

DRUG POLICY IS A WOMEN'S ISSUE¹

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- *Drug policy, criminal justice* •
and gender in Brazil

ABSTRACT

This article presents analyses that have been systematised by the Gender and Drug Project of the Land, Labour and Citizenship Institute on the intersections of the topics of gender, criminal justice and drug policy. In this regard, the paper illustrates some dangers of restricting drug policy to the fields of public security or criminal justice. It also demonstrates the need to centralise gender in connection with other social markers to analyse violations and access to rights.

KEYWORDS

Drug policy | Gender | Incarceration | Criminal justice

1 • Introduction

Drug-related crimes are among the leading reasons for incarceration worldwide. There is an increasing body of evidence that the “war on drugs” is a costly policy² that has failed to produce a “world free of drugs” and that serves to justify highly militarised policies.³

According to the report “From coercion to cohesion”, published in 2010 by the United Nations Office on Drugs and Crime (UNODC), countries that introduced harsh penalties for these crimes have higher incarceration rates but have not, however, seen any significant long-term impacts on use, dependency or drug-related crimes, in particular when compared to countries that do not have strict punishments.

Moreover, various studies have analysed the sizable impact of drug policy on female incarceration. Based on these studies and on the culmination of 20 years of work developed by the Land, Labor and Citizenship Institute (or ITTC using its acronym in Portuguese) in guaranteeing women’s rights and combating incarceration, we consider it urgent to discuss the criminal justice system in connection with incarceration, drug policy and gender. It was in this context that the Gender and Drug Project emerged in 2015 with the intention of mapping and analysing this discussion on drug policies in the context of female incarceration.

This article will present some of the analyses systematised during the two years of the project on the intersections of the topics of gender, criminal justice and drug policy. In this regard, the paper illustrates some dangers of restricting drug policy to the fields of public security or criminal justice.

2 • Getting to grips with the topic: drug policies, gender and incarceration

In our efforts to map the national and international situation regarding drugs and the justice system, we found that drug policies have a variety of models,⁴ and not necessarily exclusionary. In other words, a drug policy adopted by one country is not defined by a single model, but by a combination of models. In Brazil, for example, Law 11,343 of 23 August 2006,⁵ which established the National System of Public Policies on Drugs, adopts decriminalisation for people who “purchase, keep, store, transport or possess drugs for personal consumption”. At the same time, it maintains the criminalisation with a prison sentence for those who “import, export, dispatch, prepare, produce, manufacture, purchase, sell, display for sale, offer, store, transport, possess, keep, prescribe, administer, deliver for consumption or supply drugs”.

Brazil’s drug policy, therefore, is not defined exclusively by either the decriminalisation model or the criminalisation model. Instead, it is the result of a combination of both. Consequently, we determined that policy models cannot be analysed in isolation: it

is necessary to observe the policies of different countries and cover all the models adopted in each of them.

We initially thought that countries that adopted flexible policies based on the models of legalisation, decriminalisation or depenalisation would show a reduction in incarceration rates. However, once we understood that the policies are not based on a single model, we proceeded to investigate which models were in place in these countries and how incarceration rates in each of them were affected.

We began by setting up a database so we could cross-reference information on the rise in incarceration, both overall and female, in countries that adopted “flexible” drug policy models.⁶ This would allow us to determine in each country whether making drug policies more flexible led to decarceration.

We looked at whether the incarceration rates had increased or decreased since the adoption of flexible drug policies until the present day.⁷ This database became the Drug Policy and Incarceration: an overview of America and Europe,⁸ launched in early 2016. From these results, we found that, contrary to our initial assumption, more than half the countries that we studied presented an increase in incarceration: of the 36 countries that made their drug policies more “flexible”, 22 presented an increase in overall incarceration and 19 presented an increase in female incarceration.⁹

As a result of these findings, we turned our attention to the countries that had presented an increase in their incarceration rates with the intention of examining similarities between them and understanding the drug policies that were adopted in each one. We identified, for example, that in the overwhelming majority of cases the “flexibility” was only related to drug consumption, while the cultivation, production, transport and sale were still generally the target of criminalisation and repression. We also found that in several cases the “flexibility” related to consumption only applied to marijuana, while criminalisation was maintained for all other drugs. The conclusion we drew from this research is that a drug policy based on “flexibility” but that is restricted to certain behaviors and certain substances does not necessarily result in decarceration.¹⁰

The case of Brazil is an example of this: the decriminalisation of drug use achieved by Law 11,343 did not lead to decarceration. Instead, starting in 2006, the year the law was passed, we can observe an explosion in incarceration rates, particularly female incarceration,¹¹ caused primarily by drug-related crimes.

