The legal framework of drug offences in Portugal

The approval of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, ratified by Portugal in 1991 was the determining reason for the new legal regime approved in 1993 by the Decree-Law n. 15/93.

The above-mentioned instrument of public international law had three basic objectives:

Firstly, to deprive those who engage in trafficking in narcotic drugs of the proceeds of their criminal activities, thus eliminating their main incentive for so doing and, at the same time, preventing the use of wealth that has been illicitly accumulated from enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business and society at all its levels;

Secondly, to adopt measures to monitor certain substances, precursors, chemicals and solvents that are used in the manufacture of narcotic drugs and psychotropic substances, the ready availability of which has led to an increase in the clandestine manufacture of such drugs and substances;

Thirdly, to reinforce and supplement the measures provided in the 1961 Convention on Narcotic Drugs, as amended by the 1972 Protocol, and in the 1971 Convention on Psychotropic Substances, thereby closing loopholes and enhancing the legal means of international cooperation in criminal matters.

The incorporation in internal law of these objectives and rules was necessary for their practical functioning since the most significant provisions of the above-mentioned United Nations Convention were not enforceable without legislative measures.

In the international sphere, account was also taken of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, drawn up within by the Council of Europe and signed by Portugal on 8 November 1990, and the directive on the prevention of use of the financial system for the purpose of money laundering, issued by the Council of the European Communities on 10 June 1991.

Attention was also paid to the proposed Council directive regarding the production and marketing of certain substances used in the illicit manufacture of narcotic drugs and psychotropic substances, which was designed to establish the control measures for "precursors" required by article 12 of the 1988 United Nations Convention, signed independently by the European Community, and also to remove distortions of competition in licit manufacture and in the placing of such chemical products on the Community market, supplementing their control outside the European Communities.

Although the primary objective was to adapt national law as necessary to make the above-mentioned 1988 United Nations Convention effective in Portugal, this did not rule out the consideration of other changes deemed to be important.

The organization of the tables annexed to the main text was one of the areas of preoccupation.

It would not have been difficult to add to the existing tables the two lists relating to precursors in the 1988 Convention, taking the opportunity to include the substances that had been incorporated in the meantime by regulations pursuant to the 1961 and 1971 Conventions.

However, it seemed that a further step could be taken by grading the substances on the basis of danger and placing them in new tables taking into account the appropriate type of sanction.

The graduation of the penalties for trafficking offences taking into account the true danger of the drugs involved seemed to be the approach most compatible with the idea of proportionality. This did not necessarily imply acceptance of the distinction between hard and soft drugs, far less the conclusions drawn by some countries in the area of the decriminalization or depenalization of consumption.

However, the decision on a more appropriate graduation must be based on a rigorous scientific assessment of the danger posed by the drugs from various points of view, and considerations must be included that go beyond the scientific sphere and concern socio-cultural factors that cannot be minimized.

All this indicates that the question of the (re)organization of the tables deserves further consideration in future at an appropriate time and place.

The same seemed to apply to trafficking on the high seas. Notwithstanding its growing importance as the preferred method for drug circulation, with traffickers taking advantage of the diminished intervention capability of States in international waters, no formulas were found that would make it possible to intensify control, in the first place owing to the reductionist position implied by article 17 of the 1988 Convention.

Thus the predominance conferred on the flag State, even when there is a serious suspicion that a vessel is abusing the freedom of navigation guaranteed by international law for the purpose of illicit traffic, the flag State having rights that can only be limited by treaty, agreement or protocol, is a signal of the prevalence of certain interests, that is to say commercial interests, as expressly recognized in paragraph 5 of article 17, over the interests of the health and well-being of people all over the world.

This matter is of particular concern to the countries of the Council of Europe (Pompidou Group).

For a number of reasons, provisions of the type concerning the organization of services were withdrawn.

Related to this is the call for greater linkage between the role of the judiciary and of the public health services and agencies, specifically as regards the prevention and treatment of drug-dependent persons, not just in terms of quality, but also in terms of quantity, with consequences at the level of territorial dispersion. This is the only conceivable way of raising a barrier against the extension of a phenomenon with cultural roots but with immediate and clearly visible effects on the health of the individual.

