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QUITO, Ecuador—The prosecutor stands to deliver her opening statement in the case. She wears a tight, electric-blue dress that comes to mid-thigh. Standing on her matching stiletto heels, she turns toward the three-judge panel at the front of the room and lays out her case against the defendant. The defendant, she begins, had cut down an ancient and valuable tree, thereby committing a crime against the property owner and the state. Her opening statment is short, mostly read from the page in front of her. The judges, two middle-aged men and a young woman in her early 30s, listen intently from their seats behind a folding table. They face the audience, crammed into two narrow rows at the back of the room, and are flanked to the left by the prosecution team and to the right by the defendant and his lawyer, all seated at creaky folding tables. The defendant—a dark-skinned, middle-aged man in a short-sleeve button-down blue shirt—sits listlessly, his arms folded across his chest. His lawyer takes occasional notes during the opening statement, but mostly looks

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down at the thin binder before him. Everyone in the room—audience, judges, and lawyers—sits in folding chairs. Next to the judges is the clerk of the court at a computer. Besides that, the room is barren.

It wouldn't be much of a room if not for the spectacular view out of the dirty glass windows that take up the entire length of the left-side wall. From each, rise the sloping peaks and craggy, green ridges of the Andean mountain range that surround Quito, the capital city of Ecuador. The trial in this tiny sixth-floor courtroom on a foggy Friday morning is part of a grand experiment. Ecuador has taken a step toward an adversarial system of criminal justice. The heart of this experiment—public, oral trials—is coming to life here in this small, non-descript space.

INQUISITORIAL

Until the 1990s, almost all Latin American countries had strict inquisitorial systems. So all decision-making was centralized in the judge, who was, in theory, a neutral party tasked with discovering the truth in a criminal case and rendering a verdict and sentence. The process was closed to the public and based entirely on a written dossier compiled by a public prosecutor and handed off to the judge for decision. The problems with this system in a region with a history of corruption as rich as Latin America are obvious and became even more so as many Latin American countries struggled under the weight of soaring drug-related arrests in the 1990s. The solution posed by some both in and out of the region was a move toward an American-style adversarial system, where a defense attorney and a prosecutor duke it out in a public forum before a judge or jury until the parties reach, through this healthy back-and-forth, the truth. Or the truth as decided by the judge or jury, who watch the process and then mete out justice. The "oral" adversarial system (or accusatorial system, as it also often called), the argument went, would shine a light into the shrouded and corrupt criminal justice structures in place in Latin America.

MANY LATIN AMERICAN COUNTRIES HAVE SHOWN SURPRISING DEDICATION TO IMPROVING AND MAKING MORE ROBUST THEIR CRIMINAL JUSTICE SYSTEM.

And so a slow wave began away from the inquisitorial investigation model and toward an accusatorial template. It began in fits ands starts. Ecuador adopted a constitutional amendment in 2000 that required all provinces in the country to adopt an adversarial prototype. But judges had little understanding of what it meant to have an "oral" system and, searching for a solution, began reading the record and their verdicts aloud into tape recorders in their offices. This was technically "oral," but certainly not adversarial.

As the groundwork began to take shape, a litany of issues remained unresolved. How, for instance, do you develop rules of evidence when none have ever existed?

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How about burdens of proof at the pre-trial, trial, and appellate levels? And how can you develop rules and precedents when no one in the country is trained to act in the roles typically required in an adversarial system—a vigorous defense bar; a neutral, but zealous public prosecutors' office; and a judge whose job is not to be a main stage performer, but rather a ring-master of the circus before him?

These were the sorts of questions that faced at least 15 Latin American nations as they transitioned to a new criminal justice regime. This conversion has occurred at some level in Argentina, Bolivia, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico (in some states), Nicaragua, Paraguay, Peru, and Venezuela. And what's unusual about this dedication of effort and resources to criminal justice is that Latin Americans have never been particularly passionate about the topic.

Historically, crime has been dealt with officially by the most local municipality and, unofficially, by the community. In places like Peru and Brazil, for instance, which have experienced a significant upsurge in street crime, the electorate has consistently rejected political candidates who run on a "tough on crime" platform. When Alberto Fujimori of Peru used the same tactics against common street criminals that had proved so successful against the Shining Path guerrilla group, voter response was negative. Latin America has just never been very into "Law & Order."

FAIRNESS AS A PIPE DREAM

In many Latin American countries, the assumption has been that fairness in the arena of criminal justice is a pipe dream, particularly for the poor and underclass. Ximena Ortiz Crespo, a former Congresswoman and current professor of Ecuadorian history at the International University of Ecuador, explains that in places like Ecuador, "law is not present in people's lives," and when it does poke its head out, people run the other way. You'd rather pay a police officer to make the case "go away" than pay a lawyer down the road to defend you in a court you don't trust or believe in. In Ecuador, she explains, there is a saying that goes *la justicia es solamente para los de poncho*, or justice tends to fall only on those who wear ponchos—the indigenous who inhabit the lowest rungs of the social and economic ladder. Criminal justice has long been an after-thought.

