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# From the Criminalization of Substances to the “War on Drugs” Policy: A Century of Prohibitionism in Brazil

*DESDE LA CRIMINALIZACIÓN DE SUSTANCIAS HASTA LA POLÍTICA DE “GUERRA CONTRA LAS DROGAS”: UN SIGLO DE PROHIBICIONISMO EN BRASIL**DA CRIMINALIZAÇÃO DE SUBSTÂNCIAS À POLÍTICA DE “GUERRA ÀS DROGAS”: UM SÉCULO DE PROIBICIONISMO NO BRASIL**José Guilherme Magalhães e Silva<sup>1</sup>, Luís Felipe Zilli<sup>2</sup> e Letícia Godinho de Souza<sup>3</sup>***Abstract**

In 1921, Decree 4,294 defined prohibitionism as the referential model of state response to drugs in Brazil. One century later, not only is the approach still enshrined in national legislation but also materialized in a complex institutional and bureaucratic network of governance and public policies. This paper examines the evolution of drug policies in Brazil over the past century, exploring how a web of normative, political, and institutional devices converged to entrench the hegemony of the prohibitionist approach in public responses to drugs. A systematic analysis of national and international legislation reveals that the prohibitionist enterprise was successful in Brazil due to two factors: i) as an ideational set, it was integrated into structuring discursive fields of Brazilian political culture, dialoguing with the stigmatization of marginalized populations and criminalization of their practices; and ii) as an ordering principle of public policy, it has demonstrated remarkable resilience and adaptability, incorporating elements of alternative models into its framework without compromising its fundamental structures. Political innovations implemented in Brazil since the 1990s (especially decriminalization and damage reduction models) have been able to neither shake the definition of drugs as a moral and criminal problem, nor prevent its instrumentalization as a policy of socio-spatial control of lower classes.

**Keywords**

Drugs; war on drugs; prohibitionism; public policies on drugs; criminalization of drugs.

**Resumen**

En 1921, el Decreto 4.294 definió el prohibicionismo como modelo referencial de respuesta estatal a las drogas en Brasil. Un siglo después, este enfoque sigue presente en la legislación nacional y en una compleja red institucional y burocrática de gobernanza y políticas públicas. Este artículo examina la evolución de las políticas de drogas en Brasil durante el último siglo, explorando cómo un conjunto de dispositivos normativos, políticos e institucionales convergieron para afianzar la hegemonía del enfoque prohibicionista en las respuestas públicas a las drogas. Un análisis sistemático de la legislación nacional e internacional revela que el prohibicionismo tuvo éxito en Brasil debido a dos factores: i) como conjunto ideacional, se integró en campos discursivos estructurantes de la cultura política brasileña, dialogando con la estigmatización de poblaciones marginadas y la criminalización de sus prácticas; y ii) como principio ordenador de la política pública, demostró una notable resiliencia y adaptabilidad, incorporando elementos de modelos alternativos de respuesta

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estatal a las cuestiones relacionadas con las drogas en su marco sin comprometer sus estructuras fundamentales. Ni siquiera las innovaciones políticas implementadas en Brasil desde los años 1990 (especialmente los modelos de despenalización y reducción de daños) han logrado sacudir la definición de las drogas como un problema moral y criminal, o incluso evitar su instrumentalización como política de control socioespacial de las clases bajas.

#### Palabras clave

*Drogas; guerra contra las drogas; prohibicionismo; políticas públicas sobre drogas; criminalización de las drogas.*

#### Resumo

Em 1921, o Decreto n. 4.294 definiu o proibicionismo como modelo referencial de resposta estatal às drogas no Brasil. Um século depois, a abordagem segue consagrada na legislação nacional, mas agora materializada também em uma complexa rede institucional e burocrática de governança e políticas públicas. Este artigo analisa cem anos de trajetória das políticas de drogas no país, buscando compreender como, ao longo desse período, uma complexa trama de dispositivos normativos, políticos e institucionais se articulou para estabelecer a hegemonia da abordagem proibicionista sobre o campo das respostas públicas às drogas no Brasil. A partir de análise sistemática de legislação nacional e internacional, conclui-se que a empreitada proibicionista obteve sucesso no país em decorrência de duas ordens de fatores: i) enquanto conjunto ideacional, integrou-se a campos discursivos estruturantes da própria cultura política brasileira, dialogando com processos de estigmatização de populações marginalizadas e de criminalização de suas práticas; e ii) enquanto princípio ordenador de uma área de políticas públicas, demonstrou grande resiliência e capacidade de adaptação, absorvendo e incorporando elementos de modelos alternativos de resposta estatal à questão das drogas, sem corromper ou alterar suas estruturas fundamentais. Nem mesmo inovações políticas implementadas no país a partir dos anos 1990 (sobretudo modelos de despenalização e redução de danos) se mostraram capazes de abalar a definição das drogas como problema moral e criminal, ou impedir sua instrumentalização como política de controle socioespacial de classes populares.

#### Palavras-chave

*Drogas; guerra às drogas; proibicionismo; políticas públicas sobre drogas; criminalização das drogas.*

## INTRODUCTION

The Federal Constitution of 1988 is usually highlighted as a landmark of paradigm change in Brazilian social policies, due to its provision of comprehensive care to portions of the population that had previously been marginalized by government actions (Arretche, 2018). However, it went in the opposite direction regarding drug policies, consolidating the ideology of repression of narcotics consumption into the Brazilian legal system and aligning the country with the prohibitionist approach of the “War on Drugs”, a prominent international issue at the time. Starting with the 1988 Constitution, Brazil began to direct a specifically rigid criminal response toward drug trafficking, treating it as a non-bailable crime, insusceptible to amnesty or grace (article 5, XLIII), and going so far as to provide for the possibility of extraditing naturalized Brazilians involved with the practice (article 5, LI).<sup>1</sup>

The ideology that guides the state’s response to the drug issue in Brazil has changed little in the 30 years since the Constitution was enacted. Decree 9,761/2019 is the legal foundation that sustains public intervention on the subject, which establishes the National Drug Policy (PNAD, in Portuguese). In line with the prohibitionist logic, the document determines supply reduction and the fight against drug trafficking as its primary guidelines. These objectives are to be achieved through repressive actions and criminal proceedings conducted by the institutions of the Unified Public Security System (SUSP, in Portuguese) and other criminal prosecution bodies.

This arrangement illustrates the prevalence of an ideational set in Brazil that can be defined as “prohibitionism”: a model of state response to the issue of drugs that provides for the interdiction of all acts connected to the chain of production, consumption, and marketing of certain narcotics through criminalization and criminal repression. This model requires certain awareness in distinguishing between licit and illicit drugs, resulted from the game of geopolitical interests among major powers and international corporations (Rodrigues, 2017).

