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Explainer

September 2021

How to use the West Africa Model Drug Law: 'Explainer' 1: Summary of Key Elements

Introduction

The global drug control system[1] functions as a basis for the drug laws of almost every country around the world. It serves a dual purpose: to ensure the availability and accessibility of controlled substances for medical and scientific purposes, while restricting other forms of drug use (such as recreational use).[2] In Africa and elsewhere, provisions in national drug laws mainly focus on the latter, while neglecting the former. Regional and international policy documents[3] have attempted to address this discrepancy in recent years, calling for improved and more balanced measures in line with international human rights obligations,[4] especially with regard to the right to health as upheld constitutionally by all member states of the Economic Community of West African States (ECOWAS).

Drug law reform, however, has been slow to take place. To assist governments in bringing their drug laws in line with public health evidence, human rights and the objectives of the drug conventions to protect the health and welfare of humankind, in 2018, the West African Commission on Drugs (WACD) published a ground-breaking 'Model Drug Law for West Africa: A tool for policymakers'[5] to assist West African policymakers in (re)formulating national drug laws. The Model Drug Law was a follow-up to the Commission's 2014 publication 'Not Just in Transit: Drugs, the State and Society in West Africa'.[6] The Model Drug Law contains the four key parts of a drug law (general provisions, penal provisions, authorised activities, and schedules and annexes), each of which consists of model legislative provisions and commentary, in line with the UN drug control conventions.

By its design the Model Drug Law is a technical document, so this 'explainer' aims to provide a more accessible summary of the key elements. We have broken these down into the following themes:

1. Decriminalisation and other alternatives to conviction and punishment
2. Human rights obligations
3. Provisions for medical and scientific use of drugs
4. Provisions for non-medical drug use
5. Socioeconomic aspects
6. Governance and coordination mechanisms.

This 'explainer' is one of two advocacy documents related to the West Africa Model Drug Law – the other focuses on how to use the Model Drug Law as an advocacy tool.[7]

1. Decriminalisation and other alternatives to conviction and punishment

Reflecting the UN drug control conventions, most activities which fall outside of the scope of authorised medical and scientific use of drugs are defined as offences in the Model Drug Law. These include the possession, manufacture, cultivation and production of these 'controlled' substances, as well as their precursors and related equipment and materials, the laundering of drug trafficking proceeds, and incitement to violate laws and to unauthorised use. In line with the UN drug control conventions, the Model Drug Law notes that all these activities amount to criminal offences, *except* for the following:

- Possession, cultivation, purchase, transportation, and production for personal use
- Provision of harm reduction and drug treatment services, including the possession of drug use equipment
- Provision of factual information on a drug and its uses, or expression of an opinion on drug policy or reform.

All three UN drug conventions include specific provisions for "alternatives to conviction or punishment" in certain circumstances.[8] Over the past decade, numerous UN agencies[9] and regional bodies,[10] including the World Health Organization (WHO), UNAIDS and many others have found that criminalising drug use and possession for personal use is a serious impediment to the realisation of the right to health. Building on this, the Model Drug Law includes calls to decriminalise drug use and related activities (possession, cultivation and production for personal use, as well as possession of drug use equipment). This means that no sanctions are required for these acts.

In addition, the Model Drug Law recommends the provision of non-custodial measures[11] for low-level offences. Alternative sanctions can take forms such as verbal sanctions (i.e., warnings), fines, community service, house arrest and others. An order for drug treatment can also be issued as an alternative to conviction or punishment – but only if the individual consents and has been assessed (again, with consent) by a health professional as being dependent on drugs. It is important to note that only about one in eight people who use drugs are dependent and may benefit from some form of treatment and other health and social support.[12]

The Model Drug Law also includes a provision for the creation of a national working group of experts advising the government on the effective use of such alternative sanctions ('Working Group on Alternative Sanctions').

