Drugs and Prisons: The repression of drugs and the increase of the Brazilian penitentiary population[1]

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The relationship between the increase in drug law enforcement and the rising prison population from the 1990s to the present has been the subject of worldwide investigation. In the case of Brazil, the data confirms this hypothesis, as will be seen in the present text, which offers first an overview of drug laws, their legislative evolution and adaptation to international conventions, followed by an analysis of how repressive drug policy can be indicated as one of the principal factors behind Brazil's large prison population increase, particularly in the last ten to twenty years.

Overview of Brazilian drug law history

Brazilian drug legislation has been strongly influenced by the Conventions of the United Nations, all of which have been incorporated into the national legal structure. Brazil has committed itself to combating drug trafficking and reducing consumption and demand by all available means, including that most drastic of all, penal control. Beyond its official commitment to the international drug control system, Brazil's close diplomatic and commercial ties with the United States have led to the adoption of a prohibitionist model strongly influenced by the U.S. drug war model.

Seeking the origins of drug control, both in Brazil and in the majority of Western countries, one finds them directly linked to the consolidation of professional medical activity.[3] Brazilian doctors had a monopoly on the management of public health policy, and, in particular, jurists and psychiatrists justified medical and criminal control over drugs as part of eugenics.[4] However, slightly differently from the United States, where criminalization of the use and commerce of drugs resulted from "preventive action" promoted by specific groups, especially jurists, politicians, and religious leaders at the forefront of prohibitionist policy, in Brazil the group that pushed most for penal control of drugs was markedly psychiatrists and forensic doctors.

The publication of a new Penal Code in 1940 marked an important historical moment in Brazilian legislation. At that time, drugs were neither a focus of the media nor an object of social preoccupation, as Brazil was still a predominantly rural society with only small cities, and the kinds of crimes registered were mainly homicide, robbery, theft, and fraud.[5] In technical legislative terms, the crime of clandestine commerce or facilitation of the use of intoxicants was characterized in article 281 of the Penal Code,

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[3] MORAIS, Paulo César de Campos. *Mitos e omissões:* repercussões da legislação sobre entorpecentes na região metropolitana de Belo Horizonte. Available at: www.crisp.ufmg.br/mitonis.pdf, p. 1.

[4] Ibid., p. 4

[5] REALE JÚNIOR, Miguel. *Mens legis* insana, corpo estranho. In: DOTTI, René et al. *Penas Restritivas de Direitos:* críticas e comentários às penas alternativas. São Paulo: Revista dos Tribunais, 1999, p. 26.

which prescribed similar penalties to those of prior legislation, namely, one to five years in prison and fines. However, the code took a more moderate tack, with the decriminalization of drug consumption and reduction in the number of acts it covered in comparison with the prior legislation.[6] Legislators of the era revived the technique of the "blank penal norm," which means that the law need not mention by name every substance that is to be controlled; it creates a category of drugs that can cause dependency, which can be expanded indefinitely. The use of this norm signaled the intention to impose more rigid control on the commerce of illicit drugs, by means of generic formulas and imprecise terms with broad meanings.

With the composition of article 281 of the Penal Code, there arose doctrinal and jurisprudential discussion of the possibility of criminal liability of drug users. The Brazilian Supreme Court at the time had determined a judicial decriminalization of possession for personal use.[7] The period between 1964 and 1971 was a turbulent phase in Brazil's history, when, under the aegis of a national security ideology, extraordinary tribunals and military inquests were created to apprehend, punish, and contain the "subversives," opponents of the Military Dictatorship. There was thus installed an authoritarian penal system with political arrests, torture, censorship, police violence, and suppression of human rights and individual guarantees, such as habeas corpus. The year 1964 is considered "the division of the waters between the health model and the war model of drug criminal policy,"[8] the same year that the Single Convention on Narcotics was promulgated in Brazil, signifying the definitive entrance of the country onto the stage of international drug combat by means of increased repression. Not coincidentally, the moment coincided with a coup d'état that created the conditions for wider repression through a reduction of democratic freedoms.

Despite the transformations in the criminal drug policy during this period, one notes the persistence of the health model, if in vestigial form, and the creation of a double discourse. According to Rosa Del Olmo, this "double discourse about drugs (...) may be conceived as a medical-juridical model attempting to establish an ideology of differentiation," which has as its key characteristic the distinction between the consumer and the trafficker, or, in other words, between the sick and the delinquent. The former, because of his social status, seems absorbed by the medical discourse authorized by the health model, in vogue from the beginning of the 1950s, which represented the stereotype of dependence, while the trafficker was the criminal, the corrupter of society.[9] In Brazil, such a change of course should be understood within the extraordinary regime established by the military, with its implementation of a new type of penal intervention along with increased political repression.

