

CANNABIS POLICY REFORM IN GERMANY: CONSTITUTIONAL AND POLITICAL DISCOURSES ON DECRIMINALIZATION AND REGULATION STRATEGIES

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Abstract

There is relentless discussion in Germany about the right manner to deal with cannabis and its users. In 1994 and 2004, the Federal Constitutional Court reaffirmed the legal appropriateness of prohibition. However, since then, data about the dangers and effects of cannabis use have quieted alarm, and Europe, alongside the once-prohibitive United States, has had its initial experiences with liberalized use of cannabis. Since the founding of the *Schildower Kreis*, a network of experts from science and practice, 122 criminal law professors have petitioned the Bundestag for an Enquête Commission. The basis of the Federal Constitutional Court's decision no longer exists. The Narcotics Act and constitutional discourse on cannabis prohibition need to be reviewed, as do political arguments about wasted resources and high costs, led by empirical examinations from Hamburg University of Applied Police Sciences. This study surveys police officers for their thoughts about drug policy and dealing with cannabis-related offenses. Results show that the attitudes of criminal detectives (contrary to the officers of the security police) have changed since the 1990s and that prohibition is not considered effective. Indications of a paradigm shift in drug policy, as required by the Global Commission on Drug Policy, are appearing in Germany.

Key words

Cannabis Policy, Regulation, Germany, Police Survey, Police Attitudes

1. INTRODUCTION

Numerous German initiatives to liberalize cannabis-related criminal law have arisen against the backdrop of global debates, stimulating reform. Current drug policy is being discussed intensively, including calls to end prohibition of cannabis from well-known criminal law professors aligning

with the resolution of Prof. Dr. med. Lorenz Böllinger.¹ Advocates cite the benefits of relieving the police and courts to focus resources on organized crime. Opponents fear legalization will increase the number of consumers and magnify healthcare costs at the expense of society.

In Western and Central Europe, including Germany, a market for illegal drugs emerged in the late 1960s (Schwindt 2013, § 27 para. 10), which has not yet been stabilized politically or socially. The climate favoring drug reforms is a paradigm shift. Liberalization of drug laws in the Netherlands, Switzerland, Spain, Belgium, Portugal, several US states, and the Czech Republic has shown no increase in drug use, as feared (Rosmarin & Eastwood 2012). In 2014, Uruguay legislated to regulate cultivation, sale, and consumption of cannabis to deprive organized crime of the market and to prevent use of harder drugs (Hudak, Ramsey & Walsh 2018). Cannabis has been grown, consumed, and sold in small quantities legally in Canada since October 17, 2018.²

After reviewing Germany's current legal situation regarding cannabis in Section 2, we analyze its constitutional and political discourse in Section 3. Section 4 presents a criminological examination of arguments advocating prohibition of cannabis and citing risks to health and society. Section 5 analyzes the effects of current German drug policy on law enforcement agencies, supplemented by presentation of a criminological study in Hamburg on their attitude toward the current law enforcement practice regarding cannabis in Section 6. The conclusion compares current criminological findings with the German legal situation and drug policy.

2. GERMAN LEGAL FRAMEWORK

The German legal framework for drugs and addiction is multi-layered because policy affects many spheres of life. The handling of drugs, dealing and trafficking, medical prescriptions, drug use, and addiction are governed by provisions set at the international, European, and national levels. At the national level, a range of parties oversee drug issues. Under Germany's federal structure, they erect cross-sectoral legal conditions concerning addiction and drug policy.

Since 1981, Germany's central national legislation has been the Narcotic Drugs Act (*Betäubungsmittelgesetz*; BtMG).³ Alongside administrative regulations concerning narcotics trade, the Act is significant practically because narcotics offenses loom large in the daily business of German courts. BtMG determines what substances are narcotics, regulates their trade, and sanctions their handling. Sanctions for violating its provisions include penalties for misdemeanors and crimes, fines for regulatory offenses, rehabilitation and prevention measures, and administrative acts such as confiscation. Numerous other laws set criminal provisions and sanctions for drug-related offenses, including the German Criminal Code,⁴ German Road Traffic Act,⁵ German Precursors

¹ The resolution is available at <http://www.schildower-kreis.de> [03/01/2019].

² Department of Justice of Canada on Cannabis Legalization and Regulation <https://www.justice.gc.ca/eng/cj-jp/cannabis/> [03/01/2019].

³ The Act on the Trade in Narcotic Drugs July 28, 1981, entered into force January 1, 1982, current version 1 March 1994, Federal Law Gazette I pp. 681, 1187: http://www.gesetze-im-internet.de/btmg_1981/ [03/01/2018].

⁴ Strafgesetzbuch (StGB) <https://www.gesetze-im-internet.de/stgb/> [03/01/2019].

⁵ Straßenverkehrsgesetz (StVG) <https://www.gesetze-im-internet.de/stvg/> [03/01/2019].

