

国際開発研究フォーラム

FORUM OF INTERNATIONAL DEVELOPMENT STUDIES

研究論文
ARTICLE

The Human Rights Approach to Marijuana Control in Mexico - A Study of Amparo 237/2014

José Mauricio OJEDA ECHEVERRIA

50-3

名古屋大学大学院国際開発研究科
GRADUATE SCHOOL OF INTERNATIONAL DEVELOPMENT
NAGOYA UNIVERSITY

The Human Rights Approach to Marijuana Control in Mexico - A Study of Amparo 237/2014

José Mauricio OJEDA ECHEVERRIA *

Abstract

This paper focuses on Amparo 237/2014 (A.R.237/2014) issued by the Mexican Supreme Court in 2015, which recognizes that recreational use of marijuana is lawful based on the plaintiff's human rights. Previous studies have analyzed how drug policies are justified or unjustified by States' goals of public order and health preservation. However, this article studies how prohibitionist policies can affect individual human rights and how human rights' protection can influence future policies.

This research focuses on how the Mexican Supreme Court considered the use of recreational marijuana through the lens of the right to free development of personality, which is tied to human dignity. The Court found that human dignity encompasses the use of marijuana for recreational purposes and based its decision on the essential belief that each human being has the innate right to make his or her own decisions without trespassing or affecting the rights of third parties.

Then, this study examines how a balance between human rights and the competing values of public health, order, and security can be found. The analysis in this paper contains a description of Mexican law-making, exploration of court cases and the application of the principle of proportionality to highlight the tensions between human rights and the opposing government policies. This paper does not pretend to advocate for the legalization of marijuana, but since prohibitionist acts from the government could infringe human rights, it is necessary to analyze how policies can be improved and what kinds of measures can be adopted under a framework of human rights protection. In the conclusion, the article suggests that the government should adopt less restrictive measures as an alternative.

Keywords: Human Rights, Marijuana, Drug Control

Introduction

This research analyzes governmental policies regarding drug control adopted by Mexico and a decision by the Mexican Supreme Court of Justice of the Nation (hereinafter SCJN) from November 11, 2015 that declared them unconstitutional and acknowledged the legality of the use of marijuana for recreational purposes by looking at the drug control issue from a human rights perspective.

Previously published studies related to drug issues have focused on international criminal policies, addressing how to regulate drug use or if offenses related to the use of narcotics should be eliminated.

* Doctoral Student at Graduate School of International Development, Nagoya University

However, an increasing number of evidence-based studies show that marijuana use in adults does not pose a significant risk to health, except in cases of chronic and excessive use (Fischer, Jeffries, Hall, Room, Goldner & Rehm 2011: 326; Hall 2009: 458-466). Also, interventions that focus on preventing or reducing the use of marijuana based on prohibition and criminal punishment have shown modest effectiveness (Babor, Caulkins Fischer, Foxcroft, Humphreys, Obot, Rehm, Reuter, Room, Rossow & Strang 2018: 191-206) and thus, the argument that criminal policies are effective in protecting the public order and security of citizens may be questionable.

Recently, the debate about the use of marijuana for recreational purposes has gained fresh prominence and there has been renewed interest in arguing that the government policies that regulate the use of marijuana, and other drugs for recreational purposes lack an approach based on human rights (Boiteux, Chernicharo & Alves 2014: 1-23). If the government infringes on any human right through its legislative function, it is necessary to analyze how policies that had led to the adoption of specific laws could be improved under the scheme of human rights.

In this paper, the matter of the usage of recreational marijuana consumption is studied by analyzing the claims of the plaintiff in Amparo¹ 237/2014 (hereinafter A.R.237/2014) which frame the issue under the scope of the protection of human rights, and thus approach the issue from an individual rights perspective. For that purpose, there are three primary objectives: The first is to illustrate how the Mexican government drug control policies are justified in the need to protect public health, order and security. The second objective is to analyze the judgment of the SCJN and point out what kinds of human rights were referred to as supporting grounds for the decision. The third objective is to explore equally suitable alternative measures to protect the health and public order that could be taken by the Mexican government for future policies regarding the issue of the consumption of marijuana for recreational use under the safeguard of human rights.

The reader should bear in mind that the study has some limitations in the sense that the jurisprudence analyzed is only applicable to Mexico and the scope of the human right that was discussed in the judgment of the SCJN cannot be applied universally. However, even if the judgment is only valid for the Mexican people who received permission from the SCJN to consume marijuana for recreational purposes, the study may prove useful for those studying the issue of drug control under the framework of human rights.

1. Drug Control for the Protection of Public Health, Public Order and Security in Mexico

1.1. Current General Health Law Prohibiting Recreational Use of Narcotic Drugs

Mexican Drug Legislation² has seen a number of regulations or decrees throughout its history, yet none of them have provided for the consumption of marijuana for recreational purposes to be allowed

by the Mexican Drug Legislation. Of all of these laws, one notable piece of legislation is Decree 44 of August 20, 2009. This decree mandated amendments to the General Health Law (hereinafter GHL), the Federal Criminal Code, and the Federal Code of Criminal Procedure (Cámara de Diputados 2009), and established that the authorities of public security, administration and enforcement shall know and resolve small-scale drug dealing offenses or execute the sanctions imposed for such offenses. With this reform an entire chapter was added to the GHL called “Crimes against Health in the Mode of Drug Trafficking” which consists of ten articles, 473 to 482, which set out definitions of crimes, the current concurrent jurisdiction or competence of the authorities to deal with these crimes, a list of drugs, definition of crimes, and penalties.³

What stands out in Table 1 are the penalties for illegal use of drugs, including marijuana, punishable with prison time. In Mexico, the GHL establishes the sanitary control of products and services within the areas of general health that fall within the exclusive competence of the Ministry of Health due

Table 1. Comparison between the Penalties of the Drug Legislation before and after the Amendment of 2009

