



## Peripheral criminal injustice

### How international support for criminal procedure reform in Ecuador worsened an already weak penal system

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**Keywords:** legal exports, criminal procedure reform, Ecuador, selective law enforcement, Americanisation of law, social control and police force, administratization of criminal convictions

#### Abstract

This article explores the complex outcomes of the latest reform of the criminal procedure in Ecuador. Our research shows how US-led interventions resulted in massive incarceration while the underlying criminal procedures are systematically violating due process. Today, the Ecuadorian judiciary appears to work more efficiently, while law enforcement remains highly selective and the penal system remains weak with regard to judicial independence, fair trial, and the quality of its reasoning. With a weak judiciary, it is (still) the police who determine largely what is perceived as delinquency. Law enforcement is directed selectively toward petty offences while systematically producing impunity for severe offences. Thus, the reforms have exacerbated the weaknesses of Ecuador's criminal justice system.

Our findings shed light on the complex and unintended outcomes of the wave of adversarial reforms

in the region that have not yet been studied empirically.

## Introduction

Ecuador has undergone major changes in its criminal procedure in the last few decades, culminating in 2014 in the passing of the Código Orgánico Integral Penal (COIP). The new code articulated what has spearheaded mostly US-led criminal procedure reforms in the region since its beginning<sup>1</sup>: the new criminal procedure should be adversarial, oral, and immediate, leaving behind the alleged shortcomings of the inherited<sup>2</sup> Napoleonic inquisitorial system.

In short: the exact opposite of the procedures and routines that have been criticised for decades for their ponderousness and lengthiness, based on briefs and petitions instead of oral and therefore immediate litigation. The core of Ecuador's new criminal procedure rests on a judicial response to be obtained within 24 hours after the arrest in the so-called *Unidades de Flagrancia*. Section 6.1 of the COIP reads: "In the case of flagrant [blatant, overt] offence, the person [arrestee] shall immediately be brought before a judge for the corresponding hearing, which shall be realized within 24 hours after the arrest."<sup>3</sup>

In the new *Unidades de Flagrancia*, public defenders, prosecutors, and judges operate 24 hours a day in order to realise the first court appearance of the arrestee. During this hearing, called an *audiencia de calificación de flagrancia*, the prosecution decides orally whether to charge the arrestee, and the magistrate makes a decision immediately and also orally about the lawfulness of the arrest and about the prosecutor's request for remand (most likely pre-trial detention).<sup>4</sup>

However, a reservation merits mention. The *audiencias de calificación de flagrancia* — as far as evidence is concerned — are exclusively based on a report (the so-called *parte policial*) filed by the police officer who made the arrest: whether there has been probable cause for the arrest (*legalidad de la detención*) or whether there is sufficient evidence for granting the prosecutor's request for pre-trial detention (*elementos de convicción*), the judge decides on the basis of the written report, which is read by the prosecution during the hearing while it is practically impossible for the defence to present its own evidence. We will resume this far-reaching distortion of the principle of orality later.

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1 However, the year 2014 and the COIP should not be understood as a historical break. Since its independence, Ecuador has had five different criminal procedure codes and 14 reforms and it was the criminal procedure code of 2000 (Código Procedimiento Penal) that introduced the principle of accusation, e.g. the differentiation between accusation and trial judge (Asamblea Nacional, 2014 Registro Oficial N° 180 Ex-amposición De Motivos). In this respect, the code followed the requirements of the 1998 Constitution and became effective in January of 2000 — thus was drafted under the presidency of Jorge Jamil Mahuad Witt (1998 to January 21, 2000) — the very year the "dollarisation" was announced in Ecuador (see Paladines, 2016, p. 153). Paladines writes of a "transplant of the accusatorial system".

2 It should be noted that the inquisitorial system in South America, of course, has never been an exact copy of its continental European role model. "Even finding the right books to begin work on new private law could present insurmountable difficulties" (Mirow, 2005, p. 182).

3 See also Federal Rules of Criminal Procedures: Rule 5. Initial Appearance, Appearance Upon an Arrest: "A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge [...]."

4 Section 529 of the COIP reads: "Audiencia de calificación de flagrancia. - In cases of flagrant delicto [flagrant understood as obvious or caught in the act, not pejoratively], within twenty-four hours of the apprehension, an oral hearing will be held before the judge, in which the lawfulness of the arrest will be assessed. The prosecutor, if deemed necessary, will formulate charges and, if appropriate, will request precautionary measures [remand]."

This audience functions as a bifurcation for the further procedure as certain criminal charges proceed according to a simplified procedure (*procedimiento directo*) when departing from the *audiencia de flagrancia* and whereby the defendant's right to request evidence is severely limited in order to obtain the verdict in a timely manner.

Additionally, and in the aftermath of the passing of the COIP, it is now legally possible to sentence a person within 24 hours upon his or her arrest to up to ten years in prison, e.g. in the first and only court hearing, due to the plea bargaining (*procedimiento abreviado*)<sup>5</sup> that became effective, in the present form, in 2014.<sup>6</sup>

In order to achieve a conviction within the framework of the plea bargaining, the only and sufficient "evidence" to be introduced by the public prosecutor's office is the defendant's consent, reflecting the new role the judge has to assume in the adversarial system, whereas in the so-called inquisitorial system, the judge actively takes part in fact-finding inquiry by questioning, for example, witnesses and, furthermore, is not necessarily bound to the confession of the defendant.

According to Langer (2019), the spread and adoption of plea bargaining and other trial-avoiding conviction mechanisms imply a global trend that he calls the *administratization of criminal convictions*. Administratization means that these "mechanisms are implemented through proceedings that reach criminal convictions while circumventing the trial and the rights and requirements associated with it, such as publicity, confrontation, cross-examination, compulsory process, proof beyond a reasonable doubt and the right against self-incrimination", while the trial-avoiding conviction mechanisms have given a larger role to non-trial, non-judicature adjudicators in deciding who gets convicted and for which crimes (Langer, 2019, p. 2).

Clearly, US federal criminal procedure was the blueprint for this new routine commencing amid an arrest, a routine we suggest calling *logic of the flagrant offence*: the apprehension in cases of a "flagrant" offence according to Section 6 of the Ecuadorian COIP is equal to the arrest made by a law enforcement officer arriving at the scene of the crime when he or she determines that there is probable cause for an arrest (arrest without a warrant according to Rule 5 (b) of the Federal Rules of Criminal Procedure). The *audiencia de calificación de flagrancia* is comparable to the initial appearance at which the accused is informed of the charges. In the logic of US federal criminal procedure, the *audiencia de calificación de flagrancia* contains elements of the arraignment and the initial appearance, while the *parte policial* is equal to the complaint. Obviously, the new Ecuadorian procedure echoes the basic principles and guarantees found in US criminal procedure: no arrest without a probable cause (Fourth Amendment to the United States Constitution), and the right to a speedy and public trial (Sixth Amendment to the United States Constitution).

The rationale for reforming the legal procedure after an arrest without a warrant has been made is clear: to avoid arbitrariness on the part of the police officer conducting the arrest through immediate judicial and public control of the lawfulness of the arrest *and* enabling a speedy trial through plea bargaining (*procedimiento abreviado*) and simplified procedures (*procedimiento directo*).

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5 Section 637 of the COIP reads: "If the abbreviated procedure [plea bargaining] is requested during the flagrant offence hearing (*audiencia de calificación de flagrancia*), [...] it is admissible to proceed according to the abbreviated procedure in the same hearing."

