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THE RISE AND DECLINE OF CANNABIS PROHIBITION

THE HISTORY OF CANNABIS IN THE UN DRUG CONTROL SYSTEM AND OPTIONS FOR REFORM

Cannabis reforms: the scope and limits of treaty latitude

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Man smoking a typically Indian pipe, filled with opium. Credit: Floris Leeuwenberg

Cannabis reforms: the scope and limits of treaty latitude

Within its prohibitive parameters, parties to the UN drug control conventions are afforded a certain degree of latitude in the formulation of national policies.[1] Like most multilateral instruments, the 1961, 1971 and 1988 conventions are the products of political compromise and are consequently "saturated with textual ambiguity",[2] making their interpretation more art than science. Detailed guidance for interpretation is provided for each treaty in an official Commentary. Proceedings of the conferences in which the conventions were negotiated, provide further information about the intentions of the drafters and the arguments used in debates to reach the compromises or, quite often the voting, on the final wording.

The interpretive practice of the parties is another important source of determining the margins of interpretation of ambiguous terms. Flexible interpretations of certain treaty provisions by parties uncontested over time become part of the accepted scope of interpretation. Resolutions or political declarations adopted by the CND, ECOSOC or the General Assembly can also play a significant role in this regard. Finally, in its capacity to monitor treaty compliance, the INCB also provides guidance to countries on the implementation and interpretation of the 1961 and 1971 conventions.[3] The Board often maintains a very narrow interpretation of the treaty and usually lags behind in the development and acceptance of certain legal interpretations by the parties, but is not mandated to settle the dispute when differences arise.[4]

All those sources combined provide clear indications for what constitutes an interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" as the Vienna Convention on the Law of Treaties requires.[5] The resultant interpretations have provided the existing flexibility or room for manoeuvre[6] that has led to a variety of cannabis policy practices and reforms deviating from a repressive zero-tolerance drug-law-enforcement approach.

Turning a blind eye. Non-enforcement of drug laws in the case of cannabis is the informal reality in quite a few countries, rooted in a social acceptance or long history of traditional use. For example, Morocco, India, Cambodia, Pakistan, or even Egypt (which played a prominent role in negotiating cannabis into the international drug control treaty system) have very strict anti-drug laws applicable to cannabis, but all display a tolerance that rarely leads to arrest and prison sentences for minor cannabis offences. In some of these countries disguised cannabis dispensaries are even informally allowed to operate.[7] In part such cultural legacies operate on the basis of a well-established and accepted system of small bribes to law-enforcement

officers, comparable to an informal fine system replacing the severe penal sanctions required by the drug laws, seen as unenforceable.

Expediency principle and discretionary powers. Depending on the legal system and political power of a nation, in several countries more formalised schemes of non-enforcement have been established by written rules or guidelines for the police, the prosecution and/or the judiciary. This results in de facto decriminalization of use and possession, or in the case of the Netherlands even in allowing the sale of small quantities of cannabis in coffeeshops. Such acts remain criminal offences according to the law, but its enforcement is given the lowest priority.

Decriminalization. In several other countries cannabis consumption and possession for personal use (sometimes including cultivation for personal use) are de jure no longer a criminal offence. Many varieties of such decriminalization schemes exist, in terms of distinguishing possession or cultivation for personal use from the intent to trade; and whether or not to apply administrative sanctions.

Collective cultivation for personal use. The treaty requirements do not differentiate between possession and cultivation for personal use. In Spain, a jurisdiction with established decriminalization practices and a relevant record of jurisprudence on the matter, legal interpretation gradually became more flexible, allowing for the collective exercise of cultivation for personal use in the form of "cannabis social clubs".

Scheduling as a less harmful drug. Several countries have scheduled cannabis in a category for less harmful substances, or have prosecutorial guidelines or jurisprudence leading to lower sanctions for cannabis offences than for more harmful substances. This defies the UN scheduling system that classifies cannabis along with heroin and a few other substances (not including cocaine) as the most harmful ones with practically no medicinal uses. The conventions do however allow for certain national deviations as long as they comply with the minimum requirements for control applicable to the UN Schedule in which the substance is included.

Medical use. Including cannabis in Schedule IV of the 1961 Convention and of THC in Schedule I of the 1971 Convention was in effect a rejection of its usefulness for therapeutic purposes and an effort to limit its use exclusively to medical research, for which only very small amounts would be required. Today, many countries have rejected this position as scientifically untenable and have established legal regimes recognising the medicinal properties of cannabis and its compounds. The WHO already recommended moving THC to a lower control schedule under the 1971 Convention, and the Expert Committee will soon also reconsider the current classification of cannabis under the 1961 Convention. Meanwhile, in practice, some jurisdictions have given medical schemes more legal discretion regarding recreational use, by permitting relatively easy access to cannabis for a wide range of physical and psychological complaints.

Religious use. The 1961 Convention recognised no legitimate religious use of psychoactive plants like coca and cannabis, the traditions hence condemned as criminal behaviour had to be phased out within 25 years. However, the widespread persistence of religious uses of cannabis in Hindu, Sufi and Rastafari ceremonies and traditions led to lenient law-enforcement practices in a number of Indian states, Pakistan, the Middle East, Northern Africa and Jamaica. The 1971 Convention, in contrast, showed more consideration for ceremonial uses, leaving psychedelic plants (mainly cacti and mushrooms) outside the 1971 control regime, scheduling only their isolated alkaloids. Consequently, compared to cannabis, there is significantly more leniency in international law with regard to religious use of peyote or ayahuasca.

Industrial uses of hemp. Article 28 of the 1961 Convention specifies that the treaty does "not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes". Varieties of the cannabis plant with relatively low psychoactive cannabinoid content, usually referred to as "hemp" instead of "cannabis", have been widely used for its fibre to make paper, denim or sails. The legitimate hemp industry has suffered hugely from the controls imposed on cannabis, but is experiencing a comeback. The treaty explicitly left the use of cannabis for such purposes open, but posed

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operational problems for law enforcement as both types of the plant have the same appearance and a grey market for low-THC-content hemp for recreational purposes does exist in some countries.

Cannabis leaves. As mentioned above, the compromise reached during the negotiations over the 1961 Single Convention to limit the definition of cannabis to only its flowering tops and resin, leaves space for low-THC-content recreational uses of its leaves. This legal loophole allows for the existence of a "bhang" market in some Indian states.

All these practices or uses of cannabis are, or at least intended to stay, within the confines of the treaty latitude. Most have a solid legal basis, others employ a certain interpretive creativity not always acknowledged legally justifiable by the INCB. And sometimes schemes perfectly justifiable in principle have been applied to practices difficult to defend without a dose of hypocrisy. The strictures of the conventions and the near impossibility to amend them have led to stretching to questionable limits their flexibility and the validity of their in-built escape clauses. Examples are the legal contradictions around the backdoor of the Dutch coffeeshops; the expansion of medical marijuana schemes in some U.S. states into recreational use; the establishment of large-scale commercial cannabis social clubs in Spain; or the creation of special "churches" with cannabis ceremonies, taking advantage of religious freedom legislation.

Below we review in some detail the legality and variety of the already existing deviations from strict prohibition in cannabis policies and practices. We also examine the recently emerging initiatives to introduce a fully legally regulated cannabis market under governmental control in two U.S. states and in Uruguay. Breaking out of the treaty confines obviously creates other types of legal tensions that must be carefully considered and a number of options for resolving such breaches are discussed in the next chapter.

Decriminalization of possession for personal use

"Use" of drugs was consciously omitted from the articles that list the drug-related acts for which penal measures are required. There is no doubt, therefore, that the UN conventions do not oblige any penalty (criminal or administrative) to be imposed for consumption per se. The Commentary to the 1988 Convention in relation to its article 3 is quite clear on the issue: "It will be noted that, as with the 1961 and 1971 Conventions, paragraph 2 does not require drug consumption as such to be established as a punishable offence."[8]

The conventions are more restrictive with regard to possession, purchase or cultivation for personal consumption. Article 33 of the 1961 Single Convention states parties shall "not permit the possession of drugs except under legal authority" (and then only for medical and scientific purposes) and article 36, paragraph 1, obliges parties to make possession a punishable offence. Crucially, regarding the obligation to criminalize possession, a distinction is made between possession for personal use and that for trafficking. According to Boister, the thrust of the Convention's penal provisions is the prohibition of illicit drug trafficking, allowing little interpretative doubt that parties are obliged to criminalize possession in that context. But it "does not appear that article 36(1), obliges parties to criminalize possession of drugs for personal use".[9] The Convention's focus on the suppression of trafficking can be seen as an affirmation that countries are not obliged in terms of article 36 to criminalize simple possession under the 1961 Convention. This view is also bolstered by the drafting history of article 36, in fact, originally entitled "Measures against illicit traffickers".[10] Based closely upon the earlier instrument, the subject is treated similarly in the 1971 Convention.

