

SYMPOSIUM ON DRUG DECRIMINALIZATION, LEGALIZATION, AND INTERNATIONAL LAW

DRUG POLICY REFORM IN THE AMERICAS: A WELCOME CHALLENGE TO INTERNATIONAL LAW

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Drug policy in the American hemisphere is in flux. After decades whereby a prohibitionist regime reigned supreme and proposing alternatives was taboo, several countries have begun to reconsider policy, particularly in the case of marijuana. International law has been instrumental in building the legal and institutional regime of prohibition, and it has remained largely impervious to critiques of its disastrous consequences. Indeed, when it comes to drug law and policy, international law has been part of the problem. Nevertheless, countries in the Americas have begun to adopt innovative strategies that also embrace international obligations. In this essay, I examine the failures of the law and order paradigm behind prohibition. I then analyze legal reforms in the Americas as motivated by three different perspectives: 1) human rights, 2) public health and 3) political economy. Each one offers a powerful challenge to prohibition but relies on different assumptions and offers different transformative potential.

The Failures of the Law & Order Paradigm

Defenders of the law and order approach attribute the failures of current drug policies to ineffective institutions or insufficient enforcement. They recommend institutional reforms, improving the police force, reforming the criminal justice system, transnational cooperation, and so on, proposals long tried in countries most affected by the violence of the war on drugs.¹ Measured against its own objective to prevent the harmful health effects of drug consumption, the strategy of prohibition has failed. Consumption levels of illicit drugs have not decreased. Similarly, production and supply of drugs have not declined.²

The violent outcomes of the war on drugs far outweigh the health harms that prohibition was supposed to prevent. In Mexico alone, since then-President Felipe Calderón launched the war on drugs in 2006, more than 250,000 people have been killed.³ More than 60,000 have disappeared,⁴ and 311,000 have been forcefully displaced.⁵ The homicide rate skyrocketed from a historic low of 8 homicides per 100,000 inhabitants in 2007 to

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¹ See, e.g., U.S. Embassy & Consulates in Mexico, [The Merida Initiative](#).

² Jonathan Caulkins & Peter Reuter, [Reorienting U.S. Drug Policy](#), 23 ISSUES SCI. & TECH. 79 (2006).

³ Ernesto Zedillo et al., [Drug Policy in Mexico: The Cause of a National Tragedy—A Radical but Indispensable Proposal to Fix It](#), 41 U. PA. J. INT'L L. 107, 130 (2019).

⁴ Paulina Villegas, [A New Toll in Mexico's Drug War: More Than 61,000 Vanished](#), N.Y. TIMES (Jan. 6, 2020).

⁵ [Zedillo et al.](#), *supra* note 3, at 134.

20 per 100,000 in 2009.⁶ Despite promises to change, subsequent Mexican governments have largely upheld the policy; 2019 was the most violent year in modern times.⁷ Analysts have identified the drug war and particularly government forces' interventions as an important cause of the increase in violence.⁸ Consider "Plan Colombia" whereby Colombia collaborated closely with the United States to reduce drug supply and combat drug-trafficking. Whenever supply-reduction efforts worked, coca cultivation and production was simply displaced to other countries.⁹ The violence that the war produced in Colombia hardly needs to be recounted; yet, Colombia continues to be the world's greatest supplier of cocaine.

International law has been instrumental in building the prohibitionist regime. The three UN conventions of 1961,¹⁰ 1971¹¹ and 1988¹² have locked-in wide-ranging prohibitions that, in the case of cannabis, make little sense from a scientific or public health perspective. Moreover, the UN bodies in charge of monitoring those conventions have shown scant willingness for change. In this area, it is fair to say, international law is part of the problem.¹³ Resistance to change may be attributable to multiple factors: the influence of powerful states, ideological commitments and shared values in those institutions, or deeply vested interests in the international bureaucracy.¹⁴ One of the most insidious effects of prohibition is its normative effect.¹⁵ Declaring a substance illegal stigmatizes it as dangerous and immoral even if this classification has no basis in science. Thus, legal drugs such as alcohol, tobacco, and over the counter and prescription drugs are normalized, even if they may produce more harm to consumers than illegal substances. Of course, the reception and impact of international prohibition norms is always mediated by domestic actors. These norms may respond to domestic elites' own political agenda and reflect, or help shape, racial and class divisions in the implementing country.¹⁶

The Americas seem to be ready for change. Former presidents of Brazil, Mexico and Colombia have declared the prohibitionist policies they presided over to be "an unmitigated disaster" and are urging reform.¹⁷ In 2013, the Organization of American States issued "The Drug Problem in the Americas,"¹⁸ a report calling for a shift from a criminal justice to a public health approach. Marijuana regulation in the Americas now ranges from prohibition to legalization for recreational purposes. Organized civil society has played a vital role in convincing the public, the courts and legislatures of the need to decriminalize and regulate the marijuana market. Reforms in the United States and civil society campaigns have changed the rhetoric and public perception about marijuana consumption, enabling politicians to support positions that were once politically radioactive.

