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# A Long and Winding Road Cannabis Regulation in Mexico<sup>1</sup>

Straight people don't know what you're about,  
They put you down and shut you out.  
You gave to me a new belief,  
And soon the world will love you, sweet leaf.  
Black Sabbath, "Sweet Leaf," *Master of Reality* (1971)

## Introduction: Human Rights and Public Health

Recognizing the need to regulate cannabis and review drug policy in Mexico and the world are not only clear consequences of the failed war against drugs and the prohibitionist model, but also indications of the possibility of moving on to a paradigm based on human rights

and public health.<sup>2</sup> In this way, the system for controlling drugs will have to jibe with—and even reconcile with—human rights instruments by integrating a public health perspective, that of reducing damage, managing risks, and a perspective of economic and social development.<sup>3</sup>

While advances have been made in this field in Mexico, they seem to follow a minimalist logic by taking only one step at a time or taking baby steps instead of great strides.<sup>4</sup> The vast majority of states in the United States and some Canadian provinces have liberalized little by little to a greater or lesser degree the regulations about marijuana on a local level.<sup>5</sup> Although we could characterize this as a "marijuana localism," I think it is part of a broader global phenomenon involving different spheres, from local and national to regional and global.<sup>6</sup> We could call this "marijuana glocalism."

In Latin America, since the publication on December 20, 2013 of the Law to Regulate and Control the Cannabis

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Market in Uruguay, also known as Law 19,172, as well as the innumerable legal decisions about the exercise of constitutionality, the countries throughout the region have debated about the banning of cannabis consumption,<sup>7</sup> including the emblematic case of Colombia. Mexico certainly has not been the exception, particularly since a series of strategic pieces of litigation have been filed echoing an incipient surge of legal guarantees.<sup>8</sup>

## Ups and Downs

Since 2006, about fifty bills to regulate cannabis have been introduced in Mexico, a few more than thirty just since 2015. Generally speaking, some attempt to change only the General Law on Health and the Federal Penal Code, but the most audacious propose completely new legislation in the matter. Outstanding among the legal reforms approved in the framework of the so-called “war on drugs” instituted by former President Felipe de Jesús Calderón Hinojosa (2006-2012) is the decree published in the *Official Federal Gazette* on August 20, 2009.<sup>9</sup>

The following cases are among the legal precedents:

1. Writ of amparo under review 237/2014 (Smart Case) (November 04, 2015);
2. Writ of amparo under review 1115/2017 (Ulrich Richter Morales case) (April 11, 2018);
3. Writ of amparo under review 623/2017 (Armando Ríos Píter case) (June 13, 2018);
4. Writ of amparo under review 1163/2017 (Zara Ashley Snapp Hartman et al. case) (July 04, 2018);
5. Writ of amparo under review 547/2018 (Zara Ashley Snapp Hartman et al. case) (October 31, 2018);
6. Writ of amparo under review 548/2018 (María Josefina Santacruz González case) (October 31, 2018);
7. Writ of amparo under review 57/2019 (the case of Margarita Sandra Garfías Hernández in representation of the minor Carlos Avilés Garfías) (14/08/19).

We should remember that the first stay granted by the Supreme Court involved not only the recognition of personal cannabis use as part of the right to free development of the personality, adding that it also implied the exercise of the right to health due to its possible beneficial and/or prejudicial effects, but also called on the ex-

ecutive and legislative branches to hold a broad debate about the issue and its possibilities.

The indirect writ of amparo 1482/2015-II (Grace case) (May 9, 2016) should also be mentioned here. Based on the right to health, the case attempts to declare Article 237 of the General Law on Health unconstitutional, excluding it from the “legal sphere for youth” and establishing that no authority could prohibit or restrict “access to the medical applications of Cannabis or its derivatives. . . or those of other substances or treatments that have the aim of providing well-being and health to persons with grave ailments and that the current state of science has proven can offer notable improvements in their health.”<sup>10</sup>

While the legislative and regulatory adjustments do not legalize cannabis, they do liberalize its medicinal use by adults through an administrative regime with the aim of research, production, the medical application, manufacture, and even destruction of the raw materials, the pharmacological and medical derivatives of cannabis. It does all this through the Federal Commission for the Protection against Health Risks (Cofepris).

Until now, the Supreme Court has handed down different decisions about regulating cannabis in the framework of the writ of amparo, which include thirteen cases of binding court precedents and a general declaration of unconstitutionality regarding its consumption. The resolution of the aforementioned writs of amparo under review gave rise to the approval in First Chamber closed session on February 13, 2019, of eight theses of binding court precedent. These were published on Friday, February 22, 2019, in the *Semanario Judicial de la Federación* (Federal Judiciary Weekly).

