

Drug policy and incarceration in São Paulo, Brazil¹

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Introduction

This briefing paper analyses the impact of drug policy on incarceration in São Paulo (Brazil), based on information collected among 1,040 people caught for having committed a drug-related offence (i.e. arrested in “*flagrante delicto*”¹) between 1st April and 30st June 2011.² The objective was to use empirical data on who was caught in the criminal justice system for drug traffic to demonstrate the fragile distinctions between drug users and traffickers, provide information on how police officers deal with drug-related offences, and analyse how the judiciary effectively responds to these crimes (at least in the initial phases of the criminal justice process).³ This research is expected to inform and assess some of the consequences of the current Brazilian drug policy, taking into account its impacts on prisoners’ rights and on the criminal justice system as a whole.

Background

Brazilian drug policy is mainly guided by the *New Drug Law* (Law 11,343/06), promulgated in 2006. Although the law presented important changes to previous drugs legislation, it did not provide objective criteria to establish whether an offender should be considered as a user, as a low-level dealer or as a higher-level trafficker in a given criminal procedure. The law is deliberately vague and, in practice, the definition is determined by the circumstances surrounding the event.¹ Consequently, there are signs that relatively low-level offenders are being sentenced to long prison terms.

Through the process of implementation of the Brazilian drug policy, an individual’s rights are under threat in three different ways: by the risk of being a victim of police violence,² by unequal and deficient access to justice (which compromises the right to a fair trial and the very possibility of a pre-trial release), and finally by serving a sentence in inhumane conditions inside Brazilian prison facilities. All these situations may result in human rights violations that do not directly arise from the formulation of the Brazilian drug policy *per se*, but as a result of the social processes involving people who use drugs or traffickers and the State’s agents and institutions.

Brazilian drug law and its implementation

Brazil has ratified all three international drug conventions that represent the point of reference for UN member states to elaborate their national policy and legislation in the field of drug control: the United Nations Single Convention on Narcotic Drugs (1961),⁷ the United Nations Convention on Psychotropic Substances (1971)⁸ and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988).⁹ These documents impose the obligation for the member states to adopt criminal sanctions against illicit drug production and trade (especially when committed internationally). Nonetheless, they leave room for the adoption of alternative measures to conviction or punishment for simple drug use—indeed, none of these treaties stipulates

that drug use should be considered as a criminal offence. The possession of small quantities of drugs can also be subject to alternative sanctions according to the 1988 Convention (although the text also reinforces the obligation to criminalise conducts contrary to the 1961 Convention).

Under the Brazilian national law, the illicit trafficking and use of cocaine and its derivatives has been prohibited since a decree adopted in 1921 and was, at the time, punishable with imprisonment, with terms varying from 1 to 4 years.¹⁰ In 1940, with the adoption of the Criminal Code, the trade, possession or use of narcotic substances became indistinctly defined as criminal offences (under article 281). However, it was not until 1976 that a law was specifically adopted to prohibit illegal drugs. With Law 6,368/1976, Brazil incorporated the semantic promoted by the UN Conventions adopted in 1961 and 1971, differentiating drug possession for personal use from possession with intent to supply, applying different sentences in each case, ranging from 6 months to 2 years for the former, and from 3 to 15 years for the latter.

In 2006 a new paradigm informed the creation of a law on drug issues, following international trends promoting a differential approach to people who use drugs and drug dealers. The *New Drug Law* (Law 11,343/2006) depenalised the possession of drugs for personal use, i.e., the law defined drug possession for personal use as a crime, but one not to be punished with imprisonment. Under the system, the offender is subject to alternative sanctions and may be referred to a treatment programme (if needed).¹¹ Penalties for people who use drugs can include warnings about the risks associated with drug use, community service or an obligation to attend a course or educational programme. In any case, people caught for drug use retain a criminal record. The penalties for drug trafficking, on the other hand, were substantially increased by the *New Drug Law* – with penalties ranging from a mandatory minimum of 5 years to up to 20 years (or higher if the crime includes involvement in gangs or involves interstate or international ramifications), with longer prison terms before parole is considered and no alternatives to incarceration.¹² The law presented a reduced

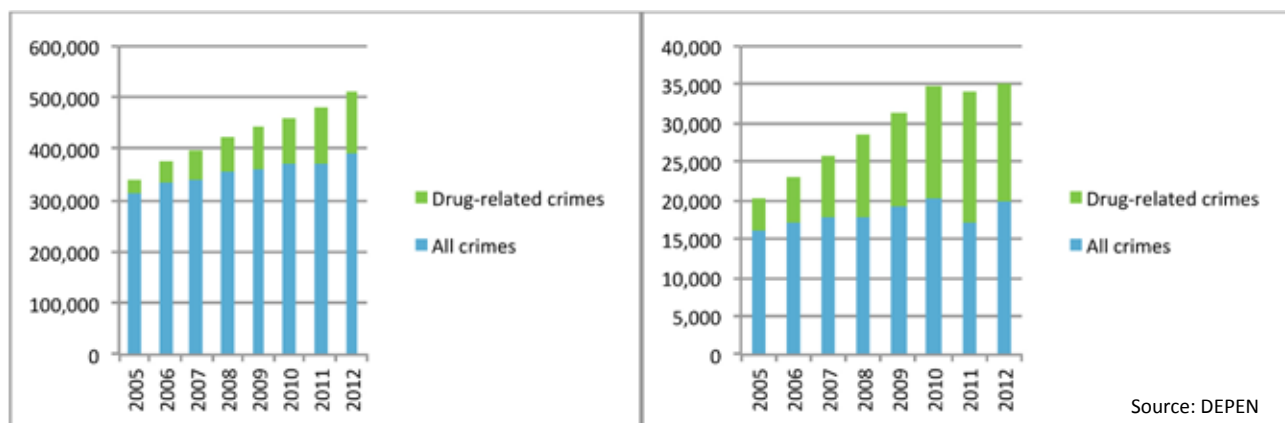
mandatory minimum for micro-traffickers to be considered by the judge in the absence of a criminal record and if there is no affiliation with a gang.