And yet, many Latin American countries have shown surprising dedication to improving and making more robust their criminal justice systems. In Ecuador, this has meant a series of changes, including instituting public, oral trials and opening the first ever Public Defender's Office.

One Wednesday afternoon, the doors of the Office of the Public Defender at the bustling corner of Robles and 6 de Diciembre are wide open, with a steady flow of people washing through the empty space. Inside, cubicles are filled with young lawyers, fresh out of law school, typing away at computers or chatting with a revolving crowd of concerned family members, inquiring about the lawyer's incarcerated "users" (in Ecuador represented defendants are called *usarios*, or "users" of the system). The fledgling lawyers, who grew up watching syndicated episodes of "Law & Order" and "CSI" on Ecuadorian television, never knew a model of criminal justice before the adversarial system. This lack of institutional memory is one of their greatest assets. As Ernesto Pazmiño, Chief Public Defender for Ecuador, explains, the criminal justice system is going through

a "total cultural change" that will require the justice sector to reimagine itself. It's a sentiment on the lips of many in the field—that this shift from an inquisitorial to an adversarial model requires not merely a change in infrastructure or procedure, but a fundamental reshaping of Ecuadorian legal culture. It is the public defenders who are best poised to make this change.

One such public defender, Demetrio Santander, understands the procedure from arrest to sentence to appeal in the current Ecuadorian criminal justice system. Some parts are working well and are fully adversarial in nature, while others are still developing. At 26-years-old, Demetrio is typical of many public defenders in the office—young, dedicated, and bright (he'll be leaving the office in less than a month to pursue a masters at Oxford through a scholarship program run by the Ecuadorian government). He knows how the system works and, more importantly, how it's supposed to work.

Many times, the public defenders—required to represent all indigent defendants in the system and even non-indigent defendants who fail to hire their own attorneys—are those most familiar with the adversarial system. They've learned cross-examination from veteran criminal attorneys from the United States and other countries who come to provide training through the American Bar Association's Rule of Law Initiative and other programs. They know when to object to the introduction of evidence and how to formulate a case theory. One afternoon, a group of supervisors who head up units assigned to each phase of the new system gather in an office. They are young, energetic, and largely female. In considering why they became public defenders, they talk about their passion for justice, their desire to protect the most vulnerable members of society, and their love of a good fight. They are the face of the new criminal justice system.

PUBLICIDAD

The great benefit of this transition is what many Ecuadorian lawyers, judges, and politicians refer to as *publicidad*, essentially the opening up of the process to the public. During the Friday morning trial of the accused tree-killer, anyone could walk into the non-descript building that serves as the courthouse, past the guard chatting quietly on his cell phone, hike up the six flights of stairs (the lone elevator is busted), and slip into the seats set up for the audience. The age-old issue of corruption is far from gone. Indeed many lawyers suggest it's very much alive, but the opening of the forum has forced all parties to account, in some measure, for their actions. Prosecutors must charge people publicly. Judges no longer review evidence or announce decisions in the privacy of chambers. Defendants have advocates who are required by the constitution to represent their interests. In fact, the constitution adopted in 2008 is unprecedented in the guarantees promised by the state to the accused. The commitment to due process in the law is clear. At least that's the theory.

The picture on the ground, though, is not nearly as rosy. In contrast to the robustness of the public defender's office, the reputation of the judges and prosecutors, who populate the new system, is somewhat less stellar. While public defenders simply never existed before 2007, judges and prosecutors—largely holdovers from the ancient regime—have had to adjust to new roles that shifted the nature of their power in the system. At this point, there are still no juries in Ecuador and trials are presided over by a three-judge panel.

Prosecutors, who never had a meaningful relationship with the police, except to accept the police paper work and put it neatly into the dossier they prepared for the judge, now have full investigatory responsibilities that involve their cooperation and integration with the police force. Neither side has responded well to this forced friendship. And, judges, once the center of the party, are now left to twiddle their thumbs until prosecutors come to the table with the results of their investigations and their own formulation of the charges.

Judges also haven't escaped the taint of corruption that lingers from the days of the inquisitorial system. Although President Rafael Correa overhauled the justice system when he entered office in 2006, booting a number of judges and installing a host of new judges and administrators, the result was as much an end to old corruption as it was an assurance that the judiciary and the executive would stay closely connected going forward. Indeed, one of the first cases to come through this new network on the civil side, that has won worldwide attention, is the topsy-turvy, never-ending litigation between the Chevron corporation and a group of Indians from the Amazon region of Ecuador. Chevron, which tried for a decade to get the case moved from the United States to Ecuador under *forums non conveniens* grounds, is now slinging mud at the Ecuadorian justice system in foreign and domestic courts around the world, claiming the system is corrupt to its core. These protestations, though, come on the heels of a $19 billion award against Chevron.

