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Drugs and Prisons

Pardon for *Mules* in Ecuador, a Sound Proposal

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At the end of 2008, about 1,500 persons who were in Ecuadorian prisons sentenced for drug trafficking were released. The measure, known as “pardon for mules,” singled out a specific group of prisoners who were victims of indiscriminate and disproportionate legislation that was in effect for many years. Although with this measure, the Government of Rafael Correa took an important step in the process of reforming draconian legislation regarding controlled substances in his country, it is still to be completed with new legislation.

INTRODUCTION

The penal system has, for many years, been under intense pressure due to abuses that occurred in confronting the phenomenon of consumption, trafficking and production of controlled substances, a dead end street that deserves critical reconsideration. The prison system has been and continues to be the dumping ground for international policies of zero tolerance concerning the phenomenon of drug trafficking. In all places where “zero tolerance” policies against drug trafficking are applied, the consequence is an increase, in many cases dramatic, of the prison population.²

The Latin American case exemplifies an unsustainable situation and reveals subhuman conditions that are contrary to fundamental human rights. Policies developed in Ecuador under the name of “Citizen Security,” and related to the discourse surrounding “the war on drugs,” have caused an increase in the

**CONCLUSIONS**

- A pardon for small-scale traffickers, or carriers, as proposed in Ecuador is a sound and pragmatic example worthy of being applied in other countries.
- The pardon shows a human face to a large group of persons who have been totally abandoned by authorities. In addition, it recognizes the draconian character of the legislation on controlled substances imposed on countries in the region since the 1980s.
- The measure is controversial because it concerns drug trafficking. It recognizes that there is a grey area when persons of humble origin with few resources are those doing the trafficking. Punishing these persons without offering them any other options is simply unjust and is disproportionate to the crime committed.
- This new measure in Ecuador could all go to waste if not properly followed up by new legislative reforms related to controlled substances. Ecuador could, with its reform proposal, inspire governments that want to free themselves from the weight of imposed legislation concerning controlled substances.

prison population, a significant increase in the length of court-determined sentences and also a significant increase in the female prison population.

Persons fitting certain social profiles find, in effect, alternatives to minimal subsistence in practices considered illegitimate, such as informal commerce, robbery or micro trafficking of controlled substances. Because such practices are developed in the streets, seldom do “Citizen Security” policies result in the detention of the lead criminals directing such kinds of businesses.

The prison situation in various countries in the region, characterized by different analysts as time bombs, have forced governments to examine and develop immediate solutions. Such examination can refer to concrete changes in legislation and in legal practices, which might produce immediate results and restore proportionality in sentencing the committed crime.

Prisons are in dire straits due to factors such as insufficient infrastructure, low prison budgets, crowding, systemic violence against the prison population and the exclusion of prisoners from decisions taken affecting their lives. In this sense, the disorientation caused by imprisonment of mothers of already precarious family groups can lead to children ending up in the street, predetermining their medium and long term futures to delinquency and prison. Such sociological considerations are forcing themselves on the political agenda of some Latin American countries, taking into account and more highly prioritizing humane conditions.

This report is dedicated to the particular case of Ecuador, whose reform of the penal code’s sentences execution could serve as a motivational example for other countries. The report emphasizes the crisis situation of Ecuador’s prison system and analyses the character of the pardon for persons called micro-traffickers (*mules* or illegal drug carriers, those who carry small amounts of drugs or are informal merchants of controlled substances).

The Ecuadorian Government has granted a pardon, under strict conditions, to a group of

persons sentenced for trafficking of controlled substances. This measure is an example of reform, which shows a reassuring pragmatism in an area that has become extremely politicized.

The fact that President Correa has had a similar experience in his personal history might have played a part in his decision. His father was a victim of mistreatment and humiliation to which persons are submitted who, in their search for a better life, make the error of transporting controlled substances over borders. His father committed suicide because of this.³ But, above all, the measure represents a humanization of drug policies; something that is urgently needed in both Latin America and the rest of the world.

Thanks to the pardon for persons designated as micro-traffickers, to date, approximately 1,500 have left Ecuadorian prisons (some of whose histories are reflected in the side-bars in this report). The Ecuadorian reform occurred in the political context of the process of the Constitutional Assembly that assumed full legislative powers during its existence and ended with the approval, via referendum, of the new Magna Carta in September 2008.