The difference between people who use drugs and drug dealers, however, was not objectively defined in the law. Instead, the judge “shall take into account the nature and quantity of the substance seized, place and conditions under which the action took place, social and personal circumstances, as well as the behaviour and previous records of the offender”¹³ to determine whether a case is related to drug trafficking or drug use. In practice, the definition of the offender as a user or a dealer is based on subjective criteria, with wide discretionary powers given to the police and judges. As Campos (2013)¹⁴ explains, more than any objective criterion, it is the police officers’ testimony that usually determines whether a person caught in possession of drugs is to be considered as a user or a dealer in the Brazilian criminal justice system.¹⁵ This is highly problematic considering the impact that this determination will have on the offender and for the system as whole.

The wide discretionary powers granted to police officers by the *New Drug Law*, combined with the higher mandatory minimums imposed on drug traffickers can explain the substantial increase in the percentage of people who have been incarcerated for drug-related offences in Brazil since the law was passed.

Indeed, when the *New Drug Law* came into force, two parallel phenomena were observed: a noticeable rise in the overall prison population, and an increase in the proportion of prisoners incarcerated for drug-related offences across the country. Between 2005 and 2012 (i.e. from one year before the law came into force to the most recent available data), while Brazil’s overall population growth was 7%, the number of people incarcerated increased by 51.6%. Within the same period, the percentage of people incarcerated for drug offences rose from 9% to 25%, meaning that the number of people serving sentences for drug-related offences increased by 320% in seven years. Currently, drug offences are responsible for 1 in 4 imprisoned men and almost 1 in 2 imprisoned women in the country. Graph 1 presents the

Graph 1: Proportion of people incarcerated for drug-related crimes in Brazil (men on the left, women on the right)



number of men and women incarcerated in Brazil from 2005 to 2012, highlighting the number of people convicted for drug-related offences.

Dataset on people incarcerated for drug-offences: A case study in São Paulo

São Paulo in particular has disproportionately contributed to Brazil’s huge prison population. While the state corresponds to 21% of the national population, it is responsible for 35% of those incarcerated in the country. In São Paulo (as is the case all over Brazil), the majority of those arrested were caught while committing the offence (i.e. arrested in *flagrante*). In 2011, this type of arrest corresponded to more than 78% of all arrests performed in the city¹⁶ (Instituto Sou da Paz, 2012: 12-13).

An arrest in *flagrante* has to be reported within 24 hours to a judge, who decides if it fulfils the legal formalities and if it is necessary to keep the suspect in custody in the interest of public security or to protect legal evidence. If so, the judge converts the case into preventative arrest,¹⁷ which has no time limitation and often lasts until the trial takes place.¹⁸

In the city of São Paulo the majority of the arrests *in flagrante*¹⁹ are conveyed to DIPO, a centre responsible for starting the legal procedures. Their judges and public defenders are informed of the arrest, a judge assesses its legality, defenders (either public defenders or private lawyers) can request a pre-trial release and the judge decides whether to put the person in preventative detention or release them until the trial takes place (in the latter case, the defendant

will be free during the criminal procedure, under certain conditions). At the end of the police investigation, the prosecutor’s office can ask for further evidence, request the closing of the case, or charge the defendant for a criminal offence. Eventually, the case is sent to one of the 31 criminal courts in the city, where a different judge can accept the charges and thus officially initiate the judicial procedure, or reject the charge and close the case (which seldom happens).

Between 1st April and 30th June 2011, 7,538 people were arrested *in flagrante* in the city of São Paulo. During that period, Instituto Sou da Paz (a Brazilian NGO) conducted research and collected information about 4,559 of those arrested (approximately 60% of all those arrested during that timeframe). Almost a quarter (23%) of the dataset produced by Sou da Paz were arrests *in flagrante* for drug-related offences, assembling information on 1,040 people arrested for drug trafficking during those 3 months (Sou da Paz, 2012:13).²⁰ The information was collected *in loco* at DIPO, drawing from the official documents of each prisoner’s judicial process just after the prosecutor’s decision (therefore, before the cases were sent to one of the criminal courts). The information, therefore, only concerns the initial phases of the criminal justice system’s procedure.

Analysing this data has enabled the researchers to identify the dynamics of drug-related offences in the city and to investigate two important questions: (I) whether the lack of objective criteria to distinguish people who use drugs from drug dealers could lead to the arrest of the former as the latter, and (II) whether the absence of reliable benchmarks to assess the necessity

of preventative arrest for drug-related offences could lead to its overuse for these specific crimes.

Profile of drug offenders

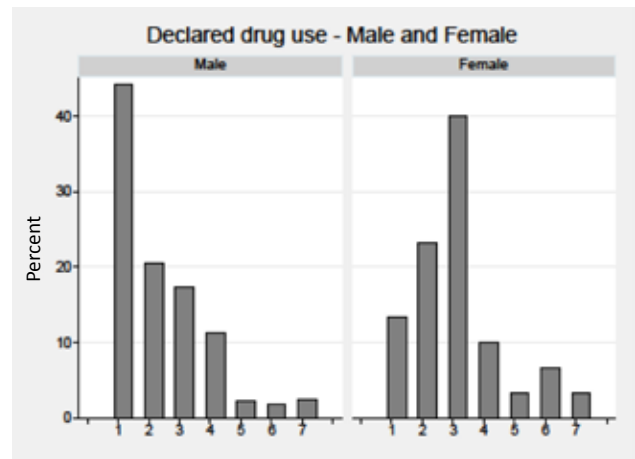
Of the 1,040 people arrested for drug-related offences in the dataset, 88% were men and 12% were women (that is, 911 men and 127 women).²¹ Although the number of women arrested for drug offences can appear to be relatively low based on the dataset, this and additional research has highlighted a gender bias in incarceration rates for drug-related crimes. Indeed, while the female prison population only represents about 6% of the total prisoners, women represent 11% of all prisoners incarcerated for drug-related offences. 64% of arrested women on the dataset reported that they had children.

With regard to prisoners' ethnicity the dataset shows that 60% of those arrested were non-white (i.e. of black and mixed race²²), with no consistent discrepancies between men and women (60% and 59%, respectively). This over-representation of non-white people on the dataset is larger than the percentage observed in the general Brazilian adult population (51%).²³ This finding is in line with recent sociological findings that underlined the racial bias in law enforcement activities in the country. Sinhoretto, Silvestre and Schilitler (2014)²⁴ have discussed, for example, how drug law enforcement efforts have resulted in disproportionate killings of non-white civilians when compared to their white counterparts.