Circumstances became more complex with the introduction of the 1988 Convention. Article 3 repeats in slightly broader language the provisions of article 36 of the Single Convention and article 22 of the 1971 Convention. Paragraph 2 of article 3 adds:

> Subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be seen necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

Even though the language is more restrictive and might be regarded as reducing the flexibility of the earlier treaties, a persuasive legal case can be made that article 3, paragraph 2 still leaves significant scope for deviation from the punitive approach. "Subject to its constitutional principles and basic concepts of its legal system", represents a clear "escape clause". It implies that "any latitude existing under this Convention does not result exclusively from the Convention but also from the constitutional and other legal principles of each country". Therefore, "Parties would not violate the Convention if their domestic courts held criminalization of personal use to be unconstitutional",[11] and consequently are not obliged to establish possession for personal use to be a criminal offence. A strong case can also be made that a party need not make cultivation for personal use a criminal offense either.[12] Further, the article allows for alternatives to conviction or punishment for offences related to personal use and other offences "of a minor nature", albeit restricting and strongly discouraging national discretionary powers related to illicit trafficking offences of a more serious nature.[13]

As a result, a country might rule that, in line with its own national circumstances, it is not within the interest of society to prosecute for possession or cultivation for personal use; that the right to privacy overrules state intervention regarding what people consume or possess in their private homes; or that self-destructive behaviour, be it consumption of potentially harmful substances or other behaviour including suicide, shall not be subject to punishment. These justifications have been argued and accepted respectively in the Netherlands, Alaska and Germany with regard to possession of cannabis for personal use. More recently, in Argentina the Supreme Court ruled that the section of the 1989 drug law criminalizing drug possession was unconstitutional.[14] The existence of an escape clause of this nature, based on constitutional principles as well as basic concepts of national legal systems, is relatively rare in international law.[15] It has been utilized by a range of authorities to create more policy flexibility while remaining within the confines of the treaty framework.[16] Thus, despite widespread acceptance of the 1988 Convention, significant room for manoeuvre in relation to cannabis decriminalization has been retained since its enactment in 1990.

At the subnational level, dating from the 1970s a significant number of states within the U.S. have decriminalized the possession of cannabis for personal use.[17] In Australia, a similar process has taken place in Victoria, New South Wales, Queensland and Tasmania.[18] Other states and territories in Australia have decriminalized cannabis possession by applying non-criminal punishments, with threshold quantities differing according to jurisdiction.[19]

Enormous differences continue to exist across Europe. Spain, for example, does not consider possession of drugs for personal use a punishable offence, criminal or administrative. However, the absence of a clear legal distinction and smoking in public remaining banned, can in practice still create difficulties for people who use drugs.

In the Netherlands or Germany, possession for personal use remains de jure a criminal offence, but de facto guidelines are established for police, prosecutors and the courts to avoid punishment, including fines or other administrative sanctions, if the amount is insignificant or for personal consumption. In yet other states like the Czech Republic, possession of cannabis for personal use is no longer a criminal offence, but those caught with small amounts can be deferred to treatment services if required, or administrative sanctions may be applied.[20]

Probably the best-known example of the latter category is Portugal, which decriminalized drug use, acquisition and possession for personal consumption of all drugs in 2001, for quantities not exceeding what an average user would consume in ten days. Portuguese officials were careful to ensure that the new policy remained within the "mainstream of international drug policy" and that decriminalization was consistent with the relevant provisions of the 1988 Convention. It was the Portuguese view that replacing criminalization with administrative regulations maintained the international obligation to prohibit those activities and behaviours.[21] Drug use, acquisition and possession for personal consumption are no longer considered a crime, although administrative

Bhang shop in Jaisalmer, Rajasthan, India.

Bisnoi men smoking a pipe. Credit: Floris Leeuwenberg

sanctions can still be applied by special bodies created within the Health Ministry. These Commissions for Drug Addiction Dissuasion provide information, discourage people from using drugs and refer users to the most suitable options, including, if required, treatment. Although initially hostile, in 2005 the INCB accepted that the Portuguese policy was legitimate inasmuch as drug possession was still prohibited, even if sanctions were administrative rather than penal, acknowledging that "the practice of exempting small quantities of drugs from criminal prosecution is consistent with the international drug control treaties".[22] Decriminalization constituted only one element of a major policy change including a strong public health orientation in Portugal, which included comprehensive responses in the fields of prevention, treatment, harm reduction and social reintegration, all contributing to a general positive trend regarding all available indicators.[23]

"Despite the different legal approaches towards cannabis," within Europe, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) concludes after a review of EU cannabis policies:

> A common trend can be seen across the Member States in the development of alternative measures to criminal prosecution for cases of use and possession of small quantities of cannabis for personal use without aggravating circumstances. Fines, cautions, probation, exemption from punishment and counselling are favoured by most European justice systems. It is of interest to note that cannabis in particular is frequently distinguished from other substances and given special treatment in these cases, either in the law, by prosecutorial directive, or by the judiciary.[24]

In response to policy developments in the Americas, in 2010 the INCB strongly criticized the governments of Argentina, Brazil, Mexico and certain U.S. states for "the growing movement to decriminalize the possession of controlled drugs [which has to be] resolutely countered".[25] But a year later, the INCB report no longer attacked the increasing decriminalization of possession for personal use, perhaps another tacit indication, like its 2005 position regarding Portugal, that the Board had finally given up its legally untenable opposition. The general treaty obligation to "limit exclusively to medical and scientific purposes" the use and possession of drugs still stands, but there is no binding legal obligation for nations to prohibit possession or cultivation of cannabis for personal consumption under their domestic criminal laws if it contradicts a basic principle of national law.

To what extent the general obligation requires specific provisions under *administrative* law to "not permit" such acts, remains open to interpretation. The 1961 Commentary seems quite clear, in reference to articles 4 and 33, declaring that parties "must prevent the possession of drugs for other than medical and scientific purposes by all the administrative measures which they are bound to adopt under the terms of the Single Convention, whatever may be their view on their obligation to resort to penal sanctions or on the kind of punishment which they should impose" and that "the obligation of Parties not to permit the possession of drugs except under legal authority requires them to confiscate drugs if found in unauthorized possession, even if held solely for personal consumption".[26] Over time state practices seem to have expanded the scope for interpretation beyond what was intended at the time the treaty and its Commentary were drafted.

The state of Alaska is an interesting case in this regard. In 1975 an Alaskan Supreme Court ruling (*Ravin v State)* barred the state from criminalizing possession and use of cannabis within an individual's home in line with its constitution's privacy provisions. The "State Supreme Court decided that the relative insignificance of cannabis consumption as a health problem in Alaskan society meant that there was no reason to intrude on the citizen's right to privacy by prohibiting possession of cannabis by an adult for personal consumption at home".[27] A 1990 voter initiative recriminalized simple possession, but an Alaskan Court of Appeals decision in 2003 (*Noy v State*) challenged the constitutionality of this vote and ruled: "Alaska citizens have the right to possess less than four ounces [one ounce is 28.35 grams] of marijuana in their home for personal use."[28]

While there remains confusion around the application of the law by police authorities, the state consequently permits possession of cannabis for personal use without any criminal or civil penalty. Alaska represents an example (as do Uruguay and Spain) where possession of limited amounts of cannabis for personal use is not a punishable offence at all, criminal or administrative. There is, however, a conflict between Alaskan state and U.S. federal law. Although possession of less than four ounces of cannabis within an adult's home is essentially "legal" under state law, it is not under federal law. Similar legal disputes have been fought over medical marijuana laws in some states and over the regulation initiatives recently passed in Washington State and Colorado.

Cannabis Social Clubs

The same latitude that the treaty regime allows for possession for personal use applies to cultivation, as the conventions do not distinguish between "possession" and "cultivation" for personal use. Similar difficulties as with possession arise in national jurisdictions regarding the legal distinction between cultivation for personal use and cultivation with intent to supply. The decision as to whether to apply quantitative thresholds, to require other proof to establish the intent to traffic, or to leave the distinction to a judge, is left by the conventions entirely in the hands of national authorities. As a consequence, legal reforms

that have included decriminalization or exemption from prosecution for cultivation of cannabis for personal use are allowed under the same conditions that apply to possession for personal use.

In Spain this latitude has led to the development of "cannabis social clubs" cultivating cannabis for personal use on a collective basis.[29] This cooperative model is legally based on the decriminalization of cultivation for personal use and was started in the 1990s by grassroots initiatives in Spain, taking advantage of a grey zone in the national law and court jurisprudence. Spanish law does not penalize consumption and in 1974 the Supreme Court ruled that drug consumption and possession for consumption are not criminal offences, although administrative sanctions do exist for smoking in public places.