According to the World Prison Brief (WPB), the increase in the Brazilian prison population between 2006 and 2014 was 51.4%. The increase in the female prison population, meanwhile, was 84.5%. Infopen, the official database on the country’s prison population containing information last published in 2014 by the Ministry of Justice’s National Prison Department, reveals that drug trafficking is the reason behind the incarceration of 27 per

cent of the total prison population, with the percentage for men standing at 25 per cent and for women 63 per cent. Additionally, a survey conducted by the Research Consortium on Drugs and the Law (*Coletivo de Estudos Drogas e Direito* or CEDD),¹² by the researcher Luciana Boiteux, shows that between 2005 and 2013, the total number of people imprisoned for drug trafficking increased 345 per cent, while the increase in the number of women imprisoned for the same reason over the same period was 290 per cent.¹³

The drug law that was introduced in 2006 and is still in effect today established harsher penalties for drug trafficking and created new criminal behaviors that are punishable by prison. The law states that criminal behaviours related to trafficking are “non-bailable and not eligible for probation, pardon, exemption, amnesty or release on own recognizance,” thereby additionally serving to keep offenders in prison. Heidi Cerneka, the director of ITTC who has worked with the topic of female incarceration for 20 years, points out that these harsher penalties are justified primarily by a supposed effort to detain the right people. In other words, the understanding that drug users should not be sent to prison is repeatedly accompanied by the idea that traffickers belong behind bars. Anyone who is not unquestionably a user, explained Cerneka, must therefore be a “trafficker” who deserves their sentence.

Although Law 11,343 was important in that it represents progress on the subject of treatment for drug users, it still keeps them in the grips of the criminal justice system. Even though they do not go to prison, these people still face criminal charges,¹⁴ since illegal drug use is still a crime.¹⁵

In Brazil, currently, there is no official objective standard (i.e. established by law or jurisprudence) for distinguishing between drug use and drug trafficking. Without this distinction, only the public security forces and the Judiciary have the power to decide who to stop, who will be considered a user or a trafficker, who poses a “threat” and which punishments, sentences or measures should be issued, etc. As such, it is up to the people who operate public security and criminal justice to determine who will have access to which policies, whether treatment for drug use or repression for trafficking and crime. In practice, judging from the profile of the Brazilian prison population, it is clear which people are assigned to criminal justice: black people from poor neighbourhoods.

3 • Dialogue and reflection: debates on drug policy in 2015 and 2016

In an attempt to solve the arbitrary way in which the security forces and the criminal justice system distinguish between drug users and traffickers, proposals have been made to establish standards for making this distinction.

Over the course of 2015, the Supreme Court resumed its judgment of Special Appeal No. 635659, which it first began to hear in 2011 and which challenges the constitutionality

of article 28 of Law 11,343. The Special Appeal analyses the possibility of decriminalising drug possession for personal use, with an initial focus on marijuana.

In this case, some court justices revisited the discussion on the adoption of objective criteria for distinguishing between drug use and drug trafficking.¹⁶ Objective criteria are standards that help classify individual behaviours that are used in drug-related offences to identify behaviours that carry different penalties according to the drug law of each country. Generally speaking, the objective criteria proposed is the amount of a substance that differentiates users from traffickers or even small-time dealers from large traffickers.¹⁷

Besides these questions about how the criteria should be defined and who should have the authority to define them, the accumulated experience of ITTC with incarcerated women reveals a number of dangers in adopting such criteria.¹⁸

We believe, for example, that the definition of quantities can lead to the automatic criminalisation of people who possess a quantity that exceeds the permitted amount. In other words, users who are stopped by the police in possession of a quantity of psychoactive substances that exceeds the defined maximum amount will automatically be classified as traffickers. This will make it easier to frame people and make seizures: all that is needed is to plant a specific quantity of drugs in a person's belongings for them to be classified as a trafficker.

At the same time, if someone in possession of a quantity that is within the permitted limit can still be considered a drug trafficker, the current reasoning is maintained that anyone who possesses drugs can be classified as a trafficker. In this case, users can still be arrested on trafficking charges.

