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Prohibition, a backwards step

The personal dose in Colombia

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In Colombia there has recently been a change to the personal dose issue, one that could be seen as a major and challenging regression. We are talking about a reform to the 1991 Constitution, passed by the Congress on December 9, 2009 and according to which the possession and consumption of a personal dose of controlled substances is prohibited. With this reform we have gone from a situation in which the law considered the possession and consumption of certain quantities of drugs for personal use legal, thanks to a decision taken by the 1994 Constitutional Court, to their constitutional prohibition.

The above should be considered within the context where many countries around the world have chosen to make the repression of possession and consumption more flexible, following the acknowledgement of the failure of the drugs policies that have come to dominate the international scene. Thus for example, in Europe, Portugal depenalized the possession of any kind of controlled substance for personal use. In the Netherlands consumption is not penalized and the sale of cannabis is allowed in certain establishments. Other countries such as Spain, Germany, Italy and Denmark do not punish cannabis use. In South America, Argentina recently depenalized drug possession for personal use through a court decision. Countries such as Uruguay and Chile do not impose sanctions if the personal dose is consumed in private.



The purpose of this report is therefore to show the changes that this amendment entails and to carry out an evaluation of the principle potential consequences, at least at the legal level. It is too soon to suggest the possible implications of the amendment on every level as, amongst other reasons, and this will become clear further on, it is not certain that prohibition entails an authorization for criminalization. However, showing the route that Colombia has taken to return to the prohibition of possession and consumption of the personal dose could prove interesting, both for internal reflection and for comparative analysis.

There are three parts to the document. The first focuses on the depenalization of the personal dose in Colombia. To do so, it briefly describes the way in which possession and consumption were classified, and goes on to focus on the ruling of the Constitutional Court that depenalized these conducts. The second part briefly details the main reactions to the Court's decision,

RECOMMENDATIONS

- The prohibition of consumption and possession passed by the Congress in December 2009 represents a step backwards in the way in which problems that arise from the consumption of controlled substances are dealt with. Increased repression of consumption of these substances does not ensure its reduction and gives rise to serious social and legal consequences.
- In the interest of protecting the health of the population, the country must therefore be in a position to ensure this protection by creating and broadening the health infrastructure needed to be able to deal properly with cases of problematic consumption. The right to health and access to treatment would produce positive results concerning drug consumption in Colombia.
- We must prevent prohibition producing the side effect of an increase in the prison population due to cases of possession and consumption. This would worsen the conditions of overcrowding which plague some of the country's major prison centres.
- To be able to distinguish between non-problematic drug and psychoactive substances consumption, recreational use and problematic use, would weaken the fundamentalist view point which imposes prohibition as it does not take these distinctions into account.
- The fact that prohibition does not allow for the imposition of penalties should be taken advantage of, to offer the problematic user the right to treatment when they request it.
- In order for the recent prohibition not to mean a step backwards for democracy, the Colombian State should take the prevention policies seriously and strengthen the bodies that favour rehabilitation. A policy of harm reduction would be able to achieve better results than repression as an answer to drug consumption.

in order to then concentrate on a description of the constitutional amendment proposal that was finally passed. The third part evaluates the changes that were made and shows their possible implications.

DEPENALIZATION OF THE PERSONAL DOSE

In 1991, when the current Constitution was established, the main points of the Colombian policy for production, manufacturing, exportation, importation, distribution, selling, use and possession of illegal drugs were contained within the National Drug Control Statute – Law 30 1986. This law, which is still in force, defined both the prevention campaigns and the control mechanisms for the manufacturing, importation and distribution of dependency producing substances, and established the penal categories that enable these conducts to be criminalized.

One of the penal categories established in the law was the possession and consumption of a personal dose. This was defined as “the quantity of drugs that a person carries or possesses for personal use”, as long as it did not go over the limits fixed by the law, and was not used for distribution or sale (Art. 2). In accordance with the said law, anyone caught carrying, possessing or consuming a quantity of drugs below or equal to the minimum dose should be arrested and fined. However, if it was proved – following a legal medical ruling – that the consumer was an addict, the penalty was to be sentenced to confinement in a psychiatric or similar establishment (Art. 51).