SITUATION IN ECUADORIAN PRISONS

Ecuadorian legislation concerning controlled substances was one of the harshest in Latin America. Designed to follow international norms, they were developed under intense political pressure from the United States during the 1980s and early 1990s.

Andean countries, in particular, consolidated penal sub-systems inconsistent with national legislation and fundamental principles of penal law, and did not respect the criteria of proportionality between a crime and punishment. It also failed to distinguish between the different areas of control: growing, processing, trafficking and consuming.

Such legislation, coming in from outside of the region, did not take into account cultural differences, any recognition of existent profound social inequalities or a consideration of human rights norms.

Interview with Analia Silva

Analia was serving an eight year sentence in El Inca women's prison in Quito. She had been charged for possession of just under 400 grams of coca paste. She had already served five years of her eight-year sentence and had had a difficult time of it.

She did not trust the members of the prison committee, stating that many were a part of the internal corruption where prison guards often earned money by allowing certain prisoners access to services they should have received for free anyway. She publically denounced the corruption to both the committee and the guards themselves. Since the prison committee was in charge of implementing the pardon process within El Inca, Analia was not one of those who quickly benefitted.

Analia also had a problem with the requirements of the new pardon. She fulfilled all requirements except the one which disallows all prisoners serving a second term. Analia had been in prison before for the same offense – possession of small amounts of drugs. Ironi-

cally, Analia had been involved in advocacy for other rights for re-offenders such as parole. In the case of the pardon, her logic was that if her long sentence was unjust for her first offense, it is still unjust for her second.

Another irony of Analia's case is that she was finally released under the new pardon due to the same corruption existent in the process as that against which she had fought within El Inca. She ended up paying someone who knew how much to pay the judge reviewing and signing the final pardons.

Analia is now free and working with a women's collective, attempting self-sufficiency through the management of the collective's coffee shop. However, as we will see in Teresa's case, Analia is having a very hard time of it after serving so many years in prison. She lost everything while incarcerated and does not have even an elementary education. Analia is also Afro-ecuadorian, between the racism in Ecuador and her prison background, she sees few other options open to her except transporting drugs, a type of work she is desperately trying to avoid.

Data on prison reality, although differing by source, might have shocked the President. According to statistics of the Ecuadorian National Office for Social Rehabilitation, dated August 2008, there were 17,000 persons in the Ecuadorian prison system,⁴ (According to the prison census carried out by the Ministry of Justice, the prison population as of August 2008 totaled 13,532). The State officially has physical space available for housing 8,000 prisoners. Extreme crowding was the result.

Although Ecuador has one of the lowest incarceration rates⁵ in Latin America, the level of crowding is one of the highest in the region; close to the levels in Brazil and Peru, although lower than levels in, for example, Bolivia and Suriname.⁶

According to the Ecuadorian Ministry of Justice, 45% of those imprisoned (6,039) had not been sentenced and 46% did not have a lawyer. Disturbances and violence inside reclusion centers had increased. Complaints

by prisoners about strong measures were no longer incidents but the rule.

Between 1990 and 2005, the prison population increased significantly due to harsh laws applied indiscriminately; a possible consequence of strong pressure by the United States Government under the Andean Initiative. On one occasion, the United States publicly expressed that it considered "*such operations insufficient and demanded that Ecuador increase apprehension of possible narco-traffickers by '12 percent'.*"⁷

Intervention by the United States in Ecuador's internal affairs and in those of other countries in the region is not exceptional but, in this case, it demonstrates how far it would go to reach specific goals.

According to the Prison Census published in August 2008, 34% of those imprisoned for narco-trafficking in Ecuador, as of mid-2008, were persons accused of crimes related to controlled substances. In June 2007, an

emergency was declared in the so-called rehabilitation centers and was reactivated in June 2008.⁸ After President Correa visited 25 cellblocks in one prison in Quito, Ecuadorian authorities announced the beginning of a national campaign that included, among other components, pardon for micro-traffickers. The Ecuadorian Government initiative would grant special consideration for this group that, according to published data, totaled 2,555 persons.⁹

In addition, President Correa promised that in two years there would be no prisoners in the country who had not received sentence. To implement this, he created a public defense unit,¹⁰ which has produced fairly significant results.

When Correa assumed government responsibility he created a Ministry of Justice and Human Rights, formerly non-existent. In January 2009, the National Office for Social Rehabilitation issued data showing the results of the first year of this campaign: in spite of not achieving its objectives, 6,600 prisoners were released by simplifying legal proceedings and by granting pardon to those who had terminal diseases and to micro-traffickers of drugs.¹¹ Approximately 1,500 persons in this last category were pardoned.

