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Research Paper

From prohibition to harm reduction? An analysis of the adoption of the Dutch harm reduction approach in Brazilian drug laws and practice

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ABSTRACT

Background: Brazilian drugs law and policy used to focus on prohibition of drug use. In 2006, inspired by the Dutch harm reduction approach, Brazil adopted *Law 11.343/06*, a new drugs law focused at harm reduction. Dutch harm reduction is characterized by a distinction between users and traffickers of drugs, and by a distinction between drug markets (soft drugs and hard drugs). Notwithstanding the new drugs law, some Brazilian scholars claim that Brazil still favors prohibitionism towards drug use. The current study investigates the extent to which the Dutch harm reduction approach is reflected in Brazilian law and practice.

Methods: First, a documentary analysis of the Brazilian law and policy documents is performed to see whether they incorporate the distinctions between actors and markets. Second, a case law analysis of 102 judicial decisions delivered by the Rio de Janeiro courts of appeal was conducted to investigate to what extent judges refer to aspects of the harm reduction approach.

Results: Findings of this study indicate that law and policy documents now indeed separate users from traffickers, but soft drugs are not separated from hard drugs. Moreover, where the distinction between users and traffickers in the Dutch law is solely based on the quantity of seized drugs, the Brazilian judge has large discretionary powers to decide whether the suspect is a user or a trafficker.

Conclusion: The Brazilian legal system has partially incorporated the Dutch harm reduction approach. The law distinguishes users from traffickers, but does not prescribe criteria to make the distinction. The lack of objective criteria by Brazilian law and policy reflects in subjective and inconsistent decisions delivered by the courts, which impairs an approach of harm reduction towards drug users.

Introduction

In the 1970's the Netherlands experienced a crisis of heroin use. By the early 80's, 1 in every 500 people was using the drug in the country (Blok, 2017). In Rotterdam, the central train station was the stage of continuous tension between travelers and opioid dependents, who chose the area to use drugs and hang around. In 1987, Reverend Visser from the protestant St. Paul's Church (Pauluskerk) transformed an empty lot next to the station into a facility that would welcome drug users, naming it *Perron Nul*. The intention was to provide heroin users with shelter, food and a safe location to use drugs, without risking being persecuted by the police or spreading diseases, and to resolve the problems of public annoyance around the station (Van der Hoeven, 2014).

The Reverend's actions followed a mentality of harm reduction that pervaded Dutch policy-making and health care interventions. The mentality is one that understands drug use as a health and social issue rather than a criminal behavior. Hence, Dutch public policies adopted harm reduction as the most efficient state approach to drug use, aiming to limit health damages on drug users whilst also minding societal impacts and nuisance issues.

In the decades that followed several jurisdictions were influenced by the harm reduction approach developed in the Netherlands, adopting varied changes on their law and policy. In 2006, Brazil promulgated a federal law that tackled the issue of drugs in the country (*Law 11.343/06*), bringing innovations in the handling of drug users. Some national scholars pointed out that the new drugs law incorporated the Dutch harm reduction, whereas others challenged that perception and refuted the adoption of the approach by the Brazilian legal system.

The present paper, therefore, seeks to analyze whether Brazil's law and policy have incorporated harm reduction in accordance with Dutch foundations. The goal is to draw a comparative analysis that clarifies the position of the South-American country regarding drug use. Furthermore, the research aims at the practical developments of

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Brazilian law and policy through the examination of judicial decisions that address drug-related offenses. It is expected that such a complementary methodology of theoretical and practical perspectives will answer the research question: to what extent has the Brazilian legal system incorporated the Dutch approach of harm reduction towards drug use?

Origins and developments of the Dutch harm reduction

Following the international tendency of prohibition-based drug control policies, the Netherlands entered the Opium Act into its national lawbooks in 1919, pursuing a repressive system against the drug market (De Kort & Korf, 1992). In the 60′s, hashish and *cannabis* gained popularity in the Netherlands and coercion towards *cannabis* users in particular started to be criticized by media campaigners. By the 1970′s, the repressive approach slowly became a policy of tolerance (Korf, Riper & Bullington, 1999). Finally, in 1976, the Dutch parliament revised the Opium Act and created the national drug policy, which main principles were the prevention/alleviation of social and individual risks caused by drug use; the differentiation between recreational and medical drugs; the prioritization of repressive measures against drug trafficking; and the highlighting of the inefficacy of criminal law to handle drug use (Grapendaal, Leuw & Nelen, 1995).