This article analyzes the ideational contents that have structured the state’s response to drugs in Brazil over the last century. Practically, it is a matter of identifying the main ideas that justified and sustained the criminalization of certain psychoactive substances throughout the period, creating paradigmatic prohibitionism and criminal framing, as well as *de facto* hegemonic models of public/state response to the supply and consumption of narcotics. Therefore, we intend to analyze the national and international legal framework that has guided Brazil’s public action regarding drugs since the beginning of the 20<sup>th</sup> century with an emphasis on Decree 4,294/1921, the first National “Drug Law”, and the consolidation of the large bureaucratic/institutional apparatus responsible for operating such guidelines.

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1 Article 5 of the Federal Constitution asserts that: “no Brazilian shall be extradited, except naturalized Brazilians, if they committed a common crime prior to naturalization or if their participation in unlawful traffic in narcotics and similar drugs is proven, under the terms of law” (Brazil, 1988).

## I. PROHIBITIONISM AS A RESILIENT IDEA

Understanding how the logic of prohibitionism has managed to endure in the Brazilian legal and institutional system for a century, guiding the structuring of a complex system of repressive public policies concerning drugs, first implies thinking about how specific ideas and discourses preserve their main characteristics over time, despite changes in social, political, and cultural contexts. In the field of Social Sciences, the approach of neoinstitutionalism, for example, defends the premise that social reality must be understood from the set of rules, organized practices, and operational procedures adopted by certain societies. Inserted into structures of relatively invariable and resilient meanings and resources, such institutions end up consolidating and shaping social reality, despite the turnover and transience of individuals, their preferences, or external circumstances. Institutions create order and predictability shape, empower, and constrain social actors to act within specific cognitive frameworks and action logics (March; Olsen, 2008).

From this perspective, even what we term as “ideas” can be considered akin to stable and durable institutions, operating at different levels of social order, from greater or lesser degrees of abstraction. In a broader sense, ideas can be understood as collective imaginaries or public philosophies. This is what German philosophy defines as *Zeitgeist*: a set of cultural, social, and economic premises, or the “spirit of an age”, in free translation. At this level, ideas would operate as a socially shared set of assumptions that shape the lenses through which certain realities will be perceived by those who share such meanings. An example of this is the collective notion that intoxication, through psychoactive substances, is morally and socially reprehensible.

At an intermediate level, ideas can relate (or not) to the definition of specific social facts as problems. Hence, the collectively shared perception that, as a morally reprehensible practice, drug use represents an issue in which society and the state must intervene. Finally, in a narrower and more applied conception, ideas can be political solutions presented in the face of predetermined problems (Mehta, 2010). Another example is the socially shared notion that the trade and consumption of certain substances should be criminalized, with consequent criminal intervention over the entire surrounding operation. From this framework, the impact of specific ideas on processes of permanence or social change depends on their circulation and interaction with various other elements that permeate the social environment (Rueschemeyer, 2006; Mehta, 2010; Perissinotto; Stumm, 2017).

At this point, it is important to highlight the capacity of specific ideas to endure, replicate, or adapt over time, remaining dominant in the face of opposing discourses, despite their flaws (Schmidt; Thatcher, 2013). Thus, the definition of “resilience” is similar to the concept adopted by the natural sciences, i.e., the ability of certain materials to recover their original shape after a shock, preventing their decimation. Therefore, a resilient idea is, by definition, flexible and malleable, capable of adapting to external pressures. In some contexts, resilient ideas coexist with opposing views, remaining the dominant moral approach or philosophy.

It is within this conceptual perspective that we argue that the dominance exercised by the prohibitionist ideology in the field of state action on drugs is due to its high degree of resilience: i) it is an idea that presents continuity over time (it is durable, recurrent, and adaptable); ii) it exercises expressive dominance over alternative and competing ideas; iii) it survives in the face of significant conjunctural challenges and alternative models, despite its flaws (Schmidt; Thatcher, 2013). Over recent decades, prohibitionism has imposed itself as a dominant idea in the field of drug policies in Brazil, as a broader philosophy which defines the issue of drugs as a social and moral problem and, above all, as the framework for this matter as the object of state action, within the sphere of public security and criminal law.

## 2. DATA AND METHODOLOGY

We intend to analyze the trajectory of drug policies implemented in Brazil since 1921, when the country first enacted its “Drug Law”. This will enable us to identify the main ideas that have structured state responses concerning drugs and understand which elements have sustained the resilience of such an approach over time. In analytical terms, three ideational resilience attributes (Schmidt; Thatcher, 2013) will be explored, each of them from a specific source of information.

### 2.1. 1<sup>ST</sup> ATTRIBUTE: DURABILITY, RECURRENCE, AND ADAPTABILITY

We analyzed the national legislation on the subject (constitutional, legal, and regulatory) to demonstrate the durability, recurrence, and adaptability of prohibitionist ideology regarding drugs in Brazil. It is assumed that the laws enacted a large portion of the victorious ideas in the political and discursive field, allowing the identification of continuity dynamics or institutional change in public policies. The *corpus* analyzed encompassed, as its initial reference, the document “*Seleção de normas brasileiras sobre drogas (1920-2020)*”, authored by CONAD.<sup>2</sup> The document highlights 100 regulations, 74 of which were enacted between 1988 and 2020. Regulations, identified by literature review, are included in the document and consist of ordinances and resolutions from the Ministry of Health and ANVISA (13 documents) and laws (ten documents) that affect the Brazilian state response on the subject, although they do not have the drug issue as their exclusive focus. Thus, 123 national regulations, enacted between 1921 and 2020, were considered for initial analysis.

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2 The National Council on Drug Policies (CONAD, in Portuguese) is a standing organ of the National Drug Policy System (SISNAD) and the primary repository of regulations published on the subject.

Added to this material are texts from eight international conventions on drugs produced by the United Nations (UN). Brazil is a signatory to the UN treaties and has ratified the content of these conventions through internal decrees. All 131 documents were put through content analysis (Mozzato; Grzybovski, 2011), observing their greater or lesser adherence to four “main-ideas” that guide the state response to the drug issue:

- a) **Repression:** prohibitionism is marked by criminal intervention over all acts in drug production, marketing, and consumption. Identifying the increase or decrease of criminalized conduct and penalties allows us to assess the strength of prohibitionism in the political agenda, as well as the degree of centrality repression has as an ordering principle of public policies.
- b) **Criminalization of Substances:** the distinction between “licit” and “illicit” narcotics stems from a complex web of political, social, and economic processes. Whether a given substance is criminalized defines if its users and suppliers will be subjected to the criminal system and moral judgment of society or if they will be targets of health and social care public policies.
- c) **Creation, extinction, or transformation of institutions focused on governing programs that make up drug policy:** the current “Anti-Drug Law” (Law 11,343/2006) institutes the National Drug Policy System (SISNAD) as the “set of policies, plans, programs, actions, and projects for the federated entities regarding drugs”. Regulations that address the creation, extinction, and transformation of institutions focused on governing drug policies were analyzed.
- d) **Establishment of approaches to health, social care, and social reintegration of drug users and addicts:** the constant transiting of the drug issue between the spheres of health and public security is a reflection of the confrontation of ideas in this discursive field. Thus, regulations that address different responses to imprisonment when it comes to drugs were also analyzed. Implementing such devices can mean opening the political agenda to ideas opposed to prohibitionism or its adaptation to other historical moments or social contexts.