Drug legislation until August 2009		Drug legislation as of August 21, 2009			
Competence	Federal	Competence		State	Federal
Offence	Penalty	Offence	Definition	Small-scale dealing penalty	Large-scale trafficking penalty
Possession or transport not for commerce or supply	According to a table that determined the penalty by type of substance, amount, and whether first time or recidivist	Possession not for commerce or supply	Physical holding of narcotics or when they are nearby and available to the person	Ten months to three years of prison	Four to seven years and six months of prison
Planting, growing or harvesting	One to six years of prison (when accompanied by low level of education and extreme economic need) Otherwise, two to eight years of prison	Planting, growing or harvesting		Kept at one to six years of prison (when low level of education and extreme economic need) Otherwise, two to eight years of prison	Kept at one to six years of prison (when low level of education and extreme economic need) Otherwise, two to eight years of prison

Source: Hernández 2011: 62–63

to the degree of risk posed to public health, which includes medicines, narcotics, and psychotropic substances, as well as the raw materials used to make them (Gómez-Dantés et al. 2011: 220–232). Likewise, the GHL provides that drugs, narcotic drugs, psychotropic substances, products or preparations containing them, for sale or supply, as well as for their importation and exportation, must have the corresponding sanitary authorization of the Ministry of Health through the Federal Commission for the Protection of Health Risks, also known as COFEPRIS (2017).

Article 1 of the GHL establishes the law's goal of protecting the right to health of the people and protecting the public order and social interest. The GHL establishes the express prohibition of any act related to some substances considered to be narcotic, including marijuana (GHL 1984). However, in the last part of Article 235 regarding drugs and Article 247 referring to psychotropic substances, in similar circumstances, the GHL opens the possibility of the use of narcotics for medical and scientific purposes provided the Ministry of Health gives its previous authorization (GHL, Articles 235 and 247; the latest amendment on these articles were on May 27, 1987).

Mexican drug legislation prohibits the use of drugs for recreational reasons but allows it for medical and scientific purposes. In the present study, the terms “medical” and “scientific” follow the definition provided by the GHL, and for the purposes of this paper, the term “recreational” is defined as drug use other than for medical and scientific purposes. It encompasses doing something for enjoyment and is similar to leisure activities such as travel or playing sports.

1.2. The Protection of Public Health, Order and Security

Article 4 of the Political Constitution of the United Mexican States (hereinafter Mexican Constitution) guarantees that all people have the right to health, one of the social rights the State must guarantee. The State has the obligation to preserve one's fundamental rights as protected by the Constitution, including the right to health. Such protection involves the creation and maintenance of the Mexican health system, which aims to provide quality health services to the whole population. The right to health is further developed as an obligation of the State to contribute to the social welfare of the population through social assistance services that put emphasis on the growth of the community (Gómez & Caicedo 2014: 66). The protection of health and the development of healthcare is one of the fundamental tasks of the Mexican government and represents one of the keys to public welfare (Government of Mexico, Ministry of Health 2017).

Furthermore, in Mexico, the right to health also involves the State's responsibility to inform society of harmful things that could damage the health of the population (Meier 2005: 127). In the same way, the State has the obligation to prevent individuals, groups or even companies from hurting themselves. Mexico understands that health as a social right can only be preserved through collective effort (Meier 2005: 118) and through a multitude of approaches that go beyond the management of a public health system that provides health services to the population.

The GHL in Mexico has the objective of protecting public health from the effects of drug consumption which can negatively affect the cognition and physiology of human beings, causing entire societies to be addicted to and trapped by drugs, with the imminent risk of that society deteriorating in terms of physical and mental health (Frenk, Gómez-Dantés, & Knaul 2009: 542–548). It is understandable that the Mexican State focuses on the negative effects of consumption of drugs as part of a public health problem that needs to be solved.

Concerning the terms “public order” and “security” it is clear that there is a linkage between these two goals. The Mexican Legal Dictionary (*Diccionario Jurídico Mexicano* 1984: 316–317) specifies that the State is responsible for ensuring that the community can achieve a peaceful coexistence between its members. Public order comprises a set of principles and rules that support the legal regime’s legitimacy to seek the preservation of the values that align with the general interests of society, by limiting the autonomy of people in order to protect the interests of the many over those of individuals, it is related to the public security of the people. In turn, as stated in Article 21 of the Mexican Constitution the public order is mentioned in the context of public security by protecting administrative rules concerning the public order:

“Public security is a responsibility of the Federation, the Federal District, the States and the Municipal Councils. Public security includes prevention of crimes, investigation, and prosecution, as well as punishment for breaking the administrative rules, according to the law and the respective provisions stated in this Constitution.”

There is a link between public order and public security, because guaranteeing the latter is necessary to preserve the values that the State seeks to protect with the former (Ilie 2014: 24–25). Drug retailing or the sale of small doses of narcotics is usually the way in which young people enter unknowingly into the world of drugs, by buying or selling such doses, and is one of the ways in which large drug trafficking organizations seek to obtain large profits. It is important to consider that those who, unfortunately, by one circumstance or another, have fallen into the clutches of small-scale dealing activities and/or have been turned into addicts, contribute to a serious public health problem that generates more insecurity (Hope 2015: 5–9) which will inevitably cause some disorder to the state and can grow into a problem that can endanger its citizens. Therefore, there is a justification in seeking to protect public order and security for the actions taken by a government that are aimed at suppressing the use of marijuana and other drugs. The State typically seeks to do this by punishing offenses related to the commerce, supply, transport, planting, growing or harvesting of marijuana and other drugs, as established by its laws.

2. The Judgment of the SCJN: A.R.237/2014

2.1. The Facts

On May 31, 2013, Mexican nationals who are members of an organization called Mexicans United for Responsible and Tolerant Consumption, as a strategic litigation to undermine the justifications for drug prohibitionist policies in Mexico, requested in writing to COFEPRIS for permission to consume cannabis sativa and psychotropic THC, which are known generally as marijuana, regularly and freely without the interference of the law. As stated before, the GHL prohibits the use of recreational marijuana. Furthermore, the petitioners asked for authorization to engage in other related activities, including planting and packaging marijuana, but excluding any sort of transactions that involve the drug (SCJN 2015, A.R.237/2014: 2).