Henceforth the Netherlands approached drug use as a social problem rather than a deviant behavior of specific individuals. Policy innovations followed several experiments, such as the syringe exchange programs in the 80′s and the testing services for synthetic drugs in the 90′s (De Kort & Kamer, 1999). The predominant mentality was that a harsh law enforcement seeking to eradicate drug use would most likely enhance social and health issues on drug users (Leuw, 1991). The harm reduction approach aimed at preventing that the risks inherent to the abuse of intoxicating substances further harmed the individual, his/her immediate environment and society as a whole (De Kort & Cramer, 1999).

As such, Dutch policies distinguished between drugs that present unacceptable risks to the users' health (hard drugs) and *cannabis* products, which offer lower risks (soft drugs). This strategy better equipped Dutch policies when pursuing its primary goal of health protection (Tweede Kamer, 1995). In that regard, according to the 1976 policy, use and possession of small quantities (up to 30 gs) of soft drugs were an infringement rather than an indictable offense. C*offee shops* emerged as state-granted spaces where to purchase small quantities of soft drugs. The purchase of hard drugs remained illegal, although prevention and treatment were still the priority.

In 1995, a new policy amended the 1976 national drug policy. The amendment addressed international concerns and accusations of lenience towards drug use (Tweede Kamer, 1995). It pointed out that developments in the dynamics of drug use caused social and administrative problems in the Dutch society, prompted by nuisance issues, involvement of organized crime in drug trafficking and criticism from foreign countries due to the external effects of Dutch drug policies. Therefore, although the new policy did not see the need for a complete re-examination of the previous policy, a more administrative approach was prioritized. The main changes were the reduction of substance quantity for personal use (from 30 gs to 5 gs), stricter regulation of coffee shops' activities, decentralization of policy-making decisions (more discretion to the municipalities dealing with specific nuisance issues) and strengthening of the repression against drug trafficking.

Currently, the national drug strategy in the Netherlands is a balanced approach of risk limitation and reduction of drug-related offenses and nuisance. In that sense, Dutch drug policies follow the guidelines set by both the *1976 Opium Act revision* and the *1995 amendment*, characterized by two distinctive foundations. Firstly, there is a specific quantity-limit that separates drug use from drug traffic (separation of actors), by which possession/purchase of five grams or less of (soft) drugs is not a criminal offense *per se.* Secondly, it maintains the distinction between hard and soft drugs, targeting at a separation of markets and thus at a better handling of different seriousness of drug use.

International influence of the Dutch approach

Despite international criticisms, the Dutch approach has influenced several foreign legal systems. In the European context, the debate regarding the decriminalization of *cannabis* and medical prescription of heroin has gained force in many countries since the 90′s (Solinge, 1999). More recently, the Council of the European Union has adopted harm reduction by combining with the World Health Organization and the United Nations Joint Programme on HIV/AIDS to recommend a compilation of services for users of injectable drugs, e.g. opioid substitution treatment (Rhodes, Sarang, Vickerman & Hickman, 2010). Reaching farther than Western countries, Dutch drug policies have influenced developing jurisdictions such as Brazil.

In 1989, influenced by Reverend Visser's *Perron Nul*, NGOs and public universities in Santos - the Brazilian city with the highest rate of HIV/AIDS contamination at the time - implemented needle exchange programs to handle the aggravating outcomes of increasing drug use (Santos and Malheiro, 2010). In the following years, many harm reduction local initiatives were conducted in the health sector, for example the Center of Study and Therapy of Drug Abuse (CETAD), in Salvador, and the Center of Study and Research of Drug Use Care (NEPAD), in Rio de Janeiro (Oliveira & Santos, 2010). After the 2001 National Conference of Mental Health, the first document policy adopting harm reduction in the country was draft: *The Health Ministry Policy of Integral Care of Users of Alcohol and Other Drugs* (Santos and Miranda, 2016). The policy created the Centers of Psychosocial Care of Alcohol and Other Drugs (CAPS ad), which are still in function to date.

In 2006, a Brazilian federal law regarding drugs was promulgated (Law 11.343/06. Legislação 2006, August 23). The mentality surrounding the new legislation apparently incorporated the harm reduction approach as developed by the Dutch and adopted by the health sector in Brazil. It departed from the international prohibitionism, finally welcoming to the legal system a health-oriented attitude towards drug users.

