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Curbing Addiction to Punishment: Alternatives to Incarceration for Drug Offenses

The Research Consortium on Drugs and the Law (CEDD)
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CEDD
Colectivo de Estudios Drogas y Derecho

About this publication

The CEDD research consortium brings together researchers from nine Latin American countries with the goal of analyzing the impact of criminal law and legal practice surrounding illicit drugs at the national and regional level. Currently, a fourth research project is being carried out on the situation of people deprived of their liberty for drug offenses in the countries under study. This investigation seeks to give an update on the situation of people incarcerated for drug crimes and also aims to propose alternatives to incarceration.

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Summary: This document summarizes the progress made on discussions regarding alternatives to incarceration for minor drug offenses in the Americas, presents some of the reasons why such measures must be implemented urgently in the region, and analyzes the relevance of some alternatives that have been applied to date. Finally, it concludes with several recommendations to governments for moving towards the adoption of alternatives to incarceration that are respectful of human rights and effective in terms of reducing prison overcrowding and protecting public health and safety.

Introduction

In the Declaration of Antigua Guatemala, adopted June 6, 2013, the countries that make up the Organization of American States (OAS) began to reassess trends regarding the growing and indiscriminate use of criminal law to sanction conduct related to illicit drugs, encouraging support for the implementation of alternatives to incarceration. In addition, the OAS General Assembly September 2014 declaration calls on member states to promote alternatives to incarceration, taking into account a gender perspective, the seriousness of the offense and whether the penalty is appropriate, among other factors.

These calls led to the establishment of a working group, at the initiative of the Colombian government, which produced a report that puts forth proposals on alternatives to incarceration for drug-related offenses, presented during the 57th session of the OAS's Inter-American Drug Abuse Control Commission (CICAD). The report recognizes that the majority of people arrested, convicted and incarcerated for drug-related crimes represent the weakest links in the illicit drug chain. Their imprisonment—in addition to not being effective in terms of protecting public health or safety—has had a negative impact on the rights and health of the people deprived of their liberty and has made inefficient use of police and judicial resources. The report also states that a comprehensive, balanced approach to drug policy that is respectful of human rights should "look for alternatives to incarceration for minor, nonviolent offenders, using incarceration as a primary response for violent crime, high-level drug trafficking, and other serious security threats" (CICAD, 2015: 16). A wide range of alternatives that countries could implement are presented, including the decriminalization of certain conducts, the diversion of cases from the judicial system to treatment or restorative justice programs, and pardons or amnesties.

Countries in the Americas are characterized by two realities that have reinforced the importance of implementing alternatives to incarceration. First, criminal and penitentiary policies have swiftly increased the prison

population and, at an even faster pace, the population imprisoned for drug offenses, resulting in severe human rights crises in prisons. Second, a considerable number of countries, and the OAS as a whole, have called on the international community to recognize the failure of the prohibitionist approach and begin a frank and open debate to reform global drug policy. Some governments have started to implement alternative policies, such as the legalization of cannabis for recreational use in Uruguay, and in the states of Washington, Colorado, Oregon, Alaska and in Washington, DC within the United States. In this context, alternatives to incarceration are measures that governments can adopt within the framework of the United Nations (UN) drug control conventions, at the same time that the aptness of these conventions is beginning to be discussed more openly. These reforms can be carried out without resorting to the excuse that the entire international community must debate global drug policy first. Nevertheless, the prejudices sown during decades of prohibitionist policies continue to hinder the implementation of alternatives to incarceration for drug offenses.

The Research Consortium on Drugs and the Law (CEDD) has prepared this document in the spirit of contributing to the drug policy debate currently underway. We also seek to promote the adoption of alternatives to incarceration that are compatible with respect for and promotion of human rights and public health, and allow for appropriate approaches for different sectors of the population.

Why is it necessary to implement alternatives to incarceration?

