



international journal
on human rights

issue **21**

- THE SUR FILE ON DRUGS AND HUMAN RIGHTS -

NGOs and drug policy
Rafael Custódio

Empty slogans, real problems
Carl L. Hart

Drugs policies and public health
Luís Fernando Tófoli

*Brazil: Critical reflections
on a repressive drug policy*
Luciana Boiteux

*The Elephant in the Room:
Drugs and Human Rights in Latin America*
Juan Carlos Garzón, Luciana Pol

*Asia: Advocating for humane
and effective drug policies*
Gloria Lai

*West Africa:
a new frontier for drug policy?*
Adeolu Ogunrombi

Uruguay's advances in drug policy
Milton Romani Gerner

The UN in 2016: A watershed moment
Anand Grover

- ESSAYS -

*State regulatory powers
and global legal pluralism*
Víctor Abramovich

Lies engraved on marble and truths lost forever
Glenda Mezarobba

*Is humanitarian action independent
from political interests?*
Jonathan Whittall

- IMAGES -

Global protests - Through the photographers' lens
Leandro Viana

- EXPERIENCES -

Occupying Hong Kong
Kin-man Chan

- INSTITUTIONAL OUTLOOK -

Family philanthropy in Brazil
Inês Mindlin Lafer

- CONVERSATIONS -

"Every voice matters"
Kasha Jacqueline Nabagesera

"They have to give us back our comrades alive"
Gerardo Torres Pérez, María Luisa Aguilar

- VOICES -

Mass e-mail surveillance: the next battle
Anthony D. Romero

BRAZIL: CRITICAL REFLECTIONS ON A REPRESSIVE DRUG POLICY

Luciana Boiteux

- *How alternative national drug policies reinforce the need for changes at the global level.* •

ABSTRACT

This article addresses the topic of international drug control and Brazil's adherence to drug conventions and human rights treaties. Moreover, it analyses the changes in the current prohibitionist drug model based on new international experiences and on the UN General Assembly Special Session (UNGASS) to be held in 2016, given the inefficiency of repressive policies that have led to increased violence, incarceration and rights violations.

KEYWORDS

Drug policy | International treaties | Prohibition | Repression

• • •

Current statistics on the abusive consumption of psychoactive substances, the rising number of users and the enormous amount of drugs that are sold illegally point to a far worse problem of use/abuse than existed in the early the 20th century,¹ when narcotic and psychotropic substances were not yet subject to any form of legal or specifically criminal control.²

Similarly, the creation of a prohibitionist system³ - due to international conventions that have imposed a strict criminal control on illegal drugs and the expansion of international cooperation against drug trafficking - has not brought the results which the prohibitionist system claims it would bring: eradicating the production of illegal drugs and reducing consumption through a supposed increase in protection of public health.

Given this situation it should be noted that Brazil is a signatory to all the international drug control conventions, which have been, without exception, translated into domestic law, and that Brazil is characterised by its broad implementation of the prohibitionist policy, which was easily adapted to Brazil's own repressive model.⁴

Although it was not Brazil, but rather the US, that was the primary instigator of prohibition, there have been at least two occasions when Brazil was a protagonist of prohibition. First was the criminalisation of the possession and sale of cannabis in 1830 in Rio de Janeiro by the state legislature, before this substance was included on the list of internationally controlled drugs.⁵ Second, was the support given by the Brazilian delegate Dr. Pernambuco Filho during discussions at the Second International Opium Conference, held in Geneva in 1924, for the prohibition of marijuana. Dr. Pernambuco Filho sided with the Egyptian delegation in defending the inclusion of this plant, together with opium and cocaine, on the list of controlled substances, even though the issue was not initially on the agenda

for discussion.⁶ According to Kendall,⁷ the speech by the Brazilian delegate, who claimed that marijuana was “as dangerous as opium”, helped rally support for the Egyptian proposal that ended up being approved at the conference.

Currently, international drug policy is based on three conventions: the Single Convention on Narcotic Drugs of 1961 and its Additional Protocol of 1972, the Convention on Psychotropic Substances of 1971 and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. All three were established under the aegis of the United Nations and have been signed and ratified by more than 95% of the world’s countries.⁸

Nevertheless, Uruguay has recently passed a law regulating the production, sale and consumption of cannabis both for recreational and therapeutic purposes. In the US - the “cradle” of prohibition - four states have already legalised the consumption of cannabis for recreational purposes: Colorado, Washington State, Oregon and Alaska, despite the ban at the federal level. Another twenty-four US states have authorised the drug for medical purposes.⁹ There are also initiatives in place in countries such as Costa Rica, which has reduced sentences for women convicted of drug trafficking, and Ecuador, which has pardoned “mules” and small-time dealers and changed its drug law to recognise objective quantities in order to distinguish between users and traffickers, establishing more proportional penalties for these offences. These and other international experiences with alternative approaches that are now recognised, even by the Organization of American States,¹⁰ have marked the current moment in history and are partly in conflict with the texts of the prohibitionist conventions.

