

THE GERMAN HOKEY COKEY

THE OVERVIEW

Recreational drug use has been categorised as immoral, evil and a fundamental characteristic of weakness by both the press and many social commentators over the past 50 years. This has provided the continued justification for punitive enforcement and the “Outraged from...” style of journalism which marks many debates on drug policy and legalisation. Many would argue that there should be no more moral grandstanding on law making or policy development with respect to cannabis than any other evolution of societal norms, but there continues to be so.

The Germany conundrum is that notwithstanding the fact that its political parties having broadcast to the population that it intended to legalise the recreational use of cannabis by adults (with the implied assertion that it had the unequivocal right to do so), it has now announced that it is to seek the permission of the European Commission for its people to be permitted to do that which it has already promised to them. The problem with this course of action is that while the European Commission is notionally a single entity, it is actually a 27-headed giant, with each of those heads having their own thoughts and perspectives which must be aggregated into the one.

It is understood that Germany has constructed a legal argument which interprets the current legal Conventions, but the content of this construction is yet to be seen in the flesh. However, what we do know is that Germany has not been prepared to challenge the framework governing national independence and international interaction, but instead seeks a nuanced side-step around old perceived impediments. The problem with “sleight of hand” is that people (for which one can read the other 26 member states within the Union) are very wary of it and generally feel the need to cogitate on the possible consequences, and every permutation of the same, before deciding that their consent to it will not come back to bite them and wreak havoc within their own lesser-accepting jurisdiction. Furthermore, in pressing “go”, on the need for the consent of the Commission, Germany has placed all of its eggs into the single basket of Commission consent, because there is no “Plan B” - other than a very muted tacit acknowledgement that the public may have to settle for decriminalisation if their primary approach fails.

Many will see each of these as a political cop out from a coalition that promised the electorate legalization, but now seems to offer the same old excuse heard many times before of, “we said we would, we tried, and it wasn’t our fault that we didn’t succeed”. Perhaps those politicians should have heeded the other adage, “better to ask for forgiveness than permission”.

THE DETAIL

Germany has been forced to consider its options to navigate both European and International obligations and effectively torpedo the historically entrenched position that recreational use is fundamentally damaging.

Many people assume that the United Nations Conventions do not allow signatories to legalise the cultivation and trade of cannabis for recreational use, however, there is a route of passage through the obligations which would allow Germany (and other signatories should they so wish) to remain within the perceived boundaries of international law and still have the lawful adult recreational use of cannabis.

Positive Human Rights obligations demand that a State takes appropriate actions to protect the members of its society and if, as can surely now be evidenced, Germany presents a robust argument that the harm to society can be more effectively managed through legalisation rather than prohibition, then the positive Human Rights aim of the new regimen can be lawfully prioritised over their obligations within international Conventions.

There has been much discussion since the “skeleton” paper was released (and it was very skeletal at only 12 pages – in contrast to that published by Canada which was over 100 pages when they were at a similar juncture), most of which centres around Germany’s current options, however, it is probably informative to review how nations arrived at the position they are now in.

The problems that Germany faces are not unique to itself and there are lessons to be learned (but no immediately transferable solutions), from the mechanisms employed by Bolivia, Uruguay and more recently Canada when assessing the position of a European Union member State.

Before considering the best approach for an EU member to depart from the Convention we should attempt to peel back the layers of the European Legal Framework – not a requirement which was faced by any of those named jurisdictions where adult recreational use is now lawful.

At the highest level we have the 1961 United Nations Single Convention on Narcotics Drugs which makes the non-medical and non-scientific use of cannabis a clear contravention. However, many do not appreciate that there are two ways for Cannabis to be removed from or reclassified within member obligations under the 1961 Convention: either by a majority approval of all signatories or by an individual signatory following the procedure of Treaty Denunciation and subsequent Re-assessment. Indeed, there is precedent for signatories to leave the governance of the Convention and subsequently return at a later date, but on different terms than were previously applicable. With that in mind, we can delve a little deeper and examine some of the country-specific declarations and reservations.

