

The Special Criminal Courts and The Drugs



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Antonio Biscaia's presentation (He is a great friend of mine, because I was his apprentice when I started working in Rio de Janeiro's Public Prosecutor's Office a little while ago – I will not tell you how much time) touched on a point that is very true: I believe that half of the judges do not know exactly what to do with drug users whereas the other half do not know what to do, but they realise that they do not know and they seek help to try to learn how to deal with drug users.

This is what we have to work with:

Law 11,343 from the 23rd of August, 2006:

It is very rare for Brazilian legislators to be as inspired as when they made this law. I believe that this legislation was so inspired because - just as half of the judges hoped it would - it was made with the help of people who understand the drug problem. It is also very rare for legislators to be able to produce a change in criminal law which has such a deep cultural character. It seemed to me that this change was unpretentious and enormous. The law states that:

Anyone who acquires, stores, transports or carries on their person any unauthorised drugs or any drugs that go against any laws or regulations, for their personal use, will be subjected to the

following punishments:

I – a warning about the effects of drugs;

II – community service;

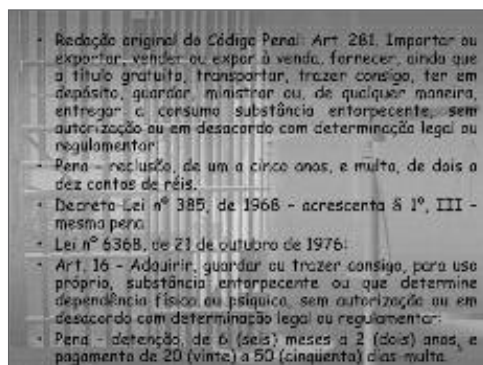
III – an educational measure of attending a programme or educational course.

§ 1 The same punishments will be given to those who, for their own use, plant, cultivate or harvest plants that are destined for the preparation of a small quantity of substance or product that is capable of causing psychological or physical dependency.

First of all, there is a very serious question concerning this Article: “for personal consumption”. What is personal consumption? Only day-to-day application of the law will tell us this. I am a criminal judge through choice from the start of my career, because I enjoy working in this area. As a judge, I have already had the opportunity to put dealers in prison for possessing a marijuana cigarette; and to declassify a drug user who had a kilo of cocaine in his house from “dealer” to “user”, because the evidence made me certain that it was for his own use, not for trafficking. In the case of the trafficker, he was selling the marihuana cigarette as part of a small business: one to one.

The law states: “the following punishments”. By this time, people have already started fighting in the Federal Supreme Court and everyone says that there has been a decrease in punishment. There was no decrease in punishment, and there was no decriminalisation because the law states that there are punishments. People need to move away from the preconception

that the only punishment that exists is imprisonment; that was already on the first chart.



Slide 04

(Slide 4) When a historical review is carried out, Article 281 of the Penal Code in its original version from 1940 barely describes drug possession and does not mention anything about drugs being for personal use or otherwise. It established a term of imprisonment from one to five years and a fine of between two to ten thousand reais, which applied equally to users and to traffickers. It is obvious that the legislators from that time were only thinking about traffickers when the punishment was established, because users were not a public health problem at that time. In 1968, paragraph 1, section III was added. This expressly established that the same punishment was also applicable to drug users. In other words, the trafficker and the user were given exactly the same treatment. Law 6368 from 1976 established a different punishment for possessing drugs to that for trafficking them. Today, of course, this is an obsolete law, a law that is 30 years old, but at the time it represented an advance as it established a characteristic example – article 16 even referred to Bezerra da Silva’s music to make it popular with the population. This is how Brazilian law evolved: from the time when the user was

not considered, to the establishment of legislative policy that repressed users with the same punishments given to traffickers and finally to the establishment of different punishments.

The first question that was asked was if there had been a decriminalisation or not. As I have said, half the judges simply crossed their arms and said “look, if it does not carry a prison sentence, it is not a crime”. The introduction to the Penal Code from the Law from 1940 states that crime is anything that carries with it a punishment of detention or imprisonment, either in an isolated or accumulated way. The new law does not consider this. The judges, however, have simply forgotten that we drafted a federal constitution in 1988, known as the Citizen’s Constitution. This constitution states that it is legislators who, among other things, also decide on the punishments that Article 5 establishes as a guideline. They are only not allowed to decide on the death penalty, defamatory or cruel punishments or perpetual sentences.

