

## SYMPOSIUM ON DRUG DECRIMINALIZATION, LEGALIZATION, AND INTERNATIONAL LAW

### A BRIEF HISTORY OF CANNABIS AND THE DRUG CONVENTIONS

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“Drugs”<sup>1</sup> have been regulated at the international level since 1912, while cannabis has been specifically regulated since 1925. Contemporary local, national, and international cannabis regulations are now diverging, with some jurisdictions legalising its recreational production, sale and consumption. This essay explores the legal and historical complexity and contingencies around the development of international cannabis regulations and prohibitions. It highlights that the global drug control system was not solely focused on prohibition and instead was a complex mix of regulations underpinned by frequently ill-defined and unclear prohibitions. It argues that the international drug control system should not serve as a bar to national-level reforms and that the two can continue to coexist. The essay favors a flexible, functional and pragmatic interpretation and implementation of the system as the most likely and indeed preferred outcome of international cannabis policy reforms.

#### *Encompassing Legal and Institutional Fragmentation*

Contemporary drug diplomacy analyses are divided into two schools, regime “integrationists” vs. regime “pluralists.” The integrationist approach is further divided among reformists and conservatives. Reform integrationists, grounded in the Orthodox School (see below), view the system as a United States-hegemonic prohibition regime and one irreconcilable with national level policy reforms. “Flexibilities” around cannabis legalization represent a legal fiction, one which threatens the foundation of international law and postpones the moment of radical systemic change.<sup>2</sup> Conservative integrationists, represented in the national approaches of Russia, China, Egypt, and others, echo this legal certitude around the centrality of prohibitions and lack of flexibilities. Counter to reformists, however, conservatives actively pursue an ever greater prohibitionist policy orientation. Both strands of the intergrationist school view legal evolution around national cannabis legalization as a long-term threat.<sup>3</sup>

Pluralists argue from a position that recognizes historical regulatory complexity. They suggest the pragmatic utility of a less integrated system in the short-term as policies evolve and adapt at local levels and thereby expand the global evidence base.<sup>4</sup> This essay sides with the pluralists, highlighting the contingency and complexity of the international cannabis regulatory system.

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<sup>1</sup> A “drug” is defined under the 1961 Single Convention as a substance listed in either of the standard regimes of Schedule I or Schedule II of that convention. United Nations, [Commentary on the Single Convention on Narcotic Drugs, 1961](#), UN Sales No. E.73.XI.1 (1973).

<sup>2</sup> John Collins, [Losing UNGASS? Lessons from Civil Society, Past and Present](#), 17 DRUGS ALCOHOL TODAY 88 (2017).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

### *Early History of Cannabis Regulation*

The cannabis plant was initially used more for textiles and rope than as a mind-altering substance. Plant strains with greater psychoactive compounds spread gradually. So too did the social mores surrounding their usage. Weaker preparations accompanied social and religious ceremonies and festivals in India while more potent hashish was frowned upon. Indian medicine also recognized cannabis' use for opiate withdrawal, appetite stimulation and analgesia among others. Nineteenth century U.S. and European societies witnessed increasing social and medical interest in cannabis. In 1850s Paris, the "Club des Haschichins" celebrated recreational consumption while the British and American Pharmacopeia suggested its utility as a sedative and anti-convulsant. Medical interest was displaced by opiates, particularly with the rise of the hypodermic syringe and following the U.S. civil war. Nevertheless, as late as the 1930s, the American Medical Association endorsed cannabis' potential medical value and low likelihood of "addiction."<sup>5</sup>

U.S. recreational consumption solidified around 1910 in the South and migrated up the Mississippi River. Local and state laws reactively sought to prohibit its use, eventually unifying under national legislation with the Marihuana Tax Act of 1937. The Act effectively ended therapeutic and other licit uses. In 1932, cannabis was dropped from the British Pharmacopoeia and the United States followed suit in 1941. By 1969, one U.S. scholar noted that "restrictive state and Federal laws" prevented "scientific investigation."<sup>6</sup> To these legal obstacles could be added international controls. However, the national-international story is often widely misconstrued as a unidirectional U.S. policy export, or, in some readings, one forced upon the League and UN systems to provide a treaty basis for U.S. federal drug laws. The reality was more complex.