These changes on the national level are threatening the stability of the international system, particularly given the shift in public opinion, which is now more open to reforming the current model of drug laws and treaties. Moreover, in addition to the examples cited above, the positive results of the new drug law in Portugal should also be noted. In 2001 the country decriminalised the possession of all drugs for personal use and has managed to reduce consumption among adolescents as well as increase access to treatment.¹¹ Against this backdrop there are at least three countries that have assumed a prominent role in international discussions - Colombia, Mexico and Guatemala - which are the leading voices calling for discussions to be reopened on the topic at the United Nations. The most recent news on this front is the UN General Assembly Special Session (UNGASS) in 2016 which will discuss the drug issue.¹²

Accordingly, what we have today, more than 100 years since the first prohibitionist treaties, is the realisation that despite the widespread acceptance (and ratification) of drug control conventions by governments, the intended goals of reducing consumption, curbing production and eradicating these substances have not been achieved. This is despite the fact that incarceration rates for drug crimes are high in most countries, especially in Latin America.¹³ Meanwhile the authorities, by prioritising incarceration and the enforcement of “anti-drug” conventions over international human rights treaties, which are hierarchically superior, have been inflicting large-scale and widespread rights violations worldwide under the pretext of complying with drug laws.¹⁴

To understand this issue, we can take the example of Brazil. In 2006 Brazil passed the “new” Drug Law, No. 11,343/06, which makes formal progress in both recognising the rights of users and also in the harm reduction strategy it establishes. This law, despite providing for the decriminalisation of the user (article 28),¹⁵ increased the minimum sentence for the crime of trafficking (article 33) from three to five years, which has been identified as the primary cause of over-incarceration in Brazil. The country ranks fourth in absolute number of prisoners, behind only the US, China and Russia, with more than 500,000 prisoners in total, while drug trafficking is the second highest cause of incarceration (nearly 26%).¹⁶ A survey conducted in Rio de Janeiro and Brasília found that most prisoners convicted of drug trafficking were first-time offenders who were arrested alone, unarmed, in possession of small amounts of drugs and with no connection to organised crime.¹⁷

Since this offence is considered a “heinous crime”, the Brazilian judiciary reinforces the repressive model by routinely denying suspects the right to release pending trial and also by rarely applying alternative sentences to imprisonment.¹⁸ This has resulted in a significant increase in the number of people imprisoned in inhumane conditions, as has already been denounced in the Inter-American Court of Human Rights, in the case of the Urso Branco Prison.¹⁹ In 2002 a massacre of dozens of inmates occurred at the prison, which is located in the state of Rondônia.

Briefly, some other examples of human rights violations committed in the name of enforcing “anti-drug” laws can be seen in Indonesia, which frequently applies the death penalty for drug traffickers, and in Latin America where the spraying of coca plantations causes serious ecological and human harm due to the chemicals that are used. Moreover, we can also cite the violation of the individual rights of consumers to privacy and the freedom to use their own bodies as they wish without harming others. Finally, we should also mention the collective rights of the indigenous populations of Latin America to use traditional psychoactive substances, such as the coca leaf, essential to the affirmation of their customs and culture, which are not respected by drug control laws and treaties.

There are currently more signatory countries of the UN drug conventions, which operate under the war on drugs paradigm, than countries that have ratified and enforced human rights treaties. If we analyse the situation in Brazil, while the country was quick to sign all the anti-drug conventions, the same cannot be said about its efforts to adhere to international human rights treaties. Indeed the very opposite occurred, i.e. a belated ratification of international human rights treaties, which only started in the 1980s and 1990s. Moreover, some important treaties still need to be incorporated into Brazilian law, namely the UN Convention for the Protection of All Persons from Enforced Disappearance.²⁰

