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Drug Policy and the Courts

A Brazilian experience

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This report is a personal response from the author on the issue of Drug Policy and The Courts. A year ago, in the author's professional practice, he felt duty-bound to make a decision that overturned Brazilian case-law and ran contrary to domestic legislation as regards possession of controlled substances.

TNI and WOLA requested that Mr. José Henrique Rodrigues, Judge of the Sixth Appellate Court of the High Court of Justice in Sao Paulo, Brazil, reduce to writing the reasons for making such decision, and this report is the result thereof.

The importance of this issue has increased even more recently because the Supreme Court of Justice of the Argentine Republic, the neighbor country, is about to enter a judgment in a similar case. Besides, we add the Oporto's Declaration signed by the author together with nine other judges in July 2009, in which they level criticism at the current legal and legislative system.

THE LEGAL DECISION ON UNCONSTITUTIONALITY

In May 2008, acting in my capacity as member of one of the Criminal Courts of the High Court of Justice in Sao Paulo and recognizing that it is possible to "abandon worn-out clothes" as Fernando Pessoa – the universal Portuguese poet – says, I decided to recognize and declare the unconstitutionality of the primary criminalization of "drug possession for personal consumption."² I would like to reflect on that decision.



KEY POINTS

- The criminalization of drug possession for personal consumption:
 - is still approached from the repressive point of view;
 - brings with it countless violations to constitutional principles and guaranties as well as of human rights which should, on the contrary, be guaranteed by our democratic legal system;
 - It exceedingly hinders or obstructs the action of assistance and preventive policies that aim to reduce damages;
 - has dubious legal and criminal sustainability.
- The legal decisions that raise objections to the current drug policy may transform the legal reality currently in force in order to lead the legal system towards its democratic normality, in harmony with constitutional principles.

“There is a time when it is necessary to set aside wornout clothes because they already have our body shape and forget our roads which may always lead us to the same places. It is the time for a trip and, if we do not dare to make it, we will stay there for ever, on the fringe of ourselves”.

Fernando Pessoa

DRUG POLICY IN BRAZIL

History is a constant surmounting of contradictions. In the international framework, Human Rights principles established in international treaties and conventions are in direct conflict with a drug policy created by a prohibitionist and pro-abstentionist ideology which is also guaranteed by international treaties such as, particularly, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988.

Thus, the overcoming of this contradiction is essential not only to completely rescue it from the Human Rights system but also to take a step forward in the course of history.

As is well known, with reference to the aesthetic expression of the breaking-off policies that characterized the anti-establishment movements in the last century, as a means of protest against war-mongering and arms policies, drug consumption reached the public niche, increased its visibility and generated an intense legislative production in criminal matters.

Brazil, Act No. 6368, 1976 – enacted in the middle of the democratic exception regime, when the Rule of Law was subjugated by a dictatorial military regime which lasted until the last part of the 80's –continued the war-mongering direction of the prevailing ideology in order to punish the traffic in narcotic drugs. This Act not only criminalized the traffic in narcotic drugs but also, to make matters worse, the possession of narcotic drugs for personal consumption; specifically, Section 16 provides as an offence: “To purchase, keep or possess, for personal use, narcotic drugs which cause physical or

psychic dependence, without authorization or in disagreement with the legal or regulatory determination. PENALTY. Detention, of 6 months to 2 years, and the payment of a 20 to 50 days' fine.”

The present Brazilian legislation was created under the aegis of the same ideology and the influence of the same repressive logic. The legislation derives from the punitive and moralizing model, inspired by reasons of State that prevail in connection with the reason of law. The legislation criminalizes the “possession of drugs for personal use”, thus widening its incidence even more. The following wording is typical: “Any person that purchases, stores, transports or possess – for personal consumption – drugs without authorization or in disagreement with the legal or regulatory determination, shall be subject to the following penalties:

- I. The warning about the effects of drugs.
- II. The rendering of community services.
- III. An educational measure regarding the attendance at an educational program or course”³

It is true that the law currently in force excluded the penalty involving personal restraint in relation to the “possession of drugs for personal consumption.” However, the criminal offense is included as a precaution in its Title III, which deals with “the activities of prevention of the undue use of drugs, assistance and social rehabilitation of drug users and drug dependent people.” Likewise, Act No. 11.343/2006, in its section 28, mentions the enforcement of “penalties”, and its paragraph 6 refers to those “penalties” as “educational measures.”