Prior research

Despite the academic interest in the *Law 11.343/06*, limited attention has been paid to the influence of Dutch drug policies in the Brazilian legal order. Tangential researches have approached historical developments of the war on drugs in Brazil (Boiteux, 2015; Brandão, 2017; Fiore, 2012; Forte, 2007; Rybka, Nascimento & Guzzo, 2018) and the role of drug users in the new law, without reflecting on harm reduction (Campos & Alvarez, 2017; Leal, 2007; Machado, 2010; Martinelli, 2009). The harm reduction approach has been subject to study, but national efforts focussed on the developments either in the health sector or unrelated to international influences (Gomes & Vecchia, 2018; Morera, Padilha & Zeferino, 2015; Santos & Miranda, 2016; Santos, Soares & Campos, 2010).

Similarly, few researches addressed the adaptation of law in books into law in action, and the only studies that investigated the application of the *Law 11.343/06* by Brazilian legal practitioners failed to produce a comparative research with the Dutch approach (Grillo, Policarpo & Verissimo, 2011; Santoucy, Conceição & Sudbrack, 2010). Most studies that compared Brazil's drug policy with other countries did not include the Netherlands (Dieter, 2011; Fraga, 2007; Ventura & Benetti, 2014), with the exception of Rigoni's (2015) ethnographic research on the experiences of agency workers with drug users in Amsterdam (the Netherlands) and Porto Alegre (Brazil). However, no researches were found regarding the legal perspective between the Brazilian and Dutch drug policies.

The current study

Ergo, although Brazilian drugs law and policy have been subject to reviews over the past years, no studies targeted the connection between the drug policies of Brazil and the Netherlands, and the practical implementation of harm reduction in the Brazilian legal system. The lack of research covering this specific framework confirms a current gap in the academia. It is this gap that the present study will fill by analyzing the extent to which Brazil incorporated Dutch harm reduction foundations. Such an analysis should not be limited to the letter of the law but also take into consideration the *application* of the new law in the daily routine of the country's judges, for sentencing decisions are the cornerstone of legitimacy of a criminal justice system (Van Wingerden, 2014). The current research thus focusses on two aspects: 1) the theoretical incorporation of harm reduction in Brazilian law and policy, and 2) the practical incorporation of harm reduction by Brazilian judges.

Methodology

The theoretical incorporation of harm reduction

To study the theoretical incorporation of Dutch harm reduction in Brazilian law and policy, a documentary analysis of Brazilian documents regarding drugs on the federal level is performed. The documents analyzed are the *Law 11.343/06*, the *National Drugs Policy* and the *Health Ministry Policy of Integral Care to Users of Alcohol and Other Drugs*. Other documents, such as the *Integrated Plan of Combat to Crack and Other Drugs* and the *National Alcohol Policy*, are not included in the present research due to their focus on a specific substance rather than the government approach to drugs in general. The revision of such documents is relevant, but because it is beyond the scope of the present study, we recommend that future research includes those documents for a more comprehensible analysis of Brazilian drug policies.

The present documentary analysis investigates to what extent Brazilian law and policy reflect the two foundations of the Dutch harm reduction approach: i) separation of actors (users/traffickers); and ii) separation of markets (soft/hard drugs).

The practical incorporation of harm reduction

To study the practical incorporation of Dutch harm reduction is the Brazilian legal system, court verdicts are analyzed to see whether Brazilian judges refer to i) separation of actors (user/trafficker) and/or ii) separation of markets (soft/hard drugs). Brazil is the fifth largest country in the world, with a population of over 200 million people. To narrow the sample to a feasible number, the research focusses on only one of the 27 Brazilian states: Rio de Janeiro, a central state in the elaboration of national drug policies and where the drug issue is aggravated. The eight courts of appeal of Rio de Janeiro are taken as samples, since most cases do reach the courts *ad quem* (Jesus, Oi, Rocha & Lagatta, 2011) and there is a greater relevance in analyzing decisions that are final.

The research used as source the official website of the Justice Court of Rio de Janeiro (TJRJ), via its search tool of jurisprudence. The tool allows the viewer to select a timeframe, the competence of the intended courts and to insert keywords to channel the search. The paper selected, then, the rulings of Rio de Janeiro's courts of appeal delivered between the date of the entry into force of the *Law 11.343/06*, October 8th 2006, and May 2019. Using the keywords “drug user”, the research was able to find all appeals that received a ruling on drug-related cases in the state. That search resulted in 4291 verdicts, to which a systematic sampling method was performed to randomly select one of every 40 verdicts. This resulted in a sample of 108 verdicts, which enabled in-depth analyses of each decision's content, otherwise unfeasible if a larger sample was selected. Relevant information from the verdicts referring to the separation of actors and markets is processed in Microsoft's Excel.

