

## Drug Law Reform Trend in Latin America

(Information by Martin Jelsma, TNI Drugs & Democracy Programme Coordinator. Transnational Institute, 2009.)

YEAR / COUNTRY	LAW CHANGE	LEGAL FRAMEWORK <sup>1</sup>	TREND
1974 <b>Uruguay</b>	Possession for personal use was never criminalized.	Law decree N° 14.294, Article 31: <i>“Whoever is in possession of a minimal quantity, destined for personal consumption, will be exempted from punishment.”</i> The phrasing of the 1974 article was updated in 1998 to: <i>“Whoever is in possession of a reasonable quantity exclusively destined for personal consumption-- as morally determined by the Judge, who would have to include his reasoning for such ruling in the sentence-- will be exempted from punishment.”</i>	Uruguay is one of the few countries that never criminalized the possession of drugs for personal use. The law establishes no quantity limits, leaving it to the judge’s discretion to determine whether the intent was personal use. There are no sanctions at all if the judge determines that the amount in possession was meant for personal use.
1982 <b>Peru</b>	Partial decriminalization of possession for personal use, but for certified dependent users only.	1982 Law on Illicit Drug Trafficking, Decree N° 122, Article 56: <i>“A person who, without medical authorization, possesses drugs in personal doses for his own immediate use is not punishable. Certification of dependency shall be required for immunity from punishment to apply.”</i>	In Peru, coca leaf consumption has never been criminalized and a state-controlled licensing system exists for its cultivation and distribution. With regard to other drugs, in 1982, Decree 122 established that dependent users shall no longer be punished for possession of drugs for immediate personal consumption, but only when medical certification is provided to prove the dependency. High sentences are in place for even the lowest levels of trade. Minimum sentences of 2 years, for example, apply for distributing “small quantities directly to individual consumers,” with a maximum of 10 years.
1988 <b>Paraguay</b>	Decriminalization of possession for personal use.	Law N° 1.340, Article 30: <i>“Whoever possesses substances referenced in this Law, prescribed by a doctor or whoever possesses them exclusively for</i>	In Paraguay, a new drug law in 1988 exempted from punishment those in possession of a maximum of 2 grams of cocaine or heroin and 10 grams of

<sup>1</sup> Most of the law excerpts in the ‘Legal Framework’ column are in-house translations from the original text in Spanish.

		<p><i>personal consumption, will be exempted from punishment. [...] It will be considered of drug users' exclusive personal use, the possession of substances amounting to a daily dosage, as determined in each case by the Forensic Doctor and a specialized Doctor designated by the Public Health and Social Welfare Ministry, and, if so requested, by another one designated by the defendant, at his/her own expense. In the case of marijuana this shall not surpass ten grams and in the case of cocaine, heroine, and other opiates, two grams."</i></p>	<p>marijuana for personal consumption.</p>
<p>1988 <b>Bolivia</b></p>	<p>Prohibition of consumption and forced treatment for possession for personal use.</p>	<p>Law 1008 of 19 July 1988 on the regime applicable to coca and controlled substances:  Article 35. <u>Prohibition of possession or storage</u>: “<i>No natural or juridical person may have or possess in any form or quantity, or in any place, drugs that contain or consist of controlled substances, without prior authorization from the Ministry of Social Welfare and Public Health, in consultation with the National Council Against Drug Abuse and Illicit Traffic.</i>”  Article 37. <u>Traffic and consumption</u>: “<i>The trafficking, portioning and consumption of controlled substances listed in the schedules of the annex to the present Law are prohibited.</i>”  Article 48. <u>Traffic</u>: “<i>Any person who traffics controlled substances shall be punished with imprisonment for a term of ten to twenty-five years plus a fine at ten thousand to twenty thousand times the daily rate.</i>”  Article 49. <u>Consumption and possession for consumption</u>: “<i>Drug-dependent persons or non-habitual consumers apprehended in possession of controlled substances in minimal quantities that are</i></p>	<p>Bolivian Law 1008 is very repressive toward drug use, possession and small-scale trafficking of all controlled substances except coca.</p> <p>To date, not much has been done to open the discussion toward a more humane legislative framework for drug control.</p> <p>The current law prohibits drug use and punishes possession for personal use with internment and forced treatment. Domestically, a legal market for coca leaf has always existed.</p>