Possession and consumption of the personal dose was depenalized in 1994. That was when the Ruling C-221 was made by the Colombian Constitutional Court, in which they had to decide whether articles 2 and 51 of Law 30 complied with the Constitution. In the ruling, the Court decided that the definition of the *personal use dose* and its limits did not go against constitutional regulations. It did however decide to

remove from the legal regulations the penalties stated in the law applicable to anyone caught with a quantity of drugs equal to the personal dose.³

In accordance with the Court, to impose a penalty – such as arrest, a fine, or a rehabilitation method, for example confinement in a psychiatric establishment – on those who decide to consume drugs and psychotropic substances,⁴ exceeds the State's rights to intervene in an appropriate way in order to guarantee its citizens the right to health. This right, decreed in article 49 of the Constitution, establishes rights for the people, but does not oblige them to act in a particular way in order to preserve their health. That is to say, it grants the freedom of decision to affect one's own state of health, as long as this does not entail the rights of third parties being affected. The consumption of prohibited drugs, including problematic use of these, is not in itself conduct that harms third parties. In some cases it does not even affect a person's health. Therefore, the person can decide to consume drugs, and the State would not be able to prohibit them from doing so, using the argument of intending to guarantee or safeguard the effective fulfilment of the right to health.

But perhaps the most important argument for the Court is that the imposition of penalties goes against the free development of personality. In virtue of this right (Art. 16 P.C.) each person is free to decide how they want to lead their life. The only limit they must respect is not to disturb the rights of other people. As a consequence, every person has the right to decide freely on matters that concern their individual sphere, and the State cannot impose boundaries that reduce their autonomy. In the words of the Court: "to decide for the person is to brutally take their ethical status from them, to reduce them to the condition of object, objectify them, convert them into a method, the purposes of which are decided by someone other than themselves".

The Court put forward two more arguments. Firstly, it suggested that imposing a punishment for mere consumption is a remnant of the penal *dangerousness criterion* that was banished by liberal law. Consumption is a conduct that does not go beyond a person's intimate sphere. To impose a sentence or another kind of penalty just because someone who is under the effects of a drug can be dangerous implies an intrusion that affects the free decision and dignity of the person. A person can only be penalized if their behaviour threatens a right that is legally protected by penal law, but not for just consuming a particular substance. A democratic and modern conception of penal law limits its intervention to preventing citizens from harming others, always, and when there are no other measures to prevent this harmful behaviour.

Secondly, it considered that penalisation for possession and consumption of the personal dose produces various forms of discrimination. For example, discrimination against drug consumers compared to consumers of other substances such as cigarettes or alcohol, since these can sometimes produce more social harm and yet their consumption is not penalized. It can also produce forms of discrimination between drug consumers, as these regulations tend to be used in a selective way against the marginal sectors.

The definite conclusion of the ruling is that, in accordance with the Colombian Constitution and the thinking that inspires it, there are no reasons to impose penal or administrative penalties on people who choose to possess or consume the *personal use dose*. The penalisation of possession and consumption would involve influencing the free development of personality, the imposition of a model of conduct, and exceeding the limits of the enforcement of criminal law.

In any case, the ruling acknowledged that the State can take other measures to discourage the consumption of drugs and psy-

chotropic substances, as well as to control socially problematic consumption. Firstly, even if they couldn't impose any kind of penalty, or oblige the person to undergo a rehabilitation programme, they could use campaigns and educational programmes to discourage use. A State that respects individual autonomy, free development of personality and human dignity should therefore use education and not repression to control drug consumption. Secondly, the State could make use of its police forces to control socially harmful consumption. This is what happens with other substances that can result in dependency such as alcohol and tobacco, the consumption of which is authorized, but limited and even penalized in some cases.

