

Room for Manoeuvre

***Overview
of comparative legal research into national drug laws
of France, Germany, Italy, Spain, the Netherlands and Sweden
and their relation to three international drugs conventions***

by
Nicholas Dorn and Alison Jamieson

Based on research by an international team
Yann Bisiou (France), Tom Blom (the Netherlands),
Lorenz Böllinger (Germany), Maria Luisa Cesoni (Italy),
José Luis de la Cuesta and Isidoro Blanco (Spain),
and Josef Zila (Sweden)

A study of
DrugScope, London

For
The Independent Inquiry on The Misuse of Drugs Act 1971, London

March 2000

Contents

Preface: purpose and acknowledgements	page ii
PART A. COMPARATIVE HIGHLIGHTS	page 1
Introduction	
Synthesis table	
Commentary	
Developments in 1999	
PART B. INTERNATIONAL OBLIGATIONS	page 8
The international conventions	
Remarkable aspects of national policies in the light of the conventions	
Importance of national decision making	
PART C. THE UK ROOM FOR MANOEUVRE	page 14
1. Possession: imprisonment not required by international law	
2. Possession: civil penalties could be considered as alternatives to action under criminal law	
3. Social supply or 'sharing': considerations that could arise from changes regarding possession	
SUMMARY	page 23

PREFACE: PURPOSE AND ACKNOWLEDGMENTS

This Overview has been drawn from 'a comparative study of the legislation on illegal drugs across six European Union States... In order to inform the Independent Inquiry's investigation of the room for manoeuvre in altering UK drug legislation'.¹ The legal systems to be examined were those of France, Germany, Italy, Spain, the Netherlands and Sweden.

The study was contracted to and carried out by ISDD, which from April 2000 becomes a constituent part of DrugScope, London. The work was done in 1998 and 1999. In each of the six states during 1998 a national legal expert wrote a draft paper about drugs legislation in their country of residence. An international expert researched and wrote about the international drug conventions and the extent to which they constrain signatory states' choices in drug legislation. A seminar followed in London in the autumn of 1998, attended by the experts and members of the Independent Inquiry, at which the features of national drug laws and the 'room for manoeuvre' in the context of international and European law were discussed. Following the London seminar, the experts re-wrote their papers and a comparative overview was written. The resulting Full Report was made available to the Independent Inquiry. Further questions and a request for updated material were put to the experts. Drawing upon all this, a Supplementary Report was submitted in summer 1999. The Independent Inquiry then specified the form in which it wished to receive the present Overview. Each of the contributors has had an opportunity to make comments on this Overview and each made final comments in January 2000.

We are grateful to the national legal experts for their sustained efforts: Yann Bisiou (France), Tom Blom (the Netherlands), Lorenz Böllinger (Germany), Maria Luisa Cesoni (Italy), José Luis de la Cuesta and Isidoro Blanco (Spain), Josef Zila (for Sweden) and Alison Jamieson (international work and co-editing). Nicholas Dorn coordinated the study. Thanks are also due to the Independent Inquiry for the opportunity to carry out this work. Nevertheless, this work does not represent a point of view or policy of the Independent Inquiry, the Police Foundation, or DrugScope. Responsibility for accuracy, interpretation and appraisal of options for the future is shared between the editors and contributors. A reference copy (350 pages) of the Full Report as of summer 1999, including the international chapter and six national chapters, is available for consultation in the library of DrugScope. A revised version, incorporating the present text, may be published in 2000.

DrugScope Fax: 0121 928 1771 <http://www.drugscope.org.uk>

¹ From the contract by the Police Foundation, on behalf of the Independent Inquiry into the Misuse of Drugs Act 1971.

PART A. COMPARATIVE HIGHLIGHTS

INTRODUCTION

It might be thought that all modern states have approximated their drugs legislation. This turns out to be generally true of legislation in relation to trafficking. However, as this study demonstrates, European states vary quite considerably in their legislation on drug possession and related issues, including self-supply (eg through self-cultivation) and 'social supply' or sharing of drugs amongst users. In some states, this middle ground is towed 'upwards' (towards supply) and becomes criminalised, whilst in other cases it is towed 'downwards' by its association with drug use, and middle ground acts are not criminalised.

The result is that, depending on where in Europe one commits an act such as possession of drugs for personal use, the act might be disregarded, or proceeded against administratively/civilly, or prosecuted under criminal law.

DISAPPROVAL WITHOUT INTERVENTION	CIVIL/ADMINISTRATIVE INTERVENTIONS	CRIMINAL LAW INTERVENTIONS
<p>Two versions of 'decriminalisation', with differing legal bases, eg:</p> <p>* Prosecutory tolerance: laws prohibit and criminalise in principle, but the policy is for prosecutors to take no action (eg possession of small amounts in the Netherlands).</p> <p>* Legislative tolerance: laws do not even prohibit (eg drug <i>use</i> [not possession] in Germany, Italy and the Netherlands)</p>	<p>For example, in Spain, possession for personal use attracts administrative sanctions (not criminal penalties).</p> <p>In Italy, possession is an administrative infringement, regardless of quantity (unless seen as trafficking, when criminalised).</p> <p>Administrative sanctions can be relatively minor, eg small fines, or substantive & lasting, eg loss of licences connected with one's livelihood.²</p>	<p>The criminal law can lead to:</p> <ul style="list-style-type: none"> - sanctions short of imprisonment, - sanctions that may include imprisonment for more serious cases, - mandatory imprisonment (no examples in the European states studied here) <p>Criminal law can be allied with diversion options or with compulsory confinement/treatment.</p>

It should be emphasised that, in practice, the responses of police, prosecutors, courts and tribunals will be influenced by the general 'climate' in a particular regional or locality and by the circumstances of the particular case. It is hazardous to generalise about the implementation of legislation. Table 1 and the commentary on the following pages give further information. We then turn to the relationship between national approaches and the international conventions, and then to the room for manoeuvre in the UK.