		<i>presumed to be intended for their own immediate personal consumption shall be detained in a public or private institution for drug-dependence to receive treatment until certainty about their rehabilitation has been established. The minimum quantity for immediate personal consumption shall be determined through a ruling by two experts from a public institution for drug-dependence. If the quantity held is greater than the minimum quantity, it shall fall under the provisions of article 48 of this Law.”</i>	
1993 <b>Venezuela</b>	Partial decriminalization: possession for personal use remains a criminal offence, but prison sentences are replaced by “social security” sanctions.	Organic Law on Psychotropic and Narcotic Substances. Article 75: <i>“Personal dose is defined as, no more than two (2) grams in the case of cocaine or its derivatives, mixed or composed, with one or various ingredients, and up to twenty (20) grams in the case of cannabis.</i> Article 76: <i>The following safety measures will be applied for the cases stated in the previous article: 1° Admission in a rehabilitation center or specialized therapy. 2° Cure or detoxification. 3° Social reintegration of subject. 4° Parole and monitoring upon release. 5° Deportation of foreign, non resident subjects.”</i>	In 1993, Venezuela replaced prison sentences with “social security measures” for possession of up to 2 grams of cocaine and 20 grams of cannabis. Possession for personal use is punished with referral to treatment, which can still lead to obligatory internment in specialized centers.
1994 <b>Colombia</b>	Decriminalization of possession for personal use.	The Constitutional Court’ sentence C-221 ruled that prohibiting drug consumption violates Colombia’s constitutional right to the “free development of personality.”	In 1994, the Colombian Constitutional Court declared unconstitutional the punishment for possession of amounts for personal use. Since then, adults could possess up to 20 grams of marijuana and one gram of cocaine, among other substances, for consumption in the privacy of their homes without fear of any penal sanctions.

<p>2002/2006 <b>Brazil</b></p>	<p>Partial decriminalization: possession for personal use remains punishable, but prison sentences are replaced by “educational measures.”</p>	<p>Law N° 11,343/2006, Article 28: <i>“Whoever acquires, stores, transports or possesses unauthorized drugs for personal consumption in violation with legal standards or guidelines shall be forced to comply with the following: I. Warning about the effects of drugs, II. Community Service, III. Participation in a drug educational program.”</i></p>	<p>Brazil went through legislative changes in 2002 and 2006, resulting in a partial decriminalization of possession for personal use. Prison sentences no longer apply and were replaced by educational measures and community services.</p>
<p>2007 <b>Chile</b></p>	<p>Partial decriminalization of consumption and possession for personal use: administrative instead of criminal sanctions are still applied if drugs are consumed or possessed in public places or in groups.</p>	<p>Law N° 20.000 Supersedes Law N° 19.366, which Punishes the Illicit Trafficking of Narcotic Drugs and Psychotropic Substances:  Article 4: Any person who, without the proper authorization, possesses, transports, keeps or carries on him/herself small amounts of drugs which create physiological or psychological dependence, or raw materials used to produce them, shall be punished by a term of imprisonment ranging between not less than 541 days to 5 years <i>“unless such person can justify that they were intended for medical treatment or exclusive personal use or consumption in the near future.”</i>  Article 50: <i>“Those who take any of the narcotic drugs or psychotropic substances mentioned in Article 1 in public places or places open to the public, such as streets, paths, parks, theatres, cinemas, hotels, cafes, restaurants, bars, sports centers, places for dancing or listening to music, educational institutions or training academies, shall be subject to any of the following penalties:”</i>  The list mentions <i>“compulsory attendance at prevention programs, for up to 60 days, or at treatment or rehabilitation programs, as the case may be, for a period not exceeding 80 days in institutions duly authorized by the competent Health Service,”</i> fines, community services and suspension</p>	<p>The adoption in 2007 of Law 20.000 formally decriminalized the possession of drugs for immediate individual use in the private sphere. Drug use or possession in public places is an infraction, punishable with fines, forced treatment, community services and/or suspension of driving licenses. The same penalties apply to “persons who consume such drugs in private places if they have assembled for that purpose.” The burden of proof is fully on the person arrested in possession of drugs. Prison sentences are high (1½-5 years) if the judge is not convinced and determines that the intent was for distribution or sharing. While the majority of cases end with suspension of sentences or administrative sanctions only, many people caught with small quantities still end up in prison. An expert commission was installed in 2009 to recommend legislative reforms and is exploring possibilities for a full decriminalization of drug use and a reclassification of cannabis.</p>

