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Conviction by Numbers

Threshold Quantities for Drug Policy

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Threshold quantities (TQs) for drug law and policy are being experimented with across many jurisdictions. States seem attracted to their apparent simplicity and use them to determine, for example, whether: a possession or supply offence is made out (e.g. Greece); a matter should be diverted away from the criminal justice system (e.g. Portugal); or a case should fall within a certain sentencing range (e.g. UK).

Looking at examples from the EU and beyond, however, it is becoming clear that there are no 'magic numbers' in drug policy and that this tool brings its own complications and pit-falls. This briefing will therefore seek to provide an overview of the current discussion around TQs and will explore the mechanism of TQs including their benefits and drawbacks as a policy and legal tool.

THE INTERNATIONAL POSITION

Currently, there is no best practice model for TQs. Further to the UN Drug Conventions, State Parties are obligated to criminalise drug-trafficking when committed intentionally² and to provide sanctions that accord with what is perceived as the 'grave nature'³ of such activity. On the other hand, States are given more leeway as regards their response to drug users and other cases of a minor nature.⁴ Having created this compelling imperative to distinguish between users and traffickers, however, the Conventions are not explicit as to how to



Key Points

- TQs recommend themselves to policy-makers as a legal short-hand that has the potential to save time and money, but they should be used with caution as they also carry the risk of wrongful conviction, disproportionate responses, and impracticality in the field.
- The key factors for gauging an appropriate response to drug use and trafficking are intention, culpability, and harm as regards which TQs can only be indicative and not decisive. TQs should be used within a system of active discretion that takes into account all the circumstances of an offence or offender.
- The presumption of innocence is a fundamental tenet of international law. As such, TQs should never be used to reverse the burden of proof i.e. they should not be binding or presumptive and above the TQ the presumption of innocence should continue to apply.
- TQs have least disadvantages when used to 'downscale' a State's response to drugs and to activate exemption or diversion away from the criminal justice system as a broad package of health-oriented reforms supported by training, investment and infrastructure.

go about doing so, merely saying that the intention necessary to trafficking offences *'may be inferred from objective factual circumstance.'*⁵

However, within the model drug laws of the United Nations Office on Drugs and Crime (UNODC) TQs are explicitly posited as a mechanism for making these important distinctions and for gauging proportionate sentences.⁶ In particular, provisions are suggested for domestic legislation which include: a presumption that over a prescribed quantity or weight of cannabis plants, a person *'shall be presumed not to have cultivated it or possessed it for personal use unless he or she satisfies the [... Court] to the contrary'*; ⁷ and, a presumption that (within 100 metres of a school) over a prescribed quantity, possession is presumed to be for the purpose of supply.⁸ Such measures are not required or promoted, however, they are merely put forward by the UNODC as one of a number of options that States may *'wish'* ⁹ to adopt and *'caution'* ¹⁰ is advised for those that do to double-check that such a reverse burden of proof is not unconstitutional in the relevant jurisdiction.

Similarly, the International Narcotics Control Board (INCB) neither promotes nor disdains TQs on principle. The latest Annual Report reflects neutrally even on the scheme in the Czech Republic where threshold quantities are used to decriminalise low-level possession.¹¹ The Board does advise caution, however, as regards practicalities; e.g. in their thematic study of proportionality in drug policy, it is stated: *'To be reliable and fair, quantity-based sentencing systems must be supported by appropriate technical facilities and adequate financial and human resources.'*¹²

There has been a groundswell of advocacy for proportionality of response to drug offences and even for decriminalisation across the human rights mechanisms¹³ and agencies such as the Joint United Nations Programme on HIV/AIDS (UNAIDS).¹⁴

TQs have appeared to be an attractive mechanism when States have been trying to interpret these concepts into legislation and policy on the ground, TQs have appeared attractive. For example, in the recent UK consultation on sentencing for drug offences, the link has been made explicit – *'the concepts of an offender's role and the quantity of drug involved are simply a reflection of the wider concepts of culpability and harm'*.¹⁵ Weighting of these latter concepts then gauges the seriousness by which a proportionate disposal is determined.¹⁶

At the regional level, the EU has directly grappled with the issue of TQs by undertaking a comparative analysis¹⁷ of the position across Member States and by expressly considering (and rejecting) whether to impose a uniform threshold as part of a Framework Decision on harmonising the definition of drug-trafficking.¹⁸ Consequently, although it can be said that, across the board in Europe, quantity is *'key to the determination of penalty...[and] one of the main factors in the legal distinction between possession for personal use and trafficking, or in determining the gravity of an offence'* ¹⁹ the ways in which quantities are defined, calculated, and related to the perceived harmfulness of offences varies so greatly between States, that it can also be said that there is *'something of a quantum leap between an offence perceived to be minor in one country and serious in the other'*.²⁰ Such seeming arbitrariness does little for public confidence in the criminal justice system.

