DOI 10.26807/rfj.vi9.129

The extensive interpretation of the criminal nature of trafficking in scheduled substances subject to control: The case N° 18282-2018-00726

La extensiva interpretación del tipo penal de tráfico de sustancias catalogadas sujetas a fiscalización: el caso N° 18282-2018-00726

Vicente Vásconez Merelo
Independent legal researcher
City: Quito
Country: Ecuador

Original article (research)
RFJ, No 8, 2020, pp. 483-526, ISSN 2588-0837

ABSTRACT: The author analyzing the penal type prescribed in article 220 of the COIP, because he considers their interpretation is extensive. To verify this assertion is necessary to evaluate the international legal context for the illegal use of narcotic and psychotropic substances, in line with the old Narcotics Law that was invalidation until the enactment of the COIP in 2014. Additionally, the paradigm shift has drawn up as a result of the entry into force of the National Constitution of 2008, which stops the consumer of prohibited substances as a criminal from receiving treatment for victims. Finally, the author analyzes to correctly interpret the aforementioned criminal type and consequently proposes an interpretation criterion reflected in the analysis of a judicial case that occurred in one of the Ecuadorian courts, thus concluding that in the Ecuadorian criminal legal system simple drug possession is atypical.

KEYWORDS: Criminal law, interpretation, crime, drug trafficking, criminal sanction.

RESUMEN: El autor se encarga de analizar con exhaustividad el tipo penal prescrito en el artículo 220 del Código Orgánico Integral Penal (COIP), pues a su forma de ver las cosas se lo ha venido interpretando de forma extensiva. Para comprobar esta aseveración, se evalúa el contexto jurídico internacional referente al uso ilegal de sustancias estupefacientes y psicotrópicas, en consonancia con la vieja Ley de estupefacientes que estuvo vigente hasta la promulgación del COIP en el año 2014. Además, se resalta el cambio de paradigma trazado a raíz de la entrada en vigencia de la Constitución Nacional de 2008, en el que deja de verse al consumidor de sustancias prohibidas como un delincuente para darle el tratamiento de víctima. Finalmente, el autor hace un análisis dogmático para interpretar correctamente el tipo penal aludido y consecuentemente propone un criterio hermenéutico que luego lo plasma en el análisis de un caso judicial acaecido en uno de los juzgados del Ecuador, concluyendo así que en el ordenamiento jurídico-penal ecuatoriano es atípica la tenencia simple de droga.

PALABRAS CLAVES: Derecho penal, interpretación, crimen, tráfico de estupefacientes, sanción penal.

INTRODUCTION

Since the entry into force of the National Constitution of the Republic of Ecuador in 2008, the Legislative Branch has been urged to adopt the infra-constitutional regulations following the parameters established in the constitution and international treaties. Then, the state of the question on the criminalization of drugs was subject to a positive reassessment, and this would be reflected in the publication of the Organic Comprehensive Criminal Code (from now on, COIP) in 2014. In this norm, a different treatment is given to the issue of drugs concerning how it was done in the ancient Law of Narcotic and Psychotropic Substances.

Despite the paradigm shift in the COIP, at the jurisdictional level, an erroneous and extensive interpretation has been made of the type of illicit drug trafficking embodied in art. 220, since individuals have been criminalized for the sole possession of non-trafficking drugs when that conduct in light of any interpretation turns out to be atypical. Therefore, we would be facing a severe violation of human rights of institutional origin.

In this sense and to give foundation to the assertion, in the development of the work, the following will be analyzed: constitutional norm and international conventions; Narcotic and Psychotropic Substances Law as a legislative antecedent; the COIP in its pertinent articles; a study will be carried out from the light of the legal-criminal dogmatics on the criminal type of illicit traffic of substances subject to the control of art. 220; Also, an executed condemnatory sentence will be analyzed, which will confirm the proposed thesis; and, finally, advancing the conclusion, the erroneous and unconstitutional judicial interpretation of the type stated will be corroborated, which will account for the enormous crisis in the administration of criminal justice.

1. CONSTITUTIONAL AND CONVENTIONAL CONSIDERATIONS

During 2007, as a result of the maximum expression of the democratic will of a State, a Constituent Assembly was installed in the Montecristi canton, and it was there that the Constitution of the Republic of Ecuador (from now on CRE) was signed, which would be published in 2008. Due to its content, the constitution has been praised by the international community on repeated occasions; *prima facie* it is coherent, guarantor, inclusive and was also the first to endow nature with an ecocentric vision. Therefore, we would say that we

are facing a norm of the highest hierarchy, which allows the free development of personality and recognizes rights and guarantees to any human being. Of course, a constitution with the described characteristics, in no way, could stigmatize and criminalize subjects who consume prohibited drugs, but rather, would urge that they are treated as individuals who require state aid for being victims of addiction.

In this sense, from article 364 of the CRE (2008) it follows:

> Addictions are a public health problem. The State will be responsible for developing coordinated information, prevention, and control programs for the consumption of alcohol, tobacco, and narcotic and psychotropic substances; as well as offering treatment and rehabilitation to occasional, habitual and problematic consumers. In no case will their criminalization be permitted, or their constitutional rights be violated. The State will control and regulate the advertising of alcohol and tobacco.

In addition to this, Ecuador defines itself according to the first article of the CRE as a constitutional State of Rights and Justice, and this can only mean that the entire infra-constitutional legal system must conform to the principles, provisions and respect for established rights by the first letter. For this reason, article 424 states: "The Constitution is the supreme norm and prevails over any other of the legal system. The norms and acts of the public power must maintain conformity with the constitutional provisions; otherwise, they will lack legal effectiveness". (CRE, 2008, art. 424)

Despite all that has been said, it is well known to those with legal training that a legislative adaptation of this nature to an incoming Constitution requires a significant period in order to achieve this objective. In criminal matters, only in

2014, the legislator published a new code that was called to meet constitutional expectations; and, consequently, the Law on Narcotic and Psychotropic Substances that regulated illicit behaviour linked to the drug problem was repealed, and the COIP assumed said power.

It should be noted that, regarding the COIP, the Ecuadorian legislator followed the position that criminal law must be aimed at strict protection of legal assets, and this can be corroborated in article 22, which refers to criminally relevant conduct, and also in article 29 inherent in unlawfulness (COIP, 2014); which, for the conception of the undersigned, is a correct and majority position in the doctrine despite all the objections that could be made to it. Consequently, in Ecuadorian criminal law, only conduct that endangers or injures protected legal assets is typified and criminalized.