⁶ *Id.* at 130.

⁷ Mary Beth Sheridan, *Mexico's Homicide Count in 2019 Among Its Highest*, WASH. POST (Jan 21, 2020).

⁸ Zedillo et al., *supra* note 3, at 131.

⁹ Daniel Mejia & Pascual Restrepo, *Why is Strict Prohibition Collapsing?*, in *ENDING THE WAR ON DRUGS: REPORT OF THE LSE EXPERT GROUP ON THE ECONOMICS OF DRUG POLICY* 26-32 (John Collins ed. 2014).

¹⁰ *Single Convention on Narcotic Drugs*, Mar. 30, 1961, 520 UNTS 151.

¹¹ *Convention on Psychotropic Substances*, Feb. 21, 1971, 1019 UNTS 175.

¹² *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Dec. 20, 1988, 1582 UNTS 95.

¹³ Alvaro Santos, *International Law and Its Discontents: Critical Reflections on the War on Drugs or the Role of Law in Creating Complexity*, 106 AM. SOC'Y INT'L L. PROC. 172-76 (2013).

¹⁴ See, e.g., Ely Aaronson, *The Strange Career of the Transnational Legal Order of Cannabis Prohibition*, in *TRANSNATIONAL LEGAL ORDERING OF CRIMINAL JUSTICE* (Ely Aaronson & Gregory Shaffer eds., 2020).

¹⁵ See, e.g., Robert Cover, *Nomos and Narrative*, 97 HARVARD L. REV. 4, 4-11 (1983).

¹⁶ See, e.g., ISAAC CAMPOS, *HOME GROWN: MARIJUANA AND THE ORIGINS OF MEXICO'S WAR ON DRUGS* (2012).

¹⁷ Fernando Henrique Cardoso et al., *Three Leaders from Latin America Call for Decriminalizing Drug Use*, L.A. TIMES (March 11, 2016).

¹⁸ Org. of Am. States, *The Drug Problem in the Americas (Analytical Report)*, OEA/Ser.D/XXV.4, 2013.

The Human Rights Perspective

Proponents of this perspective have advocated for decriminalization of personal use of marijuana and regulation of its medical use, often advancing their cause through the courts. In 1994, Colombia's Constitutional Court ruled that criminalization of the personal dose violated the right to free development of personality, which allows individuals to decide how to live their lives.¹⁹ The court referred explicitly to the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and interpreted it as giving states latitude, according to their constitutional principles, to decide the criminalization question.²⁰

In 2009, the Argentinean Supreme Court ruled that criminalization violated the constitutional right to privacy,²¹ invoking a wealth of international human rights instruments to justify its decision.²² The court also interpreted the three controlling UN conventions as not requiring Argentina to criminalize possession for personal use.²³ In 2015, the Mexican Supreme Court declared criminalization of personal use unconstitutional, based on the right to free development of personality.²⁴ The decision referred to the constitution's protection of personal autonomy, guaranteeing the freedom to carry out any conduct that does not harm others.²⁵ The court declared it a fundamental right that stems from the right to dignity, "implicit in the international human rights treaties" to which the country is a party.²⁶

It should be noted that, despite these rulings and a narrative in Latin America that increasingly recognizes the right to personal use of marijuana, it remains largely criminalized through the crime of possession.²⁷ Thus, countries continue to use the criminal justice system to prosecute consumers for possession of marijuana in a quantity that exceeds the minimum threshold, even for personal use.²⁸

In terms of medical marijuana, the Americas are now leading reform: Argentina, Brazil, Canada, Chile, Colombia, Jamaica, Mexico, Paraguay, Peru, Uruguay and thirty-three states and the District of Columbia in the United States regulate marijuana's medical use.²⁹ Advocates include patients' families and pro-legalization activists who justify individual use of cannabis to treat a variety of illnesses as a right-to-health issue. Regulations vary widely, including in the level of control for access, the characteristics of the product,³⁰ and whether they target production and supply. The medical use carve-out has proved to be more easily accepted by the public, less politically controversial and not inconsistent with the UN conventions.