Perhaps it is unsurprising that with no guidance at the international level, what happens at the domestic level, is wide-ranging indeed. Variables can include: formality; purpose; nature (i.e. whether binding or presumptive); constituents; and, level. Some of these are discussed independently in more detail below.

● **Formality:** TQs are set at different legal levels from statute (e.g. Cyprus) and Governmental or Ministerial Decree (e.g. Belgium) to case-law (e.g. Germany) or

police and prosecutorial guidelines (Norway).

More informal schemes are more responsive to the changing nature of the evidence that underpins where thresholds should be set, such as drug prevalence, patterns of use, public opinion and relative harms of substances. Such schemes also allow operational flexibility so that local police can prioritise activity where necessary at any particular time. However, there is arguably a democratic deficit to such schemes, and a danger that busy police, prosecutors, or judiciary will not have the requisite training or sufficient evidence before them to ensure appropriate exercise of their discretion or consistency of approach. Towards this end, the Czech Republic last year abandoned prosecutor directives in favour of hard law in order to provide greater certainty for citizens.

- **Purpose:** There is a dearth of data as to the policy aims behind most threshold quantity schemes and as such, real difficulty in assessing their utility. Those aims which can most commonly be inferred – to distinguish between possession and supply, to determine sentence, and to initiate diversion away from traditional criminal justice responses – are discussed in detail below. There are also overt schemes to: differentiate between supply and aggravated supply (e.g. Slovakia); reduce prison overcrowding (e.g. Ecuador’s drug mule TQs); and to justify a point below which the State need take no action (e.g. Germany and the Netherlands).

TQs are attractive to policy makers because they provide a short-hand for important distinctions that would otherwise have to be made by a close analysis of evidence that consumes financial, time, and human resources. In implementing TQs, police officers and courts can quickly and cheaply provide low-level sanctions, interventions, or diversions where appropriate and, in more serious matters, do not have to weigh the general harmfulness of an offence each

time they come to sentence as the parameters are already set down. For this to work in practice, however, TQs must be set at appropriate and evidence-based levels otherwise the time and money saving benefits are overshadowed by the immeasurable cost of injustice.

- **Constituents:** TQs are set differently in different jurisdictions either on the total mass of a substance (e.g. the UK proposals), its purity i.e. the mass of its active principle (e.g. Hungary); street-value (e.g. Ireland); or by cross-referencing some or all of these constituents (e.g. Czech Republic).

At first glance, purity seems a fairer criterion than simple weight, which also takes into account benign or licit adulterants. Purity can also indicate where drugs are in the chain of supply, which assists with gauging the role of an offender and what would be proportionate sentencing for them. On the other hand, purity is a less practical measurement than total mass and requires time, resources and expertise to ascertain, thereby undermining the potential resource-savings of TQ schemes. It is not something that can be ascertained by poorly trained police officers or in poorly-resourced settings, for example. Saying this, in very poorly resourced settings, total mass TQs can be equally impractical – for example, in Pakistan police and prosecutors complain they are not even equipped with scales.²¹

Moreover, in terms of culpability, few users and even dealers are aware of or have control over the purity of the substance in their possession, and as such purity TQs could lead to unjust outcomes. In any event the authorities in most jurisdictions seem to prefer full mass over purity as it allows them to report that a greater amount of a substance has been seized, prosecuted or punished by them.

- **Level:** Some countries define TQs by reference to size, i.e. whether ‘small’ or ‘large’ (e.g. Estonia & Germany when determining

aggravated supply). Others refer to the number of doses that can be afforded (e.g. Norway) or the number of days' drug use (e.g. Portugal). Calculations also have to be made as to comparative harmfulness with other substances. Even within Europe, however, States vary wildly on both these indices. For an example of this see the following table²² which shows how some States view heroin as equally harmful to cocaine, some more so and some less so while very few agree on what is an appropriate TQ level for dealing with possession as a crime as opposed to taking no action at all or diverting to health measures.

