

**The Human Rights Approach to Marijuana Control in Mexico**

by

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DISSERTATION

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# **Title: The Human Rights Approach to Marijuana Control in Mexico**

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## **Abbreviations**

1971 Convention	1971 Convention on Psychotropic Substances
1988 Convention	1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
A-64	Colorado's Amendment 64
A.I.	Amparo Indirecto
A.R.	Amparo en Revisión
CND	Commission on Narcotic Drugs
CNDH	Comisión Nacional de los Derechos Humanos (Mexican Human Rights Commission)
COFEPRIS	Comisión Federal para la Protección contra Riesgos Sanitarios (Federal Commission for the Protection of Health Risks in Mexico)
CSA	Controlled Substances Act of 1970
DTOs	Drug Trafficking Organizations
ENA	Encuesta Nacional de Adicciones (Mexican National Surveys of Addictions)
ENCODAT	Encuesta Nacional de Consumo de Drogas, Alcohol y Tabaco (National Drug, Alcohol and Tobacco Consumption Survey)
GHL	General Health Law
I-502	Washington's Initiative 502
INCB	International Narcotics Control Board
INEGI	Instituto Nacional de Estadística y Geografía (Mexican National Institute of Statistics and Geography)
IRCCA	Institute of Regulation and Control of Cannabis
LSD	Lysergic acid diethylamide
MC	Movimiento Ciudadano (Citizens' Movement)
MDMA	Methylenedioxyamphetamine
MORENA	Movimiento de Regeneración Nacional (National Regeneration Movement)
OAS	Organization of American States
PAN	Partido Acción Nacional (National Action Party)

PGR	Procuraduría General de la República (Attorney General's Office)
PRD	Partido de la Revolución Democrática (Democratic Revolution Party)
PRI	Partido Revolucionario Institucional (Institutional Revolutionary Party)
PT	Partido del Trabajo (Labor Party)
SCJN	Suprema Corte de Justicia de la Nación (Mexican Supreme Court of Justice of the Nation)
SCND	Single Convention on Narcotic Drugs
SGHC	Secretary of the General Health Council
UDHR	Universal Declaration of Human Rights
UMA	Unidad de Medida y Actualización (Unit of Measure)
UMAN	Unidad Mixta de Atención al Narcomenudeo (Mixed Narcomenudeo Care Units)
UN	United Nations
UNGASS	United Nations General Assembly Special Session on the World Drug Problem
UNHRC	United Nations Human Rights Council
UNODC	United Nations Office on Drugs and Crime
US	United States of America
WHO	World Health Organization
WOLA	Washington Office on Latin America



## Abstract

Regarding the interaction between marijuana control and recreational marijuana use, there is a current trend towards prohibition and the choice of a penal system based on international and national marijuana controls. However, this trend can be questioned and analyzed through the protection of human rights. This dissertation explores a case of the Mexican Supreme Court, which determined unconstitutional articles of the General Health Law and granted authorization to four people to get permission from the executive branch for the recreational and personal use of marijuana based on the human rights protection and with a different approach than that of the traditional criminal system. The Mexican Supreme Court considered the recreational use of marijuana lawful through the right to free development of personality. The District Court granted the authorization to import and use the CBD medicine, arguing that the refusal to grant the permit violated the girl's right to health.

The uniqueness of both cases can be found in the recent discussion about the degree of restriction that regulates marijuana usage and the human rights protection, which caused Mexico's legislative branch to rethink its existing marijuana policy. This dissertation focuses on presenting the world drug regulation and the reasons for the prohibition of recreational marijuana use and introducing new trends on marijuana use in countries such as Uruguay, Canada, some US states, and Mexico. This dissertation presents a view on protecting human rights in controlling marijuana use. It explores how a judicial approach can impact the regulation of marijuana in Mexico.

Chapter 1 introduces the international drug conventions to indicate the transnational legal system on drug control: The Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol (SCND), the Convention on Psychotropic Substances of 1971 (1971 Convention), and the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (1988 Convention). This chapter also examines the situations of Uruguay, Canada, and a few states in the US that have legalized recreational marijuana to provide new perspectives on marijuana use. The International Narcotics Control Board's position and the conflict with these government viewpoints are examined in this section of the study.

This first part of Chapter 2 illustrates how the Mexican government's drug control policies have been justified on the need to protect public health, order, and security of the people. The second part focuses on Amparo 237/2014 (A.R.237/2014), issued by the Mexican Supreme Court in 2015, which recognizes that recreational use of marijuana is lawful based on

the plaintiff's human rights. Previous studies have analyzed how drug policies are justified or unjustified by States' goals of public order and health preservation. However, this chapter studies how prohibitionist policies can affect individual human rights and how human rights protection can influence future policies.

Chapter 2 emphasizes how the Mexican Supreme Court considered the recreational use of marijuana lawful through the lens of the right to free development of personality, which is tied to human dignity. The Court found that human dignity encompasses the use of marijuana for recreational purposes and based its decision on the essential belief that each human being has the innate right to make his or her own decisions without trespassing or affecting the rights of third parties.

Then, this chapter examines how a balance between human rights and the competing values of public health, order, and security can be found. The analysis in this chapter contains a description of Mexican law-making, exploration of court cases, and the application of the principle of proportionality to highlight the tensions between human rights and the opposing government policies. This chapter does not pretend to advocate for the legalization of marijuana, but it argues that since prohibitionist acts from the government could infringe human rights, and that it is necessary to analyze how policies can be improved and what kinds of measures can be adopted under a framework of human rights protection. In the conclusion, the chapter suggests that the government should adopt less restrictive alternatives to penalization and that properly consider the protection of human rights and social needs to control the usage of marijuana.

Chapter 3 studies the problem of the regulation of the use of marijuana and its derived products for medicinal use in Mexico. The study focused on Amparo Indirecto 1482/2015 (A.I.1482/2015) issued by the Third District Court in Mexico City, which recognizes that some provisions of the General Health Law that regulate medical marijuana do not conform with the Mexican Constitution and its human rights protections. The study of this decision is significant because it resulted in the General Health Law being amended in 2017. In the ruling, the legality of the use of medical marijuana and the argument related to the protection on the right to the highest attainable standard of health were explored.

Regarding Mexican drug policy, this chapter discusses the implications of this case for the protection of the right to the highest attainable standard of health and its relationship with the right to free development of personality. It looks into the significance of using the proportionality principle and the relevance of international documents in decision-making, both of which have led to adopting human rights protection framework dispositions. This

chapter concludes that the decision of the Court in A.I.1482/2015 was excessive in pronouncing unconstitutional Article 237 of the General Health Law, but that this was inevitable to maintain coherence with the Amparo decision of the Mexican Supreme Court.

Chapter 4 outlines the Mexican government's vision, which emphasizes the importance of prioritizing the population's access to health care. As a result, it advocates for the legalization of cannabis for medical use while also proposing its legalization for recreational use in response to public demand. The Mexican government promoted a national debate regarding marijuana control and the Mexican government's vision was, however, only partially accepted by the Legislative branch. After the conclusion of the national debate regarding marijuana control, the legislative branch amended and added to the General Health Law and the Federal Criminal Code to allow the use of cannabis for medical, research, and manufacturing purposes.

This chapter also emphasizes the importance of the Mexican Supreme Court's role in deciding whether Articles 235 last paragraph, 237, 245 section I, 247 last paragraph, and 248 of the General Health Law are unconstitutional because they are considered to contravene the fundamental right to free development of personality. For this reason, it issued an agreement regarding the procedure of the General Declaration of Unconstitutionality 1/2018. Such resolutions (A.R.237/2014 and four similar cases) and the declaration of unconstitutionality guidelines regulating cannabis for recreational use impose the legislative branch an obligation to fulfill the request set in the General Declaration of Unconstitutionality 1/2018 regarding the unconstitutionality the articles mentioned. In this regard, it is necessary to consider the obligations that Mexico has assumed by signing several international human rights instruments, which, of course, grant rights and guarantees in favor of all persons. The Mexican government is obligated to defend, promote, safeguard, and ensure human rights and integrate domestic legislation with international treaties.

This dissertation concludes that Mexico has to follow the objectives of the international drug treaties regarding maintaining the protection of public health, public order, and security. However, the reality is that at the national level, the Supreme Court's decision on the marijuana use has prompted the legislative branch to legislate marijuana control from a human rights perspective rather than a criminal law perspective.

**Keywords:** human rights, marijuana, drug control

## General Introduction

### 1. Background

Drug use is linked to the history of humankind. Ancient civilizations show evidence that intoxicating substances were used in magic and religious rituals, and for medicinal and aphrodisiac purposes, among others.<sup>1</sup> However, over the centuries, the original use of drugs has changed. Currently, in many nations, drugs are classified simply as illegal, even if for some cultures they still represent a way to communicate with the gods. This study will focus on cannabis, also known as marijuana. It is essential to remark that marijuana, which is considered a psychotropic, is a drug. A drug is any substance that alters the structure or feature of the organism when introduced into the body.<sup>2</sup> Therefore, it is pharmacologically correct to call any foreign substance that enters the body a drug.<sup>3</sup> This definition includes lawful substances (alcohol, tobacco, medicines, etc.) and illegal substances (cannabis, cocaine, heroin, speed, and others).<sup>4</sup>

In other words, a legal drug is any substance that has been licensed by the government for usage and that, when injected into a live entity, is capable of altering one or more of the organism's functions. Some of these substances are tobacco, alcohol, medicines, and caffeine. In the same way, illegal drugs are any substance that the Government does not authorize the consumption of, purchase, sale, cultivation, or manufacture. When this substance is in the living being, it can modify one or more organisms' functions. Examples of illegal drugs are cannabis, cocaine, amphetamines and derivatives, synthetic drugs, heroin, and liquid ecstasy.

The position in favor of criminalizing illegal drugs dates back to 1909, with the Shanghai Opium Commission. This position was strengthened on the world stage with the prohibitionist policies of US President Richard Nixon and his pronouncement of the "war on drugs," officially announced on June 17, 1971.<sup>5</sup> Furthermore, on December 11, 2006, President Calderon of Mexico declared war on cartels and mobilized 45,000 soldiers to assist him in the fight since organized crime was depleting police personnel through corruption and death threats,

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<sup>1</sup> Brochu S. & Zambrana C. 2005. Globalización Económica y Drogas, *Eguzkilore*, 19, 7-22: 10.

<sup>2</sup> Yoost, B. L., & Crawford, L. R. 2021. *Fundamentals of Nursing E-Book: Active Learning for Collaborative Practice*. Elsevier Health Sciences: 2231..

<sup>3</sup> Pelikan, E. W. 2004. Glossary of Terms and Symbols Used in Pharmacology. Boston University School of Medicine. <https://www.bumc.bu.edu/busm-pm/academics/resources/glossary/> Accessed: May 11, 2021.

<sup>4</sup> Jones, S. E., Oeltmann, J., Wilson, T. W., Brener, N. D., & Hill, C. V. 2001. Binge Drinking among Undergraduate College Students in the United States: Implications for other Substance Use. *Journal of American College Health*, 50 (1): 33-38.

<sup>5</sup> Richard Nixon Foundation. 2016. Public Enemy Number One: A Pragmatic Approach to America's Drug Problem. <https://www.nixonfoundation.org/2016/06/26404/>. Accessed: December 7, 2021.

primarily at the municipal and state level.<sup>6</sup> The attention on this subject has been primarily focused on the illegal markets that control the trafficking, sale, and production of illegal substances, rather than on the harmful effects on the individuals who consume them, based on the sums of money moved by these criminal groups.

In 2017, according to official data from the Report on the Situation of Drug Consumption in Mexico, 2,597 deaths were registered due to the consumption of psychoactive substances.<sup>7</sup> Another source of information on the sociodemographic profile and the relationship between the cause of death related to drug use is the information collected annually by the Epidemiological Surveillance System on Addictions (SISVEA) through the Forensic Medical System (SEMEFO) with a total of 9,723 cases registered in 2018.<sup>8</sup> According to official data from Semáforo Delictivo Nacional 2021, drug consumption does not cease. From January to October 2021, a period in which 7,386 incidents related to drug dealing were reported, compared with 2020, increased by 8%.<sup>9</sup>

This dissertation analyzes the international trends related to marijuana control, particularly in Mexico, since the regulation of marijuana for recreational use is currently being discussed by the legislative branch for the possible decriminalization of marijuana for recreational use. The uses of marijuana can be scientific/medicinal or recreational. Medicinal use is not prohibited at the international level since international treaties allow marijuana for scientific and medicinal purposes. The most common and biologically active constituent of cannabis sativa is delta-9-tetrahydrocannabinol. Several scientific studies have found that the components of cannabis, particularly cannabidiol (CBD) and tetrahydrocannabinol (THC), help relieve pain and improve people's quality of life.<sup>10</sup>

Regarding recreational purposes, international treaties prohibit its use. In the present study, the terms "medical" and "scientific" follow the definition provided by the international documents and the Mexican legislation. The term "recreational" is defined as drug use other

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<sup>6</sup> Johnson, T. 2010. Mexico Rethinks Drug Strategy as Death Toll Soars, *McClatchy Newspapers*. August 12, 2010. <http://www.mcclatchydc.com/2010/08/12/99089/mexicorethinks-drug-strategy.html>. Accessed: September 21st, 2015.

<sup>7</sup> Gobierno de México - Secretaría de Salud & Comisión Nacional contra las Adicciones. 2019. Informe Sobre la Situación del Consumo de Drogas en México y su Atención Integral 2019; <https://www.gob.mx>. Accessed: November 28, 2021.

<sup>8</sup> Gobierno de México - Secretaría de Salud & Comisión Nacional contra las Adicciones. 2019. Informe Sobre la Situación del Consumo de Drogas en México y su Atención Integral 2019; <https://www.gob.mx>. Accessed: November 28, 2021.

<sup>9</sup> RRS & Asociados S.C. 2021. Semáforo Delictivo Nacional. Incidencia Narcomenudeo en México, Octubre 2021. <http://semaforo.com.mx/Semaforo/Incidencia> Accessed: November 27, 2021.

<sup>10</sup> Mechoulam, R. 2012. Cannabis: A Valuable Drug that Deserves Better Treatment. *Mayo Clinic Proceedings*, 87(2): 107-109.

than for medical and scientific purposes. It encompasses doing something for enjoyment and is similar to leisure activities such as travel or playing sports.

Concerning cannabis, it is still a prohibited substance for consumption for recreational purposes. Therefore, the groups that supply it continue to operate the market outside the law. The *World Drug Report 2021* reported that cannabis was the most consumed drug in 2019, and 200 million people consumed it at least once.<sup>11</sup> According to the Mexican *National Survey on Drug, Alcohol, and Tobacco Consumption 2016-2017*, marijuana use rose from 6% in 2011 to 8.6% in 2016.<sup>12</sup>

The prohibition on drugs (like marijuana) is mainly based on the American policy.<sup>13</sup> As a result, the international drug control regime is built around the concept that non-medical or non-scientific drug use should be prohibited. This dissertation will argue the need for a new drug-control system based on scientific knowledge, health policy, social progress, and the protection of human rights. This dissertation will delve deeper into the circumstances surrounding various drug policy viewpoints, particularly marijuana control.

## 2. Methodology

Because this work is based on analyzing the legal rules related to drug control, such as international treaties (Chapter 1), national legislation, and their logical connections or disjunctions via examination of cases (Chapters 2 and 3), the wording and interpretation of future legislation (Chapter 4), as well as existing literature, the scope of this dissertation includes qualitative research. This method allows the author to critically examine the meanings and ramifications of these rules and the concepts that support them.

This dissertation aims to identify why the use of marijuana is, in principle, prohibited by states under international drug conventions. Chapter 1 covers countries that have adopted a *de-facto*<sup>14</sup> system to sell marijuana in some restricted areas. It also illustrates how, in recent times,

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<sup>11</sup> UNODC. 2021. *World Drug Report 2021. Drug Market Trends: Cannabis Opioids*. [https://www.unodc.org/res/wdr2021/field/WDR21\\_Booklet\\_3.pdf](https://www.unodc.org/res/wdr2021/field/WDR21_Booklet_3.pdf) Accessed: November 27, 2021.

<sup>12</sup> Institute of Public Health of the Mexican Federal Government. 2017. *National Drug, Alcohol and Tobacco Consumption Survey National 2016-2017*: 119. <https://www.gob.mx/salud%7Cconadic/acciones-y-programas/encuesta-nacional-de-consumo-de-drogas-alcohol-y-tabaco-encodat-2016-2017-136758> Accessed: February 26, 2022.

<sup>13</sup> Buxton, J. 2010. *The Historical Foundations of the Narcotic Drug Control Regime*. In Loayza, N. and Keefer, P. (eds): *Innocents Bystanders. Developing Countries and the War on Drugs*. Washington, DC: World Bank/Palgrave Macmillan: 61-94.

<sup>14</sup> According to the Legal English website of the School of Law in Washington University in St. Louis, “de facto” and “de jure,” are closely related concepts. “De facto refers to a situation that is true in reality but is not officially sanctioned. De jure, on the other hand, refers to a legal situation that has been sanctioned by the government.” <https://onlinelaw.wustl.edu/blog/legal-english-de-factode->

some states are moving towards deregulation or decriminalization of drugs, like marijuana. The primary documentation analyzed in Chapter 1 is the main three UN Drug Control Conventions: the SCND, the 1971, and the 1988 Conventions. Nevertheless, it also examines the deregulation of recreational marijuana use cases in Uruguay, Canada, and some US states like Colorado and Washington.

In the first part of Chapter 2, this dissertation examines the Mexican drug policy and legislation by reviewing the government's actions to protect public health, public order, and security under in particular, the General Health Law. The second part of Chapter 2 and Chapter 3 presents the judgments of A.R.237/2014 and A.I.1482/2015 on how the recreational use of marijuana and medical marijuana was considered in the human rights context. Finally, Chapter 4 studies the law project for the regulation of cannabis under deliberation in the Mexican Congress. The discussion on marijuana control based on the human rights promotion and protection will be reconfirmed by examining documents on human rights.

### **3. Literature Review**

The approach to the problem of global drug control and the prohibitionist strategy are topics that have been recurrently addressed in academic debates, parliamentary groups in different countries, and international forums. Furthermore, much of the official information on the subject is available directly through UN publications like the World Drug Report 2021. However, it has become evident that there has been an interesting change in publications on global drug control and prohibitionist strategy in recent years, emphasizing drug control with a particular focus on human rights protection.

Among the latter, it is worth highlighting *Legalizing Cannabis: Experiences, Lessons and Scenarios*, a compilation of data by Decorte, Lenton, and Wilkins (2020) that addresses a wide range of evidentiary aspects of law reform policies related to drug control as well as representative events in the history of the fight against drugs and marijuana control. Likewise, this publication has allowed the topics to be expanded by reviewing more comprehensive and specialized works. Beginning with the three most relevant UN Drug Control Conventions, which is one of this research's starting points, Bewley-Taylor, Blickman, and Jelsma (2014), among many others, provide fascinating information on how country relations have always had a significant impact on international drug policies.

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jure/#:~:text=De%20facto%20means%20a%20state,i.e.%20that%20is%20officially%20sanctioned).Accessed: December 31, 2021.

It has become harder to find academic articles attempting to defend the traditional international drug policies and the current regime. Although UNODC documents show that these policies were successful, academics appear to agree that they were a failure. While the International Narcotics Control Board (INCB, 2012, 2014, and 2018) defends the content of the international drug control legal system, some US states and countries, such as Uruguay and Canada, present their legalization for recreational use of marijuana. Furthermore, the Uruguayan government proposed a variety of drug-control tactics, indicating that a more comprehensive human-rights strategy is required. Regarding this point, Bone (2019) argues against the criminal law's suffocation and instead offers a human rights perspective to change our perceptions of drug control challenges in her book *Human Rights and Drug Control A New Perspective*. Bone develops a human rights-based drug control conceptual framework and applies it to both domestic (UK) and international drug control systems. She also uses case law to demonstrate the advantages and disadvantages of successfully implementing this unique approach in practice. The findings point to a bottom-up approach to drug policy that has the potential to reshape prohibition.<sup>15</sup>

The importance of the Supreme Court of Justice of Mexico's decision in 2015, which recognized that recreational marijuana use is legal based on human rights, is the most exciting aspect of the available literature and documentation on this topic. Previous studies have analyzed how drug policies are justified or unjustified by States' goals of public order and health preservation. However, this study looks at how prohibitionist policies can affect individual human rights and how the protection of human rights can influence future policies. In this study, the control of marijuana in Mexico will be analyzed under the lens of the following human rights: the right to dignity, the right to the free development of personality, and the right to the highest attainable standard of health. Dignity can be considered as a fundamental right so that people can freely and autonomously choose their life project in a way that allows them to achieve their goals, where the State cannot undermine or eliminate the individual actions of any person within society, except when there is a preponderant factor of importance that supports it.

How can human rights provide a new view on drug control and point to alternative ideas for regulating drug use? What is the limit to the freedom to the use of marijuana for recreational purposes? Or if marijuana is found to be helpful in treating some serious illnesses, and if the government continues to prohibit it, is this the right course of action for the government to

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<sup>15</sup> Bone, M. 2019. *Human Rights and Drug Control: A New Perspective*. Routledge: 170 -181.



safeguard the right to the highest attainable standard of health? These are just some of the questions which this dissertation shall attempt to answer.

#### **4. Contribution and Limitation**

From a human rights standpoint, this study examines drug control, specifically marijuana. It also discusses the various trends in marijuana control and explains why Uruguay, Canada, and some US states have legalized marijuana for recreational use. The Mexican case discussed in the second chapter in which the Supreme Court opened the door to legalizing marijuana for recreational purposes presented a direct challenge to the federal law that currently prohibits it. The Supreme Court's decision reflects a new dynamic in Mexico, where for decades, the US anti-drug campaign had been a significant force in the drug war. The Mexican case regarding the decriminalization of marijuana has ignited a debate about the effectiveness of incarcerating drug users in a country with some of the most conservative laws in Latin America. Likewise, this study presents a new finding that human rights are analyzed in the decision of the Supreme Court, which determined that the recreational use of marijuana is lawful based on the protection of human rights, specifically the right to the free development of personality. This approach challenges the moral hegemony of the global drug regime and prohibitionist logic. This research contributes to the academic literature dealing with marijuana control and human rights.

However, the first chapter of this study has considerable limitations because it is not centered on a legal review of federal and regional marijuana legislation for all countries that are members of international drug conventions. Since the laws are rapidly changing, some jurisdictions may be excluded; thus, one should consider the cases presented as informative and not necessarily exhaustive, such as Uruguay, Canada, and some US states. In the following chapters, the limitation faced is that in the sense that the jurisprudence analyzed is only applicable to Mexico, and the scope of the human right that was discussed in the judgment of the Supreme Court or Third District Court in Mexico City cannot be applied universally. Nevertheless, even if the judgment, for example, in the case of recreational marijuana use, is only valid for the Mexican people who received permission from the Supreme Court, the study may prove helpful for those studying the issue of drug control under the framework of human rights.

#### **5. Structure of the Study**

An introduction, four main chapters, and a conclusion make up this research. Chapter 1 focuses on global drug regulations and new marijuana usage trends. The new marijuana

trends, which have resulted in marijuana use for recreational purposes being decriminalized in Uruguay, Canada, and several US states, are identified inside the framework of international prohibitionist guidance provided by the UN drug conventions. Chapter 2 reviews Mexican marijuana policy and the protection of public health, public order, and security in Mexico and analyzes one case involving marijuana drug control from a human rights perspective. Chapter 2 mainly focuses on Amparo en Revisión 237/2014 (A.R.237/2014) decided by the Mexican Supreme Court in 2015, which recognizes that the recreational use of marijuana is lawful based on the plaintiff's human rights. This part of the dissertation discusses how the Mexican Supreme Court considered the recreational use of marijuana through the lens of the right to free development of personality, which is tied to human dignity. Chapter 3 focuses on the right to the highest attainable standard of health on marijuana control (medical purposes) by looking into Amparo Indirecto 1482/2015 (A.I.1482/2015) decided by the Third District Court in Mexico City, which recognizes that some provisions of the General Health Law that regulate medical marijuana do not conform with the Mexican Constitution and its human rights protection. Finally, Chapter 4 analyzes the legislative branch's approach to deregulation of marijuana control in Mexico by evaluating the impact of the Supreme Court actions in the Federal Law for the Regulation of Cannabis proposed by the Chamber of Deputies regarding the regulation of cannabis.

## Chapter 1

### World Drug Regulations and New Trends on Marijuana Use

#### Introduction

Many governments began enforcing laws prohibiting the production and circulation of alcohol consumption and psychotropic substances in the early twentieth century.<sup>16</sup> The phenomenon of drug trafficking has been the subject of multiple treaties, conventions, agreements, and decisions of countries, individually and collectively. Likewise, from 1909 to date, the leading international organizations have devoted significant time and resources to addressing such a complex issue.

In the history of the global fight against drugs, a set of factors outside the defense of public health played a role from the start. The current criminal control system for illegal drugs is largely based on rules of public international law governing controlled substances. As influenced by international drug treaties, the international legal system for drug control is assessed and evaluated in this chapter. It also describes why states in principle prohibit the use of marijuana under international drug conventions. In general terms, this chapter covers countries that have adopted a *de facto*<sup>17</sup> system to sell marijuana in some restricted areas. It also illustrates how, in recent times, some states are moving towards deregulation or decriminalization of drugs, like marijuana.

The chapter explores the cases of Uruguay, Canada, and some US states (Colorado and Washington as pioneers) that have joined the Netherlands and other nations, for instance, Portugal, Switzerland, the United Kingdom, and Spain, in adopting policies to allow the use of marijuana, but with the particular characteristics that they had legalized marijuana for recreational use. One of the chapters' goals is to discuss the general trends toward decriminalizing marijuana use, whether for medical or recreational purposes.

The following structure is used to organize this chapter. The first section presents an outline of the regime on drug control established by international drug conventions. The second part provides a description of the different drug policy positions regarding regulating drugs,

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<sup>16</sup> Astorga, L. & Shirk, D. 2010. *Drug Trafficking Organizations and Counter-Drug Strategies in the US-Mexican Context*, Center for US-Mexican Studies: 3-4.

<sup>17</sup> According to the Legal English website of the School of Law in Washington University in St. Louis, "de facto" and "de jure," are closely related concepts. "De facto refers to a situation that is true in reality but is not officially sanctioned. De jure, on the other hand, refers to a legal situation that has been sanctioned by the government." <https://onlinelaw.wustl.edu/blog/legal-english-de-factode-jure/#:~:text=De%20facto%20means%20a%20state,i.e.%20that%20is%20officially%20sanctioned>). Accessed: December 31, 2021.

and particularly, on marijuana control. The third segment of the study identifies the trend in favor of marijuana legalization by presenting an overall view of Uruguay and Canada, the first two countries that fully legalized marijuana, and the current situation in some US states where it is lawful for recreational purposes. Finally, a set of practical lessons from Uruguayan, Canadian, and American regulations are given as pertinent examples to demonstrate current drug control trends.

## **1.1. The International Legal System on Drug Control**

### **1.1.1 Regulation under the UN Drug Control Conventions**

The dangers of narcotic and psychotropic substance abuse and illicit trafficking and ensuring their accessibility and consistent usage for exclusively medical and scientific purposes necessitate extraordinary actions by regulatory authorities in the intervention, control, and surveillance of these substances in all fields, from production to consumption. This effort must be coordinated within the context of ongoing international cooperation and oversight, and it must be guided by the same values and objectives. Leaders of the global drug control legal system agree to align their national drug laws with the provisions of the UN drug conventions, making it illegal to obtain, cultivate, or smuggle drugs listed in its schedules. Also, the parties must work together to combat international drug trafficking. This is how the Single Convention on Narcotic Drugs (SCND) of 1961<sup>18</sup> as amended by the 1972 Protocol<sup>19</sup>, the Convention on Psychotropic Substances of 1971<sup>20</sup>, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988<sup>21</sup> were developed.

To grasp the nature of the three conventions, it helps to be aware of a few central elements that run throughout the history of international drug control as well as the preparation and

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<sup>18</sup> United Nations Treaty Series Online. Single Convention on Narcotic Drugs, 1961. Conclusion date March 30, 1961; Entry into force December 13, 1964. Registration number I-7515. [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280033c8f&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280033c8f&clang=_en) Accessed: February 3, 2022.

<sup>19</sup> United Nations Treaty Series Online. Protocol amending the Single Convention on Narcotic Drugs, 1961. Conclusion date March 25, 1972; Entry into force August 8, 1975. Registration number I-14151. [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280033c8f&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280033c8f&clang=_en) Accessed: February 3, 2022.

<sup>20</sup> United Nations Treaty Series Online. Convention on Psychotropic Substances. Conclusion date February 21, 1971; Entry into force August 16, 1976. Registration number I-14956. [https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800079ad&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800079ad&clang=_en) Accessed: February 3, 2022.

<sup>21</sup> United Nations Treaty Series Online. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Conclusion date December 20, 1988; Entry into force November 11, 1990. Registration number I-27627. [https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280007fbf&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280007fbf&clang=_en) Accessed: February 3, 2022.

execution of the three conventions. For example, influential personalities, such as Colonel C.H.L. Sharman, the Chief of the Canadian Narcotic Service,<sup>22</sup> and Harry J. Anslinger, US Commissioner of Narcotics, were key players.<sup>23</sup> Their ideas, morality, goals, and dedication significantly impacted the international drug control regimes formation. The US has been a major player in most multilateral agreements since the beginning of global drug control initiatives early in the twentieth century.<sup>24</sup> The prohibition on drugs like marijuana is mostly based on American policy.<sup>25</sup> As a result, the international drug control system is founded on the presumption that non-medical or non-scientific uses of drugs should be prohibited. Financial policies, internal and overseas politics, domestic protectionist policies, development aid, armaments control measures, the Cold War, and a variety of corporate agendas are just some of the factors that have influenced and shaped the international drug control system. Another example is that the US, the United Kingdom, and China dominated the preliminary negotiations to the first convention's acceptance. Opium, morphine, heroin, and cocaine for non-medical purposes were prohibited at first, and cannabis was put on the list in 1925 with no scientific investigations of its effects.<sup>26</sup> The following section of this chapter will provide the context in which these conventions were developed, their main objectives, and the requirements for signing states to explain what kind of regime is established under the international drug system.

### **1.1.2 The Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol**

The 1961 SCND (as amended by the 1972 Protocol) consolidated and replaced all previous drug-control legislation, laying the foundation for the current system. The SCND was framed on the legal foundation that was established between 1909 and 1953.<sup>27</sup> The legal development of the SCND is a fascinating topic, but this section of the study has the main

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<sup>22</sup> Sharman, C. H. L. 1930. Narcotic Control in Canada. *The Police Journal*, 3(4): 535-549.

<sup>23</sup> Kinder, D.C. & Walker, W.O. 1986. Stable Force in a Storm: Harry J. Anslinger and United States Narcotic Foreign Policy, 1930-1962, *The Journal of American History*. 72, 4: 908-909.

<sup>24</sup> Astorga, L. & Shirk, D. 2010. *Drug Trafficking Organizations and Counter-Drug Strategies in the US-Mexican Context*, Center for US-Mexican Studies: 3-4.

<sup>25</sup> Buxton, J. 2010. The Historical Foundations of the Narcotic Drug Control Regime. In Loayza, N. and Keefer, P. (eds): *Innocents Bystanders. Developing Countries and the War on Drugs*. Washington, DC: World Bank/Palgrave Macmillan.

<sup>26</sup> Bewley-Taylor, Jelsma & Blickman, T. 2014. The Rise and Decline of Cannabis Prohibition. The History of Cannabis in the UN Drug Control System and Option for Reform. *Transnational Institute*. <https://www.tni.org/en/publication/the-rise-and-decline-of-cannabis-prohibition>. Accessed November 20, 2021.

<sup>27</sup> Buxton, J. 2010. The Historical Foundations of the Narcotic Drug Control Regime. In Loayza, N. and Keefer, P. (eds): *Innocents Bystanders. Developing Countries and the War on Drugs*. Washington, DC: World Bank/Palgrave Macmillan.

objective of examining the regime established under the conventions. Nevertheless, it is essential to note that the SCND maintained the main foundations of the preceding treaties shown in the following table:

**Table 1. Treaties in force prior to the SCND**

<b>Date of Conclusion</b>	<b>Place of Conclusion</b>	<b>Title of the Treaty</b>	<b>Date when the Treaty came into Force</b>
January 23, 1912	The Hague, The Netherlands	The 1912 Hague International Opium Convention	February 11, 1915 (5 countries) and June 28, 1919
February 11, 1925	Geneva, Switzerland	Agreement concerning the Suppression of the Manufacture of, Internal Trade in, and Use of, Prepared Opium	July 28, 1926
February 19, 1925	Geneva, Switzerland	International Opium Convention	September 25, 1928
July 13, 1931	Geneva, Switzerland	Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs	July 9, 1933
November 27, 1931	Bangkok, Thailand	Agreement for the Control of Opium Smoking in the Far East	April 22, 1937
June 26, 1936	Geneva, Switzerland	Convention for the Suppression of the Illicit Traffic in Dangerous Drugs	October 26, 1939 (Registration)
December 11, 1946	Lake Success, New York, United States		December 11, 1946 (entered into force)
December 11, 1946	New York, United States	Lake Success Protocol: Protocol amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925, and 13 July 1931, at Bangkok on 27 November 1931, and at Geneva on 26 June 1936	December 11, 1946
November 19, 1948	Paris, France	Paris Protocol - Protocol Bringing under International Control Drugs Outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, modified by the Protocol signed in Lake Success (New York) on 11 December 1946	December 1, 1949
June 23, 1953	New York, United States	New York Opium Protocol - Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and use of Opium	March 8, 1963

Source: Armenta, A., & Jelsma, M. 2015. The UN Drug Control Conventions A Primer. The Transnational Institute (TNI).

[https://www.tni.org/files/publication-downloads/primer\\_unconventions\\_24102015.pdf](https://www.tni.org/files/publication-downloads/primer_unconventions_24102015.pdf). Accessed: July 22, 2021.

Turning now to the SCND, three primary goals were achieved with the approval of this drug convention. The first goal was to start replacing all of the existing multilateral treaties in

this sector with a single instrument and to reduce the number of international bodies involved in drug control created as a result of those treaties. The second is to make the control regime more adaptable based on the rapid breakthroughs in chemistry and pharmacology. The third is to strengthen drug control by extending it to other areas and, in particular, to the raw materials from which plant-based substances are derived.<sup>28</sup> The SCND designed a global system to regulate the cultivation, manufacturing, distribution, sale, possession, and use of narcotic substances for medical and scientific purposes, focusing on plant-derived compounds like opium, heroin, cocaine, and cannabis (also known as marijuana).<sup>29</sup>

The SCND's Article 4, paragraph (c), outlines the overall regime's fundamental principle, that requires signatory parties to adopt all legislative and other measures needed "to limit to exclusively medical and scientific purposes the production, manufacture, export and import, distribution, trade, use and possession of drugs."<sup>30</sup> Correspondingly and according to their assessed therapeutic usefulness and propensity for addiction, the SCND in Article 2 divides "prohibited substances" into four categories or schedules. Schedule I focuses on drugs that are likely to be abused and cause harm but have potential therapeutic uses; Schedule II focuses on drugs with a lower risk of abuse; Schedule III focuses on exempt preparations of drugs in Schedules I or II, specifically listed formulations; and Schedule IV focuses on drugs that are especially likely to be abused and cause harm. Such a risk is not outweighed by significant therapeutic benefits.<sup>31</sup> Cannabis and cannabis-related substances are located in Schedules I and IV.

Framed by the alarm for "the physical and moral health of mankind," the treaty's guiding principle was to limit the use of narcotic medicines to medical and scientific purposes because, as stated in the preamble, "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind."<sup>32</sup> The classification

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<sup>28</sup> Sinha, J. 2001. *The History and Development of the Leading International Drug Control Conventions*. Library of Parliament. Canada. <https://sencanada.ca/content/sen/committee/371/ille/library/history-e.htm#D.%20Convention%20against%20Illicit%20>

<sup>29</sup> May, H. 1955. The Single Convention on Narcotic Drugs; Comments and Possibilities. *Bulletin on Narcotics*.1: 1-14.

<sup>30</sup> United Nations. 1973. *Commentary on the Single Convention on Narcotic Drugs, 1961*. New York: 108.

<sup>31</sup> United Nations Treaty Collection, Status of Treaties, "Chapter VI: Narcotic Drugs and Psychotropic Substances, Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, New York, 8 August 1975". [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf) Accessed: July 23, 2021.

<sup>32</sup> United Nations Treaty Collection, Status of Treaties, "Chapter VI: Narcotic Drugs and Psychotropic Substances, Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, New York, 8 August 1975": 81. [https://treaties.un.org/doc/Treaties/1964/12/19641213%2002-14%20AM/Ch\\_VI\\_15.pdf](https://treaties.un.org/doc/Treaties/1964/12/19641213%2002-14%20AM/Ch_VI_15.pdf). Accessed: March 26, 2022.

and inclusion of various plants and their derivatives in the control lists were not always based on scientific studies. Instead, they assumed that all narcotic drugs were equally dangerous until proven otherwise.<sup>33</sup> Similarly, reports against non-Western customs were sometimes used to assess the dangers of the mentioned substances.<sup>34</sup> For example, the coca leaf was included in Schedule I, and cannabis was incorporated in Schedules I and IV. As it was mentioned, the narcotics reserved for Schedule IV indicate the most dangerous substances.<sup>35</sup> For the first time in drug control history, the provisions relating to cannabis are conducive to the complete prohibition of cultivation, trading, and consumption.<sup>36</sup> Cannabis, as with any substance included in Schedule IV, and because of its “particularly dangerous properties” under Article 2, paragraph 5, section b, shall be subject to a complete ban on its cultivation, trade, and consumption, except for medical and scientific uses.<sup>37</sup> The following is stated in paragraph 1 (f) of Article 49:

“(f) The use of cannabis for other than medical and scientific purposes must be discontinued as soon as possible but in any case within twenty-five years from the coming into force of this Convention as provided in provided in paragraph 1 of article 41.”<sup>38</sup>

Paragraph 2 (e) reads that:

“(e) Coca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention as provided in paragraph 1 of article 41.”<sup>39</sup>

Prohibition of the use of cannabis, cannabis resin, extracts, and tinctures of cannabis for non-medical intentions, additionally to the complete prohibition of coca leaf chewing, shall be carried out as shortly as possible after the treaty enters into force, preferably within 25 years. The limit for prohibiting non-medical cannabis and coca leaf chewing, which had been in place

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<sup>33</sup> Bewley-Taylor, D., & Jelsma, M. 2011. Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation. *Series on Legislative Reform of Drug Policies*, 12: 1-20

<sup>34</sup> Buxton, J. 2010. The Historical Foundations of the Narcotic Drug Control Regime. In Loayza, N. and Keefer, P. (eds): *Innocents Bystanders. Developing Countries and the War on Drugs*. Washington, DC: World Bank/Palgrave Macmillan.

<sup>35</sup> United Nations. 1973. Commentary on the Single Convention on Narcotic Drugs, 1961. New York: 49-73.

<sup>36</sup> Sánchez-Avilés, C. & Ditrych, O. 2018. The Global Drug Prohibition Regime: Prospects for Stability and Change in an Increasingly Less Prohibitionist World. *International Politics* 55: 463–481: 4.

<sup>37</sup> United Nations. 1973. Commentary on the Single Convention on Narcotic Drugs, 1961. New York: 64.

<sup>38</sup> United Nations. 1973. Commentary on the Single Convention on Narcotic Drugs, 1961. New York: 468.

<sup>39</sup> United Nations. 1973. Commentary on the Single Convention on Narcotic Drugs, 1961. New York: 469.



since the SCND's inception in 1964, expired in 1989. Finally, it should be noted that Article 8 of the SCND sets out to rationalize international drug control mechanisms by reorganizing their administration within the United Nations: "The Commission is authorized to consider all matters pertaining to the aims of this Convention..."<sup>40</sup> In 1968, the International Narcotics Control Board (INCB) was founded in accordance with the SCND for the purpose of "monitoring and supporting Governments' compliance with the international drug control treaties."<sup>41</sup>

### **1.1.3 The Convention on Psychotropic Substances of 1971**

In the late 1950s and 1960s, the prohibitionist model underwent significant changes in Western countries, particularly in the US.<sup>42</sup> Counterculture movements such as the beatniks first, and the hippies later, reflected the reemergence of American drug culture.<sup>43</sup> This American drug culture was based on liberalism with an emphasis on the individual rights of fully responsible and autonomous adults, who, as free and sovereign, should be entitled to a sphere of freedom and untouchable self-determination. In the 1960s, drug use expanded among American youth throughout the hippie counterculture movement generation, a response to the restrictions of previous generations that had condemned the usage of alcohol and drugs. Hippies tried to reject the traditional values of their parents and opposed rules established by the government, forming their own culture, beliefs, and values. The use of drugs and music were symbols of rebellion and political discontent caused by the Vietnam War. Consequently, this ran into a general increase in the use of cannabis and other drugs like lysergic acid diethylamide (LSD). Since 1967, before the widespread use of marijuana, a heroin epidemic and a few seizures led to the entire reorganization of drug policy to that of prevention and repression.

For some States involved in creating the international drug control regime, it soon became apparent that these new types of synthetic substances, not covered by the SCND, needed to be taken under control and that a new treaty was needed to include synthetic substances such as amphetamine-type stimulants, hallucinogens such as LSD, ecstasy, or 3,4-

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<sup>40</sup> United Nations. 1973. Commentary on the Single Convention on Narcotic Drugs, 1961. New York: 125.

<sup>41</sup> INCB (International Narcotic Control Board). <https://www.incb.org/> Accessed July 22, 2021.

<sup>42</sup> National Research Council (US) Panel on Alternative Policies Affecting the Prevention of Alcohol Abuse and Alcoholism. In Moore M. & Gerstein D. (ed.): *Alcohol and Public Policy: Beyond the Shadow of Prohibition*. Washington (DC): National Academies Press (US); 1981. Temperance and Prohibition in America: A Historical Overview. Available from: <https://www.ncbi.nlm.nih.gov/books/NBK216414/> Accessed: November 20, 2021.

<sup>43</sup> Howard, J. R. 1969. The Flowering of the Hippie Movement. *The Annals of the American Academy of Political and Social Science*, 382(1): 43-55. <http://www.jstor.org/stable/1037113> Accessed: November 20, 2021.

methylenedioxymethamphetamine (MDMA) as sedatives, anxiolytics, analgesics, and antidepressants.<sup>44</sup> The SCND was considered as outdated, and its amendment was inevitable.

In January 1970, the UN Division of Narcotic Drugs presented a draft convention on the international control of psychotropic substances, which was evaluated by the Commission on Narcotic Drugs (CND).<sup>45</sup> The negotiations at the plenipotentiary conference in Vienna in July 1971 were based on this document. The states that produced the raw plant materials preferred strict controls on the production of psychotropic substances, similar to those they had to accept in SCND. Because of medical and scientific reasons, trade in such medications and substances cannot be eliminated.<sup>46</sup> Countries with a strong pharmaceutical industry, on the other hand, were hesitant to impose strict international controls on synthetic substances, preferring instead to impose national controls that would not impede international trade. Because these commodities have such vital applications, they become more marketable, necessitating a consistent supply to match demand.<sup>47</sup> The Conference on Psychotropic Substances resulted in the 1971 Convention on Psychotropic Substances (1971 Convention).

The 1971 Convention's primary purposes were to bring control of psychotropic substances (Article 2: Scope of the control substances) and their preparations (Article 3: Control preparations) under international control and reduce the illicit traffic in them.<sup>48</sup> This Convention expanded international control to include more than 100 synthetic substances.<sup>49</sup> In addition, as mentioned earlier, the 1971 Convention had as its objective the reorganization of the entire drug policy with a dual commitment such as prevention (Article 20: Measures against the abuse of psychotropic substances) and repression (Article 22: Penal provisions).<sup>50</sup>

The 1971 Convention is concerned with the control of Psychotropic Substances and specific terms on their preparations. As the title suggests, its primary goal is to bring these medicines and preparations under international drug control regulations. The 1971 Convention

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<sup>44</sup> Madras, B.K. 2016 The Growing Problem of New Psychoactive Substances (NPS). In: Baumann M., Glennon R., Wiley J. (eds) *Neuropharmacology of New Psychoactive Substances (NPS)*. Current Topics in Behavioral Neurosciences, vol 32. Springer, Cham: 1-18.