THE PARDON PROPOSAL

The basis for the idea to release from prison persons held for trafficking or transporting drugs is within the framework of what the Ecuadorian Government calls, “*humanizing the social rehabilitation system*” and “*complying with fundamental obligations such as respecting and enforcing respect for human rights*”¹².

In the description presented to the Task Force for Legislation and Fiscal Affairs of the Constitutional Assembly, the current law “*establishes punishment that is disproportionate to the crime committed; in reality, the majority of sentenced persons are not large-scale traffickers or sellers but persons called ‘mules’, mostly women, the majority of whom have no control over narco-trafficking but are persons who rent their bodies (. . .) as drug containers in exchange for (. . .) money*

unrelated to the amount obtained by the sale of such substances”.¹³ The Government, in its proposal, anticipates further reform of the current legislation, by stating that current legislation can be seen as an “*infringement of the Ecuadorian legal code*”.

The proposal establishes requirements for cases in which the pardon applies “*for persons carrying drugs*”¹⁴: the existence of a court-determined sentence prior to July 10, 2008, even if their case is still in process of consultation or cassation; no prior conviction under the drug law; arrested with a maximum quantity of a two (2) kilograms of any drug; and, finally, the completion of ten percent of the sentence or a minimum of one year.

In the words of the Minister of Justice and Human Rights, Dr. Gustavo Jalkh, the proposal reflects the resolution approved by the full Assembly on July 4, 2008, a text almost identical to the government’s proposal. It includes references to precedents created by resolutions of the Economic and Social Council (ECOSOC) about the Standard Minimum Rules for the Treatment of Prisoners¹⁵ and makes a reference to the observations and recommendations expressed by the Inter American Court of Human Rights, in its 1997 Annual Report, which noted that the (anti-narcotic) legislation has caused undue harm to persons.

Also, of major importance, is a special reference to the negative social effects of imprisoning women, who represented the majority of the population imprisoned for drug trafficking.

THE DEBATE AND THE POLITICAL DECISION: ARGUMENTS FOR AND AGAINST

The Correa government’s package of reforms and proposals, which included pardon for micro-traffickers, was approved by vote by the members of the Constitutional Assembly on July 24, 2008¹⁶. Also, in July 2008, the Constitutional Assembly ended its work with the approval of the new Magna Carta. In September 2008, the Government organized a public referendum to approve or reject the new constitutional text.

Interview with Elizabet Silba

Elizabet Silba was arrested in 2007 transporting 500 grams of coca paste. She was given a sentence of eight years and began serving it in Ibarra, a small town in northern Ecuador.

Elizabet was an exceptional person who, once incarcerated, immediately becoming a valuable member of the formally recognized committee of prisoners. As a member of the prison committee, she and others met with a member of the Ecuadorian National Assembly (in session at the time) who was very interested in prison reform. This particular Assembly member was involved in the development of the proposal for the pardon of drug transporters, *mules*, who had been sentenced to serve an unjust number of years in reference to the small quantities of drugs they transported.

Due to the special relationship with this Assembly member, once the pardon was approved by the National Assembly, Elizabet was chosen to help implement the pardon within the women's prison in Ibarra. She was to gather all the data on those women who qualified according to the requirements passed by the Assembly. Based on

her work to gain freedom under the new pardon for many of her fellow prisoners, Elizabet was granted her pardon as well, quickly and without charge. The pardon was an incredible gift for Elizabet as it was implemented only one year after she was sentenced to serve eight years. Elizabet left prison emotionally and psychologically intact.

Elizabet's story is interesting because gaining her freedom via the new pardon *was* so easy and without charge. Although the entire process, by law, is supposed to be free of charge, there are often legal and court documents which must be obtained from outside the prison. Many prisoners in Ibarra, and throughout Ecuador, ended up paying attorneys and/or other persons outside the prisons anything from \$30 to \$500 to gain their pardon. How difficult and costly the process was depended on the desperation of the prisoners to leave, the complexity of their cases, and/or their lack of knowledge regarding the pardon process itself.

As it turns out, Elizabet's story is one which should be the norm, but unfortunately it turned out to be the exception.