Furthermore, we believe that distinguishing between large drug traffickers and small-time dealers based on quantity ignores the fact that possession of large quantities of drugs does not necessarily mean the person in question has a senior position in the drug trafficking "hierarchy". In other words, people in possession of large quantities of drugs should not automatically be classified as large traffickers. This is because people who work in the drug trade do not always control the quantity they are allocated to store or sell.

Although these standards would be intended to make the investigation processes and trials more thorough, they do not change the important issues related to the incarceration of people for drug-related offences: the functioning and the role of the security forces and the Judiciary.

It can be said that the establishment of objective criteria does not alter the paradigm of criminal selectivity, since they will not apply, for example, to the initial contact by the police. The police contact, when the person in possession of drugs is brought into the criminal justice system and subject to repressive public security policies, will continue to occur at the discretion of the security forces. That is, the establishment of legal quantities for drug possession will have no impact on people who are considered "suspects" by the

police. Therefore, if the police continue to stop the same people, specifying a quantity that defines who is a drug trafficker may only have the effect of legitimising the detention of people who today would already be arrested as traffickers.

Also on the subject of police stops, neither will the establishment of objective criteria alter the dangers of the police being the only witnesses in the cases that go to trial. According to the research “Pre-trial detention and the Drug Law – a study on drug trafficking arrests in the city of São Paulo”, released in 2011 by the Centre for Studies on Violence (or NEV according to its acronym in Portuguese) of the University of São Paulo, for 70 per cent of the cases judged in São Paulo the only witnesses are the police officers who worked the case.¹⁹ In this respect, as pointed out by the journalist from the *Consultor Jurídico* legal journal, Sérgio Rodas, in an article published on 17 February 2017, “if it were the same officers who made the arrest, how could they testify objectively about their own acts?”²⁰

The example of Mexico is significant in that it illustrates many of the aforementioned dangers. In 2009, the country passed the *Ley de Narcomenudeo* (Small-Scale Drug Law) that amended the country's General Health Act of 1994. The Law decriminalises possession for the consumption of small quantities (up to 5g of marijuana, 2g of opium, 500 mg of cocaine, 0.015 mg of LSD, 40 mg of methamphetamine and 50 mg of heroin or diacetylmorphine). The Public Prosecutor's Office is responsible for judging, on a case-by-case basis, whether the quantities seized are within the legal limits. The Law also establishes a distinction between “use” and “compulsive use”, with compulsive use being considered anyone who presents symptoms of dependency. Mandatory treatment is established for people who are compulsive users.

The article “Mexico: The Law Against Small-Scale Drug Dealing”, by Jorge Hernández Tinajero and Carlos Zamudio Angles²¹ explains that users found in possession of more than the permitted quantity are treated as criminals and can be convicted to a prison sentence of between 10 and 36 months. In these cases, the law does not even require the authorities to prove that the seized drugs were intended for sale. The authors also point out that it is common practice for users to be detained and searched without a warrant based on “suspected trafficking”. In effect, therefore, anyone found in possession of drugs can be considered a criminal. It is important to note here, as the authors do, the absence of any control and anti-corruption mechanisms on the actions of the police force, which creates incentives for the practices of corruption, extortion and abuse of power. The article concludes that the war on drugs in Mexico ends up criminalising the most marginalised people. In the cities, poor young people are targeted by the authorities because they are deemed more likely to be drug users and because of their appearance. The article points out the need to consider that people enter the illegal drug market due to lack of economic opportunity, which is more prevalent among the most vulnerable in society, notably peasants, young people and women.

Given the situation described above, we believe that the establishment of objective criteria could be used as a way to justify incarceration or even as a means to supposedly

detain the right people, enabling the arbitrary acts of public security agents sanctioned by the criminal justice system.

As seen in the Mexico case, the establishment of objective criteria to distinguish between criminal behaviours could create a dangerous illusion of neutrality in police action, making it unquestionable because it is grounded on “concrete” standards. Moreover, it could also forge misleading ways for judges to be “secure” in their decision, as if the new standards would safely and definitively define who could be considered a user.

The belief that a “concrete” standard is needed to distinguish between who can be considered a user or a trafficker once again reinforces the dichotomy between the two, using fragile factors considering the diversity of situations. Although these standards may be a response to the arbitrariness of the security forces and the Judiciary, when applied they do not consider the specifics of each situation. We need to ask whether these new standards would result in decarceration, in particular for the profile of people who are currently imprisoned – as users or traffickers – and also whether this distinction would have the effect of guaranteeing the rights of both.