<sup>45</sup> Chatterjee, S. K. 1981. *Legal Aspects of International Drug Control*. Springer: 494

<sup>46</sup> Chatterjee, S. K. 1981. *Legal Aspects of International Drug Control*. Springer: 494

<sup>47</sup> McAllister, W. 1991. Conflicts of Interest in the International Drug Control System, *Journal of Policy History*, 4(3): 494-517.

<sup>48</sup> Chatterjee, S. K. 2013. *Legal Aspects of International Drug Control*. Springer: 494.

<sup>49</sup> United Nations Treaty Collection, Status of Treaties. 1971. Chapter VI: Narcotic Drugs and Psychotropic Substances, Convention on Psychotropic Substances, Vienna, 21 February 1971.

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-16&chapter=6&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-16&chapter=6&clang=_en)  
Accessed: July 23, 2021.

<sup>50</sup> Meier, K. J. 1994. *The Politics of Sin: Drugs, Alcohol and Public Policy*. ME Sharpe.

is based on the SCND in most ways. One of its main goals is to combat drug misuse in a more comprehensive way than the SCND.

The following section carries out a comparison between these two conventions, specifically, it will point out some of the similarities and differences between these treaties. Article 2 of the 1971 Convention is modeled after Article 3 of the SCND in terms of procedure. Even though these two Conventions have substantial differences, they both compel the Commission and the World Health Organization (WHO) to behave in similar ways. The 1971 Convention, like the SCND, provides for measures to ensure the execution of the Convention's terms and sanctions in the event of any Contracting Party's default, and the Board has primary responsibility in this regard (Articles 18 and 19). The section about measures against illicit traffic (Article 21) in the 1971 Convention is nearly identical to the relevant item in the SCND (Article 35). Nevertheless, the scope of the provisions concerning the carriage of psychotropic substances in first aid kits under the 1971 Convention is much broader than the corresponding provision in the SCND (Article 32). The 1971 Convention covers first aid kits of ships or aircraft and other forms of public transportation engaged in international traffic and where the term "psychotropic substances" means any substance, natural or synthetic, or any natural material in Schedule I, II, III, or IV of the 1971 Convention, while the SCND always employs the term "drug" in reference to a substance listed in its Schedules I or II.<sup>51</sup>

The following table presents similarities between the preambles of the SCND and the 1971 Convention concerning control of trade and traffic in narcotic drugs. The Preamble sets the tone for the body of the Conventions. It communicates the intentions of the authors, and the purpose of the document describes why it is adopted and explains what is provided for. The "preamble" effectively conveys the concept that this provision does not confer or define government authority or citizen rights. These are outlined in the wording of the Convention's main body. Preambles to legal documents are not substantial provisions in and of themselves and should not be interpreted to contradict, expand, or contract the substantive elements of the document.

**Table 2. Comparison between the 1961 SCND and 1971 Convention on Psychotropic Substances Preambles of the SCND concerning Control of Trade and Traffic in Narcotic Drugs**

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<sup>51</sup> UNODC. Commentary on the Convention on Psychotropic Substances. International Drug Conventions - [https://www.unodc.org/documents/commissions/CND/Int\\_Drug\\_Control\\_Conventions/Commentaries-OfficialRecords/1971Convention/1971\\_COMMENTARY\\_en.pdf](https://www.unodc.org/documents/commissions/CND/Int_Drug_Control_Conventions/Commentaries-OfficialRecords/1971Convention/1971_COMMENTARY_en.pdf) Accessed: November 20, 2021.

1961 SCND Preamble <sup>52</sup>	1971 Convention Preamble <sup>53</sup>
“Concerned with the health and welfare of mankind,”	“Being concerned with the health and welfare of mankind...”
“Recognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes,” “Recognizing that addiction to narcotic drugs constitutes a <i>serious evil</i> for the individual and is fraught with social and economic danger to mankind,” (emphasis added)	“Recognising that the use of psychotropic substances for medical and scientific purposes is indispensable and that their availability for such purposes should not be unduly restricted,”
“ <i>Conscious of their duty to prevent and combat this evil,</i> ” (emphasis added)	<b>* No text related to preventing and combating psychotropic substances.</b>
“Considering that effective measures against abuse of narcotic drugs require co-ordinated and universal action,”	“Believing that effective measures against abuse of narcotic drugs require co-ordinated and universal action,”

From the preambles of SCND and the 1971 Convention, it can be observed that the concern for “the health and welfare of mankind” is equally found in both texts, but the 1971 Convention does not qualify the abuse of psychotropic substances as a “serious evil” as was done with narcotic substances. Both preambles focus on the modern discourse on economic, social, and cultural rights: health and welfare. The SCND, in contrast, views narcotic drug addiction as a type of evil. According to Lines, this phrasing is essential in the context of international treaty law since the SCND is the only United Nations instrument that characterizes the conduct it intends to regulate, limit, or ban as evil.<sup>54</sup> The term “evil” had been used in previous treaty negotiations and in the SCND itself, and it survived in the final text.<sup>55</sup>

According to Koram, the language of the preamble carries not only theoretical but legal weight because it is not “a mere formal introduction, but refers to the substance of a treaty.”<sup>56</sup> The preamble’s use of the word “evil” provides the key to deciphering the treaty’s claim to rational objectivity. The use of scientific authority to mask an ideology has been a favorite tool

<sup>52</sup> United Nations Treaty Collection, Status of Treaties, “Chapter VI: Narcotic Drugs and Psychotropic Substances, Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, New York, 8 August 1975”.  
[https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf) Accessed: July 23, 2021.

<sup>53</sup> United Nations Treaty Collection, Status of Treaties. 1971. Chapter VI: Narcotic Drugs and Psychotropic Substances, Convention on Psychotropic Substances, Vienna, 21 February 1971.  
[https://treaties.un.org/doc/Treaties/1976/08/19760816%2008-16%20AM/Ch\\_VI\\_16p.pdf](https://treaties.un.org/doc/Treaties/1976/08/19760816%2008-16%20AM/Ch_VI_16p.pdf) Accessed: July 23, 2021.

<sup>54</sup> Lines, R. 2011. Deliver us from evil? The Single Convention on Narcotic Drugs, 50 years on. *International Journal on Human Rights and Drug Policy*, 1: 3-13.

<sup>55</sup> Bewley-Taylor, D., & Jelsma, M. 2012. Regime Change: Re-visiting the 1961 Single Convention on Narcotic Drugs. *International Journal of Drug Policy*, 23(1): 72-81.

<sup>56</sup> Koram, K. 2018. Encryption within Prohibition. In Ricardo Sanín-Restrepo (ed): *Decrypting Power*: 113.

of structures of oppression since the dawn of modernity. Koram mentions that the language of a theological ontology was used in the preamble of the SCND, recognized by the word “evil.” The use of this word in the preamble of the 1971 Convention, on the other hand, would not have been appreciated. If this word were used, it would have raised questions as to the objectivity of the treaty, suggesting that there are meanings beyond those that are of simple understanding or that are described in the treaty.<sup>57</sup>

Interestingly, the word “evil” has been used in the US, during the 1900s, by groups like the Woman’s Christian Temperance Union.<sup>58</sup> This group advocated for the prohibition of alcohol and gathered to protest and change American society’s moral ills, such as alcohol, gambling, and other addictions. During the 1930s, the anti-marijuana campaign was very active, and cinema joined in with films like “Marihuana: Assassin of Youth” (1935), “Reefer Madness” (1936), and “Marihuana: The Devil’s Weed” (1936), all of which promoted marijuana’s demonization.<sup>59</sup>

The 1971 Convention has four control schedules like the SCND. However, their nature and organization differ significantly from the SCND’s. Schedule IV, for example, is the most rigorous in the SCND and corresponds to the 1971 Convention’s Schedule I.<sup>60</sup> Furthermore, the SCND’s schedule includes not only the basic chemicals but also their salts, esters, ethers, and isomers, as well as derivatives. On the contrary, derivatives were absent from the 1971 Convention’s schedules. However, this omission has been corrected during the next decade by the INCB and Division of Narcotic Drugs.<sup>61</sup>

In addition, in the early 1970s, a new phase in the US war on drugs began.<sup>62</sup> President Nixon declared that “America’s public enemy number one in the United States is drug abuse

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<sup>57</sup> Koram, K. 2018. Encryption within Prohibition. In Ricardo Sanín-Restrepo (ed): *Decrypting Power*: 113.

<sup>58</sup> Tyrell, I. 1991. *Woman’s World/Woman’s Empire: The Woman’s Christian Temperance Union in International Perspective, 1880-1930*. University of North Carolina Press, Chapel Hill and London: 156.

<sup>59</sup> Harcourt, B. & Ludwig, J. Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989–2000. *John M. Olin Law & Economics Working Paper No. 371, 2006*: 13. Retrieved from: The Law School -The University of Chicago website: <http://www.law.uchicago.edu/files/files/317.pdf> Accessed: October 30, 2021.

<sup>60</sup> Sinha, J. 2001. *The History and Development of the Leading International Drug Control Conventions*. Library of Parliament. Canada. <https://sencanada.ca/content/sen/committee/371/ille/library/history-e.htm#D.%20Convention%20against%20Illicit%20Traffic%20in%20Narcotic%20Drugs%20and%20Psychotropic%20Substances> Accessed December 31, 2021.

<sup>61</sup> Sinha, J. 2001. *The History and Development of the Leading International Drug Control Conventions*. Library of Parliament. Canada. <https://sencanada.ca/content/sen/committee/371/ille/library/history-e.htm#D.%20Convention%20against%20Illicit%20Traffic%20in%20Narcotic%20Drugs%20and%20Psychotropic%20Substances> Accessed December 31, 2021.

<sup>62</sup> Sinha, J. 2001. *The History and Development of the Leading International Drug Control Conventions*. Library of Parliament. Canada. <https://sencanada.ca/content/sen/committee/371/ille/library/history-e.htm#D.%20Convention%20against%20Illicit%20Traffic%20in%20Narcotic%20Drugs%20and%20Psychotropic%20Substances> Accessed December 31, 2021.

and that in order to fight and defeat this enemy, it is necessary to wage a new, all-out offensive.”<sup>63</sup> The phrase “war on drugs,” mentioned by President Nixon for the first time,<sup>64</sup> was used for almost forty years in different US Administrations to combat the American black market on drugs. At the same time, its objective was to strengthen the SCND by amending the abuse prevision provision of the SCND and giving origin to the protocol amending SCND of 1961.<sup>65</sup> Although various articles were amended in the 1972 protocol, concerns such as the need for drug addict treatment and rehabilitation and the importance of building demand prevention tactics were included in general.<sup>66</sup> As a result of these changes, states began to recognize that the international drug control regime should focus not just on reducing supply through repressive measures but also on treating the social and health components of the global drug problem.

#### **1.1.4 The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988**

In response to rising concern about the issue of illicit drug trafficking, negotiations on a new international treaty started in the late 1980s. The demand for cannabis, cocaine (in hydrochloride and crack form), and heroin expanded in the US and Europe. The goal of these negotiations was to implement increasingly repressive methods to target all areas of illicit drug manufacture, possession, and trafficking.

In 1984, the UN General Assembly passed Resolution 39/141, directing the CND to draft a convention that would address all aspects of the illicit drug trafficking problem, including those not addressed by existing international instruments.<sup>67</sup> The intention was to provide an additional “trafficking-specific” layer to the drug control system to supplement the SCND and the 1971 Convention. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention) was signed on December 20, 1988, in

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<sup>63</sup> Law Enforcement Action Partnership. 2011. *40th Anniversary of the War on Drugs*, LEAP: 4., <https://lawenforcementactionpartnership.org>; Accessed: November 14, 2014.

<sup>64</sup> Whitford A.B & Yates, J. 2003. Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs. *Journal of Politics*. 65: 998.

<sup>65</sup> Law Enforcement Action Partnership. 2011. *40th Anniversary of the War on Drugs*, LEAP: 4., <https://lawenforcementactionpartnership.org>; Accessed: November 14, 2014.

<sup>66</sup> United Nations. 1972. Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961'. [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-17&chapter=6&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-17&chapter=6&clang=_en) Accessed August 30, 2021.

<sup>67</sup> UN General Assembly. 1984. Draft Convention against Traffic in Narcotic Drugs and Psychotropic Substances and Related Activities, 14 December 1984, A/RES/39/141. <https://undocs.org/en/A/RES/39/141> Accessed: March 29, 2022.

Vienna.<sup>68</sup> There was a relative consensus among participants that illicit drug trafficking was an issue that transcended national jurisdictions and required international cooperation. The preamble of the 1988 Convention presents a shift in the priorities of the international communities, changing the emphasis of efforts towards the elimination of illicit trafficking.<sup>69</sup>

With respect to the 1988 Convention's goal, it could be said that it has a dual purpose. On the one hand, it aims to promote international criminal cooperation between the Parties for offenses relating to illicit controlled substance trafficking. International criminal cooperation is established in Articles 4 (Jurisdiction), 6 (Extradition), and 7 (Mutual Legal Assistance). On the other hand, the treaty seeks to establish a series of obligations that States must incorporate into their domestic criminal law, reflected in Article 3 (Offence and Sanctions), which obligates the signatory Parties to establish as criminal offenses in their domestic law all aspects related to illicit trafficking in the substances controlled by the two previous conventions. It is essential to mention that the 1988 Convention separately addresses conduct related to personal consumption in Article 3, paragraph 2, which requires states to make the possession, procurement, and cultivation of narcotic or psychotropic substances for personal consumption criminal offenses.

“2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be 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.”<sup>70</sup>

With the adoption of the 1988 Convention, the emphasis on law enforcement and repression became even more clearly pronounced, and consumption of controlled substances

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<sup>68</sup> United Nations Treaty Collection, Status of Treaties, “Chapter VI: Narcotic Drugs and Psychotropic Substances, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988”. [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en) Accessed: July 23, 2021.

<sup>69</sup> Stewart, D. P. 1989. Internationalizing the War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. *Denver Journal of International Law & Policy*, 18: 387.

<sup>70</sup> United Nations Treaty Collection, Status of Treaties, “Chapter VI: Narcotic Drugs and Psychotropic Substances, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988”. [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en) Accessed: July 23, 2021.

was no longer solely a matter of national policy.<sup>71</sup> The criminal control of activities related to these substances became increasingly important in controlling illicit trade. As a result of this shift, international drug control conventions are now predominantly focused on crime prevention. As the name implies, the primary purpose of the 1988 Convention was to serve as a legal instrument to combat illicit narcotics trafficking around the world.

### **1.1.5 UN Drug Conventions Legal Framework: What Is the Limit?**

The international framework for drug control is restrictive in terms of production, possession, and use. How is it the case then that now some countries have legalized drugs such as marijuana? How has a prohibitionist policy changed to a policy where marijuana has been legalized? According to the SCND, as revised by the 1972 Protocol, in Article 36, paragraph 1, subparagraphs (a) and (b), dedicated to Penal Provisions, the state's response to consumers and addicts may or may not involve the criminal justice system.

“1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, *shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.*

(b) Notwithstanding the preceding sub-paragraph, when abusers of drugs have committed such offences, *the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38.*”<sup>72</sup> (emphasis added)

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<sup>71</sup> Thoumi, F. 2011. Los Sueños de Reformar las Políticas contra las Drogas y el Régimen Internacional de Control de Drogas (The Dreams of Reform Policies on Drugs and the International Drug Control Regime). *Oasis*. 16.

<sup>72</sup> United Nations. 1972. Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961. [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-17&chapter=6&clang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-17&chapter=6&clang=en). Accessed: August 30, 2021.



This article contains a generic provision whereby the States Parties undertake to adopt the appropriate measures to guarantee that activities mentioned in Article 36, paragraph 1, subparagraph (a), related to narcotic drugs are considered crimes if committed intentionally and that serious crimes are adequately punished, especially with prison sentences. However, the criminality is not a sole obligation upon the contracting state, because in subparagraph (b) of the same article, it is stated that when persons who abuse narcotic drugs have committed such offenses, the parties may, instead of convicting or punishing them criminally, or in addition to convicting or punishing them, subject them to treatment, education, post-treatment, rehabilitation, and social readaptation measures, following the provisions of Article 38, paragraph 1, which refers to the parties giving special attention to drug abuse prevention, as well as the quick detection, treatment, education, post-treatment, rehabilitation, and social readaptation of the people concerned.

As a result, it is clear how, under SCND, as amended by the 1972 Protocol, an occasional user or addict who was arrested with a narcotic drug, marijuana, for example, even with a quantity more significant than that necessary for personal and immediate consumption, could be exempted from criminal penalties, provided that he or she undergoes treatment, education, post-treatment, rehabilitation, and social readaptation measures. For its part, the 1971 Convention has a similar regulation, in Article 22, paragraph 1, subparagraph (a), stating that each party shall consider as an offense if committed intentionally, any act contrary to any law or regulation adopted in compliance with the obligations imposed by the Convention and shall provide that serious offenses shall be punished in an appropriate manner, especially by imprisonment or other deprivation of liberty. However, subparagraph (b) of the same article states that when persons who abuse psychotropic substances have committed such offenses, the parties may, instead of convicting them or punishing them criminally, or in addition to punishing them, subject them to treatment, education, post-treatment, rehabilitation, and social readaptation measures, following the provisions of Article 20, paragraph 1.<sup>73</sup>

The 1988 Convention, in Article 3, Offences and Penalties, contains the commitment of the States Parties to criminally punish a long list of activities related to narcotic drugs and psychotropic substances, such as their production, manufacture, extraction, preparation, supply, sale, distribution, transportation, conversion or concealment of funds derived from these illicit

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<sup>73</sup> United Nations Treaty Collection, Status of Treaties. 1971. Chapter VI: Narcotic Drugs and Psychotropic Substances, Convention on Psychotropic Substances, Vienna, 21 February 1971. [https://treaties.un.org/doc/Treaties/1976/08/19760816%2008-16%20AM/Ch\\_VI\\_16p.pdf](https://treaties.un.org/doc/Treaties/1976/08/19760816%2008-16%20AM/Ch_VI_16p.pdf) Accessed: July 23, 2021.

activities, among others. Furthermore, in Article 3, paragraph 4, subparagraph (b), the parties may provide other measures in addition to the conviction or sentence to apply. These measures can be education, rehabilitation, or social reintegration, as well as where the offender is a drug addict, treatment and post-treatment, and that in subparagraph (d), the parties may, either in substitution for a conviction or sentence for an offense established by Article 3, paragraph 2 or in addition to such conviction or sentence, provide for measures of treatment, education, post-treatment, rehabilitation or social reintegration of the offender.<sup>74</sup> Another aspect to consider is the medical and scientific use of narcotic drugs and psychotropic substances. The parties must take all legislative and administrative measures necessary to limit the production, manufacture, export, import, distribution, trade, use, and possession of narcotic drugs and psychotropic substances exclusively for medical and scientific purposes, according to Article 4 of the SCND and Article 5 of the 1971 Convention.<sup>75</sup>

The regulatory structure of the UN Drug Conventions is restrictive in terms of production, possession, and use, as discussed in this section, but other options exist under current rules. In the international framework for drug control, it is conceivable to give a non-criminal response and treatment for a particular type of minor consumers, and to another group of consumers, who may possess quantities less than those indicated for personal use, the opportunity to suspend the probation process, provided that in both cases they submit to specific counseling or treatment measures. Nevertheless, questions remain in relation to countries that have adopted means of regulation other than prohibition. In the following section, we will explore what means of control are currently in place around the world.

## **1.2. International Drug Control**

### **1.2.1 Current Regimes**

The problem associated with illicit drug use coincides with European colonial expansion and the consolidation of capitalism. In 1909 the prohibitionist impulse mainly on opium consumption and on which the international conventions were derived was consolidated in an international conference in Shanghai, China, to discuss the world's narcotics crisis.<sup>76</sup> One of

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<sup>74</sup> United Nations Treaty Collection, Status of Treaties, "Chapter VI: Narcotic Drugs and Psychotropic Substances, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988". [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en) Accessed: July 23, 2021.

<sup>75</sup> United Nations Treaty Collection, Status of Treaties. 1971. Chapter VI: Narcotic Drugs and Psychotropic Substances, Convention on Psychotropic Substances, Vienna, 21 February 1971. [https://treaties.un.org/doc/Treaties/1976/08/19760816%2008-16%20AM/Ch\\_VI\\_16p.pdf](https://treaties.un.org/doc/Treaties/1976/08/19760816%2008-16%20AM/Ch_VI_16p.pdf) Accessed: July 23, 2021.

<sup>76</sup> UNODC. This Day in History: The Shanghai Opium Commission, 1909.

the most apparent consequences of today's dominant punitive regime is the increase in the population incarcerated for crimes related to drug trafficking, even without counting the violent crimes also associated with this peculiar market. In this situation, there is now a growing climate of opinion, at least in the West, that assumes the failure of the prohibitive and punitive model that dominates international drug control and would like to see alternatives designed.

On the one hand, analyses on crime rates, car crashes, prices, work opportunities, and state budgets have been published by the pro-legalization movement. In the African Region, on the other hand, the ban is regarded as adequate and its implementation as successful.<sup>77</sup> The purpose of the following section is to reveal an understanding of the dynamics and the available options regarding the legal status of drugs. It also distinguishes three leading positions regarding the legal status of the trade and consumption of the illegal drugs most in demand: prohibition or a penal system that prevails worldwide; decriminalization; the progressive legalization of use, production, and trade of some drugs, like marijuana.

### **1.2.2 Prohibition**

The objective of prohibition regimes is to reduce drugs to the point of eradicating all non-legitimate use of drugs on controlled schedules. The only legitimate use is medical and scientific research use, and quite a few illegal drugs are not recognized as having any legitimate use. All use is then considered abuse.<sup>78</sup> It could be said that the conventions on drug control are clear evidence of the regulation of narcotics that have emerged. The punitive-prohibitive model can be based on very diverse cultural, ethical, and religious assumptions, but the emphasis is always placed on monitoring, prosecuting, and punishing transgressors. As a result of prohibitionist government policies, scientific information demonstrating the actual effects of different kinds of drugs are not being shared, which prevents a research-based approach to marijuana.

In 2008, the UNODC estimated that Colombia was involved in 48% of the world's cocaine production, and the primary user of the drug is the US which, as a consequence, has led to violence caused by drug dealing activities in the American continent.<sup>79</sup> This situation of

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<https://www.unodc.org/unodc/en/frontpage/this-day-in-history-the-shanghai-opium-commission-1909.html>  
Accessed: September 23, 2021.

<sup>77</sup> Ghiabi, M. 2018. Deconstructing the Islamic Bloc: The Middle East and North Africa and Pluralistic Drugs Policy. In Klein, A. and Stithard, B. (ed): *Collapse of the Global Order on Drugs: From UNGASS 2016 to Review 2019*. Emerald Publishing Limited.

<sup>78</sup> Ghodse, H. 2008. *International Drug Control into the 21st Century*. Ashgate Publishing, Ltd.

<sup>79</sup> UNODC. 2009. *World Drug Report*. United Nations New York, New York  
<https://www.unodc.org/unodc/en/data-and-analysis/WDR-2009.html> Accessed: March 29, 2022.

violence that has become intolerable for countries that are part of the American continent is what has given rise to the search for more alternatives to end the violence caused by the control of drug trafficking markets.<sup>80</sup> On the issue of regulation, two positions stand out: the prohibitionists and the reformists. The stand of the prohibitionist is a position that negates any possibility of experimentation with other alternatives and therefore implies that 100% control of drug markets will always remain in the hands of criminal organizations. On the other hand, the reformist position favors change and lists the social benefits that a shift in drug control policies would bring. The following table summarizes the differences between these two positions:<sup>81</sup> Overall, the prohibition on marijuana has the positive aspect of decreasing accessibility to the drug, but on the contrary, it increases criminality, incarceration, and black markets.

**Table 3. Prohibitionist vs. Reformist Positions**

	Prohibitionist Position	Reformist Position
Drug Control Implementation	The implementation of prohibition prevents people from producing, trafficking, and distributing drugs.	Drug prohibition has created other social problems such as violent gangsterism and other gun-related crimes.
Self- determination	The goal should be to wean everyone off illegal drug use.  Drug abuse is a problem in any form.	People have always used drugs and always will. Therefore, policies must recognize this reality.  The abuse of drug use is problematic, but just as most people who drink alcohol are not alcoholics, the most significant proportion of people who use drugs are not addicts.
Ability to Control	State institutions regulate drugs adequately, and drug prohibition is effective in dismantling organized criminal enterprises.	Prohibition is not effective in suppressing drug cartels.
War on Drugs	The drug war defends citizens from drug trafficking gangs.	The drug war does not protect children. On the contrary, it exposes them to risks in multiple aspects—violence on

<sup>80</sup> Jenner, M. S. 2011. International Drug Trafficking: A Global Problem with a Domestic Solution. *Indiana Journal of Global Legal Studies*, 18 (2): 901-927.

<sup>81</sup> Seddon, T. 2011. Regulating Global Drug Problems. *RegNet Research Paper* (2013/6).

		the streets and early recruitment from drug trafficking groups, among others.
Health Protection	The ban protects health.	An issue of implementation could generate an illegal drug market. The sales of a drug without the previous approval of the Secretary of Health could cause more harm. For example, the case of alcohol prohibition in the US from 1920 until 1933.

Source: Adapted from Seddon, T. 2011. Regulating Global Drug Problems. *RegNet Research Paper* (2013/6).

### 1.2.3 Decriminalization of Use of Marijuana

Decriminalization refers to the removal of criminal penalties, and replace it for fines and warnings for certain behaviors such as possessing tiny amounts of a controlled substances like marijuana, as well as, in some situations, cultivating cannabis for personal use.<sup>82</sup> According to Jesseman and Payer, decriminalization is not a simple approach; rather, it describes a range of principles, policies, and practices that can be implemented in various approaches such as “de facto” and “de jure.”<sup>83</sup> This model also places great emphasis, both rhetorically and in terms of public policy, on investment in drug treatment and prevention of drug use, generally based on publicity efforts and school-based training and information programs. To put it another way, if citizens are caught with modest amounts of drugs for personal use, they will not face criminal charges even if the usage of the substance is still prohibited. According to Drug Policy Alliance, decriminalizing drug possession and focusing efforts on treatment and harm reduction services can benefit public health and safety by lowering criminal justice costs, increasing drug treatment uptake, and, as a result, lowering the number of people arrested and incarcerated.<sup>84</sup>

It is essential to mention that decriminalization is not legalization. The removal of all legal restrictions is part of the legalization process. Cannabis, for example, would be available for purchase and use at will by the general adult population, just like tobacco and alcohol. In

<sup>82</sup> Grucza, R. A., Vuolo, M., Krauss, M. J., Plunk, A. D., Agrawal, A., Chaloupka, F. J., & Bierut, L. J. 2018. Cannabis Decriminalization: A Study of Recent Policy Change in Five US states. *International Journal of Drug Policy*. 59: 67-75.

<sup>83</sup> Jesseman, R., & Payer, D. 2018. Decriminalization: Options and Evidence. Policy Brief of Canadian Centre on Substance Use and Addiction.

<sup>84</sup> Drug Policy Alliance. 2016. Approaches to Decriminalizing Drug Use and Possession. [https://drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet\\_Approaches%20to%20Decriminalization\\_%28Feb.%202016%29\\_0.pdf](https://drugpolicy.org/sites/default/files/DPA%20Fact%20Sheet_Approaches%20to%20Decriminalization_%28Feb.%202016%29_0.pdf) Accessed: February 26, 2022.

the case of decriminalization, the degree of criminal justice involvement is different than when an illicit substance is criminalized. Decriminalization is the act of removing criminal consequences from an act or behavior. Returning to the previous example, decriminalizing cannabis means that it would remain illegal, but no one would be criminally prosecuted for possessing less than a certain amount. Instead, the sanctions would include anything from nothing at all to civil fines, drug education, and drug treatment.<sup>85</sup> In simple terms, if drug possession and personal use are decriminalized, it will still be unlawful to possess and use drugs, and it will still be illegal to sell, manufacture and distribute drugs, since it could be considered as wrongful drug trafficking.

Some governments have implemented legislation that formally eliminates criminal penalties for some drug-related offenses, but the most notable example may be Portugal's Law 30/2000.<sup>86</sup> This law is characteristic of the fact that the procurement and ownership of drugs for private use is no longer a crime, which seems to have favored harm reduction policies and programs, allowed efforts and resources to be directed towards prevention, and coincided—more or less causally—with an apparent reduction in the use of almost all illegal drugs, especially with regard to the initiation of use by adolescents.<sup>87</sup>

#### **1.2.4 Legalization of the Use of Marijuana**

The legalization approach could be understood as the process by which the status of an activity is changed from prohibited to allowed. The term is frequently used in drug policy discussions to describe a process making lawful any production, distribution, sale, and possession of previously restricted narcotics. However, it is essential to emphasize that the term legalization describes a process and not a public policy model. Hence, the legalization of any or all of the currently controlled drugs may result in the implementation of different public policy models such as legal regulation or the free market. Regulation refers to the legislative framework that governs all aspects of a drug's market, including its products, dispensers, outlets, manufacture, and availability.

A free-market model implies the absence of state regulation of certain economic activities. This term usually refers to a type of free-market legalization in libertarian societies such as in

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<sup>85</sup> Svrakic, D. M., Lustman, P. J., Mallya, A., Lynn, T. A., Finney, R., & Svrakic, N. M. 2012. Legalization, Decriminalization & Medicinal Use of Cannabis: A Scientific and Public Health Perspective. *Missouri Medicine*, 109(2): 90.

<sup>86</sup> Gonçalves, R., Lourenço, A., & da Silva, S. N. 2015. A Social Cost Perspective in the Wake of the Portuguese Strategy for the Fight Against Drugs. *International Journal of Drug Policy*, 26(2): 199-209.

<sup>87</sup> Greenwald, G. 2009. Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies. Cato Institute Whitepaper Series.

the states of Alaska and Colorado in the US. As mentioned above, liberalization or the “free market” in drugs can be a public policy option that succeeds legalization. It is significant to emphasize here that advocates of this approach argue that drugs, like any consumer good, should be subject solely and exclusively to the laws of supply and demand. They also defend an individual’s “right” to consume as long as it does not jeopardize the well-being and rights of others. Critics of this approach argue that all drug use is potentially risky; leaving it to the market to regulate the availability and access to psychoactive substances would be a mistake.

The shift from decriminalization to legalization is not always instantaneous, at least as far as the controlled dispensation of drugs in therapeutic processes or with some widely demanded drugs is concerned. In the Netherlands, as an example, there was drug use decriminalization in the 1970s, followed by a *de facto*<sup>88</sup> legalization of cannabis derivatives since 1976.<sup>89</sup> Nevertheless, this change has been brought about more by the relaxation in applying specific criminal rules than by their abolition. Some of the effects of this change in the regulatory system in the Netherlands seem that cannabis use has increased slightly, and other neighboring countries have been affected, like in Switzerland and its “hemp shops,” where cannabis is sold relatively flexibly in somewhat similar ways.<sup>90</sup> The term legalization of marijuana use for this dissertation refers to a governmental allowance of its use, cultivation, sale, transportation, and distribution under the control of the institutions established by the law. The following section will discuss marijuana legalization that can take numerous forms, each with its own set of benefits and drawbacks.

#### **1.2.4.1 Legalization without Commercialization**

Allowing the manufacturing, distribution, and sale of recreational drugs like marijuana without commercialization is one approach to making them legal.<sup>91</sup> This type of legalization prohibits industries’ sales and the obtention of profits through product branding and advertising.

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<sup>88</sup> According to the Legal English website of the School of Law in Washington University in St. Louis, “de facto” and “de jure,” are closely related concepts. “De facto refers to a situation that is true in reality but is not officially sanctioned. De jure, on the other hand, refers to a legal situation that has been sanctioned by the government.” <https://onlinelaw.wustl.edu/blog/legal-english-de-factode-jure/#:~:text=De%20facto%20means%20a%20state,i.e.%20that%20is%20officially%20sanctioned>. Accessed: December 31, 2021.

<sup>89</sup> Reinerman, C., Cohen, P. D., & Kaal, H. L. 2004. The Limited Relevance of Drug Policy: Cannabis in Amsterdam and in San Francisco. *American Journal of Public Health*, 94(5): 836.

<sup>90</sup> Blickman, T., & Sandwell, C. 2020. City-Level Policies of Regulating Recreational Cannabis in Europe: From Pilot Projects to “Local Customization?”. In Tom Decorte, Simon Lenton, Chris Wilkins (ed.) *Legalizing Cannabis: Experiences, Lessons and Scenarios*. Routledge: 192.

<sup>91</sup> Shi, Y., & Liang, D. 2020. The Association Between Recreational Cannabis Commercialization and Cannabis Exposures Reported to the US National Poison Data System. *Addiction*, 115(10): 1890-1899.

This option allows municipalities, states, and the federal government to have control over the drug's manufacturing and distribution. This would keep the substance completely legal, accessible, and available while also allowing for better quality control and labeling of its psychoactive potency and contents. "Cannabis social clubs" in Spain are an example of this kind of legalization without commercialization. These social clubs are private, non-profit organizations where cannabis is sourced and distributed to registered members. This kind of club must be registered in a regional registry of associations; it must seek to reduce the harms associated with the supply and use of cannabis, such as promoting responsible consumption. Limits on the quantity of cannabis consumed must be enforced, and the cannabis distributed by the clubs must be for more or less immediate consumption.<sup>92</sup>

The disadvantage of this approach is that, because psychoactive drugs may cause severe psychological impairments, increased accessibility and lower prices would lead to more users and thus increase the risk of possible harms and negative impact on the population. One positive aspect of this approach is that those who want to use the drug for recreational purposes could do so without fear of reprisals, prosecutions, incarceration, or underground markets. It would also lessen the stigma attached to addicts, removing one of the most significant barriers to treatment.

#### **1.2.4.2 Legalization with Limits on Commercialization**

A substance like marijuana may be considered lawful for recreational use. However, setting the limits on how much and to whom newly legalized items are promoted might be imposed by the authorities.<sup>93</sup> Its commercial marketing would be prohibited except for selected places and at specific times when children and adolescents are likely to be exposed. Some examples of countries that follow this approach are Uruguay, Canada, and some states of the US. In the following section of this chapter, detailed information about these countries is presented.

Some disadvantages of legalizing with restrictions on commercialization involve increased drug sales and use and increased public health and safety risks as more individuals use it. It is worth noting that even though laws exist to limit potential public health and safety risks from greater use, this does not mean they will be enforced well once a substance is

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<sup>92</sup> Transform Drug Policy Foundation. 2018. Cannabis Social Clubs in Spain: Legalisation Without Commercialisation. <https://transformdrugs.org/blog/cannabis-social-clubs-in-spain-legalisation-without-commercialisation> Accessed: September 26, 2021.

<sup>93</sup> American Public Health Association. 2018. Regulating Commercially Legalized Marijuana as a Public Health Priority 2014.



authorized. Increased drug accessibility for selected populations is one of the advantages of this method.

#### **1.2.4.3 Legalization with Full Commercialization**

On the opposite side of prohibition, there is the legalization with full access to commercialized marijuana. This approach gives industry freedom to brand and market as much as they want, and to sell it with few, if any, limitations. The disadvantages of complete commercialization with legalization include that it is expected to significantly increase drug sales and use and public health and safety risks as more people use it.

As a result, any possible increases in tax income from sales may be overshadowed by economic losses from lower labor productivity and higher healthcare costs. It should also be noted that, despite marijuana being lawful, economic expenditures related to law enforcement and criminal justice may still add to the economic burden associated with legalization. A clear example is the full commercialization of alcohol, in which the relationship between socioeconomic status and alcohol use may influence the risk of alcohol use<sup>94</sup> and, in consequence, increase crimes, such as robbery, sexual assaults, or even homicides. On the other hand, the benefits include the elimination of specific criminal behavior related to production and distribution as well as an increase in linked industrial jobs and tax income. Although at the time of writing, there is no country that has adopted this kind of legalization with full commercialization.

### **1.3. From Prohibition to Legalization**

#### **1.3.1 Context and Policy Frameworks**

As it was concluded in the first section of this chapter, under the current UN Drug Convention rules, medical and scientific use of narcotic drugs and psychotropic substances is allowed, and it is possible to have a non-criminal response and treatment for a specific type of minor consumers, and to give another group of consumers (who may possess quantities more significant than those indicated for personal use) the opportunity to suspend the probation process, provided that in both cases they submit to individual counseling or treatment measures. At the same time, the member countries involved in international drug control would concentrate their efforts on containing drug production and trafficking. However, the complex

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<sup>94</sup> Hamdi, N. R., Krueger, R. F., & South, S. C. 2015. Socioeconomic Status Moderates Genetic and Environmental Effects on the Amount of Alcohol Use. *Alcoholism: Clinical and Experimental Research*, 39(4): 603-610.

world of drugs is also dynamic, and therefore policies to deal with it must be adaptable. While the basis of the policy of the countries that are parties to the UN conventions is to stop the flow of drugs beyond their borders, the supply and domestic consumption grew in some cases, especially in Latin American countries such as Colombia, Uruguay, among others.<sup>95</sup>

According to Yesid Reyes, Minister of Justice and Law of Colombia, the international drug regime must be more flexible so that it allows for differentiated treatment of substances and the behaviors associated with them.<sup>96</sup> Reyes also states that greater emphasis must be placed on the use of alternative measures to incarceration.<sup>97</sup> He opines that indicators should be used that are not limited to evaluating the efficiency of policies according to the number of arrests and seizures; it is necessary to adjust the alternative development model, emphasizing the reduction of territorial vulnerabilities; it is imperative to allocate more significant resources for prevention, rehabilitation, and reduction of the harm caused by drugs. Some countries have been taking “flexible” paths regarding the regulation of drug policy.<sup>98</sup>

The following section presents three groups of states that implement the drug conventions based on the drug policies and the UN’s position regarding these postures: prohibition (group 1), decriminalization (group 2), and legalization (group 3). Group 1 includes nations in which the possession, production, distribution, and consumption of drugs are illegal and considered a crime in consistence with the UN Drug Conventions. The UN Drug Conventions, specifically the 1961 SCND, clarify that medical and scientific uses of marijuana and other prohibited plants such as coca leaf can be limited. It is well known that some countries currently have legislation to allow the medical use of marijuana.<sup>99</sup> In other words, the UN’s position supports Group 1’s implementation of the UN Drug Conventions.

Group 2 refers to about 30 countries that have decriminalized marijuana use. Some examples of countries that decriminalized marijuana use are Antigua, Argentina, Armenia,

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<sup>95</sup> Agencia EFE. 2015. La ONU, ante una Mayor Flexibilidad con la Drogas. Diario de Navarra. [https://www.diariodenavarra.es/noticias/mas\\_actualidad/internacional/2015/03/18/la\\_onu\\_ante\\_una\\_mayor\\_flexibilidad\\_con\\_drogas\\_199431\\_1032.html](https://www.diariodenavarra.es/noticias/mas_actualidad/internacional/2015/03/18/la_onu_ante_una_mayor_flexibilidad_con_drogas_199431_1032.html). Accessed September 4, 2021.

<sup>96</sup> Gobierno de Colombia. 2016. Statement by Doctor Yesid Reyes, Minister of Justice and Law if the Government of Colombia, on the Occasion of the High-Level Segment of the 59th Regular Session of the Commission on Narcotic Drugs.

<sup>97</sup> Reyes, Y., 2015. “Palabras del Doctor Yesid Reyes, Ministro de Justicia y del Derecho de Colombia, con Ocasión del Segmento Especial del 58 Periodo Ordinario de Sesiones de la Comisión de Estupefacientes” [https://www.unodc.org/documents/commissions/CND/CND\\_Sessions/CND\\_59/Statements/08\\_Colombia.pdf](https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_59/Statements/08_Colombia.pdf) Accessed: March 29, 2022.

<sup>98</sup> Reyes, Y., 2015. “Palabras del Doctor Yesid Reyes, Ministro de Justicia y del Derecho de Colombia, con Ocasión del Segmento Especial del 58 Periodo Ordinario de Sesiones de la Comisión de Estupefacientes” [https://www.unodc.org/documents/commissions/CND/CND\\_Sessions/CND\\_59/Statements/08\\_Colombia.pdf](https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_59/Statements/08_Colombia.pdf)

<sup>99</sup> Bewley-Taylor, D., & Jelsma, M. 2011. Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation. *Series on Legislative Reform of Drug Policies*, 12: 1-20.

Australia (some states), Belgium, Belize, Bolivia, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Estonia, Germany, Italy, Jamaica, Netherlands, Paraguay, Peru, Poland, Portugal, Russia, South Africa, and Switzerland.<sup>100</sup> What follows is an account to illustrate how some countries have decriminalized marijuana without contravening the three UN drug conventions.

In 2001 Portugal legislated to end the prohibition of consumption of all substances, although it maintained the prohibition of trade and promoted a Harm Reduction Program.<sup>101</sup> The strategy was detailed, and it included reasons for preferring decriminalization policy, effective preventive and educational actions, suggestions related to harm reduction policy, steps to improve and expand state-funded treatment programs, and initiatives to socially reintegrate drug-dependent people. The following are the main issues: prevention, Dissuasion Commissions, risk and harm reduction, treatment, and return to life in health and society.<sup>102</sup> The Harm Reduction Program proved to be more successful than any prohibitionist policy because, at least in the case of Portugal, it has reduced heroin consumption—a big problem in recent years—and has generated much better conditions for prevention and care for addictions.<sup>103</sup> Many of the effects of the reform were felt right away: new HIV infections, drug deaths, and the prison population all dropped dramatically in the first decade since its implementation.<sup>104</sup>

The UN's position on drug decriminalization can be found in the Outcome Document issued in the UN General Assembly in the Special Session on the World Drug Problem (UNGASS) in April 2016. In the section related to drugs and human rights, youth, women, children, vulnerable members of society, and communities, it is stated that the international society should “promote proportionate national sentencing policies, practices and guidelines for drug-related offenses whereby the severity of penalties is proportionate to the gravity of offenses and whereby both mitigating and aggravating actors are taken into account, including the circumstances enumerated in Article 3 of the 1988 Convention and other relevant and

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<sup>100</sup> Reuter, P. 2010. *Marijuana Legalization: What Can be Learned from other Countries*. Baltimore, MD: RAND Drug Policy Research Center, University of Maryland.

<sup>101</sup> Taylor, S., Buchanan, J., & Ayres, T. 2016. Prohibition, Privilege and the Drug Apartheid: The Failure of Drug Policy Reform to Address the Underlying Fallacies of Drug Prohibition. *Criminology & Criminal Justice*. 16 (4): 452-469.

<sup>102</sup> Domoslawski, A., & Siemaszko, H. 2011. *Drug Policy in Portugal: The Benefits of Decriminalizing Drug Use*. Open Society Institute.

<sup>103</sup> Pombo, S., & da Costa, N. F. 2016. Heroin Addiction Patterns of Treatment-seeking Patients, 1992- 2013: Comparison between pre- and post-drug Policy Reform in Portugal. *Heroin Addiction and Related Clinical Problems* 18.6: 51-60.

<sup>104</sup> Murkin, G. 2014. *Drug Decriminalisation in Portugal-Setting the Record Straight*. Transform Drug Policy Foundation.

applicable international law, and in accordance with national legislation”.<sup>105</sup> In this regard, countries that want to decrease the legal penalties for possession of modest amounts of narcotics for personal use might do so with the help of this document.

Group 3 refers to the states that legalized marijuana. Marijuana legalization received considerable critical attention when Uruguay and Canada began to permit lawful possession and consumption of cannabis for personal use. Furthermore, the debate gained new prominence when, in 2020, 17 US states legalized the recreational use of marijuana, which will be analyzed in the last part of this chapter. The UN’s position is clear regarding this posture: Marijuana legalization presents a different path from what is established in the three UN drug conventions. The following part of this paper moves to analyze the cases of Uruguay, Canada, and some US states and their reasons for taking such a decision on fully legalized marijuana. It is important to bear in mind that the US is not a country that adopted decriminalization, but only some states did so. On the one hand, the US is still in the midway of legalizing marijuana, but on the other hand, the countries of Uruguay and Canada adopted marijuana legalization. For that reason, in this dissertation, the analysis of the cases is not based on a historical sequence. However, it focuses on the state as a whole and then on specific states of the US.

