

Decriminalization of personal drug use: Article 28 of the Drug Law

Decriminalization of personal use of drugs: article 28 of the drug act

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SUMMARY

This final course work, written in the form of an article and based on doctrine, legislation and case law, addresses the decriminalization of personal drug use, which is provided for in Law 11.343/2006. In general, this work portrays a decriminalization of the conduct of carrying drugs for personal use, after all, it is directly linked to the amount that the individual is carrying. In this sense, the main fact is in Article 28 of the Drug Law (11.343/2006), which establishes that anyone caught carrying drugs for personal use will not be arrested, but may receive measures such as a warning, community service or participation in educational programs.

Although possession for personal use does not lead to imprisonment, it is still considered an infraction and may result in measures such as a warning, community service or participation in educational programs. This study will address Extraordinary Appeal 635,659, which discusses the compatibility of art. 28 of Law No. 11,343/06 with art. 5, item X, of the Federal Constitution. The central debate is to analyze how the lack of clear parameters in article 28 of the Drug Law contributes to criminal selectivity and the violation of fundamental rights. However, criminalizing possession for personal use violates these constitutional rights, also considering the public health approach. The justification for the research lies in demonstrating that criminal law still has a selectivity in the police approach, which refers to the way in which the criminal justice system tends to apply the laws unequally.

Keywords: Drug decriminalization; Article 28 of Law 11.343/2006; Extraordinary Appeal 635659; Criminal selectivity; Fundamental rights.

ABSTRACT

This final course work, written in the form of an article and based on doctrine, legislation and case law, addresses the decriminalization of personal drug use, which is provided for in Law 11.343/2006. In general, this work portrays a decriminalization of the conduct of carrying drugs for personal use, after all, it is directly linked to the amount that the individual is carrying. The main fact is in article 28 of the drug law (11.343/2006), which establishes that anyone caught carrying drugs for personal use will not be arrested, but may receive measures such as a warning, community service or participation in educational programs. Although possession for personal use does not lead to arrest, it is still considered an offense and may result in measures such as a warning, community service or participation in educational programs. This study will address Extraordinary Appeal RE 635659, which discusses the compatibility of art. 28 of Law No. 11,343/06 with art. 5, item X, of the Federal Constitution. The central debate is whether criminalizing possession for personal use violates these constitutional rights, also considering the public health approach. The justification for the research lies in demonstrating that criminal law still remains selective in the police approach, which refers to the way in which the criminal justice system tends to apply the laws unequally. The conclusion of the study is to demonstrate that the Supreme Federal Court (STF) is unable to effectively implement the effects of decriminalizing the conduct of carrying a narcotic substance for personal use.

Keywords: Decriminalization of drugs; Article 28 of Law 11,343/2006; Extraordinary Appeal 635659; Criminal selectivity; Fundamental rights.

INTRODUCTION

The present Final Course Work entitled “Decriminalization of the use own drugs: Article 28 of the Drugs Act” aims to explore and understand the impacts significant focusing on Article 28 of Law 11,343/2006, discussing its constitutionality, the impacts on penal selectivity and the effectiveness of alternative measures to imprisonment.

Therefore, the choice of this topic is justified by its relevance in the legal scenario and contemporary Brazilian social, as its discussion revolves largely around the article 28 of Law No. 11,343/2006, which, although it removed the custodial sentence for the user, still treats drug possession as a criminal offense. However, an analysis will be carried out of Extraordinary Appeal RE 635659, which discusses the compatibility of art. 28 of Law No. 11.343/06 with art. 5, item X, of the Federal Constitution,

Furthermore, throughout the work, the constitutionality of article 28 of Law 28 will be analyzed. Drugs, as it has been the subject of intense legal debates, especially in the Supreme Court Federal, where it is discussed whether the criminalization of possession of drugs for personal use violates constitutional principles.

