


Executive Summary Report

A stylized illustration of the scales of justice in shades of blue, positioned in the upper left background.

**Judicial
Independence**
in Ecuador's Judicial
Reform Process



Luis Pásara

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Judicial Independence in Ecuador's Judicial Reform Process

Executive Summary

There is a consensus nowadays that judicial independence requires the absence of constraints likely to result in interference in the administration of justice. Independence lies at both the institutional level and with the individual judge. The judiciary may enjoy independence from outside influence, but because of pressures from within the organization, a judge might not. In the case of the individual judge, independence means there are no ties or interference that lead him or her to rule in a certain way; that is, that prevent a judge from being impartial in deciding the cases before the court.

Appointments, judicial training, and disciplinary systems are key elements affecting independence. A judge can only be independent when his or her appointment to the bench and continued employment are not under the control of someone with a stake in any dispute.

Democracy requires judicial independence, because it is before the courts that those who exercise power can be held constitutionally and legally accountable for their acts. However, only independent judges can exercise oversight over acts of government. If the judicial branch fails to reliably monitor whether government acts are in line with the constitution and the law, its role is reduced to resolving conflicts between private individuals, and the checks and balances among the branches essential to democracy are devoid of content.

Ecuador is a country in which the rule of law has not been solidly developed. Because it has been politically unstable throughout its history, those in power have made the justice system part of the political arena. Accordingly, criticism of the justice system and proposals for its reform have multiplied in recent decades. In this context, and with the advent of a justice reform process in Ecuador in 2011, this report asks: What has happened to judicial independence as part of the "citizen's revolution" led by President Rafael Correa? This report does not attempt to cover all the actions

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taken in the course of the judicial reform begun in Ecuador. Rather, it has limited itself to raising questions about the steps taken during the course of this process with respect to judicial independence.

Fieldwork was conducted in Ecuador in September 2013 in the form of interviews and the gathering of published and unpublished materials. The report uses three main sources: court judgments handed down in several high-profile cases; resolutions of the Judicial Council in disciplinary proceedings against judges; and official statements. The material examined mainly covers the period from July 2011 to December 2013.

I. Twelve relevant cases

The first part of the report examines 12 cases of social or political relevance, which elicited major media attention because they involved the government's intent to penalize social protests or acts of political dissidence, thereby violating fundamental rights.

In summarizing the cases, attention was focused on the role played by the courts and, in that context, the role of authorities. Beyond the merits of each case—which, as happens in legal cases, are amenable to varying interpretations—our purpose was to examine the potentially improper interference which the judges hearing the cases were subjected were to. The cases were not selected on the basis of statistical representativeness, but rather on their highly sensitive nature for the executive branch and the greater public scrutiny and media attention they received.

Four of the cases pertain to a major political event known as 30-S. In the city of Quito, on September 30, 2010, there was a police uprising or an attempted coup, depending on the different versions of the events. President Rafael Correa went to the scene, and a number of incidents occurred throughout the day, during which several people were killed and others injured, leading to accounts that vary according to political position.

The social unease triggered by these events led to a partial shutdown of activity in the country, and schools suspended their

classes. Teachers' union leader Mery Zamora was accused of inciting the student body at a high school to join the riots, and in June 2013 she was sentenced to eight years in a maximum security prison for "suspension or shutdown of the public service of education." A group of dissidents stormed the official government television channel, demanding open information on the events and cancellation of the mandatory government broadcast that private channels had been forced to relay. This was the basis of another important case, known as RTV Ecuador, in which three defendants were prosecuted for "sabotage and terrorism." In December 2013, seven of a total of 13 defendants were sentenced to four years in prison.

The official version of the events of that day served as the basis for a criminal case, in which Colonel César Carrión and three other individuals were accused of various offenses. The three judges who "affirmed the innocence" of Carrión in May 2011 after the forceful testimony of the minister of the interior were subjected to disciplinary proceedings before the Judicial Council. These came to a close in February 2012 with their removal from the bench. Finally, Congressman Cléver Jiménez filed a complaint against President Correa alleging that he had lied about the events of the 30-S. The complaint was dismissed by the attorney general and declared "malicious and reckless" by a National Court judge. As a result, a criminal case was opened against Jiménez and other complainants in August 2011. They were convicted in April 2013 by the National Court and sentenced to three years in prison and the payment of US\$150,000 for having complained of an unproven crime, a legal concept known in Ecuador as "false accusation of a crime" [*injuria judicial*]. The National Court's review of the judgment resulted in the reduction of Jiménez's and Villavicencio's sentences to 18 months in prison, and of Figueroa's to six months. The Inter-American Commission on Human Rights granted a request for precautionary measures and asked the Ecuadoran government to suspend execution of the sentence.