So, the new law criminalized in Article 21 the trafficking and other illicit activities, by punishing anyone who, without authorization, cultivates, produces, manufactures, extracts, prepares, offers, places on sale, sells, distributes, purchases, transfers or receives in any circumstances, supplies to others, transports, imports, exports, dispatches in transit or illicitly possesses, except in the cases provided for in article 40, plants, substances or preparations listed in tables I to III by a term of imprisonment of between 4 and 12 years. Anyone who, acting in contravention of the terms of an authorization issued pursuant to chapter II, illicitly transfers, places on the market or persuades another to place on the market the plants, substances or preparations mentioned in paragraph 1 above shall be punished by a term of imprisonment of between 5 and 15 years. In the case of substances or preparations listed in table IV, the punishment shall be a term of imprisonment of between 1 and 5 years.

Article 22 punished anyone who, without authorization, manufactures, imports, exports, transports or distributes any equipment, material or substance in tables V and VI, in the knowledge that it is or will be used in the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances by a term of imprisonment of between 2 and 10 years. Anyone who, without authorization, possesses any equipment, material or substance in tables V and VI, for whatever purpose, in the knowledge that it is or will be used in the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances shall be punished by a term of imprisonment of between 1 and 5 years.

The minimum and maximum limits of the penalties provided for in articles 21 and 22 were increased by one quarter if:

- **The substances or preparations are supplied to or intended for minors or mentally deficient persons;**
- **The substances or preparations are distributed by a large number of persons;**
- **The perpetrator obtains or attempts to obtain substantial remuneration;**
- **The perpetrator is an official respsonsible for the prevention or repression of such offences;**
- **The perpetrator is a physician, pharmacist or any other health specialist, an official of the prison service or of social reintegration services, a worker in the post, telegraph, telephone or telecommunications service, a teacher,**

educator or worker in an educational establishment, or a worker in the social welfare service or institutions, and the offence is committed in the exercise of his or her profession;

The perpetrator participates in other international organized criminal activities;

The perpetrator participates in other illegal activities facilitated by commission of the offence;

The offence was committed on premises used for the treatment of drug users or for social reintegration, on the premises of social welfare services or agencies, in a prison, a military unit or an educational institution or in another place where schoolchildren or students engage in educational, sports or social activities, or in the immediate vicinity of such a place;

The perpetrator uses the collaboration, in whatever manner, of minors or mentally deficient persons;

The perpetrator acts as a member of a gang formed for the repeated commission of the crimes referred to in articles 21 and 22, with the cooperation of at least one other gang member;

The substances or preparations involved are corrupted, changed or adulterated, by manipulation or mixing, in a manner increasing the risk to the life or physical integrity of others.

The law foresaw a provision for minor trafficking offences. If, in the cases referred to in articles 21 and 22, the illicit nature of the activity is substantially reduced, particularly considering the means used, the modality or the circumstances, and the quality or quantity of the plants, substances or preparations, the penalty shall be:

(a) Imprisonment for between 1 and 5 years, if the offence involves plants, substances or preparations listed in tables I to III, V and VI;

(b) Imprisonment for up to two years or a fine of up to 240 days, in the case of substances or preparations listed in table IV.

Another provision envisaged the situation of so-called "trafficker-consumers". If the perpetrator's exclusive aim, in carrying out any of the activities referred to in article 21, is to obtain plants, substances or preparations for personal use, the penalty shall be imprisonment for up to three years, if the offence involves plants, substances or preparations listed in tables I to III, or imprisonment for up to one year or a fine of up to 120 days if it involves plants, substances or preparations listed in table IV. Any attempt to commit such acts shall be punishable. The provisions shall not apply if the perpetrator possesses plants, substances or preparations in a quantity exceeding that required for average individual consumption for a five-day period.

The use of criminal associations was specially punished by article 28. Anyone who promotes, establishes or finances a group, organization or association of two or more persons who, acting together, set out to commit any of the crimes referred to in articles 21 and 22 shall be punished by a term of imprisonment of between 10 and 20 years. 2. Anyone who collaborates directly or indirectly with, joins or supports a group, organization or association referred to in paragraph 1 above shall be punished by a term of imprisonment of between 5 and 15 years. 3. Anyone who heads or leads a group, organization or association referred to in paragraph 1 above shall be punished by a term of imprisonment of between 12 and 20 years. If the purpose or activity of the group, organization or association is to convert, transfer, disguise or receive goods or products deriving from the crimes indicated in articles 21 and 22, the perpetrator shall be punished:

(a) In the cases referred to in paragraphs 1 and 3 above, by a term of imprisonment of between 2 and 10 years;

(b) In the case referred to in paragraph 2 above, by a term of imprisonment of between 1 and 8 years.