The ruling is an important milestone for Colombia, for three reasons. First, because it established that any measure that entails the imposition of a punishment or rehabilitation measures violates the free development of personality and other basic rights decreed in the Constitution.

Second, because by depenalizing the possession and consumption of the personal dose they cut out a major workload for the legal system, which had to prosecute, on a daily basis, hundreds of people found in possession of prohibited drugs, consequently dedicating significant efforts to unimportant cases. Therefore it represented a reduction of work for the prison system, which was overwhelmed by high rates of overcrowding. There have been difficulties implementing the decision and some cases that the judges consider difficult; for example when a person is arrested with an amount that is just over the limit.⁵ However, they achieved major progress in the imposition of the ruling and regulations developed within it. In September 2009, for example, a ruling by the Supreme Court of Justice was announced reinforcing the concept that possession of the personal dose must not be penalized and that this covered even the supply dose. That is to say, even when a person is caught with an amount

that is well above the limits established by law, if the purpose is several days supply, and not for distribution, the person must not be judged or given a penalty.

Thirdly, because it opened an important possibility for calm debate in Colombia, one which would allow for the drawing up of appropriate policies for confronting the problems arising from the consumption of substances that can cause dependency, for all substances, not only the illegal ones but also the legal ones which are the biggest killers.

A debate such as this would surely enable the Colombian drug policies to become more flexible. These have always been characterised by their tendency to promote zero tolerance and up until now, as we know, have not given particularly encouraging results concerning the reduction of the manufacturing and selling of drugs and psychotropic substances. Thus, the ruling offered a major opportunity for the adoption of more appropriate policies for confronting the problems that arise from drug trafficking and distribution.

THE CONSTITUTIONAL AMENDMENT PROPOSAL

Despite its importance, the decision to depenalize the possession and consumption of the personal dose provoked conflicting reactions. Some sectors supported it, whilst others rejected it, arguing various reasons such as the possibility of an increase in consumption.

Since 2002, when Álvaro Uribe Vélez became President of the Republic, the Government has led the opposition to the decision. His attacks against depenalization were both verbal and legal. Concerning the first, the President took part in the public debate making declarations such as the following: "If we can make progress through the moral equilibrium of penalizing the personal drug dose, we will halt the increase in addicts and consumers."⁶

With regard to the legal attacks, resistance to the depenalization has resulted in legal strategies, as part of the drugs policy, that lean towards repression. The path that had to be taken to return to penalization was Constitutional amendment, since the decision of the Court prevented it from trying to go down the legal route. Thus, on five occasions the Government presented amendment proposals. The last one was finally passed by the Congress on December 9, 2009.

The project was presented by the Ministers of the Interior and of Social Protection in March 2009. Its purpose: to amend article 49 of the Constitution, with the aim of protecting, in a more appropriate manner, the consumer's right to health, as well as the public health of the community threatened by consumption.

According to the statement of intent which backed it, the amendment, by decreeing the prohibition of possession and consumption, did not intend a return to penalization, but to promote prevention and rehabilitation. In this sense, the statement of intent indicated that the proposal was not aiming to: "penalize the consumer through prison sentences, but to accompany them with educational, preventative and therapeutic health measures which help them and their family overcome their problems" (Pg. 4).

However, the same statement of intent showed an ambivalence since although it declared it was not a return to penalization, it also considered it contradictory that possession was not punished. In this sense it declared: "within a comprehensive anti-drugs policy such as that which the Colombian Government has been consistently implementing, (...) it is not consistent or sustainable that behaviour such as the consumption and possession of psychotropic drug substances for personal use not be penalized" (pag. 37). In order to impose these penalties Treatment Tribunals would therefore be created where legal employees

and medical staff, guided by a philosophy of prevention and treatment, would deal with cases of those who were caught in possession of or consuming drugs.