This is the reason why some theoreticians maintained that current legislation had abolished the criminalization of drug possession for personal consumption and asserted that, in accordance with the Criminal Code Introductory Act, only those behaviors for which penalties involving personal restraint were established, could be considered criminal behaviors.

This academic analysis made no impact on the operation of the legal system, however,

and drug possession for personal use is still a “criminal offense” for the majority of judges throughout Brazil.

Furthermore, it is worth noting that Section 28 of Act No. 11.343/2006 is included in Chapter II of its Title III, which deals with the following: “About Criminal Offences and Punishment.”

Therefore, in any case, the truth is that “drug possession for personal use” is still approached from the repressive point of view. Even though the penalties may formally be referred to as “educational measures”, they were only conceived in order to be applied in the sphere of the criminal system, during the accusation procedure and in view of the logic of compulsory imposition, even through the analysis of the “behavior disapproval” and subject to legal control.

Undoubtedly, at present, the criminalization of “drug possession for personal consumption”, in Brazil, is causing countless violations of constitutional principles and guaranties as well as of human rights which, on the contrary, should be guaranteed by our democratic legal system.

For example, the right to health care, which was included in the list of Human Rights established by the Federal Constitution and by the international treaties adopted by Brazil, is flagrantly violated both on the formal and the material levels, in view of that repressive approach to people who possess drugs exclusively for personal consumption.

The prohibitionist logic stigmatizes the drug user as a “criminal offender” and leads him to isolation and secrecy thereby excluding him from health and assistance institutions, leaving him subjected to police or legal agencies and depriving him of therapeutic actions which are intended to address the cause of drug dependence - and the treatment of consumption-related diseases such as AIDS (HIV). Such policies, as a result, worsen social inequality.

Further, the criminalization of drug possession for personal use undermine harm reduction policies such as, for example, the distribution of informative leaflets regarding

drug use, the creation of areas for controlled use, the supply of safe syringes and needles and drug quality control.

Furthermore, The Committee on the International Covenant on Economic, Social and Cultural Rights, in its observation No. 14, provides that the right to health shall only be possible if all members of a society have access to health facilities, goods and services which allow them to exercise such right.

Furthermore, the choice between “compulsory therapies” and “mandatory educational measures” violates the principle of moral autonomy, undermines the effectiveness of the assistance, and does nothing to prevent the increase in drug use recidivism.

Thus, we –Brazilian judges – assuming the role of guarantors of constitutional principles and the human rights system, must act – within the scope of our jurisdictional responsibility – to exclude the criminalization of drug possession for personal use from the legal order in force.

Judges, in view of their huge social responsibility within the democratic Rule of Law, cannot ignore that we are currently undergoing the transnationalization of social control, guided by a medical-legal discourse that originates in a discriminatory dependence stereotype, influenced by the differentiation ideology which causes a stereotype of criminals.

In fact, the ideological basis of the intolerant criminal policy is sustained by a neoliberal transnational discourse as well as by the enemy’s discourse on Criminal Law, shaped by the movement of “Law and Order”, which legitimizes and promotes the “War against Drugs” policy and maintains the option of a permanent exception State. In this way, the Social Defense ideology prevails, based on social control, which brings along the denial of the liberal Criminal Law and of the restrictions put on applying Criminal Law.

To this end, the judges of a democratic State cannot allow the prevalence of a National Security ideology turned into an Urban Security ideology which legitimizes the militarization of the social control system.

It is worth remembering Franz Kafka who, in a notable section of his work “The Process”, shrewdly shows that the porter at the threshold of law prevents addressees to have access to it. Besides, is important to note that the Greek word “porter” means “tyrant”.

It is impossible to ignore the break down of the social fabric, the degraded citizenship, the presence of an excluded people who have no function whatsoever in the socio-economic system of periphery country, dominated by globalization, while protected with a shield represented by a prohibitionist and pro-abstentionist ideology, which prevents users from exercising their human rights guaranteed by our constitutional legal order.

GROUNDS OF THE DECISION

The decision, subject-matter of this essay, states the prevalence of the constitutional principles of detriment, inviolability of private life, equality, respect for differences, and human dignity, in order to evidence the flagrant contradiction existing between the Human Rights system, protected by Section 5 of the Federal Constitution as dogma of protecting individual rights, and the repressive ideology adopted by the present Drug Act.