The movement began in Barcelona in 1993 when the *Asociación Ramón Santos de Estudios Sobre el Cannabis* (ARSEC) decided to challenge the juridical position regarding cultivation. ARSEC asked the public prosecutor if it would be considered a crime to grow cannabis for a group of adult users. The reply that, in principle, this was not criminal behaviour, resulted in a cultivation experiment involving about a hundred people and attracted media attention. The crop was confiscated, but a lower court acquitted those involved. Subsequently the case was taken to the Supreme Court, which ruled cannabis cultivation as dangerous per se and therefore punishable. In the following years other associations appeared, notably in the Basque Country. In 1997, the Kalamudia association established the region's first collective cannabis plantation, but subsequently failed in its efforts to achieve regulation in the Basque regional parliament. Subsequent initiatives, consequent seizures and court cases led to revisions of the Supreme Court ruling in 2001 and 2003, establishing that possession of cannabis, including large quantities, is not a crime if there is no clear intention of trafficking. The first club was legally constituted in 2001, followed by hundreds all over Spain, in particular in the Basque Country and Catalonia.

The Supreme Court decisions have served as a basis for various judicial rulings ratifying the legality of cultivation of cannabis clubs. The proviso is that there is non-profit distribution exclusively within a closed group of adult members registered with the club having a right to their share of the harvest according to their personal needs.[30] However, the interpretation of these judicial rulings remains ambiguous. The police still frequently raid the plantations of cannabis associations and prosecutors keep bringing cases to court, despite several court rulings allowing the model and ordering the police to return the seized cannabis and plants.[31]

A major goal of the Spanish clubs is to achieve political and legal recognition by the authorities. The associations are legally constituted, openly declaring their objectives and purposes, and paying taxes. They call for greater clarity in the law to permit individual and collec-

tive cultivation for medicinal purposes and personal recreational consumption. At present, the Basque Country and Catalonian regional parliaments are debating a form of legal regulation within the confines of the national law and the rejection of the current club model by the national prosecution office.[32]

More recently a more commercial type of club has appeared, especially in Barcelona,[33] essentially functioning like a Dutch coffeeshop, but with a membership-only policy. These clubs are rapidly increasing due to the opportunities cannabis entrepreneurs see in a future regulated industry. They are investing in clubs now, anticipating regulation, already securing a position on the market as well as hoping to leave the current juridical quagmire in which there still is a thin line between licit and illicit cultivation. Membership sometimes runs into several thousand per club (including foreigners). To meet demand, these clubs are regularly forced to buy from what is still the illicit market. One of the larger clubs in Barcelona proposed procuring their members' supply from large-scale plantations in the Catalan municipality Rasquera.[34] An agreement with the local administration was signed, but was blocked by the prosecution office. Nevertheless, other municipalities in Catalonia have expressed interest in similar cultivation agreements with clubs in Barcelona.

This Spanish model is being copied by activists in other European countries, in particular in Belgium, the United Kingdom,[35] and even in France, the country with some of the most draconian drug laws in Europe.[36] In Latin America informal clubs have appeared in Argentina, Colombia and Chile, in each case adapting to local laws, de facto decriminalization conditions and court rulings or the blind eye of the authorities. In Uruguay clubs of 15 to 45 members are allowed under the new cannabis regulation law approved in December 2013. Persuaded that the model is in conformity with the UN drug control conventions, it has gained popularity among lawmakers in Mexico and several European countries, such as Portugal[37] and Germany.[38] Having gained legitimacy in several countries, the model is now a frequent subject in the international debate about drug policy reform.

A next step in this approach could be to extend the model to include growers in developing countries supplying the clubs with non-domestically grown cannabis. Outsourcing one's personal supply to growers across borders would require "import for personal use" to be allowed. While this would require international agreements allowing import and export and would likely be fiercely opposed by drug control authorities, the proposition has a certain logic. One of the main arguments for the clubs is that they cut out the black market. The same would be true for foreign-grown hashish that is already available in several clubs but lacks the legal justification based on collective cultivation for personal use of the club members. European growers have had little success producing hash with the quality and taste similar to that from traditional sources like Morocco or Afghanistan. Many European consumers still have a preference for hashish over home-grown marijuana, resulting in a persisting illegal supply to the social clubs in Spain, the coffeeshops in the Netherlands and the illicit markets in other European countries in general. Such a situation will continue as long as the design of legal regulation models for the cannabis market are based on domestic growing, without taking into consideration the reality that a part of the market is supplied from abroad and is not so easily replaced by import substitution.

In Morocco a debate on regulating cannabis cultivation for sale to the government for medicinal and industrial purposes has been initiated in parliament.[39] If accepted, that sale might be extended to supplying legally constituted and regulated markets outside the country, also for recreational use. There is also a developmental argument in support of such an option. Hashish production is an important part of the local economy in the Moroccan Rif mountains; continuing the efforts to undermine those farmers' livelihoods would lead to considerable impoverishment and consequently increased migration toward Europe. Moreover, the traditionally produced hashish contains less THC and a significantly higher percentage of CBD, making it less noxious than the European product.[40]

Medical Marijuana

There is no question that the UN conventions in principle allow for the medical use of controlled substances, including cannabis, and are meant to guarantee sufficient availability of controlled drugs for licit purposes. The inclusion, however, of cannabis and its active compounds in the strictest schedules of the 1961 and 1971 treaties, reserved for substances with "particularly dangerous properties" that are "not offset by substantial therapeutic advantages" has created obstacles for legal provisions for the medicinal use of cannabis. The INCB has frequently expressed its opposition to medical marijuana schemes such as those operating at the state level in the U.S. One of its two arguments can be easily contested; the other, however, appears to have considerable legal legitimacy.

First, the Board questions the medical usefulness of marijuana. Its 2003 report notes that the conventions leave the interpretation of "medical and scientific purposes" up to the parties,[41] a crucial point, allowing for latitude within the conventions. Yet, concomitantly the INCB places the onus on governments "not to allow its medical use unless conclusive results of research are available indicating its medical usefulness".[42] It is not the Board's mandate to decide whether scientific results are conclusive or not, nor whether cannabis has medical usefulness. Countries can decide that themselves, and a unique mandate has been given to the WHO regarding advice on proper scheduling under the 1961 and 1971 Conventions. Nonetheless there

are quite a few examples of the INCB casting judgment.[43] The Board's opposition on grounds of medical usefulness is unfounded for two reasons: the lack of any universally accepted position on the issue; and it is not within the INCB's remit or competence. Furthermore, the WHO, as mentioned above, has taken a contradictory position in its recommendations regarding dronabinol or THC under the 1971 Convention.

The INCB's second point of contention is, however, more valid. As noted in its 2008 report, the Board also regards certain medical marijuana schemes to be in violation of article 28 of the Single Convention, stipulating "specific requirements that a Government must fulfil if it is to allow the cultivation of cannabis, including the establishment of a national cannabis agency to which all cannabis growers must deliver their total crops".[44] The cultivation and distribution of cannabis for medicinal purposes is only permitted under strict state control and requires a government agency with the "exclusive right of importing, exporting, wholesale trading and maintaining stocks […] Only cultivators licensed by the Agency shall be authorized to engage in such cultivation." The Convention continues that, where medical marijuana schemes are in operation, a government agency must award all licenses and take "physical possession" of all crops.[45] Most countries allowing medical cannabis have introduced and abide by the required structures and procedures.[46] However, this is clearly not the case within commercial schemes operating in U.S. states like California and the INCB's arguments regarding the legality of those practices under the Conventions are legitimate.

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Dutch coffeeshops

The INCB has also long claimed that the Dutch coffeeshop system operates in contravention to the drug control treaties.[47] In its 1997 Annual Report, for instance, the Board went so far as to claim that the coffeeshop system constituted "an activity that might be described as indirect incitement",[48] implying that Dutch authorities were complicit in the crime of promoting illicit drug use.[49] Though no longer at the forefront of cannabis tolerance after the developments in Spain, the U.S. states and Uruguay, the Netherlands in the 1970s was the first, and for a considerable time the only country to allow the limited retail sale of cannabis for recreational use through the coffeeshops. Under the present arrangement the possession of cannabis remains a statutory offence, but the government employs an expediency principle, and has issued guidelines on the use of discretionary powers, assigning the lowest judicial priority to the investigation and prosecution of cannabis for personal use. The guidelines further specify the terms and conditions for the sale of cannabis in authorized coffeeshops, whereby the sale of up to 5 grams of cannabis per transaction is tolerated and the coffeeshop is permitted to hold up to 500 grams of the drug.[50]

Dutch authorities and lawyers maintain that their law and implementation strategy are permitted under the treaties. The provisions in the Single and the 1988 Conventions requiring criminalization of cannabis cultivation, possession and trade for non-medical purposes are satisfied in Dutch legislation in the Opium Act. The 1988 escape clause to apply constitutional principles and basic concepts of their legal systems in the case of possession, purchase and cultivation for personal consumption was also emphasized in a reservation made by the Netherlands at the time of signing.

