

## How to determine personal use in drug legislation

### *The “threshold controversy” in the light of the Italian experience*

By Grazia Zuffa <sup>1</sup>

Distinguishing between drug possession for personal use and supply and trafficking is widely acknowledged as one of the most difficult and controversial issues facing drug legislators and policy makers. To address the problem, two solutions are typically enacted: the threshold scheme and the “flexible” model.

According to the former, pre-defined quantities of the substances are presumed for personal use, while in the flexible model (or “discretionary system”) the court rules whether possession of drugs is intended for personal use or for supply, taking into account all the available circumstances.

The purpose of this paper is to examine the advantages and the shortcomings of the different options, based on the Italian experience, as well as their real effectiveness in dealing with the problem.

As the threshold controversy in the Italian context is closely intertwined with the debate over “criminalisation versus decriminalisation”, it will be necessary to examine changes in drug legislation, in particular evaluating the current 2006 drug law.

#### THE PROBLEM

Article 73 of the current drug law (309/1990, as revised in 2006) includes penal provisions for various drug-related offences and establishes them as crimes. According to the article, “Whoever grows, produces, sells, hands over... or is in any way *in illicit possession* of psychoactive substances will



#### CONCLUSIONS & RECOMMENDATIONS

- To definitively address the distinction between users and dealers, a change in the very framework of drug legislations is required, clearly establishing possession as a crime only when intended for sale.
- In distinguishing between drug use and supply, the “threshold system” has many disadvantages. The “discretionary system” is preferable, although it does not solve the problem completely.
- The main shortcoming of the threshold model is its presumption of guilt of dealing for users in possession of quantities above the threshold, which has led to unfair levels of criminalisation.

be sentenced to prison for a minimum of 6 years up to a maximum of 20 years...”<sup>2</sup>

This particular wording “or is in any way in possession” establishes possession as a punishable offence, and, at the same time, as the main circumstantial evidence of personal use or other more serious drug-related offences such as dealing and traf-

ficking. Such peculiar wording, introduced in the law 685/1975, has never been substantially changed in the various revisions that have occurred in 1990, 1993 (following a referendum) and in 2006. It is worth noting that the wording of the Italian legislation follows the blueprint of the international conventions.<sup>3</sup>

Although these varied offences are established as equivalent in the text of Article 73, they clearly need to be distinguished, not only in the range of penalties, but, more importantly, in assessing whether possession is for personal use or for dealing. Identifying whether possession is for personal use is even more important in the context of proposals for decriminalisation/depenalisation of drug use.<sup>4</sup> Even if personal use is considered as a punishable offence, it is obviously necessary to distinguish the seriousness of different crimes when so many varied offences are involved, in order to abide by the principle of proportionality between crimes and penalties.

In addition, it is important to stress the distinct characteristics of the Italian penal system: the so-called “expediency principle” (present in the “common law” tradition) is absent in the Italian system. Italian law enforcement is required to prosecute any and all violations of the law.<sup>5</sup> As a result, the distinction between possession for personal use and possession for dealing has to be established in the law.

In the Italian experience, the threshold model has been one of the legislative pillars of the “tough on drugs” approach while the “flexible” system has always appeared more suitable to the purpose of drug use decriminalisation. It is worth exploring more in depth the underlying philosophies of these two approaches. Decriminalisation shifts the focus from possession to supply. Drug use is decriminalised, though still punished with administrative sanctions. As regards

dealing, it is up to the Prosecutor to gather full evidence of this crime (as ordinarily happens for any crime). The quantity of the substance will be only one of many factors to be taken into account by the judge (others being dealing in paraphernalia, client lists, large amount of cash on the defendant’s person, etc.).

In contrast, the criminalisation perspective refocuses on possession itself, which is automatically assumed to be intended for dealing when above a defined quantitative threshold and moreover is seen as criminal no matter the level of possession. As a consequence, possession of an amount below the threshold can be punished, although with less severe penalties and sanctions.