Paulo Pimenta, a member of the House of Deputies, stated this very clearly in the report presented about his project related to the crime of drug use. This report was supported by the National Antidrug Secretariat:

“This proposal’s greatest virtue is the elimination of the possibility of sending addicted drug users to prison. We would like to point out that we are not decriminalising the conduct of the drug user in any way. Brazil is a signatory to international conventions that stipulate that drug use is a crime. What we have done is simply to modify the types of punishment to be given by excluding

imprisonment as the main punishment (PL 7,124/02 - originating in the Senate).”

The fact that Brazil is a signatory to international agreements means that these agreements, after being ratified by the National Congress, are made into complementary laws. In other words, due to the hierarchy of law, legislators cannot decriminalise drug use. It is a matter of law hierarchy. A complementary law is an international law. After this law has been ratified by the National Congress, it is integrated into the Brazilian legal code.

A while afterwards, Minister Sepúlveda Pertence was judging a proceeding here in Rio de Janeiro, in the Federal Supreme Court, (this was the first judgement passed by the Supreme Court on this matter) and provided a good definition of this matter. He said that it was a question of order, and this was important due to the following point: it was a proceeding that had become void. It was destined for the archives. Or rather, as they say down there in the Barra¹ court, for recycling. The fact was that the matter was so important that the Supreme Court resolved that it should make a judgement on it. Then it was proclaimed, generally speaking, that it was not a crime any more, that it had become void. Minister Sepúlveda Pertence stated:

“I am convinced that the conduct previously described in Article 16 of Law 6,368 is still considered as a crime under the new law. In the end, nothing prevents ordinary incidental law from using other general criteria for differentiation, or from establishing punishments that are

¹ Barra: A wealthy neighbourhood to the west of Rio de Janeiro

different to "imprisonment or restriction of freedom" for certain crimes - just as article 28 of Law 11343 does. This makes up just one of the constitutional options that are subject to being adopted by the "law" (CF/88, article. 5, XLVI and XLVII). (RE 430105 QO/RJ – BY: MINISTER SEPÚLVEDA PERTENCE).”

The legislator has the power to establish other forms of law, as long as they always bear in mind the guidelines established by the constitution: they are not allowed to decide on the death penalty, defamatory or cruel punishments, or perpetual sentences. Minister Sepulveda Pertence continues by saying:

“I repeat that what has happened is a reduction in punishment, the main characteristic of which was the breaking with the tradition of imposing prison terms as the main sanction or substitution for all infractions of the law. This only existed previously in relation to corporate bodies and even then only due to lack of resources. (SUPREME COURT REPORT NO. 465).”

I beg to disagree with him because the law expressly states that a punishment exists. So there has been no reduction in punishment, and when he says “breaking with the tradition”, he means: this law, whether the legislators realised it or not when they made it, implies a cultural change. A cultural change cannot be made from one day to the next. Changing culture is a painful process that requires thought and demands a deep investigation into the principles of the law – and not just the document that is going to be drawn up about jurisprudence.

First of all, the New Law does not allow a traditional approach, like the so-called therapeutic justice that was well known as a great innovation in Brazil. Therapeutic justice, however, makes the fundamental assumption that prison is a possibility. I would impose therapy in exchange for the possibility of prison. In other words, if you go for treatment you will not be put in prison. It is a traditional model of retributive justice. The New Law is for the people, and contains concepts of restorative practices. These restorative practices refer to the worldwide consensus that has been established by the UN:

“The definition of a restorative procedure is any process in which the victim, the perpetrator and, when appropriate, any other individuals or community members affected by crime, all actively participate together to resolve the problems that are caused by crime. This generally takes place with the help of a facilitator who has several different levels of responsibility (RESOLUTION 2002/12 OF THE UN ECONOMIC AND SOCIAL COUNCIL).”

With regards to the crime of personal drug use, the offender is the person who carries drugs for his personal use. Who is the victim in this case? Is it him? Perhaps. Society? It could be. I don't know, but there are a lot of possible victims of drug use. The important thing about the principle of restorative justice is the “assignment of different levels of responsibility and not of guilt”.

