

## **About cannabis regulation: Working around or outside the UN international conventions?**

by Martin Luca de la Cruz.

Public opinion on cannabis regulation is increasingly changing towards a less punitive and more favourable approach, as was demonstrated by the results of ballot initiatives in the US States of Colorado and Washington in 2012. Scientific expert opinion also seems to be supporting a shift from prohibition to legal regulation of the cannabis market. During the 4th plenary meeting of Alice RAP in Amsterdam this was one of the main topics of discussions. Over the last two years many things have changed in country approaches to regulating cannabis, with legal regulatory systems now established in Colorado and Washington, and also in Uruguay. There has already been a switch from the question “should we regulate?” to that of “how we should regulate?” Policy makers are now looking forward to seeing which model will work best and which corrections will be needed in an area that offers a blank canvas.

Whether one agrees or not with the opportunity for regulation, the arguments for changing current approaches to prohibition, are very strong and touch many different issues: mass-criminalization, racial disparity in enforcing the law, health risks for users connected to poor quality product and few information on cannabis potency, and, last but not least, enrichment of the criminal organization instead of tax revenue for the State. So, what is everyone waiting for? The main big obstacle to implementing a regulatory model is connected to international law and politics. Under the UN conventions on narcotic drugs of 1961, 1971 and 1978, no State is allowed to regulate a market for non-medical use of cannabis. These treaties are hard to change, even if, as is the case in every international convention, there are mechanisms specifically established in order to do that. Currently any State or local legal regulatory system of non-medical use of cannabis regulation would be in breach of these treaties that specifically forbids such action. So how is it possible that in a few countries, that are part of the treaty, people can already easily buy cannabis from authorised shops?

Here is a quick report on the current state of things in a few countries where cannabis is more or less legalized but regulated in different ways :

- **Netherlands.** Chronologically speaking, the Netherlands was the first country that “legalized” a domestic market for cannabis. However, in order to formally respect the UN convention (while breaking undoubtedly its spirit), it has created a *de facto* legal system full of contradictions. In the Netherlands cannabis is still illegal but possession and sale of small quantities is tolerated. The entire production and supply system is still illegal and therefore not controlled by either the government or local authorities. The by-products of this policy are:
  - No control at all of cannabis quality and potency, with risks to user’s health; and,
  - A considerable piece of the supply market is controlled by criminal organizations.

As said by Franz Trautmann, Head of Unit of International Affairs at the Trimbos Institute, the Netherlands Institute of Mental Health and Addiction, “one of the stated targets of Netherlands’ Minister of Justice is to defeat organised crime, but the current cannabis policy actually feeds it.”

- **USA.** The United States is a Federal country, which means that each of the 50 States in which it is divided is given some freedom in policy making. For this reason, while at a Federal level, possession, production and sale of cannabis is still illegal, Colorado and Washington as States were able (and allowed) to regulate their own internal market for cannabis. However the models, different in the two States, are not the ideal ones, since the different legal status of cannabis on a Federal and State level creates, again, some contradictions. Without starting a close examination of the two systems, an example of these contradictions is the fact that the State programmes are only tolerated but not endorsed by the Federal government and can not, for example, operate on Federal lands or ask public sector workers to break Federal laws.

From an international point of view, it will be interesting to see how the US will respond if accused of breaching the treaties. The main interpretation among international law experts is that a Federal State must be considered as a whole when talking about international juridical personality, so a breach by one of the States has to result in a breach by the Federal state.

- **Uruguay.** Uruguay is the first country that decided to openly breach the treaties. Starting from this point, it was much easier to fully regulate the cannabis market and set up a system without contradictions. The government controls cultivation, production and supply to State-authorized pharmacies that are licensed to sell it. The regulatory system is very strict, allowing only residents to buy a limited (40 grams) amount of cannabis per month. Whoever wants to buy cannabis must be resident and registered on a special log that keeps track of the purchases in order to enforce the monthly limit. This system seems more likely to solve the social and criminal problems created by prohibitionism: working in this direction, the retail price of cannabis was set very low (1\$/gram) to undercut the illicit market. While many could think that this price is too low and could incentivize cannabis use, we should keep in mind that people could feel uncomfortable having themselves registered in a government-kept log as “cannabis users”; and that this provision could act as deterrent for people who were not users at the time of prohibition and could be tempted by price and availability.

Going back to the main question, which is the title of the article, I asked some questions to Robin Room, professor at the University of Melbourne and the University of Stockholm, expert on addiction policies, especially regarding alcohol and cannabis.