Findings

The theoretical incorporation of harm reduction

Separation of actors

Law 11.343/06. In the Dutch harm reduction approach, the quantity of drugs carried/purchased by a person is decisive for the distinction between user and trafficker. Separating users from traffickers redefines the legal placement of users. In that sense, the new drugs law innovated by placing drug users in a different chapter from drug traffickers and by establishing distinct penalties for each category. The previous law envisaged the penal types of both users and traffickers as criminal offenses ensuing custodial sentences, only varying the sentence length according to the verb of action ("acquire", "sell", "supply") (Law 6.368/76. Legislação 1976, October 21, arts.12–19). In the new law, the category of users is now divided from the traffickers (and others such as producers and suppliers), in distinct sections.

The *Law 11.343/06* establishes that those who acquire, keep, storage, transport and/or bring with themselves, for personal use, unauthorised drugs or substances in disagreement with legal or regulatory determination are submitted to the following penalties: I) warning over the effects of drugs; II) community service; and/or III) educational measure of attendance to program or educational course (Law 11.343/06, art. 28). Consequently, drug use still configures a criminal offense by the new law. This is reinforced by the later mention in paragraph 4 of art. 28 of recidivism as drug user and the applicable penalty for re-offenders. Nonetheless, custodial sentences are no longer on the list of potential penalties for drug use in the new law as it was in the previous law.

In that regard, the *Law 11.343/06* enshrines that it is the judge's responsibility to determine whether the apprehended drug was for personal use by examining the nature and quantity of the apprehended substance, the locality and conditions in which the action took place, and the individual's social and personal circumstances, conduct and priors (Law 11.343/06, art. 28, par.2). Hence, the *Law 11.343/06* has not established a specific quantity-limit of substance possession/purchase to define the action as drug use, as done by the Dutch. The Brazilian law provided the judge with discretionary powers to distinguish drug use from traffic.

Despite the absence of quantity-limit, this approach is comparable to current Dutch policies. Although drug use is not officially a criminal offense in the Netherlands, local authorities might prohibit it for public order or health protection of young people, e.g. at schools or public transportation (Netherlands Drug Report, 2018). Likewise, the possession of small quantities of drugs for personal use might be punishable by imprisonment, even though this type of drug use is not targeted by the Dutch police. The Dutch quantity-limit to characterize possession/purchase of drugs for personal use is five grams but another revision of the Opium Act in 2012 resulted in the possibility, under certain circumstances, of arrest and prosecution of individuals caught with less than this quantity (Netherlands Drug Report, 2018).

The Dutch police and prosecutors now observe the principle of expediency in which "in principle a police dismissal will follow if a person is carrying less than 5 gs of cannabis" and "the public prosecutor has the discretionary power to refrain from prosecuting a criminal offense if this is judged to be in the public interest" (Netherlands Drug Report, 2018, p.2 & p.4). Therefore, both documents (*Law 11.343/06* and the *Opium Act revision*) leave to institutional actors to determine whether certain confiscated substances are for personal use: in the Brazilian case to the judge, and in the Netherlands mostly to the police and prosecutor.

National drugs policy (PNAD). One of the postulates of the *PNAD* is the

recognition of the differences between the user, the individual in undue use, the dependent and the drug trafficker, in order to give them distinct treatments (Brasilia, 2011). However, the policy does not establish any criterion to distinguish the mentioned categories. The *PNAD* document is divided in five sections: prevention; treatment, recuperation and social insertion; social and health harm reduction; offer reduction; and researches, studies and evaluations. In the first three sections, the policy addresses drug users and individuals in undue use, whilst the fourth section approaches drug traffic and drug dependence. The absence of specific parameters to define each category has particular relevance in the final section, in which methodological precision is demanded from activities of harm, demand and offer reduction through the promotion of surveys and systematic researches, evaluated by a body of reference within the scientific community. The blurred lines of distinction between the figures mentioned in the policy, lacking the Dutch objectivity of five grams or less of soft drugs to characterize use, are an obstacle to the methodological precision of scientific researches on the topic.