Monitoring Act,⁶ and the German New Psychoactive Substances Act.⁷ Plants and their constituents belonging to *genus cannabis* are listed in Annex I–§1 (1) BtMG and are not marketable narcotics. Central forms of action related to cannabis production, sale, and purchase are prohibited. Although consumption is not subject to sanctions, purchase and possession preceding it are subject to sanctions. A permit under § 3 BtMG can be granted only for scientific or purposes in the public interest. In March 2017, Germany legalized therapeutics containing tetrahydrocannabinol, mainly in the form of the flower or extracts, for patients with chronic pain, multiple sclerosis, and cancer (§ 13 BtMG). Legalizing medicinal cannabis had a domino effect. Portugal and Denmark followed suit, discussing the legalization or initiating cannabis-related research (Aguilar et al., 2018).

German legislation allows dismissal of criminal cases against drug users. The most relevant is § 31a BtMG⁸, introduced in 1992 (Weber 2017, § 31a BtMG para. 2). If there is no public interest in prosecution and the offense can be considered minor, § 31a BtMG allows prosecutors to dismiss cases without consulting the court. The core consideration in applying § 31a BtMG is that of small amounts (*geringe Menge*), which is undefined by the law but specified by the German federal states, typically 6–10 grams (Weber 2017, § 31a BtMG, para. 82 ff.). The intent is to “improve the procedural recruitment options for the public prosecutor’s offices by waiving judicial approval.”⁹ Police have no discretion in reporting all suspected offenders to the public prosecutor.

Germany’s ban on cannabis and threat of punishment constitute interference with general freedom of action by adults. In consistent case law of the Federal Constitutional Court, general freedom of action under Article 2 (1) of the Basic Law includes acts that pose health risks. Protection against self-injury can justify interference with adults’ general freedom of action only in particularly serious cases.¹⁰ In 1989, the Federal Administrative Court decided that the article contravened the comprehensive right of citizenship “to grant state authorities the power to dictate to the citizen what he has to do in the interests of his own protection.”¹¹

⁶ Grundstoffüberwachungsgesetz (GÜG) [https://www.gesetze-im-internet.de/g_g_2008/\[03/01/2019\]](https://www.gesetze-im-internet.de/g_g_2008/[03/01/2019]).

⁷ Neue-psychoaktive-Stoffe-Gesetz (NpSG) [https://www.gesetze-im-internet.de/npsg/\[03/01/2019\]](https://www.gesetze-im-internet.de/npsg/[03/01/2019]).

⁸ § 31a Betäubungsmittelgesetz (BtMG) = Section 31a: Refraining from prosecution
1) If the subject matter of the proceedings is an offence pursuant to section 29 subsection 1, 2 or 4, the public prosecutor's office may refrain from prosecution if the offender's guilt could be regarded as minor, if there is no public interest in a criminal prosecution and if the offender cultivates, produces, imports, exports, carries in transit, acquires, otherwise procures or possesses narcotic drugs in small quantities exclusively for his personal use. Prosecution should be refrained from if the offender possesses narcotic drugs in a drug consumption room in small quantities exclusively for his personal use, which may be tolerated pursuant to section 10a, without being in possession of a written licence for acquisition.

European Monitoring Centre for Drugs and Drug Addiction: <http://www.emcdda.europa.eu/topics/law/drug-law-texts?pluginMethod=eldd.showlegaltextdetail&id=677&lang=en&T=2> [01/02/2018].

⁹ Bundestag printed matter (BT-Drs.) 12/934, June, 12th, 1991 12, 1991 <http://dipbt.bundestag.de/doc/btd/12/009/1200934.pdf> [03/01/2019].

¹⁰ BVerfG, 12/21/2011, 1 BvR 2007/10.

¹¹ BVerwGE 82, 45 (48 f.).

In March 1994, the Federal Constitutional Court¹² ruled that criminal cases involving possession, purchase, or import of small amounts of cannabis for personal use must be dismissed because the offender's guilt and harm caused by the offense must be considered trivial. Criminal prosecution in such cases amounts to violations of the principle of proportionality and disrespect for the *ultima ratio* of criminal law. While defending the constitutionality of BtMG, the Federal Constitutional Court found large differences in dismissal rates unacceptable because they violate rights to equal and non-discriminatory treatment. The Constitutional Court concluded that infringing rights to equal treatment and proportionality could be avoided by implementing consistent non-prosecution policies throughout Germany in cases involving possession of small cannabis quantities for personal use. The 1994 Federal Constitutional Court decision set the standard for prosecution of personal use. It declared that German law enshrines a "ban on excessive punishment" that had to be observed for minor offenses involving personal use of cannabis.

The decision further states that "in view of the open criminal policy and scientific debate on the dangers of cannabis use and the correct way to combat them, the legislator has to observe and review the effects of existing law, including the experience of others." It requested German federal states to assure a "basically uniform practice of application" and, as a rule, to refrain from prosecution if conditions in § 31a BtMG apply.