### **DRUGS LEGISLATION IN THE 1970S (l. 685/1975)**

During the seventies, there was a major shift in public opinion against the 1954 drug law, which applied harsh prison sentences for drug use. At the time, the main concern was about the relatively high cannabis use among youth. Cannabis use had been severely criminalised by the 1954 law. However, prison sentences also did not seem to provide an appropriate and humane solution even for heroin addicts, whose numbers were just beginning to increase. As a result of an intense debate, a new law was approved in 1975. The key idea was to distinguish between personal use (which would be treated in the health system) and drug dealing and trafficking (to be punished by imprisonment). The key provision on personal use was found in Article 80 where the possession of a “limited amount” of psychoactive substances was established as “not punishable”.

No defined quantity for personal use was set in the law, so in the end it was up to the judge to determine whether possession was intended for personal use or not. As re-

gards penal provisions for dealing and trafficking, the 1975 law introduced different penalties according to the categorisation or schedule of the particular drug: with more serious penalties for substances in Schedule I (heroin, cocaine, amphetamines), and milder sanctions for substances in Schedule II (cannabis). The peculiar term “not punishable” is worth noting: it was meant to stress that drug use was still not “allowed”, least of all “legalised”. Drug use and addiction as such were considered a health problem, deserving treatment and/or education instead of punishment.

### **PROHIBITIONIST SHIFT IN THE 1980s** ***Controversy about the “limited amount”***

The 1975 law was effective until 1990. However, at the end of the 1980s the government of Bettino Craxi called for a prohibitionist shift, after the premier visited the United States. The Italian government wanted to change Italian legislation in line with the well known “Just Say No” slogan of Nancy Reagan. The shift also followed the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which established the possession of drugs for personal use as a criminal offence. (Although the issue of complying with this international treaty was hardly raised in the political debate.)<sup>6</sup>

The Craxi government put the blame for the rise in drug addiction on the 1975 law, particularly on Article 80 which established as “not punishable” the possession of a “limited amount” of drugs. The government argued that punishing the demand for drugs as well as the supply would be more effective in reducing drugs use. Though the main criticism focused on the “mild” approach of the 1975 law as providing no punishment for drug use, the wording itself “limited amount” was particularly criticised, basically for ideological reasons: For the Craxi government, it became a

symbol of “laxity”, as “the limited amount establishes drug use as a legitimate behaviour.”<sup>7</sup>

Following the “Just Say No” shift, the new law applied harsher and more “defined” punishments for drug use. The lack of definition of the amount of drug to be assumed for personal use of the 1975 law was seen as creating “uncertainty” (“uncertain” meaning too mild as well as unreliable and undefined). The “limited amount” clause was blamed for the power of “discretion” it gave to judges: a further evidence of the ex-ecrated “uncertainty” of the norms. Interestingly, the “limited quantity” was mainly criticised for ideological reasons and only marginally for its inefficacy in tackling drug dealing (“it makes dealing easier”, a member from the majority said during the parliamentary debate).

### **THE 1990 LAW** ***The “daily average dose” and its unintended consequences***

The Craxi government formulated a revision of the 1975 law, which was approved by the parliament in June 1990. Among its main innovations was the definition of a “daily average dose”, that was the average amount of substance a drug consumer was supposed to use daily. In line with the prohibitionist shift, the “daily average dose” was not meant to distinguish between personal use as a non punishable offence and the crimes of dealing and trafficking (to be severely punished). Basically, the threshold was meant to distinguish between more and less severe penalties.

The daily average doses were identified by the Health Ministry a few months after the new law became effective: 100 mg for heroin, 150 mg for cocaine, and 500 mg for cannabis. The figures refer to the psycho-active active principle in the substances, so the real weight of the “doses” may change according to the different cut of each drug.

It is difficult for users to know the amount of active principles in the substances in the illegal market, so, in the end, possession of drugs considered for personal use still remains undefined (at least from the point of view of users). Soon after its approval into law, the “daily average dose” approach revealed its many shortcomings:

- The main difficulty came just from its *lack of flexibility*, resulting in a consistent *criminalisation of users as dealers*.<sup>8</sup>
- The criminalisation of users was particularly serious as the penalties for the crime of dealing were harsh (imprisonment from 8 to 20 years for substances in Schedule I, from 1 to 6 years for substances in Schedule II).<sup>9</sup> In an effort to avoid these unintended consequences, during the parliamentary debate the norm was partially modified, introducing a new provision, for crimes of “minor relevance” (*lieve entità*). As a result, possession of amounts slightly above the threshold could be punished with penalties reduced by one third. But this had limited impact because the law also provided for the mandatory provisional arrest of people caught in possession of quantities above the threshold.
- The indiscriminate criminalisation led to a sharp rise in imprisonment. On December 31, 1990, 7,299 citizens charged with drug crimes were in jail (including addicts charged with drug or drug related crimes). By the end of June 1991, this had risen to 9,623 and to 14,818 by the end of 1992.