Health ministry policy of integral care to users of alcohol and other drugs (PAIUAD). As the first policy to officially adopt harm reduction in the country, the *PAIUAD* affirmed that previous initiatives within the health care realm that implemented harm reduction did so in a split and local capacity, with limited breadth, concentrating only on the HIV/AIDS contamination (Brasil. Ministério da Saúde 2003). The policy, thus, set an assistance network focussed on the communal care of social and health services, emphasizing rehabilitation and social reinsertion of users of alcohol and other drugs. The goal was to construct a strategy of prevention, treatment and education regarding the use of alcohol and drugs. However, in its incorporation of harm reduction, the *PAIUAD* did not address the Dutch separation of actors. Rather than explicitly distinguishing drug users from traffickers, the policy posited that trafficking is often a way to make money in the poorest communities in Brazil, and often done to support drug use.

Because the *PAIUAD* (2003) is previous to the *Law 11.343/06*, the context of its draft was the one in which both use and traffic of drugs were criminalized by the old law (Law 6.368/76). To that effect, the policy condemned the Legislative choice for prohibitionism, where the focus lies on drugs instead of on drug users. According to the policy, this promotes the exclusion of drug users as a less important figure in the issue of drugs, hindering ergo an effective care and treatment approach. The *PAIUAD* did not attempt, however, to formulate a separation of actors to enable such an approach.

Separation of markets

Law 11.343/06. The second foundation identified in Dutch harm reduction policies is the distinction between drugs that offer unacceptable risks (hard drugs) and *cannabis* products that offer lower risks and are therefore acceptable (soft drugs). In that matter, the *Law 11.343/06* has not distinguished between types and severity of drugs, similarly to the absence of quantity criteria in its art. 28 and paragraphs. Types and quantity of drugs are left entirely for the competent judge to evaluate: As enshrined by art. 28, the judge must decide if the case is of drug use according to the nature and quantity of the apprehended substances, and other elements.

National drugs policy (PNAD). Correspondingly to the absence of substance quantity to distinguish dependents from individuals in undue use, and drug users from drug traffickers, the *PNAD* does not acknowledge the difference between drugs that cause unacceptable risks and those who offer lower risks, as do the Dutch. The policy refers to legal and illegal drugs, and to undue use and abuse without establishing parameters to separate one from the other. The later enactment of the *Integrated Plan of Combat of Crack and Other Drugs* suggests a state concern with that specific drug, but this concern is not addressed in the federal policy. Contrarily, the Netherlands, through their national policy of separation of markets, offer a package of strategies to tackle different types of drugs presenting different risks, such as the policy letters “A combined effort to combat ecstasy” (2001), “*Cannabis* policy document” (2004) and “Medical prescription of heroin” (2009).

Health ministry policy of integral care to users of alcohol and other drugs (PAIUAD). Similar to the two documents above analyzed, the *PAIUAD* did not effect the Dutch separation of markets. Contrarily, as seen in the 'Separation of actors' section, the policy condemns the criminalization of drugs, criticizing the legal distinction between licit and illicit drugs. The policy suggests that decriminalization does not mean a complete lack of state control but rather a better handling of the production, distribution and consumption of any psychoactive substance. The *PAIUAD* uses the example of tobacco, a legal substance to which social programs are enacted to restrict its harmful effects without taking away individual rights of self-regulation (Brasil, 2003, p.36).

Nevertheless, the *PAUIAD*, as a document policy, gives priority to alcohol over other drugs. It posits that alcohol is the most harmful substance in use in the country, as corroborated by statistics exposed in the section 'Alcoholism: the biggest public health issue' (p.17). The largest part of the document is alcohol-oriented, mostly placing both soft and hard drugs, as defined by the Dutch, as "other drugs". By doing so, the policy's mapping of a coordinated harm reduction national strategy loses concreteness. It suggests that all drugs should be regulated, without distinguishing seriousness of harm and without considering the Brazilian contextual framework at the time. Although the Netherlands separate markets and maintain purchase/possession of hard drugs illegal, the country has enacted policy letters to tackle all types of drugs within a health-oriented approach, which has not been done in Brazil.

Table 1 summarizes the aforementioned findings.

The practical incorporation of harm reduction

In the second method of the present research, 108 judicial decisions concerning drug users were randomly selected out of 4291 sentences delivered from October 8th 2006 to May 2019 by the eight criminal courts of appeal of Rio de Janeiro. Of these 108 decisions, 6 (5.5%) were excluded from the analysis because they referred to non-drug related offenses, such as theft, domestic violence and homicide. Another 16 decisions (15%) were under judicial secrecy due to the involvement

Table 1
The theoretical incorporation of Dutch harm reduction foundations in Brazil.