SENTENCING REMAINS HEAVY-HANDED, HAVING BEEN ONLY MINIMALLY REFORMED FROM THE ERA OF U.S.-INDUCED DRUG PANICS IN THE 1990S.

Indeed the power and presence of Correa is of huge importance to the future of the transition. The constitution that inaugurated an adversarial criminal justice system was adopted before Correa came to power, during a time when Ecuador saw eight presidents in nine years. Bumper stickers from the last election in Ecuador read, *Ya tenemos Presidente*, or "Already we have a President." The slogan is tremendously popular, and it's not hard to understand the power of a message that basically says—if it ain't broke, don't fix it.

Correa has ruled over Ecuador for seven years during a time of relative stability and rising income equality. He has lowered child labor rates, improved medical care across the board, and focused on educational reform. But he has also been accused of wielding tremendous political influence over every aspect of Ecuadorian life, most recently in a series of high profile cases he has launched against the press in Ecuador. Like the presidents of Venezuela and Bolivia, he's also committed to lessening, not strengthening, U.S. influence in his country. This is a president who has hosted the mother of Julian Assange personally for a sit-down talk, but not the current United States ambassador.

What this means for the transition to an adversarial system in Ecuador remains to be seen. USAID, as well as the U.S. Department of Justice, were early funders and supporters of the transition to an accusatorial model in Ecuador, providing both training and funding for the shift. Washington has began to pull money out of the country as it becomes clearer that

the two nations are not exactly on the same page on a range of issues, including the policing of drug routes that wind through Ecuador. The lack of U.S. funding does not put the entire project at risk. Ecuador is too far along in the transition to turn back now. But it does mean that the commitment to training and building infrastructure in the justice sector will have to come directly from the Ecuadorian government going forward.

And so far, reform of the justice system—criminal or civil—hasn't appeared to be a number one priority for the government. Indeed, while money is flowing in for the building of new courthouses and the installation of fancy video-conference systems, the harder work—from building reliable case tracking systems to creating a new legal culture—is not happening, according to many lawyers.

Moreover, many of the old problems that the new system was designed to alleviate persist. Prison overcrowding is overwhelming because of the prevalence of "preventive detention" for many who are arrested and a lack of proportionality in sentencing for those convicted of crimes. Almost no one receives bail, so an arrest on a serious crime inevitably leads to pre-trial imprisonment. Public defenders describe having to conduct their confidential conversations surrounded by a crush of other prisoners, making it impossible for either side to speak freely about the case. Sentencing remains heavy-handed, having been only minimally reformed from the era of U.S.-induced drug panic in the 1990s, which caused sentences to soar, but little else in the system to change. The minimum sentence for the possession of any quantity of drugs is still 12 years in prison. One public defender says many people sitting in prison today are serving longer stretches for drug crimes than for homicide. Although a new criminal code is winding its way slowly toward adoption, the lack of proportionality in sentencing means that the man facing trial on that foggy Friday morning for cutting down a tree could get a month in prison for one tree and up to three years if there were others cut.

JURY SERVICE IS THE PERFECT DIVERSION OF THIS DESIRE FOR DEMOCRATIC PARTICIPATION FROM THE STREET TO THE COURTOOM.

Only rarely discussed is whether all this energy spent in working toward a new system is worth it—whether a pure adversarial system is really a good thing. The purest adversarial system in the world is in the United States, and that system is plagued by overincarceration, racial disparities from arrest to sentencing, and overly harsh treatment of even petty drug offenses. President Correa understands all of these faults firsthand. His father was arrested in the late 1960s for smuggling a small amount of drugs into the United States and sentenced to five and a half years in an American prison. Left behind was a young boy, who would show tremendous promise despite his circumstances and would one day be president of their nation. Many years later, Correa's father killed himself for unknown reasons, but those years spent locked away in a North American prison for being a common drug mule cannot have improved his frame of mind.