In short, the court affirmed cannabis prohibition as constitutional. It would not infringe the principles of proportionality, equality, and personal freedom.¹³ In dissent, Judge Bertold Sommer complained that BtMG was too broad and did not meet the principle of proportionality.¹⁴

3. CONSTITUTIONAL AND POLITICAL DISCOURSE

More than 20 years after the 1994 Federal Constitutional Court decision, the entire German narcotics law was put to test when 122 criminal law professors (the *Schildower Kreis*) submitted a resolution to the Bundestag, draw legislators' attention to unintended harmful side effects and consequences of criminalizing cannabis. In the resolution, they demanded to check the effectiveness of the drug law. They criticized the unsuccessful criminal prosecution of drug demand and supply and noted that Taliban terrorism in Afghanistan is mainly financed via black market heroin and hashish. This gigantic black market "generates [...] other subsequent criminal activity and [has] destabilising effects on global financial markets just as [on] national economies." Science had proven that the danger of drugs would be mastered "better by health-juridical regulation [...] as well as with adequate youth welfare measures."¹⁵

In 2015, opposition fractions in the Bundestag, the Lefts and the Greens, filled a joint petition to review criminal drug law based on this resolution and to seek support from the Social Party. They drafted the Cannabis Control Bill to remove cannabis from criminal restrictions under

¹² BVerfGE 90, 145. A translation of the decision appears at <https://germanlawarchive.iuscomp.org/?p=85> [03/01/2019].

¹³ BVerfGE 90, 145.

¹⁴ BVerfGE 90, 145.

¹⁵ The resolution can be found at <http://schildower-kreis.de/resolution-deutscher-strafrechtsprofessorinnen-und-professoren-an-die-abgeordneten-des-deutschen-bundestages/> [03/01/2019].

BtMG and to open a strictly controlled legal market for cannabis.¹⁶ Facing opposition from the Christian Party and the Social Party, the draft was rejected in 2017.

In December 2017, the Free Democratic Party joined the cannabis-liberalization-movement and proposed in a "small request" to the government for a controlled legal market in cannabis and model projects for its free use.¹⁷

In February 2018, the Green Party introduced a Cannabis Control Bill (*Cannabiskontrollgesetz*), claiming it was justified by a failed cannabis drug policy. Cannabis was then Germany's most common illegal drug, consumed by an estimated 3.1 million adult citizens.¹⁸

4. CANNABIS CONSUMPTION IN GERMANY AND THE EU AND ITS HEALTH AND SOCIAL RISKS

One argument cited for years concerns the physical and psychological dangers of cannabis use. Opponents portray it dramatically (Habschick, 2014; Hambrecht, 2003; Duttge & Steuer, 2015).¹⁹ Whereas a few years ago, scientific evidence was slight and many claims were made case-by-case, numerous studies of varying quality have appeared. A meta-analysis commissioned by the Federal Ministry of Health evaluated 2,100 international papers published over a decade (CaPRis, 2017). Studies rated the health risk of cannabis low, especially in recreational use by adults, and presented fewer health risks than consumption of alcohol and nicotine (Bonnet, 2016, p.61; Bonnet et al., 2016, p.126; DG-Sucht, 2015, p.1; Gantner, 2016, p.55, Nutt et al., 2010, p.1562, 1563). Most mental and physical harm from chronic cannabis use in adulthood is reversible (Bonnet, 2016, p.64, 69). Physical withdrawal is relatively mild (Soyka et al., 2017, p.311, 323). Studies linking cannabis use and anxiety/depression (Danielsson et al., 2016, Horwood et al., 2012) or psychotic disorders (Power et al., 2014; Bonnet et al., 2016) are inconsistent. However, risk of psychotic disorders among persons with genetic predispositions appear increased (Radhakrishnan et al., 2014, p.9; van Winkel & Kuepper, 2014, p.784). Overall, inconsistent or incomplete findings sometimes require methodologically reliable longitudinal studies (CaPRis, 2017, p.2).

Early cannabis use represents risks to younger adolescents (Radhakrishnan et al., 2014, p 9; van Winkel & Kuepper, 2014, p.771, 772; Bonnet et al., 2016, p.127; CaPRis, 2017, p.3). Regular consumption by young consumers suppresses development of brain functions responsible for impulse control, affect control, control of attention and concentration, memory, élan, and social-organizational abilities (van Winkel & Kuepper, 2014, p.771, 772, Bonnet et al., 2016, p.127). Risk of later psychotic disorders increases with early onset. It remains unclear whether

¹⁶ Bundestag printed matter (BT-Drs.) 18/4204 March, 4th, 2015 <http://dip21.bundestag.de/dip21/btd/18/042/1804204.pdf> [03/01/2019].

¹⁷ Bundestag printed matter (BT-Drs.) 19/181 December, 5th, 2017 <https://dip21.bundestag.de/dip21/btd/19/001/1900181.pdf> [03/01/2019].

¹⁸ Bundestag printed matter (BT-Drs.) 19/819 February, 20th, 2018 <http://dip21.bundestag.de/dip21/btd/19/008/1900819.pdf> [03/01/2019].

¹⁹ "Cannabis should not be downplayed." Drug Officer Marlene Mortler, Tagesspiegel Mai 14, 2015: <http://www.tagesspiegel.de/politik/drogen-beauftragte-marlene-mortler-im-interview-cannabis-darf-nicht-verharmlost-werden/11774800.html> [01/03/2019].

early onset causes long-term cognitive disorders or are reversible. Nonetheless, early cannabis use is associated with psychosocial risks such as lower educational attainment (CaPRis, 2017, p.3). Overall, however, it is unclear to what extent mediators exist. Possibly, adolescents who start early belong to a delimited subpopulation (childhood abuse, low socioeconomic status) (Radhakrishnan et al., 2014, pp.9, 10).