COFEPRIS could not give authorization to the proposals because according to the GHL, Articles 235 and 237 regarding the drug “cannabis sativa,” as well as Articles 245, 247 and 248, concerning psychotropic THC, the use of, or any act related to these substances is prohibited throughout the country (SCJN 2015, A.R.237/2014: 45). Therefore, on July 5, 2013, the plaintiff filed an indirect *amparo* suit against the negative reply to its request, stating that Article 235 in the last paragraph, Article 237, Article 245 in section I, Article 247 in the last paragraph, and Article 248 of the GHL are unconstitutional. The plaintiffs’ cause of action was their appeal for protection from the unconstitutionality of certain GHL articles. The petitioners argued that the State established a prohibitionist policy on an individual’s affiliation with marijuana, saying that “it limits someone’s right to personal identity, self-image, free development of personality and to self-determination, all concerning the principle of human dignity, under Article 3 of the Mexican Constitution” (SCJN 2015, A.R.237/2014: 3-7).

In essence, the plaintiffs’ argument was that the drug ban was built upon moral values and not scientific evidence. In turn, it revealed the State’s action was not ethically neutral. In addition, they suggested that the State had abused its power to rule on circumstances related to public health by banning the ownership and consumption of marijuana, contrary to the purpose of Mexican criminal legislations and infringing upon the individual freedom of people, a principle set out in Article 73, sections XVI and XXI of the Mexican Constitution (SCJN 2015, A.R.237/2014: 6-7).

The verdict from the District Judge was not favorable to the plaintiffs. Dissatisfied with the decision, the plaintiffs submitted an appeal and in this instance, they argued that through the use of marijuana they were able to realize the foundation for their life project, stressing the connection with their individual freedom. They further argued that, in similar situations, other individuals accomplish this by participating in sports or hobbies that they take pleasure in and that in general, people can partake in these activities by doing so without limitations imposed by the State (SCJN 2015, A.R.237/2014: 10-16). The Appellate Court ruled that it was not competent to overturn the judgment

made by the District Judge and sent the case to the SCJN, which accepted the case on April 2014 as an *Amparo en Revisión* 237/2014 (A.R.237/2014).

2.2. The Reasoning of the SCJN

On November 11th, 2015, the SCJN declared the last paragraph of Article 235, Article 237, Article 245 in section I, the last paragraph of Article 247 and Article 248 of GHLL unconstitutional (SCJN 2015, A.R.237/2014: 82–89). The SCJN relied on the concept of the protection of dignity (Article 3 of the Mexican Constitution) for the legality of the consumption of marijuana for recreational purposes. The SCJN said that taking drugs was an activity that fell within the sphere of the private life of individuals, based on the protection of human dignity, and the free development of personality guaranteed by the Mexican State (SCJN 2015, A.R.237/2014: 33). The judgment also allowed for the authorizations sought by the plaintiffs, namely to perform acts related to personal consumption for recreational purposes. The authorization was to be granted by the Mexican Ministry of Health (SCJN 2015, A.R.237/2014: 89–90).

The SCJN explained the regulatory framework of narcotic drugs and psychotropic provisions of the GHLL, made an analysis of the impact of the measure that was challenged in its content as infringing upon the free development of personality and examined, in a broad sense, the proportionality of the measure challenged. First, the SCJN examined the measures taken by the State to protect health and public order, which did not allow in any way the performance of activities related to self-consumption, planting, cultivation, harvesting, preparation, transport of marijuana (SCJN 2015, A.R.237/2014: 23–29). Second, the SCJN pointed out that it was unconstitutional to infringe upon the right to free development of personality (hereinafter RFDP) since the criminalization of all activities related to possession and consumption exceeded a broad proportionality standard, which required verification of whether the penalty pursues a constitutionally valid purpose. The SCJN mentioned that there were equally suitable alternative measures to a penalty to protect the health and public order. (SCJN 2015, A.R.237/2014: 29–43).

Lastly, the SCJN tried to accommodate possible conflicts between human rights values and the state values including the maintenance of security and public health. For that purpose, it analyzed the aim of the regulations and the suitability of measures taken by the Government. The logic adopted by the Court was: firstly, whether the aim was legitimate or not, and secondly whether the regulations by the Government was suitable to achieve the aims after the first question is answered in the affirmative. The second point was examined by application of necessity and proportionality. When both criteria were met, then the Court could hold that the marijuana regulations were legitimate and suitable, and therefore constitutional. The reasoning of the judgment in favor of the applicants is as follows.

a) Aims: It was necessary to identify the reasons for banning the use of drugs. The measures taken by the State should be established as constitutionally valid. This stage of the analysis implies

the idea that no purpose can justify the control of fundamental rights by the State. The Court also analyzed the fact that COFEPRIS has administrative power to grant authorizations for certain uses of marijuana, potentially, recreational use was constitutionally valid. Such administrative prohibitions or authorizations are given after the analysis of health and public order effects of drug use (SCJN 2015, A.R.237/2014: 44–50).

b) Suitability: The SCJN analyzed that if the use of marijuana does not cause damage or harm to health or to society as a whole, the prohibition analyzed will not be a suitable measure to protect constitutional objectives of health and public order. The SCJN considered the effects of recreational use of marijuana, consequences to health, drug abuse or dependency, inclination to use harder drugs, and stimulation to commit other crimes (SCJN 2015, A.R.237/2014: 50–63).

c) Necessity: It was discussed how to protect health and public order, and if, on the contrary, there are other measures that could harm the RFDP to a lesser degree while still pursuing other State goals. This implies there are other means with a degree of suitability for achieving the aims pursued and whether these alternatives involved to a lesser extent the affected fundamental right (SCJN 2015, A.R.237/2014: 64–74).

d) Proportionality: The SCJN studied the proportionality of the legislative measure prohibiting various activities related to the production and consumption of marijuana. The SCJN concluded that such an action is unnecessary because there are equally suitable alternative means that imply less restrictions to the right. The Court also found it disproportionate in the strict sense (SCJN 2015, A.R.237/2014: 74–79).