In the first phase of the military regime Law no. 4.451/66, which included planting species that produce illicit drugs in the list of crimes, and Decree-law no. 159/67, which extended the legal prohibition to the amphetamines and hallucinogens, were published. The second phase was marked by the imposition of

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[6] BATISTA, Nilo. Política criminal com derramamento de sangue. *Discursos Sediciosos*. Ano 3. no.s 5-6, 1-2. sem. 1998, p. 84.

[7] The Brazilian Supreme Court decided that "under no circumstances is the person who uses a narcotic, or to whom a narcotic is applied, an accomplice in the crime...the crime is the contribution to the disastrous, current or future addiction of another (whom the law protects, even against his own will). The current addict (already toxicomanic or merely habitually intoxicated) is a sick person who needs treatment, and not punishment..." HUNGRIA, Nelson. *Comentários ao Código Penal.* v. 9. Rio de Janeiro: Forense V. IX, 1959, p. 139.

[8] BATISTA, Nilo. Política criminal com derramamento de sangue. *Discursos Sediciosos*. Ano 3. ns. 5-6, 1-2. sem. 1998, p. 84.

[9] DEL OLMO, Rosa. *A face oculta da droga.* Rio de Janeiro: Revan, 1990, p. 34. Cited in CARVALHO, Salo de. *A Política Criminal de Drogas no Brasil.* Rio de Janeiro: Luam, 1997.

Institutional Act no. 5 (AI-5), on December 13th, 1968, by new President General Costa e Silva, institutionalizing the dictatorial regime, closing the Congress and suspending individual rights and guarantees. At this peculiar moment a new drug law was written, Decree-law no. 385, published with Congress still closed, on December 26th, 1968. Considered quite repressive, the new drug law not only criminalized the behavior of users, but also equated them to traffickers, with penalties of one to five years of prison, plus fines.

The Penal Code, among other things, now made it illegal to encourage the spread of narcotics use, included the verbs "to prepare" and "to produce" in the heading of article 281, and increased the pecuniary punishment considerably. It continued to employ the legislative technique of using "blank" penal laws, so that the definition of "narcotic" depended on unusual criteria. Notable in this period is a "break with the official discourse founded on the ideology of differentiation between the trafficker and user,"[10] since the situation of dependents was ignored as they were equated with traffickers.

While previously the user was seen from a clinical, rather than penal perspective, the drastic change in criminal policy provoked the indignation of jurists and some magistrates. However, the repressive spirit of the time contaminated some judges, who defended the criminalization of the user as a way to combat traffic, through a repressive discourse aligned with the international conventions. The absurdity of legislation that equated users to traffickers revealed another attempt to increase social control of those opposed to the military regime through expanding the repression of drug consumption.

In Brazil, as in the United States, the use of illicit drugs involved a component of political manifestation, protest, and opposition to the Vietnam War, which came from the ghettos and reached the middle class.[11] Those were new times, and under the impact of the revolution in customs, the student protests, and the political opposition, the youth staked out a divergent position, including with regard to the popularization of drug use. The reaction of the status quo, however, was to impose ever-harsher treatment by means of a discourse that demonized drugs, as a political strategy of the agencies of power for their internal security.[12]

The war model remained through the 1970s, although new legislation proved to be slightly less repressive than the old, and, with the return of the earlier medical-juridical discourse, more in tune with international concerns. However, the possession of illicit substances by occasional, non-dependent users continued to be equated with illegal traffic, in accordance with sub-paragraph III of the first paragraph of Article 281, whose single scale of penalties for user and trafficker saw its maximum punishment rise to six years.

The end of that decade marked the moment in which Brazil went through a transitional period, culminating in the enactment of Law no. 6.368/76, conceived in the midst of the political "opening," which was considered exemplary in its responsiveness to the international norms and commitments assumed by Brazil, and continues to be in force today, with few alterations. The so-called "Toxics Law" of 1976 replaced the 1971 legislation, revoked article 281 of the Penal Code, and gathered the drug laws in a single, special law. Its basic presuppositions were: that the use and traffic in illicit substances should be prevented and repressed because they represented an abstract, or presumed, danger to public health. The Law sought prevention through the imposition, on juridical persons, of duties and penalties aimed at

[10] CARVALHO, Salo de. *A Política Criminal de Drogas no Brasil.* Rio de Janeiro: Luam, 1997, p. 25-26.
[11] Op. cit., p. 21.
[12] Idem., p. 24.

stopping drug use and traffic. In establishing the conditions of dependency treatment, the law used a medical discourse that argued for obligatory treatment as punishment, alluding to the "social danger of drugs." The authoritarian conception of such legislation can also be seen in the possibility of imposing treatment even when a person has committed no crime. This reflects the preponderance of an antiquated medical vision, which saw the addict as a weakling with no willpower, and which believed in the possibility of a cure with forced treatment.