A special regime to promote the withdrawal for criminal activity was designed in the following terms: If, in the cases referred to in articles 21, 22, 23 and 28, the perpetrator voluntarily gives up his or her activity, removes or considerably diminishes the danger caused by the conduct, prevents or seriously endeavours to prevent the effects that the law is seeking to avoid, or gives the authorities concrete assistance in gathering decisive evidence leading to the identification or capture of others involved, especially in the case of groups, organizations or associations, there may be a special reduction or a remission of the penalty.

If the crime is punishable by a maximum term of imprisonment of more than three years and the accused is deemed to be drug-dependent, the judge may rule, without prejudice to the provisions of the Code of Criminal Procedure, that the accused be treated in a suitable establishment, to which he or she must report within the period fixed. The obligation to undergo treatment shall be communicated to the establishment in question, and the judge may request the support of the services of the Institute for Social Rehabilitation for the drug-dependent offender. The accused shall confirm to the court his or her fulfilment of the obligation, in the manner and at the time fixed. Preventive custody may not be imposed if the accused is undergoing a treatment programme for drug-dependence, unless there are particular needs for precautions. If preventive custody is ordered, the individual shall be held in an appropriate part of the prison establishment.

In 1993 the consumption of drugs was a criminal offence foreseen in article 40.º of the Decree-Law n.º 15/93. This situation was changed in 2000 by the Law n. 30/2000, which expressly revoked this provision.

This new law defined the legal framework applicable to the consumption of narcotics and psychotropic substances, together with the medical and social welfare of the consumers of such substances without medical prescription. The plants, substances and preparations subject to the framework established in the new law were those listed in tables I to IV attached to Decree-Law n. 15/93.

The consumption, acquisition and possession for own consumption of plants, substances or preparations listed in the tables referred to now constitute an administrative offence. For the purposes of the law of 2000, the acquisition and possession for own use of the substances referred to in the preceding paragraph shall not exceed the quantity required for an average individual consumption during a period of 10 days.

But in a decision establishing compulsory jurisprudence for all courts, the Supreme Court in 25.6.2008 the criminal offence foreseen by article 40.º of the Decree-Law n.º 15/93 was still in effect in what regards the aquisition, detention and cultivation of drugs for own consumption when the amount of drug apprehended is above the necessary for the medium individual consumption during a period of 10 days.

The new administrative offences refered to by the law of 2000 shall be processed and the respective penalties applied by a commission referred to as commission for the dissuasion of drug addiction, especially created for this purpose, operating in the premises of the civil governments.

The Governo Civil shall have powers to enforce fines and alternative penalties.

In districts with a greater concentration of proceedings, more than one commission may be created by order of the member of the Government responsible for coordinating drug and drug addiction policy.

The Governo Civil and the IPDT (Portuguese Institute on Drug and Drug Addiction) shall provide the commissions with administrative support and technical support respectively.

Expenses relating to the members of the commissions shall be borne by the IPDT.

The IPDT shall keep a central register of proceedings relating to the offences provided for in this law, which shall be kept in accordance with regulations issued by the Minister of Justice and the member of the Government responsible for the coordination of drugs and drug addiction policies.

The commissions shall comprise three persons, one of which shall serve as chairman, appointed by the member of the Government responsible for the coordination of drugs and drug addiction policies.

One of the members of the commission shall be a legal expert appointed by the Ministry of Justice, and the Minister of Health and the member of the Government responsible for the coordination of the drugs and drug addiction policies shall appoint the other two, who shall be chosen from doctors, psychologists, sociologists, social services workers or others with appropriate professional expertise in the field of drug addiction, who in the course of their duties shall guard against any possible direct therapeutic interest or ethical conflict.

The members of the commission shall be subject to the duty of secrecy with regard to the personal data contained in proceedings, without prejudice of the legal rules on the protection of public health and the criminal proceedings, where applicable.

Non-addicted consumers may be sentenced to payment of a fine or, alternatively, to a non-pecuniary penalty. Non-pecuniary penalties shall be applied to addicted consumers.
The commission shall set the penalty in accordance with the need to prevent the consumption of narcotics and psychotropic substances. In applying penalties, the commission shall take into account the consumers circumstances and the nature and circumstances of consumption, weighing up namely:

a) The seriousness of the act;

b) The degree of fault;

c) The type of plants, substances or preparations consumed;

d) The public or private nature of consumption;

e) In the case of public consumption, the place of consumption;

f) In the case of a non-addicted consumer, the occasional or habitual nature of his drug use;

g) The personal circumstances, namely economic and financial, of the consumer.