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**SYSTEMS OVERLOAD**  
**DRUG LAWS AND PRISONS IN**  
**LATIN AMERICA**



**WOLA**



**WASHINGTON OFFICE ON LATIN AMERICA**

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## Executive Summary

Depriving a person of his or her liberty is one of the most formidable powers of any state. The way in which states exercise this power, striking a balance between the duty to guarantee public safety and the obligation to respect fundamental human rights, is of the utmost importance. The operation of the justice system has repercussions for society as a whole.

The so-called “war on drugs” waged in the last four decades has had an enormous impact on the workings of national justice and prison systems in Latin America. In order to identify these impacts more specifically, the Transnational Institute (TNI) and the Washington Office on Latin America (WOLA) brought together a group of experts from eight Latin American countries to examine the human costs of current drug laws, identifying who is behind bars and the repercussions of incarceration for them, their families, and their communities. This report covers the situation in Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Peru, and Uruguay, summarizing the results of the research team’s findings on the relationship between drug legislation and the prison situation in their respective countries.

In all these countries, the emphasis placed by drug control efforts on criminal sanctions has given rise to a significant increase in the number of persons incarcerated for drug offenses. The enforcement of severe laws for drug offenses has not only been ineffective in curbing the production, trafficking, and consumption of illicit substances, but has generated enormous negative consequences, including overwhelming caseloads in the courts, overcrowding in the prisons, and the suffering of tens of thousands of persons behind bars for small-scale drug offenses or simple possession. The weight of the drug laws has been felt with greater force among the most disadvantaged and vulnerable sectors of society.

Each country study offers an overview of the historical development of the legislation and of the current drug laws, as well as a description of the institutional structures responsible for enforcing drug laws and managing the prison system. Each study also analyzes the available data on the prison situation – including the levels of overcrowding – and the characteristics of the prisoners themselves, including socioeconomic status, the percentage of inmates behind bars on minor charges and the number of large-scale traffickers, and the percentage incarcerated for simple possession or use.

### Conclusions

Naturally there are gradations and variations among the eight countries studied, given their own particular roles within the drug markets, distinct internal political dynamics, and varying connections and vulnerabilities to inter-

national political pressures. Yet several elements are common to all of them, which allows for the identification of twelve principle conclusions.

*First*, Latin American countries have not always had such harsh drug laws; rather, they have been adopted in recent decades. Although in countries such as Argentina and Brazil such laws came into force in the context of authoritarian regimes, generally in the region the shift toward punitive drug laws came in response to international pressure, specifically stemming from the three major drug conventions adopted under the aegis of the United Nations, which promoted stiffening sanctions for drug offenses. These treaties required that the countries modify their domestic legislation so as to criminalize all acts – except use – related to the illicit market in controlled substances. In some cases, the legislation went beyond what the treaties required. The Andean countries in particular submitted to the pressures of the “war on drugs” waged by the U.S. government, which conditioned economic assistance and trade benefits on the acceptance of its drug strategy.

*Second*, extremely punitive laws were introduced for drug offenses even in countries and during periods when the drug market was of limited scope. In most of the countries studied, the penalties for drug offenses required by statute are disproportionate considered in light of other offenses. Although the laws vary from country to country, the maximum penalties for drug trafficking may range from 12 to 25 years. In Ecuador, where the maximum penalty for homicide is 16 years, a small-scale drug trafficker can end up with a longer sentence than a convicted murderer.

*Third*, in general the legislation does not distinguish between levels of involvement in the business – treating street sellers and transporters on par with large-scale drug traffickers, and failing to distinguish between violent and non-violent offenses. Many persons are sentenced to maximum penalties, and many others, even without having committed serious or violent crimes, end up in maximum-security prisons. Nor are distinctions made regarding the particular type of substance or the risk to health it poses when it comes to pursuing, arresting, and prosecuting a person, such that a person selling cannabis may end up with the same sentence as a person selling cocaine.

*Fourth*, the severity of current drug laws has contributed significantly to increasing incarceration rates and prison overcrowding in the countries studied. In seven of these countries for which it was possible to obtain data for the 15 years from 1992 to 2007, the incarceration rate increased, on average, more than 100 percent. With some differences among countries, incarceration for drug offenses shows an upward trend in every case. The situation of the Federal Penitentiary Service of Argentina is particularly striking: whereas in 1985 only 1 percent of the prison population was locked up for drug offenses, by the year 2000 such prisoners accounted for 27 percent of the total.

*Fifth*, there is abuse of pre-trial detention for those suspected of drug-related offenses; such detention is often drawn out for years without any resolution of the prisoner's status. In five of the eight countries studied – Bolivia, Brazil, Ecuador, Mexico and Peru – pre-trial detention is mandatory in drug offenses, independent of whether the offenses in question are minor or major. Drug offenses are classified along with murder, rape, and kidnapping as serious crimes, independent of the degree of one's involvement. In Peru, preventive police detention for most offenses is 24 hours, yet in the case of drug-related offenses it is 15 days. In several countries individuals may be detained indefinitely during the investigative period, until formal charges are filed. In Mexico, there is a period of up to 80 days during which the accused may be detained without formal charges. And in the five countries mentioned, detention is mandatory during trial until the verdict is handed down.

*Sixth*, persons accused or convicted of drug offenses are often denied access to alternative sentences that are available to those accused of other types of offenses. In Brazil, for example, the 2006 drug law prohibits replacement of imprisonment with alternative sentences, even though Brazilian law allows alternatives in the case of sentences up to four years for all other offenses perpetrated without violence or grave threat, which would be the case for many instances of drug offenses. In Peru, some benefits that the law allows for certain detainees – such as prohibition or parole – are denied to persons incarcerated for drug offenses. Even in Uruguay, the country with the least punitive legislation of the group studied, the scant use of alternative measures guarantees that many small-scale drug offenders are behind bars.

*Seventh*, in none of the countries studied does the prison system guarantee the international minimum standards for the treatment of prisoners. The prisons fall far short of meeting basic needs and budgets were not expanded to accommodate the increase in the prison population. This situation is particularly serious in Bolivia, Ecuador, and Peru, where the lack of resources has led to problems of health and nutrition. The daily food budget per prisoner in these countries is equivalent to just \$0.80 USD, \$1.60 USD, and \$2.00 USD, respectively.

*Eighth*, a high percentage of persons incarcerated are in prison for simple possession of drugs, consumers detained with relatively small amounts of drugs, including marijuana – even in countries where such possession is not illegal. In most of the countries studied the distinction between drug user and drug trafficker is hardly developed in the laws, and is poorly interpreted by the police and by the courts. Throughout the region, cannabis smokers in particular are stigmatized and harassed by the police, and many people are in prison for growing or simple possession of cannabis.

*Ninth*, most of the persons in prison for drug offenses are

there for minor offenses, yet are serving disproportionately long sentences. In the eight countries in question, it is unusual to find drug “kingpins” behind bars. The data on the incarceration of major drug-traffickers are scant, and according to the information that we could obtain there are many discrepancies. In this respect, the most worrisome cases are Colombia and Mexico, two countries that have declared total war on drug trafficking. According to the calculations of the study on Colombia, approximately 2 percent of all prisoners being held for drug offenses are mid- and high-level drug traffickers. In other words, 98 percent would not have had – or it was unlikely that it could be proven that they had – an important role in drug trafficking networks. In Mexico, according to the CIDE research center, in the Federal District and in the state of Mexico, 75 percent of the prisoners held on drug charges were detained for possession of small amounts. In addition, one undesired consequence of the incarceration of the small-time offenders is that prisons are in effect schools for crime; many low-level offenders emerge from prison into the world having joined some criminal organization.

*Tenth*, this research confirms the perception that the weight of the law comes down on a specific part of the population: people with little education and scant resources, who are either unemployed or holding down informal-sector jobs. As described in the case of the San Pedro prison in Bolivia, the prisoners' stories are characterized by the poverty and family or health crises they were facing when the opportunity presented itself to obtain extraordinary income that could help alleviate these fundamental problems, but at the risk of losing their liberty and compromising their physical integrity.

*Eleventh*, in this same respect, the study also reveals three relatively new and interrelated phenomena: increases in the numbers of women, couriers and foreigners behind bars for drug offenses. Although they still number far fewer than their male counterparts, the number of women in prison for drug offenses increased considerably in some cases. In 2009, 80 percent of all women detained at El Inca, the largest women's prison in Ecuador, were incarcerated for drug offenses. In Argentina the percentage of women prisoners incarcerated for a drug offense ranges between 65 to 80 percent, depending on the facility. The incarceration of women who are raising families has devastating consequences for the whole family, as the children have no economic protection. The phenomenon of drug courier, or “mule”, a person who transports small amounts of drugs on or in their body or baggage, has expanded. There are couriers operating in all of the countries, and the phenomenon is especially part of the dynamic of drug-trafficking in large cities with flights to Europe. Drugs have also become the leading cause of incarceration of foreigners, who, given their status, often face difficulties with the language, or access to legal counsel, and have no family support.

*Twelfth*, the researchers had considerable difficulties with

the quantity and quality of the information provided by government sources, given the precarious nature and irregularity of the official data in most cases. Ecuador, which conducted a prison census in 2008, and Uruguay are the exceptions.

Much remains to be learned about the degree to which the drug laws have increased the incarceration rate and overcrowding in the prisons of the region, in part because there is little official data on these matters and what information exists is often incomplete. Even so, this study is a first systematic effort to cast light on the repercussions in Latin America of this “unintended consequence” of drug policies and drug laws worldwide.

## Recommendations

The implementation of harsh drug laws has fueled rising incarceration rates and has contributed to severe prison overcrowding. Certain reforms to drug laws and how they are implemented could help alleviate prison overcrowding while protecting public safety and respecting civil and human rights.

- Incorporate drug legislation into a country’s criminal law and codes – rather than treat it separately from other offenses – and ensure that it fully respects human rights.
- Establish and expand alternatives to incarceration for those charged with low-level drug offenses, including removing criminal sanctions for possession for personal use.
- Ensure proportionality in sentencing, distinguishing between:
  - drug trafficking and other types of crime;
  - low, medium and high-level drug offenses;
  - rank or position of the accused in drug-trafficking networks;
  - violent and non-violent offenses; and
  - different types of drugs.
- Abolish mandatory minimum sentences.
- Avoid preventive detention in the case of low-level, non-violent offenders following arrest and during the investigative phase to determine whether or not formal charges will be filed.
- Promote justice sector reforms to eliminate corruption and increase the efficiency of local judiciaries, and increase government funding to improve prison infrastructure and conditions.
- Establish equal access for drug offense suspects to procedural benefits and opportunities for alternative

sentencing – such as treatment, educational opportunities or community service – that are offered to those involved in other types of offenses.

- Reorient law enforcement efforts to target high-level drug-trafficking criminal networks, rather than those at the bottom rung of the drug-trafficking ladder, such as consumers, small-scale farmers, low-level dealers and mules.
- Upgrade and expand criminal justice data systems and ensure timely access to criminal justice information for policy makers and the public. Comprehensive prison censuses, such as Ecuador performed recently, should be undertaken periodically in each country, and data systematization as carried out by Uruguay’s *Junta Nacional de Drogas* should be replicated across the region.
- Stimulate an open debate about the advantages and disadvantages of moving towards a legal, regulated market for cannabis.
- Allow natural coca leaf products to be sold on the market.
- Consider applying special amnesties, such as pardons, to people already convicted of drug offenses and who received disproportionately severe sentences.

This study leaves no doubt as to who are the primary victims of the so-called “war on drugs.” The objective of the information, conclusions and recommendations provided in this report is to encourage an urgent debate to achieve a more balanced and humane approach to reduce the harms associated with the illicit production of controlled substances, their distribution and consumption. We hope that *Systems Overload* helps to sound the alarm for reforms.

## Introduction

In response to concerns regarding the impact of drug legislation on human rights and civil liberties and Latin America's prison crisis, the Transnational Institute (TNI) and the Washington Office on Latin America (WOLA) undertook a one-year study of drug control legislation and its application and impact on prisons in eight countries – Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Peru and Uruguay. The study sought to assess the extent to which harsh drug laws have contributed to the region's prison crisis and to better determine who is incarcerated on drug trafficking charges. While anecdotal evidence points to the connection between drug laws and the prison crisis in Latin America, this is the first major study to explore the ways in which drug laws and their application have contributed to prison overcrowding, and hence worsening prison conditions, across the region. The study was also designed to look at the human cost of present policies by evaluating who is incarcerated and the impact of that incarceration on their own lives, their families and their communities. Finally, the study concludes with recommendations for legislative and other drug policy reforms to ensure a more humane and effective criminal justice system in Latin America.

### Rationale for the Study

#### *The Latin American Context*

Latin American countries face an unprecedented prison crisis. The steady rise of prison populations has resulted in extreme overcrowding. Budgets have failed to increase at the pace of growing prison populations, exacerbating already significant problems affecting prisoners' living space, nutrition, health and safety. Governments are unable to provide legal defense to all of the accused and in some cases there are insufficient guards to even control the prisons.

At the same time, countries across Latin America have adopted harsh drug laws, often characterized by exceptionally high prison sentences. While in line with the United Nations (UN) drug control treaties, these laws are usually at odds with basic international norms of due process and human rights, and sometimes even violate national constitutions. For example, the special courts or procedures established in drug control laws sometimes subvert the presumption of innocence, the accused having to prove his or her innocence rather than the prosecution establishing his or her guilt. The right to due process and legal representation is often violated. Uniformly harsh sentences regardless of the gravity of the drug offence, abuse of preventive detention, disproportionate sentences relative to other crimes, and mandatory minimums are of particular concern.

During the decades these laws were adopted, many countries in the region included in this study were under au-

thoritarian rule, and the ratification of most of the international drug control treaties was done by de facto regimes. In several cases, drugs laws were used to persecute political adversaries, as an additional repressive instrument in the hands of the regime.

Such legislation is not only ineffective in curbing the illicit drug trade – as implemented in Latin America it is also grossly unfair. Pervasive corruption and weak and inefficient police and judicial institutions ensure that accused individuals are caught up in a draconian legal system and that low-level offenders are put behind bars for many more years than their crime warranted, while major drug traffickers largely go free. Not only are the latter harder to detain, they also have the money and political influence to ensure that their illegal ventures can proceed and that they can obtain a speedy release or at least lenient treatment if they are captured.

These tendencies are aggravated by the adoption of arrest quotas or a government's desire to be perceived as "tough on drugs," which fills up prisons with those easiest to detain – consumers, street-level dealers, mules, and even entirely innocent people – rather than those higher up the drug trafficking chain. Because those at the lowest end of that chain are so easily replaced, harsh drug laws have failed to curb the illicit drug trade, and instead have had severe consequences for the most vulnerable sectors of society – those who enter the drug trade out of poverty.

#### *The International Context*

For the most part, Latin American countries have followed the legal framework established by the international drug control conventions. For many years, the international community did not attempt to control or regulate commerce related to psychoactive substances. That changed in 1909, when the first international conference on drug issues was convened in Shanghai. That meeting laid the groundwork for the first international drug control treaty. The Hague Opium Convention, which was signed three years later, formally established narcotics control as an element of international law.

Various other agreements and conventions were signed over the following decades, gradually putting into place the prohibitionist framework that dominates today. In 1961, these piecemeal efforts were replaced by the Single Convention on Narcotic Drugs, which codified all existing multilateral drug control treaties and extended the existing control systems to include the cultivation of plants grown as raw material to produce drugs. "As a general obligation, parties, subject to the provisions of the convention are obliged to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs. The Convention pays particular attention to 'plant based' or



‘organic’ drugs such as opium, heroin, coca, cocaine and cannabis.”<sup>1</sup> More than 100 controlled substances are divided up into four schedules, based among other criteria on the extent to which they can create dependency. In one of the most egregious mistakes within the conventions, the coca leaf was placed in Schedule I along with cocaine and heroin.

The 115 countries which initially ratified the 1961 Single Convention were then obligated to adopt domestic laws criminalizing a wide range of drug-related activities. The 1961 Convention was later amended by the 1972 Protocol, which strengthened its legal framework, and two additional conventions were agreed to in 1971 and 1988. The 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances requires states to “establish as a criminal offence [...] the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption...” But the Convention also states that measures to criminalize possession for personal consumption are subject to each country’s “constitutional principles and the basic concepts of its legal system.” Subscribing to the 1988 Convention only obligates a country to criminalize possession for personal consumption when that does not present a conflict with a nation’s constitutional and legal principles. Therefore, consumption per se is not a criminal offense by any of the UN drug conventions.

The United States was the chief proponent of the 1961 Single Convention and has played a key role since the early 20th Century in pushing for internationally-sanctioned and mandated prohibitionist policies. In Latin America – where the cocaine and some of the heroin and cannabis consumed in the United States originates – Washington has used its political influence and aid and trade policies to ensure collaboration with its so-called “war on drugs.” By the late 1980s, the U.S. government was demanding implementation of harsh drug control legislation that included steep sentences and mandatory minimums – and much of the legislation that appeared in fact went beyond the requirements of the UN Conventions. In some cases, such as Law 1008 in Bolivia, the U.S. government was even drafting the proposed laws. By the 1990s, the United States was routinely using arrest and seizure statistics to evaluate levels of Latin American drug-control cooperation. Washington has thus exported its model of harsh drug laws and mandatory minimum sentencing across the region.

### **Drug Laws and Prisons: A Growing Crisis**

Depriving an individual of his or her liberty of movement is among government’s most formidable powers. How a government exercises its power to imprison – balancing the duty to ensure public safety with the obligation to respect basic human rights – is of enormous significance. Tens of thousands of incarcerated individuals and their families are directly affected. The workings of the justice

system also reflect and affect society itself. A fair system upholds respect for the rule of law and the legitimacy of the state. An unfair system – rigged against the poor and the vulnerable – contravenes basic human rights obligations and erodes respect for the law.

The findings in this study are therefore deeply disturbing: countries across the region have filled their jails with consumers and low-level offenders, whose roles in the drug trade are quickly taken by others. Even in countries that have launched major campaigns against drug traffickers – such as Colombia and Mexico – the number of major traffickers behind bars remains miniscule. The region’s harsh drug laws and their aggressive enforcement are having a devastating effect on people who come from the poorest and most vulnerable sectors of society, while failing to achieve any meaningful success in curbing the illicit drug trade. This study sounds the alarm about this growing crisis and the need for immediate debate and action to reform drug laws to make them more humane and ultimately more effective.

### **Methodology of the Study**

While a direct causal relationship between the international drug control treaties, pressure from the United States and the adoption of drug legislation in the region cannot always be determined, it is clear that the evolution of drug laws in Latin America took place within the context of both phenomena. Therefore, each country study included in this report traces the historical evolution of drug legislation with an eye to both the international and national context.

The study is centered on the eight case studies mentioned previously: Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Peru and Uruguay. The selection of these countries was not exclusively based on their role within the drugs markets, but was also based on our existing research networks and experience in previous projects. We built a team composed of a researcher from each country and staff from TNI and WOLA. Each country researcher developed a short list of local experts who reviewed the individual background papers. From those background papers, TNI and WOLA staff elaborated more concise country studies with a set of conclusions and policy recommendations.

The researchers looked at drug-related legislation, prison populations and conditions, the socio-economic status of prisoners and the level of involvement in the drug trade of those in jail. Statistical information was sought from penitentiary and other national authorities; however, we encountered a remarkable lack of reliable and comprehensive data from official sources. For most of the countries studied, important data was piecemeal or lacking altogether. Our effort underscores the need for systematic and quality data collection by national governments. In order to over-

come this obstacle, each researcher also utilized additional resources such as investigations by academics and international organizations, and carried out interviews with officials, experts and detainees.

In order to show the human face of present drug control policies, interviews were conducted with prisoners in the eight countries. A series of videos of some of these interviews has been produced in conjunction with this study to show the human toll that misguided drug control policies are having across the region.<sup>2</sup>

Each country study provides an overview of the historical development of relevant legislation and the current drug laws, as well as a description of the institutional structures responsible for implementing drug legislation and managing the penitentiary system. Each study also reviews the available data on the situation in the prisons – including levels of overcrowding – and the characteristics of the prisoners themselves, including their socio-economic status and the percentage of prisoners in jail on drug charges, the number of low-level offenders or bigger traffickers, and the percentage imprisoned for simple drug possession or consumption.

As the study got underway, it quickly became clear that an alarming increase in incarceration of women for drug

offenses has occurred; indeed, the percentage of women prisoners jailed for drug charges tends to be proportionally higher than that of men – so special attention was paid to the “feminization of drug crimes.” The number of foreigners in jail on drug charges as “mules,” transporting small quantities of drugs from one country to another, has also increased significantly in recent years in numerous countries, so special attention was paid to that as well.

#### NOTES

1 Michael Woodiwiss and David Bewley-Taylor, *The Global Fix: The Construction of a Global Enforcement Regime*, the Transnational Institute, Crime and Globalization Briefing Series, October 2005, p. 25.

2 See [http://www.druglawreform.info/index.php?option=com\\_flexicontent&view=items&cid=88&id=357%3Athe-human-face&Itemid=26&lang=en](http://www.druglawreform.info/index.php?option=com_flexicontent&view=items&cid=88&id=357%3Athe-human-face&Itemid=26&lang=en)



Brasil - AP/Reporters.

# Imprisonment for drug-related offenses in Argentina

Alejandro Corda

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## Introduction

Within the international illegal drugs market, Argentina is a “transshipment” country for cocaine. Recent decades have seen an increase in the consumption of narcotic and psychotropic substances in the country, and in recent years, laboratories for the production of cocaine hydrochloride have begun to appear, though not on the scale of those in Colombia, Peru, or Bolivia.

Argentina’s criminal laws in relation to these substances have been evolving since 1924, but since the 1970s their repressive aspects have been accentuated. The growing persecution that has resulted from this legislation has come down especially hard on users and small-scale players in the trafficking business, in particular women and foreigners, groups that are overrepresented in the population of persons imprisoned for such offenses.

## Developments in criminal legislation

Argentina’s criminal legislation related to drugs developed throughout the 20th century accompanied by a proactive police presence and, in the second half of the century, in tandem with international legislation.

Neither the 1921 criminal code nor previous legislation made any reference to narcotic substances. In 1924, Law 11,309 incorporated the terms “narcotics” and “alkaloids” into the criminal code and made it an offense to bring such substances into the country clandestinely, sell them without a medical prescription, or prescribe or distribute them in dosages greater than those indicated. In 1926, a new amendment to the criminal code was approved, Law 11,331, which made it possible to criminalize possession without distinguishing between traffickers and users.

According to some specialists, the “drug problem” took hold in Argentina in the late 1960s.<sup>1</sup> Law 17,567 of 1968 expanded the description of criminalized conduct follow-

ing the model set by international legislation,<sup>2</sup> and penalties were increased from one to six years in prison. Unlawful possession “that exceeded the amounts corresponding to personal use” was punished with the same penalty. This was the only time that Argentine criminal legislation expressly excluded punishment of possession for consumption. This law lasted until 1973, when it was repealed for having been issued by a de facto government and the legislation returned to the 1926 version.

In 1974, Law 20,771 came into force. It was the first special criminal law on drugs promoted by the Ministry of Social Welfare under José López Rega, founder of the Argentine Anticommunist Alliance (AAA: Alianza Anticomunista Argentina), who shared the views of Richard Nixon on the potential for using the “war on drugs” to fight guerrilla organizations. The message that accompanied the bill indicated that these offenses constituted an attack on “national security.” This rhetoric would justify drug-related offenses being considered federal offenses.

The return to democracy in 1983 saw changes in both legislation and case-law. While Law 20,771 remained in force, the new sensibilities of the incipient democracy were reflected in a draft reform of that law in 1986 that blended some progressive initiatives<sup>3</sup> with others more reflective of the times, including novel features in the legislation.<sup>4</sup>

Nonetheless, the delay in taking up the draft legislation, the appearance of other perspectives, and the influence of the United Nation’s 1988 Vienna Convention all resulted in a new law based on the already-existing one, but with more severe penalties and some new aspects. The current drugs statute, Law 23,737 of 1989, did not substantially modify the definition of trafficking offenses and increased the applicable range of sentences to between four and 15 years in prison. In addition, it maintained the punishment for personal consumption (a prison sentence of one month to two years). Months before its entry into force, a specialized secretariat was established in the Office of the Presidency of the Nation which would come to have more functions over the following years.<sup>5</sup>

In 2009, the Arriola judgment of the Supreme Court found repression in response to possession for personal use unconstitutional. Nonetheless, there is still a tension between how the security forces and the courts enforce the law on this point. Indeed, the law that explicitly punishes possession for personal consumption remains in force, police employ practices that enforce the law with repression, and courts interpret the law in discriminatory and inconsistent fashion.

In summary, one observes a tendency towards harsher criminal legislation over the past century, even though a serious problem of consumption of “paco” (a relatively recent variety of cocaine derivatives, similar to crack in its effects) has only appeared in recent years.

### Argentina's criminal legislation on narcotic drugs

- **1924 (11,309):** The terms “narcóticos” and “alcaloides” were incorporated into the law. The following conduct was criminalized: clandestinely bringing such substances into the country; the sale by those who, being authorized, do so without medical prescription; and the prescription and dispensing of dosages larger than those indicated. Penalty: six months to two years in prison.
- **1926 (11,331):** The unlawful possession of narcóticos and alcaloides is considered a crime. Penalty: six months to two years in prison.
- **1968 (17,567):** The term “estupefacientes” (narcotic drugs) is incorporated into the law. Distinct forms of conduct that are part of trafficking are listed – including unlawful possession – and the penalty is increased (one to six years in prison). Unlawful possession remains criminalized, but only if “it exceeds that corresponding to personal use.”
- **1973 (20,509):** Law 17,567 is repealed and the law reverts to the 1926 legislation.
- **1974 (20,771):** Different conduct that constitutes trafficking is listed, and the penalty is increased (three to 12 years in prison). Unlawful possession is distinguished with a lesser penalty (one to six years in prison), but it includes possession for personal use.
- **1989 (23,737):** Different forms of conduct that constitute trafficking are listed, and the penalty is increased (four to 15 years in prison). Unlawful possession (simple), with the same penalty (one to six years of prison), is distinguished from possession for personal consumption with a lesser penalty (one month to two years in prison) and the possibility of diversion to a treatment program (if “dependent”) or an educational program (in the case of “experimenters”).

### The prison system, defense counsel, and other actors

Argentina's prison system is composed of various penitentiary services. Along with the Federal Penitentiary Service (SPF: Servicio Penitenciario Federal) are the penitentiary services of each of Argentina's 23 provinces. The federal prisons hold persons who have been detained by order of the Federal Courts (for federal offenses)<sup>6</sup> or National Courts (for common offenses),<sup>7</sup> whereas the prisons of the Province of Buenos Aires hold persons detained by order of the courts of the judicial branch of the Province of Bue-

nos Aires for common (not federal) crimes, though this distinction is not so clear-cut in every case.

While the number of persons detained in the SPF represents less than 20 percent of the persons detained nationwide, it accounts for almost 60 percent of those in prison for drug offenses. It is followed, in numbers detained, by the Penitentiary Service of the Province of Buenos Aires (SPB: Servicio Penitenciario de la Provincia de Buenos Aires), which accounts for just over 40 percent of persons imprisoned in all of Argentina, and for just over 20 percent of prisoners held for drug offenses nationwide. This concentration of persons detained for drug-related offenses (80 percent of the national total) in these two services (SPB and SPF) justifies taking a closer look at them for the purposes of this investigation.

The SPF's budget in 2009 was \$270 million USD (0.5 percent of the federal budget), whereas the SPB's budget was \$274 million USD (1.9 percent of the budget for the province of Buenos Aires). Monthly spending per detainee in the SPF is \$1,600 USD; in the SPB, it is estimated at \$864 USD.

The SPF is made up of 31 establishments with a capacity for 10,489 persons. As a result of the increase in capacity and the decline in the number of persons detained, as of late 2006 there was no more overcrowding. The SPB has capacity for 23,858 inmates and – according to official figures – there is no overcrowding. Nonetheless, if the number of persons detained in police facilities in the province of Buenos Aires is also considered, one could say there is a shortfall in total capacity.

The SPF has 7,786 agents in the units that house inmates: 2,607 (33 percent) for security, 3,458 (45 percent) for treatment (social reinsertion), and 1,721 (22 percent) for administration. A total of 344 professionals and 271 auxiliaries work in the health area. At present, 17,000 persons work in the SPB, but data is not available on how many work in the places of detention.

The Procuración Penitenciaria (prisoner advocate office) is an agency that pertains to the National Congress and works in the federal system, where it undertakes to protect the human rights of persons deprived of liberty. Its annual reports reflect a more critical view of the prison situation than that presented by the SPF itself.

With respect to public defenders, since the 1994 constitutional reform, the Public Ministry of Prosecutors (Ministerio Público Fiscal) and the Office of Public Defenders (Ministerio Público de la Defensa, MPD, also known as the Defensoría General de la Nación) became independent of all other branches of government, enjoying functional autonomy and financial self-sufficiency. The MPD performs its work in criminal cases (for common and federal offenses) in the city of Buenos Aires through 82 public defenders

and their support staff and in federal criminal cases in the rest of the country, with approximately 97 defense counsel and support staff. The MPD has a prisons committee and a gender committee that work on both issues. Civil society organizations also provide information on the prison situation<sup>8</sup> and/or assistance to the detainees during or after their imprisonment. Some of these organizations are made up of persons who were imprisoned, or their family members,<sup>9</sup> and are trying to change the prevalent view of the incarcerated.

**The prison population according to various sources**

The prison population in Argentina increased steadily following the return to democracy in late 1983, although recent years have seen a decline.

Taking into account all prison systems in the country, in 1997 a total of 29,690 persons were behind bars. According to the National System of Statistics for the Enforcement of Sentences (SNEEP, Sistema Nacional de Estadísticas para la Ejecución de Penas), by 2001 the total had risen to 41,007 inmates, peaking in 2005 at 55,423 inmates.<sup>10</sup> In 2007, the number of inmates stood at 52,457, and in late 2007, the prison rate was 133 per 100,000 population, compared to 63 per 100,000 in 1992 and 109 per 100,000 in 2001 (Graph 1).<sup>11</sup>

According to SPF data (in Graph 2), in 1984, some 2,369 persons were being held in SPF facilities; in 1989 that number climbed to 4,108; in 2000 to 7,146; and in 2005 to 9,625. The last available information indicates that as of March 26, 2010, SPF prisons were holding 9,391 persons.

The data on detainees in the SPB from 1997 to 2007 is presented in Graph 3. The 2009 report of the Committee Against Torture of the Provincial Commission for

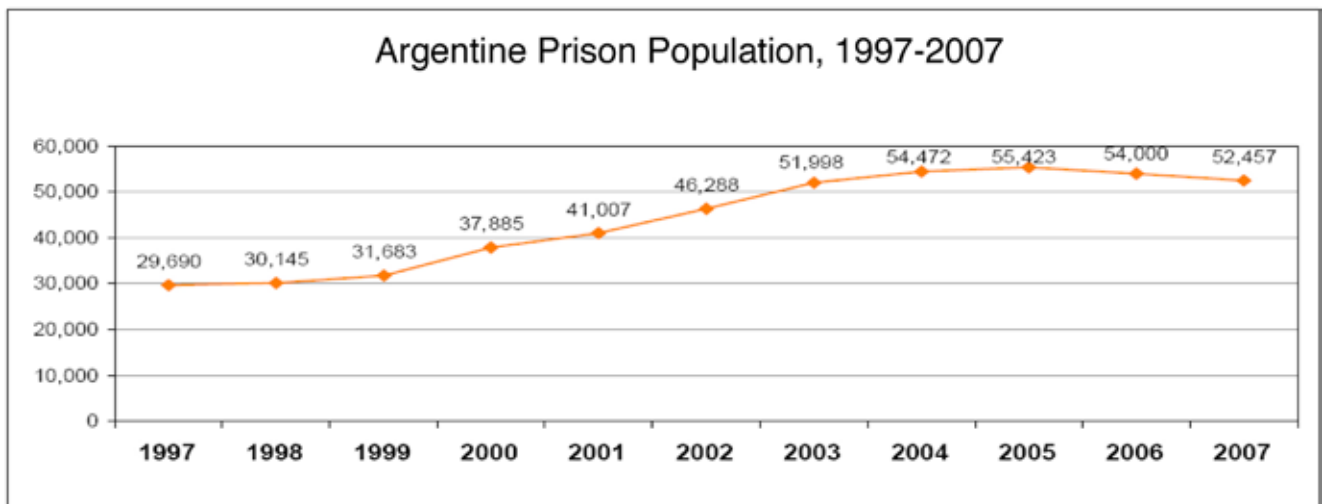
Memory notes that “as of March 2008 there were 21,104 detainees; this figure had risen to 24,180 by March 2009. In all, the province had, as of March 2010, 28,322 persons in prison.”<sup>12</sup>

Different sources indicate that of the federal prison population (SPF), one third were in prison for drug-related offenses, this being the second leading type of offense after crimes against property (mainly robberies).

According to research led by Alcira Daroqui, in 2001 an estimated 32.6 percent of persons in prison were detained on drug charges, whereas 40.6 percent were in for crimes against property.<sup>13</sup> The data produced by the SNEEP, based on the drug-related offenses mentioned, show that in 2004 and 2007 these percentages remained similar, at 27.26 percent and 32.64 percent, respectively, while crimes against property accounted for 43.01 percent and 43.25 percent. Similar figures appear in the report prepared by the United Nations Office on Drugs and Crimes (UNODC) after its visit to the SPF in mid-2008.<sup>14</sup>

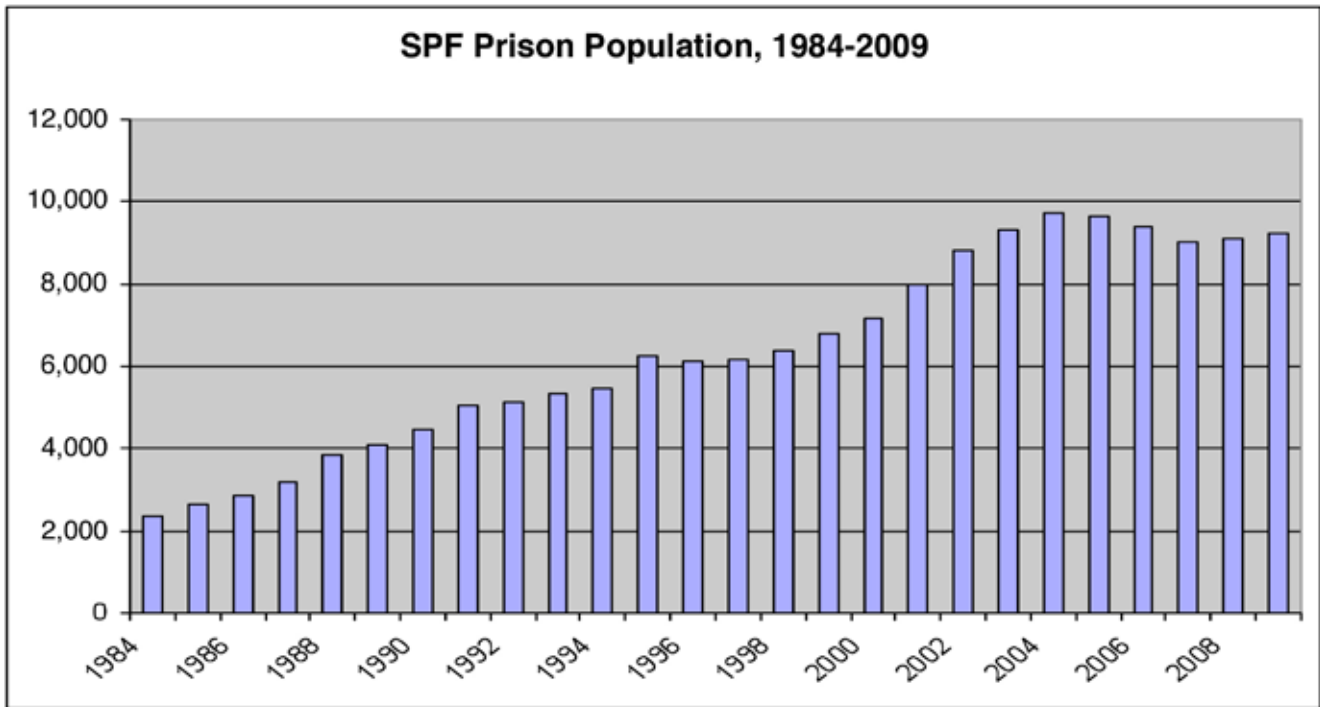
Research by the National Women’s Council (CNM, Consejo Nacional de la Mujer) on the prison population from 1995 to 2000 also suggests that convictions for drug-related offenses were on the rise during the 1990s, coinciding with the years in which Law 23,737 was in force. Breaking down the types of offenses for which persons were detained in the SPF, there is a section under the title “Special Laws” in which the drug laws have an exclusive or at least very major impact. According to the available information, 33 persons were detained under the special laws in 1985. In 1989, the year the law currently in force was adopted, the figure increased to 332, and it continued to rise in subsequent years; in 1995, it reached 1,400, and by the year 2000, the last year for which the figure is available, 1,872 were in prison under the special laws. Accordingly, whereas in 1985 this category accounted for 1 percent of SPF prisoners, in 1989 it reached 8 percent, in 1995 it surpassed 25

Graph 1



Source: SNEEP, Annual Report 2007; National Bureau of Criminal Justice Policy of the Ministry of Justice, Security, and Human Rights of the Nation

Graph 2



Source: Federal Penitentiary Service (Annual Report 2008 and website - [www.spf.gov.ar](http://www.spf.gov.ar); 1982-1992 and 2000-2009) and SNEEP, SPF 2007 (1993-1999)

percent, and by the year 2000, more than 27 percent of all persons imprisoned in the SPF were behind bars for drug-related offenses.

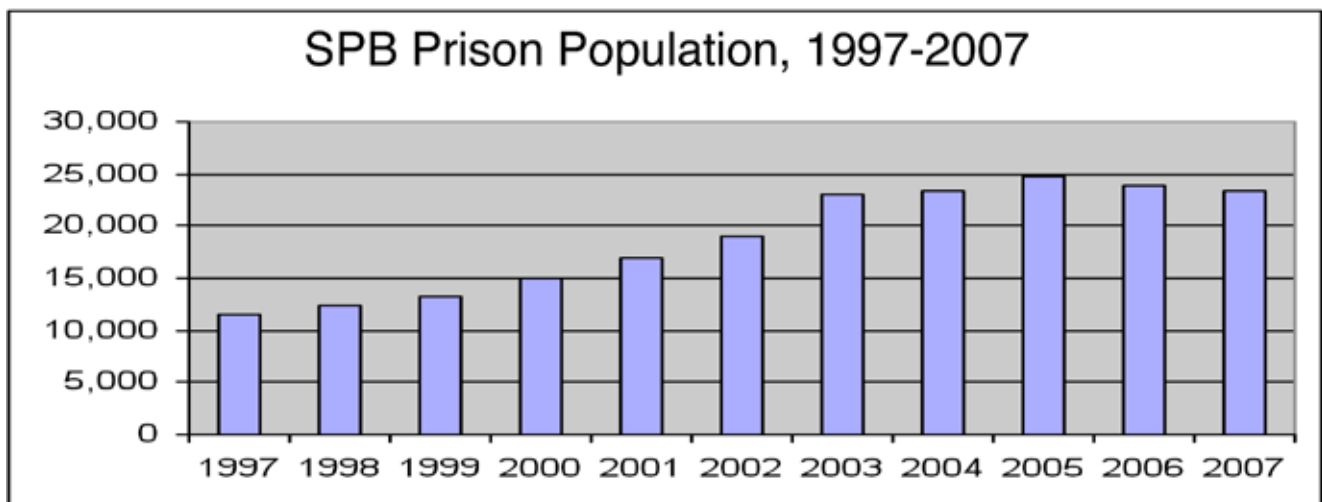
Within the SPB, in 2007 drug-related offenses accounted for only 4.78 percent of inmates, a figure which, while below that of the SPF, appears to show an upward trend in recent years, following the reform known as “de-federalization.”<sup>15</sup>

In its most recent annual report, the Centro de Estudios Legales y Sociales (CELS) states: “According to official data, the intake of persons to the Penitentiary System of the Province of Buenos Aires (SPB) for such offenses climbed from 46 inmates in 2005 to 960 in 2008 (not counting persons detained at police stations). As of September 2009, 7.5

percent of the population held in the SPB was behind bars for violating Law 23,737.”

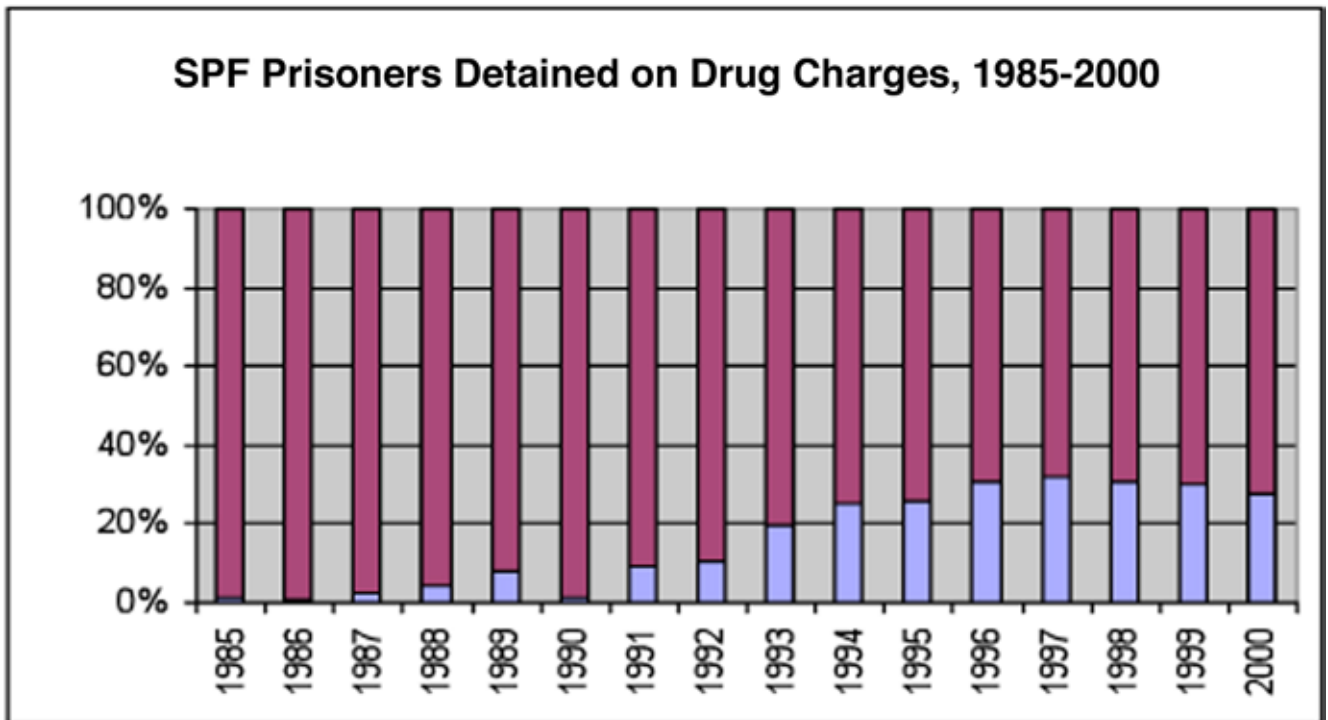
The available information does not allow one to discern the specific offense within this category, making it impossible to learn more details about the offenses for which they are in prison. Nonetheless, the offenses are those whose minimum penalties are more than three years in prison, and that do not permit the defendant to be released during trial<sup>16</sup> or allow for the imposition of a suspended sentence.<sup>17</sup> These would include, among others, the offense of drug trafficking, both nationally and internationally, and would exclude those associated with use, such as possession or growing for one’s own consumption. A similar finding, though limited to women prisoners who have been convicted, is in

Graph 3



Source: SNEEP, Annual Report 2007; National Bureau of Criminal Justice Policy of the Ministry of Justice, Security and Human Rights of the Nation

Graph 4



Source: National Women’s Council (Research project on the population of women prisoners held in the SPF, 2001)

the CNM’s 1995 research study, which states: “The cases in this population of women involve possession to sell, contraband, transport, and commerce of drugs ... they do not include cases of consumption.”<sup>18</sup>

Nonetheless, there are cases of users whose acts have been construed as trafficking or who, though treated as users, suffered the consequences of being detained, whether due to having been incarcerated or having a judicial case pending and being subject to potential police and judicial abuse.

About 60 percent of the persons behind bars in the federal system have not been convicted (they are facing charges) and about 40 percent have been convicted. The above-mentioned study by Daroqui indicates that in 2001 the percentages were 58 percent on trial and 41 percent convicted. The data of the SNEEP show that in 2004, the breakdown was 51 percent on trial and 48 percent convicted, and in 2007, 55.8 percent and 43.7 percent, respectively. The data available as of March 5, 2010, present similar findings, though over 60 percent of the women imprisoned were still on trial.<sup>19</sup>

Nonetheless, in the province of Buenos Aires, according to the data,<sup>20</sup> in both 2001 and 2004, 85 percent of those being held were on trial and 14 percent had been convicted. According to the SNEEP data, in 2007 the situation had improved, with 76 percent on trial and 21 percent convicted. Nonetheless, another report by the Committee against Torture of the Provincial Commission for Memory indicates that of all women in the SPB, 84 percent are facing trial; among those who live with their children, this figure is 96 percent.<sup>21</sup>

The SNEEP also shows (in 2004 and 2007) that 70 percent of the persons detained in the SPF were behind bars for the first time. Of the persons convicted, 50 to 51 percent had sentences of three to six years, followed by those who had received six to nine years (17 to 18 percent) and then by those with sentences of nine to 12 years (10 percent). In the SPB (2007), 67 percent were in prison for the first time. Among those convicted, 42 percent were facing sentences of three to six years, followed by those facing sentences of six to nine years (33 percent), and then by those sentenced to up to three years (10 percent).

The available information on the SPF indicates that while most of this prison population is made up of men, the number of women has been climbing at a quicker pace, meaning that the percentage of women as within the overall SPF population has grown.

Table 1

Population held in the SPF as of March 5, 2010		
General		
On trial	Convicted	Other
5,143	4,147	61
55%	44%	1%

Women		
On trial	Convicted	Other
476	310	6
60%	39%	1%

Source: Servicio Penitenciario Federal

In 1984, there were 100 women imprisoned; the figure had climbed to 253 by 1989 and to 718 in 2000. As of March 5, 2010, the number of women in SPF prisons stood at 792.<sup>22</sup> According to these figures, from 1989 to 2008 the number of women in the SPF increased 271 percent,<sup>23</sup> while the number of men rose 112 percent. Up to 1988, under democratic governments, the percentage of women had never accounted for more than 5 percent of the population of the SPF; in 1989 it reached 6.2 percent and by 1995, women came to account for 10 percent of the prisoners and continue to do so to date, according to figures from various sources. The nominal and percentage increase of women in the population of the SPF has coincided with the entry into force of Law 23,737 (which increased the penalties), first in the 1990s and persisting to the present day. This trend shows an initial link between drug-related offenses and the female prison population.

In the population of the SPB, women account for a smaller percentage of prisoners. While it is not possible to illustrate how it has evolved as shown in the case of the SPF, the latest information shows that women account for 4 percent of the total population.<sup>24</sup> Nonetheless, the Provincial Commission for Memory notes that whereas in 2007 the percentage was less than 3 percent, according to the 2008 data it had climbed above 4 percent. The increase is a result, according to the commission, of the enforcement of the drug law.<sup>25</sup>

Various investigations indicate that the leading cause for which women are behind bars in the SPF is drug-related offenses. A similar increase is now beginning in prisons in the province of Buenos Aires.