6 The plea bargaining (*procedimiento abreviado*) was first introduced in 2000 (see Sec. 369 Código de Procedimiento Penal (2000)) and reformed in 2009; however, like the *procedimiento simplificado*, it was seldom applied and limited to prison sentences of up to five years.

The latter requires, logically, a new comprehension of the way in which truth, understood allegedly as mere evidence, is introduced in the hearing as this comprehension is inconsistent with an „inquisitorial” system whereby, for example, German criminal procedure<sup>7</sup> prioritizes “the finding of the truth”<sup>8</sup> and it is precisely for this reason that plea bargaining<sup>9</sup> and simplified procedures perhaps did not become as widespread in continental European<sup>10</sup> criminal procedures as, for instance, in the US.<sup>11</sup>

The *audiencia de calificación de flagrancia* is not only relatively novel to Ecuadorian criminal procedure<sup>12</sup> but requires organisational, cultural, and even architectural reforms (Paladines, 2013). Therefore, the specialised court houses defined by their functions and called *Unidades de Flagrancia*, first seen in Ecuador in late 2012, should not be limited to a merely legal phenomenon. They affected the way judges, prosecutors, and (public) defenders see themselves as part of a new way of dealing with an arrest amid the opening of a criminal procedure.

In this respect, Jorge Paladines refers to the explicit purpose of the creation of the *Unidades de Fla-*

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7 The core of this logic, Section 244 (2) of the German Code of Criminal Procedure, reads: “The court shall, in order to establish the truth, ex officio extend the taking of evidence to all facts and means of proof that are relevant to the decision.” Consequently, a defendant can appeal a verdict just by arguing that the judge did not do the necessary in order to establish the truth.

8 Contrary to this inquisitorial “European” approach, according to the new Ecuadorian COIP, “truth” is established in a contradictory manner. The principle of this procedure, Section 5, 13, reads. “Contradiction: the parties to a case must present, orally, the reasons or arguments through which they believe they are assisted; replicate the arguments of the other parties; present evidence; and contradict those that are presented against them.”

9 Since 2009, the plea bargaining has been recognised in the German Code of Criminal Procedure. The new Section 257c (Negotiated agreement) reads: “In suitable cases, the court may reach an agreement with the parties on the further course and outcome of the proceedings [...]. Section 244 (2) shall remain unaffected.” The last sentence specifies that, even in the framework of a plea bargaining, the court shall, in order to establish the truth, ex officio extend the taking of evidence to all facts and means of proof that are relevant to the decision.

10 In order to cope with the overburdened German criminal justice system, the public prosecutor’s discretion functions as a gatekeeper. According to Section 153 of the German Code of Criminal Procedure, public prosecution offices dispense with prosecution regularly when dealing with petty offences: “Where a less serious criminal offence is the subject of the proceedings, the public prosecution office may dispense with prosecution [...] if the offender’s guilt is considered to be minor and there is no public interest in the prosecution.” Consequently, the majority of criminal investigations will neither result in a court hearing nor imply an arrest. Probably more important than the alleged difference between adversarial and inquisitorial legal culture is the difference with regard to the arrest amid the opening of a criminal investigation. Section 127 (1) of the German Code of Criminal Procedure reads: “If a person is caught in the act or is being pursued, any person shall be authorised to arrest him provisionally, even without judicial order, if there is reason to suspect flight or if his identity cannot be immediately established.” Thus, at the very moment the identity of the suspect can be established, being caught in the act is no legal ground for an arrest. Accordingly, Section 163b of the German Code of Criminal Procedure reads: “If somebody is suspected of having committed an offence, the public prosecution office and police officers may take the measures necessary to establish his identity.” Whereas in the US and now Ecuadorian criminal procedure, the arrest is the consequence of having identified a person as the suspect “caught in the act”, in Germany establishing the identity replaces widely what is the arrest in US/Ecuadorian criminal procedure. As of 2019, Germany had 12,000 and Ecuador roughly 14,000 pre-trial detainees, while the German population is about five times that of Ecuador.

11 An exhaustive overview is provided by Langer (2019, p. 10). For Germany see Altenhain (2020, p. 524). For the researchers, it seemed to be impossible to identify the exact number of convictions reached by plea bargaining since a huge number (between 3.9% and 15.2% for local district courts) of convictions are still based on informal understandings.

12 The term *audiencia de calificación de flagrancia* was added to the Código de Procedimiento Penal in March 2009.

*grancia* by quoting the Council of the Judiciary's own declaration:

„The purpose of this project [Inter-institutional Flagrancy Units] is to multiply the number of cases that come to trial, respond to the citizen's clamour to mitigate impunity and to improve security.“ (Council of the Judiciary, 2013, as quoted by Paladines, 2016, p. 170)

According to Paladines, the two main characteristics of the so-called “Inter-Institutional Units for in flagrante delictos” are: (a) the reconfiguration of the role of the institutions in charge of the management of arrests based on a preponderant communication between the police and the justice agencies; and (b) new protocols for litigation through a legal culture prone to use special procedures (Paladines, 2016, p. 170).

To sum up: the reforms of the criminal procedure in Ecuador started in the year 2000 with the incorporation of the adversarial system, and have been accompanied and supplemented by special procedures such as plea bargaining and the simplified procedure. But it was the creation of the Flagrancy Units in 2012 that eventually led to a “skyrocketing” prison population. These legal reforms and institutional changes met with a legal culture prone to use special procedures.<sup>13</sup>

According to the reform's *rationale* at the time, legal professionals were no longer supposed to hide behind lengthy briefs and written motions while the mostly locked-away defendant awaits his or her trial for years, but were now to act, react, and decide orally in a public hearing taking place within 24 hours of the arrest. Often, legal professionals had to adapt to new principles like orality and new roles as that of a judge in an adversarial procedure brusquely, while abandoning what has been regarded as a matter of course for the professional's working life.

What is more, the reform of the Ecuador's criminal procedure has not been accompanied by a domestic political-criminal debate<sup>14</sup> and did not originate from the needs of the receiving country, but as a result of exporting principles of Anglo-Saxon legal culture into the South.<sup>15</sup>

Today, the severe technical shortcomings of the export of rule of law and criminal justice reform are well demonstrated. As an example, those “legal transplants” have been realised according to a one-size-fits-all strategy (Pásara, 2012, p. 10), and by using this strategy, “assistance providers can arrive in a country anywhere in the world and, no matter how thin their knowledge of the society or how

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13 An anonymous reviewer, apparently more familiar with US criminal procedure than the authors are, stressed “the imperfect copying of mechanisms adopted from elsewhere, especially to countries where different conditions and cultures prevail. What is described as plea bargaining in the paper little resembles the type of negotiation involved in its application in the US; it instead looks like the traditional reliance on the confession (often coerced), as ‘the queen of proofs’. Moreover, the 24-hour courts have been introduced elsewhere in Latin America (e.g. Guatemala) with US assistance, but their purpose is to avoid excessive pre-trial detention, not to sentence anyone brought before them”.

This is an important comment, which we agree with. Legal export and support for legal reform probably never bring the results intended both by (domestic or international) code drafters and donors, and the Ecuadorian Flagrancy Units are a good example of this unpredictability: instead of providing judicial control of the arrest and instead of reducing excessive pre-trial detention, the units levelled the way for mass incarceration for petty offences.

14 As mentioned before, the accusatorial and adversarial system was introduced in 2000. However, as Jorge Paladines notes, the enactment of the new Criminal Procedure Code went widely unnoticed in the public debate (Paladines, 2016, p. 153).