As well as the principle of Insignificance, derived from the intervention postulate minimum standard of Criminal Law, establishing that the penal system should not deal with conduct that, although formally typical, the application of this principle has been debated when it comes to of small quantities of drugs intended exclusively for personal use.

Thus, there is a need for a legal model that is more sensitive to guarantees constitutional, which recognizes the disproportionality of imposing the weight of the penal apparatus on situations that could be addressed through alternative means, such as health and welfare policies social.

Therefore, reconsider the role of Criminal Law in the management of substance use psychoactive substances is a fundamental step towards developing a legal system that is more equitable, efficient and in line with the principles of the Constitution.

In Chapter 1, we will address the decision that dealt with the legality of Article 28 of the Drugs (Law 11,343/2006), which concerns the possession of narcotics for individual use, based on the Police routine.

In Chapter 2, we will discuss Extraordinary Appeal 635,659, with a brief analysis of what was discussed, based on the vote of the rapporteur Minister Gilmar Mendes, pointing out then the final decision.



In Chapter 3, we will analyze the connection between criminal selectivity and the application of Article 28. of Law 11.343/2006, which deals with the possession of drugs for personal use. The analysis will focus on how social and racial factors influence the distinction between user and dealer

Finally, this scientific research involves the study of doctrinal works by authors renowned, as well as relevant laws and judicial decisions, which support the analysis theoretical and practical aspects of the object studied, including articles from the Federal Constitution (1988) and Law No. 11,343/2006.

1 – THE IMPACT OF DECRIMINALIZATION OF DRUG POSSESSION IN POLICE ACTIVITIES IN DAILY LIFE

The evolution of criminal law is an area of public law that aims to establish crimes and their respective punishments, with the purpose of preventing and punishing the occurrence of these acts. The early era of Criminal Law was divided into stages or periods of development known as a phase of divine retribution, private retribution, public retribution and the phase humanitarian.

With the advent of the humanitarian phase, Criminal Law began to suffer profound changes transformations, marked by a growing concern for the dignity of the human person and the limitation of the State's punitive power.

Factor in which sanctions are no longer limited to being just punitive, and begin to have a purpose of prevention and social reintegration. With that, this moment marks the beginning the concept of the contemporary penal system, based on individual rights and foundations such as legality, responsibility and due process.

A fundamental criticism that pointed out the lack of logic and the inadequacy of the punishments, often imposed without fair standards or adequate legal protection. Faced with this situation, it became essential to develop a penal system that was more logical, equitable and focused in the dignity of the human being.

In this context, fundamental principles such as legality, individualization emerge of punishment, due process and the principle of minimum intervention, which became pillars of modern criminal law.

The importance of the principle of criminal legality is evident, which means that no action must be considered criminal or subject to penalty without there being a definition prior in the law. This principle, together with others such as criminal liability, personalization of punishment and due process, strengthened the rule of law and



restricted the powers.

Based on the judgment that addressed the issue of the constitutionality of Article 28 of the Drug Law (Law 11.343/2006), which refers to the possession of drugs for personal use. The Supreme Federal Court, is moving in the direction of decriminalizing this practice, especially with regard to marijuana, based on the protection of privacy and individual freedom. However, the real impacts of this change are not yet significantly perceived in the streets.

In this panorama, Luciana Boiteux (2019, p.18) highlights some consequences demeaning:

Thus, Brazilian drug legislation repeats and reinforces the huge gap in the criminal justice system between drug users and drug dealers. For drug users, even small-time drug dealers or drug dealers who belong to the most disadvantaged segments of society, the criminal justice system is closed prison, further worsening the terrible conditions in Brazil's overcrowded and infected prisons. Drug users, who can afford to buy drugs without dealing, have been decriminalized, as long as they are not confused with drug de

With this, it is noted that the aforementioned author makes an analysis of the Brazilian standards regarding to illicit substances, especially after the creation of Law No. 11,343/2006, continued to follow a logic of punishment and selection by not defining clear parameters to see if it is consumer or seller.