### *The Genesis of International Drug Controls*

What might be termed the Orthodox School of drug regime theory argues that the United States created a robust "global drug prohibition regime" via the League of Nations and subsequently the United Nations.<sup>7</sup> While a plurality of the policy literature maintains this narrative, the historiography has since moved on. For example, Sebastian Scheerer rejects the U.S.-centric narrative for cannabis.<sup>8</sup> James Windle posits an Asian origin of modern drug prohibitions, while Isaac Campos points to the "homegrown" nature of Mexican cannabis prohibitions.<sup>9</sup> I have suggested that the International Drug Control System (IDCS) emerged from a triangulation between various state interests and blocs. The United States was not even formally part of the League of Nations; walked out of the 1925 plenipotentiary conference, where cannabis was first regulated; refused to sign the 1936 anti-trafficking convention; and ultimately sought to torpedo the 1961 Single Convention, viewing it as weak and consensus-oriented. The United States was a key participant in the IDCS, albeit frequently an absent one, but hardly the sole force. I go further, suggesting that the title "prohibition regime" is a misnomer for what is fundamentally a complex regulatory system.<sup>10</sup>

<sup>5</sup> T. H. Mikuriya, *Marijuana in Medicine: Past, Present and Future*, 110 CALIF. MED. 34 (1969).

<sup>6</sup> *Id.* at 38.

<sup>7</sup> DAVID R. BEWLEY-TAYLOR, *THE UNITED STATES AND INTERNATIONAL DRUG CONTROL, 1909-1997* (1999).

<sup>8</sup> SEBASTIAN SCHEERER, *North-American Bias and Non-American Roots of Cannabis Prohibition*.

<sup>9</sup> James Windle, *How the East Influenced Drug Prohibition*, 35 INT. HIST. REV. 1185 (2013); ISSAAC CAMPOS, *HOME GROWN: MARIJUANA AND THE ORIGINS OF MEXICO'S WAR ON DRUGS* (2012).

<sup>10</sup> John Collins, *Rethinking 'Flexibilities' in the International Drug Control System—Potential, Precedents and Models for Reforms*, 60 INT'L J. DRUG POLICY 107 (2018).

As Liat Kozma highlights, “the US did not play a leading role at all. The role of Italy, South Africa, Egypt and Turkey in international cannabis prohibition . . . is largely overlooked.”<sup>11</sup> Egypt experienced a brief ban during Napoleon’s occupation. Cannabis was banned again in the late nineteenth century, making Egypt the first country to ban cultivation. British occupiers inheriting the policy viewed it with broad scepticism, believing it simply encouraged regional smuggling. Egyptian elites maintained their prohibitionist stance, one that would eventually propel them to the forefront of multilateral cannabis control.<sup>12</sup> European Far Eastern colonies were similarly complex. British Burma in 1891 prohibited cannabis due to concerns over its mental health effects. British India, meanwhile, maintained a licenced and taxed trade. The latter came under pressure from reformist parliamentarians in London, leading to the Indian Hemp Drugs Commission in 1894. To the chagrin of reformists, a majority of its members recommended continued taxation and regulation over prohibition.<sup>13</sup>