The proposal for the national pardon for small-scale traffickers was conceived in a particular political juncture; it was part of a package the government had presented to the Constitutional Assembly, which was formed in November 2007. The proposal was consolidated during the Assembly. There was much discussion among the representatives of the Constitutional Assembly about acceptable criterion for a limit on the amount of controlled substances that a person could transport to be eligible for the pardon. Obviously, establishing as a criterion any limit in grams would be arbitrary.

Presenting the idea of a pardon for persons who trafficked in drugs or who were suspected of trafficking, produced, in general, two main reactions: the first was a sigh of relief by prisoners who finally saw that the authorities were concerned about them. After years of protests, strikes and complaints, for the first time they were being

taken seriously with concrete actions to alleviate the inhumane crowding.

The second reaction, which was negative, was reflected in a controversy that appeared in the media. Basically, the opposition argued that the pardon favored narco-trafficking.

One of the spokespersons for the opposition was the national Attorney General, Washington Pesantez, who spoke out against the proposal, defending the position that only political crimes deserved an amnesty, not common crimes. (The pardon proposed at the Constitutional Assembly also considered a list of persons who had been victims of police entrapment by previous governments.)

It was not clear which group should benefit: the small-scale sellers or drug carriers. For some reason, it became more acceptable, for many, that the pardon is applied only to carriers, the *mules*; someone who is a victim

Interview with Teresa Delgado

The case of Teresa Delgado is an example of how the new pardon initiative in Ecuador may not go far enough. Teresa Delgado was a “mule”, involved in the transporting of small amounts of drugs from dealers to buyers. She was found with thirty grams of cocaine and eventually given a sentence of eight years.

Immediately after the requirements and procedures for the new pardon were passed by the National Assembly, the prisoners’ committee in the women’s prison in Quito, *El Inca*, began collecting the data on all inmates: the amount of drugs for which they were arrested and the length of their sentence. Teresa’s case clearly qualified. Although, for Teresa, the process was not difficult and she did not have to pay anything, it was five months after applying for release, that she was finally given her papers to leave the prison.

As with the majority of prisoners serving long sentences under the previous anti-narcotic laws in Ecuador, within the six years in which she was incarcerated Teresa lost all that she had before incarceration. Her two children were in an orphanage and she had nowhere to go. Previous friends, who also had family in prison under drug charges, took her in and offered a place for her to live with her children. She began to work with them in their catering business.

However, the family with whom Teresa was living and working was still involved in

trafficking and, unbeknownst to her, were under observation by the police. Teresa was often seen in their company. When a large amount of marijuana was found on the family’s property, Teresa was also detained with the rest of the family. She was hauled in with the rest of her friends due to the fact that she had previously been in prison on drug charges, even though no drugs were found on her.

Teresa swears that she did not re-enter the drug trade and the family, also now in prison, confirms that she was not working with them. Having been in prison for years, Teresa wanted her family back together again and would not have risked her new-found freedom. However, she is now in prison once more and her case is pending before the prosecutor’s office.

Teresa’s case is indicative of the fact that the new pardon initiative in Ecuador may not go far enough. The majority of prisoners, having served multiple years outside of society, have nowhere to go once released. Often their families, or previous acquaintances, are also in the drug trade. Those receiving the pardon have no money once they are released and the fact that they have spent years in prison is an obvious impediment to finding employment. The new pardon was a gift to many of those suffering under the draconian Ecuadorian anti-narcotic laws. However, with no existing programs for newly released prisoners in Ecuador, where will these beneficiaries go and how will they survive?

of the trafficking networks, not persons who sold small quantities in the street.

But when the quantity was set at two kilograms or less, obviously persons who met this requirement could negotiate their release from prison even though they were sellers. The requirements do not specify that the person be a carrier nor is there a definition of what transporting is in this case. The only thing that is defined is the quantity.

The Attorney General, Washington Pesantez, said that if someone is transporting two kilograms, they intend to sell it at a high

profit and that the majority of prisoners (80%) were in prison for possessing less than 50 grams, an amount he proposed as a limit¹⁷.

In spite of having identified a basic fact, the Attorney General mixed two distinct aspects: the organization of drug trafficking and the subject of decriminalizing personal use that is increasingly applied in legislative and judicial practices all over the world.