The research studies by the National Women's Council (CNM) reveal that in 1995, 45.7 percent of women in prison were convicted for drug-related offenses,<sup>26</sup> whereas by 2001, this figure had risen to 55.7 percent. The research project headed by Daroqui shows that in 2001, 69.3 percent of women in prison were there for drug offenses. In addition, the 2006 report produced by the Prisons Commission (Comisión de Cárceles) of the Office of Public Defenders in two different prison facilities shows that the percentages of women in prison for drug-related offenses reached 65 percent and 72 percent, respectively.<sup>27</sup> Of particular interest, in the prison with the higher percentage there were more foreign women, a circumstance that raises questions regarding the motives for imprisonment of this particular population. A news article from late 2009 indicated that according to the information provided by the SPF, there were some 700 women in federal prisons for drug-related offenses, accounting for 80 percent of the total number of women behind bars.<sup>28</sup>

According to the Provincial Commission for Memory, as of September 2007, at the SPB prison that held 88 percent of the women with children, 31 percent were in for drug-related offenses.<sup>29</sup> The report's author, Laurana Malacalza,

*"... the most common thing was to have women who sold in their neighborhood... you know ... the 31, the 11-14, the one from Saavedra, that is, all the marginal neighborhoods here around Buenos Aires ... and I had many such friends who are women who were supporting the family."*

Author's interview with a 40-year-old woman

noted subsequently that approximately 40 percent of the women in the SPB were confined for such offenses.

In recent years there has also been an increase in the percentage of foreigners detained in the SPF. Daroqui's research indicates that in 2001, the foreign population reached 14.94 percent, and the 2004 SNEEP placed it at 14 percent. These figures show that the foreign population accounts for approximately 20 percent.<sup>30</sup> It accounts for only 3 percent of the total in the SPB.

Recent years have seen certain changes in the composition of the foreign population in the SPF. The information available indicates how, early in the first decade of the 21st century, approximately 90 percent of foreigners were from other countries in the Americas, mostly South America. In recent years, this figure has dropped to 80 percent, with a sharp increase in the number of persons from Europe and Asia. In 2003, persons of European origin accounted for 5.21 percent, whereas in 2008, they accounted for 13.21 percent; in the same years, persons of Asian origin saw an increase in their numbers from 1.86 percent to 3.19 percent. Among Europeans, special note should be made of the large number of persons of Spanish origin, who account for nearly 40 percent of all prisoners from Europe. Also striking is the high percentage of persons of South African origin, accounting for 83 percent of the Africans.

Of the foreign prisoners, the percentage behind bars for drug-related offenses is higher than for the general population. In the first years of this decade, the percentages were approximately 50 percent and, as of 2005, over 60 percent, having peaked in 2007 at 68.46 percent.

The percentage of women in the foreign prison population is greater than the percentage of women in the general prison population, and unlike the latter has increased in recent years. While the research of the CNM showed that in 1995 and 2001 women accounted for more than 20 percent of all foreigners convicted, other sources from subsequent years place that figure at approximately 15 percent. As of 2005, according to SPF data, the figure climbed above 20 percent, peaking in 2007 at 23.22 percent.

While there is no information detailing the exact offenses for which foreign women are detained, in the information provided by the National Women's Council for 1995, of the 27 foreign women convicted, 24 (88 percent) were



convicted of drug-related offenses. A similar proportion (80 percent) was convicted of such offenses according to the 2008 UNODC report.<sup>31</sup> According to the report of the Asociación por los Derechos Civiles (Association for Civil Rights), in federal prisons “87 percent of all women detained from bordering countries and Peru are in prison for violations of the law on narcotic drugs.”<sup>32</sup>

Table 2 illustrates a breakdown of the population held in the SPF and SPB by age.<sup>33</sup>

The research by the CNM shows that women in prison for drugs tend to be older than women in prison for other types of offenses. While those convicted of crimes against property are in the 18-to-34-year age range (almost half ages 18-to-24), those held for drug-related crimes are predominantly in the 25-to-44 year range. Even in the research done in 1995, 56 percent of the women convicted of violations of the drug law are in this age bracket; in 2001 this figure increased to 63 percent.

The 1995 research study indicated that most of the women convicted of drug-related offenses were separated or divorced (42 percent) or did not have a partner (62 percent), though this latter figure appeared to drop again in the 2001 investigation. In addition, both research studies note a larger presence of women with children, and a larger number of children, among the women convicted of drug-related offenses.

Table 3 shows the levels of schooling of prisoners in the SPF and the SPB in 2007.

The research by the CNM shows that in the case of women convicted of violating the drug law, most had completed primary school, followed by those who had not finished secondary school.

As for the employment situation of the persons arrested in 2007, in the SPF, 63 percent of the population had no trade or profession, 28 percent had a trade, and only 9 percent had a profession. In the SPB, 53 percent had no trade or profession, 39 percent had a trade, and 8 percent had a profession.

In the SPF, 75 percent of the prisoners were from urban areas and 25 percent from rural areas; whereas in the SPB, these figures were 96 percent and 4 percent respectively.

While there are no publicly available studies of drug use in the prisons, the above-mentioned report by the UNODC<sup>34</sup> makes reference to a survey in which 80 percent of respondents were former drug users and 5 percent said they had been intravenous drug users. It also indicates that the population of intravenous drug users could be larger than it seems, though the authorities indicate that there are few or none.

Several of the interviews conducted in the context of this research mentioned drug use in the prisons, sometimes with drugs brought in by family members pressured to do so, and other times by prison staff. On further inquiry, the issue of the use of tranquilizers by the prison authorities themselves came up, especially in women’s prisons.

The SPF has Centers for the Rehabilitation of Drug Addicts (CRDs: Centros de Rehabilitación para Drogadependientes) in five of the 31 units, though they operate with a strict regime and offer only one type of service (therapeutic community). In late 2008 these had a population of 96 persons and a capacity for 123,<sup>35</sup> even though there were “waiting lists.”<sup>36</sup> Its annual report for 2008 mentions that three more centers are planned, and that outpatient programs have been implemented for those not reached by the CRDs.<sup>37</sup>

Table 2

Ages of the prisoners in the SPF and the SPB (2007)						
	18-24	25-34	35-44	45-54	55-64	65 y más
SPF	1,666	3,664	2,104	981	444	110
%	19%	41%	23%	11%	5%	1%
SPB	5,617	8,972	3,446	1,578	541	194
%	28%	43%	17%	8%	3%	1%

Source: SNEEP, SPF and Buenos Aires 2007

Table 3

Schooling of prisoners in the SPF and the SPB (2007)			
	Primary not finished	Completed primary	Incomplete secondary
SPF	21%	37%	20%
SPB	23%	53%	13%

Source: SNEEP, SPF and Buenos Aires 2007

Table 4

Employment situation of prisoners in the SPF and SPB (2007)			
	Unemployed	Part time	Full time
SPF	48%	29%	23%
SPB	51%	27%	22%

Source: SNEEP, SPF and Buenos Aires 2007

### Minor players in the drug-trafficking business: Some stories

Looking in greater depth at the profile of the persons imprisoned for drug-related offenses beyond the statistical data, it becomes evident that while most have participated in conduct related to drug trafficking, they did so as minor players, becoming caught up in it due to situations of vulnerability. In the case of women these situations appear to be accentuated, and even more so for foreign women.

As noted by Patricio Varela, “for the most part, women are in prison for drug-related conduct ... they generally are involved in relatively unimportant roles in the chain of illicit drug trafficking, as they are in charge of delivering the substances to users, or are those who transport drugs hidden in their body or among their belongings – ‘mulas’ – assuming the most exposed roles, as they are the visible links in the chain and therefore at greatest risk of being detected and apprehended.”<sup>38</sup>

The research studies by the CNM looking at the places where the acts were committed and where the women were detained, suggest that women are involved in minor roles in both domestic selling and cross-border trafficking. In both studies, drug trafficking activities appear to constitute an economic alternative motivated by the family situation, which places them in a special situation of vulnerability.

In carrying out this research we found that in many cases, situations of vulnerability stand out in which the agencies of the criminal justice system overreach in their role of fighting drug trafficking, considering innocent persons as suspects, or trumping up charges. Some examples we learned of include:

- A 29-year-old Peruvian woman convicted and sentenced to seven years in prison even though she always protested her innocence. The cocaine found in her home belonged to her former boyfriend and she maintained that she never knew about it.
- Based on information provided by the U.S. Drug Enforcement Administration (DEA), two Peruvians were detained, accused of being part of a drug trafficking organization. In neither case were any drugs found in their homes. One of them was convicted and sentenced to six years behind bars for having a friend who was engaged in that illegal activity.

- A travel agent with 30 years experience has been held in pre-trial detention for the last 18 months for having sold airline tickets to a person who was involved in drug-trafficking. No substance was ever found in the travel agent’s home.

- A Bolivian citizen was involved in a criminal case stemming from the fact that his neighbor sold marijuana. When his house was searched, all that was found were 12 bags of coca leaf, which weighed 5.4 kilos, and of which, he said, “I used it to burn in ceremonies, a Bolivian custom, and I chewed it for diabetes, and to make coca tea.” Despite those explanations, and the fact that Argentine law does not consider possession of coca leaf for consumption to be a crime, he was held for over a year.

Also significant is the phenomenon of the ‘mulas’ or human drug couriers. In statements to the press, legislator Marcela Rodríguez said that “the fact that more than half of the women held in the prisons of the Federal Penitentiary Service have been accused of drug trafficking means that they were used as couriers by the large drug trafficking organizations.”<sup>39</sup>

The following are among the cases we learned of involving human drug couriers:

- The case of a 38-year-old Bolivian woman who, to cover the costs of an operation that her 12-year-old daughter needed (she was losing her hearing), agreed to transport drugs to Europe from Buenos Aires in exchange for \$4,000 USD. A woman recruited her in La Paz and put her in touch with a man about whom she knew nothing. She was being monitored at all times and was told in which hotels to stay. In the hotel, they gave her the capsules with cocaine that she was to ingest, and they gave her an injection for cramps. When she refused to ingest the capsules, the person who was monitoring her said, “You’re crazy, you’re not getting out of this.” As a result, she had to buy a belt and plastic at the supermarket, in which she placed the capsules. Finally, her monitor accompanied her in a taxi to the airport, where he left her; he never saw her again. When she was arrested at the pre-boarding checkpoint for a flight to Madrid, they found 83 capsules of cocaine in her belt, and one more capsule in her vagina; in all, the cocaine weighed 952 grams. Even though much of what she said about the persons who had given her the capsules was corroborated, and even though Argentine law allows for reducing the sentence in exchange for such information, a

*“If a judge had given me the opportunity after three months of being in prison to sit down with him and hear me out, he would have realized that it was useless to keep me locked up ... you see!... it was useless...”*

*Q: You needed an opportunity....*

*“Obviously! And just like me, there are many people that need an opportunity ... there’s more a question of the consumption that led them there, all those people need an opportunity.”*

The same woman – who has a son who was addicted to cocaine and who stopped selling drugs for that reason – was convicted and sentenced to four years in prison.

strict interpretation by the courts blocked the application of that provision, and she was sentenced to four years and six months in prison.

- The case of a 28-year-old Bolivian man who, on returning from his country where he went to visit his father, who was ill, was pushed by economic necessity, and so agreed to ingest approximately ten capsules of cocaine that weighed nearly 100 grams to take them to Buenos Aires in exchange for \$200 USD. Upon arriving in Buenos Aires he felt major stomach pain, which led him to go to a clinic where he received treatment to finish evacuating the pills. Yet as a result, he was turned in by the medical personnel who assisted him, despite the professional confidentiality that should prevail in such cases.
- The case of a 20-year-old Brazilian woman who, out of economic necessity, transported one kilo of cocaine by air inside her body from Sao Paulo to Buenos Aires, this being her first attempt to take drugs across international borders. While at the moment of doing so she did not realize it, reviewing what happened she believes that there were other persons on that same flight who, like her, were transporting cocaine, but who were not detained. This young woman notes that most people involved in carrying drugs like that do so out of necessity; she recalls the case of one person who did so to be able to feed their children.
- A 30-year-old woman who was introduced, by the man with whom she was ending a relationship, to a friend who supposedly was going to get her a job in Brazil. At the airport, security personnel found cocaine in her double-bottomed suitcase, and she realized she had been used. Ultimately, she spent four years (1994 to 1998) of the almost six years of the sentence in prison.

## Conclusions

Argentina’s criminal laws on narcotic drugs developed without any correlation to a large-scale public health problem, with the exception of the situation that arose in the last decade.

The special statutes that were adopted (Law 20,771 of 1974 and Law 23,737 of 1989, still in force) have generated increased law enforcement by the criminal justice agencies, mainly acting against users. As of the 1990s, the law has come down hard on the small players in drug trafficking (small-scale sellers or small cross-border transporters), resulting in one-third of the persons behind bars in federal prisons being there for such offenses. The figure is approximately two-thirds in the case of women and foreigners, and higher still in the case of foreign women.

Accordingly, enforcement of the drug law is focused primarily on minor offenders, who are easier to arrest, and is associated with the imprisonment of two vulnerable populations, women and foreigners.

To the extent that interdiction continues to come down especially hard on such persons, its successes will only be momentary, without actually helping to contain drug trafficking. In addition, imprisoning persons who are vulnerable on various accounts (poverty, gender, nationality) aggravates the difficult situation such people already face.

## NOTES

1 Touzé, G. (2006). *Evolución del ‘problema droga’ en la Argentina*. In Touzé, G. (ed.). *Saberes y prácticas sobre drogas: el caso de la pasta base de cocaína* (pp. 47-76). Buenos Aires, Argentina: Intercambios Asociación Civil-Federación Internacional de Universidades Católicas.

2 Argentina approved the Single Convention on Narcotic Drugs by Decree-law No. 7672/63, which was ratified by Law 16,478 of 1964.

3 Not only did the 1986 draft establish that possession for consumption is not punishable, it also established attenuating circumstances for drug-trafficking conduct by minor players.

4 Such novel features included revealing information in exchange for a reduction or exoneration of the sentence.

5 Presently this office is called the Secretariat of Programming for the Prevention of Drug Addiction and Fighting Drug-Trafficking (SEDRO-NAR: Secretaría de Programación para la Prevención de la Drogadicción y la Lucha contra el Narcotráfico).

6 The offenses in the law on narcotic drugs are federal offenses. Nonetheless, as of the reform known as “de-federalization” (2005), the provinces are allowed to prosecute certain offenses (consumption and direct sale to consumers). This possibility took effect in the province of Buenos Aires in late 2005.

7 This term is used to describe the courts of the City of Buenos Aires, which before the 1995 constitutional reform was a national territory.

8 Such as the Centro de Estudios Legales y Sociales (CELS), the Committee against Torture of the Provincial Commission for Memory, the Centro de Estudios sobre Política Criminal y Derechos Humanos (CE-POC), and Unidos por la Justicia Asociación Civil, among others.

9 Among these are the Grupo de Mujeres Argentinas and their Intrapostmuros Project (<http://www.proyintrapostmuros.com.ar>), the NGO Rompiendo Muros ([ong.rompiendomuros@gmail.com](mailto:ong.rompiendomuros@gmail.com)), and the Asociación Civil Familiares de Detenidos en Cárceles Federales.

10 SNEEP (2008). *Informe Anual 2007*, op. cit. (p. 3).

- 11 International Center for Prison Studies, King's College London (at [http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb\\_country.php?country=212](http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_country.php?country=212); last visit: October 2009). The SNEEP shows similar trends, though not always with identical data (*Informe Anual 2007*, op. cit., p. 2, with mention of King's College London), with a rate of 134.61 per 100,000 (as of December 31, 2007); as does the report by ILANUD (Latin American Institute for the Prevention of Crime and Treatment of Offenders) (see note 45), where mention is made of the following rates: 1992, 63 per 100,000; 2001, 126 per 100,000; 2005, 164 per 100,000; 2007, not available.
- 12 Committee Against Torture of the Provincial Commission for Memory (2009). *Informe Anual 2009. El sistema de la crueldad IV* (p. 28). La Plata, Argentina (at <http://www.comisionporlamemoria.org/comite/informes/webinforme09.pdf>; last visited: March 2010).
- 13 Daroqui, A. (et al.) (2006). *Voces del encierro: mujeres y jóvenes encarceladas en la Argentina una investigación socio-jurídica* (p. 68). Buenos Aires, Argentina: Omar Favale Ediciones Jurídicas.
- 14 In February 2008, "this type of offense accounted for 31.70 percent of all detainees," United Nations Office on Drugs and Crime (UNODC, 2008). *Evaluación y Recomendaciones para el perfeccionamiento de los programas de prevención y atención al uso de drogas y del VIH que se implementan actualmente en los establecimientos del Servicio Penitenciario Federal. Informe de la misión de la ONUDD. 21-25 de julio de 2008* (at [http://www.spf.gov.ar/pdf/informe\\_onudd.pdf](http://www.spf.gov.ar/pdf/informe_onudd.pdf), last visited: November 2009).
- 15 See note 6.
- 16 In the federal procedural regime, until recently release during trial depended mainly on the scale of penalties applicable to the offense, not allowing release for those offenses for which the minimum penalty was greater than three years in prison. In recent years, certain criteria that have been put forth in case-law that accord greater weight to other considerations (danger of flight, hindering of the investigation) have made it possible to expand the situations in which release during trial is allowed, including in those offenses with minimum penalties greater than three years in prison, though they are not always uniformly applied.
- 17 A suspended sentence ('sursis') suspends enforcement of the penalty for a given time on condition that a new offense not be committed.
- 18 CNM. *Investigación sobre la población penal femenina alojada en el servicio penitenciario federal 1995*, op. cit.
- 19 [http://www.spf.gov.ar/sintesis\\_semanal/sintesis\\_semanal\\_femenina\\_05-03-10.pdf](http://www.spf.gov.ar/sintesis_semanal/sintesis_semanal_femenina_05-03-10.pdf); last visited: March 2010.
- 20 [http://www.spb.gba.gov.ar/index.php?option=com\\_ponygallery&Itemid=28&func=viewcategory&catid=1](http://www.spb.gba.gov.ar/index.php?option=com_ponygallery&Itemid=28&func=viewcategory&catid=1); last visited February 2010.
- 21 Committee against Torture of the Provincial Commission for Memory (2007). *Mujeres que residen junto a sus hijos en los lugares de detención de la provincia de Buenos Aires*, p. 2 (in <http://www.comisionporlamemoria.org/comite/mujeres/05.pdf>; last visited March 2010).
- 22 The data up to 2000 are from the CNM 2001; the information for 2004 is from the SNEEP SPF 2004. Both were prepared based on information provided by the SPF; the others were drawn from the website of the SPF.
- 23 An almost identical trend, from 1990 to 2006, is presented in the report by the Prisons Commission of the Office of the Human Rights Ombudsman (2007). *Informe Semestral, julio-diciembre de 2006* (pp. 35-6). Buenos Aires, Argentina: Ministerio Público de la Defensa.
- 24 SNEEP (2008). *Buenos Aires 2007*, op. cit. (p. 2).
- 25 Committee Against Torture of the Provincial Commission for Memory (2009), op. cit. (p. 18, note 47).
- 26 At the same time, the study indicated that the percentage of men convicted under Law 23,737 accounted for only 4 percent of all men in prison.
- 27 Prisons Commission of the Office of Public Defenders (2007), op. cit. (pp. 45 and 72).
- 28 Diario Página 12 (November 29, 2009). *Las perejilas*. Buenos Aires, Argentina.
- 29 Committee Against Torture of the Provincial Commission for Memory (2007), op. cit.
- 30 The SNEEP (SPF 2007) indicates 22 percent, and the SPF annual report for 2008 indicates 21 percent.
- 31 UNODC (2008), op. cit. (item 25).
- 32 See note 79, which states: "This is the situation of 97 percent of Bolivian women prisoners, 81.4 percent of Peruvian women prisoners, 76.3 percent of Paraguayan women prisoners, 80 percent of the Brazilian women prisoners, 70 percent of the Uruguayan women prisoners, and 50 percent of Chilean women prisoners."
- 33 SNEEP (2008), *SPF 2007*, op. cit. (p. 6. and p. 2, respectively)
- 34 UNODC (2008), op. cit. (item 59).
- 35 Information available as of December 31, 2008. ([http://www.spf.gov.ar/sintesis\\_2008/sintesis\\_semanal\\_femenino\\_31-12-08.pdf](http://www.spf.gov.ar/sintesis_2008/sintesis_semanal_femenino_31-12-08.pdf); last visited April 2010).
- 36 UNODC (2008), op. cit. (item 83).
- 37 SPF (2009), op. cit. (pp. 42-44). Also mentioned in the UNODC report, citing the design of these programs (item 87).
- 38 Varela, P. (2009). *Madres, niños y cárcel. In Mujeres Privadas de libertad*. (pp. 69/95). Office of the Human Rights Ombudsman -UNICEF. Buenos Aires, Argentina.
- 39 Diario La Nación (June 22, 2008), *Hay más mujeres que cometen delitos*. Buenos Aires, Argentina.

## Drug policy and the prison situation in Bolivia

Diego Giacoman

Diego Giacoman Aramayo holds degrees in economics and philosophy. He has conducted academic research and analysis on the issue of coca cultivation and alternative development. He was in charge of the Drug Policy Monitoring and Evaluation Unit of the Vice-Ministry of Social Defense and Controlled Substances in Bolivia. While holding that position, Giacoman participated in the ongoing reform of Law 1008 on the regime applicable to controlled substances and coca, as well as the design of the government strategy on drug trafficking and the coca leaf. Giacoman has spent the last three years researching political economy in Bolivia's northern Amazon region.

### Introduction

Bolivia's participation in the international drug-trafficking circuit has been conditioned by a series of factors, ranging from the ancestral tradition of growing and consuming coca leaf, to the endemic poverty of the population (per capita GDP is less than \$1,000 USD) to the structural weakness of state institutions.

Economic activity around the coca leaf, both legal and illegal, finds expression not only in the more than 45,000 peasant farmer families that make a living from coca growing, but also in the thousands of persons arrested each year for involvement in the processing and transport of the illegal derivatives of the coca leaf. This is the response of a country with high unemployment and underemployment, and a minimum wage not sufficient to cover the basic market food basket.

Notwithstanding this relationship between drugs and poverty, the Bolivian state and the international community have sought to put the brakes on the phenomenon through repressive policies in which the forced eradication of crops and interdiction of illegal trafficking in coca and its derivatives are often accompanied by systematic violations of civil and human rights.

The objective of this investigation is to describe the repercussions of these policies for Bolivian society, showing the human face of those behind bars for drug offenses and the real impact of drug policies on their lives and families, and on criminal organizations. The purpose is also to show the need to reform Bolivia's drug control statute – Law 1008 – to bring the legislation more into line with reality and to ensure that drug laws do not increase poverty, violate hu-

man rights, or render the population vulnerable to crime.

This study is based on a survey of 130 prisoners in the San Pedro men's prison in the city of La Paz, as well as other official data. The central hypothesis is that the crisis of overcrowding in Bolivian prisons, as in the rest of Latin America, is directly related to a drug policy in which a disproportionate application of criminal law results in violations of fundamental human rights.

### Bolivia's drug legislation and the international context

The United Nations Single Convention on Narcotic Drugs (1961) was the starting point for activities to control the cultivation of certain plants, which in practice meant the proscription of coca crops and the trade in coca leaves. To accomplish this, the Bolivian government undertook a plan to fight drugs. In 1973 the first mechanisms for controlling the planting, harvesting, and collection of coca leaf were developed, leading to the manual eradication of plants and sanctions against coca producers. U.S. pressure later led to the militarization of the struggle against the crops and drugtrafficking.

In 1989, the United States proposed the "Andean Strategy," a plan to strengthen programs for the eradication and sub-

### Drug legislation in Bolivia

- **1961** - The Single Convention on Narcotic Drugs was the starting point in controlling and limiting the growth of certain crops.
- **1973** - The first mechanisms were developed to control the planting, harvesting and collecting of the coca leaf.
- **1986** - The military component of the struggle against drugs takes off with the U.S.-lead operation Blast Furnace.
- **1988** - In this context the first national legislation comes into being, on July 19, 1988. The Law 1008, the coca and controlled substances regime, was informally designed by U.S. agents.
- **1989** - The United States launches the "Andean Strategy", a plan to strengthen coca crop eradication by militarily means.
- **2003** - The government of Carlos Mesa signs an agreement with the coca peasant unions from the Cochabamba Tropics, authorizing them, amongst others, to grow coca on a small plot (1,600 square meters).

stitution of coca crops through military support. In Bolivia, the military role in the war on drugs began in 1986 with Operation Blast Furnace, in which six Black Hawk helicopters and 160 high-ranking U.S. Army officers were sent to direct coca eradication and interdiction operations. It was in that context that in July 1988, the first national drug control legislation was adopted with the enactment of the Law on the Regime Applicable to Coca and Controlled Substances (Law 1008), whose design was informally entrusted to U.S. officials. With the adoption of this law, strategies were framed for combating drug trafficking with four main pillars: eradication, alternative development, interdiction, and, marginally, preventing consumption.

In 2004, the government of Carlos Mesa signed an agreement with the coca producers from the region known as the Cochabamba Tropics to implement a series of reforms, including the authorization to grow up to one ‘cato’ (1,600 square meters) of coca per unionized family within the territories of the six peasant federations of the region. Since then, the conflicts with these organizations and the attendant violations of rights have decreased. This has been the most important redress attained by a social sector, in terms of changing drug policy.

**Enforcement of Law 1008**

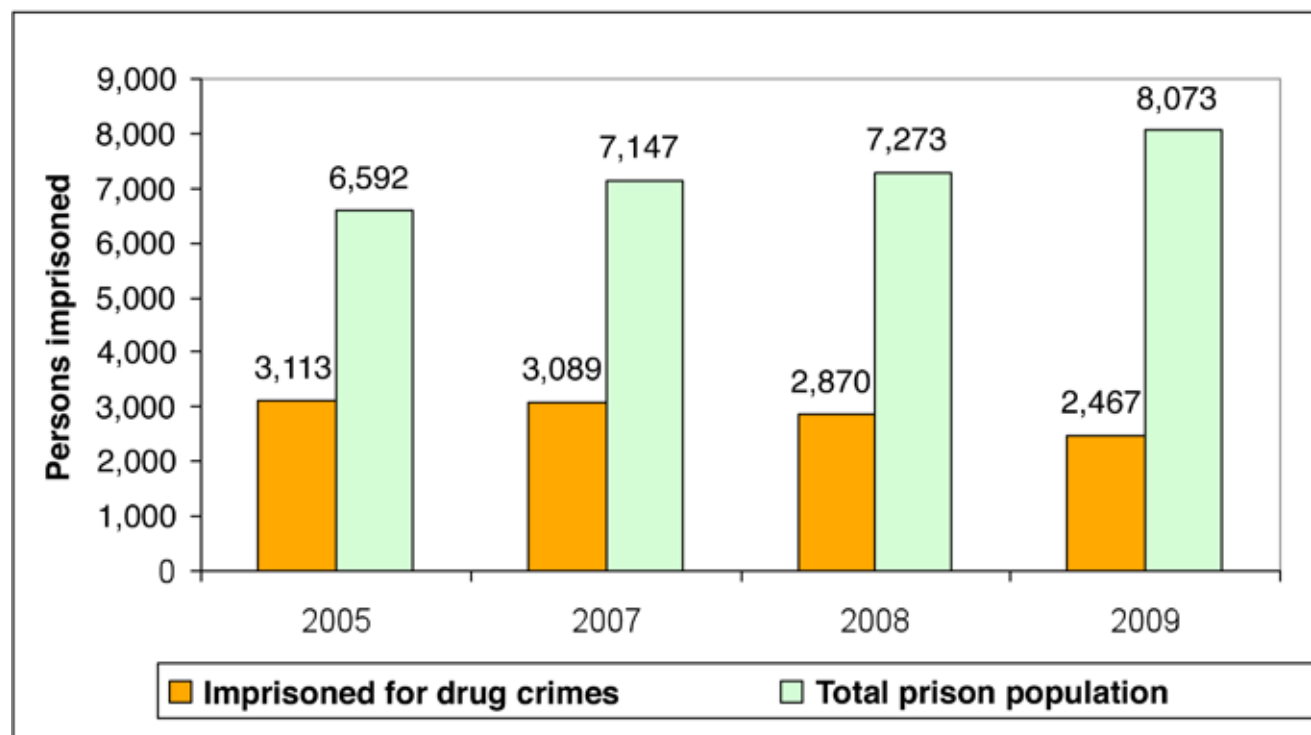
Law 1008 encompasses both the regime for the coca leaf and for controlled substances. This law, which has 149 articles, defines 32 specific forms of criminal conduct, specific forms of prosecution, and competent agencies. Yet its ambiguities and vagueness in several aspects have opened the

way to excessive penalization. For example, the law does not distinguish between street-level drug dealers and larger drug traffickers, such that the penalties range from one year in prison for a producer of controlled plants to 25 years for trafficking, without considering the volume of drug involved. The law is also ambiguous in the definition of manufacture, possession, storage, delivery, supply, purchase, sale, and donation, and/or any other type of transaction.

According to a 1995 legal analysis by the Committee on Human Rights of the Chamber of Deputies, Law 1008 “establishes a criminal justice subsystem parallel to the regular criminal justice system, characterized by the tendency towards unreasonably drastic penalties”<sup>1</sup> that suppresses fundamental rights to defense and undermines citizens’ constitutional rights. Law 1008 led to excessive penalization by including offenses already in the Bolivian Criminal Code, while also imposing more stringent sentences in terms of length of incarceration, number of days of fines, and asset seizure.

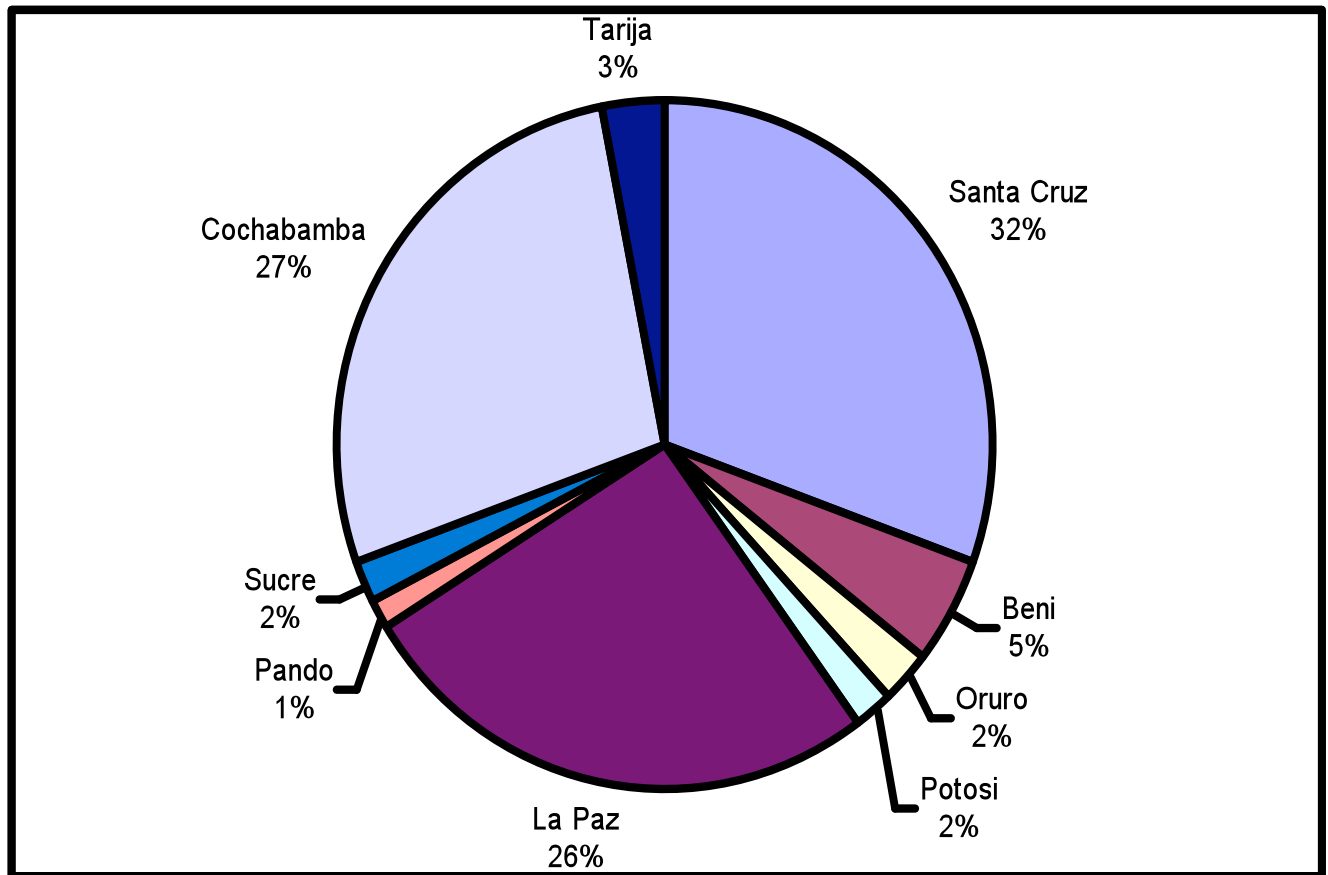
In many cases, sentences under Law 1008 end up exceeding the 30 year maximum prison term stipulated in the Bolivian Constitution. In the criminal proceedings pursuant to Law 1008, the presumption of innocence is eviscerated by pre-trial detention, the issuance of arrest warrants for defendants who are in absentia, and the provisional registration of the assets of the persons involved. Law 1008 includes elements which in themselves violate constitutional and civil rights, and which, given the manner in which they are carried out, presuppose the systematic violation of human rights in the most vulnerable sectors of the population.

Graph 1 – Total prison population and prisoners incarcerated for drugtrafficking in Bolivia



Source: Based on information provided by the General Directorate of the Prison Regime

Graph 2 – Distribution of the population behind bars for crimes codified in Law 1008 among the nine departments



Source: Based on information provided by the National Directorate for Prison Security

According to earlier studies on this law, state institutions use high levels of violence during the detention for, and investigation of, offenses defined in Law 1008.<sup>2</sup> This violence includes threats, coercion, and extortion, and even physical and psychological torture.

In the wake of the harsh criticism of Law 1008 and in an effort to restore constitutional guarantees and principles of justice, in 1996 the Bolivian state enacted the Bail Act (*Ley de Fianza Juratoria*), and in 1999 adopted a new Code of Criminal Procedure. As a result of these reforms, the benefit of conditional release was introduced in limited form in cases involving delays of justice, along with more guarantees for the exercise of the right to defense by the accused. Yet despite these new laws, the use of special prosecutors, excessively harsh penalties attached to the definitions of criminal conduct, and other elements leading to violations of the rights of the accused all continued. Moreover, the requirements for conditional release are not viable for most of the accused. The prison population incarcerated because of offenses defined in Law 1008 is made up mostly of the weakest, poorest, most vulnerable, and easiest to replace links in the drug-trafficking chain.

### The prison system and the prison population

The prison administration in Bolivia is part of the state and

is administered by the executive branch's General Directorate of the Prison Regime (DGRP: *Dirección General de Régimen Penitenciario*), which is within the Ministry of Interior (*Ministerio de Gobierno*). Bolivia's prisons reflect the country's poverty in some of its crudest forms. According to a DGRP report, in early 2006 the prison population numbered 7,782 inmates, distributed in 54 prison establishments, with a budget (provided by the national government) of just over \$4 million USD annually, earmarked for food, health expenditures, personal services, basic services, and others. With these resources, less than \$0.80 USD daily was earmarked for the prisoners' food, and only 30 percent of the prisoners' medical needs were addressed by the prison regime. In many prisons, the prisoners themselves have to take charge of medical services.<sup>3</sup>

The picture of poverty is even more dramatic if one considers the presence of children in the prisons, which in turn is closely related to the poverty of most of the prison population. "And so the absence of a social policy for minors in Bolivia means that when the parents go to prison, the children have no safer place to be than in the prison ... In all, there are more than 3,000 children in the prisons of Bolivia."<sup>4</sup>

Article 26 of Law 2298 on Enforcement of Sentences and Supervision establishes that "the children of prisoners up to six years of age may stay in the prison establishments

so long as the parent deprived of liberty is the minor’s legal guardian.”<sup>5</sup> Despite this limitation, given the impossibility of leaving their children elsewhere, many mothers and fathers keep their children by their side even after they have turned six, and family dynamics take shape within the prisons that stigmatize minors and show them a way of life in which violence is trivialized and liberty is lost.

**Prison population behind bars for drug-trafficking offenses**

Since the implementation of Law 1008, the proportion of prisoners behind bars for drug-trafficking and related offenses has been approximately 45 percent of the total prison population nationwide. As illustrated in Graph 1, the number of drug offense prisoners and their proportion of the overall incarcerated population have begun to decline only in recent years, dropping from 47 percent in 2005 to 31 percent in 2009.

According to high-ranking officers from the Special Force to Fight Drug-Trafficking (FELCN: Fuerza Especial de Lucha contra el Narcotráfico), one of the main reasons for the drop in the number of persons detained is the use of new technologies for manufacturing cocaine paste. According to this explanation, the maceration pits (the artisanal processing plants for obtaining cocaine paste) were given up in favor of large receptacles that may fit inside a room; the water from the rivers or streams has been replaced by tap water. Whereas previously up to 10 people worked in a maceration pit, now only two or three people are needed to operate the grinders (commonly “weed whackers”) in much less time.

Another possible explanation is the growing employment by the drug-trafficking organizations of youths and children, against whom criminal charges cannot be brought. It is common for these minors to be released after a few days, for no judicial proceeding to be brought against them, and for them not to go to prison.

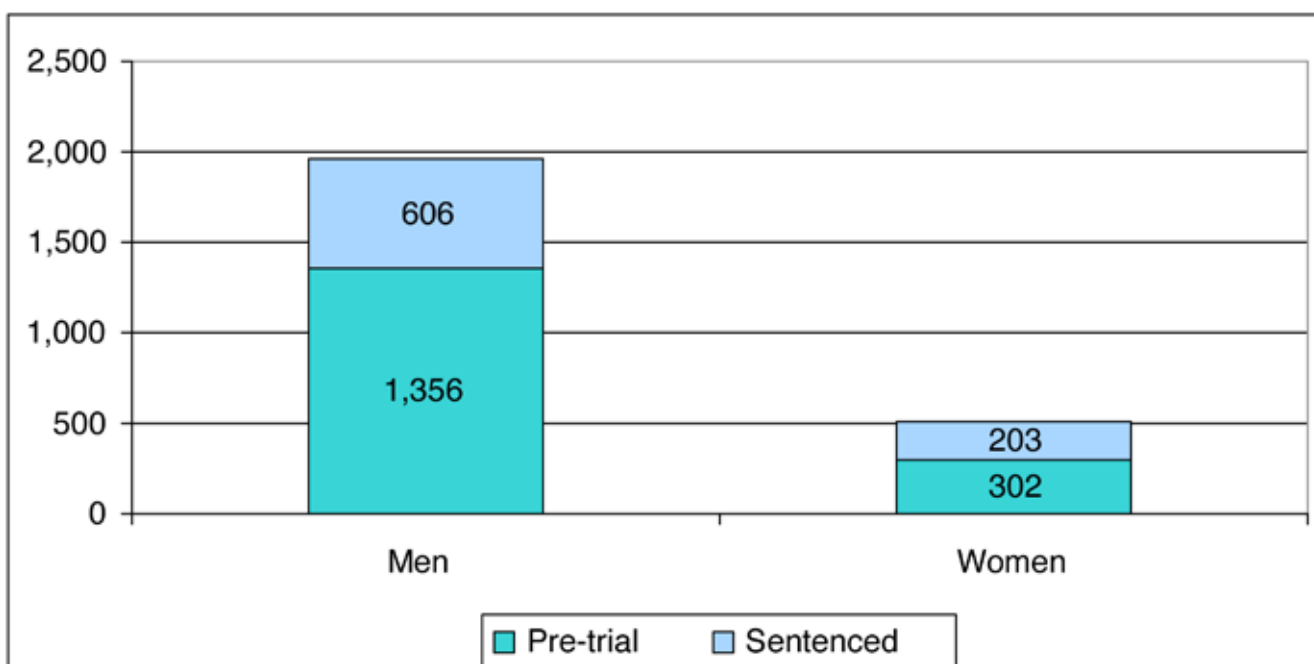
Finally, the decrease in the population confined under the drug law could also be explained by the changes that have occurred under the government of Evo Morales, which have expanded the possibilities of conditional release and improved the processing of habeas corpus petitions.

Observing the distribution of the population incarcerated for crimes codified in Law 1008, it is notable that due to the use of the new technologies for manufacturing cocaine paste and its shift from the forests of the Cochabamba Tropics to the urban areas of El Alto, La Paz, Cochabamba, and Santa Cruz, the population of persons behind bars for drug-trafficking and related offenses has extended to all nine departments of Bolivia.

Although prisoners locked up for drugtrafficking and related crimes can be found throughout the country, this population is concentrated mainly in the prisons of Palmasola, in Santa Cruz, with 672 prisoners, the San Pedro prison in the city of La Paz, with 472 prisoners, and the San Sebastián prison in Cochabamba, with 249. These three prisons account for 56 percent of the persons behind bars for drug-trafficking and related offenses; the remaining 44 percent are distributed among the other 34 prisons in the country.

Of the total population in prison for drug-trafficking and related offenses, more than 67 percent are being held in

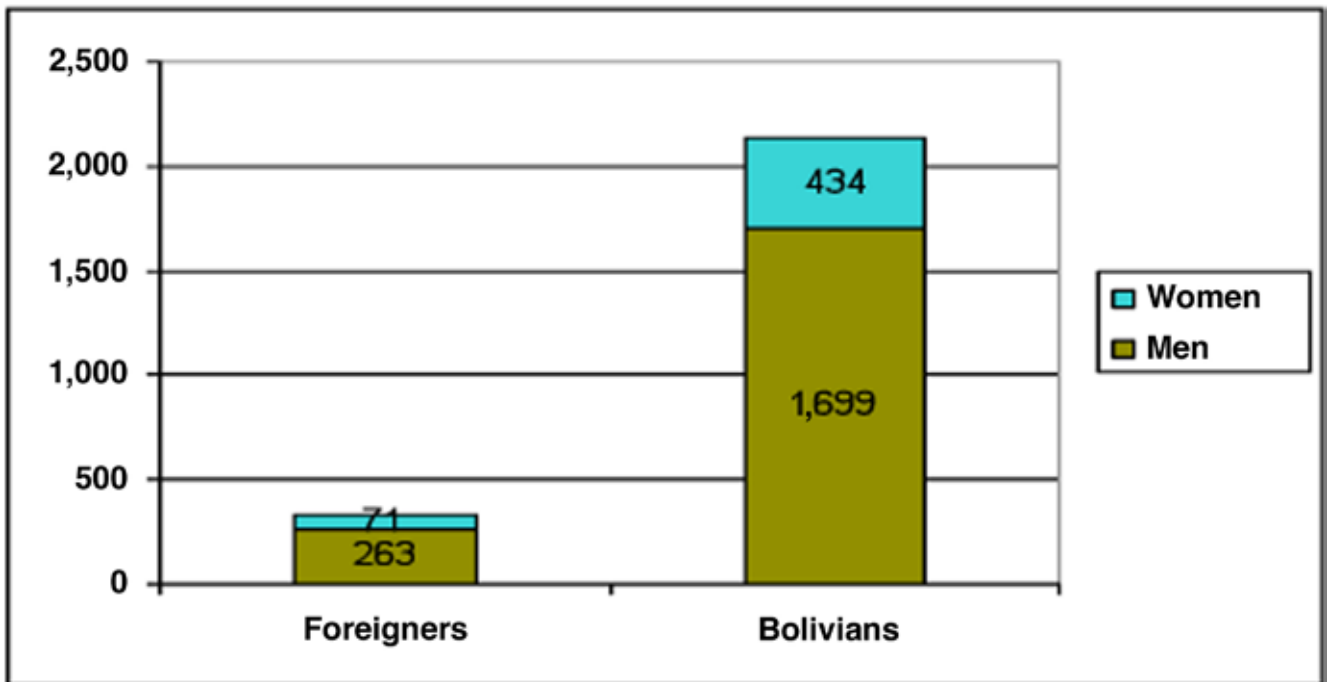
Graph 3 – Prison population for crimes codified in Law 1008 by gender and legal status



Source: Based on information provided by the General Directorate of the Prison Regime



Graph 4 – Distribution by country of origin and gender of the prison population incarcerated for crimes codified in Law 1008



Source: Based on information provided by the General Directorate of the Prison Regime

pre-trial detention, i.e., they have not been convicted. This illustrates what delayed justice means in Bolivia, and the way in which the enforcement of Law 1008 entails violations of civil and constitutional rights.

Graph 3 also shows that the proportion of male prisoners held in pre-trial detention (69 percent) is greater than the proportion of women detained without having been convicted (60 percent). Among the nearly 2,500 prisoners charged with drug-trafficking offenses, 80 percent are male and 20 percent are female.

According to the interviews carried out at the San Pedro prison, a large percentage of the prison population appears to be made up of persons hired as ‘pisadores,’ or those who stomp the coca leaves, and operators of coca leaf grinders, or ‘mulas.’ These persons, often hired without prior notice of the kind of work they are to perform, are subject to the orders of people at higher levels in trafficking networks who pay them some \$200 USD weekly to place their integrity and their liberty at risk. According to one prisoner, “We hire the operators and loaders here in La Ceja (market in La Paz), where anyone can find a plumber, mason, or day worker. From there we take them, without much explanation.”<sup>6</sup>

As for the prisoners’ country of origin, 13.5 percent are foreigners, the proportion being similar among men and women. Among the foreigners, Peruvians working as mules transporting cocaine paste from Peru to Bolivia or Brazil figure prominently. The Europeans detained account for no more than 10 percent of all foreigners; for the most part they are problematic drug users.

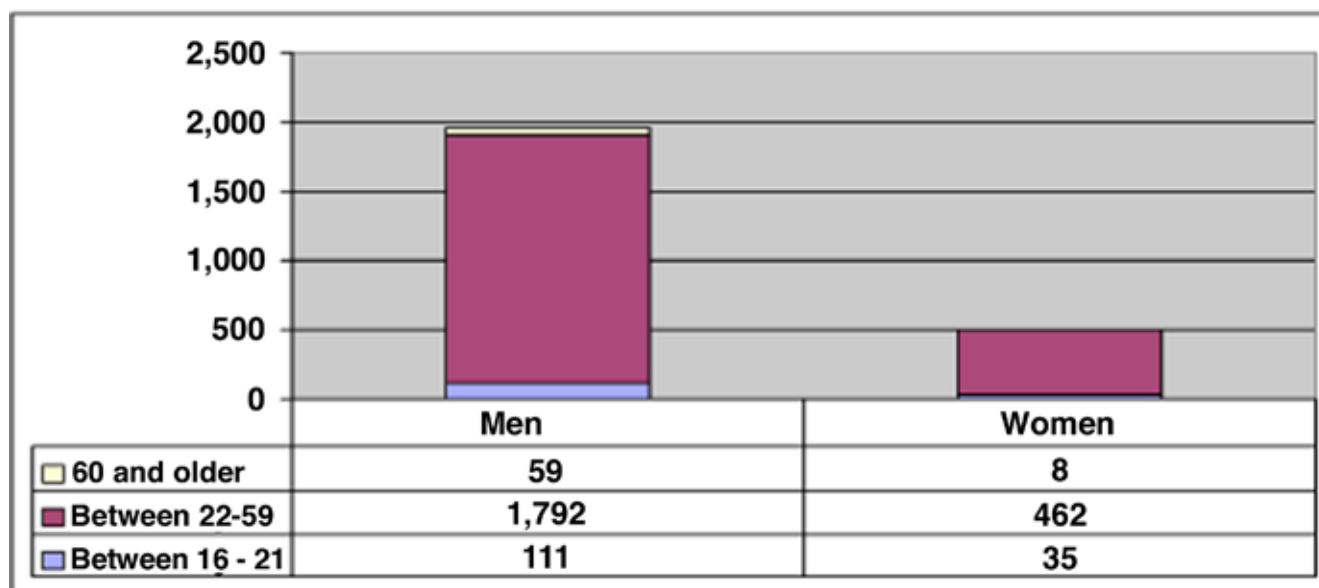
Regarding prisoners’ ages, 91 percent range in age from 22 to 59 years, while 3 percent are over 59 years of age, and 6 percent are under 21 years of age.

