted in the United States indicates that they produce an average cost of US\$2.21 in direct benefits for the criminal justice system for every dollar invested. When drug courts focus on more serious crimes, the study indicates that the average return on investment is US\$3.36.³⁶

In short, despite methodological limitations, studies providing an overview of drug courts tend to recognise their positive impact in terms of reducing recidivism and cost-effectiveness, compared to resorting to the criminal justice system.

Limitations of drug courts

It is important to promote alternatives to prison in order to reduce human costs and avoid the negation of certain human rights as a result of incarceration. However, drug courts have significant theoretical and practical limitations and face implementation challenges that are very difficult to overcome and which, in some situations, constitute real barriers and risks. In order to identify the potential constraints associated with the drug courts model, the following section offers an assessment of the main criticisms of the system, indicating practical problems related with the implementation of drug courts, based on available evidence. This section also provides an overview of the main challenges, risks and barriers associated with the adoption and implementation of drug courts if implemented in Latin America.

Criticism of the model and operation of drug courts

Most criticisms regarding drug courts focus on their design and implementation, but some have criticised the model itself. The most important ones stress that, although drug courts are an alternative to incarceration, the model still takes a criminal justice approach to a public health problem, hence perpetuating an inappropriate response to the underlying problem of drug use.³⁷ This criticism is particularly relevant in light of specific courts that focus on people whose only "criminal" behaviour is the possession and use of drugs. This is the case in the United States, where drug use is still considered a crime.

Those critics argue that there is a basic tension between the principles and objectives of treatment and the criminal justice approach. While treatment assumes that drug dependence should be considered as a health issue, the criminal justice system assumes a theoretical approach where a rational actor can make a clear calculation about the commission of a crime and understand the potential consequences of that action. The resulting tension may not be

appropriately addressed by drug courts, and that may be one reason for the high percentages of failure in treatment; people are expected to behave rationally, so they can make progress in their treatment. One fact is lost – the more serious the health problem, the more difficult it is for the person to behave rationally in response to a system of rewards and punishments. In fact, these critics say, people with less-problematic drug use will be more likely to complete treatment, because they are in better physical and mental condition to respond to the logic of the drug courts.³⁸

Critics also argue that, because drug courts take a judicial approach to the issue, they tend to reproduce the mind-set and selectivity characteristic of the criminal justice system. Ultimately, the public health approach gets lost in the legal proceedings. Some studies, mainly in the United States, also highlight the inequitable nature of access to drug courts and, therefore, to the treatment programmes they offer. Drug courts offer a potential benefit to people who have committed low-level offenses related to drug use – those who are excluded generally have less access to other treatment opportunities, such as economically vulnerable people and ethnic minority communities who traditionally suffer from discrimination.

Available figures indicate that the rate of arrest for drug-related crimes among African-Americans in the United States is 238 times that of white people, and that, along with Latino-Americans, they constitute two-thirds of the individuals imprisoned for these crimes, even though they use and sell drugs at rates comparable to those of white people.³⁹ Because people of colour are more likely to have a criminal record when they are arrested for drugs, however, they tend to be more easily excluded from drug courts than white people under the strict eligibility requirements adopted in the United States, especially in courts financed with federal funds.⁴⁰ Even when they are accepted in drug courts, African-Americans tend to be expelled from the programme at a rate 30%

higher than that of white people. This seems to be due to multiple factors, such as the lack of culturally acceptable treatment programmes, the lack of counsellors of colour, and economic vulnerability.⁴¹

Selectivity in accessing drug courts is increased by the fact that some courts tend to focus on the people least in need of the intervention, or on “easy” cases. Because they must show results and demonstrate their effectiveness without raising costs, some drug courts have tended to make their eligibility requirements very strict, excluding people who may be particularly in need of treatment because of their level of use and lack of resources, but who may also have more trouble completing the treatment successfully. This phenomenon has been reported in the United States, where it has been referred to as “cherry picking,” or choosing those people who have the greatest chance of success using a minimum of institutional and financial efforts. The Justice Policy Institute⁴² notes that drug courts that receive federal funding focus on people who have been accused of non-violent crimes and who have no record of violence. This substantially reduces the number of people who can benefit from the system and excludes people who may be in urgent need for treatment.