Three other selected cases are linked to social protest. The oldest concerns the protest march against the draft water bill in May 2010 in the province of Azuay by a group of citizens of indigenous origin. Three of the demonstration's leaders were prosecuted and acquitted in the trial court, but were convicted in the provincial court in

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August 2011 of “blocking public thoroughfares.” The second, somewhat similar, case is that of José Acacho and other leaders who led an indigenous people's demonstration in the province of Morona in September 2009, during which a confrontation with police left one person dead. Of the 11 leaders prosecuted, three were convicted in August 2013 on charges of “organized terrorism” and sentenced to 12 years in prison. The third case pertains to students of the Central Technical High School [Colegio Central Técnico], who left their classes in February 2013 to protest on the streets because their school's name had been changed by the government. The protest and its containment by the police resulted in minor property damage. Eighty-seven students were arrested, and the 12 who were of legal age were prosecuted. The prosecutor in the case declined to proceed with the charges, and the case went up to the provincial prosecutor for review. After President Correa gave a public speech on the case, the prosecutor decided to proceed and the 12 defendants were convicted in September 2013 of “rebellion.”

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The last group of cases involves two suits that seem to have the common objective of silencing or punishing expressions of political dissent. The case of the Luluncoto Ten refers to the people—including social leaders—arrested in March 2012 while assembled in a private home and accused of membership in a subversive group, that is, the crime of “terrorism.” They were sentenced to a year in prison. The second case is that of a former member of the military, Diego Vallejo, who became involved in anti-corruption activities after having worked closely with President Correa’s government. He was arrested in June 2012 while carrying two weapons given to him by a third party for safekeeping. He was prosecuted, in parallel proceedings, for both conspiracy and unlawful weapons possession. He was acquitted in the first case in June 2013, but was convicted in the second a month later and sentenced to a year in prison.

II. Disciplining judges

The second part of the report addresses the role played by the Judicial Council with respect to judicial independence. The empirical basis for the analysis is the 42 resolutions issued by the Judicial Council in as many cases, starting in August 2011. This section examines the criteria used by the council and the significance of the penalty imposed, which, in all but two cases, was removal from the bench.

The referendum called by the government and held in May 2011 resulted in changes to the composition of the Judicial Council established by the 2008 Constitution. The changes allowed other branches of government to hold sway over the judiciary, both with respect to the 18-month “transition” period, and the current permanent structure.

The number of disciplinary proceedings initiated by the council showed a significant increase over prior years. In 2013, one in every three disciplinary cases against judges resulted in removal from the bench.

Given that the council’s resolutions are not public, informal channels had to be used to obtain the 42 resolutions. Of those cases, 37 had been opened in response to complaints filed by a government employee. The resolutions in this sample resulted in the removal

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If inexcusable error is a matter subject to legal interpretation, as some of the sample cases demonstrate, and is therefore within the purview of the courts, insofar as only a court can legally establish it, the council’s intervention would constitute interference with judicial independence. This point is underscored by the fact that under current law council members are not required to be lawyers. This potentially leaves decisions regarding “inexcusable error” in the hands of individuals without legal training.

A notable aspect of the council’s disciplinary proceedings pertains to the right to a defense and, therefore, respect for due process. The resolutions examined and interviews conducted reveal that the council does not hold hearings for the judges who are subject to the proceedings. They are asked to present a defense without full knowledge of the charges or evidence against them. There were even eight cases in the sample of 42 where the judge was accused on grounds not subject to the penalty of removal from office and, in the end, was sanctioned on other grounds that did carry this penalty.

Because membership of the council is political in nature, especially since the 2011 modification of its appointments system

and composition, the disciplinary proceedings it has conducted in various documented cases have closely tracked presidential statements rejecting the decisions of certain judges and calling for their prosecution. In addition, the council has sanctioned judges whose decisions on the issue of pretrial detention and in actions to protect constitutional rights have failed to comply with the policies demanded by the executive branch.

The 2011 removal of the chief judge of the Provincial Court of Guayas and the removal of two National Court judges in 2013 were landmark disciplinary cases. In the first case, the penalty was imposed on a judge who publicly disagreed with a decision given by a provisional judge—that is, one without permanent appointment—in the case involving President Rafael Correa’s complaint against El Universo. The second case sanctioned a judge and a substitute judge of the highest court who failed to follow the opinion advanced by the government in a tax-related case. Both sanctions essentially served as a warning to the entire judiciary, and demonstrate that the objective of the disciplinary power exercised by the council is for judges to assist in putting government policies into practice.

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III. Justice in the “citizen’s revolution”

The third section looks into the role reserved for the justice system in the “citizen’s revolution” led by President Correa and, in particular, examines the significance of the so-called “criminalization of social protest.”