Gram Relations within a Country			
State	Heroin	Cocaine	Comparator
CZ	1.5g	1g	x 0.67
CY	10g	10g	x 1
NL	0.5g	0.5g	x 1
ES	3g	7.5g	x 2.5
IT	2.5g	7.5g	x 3
HU	0.6g	2g	x 3.3
LT	0.02g	0.2g	x 10

An analysis of the numbers begs some serious questions as regards the existence or possibility of an objective harm index. How can the Czechs allow more heroin by weight than cocaine whereas other countries, for example, Lithuania, allow ten times as much cocaine for personal use, as opposed to supply than heroin? Looking at other numbers, how can Belgium allow equal amounts of cannabis resin as cannabis herb whereas Lithuania allows twenty times as much cannabis herb as cannabis resin? Differences between where and how TQs are set can even be seen within countries operating on a federal system (e.g. Australia). Local factors cannot justify these gaping disparities, and without the workings out of States placed in the public domain, one has to assume that there is something wrong with the maths.

THE RIGHT TOOL FOR THE JOB?

There are three main uses for threshold quantities:

- to distinguish between possession and supply;

So few individuals are caught in the act of supply that one must look to all the circumstances of a case to determine intention. It is clear that quantity is considered a reliable indicator in this regard because so many countries from Austria to Mexico utilise TQs for this purpose and, of course, it is a matter of common sense that there must be some amount of drugs above which a person can no longer be considered in possession for personal use. However, the huge variations across where TQs are set from one country to the next (e.g. 0.5g for cocaine in Mexico versus 15g in Austria) suggest that there is no evidence-based consensus as to what is a reasonable amount of a drug for personal possession.

There are many circumstances whereby a person might have a very large quantity of drugs, but no intent to supply. For example, a person may be drug-dependent with a higher tolerance level to the substance or may want to limit contact with the criminal market and so buy in bulk, or do so, simply because it is cheaper. Arguably, none of these permutations involve greater culpability or greater harm to the community.

Alternatively, there are circumstances whereby a person might have a small amount of drugs in their possession when apprehended, but other evidence – such as dealing- paraphernalia (e.g. digital scales, client lists, pay-as-you-go telephones, cash), previous convictions, or surveillance footage – indicate supply.

Bearing the above in mind, and the fact that there appears to be no justification for weighting quantity more heavily than any other factor when determining intention, presumptive TQs appear misguided and binding ones,²³ being little more than lazy

short-hand with potentially deleterious results for justice in the instant case. In particular, there is a heightened risk of wrongful conviction²⁴ and even wrongful acquittal.²⁵ It should be remembered that the UN drug Conventions require that trafficking offences be committed ‘*intentionally*’²⁶ and arguably, this is lost sight of with use of both types of threshold mechanism. It is not simply a matter of checking your constitution, as suggested by the INCB; TQs engage the presumption of innocence - a fundamental tenet of international human rights law.²⁷

There is also a concern that TQs create too stark a distinction between supply and possession with the result of justifying heavy-handed responses against all those involved in supply irrespective of their culpability. For example, in some jurisdictions we see that user-dealers, social suppliers, medical suppliers, and drug mules can all be impacted disproportionately by virtue of TQs (see e.g. Mexico).

Finally and separately, in terms of distinguishing between production and cultivation for personal use as opposed to supply, potential yield is very hard to estimate and few countries use TQs for this purpose with scale (i.e. number of plants) and sophistication of set-up considered a better indicator.

- to determine sentence;

Proportionate sentencing is a staple of the rule of law,²⁸ vital to compliance with international human rights norms²⁹ and often explicitly enshrined in domestic legislation.³⁰ To be proportionate a sentence must be commensurate with the ‘*seriousness*’³¹ of the offence and ‘*no more than is necessary*’³² to achieve the legitimate aim pursued in sentencing (whether that is punishment or rehabilitation). It is clear that the UN drug control bodies, in framing the convention requirements as ‘*the world’s agreed proportionate response to the global problems of illicit drug abuse and trafficking*’ but nevertheless terming them ‘*minimum standards*

only’ so that ‘*each state can apply more strict or severe measures*’³³ have therefore rather misunderstood the concept of proportionality. This breach of understanding is also arguably a breach of duty; rather, considering the influence of the UN drug control bodies, there should instead be consistent, explicit, and vocal denunciation by them of disproportionate responses.