15 For the Ecuadorian scholar Geovana Pincha the “incorporation of the plea bargaining was the consequence of the interest of an international organisation that was committed to promoting the modernisation of criminal justice in our country” (Pincha, 2018, p. 90). Translation by the authors.

opaque or unique the local circumstances, quickly settle on a set of recommended programme areas” (Carothers, 1999, p. 96).

Often, foreign experts made only short visits to the receiving country, spoke primarily to government officials, and failed to take into account national experts’ opinions (Salas, 2001, p. 45). Their support of standardised strategies, with a blend of legal formalism and instrumentalism, provides “a convenient methodological shortcut as it makes it possible to offer legal advice without having to go through the tedious, difficult, and often unrewarding task of understanding the societies they purport to help” (Faundez & Angell, 2005, p. 575). As a common outcome, “reform projects are imported prescriptions rather than policy proposals that reflect specific local needs and power relations” (Domingo & Sieder, 2001, pp. 145–146).

More generally, international aid agencies used (and are still using) a normative, prescriptive understanding of what the rule of law should be and work worldwide, regardless of the historical, economic, and political context of the receiving country. In short:

In Africa, Asia, Eastern Europe, and Latin America, a burgeoning group of consultants, think tanks, philanthropic foundations, and national and transnational agencies has come to the conclusion that, whatever the problem, an essential part of the solution is an independent and relatively powerful judicial branch. “Good governance” requires the rule of law and a set of institutions to preserve it. (Dezalay & Garth, 2002, p. 3)

The reforms of Ecuadorian criminal procedure have to be understood within this context – as an approach whose non-accomplishment is widely recognised: “The failures so apparent in the earlier law and development movement – and now in the new one – make it obvious that law cannot be considered merely a matter of technology to be acquired off the shelf as the best or most efficient practice” (Dezalay & Garth, 2002, p. 5) or, as Luis Pásara put it: “None of these fairly narrow changes to make Latin American legal codes, criminal procedures, training, or facilities appear more like foreign models have actually transformed these legal systems” (Pásara, 2012, p. 5).

According to the approach of the law and development movement, the emergence of the rule of law would finally be an automatism once sound institutions were established. The receiving countries just had to copy the successful models provided by the North. Hence, in the logic of this movement, unfit institutions were the *reason* for underdevelopment and not its *effects*, whereas, taking into consideration European legal history and the appearance of what later was called “rule of law”, it becomes clear that the rule of law and appropriate institutions are the *result* of a complex struggle lasting for centuries.

Hence, the rationale of the law and development movement is based on a fallacy, mistaking cause and effect. Exporting the *effect* of an underlying social struggle can’t replace the latter. It is worth mentioning that this insight has already been addressed exactly 200 years ago by Wilhelm Friedrich Hegel in his *Philosophy of Right*: “The proposal to give a constitution – even one more or less rational in content – to a nation a priori would be a happy thought overlooking precisely that factor in a constitution which makes it more than an *ens rationis*” (Hegel, 1952, p. 268).

According to our hypothesis, the aforementioned reform of the criminal procedure towards a predominant Anglo-American adversarial conception in Ecuador<sup>16</sup> has been translated into practice in a

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16 In Ecuador, the World Bank invested 12,874,000 US dollars between 1992 and 2011 in the funding of Justice Reform Projects, while the Inter-American Development Bank spent 227,312 US dollars between 1993

highly selective way, that is, only insofar as it would not affect domestic power relations. When confronted with the “three pillars” of Justice Reform as pronounced by the World Bank – that judiciary must be independent, provide access to justice, and have an appropriate legal framework, resulting in enforceable rights for all – it is no secret that the Ecuadorian criminal justice system failed broadly in achieving these goals.

Hence, the question is not whether the reforms of the criminal procedure failed or not; rather, we want to understand the recent reforms in the way they shaped social control, mass incarceration, and the selective law enforcement in Ecuador within already existing power relations. In other words, we do not intend to compare the reality of the Ecuadorian criminal justice system with the self-declared goals of the law and development movement from the North – this would be a fruitless endeavour – but rather we want to understand *how* the reforms impacted upon a domestic political framework.

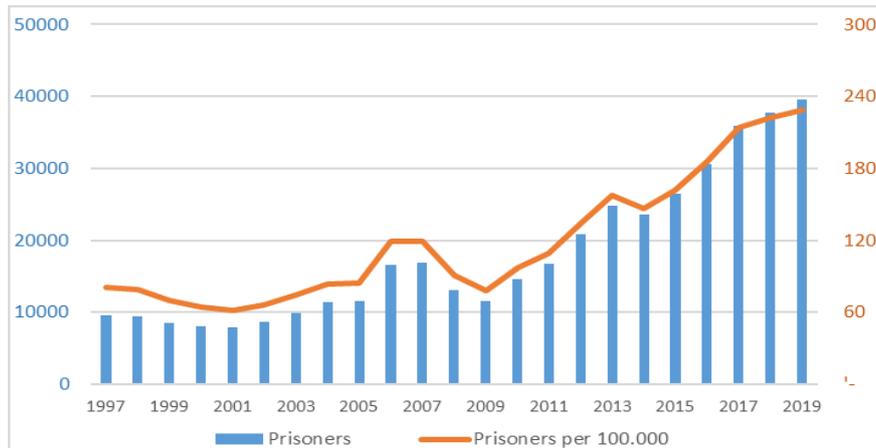
In this respect, we understand the creation of the *Unidades de Flagrancia* as a fundamental element of the new criminal procedure. Its rationale is Janus-headed: on the one side, arrests are now to be controlled immediately by a magistrate judge within a public and oral hearing; on the other side, the emphasis on promptness cuts elemental rights to a fair trial while orality is, at least in the practice of the *Unidades de Flagrancia*, confined to reading aloud the police report.

The first obvious sign that something changed within Ecuador’s penal system in the last three decades is the overwhelming increase in the number of prisoners. In 1989, when the national prison system began gathering information on imprisonment, Ecuador had roughly 7,000 prisoners. Figure I shows the increase of prisoners in Ecuador – from less than 10,000 in 1997 to almost 40,000 in 2019 and prisoners per 100,000 inhabitants, the so-called “prison population rate” (orange line). The prison population rate is based on data provided by the Servicio Nacional de Atención Integral a Personas Adultas Privadas de Libertad y a Adolescentes Infractores (SNAI) and the overall population of Ecuador according to the projections by the Instituto Nacional de Estadística y Censos (INEC), based on the census of 2010.

According to data provided by the SNAI, Ecuador’s national prison system has capacity for 29,463 prisoners, which means, as of 2019, it was overcrowded to a rate of 34.30%.

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and 2011 (Pásara, 2012, p. 3). It merits mention that the aforementioned international financial institutions *lend* most of the funds they provide. Thus, the alleged contributions provided by the North turned into public debt that receiving countries must repay: “[O]ver the last twenty years Latin American countries added 1.45 billion dollars to their public debt from financing justice reform (Pásara, 2012, p. 4) and thus it is not only the perspective of the donors that urges us to answer the question: ‘Has it indeed been worth it?’” (Pásara, 2012, p. 4).