### **IN SEARCH OF THE LOST “FLEXIBILITY” The Craxi and Amato governments and the verdict by the Constitutional Court**

In summer 1991, three young users with no criminal record were imprisoned for possession of cannabis above the threshold and killed themselves. Public opinion was deeply affected by these deaths. Following a

public uproar, the Minister for Justice, Claudio Martelli, made a statement calling for a change in the newly approved law “as the norms did not allow for distinguishing between users and dealers”. Even though the Craxi government was not ready for such a radical shift, the Minister of Justice issued a decree to abolish mandatory provisional arrest and imprisonment in case of possession of drug amounts slightly above the “daily average dose”.

Two years later, after the fall of Craxi government, the law was again changed by the Amato government, with the aim of “personalising” the “daily average dose” according to the specific patterns of use and state of addiction of the single user: the new norms allowed for tripling the thresholds “in the case that this higher amount is equivalent to the amount consumed by the user in 24 hours.”

Prior to the governments' actions, the Constitutional Court had already led the way in promoting a change. In sentence 333 of July 10, 1991, just before the so-called “Martelli decree”, the Constitutional Court called for legislators to improve the law. In the meantime, the Court invited judges to be less strict in enforcing the criteria of the daily average dose: the amount of substance should be considered as one of several criteria for determining whether the drug was intended for dealing or for personal use. The strict quantitative criterion, to determine the severity of punishment, was thus rejected by the Constitutional Court.

In April 1993, the quantitative threshold was finally abolished by a referendum, along with the penalties for personal use. Although drug use could still be punished by administrative sanctions (such as suspension of passport, driving licence etc.), 55% of Italian voters rejected the criminalisation of users and the criterion of a “daily average dose”.

## **AFTER THE REFERENDUM (1993-2006)**

### ***How to identify drug possession for personal use?***

It is worth noting that the drug law text as revised by the 1993 referendum was quite different from the 1975 law, as it did not include any mention of the “limited amount” of a drug as evidence of personal use. Many jurists argued that, following the referendum, “the penal system concerning drugs is brought back to a legality model”, where the “burden of proof” is on the Prosecutor, who is required to gather full evidence of the crime.<sup>10</sup> In the 1990 law, whoever was caught in possession of an amount of drugs above the threshold was automatically considered a dealer. As a result, he/she was *presumed* guilty without any evidence of the crime of dealing. This was not consistent with the “legality model”, which requires that evidence of the crime of dealing be presented at trial as with any other criminal case.

Many verdicts issued by the high courts appeared to agree with this interpretation. For example, the Constitutional Court (360/July 24, 1995) held that “a less severe attitude of the legislator towards conducts related to personal use is reasonable.”<sup>11</sup> In particular, it argued that “the amount of drugs, *together with other circumstantial evidence*, will allow the judge to consider the aim of possession of the substances.”

As for the “other circumstantial evidences”, several verdicts by the Supreme Court of Cassation<sup>12</sup> gave a blueprint to judges to establish the aim of possession, using criteria like the condition of addiction, economic circumstances, evidence of packaging in doses, the possession of tools to weigh and or cut the substances in addition to the (relevant) amount of drugs.

