

Nicholas Dorn

Law-law not war-war

National laws and international obligations

Research for the Independent Inquiry into the Misuse of Drugs Act 1971, discovered that within the big three international drugs conventions there is 'room for manoeuvre' for national drug laws. We don't all have to have the same laws or wars on drugs

Three international conventions frame states' obligations when making national laws.¹

These are clear and generally uncontested as far as drug *use* and drug *supply* are concerned.

Supply has to be prohibited and criminalised, use does not. Use of heroin, cocaine, cannabis and some other substances has to be limited and use of psychotropic substances such as ecstasy prohibited.

But, there are many questions over possession and related actions – this remains the epicentre of controversies in drug control.

The Independent Inquiry into the Misuse of Drugs Act 1971 asked us to conduct '... a comparative study of the legislation on illegal drugs across six European Union States ... to inform the Independent Inquiry's investigation of the room for manoeuvre in altering UK drug legislation.'

For this we worked with law academics in six EU countries: Prof Yann Bisiou in France, Judge Tom Blom in the Netherlands, Prof Lorenz Böllinger in Germany, Prof Maria Luisa Cesoni in Italy, Prof José Luis de la Cuesta and Dr Isidoro Blanco in Spain and Prof Josef Zila in Sweden.

Alison Jamieson worked with us on the three UN conventions on drug control.

This March, as the Independent Inquiry released its recommendations, the law work was published on the Internet (DrugScope.org.uk) and on paper (see box on page 21).

The conclusions are that European states vary considerably in the 'middle ground' between drug use and supply.

In some EU states this middle ground is 'towed upwards' (towards supply) and becomes criminalised, in other states it is 'towed downwards' towards drug use and not criminalised. This variation applies to possession, self-supply (home cultivation), 'social supply' and sharing of drugs.

Variation arises because international conventions do not impact 'directly' on national laws. Conventions have to be adopted by each government, which inevitably involves interpretation. National political climate and constitutional/legal considerations set the context for this interpretation.

The upshot is considerable room for manoeuvre for national drug laws.

Room for manoeuvre

Most of the European states studied do have imprisonment as an option for possession. France (via criminalisation of drug use) and the Netherlands both have one-year maximum.

Italy and Spain do not criminalise possession for personal consumption, so do not have the possibility of imprisonment, but administrative sanctions may apply in some circumstances.

The UK penalty structure is relatively high. The UK tariff for possession for personal consumption could be reduced and yet remain in compliance with the international conventions.

In strict legal terms the UK could reduce the maximums under the Misuse of Drugs Act, for some or all classes of drugs covered by the Act, and substantially if Parliament so wished. While this might be controversial UK policy, it is clearly a possibility in the international drug conventions.

In fact, as far as the international conventions are concerned, imprisonment for possession for personal consumption could be removed from the UK tariff. Possession could remain a criminal offence, but not an imprisonable one.

Nicholas Dorn is Director of international and policy research at DrugScope

Civil penalties

The study also concluded that, as far as simple possession is concerned, there is scope for civil penalties alongside the present provisions of the Misuse of Drugs Act. Criminal and civil approaches would be alternatives: civil approach for less serious circumstances; criminal approach for more serious circumstances. In no case would both apply.

This would be compatible with the international drug conventions. Nothing in the conventions requires signatory states to apply criminal law exclusively.

Civil drug offences (more correctly, according to UK law, civil wrongs) could be modelled on civil fines for parking offences, for example. They would be judged on the balance of probabilities, rather than the higher standard of 'beyond reasonable doubt'. Procedural safeguards would be ensured under the European Convention of Human Rights. Appeal mechanisms would exist.

This would give a choice between applying civil (administrative) or criminal action.

In many instances of possession for personal consumption civil approaches might be considered as more proportionate, hence more appropriate, than criminal law.

Civil sanctions or punishments could include small fines and community service. Such responses would not give rise to a criminal record.²

Criminal prosecution, with the 'leverage' it gives to diversion programmes, would be available in other cases.

