



# LEGAL REGULATIONS FORA

*moving towards consensus*

13<sup>th</sup> – 15<sup>th</sup> March 2017

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« *Legal regulation protects health.* »

Kofi Annan, former UN Secretary-General, member of the Global Commission on Drug Policy.

# PRESENTATION.

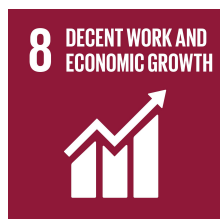
Two decades after the UNGASS of 1998 declared its desire to significantly reduce the presence of controlled psychoactive plants and substances around the world, the assessment of the failure is made obvious every year when the UNODC publishes its annual World Drug Report. While the inefficiency and counter-productivity of most of the current national anti-drug policies becomes clearer, the pathways for future legislation that enhance citizens' rights and equality while protecting public health and strengthening the rule of law remains unclear.

The **Legal Regulations Fora** has been designed to create at the crossroads of the global drug control system, the human rights treaties, the 2030 Agenda for Sustainable Development and citizen's aspirations, a momentum of open-ended discussions for stakeholders and interested parties to **together shape a practical and ethical set of guidelines for a future in which options for countries to codify the drugs issue will be open and diverse.**

Cannabis, the most used substance among the general population and youth, is often targeted as a priority in the reforms to undertake. Whether because of ease, emergency or by popular pressure, the reform of cannabis or other controlled substances' policies, depending on the local situation, clearly appears to be a necessity. While different scopes, markets and contexts in various countries may change priorities; legal frameworks and pathways for reforms are often similar for cannabis or other substances. Although it is acknowledged that each plant or substance deserves a proper framework, the Legal Regulations Fora seeks to move away from the matter of substances, to think about ethics, feasibility, means, tools, and pathways to follow.

Starting from the top, framing the issue within the legal international law, the fora will unfold towards the ground-level to achieve a comprehensive overview and *screenshot* of the movements seeking the legal regulation of controlled drugs around the globe. At each of its steps, the fora will sketch a collective answer to these two questions: **is it actually possible to reform, and how to do it?** Is it possible and doable to engage in the regulation of prohibited drugs, both for decision-makers and populations? If it is possible, then under what conditions will it succeed in its aim?

At the crossroads of the international drug control convention, the human rights treaties and the 2030 Agenda for Sustainable Development, this sharing of knowledge (in the home of diplomacy, peace and fairness) is the occasion to say at once "it is possible" and to sketch the "how" with transnational and multidisciplinary perspective.



## ACADEMIC CONFERENCE ON LEGAL REGULATIONS.

### *Human Rights and the Drug Control System: hierarchy of norms & flexibility for Member States.*

This event will provide the core foundation of the fora and an updated analysis of international law, sketching out how the sovereignty of each Member State to the drug control conventions can evolve, in order to implement their own contextual drug legislations.

Recalling recent groundbreaking research, the conference will provide a fresh reflexion about the hierarchy of norms between human rights legal instruments and the three international drug control conventions, stating that regulating national drug policies is permitted if it were to protect human rights (including the right to health) more effectively than a total prohibition on drugs.

The discussion will then focus on specific conditions outlined as critical to stay in line with the drug control convention while complying with the countries' positive human rights obligations: reforms must have nationwide democratic support and put emphasis on the protection of human rights, positively demonstrate the comparative advantages of that protection; systems implemented must in no way bring negative consequences to foreign countries; and reforms must actively discourage the promotion of the use of the regulated substance.

## I<sup>st</sup> FORUM OF AUTHORITIES ON LEGAL REGULATIONS.

### *The urgency to move ahead.*

Drug policy reform usually fails to find its way to a political consensus, falling too often into the jeopardized struggles and divide of national political debate. As modernizing drug policies transcends political labels, the need to take the heat out of the political struggle and come up with a consensual reform is crucial.

This **I<sup>st</sup> Forum of Authorities**, set within an evaluation of repressive policies, will focus on the methodologies that span the political struggle and try to reach a widely acknowledged, accepted and consensual reform among the largest number of political forces, and throughout the broadest social strata.

## II<sup>nd</sup> FORUM OF AUTHORITIES ON LEGAL REGULATIONS. *Building consensus on how to regulate.*

With the two previous events having set a legal framework, using the SDGs as moral guidelines, and opening the possibility of a consensual reform, this 2<sup>nd</sup> **Forum of Authorities** will explore different approaches of attempted and successful drug policy reforms (in particular those to cannabis) to answer the question: what pathways shall a country take if it wants to reform?