The legal mechanisms foreseen in the 1976 law were simplified to give the process more agility and to increase repression, limiting the rights of the defense by reducing guarantees, as for example in eliminating the release of convicted persons pending appeal (art. 35).[13] With regard to the kind of penalty, imprisonment remained the primary punishment, even for the user, and penalties for the crime of traffic were increased to a range of 3 to 15 years, while characterizations of the relevant crimes were maintained unchanged. In the section on crimes, the description of "traffic in intoxicants" in article 12 encompasses 18 words, without qualitative or quantitative differentiation of levels of offense, in tune with the Single Convention of 1961. The reach of the criminal sanction was extended, in comparison with the previous version, as the law's authors gave no criterion of intent (such as a profit motive), which permitted the broadening of the characterization of the most serious crime. This subjective element, however, was to be found in article 16, which prohibited the possession of drugs using the expression "for personal use." Article 12 and its sub-paragraphs established as consummated crimes acts that were merely preparatory, with the intent of increasing repression. Even the cultivation of plants meant for the preparation of drugs was characterized as a crime.

The second paragraph of article 12 of the law under discussion described other acts equated to the traffic of intoxicants that are not clearly defined in the law, lacking a precise description. Instigation, induction, or assistance in the use of intoxicants were to be punished, as were the use of a place to consume intoxicating substances, and any kind of contribution to the encouragement or diffusion of the use or traffic of intoxicants. The law generalized, and did not define what "contribution of any type" meant, so that the breadth of the legal criteria ended up serving as the basis for the penal persecution of the first organizers of harm reduction programs in Brazil in the early 1990s. These people, by distributing clean needles to injecting drug users, were accused of encouraging drug use. Article 14, meanwhile, defined conspiracy to traffic as a separate crime, punishable by 3 to 10 years in prison, so that according to the letter of the law, the mere association of two people in trafficking was punishable by a penalty harsher than that applied to a gang of four people formed in order to commit robbery. In 1990 the maximum penalty of article 14 was reduced to six years.

However, the greatest change introduced in this law was the creation of the independent crime of possession of intoxicants for personal use (art. 16), whose penalty range of six months to two years, plus fines, was distinguished from the range of penalties for traffic. This was an important point along the changing paths taken by Brazilian drug policy, although penal control was still maintained over users through the imposition of punishment or treatment. The prohibited substances were not named in the law, which referred only to "intoxicants or substances that cause physical or psychological dependency [used] without authorization or in disobedience of laws or regulations," thus constituting a blank penal norm which was to be completed by a directive from the Health Ministry (as per articles 6 and 36).

[13] LUISI, Luiz. A legislação penal brasileira sobre entorpecentes: notícia histórica. *Fascículos de Ciências Penais*. Ano 3. v. 3. n. 2. Apr-Jun 1990, p. 157.

A short time later, in 1977, the United Nations Convention on Psychotropic Substances of 1971 was enacted in Brazil.[14] This treaty imposed on its signatories the punishment of drug crimes by "adequate sanctions, particularly imprisonment or another penalty restricting liberty." The Convention admitted treatment as an alternative to punishment, even forced treatment, which completed the juridical framework and effected Brazil's complete integration into the international model of drug control. This political-criminal model outlined new stereotypes and new repressive legitimacy with the stigmatization of the "internal enemy," or the drug trafficker, at the same time as it lent flexibility to the punishment of users, a feature that marked Brazilian penal control of drugs from then on.

In the mid-1980s, the broad Penal Reform of 1984 posited rights and gave guarantees to prisoners. However, at the same time that it was well received, some, in the face of maintenance of the prison situation, considered this penal reform cautious, even timid. With the publication of the 1988 Democratic Constitution, paradoxically, there came a toughening of criminal policy which impacted drug policy, especially after the passage of the Morally Repugnant Crimes Law of 1990 (Law no. 8.072/90),[15] which eliminated bail, freedom while awaiting trial, pardons, amnesty, and commutations, in addition to forbidding movement to halfway houses and lengthening parole periods.

This law's impact on the penitentiary system was immense, as will be seen later in this study. The increase in prison inmates charged with drug trafficking was a result, first, of the increased length of penalties for such crimes, which went from a minimum of one to three years with the passage of the 1976 law, according to article 12 of Law no 6.368/76. Moreover, beginning in 1990, those found guilty of such crimes would remain in prison for longer periods, especially given the prohibition on movement to minimum-security facilities and the increased period before becoming eligible for parole. In addition, the legal differences between users and traffickers were reinforced, as the summary of article 12 itself, rather than article 16 of the law, denied various benefits to those accused of trafficking.[16] Once formally labeled a trafficker in the police report or in the moment of arrest, the accused would be taken in, even for a first offense, and would remain in custody while on trial.

At the time, various commentators questioned the constitutionality of the law, especially with regard to the elimination of progressive movement to lower-security facilities, because of the constitutional principle of individualization of punishment, but Brazilian jurisprudence repeatedly opposed this argument, and a majority of the Supreme Court found the law constitutional. However, in April of 2006, after the law had stood for fifteen years, a new configuration of the Supreme Court overturned this position.[17]

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[14] Enacted in Brazil on March 14th, 1977, through Decree no. 79.383.