However, increased demand for treatment (Bonnet & Scherbaum, 2010, p.299, DGKJP/BAG KJPP/BKJPP, 2015) cannot be cited as evidence of elevated risk for adolescents. Initial treatment numbers indicate only that a help system with cannabis-specific offers, which are also used, has been established in the past 10 years (Gantner, 2016, p.55, 56; Tossmann & Gantner, 2016, p.85).

The argument that prohibition protects the young against social and educational problems and developing criminal behavior remains scientifically unproven. Studies of links between cannabis and crime yield no consistent results. Cross-sectional studies that could prove a connection cannot make causal claims (Hoaken & Stewart, 2003). Some longitudinal studies do associate increased risk of violence with long-term cannabis use (Schoeler et al., 2016, p.1673), others don't (Green et al., 2010, pp.123f.).

Baier et al. (2016) found no causal relation between cannabis use and shoplifting, damage to property, or violence in their longitudinal study of 1,269 seventh and ninth graders in Hanover. However, it is confirmed that early alcohol consumption leads to later increased delinquency, in particular to violent offenses. These findings accord with international research (Maldonado-Molina et al., 2011). Despite inconsistent international findings, it is certain that cannabis use occurs predominantly in combination with alcohol and tobacco (ESPAD Group, 2016, p.15). No drug in itself leads to crime; drug use is embedded in complex psychosocial conditions (Kreuzer, 1990, 2005, 2015, Kreuzer et al., 1992). This statement is important, especially with regard to violent offenses, whose complex origins are well researched in early socialization environments shaped by violence.

Closely linked to the argument that "cannabis leads to criminal behavior" is the argument that cannabis is a gateway drug. That assumption long has been refuted. The majority of cannabis users do not switch to harder drugs (Kreuzer & Wille, 1988, S. 29; Krumdiek, 2008, p.441; Stöver & Plenert, 2013, p.8 with further notes). On the basis of the "Monitoring the future" study, empirical evidence suggests alcohol is a "gateway drug" before consumption of cigarettes and cannabis (Kirby & Barry, 2012, p.372, 373). Prohibitionists seem influenced by the "gateway drug" argument (Duttge & Steuer, 2015, p.801; Duttge & Steuer, 2014, p.183; Habschick, 2014, p.629). But even the Federal Constitutional Court rejected this argument in the 1994 decision.

Perhaps the foremost arguments against far-reaching reforms are that a regulated market sends the wrong message and seduces youth into cannabis use. These arguments assume that regulatory policies increase availability and that consumption increases as a result (Duttge & Steuer, 2014, Hambrecht, 2003, Weber, 2008). Neither assumption withstands scrutiny. First, cannabis is Germany's most prevalent illicit drug. About a quarter (23.2%) of German adults age 18 to 64 claim to have used cannabis at least once (Epidemiological addiction survey 2012, 2015: Pabst et al., 2013; Kraus et al. 2014; 27.2%, Piontek et al., 2017). Few are regular users, as shown by the prevalence rate of the last 30 days (2.3% respectively 3.1%). The slight potential for addiction is below that for alcohol or nicotine (Behrendt et al., 2009, p.70ff.). Approximately

1.00% of the German population age 18 to 64 is cannabis-dependent (CaPRis, 2017, p.4: 0.5% cannabis abuse and 0.5% cannabis dependence; Soyka et al., 2017, p.323).

Rates for young people vary with the sample and age group studied. One in five German 15 to 16 year-olds has tried cannabis at least once according to the European Monitoring Center for Drugs and Drug Addiction (EMCDDA, 2017, p.87) using data from the European School Survey Project on Alcohol and Other Drugs (ESPAD). The lifetime prevalence rate among young adults age 18 to 25 is higher (34.5%) according to the Drug Affinity of Young People in the Federal Republic of Germany Study 2015. Within this age group 7% state they have consumed within 30 days (Orth, 2016, p.56). Among adolescents and young adults, the highest prevalence rates were recorded in 2004. Thereafter, rates fell and remained largely constant between 2008 and 2015 (Orth, 2016, p.62).

Country-specific data give an indication whether drug policy influences availability and consumption. In Europe, the lifetime prevalence rate of 15-year-old German girls and boys (15% and 18%, respectively) falls in the mid-range behind France, Switzerland, Italy, Belgium, England, and Spain (Health Behaviour in School-aged Children Study [HBSC Survey] of the World Health Organization (WHO, 2016, p.172).

Large differences in consumption rates and patterns emerge within Europe and North America. Studies have sought evidence of increased consumption in the Netherlands, which has pursued liberal cannabis policies for 40 years. None has been found during the 1980s, 1990s (Reuband, 1992, p.43), or today. Ownership, acquisition, trade, and production are not legalized, but retailing in coffee shops under strict conditions is not prosecuted. Adolescents are prohibited from coffee shops. Lifetime and 12-month prevalences of young people stand at German levels (EMCDDA, 2017, p.87; WHO, 2016, p.172). The lifetime prevalence of German 15 to 64 year-olds is higher (27.2% versus 25.6%) than in the Netherlands (EMCDDA, 2017, p.87). Per the HBSC Survey (WHO, 2016, p.172), France, where cannabis use is banned but barely traced, has the highest rates of lifetime prevalence (29% for 15 year-old males and 26% for 15 year-old females). In the Czech Republic, where consumption of soft and hard drugs is largely an administrative offense, cannabis consumption rates were 23%, among 15 year-old girls and boys, but no higher than in France (WHO, 2016, p.172).