As regards the first limb of proportionality, the use of TQs presupposes that quantity is a valid proxy for seriousness but we have already seen in the preceding discussion that culpability can vary enormously irrespective of quantity. As to harm (the second ingredient of seriousness) it can be said that thresholds are equally misleading. For example, the link between individual drug-transactions and urban violence is well established³⁴ and so anything that reduces their incidence, including bulk transactions, surely limits the harm caused and undermines the logic of threshold quantities for determining sentence. Another example would be the issue of self-medication. In many jurisdictions cannabis is accepted as alleviating harm rather than causing it and so is available for medicinal purposes.³⁵ It is clear that in such circumstances, but where medicinal use is not authorised, threshold quantities for determining sentence are equally ill-conceived.

The use of thresholds also presupposes an objective and representative harm-index for controlled substances but from the UN³⁶ down to the domestic³⁷ level classification has been politicised with governments rejecting scientific advice. Even with the best of intentions the scientific bodies that advise policy-makers on these issues, (from the international like the WHO to the domestic like CAM and RIVM in the Netherlands) use different indices.³⁸ In any event, the evidence as regards harmfulness is constantly changing, with some parameters particularly fluid – e.g. prevalence, patterns of use, and attitudes towards particular drugs – and with different experts

Examples of Threshold Quantities used to define possession for personal use and the consequences in practice		
Country	QT (total weight) for personal use defined by laws, ministerial decrees, or prosecutor/sentencing guidelines	Practice
Australia (states)	Four states in Australia have decriminalized cannabis possession of quantities of 15 to 50 gr	Administrative sanctions only beneath the thresholds
Mexico	5 gr cannabis, 2 gr opium, 0.5 gr cocaine, 0.05 gr heroin, 0.04 gr methamphetamine	Any amount above the thresholds is considered intent to supply and severely punished
Paraguay	Possession of 10 gr cannabis, 2 gr cocaine or heroin	Exempted from punishment beneath the thresholds
Uruguay	Possession of “a reasonable quantity exclusively intended for personal consumption” is not punishable	Left entirely to the discretion of the judge to determine whether the intent was consumption or supply
US (states)	13 states decriminalized cannabis possession, several using 28.45 grams (one ounce) as limit	Schemes differ per state or county, most only applying small fines
Belgium	1 plant or 3 gr of cannabis or cannabis resin for personal use	Administrative sanctions only beneath the thresholds
Czech Republic	15 gr cannabis, 1.5 gr heroin, 1 gr cocaine, 2 gr methamphetamine, 5 ecstasy pills	Anybody possessing less than these amounts can be charged for a misdemeanour but in practice receives a police warning only
Netherlands	5 gr cannabis, and 0.5gr ecstasy, cocaine or heroin (equivalent to one pill, ball or ampoule) is not punishable	Up to 5 cannabis plants not prosecuted, possession up to 30 gr only small fine, up to 1 kg larger fine, more is punishable with prison sentence; small amounts of “hard drugs” in practice left to police, prosecution and eventually judicial discretion to determine whether the intent was consumption or supply
Portugal	The quantity required for an average individual consumption during a period of 10 days	25 gr cannabis, 2 gr cocaine are used as an indication, but without additional evidence on the intent to supply, larger quantities are regarded as possession for personal use and only administrative sanctions apply
Spain	The quantity required for an average individual consumption during a period of 5 days: 200 gr cannabis, 7.5 gr cocaine, 2.4 gr ecstasy and 3 gr of heroin	Drug use and possession for personal use are not considered a criminal offence. Administrative sanctions can be imposed: fines and/or suspension of driving license
Russia	The small quantities defined are: Up to 6 gr cannabis and up to 0.5 gr for heroin and cocaine. Please note that heroin purity in Russia is very low which means users will on average need 1.87gr per day.	In general for small quantities administrative sanctions only, including administrative arrest (15 days max). “Large” amounts are criminalised: from 6 gr cannabis, and 0.5 gr for cocaine and heroin can be punished with a fine, forced labour up to 2 years or imprisonment up to 3 years.
India	As a small quantity is defined: 100 gr of hashish, 2 gr of cocaine, 5 gr of heroin and 0,5gr of ecstasy. Bhang, ground hemp served in a drink is legally sold in Government owned shops.	Use and possession for personal use is considered a criminal offence and can be sentenced with imprisonment up to 1 year and/ or a fine. Prosecution will be dropped if the user agrees to undergo and complete treatment.
For a complete overview for EU Member States, see the tables on quantities established for personal possession offences and quantities established for supply offences on the EMCDDA-ELDD website at http://eldd.emcdda.europa.eu/html.cfm/index99321EN.html#T1		

using different parameters.³⁹ With a nebulous concept such as harm, it is hard to see how static TQs could hope to bring about proportionate sentencing.