### **1.3.2 Uruguay**

Uruguay is the first Latin American country to make marijuana cultivation, distribution, and possession lawful under government regulation.<sup>106</sup> Uruguay is one of the countries in the American continent with a substantial history of combating the illegal use of drugs. Cannabis is the most widely used substance among the Uruguayan population as it is in other countries. Its use increased by 126% between 2001 and 2011.<sup>107</sup> According to the Uruguayan statistics bureau,<sup>108</sup> 20% of the population surveyed in 2011 (15-65 years) reported consuming marijuana, while 8.3% had consumed the substance in the last 12 months and 4.9% in the last 30 days. Of those who had consumed cannabis in the last year, 14.6% did so daily. In the international context, Uruguay has annual prevalence levels (8.3%) above the average for

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<sup>105</sup> UN General Assembly. 2016. Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem—Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem. <https://undocs.org/A/RES/S-30/1> Accessed: February 26, 2022.

<sup>106</sup> Hetzer, H. & Walsh, J. 2014. Pioneering Cannabis Regulation in Uruguay. *NACLA. Report on the Americas*. 47(2): 33-35.

<sup>107</sup> TNI/WOLA. 2013. *Diálogo Informal sobre Política de Drogas*. <http://www.wola.org/sites/default/files/Drug%20Policy/InformeDialogoUruguay2013.pdf> Accessed September 21, 2021.

<sup>108</sup> Observatorio Uruguayo de Drogas. 2012. 5a Encuesta Nacional en Hogares sobre Consumo de Drogas. Junta Nacional de Drogas: 26.

Europe (6.7%) and Argentina (7.2%) and Chile (6.7%), but below that of the United States (13.7%) and Canada (23.6%).<sup>109</sup>

On June 20, 2012, the Mujica administration presented a document known as “Strategy for Life and Coexistence,”<sup>110</sup> which included the proposal to legalize cannabis, following a string of violent crimes linked to drugs.<sup>111</sup> The Uruguayan government estimated that the black market for cannabis mobilized an annual business valued at 30 to 40 million US dollars.<sup>112</sup> With the spread of criminal organizations, crimes previously unknown in the country also appeared, such as score settling and hired killings, linked to territorial disputes between criminal groups.<sup>113</sup> It is important to note that in 2013, approximately 60% of the Uruguayan population was against the legalization of marijuana.<sup>114</sup>

On November 12, 2012, the proposal was replaced by “Law 19172,” which legalized the use of cannabis. Law 19172 abrogated the rule of 1974, which authorized judges to decide independently whether a specific amount of an illegal substance was meant for individual use and, subsequently, a non-criminal offense.<sup>115</sup> On December 10, 2013, using a top-down policy process, Uruguay became the first nation to legalize its domestic nonmedical cannabis market; in other words, marijuana legalization with control on commercialization. With that action, it also became the first nation to abandon the prohibition on the use of cannabis for nonmedical purposes, which began worldwide with the SCND.

In making such action, Uruguay’s specialists realized that they would need to deal with reactions from other nations and the screens of the UN sedate bargains, specifically, the INCB. The Uruguayan officials and the INCB were struggling at the time to find the legal justification for their cannabis legalization approach under the SCND.<sup>116</sup> Also, the INCB had begun to give

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<sup>109</sup> Observatorio Uruguayo de Drogas. 2012. 5a Encuesta Nacional en Hogares sobre Consumo de Drogas. Junta Nacional de Drogas: 41.

<sup>110</sup> Security Cabinet. 2012. Estrategia por la Vida y la Convivencia. [https://medios.presidencia.gub.uy/jm\\_portal/2012/noticias/NO\\_E582/Estrategia.pdf](https://medios.presidencia.gub.uy/jm_portal/2012/noticias/NO_E582/Estrategia.pdf). Accessed December 31, 2021.

<sup>111</sup> Muller, C. & Draper, G. 2017. *Marihuana Oficial: Crónica de un Experimento Uruguayo*. Sudamericana.

<sup>112</sup> Presidencia de la República del Uruguay. 2012. Exposición de Motivos Proyecto de Ley sobre Marihuana, 08/08/2012.

<sup>113</sup> TNI/WOLA. 2013. *Diálogo Informal sobre Política de Drogas*. <http://www.wola.org/sites/default/files/Drug%20Policy/InformeDialogoUruguay2013.pdf> Accessed September 21, 2021.

<sup>114</sup> Rychert, M. & Wilkins, C., 2020. How not to Legalize Cannabis: Lessons from New Zealand’s Experiment with Regulating “Legal Highs”. In Tom Decorte, Simon Lenton, Chris Wilkins (ed.) *Legalizing Cannabis: Experiences, Lessons and Scenarios*. Routledge: 259-282:272.

<sup>115</sup> Poder Legislativo de la República Oriental del Uruguay. 2013. Ley No 19.172 -Marihuana y sus Derivados. Control y Regulación del Estado de la Importación, Producción, Adquisición, Almacenamiento, Comercialización y Distribución. <https://parlamento.gub.uy/documentosyleyes/leyes/ley/19172> Accessed: October 31, 2021.

<sup>116</sup> Vienna International Centre- United Nations Information Service. 2013. UNIS/NAR/1190 - Uruguay is breaking the International Conventions on Drug Control with the Cannabis Legislation approved by its

apparent signals of a possible reform or restructuring of the UN drug conventions. On the one hand, the Uruguayan government sought to defend public health by reducing violence committed by drug trafficking organizations and link to drugs by eliminating the black market of cannabis and promoting education and prevention campaigns regarding drug use. On the other hand, the INCB had a different position referring to Law 19172: “The Board is very concerned that the draft legislation currently being considered in Uruguay would, if adopted, legalize the production, and sale of cannabis.”<sup>117</sup>

The President of the INCB, Raymond Yans, stated that:

“[T]his would be in contravention of the 1961 Convention on Narcotic Drugs, which has been adopted by 186 countries, including Uruguay...[C]annabis is controlled due to its dependence-producing potential... [T]he current development in Uruguay, if pursued, would have serious repercussions for public health, particularly for youth, and would be in violation of the United Nations international drug control treaties.”<sup>118</sup>

After Law 19172 was approved, the Uruguayan government expressed its willingness to work with the INCB. However, as long as Yans is president, the dialogue appears to be pointless. The need for a new drug control paradigm based on science, public health, social development, and human rights is mentioned in Uruguay’s Drugs Strategy for 2011-2015.<sup>119</sup> It promotes “a great international debate about the implementation and the results of the hegemonic drug policies in force in the last 50 years, prompting the review of the international conventions governing the matter.”<sup>120</sup>

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Congress. [https://incb.org/documents/Publications/PressRelease/PR2013/press\\_release\\_111213.pdf](https://incb.org/documents/Publications/PressRelease/PR2013/press_release_111213.pdf) Accessed October 31, 2021.

<sup>117</sup> INCB. 2013. INCB is Concerned about Draft Cannabis Legislation in Uruguay - 19 November 2013. Press Release UNIS/NAR/1186. [https://www.incb.org/documents/Publications/PressRelease/PR2013/press\\_release\\_191113e.pdf](https://www.incb.org/documents/Publications/PressRelease/PR2013/press_release_191113e.pdf). Accessed July 20, 2021.

<sup>118</sup> INCB. 2013. INCB is Concerned about Draft Cannabis Legislation in Uruguay - 19 November 2013. Press Release UNIS/NAR/1186. [https://www.incb.org/documents/Publications/PressRelease/PR2013/press\\_release\\_191113e.pdf](https://www.incb.org/documents/Publications/PressRelease/PR2013/press_release_191113e.pdf). Accessed July 20, 2021.

<sup>119</sup> Junta Nacional de Drogas. Evaluación de la Estrategia Nacional para el Abordaje del Problema Drogas en Uruguay, 2011-2015. <https://www.gub.uy/junta-nacional-drogas/comunicacion/publicaciones/evaluacion-estrategia-nacional-para-abordaje-del-problema-drogas-uruguay>. Accessed: December 31, 2021

<sup>120</sup> Presidencia de la República - Junta Nacional de Drogas. 2011. Estrategia Nacional para el Abordaje del Problema Drogas Período 2011- 2015: 15 [https://www.dianova.org/wp-content/uploads/2015/08/www.infodrogas.gub.uy\\_html\\_estrategia\\_20110623\\_Estrategia\\_Naciona\\_%20Problema\\_Drogas\\_2011\\_2015.pdf](https://www.dianova.org/wp-content/uploads/2015/08/www.infodrogas.gub.uy_html_estrategia_20110623_Estrategia_Naciona_%20Problema_Drogas_2011_2015.pdf) Accessed: September 23, 2021.

Uruguay deployed the argument of incorporating the human rights perspective. The introduction of the UN human rights protection system represents a comparatively more significant challenge. According to Álvarez, Pose, and Luján, from a legal standpoint, human rights norms are hierarchically superior to the drug conventions, which provides a powerful argument for limiting the implementation of measures derived from the drug regime that may infringe on these rights.<sup>121</sup> Countries are now more receptive to a flexible drug policy and intend to include this issue in the UN Human Rights Council, the agenda of the UN High Commissioner for Human Rights, and UNAIDS.<sup>122</sup>

It is also important to mention the permissive position of the US, which has historically participated in the international drug regime with a decisive role in creating the international legal framework for psychoactive substances and their derivatives. The US position regarding the Uruguayan standpoint willing to endorse the status quo was a necessary external condition; without it, any domestic attempt would have failed.<sup>123</sup>

In addition, the Uruguayan government established a regulatory body to control marijuana legalization with limits on commercialization: The Institute of Regulation and Control of Cannabis (IRCCA). For Uruguayan citizens, the way to access the product is through clubs, pharmacies, and home growers. The table below illustrates the main characteristics of Law 19172:

**Table 4. Characteristics of the Law of Cannabis in Uruguay (Law 19172)**

Characteristics	
Approach	• Protection of public health is based on State control and cannabis decommercialization, having as its scope of regulation the entire chain of production-distribution-consumption of the cannabis.
Prevention	• It promotes the dissemination of accurate information, education, and prevention about the dangers and consequences of drug use, as well as the treatment, rehabilitation, and social reintegration of problematic drug users.
Regulation	• It establishes that the state will recognize control and regulation over cannabis and its derivatives, or hemp, as appropriate, import, export, cultivation, harvest, planting, production, acquisition of any title, storage, marketing, and distribution.

<sup>121</sup> Álvarez, N., Pose, N., & Luján, C. 2017. The International Politics of Cannabis Regulation in Uruguay. An Analysis of the Uruguayan Response to the Challenges and Opportunities from the International Drugs Regime. *Desafíos*, 29(2): 31.

<sup>122</sup> Álvarez, N., Pose, N., & Luján, C. 2017. The International Politics of Cannabis Regulation in Uruguay. An Analysis of the Uruguayan Response to the Challenges and Opportunities from the International Drugs Regime. *Desafíos*, 29(2): 31.

<sup>123</sup> Álvarez, N., Pose, N., & Luján, C. 2017. The International Politics of Cannabis Regulation in Uruguay. An Analysis of the Uruguayan Response to the Challenges and Opportunities from the International Drugs Regime. *Desafíos*, 29(2): 33-34.

Objective	<ul style="list-style-type: none"> <li>• Its goal is to provide cannabis control and guidance, as well as measures to educate, raise awareness, and protect society from health concerns, as well as to protect country residents from the dangers of illegal trade and drug trafficking.</li> </ul>
Supervision	<ul style="list-style-type: none"> <li>• Cannabis is planted, cultivated, harvested, produced, stored, distributed, and issued under its control and supervision.</li> </ul>
Controlling Body	<ul style="list-style-type: none"> <li>• The Institute of Regulation and Control of Cannabis (IRCCA) is established as a regulatory authority, and the way to access it is through clubs, pharmacies, and home growers.</li> </ul>

Source: IMPO Centro de Información Oficial. 2013. Normativa y Avisos Legales del Uruguay: Ley N. 19172. <https://www.impo.com.uy/bases/leyes/19172-2013>. Accessed: July 18, 2021.

According to a study by Queirolo, there are three key reasons behind Uruguay’s marijuana legalization: 1) To rectify a legal inconsistency in Decree-Law 14.294 from 1974, which permitted marijuana possession and use but penalized consumers for obtained marijuana. The Decree-Law 14.294 regulated the commercialization and use of drugs and established measures against their illicit trade.<sup>124</sup> This law provides with some exceptions such as research or medicinal use that the planting, trafficking, or possession of cannabis shall be punishable by imprisonment, except for people who had a minimum amount intended exclusively for personal consumption;<sup>125</sup> 2) To improve public security and reduce drug-related violence by removing cannabis supplies from the black market.; and 3) Education and preventative programs will be used to promote public health.<sup>126</sup> In her study, Queirolo points out the sources of acquisition, such as clubs, pharmacies, and home growers, as well as the flaws and strengths of Law 19172 implementation after five years of approval. On the one hand, Queirolo reveals that there are not sufficient drugstores vending cannabis to match demand due to implementation flaws.<sup>127</sup> Furthermore, the amount of marijuana that the government has approved for manufacture and distribution to pharmacies is insufficient to meet demand.<sup>128</sup> In addition, approved cultivators faced production issues, and shortages and delays in sales at pharmacies resulted in registered purchasers being unable to purchase lawfully and resorting to the black market. On the other

<sup>124</sup> Queirolo, R. 2020. Uruguay: The First Country to Legalize Cannabis. In Tom Decorte, Simon Lenton, Chris Wilkins (ed.) *Legalizing Cannabis: Experiences, Lessons and Scenarios*. Routledge: 118-119.

<sup>125</sup> Garibotto, G. 2010. Cárceles y Drogas en Uruguay. *Sistemas Sobrecargados. Leyes de Drogas y Cárceles en América Latina*: 82-89.

<sup>126</sup> Queirolo, R. 2020. Uruguay: The First Country to Legalize Cannabis. In Tom Decorte, Simon Lenton, Chris Wilkins (ed.) *Legalizing Cannabis: Experiences, Lessons and Scenarios*. Routledge: 118-119.

<sup>127</sup> Queirolo, R. 2020. Uruguay: The First Country to Legalize Cannabis. In Tom Decorte, Simon Lenton, Chris Wilkins (ed.) *Legalizing Cannabis: Experiences, Lessons and Scenarios*. Routledge: 123.

<sup>128</sup> Queirolo, R. 2020. Uruguay: The First Country to Legalize Cannabis. In Tom Decorte, Simon Lenton, Chris Wilkins (ed.) *Legalizing Cannabis: Experiences, Lessons and Scenarios*. Routledge: 123.



hand, the implementation of marijuana legalization does have some advantages: many marijuana users utilize lawful marijuana, and quality control has increased.<sup>129</sup>

### 1.3.3 Canada

Canada became the first G7 country to legalize recreational marijuana in 2018, but it's worth noting that the country's administrative framework for international drug control is defined by three international drug conventions.<sup>130</sup> According to one study by Potter, there was little evidence on how or why cannabis was banned in Canada in 1923.<sup>131</sup> During the 1960s, Canada started reforms with regard to cannabis criminalization<sup>132</sup> and followed the international guidelines, and added cannabis to the Restricted List. In the 1960s, the "devil's weed," as it was known by the US Government at the time, began to gain popularity in Canada.<sup>133</sup> In the US, the campaign against marijuana and the legislative action was essentially a response that was not informed by scientific studies but instead by racial bias and sensationalistic myths.<sup>134</sup> Following 73 countries, Canada signed the SCND in New York on March 30, 1961, with the goal of laying a stable foundation for narcotics control in the postwar age.<sup>135</sup>

As explained earlier, the UN drug conventions incorporated a prohibitionist approach to non-medical and non-scientific use, especially on cannabis, opium, and coca leaf. Intentional unauthorized cultivation, production, manufacture, extraction, preparation, offering for sale, delivery, purchase, sale, dispatch, transport, importation, and exportation of drugs are all

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<sup>129</sup> Queirolo, R. 2020. Uruguay: The First Country to Legalize Cannabis. In Tom Decorte, Simon Lenton, Chris Wilkins (ed.) *Legalizing Cannabis: Experiences, Lessons and Scenarios*. Routledge: 124.

<sup>130</sup> Sinha, J. 2001. *The History and Development of the Leading International Drug Control Conventions*. Library of Parliament. Canada.

<sup>131</sup> Potter, A. 2019. In Praise of Political Opportunism, or, How to Change a Policy in Only Fifty Years. In Potter, A., & Weinstock, D. M. (eds.): 2019. *High Time: The Legalization and Regulation of Cannabis in Canada*. McGill-Queen's Press-MQUP:11.

<sup>132</sup> Osusu-Bempah, A., Luscombe, A. & Finlay B. 2019. Unequal Justice: Race and Cannabis Arrests in the Post-Legal Landscape. In Potter, A., & Weinstock, D. M. (eds.) *High Time: The Legalization and Regulation of Cannabis in Canada*. McGill-Queen's Press-MQUP: 119

<sup>133</sup> Harcourt, B. & Ludwig, J. Reefer Madness: Broken Windows Policing and Misdemeanor Marijuana Arrests in New York City, 1989–2000. *John M. Olin Law & Economics Working Paper No. 371, 2006*: 13. Retrieved from: The Law School -The University of Chicago website: <http://www.law.uchicago.edu/files/files/317.pdf> Accessed: October 30, 2021.

<sup>134</sup> Musto, D.F. 1987. The History of Legislative Control over Opium, Cocaine, and Their Derivatives. In Ronald Hamowy (ed.): *Dealing with Drugs: Consequences of Government Control*, D.C. Health and Company. Lexington, MA.: 37-71.

<sup>135</sup> Bewley-Taylor, D., & Jelsma, M. 2011. Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation. *Series on Legislative Reform of Drug Policies*, 12: 1-20.

punishable offenses under Article 36 of the SCND.<sup>136</sup> Though drugs are an integral part of social, cultural, and religious traditions, the drug control regime obliged countries to abolish all non-medical and non-scientific uses of these plants. Users were irritated by routine punishment at the time. Cannabis possession carried a maximum penalty of six months in prison and a \$1,000 fine.<sup>137</sup> Doctors and psychologists have long advocated for a change in Canadian marijuana laws, claiming that there is insufficient scientific evidence to support its use.<sup>138</sup> Although a committee known as Le Dain presented studies advocating legalization in 1972, it was not until the dawn of the twenty-first century that laws began to change.<sup>139</sup>

By the Supreme Court of Canada's decision in the case of *R. v. Smith* in 2001, Canadians gained a constitutional right to use cannabis as a medicine, particularly for patients with multiple sclerosis, glaucoma, epilepsy, some types of cancer, and AIDS, since the prohibition was determined to be arbitrary and contradicted its purpose of protecting the health and safety of Canadians.<sup>140</sup> The Court stated:

“The precise form the order should take is complicated by the fact that it is the combination of the offence provisions and the exemption that creates the unconstitutionality. The offence provisions in the CDSA [Controlled Drugs and Substances Act] should not be struck down in their entirety. Nor is the exemption, insofar as it goes, problematic — the problem is that it is too narrow, or under-inclusive. We conclude that the appropriate remedy is a declaration that ss. 4 and 5 of the CDSA are of no force and effect, to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes.”<sup>141</sup>

Overall, the House of Commons Special Committee on Non-Medical Use of Drugs and the Senate Special Committee on Illegal Drug Use were established by the Parliament in 2002

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<sup>136</sup> United Nations. 1972. Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961. [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-17&chapter=6&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-17&chapter=6&clang=_en). Accessed August 30, 2021.

<sup>137</sup> Erickson, P. G., & Brochu, S. 2005. Alternative Sanctions for Cannabis Use and Possession. *CCSA*. 75: 39.

<sup>138</sup> Sohn, E. 2019. Weight the Dangers of Cannabis. *Nature*. Press. <https://www.nature.com/articles/d41586-019-02530-7> Accessed November 19, 2021.

<sup>139</sup> Fischer, B., Ala-Leppilampi, K., Single, E., & Robins, A. 2003. Cannabis Law Reform in Canada: Is the “Saga of Promise, Hesitation and Retreat” Coming to an End? 1. *Canadian Journal of Criminology and Criminal Justice*. 45(3): 265-298.

<sup>140</sup> Supreme Court of Canada. 2015. *R. v. Smith*, 2015 SCC 34, (2015) 2 S.C.R. 602. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15403/index.do> Accessed October 31, 2021.

<sup>141</sup> Supreme Court of Canada. 2015. *R. v. Smith*, 2015 SCC 34, (2015) 2 S.C.R. 602. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15403/index.do> Accessed October 31, 2021.

to study illicit drugs in Canada. Both committees recommended changes to Canada's drug policy and laws regarding marijuana possession, use, and distribution.<sup>142</sup> At the same time, polls showed that the Canadian public was in favor of legalization.<sup>143</sup> Following the legalization of marijuana in some US states, Canadian investors realized that the drug could be traded as a commodity, and they joined the push for legalization.<sup>144</sup>

When Prime Minister Justin Trudeau was elected in 2015, one of the Liberal Party's campaign promises was to decriminalize cannabis for recreational use. Trudeau argued that such legalization would remove drugs from the streets and take them out of children's hands while taking the production and sale of drugs away from organized crime, clarifying that under no circumstances would it be intended to encourage recreational use of cannabis.<sup>145</sup> The policy framework used by the Liberal Party after winning the 2015 federal election was based on a platform that included cannabis legalization.<sup>146</sup>

On April 13, 2017, Bill C-45, known as the "Cannabis Act," was introduced in the Parliament, which, among other points, would allow the use of the substance cannabis at the national level for recreational purposes to persons over 18 years of age and individual possession of 30 grams. It also delegated to the provinces the power to modify the restrictions and establish the permitted modalities for the possession, sale, and use of cannabis.<sup>147</sup> As a result, on June 18, 2018, Canada became the first G7 country to authorize the production, marketing, and use of cannabis for recreational purposes five years after Uruguay had done so. In general terms, the Cannabis Act is a federal law, but the states have the autonomy to regulate each in their way. Similar to the Uruguayan law, the legalization of recreational marijuana has limits on commercialization. Depending on the province, distribution takes place in authorized public or private stores. Across the country, online sales are also permitted. In authorized stores,

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<sup>142</sup> Senate, Special Committee on Illegal Drugs. 2002. *Cannabis: Our Position for a Canadian Public Policy – Summary Report*. 2<sup>nd</sup> Session, 37<sup>th</sup> Parliament.

<sup>143</sup> Forum Research Inc. 2015. Support for Marijuana Legalization Steady at More than Half. Toronto, Ontario;. [http://poll.forumresearch.com/data/011cc56c-fcc2-4aef-b005-f8f5c5ec0570Federal%20Marijuana%20News%20Release%20\(2015%2008%2020\)%20Forum%20Research.pdf](http://poll.forumresearch.com/data/011cc56c-fcc2-4aef-b005-f8f5c5ec0570Federal%20Marijuana%20News%20Release%20(2015%2008%2020)%20Forum%20Research.pdf). Accessed: March 26, 2022.

<sup>144</sup> Government of Canada. 2016. *A Framework for the Legalization and Regulation of Cannabis in Canada: The Final Report of the Task Force on Cannabis Legalization and Regulation*. Health Canada: 30. <https://www.canada.ca/en/services/health/cannabis-cannabis/task-force-cannabis-legalization-regulation/framework-legalization-regulation-cannabis-in-canada.html>.

<sup>145</sup> Postmedia News, 2013. Justin Trudeau wants to Legalize Marijuana in order to 'Keep it out of the Hands of our Kids'. National Post. <https://nationalpost.com/news/politics/justin-trudeau-wants-to-legalize-marijuana-in-order-to-keep-it-out-of-the-hands-of-our-kids> Accessed: September 5, 2021.

<sup>146</sup> Bear, D. 2017. From Toques to Tokens: Two Challenges Facing Nationwide Legalization of Cannabis in Canada. *International Journal of Drug Policy*. 42: 97-101

<sup>147</sup> Cox, C. 2018. The Canadian Cannabis Act Legalizes and Regulates Recreational Cannabis Use in 2018. *Health Policy*. 122(3): 205-209.

anyone over the age of 19 (18 years old in Alberta and Quebec), including tourists, can purchase up to 30 grams of marijuana.<sup>148</sup> The table below illustrates some of the main characteristics of the Cannabis Act:

**Table 5. Characteristics of the Cannabis Act in Canada**

Characteristics	
Production	<ul style="list-style-type: none"> <li>Up to four cannabis plants can be grown at home, but they must be hidden. No matter how many people live in the house, the maximum number of plants is four. In the case of a medical patient, it is possible to cultivate a higher number, which varies according to the medical prescription.</li> <li>The maximum amount allowed for purchase and possession in public is up to 30g for those over 19 years old, which may vary in some states for 18 or 21 years old.</li> </ul>
Driving	<ul style="list-style-type: none"> <li>Driving while under the influence of cannabis is prohibited by law in every state in the country, regardless of recreational or medicinal use.</li> </ul>
International transport	<ul style="list-style-type: none"> <li>It is prohibited to transport cannabis across international borders.</li> </ul>
Decriminalization	<ul style="list-style-type: none"> <li>It is not considered a crime to work under the influence of cannabis, even recreationally, provided that the employer has allowed it. However, the employer may decide to terminate the employment by fulfilling all labor obligations.</li> </ul>
Commercialization	<ul style="list-style-type: none"> <li>It is mandatory to obtain a license for the sale of cannabis-based products. To obtain the license is necessary to check a series of financial, administrative, and security factors.</li> <li>To sell cannabis-based medicines, the store must follow the same rules for controlled medicines and ensure that all packages are correctly labeled.</li> <li>The store must control the age for the sale of recreational cannabis and may be punished or have its license revoked in case of non-compliance.</li> <li>It is prohibited for cannabis-based products to have any marketing on their packaging. Likewise, all products must necessarily contain a safety announcement and a standardized cannabis symbol.</li> </ul>
Access	<ul style="list-style-type: none"> <li>Distribution is made in authorized public or private stores, depending on the province. Online sales are also permitted throughout the country.</li> </ul>

Source: Government of Canada. 2016. *A Framework for the Legalization and Regulation of Cannabis in Canada: The Final Report of the Task Force on Cannabis Legalization and Regulation*. Health Canada; <https://www.canada.ca/en/services/health/cannabis-cannabis/task-force-cannabis-legalization-regulation/framework-legalization-regulation-cannabis-in-canada.html>. Accessed August 7, 2021.

<sup>148</sup> Government of Canada. 2018. Health: Cannabis: Introduction of the Cannabis Act: Questions and Answers 2018. <https://www.canada.ca/en/services/health/campaigns/introduction-cannabis-act-questions-answers.html>. Accessed August 7, 2021.

The following are the main advantages of implementing the Cannabis Act for the Canadian government: reducing the burden on the criminal justice system by restricting youth access to cannabis, protecting them from the temptation to use it, creating a legal cannabis market capable of displacing the illegal market, deter criminal activity by imposing severe criminal penalties on those who break the law; protecting public health through strict product safety and quality requirements, and allowing adults to possess and have access to regulated, quality-controlled cannabis.<sup>149</sup> On the other hand, the Canadian government's negative points or concerns include health risks from early use, a lack of control over the product's safety, potency, and quality, and drugged driving. Similarly, the Canadian government is aware of the large and well-entrenched illicit market, the burden it places on the justice system, the social consequences it has, and the laws that are poorly understood and inconsistently enforced.

### **1.3.4 The United States**

The US had a role as a leader in the promotion of drug control. The “real prohibitionist era” for cannabis and other narcotics was the 1970s. At that time, the US took a renewed lead in the suppression of drug abuse, particularly at the United Nations and through the INCB.<sup>150</sup> President Nixon demanded that Congress pass the Comprehensive Drug Abuse Prevention and Control Act of 1970 to suppress drug abuse, which established a federal ban on several drugs, including marijuana.<sup>151</sup> The Act made significant changes to the federal approach to drug control, including the creation of a new and more complex set of penalties for federal narcotics law violations.<sup>152</sup>

One of the most significant current discussions is about the legality and moral philosophy of cannabis in the Controlled Substances Act of 1970 (CSA) and the current classification of this drug in Schedule I which states there is currently no accepted medical use in treatment in the United States.<sup>153</sup> The Comprehensive Drug Abuse Prevention and Control Act of 1970 was the primary vehicle for President Nixon to combat the drug problem in the US. Congress passed

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<sup>149</sup> Government of Canada. 2016. *A Framework for the Legalization and Regulation of Cannabis in Canada: The Final Report of the Task Force on Cannabis Legalization and Regulation*. Health Canada; <https://www.canada.ca/en/services/health/cannabis-cannabis/task-force-cannabis-legalization-regulation/framework-legalization-regulation-cannabis-in-canada.html>. Accessed August 7, 2021.

<sup>150</sup> Collins J. 2014. *The Economics a New Global Strategy: Ending the Drug Wars Report*. *LSE Expert Group on the Economics of Drug Policy*: 9.

<sup>151</sup> Controlled Substances Act. 1970. Public Law 91-513. Statutes at Large: 84 Stat. 1236, 1247. <https://uslaw.link/citation/us-law/public/91/513>. Accessed: March 26, 2022.

<sup>152</sup> Controlled Substances Act. 1970. Public Law 91-513. Statutes at Large: 84 Stat. 1236, 1247. <https://uslaw.link/citation/us-law/public/91/513>. Accessed: March 26, 2022.

<sup>153</sup> Controlled Substances Act. 1970. Public Law 91-513. Statutes at Large: 84 Stat. 1236, 1247. <https://uslaw.link/citation/us-law/public/91/513>. Accessed: March 26, 2022.

the Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>154</sup> including Title II, the CSA.<sup>155</sup> Simply put, Congress, through the CSA of 1970, set the foundation of the current US Drug Policy, locating marijuana in the Schedule I as a controlled substance, having “no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse.”<sup>156</sup>

During the past 40 years, much more information has become available on the debate on the legal status of cannabis. Politicians around the world have been against the legalization of drugs.<sup>157</sup> The US is recognized as one of the first countries to become a pioneer in the fight against drugs, but the current approach of the US Government against the use of drugs seems to be changing, allowing the experimental legalization of cannabis in some US states.

Whitford and Yates highlighted the importance of combating drugs during the 1980s and early 1990s.<sup>158</sup> The Reagan Administration increased the amount of federal spending from 1981 with 1.5 billion dollars to 9.7 billion dollars in 1990.<sup>159</sup> On the one hand, President Ronald Reagan’s crime control strategy aimed to reduce the drug supply (manufacturing, distribution, and use of illegal drugs) by creating the Office of National Drug Control Policy, established in the Anti-Drug Abuse Act of 1988.<sup>160</sup> Also, First Lady Nancy Reagan started a campaign called “Just Say No” and proposed to dissuade children from engaging in illegal recreational drug use.<sup>161</sup>

On the other hand, in the US a few decades ago, the support for legalizing marijuana was around 30%. Still, by 2014, 54% of the American people approved of it<sup>162</sup>, with up to 80% supporting the use of medical marijuana.<sup>163</sup> Some part of the American population changed its

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<sup>154</sup> Controlled Substances Act. 1970. Public Law 91-513. Statutes at Large: 84 Stat. 1236. <https://uslaw.link/citation/us-law/public/91/513>. Accessed: March 26, 2022.

<sup>155</sup> United States of America Drug Enforcement Administration, “*DEA History in Depth 1970-197*”, <http://www.justice.gov/dea/about/history.shtml>; Retrieved from: August 26<sup>th</sup>, 2014.

<sup>156</sup> Controlled Substances Act. 1970. Public Law 91-513. Statutes at Large: 84 Stat. 1236. <https://uslaw.link/citation/us-law/public/91/513>. Accessed: March 26, 2022.

<sup>157</sup> Joffe A. & Yancy. S. W, 2003. Legalization of Marijuana: Potential Impact on Youth. *Pediatrics*, 113(6): 632-638.

<sup>158</sup> Whitford A.B & Yates, J. 2003. Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs. *Journal of Politics*. 65: 995–1012: 995.

<sup>159</sup> Whitford A.B & Yates, J. 2003. Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs. *Journal of Politics*. 65: 995–101: 998.

<sup>160</sup> Anti-Drug Abuse Act of 1988. Public Law 100-690, 102 Stat: 4181. <https://www.congress.gov/bill/100th-congress/house-bill/5210> Accessed March 26, 2022.

<sup>161</sup> Whitford A.B & Yates, J. 2003. Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs. *Journal of Politics*. 65: 995–101: 998.

<sup>162</sup> Pew Research Center. 2014. America’s Changing Drug Policy Landscape. <http://www.people-press.org/files/legacy-pdf/04-02-14%20Drug%20Policy%20Release.pdf>; Accessed: September 5, 2014.

<sup>163</sup> Newport, F. 2011. Record-High 50% of Americans Favor Legalizing Marijuana Use. October 17, 2011. <http://www.gallup.com/poll/150149/record-high-americans-favor-legalizing-marijuana.aspx>. Accessed: December 31, 2021.

moral perspective about marijuana and constantly questioned the Government's actions with criticism about the negative results of the war on drugs,<sup>164</sup> mass incarceration of people from minority communities, and persecution of drug offenses without the decline of drug consumption.<sup>165</sup> Thus, in recent years, American society has been pressuring to have an open discussion of topics like the legalization of drugs when a century ago, this was considered as something “evil” or “immoral.”

Through the use of a referendum (used as a tool that serves to build the legitimacy of the law), the American populace found a way to discuss the issue of cannabis legalization. Setting up a debate and presenting evidence that was open to being questioned and debated, the referendum proved to be an example of democracy at work. This citizen-driven approach worked in Colorado (Amendment 64 or A-64) and Washington (Initiative 502 or I-502) in November 2012, and in recent years, its procedure has changed to such an extent that 36 states have legalized marijuana for medicinal use and 16 states and Washington D.C. for recreational use.<sup>166</sup> The referendum facilitates the approval to open the door to possible legalization and the possibility for it to be a topic of discussion and debate. This section of the chapter will focus only on the first two states that fully legalized marijuana for recreational purposes to provide the general picture of the current trend in the US on marijuana drug control.

Regarding contravention between federal and state laws, returning to the end of the era of alcohol prohibition, Amendment 21 or “Repeal of the Eighteenth Amendment” gave the authority for each state to decide about the alcohol ban situation. A similar justification seems to have been repeated on August 29<sup>th</sup>, 2013, when to resolve the confusion arising from new state cannabis laws, the Deputy Attorney General issued a memorandum for all US attorneys general providing “Guidance Regarding Marijuana Enforcement” as follows:

“The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department’s guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will

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<sup>164</sup> Global Commission on Drug Policy. 2011. *War on Drugs: Report of the Global Commission on Drug Policy*. Global Commission on Drug Policy: 4.

<sup>165</sup> United States Office of Justice. Department of Justice. 1999. *The Clinton Administration’s Law Enforcement Strategy: Breaking the Cycle of Drugs and Crime*: 1-8.  
[http://www.justice.gov/archive/dag/pubdoc/Drug\\_Final.pdf](http://www.justice.gov/archive/dag/pubdoc/Drug_Final.pdf). Accessed: October 17, 2020.

<sup>166</sup> Dills, A. K., Goffard, S., Miron, J., & Partin, E. 2021. *The Effect of State Marijuana Legalizations: 2021 Update*. *Cato Institute, Policy Analysis* (908): 11.

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....”<sup>167</sup>

This part of the memorandum clarifies that those statewide initiatives to legalize cannabis in Washington and Colorado would be tolerated under certain conditions (effectively reinforcing a model of regulation and safeguarding the enforcement priorities of the US Department of Justice in matters related to the conduct of use of marijuana) presented in the following table:

**Table 6. Enforcement Priorities of the US Department of Justice**

<b>Preventing:</b>	<ol style="list-style-type: none"> <li>1) Distribution of marijuana to minors.</li> <li>2) Revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels.</li> <li>3) The diversion of marijuana from states where it is legal under state law in some form to other states.</li> <li>4) State-authorize marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity.</li> <li>5) Violence and the use of firearms in the cultivation and distribution of marijuana.</li> <li>6) Drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use.</li> <li>7) The growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands.</li> <li>8) Marijuana possession or use on federal property.</li> </ol>
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Source: Cole, J. 2014. Guidance Regarding Marijuana Enforcement. *Federal Sentencing Reporter*. 26, (4): 217-220.  
<https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; Accessed: December 31, 2021.

The Deputy Attorney General recognized the authority of Colorado and Washington State to enact laws regarding the production, distribution, and consumption of marijuana, but the CSA could only be implemented if one of the eight enforcement priorities was violated or if the state in charge to protect the rule of law is not able to apply it. Regarding cannabis consumption for recreational purposes allowed by the governments of Washington and Colorado (or states with similar policies), it could be said that the A-64 and I-502 are clearly

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<sup>167</sup> Cole J. 2014. Guidance Regarding Marijuana Enforcement. *Federal Sentencing Reporter*. 26, (4): 217-220.  
<https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; Accessed: December 31, 2021.



contravening the CSA as passed in 1970. However, in August 2013, through the memorandum<sup>168</sup> emitted by the Deputy Attorney General that allowed the states to decide for themselves on the regulation regarding the use of marijuana for recreational purposes, it is stated that none of the eight federal enforcement priorities of the US Department of Justice in matters related to the conduct of use of marijuana mentioned in the document were violated.

Throughout the analysis of American history, it is possible to detect a similar situation in the past, as in the case of alcohol prohibition, which occurred from 1920 to 1931, when alcohol was prohibited by Amendment 18 and repealed through Amendment 21 of the US Constitution. This case is clear proof that Congress could reverse its decisions and provide that the states can decide by themselves what actions should be taken in order to control addictions, benefits of tax collection on drugs, violence caused by the black market, etc.

In order to explain the contents of the A-64 and I-502, the following figure summarizes the ballots that were voted on in each state related to the laws that were passed in Colorado and Washington to legalize the sale and recreational use for people over the age of 21. Since these laws are local state laws, conditions differ, as in grams allowed for personal possession, advertisement restrictions, or the application of tax imposed. In general, however, the current drug control position in those states is legalization with limits on commercialization.

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<sup>168</sup> Cole, J. 2014. Guidance Regarding Marijuana Enforcement. *Federal Sentencing Reporter*. 26, (4): 217-220. <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> Accessed: December 31, 2021.

**Table 7. Comparison between the I-502 and A-64**

	Colorado A-64	Washington I-502
	Amendment meaning: “An addition to and/or alteration to the Constitution”	Initiative meaning: “An initiative is a brand-new law or constitutional amendment proposed and voted on by the people. It is a law initiated by the people.”
Name	Amendment 64 - Use and Regulation of Marijuana	Initiative Measure No. 502 concerns marijuana.
Description	“An amendment to the Colorado constitution concerning marijuana, and, in connection therewith, providing for the regulation of marijuana; permitting a person twenty-one years of age or older to consume or possess limited amounts of marijuana; providing for the licensing of cultivation facilities, product manufacturing facilities, testing facilities, and retail stores; permitting local governments to regulate or prohibit such facilities; permitting the general assembly to enact an excise tax to be levied upon wholesale sales of marijuana; requiring that the first \$40 million in revenue raised annually by such tax be credited to the public school capital construction assistance fund; and requiring the general assembly to enact legislation governing the cultivation, processing, and sale of industrial hemp.”	This measure would license and regulate marijuana production, distribution, and possession for persons over twenty-one; remove state-law criminal and civil penalties for activities that it authorizes, tax marijuana sales, and earmark marijuana-related revenues.
Summary	It makes the personal use, possession, and limited home-growing of marijuana legal for adults 21 years of age and older; establishes a system in which marijuana is regulated and taxed similarly to alcohol; and allows for the cultivation, processing, and sale of industrial hemp.	This measure would remove state-law prohibitions against producing, processing, and selling marijuana, subject to licensing and regulation by the liquor control board; allow limited possession of marijuana by persons aged twenty-one and over; and impose 25% excise taxes on wholesale and retail sales of marijuana, earmarking revenue for purposes that include substance-abuse prevention, research, education, and healthcare. Laws prohibiting driving under the influence would be amended to include maximum thresholds for THC blood concentration.
Proposed cultivation laws	Personal cultivation of up to 6 plants allowed. Commercial cultivation is allowed with license only	Commercial cultivation is allowed with a license only.
Taxes applicable	Excise tax at 15% plus 15% sales tax on top of the normal state and local taxes	Excise taxes at 25% at production, processing, and retail levels. Plus, general state and local sales taxes.
Proposed commercial zoning	N/A	Not within 1000 feet of a school, playground, recreation center or facility, child care, public park, public transit center, 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 minimizing the exposure to under twenty-one years, no advertising near schools, public buildings, and public transportation.

Source: 1) Crick, E., Haase, H.J. and Bewley-Taylor, D. 2013. *Legally Regulated Cannabis Markets in the US: Implications and Possibilities*. Global Drug Policy Observatory. 2) Amendment 64 - Use and Regulation of Marijuana (<https://www.fcgov.com/mmj/pdf/amendment64.pdf> and <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2011-2012/35Results.html>) and 3) Initiative Measure No. 502 Concerns Marijuana. (<https://mrsc.org/getdoc/8cd49386-c1bb-46f9-a3c8-2f462dcb576b/marijuana-regulation-in-washington-state.aspx>)

The experience in the process of the legalized recreational cannabis market in Colorado<sup>169</sup> and Washington<sup>170</sup> presents some positive lessons, such as the importance of the citizen-driven approach and how the referendum could facilitate the approval to open the door to possible legalization. In addition, it also opens the possibility to be a topic of discussion and debate; local jurisdictions have emerged as entities that may provide extra protection around crucial public health issues; different levels of government can work together to achieve stated goals; tax revenue; and improved quality control. On the other hand, it also reveals some challenges, such as the fact that implementation of health-focused legal cannabis models would necessitate proactive government legislation and a tight definition of cannabis from the start and set the standards in state-level laws on cannabis-related expungement.

As mentioned in the introductory part of this section, in 2012, the states of Colorado and Washington took the unprecedented step of legalizing cannabis for non-medical markets (recreational use), which in turn paved the way for other states to authorize similar uses.<sup>171</sup> It appears that the debate over the benefits and drawbacks of drug legalization has piqued the interest of the American public, owing to the apparent failure of the strategy to combat illegal drug trafficking, as well as the divergence of public opinion in different US states on the impact of cannabis legalization on public safety and health. On the one hand, many from various social, political, and some academic sectors agree that legalizing drugs and allowing suitable institutions to control the market for psychoactive substances is essential to prevent the drug trade; others, on the other side, some argue that legalizing cannabis would create new problems by having negative impacts on public health, societal degradation, and ultimately aggravation of internal conflict.<sup>172</sup> These days, the search for new alternatives, such as state-level reforms, is having new impacts on drug policy, such as what occurred in March of 2021 in New York, where the bill that was passed

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<sup>169</sup> Subritzky, T., Lenton, S., & Pettigrew, S. 2020. Practical Lessons Learned from the First Years of the Regulated Recreational Cannabis Market in Colorado. In Tom Decorte, Simon Lenton, Chris Wilkins (ed.) *Legalizing Cannabis: Experiences, Lessons and Scenarios*. Routledge: 39-61.

<sup>170</sup> Mosher, C., & Akins, S. 2020. Recreational Marijuana Legalization in Washington State: Benefits and Harms. In Tom Decorte, Simon Lenton, Chris Wilkins (ed.): *Legalizing Cannabis: Experiences, Lessons and Scenarios*. Routledge: 62-88..

<sup>171</sup> Berke, J. , Gal, S. , & Lee Y.J. 2021. Marijuana Legalization is Sweeping the US. See every State Where Cannabis is Legal. Insider - Updated July 9, 2021. <https://www.businessinsider.com/legal-marijuana-states-2018-1> Accessed September 26, 2021.