The following are just three reasons, among others, that show why the implementation of alternatives to incarceration is not only compatible with State obligations deriving from various instruments of international law, but also that the measures are relevant, necessary and urgent in the current context, given the failure of drug policies that have prioritized a punitive approach and the prison crises faced by many countries in the region.

***a)* Alternatives to incarceration are a more humane, effective and cost-effective way to protect public health and safety than the use of criminal law.**

The prohibitionist logic is based on the notion that the use of criminal law to curb drug-related behavior is an effective strategy for reducing the supply of illicit substances, by disrupting criminal organizations and thereby protecting public safety. The reduction in supply resulting from criminalization should also, according to this logic, serve to protect public health because the increase in prices stemming from

limited supply should work as a disincentive to consumption. This logic is questionable for a number of philosophical and legal reasons—and for practical ones, too. Numerous studies have shown, for example, how in the case of the United States, mass incarceration has not been effective in terms of reducing the availability of substances since, contrary to the logic of prohibitionist policies, their price has been declining even as the number of people incarcerated for drug offenses has risen (Bewley-Taylor *et. al.*, 2005: 6).

The prison population in countries in the Americas has increased sharply, but the rate of people incarcerated for drug crimes specifically has grown at an even faster rate. In parallel, drug consumption has continued to rise along with the creation of new psychoactive substances, which in 2013 surpassed in number the quantity of drugs prohibited within the framework of the international drug control system (UNODC, 2015). The mass incarceration of people for drug offenses has neither reduced the violence associated with drug trafficking, nor the levels of criminality (King *et. al.*, 2005). On the contrary, it has ended up exposing minor, nonviolent offenders to prisons that, under current circumstances, serve as true schools for crime and where people's minimal basic needs are not met. This overview shows the paradoxical ineffectiveness of mass incarceration: Never before have people in the Americas been able to access so many drugs as easily as they can today, despite the fact that prisons are overflowing with people convicted or accused of committing drug offenses (OAS, 2013).

Incarceration is an ineffective and counterproductive response to minor drug offenses or other infractions committed while a person is abusing substances.

Furthermore, the incarceration of people with some level of problematic drug use can expose them to an environment in which they are less likely to overcome their dependency than if they were given treatment outside prison. According to estimates by the Justice Policy Institute, while drug treatment in prison yields benefits of between US$1.91 and $2.69 per dollar invested, therapeutic programs outside prison achieved benefits of as much as US$8.87 per dollar invested (McVay *et. al.*, 2004). In addition, studies carried out in the United States have shown that incarcerated individuals have a greater propensity to suffer problems related to mental health, substance abuse and lack of employment. This effect is even greater among women than it is among men (Keough, 2013).

Prison, as a response to minor drug offenses or other infractions committed while a person is abusing substances, is an ineffective and counterproductive measure

in terms of protecting public health and safety. Moreover, it is much more costly than other alternatives, such as treatment outside of prison for people with drug use problems who commit other kinds of crimes (Carter *et al*, 2006; Sullivan, 2014).

b) Alternatives to incarceration for minor drug offenses are needed to tackle the current prison crisis in countries in the Americas.

The most recent data available from the International Centre for Prison Studies (ICPS, 2013) indicates that countries in the Americas have, on average, a 48% rate of prison overcrowding, 26 points above the global average. Countries such as El Salvador, Guatemala, Venezuela, Bolivia and Peru have overcrowding levels more than double their penitentiary systems' capacity. Brazil and Colombia have overcrowding rates of above 50%. Only Argentina, Canada, Puerto Rico and Jamaica have prison occupancy levels that are below capacity. The OAS General Assembly[1] and the Office of the Rapporteur on the Rights of Persons Deprived of Liberty have repeatedly emphasized that overcrowding is the most serious problem affecting the majority of prison systems in the region. Among other things, it increases violence levels in prisons, creates an environment in which sanitary, health and hygiene conditions are deplorable, and hinders access to the already scarce opportunities for education and employment, creating barriers to reinsertion upon release. As a result, the Rapporteur's Office concludes that overcrowding constitutes in and of itself a form of cruel, inhuman and degrading treatment that violates the right to personal integrity, as well as other human rights.

