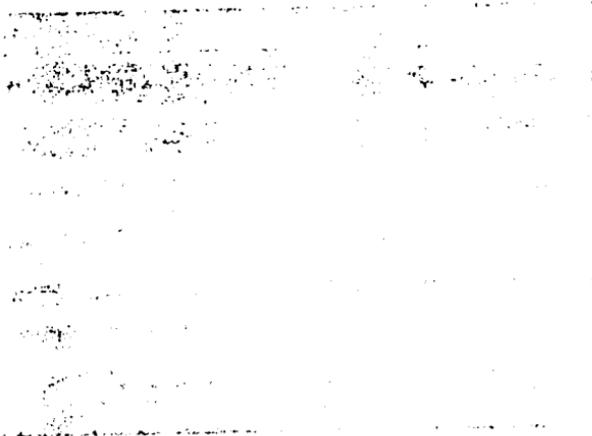


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# **THE ADMINISTRATION OF JUSTICE IN ECUADOR**



**Laura Chinchilla / David Schodt**

**CENTER FOR THE ADMINISTRATION OF JUSTICE  
CENTRO PARA LA ADMINISTRACION DE JUSTICIA  
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## **PREFACE**

The Center for the Administration of Justice (CAJ) was founded in 1984 at Florida International University (FIU), a member of the State University System of Florida. Its purpose is to engage in research, training and public education on the administration of justice in Latin America. With offices in Miami and San Jose, Costa Rica, CAJ has become a unique international resource at the forefront of justice sector reform in the region. The Center's goal is to encourage dialogue and policy reform for the criminal justice sector in Latin America. It has become a leading source of information and leadership on issues relating to the administration of justice in Latin America. Its assessments have been widely disseminated and have been influential in public policy decision-making throughout the region.

The CAJ employs a multidisciplinary and international staff of specialists, including lawyers, political scientists, public administrators and public policy analysts. Many are former justice officials with experience and skills in administration of justice issues.

This document is the result of a 1990 assessment of the Ecuadorian Justice Sector financed with a grant from the Agency for International Development in Ecuador. The assessment's goal was to develop baseline data, analysis and recommendations on the state of the justice sector in Ecuador to allow the Supreme Court and USAID/Ecuador to make program and policy decisions.

Laura Chinchilla and David Schodt participated in the assessment; the former acted as CAJ's project director and the

latter conducted the analysis of social and economic conditions. The authors wish to acknowledge the work of Ms. Valeria Merino, an Ecuadorian lawyer, who acted as the local project manager; without her direction and assistance of local staff the assessment would not have been completed. The work done by Paredes, Silva & Associates, a local management firm, and Mr. Robert Page, an experienced U.S. court administrator was also quite valuable in analyzing court administration. Finally, we also wish to thank Dr. Rodrigo Buchelli, a noted Ecuadorian legal expert who prepared a comprehensive analysis of criminal procedure; Dr. Jose Ma. Rico, CAJ's legal expert, who designed the methodology for the research, and Professor Luis Salas, CAJ's director, who provided valuable comments throughout the preparation of this monograph. The Supreme Court of Ecuador, and its staff, and especially former President, Dr. Walter Guerrero, cooperated and encouraged realization of these studies. Likewise, former Attorney General, Dr. Gustavo Medina, lent his full support to this venture.

This monograph represents a first descriptive approach to a situation that will require deeper research. It is not meant to offer a definitive analysis of the justice system within the current political context. It highlights relevant features of Ecuador's extremely complex political and institutional reality and seeks to clarify some of the main issues currently debated in Ecuador.

This analysis considers the administration of justice as a system made up of regulations, institutions, and formal and informal processes. The system operates within a political context and its actors are institutions from the different branches of government (National Assembly, Attorney General's Office, Judiciary, Police, etc.), and other institutions responsible for the academic preparation and regulation of the human resources of the system such as law faculties, and bar associations.

This document describes each of the institutional players with particular emphasis on the criminal justice system. The state of criminal justice in a country is a key indicator of how

a society protects the individual citizen and the community as a whole from actions which threaten their peace, safety, and human rights.

This monograph also provides a historical overview of politics and justice as a basis for understanding the justice system. Treated in turn are: the National Congress, the Judiciary, the Attorney General, the System of Legal Defense, the Police, the Correctional System, and the Criminal Procedure. It concludes with an analysis of the major normative, social, and procedural issues facing the system.

## **EXECUTIVE SUMMARY**

Ecuador led the return to democracy in Latin America with the inauguration of Jaime Roldós as president in 1979. Given the highly unpropitious circumstances surrounding the reinstallation of democracy, and the adverse economic conditions in later years, it is no small accomplishment that democracy has survived through the politically turbulent years after 1979. Yet, democratic institutions in Ecuador remain underdeveloped and fragile. If democracy in Ecuador is to be consolidated and deepened, the institutions that support it will have to be strengthened. The judicial system's role in supporting democracy through the efficient and impartial administration of justice is particularly important. The Ecuadorian judiciary, however, has not performed this function successfully.

Several factors, whose origins can be traced to the beginnings of the Ecuadorean nation, have hindered the development of a fair, independent, just, and efficient criminal justice system. During the colonial period, the administration of justice was strongly conditioned by racial or social criterions that discriminated against the non Spanish populations. Even though several attempts have been made to guarantee civil rights to a majority of the citizenry, severe problems still serve to deny basic rights to large sectors of the population. For example, limited access to the administration of justice results from illiteracy, indigence, and concentrations of tribunals in urban areas.

After independence, regional differences, added to the existing racial and social divisions, hindered the consolidation

of the new nation. Eventually, like many of its neighbors, a centralized and authoritarian political system, in which the executive branch predominated, emerged. Subsequent reforms decreased executive power and the legislative branch acquired prominence. The judiciary, however, has continued to occupy a secondary, and subservient role.

Following the reestablishment of democracy in 1979, after six years of military dictatorship, the judicial system has continued to be plagued by politicization and has become a pawn in the struggles between the executive and legislative branches. During the Leon Febres Cordero government (1984-1988), for example, these interinstitutional conflicts, especially related to the selection of judges, led to police takeovers of courts, the resignation of the members of the Supreme Court and their substitution with supporters of the party which controlled the Congress.

Most of the problems facing the Ecuadorian justice sector are common to the countries in the region: an antiquated, slow, and inefficient procedure; a judiciary perceived as politicized and corrupt; a passive and impotent prosecutorial body; and, a limited legal defense mechanism for indigents. These problems are aggravated by social, economic and political trends in the last few years: migration to urban centers; increase in crime rates; depressed economic conditions; growing militancy of indigenous groups; and, demands by women for a more significant societal role. Finally, narcotics has aggravated the problems faced by the justice sector as the Government tries to accommodate foreign demands to curb trafficking and money-laundering while dealing with concerns over protection of fundamental rights and complaints of foreign interference in the justice system.

Central to these problems is the continued reliance on "civil law" procedural models which have been abandoned in several European countries (Germany, Italy and Spain). Proceedings in Ecuador are characterized by written pleadings and the secret nature of some of the key stages of the process. The investigating judge, rather than performing as an arbiter, as

in the US-based adversarial system, acts as an investigating magistrate in the key stages of the criminal proceeding and directs the process in civil cases. The system relies on a conception that all crimes must be brought to trial, thus, eliminating prosecutorial discretion and preventing the State from focusing its prosecutorial resources on the most severe problems. Rather than being the main accuser and lead investigator, the prosecutor is relegated to acting as a passive depository of pleadings and a reactive figure. Defense counsel is notably absent throughout the most critical stages of the proceedings.

Most of the leading Latin American jurists recognize that the "civil law" process which predominates in Ecuador is outdated and should be replaced with an adversarial, and oral system for criminal and civil cases. The civil law process, they argue: relies on secrecy and leads to popular distrust; allows for corruption; contributes to delay; and, prevents the State from determining prosecutorial priorities, thus, rendering it impotent to deal with the gravest problems facing the system (for example, organized crime, public corruption, white collar crime). Adoption of an adversarial system in Ecuador will be the most significant legal change in recent memory. This shift, however, will not be easy and will require a great deal of planning, testing and gradual implementation.

Another factor that affects the administration of justice is its inefficiency in resolving disputes. The backwardness of the system is a consequence of its politicization and the lack of resources which the other two branches have awarded the judiciary. The human, technological, and financial resources tend to be limited in almost every institution of the sector. Moreover, these few resources are often wasted due to the lack of administrative procedures and systems. Thus, for example, it is not uncommon for the judiciary to underspend its appropriation while clamoring for additional resources.

The economic crisis of the 1980s also affected the justice sector. Budgetary cuts took place at the same time that social tensions, primarily unemployment, lower standards of living

and rising crime rates, placed greater public demands upon judicial services. Recently, the drug problem has increased the pressures upon the justice system. Its inability to deal adequately with these exigencies has led to low public confidence in these institutions.

A number of reforms have been implemented to improve the justice system (for example, a new law on court organization, establishment of new administrative units within the courts, and the most recent constitutional amendments). Recognition of the crisis facing the justice system has led to the creation of nongovernmental assistance and advocacy groups (especially in the areas of drugs, right to counsel and prisoners' rights).

While these efforts are laudable, they may go for naught until the competing political sectors agree to depoliticize the system and accord the judiciary the independence necessary for it to act as a coequal branch of government. Recently, new legislation has been created establishing a nonpartisan judicial council charged with judicial selection on the basis of merit. Its success will depend on the commitment of the political parties to the concept of judicial independence.

# I. ADMINISTRATION OF JUSTICE AND SOCIOPOLITICAL DEVELOPMENT

## A. Description of the Country

Situated astride the equator, from which the country derives its name, Ecuador is located between Colombia and Peru on the northwestern coast of South America. It is the second smallest country in South America, with a land area of approximately 281,341 square kilometers (108,623 square miles), roughly equal in size to the state of Colorado. In 1990, the population was estimated to be 10,781,600, of which approximately 45 percent lives in rural areas.<sup>1</sup> Although there are no reliable figures on the ethnic composition of the population, most rough estimates suggest that 40 percent is Indian, 40 percent is mestizo, 10-15 percent is white, and 5-10 percent is black.<sup>2</sup> A sizable fraction of the Indian population speaks Quechua as its first language. The rate of population growth, one of the highest in South America, is approximately 2.8 percent.

To a considerable extent, however, Ecuador is defined less by national statistics than by its profound regional differences.

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1 Banco Central del Ecuador, *Cuentas Nacionales del Ecuador: 1965-1990*, (No. 14), Quito: BCE, 1991, p. 25. Between 1950 and 1990, the urban population increased by over six times--an absolute increase of 5.1 million persons.

2 Dennis M. Hanratty, ed., *Ecuador: A Country Study*, 3rd. ed., Washington, D.C.: Federal Research Division, Library of Congress, 1991, p. xiv.

Partitioned from north to south by the twin ranges of the towering Andes mountains, the mainland is divided into three geographically distinct regions. The sierra, a high, temperate inter-Andean valley ranging in elevation from 5,000 to 10,000 feet, is home to Quito, the nation's capital. Until the early years of this century, nearly 90 percent of the country's population lived in this area. By the 1980s, however, internal migration, principally from the sierra to the coastal lowlands, had reduced the sierra's share of the population to approximately 45 percent. Most of the country's traditional Indian population remains in this region.

The coast, a low-lying largely tropical zone spanning the area between the Pacific Ocean and the western Andes, is the economic heart of the country and its most populated region. Nearly all of Ecuador's agricultural exports are cultivated on the coast. Guayaquil, located in the coast and the country's largest city, is the location of much of Ecuador's industrial development.

The oriente, or Amazon lowlands, is largely tropical rain forest lying to the east of the Andes at between 800 and 3,000 feet in altitude. Although this region accounts for nearly half the total area of the country, it contains only 4 percent of the population. The oriente is the source of virtually all of Ecuador's petroleum reserves, and in recent years, has witnessed increasing conflict between the territorial claims of indigenous groups and the government's interest in development of the petroleum industry.

Both the geographical fragmentation of the country and the boom and bust cycles of its export-dependent economy have had profound implications for the manner in which Ecuadorian political institutions have evolved. Political organizations have tended to be fragmented along regional lines. The traditional and insular society of the highlands nurtured Ecuadorian conservatism while the export oriented coastal economy provided a receptive home for the growth of liberalism. Historically, the conflict between Conservatism and Liberalism has structured much of national politics.

## B. Historical Background

### 1. Ecuador Prior to the 1980s

Historically, Ecuador has been a society marked by extensive poverty, a high degree of inequality, and sharply circumscribed possibilities for effective political participation. Its institutions, including the judiciary, have functioned in large part to maintain the existing social order. Very few of Ecuador's seventeen constitutions, for example, have been promulgated with the goal of reforming state institutions and processes. Rather, most have served to ratify coups and extra constitutional changes.

Since 1563, when the "Audiencia de Quito" commenced to represent royal rule over Ecuador, the administration of justice was characterized by discrimination against specific sectors of the population.<sup>3</sup> Although Philip II of Barcelona enacted the "New Laws of the Indies" to grant protection to Indians, royal authorities failed to implement them and continued to allow discriminatory treatment to persist.<sup>4</sup>

In 1830, Ecuador declared itself an independent state. The major challenge facing the nation's early presidents was to impose national authority on regions that were sharply divided by geography, and that saw little economic gain to cooperation. Nationhood during the early years of the republic was little more than a formal assertion of territorial sovereignty by a central government that struggled to contain the centrifugal interests of regional elites. Indeed, Ecuador's first constitution explicitly recognized the regional character of the new state, formally establishing the nation as confederation of the three

3 According to an Ecuadorian historian: "social strata determined the judicial procedures that were followed. In reference to sanctions, for example, it is well known that the death penalty was only applied to indians, blacks and mestizos." Osvaldo Hurtado, *El Poder Político en el Ecuador*, Quito: Ariel-Planeta-Letравiva, 1990, 8 ed., p. 43

4 *Ibid*, p. 35

departments of Quito, Guayaquil, and Cuenca.<sup>5</sup> However, barely ten years had passed before protests from individual provinces within the departments over their lack of representation brought this confederation to an end.

Relatively weak linkages between the export sectors and the national economy, along with formidable geographic barriers to communication, helped to perpetuate a legacy of inequalities in Ecuadorian society.<sup>6</sup>

The development of Ecuador's political institutions during the first republican years reflected these legacies. Constitutions promulgated during the nineteenth century placed few restrictions on the exercise of executive authority, implicitly acknowledging the *de facto* supremacy of the executive power, placing fears over the abuse of this power second to concerns for the preservation of national integrity.

Rather than enacting new legislation, the new government continued to follow the Spanish laws which had prevailed during the colonial period. Subsequently, constitutional reform was modeled after the principles of the French Revolution and the U.S. charter. Nevertheless, denial of citizenship to a substantial portion of the population and economic discrimination limited application of constitutional rights to specific sectors of the population. Indians lost many of the legal protections they had acquired under Spanish law as the new legislation repealed the guarantees of the "New Laws of the Indies". For example, the first criminal code in 1837 abrogated many of the protective provisions of Spanish law while maintaining some of its most repressive features.<sup>7</sup>

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5 David W. Schodt, *Ecuador: An Andean Enigma*, Boulder Westview Press, 1987, p. 29.

6 Linkages in the case of bananas were considerably more favorable than in the case of cacao, but were still fairly limited.

7 Victor Vega Uquillas and Grimaneza Narváez, *La Justicia Penal en el Ecuador*, Ponencia ante el Seminario Latinoamericano sobre el Sistema Penitenciario, Roma: Junio de 1989, p.66.

In the first decades of the twentieth century, official documents began to acknowledge the diminished need for executive authority to forge national unity, broadened social and economic rights, and introduced important reforms in the justice system. The Constitution of 1925, inspired by liberal ideals, expanded fundamental and political rights, abolished the death penalty and prohibited imprisonment for debts. The Constitution of 1945, widely regarded as one of Ecuador's most progressive, broadened individual rights and introduced some notable institutional changes, such as the establishment of a court of constitutional guarantees (Tribunal de Garantías Constitucionales).<sup>8</sup> This constitution also recognized the principle of free access to the justice system.