<sup>172</sup> Barry, C. L., Sherman, S. G., Stone, E., Kennedy-Hendricks, A., Niederdeppe, J., Linden, S., & McGinty, E. E. 2019. Arguments Supporting and Opposing Legalization of Safe Consumption Sites, *International Journal of Drug Policy*, 63: 18-22.

there led to the automatic expungement of previous marijuana convictions that would now be lawful.<sup>173</sup>

#### **1.4. Lessons Learned from the Cases of Uruguay, Canada, and the US**

##### **1.4.1. INCB's Position under the UN Drug Conventions**

INCB was founded on the grounds of the SCND of 1961, and it had its precedents in previous drug control accords dating back to the League of Nations' era.<sup>174</sup> The international treaties reaffirmed Governments' obligations to enforce criminal sanctions against all aspects of illicit drug manufacture, possession, and trafficking, and INCB is in charge of overseeing its implementation.<sup>175</sup> In general, the drug treaties obligate the state parties to work together (the INCB and state members) to deter the trafficking and drugs they had agreed they would control. The limitations are that these drugs are only to be used for medical and scientific purposes.

Returning to the topic of marijuana prohibition, currently, over 180 nations have signed the global legal system regarding UN drug control. Countries considered how it would not contravene the world drug system since the UN Drug Conventions provide the decriminalization option. The SCND, as amended by the 1972 Protocol, in Article 36, paragraph 1, subparagraph (b), the 1971 Convention, in Article 22, penal provisions, paragraph 1, subparagraph (b), and the 1988 Convention, in Article 3, paragraph 3, subparagraphs (c) and (d), in similar way state that an occasional user or addict who was arrested with a narcotic drug, such as marijuana, even with a quantity more significant than that necessary for personal and immediate consumption, could be exempted from criminal penalties, provided that he or she undergoes treatment, education, post-treatment, rehabilitation, and social readaptation measures. At the international level, we have countries that have applied different regulations, decriminalization, and legalization measures, each one according to their own social conditions. The issue of marijuana regulation involves governments and international organizations such as the United Nations (UN), United Nations Human Rights Council (UNHRC), Organization of American States (OAS), among others, who

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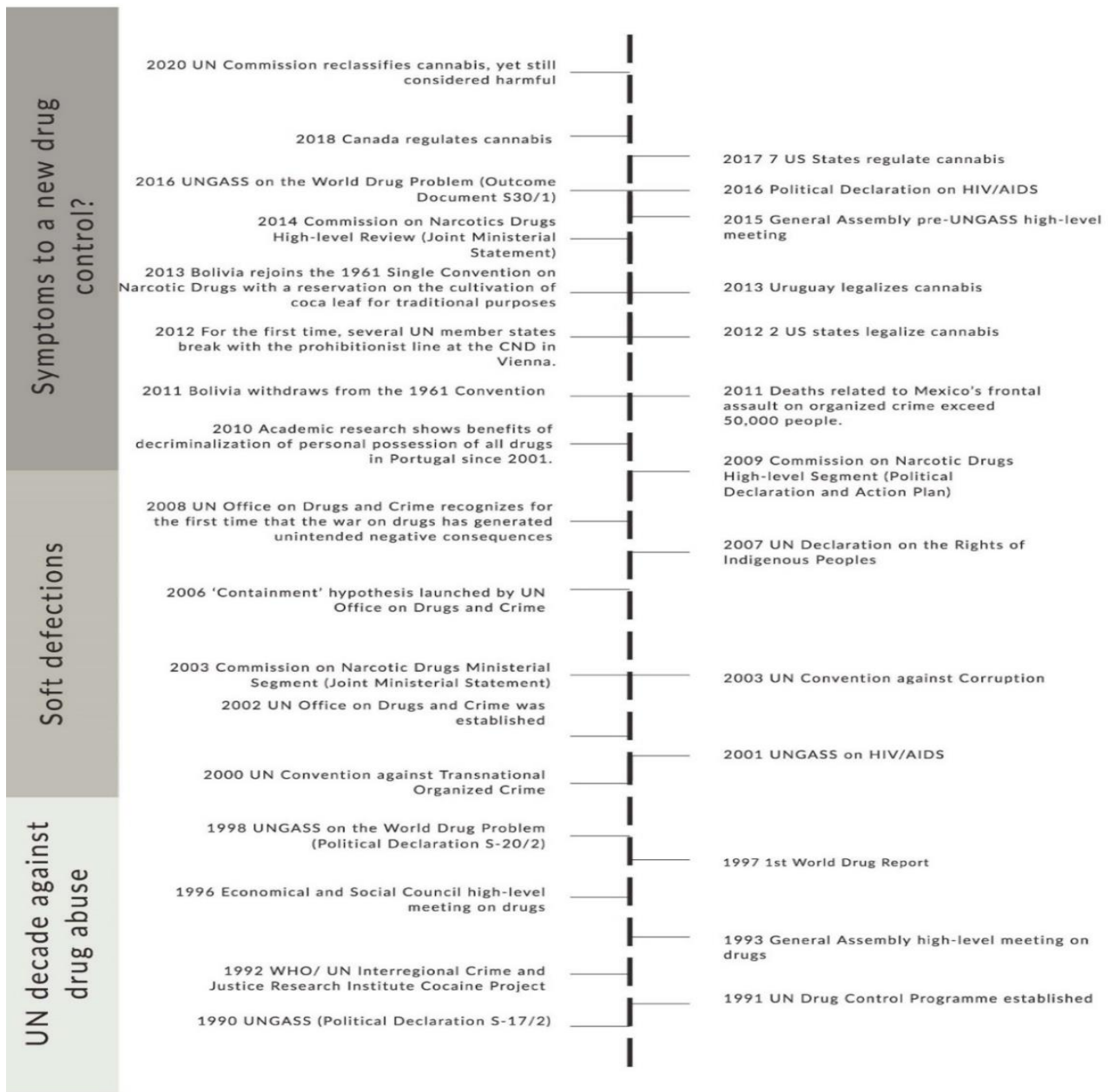
<sup>173</sup> Mendez, R. 2021. Gov. Andrew Cuomo signs bill to legalize recreational marijuana in New York. CNBC. <https://www.cnbc.com/2021/03/30/new-york-state-senate-passes-bill-to-legalize-recreational-weed.html> Accessed September 26, 2021.

<sup>174</sup> UNODC. International Narcotics Control Board (INCB) - Mandate and Functions, <http://www.unodc.org/lpo-brazil/en/drogas/jife.html>. Accessed: November 27, 2020.

<sup>175</sup> Bewley-Taylor, D., & Trace, M. 2006. *International Narcotics Control Board: Watchdog Or Guardian of the UN Drug Control Conventions?*. Beckley Foundation.

have also entered the debate. The most relevant global stand against drug abuse was the first UNGASS of 1990, which is still of significance today. A summary of the evolving global drug policy can be seen in the following table:

**Table 8. Trends on UN drug control: The UNGASS decades, 1990-present**



Source: Adapted from Nougier, M. 2018. Taking Stock: A Decade of Drug Policy—A Civil Society Shadow Report. London: International Drug Policy Consortium:17.

The table above shows that there has been a gradual increase in events related to the evolution of global drug policy. What stands out in the table is the legalization of marijuana in two states in the US in 2012 and the Uruguay and Canada marijuana legalization for recreational purposes in 2013 and 2018.

It is interesting to note the posture that the UNODC took. The UNODC clearly spoke out against the bills of Uruguay and Canada that allowed the legalization of marijuana, essentially if that legalization was to be applied throughout an entire country, like in the case of Uruguay under its Law 19172 and Canada under its Cannabis Act. However, under Article 9, section 5 of the SCND, the INCB cannot force those countries not to legalize cannabis but can only have a dialogue with Governments, provide assistance, and facilitate effective national action to attain the aims of SCND. It provides that:

“5. All measures taken by the Board under this Convention shall be those most consistent with the intent to further the co-operation of Governments with the Board and to provide the mechanism for a continuing dialogue between Governments and the Board which will lend assistance to and facilitate effective national action to attain the aims of this Convention”.<sup>176</sup>

The INCB issued the following statement in November 2012 in response to the legalization of marijuana in Colorado and Washington States in the US:

“Legalization of cannabis within these states would send wrong and confusing signals to youth and society in general, giving the false impression that drug abuse might be considered normal and even, most disturbingly, safe. Such a development could result in the expansion of drug abuse, especially among young people, and we must remember that all young people have a right to be protected from drug abuse and drug dependency... The INCB President requested the Government of the United States to take the necessary measures to ensure full

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<sup>176</sup> United Nations Treaty Collection, Status of Treaties, “Chapter VI: Narcotic Drugs and Psychotropic Substances, Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, New York, 8 August 1975”: 6 [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf) Accessed: July 23, 2021.

compliance with the international drug control treaties within the entire territory of the United States, in order to protect the health and well-being of its citizens.”<sup>177</sup>

In 2014, in response to Uruguay’s decision to legalize marijuana, INCB issued the following statement:

“In December 2013, the Senate of Uruguay approved new legislation, previously approved by the lower legislative chamber, that allows the State to assume control over and regulate activities related to the importation, production, storage, sale or distribution of cannabis or its derivatives, or the acquisition of any title related thereto, under certain terms and conditions, for the purpose of nonmedical use. The regulations governing the implementation of this law were fleshed out in a presidential decree in May 2014. Sales of cannabis to consumers were delayed, however, owing to difficulties in implementing the law. Such sales are expected to start in 2015. The Board notes that this legislation is contrary to the provisions of the international drug control conventions, specifically article 4, paragraph (c), and article 36 of the 1961 Convention as amended by the 1972 Protocol and article 3, paragraph (1) (a), of the 1988 Convention.”<sup>178</sup>

In 2018, INCB made a clear statement in response to Canada’s legalization of marijuana:

“This decision contravenes the Conventions and their overarching objectives of safeguarding the health and welfare of people. INCB is very concerned about the public health situation in Canada which will result from the Government’s decision to legalize the non-medical use of cannabis. We also call upon the Government of Canada to consider the repercussions of

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<sup>177</sup> United Nations Information Service. 2012. INCB President Voices Concern about the Outcome of Recent Referenda about Non-Medical Use of Cannabis in the United States in a Number of States - UNIS/NAR/1153: November 2012. [https://www.incb.org/documents/Publications/PressRelease/PR2012/press\\_release\\_151112.pdf](https://www.incb.org/documents/Publications/PressRelease/PR2012/press_release_151112.pdf) Accessed March 29, 2022.

<sup>178</sup> INCB. 2015. INCB Report 2014 International Narcotics Control Board [https://www.incb.org/documents/Publications/AnnualReports/AR2014/English/AR\\_2014\\_E\\_Chapter\\_III\\_Americas.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2014/English/AR_2014_E_Chapter_III_Americas.pdf) Accessed July 12, 2021.

its policy on other Member States, in accordance with its long-standing commitment to the principle of common and shared responsibility.”<sup>179</sup>

Nevertheless, the US, Uruguayan, and Canadian Governments have avoided dealing with this issue’s international legal dimensions. INCB urged them to ensure that all responsibilities are met arising from treaties:

“61. The legalization of non-medical use of cannabis contravenes the international drug control treaties. Universal and full implementation of the treaties is put at serious risk because States parties, such as Canada and Uruguay (as well as states in the United States), have legalized cannabis for non-medical use. The actions of those countries and state jurisdictions undermine the treaties. They may also encourage other States parties to follow their example and use it as a justification for doing so.

...

66. The legalization of non-medical cannabis use in some States will make it more difficult to enforce international drug control treaty provisions in neighbouring States that do comply with those provisions. It will be more difficult, for example, to prevent cross-border trafficking in cannabis products from States that have legalized non-medical cannabis use to neighbouring countries that have not done so.”<sup>180</sup>

The dilemma for countries that want to legalize marijuana for recreational purposes is that even though there is a noble reason, the drug conventions were negotiated and agreed to by the member states. The provisions in these conventions do not have an escape patch. Nevertheless, the fact is that INCB sees the Uruguay, Canada, and US governments as essential partners in drug control matters. On the same level as the activities of the US Government, the cases of Uruguay and Canada, as the first and second countries in the world to fully legalize marijuana for

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<sup>179</sup> INCB. 2018. International Narcotics Control Board Expresses Deep Concern about the Legalization of Cannabis for Non-Medical Use in Canada. Press Release - International Narcotics Control Board. <https://www.incb.org/incb/en/news/press-releases/2018/incb-expresses-deep-concern-about-the-legalization-of-cannabis-for-non-medical-use-in-canada.html> Accessed July 14, 2021.

<sup>180</sup> INCB. 2018. Report of the International Narcotics Control Board for 2018 – Chapter I. Cannabis and Cannabinoids for Medical, Scientific and “Recreational” Use: Risks and Benefits: 11. [https://www.incb.org/documents/Publications/AnnualReports/AR2018/Annual\\_Report/Annual\\_Report\\_2018\\_E\\_.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2018/Annual_Report/Annual_Report_2018_E_.pdf). Accessed October 31, 2021.



recreational use, provide a noteworthy case study in the field of drug policy and control. It is vital to consider a possible interpretation of the Uruguayan, Canadian, and American Governments that does not contravene the UN Drug Conventions based on its current motives.

## **1.4.2. Legal Justification for Alleged Violations of the UN Conventions**

### **1.4.2.1 The Uruguayan Government Position**

The Government of Uruguay, during its participation in the 57th Meeting of the United Nations Commission on Narcotic Drugs, affirmed that the Uruguayan regulation of the marijuana market “is fully within the spirit of the international conventions.”<sup>181</sup> The Uruguayan government mentioned this after the INCB condemned Uruguay for legalizing cannabis, claiming that it violated the international drug conventions. The Uruguayan government, on the other hand, insisted that Law 19172 is consistent with the country’s fundamental international human rights treaty obligations, which take precedence over drug control, and that any inconsistencies between the two should be resolved by the international community.<sup>182</sup>

In addition, as stated in Resolution 51/12 of the 2008 Commission on Narcotic Drugs, the Uruguayan government advocated for a comprehensive and balanced approach to drug policy, as well as full compliance with international human rights instruments. This document calls for the cooperation of the UNODC to properly integrate the international drug control treaties with human rights instruments.<sup>183</sup> Resolution 51/12 focuses on strengthening cooperation between the UNODC and other UN entities for the promotion of human rights in the implementation of international drug control treaties such as the SCND, the 1971 and 1988 Conventions, as well as the Universal Declaration of Human Rights while keeping in mind the SCND.<sup>184</sup> Furthermore, the

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<sup>181</sup> Ministerio de Relaciones Exteriores República Oriental de Uruguay. 2014. Comisión de Estupefacientes de Naciones Unidas 57º Período de Sesiones Intervención del Jefe de Delegación de Uruguay. [https://medios.presidencia.gub.uy/jm\\_portal/2014/noticias/NO\\_M471/Posici%3%b3n-Uruguay%20.pdf](https://medios.presidencia.gub.uy/jm_portal/2014/noticias/NO_M471/Posici%3%b3n-Uruguay%20.pdf) Accessed: November 19, 2021.

<sup>182</sup> Ministerio de Relaciones Exteriores República Oriental de Uruguay. 2014. Comisión de Estupefacientes de Naciones Unidas 57º Período de Sesiones Intervención del Jefe de Delegación de Uruguay. [https://medios.presidencia.gub.uy/jm\\_portal/2014/noticias/NO\\_M471/Posici%3%b3n-Uruguay%20.pdf](https://medios.presidencia.gub.uy/jm_portal/2014/noticias/NO_M471/Posici%3%b3n-Uruguay%20.pdf) Accessed: November 19, 2021.

<sup>183</sup> Commission on Narcotic Drugs. 2008. Resolution 51/12. Strengthening Cooperation between the United Nations Office on Drugs and Crime and other United Nations Entities for the Promotion of Human Rights in the Implementation of the International Drug Control Treaties’, in Commission on Narcotic Drugs, Report on the Fifty-First Session (28 November 2007 and 10–14 March 2008) (Vienna, UN index E/CN.7/2008/15, 14 March 2008) 32.

<sup>184</sup> Commission on Narcotic Drugs Resolution 51/12, 2008. Strengthening Cooperation between the United Nations Office on Drugs and Crime and other United Nations Entities for the Promotion of Human Rights in the

content of international drug conventions is subject to national constitutional limitations (Article 36 of the SCND), must take into account their constitutional, legal, and administrative systems (Article 21 of the 1971 Convention), and is subject to its constitutional principles and basic legal concepts (Article 3 of the 1988 Convention). As a result, it must adhere to “fundamental human rights” (Article 14, paragraph 2, of the 1988 Convention). Finally, the representative of the Uruguayan government stated that “the treaties cannot be interpreted as a justification, much less a requirement, of a prohibitionist regime,” recalling that “the original spirit of the treaties is centered on health.”<sup>185</sup>

The Uruguay standpoint recognized two different values: human rights and drug control. For the Uruguayan government, human rights protection poses a primacy position in their agenda, such as protecting public health and security. For that, the logical action of a state with this view is to protect human rights, even if this means overriding any provision of international drug control conventions and adopting a different policy. The Uruguay government’s argument is based on the presumption that the protection of human rights prevails over the UN international drug conventions.

In other words, on the one hand, Uruguay’s legal standpoint is the primacy of the UN’s international bill of human rights over all other treaties, but on the other hand, it affects the credibility of the international drug conventions. In international law, the importance of the *jus cogens* norm protects essential values shared by the international community. *Jus cogens* can be the legal embodiment of the moral conscience of international society, and it balances drug control and human rights protection. It is important to note that it is only in the last decade that universities and law schools are addressing the issue of incorporating international human rights law in a much more systematic way.<sup>186</sup> Gradually, the scientific autonomy of this law is being recognized as a specific discipline and, more slowly, as a compulsory part of the curriculum.<sup>187</sup>

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Implementation of the International Drug Control Treaties’, in Commission on Narcotic Drugs, Report on the Fifty-First Session (28 November 2007 and 10–14 March 2008) (Vienna, UN index E/CN.7/2008/15, 14 March 2008): 32.

<sup>185</sup> Ministerio de Relaciones Exteriores República Oriental de Uruguay. 2014. Comisión de Estupefacientes de Naciones Unidas 57º Período de Sesiones Intervención del Jefe de Delegación de Uruguay. [https://medios.presidencia.gub.uy/jm\\_portal/2014/noticias/NO\\_M471/Posici%c3%b3n-Uruguay%20.pdf](https://medios.presidencia.gub.uy/jm_portal/2014/noticias/NO_M471/Posici%c3%b3n-Uruguay%20.pdf) Accessed: November 19, 2021.

<sup>186</sup> Henderson, H. 2004. Los Tratados Internacionales de Derechos Humanos en el Orden Interno: La Importancia del Principio Pro homine. *Revista IIDH*, 39(29): 73.

<sup>187</sup> Henderson, H. 2004. Los Tratados Internacionales de Derechos Humanos en el Orden Interno: La Importancia del Principio Pro homine. *Revista IIDH*, 39(29): 74.

With respect to the incorporation of international human rights instruments, Oliveira and Ribeiro maintain that the *pro homine* principle “acknowledges the coexistence of both international and domestic norms aims to achieve two different but interconnected goals: solving conflicts between municipal norms and international human rights treaties, and supporting the ultimate objective of human rights which is the protection of the human person.”<sup>188</sup> Although the *pro homine* principle is intrinsically tied to international human rights law, it can also be found in domestic systems. The *pro homine* concept, for example, is explicitly referenced in the body of the Mexican Constitution (after the amendment of 2011), making it a crucial aspect of legal hermeneutics in human rights.<sup>189</sup>

Henderson, in his study, mentions some of the forms of application of the *pro homine* principle: a) The application of the most protective norm, which means that with this rule, the judge must select from among several concurrent norms, and choose the one that contains better or more favorable protections for the individual or victim in relation to his or her human rights. This decision could be based on the rule of *pro homine* interpretation, when it is possible to apply two or more national and international norms in force, regardless of their hierarchy, to a given concrete situation;<sup>190</sup> b) The application of preservation of the most favorable norm. This application refers that also, from international instruments, the *pro homine* principle acts as a rule of interpretation and application in the case of a succession of norms. A later norm has the vocation to expressly or tacitly derogate or repeal a previous norm of equal or lower hierarchy.<sup>191</sup> c) Interpretation that protects the individual or the victim, as long as this does not lead to an application contrary to the express will consist of the legislator or the body that created the international norm;<sup>192</sup> and d) An exercise of practical application, where there is a law, and the State subsequently ratifies an international human rights treaty.<sup>193</sup>

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<sup>188</sup> Oliveira M. V., & Ribeiro, D. 2015. The Japanese Legal System and the *Pro Homine* Principle in Human Rights Treaties. *Anuario Mexicano de Derecho Internacional*, 15(1): 242.

<sup>189</sup> Oliveira M. V., & Ribeiro, D. 2015. The Japanese Legal System and the *Pro Homine* Principle in Human Rights Treaties. *Anuario Mexicano de Derecho Internacional*, 15(1): 266-267.

<sup>190</sup> Henderson, H. 2004. Los Tratados Internacionales de Derechos Humanos en el Orden Interno: La Importancia del Principio *Pro homine*. *Revista IIDH*, 39(29): 93-94.

<sup>191</sup> Henderson, H. 2004. Los Tratados Internacionales de Derechos Humanos en el Orden Interno: La Importancia del Principio *Pro homine*. *Revista IIDH*, 39(29): 94-95.

<sup>192</sup> Henderson, H. 2004. Los Tratados Internacionales de Derechos Humanos en el Orden Interno: La Importancia del Principio *Pro homine*. *Revista IIDH*, 39(29): 95-96.

<sup>193</sup> Henderson, H. 2004. Los Tratados Internacionales de Derechos Humanos en el Orden Interno: La Importancia del Principio *Pro homine*. *Revista IIDH*, 39(29): 96-97.

The INCB indeed invoked the right to protection from drugs when the Uruguayan government intended to integrate the international drug control treaties with human rights instruments. It can add international human rights law principles, such as the *pro homine* principle, which represents another tool that domestic courts can count on it. In concordance with Henderson's argument, the *pro homine* principle constitutes an essential hermeneutic tool for interpretation of national and international instruments, which judges cannot ignore.<sup>194</sup>

#### 1.4.2.2 The Canadian Government Position

The change in public policy towards cannabis in Canada can be equated with the Uruguayan case with respect to the approval of laws that allow the production, commercialization, and consumption of cannabis at the national level. For the protection of health and welfare of its citizens, the Canadian government engaged in dialogue with the INCB and proactively addressed the apparent tensions between the treaty and its domestic commitments.<sup>195</sup> The Canadian government has also been open and active in dialogue at key international fora, including UNGASS 2016 and the annual Commission on Narcotic Drugs, as well as in informal discussions with like-minded states exploring implementation or implementing cannabis reforms.<sup>196</sup> One possible way forward, which Canada has considered, is treaty modification inter-se, a mechanism specified in the 1969 Vienna Convention on the Law of Treaties that allows a group of member states to modify a treaty "among themselves" (Article 41).<sup>197</sup>

Canada's position about cannabis legalization was based not only on legal considerations but also on the benefits in the long run of collecting scientific data. The right to health and safety is an important argument to justify cannabis legalization, but making legalization more relevant if it is consistent with the desire of UN agencies to gather precise data on cannabis. In other words,

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<sup>194</sup> Henderson, H. 2004. Los Tratados Internacionales de Derechos Humanos en el Orden Interno: La Importancia del Principio Pro homine. *Revista IIDH*, 39(29) 3: 98

<sup>195</sup> Government of Canada. 2016. Plenary Statement for the Honourable Jane Philpott Minister of Health - UNGASS on the World Drug Problem <https://www.canada.ca/en/health-canada/news/2016/04/plenary-statement-for-the-honourable-jane-philpott-minister-of-health-ungass-on-the-world-drug-problem.html> Accessed: November 20, 2021.

<sup>196</sup> Government of Canada. 2016. Plenary Statement for the Honourable Jane Philpott Minister of Health - UNGASS on the World Drug Problem <https://www.canada.ca/en/health-canada/news/2016/04/plenary-statement-for-the-honourable-jane-philpott-minister-of-health-ungass-on-the-world-drug-problem.html> Accessed: November 20, 2021.

<sup>197</sup> Jelsma, M., Boister, N., Bewley-Taylor, D., Fitzmaurice, M., & Walsh, J. 2018. Balancing Treaty Stability and Change: Inter se Modification of the UN Drug Control Conventions to Facilitate Cannabis Regulation. *Global Drug Policy Observatory*, Swansea University (7): 20.

the Canadian Government understands the UN Drug Conventions' main goals and also recognizes the importance of human rights protection.<sup>198</sup> At the same time, it presents a firm scientific foundation by providing the appropriate UN agencies (WHO, UNODC) with as much scientific data as possible on cannabis. The Canadian approach would be helping to achieve their priority objective of learning more about the drug.

Eliason and Howse contend that perhaps the Canadian Government “will withdraw from the drug conventions and rejoin them with reservations; or perhaps the WHO will convince the Commission on Narcotic Drugs to reschedule cannabis, thus removing the INCB’s concerns regarding Canada’s cannabis legalization regime; or perhaps the drug conventions will be ignored when it comes to cannabis.”<sup>199</sup> Even outside of this canon of treaty law, a growing body of academic research claims that the UN’s drug and human rights frameworks are essential components of the UN legal system.<sup>200</sup> As a result, UN drug and human rights legislation should be consistent to avoid conflicts between the two regimes’ rights and obligations. Furthermore, some experts claim that the human rights framework has a greater legal significance than drugs, supporting the Uruguayan government’s argument based on references to human rights in the UN Charter.<sup>201</sup> As a result, in the event of a conflict between the frameworks, the human rights framework should take precedence.<sup>202</sup>

What is certain is that the Government of Canada has its legal justification concerning cannabis legalization in similar terms to the attitude taken by the Uruguayan Government. The Canadian government could explore the inter-se mechanism because this strategy would allow a group of like-minded states to amend their relationship with the UN treaties on cannabis by forming a new treaty between themselves.

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<sup>198</sup> Government of Canada. 2016. *A Framework for the Legalization and Regulation of Cannabis in Canada: The Final Report of the Task Force on Cannabis Legalization and Regulation*. Health Canada: 30.

<https://www.canada.ca/en/services/health/cannabis-cannabis/task-force-cannabis-legalization-regulation/framework-legalization-regulation-cannabis-in-canada.html>. Accessed August 7, 2021.

<sup>199</sup> Eliason A. & Howse R. 2019. A Higher Authority: Canada’s Cannabis Legalization in the Context of International Law, *Michigan Journal of International Law*. 40: 382.

<sup>200</sup> Bone, M. 2019. *Human Rights and Drug Control: A New Perspective*. Routledge: 6.

<sup>201</sup> UN General Assembly. 2016. Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem—Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem. <https://undocs.org/A/RES/S-30/1> Accessed: February 26, 2022.

<sup>202</sup> Barrett, D, 2008. Unique in International Relations? A Comparison of the International Narcotics Control Board and the UN Human Rights Treaty Bodies SSRN: 28.

### **1.4.2.3. The US Government Position**

Is the US contravening the UN Drug Conventions? Is tolerance of legalization by some states in conformity with the obligation of signatory States under the drug conventions? Is the measure taken by the Federal Government consistent with its absolute power to prosecute those who violate some federal law? Based on the previous analysis of the legal framework of the UN Drug Conventions, the answer is that the US states that legalized marijuana for recreational purposes is inconsistent with the convention. However, the states in the US are not a member of the international society, and also it could be said that international cooperation is not a task for states of the US. Even though some states have broken the treaties, the US claims do not clearly state that the US does not violate the conventions, but it mentions that cannabis remains banned under federal law.<sup>203</sup> As mentioned, the US federal government has created guidelines to accommodate states that have legalized marijuana. The approach taken by the US by legalizing the recreational use of marijuana in some states could be summarized as what is known in international law as the subnational unit level.<sup>204</sup> This means that there remain national obligations which the US government continues banning at the federal level the recreational use of marijuana, even if this obligation is not implemented by the federal government.

### **1.4.3 Benefits and Harms of the Legalization on Recreational Marijuana**

It is undeniable that at a global level, the debate on drug policies and, mainly, on the legalization of marijuana has evolved. The following table presents a summary of their policies discussed in Section 3 in order to give a general picture of the main reasons for marijuana legalization and to deliver some lessons learned from these countries, leaving the door open for further discussion of the human rights approach. In addition, this table illustrates the weaknesses and strengths of the different legalization methods to draw some lessons from those adopted by these three countries.

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<sup>203</sup> UN Department of Justice. 2012. Justice Department Announces Update to Marijuana Enforcement Policy. <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy> Accessed: December 31, 2021.

<sup>204</sup> Kilmer, B., & Pacula, R. L. 2017. Greening the Black Market: Understanding and Learning from the Diversification of Cannabis Supply Laws. *Addiction* (Abingdon, England), 112(7): 8.

**Table 9. Summary of Uruguay, Canada, and United States’ Context and Policy Frameworks for Marijuana Use Legalization**

	Uruguay	Canada	US (16 states and Washington, D.C.)
When did the Government legalize recreational cannabis?	<ul style="list-style-type: none"> <li>December 2013.</li> </ul>	<ul style="list-style-type: none"> <li>October 2018.</li> </ul>	<ul style="list-style-type: none"> <li>2012 ~ present.</li> </ul>
Why did the Government legalize recreational cannabis?	<ul style="list-style-type: none"> <li>To eliminate legal inconsistency that had allowed marijuana possession and use but criminalized users for accessing cannabis. To improve public health through education and prevention campaigns.</li> </ul>	<ul style="list-style-type: none"> <li>Recognition of the failure that criminal prohibition has had on cannabis utilization.</li> <li>To re-focus policy and regulation on health impacts and public safety.</li> </ul>	<ul style="list-style-type: none"> <li>The apparent failure of the strategy to combat illegal drug trafficking.</li> <li>The division of public opinion in different states of the US regarding the legalization of cannabis on its influence on safety and health.</li> </ul>
How did the Government legalize recreational cannabis?	<ul style="list-style-type: none"> <li>Top-down policy process (Law 19172).</li> </ul>	<ul style="list-style-type: none"> <li>Liberal Party won the 2015 federal election based on a platform that included cannabis legalization.</li> </ul>	<ul style="list-style-type: none"> <li>The bottom-up process guided by activists who enabled legalization to be decided by a public referendum (citizen-driven approach).</li> </ul>
Public Opinion	<ul style="list-style-type: none"> <li>Against (60% to 65%)<sup>205</sup></li> </ul>	<ul style="list-style-type: none"> <li>Supported legalization</li> </ul>	<ul style="list-style-type: none"> <li>Depending on the State</li> </ul>
Drug Control Position	<ul style="list-style-type: none"> <li>Legalization with Limits on Commercialization.</li> </ul>	<ul style="list-style-type: none"> <li>Legalization with Limits on Commercialization.</li> </ul>	<ul style="list-style-type: none"> <li>Legalization with Limits on Commercialization.</li> </ul>
Where to buy it?	<ul style="list-style-type: none"> <li>At clubs, pharmacies, and home growers.</li> </ul>	<ul style="list-style-type: none"> <li>At authorized public or private stores, depending on the province. Online sales are also permitted throughout the country.</li> </ul>	<ul style="list-style-type: none"> <li>At budtenders.</li> </ul>
Weaknesses of implementation	<ul style="list-style-type: none"> <li>Not enough pharmacies were selling to meet demand.</li> </ul>	<ul style="list-style-type: none"> <li>Public health and safety concerns.</li> </ul>	<ul style="list-style-type: none"> <li>Implementation of more public health focused on legal cannabis models would require proactive legislation by</li> </ul>

<sup>205</sup> Cifra consultores. 2013. The Uruguayan and regulation of the production, sale and consumption of marijuana. Available in [www.cifra.com](http://www.cifra.com). FACTUM. The doubts and contradictions of society about the legalization of marijuana. Available in: [www.factum.edu.uy/node/1080](http://www.factum.edu.uy/node/1080)

	<ul style="list-style-type: none"> <li>• The amount of marijuana authorized for production by the government and distributed to pharmacies has not been enough to meet demand.</li> <li>• The approved cultivators had problems with production.</li> <li>• Shortages and delays in sales at pharmacies created the problem that registered buyers were not able to buy legally and therefore had to use the illegal market.</li> <li>• “The grey market” and enforcement dilemma.</li> </ul>	<ul style="list-style-type: none"> <li>• Large and entrenched illicit market.</li> <li>• Poorly understood laws, inconsistently enforced.</li> </ul>	<p>the government and that the definition of cannabis should be strictly defined at the outset.</p>
Strengths of implementation	<ul style="list-style-type: none"> <li>• A large number of marijuana consumers are using legal marijuana.</li> <li>• Improved quality control.</li> </ul>		<ul style="list-style-type: none"> <li>• A citizen-driven approach to legalization solves the problem of inactivity at the federal level.</li> <li>• Local jurisdictions have emerged as entities that may provide extra protection around crucial public health issues.</li> <li>• Various levels of government can work harmoniously towards stated goals.</li> <li>• Tax revenue.</li> <li>• Improved quality control.</li> </ul>



The drug abuse problem could be limited, and a realistic international and national policy of legalization that will reduce the supply of illicit drugs can be created. It is clear that one benefit of legalization is that the quality control in the marijuana products is much greater, so the consumer knows the origin and species of all products sold in stores, and the products have the percentage of cannabinoids THC and CBD defined.<sup>206</sup> Another positive aspect for governments is the increase in tax revenue. The marijuana industry is up-and-coming for investors. Concerning crimes, the legalization of marijuana did not lead to an increase in disruptions to public order or visible increases in crime in the cities.<sup>207</sup> On the other hand, forecasting consumption and the imbalance between supply and demand is a problem. Sometimes, store inventory is not sufficient to meet demand.<sup>208</sup> The consequence is long lines and a frequent lack of inventory. Another issue is that the legal market did not wipe out the illegal market. There is a lack of points of sale in remote local areas because the sale is concentrated in the city centers. These are reasons for users, mainly those who live farther away from urban centers, to continue buying from the illegal market. Governments should offer more options for small producers and retailers to enter the legal market.

## **Conclusion**

This chapter has shown that the circumstances or necessities of the Governments to repress the production, distribution, and consumption of drugs during the early twentieth century differs from those of the present era. The three international drug control conventions provide States with a wide range of options for implementing various drug control tactics. It may well be claimed that there is no genuine reason why Canada, Uruguay, and, to a lesser extent, the US, have implemented drug control methods that are in breach of their international drug control conventions. Although the subject of public health and the battle against organized crime does not appear to have much support, it is not the goal of this study to evaluate the effectiveness or ineffectiveness of these countries' programs. However, the most logical step for these countries would have been to bring the need for a review of the cannabis criminalization regime to a debate in international forums or

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<sup>206</sup> Pusiak, R. J., Cox, C., & Harris, C. S. 2021. Growing Pains: An Overview of Cannabis Quality Control and Quality Assurance in Canada. *International Journal of Drug Policy*, 93, 103111.

<sup>207</sup> Dills, A. K., Goffard, S., Miron, J., & Partin, E. 2021. The Effect of State Marijuana Legalizations: 2021 Update. *Cato Institute, Policy Analysis* (908).

<sup>208</sup> Dills, A. K., Goffard, S., Miron, J., & Partin, E. 2021. The Effect of State Marijuana Legalizations: 2021 Update. *Cato Institute, Policy Analysis* (908).

to promote convention derogation procedures such as declassification, amendment, denunciation or make reservations<sup>209</sup> or even consider temporary withdraw from the conventions and re-accession with reservation as Bolivia did in 2013 in relation to the cultivation of coca leaf, a narcotic drug prohibited by the SCND.<sup>210</sup>

The ultimate purpose of the three international drug control conventions is to ensure humanity's welfare and health. Countries that have chosen to legalize cannabis for recreational use have contravened their international obligations. However, many of the objectives set forth by the conventions do not reflect the current attitudes toward legalization. States were formerly committed to reducing drug usage but are now willing to allow it and even build highly profitable enterprises around it, such as the restricted cannabis market. The existing drug control regime has evolved and will continue to develop, which contributes to its adaptability. However, the current actions of countries regarding the legalization of marijuana use for recreational purposes are the object of serious discussion on the regime's future, showing the need for reconsidering it.

Can the current international drug conventions survive if more potential economic giants like the US or Canada perhaps withdraw from the drug treaties related to the prohibition of recreational use of marijuana? It seems that the international drug conventions on its prohibition of cannabis will be a sort of *de facto* abridged to time again by more countries. The world is in a position to propose new drug policies. It has been 50 years since the international system for the control of psychoactive substances was established globally, which has not yielded the expected results in terms of health and safety.<sup>211</sup> The point of the legalization of marijuana and some drugs, in general, goes beyond the recreational issue; it is an issue that should focus on the implementation of public policies that are oriented towards risk and harm reduction. More than 50 countries have medical cannabis systems in place, including Canada, Uruguay, 16 US states, and Washington, D.C.

Regarding the human rights approach, it is essential to note that it is relevant in the courtroom, not in the parliament or government, because human rights is a tool for ordinary people to fight

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<sup>209</sup> Standing Senate Committee on Foreign Affairs and International Trade. 2018. International Drug Conventions: Canada's options with respect to Bill C-45. [https://sencanada.ca/content/sen/committee/421/AEFA/Briefs/2018-03-28\\_Brief\\_LineBeauchesne\\_e.pdf](https://sencanada.ca/content/sen/committee/421/AEFA/Briefs/2018-03-28_Brief_LineBeauchesne_e.pdf) Accessed: February 6, 2022.

<sup>210</sup> UNODC. 2013. Bolivia to Re-accede to UN Drug Convention, while Making Exception on Coca Leaf Chewing. <https://www.unodc.org/unodc/en/frontpage/2013/January/bolivia-to-re-accede-to-un-drug-convention-while-making-exception-on-coca-leaf-chewing.html> Accessed: February 6, 2022.

<sup>211</sup> Bewley-Taylor, D., & Jelsma, M. 2011. Fifty Years of the 1961 Single Convention on Narcotic Drugs: A Reinterpretation. *Series on Legislative Reform of Drug Policies*. 12: 17.

against government policies. In the case of Uruguay, the government used a top-down approach to initiate marijuana legalization and involved human rights to defend the legalization of drugs in its statement sent to ICBN. In Canada, a similar situation can be observed when the Liberal Party won the federal election based on a platform that included cannabis legalization and promoted to share their findings related to recreational marijuana use. For the US, the bottom-up process was guided by activists who enabled legalization to be decided by a public referendum. Human rights were not invoked by a citizen's claim in all these cases.

The following chapters will introduce the decision-making process of the Mexican Government concerning drug control but will also present how human rights play an essential role in that process. Furthermore, in comparison to the cases of Uruguay, Canada, and the US, this dissertation will present that there is no movement for the legalization of marijuana by amendment of the Mexican drug laws. For that, the people have to rely on human rights, throughout judicial procedures, as one way to fight against the drug policies of the government.

## Chapter 2

### **The Rights to Dignity and Free Development of Personality on Marijuana Control in Mexico: A Study of Amparo 237/2014**

#### **Introduction**

Since the twentieth century, a public policy approach promoted worldwide by the US has dominated the prohibition of drug use and is supported by several countries. Over time, drug use took on more scientific overtones with the introduction of addiction, and a legal notion was also introduced that characterizes the use of these substances, like marijuana, as a crime. However, as was posed in the previous chapter, the current trend regarding marijuana use for recreational purposes is changing.

Addressing the issue of marijuana regulation and drug regulation in general from a human rights perspective is not a simple matter. However, this section of the dissertation will focus on drug control in Mexico, specifically the use of marijuana. It will present how a citizen can petition the state to use marijuana for recreational purposes and exercise the right to the protection of his or her human rights to achieve that goal. This approach can be presented from a different perspective than usual when talking about drug control regulation, and at the same time, it can be shown how a legal case can also change the mentality of the legislator with respect to prohibition. In the first instance, this chapter reviews the governmental policies regarding drug control adopted by Mexico. The primary objective is to illustrate how the Mexican government's drug control policies have been justified on marijuana in need to protect public health, order, and security of the people.

The second part of this chapter analyzes a decision by the Mexican Supreme Court of Justice of the Nation (SCJN) on November 11, 2015, which acknowledged the legality of the use of marijuana for recreational purposes by looking at the drug control issue from a human rights perspective.<sup>212</sup> Previously published studies related to drug issues have focused on international criminal policies, addressing how to regulate drug use or if offenses related to the use of narcotics should be eliminated. However, an increasing number of evidence-based studies show that marijuana use in adults does not pose a significant risk to health, except in cases of chronic and

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<sup>212</sup> SCJN. 2015. Amparo en Revisión 237/2014.

excessive use.<sup>213</sup> Also, interventions by the government that focus on preventing or reducing the use of marijuana based on prohibition and criminal punishment have shown modest effectiveness,<sup>214</sup> and thus, the argument that criminal policies are effective in protecting the public order and security of citizens may be questionable. Recently, the debate about the use of marijuana for recreational purposes has gained fresh prominence, and there has been renewed interest in arguing that the government policies that regulate the use of marijuana and other drugs for recreational purposes lack an approach based on human rights.<sup>215</sup> If the government infringes on any human right through its legislative function, it is necessary to analyze how policies that had led to the adoption of specific laws could be improved under the scheme of human rights.

In this chapter, the matter of the usage of recreational marijuana consumption is studied by analyzing the claims of the plaintiff in Amparo 237/2014 (hereinafter A.R.237/2014), which framed the issue under the scope of the protection of human rights, and thus approached the issue from an individual rights perspective. The basis for an amparo lawsuit can be summarized as measures for the protection of an individual's constitutional rights. The Mexican Federal Judiciary has a three-tier system. The SCJN (Suprema Corte de Justicia de la Nación in Spanish) has final appellate jurisdiction over all state and federal courts; The circuit courts (Tribunales de Circuito in Spanish) are the federal appellate courts, and the federal courts of the first instance are the district courts (Juzgados de Distrito in Spanish).

The Amparo Law is an instrument of defense that offers protection to citizens and companies against abuses of authority by governmental bodies. Therefore, any act of authority that goes against the recognized human rights and guarantees granted for their protection by the Mexican Constitution may be claimed before the Courts of the Federation through a direct or indirect amparo trial, depending on the nature of the act in question, in order to provide the judicial protection needed by the governed. The amparo lawsuit may be indirect, started in a District Court

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<sup>213</sup> Fischer B., Jeffries V., Hall W., Room R., Goldner E., & Rehm J. 2011. Lower Risk Cannabis Use Guidelines for Canada (LRCUG): A Narrative Review of Evidence and Recommendations. *Canadian Journal of Public Health*. 102(5): 326.

<sup>214</sup> Babor, T., Caulkins, J., Fischer, B., Foxcroft, D., Humphreys, M., Obot, I., Rehm, J., Reuter, P., Room, R., Rossow, I., & Strang, J. 2018. *Drug Policy and the Public Good*. United States of America: Oxford University Press: 255.

<sup>215</sup> Boiteux L., Chernicharo L.P. & Alves C.S. 2014. Human Rights and Drug Conventions: Searching for Humanitarian Reason in Drug Laws. In Labate, B., Cavnar, C. (eds): *Prohibition, Religious Freedom, and Human Rights: Regulating Traditional Drug Use*. Berlin, Heidelberg: Springer: 12.

or direct, initiated in the Supreme Court or Appellate Courts known as Collegiate Circuit Courts.<sup>216</sup> The difference between a direct and an indirect amparo proceeding is that the direct amparo is filed against final judgments, awards, and resolutions that put an end to a trial, while the indirect amparo proceeds against any act of authority that causes harm to the governed, in the terms established by the Amparo Law.

There are three primary objectives in this chapter: The first is to illustrate how the Mexican government's drug control policies are justified in the need to protect public health, order, and security of the people. The second objective is to analyze the judgment of the Supreme Court and to point out what kinds of human rights were referred to as supporting grounds for the decision. The third objective is to explore equally suitable alternative measures to protect the health and public order that could be taken by the Mexican government for future policies regarding the issue of the consumption of marijuana for recreational use under the safeguard of human rights.

One major drawback of this chapter is that the jurisprudence analyzed is only applicable to Mexico, and the scope of the human right that was discussed in the judgment of the Supreme Court cannot be applied universally. However, even if the judgment is only valid for some Mexican people who received permission from the Supreme Court to consume marijuana for recreational purposes, the study may prove helpful for those studying the issue of drug control under the framework of human rights.