² Procedural safeguards of the ECHR apply to all interventions, whether defined in national law as being administrative, civil or criminal or mixed.

Table 1. Synthesis table: drug-related acts that are variously allowed, prohibited, administratively responded to or criminally punished in six European states *Source: Full Report, 1999, condensed from national experts' chapters*

	IT	FR	ES	NL	GM	SW
USE Drug use <i>per se</i> (ie, in private)	Not prohibited after 1993 referendum. (Prohibited only between 1990 and 1993; never criminalised)	Prohibited and criminalised. Up to 1 year or fine or diversion to medical treatment	Unlawful, but not punishable	Not prohibited but see below	Not prohibited	Prohibited and criminalised. Law provides maximum of 3 years but, in practice, fine or 6 months prison.
Public drug use	As above (not differentiated)	Not differentiated	A serious administrative offence (fine, forfeiture, etc)	A 'lesser offence' in some local jurisdictions	Not an offence. Admin order against nuisance; or treat as possession or supply	Not differentiated
POSSESSION Possession <i>per se</i> (in private)	Prohibited. Admin infringement regardless of quantity (unless seen as trafficking, when criminalised)	Possession for own use has no legal definition in French law. Possession is seen either in connection with use or supply.	Unlawful but not an administrative offence unless in public (c.f. below).	Prohibited & criminalised: expediency principle means non-prosecution in practice	Criminalised, but prosecutorial or pre/post-verdict de-penalisation is possible for small amounts	As for use, although prison more likely (up to 3 years) if quantities indicate supply
Possession in public places	As above	As above	Serious administrative offence	As above	Not differentiated	As above
Obtaining a prohibited drug	As above - except for cultivation, which is criminalised	As above	No criminal offence if for personal use; criminal offence if for re-sale or trafficking	Criminal offence - including cannabis cultivation (leads to confiscation)	Criminal offence (including cultivation of cannabis or psychoactive mushrooms)	As above

Table 1 (cont.)

	IT	FR	ES	NL	GM	SW
TRAFFICKING Small/retail: giving or selling to a drug user	Criminal offence: up to 4 years for soft drugs, 6 years hard (<u>unless</u> eg sharing between users in a group = an administrative infringement, like private possession)	Misdemeanours: up to 5 years	Generally, criminal offence: soft drugs 1-3 years, hard drugs 3-9 plus fines.	Giving/ exchanging may be treated as supply: up to 2 years imprisonment	Users and others selling small amounts: 'drug trade' misdemeanours, up to 5 years.	Up to 3 years
Medium/ distribution: non-small amounts (eg not retail sale)	Criminal offence, up to 6 years for soft drugs, up to 20 years for hard drugs	Intermediate between above and below: 10 years (including for users bringing drugs into the country)	Intermediate between above and below	Up to 12 years (max under the Opium Act). Expediency principle: coffeeshops a special case (non-application of criminal law)	Possession/ traffic of 'non-small amounts' up to 15 years.	Intermediate penalties (see above and below)
Big, or Organised Crime, or otherwise aggravated	Up to 30 years for aggravated circumstances of trafficking; 20-24 years basic penalty for directing an organised trafficking group	Up to 30 years, or life, for being a manager, or taking part in organised importation, exportation or production	First degree aggravations, for big quantities or members of crime groups: soft drugs 3-4.5 years, hard 9-13.5 years. Second degree, for leaders or extreme gravity: soft drugs 4.5-6.75 years, hard drugs 13.5-20.25 years. Plus fines.	Parallel organised crime charges almost always applied in cases of international trafficking, adding 1/3 of Opium Law penalty: total then up to 16 years	Minimum 5 years for trafficking within a gang, up to a maximum of 15 years	Up to 10 years if criminal organisation, unscrupulous, large value.

COMMENTARY

Laws on drug use (consuming drugs, being a user)

The legal status of drug use (note we are talking here of the status of the person who takes drugs) varies considerably from state to state. (For possession, see separately below.) Three of the six countries studied prohibit drug use and the other three do not. Italy, the Netherlands and Germany do not prohibit drug use *per se*. Spanish law says that drug use is unlawful, but the law provides for no punishment unless it is done in public, when administrative sanctions apply. By contrast, Sweden and France both prohibit and criminalise drug use. This means that a person may be found guilty and punished under criminal law as a result of past drug use.

Possession: prohibition does not always equal criminalisation

When it comes to the legal status of possession *per se*, all countries studied prohibit it, but not all make it a criminal offence. Here we are talking of possession rather than trafficking - eg, possession of small amounts, or possession in circumstances which indicate that the drugs are for one's own consumption, or at least are not being sold on for a profit. Possession can mean to have the drugs in one's hand, clothing, car, or other property, or to have effective control over them by having a key to a box containing them, etc.

In relation to possession in this sense (possession by users, normally for the purposes of own use), four of the six countries studied prohibit it - Italy, the Netherlands, Germany and Sweden - but only the last three criminalise it. Italian law makes possession an administrative infringement. In Spain possession for one's own use is not lawful but it is not an offence unless it occurs in public, when it attracts administrative sanctions only. Of the six states, France is the odd one out in the sense that its law does not define >possession for own use=. In practice, possession is responded to as evidence either of drug use, (which is criminalised), or of trafficking. So although *strictly speaking* it may be correct to say that French law does not prohibit or criminalise possession for own use, *in effect* it does both.

Obtaining drugs: the ground between use/possession and supply

Using a drug implies obtaining it. This can be legally problematic. Obtaining implies *either* the existence of another person who gives or sells the drugs (and so may be treated as a supplier), *or* manufacture or cultivation by the user him/herself (which in some legal systems may be treated as a supply offence). This raises a problem which different national

legal systems resolve in different manners.

