
POLICY COMMENTARY

Regulation of Illegal Drugs: State Control and Fragile Institutional Capacity

Zara Snapp¹, Khalid Tinasti² and Jorge Herrera Valderrábano¹

¹ RIA Institute, MX

² Global Studies Institute, University of Geneva, CH

Corresponding author: Khalid Tinasti (khalid.tinasti@gmail.com)

This policy comment analyzes the risks and issues that might arise from the legal regulation of illegal narcotic and psychotropic products or substances with risks to the health or safety of citizens. We focus on reducing these risks by providing existing examples through existing state-based control mechanisms, with a focus on developing economies with fragile or corruption-sensitive institutions. We discuss the need to implement regulatory models that minimize the risk of diversion and corruption from the legal to the illegal market within a regulated framework. The primary concern is to establish legal and regulatory frameworks and policies with sufficient resilience to mitigate and reduce the risks, and that are inclusive of broad regulation stakeholders and the influence of their interactions on regulation outcomes. Importantly, we look at the integration of current players of the illegal market into the legal one in order to enhance the social, economic and legal benefits of regulation towards the most vulnerable, while at the same time undermining the illegal market. We find that state institutions, including those of LMICs, have varying institutional capacity to regulate currently prohibited drugs, with the existence of regulation frameworks of legal drugs or hazardous and controlled goods. While the technical health and judiciary mechanisms exist to allow for more effective controls of drugs through legal regulation, political will is still lacking. We reviewed regulation models using a social justice focus, thereby allowing countries to establish frameworks for the inclusion of the populations most-affected by prohibition and depriving criminal organizations of local networks of trafficking.

Keywords: Fragile institutions; regulation; corruption; institutional capacity; social justice; prohibition

Introduction

The human, social, institutional and economic costs attributed to the current drug control regime based on prohibition have been broad and far-reaching over the last sixty years (Global Commission 2011). Each region experienced these 'unintended consequences' (UNODC 2008) in differing ways, from mass incarceration to escalating homicide rates, from the involvement of criminal proceedings in politics to almost failed states due to drug trafficking, production and distribution, and from a lack of access to controlled essential medicines to fueling the HIV, hepatitis and overdose epidemics (Inkster et al. 2012).

However, debates and implementation are mounting regarding the legal regulation of drug markets as a novel policy for drug control. The rationale is that rather than leaving control of these markets to criminal organizations, local and national governments propose and implement regulatory frameworks, which allows them to control the drug market and alleviate the consequences of prohibition. Some jurisdictions include a social justice framework for repairing some of the damage inflicted on specific communities through tax revenue or equity programs (California Attorney General 2016). In this policy comment, regulation refers to the rules and protocols that would guide a legalized drug market, from production to sale. Regulation is considered a stricter policy than legalization, setting rules that regulate legalization itself. Regulation is also seen in its wider context, beyond a bipartite relationship of the state as the regulator and private sector entities as the regulated, but also other stakeholders that exercise social control over the regulated entities, and

which influence policy outcomes in subtle and informal ways. Those other stakeholders include pressure groups, civil society, financial institutions, self-regulation within the regulated industries, and others, and their policy influence and interactions impact heavily on the regulatory model and its results (Gunningham et al. 2017). This policy comment is also based on the assumption that prohibitionist drug policies have failed in their objectives of 'eliminating or significantly reducing' the production, consumption and trafficking in illegal drugs, as indicated by evidence (Csete et al. 2016).

Currently, few of these policy innovations are being implemented in developing economies, oftentimes citing fragile institutions or a lack of state capacity to regulate, while developed economies are designing regulatory frameworks and building emerging industries in this field. This policy commentary briefly explores the risks and benefits of the legal regulation of currently illegal psychoactive substances, while highlighting examples of how regulatory schemes might be put into place in contexts where there are high risks of corruption, lack of rule of law and fragile institutions. The paper begins with the states' capacity to regulate goods and behaviors in society versus their capacity to implement prohibition, although the scope and quality of that regulation vary across contexts. It ends by highlighting policies that attempt to provide possible regulatory paths for governments, as they strive to strengthen institutions and increase state capacity through socio-economic opportunities, in order to address corruption and diversion risks effectively, while promoting social justice, human dignity and the rule of law.