Another particularly problematic factor with regard to drug courts is that they ultimately create a “special court”, which may violate the principle of equality by creating a parallel judicial system. People who meet the requirements but do not accept treatment go through the ordinary judicial system, while those who have committed the same crimes under similar circumstances may not be punished. In cases where drug court coverage is limited, two people in the same state, under the same conditions and with the same characteristics, could be processed in completely different ways, with different benefits. In other cases, different “punishments” can be imposed for the same behaviour.

Studies in the United States have highlighted other problematic aspects of the operation

and effects of drug courts. For example, the increase in judicial institutions that address the drug problem (i.e. drug courts) does not ease pressure on the criminal justice system, but tends instead to increase it.⁴³ This can be explained by the fact that when the number of courts increases, arrests also increase, because the police are more likely to detain people for less serious drug-related behaviours. This, for example, occurred in Denver after a drug court was established.⁴⁴

In addition, because of the intermediate sanctions imposed by drug courts for failure to comply with some commitments during treatment, people may spend more time in prison than they would have if they had received an ordinary sentence with the regular benefits they would have qualified for. Similarly, some measurements indicate that people who fail treatment and are expelled from the drug court system tend to receive a harsher sentence than they would if they had never gone through the court.⁴⁵

Another factor that may be critical in the implementation of drug courts is the type of treatment offered in the system. In some countries, institutional capacity is insufficient to guarantee good and timely treatment all of those who participate in the courts, and in some cases, the private institutions that are contracted to provide treatment do not offer evidence-based services, which affects the effectiveness of the system as a whole. In Puerto Rico, for example, the private organisations contracted by the drug courts often provide treatment based on religion, rather than scientific principles; this can affect the drug court's overall intervention, which should always be based on empirical evidence.⁴⁶ In Scotland, although treatment always takes a scientific approach, there are problems in guaranteeing sufficient funding to ensure high quality treatment services.⁴⁷

This points to another critical factor in the operation of drug courts – in places where timely and adequate funding is not guaranteed, drug courts tend to fail, because treatment

is inadequate or there is not enough staff to oversee the treatment.

Practical challenges facing drug courts

Given the criticisms of the drug courts' design and operation, it is possible to identify some basic challenges for the implementation of this public policy option. This section identifies and briefly describes five key challenges to the implementation of drug courts in Latin America, where countries generally have limited resources and capacity to provide drug prevention and treatment.

- **Relevance vs. effectiveness.** This has to do with the definition of the crimes that fall within the drug courts' purview and the people who can receive their potential benefits, as well as the criteria for exclusion from the programme. If drug courts focus on those who are most likely to succeed in treatment, they could win in effectiveness, but lose in relevance.

Drug courts should therefore include beneficiaries who have committed minor crimes, even if this implies some degree of violence against property, for which they would be sentenced to prison according to the national criminal code, and who show signs of drug dependence. They should not focus on those who are charged with simple possession or use, not only because those behaviours should not be considered criminal, but also because for those whose only behaviour is problematic drug use, other policy alternatives should be available that are less likely to jeopardise their rights, such as community-based treatment. Similarly, drug courts should not be used for behaviours which would not incur incarceration but could qualify for criminal benefits or alternative sentences; this is because in a drug court system, if the treatment fails, the person would then be incarcerated. These courts would therefore become a step toward criminal punishment,

instead of an alternative to it, and could even contribute to an increase in pressure on the criminal justice and prison systems.

If this challenge is addressed and drug courts focus their institutional and financial efforts on people who really need them, they can reduce the risk of reproducing the selectivity characteristic of the criminal justice system, which, in turn, reproduces the exclusion and discrimination criteria typical of the criminal justice and prison systems. Those criteria are particularly harmful to the human rights of those involved and should therefore be avoided in constitutional States.

In Latin America, this challenge becomes more difficult to overcome – and becomes a key barrier to implementation of drug courts – because in countries with limited resources, as it is the case in the region, there is a tendency to succumb to the temptation for the drug courts to focus on the people who are most likely to complete treatment successfully, rather than on those who could truly benefit from an alternative to prison. Drug courts may then focus on dependent users arrested for simple possession, who have no criminal record, and for whom other policy alternatives would be more appropriate – including the provision of treatment outside of any judicial intervention.

- **Appropriateness of treatment.** A second key element is for the treatment offered to be based on solid scientific evidence, without unjustified constraints on the rights of the drug court beneficiaries. Treatment must therefore take into account that there are different types of use, and that drugs produce various effects, making differentiated treatment necessary. Treatment should be provided to every beneficiary of the drug courts, for an appropriate period of time.