An Italian magistrate, Francesco Maisto, argued that the referendum made it possi-

ble to set up two separate drug strategies, one towards simple users and addicts/small dealers based on education and treatment, and one against traffickers and large scale dealers. As a result, in the court of Milan an experiment took place to establish a drug addiction facility inside the court itself. By arranging a suitable therapeutic program, the judge was able to send the addict, charged with drug or drug related crimes, immediately to treatment, without any period of imprisonment.<sup>13</sup>

## **BACK TO “TOUGH ON DRUGS”**

### ***The 2006 drug law (current legislation)***

The 1990 law, as revised by the 1993 referendum, was in force for about ten years until the Berlusconi government launched a campaign against the innovations introduced by the referendum. The vice-premier, Gianfranco Fini, was the leader of this campaign. Speaking at a UN meeting in Vienna in 2002, on the international day against drugs, Gianfranco Fini announced a government bill to fill “the legislative breach” following the abrogation of the daily average dose as a “boundary line” between personal use and dealing.<sup>14</sup>

In Fini’s opinion, the abrogation allowing judges to determine whether the drug found in possession of the defendant was for personal use or for dealing, gave judges too many “discretionary powers”: as a consequence, quantitative thresholds were to be restored. The “Fini bill” was approved by the parliament at the beginning of 2006.

As we can see, the anti-referendum rhetoric was similar to the arguments against the “limited amount” provision in the 1975 law; the tough on drugs approach calls for a “certain” punishment of any drug related conduct, beginning with drug use itself. Yet, the legislative framework of the 2006 law is different in a number of key points. Among them:

- *“Maximum quantity allowed”*. The quantitative threshold which is meant to distinguish between use and dealing is called “maximum quantity allowed” (the maximum amounts were determined as 500 mg (active psychoactive principle) for cannabis; 250 mg for heroin; 750 mg for cocaine.<sup>15</sup> It has different wording from the “daily average dose” in the 1990 law, and a different philosophy as well. The “daily average dose” still made reference to the amount which presumably would be consumed by the addict in 24 hours. In other words, there was a sort of *subjective* reference, which allowed some (though small) flexibility in the interpretation of the norms (see above the Amato decree in 1993, which tripled the thresholds should the addict give evidence of using higher daily doses). This subjective reference is totally absent in the “maximum quantity allowed”. As a result, the person found in possession of an amount of substance above the threshold will be a “virtual” dealer, as the jurist Livio Pepino wrote.<sup>16</sup>

- *Penalties Article 73/74 (production, dealing, trafficking) and upgrading of cannabis in schedules*. The penalties set for possession above the threshold (supposedly for dealing and trafficking) are more severe, ranging from 6 to 20 years of imprisonment for all substances. While the 1990 law provided for different penalties according to the Schedules (from 1 to 6 years for cannabis in Schedule II; from 8 to 20 years for “hard drugs” in Schedule I); the 2006 law, by upgrading cannabis to Schedule I, led to a substantial rise in penalties.<sup>17</sup>

- *Penalties for drug crimes of “minor relevance”*. The 2006 law still maintains the provisions for less severe penalties for drug crimes of “minor relevance”, when the person is found in possession of quantities slightly above the threshold, with penalties ranging from 1 to 6 years of imprisonment.

Nevertheless, this is not a specific provision, but only a mitigating circumstance of the main provision. As a consequence, for quantities above the threshold, the charge always refers to Article 73 as a whole (and the mitigating circumstance would be taken into account by the judge only in the final verdict). As a consequence, people caught in possession of quantities above the threshold are more likely to be subjected to provisional arrest than they would be if paragraph 5 were a specific provision. Furthermore the mitigating circumstance may not be applied in the presence of aggravating circumstances, such as recidivism. For example, according to the provision “three strikes and you are out”, a person found in possession even of limited amounts above the threshold may be sentenced to the full sanction of six years in prison.

- *Alternatives to imprisonment*. With the aim of mitigating the impact of harsher penalties, drug addicts sentenced to less than 6 years imprisonment (or with 6 years remaining in prison) may be sent to alternative therapeutic programmes (the limit was 4 years in the previous legislation)

- *Administrative sanctions for personal use*. More and harsher sanctions are applied to users (such as a prohibition to leave their place of residence during some hours, a prohibition to drive cars, mandatory checking in at local police stations at least twice a week). Also, they may be enforced for longer periods. More importantly, therapeutic programmes are no longer alternative to sanctions but are provided *in addition* to them.