### Characterization of the population at the San Pedro prison for crimes codified in Law 1008<sup>7</sup>

For the purposes of this study, the San Pedro prison, the main prison in La Paz, was examined in order to illustrate in more detail the situation of the male population of prisoners behind bars for drug-trafficking and related offenses. More than 1,500 prisoners are incarcerated in San Pedro and distributed based on social status among six sections. The conditions of overcrowding at this prison are such that “the prisoners have to sleep in the bathrooms and patios, on the ground, and without beds. This also results in greater insecurity, as money and clothes are stolen, drugs and alcohol are sold, threats are made, persons are injured and killed, some are paid to protect others, and there is not adequate food or basic medical care, etc.”<sup>8</sup>

This prison, like other prisons in Bolivia, is administered under an open regime, which means that behind the prison walls the prisoners organize their life with only a limited role played by the police authorities in charge of administering and seeing to the security of the prison. Economic activities unfold in the San Pedro prison as though it were a small town. There are eateries, barbershops, stores, billiard halls, and even video rooms. It is all administered by the prisoners for the purpose of generating income that allows them to cover their expenses, support their families, or make up for the lack of government investment in maintaining the prison.

Graph 5 – Distribution by age bracket of the population incarcerated for offenses codified in Law 1008



Source: Based on information provided by the General Directorate of the Prison Regime

In keeping with this open regime, access to a cell in the San Pedro prison, as in the other major prisons in Bolivia, is not free of charge to the prisoner, contrary to Article 22 of Law 2298. The possibility of getting a cell in a given section depends on each inmate’s access to cash to be able to buy his cell from the delegates, who administer the spaces available in each section. In the most expensive section cells go for \$6,000 USD to \$8,000 USD, whereas in the more dilapidated section the price is no more than \$150 USD.

Given the characteristics of the open regime, “governability in San Pedro is outside of the hands of the administration, and only a severe regime of self-discipline managed by the power groups among the inmates is capable of keeping order on the inside.”<sup>9</sup> So a balance is struck between the civilian administration, the police in charge of security at the gates, and the delegates of the prisoners themselves. This relationship works, in part, thanks to a dynamic of corruption that benefits each of these parties. None of the three would be capable of keeping control of and maintaining the prison on its own.

### Socio-demographic characteristics of San Pedro

The San Pedro prisoners being held for drug trafficking and related offenses account for nearly 30 percent of the total (420 of 1,411 prisoners). Of these, 1,295 are Bolivian, 93 are Peruvian, and the rest are from various other countries. The average age of this population, according to the registry kept by the prisoners themselves, is 33.5 years.

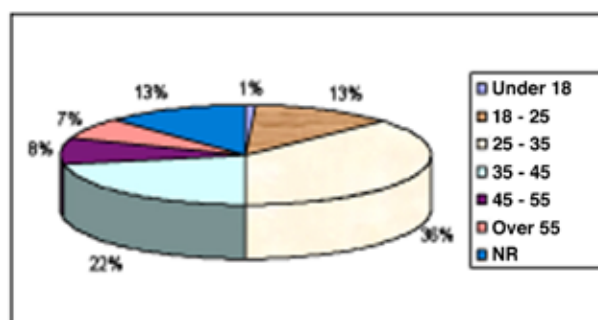
As Graph 6 shows, most of the prisoners are between 25 and 55 years old; only 1 percent are under 18 years of age, and only 7 percent over 55 years. Analyzing the distribution of the population by age bracket, together with levels of education, reveals a population with scant opportunities

for earning sufficient income for subsistence of an average-size family within the legal labor markets. Only 13 percent have had any university or graduate-level education, whereas 60 percent had only primary or secondary education.

Most of the inmates were engaged in legal economic activities, as merchants, transportation workers, or construction workers – work that generally does not require any higher education. According to the most recent legal activities they had engaged in before being imprisoned, these three categories account for 40 percent of those behind bars for drug trafficking.

The profile of poverty and economic vulnerability comes into greater focus when observing the income levels of this proportion of the incarcerated population. Some 62 percent of those surveyed said they brought in no more than \$300 USD per month. In general, the average incomes of the prisoners before being imprisoned was equivalent to \$155 USD per month, which does not cover even half the cost of the basic food basket in Bolivia.<sup>10</sup>

Graph 6 – Distribution by age bracket of the population incarcerated in the San Pedro prison for offenses codified in Law 1008



Source: Based on survey of prisoners at the San Pedro prison

The life histories of the prisoners at San Pedro reveal how they found themselves in situations of poverty, family crisis, or health problems when the opportunity arose to obtain extraordinary earnings and solve their problems in exchange for the risk of losing their liberty and jeopardizing their physical integrity.

**Features of legal process at the San Pedro prison**

Another aspect related to the logic of detention and subsequent legal proceedings in which the prisoners become submerged has to do with the lack of capacity of the institutions in charge of the administration of justice and pre-trial detention in the application of Law 1008.

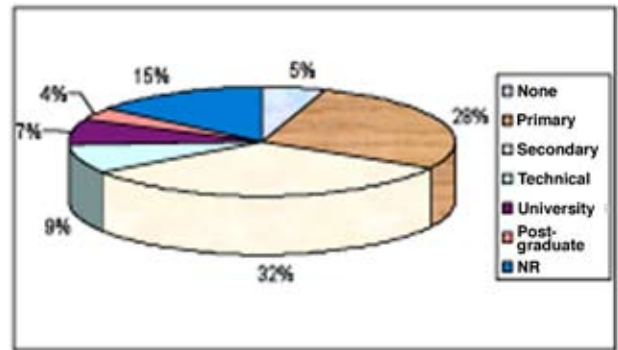
As illustrated in Graph 9, 61 percent of the persons surveyed reported that they are still awaiting verdicts in their cases. The high percentage of prisoners who have not been convicted applies not only to prisoners held under Law 1008, but also to the entire prison population. Indeed, the 5,808 prisoners being held in pre-trial detention account for 74 percent of the total prison population.<sup>11</sup>

Using incarceration as a precautionary measure to that extent constitutes a systematic violation of the constitutional principles and civil rights recognized in Bolivia. This situation stems from the particular legal process entailed in the enforcement of Law 1008, leaving the prisoners' fate in the prosecutors' hands. The prosecutors receive bonuses from funds provided by the U.S. Embassy based on the number of persons incarcerated. As shown in Graphs 10 and 11, these persons tend not to have an adequate defense.<sup>12</sup>

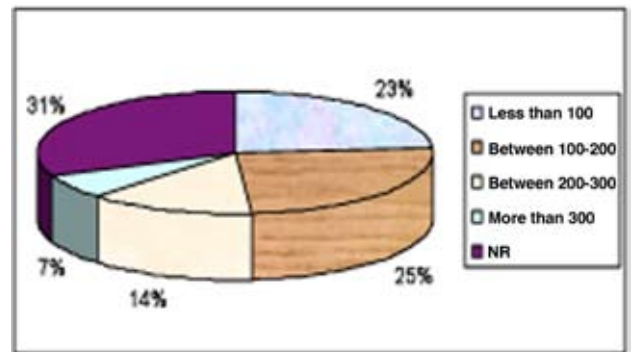
As illustrated in Graph 10, more than half of the prisoners surveyed stated they have had a public defender, since they cannot afford to pay for private defense counsel. The prisoners have a poor opinion of the public defender service.

Among the prisoners from rural areas, one beekeeper, no more than 30 years old, was interviewed. When he was 21 years of age, by which time he already had three small children and a wife, he came across a group of persons who were transporting cocaine paste. These traffickers forced him to participate in exchange for not being harmed; after the first contact, a series of new meetings ensued. The new work that the young man encountered by chance allowed him to increase his income eightfold, with which he was not only able to meet his family's most basic needs, but also to buy new inputs for his work as a beekeeper, and to then become a transportation worker. Of course, after a few years he was arrested and lost everything he had been able to accumulate in that time.

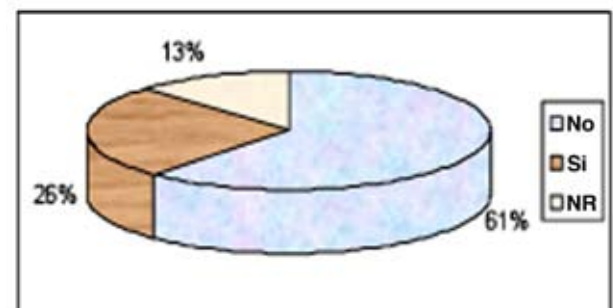
Graph 7 - Distribution by level of education of the prison population for offenses codified in Law 1008 in the San Pedro prison



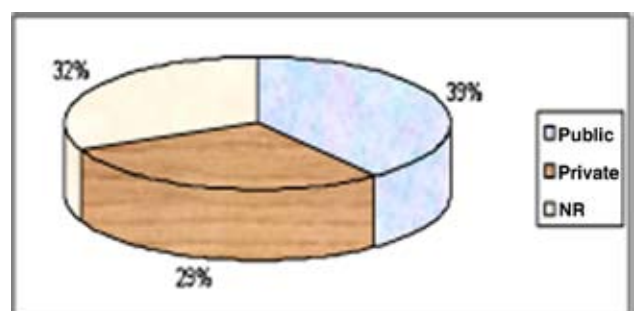
Graph 8 - Income levels (in US dollars) of the prison population before becoming involved in activities related to trafficking in controlled substances



Graph 9 - Population already convicted of drug-trafficking and related offenses at the San Pedro prison



Graph 10 - Type of defense in the San Pedro prison for prisoners incarcerated for drug trafficking and related offenses



Source: Based on survey of prisoners at the San Pedro prison

Only 4 percent of the prisoners stated that they had an effective defense, while over 43 percent said they have or have had a defense that did not allow for justice to be done in their case.

The precarious status of the conditions the prisoners face is aggravated not only by delays in the justice system and the inadequacy of their own defense, but also by the abuses they suffer at the moment they are detained: 63 percent of the prisoners surveyed said they had been beaten or tortured at that moment or in the days following their arrest by members of the FELCN.

According to interviews with the prisoners, the FELCN, seeking to extract information about the persons with whom they coordinated the manufacture, transport, or trafficking of controlled substances, tends to beat detainees for days on end, repeatedly submerging them in water or applying electricity to them.<sup>13</sup> These are forms of torture that entail the flagrant violation of the detainees' rights.

**Guidelines for characterization of the offense**

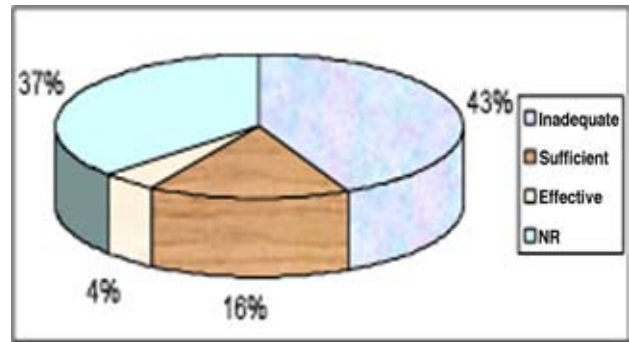
Among the prisoners surveyed at San Pedro, 30 percent reported having had over 2,000 grams of a controlled substance, mostly cocaine paste, when they were detained. This coincides with the amounts produced by the maceration pits or the amounts transported by mules to the borders. Eight percent of the prisoners had less than 100 grams, meaning they were micro-traffickers, known as 'sobretoros' in the prison slang, i.e., users accused of trafficking.

In analyzing the nature of the offense the ownership of the drugs should also be considered. Almost 60 percent of those surveyed stated that they were not the owner of the drugs for which they were detained, which would mean that they were hired by third persons to perform tasks related to manufacturing or transport.

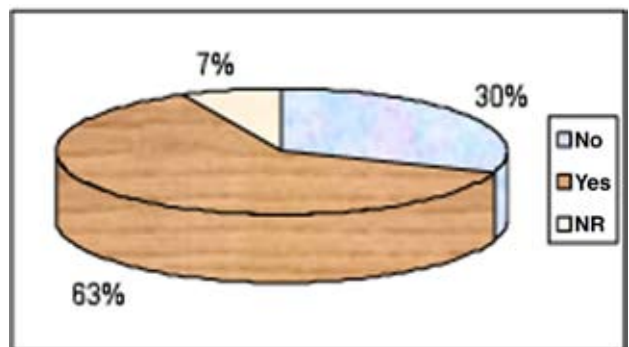
Given that most of those surveyed said they were not the owners, one can also infer a low level of participation of the prisoners in the drug trafficking organizations. Not being the owners suggests they were easy-to-replace employees of these organizations and that the interdiction policy stemming from the massive imprisonment of mules, workers, and coca stompers is hardly effective. Moreover, 44 percent of the prisoners state that their work was not coordinated with more than one person.

The impact of the massive detention of men and women on the criminal organizations is relatively insignificant, given that most of those arrested are workers and mules who know little of the operations of the criminal organizations, at least until they are incarcerated. As we found in several of the interviews, it is within the prison that many of the workers and mules become real partners in the criminal organizations.

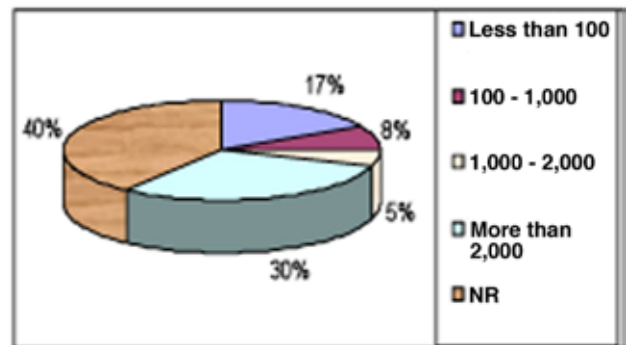
Graph 11 – How the prison population characterizes its defense



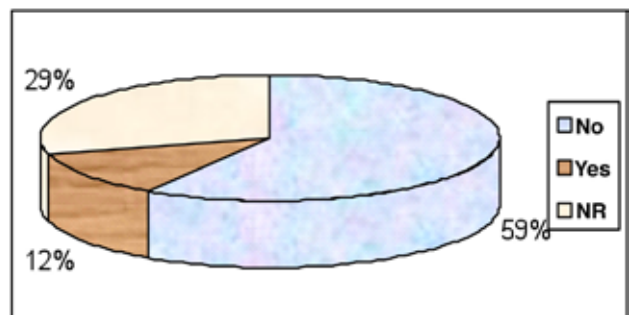
Graph 12 – Surveyed prison population complaining of having been beaten or tortured



Graph 13 – Amount of drug (in grams)



Graph 14 – Ownership of the drugs



Source: Based on survey of prisoners at the San Pedro prison

## Conclusions

The particular circumstances in which drug trafficking is carried out in Bolivia are marked by the rural and urban nature of the production of cocaine sulfate and cocaine hydrochloride throughout the country. This means that unlike in the centers of consumption, where micro trafficking is related to “problematic consumption,” in Bolivia, involvement in manufacture and transport is related to poverty and unemployment. This is a reality that has extended throughout the country and that finds expression, in concentrated fashion, in each prison.

The government of President Evo Morales has announced its intent to repeal Law 1008 and to replace it with two different laws: one on coca and another on controlled substances. At the same time, it has announced that it will reinforce the hard-line approach to trafficking in controlled substances, increasing the penalties, reducing alternatives to incarceration, and increasing the use of precautionary measures such as pre-trial detention. This announced change fails to take into account that the current interdiction policies do not resolve the problem of drug trafficking, render the population vulnerable in the face of poverty, and induce those imprisoned to join the organizations or networks trafficking in controlled substances.

These two elements of reform contrast insofar as the first highlights the importance of vindicating the value of the coca leaf for the Bolivian people, while the second expresses more the need of the Bolivian government to show the international community and Bolivian public opinion that it is firm in fighting drug trafficking.

Finally, this study underscores the urgency of beginning a serious and documented debate on this issue. Will strengthening the current policies for controlling illicit drugs achieve the desired objective? Or will it be necessary to seek more effective and humane policies that ensure the proportionality of punishments, guarantee due process, and protect human rights?

## NOTES

- 1 Committee on Human Rights of the Chamber of Deputies, 1995.
- 2 Rose Marie de Achá (1996), *Violaciones a los derechos humanos civiles durante la investigación policial en casos de detenidos bajo la Ley 1008*. Andean Information Network. This study shows that 68 percent of males and 71 percent of females detained under Law 1008 suffered torture and maltreatment while being arrested.
- 3 Pinto Quintanilla (2004), *Las cárceles en Bolivia*, p. 54.
- 4 Ministry of Interior, 2006.
- 5 Ministry of Interior, 2006.
- 6 Interview with a prisoner from the San Pedro prison incarcerated on charges of trafficking in controlled substances.
- 7 Based on surveys done by the author at that prison in 2010.
- 8 Ministry of Interior, 2006.
- 9 Ministry of Interior, 2006.
- 10 According to the National Statistics Institute, the cost of the basic food basket is approximately \$328 USD.
- 11 Ministry of Interior, 2006.
- 12 Interview with official of the Public Ministry.
- 13 Statements by prisoners interviewed at the San Pedro prison.

## Drugs and Prisons: The repression of drugs and the increase of the Brazilian penitentiary population

Luciana Boiteux

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(Mathew Meyer translated this chapter from Portuguese into English.)

### Introduction

The relationship between the increase in drug law enforcement and the rising prison population from the 1990s to the present has been the subject of worldwide investigation. In the case of Brazil, the data confirms this hypothesis. This chapter provides first an overview of Brazil's drug laws, their legislative evolution and adaptation to international drug control conventions, followed by an analysis of how repressive drug policy figures as one of the principal factors behind Brazil's large prison population increase, particularly in the last ten to 20 years.

### History of Brazilian drugs legislation

Brazilian drug legislation has been strongly influenced by the United Nations drug control conventions, all of which have been incorporated into the national legal structure. Brazil has committed itself to combating drug trafficking and reducing consumption and demand by all available means, including that most drastic of all, penal control. Beyond its official commitment to the international drug control system, Brazil's close diplomatic and commercial ties with the United States have led to the adoption of a prohibitionist model strongly influenced by the U.S. "drug war" model.

In Brazil, as in most Western countries, drug control's origins relate to the consolidation of professional medicine.<sup>1</sup> Brazilian doctors had a monopoly on the management of public health policy, and, in particular, jurists and psychiatrists justified medical and criminal control over drugs as

part of eugenics.<sup>2</sup> However, whereas in the United States criminalization of the use and commerce of drugs resulted from "preventive action" promoted by specific groups, especially jurists, politicians, and religious leaders at the forefront of prohibitionist policy, in Brazil the group that pushed most for penal control of drugs included psychiatrists and forensic doctors.

The publication of a new Penal Code in 1940 marked an important historical moment in Brazilian legislation. At that time, drugs were neither a focus of the media nor an object of social preoccupation, as Brazil was still a predominantly rural society with only small cities, and the kinds of crimes registered were mainly homicide, robbery, theft, and fraud.<sup>3</sup> In technical legislative terms, the crime of clandestine commerce or facilitation of the use of intoxicants was characterized in article 281 of the Penal Code, which prescribed similar penalties to those of prior legislation, namely, one to five years in prison and fines. However, the code took a more moderate tack, with the decriminalization of drug consumption and a reduction in the number of criminal acts covered by comparison with prior legislation.<sup>4</sup> Legislators of the era revived the technique of the "blank penal norm," which means that the law need not mention by name every substance that is to be controlled; rather, it creates a broad category of drugs that can cause dependency, which can be expanded indefinitely. The use of this norm signaled the intention to impose more rigid control on the commerce of illicit drugs, by means of generic formulas and imprecise terms with broad meanings.

The adoption of article 281 of the Penal Code prompted doctrinal and jurisprudential discussion over the possibility of criminal liability of drug users. The Brazilian Supreme Court at the time had established a judicial decriminalization of possession for personal use.<sup>5</sup> The period between 1964 and 1971 was a turbulent phase in Brazil's history, when, under the aegis of a national security ideology, extraordinary tribunals and military inquests were created to apprehend, punish, and contain the "subversives," opponents of the military dictatorship. An authoritarian penal system was installed, with political arrests, torture, censorship, police violence, and suppression of human rights and individual guarantees, such as habeas corpus. The year 1964 is considered "the division of the waters between the health model and the war model of drug criminal policy,"<sup>6</sup> the same year that the United Nations Single Convention on Narcotic Drugs was promulgated in Brazil, signifying the definitive entrance of the country onto the stage of international drug control by means of increased repression. Not coincidentally, the moment coincided with a coup d'état that created the conditions for wider repression through curtailment of democratic freedoms.

Despite the transformations in the criminal drug policy during this period, one notes the persistence of the health model, if in vestigial form, and the creation of a double discourse. According to Rosa Del Olmo, this "double discourse

about drugs (...) may be conceived as a medical-juridical model attempting to establish an ideology of differentiation,” which has as its key characteristic the distinction between the consumer and the trafficker, or, in other words, between the sick and the delinquent. The former, because of his social status, seems absorbed by the medical discourse authorized by the health model, in vogue from the beginning of the 1950s, which represented the stereotype of dependence, while the trafficker was the criminal, the corrupter of society.<sup>7</sup> In Brazil, such a change of course should be understood within the extraordinary regime established by the military, with its implementation of a new type of penal intervention along with increased political repression.

During the first phase of the military regime, Law No. 4,451/66, which included plant species from which illicit drugs can be derived in the list of crimes, and Decree-law No. 159/67, which extended the legal prohibition to the amphetamines and hallucinogens, were enacted. The second phase was marked by the imposition of Institutional Act No. 5 (AI-5), in December 1968, by new President General Costa e Silva, institutionalizing the dictatorial regime, closing the Congress and suspending individual rights and guarantees. At this peculiar moment a new drug law was written, Decree-law No. 385, published with Congress still closed, on December 26th, 1968. This new drug law not only criminalized the behavior of users, but also equated them to traffickers, with penalties of one to five years of prison, plus fines.

The Penal Code, among other things, now made it illegal to encourage the spread of narcotics use, included the verbs “to prepare” and “to produce” in the heading of article 281, and increased fines considerably. It continued to employ the technique of “blank” penal laws, so that the definition of “narcotic” depended on unusual criteria. Notable in this period is a “break with the official discourse founded on the ideology of differentiation between the trafficker and user;”<sup>8</sup> as people considered dependent on drugs became equated with traffickers.

As the drug user was seen previously from a clinical, rather than penal perspective, the drastic change in criminal policy provoked the indignation of many jurists and some magistrates. However, the repressive spirit of the time contaminated the views of some judges, who defended the criminalization of the user as a way to combat traffic, through a repressive discourse aligned with the international conventions. The absurdity of legislation that equated users with traffickers revealed another attempt to increase social control of those opposed to the military regime through expanding the repression of drug consumption.

In Brazil, as in the United States, the use of illicit drugs involved a component of political manifestation, protest, and opposition to the Vietnam War, which came from the ghettos

and reached the middle class.<sup>9</sup> Those were new times, and under the impact of the revolution in customs, Brazil’s youth staked out a divergent position, including with regard to the popularization of drug use. The reaction of the status quo, however, was to impose ever-harsher treatment by means of a discourse that demonized drugs, as a political strategy of the agencies of power for their internal security.<sup>10</sup>

The war model remained through the 1970s, although new legislation proved to be slightly less repressive than the old, and, with the return of the earlier medical-juridical discourse, more in tune with international concerns. However, the possession of illicit substances by occasional, non-dependent users continued to be equated with illegal traffic, in accordance with sub-paragraph III of the first paragraph of Article 281, whose single scale of penalties for user and trafficker saw its maximum punishment rise to six years.

The end of the 1970s marked a transitional period in Brazil, culminating in the enactment of Law No. 6,368/76, conceived in the midst of the political “opening,” which was considered exemplary in its responsiveness to the international norms and commitments assumed by Brazil. The so-called “Toxics Law” of 1976 replaced the 1971 legislation, revoked article 281 of the Penal Code, and gathered the drug laws in a single, special law. The new law presupposed that the use and traffic in illicit substances should be prevented and repressed because they represented a presumed danger to public health. In establishing the conditions of dependency treatment, the law used a medical discourse that argued for obligatory treatment as punishment, alluding to the “social danger of drugs.” The authoritarian conception of such legislation can also be seen in the possibility of imposing treatment even when a person has committed no crime. This reflects the preponderance of an antiquated medical vision, which saw the addict as a weakling with no willpower, and which believed in the possibility of a cure with forced treatment.

The legal mechanisms foreseen in the 1976 law were simplified to give the process more agility and to increase repression, limiting the rights of the defense by reducing guarantees, for example, by eliminating the release of convicted persons pending appeal (Art. 35).<sup>11</sup> Imprisonment remained the primary punishment, even for the user, and penalties for the crime of traffic were increased to a range of three to 15 years, while characterizations of the relevant crimes remained unchanged. In the section on crimes, the description of drug trafficking in Article 12 encompasses 18 words, without qualitative or quantitative differentiation of levels of offense, in tune with the Single Convention of 1961. The reach of the criminal sanction was extended, in comparison with the previous version, as the law’s authors gave no criterion of intent (such as a profit motive), which permitted the broadening of the characterization of the most serious crime. This subjective ele-

ment, however, was to be found in Article 16, which prohibited the possession of drugs “for personal use.” Article 12 and its sub-paragraphs established as consummated crimes acts that were merely preparatory, with the intent of increasing repression. Even the cultivation of plants meant for the preparation of drugs was characterized as a crime.

The second paragraph of Article 12 described other acts that were equated with drug trafficking but not clearly defined in the law. Instigation, induction, or assistance in the use of drugs were to be punished, as were the use of a place to consume intoxicating substances, and any kind of contribution to the encouragement or diffusion of the use or traffic of drugs. The law generalized, and did not define what “contribution of any type” meant, so that the breadth of the legal criteria ended up serving as the basis for the penal persecution of the first organizers of harm reduction programs in Brazil in the early 1990s. These people, by distributing clean needles to injecting drug users, were accused of encouraging drug use. Article 14, meanwhile, defined conspiracy to traffic as a separate crime, punishable by three to ten years in prison, so that according to the letter of the law, the mere association of two people in trafficking was punishable by a penalty harsher than that applied to a gang of four people formed in order to commit robbery. In 1990, the maximum penalty under Article 14 was reduced to six years in prison.

However, the greatest change introduced in this law was the creation of the independent crime of possession of drugs for personal use (Art. 16), whose penalty range of six months to two years, plus fines, was distinguished from the range of penalties for traffic. This was an important point along the changing paths taken by Brazilian drug policy, even though penal control was still maintained over users through the imposition of punishment or treatment. The prohibited substances were not named in the law, which referred only to “intoxicants or substances that cause physical or psychological dependency [used] without authorization or in disobedience of laws or regulations,” thus constituting a blank penal norm which was to be completed by a directive from the Health Ministry (as per articles 6 and 36).

A short time later, in 1977, the United Nations Convention on Psychotropic Substances of 1971 was enacted in Brazil.<sup>12</sup> This treaty imposed on its signatories the punishment of drug crimes by “adequate sanctions, particularly imprisonment or another penalty restricting liberty.” The Convention admitted treatment as an alternative to punishment, even forced treatment, which completed the juridical framework and effected Brazil’s complete integration into the international model of drug control. This political-criminal model outlined new stereotypes and new repressive legitimacy with the stigmatization of the “internal enemy,” or the drug trafficker, at the same time as it lent flexibility to the punishment of users, a feature that marked Brazilian penal control of drugs from then on.

In the mid-1980s, the broad Penal Reform of 1984 established rights and gave guarantees to prisoners, but was viewed by many as overly cautious and even timid. With the publication of the 1988 Democratic Constitution, paradoxically, there came a toughening of criminal policy which impacted drug policy, especially after the passage of the Heinous Crimes Law of 1990 (Law No. 8,072/90),<sup>13</sup> which eliminated bail, provisional release, pardons, amnesty, and commutations, in addition to forbidding movement to halfway houses and lengthening parole periods.

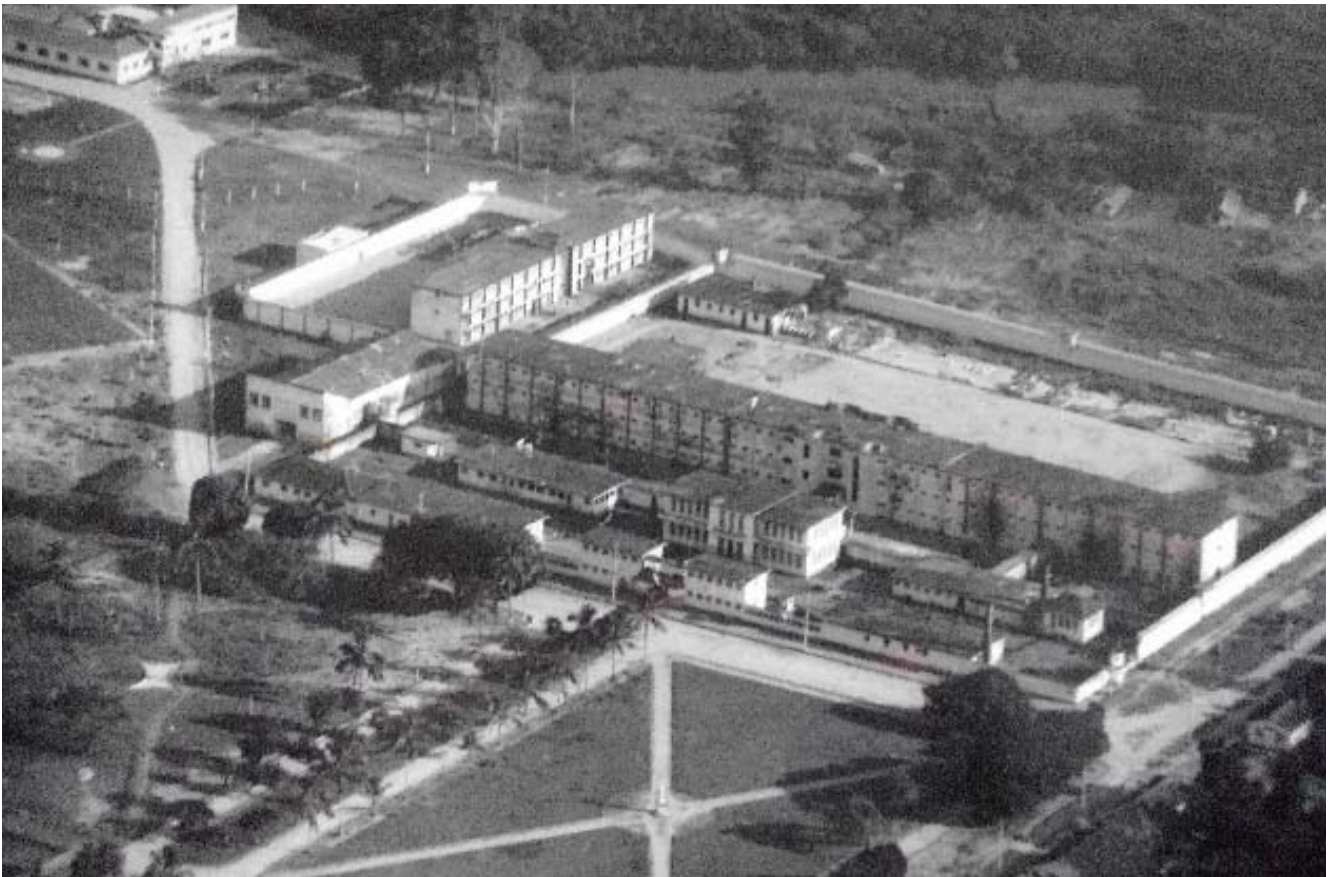
This law’s impact on the penitentiary system was immense, as will be seen later in this study. The increase in prison inmates charged with drug trafficking was a result, first, of the increased length of penalties for such crimes, which went from a minimum of one to three years with the passage of the 1976 law, according to Article 12 of Law No. 6,368/76. Moreover, beginning in 1990, those found guilty of such crimes would remain in prison for longer periods, especially given the prohibition on movement to minimum-security facilities and the increased period before becoming eligible for parole. In addition, the legal differences between users and traffickers were reinforced, with the denial of various benefits to those accused of trafficking.<sup>14</sup> Once formally labeled a trafficker in the police report or in the moment of arrest, the accused would be taken in, even for a first offense, and would remain in custody while on trial.

At the time, various commentators questioned the constitutionality of the law, especially with regard to the elimination of progressive movement to lower-security facilities, because of the constitutional principle of individualization of punishment. But Brazilian jurisprudence repeatedly opposed this argument, and a majority of the Supreme Court found the law constitutional. However, in April of 2006, after the law had stood for 15 years, a new configuration of the Supreme Court overturned this position.<sup>15</sup>

At nearly the same time, in 1991, Brazil’s adherence to the contemporary international drug control model was consolidated with the approval of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,<sup>16</sup> a repressive instrument that, for the first time, related the drug question to the organization of traffickers. The text of the Convention served as the basis for the elaboration of special laws that modified the Brazilian penal system in the following years. From that point on, a steadily strengthening discursive link was made between drug policy and organized crime, a concept that gained autonomy and serves as justification for ignoring individual rights and guarantees.

Some time later, another legislative reform (Law No. 9,099/95) softened penalties for the crime of drug use, for which prosecution might now be suspended conditionally. This constituted a small advance because of the fact that suspended prosecutions did not count as recidivism, and it





Cândido Mendes, Ilha Grande, Brasil

extinguished all culpability upon completion of the specified conditions.

However, what seemed like an improvement from the perspective of the casual drug user did little to aid those dependent on drugs who, unable to control their addictions, were placed under judicial control for a certain time as a condition of the probationary suspension of prosecution, and who, if they should be arrested again, would have their probation revoked – a frequent occurrence. Despite the apparent liberality of the law regarding users, penal control was maintained over the user, who could be arrested in the act.

Also in the 1990s came the Law No. 9,714/98, another mark in the movement toward a kind of “decriminalization,” which increased the use of alternative punitive measures for non-violent crimes, with a penalty of up to four years, and for criminal negligence. Those found guilty of trafficking, however, did not fit into this scheme, and could not have their prison sentences converted to alternative penalties, although a literal interpretation of this would in fact allow it. Some isolated decisions have been identified in which judges have authorized minimal, non-prison sentences for small-scale traffickers who are over-represented amongst the prison population, but the application of this new criterion to those found guilty of trafficking was ruled out by jurisprudence.

Given the high percentage of those sentenced for low-level

drug offenses (first-time, small-time dealers, sentenced to four or fewer years), alternative penalties could have led to significant reductions in the prison population, particularly in the long term. However, the dominant interpretation at the time, including on the part of the Supreme Court, tended to deny the possibility of alternative penalties for those found guilty of trafficking, despite the lack of any explicit legal rule against it.

In the field of drug policy, this law further widened the divide between the system as applied to the middle-class drug user, who has money to pay for his habit, and the consumer-trafficker, who must sell the drug to provide for his needs. Brazilian drug legislation reinforces the great gulf between the penal treatment of the higher and lower classes of the population. For traffickers, even those who are small-time or addicts, and come from the less-favored strata of society, the criminal justice response is always prison, aggravating the terrible conditions in the overcrowded and infested Brazilian prisons. For non-addicted drug users with no prior record, who have the means to buy drugs without dealing them, there was a reduction in criminal penalties.

Given this impact on the penal system, Brazil passed its current drug law in 2006, after a long journey through the draft laws developed in the National Congress. Brazil’s 2006 law has been considered balanced, renovating Brazilian drug policy for the better with the creation of SISNAD – the National System of Public Policy on Drugs

– and breaking with the previous policy by focusing on the misuse of drugs. However, as detailed below, the 2006 law also emphasized the repression of trafficking.

### Analysis of the current Brazilian drug law

Among the highlights of the 2006 law are the express recognition of principles such as “respect for the fundamental rights of human persons, especially with regard to their autonomy and liberty” (Art. 4, I), the acknowledgment of diversity (Art. 4, II), and the adoption of a multidisciplinary approach (para. IX). In addition, the law established guidelines aimed at preventing drug use through “strengthening individual autonomy and responsibility in relation to the improper use of drugs” (Art. 19, III), and at ensuring the “recognition of risk reduction as a desirable result of pre-

#### Brazilian criminal law on drugs

- **1940** - Art. 281 of the Criminal Code establishes the crime of clandestine commerce or facilitation of the use of intoxicants.
- **1966** - Law 4451 included plant species from which illicit drugs can be derived in the list of crimes.
- **1967** - Law Decree 159 extended the legal prohibition to the amphetamines and hallucinogens.
- **1968** - A new drug law (Law 385) was presented at the height of a *de facto* regime. This new drug law not only criminalized the behaviour of users, but also equated them to traffickers, with penalties of one to five years of prison, plus fines.
- **1976** - Law 6,368, conceived in the midst of the political “opening,” revoked article 281 of the Penal Code, and gathered the drug laws in a single, special law. Drugs represented a presumed danger to public health.
- **1990** - Law 8,072 The Law of Serious Crimes, contributed to an increase in the number of imprisoned for drugs related offences.
- **1995** - Law 9,099 relaxes the penalties for the crime of “consuming narcotic drugs”.
- **1998** - Law 9,714 shows a tendency towards a certain form of “depenalization” of consumption.
- **2006** - The current drug law is born. The Supreme Federal Court modifies the interpretation of Law 8,072. The National System of Public Policies on Drugs (SIS-NAD) is created, focusing on the prevention of drug use.

vention activities” (para. VI). The legislative articulation of such principles reflected a new approach, based on moderate prohibitionism, especially with the adoption of harm reduction as official policy.

With regard to drug use, an important change was the decriminalization of use, and the rejection of prison sentences for users, even repeat offenders<sup>17</sup> through Article 28, which allows alternative penalties as follows: “Whoever acquires, keeps, holds in storage, transports or carries upon himself, for personal use, drugs without authorization or in violation of legal or regulatory decree, shall be subject to the following penalties: I: warnings about the effects of drugs; II: community service; III: educational measures, completion of an educational course.”

Beyond this, there are other positive aspects, such as the equivalence of cultivation for personal use to personal use itself, as put forth in Art. 28, §1.<sup>18</sup> Another act which, under the old law, was equated to traffic is the shared consumption of illicit drugs; it too saw a reduction of penalties (Art. 33, § 3)<sup>19</sup> when delivery is occasional, made to someone with a relationship to the subject, and has no profit motive, a scenario distinct from that of the professional trafficker, which justifies the softening of the punishment. With respect to the user, therefore, these changes may be considered positive, as they include a reduction of penal control and a certain differentiation between kinds of acts.

Such advances notwithstanding, there persists in the law a lack of clear differentiation between use and traffic. According to the legal criteria, the difference should be determined according to the quantity and nature (or quality) of the drug, as well as elements such as place and other objective circumstances, in addition to subjective ones, such as prior offenses and personal and social circumstances (as stated in Art. 28, § 2). Such vague criteria are so difficult to apply that in actual cases the determination is made by the authority involved. *A priori* legal distinctions give way to the subjective vision of law enforcement agents, such that the first authority to come into contact with the case has excessively wide discretion with respect to how to treat it.

In its treatment of traffic, the new law provides quite rigorous punishments, as the minimum sentence was raised from three to five years, albeit with the possibility of a reduction in the sentence. The crime of traffic is currently defined as follows: “Art. 33. To import, export, deliver, prepare, produce, fabricate, acquire, sell, offer for sale, offer, hold in storage, transport, carry with oneself, keep, prescribe, administer, furnish for consumption or offer drugs, even with no charge, without authorization or in violation of a legal or regulatory decree. Penalty: a prison term of five to 15 years and payment of 500 to 1,500 fine-days.”

In § 1 of this same article (paragraphs I, II, and III) are described three figures that are equated, or assimilated to traffic, with the aim of encompassing the whole chain of

production.<sup>20</sup> One can clearly see that the law's intention is to cover all possible acts related to the process of production, distribution, commerce, and consumption of drugs.

However, the greatest target of specialists' criticism was the increase in the minimum penalty for the crime of drug dealing, which lawmakers justified by the necessity for "toughening the war on traffic." For authors such as Salo de Carvalho, such a position must be criticized for the disparity between the magnitude of the punishment, and the lack of intermediate penalties with proportional gradations, highlighting the gray area between the minimum and maximum penal response, despite the various acts characterized in Art. 33.<sup>21</sup> Thus, despite significant differences between kinds of act (there is no requirement of commerce or a profit motive), and the clear harm done to the juridical good at stake (public health), there is a single range of penalties, which can open the door to unjust punishments.

Thus, the new law widened the legal difference between users, subject only to alternative measures, and traffickers, who face long prison sentences, without the law's defining, in strict terms, who may be placed in each of these categories. Although the law has progressed in comparison with the previous one, certainly it is still far from ideal.

Currently, the legal possibility of moderating the penalty for the crime of trafficking drugs is envisioned in § 4 of Art. 33, which posits, in special circumstances, sentence reductions for first-time offenders not involved in organized crime. With regard to the article's main purpose it is a special type, defined as follows: "§ 4. The penalties for the crimes defined in the heading and § 1 of this article may be reduced from one-sixth to two-thirds, but not converted into a non-jail sentence, as long as it is a first offense unrelated to ongoing criminal activity or a criminal organization."

The lawmakers' bias toward prison sentences is evident, even for small-time traffickers for whom a penalty reduction is appropriate, since, while a judge may recognize the small-scale nature of a defendant's involvement with the commerce of illegal drugs, the law prohibits the substitution of alternative penalties for prison time – even while Brazilian law allows such substitution when sentences are four years or less for all other crimes which, like drug trafficking, are non-violent and consensual.

Such a reduction, if fully applied, could result in a trafficking sentence of one year and eight months. In practice, however, technical obstacles to interpreting the text of the criteria have made such reductions difficult, as was recently shown by empirical research on judicial sentences in Rio de Janeiro and Brasília.<sup>22</sup>

That study questioned whether the possibility of moderating penalties distinguished adequately between the various illicit acts involved in the commercial drug production

network. It concluded that variation in judges' interpretations of the law meant that in practice, reduction of penalties was made more difficult, even for first-time offenders, especially at the State Court level. At the same time, it was found that, in Rio de Janeiro's Federal Court, greater reductions in penalties were given to those convicted as "mules" (drug transporters), who were most often foreigners, while judges at the state level applied such reductions much less frequently, even though in theory it could be applied to the lower-level traffickers working in the urban retail market who make up the majority of those accused of this crime.

According to the study's conclusions, in Rio de Janeiro the majority of those convicted of drug trafficking (61.5 percent) are tried individually, which is to say they were arrested alone; 66.4 percent are first offenders with relatively small quantities of drugs. The majority of those convicted of trafficking offenses are thus acting alone, or at least were arrested in that situation. The data reveal that, despite commonsense notions, the majority of traffickers convicted are not "by definition" members of "criminal organizations," nor do they necessarily operate in association. Thus, among that minority of cases in which the accused did not act alone, in 46.9 percent of them two people were arrested working together. In 58.1 percent of the cases in that city, those convicted for trafficking received sentences of five years, or longer than the legal minimum, while a penalty lower than the minimum was applied in 41 percent of the cases.

In a number of cases, the judge appeared to assume, based on mere suspicion, that the defendant dedicates himself to criminal activity or is a member of a criminal organization, and is therefore ineligible for a sentence reduction; as occurred in about 40 percent of the cases studied. Selectivity of operation in Brazil's penal system is clearly notable. While there are various degrees of importance in the drug trafficking hierarchy, the actions of authorities seem to be directed at the least fortunate levels of society, which are over-represented in Brazilian prisons.

The legislative option for increased repression, and the exclusive use of imprisonment, were recently questioned, in September 2010, before the Brazilian Supreme Court, which found in favor of a person accused of trafficking 13.4 grams of cocaine,<sup>23</sup> and discussed the restriction, contained in paragraph 4 of article 33 of the drug law, on the substitution of alternative penalties for prison terms in cases of small-time drug traffickers. The majority ruled such a prohibition unconstitutional, deciding that the possibility of substitution should be evaluated on a case-by-case basis. In the view of some authorities, the application of this decision may benefit many other small traffickers and decrease the size of the national prison population, given the large number of small traffickers imprisoned in Brazil.

It is notable that, even in the United States and Western Europe, it is easier for law enforcement to capture street

dealers, the retailers of drugs, who are more numerous and easier to reach than the traffickers (wholesalers). Thus the question, “Why are only the small-scale traffickers (and a few mid-level ones) arrested?” can be answered by pointing to the selective operation of the Brazilian penal system in Rio de Janeiro, which criminalizes poverty and the poor and vulnerable, repressive drug policy only aggravating the situation.

Given everything that has been said until now, therefore, one may conclude that Brazil follows a penal drug control model inspired by international conventions, but its legislation is marked, on the one hand, by a progressive and humanitarian focus on the user stemming from the decriminalization movement, with recognition of harm-reduction policies, which are considered quite advanced. On the other hand, Brazil’s model features exaggeratedly punitive treatment of the drug trafficker, who is subject to heavy sentences, without a clear legal distinction between these two figures. This leads to the over-representation of small retailers in Brazilian prisons.

Thus, the current Brazilian drug control system, while democratic, acts in an authoritarian manner in not limiting punitive power. On the contrary, it fails to establish limits and precise distinguishing characteristics for the figures of the user and the small, medium, and large traffickers, and it gives to the authorities, in concrete cases, a broad margin of discretion that leads to unjust application of the law.

### Drug policy and Brazil’s penitentiary system

The Brazilian penitentiary system is (and always has been) overcrowded, and currently has 170,000 more prisoners than beds, leading to terrible conditions for inmates. In addition, it faces a problem common to Latin American countries: an excess of provisional prisoners (that is, those deprived of their liberty but not yet definitively sentenced), who constitute 45 percent of the current national prison population. The very poor conditions of the Brazilian prison system were denounced recently in a report by the International Bar Association, which found that “severe overcrowding, poor sanitary conditions, gang violence and

Table 1 – Total number of prisoners in Brazil, 1992-2004

Year	Number of prisoners
1992	114,377
1995	148,760
1999	194,074
2000	232,755
2001	233,859
2002	239,345
2003	308,304
2004	336,358

Source: Justice Ministry (Infopen)

riots blight the prison system, where ill-treatment, including beatings and torture, are commonplace.”<sup>24</sup>

The current rate of 245 prisoners per 100 thousand inhabitants places Brazil in the 47th position worldwide among countries with the highest rates of incarceration,<sup>25</sup> and in terms of total prison population, Brazil is fourth, trailing only the United States, China, and Russia.<sup>26</sup> The monthly cost of a prison population of this size is extremely high, and the sum that must be invested in making new spaces available is even higher. Authorities estimate that “to create 60,000 beds in the system would take \$1 million USD, approximately, besides the monthly upkeep of these beds.”<sup>27</sup>

According to data for 2009, the most recent available, Brazil has a total of 473,626 individuals incarcerated in its penitentiary system, including those held in police stations.<sup>28</sup> From 1992 to 2009, the number of people incarcerated in Brazil grew by 314 percent. This growth in imprisonment reflects the effects of a criminal policy based on harsher laws, weakening of guarantees, and a focus on repression. In ten years (from 2000 to 2009) the prison population doubled, increasing from about 233,000 to more than 473,000 prisoners, as can be seen in the tables 1 and 2.

Given this general situation, it becomes more important to examine the proportion of this total represented by those convicted of trafficking, which is the second most common source of prisoners (91,037) in the system, behind property crimes (217,762),<sup>29</sup> which traditionally take first place.