**Figure I:***Prison rate and absolute numbers of prisoners***Table I***Pre-trial detainees*

Year	Pre-trial detainees	Pre-trial detention rate	Pre-trial detainees per 100,000 inhabitants
2001	5,451	70.4%	42
2005	7,713	63.0%	56
2009	7,107	46.0%	48
2014	9,518	39.6%	59
2018	13,073	34.0%	77

Table I shows that the Ecuadorian penal system apparently needs less time to sentence defendants *and* imprisons more. While as of 2001, 70% of prisoners were still awaiting their trial as pre-trial detainees, in 2018 the pre-trial detention rate decreased to 35%. At the same time, pre-trial detentions rose from 5,400 to 13,073 (absolute numbers). This data suggest that the reformed Ecuadorian criminal justice system is indeed convicting faster as was able to address the widespread blame for the excess of pre-trial detention. The crucial question here is, of course, *how* the convictions were reached.

Against this background, we conducted a study on the productivity of Ecuador's criminal system. We wanted to know how the significantly increased convictions have been achieved. We wanted to understand to what extent these imprisonments are based on a proper adversarial trial or are the result of the application of simplified procedures such as the plea bargaining (*procedimiento abreviado*) and the severely limiting *procedimiento directo*, both to be understood as a form of the *administratization* of criminal convictions and trial-avoiding<sup>17</sup> mechanisms (Langer, 2019).

It is worth of note that in Ecuador (as of 2020) there does not exist a Ministry of Justice. The Council

17 Even though the simplified procedure, the *procedimiento directo*, results formally in a trial, there is no way the defendants could meaningfully exercise their basic trial rights.

of the Judiciary (*Consejo de la Judicatura*) is allegedly to be understood as a mere judicial *administration*, but at the same time, it exerts a strong influence on jurisprudence. Thus, the Council is likely to play a hybrid role between the executive and the judiciary.

Even though the Council of the Judiciary maintains on its eighth floor a so-called National Directorate of Legal Studies and Statistics, there are no data available on the performance of the judiciary: officially, we do not know what kind of proceedings have been applied in order to achieve a verdict; we do not know — for example — the rate of acquittals versus convictions, how many cases have been dispensed with (which means discontinued or archived) without trial, appealed, or dismissed by the courts and so on.

In other words, due to the lack of data, it was impossible to evaluate the productivity of the actual, “reformed” judiciary and contrast it with the judiciary before the incorporation of the adversarial system. Annually, the Council of the Judiciary gives a so-called *rendición de cuentas*, a kind of accountability speech in which the judiciary sets out its ever-increasing *eficiencia* – efficiency understood as the number of cases solved per judge.<sup>18</sup> However, nobody knows how this “efficiency” has been achieved and our findings indeed reveal that many of the allegedly solved cases are in fact discontinued cases, where the judge certifies the termination of the investigation issued by the public prosecutor’s office – which is a mere bureaucratic act and not a judicial decision reflecting judicial efficiency – and there is good reason for the Council of the Judiciary and the Ecuadorian government to keep the details on how the alleged “productivity” has been achieved unconcealed.

## Methodology

The database provided by the National Directorate of Legal Studies and Statistics of the Council of the Judiciary contains all criminal cases between August 10, 2014<sup>19</sup> and July 31, 2019, registered by the judiciary.

This database initially had to be filtered according to the objectives of the study: to measure judicial productivity in the shape of *substantial* judicial decisions with respect to all criminal cases reported by the Council of the Judiciary. We understood a “substantial judicial decision” as a verdict on the penal responsibility [guilt] of the accused as the result of an evaluation of the evidence presented by the prosecutor’s office, that is, ratification of innocence [acquittal], conviction, or dismissal as contemplated in Section 605, (2) and (3)<sup>20</sup> of the COIP.

Another objective of the investigation was to understand *how* the trial has been carried out, the “how”

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18 See, for example, the press release by the then President of the Council of the Judiciary, Gustavo Jalkh: “More than 718,000 cases resolved by the Judiciary in 2017” (Jalkh, p. 2018).

19 As mentioned before, on August 10, 2014, the COIP came into effect.

20 The code reads: “Dismissal. - The judge will issue a dismissal order in the following cases: 1. When the prosecutor refrains from accusing and, if applicable, that decision is ratified by the superior. 2. When he or she concludes that the facts do not constitute a criminal offence or that the elements on which the prosecutor has supported the accusation are not sufficient to presume the existence of a crime or participation of the person prosecuted. 3. When causes for the exclusion of unlawfulness [legal justification = self-defence] have been established.” Thus, the dismissal according to # 1 of the aforementioned section is not a substantive decision, but a procedure at the request of the Prosecutor’s Office, while the decision according to # 2 and 3 of the norm is – as legal reasoning – a substantial legal decision. The purpose of the evaluation during the trial preparation stage is to assess and evaluate the elements of conviction on which the prosecution is based, Sec. 601 of the COIP.

being understood as the respective rate of abbreviated [plea bargaining], direct [simplified], or ordinary procedure, with respect to the total number of judicial decisions in which the criminal justice system has reached a verdict on the penal responsibility (understood as the different forms of guilt) of the defendant.

We accepted conciliation [mediation] as a form of termination, even though, in the strictest sense, it is not a substantial decision, since the conciliatory agreement terminates the procedure – and thus the enquiry about the alleged penal responsibility without giving the judge any discretion on the decision.

In addition, we accepted the so-called “no qualification of a flagrant offence” (*no calificación de flagrancia*) as a way to end a criminal procedure. In this case, the judge’s task in the framework of the initial hearing (*audiencia de flagrancia*) comes to an end, while the Prosecutor’s Office will or will not conduct an investigation that may or may not result in the formulation of charges [indictment]. According to the interviews conducted with prosecutors and public defenders, the prosecution requests not to qualify the offence as flagrant in order to gain time for further investigation when the police report seems insufficient.

**Table II**

*Determination of the Scope of Study*

Type	Cases	Percentage
Cases received in database	1,048,576	100%
Administrative offences [misdemeanours]	525,858	50.15%
Does not correspond to the first instance (appeals)	41,909	4.00%
Sex crimes	11,495	1.10%
Crimes of adolescent offenders	Does not apply	-
Crimes against minors	Does not apply	-
Procedural decisions	270,234	25.77%
Offences with regard to the Organic Law on Consumer Protection	2,035	0.19%
Scope of study	197,045	18.79%

It is important to note that the Council of the Judiciary indicates, according to its own database and the interviews conducted with the head of the department, that 1,048,576 criminal cases are presented as *resolved*, whereas applying the above-mentioned filters shows that only around 20% of the reported and allegedly solved cases are criminal cases in the strict, substantial sense.

We used the file reference numbers included in the database provided by the Judiciary Council in order to identify the cases in the public database called “eSatje system”, to obtain the case transcripts, and eventually to extract the details of each case defined in the random sample. The study was supported by a team of trained analysts from the law school of an Ecuadorian university<sup>21</sup> and two visiting researchers.<sup>22</sup>

21 We want to thank Professor Milton Rocha and the students of the Universidad Indoamérica, Carrera de Derecho, Sede Quito.

22 Johann Neukirch and Lea Wiesmüller, who received a travel grant from the German Academic Exchange Service (DAAD), provided valuable assistance.

For the calculation of the sample, the following formula was applied:

$$n = \frac{z_{1-\frac{\alpha}{2}}^2 \alpha N(1-p)}{p(N-1)\varepsilon_r^2 + z_{1-\frac{\alpha}{2}}^2 \alpha(1-p)}$$

where:

N = total number of criminal cases

z = confidence coefficient

$\varepsilon_r^2$  = expected maximum relative error

p = ratio estimator

n = sample size

As a result, 934 cases were chosen randomly within the database.

