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## Differentiation between trafficking and personal use in the Brazilian criminal procedural system from the perspective of drug law

*The differentiation between trafficking and personal use in the Brazilian criminal procedural system under the drug law*

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1

### Summary

This article analyzes the legal treatment of the distinction between drug trafficking and personal use in Brazilian criminal proceedings, in light of Law No. 11,343/2006 and the case law of the Federal Supreme Court (STF). It examines how the lack of objective criteria in the legislation generates discretion and criminal selectivity, resulting in the criminalization of socially vulnerable groups, especially Black and peripheral populations. The Drug Law delegates to police and judicial authorities the subjective interpretation of elements such as quantity, location, and circumstances of seizure, which contributes to racial disparities and violates principles such as legality, the presumption of innocence, and proportionality. The research adopts a qualitative and bibliographical approach, based on doctrine, legislation, and judicial decisions. It concludes that the STF's decision in RE 635,659, by establishing a provisional parameter of 40g or six female marijuana plants to differentiate use and trafficking, constitutes progress by limiting judicial discretion. However, the need for legislative reform that establishes objective criteria and promotes a hermeneutic guarantee, capable of reducing punitive selectivity and ensuring greater coherence and justice in the application of criminal law, is reinforced.

**Keywords:** Drug Law; Drug Trafficking; Personal Use; Criminal Procedure; Criminal Selectivity.

### Abstract

The article analyzes the legal treatment of the distinction between drug trafficking and personal use within the Brazilian criminal procedure system, in light of Law No. 11,343/2006 and the case law of the Federal Supreme Court (STF). It examines how the absence of objective criteria in the legislation generates discretion and criminal selectivity, resulting in the criminalization of socially vulnerable groups, especially Black and marginalized populations. The Drug Law delegates to police and judicial authorities the subjective interpretation of elements such as the quantity, location, and circumstances of the seizure, contributing to racial disparities and violating principles such as legality, presumption of innocence, and proportionality. The research adopts a qualitative and bibliographic approach, based on legal doctrine, legislation, and judicial decisions. It concludes that the STF's decision in RE 635.659, which sets a provisional threshold of 40 grams<sup>2</sup> or six female cannabis plants to distinguish use from trafficking, represents progress in limiting judicial discretion. However, it reinforces the need for legislative reform by establishing objective criteria and promoting a rights-based hermeneutic capable of reducing punitive selectivity and ensuring greater coherence and fairness in the application of criminal law.

**Keywords:** Drug Law; Drug Trafficking; Personal Use; Criminal Procedure; Criminal Selectivity.

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## 1. Introduction

Criminal drug policy in Brazil is a topic of constant academic debate and judicial, especially in view of the structural tension between the right to individual liberty, a pillar fundamental of the Democratic State of Law, and the state's duty to repress illicit trafficking, tax under the aegis of public security. Since the enactment of Law No. 11,343/2006, known as the Drug Law, the Brazilian legal system began to live with normative ambiguity deep that, although it intends to distinguish the user from the trafficker, fails to offer criteria objectives and measurable for this essential differentiation. This legislative gap has, in practice, resulted in a fertile field for subjective and discretionary interpretations, often based on social stigmas, structural prejudices and moral perceptions about consumption and commercialization of narcotic substances.

On a material level, the Drug Law sought to break with the merely repressive paradigm in relation to the user, replacing the custodial sentence with educational and restrictive measures of rights, an attempt to address consumption as a public health issue. However, in practice forensic, this supposed humanization has not been consolidated. The line that separates carrying for personal use (Art. 28) of illicit trafficking (Art. 33) has become tenuous and, in many cases, arbitrary. The absence of objective criteria transfers to the police authority, the Public Prosecutor's Office and the magistrate the power almost unlimited ability to qualify conduct according to subjective perceptions. This qualification is based on vague factors such as the amount seized, the location of the events, the agent's conduct and his profile socioeconomic and racial, culminating in the overrepresentation of black and poor individuals in crimes of trafficking.