In a way, quantity is one of the first clues considered, being small servings tend to indicate personal consumption, while large volumes are usually interpreted as compatible with the purpose of trafficking. However, this assessment is not standardized and may vary depending on the type of drug and local conditions.

The way the product is packaged is also one of the essential points that analyze whether it comes divided into small portions, specially made to facilitate sale, This is often seen as a sign that the substance may be being trafficked.

This lack of clarity in the rules gives the forces a great deal of freedom of interpretation. police and the judicial system, which results in an unequal application of laws, mainly in relation to people in conditions of social vulnerability.

Despite the Federal Supreme Court's tendency to decriminalize the user, the law does not define clear criteria for this distinction. The initial judgment is up to the individual police, therefore, approaches, searches and arrests still happen normally, since the agents can justify their actions with the claim of "well-founded suspicion of trafficking".

The research is based on data from the Infopen Statistical Information System of Brazilian penitentiary system, which indicate that the majority of the prison population is made up of



by black and low-educated people, reinforcing the discriminatory bias of the system criminal justice. In any case, penal selectivity is evident in the way laws are applied, resulting in mass incarceration that reinforces social exclusion.

The use of article 28 of Law No. 11,343/2006, which deals with the possession of drugs for personal use as a criminal offense, shows a somewhat confusing legal situation that affects the people differently in society. Although the article offers alternatives to prison, such as warnings about the risks of drugs and community work, in practice, this law still leads the security forces and the judicial system to act quite actively in this type of case.

According to data from the Brazilian Public Security Forum, in 2022 alone there were approximately 117 thousand occurrences of drug possession were recorded throughout the country, a number which represents a considerable portion of police activity.

International experience offers relevant examples of alternative policies to criminalization of drug use, especially with regard to possession for personal use. In Portugal, in 2001, the use of illicit drugs was decriminalized, replacing criminal sanctions for administrative measures and public health programs. Since then, the country has seen significant reductions in HIV infection rates among users, a drop in overdose deaths and reduced burden on the justice system.

However, the criminalization of drugs has been one of the main factors for imprisonment en masse, and the lack of objective criteria to differentiate users from traffickers increases the selectivity of the penal system. In view of this, the recent decision of the STF in RE 635659 seeks establish clearer parameters, raising debates about their effectiveness in reducing criminal selectivity and racism in the police approach.

Regarding the subject, the contribution of Luís Carlos Valois stands out in his book “The Criminal Law of the War on Drugs” 5th Edition (2024, p 22):

When the debate focuses on whether drugs should be decriminalized, critics of our policy are forced to identify the benefits of change.

When they try to describe these benefits, opponents are able to raise doubts about whether these benefits would materialize if drug laws were changed; it is very difficult to predict exactly how our society would change if we stopped punishing drug users.

In this way, the author highlights the complexity of the debate on the decriminalization of drugs, highlighting that advocates for change are constantly pressured to present concrete and immediate benefits of this legislative reform.

Given the aspects addressed, the demand for certainties ends up functioning as a obstacle to the transformation of the current repressive model, perpetuating a system that already shows serious signs of ineffectiveness and selectivity.

Therefore, it is necessary to recognize that, in everyday practice, the application of this standard falls on the shoulders of public security agents, who face a reality complex, often without the appropriate instruments for precise and technical distinction between the ducts.

2 - EXTRAORDINARY APPEAL 635,659

After the recognition of General Repercussion in 2011 by the Supreme Federal Court, It is noted that the applicant argues that the legislation that considers the possession of drugs for personal consumption as a crime would violate clear constitutional principles in article 5, paragraph X, of the Federal Constitution of 1988 (Brazil, 1988), since it violates privacy and the privacy of the citizen.