Two-thirds of the arrested people (66%) declared no illicit drug use, with levels of use being lower for women than for men. An analysis of the 351 people who did report some drug use showed variations in patterns of use between men and women. Among men, the most commonly used drug was cannabis (44%), while cocaine was the preferred drug for women (40%). Graph 1 depicts patterns of drug use for men and women.

In terms of age distribution, the majority of men (63%) were aged 18-25. Women were also young, but less concentrated in one age range. The mean age was 25 years-old for men and 29 years-old for women. Both men and women arrested *in flagrante* for drug offences in São Paulo had a low level of education, with 81% only having completed a basic level of formal education.

Graph 2: Declared drug use for men and women



Legend: 1: Only cannabis; 2: Only cocaine; 3: Only crack; 4: Cannabis and cocaine; 5: Cannabis and crack; 6: Cocaine and crack; 7: Cannabis, cocaine and crack.

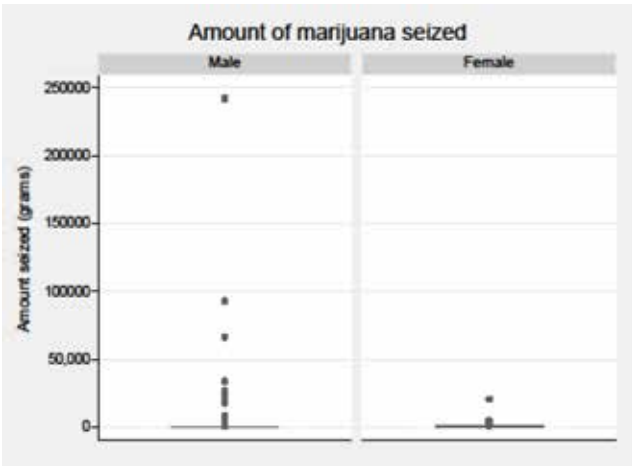
The majority of those arrested in the dataset did not have previous criminal convictions or a criminal record: 73% of men and 77% of women had never been convicted; 52% of men and 62% of women did not have a criminal record before arrest.

Type of drug offences

The majority (77% for men and 57% for women) of the arrests took place in public spaces. There are two major differences concerning place of arrest for men and women, for arrests conducted inside residences and for arrests in prison facilities. Women were arrested inside their own homes twice as much as men, and it is worth noting that there was no official warrant when women were arrested. Women were also arrested 10 times more than men inside prison facilities (8% and 0.7%, respectively). Although the dataset does not provide detailed information on the circumstances of these arrests, it can be suggested that those women were caught attempting to deliver drugs to their relatives or partners while visiting them in prison.²⁵

In terms of the drugs possessed during arrest, 97% of the cases were related to three types of drugs: cannabis, cocaine and crack.²⁶ Most women (57%) possessed only one type of drug at the moment of the arrest, while most men (58%) possessed more than one type. In 17 cases of the dataset, people were arrested without being in possession of any drugs.²⁷ There was no major difference between the percentage of men and trafficking only involved very small amounts of

Graph 3: Amount of marijuana seized, by gender



Source: dataset

Amounts of cannabis seized with men:

Smallest seizure: 0.1g

Median: 42.4g

Largest seizure: 242.09kg

Mean: 2,826g

Amounts of cannabis seized with women:

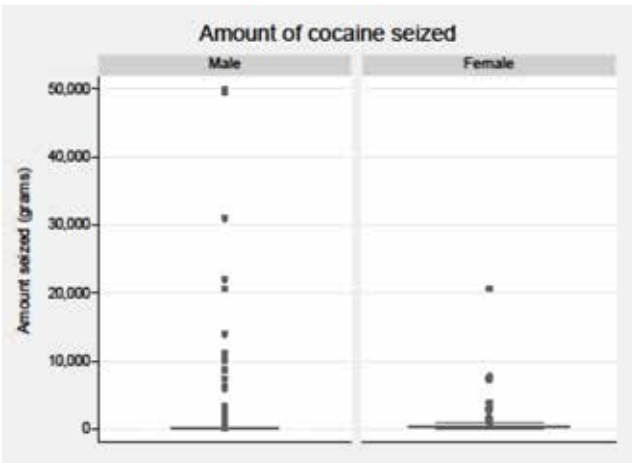
Smallest seizure: 0.6g

Median: 101.5g

Largest seizure: 20.5kg

Mean: 726.8g

Graph 4: Amount of cocaine seized, by gender



Source: dataset

Amounts of cocaine seized with men:

Smallest seizure: 0.2g

Median: 22.7g

Largest seizure: 49.8kg

Mean: 623.9g

Amounts of cocaine seized with women:

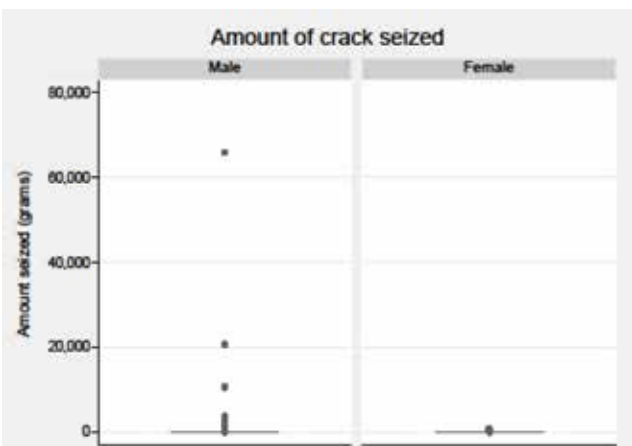
Smallest seizure: 0.01g

Median: 50.9g

Largest seizure: 20.6kg

Mean: 793.9g

Graph 5: Amount of crack seized, by gender



Source: dataset

Amounts of crack seized with men:

Smallest seizure: 0.1g

Median: 10.4g

Largest seizure: 65.9kg

Mean: 317.1g

Amounts of crack seized with women:

Smallest seizure: 0.1g

Median: 10.8g

Largest seizure: 761.1g

Mean: 73.6g

drugs. In some instances, seizures of quantities as small as 0.1g of cannabis, 0.01g of cocaine and 0.1g of crack justified arrest. For women, the largest amounts of drugs seized were substantially smaller than for men.