This lack of definition generates direct consequences in the criminal procedural field: the treatment and The defendant's guarantees depend, from the beginning of the criminal prosecution, on the classification attributed in the investigative phase. This initial choice impacts the individual's life, from the legality of the arrest to flagrant, the granting of provisional liberty, the application of precautionary measures and, subsequently, the procedural rite itself. The defendant classified as a "drug trafficker" is subjected to a procedural regime more severe, with greater restrictions on rights and less possibility of applying benefits legal. This procedural disparity reflects the structural selectivity of the criminal justice system. This article analyzes, from the perspective of criminal procedure and critical criminology, how the system legal system has faced — or failed to face — the distinction between use and trafficking, considering the criminal dogmatics, the jurisprudence of the higher courts and the social effects of this differentiation. We also intend to discuss how the lack of clear legal parameters contributes to selectivity punitive and reinforces the symbolic and repressive function of criminal law. The analysis culminates with the discussion of the recent guidelines set by the STF, which attempt to bring objectivity where the legislator was negligent.

## 2. Law No. 11,343/2006 and the criminal treatment of drugs

Law No. 11,343/2006, known as the Drug Law, replaced the former Law No. 6,368/1976 and represented the promise of a new criminal policy aimed at substantial differentiation and humanized relationship between users and traffickers. In theory, the aim was to align Brazilian legislation with international trends in harm reduction and treating consumption as a problem of public health. However, although it has modernized the normative wording and incorporated principles of health, the new legislation maintained the criminalization of possession of drugs for personal use, provided for in its art. 28, even without the threat of a custodial sentence. On the other hand, trafficking of drugs, defined in art. 33, remained classified as a highly serious crime, with a penalty minimum of 5 years imprisonment, without the possibility of probation, amnesty, pardon or substitution for punishment restrictive of rights. This punitive duality, although with different sanctions, created a chasm legal and social.

The legislative option of eliminating prison sentences for users but maintaining criminalization of the conduct, generated the legal phenomenon known as imperfect decriminalization. Art. 28 typifies as a crime to acquire, keep, have in storage, transport or bring with oneself, for personal consumption, drugs without authorization or in violation of legal requirements. The legislator did not define objective parameters that delimit what would be "personal consumption", nor quantitative limits of seized drug. §2 of the article only guides the consideration of the nature and quantity of the substance, place and conditions of the action, social and personal circumstances and conduct and antecedents of the agent, giving the authorities a wide margin of interpretation.

The lack of clear criteria has been criticized by legal scholars, who argue that the current law reinforces selective and discriminatory practices, concentrating repressive action on marginalized groups, notably young black and poor people from peripheral areas. The distinction between possession and trafficking is influenced by skin color, location of seizure and social class, more than by quantity of substance or proof of merchandise.

## 3. Legal, jurisprudential and empirical criteria of differentiation: selectivity in numbers

In the absence of objective parameters, it was up to case law to consolidate practical criteria to distinguish trafficking and personal use. The Superior Court of Justice has reiterated that quantity and variety of drugs are central, but not exclusive, elements for the configuration of the crime of

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illicit trafficking. Despite seeking uniformity, the subjective interpretation of other factors becomes vector of punitive selectivity.

Studies show a direct correlation between the socioeconomic and racial profile of the accused and the criminal classification. Black defendants are more often classified as drug traffickers, even with small amounts of drugs. The amount seized, far from being a technical criterion, is malleable and subordinated to the profile of the person approached. This reality highlights the political-criminal nature of the distinction between user and drug dealer, revealing an issue of social justice.

#### **4. The role of criminal proceedings in consolidating punitive selectivity**

The criminal process is configured as the institutional space where they materialize, in a concrete and direct, the gaps and ambiguities present in drug legislation, especially in distinction between trafficking and personal use. The lack of clear objective criteria is not limited to a failure theoretical; it is reflected in an immediate and tangible way in the lives of the accused, determining, from the first acts of investigation, how the entire procedural process will be conducted.