In jurisdictions such as the Netherlands that follow the expediency principle (a discretionary option that allows authorities to refrain from prosecution if seen in the public interest to do so), it is possible to meet the letter of the international conventions by de jure establishing cultivation, possession and trade of cannabis (even for personal use) as criminal offences while allowing de facto legal access to cannabis for non-medical purposes by declining to prosecute such illegal acts under specified circumstances. As argued above, there is little doubt that this conforms with the acknowledged treaty latitude concerning cultivation, purchase and possession for personal use (under article 3, para. 2).

Whether it can be extended to sale and possession of quantities for commercial trading purposes, as is permitted de facto in the coffeeshop system, is arguable and a matter

of contention. This is the case since it is a treaty obligation to make such offences, "liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation" (article 3, para. 4-a). The 1988 Convention limits the applicability of discretionary powers under domestic law for illicit drug trafficking offences.[51] The Netherlands, upon acceptance of the treaty in 1993, therefore made an explicit reservation in order to fully preserve its discretionary powers and to ensure that implementing the 1988 Convention would not affect its legal justification for the coffeeshops.[52]

While this argumentation can be defended based on the letter of the treaties combined with the reservation the Netherlands made under the 1988 Convention, it does stretch the art of interpretation to its limits. The question can be raised whether or not the coffeeshop system can be regarded as a legitimate and faithful implementation of the prohibitive spirit of the treaties, given the general obligation under the Single Convention that "parties shall take such legislative and administrative measures as may be necessary [...] to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs".[53]

That said, if the coffeeshops are viewed as operating within the, albeit stretched, parameters of the extant treaty framework, one might apply the same argumentation to allow supplies to the coffeeshops; a route that would resolve the "back door" problem that has confounded the model from its inception. The Dutch government rejects any experiments with legally controlled cultivation, claiming that it is not permissible under the UN Conventions. However, given the fact that the legal justification for the coffeeshop model as it exists today is not only based on the flexibility the treaties allow for consumption-related offences, but applies the expediency principle to distribution and trade, it is difficult to justify that the same discretionary power could not be applied to the cultivation of cannabis to supply the coffeeshops under certain conditions. Interpretation would be stretched that much further, but most probably within the same limits.

Some Dutch jurists go even further, arguing that, since it is not defined within the conventions, the treaty concept of "medical purpose" could be interpreted broadly enough to include any policy measures, including a legal regulation of the cannabis market, justifiable on the basis of its positive contribution to public health, as that is the primary aim of the 1961 Convention.[54] While such a position could be argued on the basis that the conventions leave discretion to individual countries as to what constitutes medical use, the Commentary does not seem to support such a broad interpretation.[55] The trend in cannabis policy developments may well lead to more acceptance of such a broad interpretation in the future, but at present its legal basis is problematic.

A regulated cannabis market

As we have seen, decriminalization, including schemes in which possession, purchase and cultivation for personal use are no longer punishable offences, is now functioning comfortably within the confines of the UN drug control conventions. Parties are also allowed to provide social support rather than punishment for those caught up in minor drug offences due to socio-economic necessity and the lack of alternative livelihood options. Indeed, the 1988 Convention introduced the provision to allow health or social services "as alternatives to conviction or punishment" for offences of a minor nature, not only in cases in which the offender is dependent on drugs, but for anyone involved in minor drug offences. This compensates for the stricter provisions in the treaty calling for harsher penalties for more serious offences. It introduces proportionality principles in sentencing for low-level drug offences such as small-scale cultivation, street dealing or courier smuggling. Here lies a potential legal basis for development-based policy approaches regarding subsistence farmers of cannabis (and of coca or opium poppy): non-enforcement of legal eradication requirements in the absence of alternative-livelihoods options, in order to create an enabling legal environment for sustainable development assistance. It could also be applied to micro-traders, a group for which this policy option is rarely considered.
Although the conventions leave considerable room for

manoeuvre and permit softening of criminal sanction requirements, the limits of latitude are also clearly established and finite. Authorities cannot create a legally regulated market including the cultivation, supply, production, manufacture or sale of controlled drugs for non-medical and non-scientific use, which is to say, recreational purposes. Proscriptions laid out in the conventions clearly prevent authorities from creating a legally regulated market for cannabis beyond the realm of medical and scientific purposes.

Although the explicit reference to the complete "prohibition of cannabis" in the original draft version was deleted, the Single Convention did broaden the scope of the regime to include the cultivation of plants. Article 22 of the Single Convention specified the "special provision applicable to cultivation" using a similar phrasing as used for Schedule IV substances:

> "Whenever the prevailing conditions in the country or a territory of a Party render the prohibition of the cultivation of the opium poppy, the coca bush or the cannabis plant the most suitable measure, in its opinion, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic, the Party concerned shall prohibit cultivation."[56]

This refers to prohibiting cultivation for medical and scientific purposes, because the requirement to prohibit cultivation for other purposes is the basic premise of the treaty. The only exception is that it does "not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes" (article 28, para. 2).

For parties deciding not to prohibit cannabis cultivation, article 28 establishes clear conditions under which licit production for medical or scientific purposes would be permitted.[57] As touched on above in the discussion of the INCB's stance on medical marijuana, these requirements, identical to those in article 23 for the control of the opium poppy, include the obligation to create national agencies with a monopoly to license and control distribution. Such agencies designate the areas in which the cultivation can take place, allow only licensed cultivators to engage in such cultivation, and ensure that the total crop be delivered to the agency. The agency maintains exclusive rights regarding importing, exporting, wholesale trading and maintaining stocks.

These treaty articles about the optional character of prohibition, leaving open options for licit cannabis cultivation, are often misinterpreted by cannabis-reform advocates, arguing that they also allow for licit cultivation for non-medical purposes if the strict requirements for governmental control are met. They argue that if a party does not "render the prohibition of the cultivation [...] the most suitable measure [...] for protecting the public health and welfare," that party is not required to prohibit it and thus can allow cannabis cultivation under state control. However, the object and purpose of the conventions limits the non-prohibition option exclusively to medical and scientific purposes. And in the case of cannabis, as per its inclusion in Schedule IV, the Single Convention clearly recommends that it should be limited to small amounts for research only. Legal regulation of the cannabis market for recreational purposes, therefore, cannot be justified within the existing limits of latitude of the UN drug control treaty regime. It is within this context that we must view recent policy shifts in two U.S. states and in Uruguay.

The Colorado and Washington initiatives

In November 2012, voters in the states of Washington and Colorado approved ballot initiatives establishing legally taxed and regulated markets for the production, sale and use of cannabis. Washington's Initiative 502 (I-502) passed with a 55.7 to 44.3 per cent majority and in Colorado, Amendment 64 (A-64) passed by 55.3 to 46.7 per cent.[58] With Uruguay, these represent the first initiatives to legally regulate the cannabis market, going beyond the coffeeshop system in the Netherlands and the cannabis clubs in Spain, which are merely tolerated through judicial guidelines and court rulings rather than enshrined in law.

In Washington and Colorado voter approval depended on a number of key motivations for the creation of a regulated cannabis industry: eliminating arrests; undercutting black markets and reducing violence; assuring product quality; increasing choices for those seeking intoxication; and limiting access by young people. Expectation that the initiatives would generate much needed income in tax revenue and save the states money on law enforcement was a significant factor as well.[59] Both states already had

November 2012 ballot initiatives [60]		
	Colorado A-64	**Washington I-502**
Taxes applicable	Excise tax at 15% plus 15% sales tax on top of normal state and local taxes	Excise taxes at 25% at production, processing and retail levels. Plus general state and local sales taxes
Proposed cultivation laws	Personal cultivation of up to 6 plants allowed. Commercial cultivation allowed with licence only.	Commercial cultivation allowed with licence only.
Proposed commercial zoning	N/A	Not within a 1000 feet of a school, playground, recreation centre or facility, child care centre, public park, public transit centre, library or any game arcade, admission to which is not restricted to persons aged twenty-one years or older
Advertising/Signage restrictions	Restrictions on advertising and display of products.	State Liquor Control Board to develop restrictions on advertising including minimising the exposure to under-21s, no advertising near schools, public buildings and public transport.

a regulated medical marijuana industry and voters were accustomed to forms of legal marijuana.