After reading and analyzing the 131 regulations obtained, we excluded the ones that were very specific about certain substances or that only marginally addressed the topic. Fifty-one remained for further analysis.

**2.2. 2<sup>ND</sup> ATTRIBUTE: MASTERY OF THE DISCURSIVE FIELD, TO THE DETRIMENT OF ALTERNATIVE MODELS**  
Another characteristic of ideational resilience (Schmidt; Thatcher, 2013) is the dominance of certain ideas in a discursive field to the detriment of opposing or competing alternatives. In this sense, the analysis also covered bills that seek to mitigate or overcome the prohibition model, identified from a search on the Chamber of Deputies website. We identified four bills between 1988 and 2020 proposing the discrimination of drugs.

**2.3. 3<sup>RD</sup> ATTRIBUTE: SURVIVAL OF THE IDEA, DESPITE ITS FLAWS**

Resilient ideas survive the clash with antagonistic ideas and their flaws (Schmidt; Thatcher, 2013). Many studies have demonstrated the perverse social effects of prohibitionism over the past few years. Seven studies produced by public agencies and academic entities were also analyzed to highlight the results and reflections of the prohibitionist model in the Brazilian context.

Based on literature and document reviews, 62 texts compose the *corpus* of research, displayed in Table 1.

TABLE 1 – **PROHIBITIONISM IN BRAZIL: ANALYZED DOCUMENTATION**

IDEATIONAL RESILIENCE ATTRIBUTE	DOCUMENT TYPE	SOURCE	ANALYZED DOCUMENTS
DURABILITY RECURRENCE ADAPTABILITY	BRAZILIAN LEGISLATION	CONAD, PLANALTO WEBSITE, AND OFFICIAL DIARY OF THE UNION	43
	INTERNATIONAL TREATIES RATIFIED BY BRAZIL	BRAZILIAN UNODC WEBSITE	8
DOMINANCE OVER THE DISCURSIVE FIELD	BILLS	CHAMBER AND SENATE WEBSITES	4
SURVIVAL, DESPITE ITS FLAWS	OTHERS	CHAMBER OF DEPUTIES, CESEC, BRAZILIAN FORUM ON PUBLIC SECURITY, PERSEU ABRAMO FOUNDATION, OSWALDO CRUZ FOUNDATION, INFOPEN, AND IPEA	7
TOTAL			62

Source: Authors' own elaboration.

### 3. A CENTURY OF PROHIBITION IN BRAZIL

#### 3.1. 1921 TO 1988

The consumption of substances to alter an individual's state of consciousness is a traditional and widely disseminated practice (Gamella, 2003). Despite this, various drug criminalization measures have spread throughout the world over the past centuries. Episodes such as the prohibition of gin in England in the 18<sup>th</sup> century,<sup>3</sup> the crusade of Chinese rulers against Opium in the 19<sup>th</sup> century,<sup>4</sup> and the *Marihuana Tax Act* of 1937<sup>5</sup> in the United States make it clear that anti-drug actions have always been inspired by a series of moral, cultural, political, and economic issues, as well as by the interest in consolidating mechanisms of social control over specific populations.

In Brazil, the beginning of the formal framing of the drug issue as a public problem occurred with the publication of Decree 4,294/1921. In addition to criminalizing the unauthorized trade in cocaine, opium, morphine, and their derivatives, the text consolidated criminal intervention as a preferential state response to the supply and consumption of narcotics. In the following decades, especially during the “Vargas Era” (1930-1954), an intense federal legislative production would be responsible for aligning Brazil with the intense international escalation of prohibitionism observed at the time, materialized in the regulations produced by the Geneva Conventions of 1925, 1931, and 1936.

The inclusion of marihuana and heroin to the list of internationally controlled substances was agreed at the first of these three meetings (a determination ratified in Brazil by Decrees 20,930/1932 and 22,950/1933). The second Convention recommended the creation of domestic structures to control and supervise the use and trade of legal drugs and the repression of those considered illegal (guidance ratified in Brazil by Decrees 113/1934 and 780/1936). In the third meeting, the signatory countries were directed to intensify measures

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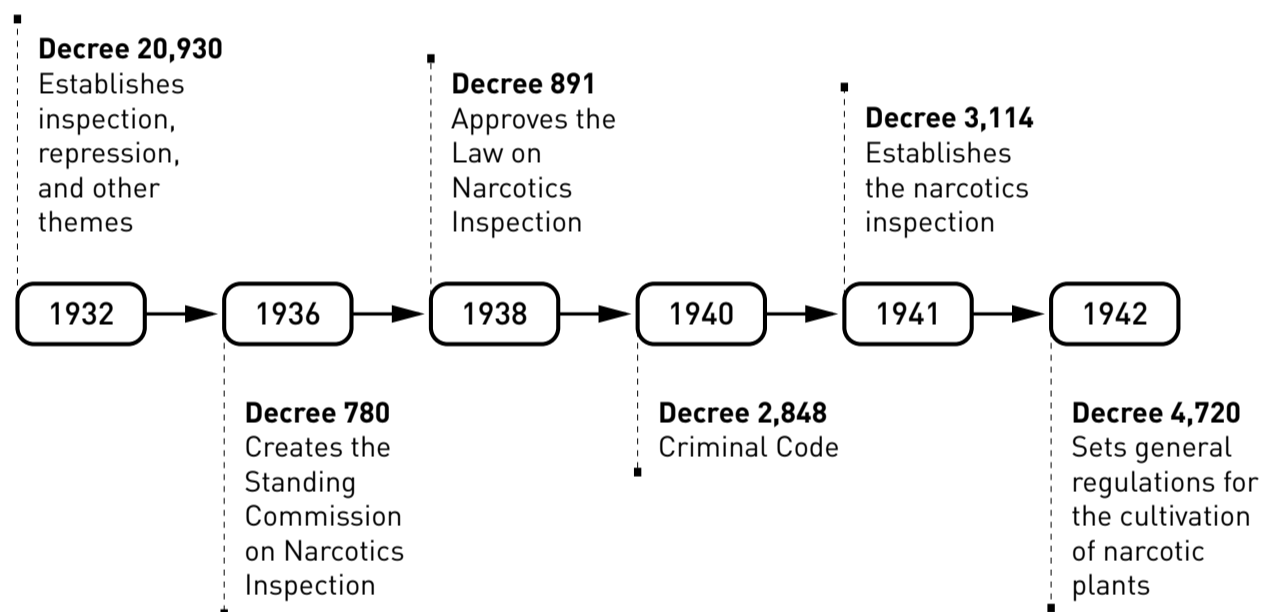
- 3 The *Gin Act* was a tax rule implemented in England in 1736 to hinder the legal gin trade. The law resulted from pressure exerted by religious temperance movements, according to which the consumption of alcoholic beverages by the population – especially the poorest – led to physical and moral degeneration (Gamella, 2003; Shecaira, 2012).
- 4 Opium was the central element of two wars between China and England (1839-1842 and 1856-1860). Defeated in both conflicts, China was forced to accept the foreign exploitation of opium in its territory (Escohotado, 1989; Gamella, 2003; Torcato, 2016).
- 5 The legislation criminalized cannabis (a drug associated with Latin American immigrants), making its possession a federal crime. This is yet another episode in which the US Government used anti-drug policy as a mechanism of social control and repression over subaltern groups (Escohotado, 1989; Rodrigues, 2006; Shecaira, 2012).