According to the vote of the rapporteur Minister Gilmar Mendes, who has already filed his vote in favor of the unconstitutionality of art. 28 of the Drug Law (Brazil, 2006). In its understanding, the criminalization of possession of drugs for personal use violates precepts fundamental constitutional rights, such as the right to liberty, privacy and autonomy individual.

The vote of Minister Edson Fachin, of the Federal Supreme Court, in the Appeal Extraordinary, was in favor of the partial provision of the appeal that questioned the unconstitutionality of article 28 of Law No. 11,343/06. According to its interpretation, only the marijuana should be targeted for decriminalization.

As published in SENAPPEN, a prison system statistics tool Brazilian that condenses information about prison establishments and their respective sentences, demonstrating the size of the prison population:

The total number of prisoners in Brazil is 663,906 in physical cells, those who, regardless of leaving to work and study, sleep in the prison establishment. There was also an increase in the number of prisoners under electronic monitoring: 105,104 are monitored. The population under house arrest, which does not use electronic ankle bracelet equipment, increased by 14.40% [..]. (Brazil, 2024)

Therefore, using the same database, it is possible to observe that, of the total number of prisoners in the country, 208 thousand (about 30%) fall under the Drug Law, number 11,343/06, mainly in the crime of trafficking, defined by article 33 (BRAZIL, 2006).

In this context, the legal device that deals with the user criminalizes in its text that who acquires, keeps, has in storage, transports or brings with him, for personal use, drugs

without authorization or in disagreement with legal determination, while the legal penalty of drug dealer is about:

Art. 33. Importing, exporting, sending, preparing, producing, manufacturing, acquiring, selling, offering for sale, offering, having in storage, transporting, bringing with oneself, storing, prescribing, administering, delivering for consumption or supplying drugs, even free of charge, without authorization or in disagreement with a legal or regulatory determination: Penalty - imprisonment of 5 (five) to 15 (fifteen) years and payment of a fine of 500 (five hundred) to 1,500 (one thousand and five hundred) days.

It is understood that in this device, for the configuration of the subjective element to exist, type provided for in art. 33, caput, of Law No. 11,343/2006, the criminal type encompasses an extensive list of 18 nuclear verbs, such as "import", "sell", "keep", "transport", among others, which may be practiced alone or together, as long as there is a clear intention to violate the prohibitive norm. (Marcão, 2024, p106)

Regarding article 28 of Law 11,343/2006, it deals with the possession of drugs for personal consumption, no longer providing for prison sentences and establishing educational measures such as warning, providing community service and participating in educational programs.

Extraordinary Appeal 635,659, in the Federal Supreme Court, was filed resulting from a conviction based on Article 28 of Law 11.343/06, of a convicted person surprised inside a prison unit in the State of São Paulo with 3 (three) grams of marijuana.

Art. 28. Whoever acquires, keeps, has in deposit, transports or brings carry with you, for personal use, drugs without authorization or in disagreement with legal or regulatory determination will be subject to the following feathers:
I - Warning about the effects of drugs;
II - Provision of services to the community;
III - educational measure of attendance at an educational program or course.

Rather than being considered a crime, the act of possessing marijuana for personal use is now classified as an administrative infraction, subject to sanctions such as a warning, drug seizure and educational measures.

The lack of clear criteria in the Drug Law to differentiate between users and traffickers contributes to the incarceration of small users, who end up classified as drug traffickers. The interpretation of drug quantity and seizure statistics often based on subjective judgment, leads to an increase in arrests for trafficking, even in situations in which the size for use would be more appropriate.

Furthermore, in order for the conduct of transporting a substance to be characterized narcotic, it is not required that the agent appear as the driver of the vehicle used in the

displacement of the drug. However, the determining aspect is the conscious participation in the act of transfer the substance from one place to another.