Graphs 3, 4, and 5 provide information about the amount (in grams) of cannabis, cocaine and crack seized by police officers at the moment of the arrest. The information also presents the smallest and the largest amounts of each of these three types of drugs, the median and mean values – disaggregated by gender.

As the distinction between people who use drugs and drug traffickers is not made through objective criteria under Brazilian law, law enforcement officers and judges generally use the circumstances of the case in order to determine the type of offence. Some elements present at the crime scene can help both police officers and operators of the law to make this judgment, such as drug paraphernalia, a communication handset, money, accounting registration and guns.²⁸ The dataset provides information on some of these elements. In 25% of the cases, a communication handset (mobile phone, radio, etc.) was found with the arrested person, and seized. In 65% of the cases, some amount of money was seized during arrest – although the amounts seized were very small: median value was R\$ 82 (app. US\$ 30), while the mean value was R\$ 255 (app. US\$ 96).²⁹ In only 9% of the cases there was some type of accounting registration with the arrestee. Only in 4% of the cases did the person possess a firearm at the moment of the arrest, and this was never the case for women.

In most cases, the only witnesses of the crime and the arrest were the police officers.³⁰ Only in 22.5% of the cases were there civilian witnesses. This means that the police version of the facts could generally not be contested by anyone but the accused themselves. As discussed by Campos (2013),³¹ given the subjective parameters for defining whether a person is a user or a trafficker, it is the police's narrative that usually defines how people will be considered within the criminal justice system: if that police narrative reports a scene of possession of drugs for personal use, the arrested person will not be sent to prison; whereas

if the official narrative points to suspicion of drug trafficking, person will face a criminal process and be punished by a prison sentence varying from 5 to 15 years.

The use of pre-trial detention

In 39% of the cases, the arrest was not communicated to the judicial authorities within 24 hours, as stated by the Brazilian Code of Penal Procedure.³²

Out of the 1,040 people included in the dataset, lawyers or public defenders submitted a pre-trial release request for 536 people at the initial stage of the criminal procedure. Although public defenders were not notified of the arrest in 25% of the cases, they were responsible for 76% of the pre-trial release requests, that is, 411 requests, in contrast with the 123 requests from private lawyers and only 2 from the prosecutor's office. The impressive number of requests from public defenders for pre-trial release may in fact be an indication of the economic vulnerability of the accused who largely rely on these professionals to access legal aid for their defence. On the other hand, for the remaining 504 people, no pre-trial release request was made during this initial stage. Prosecutors only supported 5 of the 536 requests made by public defenders and private lawyers, that is, for less than 1% of the total requests.

Pre-trial release was only granted to 28 people. In 11 cases, the release resulted from the judge's own initiative, while in another 17 cases it was granted in response to a pre-trial release request. Table 3 reports the judge's decision (or lack of decision³³) on the pre-trial release requests, disaggregated by author of the request.

The small number of pre-trial releases granted by judges (even considering the profile of the accused: mostly non-violent offences, and first-time offenders) seems to confirm research in Brazil which shows that judges tend to use pre-trial detention³⁴ when they believe that the defendant will eventually be convicted.³⁵ This practice constitutes a form of anticipated conviction, which violates the constitutional right to the presumption of innocence.

Table 1: Judge decision by author of the pre-trial release request (n = 536)

Judge decision	Public defender	Private lawyer	Prosecutor	Total
No decision	104	24	1	129
Pre-trial release	9	7	1	17
Not released	298	92	0	390
Total	411	123	2	536

Source: dataset

The Brazilian drug law is therefore dramatically affecting the national criminal justice system, based on two main factors: (I) the lack of objective criteria for the distinction between people who use drugs and drug dealers (resulting in the former being processed as the latter); and (II) the overuse of pre-trial detention for people arrested for drug offences (contributing to prison overcrowding, the growth of criminal gangs and a deterioration of the living conditions inside prison facilities). Below, both factors are discussed, using evidence from the dataset presented here.

Distinction between user and trafficker and its impact on the criminal justice system

As the Brazilian drug law does not provide any objective criteria for the distinction between user and dealer, the identification of a person

as one or the other is usually made based on the circumstances of the crime, which are first reported by the police officer and then ratified (or not) by the operators of law (defenders or lawyers, prosecutors and judges).

Other countries, however, apply objective criteria for such a distinction, including quantity thresholds (QTs). In those countries, the amount of drugs seized is crucial to define whether the person should be considered to be a user or a trafficker. As discussed by Harris (2011),¹ QTs are used for different purposes – to determine if the possession of drug is a matter of personal use or supply/trafficking; to establish if the offence should be diverted away from the criminal justice system; and to determine sentencing ranges for a drug trafficking offence. Table 4 presents QTs used to define possession of cannabis and cocaine for personal use in different countries, according to

Table 2: QT to establish whether cannabis/cocaine possession is for personal use in different countries

Country	Cannabis threshold (in grams)	Cocaine threshold (in grams)
Belgium	3	-
Australia (lower limit)	15	-
Australia (upper limit)	50	-
Czech Republic	15	1
India	-	2
Mexico	5	0.5
Netherlands	5	0.5
Paraguay	10	2
Portugal	25	2
Russia	6	0.5
Spain	200	7.5
United States ³⁷	28.45	-

Source: dataset

Table 3: Comparison between amounts of cannabis seized on the dataset and QT in different countries

Country	Threshold (in grams)	Number of people in the sample that would not be arrested if the threshold was applied in Brazil	Percentage of people in the sample that would not be arrested if the threshold was applied in Brazil
Belgium	3	8	9%
Mexico	5	8	9%
Netherlands	5	8	9%
Russia	6	8	9%
Australia (lower limit)	15	14	15%
Paraguay	10	11	12%
Czech Republic	15	14	15%
Portugal	25	27	29%
United States	28.45	32	34%
Australia (upper limit)	50	39	41%
Spain	200	65	69%

Table 4: Comparison between amounts of cocaine seized on the dataset and QT in different countries

Country	Threshold (in grams)	Number of people in the sample that would not be arrested if the threshold was applied in Brazil	Percentage of people in the sample that would not be arrested if the threshold was applied in Brazil
Mexico	0.5	1	0%
Russia	0.5	1	0%
Netherlands	0.5	1	0%
Czech Republic	1	1	0%
Paraguay	2	9	4%
Portugal	2	9	4%
India	2	9	4%

Harris (2011). Of course, QTs may sometimes not be enough to truly assess whether possession is for personal use, social dealing (without intent to supply), or trafficking. Therefore, most countries that use QTs also use additional criteria, including additional evidence gathered at the moment of arrest (as is the case in Brazil), as well as mitigating factors (for example, if the person has a history of drug use).

