

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

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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.¹ 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.²

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.³

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.⁴ 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 model⁵ 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."⁶

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.⁷ 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.”⁸ 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.⁹ 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.¹⁰ 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.¹¹ 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.¹² The study and its conclusions were confirmed more than a decade later by legal analyst, Farith Simón,¹³ 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.¹⁴ 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.¹⁵ According to the UN Office on Drugs and Crime (UNODC), in August 2008 Ecuador had the highest percentage of prison overcrowding in Latin America.¹⁶

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).¹⁷

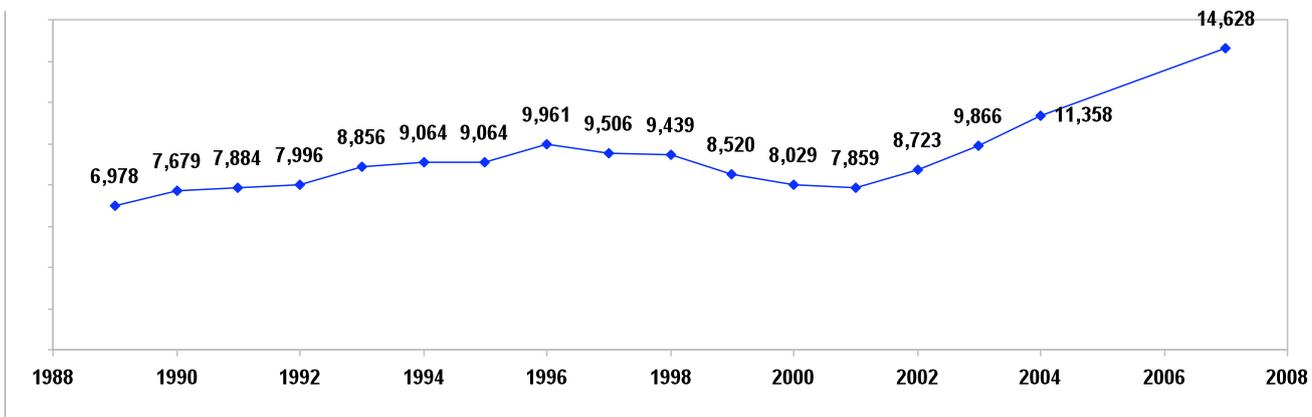
When looking at the national annual budgets for Ecuador’s prison system, it becomes clear why basic services for food and health were in such an abysmal state. A recent government sponsored study includes a table that shows the national budget for Ecuador’s prison system over a period of three years. 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.¹⁸ 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.¹⁹ 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.²⁰ At several points between 1993 and 2007, almost 50 percent of all prisoners in Ecuador were incarcerated on drug charges.²¹

DNRS officials were reportedly frustrated that as the number of inmates rose, there was no proportional increase in its budget.²² 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

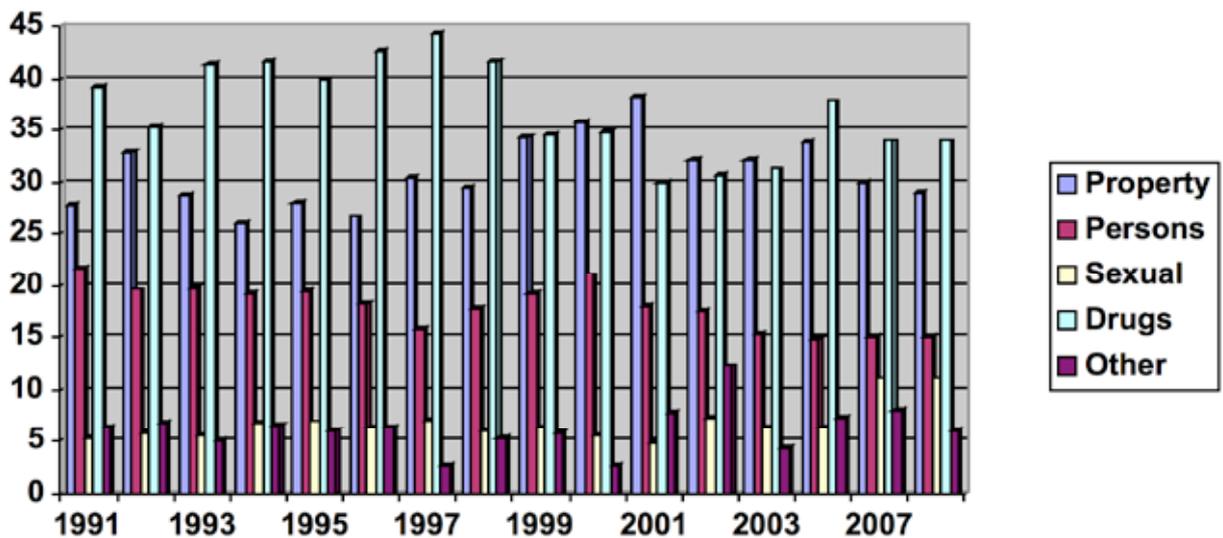
Chart 1

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.”²³

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.²⁴ 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 theft²⁵ 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.”²⁶ 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.”²⁷

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.²⁸ 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.²⁹ Also, in 2004, around 40 percent of all detainees were between the ages of 18 and 28 years old.³⁰ 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 2004.³¹ 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.³² In 2009, 80 percent of all women held in Ecuador’s largest female prison, El Inca, were detained on drug charges.³³

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.”³⁴ 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.³⁵

“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.³⁶ 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.³⁷

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.³⁸ The proposal was approved by the Constituent Assembly and went into effect on July 4, 2008.³⁹ 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.⁴⁰

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.⁴¹ 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."⁴²

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),⁴³ 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 Tráfico de Estupefacientes, 1970, Título 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 Tráfico 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 Looor, 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>

17 UN Committee against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, Ecuador, November 2005, Thirty-fifth Session, Number 24 under Principal subjects of concern and recommendations, p. 5, [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/86774a529a09d5fcc1257122002dd258/\\$FILE/G0640362.DOC](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/86774a529a09d5fcc1257122002dd258/$FILE/G0640362.DOC)

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.

29 Ibid. pp. 22 and 23.

30 Ibid. pp.26 and 27.

31 Ibid., p. 24.

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

33 From author's interview with Washington Yaranga, 6 December 2009.

34 Author interview with Ernesto Pazmiño, Director of the Office of the Public Defender, 17 March 2010.

35 Nuñez, Jorge, Efectos del modelo carcelario hacia las drogas ilegales en el sistema de cárceles de Ecuador, FLACSO, 2005 Also, author's calculations based on González, Marco (editor), Boletín Estadístico 2004-2005, Dirección Nacional de Rehabilitación Social pp. 34-37.

36 Presidential Decree, EL CONSEJO NACIONAL DE REHABILITACION SOCIAL, 14 de agosto del 2007, <http://www.edicioneslegales.com/novedades/consejo.htm>.

37 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.

38 Ibid.

39 For more information on this measure see, Metaal, Pien, Drugs and Prisons, Pardon for Mules in Ecuador, a Sound Proposal, Series on Legislative Reform of Drug Policies, No. 1, Transnational Institute and Washington Office on Latin America, February 2009, <http://www.tni.org/sites/tniclone.test.koumbit.net/files/download/dlr1.pdf>.

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.