According to the OAS's Inter-American Commission on Human Rights (IACHR), attempting to make up for infrastructure shortcomings is not a sustainable solution over time, nor are presidential pardons or programs to collectively release certain categories of inmates, even though such measures may be necessary in emergency situations. Recognizing that overcrowding results from implementing repressive social-control policies based on the premise that the deprivation of liberty is a fundamental tool for ensuring citizen safety, the IACHR considers that countries should adopt the following policies, among others: promote the use of alternative measures or substitutes for preventive detention and the deprivation of liberty as a sanction, and

[1] OAS, General Assembly resolution, AG/RES. 2510 (XXXIX-O/09), approved June 4, 2009; OAS, General Assembly resolution, AG/RES. 2403 (XXXVIII-O/08), approved June 13, 2008; OAS, General Assembly resolution, AG/RES. 2283 (XXXVII-O/07), approved June 5, 2007; and OEA, General Assembly resolution, AG/RES. 2233 (XXXVI-O/06), approved June 6, 2006.

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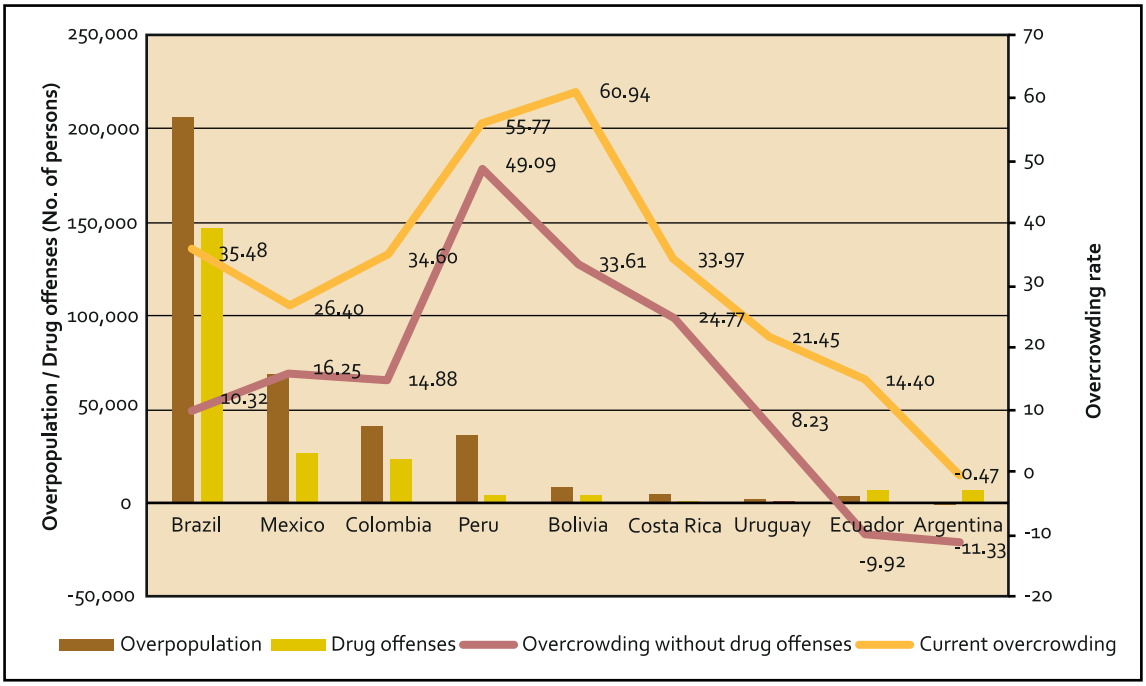
the use of other methods to serve sentences such as probation, supervised release and work or school release (IACHR, 2011: 177).