[15] According to Law no. 8.072/90, the 'morally repugnant' crimes are the following: robbery-murder (art. 157, § 3º *in fine*); extortion with special circumstances (art. 158, § 2º); extortion with kidnapping and special circumstances (art. 159, *caput*); rape (art. 213, *caput* e § ún.); violent assaults on decency (art. 214); epidemic resulting in death (art. 267, § 1º); poisoning with special circumstances (art.270 c/c art. 285), all in the Penal Code; and genocide (arts. 1º a 3º, Law no. 2889/56).

[16] Law 8072/90 changed article 83 of the Penal Code, including paragraph V, which establishes that parole may be granted only to prisoners who have "completed more than two-thirds of the sentence, in cases of 'morally repugnant' crimes, torture, illicit traffic of narcotics or similar drugs, and terrorism, if the inmate is not a repeat offender of the specific kind of crime in question." This proportion is greater than that of other crimes, which require serving one-third or half of a sentence, in cases of recidivism.

[17] On February 23, 2006, the Brazilian Supreme Court, in a Plenary judgment of the writ of *Habeas corpus* no. 82.959/SP, ruled, by majority decision, that § 1º of art. 2 of Law 8.072/90, which forbids the progressive relaxation of security level in the fulfillment of sentences for morally repugnant crimes, was unconstitutional. It

At nearly the same time, in 1991, Brazil's adherence to the contemporary international drug control model was consolidated with the approval of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[18] a repressive instrument that, for the first time, related the drug question to the organization of traffickers. The text of the Convention served as the basis for the elaboration of special laws that modified the Brazilian penal system in the following years. From that point on, a steadily strengthening discursive link was made between drug policy and organized crime, a concept that gained autonomy and serves as justification for ignoring individual rights and guarantees.

Some time later another legislative reform (Law 9.099/95) softened penalties for the crime of "use of intoxicants," for which prosecution might now be suspended conditionally. This constituted a small advance because of the fact that suspended prosecutions did not count as recidivism, and it extinguished all culpability upon completion of the specified conditions.

However, what seemed like an improvement from the perspective of the casual drug user did little to aid those dependent on drugs who, unable to control their addiction, were placed under judicial control for a certain time as a condition of the probationary suspension of prosecution, and who, if they should be arrested again, would have their probation revoked. In dealing with those problematic users, this ended up occurring frequently. Despite the apparent liberality of the law, penal control was maintained over the user, who could be arrested in the act.

Also in the 1990s came the Law no. 9.714/98, another mark in the movement toward a kind of "decriminalization," which increased the use of alternative punitive measures for non-violent crimes, with a penalty of up to four years, and for criminal negligence. Those found guilty of trafficking, however, did not fit into this scheme, and could not have their prison sentences converted to alternative penalties, although a literal interpretation of this would in fact allow it. Although some isolated decisions have been identified in which judges have authorized minimal, non-prison sentences for small-scale traffickers who are over-represented amongst the prison population, the application of this new criterion to those found guilty of trafficking was ruled out by jurisprudence.

Given the high percentage of those sentenced for low-level drug offenses (first-time, small-time dealers, sentenced to four or fewer years), alternative penalties could have led to significant reductions in the prison population, particularly in the long term. However, the dominant interpretation at the time, including on the part of the Supreme Court, tended to deny the possibility of alternative penalties for those found guilty of trafficking, despite the lack of any explicit legal rule against it.

In the field of drug policy, this law widened even more the divide between the system as applied to the middle-class drug user, who has money to pay for his habit, and the consumer-trafficker, who must sell the drug to provide for his needs. In Brazil the 20th century came to a close under the banner of a law that

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was understood that the law's disallowing of progressive relaxation of security is an affront to the right to the individualization of punishment (CF, art. 5, LXVI) since, by not permitting the consideration of the particularities of each person, their capacity for social reintegration, and the effort put forth toward re-socialization, it ends up making the constitutional guarantee empty. It was also emphasized that the classifications in question were incoherent, and therefore impede progressivism, but allow parole after the completion of two-thirds of the sentence (Law 8.072/90, art. 5). See Informativo STF n. 418, March 6-10, 2006.

[18] The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Drugs was enacted in Brazil through Decree no. 154, on June 26, 1991.

toughened the conditions of sentence fulfillment in prisons, at the same time as the decriminalization movement reached only those crimes considered less serious, among them drug use.

Brazilian drug legislation merely repeats and reinforces the great gulf between the penal treatment of the higher and lower classes of the population. For traffickers, even those who are small-time or addicts, and come from the less-favored strata of society, the penal response is always the closed prison, aggravating still more the terrible conditions in the overcrowded and infested Brazilian prisons. For non-addicted drug users with no prior record, who have the means to buy drugs without dealing them, there was a reduction in criminal penalties.