Portugal's decriminalization model is associated with decreasing rates among young people (Hughes & Stevens, 2010, p.1017): in 2013/14 about 10% and 13%, respectively, among 15-year-old girls and boys (WHO, 2016, p.172). These and other improvements in Portugal's drug situation (declining rates of intensive use and drug-related harm) are not only attributed to decriminalization but also to health improvements and harm minimization (Hughes & Stevens, 2010, p.1917; Hughes & Stevens, 2012, p.102f.; Murkin, 2014, p.3). The extent to which these changes are influenced by introducing the Commission for Dissuasion of Drug Addiction (CDT) cannot be quantified (Hughes & Stevens, 2010, p.1018).

Overall, there is no correlation between national drug strategy and consumption rates (Degenhardt et al., 2008; DG-Sucht, 2015; EMCDDA, 2017). Even in highly prohibitive Sweden, often cited as a positive example in Germany, repressive drug policy does not explain consumption rates (Rolles & Murkin, 2014, p.2), which are embedded in complex economic, social, and cultural factors, as well as drug policy. Decriminalization has neither increased consumption rates in Portugal nor reduced the age of onset in the Czech Republic (Červený et al., 2017, p.128). Strongly divergent consumption rates under a range of policy models suggest that even reg-

ulated markets will not mono-cause higher consumption. The decisive factors are ancillary, including measures geared to prevention, addiction therapies, and reducing damage.

Indications of the effects of a regulated market are available in the US, but data provide limited evidence because adolescents under 21 are subject to total prohibition in all states that have legalized cannabis (Barsch 2018, p.71). Results from the 2017 National Survey of Drug Use and Health Substance Abuse by the Mental Health Services Administration (SAMHSA, 2017) show that cannabis use among 12 to 17 year-olds in 2016 was below 2009–2014 despite legalization in further US states.²⁰ Consumption has increased only among those over 26 and little among those 18 to 25 (SAMHSA, 2017, p.1). In Colorado, the first state to legalize marijuana by referendum in 2012, cannabis use among 12 to 17 year-olds has fallen steadily since the legalized opening of cannabis shops in 2014. Colorado's 30-day prevalence rate of 9% for 2015/2016 was the lowest since 2007/2008 (over 12%).²¹ US findings indicate that regulated availability increases adult demand and consumption only temporarily. Slightly higher consumption among US adults could be attributed partly to different reporting behavior; in case of true moderate increases, it must be observed how they develop in the long term.

Hints of declining consumption by US adolescents could indicate reduced availability. About one-third of 16 year-olds in 35 European countries report cannabis is readily or very readily available (ESPAD, 2016, p.30). Availability rates span 5% to 50%. Looking again at France, the Czech Republic, the Netherlands, and Portugal, 41% of French, 42% of Dutch, 50% of Czech, and 31% of Portuguese adolescents indicate easy availability. As shown, however, consumption among adolescents diverges significantly, and correlations between drug policy and availability (the more repressive the lower) are not provable. Availability of a drug is embedded amid complex conditions. For example, young people in a prohibitive model may find it easier to obtain drugs because prohibition triggers black markets. Contrary to expectations of prohibitionists, prices in Colorado and Washington have fallen since legalization, and prison sentences for distributing unlicensed cannabis have declined—facts taken as evidence that black markets are increasingly unable to compete with legal trade (Boyd, 2018, p.64). There seems no connection between regulation and increased consumption via greater availability among adolescents (GCDP, 2014, p.8; DG-Sucht, 2015, p.3; EMCDDA, 2017, p.12; Gantner, 2016, p.55, 56 with further notes).

Drug consumption does burden healthcare (Effertz et al., 2016), but no reliable data yet indicate that regulation elevates that burden (as claim Duttge & Steuer, 2014, p.183; 2015, p.802). Moreover, tax revenues from regulated markets create resources for preventive measures that could counteract consumption and exert positive effects on healthcare system.

Criminalization has no demonstrable positive impact on consumption and availability of cannabis. Lifetime prevalence of cannabis use in Germany, for example, rose until the mid-2000s

²⁰ The District of Columbia and 10 states—Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont and Washington— have the most expansive laws legalizing recreational marijuana use: <http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html> [01/02/2019].

²¹ Ingraham, C., Following marijuana legalization, teen drug use is down in Colorado. Washington Post, December 11, 2017: https://www.washingtonpost.com/news/wonk/wp/2017/12/11/following-marijuana-legalization-teen-drug-use-is-down-in-colorado/?utm_term=.3ca34e69943c [01/02/2018].

despite existing prohibition (Orth, 2016, p.62). According to the Global Commission on Drug Policy (GCDP 2016, 2014) there is no justification for a repressive drug policy. Drug prohibition is regarded as a failure because black markets generate social damage. (GCDP 2018, 2016, 2014; Stöver & Plenert, 2013, p.44).

Another important argument is that regulated markets or even downgrading consumption to an administrative offense lead to a massive discharge of law enforcement authorities (Gaßmann, 2005, p.100; Flöter & Pfeiffer-Gerschel, 2012; pp.40f; Stöver & Penert, 2013, p.18; Simon & Hughes, 2015, pp.21–23; Pollähne, 2016, p.78). Even if black markets cannot be eliminated, they can be reduced significantly (Caulkins et al., 2015, p.63), thereby releasing resources for prevention or to fight serious crimes.