In keeping with what has been stated, in the Third Chapter of the COIP (2014) that refers to the "Crimes Against the Rights of Good Living", it typifies in its Third Section the "Crimes Against the Right to Health". Therefore, health will be the legal asset protected by criminal law in illicit acts related to psychotropic and narcotic drugs. About the right to health, the constitutional norm includes it in articles 32 and 359 and describes them as follows:

> Health is a right guaranteed by the State, whose realization is linked to the exercise of other rights, among them the right to water, food, education, physical culture, work, social security, healthy environments and others that they support good living.
>
> The State will guarantee this right through economic, social, cultural, educational and environmental policies; and permanent, timely and without exclusion access to programs, actions and services for the promotion and comprehensive care of health, sexual

> health and reproductive health. The provision of health services will be governed by the principles of equity, universality, solidarity, interculturality, quality, efficiency, effectiveness, precaution and bioethics, with a gender and generational focus. (CRE, 2008, art. 32)
>
> The national health system will comprise the institutions, programs, policies, resources, actions and actors in health; it will cover all dimensions of the right to health; it will guarantee promotion, prevention, recovery and rehabilitation at all levels; and will promote citizen participation and social control. (CRE, 2008, art. 359)

That said, from a look at international law, Ecuador has acceded to the 1961 Single Convention on Narcotic Drugs, which in turn was amended by the 1972 Protocol signed by the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. In this regard, in Article 33 of the 1961 Single Convention on Narcotic Drugs (1988), it has been stated that the parties will only allow the possession of narcotic drugs with legal authorization; and, among other things, the following has been prescribed:

> FIGHT AGAINST ILLICIT TRAFFIC. - Taking due account of their constitutional, legal and administrative regimes, the Parties:
>
> a) They will ensure coordination of preventive and repressive action against illicit trafficking on the national level; for this, they may designate an appropriate service to be in charge of said coordination;
>
> b) Help each other in the fight against illicit drug trafficking;
>
> c) Cooperate closely with each other and with the competent international organizations of which they

are members to maintain a coordinated fight against illicit trafficking;

d) They shall ensure that the international cooperation of the appropriate services is carried out expeditiously;

e) Take care that, when the documents for judicial action are transmitted from one country to another, the transmission is carried out in an expedited manner to the bodies designated by the Parties; This requirement does not prejudge the right of a Party to require that the auto parts be sent to it through diplomatic channels;

f) Provide, if they deem it appropriate, in addition to the information provided in article 18, to the Board and the Commission through the Secretary-General, the information regarding illicit drug activities within their borders, including the reference to cultivation, illicit production, manufacture, trafficking and use of narcotic drugs.

g) To the extent possible, they will provide the information referred to in the previous section in the manner and on the date that the Board requests; If requested by a Party, the Board may offer its advice in its task of providing information and trying to reduce illicit drug activities within the Party's borders. (Single Convention on Narcotic Drugs, 1961, art. 35)

MEASURES AGAINST THE IMPROPER USE OF NARCOTIC DRUGS:

1. The Parties shall pay special attention to the prevention of drug abuse and the prompt identification, treatment, education, post-treatment, rehabilitation and social rehabilitation of the affected persons, shall take all possible measures to that end and coordinate their efforts in that regard.

> 2. The Parties shall promote, to the extent possible, the training of personnel for the treatment, post-treatment, rehabilitation and social rehabilitation of those who abuse drugs.
>
> 3. The Parties shall endeavour to assist persons whose work so requires so that they may become aware of the problems of drug abuse and its prevention and shall also promote such knowledge among the general public if there is a danger that it will spread. the abuse of narcotic drugs. (Single Convention on Narcotic Drugs, 1961, art. 38)

Concerning the three cited articles of the Single Convention on Narcotic Drugs, it is worth making a few brief observations that are highly pertinent: article 33, referring to the possession, ordered to define any type of possession that does not have prior authorization and that is why, in Ecuador, the repealed Law on Narcotic and Psychotropic Substances did so broadly and expressly. However, it has already been said that the legal assessment of drug possession behaviour fluctuated as a result of the entry into force of the COIP, due to its adaptation to the 2008 CRE criteria.

Regarding Article 35, entitled "Fight Against Illicit Traffic", it is too essential to highlight the express recognition that the convention makes to the superiority of the constitutional norm, internal laws and regulations. Besides, the article shows a clear intention to combat illicit trafficking, which in the eyes of the writer turns out to be the real conflict and that is why, in article 38, which refers to the measures to be taken for the improper use of narcotic drugs, the intention of treating, rehabilitating and socially readapting the affected people is embodied, because it is understood - rightly - that the misuse does not make the individual a criminal and instead, is a vulnerable subject that requires special attention due to their addiction.

However, regarding the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) the following has been agreed:

> CRIMES AND PENALTIES
>
> 1. Each of the Parties shall adopt the measures that are necessary to define as criminal offences in its domestic law when they are intentionally committed:
>
> i) The production, manufacture, extraction, preparation, offer, offer for sale, distribution, sale, delivery under any conditions, brokerage, shipping, transit shipment, transportation, import or export of any narcotic drug or psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
>
> (ii) The cultivation of opium poppy, coca bush, or cannabis plant to produce narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
>
> iii) Possession or acquisition of any narcotic drug or psychotropic substance in order to carry out any of the activities listed in section i) above;
>
> iv) The manufacture, transportation or distribution of equipment, materials or substances listed by Table I and Table II, knowing that they will be used in the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances or for such purposes;
>
> v) The organization, management or financing of any of the crimes listed in the preceding sections i), ii), iii) or iv);
>
> 2. Subject to its constitutional principles and the fundamental concepts of its legal system, each of the Parties shall adopt the measures that are necessary to

> define as criminal offences under their domestic law, when they are intentionally committed, possession, acquisition or the cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or 1971. Convention (United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, article 3)

In the first paragraph of the article mentioned above, there is no doubt that the conduct that is intended to be prohibited is the illicit trafficking of narcotic substances. Concerning the second numeral, the pre-eminence of the constitutional and legal norms of the internal legal order is again expressly subscribed to over the agreements of the convention, which although they recommend typifying crimes of possession, that has not been reflected by The COIP, since faithfully following the constitutional principles in force, the possession or possession of scheduled substances subject to non-trafficking control has not been criminalized, and this will be demonstrated in greater detail in the development of the investigation.

2. LAW OF NARCOTIC AND PSYCHOTROPIC SUBSTANCES: LEGISLATIVE BACKGROUND TO THE COIP

At the moment it has been put on the table that the Law on Narcotic and Psychotropic Substances had no constitutional impediment to incorporate the recommendations made by the international conventions mentioned in the previous chapter, and that is why it openly typified possession, possession and of course illicit trafficking in narcotic and psychotropic substances. However, as it has already been said, this normative situation fluctuated in the COIP for the forceful reason that the new National Constitution revalued those behaviours in a

much more rational and up-to-date sense when feeling social and scientific.

When saying of the ancient Law of Narcotic and Psychotropic Substances, this had as an objective in its art. 1 the following: "This Law aims to combat and eradicate the production, supply, misuse and illicit trafficking of narcotic and psychotropic substances, to protect the community from the dangers arising from these activities." (Law on Narcotic and Psychotropic Substances, 2004, art. 1)

In turn, Article 3 indicated allusion to the following:

> Scope of the law. This Law covers everything related to The possession, possession, acquisition and use of controlled substances, raw materials, inputs, components, precursors or other specific chemical products intended to manufacture or produce them, their derivatives or preparations, and the machinery, equipment or goods used to produce or maintain them. (Law of Narcotic and Psychotropic Substances, 2004, art. 3)

As it is easy to see, there is an absolute acceptance of the ancient Law on Narcotic and Psychotropic Substances to the conventions that were cited, since possession and position without trafficking purposes were considered criminally relevant conduct there. Moreover, as it has already been said, that would not have to generate astonishment, since the non-existent constitutional contention of that time allowed it. Continuing with the analysis of the Law, the third title refers to the improper use of substances subject to control and the rehabilitation of affected persons, and article 27 prescribes that: "Of the improper use of substances subject to control. - Abuse of controlled substances is understood to mean anyone who is not therapeutic." (Narcotic and Psychotropic Substances Act, 2004, art. 27), while article 38 maintained the following:

> Possession of substances subject to control. - No one may, without legal authorization or prior dispensing of a medical prescription, keep on their person, clothes, suitcases, housing, workplace or any other place any quantity of the substances subject to control, nor have them, in any way, for traffic unlawful of them. (Law of Narcotic and Psychotropic Substances, 2004, art. 38)

Consequently, article 27 of the Law makes it clear that the use of substances subject to control without therapeutic purpose is improper and therefore punishable; Helping with this, Article 38 establishes a wide variety of commission forms in which it includes possession and illicit trafficking. Therefore, whether from a systematic, a literal (syntactic, semantic) or a teleological interpretation, in any case, would lead to the conclusion that in the Law of Narcotic and Psychotropic Substances any type of possession of controlled substances was typified with the only exception of therapeutic use.