The proposal declared it was based on statistics and studies, such as the consumption survey carried out in 2008, which showed that in Colombia there is a high rate of drug consumption, particularly amongst the young. Using this data, the statement of intent declared that the prohibition of possession and consumption would be a necessary measure for the fight against consumption and the criminality associated with drug distribution and trafficking, which had increased due to the ruling of the Constitutional Court (pg. 38).

Nevertheless, the way in which the statistics were used by the government to back up its proposal was much criticized, since the data provided did not support the statements made. Indeed, the survey only showed the level of consumption in Colombia for the year of its implementation. It did not mention the existing levels for previous years or periods, which means it was not possible to conclude that there had been an increase in consumption. Therefore, the data provided was not sufficient to put any responsibility for the alleged increase in drug use on the ruling. What is more, the survey did not indicate the relation between these results and the consumption levels of other countries. Thus, it was not able to show that Colombia was far below the global average levels of consumption, as was shown in the 2007 report by the United Nations Office on Drugs and Crime.

The proposal specified the addition of two subsections to article 49 of the Political Constitution, which read as follows:

"Possession and consumption of drugs or psychotropic substances is prohibited. With the purpose of prevention and rehabilitation, the law will establish educational, preventative or therapeutic health measures for those who consume the said sub-

stances. Through the decision of a body made up of legal and health sectors these measures could be accompanied by temporary restrictions to the right to freedom in establishments adapted to the purposes of prevention and rehabilitation. The restrictions on freedom that they could impose would not automatically entail the imposition of prison sentences.

Moreover the State will give special attention to dependent or addicted sufferers and to their families in order to strengthen them with values and principles that contribute to preventing behaviour that affects people's basic health care and, consequently, that of the community. It will regularly develop prevention campaigns against drug consumption and in favour of the recovery of addicts".

The procedure that followed the proposal led to some modifications being made to it. The text passed in the first debate by the First Commission of the House of Representatives eliminated the creation of the Treatment Tribunals in the first round together with the possibility of imposing measures of temporary restrictions of freedom. However, the prohibition of possession and consumption was maintained, accompanied by educational, preventative or therapeutic health measures. In the first round in the Senate the clause was added that the consumer willingly undergo the measures envisaged by the State. Comparative experience shows that compulsory treatment is a measure that does not work and can even, in certain cases, provoke a counterproductive result.

In June, the project was ready to launch the second debate. It made it to the last debate with the basic structure and content outlined in the first debate. The definitive text declared:

"Possession and consumption of drugs or psychotropic substances is prohibited, except for medical prescriptions. With the purpose of prevention and rehabilitation, the law will establish administrative meas-

ures and treatments of an educational, preventative or therapeutic nature for consumers of the said substance. The addict must give their informed consent in order to undergo these measures.

Similarly, the State will give special attention to dependent or addicted sufferers and to their families in order to strengthen them with values and principles that contribute to preventing behaviour that affects people's basic health care and, consequently, that of the community. It will regularly develop prevention campaigns against drug consumption and in favour of the recovery of addicts".

In this way, the debate clearly excluded the possibility of imposing restrictions on freedom. Although the prohibition of possession and consumption was maintained, the only clauses that remained established in the constitutional text were the imposition of educational, preventative and therapeutic health measures, always requiring a person's consent. Therefore, paradoxically, the amendment seems to lean more towards prevention than was intended by the government in their proposal.

EVALUATION OF THE AMENDMENT PASSED IN DECEMBER 2009

Generally speaking it can be said that the contents of the amendment could have been worse, but the evaluation is not positive. Although the Congress ruled out the possibility of imposing measures that are restrictive of freedom, the prohibition of possession and consumption was maintained. This poses problems because it disregards the regulations established in the ruling, and discards the outline set by the Court that, as stated earlier, would have enabled the drugs policy to become more flexible, in a country in which zero tolerance has not given convincing or even positive results.