A factor that fuels the debate for judges at the moment demonstrates that restorative justice is made different by the act of picking up the judge's pen and saying to the drug user: “Look, the pen is here on the

table. Do you want to participate in writing your sentence? Do you want to participate in the resolution of your problem with the law? Do you want to construct the sentence that is going to guide you through life?" This is the main difference between a retributive model, where it is the judge alone who passes sentence on the person who appears in his documents, at one stage or another of the process, and between a restorative justice model where the judge passes sentence in conjunction with the parties involved in the trial and with society itself, at least for cases where the trial does not have a party that can be labelled as a direct victim of the crime within the process.

I always remember the case of a judge from Paraná, Dr. Roberto Bacelar, who took part in a project that SENAD runs for training judges. He told a wonderful story about something that happened in his Special Criminal Court, where a citizen asked him "Doctor, what sort of crime do I have to commit to appear in your courtroom?"

This is because at the moment when a drug user or the person involved in a trial is made responsible, or accountable for their actions (a concept that has no direct translation for Brazilians), they also end up affecting society and the community that lives in and around the court's district, and this leads to a greater recognition of the legitimate nature of the judiciary's actions.

The Special Criminal Court.

Why must a Special Criminal Court keep drug use as part of its jurisdiction? Because it is a suitable place to confront this issue. Because it also allows many different people who work in different areas to get involved. It is written into the Drugs Law:

"the strengthening of individual autonomy and responsibility". Why is this involvement of many different people only possible in the court? A judge will never take a process and ask the parties what should be done with the process. The judge will formally examine in the trial whether or not the accusation is suitably backed up by proof and will pass a sentence in an isolated way, with all the prejudices and lack of impartiality that is normal for human beings, as I do not know any humans that are capable of absolute neutrality. The judge will preside over this process under the influence of all sorts of social prejudices. This does not happen in a Special Criminal Court. The case has to be judged in conjunction with all the parties, as well as with the community and with the network of attention centres for drug users.

The strengthening of individual autonomy and responsibility

The Special Criminal Court mainly works with penal transactions. The concept of penal transaction may be a little difficult to understand for anyone not from Brazil, because it is nothing like the plea bargain concept from American law. In penal transactions, the method of the crime is not considered, guilt is not assumed, and no legal consequence is assumed over and above the fulfilment of the punishment that has been negotiated. We are in the middle of the road between plea bargain and an agreement of civil character. This is revolutionary. There is nothing like it in the world.

It falls to the courts and the law (article 22, section III and IV of Law 11,343) to define the individualised therapeutic process which is orientated towards social inclusion, the

reduction of social damage and damage to health and the treatment of the drug user or addict and their families - wherever possible. This is carried out in a multidisciplinary way by teams made up of professionals from different disciplines.

I repeat, the Special Criminal Court does not pass a judgement in an isolated way. It passes judgement through consensus. The different parties write the sentence with the judge, finally making possible the integration of the judiciary system into this multi-disciplinary approach. This is included in article 4, section VIII of Law 11,343. The legislators were very direct when they made this law, as it states that the judiciary does not act alone and it is not a state body with a monopoly on power, but it is one of the elements in the treatment network for drug users.

To discuss matters like these, judges from all over Brazil meet in the court forum, the National Forum for Special Courts (FONAJE), where they share experiences, try to come to a consensus and standardize their approach. Statement number 95 was established at the 21st meeting of this Forum that took place in Vitória. “The individualized multidisciplinary approach must be orientated towards choosing the punishment or measure to be taken within the scope of that laid out in article 28 of Law 11343/06, as there is no gradation in the list”.

Amongst the punishments and measures that appear in the law are: a warning, community service and the measure of attending a course or educational programme. There is no gradation because it is not the judge who decides, based on legal criteria, what a suitable punishment for drug use is at a

certain moment in time for a particular user. This is established by a consensus.

Incidental suggestion for transaction.

Anything that was laid down under the old law has to be adapted because a principle exists in Brazil stating that the most beneficial criminal law must be applied to all cases, even those that have already been judged where, of course, the punishment has not been carried out. Therefore, the reality of processes that predate the introduction of the Drug Law must be adapted to take on the multidisciplinary approach.