As Table 2 shows, there are significant differences in the QTs established for cannabis and cocaine around the world. Although there is no set rule on how to define QTs, it is important that the

quantities set out truly reflect the drug market and patterns of drug use to ensure that the QTs do differentiate between a user and a dealer.

Using information from Table 2 above, it is possible to compare the amounts of drugs possessed by people from the dataset to QTs used in other countries, in order to investigate if the adoption of similar parameters in Brazil could have an impact over the number of arrests for drug trafficking in the country. Tables 3 and 4 show the number of people on the dataset who would have been considered as cannabis and cocaine users (and, thus, would not have been

Table 5: Estimated economic impact of objective distinction between drug users and dealers in prisons' costs in the state of São Paulo for 2011 in Brazilian Reais (R\$)

	Number of people	Annual cost (in Reais)	Possible savings	
			Lower bound	Upper bound
Total prison population	180,059	3,024,991,200		
People incarcerated for drug offences	52,713	885,578,400		
People incarcerated for cannabis possession⁴¹	4,765	80,052,000	7,204,680	55,235,880
People incarcerated for cocaine possession⁴²	11,507	193,317,600	7,732,704	36,730,344

sent to prison) if different QTs had been used in Brazil.³⁸

From the tables above, if Brazil adopted similar QTs to those applied in other countries, up to 69% of people arrested for cannabis possession and 19% of those arrested for cocaine possession on the dataset would be considered as users, rather than as drug dealers.

If we extrapolate these figures to obtain a bigger picture of the impact that QTs could have to more adequately distinguish between users and dealers, it is possible to reach some interesting conclusions. In 2011 (when the dataset was produced), the state of São Paulo had a prison population of 180,059 people – although its prison facilities can only accommodate 100,034 people. Among them, 52,713 inmates (29%) were serving a sentence for drug trafficking.³⁹ Although there is no information available on the types and amounts of drugs possessed by those serving sentences for drug trafficking, if that population presented similar patterns to those observed on the dataset, it would be possible to estimate that around 9% (4,765 people) were serving sentences for cannabis possession and 22% (11,507 people) for cocaine possession in that year. According to Pastoral Carcerária,⁴⁰ the average monthly cost of a prisoner in the state of São Paulo is R\$ 1,400 (approximately US\$ 530). That means over R\$ 3 billion (US\$ 1.2 billion) was spent by São Paulo on prisons in 2011; with 29% of that amount or R\$ 885 million (US\$ 326 million), being used for the incarceration of drug traffickers.

Table 5 presents the economic impact that the adoption of QTs would represent in the state of São Paulo, taking the lower (9% for cannabis

and 4% for cocaine) and the upper bounds of reduction (69% for cannabis and 19% for cocaine).

Pre-trial detention and sentencing for drug-related offences

Factors influencing pre-trial detention

To investigate whether pre-trial detention for drug-related offences was being overused in São Paulo, the author investigated the elements that had most impact on judges' decision on whether to keep people in custody or grant them pre-trial release. In order to do so, a statistical test was performed (using the relogit model) to identify the characteristics of the crime and of the accused that could have been used by the judge as benchmarks to assess the necessity of the pre-trial detention.

The test, however, showed no significant effect for any of the characteristics that could impact upon the judge's decision, either the amounts of drugs seized with the arrestees or their profile (in terms of race, age, gender, education, previous convictions and previous criminal record). The type of drugs possessed by the prisoner had some influence on judge's decision, although this effect was ambiguous and not linear.⁴³ The existence of pre-trial release request and the type of defender also had little influence on the granting of pre-trial release by a judge. The only element from the justice system that had a significant influence on the judicial decision was the prosecutor's agreement on the request.

For statistical purposes, the small number of conceded pre-trial releases may weaken the inferences about the variables that influence judges' verdict – because the analysis is based on very few cases. However, this narrow sample

Table 6: Sentencing range that could be applied for arrestees on the dataset if Brazil applied Ecuador's sentencing QTs for drug trafficking

	Cannabis (n=94)		Cocaine (n=227)		Crack (n=116)	
2 - 6 months	71	76%	144	63%	97	84%
1 - 3 years	10	11%	66	29%	17	15%
5 - 7 years	6	6%	4	2%	1	1%
10 - 13 years	7	7%	13	6%	1	1%
Total	94	100%	227	100%	116	100%

(28 out of 1,040) is an already relevant piece of information, once it demonstrates that pre-trial releases for drug offences are not but rare exceptions (which correspond to only 2.6% of the cases).

Sentencing practices and the role of QTs

In addition to its use in distinguishing between users and dealers, QTs are also useful in the imposition of proportionate penalties for drug-related offences.

In Ecuador, since the adoption of the country's new criminal code, QTs are used to determine whether possession is for personal use or for intent to supply, but they are also instrumental in the imposition of sentencing ranges for different levels of seriousness for drug offences. The amounts of drugs for personal use as established in the criminal code correspond to a maximum of 10g for cannabis and 1g for cocaine.⁴⁴ The possession of up to 300g of cannabis and 50g of cocaine lead to sentences ranging from 2 to 6 months of imprisonment. Between 300g and 2kg of cannabis, and 50g to 2kg of cocaine, sentences range from 1 to 3 years in prison. Possession varying from 2 to 10kg of cannabis and from 2 to 5 kg of cocaine is punished with sentences from 5 to 7 years of imprisonment. For possession of amounts greater than 10 kg of cannabis and 5 kg of cocaine, the sentence ranges from 10 to 13 years.⁴⁵ In order to ensure proportionate penalties, Ecuador also uses a series of mitigating factors, in particular for micro-traffickers, to ensure that the vulnerabilities of those caught in the drug trade through coercion or violence are taken into account while determining the sentence.