Lessons from regulations of legal psychoactive substances

Over the last one hundred years, governments and state institutions have focused on implementing a prohibitionist regime, allocating resources, energy and policy focus towards eradicating illegal crops (Marulanda 2018; UNODC 2016), incarcerating those involved in the production, transit, distribution and possession of illegal psychoactive substances (Csete et al. 2016) and attempting to reduce the consumption of psychoactive substances through abstinence programs, forced treatment or legal sanctions (Kamarulzaman et al. 2015). The objectives of prohibition have not been met and alternatives are being explored to reduce the harms of the currently illegal, prohibitionist framework, with a focus on the potential positive impacts on vulnerable populations of alternative approaches, such as regulation.

Regulation is used here not only as a set of rules imposed by governments and to which noncompliance leads to punishment, but a broader regulatory theory that involves larger empirical contents. This leads to the treatment, in this policy comment, of regulation as collaborative, involving other actors and influences, but also several levels of rules that themselves can influence the regulator, the regulated entity and the outcomes of the regulatory model:

Supermarkets are one of the places where we can see or trace many of the fundamental changes in regulation that have occurred in states over the past few decades. The rise in private security services, private voluntary certification standards and the globalisation of regulation are some examples of such changes. [...] However, if we approached a study of regulation and supermarkets that confined the meaning of regulation to rules commanded by a sovereign for the purposes of guiding or restraining behaviour, we would miss or only glimpse many of the processes of which supermarkets were a part. We might not pick up, for example, the way in which supermarkets were setting standards for those in their supply chains and how farmers, if asked, would say that supermarkets were the new regulators. Moreover, if we wanted to strategically intervene in systems such as the food system, a rules-based definition might mislead us as to how best to intervene (Drahos et al. 2017).

Since industrialization, governments have succeeded, to varying degrees and within different jurisdictions, in regulating many products and behaviors that could be considered risky under specific circumstances (Haines 2017) while failing to provide the necessary attention to drugs or to provide the needed regulatory response to their market. Furthermore, the regulation of a transnational issue such as currently illegal drugs proves urgent, with globalization and international trade allowing for easier access of goods – legal and illegal – and people to markets around the world.

Furthermore, there are examples of effective regulation of psychoactive substances which can provide real-life models, notably alcohol and tobacco regulation policies, especially their public health components, dictated in part by national and historical influences. While both these substances represent public health threats, with tobacco being responsible for 7 million deaths per year and alcohol for over 3 million, their control policies have evolved in the last 20 years to protect public health, and reduce the impact of these substances on the health of communities. Tobacco, whose use is concentrated up to 80% in low- and middle-income countries (WHO 2018), presents a good example of a product regulation

aimed at reducing its use without imposing prohibition, mostly in developing economies. This policy comment does not minimize the difficulties in tobacco smoking or alcohol drinking reduction through public policies, yet it uses their modern control mechanisms as pathways to controlling currently illegal drugs through state regulations.

Alcohol control policy, as an inspiration to future regulation models of illegal drugs, includes relevant control strategies initiated by the state to influence alcohol consumption, with responses such as alcohol taxation, legislative restrictions on alcoholic beverage availability, age restrictions on purchasing, alcohol education and media information campaigns, measures affecting drinking within specific contexts and measures targeted at specific alcohol-related problems like driving (Edwards 1997). Taking into account 'the fact that alcohol-related problems are the result of a complex interplay between individual use of alcoholic beverages and the surrounding cultural, economic, physical environment, political and social contexts' (WHO 2004), alcohol policy refers to those measures put in place to control the supply and/or affect the demand for alcoholic beverages in a population, including education and treatment programs, alcohol control and harm-reduction strategies (Babor 2015).

Institutional capacity is an essential factor to consider when engaging in the legal regulation of risky products. The fragility of institutions does not, however, demonstrate success in imposing prohibition and, along with alcohol, tobacco regulations provide an interesting example. For many decades, tobacco cigarette production, sale and consumption were entirely unregulated. Growing awareness of the health risks of smoking were aided by the US Surgeon General Reports which were issued on a nearly annual basis beginning in 1964. Risks of secondhand smoke, in addition to increased social stigma around smoking, have contributed to further regulatory measures, which restrict smoking in public spaces (Paoletti 2012).