to combat trafficking and facilitate the extradition of those convicted (determinations ratified by Decree 2,994/1938). This normative process was consolidated in 1940, when the Criminal Code (Decree-Law 2,848/1940) established the crime of drug trafficking in article 281, with a penalty of one to five years imprisonment.

For authors such as Carvalho (2014), the regulations enacted throughout the 1930s and 1940s marked Brazil’s adherence to the international model of drug control, institutionalizing prohibitionist policies as its basis for action, with bureaucratic structures that are present to this day. From the discursive perspective, repression was consolidated as an ideational set to guide drug policies. Figure 1 presents the drug legislations enacted in Brazil during the “Vargas Era” (1930-1945).

FIGURE 1 – PRIMARY FEDERAL DRUG LAWS DURING THE “VARGAS ERA”



Source: Authors’ own elaboration.

This basis would gain new momentum between the 1960s and the first half of the 1980s, during the civil-military dictatorship in Brazil. In this period, the political prominence of moral entrepreneurs linked to conservative, religious, social, and economic groups resulted in a restrictive agenda for rights to advance in the public debate (Rolim, 2011). In the case of drug policies, legislative production reinforced the prohibitionist ideology, aligning Brazil to the North American model of the “War on Drugs” (Batista, 1997; Rodrigues, 2006; Torcato, 2016).

In the early years of the dictatorial period, regulations that amended the Criminal Code and laid the foundations for a new frame for the prohibitionist model were enacted. In 1964, Law 4,451 included the verb “to plant” in the top line of article 281. In 1967, Decree-Law

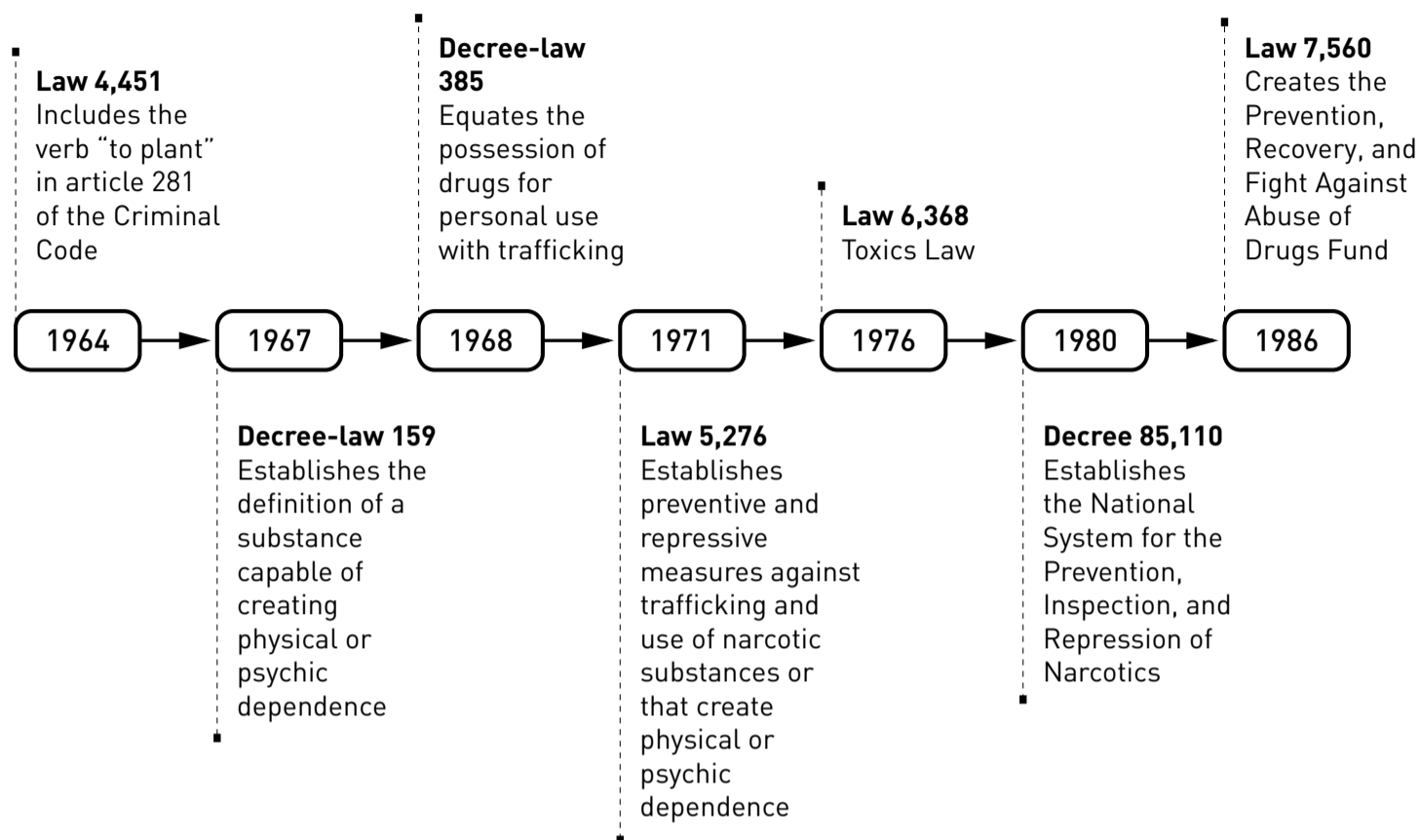
159 extended criminal treatment to conduct linked to substances that caused physical or mental dependence, even if they are not considered narcotics. In the following year, Decree-Law 385/1968 determined that equal penalties must be applied to drug users and traffickers. Imported from the US legal system, the measure became a tool of social control over groups challenging the regime, allowing the incarceration of young people linked to resistance collectives. Drug control policies proved to be useful tools for repressing internal enemies in both countries (Rodrigues, 2006).