## **2.1. Mexico's Preservation Policies: Public Health, Order and Security**

### **2.1.1 Current General Health Law Prohibiting Recreational Use of Narcotic Drugs**

Mexican Drug Legislation<sup>217</sup> has seen a number of regulations or decrees throughout its history, yet none of them have provided for the consumption of marijuana for recreational purposes to be allowed by the Mexican Drug Legislation. As mentioned, of all of these laws, one notable piece of legislation is Decree 44 of August 20, 2009, also known as the Narcomenudeo Act. This decree mandated amendments to the GHL, the Federal Criminal Code, and the Federal

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<sup>216</sup> Secretaría de Gobernación 2020. Unidad General de Asuntos Jurídicos. Capítulo IV. Del Poder Judicial. <http://www.ordenjuridico.gob.mx/Constitucion/articulos/94.pdf> Accessed: December 30, 2021.

<sup>217</sup> For this research, the Mexican Drug Legislation composes three main laws: General Health Law with 115 regulations or decrees since its creation, but with 70 decrees from August 20, 2009 until December 24, 2018; the Federal Criminal Code with 45 from August 20, 2009 until April 12, 2019; and the Federal Code of Criminal Procedure which was abrogated on March 3, 2014 and replaced by the National Code of Criminal Procedure which prevails until present time.

Code of Criminal Procedure<sup>218</sup> and established that the authorities of public security, administration, and enforcement shall know and resolve small-scale drug dealing offenses or execute the sanctions imposed for such offenses. With this reform, an entire chapter was added to the GHL called “Crimes against Health in the Mode of Drug Trafficking,” which consists of ten Articles from 473 to 482, which set out definitions of crimes, the current concurrent jurisdiction or competence of the authorities to deal with these crimes, a list of drugs, definition of crimes, and penalties.

**Table 10. Comparison between the Penalties of the Drug Legislation before and after the Amendment of 2009**

Drug legislation until August 2009		Drug legislation as of August 21, 2009			
Competence	Federal	Competence		State	Federal
Offence	Penalty	Offence	Definition	Small-scale dealing penalty	Large-scale trafficking penalty
<b>Possession or transport not for commerce or supply</b>	The penalty determined by a table based on type of substance, amount, and whether first time or recidivist	<b>Possession not for commerce or supply</b>	Physical holding of narcotics or when they are nearby and available to the person	Ten months to three years of prison	Four to seven years and six months of prison
<b>Planting, growing, or harvesting</b>	One to six years of prison (when accompanied by a low level of education and extreme economic need) Otherwise, two to eight years of prison	<b>Planting, growing, or harvesting</b>		Kept at one to six years of prison (when a low level of education and extreme economic need) Otherwise, two to eight years of prison	Kept at one to six years of prison (when a low level of education and extreme economic need) Otherwise, two to eight years of prison

Source: Hernández, A. P. 2011. Drug Legislation and the Prison Situation in Mexico. Systems Overload-Drug Laws and Prisons in Latin America: 62-63. <http://www.drogasyderecho.org/wp-content/uploads/2015/03/so-mexico.pdf> Accessed: March 29, 2022.

<sup>218</sup> Cámara de Diputados. 2009. Código Federal de Procedimientos Penales. <https://www.diputados.gob.mx/LeyesBiblio/abro/cfpp.htm> Accessed: March 29, 2022.

What stands out in the table presented above are the penalties for illegal use of drugs, including marijuana, punishable with prison time. In Mexico, the GHL establishes the sanitary control of products and services within the areas of general health that fall within the exclusive competence of the Ministry of Health due to the degree of risk posed to public health, which includes medicines, narcotics, and psychotropic substances, as well as the raw materials used to make them.<sup>219</sup> Likewise, the GHL provides that drugs, narcotic drugs, psychotropic substances, products or preparations containing them, for sale or supply, as well as for their importation and exportation, must have the corresponding sanitary authorization of the Ministry of Health through the Federal Commission for the Protection of Health Risks, also known as COFEPRIS (Comisión Federal para la Protección contra Riesgos Sanitarios in Spanish).<sup>220</sup>

Article 1 of the GHL establishes the law's goal of protecting the right to health of the people and protecting the public order and social interest. The GHL provides for the express prohibition of any act related to some substances considered to be narcotic, including marijuana (The GHL of 1984). However, in the last part of Article 235 regarding drugs and Article 247 referring to psychotropic substances, in similar circumstances, the GHL opens the possibility of the use of narcotics for medical and scientific purposes provided that the Ministry of Health gives its previous authorization (The GHL, Articles 235 and 247; the latest amendment on these articles made on May 27, 1987).

“Article 235 The planting, cultivation, harvesting, processing, preparation, conditioning, acquisition, possession, trade, transport in any form, prescription, supply, employment, use, consumption and in general, any act with a drug or any product that contains them is subject to:

The provisions of this Act and its regulations;...

VI. The provisions relating to issues within the scope of their respective powers of other agencies of the Federal Government. The acts referred to in this Article may only be made for medical and scientific purposes and require authorization from the Ministry of Health.”

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<sup>219</sup> Gómez-Dantés O., et al. 2011. Sistema de Salud de México. Salud Pública de México. 53: 220-232.

<sup>220</sup> COFEPRIS. 2019. <https://www.gob.mx/cofepris/que-hacemos>. Accessed November 19, 2021.



From the article quoted above, Mexican drug legislation prohibits the use of drugs for recreational reasons but allows it for medical and scientific purposes. In the present study, the terms “medical” and “scientific” follow the definition provided by the GHL, and for the purposes of this dissertation, the term “recreational” is defined as drug use other than for medical and scientific purposes. It encompasses doing something for enjoyment and is similar to leisure activities such as travel or playing sports

### **2.1.2 The Protection of Public Health, Order and Security**

Article 4 of the Political Constitution of the United Mexican States (hereinafter Mexican Constitution) guarantees that all people have the right to health, one of the social rights the State must guarantee.<sup>221</sup> The State has an obligation to preserve one’s fundamental rights as protected by the Constitution, including the right to health. Such protection involves the creation and maintenance of the Mexican health system, which aims to provide quality health services to the whole population. The right to health is further developed as an obligation of the State to contribute to the social welfare of the population through social assistance services that put emphasis on the growth of the community.<sup>222</sup> The protection of health and the development of healthcare is one of the fundamental tasks of the Mexican government and represents one of the keys to public welfare.<sup>223</sup> Furthermore, in Mexico, the right to health also involves the State’s responsibility to inform society of harmful things that could damage the health of the population.<sup>224</sup> In the same way, the State has an obligation to prevent individuals, groups, or even companies from hurting themselves. Mexico understands that health as a social right can only be preserved through collective effort and through a multitude of approaches that go beyond the management of a public health system that provides health services to the population.<sup>225</sup>

The GHL in Mexico has the objective of protecting public health from the effects of drug consumption which can negatively affect the cognition and physiology of human beings, causing

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<sup>221</sup> Government of Mexico. 2008. Political Constitution of the United Mexican States. [http://www.oas.org/juridico/mla/en/mex/en\\_mex-int-text-const.pdf](http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf)

<sup>222</sup> Gómez A. & Caicedo C. 2014. Plan Decenal de Salud Pública 2012—2021 Resumen Ejecutivo. Monitor Estratégico. 6: 66.

<sup>223</sup> Government of Mexico. Ministry of Health. 2017. Sitio de Secretaría de Salud, Acciones y Programas. <https://www.gob.mx/salud#393>

<sup>224</sup> Meier, B. 2005. The Highest Attainable Standard: Advancing Collective Human Right to Public Health. *Columbia Human Rights Law Review*. 37(1): 127.

<sup>225</sup> Meier, B. 2005. The Highest Attainable Standard: Advancing Collective Human Right to Public Health. *Columbia Human Rights Law Review*. 37(1): 118.

entire societies to be addicted to and trapped by drugs, with the imminent risk of that society deteriorating in terms of physical and mental health.<sup>226</sup> It is understandable that the Mexican State focuses on the adverse effects of the consumption of drugs as part of a public health problem that needs to be solved. Concerning the terms “public order” and “security,” it is clear that there is a linkage between these two goals. The Mexican Legal Dictionary specifies that the State is responsible for ensuring that the community can achieve a peaceful coexistence between its members.<sup>227</sup> Public order comprises a set of principles and rules that support the legal regime’s legitimacy to seek the preservation of the values that align with the general interests of society by limiting the autonomy of people in order to protect the interests of the many over those of individuals, it is related to the public security of the people. In turn, as stated in Article 21 of the Mexican Constitution, the public order is mentioned in the context of public security by protecting administrative rules concerning the public order. Article 21 stipulates that:

“Public security is a responsibility of the Federation, the Federal District, the States and the Municipal Councils. Public security includes prevention of crimes, investigation, and prosecution, as well as punishment for breaking the administrative rules, according to the law and the respective provisions stated in this Constitution.”<sup>228</sup>

There is a link between public order and public security because guaranteeing the latter is necessary to preserve the values that the State seeks to protect with the former.<sup>229</sup> Drug retailing or the sale of small doses of narcotics is usually the way in which young people enter unknowingly into the world of drugs by buying or selling such doses and is one of the ways in which large drug trafficking organizations seek to obtain large profits. It is essential to consider that those who, unfortunately, by one circumstance or another, have fallen into the clutches of small-scale dealing activities and/or have been turned into addicts, contribute to a severe public health problem that generates more insecurity which will inevitably cause some disorder to the state and can grow into

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<sup>226</sup> Frenk, J., Gómez-Dantés, O., & Knaul, F. M. 2009. The Democratization of Health in Mexico: Financial Innovations for Universal Coverage. *Bulletin of the World Health Organization*. 87: 542-548.

<sup>227</sup> UNAM. 1984. *Diccionario Jurídico Mexicano*. México: Instituto de Investigaciones Jurídicas. Tomo VI: L-O. 316-317.

<sup>228</sup> Government of Mexico. 2008. *Political Constitution of the United Mexican States*. [http://www.oas.org/juridico/mla/en/mex/en\\_mex-int-text-const.pdf](http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf)

<sup>229</sup> Ilie, V. 2014. The Concept of Public Order. *Journal of Criminal Investigations*. 7(2): 24-25

a problem that can endanger its citizens.<sup>230</sup> Therefore, there is a justification in seeking to protect public order and security for the actions taken by a government that is aimed at suppressing the use of marijuana and other drugs. The State typically seeks to do this by punishing offenses related to the commerce, supply, transport, planting, growing, or harvesting of marijuana and other drugs, as established by its laws.

## **2.2. The Judgment of the Supreme Court: A.R.237/2014**

### **2.2.1 The Facts**

On May 31, 2013, Mexican nationals who are members of an organization called Mexicans United for Responsible and Tolerant Consumption, as strategic litigation to undermine the justifications for drug prohibitionist policies in Mexico, requested in writing to COFEPRIS for permission to consume cannabis sativa and psychotropic THC, which are known generally as marijuana, regularly and freely without the interference of the law. The GHL prohibits the recreational use of marijuana. Furthermore, the petitioners asked for authorization to engage in other related activities, including planting and packaging marijuana, but excluding any sort of transactions that involve the drug.<sup>231</sup>

COFEPRIS could not give authorization to the proposals because according to the GHL, in Articles 235 and 237 regarding the drug “cannabis sativa,” as well as Articles 245, 247, and 248, concerning psychotropic THC, the use of, or any act related to these substances is prohibited throughout the country.<sup>232</sup> Therefore, on July 5, 2013, the plaintiff filed an indirect amparo suit against the negative reply to its request, stating that Article 235 in the last paragraph, Article 237, Article 245 in section I, Article 247 in the last paragraph, and Article 248 of the GHL are unconstitutional. The plaintiffs’ cause of action was their appeal for protection from the unconstitutionality of specific GHL articles. The petitioners argued that the state established a prohibitionist policy on an individual’s affiliation with marijuana, saying that “it limits someone’s right to personal identity, self-image, free development of personality and to self-determination, all concerning the principle of human dignity, under Article 3 of the Mexican Constitution.”<sup>233</sup>

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<sup>230</sup> Hope, A. 2015. Plus Ça Change: Structural Continuities in Mexican Counternarcotic Policy. *Foreign Policy at Brookings*: 5-9.

<sup>231</sup> SCJN. 2015. Amparo en Revisión 237/2014: 2.

<sup>232</sup> SCJN. 2015. Amparo en Revisión 237/2014: 45.

<sup>233</sup> SCJN. 2015. Amparo en Revisión 237/2014: 3-7.

In essence, the plaintiffs' argument was that the drug ban was built upon moral values and not scientific evidence. In turn, it revealed that the state's action was not ethically neutral. In addition, they suggested that the state had abused its power to rule on circumstances related to public health by banning the ownership and consumption of marijuana, contrary to the purpose of Mexican criminal legislations and infringing upon the individual freedom of people, a principle set out in Article 73, sections XVI and XXI of the Mexican Constitution.<sup>234</sup>

The verdict from the District Judge was not favorable to the plaintiffs.<sup>235</sup> Dissatisfied with the decision, the plaintiffs submitted an appeal, and in this instance, they argued that through the use of marijuana, they were able to realize the foundation for their life project, stressing the connection with their individual freedom.<sup>236</sup> They further argued that, in similar situations, other individuals accomplish this by participating in sports or hobbies that they take pleasure in and that, in general, people can partake in these activities by doing so without limitations imposed by the state.<sup>237</sup> The Appellate Court ruled that it was not competent to overturn the judgment made by the District Judge and sent the case to the Supreme Court, which accepted the case on April 2014 as an *Amparo en Revisión* 237/2014 (A.R.237/2014).

## **2.2.2 The Reasoning of the Supreme Court**

On November 11, 2015, the Supreme Court declared unconstitutional the last paragraph of Article 235, Article 237, Article 245 in section I, the last paragraph of Article 247, and Article 248 of the GHL.<sup>238</sup> The Supreme Court relied on the concept of the protection of dignity (Article 3 of the Mexican Constitution) for the legality of the consumption of marijuana for recreational purposes. The Supreme Court held that "taking drugs was an activity that fell within the sphere of the private life of individuals, based on the protection of human dignity, and the free development of personality guaranteed by the Mexican State."<sup>239</sup> The judgment also allowed for the authorizations sought by the plaintiffs, namely to perform acts related to personal consumption for recreational purposes. The authorization was to be granted by the Mexican Ministry of Health.<sup>240</sup>

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<sup>234</sup> SCJN. 2015. Amparo en Revisión 237/2014: 6-7.

<sup>235</sup> SCJN. 2015. Amparo en Revisión 237/2014: 5-7.

<sup>236</sup> SCJN. 2015. Amparo en Revisión 237/2014: 7.

<sup>237</sup> SCJN. 2015. Amparo en Revisión 237/2014: 10-16.

<sup>238</sup> SCJN. 2015. Amparo en Revisión 237/2014: 82-89.

<sup>239</sup> SCJN. 2015. Amparo en Revisión 237/2014: 33.

<sup>240</sup> SCJN. 2015. Amparo en Revisión 237/2014: 89-90.

The Supreme Court explained the regulatory framework of narcotic drugs and psychotropic provisions of the GHL, made an analysis of the impact of the measure that was challenged in its content as infringing upon the free development of personality, and examined, in a broad sense, the proportionality of the measure challenged. First, the Supreme Court examined the measures taken by the state to protect health and public order, which did not allow in any way the performance of activities related to self-consumption, planting, cultivation, harvesting, preparation, transport of marijuana.<sup>241</sup> Second, the Supreme Court pointed out that it was unconstitutional to infringe upon the right to free development of personality since the criminalization of all activities related to possession and consumption exceeded a broad proportionality standard, which required verification of whether the penalty pursues a constitutionally valid purpose. The Supreme Court held that there were equally suitable alternative measures to a penalty to protect health and the public order.<sup>242</sup>

Lastly, the Supreme Court tried to accommodate possible conflicts between human rights values and the state values including the maintenance of security and public health. For that purpose, it analyzed the aim of the regulations and the suitability of measures taken by the government. The issue examined by the Court was: firstly, whether the aim was legitimate or not, and secondly, whether the regulations by the government were suitable to achieve the aims after the first question is answered in the affirmative. The second point was examined by the application of necessity and proportionality. When both criteria were met, then the Court could hold that the marijuana regulations were legitimate and suitable, and therefore constitutional. The reasoning of the judgment in favor of the applicants is as follows.

a) Aims: It was necessary to identify the aims for banning the use of drugs. The measures taken by the state should be established as constitutionally valid. This stage of the analysis implies the idea that no purpose can justify the control of fundamental rights by the state. The Court also analyzed the fact that COFEPRIS has the administrative power to grant authorizations for certain uses of marijuana. Such administrative prohibitions or authorizations are given after the analysis of the health and public order effects of drug use.<sup>243</sup>

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<sup>241</sup> SCJN. 2015. Amparo en Revisión 237/2014: 23-29.

<sup>242</sup> SCJN. 2015. Amparo en Revisión 237/2014: 29-43.

<sup>243</sup> SCJN. 2015. Amparo en Revisión 237/2014: 44-50.

b) Suitability: The Supreme Court analyzed that if the use of marijuana does not cause damage or harm to health or to society as a whole, the prohibition analyzed will not be a suitable measure to protect constitutional objectives of health and public order. The Supreme Court considered the effects of recreational use of marijuana, consequences to health, drug abuse or dependency, inclination to use harder drugs, and stimulation to commit other crimes.<sup>244</sup>

c) Necessity: It was discussed how to protect health and public order, and if, on the contrary, there are other measures that could harm the right to free development of personality to a lesser degree while still pursuing the State goals. This implies that there are other means with a degree of suitability for achieving the aims pursued and whether these alternatives involved to a lesser extent the affected fundamental right.<sup>245</sup>

d) Proportionality: The Supreme Court studied the proportionality of the legislative measure prohibiting various activities related to the production and consumption of marijuana. The Supreme Court concluded that such action is unnecessary because there are equally suitable alternative means that imply less restrictions to the right. The Supreme Court found it disproportionate in the strict sense.<sup>246</sup>

### **2.2.3 The Assessment by the Supreme Court**

It is clear that the intention of Article 1 of the GHJ is to protect the right to health of the public. In addition, the arguments of the plaintiffs were that the restriction on the consumption of marijuana for recreational purposes was not justified, especially in a country that recognizes the protection of personal independence as one of its founding principles. The judgment would have been more interesting if it had included the analysis of the acquisition or obtaining of marijuana or its seeds, which is considered a crime, but the Supreme Court stayed away from such a question. Instead, the judgment was based on the right to free development of personality and the principle of proportionality. It evaluated the proportionality of the legislative measure prohibiting various activities related to the production and consumption of marijuana. Proportionality is a general principle of law,<sup>247</sup> and in the case where exceptional rules are applied, there is a high risk that

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<sup>244</sup> SCJN. 2015. Amparo en Revisión 237/2014: 50-63.

<sup>245</sup> SCJN. 2015. Amparo en Revisión 237/2014: 64-74.

<sup>246</sup> SCJN. 2015. Amparo en Revisión 237/2014: 74-79.

<sup>247</sup> Engle, E. 2012. The History of the General Principle of Proportionality: An Overview. *Dartmouth Law Journal*. 10: 3.

the basic or fundamental rules are ignored. In other words, when exceptional rules expand, the basic rules, as a consequence, shrink. Therefore, when the exceptional rules are interpreted, the principle of proportionality is an essential tool to safeguard the general rule.

In Mexico, the proportionality test has particular relevance for the effective constitutional control of legislative powers. Strict use of the principle of proportionality will force the legislator to take the Mexican Constitution and fundamental rights seriously. The Supreme Court clearly set its judgment centered on the argument of the protection of the right to free development of personality, which is tied to a constitutional principle of human dignity. When the state imposes a restriction on human rights, then the principle of proportionality can be invoked because that regulation is exceptional. Based on the right to free development of personality, the judgment applied the proportionality principle to the legislative action prohibiting various activities related to the production and consumption of marijuana. The Supreme Court concluded that such action was unnecessary since other alternatives are equally appropriate to deal with the issue at hand.

### **2.3. The Protection of the Rights to Dignity and Free Development of Personality**

#### **2.3.1 The Right to Dignity and its Function in the Mexican Legislation**

Article 1 of the Mexican Constitution grants broad protection to empowering people and to allowing them to realize their life plans through the principle of human dignity.<sup>248</sup> In this instance, it is essential to guarantee the autonomy of people and the freedom from any conduct that does harm to others. Article 3 of the Mexican Constitution contains a catalog of “rights of freedom” that results in permissions to perform specific actions that are required for the autonomy of an individual and mandates that the state has the duty to impart education through the federation, states, and municipalities that allow for the developing of all the faculties of a human being.<sup>249</sup>

Human dignity is recognized by several legal documents,<sup>250</sup> and the importance of the recognition of dignity in legal texts opens an opportunity to be considered by the judge to set the limits to the state’s obligations of protecting the individual without interfering with their personal decisions or their actions as long as they do not affect other people and stay in accordance with the

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<sup>248</sup> Cámara de Diputados. 2021. Constitución Política de los Estados Unidos Mexicanos. <http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm> Accessed: January 2, 2021.

<sup>249</sup> Cámara de Diputados. 2021. Constitución Política de los Estados Unidos Mexicanos. <http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm> Accessed: January 2, 2021.

<sup>250</sup> McCrudden, C. 2008. Human Dignity and Judicial Interpretation of Human Rights. *European Journal of International Law*. 19(4): 667.

law. However, while human dignity is a term frequently used in the literature, to date, there is no consensus about its definition and function.<sup>251</sup> The principle of human dignity is challenging to define because the concept of human dignity varies from jurisdiction to jurisdiction, even if it is considered a universal right.

For example, according to the American Convention on Human Rights, there are three explicit references to the idea of human dignity in Article 5 (right to humane treatment), Article 6 (freedom from slavery), and Article 11 (right to privacy).<sup>252</sup> Likewise, the Preamble to the Convention is permeated by direct allusions that suggest a specific naturalistic idea of human dignity insofar as “the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality...”.<sup>253</sup> Compare this with the EU Charter of Fundamental Rights, Title I, Article 1, which states that: “Human dignity is inviolable. It must be respected and protected”.<sup>254</sup> The European Union Agency for Fundamental Rights interpreted human dignity as follows: “the dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights.”<sup>255</sup> Simply put, the “dignity” of the human person has two functions. First, it is an independent human right, and as a fundamental right, the final goal is the protection of human dignity.<sup>256</sup> The existence of various human rights does not mean that they cover all aspects of human dignity. For that reason, uncovered areas should be protected by the right to human dignity. Secondly, human dignity is the foundation of other human rights. Thus, human dignity as a principle should exist to give meaning to all human rights, such as the right to life, expression, religion, and so on. Therefore, there is a variety of human rights that come from the principle of human dignity. The dimension may be different, but human dignity is the origin of every human right.

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<sup>251</sup> McCrudden, C. 2008. Human Dignity and Judicial Interpretation of Human Rights. *European Journal of International Law*. 19(4): 675.

<sup>252</sup> United Nations. 1979. UN Treaty Series: American Convention on Human Rights: Pact of San José, Costa Rica. UN Treaty Series. 1144: 144-212. <https://treaties.un.org/doc/publication/UNTS/Volume%201144/v1144.pdf> Accessed: March 26, 2022.

<sup>253</sup> Organization of American States. 1969. American Convention on Human Rights. In *Treaty Series, No. 36*. <https://treaties.un.org/pages/showdetails.aspx?objid=08000002800f10e1> Accessed: March 29, 2022.

<sup>254</sup> Charter of Fundamental Rights of the European Union. *Official Journal of the European Union* 2016/C 202/02: 389-405. [https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights\\_en](https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en) Accessed: March 29, 2022.

<sup>255</sup> FRA European Union Agency for Fundamental Rights. 2001. Case C-377/98 Netherlands v European Parliament and Council. ECR I-7079. <https://fra.europa.eu/en/eu-charter/article/1-human-dignity> Accessed: February 26, 2022.

<sup>256</sup> Bennett, G. 2016. *Technicians of Human Dignity: Bodies, Souls, and the Making of Intrinsic Worth*. New York: Fordham University Press: 141.



This study concurs with what the case of Mexico has taught us about what human dignity is. The constitution accepts that in the human being, there is a dignity that must be respected in any case since this constitutes, at the same time, a stand-alone fundamental right and the basis and condition of all other human rights.<sup>257</sup> In other words, human dignity in Mexico is one of the preeminent constitutional values. It constitutes the base of social peace and political order. Human dignity is the distinctive feature of human beings in relation to other living beings, and that understands the person as an end in itself, preventing humans from being considered as an instrument or means for another purpose, in addition to endowing the capacity for self-determination and of realization through the free development of the personality.<sup>258</sup>

### **2.3.2 The Right to Free Development of Personality in the Mexican Jurisprudence**

The Supreme Court relied on the right to free development of personality to justify the use of marijuana for recreational purposes. However, the right to free development of personality is not enshrined in the Mexican Constitution, and that is why it has been developed in jurisprudence as “the achievement of the project of life that the human being has for himself, as an autonomous entity.”<sup>259</sup> In the Mexican law, the Supreme Court has understood that “the free development of personality is a fundamental right derived from the right to dignity, which in turn is provided for in Article 1 of the Mexican Constitution and is implicit in international treaties of human rights entered into by our country.”<sup>260</sup> According to this, in the judgment that resolved amparo directo 6/2008, the Supreme Court pointed out that “the individual, whomever they may be, has the right to freely and autonomously choose his or her life project, the way in which he or she will achieve the goals and objectives that, for him or her, are relevant.”<sup>261</sup>

Moreover, according to the Mexican jurisprudence, when personal rights are not expressly stated in the Mexican Constitution (right to life, physical and mental integrity, honor, privacy,

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<sup>257</sup> SCJN. 2009. Tesis Aislada: “Derecho al Libre Desarrollo de la Personalidad. Aspectos que Comprende”. *Semanario Judicial de la Federación y su Gaceta*. 30: 165822.

Tesis Aislada is issued by the judiciary branch, interpreting some legal precept but has not become mandatory. However, it does serve to guide the criteria of the administrators of justice and sometimes start forming or interrupting jurisprudence.

<sup>258</sup> Avendaño González, L., Nettel Barrera, A., & Serrano Ceballos, J. 2016. El Principio de Dignidad en la Jurisprudencia Constitucional Mexicana. *Revista de Ciencias Jurídicas y Sociales*. 19(1): 77-98: 88.

<sup>259</sup> SCJN. 2009. Tesis Aislada: “Derecho al Libre Desarrollo de la Personalidad. Aspectos que Comprende”. *Semanario Judicial de la Federación y su Gaceta*. 30: 165822.

<sup>260</sup> SCJN. 2015. Amparo en Revisión 237/2014.

<sup>261</sup> SCJN. 2009. A.D. 6/2008: 85.

name, self-image, free development of personality) and these rights are implicit in the international treaties signed by Mexico, they should be understood as rights derived from the recognition of the right to human dignity because only through their full respect can a human being attain full dignity.<sup>262</sup>

In Mexico, the right to free development of personality guards a “residual area of freedom” not protected by other public rights.<sup>263</sup> As mentioned above, all of this implies that every individual has a right to freely and autonomously choose his or her life project.<sup>264</sup> This right is the recognition of the state of the ordinary capacity of every person to be the individual the person wishes to be, without coercion or unjustified control, and with the freedom to fulfill the goals or objectives that the person has set, in accordance with their values, ideas, expectations, tastes, and so on.

The right to free development of personality includes the freedom to choose marriage, procreation, appearance, profession, or sexuality. All of these aspects are part of the way a person wishes to live his or her life, which corresponds to a right to make these decisions autonomously.<sup>265</sup> The sphere of autonomy of individuals protects the sphere of privacy. The protection granted by law does not merely include those decisions but also the actions needed to realize that choice.

Additionally, to clarify the relationship between the right to free development of personality and state control, it is vital to recognize specific cases that touch upon behaviors or decisions that are protected by the law and that correspond exclusively to the right of the individual. For example, in several cases regarding sexual reassignment, judges may not be able to understand the mental state of the plaintiff regarding why he or she is choosing reassignment. In reality, it is the plaintiff’s life and not the judge’s life. In addition, cases concerning the decision of marriage, procreation, personal appearance, profession, or sexuality are all covered by the right to free development of personality.

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<sup>262</sup> SCJN. 2009. Tesis Aislada: “Dignidad Humana. El Orden Jurídico Mexicano la reconoce como condición y base de los demás derechos fundamentales”. *Semanario Judicial de la Federación y su Gaceta*. 30: 165813.

<sup>263</sup> SCJN. 2009. Tesis Aislada: “Derecho al Libre Desarrollo de la Personalidad. Aspectos que Comprende”. *Semanario Judicial de la Federación y su Gaceta*. 30: 165822.

<sup>264</sup> SCJN. 2009. Tesis Aislada: “Dignidad Humana. El Orden Jurídico Mexicano la reconoce como condición y base de los demás derechos fundamentales”. *Semanario Judicial de la Federación y su Gaceta*. 30: 165813.

<sup>265</sup> SCJN. 2009. Tesis Aislada: “Derecho al Libre Desarrollo de la Personalidad. Aspectos que Comprende”. *Semanario Judicial de la Federación y su Gaceta*. 30: 165822.

Some of the cases related to the right to free development of personality already resolved by the judicial branch in Mexico are: 1) gender reassignment,<sup>266</sup> 2) marriage between people of the same sex,<sup>267</sup> 3) free modification of the civil status of people,<sup>268</sup> 4) procedure of divorce without expression of cause established in the Civil Code of the State of Hidalgo,<sup>269</sup> 5) application for marriage filed by a same-sex couple that was declared inadmissible by a Civil Registry Office of the State of Oaxaca,<sup>270</sup> 6) freedom of contract and against age discrimination,<sup>271</sup> and 7) unconstitutionality of the system of reasons for divorce.<sup>272</sup>

The ability to choose any recreational activity entails a decision that absolutely goes to the sphere of personal autonomy that must be protected by the Mexican Constitution. That decision may include the use of substances that produce experiences that in some way affect the thoughts, emotions, or feelings of the person. It has been recognized that the decision to consume marijuana can have different purposes, including stress relief, intensification of perceptions, or desire for new personal and spiritual experiences.<sup>273</sup> In Mexico, the right of the free development of personality allows, *prima facie*, for people of legal age to decide without interference what kind of recreational activities they wish to carry out, as well as the capacity to undertake all the necessary actions or events to be able to materialize that choice, including the use of marijuana for recreational purposes.<sup>274</sup>

It must be noted that in the Mexican case, there are no provisions or a specific human right in the Mexican Constitution that provides for the consumption of marijuana for recreational purposes. Also, the concept of dignity used in Mexican legislation is not precise, nor does it determine its scope with exactitude or to the extent it should. Article 3 of the Mexican Constitution merely refers to it and considers it to be a right against which there can be no attack in the discriminatory sense. However, the Supreme Court has filled that gap with the usage of the free

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<sup>266</sup> SCJN. 2009. A.D. 6/2008.

<sup>267</sup> SCJN. 2010. Acción de Inconstitucionalidad 2/2010.

<sup>268</sup> SCJN. 2012. A.D.339/2012.

<sup>269</sup> SCJN. 2012. A.D.1905/2012.

<sup>270</sup> SCJN. 2012. A.D.457/2012.

<sup>271</sup> SCJN. 2014. A.D.992/2014.

<sup>272</sup> SCJN. 2014. Contradicción de Tesis 73/2014.

Contradicción de Tesis exists when courts adopt in their judgments discrepant legal criteria on the same point of law, regardless of whether the factual issues that surround it are not the same.

<sup>273</sup> Supreme Court of Hawaii, Judge Levinson dissenting. 1972. *Hawaii State v. Kantner*, 53 *Haw.* 327, 342; 493 P.2d 306.

<sup>274</sup> SCJN. 2015. Amparo en Revisión 237/2014: 29-43.

development of personality, derived from the right of dignity to protect the human dignity of the plaintiffs.

## **2.4. Balancing Drug Control and Protection of Human Rights in Mexico**

### **2.4.1 Marijuana and Drug Control**

The position of the government is clear. If the drug is deemed harmful, then the drug should be prohibited. The question is whether, in this case, marijuana is dangerous or not and represents a threat to public health, order, and security. To this point, the Supreme Court in A.R.237/2014 highlighted a study pointing out that while there was medical evidence that marijuana use can cause health damage, it can be classified as not dangerous as long as minor age consumers are not allowed to use the drug. Also, marijuana use has less severe consequences for health than those reported by people addicted to other substances, such as opium or alcohol. Additionally, the use of marijuana does not encourage the commission of other crimes, but it does negatively affect the ability to drive motor vehicles and may increase the probability of causing accidents.<sup>275</sup>

Logic may tell us that in a place where marijuana consumption for recreational purposes is lawful, the number of crimes related to marijuana will drop. But how about other considerations such as fatalities in car accidents under the effects of marijuana? There are not many cases. A recent study regarding marijuana legalizations and related policies in the US, specifically in Colorado, Washington, Oregon, and Alaska, reflects that marijuana legalization had minimal effect on marijuana use and associated outcomes, such as drug use, health, suicides, crime, economics and road safety.<sup>276</sup> In that research, it is shown that Colorado had no increase in fatal traffic accidents or fatalities following the legalization of medical marijuana in 2009. Although fatality rates have reached a slightly higher increment in recent summers, no apparent increase occurred after either legalization in 2012 or the opening of stores in 2014.<sup>277</sup> Similar situations occurred in Washington, Oregon, and Alaska.<sup>278</sup> However, because of the limitation of cases, it is essential to

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<sup>275</sup> SCJN. 2015. Amparo en Revisión 237/2014: 55-64

<sup>276</sup> Dills, A.K., Goffard, S., & Miron, J. 2016. Dose of Reality: The Effect of State Marijuana Legalizations. *Policy Analysis, CATO Institute*. 799: 1-36. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2842278](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842278) Accessed: December 2, 2021.

<sup>277</sup> Dills, A.K., Goffard, S., & Miron, J. 2016. Dose of Reality: The Effect of State Marijuana Legalizations. *Policy Analysis, CATO Institute*. 799: 1-36. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2842278](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842278) Accessed: December 2, 2021.

<sup>278</sup> Dills, A.K., Goffard, S., & Miron, J. 2016. Dose of Reality: The Effect of State Marijuana Legalizations. *Policy Analysis, CATO Institute*. 799: 16-19. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2842278](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842278) Accessed: December 2, 2021

mention that it is too early to conclude that marijuana use for recreational purposes might never affect public health, order, and security of a state.

In the US, during the 1900s, alcohol was prohibited, and it was viewed in a comparable light to the way people today see heroin. For some parts of American society, alcohol was the primary cause of nearly all social problems, such as crime, poverty, business failure, violence, unemployment, and even insanity,<sup>279</sup> much in the same way as marijuana use could be considered in present times. It is essential to clarify that in Mexico, like in the US, alcohol is not a hard drug, even if it might have similar adverse effects on the human body. Drunk driving is unlawful, yet, these accidents are still occurring. A similar situation might happen with legalized marijuana consumption, and thus clear regulations that prevent these situations are needed.

#### **2.4.2 Less Restrictive Alternatives in Drug Control**

Dignity can be considered as a fundamental right for people to freely and autonomously choose their life project in a way that will let them achieve their goals, where the state cannot undermine or eliminate the individual actions of any person within society, except when there is a preponderant factor of significance that supports it. What is the limit of freedom to use marijuana for recreational purposes? To answer this, it is essential to clarify that an individual cannot interfere with another person's private sphere while consuming marijuana for recreational purposes. For that reason, some restrictions are necessary. The protection of public order, health, and security is a part of the principle of not doing harm to others. Besides, ensuring that allowing the use of marijuana for recreational purposes does not lead to a severe increase in road accidents can also be regarded as a part of ensuring that the freedom of one does not end up doing damage to another.

The question is whether there are other methods or measures for the government to obtain the same goal regarding how to regulate marijuana use for recreational purposes or not. If there are no other methods or measures, then criminalization is the only available strategy for the government; however, if there are other possible ways, less restrictive alternatives must be taken, especially those that do not lead to serious human rights violations such as imprisonment.

The United Nations Office on Drugs and Crime (UNODC) mentioned different alternatives with regard to the proportionality of sentencing for drug offenses, essentially for personal drug use

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<sup>279</sup> Bonnie R.J. & Whitebread C. H. 1970. The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition. *Virginia Law Review*. 56: 971-1203.

instead of conviction and punishment, such as: “treatment, education, aftercare, rehabilitation, or social integration.”<sup>280</sup> Werner Sipp, President of the International Narcotics Control Board (INCB), insisted in a side event held by the board “to develop drug policies which contribute to furthering the health and welfare of mankind through the adoption of humane and proportionate drug policy.”<sup>281</sup> For the Supreme Court, alternatives to the total prohibition of marijuana are: “(I) limitations on the places of sale and consumption; (II) ban on driving or operating dangerous equipment or substances under the influence of the substance; (III) prohibitions on publicizing the product; and (IV) restrictions on the age of those who can purchase and consume.”<sup>282</sup>

Proportionality compels states to offer less restrictive alternatives to penalization and that properly consider the protection of human rights and social needs to control the usage of marijuana. Thus, while the state still has the responsibility to control the social problems caused by users of marijuana, it also has the obligation of seeking less restrictive alternatives to prevent any related problems. Therefore, the government must figure out a way to attain the goal of controlling marijuana usage, and it certainly does not have to abolish all regulation, but it must prefer measures such as education for prevention, medical treatment for rehabilitation, prohibition on the sale, distribution and supply of marijuana to minors rather than more restrictive approaches. The government may also consider prohibiting the use of marijuana in public spaces and in the public or private workplace. Regarding production and trade, advertising on the use of marijuana should be directed to adults through magazines for adults and in establishments exclusively for adults. The prohibition of the use of marijuana when driving automobiles and operating machinery, instruments, and potentially dangerous devices should also be given serious consideration. It is likely that all of these measures would pass a proportionality test before a constitutional court.

### **2.4.3. Is Mexico Ready for Change?**

In A.R.237/2014, the Supreme Court analyzed the proportionality of the legislative measure that prohibits various activities related to the production and consumption of marijuana. Its

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<sup>280</sup> UNODC. 2012. UNODC and the Promotion and Protection of Human Rights. *UNODC Position Paper*: 13. [https://www.unodc.org/documents/justice-and-prison-reform/UNODC\\_Human\\_rights\\_position\\_paper\\_2012.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Human_rights_position_paper_2012.pdf) Accessed: December 2, 2021.

<sup>281</sup> INCB. 2017. INCB side event on proportionality at CND. Statement by Werner Sipp, President, International Narcotics Control Board. [http://www.incb.org/documents/Speeches/Speeches2017/Speech\\_60th\\_CND\\_proportionality\\_check\\_against\\_deliver\\_y\\_for\\_website.pdf](http://www.incb.org/documents/Speeches/Speeches2017/Speech_60th_CND_proportionality_check_against_deliver_y_for_website.pdf) Accessed: March 26, 2022.

<sup>282</sup> SCJN. 2015. Amparo en Revisión 237/2014: 94.

conclusion established that such action is not only unnecessary, since there are equally suitable alternative means that restrict the right less, but it is also disproportionate in the strict sense since it generates minimum protection to health and public order while resulting in an intense interference with the right of people to decide what leisure activities they wish to carry out.

However, we must not lose sight of the fact that worldwide, the permission and decriminalization of the recreational use of marijuana has occurred through processes of democratic deliberation within congresses and parliaments, such as the cases of Uruguay or the States of Colorado and Washington.<sup>283</sup> In other words, the consensus of the population through parliament and experts is also necessary to make a change in the drug legislation of Mexico.

In the case of Mexico, citizens needed to bring the case to the judicial branch as a final measure to be allowed to consume marijuana for recreational purposes. The legal binding effect of the judgment only extends to the plaintiff. However, if the use of marijuana is a human right, every individual must be allowed to enjoy it, and thus, action from the legislative branch is needed. Still, the importance of expert analysis is essential to know if the Mexican government is prepared economically and structurally to make such a change to drug control legislation.

After A.R.237/2014, the Mexican government stressed that the Supreme Court ruling did not legalize marijuana; its sowing, supply, and marketing were still prohibited by law,<sup>284</sup> but exposed the existence of two parallel legal realities in Mexico, specifically: One set of laws that applies to the general population and another which applies exclusively to the four protected persons to whom the administrative permission was granted for the recreational and personal use of marijuana.

An important consideration is that a possible conflict might be caused between the decision of legalizing marijuana for recreational purposes and the International Drug Conventions goals.

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<sup>283</sup> For more information of marijuana legalization see:

Smiley, E. 2016. Marijuana & Other Drugs: Legalize or Decriminalize. *Arizona Journal of International & Comparative Law*. 33: 825.

Graham, L. 2015. Legalizing Marijuana in the Shadows of International Law: The Uruguay, Colorado, and Washington Models. *Wisconsin International Law Journal*. 33: 140.

Room, R. 2014. Legalizing a Market for Cannabis for Pleasure: Colorado, Washington, Uruguay and beyond. *Addiction*. 109(3): 345-351.

Pardo, B. 2014. Cannabis Policy Reforms in the Americas: A Comparative Analysis of Colorado, Washington, and Uruguay. *International Journal of Drug Policy*. 25(4): 727-735.

<sup>284</sup> Presidencia de la República. 2015. La Marihuana no está legalizada en México: Gobierno de la Republica. <https://www.gob.mx/presidencia/prensa/la-marihuana-no-esta-legalizada-en-mexico-gobierno-de-la-republica> Accessed: December 19, 2019.

However, a complete discussion of this topic was not examined by the Supreme Court in the judgment itself. As it was mentioned, the A.R.237/2014 is only applicable to the jurisdiction of Mexico, and only the plaintiffs enjoy its binding force; therefore, to universalize such judgment to all Mexicans, it is necessary for the legislative branch to enact new laws related to drug control. For that purpose, the Mexican government needs to assimilate or concretize the judgment to decriminalize the use of marijuana for recreational purposes since less restrictive measures are available and similar cases where human rights might be affected could present themselves again.

### **Conclusion**

The case of Mexico provides a new perspective for the debate on drug control. This case presents a new finding that human rights are analyzed in the decision of the Supreme Court, which determined that the recreational use of marijuana is lawful, based on the protection of human rights, specifically the right to the free development of personality. This approach challenges the moral hegemony of the global drug regime and prohibitionist logic. The Mexican Supreme Court addressed the issue of the usage of recreational marijuana from the perspective of human rights. The consumption of marijuana can be analyzed from a public health perspective whereby addictions must be treated with prevention and comprehensive therapeutic solutions and without criminalizing consumers. Actions to prevent drug use, including marijuana, especially campaigns targeted at children and young people, should be strengthened, but at the same time, access to controlled substances should also be enabled for therapeutic purposes and scientific research. According to the Supreme Court, the criminalization of marijuana use is not a proportional measure to protect health and public order. The judgment of the Supreme Court was clear in that the penalization on consuming marijuana for recreational purposes is too excessive, less restrictive alternatives for drug control should be considered, and Mexico must move to a new paradigm where the rights and freedoms of individuals are entirely guaranteed in these cases. Therefore, the Supreme Court opened a gate to the legalization or decriminalization of marijuana from the point of view of human rights. It was a bottom-up view, a particular way to see the situation from an individual perspective.

In general, it seems that the debate on the pros and cons of drug legalization has become of particular interest to some drug policy activists, in response to the apparent failure of the strategy to combat illegal drug trafficking and due to the division of public opinion in different countries



regarding the legalization of cannabis and its influence on public safety and health. On the one hand, proposals from different social, political, and academic sectors argue that to deter the drug trade, it is necessary to legalize drugs and enable the appropriate authorities to regulate the market of psychoactive substances;<sup>285</sup> others, on the other hand, claim that to legalize cannabis could lead to additional problems, because its implementation would generate perverse effects on public health and cause social decay. However, it is the fundamental belief behind universal values of freedom and liberty, and it is the foundation of modern liberal democracies that “restriction is not justified since the imposition of a single standard of healthy living is not admissible in a liberal state, which bases its existence on the recognition of human uniqueness and independence.”<sup>286</sup>

The Mexican Supreme Court considered the recreational use of marijuana through the right to free development of personality, which is tied to human dignity, and the application of the principle of proportionality to strike a balance between human rights and the principles of public health, order, and security. This chapter has argued that less restrictive measures in conformity with human rights should be adopted by the government. This may be the only way to ensure that each human being has the inherent right to make his or her own decisions without trespassing on third parties’ guaranteed rights.