¹⁹ Corte Constitucional [C.C.], mayo 1994, [Sentencia C-221/94](#), Gaceta de la Corte Constitucional (tomo 5) (Colom.).

²⁰ *Id.* at sec. 4.6.

²¹ See Corte Suprema de Justicia de la Nación [CSJN], 25/08/2009, "Caso Arriola/ Recurso de Hecho", (A. 891, XLIV) (Arg.).

²² *Id.* at 13–18.

²³ *Id.* at 19.

²⁴ Amparo en revisión 237/2014, Primera Sala de la Suprema Corte de Justicia de la Nación [SCJN], 11-04-2015 (Mex.).

²⁵ *Id.* at 30.

²⁶ *Id.* at 32.

²⁷ See e.g., Catalina Pérez Correa et al., [Regulation of Possession and the Criminalisation of Drug Users in Latin America](#), in AFTER THE DRUG WARS (Report of the LSE Expert Group on the Economics of Drug Policy, February 2016).

²⁸ *Id.* at 33.

²⁹ Alejandro Corda et al., [Cannabis in Latin America: The Green Wave and Challenges for Regulation](#) (Colectivo de Estudios Drogas y Derecho 1, 2020).

³⁰ These include issues such as whether products include THC (tetrahydrocannabinol) the main psychoactive ingredient of marijuana, or mostly CBD (cannabidiol), which is not intoxicating but therapeutically useful. See JONATHAN P. CAULKINS ET AL., [MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW](#) ch. 13 (2d ed. 2016).

The Public Health Perspective

The critique of prohibition based on public health argues that the tools of the criminal justice system are inadequate to address addiction, harm reduction and the health effects that originally led to prohibition.³¹ Prohibition often compounds the health harms since product quality cannot be ensured, drug markets cannot be separated based on health risk, and addicts cannot access proper treatment. Moreover, the violence in countries waging wars on drugs have deleterious physical and mental health effects on the population.

The governments in Uruguay and Canada have used this justification to pass comprehensive marijuana regulation.³² Unlike the right to health, the public health perspective is not based on an individual right to medical marijuana but on the policy's effects on the health of the general population. Regulation thus covers not only personal consumption but all aspects of the market and is designed to reduce the negative health consequences for society. Furthermore, because it is more comprehensive, the public health perspective has great transformative potential, offering the possibility of learning from the health effects of a regulated marijuana market when regulating other drugs in the future.

The Political Economy Perspective

The political economy perspective offers important insights into drug trafficking and the role that law plays in constituting transnational markets. The preliminary question is not how law can solve the drug trafficking phenomenon but how law is currently implicated in it.³³ Prohibition, after all, is a legal regime, supported by myriad laws and legal institutions at the international, national, and local level. The second question is a distributional one: who wins and who loses with the current regime and with possible alternatives. Consider the multiple actors involved, going beyond states or state agencies.³⁴ In the supply chain, there are producers, distributors, retailers, and consumers, while those involved in managing prohibition include politicians, police forces, the military, private security forces, gun manufacturers, and so on. Finally, those involved in laundering the proceeds include businesses and financial institutions.

From this perspective, it is not as if marijuana legalization is moving from lawlessness to order, or from prohibition to permission. Rather legalization appears as a form of re-regulating a market that is already regulated, already structured by law, in order to produce different consequences. There are multiple ways to regulate a legal market, with different ways to structure and control cultivation, production, distribution, and sale of the product. In Uruguay, the government has the monopoly at all stages from growing to retail sale whereas in Canada, private actors participate throughout the chain.³⁵ Countries can regulate strictly to prevent vertical integration of the industry; to delimit points, forms and conditions of sale so as to prevent access to minors; to ensure product quality; and so on.

An analysis of the multiple actors involved helps to illuminate where there may be current or future support for change, and where there may be resistance. In countries like Mexico or Colombia (or the United States at the federal level), which have pursued a full-scale war on drugs, it may be more difficult to reverse course than in countries like Uruguay and Canada, which did not adopt such policies. These governments would first need to

³¹ See e.g., Joanne Csete et al., *Public Health and International Drug Policy*, 387 LANCET 1427 (2016).

³² See Canada's *Cannabis Act*, SC 2018, c 16, art. 7, establishing as its purpose "to protect public health and public safety."

³³ Santos, *supra* note 13, at 8.