2.3. The SCJN's Assessment

It is clear that the intention of Article 1 of the GHJ is to protect the right to health of the public. In addition, the arguments of the plaintiffs were that the restriction on the consumption of marijuana for recreational purposes was not justified, especially in a country that recognizes the protection of personal independence as one of its founding principles. The judgment would have been more interesting if it had included the analysis of the acquisition or obtaining of marijuana or its seeds, which is considered a crime, but the Court stayed away from such a question. Instead, the judgment was based on the RFDP and the principle of proportionality. It evaluated the proportionality of the legislative measure prohibiting various activities related to the production and consumption of marijuana. Proportionality is a general principle of law (Engle 2012: 3) and in the case where exceptional rules are applied, there is a high risk that the basic or fundamental rules are ignored. In other words, when exceptional rules expand, the basic rules, as a consequence, shrink. Therefore, when the exceptional rules are interpreted, the principle of proportionality is an essential tool to safeguard the general rule.

In Mexico, the proportionality test has particular relevance for the effective constitutional control

of legislative powers. A strict use of the principle of proportionality will force the legislator to take the Mexican Constitution and fundamental rights seriously. The SCJN clearly set its judgment centered on the argument of the protection of the RFDP, which is tied to a constitutional principle and right, human dignity. When the State imposes restriction on human rights, then the principle of proportionality can be used, because that regulation is exceptional. Based on the RFDP, the judgment analyzed the proportionality of the legislative action prohibiting various activities related to the production and consumption of marijuana. The SCJN concluded that such action was unnecessary since other alternatives are equally appropriate to deal with the issue at hand.

3. The Protection of the Rights to Dignity and Free Development of Personality

3.1. The Right to Dignity and its Function in Mexican Legislation

Article 1 of the Mexican Constitution grants broad protection to empowering people and to allowing them to realize their life plans through the principle of human dignity. In this instance, it is essential to guarantee the autonomy of people and the freedom from any conduct that does harm to others. Article 3 of the Mexican Constitution contains a catalog of “rights of freedom” that result in permissions to perform certain actions that are required for the autonomy of an individual and mandates that the State has the duty to impart education through the federation, states and municipalities that allows for the developing of all the faculties of a human being.

Human dignity is recognized by several legal documents (McCrudden 2008: 655–724) and the importance of the recognition of dignity in legal texts opens an opportunity to be considered by the judge to set the limits to the State’s obligations of protecting the individual without interfering with their personal decisions or their actions as long as they do not affect other people and stay in accordance with the law. However, while human dignity is a term frequently used in the literature, to date, there is no consensus about its definition and function (McCrudden 2008: 655–724). The principle of human dignity is challenging to define because the concept of human dignity varies from jurisdiction to jurisdiction even if it is considered a universal right.

For example, according to the American Convention on Human Rights, there are three explicit references to the idea of human dignity, in Article 5 (right to humane treatment), Article 6 (freedom from slavery) and Article 11 (right to privacy). Likewise, the Preamble to the Convention is permeated by direct allusions that suggest a certain naturalistic idea of human dignity insofar as “the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality...”. Compare this with the EU Charter of Fundamental Rights, Title I, Article 1 which states that: “Human dignity is inviolable. It must be respected and protected”. The FRA European Union Agency for Fundamental Rights interpreted human dignity as follows: “the

dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights”. Simply put, the “dignity” of the human person has two functions. First, it is an independent human right and as a fundamental right, the final goal is the protection of human dignity (Bennett 2016: 134–164). The existence of various human rights does not mean that they cover all aspects of human dignity. For that reason, uncovered areas should be protected by the right to human dignity. Secondly, human dignity is the foundation of other human rights. Thus, human dignity as a principle, should exist to give meaning to all human rights, such as the right to life, expression, religion, and so on. Therefore, there is a variety of human rights that come from the principle of human dignity. The dimension may be different, but human dignity is the origin of every human right.

This study concurs with what the case of Mexico has taught us about what human dignity is. The constitution accepts that in the human being there is a dignity that must be respected in any case, since this constitutes, at the same time, a stand-alone fundamental right, and the basis and condition of all other human rights. (SCJN 2009, Tesis Aislada⁴ or T.A.: 165822). In other words, human dignity in Mexico is one of the preeminent constitutional values. It constitutes the base of social peace and political order. Human dignity is the distinctive feature of human beings in relation to other living beings, and that understands the person as an end in itself, preventing humans from being considered as an instrument or means for another purpose, in addition to endowing the capacity for self-determination and of realization through the free development of the personality (Avendaño, Barrera & Ceballos 2016: 88).

3.2. The RFDP in Mexican Jurisprudence

The SCJN used the RFDP to justify the use of marijuana for recreational purposes. However, the RFDP is not enshrined in the Mexican Constitution and that is why it has been developed in jurisprudence, as “the achievement of the project of life that the human being has for himself, as an autonomous entity” (SCJN 2009, T.A.: 165822). In Mexican law, the SCJN has understood that “the free development of personality is a fundamental right derived from the right to dignity, which in turn is provided for in Article 1 of the Mexican Constitution and is implicit in international treaties of human rights entered into by our country” (SCJN 2015 A.R.237/2014: 33). According to this, in the judgment that resolved Amparo directo 6/2008, the SCJN pointed out that “the individual, whoever they may be, has the right to freely and autonomously choose his life project, the way in which he will achieve the goals and objectives that, for him, are relevant” (SCJN 2009, A.D.6/2008: 85).

Moreover, according to the Mexican jurisprudence, when personal rights are not expressly stated in the Mexican Constitution (right to life, physical and mental integrity, honor, privacy, name, self-image, free development of personality) and these rights are implicit in the international treaties signed by Mexico, they should be understood as rights derived from the recognition of the right to human dignity, because only through their full respect can a human being attain full dignity (SCJN 2009, T.A: 165813).

In Mexico, the RFDP guards a “residual area of freedom” not protected by other public rights (SCJN 2009, T.A: 165822). As mentioned above, all of this implies that every individual has a right to freely and autonomously choose his or her life project (SCJN 2009, T.A: 165813). This right is the recognition of the State of the ordinary capacity of every person to be the individual the person wishes to be, without coercion or unjustified control, and with the freedom to fulfill the goals or objectives that the person has set, in accordance with their values, ideas, expectations, tastes, and so on.

The RFDP includes the freedom to choose: marriage, procreation, appearance, profession or sexuality. All of these aspects are part of the way a person wishes to live his/her life, which corresponds to a right to make these decisions autonomously (SCJN 2009, T.A: 165822). The sphere of autonomy of individuals protects the sphere of privacy. The protection granted by law does not merely include those decisions, but also the actions needed to realize that choice.