Even though all these binding court precedent decisions are interrelated due to their content and scope, we could group these criteria by theme into four large sub-groups: precedents referring to the right to the free development of the personality; others related to the scope of the absolute prohibition of recreational marijuana consumption; another linked to the individual and social dimensions of the right to the protection of health; and one more regarding the impact of banning personal consumption of marijuana on the free development of the personality.

Regarding these precedents, the very same First Chamber, in its March 6, 2019, closed session, approved another precedent. This stipulates that the absolute prohibition

of marihuana for recreational purposes is not necessary for protecting health and public order since alternative measures exist that may be ideal for achieving those ends but that affect the right to the free development of the personality less.

Based on these theses handed down by the Supreme Court, grounded above all in the right to the free development of the personality, it was possible to declare the system of administrative prohibitions that exist in different parts of the General Law on Health to be unconstitutional (the last paragraph of Article 235; and Articles 237, 245 [Section I], 247 [last paragraph], and 248).

Declaring unconstitutional the Ministry of Health's absolute ban of authorizations to carry out activities linked to personal consumption of cannabis and tetrahydrocannabinol (THC) for recreational purposes also implied that Congress had to review the legislation in this matter within ninety days, that is, by October 31, 2019.

The president of the Senate Presiding Committee requested an extension, and, on October 29, 2019, the closed session of the Supreme Court plenary agreed that it would extend the period "as an exception and for one time only" to be able to fulfill this obligation before the "last day of the [next] regular session," that is, before April 30, 2020. Later, due to the Covid-19 pandemic, in its April 17, 2020, closed session, it agreed to a second stay. Once that period was up, again at the request of the president of the Senate Presiding Committee, the Supreme Court agreed to a third and last extension in its closed session of December 10, 2020, until the last day of the following regular session of Congress, that is, by April 30, 2021. When that period was up and the issue of constitutionality had not been resolved, the plenary decided to pass the General Declaration of Unconstitutionality 1/2018 on June 28, 2021.<sup>11</sup>

It should be mentioned that there was a later ruling: the writ of amparo under review 355/2020 (Desart MX case) (December 1, 2021. This is relevant for several reasons:

- 1) It is the first amparo filed against the General Declaration of Unconstitutionality and the constitutional reform with regard to the Judiciary Branch, published in the *Official Federal Gazette* on March 11, 2021, which established a system of direct precedents for the Supreme Court plenary and chambers;

- 2) The same writ of amparo broadened the basis of the right to consume cannabis by also recognizing it as complying with the freedom of trade and industry, in addition to the right to the already recognized personal and medicinal uses; and
- 3) As a result, four theses of direct legal precedents were derived from the decision on this writ of amparo and were published in the *Gaceta del Semanario* (Weekly Gazette).

What is more, recently, on March 3, 2023, two more theses were published. They reiterate that absolute prohibition violates the human rights to the freedom of trade and work, as well as stating that the criterion of proportionality is applicable. These theses are derived from the writ of amparo under review 461/2020 (May 25, 2022).

## Is There a Way Out?

People may consume cannabis for different legitimate reasons, in addition to scientific research. This has led the Supreme Court to recognize the following uses:

- 1) Personal. Free and responsible, regardless of the motivation, but for any legitimate ends. This is reserved for adults and preferably persons older than twenty-five.
- 2) Medicinal. Regardless of the concentrations of THC and CBD, as well as that of other compounds prescribed both for human beings and other living beings; and
- 3) Industrial. When it is possible to use hemp given its concentration of less than 1 percent of THC.

As we have seen, the system of administrative prohibitions was declared unconstitutional because it was counter to fundamental rights recognized in the Constitution:

Over the years, it has become clear that the system of administrative prohibitions, renamed today "administrative authorizations," can also violate other rights and freedoms, such as those of association, expression, the expression of ideas, of protest, and even the right to petition.

- 1) Free development of the personality (Article 1);
- 2) Right to health (Article 4);
- 3) Human dignity, equality, and non-discrimination (Article 1, paragraph five);
- 4) Rights to intimacy and a private life, as well as to one's self-image (Articles 1, 14, and 16); and
- 5) Freedom of trade and industry (Article 5).

