A Short History of Ecuador's Drug Legislation and the Impact on its Prison Population

by Sandra G. Edwards

Ecuador was never 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 and 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 drug law, *The Law on Narcotic Drugs and Psychotropic Substances*, better known as 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, resulting in 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 over-crowding and a worsening of prison conditions.

This paper 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 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 of the law 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,

[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.

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, titled the *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 mandating 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.

This emphasis and 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*, 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 *U.N. Convention on the 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, the 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]

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[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.

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 ten percent, the confiscation of arms and precursor chemicals should increase by fifteen percent and the number of persons detained and court hearings held for drug offenses should rise by twelve 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 had to enter 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, as stated above, 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[5] 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]

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[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. It 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.

Ecuador's prison system is administered by the National 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 is still in force at this time. 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 are subject to a mandatory minimum sentence of ten years (modified by congress in January 2003 to twelve 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 frequently is the case despite unconstitutional - potentially being 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

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

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 the law. Apart from treating drug offenses differently from 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.

Table 3

Crimes committed	1975	1995
Crimes against property	23.4 %	64.3 %*
Crimes against persons	0.4 %	15.6 %

Table 4

Cases "heard" by criminal courts	1993
Crimes against property	38.8 %
Crimes against persons	12.4 %

[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.

Drug offenses	13.5 %	8.5 %
Other	62.7 %	11.6 %

Drug offenses	46.8 %
Other	2.0 %

*1994

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

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 give more than two or three years less than the congressionally mandated minimum of twelve years. The dismissal of accusations and the 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.

Another change in the revision of the law is that drug users are no longer placed in the same category as traffickers and producers; consumption of drugs is no longer a crime. However, no 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 preventative detention

[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.

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

The implementation of Law 108 and the use of indefinite preventative 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 under staffed, reached a breaking point due to the huge increase in drug-related cases. This in turn resulted in extreme overcrowding throughout Ecuador's prisons, which became centres for warehousing thousands of persons who's human and civil rights were ignored.

The human cost: The prison situation

As Law 108 went into effect, more and more bodies 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 one hundred thousand Ecuadorians were incarcerated.[14] In August 2007, the percentage of prison overcrowding 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 U.N. 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 especially the lack of hygiene, proper food and appropriate medical care, constitute violations of rights which are protected under the Convention (art. 11)*."[17]

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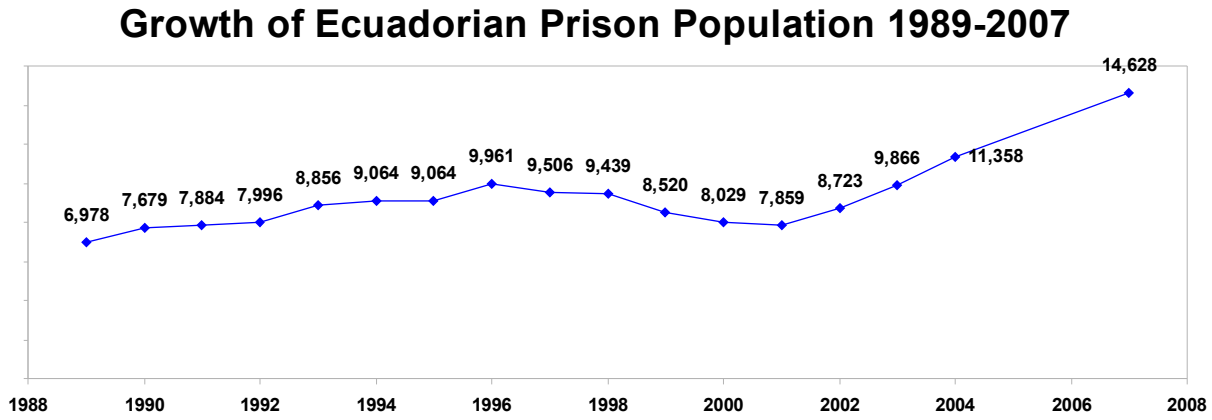
[14]Taken from the governent sponsored study, Nuñez Vega, Ponton, Ponton, Estrella, *Análisis de la ley de drogas desde una perspective socio-política: Diagnóstico de la ley de sustancias estupefacientes y psicotrópicas*, 31 octubre 2008, p.68.

[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]Taken from the Ecuadorian newspaper**,** El Universo**,** *"Grave riesgo de sida en cárceles de Ecuador por el hacinamiento"* August 11, 2008, *http://www.eluniverso.com/2008/08/11/0001/10/A66828FE800D47438A8537591FC4A73D.html*

[17]U.N. 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

When looking at the national annual budgets for Ecuador's prison system, it becomes clear why the 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 two dollars a day was budgeted for each person. Of this amount, only 68 cents 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 two dollars per day per inmate.