Additionally, to clarify the relationship between the RFDP and state control, it is important to recognize specific cases that touch upon behaviors or decisions that are protected by the law and that correspond exclusively to the right of the individual. For example, in several cases regarding sexual reassignment, judges may not be able to understand the mental state of the plaintiff regarding why he or she is choosing reassignment. In reality, it is the plaintiff’s life and not the judge’s life. In addition, cases concerning the decision of marriage, procreation, personal appearance, profession, or sexuality are all covered by the RFDP.

Some of the cases related to the RFDP already resolved by the Judicial Branch in Mexico are: 1) Gender reassignment (SCJN 2008, A.D.6/2008), 2) Marriage between people of the same sex (SCJN 2010, Acción de Inconstitucionalidad 2/2010), 3) Free modification of the civil status of people (SCJN 2012, A.D.339/2012), 4) Procedure of divorce without expression of cause established in the Civil Code of the State of Hidalgo (SCJN 2012, A.D.1905/2012), 5) Application for marriage filed by a same-sex couple that was declared inadmissible by a Civil Registry Office of the State of Oaxaca (SCJN 2012, A.D.457/2012), 6) Freedom of contract and against age discrimination (SCJN 2014, A.D.992/2014), and 7) Unconstitutionality of the system of reasons for divorce (SCJN 2014, Contradicción de Tesis⁵: 73/2014).

The ability to choose any recreational activity entails a decision that absolutely goes to the sphere of personal autonomy that must be protected by the Mexican Constitution. That decision may include the use of substances that produce experiences that in some way affect the thoughts, emotions or feelings of the person. It has been recognized that the decision to consume marijuana can have different purposes, including stress relief, intensification of perceptions, or desire for new personal and spiritual experiences (Supreme Court of Hawaii 1972: 342). In Mexico, the right of the free development of personality allows, *prima facie*, for people of legal age to decide without interference what kind of recreational activities they wish to carry out, as well as the capacity to undertake all the necessary actions or events to be able to materialize that choice, including the use of marijuana for recreational

purposes (SCJN 2015, A.R.237/2014: 29-43).

It must be noted that in the Mexican case, there are no provisions or a specific human right in the Mexican Constitution that provides for the consumption of marijuana for recreational purposes. Also, the concept of dignity used in Mexican legislation is not precise, nor does it determine its scope with exactitude or to the extent it should. Article 3 of the Mexican Constitution merely refers to it and considers it to be a right against which there can be no attack in the discriminatory sense. However, the SCJN has filled that gap with the usage of the free development of personality, derived from the right of dignity to protect the human dignity of the plaintiffs.

4. Balancing Drug Control and Protection of Human Rights in Mexico

4.1. Marijuana and Drug Control

The position of the government is clear, if the drug is deemed harmful, then the drug should be prohibited. The question is, whether, in this case, marijuana is dangerous or not and represents a threat to public health, order and security. To this point, the SCJN in A.R.237/2014, highlighted a study pointing out that while there was medical evidence that marijuana use can cause health damage, it can be classified as not dangerous as long as minor age consumers are not allowed to use the drug. Also, marijuana use has less severe consequences for health than those reported by people addicted to other substances, such as opium or alcohol. Additionally, the use of marijuana does not encourage the commission of other crimes, but it does negatively affect the ability to drive motor vehicles and may increase the probability of causing accidents. (SCJN 2015, A.R.237/2014: 55-64).

Logic may tell us that in a place where marijuana consumption for recreational purposes is legal, the number of crimes related to marijuana will drop. But how about other considerations such as fatalities in car accidents under the effects of marijuana? Since there are not many cases, a recent study regarding marijuana legalizations, and related policies in the US, specifically in Colorado, Washington, Oregon, and Alaska reflected that marijuana legalization had minimal effect on marijuana use and associated outcomes, such as drug use, health, suicides, crime, economics and road safety (Dills, Goffard, & Miron 2016: 1-36). In that research, it was shown that Colorado had no increase in fatal traffic accidents or fatalities following the legalization of medical marijuana in 2009. Although fatality rates have reached a slightly higher increment in recent summers, no apparent increase occurred after either legalization in 2012 or the opening of stores in 2014. Similar situations occurred in Washington, Oregon, and Alaska. (Dills, Goffard, & Miron 2016: 16-19). However, because of the limitation of cases, it is important to mention that it is too early to conclude that marijuana use for recreational purposes might never affect public health, order, and security of a state.

In the US, during the 1900s, alcohol was prohibited, and it was viewed in a comparable light to the way people today see heroin. For some parts of American society, alcohol was the primary cause of

nearly all social problems, such as crime, poverty, business failure, violence, unemployment, and even insanity (Bonnie & Whitebread 1970: 971–1203), much in the same way as marijuana use could be considered in present times. It is important to clarify that in Mexico like in the US, alcohol is not a hard drug, even if it might have similar adverse effects in the human body. Drunk driving is unlawful, yet, these accidents are still occurring. A similar situation might happen with legalized marijuana consumption, and thus clear regulations that prevent these situations are needed.

4.2. Less Restrictive Alternatives in Drug Control

Dignity can be considered as a fundamental right for people to freely and autonomously choose their life project in a way that will let them achieve their goals, where the state cannot undermine or eliminate the individual actions of any person within society, except when there is a preponderant factor of significance that supports it. But, what is the limit of freedom to use marijuana for recreational purposes? To answer this, it is important to clarify that an individual cannot interfere with another person's private sphere while consuming marijuana for recreational purposes. For that, some restrictions are necessary. The protection of public order, health, and security is a part of the principle of not doing harm to others. Besides, ensuring that allowing the use of marijuana for recreational purposes does not lead to a severe increase in road accidents can also be regarded as a part of ensuring that the freedom of one does not end up doing damage to another.

The question is whether there are other methods or measures for the government to obtain the same goal regarding how to regulate marijuana use for recreational purposes or not. If there are no other methods or measures, then criminalization is the only available strategy for the government. But if there are other possible ways, less restrictive alternatives must be taken, especially those that do not lead to serious human rights violations, such as imprisonment.