Bolivia is as good a place to start as any but, for the reasons which we will identify, the “Bolivian Option” is not suited to Germany and cannabis. Bolivia was firstly a signatory to the 1961 Convention, but then it ceased to be so in 2011 (i.e., the obligations imposed by the Convention no-longer applied to it) and then later rejoined as a signatory in 2013, but with a “reservation”. Bolivia’s “reservation” was thereafter to lawful to permit the chewing of the Cocoa leaf (an intoxicating “drug” within the Convention) within its jurisdiction. The justification for the reservation was that such chewing was traditional within the country and that thousands of years of national heritage should not be lost or undermined pursuant to a Treaty entered into 50 years prior. Thus, one can see that the chewing of the Cocoa leaf is clearly a geographically specific pastime rather than a globally-applicable issue and so the Bolivian “Hokey Cokey” (pun intended) did not cause too many raised eyebrows. However, whether signatories appreciated it at the time of Bolivia’s in/out dance, a precedent was being set which sought to align the desires of an individual nation and the required implicit acceptance of such by the other signatories.

The Canadian proposal under which adult recreational use of cannabis became lawful is clearly a direct contravention of the strict purpose of the Convention and has no historical or cultural justification. However, Canada shaped the discourse as: “the best way to protect our youth whilst enhancing public safety” - a clear nod to the Human Rights issue of positive action. One is perhaps forgiven for thinking that, at the time of deciding on Canada’s effective exemption from the application in respect of cannabis, other signatories saw its attitude as that of a

whimsical and benevolent uncle going off on a tangent of its own and thought “what harm can it do us – we’re not agreeing to it for our own population?” Today those other nations which show resistance to the likely unstoppable tsunami which is approaching almost every country may well regret humoring their charming old uncle. It is pursuant to this regret over unintended consequences that Germany may find greater resistance from its fellow members states within the Union that it might hope.

LEGALISATION AND DECRIMINALISATION – IT’S THE SAME ISN’T IT?

Internationally, cannabis laws remain static and are more and more viewed as being from a bygone era, while the public opinion and enforcement agencies recognise that the “war on all drugs” (emphasis added), has failed. The US “State by State” or “Streets-Up approach” is a further example of towns, cities, States and jurisdictions decriminalising by dent of policy, but not lawfully and legislatively. In Germany more than a dozen cities, led by Berlin, have been pushing unsuccessfully for recreational use over the past 10 years.

Despite how often people tend to do it, one must never interchange legalisation with decriminalisation because, while they may have the same effect for some involved (e.g., the end user who smokes the odd “joint”), they are worlds apart for the businesses which must contribute along the supply-chain to place that “reefer” in the smoker’s hand.

It is clear that notwithstanding the international legal framework that attempts to govern people’s interaction with cannabis, the world has moved on and there are many people in many jurisdictions who positively want to be permitted to lawfully engage with it. Presently, the ratio of those people varies from a minority to a majority, but what is relatively consistent is that in those locations where the desired users are in the minority, the opinion of those in the majority (those who do not wish to indulge with it themselves), is that people should be permitted to do so if they so wish - that it should be lawful and a matter of personal choice.

As is always the case where there is an overt demand, but no overt lawful supply, the commodity is fueled by the black market and, in many areas, this is not manifested through a man or woman who is a hippy throwback from the Flower-Power of the 1960s (the “Mr. Nice”-type character), but rather through the much more commercial world of Organised Crime. Until there is a mechanism for true legalisation, cannabis money cannot move legitimately, the banks will not take part, investment cannot be achieved, and the aims of the Convention are stymied by its very existence.

If Germany fails in its “request for permission” we will most likely see the world’s largest black market (by user % of population) concentrated within Europe’s flagship member state and, given the direction in which the political wind blows, it is unlikely that a parliament which was seeking to legalise cannabis will do anything to persecute its people for what it wanted them to be able to do in the first place. However, such Decriminalisation, whether by overt proclamation or by covert omission to take detrimental action against those involved:

- will support the current status quo of control by those who would not otherwise be permitted in a regulated environment;
- will inhibit investment by legitimate businesses;
- will weaken consumer protection; and,
- will fail to prevent the harm its politicians seek to reduce.