As a comparison, if the same criteria for ranging sentences for drug trafficking were applied to the people from the analysed dataset, the vast majority would be sentenced to up to 6 months of imprisonment – far shorter than the 5 years' mandatory minimum established by the Law 11,343/2006. Table 8 presents the sentencing range that could be applied for arrestees on the dataset if Brazil were to adopt similar criteria to Ecuador.⁴⁶

Conclusions and recommendations

Data analysed in this briefing paper reveals that, although drug possession for personal use was depenalised in the 2006 Brazilian drug law, people caught with very small amounts of drugs continue to be arrested and punished for drug trafficking. In fact, available data shows that the prison population has increased since 2006, and this is mostly due to drug law enforcement efforts. These arrests have caused disproportionate harm to vulnerable groups in society, and have increased pressure on an already slow and ineffective criminal justice system, contributing to prison overcrowding, draining economic resources and causing much avoidable human suffering.

Available evidence shows that the increased arrests of minor drug offenders have had little impact on reducing drug supply or demand in Brazil. Although there is no consistent information on the evolution of drug use in the country over the past few years,⁴⁷ available data show a rise in cocaine and crack use prevalence, while cannabis use has remained relatively stable. A survey conducted in 2005⁴⁸ on the prevalence of drug use among the general population (12 to 65 year-

olds) indicates that 2.66% had used cannabis, 0.74% used cocaine and 0.14% used crack at least once during the previous 12 months. Another survey conducted in 2012⁴⁹ among adults aged 18 and over showed a similar prevalence of cannabis (2.5%), but greater use prevalence for cocaine (1.7%) and crack (0.7%) during the previous 12 months. It is worth noting that during the same timeframe (2005-2012), the number of people serving sentences for drug trafficking increased by 320%.

There are inherent challenges to reforming the national drug policy in a country as big and diverse as Brazil. Nevertheless, the adoption of objective criteria to guide the implementation of the drug law – in particular in defining the type of offence and in sentencing – could be beneficial in many aspects. Although taking into account the specific circumstances and evidence available for each case, the application of QTs, as well as criteria determining the role and motivation of the offender (i.e. mitigating factors), can constitute much more reliable benchmarks for judges to assess (I) whether the offender is a user or a dealer; (II) whether pre-trial detention is necessary; and (III) which sentences to impose.

Ideally, distinctions between users and dealers should be made on a case-by-case basis, taking into account all the specificities of the circumstances. However, as this paper has shown, the sole application of subjective criteria in a country widely marked with deep socio-economic inequalities has not resulted in a just and adequate application of the law, and has led to increases in arrests and the imposition of disproportionate sentences for minor offences. The data presented above show that the adoption of QTs could have avoided the imprisonment of up to 3,288 cannabis users and 2,186 cocaine users, in the state of São Paulo alone in 2011. In addition to preventing individual and social costs, such an approach could have saved up to R\$ 91.9 million (US\$ 33.8 million) annually to the state of São Paulo. Undoubtedly, the adoption of QTs would need to be closely analysed and evaluated to prevent unintended consequences – such as increases in the number of people who use drugs being incarcerated for trafficking if the QTs are set too low.

In addition, it is also crucial to offer judges suitable options to take into account the specificities of each offender when deciding whether to impose pre-trial detention or release. An opportunity to do so was offered in 2011, with the revision of Law 12,403/11.⁵⁰ The revised law offered judges a wider range of measures for those arrested *in flagrante*. Judges were no longer limited to either keeping the accused in pre-trial detention or to release them. Instead, the legislation offered options such as bail, electronic monitoring, home arrest, periodic attendance to court, prohibition to attend specific areas or places, obligation to remain at home during night-time, prohibition to contact specific people, prohibition to leave a specific geographical area, suspension of work activities (for civil servants), etc. Disappointingly, Law 11,403 prevented bail for drug trafficking offences, which significantly reduced its impact for drug-related offences – as research has shown.⁵¹ It is also essential for the judge to truly assess the characteristics of the offenders and circumstances in which the offence took place. An initiative recently initiated in São Paulo⁵² indicates that when talking to the offenders in person, judges were more likely to grant them pre-trial release. The so-called *custody hearings* are opportunities for the judges to assess the necessity of the preventive detention upon not only analysing files and documents, but interviewing the arrestee in person. In the framework of these hearings, judges talk to the arrestees within 24 hours after the arrest, what means that they can grant pre-trial release or put the accused in pre-trial detention based on other sources than just the police reports. Under the previous criminal justice procedures, the offender would usually only have the chance to talk to a judge months after the arrest, when his/her case went to trial. These hearings have produced an impressive impact on pre-trial detention. Only a month after these hearings started, 42% of those sent to custody hearings were released (according to preliminary evaluations broadcasted by newspapers⁵³). Although there is no information on the specific impact of these hearings on drug-related arrests, this is an interesting development which should be monitored and applied more widely in Brazil.

Enhancing qualitative and quantitative research on the implementation of Brazilian drug policy is paramount to identify the shortcomings of the system, police misconduct, bias in policy implementation, etc.

Reviewing Brazilian drug policy into a fairer and more rational strategy to address drug offences requires a deeper understanding of the circumstances of drug use and dealing offences, and of alternative policies to imprisonment in other parts of the world. With careful consideration and proper adaptation to local circumstances, the adoption of QTs could be a way of moving in the right direction.