As regards the second limb of proportionality, TQs of themselves provide no safeguard against excessive responses to drug-offending – one wonders if this is perhaps indirectly in part because of the *carte blanche* provided by the INCB for States to upscale responses to drug-offences as discussed above. An example is the death penalty, which, as a matter of international law should be reserved for ‘*the most serious crimes*’⁴⁰ a category in which drug-trafficking is not included.⁴¹ Yet TQs can be complicit in violating this tenet, with their application triggering the death sentence in countries like Pakistan.⁴²

- to initiate diversion away from traditional criminal justice responses;

TQs as a bench-mark for diversion are usually linked with the distinction between possession and supply (e.g. Germany); as such, many of the terms of the discussion above apply. However as diversion is about down-scaling (rather than up-scaling) a State’s response, TQs cannot be said to increase the risk of wrongful conviction or disproportionate sentencing in this context. As such, the benefits of TQ schemes for diversion purposes are less tarnished.

A number of States have used TQs as a way to reduce pressure on their criminal justice systems. For example, the Netherlands brought in a system based on the amount of drugs that a drug-mule could carry internally, under which individuals would be deported and put on a travel-blacklist rather than face prosecution and lengthy imprisonment as before. This scheme saw a great easing on penal resources and a reduction in attempted offending.⁴³ Likewise, Ecuador successfully brought in TQs as part of an amnesty for convicted drug-mules in order to reduce prison overcrowding; it was also hoped that the policy

would repair disproportionate sentences. For those who just fell above the threshold, this was bitter-sweet indeed, but the prison population has been reduced by over 1500 people already.⁴⁴

On the other hand, Peru provides a cautionary example – since TQs for personal use were enacted in 2000, detention rates have in fact gone up. Indeed, examples from other jurisdictions showcase the ability of drug markets to work around TQs and even use them to their advantage, with suppliers keeping stocks just under the relevant TQ to mitigate their exposure.⁴⁵

In an effort to better direct its resources to counter organised crime, violence, and rising drug use, Mexico brought in TQs in 2008 to distinguish between users, who were to be diverted into health treatment, and traffickers (including small scale drug dealers) who were to be punished.⁴⁶ Unfortunately, the thresholds set were out of line with commercial realities (cocaine is set at 0.5g but street deals are commonly made at 1g). As a consequence of this and of the need of the police and judiciary to be seen to be doing something when too afraid to actually confront organised crime,⁴⁷ the presumptive thresholds have rarely been overturned in practice and the prisons are full of users. There is as yet no data as to how many people have been diverted into health care, (little extra funding or infrastructure supports this purpose), and the violence of the traffickers continues. In these circumstances, it can therefore be said that TQs have provided a smoke-screen for a failed response that perpetuates the bigger underlying problems of violent organised crime. Conversely, TQs have brought about a change in political rhetoric and public understanding as to drug users not being criminals, which is in itself valuable and potentially transformative.

Portugal has incorporated TQs into a more systemic approach. Concerned about inconsistency in sentencing and the highest prevalence of problematic drug use in

Europe, presumptive TQs (set at what is average for 10 days' use of a particular drug) were brought in to distinguish between possession and supply and to trigger diversion of matters away from the Courts to Dissuasion Commissions ('DCs'). DCs aim to educate about the harmfulness of drug use and dissuade people from it. To this end, DCs can refer to treatment, if required, or to other social services such as employment agencies. DCs can also impose civil fines and other low level sanctions where a person does not comply.