Despite those changes, the bulk of the population continued being effectively excluded from the political system by both formal and informal mechanisms. Although the 1929 Constitution formally extended the franchise to women, it appears that this step was undertaken as a means to buttress the system against the threat of growing lower class participation.<sup>9</sup> The same constitution continued to exclude illiterates from voting (approximately 65 percent of the population in 1930) and imposed numerous technical obstacles to voting, such as a registration requirements and payment of fees. When Galo Plaza Lasso, known as the country's first champion of economic and political modernization, was elected president in 1948, only 9.1 percent of the population voted.

The structural changes accompanying the economic boom of the 1950s and 1960s (brought about by the development of

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8 TGC, as the Tribunal is known, replaced an existing institution, the Council of State (Consejo de Estado), which had been first established in the 1830 Constitution as an advisory body to the president. The Constitution of 1815 made the Council independent of the executive and awarded it limited powers of constitutional review. Although the 1945 Constitution brought back the Council of State in place of the TGC, this lasted only a year until the latter was reestablished in the 1967 Constitution.

9 See, for example, Rafael Quintero, *El Mito del Populismo en el Ecuador*, Quito: FLACSO Editores, 1980.

world markets in bananas) brought in new electoral groups, notably lower-class voters from the Guayaquil suburbs. Yet, Ecuadorian populism never seriously threatened the existing social order. José María Velasco Ibarra, Ecuador's preeminent populist politician, who followed Galo Plaza into the presidency, won in an election in which just 10.8 percent of the population voted. However, populism placed new demands on state revenues. Public works spending, always important as a means to satisfying regional demands on the central government, was now forced to accommodate the additional political demands of the newly incorporated populist groups. Political patronage, always a staple of Ecuadorian politics, acquired singular importance. The legitimacy of any government was judged largely by its ability to satisfy these demands.

Following a period of frequent abuses of constitutional authority, and in a climate of fear over the probable resumption of power by former president José María Velasco Ibarra, the Constitution of 1967 was drafted placing further restrictions on executive authority and tipping the balance of power toward the legislature. The same concerns, along with regional demands for control of the national budget, also resulted in extensive earmarking of taxes and the creation of quasi-public institutions that shielded large areas of government activity from both the national government and from executive control.<sup>10</sup> As political scientist John Martz writes, the changes "exacerbated rather than moderated traditional conflict between congress and the executive."<sup>11</sup> On the more positive side, the 1967 constitution made the first mention of political parties, providing guarantees for their existence and functioning. This constitution also restored the power of the Supreme Court to rule on the constitutionality of legislation, established new jurisdictions to redress citizen grievances against executive

10 By early 1970, more than 50 percent of total tax revenue and 1,300 public institutions were effectively outside of executive control. (John D. Martz, *Ecuador: Conflicting Political Culture and the Quest for Progress*, Boston: Allyn and Bacon, 1972, p. 82)

11 John Martz, *Ecuador: Conflicting Political Culture and the Quest for Progress*, Boston: Allyn and Bacon, 1972, pp. 79-80

abuse, promoted public trials and hearings, set the basis for the selection of judges on the basis of merit, and strengthened the authority of the Supreme Court.<sup>12</sup>

In the mid-1970s, petroleum revenues launched an unprecedented period of economic expansion. Economic growth accelerated rapidly into the 1970s. During the first half of the preceding decade, real output had increased at an annual rate of 4 percent. Between 1970 and 1975, the growth of real output jumped sharply to an annual rate of 11.4 percent. Although this pace was not sustained during the later half of the 1970s, the economy grew at an average annual rate in excess of 6 percent throughout the remainder of the decade. Given rates of population growth of over 3 percent, per capita income rose rapidly. Ecuadorians saw average incomes roughly double in real terms from the beginning to the end of the decade.

Rising incomes, expanded government services, and infrastructural developments during the petroleum years, contributed to significant improvements in a number of social indicators, such as life expectancy, illiteracy, and infant mortality rates. Nevertheless, the percentage of the population in poverty remained stubbornly high even by South American standards, with most estimates placing between 50 to 60 percent of Ecuadorians below the poverty line.<sup>13</sup> Income distribution figures, although notoriously unreliable, suggest that the major beneficiaries of the petroleum boom were the rapidly expanding urban middle class.<sup>14</sup>

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12 Julio Tobar Donoso and Juan I. Larrea, *Derzcho Constitucional Ecuatoriano*, Quito: Corporación de Estudios y Publicaciones, 1989, p. 440

13 See: Morris D. Whitaker and Dale Colyer, *Agriculture and Economic Survival: The Role of Agriculture in Ecuador's Development*, Boulder: Westview Press, 1990, pp. 63-65, for a summary of studies on the percent of the population in poverty.

14 Carlos Luzuriaga and Clarence Zuvekas, Jr., *Income Distribution and Poverty in Rural Ecuador, 1950-1979*, Tempe: Arizona State University, 1983.

Structural changes also accompanied the petroleum boom, with the industrial, construction, and service (government) sectors enjoying prolonged periods of expansion. This resulted in an expansion of urban employment opportunities which combined with the depressed agricultural sector accelerated rural to urban migration. Between 1974 and 1982 (the two most recent census years), the urban portion of the population rose from 41 to 50 percent.<sup>15</sup>

The economic and social changes brought about by petroleum revenues created opportunities for democratic political change but, in a system which had long functioned to restrict opportunities for effective participation to a small minority of the population, the practices of the past continued to frustrate efforts to reform the political system.

Not surprisingly, in a system where elites continued to dominate politics, participation remained at low levels. Personality played a more important role than programmatic policies, and as a consequence, political parties remained numerous, fragmentary, and could command little discipline. Party affiliations are changed frequently and opportunistically, giving rise to the phrase "cambio de camisetitas," describing the post-election ritual of shifting allegiances.

The military government that held power from 1972 to 1978 essentially froze institutional political development. Although parties had never functioned well as vehicles for representing majority interests, their proscription during the years of military rule ruled out any possibilities for their modernization during this period. Even less democratic organizations, such as the Chambers of Commerce, Industry, and Agriculture, acquired increased importance as the primary conduits for the representation of elite interests.

Nevertheless, the military's eventual willingness to oversee a return to democracy, and the structural changes that oc-

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15 Banco Central del Ecuador, *Boletín Anual No. 12 (1989-1990)*, Quito: BCE, 1990, p. 156.

15

curred in the intervening years, provided opportunities for political modernization after 1978. In addition, because the Ecuadorian military had not systematically violated human rights in the ways that had characterized the military governments in the Southern Cone countries, there was little pressure from civil society for trials of military officials, thus facilitating the reestablishment of democratic institutions. The increasing urbanization of the country, rising levels of education and income, along with the growth of the middle-class, all contributed to broadening political participation. So also did the 1978 Constitution, which enfranchised illiterates for the first time in the country's history. Yet, in spite of these many changes, historical patterns continued to haunt contemporary politics in ways that suggested that the rapid economic modernization has not been matched by similar changes in the political arena. The Ecuadorian judicial system was both a victim of these petroleum induced changes and a contributor to the failure of the political system to modernize along with the large influx of petroleum revenues.

## 2. Political and Economic Changes in the 1980s and Early 1990s

Since election of Jaime Roldós Aguilar and his vice-president, Osvaldo Hurtado in 1979, Ecuador's return to democracy has been plagued by adversity. Neither political institutions nor economic conditions have been particularly conducive to the deepening of democracy. Despite more than a decade of civilian rule, Ecuador has failed to produce a professional political class with a firm commitment to the development of the party system. As electoral participation expanded dramatically, Ecuadorian parties found themselves unable, or unwilling, to build the kinds of political organizations that would effectively incorporate these new voters.

Governments since 1979 have been marked by repeated conflicts between the legislature and executive, which have frequently paralyzed the decision-making process, and which, on more than one occasion, have brought the country to the brink

of a constitutional crisis. In considerable part, this struggle between the branches of government has been brought about by both the proliferation of parties, and by their weakness as vehicles for interest representation.

Moreover, the inevitable economic hardship caused by policies of structural adjustment has tarnished the political fortunes of parties associated with the implementation of those policies, retarding their efforts at party building. The economic crisis of the 1980s also contributed to weakening party discipline and organization. Deteriorating economic conditions, and the imposed need to reduce the size of the government sector, greatly diminished the patronage resources on which Ecuadorian parties have traditionally relied. In this context, the small number of high level government patronage positions at the disposition of the legislature, such as those for Supreme Court justices, took on added importance.

Both, the escalating conflict between the legislature and the executive, along with the relative scarcity of patronage resources, contributed to the ensuing politicization of the Supreme Court and the loss of judicial independence.<sup>16</sup> The Supreme Court was embroiled in a political crisis shortly after the election of Jaime Roldós as president. Although Roldós ran on the CFP ticket (*Concentración de Fuerzas Populares*), a rift had developed between him and the party's leader, Asaad Bucaram, who was elected to the Congress. Intent on realizing his frustrated presidential ambitions by governing from Congress, Bucaram drew on the resources available to him as leader of the largest legislative block to fashion an opposition majority that would give him leadership of the Congress. Appointments to the Supreme Court figured prominently in his successful efforts to forge an alliance with the Conservative and Liberal parties. Dr. Armando Pareja, for example, a prominent figure in the Liberal party, which had only 4 seats in the 1979 Congress, received the presidency of the Supreme Court.

16 The politicization of the courts often reaches beyond the Supreme Court. The Guayas Superior Court, for example, is frequently mentioned as a highly politicized court.

Further politicization of the Supreme Court occurred in August 1983 when the Congress, then under the control of a coalition of center-left parties led by Raúl Baca of the ID (Izquierda Democrática), amended the constitution to reduce the terms of Supreme Court justices from six to four years.

León Febres Cordero, who was affiliated with the center-right Partido Social Cristiano (PSC), assumed the presidency in August 1984 after a bitter campaign against the ID candidate, Rodrigo Borja. Immediately upon taking office, the new president faced an opposition majority in Congress. Led by the ID, which held 24 of the 71 seats, the opposition coalition interpreted the previous constitutional amendment reducing the terms of the Supreme Court justices to four years, as taking effect retroactively. Thus, since four years had passed since the sitting Supreme Court justices had been installed, the new ID controlled congress moved to appoint a new court, which then elected Gustavo Medina of the ID as its president.

This action set off a dispute between the President and the Congress that threatened to rupture Ecuador's fragile democracy. Febres Cordero declared the action by Congress to appoint a new Supreme Court unconstitutional and ordered the police to prevent it from assuming office. However, the sitting president of the 1979 Supreme Court declared the Medina court to be the legitimate one and vacated his position. Several months of conflict ensued after which the president and the Congress reached an agreement in which the Medina court resigned and a new court was named. Twelve of the new justices were appointed from the parties constituting the opposition coalition; this court named ID member Gonzalo Córdova as its president.

With the election of Rodrigo Borja as president in 1988, a new Congress, controlled by the ID, was installed. This Congress amended the Constitution to stipulate that the terms of all government officials appointed for four years (notably the justices of the Supreme Court, the Fiscal Tribunal, and the Tribunal of Administrative Disputes; the Attorney General, the Comptroller General, the Superintendent of Banks, and the

Superintendent of Companies) would run concurrently with the presidential term. The Court of Constitutional Guarantees (TGC), which had been silent throughout most of the constitutional conflict, pronounced this decision unconstitutional.<sup>17</sup> Congress, however, exercised its constitutional prerogative to overturn the decision of the TGC. A new Supreme Court was installed, with Ramiro Larrea Santos as president.

Elections for provincial deputies were held in 1990, and a new legislature took office on August 10. Gains by the PSC and the Partido Roldosista (PRE), together with losses by the ID, allowed the opposition parties (PSC, PRE, PLR, and CFP) to form a weak majority that elected Averroes Bucaram (CFP) president of the Congress. Motivated at least in part by a desire to influence legal proceedings against former presidential candidate, Abdalá Bucaram, and former president, León Febres Cordero, Averroes Bucaram's first act was to push through a resolution dismissing the sitting members of the Supreme Court.<sup>18</sup> Bitterly opposed by the executive and the judiciary, the actions of the legislature brought the country again to the brink of a constitutional crisis. Further aggravating tensions between the executive and the legislature, the latter voted to grant amnesty to Abdalá Bucaram (PRE). Averroes Bucaram announced that the Congress would initiate impeachment proceedings against Rodrigo Borja, the country's president.

The crisis was averted when the Liberal (PLR) deputies defected to the government coalition. The newly constituted pro-government majority elected Edelberto Bonilla (PSE) president of the Congress. Bonilla also assumed leadership of a congressional commission charged with reforming the constitution to prevent further abuses of the judiciary.

17 Note that members of the TGC are appointed by the Congress for two year terms.

18 Abdalá Bucaram (PRE), who hoped for a legislative pardon, was a fugitive from justice in Panama. The Supreme Court had before it a case of misuse of public funds against former president León Febres Cordero.

The deterioration of the economy during the 1980s placed additional demands on the judicial system. Declining standards of living, high unemployment, and the consequent rise in crime rates, further contributed to an increase in case loads. The debt crisis, the fall in world petroleum prices that began in 1986, and the economic policies adopted to respond to these problems, have severely depressed the Ecuadorian economy. Ecuador's foreign debt in 1990 was approximately U.S. \$12 billion. Interest payments due as a fraction of export earnings (a measure of a country's ability to service its foreign debt) were 32 percent; the second highest in Latin America.<sup>19</sup> These large outflows of capital, the limited amounts of new investment forthcoming, and the reductions in government subsidies required containment of the budget deficit, all combined to slow economic growth and contributed to rapid deterioration of the standard of living for lower income groups.

Prospects for the Ecuadorian economy in the 1990s are not favorable. Although the choice of domestic economic policy is clearly important, the constraints imposed by Ecuador's large foreign debt, and by the low international price of petroleum, virtually ensure that regardless of policies pursued by the government, the Ecuadorian economy will be slow to recover from the depressed years of the 1980s and early 1990s. These conditions of economic austerity place severe stress on the country's political institutions. The judiciary faces increasing demands arising from the structural changes of the last 20 years, while its ability to respond to these demands is constrained by limited resources and lack of independence. However, not only is the judiciary a victim of adverse economic circumstances and political opportunism, but its inability to perform effectively is itself an impediment to economic recovery. As the most recent report of the Inter-American Development Bank notes: "a strong, honest, and independent judiciary is indispensable for helping the state carry out its reforms and

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19 Inter-American Development Bank, *Economic and Social Progress in Latin America: 1991 Report*, Washington, D.C.: IDB, 1991, p. 85.

for inspiring confidence on the part of national and foreign investors."<sup>20</sup>

## II. THE JUSTICE SYSTEM

Ecuador has a tripartite system of government, with power shared nominally among the executive, the legislature, and the judiciary. However, as in most of the Latin American countries, the judicial branch is relatively weak. As an institution, the judiciary has contributed only marginally to the restructuring and consolidation of democratic political after the military stepped down in 1978. Most power is concentrated in the executive. However, regional interests, and attempts to contain the excesses of populist leaders, notably José María Velasco Ibarra, have resulted in a legislature that is relatively more powerful than those in many other Latin American countries. Nevertheless, the weakness of the party system has contributed to reducing the effectiveness of the legislature.

The criminal justice system is composed of a variety of institutions some of which intervene directly (i.e. the Police, Judiciary, Prosecutors, Legal Defense and Corrections) while others impact indirectly upon the system (for example, the Legislative Branch). This section analyzes the role of these institutions in the processing of criminal cases.

### A. The National Congress

According to the Constitution (art.56), Congress is the branch in charge of enacting, abrogating, interpreting and modifying all laws. With just one chamber, the Congress is composed of two different kinds of members: national congressmen (12) elected for a period of four years and provincial con-

20 Inter-American Development Bank, 1991, *op. cit.*, p. 15.

gressmen (2 for each province with a population of more than one hundred thousand, and one for those with less than that) elected for a period of two years.