In Spain, the case law generally does not consider it a criminal offence to obtain, by purchasing or by cultivation, a prohibited drug as long as it is not done in order to supply. Although both cultivation and purchasing are included in the scope of acts criminalised by the legislation, for constitutional reasons the Spanish jurisprudence and judicial practice consider that these acts should not be punished. However, possession in public, which would be the case if the obtainer had to go to the point of supply, would be a >serious administrative offence=. The balance of case law holds that, having obtained a drug, it is not an offence for a user to share it out among friends or other habitual drug users if there is no danger of a wider dissemination and if the distribution is not done in public.

In Italy, obtaining a drug has the same legal status as possessing it. In this case it is an administrative infringement, regardless of quantity (unless seen as trafficking). Furthermore, the act of giving the drug to other users, as long as done *in a group*, is - in certain conditions - treated in the same way. Thus current legal interpretation has it that it is not a criminal offence in Italy (i) to obtain a drug for oneself, (ii) to purchase on behalf of a group, (iii) to purchase together with a group of users or, (iv) to share out drugs between users without payment. However, cultivation for own use is criminalised, following a decision of the Constitutional Court.

In the Netherlands, possession and supply are prohibited and criminalised as envisaged in the international drug conventions. However, the expediency principle is applied in most cases of possession and in relation to supply of small quantities of cannabis through the coffeeshops. The coffeeshops are tolerated as long as they stick to cannabis and do not cause community nuisance problems, although their activities even in relation to cannabis are strictly speaking illegal. A similar policy applies to cultivation of cannabis in the home on a small scale, which is tolerated - as long as neighbours do not complain of the pungent smell, in which case the plants may be removed by police (as prohibited objects). Commentaries that refer to a decriminalisation of possession or legalisation of supply of cannabis or of other controlled drugs in the Netherlands are incorrect.

DEVELOPMENTS DURING 1999

France: harm reduction in law enforcement?

On 16 June 1999 the French Government presented a three year plan against drugs. Emphasis has been placed on prevention, harm reduction

and treatment for addicted persons. Regarding penal policy, the law of 1970 has not been modified - drug use is still a criminal offence - but the Minister of Justice invites prosecutors to avoid imprisonment and to promote treatment. In relation to the use of soft drugs (ie cannabis) this translates into prevention and information in the context of diversion away from the criminal justice system. As far as punishment is concerned they will, at most, be fined. The police and the criminal justice system generally must facilitate harm reduction, as far as users are concerned.

Germany: tipping towards decriminalisation?

In late 1998 a new parliamentary coalition of the Social-Democratic and Green parties came to power - the red-green government. The German national expert in the comparative study reports that, in spite of calls from the Green Party and from about 50% of Social Democratic Party members, during 1998 and 1999 the new coalition has warded off appeals to reform drug policy. However the new ministers of Justice, Interior and Health have pronounced their willingness to encourage further research and discussion in this area. Commitments have been made to 'health rooms' well-equipped and medically supervised institutions for safe self-injection of heroin and to experimental heroin dispensing programs for scientific study. The new government relocated the person charged with drug affairs (the so-called drug czar) from the Ministry of the Interior (dealing with criminal law matters), to the Health Ministry. The new appointee, Mrs Christa Nickels (Green Party) favours law reform, eg legalisation of cannabis or at least legalisation of medical cannabis. She has encouraged the Association for Medical Cannabis to bring an action at the Constitutional Court for legalisation of medical cannabis. Mrs Nickels also began to re-constitute the Nationaler Drogenbeirat (national drug council) which has hitherto consisted exclusively of experts favouring the 'strict abstinence principle'.

Spain: private possession now administratively sanctionable?

Whilst political developments have been towing German drug policy in a more liberal direction, Spanish legal decision-making has tightened up what has been one of Europe's most liberal drug control regimes. After the Decision of 28 September 1999 of the Third Section of the Supreme Court, a new interpretation of the law in relation to drug possession for own consumption has arisen.³ Until that Decision, the majority of legal scholars

³ The Decision was made in 1998 but did not become generally known until 1999. See critical commentary in J.J. Queralt, 'La tenencia de drogas para autoconsumo', Comentario a la sentencia del Tribunal Supremo (Sala 30 Secc. 60) de 28 de septiembre de 1998, *La Ley*, 4770, April 1999.

had considered that, under the law of 1992, public consumption was administratively sanctionable but private consumption was not. That interpretation had on a number of occasions been reflected in written instructions to the police (these varied in different parts of Spain). The new Supreme Court Decision defines any kind of possession as being administratively punishable, including possession in private.

We now turn to the international context, and ask how different legal systems reconcile their diverse national laws with the three international drug conventions.

PART B. INTERNATIONAL OBLIGATIONS

THE INTERNATIONAL DRUG CONVENTIONS

The six European states compared in this study, plus the UK, have all ratified the three international drug conventions.⁴ What these conventions say is in some places very clear and in other places is open to a variety of interpretations.

Use

The provisions of the 1961 and 1971 conventions as far as use and possession are concerned are set out in Table 2.

On the use of narcotic drugs as defined by the Single Convention of 1961, states are required 'to take steps to limit [drug use] exclusively to medical and scientific purposes'. Perhaps this could or should be understood as a requirement for use to be prohibited in national legal systems - but such a requirement is not spelled out. States are not required to prohibit or 'not permit' use of these drugs. In any case, states are not required to establish sanctions or punishments, criminal or otherwise, for use of these drugs. Criminalisation of their use is certainly not evident in the words of UN 1961, nor indeed in its 1971 and 1988 successors.

On the use of psychotropic drugs (as defined by the 1971 Convention) states are required to 'limit' use - and also to prohibit all use of such drugs (except for scientific and very limited medical purposes). States are also required to establish sanctions or punishments for 'any action contrary to a law or regulation adopted in pursuance of [UN 1971]', subject to constitutional limitations. This rather broad and unspecific provision could conceivably be read as meaning that use of such psychotropic drugs must be punishable (which would not necessarily mean criminalised) but this interpretation was not encountered in this study nor in the literature.

⁴ The Single Convention on Narcotic Drugs, 1961, Done at New York on 30 March, as amended by the Protocol Amending the Single Convention on Narcotic Drugs, Done at Geneva on 25 March. The Convention on Psychotropic Substances, 1971, Done at Vienna at 21 February 1971. United Nations Convention Against Illicit Traffick in Narcotic Drugs and Psychotropic Substances, 1988, Done at Vienna on 20 December. For fuller details and more extensive commentary, see ISDD's Full Report.

Supply, and possession with intent

The 1988 convention focused on drug supply and related acts, and its provisions generally update those of the 1961 and 1971 conventions on these issues. In relation to both narcotic and psychotropic drugs, the 1988 convention requires that:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic laws, when committed intentionally: (a) (i) The production, manufacturing, extraction, preparation, offering, offering for sale, distribution, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychoactive substance contrary to the provisions of the 1961 Convention, the 1971 Convention as amended or the 1971 Convention; (ii) The cultivation of opium poppy, coca bush or cannabis plant [...]; (iii) The possession or purchase of any narcotic drug or psychoactive substance for the purpose of any of the activities enumerated in (i) above. [...] (UN 1988, Article 3(1), Offences and Sanctions)

Thus, as a result of the 1988 convention, supply and possession with intent to supply have to be subject to control under criminal law.

Possession

The requirements of the conventions on use and on supply are clear and generally uncontested. Supply has to be prohibited and criminalised, use does not (even though it has to be limited and, in the case of psychotropic substances, prohibited). But the middle ground is murky. There are many questions as far as possession and related acts are concerned. On possession of drugs such as cannabis, cocaine, etc, the 1961 convention requires that states 'shall not permit the possession of drugs except under legal authority' (Article 33). It goes on to require that punishments be available for possessors - albeit subject to constitutional limitations of the state concerned (Article 36(1)). There are debates over whether or not the context implies that it is only possession for purposes of supply that is being referred to here: the text itself is not explicit.

However, the 1988 convention goes further, requiring states to

'establish a criminal offence under its domestic law, when committed intentionally, the possession... for personal consumption...' (Article 3(2) of UN 1988).

This seems decisive. Having said that, as the experts involved in the comparative study agree, there are a number of provisos:

In some legal systems (for example Spain and Italy) it is authoritatively argued that the convention's provisions on possession need to be interpreted in the light of (a) the context of the convention's own provisions on drug use (not criminalised), (b) the national law on drug use (eg, in Italy, Spain, the Netherlands or Germany) and, (c) national constitutional principles (eg, in Germany, the freedom to harm oneself). Where national legal systems do not provide sanctions for drug use, or where they provide non-criminal sanctions for use, then the legal system may find it appropriate to deal likewise with drug possession for personal use - thus ensuring a degree of coherence of the national law. Other legal systems have taken a different view.

In any case, in those systems in which the criminal law is applied to drug possession, then the person could be diverted from the criminal process to treatment or social facilities. Depending on national law, police discretion, cautioning, prosecutor's discontinuance or other decision, diversion at courts, or other expediency principle might apply. This can mean that, although the act is not decriminalised in the proper sense (it may still be defined as a crime), its occurrence is either routinely disregarded or converted to a non-criminal disposal on particular occasions. This proviso attracts wide understanding and acceptance. (In our concluding section, we pose a version of this in which civil penalties might be introduced alongside the criminal law.)

SOME REMARKABLE ASPECTS OF NATIONAL POLICIES, IN THE LIGHT OF THE CONVENTIONS

Spain: reconciliation of national law and international conventions

In the view of the Spanish experts in the comparative study, the most remarkable aspect of Spanish drug control policy is the effort to respect international conventions, without changing the well established distinction between the treatment of (i) drug trafficking (punishable) and (ii) consumption or possession for own consumption (not punished). Even though drug use has been unlawful since 1967, the Penal Code has not provided any punishment. Accordingly only possession related to traffic was considered punishable by the Courts after 1973. In 1992 the Law for the Protection of Public Safety tried a compromise between Spanish legislation and International Conventions, introducing some administrative (non penal) sanctions for consumption in public places and for possession. In practice, up until 1998 at least, possession has been only sanctioned if

consumption takes place in public, in line with most courts' interpretation of the administrative Act and even some police instructions. Up to that time, private possession was not sanctioned (but this appears to have been changed by the 1998 Supreme Court Decision, noted above).

Italy: primacy of national and Human Rights law

According to the Italian legal expert, Article 3(2) of the UN convention of 1988 must be regarded as not being binding on Italy, since it is in contrast with the fundamental principles of Italian law. With regard to consumption, Italian law is based on the principle of not criminalising the use of narcotics or their possession for personal use. Importation, purchase and possession of drugs for personal use are administrative infringements, regardless of the quantity of the substance involved. Italian scholarly opinion considers that the actions which do not injure, directly or indirectly, other people's rights - like using or possessing drugs - cannot be punished, in light of Article 8 of the European Convention on Human Rights (broadly, the right to respect for one's private life).

Sweden: beyond the requirements of international conventions

The expert covering Sweden suggests that the most characteristic features of the national drug policy may be as follows: (1) Drug policy is based on very rigid ideological foundations, which makes it difficult to conduct a debate based on facts. (2) To a great extent, policy is aimed at suppressing narcotic drug consumption. A significant proportion of enforcement resources is directed at this aspect of the problem. (3) Within Swedish criminal law, narcotic drug offences carry relatively severe punishments in comparison with other (non-drug) offences. Swedish criminal policy is very rigorous when narcotic drug offences are involved.

IMPORTANCE OF NATIONAL DECISION MAKING

The national legal experts pointed out several instances of drug legislation being heavily influenced by party politics as well as by strictly legal considerations.

In the Netherlands, a 'deal' between parties in parliament resulted in that country's characteristic hard/soft laws (hard on traffickers, soft on users/possessors)

In Italy, following political mobilisation, a popular referendum caused measures on use and possession within an existing law to be abrogated

In Sweden the matter was highly politicised both by parliament and in the press

In France the matter went through parliament with little debate, and the media and popular opinion seemed to share the same line, at least until the late 1990s.

Nevertheless, decision-making within the legal system *per se* has been significant in several countries:

In Italy, alongside and indeed within the political debates, referenda, etc, consideration of constitutional issues and basic legal principles has played an important part

In Germany, the [Federal] Constitutional Court gave an important judgement relating to cannabis which disappointed decriminalisers insofar as it declined to find controls on cannabis possession unlawful (disproportionate). However the Court emphasised that regional/local authorities should act against cannabis possession only to the extent that is proportionate to the social harms associated with such possession

In Spain, decisions of the upper courts have been very important, as far as drug possession and related acts (cultivation for own use, etc), that is to say the 'middle ground' of drug control are concerned, and the debate is by no means over.

The international conventions do not impact 'directly'. They have to be adopted at national level, a process which inevitably involves interpretation. At national level, both the political climate of the day and constitutional/legal considerations set the context within which proposals for drug policy are considered.

Once particular proposals come to the forefront, the types of legislation in which they are drawn up and the interpretation of the courts regarding implementation of those laws are governed by legal systems, traditions and principles drawn from a variety of national, European and international sources. It follows that the room for manoeuvre in UK drug law is set by national as well as international considerations.

Table 2. The International Drugs Conventions: focus on possession & use

For all 'narcotic' and psychotropic drugs

Article 3(2) of UN 1988

Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychoactive substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

For psychotropic substances

Article 5 of UN 1971

1. Each Party shall limit the use of substances in Schedule I (LSD, ecstasy, etc, but *not* amphetamine) - as provided in Article 7. [...]

3. It is desirable that the Parties do not permit the possession of substances in Schedules II, II and IV (amphetamine etc) except under legal authority.

Article 7 of UN 1971

In respect of substances in Schedule I, the Parties shall: (a) prohibit all use except for scientific and very limited medical purposes by duly authorised persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them. [...]

Article 22 of UN 1971, Penal Provisions

1(a) Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.

Article 5 of UN 1971

1. Each Party shall limit the use of substances in Schedule 1 as provided in Article 7. [...]

3. It is desirable that the Parties do not permit the possession of substances in Schedules II, II and IV except under legal authority.

Article 7 of UN 1971

In respect of substances in Schedule I, the Parties shall: (a) prohibit all use except for scientific and very limited medical purposes by duly authorised persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them. [...]

Article 22 of UN 1971, Penal Provisions

1(a) Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty.

For heroin, cocaine, cannabis and other 'narcotic' drugs

Article 4 of UN 1961

The parties shall take such legislative and administrative measures as may be necessary:

(c) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.

Article 33 of UN 1961

The Parties shall not permit the possession of drugs except under legal authority.

Article 36 of UN 1961

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

4. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

Sources:

UN 1961, 1971 and 1988

PART C. THE UK ROOM FOR MANOEUVRE

HOW POSSIBILITIES FOR CHANGE HAVE BEEN IDENTIFIED

Having compared and contrasted the drug legislation of France, Germany, Italy, Spain, the Netherlands and Sweden, and set them against the background of the three international drug conventions, we now come to the possibilities for change in the UK.

The Independent Inquiry's reason for commissioning the study was to identify 'the room for manoeuvre in altering UK drug legislation'. The Inquiry did not direct our attention to particular options. It has been for the editors, in consultation with the six national experts, to decide which questions to focus upon when considering the room for manoeuvre.

In doing so we have:

- drawn closely upon our six national experts' comparative evidence and interpretations of the international conventions, and also drawn broadly upon colleagues' earlier work on civil and administrative penalties⁵
- taken a step back from the detail, in order to draw out broad themes and to explore what would be legally possible in the UK setting, should policy-makers desire to move in these directions
- taken into account the fact that the greatest controversy internationally and nationally concerns legal obligations in relation to drug possession for personal use and related acts.

On this basis we point out some room for manoeuvre in strict legal terms in relation to imprisonment for possession for personal consumption (not required by international law), in relation to civil penalties (could be added alongside criminal law and in time become the more usual response) and in relation to 'social supply' (where civil penalties might also play a part). It should be emphasised that what is discussed here is the room for manoeuvre for the UK. Neither the editors nor the contributors is making any proposals here regarding other national legal systems (nor for the European Union).

⁵ Dorn, N (ed) 1999, *Regulating European Drug Problems: administrative measures and civil law in the control of drug trafficking, nuisance and use*, The Hague: Kluwer Law International.