While policies for regulating the production and sale of tobacco face legal and social challenges in countries such as China or Indonesia, other developing economies have been able to better control them. Research shows that Uruguay's tobacco control strategy has had positive effects on reducing its appeal. From 2006 to 2011 Uruguay implemented several important tobacco control policies that went beyond its obligations under the WHO Framework Convention on Tobacco Control (FCTC). The policies included: a comprehensive ban on smoking in public places; a ban on advertising and promotion; several tobacco tax hikes; increasing the size of pictorial warning labels from 50% to 80% of the cigarette packs; implementing highly graphic warnings on the health effects of smoking; and a ban on multiple brand presentations. By analyzing the context of policy changes during the preceding period, researchers were able to measure the impact of these policies on key attitudes and behaviors. Figures show that surveyed smokers reported that the enhancement made them more likely to notice the warnings (from 65.1% to 70.9%), think about health risks of smoking more (increasing from 33.1% to 43.1%), and make them think about quitting (ITC Project 2014).

Lessons learned from the regulation of legal psychoactive substances, while not necessarily relevant for all illegal drugs and psychotropic substances, can provide a framework and a real-life experience for the regulation of cannabis, which represents about 70% of drug use globally (UNODC 2018).

Effective control of diversion and corruption

Other concerns that could be raised against the regulation of currently illegal drugs include the over-commercialization aspect of legalization, or the risk of financial interests of important private groups taking prominence over public health policies. In drug regulation – similar to the regulation of almost all markets – there is a need to focus on the types of corruption that can lead to a diversion of legal drugs to the illegal market, either by state or private agents: public corruption, when a public agent is offered private gain to divert the substances from the legal chain; national and international corruption, at the national level or with foreign agents; and active and passive corruption, either solicited by a private agent or accepted by a public agent, respectively.

Since corruption can greatly impact judiciary and police forces (among other state institutions), it is key to focus the goals of regulation on eradicating corruption, both individual and institutional, while supporting efforts to improve the rule of law and development. In some states, it is difficult or nearly impossible for governments to equal the leverage and power of drug trafficking organizations. For example, approximately 1.25 billion USD worth of cocaine flows through West Africa each year, leading to deep instability and undermining government efforts to develop social and economic opportunities (UNODC 2013).

In regulating a currently prohibited drug, a main risk of corruption is related to the diversion of drugs from the legal chain to the illegal one, which in criminal law is linked to the appropriation and misuse of private or public assets (Kaufmann et al. 2011). Developing economies have efficiently directed anti-corruption interventions, ranging from judicial and police laws to reforms aimed at strengthening institutional mechanisms for prosecuting and enforcing anti-corruption laws. Such mechanisms have been used to address the

corruption and contraband in tobacco trade, by reducing the interference of tobacco industry in national regulations to protect public health policies in countries such as Brazil, Kenya, Lebanon or Thailand (Sy 2017).

WHO has identified best practices for tackling corruption related to tobacco regulation, which could be implemented for the legal regulation of currently illegal psychoactive substances. For instance, Kenya implemented a pilot electronic cargo tracking system in 2011 to ensure exports actually exit the country, with a resulting increase in sales of up to 30% of duty-paid tobacco in Western border areas. Bangladesh's finance minister established a 'tobacco tax cell' in 2011, to increase monitoring of domestic production. Brazil introduced an automated cigarette production monitoring system in 2011, which led to a reduction in tax evasion of 100 million USD in 2008 (WHO 2018). To implement measures to control the supply chain and to cooperate internationally on a range of matters, WHO used the ratification of the FCTC, complemented by the Protocol to Eliminate Illicit Trade in Tobacco Products (WHO 2012). This framework commits its parties to establishing global tracking and tracing systems to reduce illegal trade of tobacco.