		of drivers license. <i>“Likewise, said penalties shall apply to anyone who consumes such drugs in private places if they have assembled for that purpose.”</i>	
2008 <b>Ecuador</b>	Pardon for mules; New Constitution.	New Constitution, Article 364: <i>“Addictions are a public health problem. It is the State’s responsibility to develop coordinated information, prevention and control programs for alcohol, tobacco, and psychotropic and narcotic substances; as well as offer treatment and rehabilitation for occasional, habitual, and problematic users. Under no circumstance shall they be criminalized nor their constitutional rights violated.”</i>	In 2008, Ecuador’s Special Assembly ( <i>Asamblea Constituyente</i> ) approved an amnesty for drug couriers imprisoned for carrying less than 2 kilos and who had spent more than a year in prison. A new Constitution approved by referendum in September 2008 states the following about drug users: “Under no circumstance shall they be criminalized nor their constitutional rights violated.” This opens the door for drug law reform, expected in 2010.
2009 <b>Mexico</b>	Decriminalization.	‘Narcomenudeo Decree’ (August 2009), reform Article 478 (General Health Law): <i>“The Public Ministry will not pursue penal action for the crime detailed in the previous article, against an addict or consumer in possession of any of the narcotics listed in the table, in equal or less quantity than described in the same table, for strict personal use and outside of the places restricted by section II of article 475 of this Law. The ministerial authority will inform the consumer on the location of medical treatment institutions or addiction prevention centers.”</i>	In Mexico the ‘Narcomenudeo decree’ was adopted by Congress in April 2009 and came into effect in August 2009, removing any sanctions for quantities for personal use: 5gr cannabis, 2gr opium, 0.5gr cocaine, 50 mgr heroin or 40 mgr of methamphetamine. Addicts enter mandatory treatment only after the third arrest.  In 2006, Congress passed a similar decree, but under pressure from the Bush Administration, then President Fox decided not to sign it into law. However, President Calderon did sign the amendment decree and it came into force on August 20, 2009.
2009 <b>Argentina</b>	Decriminalization: Punishment of possession of drugs for personal use is declared unconstitutional.	The Supreme Court ruling on a case involving the possession of small quantities of marijuana, declared unconstitutional the application of the following 1989 provision: Law 23.737, Article 14° bis: <i>“The sentence will be of at least a month but no more than two years of</i>	On August 25, 2009, Argentina’s Supreme Court ruled that applying sentences for possession of amounts of marijuana for personal use is unconstitutional. Although the Court Order does not specifically reference other substances, it opens the judicial

		<i>prison when scant quantity and other circumstances unequivocally suggests that possession is for personal use.”</i>	door to drug law reform in Argentina, as the arguments are applicable to other drugs. Art. 14° bis would have to be deleted and judges already started to act accordingly in legal practice after the ruling, even though the criteria for defining possession for personal use are not yet established.
2009 <b>Colombia</b>	Decriminalization confirmed.	In July 2009, the Supreme Court of Justice reconfirmed the 1994 ruling of the Constitutional Court by determining that the possession of drugs for personal use “ <i>cannot be the object of any punishment,</i> ” when the incident occurred “ <i>in the exercise of his personal and private rights, [and] the accused did not harm others.</i> ”	In July 2009, the Supreme Court overruled an October 2008 sentence imposed to a man arrested for possession of 1.3 grams of cocaine. The man had been sentenced to 64 months in prison and needed to pay a fine. The Court ordered his immediate release, an indication that the 1-gram threshold is not the only criteria to be considered.
2009 <b>Colombia</b>	Re-prohibition of consumption and possession.	The Colombian Congress amended the Constitution to prohibit drug consumption and possession. Article 49 of the Constitution will now include: “ <i>Possession and consumption of narcotic and psychotropic substances is prohibited, with the exception of medical prescriptions. Focusing on prevention and rehabilitation, the law will provide for educational, preventative and therapeutic measures and treatments for those who use such substances. Being subjected to those measures and treatments requires the addicts’ informed consent.</i> ”	As the exception to the rule, and counter to the trend in Latin America, President Alvaro Uribe had been trying for several years to re-penalize possession for personal use in Colombia. On December 9, 2009, Congress amended the Constitution to prohibit drug use and possession. Only administrative sanctions will be applicable.  The Constitution had to be amended in order to overrule the 1994 Constitutional Court decision.
<b>Pending 2010 Argentina</b>	Decriminalization.		The Supreme Court ruling in Argentina opens the judicial door for drug law reform to decriminalize the possession of all drugs for personal use. The bill is expected in 2010.