Various commercial expansionist, diplomatic, and moralist forces encouraged the United States to push for an international meeting to deal with opium. The resultant 1909 Shanghai Opium Commission paved the way for the 1912 Hague Opium Convention. The 1912 conference examined the issue of “Indian Hemp” but merely encouraged states “to study the question.”<sup>14</sup> Cannabis was eventually regulated under the 1925 International Opium Convention at the behest of Egypt, and previous encouragement from South Africa, Italy, and others. Britain remained ambivalent and the United States remained focused on opium. The Convention represented a compromise, committing Contracting Parties “to limit exclusively to medical and scientific purposes the manufacture, import, sale, distribution, export and use” of extracts and tinctures of Indian hemp.<sup>15</sup> It further brought the licit Indian Hemp trade within a system of import and export authorisations. Far from an absolute prohibition, it dealt only with international trade, it did not prohibit production or impose controls on domestic traffic or consumption, and did not mandate government production estimates.<sup>16</sup>

The Convention did focus attention on regional drug trafficking, sparking an outpouring of official League reports.<sup>17</sup> This helped fuel normative and regulatory reciprocity, as Parties felt increased responsibility for regulatory actions or inactions. However, the pressure to regulate wasn’t just, or even primarily, external. While states remained wary of international legal commitments, they broadly moved towards unilateral domestic prohibitions.

The United States had walked out of the 1925 Plenipotentiary Conference over U.S.-European disagreement on opium prohibitions. The move caused lasting embarrassment within the State Department. The new Commissioner of the Federal Bureau of Narcotics, Harry J. Anslinger, softened U.S. drug diplomacy, leading to the *1931 Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs*.<sup>18</sup> This created a closed system of control based on statistical estimates and returns. The Convention also produced the system of “Scheduling,” classifying drugs according to their supposed addiction risk-therapeutic value ratio. Despite minimal immediate impact on cannabis, the multilateral system was growing in regulatory coherence.

<sup>11</sup> Liat Kozma, *Cannabis Prohibition in Egypt, 1880-1939: From Local Ban to League of Nations Diplomacy*, 47 MIDDLE EAST. STUD. 443, 443 (2011).

<sup>12</sup> *Id.*

<sup>13</sup> JAMES H. MILLS, *CANNABIS BRITANNICA: EMPIRE, TRADE, AND PROHIBITION 1800-1928* (2003).

<sup>14</sup> *International Opium Convention*, Jan. 23, 1912, 8 LNTS 187.

<sup>15</sup> *International Opium Convention* art. 5, Feb. 19, 1925, 81 LNTS 319.

<sup>16</sup> UN Off. on Drugs & Crime, *A Century of International Drug Control* 55 (2008).

<sup>17</sup> *Kozma*, *supra* note 10.

<sup>18</sup> ARNOLD H. TAYLOR, *AMERICAN DIPLOMACY AND THE NARCOTICS TRAFFIC, 1900-1939: A STUDY IN INTERNATIONAL HUMANITARIAN REFORM* (1969).

The collapse of the League during the 1930s split drug control in two parts. The first was the increasingly politically static League Opium Advisory Committee. The second was the functioning semi-independent treaty bodies. When the League collapsed during World War II, these bodies fled for Washington DC as guests of the U.S. government.<sup>19</sup> They would facilitate the uninterrupted operation of the system of estimates and thereby the transition of IDCS to the UN Commission on Narcotic Drugs. Immediate postwar political efforts then turned to synthetic drug limitation, the expansion of regulatory controls beyond manufacture towards comprehensive opium production limitation, and the creation of a new “single convention” encapsulating all previous ones.<sup>20</sup>

### *Legal and Policy Compromises Under International Conventions*

The UN Single Convention was adopted in 1961 following two decades of tumultuous negotiations. It represented relatively minimal regulatory expansion and focused instead on unifying past treaties. While not driven by cannabis, it created more coherent controls for “cannabis,” the “cannabis plant,” and “cannabis resin.” Regulations were roughly transposed from the core regulatory apparatus limiting the opium and drug manufacturing trades. For example, states choosing to allow medical and scientific cannabis and cannabis resin production need to follow exactly the regulatory structures for opium production.<sup>21</sup>