I. THE PRINCIPAL OF HARM TO THIRD PARTIES

The primary criminalization of drug possession for personal consumption is a dubious argument from the point of view of its legal and criminal sustainability because Section 28 of the Act No. 11.343/2006 does not categorize any behavior capable of causing any damage that invades the limits of alterity.

As Salo de Carvalho points out, “the permanence of a war-mongering and welfare logic regarding drug policies in Brazil is the result of the moralizing punitive model that favors the reason of the State instead of the reason of Law because, from the structure of the constitutional criminal law, the punitive treatment of the use of narcotic drugs is justifiable.”

The argument that Section 28 of the Act No. 11.343/2006 implies an abstract danger, as well as the statement that public health is a

protective right, is not legally sustainable. This is also contrary to the typical expression of that criminalizing device, created by the same prohibitionist ideology, which establishes limits on its effect due to the components of the criminal figure referred to, which determine the individualistic sphere of harm and forbid its expansion.

It is only necessary to read the criminal figure in question which describes – with regard to the incidence of the behavior intended to be criminalized – exclusively the behavior of the person who buys, keeps, stores, transport or possess prohibited drugs “for personal consumption.”

The subjective element of the figure reflected in the expression “for his/her own consumption,” exactly limits the sphere of alterity and prevents any expansive interpretation that goes beyond the limits of self-injury.

In fact, as stated by María Lucía Karan “it is obvious that the behavior of a person who, for his/her own use, buys or possesses any substance that causes or may cause health problems, shall not be identified as an offense to public health, due to the lack of expansibility of danger (...) In this line of thought there is no way whatsoever to deny the incompatibility between the purchase or possession of drugs for personal use – no matter the quantity thereof – and the offense to public health, because there is no way to deny that the expansibility of danger and the individual use are opposite sides. Personal use is not compatible with an alleged third-party legal interest. They are conceptually conflicting things: the fact of having something to distribute among third parties it is completely illogical to sustain that the protection of public health implies the punishment of drug possession for personal use.”⁴

That was the reason why Alexandre Morais de Rosa asserted in the validity of Act No. 6.368/76 that “in the event of the possession of toxic substances there is no crime whatsoever because, contrary to what it is said, the legal right protected by Section 16 of the Act No. 6,368/76 is the personal safety and not the public tranquility.” Thus, the fact of transforming a person, who only and exclusi-

vely possesses drugs for *personal use, into an agent causing danger to the public tranquility, as if s/he were a potential drug trafficker, implies a direct violation to the principle of offence is a protective dogma foreseen in of the Federal Constitution.*

Clearly, “in the Criminal Law with a libertarian slant, oriented by an enlightening ideology, the punishment directed to self-injury is forbidden (...), Criminal Law is exclusively focused on the protection against any damage to legal rights of third parties. The fact of foreseeing as criminal offenses those acts addressed against the person him/herself is a solution of pre-modern criminal systems. The modern criminal system – a protectionist and democratic system – does not admit a criminal offense without a victim. The law cannot punish those who make an attempt on his/her own health or life – a greater legal right – in acts with no detriment whatsoever to other people; a punishment disproportionate to the act is irrational.”⁵

II. THE PRINCIPLE OF EQUALITY

Apart from that, the criminalization of drug possession for personal use also violates the constitutional principle of equality, due to the flagrant “distinction between the criminal treatment (illicit drugs) and non-criminal treatment (licit drugs) for users of different substances, both types having the potential to determine physical and psychic dependence.”

Unquestionably, the choice of illicit drugs is based upon economic criteria which are incompatible with the principle of equality.

III. THE PRINCIPLE OF INVIOABILITY OF PRIVACY AND PRIVATE LIFE

The violation of the constitutional principle that guarantees the privacy of private life cannot be denied either. It establishes as unbridgeable the separation that exists between Law and morals.

Clearly, any State intervention cannot be admitted, mainly if it has a repressive nature and a criminal character in the sphere of personal options, especially when it is

intended to impose rules of behavior in the sphere of morality.