The system of rights enshrined in the 2008 Constitution is extensive and contains provisions aimed specifically at ensuring that those rights are valid and enforceable. Key to guaranteeing those rights and ensuring that they are respected by individuals and the state is the justice system. The judge thus has major responsibility as guardian of the rights set out in the constitution. However, the

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political system in which the constitutional provisions operate needs to be examined in order to identify the conditions that system creates for the exercise of judicial duties.

Central to this discussion is the president's speeches, around which much of the country's political life revolves. Starting in 2011, the president's decision to identify the fight against crime as a high priority led to an approach in which responsibility for the problem was placed on the justice system, and reform of the system was promoted and justified as the solution. The country's justice system, identified in official discourse with crime, corruption, and "*partidocracia*," or political party domination, had to be transformed according to changes proposed in a referendum. The president announced: "We will stick our noses into the justice system." Since then, this phrase has been repeated by President Correa and well-known members of the opposition in reference to the judicial reform process proposed by the government. Admittedly, these statements have been within the frame that "the President of the Republic is not only the head of the Executive Branch; he is the head of the entire Ecuadoran State," as President Correa himself has stated on more than one occasion.

After the reforms were approved by a slim margin, the first step was the establishment of the Transitional Judicial Council; the next was the competition to fill the seats on the new National Court. The qualifications of various candidates has been called into question by various sources, including the international observatory for judicial reform in Ecuador appointed by the government and headed by former Spanish judge Baltasar Garzón.

Various national and international reports refer to what has been called the "criminalization" of dissenters and opponents of government policies. This trend is contrary to the policy of amnesty established by the Constitutional Convention during its 11 months of operation, aimed precisely at releasing from criminal responsibility social leaders who had fought against specific government actions. Instead, and as evidenced in the first part of the report, numerous cases of social protest akin to those that the Constitutional Convention deemed inappropriate for criminal prosecution have been subjected to prosecution and have resulted in convictions. The state apparatus, including police and prosecutors, has played an

active role in this persecution, and the judges have been given the responsibility to convict.

The speeches by the authorities, especially the president and certain ministers, are relevant to this policy of persecution, insofar as they acquiesce in the criminalization by stigmatizing the activities of opponents and dissidents. The identification of dissidents as a threat and danger to the state and law and order is a central theme in such speeches, and is meant to have a chilling effect on potential government adversaries. The speech goes hand in hand with the practice of harassment by means of criminal or civil complaints and administrative proceedings. Both practices lead to a narrowing of the space for social protest, even though it is recognized as a right in the constitution.

In particular, it is the use of the criminal concepts of “terrorism” and “sabotage” that has attracted the attention of various observers. In addition to the office of the ombudsman of Ecuador, which raised red flags early on, these observers notably include the international observatory for judicial reform and four United Nations Special Rapporteurs, who expressed their concerns on the issue in relation to the cases reviewed in the first part of the report in an address to the Ecuadoran government in October 2013. It has been noted that neither the legal texts used until the end of 2013 nor the way in which they were applied bore any relation to what is understood as terrorism and sabotage in international law. The Comprehensive Criminal Code, enacted at the beginning of 2014, does not satisfactorily resolve these issues.

IV. Conclusion

In Latin America, judiciaries have historically failed to live up to the responsibility that democratic institutional theory and design have assigned them, or that established by international standards. In many countries and on many occasions, the potential to divest the judiciary of their responsibilities, and the act of doing so, have been used as a form of interference in the judiciary. Accordingly, the experience of Latin America, with the exception of extraordinary times and public figures, has been that courts have not used the powers vested in them by the region’s laws and constitutions.

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In spite of all the changes brought about by judicial reforms in Latin America, the institutional tradition of dependence of the judiciary on those in power has still not ended. The interference by those who exercise power is an active specter that occasionally materializes in a given country, directly or indirectly, through one mechanism or another designed to get for those in power what they want from the judiciary.

The judicial branch has been seen by politicians as under their control. It has been in their interests to fill it with fellow party members, or at least with politically inoffensive individuals who, if not actively loyal, refrain from jeopardizing the political interests. The role of the justice system, obliquely transformed into another arm of the executive branch, has remained diminished. In general, judges looked the other way when the authorities did something legally improper and, for the authorities, that attitude was all they needed. The checks provided for in the constitutional design functioned, but not the balances.

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The final section of the report reasserts the central thesis that Ecuador's justice system is currently being subjected to political usages that seriously jeopardize judicial independence in those cases where the government's interests are at stake. The curtailment of judicial independence, and consequently judicial impartiality in giving judgment, reflects the need to exercise power in a certain way that is evident when there is a government policy or proposal at issue.