The Congress has often been at odds with the Executive, especially during periods when the opposition controlled the legislative branch. For example, in 1970, President Velasco forwarded to Congress a series of measures to consolidate the public debt and reform the national budget. Congress failed to act on the majority of the proposals and Velasco implemented them by decrees.<sup>21</sup> The Guayaquil Chamber of Commerce challenged the new tariffs contained in the decrees and the Supreme Court declared the Executive action unconstitutional. Finally, Velasco closed Congress and governed by decree.

Due to its pre-eminently political character, the Congress is the branch of government that has been most affected by the continuous fragmentation of political parties. Following the end of military rule, the traditional parties, the Conservatives and the Liberals, found themselves with limited electoral appeal. Populism had suffered some setbacks with the withdrawal from active political life of Velasco Ibarra and the military imposed proscription against CFP leader Asaad Bucaram's bid for the presidency. The emergence of an electorally significant block of urban middle-class professionals created opportunities for new parties, such as the center-left Democracia Popular (DP) and the Izquierda Democrática (ID), both with surprising strength. In addition, a number of minor leftist parties, and several personalistic parties have long been part of the Ecuadorian political spectrum.

The Constitution and the Law on Parties contain a number of provisions designed to limit the number of political parties and impeding the opportunistic switching of party allegiances that characterizes every legislative session. In prac-

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21 Although decrees are akin to executive orders or regulations in the United States, Latin American executives have often resorted to issuing decrees in lieu of legislation.

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tice, however, these provisions have not been enforced and no party has lost recognition. As a consequence, the large number of parties contributes to the difficulty of forming and sustaining legislative majorities, giving disproportionate influence to minor parties. For example, during the first Congress, following military rule, ten political parties were represented. Internal party divisions ultimately raised this number to thirteen by 1980.

The Congress operates in a slow and cumbersome manner without the assistance of modern means of research or tracking of legislation. There have been no major code reforms in recent years and these have historically been drafted by non-members appointed by the executive for that purpose. The action of the Congress is mostly reactive, with little legislation arising from its own initiative. Like many other Latin American countries, the executive may be said to carry out a major share of the legislative action through the adoption of executive decrees.

In addition to its lawmaking powers, the Congress subordinates the administration of justice by reserving the constitutional right to appoint the members of the Supreme Court every four years.<sup>22</sup> The power to appoint members of the Court has served as a tool in the interparty disputes which have often dominated the work of the Congress. Thus, for example, in 1983, the Congress amended the Constitution reducing the tenure of Supreme Court magistrates from six to four years. In 1985, the opposition coalition in the Congress interpreted this measure to apply retroactively to sitting members of the Court, allowing it to replace the totality of the magistrates with judges more favorable to the legislative majority.

Finally, the Congress exercises power over the approval of the national budget assigned to the Judiciary. This compels the Court to continually argue for a greater assignation be-

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22 The Congress also appoints the Attorney General and the Procurator General. The first for a term of four years and the second for a term of five years.

fore the appropriate congressional committee. Thus, it is not surprising that one of the primary reforms is seeking to assure greater judicial independence is a constitutionally mandated fixed percentage of the national budget.

## B. The Judiciary

In accordance with last modification to article 98 of the Constitution, the following institutions compose the Judiciary: a) the Supreme Court, the Superior Courts, and the lower courts; b) the Judicial Council; and, c) the remaining courts established by law (See Figure 1). This section shall focus on the criminal courts.

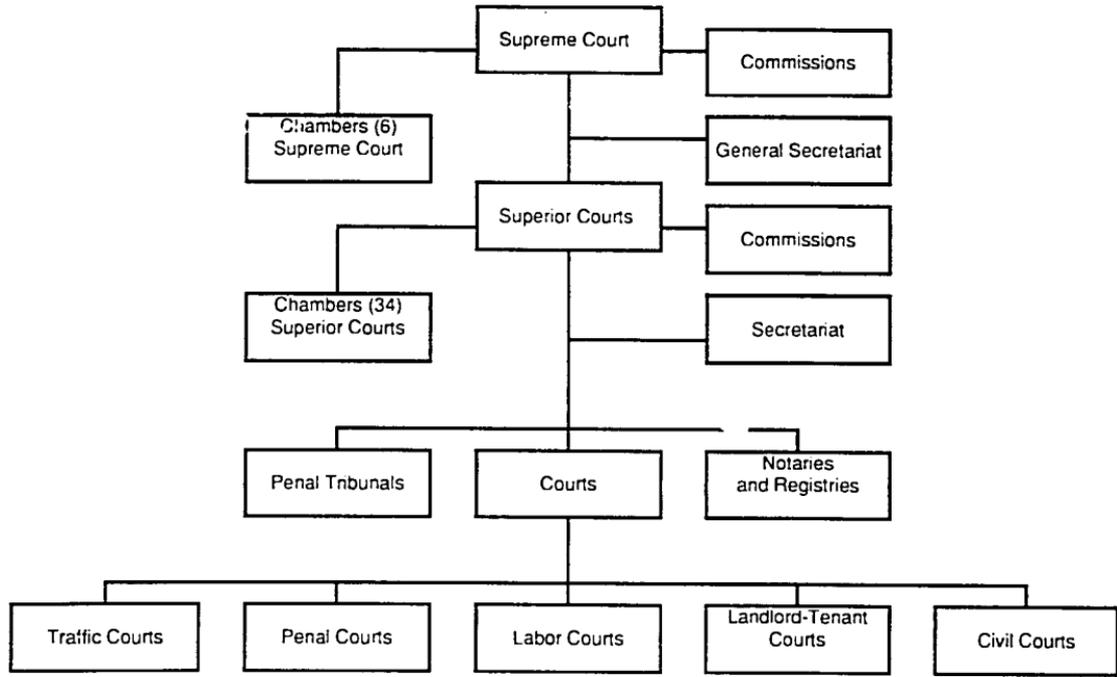
### 1. Structure and Functions

The Supreme Court presides over the Judiciary. Fifteen of the twenty provinces have Superior Courts ("Cortes Superiores"). At the sub-province level there are the trial courts ("juzgados"): penal, civil, landlord-tenant ("inquilinato"), labor ("trabajo"), and traffic ("tránsito"). Although they respond to the Executive Branch; the Political Lieutenants ("Tenientes Políticos"), Police Officials ("Comisarios de Policía") and Intendants and Subintendants (Intendentes and Subintendentes), exercise quasi-judicial duties since they process minor infractions.

#### i. The Supreme Court

The Supreme Court is composed of thirty magistrates ("Ministros Jueces"), including the President who is selected by the justices from among its members. Under the new constitutional reform, one third of these justices are selected by Congress by a two-thirds vote, one third by the Executive and one third by the Judiciary. They serve six-year terms and there is no ban on reelection.

FIGURE 1  
ORGANIZATION OF THE JUDICIARY



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The Court is divided into six chambers ("salas") of five justices each. These chambers are specialized by matters (Civil and Commercial, Criminal, Social and Labor, Fiscal, Administrative, and Constitutional).

In addition to its role as the highest appellate tribunal, the Supreme Court also has the following functions: a) supervision of the administration of the judicial sector; b) appointment of the judges of the superior courts; c) removal of lower court judges for cause and; d) acting as the trial court in the impeachment of high-level officials.

## ii. Superior Courts

In fifteen of the twenty-one provinces there is a Superior Court ("Corte Superior"). These courts act as intermediate appellate courts, hearing all appeals from rulings of the lower courts. They also supervise an administrative apparatus and administer the budget assigned by the Supreme Court.

The judges of the superior courts are named by the Supreme Court to four-year terms. Each of these courts is broken down into chambers, with the largest ones being in Quito and Guayaquil with five chambers each. The work of the court is directed by a President selected for a one-year term by the members of the superior court.

## iii. Penal Tribunals

Penal courts exercise jurisdiction at the province level. According to law, the Supreme Court determines the number of penal tribunals to be established in each of the provinces. Each of these tribunals is composed of three judges selected by the corresponding superior court for a four-year term. In addition, there are three alternate judges. Each tribunal has also a prosecutor and a secretary.

The penal courts act as primary trial courts for all serious crimes. There are 40 penal courts (5 in Pichincha; 3 in Azuay, Loja and Chimborazo; 2 in Tungurahua, El Oro and Los

Ríos; and one in each other province). These judges are selected by the superior court of their province.

#### iv. Other courts

At the lowest level, there are 100 criminal courts ("Juzgados") charged with conducting pretrial investigations of crimes.<sup>23</sup> The number of criminal judges and their jurisdiction is decided by the Supreme Court. Besides the criminal courts there are also 233 civil courts, 29 labor courts, 19 landlord-tenant courts, and 51 traffic courts.

## 2. Budget

Following the precepts of Article 96 of the Constitution assuring independence to the Judiciary, the Law on Court Organization established a Judicial Treasury ("Caja Judicial") to provide financial independence to the courts. However, even though the courts enjoy financial independence legally, this principle has not been applied in practice since judicial budgets are subject to the same procedures and constraints as those of any other public sector institution in Ecuador. A last significant step in assuring financial independence is the constitutional reform to guarantee the judicial system 2.5% of the current net income of the central government's budget for the years 1994, 1995 and 1996.

There are two main sources of financing: an annual congressional appropriation; and, since 1983, earnings on the investment of judicial deposits held by the Central Bank and the Banco Nacional de Fomento. Annual income from judicial deposits averages 10 to 15 percent of the congressionally appropriated budget for the judicial sector. The congressional appropriation for the judicial sector is applied principally for current expenditures. The largest share of these is designated for

23 In some "cantones", where no such courts exist, the law allows for police officials (comisarios policiales, intendentes and subintendentes) and political lieutenants (tenientes políticos), who belong to the Executive Branch, to act as instructional judges and to try misdemeanor cases.

salaries of court employees. In 1990, for example, approximately 69 percent of the budget went to salaries, 8 percent for services and supplies, and 6 percent for capital expenditures.<sup>24</sup> Income from judicial deposits has been used exclusively for capital expenditures.

#### i. Congressional Appropriations

The judicial sector budget has increased from 90.3 million sucres in 1973, at the beginning of the petroleum boom, to 13,000 million sucres in 1991 (See Table 1). The annual rate of increase in nominal sucres over this period was approximately 28 percent. By most measures the Ecuadorian judicial sector is underfinanced.

Although the increase in judicial sector spending appears to have been substantial, most of this increase simply reflects the rising rate of inflation during the 1970s and 1980s. If the annual budget for the judicial sector is computed in 1975 sucres, expenditures increase modestly over the same period (1973-1989) from 121.4 million sucres to 164.9 million sucres. In addition, most of the increase in the judicial sector budget occurred during the period 1973 to 1979, when the annual rate of increase was approximately 7.6 percent. In contrast, from 1979 to 1989, judicial sector spending increased at an annual rate of less than 0.5 percent.

Relative to other sectors of the government, spending on the judiciary has fallen during the 1970s and 1980s. As shown in Table 1, the percentage of the national budget dedicated to the judiciary in Ecuador was only 0.98 in 1973, and has declined more or less steadily to a low of 0.52 percent in 1983 recovering to 0.76 percent in 1991. In part, the decline in the budgetary share received by the judiciary is a function of the large expansion of the Ecuadorian state into non-traditional areas that occurred during the petroleum boom years. Never-

24 The salary line item in 1990, as a percentage of the total appropriation, is somewhat higher than normal due to a significant increase in remunerations in that year.

theless, the continued decline in the judiciary's share after the early 1980s (by which time the large expansion of the public sector had virtually ended), and the very slow growth in real expenditure on the judiciary, indicates a clear decrease in the budgetary importance of this sector.

Comparisons with other countries also provide evidence of the low priority given to the judicial sector in the Ecuadorian government budget. From 1980 to 1989, the average budgetary share of the Ecuadorian judiciary was 0.69 percent. In contrast, other countries receive both a considerably higher budgetary share, and one which is often constitutionally determined. Since 1957, the Costa Rican judiciary, for example, has benefited from a constitutionally mandated 6 percent share of the budget. The judicial sectors in several other countries whose democratic traditions are less exemplar than Costa Rica's also benefit from constitutionally mandated budget shares. For example, the Guatemalan judiciary is assigned 2 percent of the budget; the Honduran judiciary is 3 percent.<sup>25</sup>

Currently, there are proposals to constitutionally assign a fixed share of the government budget to the judicial sector (3 percent). The arguments for fixing the share of the budget received by the judicial sector at, for example, 3 percent, are that such a move would be a means to increase its independence and would guarantee increased resources for the sector. Unquestionably, the judicial sector could benefit from a larger budgetary appropriation. The resources of the system are inadequate to meet the growing case loads. Salaries of judicial officials need to be increased, as a means of attracting more qualified individuals, in order to decrease pressures to further politicize the judiciary, and to reduce opportunities for corruption. In addition, the independence of the judiciary from the immediate political concerns of the legislature would be enhanced.

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25 In practice, these countries do not always receive an appropriation equal to their constitutionally mandated share. The Honduran judiciary, for example, has never received more than 1.7 percent. All three, however, receive a greater share than the Ecuadorian judiciary. See, for example, Luis Salas and José Ma. Rico, *La Justicia Penal en Honduras*, San José: EDUCA, 1989, pp. 110-112.

Nevertheless, earmarking a 3 percent share for the judiciary also has disadvantages. The proposed figure of 3 percent was reached without any systematic planning of the needs of the judiciary. Earmarking revenue also contributes to increasing the rigidity of the budgetary process. In addition, even if the 3 percent figure could be justified for a given year, the constitutional earmarking of a fixed proportion of the budget severs the link between the spending needs of the judiciary and its income.

## ii. Income from Judicial Deposits

Despite the apparent fiscal distress of the judicial system, there are often unspent funds at the end of the fiscal cycle. Unspent earnings from judicial deposits do not revert to the state at the end of the fiscal year, but may accumulate. In January 1989, for example, the judicial deposits fund held an accumulated total 984,052,975 sucres, equal to 20 percent of the congressional appropriation for that year.<sup>26</sup>

Expenditures from earnings on the judicial deposits account suffer from a lack of planning. Not only is there frequently a relatively substantial amount to be carried forward, but no mechanism exists for effective planning for those expenditures that are made from this source. Expenditures are made on an *ad hoc* basis, with little attempt to identify priority areas of need for the court system.

## 3. Personnel

The total number of positions in the judiciary has grown in recent years from 2,580 positions in 1987 to 3,072 in 1990. Of the 3,072 positions, 688 are judges. The number of judges is distributed as follows: 16 justices of the Supreme Court, 117 minister judges of the Superior Courts, 123 Penal Tribunal judges, and 432 first instance (trial) judges (100 criminal, 233 civil, 29 labor, 19 landlord-tenant and 51 traffic). Their work

26 Corte Suprema de Justicia, *Informe al Congreso Nacional*, Quito: 1990, p. 113.

is assisted by 1,792 support staff, 141 administrative and financial personnel and 451 service employees.

There are at least 11 institutions or departments which deal with personnel issues. Pursuant to a constitutional mandate to establish a judicial career (akin to a civil service system), in 1990 the Court issued regulations establishing such a career and empowering the National Judicial Career Commission ("Comisión Nacional de Carrera Judicial") to admin-

TABLE 1

Congressionally appropriated judicial sector budget, 1973-1991 (millions sucres)							
Year	Judicial Sector Expend.	Government Expend.	B/C (%)	Public Admin. Deflat.	Real Justice Expend. (1975)	Populat. (X100)	Real Justice Expend. Per Capita (D/E)
(A)	(B)	(C)			(D)	(E)	(D/E)
1973	90.3	9213.6	0.98	74.4	121.4	6628.8	18.31
1974	121.4	12705.9	0.96	88.5	137.2	6829.5	20.09
1975	140.4	14435.9	0.97	100.0	140.4	7034.5	19.96
1976	*	19572.0	0.00	109.0	00.0	7242.9	0.00
1977	179.5	22307.8	0.80	119.9	149.7	7454.5	20.08
1978	218.4	26499.0	0.82	128.3	170.2	7670.8	22.19
1979	261.8	29307.5	0.89	138.9	188.5	7893.3	23.88
1980	319.5	46083.8	0.69	180.3	177.2	8123.4	21.81
1981	373.4	62105.3	0.60	205.7	181.5	8361.3	21.71
1982	427.0	72870.7	0.59	239.3	178.4	8606.1	20.73
1983	507.0	80980.7	0.63	306.9	165.2	8857.4	18.65
1984	745.4	120460.4	0.62	452.9	164.6	9114.9	18.06
1985	1094.1	188892.6	0.58	604.1	181.1	9377.9	19.31
1986	1370.9	257987.9	0.53	797.6	171.9	9647.1	17.82
1987	2314.0	397409.6	0.58	1084.6	213.4	9922.5	21.50
1988	2814.0	516366.1	0.54	1608.8	174.9	10203.7	17.14
1989	4865.3	932667.3	0.52	2326.4	209.1	10490.2	19.94
1990	8011.1	1167075.0	0.69	3208.3	249.7	10781.6	23.16
1991	13000.0	1706322.0	0.76	*			

Source: Government General Budget, Banco Central del Ecuador, *Boletín Anual*, Quito: BCE, Vols. 7, 10, 12 (various years). The deflator for the public and Banco Central del Ecuador, *Cuentas Nacionales del Ecuador 1965-1990*, No.14, Quito, 1991 (pp. 19-20, 25).