Thanks to the perspectives of authorities and in particular parliamentary work, this event aims at extracting the essential pieces from the national approaches to policymaking led by local idiosyncratic specificities, to come up with cross-cutting policy practices and an ethical base that can enhance the comprehensiveness of a reform.

## CITIZENS FORUM ON LEGAL REGULATIONS. *Involving broad stakeholders for a comprehensive reform.*

The role of civil society is essential for widely-accepted reforms, particularly those that have expertise on the matter (from law enforcement or local authorities, health, social and cultural workers to affected populations) and these will be outlined in the **Citizens Forum**.

Interactions and complementarities between bottom-up proposals and inputs into top-down processes will be stressed, while key issues and meaningful inputs brought by civil society organizations within drug policy reform processes will be presented.

## LEGAL REGULATIONS EXHIBITION. *Building consensus around what works.*

Supervised drug consumption programs are now implemented in 10 countries, for years in some States, while nascent in others, and a few nations are on their way to implement experimental programs. In each of these countries, a comprehensive dialogue and a positive presentation of these programs have been a key element in allowing a large acceptance of the sites, allowing for increased health care and protection for the people who use drug in the most vulnerable conditions.

Initiated by civil society (users or healthcare workers), supervised drug consumption programs have been deeply questioned and debated by national authorities, before step by step getting implemented, thus finally gaining acceptance at the United Nations level by complying with international law in its finality of protecting health, reducing harm and fighting blood-borne diseases.

The exhibition will present photographs and a serie of indicators showing the positive health and social outcomes of these programs.

## Annex I. Drug policy reform as a tool to fulfill the 2030 Agenda for Sustainable Development.

24 specific SDGs targets have been identified as potentially gaining empowerment thanks to the reform of drug policies at the national level.

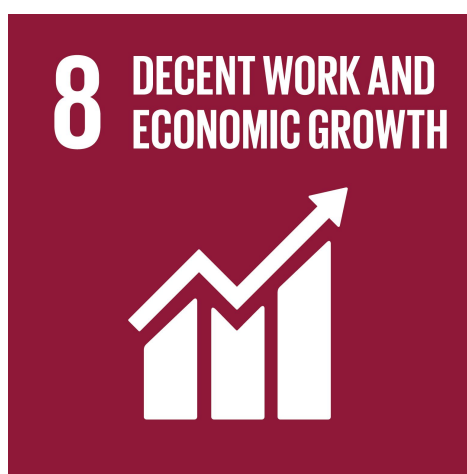


**3.4** By 2030, reduce by one third premature mortality from non-communicable diseases through prevention and treatment and promote mental health and well-being.

**3.5** Strengthen the prevention and treatment of substance abuse, including narcotic drug abuse and harmful use of alcohol.

**3.6** By 2020, halve the number of global deaths and injuries from road traffic accidents.

**3.d** Strengthen the capacity of all countries, in particular developing countries, for early warning, risk reduction and management of national and global health risks.



**8.3** Promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services.

**8.5** By 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value.

**8.6** By 2020, substantially reduce the proportion of youth not in employment, education or training.

**8.8** Protect labour rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment.



**10.1** By 2030, progressively achieve and sustain income growth of the bottom 40 per cent of the population at a rate higher than the national average.

**10.2** By 2030, empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status.

**10.3** Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard.

## 11 SUSTAINABLE CITIES AND COMMUNITIES



11.4 Strengthen efforts to protect and safeguard the world's cultural and natural heritage.

11.a Support positive economic, social and environmental links between urban, per-urban and rural areas by strengthening national and regional development planning.

## 16 PEACE, JUSTICE AND STRONG INSTITUTIONS



16.1 Significantly reduce all forms of violence and related death rates everywhere.

16.2 End abuse, exploitation, trafficking and all forms of violence against and torture of children.

**16.3 Promote the rule of law at the national and international levels and ensure equal access to justice for all.**

16.4 By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime.

16.5 Substantially reduce corruption and bribery in all their forms.

16.6 Develop effective, accountable and transparent institutions at all levels.

16.10 Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.

16.a Strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime.

**16.b Promote and enforce non-discriminatory laws and policies for sustainable development.**

## 17 PARTNERSHIPS FOR THE GOALS



17.13 Enhance global macroeconomic stability, including through policy coordination and policy coherence.

**17.14 Enhance policy coherence for sustainable development.**

17.17 Encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships.

## ***Annex II. “Regulation of cannabis cultivation and trade for recreational use: positive human rights obligations versus UN Narcotic Drugs Conventions.”, Executive summary of *International law and cannabis II*.***

Are authorities permitted under international law to regulate the cultivation of and trade in cannabis for recreational use? In our first book on International law and cannabis (Van Kempen & Fedorova, Kluwer 2014), we conclude that this is not the case when the question is considered strictly from the internal perspective of the relevant UN Narcotic Drugs Conventions (the UN 1961 Single Convention and the UN 1988 Illicit Traffic Convention). Whether the answer is different when considered from the external perspective of international human rights conventions (ICESCR, ESC, ICCPR, ECHR<sup>1</sup>) is the subject of the current study. From this external perspective there is a possibility to regulate, even by legalization, the cultivation of and trade in cannabis for the recreational user market.