The initial classification of the crime, often carried out based on subjective assessments and discretionary interpretations, exerts a decisive influence on the legal framework of conduct, on the application of precautionary measures and on the extent of procedural rights and fundamental guarantees to which the individual has access. When the accused is classified as drug trafficker, he faces a set of severe restrictions, including the ease of decreeing preventive detention, the substantial limitation of the right to provisional liberty and the almost total prohibition of legal benefits, such as privileged trafficking, the replacement of punishment by restrictive rights or even non-prosecution agreements.

On the other hand, when the crime is classified as possession for personal use, it opens the door to possibility of applying alternative measures, of an educational or rights-restrictive nature, allowing the accused to remain outside the prison system and reducing the stigmatizing effects of their conduct. However, the predominance of subjective judgments based on social prejudices, cultural stigmas and discretionary interpretations, transforms the criminal process into a true reflection of the exceptional criminal policy, reproducing and reinforcing patterns of selective repression that disproportionately affect young people, black people and economically vulnerable individuals, in especially those living in urban peripheries, thus perpetuating a cycle of marginalization social and judicial inequality.

#### **5. Recent case law and re 635.659/SP: the establishment of objective criteria by the STF**

Given the scenario of normative uncertainty and proven punitive selectivity in treatment of possession of drugs for personal use, the Federal Supreme Court (STF) played a decisive role in intervening in Extraordinary Appeal No. 635,659/SP. In this judgment, the Court declared the unconstitutionality of criminalizing the possession of cannabis sativa for use own, recognizing that the current legislation, by not establishing objective criteria, subjected the citizen to a regime of excessive judicial and police discretion, with consequent violations to fundamental rights, such as individual freedom, privacy and personal self-determination. Although the conduct remains illegal, the Supreme Federal Court (STF) redefined its nature, transferring it from the criminal sphere. for administrative and educational spheres, allowing pedagogical and preventive measures and social replace strictly criminal punishment.

One of the central points of the decision was the establishment of an objective and quantitative parameter: 40 grams of marijuana or 6 female plants as a criterion for relative presumption of user. This milestone jurisprudence represents a concrete effort to reduce subjectivity in the qualification of conduct, limiting discretion in police and judicial action, and establishing an auditable parameter for future decisions. However, although the measure represents a historic advance, its application is still restricted to marijuana, is provisional in nature and does not eliminate the need for judicial interpretation in specific cases, which demonstrates that the solution is palliative. More than that, the decision signals clarity on the urgency of a broad legislative reform, capable of establishing objective criteria and consistent for all substances, reduce punitive selectivity and ensure greater safety legal and social justice in the application of the Drug Law.

## 6. Conclusion

The distinction between drug trafficking and personal use in Brazil remains strong dependent on subjective interpretations, which results in structural punitive selectivity and discrimination against historically vulnerable groups, especially young people, black people, and residents from peripheral areas.

This reality shows that the application of Law No. 11,343/2006 is not limited to the sphere legal, but acts as a mechanism of social control, reproducing inequalities and consolidating patterns of marginalization.

In this context, the decision of the Supreme Federal Court in Extraordinary Appeal No. 635.659/SP represented an important milestone, establishing provisional objective parameters — 40 grams of marijuana or 6 female plants — to reduce police and judicial discretion in

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identification of users. However, although the measure partially limits arbitrariness, it is insufficient to correct systemic selectivity, since it does not apply to all substances nor does it replace the need for clear and uniform legal criteria.

To overcome these challenges, it becomes essential to consolidate objective parameters in legislation, ensure responsible judicial action and combine such measures with consistent public policies prevention, treatment and care. Only in this way will it be possible to promote the application of Drug Law that is fair, coherent and aligned with the constitutional principles of equality, proportionality and protection of fundamental rights.

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