Another important factor is that the treatment be provided by trained personnel who can empathise with those attending the programme. Treatments must also take into account cultural differences; this is a key factor in the success or failure of the programme. Differentiated factors, particularly gender, also play an important role in the appropriateness of treatment. Without these factors, treatment could become irrelevant.

Therefore, treatment is only relevant if it responds to the following basic principles: i) having a scientific base; ii) being adjusted to the specific needs of the individual; iii) having sufficient scope and time frame; and iv) being voluntary.

These basic principles constitute an important barrier to implementation of drug courts in Latin America, where treatment services are usually not easily accessible, where there are only a few public programmes, and where private programmes often lack sufficient government control. Good implementation of drug courts requires, as a basic prerequisite, the existence of multiple evidence-based treatment options. Without solid, proven, high-quality programmes, drug courts are doomed to fail, since their effective operation depends on the provision of timely and permanent access to appropriate treatment.

- **Sustainability.** Drug courts need appropriate, adequate and timely resources, without which treatment and the entire intervention may become unsustainable. It is also essential to ensure a low turnover of staff, as the experience acquired in such interventions may be crucial for the long-term sustainability of the courts and for improving the treatment programme, as well as for the overall approach to dealing with beneficiaries. Experience in England and Wales has underscored the importance

of guaranteeing specialisation, ongoing training and continuity for drug court staff,⁴⁸ because these are crucial for ensuring a significant impact on the beneficiary, where he or she acquire a real commitment to re-socialisation. The continuity of judges, in particular, helps improve relations with drug offenders, which is a key factor in increasing their self-esteem, accountability and commitment to treatment.⁴⁹

Good inter-agency coordination and teamwork are also important. Because drug courts do not only require the intervention of the judiciary, but also that of other government agencies responsible for treatment and other social services, coordination among the various authorities responsible for areas directly or indirectly related to the work of drug courts is essential.

In countries with limited resources, as is the case in Latin America, addressing this challenge can be especially difficult to ensure that enough resources are allocated to drug courts, treatment programmes and to ensure that the staff is skilled, experienced and stable. It will sometimes be necessary to prioritise which public policies require immediate implementation and which can be adopted later. In such cases, the priority must focus on strengthening treatment and other social programmes for people dependent on drugs – only after access to these services is ensured should countries think about other policies.

- **Specialisation and judicial capacity.** There is a need to address the general lack of specific training and sensibility that judges need to direct interventions towards a public health approach rather than a punitive justice one. Judges generally approach people who have committed crimes only as criminals, and are rarely prepared to offer the therapeutic tools needed in cases of drug dependence. The

theoretical assumptions underlying this model require that judges take the lead in the process and are committed to treatment outcomes. The court or the judges should also have the financial and institutional capacity necessary to meet the demand for their intervention.

- **Empirical evaluation.** The range of methodological problems attached to evaluations of drug courts has raised doubts about their quality. These problems also make it difficult to draw general conclusions about the courts' success or failure. These programs, like all public policies, should be accompanied by a clear definition of goals, targets and forms of periodic evaluation to make it possible to identify progress and setbacks in their operation. Academic measurements of their implementation should also be developed, in order to assess the true scope and effects of drug courts more reliably.

This is particularly important in Latin America, where there appears to be a tendency to transplant foreign institutions without considering their appropriateness for the countries' specific needs. There is also a tendency to implement policies without a proper evaluation process. Without reliable information about the functioning of drug courts, it is impossible to evaluate effects and determine their true scope and effectiveness. It is even more difficult to identify dysfunctions and make appropriate changes to their operation.

Recommendations

The points discussed in this briefing paper indicate that drug courts are an interesting model which, in some cases, seems to have yielded positive outcomes in terms of recidivism rates and costs. However, the system has serious limitations stemming from thorny

theoretical and practical problems. Drug courts, at times, lead to a repressive, abstinence-based response to a problem that should be addressed as a social and health issue. This is particularly true when they focus on possession and use. Latin America is characterised by a lack of resources and little progress in providing effective drug dependence treatment. An analysis of the potential of implementing the drug courts model in Latin America indicates that its widespread implementation would meet so many major obstacles that they would be inadequate in decreasing prison overcrowding and addressing criminality associated with drug dependence.