Given this impact on the penal system, the current drug law was passed in 2006 after a long journey through the draft laws developed in the National Congress. It is a law considered balanced, which renovated Brazilian drug policy for the better with the creation of SISNAD—the National System of Public Policy on Drugs—and broke with the previous policy by focusing on the misuse of drugs, although it also put emphasis on the repression of traffic, as will be seen below.

Analysis of the current Brazilian drug Law

Among the highlights of the new law are the express recognition of principles such as "respect for the fundamental rights of human persons, especially with regard to their autonomy and liberty" (art. 4, I), the acknowledgment of diversity (art. 4, II), and the adoption of a multidisciplinary approach (para. IX). In addition, it established guidelines aimed at preventing drug use through "strengthening individual autonomy and responsibility in relation to the improper use of drugs" (art. 19, III), and at ensuring the "recognition of risk reduction as a desirable result of prevention activities" (para. VI). The legislative articulation of such principles may be considered essential, since it reflected a new approach, based on moderate prohibitionism, especially with the adoption of harm reduction as official policy.

With regard to drug use, an important change was the decriminalization of use, and the rejection of prison sentences for users, even repeat offenders[19] through the repeal of article 28, which allows alternative penalties only as follows:

"Whoever acquires, keeps, holds in storage, transports or carries upon himself, for personal use, drugs without authorization or in violation of legal or regulatory decree, shall be subject to the following penalties: I: warnings about the effects of drugs; II: community service; III: educational measures, completion of an educational course."

Beyond this, there are other positive aspects, such as the equivalence of cultivation for personal use to personal use itself, as put forth in art. 28, §1.[20] Another act which, under the old law, was equated to traffic is the shared consumption of illicit drugs; it too saw a reduction of penalties (art. 33, § 3)[21] when delivery is occasional, made to someone with a relationship to the subject, and has no profit motive, a scenario,

[19] Cf. BOITEUX, Luciana. A nova lei de drogas e o aumento de pena do tráfico de entorpecentes. *Boletim do Instituto Brasileiro de Ciências Criminais*. Ano 14. no. 167. October 2006, p. 8-9**.**

[20] Art. 28, § 1. of Law no. 11.343/06: "The same penalties shall be applied to whoever, for personal use, sows, cultivates, or harvests plants destined for the preparation of a small quantity of a substance or product that is capable of causing physical or psychological dependence."

[21] Art. 33, § 3: "To offer drugs, occasionally and without a profit motive, to a person of one's acquaintance for the purpose of consuming them together. Penalty—detention for 1 (one) to 3 (three) years, and fines..."

distinct from that of the professional trafficker, which justifies the softening of the punishment. With respect to the user, therefore, these changes may be considered positive, as they include a reduction of penal control and a certain differentiation between kinds of acts.

Such advances notwithstanding, however, there persists in the law a lack of clear differentiation between use and traffic. According to the legal criteria, the difference should be determined according to the quantity and nature (or quality) of the drug, as well as elements such as place and other objective circumstances, in addition to subjective ones, such as prior offenses and personal and social circumstances (as stated in art. 28, § 2). Such vague criteria are so difficult to apply that in actual cases the determination is made by the authority involved. A priori legal distinctions give way to the subjective vision of law enforcement agents, such that the first authority to come into contact with the case has excessively wide discretion with respect to how to treat it. This legislative option may be considered rather questionable, precisely because of the absence of legal guarantees limiting state intervention in the life of the user.

In its treatment of traffic, the new law provides quite rigorous penal treatment to the crime, as the minimum sentence was raised from three to five years, albeit with the possibility of a reduction in the sentence. The crime of traffic currently answers to the following description:

Art. 33. To import, export, deliver, prepare, produce, fabricate, acquire, sell, offer for sale, offer, hold in storage, transport, carry with oneself, keep, prescribe, administer, furnish for consumption or offer drugs, even with no charge, without authorization or in violation of a legal or regulatory decree.

Penalty: a prison term of 5 (five) to 15 (fifteen) years and payment of 500 (five hundred) to 1,500 (one thousand five hundred) fine-days.

In § 1 of this same art. 33 (paragraphs I,II, and III) are described three figures that are equated, or assimilated to traffic, with the aim of encompassing the drug's whole chain of production.[22] One can clearly see that the law's intention is to cover all possible acts related to the process of production, distribution, commerce, and consumption of drugs.

However, the greatest target of specialists' criticism was the increase in the minimum penalty for the crime, which was justified by lawmakers by the necessity for "toughening the war on traffic." For authors such as Salo de Carvalho, such a position must be criticized for the disparity between the magnitude of the punishment, and the lack of intermediary kinds of penalties with proportional gradations, highlighting the gray area between the minimum and maximum penal response, despite the various acts characterized in art. 33.[23] Thus, despite significant differences between kinds of act (there is no requirement of commerce or a profit motive), and the clear harm done to the juridical good entrusted (public health), there is a single range of penalties, which can open the door to unjust punishments.