**What course of action would you suggest to a State that wants to regulate a domestic market in cannabis, without breaching the UN conventions?**

Currently there are two main options:

A) **Denouncing and then re-acceding** - The more straight forward way would be what Bolivia did in order to allow the traditional use of the coca leaf. This included denouncing the treaty and then re-acceding to it with a reservation on this matter. The main problem with this strategy is whether or not such a reservation would stand, since the general reservation on cannabis may be a reservation on something that is intrinsic to the treaty, and that may go against the [universally accepted values implicit in and ] spirit of the treaty. It is a big unanswered question whether or not this course of action could be legal from an international point of view.

The system of the UN drug conventions has two kinds of values:

1. values that are universally accepted, that nearly all the countries subscribe to without reservation; and,
2. values that are not “essential” to the treaty, such as those for which there are already a number of reservations by more than one country.

The big question is in which of this categories of values is cannabis prohibition set.

B) **“Soft” changes** - A “soft” regulation could be done also without even touching the current treaties. A State could legalize everything except the fruit and the flowering tops of the cannabis plant since the definition of cannabis included in the UN convention covers only these parts, specifically excluding seeds and leaves. It is hard to find good information on this topic, but some Indian states have actually already worked around this definition when they implemented a government-controlled system of cultivation and sale of the so-called *bhang*, which is basically a cannabis preparation based on leaves from the female plant.

A good common starting point, however, would be for the Member States of WHO to ask for a meeting of the WHO expert committee for drug dependence, which is regulated by the treaty, and to give them the task of providing a clearer scientific basis to the convention itself. The last review on cannabis was... well actually none have ever been done by WHO expert committee. And many of the other substances included in the convention’s range have not been reviewed since their inclusion. In the last committee’s report of 2012 this problem was pointed out. They should be reviewed every ten years as the science standards may (or may not) change.

**What about the case of more than one State that wants to adopt a regulatory model?**

What they can do as a group of States is to sign another treaty among themselves. Basically, the rule is that the most recent treaties prevail on old ones when the States involved are part of both treaties. The main issue in this situation is the mutual commitment between States that is part of both the new and the old treaty and those that are just part of the latter. In this case the State(s) which signed the new treaties would be bound (towards different parties) by two different treaties, stating different rules: a behaviour fully consistent with the new treaty could be prohibited in the old treaty and the result would be a breach of international convention law towards the States which were part of only the old one.

My suggestion on the way around that is what I proposed as a framework convention on cannabis control in my 2010 book (<http://www.beckleyfoundation.org/Roadmaps-to-Reform.pdf>) . The idea was that the provisions regarding internal market would be more like the provisions in the tobacco treaty, advising states on what to do and not compelling them to do things, and saving all the provisions about trade that are in the 1961 UN convention. In the case where they kept the trade provisions they would respect both conventions: the hypothetical new one towards the State that are part of it and the 1961 Convention towards the states that are part of it and did not sign the new treaty.

However international law is a field without many certainties and it is not positive that this strategy could be legally adopted.

**Regulation of other drugs: the reasoning at the base of it is quite similar to that regarding cannabis regulation. However the political and moral implications are maybe more tangled. Any idea?**

What’s happening with respect of decriminalisation of personal use is that most countries that have done that in the last 10 years or so, have done it for all drugs and not just for cannabis. This is not about legalizing a market. Czech republic, Portugal and several South American countries have decriminalised personal use, however they have not done it just for cannabis, but for all illicit drugs. The distinction between cannabis and other illicit drugs that, for example, is made in the Netherlands, is not kept.

The step towards regulation would be harder: there was an initiative in New Zealand regarding new psychoactive substances, but they just pulled the plug on that one. It is also worth noting that any change to the scheduling of cannabis under the international drug control system is likely to undermine the whole so-called “ War on Drugs” approach. Without cannabis within the system’s remit, the proportion of illegal drug-users in the global population is

just over 1 % - far too small to justify the vast costs, both in financial terms and human suffering, which result from the current efforts to enforce the ideals behind prohibitionist approaches.

## CONCLUSION

International law is the most unpredictable field of law and, especially in this case, it is hard to figure out what will be the guidelines for the next years. It is clear that current rules are not fit to purpose, and more problems, such as Netherlands' backdoor problem, are created when countries try to work around them. It seems that the only solution for having a policy without contradictions is to work outside them, like Uruguay is doing.

Even if international law is probably the field with the loosest rules, a mass breach of them by a number of States is not the solution for cannabis regulation. The road is still long and it includes a massive work of political negotiation, but policy makers need to start to realise that an efficient regulatory system cannot be implemented as long as States are bound by rules made more than fifty years ago by people with little or no knowledge of the issue.