

## REVIEW

# Illusions Clouding Decision-Making: How the Justice System Fails to Understand the Illicit Drug Market

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This paper reviews some of the main research on drug law enforcement in Brazil since the 2006 Drug Law came into force, noting a clear and constant pattern of police and judicial focus directed at retail drug trafficking, decisively impacting current incarceration rates. It then examines the lack of understanding of the actual functioning of illicit drug markets by the criminal justice system, leading to judicial decisions not only ineffective for its declared purposes, but also counterproductive in terms of controlling illicit economies.

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**Keywords:** illicit economies; criminal justice system; prisons; illicit drug markets; sentencing

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## Introduction

The illicit drug market is a multifaceted, profitable one in Brazil. The country of continental proportions shares borders with the major producing countries of plant-based drugs in the world and is itself a large consumer market (INCB 2016). The control over transportation routes and retail sales points is subject to dispute among different criminal organizations. The violence resulting from such disputes, as well as from state repression, is part of everyday lives of thousands of people living in communities that are somehow regulated by this economic activity. The articles in this special edition of JIED focus on different aspects of this illegal market, including routes, prices, operating systems, and criminal organizations.

Official regulation and repression mechanisms are extremely limited. The criminal justice system focuses heavily on small drug retailers, who are highly replaceable and represent the weakest link in the organizations' framework. Brazilian prisons are packed with criminals charged with small offenses, but this has negligible impact over drug trafficking operations. Instead, this practice helps drive new members to factions, who organize their structure (and criminal activities) from within the prisons (Feltran 2018).

While justice system operators—judges, prosecutors, and assistants—remain oblivious to the complexity of the matter, there is a growing number of research studies focused on drug policy and incarceration in Brazil, and they all point toward similar directions. Hence, the challenge is accessing legislators and the judicial system to finally surface the negative consequences of the current model of confrontation and bring it to public debate.

## The Impact of the 2006 Drug Act

The Brazilian drug legislation is mainly punitive. The current law has been in force since 2006 and was generally perceived as a great breakthrough amongst progressists because it showed an effort to differentiate consumers and drug dealers by decriminalizing drug possession for personal use. However, the same law raised the minimum sentence for drug-related charges to five years; this term can be reduced to one year and eight months of imprisonment in specific scenarios.

Expectations about the new law led researchers to develop new studies to understand the impact of its enforcement. In 2009, the University of Brasilia and the Federal University of Rio de Janeiro carried out a research commissioned by the Ministry of Justice to analyze drug trafficking-related court rulings in

the cities of Brasília and Rio de Janeiro pronounced in the first 18 months of enforcement (Boiteux et al. 2009). In short, the research found that the average drug dealer convicted by the system was male, was young, was arrested in flagrante<sup>1</sup> when alone, and carried only one type of drug, a likely indication of a small retailer. In 80% of the cases, the judiciary declined requests for pretrial release. The study also found that few were the cases of reduced sentences; the average prison sentence on analyzed cases was 4.5 years (Boiteux 2009: 99).

In 2011, the University of São Paulo's Center for Violence Studies carried out a research about drug-related in flagrante arrests in the city of São Paulo between November 2010 and January 2011 (Jesus et al. 2011). Even though data was gathered at a different state nearly four years later, the findings were very similar to those showcased by the 2009 research: most of the arrests were done in flagrante during military police routine operations, an indication that the arrests were not preceded by any investigation. As observed in Brasília and Rio de Janeiro, most individuals were arrested alone, unarmed, and carrying small drug amounts, and they were subject to remand. The research also found that more often than not, the only witnesses to the crime were the police officers in charge of the arrest. This was also observed in other studies that followed. The offenders' profiles were also replicated at more recent studies: mostly nonwhite individuals who completed up to primary education and had no prior records. Nevertheless, the studies differ in relation to the average imprisonment term: in São Paulo, the most frequent ruling was one year and eight months in prison.

The same trend was verified by a research study carried out by the *Sou da Paz* Institute in 2012, focused on in flagrante arrests in the city of São Paulo between April and June of 2011 (Carlos 2012). Within this period, 22.7% of offenders were detained for drug trafficking, a dramatic increase in comparison to detentions prior to the new law. Most of the offenders were arrested alone and faced pretrial arrest. They also share the same sociodemographic profile found in previous research: mostly young males, low level of education, and no prior records, pertaining to the group of small retailers in the illicit drug trade.