In 1971, Law 5,726 increased the maximum sentence for drug crimes (from five to six years of imprisonment) and equated such offenses to crimes against national security and political/social order. Finally, in 1976, Brazil enacted Law 6,368 (Toxics Law). This instrument would remain in force for almost 30 years, consolidating the structures of the prohibition model. It reduced the prison sentence for users (6 months to 2 years) but significantly increased it for the crime of trafficking (from 6 to 15 years).

As an alternative to the imprisonment sentence for users, it enabled the compulsory hospitalization of chemical addicts in specialized establishments of the public health network. Such measures applied the medical approach to the problem, even if still within a clear security basis (Machado; Miranda, 2007). To ensure the implementation and governance of the new drug policy, the regulation created the “National Anti-Drug System”, consisting of a set of federal, state, and municipal agencies that carried out activities for the prevention and repression of drugs, as well as the social reintegration of users.

In 1980, continuing the development of an institutions network focused on the governance of the National Drug Policy, the federal government enacted Decree 85,110, establishing the “National System for the Prevention, Supervision, and Repression of Narcotics”, an arrangement that advanced the integration and the financing of public organizations network focused on the fight against and prevention of drugs. Figure 2 presents the drug legislations enacted in Brazil during the “Military Dictatorship” (1964-1986).

FIGURE 2 – PRIMARY FEDERAL DRUG LAWS DURING THE “MILITARY DICTATORSHIP”



Source: Authors’ own elaboration.

### 3.2. POST-1988 CONSTITUTION

As previously discussed, resilient ideas stand the test of time; although they incorporate new elements to adapt to changes in context, they maintain the principles that structure them (Schmidt; Thatcher, 2013). The legislative production concerning drugs in Brazil demonstrates that, throughout the 20<sup>th</sup> century, the ideational set of prohibitionism survived historical, political, and social transformations, determining its definitive consecration in the 1988 Constitution. Contrary to the progressive sense emanated from other areas of public policy, the Constitution consolidates criminal repression as the primary line of state response to the supply and consumption of illicit drugs. However, it incorporates elements from alternative models into the legal system.

At the end of the 1980s, this movement aligned Brazil with the international rise of “law and order” movements, a repressive and moralistic political and criminal panorama fundamentally inspired by the United States (Rodrigues, 2006). In a regulatory context that had already established imprisonment for both traffickers and users (Law 6,368/1976), in 1990, came the enactment of the Heinous Crimes Law (Law 8,072). This device intensified the criminal and procedural response to trafficking, restricting guarantees and increasing the sanctions against it. Only one year later, in 1991, Brazil ratified the 1988 “United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic

Substances”, considered a milestone in the internationalization of US repressive policy (Rodrigues, 2006).

However, the ideational scenario became more complex in the second half of the 1990s, when Brazilian legislation began to incorporate elements from two other models of drug control: depenalization and harm reduction.

### 3.2.1. THE DEPENALIZATION MODEL

The depenalization, or “moderate prohibitionist”, model proposes either the progressive and gradual reduction of criminal control over drug consumption or its replacement by administrative controls. The model is divided into two large subtypes:

- a) **Decarceration of use and possession:** establishing the application of rights-restrictive penalties to the detriment of custodial sentences. It maintains criminal control over such conduct, however, removes the possibility of user arrest. It can be found in Germany, Austria, Belgium, Denmark, Ireland, United Kingdom, Switzerland, and, currently, Brazil.
- b) **Decriminalization of use and possession:** total removal of criminal control over the consumption of certain narcotic drugs. This has been established in Portugal and Spain.

In Brazil, the procedural bases for implementing the decriminalization model (in its decarceration aspect) were established in 1995 with the publication of Law 9,099. The regulation created the Special Criminal Courts and, with them, the institutes of criminal transaction (possibility of immediate application of a rights-restrictive penalty or fines substituting imprisonment) and the procedural *sursis* (suspension of the proceedings for two to four years, with the possibility of extinguishing the punishment at the end of the period).

However, in criminal terms, the establishment of user decarceration in Brazil occurred only in 2006, with the publication of Law 11,343. Despite determining penalties from five to 15 years imprisonment for drug trafficking, the instrument includes alternative measures for drug possession for personal use. In article 28, the law no longer includes imprisonment for drug users, but the application of rights restriction (warning, community service, and educational intervention).

However, despite absorbing elements of the alternative model of user decarceration, the new drug law caused the opposite effect, massively increasing the number of incarceration, for drug crimes in Brazil. This is because the text does not offer objective criteria for operators of the Criminal Justice System to distinguish between what should be considered “possession of drugs for personal consumption” (article 28) and “drug trafficking” (article 33). According to the law, such distinction is up to the public agents involved, based on the observation of the following issues: nature and quantity of the substance seized; the location and conditions under which the action took place; *the social and personal circumstances of*

*the subjects* (emphasis added); and the conduct and antecedents of the agents (article 28, paragraph 1). In a country known for deep social inequalities, racism, and the desire for socio-spatial control of marginalized populations, the discretion given to police officers, prosecutors, and judges fostered the overrepresentation of marginalized populations among the subjects incriminated. While individuals from socioeconomic elites were covered by the provisions of article 28 (possession for use), the penalties for trafficking were reserved for those the system wished to incarcerate (Carvalho, 2014).<sup>6</sup>

Therefore, contrary to what was previously foreseen, Law 11,343/2006 contributed to a significant increase in the number of people arrested for drug crimes (Lemgruber *et al.*, 2021). According to the National Penitentiary Information Survey (Infopen, in Portuguese), in 2005, the year before these regulations were enacted, about 15% of the Brazilian prison population was imprisoned for drug-related crimes. In 2020, this percentage rose to 29.91%, making drug-related crimes the largest single cause of incarceration in the country (DEPEN, 2020).

Since Law 11,343/2006, a change in the classification profiles and processing for drug crimes can be observed, with fewer cases classified as “possession/personal use” and an increase in “drug trafficking” cases. A study conducted by Ribeiro, Rocha, and Couto (2017), for example, indicates that, in 2008, the new drug law instigated the development of a judicial instance meant solely to process drug crimes in a South-eastern Brazilian metropolis, and it was created simply to handle such increases in cases related to legislation. In Rio de Janeiro, a study by Grillo, Policarpo, and Veríssimo (2011) determined that instead of resulting in the softening of state control over drug use, the law was used by military police officers to negotiate with users over their release or arrest and removal to a police station.