[22] Art. 33, § 1. The same penalties shall apply to whoever: I – imports, exports, delivers, produces, fabricates, acquires, sells, offers for sale, proffers, furnishes, holds in storage, transport, carries with himself or keeps, even free of charge, without authorization or in violation with legal or regulatory determination, raw materials, precursors, or chemical products destined for the preparation of drugs; II – plants, cultivates, or harvests, without authorization or in violation of legal or regulatory determinations, plants that constitute the raw materials for the preparation of drugs; III – uses a place or good of any kind of which he has possession, ownership, administration, or oversight, or allows others to make such use, even without charge, without authorization and in violation of legal or regulatory determination, for the illicit traffic of drugs.

[23] CARVALHO, Salo de. *A política criminal de drogas no Brasil.* Rio de Janeiro: Lumen Júris, 2007, p. 189.

Thus, the new law widened the legal difference between users, subject only to alternative measures, and traffickers, who face long prison sentences, without the law's defining, in strict terms, who may be placed in each of these categories. Although the law has progressed in comparison with the previous one, certainly it is still far from ideal.

Currently, the legal possibility of moderating the penalty for the crime of trafficking drugs is envisioned in § 4 of art. 33, which posits, in special circumstances, sentence reductions for first-time offenders not involved in organized crime. With regard to the article's main purpose it is a special type, defined as follows:

§ 4. The penalties for the crimes defined in the heading and § 1 of this article may be reduced from 1/6 (one-sixth) to 2/3 (two-thirds), but not converted into a non-jail sentence, as long as it is a first offense unrelated to ongoing criminal activity or a criminal organization.

The lawmakers' bias toward prison is evident, even for small-time traffickers for whom a penalty reduction is appropriate, since, while a judge may recognize the small-scale nature of a defendant's involvement with the commerce of illegal drugs, the law prohibits the substitution of alternative penalties for prison time—even while Brazilian law allows such substitution when sentences are four years or less for all other crimes which, like drug trafficking, are non-violent and consensual.

Such a reduction, if fully applied, could result in a trafficking sentence of one year and eight month, however, the technical failure of the text of the criteria, in practice, has prevented its application or made it more difficulty, as was recently shown by empirical research on judicial sentences in Rio de Janeiro and Brasília.[24]

That study questioned whether the possibility of moderating penalties sufficiently distinguished between the various illicit acts involved in the commercial drug production network. It concluded that variation in judges' interpretations of the law meant that in practice, reduction of penalties was made more difficult, even for first-time offenders, especially at the State Court level.[25] At the same time, it was found that, in Rio de Janeiro's Federal Court, greater reductions in penalties were given to those convicted as "mules" (drug transporters), who were most often foreigners, while judges at the state level applied such reductions much less frequently, even though in theory it could be applied to the lower-level traffickers working in the urban retail market who make up the majority of those accused of this crime.

According to the study's conclusions, in Rio de Janeiro the majority of those convicted of drug traffic (61.5%) are tried individually, which is to say they were arrested alone; 66.4% are first offenders with relatively small quantities of drugs. The majority of convicted traffickers thus act alone, or at least were arrested in that situation. The data eloquently reveals that, despite commonsense notions, the majority of traffickers convicted are not "by definition" members of "criminal organizations," nor do they necessarily operate in association. Thus, among that minority of cases in which the accused did not act alone, in

[24] BOITEUX, Luciana, WIECKO, Ela, *et alli. Tráfico de Drogas e Constituição:* um estudo jurídico-social do artigo 33 da Lei de Drogas e sua adequação aos princípios constitucionais penais". Brasília: Ministério da Justiça/PNUD, 2009. The research cited above sentences handed down in convictions for drug trafficking in the city of Rio de Janeiro (in the central state and federal forum) and in the specialized courts of the Federal District, during the period between October 7, 2006 and May 31, 2008, and this sample permits an understanding of how Brazilian drug law is applied in practice.

[25] Twenty four.

46.9% of them two people were arrested working together. In 58.05% of the cases in that city, those convicted of trafficking received sentences of five years, or longer than the legal minimum, while a penalty lower than the minimum was applied in 41% of the cases.

A number of cases caught the attention of the researchers, in which the judge assumes, based on mere suspicion, that the defendant dedicates himself to criminal activity or is a member of a criminal organization; that is, when a judge presumes his guilt in order to deny a sentence reduction, which was observed in about 40% of the cases. Given this, everything indicates that a significant number of individuals did not have their sentences reduced because of the fact that some judges rejected the application of the exception described in paragraph 4 of article 33, a situation whose legality and constitutionality are highly questionable. Selectivity of operation in Brazil's penal system is clearly notable. While there are various degrees of importance in the drug trafficking hierarchy, the actions of authorities seem to be directed at the least fortunate levels of society, which are over-represented in Brazilian prisons.