Following this study, Juliana Carlos further analyzed its database to validate several trends identified by those previous ones (Carlos 2015): Most offenders arrested in flagrante for drug trafficking carried a very small amount of only one type of drug. In crack-related arrests, for instance, the average possession by men and women was slightly over 10 g (Carlos 2015: 5). The research simulated the effect of adopting the same quantity thresholds used to distinguish personal use from drug trafficking in other countries, and results show that using moderate criteria (such as the one used in Portugal) would prevent the arrest of 29% of those detained in flagrante for possession of marijuana within the period in question (Carlos 2015: 8).

In the same year, Lemgruber and Fernandes (2015) analyzed 1,437 cases of arrests in flagrante for drug-related crimes in Rio de Janeiro, focusing on alternatives to remand. However, it demonstrated the judiciary's reluctance to pretrial release to persons accused of drug-related crimes: 70.2% of the defendants were in remand throughout the criminal proceedings.<sup>2</sup> The authors emphasize the divorce between 'the imaginary and the real' when describing how the judiciary constructs the image of drug trafficker to justify the need of remand.

In 2018, the Rio de Janeiro's Public Defender's Office identified all drug-related rulings pronounced in Rio's metropolitan area between August 2014 and January 2016 (Haber 2018). Although carried out almost 10 years after that first 2009 research, the findings were mostly the same: people convicted of drug charges were mostly first offenders, arrested in flagrante with small drug amounts. This scenario shows a clear focus of public safety agencies on the retail drug market (Haber 2018: 30). Another interesting piece of information found by this research was that the place of arrest influenced court ruling in 40% of the cases, where longer sentences were given because of the likelihood that the offender would belong to a criminal organization.

The pattern around profiles, circumstance of arrests, and crime types indicate that the criminal justice system—represented by several actors, from the military police in charge of arrests to the superior courts—is undoubtedly focused on retail drug trafficking. This trend is even more evident in two related research studies carried out independently in Rio de Janeiro (ISP 2016) and São Paulo (Sou da Paz 2018).

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<sup>1</sup> An arrest in flagrante delicto (henceforth arrest in flagrante) is not preceded by an investigation. It shall be applied when the alleged criminal is caught by police officers just after having committed the crime (being denounced by the victims or witnesses), or with tools, guns, or other objects related to committing a crime.

<sup>2</sup> In addition to the information on pretrial detention, the report confirmed data from other investigations into the sociodemographic profile of the defendants and the usual conditions of police occurrences, showing that pretrial detention, primary offenders, and unarmed prisoners prevail.

The first one, conducted by the Rio de Janeiro's Public Safety Institute, mapped police incidents and drug seizures in the state of Rio de Janeiro between January 2010 and August 2016. The findings did not come as a shock but are still impressive: 1% of police incidents found 85.4% of all marijuana and 46% of all cocaine apprehended during operations in the period. The research has shown that only 1% of drug-related police incidents seized more than 10 kg of marijuana, 2 kg of cocaine, and 1.3 kg of crack. It also showed that the average seizure was 14 g of marijuana and 23 g of cocaine (ISP 2016: 15).

The second study was carried out by *Sou da Paz* and addressed drug seizures in the state of São Paulo between 2005 and 2017. The results are presented by Silva and Langeani in another article published in this JIED. Study findings in Rio and São Paulo are starkly similar: in the latter, only 1% of the police incidents found 76% of all marijuana, 56% of all cocaine, and 66% of all crack seized in the state. The average seizure was 39.8 g of marijuana, 21.6 g of cocaine, and 9.4 g of crack (Sou da Paz 2018: 36–37). The report highlights the immense gap found between police efforts and their results.

On the one hand, tens of thousands of incidents resulted in the seizure of tiny amounts of drugs. On the other hand, just a very few operations were able to seize relevant amounts ... We are talking about thousands of people who were arrested because of very small drug amounts for a crime whose minimal penalty is five-year imprisonment without the right to pre-trial release. (Sou da Paz 2018: 44)

So far, this article showed that a consistent corpus of research was carried out since the current Drug Act came into force and that all studies reached similar findings, regardless of region or period of data collection.<sup>3</sup> It is reasonable to assume that such similarity is a reliable indication of the criminal justice system's primary target in drug-related offenses: low-level workers who operate the retail drug market, the object of several articles in this special edition.