The tendency to respond with ever-longer prison sentences has been particularly strong with regard to drug offenses, which has contributed significantly to aggravating the problem of overcrowding. Graph 1 shows the comparison between prison overpopulation and people who are incarcerated for drug offenses in nine Latin American countries; it also shows how the rates of overcrowding would change if alternatives to incarceration were implemented for persons detained for drug crimes in penitentiary facilities.

If alternatives to incarceration were applied to people imprisoned for drug offenses in these nine countries, the average rate of overcrowding would fall from 31.39% to 15.10%. In Brazil, the overcrowding would drop from 35.48% to 10.32% and in Ecuador it would disappear and even serve to free up 9.92% of current capacity.

In Colombia, just by applying alternatives to incarceration for women imprisoned for drug offenses—and no other additional crimes—the overcrowding in female prison facilities, which current stands at 49%, would vanish and another 18% of capacity would be freed up. Implementing these alternatives would allow Colombia to use much of the $1.184 billion dollars that it has spent to incarcerate people for drug offenses in the last 14 years—or in the case of Bolivia and Argentina, the $6.5 million and $1.3 million dollars spent, respectively, to this end in 2013—on more effective security and public health strategies.

Graph 1: Overpopulation in the Prison System vs. People Incarcerated for Drug Offenses (bars) and Overcrowding With and Without Drug Offenses (lines) in Nine Countries. Most Recently Published Data.



Sources:
Brazil: National Justice Council (June 2014).
Mexico: Secretariat of the Interior (2015). The total population and overpopulation was calculated for 2015, the population for drug offenses was calculated for 2015, based on the same proportion that existed versus the total in 2012.
Colombia: National Penitentiary and Prison Institute (INPEC) (December 2014).
Peru: Total population and drug offenses figures from Aynaznoa (2013), with data to November 2013. Prison overcrowding based on Campos Peralta (2014), with data to 2013.
Bolivia: National Institute of Statistics (December 2013). Overpopulation and prison overcrowding calculated on the basis of data from the International Centre for Prison Studies (ICPS) (2013).
Costa Rica: Data on prison overpopulation and overcrowding based on Delgado (2015). People incarcerated for drug offenses to 2011: Ministry of Justice and Peace – General Directorate of Social Adaptation.
Uruguay: National Drugs Board (2012).
Ecuador: Data from 2009: National Public Defender's Office and the Ministry of Justice, Human Rights and Religion.
Argentina: National System of Statistics for the Enforcement of Sentences (SNEEP) of the national Ministry of Justice and Human Rights (November 2013).

c) Alternatives to incarceration for minor drug offenses are measures that would contribute to States' fulfillment of their human rights obligations and would be compatible with the international drug control system.

According to Article 103 of the United Nations Charter and due to the *jus cogens* status of the main international human rights instruments, the obligations of States on these matters prevail over policies derived from the drug conventions, as the United Nations Office on Drugs and Crime (UNODC) itself has acknowledged.[2] Despite this,

[2] "While it is not always easy to establish a hierarchy between these different instruments, it is clear that the constituting document of the Organization, the Charter of the United Nations, takes priority over all other instruments ... In the context of drug control, this means that the drug Conventions must be implemented in line with the obligations inscribed in the Charter. Among those obligations are the commitments of signatories to protect human rights and fundamental freedoms." (CND, 2008, p. 19)

governments in the region have opted—even when the conventions themselves have not required them to do so—to punish the conduct sanctioned by the conventions with prison sentences; some of them have even established pretrial detention as mandatory in the case of drug offenses, or have eliminated the possibility that people convicted of these crimes benefit from suspended sentences or probation, or other alternatives to incarceration. This interpretation of the conventions has meant that in practice, drug policies end up violating people's rights because they have aggravated the problem of prison overcrowding in the region, which means sentences cannot be served in decent conditions. The latter has been recognized as a violation of the ban on cruel and inhuman punishment. For that reason, for example, after confirming that the problem of prison overcrowding had worsened in Colombia, the United Nations Committee Against Torture urged in its concluding observations for that country's universal periodic review in 2015 that the State "urgently adopt effective measures to reduce occupation levels in penitentiary facilities, primarily through the use of alternative measures to the deprivation of liberty" (Committee Against Torture, 2015).[3]

The adoption of alternatives to incarceration, therefore, is necessary for States to comply with their human rights obligations and is also fully compatible with what has been set forth in the international drug control conventions.[4] There is no valid excuse, then, for not implementing these kinds of measures.