\* Unavailable.

ister it. District commissions were also created under this regulation.<sup>27</sup>

In addition to the judicial career commission, the Supreme Court also presents in its organizational chart a personnel unit which reports to the Financial Department ("Dirección Financiera Administrativa"). This office tends to concentrate its efforts in record-keeping of personnel files. Other personnel units are established by regulation at the Superior Court level even though the majority of courts do not have one.

Regulation of judicial conduct is awarded to Complaint Commissions ("Comisiones de Quejas y Reclamos") composed of three judges from the Superior Courts. The distribution of personnel is fixed by law. There are no analyses of how efficiently the personnel is distributed relative to caseloads or their necessity.

While the formal structure of a personnel system has been established by the adoption of the Judicial Career Regulations, the Court has not developed procedures and manuals for the implementation of such a system.<sup>28</sup> Currently, the personnel unit of the Court has been working to develop position classifications and projects for the various personnel subsystems.

Personnel selection mechanisms vary depending on the category of the employee being appointed. The Supreme Court names the judges of the Superior Courts and its own staff. Superior Courts name their own support personnel and the lower court judges. Individual lower court judges have the ability to select their own support staff. Traditionally, absence of pre-

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27 The National Commission is composed of the President of the Supreme Court, another justice from that Court, a minister judge representing the Superior Courts, and the president of the National Federation of Judicial Employees. The function of the Commission is to act as a civil service board, establishing personnel policies and guidelines, and implementing the judicial career system.

28 In 1987, the Court prepared the "Salary Scale of the Judiciary" (Escala de Remuneraciones de la Función Jurisdiccional).

determined recruitment mechanisms have limited entry into the system and have given undue advantage to those with relatives or friends already in the system. With the last constitutional reform selection to lower courts will now be on the basis of competitive reviews of merits among candidates.

The judicial sector suffers from a serious lack of well-trained personnel at all levels. A judicial career has never been the first choice of the best Ecuadorian lawyers. This problem is the result of poor salaries, the generally low prestige of the judiciary in Ecuador, and the increased politicization of the system that has occurred since 1978.

Despite increases in recent years, the salaries of judges in Ecuador remain relatively low. In 1990, Supreme Court justices received a total compensation of 729,233 sucres (U.S. \$ 949.83) per month.<sup>29</sup> This amount was roughly equal to that received by legislative deputies, slightly less than that received by government ministers, and decidedly inferior to that earned by good private sector lawyers. Relative to the range of salaries for Supreme Court justices in other Latin American countries, those in Ecuador are at the low end. Supreme Court justices in Guatemala and Honduras, countries with a lower GDP per capita than Ecuador, received \$1,800 (1987) and \$1,600 (1986), respectively. In Costa Rica, a country with a higher GDP per capita than Ecuador, justices received \$1,770 (1986).<sup>30</sup>

The problem of low salaries is most acute for judges and other judicial officials below the Supreme Court level (salary grades 18 and lower). As Figure 2 illustrates, the salary curve

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29 Salaries have been converted to dollars using the average 1990 exchange rate of 767.75 sucres per dollar. Salary figures reported are basic salary plus all additional compensation, such as, thirteenth, fourteenth, and fifteenth month payments; expenses for housing, representation, and responsibility; as well as other payments.

30 José Ma. Rico and Luis Salas, *Independencia Judicial en América Latina: Replanteamiento de un Tema Tradicional*, San José: Center for the Administration of Justice (FIU), 1990, p. 34. These figures may not be directly comparable with the Ecuadorian ones, but are nevertheless useful for rough comparisons.

for judicial officials is quite flat in the lower grades, but rises very steeply in the highest grades. In 1990, for example, Superior Court judges received 390,417 sucres (U.S. \$508.52), while judges in the provincial courts (juzgados) received only 251,890 sucres (U.S. \$308.09).

The participation of women in the Judiciary (approximately 9 percent of judges), particularly in its upper levels, is much lower than in the legal profession. No women are represented on the Supreme Court, a pattern typical of all South American countries, with the single exception of Venezuela.<sup>31</sup> Four women (3.4 percent) are Superior Court judges. Women are somewhat better represented in the lower courts (juzgados), where they account for 13.5 percent of all judges. It is interesting to note that women are represented in the greatest proportions in the labor courts (30.0 percent) and the landlord-tenant courts (21.1 percent).

In addition, the geographic representation of women on the lower courts favors districts outside of Pichincha (Quito) and Guayas (Guayaquil). Only 10 of the 50 women lower court judges are located in the two major districts. Similarly, no women are represented on the Supreme Electoral Tribunal, or on the Court of Constitutional Guarantees.

#### 4. Caseloads

While comparisons of population are one means to determine court needs, they do not necessarily determine demand. In 1989, for example, 158,176 cases were received by the courts and 95,456 cases were closed. The majority of cases filed were civil (53%), followed by criminal (16%), appeals to Superior Courts (13%), landlord-tenant (6.5%), traffic (4%), labor (3.5%), appeals to the Supreme Court (2%), and criminal courts (1.5%).

Caseloads are also useful in evaluating judicial performance. The number of cases resolved per judge were 198 in

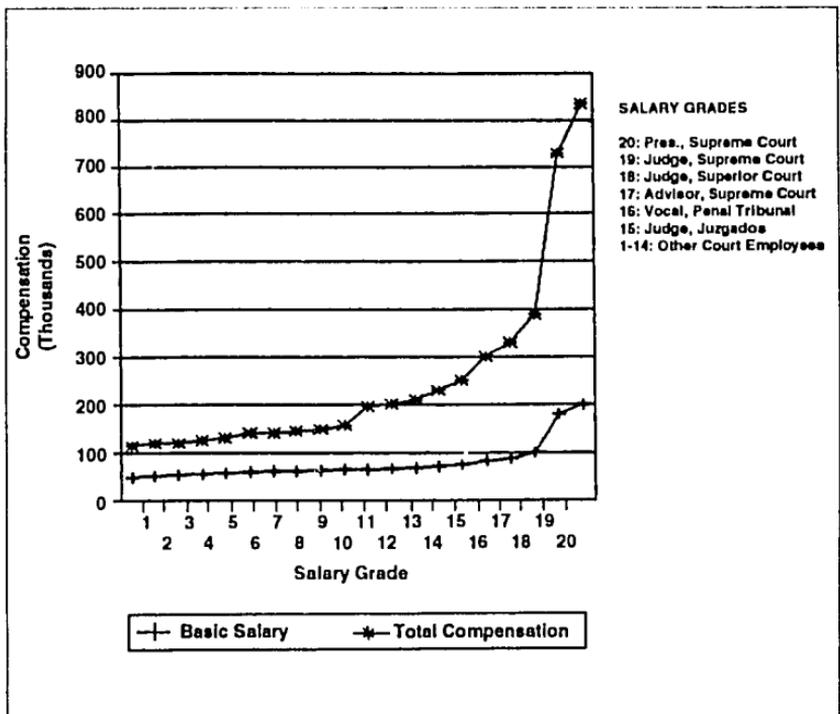
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31 The representation of women in the Central American countries is marginally better.

the Supreme Court, 153 in the Superior Courts, 15 in Penal Tribunals, 224 in the Civil Courts, 111 in the Criminal Courts, 189 in the Landlord-Tenant Courts, 120 in the Labor Courts, and 43 in Traffic Courts.

Variances between different court levels may also be found in units within the same court. Thus, for example, the average number of cases resolved per judge in each chamber of the Supreme Court during the period 1987-1989 was 149 in the First Chamber, 173 in the Second, 254 in the Third, 137 in the Fourth, and 341 in the Fifth. Differences are also found in comparisons across geographic areas. Thus, for example, the criminal courts of La Sierra resolved 133 cases per judge while 85 cases were resolved in the same types of courts in La Costa. A comparison of civil cases for the same jurisdictions gives an

**FIGURE 2**  
**Salaries of Judicial Officials by Salary Grade, 1990**



inverse relationship with 261 cases in "La Sierra" and 186 in the "La Costa".

There is also a trend toward increasing accumulation of cases (316,878 in 1987, 370,545 in 1988 and 433,258 in 1989). The solutions proposed to curb the growing number of pending cases and the resultant processing delays have been largely the creation of new courts or the adoption of emergency measures.

Studies carried out in other countries have shown that simply increasing the number of judges or shifting their jurisdictions did not solve the problem. It would take, for example, several times the number of current judges, working for a number of years to clear the current dockets, assuming no growth in the number of current cases filed annually.

## 5. Planning and Evaluation

While the sector suffers from a serious lack of resources, the effective use of existing resources is hampered by the virtual absence of a mechanism for planning and evaluation. For example, expenditures from earnings on the judicial deposits account suffer from a lack of planning. Not only is there frequently a relatively substantial amount to be carried forward, but no mechanism exists for effective planning for those expenditures that are made from this source. Expenditures are made on an *ad hoc* basis, with little attempt to identify priority areas of need for the court system.

The Court has begun to realize the need for some planning and adopted the first "biannual plan" for the development of the Court in 1991.<sup>32</sup> The establishment of a planning unit within the Court is a noteworthy achievement. However, this unit has neither the human nor the material resources necessary to carry out its mission. Lack of planning is even more acute at the lower court levels. Each lower court develops work

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32 Corte Suprema de Justicia, *Perfil del Primer Plan Bienal de Desarrollo de la Corte Suprema de Justicia del Ecuador: 1991-1992*, Quito: 1991.

plans and establishes control mechanisms in accordance with their own criteria and in the absence of guidance from the Supreme Court.

The situation of the sector's acute financial distress, together with unspent funds at the end of the fiscal year, highlights the need for planning. Yet, effective planning cannot be implemented without improved judicial statistics and information management. Judicial statistics are the basis for any sound planning and administrative system since it provides basic data to decision makers to assist them in reaching conclusions and plan for the development of the institution.

The Supreme Court has an Office of Judicial Statistics ("Dirección de Estadísticas Judiciales") which compiles, by trimester, national information on cases entering the courts, cases in process and concluded cases. These figures are maintained by legal area (civil, criminal, labor, landlord-tenant and traffic). The results are published in the annual report of the President of the Supreme Court to the Congress.

An impediment for the establishment of a reliable statistical system is that not all offices forward reports regularly. Thus, for example, in 1990, 81 percent of the courts in Quito and 78 percent of those in Guayaquil had not forwarded their reports. The absence of such reports from the two major population centers indicates the lack of reliability of national figures.

Delays and inefficiency in reporting is due to a variety of factors: a lack of motivation, insufficient human resources, and absence of control mechanisms. Analysis of the information is impeded by a manual system of processing (935 questionnaires every three months). The limited nature of the aggregate data reported, without any analysis, results in a system which is largely useless for planning and evaluation purposes.

Judges have shown skepticism as to the merits of the statistical system. Some complain that it does not properly reflect caseloads and that the system does not take into account

the complexity or diversity of cases processed. For example, any case which is presented is accounted for statistically even though no suspect is ever detected or detained distorting assumptions about caseloads.

Every organization is in need of an information system which provides facts so that decisions are made on an informed basis and communicates details to outside entities or the public. While the Supreme Court does not have any system for automating its work, there is a project being developed which primary objective appears automating word processing. However, implementation of this system will probably be restricted to the largest courts due to its cost/benefit. The Court is also studying the possibility of developing a legal database which would reference legislation and jurisprudence.

### C. The Attorney General's Office

#### 1. Structure and Functions

The Latin American prosecutor systems are varied. In some countries, the prosecutorial function is carried out by the Executive (Argentina, Colombia, Mexico). In others, the Executive intervenes in the selection of their personnel or provides administrative support (Panama and Brazil). Recently, there has been a tendency among civil law nations (Costa Rica and the Dominican Republic) toward judicialization of the prosecution function. In many other nations prosecutors report to the Attorney General, such is the case in Guatemala, Honduras, and Ecuador.

In Ecuador, representation of the State in criminal matters is accorded to the General Attorney's Office through the Public Ministry ("Ministerio Público").<sup>33</sup> The role this office plays in the criminal process will be detailed further in the section dealing with criminal procedure.

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33 *Constitution*, art. 112 and, *Ley Orgánica del Ministerio Público* (Law No. 3544, July 10, 1979), art. 2.

The Attorney General's Office (see Figure 3) is organized into two main branches: the Public Ministry ("Fiscalía General") and the Deputy General Attorney ("Subprocuraduría General"). At the same time, the Public Ministry, which acts as the prosecutorial unit in criminal cases, is divided into two units: the Legal Counsel ("Asesoría Jurídica") and the General Secretariat ("Secretaría General").

The Public Ministry operates under the direction of the General Prosecutor ("Ministro Fiscal General") who supervises the work of other prosecutors (ministers and "agentes fiscales") at the Superior Court level.

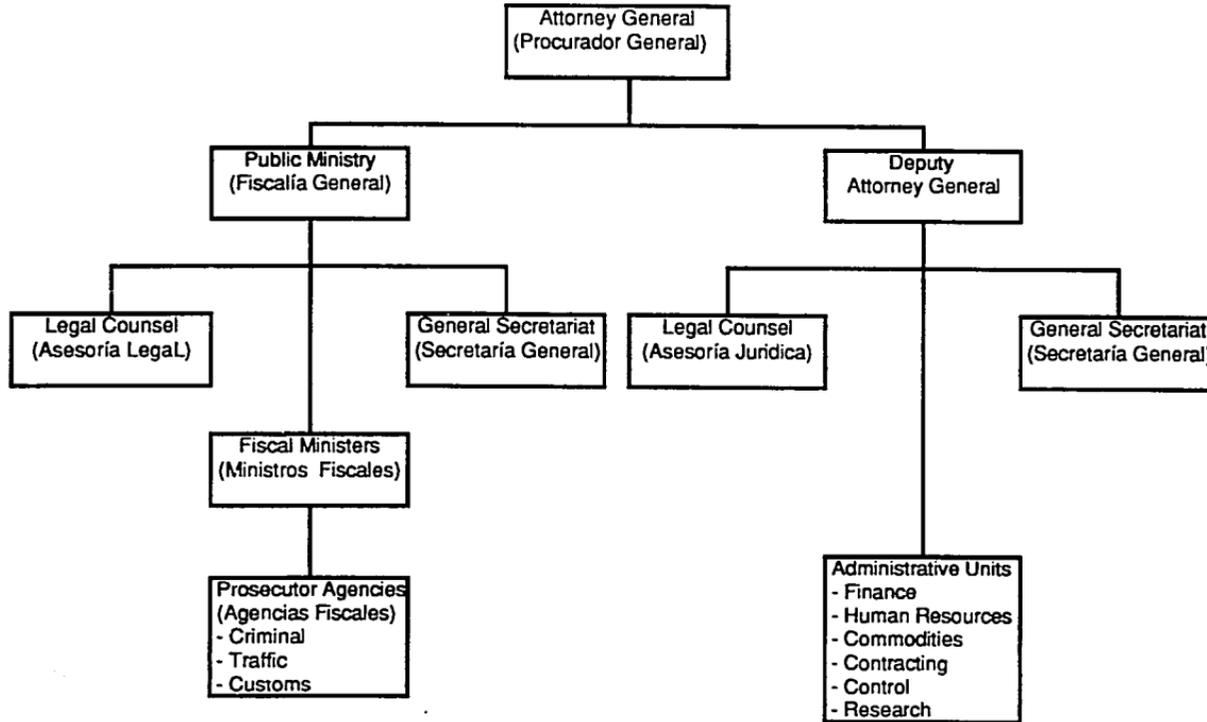
## 2. Budget

The budget for prosecutors is included in the overall budget of the Attorney General's Office but there is no internal consultation to the personnel involved in the prosecutorial for the elaboration of their budget. In 1991 the Attorney General's budget was 1,883,4 millions of sucres (0.15 percent of the national budget). Of this amount, 56 percent was assigned to prosecutorial functions (82.5 percent went to salaries, 8.5 percent operating expenses, 5 percent for transfers, and only 0.1 percent for capital expenditures).