In São Paulo, a study conducted by Jesus (2020) also notes the influence that military police officers exert over the classification of drug cases. According to the research, the narratives produced by officers on arrest forms are key to the formation of judicial truth, validated by prosecutors and judges in custody hearings, instructions, and judgments (according to the study, 74% of arrests during the commission of a drug crime have only police officers as witnesses).

Similarly, these studies indicate that “suspicion” constitutes an important factor for police judgment and, consequently, support the differential application of the drug law among Brazil’s populational segments. As police suspicion tends to fall mostly on poor and

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<sup>6</sup> There is a vast academic literature in Brazil that analyses the effects of Law 11, 343; 2006 (Drugs Law) for the massive increase in the imprisonment of young, black, and poor people in the past few decades. See: Grillo, Policarpo and Veríssimo (2011); Souza (2014); Ribeiro, Rocha and Couto (2017); Campos (2019); Jesus (2020); Sinhoretto, Cedro and Macedo (2022); Reis and Ribeiro (2023).

marginalized populations, these groups find themselves subjected to a harsher penal treatment (that of a dealer). On the other hand, the “unsuspected” are free from penal control when carrying illicit drugs. This “criminal subjection” process (Misse, 2010) explains how, especially in Brazil, the label of trafficker has been historically linked to the idea of a *favela* inhabitant, someone who is poor and black.

As previously indicated, this is based on the premise that, to a large extent, the legislation and the ways in which they are operationalized by institutions reflect the socially predominant ideas which carry force at specific times in history. In this sense, it is clear that prohibitionist ideas do not end with the letter of the law, but also encompass the daily practices of the agents responsible for their execution. The mismatch between what Law 11,343/2006 proposed (aligned with the logic of decarceration) and its real practical effects (a massive increase in incarceration for drug crimes) proves such a process. The prohibitionist model is so ingrained in Brazilian organizations and their drug policies that it has enabled its survival, even in the face of a legislative change intended to mitigate it.

### 3.2.2. HARM REDUCTION AND THERAPEUTIC COMMUNITIES

Based on individual autonomy, the model known as “harm reduction” prioritizes social reintegration and improvement of addicts’ living conditions. In this sense, abstinence is not necessarily a goal to be achieved, although it can become a long-term goal (Rodrigues, 2017). The approach proposes viable options for people who do not want or cannot reduce their drug use and those who cannot access health services (Teixeira *et al.*, 2017).

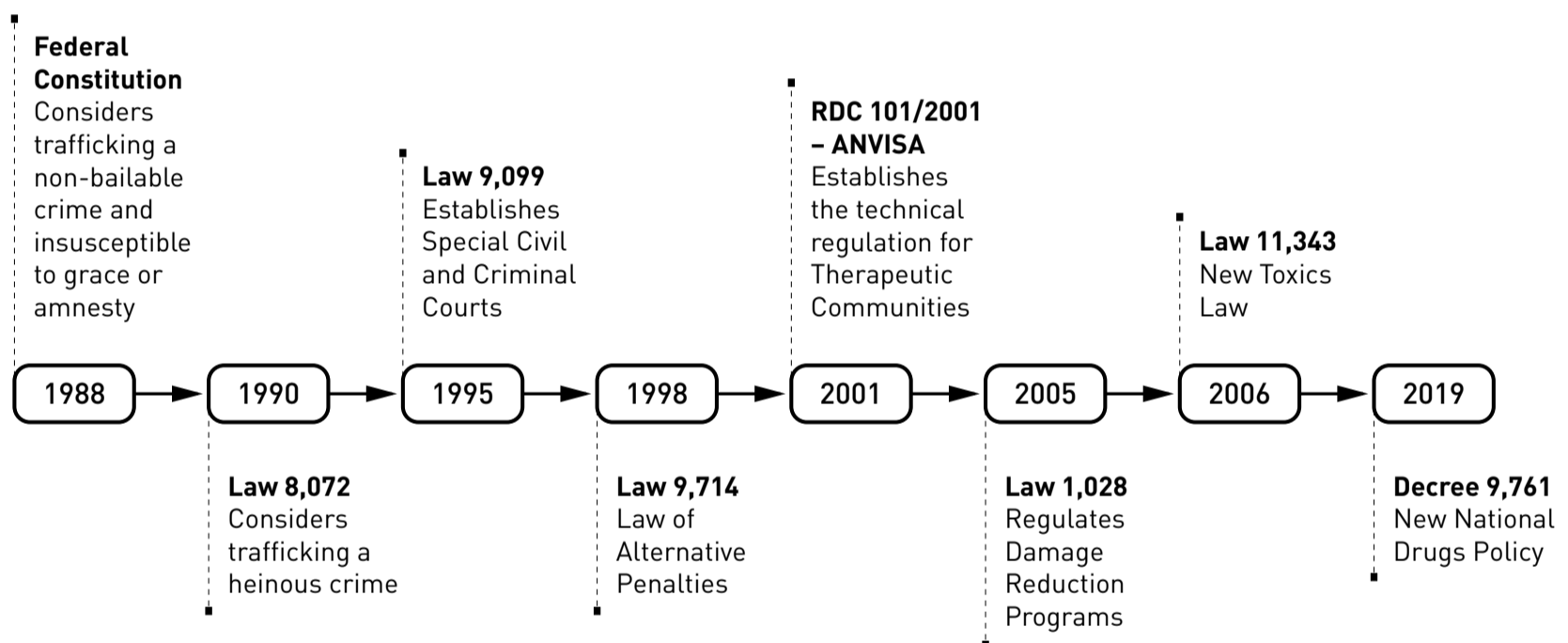
The model began to gain notoriety in Brazil in the late 1980s, with the installation of syringe exchange programs in Santos (State of São Paulo) to reduce the proliferation of blood-borne diseases among intravenous drug users (Andrade, 2011). Similar programs were also implemented in Bahia, Santa Catarina, and Rio de Janeiro in the second half of the 1990s, along with other cities in São Paulo State (Rodrigues, 2017).

In federal legislation, the principles of harm reduction were established only at the beginning of the 21<sup>st</sup> century due to the “psychiatric reform” movement. The approach defends a model of mental health care opposite to that of hospitalization and exclusion of the dependent from society (Teixeira *et al.*, 2017). Decree 4,345/2002, which determines the National Anti-Drug Policy, recognizes harm reduction as a preventive intervention to address health problems associated with narcotics abuse. The model was regulated by the Ministry of Health’s Ordinance 1,028/2005, demonstrating that the drug issue moves through the discursive field of health policies and the ideational sphere of public security.