3. CURRENT TREATMENT OF THE PROBLEMS RELATED TO NARCOTIC AND PSYCHOTROPIC SUBSTANCES

At this point, the COIP prescribes in the Second Section of the Third Chapter referring to "Crimes Against the Rights of Good Living", all the offences and provisions related to listed substances subject to control, from "production" to "actions of bad faith to involve in crimes". However, as it has already been said, the legislator does not classify the simple or non-traffic possession as if the old Law of Narcotic and Psychotropic Substances did. Therefore, from now on, the article 220 of the COIP that refers to illicit trafficking and the provision of article 228 that refers to the acceptable amount for personal use or consumption will be exclusively analyzed, since these articles are usually used as Reason for wrongly criminalizing simple tenure:

> The illicit trafficking of scheduled substances subject to control. - The person who directly or indirectly without authorization and requirements provided in the corresponding regulations:
>
> 1. Offer, store, broker, distribute, buy, sell, send, transport, market, import, export, possess, possess or generally carry out illicit traffic in narcotic and psychotropic substances or preparations containing them, in the quantities indicated in the scales provided in the corresponding regulations, will be punished with the custodial sentence as follows:
>
> a) Minimum scale of one to three years.
>
> b) Medium-scale of three to five years.
>
> c) A large scale of five to seven years.
>
> d) A large scale of ten to thirteen years.
>
> The final paragraph of article 220
>
> The possession or possession of narcotics or psychotropic substances for personal use or consumption in the amounts established by the corresponding regulations, will not be punishable. (COIP, 2014, art. 220)

First, as a preliminary clarification, due to being impertinent for the investigation, the decision was taken not to cite the second numeral of article 220 of the COIP that refers to the illicit trafficking of chemical precursors, and the penultimate clause of the article that refers to an aggravating circumstance. Now, it is valid to emphasize at the outset that a literal (syntactic, semantic) and constitutional interpretation of article 220 makes it clear that the only intention is to criminalize the illicit trafficking of scheduled substances subject to control and chemical precursors. However, the topic of the

interpretation of the penal type will receive a more significant dogmatic treatment in the fourth chapter of the investigation.

Now, to have a comprehensive vision of current regulations, an extract from Resolution No. 001 of September 9, 2015, published in the Second Supplement of Official Registry No. 586 of December 14, will be cited below. September 2015 issued by the National Council for the Control of Narcotic and Psychotropic Substances (from now on, CONSEP), which establishes the punishable amounts concerning illicit trafficking.

Article 1, Ratify the tables of narcotic and psychotropic substances to sanction the illicit traffic of minimum, medium, high and large scale, provided for in article 220 of the COIP, approved by Resolution No. 001 CONSEPCD- 2015, of September 9, 2015, published in the Second Supplement of the Official Registry No. 586 of September 14, 2015, and its errata faith published in the Official Registry No. 597 of September 29, 2015, the amounts of which are:

Annexe 1

NARCOTIC SUBSTANCES								
Scale (grams) Net weight	**Heroine**		**Cocaine base paste**		**Cocaine hydrochloride**		**Marijuana**	
	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
Minimum scale	>0	0,1	>0	2	>0	1	>0	20
Medium scale	>0,1	0,2	>2	50	>1	50	>20	300
High scale	>0,2	20	>50	2.000	>50	5.000	>300	10.000
Large scale	>20		>2.000		>5.000		>10.000	

Source: CONSEP (2015)

Annexe 2

PSYCHOTROPIC SUBSTANCES						
Scale (grams) Net weight	**Amphetamines**		**Metilendioxifenetilamina (MDA)**		**Ecstasy (MDMA)**	
	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
Minimum scale	>0	0,090	>0	0,090	>0	0,090
Medium scale	>0,090	2,5	>0,090	2,5	>0,090	2,5
High scale	>2,5	12,5	>2,5	12,5	> 2,5	12,5
Large scale	>12,5		>12,5		>12,5	

Source: CONSEP (2015)

The final subsection of article 220 has also been cited, where the existence of a regulation that details the quantity of drug admissible for use for personal consumption is established; Along the same lines, article 228 prescribes the following: "Allowable quantity for personal use or consumption. - The possession or possession of narcotics, psychotropic substances or preparations containing them, for personal consumption, will be regulated by the corresponding regulations". (COIP, 2014, art. 228)

Therefore, in order to inform the appropriate amount for personal use, CONSEP (2013) in resolution No. 001 -CD- 2013 has said the following:

> **Considering:**
>
> That article 364 of the Constitution of the Republic of Ecuador says: "Addictions are a public health problem. The State will be responsible for developing coordinated information, prevention, and control programs for the consumption of alcohol, tobacco, and narcotic and psychotropic substances as well as offering treatment and rehabilitation to occasional, habitual and problematic consumers. In no case will their criminalization be permitted or their constitutional rights be violated ... ";
>
> **Solve:**
>
> Article 1.- To accept the toxicity analysis, psychological, biological and other studies necessary on the possession of narcotics and psychotropic substances for personal consumption prepared by the Ministry of Public Health, as well as the proposal of maximum admissible amounts of possession for consumption personnel raised by the Minister of Health, in which the following amounts are recommended as maximum admissible for tenure:

Annexe 3

SUBSTANCES	QUANTITIES (GRAMS, NET WEIGHT)
1 MARIJUANA	10
2 COCAINE BASE PASTE	2
3 COCAINE CHLORHIORATE	1
4 HEROIN	0.1
5 MDA -N-ethyl-a-methyl-3. methylphenolxyphenethylamine	0.015
6 MDA -N-a-dimethyl-3. methyl-phenolxyphenethylamine	0,015
7 AMPHETAMINS	0.040

Sources: CONSEP (2013)

Finally, with this normative framework and to direct the dogmatic analysis that continues, from now on it will be decided to change the perspective of abstract analysis, to a specific assumption that allows corroborating the objective set out in the research. In this sense, the extensive catalogue of substances subject to control will be exemplified only with marijuana, and the guiding verbs of article 220 will be analyzed in depth.