## **EVALUATING THE 2006 DRUG LAW (2006-2010)**

In 2009 a study was carried out by *Forum droghe*, an Italian NGO, and by the *Fondazione Michelucci* to evaluate the 2006 law

and its impact on imprisonment. The study, funded by the Region of Tuscany, while focusing on an in-depth analysis of the four main prisons in the region, also offered an overview of the national situation from 2006 to 2008. The main results from this study have been updated to 2010 by the author:<sup>18</sup>

- *Drug offences.* Offences against Article 73/74 of the drug legislation reported by the police rose from 33,056 in 2006 to 35,427 in 2008, to 36,458 in 2009 and 39,053 in 2010. As regards the different substances, most police activity is against cannabis offenders and has steadily increased (12,805 cannabis offences in 2008, 13,344 in 2009, 16,030 in 2010)
- *Imprisonment for drug crimes.* In 2006, 25,399 people were imprisoned for drug crimes out of an overall of 90,774 imprisoned for all crimes (28%); in 2010, 26,096 drug offenders were imprisoned out of an overall 84,598 (31%)
- *Proportion of detainees in prison for drug crimes.* On December 31 2006, 14,640 people were in jail for drug crimes (37.53%); on December 2010, 27,294 (40.16%).
- *Imprisonment of addicts.* In 2006, 24,493 addicts were imprisoned (27% of the overall figure) while in 2010, 23,944 drug addicts were imprisoned (29%). In 2008, the number of addicts rose to 30,528 (33%): this is the highest figure since 2001.
- *Police operations and seizures.* In 2006, 20,775 anti drug police operations were reported; in 2010, 22,064, with a top figure in 2009 of 23,262 police operations (the highest in the last ten years). While police operations are increasing, the amount of drug seizures (in kilos) is stable, apart from a boom in 2008. But it is worth noting that cannabis seizures make up by far the majority of overall seizures, and have in-

creased in numbers and proportion. In 2006, cannabis seizures equalled 24,672 kilos (74% of overall drug seizures); in 2009, 28,400 kilos (83,2 %); in 2010, 25,487 kilos (82,2%).

- *Sanctions for personal use.* In 2006, 7,229 sanctions were applied; in 2010, 16,154.<sup>19</sup> While the number of sanctions doubled from 2006 to 2010, in the same period there was a dramatic drop in use of therapeutic programmes by sanctioned users from 6,713 therapeutic programmes in 2006 to 518 in 2010.
- *Therapeutic alternatives to imprisonment.* In the years 2006-2010 there was an overall decrease in alternative therapeutic programmes. On 1 January 2006, 3,852 drug offenders (diagnosed as addicts) were in a therapeutic program; on the same day in 2010, the figure had fallen to 1,597. It is difficult to analyse the trend, as in 2006 all prisoners benefited from an amnesty of three years: as a result, a large number of drug offenders were released from jail, which may explain the sharp decrease of participants in alternative programmes to prison. Regardless, the decrease is still significant, as the total number of inmates at the beginning of 2010 was even higher than in 2006, before the amnesty (67,961 detainees on 1 January 2010 versus 62,000 on 1 January 2006), with the rate of imprisonment of addicts on the rise. More importantly, there has been a significant decrease in the number of addicts directly sentenced to therapeutic programmes (without spending any time in jail). As a result, in 2009 and in 2010, the number of prisoners released and sent to alternative treatments was higher than the one of citizens directly sentenced to therapeutic programmes (without entering prison): on 1 January 2009, 613 prisoners were sentenced to alternative treatment programmes versus 500 persons who were sent

directly to programmes (without previous imprisonment); on 1 January 2011, 1,594 inmates went to therapeutic programmes versus 932 not previously imprisoned persons. This is a major change in trends as addicts directly sentenced to alternative programmes have consistently outnumbered people released from prison since the 1990s.<sup>20</sup>

- *Drug crimes of “minor relevance”*. Data on this would allow us to assess whether law enforcement is focused on major or minor drug crimes. A large prevalence of these crimes may also indicate a disproportionate punishment of drug possession for personal use, due to the threshold. However, no official data are available about the prevalence of drug crimes of “minor relevance” at national level. The in-depth qualitative research in Tuscany tries to fill the void: in the Florence prison (Sollicciano) the rate of prisoners (sentenced or charged) for drug crimes of “minor relevance” made up 40% of the overall drug crimes (suggesting that law enforcement is mainly focused on punishment of users/small dealers).<sup>21</sup>

In short, these figures show the striking impact of the 2006 drug legislation on the justice and prison systems, particularly in terms of increased rates of imprisonment for drug crimes and of imprisoned addicts (though the latter to a more limited extent). Noticeably, minor drug crimes seem to be the main target of law enforcement. Also, the upgrading of cannabis on the schedules (with the related emphasis on the “cannabis threat”) seems to have led to an indiscriminate enforcement and punishment of cannabis crimes (see the overwhelming rise in cannabis offences, police operations and seizures of this substance).