Therefore it can be said that Brazil’s broad acceptance of drug control treaties, including during the civil-military dictatorship of 1964-1984, is not the result of a general endorsement of the international agenda, but rather a specific internal interest to intensify repression in various fields, including in its drug policy. Meanwhile the country has been slow to adhere to the universal and regional systems of human rights protection as a result of the structural violence practiced by the Brazilian state and its adoption of a punitive criminal policy. The result has been an increase in violence, overcrowding of prisons and a rise in the consumption of illegal substances such as crack, the use of which has spread throughout the country²¹ as a direct result of prohibition.²²

More recently, prohibition of some drugs has prevented the population from having access to essential medicines for certain critical illnesses, such as autism and epilepsy in children, for which medical marijuana may be an effective treatment.²³ Regardless of this medical evidence, the repressive model restricts access to this treatment and thus denies any therapeutic benefits of cannabis. There has however been some recent progress, such as the decision of the Federal Council of Medicine and the Regional Council of Medicine of the State of São Paulo (CREMESP), which authorised, for specific cases, the use of cannabidiol, a derivative of cannabis sativa.²⁴

Medical discourse in relation to health protection plays a prominent role in the current drug control policy. Despite this rhetoric, economic interests shape the policy in several ways. For example, it is noted that prohibited drugs and semi-clandestine consumption coexist – in a contradictory manner - with legal “therapeutic” substances manufactured by large multinational companies. It is therefore clear that the distinction between what is prohibited and what is legal is made by political and legislative criteria influenced especially by economic interests and not by considerations based on health protection.²⁵

The fact is that, in the choice of the behaviours that are criminalised under the justification of “health protection”, and in the actions of the courts that enforce such criminalisation, there is a major contradiction between drug control treaties and human rights treaties. For example, the Convention of 1961 expressly bans the smoking and ingestion of opium, as well as the simple chewing of coca leaves (an ancestral practice in the Andean region), and it bans the non-medical use of cannabis (a cultural tradition of Mexicans), establishing a time frame for the eradication of these plants, i.e. in blatant violation of the human rights of these people and their ancient customs.

Similarly the Convention of 1988 contains provisions intended to eradicate the cultivation of narcotic plants, and it was this treaty that definitively internationalised the “war on drugs” policy that legitimised, among other things, US military intervention in other countries. This policy also recommended longer prison sentences for drug crimes, not only for drug traffickers but also for users.²⁶

The problem of this punitive discourse is that it not only defines the enemy, but that it also transfers most of the responsibility to the Latin American countries that produce the drugs. The militarisation of the “war” on drugs, police

violence, the preference for a symbolic criminal law,²⁷ increased sentences and mass incarceration are consequences of the incorporation and reinforcement of this punitive discourse in Brazil.²⁸

This repressive policy, reinforced by the commotion and sensationalism propagated by the corporate media, is intended to guarantee the election of “hardline” conservative politicians and to secure, both in the US and in Brazil, the approval of large budgets for public security and the construction of prisons or, in the words of Christie, “*for the crime control industry*”,²⁹ a market that is worth billions of dollars per year.

Overcoming the binary model of repression and prohibition: experiments at the national level

Since the last century, most developed countries have established a prohibitionist and militaristic policy, influenced by the US, the primary goal of which is to reduce the production of drugs at any cost, while imposing excessive obligations on developing countries, but guaranteeing high profits for the black market that has thrived from drug prohibition.

Meanwhile, some European countries such as Portugal (since 2001), Holland (since the 1970s) and, more recently, Uruguay (since 2014) and the US states mentioned earlier, have taken steps to decriminalise and regulate the consumption and sale of cannabis and to introduce harm reduction programmes.

Since 1912, when the international community created the first multilateral drug control treaty, thirteen such treaties have been discussed, drafted, signed and ratified by most countries in the world, which decided to adopt a common strategy to address the drug problem. However few concrete results have come from the implementation of these treaties, while the production, trafficking and consumption of illegal substances continues worldwide.

In light of this situation, we must seriously ask ourselves whether this international policy is the best approach and stress the need to consider alternatives to the current model with respect to the cultural, ethnic and economic elements of the problem, instead of persisting with a uniform and repressive system that has not even come close to achieving its proposed goals.

Notably in developing countries like Brazil, where the social impact of illegal drugs and trafficking is particularly high and where violence against racial minorities is still a major problem, it is especially urgent to criticise the current model - which is totally outdated - and look for new solutions. This includes the need for an urgent reform of the international drug control system in order to develop national models that can be assessed by their results in terms of realising rights rather than restricting them.