4. DOGMATIC ANALYSIS OF THE CRIME OF ILLICIT TRAFFICKING OF CATALOGED SUBSTANCES SUBJECT TO AUDIT IN THE COIP

Muñoz Conde and García Arán (2010) teach that the interpretation of the norms can be carried out on different levels, namely: the authentic interpretation is primal and is carried out by politicians in their legislative work; Judicial interpretation is carried out by the judges in their jurisdictional

tasks and, naturally, doctrinal interpretation is in charge of the jurists and professors of criminal law. Now, it is nothing new to assert that, the legislative technique is usually insufficient in order to comply with the maximum taxability mandate that is characteristic of the principle of legality. Therefore, the interpretive task of judges and jurists are necessary and complementary to reach a maximum of rationality in the administration of justice. Consequently, in future lines, the aforementioned legal institutions will be characterized:

4.1. Principle of legality

Liberal criminal law has as its letter of introduction the Principle of Legality. Because of this, it is said that any interpretation of the norm can never exceed the limits set by the legislator, but this rigorous interpretation has nothing to do with the irrational and ancient formalism, thus having the possibility of using various techniques. From interpretation provided, they do not go beyond the normative prescriptions. Therefore, to achieve a maximum of certainty in the application of criminal law, it is legitimate to make systematic, literal (syntactic, semantic) or teleological interpretations, in order to find the true meaning that the legislator intended to give to the rule.

4.2. Interpretation of the Criminal Law

4.2.1. Systematic interpretation of article 220 of the COIP

About this, Muñoz Conde and García Arán (2010) teach the following:

> The logical-systematic interpretation of the norm seeks the meaning of the legal terms based on their location within the Law and their relationship with other precepts, from the perspective of the necessary coherence of the legal system. Although the legislator

> sometimes forgets the systematic order and incurs contradictions, the legal terms cannot be interpreted in isolation but concerning the context in which they are used. (p. 126)

In this intelligence, the systematic interpretation of the norms starts from the idea that a legal system is a set of norms and when in doubt about the scope of the norms, the most recommendable thing would be to resort to the "spirit of the system" (Bobbio, 1991, p. 241); Besides, what is stated has logical support, under pain that the legislator admits the existence of normative chaos. The systematic interpretation suggests that the penal norm be analyzed from its location in the legal body since it is not a product of chance but comes from a conscious decision of the legislator.

In this sense, article 220 of the COIP (2014) which has the title: "Illicit traffic of scheduled substances subject to control", is part of the Second Section that reads as follows: "Crimes for the production or illegal traffic of listed substances subject to inspection ". Therefore, in any light, it appears that the legislative intent was to criminalize drug trafficking and other activities such as production, and nothing more than that.

Consequently, the regulatory context prevents an interpretation of the rule of article 220 to be aimed at criminalizing possession or possession without the purpose of trafficking; and, therefore, it is feasible to infer that the COIP in full harmony with constitutional imperatives, is not aimed at criminalizing consumers. Also, common sense indicates that for there to be consumers, they previously had to have or possess drugs without the purpose of trafficking, and that is one of the reasons why the Ecuadorian legal-criminal system does not typify simple possession.

4.2.2. Literal interpretation of article 220

The same Spanish authors, that is, Muñoz Conde and García Arán (2010) have said about the literal interpretation that in these cases: "it is intended to establish the meaning of the rules based on the meaning and order of the words contained in them". (p. 126). Consequently, the title of the provision of article 220 of the COIP, when it reads as follows: "Illicit traffic of scheduled substances subject to control"; hints that the content of the prohibition of the criminal law can only be conduct related to illicit drug trafficking. Likewise, the Royal Spanish Academy (2014) defines the action of trafficking as: "trade, negotiate with money and merchandise"; "Do non-legal business".

Now, in the context of article 220, a series of guiding criminally relevant verbs have been captured. In this regard, the legislator provides that, when a person: "Bid, store, broker, distribute, buy, sell, send, transport, market, import, export, have, possess ..." (thus far the legislator prescribes various typical behaviours, and some of them have a similar meaning to trafficking, such as marketing, in such circumstances, these behaviours are typical in themselves since they exhaust the content of the prohibition with their mere staging. However, the other behaviours such for example, possession, will only have criminal relevance as long as it is directed to illicit drug trafficking). The article continues saying "or in general carry out illicit traffic in narcotic and psychotropic substances" (The words "or in general" are obviously a way of encompassing all the previous actions and also indicate that any other action that has the purpose of illicit drug trafficking will also be criminalized).

Then, the important thing is to highlight that the legislator never had in mind to give the governing verb "have" or "possess" autonomous criminal relevance, but only to the

extent that they are aimed at trafficking in substances subject to control would they be relevant. Article 220 also states the following: "The possession or possession of narcotics or psychotropic substances for personal use or consumption in the amounts established by the corresponding regulations, will not be punishable." Therefore, in what follows, a specific analysis will be proposed to clarify better the interpretation that should be given to this criminal type, and marijuana will be used for this.

It can be seen in Annex N ° 1 that the minimum scale prescribed in article 220 sanctions a person deprived of liberty of 1 to 3 years for having for traffic purposes the quantity of 0 to 20 grams of marijuana. However, CONSEP (2013) resolution No. 001 -CD- 2013 that was cited in previous pages, accepting the constitutional budgets for non-criminalization of individuals who consume substances subject to control, has provided the following: "To accept the toxicity analysis (...) As well as the proposal of maximum admissible amounts of possession for personal consumption (...) The following amounts are recommended as maximum admissible for possession ".

Furthermore, the amount that the norm declares possession for personal consumption is 10 grams, as can be seen in Annex N ° 3, which supposes that exceeding that amount, at most would make the possession inadmissible, but in no way converts the possession of marijuana in traffic, for the categorical reason that responsibility in criminal law is eminently subjective, and therefore, if an individual does not have the purpose of trafficking in the substance in his possession, despite being higher than the admissible, does not make it per se typical in the eyes of article 220.

To clarify, let us say we have the following factual assumption: an individual who uses marijuana, moves from his home to a sector of the city where he acquires the substance, but this sector turns out to be distant and socially known as dangerous, and that is why that the individual could not move smoothly and prefers in each of his visits to acquire enough to consume for a couple of weeks. Specifically, the subject acquires 40 grams of marijuana, and during the return to his home, he is intercepted by the gendarmerie, and they find the substance. Following the line drawn, the individual has carried an inadmissible amount for personal consumption, but since it has no purpose of trafficking (marketing) with that substance, his conduct would not be appropriate to the criminal type of article 220 of the COIP.

Despite the preceding, what is worrying is that in judicial practice, the administrators of justice presume iure et de iure that, the fact of "having" a quantity more significant than the admissible one automatically becomes possession for traffic without practising sufficient evidence that proves such purpose. Alternatively, in turn, they misinterpret the guiding verbs that make up the criminal type, and it is thought that each guiding verb has autonomy by itself and therefore, having or possessing marijuana above the acceptable amount even without the purpose of trafficking turns out to be typical. This serious flaw in the interpretation of article 220 has empirical proof and will be evidenced in the following lines.