The legislative option for increased repression, and the exclusive use of imprisonment, were recently questioned, in September 2010, before the Brazilian Supreme Court, which found in favor of a person accused of trafficking 13.4 grams of cocaine,[26] and discussed the restriction, contained in paragraph 4 of article 33 of the drug law, on the substitution of alternative penalties for prison terms in cases of small-time drug traffickers. The majority ruled such a prohibition unconstitutional, deciding that the possibility of substitution should be evaluated on a case-by-case basis. In the view of some authorities, the application of this decision may benefit many other small traffickers and decrease the size of the national prison population, given the large number of small traffickers imprisoned in Brazil.

It is notable that, even in the United States and Western Europe, it is easier for law enforcement to capture street dealers, the retailers of drugs, who are more numerous and easier to reach than the traffickers (wholesalers). Thus the question, "Why are only the small-scale traffickers (and a few mid-level ones) arrested?" can be answered by pointing to the selective operation of the Brazilian penal system in Rio de Janeiro, which criminalizes poverty and the poor and vulnerable, repressive drug policy only aggravating the situation.

Given everything that has been said until now, therefore, one may conclude that Brazil follows a penal drug control model inspired by international conventions, but its legislation is marked, on the one hand, by a progressive and humanitarian focus on the user stemming from the decriminalization movement, with recognition of harm-reduction policies, which are considered quite advanced. On the other hand, Brazil's model features exaggeratedly punitive treatment of the drug trafficker, who is subject to heavy sentences, without there being a clear legal distinction between these two figures. This leads to the over-representation of small retailers in Brazilian prisons.

Thus, the current Brazilian drug control system, while democratic, acts in an authoritarian manner in not limiting punitive power. On the contrary, it fails to establish limits and precise distinguishing

[26] In Habeas Corpus no. 97.256, filed by the National Public Defender's office on behalf of a prisoner sentenced to one year and eight months of prison, initially in high security, after being apprehended with 13.4 grams of cocaine, there was discussion whether the sections of the New Drug Law (Law 11.343/06) that prohibit the conversion of prison sentences into alternative penalties (or administrative punishment) for those convicted of drug trafficking are compatible with article 5, paragraph XLVI, of the Constitution, on the individualization of penalties.

characteristics for the figures of the user and the small, medium, and large traffickers, and it gives to the authorities, in concrete cases, a broad margin of discretion that leads to unjust application of the law.

There follows an analysis of this kind of policy on the Brazilian penitentiary system.

Drug Policy and the Brazilian Penitentiary System

The Brazilian penitentiary system is (and always has been) overcrowded, and currently has 170,000 more prisoners than beds, leading to terrible conditions for inmates. In addition, it faces a problem common to Latin American countries: an excess of provisional prisoners (that is, those deprived of their liberty but not yet definitively sentenced), who constitute 45% of the current national prison population. The very poor conditions of the Brazilian prison system were denounced recently in a report by the International Bar Association, which found that "severe overcrowding, poor sanitary conditions, gang violence and riots blight the prison system, where ill-treatment, including beatings and torture, are commonplace."[27]

The current rate of 245 prisoners per 100 thousand inhabitants places Brazil in the 47th position worldwide among countries with the highest rates of incarceration,[28] and in terms of total prison population, Brazil is fourth, behind just the United States, China, and Russia.[29] The monthly cost of a prison population of this size is extremely high, and the sum that must be invested in making new spaces available is even higher. Authorities estimate that "to create 60,000 beds in the system would take 1 million US Dollars, approximately, besides the monthly upkeep of these beds."[30]

According to the data for 2009, the most recent available, Brazil has a total of 473,626 individuals incarcerated in its penitentiary system, including those held in police stations.[31] A glance at the historical evolution of the Brazilian prison population since 1990 shows that the country increased the number of people in its penitentiaries by about 314% from 1992 to 2009. This growth trend in imprisonment is confirmed by the numbers and reflects the effects of a criminal policy based on harsher laws, weakening of guarantees, and a focus on repression. In ten years (from 2000 to 2009) the prison population doubled, increasing from about 233,000 to more than 473,000 prisoners, as can be seen in the tables below.

Table 1 – Total number of prisoners in Brazil 1992-2004 (Source: Justice Ministry - Infopen)

Year	No. of prisoners
1992	114377
1995	148760
1999	194074

[27] The report is entitled "One in Five: The crisis in Brazil's prisons and criminal justice system," and it can be downloaded from http://www.ibanet.org/Document/Default.aspx?DocumentUid=D6AAB956-DC90-4B77-A5D6-81A7EB6D7CAA.
[28] Cf. http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poprate
[29] Cf. http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poptotal
[30] Source: Panorama do Sistema Penitenciário do CNJ, available at: http://www.cnj.jus.br/images/imprensa/apresentacao%20mutirao%20-%20jun%202009%202x.pdf
[31] Source: Infopen, www.mj.gov.br.

2000	232755
2001	233859
2002	239345
2003	308304
2004	336358

Given this general situation, it becomes more important to examine the proportion of this total represented by those convicted of trafficking, which is the second most common source of prisoners (91,037) in the system, behind property crimes (217,762),[32] which traditionally take first place.