Where the amount exceeds the threshold quantity, a Judge still has discretion to re-divert the matter to a DC if all the other evidence goes against supply but he can also treat possession above the threshold as a criminal offence. In such circumstances, above and beyond the criminalisation, the sanctions imposed by a court will be the same as those imposed by a DC. Portugal has expanded its welfare state and created a new institutional structure in order to support this scheme which is governed, crucially, by the Ministry of Health and not the Ministry of Justice. The results have been positive with a reduction in problematic drug use and a reduced burden on the criminal justice system, amongst other positive trends.⁴⁸

Of course, there are downsides. For example, approximately 65% of those before DCs are low level cannabis users (raising concerns about effective allocation of resources). Also, simple-users can still end up being criminalised in some circumstances. However, the thresholds are set at a high enough level to generally exclude regular users and are cross-checked against what can be termed 'active discretion'. This more careful application of TQs are taken in the context of down-scaling the State's response to health-oriented interventions, arguably demonstrates that the Portuguese model is a strong one, resulting in more proportionate and resource-efficient responses than before whilst remaining within the UN framework of prohibition.

There is no doubt, however, that TQs exemplify a half-way house approach. States, such as Argentina – confident of the integrity of its institutions and actors to do justice under a fully discretionary approach – have rejected TQs. In decriminalising possession for personal use, Argentina thought TQs unnecessary, it being perfectly quick and simple for police and legal professionals to determine whether drugs are for personal use or supply, and finding the risk insupportable that drug users would be forced to buy in smaller quantities on more occasions and so increase their exposure to the dangers of the market and traffickers.⁴⁹

THE ALTERNATIVE

In theory, discretion is more capable of producing proportionate and humane outcomes than rigid TQs because under discretionary schemes, like that currently operative in the UK, decisions are tailored to all the facts. Juries can look at all the evidence to determine whether the correct charge has been laid, and judges, though guided towards a particular sentencing range by quantity, have a much broader decision to make on sentence, taking into account personal mitigation and any other relevant information. Even when the sentencing ranges suggested by case-law are enshrined by formal sentencing guidelines as expected later this year,⁵⁰ judges will still be able to depart from these where 'satisfied that it would be in the interests of justice to do so'.⁵¹

Unfortunately, the downside of discretion is discrimination, with black people in the UK more likely than white people to be included at each stage of the criminal justice system for drug offences and to be sentenced more harshly.⁵² There is no suggestion that this discrimination is even conscious, but the hope is that the informal TQs suggested, just for sentencing, will guide judges towards a more consistent approach. TQs should, in principle, provide the same function for systems which are confounded by more traditional corrup-

tion. Where police and prosecutors cannot be trusted to exercise their discretion properly, TQs should, in theory, take away the danger of abuse. In Uruguay, cannabis users have indeed been clamouring for the introduction of TQs to address police harassment. On the other hand, there are reports from Mexico, of police threatening to increase the recorded amount of drugs found so as to take people over the relevant thresholds unless a bribe is paid.⁵³ It seems that as much as the drug markets are flexible and can accommodate TQs, so can corrupt authorities.

CONCLUSION

In an ideal world, appropriate charging decisions and sentencing would be decided by an incorruptible and indiscriminate agent of the state on a case by case basis taking into account all the relevant circumstances and based on an objective, evidence-based index of harm. Ours is not, however, an ideal world, but an arbitrary and often discriminatory or corrupt one and always one of stretched resources where any short hand that can save the time of the police officer on the street or the judge at court is welcome to policy-makers.

In this regard TQs do not import any magic but are an imperfect tool, importing their own risk of wrongful conviction and disproportionate response or simply being impractical in the field. In addition, there are clear gaps in the research and rational that underpins TQs not least because the lack of an objective evidence-based harm index (were such an index even possible bearing in mind the importance of local factors).

The value and utility of TQs will depend on the robustness, integrity and resources of a State's institutions. Where there is an appetite for this policy tool, the international case-studies provide some tips for best practice:

1) TQs have least disadvantages when used to 'downscale' a State's response to drugs

and to activate diversion away from the criminal justice system as a broad package of health-oriented reforms supported by training, investment and infrastructure.

2) The presumption of innocence is a fundamental tenet of international law. As such, TQs should never be used to reverse the burden of proof i.e. they should not be binding or presumptive and above the TQ the presumption of innocence should continue to apply.

3) TQs should be indicative only and always used within a system of active discretion, that takes into account all the circumstances of an offence or offender.

4) TQs should be informed by objective scientific advice and open consultation with all interested parties.