The United Nations Office on Drugs and Crime mentioned different alternatives with regard to the proportionality of sentencing for drug offenses, essentially for personal drug use instead of conviction and punishment, such as: "treatment, education, aftercare, rehabilitation, or social integration" (UNODC 2012: 13). Werner Sipp, President of the International Narcotics Control Board, insisted in a side event held by the board "to develop drug policies which contribute to furthering the health and welfare of mankind through the adoption of humane and proportionate drug policy" (INCB 2017: 3). For the SCJN, alternatives to total prohibition of marijuana are: "(I) limitations on the places of sale and consumption; (II) ban on driving or operating dangerous equipment or substances under the influence of the substance; (III) prohibitions on publicizing the product; and (IV) restrictions on the age of those who can purchase and consume" (SCJN 2015 A.R.237/2014: 94).

Proportionality compels states to offer less restrictive alternatives to penalization and that properly consider the protection of human rights and social needs to control the usage of marijuana. Thus, while the State still has the responsibility to control the social problems caused by users of marijuana, it also

has the obligation of seeking less restrictive alternatives to prevent any related problems. Therefore, the government must figure out a way to attain the goal of controlling marijuana usage, and it certainly does not have to abolish all regulation, but it must prefer measures such as education for prevention, medical treatment for rehabilitation, prohibition on the sale, distribution and supply of marijuana to minors rather than more restrictive approaches. The Government may also consider prohibiting the use of marijuana in public spaces and in the public or private workplace. Regarding production and trade, advertising on the use of marijuana should be directed to adults through magazines for adults, and in establishments exclusively for adults. The prohibition of the use of marijuana when driving automobiles and operating machinery, instruments, and potentially dangerous devices should also be given serious consideration. It is likely that all of these measures would pass a proportionality test before a constitutional court.

4.3. Is Mexico Ready for Change?

In A.R.237/2014 the SCJN analyzed the proportionality of the legislative measure that prohibits various activities related to the production and consumption of marijuana. Its conclusion established that such action is not only unnecessary, since there are equally suitable alternative means that restrict the right less, but it is also disproportionate in the strict sense since it generates minimum protection to health and public order while resulting in an intense interference with the right of people to decide what leisure activities they wish to carry out.

However, we must not lose sight of the fact that worldwide, the permission and decriminalization of the recreational use of marijuana has occurred through processes of democratic deliberation within congresses and parliaments, such as the cases of Uruguay or the States of Colorado and Washington (for more information of marijuana legalization see, Smiley 2016; Graham 2015, Room 2014 & Pardo 2014). In other words, the consensus of the population through parliament and experts is also necessary to make a change in the drug legislation of Mexico.

In the case of Mexico, citizens needed to bring the case to the judicial branch as a final measure to be allowed to consume marijuana for recreational purposes. But the legal binding effect of the judgment only extends to the plaintiff. However, if the use of marijuana is a human right, every individual must be allowed to enjoy it and thus, action from the Legislative branch was needed. Still, the importance of expert analysis is essential to know if the Mexican government is prepared economically and structurally to make such a change to drug control legislation.

After A.R.237/2014, the Mexican government stressed that the SCJN ruling did not legalize marijuana; its sowing, supply, and marketing were still prohibited by law (Presidencia de la República 2015), but exposed the existence of two parallel legal realities in Mexico, specifically: One set of laws that applies to the general population and another which applies exclusively to the four protected persons to whom the administrative permission was granted for the recreational and personal use of

marijuana.

Undoubtedly, what the decision of the SCJN did accomplish was to force the Mexican administration to address the issue of drug consumption. The impact of the ruling was so evident that in 2016, the Mexican government announced the Debate on the Use of Marijuana in Mexico (Secretaría de Gobernación 2016). As a result of the debate, on April 21st, 2016, the Mexican government presented a new initiative to Congress by which various provisions of the General Health Law and the Federal Penal Code were amended (President of Mexico 2016).

On December 13, 2016, the Senate of Mexico approved the bill that would reform various provisions of the GHL and the Federal Penal Code to allow the medicinal use of cannabis in the country and sent it to the Chamber of Deputies for final approval⁶. The amendment represented a significant advance since thousands of patients will have access to medicines derived from cannabis that help reduce chronic pain, improve motor coordination, treat and control multiple sclerosis, glaucoma, cancer, and AIDS (Senado de la República 2016). However, the amendment does not decriminalize the possession for personal use of marijuana proposed by the President. On April 28, 2017, the Deputies approved the bill on amendments of various provisions of the GHL (Decree 107) and the Federal Penal Code (Decree 132) to regulate the medicinal use of cannabis sativa and indica, otherwise known as marijuana (Cámara de Diputados 2017).

The legislative branch did not take into account the argument that the dignity of people who want to use marijuana for recreational purposes must be recognized, and of course did not consider if a human right to consume drugs, marijuana, or other substances, should be established. It might be said that the new amendment to control drugs in Mexico indicates the beginning of a path towards a visionary public policy that also allows the recreational use of marijuana, but the reality is that even after the judgment of the SCJN showed the importance of human rights in drug control, and after a national debate with regard to the use of marijuana was held, in the end, the legislative branch did not accept the proposal of the president to stop criminalizing consumption.

An important consideration is that a possible conflict might be caused between the decision of legalizing marijuana for recreational purposes and the International Drug Conventions goals. However, a full discussion of this topic was not examined by the SCJN in the judgment itself. Therefore, it lies beyond the scope of this study. As it was mentioned, the A.R.237/2014 is only applicable to the jurisdiction of Mexico, and only the plaintiffs enjoy its binding force, therefore, to universalize such judgment to all Mexicans, it is necessary for the legislative branch to enact new laws related to drug control. For that purpose, the Mexican government needs to assimilate or concretize the judgment to decriminalize the use of marijuana for recreational purposes, since less restrictive measures are available and similar cases where human rights might be affected could present themselves again.