4 • Gender: (in)visibility, impacts and selectivity in prison

Since its foundation, ITTC has been working with women in conflict with the law both inside and outside prison. The Institute encounters in the prison environment and in the criminal justice system the inequalities based on gender asymmetries in their intersection with other markers of difference, since we believe that both the prison environment and the criminal justice system produce and reproduce gender inequality and violence.

We have found, as pointed out by Bruna Angotti,²² that “prison is a powerful place of stigmatisation, within a context of structural oppression of sex, gender, race and class”. The author also emphasises that prison represents yet one more violent place among so many others from previous experiences, whether in the maintenance of violent spaces or in the reinforcement of gender stereotypes. The prison system, just like the justice system, contributes to enhancing violence against women and perpetuating gender inequality.²³

It is interesting to note how gender is a topic that is frequently hidden over the course of the passage of men and women through the criminal justice system. According to the report “Women in Prison”, released by ITTC on 7 March 2017, matters of gender are systematically ignored in criminal cases, from the initial police contact until the end of the proceeding. Several public bodies fail to make a distinction between cases of men and women, from courts to Public Defender’s Offices, State Security Departments, the Ministry of Justice and even the National Justice Council, which has oversight powers over the justice system. During the research for the report, it was found that police reports,

for example, suppress important information on maternity, which makes it difficult for women facing charges to access certain rights, such as house arrest.

The invisibility of specific gender issues in official information and data on the prison system²⁴ leads to the reinforcement of gender violations in this environment and, subsequently, makes it difficult to create and provide access to specific policies and to guarantee rights.

According to Angotti,²⁵ “it is undeniable that there are particularities in the imprisonment of men and women, whether on account of the binary structure that separates the sexes into two distinct categories, attributing to them their own social roles, the social effects of this division or even the physical characteristics of the female body”. It is interesting to note how the environment can serve to reinforce gender roles and stereotypes related to specific ideas about “women”. Whether through the control of conjugal visits,²⁶ the repression of affective-sexual relationships that occur between female prisoners,²⁷ the promotion of domestic chores for women²⁸ or the offer of training courses and jobs that reinforce gender stereotypes,²⁹ prisons and even juvenile detention centers impose standards for the expected behaviour of women in these environments.

According to Heidi Cerneka,³⁰ social and family issues also contribute to distinguishing between the experiences of women in prison and those of men. Although there is no official survey in Brazil on maternity among female prisoners, it is safe to say, based on the experience of the ITTC, that many of them are responsible for looking after children, for other family members or people from their close social circle, a role socially attributed to women. As a result, prison can also have an economic and affective impact on the family. Also on the subject of maternity inside prisons, the study “Dar à luz na sombra” (Giving Birth in the Dark)³¹ reveals that maternity in prison generally appears to be controlled by the institutions. The study also shows that women who are mothers and/or caregivers experience prison in a hyper and hypo-maternity paradox, i.e. prison can either represent a space where new mothers spend 24 hours per day with their babies or it can serve as a rupture of the maternal bond.

According to the working group responsible for the publication “Women, Drug Policies and Incarceration: a guide for policy reform in Latin America and the Caribbean”, released by the Washington Office on Latin America (WOLA), the International Drug Policy Consortium (IDPC), Dejusticia and the Inter-American Commission of Women (CIM) of the Organization of American States (OAS), with the support of ITTC, the use of prison as a response to drug-related offences has disproportionately affected women. The publication shows that prison further limits the chances of women finding a decent job in the formal employment market after they are released. This is particularly true in the market for caretaking jobs (domestic workers, nannies, caregivers etc.), since their criminal record and prison time is frequently the greatest impediment to them finding employment. Even though the Judiciary and the labour market are not directly related, it is interesting to note that the profile of women who face the greatest economic hardship is the same as most of the women who are caught up in the criminal justice system.³²

Female prisoners in Brazil fit a certain profile. In general, they are young, black and have a low level of schooling, just like the overall profile of the Brazilian prison population. According to the aforementioned survey by Infopen, 50 per cent of the women are between 18 and 29 years old, 68 per cent are black and just 14 per cent have finished high school.³³ This profile, however, is not exclusive to Brazil: in Latin American prisons, women are mostly young, black, indigenous and latina, and have a low level of schooling. They are also mostly first-time offenders, family breadwinners and say they have already suffered some type of violence.³⁴