5) There should be information sharing between States as to their setting of thresholds, their aim in so doing, and the indices of harm used. There should be moderation of policy outcomes with data collection.

6) TQs should be set within primary legislation, containing a sunset clause that provides for review by experts at regular intervals in order to keep pace with the changing nature of evidence as to drug harms and drug use and the development of local factors as well as to allow responsiveness where negative unintended consequences emerge.

7) TQs should be practical and pragmatic, matched to the resources and abilities of those actors tasked with implementing and enforcing them. In particular: they should be based on general mass rather than purity albeit provisions should be made for purity-analysis in cases which are challenged; and, they should be set at a high enough level to provide a safeguard against the need to re-divert cases and moreover, to leave no danger of wrongful conviction or excessive sentence for the legitimate user.

In short, flexibility, practicality and scrutiny should accompany any TQ scheme and policy makers should not lose sight of what is really significant – intention, culpability, and harm.

NOTES

This paper is indebted to the interventions made at the *TNI-EMCDDA Expert Seminar on Threshold Quantities* in Lisbon on 20 January 2011, and the exhaustive data collection and comparative analysis undertaken by the EMCDDA, from which much of the data and country examples are taken. The report of the seminar is available at:

<http://www.druglawreform.info/en/events/expert-seminars/item/1265-tni-emcdda-expert-seminar-on-threshold-quantities>

1. Genevieve Harris is an Associate for the International Drug Policy Consortium and a UK Barrister.
2. Art. 3(1) of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 ('The 1988 UN Convention')
3. Art. 3(4)(a) of the 1988 UN Convention
4. See Art. 36(1)(b) of The Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol ('The Amended 1961 Convention'), Art. 22(1)(b) of the Convention on Psychotropic Substances of 1971 ('The 1971 Convention'), and Art. 3(2), 3(4)(b), and 3(4)(c) of the 1988 UN Convention.
5. Art. 3(3) of the 1988 UN Convention
6. Cl. 46(1) and Table 5 UNDCP Model Drug Abuse Bill 2000 (MDAB 2000). See also Para 105 of the MDAB 2000 Commentary.
7. Cl. 56(2) MDAB 2000
8. Cl. 101(2) MDAB 2000
9. See, eg. par. 143 MDAB 2000 Commentary
10. Par. 222 MDAB 2000
11. Par. 699, the Report of the International Narcotics Control Board for 2010 (E/INCB/2010/1)
12. Par. 35, the Report of the International Narcotics Control Board for 2007 (E/INCB/2007/1) (INCB 2007)
13. See, e.g. Para 16, Grover. A. (2010), *Annual Thematic Report of the Special Rapporteur on the Right to Health* (A/65/255).

14. Letter of M. Sidibé, Executive Director of UNAIDS, to civil society networks dated 9th November 2009: '*UNAIDS is unequivocal in our call for the decriminalisation of people who use drugs*'. (EXO/EECAAC/MS/vps)

15. Sentencing Council (2011), '*Drug Offences Guideline; Professional Consultation*' p. 11

16. S. 143(1) Criminal Justice Act 2003.

17. See EMCDDA (2003) '*The Role of the Quantity in the Prosecution of Drug Offences*'; EMCDDA 2005 '*Illicit Drug Use in the EU; Legislative Approaches*' and the updated EMCDDA online topic overview '*Threshold Quantities for Drug Offences*' <http://www.emcdda.europa.eu/html.cfm/index99321EN.html>

18. Walsh C. (2008), '*On the Threshold: How Relevant Should Quantity be in Determining Intent to Supply*' *International Journal of Drug Policy* 19 (2008) 479-485 at 483.

19. EMCDDA (2005), p. 19

20. EMCDDA (2003), p. 6

21. Gallahue, P. & Lines, R. (2010), '*The Death Penalty for Drug Offences: Global Overview*', *International Harm Reduction Association* (IHRA), p. 34

22. Taken from figures provided by B.Hughes EMCDDA 2010 as cross-referenced against online EMCDDA figures op.cit.

23. Slovakia utilises binding thresholds.

24. See eg. decision of the Constitutional Court of South Africa in *The State v Bhulwana and Gwadiso*, judgment of 29 November 1995. See also, *Salabukia v France* (1988) 13 EHRR 379

25. Home Office (2006), '*Summary of Responses to the Home Office Consultation Letter on s2 of the Drugs Act 2005*' London. P. 9

26. Art. 3(1) of the 1988 Convention

27. Art. 11(1) Universal Declaration of Human Rights; Art. 14(2) International Covenant of Civil and Political Rights ('ICCPR').