Which alternatives should be implemented?

Countries can implement a wide range of alternatives to incarceration, which have been classified according to different criteria (CICAD, 2015). One set relates to the stage in judicial proceedings at which they occur, and refers to: *a)* measures aimed at limiting entry into the criminal justice system; *b)* measures applied during criminal proceedings and aimed at either preventing incarceration or making the sentence proportional to the offense; and *c)* measures aimed at reducing prison populations through the early release of convicted individuals or those in pre-trial detention, accompanied by social integration strategies. Alternatives to incarceration can also be classified by the target population that would benefit (women, youth, persons in conditions of

[3] CEDD translation from Spanish.

[4] Article 3.4 (b, c, and d) of the 1988 Convention, establishes that "... in appropriate [supply offenses] of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare." Similarly, the 1972 Protocol to the 1961 Convention, in Article 36.1 (b), states: "... when abusers of drugs have committed such offenses, the Parties may provide ... either as an alternative to conviction or punishment or in addition ... that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration."

vulnerability, cultivators, human couriers, people with substance abuse problems, etc.); the levels of implementation (national or local); or the kind of approach they propose (decriminalization, depenalization, non-custodial sanctions or proportionality in sentencing) (CICAD, 2015).

Although each country, in light of its institutional capacity, legal tradition and its own realities and priorities, should evaluate the alternatives to incarceration whose implementation are best suited to its specific context, there are some criteria that can be taken into account when officials evaluate the appropriateness of adopting such strategies.

First of all, any alternative must be based on full respect for human rights, have a public health focus and be evidence-based. Second, the implementation of alternatives must be guided by strict adherence to the principle of proportionality, which necessitates making distinctions between different realities and responding to each of them with the proper instruments. In this sense, drug use should, under no circumstance, be the object of sanctions—much less criminal sanctions. Moreover, people who commit a crime due to their substance dependency should receive support, if they want it, to help them overcome that dependency, rather than punishment in conditions that could aggravate it. In accordance with this principle, distinctions should be made between the legal treatment given to people who are involved in drug trafficking because they are in a situation of need, and who do not pose any danger to society, and those people whose role in criminal organizations makes them a threat to citizen security. And finally, the implementation of alternatives should be based on cost-benefit criteria, which allow for optimizing available resources to achieve the greatest impact possible in reducing the prison population and promoting public health objectives that are coherent with respect for human rights, while also comprehensively discouraging certain types of conduct and substance abuse.

When applying these criteria, officials should also evaluate the relevance of continuing to implement some of the alternatives most used in the region thus far. Drug treatment courts (DTCs), for example, are the most widely employed alternative as they are already in operation or plan to be extended to nearly half of the OAS member states.

Available evidence has shown that drug courts are more effective than prison, both in terms of preventing problematic consumption and reducing recidivism, when applied to people who have a strong dependency on licit or illicit drugs and a high risk of criminal recidivism, and when best treatment practices are used. (National Association of Drug Court Professionals, 2013; Cissner *et. al.*, 2013). However, when applied to people with other profiles, and in a context in which treatment services for those who need them but do not commit crimes are lacking and difficult to access, they can be counterproductive (Lowenkamp, Holsinger, and Latessa, 2005; Lowenkamp and Latessa, 2004). Some scholars have highlighted the tension between treatment objectives as a public health strategy and the treatment objectives linked to judicial proceedings as seen in the DTC model. From a public health perspective, treatment is justified because drug dependency is understood as a complex illness that can have multiple causes. In contrast, the vision of treatment put forth in the context of DTCs is based on the premise that people can overcome problematic drug use more easily through the provision of incentives and sanctions related to criminal penalties (Guzmán 2012). Nor is it clear that judges are the most appropriate people to lead a treatment team. Finally, before they are implemented, officials should consider whether the investment needed to put DTCs into place can really result in a substantial decline in incarceration (insofar as there is a strong connection between drug abuse and crime), or if alternatives that divert cases from the judicial system to other treatment channels would be preferable. The latter avoids incurring all the costs of setting up a special "therapeutic justice" apparatus, the impact of which on overcrowding could be of little significance.