Only in 2005 did it become possible to find more specific data about those convicted of drug trafficking in relation to the entire prison population. Table 2 highlights the percentage increase in the relative representation of those convicted of trafficking in the Brazilian penal system, which allows the affirmation that the increase in the repression of drug traffic has contributed to the increase in the number of prisoners in Brazil.

Under Drug Law No. 6,368/76 (that is, until the end of 2006), the percentage of inmates convicted of drug trafficking was 12.38 percent, which increased to 19.22 percent by the end of 2009, nearly double the number convicted for that crime when Law 11,343/06 went into effect. The number of people incarcerated for the crime of drug trafficking is already high, and appears set to continue growing, according to the statistics examined. Thus, the decision to opt for repressive penal responses to the crime of drug trafficking contributed to the increase of the Brazilian prison population in recent years, with the glaring over-representation of small-time dealers of illicit drugs who are sentenced to long prison terms, which reinforces the marginality and the stigma to which they are subjected.

It is also worthwhile to analyze data on a subset of this group: minors involved in drug crimes. Taking as an example the total number of minors who were brought before

Table 2 – Brazilian Prison Population: total and those sentenced for trafficking, 2005-2009

Year	Total number of prisoners	Number of prisoners jailed for trafficking	Traffickers as percentage of total prison population
2005	361,402	32,880	9.10%
2006	383,480	47,472	12.38%
2007	422,590	65,494	15.50%
2008	451,219	77,371	17.50%
2009	473,626	91,037	19.22%

Source: Infopen

the Second Court of Children and Youth in Rio de Janeiro, and the kinds of crimes with which they were charged, another important observation is confirmed: that the youngest part of the population is the one which is incarcerated at the highest rate for drug trafficking. From 1991 to 1994, drug use and trafficking were responsible for 8 percent to 13 percent of the referrals of minors to detention centers. In 1995, this share jumped to 24 percent and in the next year to 36 percent, overtaking property crimes at the top of the list. From 1991 (204 minors) to 1997 (1,648 minors), there was a 700 percent increase, as shown in Table 3.<sup>30</sup>

### Conclusions

The goal of this text has been to analyze the correlation between Brazilian drug policy and the increase in the country's prison population. An evaluation of the evolution of Brazilian drug legislation reveals a progressive increase in penal repression of drug traffic, given the percentage increase in those convicted of this crime in the penitentiary system. Increasingly, and especially after the passage Brazil's 2006 drug law, which increased the minimum penalty for trafficking to five years of prison, there has been a marked and intentional toughening of the penal reaction to commerce in drugs, which is one of the principal factors in the increase of Brazil's prison population, despite which the issue of supply and demand of illicit drugs has not been resolved.

Despite some recent favorable decisions by the Brazilian Supreme Court, as mentioned above, the continued existence of the current repressive system, with its punitive and symbolic character, may lead to an even greater increase in the number of drug prisoners in the penitentiary system, reinforcing the marginalization of the less fortunate segments of Brazilian society, who make up nearly all the prisoners.

Brazilian prisons, which have traditionally been occupied, for the most part, by people sentenced for property crimes, have seen penitentiary space increasingly shared by those sentenced for trafficking, who in most cases are small-time retailers from the lowest levels of society, thus maintaining the selective and unjust operation of the penal system. The relationship between drug policy and prison is a reflection of the insistence of governments on adopting policies that are destined to fail at achieving their stated aims, or else it reflects the success of these policies at achieving hidden or undeclared goals of increasing repressive social control of the poorer segments of the population, who are subjected to rights violations and degrading treatment in Brazilian and Latin American prisons. If the objective of drug policy has been to increase the number of prisoners, one may say that the goal has been reached. However, controlling or reducing the consumption or sale of illicit drugs has not been achieved.

Table 3 – Cases involving minors in the Second Court of Children and Youth in the District of the City of Rio de Janeiro<sup>31</sup>

	1991	1992	1993	1994	1995	1996	1997
Property crimes	2,016 (76.8%)	2,041 (76.9%)	1,504 (73.5%)	1,632 (71.3%)	1,430 (57.6%)	1,506 (49.3%)	1,345 (26.8%)
Narcotics	204 (7.8%)	280 (10.5%)	196 (9.6%)	303 (13.2%)	610 (24.6%)	1,108 (36.3%)	1,648 (32.8%)
Personal crimes	184	170	181	194	250	232	299
Violations	186	115	93	92	120	134	186
Moral standards	14	23	34	39	26	48	49
Others	20	26	38	27	45	24	1,484
Total	2,624 (100%)	2,655 (100%)	2,046 (100%)	2,287 (100%)	2,481 (100%)	3,052 (100%)	5,011 (100%)

Source: Infopen

NOTES

- 1 Morais, Paulo César de Campos. *Mitos e omissões: repercussões da legislação sobre entorpecentes na região metropolitana de Belo Horizonte*, www.crisp.ufmg.br/mitonis.pdf, p. 1.
- 2 Ibid., p. 4
- 3 Reale Junior, Miguel. *Mens legis insana, corpo estranho*. In: Dotti, René et al. *Penas Restritivas de Direitos: críticas e comentários às penas alternativas*. São Paulo: Revista dos Tribunais, 1999, p. 26.
- 4 Batista, Nilo. *Política criminal com derramamento de sangue. Discursos Sediciosos*. Ano 3. no.s 5-6, 1-2. sem. 1998, p. 84.
- 5 The Brazilian Supreme Court decided that “under no circumstances is the person who uses a narcotic, or to whom a narcotic is applied, an accomplice in the crime...the crime is the contribution to the disastrous, current or future addiction of another (whom the law protects, even against his own will). The current addict (already toxicomaniac or merely habitually intoxicated) is a sick person who needs treatment, and not punishment...” HUNGRIA, Nelson. *Comentários ao Código Penal*. v. 9. Rio de Janeiro: Forense V. IX, 1959, p. 139.
- 6 Batista, Nilo. *Política criminal com derramamento de sangue. Discursos Sediciosos*. Ano 3. ns. 5-6, 1-2. sem. 1998, p. 84.
- 7 Del Olmo, Rosa. *A face oculta da droga*. Rio de Janeiro: Revan, 1990, p. 34. Cited in CARVALHO, Salo de. *A Política Criminal de Drogas no Brasil*. Rio de Janeiro: Luam, 1997.
- 8 Carvalho, Salo de. *A Política Criminal de Drogas no Brasil*. Rio de Janeiro: Luam, 1997, p. 25-26.
- 9 Op. cit., p. 21.
- 10 Idem., p. 24.
- 11 Luisi, Luiz. *A legislação penal brasileira sobre entorpecentes: notícia histórica*. Fascículos de Ciências Penais. Ano 3. v. 3. n. 2. Apr-Jun 1990, p. 157.
- 12 Enacted in Brazil on March 14, 1977, through Decree No. 79,383.
- 13 According to Law No. 8,072/90, the ‘morally repugnant’ crimes are the following: robbery-murder (Art. 157, § 3º *in fine*); extortion with special circumstances (Art. 158, § 2º); extortion with kidnapping and special circumstances (Art. 159, *caput*); rape (Art. 213, *caput e § ún.*); violent assaults on decency (Art. 214); epidemic resulting in death (Art. 267, § 1º); poisoning with special circumstances (Art. 270 *c/c* Art. 285), all in the Penal Code; and genocide (Arts. 1º a 3º, Law No. 2,889/56).
- 14 Law 8,072/90 changed Article 83 of the Penal Code, including paragraph V, which establishes that parole may be granted only to prisoners who have “completed more than two-thirds of the sentence, in cases of ‘morally repugnant’ crimes, torture, illicit traffic of narcotics or similar drugs, and terrorism, if the inmate is not a repeat offender of the specific kind of crime in question.” This proportion is greater than that of other crimes, which require serving one-third or half of a sentence, in cases of recidivism.
- 15 On February 23, 2006, the Brazilian Supreme Court, in a Plenary judgment of the writ of *Habeas corpus* No. 82,959/SP, ruled, by majority decision, that § 1º of art. 2 of Law 8,072/90, which forbids the progressive relaxation of security level in the fulfillment of sentences for morally repugnant crimes, was unconstitutional. It was understood that the law’s disallowing of progressive relaxation of security is an affront to the right to the individualization of punishment (CF, art. 5, LXVI) since, by not permitting the consideration of the particularities of each person, their capacity for social reintegration, and the effort put forth toward re-socialization, it ends up making the constitutional guarantee empty. It was also emphasized that the classifications in question were incoherent, and therefore impede progressivism, but allow parole after the completion of two-thirds of the sentence (Law 8,072/90, Art. 5). See Informativo STF n. 418, March 6-10, 2006.
- 16 The 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Drugs was enacted in Brazil through Decree No. 154, on June 26, 1991.
- 17 Cf. Boiteux, Luciana. *A nova lei de drogas e o aumento de pena do tráfico de entorpecentes*. *Boletim do Instituto Brasileiro de Ciências Criminais*. Ano 14. no. 167. October 2006, pp. 8-9.
- 18 Art. 28, § 1. of Law No. 11,343/06: “The same penalties shall be applied to whoever, for personal use, sows, cultivates, or harvests plants destined for the preparation of a small quantity of a substance or product that is capable of causing physical or psychological dependence.”
- 19 Art. 33, § 3: “To offer drugs, occasionally and without a profit motive, to a person of one’s acquaintance for the purpose of consuming them together. Penalty – detention for 1 (one) to 3 (three) years, and fines...”
- 20 Art. 33, § 1. The same penalties shall apply to whoever: I – imports, exports, delivers, produces, fabricates, acquires, sells, offers for sale, proffers, furnishes, holds in storage, transport, carries with himself or keeps, even free of charge, without authorization or in violation with legal or regulatory determination, raw materials, precursors, or chemical products destined for the preparation of drugs; II – plants, cultivates, or harvests, without authorization or in violation of legal or regulatory determinations, plants that constitute the raw materials for the preparation of drugs; III – uses a place or good of any kind of which he has possession, ownership, administration, or oversight, or allows others to make such use, even without charge, without authorization and in violation of legal or regulatory determination, for the illicit traffic of drugs.
- 21 Carvalho, Salo de. *A política criminal de drogas no Brasil*. Rio de Janeiro: Lumen Júris, 2007, p. 189.
- 22 Boiteux, Luciana, Wiecko, Ela, et alii. *Tráfico de Drogas e Constituição: um estudo jurídico-social do artigo 33 da Lei de Drogas e sua adequação aos princípios constitucionais penais*. Brasília: Ministério da Justiça / PNUD, 2009. The research cited above sentences handed down in convictions for drug trafficking in the city of Rio de Janeiro (in the central state and federal forum) and in the specialized courts of the Federal District, during the period between October 7, 2006 and May 31, 2008, and this sample permits an understanding of how Brazilian drug law is applied in practice.
- 23 In Habeas Corpus No. 97,256, filed by the National Public Defender’s office on behalf of a prisoner sentenced to one year and eight months of prison, initially in high security, after being apprehended with 13.4 grams of cocaine, there was discussion whether the sections of the New Drug Law (Law 11,343/06) that prohibit the conversion of prison sentences into alternative penalties (or administrative punishment) for those convicted of drug trafficking are compatible with article 5, paragraph XLVI, of the Constitution, on the individualization of penalties.
- 24 The report is entitled “One in Five: The crisis in Brazil’s prisons and criminal justice system,” <http://www.ibanet.org/Document/Default.aspx?DocumentUid=D6AAB956-DC90-4B77-A5D6-81A7EB6D7CAA>.
- 25 Cf. [http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb\\_stats.php?area=all&category=wb\\_poprate](http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poprate)
- 26 Cf. [http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb\\_stats.php?area=all&category=wb\\_poptotal](http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poptotal)
- 27 Source: Panorama do Sistema Penitenciário do CNJ, at: <http://www.cnj.jus.br/images/imprensa/apresentacao%20mutirao%20-%20jun%202009%202x.pdf>
- 28 Source: Infopen, www.mj.gov.br.
- 29 Ibid. Data from December 2009.
- 30 National figures, which would have enabled a wider comparison of convictions of minors, were unavailable.
- 31 Data were gathered in the Second Court of Children and Youth in the District of the City of Rio de Janeiro.

## Drug policy and the prison situation in Colombia<sup>1</sup>

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### Introduction

During the 20th century, drug policies in Colombia were increasingly repressive, largely ineffective, and heavily influenced by the international legal framework that was put in place. In effect, in just a few years Colombia went from having a scattered set of regulations, with an emphasis on prevention and medical-administrative treatment, to having legislation abundant in definitions of criminal conduct and sanctions that included the full drug cycle, from production through marketing and trafficking to consumption.

Moreover, the increased emphasis on repression reflects the growing influence of international legislation that evolved over the same period, generally promoted by the United States. Especially over the last decades of the 20th century, as drug trafficking became increasingly important in Colombian economy and society, Colombia began to follow the agenda developed by the United States to fight trafficking, resulting in an internalization of the “war on drugs.”

But increasingly harsh policies, including zero-tolerance measures, have not put an end to the organized criminal networks. Supply-reduction drug policies have not only proven ineffective, but have had a major impact on the prison system as a result of the considerable increase in repressive approaches, including measures entailing deprivation of liberty. At present, Colombia’s prison population includes a large number of persons incarcerated for drug-

related offenses who, for the most part, are among the least important links in the chain of growing, production, and trafficking of drugs.

This document is intended to show some of the ways in which drug policies impact the country’s prison system. To that end, we focus our analysis on what appears to be the sector hardest hit by these policies: persons only minimally involved in the drug business, playing small or marginal roles, and not benefiting from the truly substantial profits. All of which occurs in the context of a prison system characterized by major restrictions on human rights stemming from the precarious conditions of incarceration.

### Developments in Colombian drug policies

Colombia’s drug policies are in line with the international legal framework; accompanied by the adoption of a number of laws, particularly criminal statutes, the provisions of this framework have been incorporated into domestic law.

In the 20th century, the international legal framework evolved from a system lacking drug control to a regime of “fighting” drugs head on, manifesting itself in prohibitionist and highly repressive strategies. From 1909 to 1988, several international conferences were held and many agreements were signed aimed at strengthening an international system to control certain drugs and to divert precursors for their production. Throughout this process, the United States played a fundamental role as the driving force behind the conferences and treaties.

### Incorporation into domestic law

The general evolution of Colombian anti-drug policy could be characterized, in keeping with the terminology proposed by Boaventura De Sousa Santos, as a “localized globalism,” which is, in turn, the effect of a “globalized localism” in the law.<sup>2</sup> Accordingly, international drug law is a type of globalized localism, since domestic laws in the United States were transformed into binding treaties, which in turn have not only reinforced prohibitionist trends at home, but have also, through the exclusion or marginalization of any other options, strongly influenced other national policies. This localized globalism has gone through various stages.

The first, from the 1920s to the 1970s, saw the evolution from regulations to prevent drug offenses to the passage of the first repressive laws; the second, in the 1970s, was the reinforcement of the repressive approach in response to the growing influence of international treaties and the quest of various governments to coordinate their repressive policies; the third, in the 1980s, was the search for comprehensive regulation and the adoption in 1986 of Law 30, or the National Narcotics Statute (Estatuto Nacional de Estupefacientes); the fourth was the ratification of the 1988 Vienna

Convention, with reservations; and finally, the evolution from the decriminalization of possession and consumption of the personal dose, mandated by Judgment C-221 of 1994 of the Constitutional Court, to the return to prohibition with the constitutional amendment of 2009.

### **Colombian domestic law**

Colombia's legal framework on drugs today has four fundamental pillars: (i) the prohibition of consumption; (ii) the fight against drug trafficking as organized crime through the use of criminal law; (iii) repressive administrative tools, such as crop eradication; and (iv) prevention and education.

Some of the sentences for drug-related offenses are presented in Table 1.

In addition to having relatively stiff penalties, these and other drug offenses do not allow access to various procedural benefits provided for by law; among others, according to Article 1 of Decree 177 of 2003, the benefit of electronic surveillance as a substitute for imprisonment does not apply to drug-trafficking crimes. Even more complicated in relation to the penalties imposed on such offenses is that the fine is considered the principal penalty and paying the fine is therefore a requirement for securing one's release. This has created enormous difficulties for those unable to pay their fines because even if they have served the required prison sentence, they still have to pay the fine in order to regain their liberty.

### **Institutional framework**

The main institutions in charge of designing policies to address drugs in Colombia are concentrated in the executive and judicial branches. The most important institutions responsible for implementing these policies perform functions of containment and punishment, and together they constitute a highly repressive model.

The National Narcotics Council (Consejo Nacional de Estupefacientes): An executive-branch agency, under the Ministry of Interior and Justice (Article 89, Law 30 of 1986), entrusted with defining the policy aimed at controlling and eliminating production, trafficking, and consumption of psychoactive substances.

The National Narcotics Bureau (Dirección Nacional de Estupefacientes): An institution entrusted with advising on, coordinating, and executing "the policy of the National Government focused on controlling and reducing the production, trafficking, and consumption of psychoactive substances."

The National Police: In pursuing its constitutional func-

### **Main developments in Colombian drug legislation**

- **1920** - Law 11 of 1920 did not punish trafficking or consumption by deprivation of liberty, only by fines.
- **1928** - Law 128 of 1928 established repressive sanctions and made it possible to seize controlled substances.
- **1936** - The Criminal Code of 1936 punished by minor sentences carried out in low-level security prisons those who participate in the preparation, distribution, sale, or supply of narcotic substances.
- **1946** - Law 45 of 1946 increased the penalties with longer sentences and periods of solitary confinement carried out in medium-level security prisons.
- **1964** - None of these laws criminalized consumption, but there was a registry of drug addicts at the departmental health offices. In the 1950s, the first laws criminalizing the consumption of marijuana were adopted. Decree 1669 of 1964 criminalized the consumption of any narcotic substance.
- **1971** - Decree 522 of 1971 punished the trafficking and cultivation of marijuana, cocaine, morphine, and any drug that causes dependency, but decriminalized their possession and use in private; public use was punished by detention of one to three months.
- **1974** - Decree 1188 of 1974 increased the penalties for trafficking and criminalized consumption. From 1974 to 1980 Colombia ratified international agreements on drugs.
- **1986** - Law 30 of 1986, known as the National Narcotics Statute (ENE: Estatuto Nacional de Estupefacientes), is purely an instrument of control and repression without the preventive and rehabilitative dimensions of the previous legislation.
- **1993** - Law 67 of 1993 approved the 1988 Vienna Convention. It is of major symbolic value, as the government was seeking to show that it was responding to the challenges of the major drug traffickers.
- **1994** - Judgment C-221 of 1994 of the Constitutional Court found those articles of Law 30 of 1986 that punish possession and consumption of the personal dose to be unconstitutional.
- **2009** - A 2009 constitutional amendment prohibits possession and consumption of the personal dose.



Table 1

Article	Criminal conduct	Typical description and modalities	Penalty
375	Maintaining or financing plantations	One who, without the permission of the competent authority, cultivates, conserves, or finances plantations of marijuana or any other plant of those from which cocaine, morphine, heroine, or any other drug that causes dependency, or more than 1 kilogram of seeds of those plants can be produced.	Prison term: 96 to 216 months Fine: 266.66 to 2,250 Colombian pesos, current legal monthly minimum salaries (SMLMV) <sup>1</sup>
		If the number of plants exceeds 20 without surpassing 100.	Prison term: 64 to 108 months Fine: 13.33 to 75 SMLMV
376	Manufacture, trafficking, or possession of drugs	One who, without the permission of the competent authority, except as provided with regard to a dose for personal use, brings into the country, even in transit or removes from it, transports, takes with him or her, stores, maintains, produces, sells, offers, acquires, finances, or supplies a drug that causes dependency in any capacity.	Prison term: 128 to 360 months Fine: 1,333.33 to 50,000 SMLMV
		If the amount of drug does not exceed 1,000 grams of marijuana, 200 grams of hashish, 100 grams of cocaine, or cocaine-based drug, or 20 grams of poppy-derivative, 200 grams of methaqualone or synthetic drug.	Prison term: 64 to 108 months Fine: 2.66 to 150 SMLMV
		If the amount of drug exceeds the maximum limits provided for in the previous subsection, without surpassing 10,000 grams of marijuana, 3,000 grams of hashish, 2,000 grams of cocaine or cocaine-based drug, or 60 grams of poppy-derivative, 4,000 grams of methaqualone or synthetic drug.	Prison term: 96 to 144 months Fine: 133.33 to 1,500 SMLMV
377	Illicit use of movable and real property	One who unlawfully designates movable or real property for use in the production, storage, transport, sale, and use of any of the drugs referred to in Articles 375 and 376 and/or authorizes or tolerates such use thereof.	Prison term: 96 to 216 months Fine: 1,333.33 to 50,000 SMLMV
378	Encouraging illicit use	One who in any way encourages or propagates the illicit use of drugs or medicines that cause dependency.	Prison term: 48 to 144 months. Fine: 133.33 to 1,500 SMLMV
383	Possession of substances	One who in a public or open place and without justification possesses scopolamine or any similar substance used to render persons defenseless.	Prison term: 16 to 36 months, unless the conduct constitutes an offense punished by a higher prison term.

Source: INPEC

tions, and in order to maintain public order, this force may detain those who engage in criminal conduct. In the case of drug-related offenses, members of the National Police may detain persons who are caught in possession of or consuming drugs and take them before a competent prosecutor to determine whether the person should be released or have charges brought against him or her.

Other such institutions include the National Army, which performs functions in the eradication of illicit crops; the ministries of health, education, and communications, which are in charge of promoting and carrying out prevention campaigns and contributing to rehabilitation; and the

judicial system, whose criminal justice institutions assume responsibility for enforcing the penalties provided for in the domestic law.

### Drug policies and the prison system

The methodology used in this document includes both quantitative and qualitative components: a review and analysis of the information in the administrative record produced by the National Penitentiary and Prison Institute (INPEC: Instituto Nacional Penitenciario y Carcelario) of Colombia, and information obtained from 19 semi-struct-

tured interviews with women incarcerated for drug-related offenses. We opted to interview women because, even though most of the prison population is made up of males 18 to 40 years of age, on analyzing the quantitative information we realized there appears to be a sort of “feminization” of drug offenses.

We identified 30 women at El Buen Pastor Prison who were being represented at the time by female attorneys from the Defensoría Pública, the public defenders’ office. Going into the prison made it possible not only to conduct interviews but also to get to know some of the internal dynamics and identify key elements of the situation for women incarcerated on drug charges. This sample has several evident biases due to the way in which we gained access to them; nonetheless, the prisoners provided qualitative information that we consider relevant.

The results have been grouped around three central elements. The first is the number of people deprived of liberty for drug-related offenses. The second is who is imprisoned in Colombia for drug-related offenses, showing the socio-demographic characteristics of such persons and seeking to establish their level of participation in the drug business in Colombia. The final element is the impact of criminalization in the lives of persons imprisoned for having had only marginal participation in the drug business, which we refer to as “the ones on the bottom.”

**Prison population behind bars for drug-related offenses**

In Colombia, the share of the prison population behind bars for drug-related offenses is quite high. According to the INPEC, it is the third leading category of crime, surpassed only by offenses against economic property – in which different forms of theft play a major part – and

Nidia is a 43-year-old woman who was responsible for three of her five children, all minors, to which end she worked as a domestic employee on a per-day basis. Her daily income was approximately 20,000 Colombian pesos (equivalent to less than \$10 USD). Over time, the work became less and less reliable, and her expenses began to consume her.

*“I wouldn’t mind having just one cup of agua de panela (a hot drink based on brown sugar) all day, but my children... They were suffering and telling me they were hungry.”*

In her words, that is what led her to accept the proposal of a female friend to sell ‘bazuco’ (a derivative of cocaine). For her, each unit sold represented an additional income of 400 pesos (only \$0.20 USD). Though not much, it became a “fixed” source of income that enabled her to meet some of her family’s basic needs. Still, she continued washing dishes and clothes.

crimes against life and personal integrity, in which the main crime is homicide. This group includes all the crimes defined in Colombia’s Criminal Code under the title of “narcotics trafficking and other infractions,” as well as the infractions included in Law 30 of 1986. From 2003 to 2009, the proportion of the prison population behind bars for drug-related offenses fluctuated from 16 percent to 19 percent of all persons held in the country’s prisons, which in net figures represents about 11,000 persons. At the end of 2009, 12,616 persons were incarcerated for drug-related offenses, equal to 17 percent of the country’s prison population.

The number of persons reported as deprived of liberty corresponds both to persons indicted and persons convicted. While Colombia’s policies on fighting drugs have brought significant pressure to bear on the prison system, in recent

Table 2 - Makeup of the prison population behind bars for drug-related offenses

Year	Men		Women		Total
	Total	%	Total	%	
	2003	9,485	83%	1,969	
2004	10,686	83%	2,218	17%	12,904
2005	10,260	84%	1,891	16%	12,151
2006	8,311	85%	1,488	15%	9,799
2007	8,787	85%	1,526	15%	10,313
2008	9,870	84%	1,938	16%	11,808
2009	10,492	83%	2,124	17%	12,616

Source: INPEC

years there has been an interesting evolution in relation to the make-up of the prison population: The percentage of persons deprived of liberty who are defendants has diminished significantly. While in 2003, 49 percent of the prison population was made up of persons indicted but not convicted, by 2009 that figure had fallen to 29 percent. With respect to sentencing, in 2003, 51 percent of the persons in prison for drug-related offenses had been convicted and sentenced, whereas in 2009 convicts accounted for 71 percent of such persons.<sup>4</sup> This trend coincides with the dynamics of the prison population in general.

### **Who is deprived of liberty for drug-related offenses?**

Drug-related offenses clearly account for a major share of the prison population. This is consistent with the repressive philosophy that is reflected in the “drug war” policies adopted and carried out by the Colombian State.

In order to have greater in-depth knowledge of the impact of those policies, more and better data is needed regard-

ing the socio-demographic characteristics of the persons effectively criminalized and deprived of liberty. In this part of the document we seek to identify criteria for characterizing the population locked up for drug-related offenses. Specifically, we include information on a range of socio-demographic characteristics, including, sex, age, occupation, income, belonging to vulnerable groups, and level of participation in the offense.

#### *Socio-demographic characteristics*

*Women* – Table 2 shows the make-up of the prison population behind bars for drug-related offenses broken down by sex. The number of women deprived of liberty for drug-related offenses is significantly less than the number of men. Indeed, an analysis of the composition of the prison population by sex shows that since 2003 women have never accounted for more than 17 percent of the total.

Even though the percentage of women deprived of liberty on drug charges has not been greater than 17 percent in recent years, one notes a sort of feminization of such

Table 3 - Makeup of the prison population by sex (2003-2009)

Year					
	Men		Women		Total
	Total	%	Total	%	
2003	58,098	93%	4,179	7%	62,277
2004	63,385	93%	4,635	7%	68,020
2005	62,707	94%	4,122	6%	66,829
2006	56,626	94%	3,395	6%	60,021
2007	59,971	94%	3,632	6%	63,603
2008	65,786	94%	4,193	6%	69,979
2009	71,204	94%	4,788	6%	75,992

Source: INPEC

Table 4 - Women deprived of liberty for drugs as a percentage of the general population of women inmates

Year	Women		
	General	Drugs	%
2003	4,179	1,969	47%
2004	4,635	2,218	48%
2005	4,122	1,891	46%
2006	3,395	1,488	44%
2007	3,632	1,526	42%
2008	4,193	1,938	46%
2009	4,788	2,124	44%

Source: INPEC

crimes. Compared to the figures for the prison population as a whole (Table 3), women account for a larger share of the persons in prison for drug-related offenses. The total breakdown of the prison population shows that men account for nearly 93 percent of all persons deprived of liberty, and women comprise the remaining 6 to 7 percent. But among those persons imprisoned for drug-related offenses, women account for as much as 17 percent.

Although this data may be considered not very representative, if one analyzes the breakdown of the prison population for other crimes by sex, it clearly appears to show a trend. There are very few crimes in which women consistently and representatively account for more than 10 percent of the prison population. Perhaps the only crime in which women have accounted for a large part of the prison population is procuring, or prostitution-related offenses, where it has been as high as 40 percent.

Table 4 shows the proportion of women incarcerated for drug-related crimes compared to all crimes. Between 42 and 48 percent of the female population deprived of liberty are behind bars for drug-related crimes.

This shows that while the majority of persons detained for drugs are not women, most women in prison have been locked up on charges related to drugs. This statistic reinforces the thesis that there appears to be a feminization of drug-related crimes.

*Age* – Although most persons imprisoned for drug offenses fall within the range of 26 to 35 years old, there is a high percentage (22 percent) of very young people – 18 to 25 years old – deprived of liberty for this crime. The other group with major participation ranges in age from 36 to 45 years, and accounts for 23 percent of the total. The lion’s share of the persons incarcerated on account of drugs – both men and women – are 18 to 45 years old. Data could only be obtained from 2007 to 2009, therefore it is not possible to distinguish between years or determine which persons left prison, only those who entered prison during those years.

Table 7 - Number of persons deprived of liberty due to drug-related crimes who meet the characteristics of vulnerability defined by the INPEC, compared to the total number of persons deprived of liberty with the same characteristics (2007-2009)

Characteristic	Persons deprived of liberty for drug-related crimes who have the characteristic	Total number of persons deprived of liberty who have the characteristic
Nursing mother	67	151
Older adult	530	2,242
Afro-Colombian	475	2,844
Disability	141	682
Foreigner	237	320
Indigenous	164	637

Source: INPEC

Table 5 - Makeup of the persons deprived of liberty for drug-related offenses from 2007 to 2009, broken down by age bracket

Age				
18-25	26-35	36-45	46-55	56 and over
4,788	8,060	5,063	2,778	1,055
22%	37%	23%	13%	5%

Source: SISIPPEC, of the INPEC

Table 6 - Makeup of the persons deprived of liberty for all crimes from 2007 to 2009, broken down by age group

Age				
18-25	26-35	36-45	46-55	56 and over
22,262	35,535	19,887	9,249	4,398
24%	39%	22%	10%	5%

Source: SISIPPEC, of the INPEC

*Criteria of vulnerability* – One important element in characterizing persons deprived of liberty for drug-related crimes is whether they belong to a population group that makes them especially vulnerable. The INPEC has defined five criteria of vulnerability that are taken into consideration in its database: (i) nursing or pregnant mother; (ii) belonging to an ethnic minority; (iii) having some disability; (iv) being an older adult; and (v) being a foreigner. As Table 7 shows, the number of persons deprived of liberty who meet any of the characteristics defined by the INPEC is low. As mentioned earlier, the prison population behind bars for drug offenses for the period in question is 21,746, and the total prison population is 91,331.

Though in general the number of persons behind bars with the vulnerability characteristics defined by the INPEC is low, the data indicate that most (74 percent) of the foreigners who went to prison from 2007 to 2009 are behind bars for drug-related offenses.

Schooling, occupation, and income – Solid quantitative information on these areas was not available. Due to the precarious nature of the data we were able to obtain on these aspects, we emphasized them in the interviews. The results obtained in this field work cannot be generalized to the entire population deprived of liberty because only women prisoners were interviewed. Nonetheless, we believe that the qualitative information obtained is valuable and enriches the analysis.

Regarding their socioeconomic profile, the interviews made it possible to determine that these women do not have steady employment, have low levels of schooling, and earn little income. There is an important relationship between socioeconomic profile and the motivation to participate in some way in drug-related offenses. Accepting the possibility of losing one's liberty was, for one of the women interviewed, a very low price to pay in relation to what it meant to get money to support her family.

**Participation in the offenses**

It is also important to establish which participants in the drug-trafficking networks are affected by the repressive policies; i.e., whether the policies only reach the weakest links in the chain – made up of those who participate in the least profitable activities of the business or do so marginally, such as the ‘raspachines’ (coca leaf pickers), the small-scale cultivators, the ‘mulas’ or petty smugglers, and the small-scale distributors – or whether they reach persons who play a significant role in the drug-trafficking business.

Though this is especially important, the quantitative data available does not allow one to make such a determination. The INPEC's information system reports the offense or offenses for which persons are deprived of liberty, but does not indicate the extent of their participation in the criminal conduct, nor the amount of drugs with which the person was caught. In addition, in Colombia it is possible for both small distributors and large-scale traffickers to be tried for the same crime: trafficking, manufacture, or possession of narcotics (tráfico, fabricación o porte de estupefacientes). This encompasses practically the entire drug trafficking cycle and carries differentiated penalties based on the amount of drugs involved in the particular prosecution.

*Table 8 - Persons deprived of liberty from 2007 to 2009, based on the crime of trafficking, manufacture, or possession of narcotics, broken down into whether they were prosecuted for concurrence with other criminal conduct*

<b>Narcotics trafficking</b>	
Without concurrence	16,695
With concurrence	1,348
<b>Total</b>	<b>18,403</b>

Source: SISIPPEC, of the INPEC

Any illness is even more painful in prison. This was noted by Yaneth, who suffered from varicose ulcers which, after several complications, developed into an even more serious illness that affected her for months. Claudia describes the difficulties she has had when it comes to receiving care for the afflictions affecting her leg in prison, for even though they have doctors and do receive some medicines, the restrictions on liberty also affect her access to health care.

In order to overcome this difficulty, we have designed a proxy indicator that takes into account whether the person has been deprived of liberty for drug trafficking, for the concurrence of more than one type of criminal conduct, and in particular, if that concurrence is with the crime of ‘concierto para delinquir,’ or conspiracy to engage in criminal conduct. The starting point of this measurement is that if a person who has been prosecuted for trafficking has been found to have participated in a major way in a criminal drug-trafficking organization, he or she should also be prosecuted for concierto para delinquir. In addition, if a person is simply prosecuted for possession and does not appear to have major ties with trafficking networks, there would be no grounds for charging them with concurrence with any other criminal conduct. Although this approach entails a very tentative measurement that may not capture relevant elements, it may help evaluate who ends up feeling the pressure applied by the judicial system when carrying out anti-drug policies. Table 8 shows the results.

Of the total number of persons deprived of liberty for drug trafficking, manufacture, or possession, only 1,348 were prosecuted in concurrence with other crimes. Of those individuals, only 428 were prosecuted for concurrence with conspiracy to engage in criminal conduct, which is equivalent to 2 percent of all persons deprived of liberty in the period in question. This could imply that 98 percent of the persons deprived of liberty for this crime had not had – or it had not been possible to prove that they had – major participation in drug-trafficking networks.

The women we interviewed who recognized they had somehow participated in the “drug business” said they had done so as dealers or mulas. Even though they knew they were “the women at the bottom” and not the owners of the merchandise seized from them, they were nevertheless not willing to reveal the names of their contacts or bosses out of fear of reprisals against them or their children.

**Impacts of criminalization**

To show the impact of criminalization, we have opted to refer to two complementary dimensions. The first refers to the conditions of confinement itself and the second to how the lives of the persons imprisoned are affected by the

Table 9 - Level of overcrowding

Year	Population	Capacity	Excess	Overcrowding
1997	42,454	29,217	13,237	45.3%
1998	44,398	33,119	11,279	34.1%
1999	45,064	33,600	11,464	34.1%
2000	51,548	37,986	13,562	35.7%
2001	49,302	42,575	6,727	15.8%
2002	52,936	45,667	7,269	15.9%
2003	62,277	48,291	13,986	29.0%
2004	68,020	49,722	18,298	36.8%
2005	66,829	49,821	17,008	34.1%
2006	60,021	52,414	7,607	14.5%
2007	63,603	52,555	11,048	21.0%
2008	69,979	54,777	15,202	27.8%
2009	76,471	55,042	21,429	38.9%

Source: INPEC

deprivation of liberty. The first dimension is useful in two ways. First, it further illustrates the pressure on the prison system resulting from the repressive policies. Second, it facilitates the obtainment of relevant information on the conditions faced by incarcerated persons. To develop this dimension we have taken into account the reported level of overcrowding as a minimum and significant indicator – since there cannot be dignified living conditions if there is overcrowding – as well as qualitative information on life behind bars. We have developed the qualitative dimension based primarily on the information collected in the interviews.

### Prison conditions

Determining the conditions in which persons deprived of liberty are held in Colombia is especially important in order to grasp the impact of highly repressive drug policies

on their lives. To this end, we look at overcrowding from the quantitative perspective, and we also include information on the state budget per inmate.

Table 9 shows the evolution of the levels of overcrowding in Colombia from 1997 to 2009. The results point to a major decline around 2001 and 2002, but a subsequent relatively steady increase.

The decline in 2001-2002 appears to have been due to one of the most drastic interventions in Colombia's prison system undertaken by the Constitutional Court. In Judgment C-153 of 1998, which declared an unconstitutional state of affairs in the country's prisons, the Court found: (i) the existence of a situation of overcrowding that violated fundamental rights; (ii) that said violation was generalized, as it affected a large number of persons; and (iii) that the causes of the situation were structural, as they were not attributable exclusively to the authority against whom the action

Table 10 - Projection of the pressure of drug offenses on overcrowding

Year	General population	Total population for drugs	Difference	Capacity	Excess	Overcrowding
2003	62,277	11,454	50,823	48,291	2,532	5.2%
2004	68,020	12,904	55,116	49,722	5,394	10.8%
2005	66,829	12,151	54,678	49,821	4,857	9.7%
2006	60,021	9,799	50,222	52,414	-2,192	-4.2%
2007	63,603	10,313	53,290	52,555	735	1.4%
2008	69,979	11,808	58,171	54,777	3,394	6.2%
2009	76,471	12,616	63,855	55,042	8,813	16.0%

Source: INPEC

Table 11 - Projection of the pressure of drug offenses on overcrowding, without mid- and high-level traffickers

Year	General population	Population for drugs. without kingpins	Difference	Capacity	Excess	Overcrowding
2003	62,277	10,309	51,968	48,291	3,677	7.6%
2004	68,020	11,614	56,406	49,722	6,684	13.4%
2005	66,829	10,900	55,929	49,821	6,108	12.3%
2006	60,021	8,820	51,201	52,414	-1,213	-2.3%
2007	63,603	9,282	54,321	52,555	1,766	3.4%
2008	69,979	10,628	59,351	54,777	4,574	8.4%
2009	76,471	11,355	65,116	55,042	10,074	18.3%

Source: INPEC

was brought, which is why its solution required the coordinated action of various authorities.

By virtue of the orders issued in the judgment, changes were made in the state's prison policy. As a result, after the judgment was issued, overpopulation in the prisons diminished. Nonetheless, the rate of overcrowding subsequently climbed once again to very high levels. As of 2003, the figures on prison crowding went up once again and maintained an upward trend. In 2009 it reached 38.9 percent.

Overcrowding is a minimum and significant indicator of prison conditions. While fundamental guarantees may be violated in the absence of overcrowding, and it does not take into account the various dimensions of confinement, there cannot be dignified living conditions in the context of overcrowding. Increases in overcrowding therefore point to deterioration in the conditions of confinement.

The following shows the relationship between drug crimes and overcrowding. In a hypothetical exercise, if we subtract from the reported prison population those who have been deprived of liberty for drug-related crimes, we will be able to see the pressure these crimes bring to bear on the Colombian prison system, or in other words, the extent to which drug-related crimes contribute to overcrowding. The results of this exercise are set forth in Table 10.

Table 12 - Annual budget per prisoner

Year	Budget per prisoner per year	Deflated value	Equivalence in US dollars
2003	\$ 6,606,712.00	\$ 6,606,712.00	US\$ 2,295.99
2004	\$ 6,546,160.00	\$ 6,204,891.00	US\$ 2,362.67
2005	\$ 8,108,922.00	\$ 7,330,645.68	US\$ 3,158.71
2006	\$ 10,210,670.00	\$ 8,834,870.38	US\$ 3,747.91
2007	\$ 9,459,495.00	\$ 7,744,261.26	US\$ 3,726.16
2008	\$ 9,061,923.00	\$ 6,890,293.13	US\$ 3,504.26
2009	\$ 9,503,144.00	\$ 7,084,096.51	US\$ 3,285.32

Source: INPEC (\$ = Colombian peso)

The pressure of drug offenses on overcrowding is considerable. When removed, the number of prisoners above capacity diminishes considerably, as does overcrowding. In some years, overcrowding would practically cease to exist.

To this exercise we will add a variable that derives from the results presented previously: Most of the persons imprisoned for drugs make up the weakest link in the drug-trafficking networks. Although there are mid-level and high-level figures deprived of liberty in Colombia,<sup>5</sup> their participation in the composition of the population imprisoned for drugs appears to be much less in percentage terms. The proxy indicator that we use suggests that it is approximately 2 percent of the total. For the hypothetical exercise we suggest on this point, we will not take the total of all persons deprived of liberty for drug-related crimes, but rather we will subtract 10 percent. We opted to go from 2 percent to 10 percent, so as to allow a larger margin for the possible participation of major traffickers in the national prison population – i.e., those who played a major role in the drug-trafficking networks, kingpins, and mid-level traffickers. Table 11 shows the results of this exercise.

In this case, even subtracting the kingpins, both excess population and overcrowding are reduced significantly. For some years it even disappears. This would support the

The women interviewed provided valuable information on the conditions of detention. For example, for Luz, a recycler, the harshest part of being confined is having to share the cell with persons who humiliate her for her scant education or because she is very humble. Living with different persons in a small space and having to share every day with them, and follow a routine, significantly affects the lives of persons deprived of liberty. Indeed, there have been fights in which the women prisoners were sometimes injured.

idea that the pressure of drug offenses is a very significant contributor to overcrowding and its consequences for the living conditions within Colombia's prisons.

There is another piece of information that may be interesting for the analysis of conditions of confinement. Table 12 shows the evolution of the budget allocated by the state per prisoner, from 2003 to 2009. The data show an increase in the budget allocation per prisoner through 2006, but then a decline through 2009.

Other evidence also suggests that in the case of drug-trafficking, the inequalities between the mid- and upper-level traffickers on the one hand, and "those at the bottom" on the other, are more marked. While the first can gain access to private basic services, the latter must accept such services provided by the state, regardless of the quality.

### **"Los de abajo," or "Those at the bottom": Some of their stories**

*"They never catch those at the top."*

Losing one's freedom may represent a total break with one's life project. That is the case of Luisa, a university student, now in prison, who was arrested along with her boyfriend, who sold food made with marijuana. Luisa is facing a 54-month sentence as a 'coautora' (accomplice), even though she never sold or distributed any drug. Thanks to her studies, she has decided to make a better life for herself in prison and participates as an instructor in the prison's educational program. In addition, she is continuing her studies and hopes to be able to make progress on her thesis. Nonetheless, she insists that "the dreams are over." After leaving prison, her entire career ahead will be affected by her criminal record.

For Francy, a 32-year-old housewife, her criminal record is a problem. She is concerned that her children will suffer due to the fact that their mother was in prison on drug charges.

Marlene, 50 years old, says that "they ruined my life" ("me dañaron la vida"). She only studied up to the second year of primary school and has held a variety of jobs, though it

became ever more difficult to get work. When she was arrested Marlene was visiting her twin sister, something she did regularly in order to take care of her nephew. "That day the police entered and we didn't understand anything. What we knew was that my sister's tenant sold drugs, but I never knew how much he had in the room." Neither of them had any way to prove their innocence, and they ended up accepting charges. "But me, I swear to God, I am innocent." After pleading guilty, they were sentenced to five years and 800 times the current legal monthly minimum salary. They are now facing another drama: Marlene's 15-year-old daughter has been physically assaulted several times by her father, who turns violent when drunk.

The relationship with one's children and family is a constant concern. Although some interviewees have found in their loss of liberty an opportunity to value their family and improve the relationship with their parents, the greatest concern for women inmates is their children, and how they seem to become ever more distant. Rocío feels sad when talking about her eldest son, who she has not seen since she has been in prison, and from whom she feels separated by a great distance. For Sandra, the worst aspect of her confinement is that she was no longer able to see her small children. Although they are well and have all their needs met, she has not been able to see them grow and feels the growing distance when she speaks with them by phone. At 25 years of age, she is deprived of liberty, far from her children, and submerged in a draining routine. After attempting to bring drugs into the prison in return for pay-

The situation wasn't much different for Rocío, 38 years old and the mother of three children. Her husband was murdered a few years ago and she was victim of forced displacement. This forced her to leave her belongings and the economic activity in her home town to support her family. Upon reaching the city, life became harder and harder for her. She could not find a steady job, and there were not many things she knew how to do, as she had only third-grade primary education. After several months with no fixed income, she agreed to transport drugs to another part of the country. The work consisted of traveling overland with some grams of cocaine; on delivery she would receive 250,000 pesos (equivalent to \$125 USD). She never had problems with the payment and, over time, that activity became her source of income. Rocío became a recidivist in the crime of drug trafficking the day she was caught with 1,500 grams and was prosecuted along with her travelling companion, who was transporting almost 1,000 grams more. During her second stay in prison for transporting drugs, she lamented that her major concern, in addition to her children, is the knowledge that upon leaving prison she would receive no support for getting back on her feet and finding a stable, legal, and sufficient source of income.



ment, Sandra was caught at the entrance, ending the deal and leaving her without the promised pesos.

The life histories encountered describe the rupture in the family faced by the women when they are deprived of liberty for a long time. Concern for their children is very much present in all of them, as noted by the women attorneys from the public defender's office (Defensoría Pública) with whom we were able to speak.

The paradoxical aspect of the deprivation of liberty is that while they entered the "business" because they saw it as their only economic alternative, confinement does not improve their labor conditions or prospects. The incredible weight of a criminal record on the economic life projects of the women who today are inmates is not taken into consideration by drug policies. It is as though the problem is over when the judge concludes that the conduct fits the crime as defined, ignoring the persistence of the conditions of socioeconomic vulnerability that led the persons on trial to sell or transport drugs.

## Conclusions

The first finding of this study is that Colombia's legislation copies international trends promoted mainly by the United States and characterized by high doses of repression that take the form of multiple strategies, the most important of which are the use of the criminal law and crop eradication.

Second, the repressive approach does not appear to have had significant effects on the organized crime that has emerged around the drug business. Although there is aggressive repression of the growing, manufacture, and trafficking of drugs, the real and symbolic effectiveness of this policy is very limited. The precarious social conditions that persist in Colombia and the unmet basic needs constitute a propitious environment for drug entrepreneurs to find persons willing to participate in growing, manufacturing, and marketing.

Third, the consequences of the repressive policies are many and manifest themselves in different areas of national life. Nonetheless, the prison system is perhaps one of the most salient, given that drug-related crimes are the third-leading cause for which persons are deprived of liberty in Colombia.

Fourth, the vast majority of persons incarcerated for drug offenses has played only a minor part in the drug cycle, and so are easily replaced in the networks of manufacturing and trafficking; they generally have limited schooling and have lived amidst precarious socioeconomic conditions.

Fifth, overcrowding clearly threatens the effective fulfillment of the rights of the population deprived of liberty.

## NOTES

1 We are especially grateful for the valuable assistance of the National Penitentiary and Prison Institute (INPEC: Instituto Nacional Penitenciario y Carcelario) of Colombia, which provided us quantitative information and allowed our visit to the women's prison El Buen Pastor; Ms. Ivonne Lagos, of the INPEC; the directors of the above-mentioned prison, for their assistance with our visit; the Public Defender's Office of Colombia (Defensoría Pública), for facilitating the contact with the women deprived of liberty who participated in the interviews; Ms. Martha del Río, public defender, who facilitated our qualitative work; Libardo Ariza, professor at the Universidad de los Andes, who read our first draft and made valuable comments on it; and the research group, which provided valuable insights.

2 On the concept of "globalized localism" and "localized globalism," see De Sousa Santos, B. (2002) *La globalización del derecho: los nuevos caminos de la regulación y la emancipación*. Bogotá: Universidad Nacional; and (2009) *Sociología Jurídica Crítica. Para un nuevo sentido común en el derecho*. Bogotá: ILSA.