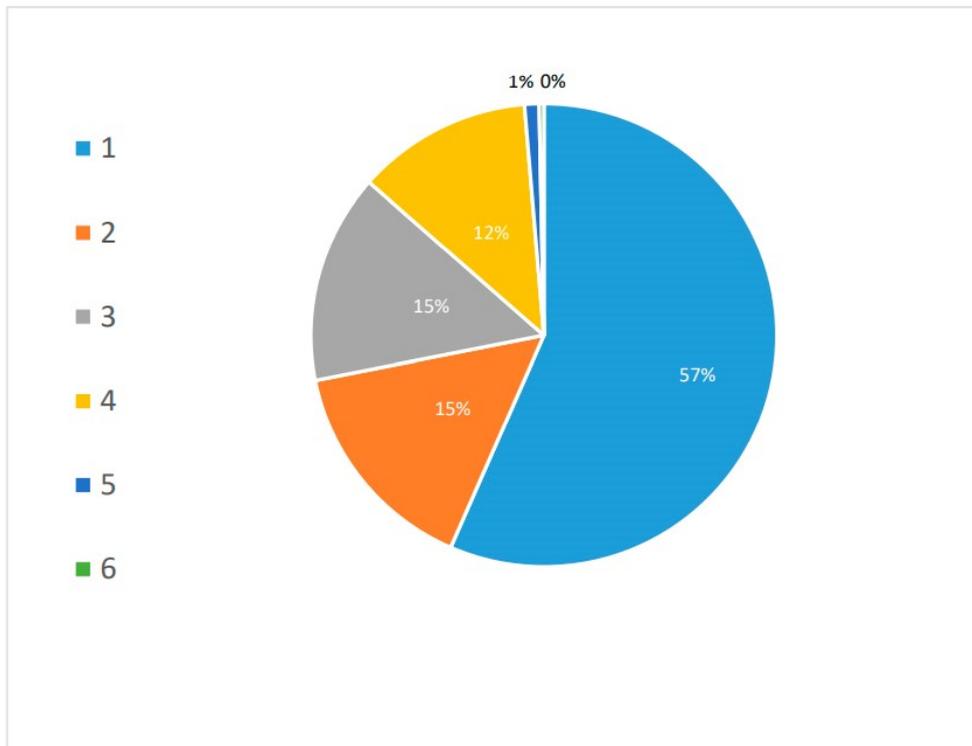
Each analyst reported the information on a data sheet. The individual results were merged in a single results matrix. The author conducted prior training for the analysts on how to collect the data.

We further observed 80 court hearings in the *Unidades de Flagrancia* between July and October 2019 and carried out interviews with several public prosecutors, judges, public defenders, pre-trial detainees, and senior officials of the Council of the Judiciary. The results of this field study are subject to a different publication. However, we used some findings additionally for the interpretation (IV).

## Results

### Types of Prosecuted Crimes

Figure II shows the composition of 197,045 criminal cases differentiated by criminal type processed according to the COIP's chapters.

**Figure II***Types of Prosecuted Offences in Ecuador Between 2014 and 2019*

Note: 1= Crimes against the rights of liberty; 2= Crimes against the rights of good living; 3= Crimes against citizen responsibility, crimes against the structure of the constitutional state, terrorism and its financing; 4= Traffic offenses; 5= Crimes against environment and nature or Pacha Mama; 6= Serious human rights violations and crimes against international human rights.

It is noteworthy that the object of legal protection (or protected right) “liberty” is theft, robbery, and any form of property offence,<sup>23</sup> while the object of legal protection “good living” (as derived from the Quechua term *sumak kawsay*) is public health and therefore drug possession and trafficking.

As a first finding, the study demonstrates an imbalance both in the distribution of the offences within the initial universe of 197,045 cases and within the COIP’s chapters. For example, of the 30,218 cases belonging to the third chapter of the COIP (offences against the legal good “good life”) – 29,458 cases consist of drug related offences (97.49%). Therefore, further offences against the “Rights to Good Living”, such as neglect of health service, production and distribution of expired medicines and supplies, contamination of substances intended for human consumption, etc., are irrelevant in Ecuador’s criminal practice despite the fact that they have a clearly determinable legal good.

As mentioned above, the representative sample includes 934 cases of which 464 have been reported

<sup>23</sup> We are aware that for many Anglo-American readers, the notion of “legal good” may sound odd. The *bien jurídico* stems from the German legal term *Rechtsgut*, which is hard to translate properly. In the Anglo American tradition, the term corresponds roughly to the harm principle.

as resolved according to our criteria on judicial productivity, e.g. with convictions, acquittals, conciliation, or dismissal<sup>24</sup>, as shown in Table III.

Type	Cases
Sample	934
Administrative offences (misclassified in database provided by the Council)	23
Discontinued through judicial decision (154), or discontinued due to loss (mishandling) of files (39)	193
Inaccessible cases (most likely misclassified sexual offences inaccessible in the eSatje system)	145
Procedural decisions (misclassified)	13
Family cases (misclassified)	3
Cases not reported by the analysts	93
Resolved cases	464
Cases suitable for further analysis	657

Six hundred and fifty-seven cases (464 plus 193) were finally deemed suitable for further analysis, e.g. *excluding* misclassified or inaccessible cases (possible sexual offences or offences against minors, procedural decisions, family cases) or cases not reported. Of the 657 cases, 70.62% involve a decision on the merits according to the study's criteria (464 cases). Consequently, 29.38% of the cases analysed (193) have not been resolved by a sentence [ruling], conciliation, or dismissal, despite the fact that they appear in the database of the Judicial Council as resolved cases.

Most of these prosecutions have been discontinued through judicial "decision" based on Section 587 of the COIP.<sup>25</sup>

In turn, in 363 of the 464 cases properly resolved, the defendant was "caught in the act", that is, committing an offence as qualified by Section 527 of the COIP. So, an initial hearing (*audiencia de flagrancia*) 24 hours after the arrest was realised in 78.23% of all criminal cases reported by the database. In these cases, the simplified procedure [procedimiento directo] is mandatory if the further legal requirements are met.

In conclusion, only 21.77% of the criminal cases resolved by a decision on the merits did access the judicial system within the "ordinary" sequence of events: after criminal charges have been pressed

24 According to our criteria described above, the dismissal requested by the prosecutor's office does not necessarily reflect judicial productivity. Thus, it is likely that the data on dismissals might, cover cases that are a mere "filing away" of the case without a judge being involved substantially.

25 A case is dismissed [dispensed with, archived, or discontinued] when the fact under investigation does not constitute a crime (Sec. 586.2 of the COIP), e.g. dismissed or dropped for lack of merit. Curiously, discontinuing the case requires the intervention of the judge. "The decision to archive will be substantiated and requested from the judge", Sec. 587.1 of the COIP. This rule is a gateway for a demonstration of false productivity by justice operators.

(*denuncia*), police start an investigation, which may eventually result in an arrest with a warrant, an indictment, and the involvement of a judge.

This data reveal the emphasis of the Ecuadorian criminal system on what is called “flagrant offence”, with all the logic implied with regard to speed and a lack of sufficient time to carry out a thorough, impartial, and extensive investigation as in most cases it involves sentences up to five years, in the so-called “simplified procedure” (*procedimiento directo*).<sup>26</sup>

This emphasis is demonstrated by considering the following: the database reports 154 discontinued cases (see Table III), however only 40 of them (25.97%)<sup>27</sup> have entered the criminal justice system according to the logic of the “flagrant offence hearings”.