2. Human rights obligations

The Model Drug Law emphasises the importance of human rights and public health as guiding principles for a drug law, including the right to health (see section 3 and 4). Crucially, the Model Drug Law is based on the principle that all practices of search, seizure, arrests and detention that take place in relation to drug laws must comply with national law and respect the dignity of the person and the right to privacy. Drug laws should protect society from arbitrary, discriminatory and/or abusive law enforcement practices – such as unjustified pre-trial detention, extortion and violence[13] – and should provide mechanisms for complaints and responses. Below are several key provisions recommended in the Model Drug Law in this regard.

Regarding search, seizure and arrest:

- Searches can only occur if there is a reasonable ground of suspicion.
- Searches must be conducted in a manner consistent with the inherent dignity of the person and right to privacy. They must be conducted by a person of the same sex as the person being searched.
- Arrests and detention can only occur if there are reasonable grounds to do so and should be carried out in full compliance with the law.
- Officers have to wear identification, inform the arrestee about the arrest, and ensure that any use of force is proportionate.
- If a person whose drugs have been seized can provide a medical prescription for the concerned drugs, the person shall have their property returned to them.
- People under arrest have the right to be free from torture, to information, to access a lawyer, to medical assistance and humane and hygienic conditions, to freely access complaints and oversight mechanisms, and many more.[14]
- There should be regulations governing police training (including for the medical needs of people who use drugs), oversight, accountability, and record keeping.

Regarding trial and sentencing:

- Pre-trial detention should be used as a last resort, and policies and regulations for it should be regularly reviewed in line with the Luanda Guidelines.[15] Detained people have the right to undergo trial within a reasonable time.
- The Model Drug Law states that the burden of proof is on the prosecution for all activities defined as offences in the drug law. This means that the presumption of innocence applies to all persons regardless of their charges.

- A national drug law should also outline the process by which prosecutions are made, including how a seized drug is identified and tested.
- No mandatory sentences, especially minimum sentences, may be imposed.16Sentencing must be carried out in a consistent and transparent manner.
- Sentencing must be proportionate, and comply with sentencing guidelines defined by the drug law,17 taking into account factors such as seriousness of offence and personal mitigating factors.[18] Alternatives to conviction and/or punishment should be made available.

3. Provisions for medical and scientific use of drugs

The Model Drug Law emphasises that each country's national drug laws should contain provisions clarifying their objectives – notably to facilitate the use of controlled drugs for medical and scientific purposes, while limiting uses outside this scope. The stated objectives of a national drug law should be in line with human rights and public health principles.

The commentary to the Model Drug Law identifies, as an outcome indicator for health, 'better management of pain relief and palliative care through improved access to essential medicines; and increased training for healthcare workers on the use of controlled medicines.'[19]

The UN drug control system has long been criticised for putting more emphasis on diversion, prevention, and punishment, rather than on ensuring access and availability.[20] The Model Drug Law itself does not include concrete provisions on the authorisation of the use of controlled substances for medical and scientific purposes – as the formulation of such provisions depends on the health care systems and resources of each country, and should be detailed outside of a country's drug law. However, the Model Drug Law does note how criminalisation and punitive approaches have undermined access to controlled medicines, including for drug treatment, such as opioid agonist therapy.

In this regard, several key provisions are worth highlighting:

- Ensure that the country's national list of essential medicines includes controlled drugs – such as methadone, buprenorphine and morphine.
- Sanctions for the diversion of medicines should not discourage healthcare workers from prescribing controlled medicines when necessary.
- Controlled drugs seized by police must be returned to the person if they present the relevant prescription to the relevant authority.
- A commission on improving access to controlled medicines should be created, which would be tasked with removing unnecessary sanctions and barriers to drug prescription, reviewing and updating essential medicine lists, increasing training and ensuring that prescriptions can be done at all appropriate levels of care, and developing harm reduction services, amongst many others.[21]

With regard to essential lists of medicines, the Model Drug Law refers to the WHO's guidelines to 'adopt and implement a national public health strategy and plan of action and ensure access to medicines'.[22] However, updating essential lists of medicines alone is not enough. The Model Drug Law shows that other obstacles may remain when it comes to access to essential medicines like morphine. These include administrative burdens, unequal geographic coverage (which corresponds to issues such as low availability of doctors in rural areas, for example), and policies restricting morphine dispensation to only hospitals.[23]