4.2.3. Teleological interpretation of article 220

a) Regarding the teleological interpretation, Muñoz Conde and García Arán (2010) have indicated that it is one that "meets the purpose pursued by the norm" (p. 126) and that the indications to discover this purpose may be: the location of the precept criminal (previously

analyzed in the systematic interpretation) and the legal asset to be protected. Then, since the objective is to know the prohibitive purpose of article 220 of the COIP, the following illuminating arguments will be necessary:

b) Drug trafficking is a scourge worldwide, and there is an absolute consensus on this. Recognized this problem, Ecuador allows the criminalization of any subject that is part of this complex network of criminality, with the apparent exception of the victims (consumers). Likewise, the Ecuadorian Constitution expressly prevents the criminalization of consumers of controlled substances; ergo, the COIP does not intend to criminalize the mere possession without the purpose of trafficking, for the forceful reason that those who have drugs without that purpose would-be consumers.

c) Article 66, paragraph 4 of the CRE (2008), recognizes the right to formal, material equality and non-discrimination. In this logic, one might ask: Why would the COIP prohibit the mere possession of narcotic drugs or psychotropic drugs for consumption and not so alcohol or tobacco for the same purpose? Keep in mind that, number 5 of the articulated pre-named, recognizes the right to the free development of the personality without more limitations than the rights of others. Therefore, if a person's goal is to use marijuana or tobacco without disturbing or endangering the legal property of third parties, in no way could he be criminalized. Consequently, this is another argument to assert that article 220 of the COIP is not aimed at prohibiting the simple or non-purpose possession of traffic.

d) It is said that the legal asset protected in the second section of the COIP is public health. For this reason, the only way to endanger "public health" is for the subject's activity to be directed to trafficking the substance classified as control, contrary sensu, if the subject intends to use the substance for its consumption, in full enjoyment of his constitutional right to freedom and the free development of personality, he would not put public health at risk, even in the abstract, and for this reason, this It is another argument to maintain that the COIP does not criminalize simple tenure.

e) Finally, it seems that some significant criminal and constitutional principles are not taken as seriously as they should be. The rule of law is such, because each criterion, norm, principle or guarantee goes beyond its simple enunciation and becomes fully operational. Therefore, when saying about this, if the justice operators applied principles such as that of lesividad, ultimo ratio, state economy of violence, rationality, and others, there would be no doubt that the purposeless or straightforward possession of drug trafficking would be out of the question about the scope of punitive power.

4.3. Characteristics of the criminal law and classification of criminal types: a distinctive look at article 220 of the COIP

Without going into the subject, as it is unnecessary, a complete criminal law has a factual assumption and a legal consequence. For its part, the factual assumption that it complies with the parameters of legality must make clear the prohibited conduct or the due conduct, depending on whether it is a crime of activity or omission. (Zaffaroni, Slokar and Alagia, 2002, p. 112 et seq.)

Now, when the criminal type only requires the performance of action without expecting any result, we are facing a crime of mere activity, but there are crimes that are not exhausted in the performance of the guiding verb, but instead require a destructive result; these types of crimes, in turn, admit the type of injury or danger and a clear example of the latter would be article 220 of the COIP.

Muñoz Conde and García Arán (2010) classify outcome crimes as compound and straightforward, depending on whether they include one or more behaviours. In turn, compound crimes are divided into complex and mixed, and must be understood as follows:

> Complex crimes are characterized by the concurrence of two or more actions, each constituting an autonomous crime, but from whose union a different autonomous crime arises (for example, Article 237 typifies robbery with violence or intimidation of people, means that in themselves are already constitutive of coercion or threats, but that, when integrated into theft, are part of a sophisticated autonomous crime). In mixed crimes, the type contains, under the same criminal injunction, various forms of conduct, it is sufficient for one of them to be carried out for the type to be constituted (thus, in trespassing, art. 202.1, enter or remain in someone else's dwelling, or in the bribery of article 419, the official who receives or requests the improper benefit). (pp. 260 and 261)

In this way, the conduct typified in article 220 of the COIP (2014) would be a crime of mixed result of danger and, consequently, the execution of any modality that is part of the criminal type would be punishable in cases where the conduct itself exhausts the prohibition of the norm, for example: being that the commercialization would be the modality and the traffic the conglobate contamination; to the commercialization

modality it is not required to verify anything more than its execution since it has an identical value content to the act of trafficking. However, the same does not happen with the modality of possession or possession, since in these cases their activity is not sufficient per se since they will only have criminal relevance when the purpose of the traffic is proven.

4.4. The subjective element of the criminal type of traffic in scheduled substances subject to control

Hans Welzel (1956), was the precursor of the idea that carrying out a behaviour necessarily requires knowledge about it and a willingness to do it; therefore, its significant contribution to the theory of crime was to transfer part of the subjective element of conduct from the category of guilt to the category of typicality and, therefore, in the dominant doctrine of today, typicality has an objective face and another subjective.

The aforementioned is pertinent insofar as a malicious crime typified in the COIP, can only be imputed to the subject when he has adapted his conduct to the objective elements of the criminal type and has also contributed to the knowledge and the will to have done so. In the case examine, the purpose that is required to impute the possession or possession of drugs does not turn out to be a subjective element other than fraud but is a constituent element of the subjective element of the criminal type of article 220 of the COIP.

Under this intelligence, the analysis of conduct that possibly has criminal relevance should be carried out in a stratified way, that is to say, that, in the case of possession of narcotic drugs or psychotropic drugs without trafficking purposes, it would not even exceed the stage of criminality, or it is the same, it would be atypical behaviour.

5. ANALYSIS OF THE JUDGMENT CALLED BY THE NUMBER 18282-2018-00726

As announced in the introduction to the investigation, at this point an erroneous condemnatory sentence for possession of marijuana without trafficking will be analyzed, this has been issued by one of the judges of the Criminal Judicial Unit of the city of Ambato, in the Republic of Ecuador, dated June 25, 2018, and was fully signed on October 2 of the same year.

The judicial case is signed with the number 18282-2018-00726 and can be located and reviewed in the "consultation of causes" section of the website of the Council of the Judiciary. The sentence to be analyzed has a considerable length, and for this reason, the main events that occurred and the legal considerations adopted by the judge will be transcribed with some criticism from the writer. Of course, the reader is told that the sentence has a series of typing errors and some inconsistencies in the identity and quantity of the prohibited substance for which it is criminalized; In such circumstances, it is recommended to read it in its entirety to understand its content entirely.

Facts:

1.- On Wednesday, May 02, 2018, at approximately 5:00 p.m., in the streets Av. Bolivariana and Av. Galo Vela of the canton Ambato, the anti-drug police officers Sgos. Ivan Guamangallo, Cbop. Walther Chillagana and Cbos. Klever Chicaiza have apprehended the citizen Patricio José López Tobar, in circumstances that minutes before have come to know that in this sector a subject would be carrying out activities to sell scheduled substances subject to control, so when they went to the sector they found that a subject with similar characteristics to those reported, was on Av. Galo Vela at the height of

> Parque Troya, so they have approached him identifying themselves as police members in order to have proceeded to carry out a body search, finding him in his right pocket from his pants, six transparent plastic covers containing a greenish vegetable substance, presumably drugs, thus making him aware of his constitutional rights. (Court case No. 18282-2018-00726, 2018, p. 1)

What is prescribed corresponds to the main event that occurred, but it is essential to highlight the existence of a second fact, which is that, once the subject was apprehended, he allegedly would have given consent to the police officers to enter his home, and in that place a second quantity of marijuana. In this regard, the judge said the following:

> 2.- In this scenario, since it is a person apprehended whose apprehension indicates one of the apprehending police officers to have occurred on the street and who would have been informed of his constitutional rights, which are located in Article 77, paragraph 4 of the Constitution (2008), namely: "At the time of the arrest, the agent or agent will inform the detained person of their right to remain silent, to request the assistance of a lawyer, or to a human rights defender. public in case you could not designate it by yourself, and to communicate with a family member or with any person you indicate. ", allows us to warn that for the entrance to the address in question, a court order was required, since the information obtained was from of the apprehension of the current defendant, who in an inexorable and evident way was already coerced by the very presence of the police element and therefore no questioning could be carried out, which means that the second quantity of substance found in a total gross weight of 300 grams, as stated in the drug verification and weighing act, lacks legal efficacy, since said evidence (300 gr.) has been obtained in violation of the due process rules , specifically that provided for in