In this way, any individual who, even without driving the vehicle, contributes in a voluntary and effective way to transport the drug, may be held criminally liable for such conduct. (Marcão, 2024, p.30)

In this appeal, in light of Article 5, X, of the Federal Constitution, the compatibility is discussed, or not, of art. 28 of Law 11.343/2006, which typifies the possession of drugs for personal use, with the constitutional principles of privacy and private life.

Art. 5 All are equal before the law, without distinction of any nature, guaranteeing Brazilians and foreigners residing in the country the right to inviolability of the right to life, liberty, equality, security and property, under the following terms:
X - The privacy, private life, honor and image of individuals are inviolable. people, ensuring the right to compensation for material or moral damages arising from its violation.

The decision was based on the understanding that criminalizing drug possession for personal consumption violates the rights to privacy and private life, in addition to not being effective in reduction in drug use, and may even encourage the practice of activities criminals.

3 – PENAL SELECTION AND DRUG POLICY

In this scenario, penal selectivity refers to the functioning of the system of criminal justice, which, despite being based on principles such as legality and equality formal, ends up operating unequally in practice. This disparity manifests itself in application of repressive measures, which tend to focus on specific social groups, evidencing a bias in legal treatment.

Otherwise, it becomes quite clear when looking at most people's profiles. who are in prison in Brazil. They are generally young, black and residents of the outskirts, who end up suffering stronger repression from the State, even when they commit minor offenses.

Based on these observations, the penal system ends up punishing individuals of different social classes, as demonstrated by Alessandro Baratta in his book “Critical Criminology

and criticism of criminal law” (1999, p. 15):

The criminalization process, conditioned by the class position of the perpetrator and influenced by his/her situation in the labor market (unemployment, underemployment) and by socialization defects (family, school), would concentrate the chances of criminalization on the subproletariat and socially marginalized people in general. In this way, the criminalization process would fulfill the function of social conservation and reproduction: the punishment of certain behaviors and subjects would contribute to maintaining the vertical social scale and would serve as ideological cover for socially immunized behaviors.

Regarding the aspect of the individual having the possibility of reintegration is a right established in the Penal Enforcement Law and is not intended only to punish those who commit offenses as a final means to imprisonment, but also offers resources for the rehabilitation of the individual, aiming at their effective reintegration into society.

However, even though the legal text makes it clear how important reinstatement is, the reality in Brazilian prisons is often very different, they are often overcrowded and without many opportunities for education or work for the inmates.

In this sense, it is demonstrated in the work “Critical Criminology and Criminal Law” (2022, p.14):

As has been widely demonstrated, the purpose of a custodial sentence is to remove a person who has committed a crime from society and then return him/her to it. However, it is necessary to investigate statistically whether this function is actually carried out in the reality of Brazilian prisons. This can be done by analyzing official data on criminal recidivism, since if the prisoner reoffends, then the sentence has not achieved its purpose of reintegrating him/her into society.

Analyzing the author's view, punishment should not be restricted to incarceration alone, but it must function as a chance for personal and social change, and yes, with the offer of education, professional training, psychological assistance and strengthening of relationships family members, the government can break the cycle of crime and significantly reduce recidivism rates.

By recognizing the prisoner as an individual with rights and potential for transformation, the judicial system not only performs its function of penalization, but also acts as a reintegration agent and promoter of citizenship.

Understanding that this structural selectivity reflects not only an institutional bias of the Judiciary and security forces, but also a penal policy that prioritizes mass incarceration as a response to poverty, as demonstrated by Nilo Batista

in his book "Critical Introduction to Brazilian Criminal Law" 11th Edition (2007, p. 25-26):

Thus, the penal system is presented as egalitarian, affecting people equally based on their conduct, when in fact its operation is selective, affecting only certain people, members of certain social groups, under the pretext of their conduct.

In this sense, criminal policy in Brazil is characterized by an action predominantly repressive, aimed at toughening penalties and increasing incarceration, especially since the 1990s.