Undoubtedly, “no penalizing Criminal Rule shall be legitimate if it acts in the personal options or it imposes on individuals certain standards of behavior that reinforce moral conceptions. The secularization of law and criminal procedure, which is the result of the constitutional inclusion of certain values such as pluralism and tolerance to diversity, protects individuals from unlawful interventions in the sphere of privacy.”⁶

Therefore, only the criminalization of individual behaviors, which cause a concrete damage or danger to the legal rights of third parties, is admissible. That is not the case with the behavior described in Section 28 of the Act No. 11343/2006.

As explained by Maria Lucía Karan, “the simple possession of drugs for personal use, or the consumption thereof in such circumstances which do not involve any concrete danger to third parties, are behaviors that act on the individual sphere, belong to the field of privacy and private life, a sphere that is forbidden to the State and, therefore, to Law. Thus, as it can neither be criminalized nor punished – as that is the case with attempted suicide or self-injury – those behaviors that may imply a mere danger of self-injury, at the most, can neither be criminalized nor punished.”⁷

IV. THE RESPECT FOR DIFFERENCE AND HUMAN DIGNITY

The criminalization of drug possession for personal consumption threatens equality, the corollary of the principle of dignity is protected by the Federal Constitution and the numerous international treaties on human rights ratified by Brazil.

Therefore, “the criminalization of the possession of narcotic drugs is a slap in the face to the respect for being different, thus invading the moral option of an individual. There is a clear disapproval of those who do not follow the imposed pattern of behavior. There is a sort of social elimination of those who are not equals (...). It is the right of any human being, provided that s/he neither

Porto Declaration 2009

European and Latin American Judges' Document on Drugs and Human Rights Public Policies

1. Public policies on drugs have proved to be an outright failure, as they have neither achieved the intended purpose of reducing narcotic drug consumption nor been able to prosecute large criminal organizations.

The United Nations in an official document issued this year – UNODC 2009 World Drug Report – has clearly stated that “public health must not be sacrificed for public security” and that “universal access to treatment for drug dependence” must be encouraged as “one of the best ways of reducing the illegal drug market”.

Besides, it acknowledged that the absolute control has created an illicit market of unknown macroeconomic proportions that uses violence and has managed to corrupt different State strata.

2. The transnationalization of criminal phenomena has managed to import and impose either criminal figures or legislative techniques that are alien to recipient States, thus creating a legislative colonization which has neglected the criminal peculiarities of each country.

3. International cooperation in criminal matters is one of the weakest areas of Criminal Law, where there is certainly no shortage of bilateral and multilateral international instruments which show a general material fragility and which must be improved within a globalized framework in order to achieve the purposes for which they were conceived.

4. While courts have been flooded with minor cases, the most serious cases never reach them. Those cases not only involve traffic or money laundering crimes but also corruption crimes committed by government officials.

5. In view of the above-mentioned phenomenon, it is observed that the State neglects its own State control spaces, to wit: the control and supervision of chemicals

precursors, the pharmaceutical market, the institutional system, the financial system, as well as it does with regard to the timely setting of or compliance with preventive and educational policies or the implementation of alternative penalties.

6. What can be inferred from the information gathered from different empirical studies that were carried out is that, in the main, only trivial or insignificant cases reach the legal system, which has resulted in the overpopulation of the prison system and in a huge and unnecessary weakening of the legal system.

7. Drug legislation confronts with the principle of legality in Criminal Law, the principles of *pro homine*, detriment, offensibility, and proportionality, all of them included in the Human Rights Treaties to which our countries are signatories.

8. Drug legislation is an emergency legislation and, as such, it has no specific legal right to protect; it has a poor legislative technique and a proliferation of verbs, among other technical problems, which have been pointed out by the most important textbooks and opinions.

9. The so-called solution to a complex social problem through the criminal system violates the right to access to health care which is only possible – as pointed out by the Committee on the International Covenant on Economic, Social and Cultural Rights (General Observation 14) – if members of a population have goods and public services at their disposal which guarantee minimum rights; therefore, the repressive system shall be reserved for serious cases.

10. The role of Law in the development of the protection of individual rights must be emphasized and deepened by positively considering the reduction of ethnic and urban violence, thus favoring multicultural harmony.

11. In the event of a discrepancy among different legal rights, priority shall always be given to that right which prioritizes the highest respect for human dignity, health, life, pursuant to the hierarchy of legal rights which prevail over the right to security in the reductionist sense.

12. The lack of public policies on preventive issues by certain governments of different political slants is directly proportional to the increase in hard-line propaganda or campaigns for law and order, which, in reality, prove to be mere illusions.