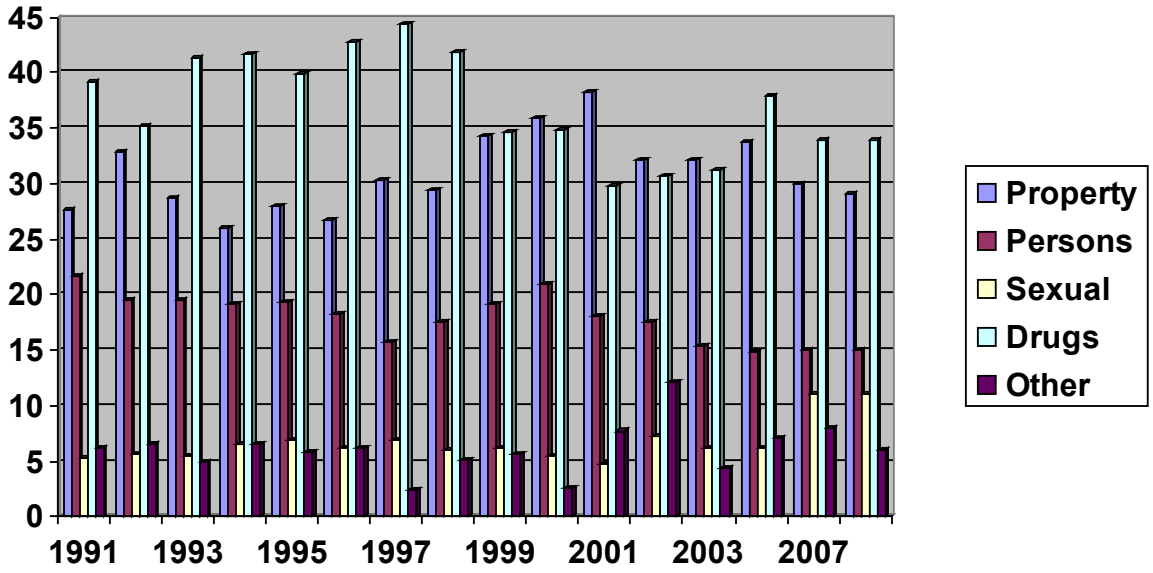


Source: Pontón y Torres (2007), data 1989-2006.
National Direction of Social Rehabilitation, data 2007

A 2008 census of Ecuador's prisons found that in May of that year, 34 percent of all detainees in Ecuador were imprisoned under drug charges. However, during that same year, if one looked only at prisons in urban areas where the 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 fifty percent of all prisoners in Ecuador were incarcerated on drug charges.[21]

Chart I Crimes against property & persons; sexual offenses & drug offenses

[18]Estrella, Pontón, Pontón y Nuñez (coordinador de investigación), *Análisis de la ley de drogas desde una perspective socio-política: Diagnóstico de la ley de sustancias estupefacientes y psicotrópicas*, Quito, 31 octubre, 2008, p76, 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 are 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.



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 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 under 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

[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, pg 2.

[24]Public Defender's Office, *Penitentiary Census*, 2008.

micro-trafficking or theft[25] has led Pazmiño to conclude that the crimes most often committed in Ecuador are those which would, in some way, bring economic benefit. Paraphrasing Pazmiño, "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. Forty nine 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 eighteen and twenty-eight.[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 fifteen 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 *mules* or micro-traffickers. According to the director of the Office of the Public Defender, Ernesto Pazmiño, there are multiple secondary effects as a

[25]Although quoting 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 Boletin Estadistico of the DNRS from the years 1989 thru 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 (editor), *Boletín Estadístico 2004-2005*,Dirección Nacional de Rehabilitación Social pp. 30,31.
[29]Ibid. pp. 22, 23.
[30]Ibid. pp.26, 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.

result of this reality. Many mules or micro-traffickers are mothers who have fallen into the transiting of drugs for 200 to 300 dollars: "We have demonstrated -- we did a study with the press – 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 twelve, sixteen 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 *mules* and/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 under charges for a drug offense. Sixty percent of all detained foreigners were from Colombia.[35]

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), with the objective of improving the existing systems of penal justice and social rehabilitation; supervision of Ecuador's national penitentiary system to resolve the present

[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.

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. At some point in 2010 it is to become a separate unit within the Ecuadorian government, working in coordination with that ministry. The Public Defender's Office was in charge of conducting the national prison census, which has been completed. The Public Defender's 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 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,

[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.

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 sentence.[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 one 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 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. In the proposed legislation, distinctions are made between large-scale drug

[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*, Source: Centers of Social Rehabilitation, Planning Dept, Office of the Public Defender.

[41]Constitution of the Republic of Ecuador, 2008, Title II *Rights*, Chapter eight, *Rights to Protection*, Articles 75 thru 82.

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

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 spring 2010 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 drug offenses from violent crime. Some members of the National Assembly will have political concerns about how 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 seen 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.

[43]El Comercio, *EE.UU. reconoce el trabajo antidrogas*, 13 febrero 2010 and El Comercio, *Ecuador lidera lucha antidrogas*, 14 febrero 2010.