The Model Drug Law also notes the importance of the following:

- The national drug law should include provisions – depending on the country's financial resources and health care system – for the authorised supply of controlled drugs for medical and scientific purposes, including drug treatment.
- The national drug law should include provisions for authorised cultivation of cannabis and opium for medical purposes, in line with specific sections of the conventions, such as the requirement for governments to form a dedicated national agency, and to produce estimates of licit use and production.[24]

4. Provisions for non-medical drug use

People who inject drugs are at 35 times greater risk of acquiring HIV infection than people who do not inject drugs. The median HIV prevalence among countries that reported these data in Western and Central Africa was 3.9% among people who inject drugs. The prevalence of hepatitis C is also very high among people who inject drugs in the region.[25] This is a result of the ongoing criminalisation of people who use drugs and lack of access to harm reduction and drug dependence treatment services.

As noted above, the Model Drug Law states that activities (including the possession, cultivation, production, purchase and transportation of controlled drugs) for the purpose of personal use should not be criminalised – nor should they serve as a lawful ground for suspicion, searches or seizures by police officers.[26]

Crucially, the Model Drug Law recommends the inclusion of indicative thresholds that can be used to decide what is considered as 'personal use[27] – to be annexed alongside 'sentencing guidelines'. Both elements are crucial parts of an effective national drug law. They serve as tools to ensure that drug use and possession for personal use are decriminalised, and to ensure that in the case of supply offences, sentencing is carried out proportionally and includes alternative sanctions whenever possible.

The Model Drug Law recommends that an effective national drug law should also include the following key provisions:

- Definitions of 'personal use', notably: 'the sole use of the person in possession of the controlled drug', or 'the collective and voluntary consumption of the controlled drug by a group of adult persons, all known personally to the person in possession of the controlled drug, where the person in possession of the controlled drug does not stand to gain financially from the collective consumption'.[28]
- Possession of equipment and materials (such as needles, syringes and other paraphernalia) should never amount to a criminal offence, and should therefore never be grounds for suspicion, searches, seizures or arrests. Criminalising these activities has been demonstrated to undermine harm reduction service provision and uptake, and to have a damaging impact on public health.[29]
- Drug treatment must not be coerced and should be evidence-based, and in line with minimum standards for drug dependence treatment[30] as well as the right to health.[31]
- In line with the right to health, the state must ensure access to harm reduction materials and drug treatment for people who need them.

5. Socioeconomic aspects

The Model Drug Law acknowledges the importance of considering socioeconomic conditions in law enforcement decisions and actions. As mentioned above, alternatives to conviction and punishment should be considered, especially for low-level offences (such as those tied to a person's personal drug use). Socioeconomic aspects should also be taken into account throughout all prosecution and sentencing stages. For example, when a drug-related offence is motivated by economic necessity and survival (as opposed to large financial gain), or is committed under coercion and/or manipulation, this offence should lead to lower forms of sanctions.

The Model Drug Law also highlights the need to address and respond to the disproportionate impact of drug policing and law enforcement on poor and vulnerable populations, including small-scale farmers and others who have little to no access to alternative livelihoods. In this regard, the Model Drug Law recommends the formation of a working group on alternative, sustainable and acceptable livelihoods for cannabis farmers. Such a group should advise the government on key issues such as the licensing of cannabis cultivation for medical or industrial purposes, and may be extended to farmers of other crops used for illegal drug production. The Model Drug Law also highlights the possibility for countries to follow international guidelines to separate industrial cannabis ('hemp') from other cannabis varieties controlled by the conventions.[32]

It is important to note that the Model Drug Law does not include any provisions on drug crop

eradication – because of the well-evidenced negative impacts of such measures on the environment, health, rights and livelihoods. Furthermore, the Model Drug Law notes that such measures ultimately have little impact on drug supply and availability.