The situation experienced by these women, according to Angela Davis,³⁵ has historic roots and is interspersed with certain marks of distinction. In her book “Women, Race and Class”, the author turns her attention to countries with experiences in slavery and points out that black women who progressed from the condition of merchandise at the end of the 19th century to rights-holders do not fully enjoy, in the 21st century, all the same political, economic, social and affective rights as white people. The political, economic and social inequalities identified by Davis are the result of societies that are structured on racism and, once they are structured as such, all relations will carry the markers of inequality based on this mechanism.³⁶ Along the same lines, the lawyer Dina Alves presents, in the context of Brazil, the influence of racist theories on relations between race and crime developed in the 19th century, during the formation of Brazilian legal thought. She argues that racism is an anchor of criminal selectivity generating a “continuum from *senzala* (slave quarters), *favela* (slum) to prison”.³⁷

For the black lawyer and activist Deborah Small,³⁸ it is essential to understand how the racist mechanisms of society are reinforced by the current drug policy. According to Small, the so-called “war on drugs” is an effective tool for criminalising blacks, since it criminalises entire poor territories and the relationships contained within them.

In this regard, it is important to understand not only how the profiles of drug users and traffickers are formed, but also the various profiles associated with drug use. It is also important to keep in mind how drug policies reproduce and modernize a series of inequalities based on gender, race and class. It is these reflections that make it possible to consider and develop other drug policy tools that are not anchored solely or primarily in incarceration and that are not intended solely to control and repress these same women.

5 • Conclusion

It is safe to say that incarceration, in particular female incarceration, is affected by the drug policies adopted in different countries.

Understanding the centrality of the topic of gender in connection with other social markers is to understand the existence of specific issues that need to be taken into account with regard to both violations and concrete proposals on access to rights.

It is also to understand that the formulation of drug policy should not be limited to the field of public security or criminal justice. Thinking about these policies in other terms, therefore, involves thinking about them in connection with policies on healthcare, social services, employment and income distribution, among others, considering local realities.

We believe this will make it possible to find ways to help guarantee rights and reverse the inequalities primarily experienced by women due to drug policies. After all, we consider drug policy to be a woman's issue.

NOTES

1 • Ana Luiza Voltolini Uwaj, Bruna Bumachar, Denise Neri Blanes and Heidi Cerneka contributed to this article.

2 • "The Alternative World Drug Report: Counting the Costs of the War on Drugs – Executive Summary," Count the Costs, 2016, accessed June 15, 2018, <https://www.unodc.org/documents/ungass2016/Contributions/Civil/Count-the-Costs-Initiative/AWDR-exec-summary.pdf>.

3 • "Ending the Drug Wars – Report of the LSE Expert Group on the Economics of Drug Policy," LSE, May 2014, accessed June 15, 2018, <http://www.lse.ac.uk/ideas/Assets/Documents/reports/LSE-IDEAS-Ending-the-Drug-Wars.pdf>.

4 • For more information, see: "Glossário – Tipo de Políticas de Drogas," Instituto Terra, Trabalho e Cidadania, 2015, accessed June 15, 2018, <http://itcc.org.br/glossario-tipos-de-politicas-de-drogas/>.

5 • "Lei nº 11.343, de 23 de Agosto de 2006," Presidency of the Republic, Chief of Staff, Subdivision for Legal Affairs, 2006, accessed June 15, 2018, http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/l11343.htm.

6 • To identify the countries that have adopted flexible policies, we used the report "Levantamento sobre legislação de drogas nas Américas e Europa e análise comparativa de prevalência de uso de drogas" of the National Department on Drug Policy

of the Ministry of Justice that listed 34 countries. However, it was found that Ukraine and the United States, despite having tolerant legislation on drug use, were not included in the report. Adding these two countries, we established a total of 36 legislations that have depenalised, decriminalised or legalised the use or otherwise legalised and/or regulated the cultivation, production and/or sale of an illicit psychoactive substance (marijuana, cocaine, lysergics etc). The information found on the Asian and African continents was inconclusive and, therefore, was not included in the report.

7 • To monitor incarceration rates, we used the database available at: "World Prison Brief Data," Institute for Criminal Policy Research, 2018, accessed June 15, 2018, <http://www.prisonstudies.org/world-prison-brief-data>.