5. POLICE RESOURCES AND REFUSAL TO PROSECUTE UNDER § 31A BTMG

The introduction of § 31a BtMG has relieved public prosecutors and the courts and freed police to investigate more serious crimes alongside transgressions of consumer law (Aulinger, 1997, p.321; Schäfer & Paoli, 2006, p.395). Although § 31a BtMG and corresponding guidelines have helped standardizing prosecution, problems in practice remain, as shown by Stock and Kreuzer's (1996) large study of law enforcement and drug offenses. Limited capacity *de facto* forces police to act opportunistically or to make decisions under informal rules (Stock, 1999, p.105). In addition, police are unwilling to "work for nothing" (Stock & Kreuzer, 1996) if they perceive that most consumer offenses are dismissed.

Refraining from prosecuting consumer crime cannot be quantified according to public prosecutor's statistics,²² which do not report consumer offenses separately. In 2016, 54.2% of completed narcotics proceedings in Hamburg were not prosecuted (6,731 of 12,410), and half of those invoked § 31a BtMG (3.120 of 12.410: 25.1 %). These shares are slightly lower for Germany as a whole (37.2 % respectively 19.2 %).

Hamburg has a higher rate of refraining from prosecuting drug crimes than Germany overall, rising from 43% in 2008 to 57% in 2015 there versus rising from 32% to 37% in Germany overall for the period.

Of 231,926 drug-related offenses recorded in police crime statistics, 77% were general violations under § 29 BtMG (BKA PKS 2016, p.139, 140), which covers consumer transgressions. So, by deduction, three-quarters of drug offenses are consumer offenses. Among all recorded 2016 drug cases, 61.6% involved cannabis. Thus, almost every charge of acquiring and possessing cannabis was not prosecuted. Schäfer and Paoli (2006) examined 2,011 consumer offenses in six federal states. The proportion of refusals to prosecute offenses involving fewer than six grams of cannabis ranged from 1% in Berlin and Schleswig-Holstein to 24% in Bavaria. The increased number of cases and completed procedures suggest massive increases in police effort. Consumer-related offenses rose 39.8% from 165,880 in 2010 to 231,926 in 2016. The number of completed BtMG procedures rose 36.5% from 254,604 in 2010 to 347,430 in 2016.

In next section surveys attitudes about consumption related offenses among Hamburg police officers.

²² Federal Statistical Office, Judiciary, Public Prosecutor, Fachserie 10 Reihe 2.6.

6. ATTITUDES ABOUT PROSECUTION OF DRUG OFFENSES AMONG POLICE OFFICERS IN HAMBURG

We surveyed Hamburg police to discover their reactions to drug prosecutions of consumer crimes. We wanted to know what their attitudes are and what factors explain them. During May and June 2016, we sampled 96 Hamburg law enforcement officers who specialize in drug offenses. Only departments devoted exclusively to drug-related crime were selected.²³ Among those surveyed, 69% were detectives in Hamburg's *Landeskriminalamt* (LKA). They served in one of two offices, which we identify as LKA 62 and LKA 68. The remaining 31% of subjects were local police, designated PK 113.

Subjects answered 13 questions. Four collected socio-demographic data; others included estimates of refusal to prosecute drug offenses, police workload and effectiveness, work motivation, work focus, and officers' attitudes toward prosecution in Hamburg. Subjects had the opportunity to evaluate drug policy and to state preferences for handling cannabis consumption offenses. Three questions were transferred from Stock and Kreuzer (1996) to compare today with 20 years earlier.

Twenty detectives from LKA 62 (33.9%), 21 from LKA 68 (35.6%) and 18 officers from PK 113 (30.5%) completed the questionnaire (61.46% response rate). Among these 59 respondents, 86% were male, 56.9% were 35 or older, 73.7% had at least 10 years of police experience, and 36.2% had investigated drug crimes more than six years. No significant socio-demographic characteristics distinguish detectives and local officers.

More than 66.8% of LKA detectives favor downgrading cannabis use to an administrative offense or legalizing it, whereas 92.8% of PK officers favor harsher punishments or fines.

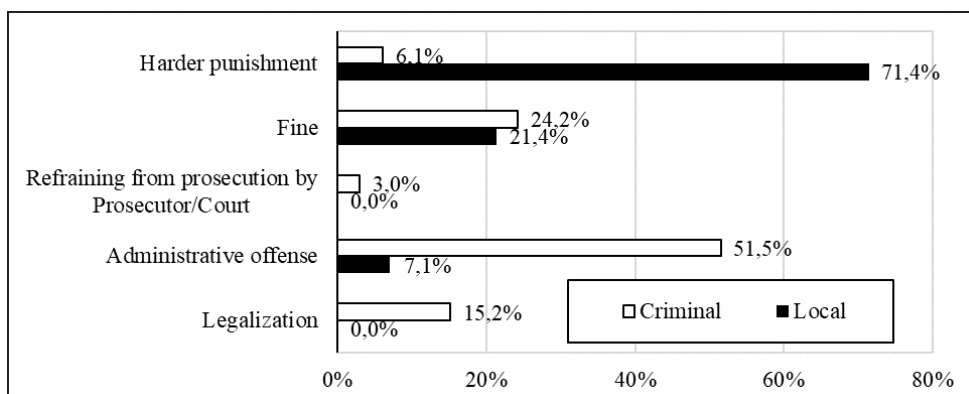


Figure 1: Future legal treatment of cannabis offenses (acquisition / possession), N = 47