This reinforces the practice of poverty criminalization in Brazil and contributes to the critical conditions of the national penitentiary system. According to more recent data, 726,712 people were in prison as of June of 2016, an 81% increase in relation to 2006. Incarceration rates rose from 214.8 to 352.6 per 100,000 inhabitants in the same period. Among the prison population, 64% were nonwhite individuals, whereas the nonwhite population represents 53% of the country's population. The increase in incarceration rates due to drug-related offenses has significantly contributed to this scenario: drug trafficking responded for 10.5% of detentions in 2006, but the number jumped to 26% in 2016 (DEPEN 2017).<sup>4</sup>

## The Justice System and Illegal Markets

Despite the soundness of the research and the harsh reality in penitentiaries across the country, justice system agents fail to acknowledge the negative impact of these practices. Frequent are the cases where defendants are severely punished for the apprehension of allegedly large amounts of drugs, even when just a small portion of marijuana was seized, under the justification that small, unarmed retailers must be taken off the streets to contain the violence associated with the illicit market.

Justice system agents build their understanding of the drug market upon the cases brought to them by security forces and upon prejudices and conceptions that are commonplace in their own social group. The sources of information to which they are exposed and the punitive nature of legal careers in Brazil also play important roles in their rulings. They see the real world through an illusory filter and use the resulting image to inform their decisions and determine what must be done to suppress drug trafficking. There are several clear examples of how legal agents lack basic knowledge about the means of operation of the illicit markets they attempt to control.

The final report produced by the Rio de Janeiro's Public Defender's Office identified a very particular aspect of the Brazilian justice system that may fall under the radar for outside observers, albeit well known by its agents: The extensive resource to 'sentence models', standardized decision templates 'previously structured

<sup>3</sup> Albeit the shortage of data about enforcement of the Drug Act in other regions, the information gathered in São Paulo, Rio de Janeiro, and Brasília are numerically relevant. Together, they represent around 30% of the country's total population and 42% of the Brazilian prison population (IBGE 2010; DEPEN 2017). It is worth noting that the literature review set forth in this article is not exhaustive.

<sup>4</sup> Women have been more severely impacted by the new punishment practices perpetrated by the justice system in relation to drug trafficking. The female prison population has increased 146% since 2006; 62% of the women arrested in the country in 2016 were accused of drug-related offenses.

and ready to fit any reality' (Haber 2018: 59). Sentence models are a clear manifestation of how legal activities have gone through extreme bureaucratization in response to the massive number of similar cases that are analyzed every day. However, even rulings devised from scratch repeat a series of commonplaces that serve as foundation to arbitrate on drug trafficking cases. Most times, the arguments bear no relation to the real dynamics of the illicit markets. They are legal fictions whose mission is both to inform proceedings and legal consequences and appease the conscience of those working for the justice system. After all, for the mechanism to work, it is paramount that all actors involved truly believe that one ragged, weary defendant, who was arrested in flagrante with 40 g of marijuana on him and unarmed, is a major drug dealer whose liberty puts at risk the social order and the lives of law-abiding citizens.

A dramatic example of this practice is the way the judiciary deals with the fact that a vast majority of traffic-related incidents only have as witness the same police officers in charge of the arrest. The Court of Appeals of Rio de Janeiro even felt the need to amend an abridgement<sup>5</sup> to include the following statement: 'Having the depositions of police authorities as the sole oral evidence for an incident does not disallow conviction.' This fails to acknowledge the complex dynamic between security forces and illegal markets, as well as the incentive-to-arrest policy that is central to local law enforcement—two factors that should certainly suffice for judges to exercise more caution when considering these testimonies.

Another recurring aspect in court rulings is how judges' perceptions are completely detached from reality in terms of what can be considered a 'reasonable amount of drug for personal (especially problematic) use,' or how much can be considered a relevant amount of drug in an apprehension. Thus more often than not, negligible apprehensions are treated as clear evidence of grave cases, as illustrated by the examples below.<sup>6</sup>

The packaging, quantity and variety of the apprehended drugs suffice to indicate, with reasonable levels of certainty, that the substances were destined to trafficking purposes. The unanimous report of police officers regarding the offender's behavior also corroborates this perspective. In addition, the quantity and the type of the drug found with the defendant, namely 5 (five) bags of cocaine weighing 4.4 g (four grams, four decigrams) and 2 (two) bags of cocaine weighing 1.6 g (one gram, six decigrams) are absolute proof of the agency and the materiality of the event.<sup>7</sup>

Those so-called 'user-dealers' (*sic*) must receive equally severe punishment, as they have a critical role in the traffic life cycle and, due to their pursue for an easy profit to afford their own addiction, they take any risks to attract new customers and users. [This case pertains to an apprehension of 13 g of marijuana and 14 g of crack]<sup>8</sup>