13. The prohibition of consumption through the repression of narcotic drug possession marginalizes drug users and conditions their contact with health institutions or other social welfare organizations, as they identify them with police agency, thus depriving them of the necessary therapeutic action for the voluntary treatment as well as medical care for problematic consumption – which need urgent treatment of their pathologies – and the possibility of accessing information on preventive measures.

14. The concept of harm reduction must be changed, so that it is not reduced to a mere concept of welfare but instead represents one that works towards the reduction of violence

exerted by government or state agencies on the population either through their acts or omissions, which shall imply a change of paradigm.

15. All drug users shall enjoy the right to health care. With regard to the voluntary treatment to be followed, the right to information and diagnosis, as well as the right to the confidentiality of their personal data, are inviolable. The treatments to be implemented shall not be delayed, employing suitable measures and medications for the specific problem of each person. Hospitalization shall always be the last resort to be considered when no other type of care may prove effective.

16. Imposing a compulsory therapy, whether as a security measure or as an alternative punishment, pursuant to the different legislations in force, not only violates the principle of autonomy but also it has proven to be an inefficient tool for helping drug users, since statistics show that these types of interventions have not managed to prevent the increase in relapses. That is the reason why it is imperative that drug users be offered a wide range of support alternatives.

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interferes nor damages, individually, the plans of third parties, to choose and trace out the routes which s/he deems more convenient. When disapproving its use, thus criminalizing the possession thereof, the society invades certain spheres which are not constitutionally its own sphere. In doing so, it does not respect the individual options and it stigmatizes the human being who is different for the simple reason that s/he is reluctant to agree to the belief of what would be right. (..) The Constitution requires tolerance to the one that acts that way, without demanding patterns of morality to the different existing groups, among them, those who use drugs.”⁸

Therefore, it is obvious that the criminalization of drug users constitutes an evil source of stigmatization of those who are different, thus creating discriminatory and exclusive policies.

V. THE UNCONSTITUTIONALITY OF CRIMINALIZATION

Definitively, primary criminalization of drug possession for personal consumption is oriented towards a war-mongering and health logic, which is the result of prohibitionist ideologies regarding “Social Defense” and “Law and Order”; it encourages the concept of “The Enemy Criminal Law” – a true Jacobine delusion – and determines the prevalence of State reasons over Law reasons. It also encourages the militarization of the fight against drugs, promotes intensification policies which are contrary to the canons of the Liberal Criminal Law and the Minimum Criminal Law, results from a medical-legal-political discourse, privileges State intervention in the sphere of private life, establishes discriminatory and exclusive stereotypes, harbors moralizing punitive models, gives way to transnational economic discourse and increases repression.

CONSTITUTIONAL AND DEMOCRATIC VIOLATIONS

It is worth noting that the process of primary criminalization in a democratic Rule of Law should be oriented by those principles that are the result of the constitutional and

protective principles of human dignity, minimum intervention and last ratio: the principle of suitability, the principle of rationality and the principle of subsidiarity.

Besides, it is worth noting... that a behavior cannot be criminalized neither as an imposition of a moral behavior standard nor in a merely symbolic sense or as a promotional measure. The criminalization of drug possession for personal use violates all those constitutional and protective principles, corollaries and criteria regarding fundamental rights.

I. THE PRINCIPLE OF SUITABILITY

According to this principle, criminalization must be a useful means for controlling a certain “social problem.” Notwithstanding the above, in spite of the adoption of a drug policy which is extremely prohibitory and which has created the ideological concept of a “war” against drugs, and considering the fact that in the last few years States have been investing an amount worth millions in material resources for the implementation and maintenance of this military policy, the results achieved so far are absolutely small and totally inefficient.

Brazil, apart from adopting specific legislations in 1990, which were essentially prohibitory in order to approach that “social problem”, also opted for the adoption of an Act known as “Horrible Crimes Act” (Act No. 8072/90), in relation to traffic in drugs.

In this Act, Brazil flagrantly restricted the constitutional and protective principles of the due process of law, defense, double instance, the individualization of punishment, and humanity thus prohibiting the granting of parole, as well as the lodging of an appeal against a convicting sentence in the first instance and the progression of regimes, in the compliance with the punishment imposed.

However, in spite of this prohibitionist and restrictive stance, the drug “problem” has not been solved and all measures adopted so far have been absolutely inefficient.