Stock and Kreuzer (1996) collected data shortly before 31a BtMG appeared in 1992, when refusal to prosecute was available only under § 29 V BtMG. A comparison with 1992 reveals

²³ LKA 68 pursues consumer offenses and street dealers. LKA 62 deals solely with drug traffickers, but we assumed it regularly encounters consumer offenses. Local police officers surveyed at PK 113 investigate drug crimes.

similarities and changes. Then as now, refusal to prosecute—today’s prevailing practice in Germany—is respondents’ least-favored option: 5.1% to 8.0% of Stock and Kreuzer’s respondents favored it. In our study, 3% of LKA detectives and no local police officer favored it (Figure 1).

More than half (51.5%) of surveyed LKA detectives favor classifying cannabis-related crimes as administrative offenses. In 1992 (Stock & Kreuzer, 1996), only 10% approved that approach in, although 26% of officers they surveyed from North Rhine-Westphalia approved it. However, their approval percentages do not approach those we uncovered (Figure 1).

Surveyed PK officers’ preference for harsh punishment mirrors 1992. Here the polled groups demanded retention of the criminal prohibition with an agreement between 83.5% in Hesse and 92.1% in Bavaria. The approval rate for investigators in North Rhine-Westphalia was 57.4% (Stock & Kreuzer, 1996, p.128, 129). In this respect, regarding our results, at least for the group of criminal officials today can be spoken of a rethink; they strongly favor decriminalization strategies.

This also can be seen in respondents’ reactions to drug policy regarding all drugs. LKA detectives favor prioritizing trafficking offenses, whereas PK officers advocate harsher punishment and enforcement for consumption.

Officers surveyed by Schäfer and Paoli (2006, p.389) did not endorse shifting prosecutorial discretion to the police (“discretionary prosecution principle”). In our survey, half of LKA detectives ($n = 19$) want more discretion over cannabis offenses, whereas 13.2% ($n = 5$) want discretion over harder drugs (cocaine, heroin, crack, ecstasy, LSD, crystal meth). No sampled PK officer wanted that shift irrespective of the drug involved. Stock and Kreuzer (1996) found that 51.6% of all sampled officers supported police discretion to pursue soft and hard drugs in 1992. However, they found large differences between Bavaria (35.1%) and North Rhine-Westphalia (77.2%) (Stock and Kreuzer, 1996, p.156).

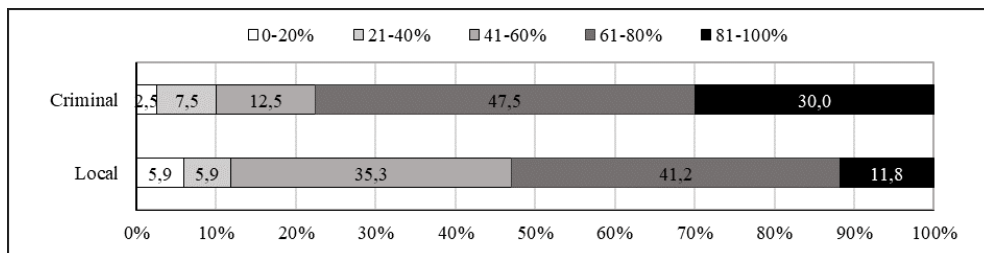


Figure 2: Estimated refraining from prosecution for consumption-related offenses

Discretion receives high priority. One explanation may be an aversion to what is deemed pointless use of resources. We asked respondents to estimate the rate of refused prosecutions. None of the factors—respondents’ ages, time in service, or assignment—influenced their assessments. Again, however, assessments by LKA detectives differed from those of PK officers: 77.5% of the former estimated that refusals to prosecute surpassed 60%, versus 52.9% of the latter (Figure 2).

Estimated rates of refusal to prosecute influenced motivation to work and estimated workload only among LKA detectives: 39.3% indicated that a rate exceeding 60% dampened their motivation. The rate was irrelevant among PK officers. Almost none felt unmotivated to pursue their work (Figure 3).

We measured estimated workload for consumer offenses on a scale of 1 to 6. Significantly higher, in turn, is the workload of LKA detectives, who assume a high rate of refusal to prosecute (Figure 4). No difference was reported among local officers.