8 • Available at: "Política de Drogas e Encarceramento: Um Panorama América-Europa," ITTC, 2016, accessed June 15, 2018, <http://itcc.org.br/infografico/>.

9 • An increase in the total prison population was seen in Argentina, Belgium, Bolivia, Brazil, Chile, Colombia, Ecuador, Honduras, Hungary, Ireland, Italy, Luxembourg, Mexico, Netherlands, Paraguay, Peru, Portugal, Slovakia, Slovenia, Spain, United Kingdom and Venezuela. An increase in the female prison population was seen in Argentina, Brazil,

Chile, Colombia, Ecuador, Honduras, Hungary, Ireland, Italy, Luxembourg, Mexico, Netherlands, Paraguay, Peru, Slovakia, Slovenia, Spain, United Kingdom and Venezuela.

10 • For further details, see: Lucia Sestokas and Nathália Oliveira, "O Que Experiências em Países Tolerantes com o Uso de Drogas Têm a Nos Mostrar?" *Le Monde Diplomatique*, April 19, 2016, accessed June 15, 2018, <https://diplomatique.org.br/o-que-experiencias-em-paises-tolerantes-com-o-uso-de-drogas-tem-a-nos-mostrar/>.

11 • For further details, see: Lucia Sestokas and Nathália Oliveira, "Guerra às Drogas: Heranças e Novos Paradigmas." April 5, 2016, accessed June 15, 2018, <https://jota.info/artigos/guerra-drogas-herancas-e-novos-paradigmas-05042016>.

12 • Coletivo de Estudos Drogas e Direito (CEDD) is formed by researchers from 9 Latin American countries whose objective is to analyse the impact of criminal legislation and legal practice in the area of drugs, seeking to generate information and promote informed debate about the effectiveness of current policies and recommend alternative approaches for fairer and more effective policies. More information on the website: *Drogas y Derecho*, Homepage, 2018, accessed June 15, 2018, <http://www.drogasyderecho.org/index.php/es/>.

13 • Luciana Boiteux, "Mujeres y Encarcelamiento por Delitos de Drogas." *Colectivo de Estudios Drogas y Derecho*, 2015, accessed June 15, 2018, http://www.drogasyderecho.org/publicaciones/pub-priv/Luciana_v08.pdf.

14 • In practice, a person stopped by police officers in possession of illegal drugs can be taken to the police station for questioning or be detained on the spot on trafficking charges. At the police station, the police chief may decide that he/she is dealing with a user and send them to a special criminal court, where they will receive punishments such as community service or educational assignment. If the police chief determines that the case involves trafficking, they may be sent to a custody hearing. At the custody hearing, the judge may rule that

the arrest was illegal if they understand that the person is a user (even in cases of framing, no-knock raids, etc.) and send them to the special criminal court. If the judge determines that it is a trafficking case, he/she will issue a sentence that could include detention (if he/she deems that there is sufficient evidence to justify detention and that the person poses a threat to the public order or to the observance of the law) or other measures (probation, bans on entering certain places, bans on contacting certain people, bans on leaving the city, curfew after a certain time of day, etc.).

15 • The association of drug use with crime led us to question whether this is a common association and whether it exists in all countries. The research that produced the *Drug Policy and Incarceration: an overview of America and Europe* reveals that in at least 20 countries in the Americas and Europe the use of psychoactive substances is not considered a crime.

16 • Justice Luís Roberto Barroso voted to establish a quantitative criterion to distinguish between drug use and drug trafficking and Justice Luiz Edson Fachin said the quantitative criterion should be determined by the legislative branch. For more information, see the position of the rapporteur, Justice Gilmar Mendes "Recurso Extraordinário 635.659 São Paulo," *Migalhas*, August 20, 2015, accessed June 15, 2018, <http://www.migalhas.com.br/arquivos/2015/8/art20150820-10.pdf>, the vote of Justice Edson Fachin ("RE 635.659-RG – Rel. Min. Gilmar Mendes Voto-Vista Min. Edson Fachin," *Migalhas*, 2015, accessed June 15, 2018, <http://www.migalhas.com.br/arquivos/2015/9/art20150910-12.pdf>) and the notes for the oral vote of Justice Luís Roberto Barroso ("RE 635.659 Descriminalização do Porte de Drogas Para Consumo Próprio," *Migalhas*, 2015, accessed June 15, 2018, <http://www.migalhas.com.br/arquivos/2015/9/art20150911-04.pdf>).