3 The legal monthly minimum wage in Colombia for 2010 is 515,000 Colombian pesos. The equivalent in U.S. dollars is about \$259 (at the May 2010 exchange rate).

4 In Colombia the crime of drug trafficking and other violations fits under a broader category, "crimes against public health."

5 Other mid- and high-level trafficking figures have been extradited or are imprisoned in other countries.

6 The names of the women interviewed have been changed to protect their anonymity.

## A short history of Ecuador's drug legislation and the impact on its prison population

Sandra G. Edwards

Sandra G. Edwards has lived in Ecuador since 1991, where she has worked for the Latin American Council of Churches and various international NGOs. Since 1995, she has worked as an independent consultant on issues of human rights and forced migration for NGOs such as Oxfam UK and the American Friends Service Committee. She is also a consultant for the Washington Office on Latin America, monitoring U.S. drug policies and their impact on human rights and democracy in Ecuador. Before moving to Ecuador, she lived in Central America. She holds a Masters in Education from Harvard University.

### Introduction

Ecuador has never been a significant center of production or traffic of illicit drugs; nor has it ever experienced the social convulsions that can result from the existence of a dynamic domestic drug market. While Ecuador has become an important transit country for illicit drugs, precursor chemicals, and for money laundering, the illicit drug trade has not been perceived as a major threat to the country's national security. However, for nearly two decades, Ecuador has had one of the most draconian drug laws in Latin America.

Ecuador's current "Law on Narcotic Drugs and Psychotropic Substances," better known as Law 108, was not developed based on the reality on the ground, but rather was the result of international pressures and domestic politics. It is an extremely punitive law, entailing sentences disproportionate to the offense, contradicting due process guarantees, and violating the constitutional rights of the accused. Its focus on enforcement and the presence of U.S. pressure meant that the success of Ecuador's drug policies was measured by how many individuals were in prison on drug charges. This resulted in major prison overcrowding and a worsening of prison conditions.

This chapter analyzes the direct connections between Law 108 and Ecuador's worsening prison conditions up until the time of the present government. Although the law is still in force, the Correa administration is the first to analyze the law's ramifications, define the problems within the country's prisons and develop proposals for legal and institutional reforms related to both drugs and prisons.

### Evolution of Ecuador's national drug legislation

Starting with Ecuador's 1970 drug law, historical records indicate that although Ecuador's drug policies included drug control via law enforcement, the country prioritized the prevention of the abuse of illicit drugs as a public health issue. However, as international treaties under both the United Nations (UN) and the Organization of American States (OAS) became more prohibitionist – prioritizing drug issues as a concern for law enforcement rather than from a public health perspective – Ecuadorian drug policies tended to follow a similar direction.

The "Law of Control and Intervention in the Trafficking of Narcotics" of 1970 (including reforms in 1972 and 1974) emphasized the public health aspects of the use of drugs, mandating that any person found under the influence of illicit drugs was to be taken directly to a hospital where it was to be determined if they were dependent on the drug. If defined as being dependent, they were detained within a medical facility until they finished a rehabilitation program under the supervision of medical personnel.<sup>1</sup> The law's section dealing with enforcement placed the highest emphasis on penalties for growing plants used for processing controlled substances or selling chemicals that can be used to produce illicit drugs. Enforcement efforts were more focused on the supervision of pharmaceutical companies and pharmacies, defining which drugs could not be sold without a prescription. There appeared to be little concern with informal trafficking by individuals or groups. Ecuador's National Plan for the Prevention of the Improper Use of Drugs, in force from 1981 to 1985, even referred to the dangers of emphasizing enforcement over treatment and pointed to the importance of treating the issue of drug dependence as a result of specific social ills within Ecuadorian society.<sup>2</sup>

In 1987, the Ecuadorian Congress passed a new "Law of Control and Intervention in the Trafficking of Narcotics and Psychotropic Substances." Drug users were still not penalized with imprisonment and continued to be required to undergo obligatory medical assessment and possible government ordered treatment if arrested under the influence. However, starting with this law, Ecuador's policies begin to reflect the more prohibitionist character of the international treaties developed around that time, especially the protocols to the 1961 UN Single Convention on Narcotic Drugs. Enforcement was given an almost equal role to that of prevention efforts. This law also began the use of harsh penalties for drug convictions, giving judges the possibility of issuing prison sentences from 12 to 16 years. However, such sentences were considered exceptional, were given only for the production or trafficking of a specified list of substances stated in the law, and they were applied only after taking into account the circumstances and the history of the accused.

The more integrated approach represented by Ecuador's

previous laws and national plans regarding the control and prevention of the use of illicit substances was completely reversed in Ecuador's subsequent drug law approved in 1991, "The Law of Narcotic Drugs and Psychotropic Substances," or Law 108. With the passage of Law 108, a shift occurred in the country – from focusing on drugs as a public health issue to prioritizing the use of law enforcement. This new dynamic was not brought about by any major changes in drug consumption or trafficking trends in Ecuador, but by changing priorities directly influenced by international treaties on drug control and newly flowing funds offered by the United States for drug control programs.

Law 108 was developed via a patchwork process. Some statutes were taken directly from the text of the 1988 UN Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances. Other parts were pieced together from a commission comprised of representatives from several of Ecuador's governmental offices. The commission was so pressured by the deadline they were given, as well as by the politics surrounding the process, that when it was finally presented to Congress, paragraphs were actually out of order, with sentences that lacked logical coherence. However, Congress passed it in the form in which it was presented. Once it was passed, it was shown to the Narcotics Affairs Section (NAS) at the U.S. embassy. Many of the suggestions by NAS, parts that had been left out in the rush, as well as comments sent after a review by the OAS's CICAD (Inter-American Drug Abuse Control Commission) were later incorporated into the law which was published in a second and corrected edition in the country's National Register.<sup>3</sup>

While the annual bilateral agreements on U.S.-Ecuadorian anti-drug cooperation are usually kept confidential, parts

of the agreement reached in the 2003 review were reported in the Ecuadorian press. The accord stated the clear goal that Ecuador would improve its efforts against illegal drug trafficking. In exchange for funding, equipment and new police stations, Ecuador would implement air interdiction and destroy illicit crops and the production of illicit drugs through joint military and police operations. The accord included indicators for evaluating results: the amount of illegal drugs impounded should rise by 10 percent, the confiscation of arms and precursor chemicals should increase by 15 percent, and the number of persons detained and court hearings held for drug offenses should rise by 12 percent.<sup>4</sup> These criteria assumed that the presence of illegal drugs was increasing in Ecuador, that the number of persons trafficking illegal drugs was growing, and that all those arrested met the legal criteria to be tried for a drug offense. In order to fulfill their side of the agreement, Ecuador entered into the numbers game – more people in prison and more of them put there under drug charges. Ecuadorian police took this as their marching orders; their job, in exchange for continued economic aid, was to detain as many persons as possible under Law 108.

### **Institutional structure**

The judicial aspects of Law 108 became the primary tool that enabled Ecuadorian security forces to implement activities funded by U.S. drug control aid. However, Law 108 also laid out the basis for the development of the administrative body that focused solely on drug issues. It specifically called for the establishment of the National Council for the Control of Narcotic Drugs and Psychotropic Substances (Consejo Nacional para el Control de Drogas Narcóticas y Sustancias Psicotrópicas, CONSEP). The establishment of a separate administrative body for drug control issues was a major change from Ecuador's previous administration of drug issues under the central government.

Due to the fact that Law 108 was based on an external legal model<sup>5</sup> and included input from various sources influenced by internal and international political priorities, much of the law contradicted Ecuador's constitution at the time as well as established norms inherent in Ecuador's existing legal code. Because of this, the law formed the basis for what essentially developed into a separate judicial structure for processing drug offenses. An Ecuadorian legal analyst commented that despite the fact that the law was in contradiction to the judicial values inherent in Ecuador's constitution as well as Ecuador's original code of justice, Law 108 is "one of the laws most practiced by [Ecuador's] administration of penal justice, implemented via an enormous government apparatus that includes a specially trained police corps, its own infrastructures, and an administrative body that manages all resources generated by the battle against drug trafficking."<sup>6</sup>

Ecuador's prison system is administered by the National

### **Legislation on drugs in Ecuador**

- **1970** - The "Law of Control and Intervention in the Trafficking of Narcotics" emphasizes the public health focus.
- **1987** - In 1987, the Ecuadorian Congress passed a new "Law of Control and Intervention in the Trafficking of Narcotics and Psychotropic Substances." It reflects the more prohibitionist character of the international treaties.
- **1991** - "Law of Narcotic Drugs and Psychotropic Substances," or Law 108, was approved. This law marked a shift from a public health focus on drugs towards a law enforcement priority. This law is still in force today, with a few modifications.
- **2008** (July) - Amnesty given to small scale drugs couriers.

Direction for Social Rehabilitation, or DNRS. As prison conditions began to worsen, DNRS became known as a bureaucracy out of control with little internal organization, administered by multiple directors who came and went depending on the political connections any one of them had at the time. It also became known for its clientelism, where one received a job through personal or family connections rather than professional qualifications.<sup>7</sup> This has only begun to change with the reforms implemented by the present government.

**Law 108: an obstruction of justice**

Despite reform processes now taking place in Ecuador, Law 108 remains in place at the time of this writing. As noted, a number of aspects within Law 108 contradicted rights and due process guarantees set down in the Ecuadorian constitution. Some of those have been corrected while others remain in force.

One contradiction in the original version had to do with the concept of judicial independence. The law required that the Superior Court (SC) automatically review all judicial decisions handed down in drug cases. It also included sanctions that could be applied by the reviewing SC if the judge ruled in favor of a person accused of a drug offense and the SC suspected that the decision was not well founded. This review process, including the potential for sanctions, was included in the new law as an attempt to circumvent judges being bought off by drug traffickers. The effect of the review on the judicial process, however, was to almost guarantee a guilty verdict. Judges were concerned that a decision in favor of the accused could be overturned by the SC, that they could suffer sanctions, and that they would be suspected of having been bought off. It was much easier to simply find the accused guilty than to risk the repercussions.

Judicial independence was further undermined by the adoption of mandatory minimum sentencing, a mechanism commonly used at that time in the United States for drug-related crimes. In addition, no distinction is made between the smallest offenders – drug users, first-time offenders, or micro-traffickers in possession of small amounts – and high-level drug traffickers. All were subject to a

mandatory minimum sentence of 10 years (modified by Congress in January 2003 to 12 years). A person carrying a few grams of marijuana can potentially serve the same 12 years as a person accused of selling a much larger amount of cocaine. The law includes various offenses of which a person can be accused (such as possession, transport, trafficking, etc.) and also convicted at one time – which is frequently the case despite being unconstitutional. Therefore, the accused could potentially be sentenced to a maximum of 25 years; a higher sentence than for any other crime under Ecuadorian law (the maximum sentence for murder is 16 years). These sentencing guidelines contradict the legal principal of proportionality: length and type of sentence should be proportionate to the offense.

Unlike Ecuador’s previous drug legislation, the original version of Law 108 criminalized drug use, placing drug use or dependence on its use, into the same category as drug production and trafficking. Even if the amount found on a person was small enough to be deemed for personal use only and the person was perceived dependent on the drug, he or she was automatically detained and subject to the mandatory minimum sentence in prison.

A very disturbing characteristic of the law is its definition under the Ecuadorian criminal code, which places the possession of any amount of drugs on a par with serious, violent crimes. There are two categories of crime in the Ecuadorian code – “crimes of reclusion” and “crimes of prison.”<sup>8</sup> Crimes of reclusion usually involve violence and require immediate detention with no right to bail, while crimes of prison allow the accused the right to immediate bail and the opportunity to remain at liberty before and during the trial. All drug charges, no matter the amounts involved or the circumstances of the arrest, are considered crimes of reclusion on the same punitive level as first-degree murder, armed robbery, rape, and kidnapping.<sup>9</sup> Therefore, drug offenders cannot request bail. The law in its original form also prohibited the commutation of sentences for extenuating circumstances (such as terminal illness) for drug offenders, even while others in prison for crimes of reclusion did have this right.

One of the most egregious contradictions to the Ecuadorian Constitution is the presumption of guilt inherent in Law 108. Apart from treating drug offenses differently from

Table 1

Crimes committed	1975	1995
Crimes against property	23.4 %	64.3 %*
Crimes against persons	0.4 %	15.6 %
Drug offenses	13.5 %	8.5 %
Other	62.7 %	11.6 %

\*1994

Table 2

Cases “heard” by criminal courts	1993
Crimes against property	38.8 %
Crimes against persons	12.4 %
Drug offenses	46.8 %
Other	2.0 %

Source: Colectivo de Abogados, “Por los Derechos de las Personas,” Ecuador, 1995, pp. 7–8.

*“They stopped me minutes after entering the airport. They detained me. I called my wife in Spain and she wired me some money to pay for a lawyer, who told he would help. After receiving the money the lawyer never again appeared in the prison I was held.”* Spanish citizen detained in Ecuador.

others of seemingly similar magnitude by defining them as crimes of reclusion, accused drug offenders (in contrast to those accused of other crimes of reclusion such as murder) are presumed to be guilty even before their hearing takes place. This presumption of guilt until proven innocent is not overtly written into the law, but its many unconstitutional aspects make up what attorneys call an inversion of proof.<sup>10</sup> This is because the law denies so many rights to the accused that in its de facto implementation, it transfers the burden of proof onto the accused rather than placing it with the state prosecutor as is done for all other crimes and as stipulated in the constitution.

In 1995, the Lawyers' Collective, a coalition of civil rights and criminal attorneys, presented an appeal for legal protection (acción de amparo) to the Ecuadorian Supreme Court questioning those parts of Law 108 deemed unconstitutional and its overuse by the courts in comparison with other crimes.<sup>11</sup> As can be seen in Tables 3 and 4, the report noted that from 1975 to 1995, crimes committed against property and persons (robberies and assaults) increased considerably, while drug offenses actually decreased. However, because of the exigencies of Law 108, in 1993, most cases heard in criminal courts concerned drug offenses, while the percentage of cases brought to trial for crimes against property and persons was much smaller, despite their relative increase.

Keeping in mind that Ecuador's historical issues with drug trafficking were money-laundering and its role as a transit country, the Collective's study underlined the fact that the actual threats to citizen safety were crimes against persons and property in which drugs played no part; yet justice sector resources were disproportionately focused on drug offenses.<sup>12</sup> The study and its conclusions were confirmed more than a decade later by legal analyst, Farith Simón,<sup>13</sup> in a review of judicial cases from 2007.

### **Modifications to Law 108**

As a result of the work of the Lawyers' Collective in the mid-nineties, the law was revised, reversing some of its most egregious elements. However, those changes did not take effect until 1997, and the fundamental thrust of the legislation, in which one is presumed guilty until proven innocent, has remained in place. Judges' decisions in drug cases are no longer automatically reviewed by a higher court nor can a judge be sanctioned for ruling in favor of

the accused. It is now possible for sentences to be commuted because of extenuating circumstances. Judges have also recovered their right to independently determine sentences for drug offenses. Taking into account such factors as the absence of a criminal record or other mitigating circumstances, a judge may sentence a person found guilty of a drug offense to a lesser number of years than the mandatory minimum sentence. However, political pressures and the deeply embedded stigma against lenience for drug offenses make it highly unusual for a judge to issue sentences that shave more than two or three years from the congressionally-mandated minimum of 12 years. The dismissal of accusations and findings of innocence are still very rare.

Attorneys who choose to represent those accused of drug offenses are also stigmatized. Police publicly state that such attorneys are taking dirty money, supposedly from drug trafficking, and therefore are as guilty as the accused. Many attorneys claim that they would never risk their legal careers by taking drug cases; those who have are questioned by their colleagues as to their motives for putting themselves in such a vulnerable position professionally. The result of this legal, political, and social stigmatization is that many of the accused go without legitimate legal representation.

In the revised version of the law, drug users are no longer placed in the same category as traffickers and producers; consumption of drugs is no longer a crime. However, no threshold amount is specified as to what indicates personal use – in a context in which prosecutors and judges are encouraged to seek convictions. What might be an amount for personal use for one judge may be enough for another to convict someone for trafficking. Also, a person found in possession of drugs is still immediately detained and the burden of proof is on the accused to prove that they are users rather than dealers.

### **The problem of preventive detention**

A recurring problem in Ecuador is the use of preventive detention ('prisión preventiva'). Intended as a precautionary measure to be used in extreme cases, in Ecuador preventive detention became the norm. Whenever a person was arrested, he or she was immediately detained. If charged with a drug offense, preventive detention was granted almost automatically and the accused could be held indefinitely.

The implementation of Law 108 and the use of indefinite preventive detention – combined with the prioritization by Ecuador's internal security forces on the arrest and detention of large numbers of persons on drug charges – took a tremendous toll on the courts and Ecuador's prisons. The judicial system, already overwhelmed and understaffed, reached a breaking point due to the huge increase in drug-

*“If we would really be involved in mayor drug trafficking, wouldn’t we be rich? Where are the profits of the sale of all these drugs? We are at the lowest end of the trade, and the little money we made, has all gone.”* Tina, Ecuadorian woman accused of drug trafficking.

related cases. This in turn resulted in extreme overcrowding throughout Ecuador’s prisons, which became centers for warehousing thousands of persons whose human and civil rights were ignored.

**The human cost: The prison situation**

As Law 108 went into effect, more and more people were being warehoused in a system that had not undertaken adequate updates for decades. As can be seen in the graph below, the prison population more than doubled over a period of slightly less than two decades. By 2007, 106 out of every 100,000 Ecuadorians were incarcerated.<sup>14</sup> In August 2007, the prison overcrowding rate in Ecuador (the number of persons incarcerated vs. the number of persons for which the prison system was built) was 157 percent. That same year, there were 18,000 persons detained in a prison infrastructure that was built to hold 7,000 inmates.<sup>15</sup> According to the UN Office on Drugs and Crime (UNODC), in August 2008 Ecuador had the highest percentage of prison overcrowding in Latin America.<sup>16</sup>

Also, Ecuador’s prisons were known internationally as places where even the most basic of human needs often went unmet. According to a 2005 report from the UN Committee against Torture, “The Committee deeply deplores the situation in [Ecuador’s] detention centres and especially in social rehabilitation centres where prisoners’ human rights are constantly violated. The overcrowding, corruption and poor physical conditions prevailing in prisons, and espe-

cially the lack of hygiene, proper food and appropriate medical care, constitute violations of rights which are protected under the Convention (Art. 11).”<sup>17</sup>

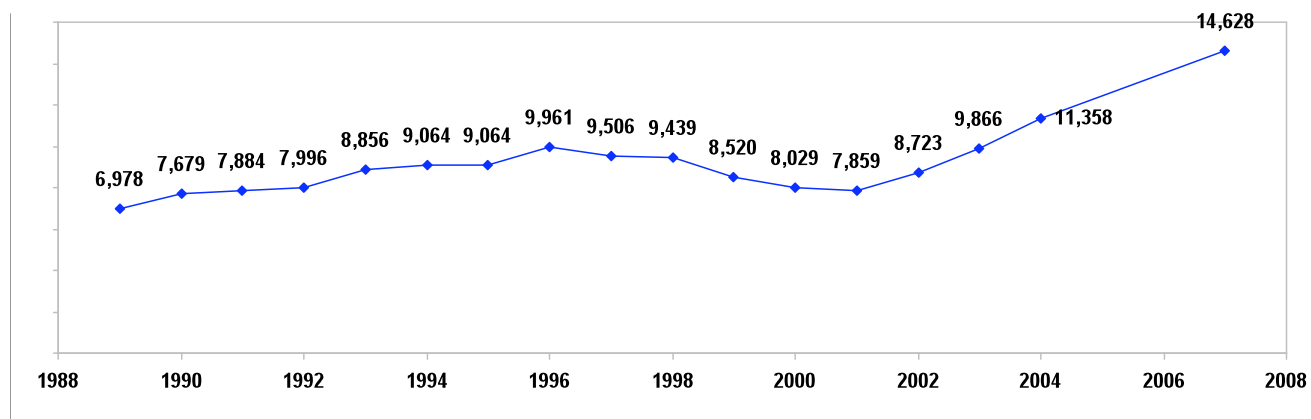
When looking at the national annual budgets for Ecuador’s prison system, it becomes clear why basic services for food and health were in such an abysmal state. A recent government sponsored study includes a table that shows the national budget for Ecuador’s prison system over a period of three years. The table divides the budget allocations by the number of detainees in Ecuador’s prisons and finds that for the year 2007, just under \$2 USD a day was budgeted for each person. Of this amount, only \$0.68 USD was spent daily on food for each detainee.<sup>18</sup> In the beginning of 2010, the National Direction for Social Rehabilitation increased the budget for meals to \$2 USD per day per inmate.

A 2008 census of Ecuador’s prisons found that in May of that year, 34 percent of all detainees in Ecuador were imprisoned on drug charges. However, during that same year, if one looked only at prisons in urban areas where drug control police operate, the percentage of those detained for drug offenses went as high as 45 percent.<sup>19</sup> Starting in 1991 and examining the types of crimes for which persons were accused and detained each year until 2007, the percentage of persons detained on charges of committing a drug offense is consistently one of the highest percentages.<sup>20</sup> At several points between 1993 and 2007, almost 50 percent of all prisoners in Ecuador were incarcerated on drug charges.<sup>21</sup>

DNRS officials were reportedly frustrated that as the number of inmates rose, there was no proportional increase in its budget.<sup>22</sup> As a recent Minister of Justice stated, “Perhaps the greatest harm caused by this abandonment [of the prisons] is not only the lack of funding, but that it has created something even more prejudicial: a divorce between society as a whole and that part of itself made up of citizens completing their sentences in confinement. This divorce

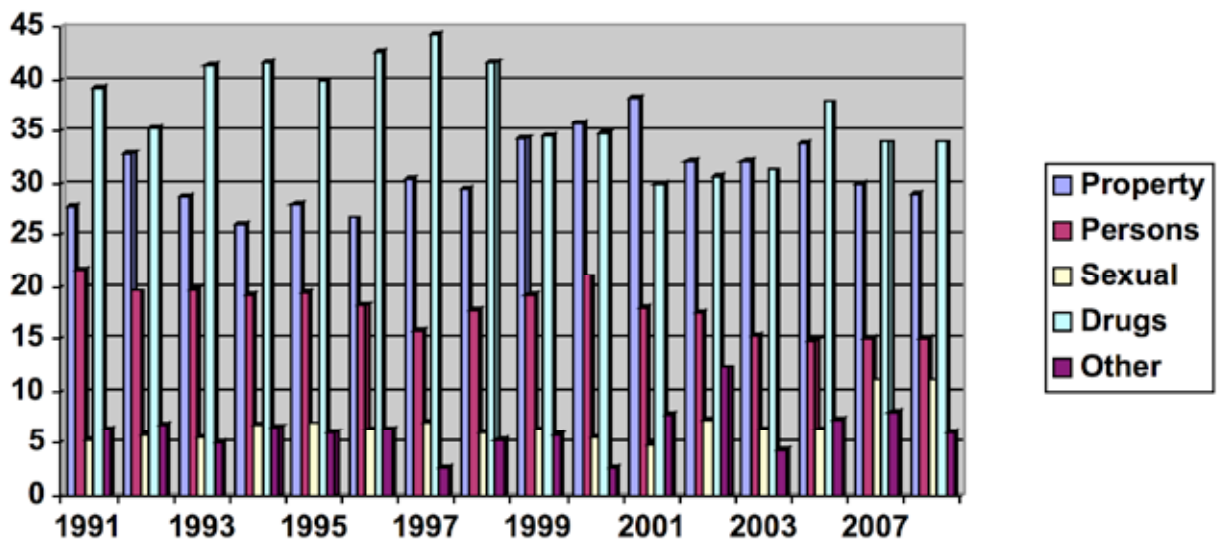
Chart 1

**Growth of Ecuadorian Prison Population 1989-2007**



Sources: Pontón y Torres (2007), data for 1989-2006. National Direction of Social Rehabilitation, data for 2007

Chart 2 – Crimes against property & persons; sexual offenses & drug offenses



Source: Boletín Estadístico 2004-2005, Defensoría Pública Penal, May 2008.

reached the extreme, on the one hand, of making invisible those who are imprisoned and, on the other hand, making us more aware of a society increasingly separated from its own problems.”<sup>23</sup>

One of the reasons Ecuador’s prison population remains invisible is that it is made up of persons taken from society’s most marginalized and, therefore, most vulnerable sectors. Prison statistics show that a majority of those imprisoned under drug charges are problematic drug users, the poor, and members of minority groups. Women are disproportionately represented; DNRS statistics show several years where up to 80 percent of all women imprisoned in Ecuador were there on drug charges. A police force that suffers from weak infrastructure and lack of resources tends to target those easiest to detain. It is still rare to find a major drug dealer in one of Ecuador’s prisons.

Returning to 2008, when 34 percent of all detainees were held on drug charges, the next largest group was detained for crimes against property.<sup>24</sup> According to the present director of the Public Defender’s office, Ernesto Pazmiño, the majority of those crimes were micro-trafficking and petty theft. The fact that 63 percent of all detainees were imprisoned on charges of either micro-trafficking or theft<sup>25</sup> has led Pazmiño to conclude that the crimes most often committed in Ecuador are those which would, in some way, bring economic benefit. In Pazmiño’s words: “If I steal, if I work as a mule [transporting small quantities], it is because I need to survive. These statistics are a consequence of the elevated levels of poverty [in Ecuador]; there is a direct connection. I would say that here [Ecuador] there is an intimate relation between poverty, delinquency, and imprisonment. It is very sobering to visit the prisons and find only the faces of the poor.”<sup>26</sup> As one woman imprisoned on drug charges stated, “If we are really involved in major drug trafficking,

wouldn’t we be wealthy? Where are the profits from selling all those drugs? We are on the lowest rung of the business and what little we earned is now gone.”<sup>27</sup>

Looking at both the levels of education and the occupations of the general population of detainees in Ecuador’s prisons, one can safely make the assumption that the majority of Ecuador’s prison population is of lower education and previously worked in the non-professional sector. In 2004, 50.5 percent of all detainees had no determined occupation at the time of their arrest, while 49 percent stated that they had a defined occupation but were unemployed.<sup>28</sup> Of those with a defined occupation, the majority considered themselves to be craftsmen (carpentry, construction, etc.). In terms of education, that same year, less than 45 percent had completed only the primary level of instruction and less than 44 percent had completed high school.<sup>29</sup> Also, in 2004, around 40 percent of all detainees were between the ages of 18 and 28 years old.<sup>30</sup> Four years later in 2008, the common profile of a detainee in any prison in Ecuador was generally the same as that of a detainee in 2004.<sup>31</sup> Being poor also ensures that once detained, it is highly unlikely that the detainee can afford legal defense.

### **The feminization of drug-related crime**

The percentage of women incarcerated on drug charges is consistently more than that of men. Over the last 15 years, 65 to 79 percent of Ecuador’s female prison population was detained on drug charges.<sup>32</sup> In 2009, 80 percent of all women held in Ecuador’s largest female prison, El Inca, were detained on drug charges.<sup>33</sup>

Women are exceptionally vulnerable to falling into micro-trafficking. They play a role on the lowest rung of drug

trafficking, usually as ‘mulas’ or micro-traffickers. According to the director of the Office of the Public Defender, Ernesto Pazmiño, there are multiple secondary effects as a result of this reality. Many mules or micro-traffickers are mothers who have fallen into the transiting of drugs for \$200 USD to \$300 USD: “We have demonstrated ... that mules, principally women who have been imprisoned for drugs, have underage children on the outside. When the mother returns home, she encounters her daughters at 12 or 16 years of age as prostitutes because they had no other way [to earn a living]. The sons were found to have entered into delinquency.”<sup>34</sup> Once incarcerated and convicted, opportunities for women to turn their lives around and to stay out of the lower echelons of the drug trade become even further out of reach.

Women are more vulnerable to becoming mulas or micro-traffickers not only because of high unemployment rates and economic responsibilities to their children, but also because they can fall prey to husbands, lovers, or male abusers who force them, either physically or verbally, into doing just this “one favor” for them.

Women are also, in some ways, more vulnerable to abuse once detained. In the largest women’s prison in Ecuador, El Inca, it is not unusual for at least 50 percent of El Inca’s prison guards to be men. While both men and women guards have been known to demand bribes in return for rights that prisoners should be receiving anyway (such as access to medical care, receipt of food or money from family members), male guards often demand sexual favors from female detainees in return for access to services or other necessities. Until two years ago, guards could call for a full body search at any time, supposedly looking for drugs or other contraband. Full body searches included a vaginal search, which was sometimes done by male guards to female detainees. Guards also used full body searches as punishment for certain kinds of infractions.

Although both men and women act as mules transporting drugs to other countries, since Law 108 has been in effect, among foreigners, a higher percentage of females than males are detained. According to a study done by Jorge Nuñez, at the beginning of the 1980s, statistics regarding the size of Ecuador’s prison population did not even include a category for the number of foreigners detained. However, by 2004, 10.4 percent of male detainees and more than 23 percent of female detainees were foreigners. Ninety percent of all foreigners detained that year were held on charges for a drug offense. Sixty percent of all detained foreigners were from Colombia.<sup>35</sup>

*“I had a throat problem and I underwent surgery in the Eugenio Espejo Hospital. The operation went wrong, and I have been unable to eat for almost one year now. I can only take liquid food. I am alone here.” Mamadou, citizen from Ivory Coast.*

## Prison and drug policy reform under President Correa

As overcrowding worsened in Ecuador’s prison system, detainees began to organize themselves to demand better treatment and respect for their civil and human rights. Sympathetic media coverage began to create a more propitious environment for the reform of Law 108, but the election of President Rafael Correa in November of 2006 also became another turning point. Upon entering office, Correa took on a complete overhaul of Ecuador’s governmental institutions and one of the most important changes was the establishment of the Ministry of Justice and Human Rights (MJHR). Some of the tasks mandated to MJHR were the improvement of the existing systems of penal justice and social rehabilitation; supervision of Ecuador’s national penitentiary system to resolve the present crisis and avoid future crises which put at risk the physical and emotional integrity of detainees; the establishment of a public defender’s office; coordination with CONSEP; supervision of all processes of foreign repatriation; and the design and implementation of a statistical study of Ecuador’s national penitentiary system.

In August 2007, Correa signed a decree stating that the national system of social rehabilitation was now declared in a state of emergency.<sup>36</sup> One of the immediate results of the decree and the action plan developed in its wake was the creation of what is called the Transitory Unit for the Administration of a Public Penal Defender (Unidad Transitoria de Gestión de Defensoría Pública Penal). The Public Defender’s Office was set up as a temporary body under the MJHR, but is now an independent government institution. The Public Defender’s Office was in charge of conducting the national prison census, which has been completed. The Office now has 220 young attorneys working on the defense of any detainee who cannot afford a lawyer. In the two years that this office has existed, it has greatly decreased the number of persons detained without a sentence. This was done not only through the Public Defender’s resources, but also through the accreditation of qualifying legal clinics operating under NGOs and universities. Through the actions of the Public Defender’s Office, prison overcrowding was reduced from 157 percent to 54 percent.<sup>37</sup>

Also, an office was formed within the MJHR that assumed responsibility for all applications for repatriation to the home countries of foreigners imprisoned in Ecuador. Based on the 1983 Council of Europe Strasbourg Convention on the Transfer of Sentenced Persons (to which Ecuador is a signatory), as well as bilateral treaties that Ecuador has with Peru, Paraguay, Colombia, and Spain, many foreigners sentenced for a crime under Ecuadorian law can apply to be transferred to serve out the rest of their sentence in their home countries. Up until a few years ago, those sentenced for a drug offense did not have access to the right to transfer under these treaties. This new measure allowed hundreds of foreigners to return home to serve out





AP/Reporters

their sentences and aided, to a certain extent, in lessening overcrowding in Ecuador's prisons. However, there are still many countries, mostly in Africa and Asia, that are not signatories to such treaties and hence citizens from these countries remain imprisoned in Ecuador.

At the same time, members of a National Constituent Assembly Task Force on Legislation and Fiscal Affairs undertook a review of prisons, the country's penal code, and the judiciary. Visiting prisons across the country, the Task Force observed the inhumane conditions and overcrowding, and noted the high percentage of persons incarcerated under Law 108. In its official report to the whole of the Constituent Assembly, the Task Force pointed out the draconian nature of Law 108 and noted that the law did not distinguish between types of drugs or amounts and resulted in sentences that were often grossly disproportionate to the crimes committed.

The prison visits by members of the Constituent Assembly combined with sympathetic media coverage created a window of opportunity for the development of a national pardon proposed by the Task Force that would cover all persons who had been sentenced for trafficking, transport, acquisition, or possession of illegal substances and met the following criteria: the prisoner had been convicted, it was a first-time offense, the amount of the illegal substance involved was two kilograms or less, and the prisoner had completed at least 10 percent (or at least a year) of the sen-

tence.<sup>38</sup> The proposal was approved by the Constituent Assembly and went into effect on July 4, 2008.<sup>39</sup> According to the Public Defender's Office, 2,300 people were released through the pardon. As of March 2010, the recidivism rate for those released was under 1 percent.<sup>40</sup>

The legal measures adopted by the National Constituent Assembly were only the first steps in a much larger reform process. While those measures were a temporary response to the emergency situation that had developed within Ecuador's prisons, the Assembly recognized that the causes behind the situation in Ecuador's prison were rooted in problems within Ecuador's penal code, especially in Law 108 and its implementation. The Assembly Task Force stated that an overall reform was necessary to confront the humanitarian crisis facing Ecuador's prison system as well as to ensure a more equitable system of justice in Ecuador. Finally, it is important to underscore that the constitution written by the National Constituent Assembly was passed by public referendum in September 2008. In its chapter

*"A woman was bleeding and nobody noticed. The whole prison block tried to help her. We called the night guards, who told us not to worry. "Do not worry, she will be OK" But she was not OK, the next morning she was found dead." Haydee, Ecuadorian woman, accused of drug trafficking.*

on rights to protection under the law, the new constitution includes articles that list certain rights that must be guaranteed under Ecuador's penal code.<sup>41</sup> Also, Article 364 in the constitution's section on health states: "Addictions are a public health problem. It is the State's responsibility to develop coordinated information, prevention and control programs for alcohol, tobacco, and psychotropic and narcotic substances; as well as offer treatment and rehabilitation for occasional, habitual, and problematic users. Under no circumstance shall they be criminalized nor their constitutional rights violated."<sup>42</sup>

## Conclusions

In its effort to bring Ecuador's penal code in line with the 2008 Constitution, the MJHR proposed a complete overhaul of its judicial system, including the codes which typify particular offenses, the procedures used to determine guilt or innocence, and the type and implementation of penalties. The MJHR undertook a long process of study, review, and discussion with various Ecuadorian and international experts and has developed a "Proposal for the Integrated Reform of the Law of Narcotic Drugs and Psychotropic Substances." According to the legal reforms originally proposed, offenses related to illegal substances would no longer be treated under a separate system with its own classification of offenses, separate procedures, and unique sentencing structure. Also, in the proposed legislation, distinctions are made between large-scale drug trafficking, street-corner dealing, and different levels of participation in drug production and trafficking.

While many of the reforms proposed for Ecuador's prison system are already in place, many of the legislative reforms are on hold and the fact remains that, as of early 2011, the proposed drug legislation had not yet been presented to the Ecuadorian National Assembly. Even once presented, the new law may not be approved as written. There are growing concerns regarding a rise in violent crime in Ecuador and the public and press often do not differentiate non-violent drug offenses from violent crime. Some members of the National Assembly will have political concerns about how

*"There is hardly any work in prison to earn a living. I have to buy everything myself, from toilet paper, to soap to wash myself and my clothes. I even had to buy my own mattress to sleep on when I entered prison. The police stole all my clothes and the things I had in a suitcase when they arrested me. I have no family in Ecuador to bring me clothes or food or to help me in my legal process. I am a foreigner. I do not know the judicial system in this country and nobody explains it to me. It seems a very unjust system. Even worst when you are Colombian." Marta, Colombian woman accused of drug trafficking.*

the reforms will play to their constituents. Moreover, like the national pardon that preceded the proposed reforms, even if approved there will be challenges in ironing out the problems of implementation, particularly with regard to the roles of the judiciary and the security forces.

In the meantime, Law 108 is still in effect and prisons continue to fill with micro-traffickers and mules. And after almost two decades of implementing Law 108, Ecuador's police, judges, and military continue to perceive anyone involved in the drug trade as a hardened criminal. While security forces have recently improved in the seizure of large quantities of drugs transiting through Ecuador (as well as finding more processing labs on Ecuador's border with Colombia),<sup>43</sup> they still consider the number of arrests on drug charges to be a concrete indication of the value of their work against drug trafficking.

With Ecuador's history of unstable governments and political winds changing overnight, it is hard to predict if any of the positive reforms targeting a judiciary that has been dysfunctional for decades and a prison system that became known as one of the worst in Latin America will actually be implemented before a new government is either installed or elected. At the same time, this is the first government to even attempt such far-reaching, integrated, and well-developed proposals. One can only hope that their rationale is sound enough and the need for change clear enough that the reform process will continue.

## NOTES

1 Ley de Control y Fiscalización del Trafico de Estupefacientes, 1970, Titulo 11, Artículos, 24 – 28; Decreto Supremo No. 909, Sept. 5, 1974; Registro No. 638, Sept. 13, 1974.

2 Plan Nacional de Prevención del Uso Indebido de Drogas, Ministerios de Gobierno, Finanzas, Educación, Salud y Bienestar Social, Procuraduría General del Estado, División Nacional Contra el Trafico Ilícito de Estupefacientes, 1981-1985.

3 Author interview with Dr. Silvia Corella, director of the National Drug Observatory of Ecuador, CONSEP, May 2003, combined with another author interview with other CONSEP officials in February 2010. The newly corrected law was published in the National Register without being passed through Congress a second time.

4 "FFAA y Policía Deben Mejorar su Lucha Antidrogas," El Comercio, Quito, 12 octubre 2003, p. A7.

5 Ecuador's legal system was at that time based on the Napoleonic model of law whereas much of the drug control legislation being proposed internationally at the time was based on an Anglo-Saxon legal paradigm.

6 This quote is taken from a comment made by David Cordero Heredia who wrote "La Ley de Drogas Vigente como Sistema Política Paralelo," which clearly defines how Law 108 contradicts both international norms and Ecuador's Constitution. Cordero Heredia's article can be found in Entre el Control Social y los Derechos Humanos, los retos de la política y la legislación de drogas, Ministerio de Justicia y Derechos Humanos, Subsecretario de Desarrollo Normativo, April 2010.

7 Various interviews in 2003, 2005 and 2009 with officials at CONSEP and former DNRS employees.

8 This has changed with parts of legal code reform proposals – such

as judiciary procedures – that have already been passed by the National Assembly. However, again Law 108, as it pertains to drug arrests, is still in force.

9 Author interview with Dr. Suzy Garbay, coordinator of legal department, INREDH (Regional Institute for Human Rights Support), Quito, Ecuador, June 2003.

10 “Inversión de prueba” is the term commonly used among attorneys who have worked with this law.

11 The Collective was comprised of the following people: Dr. Pilar Sacoto de Merlyn, Dr. Ernesto Albán Gómez, Dr. Alberto Wray, Dr. Alejandro Ponce Villacís, Dr. Judith Salgado, Dr. Gayne Villagómez, Dr. Ramiro Avila Santamaría, Dr. Gonzalo Miñaca, Dr. René Larenas Loor, Dr. Farith Simon and Sister Elsie Monge.

12 Colectivo de Abogados, Por los Derechos de las Personas, Ecuador, 1995, p. 8.

13 Legal analyst and professor of law at the University San Francisco de Quito.

14 Taken from the government sponsored study, Nuñez Vega, Ponton, Ponton, Estrella, Análisis de la ley de drogas desde una perspectiva socio-política: Diagnóstico de la ley de sustancias estupefacientes y psicotrópicas, 31 octubre 2008, p.68.

15 Ministerio de Justicia y Derechos Humanos, Unidad Transitoria de Gestión de Defensoría Pública Penal, Comparison of prison reality before and after the establishment of the Public Defenders Office, 31 December 2009.

16 “Grave riesgo de sida en cárceles de Ecuador por el hacinamiento,” El Universo, 11 August 2008, <http://www.eluniverso.com/2008/08/11/0001/10/A66828FE800D47438A8537591FC4A73D.html>

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18 Estrella, Pontón, Pontón y Nuñez (coordinador de investigación), Análisis de la ley de drogas desde una perspectiva socio-política: Diagnóstico de la ley de sustancias estupefacientes y psicotrópicas, Quito, 31 octubre, 2008, p.76, Table 12.

19 Censo Penitenciario (Prison Census), Office of the Public Defender, Producto 1, population characteristics by region, May 2008.

20 González, Marco (editor), Boletín Estadístico 2004-2005, Dirección Nacional de Rehabilitación Social, Censo Penitenciario (Prison Census), Office of the Public Defender, May 2008. For men, the highest percentage is detained for crimes against property with micro-trafficking as the second highest. For women, micro-trafficking is consistently the highest.

21 Dirección Nacional de Rehabilitación Social, Distribución Poblacional Penitenciaria por Tendencias Delictivas Periodo: 1989-2004, 2007.

22 In an interview with the author in 2003, the then director of DNRS complained of having just attended a meeting with the anti-narcotics police at the offices of NAS (Narcotics Affairs Section) in the U.S. embassy where the police were congratulated for the increase in the numbers of persons arrested under drug charges, but nothing was said regarding the issue of resources for the prisons now housing that rise in numbers.

23 Arbito Chica, Nestor, Minister of Justice and Human Rights, 2009-2010 preface in the brochure, Construyendo el Cambio, Ministry of Justice and Human Rights, December 2009, p. 2.

24 Public Defender's Office, Penitentiary Census, 2008.

25 Although citing statistics from the 2008 census, Pazmiño's study of

Ecuador's penal system has convinced him that 2008 is no exception regarding the high percentages of prisoners held for either micro-trafficking or robbery. Proof of this can be found looking at the Boletín Estadístico of the DNRS from the years 1989 through 2005 as well as the DNRS statistics now being organized by the Ministry of Justice and Human Rights, Office of Social Rehabilitation.

26 Author interview with Dr. Ernesto Pazmiño, director of the Public Defenders Office, 17 March 2010.

27 Author interview with woman in El Inca charged unconstitutionally for the same offense three times and living out a sentence of 25 years.

28 González, Marco (ed.), Boletín Estadístico 2004-2005, Dirección Nacional de Rehabilitación Social pp. 30 and 31.

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32 Dirección Nacional de Rehabilitación Social, Distribución Poblacional Penitenciaria por Tendencias Delictivas Periodo: 1989-2004, pp. 14, 20.

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40 Numerico de Personas Privadas de Libertad Indultadas por Drogas, Casos Reingresos Registrados, Centers of Social Rehabilitation, Planning Department, Office of the Public Defender.

41 Constitution of the Republic of Ecuador, 2008, Title II Rights, Chapter Eight, Rights to Protection, Articles 75 through 82.

42 Constitution of the Republic of Ecuador, 2008, Title VII Rule of Living Well, Second Section, Health, Article 364.

43 “EE.UU. reconoce el trabajo antidrogas,” El Comercio, 13 febrero 2010, and “Ecuador lidera lucha antidrogas,” El Comercio, 14 febrero 2010.

## Drug legislation and the prison situation in Mexico

Ana Paula Hernández

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### Introduction

Mexico is currently undergoing one of the worst crises in its history in terms of violence and insecurity. This crisis is directly related to the strengthening of organized crime in Mexico associated with drug trafficking, the divisions within the leading drug trafficking cartels, and their diversification. All this has resulted in a bloody struggle to control the key markets for the trafficking routes. The response of the administration of President Felipe Calderón has been a "war on organized crime" with two key elements: the growing use of the armed forces in public security tasks, and legal reforms aimed at more effectively fighting organized crime and, in particular, those involved in the trafficking, commerce, and supply of drugs.

The most visible cost of this war is seen in the unacceptable levels of violence in the country. Yet there are other costs too, such as the number and profile of people incarcerated as a result of drug legislation. The fact that fighting drugs is considered a national security issue has led to enhanced penalties, has modified the procedures so as to give greater discretion to the police, prosecutors, and judges, and has allowed for setbacks in the recognition of fundamental due process rights. Nonetheless, a large number of persons imprisoned for drug-related offenses do not fit within the category of large-scale trafficker, and have not even committed offenses related to the commerce, production, supply, or trafficking of drugs; many of them are in prison for simple possession of minor amounts of some drug, mainly marijuana, followed by cocaine. This document analyzes the relationship between drug legislation and the prison situation in Mexico.

### Historical development of Mexico's drug legislation

Mexico's drug strategy is tied to the prohibitionist approach that has marked the global anti-drug effort since the early 20th century. Whereas initially the emphasis was on fighting and criminalizing the planting, growing, and harvesting, in particular, of marijuana, in the late 1980s the emphasis became fighting and criminalizing drug production, trafficking, supply, and commerce. Since then there has been a clear increase in the penalties for this latter group of offenses.

In the 1920s, the prohibition on the import and export of drugs had the undesired effect of generating illegal trafficking in substances along the Mexico-U.S. border. In 1931, the Federal Regulation on Drug Addiction (Reglamento Federal de Toxicomanía) went into effect; it classified as a "toxicómano" one who habitually uses drugs without any therapeutic purpose. The 1940 reform to the Federal Criminal Code introduced a new regulation according to which "the vice-ridden person should be conceived of more as a patient who must be cared for and cured than as a true criminal who should suffer a penalty."

In 1947, the Federal Security Directorate (Dirección Federal de Seguridad) was established, with legal powers to become involved in drug-related matters. It was accompanied by reforms to the Federal Criminal Code that began a process of stiffening penalties for "crimes against health," as drug-related crimes are categorized in Mexico, that are still in effect today. In 1948, Mexico began the first national campaign for the eradication of illicit crops. Ever since, eradication has been a permanent program.

In 1961, Mexico participated in the meeting to draw up and adopt the United Nations Single Convention on Narcotic Drugs. In 1975, when Mexico ratified the Convention on Psychotropic Substances of 1971, it was the principal supplier of heroin and marijuana to the United States. New reforms were introduced to the Federal Criminal Code in 1978, in particular with regard to drug use and the treatment of "addicts," as the term 'adicto' came to replace toxicómano. Beginning in 1978, drug use, even in amounts for strictly personal use, was clearly criminalized, except in certain cases related to personal drug use by addicts. In particular in the case of cannabis, simple possession without intent to sell, commercialize, or traffic was punished by two to eight years in prison. In 1990, Mexico ratified the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

The reforms made to the Federal Criminal Code in 1994 account for a large part of Mexico's current drug legislation. One important change is that since 1994 controlled substances and the various offenses related to them are no longer dealt with in a single article. The penalties for

production, transport, trafficking, commerce, and supply were significantly increased to a minimum of ten years and a maximum of twenty-five years. Yet the penalty for planting, growing, and harvesting was reduced. Regarding drug use – in a significant change with respect to the earlier legislation – the law establishes that “No action shall be taken against one who, not being a drug addict, is found in possession of one of the narcotics indicated in Article 193, just once and in an amount that one may presume is for personal use,” and that “no penalty whatsoever shall be applied to a drug addict who possesses any of the narcotics indicated in Article 193 strictly for his or her personal use.”

In 1996, the Federal Organized Crime Law was adopted; it increased exponentially the penalties for any offense considered to be committed as part of organized crime (or

conspiracy, as defined in the law). This statute established the rule of ‘arraigo’ (a restraining order prohibiting a suspect or defendant from leaving the jurisdiction of the court while a criminal investigation is in process), which in 2008 was incorporated into the Mexican constitution. The rule of arraigo allows for the detention and deprivation of liberty of a person for up to 80 days, without any accusation or arrest warrant, and without having committed an offense in fraganti, merely on suspicion of having committed an offense related to organized crime.

The penalties and offenses established in the 1990s remain to this day, although as of August 21, 2009, they only apply to large-scale drug trafficking cases.