The successful referenda could be seen as the beginning of a new wave of defection from the UN conventions, this time moving from soft to hard defection. In 2013, eleven U.S. states proposed legislative bills (as opposed to ballot initiatives) to regulate and tax marijuana.[61] Many of these have been temporarily stalled, but cannabis legalisation is now firmly on the policy agenda. New referenda are expected in California and Oregon to coincide with either the 2014 congressional or 2016 presidential election. The final decision is very much a strategic consideration since, among other things, the demographics of voter turnout varies. Reform initiatives in the U.S. have taken the form of direct democracy through ballot initiatives and bills within state legislatures. A bill originates and is voted in the legislature, whereas an initiative is a law or constitutional amendment voted by the electorate, it having been added to the ballot through a petition process.[62]

It was not the first time reform activists in the U.S. used ballot initiatives to change the status of cannabis, but until November 2012 they had been unsuccessful. As early as 1972 California held a ballot initiative on legalisation (Proposition 215), but it failed 66 to 33 per cent. In 1986, at the peak of the President Reagan's "war on drugs", Oregon held a ballot initiative to legalize cannabis, which also failed, this time 74 to 26 per cent. In 2004 Alaska voted on regulating recreational use, it losing 56 to 44 per cent. Nevada voted on a similar policy in 2006, which was rejected 56 to 44 per cent. Colorado also held a vote on cannabis in 2006, aiming to make possession of up to one ounce legal, without addressing production and supply issues, which failed 58 to 41 per cent.[63]

In November 2010 in California, Proposition 19, known as the Regulate, Control and Tax Cannabis Act, proposed allowing anyone over 21 to possess up to one ounce of marijuana; cultivate limited amounts within a private space; and designate city or county authorities in charge of regulating and taxing the commercial market. The Proposition failed to pass by 53.5 to 46.5 per cent. Interestingly, a post-election poll revealed that 50 per cent of the voters believed cannabis should be legal, but voted against the proposition due to issues with the details of the regulations. According to a recent poll in California a solid majority of 65 per cent now supports legalizing, regulating and taxing adult recreational marijuana.[64] Oregon held a ballot initiative in November 2012 to institute a legally regulated marijuana market for recreational use, but that failed by 54 to 46 per cent due to the poor design of the proposal.[65]

The outcomes of the ballot initiatives and their subsequent regulation models announced in October 2013, are in clear contravention of federal law; specifically the 1970 Controlled Substances Act establishing federal prohibition, and Washington D.C.'s commitments under international law. However, the clear majorities in the referenda and the shift in opinion polls are an important signal for politicians in the U.S. that cracking down on cannabis will no longer be popular. A poll in October 2013 showed that for the first time a clear majority of 58 per cent of Americans nationwide were in favour of legalising and regulating cannabis, up from 12 per cent in 1969.[66]

The reform initiatives reflect a shift in public attitude towards recreational cannabis use. In a sense, they can be seen as a shift back to President Carter's proposal at the end of the 1970s that the states remain free to adopt whatever

laws they wished concerning cannabis users; and related support for legislation amending federal law to eliminate all federal criminal penalties for the possession of up to one ounce of cannabis. Today's initiatives, of course, go beyond decriminalization, and on to regulate and tax production and distribution.

Fully aware of the major shifts in public opinion, the Obama administration was slow in its response, but on 29 August 2013, the Department of Justice issued a memorandum to federal prosecutors. It announced that it would not seek to challenge or otherwise undercut voter initiatives passed in Washington and Colorado, while reiterating the commitment to maintaining federal laws prohibiting cannabis.[67] The memorandum set out eight enforcement priorities. Those priorities were to prevent:

- the distribution of marijuana to minors;.
- revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels.
- the diversion of marijuana from states where it is legal under state law in some form to other states.
- state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity.
- violence and the use of firearms in the cultivation and distribution of marijuana.
- drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use.
- the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands.
- marijuana possession or use on federal property.[68]

Since the federal government relies on state and local law-enforcement agencies for enforcement, the memorandum stated that, because enactment of these laws affects the "traditional joint federal-state approach" to enforcement, the guidance rested on its expectation that those states enacting laws authorising marijuana-related conduct would "implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests", while stressing that the guidance did not "alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law".[69]

Deputy Attorney General James Cole testified before the Senate Judiciary Committee that federal prosecutors and

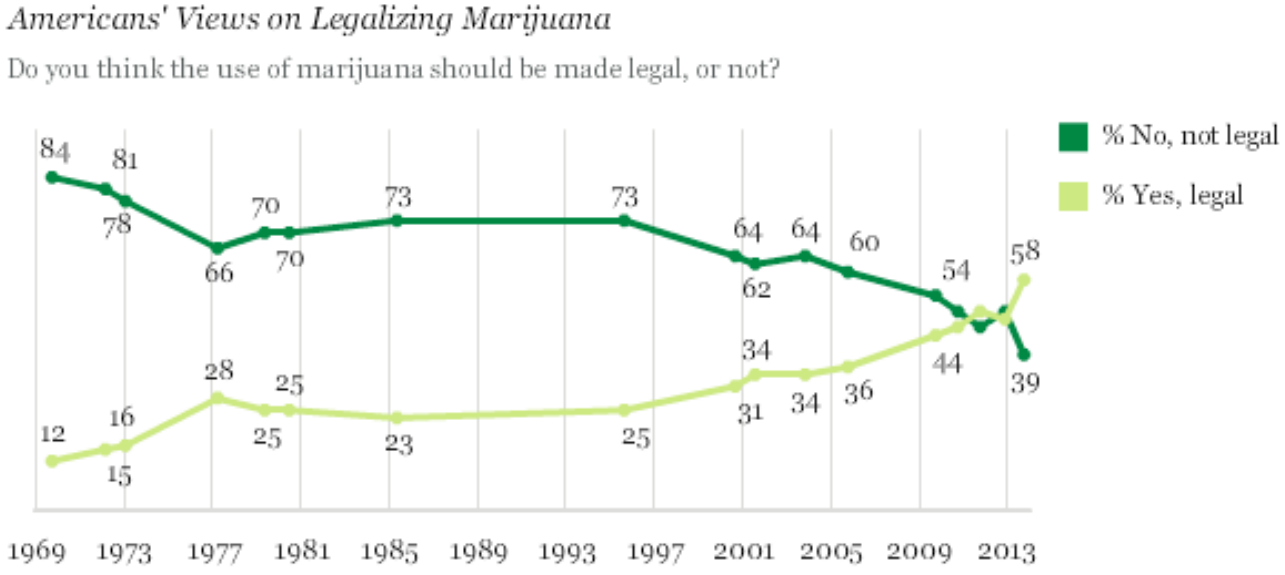
agents were prepared to focus aggressive efforts on interstate and national enforcement of marijuana trafficking laws: "We are not giving immunity. We are not giving a free pass. We are not abdicating our responsibility."[70]

The initiatives increased the pressure on the federal government to find a solution to the state-federal conflict brought about by the implementation of legally regulated cannabis markets. The issue remains far from being resolved. Due to the complicated legal interaction between federal and states' rights, the main issue is whether federal law "pre-empts" state laws, rendering them null and void. The principle of pre-emption is rooted in the Supremacy Clause of the U.S. Constitution, which dictates that federal law and treaties generally override conflicting state law on the same subject matter. The concept of supremacy is, however, limited by the Tenth Amendment to the Constitution, which reserves to the states powers not granted to the federal government under the Constitution. To complicate matters even more, pre-emption power is also limited by the "anti-commandeering" principle, providing that the federal government may not "commandeer" the state legislative process by forcing states to enact legislation or enforce federal legislation.[71]

Although currently eclipsed by divisions over legally regulated cannabis markets, the divergence of views on cannabis between the states and the federal government had already been a point of conflict with the 21 states permitting medical marijuana use since 1996. Both Presidents George W. Bush and Barack Obama promised not to interfere in

states' medical marijuana policies during their presidential campaigns, but both failed to keep that promise. Federal agencies have raided medical marijuana facilities regularly under both administrations. Having already signalled its displeasure regarding medical marijuana schemes within the U.S., the INCB quickly voiced grave concern about the outcome of the ballot initiatives in the U.S., claiming "these developments are in violation of the international drug control treaties",[72] while emphasizing that the U.S. has an obligation to ensure full compliance over its entire territory. In its 2012 annual report, the Board urged the federal government "to take the necessary measures to ensure full compliance with the international drug control treaties on its entire territory".[73]

Regarding the issue of taxation, Washington has imposed a heavy 25 per cent tax on each of the three steps of production: producer to processor, processor to retailer and retailer to customer. Passed in November 2013, Colorado's taxation is less onerous and in the form of a 15 per cent excise tax and a 10 per cent sales tax. Finding the "sweet spot" for taxation is key in order to secure a robust self-funding regulation, without increasing the price of legal marijuana to a level making the black market attractive. Unlike Colorado, Washington has imposed a cap on the total amount of marijuana that can be produced per year in the state. The chief rationale behind limiting annual production is to avoid diversion of surplus legal cannabis that can be illegally smuggled to other states. Diversion is