In terms of the organization of narco-trafficking, persons called *mules* as well as small-scale sellers are the weakest links of the chain of a highly profitable business. Many

women risk their lives swallowing substances that could kill them instantly or selling drugs on the street for a relatively small amount compared to the value of the merchandise they are trafficking. These persons are used by traffickers and, almost without exception, come from vulnerable and poor social classes. Also, there is no proportionality between the profit earned by the networks that contract the mules and the small amounts earned by the *mules* themselves, who are taking much greater risks.

The Ecuadorian Government's proposal can also bear a relation to the topic of decriminalization of drug possession for personal consumption. There is sufficient proof that the new law, or reformed law, will take into account a focus based on the principle retained in the Constitution: that the problem of drug consumption is a public health issue and, in reference to users, "*in no case will criminalisation be permitted nor will persons' constitutional rights be violated*¹⁸."

For the majority, the most important argument of the Ecuadorian proposal is to return certain proportionality to the sanctions imposed which has been totally absent in juridical practice.

CONCLUSION

A pardon for small-scale traffickers, or carriers, as proposed by the Ecuadorian Government and approved by the Constitutional Assembly with its full powers, is a sound and pragmatic example worthy of being applied in other countries.

The pardon shows a human face to a large group of persons who have been totally abandoned by authorities. In addition, it recognizes the draconian character of the legislation on controlled substances imposed on countries in the region since the 1980s.

The measure is controversial because it concerns drug trafficking. However, in the end, it recognizes that there is a grey area when persons of humble origin with few resources are those doing the trafficking. Punishing these persons without offering them any other options is simply unjust and is disproportionate to the crime committed.

This new measure in Ecuador, however, could all go to waste if not properly followed up by new legislative reforms related to controlled substances. At the same time, as in other countries in the region, Ecuador could, with its reform proposal, inspire governments that want to free themselves from the weight of imposed legislation concerning controlled substances.

NOTES

1. With the support of Andrea Aguirre, from *Mujeres de Frente*, based in Quito; translation and editing by Tom Edwards and Amira Armenta.
2. For a sociological analysis, see: Waquant, Loïc 2006 *Las cárceles de la miseria* (Buenos Aires: Manantial).
3. A Quechua Christmas Carol, MWC news: <http://mwcnews.net/content/view/18961/26/>
4. When this report was published the Web page of the National Office of Social Rehabilitation of Ecuador was not available. See the Web page of the Ministry of Justice: http://www.minjusticia-ddhh.gov.ec/index.php?option=com_content&task=view&id=89&Itemid=11.
5. Prison Population Rate: number of prisoners per 100,000 inhabitants in a country (see list from the International Centre for Prison Studies (ICPS) at: <http://www.kcl.ac.uk/schools/law/research/icps>)
6. Occupancy Rates, International Centre for Prison Studies (ICPS): http://www.kcl.ac.uk/depsta/law/research/icps/world/brief/wp_b_stats.php?area=all&category=wb_occupancy
7. *El Comercio*, March 30, 2005, “*Estado Unidos presiona por más capturas*”
8. Renovación del estado de emergencia por grave conmoción en el sistema penitenciario en todo el país, decreto ejecutivo 1142, 17 de junio de 2008, Sistema de Información de Decretos Ejecutivos: <http://www.sigob.gov.ec/decretos/Default.aspx>
9. *El Comercio*, February 1, 2008, “*El indulto a las mulas, en estudio*”
10. Defensoría Pública <http://www.defensoriapublica.gov.ec/>
11. *El Comercio*, January 5, 2009; “*En las prisiones se invirtieron USD 11 millones en un año.*”
12. Majority Report; *Informe sobre el sistema de rehabilitación social*, Republic of Ecuador, Constitutional Assembly, Montecristi, April, 3, 2008, http://www.asambleaconstituyente.gov.ec/documentos/resolucion_mulas_04-07-2008.pdf
13. *Idem*. p.6
14. Information of pardons for persons carrying drugs, Prison Public Defense Unit, Ministry of Justice and Human Rights
15. Resolutions 663C (XXIV) of the 31 of July 1957 and Resolution.2076 (LXII) of 13 of May 1977.
16. Cronología de los hechos más importantes desde que Rafael Correa asumió la presidencia, <http://www.ecuavisa.com/Desktop.aspx?Id=958&e=3478>
17. Pesantez refers in an interview (*El Comercio*, 6 February 2008) to the World and Pan-American

Health Organizations (OMS and OPS) that allegedly sustain that up to 10 grams is acceptable for personal consumption.

18. Article 364, Constitution of the Republic of Ecuador

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