Over the years, it has become clear that the system of administrative prohibitions, renamed today “administrative authorizations,” can also violate other rights and freedoms, such as those of association, expression, the expression of ideas, of protest, and even the right to petition. As U.S. psychiatrist Lester Grinspoon (1928-2020) would say, it is increasingly clear that our society cannot be both free and drug free.<sup>12</sup>

In addition to generating a comprehensive regulation for cannabis, among the other challenges we face in this matter, we need to base ourselves on a broad dialogue among different fields of knowledge to:

- 1) Fight against the stigma and prejudice associated with consumers or users, as well as combat the extortion and persecution they often face;
- 2) Decriminalize and stop penalizing simple possession, under the assumption that its origins and intended use are licit, except in cases proven to be the contrary;
- 3) Avoid administrative bottlenecks by eliminating the requirement of authorizations, licenses, and permits, and liberalizing the issue so that it is sufficient to give notice or, in any case, making permission automatic if the authorities do not respond, without having to go through any more paperwork, including strategic amparos;
- 4) Identify areas of opportunity: localisms;
- 5) Prevent damages and reducing risks, with special attention to mental health and addictions;
- 6) Regulate based on scientific evidence and not mere whim; and
- 7) Design and implement public policies based on human rights and public health, including the net for a regulatory or coordinating agency, which could be a broad, inter-ministerial commission.

## Conclusion: Sweet Belief

To close, the only thing remaining is to reiterate that, despite the long, winding road, full of ups and downs, I hold to the sweet belief that soon we will have a way out for comprehensive regulation of cannabis in Mexico. Comprehensive regulation must guarantee the full, generalized exercise of our human rights, including access to health without undue limitation or restriction, much less in a way that constitutes privileges for the few. For this reason, I am convinced that it will be a door to the review of drug policy in our country, the region, and the world. **NM**

## Notes

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**2** Imer B. Flores, ed., 4 20. *Momento de regular el cannabis y revisar la política de drogas (en México y en el mundo)* (Mexico City: IJ-UNAM, 2020).

**3** Milton Romani Gerner, “Modelos de regulación de cannabis en las Américas,” OEA-CICAD, 2017, p. 13, <https://www.scribd.com/document/433758647/ROMANI-Modelos-de-Regulacion-de-Cannabis-SPA-PDF>.

**4** Imer B. Flores, “One Step Forward: Cannabis Regulation in Mexico,” *Verfassungsblog*, July 20, 2021, <https://verfassungsblog.de/one-step-forward-cannabis-regulation-in-mexico/>.

**5** Robert A. Mikos, “Marihuana Localism,” *Case Western Reserve Law Review*, vol. 65, no. 3, 2015, pp. 719-767.

**6** Imer B. Flores, “Hacia un derecho ‘glocal’ o ‘transnacional’ y una jurisprudencia ‘glocal(izada)’ o ‘transnacional(izada)’: repensar el derecho a la luz de la ‘globalización’ o ‘gobernanza global,’” in José María Serna de la Garza, comp., *Gobernanza global y cambio estructural del sistema jurídico mexicano* (Mexico City: IJ, UNAM, 2016), pp. 91-103.

**7** Adriana Muro Polo, comp., *El control de constitucionalidad de las Altas Cortes sobre la prohibición del consumo de cannabis en América Latina* (Mexico City: Suprema Corte de Justicia de la Nación, 2020).

**8** Imer B. Flores and Daniel Márquez, “Tercera llamada, tercera... Hacia un modelo de regulación de los diversos usos del cannabis en México,” in Imer B. Flores, ed., 4 20. *Momento de ...* op. cit., pp. 205-227; and Fernando Silva García, comp., *Marihuana y jueces* (Mexico City: Porrúa, 2021).

**9** “Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Salud, del Código Penal Federal y del Código Federal de Procedimientos Penales,” *Diario Oficial de la Federación*, Segob, August 20, 2009, [https://dof.gob.mx/nota\\_detalle.php?codigo=5106093&fecha=20/08/2009#gsc.tab=0](https://dof.gob.mx/nota_detalle.php?codigo=5106093&fecha=20/08/2009#gsc.tab=0). [Editor’s Note.]

**10** Emphasis in the original [Amparo Indirecto 1482/2015-II].

**11** Imer B. Flores, “One Step Forward: Cannabis Regulation in Mexico,” *Verfassungsblog*, July 20, 2021, <https://verfassungsblog.de/one-step-forward-cannabis-regulation-in-mexico/>.

**12** Lester Grinspoon, *Marihuana Reconsidered* (New York: Bantam Books, 1971).