Colorado's and Washington's laws are based on a similar model, allowing a three-tiered system of production, processing and retail by licensed individuals or organisations.[74] They both tax and tightly regulate legal marijuana markets; require rigid security and third-party laboratory testing; limit sale to individuals over 21 and the amount one can carry; prohibit out-of-state investment; and track marijuana closely from "seed-to-sale".[75] Nevertheless, there are important differences between the two approaches. In Colorado, the ballot initiative was a constitutional amendment, hence its full title, Amendment-64. As such, no future state government can overturn the policy without further amending the state constitution. This is in contrast to Washington, where I-504's status as a law makes it easier to change or repeal.[76] Furthermore, since the Tenth Amendment to the U.S. Constitution asserts that the federal government's powers are limited by the states and that it is "the people" who are sovereign, A-64 arguably has greater potential to restrict the capacity of federal government to intervene in Colorado than it can in Washington.[77]

understandably a major concern of federal authorities, and while Colorado has not imposed a cap, it may do so in the future if deemed necessary.[78]

Colorado and Washington also license the businesses differently. Colorado initially requires "vertical integration", meaning that every business must be involved in all stages of the enterprise (growing, processing, and selling) to get a license; the rationale being that initially limiting the number of businesses makes it easier to control the new market. In the summer of 2014, Colorado will open the market to those interested in specific sections of the industry. Washington, conversely, prohibits "vertical integration", permitting businesses a license in only one stage, to prevent monopolists from setting artificially high prices.

While Colorado has a stringent two-year-minimum-residency requirement for any owner or investor, Washington has only a three-month requirement. These rules essentially prohibit out-of-state investment in the marijuana industry to reassure the federal government that

illegal drug money from across the country and around the world is not entering the legal market. The rules and regulations are still hotly debated and may change over time as both states learn from experience.

Uruguay: "Someone has to be first…"

On 20 December 2013, after the bill had passed both chambers of the Uruguayan Parliament, President José Mujica enacted Law 19.172, making Uruguay the first country in the world to legally regulate the cannabis market from seed to sale. The consumption and possession for personal use of cannabis, in fact of no psychoactive drug, has ever been criminalised in Uruguay, but now the state will take control over the import, export, cultivation, production and distribution of cannabis through the newly established Institute for Regulation and Control of Cannabis (*Instituto de Regulación y Control de Cannabis*, IRCCA). In a presentation to the INCB, Vice-Minister of Foreign Affairs Luis Porto, explained that this "initiative to responsibly regulate the cannabis market" forms part of the national *Strategy for Life and Coexistence* aiming to "guarantee the right to public safety".[79]

Through regulation Uruguay intends to reduce the potential risks and harmful effects of smoking marijuana for recreational purposes; take the cannabis market out of the hands of criminal organisations; and separate the licit cannabis market from the illicit market of more harmful substances, especially the one that causes the most concern, *pasta base*, a crude form of cocaine base smoked throughout the region. Uruguay has a long history of the state regulating the alcohol market, and cannabis will be strictly controlled, following that model. The *Administración Nacional de Combustibles, Alcoholes y Portland* (ANCAP) was established as a state company in 1931, both to operate Uruguay's oil refinery, and run a state alcohol monopoly to eliminate illegal production of very toxic hard liquors. The state lost its monopoly on distilled spirits in 1996 but continued to control the alcohol market, seen as a positive example in support of cannabis regulation.

"The state needs to regulate this market, like it did before with alcohol," Senator Lucia Topolansky, and wife of the president, said. Uruguay's national drug coordinator, Julio Calzada, despite worrying about increasing problems related to excessive alcohol use, said the state liquor factory deserved credit for eliminating dangerous brews. "Today we have to take action with marijuana because those who buy it don't know what they're buying, just the same as what happened with people buying alcohol in 1930."[80] After citing the work of his predecessors in controlling alcohol in 1931, Senator Roberto Conde introduced the new law in the senate: "In our country the consumption of cannabis is a licit activity, however its access is not, thus

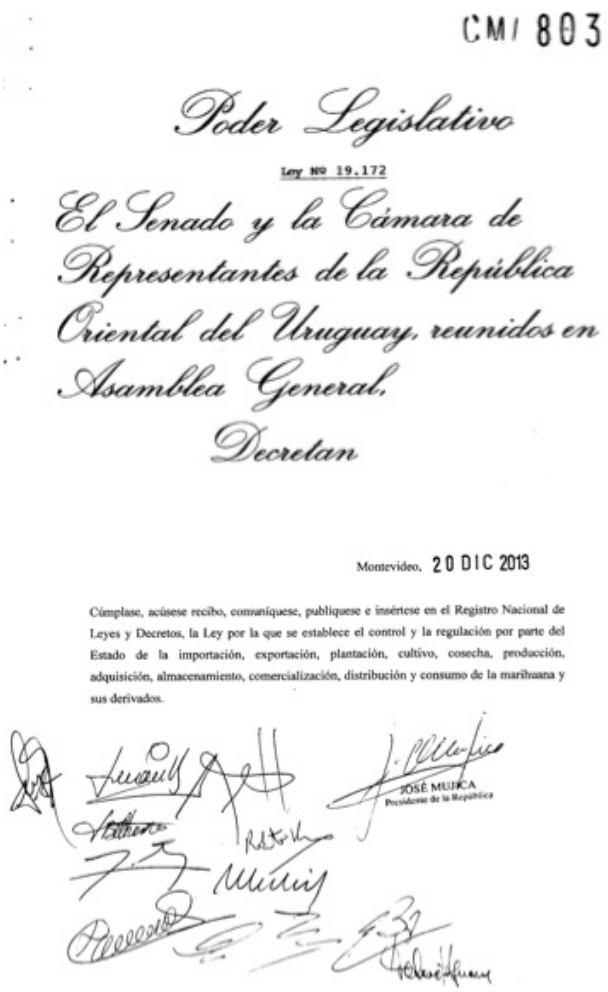
Public debate in Montevideo with Martin Jelsma (TNI) and Julio Calzada (Junta Nacional de Drogas), October 2012. Photo: JND

users must resort to the black market with all the risks that implies." Among other objectives, he continued, the state intervention seeks to "reduce the resources of organized crime and to establish safe channels for users".[81]

The elaboration within the ruling *Frente Amplio* party of legislative proposals on cannabis started a few years ago, initially focused on *autocultivo* (cultivation for personal use) and cannabis clubs based on the Spanish model. In May 2011 a legislative proposal was submitted to congress decriminalizing possession up to 25 grams of cannabis and the cultivation and harvesting of a maximum of eight cannabis plants for personal use, which could also be carried out collectively by associations of users. Amidst ongoing parliamentary discussion, in June 2012 the government announced it would present its own legislative proposal to legally regulate the whole chain of production, distribution and sale of marijuana. The announcement was made within the context of measures aimed to address public insecurity related to *pasta base*, blamed for the majority of drug-related crimes and violence. But the most noteworthy proposal was regulation of the cannabis market under state monopoly control.

According to Congressman Sebastián Sabini, one of the drafters of the *autocultivo* bill, President Mujica's proposal changed the terms of the debate: "Our proposal is aimed at reducing judicial interventions against growers and establishing some principles for community regulation, such as the case of the cultivation clubs. Now, the state would have a monopoly on production, distribution and sales."[82] Many who had been working on the other proposal were concerned that the executive's alternative plan would not allow cultivation for personal use (individually or collectively), while ending criminal prosecution of people growing cannabis plants for their own use had been the primary motive behind the parliamentary initiative.

The government package, moreover, contained other controversial elements, such as an increase of minimum sentences for small trafficking offences from one to three years and the possible enforced treatment of "addicted persons". These proposals were made in the context of distinguishing more clearly policy responses to the two different markets, *pasta base* and cannabis, and making the very sensitive proposal to regulate cannabis more politically acceptable by cracking down harder on *pasta base*. Difficult negotiations on all points led to a number of compromises. The increase in minimum penalties was scaled down to 20 months, very significant in that offenders sentenced less than 24 months are eligible for probation, alternative sentences or conditional release. The compulsory treatment provision was also substantially changed, limiting the option to "problem drug users in crisis situations who pose a risk to themselves or to others", representing in fact an improvement compared to the relevant provisions still in force under the existing drug law (article 40 of the 1974 Law 14.294).