II. THE PRINCIPLE OF RATIONALITY

In accordance with the principle of rationality, the social benefits and costs of adopting criminalization must be taken into account. Meanwhile, apart from being ineffective, as was previously mentioned, drug criminalization policy carries with it a huge negative social impact not only on the Brazilian society but also on the rest of the world.

In fact, consequences of drug criminalization, introduced under a military standpoint, inevitably cause a huge number of people to lose their lives due to the violence of the “war”, the combat and, also, due to disputes for the control of the parallel or illicit market, which is an extremely profitable one.

Besides, the “war” against drugs causes an uncontrollable increase in delinquency, in view of the need of purchasing drugs in the illicit parallel market, and aggravates corruption in State control agencies, both in the police sphere and in the rest of State strata.

Besides, drug criminalization also generates an uncontrollable parallel market by creating complementary economies, sponsored by very important financial institutions, which significantly affects the financial situation of States and brings with it huge damage to public policies regarding social promotion and the combat of inequality.

Further, the criminal system efforts, in the sphere of secondary criminalization, which are essentially addressed against users and small drug traffickers, create a marked increase in prison population due to a selective discriminatory policy by criminal agencies that opt for the poorest and the youngest who are excluded from the illicit labor market and exposed to the destructive effects of the prison system.

As it can be seen, the maintenance of the criminalization of the combat against drugs is irrational in view of the huge social cost that it creates and reproduces.

III. THE PRINCIPLE OF SUBSIDIARITY

Pursuant to the principle of subsidiarity, the criminalization is only justifiable when there

is no other means or alternatives to approach a specific “social problem”.

It is obvious that outside the criminal system, there are countless alternatives to address this “social problem”, like for example, public policies for harm reduction, as well as educational and preventive public policies. Such policies are much more efficient and do not cause the damages inherent in violence, exclusion, corruption and discrimination encouraged by the repressive system.

Moreover, drug use is closely related to the history of people and it is far from creating a “social problem” in itself. In fact, the “problem” was not specifically created by drug consumption but by the commercialization process, especially encouraged for its own criminalization, thus producing and maintaining a parallel illicit market economy.⁹

IV. CRIMINALIZATION SHALL NOT BE USED TO IMPOSE MORAL BEHAVIOUR STANDARDS

Unquestionably, the criminalization of drug consumption imposes a moral behavior standard thus restricting individual options ... in a democratic Rule of Law.

Thus, on the basis of the democratic principles, the State intervention cannot be admitted, when repressive of nature and defining actions in the personal spheres as criminal, especially when certain behavior patterns – with certain moral conceptions – are intended to be imposed.

V. CRIMINALIZATION CANNOT BE A SYMBOLIC OPTION

Criminalization cannot simply be a symbolic option adopted for the sole purpose of making people believe that some measures are being taken to face a certain problem. Unquestionably, the criminalization of drug possession for personal use has been implemented and continues being implemented in different legal spheres in order to achieve a positive impact on public opinion without any concrete effectiveness or efficiency whatsoever.

Finally, as the poet Carlos Drummond de Andrade would say, "Laws are not good enough; lilies do not arise from laws." Laws are not good enough, especially when they are edited with an obvious symbolic connotation, without any commitment to transformation through an effective focus on social problems only possible through effective preventive, educational and promotional public policies."

VI. CRIMINALIZATION IS NEITHER PROMOTIONAL NOR PEDAGOGICAL

It is worth noting that criminalization neither has a promotional function, and it never will, nor any pedagogical effect. As Norberto Bobbio points out, the repressive system is always implemented to guarantee the maintenance of the status quo and it must not be confused with the promotional system which indeed is a transforming factor. Besides, such opposite systems – the repressive and the promotional ones – are irreconcilable and, therefore, it is impossible that essentially repressive criminalization can create either any promotion of values or the overcoming of any axiological problem.

I have known countless cases of public defenders and individuals throughout Brazil who have used the reference decision¹⁰ to support closing arguments regarding the unconstitutionality of the criminalization of drug possession for personal consumption. Several judges have also recognized this unconstitutionality, in the first instance, citing the decision of the reference as a driving paradigm of their legal grounds.