Endnotes

- An extended version of this research was presented at the University of Essex (UK) as a dissertation for the completion of the Master of Science in Human Rights and Research Methods. The author would like to thank the Foreign and Commonwealth Office for the award of the Chevening Scholarship (which funded the Master), Professor Todd Landman (supervisor of the research), Instituto Sou da Paz (for providing the dataset analysed), and Open Society Foundation (for the award of the Latin American Advocacy Fellowship Program on Drug Policy Reform)
- In Portuguese, “*flagrante delicto*” (henceforth arrest *in flagrante*) refers to an arrest that is usually not preceded by an investigation. It is applied when the alleged criminal is caught by police officers while committing the crime, just after having committed the crime (denounced by victims or witnesses), or with tools, guns or other objects to commit a crime.
- The dataset analysed was produced by Instituto Sou da Paz for the research “Arrests *in Flagrante* in São Paulo”. The research report was published (Instituto Sou da Paz, 2012. “Relatório da Pesquisa Prisões em Flagrante na Cidade de São Paulo”. Title in English: Research Report Arrests *in Flagrante* in the City of São Paulo) and is available at http://www.soudapaz.org/upload/pdf/justica_prisoeflagrante_pesquisa_web.pdf, retrieved 23rd February 2015.
- The dataset analysed contain information only about the initial phases of the criminal justice system’s procedures, as it will be explained later on this article.
- According to the 28th article (second paragraph) of the referred law.
- A broad account of police brutality in the state of São Paulo can be found on Human Rights Watch’s report on the theme, “Lethal Force – Police violence and public security In Rio de Janeiro and São Paulo”, available at <http://www.hrw.org/node/87020>. Retrieved 16th March 2015.
- Full text can be found at https://www.unodc.org/pdf/convention_1961_en.pdf
- Full text can be found at https://www.unodc.org/pdf/convention_1971_en.pdf
- Full text can be found at https://www.unodc.org/pdf/convention_1988_en.pdf
- Full text of the National Decree can be found at <http://www2.camara.leg.br/legin/fed/decret/1920-1929/decreto-4294-6-julho-1921-569300-publicacaooriginal-92525-pl.html>
- The law even mentions harm reduction among the measures that might be offered to drug users and their families (Article 22). Even tough, the possession of drug for personal use produces a criminal record for its agent.
- According to Law 11.343/06, imprisonment was mandatory even for micro trafficking. Although the Brazilian Supreme Court ruled out this obligation as unconstitutional in 2010, in São Paulo judges seem to be still reluctant in granting pre-trial release in such cases.
- According to Article 28 of the referred Law.
- Campos, Marcelo da Silveira (2013). “Drogas e justiça criminal em São Paulo: conversações”. *Sistema Penal e Violência*, Porto Alegre, v. 5, n.1, pp. 120-132 [Title in English: Drugs and Criminal Justice in São Paulo: conversations].
- Informal negotiation (or bribery) is not an uncommon form of resolution of this definition, as ethnographic accounts on the theme have shown. See Feltran, G. de S. (2012). “Manter a ordem nas periferias de São Paulo: coexistência de dispositivos normativos na ‘era PCC’” [Title in English: Maintaining the order in the outskirts of São Paulo: coexistence of normative apparatus in ‘PCC era’]. In: Azaïs, C.; Kessler, G. & Telles. V. S. (Eds). *Illegalismos, cidade e política*. Belo Horizonte (MG): Fino Traço [Title in English: Illegalsities, city and politics].
- In the city of São Paulo, in 2011, 29,023 out of 37,057 arrests were initiated by a *flagrante*, according to the Public Security Secretariat of the state. A similar pattern is observed state wide, where more than 68% of the arrests (104,558 out of 153,066 cases) were initiated as an arrest *in flagrante* in the same year (Instituto Sou da Paz, 2012: 12-13)
- Equivalent to a remand prison
- Preventative detention is only applied in cases where there is no reasonable doubt of the existence of the crime and where there are concrete indications of its author, provided there are no less drastic means to achieve its objective. It should not be used in anticipation of punishment, as mandated by the constitutional right to presumption of innocence.
- Due to specifications in Law, the only crimes whose reports of arrest are not conveyed to DIPO are those concerning domestic violence and crimes against life (homicide, inducement to suicide, infanticide and abortion).
- According to the Public Security Secretariat of São Paulo, during the period when the data was collected (April to June 2011) 7,528 persons were arrested *in flagrante* in the city of São Paulo (Sou da Paz, 2012:13).
- Besides the 911 men and 127 women, there are two observations without information about gender on the dataset, composing, altogether, the 1,040 total observations.
- The sum of black and mixed race on discussions about race disparities in Brazil is a tendency observed in both academic literature and black movement. For more information, see Rosemberg, Fúlvia (2004). “O branco do IBGE continua branco em programas de ação afirmativa?”. *Estudos Avançados*. São Paulo, v. 50, pp. 61-66.
- According to IBGE’s census in 2010. For more information see ftp://ftp.ibge.gov.br/Censos/Censo_Demografico_2010/Resultados_do_Universo/tabelas_pdf/tab3.pdf. It is worth noting, however, that while the information on ethnicity is self-declared on census, there is no confidence on the methodology applied for filling up the “personal information report” on police stations, from where this information was retrieved.
- Sinhoretto, J., Silvestre, G. & Schlittler, M. C. (2014). *Desigualdade Racial e Segurança Pública em São Paulo: Letalidade policial e prisões em flagrante*. Available at http://www.ufscar.br/gevac/wp-content/uploads/Sum%C3%A1rio-Executivo_FINAL_01.04.2014.pdf retrieved 19 July 2014. [Title in English: Racial Disparity and Public Security in São Paulo: Police Lethality and Arrests *in flagrante*]
- Out of these 16 arrests in prisons facilities, 11 correspond to cannabis possession (only), 1 to cocaine possession (only) and 4 to cannabis and cocaine combined. This information reinforces the arguments around criminal gang’s hegemony inside prisons in the state of São Paulo. According to a recent sociological literature, the criminal gang known as PCC (the acronym for First Capital Command, “Primeiro Comando da Capital”, in Portuguese) have reached control over the majority of prisons in the state and imposed its own rules to inmates. Among this rules there is the prohibition of crack use inside prisons facilities (while cannabis and cocaine are tolerated). The evidence from the dataset support this thesis.
- These are, therefore, the drugs analysed on the research.
- Police officers try to justify the arrest of a person without drugs as a drug trafficker claiming the person had already sold all the drugs and that there were evidences of the crime.
- The possession of a fire gun is a crime in itself, with sentences varying from 1 to 3 years of imprisonment (Law 10826/2003).
- Just for a matter of comparison, the current minimum wage in Brazil is R\$ 788.00 (app. US\$ 252.00).