Conclusion

The case of Mexico provides a new perspective for the debate on drug control. This case addressed the issue of the usage of recreational marijuana from the perspective of human rights. The consumption of marijuana can be analyzed from a public health perspective whereby addictions must be treated with prevention and comprehensive therapeutic solutions, and without criminalizing consumers. Actions to prevent drug use, including marijuana, especially campaigns targeted at children and young people, should be strengthened, but at the same time, the access to controlled substances should also be enabled for therapeutic purposes and scientific research. According to the SCJN, the criminalization of marijuana use is not a proportional measure to protect health and public order. The resolution of the SCJN was clear in that the penalization on consuming marijuana for recreational purposes is too excessive and less restrictive alternatives for drug control should be considered and Mexico must move to a new paradigm where the rights and freedoms of individuals are entirely guaranteed in these cases. Therefore, the SCJN opened a gate to legalization or decriminalization of marijuana from the point of view of human rights. It was a bottom-up view, a particular way to see the situation from an individual perspective.

In general, it seems that the debate on the pros and cons of drug legalization has become of special interest to some drug policy activists, in response to the apparent failure of the strategy to combat illegal drug trafficking and due to the division of public opinion in different countries regarding legalization of cannabis and its influence on public safety and health. On one hand, proposals from different social, political and academic sectors argue that to deter the drug trade, it is necessary to legalize drugs and enable the appropriate authorities to regulate the market of psychoactive substances (SMART 2015); others, on the other hand, claim that to legalize cannabis could lead to additional problems, because its implementation would generate perverse effects on public health, cause social decay and finally, escalate internal conflict. However, it is the fundamental belief behind universal values of freedom and liberty, and it is the foundation of modern liberal democracies that “restriction is not justified since the imposition of a single standard of healthy living is not admissible in a liberal state, which bases its existence on the recognition of human uniqueness and independence” (Delman 2015).

The Mexican Court considered the use of recreational marijuana through the RFDP, which is tied to human dignity, and the application of the principle of proportionality to strike a balance between human rights and the principles of public health, order, and security. This study concludes that less restrictive measures in conformity with human rights should be adopted by the government. This may be the only way to ensure that each human being has the inherent right to make his or her own decisions without trespassing on third parties' guaranteed rights.

Notes

- 1 The basis for an amparo lawsuit can be summarized as a guarantee of protection of an individual's constitutional rights. The Mexican Federal Judiciary is based on a three-tier system. The amparo lawsuit may be indirect, started in a District Court or direct, initiated in the SCJN or Appellate Courts known as Collegiate Circuit Courts.
- 2 For this research, the Mexican Drug Legislation composes three main laws: General Health Law with 115 regulations or decrees since its creation, but with 70 decrees from August 20, 2009 until December 24, 2018; the Federal Criminal Code with 45 from August 20, 2009 until April 12, 2019; and the Federal Code of Criminal Procedure which was abrogated on March 3, 2014 and replaced by the National Code of Criminal Procedure which prevails until present time.
- 3 The laws presented in this paper are in Spanish, and there are not official translations into English. The author of this research has made adaptations from Spanish to English.
- 4 Tesis Aislada is issued by the judiciary branch, interpreting some legal precept but has not become mandatory. However, it does serve to guide the criteria of the administrators of justice and sometimes start forming or interrupting jurisprudence.
- 5 Contradicción de Tesis exists when courts adopt in their judgments discrepant legal criteria on the same point of law, regardless of whether the factual issues that surround it are not the same.
- 6 In the Mexican federal sphere, the Legislative Branch, the General Congress, is divided into two chambers: The Deputies and the Senators.

References

- Avendaño González, L., Nettel Barrera, A., & Serrano Ceballos, J. 2016. El Principio de Dignidad en la Jurisprudencia Constitucional Mexicana. *Revista de Ciencias Jurídicas y Sociales*. 19(1): 77-98.
- Babor, T., Caulkins, J., Fischer, B., Foxcroft, D., Humphreys, M., Obot, I., Rehm, J., Reuter, P., Room, R., Rossow, I., & Strang, J. 2018. *Drug Policy and the Public Good*. United States of America: Oxford University Press.
- Bennett, G. 2016. *Technicians of Human Dignity: Bodies, Souls, and the Making of Intrinsic Worth*. New York: Fordham University Press.
- Boiteux L., Chernicharo L. P. & Alves C. S. 2014. *Human Rights and Drug Conventions: Searching for Humanitarian Reason in Drug Laws*. In: *Prohibition, Religious Freedom, and Human Rights: Regulating Traditional Drug Use*. Berlin, Heidelberg: Springer.
- Bonnie R. J. & Whitebread C. H. 1970. The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition. *Virginia Law Review*. 56: 971-1203.
- Cámara de Diputados. 2017. Boletín 3577-Diputados aprueban uso medicinal de la cannabis sativa, índica y americana o mariguana. <http://www5.diputados.gob.mx/index.php/esl/Comunicacion/Boletines/2017/Abril/28/3577-Diputados-aprueban-uso-medicinal-de-la-cannabis-sativa-indica-y-americana-o-mariguana>
- Cámara de Diputados. 2009. Código Federal de Procedimientos Penales. <http://www.diputados.gob.mx/LeyesBiblio/abro/cfpp.htm>
- Cámara de Diputados. 2009. Código Penal Federal. <http://www.diputados.gob.mx/LeyesBiblio/ref/cpf.htm>
- Cámara de Diputados. 2009. Ley General de Salud. <http://www.diputados.gob.mx/LeyesBiblio/ref/lgs.htm>
- COFEPRIS. 2019. <https://www.gob.mx/cofepris/que-hacemos>
- Delman E. 2015. Is Smoking Weed a Human Right? Why the Mexican Supreme Court Thinks the Answer Is Yes. *The Atlantic*. <http://www.theatlantic.com/international/archive/2015/11/mexico-marijuana-legal-human-right/415017/>
- Dills, A. K., Goffard, S., & Miron, J. 2016. Dose of Reality: The Effect of State Marijuana Legalizations. *Policy Analysis, CATO Institute*. 799: 1-36. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842278
- Engle, E. 2012. The History of the General Principle of Proportionality: An Overview. *Dartmouth Law Journal*. 10: 3.
- European Union. 2010. Charter of Fundamental Rights of the European Union. *Official Journal of the European Union*.