17 • Objective criteria can also be based on purity, type (hard or soft), the value of the drug that the person possesses, or a combination of these

factors. These criteria can be used to differentiate between “problem users” and “recreational users”, “users” and “traffickers”, “small-time dealers” and “large traffickers”, and “small producers” and “large producers”, etc.

18 • For further details, see: “10 Anos da Lei de Drogas: É Estratégico Discutir Critérios Objetivos?” ITTC, September 29, 2016, accessed June 15, 2018, <http://itc.org.br/10-anos-lei-de-drogas-e-estrategico-discutir-criterios-objetivos/>.

19 • The study analysed 667 cases of detention for possession of narcotics in the city of São Paulo from the months of November and December 2010 and January 2011.

20 • Sérgio Rodas, “74% das Prisões por Tráfico Têm Apenas Policiais Como Testemunhas do Caso.” Consultor Jurídico, February 17, 2017, accessed June 15, 2018, <http://www.conjur.com.br/2017-fev-17/74-prisoos-traffic-apenas-policiais-testemunhas>.

21 • Jorge Hernández Tinajero and Carlos ZamudioAngles, “Mexico: The Law Against Small-Scale Drug Dealing”, Transnational Institute, *Series on Legislative Reform of Drug Policies* no. 3 (2009).

22 • Bruna Angotti, “O Encarceramento Feminino como Ampliação da Violação de Direitos”. *Le Monde Diplomatique*, p. 4, December 7, 2015, accessed June 15, 2018, <http://diplomatie.org.br/o-encarceramento-feminino-como-ampliacao-da-violacao-de-direitos/>.

23 • For further details, see: “Infográfico Mulheres e Tráfico de Drogas: Uma Sentença Tripla,” ITTC, August 12, 2015, accessed June 15, 2018, <http://itc.org.br/infografico-mulheres-e-traffic-de-drogas-uma-sentenca-tripla/>.

24 • For further details, see: “Situação das Mulheres Presas no Brasil Pode Ser Mais Grave do Que Apontam Dados Oficiais,” ITTC, December 14, 2015, accessed June 15, 2018 <http://itc.org.br/situacao-das-mulheres-presas-no-brasil-pode-ser-mais-grave-do-que-apontam-dados-oficiais/>; “Nota ITTC: ‘Brasil é o Quinto País Com Mais Mulheres Encarceradas no Mundo’, According to the report

of the Institute For Criminal Policy Research, published in *O Globo*,” ITTC, October 5, 2015, accessed June 15, 2018 <http://itc.org.br/brasil-e-o-quinto-pais-com-mais-mulheres-encarceradas-no-mundo-segundo-relatorio-do-institute-for-criminal-policy-research-publicado-em-o-globo/>.

25 • Angotti, “O Encarceramento Feminino”, 2015, p. 2.

26 • The researcher Natália Corazza Padovani, in her article “No olho do furacão: conjugalidades homossexuais e o direito à visita íntima na Penitenciária Feminina da Capital”, analyses the right to conjugal visits and looks at which relationships are considered family or matrimonial relationships by the prison’s governing body. Her analysis focuses on the struggle for the right to homosexual conjugal visits. Available at: Natália Corazza Padovani, “No Olho do Furacão: Conjugalidades Homossexuais e o Direito à Visita Íntima na Penitenciária Feminina da Capital,” *Cadernos pagu* 37 (July-December 2011): 185-218, accessed June 15, 2018, <http://www.scielo.br/pdf/cpa/n37/a07n37.pdf>.

27 • The researcher Natália Corazza Padovani, in her article “Poder e sexualidades dissidentes na prisão: discutindo a relação entre poder e prazer (homo)sexual na Penitenciária Feminina da Capital.”, analyses the relationship established, by the legal system, between sexual behaviours considered illegitimate and criminality during a study period of just over thirty years, covering past and present forms of classifying and managing the sex of the female prisoners. Available at: Natália Corazza Padovani, “Poder e Sexualidades Dissidentes na Prisão: Discutindo a Relação Entre Poder e Prazer (Homo)sexual na Penitenciária Feminina da Capital.” 34° Encontro Anual da ANPOCS Seminário Temático 30: Sexualidade, Gênero: Ética e Política, 2010, accessed June 15, 2018, <http://www.anpocs.com/index.php/papers-34-encontro/st-8/st30-2/1650-npadovani-poder/file>.