It would clearly be a lot easier for me to take an academic position and say that this is not a crime, that there is no legal prison term and that there is nothing that can be done with this. I do, however, believe that we have a social responsibility and that we cannot run away from this responsibility given to us by the law.

Penal transaction.

Under the new law, penal transaction is even possible for repeat offenders. Paragraph 4 of article 28 states that any of the three types of punishment can be doubled in length for cases of repeat offenders. The principles of interaction between different areas, of free will and of the need to define a therapeutic project all continue in force. It is because of this that paragraph 4 states that in the case of repeat offenders - and I am not afraid of saying this -, if someone is arrested for using drugs they could be imprisoned for up to 10 months. I am not going to stick to technical issues as repeat offending is merely an aggravating factor and would not technically be considered as a cause for increasing the punishment. A longer term,

and nothing more, is established for cases of repeat offenders.

I would like to challenge this: would it be an alternative punishment? Would it be an alternative to punishment? Law 11343 abandons the traditional system of fixing a punishment as the same Penal Code Standards do not exist anymore. The punishments are not graded and do not have a hierarchy. They are the following: a warning about the effect of drugs, community service and the educational measure of attending an educational course or program. A lot of people have criticized the wording of the law when it talks about educational measure and educational courses. I think that the wording is marvellous. It is important to stress its educational nature. It is not the attendance or the programme itself that is important, it is the fact that it has to be educational as well.

It does not state that the judiciary is going to carry out the therapy, or that it is not going to carry out the therapy. The judiciary imposes the punishment. The punishment will always be proposed through the involvement of people from many different areas - this is what the law states. It is a law that has principles, and must be interpreted according to its principles and not just as a dry legal text.

What did we try to do in Rio de Janeiro? Even before the law was made, we obtained several buildings from the National Public Security Secretariat (SENASP) in which any type of gathering for treating drug users could be carried out. Within the judiciary, I had to oversee the obtaining of support from the Centre for Research and Study into Treatment for Drug Users (NEPAD). We

obtained the support of several bodies. Rio de Janeiro's local government has a Special Office for the Prevention of Dependence on Chemical Substances, where I had a meeting with Colonel Duran to talk about what could be achieved by working together - how justice could also be preventative. The Rio local government paid attention to our request. Although there were no people available, Colonel Duran took on this struggle and, by using the concept of a network, was able to establish a system of attention in the Rio de Janeiro district courts.



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So, the group of people in 2006 was composed as follows: the majority of our clients are between 18 and 24 years old (slide 13). 75% of them are 34 years old or younger. Even in 2006 we were going in the right direction, with 630 people attended to. There was a very noticeable tendency towards recommendations of mutual support groups, walk-in treatment, visits to institutions, the addiction prevention centre that the Office runs in the Reinaldo Delamare centre and, of course, community service and placement and inclusion in school. According to the data that Colonel Duran has given to me, in 2007 we attended almost 700 people in the court, just in the capital city. I am not talking about the whole state of Rio de Janeiro, because this is a

municipal office, and although it does attend to people from the whole state, because Rio de Janeiro attracts people from surrounding towns, there is no way that the office can deal with the rest of the state of Rio de Janeiro. This would be a physical impossibility.

We attended 700 people, and this is a figure that seems quite interesting to me: 1150 people were brought together. Of these people, 700 of them attended spontaneously. The process of those who did not attend stays with the court, but in this case we have to insist that they attend. This is a work of persuasion as justice has to take coercive measures to fulfil their obligation of making people attend, because the law obviously does not exclude the possibility of a prison sentence. Drug users have the constitutional right to make a statement, or to attempt to prove that the confiscated drugs do not belong to them. This is the right that they have. Also, if they are addicted to drugs, they have the right to prove this and to not want to accept the punishment. Or they can state that they have a marvellous relationship with drugs, that they enjoy them a lot and want to continue using them. They can say all of this, but the punishment has to be enforced - one of the three that have already been outlined - after a multidisciplinary approach. I cannot say "look, he is black and poor, he lives a long way away and, therefore, he is going to carry out community service. He is white, lives close by and is rich so, therefore, I am going to give him a warning". This is not the criteria laid down by the law. An interdisciplinary approach is laid down by the law. The partnership that has been created with the network is important because it provides the judiciary with the means that they need to pronounce this sentence.