## 3. Personnel

The Attorney General is named by the Congress, from a slate of candidates proposed by the President for a four-year term. The Fiscal Minister is also appointed by the Congress to a five-year term from a slate of candidates proposed by the Attorney General. Thereafter, the Fiscal Ministers at each district level are named by the Attorney General from a slate proposed by the Ministro Fiscal General for a five-year term.

**FIGURE 3**  
**ORGANIZATION OF THE ATTORNEY GENERAL'S OFFICE**



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There were a total of 15 fiscal ministers, and 176 prosecutors ("agentes fiscales"), 126 criminal and 50 traffic in 1991. These prosecutors were assigned to the existing 199 trial offices, and three regional offices (Quito, Guayaquil and Cuenca) throughout the country. As of January 1991, 22 prosecutorial offices operated without an assigned prosecutor even though funds were available to contract the required personnel.<sup>34</sup> In those cases in which no fiscal agent has been named, the fiscal minister at the district level may appoint lay prosecutors ("promotores fiscales").

While prosecutors and their superiors are named to fixed terms, the remainder of the personnel enjoys little job security and their positions are regulated by a Personnel Selection Commission. There is a generalized opinion that many of these positions are part of the patronage assigned to the victorious political party.

There is no specific unit or program providing regular training for prosecutors. Occasionally, on an individual basis personnel from the Public Ministry attend to updating courses organized by the Faculties of Law or by the Judiciary.

Salaries are established in accordance with a position classification scale fixed by the Executive for all public sector employees. For example, the basic monthly salary of a fiscal minister was, in January 1991, 96,000 sucres, a prosecutor ("agente fiscal") earned 83,000 sucres and an office assistant earned 63,000 sucres. However, to accurately determine the monthly salaries a variety of additional compensation (representation expenses, housing allowances, seniority, etc.) must be taken into account.

There is almost no difference between the salaries paid to prosecutors and those earned by their counterparts in the ju-

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34 The reasons for these vacancies were: establishment of too many offices for the personnel available, unavailability of suitable transportation to areas in which offices are located, lack of qualified professionals to fill vacancies and, low salaries.

diciary. For example, the salary of the President of the Supreme Court (200,000 sucres), and the justices of that Court (180,000 sucres) are higher than that of the Ministro Fiscal General (144,000), Superior Court judges (100,000) are likewise higher than fiscal ministers (96,000). On the other hand, prosecutors earn a higher monthly salary (83,000 sucres) than equivalent judges (75,000 sucres).

Even though prosecutors are subject to the Civil Service Law ("Ley de Servicio Civil y Carrera Administrativa") since there are only three position categories for these officials, promotions are almost unheard of. The average length of service for prosecutors was 8 years, beyond the 5 year-term established by law.

#### 4. Caseloads

Caseloads assigned to prosecutors correspond closely with that of their judicial counterparts since they must participate in all criminal proceedings. Cases are randomly assigned between the prosecutors of each criminal court.<sup>35</sup>

In Quito and Guayaquil there are two prosecutors for each Criminal Court while in the rest of the country there is one prosecutor assigned to each corresponding court. The monthly average caseload varies between provinces. For example, in March 1991, it was over 400 cases in Imbabura and Azuay, more than 300 in Tungurahua, more than 200 in Chimborazo, and less than 100 in Bolivar and Carchi.

In addition to these caseload statistics, one must also take into account prescribed legal duties which the prosecutors must also pay attention to such as intervention in narcotics cases, and investigation of complaints against colleagues in the Public Ministry.

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35 Reglamento de sorteos, art. 1, Registro Oficial No. 536, March 10, 1978.

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## 5. Planning and Evaluation

Like the Judiciary, the Attorney General's Office does not have a planning and/or evaluation system. There is no unit charged with this task and neither individual nor institutional evaluations take place even though quarterly reports are filed by all prosecutors.

The absence of planning is especially noticeable in the elaboration of the Office budget. Rather than presenting a budget based on a determination of actual need, the budget office limits itself to routinely adjusting for inflation prior year figures.

### D. The Legal Defense System

The importance of an adequate defense to the development of a fair and efficient justice system cannot be underestimated. Any criminal proceeding requires the presence of an attorney, either private or public, for an expeditious and equitable resolution. In a system as formalistic as the Ecuadorian one, access to courts is largely determined by the ability to retain counsel or to have counsel provided in cases of indigence.

#### 1. Private Legal Defense

Private legal defense is guaranteed by the Constitution and is available to those with sufficient resources to employ a lawyer. All lawyers must belong to a bar association and each district has its own association. The approximate number of lawyers is 9,350 nationally, with 3,350 in Quito, 5,000 in Guayaquil and another 1,000 in the remainder of the country. A small percentage of these lawyers specialize in criminal law.

In the case of indigents, public defense is fulfilled through one of three mechanisms: court appointed counsel, public defenders, and legal clinics.

## 2. Court Appointed Counsel

The primary mechanism for providing public defense is through court appointed, not remunerated, counsel ("abogados de oficio"). These counsel are appointed by the trial judge after probable cause to proceed has been established ("auto cabeza de proceso").

Like most other countries in which this system operates, it tends to result in the delivery of poor or unfulfilled legal services since most lawyers attempt to evade appointment or fulfill their duty superficially.

## 3. Public Defenders

The Constitution provides for the employment of public defenders for indigents. Nevertheless, only since September 1989 have a few public defenders been assigned to the criminal courts. By the end of 1990 there were only 21 defenders for the whole country. Appointment of public defenders is assigned to the judiciary which has the duty of organizing this service and insuring the adequacy of representation. The responsibility of the public defenders extends beyond criminal proceedings and they are also charged with representation of indigents in civil cases.

Salaries for public defenders begin at 75,000 sucres monthly, but adding all the compensations, they are equivalent to the salary of a judge at the provincial level (juzgados). Working conditions are poorer than their counterparts in the judiciary or in the Attorney General's Office due to a lack of staff, budget, inadequate facilities, etc.

## 4. Legal Clinics

Legal clinics are operated and financed by the law schools. Staffed by law students, they are a unique resource for the representation of indigents. Their services are usually re-

stricted to representation in criminal, labor, civil, landlord-tenant, and juveniles. They are located in the cities in which there are law faculties (Quito, Guayaquil, Cuenca, Loja and Puertoviejo).

While in the majority of law schools legal internship is an elective course, the law faculty in Cuenca requires it prior to graduation. On an average, 700 law students participate nationally annually.

Resources accorded to these legal clinics are low, especially the salaries of lawyers who supervise the students. They are also limited by a lack of cooperation from judges and other judicial officials.

In addition to law faculties, a number of nongovernmental agencies provide legal services to the poor (the *Confra-ternidad Carcelaria*, the *Comisión Ecuémica de Derechos Humanos*, and the *Fundación Rescate*). Lawyers provide *ad honorem* services and working conditions tend to be higher than legal clinics due to the assistance which they receive from national or international organizations.

## E. The Police

### 1. Structure and Functions

The National Police was first established in 1838 and its current structure is dictated by Organic Law No. 189 of February 28, 1975 (LOPN). While the police is primarily concerned with internal order maintenance, and security in correctional institutions, it may also be called upon to perform national security functions by its commander-in-chief, the President.<sup>36</sup>

The first police forces in Ecuador were established by municipal councils who were charged with primary responsibility for law enforcement. For the thirty years following inde-

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36 *Constitution*, art. 127 y 128, and *LOPN*, art. 2.

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pendence the police continued to respond to the councils and were, oftentimes, subservient to the army. Slowly, provinces began assuming control over these forces and in 1937 the first national police organization was created. In 1951 the name was changed from the National Civic Guard to the National Civil Police, and in 1979 to the National Police.<sup>37</sup>

The structure of the National Police follows the centralized model which is so common throughout the region. This pattern is characterized by a service which is administratively and functionally centralized and which exercises jurisdiction throughout the national territory.<sup>38</sup>

The force is subservient to the Ministry of Government through the Subsecretariat of Police and the General Police Command (art. 10-16 LOPN). The Police Command is directed by a General Commander, while the Subsecretariat acts as the liaison between the Ministry and the field forces. The latter is commanded by an active duty police general. In 1988 the National Police consisted of approximately 18,000 personnel.<sup>39</sup>

Police are organized along military lines. The agency is basically divided into technical (public security, urban and rural services, intelligence, operations judicial police, immigration, border and traffic) and support directorates. The country is subdivided into four operational districts (Quito, Riobamba, Cuenca and Guayaquil), each with five commands assigned provincially.<sup>40</sup>

Like many other Latin countries, the investigative task is assigned to a Judicial Technical Police (LOP Title VI) attached

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37 Dennis M. Hanratty, 1991, *op. cit.*, p. 239.

38 Jose Ma. Rico and Luis Salas, *Inseguridad Ciudadana y Policia*, Tecnos, Madrid: 1988, p. 64.

39 George Thomas Kurian, *World Encyclopedia of Police Forces and Penal Systems*, New York: Facts on File, 1989.

40 Dennis M. Hanratty, *op. cit.*

to the National Police and assigned to act as an auxiliary to the judiciary. However, the creation of this force is yet to be made. A major impediment to the establishment of this force is the reluctance of the judiciary to assume responsibility for a cadre of men from the ranks of the National Police, an institution held in low regard by the population.

Other police agencies complement the work of the National Police. The National Directorate for Control of Illegal Narcotics reports to the Minister of Government while the customs police are subordinated to the Ministry of Finance and Credit. Municipal police forces also operate, principally in Quito and Guayaquil, but their activities are relegated to enforcement of ordinances.

Being a quasi-military institution, crimes committed by the police, which are not punishable as common crimes, are tried before special police courts (art. 62-78 LOPN) under a code of police conduct.

The National Police has also been affected by the politicization which dominates the public sector. The police has been in the middle of the struggles between the branches of government. Thus, for example, during the administration of Febres Cordero, the Congress, dominated by the opposition, announced its decision to remove the Minister of Government under charges of abuse of power and violations of human rights. The National Police, under the jurisdiction of the Minister, reacted immediately and issued a threatening proclamation complaining that the honor of the institution had been impugned. The Congress responded by criminally accusing all of the police chiefs who had signed the proclamation. Thereafter, further charges were leveled by both sides against the Court of Constitutional Guarantees which had upheld the validity of the proceedings brought by the Congress against the Police.<sup>41</sup>

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41 Comisión Andina de Juristas, *Derechos Humanos en Ecuador: Problemas en Democracia*, Lima: 1988, pp. 20-23.

Finally, like its Andean neighbors, the National Police has been drafted in the war against drugs. Police units, with the assistance of the United States, eradicated crops along the border with Colombia. By 1988, members of Colombian cartels were actively operating in the country killing a superior court judge who had been investigating trafficking.

## 2. Personnel

The General Commander is appointed by the President, upon recommendation of the Minister of Government, from the active duty police generals. The Minister retains the power to name the bulk of general officers while the remainder of the force is selected by the institution.

Police training is carried out by the Superior Police Institute (Instituto Superior de Policía) which trains officers, while enlisted personnel are trained by the National Police Institute (Instituto Nacional de Policía). Additionally, advanced courses are offered by another institute. Curriculum and methodologies are primarily influenced by a military model.

## 3. Control and Supervision

Control and supervision mechanisms help in preventing and curbing potential police abuses. Control can be external and internal. The former refer to procedures adopted by the police force itself while the latter are applied by external institutions (courts, Congress, etc.).<sup>42</sup> Internal control mechanisms have not functioned properly in Ecuador, and when they have functioned, at all, they have been due more to political factors than due to a real desire to control police behavior.

The absence of effective mechanisms for regulating police conduct occurs against a background of constant charges about police abuses, especially human rights violations. A report of

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42 José Ma. Rico and Luis Salas, *op. cit.*, note 19, pp. 94-95.

the Congress' Special Commission on Human Rights charged that "arbitrary arrests, illegal searches and seizures, tortures and executions have become commonplace".<sup>43</sup> Additionally, a nongovernmental human rights group, the Ecuadorian Commission on Human Rights (CEDHU), reported in 1986, 186 documented cases of arbitrary arrests. Finally, the Human Rights Commission of the Court of Constitutional Guarantees received during the first six months of 1985, 34 complaints of human rights violations of which 28 percent referred to arbitrary arrests, 21 percent dealt with prolonged incommunicado detention and torture with the remainder ranging from assaults to assassinations.<sup>44</sup> The United States Department of State's Human Rights Report for 1987 criticized the government for not taking any judicial action against police believed involved in human rights violations.<sup>45</sup>

While subsequent governments have been critical of human rights abuses they appear to continue, although reduced, while prosecutions of violators are rare. The U.S Department of State reported to the U.S Congress in 1991 that "Ecuadorians enjoy, both in law and in fact a wide range of freedoms and individual rights, but human rights problems remain. Principal among these are torture and other mistreatment of prisoners and detainees, brutal prison conditions, lengthy detention without charge, a politicized court system, and pervasive discrimination against women, blacks, and Indians."<sup>46</sup>

The courts appear to have also turned a blind eye to these charges of human rights abuses. Administrative and judicial

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43 "Informe de la Comisión Especial de Derechos Humanos del Congreso Nacional" (1987), p. 63, in: Comisión Andina de Juristas, *op. cit.*, p. 44.

44 Comisión Andina de Juristas, *op.cit.*, p.50.

45 United States Congress, 100 Congress, 1st Session, U.S. Senate, Committee on Foreign Relations, *Country Reports on Human Rights Practices for 1988*, Washington: Government Printing Office, 1989.

46 United States Congress, 102d Congress, 1st. Session, U.S Senate, Committee on Foreign Relations, *Country Reports on Human Rights, Practices for 1990*, Washington: Government Printing Office, 1991, p. 599.

processes tend to be resolved in favor of the police.<sup>47</sup> The Court of Constitutional Guarantees is charged with the investigation of human rights abuses, yet the Court limited its activities to hearing complaints of abuses and calling upon the government to act. This apparent impunity is aggravated by the existence of special police courts organized into tribunals, district courts, and the National Court of Police Justice.<sup>48</sup> Police judges are named by the minister of Government for a period of two years and may be removed by the Minister. Critics have charged that this dependence on the Minister brings their potential impartiality into question.<sup>49</sup>

Finally, effective control of police misconduct is hindered by a code of silence and *esprit de corps* which penalizes those who cooperate in harming fellow police. This affects not only the rank and file but also the police judges who are on active duty or are retired police personnel.

## F. The Correctional System

Like most other Andean nations, the Ecuadorian correctional system presents the most serious problem of the criminal justice system. Government largess has resulted in an inhumane system in which even the most basic needs of inmates are unmet.

The correctional system was originally administered by the Municipal Councils of the localities in which they were situated. Thereafter, in 1965, they were operated by the Prison Trusteeship ("Patronatos de Cárceles") even though they have continued to rely on municipal governments for purposes of vigilance and the feeding of inmates. In 1970 the Ministry of

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47 Comisión Andina de Juristas, *op. cit.*, pp. 105-108.

48 Article 131 of the Constitution recognizes the existence of special courts but exempts common crimes from their jurisdiction. These cases must be tried before the ordinary courts (art. 62-69 LOPN).