With regard to alternatives such as pardons, available evidence has shown that while they can serve as a useful emergency measure to alleviate crises in prison systems, inmate populations may return to or even exceed previous levels within a few years if the lack of proportionality in penalties to sanction drug offenses is not addressed (Paladines, 2014). For this reason, alternatives such as the reform of criminal codes to decriminalize certain conduct or to adopt more proportional penalties have proven to be more effective. Examples include the reform of Ecuador's criminal procedures code (Pazmiño *et. al.*, 2014), or the reform of Article 77 *bis* of Costa Rica's Psychotropics Law, which reduces penalties for women who introduce drugs into prison. If accompanied by public support services to comprehensively prevent recidivism, such reforms can achieve significant reductions in prison overcrowding, without those who benefit returning to engage in criminal behavior (Muñoz, 2015).

The criteria of proportionality and alternatives respectful of human rights

that comprehensively address the matter of dissuading the conduct and preventing problematic use should generate a special interest in programs to divert cases before they enter the criminal justice system. In this way, treatment can be tailored to the different profiles of people who commit criminal acts, diverting minor, nonviolent offenders to public support services that allow them to seek out legal employment options, while diverting those with drug dependencies to voluntary, evidence-based treatment services with a strong community component for rehabilitation. These would be more cost-efficient alternatives than waiting for these cases to enter the criminal justice system or for convictions to be handed down before implementing alternatives.

Conclusions and recommendations

Based on the considerations set forth in this document, and in the spirit of contributing to overcoming the human rights violations stemming from the prison crisis faced by numerous countries in the region, as well as seeking more appropriate and effective responses than the failed use of criminal law to sanction all types of drug-related conduct, CEDD offers the following policy recommendations with regard to adopting alternatives to incarceration:

a) Decriminalize drug consumption and put an end to all persecution of users. In the case of people who have substance dependency problems (whether they commit other crimes or not), offer services for voluntary treatment of the highest standards that is centered on a public health approach and is not subject to the threat of criminal sanctions.

b) Carry out the necessary reforms to ensure that minor, nonviolent drug offenders are not sent to prison and are diverted to public support services aimed at comprehensively preventing recidivism by addressing the socioeconomic factors that led to that conduct. Insofar as possible, opt to reform criminal codes to decriminalize these actions or set up diversion programs for cases before they enter the criminal justice system. This would allow for available police, investigative and judicial resources to be utilized to pursue those cases that do indeed represent a threat to citizen security.

c) Implement as quickly as possible alternatives to incarceration that strictly respect the rights of the persons involved in the commission of drug-related offenses. These alternatives must be based on a proper diagnosis about what measures will allow for available resources to be optimized in each country in order to reduce prison overcrowding, contribute to public health objectives, and reduce criminal recidivism. This should be

done guaranteeing the participation of civil society in the design, implementation and evaluation of these kinds of alternatives.

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About CEDD

The Research Consortium on Drugs and the Law (*Colectivo de Estudios Drogas y Derecho, CEDD*) brings together researchers —most of them lawyers— from nine Latin American countries: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Peru and Uruguay. Launched as an initiative of WOLA and TNI, CEDD's main objective is to analyze the impact of criminal law and legal practice related to drugs, seeking to provide information on the characteristics and social and economic costs of drug policies in Latin America and thereby foster an informed debate about the effectiveness of current policies and recommend alternative approaches that are fairer and more effective.

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