In contrast, 114 (74%) of the discontinued cases accessed the criminal justice system as a non-flagrant offence and thus through the “ordinary” procedure, based on a criminal investigation (*investigación previa*). Consequently, the probability that a case will be archived and discontinued is significantly higher if it accesses the penal system through the supposed normality of a criminal investigation.

With regard to the resolved cases, that is, the 464 cases that actually include a judicial decision (acquittal, conviction, dismissal, or conciliation), 329 cases embraced one defendant, while the rest embraced multiple defendants.

As we were analysing judicial productivity, we had to consider decisions, and not cases – and therefore one case can consist of two or more judicial decisions on penal responsibility, depending on the number of defendants involved.

### **Abbreviated Procedure [Plea Bargaining]**

In order to elaborate the proportion of convictions obtained through the application of the abbreviated procedure among the 464 resolved cases, we had to exclude all cases in which the maximum sentence exceeds 10 years, since in this constellation, the abbreviated procedure is inadmissible. After analysing the universe of 464 cases according to this criterion, it showed that the abbreviated procedure would be admissible in 433 cases.

In a second step, we determined that the 433 cases suitable for the application of the abbreviated procedure correspond to 506 decisions (in a case with multiple defendants, multiple decisions on the application of the abbreviated procedure can be made).

According to our case analysis, the abbreviated procedure was applied 190 times, that is, in 37.55% of the decisions on its application. This means that already within the very limited scope of substantial decisions on the defendant’s guilt within the overall sample (464 out of 657 cases, see Table III), the

26 See for the reformed (2020) *procedimiento directo* Sec. 640 of the COIP, which now extends the statutory period for the investigation to 20 days.

27 Within the framework of the initial hearing of the flagrant offence, the prosecutor’s office may formulate charges, while generally the hearing of the formulation of charges (so-called *audiencia de formulación de cargos*) commences the so-called “investigation stage” (see Sec. 591 of the COIP). Thus, in the logic of the flagrant offence, the filing away can be carried out according to the general rules, Sec. 599 (3) and Sec. 600 of the COIP.

proportion of this trial-avoiding conviction mechanism is significant.

### **Pre-trial Detention [Remand]**

In order to improve the accuracy of the result regarding the proportion of pre-trial detentions, the cases with four defendants have been included in the analysis, which implies an increase in the number of the decisions on the application of pre-trial detention. In 59.50% of all pertinent decisions, the request for pre-trial detention was granted during the first court hearing: 307 affirmative resolutions out of 516 decisions.

Ruling out offences that are not flagrant according to Sec. 529 of the COIP, the percentage increases to 61.67%. In other words, 61.67% of flagrant offence hearings [initial hearing 24 hours after the arrest] result in pre-trial detention, despite the fact that this measure should – according to the Ecuadorian constitution – be an exceptional measure and despite that Ecuador’s judiciary not only has a long record of abuse of pre-trial detention, but almost never succeeds in meeting the formal requirements for pre-trial detention (Krauth, 2018).

### **Pre-trial Detention and Abbreviated Procedure**

The correlation between the decision on pre-trial detention [remand] and the subsequent acceptance of the abbreviated procedure [plea bargaining] by the defendant points to the pre-trial detention as a means of coercion: in 87.89% of the applications of the abbreviated procedure (190 acceptances of the abbreviated procedure at 167 orders imposing pre-trial detention), pre-trial detention has been imposed before.

In other words, the decision of the defendant to confess and accept the abbreviated procedure has been made while being imprisoned in 87.89% of cases.

### **Simplified Procedure [Procedimiento Directo]**

Of the 464 cases with decisions on the merits, the simplified procedure according to Sec. 460 of the COIP was applied in 265 cases (57.11%), implying the limitations on the rights of the defendant outlined above and in the glossary.

### **Results of Criminal Trials**

As mentioned above, 37.5% of the cases in which its application was admissible resulted in the abbreviated procedure, which in turn inevitably implies a conviction; in these cases, the trial judge is “exonerated” from making a substantial decision.

Therefore, only in cases *not* being resolved through the abbreviated procedure is the judge obliged to make his or her own decision on the criminal responsibility of the defendant within the (adversarial and oral) trial.

Table IV sets out the results of these substantial decisions in criminal proceedings without an abbreviated procedure applied in cases of between one and four defendants.

**Table IV***Decisions on the Merits in Criminal Cases Without Abbreviated Procedure*

Outcome of proceedings	Decisions	Percentage
Conviction	110	32.54%
Dismissal	68	20.12%
Acquittal	86	25.44%
Conciliation	74	21.89%

In order to obtain a broader perspective, the judicial decisions on penal responsibility resolved without recourse to the abbreviated procedure had to be compared to the number of cases resolved through that mechanism.

**Table V**

Decisions	A Decisions without abbreviated procedure (up to 4 defendants): 338 (62.59%)	B Total, abbreviated procedure (up to 4 defendants): 202 (37.41%)
Conviction	110	202
Dismissal	68	-
Conciliation	74	-
Acquittal	86	-
Total A + B	540	

Within the universe of 540 decisions on criminal responsibility, 312 procedures resulted in a conviction, including the abbreviated procedure, which corresponds to 57.78%.

The criminal proceedings (again understood as decisions, not cases) that resulted in an acquittal represent 15.92% of the universe, while 12.59% have been dismissed and 13.70% reached a conciliation agreement.

Discounting the abbreviated procedure, the dismissal, and the conciliation, only 196 verdicts (conviction and acquittal) out of 540 decisions were properly tried, e.g. in an adversarial manner, which is 36.30%. Considering the significant share of simplified procedures within this percentage leads to the conclusion that trial-avoiding mechanisms are prevailing.

## Interpretation

This data, supported by the findings of our field study, reveal in several ways the severe shortcomings of the reformed Ecuadorian penal system. What is often considered as a sudden Judiciary productivity turned out to be mostly *tramitología* – a term almost impossible to translate and that refers to the void formality and bureaucratization of a legal issue.

The newly gained “efficiency” is due to simplified procedures, plea bargaining, and conciliations but not *litigation*. A meaningful exercise of trial rights *de facto* does not exist; the observed court hearings often looked like show trials, and only lip service is paid to due process.

However, at this point we will limit our interpretation to the functioning of the logic of *flagrancia*. In this respect, it is remarkable that delinquency exists almost exclusively within what we understand as the *logic of flagrancia*: the vast majority of criminal investigations that do not access the criminal ju-

stice system through this bottleneck are dispensed with (discontinued) and the related cases are terminated by the prosecutor's office. In order to understand the scale of this finding, we have to realize that mostly so-called urban, visibly delinquent, and offences committed in the public are tried (or more precisely administrated) in the *Unidades de Flagrancia*.

Typically, police officers arrive at a crime scene when called amid the committing of an alleged offence or conduct an arrest after having searched a suspect and having found drugs or weapons carried by the suspect. Those cases are brought to, and eventually tried at, the *Unidades de Flagrancia* and one might justify the simplified, accelerated, and limited procedures parting from the *audiencia de flagrancia* with the assumption that in these kinds of offences, evidence is "evident", immediately to be obtained at the moment of the arrest and lengthy police investigation, and court procedures are therefore not necessary in order to obtain a verdict.

In contrast, criminal offences that are typically not carried out publicly, such as so-called "white-collar crime", corruption, upscale drug trafficking, and sexual offences, do often require lengthy and cumbersome criminal investigations, and are therefore not suitable for the logic of the *flagrancia*.