The relevant rise in sanctions for personal use together with the dramatic drop in therapeutic programmes for sanctioned

users is clear evidence of the poor results and unintended consequences of a punishment-oriented approach.

A further lesson may be learnt from the data regarding the substantial fall of alternatives to prison: the milder provisions in the law in favour of alternatives to incarceration have been totally ineffective. This probably happened because they were not consistent with the overall “tough on drugs” approach, so they were not able to counteract the rise in imprisonment due to the higher penalties and the harsher law enforcement.

## **CONCLUSION: BEYOND THE THRESHOLD CONTROVERSY**

### ***A new legislative framework***

The main shortcoming of the threshold model (both in the “daily average dose” and in “the maximum quantity allowed” versions) is the risk of indiscriminate criminalisation of drug users, who have an amount of substance above the threshold. Paradoxically, the threshold system is particularly inappropriate and unfair in the context of illegal markets, where it is difficult for users to have control over the quantity and purity of the substance in their possession. Moreover, the threshold model does not meet basic legal principles as it relies on a presumption of guilt, a reverse of burden of proof. In this perspective, the “flexible” model is preferable.

Regardless, none of these models address the necessity of differentiating between users and dealers adequately. On closer look, the real difficulty appears to lie in the core framework of all drug legislation up to now: summed up in the key section (Article 73), where production, sale, trafficking are listed together with possession (suggesting that the simple possession of drugs is considered equivalent to producing, dealing and trafficking).



To address the problem definitively, a fundamental change in the framework of drug legislation is necessary. This has been the purpose of the “La Greca draft”, a text written by a special committee of experts promoted by the Ministry of Justice in the XIII legislature (1996-2001).<sup>22</sup> These are the key sections:

- *Possession redefined to target drug sales.* Article 73, entitled “Sale of psychotropic substances” establishes as a crime “possession aimed at delivering substances so to make profit from them.”
- *Differentiating penalties.* Penalties for Article 73 are differentiated for substances in Schedule I (ranging from 1 to 6 years imprisonment) and substances in Schedule II (cannabis) (from 6 months to 2 years).
- *Production aimed at sales.* The same penalties for Article 73 are provided for cultivation or production aimed at dealing.
- *Minor drug crimes.* A mitigating circumstance is established for crimes of “minor relevance”, punished with milder penalties (from 6 months to 3 years, for substances in Schedule I; from 3 months to 1 year, for Schedule II).
- *Trafficking.* An aggravating circumstance is established for trafficking (from 2 to 8 years imprisonment for substances in Schedule I; from 1 to 4 years for Schedule II).

As Giuseppe Cascini (one of the jurists who took part in the Committee) notes, the new wording was meant to clearly rule drug use (and all the related conducts like growing for personal use) out of the penal provisions. The result is the decriminalisation of drug use, to be properly addressed by psychosocial interventions. Penalties are also milder than in the current legislation and well balanced. In addition, the “La Greca draft” meets the principle of the “burden of proof”, as it is up to the Prosecutor to

gather full evidence of possession intended for dealing.<sup>23</sup>

It is worth noting the above legal framework meets the requirements of the 1988 Convention. Though Article 3 paragraph 2 requires the parties to establish possession as a criminal offence, in the same paragraph it is clearly stated that this provision is “subject to the constitutional principles and basic concepts of the legal system”. Without question, the requirement for burden of proof in the penal system is one of the basic principles of democracies. In the same treaty, “measures such as education, rehabilitation or social reintegration” are provided as “alternatives to punishment” (Article 3 paragraph 4(c)).

The “La Greca draft” also meets the basic requirements of the EU Council Framework Decision 2004/75 (which laid out minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking), with special regard to preamble 5, which demands that penalties are “proportionate” and determined by taking into account “factual elements, such as quantities and *the type of drugs* trafficked”. This wording clearly demands a distinction between more and less harmful drugs.