The amount of drug found with the defendant is significant: 59.6 g. According to data found on Wikipedia, a joint usually carries 0.25–1 g of marijuana. Therefore, one can easily assume that this massive amount of drug could not be destined to personal use.<sup>9</sup>

The defendant confessed to the possession, but she claimed to be a user. However, she also had cash on her, and the drug was packaged in individual bags, which is incompatible with personal use ... Therefore, this is a grave crime that renders the whole society unstable. [The case pertains to the apprehension of 14 crack stones totaling 4.8 g]<sup>10</sup>

In several cases, apprehensions are taken as evidence of trafficking because the defendant 'makes a living out of crime.' When read by itself, the statement may sound merely tautological, but it brings along a world view marked by prejudices of class and unfamiliarity with everyday lives in communities that rely on illegal markets to survive. This unfamiliarity can be perceived in other excerpts of court rulings. They are repeated or rephrased in hundreds of thousands of similar sentences.

<sup>5</sup> In legal jargon, abridgement is a summary of court rulings regarding a certain topic that has the purpose of facilitating compliance with precedents in lower courts.

<sup>6</sup> All the examples were extracted from court rulings pronounced in trial courts at the São Paulo's Central Criminal Forum in 2016.

<sup>7</sup> Lawsuit no. 0002194-52.2016.8.26.0635.

<sup>8</sup> Lawsuit no. 0097952-04.2015.8.26.0050.

<sup>9</sup> Lawsuit no. 0001326-74.2016.8.26.0635.

<sup>10</sup> Lawsuit no. 0101165-18.2015.8.26.0050. It is worth noting that the average daily consumption of crack in Brazilian state capitals is of 14.6 stones/day (FIOCRUZ 2014: 61).

Crime factions control drug sales points and fight over them by means of summary execution.<sup>11</sup>

The illicit traffic of narcotics is one of the most heinous crimes, as it drives the practice of other illegal activities and is becoming a crime against humanity ... Particularly in the case of a parent, we would not expect her to be engaged in drug trafficking, as this would bring misery to other mothers, like herself, whose offspring are addicted.<sup>12</sup>

The criminal justice system's complete unawareness of reality is out in the open when court rulings assume roles that are not consonant with the actual practices of the illegal drug market and the penitentiary system. For instance, judges often impose imprisonment where the law would allow a milder punishment, arguing that incarceration is necessary to disrupt the illicit trade—even though this small drug retailer will certainly have been replaced by another one before he even gets to the precinct. Insisting in incarceration as the means to solve the 'traffic problem' also shows complete ignorance about the forms of recruitment, organization, and development of the country's most important criminal organizations, which were founded and are managed from within prisons; for more details, please refer to Gabriel Feltran's article in this special edition.

This phenomenon does not only affect trial court judges. Legal fictions and commonplaces built around the dynamics of the illicit drug market are also vastly used by the high courts, as evidenced by Machado et al. in their article for this JIED.

Consequently, the country's scenario bears the existence of two parallel worlds: The highly profitable, complex, and dynamic illicit drug market, marked by violent competition for the control over routes and territories; and the picture painted by the justice system, who has leeway to operate of its own accord across all levels and regions. The sole point of intersection between these two worlds is the small drug retailer—a disposable piece of the mechanism whose workforce is readily available and who serves as a scapegoat for the imaginary of judges, prosecutors, lawyers, and even the Brazilian society as a whole.

## Conclusion

The criminal justice system is highly unfamiliar with the dynamics of the illicit drug market. Furthermore, they build their interpretation of reality upon their own understanding of how the market operates and hence of how it would be impacted by official repression. These are extremely damaging practices to the Brazilian society.

As set forth in this article, a substantial body of research demonstrates that repression is focused on the lower market ranks. In addition to wasting time and resources of justice and public safety agencies, this approach strengthens the main vectors of the illicit markets, fails to combat the violence associated with its practices, and perpetuates the damage caused by illicit economies.

The official discourse is very powerful; repressive measures are constantly reinforced by national politics. Our objective is to raise awareness around the real impact of current judicial policy and to highlight the complexity of illegal drug markets in Brazil in the hopes that this will brake paradigms and provide rational elements to better inform court rulings.

## Competing Interests

LGMP is a federal civil servant at the Brazilian Government. Views are of his own. The other author has no competing interest.

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<sup>11</sup> Lawsuit no. 0074504-02.2015.8.26.0050.

<sup>12</sup> Lawsuit no. 0007813-94.2015.8.26.0635.

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