The ultimate question remains whether the adversarial system has helped

to secure legitimate convictions and free innocent defendants. Colombia is often suggested as a country that has succeeded in adopting a dynamic adversarial model. Its commitment to the transition process has been demonstrated through the dedication of meaningful funding to the justice sector and by working closely with the United States. The payoff is a more efficient, trustworthy, and just system of criminal justice, but part of this commitment has also been the ready embrace of plea bargaining. From January 2005 to July 2007, shortly after plea bargaining was introduced in Colombia, there were upwards of 35,000 defendants sentenced after a plea bargain as opposed to 693 who were sentenced after a trial. Plea bargaining is perhaps the greatest perversion of the adversarial system in the United States. It happens behind closed doors and with little or no record of what has occurred between the prosecutor and the defendant and his counsel. Done on a wide scale, it risks preserving some of the most inquisitorial aspects of the former system—a non-oral, non-public process of decision-making–in the countries that have adopted it as the central method for resolving criminal cases. Ultimately, the mere presence of an adversarial system is no guarantee of accountability, transparency, or justice. The benefits come from understanding and promoting the fundamental principles behind the accusatorial model that may bring a country like Ecuador closer to a more transparent and less corrupt criminal justice system.

One possible way to achieve this is to institute jury trials. Juries are one of the clearest distinguishing features of an adversarial system. A distaste for citizen jury service was at the core of early arguments in Latin America against adopting an adversarial model. As Maximo Langer, a leading scholar on adversarial transitions in Latin America, has noted, the early 19th century was a time of debate over how to reform criminal procedure in the region. Many Latin American nations toyed with the idea of moving toward an adversarial system or a mixed system containing pieces of both the accusatorial and inquisitorial models. Ultimately, though, Latin American elites "rejected [adversarial structures] because they deeply distrusted and disliked the jury as well as oral and public trials, believing their populations were not ready for them."

The lack of juries seems a relic of this elitism. Ecuadorians have always had a passion for civic participation, although it has often come in the form of street protest (hence the eight presidents in almost as many years). Many claim that Correa's government has put the lid on that spirit of protest with threats of imprisonment or civil suits. Whether or not that's the case, it seems that jury service is the perfect diversion of this desire for democratic participation from the street to the courtroom. Jury duty connects citizens to the process of justice. Connection and participation give citizens a stake in their democracy, and this is true of nothing so much as a compulsory jury system. In a country where people have long believed that justice falls—unfairly—only on those in ponchos, putting indigenous men and women, as well as Ecuadorians of all backgrounds, on juries is a way to renew faith and engagement with the system. It's true, of course, that juries are an administrative nightmare to assemble and regulate. Just take a look at the overflowing jury room in the courthouse of any major American city. And in Ecuador and elsewhere in Latin America, they are certainly open to corruption, even more so

than the other players in the system, because they deliberate privately and don't have to answer to anyone about the decision they reach. But these reasons are not sufficient to give up on the idea. With some measure of wealth flowing in from oil and a new sense of stability, Ecuador is better prepared than ever before to experiment with jury service.

Juries, however, don't mean much if cases don't get to trial. One of the greatest setbacks to the adversarial process in the United States is that, by most estimates, fewer than five percent of cases actually end up at trial. While fewer trials means more efficiency, it also means that almost no one in the system is exercising the right to a trial by his or her peers. Concerns about efficiency in Ecuador are very real, but at this point there should be trials and lots of them. Public, oral trials are the heart of the system, and they should keep pumping throughout the country. One way to ensure this is to make certain that prosecutors and public defenders are equally funded and well-matched, which Ecuador seems to be accomplishing. A good fight between two worthy adversaries is what makes a trial work.

Another way to make sure trials happen is to lighten the burden on the system overall. This can be achieved by the instituting of bail to avoid having people sitting in jail while their cases are being litigated. People in jail don't want trials, they want out. The more defendants get the opportunity to participate in their defense—outside the walls of a cell—the more likely they will go to trial. But sentencing and prisons must also be reformed for the system to work. Even if everything works as it should from arrest through trial, if sentencing remains totally disproportionate and jails are the subject of human rights reports, the system has failed and the presence of trials will be overshadowed by the presence of jails filled with people in for minor charges.

Despite the many questions swirling around this transition, most with a stake in the process seem genuinely committed. Diego Zalamea is at the offices of the Attorney General of Ecuador to help the state prosecutor transition to a modernized system of case tracking. The office is located in the former U.S. embassy building, a grayish structure with the aura of a distant era. The building is surrounded by cement vines that twist and turn like ivy across the outer walls. On the inside, lawyers march back and forth between offices and a pleasant cafeteria in the lobby. Since he's new to the office, there is nothing on Zalamea's walls, no photos on his desk, no computer, not even a notepad. But he expresses the same passion for his work as was apparent at the office of his adversary, the public defender. As to whether Ecuador will transition fully and successfully to an adversarial system at some point, he nods his head enthusiastically. His singsong accent gives away his origins in the slow-paced and spectacularly beautiful city of Cuenca, located in the south of Ecuador. He says cheerfully that he has no doubt that Ecuador will someday have a successful and fully realized adversarial system. What we are doing here "is like building a cathedral," he says. "We are building it for our great-grandchildren." ●