**Potential relevance of human rights obligations.** Pleas in favour of regulating cannabis cultivations and trade for recreational use are often based on arguments that relate to the interests of individual and public health, the security of citizens and crime control. The essence of these arguments is that regulation of cannabis can better protect these interests than a prohibitive approach. This is interesting from a human rights perspective because health, security and crime control interests are also covered by the umbrella of human rights. The right to health, the right to life, the right not to be subjected to inhumane treatment and the right to privacy are the source of the so-called positive obligations for the fulfilment of the stated interests. Positive human rights obligations require states to take measures in order to guarantee fundamental human rights of individuals. Central to this study are the obligations to improve actively individual and public health, and to protect actively the lives and physical and mental integrity and privacy of citizens. The so-called negative obligations – that is: obligations that stipulate that a state has to abstain from unlawful interference with rights guaranteed under the human rights conventions – are less relevant for the question whether states are allowed to permit cannabis for recreational use through regulation.

**Central research questions.** In this second book on “international law and cannabis”, the first central question is whether states – on the basis of their positive human rights obligations for the protection of individual and public health, the security of citizens and crime control – can be obligated to regulate cannabis cultivation and trade for recreational use if such regulation ensures a better protection of these interests than a prohibitive drug policy in conformity with the UN Narcotic Drugs Conventions. To the extent that such an obligation can be established, the second question arises whether states can or must prioritize their positive human rights obligations rather than their obligations under the drugs conventions. This book approaches this second question from two perspectives: the so-called conflict approach and the so-called harmony approach. More specifically this study discusses the different rules for solving conflicts between treaty provisions, including *lex specialis* and *lex prior*; it addresses the relevance of the priority rule in article 103 of the UN Charter and the concepts such as *jus cogens*, *erga omnes* and integral obligations; and finally it examines the substantive weight of human rights as compared to other international legal norms. Moreover, on the basis of the principles of systemic integration and the presumption against conflict, this book explores in what way the conflicting obligations under the international human rights conventions and the UN Narcotic Drugs conventions can best be reconciled or harmonized.

**Conclusions of this research.** Both questions are answered in the affirmative. The regulation of cannabis cultivation and trade for recreational use because of the interests of individual and public health, security and crime control can find its basis in positive

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<sup>1</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR), European Social Charter (ESC), International Covenant on Civil and Political Rights (ICCPR), and European Convention on Human Rights (ESHR).

human rights obligations that arise from international human rights conventions (Chapter 2). Under international law, states must give priority to their human rights obligations over and above any conflicting obligations under the UN Drugs Conventions (Chapter 3). This means that states have the possibility under international law to regulate cannabis despite their obligations under the UN Drugs Conventions. However, this applies only when certain conditions are met (Chapter 4).

**Primary conditions for regulating cannabis cultivation and trade for recreational use.** The possibility for states to regulate cannabis cultivation and trade in view of their positive human rights obligations only exists if at least the following conditions are met:

**1. Relevant human rights based interest.**

First, the regulation of cannabis cultivation and trade should protect interests that are relevant from the perspective of positive human rights obligations. Otherwise, the potential applicability of such obligations is out of the question.

In the discussion about the possibilities of regulating cannabis cultivation and trade, several arguments in its favour are presented that – assuming their empirical validity – are supported by one or more of those positive obligations. These relevant arguments hold that it is desirable to regulate cannabis because such regulation would better protect the following interests: safeguarding the quality of cannabis; monitoring the cannabis chain; reducing peripheral crime (murder, manslaughter, causing death by negligence, abuse and assault and threats); protection of health, life and the physical and mental integrity of local residents (e.g. against fire or legionella contamination that results from the illegal and unsafe installation for illicit cannabis plantations); protection of health of juveniles; reducing substantial nuisance and damage that directly affects the enjoyment of people's private lives (due to, for example, a terrible stench, noise, fire and legionella infection) and the separation of the soft drugs market and the hard drugs market (which would divide the simultaneous availability of and access to soft drugs and hard drugs).

We have come to the conclusion that regulation of cannabis cultivation and trade for recreational use, under certain conditions is to be considered a positive obligation for the protection of human rights. This conclusion is based on the right to health (ICESCR and ESC) and the right to life, the right not to be subjected to inhumane treatment and the right to privacy (ICCPR and ECHR).