Table 3. Comparison of maximum penalties for (simple) possession

Source: condensed from national experts' supplementary reports & notes, 1999

	First category	Second category	Third category
IT	Table I substances: Opium, Heroin, Methadone, Codeine - no penal sanctions. Administrative sanctions apply	Table II substances - Cannabis, Hashish - no penal sanctions. Administrative sanctions apply	Table III substances - Methaqualone, Secobarbital, Metilpirolone - no penal sanctions. Administrative sanctions apply
FR	Opium, cannabis, coca leaves, methadone, pethidine, dextromoramide - up to 1 year	Codeine, propiram, dextropropoxyphene, etc - up to 1 year	Methaqualone, mescaline, psilocybin, LSD-25, DMT, amphetamines, DMA, MDMA (ecstasy) - up to 1 year
ES	Heroin, Cocaine, LSD, Amphetamines, Morphine - no sanctions for possession in private. Possession in public places: administrative sanctions (fine)	Marijuana, Cannabis oil, hashish - measures as for heroin etc	N/A
NL	Hard drugs - Heroin, Cocaine, Ecstasy - maximum of 1 year imprisonment and a fine of max. 10,000 DGL	Soft drugs - maximum of 1 month imprisonment and a max. fine of 5,000 DGL	Maximum of 1 month imprisonment and a maximum fine of 5,000 DGL
GM	Germany has no legal classification of drugs or drug categories (like 'soft' and 'hard'); rather, the courts establish the danger of any given drug. Similarly, legislation does not differentiate between possession per se and possession in the course of trafficking, but the courts differentiate. In practice, reactions to possession of small amounts vary, according to locality from no action, to imprisonment of several years		
SW	Fine or imprisonment up to 3 years in respect of any controlled drug.		

Table 4. 'Social supply'/sharing: how are such acts treated in national law?

Source: condensed from national experts' supplementary reports & notes, 1999

	IT	FR	ES	NL	GM	SW
What sanctions/ penalties, if any, for 'social supply' (sharing)?	Sharing between users in a group is an administrative infringement, like private possession. Otherwise, criminal offence: up to 4 years for soft drugs, 6 years for hard	Similar to trafficking for personal use, (misdemeanour: up to 5 years, Articles 222-39 of the Penal Code) or to trafficking (misdemeanour: up to 10 years, Article 222-37)	Sharing among friends or other habitual drug users if no danger of wider dissemination. Administrative sanctions could be applied, not criminal sanctions.	Giving/ exchanging may be treated as supply: up to 2 years imprisonment	Users and others selling small amounts: 'drug trade' misdemeanour, up to 5 years.	Up to 3 years
Distinction between 'social supply' (sharing), and trafficking	For social supply: - simultaneous purchase - purchase on behalf of others - the purchaser must also be a consumer	Under Article 222-39 of the Penal Code, the Courts do not consider an offre gratuite to be trafficking. The fact that a supplier is a drug user may influence the courts.	- Drug dependence (or not) of the individual - Wages, money found... - Quantity of drugs	The amount: for List I and IIa drugs, a dose, eg 1 pill or 0.5 grams; for List IIb drugs, 5 grams	Trafficking is defined by the commercial character of the action. A supply of money for drug deals suffices.	Giving drugs is either possession or transfer of narcotics. Law does not distinguish between "social supply" and "trafficking".

1. POSSESSION: IMPRISONMENT IS NOT REQUIRED BY INTERNATIONAL LAW

The UK's maximum penalties for possession are high compared with those in the other European legal systems studied. There is no impediment in international law to reducing the terms of imprisonment or even removing imprisonment from the penalties available for possession for personal use.

Comparison of UK penalties with the penalty structures of the six European states studied shows that, with maximum penalties of seven years (on indictment) for 'simple' possession - possession for personal consumption - of a Class A drugs and a maximum of five for cannabis, the UK is relatively severe. Most of the European states studied do have imprisonment as a option for possession. Two states studied, France (via criminalisation of drug use) and the Netherlands, have one year maxima. (See table 3). Of course, those states which do not criminalise for personal consumption - Italy and Spain - do not have the possibility of imprisonment for possession for personal consumption, although administrative sanctions may apply in some circumstances. But, setting that aside for the present, the UK penalty structure is still relatively high in the European context.

Could the UK tariff for possession for personal consumption be reduced? From the point of view of compliance with the international conventions, yes it could. The conventions do not specify lengths of imprisonment (in principle international conventions do not so). As far as international obligations go, in strict legal terms it would be open for the UK to reduce the maxima under the Misuse of Drugs Act, for some or all classes of drugs covered by the Act, and substantially if Parliament so wished. Whilst this might be controversial in UK policy terms,⁶ it is clearly a possibility in the light of the international drug conventions.

⁶ The policy issue is complicated by concerns over drug related crime. In relation to those heavy users who are involved in acquisitive crime, current policy in the UK relies on having imprisonment as an option, in order to coerce/coax them into treatment. There is also an element of the UK mimicking the USA in respect of control of heavy users who may be involved in property crime. Although the question of drug-related crime is logically and legally quite separate from the question of drug possession (especially as far as cannabis is concerned), on a policy level the issues may be seen to interact, as far as 'sending a clear message' is concerned.

This point can be underlined by pointing out that, as far as the international conventions are concerned, and considering possession for personal consumption, imprisonment could be removed from the UK tariff.

Possession would then remain a criminal offence, but not an imprisonable one.⁷ Whilst the 1988 convention refers to 'criminal offences' for 'possession...for personal consumption', and the 1961 convention refers to imprisonment for 'serious offences', neither of them nor the two taken together impose any obligation to provide for imprisonment for possession for personal consumption. From the 1988 convention:

Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychoactive substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention. (Article 3(2) of UN 1988, emphasis added)

There is nothing there about imprisonment. Perhaps some of the drafters of the 1988 convention had in mind the possibility of imprisonment when referring to the establishment of a criminal offence, but the convention does not refer to imprisonment. This is not because of any general disinclination or inability to refer to imprisonment in international conventions. The 1961 convention does refer to imprisonment, albeit with reference to serious offences, and in the following context:

Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that the cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be

⁷ There are several criminal offenses of this type, where Parliament has given the courts sentencing powers falling short of imprisonment. For example: those convicted of an offence of disordering behaviour (Public Order Act 1986); parents who commit the offence of failing to make arrangements for their child to be educated (Education Act); offences such as malicious communication, or sending an offensive letter, etc.

punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty. (Article 36(1) of UN 1961, emphasis added)

The question is, do acts of possession for personal consumption have to be regarded as 'serious offences' in the trafficking-related context of Article 36(1) of the 1961 convention? What is in question is the relationship in Article 36(1) between 'possession', 'trafficking' and 'serious offences'. Adopting for the purposes of present purposes the conservative assumption that the word 'possession' in Article 36(1) may refer to both possession for personal consumption and possession for the purpose of supply,⁸ 'serious offences' can be equated with the latter.⁹ If a national law defines acts of possession for personal consumption as 'serious offences [which] shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty', then it does so as a matter of national policy.