In 2007, most of the people attended to were male, and the same relationship is maintained for the group of up to 34 years old, where we attend to almost 20% of users from other districts. The profile of suggested punishments continues in the same way, mainly directed towards the network of anonymous drug addict groups and walk-in treatment.

Warning about drug use.

Any of the punishments can be suggested after the involvement of people from many different areas. What is a warning? It is something that is carried out at the moment when I give a warning about drugs. This is not a legal warning, for example: "look, taking marihuana is a crime". This does not make any sense whatsoever, as the drug user already knows about this - it is the law and it is in the newspapers. It is seen everywhere at the end of the day - there was a time that the press said that it was not a crime, but it still is. The warning has to be technical and requires the training of Law enforcement officers, which is what we are looking for with SENAD. A warning has to be multidisciplinary about all the aspects of the law.

Community service.

First of all, the law itself states that this has to involve people from many different areas - I threw this in on purpose to remind us that all punishments involve people from many different areas - and community service will be carried out in institutions that are designed for treating drug users. I cannot simply take a drug user and send him to carry out his service painting a school that has nothing to do with drug use. If it was a school that did some work related to drugs,

it would be alright for him to paint the wall of that school and to have contact with that work. The judiciary's function is to get close to the user and, if treatment is necessary, to bring the user close to the person who is going to treat them by integrating the network.

Measure of attending a course.

Again, this has the same characteristic as Article 5. Not just any course will do – this is a course that has to have some sort of link with drug addiction.

Noncompliance (to guarantee the educational measures).

It is clear that there is no way that a warning cannot be complied with. If I give a warning, that is the end of it. The judge can then later issue a verbal reprimand. This is my favourite measure: I tend to treat my defendants very evenly. If they do not comply, they go there 3, 4, 5 times and then receive a fine, which can be as high as 114 thousand reais, according to my calculations. I believe that this fine is not very effective because it only affects the middle class. The upper classes are able to pay it, and the lower classes are never able to pay it. The money from the fine goes to the National Antidrug fund, in small quantities according to agreements, and filters down to the network.

Internment.

Is this possible under the new law? Yes, it is. The judge, however, does not intern people. The judge guarantees the constitutional right to be interned. The judge decides when a Public Authority should make a health establishment available –

preferably a walk-in centre - free of charge, for specialized treatment. The judge, once again taking the interdisciplinary character of the law into account, will come across certain situations where internment is necessary to guarantee the safety and life of the user and the people around him. In this case, the technician from the network will inform the judge if the user needs to be interned. The state of Rio de Janeiro does not have a clinic for interning drug users. I would derive immense pleasure from ordering the state of Rio de Janeiro to intern a drug user in the most expensive clinic that exists here.

Mutual support groups.

One of the great difficulties involved in mutual support groups is checking attendance, as these groups are anonymous. In Rio de Janeiro, this problem is solved by a card that the user takes with them to drug user anonymous sessions to get a stamp. They keep their anonymity in this way, but also prove that they have attended. The sessions form part of a warning for the drug user, reminding them about the accountability that they have to the programme that they have joined.

We are trying to do something new with a joint project with NEPAD, which will attempt to make some small advances to the educational measure of attending an educational course. What does this project involve? NEPAD is going to be structured in order to establish educational resources that will be based on the experience that they have with their offices that already exist within the centre. We are also looking to form a partnership with SENAD. These educational resources will constantly challenge the drug user: “hey – you have

some talent for art. You are going to attend a technical course in painting. Why don't you attend this technical course at NEPAD?". During this technical course, the drug user will have abundant motivation to give him the desire to face the challenge of sticking to a process of recuperation from drug use.

I really like the advertising slogans that say, "Unity is the weapon against this evil". Not very long ago, I was not able to see any justice inside there. I am starting to identify myself with some of the people who are part of this. My favourite slogan is: "Life is a patchwork quilt where every little piece must be taken advantage of". There is no other way out of drug use aside from this: making a patchwork quilt. This means creating a network, seeking partnerships, looking for training and starting to learn how to work with this new justice that is different to the tradition of 500 years of adversarial justice inherited from Portugal - learning how to work with this justice from the 21st century.