<b><i>Pending 2010 Ecuador</i></b>	Decriminalization.		It is expected that the Ecuadorian government will present a new law to Congress, including decriminalization of possession for personal use and the lowering of sentence levels for small-scale trafficking.
<b><i>Pending 2010 Brazil</i></b>	Decriminalization.		The Ministry of Justice and members of Congress are preparing various proposals to reform the current drug law. These are expected to include total decriminalization of possession of drugs for personal use and the lowering of sentence levels for small-scale trafficking.
<b><i>Pending 2010 Bolivia</i></b>	Proposals to change the international legal regime for the coca leaf.	Amendment proposal to delete paragraphs 1(c) and 2(e) of article 49 of the 1961 UN Single Convention on Narcotic Drugs where it is explicitly mentioned that <i>"coca leaf chewing must be abolished with twenty-five years from the coming into force of this Convention."</i>	<p>In March 2009, President Evo Morales requested the deletion of articles in the UN 1961 Single Convention on Narcotic Drugs prohibiting the chewing of the coca leaf. This marks an important first step that will be followed by initiating the WHO procedure to withdraw the coca leaf from Schedule I of the 1961 Convention.</p> <p>While other reforms have been announced in regard to the Bolivian drug law, changes remain to be seen.</p>

## Country Analysis

- **Mexico decriminalized consumption but increased penalties for other drug law offences**

On August 20, 2009, President Felipe Calderon enacted a decree, approved by Congress, on small-scale trafficking ('narcomenudeo' decree), which legally defines categories for consumption, small-scale trafficking, and large-scale trafficking.<sup>2</sup> An important component of the new legislation is the removal of all penal sanctions for the possession of certain quantities of drugs for personal use: for example, 5 grams of cannabis, 2 grams of opium, 500 milligrams of cocaine, 50 milligrams of heroin, 40 milligrams of methamphetamine or ecstasy, etc. The Mexican Congress had approved a similar decree in 2006, but then President Vicente Fox – who originally supported the initiative – came under heavy US pressure and decided not to sign it into law.

The law strictly defines personal dosage and establishes very low amount thresholds. There are several problems with these strict quantity divisions. For example, the law allows the possession of a maximum of 0.5 grams of cocaine; however, in Mexico, cocaine is most commonly sold in 1-gram packages. Therefore, this can result in heavy prison sentences for those caught with just a single gram of cocaine, as they will be assumed to be small traffickers even if there are no other indications that the amount in possession was meant for selling. In addition, the penalties for several offences were increased, for example, selling to minors or in school neighborhoods. Also, the decree defines small-scale trafficking by quantities up to 1000x the dosage for personal use. Therefore, courier-level smuggling (someone caught at the airport who swallowed more than 500 grams of cocaine or more than 50 grams of heroin) will now be treated as large-scale trafficking, which falls under the highest penalty category. As a legislative principle, it is preferable to use quantitative definitions only as a rough minimum guideline and provide judges with room to maneuver and take into account other indications for deciding penalties in those cases when the minimum dosage quantity is exceeded – for example: first offence, social circumstances, situation under which the person was arrested, etc.

- **Argentina is likely to go further than Mexico; 80 legislators signed a letter of support for drug law reform**

Drug law reform proposals in Argentina are being elaborated by a scientific advisory group convened by former Minister of Justice, now Cabinet Chief, Anibal Fernandez. Both Fernandez and President Cristina Fernandez de Kirchner have expressed their support for the decriminalization of drugs for personal use. "Repressive policies have been tested for 18 years already and it's clear that they've achieved nothing so far," said Fernandez in a radio interview in December 2008 in reference to Law 23.737. Enacted under President Menem, this law establishes that drug users can be sentenced to a maximum of two years in jail. The reform proposals were scheduled to enter Parliament in March, but the process stalled because of internal opposition and disagreements between government agencies. The vice-president and José Ramón Granero-- the head of the inter-ministerial drug coordination (SEDRONAR)-- strongly oppose any steps toward decriminalization. The proposals have strong support from the judiciary sector, where steps in that direction have already been taken with jurisprudence in specific cases (on cultivation of cannabis for personal use, for example). In addition, in August 2009, the Supreme Court ruled that imposing penal sanctions for drug consumption is unconstitutional. The support for this measure became evident in a statement issued in March 2009 by 80 judges, prosecutors, and lawyers, including well-known magistrates such as Martín Vázquez, Monica Cuñarro, Horacio Cattani, and Patricia Llerena. Their joint declaration addresses decriminalization, the right to health, harm reduction, and human rights principles: "Law 23.737 urgently needs to be modified to make it compatible with human rights treaties enshrined in

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<sup>2</sup> For a more detailed analysis of the decree, see: *Mexico: The Law Against Small-Scale Drug Dealing*, Jorge Hernandez Tinajero y Carlos Zamudio Angles, Series on Legislative Reform of Drug Policies Nr. 3, TNI/WOLA, October 2009.

the Constitution by the 1994 constitutional reform, especially with regard to the principles of “ultima ratio,” “harmfulness,” and “proportionality.”