Although there is no possibility of a radical overhaul of the international drug control system in the near future, even though this would be desirable, perhaps with the opportunity of UNGASS 2016, and despite the resistance to change by the vast majority of countries, there is a chance of reaching some consensus towards a more flexible interpretation (while keeping the formal integrity) of the treaties. That way, countries can pursue their own alternative solutions to the international model.

And what about the situation in Brazil? The prospects are not encouraging, given the ultra-conservative profile of the National Congress elected in 2014, not to mention the repressive institutional practices - so entrenched in the judiciary and in the population itself, which legitimise imprisonment as a magic solution to crime and drug abuse. On the other hand, a bill is already pending in Congress that would create a regulated cannabis market, proposed by Federal Congressman Jean Wyllys. Therefore, given the greater international openness for discussion and the new alternatives adopted in some countries, it is hoped that Brazil will engage in the debates on the topic in order to try and break with this repressive tradition that violates human rights and, in doing so, reach new heights as a country that is more just and protective of rights. This, however, will only be possible if we change the current paradigm.

NOTES

1. Louisa Degenhardt et al., "Illicit Drug Use," in *Comparative Quantification of Health Risks Global and Regional Burden of Disease Attributable to Selected Major Risk Factors*, Majid Ezzati et al. (Geneva: World Health Organization, 2004), 1109–76, accessed April, 2015, <http://www.who.int/publications/cra/chapters/volume1/1109-1176.pdf>.
2. In Brazil, the research that has been conducted on drug consumption cannot be easily used for comparison, because of the different methodologies that are used; the following are some examples: 1. Brazilian Center for Psychotropic Drug Information (CEBRID, acronym in Portuguese), from 2005, accessed May, 2015, http://www.obid.senad.gov.br/portais/OBID/biblioteca/documentos/Dados_Estatisticos/populacao_brasileira/II_levantamento_nacional/327451.pdf; 2. II Brazilian National Alcohol and Drugs Survey (LENAD, acronym in Portuguese), in 2012, accessed May, 2015, <http://inpad.org.br/lenad/resultados/relatorio-final/>; 3. Fiocruz from 2013, the most recent survey on crack users in the Brazilian capitals, accessed May, 2015, <http://portal.fiocruz.br/pt-br/content/maior-pesquisa-sobre-crack-já-feita-no-mundo-mostra-o-perfil-do-consumo-no-brasil>.
3. By prohibition I mean the model of drug control adopted by the prevailing international conventions, which require criminalisation with prison sentences for possession, even for personal consumption, and for all forms of production, sale and transportation of drugs classified as illegal (Luciana Boiteux, "O controle penal sobre as drogas ilícitas: o impacto do proibicionismo sobre o sistema penal e a sociedade" (Tese de doutorado, Faculdade de Direito da USP, 2006)).
4. Boiteux, "Controle penal".
5. Maurício Fiore, *Uso de "drogas": controvérsias médicas e debate público* (São Paulo: Mercado de Letras, 2007).
6. Elisaldo Araujo Carlini, "A história da maconha no Brasil," *J Bras Psiquiatr.*, 55, no. 4 (2006): 314–317; José Lucena, "Os fumadores de maconha em Pernambuco," *Arq Assist Psicopatas* 4, no. 1 (1934): 55–96.
7. Robert Kendell, "Cannabis condemned: the prescription of Indian hemp," *Addiction* 98 (2003):143–51.
8. Luciana Boiteux, Luciana Peluzio Chernicharo e Camila Souza Alves, "Human Rights and Drug Conventions: Searching for Humanitarian Reason in Drug Laws," in *Prohibition, Religious Freedom, and Human Rights: Regulating Traditional Drug Use*, org. Beatriz Caiuby Labate and Clancy Cavnar (Berlin, Heidelberg: Springer-Verlag, 2014): 1–23.
9. "23 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits", last modified on July 1, 2015, accessed April, 2015, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881>.
10. See the report of the Organization of American States (Organização dos Estados Americanos (OEA). *Alternatives to incarceration for drug-related crimes* 2014, accessed in June 2015, http://www.penalreform.org/wp-content/uploads/2015/04/Report_on_Alternatives_to_Incarceration-ENGLISH.pdf).
11. Caitlin Elizabeth Hughes and Alex Stevens, "What can we learn from the Portuguese decriminalization of illicit drugs?" *Br J Criminol.* 50, no. 6 (2010): 999–1022. doi: 10.1093/bjc/azq038.
12. Martin Jelsma, "UNGASS 2016: Prospects for Treaty Reform and UN System-Wide Coherence on Drug Policy," Brookings Institute, abr. 2015, accessed June, 2015, <https://dl.dropboxusercontent.com/u/64663568/library/tni-ungass2016-prospects-for-treaty-reform-un-system-wide-coherence-drug-policy-2015.pdf>.
13. Luciana Boiteux y João Pedro Padua, "La desproporción de la Ley de Drogas: los costes humanos y económicos de la actual política en Brasil," in *Justicia desmedida: Proporcionalidad y delitos de drogas en America Latina*, 1a. ed. org. Catalina Pérez Correa (Ciudad de Mexico: Fontamara, 2012): 71–101.
14. Boiteux, Chernicharo e Alves, "Human Rights".
15. See, Luciana Boiteux, "A nova lei antidrogas e aumento da pena do delito de tráfico de entorpecentes," *Boletim IBCrim.* 167, no. 14, (out. 2006): 8–9.
16. Source: DEPEN. A análise do crescimento desproporcional do número de presos no Brasil pode ser encontrada em Boiteux e Pádua ("La desproporción", 71-101).
17. Luciana Boiteux et al., *Tráfico de Drogas e Constituição* (Brasília: Ministério da Justiça, 2009).
18. Luciana Boiteux, "Drogas y prisión: la represión contra las drogas y el aumento de la población penitenciaria en Brasil," in *Sistemas Sobrecargados: Leyes de drogas y cárceles en América Latina*, ed. Pien Metaal and Coletta Youngers (Amsterdam, Washington: TNI/WOLA, 2010): 30–39.
19. Corte Interamericana de Derechos Humanos, "Medidas Provisórias a respeito da República Federativa do Brasil. Caso da Penitenciária Urso Branco", Set. 2005, accessed April, 2015, http://www.corteidh.or.cr/docs/medidas/urso_se_05_portugues.pdf.
20. Vanessa Oliveira Batista, Luciana Boiteux e Thula Pires, *Direitos Humanos* (Brasília: Ministério da Justiça, 2009).
21. Fundação Oswaldo Cruz (Fiocruz). *Estimativa do número de usuários de crack e/ou similares nas capitais do país* (Rio de Janeiro, 2013), mimeo.
22. Crack is a derivative of cocaine that is cheap to produce and extremely profitable and that has adapted to the low-income consumer market in the poor outskirts of Brazil's cities. Some authorities attribute the expansion of production and consumption of crack to the greater efficiency of the police in controlling the precursor chemicals used to refine cocaine, which they claim has encouraged producers to manufacture this more impure form of cocaine that has acquired wide acceptance precisely because of its low cost and quick high. See: "Uso de Crack Cresceu Após Ações Contra Cocaína, Segundo PF", *Revista Época*, 28 Apr. 2010, <http://revistaepoca.globo.com/Revista/Epoca/0,,EMI136401-15518,00.html>. Although there are no empirical studies to prove this claim, it is considered a likely hypothesis.
23. Renato Malcher-Lopes, "Canabinóides ajudam a desvendar aspectos etiológicos em comum e trazem esperança para o tratamento de