49 Comisión Andina de Juristas, *op. cit.*, p. 104.

Government established the National Directorate of Social Rehabilitation (Dirección Nacional de Rehabilitación Social)<sup>50</sup> and transferred all responsibility for prison management to the central government.<sup>51</sup>

### 1. Financial Resources and Infrastructure

According to many observers, prison conditions in Ecuador are "so squalid and brutal that in themselves they represent cruel treatment."<sup>52</sup> Most Ecuadorian justice officials agree that the funds appropriated for the operation of the correctional system are insufficient. However, the system has been incapable of administering its budget. Thus, for example, during the fiscal year 1989, almost 40 percent of the prison budget went unused.<sup>53</sup>

Insufficient funding contributes to uninhabitable prison buildings with an almost total absence of sanitary facilities and potable water as well as food allotments insufficient to meet basic dietary needs.

Prison overcrowding is a feature of the system. For example, studies have shown that cells of six square meters or less tend to hold between two and seven detainees with this figure reaching up to eleven inmates. The insufficiency of the

50 The Council is composed of the Minister of Government, a representative of the President of the Supreme Court with expertise in Penal Law, the Attorney General and the Director of the Criminology Institute of the Central University (*Código de Ejecución de Penas y Rehabilitación Social*, June 9, 1982, arts. 2-5).

51 Victor Vega Uquillas et. al., "El sistema penitenciario ecuatoriano. Estudio de diagnóstico", *Archivos de Criminología, Neuro-Psiquiatría y Disciplinas Conexas*, vol. XXIV, No. 25-26, 1982-1983, p. 182.

52 United States. Congress, *Country Reports on Human Rights for 1988*, *op.cit.*, p.247.

53 Santiago Arguello, *Prisiones: Estado de la Cuestión*, ALDHU-El Conejo, Quito: 1991, p. 58.

available space is compounded by poor maintenance since almost none of the prison budget is dedicated to upgrading of existing facilities or new construction. Thus, for example, almost 30 percent of the available space is unusable.<sup>54</sup>

## 2. Personnel

There are approximately 1,200 personnel assigned to the entire prison system. The highest percentage are the guards which account for 45 percent of the staff; administrative personnel with 29 percent; and the remaining 26 percent are professional staff and technicians.

Even though there has been an increase in the number of staff in the last few years they are still insufficient to meet the needs of the system. Thus, for example, in the Penal Center of Guayaquil there were only 10 guards to supervise 2,700 inmates during any one shift. The low salaries, added to the dangers involved, results in a constant turnover of personnel and vacancies.<sup>55</sup>

Insufficiency of personnel, poor distribution of the work, the lack of training for staff and an almost total absence of information have resulted in low morale and apathy among the personnel who work in the prison system.<sup>56</sup>

## 3. Inmate Population

One of the major problems facing the correctional system is the large percentage of detainees awaiting trial. In 1990, of 7,455 inmates, approximately 70 percent were pretrial detain-

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54 *Ibid.*, pp. 64-65.

55 *Ibid.*, p. 37.

56 *Ibid.*, p. 62.

ees and almost 1,000 of them had been imprisoned awaiting trial for more than four years.<sup>57</sup>

The large percentage of pretrial detainees, added to the insufficiency of space contributes to prison overcrowding. For example, according to the 1989 prison census, the Penitentiary in Guayaquil housed 1,774 persons even though the capacity was for 800 inmates. Overcrowding is common throughout the system.<sup>58</sup>

Another critical problem facing the justice system is the detention of minors in the adult correctional system. This results from provisions in Ecuadorian criminal procedure which requires that a court determine the juvenile status of a detainee prior to transfer to the juvenile system. The absence of counsel oftentimes result in juveniles being held as adults for long periods of time while awaiting a court appearance.<sup>59</sup>

#### 4. Other Factors

Political factors also affect the operation of the prison system. Politicization of corrections led Dr. Ramiro Larrea, former president of the Supreme Court, to complain that "the correctional system is a tool at the service of the national government and the Executive".<sup>60</sup> This statement primarily refers to the overutilization of prison sentences by instructional and police judges as a tool of political persecution.

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57 "Congreso tramita indulto para presos sin juicio", *Hoy*, November 16, 1990 and, "Menos presos sin sentencia", *Hoy*, December 26, 1990.

58 Vladimiro Alvarez G., "La función legislativa frente al problema carcelario", *Revista de Investigaciones Jurídicas, Penales y Penitenciarias*, No.1, Guayaquil: 1989, p. 36.

59 Estudiantes de Jurisprudencia de Ayuda Carcelaria Universidad de Guayaquil, "Negligencia y Errores Judiciales", *Revista de Investigaciones Jurídicas, Penales y Penitenciarias*, No. 1, 1989, Guayaquil: p. 20.

60 Ramiro Larrea Santos, "La función judicial frente al problema carcelario", *Revista de Investigaciones Jurídicas, Penales y Penitenciarias*, No. 1, Guayaquil: 1989, p. 42.

Efforts to reform the system have been isolated and primarily formalistic in nature. A major legislative change was completed with the establishment of the National Directorate of Prisons in 1970 and the adoption of an administrative code for correctional institutions in 1973. Both of these actions had as a goal the adoption of a system for the rehabilitation of inmates. However, these legalistic changes were not accompanied by the necessary budgetary and personnel commitments to make them effective.<sup>61</sup> Additionally, the few practical innovations, primarily in the education of inmates, did not have sufficient follow-up. This resulted in a return to previous conditions by the end of the decade of the seventies.

In the early 1980s, a Code for the Execution of Sentences and Social Rehabilitation (Código de Ejecución de Penas y de Rehabilitación Social) was enacted. This legislation established a series of norms seeking to guarantee the individual rehabilitation of inmates. However, most officials agree that the code is seldom complied with.

The inability of the government to deal with the correctional crisis has resulted in the emergence of nongovernmental organizations such as the Prison Association of Ecuador (Confraternidad Carcelaria del Ecuador) and the Law Students for Prison Assistance of the University of Guayaquil (Estudiantes de Jurisprudencia de Ayuda Carcelaria de la Universidad de Guayaquil). In addition to providing legal assistance to inmates, these organizations have promoted the construction of rural prison farms, the establishment of half-way houses and prison enterprises.

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61 Víctor Vega Uquillas et al., *op. cit.*, p. 207.

### III. CRIMINAL PROCEDURE<sup>62</sup>

This section examines Ecuador's criminal procedure, which primarily relies on the traditional civil law written process and is based on the Code of Criminal Procedure adopted in 1983<sup>63</sup>. Like other Latin American codes, many of the provisions and its basic premises are almost exact copies of foreign, primarily European codes, which were imported to Ecuador with little adaptation to local conditions and social needs.

Criminal procedure is characterized by its strong apparent emphasis on "due process" requirements such as the privilege against self-incrimination, the prohibition of defendants being held incommunicado, the right to counsel, the right to a public trial, and fixed periods for the completion of the different procedural stages. Even though all of these guarantees are written in the Constitution, they are not always followed. For example, there is a presumption of innocence but it is often violated by pretrial incarceration which sometimes may exceed the maximum potential sentence for which the accused was detained in the first place. Likewise, the right to counsel is guaranteed for all defendants from the initiation of the investigatory stage; yet it is effectively denied for indigents by the absence of an effective system of public legal defense and the fact that court appointment of counsel usually does not take place until the opening of trial, ignoring the necessity of representation at critical pretrial stages.

The nature and severity of the offense determines the type of proceeding to be followed, including who may bring the prosecution. For the majority of serious crimes, the prosecution is brought by the State, through the "ministerio fiscal" and the

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62 The most recent treaties on criminal procedure are: Jorge Zavala Baquerizo, *El Proceso Penal*, 3 tomo, 4a edición, Bogotá: EDINO Jurídico, 1989-1990 and, Walter Guerrero V., *El Proceso Penal*, Facultad de Jurisprudencia, Universidad Nacional de Loja, 1991.

63 Recently a new Code of Criminal Procedure has been drafted, which proposes major changes by the adoption of several elements of the adversarial process.

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process is divided into four stages: the instructional stage ("sumario"), the intermediate stage, the trial ("plenario"), and the appeal. The instructional stage has as its purpose the investigation of the crime and the determination that there is probable cause to proceed to trial against an accused. The intermediate stage is the final stage of the instruction during which time the charging party has an opportunity to formulate the charges which it wishes to have the court incorporate in its ruling. The trial stage has the finality of determining the guilt or innocence of an accused and the imposition of a sentence upon conviction of a defendant.

The following sections refer to the ordinary criminal process to be followed in the prosecution of serious crimes. Minor offenses are tried by police judges under different procedural norms.

#### A. Instructional Stage (Sumario)

Criminal cases are initiated by the issuance of a charge ("auto cabeza de proceso"). Although the prosecutor has the responsibility of initiating the process, most charges are filed with the police and/or criminal courts (in Quito, 44 percent, and 46 of the cases respectively; in Guayaquil, 73 percent, and 17 percent respectively).

The purpose of the investigative stage is to determine if a crime was committed, and the person to be charged for that act. This stage is supervised by the criminal court judge who may order a number of investigative measures including arrest of the accused, searches, preventive detention, and seizures of goods.<sup>64</sup> Field research has indicated, however, that in 30 percent of the cases judges abdicated this responsibility

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64 Although generally this stage is under the supervision of a judge, "intendentes, subintendentes, comisarios de policia and tenientes politicos" may also supervise this stage in those cases in which the law awards them jurisdiction. However, upon its conclusion they must be forwarded to a criminal judge for trial.

and delegated it to "intendants, commissars and political lieutenants."

Nonjudicially ordered detention may not last longer than 48 hours prior to placing the accused before a competent judicial authority to review the terms of incarceration. Although the judge has the power to allow pretrial release of detainees, incarceration is the rule rather than the exception. The imposition of monetary bail on indigent defendants eliminates the possibility of release for most of them. Thus, in the beginning of 1990, 68 percent of prisoners were pretrial detainees.

This stage must be completed within 15 days although it may be extended an additional 15 days to complete the investigation, or 30 days if there is a big geographic distance from the site of the crime to the court. In no case, should this stage last longer than 60 days. However, these terms are often violated (79 percent in Ambato, 85 percent in Quito, 94 percent in Guayaquil, and 98 percent in Otavalo). In many cases the instructional phase takes between 6 months and 1 year (34 percent in Quito, 40 percent in Otavalo, 41 percent in Ambato and 61 in Guayaquil) and in some even more than 1 year (15 percent of the cases in Quito and 38 percent in Otavalo).

The factors causing noncompliance with these terms are: negligence of judges and staff, excessive caseloads, desire of judges to prove the guilt of the accused, delays caused by the parties, appeals before superior courts, corruption, lack of staff, and indifference of the police in forwarding requisite documents to the courts. Finally, most the persons interviewed during the field research, pointed out that the prescribed terms are unrealistic.

## **B. Intermediate Stage**

Upon the completion of the investigative stage, the judge orders the private complainant or the prosecutor, depending on the nature of the crime, to file formal charges. The prosecutor has six days to do this and forward it to the defense

counsel, who has six days to respond. Once this process has been completed, the judge may order dismissal, which may be temporary or with prejudice, reopening of the investigative stage or opening of the trial stage.

The research findings indicated that temporary dismissals occur in a large number of cases: 24 percent in Ambato, 53 percent in Guayaquil, 40 percent in Quito and 31 percent in Otavalo. The large number of temporary dismissals often indicates deficient investigation in the preceding stage and leaves the accused in a state of legal limbo since the charges may be refiled at any time.

If the judge finds there is probable cause that a crime has been committed and that the accused committed it, the judge orders the opening of the trial stage and forwards the record to the corresponding tribunal.

### **C. Trial Stage (Plenario)**

The purpose of the trial stage is to determine the guilt or innocence of the defendant. This phase is divided into two separate stages. In the first, the court assigns counsel to indigent defendants, fixes the date of the trial, and allows the parties to present evidence. The second stage is the trial itself, which must be public and oral.

While the law requires a public oral trial, the bulk of the evidence has been presented in prior stages, especially during the investigatory stage, and the trial is usually limited to a reading of papers and debate between the parties. Upon the conclusion of the trial the members of the court retire and determine the guilt or innocence of the accused. The majority of cases result in a guilty verdict (62.5 percent in Otavalo, 84 percent in Guayaquil, 85 percent in Quito and 88 percent in Ambato). Sentence is also imposed during this stage.

The trial lasts less than a month in the majority of instances (75 percent in Quito, 87.5 percent in Otavalo and 51

percent in Ambato). However, these periods are extended in Guayaquil in which only 10.5 percent of the trials are completed in less than 1 month, 47 percent between 1 and 2 months, and 25 percent in more than 6 months.

#### D. Appeal

The decisions taken during the instructional stage are subject to interlocutory appeals. Final decisions of the Penal tribunal may also be challenged through the remedies of nullity, cassation and revision.<sup>65</sup> Finally, *habeas corpus* may be utilized at any point of the prosecution as long as the defendant is being illegally detained.

### IV. PROBLEMS FACING THE ADMINISTRATION OF JUSTICE

This section analyzes the major problems identified throughout the preceding descriptive sections. It is divided into several categories, some of them concerning normative and social issues (including the narcotic problem) directly influencing the administration of justice in Ecuador, and others related to the basic principles which are critical to a Justice System.

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65 There are several types of postconviction remedies which may be pursued by a defendant. Nullity ("nulidad") lies in a limited number of cases: lack of jurisdiction by the court, errors in the established procedure, absence of notification to the accused or defense counsel, etc (art. 360 CCP). The cassation remedy ("casación") may be pursued when the sentence is in violation of the law either in its interpretation or in its application (art. 373 CCP). Finally, revision ("revisión") may be presented before the Supreme Court when there are errors of fact (art. 385 CCP).

## A. Normative

Ecuadorian law is characterized by extensive copying of foreign codes with little reference to the social and economic reality of the country in which the code is being applied, uncoordinated participation of diverse institutional actors in the implementation of the legislation, and even sometimes, contradictions between norms. Many of the laws have not been revised since their enactment, even though conditions may have radically changed. For example, a basic criticism of criminal procedure is its adequacy to process large numbers of serious cases speedily while guaranteeing basic procedural rights to the accused.

There is a trend to abandon the written procedure and adopting an adversarial system. This would be a revolutionary step, in accord with modern trends in Europe and Latin America. However, such a radical shift must be undertaken with great care. While an adversarial system has many benefits, it depends largely on active parties to move the process along. The absence of a powerful and active prosecutor and the virtual lack of legal defense for indigents may result in greater inequities and inefficiency than the current system.

The normative structure is complicated by the diversity of actors which may adopt rules which alter the law:

“... in addition to the Legislature, there are a number of quasi-legislative bodies such as: the President of the Republic who may issue Executive Decrees; the twelve ministers of State and the Secretary General of the Public Administration who may publish Ministerial Accords or Resolutions; the National Security Fronts, the Interministerial committees, the Monetary Junta, the Controller, the Superintendents of Banks and Companies, the Directorates or Council of Autonomous Entities, Municipal and Provincial Councils, and numerous other public entities. All of the foregoing may adopt, almost weekly, an innumer-

able number of norms binding on the public sector".<sup>66</sup>

The preponderance of the Executive in the issuance of norms is especially noteworthy in recent years. For example, between 1980 and 1989 the Executive enacted more than 23,500 legally binding norms including decrees, ministerial accords, resolutions, and ordinances.<sup>67</sup>

The diversity of institutions engaged in normative production result in a great deal of confusion and impede access to knowledge of the law which, in turn, contributes to popular distrust in the legal system.

## B. Social

The growth in Ecuador's population over the last 20 years, and the accompanying shift in its geographic distribution from rural to urban areas, have placed increased demands on the poorly equipped judicial system. The inevitable increase in crime rates that accompanied urbanization, and the legal demands of modern society, have brought increased numbers of cases before the courts. Even in rural areas the courts saw increasing numbers of cases as disputes developed more frequently over issues such as land titles and irrigation rights.

Depressed economic conditions in the 1980s further contributed to demands on the courts, as crime rates increased. Penal cases rose abruptly in the early 1980s as the economy contracted sharply, and unemployment rose. Between 1980 and 1985, the number of criminal cases entering the system each year had risen from 2,013 to 13,598. In addition, middle and upper class individuals increasingly sought to use the courts to protect their economic positions.