⁸ Historically, Article 36(1) of the 1961 convention has been the subject of some controversy. One 'liberal' interpretation - which we mention in order to clearly distinguish it from the argument made here - is that national legal systems are free to define 'possession' in Article 36(1) restrictively, as meaning possession in the context of supply or with intent to supply. This meaning has sometimes been imputed because of the context of trafficking-related terms which surround the word 'possession' in Article 36(1): production, importation, exportation, etc. Our national experts say that this is the general understanding within the legal systems of Germany, Spain and Italy. Indeed in Italy and Spain, that interpretation provides the basis for non-criminalisation of drug use and 'simple' possession. This interpretation carries much weight with some commentators. However, for present purposes, we adopt a more 'conservative' interpretation according to which Article 36(1) refers to any form of possession and thus requires signatory states to make possession for personal consumption a criminal offence - though that need not be the only response.

⁹ That equation would not be out of line with UK law on possession with intent to supply, which is indeed treated as a 'serious offence', being a trafficking offence in terms of the Misuse of Drugs Act 1971 for which long prison sentences are possible. For an authoritative overview of UK drug legislation, see Fortson, R, *The Law on the Misuse of Drugs and Trafficking Offences*, London: Sweet and Maxwell.

In summary, there is ample legal room for manoeuvre here. Should it be consistent with UK policy aims, then maximum terms of imprisonment for drug possession for personal consumption could be reduced, indeed replaced by non-custodial measures. Both the comparative evidence and a reading of the conventions show that national legal systems are not obliged to provide for imprisonment in relation to possession for personal consumption.

2. POSSESSION: CIVIL PENALTIES COULD BE CONSIDERED AS ALTERNATIVES TO ACTION UNDER CRIMINAL LAW

For possession for personal consumption, administrative/civil measures and sanctions could provide alternatives to action under criminal law, and in time might become the typical response.

Here we point out the scope for civil penalties - alongside the retention of all present provisions of the Misuse of Drugs Act. The criminal and civil approaches would be alternatives, with the civil approach being utilised for less serious circumstances whilst the criminal approach is retained for more serious circumstances. In no case would both apply.¹⁰

The possibility that we describe would be in no way incompatible with the international drug conventions. In the scenario envisaged, there is no question of possession no longer being subject to criminal law, so there would be no breach of Article 3(2) of the 1988 Convention, the requirement to 'establish a criminal offence' (mentioned above). Similarly, the long-running arguments around Article 36(1) of the 1961 Convention are not relevant to the proposal to add a civil/administrative power alongside a criminal one. And nothing in the conventions requires signatory states to apply criminal law exclusively. We conclude that it would be possible to introduce civil approaches for drug possession for personal consumption (and possibly for related acts) alongside the retention of the criminal law provisions of the Misuse of Drugs Act.

Turning now to domestic practicalities, could civil law drug offences be created in the UK? The answer is yes. Civil drug offenses (more correctly, according to UK law, civil wrongs) could be created on the model of civil

¹⁰ *Ne bis in idem*: no punishment twice for the same act. But one issue would be whether the person proceeded against civilly could opt out of the civil approach if they preferred a criminal charge.

finer for parking offences, for example. This means that they would be judged on the balance of evidence, rather than the higher standard of 'beyond reasonable doubt'. Procedural safeguards would be ensured under the European Convention of Human Rights, Article 6.¹¹ Appeal mechanisms would exist.

In terms of application of the law, this would give a choice between civil (administrative) and criminal action.¹² In relation to many instances of possession for personal consumption, civil approaches might be considered as more proportionate, and hence more appropriate than criminal law. Civil sanctions or punishments could include small fines and community service. Petty offenders attracting such responses would not gain a criminal record.¹³ Criminal prosecution - and the 'leverage' it gives in relation to diversion programmes - would be available in other cases.

From the point of view of public policy in the UK, adding a civil wrong approach to drug possession alongside criminal law would present several advantages and open up opportunities that seem compatible with UK drug strategies. We set these out in a box (below/opposite). In making these points, we have gone way beyond a purely technical assessment of the legal possibilities of adding civil/administrative measures alongside criminal law, as far as possession is concerned. Needless to say, the approach described is only one of several options that might be considered, should the UK move in this general direction. Such considerations are not needed

¹¹ For a summary see Dorn, N (ed) op cit, pp 278-282.

¹² The extent to which it would be necessary to define the circumstances in which either criminal or administrative/civil responses would be applied was not fully discussed by the members of the study group. A majority considers that in principle, administrative/civil responses are a valuable response in some circumstances; that, if implemented with due care, no general principles of international law would be offended by the present proposal; and that as a minimum, guidelines would be desirable, based for examples of weight of drugs and/or other material facts of the case. A minority goes further and believes that such criteria should be written into the law. We leave these issues open in the context of the UK.

¹³ Australian experience suggests that there is a problem of how to deal with civil fine defaulters (National Drug Strategy Committee, 1998, The Social Impacts of the Cannabis Expiation Notice Scheme in South Australia, Summary Report (4 May), Canberra: Commonwealth Department of Health and Aged Care). Work would be necessary on this aspect for the UK.

in order to establish the legal room for manoeuvre. However, they may make the legal possibilities less abstract. The key point is that, as far as drug possession for personal consumption is concerned, there is no international constraint on adding a civil dimension alongside the UK's existing criminal law.