28. See, e.g. the European Court of Human Rights judgment in the case of *Scoppola v Italy* (No. 2) Application No. 10249/03 dated 17th September 2009 at par. 108: '*In the Court's opinion it is consistent with the rule of law...to expect a trial court to apply to each punishable act the penalty which the legislator considers proportionate*'.

29. The European Court of Human Rights requires consideration of whether the 'severity'

of a sentence is 'out of proportion with the legitimate aim pursued' in a State's limitation of a qualified right; *Arrowsmith v United Kingdom* (1981) 3 E.H.R.R. 218 at par. 99

30. See e.g. Cyprus, Canada,

31. See Recommendation R (92) 18 in 'Consistency in Sentencing', Council of Europe, 1993, A.4.

32. See e.g. the exposition of Lord Clyde in *De Freitas v the Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at p.80

33. INCB (2007), p. 1

34. See e.g. Stevens, A. & Bewley-Taylor, D. (2009), 'Drug Markets and Urban Violence; Can Tackling One Reduce the Other', The Beckley Foundation, UK.

35. E.g. Canada, over 13 states within the USA, the Netherlands, Spain, Finland, & Israel.

36. See the discussion on the classification of coca in Henman, A. & Metaal, P. (2009), 'Coca Myths', TNI Drugs & Conflict Debate Paper Nr. 17, June 2009.

37. See e.g. the UK Government's rejection on the harmfulness appraisals of their expert advisory committee: 'It is our view that the system should be based on evidence, but it should also be based on the considered view of those responsible for policy making' House of Commons Hansard Debates for 9 February 2009 at Column 1094

38. See the discussion in the report of the Trans National Institute 'Expert Seminar on the Classification of Controlled Substances' 2009

39. Nutt, D. et al. 'Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse', *The Lancet*, vol 369, March 24, 2007

40. Art. 6(2) ICCPR

41. Nowak. M. (2009), *Report of the Special Rapporteur on Torture and other Cruel, Degrading and Inhuman Treatment*, par. 66 (A/HRC/10/44). See also, Alston, P. 2007 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, par. 53 (A/HRC/4/20)

42. Gallahue P. & Lines R. (2010), p. 34

43. UNODC & the World Bank (2007), 'Crime, Violence and Development: Trends, Costs, and Policy Options in the Caribbean' par. 7.13-7.19

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45. Harris, G. (2011) 'Expert Seminar on Threshold Quantities', TNI & EMCDDA Seminar Report, p.13 & 15; Home Office (2006), p.9

46. See the discussion in Hernandez Tinajero, J. & ZamudioAngles C. (2009), *Mexico: The Law Against Small Scale Drug Dealing*, TNI /WOLA Series on Legislative Reform of Drug Policies Nr. 3, October 2009

47. Harris G. 2011 p.15

48. Hughes, C. & Stevens (2010), A, *What can we learn from the Portuguese Decriminalisation of Illicit Drug Use*, *Brit. J. Criminology* 50, 99-1022.

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50. UK Sentencing Council (2011), *Drug Offences Guidelines; Professional Consultation*, p.11

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52. Stevens. A. speaking at the 2008 Release conference on 'Drugs, Race, and Discrimination'; See also Stevens A 'Drugs, Crime and Public Health; the Political Economy of Drug Policy' Routledge-Cavendish.

53. Harris, G. (2011), p.13

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Drug Law Reform Project

The project aims to promote more humane, balanced, and effective drug laws. Decades of repressive drug policies have not reduced the scale of drug markets and have led instead to human rights violations, a crisis in the judicial and penitentiary systems, the consolidation of organized crime, and the marginalization of vulnerable drug users, drug couriers and growers of illicit crops. It is time for an honest discussion on effective drug policy that considers changes in both legislation and implementation.

This project aims to stimulate the debate around legislative reforms by highlighting good practices and lessons learned in areas such as decriminalization, proportionality of sentences, specific harm reduction measures, alternatives to incarceration, and scheduling criteria for different substances. It also aims to encourage a constructive dialogue amongst policy makers, multilateral agencies and civil society in order to shape evidence-based policies that are grounded in the principles of human rights, public health and harm reduction.



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