6. Governance and coordination mechanisms

As mentioned above, the Model Drug Law contains specific provisions for the formation of three key working groups and/or commissions, focused on:

- alternative sanctions
- improving access to controlled medicines
- alternative, sustainable and acceptable livelihoods for cannabis farmers.

Crucially, the Model Drug Law also includes a specific provision for an 'Inter-Ministerial Coordination Mechanism' to monitor drug control from a health and human rights perspective, in line with the 2016 UN General Assembly Special Session (UNGASS) on drugs, and various UN recommendations on inter-agency cooperation to improve access to controlled medicines.[33] This provision assigns these mechanisms with the follow tasks:

- To ensure drug control measures are designed from a health and human rights perspective
- To facilitate inter-ministerial meetings for the national drug strategy, and to stimulate a coordinated approach across sectors and institutions
- To include civil society
- To oversee the aforementioned working groups
- To collect data in support evidence-based policymaking
- To participate in international decision-making processes such as the UN Commission on Narcotic Drugs.

Endnotes

1. Three UN conventions comprise today's global drug control system: the UN Single Convention on Narcotic Drugs (1961) as amended by the 1972 Protocol, the UN Convention on Psychotropic Substances (1971), and the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)
2. In this document, the term 'non-medical use' refers to the use of controlled drugs other than for authorised medical and scientific purposes, as defined by the law. However, it is important to note the different sets and settings in which controlled drugs are used, as well as the underlying factors behind one's drug use. In some cases, controlled drugs are used to alleviate legitimate physical and/or psychological pain outside of formal healthcare systems, while in other cases drugs can be used primarily for recreational purposes. See for example: Dalgarno, P. & Shewan, P. (2009), 'Reducing the risks of drug use: The case for set and setting', *Addiction Research & Theory*, **13**(3), https://www.tandfonline.com/doi/abs/10.1080/16066350500053562
3. See for example: African Union (2014), *Common African Position (CAP) on the Post-2015 Development Agenda*, https://www.unodc.org/documents/ungass2016/Contributions/IO/AU/Common_African_Position_for_UNGASS_-_English_-_final.pdf; African Union (2019), *African Union Plan of Action on Drug Control and Crime Prevention 2019-2023*, http://fileserver.idpc.net/library/AUPA_on_drug_control_2019-2023_en.pdf; UN General Assembly (2016), *Outcome document of the 2016 United Nations General Assembly Special Session on the world drug problem: Our joint commitment to effectively addressing and countering the world drug problem*, https://www.unodc.org/documents/postungass2016/outcome/V1603301-E.pdf; United Nations Chief Executives Board for Coordination (2018), *United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration*, CEB/2018/2, https://unsceb.org/sites/default/files/2021-01/2018%20Nov%20-%20UN%20system%20common%20position%20on%20drug%20policy.pdf
4. International Centre on Human Rights and Drug Policy, UNAIDS, World Health Organization & United Nations Development Programme (2019), *International guidelines on human rights and drug policy*, https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/international-guidelines-on-human-rights-and-drug-policy.html
5. West Africa Commission on Drugs (September 2018), *Model Drug Law for West Africa: A tool for policymakers*, https://www.globalcommissionondrugs.org/wp-content/uploads/2018/08/WADC-MDL-EN-WEB.pdf
6. West Africa Commission on Drugs (2014), *Not Just in Transit: Drugs, the State and Society in West Africa*, https://www.globalcommissionondrugs.org/wp-content/uploads/2017/02/WACD_En_Report_WEB_051114.pdf
7. International Drug Policy Consortium & West Africa Drug Policy Network (September 2021), *How to use the West Africa Model Drug Law: 'Explainer' 2: Guide for civil society advocacy*, https://idpc.net/publications/2021/09/how-to-use-the-west-africa-model-drug-law-explainer-2-guide-for-civil-society-advocacy
8. See: Article 36(1b) of the UN Single Convention on Narcotic Drugs (1961) as amended by the 1972 Protocol; Article 22(1b) of the UN Convention on Psychotropic Substances (1971); and Article 3(4b&c) of the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)
9. United Nations Chief Executives Board for Coordination (2018), *United Nations system common position supporting the implementation of the international drug control policy through effective inter-agency collaboration*, CEB/2018/2, https://unsceb.org/sites/default/files/2021-01/2018%20Nov%20-%20UN%20system%20common%20position%20on%20drug%20policy.pdf
10. See, for instance: African Commission on Human & Peoples' Rights (2018), *HIV, the law and human rights in the African human rights system: Key challenges and opportunities for rights-based responses*, https://www.unaids.org/en/resources/documents/2018/HIV_Law_AfricanHumanRightsSystem
11. Alternative sanctions, including non-custodial measures, are effective in reducing issues such as prison overcrowding. The Model