For public policy in the UK, adding a civil wrong approach to drug possession, alongside criminal law, would present several advantages and opportunities compatible with UK drug strategies (see boxed text).

Using drugs in Europe

The legal status of drug use – the status of the person who takes drugs – varies considerably from one EU member state to another. Three of the countries studied prohibit drug use, the other three do not.

Italy, the Netherlands and Germany do not prohibit drug use. In Spain drug use is unlawful but the law provides no punishment unless it is



Civil drug offences (more correctly, according to UK law, civil wrongs) could be modelled on civil fines for parking offences

A civil wrong approach to drug possession alongside criminal law: possible compatibility with UK drug strategies

Exploration of effectiveness

There is no reason to believe that civil approaches would be less effective in control, discouragement or prevention of possession and use. Criminal law alone has not proved decisive in the post-war period. If the two approaches were run flexibly side by side in some sites, while in other sites criminal law remained the main response, then assessment would be possible.

Low costs

Civil approaches are cheaper than criminal approaches. Moreover, civil fines raise funds – the sums involved may be small but their use might have symbolic significance. Some part of the funds might be retained locally to support drug related action (according to local and/or national priorities). Alternatively, national (devolved) governments might retain all or part of the income derived from civil fines, possibly recycling it back to local level. Such issues are familiar with funds arising from criminal forfeiture and civil forfeiture and confiscation in major crimes.

A role for local authorities

Within the objectives and structures of the UK drug strategy, local authorities could be granted power to levy civil fines for possession for personal consumption – along the lines of civil fines for car parking. Alternatively, Police Forces might administer local schemes.

Civil approaches could be introduced uniformly across the UK, but local administration seems to fit local drug policy making and target setting and, in this sense, could complement the UK drug strategy and parallel anti-crime strategies.

A role for Drug Action Teams

In setting civil fines local authorities could take into account local drug problems, strategies and priorities drawn up and reviewed annually by Drug Action Teams (DATs) and/or similar forums concerned with crime prevention.

DATs represent all concerned agencies at a local level, across all sectors, including the police. DATs should be in a position to weigh the advantages and disadvantages of various approaches to control of drug possession. They could take into account the harmfulness of specific drugs, the dangers to younger people in particular, the impacts of drug problems and controls upon communities, and local people's views and priorities. National government might wish to set broad parameters and to retain powers of direction.

done in public, when administrative sanctions apply.

Sweden and France both prohibit and criminalise drug use. But on 16 June 1999 the French Government presented a three-year plan, which emphasised prevention, harm reduction and treatment for addicts.

The French drug law of 1970 has not been modified – drug use is still criminal – but the Minister of Justice invites prosecutors to avoid imprisonment and to promote treatment.

For the use of 'soft drugs' (ie, cannabis) this translates into prevention, information and diversion from the criminal justice system. Punishment is, at most, a fine. The police and criminal justice system generally must facilitate harm reduction for users.³

Possessing drugs in Europe

Prohibition does not always equal criminalisation. All the countries studied prohibit possession, but not all make it a criminal offence.

Four of the six countries studied prohibit possession in this sense – Italy, the Netherlands, Germany and Sweden – but only the last three criminalise it. Italian law makes possession an administrative infringement.

In Spain possession for personal use is unlawful but it is not a punishable offence unless it occurs in public, when it attracts administrative sanctions only.

Of the six states, France is the odd one out. Its law does not define possession for own use. In practice possession is responded to as evidence either of drug use (which is a crime), or of trafficking. Although strictly speaking French law does not prohibit or criminalise possession for personal use, in effect it does both.

Obtaining drugs in Europe

Using a drug implies obtaining it. Obtaining implies the existence of a supplier who gives or sells the drugs, or manufacture or cultivation by the user (which some legal systems treat as a supply offence). This raises problems that national legal systems resolve differently.

In Spain, case law generally does not consider it a criminal offence to purchase or cultivate a prohibited drug, as long as it is not in order to supply. Both cultivation and purchase



are in the legislation as criminal acts, but for constitutional reasons Spanish jurisprudence and judicial practice consider these acts should not be punished.