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<sup>285</sup> Sociedad Mexicana de Autoconsumo Responsable y Tolerante A.C. (SMART). 2015. Marihuana: Lo que sigue es regular.

[http://drogasmexico.org/index.php?nota=13338&tipo=6&id\\_ext=3022](http://drogasmexico.org/index.php?nota=13338&tipo=6&id_ext=3022) Accessed: March 29, 2022.

<sup>286</sup> Delman E. 2015. Is Smoking Weed a Human Right? Why the Mexican Supreme Court Thinks the Answer Is Yes. The Atlantic Newspaper. November 10, 2015, Global.

<http://www.theatlantic.com/international/archive/2015/11/mexico-marijuana-legal-human-right/415017/> Accessed: March 26, 2022

## Chapter 3

### The Right to the Highest Attainable Standard of Health on Marijuana Control in Mexico: A Study on Amparo 1482/2015

#### Introduction

The ruling dated May 9, 2016, by the Third District Court on Administrative Matters in Mexico City (hereafter the District Court) is of interest because it recognizes that the use of medical marijuana is lawful based on the protection of human rights. This is the second judgment<sup>287</sup> declaring that the use of marijuana is lawful in Mexico and that declares that a provision of drug control laws is unconstitutional. The case showed a conflict between human rights values, such as the protection of the right to the highest attainable standard of health, and state values, including the preservation of security and public health. In Mexico, there was constant deliberation on the regulation of the use of marijuana and its derivatives<sup>288</sup> for medicinal use in patients with diseases such as epilepsy, cancer, and other similar pathologies until the ruling of Amparo 1482/2015 (A.I.1482/2015) in 2015, which created a strong precedent as the ruling resulted in the amendment of the General Health Law (GHL) in 2017.<sup>289</sup>

This chapter examines the problems related to the regulation of marijuana use and its derived products for medicinal purposes in Mexico before the amendment of the GHL in 2017. Specifically, this chapter looks at and analyzes in-depth a case-study in the following three sections. The first section explores the facts, the norms, and the constitutional rights, plus the methodology used in the judgment to decide the unconstitutionality of Article 237 of the GHL and the improper interpretation of Article 103 in the GHL. The second section considers the decision made in A.I.1482/2015 by presenting the relationship between the right to the highest attainable standard of health and the right to free development of personality within the context of drug

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<sup>287</sup> The first judgment is A.R.237/2014 issued by the Mexican Supreme Court of the Nation (SCJN) in 2015, which recognizes that recreational use of marijuana is lawful based on the plaintiff's human rights. In this resolution, the Court considered the recreational use of marijuana through the right to free development of personality, which is tied to human dignity, and the application of the principle of proportionality to strike a balance between human rights and the principles of public health, order, and security.

<sup>288</sup> Senado de la República. 2008. Gaceta del Senado LX/3PPO289/18567  
[https://www.senado.gob.mx/64/gaceta\\_del\\_senado/documento/18567](https://www.senado.gob.mx/64/gaceta_del_senado/documento/18567) Accessed: June 11,2021.

<sup>289</sup> Secretaría de Gobernación.2017. Decreto por el que se Reforman y Adicionan Diversas Disposiciones de la Ley General De Salud y del Código Penal Federal.  
[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5487335&fecha=19%2F06%2F2017](https://www.dof.gob.mx/nota_detalle.php?codigo=5487335&fecha=19%2F06%2F2017) Accessed: June 11,2021.

control. It questions the declaration of unconstitutionality of Article 237 of the GHL by emphasizing the importance of the application of the law itself. The last part of the chapter illustrates the implications of the ruling on the legality of the use of marijuana for medical purposes based on the human rights approach and the recognition of the State's duty to protect human rights.

This chapter seeks to understand how the judicial process was carried out and what the norms were that the judge applied to decide the case. Also, it studies the importance of the use of the principle of proportionality, not considered by the judge in A.I.1482/2015. This is done in hopes that this research can contribute to the debate on marijuana decriminalization by suggesting that medical marijuana should be protected on the basis of the right to health, which is accepted by a large part of the international community despite the debate that has always existed on social and cultural economic rights.<sup>290</sup> However, even if the judgment was only valid for the plaintiff who received the permission to use medical marijuana, the study may prove helpful for those studying the issue of drug control under the framework of human rights and for the ongoing dialogue on these matters that continues in the field of comparative constitutional law.

### **3.1. The Ruling of A.I.1482/2015: What was Held**

#### **3.1.1 Cannabis Sativa**

Before looking at the specifics of this case, it is necessary to first understand the medicinal properties of marijuana. The medicinal properties of cannabis sativa, the scientific name of marijuana, have been known and used for thousands of years.<sup>291</sup> Cannabis sativa contains more than 400 active components; 60 of them are cannabinoids.<sup>292</sup> The most abundant and biologically active is delta-9-tetrahydrocannabinol (THC). The elements of cannabis, specifically cannabidiol (CBD) and THC are substances that, based on various scientific studies carried out, may help in the treatment of pain and improve the quality of life of the patients who receive it.<sup>293</sup> In this chapter, the term 'medical marijuana' is used, and it encompasses one derivate of cannabis sativa, in particular: CBD.

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<sup>290</sup> Steiner H., Alston P., & Goodman, R. 2008. *International Human Rights in Context: Law, Politics, Morals: Text and Materials*. Oxford University Press: 151-160.

<sup>291</sup> Zlas, J., Stark, H., Seligman, J., Levy, R., Werker, E., Breuer, A., & Mechoulam, R. 1993. Early Medical Use of Cannabis. *Nature*. 363(6426): 215.

<sup>292</sup> Atakan Z. 2012. Cannabis, a Complex Plant: Different Compounds and Different Effects on Individuals. *Therapeutic advances in Psychopharmacology*, 2(6): 241.

<sup>293</sup> Mechoulam, R. 2012. Cannabis A Valuable Drug that Deserves Better Treatment. *Mayo Clinic Proceedings*. 87(2):107-109.

At the beginning of the twentieth century, cannabis was eliminated from the pharmacopeia,<sup>294</sup> and it was considered an illegal substance due to the harmful effects of excessive consumption on the nervous system.<sup>295</sup> The Single Convention on Narcotic Drugs (SCND), which regulated the control of illicit drugs, was adopted in 1961 and amended by the 1972 Protocol.<sup>296</sup> The SCND required signatory countries to work together to contribute to the establishment of a universal system to fight against illicit drugs and monitor their implementation. Although medical cannabis is not prohibited under the SCND, the incorporation of the substance in Schedule IV of the SCND meant the application of stringent guidelines that must be complied with in order to permit the medical and scientific utilization of cannabis.<sup>297</sup>

Currently, in the world, there is an absence of a unified scientific practice of cannabis for medical purposes.<sup>298</sup> According to the World Health Organization (WHO), the symptoms that appear after the ingestion of THC or CBD depend on the dose given, their control and moderate use being recommended through medical accompaniment. Their study has required establishing a close relationship and the differentiation of the implementation of cannabis as a pharmacological method and as a playful use; as well as its relationship with other drugs such as tobacco and alcohol. Nowadays, the WHO recommends that cannabis should be reclassified in the SCND for its medicinal properties.<sup>299</sup>

There has been a serious debate around the different uses that can be given to marijuana and its psychotropic properties. The discussion focuses not only on the need to propose alternatives to ensure the recreational use of the cannabis but also on the benefits it could have for medicinal, therapeutic, and scientific purposes, specifically active substances such as CBD, and THC. There is scientific evidence of the positive effects of the medical use of marijuana in conditions such as chronic pain, HIV infection, multiple sclerosis, nausea and vomiting, epilepsy and terminal

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<sup>294</sup> Bridgeman, M., & Abazia D. 2017. Medicinal Cannabis: History, Pharmacology, and Implications for the Acute Care Setting. *Pharmacy and Therapeutics* 42.3:180.

<sup>295</sup> Mead, A. P. 2014. International Control of Cannabis. In Pertwee, R. (ed.): *Handbook of Cannabis*. Oxford University Press: 46.

<sup>296</sup> Bewley-Taylor, D., & Martin J. 2012. Regime Change: Re-visiting the 1961 Single Convention on Narcotic Drugs. *International Journal of Drug Policy* 23(1):72.

<sup>297</sup> United Nations. 1973. Commentary on the Single Convention on Narcotic Drugs, 1961. New York: 66-69.

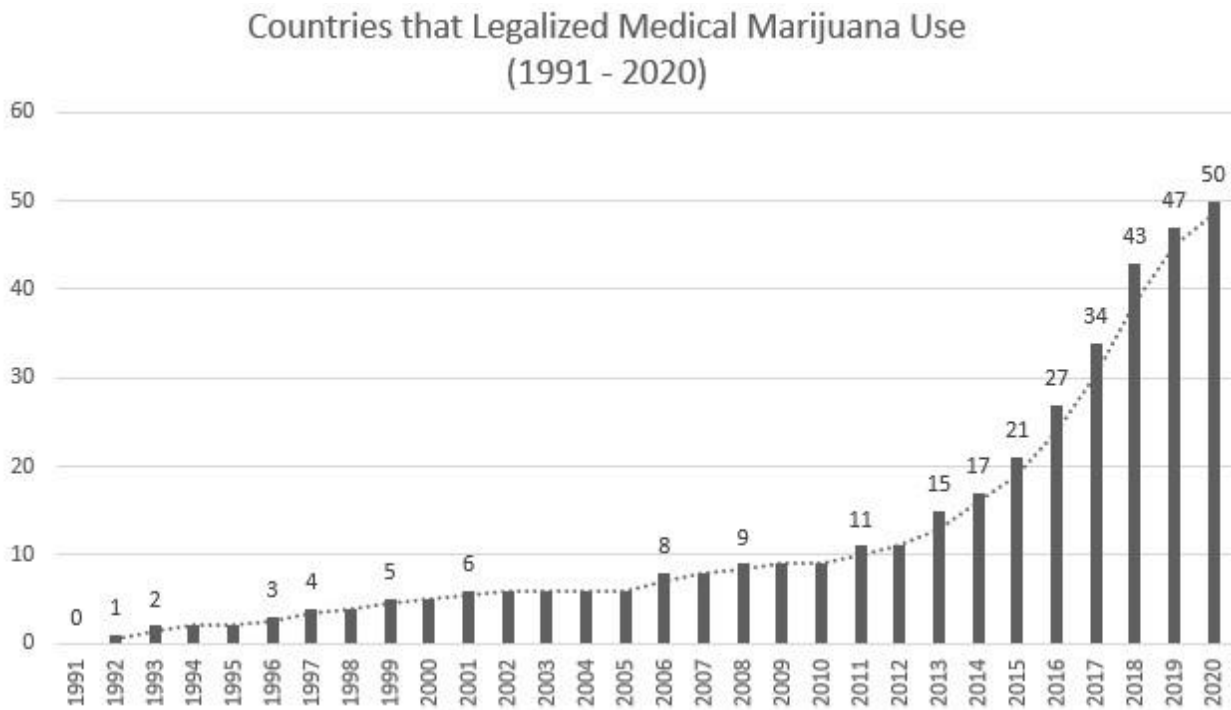
<sup>298</sup> Ladha, K., Ajrawat, P., Yang, Y., & Clarke, H. 2020. Understanding the Medical Chemistry of the Cannabis Plant is Critical to Guiding Real World Clinical Evidence. *Molecules*, 25(18): 2.

<sup>299</sup> WHO. 2019. ECDD41. [https://www.who.int/medicines/access/controlled-substances/UNSG\\_letter\\_ECDD41\\_recommendations\\_cannabis\\_24Jan19.pdf?ua=1](https://www.who.int/medicines/access/controlled-substances/UNSG_letter_ECDD41_recommendations_cannabis_24Jan19.pdf?ua=1). Accessed: April 25, 2021.

diseases.<sup>300</sup> There is a coincidence that treatments with cannabis products, if used correctly, contribute to mitigate the suffering of certain diseases and are alternative methods to make the treatment of patients curable.<sup>301</sup>

Even though most countries still have a prohibitionist and punitive policy surrounding the manufacture, distribution, marketing, and possession of marijuana, certain governments have begun to allow the use of marijuana for medical purposes. This has been seen in the case of the nations that allow its use under this perspective in the following table:

**Figure 1. Historical Developments on Countries that Legalized Medical Marijuana Use (1991-2020)**



Source: The THC Times. 2021. Marijuana Laws by Country

The chart presents that during the years 1991 to 1999 only 5 countries approved marijuana for medical purposes. Same case during the years of 2000 to 2009. However, from 2010 to 2020,

<sup>300</sup> Rodríguez Carranza, R. 2012. Los Productos de Cannabis Sativa: Situación Actual y Perspectivas en Medicina. *Salud Mental*: 247-256.

<sup>301</sup> Tapia, R. 2014. Las Drogas y Salud. El Punto de Vista Científico, desde las Neurociencias y la Medicina, de Efectos de la Cannabis en la Salud. *Foro Internacional de Política de Drogas*. 5: 1-6.

around 40 countries approved the usage of medical marijuana. Of the exemplified countries, with the exception of Uruguay and Canada, it is important to specify that their production, distribution, commercialization and possession remain illegal. In almost all of these countries, drugs containing CBD are sold only with medical prescription and under the highest standards of control, such as: Norway, Italy, Germany, Poland, among others.

Based on scientific study and case studies, the aforementioned countries have concluded that the qualities of marijuana can alleviate the symptoms of certain diseases, and, more importantly, that therapies with the active component of cannabis can improve patients' quality of life.<sup>302</sup> Safety problems, such as in utero effects in pregnancy, drug-drug combinations, and other medical contraindications, are among the drawbacks to marijuana medicalization.<sup>303</sup> Medicalization usually necessitates considerable testing to verify that users of the prescribed drug are not injured, and that side effects are kept to a minimum. Some positive aspects of the medicalization of a drug can effectively destigmatize use and reduce pain and suffering associated with specific medical problems, provided it is appropriately legalized and supported by clinical science for specific medical conditions.

### **3.1.2 The Litigation in A.I.1482/2015**

#### **3.1.2.1 Claims of the Plaintiff**

On July 24, 2015, Raúl Elizalde Garza and Mayela Benavides Arriola initiated an amparo lawsuit on behalf of their minor-aged daughter Graciela Elizalde Benavides seeking a review on the justifications for the prohibitionist drug policies in Mexico. Graciela was eight years old at the time when the amparo lawsuit was filed. Graciela had been diagnosed with Lennox-Gastaut Syndrome as a child, a disease that causes up to 400 convulsions per day and is likely to persist until she is an adult. She had already gone through several medical treatments and different kinds of drugs without positive responses. Specialists also performed a callosotomy on the girl, a surgery that involves cutting three-quarters of the corpus callosum of the brain to control generalized convulsions.<sup>304</sup> None of this worked. Her parents' hope was placed on a medicine derived from

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<sup>302</sup> Clark, P. A., Capuzzi, K., & Fick, C. 2011. Medical Marijuana: Medical Necessity Versus Political Agenda. *Medical Science Monitor: International Medical Journal of Experimental and Clinical Research*, 17(12): 249-261: 258.

<sup>303</sup> Metz, T. D., & Stickrath, E. H. 2015. Marijuana Use in Pregnancy and Lactation: A Review of the Evidence. *American Journal of Obstetrics and Gynecology*. 213 (6): 761-778.

<sup>304</sup> TDCAMM.2016. A.I.1482/2015: 71.

elements of cannabis or marijuana (CBD), which experimental studies have shown may reduce convulsions in these patients.<sup>305</sup> Following the SCND in the area of drug control in Mexico, the Mexican Government enacted the General Health Law (GHL) in 1984.<sup>306</sup> Cannabis sativa and its derivatives, including THC and CBD, appeared in Article 237 of the GHL, and their regular medical use was prohibited.<sup>307</sup>

In general, the plaintiff argued two points. First, some provisions of the GHL do not help fulfill the right to health. The applicant's argument refers to the unconstitutionality of Article 237 of the GHL for prohibiting medical prescription and the use for medical purposes of marijuana, infringing upon Article 4 of the Mexican Constitution, which recognizes the right to health. The second argument was that Article 103 of the GHL was interpreted incorrectly. The provision states that in the treatment of a sick person, the doctor may use therapeutic or diagnostic resources that are still being researched when there is a well-founded possibility of saving a life, restoring health, or diminishing the patient's suffering. Concretely, the plaintiff argued that the denial of a request to import, carry and consume CBD by the Secretary of the General Health Council (SGHC)<sup>308</sup> was due to an erroneous interpretation of the law.

### **3.1.2.2 The Response of the SGHC**

On June 4, 2015, Raúl Elizalde Garza requested the Ministry of Health permission to import, carry and consume CBD for immediate medical needs. On June 18, 2015, the Ministry of Health, by official letter UCVPS-DGACPE-DGPCPS-1334-2015, took the petition to the General Health Council so that it could decide on the request.<sup>309</sup> In response to this, on June 29, 2015, the SGHC issued the official letter CSG-2090-2015, through which it denied the request.<sup>310</sup> The SGHC considered that at the moment when the letter was issued, there was no conclusive scientific evidence on the efficacy of CBD. The effects of CBD on children with epilepsy were unknown, and this included the risk of CBD increasing or exacerbating epileptic seizures. For that, the official

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<sup>305</sup> Lattanzi, S., Zaccara, G., Russo, E., La Neve, A., Lodi, M., & Striano, P. 2021. Practical Use of Pharmaceutically Purified Oral Cannabidiol in Dravet Syndrome and Lennox-Gastaut Syndrome. *Expert Review of Neurotherapeutics*. 21(1): 99-110.

<sup>306</sup> Cámara de Diputados. 2009. Ley General de Salud (GHL). <http://www.diputados.gob.mx/LeyesBiblio/ref/lgs.htm> Accessed: June 11, 2021.

<sup>307</sup> Cimino, A. 2013. *Drug Wars: The Mexican Cartels*. Arcturus: 208.

<sup>308</sup> The General Health Council depends directly on the executive branch and has the character of a health authority, with normative, advisory, and executive functions. The provisions issued will be general and mandatory in the country.

<sup>309</sup> TDCAMM. 2016. A.I.1482/2015: 71-78.

<sup>310</sup> TDCAMM. 2016. A.I.1482/2015: 71-78.

letter said, a lack of evidence prevented the assurance of any benefit from the use of cannabinoids.<sup>311</sup> In addition to these statements, the SGHC argued that the General Health Council did not have powers to import the anticonvulsant component containing CBD.<sup>312</sup> Besides, the SGHC based its response on studies published between 1978 and 1990 and expressed the lack of evidence on positive results on the use of CBD.<sup>313</sup> The General Health Council, within its competencies, recommended and suggested other medications to treat Lennox-Gastaut Syndrome.<sup>314</sup>

### **3.1.2.3 The Judgment**

The amparo lawsuit 1482/2015<sup>315</sup> was accepted on August 10, 2015, by the District Court, which analyzed the plaintiff's arguments and studied the unconstitutionality claims of the GHL, specifically Article 234, Article 235 in its last paragraph, Article 237, Article 245, section I, Article 247 in its last paragraph, Article 248, Article 368 and Article 479 and the negative reply to the request by the complainant about a medical treatment based on the active ingredient CBD. Based on the articles mentioned, the plaintiff argued an incorrect interpretation of Article 103 of GHL in the official letter CSG-2090-2015 issued on June 29, 2015, by the SGHC.<sup>316</sup>

The conclusion of the judgment was the declaration of unconstitutionality of Article 237 of the GHL only for Graciela Elizalde Benavides, and the issue was provisionally resolved by making the official letter CSG-2090-2015 null and void, and by issuing in its place another one with which the complainant, a minor, could import, carry and consume the CBD component only for medicinal purposes.<sup>317</sup> Finally, the District Court deliberated that the SGHC had made an inadequate application of Article 103 of the GHL by making the refusal of the request for the importation dogmatically, carrying, and consumption of the components cited for the immediate medical needs of Graciela Elizalde Benavides.<sup>318</sup>

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<sup>311</sup> TDCAMM.2016. A.I.1482/2015: 77-79.

<sup>312</sup> TDCAMM.2016. A.I.1482/2015: 71-73.

<sup>313</sup> TDCAMM.2016. A.I.1482/2015: 20, 65-68.

<sup>314</sup> TDCAMM.2016. A.I.1482/2015: 19-25.

<sup>315</sup> The content of A.I.1482/2015 can be found in the archives of the SCJN. It had been translated, and adapted by the author of this dissertation since the length of the publication is too large. The intention of doing this is to make the reading more accessible, and the focus on the substance of the matter is not lost.

<sup>316</sup> TDCAMM.2016. A.I.1482/2015:1-2.

<sup>317</sup> TDCAMM.2016. A.I.1482/2015:48-69.

<sup>318</sup> TDCAMM.2016. A.I.1482/2015:72.



## 3.2. Exploring the Reasoning behind A.I.1482/2015

### 3.2.1 The First Argument by the Applicant: Unconstitutionality of Article 237 of the GHL

The first argument is that some provisions of the GHL do not help fulfill the right to health. Article 97 of the GHL authorizes the Ministry of Public Education in coordination with the Ministry of Health and the participation of the Council of Public Education to develop scientific and technological research related to health studies. Likewise, Article 102 of the GHL mentions that the Ministry of Health may authorize, for preventive, therapeutic, rehabilitative, or research purposes, the use in human beings of medicines or materials for which there is not yet sufficient scientific evidence.

Under Article 237 of the GHL, marijuana use is generally prohibited. However, Article 235 of the GHL states that a person can realize any action or use any product related to marijuana as long as it is for medical and scientific purposes, based on the authorization of the Ministry of Health. In practice, on the one hand, it could be possible to obtain the approval of the Ministry of Health for the use of marijuana for scientific purposes. On the other hand, to receive this permission for medical use is denied. Regarding marijuana prohibition, the judge invoked Article 237 of the GHL that states:

“Are *prohibited* in the country, all of the acts<sup>319</sup> mentioned in Article 235 of this Act, with respect to the following substances and plants: opium prepared for smoking, diacetylmorphine or heroin, its salts and preparations, *cannabis sativa, indica and american or marijuana* or opium poppy papaver somniferum, papaver bacteatum and erythroxilon novogratense or coke, in any form, derivatives or preparations.”<sup>320</sup> (Emphasis added)

However, new treatments and developments have materialized in recent years, which could open the door for the utilization of medical marijuana.<sup>321</sup> For that, this case posed a broader question: If marijuana is found to be helpful for the treatment of some severe diseases, and if the

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<sup>319</sup> Article 235 of the GHL refers to the term *all of the acts* as: “medical and scientific purposes and will require authorization from the Ministry of Health.”

<sup>320</sup> Cámara de Diputados. 2009. Ley General de Salud (GHL).

<http://www.diputados.gob.mx/LeyesBiblio/ref/lgs.htm> Accessed: June 11, 2021.

<sup>321</sup> Hill, K. 2020. Medical Cannabis. *Jama* 323(6): 580.

government continues to ban it, is this the right course of action for the government in order to secure the right to the highest attainable standard of health? CBD is a substance that cannot be used for medical purposes since it is prohibited in Article 237 of the GHL. Therefore, it cannot be prescribed by any doctor. According to the reasoning of the judge, this prohibition transgresses the right to health guaranteed by Article 4 of the Mexican Constitution.<sup>322</sup> The right to health (or its protection) is one of the social rights per excellence. It is a complex right that unfolds in a comprehensive series of fundamental legal positions for individuals and the State.<sup>323</sup>

According to the World Health Organization (WHO), “Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.”<sup>324</sup> It is essential to emphasize the idea contained in the previous definition that health has an individual component and also a collective or social component. Of course, the enjoyment of health is an individual good, since each person may or may not have it, regardless of whether his family or neighbors are also in good health. Nevertheless, health has a collective dimension if we consider that social factors contribute to protect or not protect it, such as epidemics, pollution, lack of hygienic habits, inappropriate disease prevention measures, etcetera. Health for all can only be preserved through a collective effort and based on an adequate health care system.<sup>325</sup>

As stated by the District Court, the negative reply to the request by the complainant about a medical treatment based on the active ingredient CBD by the SGHC contravenes the principles set forth in the Universal Declaration of Human Rights (UDHR),<sup>326</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>327</sup> General Comment No. 14 of the Committee on Economic, Social and Cultural Rights (General Comment 14),<sup>328</sup> and the Additional Protocol to

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<sup>322</sup> Cámara de Diputados. 2021. Constitución Política de los Estados Unidos Mexicanos. <http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm> Accessed: January 2, 2021.

<sup>323</sup> Instituto de Investigaciones Jurídicas. 2013. *El Derecho a la Salud*. Mexico, UNAM:1-2.

<sup>324</sup> WHO. 2002. International Health Conference, Constitution of the WHO, 1946. *Bulletin of the WHO*, 80 (12): 983-984.

<sup>325</sup> Freire, J. 1999. Política Sanitaria in *Garde, J.A, Políticas Sociales y Estado de Bienestar en España*. Spain: Trotta: 433.

<sup>326</sup> The Universal Declaration of Human Rights, GA Res. 217 (III), <https://www.un.org/en/about-us/universal-declaration-of-human-rights> Accessed: February 26, 2022.

<sup>327</sup> UN General Assembly. 1996. International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, Vol. 993:1-14.. [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4) Accessed: February 26, 2022.

<sup>328</sup> Committee on Economic, Social and Cultural Rights. 2000. General Comment No. 14: The Right to the Highest Attainable Standard of Health. *Article 12 of the International Covenant on Economic, Social and Cultural Rights, adopted by the Committee on Economic, Social and Cultural Rights on 11 May 2000*, UN Doc. E/C.12/2000/4 (11 August 2000), <https://digitallibrary.un.org/record/425041> Accessed: March 26, 2022.

the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador,”<sup>329</sup> which enshrines the right of every person to the enjoyment of the highest possible level of physical and mental health and the correlative obligation of the State parties to respect and progressively fulfill the right to health.<sup>330</sup>

The plaintiff mentioned that the European and American medical research had determined and suggested that there was scientific evidence that CBD drugs were influential in the treatment of epilepsy in many cases.<sup>331</sup> Research showed that it was even possible to eliminate or mitigate the crises of many children who suffered from Lennox-Gastaut syndrome.<sup>332</sup> Regarding the request made by the plaintiff, the SGHC determined that in Mexico, there was no scientific evidence that found that marijuana or the cannabinoid was effective in drug-resistant epilepsies or epileptic encephalopathies such as Lennox-Gastaut syndrome. The SGHC suggested the use of various medicines included in the Basic Chart and Catalog of Health Sector Supplies in Mexico.<sup>333</sup>

The reasoning of the District Court was that despite the response contained in the official letter CSG-2090-2015, it was essential to emphasize that the GHL prohibited the use of marijuana for medical purposes, including its prescription.<sup>334</sup> This prohibition was in violation of the right to health because, when the request for using medical marijuana was made in Mexico without the availability of reliable information on CBD medication’s effects on epilepsy, there was evidence in other countries that supported the effectiveness of CBD based products in the treatment of epilepsy.<sup>335</sup> The prohibition, the court reasoned, prevented people from accessing medicine and supplies that contained a substance that could be beneficial to their health.<sup>336</sup>

The District Court ruled that the action taken by the SGHC violated the right to health because the argument that there was no well-founded evidence on its efficacy in the medication of epilepsies available in Mexico only demonstrated the deficient public policy related to the research

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<sup>329</sup> Organization of American States. 1999. *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”)*, <http://www.oas.org/en/sare/social-inclusion/protocol-ssv/docs/protocol-san-salvador-en.pdf> Accessed: February 26, 2022.

<sup>330</sup> TDCAMM.2016. A.I.1482/2015: 61-64.

<sup>331</sup> TDCAMM.2016. A.I.1482/2015: 64-65.

<sup>332</sup> Koo, C. M., Kim, S. H., Lee, J. S., Park, B. J., Lee, H. K., Kim, H. D., & Kang, H. C. 2020. Cannabidiol for Treating Lennox-Gastaut Syndrome and Dravet Syndrome in Korea. *Journal of Korean Medical Science*, 35(50):1-9.

<sup>333</sup> TDCAMM.2016. A.I.1482/2015: 19-25.

<sup>334</sup> TDCAMM.2016. A.I.1482/2015: 69-79.

<sup>335</sup> TDCAMM.2016. A.I.1482/2015: 78-79.

<sup>336</sup> TDCAMM.2016. A.I.1482/2015: 78-79.

and development of such products in the country.<sup>337</sup> There was evidence in other countries on the usefulness of cannabis in the treatment of epilepsies.<sup>338</sup> For this reason, the judge declared the unconstitutionality of Article 237 of the GHL, as it prohibited the medical prescription and use for medicinal purposes of cannabis.

The decision was based on the right to health, stipulated in Article 4 of the Mexican Constitution, and on the international agreements signed by the Mexican Government.<sup>339</sup> In the Mexican Constitution and international treaties, the right of every person to enjoy the highest possible level of physical and mental health carries with it the corresponding obligation of the States' parties to respect and progressively fulfill the right to health by not allowing for the adoption of regressive measures to their detriment, refraining from denying their access and guaranteeing it in equal conditions. The District Court also expressed its understanding that the declaration of unconstitutionality should not transcend or affect the powers of the authorities to regulate its use and way of prescription.<sup>340</sup>

### **3.2.2 The Second Argument by the Applicant: Misapplication of Article 103 of the GHL**

The second argument was that Article 103 of the GHL was interpreted incorrectly. The District Court analyzed the official letter CSG-2090-2015 and a possible misinterpretation of Article 103 of the GHL, transgressing the right to health in consequence since the state cannot implement any restrictions to safeguard that fundamental right. Following the reasoning of this thought, the District Court declared that the principle of legality was transgressed since the authority made an improper application of Article 103 of the GHL, which reads that:

“Article 103. In the treatment of a sick person, the doctor may use new therapeutic or diagnostic resources, when there is an established *possibility* of saving lives, restoring health or reducing the patient's suffering, provided he has the consent in writing by himself, his legal representative, if applicable, or the closest relative in connection, and notwithstanding

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<sup>337</sup> TDCAMM.2016. A.I.1482/2015: 76-77.

<sup>338</sup> TDCAMM.2016. A.I.1482/2015: 74.

<sup>339</sup> TDCAMM.2016. A.I.1482/2015: 61-64.

<sup>340</sup> TDCAMM.2016. A.I.1482/2015: 78.

complying with the other requirements determined by this Law and other applicable provisions.”<sup>341</sup> (emphasis added)

According to the District Court, Article 103 of the GHL does not require unequivocal or irrefutable evidence on the effectiveness of a drug.<sup>342</sup> The provision considers the “possibility” of improvement in the health or quality of life of the patient.<sup>343</sup> Besides, based on the right to health, guaranteed by Article 4 of the Mexican Constitution and the principle of legality, the authority has an obligation to authorize and facilitate the performance of treatment even if the substances are prohibited by the GHL.<sup>344</sup> For that reason, the answer of the SGHC, which denied the importation, carrying, and consumption of the CBD for the medical needs of the minor, was considered as a violation to the right to have a life without pain and suffering.<sup>345</sup> It was also observed by the judge that the official letter CSG-2090-2015 based their response on studies between the years 1978 and 1990 and not on more recent studies on the treatment used in children suffering from Lennox-Gastaut syndrome.<sup>346</sup> This situation evidences the use of obsolete measures and the lack of information and recent studies by health authorities, which transgresses the fundamental right of health.<sup>347</sup>

As maintained by the study made in A.I.1482/2015, Article 103 of the GHL provides the possibility that the doctor will be allowed to use therapeutic or diagnostic resources currently under research, restoring the health or reducing the patient’s suffering. The doctor needed the written consent of the patient, family member, or person who was in charge of the guardianship of the patient.<sup>348</sup> On these bases, as the complaining party argued, the SGHC made an improper application of Article 103 of the GHL since the provision does not require unequivocal or irrefutable evidence on the effectiveness of treatment.<sup>349</sup> The patient’s consent could be enough to fulfill the requirements for the doctor to start a treatment, even based on substances considered prohibited by the GHL.<sup>350</sup> Therefore, the judge held that the action taken by the SGHC violated

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<sup>341</sup> TDCAMM.2016. A.I.1482/2015: 72.

<sup>342</sup> TDCAMM.2016. A.I.1482/2015: 70.

<sup>343</sup> TDCAMM.2016. A.I.1482/2015: 72.

<sup>344</sup> TDCAMM.2016. A.I.1482/2015: 72-73.

<sup>345</sup> TDCAMM.2016. A.I.1482/2015: 71-72.

<sup>346</sup> TDCAMM.2016. A.I.1482/2015: 70-71.

<sup>347</sup> TDCAMM.2016. A.I.1482/2015: 69-71.

<sup>348</sup> TDCAMM.2016. A.I.1482/2015: 72-73.

<sup>349</sup> TDCAMM.2016. A.I.1482/2015: 72-73.

<sup>350</sup> TDCAMM.2016. A.I.1482/2015: 72-73.

the right to health since the responsible authority did not grant the facilities, goods, services, and conditions necessary to reach the highest possible level of health of Graciela Elizalde Benavides.<sup>351</sup>

Finally, the District Court considered that the SGHC made the refusal of the request for the importation, carrying, and consumption of the CBD for the immediate medical needs of the minor in a dogmatic way.<sup>352</sup> The conclusion was that the SGHC did not conduct a detailed analysis of recent studies on the treatment of Lennox-Gastaut syndrome based on CBD or request the advice or opinion of various institutions in the sector of health on the subject, as the SGHC contested.<sup>353</sup> The judge studied documentary evidence of the Head of the Pediatric Neurology Service and the Head of the Neurology Service, both of the National Medical Center “20 de Noviembre” of the Institute of Social Security and Services of State Workers in Mexico.<sup>354</sup> These documents provide an in-depth analysis of scientific evidence of crisis reduction in patients suffering from Lennox-Gestaut Syndrome with 80% improvement in seizures, alertness, and no side effects, except fatigue and drowsiness in some children.<sup>355</sup> Nevertheless, most importantly, they conclude that there are patients who can improve their quality of life.<sup>356</sup>

### **3.3. Some Errors in A.I.1482/2015**

#### **3.3.1 Proper Application of Article 103 of the GHL: The Principle of Proportionality**

A.I.1482/2015’s decision would have been much more relevant if the District Court considered the principle of proportionality in a similar way as the ruling of the Supreme Court in A.R.237/2014 did. Even the principle of proportionality is not mentioned in A.I.1482/2015, the importance of the consideration of this principle is that it has general application in all legal fields.<sup>357</sup> The objective of the principle of proportionality is to ensure maximum enjoyment of rights and set the limitations of these rights, regardless of whether they are imposed by the legislative, administrative, or judicial authority. This principle requires an examination of various elements to measure whether the law restricts a fundamental human right or not.

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<sup>351</sup> TDCAMM.2016. A.I.1482/2015: 73-79.

<sup>352</sup> TDCAMM.2016. A.I.1482/2015: 73- 79.

<sup>353</sup> TDCAMM.2016. A.I.1482/2015: 77.

<sup>354</sup> TDCAMM.2016. A.I.1482/2015: 71-79.

<sup>355</sup> Porter, B., & Jacobson, C. 2013. Report of a Parent Survey of Cannabidiol Enriched Cannabis Use in Pediatric Treatment-Resistant Epilepsy. *Epilepsy & Behavior*. 29(3): 574–577.

<sup>356</sup> TDCAMM.2016. A.I.1482/2015: 71-79.

<sup>357</sup> Sieckmann, J. 2018. Proportionality as a Universal Human Rights Principle. In Duarte D. & Silvia J. (ed) *Proportionality in Law*. Springer: 4.

The relation between the principle of proportionality and the use of marijuana not only for medical purposes but for recreational purposes can be seen in A.R.237/2014. As it was mentioned previously, in this judgment, the Supreme Court applied a mechanism of interpretation in the measures, that is, the application of the principle of proportionality to highlight the tensions between human rights and the opposing government policies. This requirement gives the authority's decisions a scientific quality to the extent that the justification of the standards is based on well-founded scientific conditions to formulate the relevant questions and consider the studies and opinions of the specialists needed to make an informed judicial decision. However, in A.I.1482/2015, this analysis was not performed.

It is true that the issue of regulating marijuana for medical purposes causes great controversy. It is also true that prohibition is thought of as necessary to protect people's health, security, and public order. However, from a human rights perspective, it is considered that a policy that prohibits or limits the use of drugs can obstruct several rights, including a right to health. How were the rights affected in the case of A.I.1482/2015 by the GHJ? Why was the analysis of the unconstitutionality of Article 237 not based on the principle of proportionality and linked to Article 103?

Regarding the use of the principle of proportionality, it seems that it has been applied in A.R.237/2014 with a different meaning than in A.I.1482/2015, since in A.I.1482/2015, exceptional rules (use of marijuana for medical purposes) are discussed against general regulations, embodied in Article 103 of the GHJ. This is different from the context in A.R.237/2014, in which exceptional provisions (for consumption of recreational marijuana) must be interpreted narrowly, without damaging the general principles of the public health order and security. For that, the meaning of proportionality cannot have the same meaning in A.I.1482/2015. The principle of proportionality can be analyzed in the declaration of unconstitutionality of the provision of the GHJ. The declaration of unconstitutionality should be the last resort of the judges, considering the exploration of other routes on the application of the law.

In A.I.1482/2015, the principle of proportionality is embedded in Article 103 of the GHJ, since generally, marijuana should be prohibited, but Article 103 of the GHJ provides the option to the doctor as an exception to prescribe marijuana or its derivatives. It could be said that proportionality was already considered by legislators at the moment that Article 103 of the GHJ was enacted. By having identified the principle of proportionality in Article 103 of the GHJ, the

linkage between Article 237 and Article 103, both of the GHL, could be made by the District Court, without the necessity to declare unconstitutional Article 237 of the GHL. According to the judgment, prohibiting cannabis production, possession, and consumption for medicinal use, is, in some way, a violation of the right to health, and it also transgresses the right to free development of personality, since the actions of the State affect a person's selection on the treatment that is available. In A.I.1482/2015, there was no need to apply the principle of proportionality like in A.R.237/2014, since Article 103 of the GHL presents a viable solution to the protection of the right to health.

The balance between the protection of the right to health and state values is fundamental to maintaining national health, security, and public order. However, in A.I.1482/2015, the unconstitutionality of Article 237 of the GHL was established, and it means that marijuana can be used for all patients, not only those with severe diseases. For that reason, the approach adopted in this chapter gains relevance in terms of the need to limit some applications of medical marijuana for serious illnesses. The GHL provided some restrictions that marijuana shall be used as a last resort. Therefore, the test is whether there are any other possible alternative measures as a treatment for severe illness or medical marijuana, according to scientific research, which has established that marijuana has positive effects of treating a specific disease. Article 103 of the GHL protects the human right to health. The misinterpretation of the law is what infringed on human rights.

### **3.3.2 The Interrelation between A.R.237/2014 and A.I.1482/2015**

The District Court could have avoided the decision of declaring the unconstitutional Article 237, based on the application of Article 103, both of the GHL. So, why did the District Court declare unconstitutional Article 237 of the GHL? The Supreme Court has a higher authority than the District Court in the Mexican judicial system; for that higher hierarchy, the Court followed in the footsteps of the essentials of the previous case.

The chronological order of the cases is a critical point to remark. It could be said, on the one hand, that the Supreme Court studied the case of the use of marijuana using a wider notion: its recreative use. On the other hand, a study of the use of marijuana for medical use was made by a lower court, recognizing the decision made by the Supreme Court, and a narrow or restricted approach was abandoned. In consequence, to incorporate the view of the Supreme Court into



A.I.1482/2015, the District Court had to declare unconstitutional Article 237 of the GHL to be in coherence with A.R.237/2014. The Supreme Court in A.R.237/2014 recognized that marijuana for recreational purposes should be deregulated or declared lawful. Therefore, the usage of marijuana for medical goals must be, in consequence, legalized in a broader framework of the use of marijuana for recreational purposes. It means that the District Court in A.I.1482/2015 had to declare the unconstitutionality of Article 237 of the GHL to be in accordance with A.R.237/2014.

The present study would be relevant even if the judgments A.R.237/2014 and A.I.1482/2015 are treated separately. The conclusion for A.I.1482/2015 is clear; the decision was excessive in declaring the unconstitutionality of Article 237 of the GHL. However, when the judgment A.R.237/2014 is taken into consideration, it presents an apparent contradiction. If the Supreme Court decides the legality of the use of marijuana for recreational purposes, this legality would also cover the use of marijuana for medical purposes. In consequence, the decision made by the District Court in A.I.1482/2015 can be considered correct and legitimate, even though there is a shred of indirect evidence that the District Court considered the Supreme Court's decision in A.R.237/2014. However, the District Court offers no explanation for the interrelation between A.R.237/2014 and A.I.1482/2015, and the District Court acknowledged the significance of the analysis of the use of marijuana for medical purposes, without any attempt at explaining how the legality of the use of marijuana for recreational purposes means allowing the consumption of marijuana for medical purposes as well. A.I.1482/2015 focused on the case of the use of marijuana for medical purposes, but again, a more comprehensive justification for legal use of marijuana was already given by the Supreme Court in A.R.237/2014. In this case, the law itself, in addition to its application, was deemed to be unconstitutional.

It is essential to mention that A.R.237/2014 and A.I.1482/2015 were considered at the time of amendment of the GHL. In both decisions, the unconstitutionality of articles related to the prohibition of the use of marijuana was determined. A.I.1482/2015 has shown that the idea of the authorization of the use of marijuana for medical purposes is possible. One of the more proper approaches to the GHL is to consider for amendment of only the provisions that touch upon the medical use of marijuana. However, in A.R.237/2014, the acceptance of the use of marijuana for recreational purposes was studied, and not only medical use but also use of marijuana by the general population may be allowed. Overall, these cases support the view that the reasons for

declaring the unconstitutionality of Article 237 of the GHL in A.I.1482/2015 are acceptable since the Court is trying to follow the precedent of the Supreme Court in A.R.237/2014.

### **3.4. The Relevance of International Treaties in A.I.1482/2015: The Right to the Highest Attainable Standard of Health**

#### **3.4.1 General Application of the Right to Health in the International Documents for Adults**

In A.I.1482/2015, international treaties were invoked, even if some of them were not binding treaties in Mexico. However, why did the Court think these were relevant, even if some of them are not binding treaties for Mexico? What kinds of actions were taken by the Mexican Government during and after the decision in A.I.1482/2015? Finally, did the decision have any impact on Mexican drug legislation? These are some of the questions that will be analyzed in the following sections.

Article 1 of the Mexican Constitution establishes that all people enjoy the human rights recognized in it and in international treaties. The norms related to human rights are to be interpreted in accordance with the constitution and international treaties, favoring at all times the protection of the people.<sup>358</sup> All authorities, within the scope of their competence, have an obligation to promote, respect, protect and guarantee human rights. That is to say, the State has the duty to prevent, investigate, punish and repair human rights violations. Likewise, from a national point of view, Article 4 of the Mexican Constitution provides that every person has the right to health protection. In all decisions and actions of the State, the principle of the best interest of children should be ensured and fulfilled as well, totally guaranteeing their rights, including the right to the satisfaction of their needs for food, health, education, and appropriate recreation for their integral development. In the same form, from an international perspective, Article 25 of the UDHR mentions health as part of the right to an adequate standard of living.

A.I.1482/2015 considered that there was a violation of the obligations indicated in paragraphs 33 and 34 of the General Comment 14 regarding the obligation to respect and not interfere in the enjoyment of the right to health.<sup>359</sup> In other words, the State has the legal obligation

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<sup>358</sup> Hunt P.2016. Interpreting the International Right to Health in a Human Rights-Based Approach to Health. *Health and Human Rights*. 18(2): 117-118.

<sup>359</sup> TDCAMM.2016. A.I.1482/2015: 66-67.

to respect and protect the right to health and refrain from any act that could affect the full enjoyment of that right. Also, in A.I.1482/2015, a series of international instruments were presented. These touch on the issue of the right to the highest attainable standard of health. It is crucial to highlight that there is no proper right to use the components of marijuana for medicinal use, but by the mere fact of being human, people are considered as subjects of human rights, regardless of any political and economic regime. For the Court, Mexico, as a state party to the International Covenant on Economic, Social and Cultural Rights (Article 12), needs to recognize and must achieve, progressively, the full realization of the highest attainable standard of health. Concerning the Additional Protocol to the American Convention on Human Rights in Matters of Economic, Social and Cultural Rights “Protocol of San Salvador” (Articles 1 and 10), the Mexican government must take the necessary measures to ensure the exercise of the right to health.