Drug Law highlights a number of useful international guidelines and standards for this, including the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), the UN Standard Minimum Rules for the Treatment of Women Prisoners Non-custodial Measures for Women Offenders (the Bangkok Rules), and the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules). See page 39 of the Model Drug Law

12. United Nations Office on Drugs and Crime (2021), 'Booklet 2: Global Overview: Drug Demand and Supply', *World Drug Report 2021*, https://www.unodc.org/res/wdr2021/field/WDR21_Booklet_2.pdf
13. In its report 'Arbitrary detention relating to drug policies' published in May 2021, the Working Group on Arbitrary Detention emphasises that 'people who use drugs are particularly at risk of arbitrary detention, and has noted with concern "increasing instances of arbitrary detention as a consequence of drug control laws and policies"'. The report further details human rights violations relating to arbitrary detention which are committed in the context of drug policies, such as torture and ill-treatment, testing without consent, stop and frisk, lack of fair trial, and many more. The impacts of such practices, the report highlights, are disproportionately harsher for populations facing intersecting inequalities, including minorities, LGBTQIA+ people, and indigenous populations. See: Working Group on Arbitrary Detention (2021), *Study on arbitrary detention relating to drug policies*, https://www.ohchr.org/EN/Issues/Detention/Pages/Detention-and-drug-policies.aspx
14. See page 26 of the Model Drug Law and see: Office of the High Commissioner of Human Rights (n.d.), *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, https://www.ohchr.org/en/professionalinterest/pages/detentionorimprisonment.aspx
15. African Commission on Human and Peoples' Rights (2014), *Luanda Guidelines on the Conditions of Arrest, Police Custody and Pretrial Detention in Africa*, https://www.achpr.org/public/Document/file/French/guidelines_arrest_police_custody_detention_2.pdf
16. "In many West African countries the harshness of the minimum sentences results in a big discrepancy between what the law says and what the law does and in the absence of a list of mitigating and aggravating factors this can fuel corruption and undermine the rule of law. The use of mandatory minimum sentences is an obstacle to proportionate sentencing as it precludes a judge from taking into account all circumstances of the offence." Read more on page 35 of the Model Drug Law
17. The Model Drug Law prescribes two Schedules serving as guidelines in this context. Schedule I concerns Indicative Thresholds for Personal Use. Schedule II concerns Sentencing Guidelines
18. In measuring the severity of an offence, several main indicators can be used, including a) involvement in violence, exploitation, abuse, b) financial gain or economic necessity, c) influence on others and/or in the scale of operation. In addition, personal mitigating factors – such as age, economic situation, health condition – should also be taken into account. Furthermore, the Model Drug Law emphasises the recommendation of the International Narcotics Control Board to abolish the death penalty for drug related offences. See page 36
19. See page 8 of the Model Drug Law
20. Burke-Shyne. N et al (2017), 'How drug control policy and practice undermine access to controlled medicines', *Health and Human Rights Journal*, **19**(1), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5473053/
21. Other tasks include: to strengthen legislative and policy administration, to formulate national guidelines on opioid medicines, to review the national essential medicine list, to ensure that national investment in law enforcement does not surpass national investment in public health, and to include people who inject drugs in health services. See the full list on page 43 and 44 of the Model Drug Law
22. See page 44 of the Model Drug Law
23. See page 44-47 of the Model Drug Law
24. See: Article 23 (National Opium Agencies) and Article 28 (Control of Cannabis) in the UN Single Convention on Narcotic Drugs (1961)