- **Ecuador: progressive new drug law will go to new Congress**

At the end of 2008, between 2,000-3,000 persons incarcerated in Ecuador for drug trafficking were released. This measure, known as “pardon for mules,” singled out a specific group of prisoners who were victims of an indiscriminate and disproportionate legislation in effect for many years. Although with this measure, the government of Rafael Correa took an important step in the process of reforming draconian laws on controlled substances in his country, the process still needs to be completed with new legislation.<sup>3</sup> Now, after the new Constitution was approved by referendum and Correa was re-elected in April with a comfortable majority, the newly installed Congress must discuss a fully reworked drug law to adjust the entire penal rights system to the new Constitution. The draft legislation is expected to be introduced early this year and will have to be based on the principle retained in the Constitution: that the problem of drug consumption is a public health issue and, in reference to users, “*in no case will criminalization be permitted nor will persons’ constitutional rights be violated,*” (Article 364, Constitution of the Republic of Ecuador). It will also have to consider the judicial precedent of the pardoned drug mules, which established criteria for prison release: no prior conviction under the drug law, arrested for the possession of a maximum of two kilograms of any drug, and having served ten percent of the sentence or a minimum of one year.

- **Bolivia: coca issue and pending review of Law 1008**

The focus in Bolivia has been to establish a different legal regime for the coca leaf. In March, President Evo Morales sent a formal letter to the UN Secretary General requesting the deletion of two sub-articles in the UN 1961 Single Convention on Narcotic Drugs that specifically prohibit the chewing of the coca leaf.<sup>4</sup> This constitutes an important first step toward repairing a historical error in the treaty system, and one that will be followed soon by initiating the WHO procedure to withdraw the coca leaf from List I of the 1961 Convention. The reform of other aspects of the Bolivian drug law (Law 1008), which regulate substances other than coca, has been announced but has yet to start. The delay could be due to the government’s priority of changing the control regime for natural coca products. In addition, it seems that the Bolivian government wants to prevent being seen as taking a softer approach on drug control at a time when the coca leaf proposals are likely to generate controversy in the international arena. The Bolivian law, similar to that of Ecuador and Argentina, is very repressive toward drug use and small-scale trafficking, but not much has been done to date to open the discussion and to draft proposals for a more humane legislative framework for drug control. It is expected that this discussion will eventually surface on the Parliamentary agenda, but the question remains when.

- **Colombia as the exception to the rule: Congress re-prohibited drug consumption and possession**

In 1994, Colombia’s Constitutional Court (sentence C-221) determined that prohibiting the use of drugs violated the Constitutional right to the “free development of personality.” Since then, adults could possess up to 20 grams of marijuana and one gram of cocaine, among other substances, for consumption in the privacy of their homes without fear of penal sanctions. Since being elected, President Alvaro Uribe tried to revert the Court’s decision and re-penalize possession for personal consumption. The first attempt was through a referendum held in 2003, which was defeated and followed by four initiatives in Congress that failed to achieve majority. After five attempts, and in December 2009, Congress amended the Constitution to prohibit drug consumption. Article 49 of the Colombian Constitution will now include:

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<sup>3</sup> See: *Pardon for Mules in Ecuador, a Sound Proposal*, Series on Legislative Reform of Drug Policies Nr. 1, TNI/WOLA, February 2009.

<sup>4</sup> See: *Coca Chewing out of the UN Convention?*, weblog Martin Jelsma, Transnational Institute, 21 August 2009.

“The possession and consumption of narcotic or psychotropic substances is prohibited,” (*“El porte y consumo de sustancias estupefacientes o psicotrópicas está prohibido.”*) Penalties will be decided later, but previous attempts at the amendment had introduced the idea of making drug consumption a misdemeanor and making offenders face "therapeutic courts" comprised of judges, physicians, and psychologists who would decide on sentences for treatment. The drug courts and compulsory treatment elements were initially taken out of the amendment proposal last spring, facilitating its approval on April 28th in the legislative commission in Congress, despite strong objections from the opposition minority. It seems that this time, supporters of the constitutional amendment aimed to pass just the basic legal principle of re-penalization to avoid strong opposition. With respect to the administrative measures, the conciliatory text from June 18 established: “being subjected to those measures and treatment requires the addicts’ informed consent.” In the final proposal as adopted on December 9, 2009, this principle was upheld. It remains to be seen how the reintroduction of prohibition of drug use and possession of personal quantities will be implemented in the practice of jurisdiction and law enforcement.