Simply put, international treaties essentially enshrine the responsibility of states’ parties to protect, respect, and progressively fulfill the right to health.<sup>360</sup> Also, they have an obligation to avoid adopting regressive measures to their detriment, refraining from denying their access, guaranteeing it under identical conditions and without any limitation, and adopting standards for the right to health’s full realization. The right to health should be understood as a human right to enjoy a full range of facilities, goods, services, and conditions necessary to achieve the highest possible level of health.

### **3.4.2 Specific Application of the Right to Health in the International Documents for Children**

Another essential element is the care and protection of children (as in A.I.1482/2015, initiated by the parents of Graciela Elizalde Benavides on her behalf, as she was a minor at the time) because they are considered a vulnerable group. Under the international human rights law, children are subjects of rights and not only objects of their protection.<sup>361</sup> In particular, children with disabilities require special attention to ensure their dignity, promote their self-reliance, and facilitate active participation in the community. In turn, primary care pediatrics should promote the comprehensive development of children through health services (education, prevention,

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<sup>360</sup> Leary, V. 1994. The Right to Health in International Human Rights Law. *Health and Human Rights*. 1 (1): 24-28.

<sup>361</sup> Inter-American Court of Human Rights. 2002. Advisory Opinion OC-17/2002. Juridical Condition and Human Rights of the Child. [https://www.corteidh.or.cr/docs/opiniones/seriea\\_17\\_ing.pdf](https://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf); Accessed: March 29, 2022.

treatment, and rehabilitation) that must be provided in the community where the child lives and grows up.<sup>362</sup>

The Court invoked the Declaration of the Rights of the Child, which implied that every authority is obliged to provide the conditions to give appropriate medical treatment depending on the condition of a person.<sup>363</sup> Then, the authority needs to provide the medications or basic and essential supplies for the proper treatment.<sup>364</sup> The goal is to preserve the quality of life, especially in the case of children.<sup>365</sup> In the same line, Article 12, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights establishes that the right to health must be guaranteed at its highest possible level of enjoyment and sets specific obligations for the states, which imply a series of measures must be taken in order to meet the demands of the protection of this right.<sup>366</sup> Article 2, paragraph 2, states that the rights invoked in the Covenant will be exercised without discrimination, setting the ground for the immediate effectiveness of its application.<sup>367</sup>

The decision in A.I.1482/2015 could be accused of misinterpreting the international instruments since there is not a differentiation between documents that are legally binding treaties and those that are to be taken only as guidelines, namely, the UDHR and the General Comment 14. These two are not strictly mandatory in a formal sense.<sup>368</sup> However, these documents have become part of customary international law and thus, are binding for Mexican Courts and the Mexican State as laid out in the Mexican Constitution.<sup>369</sup> It was necessary to include this rationale in the analysis of the judgment since it is essential to understand the application of international instruments by the District Court and since they should not be treated in the same way as national law.

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<sup>362</sup> Defensoría del Pueblo. 2003. El Derecho a la Salud en la Constitución, la Jurisprudencia y los Instrumentos Internacionales. <https://www.corteidh.or.cr/tablas/27803.pdf> Accessed: June 11,2021.

<sup>363</sup> TDCAMM.2016. A.I.1482/2015: 50-52.

<sup>364</sup> TDCAMM.2016. A.I.1482/2015: 49-50.

<sup>365</sup> TDCAMM.2016. A.I.1482/2015 :51.

<sup>366</sup> UN General Assembly.1996. International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, Vol. 993:1-14. [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4) Accessed: February 26, 2022.

<sup>367</sup> UN General Assembly.1996. International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, Vol. 993: 1-14. [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4) Accessed: February 26, 2022.

<sup>368</sup> Riccardi, A. 2019. The Universal Declaration of Human Rights in Twenty Years of ICC Practice: An International Law Perspective. *International Criminal Law Review*, 19(6): 1062.

<sup>369</sup> Becerra R. M. 2017. *Las Fuentes Contemporáneas del Derecho Internacional*. Universidad Autónoma de México: 37-38.

It can be said that while the legality issues are one thing, the efficacy or legitimacy is another. This means that even when not binding, international instruments can be valuable tools for the human rights protection mechanism.<sup>370</sup> Therefore, even though they lack legal binding force, they are usually observed by states and are taken into account by organizations that preserve the protection of human rights. Article 25 of the UDHR of 1948 considers that the full enjoyment of the right to health cannot be achieved if the person is deprived of other rights, such as the treatment that the individual wants to undergo in order to improve their health, in accordance with religious, cultural or ideological beliefs.<sup>371</sup>

This dissertation does not deny the significance of the UDHR or General Comment 14 or other international instruments, even if they lack legal binding force. Instead, it can be questioned why the judge did not base its judgment on another international treaty such as the Convention on the Rights of the Child,<sup>372</sup> a legally binding international instrument of children's rights protection.<sup>373</sup> Paragraph 1 of Article 24 of this Convention clearly establishes the right to obtain the best treatment available for children in relation to health. The provision recognizes the fundamental value of the family and the obligation of the State to offer its assistance, especially to parents, in fulfilling their responsibilities with the child. In addition, it mentions the elimination of traditional practices that are harmful to the health of the minor.<sup>374</sup> In other words, international instruments indicate the need to strengthen children's health through preventive health care measures, which seek to guarantee the full and harmonious development of the child, including her spiritual, moral, and social development.

If the provisions of the Convention on the Rights of the Child had been invoked, the decision would have presented powerful arguments that prove that children have the right to health and also the right to use medical marijuana. However, the limitation is that it is only for children; there is no consideration about adults for the relief of pain by using medical marijuana. In consequence, that Convention would not be applicable for adults. The right of children in regards to health can

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<sup>370</sup> Hafner-Burton, E. 2013. *Making Human Rights a Reality*. Princeton University Press: 83.

<sup>371</sup> Brown, G. 2016. *The Universal Declaration of Human Rights in the 21st Century*. Cambridge: Open Book Publishers: 54-55.

<sup>372</sup> UN Commission on Human Rights, 1990. Convention on the Rights of the Child, UN Treaty Series. 1577: 1-15, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> Accessed: February 26, 2022

<sup>373</sup> Svevo-Cianci, K., & Lee, Y. 2010. Twenty Years of the Convention on the Rights of the Child: Achievements in and Challenges for Child Protection Implementation, Measurement and Evaluation Around the World. *Child Abuse and Neglect*. 34(1): 1-4.

<sup>374</sup> Eide, W. & Eide A. 2006. Article 24: The Right to Health. In Alenet, A. (ed.): *A Commentary on the United Nations Convention on the Rights of the Child*. Leiden: Nijhoff: 9-16.

be found in the Convention on the Rights of the Child, reinforcing and supporting the argument contained in the judgment. However, the decision did not restrict its discussion only based on the Convention on the Rights of the Child, but it invoked other international instruments, expanding its application to adults too. It could be said that the Court took a much broader approach to the use of international instruments, not only focusing on the use of medical marijuana for children but also for the general population.

### **Conclusion**

In this chapter, the reasoning of A.I.1482/2015 was analyzed since this decision recognized that medical marijuana use is lawful based on the plaintiff's human rights. However, the results of this research highlight some negative aspects of this judgment, essentially, the declaration of unconstitutionality of Article 237 of the GHL. Avoiding such determination would have been possible if the court had made a clear differentiation between the application of law and the law itself in the assessment of unconstitutionality. The Court used the second approach, which meant that rules or norms themselves were declared unconstitutional when, in reality, the real issue was a misapplication of the GHL. The importance of the decision of this case for Mexican society set the stage for the legislative branch to amend Mexican drug laws. Article 237 of the GHL could be considered satisfactory since it protects and controls the usage of medical marijuana under stipulated conditions, based on the circumstances set in Article 103 of the GHL.

This research has also shown that the analysis of the decision presented a favorable consideration in the case of the discussion of the deregulation of the usage of medical marijuana, which is the application of the right to health to the patient who wants medical marijuana to relieve their suffering. Another positive aspect of the judgment is that it is limited in its scope. The judgment does not incorporate average patients; it is only for patients with severe sickness, suffering pain at the moment they ask for a treatment based on medical marijuana.

Also, in this chapter, the importance of assessing the application of the proportionality principle was analyzed since it is of interest for future studies in constitutional law. In this research, a different way of applying the principle of proportionality was observed, and also that the courts are up to now inconsistent in their sentences because, for A.R.237/2014, human dignity was invoked as a basis to justify the sentence. However, A.I.1482/2015 did not invoke it, despite

analyzing the right to health that can be directly linked to the animus of any fundamental right, namely, the dignity of all people.

The second significant finding is the understanding gained from overviewing the national and international legislative aspects related to the protection of the right to health and the importance of the achievement of the highest possible level of health. It was possible to observe that international treaties do not force the state to provide a specific benefit to patients who require medical treatment based on the components of marijuana. However, at the same time, international standards serve as guidance for the establishment of local legislation on the protection of health at its highest level. It could be said that part of the role of human rights is to set the conditions for individual rights, understood as universal, in society and to set the conditions to limit these rights lawfully. Ironically, human rights are part of the same political system, and society can also commit injustices towards its own members, as in this case by denying the usage of marijuana's components as a way to procure the best medical treatment possible.

From a legal point of view, the right to health, and the access to the highest attainable standard of health, is a public and subjective right in favor of the governed. It imposes the duty for the State to protect the health of citizens through the organization and action of the necessary means to do so. In addition to the responsibility of the State in the protection of the rights of patients that need treatment to treat a specific condition or for other medical situations where marijuana components can be helpful, it is also necessary to promote a culture of prevention and awareness, with respect to these cases in the population.

The last aspect to emphasize in relation to human rights policies and drug control legislation would be the improvements towards the quality of medical care. Legislative provisions regarding general living conditions and protection against precarious treatments make it possible to attain significant gains towards the effectiveness of the use of marijuana for medical purposes. Through legislation, it is possible to set minimum standards regarding medical treatments in cases where CBD can be used. In turn, minimum requirements and skills to accredit medical professionals can be established in order to ensure that there is a minimum standard of knowledge that must be achieved in order to perform their function under a specific state regime. Similarly, it is possible to set minimum standards of personnel when accrediting the purpose of the use of marijuana components for medical use.

This chapter argued that the decision of the District Court in A.I.1482/2015 was excessive in declaring the unconstitutionality of Article 237 of the GHL. However, it is essential to consider what was decided in A.R.237/2014 by the Supreme Court and to incorporate that view into A.I.1482/2015. The District Court had to declare unconstitutional Article 237 of the GHL to align with the judicial precedent set in A.R.237/2014. It is fundamental to point out that the judge was asked about the constitutionality of some provisions of the GHL but also that the Court had no need to act beyond the complaints made by the plaintiff. The question of how to implement this judgment by executive bodies can be discussed separately. The creation of a network of authorized suppliers, making sure that insurance gives access to cannabis to people who require it for medical reasons, or the necessity to incorporate regulatory provisions are some of the issues that were not part of the judge's decision, neither was he under any obligation to decide upon those issues. In addition, international drug control conventions do not prohibit the medical and scientific use of marijuana. However, questions on how this use can be implemented and monitored, what the guidelines for the control of medications should be, and the reaction that the legislative branch took regarding the amendment of the GHL shall be analyzed in the next chapter.



## Chapter 4

### The Legislative Branch Approach to Deregulation of Marijuana Control in Mexico

#### Introduction

In Mexico, courts have established jurisprudence by reiteration when they unanimously uphold the same criterion in five judgments not interrupted by another judgment to the contrary. This chapter presents the importance of the Supreme Court's actions in resolving Amparos en Revisión 237/2014 (analyzed in Chapter 2), 1115/2017, 623/2017, 547/2018, and 548/2018, since it ruled on five occasions upholding the same criteria regarding the unconstitutionality of Articles 235 last paragraph, 237, 245 section I, 247 last paragraph and 248 of the GHL. The Supreme Court considered that these provisions violated the fundamental right to free development of personality by not allowing the unrestricted use of marijuana for recreational purposes.<sup>375</sup> For that reason, the Supreme Court created jurisprudence and issued "The General Declaration of Unconstitutionality 1/2018,"<sup>376</sup> which deals with this issue.

Concerning the jurisprudence and the referred declaration of unconstitutionality, this part of the dissertation points out that said criteria establishes the guideline towards regulating marijuana for recreational use. In 2019, the Supreme Court declared that the absolute prohibition of cannabis consumption was unconstitutional and ordered the legislative branch to regulate it.<sup>377</sup> The following chapter analyzes and evaluates the impact of the refereed jurisprudence by declaring unconstitutionality and had made the legislators modify or repeal the last paragraph of Article 235, Article 237, Article 245 in section I, the last paragraph of Article 247, and Article 248 of GHL.

The legislative branch voted on March 10, 2021, to accept a draft decree that would legalize and regulate the recreational use of cannabis by enacting new federal legislation.<sup>378</sup> This chapter introduces the background of this new federal law. In addition, it will identify the characteristics

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<sup>375</sup> Secretaría de Gobernación. 2021. Declaratoria General de Inconstitucionalidad 1/2018.

[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5623991&fecha=15/07/2021](https://www.dof.gob.mx/nota_detalle.php?codigo=5623991&fecha=15/07/2021) Accessed: January 2, 2022.

<sup>376</sup> Secretaría de Gobernación. 2021. Declaratoria General de Inconstitucionalidad 1/2018.

[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5623991&fecha=15/07/2021](https://www.dof.gob.mx/nota_detalle.php?codigo=5623991&fecha=15/07/2021) Accessed: January 2, 2022.

<sup>377</sup> Secretaría de Gobernación. 2021. Declaratoria General de Inconstitucionalidad 1/2018.

[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5623991&fecha=15/07/2021](https://www.dof.gob.mx/nota_detalle.php?codigo=5623991&fecha=15/07/2021) Accessed: January 2, 2022.

<sup>378</sup> In Mexico, the process to pass a federal law consists of the following stages: 1) Presentation of the initiative; 2) Opinion; 3) Discussion; 4) Voting; 5) Review; and 6) Promulgation. The presentation of the initiative may be by the president, federal deputies and senators, local legislators, or a group of citizens equivalent to 0.13% of the nominal list of voters. In this case, the initiative regarding the regulation of cannabis was made by the Chamber of Deputies and still under the approval of the Senate (stage 5: review).

of this law proposed by the legislative branch regarding the regulation of cannabis and whether it is carried out within the umbrella of the international drug conventions and the protection of public health, security, and human rights.

#### 4.1. International Drug Policy in Mexico

##### 4.1.1 The UN Drug Conventions

As discussed in Chapter 2, the drug problem in Mexico has been pursued almost from a criminal justice perspective. The federal government waged a “war on drugs” in which it redirected massive resources toward policies that criminalized users rather than addressing the problem from a health protection standpoint.<sup>379</sup> The Mexican government, like the US, pursued a war on drugs campaign, which has resulted in adverse outcomes and collateral damage to human rights.<sup>380</sup> Another significant aspect to consider is the Mexican government’s awareness of the guidelines set by international policy on drug control, specifically on the use of marijuana, as described in Chapter 1. Some actions of the Mexican government concerning the UN drug conventions, of which Mexico is a member, were to conform with the statutes regarding the control of the medicinal and therapeutic use of marijuana.

Mexico has signed the current three main UN drug conventions: The SCND, the 1971 Convention, and the 1988 Convention. In the same way, the following table presents a summary of the international treaties related to drug control that the Mexican Government has signed, including the current three main UN drug conventions:

**Table 11. International Drug Control Agreements to Which Mexico is a Party**

Date of Conclusion	Place of Conclusion	Title of the Treaty	Date when the Treaty came into Force	Ratification
July 13, 1931	Geneva, Switzerland	Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs	July 9, 1933	March 15, 1933
June 26, 1936 December 11, 1946	Geneva, Switzerland Lake Success, New York,	Convention for the Suppression of the Illicit Traffic in Dangerous Drugs	October 26, 1939 (Registration) December 11, 1946 (entered into force)	May 6, 1955

<sup>379</sup> Atuesta, L. H., Siordia, O. S., & Lajous, A. M. 2019. The “War on Drugs” in Mexico: (official) Database of events between December 2006 and November 2011. *Journal of Conflict Resolution*, 63 (7): 1765-1789.

<sup>380</sup> Hernández, R. D. R., & Sadek, I. 2020. *Narratives of Vulnerability in Mexico's War on Drugs*. Springer International Publishing.

	United States			
December 11, 1946	New York, United States	Lake Success Protocol: Protocol amending the Agreements, Conventions and Protocols on Narcotic Drugs, concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925 and 19 February 1925, and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936	December 11, 1946	December 11, 1946
November 19, 1948	Paris, France	Paris Protocol - Protocol Bringing under International Control Drugs Outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, modified by the Protocol signed in Lake Success (New York) on 11 December 1946	December 1, 1949	November 19, 1948
March 1961	New York, United States	Single Convention on Narcotic Drugs, 1961	December 13, 1964	April 18, 1967
February 21, 1971	Vienna, Austria	Convention on Psychotropic Substances	August 16, 1976	February 20, 1975
March 24, 1972	Geneva, Switzerland	Protocol amending the Single Convention on Narcotic Drugs, 1961	August 8, 1975	April 27, 1977
December 20, 1988	Vienna, Austria	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances	November 11, 1990	April 11, 1990

Source: Senado de la República. 2014. LXII/3PPO-45/50692.

On the one hand, Mexico keeps a prohibitionist model that follows the rules imposed by international drug control treaties. The prohibitionist model is founded on the belief that drug prohibition is necessary to preserve public health. Various activities related to their use, from production to consumption, are sanctioned, except in the minimum cases provided for by law. On the other hand, the discourse about the justification of the prohibition based on the argument of the severe damage it causes to health is not so solid, given that other factors cause more significant health problems, such as alcohol consumption, tobacco, and junk food, among others. Consequently, the damage caused by prohibition and, therefore, the war on drugs in Mexico caused more damage to the Mexican people than the damage to health attributed to drugs.<sup>381</sup>

#### 4.1.2. Changes in Mexico Drug Policy

<sup>381</sup> Comisión Global de Políticas de Droga. 2011. Informe de la Comisión Global de Políticas de Drogas. [http://www.globalcommissionondrugs.org/wp-content/uploads/2017/10/GCDP\\_WaronDrugs\\_ES.pdf](http://www.globalcommissionondrugs.org/wp-content/uploads/2017/10/GCDP_WaronDrugs_ES.pdf) Accessed: November 27, 2021.

According to official data from Mexico's Report on the Situation of Drug Consumption, 2,597 people died due to psychoactive substances in 2017.<sup>382</sup> Another source of information on the sociodemographic profile and the relationship between the cause of death related to drug use is the information collected annually by the Epidemiological Surveillance System on Addictions through the Forensic Medical System with a total of 9,723 cases registered in 2018.<sup>383</sup> Official data from Semáforo Delictivo Nacional 2021, drug consumption does not cease. From January to October 2021, a period in which 7,386 incidents related to drug dealing were reported, increased by 8% compared to 2020.<sup>384</sup>

Cannabis has remained to date as a prohibited substance for consumption for recreational purposes. Therefore, the groups that supply it continue to operate the market outside the law. The World Drug Report 2021 disclosed that cannabis was the most consumed drug in 2019: 200 million people consumed it at least once.<sup>385</sup> According to the Mexican *National Survey on Drug, Alcohol, and Tobacco Consumption 2016-2017*, marijuana use climbed from 6% to 8.6% between 2011 and 2016.<sup>386</sup>

According to the Chamber of Deputies in Mexico, a global and regional change is taking place in dealing with drug-related problems, despite international prohibitionist guidelines.<sup>387</sup> For example, several legislations have undergone reforms to allow certain psychotropic substances for medical and religious purposes, such as Argentina, Chile, Jamaica, and several states in the US.<sup>388</sup> This fact reveals that a transition is underway that makes the need to promote the international debate from points of view that align with the current reality. It is essential to point out the cases

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<sup>382</sup> Gobierno de México - Secretaría de Salud & Comisión Nacional contra las Adicciones. 2019. Informe Sobre la Situación del Consumo de Drogas en México y su Atención Integral 2019; 61. <https://www.gob.mx>. Accessed: November 28, 2021.

<sup>383</sup> Gobierno de México - Secretaría de Salud & Comisión Nacional contra las Adicciones. 2019. Informe Sobre la Situación del Consumo de Drogas en México y su Atención Integral 2019; 61. <https://www.gob.mx>. Accessed: November 28, 2021.

<sup>384</sup> RRS & Asociados S.C. 2021. Semáforo Delictivo Nacional. Incidencia Narcomenudeo en México, Octubre 2021. <http://semaforo.com.mx/Semaforo/Incidencia> Accessed: November 27, 2021.

<sup>385</sup> UNODC. 2021. World Drug Report 2021. Drug Market Trends: Cannabis Opioids. [https://www.unodc.org/res/wdr2021/field/WDR21\\_Booklet\\_3.pdf](https://www.unodc.org/res/wdr2021/field/WDR21_Booklet_3.pdf) Accessed November 27, 2021.

<sup>386</sup> Institute of Public Health of the Mexican Federal Government. 2017. National Drug, Alcohol and Tobacco Consumption Survey National 2016-2017: 119. <https://www.gob.mx/salud%7Cconadic/acciones-y-programas/encuesta-nacional-de-consumo-de-drogas-alcohol-y-tabaco-encodat-2016-2017-136758> Accessed: February 26, 2022.

<sup>387</sup> Cámara de Diputados. 2021. Gaceta Parlamentaria Número 5736-II. <http://gaceta.diputados.gob.mx/Gaceta/64/2021/mar/20210310.html>; Accessed: March 28, 2022.

<sup>388</sup> Clarín. 2018. Legalización Marijuana, País por País: Dónde es Legal su Consumo y su Cultivo. [https://www.clarin.com/sociedad/salud/marijuana-pais-pais-legal-consumo-cultivo\\_0\\_HC\\_h5-fNn.html](https://www.clarin.com/sociedad/salud/marijuana-pais-pais-legal-consumo-cultivo_0_HC_h5-fNn.html) Accessed: November 28, 2021.

of Uruguay, Canada, and some US states, since they have also moved towards a regulatory model to achieve an alternative or complementary way to address the problems caused by some drugs in their respective nations.

In 2016 during the Thirtieth Special Session of the United Nations General Assembly on the World Drug Problem held in New York (UNGASS 2016), the document entitled “Our joint commitment to effectively addressing and countering the world drug problem”<sup>389</sup> was created concerning General Assembly Resolution S-30/1 adopted on April 19, 2016. The Global Commission on Drug Policy mentioned that governments could move towards responsible regulation by taking control of illegal drug markets, which would lead to a weakening of criminal groups, with a position on the need for reform of the international drug control system based on prohibition.<sup>390</sup> The Mexican government expressed its intentions to open the possibility of a complete change in international drug policies, which should be harmonious with three major topics of the United Nations: human rights, sustainable development, and peace and security.<sup>391</sup>

## **4.2. The Recognition of the State Duty to Protect Human Rights**

### **4.2.1 Change of the Marijuana Decriminalization Paradigm in Mexico and Legislative Actions to Respond to the Cases on Marijuana Use**

The prohibitionist system criminalizes drug users, a situation that neglects the root of the problem and does not address problematic consumption from a human rights approach; a system that, in addition, is led by the international drug regulations. This system has triggered more deaths in Mexico due to the fight against drug trafficking than deaths caused by problematic drug use, which has fostered an illegal trade with its transfer, empowering organized crime.<sup>392</sup> The current

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<sup>389</sup> United Nations Office on Drugs and Crime (UNODC). 2016. UNGASS 2016 Special Session of the United Nations General Assembly on the World Drug Problem: The Outcome Document of the 2016 United Nations General Assembly Special Session on Drugs - Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem. <https://www.unodc.org/ungass2016/> Accessed November 27, 2021.

<sup>390</sup> Global Commission on Drug Policy. 2018. Regulation: The Responsible Control of Drugs. <http://www.globalcommissionondrugs.org/reports/regulation-the-responsible-control-of-drugs> Accessed November 26, 2021.

<sup>391</sup> Gobierno de México. 2016. Discurso del Presidente de México Enrique Peña Nieto, durante la Sesión Especial de la Asamblea General Sobre el Problema Mundial de las Drogas (UNGASS 2016). No.16/083. [https://www.gob.mx/cms/uploads/attachment/file/210802/7.\\_PEUM-\\_UNGASS\\_2016.pdf](https://www.gob.mx/cms/uploads/attachment/file/210802/7._PEUM-_UNGASS_2016.pdf). Accessed: February 27, 2022.

<sup>392</sup> Washington Post. 2021. Opinión: Una Guerra Inventada y 350,000 Muertos en México. June 14, 2021. <https://www.washingtonpost.com/es/post-opinion/2021/06/14/mexico-guerra-narcotrafico-calderon-homicidios-desaparecidos/> Accessed: November 19, 2021.

environment has led various sectors of peasants, indigenous and marginalized communities to opt for employment in illicit, irregular, and even abusive productive or labor activities as an option to aspire to a better life.<sup>393</sup> In addition, it has deprived productive sectors of the opportunity to join an economic system that contributes to the country's sustainable development and has not allowed for fair tax retribution or fostered security and peace. Concerning the use of psychoactive substances, Mexico made clear the need to prioritize access to health for the population; therefore, cannabis was legalized for medical purposes.

#### **4.2.2 The 2011 Human Rights Reform in the Mexican Constitution**

On June 10, 2011, the most crucial reform made to the Mexican Constitution since 1917 was reported in the Official Journal of the Federation. In 2011, the method of protecting human rights was modified in Mexico. The modified Articles were the 1, 3, 11, 15, 18, 29, 33, 89, 97, 102 section B and 105.<sup>394</sup> In Mexico, the Constitution and international treaties are at the same hierarchical level. Mexico has signed and ratified multiple international treaties that recognize human rights. One of the fundamental changes is that the *pro persona* principle has been established, which means that in case a judge or authority has to choose which norm to apply, it must choose the one that favors the person the most, regardless of whether it is the Constitution, an international treaty or a national law.<sup>395</sup> The Constitutional Reform of 2011 recognizes human rights' universality, interdependence, indivisibility, and progressiveness.

The constitutional reform in human rights has been a fundamental change in the Mexican legal order, as it expressly recognizes that people must be given the most outstanding protection in the enjoyment and exercise of their rights.<sup>396</sup> It is no longer a matter of guarantees granted by the Mexican government but of rights inherent to individuals, which the State must recognize and guarantee. The new wording of Article 1 envisages that all persons shall enjoy the human rights

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<sup>393</sup> Organización de los Estados Americanos. 2013. El Problema de Drogas en las Américas: Estudios - Drogas y Salud Pública. <https://biblio.flacsoandes.edu.ec/libros/digital/54489.pdf>; Accessed: March 29, 2022

<sup>394</sup> Gobierno de México. 2011. ¿Qué Sabes sobre #DDHH y la Reforma Constitucional de 2011? <https://www.gob.mx/segob/articulos/que-sabes-sobre-ddhh-y-la-reforma-constitucional-de-2011-11-puntos-clave-para-entender-y-ejercer-tus-derechos> Accessed: December 28, 2021.

<sup>395</sup> Gobierno de México. 2011. ¿Qué Sabes sobre #DDHH y la Reforma Constitucional de 2011? <https://www.gob.mx/segob/articulos/que-sabes-sobre-ddhh-y-la-reforma-constitucional-de-2011-11-puntos-clave-para-entender-y-ejercer-tus-derechos> Accessed: December 28, 2021.

<sup>396</sup> Gobierno de México. 2011. ¿Qué Sabes sobre #DDHH y la Reforma Constitucional de 2011? <https://www.gob.mx/segob/articulos/que-sabes-sobre-ddhh-y-la-reforma-constitucional-de-2011-11-puntos-clave-para-entender-y-ejercer-tus-derechos> Accessed: December 28, 2021.

recognized in the Mexican Constitution and international treaties: Rights are inherent to persons, and the State recognizes and guarantees their existence.<sup>397</sup> In this way, human rights are part of the supreme norm that governs Mexicans and occupies the highest normative hierarchy in the Mexican legal order. In its interpretation, for example, if we ask ourselves if a person in Mexico has the human right to receive treatment with medical cannabis, what should be the answer after the 2011 reform? We must follow the interpretation techniques appropriate to the Constitution and treaties in favor of the person. The Mexican authority must both protect human rights and guarantee international human rights law and apply it as domestic law.

Recognizing human rights in the country's supreme law ensures that all state activities must be directed towards protecting human rights for all people as their central objective and that international treaties and all secondary legal norms must be under these human rights. According to Article 133 of the Mexican Constitution: "the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States."<sup>398</sup>

Article 1 of the Mexican Constitution, in its first paragraph, stipulates that in Mexico, all persons shall enjoy the human rights recognized in the Constitution and the international treaties.<sup>399</sup> The second paragraph of the same article indicates that human rights standards will be interpreted in accordance with the Mexican Constitution and international treaties, with an emphasis on individual protection.<sup>400</sup> This is known as the *pro persona* principle. The third paragraph defines the obligation of all authorities to ensure human rights within their scope of competence, based on the principles of universality, interdependence, indivisibility, and progressiveness. As a result, the state is responsible for preventing, investigating, punishing, and redressing human rights violations according to the law.<sup>401</sup>

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<sup>397</sup> Cámara de Diputados. 2021. Constitución Política de los Estados Unidos Mexicanos. <http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm> Accessed: January 2, 2021.

<sup>398</sup> Cámara de Diputados. 2021. Constitución Política de los Estados Unidos Mexicanos. <http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm> Accessed: January 2, 2021.

<sup>399</sup> Cámara de Diputados. 2021. Constitución Política de los Estados Unidos Mexicanos. <http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm> Accessed: January 2, 2021.

<sup>400</sup> Cámara de Diputados. 2021. Constitución Política de los Estados Unidos Mexicanos. <http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm> Accessed: January 2, 2021.

<sup>401</sup> Cámara de Diputados. 2021. Constitución Política de los Estados Unidos Mexicanos. <http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm> Accessed: January 2, 2021.

Another relevant aspect regarding the 2011 human rights reform in the Mexican Constitution can be reflected in the techniques of constitutional interpretation that were used in decisions A.R.237/2014 and A.I.1482/2015. According to traditional doctrine, the application of rules is carried out employing a relatively simple technique known as subsumption and consists of syllogistic reasoning (from normative premises and from their relationship with the facts, a legal conclusion in the form of a resolution or sentence is drawn).<sup>402</sup> On the other hand, when dealing with rules in the form of abstract principles, it is necessary to resort to another application technique known as weighting. Subsumption serves for cases that could be cataloged as common cases.<sup>403</sup>

On the other hand, weighting serves in difficult cases in which there are principles in a conflict; it is a complex technique that must be learned to resolve cases involving human rights. This applies to all legal practitioners but mainly to judges who often have to decide which norm should not be applied in cases of normative conflicts.<sup>404</sup> For example, in the case of conflicting rights, the guaranteeing bodies must assess the relative importance of the principles or rights in conflict and determine which of them should prevail. This task has to be carried out on a case-by-case basis and, according to contemporary theory, is articulated through an argumentative strategy based on the principle of proportionality.<sup>405</sup>

In other words, the 2011 constitutional reform of Article 1 presents, in a fundamental way, a cultural transformation before the law; a new way of understanding, analyzing, applying, interpreting, studying, and investigating legal science.

### **4.2.3 The Debate on the Use of Marijuana in Mexico and the Partial Amendment of GHL**

On November 4, 2015, the Supreme Court determined the unconstitutionality of several articles of the GHL when it granted amparo to four people so that the executive branch could grant them a permit for the recreational and personal use of marijuana. The main argument of the

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<sup>402</sup> Méndez-Silva, R. 2014. La Reforma Constitucional sobre Derechos Humanos: Una Guía Conceptual. Boletín Mexicano de Derecho Comparado, 47(141), 1207-1215: 197.

<sup>403</sup> Méndez-Silva, R. 2014. La Reforma Constitucional sobre Derechos Humanos: Una Guía Conceptual. Boletín Mexicano de Derecho Comparado, 47(141), 1207-1215: 197.

<sup>404</sup> Méndez-Silva, R. 2014. La Reforma Constitucional sobre Derechos Humanos: Una Guía Conceptual. Boletín Mexicano de Derecho Comparado, 47(141), 1207-1215: 197-198.

<sup>405</sup> Méndez-Silva, R. 2014. La Reforma Constitucional sobre Derechos Humanos: Una Guía Conceptual. Boletín Mexicano de Derecho Comparado, 47(141), 1207-1215: 198.



Supreme Court was that the prohibition of marijuana violates the right to free development of personality since the prohibitive regime is disproportionate concerning the weighing of the right to health and right to free development of personality.<sup>406</sup> This situation led to the existence in Mexico of two parallel legal realities, namely: First, the one applicable to the general population, and second, the one that applies exclusively to the four protected persons who were granted the administrative permit for the recreational and personal use of marijuana. As a result of the Supreme Court ruling, COFEPRIS has received, until February 2016, 231 requests to issue permits for the personal and recreational use of marijuana.<sup>407</sup>

As it was discussed in Chapter 3, in 2015, the plaintiff of A.I.1482/2015 requested the Secretary of the General Health Council (SGHC) to allow them to import and use medicine with cannabidiol (CBD), a component of marijuana, for the treatment of Lennox-Gastaut syndrome suffered by their daughter Graciela Elizalde Benavides.<sup>408</sup> The SGHC responded by stating: that there is no scientific evidence to conclude the therapeutic efficacy of CBD for the treatment of epilepsy.<sup>409</sup> Furthermore, the SGHC would not have the authority to issue a permit to import medicine containing illegal components of marijuana.<sup>410</sup> In response, the Third District Court on Administrative Matters in Mexico City (District Court) ruled in favor of the plaintiff, arguing that the refusal to grant the parents the permit violated the child's right to health.<sup>411</sup> Since the dissemination of this case, other patients with similar conditions have applied for import permits for CBD-based medicines. On January 31, 2016, COFEPRIS issued two import permits for the US product "RHSO-X Real Scientific Hemp Oil."<sup>412</sup>

Undoubtedly, what the decisions A.R.237/2014 and A.I.1482/2015 did accomplish was to force the Mexican administration to address the issue of drug consumption. Because the uniqueness of both cases is in the context of the national discussion regarding the degree of restriction that regulates the use of marijuana, on November 9, 2015, the former President of Mexico, Peña Nieto, instructed to generate a broad, specialized, representative, and inclusive debate with the purpose that the diverse voices and positions of the citizens of Mexico regarding

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<sup>406</sup> SCJN. 2015. Amparo en Revisión 237/2014

<sup>407</sup> COFEPRIS. 2019. <https://www.gob.mx/cofepris/que-hacemos> Accessed: November 19, 2021.

<sup>408</sup> TDCAMM.2016. A.I.1482/2015:18.

<sup>409</sup> TDCAMM.2016. A.I.1482/2015:20-23.

<sup>410</sup> TDCAMM.2016. A.I.1482/2015:19-24.

<sup>411</sup> TDCAMM.2016. A.I.1482/2015:71-79.

<sup>412</sup> COFEPRIS. 2019. <https://www.gob.mx/cofepris/que-hacemos> Accessed November 19, 2021.

the use of marijuana be duly heard in a context of respect and democratic deliberation to define the policies and actions to be adopted by the Mexican Government regarding this issue.<sup>413</sup> In compliance with this instruction, on January 12, 2016, the Federal Government, through the Ministries of the Interior and Health, convened specialists, researchers, academics, medical, legal, and psychological professionals, members of civil society, and other technically qualified persons to participate in the National Debate on the Use of Marijuana.<sup>414</sup>

The debate consisted of four thematic forums: 1) Public Health and Prevention; 2) Ethics and Human Rights; 3) Economic and Regulatory Aspects and 4) Public Health and Prevention.<sup>415</sup> On January 26, 2016, the National Debate on the Use of Marijuana was inaugurated. As a result of the debate, on April 21, 2016, the Mexican government presented a new initiative to Congress by which various provisions of the General Health Law and the Federal Penal Code were amended.<sup>416</sup> On December 13, 2016, the Senate of Mexico approved the bill that would reform various provisions of the GHL and the Federal Penal Code to allow the medicinal use of cannabis in the country and sent it to the Chamber of Deputies for final approval. The amendment represented a significant advance since thousands of patients will have access to medicines derived from cannabis that help reduce chronic pain, improve motor coordination, treat and control multiple sclerosis, glaucoma, cancer, and AIDS.<sup>417</sup>

However, the amendment does not decriminalize the possession for the personal use of marijuana proposed by the President. On April 28, 2017, the Deputies approved the bill on amendments of various provisions of the GHL (Decree 107) and the Federal Penal Code (Decree 132) to regulate the medicinal use of cannabis sativa, indica, and americana, otherwise known as

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<sup>413</sup> Secretaría de Gobernación. 2016. México debate sobre el uso de la marihuana: Participa en #DebateMarihuanaMx. <https://www.gob.mx/segob/articulos/mexico-debate-sobre-el-uso-de-la-marihuana-participa-en-debatemarijuanamx-18515> Accessed: November 19, 2021.

<sup>414</sup> Secretaría de Goberación. 2016. México Debate sobre el uso de la Marijuana: Participa en #DebateMarijuanaMx. <https://www.gob.mx/segob/articulos/mexico-debate-sobre-el-uso-de-la-marijuana-participa-en-debatemarijuanamx-18515>. Accessed: November 19, 2021.

<sup>415</sup> Secretaría de Goberación. 2016. México Debate sobre el uso de la Marijuana: Participa en #DebateMarijuanaMx. <https://www.gob.mx/segob/articulos/mexico-debate-sobre-el-uso-de-la-marijuana-participa-en-debatemarijuanamx-18515>. Accessed: November 19, 2021.

<sup>416</sup> President of Mexico. 2016. Decree Initiative by which various provisions of the General Health Law and the Federal Penal Code are amended and added as a result of the Debate on the use of Marijuana. [https://www.gob.mx/cms/uploads/docs/Iniciativa\\_Marihuana.pdf](https://www.gob.mx/cms/uploads/docs/Iniciativa_Marihuana.pdf); Accessed: March 29, 2022.

<sup>417</sup> Senado de la República. 2016. Aprueba Senado Uso Medicinal de la Marijuana. <http://comunicacion.senado.gob.mx/index.php/informacion/boletines/33322-aprueba-senado-uso-medicinal-de-la-marijuana.html>; Accessed: March 29, 2022.

marijuana.<sup>418</sup> The legislative branch did not take into account the argument that the dignity of people who want to use marijuana for recreational purposes must be recognized and, of course, did not consider if a human right to consume drugs, marijuana, or other substances, should be established. It might be said that the new amendment to control drugs in Mexico indicates the beginning of a path towards a visionary public policy that also allows the recreational use of marijuana, but the reality is that even after the judgment of the Supreme Court showed the importance of human rights in drug control, and after a national debate with regard to the use of marijuana was held, in the end, the legislative branch did not accept the proposal of the president to stop criminalizing consumption.

#### **4.2.4 The Jurisprudence and Declaration of Unconstitutionality 1/2018**

It is essential to highlight the Supreme Court in resolving *Amparos en Revisión* 237/2014, 1115/2017, 623/2017, 547/2018, and 548/2018, which ruled on five occasions regarding the unconstitutionality of Articles 235 last paragraph, 237, 245 section I, 247 last paragraph, and 248 of the GHL.<sup>419</sup> The Supreme Court considered that these provisions violated the right to free development of personality and issued the jurisprudence entitled “Unconstitutionality of the Absolute Prohibition on the Ludic or Recreational Consumption of Marijuana provided for by the General Health Law,” which is the General Declaration of Unconstitutionality 1/2018.<sup>420</sup> The Supreme Court declared that Articles 235, last paragraph, 237, 245 section I, 247 last paragraphs, and 248, all of the GHL were unconstitutional. As mentioned earlier, the GHL prohibits the Ministry of Health from issuing authorizations to carry out activities related to self-consumption for recreational purposes, such as sowing, cultivating, harvesting, preparing, possessing, and transporting of the narcotic drug “cannabis” and the psychotropic drug “THC,” together known as marijuana.

The declaration of unconstitutionality in 1/2018 does not imply in any case authorization to carry out acts of commerce, supply, or distribution of marijuana. In addition, the consumption of

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<sup>418</sup> Cámara de Diputados. 2017. Boletín 3577- Diputados Aprueban Uso Medicinal de la Cannabis Sativa, Indica y Americana o Mariguana.

<http://www5.diputados.gob.mx/index.php/esl/Comunicacion/Boletines/2017/Abril/28/3577-Diputados-aprueban-uso-medicinal-de-la-cannabis-sativa-indica-y-americana-o-mariguana> Accessed: March 29, 2022.

<sup>419</sup> Secretaría de Gobernación. 2021. Declaratoria General de Inconstitucionalidad 1/2018.

[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5623991&fecha=15/07/2021](https://www.dof.gob.mx/nota_detalle.php?codigo=5623991&fecha=15/07/2021) Accessed: January 2, 2022.

<sup>420</sup> Secretaría de Gobernación. 2021. Declaratoria General de Inconstitucionalidad 1/2018.

[https://www.dof.gob.mx/nota\\_detalle.php?codigo=5623991&fecha=15/07/2021](https://www.dof.gob.mx/nota_detalle.php?codigo=5623991&fecha=15/07/2021) Accessed: January 2, 2022.

marijuana for recreational purposes can be exercised neither in front of minors nor in public places where third parties who have not given their authorization are present.<sup>421</sup> The importance of the General Declaration of Unconstitutionality 1/2018 is that it establishes the route for regulating cannabis for recreational use. Also, the Supreme Court imposed on the legislative branch a duty to modify or repeal Articles 235 the last paragraph, 237, 245 section I, 247 the last paragraph, and 248 of the GHL for violating the right to free development of personality.

In other words, the unconstitutionality's normative effect consists of allowing authorization of recreational marijuana use. The criminal offenses contained in the Federal Criminal Code and the GHL are to be excluded from punishability. However, it is observed that the scope of the amparo suits did not resolve a problem originated by the prohibitory system, such as how the people who requested the authorization would licitly obtain cannabis seeds or plants. Due to the effects of the grant of amparo, it is related to the activities involved in self-consumption for recreational purposes. However, the lawful way to obtain cannabis seeds or plants was not addressed. Finally, activities inherent to the self-consumption of cannabis for recreational purposes will depend on the approval issued by the health authority, which obviously merits the need for regulation.

Within such regulation, attention must be paid to the places suitable for people to carry out the acts inherent to the sowing, growing, harvesting and preparation, carrying, transportation, and consumption for recreational purposes, which must be exercised under the authorized terms, conditions, and parameters. In addition, it is established that to avoid incurring differential treatment. The legislative adjustments must contemplate the exercise of the right to self-determination of the consumers of cannabis by those who do not have a house or a suitable place to carry them out. The Supreme Court did not touch upon the issues on the production of marijuana, even though the right to consume marijuana is accepted. There is no way to obtain marijuana lawfully.

The legislative branch needs to pay attention to ensure that all persons of legal age (over eighteen years old) may have access to the consumption of psychoactive cannabis within a legal framework, with the due intervention of the State to take measures and actions to protect health and thus prevent the problematic consumption of psychoactive cannabis and its addiction. This

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<sup>421</sup> Secretaría de Gobernación. 2021. Declaratoria General de Inconstitucionalidad 1/2018. [https://www.dof.gob.mx/nota\\_detalle.php?codigo=5623991&fecha=15/07/2021](https://www.dof.gob.mx/nota_detalle.php?codigo=5623991&fecha=15/07/2021) Accessed: January 2, 2022.

will make it possible to respond to the possible risks and harms of regulation and the protection of human rights and, in general, the design and implementation of cross-cutting policies for the protection of the population. In addition, it will allow a comprehensive approach to cannabis regulation and break the paradigm of prohibition to move towards a regulatory model that contemplates both the adult use of psychoactive cannabis and the industrial use of non-psychoactive cannabis (hemp), as well as its production chain under a public health, human rights and sustainable development approach.