25. UNAIDS, *The key populations atlas*, https://kpatlas.unaids.org/dashboard (accessed 23/08/2021); UNAIDS (July 2021), *2021 UNAIDS Global AIDS update – Confronting inequalities – Lessons for pandemic responses from 40 years of AIDS*, https://www.unaids.org/en/resources/documents/2021/2021-global-aids-update
26. "The international drug conventions do not require countries to punish either the possession or the supply of equipment for drug use/consumption." Furthermore, Article 22 of the 1971 Convention states that the criminalisation of possession can only occur when its purpose is for drug trafficking. See page 14 of the Model Drug Law
27. As noted on page 54 and 55 of the Model Drug Law: 'There is considerable variance in the threshold quantities adopted in different countries. The amounts defined in law or prosecutorial guidance must be meaningful – that is to say, adapted to reflect drug consumption patterns, the quantity of drugs a person is likely to use in a day, patterns of purchasing and market realities and to ensure that persons are not detained, criminalised or otherwise stigmatized for drug use and to ensure that drug trafficking offences are efficiently enforced. The definition of specific quantities will aid consistency and transparency and undermine corruption and unjustified arrest and prosecution of people who use drugs'. Furthermore, the Model Drug Law prescribes indicative thresholds similar to those adopted in Portugal, Spain, and several states in the US. More examples from other countries are also included in: Talking Drugs, Release & International Drug Policy Consortium, *Drug Decriminalisation Across the World*, https://www.talkingdrugs.org/drug-decriminalisation
28. See page 12 of the Model Drug Law
29. See page 18 of the Model Drug Law
30. See page 49 and 50 of the Model Drug Law, and see: African Union (2012), Proposed Continental Minimum Standards for Treatment of Drug Dependence (CAMDC/EXP/4(V)), https://au.int/sites/default/files/newsevents/workingdocuments/28056-wd-mqs_treatment_-_english.pdf
31. In one of its commentaries on page 5 and 6, the Model Drug Law emphasises that '[t]he right to health is one of the many human rights implicated in drug policy.' In addition, the right to health 'is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body... and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation." See: UN Committee on Economic, Social and Cultural Rights (2000), *General Comment No. 14 (2000), The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, Paragraph 8 http://data.unaids.org/publications/external-documents/ecosoc_cescr-gc14_en.pdf
32. Page 9 of the Model Drug Law states, 'Article 28 of the 1961 Convention provides that the international drug conventions do "not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes"'
33. See page 7 and 8 of the Model Drug Law, and see: UNODC (2016), Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem, United Nations; International Narcotics Control Board (2016), *Availability of Internationally Controlled Drugs: Ensuring Adequate Access for Medical and Scientific Purposes. Indispensable, Adequately Available and Not Unduly Restricted,* E/INCB/2015/1/ Supp.1, https://www.incb.org/documents/Publications/AnnualReports/AR2015/English/Supplement-AR15_availability_English.pdf; World Health Organization (2011), *Ensuring Balance in National Policies on Controlled Substances: Guidance for Availability and Accessibility of Controlled Medicines*, https://apps.who.int/iris/handle/10665/44519

About this Briefing Paper

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International Drug Policy Consortium

Email: contact@idpc.net
Website: www.idpc.net

About IDPC

The International Drug Policy Consortium (IDPC) is a global network of NGOs that come together to promote drug policies that advance social justice and human rights. IDPC's mission is to amplify and strengthen a diverse global movement to repair the harms caused by punitive drug policies, and to promote just responses.

Report design by Mathew Birch - mathew@whatifweconsulting.com

With thanks for the generous support and advice from:

UNAIDS