One can also look to the alcohol market for examples of lessons learned. In Latin America, approximately 21% of the alcohol market is illegal. This can be disaggregated, with 42% of the total illegal market being categorized as counterfeit, 39% contraband, 11% illegal artisanal and 8% surrogate (Euromonitor International 2014). This illegal alcohol market is not subject to quality control and, according to the research, operates largely within specific populations: low-income groups for contraband and counterfeit products; cultural groups for illegal artisanal produce; and primarily among those with problematic use and/or who are experiencing homelessness for the surrogate market. While it is concerning that those groups continue to put their health at risk by consuming a product that is not held to quality standards, most consumers purchase products within a legal framework, unlike currently illegal drugs. Considering which populations are most likely to consume counterfeit or contraband alcohol, there is an economic divide that could be overcome, leading to a potential shrinking of this illegal market. Such an approach is based on the hypothesis that regulated markets continue to face illegal ones for the same goods or substances, yet are successful when they reduce the illegal market into small proportions. For example, the medical regulation of heroin use through the introduction of legal heroin assisted-treatment in the city of Zurich resulted in the reduction of the number of new users by 80% between 1990 and 2002 and problematic use declined by 4% per year (Nordt et al. 2006).

The illegal market for cigarettes is even smaller than alcohol, with the global percentage remaining stable at around 9% of the total market, with some regional exceptions. Indeed, Latin America has a higher percentage at 16.7%, which could be related to a combination of factors, according to WHO, including weak governance, ineffective customs controls, corruption and complicity of manufacturers, or the presence of informal sectors (WHO 2018). Yet, the tobacco illegal market presents an interesting case study for future legal markets of currently illegal drugs. Indeed, it is estimated that 98% of smuggled illegal tobacco originates from legal manufacturers, who push it in the market and benefit from the revenues it generates, while using the existence of this illegal trade to counter effective public health regulations against tobacco smoking (The Tobacco Atlas 2018). Such issues need to be addressed specifically for products that will experience a legalization framework close to that of tobacco, notably cannabis.

These examples provide evidence on the capacity of state institutions, even with fragile institutions and lack of rule of law, to deliver better policy outcomes through legal regulation, which is not necessarily a policy 'silver bullet', than the prohibition of products for which demand cannot be eliminated. This also points to the fact that states need to identify their own specific paths to regulation, based on the initial situation they face in terms of prevalence of drug use, violence of the illegal market, or their control capacities: 'An important first step in developing feasible reform strategies is defining institutional functions and failures, in order to better understand where reform efforts should focus and it is often easier to circumvent or avoid weak institutions' (Graham 2018).

The case for regulation and social justice

While prohibition is the dominant drug control paradigm globally, some jurisdictions are using different policy models: regulating consumption through decriminalization such as in Portugal (Stevens et al. 2010); regulating the medical dependence of heroin in Switzerland, Germany and the Netherlands (Fischer et al. 2007); and regulating the cannabis market in Canada, Uruguay and ten states in the United States. The possibility of regulating with a social justice framework has become ever more relevant as a means of preventing the harms and 'negative consequences' of prohibition.

The most advanced examples of a social justice framework when regulating a psychoactive substance are the cases of cannabis in California and Massachusetts. The California legislation which was implemented on January 1, 2018, was drafted with a focus on repairing the harms of prohibition particularly towards affected

communities that had been most adversely impacted by mass incarceration, criminalization and marginalization. The state levied a 15% tax on both medical and adult use cultivators and an additional 10% excise tax on the sale of adult use cannabis (California Attorney General 2016). The goal is to use the legal market for social good through job training and placement, mental health services, legal services for formerly incarcerated people, economic development in marginalized communities and restorative justice.

After covering the cost of implementation, the first 10 million USD will be put towards a community reinvestments' grants program, which will increase by 10 million every year up to 50 million annually. These funds are specifically focused on 'communities disproportionately affected by past federal and state drug policies' (Drug Policy Alliance 2018b). Additional disbursements are budgeted for research (including possible substitution of cannabis for alcohol, and to study the relationship between driving impairment and THC levels) and community reinvestments. Following that distribution, 60% of the remaining funds are designated for youth treatment and education, 20% to local governments, and 20% to environmental restoration (State of California 2017).