The Convention adopted the term cannabis instead of “Indian hemp.” Cultivation was delineated between that for cannabis or cannabis resin and that for industrial (fibre and seeds) and horticultural purposes. For the former, Article 23 applies, providing that a government agency take full control of licencing and regulation, such as designating cultivation areas and issuing import and export certificates.<sup>22</sup> For the latter, production is regulated by more general obligations to prevent misuse and illicit traffic.<sup>23</sup> The Convention places no obligation to impose criminal sanctions for possession. It does require a Party to implement “Penal Provisions,” “[s]ubject to its constitutional limitations” with regard to “[c]ultivation, production, manufacture, extraction, preparation, possession, offering, . . . distribution, purchase, sale, delivery . . . brokerage . . . transport, importation and exportation of drugs contrary to the provisions of this Convention.”<sup>24</sup> However, this provision does not refer to “use” since the focus is on “the illicit traffic, and unauthorized consumption of drugs . . . does not constitute ‘illicit traffic.’”<sup>25</sup> The UN Commentary goes further, explaining that the term possession “does not include possession for personal consumption” which is “left to the discretion of each Party.”<sup>26</sup> Under those articles that apply only to cannabis, states parties would decide on whether prohibition of “cannabis plant” cultivation was “the most suitable measure” and, should that be the case, to “take appropriate measures” to seize and destroy plants.<sup>27</sup>

More broadly, parties had to conform to Article 4 of the standard regime, namely “to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.”<sup>28</sup> This, however, does not mandate penal sanctions. Further, the production and possession elements

<sup>19</sup> WILLIAM B. McALLISTER, [DRUG DIPLOMACY IN THE TWENTIETH CENTURY: AN INTERNATIONAL HISTORY](#) (2000).

<sup>20</sup> *Id.*

<sup>21</sup> [Single Convention on Narcotic Drugs](#), Mar. 30, 1961, 520 UNTS 151 (as amended by the 1972 Protocol) [hereinafter Single Convention].

<sup>22</sup> *Id.* art. 23.

<sup>23</sup> [United Nations](#), *supra* note 1.

<sup>24</sup> [Single Convention](#), *supra* note 21, art. 2.

<sup>25</sup> [United Nations](#), *supra* note 1, at 428.

<sup>26</sup> *Id.* at 111 & 428.

<sup>27</sup> [Single Convention](#), *supra* note 21, art. 22.

<sup>28</sup> *Id.* art. 4.

were effectively negated by cannabis' specific regimes.<sup>29</sup> There was also no accepted definition of “medical and scientific” use, which has been highlighted as a significant “legal gap”<sup>30</sup> and one which has enabled expansive definitions of scientific policy experimentation in recent years.

Cannabis, cannabis resin, as well as extracts and tinctures were listed under Schedule I while cannabis and cannabis resin were also listed under Schedule IV. Drugs in Schedule I and IV were under the Convention's “standard regime.” The principle features of Schedule I are

Limitation to medical and scientific purposes of all phases of narcotics trade (manufacture, domestic trade, both wholesale and retail, and international trade) in, and possession and use of, drugs; requirement of governmental authorization (licensing or state ownership) of participation in any phase . . . and . . . import and export authorization.<sup>31</sup>

Cannabis and cannabis resin are also covered by Schedule IV. All drugs in Schedule IV are, by definition, also in Schedule I. Schedule IV suggests parties (a) evaluate “special measures of control” and (b) decide whether to “prohibit production, manufacture, export and import of, trade in and possession or use . . . if in its opinion the prevailing conditions . . . render it the most appropriate means of protecting public health and welfare.”<sup>32</sup> The Commentary set a subjective and low test, “[i]f a Party believed . . . that special measures were required, but refused to adopt them . . . it would not be acting in good faith and thus would violate its obligation.”<sup>33</sup> Whether a party's opinion was legitimate, meanwhile, “could not be challenged by any other Party.”<sup>34</sup> The ambivalence arose from a long-standing debate about mandatory prohibitions, which remained unresolved. The 1961 Convention represented “a compromise which leaves prohibition to the judgement, though theoretically not to the discretion, of each party.”<sup>35</sup>