### **Institutional structure of the drug control system**

Mexico does not have a single office entrusted with conducting the country’s counter-drug strategy. Responsibility is “distributed” among various ministries – the Ministries of Public Security and Defense – and in turn distributed among various secretariats and the federal Ministry of Health. As Mexico has a federal system, most of the administrative arrangements are also replicated at the three levels of government: federal, state, and municipal.

The security and defense strategy is entrusted to four main agencies: the Ministry of Public Security (SSP), the Ministry of the Navy (SEMAR), the Ministry of Defense (SEDENA), and the Office of the Attorney General of the Republic (PGR), with all four under the federal Executive Branch.

The operation of the system is complex due, among other factors, to the enormous bureaucracy involved in the implementation and enforcement of the legislation, which clearly has repercussions on the prison situation. Moreover, the drug legislation itself is problematic insofar as the laws establish lists of grave offenses that require pre-trial detention. In the Federal District, the 2003 reforms led to an aggravation of penalties applicable to almost all offenses: while before there were 16 different forms of criminal conduct that were considered grave offenses, there are now 200. According to Article 194 of the Federal Code of Criminal Procedure, all drug-related offenses are considered grave, with the exception of the offense of planting, growing, or harvesting plants known as ‘enervantes’ (stimulants), where the objective is not narcotics production, supply, commerce, or trafficking, or their entry to or removal from the country. Accordingly, anyone accused of one of these crimes must remain in prison for the duration of the trial (pre-trial detention), even if innocent. This situation is aggravated by corruption, bonuses provided to the police for having made more arrests, and quotas of indictments imposed by top-level prosecutorial authorities on the district attorneys.

### **Historical development of drug legislation in Mexico**

- **1916** - Production, commerce, and use made illegal. Establishment of the General Public Health Board (Consejo de la Salubridad General).
- **1923** - Prohibition on the import of narcotics.
- **1927** - Prohibition on the export of heroin and marijuana. Beginning of illegal cross-border traffic.
- **1931** - Drafting of Title Seven of the Federal Criminal Code of Mexico, which regulates crimes against health.
- **1940** - Reform of the Federal Criminal Code. Title Seven includes the chapter “On the possession of and trafficking in stimulants.”
- **1947** - Federal Security Directorate (Dirección Federal de Seguridad) is created. Tougher penalties for crimes against health.
- **1948** - “Great Campaign” to eradicate illicit crops.
- **1978** - Criminalization of drug use.
- **1984** - General Health Law.
- **1994** - Increased penalties for drug production, transport, trafficking, commerce, or supply, and their entry to or removal from the country. Reduction in penalties for growing.
- **1996** - Federal Organized Crime Law.
- **2009** - The Law against Small-Scale Drug Dealing (Ley de narcomenudeo).

Table 1 – Drug legislation until August 2009

Possession or transport not for commerce or supply	Possession for commerce or supply	Commerce, supply, transport, production, traffic, entry to or removal from the country	Planting, growing or harvesting
According to a table that determined the penalty by type of substance, amount, and whether first time or recidivist	5 to 15 years	10 to 25 years	One to six years (when accompanied by low level of education and extreme economic need)  Otherwise, two to eight years.

source: Federal Criminal Code, 2009

### Current drug legislation in Mexico

At present, Article 193 of the Federal Criminal Code establishes that ‘narcóticos’ are considered “narcotic, psychotropic, and other substances or plants as determined by the General Health Act and international treaties in force in Mexico.”

Prior to August 21, 2009, criminalization was as described in Table 1.

On August 21, 2009, a decree came into force that reforms the General Health Law, the Federal Criminal Code, and the Federal Code of Criminal Procedure. Following its approval, the decree has been known in common parlance as the ‘Ley de narcomenudeo,’ or the Law against Small-Scale

Drug Dealing, as its main objective is precisely to combat the retail mode of trading in drugs.

The decree determines maximum quantities of the various drugs permitted for personal use, as illustrated in Table 2 using the amounts in Article 479 of the General Health Act.

Based on these amounts, a distinction is made between large-scale drug traffickers (‘narcomayorista’) and small-scale, street-level dealers (‘narcomenudista’). The first is when the amount is equal to or greater than the amounts provided for in the table multiplied by 1,000, the second, when the amount is less than the amounts in the table, multiplied by 1,000.

Table 2

Table of maximum doses for personal and immediate consumption		
Substance	Maximum dose for personal and immediate consumption	
Opium	2 grams	
Diacetylmorphine or heroin	50 milligrams	
Cannabis sativa, cannabis indica, or marijuana	5 grams	
Cocaine	500 milligrams	
Lysergide (LSD)	0.0015 milligrams	
MDA Methylenedioxyamphetamine	Powder, granulate or crystal	Tablets or capsules
	40 milligrams	One unit
MDMA3,4-Methylenedioxymethamphetamine	40 milligrams	One unit
Methamphetamine	40 milligrams	One unit

Source: General Health Act, 2010

The decree establishes the scope of authority of the various levels of government in the drug control effort. Previously, only federal authorities had jurisdiction over these offenses, but the new law intends that state and municipal authorities also participate actively. According to Article 474 of the General Health Act, in those cases of small-scale dealing that lack sufficient elements to be considered as organized crime, “the authorities in charge of public security, prosecution, and administration of justice, as well as enforcement of sanctions of the states, shall take cognizance of and resolve the offenses and shall enforce the sanctions and security measures.” In other words, the state and municipal authorities will detain, investigate, prosecute, and enforce the sanctions. The federal authorities will continue to be in charge of all aspects related to large-scale drug-trafficking and cases of organized crime.

With the reforms in place, the penalties listed in Table 3 apply from now on.

At the same time, the Health Act now defines (at the beginning of the new chapter “Offenses against health in the modality of small-scale dealing”) what is understood by such conduct:

*Possession:* physical holding of narcotics or when they are nearby and available to the person.

*Supply:* physical transmission, directly or indirectly, by any means, of the possession of narcotics.

*Commerce:* sale, purchase, procurement, or conveyance of a narcotic.

Furthermore, in Articles 192 and 473 of the General Health Act, the decree defines and differentiates user and addict as follows:

*Drug addict:* any person who shows some sign or symptom of dependency on narcotic drugs or psychotropic substances.

*User:* any person who consumes or uses narcotic drugs or

psychotropic substances and who does not show signs or symptoms of dependency.

**Analysis of the law against small-scale drug dealing**

While this law appears to decriminalize personal use, it is consistent with the strategy of the Mexican government of continuing to emphasize criminalization and incarceration as the main solution to the drug problem in Mexico. Nonetheless it has some positive features, such as the distinctions it draws between the above-noted concepts. It also “allows” minimal quantities for personal use, and recognizes and permits the use of peyote and hallucinogenic mushrooms for the ceremonial and cultural uses of indigenous peoples.

Its negative aspects and main risks are found in the new way of prosecuting drug offenses and meting out penalties. If a person has in his or her possession the amount established for personal use, then the prosecutorial authorities “shall not bring a criminal action against the offense.” What this wording indicates is that use continues to constitute an offense. The difference is that no criminal action will be brought, no accusation will be brought, and charges will not be filed before a judge, if the amounts are those permitted in the Act. Nonetheless, given the way the criminal justice system works in Mexico, a person in possession of such amounts may still be detained by the preventive or prosecutorial police or taken before authorities of the Public Ministry, which have 48 hours to investigate and determine whether to file charges. This user will be treated as an “offender” until the Public Ministry releases him.

The distinction between user and addict is important, though not very clear as it bases the difference on the drug addict showing “some symptom of dependency.” With this, the risk exists of a user being labeled an addict and being required to undergo the treatment established by law. In addition, the law may result in greater persecution of use. For simple possession of amounts greater than those stipulated by law, not for commerce or supply, a person can

Table 3: Drugs legislation as of August 21, 2009

	Possession not for commerce or supply	Possession for commerce or supply	Commerce, supply, transport, production, traffic	Planting, growing, or harvesting
<b>Small-scale dealing (narcomenudeo)</b>	10 months to 3 years	3 to 6 years	4 to 8 years	Kept at one to six years (when low level of education and extreme economic need) Otherwise, two to eight years
<b>Large-scale trafficking (narcotráfico)</b>	4 to 7 years and 6 months	5 to 15 years	10 to 25 years	

Source: Federal Criminal Code, 2009

receive ten months to three years in prison. Given that the amounts established are so small, it is highly likely that a user would carry amounts greater than those allowed by law. In addition, those amounts do not correspond to the reality of the drug market in the streets, given that a user can only possess half a gram of cocaine, yet it is sold in the street by the gram.

Another problem is that in Mexico the biggest corruption problem among the police forces and the judicial sector is at the state and municipal levels. Yet it is precisely the state and municipal administrations that are being entrusted with implementing the new legislation on street-level drug dealing.

### The prison situation in Mexico

In Mexico, the Federal Penitentiary System is under the direct authority of the Ministry of Public Security, which has a Vice-Ministry for the Federal Penitentiary System en-

trusted with administering the federal prisons. A similar arrangement is reproduced at the state level, where an Office of Deputy Secretary of the State Penitentiary System or a General Bureau of Prevention and Social Readaptation exists in each state under the state's Secretariat of Public Security. These offices are in charge of creating, organizing, and administering the Centers for Social Readaptation in each state. There is a 'juez de ejecución,' or court officer in charge of the enforcement of judgments, under the judicial branch, who is responsible for ensuring the legality of the enforcement of criminal sanctions, and the adequate implementation of the penitentiary regime, in keeping with the federal (or, as the case may be, state) Criminal Sanctions Enforcement Act.

According to official data from the Ministry of Public Security, in the last 11 years the prison population in Mexico has evolved as illustrated in Table 4.

As Table 4 makes clear, a significant increase in the total prison population occurred during the past decade. In 2008, there were approximately 90,000 more persons in

Table 4 - Mexico's prison population: persons convicted and persons facing trial, 1998-2009

Year	Existing prisons	Total spaces available	Total prison population	Total population in pre-trial detention	Total population convicted
1998	445	103,916	128,902	54,403	74,499
1999	447	108,808	142,800	61,424	81,376
2000	444	121,135	154,765	63,724	91,041
2001	446	134,567	165,687	71,501	94,186
2002	448	140,415	172,888	73,685	99,203
2003	449	147,809	182,530	80,134	102,396
2004	454	154,825	193,889	80,661	113,228
2005	455	159,628	205,821	87,844	117,977
2006	454	164,929	210,140	89,601	120,539
2007	445	169,970	212,841	88,136	124,705
2008	438	171,437	219,754	88,935	130,819
2009	433	170,924	227,021	91,128	133,893

Source: Ministry of Public Security

Table 5 - Persons detained for crimes against health in 2008

	Production	Supply	Commerce	Use	Trafficking	Transport	Possession	Other	Total
Chihuahua	10	4	31	639	5	96	697	492	1,974
Federal District	0	0	4	31	0	0	2,083	5,886	8,004
Jalisco	14	8	747	13,589	1	12	1,473	636	16,480
TOTAL (all 32 states)	90	114	3,324	31,112	40	471	24,212	16,198	75,561

Source: Legal and International Affairs Office, Office of the Attorney General of the Republic



prison than in 1998. In places such as the Federal District, the prison population has increased 84 percent in the last seven years.<sup>1</sup> According to King's College London, Mexico has the sixth largest prison population, trailing only the United States, China, Russia, Brazil, and India.<sup>2</sup> Some 40 percent of the incarcerated population does not have a verdict, due largely to the excessive use of pre-trial detention.

According to research by Guillermo Zepeda, an analyst of the Mexican criminal justice system, in 2007 the average daily cost per prisoner was the equivalent of \$10 USD. Considering that in that year there were more than 212,000 prisoners, the approximate daily cost would be in excess of \$2 million USD, or nearly \$775 million USD annually.<sup>3</sup>

The Mexican government could argue that the cost is necessary in the logic of fighting drugs and organized crime. Yet an analysis of the prison population based on the offense committed shows that a large number of those in prison are persons whose dangerousness and role in drug trafficking is minimal. The Centro de Investigaciones y Docencia Económica (CIDE) has undertaken surveys of the prison population in the Federal District and the state of México since 2002; together these account for 28 percent of the prison population nationally. Though these figures are not representative of the whole country, they provide important data that can be compared to other states of Mexico:

- The system of imparting justice results mainly in the arrest of the poor and the marginal.
- Approximately two of every three prisoners are from households with major unmet needs.
- Some 40 percent of the prisoners are 18 to 30 years old.
- 21 percent of the prisoners never went to school or never finished primary school.
- Approximately 40 percent of the prisoners are behind bars for petty thievery or street-level drug dealing.
- In 2009, 50 percent of the prisoners locked up for selling drugs were detained for possession of merchandise with a value of \$100 USD or less, and 25 percent for merchandise with a value of \$18 USD or less. In 2002, this situation was even more serious: 67 percent of those imprisoned for drug trafficking were selling drugs whose value was less than \$70 USD.
- There was a worrisome increase in the proportion of recidivists from 2005 to 2009, during which time this percentage climbed 17 percent.<sup>4</sup>

The trend in Mexico is to fill the prisons with minor offenders where, according to Zepeda, “the sanction costs society more than the harm caused by the person convicted

or accused.”<sup>5</sup> The new legislation on small-scale trafficking could accentuate this trend, and more minor offenders, street-level dealers, or consumers who are not criminals will be imprisoned, further aggravating the situation of prison overpopulation, another serious problem of the Mexican prisons.

### **Prison population for crimes against health in Mexico**

Based on official figures, the total prison population in 2008 was 219,752 persons, approximately 20,000 of whom were incarcerated for crimes against health. To illustrate the situation, we have selected three emblematic states: Chihuahua, along the U.S. border, and one of the hardest hit by drug trafficking, including Ciudad Juárez, considered the most violent city in the world; Jalisco, the state with the largest number of persons detained for crimes against health; and the Federal District, as it is the largest federal entity in the country, with a population of more than 8 million.

One major limitation for the objectives of this research project is the inconsistency in the information provided by the authorities, which means that one cannot consider it entirely reliable. There is no clarity or consistency in the classification of the specific criminal conduct, since in some records arrests are based on use (not criminalized in the Federal Criminal Code) and in others they are based on possession. The data presented by the Federal District are particularly inconsistent.

Based on the data provided, in 2008 not a single person was detained in the Federal District for transport, supply, production, or trafficking. Nonetheless, in 2008 there are 5,886 classified under “other,” which once again calls into question how the authorities are classifying crimes against health.

The data provided indicate that the vast majority of persons detained for crimes against health are men, at least for the crimes for which demographic data was provided: planting, growing, and harvesting, and possession.

The inefficiency or lack of investigation by the country's prosecutorial authorities often leads to a large number of persons being arrested before the authorities have pulled together the necessary evidence to be able to file charges or indict and convict them. This has been a major criticism leveled by various sectors against the Calderón administration. Despite the governmental discourse with respect to persons detained in the drug control effort, relatively few of those detained actually end up in prison, and fewer still are convicted. As observed in Table 6, the state of Jalisco has the most alarming data in this regard: Of 43,153 persons detained for crimes against health during the administration of President Calderón, only 3,500 have had charges

filed against them and only 2,173 have been convicted. To find out what explains the alarming number of arrests on such charges, one would need additional information; however, what is clear both in Jalisco and in the Federal District is that of the total number of detainees, less than 10 percent have been convicted.

The data in Table 5 also show that those who have been most pursued and detained are not drug traffickers or dealers, but the possessors and users who have no intent to engage in commerce or supply. These data help clarify the reality of Mexico's current drug war strategy in Mexico:

- The offense of growing, harvesting, and planting is hardly prosecuted in Mexico.

- The offense most prosecuted continues to be possession, with the number of persons detained much greater than those detained for other offenses. Even considering the inconsistency and confusion in the way in which use and simple possession are defined in the law, it is clear that simple possession accounts for the largest number of detainees and persons charged in the last ten years.

### Verdicts in crimes against health

Tables 7 and 8 illustrate the situation with regard to verdicts in 1998 and 2008.

Table 6 – Total detentions for crimes against health during the Calderón administration (2006-2009)

State	Persons arrested	Charged	Convicted
Chihuahua	5,856	2,942	1,040
Federal District	27,366	2,313	1,797
Jalisco	43,153	3,500	2,173
TOTAL (all 32 states not shown here)	226,667	51,282	33,500

Source: Legal and International Affairs Office, Office of the Attorney General of the Republic

Table 7 – Drug verdicts 1998

State	Total	Convictions	Acquittals
Chihuahua	1,023	922	101
Federal District	241	221	20
Jalisco	734	634	100
Total (the 32 states)	9,307	8,313	994

Table 8 – Drug Verdicts 2008

State	Total	Convictions	Acquittals
Chihuahua	820	762	58
Federal District	1,028	851	177
Jalisco	1,226	1,128	98
Total (the 32 states)	14,532	12,228	2,304

Source: INEGI

The Federal District has 18 federal district courts for criminal matters, Chihuahua has ten, and Jalisco has nine. Not all of these courts provided the information requested, thus the information presented next is only suggestive of how verdicts play out in crimes against health. In addition, most of the courts did not provide information on 1998, stating it was non-existent, and in several cases indicating that this was because the court itself did not exist at that time. For this reason, insufficient information was available for this period to make an analysis.

Eight courts of the Federal District, four courts of Jalisco, and three courts of Chihuahua provided more detailed information on verdicts in crimes against health, indicating the article and section of the Federal Criminal Code that contains the offense at issue in the criminal case. Only seven courts indicated the specific offense (possession, supply, etc.) as well as the drug involved. All the courts indicated the penalty or sanction, in years and months, imposed for the offense committed.

We cannot say that the information provided by these courts is representative of all the courts in the country. Nonetheless, it does give us an idea of how verdicts were handed down in crimes against health in Mexico before the reform in the legislation on small-scale drug dealing in August 2009, and the data suggest patterns that should be researched in greater depth.

To get an idea of the number of verdicts for each offense, Table 9 presents detailed information provided by three courts, one from each state. Similarly, the sentence imposed for each offense is presented, in most cases, by these three courts.

In the case of the three courts, the possession of marijuana results in the largest number of verdicts. It is followed by possession of cocaine, possession of cocaine for sale or commerce, and possession of marijuana for sale or commerce. In terms of possession for use, the main drug involved is marijuana, whereas in terms of sale or commerce, it is cocaine. Most of the convictions in the three courts are for possession or sale. There are no convictions for trafficking and very few for supplying, transporting, or bringing drugs into or removing them from the country.

In almost every case, the offender received the minimum sentence. In most cases, in these three courts as well as in the others that provided detailed information, the sentence for possession is from ten months to one year and four months, the sentence for possession with intent to sell is five years, the same as for sale or commerce, and the sentence for supply, transport, removal from or bringing into the country is ten years; these are the minimum sentences for all of these offenses. The longest sentence reported is 17 years.

The fact that in most cases the minimum sentence is being imposed for drug-related offenses may reflect that the amounts involved were minor. This appears to indicate that most of the persons imprisoned in Mexico for drug-related crimes are users picked up for simple possession or street-level dealers of some drug. There are very few convictions for serious offenses such as supply, trafficking, bringing into or removing from the country, or transport, and similarly there are few convictions involving longer terms that would indicate larger amounts involved in the offense.

*Women in prison* – Although the prison population for crimes against health has remained more or less stable over the last ten years, accounting for approximately 10 percent of the total prison population, there has been a significant change in the involvement of women.<sup>6</sup> Whereas before, most women in prison were there for robbery, in the last decade drug-related offenses became the main grounds for prosecuting women.

While only 15 percent of men in prison are there for drug-related crimes, for women the figure is approximately 48 percent. In the case of indigenous women, who account for 5 percent of all women incarcerated, 43 percent are in prison for drug-related offenses.<sup>7</sup> Many of these women are in prison with very stiff and disproportionate penalties. Most of the women prisoners match the following profile: they are young, poor, illiterate or have little schooling, and almost all are single women who are their children's principal caretaker. In most cases these women do not have a prominent role in drug-trafficking networks. Many of them

*My golden dream was to come to the city and buy seeds and plants to reproduce there. I was able to pull together 800 pesos; my cousins were here, they'd come to study.... One sunny day I came to buy a bus ticket and I never imagined that it was going to be a ticket for a life with no return, a crude life far from my loved ones.*

*I ran into a person I'd known my whole life, at my daughter's godparents' home.... He told me that they too were coming to the city, that why didn't I go with them, and they would give me the return ticket, if I helped them bring money ... they had a store.... I didn't hesitate. I told them that even if they didn't pay me, I would help them.... And we came.*

*We came and we reached Taxqueña ... and my comadre (the goddaughter's mother) told me: "comadre, as you don't have a telephone, no one has come for you." And then they told me to go with them to the airport. We reached the airport ... and, before I entered, they told me "federal police, stop ma'am." How was I going to stop, I felt everything was fine ... my comadre was carrying a bag ... the money wasn't on her person, it was in the bag, I was carrying the bag my comadre gave me, I was carrying the one my compadre (the goddaughter's father) gave me, I was carrying both bags....*

*When the federal judicial police told me to stop, I did not stop; I didn't know that he was speaking to me. My compadre told me – they were going up some stairs – and he told me "comadre, put your things there, they'll check it there, you'll catch up with us soon." And I put my things down and the policeman asked me "What are you carrying, ma'am." And I told him, "money." And he told me: "Why didn't you declare your valuables?" And I told him "the money isn't mine, it's theirs." And when I said that, they were already lost on the stairs.*

*When they took me to the police station at the airport, I felt I had fallen into a well. Faster than lightning a person came and told me "beggar bitch, you'll see, you'll be locked up for a fucking lot of years." You have on you what I never imagined. They opened one of the packages and there were brand new dollars; they open the packages and there was the morphine. Years later I found out that my compadre worked for a cartel. That day, the decoy for all the cargo to pass through was me. They needed to find someone as naïve as me for the cargo to go through; the belly of the plane was filled to capacity and everything went through, everything went through.*

*When you get to prison you feel that soon, soon you'll be out, because you're innocent, and I never got out.... I kept repeating that I was innocent. They sentenced me to 25 years, and thanks to a public defender, they reduced it to 12, and I was in for ten-and-a-half years.*

*Many of my fellow prisoners ... for example one case that wrenched my soul was that of doña Ame, who was from the Chiapas highlands; her only sin was to work in a home of drug-traffickers, washing their clothes.... And she ended up in prison for that, for being a woman, for working, for not knowing how to read or write, for being vulnerable.*

Excerpt of an interview with Rosa Julia Leyva in January 2010. Rosa is from the state of Guerrero and spent more than ten years, from 1993 to 2004, in prison for the crime of transporting drugs.

Table 9 – Convictions and sentences for crimes against health 2008-2009

Offense	First District Court for the State of Chihuahua	Fourth District Court for Criminal Matters in the State of Jalisco	Second District Court in Federal Criminal Trials in Mexico City	Sentences
Possession of cocaine	6	25	11	10 months / 3 years 3 months
Possession of marijuana	19	45	5	10 months / 1 year 4 months
Possession of heroin	7	1		10 months
Possession of clonazepam	1	4	2	10 months
Possession of flunitrazepam			1	5 years 100 days
Possession of methamphetamine	1	5		1 year 9 months
Possession of crystal meth and marijuana		1		5 years 6 months
Possession of cocaine and marijuana		3	2	10 months / 5 years
Possession of psychotropic pills		3		3 years 9 months
Aggravated possession of narcotics (marijuana, cocaine, psychotropic pills, among others)		3		5 years 7 months
Possession of marijuana and free supply of the drug		1		2 years 6 months
Possession of cocaine for sale or commerce		24	10	5 years 100 days / 7 years 6 months/ 11 years
Possession of marijuana for sale or commerce	13	22	1	5 years / 7 years / 13 years / 15 years
Possession of psychotropic pills for sale or commerce		3		5 years
Possession of methamphetamine for sale or commerce		4		2 years 9 months / 5 years / 10 years
Possession of heroin for sale		1		5 years
Possession of marijuana and cocaine for sale or commerce	5	1	3	5 years 10 months / 8 years 5 months
Possession of marijuana, cocaine and flunitrazepam for sale or commerce			1	5 years

Offense	First District Court for the State of Chihuahua	Fourth District Court for Criminal Matters in the State of Jalisco	Second District Court in Federal Criminal Trials in Mexico City	Sentences
Possession of marijuana, cocaine and methamphetamine for sale or commerce		2		6 years 1 month
Possession of cocaine, flunitrazepam, clonazepam and diazepam for sale or commerce		2	1	6 years 3 months
Possession of marijuana, free supply		1		2 years 6 months
Possession of marijuana for transport		1		5 years
Supply of cocaine		1	1	2 years 6 months / 13 years
Supply of marijuana		1	1	10 years 3 days / 15 years
Supply of crystal meth		1		10 years
Sale or commerce of cocaine		24	12	5 years / 11 years 10 months
Sale or commerce of marijuana		5	1	10 years / 11 years 10 months / 13 years 9 months
Sale or commerce of methamphetamine		3		5 years
Sale or commerce of methamphetamine and cocaine		1		5 years
Bringing heroin into the country			1	10 years
Bringing cocaine into the country			1	10 years 100 days
Removing cocaine from the country			1	10 years
Transporting marijuana	1	3	1	10 years 100 days / 13 years 9 months
Transporting methamphetamines		1		10 years
Planting marijuana	4			1 year
Growing marijuana		1		1 year
Furtherance of crimes against health by helping to make them possible		1		4 años

Source: Courts of Federal districts of Chihuahua and Jalisco

are behind bars for transporting or bringing drugs into the country, and others for bringing drugs into the prisons, often because their husbands or boyfriends asked them to do so.<sup>8</sup> As they do not hold any important position in the trafficking networks, the women are just the last link in the chain.

## Conclusions

The stiffening of penalties for drug-related offenses – or crimes against health – and the use of pre-trial detention are two major factors in the increase in the number of persons imprisoned in Mexico. Most of the prison population is made up of men. Although women account for just 5 percent of this population, about 50 percent of incarcerated women are behind bars for crimes against health.

Based on the available data, two situations stand out in Mexico. The first is that although the number of persons detained and imprisoned has been an indicator used by the government to show that its efforts to fight crime – especially organized crime – are working, there are hundreds of thousands of detentions that do not result in charges being filed and fewer still in convictions. These figures suggest that a large number of innocent people are being detained and also that there is a lack of professional investigations to produce the necessary evidence to allow judges to reach a guilty verdict. The second is that a large number of those who do end up in prison are hardly dangerous and that their role in drug

trafficking is relatively insignificant. The government's strategy to oppose organized crime appears to have as one of its results the criminalization of drug users, in most cases of less dangerous drugs, such as marijuana, and of small-scale dealers, mainly of cocaine and marijuana. At least in the Federal District and the State of México, according to CIDE, 40 percent of the prisoners are behind bars for petty thievery or street-level dealing; in 2009, 50 percent of those in prison for selling drugs were detained for merchandise worth US\$ 100 or less, and 25 percent for merchandise with a value of US\$ 18 or less. In other words, 75 percent had been detained with an extremely small amount of drugs.

Finally, the law against small-scale drug dealing approved in August 2009 will probably further increase the criminalization of consumers and small-scale drug dealers. Accordingly, drug legislation in Mexico has been useful, and apparently will continue to be useful, mainly to detain and imprison those whose dangerousness and role in drug-trafficking is minimal. This helps fill the prisons with users and small-scale criminals, contributing to overpopulation and overcrowding – serious problems in themselves – and investing considerable human and material resources that could be much better used fighting the corruption, inefficiency, and weaknesses of the institutions that prosecute and administer justice and provide public security in the country, as well as for evidence-based drug prevention and education programs.

## NOTES

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Mexico prison riot, AP/Reporters

## Legislation on drugs and the prison situation in Peru

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### Introduction

Peru is a major world producer of coca leaf and its derivatives. Since the year 2000, successive Peruvian administrations have followed a drug policy focused on supply reduction through interdiction and eradication strategies.

This chapter examines aspects related to drug offenses in Peru and their impacts on the prison system, as well as the conduct of the agencies in charge of law enforcement and prosecution. The study covers the period of democratic transition, 2000-2008, during which the country implemented drug control policies based on international norms. Drug-related offenses have become the third leading cause of imprisonment in Peru – after the two property crimes (theft and robbery) – constituting one of the major drivers of prison overcrowding. The expansion of illegal commercial activity related to drugs has considerably worsened the situation of the Peruvian criminal justice system.

Peru has a precarious institutional framework and lacks criteria for the proportionality that should be maintained among institutions, statutes, and procedures. The problem of determining criminal conduct in drug-related offenses has generated a system of prosecution and detention that expands in a way that discriminates against certain sectors of the Peruvian population: the poor, the peasants, youths, poor ‘mestizos,’ and indigenous persons. The nearly 12,000 inmates in Peru for drug offenses are often incarcerated without having been convicted, with no degree of classification based on type of offense, and with a prohibition on any benefit that would make it possible to reduce the sentence.

This document is based on information requested from the National Prison Institute (INPE: Instituto Nacional Penitenciario) and other state institutions.<sup>1</sup> The information

provided is partial and there is no disaggregated information on the social and economic conditions of the persons detained.

### Criminal legislation related to drugs

Most of the criminal legislation on drugs was initially contained in Article 296 of the Criminal Code of 1991, which refers to illicit drug trafficking. Over the years, the legislation has been amended, increasing penalties and removing and adding specific forms of criminal conduct, as illustrated in Table 1.

Since 1978, Peru has followed a disorderly cycle of designing laws and regulations around the crime of drug trafficking. The first phase was disproportionate in its definitions and highly repressive in the determination of the penalties (Legislative decrees 22,095 and 122). The adoption of the 1991 Criminal Code sought to establish some minimal criteria for the operation of the general principles of criminal law, including some timid efforts to maintain proportionality among the forms of criminal conduct defined, but also sought to maintain a large dose of repression and stiff penalties.

Finally, in 2002 and 2003, two more statutes were enacted that placed more emphasis on the determination of three criminal law definitions: the general offense of illicit drug trafficking, the offense of micro-commercialization, and possession for personal use. Although possession for personal use has not been declared punishable by the original statutes or the subsequent reforms, the law does not establish precise criteria for police action leaving room for police discretion, frequent cases of corruption, and abuse of persons who possess drugs merely for their own use.

Specifically, Law 28,002 of June 2003 reformed the structure of penalties for drug offenses, establishing eight to 15 years imprisonment generally for drug-related offenses; from six to 12 years for possession for trafficking; and 15 to 25 years in the most serious cases. This new legislation also distinguishes clearly the substances (i.e., between different types of drugs), the amounts of the substances, the cases of possession for personal use, micro-commercialization, and general illicit trafficking. There is also criminal legislation on money laundering and asset forfeiture.

At the same time, in the last decade, 80 general criminal statutes have been passed aimed very specifically at bolstering the struggle against terrorism, organized crime, and the whole issue of citizen security. This process of legislative inflation has been accompanied by pronouncements in favor of restoring the death penalty, first in 2004 and then in 2006 by President Alan García himself.

The general trend under democratic governments has been to reinforce the punitive authority of the state, to reduce

Table 1 – Legislation on illicit drug trafficking – possession and selling

Legislation	Modality	Penalties
<b>Legislative decree 22,095 of 1978</b>	<b>Art. 55</b> - Promotion of gang-type organization  <b>Art. 58</b> - Cultivation of plants, instigation	Imprisonment  Imprisonment of no less than two years
<b>Legislative decree 122 of June 1981</b>	<b>Art. 55.A</b> - Growing, manufacture, preparation, trafficking, selling  <b>Art. 55.B</b> - Cultivation of small area, manufacturing of small amount, distribution of small amount	Imprisonment  Imprisonment of no less than two years and no more than ten years
<b>Legislative decree 635, Criminal Code of 1991</b>	<b>Art. 296</b> - Illicit drug trafficking in general  <b>Art. 297</b> - Aggravated forms  <b>Art. 298</b> - Possession for illicit trafficking in small amounts  Distribution in small amounts to individual consumers <sup>2</sup>  <b>Art. 299</b> - Possession for personal use exempted from penalty	Prison sentence of no less than eight years and no more than 15 years  Imprisonment for not less than 25 years  Imprisonment of not less than two years and not more than eight years  Imprisonment of not less than one year and not more than four years  No penalty
<b>Law 27,817 of August 2002. Modifies Article 298 of the Criminal Code</b>	Micro-production  Micro-commercialization to individual users  Aggravated form of Article 297	Imprisonment of not less than two years and not more than eight years  Not less than one year and not more than four years  Not less than six years and not more than 12 years
<b>Law 28,002 of 2003</b>	<b>Art. 296</b> - General formulation  Promotion, abetting, through manufacture  Possession for trafficking  <b>Art. 297</b> - Aggravated forms  <b>Art. 298</b> - Micro-commercialization, manufacture, commercialization (up to 50 grams of cocaine paste, 25 grams of cocaine hydrochloride, and 100 grams of THC)  <b>Art. 299</b> - Possession not punishable (up to five grams cocaine paste, two grams cocaine hydrochloride, and eight grams THC)	Imprisonment for not less than eight years and not more than 15 years  Imprisonment of not less than six years and not more than 12 years  Imprisonment for not less than 15 years and not more than 25 years  Imprisonment for not less than three years and not more than seven years  No penalty

Source: Centro de Investigación Drogas y Derechos Humanos (CIDDDH)



the scope of guarantees, and to apply the rule of progressive expansion, usually lacking any proportionality in the application of the penalties making the problem of disproportionality all the more visible. In particular, under the current administration (García) there has been an increase in the number of items on the list of offenses subject to sanction, which in many cases has had repercussions for the actions of the police and judicial and prison authorities, with a detrimental impact, in particular, on prisoners, defendants, and persons convicted of drug offenses.

### **Institutional structure**

The INPE is the lead entity of the national prison system. It is a decentralized public agency, part of the Ministry of Justice, and subject to frequent reorganization. Although the INPE enjoys normative, economic, financial, and administrative autonomy, and manages its own budget, it is subject to political decisions and limitations. It is governed by the Code of Prison Enforcement (CEP: Código de Ejecución Penitenciaria, Legislative Decree 654), which regulates the direction, control, and administration of the Peruvian prison system. It is organized into eight regional bureaus.

The Peruvian National Police (PNP: Policía Nacional Peruana) is responsible for all areas of law enforcement and operates under the authority of the Ministry of Interior. The organizational structure of the PNP includes local police units as well as bureaus specializing in specific areas, including drug trafficking and terrorism. The PNP has a presence in each department, province, and city.

The INPE and the PNP have jurisdiction over the entire

Peruvian prison system. The administrations of Valentín Paniagua (2001) and Alejandro Toledo (2002-2006) opted for a slow increase in the prison infrastructure, expanding or remodeling certain prisons, but without building new facilities; the information available indicates that in the 2000-2006 period, the 84 prisons that existed from the days of former President Alberto Fujimori (1990 to 2001) were maintained.<sup>3</sup> Short-term measures, such as periodic transfers of prisoners among different regions of the country, some commutations of sentences, and the recent implementation of a system of releasing prisoners with electronic bracelets do not appear to have succeeded in having an impact on prison overcrowding. Indeed, no measure taken to date has attempted to reduce the flow of detainees or persons being tried for drug offenses.

In the context of cutbacks in public spending and enhanced fiscal discipline, which successive administrations have been carrying out since the 1990s, the budgets for the prison system and criminal justice system in general in Peru have been hit hard. Despite the clear increase in the incarcerated population from 2000 to 2008, the budget allocated to prison infrastructure diminished in several fiscal years, reaching its lowest point in the 2002-2006 period. The current administration has not addressed the problems generated by the periodic crises in the justice system and the INPE, and has preferred to administer the problem with partial solutions.

### **Budget and capacity**

The budget issue is key to understanding the shortcomings in the Peruvian prison system and the Peruvian criminal justice system in general. The system's capacity for spend-



Instituto de Defensa Legal IDL Lima, Perú, Courtesy of IDL



Instituto de Defensa Legal IDL Lima, Perú, Courtesy of IDL

ing is not adequate enough to address structural problems. Although there have been slight budget increases in absolute terms, they have been insufficient. The health care, education, and job-training services provided by INPE leave much to be desired; the same can be said of the capacity and availability of trained personnel.

Title VIII of the CEP,<sup>4</sup> which regulates prison staff, indicates that the INPE should have the personnel necessary for performing its functions; the personnel should be duly selected, educated, and trained. In addition, it notes that job positions should be held in keeping with a career progression. Whereas under Fujimori the PNP controlled most of the prisons, in 2000 the INPE began to recover its authority, by then controlling 53, and the PNP 31, of the country's 84 prisons. By 2006, the PNP was in charge of 29 prisons, and the INPE 55, although the PNP still controls some major prisons, such as Lurigancho, the largest in the country.

Including both technical and administrative areas, the INPE has a total of 4,742 workers which, taken as a whole, means one worker for every nine prisoners. The remuneration of the prison personnel ranges from 800 to 1,137 soles per month (about \$290 USD to \$350 USD), depending on the specific job. This sum is not much more than the minimum wage of 550 soles per month, which augments the risks of corruption inside and outside the prisons.

Yet among the most serious problems affecting Peru's institutional framework is the lack of a civil service regime and the existence of "parallel administrations" that are ab-

solutely dependent on the group holding political power at the time. Analysts note that the existence of mafia-type groups in the administration is an obstacle to giving absolute control of the prisons to the INPE.

The solutions to the sector's many problems tend to focus on the promise – not always carried out – of building more prisons, neglecting both the need to identify the causes of crime in order to prevent and punish it, and to rehabilitate the inmates in the prisons. This has been the response of the Toledo and García administrations. In addition to building some prison infrastructure, Alan García has proposed the privatization of the prisons and the use of electronic bracelets.

The critical situation of the Peruvian prison system has been well illustrated by recent events. The INPE had six directors from August 2006 to March 2010. A warden from the Castro Castro prison (in Lima) was assassinated due to vendettas of organized gangs. The candidate to succeed him as director of the INPE was accused of molesting his children. Subsequently, there was a riot at the prison in the city of Chachapoyas (Amazonas), and an instance of drug traffickers escaping in Abancay. Two weeks before completing his term, Minister of Justice Aurelio Pastor was virtually dismissed for having "ill-advised" President García as to whether to grant a pardon to the businessman Crousillat, an individual linked to the mafia operating under Vladimiro Montesinos who wanted to recover his ownership interest in a television station.

Table 2 – Prison Population in Peru, 1995-2009

1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
20,899	22,638	24,297	26,059	27,400	27,734	26,968	27,417	28,826	31,311	33,010	35,835	39,684	43,286

Source: INPE

These elements all point to a systemic crisis in the administration of justice in Peru, which has “undesired consequences” for citizen security and internal order, particularly in rural regions and in some high-crime pockets of the cities.

In 2006, the Special Commission to Study the National Plan for Comprehensive Reform of the Administration of Justice (CERIAJUS), the latest attempt to undertake a comprehensive reform of the justice system, recognized the Peruvian prison policies, “failure to carry out the constitutional mandate of rehabilitation, absence of a prison policy, and absence of a policy of less reliance on incarceration in the justice sector.”

Peru’s criminal justice system includes, in its history, the war with the Shining Path (1980-2000), in which very heavy-handed state counterinsurgency policies were adopted. In addition, a key objective of the actions by Montesinos and Fujimori from 1990 to 2000 was the penetration and corruption of the judiciary. Subsequently, however, during the democratic transition, an anti-corruption system was temporarily put in place that made it possible to dismantle, prosecute, and punish many members of the corrupt network of Vladimiro Montesinos.<sup>5</sup>

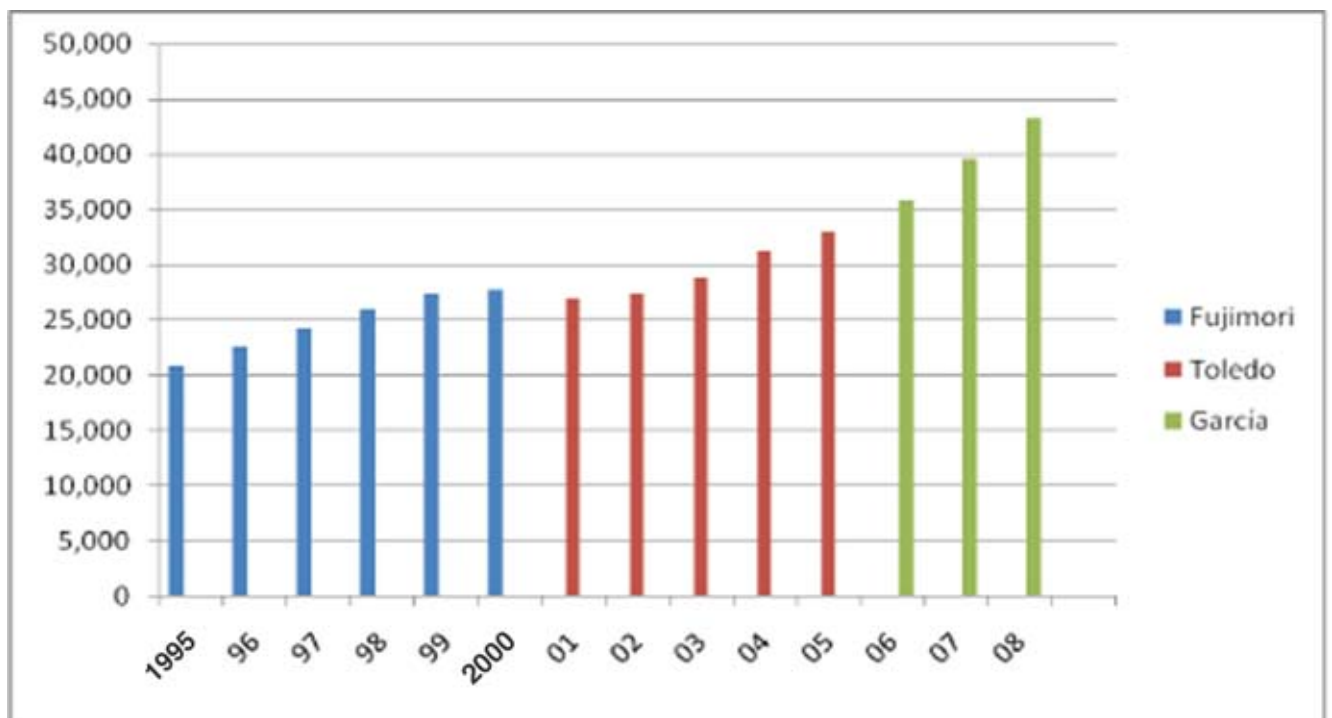
### The prison situation

In December 2009, despite the infrastructure only allowing for a capacity of 24,961 persons, Peru had a prison population of 44,735 persons, 94 percent of whom were male.<sup>6</sup> Prison overcrowding was clearly apparent. According to 2006 data, the overcrowding index at Lurigancho, the largest prison in Peru, was 607 percent.<sup>7</sup> At present, 23 percent of the prisoners are behind bars for drug-related offenses. The application of “criminalizing” policies has led to a demand for prison space in Peru.

The scant budgetary importance accorded the justice system – and the prisons in particular – by the Peruvian state is evident in the level of food allocation, which in 2009 was 4.50 soles daily per person (\$1.59 USD).<sup>8</sup>

In the last decade (2000-2010), Peru’s prison population showed a gradual increase. Whereas in 1995, during the Fujimori government, there were 84 inmates for every 100,000 persons in Peru, in 2000, at the beginning of the democratic transition period, there were 107 inmates per 100,000 population. In 2006, when Alan García’s term began, there were 132 inmates per 100,000 population.<sup>9</sup> According to the reports of the United Nations Latin American Institute for the Prevention of Crime and the Treatment

Graph 1 – Prison Population in Peru, 1995-2008



Source: INPE

of Offenders (ILANUD), Peru’s prison rate increased to 164 per 100,000 population in 2008.<sup>10</sup>

Table 2 and Graph 1 illustrate the prison population in Peru from a few years before and after the democratic transition.

In recent years in Peru there has been a clear increase in the reliance on imprisonment in response to a complex scenario in which crime, insecurity, and social upheaval have increased, all within the framework of economic austerity measures.

The growth in the prison population since 2003 corresponds to a period in which the Toledo administration tailored Peru’s position on drug policy to international demands in order to make it possible to continue negotiations on the free trade agreement (FTA) with the United States. This trend has continued during the administration of Alan García.

As for the condition of prisons in Peru, by way of example, we detail below the situation in one specific year, 2005.<sup>11</sup>

In terms of health, the country’s prisons are potential foci for any number of infectious diseases, particularly tuberculosis. Mental health problems, particularly those related to drug addiction, are not treated as they should be. Definitive figures on drug use in the prisons could not be obtained, but all the testimony, inside and outside the prisons, confirms the existence and proliferation of the problem, in addition to an extensive corruption network that includes the police.

**Persons arrested for illicit drug trafficking**

Although the relationship between drugs and crime is not always very clear, it is frequently assumed to be so. In recent years, it has been common in the media, and among

public officials and some scholars, to argue that 70 percent of the crimes committed in Peru are committed under the influence of drugs. Nonetheless, there are no sources or studies that support this assertion, for no one – neither the National Institute of Statistics and Informatics (INEI) or the private centers – systematizes the information from the police reports that are used in the more than 1,000 police stations across the country. Nor is the socioeconomic status of the accused recorded; for their first statement individuals are only asked questions about their personal information: name, age, domicile, and employment.

At present, 61 percent of the prison population in Peru is on trial and 39 percent have been convicted. These figures are similar to the average for Latin America. Although it is not possible to differentiate the cases of persons detained for illicit drug trafficking, these figures reflect a structural problem related to delays in the administration of criminal justice. In cases involving drug offenses, no criteria of selectivity and legal specificity are used to adequately distinguish the various elements of the chain of drug-related crime, which represent varying degrees of criminal liability. All of this also influences the conduct of the different criminal justice subsystems: police, judges, prosecutors, and prison personnel.

Various “bottlenecks” exist in the administration of justice in cases of drug-related offenses in Peru, i.e., those points at which the process slows down and becomes especially difficult.

A first bottleneck has to do with the traditional confusion on the part of regional police on the possession of drugs for use and for sale. Possession for personal use accounts for a considerable share of persons incarcerated.

Table 4 shows the number of police detentions related to drug offenses as recorded by the police authorities, from 1995 to 2008.<sup>12</sup>

Table 3 – Prison situation, 2005

Population	33,010 inmates
Overpopulation	62 percent
Expenditure per person per year	\$1,300 USD
Food	\$1.28 USD a day
Number of prisons	84 prisons: 53 INPE and 31 PNP
Water, electricity, and drainage services	89 percent in fair or poor condition
Medical treatment services	71 percent in fair or poor condition
Average growth of the prison population	12 to 13 percent annually
On trial / convicted	70.5 percent / 29.5 percent
Population in prison for drug-related offenses	7,853 inmates = 23.8 percent of total population
From five to ten years in prison	34.35 percent

Source: INPE

Table 4 – Drug-related police detentions

	1995	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
Operations	10,709	14,319	17,186	15,577	17,986	13,343	13,158	12,234	10,149	11,260	7,818	11,776	12,332
Large-scale trafficking	3,620	3,977	3,287	2,918	2,829	2,298	2,048	2,173	1,991	1,511	1,076	2,679	2,372
Micro-commerce					3,006	2,136	2,212	1,990	1,196	1,344	1,133	1,837	2,494
Use	6,876	10,043	13,603	12,288	12,151	8,909	8,898	8,071	6,962	8,405	5,609	7,260	7,466
Users as percentage of detainees	55	71	79	79	67.55	66.76	67.62	65.97	68.59	74.64	71.74	61.65	60.54

Source: Peruvian National Police (PNP)

As illustrated in this table, using information from the PNP, since 1997 over 60 percent of those arrested have been users. According to Article 296 of the Criminal Code currently in force, consumption is not punishable. Since the 2003 reform, possession of an amount for personal use is not punishable either. Therefore, though the law does not criminalize possession for personal use, in practice the police treat it as a crime.