	Separation of actors	Separation of markets
Law 11.343/06	Criteria for distinction left for the competent judge No substance quantity-limit is imposed	No Mention
PNAD	Mention the distinction but no criterion or definition is proposed to separate users from traffickers	No mention
PAIUAD	No mention	Alcohol as the most harmful substance in use in the country Suggests decriminalization and state control of all psychoactive substances

Table 2
Cross-tabulation of the practical incorporation of Dutch harm reduction foundations in Brazil's verdicts (N = 102).

		Mention separation of markets		
		Yes	No	Total
Mention separation of actors	**Yes**	4 (4%)	37 (36%)	41 (40%)
	No	0 (0%)	61 (60%)	61 (60%)
	Total			102 (100%)

of underage or known defendants. In those cases, the sentence report was not entirely available, but using the summary of the decisions, the cases were nonetheless used for the analyses.

The majority of cases (72) concerned defense appeals for the defendant's acquittal, or to change the conviction for trafficking into one for usage, with alternate requests for the reduction of the sentencing time and the softening of the custodial regime. 26 sentences confirmed the traffic conviction but reformed the sentence length or the regime. 10 decisions addressed a prosecutorial appeal and 9 were in response to an *habeas corpus* to release the defendant. The quantity and type of drug, the average length of the carceral penalty and regime imposed varied considerably among the cases. In certain cases, the quantity of seized drugs was under five grams and in others the defendant was found with more than one kilo of substance. Likewise, the cases featured diverse type of drugs such as *cannabis*, cocaine, heroin and/or crack. The majority of sentences established custody as punishment, but non-custody sanctions were also imposed as alternative penalty in 9 cases.

Table 2 shows the reference of the 102 verdicts on drug-related offenses to the separation of actors and markets: The distinction between users and traffickers is mentioned in 41 cases and only four cases also refer to the distinction between soft and hard drugs. That the distinction between users and traffickers is referred to much more frequently can be explained by the fact that the qualification as a trafficker was often the reason for the appeal. It makes sense, then, that the court refers to the topic. In the remaining 61 cases no reference was made to the Dutch harm reduction foundations.

Separation of actors

The most employed Dutch foundation in the analyzed decisions was the separation of actors, with 41 sentences addressing the criteria used to distinguish drug users from drug traffickers. Despite the high proportion of decisions denying the defense arguments of use and confirming the conviction for traffic (61% of 102 decisions), only 32 decisions that charged the defendant as trafficker in fact explained the reasons for such sentencing based on the quantity of substance confiscated.

Alongside the amount of drugs found with the defendant, the diversity and packaging of drugs were the criteria predominantly applied in said decisions. In that sense, substance quantity varied greatly among the cases (e.g. 152.7 g of crack in one case, 2.050 g of *cannabis* and 1.7 g of *cannabis* in another two), but there was always a mention by the judges of the way the drugs were distributed (in several plastic bags) and whether the defendant was found with more than one type of drug. Other elements that corroborated the prosecutorial plea were the association of the defendant with known criminal organizations, demonstrated by eyewitness statements or anonymous tips, and the defendant's possession of radio equipment, weapons or large amount of cash. Those circumstances combined to convince the judge of the mercantile intention of the defendant.

The testimonies of police officers regarding the circumstances of the arrest and the actions of the defendant turned out to be very important for the qualification as a trafficker. Their depositions were fully transcribed in the body of the appeals and the judging courts engaged in a considerably larger effort to certify the legitimacy and coherence of their testimonies than to measure the quantity of apprehended drugs. Therefore, despite the reference of the *Law 11.343/06* in its art. 28, paragraph 2, to the judge's responsibility to define whether the situation configures use or traffic, the Rio de Janeiro's judges relied considerably on the discretion of the police and their perspective on the events, which resembles the principle of expediency enjoyed by the Dutch police.

Another argument often used by the courts when rejecting the defendant's plea to disregard the charge of drug traffic and rule them as users instead, was that the characterization of user does not prevent the parallel characterization of trafficker. As such, similar to the *PAIUAD*, the judges have argued that many users turn to traffic as a way to maintain their drug supply. The courts, however, characterized the defendants in those cases as both users and traffickers, rejecting their defense appeal. Unfortunately, the sentences under examination did not explain the distinction criteria between a defendant who is only a drug user, one who is only a drug trafficker and one who is both.