28 • According to an article published in the magazine *Época* in 2015, girls from one unit of

the Fundação Casa youth reform centre said that they receive the clothes, sheets and towels from the male unit of the same reform centre to wash. Available at: Flávia Tavares, "A Vida e os Problemas das Meninas Infratoras." *Época*, May 27, 2015, accessed June 15, 2018, <http://epoca.globo.com/tempo/noticia/2015/05/vida-e-os-problemas-das-meninas-infratoras.html>.

29 • It is interesting to note that very often the vocational courses and jobs offered to the detained women and girls reinforce some gender stereotypes. An example of such occupations are those related to the kitchen, sewing, cleaning, caretaking or beauty activities.

30 • Heidi Cerneka, *Incarcerated Women of Color and How Race and Mental Illness Issues Affect Them and Are Manifest in Their Prison Time*. Unpublished manuscript. Loyola University Chicago School of Law, 2015.

31 • "Dar À Luz na Sombra: Condições Atuais e Possibilidades Futuras para o Exercício da Maternidade por Mulheres em Situação de Prisão," Instituto de Pesquisa Econômica Aplicada, 2015, accessed June 15, 2018, <http://www.justica.gov.br/noticias/201clugar-de-crianca-nao-e-na-prisao-nem-longe-de-sua-mae201d-diz-pesquisa/pesquisa-dar-a-luz-na-sombra-1.pdf>.

32 • According to the research "Mulheres e Trabalho: Breve Análise do Período 2004-2014", released by IPEA in March 2016, black women are more susceptible to unemployment: in 2014, 10.2 per cent were unemployed, whereas just 4.5 per cent of white men were unemployed in the same period. Moreover, the percentage of people who are in precarious working conditions is 39.08 per cent among black women, followed by 31.6 per cent among black men, 26.9 per cent among white women and finally 20.6 per cent among white men. It is also black women who have the lowest remuneration and who represent the largest contingent of workers without formal employment contracts and in self-employed activities. According to the analysis conducted in the research, even

though income inequality has narrowed, in 2014 black women still earned less than 40 per cent of the average salary of white men, or R\$946 per month compared to R\$2,393. See: "Mulheres e Trabalho: Breve Análise do Período 2004-2014," Instituto de Pesquisa Econômica Aplicada, 2016, last accessed June 15, 2018, http://trabalho.gov.br/images/Documentos/Noticias/Mulher_e_trabalho_marco_2016.pdf.

33 • For the purposes of comparison, the Pesquisa Nacional por Amostra de Domicílio household survey from 2015 conducted by the IBGE statistics institute identifies that the percentage of black women in Brazil is 53.6 per cent. Moreover, the 20-29 age group represents 7.5 per cent of the Brazilian female population. Finally, a survey by Todos pela Educação (available at: "79,8% das Meninas Concluíram o Ensino Fundamental Até os 16 Anos em 2014," Todos Pela Educação, March 8, 2016, accessed June 15, 2018, <http://www.todospelaeducacao.org.br/reportagens-tpe/37285/798-das-meninas-concluiram-o-ensino-fundamental-ate-os-16-anos-em-2014/>) reveals that the percentage of girls up to 19 years of age in Brazil who finish high school is 63 per cent.

34 • Boiteux, "Mujeres y Encarcelamiento," 2015.

35 • Angela Davis, *Mulheres, Raça e Classe* (São Paulo: Boitempo, 2016).

36 • *Ibid.*

37 • Enedina do Amparo Alves, "Rés Negras, Judiciário Branco: Uma Análise da Interseccionalidade de Gênero, Raça e Classe na Produção da Punição em uma Prisão Paulistana." Master's Dissertation in Social Sciences at Pontifícia Universidade Católica de São Paulo, p. 129, 2015, accessed June 15, 2018, <https://sapientia.pucsp.br/bitstream/handle/3640/1/Enedina%20do%20Amparo%20Alves.pdf>.

38 • In a talk given on 29 July 2016, documented at: "A Melhor Política de Drogas É Não Ter Política de Drogas," ITTC, August 5, 2016, accessed June 15, 2018, <http://ittc.org.br/melhor-politica-de-drogas-e-nao-ter-politica-de-drogas/>.



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