> our constitutional framework in Article 76, numeral 7, literal e) of the Supreme Charter of the State: "No one may be questioned, even for investigative purposes, by the State Attorney General's Office, by an authority police or any other, without the presence of a private attorney or a public defender, or outside of the premises authorized for this purpose." (CRE, 2008) 7.8.- This jurisdictional criterion has also been upheld by the Honorable Specialized Chamber of Criminal Matters of the National Court of Justice, considering that: "23.- In conclusion: a.- That the arresters have subjected the detainee to interrogation without technical assistance and without having been previously brought before a judge of guarantees, makes it possible to distinguish between the evidence she provided at the time of her arrest (...), and that found as a result of the unlawful interrogation, leaving her defenceless according to the previous numerals. (Court case No. 18282-2018-00726, 2018, pp. 9-10)

Then, according to what the judge said, noting that was found in the home could be taken into consideration when solving the case because it was obtained illegally and unconstitutionally; and, therefore, to act differently would be to break provisions of the highest hierarchy. Therefore, the trial will only deal with the six marijuana cases found in Patricio López's pants and which have been described in the first act. Continuing with the facts:

> 3.- The statement with the oath of the expert AUGUSTO XAVIER CAJAS ROCAFUERTE, who stated that on May 3, 2018, two pieces of evidence of the case of Mr Patricio José López Tobar were delivered to him in order to carry out the diligence of weighing and chemical analysis of the A substance identified by an M1 sample as consisting of six transparent plastic covers of a greenish vegetable substance that tested positive for MARIHUANA with a gross weight of 42.18

> grams and a gross weight of 39.95 grams. (Court case No. 18282-2018-00726, 2018, p. 14)
>
> 4.- For his part, the defendant as a means of defence in light of Art. 507 numeral 1 of the COIP, declared WITHOUT OATH, who is Ecuadorian, 28 years old, who had his domicile on the streets Av. Galo Vela and he currently resides with his parents in the parish Augusto N. Martínez, who was at his home on May 2, 2018 and that he left for lunch, returning later, which also later came out again and when he took about five steps some gentlemen voted for him against the wall saying that they had a complaint against him for stealing phones, that they proceeded to search him and that's where they found him (referring to the M1 evidence that today is known to be marijuana), that they also found his money in the sum of 350 dollars and his cell phone, that in January they voted him something and he got strange, that there they told him if he had more or not (referring to the substance found), who pointed out that this (green vegetable substance) is its use pe rsonal, that the police threatened that the GOE would come to his house to knock on the door and that in this situation he let them in and a chubby policeman was the one who took their money from which he made a loan and there he bent down and handed them the cover black that is in the photos, that in the nightstand had jewels and these were lost since criminalistics never took and took him to Ficoa. (Court case No. 18282-2018-00726, 2018, p. 16)

On the testimony of the expert who analyzed the substance that the defendant had, he indicated beyond the typing error that his net weight was 39.95 grams. For his part, the defendant who was allowed to give his testimony on the facts indicated that the substance found was for his personal consumption. So, up to here and according to the analysis that was made in the previous chapters, the quantity that Patricio had for his consumption should be considered inadmissible

in the eyes of the Law, in reason of exceeding the 10 grams allowed according to the CONSEP resolution, but This does not automatically convert it into traffic, being the unavoidable responsibility of the prosecution to verify that purpose during the trial hearing.

Well, so far, the primary and pertinent facts of the case have been transcribed. From now on, the legal foundations issued by the judge will be reflected in the operative part of the judgment. The judge said the following:

> EIGHTH: [FACTICAL, LEGAL AND JUDICIAL PROTECTION REASONING]
>
> 1.- Referring to the budding case, Criminal Law as part of the legal system has an eminently protective function of legal assets; In the case at hand, the protected legal asset is the right to health, since the substances catalogued are narcotic or psychotropic, threaten the health of all the associates within the constitutional state of rights and justice that prevails in Ecuador and is the that the standard seeks to protect. (Court case No. 18282-2018-00726, 2018, p. 12)

In this first extract, the judge makes it clear that the COIP follows a trend of exclusive protection of legal assets, expressly moving away from any functionalist concept. The legal asset protected in article 220 is the right to health; In this sense, the conduct of having 39.95 grams of marijuana on the part of Patricio López, should only acquire criminal relevance if it was aimed at trafficking, since only in that case would the health of "all the associates within the state be endangered constitutional rights and justice that governs Ecuador "as indicated by the judge, otherwise, Patricio's right to the free development of his personality would prevent any punitive intervention.

> 2.- On the other hand, the doctrine when referring to this type of infractions, classifies them as crimes of abstract danger that are consummated with the creation of a small danger for the protected legal good, that is to say, that it can be conceived as a simple probability of injury and the active situation of danger is not expressly required, but the reason for their punishment is that they usually pose a danger. (Court case No. 18282-2018-00726, 2018, p. 12)

Regarding this, although the argument put forward by the judge is valid, it should be emphasized that not any conduct is dangerous or relevant to criminal law, and this has been demonstrated in the fourth chapter of the investigation, by saying that the legislator signed the guiding verbs of article 220 with the purpose of drug trafficking and that possession or possession is not typical but are aimed at that purpose.

> 3.- Thus, the public health legal asset, analyzed in the context of the illicit possession and possession of narcotics and psychotropic substances, denotes the intention of the legislator to protect the plural holders of that asset (society), from the alleged conduct dangerous fork. (Court case No. 18282-2018-00726, 2018, p. 12)

Here, the judge makes it clear that illegal possession and possession endangers society and for this reason, the legislator criminalizes that conduct. What the judge seems to ignore or ignore is that, for the possession or possession of drugs to endanger society, it must be aimed at trafficking or commercialization, since only there would it become dangerous for third parties.

> 4.- Thus, the prosecution has accused the accused Patricio José López Tobar of having adapted his conduct to the criminal type contained in numeral 1, literal c) of Art. 220 of the Organic Comprehensive Criminal

> Code, but more in kind the prosecutor Dra. Mabel Díaz imputed her alleged participation for the same criminal type but literal b) that deals with the illicit traffic of scheduled substances subject to medium-scale control and is in turn typically described in Article 220, numeral 1. (Court case No. 18282-2018-00726, 2018, pp. 12-13)

This part establishes that the prosecution had initially accused Patricio López of marijuana trafficking in the high-scale quantity. However, when the substance found in the home was ruled unconstitutional, she ended up reformulating her accusation to the medium-scale quantity. Also, the judge recognizes that article 220 typifies illicit trafficking, so it is suggestive that the evidentiary activity should be directed in that direction.

> 5.- As can be seen from the description of the criminal type supra cited, there are several guiding verbs, being that the prosecution has attributed to the accused the possession (at the time of registration) and possession (at the time of registration of the address) of a narcotic substance such as COCAINE BASE. (Court case No. 18282-2018-00726, 2018, p. 13)

First of all, it is necessary to clarify that at the end of the extract a confusion of substance is committed when referring to cocaine, but in subsequent pages, it is made clear that it was a typing error and that the alluded substance never existed, but rather, He intended to refer to 39.95 grams of marijuana. Well, having clarified this point, the judge acknowledges that article 220 is made up of several guiding verbs and that the prosecution accused him of possession, due to the marijuana found against Patricio López. That said, prima facie it is concluded that both the prosecution and the judge understand that the guiding verbs of article 220 of the COIP are autonomous and reach criminal relevance without any purpose. Therefore, they only require

checking their mere staging, what which, can not be less than an aberration in the exegesis of the norm.