The 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances enshrined two major innovations: first, control of precursor chemicals; second, it targeted illicit traffickers. It also included a specific paragraph dealing with “personal consumption contrary to the provisions of the 1961 Convention . . . or the 1971 Convention.”<sup>36</sup> The Commentary acknowledged this as a “controversial matter,” and the Convention

reflects a compromise on a number of points . . . First . . . the safeguard clause referring to constitutional principles and the basic concepts of a party's legal system . . . Secondly, the final words requiring the conduct to be “contrary to the provisions of” the earlier conventions. This could be interpreted as enabling the parties to retain the stance that they adopted regarding the interpretation of those earlier texts.<sup>37</sup>

Few now question the legality of decriminalization under international law.<sup>38</sup> The 1988 Convention came the closest to establishing a clear commitment to criminal sanctions for personal possession but ultimately stopped short.

<sup>29</sup> United Nations, [Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988](#), UN Doc. E/CN.7/590 (1998).

<sup>30</sup> Francisco E. Thoumi, [Re-Examining the 'Medical and Scientific' Basis for Interpreting the Drug Treaties: Does the 'Regime' Have Any Clothes?](#), in *AFTER THE DRUG WARS* (2016).

<sup>31</sup> [United Nations](#), *supra* note 1, at 51-52.

<sup>32</sup> [Single Convention](#), *supra* note 21, art. 2.

<sup>33</sup> [United Nations](#), *supra* note 1, at 65.

<sup>34</sup> *Id.* at 67.

<sup>35</sup> *Id.* at 66.

<sup>36</sup> [UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances](#) art. 3, Dec. 20, 1988, 1582 UNTS 95.

<sup>37</sup> [United Nations](#), *supra* note 29, at 81-82.

<sup>38</sup> Marcus Keane et al., [Not Criminals: Underpinning a Health-led Approach to Drug Use](#) (2018).

*Conclusion*

The IDCS created a complex legal regime that was not solely about prohibition and was not focused on cannabis. In its current form, it does not serve as a formidable *de facto* or *de jure* bar to national policy experimentation and reform around recreational cannabis use.

First, the IDCS was not just about prohibition. It was fundamentally about regulation and reciprocity of controls. The imposition of unequivocal prohibitions is virtually absent from the conventions, except in broad and ill-defined terms resting under national prerogatives. While tensions arising from national regulatory changes are clear and apparent, the multilateral legal system can likely survive and evolve. Second, the system was first and foremost about opiate regulation. The system's core elements were transposed roughly onto cannabis, with at times strange areas of contradiction and overlap. Third, the emergence of nationally enclosed regulatory frameworks for recreational use, operating within a restrictive international trading system, is less of a legal-conceptual hurdle than integrationists believe. Fourth, the political economy of cannabis control is often framed as an external imposition. In fact, states and reformers must look inwards to the elite politics, modernization assumptions and indeed racist and classist underpinnings of national policy choices. As the 1988 Commentary noted, the conventions, "operating necessarily at the level of public international law, do not in themselves prohibit any conduct by an individual or group of individuals."<sup>39</sup> Their execution within state legal systems ultimately determines their implementation.

Finally, a functionalist and regulatory approach to the current system can provide some utility as national approaches diverge. Absent an international regulatory system, predatory practices would produce suboptimal public health outcomes and even potentially drive national or regional powers towards ever more repressive approaches justified by the lack of reciprocal regulatory arrangements. In the long run, evidence of efficacy is the best inoculation against bad policies. A more flexible international system which both allows and provides a check upon divergent national cannabis policies is likely the best way to protect global health and welfare.

<sup>39</sup> [United Nations](#), *supra* note 29, at 52.