Besides, a transforming jurisdictional experience is worth a mention: in an area of the coastal region of Sao Paulo, a promoter of justice who is a member of the Public Prosecutor's Office, totally convinced of the unconstitutionality of the criminalization of drug possession for personal consumption, required the filing of all proceedings carried out by the police to promote acts of that nature, and the Judge having jurisdiction in the region, on the basis of the reference decision, bravely admitted such decision and postponed those petitions.

EFFECT OF THE REFERENCE DECISION

There was an immediate and intense effect of the decision and this was analyzed in the media, doctrine, academic and legal fields. The main newspapers nationwide had headlines stating the unprecedented characteristic of the ruling, thus giving rise to an intense public debate. The "Folha de Sao Paulo" newspaper dated May 24, 2008 read as follows: "A Court of Law in Sao Paulo considers that drug possession is not a criminal offense", and pointed out the controversy that the issue provokes, gathering opposite opinions from several specialists (p. C4).

On May 23, 2008, the newspaper "Estado de Sao Paulo" read on the front page: "A Court of Sao Paulo decides that drug possession is not a criminal offense." It pointed out that the "decision of the Judge who hears the case at the Court may set a precedent to other cases." It also published that "A controversial issue causes heated debates" and that "Criminal Law specialists have been defending for years the thesis of decriminalization."

Besides, it gathered opinions from members of academies and legal authorities: Luis Flavio Gomes affirmed "that is a revolutionary agreement. It sets an important precedent in Sao Paulo and, as it has to be addressed to the High Court of Justice, it is possible that this court also accepts the decision"; and María Lucia Karam, during an interview, affirmed that "it is necessary to legalize the production, commerce and consumption" (p. C-1).

On June 2, 2008, the newspaper "Estado de Sao Paulo" published an article by Carlos Alberto Di Franco, criticizing that decision (p. A-2). On August 2, 2008, another article by the legal writer Miguel Reale Junior sustained that "reality showed the failure of the repressive line; especially, in the sphere of users. The change must begin there" (p. A.2). Furthermore, there were other publications and the disclosure of various articles and comments on the decision in the main television news and in several radio programmes throughout the country.

In Universities and, especially, in Law Schools, the decision had a great impact. We have

received information about different studies that are progressing with regard to the issue in the academic sphere. Moreover, on May 31, 2008, in view of that decision, I participated in the IX Research Conference called “Drugs, an Interdisciplinary Approach”, held in the University of Sao Paulo, to discuss the following issue: How does the media inform about and examine the drug issue? Students, professionals as well as Law, Health and Journalism professors attended the conference.

After this, and also because of the decision, I was invited to participate in a Workshop of Legal Writers and Lawyers on Drug Law Reform, organized by WOLA and the TNI, which was held in Cochabamba, Bolivia, on September 1, 2008.

Finally, I received countless news from public defenders and individuals throughout Brazil who have used the decision of the reference to structure closing arguments on the unconstitutionality of the criminalization of drug possession for personal consumption. Several judges have also recognized said unconstitutionality in the first instance, making reference to the decision subject-matter of this work, as a driving paradigm of their arguments.

TRANSFORMING EFFECT OF LEGAL DECISIONS

Unquestionably, legal decisions may have a transformative effect. By way of illustration, we mentioned some seditious decisions taken by judges who, contrary to the logic of the system and the positivism prevailing in the legal order, caused the reversal of the legislation in force, inspired by Antigone, who refused to comply with the Athenian law to pay tribute to the principles that, at present, could be compared to those which are kept within the bounds of the Human Rights system based on dignity: during several years. Specifically, Brazilian judges refused to enforce legal provisions that infringe constitutional principles. These legal provisions:

- required the imprisonment of the accused in compliance with a judgment that sustained the charges, without a specific reference to the need of provisional imprisonment;

- prohibited the release on bail on the basis of certain selective hypothesis, including those cases related to illicit traffic in drugs;

- prevented, in a discriminatory way, the progression of the prison regime in certain cases such as drug traffic;

- required the imprisonment of the accused, a prerequisite for taking into account his appeal;

- prevented the proceeding of the appeal during the escape of the convicted person; and,

- prevented the interrogation of the accused with effective participation of counsel for the defense, thus denying the measure of the plaintiff's lawyer in that stage of the proceedings.

All these legal provisions, which were flagrantly unconstitutional, in accordance with what was stated in the recalcitrant legal decisions, have recently been revoked, in honor of the supremacy of protective principles regarding presumption of innocence, the due process of law, the contradictory proceedings in which the party may submit a defense, self-defense, the double instance, humanity and the individualization of penalties.