According to the Center for Information and Education for Drug Abuse Prevention (CEDRO: Centro de Información y Educación para la Prevención del Abuso de Drogas), an entity that opposes any change aimed at making the current regime more flexible, “In Peru drug consumption is not criminalized. Nonetheless, when a person is found in possession of drugs, he is detained until there is verification as to whether he is a user or a trafficker; this evaluation is done based on the amount of drugs he had on his person, and his record.”

As indicated above, it appears there is nothing in official prison records that would make it possible to clearly distinguish among the various types of offense associated with drugs, but an interpretation of the figures provided by the Public Ministry indicates that of the criminal complaints processed in recent years, most are made up of the less serious drug-related offenses and micro-commerce.

According to the information available in the Public Ministry’s national registry of persons incarcerated, the judicial districts where drug-related offenses are the leading crime are El Callao (50.34 percent), home to the country’s principal port and airport, followed by the department of Junín, in the central highlands, through which drugs coming from the region of the Apurímac and Ene River Valley pass, and VRAE (17 percent). Drug offenses constitute the second largest category of offenses committed in numerous departments: Apurímac (16.94 percent), Ica (15.62 percent), Lambayeque (19.25 percent), and Cusco (19.39 percent) – all of which are areas through which drugs pass on their way to the coast or the borders. Drug-related of-

fenses are the third leading category of offense in the geographic area of northern Lima (18.15 percent) and in the department of Piura (19.46 percent).

The excessive number of cases of police preventive detention of potential drug users affects various fundamental principles and rights. In other words, police officials prefer to consider those who possess drugs to be potential traffickers, determining their legal situation only when they get to the police station, which can entail flagrant cases of unlawful detention. Countries such as Peru fail to meet the objectives of a prison policy that takes into account international human rights instruments, including Article 5(6) of the American Convention on Human Rights, which addresses the reform and social re-adaptation of convicts.

The problem of arbitrary detentions, and the resulting pre-trial detentions and overpopulation of the prisons, is out of control. Recently, Congress, the press, and public opinion have rejected re-establishing use and possession for use as drug-related offenses, as called for in a legislative proposal by the Ministry of Interior and various local mayors of Lima districts in April 2009.

A second bottleneck that poses a key problem for prison policy in Peru is the position taken by the Constitutional Court (Tribunal Constitucional) in relation to maintaining the powers of police detention for up to 15 days – the normal period is 24 hours – for drug-related offenses.<sup>13</sup>

In addition to the lack of clear definition of the scope of police authority, the PNP have expanded authority to carry out detentions. This illustrates the frequency with which abuses and violations of rights occur as a result of the national application of the strategies of the “war on drugs” in its Latin American version.

In its recent judgments, the Constitutional Court has been very clear in rejecting habeas corpus for drug-trafficking cases, but without distinguishing between cases involving members of complex organizations (cartels), for whom the

Table 5 – Drug trafficking cases handled by the Office of the Public Prosecutor

	2000	2001	2002	2003	2004	2005	2006	2007	2008
Drug-related macro-offenses	745	857	1,009	1,114	1,094	1,204	1,409	1,725	1,414
Drug-related micro-offenses	3,023	2,547	2,333	2,561	2,905	3,761	4,097	4,227	4,661

Source: INPE

restrictions are understood to apply, and the cases of individuals who are in a weak position and are easily replaceable in the illicit drug chain. This reflects an abdication of the function of upholding the rule of law, replacing it with an ill-conceived notion of public security.

The third bottleneck has to do with the prohibition of concessions and rights during the prison stage, mainly referring to Article 42 of the Peruvian Code of Prison Enforcement. Prison benefits in the Peruvian system are as follows: permission to leave prison, reduction in the sentence for work and education, semi-liberty, parole, and intimate visits, among others. Yet Article 47 of the same code prohibits benefits in cases involving drug-related offenses,<sup>14</sup> including parole (Article 53).

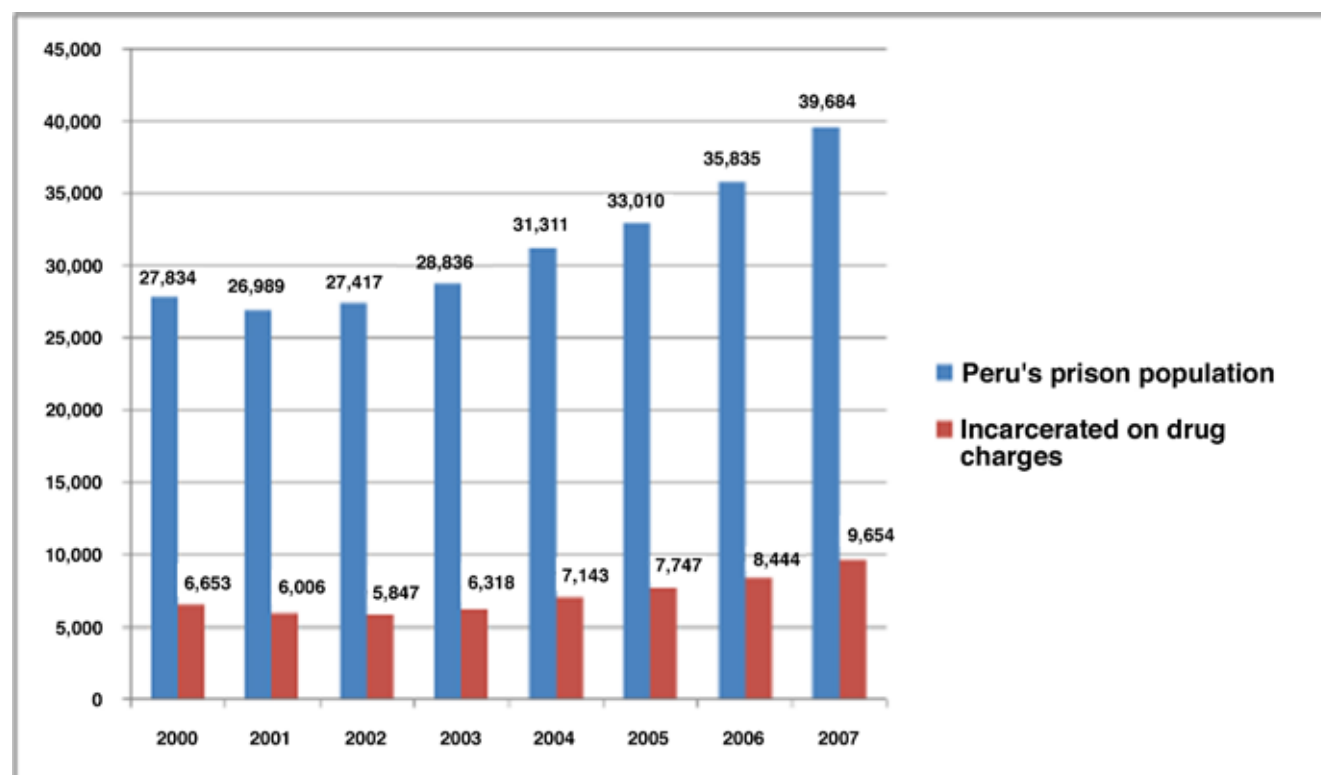
The case-law of the Peruvian Constitutional Court grants the legislator a margin of discretion when establishing or failing to establish prison benefits for a given type of conviction. In addition, it denies the fundamental right to the purpose of re-education, rehabilitation, and reintegration

of the convict to society in certain cases, and places greater emphasis on the result (reinsertion) than on the process (re-education) of re-socialization.

The Constitutional Court holds that while such benefits are individual rights to which one has a legitimate expectation provided for in the law, this does not mean they are constitutional rights. This generic restrictive measure, without filters or exceptions, reduces the possibility of rehabilitation and generates worse problems brought on by the lack of liberty. Moreover, the inequities experienced by prisoners behind bars for drug offenses in Peru is one of the main complaints, as reflected in the number of official notes, requests, and proposals that reach the Congress. This was also evident in the visits in 2009 and 2010 to various prisons in the city of Lima: Castro Castro, Sarita Colonia, Chorrillos, and the largest, Lurigancho.

Graph 2 shows the total number of prisoners overall and the total number of those locked up for drug-related offenses, both of which have clearly increased since 2003.

Graph 2 – Total prison population and those imprisoned for drugs



Source: INPE



Instituto de Defensa Legal IDL Lima, Perú, Courtesy of IDL

### **Female population in the prisons**

In 2006, of the 35,835 prisoners in all of the country's prisons, 2,531 were women. That same year, 66.38 percent of the total population of women in Peru's prisons was behind bars for drug-related offenses.<sup>15</sup> According to a report by the Office of the Human Rights Ombudsman, the last two decades have seen an increase in crime committed by women in general in Peru,<sup>16</sup> though it is still far less than the number of crimes committed by males. A study by CEDRO indicates that in the Chorrillos prison, of the 178 women inmates surveyed, one-third had sold drugs from their homes, a quarter was detained while travelling with drugs to Lima, and a quarter was detained at Lima airport.<sup>17</sup>

### **The figures of the Office of the Public Prosecutor**

As the figures of the PNP show, there has been an increased effort to detain persons for alleged drug offenses in recent years and that trend has become the most important cause of prosecution. According to the annual statistics of the Ministry of Interior on operations and detentions for up to 15 days for possession for use and/or sale, it is at the moment of detention that the officers of the PNP commit the most violations and infringements of the rights of persons involved in one way or another in such acts.

Table 5 illustrates the cases of drug offenses handled by the Office of the Public Prosecutor specializing in drug-related offenses.

Based on these figures, one can verify that there is a prevalence of micro-trafficking offenses over macro-trafficking,

of approximately 75 percent to 25 percent, respectively. Micro-trafficking is the offense that draws more of the attention and accounts for more of the excessive caseload handled by the officers of the administration of criminal justice in Peru.

Given the difficulties of obtaining sufficiently systematized information from the administration of justice and the judicial branch, we have had to limit ourselves to the information provided to us by the Office of the Public Prosecutor. Everything appears to indicate that not even important measures such as the Law on the Judicial Career Service in Peru (Law 29,277 of November 2006), which is aimed at professionalizing and modernizing the judicial career service, have succeeded in reducing the problem of lethargy in the administration of justice.

### **Conclusions**

The incidence of extended police detention and pre-trial detention throughout the criminal process for drug offenses is a specific problem that results in arbitrary acts (incarceration, delays in the administration of justice), when the various cases and corresponding responsibilities are not defined more precisely.

In addition, the process of complaint, indictment, and prosecution of drug offenses in Peru combined with the existence of a prison regime constantly operating on an emergency basis that is constantly expanding, and a system of disproportionate sentences that severely limits fundamental rights (freedom, due process, and other judicial guarantees), all generate a very close connection between drug offenses, lethargy in the administration of justice, and

overcrowding in the prisons.

In recent years in Peru, on average between 20 and 24 percent of the prison population were behind bars for drug-related offenses. In only about one-third of these cases is the prisoners' legal situation defined.

In the most common cases of drug-related offenses, the Peruvian authorities do not seek to apply the principle of proportionality in sentencing nor do they pursue measures other than prison, such as early release and community work.

The police do not implement corrective measures that would much improve their involvement in drug cases in general, and particularly in cases of possession for use and even in cases of micro-trafficking without aggravating factors. The PNP does not have very clear rules for its own involvement in either of these situations.

There is a major problem of institutional management in all of the official entities related to the administration of justice that has negative repercussions for the situation of the persons tried, convicted, and imprisoned in general. This is aggravated in specific cases, such as drug-related offenses.

There is no transparent system for management of the budget or of actions and plans for the Peruvian prison system. Nor is there visible information on the socioeconomic situation of the prisoners, according to the offense committed. The information that is available reveals dispersion and contradictions in the statistics. The procedures on access to information are frequently violated in all of the institutions of the criminal justice system. Nonetheless, as a result of the requests made repeatedly by the Centro de Investigación Drogas y Derechos Humanos (CIDDDH), we have succeeded in getting budget data from 2007 posted on the Internet ([www.inpe.gob.pe](http://www.inpe.gob.pe)).

Any structural solution to the problem of enforcing the drug laws and their impact on the prison system should include specific legal reforms, limits on police activity, and timely justice for the most numerous and least important cases in the chain of illicit conduct. The result should be a reasonable and humane prison system that fulfills its purpose of re-adaptation and that does not resort to threats to resolve the major social problems of health and poverty that beset the nation.

## NOTES

1 After much evasiveness and expressions of rejection on the part of the INPE in response to requests for information, a response was finally received from the Public Ministry. Subsequently, the Office of the Public Prosecutor sent the information requested on complaints involving drug offenses.

2 Up to 100 grams of PBC, 25 grams of HCl, and 20 grams of THC.

3 "Situación Carcelaria en el Perú," document produced by CEAS and APRODEH for the Regional Conference on the Prison Situation in the Andean Region, INREDH, January 2000.

4 Legislative decree 654, Code of Prison Enforcement and successive decrees and regulations.

5 <http://www.justiciaviva.org.pe>

6 [http://www2.inpe.gob.pe/portal/archivos/upload/menu/diciembre\\_2009.pdf](http://www2.inpe.gob.pe/portal/archivos/upload/menu/diciembre_2009.pdf). General office of Statistical Planning of the INPE. According to this same source, in July 2010 Peru's prison population was 45,012 persons.

7 Lecture by Rosa Mavila, President of the INPE, "Overcrowding index in the main prisons," December 2006, Office of Statistics of the INPE.

8 Presentation of the Bishops' Social Action Commission, CEAS, "Trabajo en Cárceles," [http://www.ceas.org.pe/recursos\\_publicaciones/Diptico\\_trabajoenlascarceles\\_2010.pdf](http://www.ceas.org.pe/recursos_publicaciones/Diptico_trabajoenlascarceles_2010.pdf)

9 Final Report, Multisectoral Commission in Charge of Evaluating the Prison System and Proposed Solution, 2006, p. 5.

10 Elias Carranza (ed.), *Cárcel y Justicia Penal en América Latina y el Caribe*, ILANUD, 2009.

11 Report by CEAS, Office of the Human Rights Ombudsman, "La Realidad del Sistema Penitenciario en el Perú. Diagnóstico, Limitaciones y Retos," January 2006.

12 Assembled by the author.

13 Article 2(24)(f) of the Peruvian Constitution states: "No one may be detained other than by written and reasoned order of the judge or by the police authorities in the case of flagrante delicto. The detainee must be brought before the corresponding court within 24 hours or within the required travel time. These time periods do not apply to cases of terrorism, espionage, and illicit drug trafficking. In those cases, the police authorities may effectuate the preventive detention of the persons allegedly implicated for no more than 15 calendar days. They are accountable to the Public Ministry and the judge, who may assume jurisdiction prior to the lapsing of that term."

14 Article 47: "The benefit of reduction of the sentence for work or education is not applicable to the agents of the offenses defined at Articles 296, 297, 301, 30, and 319 to 323 of the Criminal Code."

15 Ibero-American Federation of Ombudsman, Report on Human Rights: "Sistema Penitenciario," 2007, p. 331.

16 Report Office of the Human Rights Ombudsman, CEAS, p. 30.

17 CEDRO, "El Problema de las Drogas en el Perú," June 2006, p. 130.



## Prisons and drugs in Uruguay

Giorgina Garibotto

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### Introduction

Much like other Southern Cone countries, Uruguay has historically served as a transit country for controlled substances on their way to Europe. An important change in the use of controlled substances, associated with their availability on the drug market, has taken place over the last 15 years in southern Latin America, especially in Argentina, Chile, and Uruguay. As an indirect effect of international interdiction policies, and as a result of other factors that are yet to be well understood, laboratories producing cocaine hydrochloride began to appear in the Southern Cone countries, and 'paco' began to appear in drug markets in these countries.<sup>1</sup> Paco is a much cheaper product than cocaine, with a greater turnover and lower quality, but with strong psychoactive effects; its sudden availability stimulated debate across the region on public policies related to drugs.

In Uruguay, the law does not criminalize drug use or possession for personal consumption. In recent years, Uruguayan national drug policies have focused on specific directives, for both police and judicial personnel, aimed at prioritizing the repression of medium and large traffickers and not at small-scale drug dealers.

The impact of these directives in terms of drug policies cannot yet be fully evaluated. Nonetheless, a prison crisis persists in Uruguay in which ever larger numbers of youths, and other vulnerable sectors of society, situated at the lowest levels of the drug-trafficking chain are inside the prison system.

This country study examines the scope of the legislation, the policies developed, and how the normative and policy frameworks find expression in Uruguay's prison system, with a special focus on the population incarcerated for drug-related offenses.

### History of legislation on narcotic drugs

The first provision to regulate drugs in Uruguay was the 1934 Criminal Code. "Commerce in coca, opium, or their derivatives" was listed among the crimes against public health punishable with a prison sentence of six months to five years.

Law 9,692 of September 1937 was aimed at adapting domestic legislation to the commitments acquired internationally, especially the International Opium Convention, signed at The Hague in January 1912 and during the Conference for Limiting the Manufacturing of Narcotic Drugs, held in Geneva in July 1931. In 1974, the Council of State approved Decree-law 14,294 of October 1931, which repealed, among others, Law 9,692. Subsequently, in October 1998, Law 17,016 was passed; it replaced several provisions of Decree-law 14,294 and incorporated five new chapters. As a result, Decree-law 14,294 remained in force as amended by Law 17,016, which will be the focus of this analysis.

In recent years other legal provisions have been adopted that have introduced specific reforms, as well as important Central Bank legislation, referring mainly to money laundering. Traditionally, it has been understood that the legal interest preserved by the specific criminal conduct defined by drug laws is limited exclusively to public health. Nonetheless, this reform, which includes provisions on money laundering, also adds the "economic order of the State" as a legal interest protected by this legislation.

Initially drugs laws only dealt with narcotic and psychoactive substances (*sustancias estupefacientes y psicotrópicas*), but Law 17,016 also included "chemical precursors or other chemical products." With respect to narcotic and psychoactive substances, Uruguayan legislation has opted not to define them and instead refers to the schedules contained in the 1961 and 1971 United Nations conventions.

Article 30 of the current Law 17,016 establishes that "one who, without legal authorization, produces in any manner raw materials or substances, as the case may be, capable of producing psychological or physical dependency ... shall be punished by 20 months to 10 years in prison." This provision is problematic because it does not consider the case of someone who engages in such conduct for personal use. This has led to major problems in judicial practice, in which the judge enjoys absolute freedom to form his or her conviction. Yet this article should be interpreted in conjunction with and in the context of other articles of the same law, such as Article 31, which decriminalizes one who "has in his or her possession a reasonable quantity, exclusively for his or her personal consumption."

The unrestricted application of Article 30 leads to the contradictory situation of not criminalizing a person who possesses a reasonable quantity because he or she bought

### History of drug legislation in Uruguay

- **1934** – Criminal Code, offenses against public health, article on “Trade in coca, opium, or their derivatives.”
- **1937** – Law 9,692 issued to bring the domestic legislation in line with the commitments acquired internationally.
- **1974** – Decree-law 14,294, which repealed Law 9,692.
- **1998** – Law 17,016, which replaced several provisions of Decree-law 14,294 and incorporated five new chapters. This is the law currently in force.
- **2004** – Law 17,835 on the “System for the prevention and control of asset laundering and the financing of terrorism.”

it, but criminalizing a person who has a reasonable quantity in his or her possession because he or she produced it (where that production is in preparation for use that is not criminalized). Article 31 also addresses illegal or illicit drug trafficking, punishing the massive movement of such substances, as well as the stages prior to transit.

The penalties for drug-related offenses range between a minimum of 12 to 20 months and a maximum of four to 18 years in prison. In this regard, the 1998 amendment to Law 14,294 was very important because until then the minimum penalties did not provide for the prosecution of these offenses without imprisonment, nor did it grant the benefit of probation or conditional release. Now, in contrast, as the minimums are less than 24 months of prison, such offenses do not necessarily result in jail time, and provisional liberty is allowed, as are alternative sentences.

The incorporation of articles regarding asset laundering into the legislation introduced the legal framework for distinguishing among the different levels of trafficking. Law 17,835 of 2004 proposed to target large-scale actions and to stiffen the penalties for those who direct the chain of production and commercialization of drugs. In addition, it requires that the offense be punished by imprisonment.

### Institutional structure of Uruguay

The National Drug Board (JND: La Junta Nacional de Drogas) was created by Executive Decree No. 463/988 in July 1988 “for the purpose of waging an effective struggle against drug trafficking and the abusive use of drugs.” It is comprised of the deputy secretaries of the following permanent members: Ministry of Interior, Ministry of Foreign

Relations, Ministry of Economy and Finance, Ministry of National Defense, Ministry of Education and Culture, Ministry of Labor and Social Security, Ministry of Public Health, Ministry of Tourism and Sports, and Ministry of Social Development. It is chaired by the Deputy Secretary of the Presidency of the Republic, but its meetings are convened and its activities coordinated by the Secretary General of the National Secretariat on Drugs.

The JND’s main responsibilities include implementing directives related to national drug policy in order to prevent problematic drug consumption and treat drug addiction, and to repress the trafficking of drugs and precursor chemicals, money laundering, and related offenses. The JND has several advisory committees on the issues of security, preventive education, assistance, and rehabilitation, and on precursors, chemical products and controlled substances.

All the country’s drug policies are defined in the National Drug Board which, as a supra-ministerial structure directly under the president of the republic, enjoys wide recognition by the cabinet authorities. In addition, as it brings together many ministries, it makes possible a comprehensive approach to drug policy. Yet one of its main difficulties is that it depends on the budget allocation of each ministry to actions related to drug policy. One paradigmatic example is the health system: While it participates in and understands the approach required to address problematic consumption and prevention strategies, it never budgets enough to properly prioritize these matters.

In addition, in 2005 the public function of the Parliamentary Prison Commissioner (Comisionado Parlamentario Penitenciario), who does not participate in the JND, was created as a strategy to respond to Uruguay’s prison emergency.

### The prison situation and offenses related to the drug law

The fact that use and possession for use are not punished in Uruguay has made it possible for harm reduction measures to be incorporated into demand reduction strategies for the past ten years. The adoption of this approach by the Uruguayan government has been very significant internationally insofar as it expands the array of demand reduction strategies without presupposing that harm reduction is at odds with abstaining from use. Quite simply, it assumes the possibility of adopting different strategies for different consumption situations.

In the framework of the national policies, since the previous administration (2005-2009), a major effort has been underway on specific directives, for both police and judicial personnel, aimed at prioritizing the repression of medium and large-scale traffickers, and not focusing energies on small-scale drug dealers.

Uruguay has 29 prisons in all. Of these, 20 are departmental prisons and 8 are central prisons, under the authority of the National Directorate of Prisons, Penitentiaries, and Centers of Recovery; there is also one National Rehabilitation Center that serves as an independent implementing unit. Overcrowding in 2009 was 138 percent. In 2010, in the context of a new administration, the budget for the Ministry of Interior, and hence for the National Prison System, doubled. The doubling of that budget has been announced by the authorities and a large part of it will be earmarked for improving and shoring up the prison system.

Of the country's total prison population, 11 percent are behind bars for drug offenses. Unfortunately, no annual series corresponding to that information is available. It is therefore not possible to estimate how the prison population behind bars for drug-related offenses has evolved, so as to be able to reliably gauge the impact of the current policies that focus police operations primarily on medium and large-scale drug trafficking, or to gauge the scant use of alternative sentences. Yet the data does show that a larger percentage of women prisoners are behind bars for drug-related crimes, rising to 15 percent for 2007 (the last year for which this statistic is available).

At present, priority is being accorded to the prison system as a matter of state policy. In the wake of the successive assessments of the humanitarian emergency in the prisons, there has been a significant increase in the levels of international cooperation available to address this problem.

Some data that illustrate the current prison situation are:

- 60 percent of all prisoners are recidivists;

- 65.3 percent are being held in pre-trial detention, with no final verdict; and
- therefore, only 34.7 percent have been convicted.

*Persons prosecuted for violations of the drug law* – In Uruguay, the JND has systematized information going back to 2006 (see Table 3).

In these police operations, as will be seen below, a large percentage of the cases involve seizures of less than ten grams of any substance. Nonetheless, the resulting judgments do not appear to reflect this situation because the percentage of persons prosecuted without incarceration is very low.

As shown in Table 4, 72.3 percent of the persons involved in the operations range in age from 15 to 35 years, consistent with the profile of ages in the prison population. Also noteworthy is the number of children involved in the operations, which means that minors were present at the moment the police arrived to conduct a search. Often these minors, when not under the custody of another relative, end up in a state caretaker institution, while the adult in question with whom he or she was found during the search resolves their legal situation.

The vast majority of prisoners – 94.2 percent – are of Uruguayan nationality. The prisoners from other Latin American countries account for only 3.5 percent, and the numbers are even lower for persons from other parts of the world.

Some 7,883 persons were involved in a total of 3,371 police

Table 1 – Population in prison nationwide by legal status and sex

Year	On trial	Convicted	Men	Women	First-time	Recidivists	Total
2008 (September)	5,033	2,847	7,303	577	3,158	4,722	7,880
2009 (October)	5,520	2,930	7,824	626	3,453	4,997	8,450

Source: Statistics Division – Ministry of Interior

Table 2 – Persons in prison and on trial for violations of the law on narcotic drugs and asset laundering; partial data as of December 28, 2009

Year	Total prisoners	Males on trial	Females on trial	Total on trial
2003	1,849	253	46	299
2004	1,594	234	95	329
2005	1,248	293	70	363
2006	1,566	344	122	466
2007	2,177	434	172	606
2008	2,374	503	197	700
2009	1,592	492	203	695

Source: JND, Presidency of the Republic

Table 3 – Persons involved in drug-related police operations

Year	All persons	All persons prosecuted and incarcerated	Percentage prosecuted and incarcerated	Persons prosecuted but not incarcerated	Percentage prosecuted but not incarcerated
2006	1,601	447	27.9	21	1.3
2007	2,211	542	24.5	66	3.0
2008	2,406	624	25.9	64	2.7
2009	1,647	662	40.2	40	2.4
Total	7,883	2,275	28.9	192	2.4

Source: Compiled by the author, based on data from JND

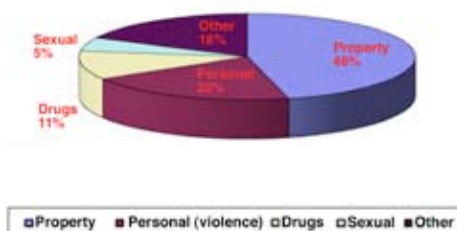
operations carried out from 2006 to 2009. Of these, 4,649 were subsequently released.

*Substances seized* – Table 5 details the substances seized, by amount, in each of the operations.

As can be observed, for all the substances, the largest share of operations are those in which seizures amount to less than 10 grams or units of the substance in question. While the political guidelines prioritize the actions directed against the medium and large-scale drug-traffickers, most

Graph 1

Imprisoned population by type of offense committed



Source: Parliamentary Commissioner, Legislative Branch, January-June 2009

Table 4 – Ages of persons involved in the operations

Age in years	Persons	Percentage
Under 10	20	0.3
10 to 14	93	1.2
15 to 19	1,408	17.9
20 to 24	1,761	22.3
25 to 29	1,418	18.0
30 to 34	1,109	14.1
35 to 39	672	8.5
40 to 44	430	5.5
Over 45	835	10.6
No data on age	137	1.8
Total	7,883	100

Source: Compiled by author, based on data from JND

of the operations involve the possession of substances in sums close to the limit of the definition of what could be considered possession for personal use. And where they do involve trafficking, it is at the street retail level.

The fact that there may have been 681 operations that resulted in seizures of less than 10 grams of marijuana and 63 that seized just a few marijuana plants makes no sense in terms of the use of police and judicial resources. In addition, this represents a violation of users' rights to have minimal doses for their own use. In other words, an inconsistency exists between lawful possession for personal use and police arrests. On top of this, many of the persons detained in these police operations have been prosecuted and incarcerated, calling into question the effective implementation of the drug directives and policies designed in Uruguay in the last five years. Persons prosecuted for less than 10 grams of any substance should be candidates for alternative sentences, and by no means should they be among the ranks of those locked up in high-security prisons.

It is true that the substances, even in small amounts, may have been seized along with other substances in larger amounts. Yet it is significant that the many operations that have involved minimal quantities of substances account for such a large percentage of the total number of persons prosecuted and incarcerated (2,275) as a result of these police actions.

The case of cocaine paste (PBC) merits special attention, for while there are specific directives to target the outlets where this substance is sold, in 258 cases the amount of cocaine paste seized was two grams or less. This raises the question of whether, in effect, the traffickers of that substance are being detained or whether the persons being arrested are the most vulnerable users.

### The faces of persons behind bars for drug offenses

As part of this research we interviewed four people behind bars for drug-related crimes, three men and one woman with different levels of education: Two have nine years of formal schooling while the other two never finished pri-

Table 5 – Substances and amounts seized

<b>Marijuana</b>		
Grams	Operations	Percentage
0 to 9	681	43.3
10 to 49	434	27.6
50 to 99	118	7.5
100 to 499	156	9.9
500 to 999	60	3.8
1,000 to 1,999	77	4.9
2,000 to 2,999	19	1.2
3,000 to 3,999	10	0.6
4,000 to 4,999	6	0.4
5,000 to 9,999	13	0.8
Total	1,574	100.0
<b>Coca leaf</b>		
Grams	Operations	Percentage
100 to 499	4	40.0
500 to 999	3	30.0
1,000 to 1,999	3	30.0
Total	10	100.0
<b>Cocaine paste</b>		
Grams	Operations	Percentage
0 to 9	540	55.2
10 to 49	276	28.2
50 to 99	30	3.1
100 to 499	43	4.4
500 to 999	16	1.6
1,000 to 1,999	45	4.6
2,000 to 2,999	9	0.9
3,000 to 3,999	8	0.8
4,000 to 4,999	1	0.1
5,000 to 9,999	11	1.1
Total	979	100.0

mary school. Their ages range from 21 to 31 years; all are Uruguayan nationals. Two are of lower class socioeconomic background, and two are lower middle class. Three of them are heads of household whose incomes revolve around legal activities (employment as a cook, independent work as a seamstress, or menial jobs in the informal sector) or illicit activities (stealing). Only one of the four had a formal-sector job with social security benefits. Their family ties are weak. Three of these persons have children; accordingly incarceration takes a greater toll on them. They are removed from their children's day-to-day lives, and concerned about the impact their incarceration and separation could have on their children. *"My little girl has not been doing too well in school since I went down ... strange, she's violent."* Not all of them have the same association with drugs (though all are or were users) and the variety of offenses with which they were charged reflects the variety of situations and realities that can be found in the country's

<b>Cocaine (salts)</b>		
Grams	Operations	Percentage
0 to 9	176	35.3
10 to 49	87	17.4
50 to 99	28	5.6
100 to 499	43	8.6
500 to 999	28	5.6
1,000 to 1,999	53	10.6
2,000 to 2,999	31	6.2
3,000 to 3,999	30	6.0
4,000 to 4,999	9	1.8
5,000 to 9,999	14	2.8
Total	499	100.0
<b>Cannabis plant</b>		
Unidades	Operations	Percentage
0 to 9	63	87.5
10 to 49	8	11.1
50 to 99	1	1.4
Total	72	100.0
<b>MDMA (ecstasy)</b>		
Unidades	Operations	Percentage
10 to 49	4	57.1
100 to 499	2	28.6
1,000 to 1,999	1	14.3
Total	7	100.0

Source: Compiled by author, based on data from JND

different prisons. The persons interviewed agreed that it was during adolescence that they began to use drugs with their friends. *"It all began years ago; I first tried drugs in adolescence. I began with marijuana, one thing led to the next, and I ended up with cocaine paste."*

*Experience in prison* – Three of the persons interviewed did not complain specifically about the conditions of their confinement. One of them said she had suffered torture or beatings by the police, guards, and fellow prisoners. Part of the experience of imprisonment consists of getting along with the prevailing codes. Accordingly, the prisoners incarcerated for conduct related to the production and sale of drugs must pay certain prices, like a "toll," to be able to walk in certain areas. They may receive special demands from their fellow prisoners because it is thought they have money, contacts, and/or opportunities for bringing in drugs and other items. It is essential to make oneself known or to have contacts in the prison who know your situation; you want to make it known that you are a user without any money and not a trafficker, to avoid certain types of situations and confrontations. Some of the worst experiences in prison have to do with some violent episodes that result in confrontation and death. Conditions are aggravated by overcrowding. For example, one of the

persons interviewed shares a cell with a capacity for three with seven other men.

One of the interviewees stated: *“I never opposed the police, but I came to see the injustices committed here inside by the officials against the prisoners, even though no one says anything ... and the prisoner is a violent person. And they end up inciting terrible fights, stabbings in the patio or they hold the guard against the bars and stab him. And it happens every day because they [the police] contribute to this whole climate of tension.”*

The opportunity to participate in organized activities makes confinement easier. Women, for example, study, work, and exercise. Men, on the other hand, have fewer opportunities to participate in committees or study. *“I signed up for the secondary school, but it appears that there’s a limited number of places, and I wasn’t chosen. Here in prison, you don’t learn anything; being a prisoner here, and you walk out even worse.”*

Regarding the legal situation of the persons interviewed, two of them have not been sentenced, but have nevertheless been in prison for five months and one year, respectively. These cases reflect the situation of thousands of prisoners who are awaiting trial. The work of the defense counsel *“leaves a great deal to be desired,”* according to one of the interviewees. He was only able to talk with a lawyer once, and after a time the lawyer retired. The public defender who replaced him as counsel has not had any contact with him. It is considered better to have one’s own lawyer, but not many of them can afford it.

A 21-year-old man has been in prison for 15 months. Previously he worked, studied, and lived with his family – without any criminal record – in a middle-class neighborhood in Montevideo. This young man was arrested for producing and selling drugs and must serve a sentence of two years and four months. He has used marijuana for years; he raises plants and garden vegetables, among which he was growing seven marijuana plants. His crime was to sell marijuana to acquaintances, which he claims is an occasional activity to earn enough money to go to the beach for vacation.

*“I didn’t have the plants to produce for trafficking. I came to have them because I like plants. When I went down I explained this to the trial judge, and they didn’t take it into ac-*

*count. I keep lots of plants in my house; I like to grow plants and this wasn’t taken into account. And I am accused under laws of presumption of production.”* As a result of a complaint, the police went to his home with a search warrant and found less than ten grams of marijuana, plants, and marijuana seeds. His father was also arrested and incarcerated for eight months for presumption of production. Both were sent to the prison known as Penal de Libertad, Uruguay’s maximum security prison, apparently simply because there was space there, with no consideration that it was their first arrest and they had no prior record.

Incarceration led to a breakdown in his personal and family life. His sister left the home and emigrated, and as the house was empty, it was burglarized and looted. His father, who was about to retire, lost everything. *“I don’t consider myself a criminal; I am here for having told the truth, and I’m a fool for having exposed myself so much with the question of the marijuana... When they put me on trial I couldn’t believe it. I thought they were going to have me do community service, or give me house arrest. I was seeking an alternative sentence, I never committed a crime; my family has no criminal record. We always pay the electricity bill, the water bill, our taxes, everything. And when they put me on trial, they sent me to the Penal de Libertad prison.... I thought they were going to put me in the CNR [National Center for Rehabilitation] or something like that.”*

One has to wonder whether the sentence this young man received is proportional to and appropriate for the crime committed. Cases such as this help to overburden the prison system without any clear justification.

A 28-year-old man, of lower middle class background, is addicted to cocaine paste. *“I ended up here as a user. While the authorities thought I sold because I used a large amount, one can perfectly well consume it, even more.... In addition, cocaine paste is highly addictive. If you have another dose, you keep going. There’s no limit, and you never want to stop.”* He says that *“there are cases of people who had less than they caught me with who are here and they’re people who everyone knows don’t sell. What you see here nowadays are a lot of people who are in for drugs because they’re users, daily, two, three times a day. The weakest links. And then, to get people not to take drugs, they attack the users, but there are millions of outlets that the people know about. And nonetheless, they catch any neighbor’s son, they catch you smoking, and you end up here.”*

Table 6 – Seizures of up to 2 grams of substances

	Substances							Total
	Marijuana	Cocaine paste	Cocaine	Cannabis plant	Cannabis seeds	LSD	Other drugs	
Seizures of up to 2 grams	368	258	109	34	7	3	4	861

Source: Compiled by author, based on data from JND

This case is more complex because the interviewee had outstanding robbery charges. As he tells it, from the age of 17 he has been stealing (with periods of rehabilitation and legal work). This opened up another chapter of his life that he emphasizes, especially since he became a user of cocaine paste: the direct association between drug use and stealing.

*“I began using drugs, I used marijuana and cocaine, and I was a relatively normal person, in the sense that I worked and went to school. But once on cocaine paste, you stop being responsible. It is very difficult for an addict to hold a steady job, because one day he’s going to fail to show up, or he’s spun out and tired. I’ve worked while an addict, but after a month and a half I lost it; I could not hold down the job. You can’t work and be an addict; most go after easy money by stealing.”*

This person is in prison for selling drugs, when his real crime was systematic theft. In a way, the system fulfills its purpose by imposing a sentence on him, yet the cause is blurred and other cases are neglected. What measures would be more appropriate for these youths, who commit other crimes due to their addictions? Is prison the appropriate response? How might a continuation of this approach affect the prison situation in Uruguay? What is the impact on their opportunities for rehabilitation?

*“Even the healthiest kid can get into the circle of trying to get money for drugs for his own use. Either you steal something or you sell something stolen and it leads to you do things that you probably never did.”*

A 30-year-old woman who has four children, and a more dramatic, since in her life *“it’s me and my children, no one else.”* Her confinement led to her separation from those who, for the last 11 years, have been *“my reason for being”* and her strongest affective relationship. At the same time, her children were separated from one another (two stayed under the guardianship of the father, and the other two under the care of an aunt because they have a different father); the two oldest children spend practically all day in the streets.

She is in prison for being at the same place where a police operation was being carried out. As she tells it, she was visiting, was innocent, and had no money or drugs. *“I’m like this [she cries during the interview] because it’s unfair and not being able to show it because you have no money, it’s horrible.... They didn’t find anything. They didn’t even search me. They said ‘There’s nothing here, what do we do?’ ‘Now there is,’ he said. ‘Look.’ And he took it out, from above the pocket, and I cried because the judge was going to believe him. Desperate, I put it on top of the trunk. In the house supposedly they sell, but there was nothing, and the person prosecuted is me, but I don’t live in that house.”*

Cases such as this give rise to doubts about the guarantees

or lack thereof in police operations, and therefore, the vulnerability of persons and their rights. *“The attorney tells you that you should say yes, to get a lighter sentence. They tell you that it’s better to say you’re the perpetrator; that you are the person, to tell the truth, that you do it to feed your kids. If it were true I would say so, but it’s not.”*

## Conclusions

In contrast to other Latin American countries, Uruguay has relatively good information systems regarding the prison situation. While Uruguay’s legislation has incorporated the leading international conventions, it has reserved areas that guarantee its independence in some aspects, mainly in terms of how stiff the penalties are.

The budget of the national prison system has been shored up in recent years. Nonetheless, overcrowding and the vulnerability of the population in poverty persist.

The judicial system is one of the weakest points of the prison system, especially due to the delays, the scant use of alternative sentences and the abuse of pre-trial detention.

The percentage of the population incarcerated for drug-related offenses (11 percent) is low compared to other crimes against property and against persons. The number of persons prosecuted and imprisoned and the persistence of police operations with seizures of minimal amounts of substances suggest that either the current policy directives have yet to be reflected in the quantitative data, or there are problems that make it difficult for them to be translated into police and judicial practice.

The aforementioned cases provide a glimpse of the situation of a prison population who represent the weakest links in the chain, and who are the most vulnerable to police operations. Their plight suggests the importance of re-examining the actual reach of drug policies and the consistency of their implementation in both the judicial and the police spheres.

## NOTES

1 Paco is similar in appearance and effects to cocaine paste (PBC) – a substance obtained halfway through the process of producing cocaine hydrochloride – and also similar to cocaine base and crack, substances that have different definitions depending on whether it is a produce of cooked cocaine HCL or created from a previous stage in the process.

## Conclusions and Recommendations

Depriving an individual of his or her liberty is among a state's most formidable powers. The way this power to imprison is exercised – balancing the obligation to ensure public safety with respect for civil and human rights – is of enormous significance. Incarcerated individuals and their families are obviously affected directly. But the workings of the criminal justice system also reflect and affect society as a whole. A fair system upholds respect for the rule of law and the legitimacy of the state. An unfair system – rigged against the poor and the vulnerable – contravenes basic human rights obligations and erodes respect for the law. The so-called “war on drugs” has had an enormous impact on the functioning of national justice systems and prisons in Latin America.

In recent decades, the realm of drug control has increasingly become a matter of criminal law around the world. Led by influential governments such as the United States, the global drug control system – embodied in three United Nations conventions – came to emphasize prohibition and criminal sanctions for many aspects of illicit involvement with controlled drugs. In Latin America, numerous governments adopted exceptionally harsh drug laws, featuring stiff prison sentences.

The global drug control system's increasing emphasis on criminal sanctions has led to unprecedented increases in the number of people imprisoned for drug offenses, including in Latin America. The criminalization of drug policy was meant to protect public health and safety by curbing illicit drug production, trafficking and consumption. These goals have not been achieved. To the contrary, despite the enactment of harsh drug legislation and the incarceration

boom that has ensued in Latin America, the illicit drug industry is flourishing like never before.

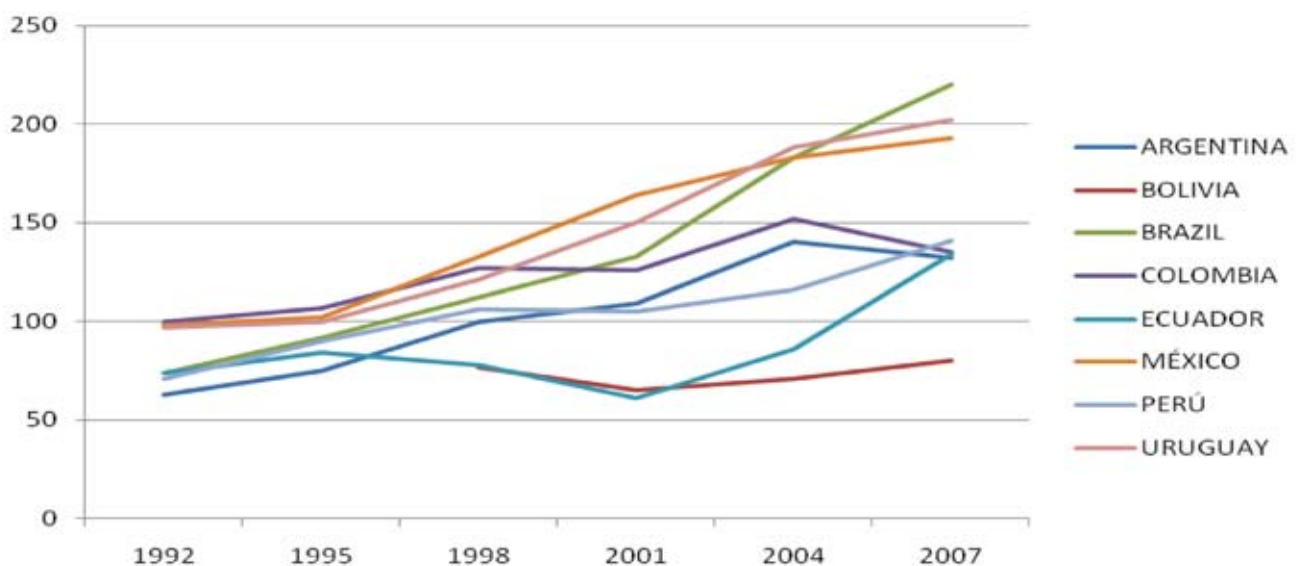
The country studies assembled here have demonstrated that harsh drug laws have not merely proven ineffective in stemming the drug trade. Increased reliance on criminal sanctions for purposes of drug control has generated enormous negative consequences, including over-burdened courts and prisons and the suffering of tens of thousands of people put behind bars for low-level drug offenses or simply for drug possession. The fact that the weight of the criminal law falls most heavily on those at the lowest ranks of the drug trade speaks to both the injustice and the ineffectiveness of the current approach.

The current approach is unfair, as the smallest players in the drug trade – including those charged with mere possession of drugs – face penalties grossly disproportionate to the gravity of their offenses. The current approach is also ineffective, since the severe punishment and incapacitation of so many low-level participants has no impact on the functioning of the drug market; low-level participants are quickly and easily replaced by newcomers, and if and when the newcomers are jailed, fresh recruits are abundant.

The twelve main conclusions drawn from these country studies are described below. The conclusions leave no doubt as to whom are the primary victims of this “war on drugs,” and should spur an urgent debate on ensuring a more balanced and humane approach to reduce the harms associated with illicit drug production, distribution and consumption.

Naturally there are gradations and variations among the eight countries studied, given their own particular roles within the drug markets, distinct internal political dynamics, and varying connections and vulnerabilities to inter-

Graph 1. Prison population rate (per 100,000 national population), 1992-1997



Source: Authors' elaboration, based on data from International Centre for Prison Studies, King's College London



national political pressures. To be sure, much remains unknown about the extent to which drug laws have fueled incarceration rates and exacerbated prison overcrowding in the region; clearly it has been one of the key contributing factors, but official data on these subjects is sorely lacking and must be improved. Still, as a first systematic attempt to shed light on the repercussions in Latin America of this “unintended consequence” of global drug policies, we hope that this study helps sound the alarm for reforms.

## CONCLUSIONS

### Conclusion I

• **Latin American countries have not always had such harsh drug laws. The adoption of the laws now in place began within the past four decades, first under authoritarian regimes in some countries and then during a period of intense international and U.S. government pressure to stiffen penalties for drug offenses.**

In some of the countries studied, such as Argentina and Brazil, drug legislation characterized by harsh criminal sanctions was adopted under authoritarian regimes. In most countries, new drug legislation was based on external models, and was implemented under international or bilateral pressure, using a variety of instruments for imposing conditions. These instruments include the United Nations conventions, specifically the Single Convention on Narcotic Drugs of 1961, and its Protocol of 1972; the Convention

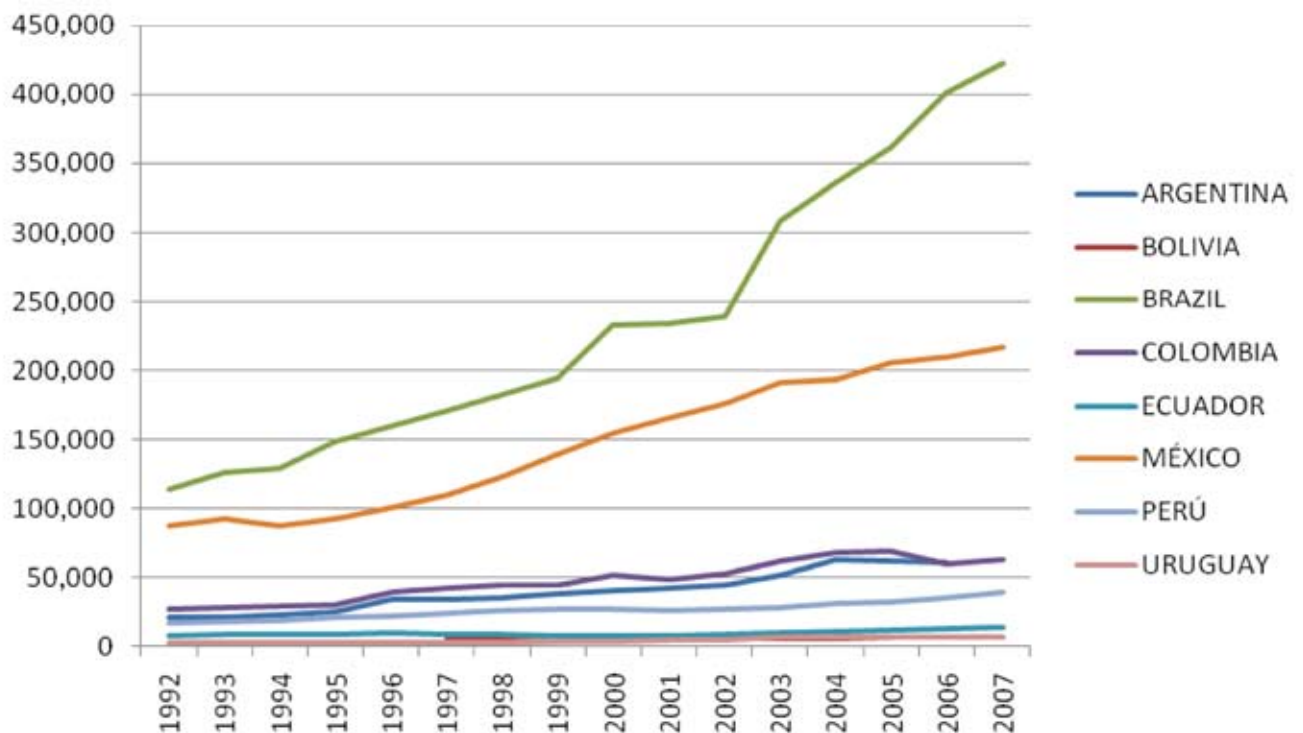
on Psychotropic Substances of 1971; and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. This treaty obligated the countries that ratified it to adapt their domestic legislation so as to criminalize all acts – except for use – related to the illicit market in controlled substances. This led to various changes in the existing body of laws, to amendments and decrees, as well as to new statutes that date from those years.