³⁴ See e.g., Aaronson & Shaffer, *Introduction*, *supra* note 14.

³⁵ See e.g., Zedillo et al., *supra* note 3, at 161-67.

accept that the policy has failed—no easy feat—and then address potential resistance from the myriad actors with vested interests in policy continuity, including drug cartels and government agencies.

This approach can also help assess the economic benefits of proposed reforms. For instance, legislative activity indicates that Mexico may be the next country to legalize marijuana. Analysts who support legalization, however, have raised powerful critiques of the proposed regulation.³⁶ First, the bill preserves administrative and criminal sanctions for possession beyond certain thresholds, thus retaining the link with the criminal justice system and subjecting users to the discretionary use of policing and enforcement. Second, it imposes verification requirements on seeds used for home growing, which could subject growers to policing. Third, it imposes requirements of traceability and testability that may make sense in the United States, with fragmented, state-based marijuana markets, or in Canada, with wealthy market actors, but not in Mexico. These requirements impose high barriers to entry that would effectively prevent small farmers, currently abused by drug cartels, to enter the market, and privilege transnational corporations. Countries that have paid the greatest cost of prohibition in transnational markets should regulate their markets so they can maximize the economic and social benefits at home. These policies could help generate income for farmers in rural areas, new business opportunities for the economically excluded urban population, and revenue for the government.

Strategies for Change in Light of International Law's Resistance

As countries move away from prohibition, they are adopting different positions regarding compliance with the UN conventions, which can be characterized as denial, triangulation, confrontation, and withdrawal. The United States has argued that although several of its states have legalized marijuana for recreational use, prohibition remains at the federal level and is thus not in violation of its international obligations.³⁷ It has also argued that the drug treaties provide sufficient flexibility for these changes, although that is highly contested.³⁸ Uruguay has argued that its regulation is motivated by other international obligations concerning human rights, which take precedence.³⁹ Canada has explicitly accepted the breach of its international obligations under the UN drug treaties, arguing that legalizing and strictly regulating cannabis was the best way to safeguard the health and safety of its population, especially the youth.⁴⁰ Finally, Bolivia denounced the Single Convention and then re-acceded with a reservation to protect its non-medical domestic market of coca leaf.⁴¹ Strategies may vary depending on a country's ability to withstand pressure or ignore international obligations without consequence. Canada's explicit challenge to the conventional legal regime signals that a country may contravene it for good reason.

An increasing number of countries have questioned the marijuana prohibition at the UN meetings, an all-talk, no-walk endeavor. Of course, the preferable course of action would be to amend the conventions and explicitly allow for a regulated marijuana market. If comprehensive amendment is unfeasible, then some countries could explore an *inter se* reform of the drug conventions, respecting the objectives of the regime and complying with the

³⁶ See e.g., *Cannabis, Cuenta Regresiva*, Mexico Unido Contra la Delincuencia.

³⁷ Martin Jelsma et al., *Balancing Treaty Stability and Change: Inter Se Modification of The UN Drug Control Conventions to Facilitate Cannabis Regulation* 8 (WOLA Policy Report 7, Mar. 2018).

³⁸ *Id.*

³⁹ *Id.* at 9-11.

⁴⁰ *Statement of H.E. Heidi Hulan*, Permanent Representative of Canada, June 25 Intersessional meeting of the 61st Session of the UN Commission on Narcotic Drugs, 3-4 (2018).

⁴¹ *Jelsma et al.*, *supra* note 34, at 21.

original obligations vis a vis other parties.⁴² At any rate, changes in the Americas, including in the United States, which for decades was the champion of prohibition, show that a country willing to change course and dismantle prohibition for marijuana does not have to wait for a change in international law to do so. Countries that have been most affected by the violence of prohibition would do well to proceed domestically while insisting on change internationally.

Conclusion

The three perspectives analyzed here, human rights, public health, and political economy, have all been instrumental in weakening the prohibition regime in the Americas. Reform does not mean a laissez-faire market; it means regulating the marijuana market differently, using legal and institutional tools that are better equipped to address health concerns and manage markets. The international conventions and institutional bodies managing prohibition may soon face an existential question. States are adopting strategies to resist obligations whose proponents seem unmoved by the horrors these states face. To remain formally and morally relevant, international law will need to embrace reform.

⁴² *Id.* at 21-34 and David Bewley-Taylor, [*Politics and Finite Flexibilities: The UN Drug Control Conventions and their Future Development*](#), 114 AJIL UNBOUND 285 (2020).