Only in 2005 did it become possible to find more specific data about those convicted of drug trafficking in relation to the entire prison population. Table 2, below, highlights the percentage increase in the relative representation of those convicted of trafficking in the Brazilian penal system, which allows the affirmation that the increase in the repression of drug traffic has contributed to the increase in the number of prisoners in Brazil.

Table 2 – Brazilian Prison Population: total and those sentenced for trafficking (2005 – 2009) – Source: Infopen

Year	Total no. of prisoners	No. of prisoners jailed for trafficking	Traffickers as % of total prison pop.
2005	361402	32880	9,10%
2006	383480	47472	12,38%
2007	422590	65494	15,50%
2008	451219	77371	17,50%
2009	473626	91037	19,22%

[32] Ibid. Data from December 2009.

Analysis of the data reveals that, under Drug Law no. 6.368/76 (which means until the end of 2006), the percentage of inmates convicted of drug trafficking was 12.38%, which increased to 19.22% by the end of 2009, nearly double the number convicted for that crime when Law 11.343/06 went into effect. The number of people incarcerated for the crime of drug trafficking is already high, and appears set to continue growing, according to the statistics examined. Thus, the decision to opt for repressive penal responses to the crime of drug trafficking contributed to the increase of the Brazilian prison population in recent years, with the glaring over-representation of small-time dealers of illicit drugs who are sentenced to long prison terms, which reinforces the marginality and the stigma to which they are subjected.

It is also worthwhile to analyze data on a subset of this group: minors involved in drug crimes. Taking as an example the total number of minors who were brought before the Second Court of Children and Youth in Rio de Janeiro, and the kinds of crimes with which they were charged, another important observation is confirmed: that the youngest part of the population is the one which is incarcerated at the highest rate for drug trafficking. If, from 1991 to 1994, drug use and trafficking were responsible for 8% to 13% of the referrals of minors to detention centers, in 1995 this share jumped to 24%, and in the next year to 36%, overtaking property crimes at the top of the list. If we compare the absolute values from 1991 (204 minors) and 1997 (1648 minors), we see an 800% increase, as shown in the table below.[33]

Table 3 – Cases involving minors in the Second Court of Children and Youth in the District of the City of Rio de Janeiro[34]

	1991	1992	1993	1994
Property crimes	2016 (76.8%)	2041 (76.9%)	1504 (73.5%)	1632 (71.3%)
Narcotics	204 (7.8%)	280 (10.5%)	196 (9.6%)	303 (13.2%)
Personal crimes	184	170	181	194
Violations	186	115	93	92
Moral standards	14	23	34	39
Others	20	26	38	27
TOTAL	2624 (100%)	2655 (100%)	2046 (100%)	2287 (100%)

	1995	1996	1997
Property crimes	1430 (57.6%)	1506 (49.3%)	1345 (26.8%)
Narcotics	610 (24.6%)	1108 (36.3%)	1648 (32.8%)

[33] National figures, which would have enabled a wider comparison of convictions of minors, were unavailable.
[34] Data were gathered in the Second Court of Children and Youth in the District of the City of Rio de Janeiro.

Personal crimes	250	232	299
Violations	120	134	186
Moral standards	26	48	49
Others	45	24	1484
TOTAL	2481 (100%)	3052 (100%)	5011 (100%)

Conclusion

The goal of this text has been to analyze the correlation between Brazilian drug policy and the increase in the country's prison population. An evaluation of the evolution of Brazilian drug legislation reveals a progressive increase in penal repression of drug traffic, given the percentage increase in those convicted of this crime in the penitentiary system. Increasingly, and especially after the passage of the new 2006 Brazilian drug law, which increased the minimum penalty for trafficking to five years of prison, there has been a marked and intentional toughening of the penal reaction to commerce in drugs, which may be considered one of the principal factors in the increase of Brazil's prison population, despite which the issue of supply and demand of illicit drugs has not been resolved.

In spite of some recent favorable decisions by the Brazilian Supreme Court, as mentioned above, the continued existence of the current repressive system, with its punitive and symbolic character, may lead to an even greater increase in the number of drug prisoners in the penitentiary system, reinforcing the marginalization of the less fortunate segments of Brazilian society, who make up nearly all the prisoners.

Brazilian prisons, which have traditionally been occupied, for the most part, by people sentenced for property crimes, have seen penitentiary space increasingly shared by those sentenced for trafficking, who in most cases are small-time retailers from the lowest levels of society, thus maintaining the selective and unjust operation of the penal system. The relationship between drug policy and prison is a reflection of the insistence of governments on adopting policies that are destined to fail at achieving their stated aims, or else it reflects the success of these policies at achieving hidden or undeclared goals of increasing repressive social control of the poorer segments of the population, who are subjected to rights violations and degrading treatment in Brazilian and Latin American prisons. If the objective of drug policy is to increase the number of prisoners, one may say that the goal has been reached; without, however, controlling or reducing the consumption or sale of illicit drugs.