A civil wrong approach to drug possession alongside criminal law: possible compatibilities with UK drug strategies?

Exploration of effectiveness There is no reason to believe that civil approaches would be any less effective in controlling, discouraging or preventing such possession and use. Certainly the criminal law alone has not proved a decisive factor in the post-war period. If the two approaches were run flexibly side by side in some sites, whilst in other sites criminal law remained the main response in practice, then assessments would be possible.

Low costs Civil approaches are cheaper than criminal approaches. Moreover, civil fines raise funds. Although the sums involved may be small, their use might be regarded as having symbolic significance. Some income part of the funds might be retained locally to support drug related action (locally and/or nationally defined priorities). Alternatively, national (devolved) government might wish to retail all or part of the income derived from civil fines, possibly recycling it back to local level. (Such issues are familiar in relation to use of funds arising from criminal forfeiture and civil forfeiture and confiscation in relation to major crimes.)

A role for Local Authorities? Considering the objectives and structures of the UK drug strategy, it could be for consideration whether local authorities could be granted the power to levy civil fines for possession for personal consumption - along the lines of powers granted them in relation to civil fines for car parking. Alternatively, Police Forces might administer local schemes. Of course, civil approaches could be introduced on a uniform, UK-wide basis. But local administration seems to fit in with local drug policy-making and target setting and, in this sense, could complement the UK drug strategy and parallel anti-crime strategies.

A role for Drug Action Teams? In setting civil fines, local authorities could have regard to local drug problems and to the local strategies and priorities drawn up and reviewed on an annual basis by Drug Action Teams (DATs) and/or similar forums concerned with crime prevention. DATs represent all concerned agencies at a local level, across all sectors, including of course the police. DATs should be in a position to weigh the advantages and disadvantages of various approaches to control of drug possession. They could take into account the harmfulness of particular drugs, the dangers to younger people in particular, the impacts upon communities both of drug problems and of controls, and local people's views and priorities. Checks and balances would be necessary to ensure that the various aims of local strategies in relation to civil measures were proportionate. DATs, possibly in cooperation with local crime forums, could make recommendations to Local Authorities or police forces, who could administer civil schemes. National government would wish to set broad parameters and to retain powers of direction.

3. SOCIAL SUPPLY OR 'SHARING': CONSIDERATIONS THAT COULD ARISE FROM CHANGES REGARDING POSSESSION

A sensitive issue concerns the manner in which the law should treat 'social' supply and sharing - the typical manner in which young people obtain drugs.

It is widely observed that most casual/recreational drug users get their drugs from friends - meaning that, in the UK, the latter commit a trafficking offence. Perhaps the majority of young people in the UK may fall into this category at one time or another. This section looks briefly at the room for manoeuvre for the UK in relation to 'social supply' in the light of the comparative evidence and international legal obligations.

In particular, if in the UK, as proposed above, possession remains a criminal offence but at some future date also were to become a civil (administrative) offence, then how would the courts treat 'social supply': as belonging exclusively to the criminal law, or as something for which the police and other authorities could opt to deal with civilly in some cases? We raise the legal possibility that here, too, both criminal and civil law could be made available, as alternatives.

The comparative work of the study shows that a wide range of responses is possible, depending on the legal system. Table 4 (presented earlier) presents information provided by the six European national legal experts who were involved in the study. In the majority of states studied, what in the UK might be considered 'social supply' may or may not be treated as trafficking - depending on circumstances such as the amount of drugs, whether there is an exchange of money, whether the sharing takes place between existing users or initiates new users, etc. The situation varies from state to state as table 4 shows. Some of the experts also indicated that the situation varies between regions or localities within states, but the research base on this is slim to the point of being non-existent.

It may be asked how some legal systems avoid treating 'social supply' as trafficking.

In relation to all 'narcotic' drugs (including cannabis, cocaine and heroin), Article 36(1) of the 1961 Convention (set out above) is understood by all commentators to require criminalisation of commercial supply. Nevertheless, some legal systems consider that acts that are bound up closely with drug use are assimilated to the same legal status as drug use. Thus, drug users who share the task of getting drugs, or who take turns,

may be treated not as traffickers (to each other) but as users. This can lead to two main results (different for different legal systems):

- 'social supply' may be criminalised and punished in the same way that use/possession is, rather than at the higher level at which trafficking is
- 'social supply' may be dealt with administratively/civilly, in those legal systems in which use/possession is so treated.

To conclude, the comparative evidence is that some legal systems apply administrative/civil measures in some cases of 'social supply'. For the UK, if a clear demarcation of 'social supply' could be arrived at (eg, small-scale supply with a non-commercial character, and not initiating non-users) then, as far as the international conventions are concerned, there seems no bar to adoption of civil measures alongside retention of the criminal law.

Two provisos are necessary. First, a civil/criminal 'menu' for 'social supply' would only make sense in the context of adoption of civil measures alongside criminal offences for possession for personal use. Second, more work would have to be done in relation to UK law - work that is outside the scope of this European comparative study.

SUMMARY

In summary, we offer three conclusions about the room for manoeuvre in terms of international legal obligations.

- 1) For possession for personal consumption, there is no impediment in international law to reducing the terms of imprisonment or removing imprisonment from the penalties available.
- 2) For possession for personal consumption, administrative/civil measures and sanctions could provide alternatives to action under criminal law, and in time might become the typical response (for some or all illegal drugs).
- 3) More work needs to be done in relation to 'social supply' (eg, small-scale supply with a non-commercial character) but this study has found no bar in international law to the adoption of administrative/civil measures alongside the continuation of criminal law.