autismo e epilepsia," *Revista da Biologia* 13, no. 1 (2014): 43–59, doi: 10.7594/revbio.13.01.07.

24. "Conselho Federal de Medicina libera uso compassivo do canabidiol no tratamento de epilepsia," last modified on December 11, 2014, accessed April, 2015, http://www.portal.cfm.org.br/index.php?option=com_content&view=article&id=25239:cfm-no-211314&catid=3.

26. Boiteux, Chernicharo e Alves, "Human Rights".

27. "Symbolic criminal law" is a criminal policy discourse based on an alleged intimidatory effect of the sentence and on the symbolism of criminalisation as justifications for harsher penalties to reduce the number of crimes that are committed, without any evidence to this effect.

28. Nilo Batista, "Política criminal com derramamento de sangue," *Discursos Sediciosos* 3, nos. 5-6 (1998): 77–94.

29. Nils Christie, *A indústria do controle do crime* (Rio de Janeiro: Forense, 1998).



LUCIANA BOITEUX - Brazil

Luciana Boiteux is Master and PhD in Criminal Law. She is also Associate Professor of Criminal Law and Coordinator of the Research Group on Drug Policy and Human Rights at the Federal University of Rio de Janeiro (UFRJ).

email: luboiteux.adufrj@gmail.com

Received in June 2015.

Original in Portuguese. Translated by Barney Whitoak.

"This paper is published under the Creative Commons Noncommercial Attribution-Share Alike 4.0 International License"