Perhaps more importantly, it may signal acceptance that the contradiction in terms of “legalisation through decriminalisation” is the best or only way to proceed, in which case the opportunity to fuel the current momentum to finally modernise the international approach to prohibition will be lost.

THE HUMAN RIGHTS “TOP TRUMP”

The United Nations was formed for *“Maintaining international peace and security, developing friendly relations among nations and promoting social progress, better living standards and human rights.”* Consider that statement again: *“Social progress, better living standards and human rights.”* Therefore, the overt purpose of the United Nations is the maintenance of Human Rights and such rights are, notwithstanding what is said to be the purpose of any specific Convention, under international law their overarching purposes take precedence over the individual Convention, including that of 1961. Through this mechanism member States are required to take positive actions to preserve those Rights, even where they are in conflict with a particular Convention.

We can all see that the continued prohibition and punitive punishments for a populations’ interaction with cannabis are a direct assault on those fundamental rights and that the consequences of these international laws can be said to sit at the heart of the erosion of society, personal freedoms and societal health.

Most people recognize that through the criminalisation of cannabis, national societies suffer from the wider criminality of organisations/gangs which are, in part at least, funded through the black-market supply of recreational cannabis. Thus, there is a very strong case for arguing that more harm is done due to the continued application of the 1961 Convention in respect of cannabis than would be done were it a controlled and regulated recreational adult use lawfully permitted.

We would suggest that, rather than taking an interpretative essay to the Teacher and asking for it to be marked, Germany would have been better advised to “go on the front foot” and evidence the need for positive legalisation to combat the jurisdictional detriment prohibition is directly causing some of its citizens, plus the additional wider and indirect benefits to all of society of crime reduction, increased public health and public safety.

The European Union has enshrined the Convention position within its legal framework and, despite its protestations to the contrary, positively encourages decriminalisation whilst preventing legalisation – all in an attempt to obey two masters, each with contradictory aims: to allow those who want to “to do”, whilst appeasing those who would wish that it not be done by hiding behind the party line of “we’re not sanctioning legality”.

One of the founding principles of the European Union is to recognise the cultural and historical identity and differences of its members and to encourage divergent legislation at a state level which collectively seeks to meet the objectives of the Union’s Directives. This mechanism works with most overriding principles but not with recreational drugs law.

We would suggest that a member state such as Germany cannot enact legislation to allow the cultivation and supply of Cannabis for recreational purposes without breaching the very core principles of the Union if their near-neighbours have opposing views on cannabis. The Directives are in place to prevent and combat illegal drug trafficking within the Union, to eliminate “drug tourism” and to prevent cross border disputes. Therefore, how can Germany persuade the EU Commission other than through successfully persuading the individual nation members to abandon their own objections to recreational cannabis use, in support of Germany’s permissive attitude? Such a system may be possible in principle within the European federation, however, even if it were to be practically achievable (and there is a huge gulf between what is possible and what is achievable), the same problems with regards to cross border controls, money transfers and Union/member state illegality would continue to exist.

The European model is therefore based on an oxymoron: “The principle of subsidiarity”. This prohibits the recreational use of cannabis unilaterally, via respect for the 1961 Convention, but does not bind member states where lawful regulation is nationally possible/desired by some states. A divergence between the overall Union position and individual national positions is itself in direct conflict with the European Schengen Convention, under which border controls between EU members states are prohibited and the free movement of people and goods is enshrined.

Perhaps the best recent example of this oxymoron in action can be seen with the Kanavape case in which the European Court of Justice ruled that French national law was incompatible with France’s obligations imposed through its membership of the Union. In those circumstances France was effectively ordered to bring its national law into line with its pre-existing Union obligations. Interestingly, in the current German situation any conflict would be resolved rather differently, with a potential decision by the Commission that Germany’s proposed law would be in conflict with its current obligations to the Union.