CM/ 803

Poder Legislativo

Ley Nº 19.172

El Senado y la Cámara de Representantes de la República Oriental del Uruguay, reunidos en Asamblea General,

Decretan

Montevideo, 20 DIC 2013

Cúmplase, acúsese recibo, comuníquese, publíquese e insértese en el Registro Nacional de Leyes y Decretos, la Ley por la que se establece el control y la regulación por parte del Estado de la importación, exportación, plantación, cultivo, cosecha, producción, adquisición, almacenamiento, comercialización, distribución y consumo de la marihuana y sus derivados.

JOSÉ MUJICA
Presidente de la República

In December 2012 a new version of the cannabis regulation bill was presented, allowing *autocultivo* up to six plants and including the option of social clubs (initially only 15 members but in the final approved version changed to 15 to 45 members). The parliament vote, however, was postponed due to residual opposition within the *Frente Amplio* and polls indicating insufficient public support for cannabis legalisation. The government and civil society groups engaged in intensive campaigns to explain the regulation and increase support. Meanwhile, internal negotiations within the ruling party coalition were engaged to bring the dissenters on board and ensure a majority vote. The House of Representatives approved the bill in a 50-46 vote 31 July 2013, and on 10 December the Senate approved it as well. The law would likely have failed without the strong conviction of the president, his principal advisor Diego Cánepa, and the commitment of a group of dedicated parliamentarians and activists.

The comprehensive Law 19.172 establishes the following rules for cannabis regulation:

- Cultivation of hemp for industrial purposes (containing less than 1 per cent THC) falls under the responsibility of the Ministry of Livestock, Agriculture and Fisheries.

- Cultivation of psychoactive cannabis (containing more than 1 per cent THC) for medical purposes, scientific research or "for other purposes" requires prior authorisation from the IRCCA.

- Cultivation of cannabis for personal consumption or shared use at home is permitted up to six plants with a maximum harvest of 480 grams per year.

- Membership clubs with a minimum of 15 and a maximum of 45 members, operating under control of the IRCCA, are allowed to cultivate up to 99 cannabis plants with an annual harvest proportional to the number of members and conforming to the established quantity for non-medical use.

- IRCCA licenses pharmacies to sell psychoactive cannabis for therapeutic purposes on the basis of medical prescription, and for non-medical use up to a maximum of 40 grams per registered adult per month.

- Any plantation operating without prior authorisation shall be destroyed upon the order of a judge.

The possession of drugs for personal use was never a criminal offence in Uruguay, but no quantitative thresholds indicating a reasonable amount for personal use had ever been established, leaving absolute discretion of the judge. Under the new law persons carrying with them up to 40 grams are not liable for prosecution; and, as mentioned above, at home people can have six plants or a harvested amount of maximum 480 grams. Greater quantities must be authorized by IRCCA, as in the case of a social club, licensed producer or pharmacy retailer. Several more technical rules, for example establishing acceptable quality standards and thresholds for THC and CBD content, are still being elaborated, a task expected to be completed by April 2014 after which implementation can begin.

When Uruguay announced its intention, on 20 June 2012, INCB President Raymond Yans immediately denounced the regulation plan. At the UN General Assembly session in New York six days later, he took the opportunity of the International Day against Drug Abuse and Illicit Trafficking, to proclaim: "A chain is no stronger than its weakest link. If the chain of drug control is broken in one country or region — and I am thinking now of certain projects in Uruguay — the entire international drug control system may be undermined."[83] "Dialogue" with the INCB has since been troubled, and Uruguayan officials have struggled to find the right legal justification for their model of cannabis regulation under the UN treaty regime, or to provide proper argumentation justifying the need to breach it.

In December 2013 Yans accused Uruguay of negligence with regard to public health concerns, deliberately blocking dialogue attempts and having a "pirate attitude" towards the UN conventions. President Mujica reacted angrily, declaring that someone should "tell that guy to stop lying", while Milton Romani, Uruguay's ambassador to the Organisation of American States said that Yans

Moroccan Marihuana Smoker
Credit: Collection Hash Marihuana & Hemp Museum Amsterdam/Barcelona

"should consider resigning because this is not how you treat sovereign states".[84] In the context of this abysmal rapport, Vice-Minister Luis Porto went to Vienna in February 2014 to present to the INCB Uruguay's new legislation and explain the arguments behind it.

Porto's key points were: The object and purpose of the drug control conventions is the protection of health and countering the harmful effects of illicit drug trafficking. All measures taken in that context must neither contradict Uruguay's constitution nor leave any fundamental rights unprotected. The obligations assumed under other conventions, must be taken into account as well, in particular those relating to the protection of human rights. And "given two possible interpretations of the provisions of the Convention, the choice should be for the one that best protects the human right in question, as stated in Article 29 of the American Convention on Human Rights". For those reasons, Uruguay believes "that production and sale in the manner prescribed in the new law may be the best way, on the one hand, to combat drug trafficking, and on the other, to defend the constitutionally protected right to freedom of our fellow citizens".[85] He also reminded the Board that Uruguay actively promoted better integration of human rights instruments with drug control policy at the CND.[86]

Porto stressed that cannabis consumption was not criminalized in Uruguay, that the existence of the cannabis market was not created by the new law, which, in fact, is a very restrictive model of regulation that in no way promotes the use of cannabis. He drew attention to several elements of the new law coinciding with treaty provisions, such as the establishment of a state control agency; the prohibition of advertising; the attention given to educational efforts and awareness campaigns regarding the risks, effects and potential harms of drug use; and the emphasis on the prevention of the problematic use of cannabis. He concluded: "the spirit, as well as the regulations of Law No. 19.172, follow the philosophy of the Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol and incorporate the bases established by it".

The Uruguayan government does not deny that the cannabis regulation now being implemented triggers legal tensions with the treaties, and in this regard has called for an open and honest debate about the UN drug control system. Diego Cánepa, for example, told the CND in March 2013: "Today more than ever we need the leadership and courage to enable us to discuss in the international community if a revision and modernization is required of the international instruments we have adopted in the last 50 years."[87] At the same time, as is the case for the U.S. government, it is politically and diplomatically not easy for Uruguay to declare publicly they are in direct violation of an international treaty they have signed. On their own it will not be easy to legally resolve the breach of certain treaty provisions, so the disaccord and tension will likely continue until more countries are willing to join them in a future treaty reform effort. The options and difficulties associated with embarking on that challenge are discussed within the following chapter.

Endnotes

Cannabis reforms: the scope and limits of treaty latitude

1 Bewley-Taylor and Jelsma (2012)

2 Boister (2001), p. 22

3 The INCB's monitoring mandate under the 1988 Convention is very restricted, largely limited to its precursor control regime.

4 United Nations (1961), article 48 on Disputes:

1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the said Parties shall consult together with a view to the settlement of the dispute by negotiation, investigation, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.

2. Any such dispute which cannot be settled in the manner prescribed shall be referred to the International Court of Justice for decision.

5 United Nations (1969), article 31 (1)

6 Dorn and Jameson (2000)

7 For examples from Cambodia, Pakistan and Egypt see: *World Wide Weed*, a Global Post in-depth series, 27 February 2013. http://www.globalpost.com/series/world-wide-weed-marijuana-legalization-global

8 E/CN.7/590 (1998) p. 82

9 Boister (2001), p. 81

10 United Nations (1973), p. 112.

11 Boister (2001), p. 125

12 Domestic legal interpretations do not always take into account this flexibility regarding cultivation. See for example, the 2005 US Supreme Court case, *Gonzales v. Raich*. Although complicated by the fact that this is related to cultivation of marijuana for personal *medical* use, the Supreme Court ruled that the Drug Enforcement Administration was acting lawfully in seizing and destroying six plants. See: Thoumi (forthcoming).

13 E/CN.7/590 (1998), pp. 85-95

14 See: '*Overview of drug laws and legislative trends in Argentina*', TNI Drug Law Reform in Latin America (webpage), http://www.druglawreform.info/en/country-information/argentina

15 While many treaties are subject to member states' constitutional principles, the basic rules of international law provide that a state party "may not invoke the provision of its internal law as a justification for its failure to perform a treaty". See: United Nations (1969), article 27.

16 Boister (2001), p. 125, footnote 228

17 Oregon, California, Colorado, Ohio, Maine, Minnesota, Mississippi, New York, Nebraska, Connecticut, Louisiana, Massachusetts, New Jersey, Nevada, Vermont, Wisconsin, West Virginia. See: Room et al. (2008), pp. 85-86

18 Pacula, Chriqui, and King (2004)

19 South Australia, the Australian Capital Territory, the Northern Territory and Western Australia.

20 Only very few European countries (Sweden, Latvia and Cyprus) exercise the option to impose prison sentences for possession of small amounts. For an overview of policies see: Blickman and Jelsma (2009); Room et al.(2008); and Rosmarin and Eastwood (2012)

21 Van het Loo, Van Beusekom and Kahan (2002); Domoslawski (2011)

22 INCB (2005), *Report for 2004*

23 Domoslawski (2011)

24 EMCDDA (no date), *Legal Topic Overviews*

25 INCB (2010), *Report for 2009*

26 United Nations (1973), p. 113, and p. 402.

27 Boister (2010), p.125

28 Noy v State (2003)

29 Barriuso (2011)

30 For a more detailed history of the legal context of the cannabis clubs, see Barriuso (2011).

31 Barriuso (2011)

32 Barriuso (2012a). The procedure was interrupted by regional elections but resumed in September 2012. For Catalonia, see: Subirana (2013) and Sustainable Drug Policies Commission (2013).