Massachusetts has been at the forefront of ensuring social equity in their regulatory process, creating a specific program which builds a pathway to enter the cannabis industry with the overall objective to 'decrease the disparities in life outcomes for impacted individuals and improve the quality of life in areas of disproportionate impact' (Massachusetts Cannabis Control Commission 2018). The Massachusetts Cannabis Control Commission is composed of five members with expertise in public health, public safety, business/finance, government regulation, and social justice. In order to be eligible for the Social Equity Program, applicants must meet one of the criteria, including residing in areas that have been disproportionately impacted by prohibition for the past five years, have a past drug conviction as a resident of the state or has been married to or is the child of a person with a drug conviction and is a resident of the state (Massachusetts Cannabis Control Commission 2018). In addition, the Commission has determined that licenses for delivery services of cannabis and cannabis products will be exclusively provided to those that meet the above social equity requirements. The Global Commission on Drug Policy has said that Massachusetts has the '[farthest] reaching equity provisions than any legal cannabis market so far' (Global Commission 2018).

The opioid-related overdose crisis in the United States and Canada reflects the failure of a 'narrow' regulation model, a regulation that did not take into account the social determinants of the use of opiates, or the role of 'other' regulators and stakeholders, beyond the state. The crisis was spurred by a broad expansion of the medical use of opioids, which began in the 1990s as a legitimate response to the under-treatment of pain, but which was soon exploited by the unethical behavior of pharmaceutical companies eager to increase their revenue (Van Zee 2009). The rise in supply fed high levels of diversion among an economically stressed and vulnerable population. Initial reactions were to review the regulatory mechanisms to limit prescriptions and to introduce pills that were harder to manipulate (Global Commission 2017). The reduced supply of prescription opioids, however, drove an important minority of people with dependency to less expensive and more accessible street heroin. Under what has become known as the 'iron law of prohibition', cheaper and more potent opioids – including fentanyl and its derivatives – increasingly appeared on the market (Beletsky et al. 2017).

Uruguay, Massachusetts and California provide real-life examples for other jurisdictions on how to use the regulation of psychoactive substances as a means to promote social justice and repair the negative consequences of prohibitionist policies. Monitoring of the implementation of their models will allow other jurisdictions to avoid pitfalls in the longer term. Additional lessons will be learned from the emerging regulations in the United States, Canada and Mexico. While these provide examples for cannabis alone, states can determine pathways to access, tax and undermine other currently illegal markets through responsible regulation.

Conclusion

Governments know better how to mitigate risks related to potentially harmful products by legalizing them and appropriately restricting their access, rather than prohibiting them. While existing regulation models are not all efficient, and all countries do not achieve the desired outcomes in terms of control, their institutions are set up to provide rules, guidelines and oversight of the production, manufacturing, distribution, promotion and sale of items that might pose risks to their population. In developed and developing economies, most have the institutional capacity to regulate currently prohibited psychoactive substances through the existing frameworks of legal drugs or hazardous and controlled goods. A comprehensive approach is needed to address their vulnerability to smuggling, contraband and corruption, including the designated regulatory bodies, customs and law-enforcement along with the increase of transparency and accountability.

We reviewed the process of regulation of alcohol and tobacco mainly in Latin America, and the conditions under which the regulation of these substances allows for harm reduction related to their consumption but

also to their control, which could be applied to currently illegal substances. Without addressing a definite economic model for regulation, be it state monopoly, private sector initiatives or a public-private partnership, we reviewed regulation models with a social justice focus, allowing for developing countries to establish frameworks for a regulation inclusive of the populations most affected by the prohibition and legal coercion currently in place. Such an approach also supports undermining transnational organized crime and depriving criminal organizations of local 'workers and networks' of trafficking, because these populations would be able to join the legal drugs market.

Finally, we focused our analysis on regulation within a national framework. It is important to note, however, that the organizational capacity of state institutions will be different, depending on whether regulation is implemented in one country while prohibition is the prevailing international model, or if regulation is an international phenomenon accepted by all countries. Broad international agreement would allow for establishing an international framework to technically support countries with more fragile institutions in their implementation of a regulated drug market.

Competing Interests

The authors have no competing interests to declare.

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