Still within the field of alternatives to criminal intervention concerning drugs, the therapeutic communities approach spread throughout the 1990s. Defending abstinence, these organizations propose treatments that imply the temporary removal of users from social life (Machado; Miranda, 2007; Teixeira *et al.*, 2017). There is no precise information on the emergence of the first TCs in Brazil. However, there has been a more systematic expansion

of the model since the 1990s, when units began to receive significant financial contributions from states and municipalities. On the other hand, these institutions began to be regulated only from the 2000s (Anvisa Resolution 101/2001), at which point the presence and importance of TCs began to continuously expand in the national political agenda. Starting in 2018, the approach reached strong predominance in the Brazilian political agenda, with an increase in the federal budget allocated to TCs. The CONAD (Brazil, 2021) report shows that the federal government financed 10,771 beds in TCs in 2020, at an annual cost of R\$151 million. For 2021 and 2022, SISNAD aimed to expand the number of shelters and vacancies by 100%. Figure 3 presents the drug legislations enacted in Brazil between 1988 and 2020.

FIGURE 3 – KEY FEDERAL DRUG LAWS (1988-2020)



Source: Authors' own elaboration.

## 4. PROHIBITIONISM'S DOMINANCE OVER ALTERNATIVE MODELS

### 4.1. THE ADAPTABILITY OF PROHIBITIONISM

At first glance, the consolidation of the prohibitionist model in the Brazilian Constitution could have meant locking the political agenda out of the rise of alternative ideas in the discursive field of drug policies. However, the national normative framework became permeated by elements of the alternative models of depenalization and harm reduction, after intensifying the criminal and procedural response to the issue between the end of the 1980s and the first half of the 1990s.

In ideational terms, the possibility that drug users are the object of responses other than imprisonment has brought Brazilian policy closer to the experience of European countries, to the detriment of repressive premises disseminated by the US and UN over the past century. However, it is also necessary to observe that, even when led by actions developed in the health field, the advancement of these alternative approaches was based on strongly colonized interventions by traditional public security ideas.

On the one hand, the entry of health actors into the discursive field of drug policy did not weaken the prohibitionist ideal; the absorption of concepts from harm reduction was not reflected in a decrease in criminal intervention. On the other hand, it is also necessary to observe that the same shift from the discussion of drugs to the field of health originated from the solutions of therapeutic communities, an approach supported by security principles such as abstinence, control, and interdiction of subjects and their bodies, as well as the imposition of religious principles to those served. Such elements reflect the resilience of prohibitionist ideas, representing a cognitive model that adapts to political and social pressures, keeping its ideational core reasonably intact.

Where criminal policies are concerned, all Brazilian legislation from the 21<sup>st</sup> century maintained the repression of supply and consumption as central objectives of the state's response to the drug issue. This is evidenced by the maintenance of harsh imprisonment sentences for traffickers throughout all the laws enacted in recent decades and by the determination (in the most recent legislation) that it will be up to the operators of the Criminal Justice System to distinguish between users and traffickers (since the regulations do not present objective criteria to discern them). This results in an overrepresentation of black and poor people classified as traffickers, even when apprehended with smaller quantities of drugs.

#### 4.2. THE INTERDICTION OF ALTERNATIVE AGENDAS

In addition to absorbing and incorporating elements from competing alternatives, another aspect demonstrating the resilience of prohibitionist ideology is its prevalence over approaches that are frontally opposed to it. Normatively speaking, the model's strength can be observed when it is confronted by bills that, over the past decades, have attempted to propose the decriminalization or even legalization/regulation of drugs in Brazil.

Bill 5,824/2001, for example, proposed the partial decriminalization of the possession of up to five grams of marijuana (tetrahydrocannabinol) for personal use, amending article 16 of Law 6,368/76. Ideally, the project rejected one of the basic principles of prohibitionism – the use of drugs as a social problem. The bill's primary argument was that the consumption of marijuana would be an irrelevant act to criminal law, without causing problems to citizenship or public peace. Therefore, there would be no justification for moralizing ideas to prevail over individual freedom. However, the bill was archived at the end of the 51<sup>st</sup> Term of the Legislature (1999-2003).



Bill 7,270/2014, in turn, proposes to regulate the production, industrialization, and commercialization of the *Cannabis* genus plant and its derivatives. The proposal provides for the removal of the plant from the list of substances and drugs subject to special control by the Brazilian Health Regulatory Agency (ANVISA), authorizing its production and marketing through state regulation, encompassing registration, standardization, classification, inspection, and supervision similar to the ones in force for alcohol and tobacco. In addition, the bill also addresses all currently illicit drugs, proposing the amendment of article 28 of Law 11,343/2006, making acts related to possession, transportation, and cultivation for personal use lawful. The bill argues that the current prohibitionist regulations are ineffective in combating the use of narcotics, causing worse problems, such as the stigmatization of social groups and violence.

Similarly, bill 10,549/2019 suggests the removal of *Cannabis* and its derivatives from the lists of prohibited plants and substances, allowing possession and cultivation for personal use. Like the previous bill, the proposal determines control, supervision, as well as the regulation of production and trade. In addition, it proposes the amendment of article 28 of Law 11,343/2006, making the possession of drugs for personal use lawful at the maximum quantity established by the National Secretariat for Drug Policies (SENAD). According to the bill, the use of *Cannabis* and other drugs is an individual decision, with no justification for the application of public security material and human resources in its repression. Finally, bill 4,565/2019 aims to make the possession of up to 30 doses of illicit drugs or the cultivation of up to six plants lawful.

These proposals remove the incidence of criminal law on the possession of drugs for personal use, only differing in the definition of limits and substances in which possession would constitute trafficking. Some of the bills are more audacious, proposing the removal of criminal intervention on all acts linked to the chain of production, supply, and consumption of illicit drugs, providing for their economic exploitation through state regulation. Such proposals directly challenge the prohibitionist *Zeitgeist*, proposing its replacement by the concept that narcotic consumption is not a moral and social evil. Therefore, it is not the state’s responsibility to intervene in individual behaviors without offensive potential. This substitution of the ideational background changes the definition of the drug problem, leading to proposition of solutions that are directly contrary to criminal intervention.

However, none of the four proposals was successful. The first was archived, others were attached to a project presenting measures opposed to decriminalization, and the most recent proposal is still in process. This legislative clash demonstrates the ideational resilience of prohibitionism, a model that systematically proves itself capable of hindering intervention alternatives that directly attack its structuring assumptions.