> 6.- What happens in the present case, being that the executive conduct has managed to cross the barriers of protection of the legal good, which leads to establishing that the person accused is deserving of the judgment of criminal reproach as the third dogmatic category of crime when the guiding verb of "having" a narcotic substance in his possession (body) has been complied with, in contravention of the criminal type of abstract danger and common risk, since the conduct he attends hangs over as a threatening health risk public since here the danger is not an element of the type, but the reason or motive that led the legislator to incriminate the conduct [illicit trafficking], so that when faced with a dangerous course of action, the legislator, without other requirements, sanctions its performance with a penalty; therefore, this crime is formal or of mere activity. (Court case No. 18282-2018-00726, 2018, p. 18)

The prescribed extract is the most important in order to corroborate the premise of the research. The judge expressly says that Patricio López deserves the trial of criminal reproach for having fulfilled the guiding verb of "having" a substance in his possession. It appears that all the evidence acted by the prosecution was aimed at verifying that Patricio had the substance. However, at no time was the purpose of the traffic even mentioned, let alone anybody of evidence to that effect. Once again corroborating that, for both the prosecution and the judge, the guiding verb "have", which is part of the criminal type of illicit trafficking, enjoys autonomy and does not require any other verification.

Not enough with that hermeneutical aberration, at the end of the extract, it is said by the judge that the criminal type of article 220 was a crime of mere activity when previous lines had indicated that it is a crime of danger. Regarding this, it has been made clear in the fourth chapter of this investigation that the crime of mere activity is entirely different from the crime of danger, and that has different consequences in the analysis of the criminal charge. Nevertheless, well, without wishing to delve into the subject in order to exceed the purpose of the investigation, it is essential to highlight the existence of a dangerous ignorance of criminal law at the head of the judge.

> 7.- In this order of ideas, the crime in examines sanctions the action that entails the execution of the verb "to have", narcotic substances without due legal authorization; therefore, the legislator does not establish as part of the constituent elements of its typology any quantitative consideration for the execution of said verbs, that is, the criminal hypothesis abstractly formulated in the legislation referred to by the legislator does not consider the number of illegal substances that they are "held", but to the fact that this action is carried out, with express or tacit consent without any legal authorization, since the amounts found will serve to adjust the sentence to be adopted. Note, therefore, that the aforementioned legal norm Arts. 220 numeral 1, of the COIP- establishes as one of the fundamental assumptions of the typical and unlawful conduct of this class of crimes, the possession of the narcotic substance, whether in the body, in things, in furniture or real estate that one owner or have any title. This has been pointed out by the National Court of Justice in one of its multiple rulings (Judicial Gazette. Year CIX-CX Series XVIII, No. 7. Page 2436. March 16, 2009). (Court case No. 18282-2018-00726, 2018, pp. 18-19)

Again, the judge makes it clear that Patricio López is criminalized for flat and straightforward possession of 39.95 grams of marijuana, conduct that is atypical in the COIP as has been shown in the investigation. Another argument to understand this hermeneutical aberration is that in the head of the prosecutor and the judge, the possession more significant than 10 grams that the Law for personal consumption allows automatically turns it into trafficking, implying that fraud and the category of guilt are criteria optional to take into account and that they prefer to impute and sanction for mere presumptions. If they take their role in the administration of justice seriously, they should know that having more than 10 grams of marijuana makes possession only inadmissible. However, in order to be typical in light of article 220 referring to trafficking, it must be shown more beyond any reasonable doubt that the subject intended to market the substance, which has been ignored in the present case.

At the end of the extract, the judge cites a 2009 ruling issued by the National Court of Justice and indicates that the grounds of his sentence are following the record set by the Court. In this part, not only is evidence of ignorance on the part of the judge, but also, complete negligence in giving rationality to his sentence; Since it is real that the National Court issued an analysis of the problem with that content, but it did so taking as a starting point the Law on Narcotic and Psychotropic Substances (repealed in 2014) that expressly admitted the simple possession of drugs. Then, the judge never found out about the existence of article 364 of the CRE and was not aware of the revaluation of the state of the drug issue in the COIP.

> 8.- From the supra singular tests, the elements of the criminally relevant conduct described in Art. 220, numeral 1, literal b) of the COIP have been adequately justified, since the typical action has been executed in

> a manner directly, without authorization as required by the legal norm, having complied with one of its guiding verbs which is "to have" narcotic substances, in contravention of the criminal type. (Court case No. 18282-2018-00726, 2018, p. 19)

The judge says that the test carried out led to the conclusion beyond a reasonable doubt that Patricio López had narcotic substances and therefore he violated article 220 of the COIP. Therefore, it is once again corroborated that it was never proven, and it was not even intended to prove the purpose of trafficking in tenure and that the mere staging of the guiding verb "have", turns Patricio into a trafficker.

> 9- "ADMINISTERING JUSTICE ON BEHALF OF THE SOVEREIGN PEOPLE OF ECUADOR AND BY AUTHORITY OF THE CONSTITUTION AND THE LAWS OF THE REPUBLIC", I resolve: 9.1.- TO DECLARE, the guilt of Patricio José López Tobar, Ecuadorian, single, with citizenship card number 1804619227, 28 years old, domiciled in the streets Av. Galo Vela in front of the Guayaquil school in the canton Ambato, province of Tungurahua and currently residing with his parents in the Augusto N. Martínez parish, as the direct author of the typical, unlawful conduct and guilty as provided for in Article 220, numeral 1, literal b) of the Organic Comprehensive Criminal Code [ILLICIT TRAFFIC OF SUBSTANCES CATALOGED SUBJECT TO AUDIT ON A MEDIUM SCALE. 9.2.- IMPOSE, the citizen Patricio José López Tobar, the custodial sentence of THREE YEARS OF PRISON to be served at the Ambato Social Rehabilitation Center. (Court case No. 18282-2018-00726, 2018, pp. 24-25)

As expected, the judge found Patricio López guilty and sentenced him to 3 years in prison, and while his sentence allowed conditional suspension under article 630 of the COIP, his lawyer filed said action. Now, the article mentioned above requires four

conditions for the request for suspension of the sentence to be admitted, and the judge made the following analysis:

Regarding the first requirement, he stated: "On this point, it is clear that given the criminal type with a sentence of three to five years in prison, which complies with this budget." (Court case No. 18282-2018-00726, 2018, p. 21)

About the second requirement, it was said:

> In this regard, sufficient documents have been presented, such as the certification obtained from the Council of the Judiciary through the computer system that is publicly available on the web, thus justifying not having a ruling or process in force beyond the current one, nor that he has been benefited with an alternative solution in another case, which means that the sentence imposed on the active subject Patricio José López Tobar is the first, thus revealing the low level of danger of the individual. (Court case No. 18282-2018-00726, 2018, p. 21)

Regarding the fourth requirement, it was said: "That it is not about crimes against sexual and reproductive integrity, violence against women or members of the family nucleus, which is not the case." (Court case No. 18282-2018-00726, 2018, p. 21)

So far, for the judge's perspective, the requirements of the conditional suspension of the sentence were met, but regarding the third requirement that includes two budget, he said the following:

On the first budget of the third requirement (the personal, social and family history of the sentenced person):

> At this point, more than the certificates that do not record a personal history has been presented, as well as several certificates of honorability, recognized signature and heading, as well as a birth certificate of a minor between the accused and the Belgian citizen Yolanda Manobanda Chuquicondor, who provides food as stated in the corresponding web form through family process No. 18202-2015-01199, also counting on the affidavit given by Marlo Roberto Granda López as soon as he, in the Eighth Notary of the canton Ambato, has indicated to be the person who agrees to provide work to the sentenced from the request for conditional suspension of sentence. (Court case No. 18282-2018-00726, 2018, pp. 21-22)

Regarding the second budget of the third requirement (the modality and severity of the conduct are indicative that there is no need for the execution of the sentence), he said that: "... the THEME OF DRUGS is considered a crime against humanity due to its harmful effects that it produces in PUBLIC HEALTH... "(Court case No. 18282-2018-00726, 2018, p. 23). Furthermore, the following was said:'

> ... Official Registry No.319 of November 12, 2010, and even in judgment 001-12-SCN-CC of January 5, 2012, it is noted that: "on the subject of drug trafficking crimes that, due to its negative connotations, have been classified as crimes against humanity. (Court case No. 18282-2018-00726, 2018, p. 23)

> Therefore, we should not fail to note that in the case in process, the defendant was additionally found to have another quantity of the same substance (288.33 grams of marijuana in his home), which under the application of the exclusion rule for being violative of constitutional rights was expelled from the judicial assessment as a result of the ineffective police action, but which in itself, therefore allows us to warn, according to the evidence practised in the oral trial, that the quantity

> of 39.95 grams of marijuana found in the power of the defendant at the time of his body registration in the Av. Galo Vela and Av. Bolivariana of this canton Ambato correspond to a modality of his conduct that merits his internment in a social rehabilitation centre in order to fulfil the proper purpose of the penalty to the extent that Article 52 of the COIP establishes it, because "... society requires a civilized coexistence where people mutually respect their rights so that there is permanent, an entirely harmonious and peaceful social coexistence continues; however not all people assume the social commitment of this coexistence and with their acts they break the harmony in these cases when people cross the field of legality thus committing offences... "(Court case No. 18282-2018-00726, 2018, pp. 23-24)

Well, even although the conditional suspension of the sentence escapes the academic interests of the investigation, it is unavoidable to highlight the last significant aberration of the judge at the time of sentencing. Here it is stated that the requirements: first, second, fourth and the first budget of the third requirement have been demonstrated.

Nevertheless, in the judge's eyes, the problem lies in the second budget of the third requirement of article 630 of the COIP, that is, that the modality and seriousness of the conduct are indicators that it is not necessary to execute the sentence; So, first, the judge says that the "drug issue" is considered a crime against humanity; and here it is pronounced with an astonishing generality since in this line of thought it turns out that possession of 39.95 turns out to be a crime against humanity.

Then he cites a resolution of the National Court in which it is indicated with greater wisdom that drug trafficking is a listed crime against humanity. However, then, not any "drug issue" is considered a crime against humanity, but only

drug trafficking. At this point, the Royal Academy of Language (2014) defines drug trafficking as "large-scale toxic drug trade". In this sense, the non-trafficking possession of 39.95 grams of marijuana (minimal amount) is not at all drug trafficking and even less can serve as a legitimate argument to reject the conditional suspension of the sentence.

Moreover, the trigger point of maximum irrationality in the sentence is found in the last extract that was cited; here it is based on an inadmissible prejudice, because verbatim the judge says: "we must not fail to note that in the case in process, the defendant was found additionally another quantity of the same substance (288.33 grams of marijuana at his home)." (Court case No. 18282-2018-00726, 2018) When the judge himself had initially stated that in no way will events after the arrest of Patricio López be taken into account due to the constitutional violation committed by the police officers in the collection of evidence.

CONCLUSIONS

Article 364 of the Constitution of the Republic of Ecuador expressly prohibits the criminalization of consumers of scheduled substances subject to control.

The Organic Comprehensive Criminal Code prescribes in article 220 the trafficking of scheduled substances subject to control. Therefore, the guiding verbs that are part of the article and that do not exhaust the prohibition of the rule with its mere stagings, such as possession or possession, will only be punishable when the purpose of trafficking or beyond a reasonable doubt is verified.

Having more than 10 grams of marijuana makes possession "inadmissible", but this does not mean that

inadmissible possession becomes full-fledged traffic, but instead that the prosecution must reliably demonstrate that the substance was destined to be marketed.

The inadmissible possession of marijuana at most serves as a sign of trafficking; however, proof remains through sufficient and reasonable evidentiary exercise.

The inadmissible possession of marijuana without trafficking purposes does not endanger the legal health, and since the crime prescribed in Art. 220 of the COIP results from danger. In no way would it meet the injurious requirement for its punishability.

Simple possession of marijuana is atypical in the Ecuadorian legal system.

Patricio López was illegitimately sentenced to 3 years in prison in cash compliance.

An exhaustive search will show that, like this case, there are many more in which Ecuadorian and foreign citizens have been sentenced for the conduct of inadmissible possession of drugs without the purpose of trafficking, constituting a monumental legal aberration and a severe violation of human rights of institutional origin.

REFERENCES

Association of the Royal Academy of Language. (2014). *Dictionary of the Royal Spanish Academy*. Recovered from: http://dle.rae.es/?id=aELNlgY

Bobbio, N. (1991). *Teoría General del Derecho*, trad. Eduardo Rozo Acuña. Madrid: Editorial Debate.

García, F. M. (2010). *Derecho Penal: Parte general,* 8d edition. Valencia: Editorial Tirant lo Blanch.

Welzel, H. (1956). *Derecho penal parte general.* Trad. Carlos Fontán Balestra. Buenos Aires: Depalma.

Zaffaroni, E., Alagia, A. and Slokar, A. (2002). *Derecho penal parte general,* 2nd edition. Buenos Aires: Ediar.

BILLS AND REGULATIONS

Constitution of the Republic of Ecuador [Const.] (2008). 2nd ed. CEP.

Criminal Judicial Unit with headquarters in Ambato Canton. Case 18282-2018-00726 (25 June 2018). Retrieved from: http://consultas.funcionjudicial.gob.ec/informacionjudicial/public/informacion.jsf

National Assembly of Ecuador. Comprehensive Organic Criminal Code. [Code]. RO. 180 of 10 February 2014.

National Congress of Ecuador. Law of Narcotic and Psychotropic Substances. [Law 25 of 2004]. (12 September 2014). RO. 490 of December 27, 2004.

National Council for the Control of Narcotic and Psychotropic Substances CONSEP. Resolution No. 001-CONSEP-CD-2015. (9 September 2015). Second Supplement to the RO. 586 of September 14, 2015.

National Council for the Control of Narcotic and Psychotropic Substances CONSEP. Resolution No. 001-CONSEP-CD-2013. (21 May 2013).

United Nations. Single Convention on Narcotic Drugs of 1961. (1961).

United Nations. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. (1998).

Received: 01/12/2019

Approved: 24/06/2020

Vicente Vásconez Merelo: Independent legal researcher. Criminal lawyer. Specialist in Criminal Law by the University of Palermo-Argentina.

Email: vvasconez@hotmail.es

City: Quito

Country: Ecuador

ORCID: https://orcid.org/0000-0002-3617-7292