Although developments during the government of the "citizen's revolution" have reached unprecedented levels, the judiciary in Ecuador has never been distinguished by an historical record of independence. As in other countries, abuses of power and human rights violations in the country have resulted in convictions only in exceptional cases. The administration ushered in by Rafael Correa in January 2007 found a weakness in the justice system that, as in other countries, was typical of an institution that was mainly occupied by those in power, resulting in low professional standards and general submission to prevailing interests.

Against that background, and after a couple of years when judicial reform remained the subject of studies and plans, the

referendum was announced and held in May 2011. By means of a constitutional amendment, membership of the Judicial Council was reconfigured to give it a clearly political profile. The issue of judicial independence does not seem to have been important to the council once it was reconstituted pursuant to the 2011 reform. Its actions in the disciplinary proceedings have made it the judge of judges, an institution that scrutinizes and sanctions the judicial conduct of all the authorities in the justice system. Various aspects of this conduct have been objectionable in regard to judicial independence.

The most important of these concerns, without a doubt, is the fact that an administrative body reviews and evaluates judicial decisions in order to then sanction their authors, contrary to what the law expressly provides. Another aspect of the council's actions that is cause for concern is the fact that its resolutions are not public. If a court decision must be public, except where the law protects the identity of the parties, it is very difficult to accept that a sanction imposed on a judge should not also be so. An additional element is the absence of guarantees that appears to be the norm in the council's disciplinary proceedings. The respondent judge is never afforded a hearing and, worse still, a case can be opened against a judge based on one charge and he or she can be sanctioned on the basis of another. These conditions seriously violate the right to a defense.

Outside the institutional justice system, the statements of President Correa and other high-ranking authorities have remained constant, and sometimes openly discredit judicial proceedings. These statements have become a routine form of pressure, and the council has in turn become the enforcement arm, as seen in some of the disciplinary proceedings noted above.

The public statements by political authorities regarding the performance of judges suggest that the problem facing judicial independence in Ecuador is not legal, but rather political. It stems from the fact that the government of the "citizen's revolution" developed a line of action designed to oversee judicial decisions in matters of interest or concern to the government. Second, by following this course, the government has seriously weakened the separation of powers in the state and the system of checks and balances that characterize a democratic regime.

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This is a scenario in which judicial independence has not only failed to get the attention it deserves in a robust democracy, but also has been fundamentally harmed by the interference of other branches of government. It is certainly possible to suggest legal changes aimed at curtailing those actions most harmful to judicial independence. However, to create solid space for the exercise of judicial independence in Ecuador at this time would require a change of such proportions that it would amount to a departure from the political direction taken by the government with respect to the justice system. Located as it is at the center of such a change, the Judicial Council would have to undergo radical transformation.

If, as this report reminds us, judicial independence flourishes in the absence of interference, then the course to be taken in Ecuador to safeguard independence and impartiality must clear the air currently surrounding judges and the intrusions they face. Taking that route will depend on political factors that go beyond the scope of justice but that fundamentally affect it.

Judicial independence, a core component of the rule of law, remains an ongoing challenge in Latin America. In spite of the various reforms implemented in Ecuador in recent years, the facts show a tendency to interfere with the decisions of judges in matters of public interest, which seriously weakens the separation of powers of the State and the checks and balances that define a democratic system.

The **Due Process of Law Foundation** (DPLF) is a regional organization comprised by a multi-national group of professionals, whose mandate is to promote the rule of law in Latin America. DPLF was founded by Thomas Buergenthal, former President of the International Court of Justice (The Hague) and of the Inter-American Court of Human Rights (Costa Rica). Its work focuses on strengthening judicial independence, combating impunity, and promoting respect for fundamental rights in the context of natural resource extraction. DPLF conducts this work through applied research, cooperation with organizations and public institutions, and advocacy.

The **Centro de Estudios de Derecho, Justicia y Sociedad/Center for the Study of Law, Justice, and Society** (DeJusticia) is a research and action center located in Bogotá, Colombia. Since 2003, it has generated expert knowledge on human rights, in order to influence public opinion and the design of public policies, and to strengthen and support social organizations, thereby contributing to the effective operation of the social and democratic rule of law. Its work pertains largely to the fight against discrimination, the promotion of human rights, the strengthening of the rule of law, the defense of environmental justice, and the analysis of transitional justice.

The **Instituto de Defensa Legal/Legal Defense Institute** (IDL) is a non-profit association of professionals based in Lima, Peru, which was established over 30 years ago. Its mission is focused on issues of democratic institutional culture, human rights, citizen security, anti-corruption, and social inclusion. It is an important voice in Peruvian civil society and a leading authority in Latin America, especially in the Andean region. It combines advocacy work for the adoption of measures and public policies—based on its ability to create proposals—with direct service to the most vulnerable sectors of society. IDL also litigates cases nationally and internationally and has significant communications experience through its own media outlets and an investigative journalism unit.