Instead of adopting a preventive and integrated approach, the country has been betting mostly in criminal responses that prioritize the use of the prison system as the main social control mechanism

As demonstrated by Ari Bassi Nascimento, in his publication "A vision criticism of the policies of decriminalization and pathologization of drug users" (2006, p.185):

Drug abuse is a social problem. This statement must be understood as true, but in a very restrictive way. After all, what constitutes a social problem are the economic losses (in the broad sense) resulting from drug abuse. These losses must arise from the individual-drug interaction and materialize in different ways. Some are located in the affective sphere, others in the productive, educational and health spheres or in social relations. In any of these spheres of action, the relationships of individuals imply costs and benefits, which is why any losses in these instances of action result in economic losses.

With this, criminal policy in Brazil shows a certain tension between the principles of Democratic State of Law and the way in which the application of criminal law takes place in practice. Therefore, it is important to carry out a critical analysis, taking into account the complexity of the factors. social issues involving crime and respect for human rights.

On the other hand, maintaining a model that prioritizes severe punishments and the mass incarceration conflicts with the principles of respect for the dignity of human person, demonstrated by Ari Bassi Nascimento (2006, p. 186):

In fact, the State is merely trying to find ways to punish or treat drug users. Objectively, what appears to be the current public policy on drug use is aimed solely at combating drug use. This is apparently just a tautology. After all, if there is a policy whose objective is to reduce drug use, but whose actions focus on preventing drug use, then we are faced with a circularity.

When the current model fails to insist on punitive solutions

ignored when there is scientific and social evidence that shows the importance of adopting integrated strategies, based on human rights, health and social inclusion.

Given this, the fact of continuing to use strategies, even when there is information that show that other approaches are more effective, shows that there is a distance between what the State makes in practice and advances in science and society.

FINAL CONSIDERATIONS

Analysis of article 28 of Law No. 11,343/2006, in the context of the decriminalization of possession of drugs for personal use, highlights the complexity of the issue from the perspective constitutional, criminal and social. Although the rule excludes the custodial sentence for users, its maintenance as a criminal offense keeps the repressive logic of the State active, which continues to operate with strong selectivity, especially on historically populations marginalized.

The absence of objective criteria to distinguish the user from the drug dealer reinforces the subjectivity of police approaches and judicial decisions, contributing to a system unequal penalty.

The judgment of Extraordinary Appeal No. 635,659 by the Federal Supreme Court appears to be a potential milestone in the review of the current model, especially in light of the principles of privacy, autonomy and human dignity provided for in Article 5 of the Federal Constitution. The votes of ministers Gilmar Mendes and Edson Fachin indicate different but convergent paths regarding the need to resize the criminal response to drug use.

However, institutional and social resistance to decriminalization, combined with the lack of effective public health and reintegration policies, makes it difficult to implement solutions balanced and humanized.

International experience, such as that of Portugal, shows that decriminalization, when accompanied by health, prevention and social inclusion programs, it can reduce social harm and mass incarceration. In Brazil, however, a criminal policy persists centered on repression and selective punishment, which criminalizes poverty and worsens racial and economic inequalities. Criminal selectivity, amply demonstrated by data of the prison system and statistics on police approaches, reveals that criminal law continues operating with implicit social criteria, far from the ideal of equitable justice.

Therefore, given the weakness of current legislation regarding the distinction between use and trafficking, added to its discriminatory application, the decriminalization of drug possession for personal consumption is presented not as an incentive to use, but as a strategy of rationalization of criminal policy, aligned with constitutional principles and respect for fundamental rights.

In this scenario, it is essential to rethink the role of Criminal Law in the face of complex social issues involving drug use, especially considering the impact disproportionate impact that current criminal policy has on vulnerable populations.

Even though it does not propose a definitive solution to the drug issue in the country, such measure may represent a step forward in the construction of a fairer penal system, proportional and effective, capable of breaking with the paradigm of ineffective repression and structurally exclusionary that still dominates Brazilian criminal policy.

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