### **4.3. The Law for the Regulation of Cannabis**

#### **4.3.1 Background**

In 2018, the Supreme Court transferred the matter to the legislative branch so that before declaring several unconstitutional articles of the GHLL, the Federal Congress could be addressing the issue of marijuana regulation. As mentioned in this chapter, the legislative branch has already worked on 17 initiatives, in an open parliament, with the participation of professional associations, higher education institutions, consumers, business people, and experts from other countries that have already gone through this process to learn from previous experiences and fulfill the protection of the preservation policies of public health, order, and security, but at the same time to incorporate the human rights protection.

The following table presents the timeline of 17 initiatives related to the marijuana regulation presented by representatives of political parties<sup>422</sup> that belong to the legislative branch, having considered the following factors: 1) Complete: the initiative regulates the entire production chain and contemplates the different uses; 2) Balanced: the initiative provides more than one supply pathway, controls substance availability of marijuana 3) Careful: as it prohibits advertising of marijuana products, it prevents access to minors and implements quality controls; 4) Inclusive: this allows vulnerable groups to have access to participate in commercial activities, and 5) Evaluable: the initiatives delegates the monitoring and correction of public policies to a specialized institution.

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<sup>422</sup> Political Parties in Mexico: Democratic Revolution Party (PRD), Labor Party (PT), Citizens' Movement (MC), Institutional Revolutionary Party (PRI), National Regeneration Movement (MORENA) and National Action Party (PAN)

**Table 12. Timeline of Initiatives related to Marijuana Decriminalization**

No	Date of Presentation	Presented by political parties	Name of the Initiative	Factors to Consider in Marijuana Regulation				
				Complete	Balanced	Careful	Inclusive	Evaluable
1	April 26, 2016	PRD José de Jesús Zambrano y Guadalupe Hernández	Initiative with draft decree reforming and adding various provisions of the GHL to recognize the therapeutic qualities of cannabis and establish incentives to promote research and production of food supplements made from non-psychoactive cannabis.	NO	NO	NO	NO	NO
2	December 6, 2017	PT Mario Delgado Carrillo	Initiative with a draft decree that enacts the General Law for the Control of Cannabis and its Derivatives; and amends several provisions of the GHL, the Federal Criminal Code, and the Federal Criminal Code.	YES	YES	YES	YES	YES
3	March 13, 2018	PT Marlon Berlanga	Initiative and draft decree enacting the Law on Cannabis and the Eradication of Violence Caused by its Prohibition in Mexico.	YES	NO	NO	NO	YES
4	August 15, 2018	PRD Angélica de la Peña	Initiative with a draft decree reforming, adding, and repealing various provisions of the GHL and the Federal Criminal Code regarding the different uses of cannabis.	YES	NO	NO	NO	NO
5	November 6, 2018	MC	Initiative with draft decree amending and adding various provisions of the GHL.	YES	NO	NO	NO	NO
6	November 8, 2018	PRI Miguel Ángel Osorio Chong	Initiative with draft decree amending and repealing several articles and adding an article 247 Bis to the General Health Law and modifying several provisions of the Federal Criminal Code and the Federal Law against Organized Crime.	NO	NO	NO	NO	NO
7	November 8, 2018	MORENA Olga Sanchez	Initiative with draft decree enacting the General Law for the Regulation and Control of Cannabis.	YES	YES	NO	NO	YES
8	April 25, 2019	PAN Raul Paz	Initiative with draft decree amending and adding Article 245 of the GHL for the Regulation of Hemp and Cannabidiol (CBD)	NO	NO	NO	NO	NO
9	July 10, 2019	PT Cora Cecilia Pinedo	Initiative with draft decree enacting the General Law for the Regulation of Cannabis for Self-consumption and for Medical, Scientific, Therapeutic and Cosmetic	YES	NO	YES	NO	YES

			Use; amending and adding various provisions of the GHL and the Federal Criminal Code, in order to decriminalize possession for the personal use of cannabis and regulate domestic cultivation for self-consumption and its use for scientific, medical, therapeutic and cosmetic purposes.					
10	September 3, 2019	PRD Miguel Ángel Mancera	Initiative with a draft decree enacting the General Law for the Regulation and Control of Cannabis.	YES	NO	NO	YES	YES
11	September 3, 2019	MORENA Julio Menchaca	Initiative with draft decree reforming Articles 235 and 247 of the GHL	NO	NO	NO	NO	NO
12	September 18, 2019	MORENA Mónica Fernández	Initiative with Draft Decree reforming Articles 235 and 247 of the GHL regarding the different uses of cannabis.	NO	NO	NO	NO	NO
13	October 15, 2019	MORENA José Narro	Initiative with draft decree enacting the Law for the Regulation and Control of Cannabis and amending various provisions of the GHL.	NO	NO	NO	NO	NO
14	October 15, 2019	MORENA Gerardo Novelo	Initiative with draft decree creating the General Law for the Regulation, Control and Use of Cannabis and its derivatives, and amending various articles of the GHL, as well as the Federal Criminal Code and the Law of the Special Tax on Production and Services.	YES	YES	YES	NO	NO
15	October 17, 2019	PRI Manuel Añorve Baños	Bill with draft decree enacting the General Law for the Control and Commercialization of Cannabis; amending and adding various provisions of the Federal Law of Rights, the Law of the Special Tax on Production and Services, and the Federal Criminal Code.	YES	NO	YES	NO	YES
16	October 22, 2019	PRD Juan Manuel Fócil	Initiative with a draft decree reforming section III of Article 235 and the first paragraph of Article 237 of the GHL.	NO	NO	NO	NO	NO
17	December 11, 2019	PRI Eruviel Ávila	Initiative with draft decree enacting the General Law on the Use of Cannabis for Medical, Pharmaceutical, and Scientific Purposes.	NO	YES	YES	NO	YES

Source: Ramírez T. & Guitiérrez V. 2019. Cuenta Regresiva: El Dictamen de Cannabis. Nexos. <https://www.nexos.com.mx/?p=45311>. Accessed: December 18, 2021.

On August 20 and September 9 of 2019, the Senate agreed to homologate initiatives 1 to 9 and then to homologate 1 to 17 to the United Commissions of Health, Justice, and Legislative Studies for their analysis and opinion. On March 10, 2021, Mexico's Chamber of Deputies voted to approve a draft decree to legalize the recreational use of cannabis by issuing a new Federal Law for the Regulation of Cannabis and passed to the Senate for review and final promulgation. This part presents a summary and describes the draft opinion, which presents a draft of the Federal Law for the Regulation of Cannabis and amends and adds various provisions of the GHL and the Federal Criminal Code.

### **4.3.2 The Structure**

The Federal Law for the Regulation of Cannabis has 74 articles, and it has five main titles that will be summarized: 1) general provisions (Articles 1 to 11); 2) the use of cannabis and its derivatives (Articles 12 to 34); 3) authorizations (Articles 35 to 46); 4) the Mexican Institute for the Regulation and Control of Cannabis (Articles 47 to 58) and; 5) infractions and sanctions (Articles 59 to 74).<sup>423</sup> It also reforms 6) the General Health Law and 7) the Federal Criminal Code.<sup>424</sup>

#### **4.3.2.1 General provisions (Articles 1 to 11)**

The purpose of the Federal Law for the Regulation of Cannabis is to regulate the production and commercialization of cannabis and its derivatives under the approach of free development of personality, public health, and respect for human rights (Articles 1, I and 3, XXIX). It is important to note that this law textually recognizes the right to the development of free personality, based on the decisions of the Supreme Court concerning the recreational use of marijuana. Likewise, this law regulates the production, distribution, and commercialization of marijuana.

#### **4.3.2.2 The Use of Cannabis and its Derivatives (Articles 12 to 34)**

##### **a) Personal use and self-consumption (Article 17)**

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<sup>423</sup> Cámara de Senadores. 2021. Ley para la Regulación del Cannabis.

[https://cannabis.senado.gob.mx/images/pdf/anteproyecto\\_LRC.pdf](https://cannabis.senado.gob.mx/images/pdf/anteproyecto_LRC.pdf) Accessed: January 2, 2022.

<sup>424</sup> Cámara de Senadores. 2019. Dictamen de las Comisiones Unidas de Justicia, Salud y Estudios Legislativos, Segunda, con Opinión de la Comisión de Seguridad Pública, por el que se expide la Ley para la Regulación del Cannabis y Reforma y Adiciona Diversas Disposiciones de la Ley General de Salud y Reforma del Código Penal Federal. <https://cannabis.senado.gob.mx/images/pdf/ADLRC.pdf> Accessed: January 2, 2022.



The adult use for self-consumption includes sowing, cultivation, harvesting, use, preparation, carrying, transport and consumption. It is established that possession is limited to 4 cannabis plants per person; in the case of more than one consumer living in the same house, a maximum of 20 plants.

b) Associations where the shared use among members of psychoactive cannabis consumption is allowed (Articles 18 to 21)

The Associations are constituted with no predominantly economic purpose and with the sole social purpose of satisfying the individual needs of their members and associates for the personal use for recreational or recreational purposes of cannabis. These associations allow the members to sow, cultivate, harvest, use, prepare and consume cannabis. The members of the associations must have a permit from the Mexican Institute for the Regulation and Control of Cannabis.

The association members may sow or plant up to an amount equivalent to 4 plants of psychoactive the equivalent amount of 4 psychoactive cannabis plants per associated person. The members can cultivate, harvest, use and prepare up to a maximum of 4 plants of psychoactive cannabis per associated person per year. If there is a surplus, it shall be donated to the institutions determined by the Mexican Institute for the Regulation and Control of Cannabis under the provisions of the regulations of this law for scientific research purposes.

c) Commercialization for adult use (Articles 22 to 25)

In the marketing for adult use, according to this law, it is forbidden to sell any product that exceeds the percentage of THC or CBD levels, or a combination of both, authorized by the Mexican Institute for the Regulation and Control of Cannabis. Also, it is prohibited to market cannabis mixed with other substances such as alcohol, nicotine, tobacco, caffeine, or any other substance, whether or not considered psychotropic, that actually or potentially increases the level of addiction or the effects of psychoactive cannabis. With respect to packaging and labeling, it is provided that products for the end-user must display a label on the packaging with warning legends (Article 26)

d) Research purposes (Articles 27 and 28)

The use of cannabis and its derivatives is allowed for laboratories, institutes, and universities to carry out various studies and research into the nutritional, industrial, and productive properties of the plant, as well as its agronomic characteristics. However, this permit will be established by the mechanisms and guidelines of the Institute in order to promote research on the use of psychoactive and non-psychoactive cannabis, encouraging it to promote access to health, as well as to privilege the domestic market of products made from cannabis.

e) Medical or pharmaceutical purposes and therapeutic or palliative purposes (Article 29 to 31)

The use, production, importation, and exportation of cannabis for medical, therapeutic, or palliative purposes are permitted to persons of legal age and individuals as companies, provided they have the corresponding license and comply with the provisions of the GHL.

f) Industrial use (Article 32 to 34)

In similar terms as medical or pharmaceutical purposes, the use of cannabis corresponds to their license for industrial use and complies with the provisions of the GHL. Cannabis products and their derivatives for industrial uses may be commercialized, exported, and imported complying with the requirements established in the Federal Law for the Regulation of Cannabis, the sanitary regulation, and other commercial provisions contained in the international treaties to which Mexico is a party, respecting the sovereignty of the countries following international law.

#### **4.3.2.3 Authorizations: Supply Routes, Licenses, and Permits (Articles 35 to 46)**

Adults can access cannabis through purchase in official establishments, self-cultivation, or by being part of associations for the consumption of psychoactive cannabis. There are four types of licenses (Article 35 to 43) :

a) Cultivation: This license includes the acquisition of seed or seedling, sowing, cultivation, harvesting, and preparation of cannabis; and harvesting and preparation of cannabis;

b) Transformation: This license includes the preparation, transformation, manufacture, and production of cannabis;

c) Commerce: This license includes distributing and selling psychoactive cannabis, its derivatives, and its product to the public.

d) Export or import: This license includes distribution and sale outside Mexico under the terms of applicable laws, treaties, and other regulations, which shall specify the destination or origin of the cannabis product, respectively.

Article 44 refers to permits for the personal use or self-consumption of cannabis and its derivatives is permitted to persons over eighteen years of age, with the capacity to exercise, under the terms established by the Federal Law for the Regulation of Cannabis. Some of these requirements are to prove the legal acquisition of their seeds and plants or that at the time of consumption, there are no persons under 18 years of age in the person's domicile, that they cannot exercise or that due to any situation they are not able to give their informed consent.

Likewise, Article 46 refers that if the object is exclusively the transformation of hemp, they will not require a license and may request a permit from the Institute.

#### **4.3.2.4 Mexican Institute for the Regulation and Control of Cannabis (Articles 47 to 58)**

The Mexican Institute for the Regulation and Control of Cannabis is a decentralized body of the Ministry of Health, and it coordinates the agencies and entities of the Federal Public Administration that, according to this law and other applicable laws, have competence in the various areas of impact on the regulation of the use of cannabis. The Institute cooperates with the other competent authorities in controlling acts related to psychoactive cannabis and its derivatives and non-psychoactive cannabis and contributes to determining public policies and central axes of the sanitary control of cannabis and its derivatives. This Institute concentrates on making transparent information regarding permitted acts concerning cannabis and its derivatives. In addition, it addresses the national policy on the use of cannabis and its derivatives.

#### **4.3.2.5 Infractions and sanctions (Articles 59 to 74)**

Any cannabis seed, plant, or plantation not registered and not authorized by the Mexican Government will be considered illicit. Consequently, it will be subject to seizure and confiscation, and if necessary, with the intervention of the competent authorities, it will be placed at the disposal of the Institute. Likewise, any elaboration, production, storage, transformation, distribution of cannabis, its derivatives, and any product made based on these that does not comply with the respective legal regulation will be considered illicit acts and, therefore, will be sanctioned.

The Mexican Government will be able to carry out inspection visits. A warning of suspension of the corresponding license and the application of a fine ranging from 240 to 1200 times the Unit of Measure, also known as UMA (Unidad de Medida y Actualización in Spanish),<sup>425</sup> will be applied in the first inspection visit. In case of recidivism, the suspension of the corresponding license and the application of a fine ranging from one thousand two

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<sup>425</sup> Unidad de Medida y Actualización, or UMA, has been used to calculate important figures in Mexico since 2016. This unit determines how much a person must pay in fines and taxes. This unit of measurement increases year by year. It applies to the entire national territory and is established in the Federal Labor Law. Until December 2021, the value of the UMA is \$89.62 Mexican pesos. That is: \$2,724.45 monthly and \$32,693.40 annually. <https://www.sesamehr.mx/blog/uma-que-es-y-para-que-sirve/#:~:text=Desde%20hace%20cinco%20a%C3%B1os%2C%20la,medida%20aumenta%20a%C3%B1o%20con%20a%C3%B1o.>) Accessed December 13, 2021.

hundred to six thousand times the UMA will be decreed. In applying the fines, the authority must apply a criterion of proportionality with the economic capacity of the offender, considering the seriousness of the infraction. The Institute's activity in seed and plant certification and traceability is linked to the competent authorities.

Third parties are protected by prohibiting the consumption of psychoactive cannabis and its derivatives in all commercial establishments with public access, as well as in public and private schools, government facilities, and in all places where the use of tobacco is prohibited according to the General Law for Tobacco Control. Likewise, it is prohibited to consume psychoactive cannabis and its derivatives in places of mass concurrence.

“Article 62. The following acts are prohibited:

I. The performance of any act not expressly authorized in the authorizations granted by the competent authority, according to the purposes for which the use of cannabis and its derivatives has been authorized, under the terms of this Law and other applicable regulations;

II. The importation and exportation of cannabis and its derivatives, as well as products made with or based on these, with the exception of those cases expressly permitted in international treaties to which Mexico is a party, in this Law, in the General Health Law, and in other applicable legal provisions;

III. To carry out any form of advertising, promotion, or sponsorship, directly or indirectly in any medium, of cannabis and its derivatives. Excepted from this provision are products derived from hemp;

IV. The use of cannabis and its derivatives for cosmetologically purposes, as well as its importation;

V. To commercialize edible and drinkable products of cannabis or its derivatives, with the exception of those products used for medical or pharmaceutical and therapeutic or palliative purposes, under the terms of this Law, the General Health Law, and other applicable regulations.

VI. The use of contaminating agents, chemical, biological, or of any other nature that may exist, such as residual solvents, pesticides, fungicides, microbial agents, bacteriological, mold, or any other that represents or could represent a risk for the health of people, both in the seeds and plants of cannabis and its derivatives, as well as in products elaborated based on these.

VII. The use of any means or substance, natural or synthetic, that may alter the chemical or physical properties of psychoactive cannabis or products made from it, and that represent a risk to the health of people, with the exception of its use for medical or pharmaceutical, therapeutic or palliative, and research purposes.

VIII. To drive any vehicle, handle or operate equipment or machinery that may cause danger under the effects of THC.

IX. To provide free of charge psychoactive cannabis, its derivatives, and products made from it. However, the following are excepted from this provision:

a) Its free transmission for medical or pharmaceutical and therapeutic or palliative purposes, provided that it is accredited before the competent authority that the person to whom it is provided has a diagnosis and a medical prescription that justifies it, under the terms of the General Health Law and the applicable regulations.

b) The donation for scientific and research purposes under the terms established by this Law.

X. The consumption of cannabis and its derivatives during pregnancy and breastfeeding. The sale of products made from psychoactive cannabis or its derivatives through exhibitors that allow self-service, as well as through the internet, mail, telephone, or any other similar means that prevents the personal, direct, and responsible verification of compliance with the legal conditions and requirements for its access.

XI. To not comply with the provisions applicable to packaging and labeling provided in this Law.

XII. The sale of Cannabis products for adult use that only contain THC, or those that do not comply with the THC: CBD ratio determined by the Institute;

It is prohibited the sale of products mixed with other addictive substances such as alcohol, nicotine, tobacco, or caffeine, or any other consideration or not as psychotropic, which increase, actually or potentially, the effects or the level of problematic consumption of cannabis and its derivatives.

XV. Selling to the public any product that is not cannabis, its derivatives or the directly related inputs for its consumption in the points of sale to the public or in the Associations.”<sup>426</sup>

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<sup>426</sup> Cámara de Senadores. 2021. Ley para la Regulación del Cannabis. [https://cannabis.senado.gob.mx/images/pdf/anteproyecto\\_LRC.pdf](https://cannabis.senado.gob.mx/images/pdf/anteproyecto_LRC.pdf) Accessed: January 2, 2022.

In general terms, this section of the law forbids carrying out any work or paid activity under the effect of psychoactive cannabis, and it establishes the need for consumers to take steps to protect others from secondhand smoke indoors. Finally, there are penalties for those who provide access to cannabis to minors, but it is stated that there will be no penalties for underage offenders.

#### **4.3.2.6 General Health Law**

Articles 3, 7, 17 Ter, 191, 192, 192 section V, 234, 235, 235 Bis, 245, 247, 474 are amended, 475, 476, 477, 478, 479. The offense of simple possession still exists: Simple possession of between 0 and 28 grams of cannabis does not carry penalties, although people could still be arrested and referred to the civil justice system – no longer to the Public Prosecutor’s Office; simple possession of between 28 and 200 grams of cannabis is punishable by a fine of between 60 and 120 UMA and; simple possession of between 200 grams and 28 kilograms of cannabis will be punishable by ten months to three years imprisonment.<sup>427</sup>

#### **4.3.2.7 Federal Criminal Code**

Articles 193, 194, 195, 195a, 195bis, 196b, 197, 198 and 201 are amended: The possession to produce, transport, trafficking, dealing, trading, supplying (Article 198, f. (II) is punishable by 5 to 10 years’ imprisonment. Also, the cultivation of psychoactive cannabis remains a punishable offense, although it is introduced with the exception of a prison sentence of 6 months to 3 years for persons whose main activity is farming and who are poorly educated or in extreme economic need. The administration of cannabis without a medical prescription is punishable by 3 to 9 years in prison and a fine of 60 to 180 days of salary. This modification results in a worse scenario with respect to the bill initially sent by the Senate, as it increases the penalty by one year, although it decreases the amount of the fine (the bill established a penalty of 2 to 5 years and a fine of 60 to 180 days).<sup>428</sup>

Article 201 (bis) contemplated a prohibition of child labor for activities related to the sowing, cultivation, or transformation of any variety of cannabis or its derivatives. Finally, a

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<sup>427</sup> Cámara de Senadores. 2019. Dictamen de las Comisiones Unidas de Justicia, Salud y Estudios Legislativos, Segunda, con Opinión de la Comisión de Seguridad Pública, por el que se expide la Ley para la Regulación del Cannabis y Reforma y Adiciona Diversas Disposiciones de la Ley General de Salud y Reforma del Código Penal Federal. <https://cannabis.senado.gob.mx/images/pdf/ADLRC.pdf> Accessed: January 2, 2022.

<sup>428</sup> Cámara de Senadores. 2019. Dictamen de las Comisiones Unidas de Justicia, Salud y Estudios Legislativos, Segunda, con Opinión de la Comisión de Seguridad Pública, por el que se expide la Ley para la Regulación del Cannabis y Reforma y Adiciona Diversas Disposiciones de la Ley General de Salud y Reforma del Código Penal Federal. <https://cannabis.senado.gob.mx/images/pdf/ADLRC.pdf> Accessed: January 2, 2022.

penalty of 2 to 5 years' imprisonment is provided for anyone who diverts or contributes to the diversion of essential chemicals or machines to the cultivation, extraction, production, preparation, or conditioning of psychoactive cannabis. This penalty is lower than the rest of the narcotics, whose penalty is 5 to 15 years imprisonment.<sup>429</sup>

### **4.3.3. The Cannabis Regulation and the International Drug Control**

Various countries worldwide have allowed cannabis for personal and recreational consumption. Uruguay, Canada, and some US states stand out. Such legislation shows that a global and regional change is taking place in dealing with the problems caused by drugs, despite international prohibitionist guidelines, which reveals that this is not a rebellious or capricious change. Still, a transition shows the need to promote international debate to address those problems from points of view that align with current realities. Various issues caused by drugs should be addressed from cross-cutting, multifactorial, and multidisciplinary approaches, placing not drugs but people at the center of the analysis of the problems and solutions from a human rights perspective.

On that topic, the outcome document of the UN General Assembly on the World Drug Problem held in New York in 2016, entitled “Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem”<sup>430</sup> in General Assembly Resolution S-30/1 adopted on 19 April 2016, alludes, among other circumstances, to the following:

“We reaffirm our unwavering commitment to ensuring that all aspects of demand reduction and related measures, supply reduction and related measures, and international cooperation are addressed in full conformity with the purposes and principles of the Charter of the United Nations, international law, and the Universal Declaration of Human Rights, with full respect for the sovereignty and territorial integrity of States, the principle of non-intervention in the internal affairs of States, *all human rights*,

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<sup>429</sup> Cámara de Senadores. 2019. Dictamen de las Comisiones Unidas de Justicia, Salud y Estudios Legislativos, Segunda, con Opinión de la Comisión de Seguridad Pública, por el que se expide la Ley para la Regulación del Cannabis y Reforma y Adiciona Diversas Disposiciones de la Ley General de Salud y Reforma del Código Penal Federal. <https://cannabis.senado.gob.mx/images/pdf/ADLRC.pdf> Accessed: January 2, 2022.

<sup>430</sup> UN General Assembly. 2016. Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem—Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem. <https://undocs.org/A/RES/S-30/1> Accessed: February 26, 2022.

*fundamental freedoms, the inherent dignity of all individuals and the principles of equal rights and mutual respect among States;*<sup>431</sup> (emphasis added)

Likewise, the 2019 Ministerial Declaration “Strengthening Our Actions at the National, Regional and International Levels to Accelerate the Implementation of Our Joint Commitments to Address and Counter the World Drug Problem” of the Commission on Narcotic Drugs, UNODC, held the following:

We also reaffirm our commitment to effectively addressing and countering the world drug problem in full conformity with the purposes and principles of the Charter of the United Nations, international law and the Universal Declaration of Human Rights, with full respect for the sovereignty and territorial integrity of States, the principle of non-intervention in the internal affairs of States, *all human rights, fundamental freedoms, the inherent dignity of all individuals* and the principles of equal rights and mutual respect among States;<sup>432</sup> (emphasis added)

The international drug policies should harmonize with the UN topics: human rights, sustainable development, and peace and security. In this regard, Article 55 of the Charter of the UN states the promotion of “higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>433</sup>

The Mexican government bases the justification of cannabis regulation on its national level experiences. The Mexican government analyzed the results of the war on drugs and the prohibitionist system. However, most of all, the impulse of the judiciary branch’s resolutions

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<sup>431</sup> UN General Assembly. 2016. Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem—Our Joint Commitment to Effectively Addressing and Countering the World Drug Problem: 2. <https://undocs.org/A/RES/S-30/1> Accessed: February 26, 2022.

<sup>432</sup> Commission on Narcotic Drugs. 2019. Ministerial Declaration on Strengthening our Actions at the National, Regional and International Levels to Accelerate the Implementation of our Joint Commitments to Address and Counter the World Drug Problem: 1 [https://www.unodc.org/documents/commissions/CND/2019/Ministerial\\_Declaration.pdf](https://www.unodc.org/documents/commissions/CND/2019/Ministerial_Declaration.pdf) Accessed: January 3, 2022.

<sup>433</sup> United Nations. 1945. United Nations Charter, Chapter IX: International Economic and Social Cooperation <https://www.un.org/en/about-us/un-charter/chapter-9> Accessed: January 3, 2022.



takes much relevance when declaring the prohibition of the recreational use of marijuana unconstitutional, based on the protection of human rights.

Under the international drug conventions, Mexico is indeed obliged to prohibit the recreational use of marijuana. However, the reality is that at the national level, after more than four decades, the prohibitionist policy in Mexico has unleashed deaths due to the fight against drug trafficking.<sup>434</sup> It has also dragged various peasants and marginalized communities to opt for employment in productive or illicit labor activities.<sup>435</sup> It has also removed productive sectors from the opportunity to join an economic system that contributes to the country's sustainable development, which has not allowed a fair distribution of taxes and has not promoted peace or security.<sup>436</sup> This, paradoxically, is contrary to what the aforementioned international treaties address as goals: the protection of health and the protection of the welfare of humankind. However, the international drug conventions mainly address the drug problem from a criminal law approach.

In this regard, it is necessary to consider the obligations that Mexico has assumed in the area of human rights by signing various international instruments, which form part of the constitutional block in the terms outlined in Articles 1 and 133 of the Mexican Constitution, which, of course, grant rights and guarantees in favor of all persons. Such obligations imply promoting, respecting, protecting, and guaranteeing human rights, and, therefore, the Mexican government has an obligation to harmonize domestic legislation with international treaties. Mexico signed and ratified international treaties on drugs in the 1970s and 1980s that set the tone for drug policies in Mexico based on a prohibitionist model.

However, in Mexico, unfortunately, the prohibitionist policy has not produced the good results that the country expected, since the violence generated by the trade and trafficking of drugs, including cannabis, has not been reduced, nor has its consumption ceased, resulting in a constant climate of insecurity and constant acts of violence among groups of drug traffickers. Likewise, there is a mandate from the Supreme Court for the legislative branch to adapt the internal normative framework to promote, respect, and guarantee human rights. In that order of ideas, for Mexico, the need to legislate the use of cannabis for different purposes is imminent

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<sup>434</sup> Gobierno de México. 2019. Informe sobre la Situación del Consumo de Drogas en México. 61-62 [https://www.gob.mx/cms/uploads/attachment/file/477564/Informe\\_sobre\\_la\\_situacion\\_de\\_las\\_drogas\\_en\\_Mexico.pdf](https://www.gob.mx/cms/uploads/attachment/file/477564/Informe_sobre_la_situacion_de_las_drogas_en_Mexico.pdf) Accessed: February 27, 2022.

<sup>435</sup> Gobierno de México. 2019. Informe sobre la Situación del Consumo de Drogas en México. 77 [https://www.gob.mx/cms/uploads/attachment/file/477564/Informe\\_sobre\\_la\\_situacion\\_de\\_las\\_drogas\\_en\\_Mexico.pdf](https://www.gob.mx/cms/uploads/attachment/file/477564/Informe_sobre_la_situacion_de_las_drogas_en_Mexico.pdf) Accessed: February 27, 2022.

<sup>436</sup> De la Cabada Hurrele, J. L. 2020. La Marihuana como Alternativa para Enfrentar una Crisis Económica. Nexos, <https://economia.nexos.com.mx/la-marihuana-como-alternativa-para-enfrentar-una-crisis-economica/> Accessed: March 30, 2022.

based on the jurisprudence and declaration of unconstitutionality 1/2018 declared by the Supreme Court. Starting from the point of view that unconstitutionality of the GHL is not synonymous with an absolute liberation of the use of the plant and its derivatives or the market that provides them, the legalization of certain acts for specific purposes is necessarily linked to control and intervention of the State, under some rules and standards on the production chain. The following table summarizes the timeline of action taken in Mexico related to marijuana decriminalization to reach the point for the discussion of the Law for the Regulation of Cannabis and amends of the GHL and Criminal Federal Code.

**Table 13. Timeline Action taken related to Marijuana Decriminalization in Mexico**

Year	Month/Day	Action taken related to Marijuana Decriminalization
2007	November 27	First Cannabis Law initiative with draft decree reforming and adding various provisions of the Federal Criminal Code and the Federal Code of Criminal Procedure
2013	July 5	The Mexican Society for Responsible and Tolerant Self-Consumption filed an indirect Amparo suit against the administrative cannabis prohibition regime. (A.R.237/2014)
2015	November 11	The Supreme Court declared the last paragraph of Article 235, Article 237, Article 245 in section I, the last paragraph of Article 247, and Article 248 of GHL unconstitutional (A.R.237/2014)
2016	January 26	Presidency organized the National Debate on the Use of Marijuana
	January 27	The Congress of the Union organized the Public Hearings for Marijuana Regulation Alternatives.
	April 21	Former President of Mexico, Enrique Peña proposed a bill on medical cannabis and decriminalized 28 gr. of cannabis for personal use.
	April 26	The creation of the first bill for a legal cannabis market at the national level.
2017	April 28	Approval of the law on the medical use of cannabis by a majority in Congress
2018	June 20	First Notification to the Congress of the Union: Supreme Court initiates proceedings of the General Declaration of Unconstitutionality 1/2018.
	October 31	Supreme Court resolved the fifth amparo declaring the absolute prohibition of personal use of cannabis unconstitutional. (A.R.548/2018)
2019	August 20	The Senate Board of Directors turns 9 initiatives to the Health, Justice and Legislative Studies, Second Unit Commissions for their analysis and ruling
	September 9	The Board of Directors rectifies the turn to the Justice Committee to lead the ruling.

	October 24	Senate Justice Committee requests the Supreme Court for an extension of the constitutional deadline.
	October 31	First extension: Supreme Court grants an extension due April 30, 2020.
2020	April 17	The Senate requests the Supreme Court for an extension of the constitutional deadline.
	April 17	Second extension: Supreme Court granted an extension to expire on December 15, 2020.
	March 4	The United Commissions of Justice; Health; and Legislative Studies, Second, approved, in general, the draft opinion on the regulation of cannabis.
	November 19	Senate of the Republic approved another draft of the opinion to enact the Law for the Regulation of Cannabis.
	November 24	The Law for the Regulation of Cannabis is referred to the Justice and Health Commissions of the Chamber of Deputies
	December 10	Third extension: Supreme Court agrees to grant the legislature a new extension to regulate cannabis, with a deadline of April 30, 2021.
2021	March 8	United Commissions of Health, Justice and Legislative Studies, Second, approves, in general, a new opinion
	March 10	The opinion is approved in the plenary session of the Chamber of Deputies, and it is forwarded to the Senate
	April 5	The Justice Committee approves the opinion with 6 votes in favor and 5 against
	April 6	The Second Legislative Studies Commission approves the opinion with 8 votes in favor, 2 against, and 3 abstentions.
	April 7	The Senate seeks another extension from the Supreme Court
	April 30	The Senate announces that no changes will be made to the ruling until September 2021. The Congress of the Union failed to comply with its responsibility to regulate cannabis
	June 28	The Supreme Court issued the General Declaration of Unconstitutionality of Articles 235 and 247 of the GHL
	July 15	The General Declaration of Unconstitutionality is published in the Official Journal of the Federation
2022	January ~	No official publication of the Law for the Regulation of Cannabis and amends of the GHL and Criminal Federal Code.

Source: México Unido Contra la Delincuencia. 2022. Cannabis: Cuenta Regresiva. <https://www.mucd.org.mx/cannabis-cuenta-regresiva/> Accessed: March 30, 2022.

At the national level, the draft of the Law for the Regulation of Cannabis results from the analysis of the previous 17 initiatives. Like some previous proposals, the new project contemplates four uses: recreational, scientific, medical, and industrial use of marijuana for

adults.<sup>437</sup> In the case of minors, medical marijuana use can be authorized if the legal guardian requests it.

As it was discussed, there are positive aspects and some negative aspects. The law contemplates the entire production chain and the different uses. Also, it intends to be balanced since it contemplates more than one supply route and controls the availability of the substance. The law appears to be careful since it prevents access to minors and implements quality controls; it is inclusive because it has access to vulnerable groups in the market. Finally, it includes monitoring and correcting public policies to a specialized institution.

Moving to a positive side of the Law for the Regulation of Cannabis, it changes the definition of recreational use for adults, recognizing it as part of the right to the free development of personality and making other types of cannabis use visible, such as spiritual, therapeutic, and experimental. In addition, it creates an institution that will be in charge of regulating cannabis and carrying out awareness campaigns. Concerning personal consumption, the Law recognizes the right of persons over 18 years of age to consume psychoactive cannabis but prohibits its consumption by persons under that age.

The law's guiding principles include empowering farmers, protecting vulnerable groups, and promoting human rights. However, it establishes entry barriers to the cannabis market in the hands of a few economic agents. In addition, it establishes testing and traceability requirements for seeds, plants, and cannabis products and their derivatives that imply costs that a few companies could only meet. This excludes the possibility for independent farmers to participate in the legal market since they grow in open fields and cannot label and follow each plant and its derivatives throughout the process. For self-consumption, the proposal is also restrictive. It requires those who want to grow at home to obtain a permit from the Institute and obliges them to make adjustments to their homes, import seeds, and submit to verification visits. Also, it is vital to mention the bureaucracy that this implies. The penal system continues to be the central instrument for sanctioning those who fail to comply with the long list of requirements. In general terms, it is too early to say whether this law will bear the fruits desired by the Mexican government. What is clear is the clear intention to continue with the protection of human rights as the main banner in the regulation of the recreational use of marijuana.

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<sup>437</sup> Cámara de Senadores. 2021. Ley para la Regulación del Cannabis. [https://cannabis.senado.gob.mx/images/pdf/anteproyecto\\_LRC.pdf](https://cannabis.senado.gob.mx/images/pdf/anteproyecto_LRC.pdf) Accessed: January 2, 2022.

## **Conclusion**

The Supreme Court determined that the total prohibition of marijuana is not proportional because it intensely affects the right to the free development of personality instead of regulating the way and place in which the recreational use of marijuana can be carried out. The Supreme Court declared unconstitutional the system of administrative prohibitions established in the GHL. However, the specific legal effects of this ruling are short-range. It is limited to the persons who filed the Amparo with respect to marijuana and did not include acts of commerce, supply, or any other act that refers to the sale or distribution of marijuana.

Integrating the contents of the right to free development of personality is broad, elastic, and malleable. This precedent was the axis that articulated new amparos that any person or group that can argue a legitimate interest can file. As mentioned in this chapter, five cases were generated, creating jurisprudence. Sometime later, the Supreme Court determined to the legislative branch, based on the Declaration of Unconstitutionality 1/2018, that it should regulate beyond marijuana consumption and cover other types of behaviors or other substances through which the right to the free development of personality can be exercised.

It is essential to point out that the judiciary branch is not a place for public debate. Nor can the judiciary branch produce general legislation covering all the necessary aspects for legalizing a drug. The general way to regulate marijuana consumption should not be through the judiciary. The legislative branch had the vital role of addressing what was discussed in the Declaration of Unconstitutionality 1/2018 and regulating the use of marijuana for recreational purposes based on the protection of public health, safety, and public order, but above all, based on the protection of human rights.

The Law for the Regulation of Cannabis results from the analysis of the previous 17 initiatives. Like some previous proposals, the new project contemplates four uses: recreational, scientific, medical, and industrial use of marijuana for adults. As it was discussed, there are positive aspects and some negative aspects. The law contemplates the entire production chain and the different uses. Also, the law is intended to be balanced since it contemplates more than one supply route and controls the availability of the substance. The law seems to be careful since it prevents access to minors and implements quality controls. It is inclusive because it has access to vulnerable groups in the market. Finally, it includes monitoring and correcting public policies to a specialized institution.

The law's guiding principles include empowering farmers, protecting vulnerable groups, and promoting human rights. However, it establishes entry barriers to the cannabis market in the hands of a few economic agents. In addition, it establishes testing and traceability

requirements for seeds, plants, and cannabis products and their derivatives that imply costs that a few companies could only meet. This excludes the possibility for independent farmers to participate in the lawful market since they grow in open fields and cannot label and follow each plant and its derivatives throughout the process. For self-consumption, the proposal is also restrictive. It requires those who want to grow at home to obtain a permit from the institute that will be created and obliges them to make adjustments to their homes, import seeds, and submit to verification visits. Also, it is vital to mention the bureaucracy that this implies.

Mexico would join Canada and Uruguay in a small but growing list of countries that have legalized marijuana in the Americas, adding new momentum to the movement against prohibitions in the region. The Law for the Regulation of Cannabis leans towards the legalization of marijuana with limits on commercialization. It allows recreational use, planting, harvesting, distribution, and commercialization of marijuana on a permit basis. In the international aspect regarding drug conventions, it could be deduced from the general aspects of the law that such control is based on the protection of human rights, specifically the right to free development of the personality. This is consistent with the attitude taken by the Mexican government in 2016 when the President of Mexico expressed his intentions to legalize the use, distribution, and commercialization of marijuana.<sup>438</sup> Finally, it is essential to remark that at the time this dissertation has been written, the Law for the Regulation of Cannabis not been approved, which can be modified or adjusted before its final approval.

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<sup>438</sup> Gobierno de México. 2016. Discurso del Presidente de México Enrique Peña Nieto, durante la Sesión Especial de la Asamblea General Sobre el Problema Mundial de las Drogas (UNGASS 2016). No.16/083. [https://www.gob.mx/cms/uploads/attachment/file/210802/7.\\_PEUM-\\_UNGASS\\_2016.pdf](https://www.gob.mx/cms/uploads/attachment/file/210802/7._PEUM-_UNGASS_2016.pdf). Accessed: February 27, 2022.

## **Conclusion of the Dissertation**

The goal of this dissertation was to investigate how human rights might be used to address a fundamental central issue of drug policy, that is, the tension between the state's interests in controlling marijuana consumption and the individual's freedom to consume. This dissertation presented an overview of international trends related to marijuana control. Initially, it described the actions taken at the UN concerning drug control. The international conventions related to drug control established a ban on the recreational use of marijuana. The legalization of recreational marijuana certainly conflicts with international drug conventions. However, it is also notable that in the current era, the use of marijuana is no longer taboo like it was in the past.

On the one hand, it could be said that this new view regarding the legalization of marijuana for recreational purposes is only seen in a few countries, for example, Canada, Uruguay, or the US, when on the other hand, the attitude, concerns, and perception regarding the recreational use of marijuana in the rest of the world is quite different. Legalization policies of Canada, Uruguay, and the US could be shared and accepted by several countries, but it is essential to remember that international drug conventions are universal treaties.

The positions of the INCB and countries like Canada, Uruguay, and the US are different regarding recreational marijuana use. This challenge should be addressed at the international level before countries decide to legalize marijuana for recreational purposes and avoid its universal obligations regarding marijuana use. Renegotiations on how to amend the international drug conventions regarding marijuana use can be possible based on recent events. This dissertation studied the cases of Uruguay, Canada, and some states in the US that have opted for different strategies concerning marijuana control, including the legalization of recreational marijuana use. Their action is basically taken for the protection of human rights, health, public safety, and the obtention of more scientific data regarding recreational marijuana use.

The case of Mexico presented in Chapter 2 becomes essential because, unlike Uruguay, Canada, and the US, this initiative to regulate recreational marijuana based on the protection of human rights comes from the judiciary. This decision creates the linkage between the protection of human rights that is reflected in the Universal Declaration of Human Rights and international drug control. Chapter 2 presented an analysis and discussion related to the use of marijuana for recreational purposes based on the protection of the free development of the personality. In Mexico, the free development of personality is a right that has been defined

jurisprudentially. It has not been the executive branch or the legislative, but the judicial bodies that delimited its scope in resolving specific cases. The jurisprudential interpretation developed by the judiciary branch considers that the free development of personality is the legal expression of the autonomy that a person has to freely choose a way to live according to their values, expectations, tastes, and to be as they want to be, without coercion or unjustified controls. In this sphere of personal freedom, the State is forbidden to interfere beyond the external limits of exclusively public order and the rights of third parties. In concrete terms, the free development of personal liberty is the individual's right.

Chapter 3 pointed out the protection of the right to the highest attainable standard of health and revealed the pressure exerted by the judiciary on the legislature to act and analyze future laws to regulate the use of marijuana. In the context of drug control in Mexico, the chapter discussed the implications of A.I.1482/2015 for the protection of the right to the highest attainable standard of health and its relationship with the right to free development of personality. It looked into the significance of using the proportionality principle and the relevance of international documents in decision-making, both of which have led to adopting human rights protection framework dispositions. It was concluded that the decision of the Court in A.I.1482/2015 was excessive in declaring the unconstitutionality of Article 237 of the General Health Law, but that this was inevitable to maintain coherence with the Mexican Supreme Court.

Chapter 4 described the antecedents that led the legislative branch to present a federal law for the regulation of marijuana. This law focuses on the protection of public health, human rights, and sustainable development in order to improve the living conditions of the people living in Mexico, combat the consequences of problematic cannabis use and reduce the incidence of crime linked to drug trafficking, promote peace, security, and individual and community well-being. Interestingly, this law is based in large part on a Supreme Court petition founded on the protection of human rights. As of the time this dissertation has been written, this bill has not been approved, which can be modified or adjusted before its final approval. Reality is that the Supreme Court has developed jurisprudence regarding the recreational use of marijuana due to the unconstitutionality decreed in the articles of the General Health Law prohibiting the recreational use of marijuana. Currently, the legislative branch is working on elaborating marijuana control based on human rights protection.

At the international level, the discussion related to the control of marijuana is undoubtedly gaining more traction day by day, and the trends regarding marijuana control seem to be changing. The human rights approach is being considered on the world drug problem, as



can be observed in recent UNGASS outcome documents. The paradigm shift regarding recreational marijuana use from its prohibition to its legalization implies several challenges and responsibilities for the governments of countries that want to do so. Institutions must be prepared to face various implementation risks, such as organized crime diversifying its actions, moving from committing crimes against health to other activities outside the law, or modifying ways of committing crimes. The UN Drug Conventions are indeed against the legalization of marijuana. However, the academic discussion regarding protecting human rights in drug control is relevant in the international community. At present, the points of view among governments that seek new alternatives based on dialogue and the elaboration of concrete and reasonable proposals that can fulfill a strategic role from within the judicial process should be considered for future research, especially if the new proposal allows demanding from the beginning and throughout the judicial procedure, the harmonious and practical application of the international human rights and national law.

On the one hand, Mexico has to follow the objectives of the international drug treaties regarding maintaining the protection of public health, public order, and security. On the other hand, at the national level, the Supreme Court's request to regulate marijuana use has prompted the legislative branch to legislate marijuana control from a human rights perspective rather than a criminal law perspective. Now, Mexico is facing a conflict between the prohibitionist policy embodied in the international drug conventions on one side, and the protection of human rights under international human rights law and the Constitutional Law of Mexico on the other side. Further study is necessary to solve this issue for Mexico. It is certain, however, that human rights might provide the international community with strong impetus towards decriminalization of marijuana use, which is not clearly prohibited under the UN drug conventions.

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