More importantly, in Article 2(c) (*Crimes linked to trafficking*), possession is mentioned in a specific formula: “possession or purchase of drugs with a view to conducting one of the activities listed in paragraph 1(a) (production, sale, transport etc.).<sup>24</sup> This is close to the La Greca draft wording, which establishes *possession as a crime only when intended for sale*, reflecting the same concern for criminalisation of possession for personal use. To further avoid this risk, Article 2, paragraph 2, clearly states that the punishable conduct previously described “shall not be included in the scope of this Framework Decision when it is committed

by perpetrators exclusively *for their personal consumption*.” As we can see, the EU Council Decision explicitly mandates two different approaches, to address dealing and trafficking on one the hand, and personal use on the other.<sup>25</sup>

## NOTES

1. Grazia Zuffa is a psychologist working in the field of drug policy and research. She is a founding member of *Forum droghe* in Italy. Special thanks to Franco Corleone and to jurists Alessandro Margara and Francesco Maisto.

2. We are only quoting the main offences. The 2006 law Article 73 establishes 22 misconducts as criminal offences.

3. See Article 36 of the Single Convention on Narcotic Drugs (1961): “...each party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale... (ten more offences are mentioned) ... shall be punishable offences...”

4. There is some confusion in wording, between decriminalisation and depenalisation. The Italian wording is “depenalizzazione”, but according to the definition given by EMCDDA (Thematic Paper 2005, Legislative Approach, p.12) “decriminalisation” is the most suitable phrasing in the English language for the Italian term. In fact, according to the EMCDDA convention “decriminalisation” comprises removal of a conduct or activity from the sphere of criminal law”, while “depenalisation” means relaxation of the penal sanction provided for by law. Nevertheless, it is acknowledged that “it is difficult to find a precise, validated scientific definition of these two terms, and in particular one that is universally shared” (ibidem).

5. This is a constitutional principle (“obbligatorietà dell’azione penale”, Article 112 of the Italian Constitution), according to which any transgression of the law must be prosecuted.

6. We can imagine it would have been a poor argument as the 1988 Convention allows flexibility in the implementation of the norms so that decriminalization is not considered in breach of the international treaty (see below)

7. G.Zuffa (2000), *I drogati e gli altri*, Sellerio editore Palermo, p.91

8. The main reason for possessing amounts of drugs above the threshold is that many users may prefer to buy larger quantities of drugs, simply to avoid too frequent contact with the illegal market.

9. As a magistrate said “penalties in the drug law are so harsh that it is difficult to understand whether murder is still considered, and punished accordingly, as the most serious crime” (C.D’Elia (1998), ‘Cambia forse la legge, paternalismo e cura coatta rimangono’, in *Fuoriluogo*, June 1998, p.6).

10. F.Maisto (2003), ‘Da consumatori a spacciatori’, in *Fuoriluogo*, May 2003, p.6.

11. The reference is to the depenalisation of personal use of drugs, as a result of the 1993 referendum

12. The Supreme Court of Cassation (Italian: *Corte Suprema di Cassazione*) is the major court of last resort in Italy.

13. C.D’Elia (1998), cit. p.6

14. S.Rissa (2002), ‘Una dose d’oblio’, in *Fuoriluogo*, July 2002, p.5

15. The amounts were established in the Ministry of Health decree in April 2006. In the former government bill, the amounts were determined as 250 mg (active principle) for cannabis, 200 mg. for heroin, 500 mg. for cocaine.

16. L.Pepino (2006), ‘Delinquenti virtuali. Le tabelle della Fini Giovanardi’, in *Fuoriluogo*, April 2006, p.8. He also wrote: “Obviously, the presumed and anticipated identification of the virtual dealer is not reliable and alters the basic principles of equity, logic and law”.

17. Of course, the harsher penalties meant the simple user found in possession of higher amounts of drug was more likely to receive unfair punishment.

18. Data have been collected from the National Department of Prisons; 2010 Report of the Antidrug Police Department; 2011 Annual National Report to the Parliament on Drug use and Drug Addiction; *Secondo Libro Bianco sulla legge Fini Giovanardi*, dossier di *Fuoriluogo*.