#### 4.3. THE SURVIVAL OF PROHIBITIONISM DESPITE ITS FLAWS

Prohibitionism resisted social and political transformations in Brazil, reaching the third decade of the 21<sup>st</sup> century supported by a broad legislative base and operationalized by a

complex network of government organizations. The basic ideas of the model are resilient, dominating the discursive field, incrementally absorbing elements of alternative approaches, and hindering the rise of decriminalization proposals. In conclusion, a third attribute of the ideational resilience of prohibitionism is presented (Schmidt; Thatcher, 2013), also known as the ability to survive in the face of external pressures despite their flaws.

A challenge imposed on defenders of prohibitionist morality is to justify the permanence of the model in the face of the perverse effects arising from its implementation. Devos and Marcarello (2020), for example, point out that prohibitionism failed in its alleged proposal to address public health problems resulting from drug use, revealing itself as a form of socio-spatial control of marginalized populations. Rodrigues (2017) points out that, in addition to not preventing drug consumption, prohibitionism has led to a lucrative illegal market, as prohibition itself inflates the market value of narcotics. Carvalho (2014) notes that social costs and secondary effects of criminalization (social stigmatization of users, cost of the repressive system, increase in incarceration, etc.) far outweigh the primary effects concerning the nature of drugs (public health problems).

A study by Silva, Lima, and Teixeira (2016) indicates that prohibition is ineffective in reducing drug consumption and supports the formation of large-scale illicit markets, financing criminal networks involved in arms trafficking, robbery, extortion, murder, and money laundering. Even the field of state violence is greatly enhanced by prohibition, with a significant number of deaths caused by the police associated with the “war on drugs” (FBSP, 2021).

Finally, in addition to the loss of life, prohibitionism also imposes high costs on the public budget. A survey by Lemgruber *et al.* (2021) revealed that, only in 2017, prohibition cost R\$ 5,2 billion to the public coffers of Rio de Janeiro and São Paulo, considering only the expenses of police and judicial actions to suppress drug trafficking.

## FINAL REMARKS

All investigations show that, despite its flaws and perverse effects, prohibitionism remains the primary ideational background of the discursive field of drug policies in Brazil, regardless of the existence of alternative models. From the perspective of collective moral philosophies, such prevalence has always been sustained by the clear and collectively shared premise that intoxication through psychoactive substances is morally and socially reprehensible. Over the course of a century, a consensus that the state must intervene in the drug problem has been consolidated in Brazil within this *Zeitgeist*.

This cognitive framework paved the way, especially starting in the second half of the 20<sup>th</sup> century, for the discursive, political, and institutional fields of public responses to the matter of drugs to be practically hegemonized by the prohibitionist model, which calls for the criminalization of certain substances and for criminal intervention on their chain of production, marketing, and consumption.

In Brazil, the trajectory of consolidating prohibitionism in the normative and institutional spheres has always been deeply aligned with the prevalence of the model in the international context. However, it is necessary to be clear that such a process has never exclusively concerned drug issues and their effects on the sphere of public health. Especially in Brazil, prohibitionism has always helped to compose the ideational framework that was historically responsible for justifying and sustaining strategies of social and political control of marginalized populational segments.

Authors such as Campos and Azevedo (2020), for example, discuss how (especially after the enactment of the 1988 Constitution) governments of different political orientations, legislators, actors within the Criminal Justice System, and part of civil society invested in the punishment and incarceration approaches as preferred ways of containing and changing behaviors and practices classified as “reprehensible” (and, by extension, of controlling the populational groups associated with them). Throughout the past decades, it was that ideational premise that sustained the penal and legislative enforcement that resulted in broadening the spectrum of criminalized conducts, especially in the field of narcotics policies (Campos; Azevedo, 2020). Consequently, the public debate on drugs issues is mostly evidenced in the narrative sphere of public security, ensuring the prevalence of the security approach (Garland, 2008) as well as its permanence over time, despite its flaws and inability to create positive social results.

Prohibition has always dialogued and found deep resonance with a vast history of repression policies and socio-spatial control of marginalized classes, surveillance over racialized bodies and their practices, segregation, stigmatization, and criminalization of marginalized social groups. Therefore, the model discusses ideational traits very firmly rooted in the process of the Brazilian political and social constitution.

This is why the prohibitionist normative apparatus has always proved capable of absorbing attempts at legislative changes, maintaining its repressive nuclear premises almost untouched. The best recent example of such resilience is the *de facto* (*prático*) strengthening of prohibitionism after the enactment of Law 11,343/2006, an act whose manifest objective was to promote user decarceration and, therefore, mitigate the criminal treatment of the subject. The regulation caused the opposite effect when operationalized by police organizations cognitively oriented by the “war on drugs” ideology: it massively increased the incarceration of people caught with small amounts of narcotics.

In conclusion, despite the legal and institutional changes experienced by Brazil in recent decades, the ideology that currently sustains most drug policies is fundamentally the same that outlined the first National Drug Law (Decree 4,294/1921) in 1921. Prohibitionism is so firmly rooted in the legal and institutional frameworks that it either hinders the circulation of alternative ideas through public debate or limits it to the incremental scope of existing repressive public interventions. Despite the space recently conquered by harm reduction and decarceration practices, it is possible to affirm that such approaches have not yet proved capable of overcoming the framework of drugs as a moral and criminal problem.

## CHART 1 – THE PROHIBITIONIST IDEATIONAL SET

LEVEL OF IDEATIONAL SET ABSTRACTION	COGNITIVE/DISCURSIVE FRAMING AND PROBLEM DEFINITION
<b>BROAD (PUBLIC PHILOSOPHIES OR ZEITGEIST)</b>	INTOXICATION THROUGH THE USE OF PSYCHOACTIVE SUBSTANCES IS A MORAL AND SOCIAL PROBLEM.
<b>INTERMEDIARY (PROBLEM DEFINITION)</b>	SOCIETY AND THE STATE MUST INTERVENE IN THE CHAIN OF PRODUCTION, MARKETING, AND CONSUMPTION OF NARCOTICS.
<b>NARROW (POLITICAL SOLUTION)</b>	CERTAIN PSYCHOACTIVE SUBSTANCES SHOULD BE CRIMINALIZED (DEFINITION THAT IMPOSES CRIMINAL RESPONSES).
	OTHER SUBSTANCES MUST HAVE THEIR ABUSIVE USE CONTROLLED AND DISCOURAGED (DEFINITION THAT IMPOSES PUBLIC HEALTH RESPONSES).
	IMPRISONMENT FOR SUPPLIERS OF ILLICIT DRUGS.
	RIGHTS-RESTRICTIVE PENALTIES FOR ILLICIT DRUG USERS.
	DAMAGE REDUCTION (APPLICABLE TO THE ABUSE OF LICIT AND ILLICIT DRUGS).
	ABSTINENCE (APPLICABLE TO THE ABUSE OF LICIT AND ILLICIT DRUGS).

Source: Authors' own elaboration.

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