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66 Luis Hidalgo López, *La Legislación Informal en el Ecuador*, Lexis S.A., Quito: 1990, p. 15

67 *Ibid.*, p. 39.

Indigenous peoples in rural areas have been typically subject to justice administered by political lieutenants, a particularly weak link in the judicial system. With increased migration to urban areas, Indians came into contact with the police and the courts. As a group, Indians are disadvantaged because of their poverty, their unfamiliarity in many cases with the Spanish language, and because of the discrimination they often encounter in Ecuadorian society. A particular problem for Indians appears to be their treatment by the Criminal Investigation Service (SIC) of the police. Torture is apparently not uncommonly used to extract confessions that are subsequently employed as the basis for conviction.<sup>68</sup>

Despite the fact that, traditionally, indigenous groups in Ecuador have not played an important role in national politics, this situation may be changing. Indigenous groups did not escape the social changes that occurred in the 1970s and 1980s. The formation of regional and national organizations such as CONFENIAE (Confederación de Nacionalidades Indígenas de la Amazonía Ecuatoriana) and CONAIE (Confederación de Nacionalidades Indígenas del Ecuador), brought Indian concerns into the national political arena.

The nationally organized uprising of indigenous groups took place in May and June 1990, the first one since the early nineteenth century, is the most visible indication of this change. The recent case brought before the Court of Constitutional Guarantees by Huaorani Indians and environmental groups to prevent petroleum development in the Yasuni National Park and on Huaorani lands, marks a significant use of the legal system to protect indigenous rights.<sup>69</sup> Although the demands of indigenous organizations so far have not included reforms to the justice system, such demands may not be distant.

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68 Interview with Asdrúbal Granizo, lawyer to Hospedería Campesina (La Tbla). See also, *Derechos Humanos en Ecuador: Problemas en Democracia*, Lima: Comisión Andina de Juristas, 1988.

69 The TGC decided in favor of the Huaorani petition, but subsequently reversed its decision, apparently as a result of political pressure.

The legal system has also discriminated against women. Unlike many other Latin American countries, Ecuador does not have a long history of politically active women's organizations. Since the 1970s women began to be educated and entered the labor force in large numbers. As a result of the emerging political role of women, women's organizations have lobbied for changes in the laws pertaining to gender. In this area, women appear to have been more successful than other disadvantaged groups, as evidenced, for example, by the recent decisions of the Tribunal of Electoral Guarantees that struck down a discriminatory section of the electoral laws.

### C. Narcotics

The narcotics problem in Ecuador derives principally from the country's participation in the cocaine trade. Although marijuana has been produced and consumed locally since the early 1960s, the relatively low profitability of this drug has helped to contain its negative social effects. Marijuana does appear to be the most frequently consumed drug, and in this manner its domestic use contributes to the large numbers of narcotics cases the courts have had to handle during the 1970s and 1980s.

Ecuador's role in the cocaine trade is of more recent origin, and of a considerably lesser magnitude, than that observed in the other Andean countries. Although Ecuador has a history of coca production and use dating from pre-columbian times, the incessant persecution of coca chewing by ecclesiastic and government officials that began in the sixteenth century had virtually eradicated coca growing and chewing by the nineteenth century. Thus, Ecuador's recent involvement in the cocaine trade occurs in a different context from that observed in Peru, Bolivia and Colombia, where indigenous cultivation and use was never eliminated. Largely for this reason, Ecuador is considered a transit country for the movement of semi-processed cocaine from Bolivia and Peru to Colombia. At the same time, Ecuador's location, its poverty, and the increased enforcement efforts in neighboring countries, hold the poten-

tial for a considerable expansion of Ecuador's role. In recent years, for example, some limited production and processing of coca has taken place within the country, although so far on a relatively small scale.

Nevertheless, despite Ecuador's peripheral involvement to date in the narcotics trade, the judiciary has not escaped this plague. More important, is the potential danger posed by an expansion of narcotics traffic in Ecuador. The relative poverty of the country and the weakness of the judicial system make such an expansion a potentially serious threat to the administration of justice.

There is no reliable evidence on the annual volume of money laundering in Ecuador. The often cited estimates of \$200 to \$400 million, or those suggesting as much as 10 percent of GNP, are highly suspect.<sup>70</sup> Officials in the national accounts division of the Central Bank report no obvious evidence of large volumes of dollars entering the economy, nor does the behavior of the free market exchange rate provide unequivocal support for unusually large dollar transactions.<sup>71</sup> Between 1989 and 1990, dollar bills traded in free market, a possible indicator of money laundering, rose from 5.7 percent to 11.0 percent of the value of total transactions. Yet, there is no evidence linking the rise in dollar bill transactions to narcotics traffic.<sup>72</sup> Local effects, such as the reported increase in real estate values in certain areas of the country, may be the consequence of much smaller amounts on specific markets.

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70 As reported in: Congreso Nacional del Ecuador, *Informe Comisión Especial que Investiga el Lavado de Dólares en el Ecuador*, Quito: December 1990, pp. 8, 22, 35.

71 One possible indication of the local inflow of dollars is the reported 30 sucre spread between exchange rates in Tulcan, on the Colombian border, and Quito. See Wilson Miño "La Economía Política de la Droga y el Lavado de Dinero en el Ecuador" in Jacques Laufer, et. al., *Las Plagas de América*, Quito: CAAP/CIUDAD/CERG/CECCA, 1990.

72 The reported increase in dollar bill transactions may have been simply the result of statistical reporting errors. See *Análisis Semanal*, Año XX, No. 48 (December 10, 1990), pp. 609-610.

At the same time, even relatively small amounts of illegal money entering the country have the potential to corrupt the judiciary. The low pay for judges (particularly those below the Supreme Court level, and other key officials, such as the court secretaries), and the generally low esteem in which the judiciary is held, make judicial officials potentially vulnerable targets for corruption. Although there is limited evidence of the actual extent of corruption, a recent study documents significantly greater irregularities in drug related cases than in others.<sup>73</sup> The recent development of law firms ("bufetes") specializing in narcotics cases is another indicator of the influence of narcotics on the judicial system.

Beginning in the 1970s, narcotics cases began to increase as a share of all cases (See Table 2). This has been particularly true in the border areas, as well as in the major cities of Quito and Guayaquil. This trend continued through the 1980s, as narcotics cases rose from 79 in 1980 to 574 in 1987. In the latter year, women constituted 23 percent of all narcotics cases.

Yet, throughout the 1980s, the percentage of all cases that were narcotics related remained constant. From 1980 to 1989, the average percentage of narcotics related cases was 3.4 percent. These figures seem to suggest that the same factors that were causing the number of criminal cases to increase in general were also increasing narcotics cases.

Despite the evidence that narcotics related cases during the 1980s never exceeded 4.2 percent in any year, the prison population was increasingly narcotics related. By the mid-1980s, drug related crimes accounted for approximately 27 percent of the prison population, an increase from the 16 percent recorded in 1979.<sup>74</sup> Current estimates suggest this figure has risen to nearly 50 percent.

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73 Fundación Nuestros Jóvenes, unpublished study (1990), reported in *El Comercio* (Nov. 12, 1990).

74 Víctor Vega Uquillas, et al., "Tendencias de la Criminalidad en el Ecuador", *op. cit.* pp.105-107.

Prior to 1990, the Ecuadorian penal code was inadequate to deal with the problems created by the narcotics trade. A major revision adopted in that year provided legislation to deal with previously uncovered areas such as trafficking in precursor chemicals and money laundering. In addition, the new narcotics law also increased the emphasis on the apprehension of drug traffickers and producers. This law is a significant improvement as it provides, for the first time, the legal framework for the prosecution of major figures in the narcotics trade.<sup>75</sup>

TABLE 2

## Narcotics cases as a percentage of total criminal cases, 1980-1989

Year	Total Cases Number	Percentage	Narcotics Cases
1980	2013	79	3.92
1981	7343	170	2.32
1982	7170	205	2.86
1983	8586	296	3.45
1984	10741	262	2.44
1985	13598	453	3.33
1986	10095	349	3.46
1987	13683	574	4.19
1988	13535	503	3.72
1989	12715	524	4.12

Source: Calculated from CAJ/EIJ, "Evaluación de los Sistemas de Información: Corte Suprema de Justicia del Ecuador" (January 1991), Anex 2.2, Table 2.2. Note that the reliability of all published statistics on cases is questionable.

75 It is important to note that the new narcotics legislation enacted in September 1990 owes a great deal to the efforts of non-governmental organizations. Collaboration between the law faculty of the Catholic University and the Fundación Nuestros Jóvenes produced model legislation that was adopted largely intact by the Ecuadorian congress. *Sociedad, Juventud y Droga*, Año 1, No. 1, 1989; "Anteproyecto de ley de sustancias estupefacientes y psicotrópicas", pp. 129-156.

It is important to caution that the great emphasis on narcotics control also holds the potential for violations of human rights. Many of the individuals directly involved in transporting drugs through Ecuador are both poor and female. One possible consequence of the new narcotics law may be to increase apprehensions of small traffickers, while the major figures still remain untouched.

#### D. Judicial Independence

Judicial independence is a benchmark of a democratic society. Achieving this principle requires the Justice Sector to be both externally autonomous (to formulate and manage its budget, to hire and fire its personnel and to take decisions without any external interference from other branches), and internally independent (freedom from the lower judicial instances to act independently of those above, yet respecting the existing hierarchy).

The Ecuadorian Judiciary is unquestionably the weakest branch of government. It has been subservient to the executive and legislative branches throughout much of its history, especially during the last decade when it has become part of the patronage system that characterizes Ecuadorian politics.

Prior to 1978, the Ecuadorian judiciary had escaped overt politicization, although it functioned with a very limited degree of independence. In large part, this reflected the low levels of national political participation in the country, the domination of politics by elite groups, and the largely peripheral role of the judiciary. Constitutional questions, for example, were more frequently handled by legislative reform of the constitution than by the courts themselves. Ecuador's seventeen constitutions provide ample historical evidence of the use of this mechanism to ratify non-constitutional actions.<sup>76</sup> After

76 Based on a bibliographic review of pre-1979 sources, Verner classifies the Ecuador judiciary as "minimalist", that is, one with institutional continuity, but with little independence with respect to other government agen-

1978, with the return of democracy, the overt politicization of the Court began. The Supreme Court, in particular, became part of the patronage spoils used by the political parties to reward loyal members and to build majority coalitions. Both, the large number of parties in Ecuador, and their low level of institutional development contributed to the problem.

The principal problem is that the system is perceived to be advantageous by the political parties. The Supreme Court affords important opportunities for political patronage, and, increasingly, party control of the Court is seen as a way to prevent political persecution of government officials by the opposition.

The reform proposals that came from the Supreme Court and the most recent constitutional amendment appear to reflect a sincere desire for reform, and improve the prospects to limit politization of the judiciary.

Besides the overt politicization of the Justice System, judicial independence is also limited by the budgetary dynamics which have also made the Judiciary the hostage of the Congress and the Ministry of Finance. There is little compliance with constitutional and legal mandates awarding the judiciary independence in the expenditure of their budget. Even in those matters which clearly correspond to the Supreme Court, namely budgetary changes proposed by the Judicial Treasury, approval must be sought from the Ministry of Finance. The constitutional mandated 2.5% share of the budget and the creation of the National Judiciary Council are expected to have a positive impact on the levels of independence of the Ecuadorian judiciary.

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cies. As Verner comments, "these courts function, in the main, to legitimate, to rubberstamp decisions made elsewhere in the political process." While the Ecuadorian judiciary before 1979 appears to have been freer from overt political intervention than in many Latin American countries, this situation was due primarily to the largely peripheral role of the courts. Joel G. Verner, "The Independence of Supreme Courts in Latin America: A Review of the Literature", *Journal of Latin American Studies*, Vol. 16, Part 2 (November 1984), pp. 494-497.

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Finally, an inhibiting factor to judicial independence is the existence of special courts outside the control of the judiciary. The "Police Judges," under the Executive Branch have broad powers to apply criminal procedure, especially during the instructional stage, are a clear danger to the principle of independence of the Judiciary.

Independence of the Public Ministry is related to an unclear model of the prosecutorial function and its situ within the Attorney General's Office. While there is a clear separation between the civil functions performed by the Attorney General's Office and those of the prosecutors, in practice the prosecutors are subsumed within the structure of the Office. Thus, conflicts arise between the specialized prosecutorial body and the other entities in the Office. Prior to enactment of the current Law on the Public Ministry ("Ley Orgánica del Ministerio Público") in 1979, the prosecutorial function was assigned to the judiciary. Currently, there is a debate as to whether this transfer was wise or the prosecutors should be transferred back to the judiciary.

## **E. Accessibility**

Accessibility refers to the possibility of any citizen to reach the judicial system to solve problems or conflicts which are legally predetermined as being within the competence of that sector. This principle is conditioned on a series of factors: public knowledge of the law and the institutions, confidence, costs, location, and number of courts and corruption.

### **1. Knowledge of Rights and Institutions**

One of the first conditions which must exist for the system to be truly accessible is that the citizenry be aware of the laws and of the institutions of the justice sector. In this regard, there is no information about public knowledge of their

civil or criminal rights. However, one could assume that given the complexity of the legal system and the amount of new legislation issued since the adoption of the 1984 Constitution, together with popular distrust in the justice sector, popular knowledge of legal rights is unlikely. This must also be considered in light of the effect of seven years of military government in which laws changed constantly and rights were not respected.

Access to the system is aggravated by high rate of illiteracy (85 percent). The scarcity of free legal services for lower income groups also contributes to the lack of legal knowledge. For example, while the right to counsel is afforded to all citizens, court appointed counsel is only provided after the pre-trial investigation is completed and the defendant is denied the right to have the advise of counsel during the most critical period of the proceedings.

It is important for the justice system to pay particular attention to the problems presented by an uninformed population, confused as to their rights or the institutions that may redress their grievances. Under these conditions, the justice system becomes an inaccessible resource or option for the population and may lead some to seek alternative means of resolving disputes.

## 2. Confidence

Another factor which affects access to the justice system is the public's confidence in the ability of the courts to solve their problems. Users will seldom accede to a system which they distrust. Trust is partially a product of the perception about its impartiality, the equality with which it treats users, and the stigmatization which is applied to parties. There is distrust among lawyers and citizens about the impartiality of the system. Constant criticism of the administration of justice in the press fuels this wariness.

### 3. Costs

Access to the system is also limited by the user's financial resources and the costs of access. Even though the Constitution guarantees equality of all citizens and state provided legal services to those who have no means to pay for them, the infrastructure for the provision of such services is limited. While there is some limited State and nongovernmental supported legal services, their capacity to meet the high demand is low. The greatest deficiency is in the criminal area where lack of a State funded public defender system produces the gravest results to indigent defendants.

Courts are partially financed by fees charged to users of the system. There are a variety of processing costs which must be borne by legal consumers. Of these, some of the most important in impeding access to indigent are: photocopying, certifications, notifications, etc.

### 4. Location and number of courts

The number and location of courts determine, in part, popular access to the justice sector and ultimately their confidence in it. In 1989, there were a total of 688 judges providing service to an estimated population of 11 million (one judge for every 15,988 residents). This figure is extremely high compared to other countries in the region. The courts have complained of the scarcity of judges given the population growth.

Additionally, there is a poor geographical distribution of courts. The administration of justice in Ecuador, as well as in other Latin American countries, is concentrated in urban areas. Thus, for example, even though the law requires that each province has a Superior Court, six provinces do not have one (Napó, Sucumbios, Pastaza, Morona, Zamora and Galapagos). There are some instances in which the court exists, but the positions are unfilled, for example, 22 vacancies for prosecutors in 1991. These limitations to access are aggravated by poor

transportation and communications in the rural areas of Ecuador.

## 5. Corruption

The existence of corruption among judicial personnel also affects access to the system. On one hand, the politicization of the system works against a fair and impartial administration of justice while the inefficiency of the system forces people to use bribes as a way to get things done.