Possession in public in Spain, as the obtainer returns from the point of supply, would be a 'serious administrative offence'. But the balance of case law holds that, having obtained a drug, it is not an offence for a user to share it out among friends or other habitual drug users if there is no danger of a wider dissemination and if the distribution is not done in public.

In Italy obtaining a drug has the same legal status as possessing it. This is an administrative infringement regardless of quantity (unless trafficking). The act of sharing with other users, as long as done *in a group*, is treated in the same way in certain conditions.

Thus current Italian legal interpretation is that it is not a crime:

- i) to obtain a drug for oneself,
- ii) to purchase on behalf of a group,
- iii) to purchase together with a group of users or,
- iv) to share out drugs between users without payment.

However, cultivation for personal use is criminal, following a decision of the constitutional court.

In the Netherlands possession and supply are prohibited and criminalised, as envisaged in the international drug conventions. But as a matter of policy, prosecution does not occur in most cases of possession and in supply of small quantities of cannabis through coffee shops.

The coffee shops are tolerated as long as they stick to cannabis and do not cause community nuisance problems, although their sale of cannabis is strictly speaking illegal.

A similar policy applies to small-scale cultivation of cannabis in the home. It is tolerated as long as neighbours don't complain of the pungent smell, in which case police may remove the plants, as prohibited objects.

Commentaries that refer to decriminalisation of possession or to legal supply of cannabis or other controlled drugs in the Netherlands are incorrect.

Conventional use

The six European states compared in this study, plus the UK, have all ratified the three international drug conventions.

In the Single Convention of 1961 states are required 'to take steps to limit [drug use] exclusively to medical and scientific purposes'. This could or perhaps should be understood as a requirement for use to be prohibited in national legal systems, but it is not spelled out as such.

States are not required to prohibit or 'not permit' use of drugs such as cannabis, cocaine or heroin. In any case, states are not required to establish sanctions against or punishments for use of these drugs, criminal or otherwise. Criminalisation of their use is certainly not evident in the words of the 1961 convention, nor in the 1971 and 1988 ones.

On the use of psychotropic drugs

(as defined by the 1971 Convention, eg, ecstasy) states are required to 'limit' use, also to prohibit all use of such drugs (except for scientific and very limited medical purposes).

All EU countries struggle to reconcile severe responses to drug trafficking with proportionate responses to possession and use

Conventional possession

On possession of drugs such as cannabis, cocaine, etc, the 1961 convention requires that states 'shall not permit the possession of drugs except under legal authority' (Article 33). It goes on to require that punishments be available for possessors – albeit subject to constitutional limitations of the state concerned (Article 36(1)).

There are debates over whether the context implies that only possession for purposes of supply are referred to here – the text is not explicit. The 1988 convention goes further, requiring states to 'establish a criminal offence under its domestic law, when committed intentionally, the possession ... for personal consumption ...' (Article 3(2) of UIN 1988).

National climates

As stated previously, international conventions do not impact 'directly' on national laws. They have to be adopted at national level, which inevitably involves interpretation. National constitutional/legal considerations and the political climate of the day influence this interpretation.

Decision-making within the legal system is significant in several countries.

In Italy, alongside and within the



Commentaries that refer to decriminalisation of possession or to legal supply of cannabis or other controlled drugs in the Netherlands are incorrect

political debates, referenda, and so on, consideration of constitutional issues and basic legal principles has played an important part.

In Germany, the Constitutional Court gave an important judgement on cannabis, which disappointed decriminalisers as it declined to find controls on cannabis possession unlawful (disproportionate). But the Court emphasised that regional/local authorities should act against cannabis possession only to an extent proportionate to the associated social harms.

In Spain, decisions of the upper courts have been very important, as far as drug possession and related acts are concerned (cultivation for own use, etc). This is the 'middle ground' of drug control and the debate is by no means over.

There are also instances of drug legislation being heavily influenced by party politics, as well as by strictly legal considerations.