For most cases, the sentencing fundaments were generic, not presenting objective and replicable parameters of distinction. The majority of the analyzed appeals - 61% in favor of the prosecutorial charge as noted earlier - repeated the same arguments: The diversity and packaging of the drugs in combination with the quantity apprehended, the coherence and legitimacy of the police officers' testimonies and the discard of the defense of use due to the parallel characterization of the defendant as user and trafficker.

The decisions that properly engaged in the differentiation of the two legal figures according to the Dutch separation of actors were the ones that acquitted the defendants (9 sentences). Two cases referred to the quantity of drugs caught with the defendant as insignificant to configure traffic (0.5 g of cocaine and 3.5 g of *cannabis*, 1 g of cocaine and 0.4 g of crack). Another case, which alluded to both the separation of actors and markets, included statistics to rule that the 16 unities of crack found with the defendant were within the limit of use for crack dependents, subsequently discarding traffic. A different case addressed the separation of actors to state that an overall large amount of drugs confiscated from defendants does not have a necessary link with traffic. The decision, joined by three more, urged a more effective participation of the prosecution and the police in establishing that the circumstances of the arrest and the actions of the defendant indicated his/her mercantile intention, beyond the quantity of drugs found. One case, following further that line of argumentation, understood that the confiscated drugs were minimum (1.75 g of cocaine and 3.45 g of *cannabis*) and below the average consumption. Finally, another case combined the small apprehended quantity of drugs with the absence of other elements, such as weapons or cash, to acquit the defendant.

Although in the above cases the judges referred to the distinction between users and traffickers according to the quantity of seized drugs, 60% of the sample cases made no reference to the separation of actors.

Separation of markets

The distinction between soft and hard drugs was scarcely mentioned in the selected sample (only four cases) but, when done so, also referred to the separation of actors. Three of them involved crack use. While two cases affirmed the higher harmful effects of the drug in comparison to other drugs in order to deny the defense appeals, another case stood out for developing a deeper examination of the circumstances of the arrest. The decision brought researches on the specific use of crack, affirming that confiscated quantities of different drugs must be evaluated according to the characteristics of each drug. In that respect, the sentence explained that 16 unities of crack (the amount of drugs confiscated from the defendant) do not equal 16 cigarettes of *cannabis* or 16 paper bags of cocaine, since crack addiction is stronger and requires a larger frequency of use to avoid abstinence crises. Moreover, the judging court considered that crack users often share their drugs and, therefore, the confiscated substance from the defendant might have also belonged to his fellow users. Conclusively, the judging court decided that the

defendant was a user and acquitted him.

Conversely, in a different case, where the defendant carried 78 g of *cannabis* products distributed in 52 bags, the court understood it as drug traffic but accepted the defense appeal to reduce the penalty because of the nature of the drug. The sentence acknowledged the lower seriousness of *cannabis* products in comparison to other drugs, and its reduced negative effects to society.

In the four sentences that addressed the separation of markets, judges made a greater effort in balancing the circumstances of the case in comparison to the cases that addressed the separation of actors. And every decision that mentioned the distinction between seriousness of types of drugs also addressed substance quantities to properly decide whether the defendant was a user or a trafficker, showing a greater alignment with the Dutch approach.

Discussion

The current study investigated the extent to which the Brazilian legal system incorporates the Dutch harm reduction towards drug use. It used a multi-method approach to test the adoption of the Dutch foundations of separation of actors (user/trafficker) and markets (soft/hard drugs) both in law and policy, and in the verdicts of the courts.

The findings of the documentary and case law analyses show that the Brazilian legal system has partially incorporated the foundations of the Dutch approach towards drug use. The Brazilian law separates users from traffickers, with only non-custodial sentences for users, but leaves it to the competent judge to decide over the distinction, whereas the policies are silent concerning the separation criteria. The courts predominantly did not use a quantity-limit of substance to separate users from traffickers, as in the Netherlands, but used other criteria, such as the testimonies of police officers, the diversity of drugs and their packaging. Further, the *Law 11.343/06*, the *PNAD* and the *PAIUAD* did not separate soft drugs from hard drugs, yet the courts in Rio de Janeiro occasionally addressed this distinction with varied outcomes. The Dutch foundations of separation of actors and markets are thus only partially incorporated in the Brazilian legal system, and in a way that differs from the Dutch approach.

The first difference is the central role of the testimonies of police officers in drug-related cases handled by the Rio de Janeiro courts. The majority of the analyzed cases relied on the testimony of the police to define the defendant's action as drug traffic. Although the law leaves the distinction between users and traffickers to the discretion of the competent judge, the case law analysis revealed that they curtailed their own discretion and expanded the police's. Often the courts based their decisions solely on the officers' testimonies without additional elements as recommended by art. 28 - the nature and quantity of drug, the locality of the action and the conduct and priors of the defendant.