19. Ministry for Home Affairs, *Analisi dei mutamenti del consumo tra le persone segnalate ai Prefetti per uso personale di sostanze stupefacenti dal 1991 al 2006* (updated to 22 June 2011)

20. A.Scandurra (2011), Gli spacciatori in carcere e i tossicodipendenti in comunità? Un bilancio disastroso, in *Secondo Libro Bianco sulla legge Fini Giovanardi*, p.15

21. The researchers stress that this rate is probably underestimated, as the mitigating circumstance of “minor relevance” can only be acknowledged for sentenced prisoners, while for prisoners in provisional arrest the records only mention the charges for Article 73. Moreover, the study found that the rates of imprisonment for drug crimes are higher in Tuscany than the average figures in Italy: for example, in the Florence prison (Sollicciano), in 2008, of a total figure of 777 people entering prison, the rate of people imprisoned for drug crimes was 43%, while the rate of addicts (imprisoned for drug or drug related crimes) was as high as 61.4% (!). Similar rates could probably be found in many other big cities, such as Turin, Milan, Bologna.

22. The committee was established in 1998, after resolutions from the National Government Conference on Drug Addiction. It was chaired by the magistrate Giuseppe La Greca and the Undersecretary for Justice, Franco Corleone. Later on, the La Greca draft became a parliamentary bill, presented to the Chamber of Deputies in 2003 and again in 2006 (first signatory Marco Boato).

23. G.Cascini (2004), Le colpe dei consumatori di droga”, in *Fuoriluogo*, October 2004, p.9

24. Art.2, par.1 (2): “the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms... transit, transport, importation or exportation of drugs.”

25. G.La Greca (2006), L’attuale tendenza politico criminale, in F.S. Fortuna, S.Grieco (eds), *Droga e controllo penale*, Università degli studi di Cassino, p.46.



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**Forum Droghe** has been involved in the reform of drug policies from a pragmatic and evidence-based perspective. Since it was established in 1995, Forum Droghe has acquired a large amount of knowledge and expertise, particularly in the field of harm reduction policies in European countries. It has sponsored or co-sponsored many conferences and seminars all over Italy.

After the 2006 tough on drugs shift of the Berlusconi government, it has been lobbying for a new drug law to replace the current legislation. In recent years, Forum Droghe has also promoted research in the following fields:

- the evaluation of the drug legislation on its impact on the prison and justice system, publishing the First (2009) and Second (2011) White Books on the Fini Giovanardi law.
- the study of “controlled” use of drugs, in particular cocaine, and the development of an innovative prevention approach within the Harm Reduction model.

Until 2009, Forum droghe has published **Fuoriluogo**, distributed as a monthly supplement to the national daily paper *il Manifesto* (where it still publishes a weekly op ed). *Fuoriluogo*, which is now available on line, deals specifically with drug policies, justice and law enforcement at both national and international level. One of its main objectives is producing information on the most innovative drug policies carried out in European countries.

*Fuoriluogo* it provides reliable and up to date information and documentation on a wide variety of issues (drug legislation, imprisonment of addicts and therapeutic alternatives to incarceration, cannabis decriminalization, cannabis and science, harm reduction practices, medical cannabis etc.).

Forum droghe also publishes **Quaderni di Fuoriluogo**, a series of thematic papers. Forum Droghe is a member of the International Drug Policy Consortium (IDPC).

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## **Drug Law Reform Project**

The project aims to promote more humane, balanced, and effective drug laws. Decades of repressive drug policies have not reduced the scale of drug markets and have led instead to human rights violations, a crisis in the judicial and penitentiary systems, the consolidation of organized crime, and the marginalization of vulnerable drug users, drug couriers and growers of illicit crops. It is time for an honest discussion on effective drug policy that considers changes in both legislation and implementation.

This project aims to stimulate the debate around legislative reforms by highlighting good practices and lessons learned in areas such as decriminalization, proportionality of sentences, specific harm reduction measures, alternatives to incarceration, and scheduling criteria for different substances. It also aims to encourage a constructive dialogue amongst policy makers, multilateral agencies and civil society in order to shape policies that are grounded in the principles of human rights, public health and harm reduction.



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