**2. The claim of a more effective human rights protection must be substantiated.**

The conclusion that regulation of cannabis cultivation and trade for recreational use can indeed be based on positive human rights obligations does not mean that such regulation is automatically permissible. For this purpose, the state should – in a sincere and convincing manner – demonstrate that regulation would better fulfil the relevant positive human rights obligations (derived from the rights to health, life, physical and mental integrity and privacy) than an approach in which the cultivation and trade of cannabis is prohibited and combatted. Otherwise, it would not be possible to base the regulation of cannabis on positive human rights obligations and the state would be obliged to fully honour its obligations under the UN Narcotic Drugs Conventions.

Thus, for the potentially relevant positive human rights obligations to be applicable, at least two conditions must be met. First, the regulation of cannabis cultivation and trade for recreational use should provide for a more effective protection of human rights than a policy that is in accordance with the drugs conventions (the requirement of greater effectiveness). Second, a state that aspires to regulate cannabis should at a minimum substantiate that this regulation would actually lead to a more effective protection of human rights than a prohibitive and repressive approach (the requirement of substantiation i.e. plausibility). The substantiation by the state required for this purpose should be based on genuine analysis, argumentation and considerations that are convincing and that are, as far as possible, based on available scientific and other research data.



There is also the question whether a state that intends to regulate cannabis cultivation and trade because of its positive human rights obligations should first collect data on the effects of such regulation through pilot studies rather than introduce nation-wide regulation without any further ado. We conclude that it is up to the state to make a considered and substantiated decision on whether such pilots are meaningful and desirable.

### **3. National democratic support and decision-making.**

A state's conclusion that regulation of cannabis would lead to more effective protection of human rights should be based on the democratic decision-making process in that state. As states and their societies have their own idiosyncrasies, peculiarities and constellations, the most effective approach in one state does not necessarily work in another state. It is partly for this reason that every state – in accordance with the so-called principle of primarity – in order to fulfil its treaty obligations is first and foremost responsible for determining which means are most adequate. Moreover, in the context of the right to health, the importance of participation of the public in the decision-making process concerning health related issues is emphasized. Furthermore, a measure that cannot count on public support will in many instances also prove to be less effective than in a case where such support exists. Local authorities – or individuals or private organisations – as a rule do not possess the possibility to force national authorities (both the administration and the legislator) to regulate cannabis cultivation and trade when national authorities refuse to take that step.

### **4. No disadvantage for other states: a closed system.**

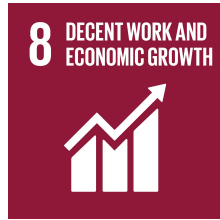
When a state proceeds with regulation of cannabis cultivation and trade for recreational use, it should make sure to monitor the regulation to such a degree that other states are not confronted with negative consequences, most importantly with the export from the regulating state. The protection offered in that sense to other states should not be less – and preferably even more effective – than that offered under the prohibitive approach that fully accords with the drugs conventions. Therefore, the state should create a closed national system and/or chain for cultivation, trade and possibly also use of cannabis.

### **5. The obligatory policy of discouragement.**

When a state proceeds with regulation of cannabis cultivation and trade for recreational use, it should create an adequate policy to ensure discouragement, limitation and increased public awareness of the risks associated with recreational use of cannabis. This is necessary not only to ensure that the national drugs policy adequately protects human rights; the right to health itself creates an obligation to that end. When developing such a policy of discouragement, the state needs to consider what measures are most effective. In this context it is important to underline that obligations do not have to be implemented so as to backfire in the end.

**Summarizing conclusion.** This legal research shows that it can be possible for states to regulate cannabis cultivation and trade for recreational use by legalization in accordance with international law in spite of the UN Drugs Conventions. To this end, the state should – in a sincere and convincing manner – demonstrate that regulation would constitute a better protection of human rights than a prohibitive approach in accordance with the drugs conventions. These human rights first and foremost concern positive obligations deriving from the rights to health, life, physical and mental integrity, and privacy to the extent that these obligations serve to ensure individual and public health, security and crime control.

The regulation, however, will have to satisfy several requirements and must be accompanied by a policy that discourages recreational cannabis use. If a state is able to satisfy these conditions, under current international law it can legitimately prioritize the human rights obligations over and above any conflicting obligations arising from the UN Narcotic Drugs Conventions.



*« The way that war on drugs is being overtaken is as much, or even more harmful than all the wars that are waging in the world. It's time to change our strategy. »*

Juan Manuel Santos Calderón, president of Colombia, Nobel Peace Prize laureate 2016.