As can be noted, exercise of protective jurisdiction cannot be compared with Sisyphus useless and never-ending work. Therefore, I believe that legal decisions that confront the current drug policy can transform the prevailing legal reality at present in order to lead the legal system to a democratic normality, in harmony with the constitutional principles.

CONCLUSION

In a democratic State, judges have no commitment whatsoever to the upholding of the “order” established by the State, due to reasons of State, as Creon proclaimed by sentencing Antigone to be buried alive as punishment. We do have, however, a commitment that cannot be waived with regard to the guarantee of constitutional principles and Human Rights.

We cannot play the role of puppets of a repressive, prohibitionist and pro-abstentionist ideology which is contrary to democratic and constitutional principles. We cannot resign ourselves to losing because of irrational ideologies which dictate State policies created

on the basis of emergency and exception, with a war-mongering orientation, and built upon the prevalence of inequality, exclusion and social injustice.

Besides, as Ernesto Sabato says, resignation "is a cowardice; it is the feeling which justifies the abandonment of those things worth fighting for; in a certain way, it is an indignity". The ruling is the only weapon with which judges may resist. It is hard work but it is possible.

As Paulo Freire, the great Brazilian educator, affirmed, "Transforming the world is as difficult as possible".

NOTES

1. Judge of the Sixth Appellate Court - High Court of Justice, Sao Paulo.

2. *Tribunal de Justiça de São Paulo considera que portar drogas não é crime*, (São Paulo Court of Justice considers that drug possession is not a criminal offense), Folha de São Paulo, May 24, 2008, <http://www1.folha.uol.com.br/folha/cotidiano/ult95u404972.shtml>

3. In order to read the text of the current legislation, click on:

<http://www.obid.senad.gov.br/portais/OBID/biblioteca/documentos/Legislacao/327003.pdf>

4. Maria Lucia Karan, *De crimes, penas e fantasias*, (Crimes, punishment and fantasies), 1991, LUAM (Niterói, RJ), p. 126

5. *Lições de* (Lessons by) Eugenio Raúl Zafaroni, Nilo Batista, Vera Malaguti Batista, Rosa Del Olmo, Maria Lúcia Karan and Salo de Carvalho.

6. Salo de Carvalho, op. cit. p. 256

7. Karan, *Revisitando a sociologia das drogas. Verso e reverso do controle penal* (Revisiting Drug Sociology. The two sides of criminal control), p. 136

8. Alexandre Bizzotto and Andréia de Brito Rodrigues, *Nova lei de drogas* (New Drug Law), p. 41

9. Ferreira, Otávio Dias de Souza. *Drogas e direitos penal mínimo* (Drugs and Minimum Criminal Rights), in *Revista Brasileira de Ciências Criminais* (Brazilian Journal of Criminal Sciences), Ed.; *Revista dos Tribunais* (Court Journal), 2008, v. 75, p. 184.

10. Here, as well as in other parts of the text, when it is said "the decision of the reference" it refers to the decision adopted by the judge, author of this document, with regard to recognizing and declaring the unconstitutionality of primary criminalization of "drug possession for personal consumption".

Drug Law Reform Project

The project in which a number of Latin American judicial experts and legislators participate, aims to promote more humane, balanced, and effective drug laws. It was created with the realization that after decades of the same drug policy the expanding drug markets did not decline, and instead have led to human rights violations, a crisis in the judicial and penitentiary systems, the consolidation of organized crime, and the marginalization of drug users who are pushed out of reach of the health care systems. It's time for an honest discussion on drug policy strategy, aiming at significant changes in both legislation and implementation.

The project seeks to help shape the policy debate incorporating human rights and harm reduction perspectives into the drug policy debate and stimulating the debate about appropriate legislative reforms by pointing out good practices and lessons learned in areas such as proportionality of sentences, prison reform, and the status of the coca leaf in the international conventions. In addition to coordinating a series of informal drug policy dialogues and workshops in the region, our research team will conduct investigations of anti-drug legislation and the prison situation in seven key countries: Argentina, Brazil, Bolivia, Peru, Ecuador, Colombia and Mexico. We aim to see progress in drug policy reforms in Latin America and increased public support of the need for such reforms.



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