- C83. 53.
- European Union. European Union Agency for Fundamental Rights. 2018. EU Charter of Fundamental Rights. *FRA European Union Agency for Fundamental Rights*. <http://fra.europa.eu/en/charterpedia/article/1-human-dignity>
- Fischer B., Jeffries V, Hall W., Room R., Goldner E., & Rehm J. 2011. Lower Risk Cannabis Use Guidelines for Canada (LRCUG): A Narrative Review of Evidence and Recommendations. *Canadian Journal of Public Health*. 102(5): 458–466.
- Frenk, J., Gómez-Dantés, O., & Knaul, F. M. 2009. The Democratization of Health in Mexico: Financial Innovations for Universal Coverage. *Bulletin of the World Health Organization*. 87: 542–548.
- Gómez-Dantés O., et al. 2011. Sistema de Salud de México. *Salud Pública de México*. 53: 220–232.
- Gómez A. & Caicedo C. 2014. Plan Decenal de Salud Pública 2012–2021 Resumen Ejecutivo. *Monitor Estratégico*. 6: 66.
- Government of Mexico. 2008. Political Constitution of the United Mexican States. http://www.oas.org/juridico/mla/en/mex/en_mex-int-text-const.pdf
- Government of Mexico. Ministry of Health. 2017. Sitio de Secretaría de Salud, Acciones y Programas. <https://www.gob.mx/salud#393>
- Graham, L. 2015. Legalizing Marijuana in the Shadows of International Law: The Uruguay, Colorado, and Washington Models. *Wisconsin International Law Journal*. 33: 140.
- Hall, W. 2009. The Adverse Health Effects of Cannabis Use: What are they, and what are their implications for policy?. *International Journal of Drug Policy*. 20(6): 458–466.
- Hernández, A. P. 2011. Drug legislation and the prison situation in Mexico. *Systems Overload-Drug laws and prisons in Latin America*: 62–63. <http://www.drogasyderecho.org/wp-content/uploads/2015/03/so-mexico.pdf>
- Hope, A. 2015. Plus Ça Change: Structural Continuities in Mexican Counternarcotic Policy. *Foreign Policy at Brookings*: 5–9. <https://www.brookings.edu/wp-content/uploads/2016/07/Hope-Mexico-final.pdf>
- Ilie, V. 2014. The Concept of Public Order. *Journal of Criminal Investigations*. 7(2): 21–28.
- INCB. 2017. INCB side event on proportionality at CND. Statement by Werner Sipp, President, International Narcotics Control Board. http://www.incb.org/documents/Speeches/Speeches2017/Speech_60th_CND_proportionality_check_against_delivery_for_website.pdf
- McCrudden, C. 2008. Human Dignity and Judicial Interpretation of Human Rights. *European Journal of International Law*. 19(4): 655–724.
- Meier, B. 2005. The Highest Attainable Standard: Advancing Collective Human Right to Public Health. *Columbia Human Rights Law Review*. 37(1): 101–148.
- Organization of American States. 1999. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights. OAS. <https://www.oas.org/juridico/english/treaties/a-52.html>
- Pardo, B. 2014. Cannabis Policy Reforms in the Americas: A Comparative Analysis of Colorado, Washington, and Uruguay. *International Journal of Drug Policy*. 25(4): 727–735.
- Presidencia de la República. 2015. La Marihuana no está legalizada en México: Gobierno de la Republica. <https://www.gob.mx/presidencia/prensa/la-marihuana-no-esta-legalizada-en-mexico-gobierno-de-la-republica>
- President of Mexico. 2016. Decree Initiative by which various provisions of the General Health Law and the Federal Penal Code are amended and added as a result of the Debate on the use of Marijuana. https://www.gob.mx/cms/uploads/docs/Iniciativa_Marihuana.pdf
- Room, R. 2014. Legalizing a Market for Cannabis for Pleasure: Colorado, Washington, Uruguay and beyond. *Addiction*. 109(3): 345–351.
- SCJN. 2009. A.D. 6/2008.
- SCJN. 2009. Tesis Aislada: “Derecho al Libre Desarrollo de la Personalidad. Aspectos que Comprende”. *Semanario Judicial de la Federación y su Gaceta*. 30: 165822.
- SCJN. 2009. Tesis Aislada: “Dignidad Humana. El Orden Jurídico Mexicano la reconoce como condición y base de los demás derechos fundamentales”. *Semanario Judicial de la Federación y su Gaceta*. 30: 165813.
- SCJN. 2010. Acción de Inconstitucionalidad 2/2010.

- SCJN. 2012. A.D.339/2012.
- SCJN. 2012. A.D.1905/2012.
- SCJN. 2012. A.D.457/2012.
- SCJN. 2014. A.D.992/2014.
- SCJN. 2014. Contradicción de Tesis 73/2014.
- SCJN. 2015. Amparo en Revisión 237/2014.
- Secretaría de Gobernación. 2016. México debate sobre el uso de la marihuana: Participa en #DebateMarihuanaMx. <https://www.gob.mx/se gob/articulos/mexico-debate-sobre-el-uso-de-la-marihuana-participa-en-debatemarihuanamx-18515>
- Senado de la República. 2016. Aprueba Senado Uso Medicinal de la Marihuana. <http://comunicacion.senado.gob.mx/index.php/informacion/boletines/33322-aprueba-senado-uso-medicinal-de-la-marihuana.html>.
- Smiley, E. 2016. Marijuana & Other Drugs: Legalize or Decriminalize. *Ariz. J. Int'l & Comp. L.* 33: 825.
- Sociedad Mexicana de Autoconsumo Responsable y Tolerante A.C. (SMART). 2015. Marihuana: Lo que sigue es regular. http://drogasmexico.org/index.php?nota=13338&tipo=6&id_ext=3022
- Supreme Court of Hawaii, Judge Levinson dissenting. 1972. Hawaii State v. Kantner, 53 *Haw.* 327, 342; 493 P2d 306.
- UNAM. 1984. *Diccionario Jurídico Mexicano*. México: Instituto de Investigaciones Jurídicas.
- United Nations Office on Drugs and Crime. 2012. UNODC and the Promotion and Protection of Human Rights. *UNODC Position Paper*: 13. https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Human_rights_position_paper_2012.pdf