But, according to the data presented above, the offences tried in *flagrancia* amount to the vast majority of what is understood and perceived as crime in Ecuador. We can see that a procedural logic or rationale aimed at speeding up the criminal procedure in certain, suitable cases of "everyday crime" with evident occurrences eventually *replaced* the ordinary criminal procedure based on prior criminal investigation.

This, again, has severe outcomes for the way delinquency is produced and perceived in Ecuador: against the background of the notorious feeble Ecuadorian Judiciary it is eventually the police that control and determine delinquency: There is neither a meaningful challenge of police conduct nor a control of how evidence is collected and presented within the logic of *flagrancia*.<sup>28</sup>

Therefore, we suggest understanding the logic of the *flagrancia* as the gateway for the police taking control of the criminal conviction, or, in the same vein, as the gateway for the loss of control over the criminal conviction on the part of lawyers and judges since the logic of the *flagrancia*, which includes the plea bargaining, the simplified procedure, and the impotence of defence attorneys when pre-trial detention is requested, is the trial-avoiding conviction mechanism par excellence.

First, our findings suggest that there is no effective legal control on the lawfulness of the arrest. After the creation of the *Unidades de Flagrancia*, scholars expressed the hope that through the immediate realization of the *audiencia*, arbitrary detention would eventually be reduced (Binder, 2012, p. 11), whereas the *Unidades* turned into factories producing imprisonment at previously unknown rates (Paladines, 2013, p. 137). According to our observations of 80 court hearings, police officers manage – by applying the signature phrase of a suspicious conduct (*conducta sospechosa*), which is never substantiated in the complaints – to justify literally every arrest subsequently. Public defenders and defence attorneys rarely succeed in questioning the lawfulness of the arrest, and magistrate judges

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28 This seems to be a general outcome of what Langer (2019) calls „administratization of criminal convictions”: “Convictions based on the defendant’s consent and on evidence collected in these administrative proceedings give more power to the police [...] to the extent that they are not challenged or made accountable through a trial and since their decisions to arrest and charge an individual for a certain offense may be, de facto, the final or close to final verdict. Also, their decisions in this regard may not be accessible or transparent to third parties, citizens and the media“ (Langer, 2019, p. 25).

hardly ever oppose the police.<sup>29</sup>

Second, the police report (the *parte policial*) figures as an anticipated verdict precisely because, within the framework and logic of the *Unidades de Flagrancia*, there is almost no legal or actual opportunity for the defence to take part in the criminal investigation and request exonerative evidence. Public defenders see their defendants and are permitted to review the charges mostly just minutes before the initial hearing, even if the defendant has been waiting for hours in the arrest cell in the same building. Hence, and according to the interviews conducted with public defenders, the request for exonerative evidence would regularly be rejected because of the lack of time and the public defenders remain passive, echoing abstract constitutional principles unrelated to the tried case they cannot prepare.

Later, when the *procedimiento directo* takes place, and due to the shortcomings of the organization of the *Defensoría Pública*, public defenders hardly have any opportunity to prepare the legal defence. Their defendants are mostly locked away in a prison a roughly two-hour drive away from Quito and the institution's guidelines do not permit public defenders working in the *Unidades de Flagrancia* to travel to the facility in order to interrogate their defendants, conduct their own investigations, and eventually present exonerative evidence within the time frame permitted by the simplified procedure.

For this reason, the initial police report anticipates and usurps the verdict.<sup>30</sup> This report is read by the prosecutor – due to the orality as a new maxim – but de facto cannot be called into question by the defence attorneys and is often the only “evidence”. Hence, our findings suggest that Ecuadorian criminal procedure is not an adversarial system, regardless of how the COIP reads. Police officers de facto are investigators, prosecutors, and trial adjudicators<sup>31</sup> at the same time.

It is precisely because of this lack of an unbiased and effective criminal investigation that most of the public defenders interviewed by us preferred to accept the plea bargaining (*procedimiento abreviado*) instead of risking a trial, even though the defendant would not have been proven guilty in a sound criminal procedure.

Therefore, the police manage to control the Ecuadorian penal system by using the void shapes of the adversarial system, or more accurately, by exploiting the weak spots within the logic of *flagrancia* and with this neutralizing the guarantees and principles of a fair trial. The alleged “new” orality is, in fact, the *continuation* of the written form in which criminal procedures took place for centuries where legal professionals referred to police reports and written expert opinions instead of oral, immediate intervention and testimonials (Binder, 2016, p. 60).

The plea bargaining, spread all over the continent as part of the Americanization of the Law, is not only the sequel of the Inquisition (Schünemann, 1998) but has, at least in the case of the Ecuadorian

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29 We have been told in one of our interviews with a public prosecutor that police officers observing a flagrant court hearing file a complaint against the prosecutor to the Ministry of the Interior when he or she does not request pre-trial detention, and indeed, the mere physical presence of police officers openly carrying weapons in court hearings seems to be perceived as a threat against judges, witnesses, and prosecutors.

30 Trial-avoiding conviction mechanisms “empower police and prosecutors since defendants have incentives not to challenge the police’s investigations or prosecutors’ decisions and to shorten the pre-trial judicial process as much as possible” (Langer, 2019, p. 19). Moreover, “plea bargaining empowers not only prosecutors but also the police and other administrative agencies in deciding who gets convicted and for which crimes” (Langer, 2019, p. 19).

31 See Langer (2019, p. 15) for the legal literature on criminal justice in the United States exploring how prosecutors have become de facto adjudicators of criminal cases in administrative-like proceedings.

*procedimiento abreviado*, nothing or little to do with negotiation. The mere fact of pre-trial detention in the face of the reality of the Ecuadorian prison system excludes voluntariness as a precondition for every kind of negation (Pincha, 2018, p. 49). Geovana Pincha's conclusion is supported by our findings set out above and according to which the consent to the plea bargaining only in roughly 10% of the cases is given when the defendant is not imprisoned.

As mentioned above, we suggest understanding the logic of *flagrancia* and therefore the plea bargaining, the simplified procedure, and the initial, flagrant hearing, which mostly results in pre-trial detention, as trial-avoiding conviction mechanisms par excellence. These mechanisms further weakened an already weak penal system since there is no meaningful exercise of trial rights within the logic of *flagrancia* and police are empowered as adjudicators of criminal cases. A proper (public, oral, adversarial, equal) trial has never prevailed as the common way to achieve a verdict.

Thus, the police, in the framework of the distribution of domestic power relations, control "crime" through selective law enforcement and selective impunity. The bifurcation of the criminal procedure in so-called "flagrant" [caught in the act] offences, activating the logic of the *flagrancia*, and the "ordinary" criminal investigation, discharging in formal indictment and an "ordinary" criminal procedure facilitates the weakness of the criminal justice system. The "ordinary" criminal investigation is hardly realised at all, and even if so, neither effectively nor independently. Due to its overbureaucratization and both a lack of a well-trained and specialised investigative group and, decisively, political independence, investigation results in the vast majority of the cases in the public prosecutor's office dispensing with the prosecution.

The conclusions to be drawn are firstly that, in spite of extensive legal reforms, Ecuador's criminal system still suffers from a lack of functional differentiation. Public safety and penal efficiency, as understood and applied by the police and its punitive logic, predominate in Ecuador's criminal system. Ironically, it is *because* of this predominance of the public safety discourse that "security" is an issue more than ever in Ecuador: the extraordinarily weak penal system fails to establish the validity of a normative order and hence a normative structure for society.

