



WOLA

SYSTEMS OVERLOAD Drug Laws and Prisons in Latin America

*Transnational Institute
Washington Office on Latin America*

December 2010

Executive Summary

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

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

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

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

Conclusions

Naturally there are gradations and variations among the eight countries studied, given their own particular roles within the drug markets, distinct internal political dynamics, and varying connections and vulnerabilities to international political pressures. Yet several elements are common to all of them, which allows for the identification of twelve principle conclusions.

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

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

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

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

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

Sixth, persons accused or convicted of drug offenses are often denied access to alternative

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

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

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

Ninth, most of the persons in prison for drug offenses are there for minor offenses, yet are serving disproportionately long sentences. In the eight countries in question, it is unusual to find drug kingpins behind bars. The data on the incarceration of major drug-traffickers are scant, and according to the information that we could obtain there are many discrepancies.

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

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

Eleventh, in this same respect, the study also reveals three relatively new and interrelated phenomena: increases in the numbers of women, couriers and foreigners behind bars for drug offenses. Although they still number far fewer than their male counterparts, the number of women in prison for drug offenses increased considerably in some cases. In 2009, 80 percent of all women detained at *El Inca*, the largest women's prison in Ecuador, were incarcerated for drug offenses. In Argentina the percentage of women prisoners incarcerated for a drug offense ranges between 65 to 80 percent, depending on the facility. The incarceration of women who are raising families has devastating consequences for the whole family, as the children have no economic protection. The phenomenon of drug courier, or "mule", a person who transports small amounts of

drugs on or in their body or baggage, has expanded. There are couriers operating in all of the countries, and the phenomenon is especially part of the dynamic of drug-trafficking in large cities with flights to Europe. Drugs have also become the leading cause of incarceration of foreigners, who, given their status, often face difficulties with the language, or access to legal counsel, and have no family support.

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

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

Recommendations

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

- Incorporate drug legislation into a country’s criminal law and codes – rather than treat it separately from other offenses – and ensure that it fully respects human rights.
- Establish and expand alternatives to incarceration for those charged with low-level drug offenses, including removing criminal sanctions for possession for personal use.
- Ensure proportionality in sentencing, distinguishing between:
 - drug trafficking and other types of crime;
 - low, medium and high-level drug offenses;
 - rank or position of the accused in drug-trafficking networks;
 - violent and non-violent offenses; and
 - types of drugs.
- Abolish mandatory minimum sentences.
- Avoid preventive detention in the case of low-level, non-violent offenders following arrest and during the investigative phase to determine whether or not formal charges will be filed.
- Promote justice sector reforms to eliminate corruption and increase the efficiency of local judiciaries, and increase government funding to improve prison infrastructure and conditions.
- Establish equal access for drug suspects to procedural benefits and opportunities for alternative sentencing – such as treatment, educational opportunities or community service – that are offered to those involved in other types of offenses.
- Reorient law enforcement efforts to target high-level drug-trafficking criminal networks, rather than those at the bottom rung of the drug-trafficking ladder, such as consumers, small-scale farmers, low-level dealers and mules.
- Upgrade and expand criminal justice data systems and ensure timely access to criminal justice information for policy makers and the public. Comprehensive prison censuses, such

as Ecuador performed recently, should be undertaken periodically in each country, and data systematization as carried out by Uruguay's *Junta Nacional de Drogas* should be replicated across the region.

- Stimulate an open debate about the advantages and disadvantages of moving towards a legal, regulated market for cannabis.
- Allow natural coca leaf products to be sold on the market.
- Consider applying special amnesties, such as pardons, to people already convicted of drug offenses and who received disproportionately severe sentences.

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