The justification for having a separate body of laws for drugs is based on the presumption that illicit drug activities constitute crimes that attack universally held legal principles and interests. According to the dominant perception and as codified in the United Nations conventions, the nature and magnitude of the business is such that it cannot be addressed with the same mechanisms used for other criminal offenses. In Latin America, the existing legislation often goes beyond the obligations assumed in the international treaties.

Bilaterally or regionally, as in the case of the Andean region, the export of the U.S. government’s “war on drugs” has contributed significantly to the wave of harsh laws that were adopted in the 1980s and 1990s. The U.S. government used economic assistance and access to certain trade benefits to pressure Latin American countries, imposing its agenda, methodology, and strategies.

One extreme case is **Ecuador**, a country that in large part due to U.S. pressure has one of the harshest drug laws in all of Latin America. Apparently, U.S. bilateral agreements in

Graph 2. Overall Prison Population Trends, 1992-2010



Source: Authors’ elaboration based on data from: E. Carranza, *Cárcel y Justicia Penal*, 2003; TNI-WOLA reports; and International Centre for Prison Studies, King’s College London

the area of counter-drug cooperation between the United States and Ecuador included arrest quotas for drug offenses. In other words, in order to carry out the agreement, Ecuador had to show a larger number of persons charged and prosecuted for drug offenses. Another example is **Bolivia**, whose Law 1008 was reportedly drafted by U.S. government officials, apparently originally in English, a language foreign to the Bolivian legislature.

## Conclusion II

**• Drug legislation and the manner in which it is applied in Latin America results in disproportionately severe penalties for those charged with drug offenses.**

In recent decades, punitive legislation has been adopted in the region, along with greater reliance on criminal law, to address the production, trafficking and consumption of illicit drugs. This trend has occurred in periods and in countries in which illicit drug markets were relatively limited in size and scope. The relationship between the challenges posed by drug distribution and problematic drug use and the penalties entailed by the criminal statutes is alarmingly disproportionate.

In most of the countries studied, sentences for drug offenses mandated by law are disproportionate to other crimes, and rigid mandatory minimum sentences ensure that those convicted stay behind bars for prolonged periods, often for years. While the laws vary across countries, maximum sentences for drug trafficking can range from 15 to 25 years. In countries where mandatory minimums are in place, judges have no discretion to take into account extenuating circumstances or distinguish between first-time and repeat offenders. Even in countries with sentencing guidelines, rather than mandatory sentences, political pressure is often brought to bear on prosecutors and judges to issue stiff sentences.

Perhaps the most extreme case is **Ecuador**. In that country, drug trafficking convictions result in minimum and maximum sentences of 12 and 25 years, respectively. Yet the maximum sentence for murder is 16 years. As is common across the region, the Ecuadorian law fails to distinguish between levels of involvement in the drug trade, so that a small time trafficker can end up with a longer sentence than someone who committed murder.

## Conclusion III

**• Existing drug laws fail to distinguish adequately between low-level and high-level drug offenses, and fail to distinguish among types of drugs; in general, all drug offenders are subject to comparably high sentences.**

Drug laws in general do not distinguish among levels of

involvement in the business, treating small-scale sellers and “mules,” or transporters, on par with large-scale drug traffickers, and failing to distinguish between violent and non-violent offenses. Many accused are subject to the maximum penalties and many, even those who have not committed serious or violent crimes, end up in maximum-security prisons.

Nor are distinctions made between the particular type of substance and the health risks it poses when it comes to pursuing, arresting and prosecuting persons for drug offenses. In many cases cannabis is treated the same as cocaine, and a seller of cannabis may get the same sentence as a person who sold cocaine.

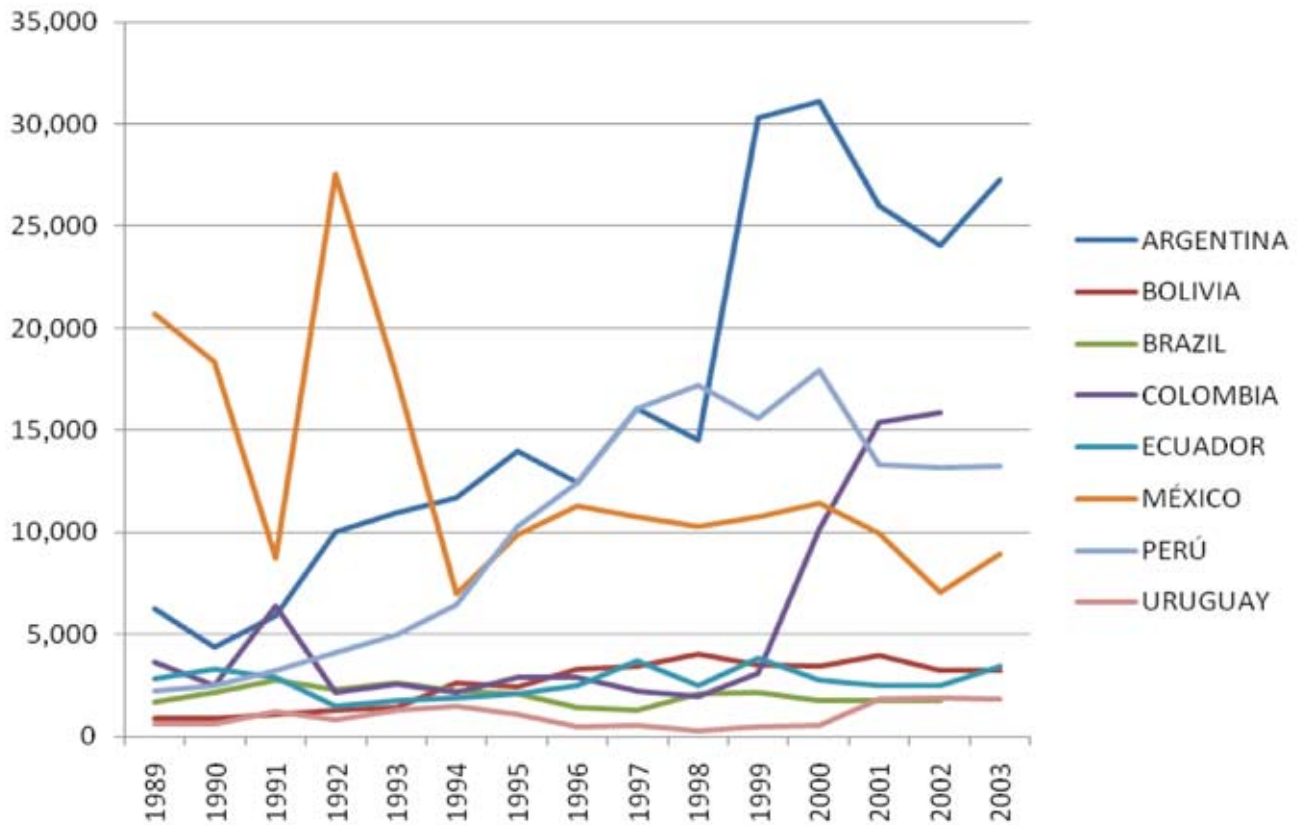
One example is Law 1008 in **Bolivia**, which according to a 1995 report by the Committee on Human Rights of the Bolivia’s Chamber of Deputies “establishes a criminal justice subsystem parallel to the regular criminal justice system, characterized by the tendency towards unreasonably drastic penalties” that suppresses fundamental rights of defense and violates the constitutional rights of citizens. Law 1008 leads to over-criminalization by including offenses that already exist in Bolivia’s Criminal Code, assigning them longer periods of imprisonment, more days of fines, and more confiscation of assets. The law does not distinguish clearly between street-level drug dealers and large-scale drug traffickers, such that the penalties range from one year in prison for producers of controlled plants to up to 25 years in prison for trafficking, independent of the volume of drugs involved. The law is also ambiguous in its definitions of manufacture, possession, storage, delivery, supply, purchase, sale, and donation and/or any other type of transaction. Moreover, the penalties as provided for in Law 1008 may be unconstitutional, given that the sum of the prison sentence and days of fine in many cases leads to periods of imprisonment that extend beyond the maximum of 30 years established by Bolivia’s constitution.

## Conclusion IV

**• Strict drug legislation and its aggressive implementation are a key factor in rising incarceration rates and often extreme prison overcrowding in the countries studied.**

Prisons across the region are bursting at the seams as a result of “mano dura” or hard line policies meant to address drug trafficking and related crime and violence. This study suggests a strong relationship between the aggressive enforcement of severe drug laws and soaring incarceration rates and prison overcrowding in the countries studied. Although a direct causal relationship is difficult to prove, especially given the paucity of trend data from prison authorities and other governmental sources, the available data do indicate at least a correlation. For the seven countries for which data on incarceration rates were available for the

Graph 3. Number of arrests for drug offenses, 1989 to 2003



Source: Inter-American Drug Abuse Control Commission (CICAD)

15-year period 1992-2007, on average the incarceration rate increased by more than 100 percent.

For **Bolivia**, the one country without data for the 15-year period 1992-2007, data for the 12-year period 1996-2008 show a nearly 13 percent increase in the incarceration rate. Comparing Graph 2, which shows the trends in the overall number of prisoners, to Graph 3, which shows the trends in the number of arrests made for drug offenses illustrates the connection between the two phenomena.

Of the countries studied, the most extreme example is **Brazil**, where the number of people behind bars increased by more than 300 percent between 1992 and 2009, resulting in an incarceration rate of 253 prisoners per 100,000 national population. Prison infrastructure has lagged behind the growth in the prison population, leading to a shortage of space for 170,000 inmates and poor living conditions.

While the situation varies by country, drug offenders make up a significant and growing proportion of the prison population. In all eight countries, drug offenses are either the second or third cause for criminal prosecution. According to the data compiled by the research team, the percentage of the prison population incarcerated on drug charges currently ranges from about 9 percent in **Mexico** to 34 percent in **Ecuador**. Drug offenders also account for comparably large proportions of the overall prison populations in **Colombia** (17 percent), **Brazil** (19 percent), **Peru** (23 per-

cent), and **Bolivia** (30 percent). According to **Argentina's** Federal Penitentiary Service, the percentage of prisoners incarcerated for drug offenses increased from 1 percent in 1985 to more than 27 percent in 2000. The country-specific trends for drug offense arrests during the 15-year period 1989-2003 are illustrated in Graph 3.

### Conclusion V

• **A key factor in prison overcrowding is the use of preventive detention, which is mandatory for drug offenses in many countries, regardless of the gravity of the offense. As a result, many people accused of drug offenses spend long periods of time behind bars before their cases are even considered in court.**

The use of preventive detention is a widespread practice in the region and is at odds with respect for constitutional rights and with the human rights commitments assumed by the governments. In many cases, long periods of detention stem from chronic delays in the administration of justice and from the inclusion of preventive detention provisions in drug legislation.

In five of the eight countries studied – **Bolivia, Brazil, Ecuador, Mexico** and **Peru** – preventive detention is mandatory in cases of drug offenses, whether minor or major. Drug offenses are classified along with murder, rape, and

kidnapping as serious crimes, no matter the degree of participation. Preventive police detention for most crimes in Peru is 24 hours, yet in drug cases it is 15 days. In addition, in several countries suspects may be detained for indefinite periods during the investigation phase until formal charges are filed. In Mexico, the accused may be detained without formal charges for up to 80 days. And in the five countries mentioned, detention is mandatory during the course of the trial until there is a verdict.

In general, given the delays in the administration of justice common to all the countries in this study, it is not unusual for an accused person to end up behind bars for a longer period than the sentence that is eventually imposed would have required. The filing of formal charges is the first stage of preventive detention. Once a person is formally charged with a criminal offense, the preventive detention prescribed by law ensures that the accused will remain behind bars. The proportion of those held in preventive detention that is charged with drug offenses could not be determined for this study.

### Conclusion VI

- Those accused of and sentenced for drug offenses are usually denied or given only limited access to procedural benefits or opportunities for alternative sentences, although these are often made available to those accused of other types of offenses.

In most of the countries studied, access to procedural and prison benefits for the persons prosecuted and convicted of drug offenses is restricted or prohibited – another factor that contributes to the problems of overpopulation and

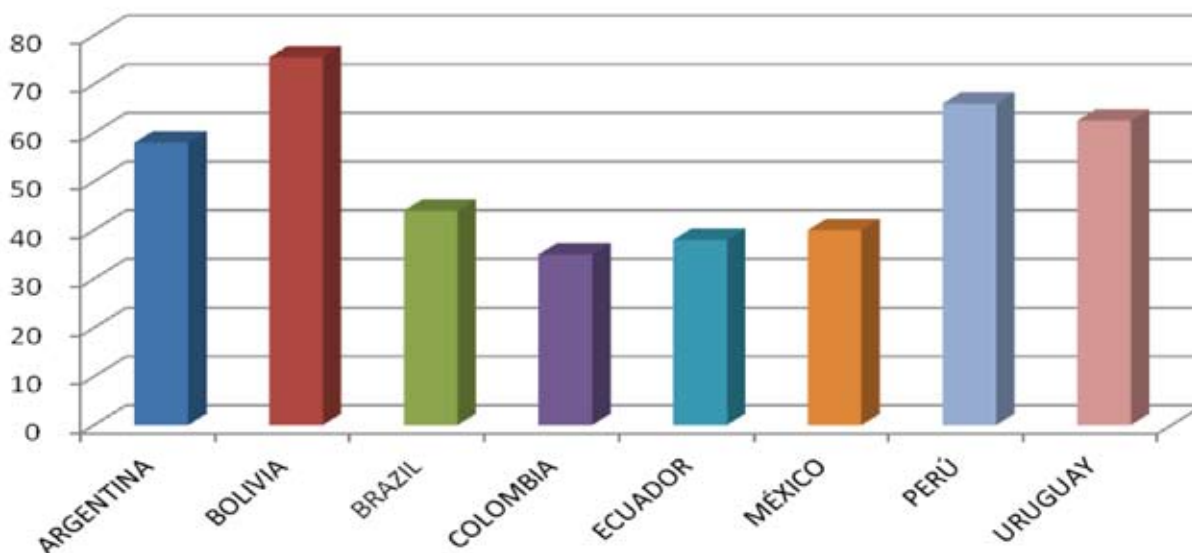
overcrowding in the prisons. The restrictions on access to benefits even while imprisoned are notable and are related to the tendency to fail to take into account the seriousness of the crime committed. Similarly, those accused of minor drug offenses do not have access to benefits that are commonly available for different types of offenses.

For example, **Brazil's** 2006 drug law prohibits substituting prison with alternative penalties, even though Brazilian law allows this in the case of sentences of up to 4 years for all crimes perpetrated without violence or grave threat, as is the case in many drug offenses. However, in September 2010, Brazil's Federal Supreme Court (Supremo Tribunal Federal) ruled in favor of an appeal by a person accused of trafficking 13.4 grams of cocaine, and determined that the prohibition on substituting the penalty of imprisonment in the case of a small-scale drug dealer, as established in the country's drug law, is unconstitutional and that the possibility of substitution should be considered on a case-by-case basis. In the opinion of some authorities, the application of that decision could avoid the incarceration of many other small-scale dealers, and as a consequence reduce the size of the national prison population.

One bottleneck in the justice system of **Peru** has to do with the prohibitions on benefits and rights during imprisonment, fundamentally those referred to in Article 42 of the country's Code of Prison Enforcement. Benefits in the Peruvian prison system include permission to leave prison, reduction in the sentence for work and education, semi-liberty, parole, and intimate visits, among others. Yet Article 47 of the same code prohibits such benefits, including the possibility of parole, in cases involving drug offenses. Even in **Uruguay**, which is alone among the countries studied in not having adopted punitive drug legislation,

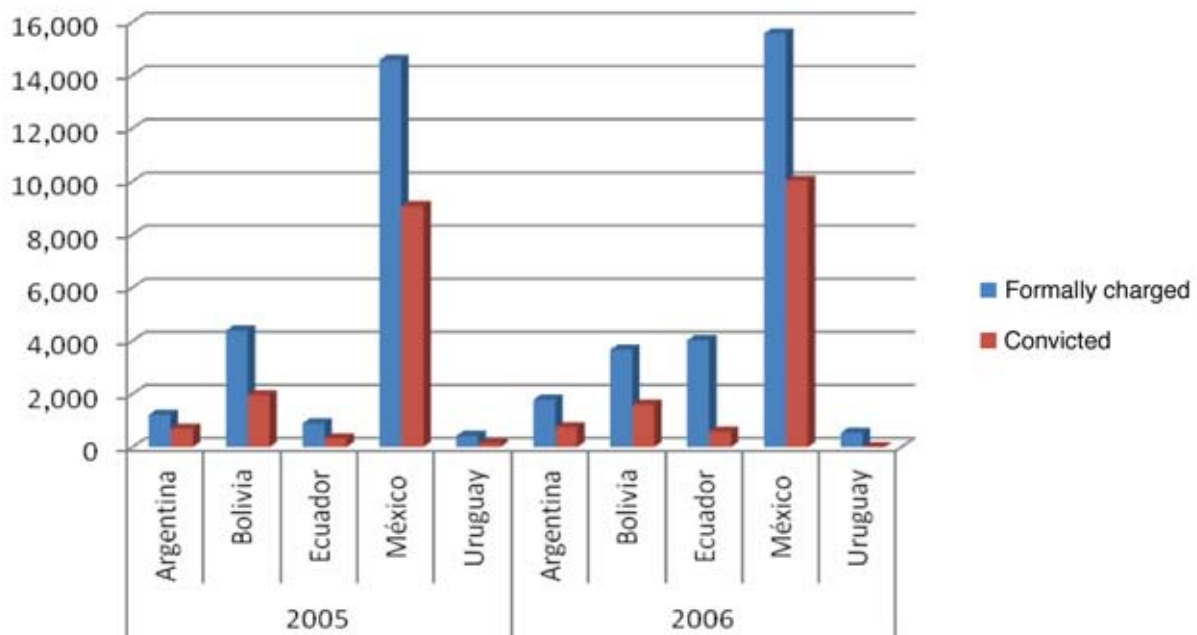
Graph 4. Percentage of prison population without a sentence

Argentina and Bolivia (2006); Brazil (2007); Colombia, Ecuador, Mexico, Peru and Uruguay (2008).



Source: Lucía Dammert and Uza Zúñiga, *La cárcel: problemas y desafíos para las Américas*, FLACSO, 2008.

Graph 5. Percentage of prison population formally accused and sentenced for drug charges, 2005 and 2006



Source: Inter-American Drug Abuse Control Commission (CICAD)

the scant use of alternative measures guarantees that many low-level, non-violent offenders remain behind bars.

### Conclusion VII

- **Prison budgets and infrastructure are severely deficient in every country studied, due at least in part to the significant increases in the number of drug-offense prisoners.**

As a result of budget shortfalls, the prison infrastructures in all of the countries included in the study are inadequate for ensuring the rights of persons deprived of liberty and for respecting the countries' international obligations regarding prison conditions. Although drug policies have contributed to overcrowding the prisons, there was no corresponding increase for the prison system budgets, even as spending allocated to drug enforcement grew.

Graph 6 shows the level of prison overcrowding in six of the countries studied, while Graph 7 illustrates the extent to which governments are failing to meet the basic needs of detainees, particularly in **Bolivia, Ecuador and Peru**. These three countries allocate a daily food budget per prisoner of only \$0.80 USD, \$1.60 USD and \$2.00 USD, respectively. As a result, prisoners depend on food and other goods provided by family members in order to survive within the prisons.

The state should guarantee the rule of law and due process for each of the accused, including provision of legal representation. If before the existence of the drug legislation several states were not able to guarantee an adequate defense for all, now the situation has grown even worse. The

vast majority of those accused of drug offenses do not have access to an adequate legal defense.

### Conclusion VIII

- **A shockingly high number of people are imprisoned for simple possession of drugs, including marijuana, even in countries where carrying small amounts of drugs for personal use is not a crime.**

A high percentage of drug offense prisoners are locked up for simple possession of drugs – consumers detained with a relatively small amount of drugs – even in countries where such conduct is not illegal. In most of the countries studied, the distinction between drug users and drug traffickers is barely developed in the statutes and is poorly interpreted by the police. According to our **Brazil** researcher Luciana Boiteux: “Such vague criteria are so difficult to apply that in practice the distinction depends on the respective authority in each case. The lack of a legal distinction a priori prejudices the defense of the accused, since the subjective view of the authority and the discretion of the police who make the first contact with the case are excessively broad.”

In **Uruguay** the law does not penalize the use of drugs or possession for personal use by someone who, in the terms of the law, “has in his or her possession a reasonable quantity, exclusively for his or her personal consumption.” But the law does not define “a reasonable quantity,” leading to problems in police and judicial practice, where the judge enjoys full discretion to reach his or her own findings. On the one hand, this discretion gives judges the opportunity to consider the broader circumstances of a detention, but it also results in a situation in which police arrest many

users. Most of the cases appear to involve the possession of drugs in amounts near the limit of what could be interpreted as possession for use. Indeed, more than half of the persons in prison for drug offenses possessed between 0 and 9 grams of a prohibited substance. Here the problem is not strictly in the law itself, but in its application by the police and the courts.

Even in cases where the law defines the amounts that correspond to personal use, it may harm users. In **Mexico**, the decree commonly known as the law against small-scale drug dealing (“Ley de narcomenudeo”), given that its main purpose is precisely to address retail-level drug distribution, establishes maximum amounts allowed for personal use of the various illegal drugs. But because the amounts established by the law are so small, it is very likely that a consumer will carry larger quantities than are permitted. In addition, the permitted quantities do not correspond to the reality of the retail-level drug markets; for example, while a consumer may possess only half a gram of cocaine, in the street the drug is sold by the gram. It is therefore quite possible that more users will end up in prison as one result of this law and its enforcement.

Throughout the region, smokers of cannabis are particularly stigmatized and harassed by the police, and many people are incarcerated for growing or simple possession of cannabis. One of the most alarming examples is **Mexico**. In a selection of courts in the Federal District and the states of Chihuahua and Jalisco, possession of marijuana gener-

ates the largest number of convictions in drug cases. It is followed by: possession of cocaine, possession of cocaine for sale or commerce, and possession of marijuana for sale or commerce.

### Conclusion IX

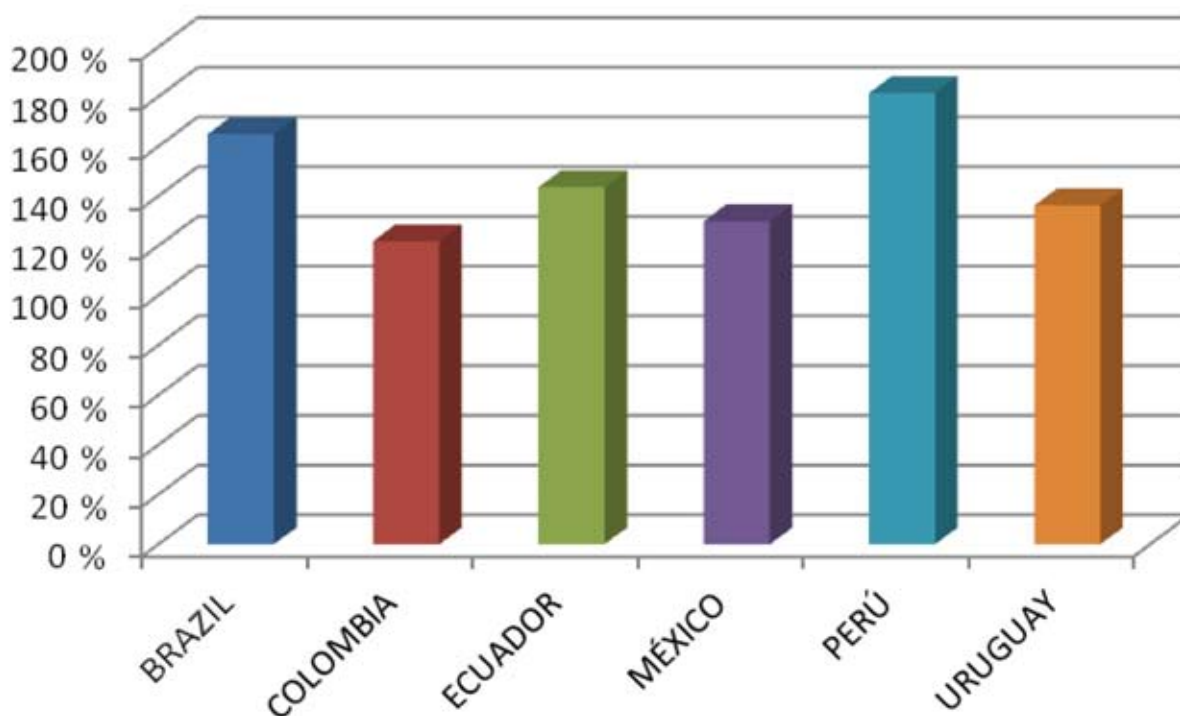
- **Those imprisoned on drug charges come from the lowest ranks of the drug trafficking chain – consumers, couriers and street level dealers. The available data indicate that very few high-level drug trafficking operatives are behind bars.**

One of the key conclusions of this study is that a large number of persons are behind bars for minor drug offenses with disproportionately long sentences. In most of the countries studied, it is the exception to find anyone with decision-making authority in the drug-trafficking networks in prison. The information we were able to obtain points to enormous disparities. The most worrisome cases are **Colombia** and **Mexico** – two countries that have declared total war on drug trafficking.

In the case of **Colombia**, the vast majority of those incarcerated for drug offenses have only limited involvement in the drug cycle; these individuals are easily replaced in drug production and trafficking networks. They are the weakest, most vulnerable links in the chain – composed of those who participate in the least lucrative activities of the

Graph 6. Overcrowding Rate of Prisons

Ecuador and Mexico (2009); Brazil, Colombia, Peru and Uruguay (2010)



Source: International Centre for Prison Studies, King's College London

business or who are only marginally involved, such as the ‘raspachinnes’ or coca leaf pickers, the small-scale growers, the ‘mules,’ and the small-scale distributors. According to the calculations by the study’s Colombia researchers, only about 2 percent of those behind bars for drug offenses are mid- and upper-level trafficking operatives. In other words, about 98 percent of the persons deprived of liberty for drug offenses apparently did not have – or it would likely not be possible to prove they had – significant involvement in drug-trafficking networks.

Similarly, in **Mexico** the government has used the indicator of the number of persons incarcerated to show that its effort to fight drugs and organized crime is yielding encouraging results. Nonetheless, according to the CIDE research center, in 2009 in the Federal District and in the state of México, 50 percent of the prisoners locked up for drug sales were detained for possessing merchandise with a value of \$100 USD or less, and 25 percent for possession of merchandise with a value of \$18 USD or less. In other words, 75 percent had been detained with a minimal amount of drugs. Hence, the government’s strategy for fighting organized crime appears to have resulted in the criminalization of drug users, especially of less dangerous drugs such as

marijuana, and small-scale sellers – but with far less impact on the medium- and large-scale drug traffickers.

Furthermore, it is important to emphasize that, in most countries, low-level drug offenders are put into the same facilities as hardened criminals. Prisons function as a school for crime; low-level offenders usually enter jail with no direct connections to organized crime, often knowing only who gave them the job. But they can emerge from prison as part of criminal bands or networks.

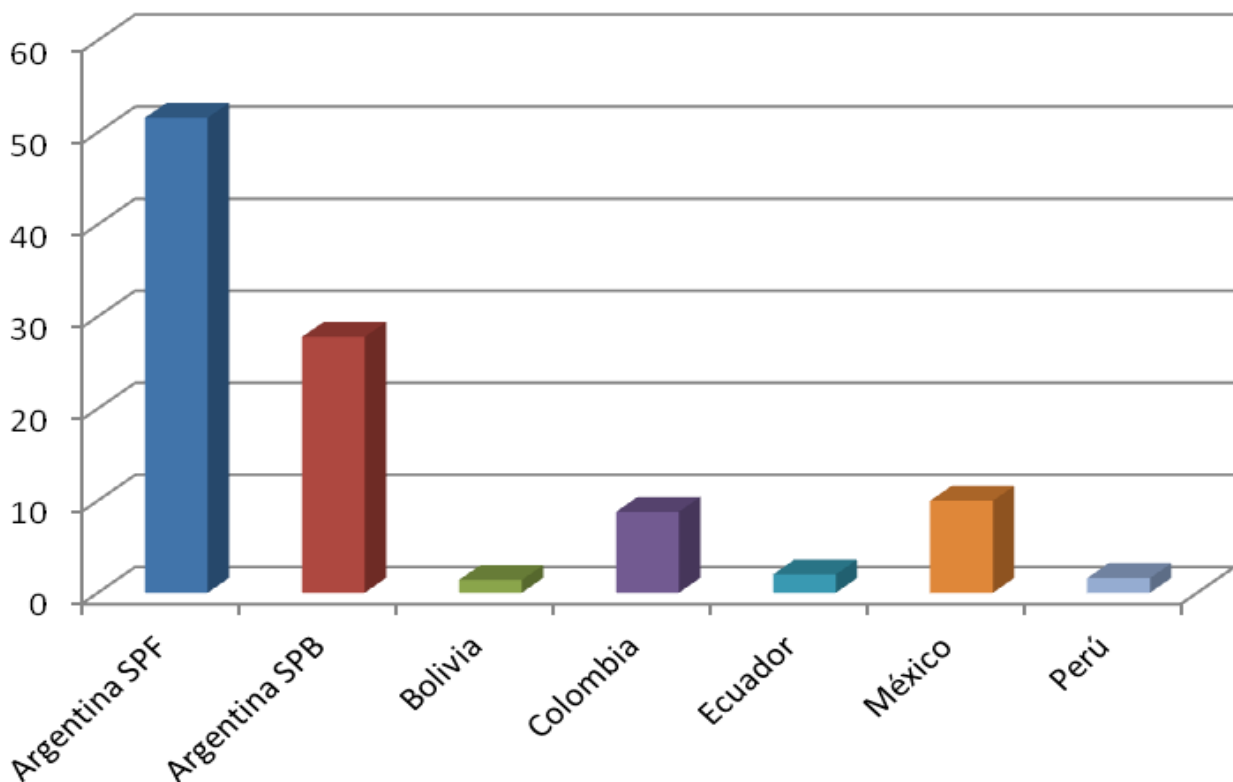
**Conclusion X**

- **Those imprisoned on drug charges tend to come from the most vulnerable sectors of society, with little formal education, low incomes, and limited employment opportunities.**

The socioeconomic profile of the vast majority of persons incarcerated for drug offenses – whether convicted or not – is a low level of education, little money, unemployed or working in the informal sector, and coming from broken homes and/or in charge of raising children (most often the

Graph 7. Daily expenditure per prison inmate (in US dollars)

Bolivia (2006); Ecuador (2007); Mexico (2007); Argentina (Sistema Federal Penal de Argentina and Sistema Penitencial de Buenos Aires), Colombia and Peru (2009)



Sources: Argentina – SPF and SPB, 2009; Bolivia – Dirección General de Régimen Penitenciario (DGRP, 2006); Colombia – Instituto Nacional Penitenciario y Carcelario (INPEC, 2009); Ecuador – Estrella, Pontón, Pontón and Núñez, Análisis de la ley de drogas desde una perspectiva socio-política: Diagnóstico de la ley de sustancias estupefacientes y psicotrópicas, Quito, October 2008; Mexico – Guillermo Zepeda, analyst of the Mexican penal system, 2007; Peru – La Realidad del Sistema Penitenciario en el Perú. Diagnóstico, Limitaciones y Retos, Informe CEAS, Defensoría del Pueblo, 2006.

mother). Our research confirms the perception that the weight of the law comes down most heavily on these especially vulnerable sectors of the population.

In most of the countries under study, either the authorities do not collect meaningful statistics on the socioeconomic characteristics of the imprisoned population, or it was not possible to obtain such information. Indeed, we have only been able to obtain official data in three countries, and only for some years. In the other countries, the researchers conducted interviews with inmates to develop a profile of those detained.

Given the lack of official information in Bolivia, a survey was conducted of a group of prisoners locked up for drug offenses in the men's prison of San Pedro, in the city of La Paz. The survey revealed a population with little opportunity to earn income sufficient for the subsistence of an average-size family within the legal labor markets. Only 13 percent of those surveyed have had some university or graduate-level education, whereas 60 percent had primary or secondary education. In general, the average income of the prisoners before being detained was 1,080 bolivianos, equivalent to \$155 USD per month – not even 50 percent of the cost of the basic food basket in **Bolivia**. The histories of the prisoners at San Pedro are characterized by the situation of poverty and family or health crisis that they found themselves in when the possibility arose to obtain extraordinary income and overcome these fundamental problems in exchange for accepting the risk of losing their liberty and endangering their physical integrity.

Similar results were found in a government-sponsored census of prisoners in **Ecuador**. The majority of those incarcerated on drug offenses are either people with patterns of problematic drug use or poor people and members of minority groups. Socioeconomic indicators for those in

prison for drug offenses are also available in **Argentina**, as indicated in graphs 8 and 9 on education and employment levels.

### Conclusion XI

- A growing number of women, couriers, and foreigners are imprisoned for drug offenses.

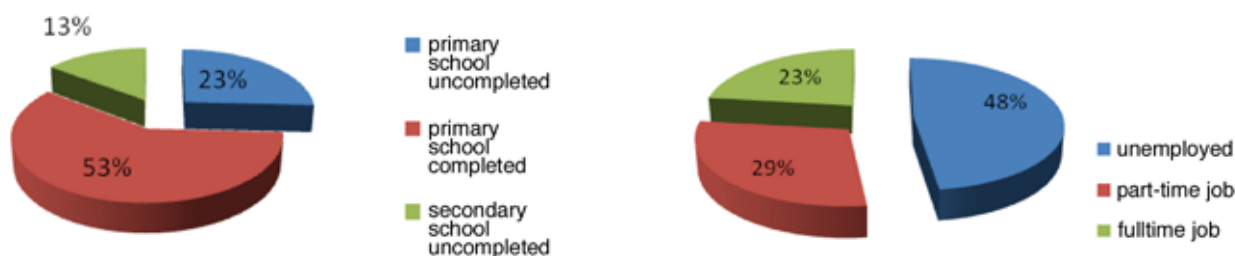
In almost all the countries under study, one finds three relatively new and somehow inter-related phenomena. The first has to do with gender: there is an increase in the population of incarcerated women generally, and a large percentage of them have been detained for drug-related offenses. Though it is still considerably smaller than the population of male prisoners, the percentage of prisoners who are women has increased, and most of them are behind bars for offenses involving drugs.

For example, in the last 15 years, from 65 to 79 percent of the women prisoners in **Ecuador** were incarcerated for drug offenses. In 2009, some 80 percent of all women held at El Inca, the largest women's prison in the country, were detained for drug offenses. Similarly, in **Argentina**, the percentage of women in jail on drug offenses ranges from 65 to 80 percent, depending on the prison facility.

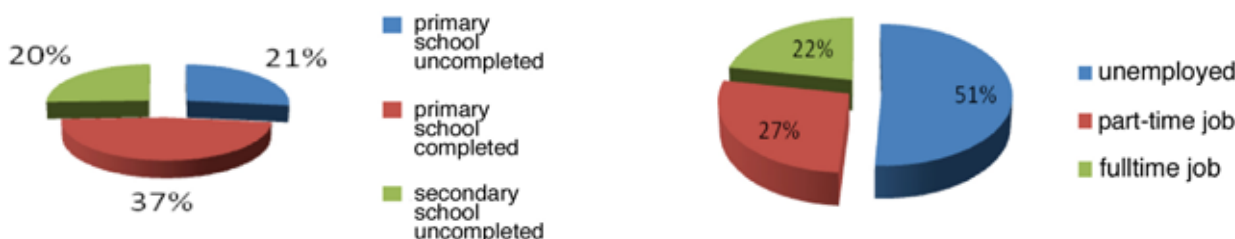
Women are more vulnerable to becoming “mules” and/or micro-vendors of drugs due to the high rates of unemployment among women, and their economic responsibilities for their children. More often than men, women are victims of deceit and violence at the hands of their husbands, lovers, or family members, and end up becoming accomplices.

The impact of existing drug laws on individuals, their families and their communities can be devastating. The study

Graph 8. Argentina: Federal Penitentiary System



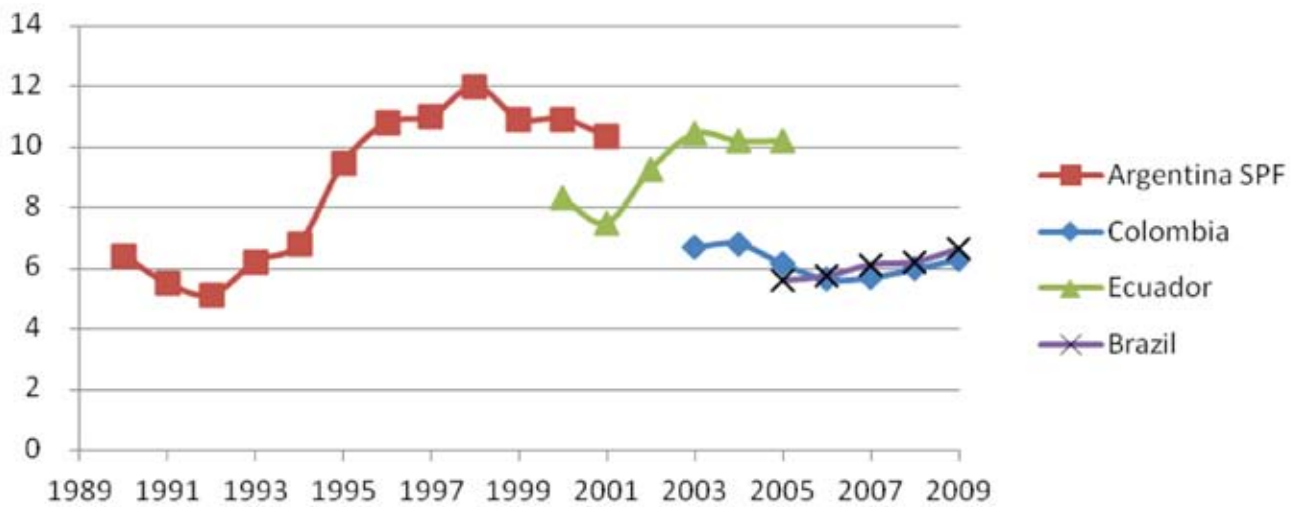
Argentina: Buenos Aires Penitentiary System





Graph 9. Women as a percentage of all prisoners, 1989 to 2009

Argentina (Sistema Federal Penal de Argentina, 1989-2001); Brazil (2005-2009); Colombia (2003-2009); and Ecuador (2000-2005).



Sources: Argentina – Ministry of Justice and Human Rights and SPF (1981-2001); Brazil – Ministry of Justice (2005-2009) and *La cárcel: problemas y desafíos para las Américas*, Lucía Dammert and Uza Zúñiga, FLACSO, 2008; Colombia – Instituto Nacional Penitenciario y Carcelario (INPEC, 2003-2009); and Ecuador – Boletines Estadísticos Dirección Nacional de Rehabilitación Social (2000-2005).

found a growing number of women, often the sole providers for their families, entering the drug trade simply in order to put food on the table for their children. Once convicted on a drug offense, they have even fewer economic opportunities when they leave prison. Children whose parents end up behind bars can be split up among relatives and often end up in the streets, or are forced to live in detention themselves.

Another relatively new phenomenon is the widespread use of drug couriers, or ‘mules.’ Although this kind of transport is not novel, during the past decade more people have been detained and convicted for this offense. These are persons detained in possession of drugs trying to take them from one place to another, within or outside the country. The drugs are transported inside the body (swallowed capsules) or outside the body. Several persons who were recruited as couriers and whom we met through this study were unaware of the risks they were taking. Most of the persons received a payment for transport, but of a relatively small sum compared to the market price of the cargo they were carrying.

It was not possible to identify the number of persons per country detained for this type of trafficking, or to get more indicators on their personal characteristics. However, the studies confirm that the phenomenon exists in all countries and is part of a dynamic of the organizers of drug trafficking, who adapt their routes and methods of transport in response to several factors, the most important being interdiction pressures. The couriers tend to be overrepresented in the prisons in cities with air routes to Europe, such as Lima and Buenos Aires.

The last relatively new phenomenon is the increased numbers of foreigners in the prisons. Drug offenses constitute the leading cause of incarceration of foreigners in the coun-

tries under study. Foreigners face particular challenges with regards to access to adequate legal defense, language, and the lack of family support in countries where prison authorities fail to provide adequate amounts of food and services.

### Conclusion XII

• **For the countries in this study, the quality and quantity of information on drug laws and prisons available from official governmental sources is severely deficient. Such an important arena requires that adequate information be readily available to policy makers and the public.**

In six of the eight countries in this study, statistical information on basic items such as the charges or convictions for which prisoners are in jail, the socioeconomic background of prisoners, and even in some cases basic information about the prison population, was very limited or simply non-existent. Of particular concern, while most countries have data available on the number of prisoners accused of or convicted of drug offenses, little information is available on the specific nature of those charges. Keeping track of what drug offenses individuals are charged with is essential for developing adequate laws and policies.

Certain groups of detainees appear to be invisible in the official data. Several researchers identified the issue of detainees held in police stations and detainees in rural areas, but official data were sparse or non-existent. The first group includes people detained and held in police stations around the region, often under inhuman conditions. Another group includes those held in rural areas, including along national borders, where central governments pay even less attention to prison conditions. The jails in these

areas likely hold many people accused of small-scale trafficking, growing and production.

The two countries where significantly better data is available are **Ecuador** and **Uruguay**. The Ecuadorian government carried out a detailed prison census in 2008 that provides valuable information on the prison population and prison conditions, and on inmates' socioeconomic characteristics; prisoners were surveyed regarding their own concerns. In Uruguay, the Junta Nacional de Drogas has systematized information going back to 2006, including data on police operations related to drugs. These data allow for analyses of those detained and incarcerated for drug offenses. Socioeconomic indicators on the prison population are also available.

## RECOMMENDATIONS

**The implementation of harsh drug laws has fueled rising incarceration rates and has contributed to severe prison overcrowding. Certain reforms to drug laws and how they are implemented could help alleviate prison overcrowding while protecting public safety and respecting civil and human rights.**

- Incorporate drug legislation into a country's criminal law and codes – rather than treat it separately from other offenses – and ensure that it fully respects human rights.
- Establish and expand alternatives to incarceration for those charged with low-level drug offenses, including removing criminal sanctions for possession for personal use.
- Ensure proportionality in sentencing, distinguishing between:
  - drug trafficking and other types of crime;
  - low, medium and high-level drug offenses;
  - rank or position of the accused in drug-trafficking networks;
  - violent and non-violent offenses; and
  - different types of drugs.
- Abolish mandatory minimum sentences.
- Avoid preventive detention in the case of low-level, non-violent offenders following arrest and during the investigative phase to determine whether or not formal charges will be filed.
- Promote justice sector reforms to eliminate corruption and increase the efficiency of local judiciaries, and increase government funding to improve prison infrastructure and conditions.
- Establish equal access for drug offense suspects to

procedural benefits and opportunities for alternative sentencing – such as treatment, educational opportunities or community service – that are offered to those involved in other types of offenses.

- Reorient law enforcement efforts to target high-level drug-trafficking criminal networks, rather than those at the bottom rung of the drug-trafficking ladder, such as consumers, small-scale farmers, low-level dealers and mules.
- Upgrade and expand criminal justice data systems and ensure timely access to criminal justice information for policy makers and the public. Comprehensive prison censuses, such as Ecuador performed recently, should be undertaken periodically in each country, and data systematization as carried out by Uruguay's Junta Nacional de Drogas should be replicated across the region.
- Stimulate an open debate about the advantages and disadvantages of moving towards a legal, regulated market for cannabis.
- Allow natural coca leaf products to be sold on the market.
- Consider applying special amnesties, such as pardons, to people already convicted of drug offenses and who received disproportionately severe sentences.

This study leaves no doubt as to who are the primary victims of the so-called “war on drugs.” The objective of the information, conclusions and recommendations provided in this report is to encourage an urgent debate to achieve a more balanced and humane approach to reduce the harms associated with the illicit production of controlled substances, their distribution and consumption. We hope that *Systems Overload* helps to sound the alarm for reforms.

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This report is the result of a research project on the relationship between drug legislation and the prison situation that was carried out in eight countries: Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Peru, and Uruguay.

Depriving a person of liberty is one of the most imposing powers of any state. The way in which states exercise this power – striking a balance between the duty to guarantee public safety and the obligation to respect fundamental human rights – is of the utmost importance. The operation of the justice system has repercussions for society as a whole.

In all of these countries, the emphasis placed by drug control efforts on criminal sanctions has led to a major increase in the number of persons incarcerated for drug offenses. The enforcement of severe laws for drug-related offenses has not only been ineffective in stopping the production, trafficking, and consumption of illicit substances, but has generated negative consequences, such as excessive caseloads in the courts, prison overcrowding, and the suffering of tens of thousands of persons behind bars for small-scale drug offenses or simple possession. The weight of the drug laws has been felt most strongly at the lowest levels of society and among the most vulnerable sectors.

This study represents an important step towards documenting the relationship between drug laws and the deterioration of prison conditions throughout the region. Certainly much remains to be learned about the degree to which drug laws have increased the incarceration rate and overcrowding in the region's prisons. There is scant official data on these matters, and the available information is typically incomplete. Even so, this is a first systematic effort to cast light on the repercussions in Latin America of this “undesired consequence” of drug policies and drug laws worldwide. We hope that this study helps to sound the alarm for needed reforms.

The TNI/WOLA Drug Law Reform Project promotes more effective and humane drug policies through dialogue and up-to-date analysis of developments in the region.

The project was created amid growing evidence that the decades long “War on Drugs” has failed. Current international drug control policies have not decreased drug consumption, curbed the planting of crops destined for the illicit market, or curtailed the expanding drug trade. Instead, they have marginalized drug users who are pushed out of reach of treatment programs, repressed farmers who may have no other means of survival, and overwhelmed criminal justice systems. Such policies have targeted users and small-scale traffickers, while large-scale criminal organizations have remained unrestrained.

It is time for an honest discussion based on research and analysis into the effectiveness of current and alternative drug policies. The TNI/WOLA Drug Law Reform Project aims to inform national and international debates, incorporating the principles of effective law enforcement practices, harm reduction, proportionality of sentences, prison reform, and human rights.