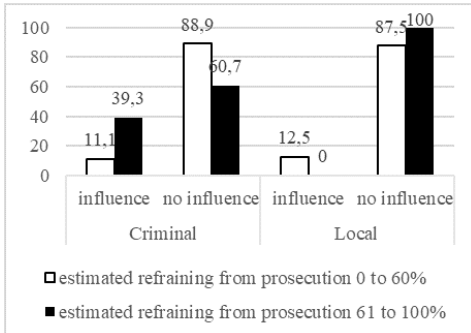


Figure 3: Work motivation by estimated rate of refusal to prosecute

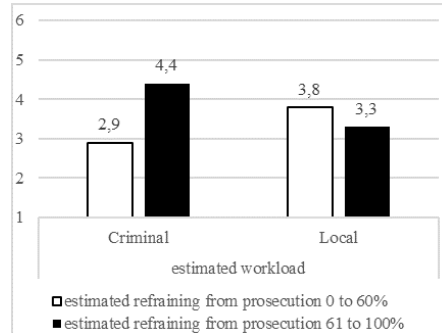


Figure 4: Workload by estimated rate of refusal to prosecute

The categories “Decriminalization” and “Repression” examined the extent to which attitudes about cannabis offenses influence motivation, workload, or effectiveness of current drug policy. Respondents who rate refusals to prosecute as relatively low are more likely to favor greater repression (Figure 5). Results also show that advocating repressive measures ties to higher perceived effectiveness of police measures (Figure 6). On the other hand, respondents who favor decriminalization estimate that refusals to prosecute exceed 60% and regard the workload of consumer offenses as high (Figures 5 and 6).

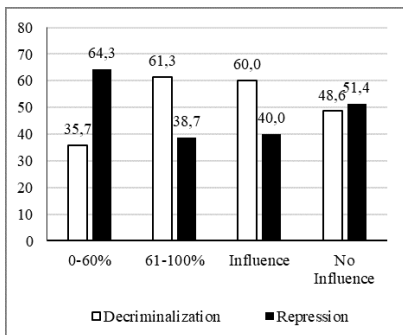


Figure 5: Estimated rate of refusal to prosecute and work motivation by attitudes on cannabis policy

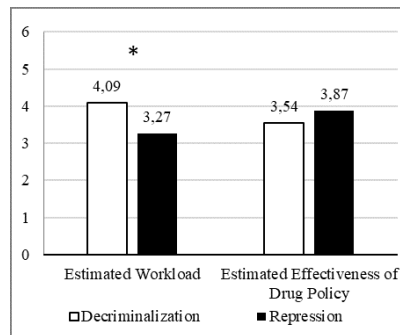


Figure 6: Estimated workload and estimated effectiveness of drug policy by attitudes toward cannabis policy

We calculated final logistic regressions to discern the influence of estimated rate of refraining from prosecution, work motivation, workload and effectiveness of drug policy on attitudes about cannabis offenses. Dependent variables capture the dichotomized approach to cannabis and the desire for discretion in pursuing cannabis offenses.

As expected, group membership explains most of the variance: PK officers prefer repression and tougher punishment. Older officers are slightly more punitive, whereas those who have worked as narcotics investigator for many years are more lenient. The higher the estimated rates of refusal to prosecute and workload, the more lenient officers tend to be. Among LKA detectives, age is associated with punitive attitudes. Longer involvement with narcotic crimes and belief most consumer offenses are not prosecuted contribute to preferences for decriminalization. Older PK officers and those who believe police measures to combat drug crime are effective notably oppose granting discretion to pursue cannabis offenses.

7. CONCLUSION

The current German legal regime of cannabis control is based on strict prohibition of cannabis outside medical or scientific use. That makes its production, trade, distribution, and consumption punishable. Even though § 31a BtMG gives the public prosecutor in cases of small amounts of cannabis (*geringe Menge*) the opportunity to waive judicial approval, the German police has no discretion in reporting all suspected offenders to the public prosecutor and its workload occasioned by cannabis offenses drains resources from more serious crimes.

As shown, organized criminal control of production and supply cannot be broken by police means, and a strategy of prohibition promotes it. The cannabis market is large, profitable, organized, and characterized by violence and associated crimes (EMCDDA & Europol, 2016, p.17). Technological innovations raise production volumes and product potency (EMCDDA & Europol 2016, p.7). The market is booming — 1% of Europeans consume cannabis daily (EMCDDA & Europol, 2016, p.7) — a fact that historically neither consumption nor criminalization strategies influence. Efforts to decriminalize cannabis consumption are overdue. Results of our recent survey among police officers in Hamburg show that the attitudes of criminal detectives (contrary to the officers of the security police) have changed since the 1990s and that prohibition is not considered effective.

Twenty years after the German Federal Court declared criminalization of cannabis by the BtMG constitutional, numerous scientists and politicians argue that the basis for the Federal Constitutional Court decisions no longer exists. Studies would rate the health risk of cannabis low, especially in recreational use by adults, and presented fewer health risks than consumption of alcohol and nicotine. The argument that prohibition protects the young against social and educational problems and developing criminal behavior would remain scientifically unproven. Science had proven that the danger of drugs would be mastered “better by health-judicial regulation [...] as well as with adequate youth welfare measures. The Narcotics Act would need an urgent review.

The public debate on decriminalization of cannabis use initiated by the *Schildower Kreis* has reached German parliament. The advocates of decriminalization of cannabis use argue, the prohibition would allow criminal organizations to control the supply chain and that the world would suffer from the attendant violence, corruption, and money laundering etc. Production areas and transit routes were contested, the state and democratic institutions were undermined, and legal economies weakened.

Several times in recent years a Cannabis Control Bill (*Cannabiskontrollgesetz*) liberalizing cannabis use has been introduced to German Parliament. Policy reform seems increasingly likely.

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