In the Netherlands, a 'deal' between parties in parliament resulted in that country's characteristic hard/soft policies (hard on traffickers, soft on users/possessors).

In Italy, following political mobilisation, a referendum caused measures on use and possession within an existing law to be abrogated.

In Sweden the matter was highly politicised both by parliament and

in the press.

In France the 1970 drug law went through parliament with little debate, and the media and popular opinion seemed to share the same line, at least until the late 1990s.

Sensitive issue

A sensitive issue is how the law should treat 'social' supply and sharing. Most casual/recreational drug users get their drugs from friends – in the UK the latter commit a trafficking offence. Perhaps the majority of young people in the UK fall into this category at one time or another.

A wide range of responses is possible, depending on the legal system. In the majority of EU states studied, what in the UK might be considered 'social supply' may be treated as trafficking. This depends on circumstances such as the amount of drugs, whether money is exchanged, whether sharing is between existing users or initiates new users, and so on.

The situation varies from state to state:

- 'social supply' may be criminalised and punished in the same way that use/possession is, rather than at the higher level of trafficking
- 'social supply' may be dealt with administratively/civilly in legal systems that treat use/possession similarly.

The underlying and continually perplexing issue is how to reconcile responses to drug use and drug supply. Few legal commentators in Europe suggest that use should be criminalised.

Supply is the object of sustained efforts at criminalisation. Social supply falls right in the middle – it is the most sensitive and inherently contradictory issue of drug policy.

Possession is almost as sensitive – demonstrated by the short-term reaction of government to the principal recommendations of the Independent Inquiry.

The Independent Inquiry's terms of reference were to examine the UK law on drugs, which limited comparative legal research. Focussing on the Misuse of Drugs Act 1971, it decided that the relationship between specific substances and the three drug 'classes' is key.

The news media picked this up and spoke of 'relaxation' of the law. This question confronted government. Their response was predictable.

Research and policy

The relationship between research and policy formulation is not simple. Both research and policy must be put in context.

Some commentators suggest that for this government election strategy is the determining factor in framing policy, rather than research. There might be another consideration. At the time the Independent Inquiry went public the attention of many Ministers and officials was on the revitalisation of action against drug supply: setting up an anti-trafficking taskforce of officials from the Home Office, Foreign Office, Customs and Excise, MI5, MI6 and the UKADCU.⁶

Maybe it was not (or not only) that the Independent Inquiry's recommendations were unacceptable, rather that they were untimely, on the wrong agenda. A policy system transfused with ideas about trafficking does not cope well with proposals on possession.

From this perspective, the Independent Inquiry might be seen as unfortunately timed. The bad-luck theory of history might be something for future policy analysts and commentators to bear in mind when trying to make sense of this episode ■

1. *The Single Convention on Narcotic Drugs*, New York, 30 March 1961, amended by the Protocol Amending the Single Convention on Narcotic Drugs, Geneva, 25 March. *The Convention on Psychotropic Substances*, Vienna, 21 February 1971. *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Vienna, 20 December 1988. For details and more extensive commentary, see DrugScope's full report, *Room for Manoeuvre*.
 2. Australian experience shows a problem of how to deal with civil fine defaulters (National Drug Strategy Committee, 1998, *The Social Impacts of the Cannabis Expiation Notice Scheme in South Australia*, Summary Report (4 May), Canberra: Commonwealth Department of Health and Aged Care). Work would be necessary on this aspect for the UK.
 3. French administrative structures concerning drugs have changed several times over the past thirty years in an effort to apply a coherent strategy. See pp 21-30 of the excellent report by the French monitoring centre on drugs and drug addictions: Observatoire Français des Drogues et des Toxicomanies, 1999, *Drugs and Drug Addictions*, Paris: OFDT, 269 pages, fax 0033 1 53201600 e-mail information@ofdt.fr
 4. Burns J. 'Taskforce to organise fight against drug traffic', *Financial Times*, 3 April 2000, p.3.

DrugScope
RESEARCH series

Room for manoeuvre

Room for manoeuvre is available from DrugScope, price £6 (£5.40 for DrugScope members)