Consequently, what is understood as the legal system's function in the framework of the rule of law has even been weakened by the reforms, since the criminal justice system is controlled by the police and their limited understanding of social control precisely by promoting the logic of the *flagrancia* and its underlying scarcity of judicial control. The collateral damage due to this dismemberment of the criminal justice system is, as mentioned above, anomie and thus insecurity, which in turn results in the call for more security and less fair trial.

The fact that this very scarcity of judicial control within the logic of *flagrancia* has little to do with the text of the COIP leads to the second conclusion: the debate on how to improve Latin American penal systems – promoting the adversarial versus the inquisitorial system – is missing the actual target. This assumption follows the fallacy mentioned above and superficially ascribes the weakness of Latin American criminal justice systems to the weakness of its legislature and institutions instead of addressing the underlying and highly complex power relations that shaped law both in colonial and post-colonial South America for centuries (Ots Capdequí, 1949; Valarezo, 2013): In this respect, law is to be understood not so much as a means of rationalising and limiting state power but as an ornamental accessory to power, like the gold in the churches in the New World.<sup>32</sup>

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32 As an anonymous reviewer pointed out, the absence of any significant police reform and the failure to establish a prosecution agency with its own investigative capacity are critical to the success of any criminal

However, neither the significant increase in the number of prisoners (Sozzo, 2016, p. 17) nor the excessive focus on *in-flagrante delictos* is an isolated issue in Ecuador, which is in line with most countries in the region. The spread and adoption of plea bargaining and other trial-avoiding conviction mechanisms even imply a global trend (Langer, 2019).

Nevertheless, it seems safe to assume that Ecuador lost a chance to improve its criminal justice system by carelessly combining the incorporation of the adversarial system with alternative dispute resolution mechanisms such as the plea bargaining, the conciliation, and, as far as promptness is concerned, the simplified procedure. For example, in Venezuela the incorporation of the adversarial system initially reduced the prison population rate per 100,000 inhabitants between the years 1999 and 2000 from 104 to 69 (Grajales & Hernandez, 2016, p. 133).

So it seems that the adversarial system alone did not necessarily cause the dramatic increase in prisoners and it was probably not initially the wave of adversarial reforms that “brought with it an administratization of criminal convictions in the region” (Langer, 2019, p. 22) but rather the clamour for a more efficient criminal justice system to which the meaningful exercise of trial rights seems like an obstacle, again, regardless of the legal tradition from which they originate.<sup>33</sup>

It was therefore the blending of legal reforms with the promise of more efficient solutions, the blending of the incorporation of the adversarial system with the introduction of the plea bargaining, and the simplified procedure already within the *Código de Procedimiento Penal* in 2000 that exacerbated the pre-existing condition “administratization of criminal convictions” in Ecuador.

## Glossary

**Consejo de la Judicatura** (Council of the Judiciary) is more a governance body than an administrative one as perhaps originally intended. It nominates, sanctions, and removes judges and is involved actively in Ecuador’s jurisprudence through guidelines whose application is mandatory for judges, for example on how to evaluate evidence and on how to apply the law in cases of sexual violence. This influence on judges often results in the reversal of the burden of proof through a merely technical “guideline” provided by the Council.

The body is highly politicised and controlled by the so-called Consejo de Participación Ciudadana y Control Social (Cpccs) and removes judges through the legal figure of the “inexcusable error”. According to an interview conducted in July of 2019 in Quito with a former member of the body’s executive board, applicants are regularly expected to bribe senior officials of the Council of the Judiciary in order to be accepted as judges. As a result, most judges are susceptible to blackmail for the rest of their professional lives and thus subject to political pressure when deemed necessary.

Undue influence on judges was common not only under the Presidency of Rafael Correa, but also under the Presidency of Lenín Moreno. After dismissing the request for pre-trial detention against one of the members of the Correa government correctly for formal reasons, the judge, Beatriz Benítez, was

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justice reform, regardless of its legal tradition. This observation is undoubtedly correct, but the question remains: why have the donors, both domestic and international promoters of legal reform and governments, “overseen” the necessary police reforms? Was it merely an accident, or was substantial police reform, which would have affected the core of domestic power relations, a task too difficult to tackle?

33 The “administratization” of criminal convictions and the adversarial system are not necessarily related. For the situation in Germany, see Altenhain (2020).

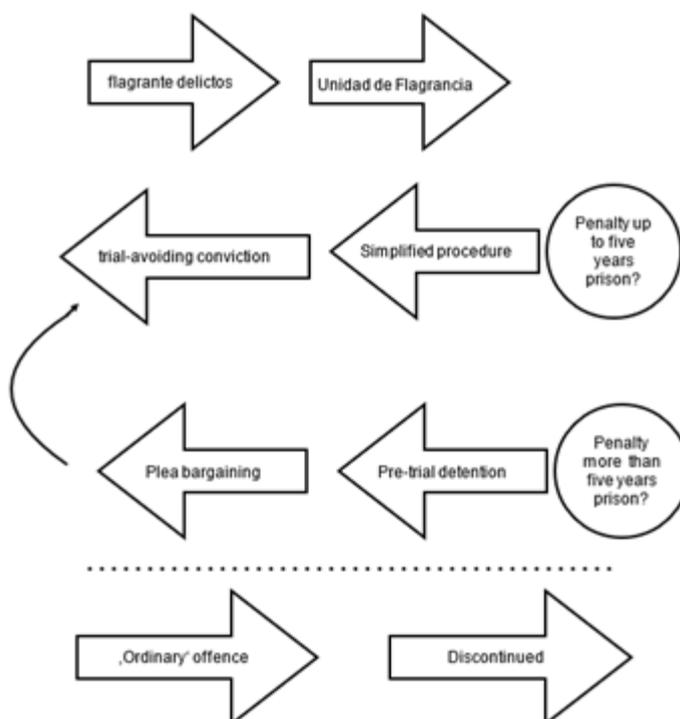
threatened by the former Interior Minister María Paula Romo, who said publicly: “The name of Beatriz Benítez should be remembered.”

**Código Orgánico Integral Penal.** This law was passed in 2014 and includes all former codes related to criminal law, such as procedural and substantive law and the execution of the sentence (prison regulation). The harsh increase of minimum sentences indicated by the new code is widely understood as causal for the increase in the prison population. For example, the punishment range for fraud in the former Código Penal was a prison sentence ranging from one to five years, while the new COIP provides for a punishment range of five to seven years for the same offence.

**Procedimiento Directo** (Simplified Procedure). This procedure limits the rights to a fair trial severely and is compulsory for most offences with a range of punishment up to five years. The purpose is to obtain the verdict within 20 days after the initial court hearing (and apprehension). The defence can present exonerative evidence only in a very narrow time frame (up to three days before the hearing; see Sec. 640 of the COIP). In practice, the proceedings can take months if not years because expert witnesses are overworked, while the defence lawyers are condemned to inactivity.

Due to the severe shortcomings within the organisation of the Public Defender’s Office, public defenders can hardly ever discuss the charges beforehand with the defendants.

Thus, according to the aforementioned, the most probable course of criminal proceedings is as follows:



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How to cite this article (APA– 7th ed.): García-Guerrero, J. E., & Krauth, S. (2021). Peripheral criminal injustice. How the US-Led criminal procedure reform in Ecuador worsened an already weak penal system. *Criminological Encounters*, 4(1), 50-73. doi:10.26395/CE21040105



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