The corruption problem is aggravated by the absence of effective controls to prevent and sanction official misconduct. Although rules regulating judicial behavior have been enacted, procedures for making complaints are largely unknown to the public and scant attention is paid to them.<sup>77</sup>

## F. Efficiency

It is very difficult to evaluate the efficiency of the system of justice in terms of costs and benefits. This is so because the system rests on concepts that are difficult to evaluate quantitatively, such as justice, equity, innocence, etc. However, certain evaluative parameters can be used.

One of these parameters is the degree to which the system complies with the time limits imposed by the law. As indicated herein, a high percentage of trials exceed the prescribed terms.

Other indicators of the efficiency of the system are the methods for selection of personnel and their professional training. Criticisms of the personnel selection system have already been mentioned. There is also a lack of training programs for judges, and support personnel of the Judicial Branch.

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<sup>77</sup> See, for example, Reglamento de Carrera Judicial, articles 74 and 78.

Finally, the efficiency of the system can be judged by the degree of satisfaction which the public, users, and participants have with its operation. In general, there is dissatisfaction with the performance of the justice system personnel.

In this section we will analyze the main obstacles to a speedy and efficient administration of justice in Ecuador.

### 1. Administration

Justice administration is a new concept for this sector. Efforts to modernize the judiciary began in 1978 with the issuance of rules for financial management (Reglamento Financiero de la Función Jurisdiccional). Subsequent modifications to the Constitution and the Law on Court Organization reflect the desire for change. In May of 1989, the Court established an Advisory Department and in June of that same year, the Court created departments of Training and Development, Planning, and Administration and Information Systems. As a culmination of this effort, the Court in November of 1989 issued regulations for the establishment of a judicial career. Recently, an administrative development program (PRODAD) has been implemented with the collaboration of the National Administrative Development Department.

Although the Judiciary has undertaken some major reform efforts, the CAJ analysis revealed significant administrative problems related to the judicial organization and structure: a) many departments have been established without a clear definition of their functions and have poor material resources; b) there are unclear lines of authority; c) chains of command are not complied with; d) excessive centralization of authority; e) absence of inventories and a lack of planning for future needs.

Other entities reveal even more serious problems of administration. For example, the correctional system, as pointed out earlier, has oftentimes failed to utilize its allotted budget.

## 2. Coordination

While the justice sector is a system composed functionally of different parts (police, courts, prosecution, legal defense, corrections) regularly interacting, there is little coordination between the different components of the justice system, and even between agencies within the same subsector. Coordination between these institutions is fundamental to a more efficient processing of cases and clearer definition of functions.

Lack of coordination is aggravated by the diverse number of justice institutions which respond to different branches of government. While the court system appears to be centralized with power resting on the Supreme Court, there are a number of courts that exercise judicial authority outside of the court system. The most worrisome examples are the police courts, which depend on the executive and have the authority to carry out broad judicial functions in the criminal process, especially in the investigative stage.

## 3. Budgeting, Planning and Evaluation

Preparation of the justice system budgets are not based on a rational planning process which evaluates needs and projects requirements. Moreover, the revenue generated by judicial deposits are not taken into account in the elaboration of the budget. The centralization of the budgetary and financial management functions in Quito isolates other units courts from the process.

A common characteristic of Ecuadorian justice agencies is the absence of planning and evaluation. There has never been an adequate assignment of resources to carry out sector planning nor a definition of achievable goals and objectives. There is a common tendency in the Ecuadorian justice sector to confuse sector planning with the process for budget approval. The process is further complicated by the fact that most budgetary planning comes about after the public agency receives their budget allocation.

Critical to the development of a planning and evaluation system is the existence of reliable information and statistical systems. In Ecuador, as in many other developed and under-developed countries, there is confusion as to the meaning of information systems and the term is often used solely in reference to automation without taking into account that information flows through a variety of means only one of which is computerized. Even though justice statistics are an integral part of any information system, they have been treated separately due to their importance in the development of efficient planning and evaluation systems.

The manner in which such justice statistics are collected and reported in Ecuador severely limit their utility for planning and evaluation. Additionally, their reliability is open to serious question.

#### 4. Caseloads and Delays

One of the most serious problems hindering the efficiency of the administration of justice is the increasing number of cases entering the system without a corresponding increment in human and financial resources. The combination of growing caseloads and diminishing resources result in delays in case processing. Thus, for example, in the Criminal Courts, the caseload rose by more than two thousand annually from 1987 to 1989.

A result of judicial inefficiency and growing caseloads is processing delays, with an estimation that an average criminal case may take up to two and a half years prior to final resolution. Deviations are quite varied between geographic areas. Thus, for example, only in a few cases is the maximum prescribed term for completion of the investigative stage complied with (21 percent of cases in Ambato, 15 percent in Quito, 6 percent in Guayaquil and only 2 percent in Otavalo).

A very serious problem arising from the congestion of the courts is the large number of people who are jailed for long

periods of time awaiting sentence. Between 1972 and 1979, an average of 60 percent of the prison population was without sentence; by 1990 this figure had risen to 70 percent. In the early 1980s, the average length of time without sentence for the prison population was approximately 2.5 years.

The solutions attempted to curb the growing number of pending cases and the resultant processing delays have been largely the creation of new courts or the adoption of emergency measures. However, studies carried out in other countries have shown that simply increasing the number of judges or shifting their jurisdictions cannot solve the problem. It would take, for example, several times the number of current judges, working for a number of years to clear the current dockets, assuming no new cases are filed.

An alternative solution to the problem of judicial congestion is to encourage the usage of alternatives to the courts. The adoption of dispute resolution mechanisms could free the courts to deal with the most serious cases while encouraging amicable settlements among the disputing parties.

Another mechanism designed to reduce delays and to improve the efficient administration of courts is case flow management. The term case flow management is used to define the continuum of resources and processes necessary to move a case from filing to disposition. Case flow management suggests active attention by the judge to whom the case is assigned. It also suggests an oversight role for the higher courts. However, there is little commitment on the part of Ecuadorian judges to control the movement of cases and avoid backlogs. Individual courts prepare statistical reports every three months. However, these reports do not provide information useful for controlling caseloads since they are aimed at generating the data necessary for the annual report rather than informing superior courts of backlogs.

Processing periods are established by law yet, as mentioned earlier, these are seldom met. There is no evidence of estab-

lished guidelines for the processing of cases through case management standards.

## 5. Personnel System

The greatest asset of any institution is its personnel. This is especially so in the justice system wherein the quality of the personnel determine the fairness of the system and the respect which the public will have towards it.

The problem of inadequately qualified personnel is complicated by the absence of merit based personnel systems. Although a judicial career is stipulated by the Constitution, and established by law, this provision has never been implemented.<sup>78</sup>

Inadequate salaries make it difficult to attract qualified personnel to all levels of the justice system, but the problem is particularly acute at the lower levels. In addition, the low salaries and low prestige threaten the independence of the judiciary, creating conditions in which the system becomes increasingly susceptible to corruption and influence. Although politically difficult, it would seem that the most cost-effective response to the threat of corruption, given the steep salary curve and the limited resources available to the sector, would be to raise salaries of lower level officials proportionately more than those of the Supreme Court justices.

In the case of the Judiciary, the politicization of the Supreme Court has also contributed to a decline in the quality of judges at the highest level. While there are still highly qualified Supreme Court judges, increasingly appointments to this court are made to reward political loyalty rather than on the basis of legal ability. Since the Supreme Court makes appointments to the Superior Courts, there is the danger that this lower level of the judiciary will also begin to be influenced by

78 The *Registro Oficial* No. 564 (November 16, 1990) sets forth regulations for a judicial career. It remains to be seen how this will be implemented.

the same political considerations that now affect the highest court. In the Public Ministry, legal requirements are not always followed and political factors also carry greater weight in the selection of personnel than merit.

The limited terms for judicial officials further constrain the effective administration of justice. Many of those officials find themselves in the position of either having to curry political favor in order to gain reappointment, or succumbing to opportunities for personal enrichment in the expectation that their tenure will be both short and underpaid.

Finally, control mechanisms to assure efficiency and ethical behavior are inadequate. It is necessary to strengthen current control mechanisms and evaluate the possibility of utilizing external mechanisms currently unused.

## 6. Role of Prosecutors

As described in greater detail in the criminal procedure section, the prosecutors play a passive role in the criminal process. For example, even though the law provides that most criminal cases, except those begun by private parties, must be forwarded to the courts by way of a formal charge issued by the prosecutor ("excitación fiscal") this does not happen because the police oftentimes notify the violation to the judges directly rather than through the procedure established by law. Additionally, when the judge assigns a prosecutor to a case, oftentimes, a lay prosecutor ("promotor fiscal") is appointed. The role which such an untrained actor may play in the process is limited and months and years sometimes go by while the prosecutor sits idly by.

The passive role of prosecutors is common to most of Latin America. Nevertheless, in recent years there has been a trend in this region towards strengthening the prosecutorial institution by guaranteeing its autonomy and charging them with broader powers, especially during the investigatory stage.

## G. Fairness

The extent to which this principle is respected can be evaluated by considering certain parameters, among which the most important are: adherence to constitutionally mandated guarantees, celerity of the process, equality of access to the system, impartiality of the judges, equity of judicial decisions, and respect for fundamental procedural guarantees.

With regard to equality of access to the system, as discussed earlier, there are many barriers to systemic entry. The constitutional guarantee of equal protection of the laws is often violated because of discrimination based on political, ethnic, and economic factors. As noted earlier, the politicization of the system, the large Indian population, and poverty are factors that contribute to the inequality of the administration of justice.

The principle that all proceedings will be conducted before an impartial magistrate is also violated by the existence of diverse jurisdictions outside the judiciary. This is the case, for example of the police judges discussed earlier.

The right to counsel is limited for indigents by the absence of a cadre of state supported defenders. Court appointed lawyers tend to provide a very limited service and are notably absent during the process, sometimes they do not even know their defendants. While the Criminal Code of Procedure provides for stiff sanctions for lawyers who inadequately represent clients appointed by a court, a decision of the Court of Constitutional Guarantees has suspended this provisions so that there is no viable mechanism to regulate their conduct.

The general conclusion is that public defenders do not fulfill their role adequately. Their low number, given the caseloads and understanding that their responsibility extends to almost the entire gamut of legal services, is inadequate for the user population. Scarce resources, for example, prevent them from attending courts, jails and other institutions relevant to their duties. Finally, in those few places in which a public defender

has been assigned there are inadequate resources to support their work.

Finally, while legal clinics are a praiseworthy effort by law schools, they, also suffer from many deficiencies. Some of these are: the fact that participation is not required of law students, the low salaries paid to lawyer supervisors, poor working conditions, and the temptation to bribe judicial officials to obtain the requisite number of cases in order to graduate.

Pretrial detention is the rule rather than the exception. This not only violates the presumption of innocence but leads to prison overcrowding, assignment of an inordinate number of resources to the detention of pretrial detainees resulting in unavailability of resources for the rehabilitation of condemned prisoners, and a large economic and social cost to the families of the inmates. While the criminal code of procedure allows for pretrial release of defendants, judges have been reluctant to order it. This is due to the broad discretionary power accorded to judges in the code, a natural reluctance to take the responsibility for freeing potentially dangerous offenders, and the procedural burdens placed on defendants requesting release. For example, the code requires that the accused present proof that he/she has no prior convictions. This requires the defendant to obtain such documentation from each court in the country.

There is an incorrect assumption by many of the investigating judges who feel that the purpose of the instructional stage is to establish the guilt or innocence of the accused. The result is that prescribed terms are not met due to the extensive nature of the investigation and trials in which the court limits itself to reviewing the proof gathered during the investigatory stage.

Finally, human rights violations are not uncommon in the system. While accusations of human rights abuses are primarily leveled at police agencies, the prison system appears to be commit the gravest violations by the inhumane conditions in which prisoners are housed.

## H. Accountability

Public accountability ("transparencia") is one of the primary themes currently in Latin American public administration. It rests on the premises that public officials have a duty to report to those who placed them in positions of power, that the work of government officials can and should be periodically evaluated and that it should be done in a public manner.

Evaluation of the executive and legislative branches takes place every election. Politicians, therefore, must communicate regularly with the electorate and convince them of the benefits to be derived from keeping them in office.

The judiciary, on the other hand, feels reluctant to render accounts of their work since many feel that they should only be responsible to a vague notion of the "Law." In addition they take refuge on principles of judicial independence and characterize their branch as apolitical. Police, on the other hand, adhere to concepts of state security as the justification for the secrecy of their activities.

Openness, not secrecy is at the center of the notion of public accountability. Unfortunately, the justice system is characterized by the former and not the latter. Indeed, personnel who provide ready access are viewed as dangers to the institution and are often punished. There are variety of mechanisms by which the justice system can submit itself to public review. Publication of periodic reports outlining the successes, failures and needs of the sector is one of the primary tools by which the other branches of government and the citizenry can be informed. However, periodic activity reports by any of the component agencies of the justice sector are rare. In most instances there is no such publication. The little we know about their operation is gleaned from reviews conducted by outside agencies which focus on the most inhumane aspects of their work. Police, likewise, seldom issue reports and the few that are published are usually boring tome with pictures of men marching in military regalia and speeches by their leaders. Judicial

publications are also dense and uninformative. Statistics are notably absent from all such publications.

Relations with the press are usually strained or limited. A recent phenomena is the establishment of press offices whose function, unfortunately, appears to be to keep the press out rather than to facilitate access to information. A general perception persists that journalists are the enemy whose sole function is mud racking and whose goal is to demean the institution.

One of the primary areas in which there should be some public oversight is in the regulation of the conduct of justice officials. Rather than encouraging complaints and facilitating access to grievance mechanisms, the justice system tends to impede access by not informing the public about the place and manner in which complaints can be filed, simplifying the process, guaranteeing the safety of the complainant, and achieving satisfactory and speedy resolution of cases. The public does not feel that wrongs can be remedied and they feel that it is useless to complain.

## CONCLUSION

We have analyzed the Ecuadorian justice system in a global context, studying the system from socio-political, legal, and administrative perspectives. Whenever possible we have attempted to identify the historical context in which changes have occurred.

The general conclusion is that the administration of justice in Ecuador, similar to the rest of Latin America, is deficient and unable to meet the growing demands placed upon it. There is a crisis in public confidence and popular mistrust is not limited to any one institution in the sector. The system suffers from political, social, economic, and administrative problems. However, the most serious impediment to change is the politicization of the system. The overpoliticization of the system affects its impartiality, efficiency, and legitimacy.

Most recently, it is possible to observe a political will to modernize the system. However, the commitment to change cannot be limited to leaders in the judicial sector, but must extend to the executive, the Congress, and the political parties. It is imperative to reach a political pact to modernize the judiciary. It is also important to create mechanisms to aid in the coordination and planning of the system.

Several reforms are needed for the system to work. Some of them are going to be harder to achieve than others. In some instances, there is a need to reform the legislative and constitutional framework as well as the organizational structure of

the justice system institutions. It is also important to incorporate nongovernmental organizations into the reform effort.

Justice reform will be costly during a period of decreasing public resources. While adoption of a constitutional prescribed appropriation for the judiciary is a laudable goal it should be accompanied by a more efficient system for utilization of resources. Additionally, experimentation with extra-judicial mechanisms for resolving disputes should also be encouraged.

Finally, justice system reform should be gradual and based on thorough study so that the solutions take into account the social and economic context in which they are to be applied. Finally, an open discussion should take place so that the public may feel some stake in the operation and reform of the administration of justice.

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**Esta monografía brinda una visión global de la administración de justicia en Ecuador, con especial énfasis en la justicia penal. Se analiza el sistema en un contexto global, y desde múltiples perspectivas: socio-política, económica, administrativa y legal. El objetivo de la misma es resaltar las características más relevantes del sistema de justicia de Ecuador y clarificar algunos de los temas actualmente más debatidos.**

**This monograph provides an overview of the administration of justice in Ecuador with particular emphasis on criminal justice. It analyses the justice system in a global context, studying the system from socio-political, economic, administrative, and legal perspectives. Its purpose is to highlight the most relevant features of Ecuador's justice system and to clarify some of the main issues currently debated.**