Latin American countries should continue to discuss alternatives to incarceration for drug-related crimes. These can play a key role, not only in addressing the overburdened judicial and prison systems, but also to address the needs of people who commit crimes related to drug dependence. These alternatives should be embedded in a public health approach, rather than a repressive one, they should be based on solid empirical evidence and be adapted to the context in which they will be implemented. Their design and implementation should be based on solid studies of risk levels and prevalence of drug dependence at the local level and a deep understanding of the types of use and drugs involved and their effects.

With these points in mind, the next section offers some recommendations. The first set of recommendations is general and is based on the need for long-term reforms for addressing drug dependence as a public health issue. These recommendations can help guide public and judicial policy on drugs. The second group of recommendations contains some more specific guidance, based on the idea that although drug courts may not be the best alternative for Latin America, if the choice is made to implement them, it is important to focus, design, implement and evaluate policies as well as possible, in order to mitigate the risks of implementing yet another overly repressive measure.

Long-term reforms

- Drug dependence should be approached as a public health issue, rather than a criminal justice one. Criminal penalties, particularly incarceration, should be reserved for those who commit drug-related crimes, not simple possession.
- Drug laws should be reviewed to decriminalise drug use and possession for personal use. Alternatives to incarceration should also be implemented for low-level and non-violent drug-related crimes.
- The criminal justice system should not constitute the first venue for offering treatment to people dependent on drugs. The provision of drug dependence treatment before people enter the criminal justice system is the most effective way to reduce incarceration rates and lower associated economic and social costs.
- Governments should make long-term investments in treatment to reduce drug dependence and the social and health problems associated with it. It is necessary to study, reinforce and expand the treatment options currently available. Treatment should always be based on empirical evidence and supervised effectively to ensure positive outcomes.

Recommendations for the most effective implementation of drug courts

- To ensure that drug courts do not deviate from their initial purpose, they must be implemented in the context of a broader set of reforms which seek to reinforce a public health approach to the drug problem.
- Drug courts should never be used for people who are arrested for simple possession of drugs and who do not show any sign of dependence, or for people who are dependent on drugs but have not committed any crime. Treatment

programmes should be developed to outside of the criminal justice system for the latter. Drug courts should be reserved for cases in which people's criminal behaviour is related to drug dependence, including repeat offenders and those who have committed serious crimes, although some restriction criteria may be established.

- Drug courts should be designed to ensure that they do not contribute to an increase in the prosecution and punishment of people who commit drug-related crimes. They should only focus on people who would be sent to prison, rather than on those who could be referred to other programmes (including treatment) or who would receive a less severe sentence than incarceration.
- Drug courts should adopt objective criteria for admission to the programme and preferably choose a pre-sentencing rather than a post-sentencing model. They should also guarantee due process; this requires, among other things, an appropriate defence system.
- Drug courts should emphasize a public health approach to treatment, rather than a punitive one. Court-ordered testing throughout the treatment should therefore be viewed as a treatment tool, not a potential factor for punishment. Punishment for failing to complete the programme should not be more severe than the sanction which would have been received if the person had followed normal criminal justice proceedings.
- Treatment must be based on empirical evidence and offer real possibilities for reducing drug dependence. Treatment programmes should properly function before the drug courts start operating – adequate infrastructure is essential for the good functioning of the courts.
- Drug court and treatment programmes should be adequately funded and benefit from skilled, specialised personnel.

- Treatment should not be based on coercion, but on evidence and respect for human rights. It should focus on reducing the harms associated with drug dependence among individuals, families and their communities.
- The design and implementation of drug courts must be accompanied by mechanisms for ongoing monitoring and evaluation, in order to assess progress and distortions that could arise from their operation. Evaluation is crucial for adopting corrective measures to ensure that drug courts meet their objectives.

The International Drug Policy Consortium is a global network of non-government organisations and professional networks that specialise in issues related to illegal drug production and use. The Consortium aims to promote objective and open debate on the effectiveness, direction and content of drug policies at national and international level, and supports evidence-based policies that are effective in reducing drug-related harm. It produces occasional briefing papers, disseminates the reports of its member organisations about particular drug-related matters, and offers expert consultancy services to policy makers and officials around the world.

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Other resources of interest: The Canadian Association of Drug Treatment Court Professionals: <http://www.cadtc.org/>;
National Association of Drug Court Professionals: <http://www.nadcp.org/learn/facts-and-figures>

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