The Commission does not have the power to forbid Germany from enacting lawful adult recreational use, but be warned that upon doing so it would be immediately open to a complaint/challenge from the Commission, either of its own volition or at the petition of another member. It is likely that the Commission will “belt and braces” its opinion with every known European constitutional scholar prior to providing it to Germany and, in circumstances where Germany defied the opinion of the Commission and was subject to a later challenge because of such defiance, it is unlikely that those same scholars would have any difference of opinion. If the Commission’s answer to Germany is “No”, it is almost inconceivable that Germany would confront the Commission head-on in a public battle over this issue.

WHY CAN’T TWO JUST TANGO ALONE?

Much has been talked about the “inter-se” option regarding the 1961 Convention, which is where two (or more) parties to the Convention each permit the cultivation and supply of cannabis for adult recreational use within their own jurisdictions and they form a bi-lateral (or wider) agreement to permit the supply in each other’s jurisdictions.

This is a preferred option for many opposed to the Denunciation and Re-Assessment route (the in/out/in “Hokey-Cokey”) but requires adherence to a number of prerequisite rules. The “inter-se” agreement must, in general terms, not:

- be prohibited by the Treaty;
- affect the rights and performance of duties by others under the Treaty; and,
- be incompatible with the objectives and purpose of the Treaty.

So how can Germany and another party (or a number of parties) satisfy these requirements? We would suggest that it can do so by marrying the “inter-se” approach with the positive Human Rights obligations that it unquestionably has. Indeed, we do not believe that you cannot do one without the other because the Human Rights element cannot solve the “Convention issue” alone and the “inter-se” approach cannot satisfy the Convention requirements without the positive Human Rights obligations being deployed.

WHERE DOES THIS LEAVE GERMANY?

Without a Union-wide debate on the application of the 1961 Convention, leading to majority support by the EU Member States for the legalisation of adult-use of cannabis in Germany (with the consequential unintended consequences that such may have for each of the own jurisdictions), Germany cannot achieve its published aims and the politicians know this – and if they don’t, then they should do.

However, in order for its published aims of driving out the black market and ensuring that all supply meets the required regulatory requirements, then Germany will need to allow the importation of biomass from a bilateral partner - at least in the short term - because the capacity of the cultivation facilities within its own borders, combined with their costs of production, mean that it will be impossible for the regulated supply (with its inevitable price premium) to compete at a point at which the consumer will be willing to pay, to gain the satisfaction that comes from consuming a regulated product rather than an unregulated one.

Therefore, for Germany there are two glass ceilings to be broken: Internationally in the form of the 1961 Convention ***and*** within the European Union, the latter of which may prove to be the higher of the two and not one which any of the jurisdictions which have previously moved through or around the international barriers have had to face.

The reality is that the Commission will only be able to move at the pace of the slowest member, that justification will be found for extending timescales which are said to be rigid (but which never are), and that; either because of the glacial pace that we expect, or because of a quiet “nod” behind the scenes, Germany will start to extol the virtues of decriminalisation in order to deflect from what we predict to be the almost inevitable rejection of their proposition by the Commission. In taking this easy way out, the opportunity for the required debate - advanced as it could be by one of the most powerful and respected countries in the world, and certainly within the Union - will be lost.

We do not intend this piece to sound like a criticism of Germany per se, but more at the failure of those tasked with implementing the electoral pledge to grasp their duty with the same vigour with which the politicians drumming for votes and campaigning on the back of the issue did so. What is truly required is a global reassessment of the prohibition on the recreational use of cannabis by adults and an open debate fueled by science rather than stigma – but that is unlikely to happen given the stance of some of the power-broking nations. In consequence, the now ever-antiquated Convention that some of the signatories cling to so dearly, risks undermining its very purpose for being.

As a final thought. Imagine if a country had left the European Union, had a population in favour of the legalisation of recreational use of cannabis by adults and had its own Human Rights Act. Now what an opportunity that would present – perhaps what is needed is to marry the German political will with the opportunities possessed by that mythical (?) country!

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