33 Sustainable Drug Policies Commission (2013)

34 Barriuso (2012b)

35 CLEAR (2013). See for a list of Cannabis Social Clubs already established, awaiting legislative change that would allow them to become operative: http://ukcsc.co.uk/official-club-list/

36 See for instance: Le Devin (2013) and AFP (2013)

37 Barriuso (2012c)

38 DPA (2012)

39 Karam (2013)

40 Niesink & Rigter (2013)

41 INCB (2004), *Report for 2003*, p. 37. Furthermore, while some clauses within article 2, paragraph 5, of the Single Convention might be read as limiting the use of medical marijuana to research purposes only, inclusion of the phrase "in its opinion" on two occasions confirms that parties are within their rights to permit the use of marijuana for medical purposes.

42 INCB (2003), *Report for 2002*, p. 67

43 Bewley-Taylor (2010), p. 5

44 INCB (2009), *Report for 2008*, p. 66

45 United Nations (1961). paragraph 3 of article 23, which focuses on National Opium Agencies and to which Article 28 on the Control of Cannabis refers, notes: "The governmental functions…shall be discharged by a single government agency if the constitution of the Party concerned permits it."

46 Ballotta, Bergeron and Hughes (2009), p. 112. Apart from more than twenty U.S. states, regulations for medicinal use of cannabis are in place in the Netherlands, Canada, Spain, Germany, Austria, Israel, Finland, Italy and the Czech Republic.

47 IDPC (2008), p. 11

48 INCB (1998), *Report for 1997*

49 Blickman (2002); Bewley-Taylor (2012b), pp. 200-206.

50 Grund and Breeksema (2013)

51 United Nations (1988).
Article 3, para. 6 states that parties "shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences, and with due regard to the need to deter the commission of such offences."

52 "The Government of the Kingdom of the Netherlands accepts the provisions of article 3, paragraphs 6, 7, and 8, only in so far as the obligations under these provisions are in accordance with Dutch criminal legislation and Dutch policy on criminal matters." The Dutch reservation can be found at: United Nations Treaty Collection, Chapter VI: Narcotic Drugs And Psychotropic Substances, (19) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&lang=en

53 United Nations (1961), article 4 on General Obligations

54 Y. Buruma, professor of criminal law and criminology, recently appointed to the Dutch Supreme Court, elaborated this interpretation as a member of a drug-policy commission for the Dutch social democratic party, the PvdA. Such a broad interpretation appealing to the general purpose of the treaty, in his opinion, is not uncommon in international law, citing an example from the European Human Rights Court. For an unofficial English translation, see: http://www.drugtext.org/Law-and-treaties/european-integration-and-harmonization.html

55 See for example: United Nations (1973), p. 111.

56 United Nations (1973), pp. 275–276. The Commentary explains that a government "might come to the conclusion that it cannot possibly suppress a significant diversion into the illegal traffic without prohibiting the cultivation of the plant" and that the "decision whether the conditions of article 22 for prohibition exist is left to the judgement, but not entirely to the discretion of the Party concerned." It goes on to note: "A Government which for many years, despite its efforts, has been unable to prevent large-scale diversion of drugs from cultivation can hardly be of the opinion that prohibition of such cultivation would not be 'the most suitable measure ... for protecting public health and welfare and preventing the diversion of drugs into the illicit traffic.'"

57 UNODC (2009), p. 61

58 For results and content of the ballot initiatives, see Ballotpedia at http://ballotpedia.org

59 Crick, Haase and Bewley-Taylor (2013)

60 Crick, Haase and Bewley-Taylor (2013)

61 Crick, Haase and Bewley-Taylor (2013)

62 Crick, Haase and Bewley-Taylor (2013)

63 Crick, Haase and Bewley-Taylor (2013)

64 Miles (2013); Tulchin and O'Neil (2013)

65 For a good overview on the reasons why ballot initiatives passed or failed, see: Crick, Haase and Bewley-Taylor (2013).

66 Swift (2013)

67 Richey (2013)

68 Cole (2013)

69 Crick, Haase and Bewley-Taylor (2013)

70 Richey (2013)

71 Crick, Haase and Bewley-Taylor (2013)

72 UNIS/NAR/1153 (2012)

73 INCB (2013), *Report for 2012*, Recommendation 5, p. 116

74 Crick, Haase and Bewley-Taylor (2013)

75 Gray (2013)

76 Crick, Haase and Bewley-Taylor (2013)

77 Crick, Haase and Bewley-Taylor (2013)

78 Gray (2013)

79 MRE (2014)

80 Haberkorn (2013)

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87 Intervención del Jefe de Delegación de Uruguay (2013)

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OPEN SOCIETY FOUNDATIONS

The cannabis plant has been used for spiritual, medicinal and recreational purposes since the early days of civilization. In this report the Transnational Institute and the Global Drug Policy Observatory describe in detail the history of international control and how cannabis was included in the current UN drug control system. Cannabis was condemned by the 1961 Single Convention on Narcotic Drugs as a psychoactive drug with "particularly dangerous properties" and hardly any therapeutic value. Ever since, an increasing number of countries have shown discomfort with the treaty regime's strictures through soft defections, stretching its legal flexibility to sometimes questionable limits.

Today's political reality of regulated cannabis markets in Uruguay, Washington and Colorado operating at odds with the UN conventions puts the discussion about options for reform of the global drug control regime on the table. Now that the cracks in the Vienna consensus have reached the point of treaty breach, this discussion is no longer a reformist fantasy. Easy options, however, do not exist; they all entail procedural complications and political obstacles. A coordinated initiative by a group of like-minded countries agreeing to assess possible routes and deciding on a road map for the future seems the most likely scenario for moving forward.

There are good reasons to question the treaty-imposed prohibition model for cannabis control. Not only is the original inclusion of cannabis within the current framework the result of dubious procedures, but the understanding of the drug itself, the dynamics of illicit markets, and the unintended consequences of repressive drug control strategies has increased enormously. The prohibitive model has failed to have any sustained impact in reducing the market, while imposing heavy burdens upon criminal justice systems; producing profoundly negative social and public health impacts; and creating criminal markets supporting organised crime, violence and corruption.

After long accommodating various forms of deviance from its prohibitive ethos, like turning a blind eye to illicit cannabis markets, decriminalisation of possession for personal use, coffeeshops, cannabis social clubs and generous medical marijuana schemes, the regime has now reached a moment of truth. The current policy trend towards legal regulation of the cannabis market as a more promising model for protecting people's health and safety has changed the drug policy landscape and the terms of the debate. The question facing the international community today is no longer whether or not there is a need to reassess and modernize the UN drug control system, but rather when and how to do it.

Transnational Institute

Since 1996, the TNI Drugs & Democracy programme has been analysing the trends in the illegal drugs market and in drug policies globally. The programme has gained a reputation worldwide as one of the leading international drug policy research institutes and a serious critical watchdog of UN drug control institutions. TNI promotes evidence-based policies guided by the principles of harm reduction and human rights for users and producers, and seeks the reform of the current out-dated UN conventions on drugs, which were inconsistent from the start and have been overtaken by new scientific insights and pragmatic policies that have proven to be more successful. For the past 18 years, the programme has maintained its focus on developments in drug policy and their implications for countries in the South. The strategic objective is to contribute to a more integrated and coherent policy – also at the UN level – where drugs are regarded as a cross-cutting issue within the broader development goals of poverty reduction, public health promotion, human rights protection, peace building and good governance.

Global Drug Policy Observatory

National and international drug policies and programmes that privilege harsh law enforcement and punishment in an effort to eliminate the cultivation, production, trade and use of controlled substances – what has become known as the 'war on drugs' – are coming under increased scrutiny. The Global Drug Policy Observatory aims to promote evidence and human rights based drug policy through the comprehensive and rigorous reporting, monitoring and analysis of policy developments at national and international levels. Acting as a platform from which to reach out to and engage with broad and diverse audiences, the initiative aims to help improve the sophistication and horizons of the current policy debate among the media and elite opinion formers as well as within law enforcement and policy making communities. The Observatory engages in a range of research activities that explore not only the dynamics and implications of existing and emerging policy issues, but also the processes behind policy shifts at various levels of governance.