Such strategy adopted by the Brazilian legal practitioners unveils the importance of the police in the context of the drug issue in the country. Not only are police officers the first criminal justice actors in contact with drug users, and therefore the immediate authority in power to dismiss or arrest them, they are also the agents in charge of influencing the court in defining the action as use or traffic. Their testimonies encapsulate the behavior of the defendant, the details concerning the diversity of drugs and their packaging as confiscated by them during the arrest. They act thus as the filter and the gavel.

In that respect, the omission in Brazilian law and policy of the central role of the police in the tackling of the drug issue poses a drawback to the practical embracement of harm reduction in the country. Whereas the Netherlands explicitly gives police officers a margin on which to work on, namely the principle of expediency to dismiss individuals caught with five grams or less of soft drugs, the Brazilian Executive and Legislative remained silent over the powers conferred to police authorities. Such legislative silence triggers inconsistency in the Brazilian legal system: Each judging court is free to adopt or reject the testimonies of the officers as it sees fit. Testimonies of police officers can serve as sole proof of the defendant's conviction (Precedent n.70 TJRJ). Therefore, each judge may choose the extent to which the police testimony is accepted as evidence. And, although a margin of appreciation and certain discretion are inherent to judging activities, in the present case the lack of objectivity concerning the elements adopted by each judge to convict or acquit the accused raises questions.

Another difference with the way users are distinguished from traffickers is that Dutch drug policy uses the quantity of seized drugs as criterion, whereas Brazilian judges look at the diversity and packaging of drugs. Despite the fact that the present paper did not perform an analysis to investigate whether the five grams criterion is indeed implemented in practice in the Netherlands, the scope of the research was to verify the incorporation of the Dutch foundations, as enshrined in Dutch drug policies, by the Brazilian legal system. In that vein, the criteria used by Rio de Janeiro courts to make the separation of actors were different from those established in Dutch policies, and it varied considerably from court to court: Judges did not follow a same line of interpretation to reach a decision. This led to sentencing disparity, as some defendants were convicted for traffic by one court and other defendants, whose cases featured similar circumstances, were acquitted by a different judging court.

However, the current study focussed only on the courts of appeal of Rio de Janeiro, which limits the generalizability of the findings: They cannot be automatically extended to the other 26 states. We chose to focus on only one state because this enabled in-depth analyses of the final decisions of higher courts of what is perhaps the most relevant state in Brazil when it comes to the elaboration of national drug policies. Our conclusions here are thus only pertinent to the context of Rio de Janeiro. To further capture the practical incorporation of harm reduction by Brazilian judges, future research should carry on the subject by addressing other states, and their specific settings.

Moreover, the paper acknowledges that the practical incorporation of harm reduction in Brazil is not restricted to the verdicts of the courts, but can much depend on other aspects, e.g. police performance. Because it was beyond the scope of the present research, we suggest that future research expand the analysis to, for instance, the role of the police in distinguishing actors from traffickers in the streets and soft drugs from hard drugs.

Despite the limitations, the present findings show that the current Brazilian approach to drug use is considerably distinct from the Netherlands. But that is not necessarily a weakness. The Dutch approach where users are distinguished from traffickers by the quantity of seized drugs is perhaps too generic. Brazilian judges who take the packaging and diversity of the drugs into account might have a better way to separate users from traffickers. However, a more uniform approach in Brazil is required.

Conclusion

The current research identified issues in the Brazilian national strategy towards drug use that place obstacles to the integral adoption of harm reduction. The lack of acknowledgement by law and policy of the role of the police in the tackling of the drug issue has led the courts to improvise and incorporate the police version of the events subjectively and non-uniformly, which prevented a more pragmatic approach to drug-related cases. Likewise, the absence of clear-cut criteria in law and policy to distinguish drug use from traffic has given a great deal of discretion to judges, opening space to judicial selectivity and causing dissonance among the Rio de Janeiro courts of appeal.

Those issues have been scarcely addressed by the academia. Therefore, the present paper highlights that they ought to be considered by the Executive and the Legislative when drawing a more effective state approach to drug use in Brazil in order to minimize social and health damages on drug users and reduce drug-related offenses and nuisance on society. As it is, without objective criteria to firmly identify

and allocate users, individuals are at risk of doing time just for doing drugs.

Declaration of Competing Interest

None.

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