There are two possible takes on this scenario. The first is to consider that by

establishing prohibition the amendment opens the path to repression, which would undoubtedly be a definite and undesirable step backwards. It would mean the amendment would be nothing more than an extra component in a general policy of repression, in one of the countries in which the drug policies have been strictly applied. Since drug trafficking began to be identified as a real problem, and Colombia as one of the biggest producers, the law has become more severe and the repressive practises increasingly harsher. Criminalization has become a fundamental instrument in the fight against drugs, yet it has not led to a reduction of drug production, distribution and trafficking. On the contrary, we remain one of the main producers and the drug trafficking networks do not appear to have been touched. This would therefore not be the most positive take on the amendment.

The second is a legal interpretation, which produces interesting results. According to this interpretation, the amendment is in any case a step backwards, because it maintains a fundamentalist vision on drug consumption by not acknowledging that recreational and non-problematic drug and psychotropic drug consumption does exist. However, the establishment of prohibition would not enable the imposition of penalties since the same legal body that was able to modify the constitution ruled this possibility out. A view of this kind would also enable, paradoxically, the amendment to establish a right to treatment for problematic users who wish to receive it. This would therefore be an interpretation in agreement with the constitutional regulations and would have the potential to produce positive results concerning drug consumption in Colombia.

By adopting the second interpretation, it could give an interesting turn to this story that tells of a step backwards and a missed opportunity for democracy. If the State would take prevention policies seriously, this would strengthen the bodies which fa-

vor rehabilitation and impose treatment as a problematic consumer's right, one to which they should have access when they voluntarily choose. They might then be able to promote a harm reduction policy, and by this route, achieve better results in the field of drug consumption.

NOTES

1. Researcher at the Centre for the study of Law Justice and Society– DeJusticia.
2. Director of the Centre for the study of Law Justice and Society – DeJusticia – and professor at the National University of Colombia
3. As a result, it declared articles 51 and 87 of Law 30 of 1986 unenforceable, and enforceable subsection J of article 2 of the same law, in which the dose for personal use is defined.
4. The term “psychotropic substances” was created in order to distinguish these from pharmaceutical industry products, and to prevent them from undergoing the same levels of control as those included in the 1961 Single Convention of Narcotic Drugs lists. It therefore represents a legal distinction between controlled substances, which is based more on political criteria than on scientific evidence. However, it is used in this document as it is widely used in legal texts and legislation. This term is in any case different from “psychoactive substances” which is a generic scientific term that includes different types of drugs, such as narcotics.
5. Article 2° of Law 30 of 1986 establishes that the following quantities can be considered a personal dose “a quantity of marihuana that does not exceed twenty (20) grams; of hashish marihuana that does not exceed five (5) grams; of cocaine or any cocaine-based substance that does not exceed one (1) gram, and of methaqualone that does not exceed two (2) grams”.
6. See: BBC World. (2009) *Debate on the personal dose in Colombia Available at:* http://www.bbc.co.uk/mundo/america_latina/2009/08/090825_1830_colombia_drogas_dosis_wbm.shtml (Consulted on December 11th 2009)

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Drug Law Reform Project

The project in which a number of Latin American judicial experts and legislators participate, aims to promote more humane, balanced, and effective drug laws. It was created with the realization that after decades of the same drug policy the expanding drug markets did not decline, and instead have led to human rights violations, a crisis in the judicial and penitentiary systems, the consolidation of organized crime, and the marginalization of drug users who are pushed out of reach of the health care systems. It's time for an honest discussion on drug policy strategy, aiming at significant changes in both legislation and implementation.

The project seeks to help shape the policy debate incorporating human rights and harm reduction perspectives into the drug policy debate and stimulating the debate about appropriate legislative reforms by pointing out good practices and lessons learned in areas such as proportionality of sentences, prison reform, and the status of the coca leaf in the international conventions. In addition to coordinating a series of informal drug policy dialogues and workshops in the region, our research team will conduct investigations of anti-drug legislation and the prison situation in seven key countries: Argentina, Brazil, Bolivia, Peru, Ecuador, Colombia and Mexico. We aim to see progress in drug policy reforms in Latin America and increased public support of the need for such reforms.



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