30. Either Military and Civil officers or Metropolitan Civil Guards.
31. Campos, M. S. (2013).
32. Article 306, §1º of CPP (from the Portuguese acronym for Código do Processo Penal).
33. As DIPO is a transitional department, it is possible that some processes are conveyed to the definitive criminal court before having a decision on the grant of pre-trial release at DIPO. In that case, the request was marked here as receiving no decision on the table.
34. There is no consistent data about the average period of duration of pre-trial detention in Brazil, but it is certain that these detentions can last for several years. High courts in Brazil have deemed 3 years of pre-trial detention as acceptable (see <http://jus.com.br/artigos/18504/a-arbitrariedade-no-excesso-de-prazo-da-prisao-preventiva>). Cases of prisoners serving for 11 and 14 years as pre-trial detainees were recently denounced by Brazilian press (see <http://www.conjur.com.br/2013-fev-09/observatorio-constitucional-abuso-prisoas-provisorias-pais>).
35. Barreto, Fabiana Costa (2007). *Flagrante e Prisão Provisória em Casos de Furto: da presunção de inocência à antecipação de pena*. São Paulo: IBCCrim, p:63. [Title in English: *Flagrant and Provisional Arrests in Cases of Theft: from presumption of innocence to the anticipation of sentence*].
36. Harris, Genevieve (2011). "Conviction by numbers: threshold quantities for drug policy". IN: Series on Legislative Reform of Drug Policy, nr. 14, May. Available at <http://www.tni.org/briefing/conviction-numbers> retrieved 15 July 2014.
37. Harris presents only a general QT for possession of cannabis and Cocaine in the US, without distinctions among different states in the country. The article predates the legalisation of cannabis in Washington and Colorado in 2012
38. Both comparisons only take into account people arrested for cannabis possession (n = 94) and cocaine possession (n = 227)
39. Information on the imprisoned population and the number of places in São Paulo's prisons can be found at <http://portal.mj.gov.br/main.asp?View=%7BD574E9CE-3C7D-437A-A5B6-22166AD2E896%7D&Team=¶ms=itemID=%7B73D32EC4-06E3-4E17-BE46-E0C-ECD03122A%7D;&UIPartUID=%7B2868BA3C-1C72-4347-BE11-A26F-70F4CB26%7D> Retrieved at 31st March 2015.
40. Pastoral Carcerária is a group from Roman Catholic Church devoted to offer spiritual and material support for prisoners. In Brazil the group has been playing a decisive role in visiting prison facilities, given voice to prisoners denounces, conducting research and demanding govern authorities on issues related to justice and prisoners' wellbeing. For more information see <http://carceraria.org.br/>
41. This number correspond to an estimate calculated using the percentage of cannabis possession (only) as observed on the dataset, upon the total number prisoners for drug-related in the state of São Paulo in 2011.
42. This number correspond to an estimate calculated using the percentage of cocaine possession (only) as observed on the dataset, upon the total number prisoners for drug-related in the state of São Paulo in 2011.
43. The types of drugs seized with the suspects were found to have a negative effect on judges' decision. However, this effect is not linear: having 2 types of drugs have a more negative impact on judge's decision than having 3. This contradicts the idea that the more types of drugs one has, the more likely to be considered a trafficker he/she would be.
44. The same law also established the amounts for non-criminal possession of other types of drugs. Full text can be found at http://www.consep.gob.ec/descargas/REGISTRO_OFICIAL.PDF . Retrieved 31st March 2015.
45. For more information see http://www.consep.gob.ec/descargas/2014/07/2sro_288.pdf Retrieved 31st March 2015.
46. Ecuadorian law does not establish ranging sentences for crack possession. However, as crack is nothing but a form of cocaine which can be smoked, people arrested for crack possession on the dataset were compared to cocaine QT for ranging sentences.
47. Data on the analysed pieces of research are of difficult comparison, once the surveys adopt different sampling criteria. The information on drug prevalence is presented here, not for a matter of percentages comparison, but for the sake of grasping general trends of drug use in the country over the years.
48. Full research can be found (in Portuguese) at http://www.obid.senad.gov.br/portais/OBID/biblioteca/documentos/Dados_Estatisticos/populacao_brasileira/II_levantamento_nacional/327451.pdf 31st March 2015.
49. II LENAD – Levantamento Nacional de Álcool e Drogas (2012). Title in English: National Survey on Alcohol and Drugs. Available at <http://inpad.org.br/lenad/resultados/relatorio-final/> Retrieved 31st March 2015.
50. Full text of the law can be found at http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/12403.htm Retrieved 7th April 2015.
51. Full text of the research (in Portuguese) can be found at http://www.soudapaz.org/upload/pdf/lei_das_cautelares_2014_digital.pdf Retrieved 7th April 2015.
52. Since 24th February 2015.
53. Full text on Folha de São Paulo (newspaper) can be found at <http://www1.folha.uol.com.br/cotidiano/2015/03/1606054-com-novo-modulo-justica-de-sp-solta-42-dos-presos-em-flagrante.shtml> Retrieved 7th April 2015. 4/2014gapreport/

About this briefing paper

This briefing paper analyses the impact of drug policy on incarceration in São Paulo (Brazil), based on information collected among 1,040 people caught for having committed a drug-related offence between 1st April and 30st June 2011. The objective was to use empirical data on who was caught in the criminal justice system for drug traffic to demonstrate the fragile distinctions between drug users and traffickers, provide information on how police officers deal with drug-related offences, and analyse how the judiciary effectively responds to these crimes. The research highlights some of the consequences of the current Brazilian drug policy on prisoners' rights and on the criminal justice system as a whole.

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The International Drug Policy Consortium is a global network of non-government organisations that specialise in issues related to illegal drug production and use. The Consortium aims to promote objective and open debate on the effectiveness, direction and content of drug policies at national and international level, and supports evidence-based policies that are effective in reducing drug-related harm. It produces briefing papers, disseminates the reports of its member organisations, and offers expert advice to policy makers and officials around the world.

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Report design by Mathew Birch - mathew@mathewbirch.com

Funded, in part, by:

