

5. RULE OF LAW SUPPORT BY THE KONRAD ADENAUER FOUNDATION

A legal system consisting of efficient and constitutional principles is a core element of each democratic system. Therefore the Konrad Adenauer Foundation that carries out programmes realizing the aim of supporting democracy globally does not only work on a state level but also carries out international sector programmes that support the rule of law (the so called rule of law programmes).

In this respect the rule of law programme in Latin America, which is carried out by two specially employed representatives of the KAF in Montevideo and Mexico City, functions as a kind of 'pioneer model'. Fifteen years after its foundation in the year 1991, it has become an innovative trademark of the international work of the Konrad Adenauer Foundation. Following this example – each consisting of an own, unique office structure as well as a special programme manager – the rule of law programme for the Sub-Saharan Africa region was launched in Nairobi in January 2006. Further programmes were established in different regions throughout the year. The rule of law programme covering the region of South Eastern Europe opened headquarters in Bucharest in April 2006. The head office of the rule of law programme for East- and Southeast Asia with location in Singapore started operating in July 2006.

Principal goals of rule of law support

The principle goal of the Konrad Adenauer Foundation's rule of law programme is to contribute towards a development and a consolidation of a legal system that fulfils functional and constitutional principles. Special focus is placed on the issue of developing the participant's awareness in this respect. Furthermore, the central point of the application of law lies in promoting and accelerating the conversion of structures that already exist on a theoretical level (constitution, laws) or in eliminating deficits. In view of the effects the world's economic globalization has had on all areas of life up to now and with the

increase of the internationalization of rights, the rule of law programmes place a special focus on international legal aspects.

While realizing each specific project the Konrad Adenauer Foundation automatically adapts its work to each world region and to each individual country. Still, four *subordinate aims* are to be mentioned here that are all part of the Konrad Adenauer Foundation's rule of law programmes. They are the following:

- *Guarantee of human rights:*

To reach the aim – to guarantee that human rights are being promoted – national and international systems of protection have to be strengthened and the use of guaranteed rights has to be secured. This includes embedding human rights in constitutions and educating the participants about the obligations that are undertaken on an international level, for example within the framework of UN pacts on political and civil rights as well as on economic, social and cultural rights. The evolving international criminal law is increasingly taken into consideration by the Foundation's work too.

- *Guaranteeing the separation of powers with special focus on an independent judiciary:*

The establishment and ongoing securing of a stable and clear separation of power, the strengthening of an independent and productive judiciary with judges acting according to ethical principles, the strengthening of the parliament's influence, the binding of the public authority to law and constitution as well as the establishment and strengthening of independent supervisory bodies (for example audit divisions) and institutions protecting human rights and civilian rights (for example human rights commissions and ombudsmen) are topics worth promoting especially within all the regions of the world mentioned above. Concerning the strengthening of the judiciary, a special interest to establish independent constitutional courts to guarantee the constitutional binding of the state authorities has been taken.

- *Establishment of transparency, efficiency and active involvement of citizens in judicial proceedings:*

To secure rule of law principles the KAF is also involved below the level of constitutional law. In that respect a lot of work is dedicated to procedural law because it is closely connected to fundamental rights in a lot of respects. The Konrad Adenauer Foundation supports easy access to the administration of justice,

summary proceedings, and an increase in efficiency of courts and administrations for citizens without any obstacles.

Furthermore, the Konrad Adenauer Foundation is dedicated to support and promote reforms of criminal proceedings because criminal proceedings are considered to be a sensitive 'seismograph' of rule of law.

- *Support of regional integration efforts:*

Considering the increase of globalization of international business relations, a special effort is contributed to the support of integration endeavours. A lot of developing countries are only going to have a real chance to have a lasting economic and social development, if they are able to strengthen the existing economic and political integration process within the country. This could enable them to be included in interregional cooperation systems - for example with the European Union - as an equal partner. The KAF rule of law programme contribute to an awareness of a political 'conscience' of people, as well as to the legal institutionalization of the integration process within the different regions throughout the world. An additional aim of the foundation's work is to strengthen existing institutions, or bodies within the integration alliances, whose orientation often tends to resemble the European Union model. The development towards an independent integration law of supranational character as well as the question of its realization on a national level is another issue of special importance.

To reach their aims, the rule of law programmes work with national partners (such as constitutional courts, judge academies, departments of public prosecution) and independent local non-governmental partners (especially legally oriented non-governmental organizations). Target groups of the rule of law programmes are primarily people working with legal issues such as judges, lawyers, prosecutors and defence counsels, personnel of the administration of justice, college and university teachers (working in the faculty of law and in independent scientific institutes), and law students, politicians concerned with legal matters, Members of Parliament, representatives (especially from the ministry of justice, ministry of the interior, and foreign ministry), officials of the different integration leagues as well as the civil society.

Because the Konrad Adenauer Foundation is a political foundation the rules of law programmes deal exclusively with legal aspects which have a political relevance. In contrast, the rules of law programmes usually do *not* take action concerning legal areas of regulation without

an explicit “political element”, such as the substantive civil law, criminal law and administrative law.

The rule of law programme in Latin America

At the beginning of the 90's of the last century, ambitious legal reforms were introduced in almost all of Latin America's countries. The process is still in progress today, as such fundamental legal reforms are incredibly complex social and political processes which include a large number of participants who usually have to consider and include very diverse interests. Especially within the area of law establishment in Latin America a remarkable progress has been achieved. In comparison, most of the other countries are confronted with considerable problems converting the new law into action. This is the case in view of the establishment or strengthening of the jurisdiction of the constitutional courts as well as with regard to the appointment procedures for judges with the aim of achieving a greater political independence, the protection of human and civil rights established by human rights commissions or ombudsmen, the modernization of the administration of justice and the fundamental reforms of the criminal law as well as the criminal proceedings law. This situation is mirrored in the main subjects of the rule of law programme: constitutional law, protection of human rights, procedural law, and integration law.

In that respect the rule of law programme – as an example – has been organising conferences for Latin American constitutional judges for thirteen years. Above all, they serve to stabilize the – for the most part – fairly new constitutional jurisdiction and they are each respectively dedicated to a current topic that is related to constitutional law, such as the constitutional procedural law, or to the role of the constitutional judges, for example. The venue of the conference in 2006 was Mexico, the previous twelve meetings since 1993 took place in: Guatemala, Columbia, Cost Rica, Paraguay, Nicaragua, Argentina, El Salvador, the European Union, Brazil, Chile, the Dominican Republic and Uruguay. Each time the event took place in co-operation with the constitutional court, or the Supreme Court of Justice of the hosting country. The delegations of the constitutional courts, or the Supreme Courts of Justice from more or less all the Latin American countries present their point of view concerning the specific topic of the conference, discuss it with fellow colleagues from the different countries, present current jurisdiction of their court, and exchange experiences.

Concerning the protection of human rights in Latin America, the Konrad Adenauer Foundation promotes the ratification or implementation of the Rome Statute among other things. In that respect the foundation primarily focuses on the question, if and to what extent an adaptation of the national criminal law to the

substantive penal provision of the Rome Statute is necessary or at least useful. Germany plays a certain model role within this discussion as it is one of the only countries worldwide that decided on a so called modified implementation. It also developed an autonomous Code of Crimes against International Law (*Völkerstrafgesetzbuch*, VStGB). These – among other things – should enable Germany to prosecute crimes autonomously, that have been committed within the jurisdiction of the International Criminal Court (ICC).

In this respect the “Latin American International Criminal Court Group of the KAF” (*Grupo de Estudios de la Fundación Konrad Adenauer sobre la Corte Penal Internacional*) should be mentioned. It carries out an international conference annually concerning the latest development of the implementation of the Rome statute in the different Latin American countries, as well as the current aspects of international criminal law. The foundation’s ICC-group is the only group of experts within Latin America working on a scientific level that endeavours to implement the Rome statute on a national level that is scientifically sound. Its members have constant contact with one another and by now their opinion as experts has been requested not only in their respective home countries but also on an international level. A total of thirteen countries are represented in the study group, by name: ten partaking countries from the southern part of the rule of law programme (Argentina, Bolivia, Brazil, Chile, Ecuador, Columbia, Paraguay, Peru, Uruguay and Venezuela) as well as Mexico, Costa Rica and El Salvador from the northern part.

Another important example concerning the area of the protection of human rights are further intensive educational seminars that the rule of law programme organizes within the whole region of the Andes, in co-operation with the renowned Peruvian non-governmental organization *Comisión Andina de Juristas* (CAJ). They address human rights experts and teachers from the Andes region who have each been chosen by public invitation of tenders.

Important consultation and training work has been achieved by the rule of law programme in different Latin American countries concerning the area of criminal proceedings as well. It is generally perceived to be a sensitive “seismograph” indicating the levels of development of the rule of law. In Latin America a tendency towards the replacement of the traditionally written trials dating from the colonial “inquisition process” by more constitutional oral kinds of trials could be noted since the 80’s. The marked position of power of judges was diminished, and as a countermove the legal position of the accused improved. Up to now the latter had overall only been an *object* in a law suit against him, whereas now he is more and more seen as a law suit *subject*, whom certain fundamental rights were guaranteed. This

process was supported and still is supported by the Konrad Adenauer Foundation by employing experts, special training and publications.

Generally speaking in the rule of law programme in Latin America the undertaking of educational measure as well as the regular publishing of specialist literatures in legal matters play an important role. In the location Montevideo, alone more than 60 books about legal matters of the issues mentioned above have been produced since the beginning of the new millennium. In this respect special mention should on the one hand be given to the year book of constitutional law *Anuario de Derecho Constitucional Latinoamericano*, which has been published for the twelfth time in 2006 and which contains more than 60 professional articles from leading constitutional law experts from the whole continent on almost 1500 pages. On the other hand, it is important to stress that the most important rulings of fundamental rights that have been passed by the German Federal Constitutional Court since its founding, has been made systematically accessible in extensive collections of rulings in Spanish as well as in Portuguese to the Latin American reader for the first time.

Against the background of recent political unrests within the region of the Andes, especially in Bolivia and Ecuador, the KAF increasingly tries to integrate indigenous lawyers into their rule of law programme work. Thus, at the XII. KAF meeting of the judges of the constitutional courts, it was the first time that highly qualified indigenous lawyers were given the opportunity to present their matters of concern and their point of view before the judicial elite of the Latin American continent for a whole morning, and were then able to discuss these. To this end, the central issue of this conference, titled “the guaranteed constitutional rights in criminal proceedings”, offered an ideal embedding of these matters. It is often the seemingly archaic customs of the indigenous peoples concerning their criminal prosecution which are taken up by the Latin American media, creating shock amongst the non-indigenous, “educated” population (lynch-law, etc.).

The rule of law programme in Sub-Saharan Africa

The legal systems of the African countries are influenced by their colonial past to a large degree. In the former British colonies Anglo-Saxon *common law* is the foundation of the legal systems. In contrast, the former French, Portuguese and Belgian colonies are dominated by Continental European (positive) law. These legal systems that were at first imposed on the Africans were unknown to them – and they still are to vast parts of the population. Only the educated elites know how to interpret these laws. And they use their knowledge for their own benefit far too often.

Then during the Cold War many African countries entered the sphere of influence of the Soviet Union. In consequence they usually introduced a communist or socialist system (also legal system). Here once again, a foreign system was superimposed on an already existing alien colonial system. It brought about the nationalization of property – the community lost its usufruct as well as its power of appointment in exchange for a state that in their eyes was anonymous and not legitimate. To this day in many African countries the effects of this development have either not or only partly been eliminated.

Apart from the two mentioned aspects, a religious component plays an important role for the development of a constitutional state in Africa as well. Between the equator and the Sahara desert the Islam is widespread and continues to gain ground. This also means an advance of the Islamic law, the Sharia. Although the Islam in Africa is not as militant as for example in the Arabic region, developments in Nigeria or Sudan do show that there are tendencies to align governmental actions to Islamic law. In Islamic shaped or influenced legal systems effects – mainly in criminal law as well as civil law – show that they are incompatible with our “Western” idea of a constitutional state and human rights.

The interaction of these factors impedes a development towards constitutional orders in almost all African countries. Constitutional body of thought is unfamiliar to major parts of the population. It is neither a natural part of the population’s way of thinking, nor theme of government action. The systems that were imposed by the former colonial powers or socialism still encounter ignorance, indifference and disapproval to a very large degree.

As a result, in the understanding of a majority of Africans – especially the political and economic elite – law has no value per se. Laws are regarded as an instrument to push through ones own interests and demands or to avert interests and demands of others. Above all, however, assertion of power is the main goal. Consequently, constitutional order is hardly regarded as an essential part and prerequisite of or for democracy and development.

The lack of rule of law is one of the most important causes for the *altogether* unsatisfactory development in Africa. Sustainable development, peace and security are inconceivable without stable democracies – and stable democracies are not possible without rule of law. Corruption, maladministration, nepotism and abuse of power thrive without a functioning constitutional state. This leads to violation of human rights and poverty. And this in turn provides fertile soil for violence and terrorism.

In spite of the described initial situation it can be observed that the issue of rule of law is slowly gaining influence in Africa as well. The so-called “third democratization wave” has reached Africa in the meantime. This can be seen not least by the new objectives and programmes of the African Union. The election of the 11 judges of the African Court of Justice for Human Rights by the African Union in January 2006 is an indicator for this as well.

This is where the rule of law programme of the KAF in Africa takes effect. In its initial phase it has dedicated itself to the goal of identifying those forces, groups and organizations, that are devoted to the strengthening of the constitutional state – or that at least can be motivated to do so. In cooperation with these, a concept of measures is supposed to be worked out that promotes the strengthening of constitutional states of African countries. In all probability the issue of separation of powers will play a crucial role here. Because almost everywhere in Africa the executive is the dominant power, the legislature and judiciary mostly only play a sub-ordinate role.

The rule of law programme in Southeastern Europe

The rule of law programme for South Eastern Europe includes – next to Bulgaria and Romania – the Western Balkan countries of Bosnia and Herzegovina, Croatia, Macedonia, Serbia and Montenegro, including the province of Kosovo. In spite of all their differences these countries show a common ground concerning the special requirements, problems and potentials, that are vital for building up a rule of law programme in the region.

These countries first of all have in common, that they are in a continuous process of transformation from an authoritarian one-party state to a democratic state under the rule of law. The post-communist system transformation is considerably influenced and accelerated by the efforts of countries in South Eastern Europe to meet the criteria – the so-called Copenhagen Criteria – for an admission into the European Union. Parts of these “political” membership criteria are institutional stability, democratic and constitutional order, preservation of human rights as well as respect for and protection of minorities. The “Acquis Criterion” states that countries are obliged to adopt the *acquis communautaire* (roughly 80.000 pages of legal texts) as part of their domestic legislation.

Another common characteristic is that the population’s distrust of state authorities and institutions including the judiciary is still profound. Although there has been a more or less extensive change of elite in different institutional sectors in the whole of South Eastern Europe after the end of the communist systems, alternative “counter-elites”

rarely were able to rise. Moreover, those functionaries, technocrats and intellectuals, who had belonged to the upper or middle hierarchic level in the old system, moved up into those elite positions. These elite positions had either been left vacant after the departure of the old elite or been newly created in the process of institutional change. An actual change of elite with a far-reaching change in outlook has not taken place, at least not extensively. The population of Romania and Bulgaria currently hope that the national – often corrupt – elite of these countries will be controlled by the European Union.

Against this background the rule of law programme in South Eastern Europe contributes first of all to the establishment of modern institutions, in which the institutional and material chief elements of a democratic constitutional state are embedded. The countries of the rule of law programme for South Eastern Europe differ as far as the respective levels of development are concerned: Bulgaria and Romania already established new constitutions in 1991, shortly after the collapse of the communist regimes. They changed them with regard to the EU-membership inter alia in the fields that concern the judiciary. In contrast, the constitution that is in force in Serbia and Montenegro, still dates from the term of office of Slobodan Milošević. The issue of constitutional reform is a very current matter in Bosnia Herzegovina as well. It is necessary because even though institutions were established according to the Dayton Agreement – which are constitutive for a constitutional state – the agreement, however, does not grant the constitutional and administrative frame that the country needs in order to achieve the required progress in the EU integration process. The main goal of a constitutional reform should be to strengthen the national institutions and the state and to enable them to function, furthermore to guarantee the protection of the human rights of all citizens of Bosnia and Herzegovina regardless of their ethnic affiliation by constitutional law. The KAF rule of law programme dedicates itself to this issue intensively.

One of the central tasks of the constitutional state promotion in the region is the support of the countries in their fight against corruption and organized crime including the trafficking of human beings (especially of women and children), which is closely linked to corruption. The latter is a typical problem of post-socialist transformation that concerns all countries of the rule of law programme. There is a direct connection between corruption and promotion of rule of law: on the one hand corruption in the legal system and the administration of justice undermines the trust of the population in the constitutional state; on the other hand the legal and judicial system is a vital instrument to control corruption effectively.

There is also a need for reform in South Eastern Europe concerning the respect for and the protection of minorities. All countries, in which the rule of law programme is active, are distinguished by the fact that they are not homogeneous nations in an ethnic sense: in each country of the region one or more ethnic minority groups live. The minority problem has recently gained special relevance in connection with the negotiations on the future status of the Kosovo region. The treatment – according to international standards – of the Serbian minority in Kosovo as well as the Albanian minority in the south of Serbia, is one of the central issues of the status negotiations.

Deficiencies in the field of protection of minorities exist in the area where the translation into action of legal norms for the protection of ethnic minorities (national and international) is concerned. The gap between legal norm and legal reality is wide. Especially the – internationally valid – prohibition of discrimination is not carried out effectively. It is flouted first and foremost regarding the Roma that live in the region. And this is the case, although the treatment of the Roma according to the norms of the international protection of minorities is a prerequisite for the EU membership. The countries of this region partly lack a constitutionally guaranteed protection of minorities as well. The Bulgarian constitution for example does not acknowledge national minorities.

A fundamental part of the legal transformation process in the countries of the region eventually was and is the reform of the criminal law and criminal proceedings law, which are essential for the legal reappraisal of the crimes that were committed during the communist dictatorships. The criminal law and the criminal proceedings law reflect the development of the rule of law of a country as well as its legal culture. They have undergone fundamental changes in the past years, especially within the South Eastern European countries. The KAF rule of law programme offers educational seminars for those people who are involved in legal matters so that the new regulations can be applied better in the future.

The rule of law programme in East and Southeast Asia

The heterogeneity of the Asian countries is especially apparent in the arrangement of their systems of governments and systems of law. Each respective conception of legal thinking was influenced by a wide range of different factors such as culture, religion, colonial influence, etc. However, rule of law in Asia is not conceived as a comprehensive system of a democratic social system as such. The constitutional state is rather understood as a “rule by law” instead of “rule of law”. The concept rather serves as means to an end, preserving the close

interconnection of politics and economy and thereby the privileges of small parts of the upper class and the traditional structure of power.

Corruption and nepotism, arbitrariness, inefficiency and a lack of transparency shape the picture of an all-powerful bureaucracy in most of the Asian countries. Changes are only slowly permitted and within close boundaries as far as they are considered to be economically necessary. In practice, fundamental reform resolutions are frequently diluted or even counteracted.

The improvement of the economic situation, especially in the so-called East Asian Tigers of East and South East Asia have the effect, however, that further reaching reforms are increasingly demanded by the civil society. The created freedom concerning trade in private industry increasingly calls for an adjustment of the bureaucratic structures to the changed circumstances. It can be stated that for most Asian countries the study of the concept of the rule of law has increased considerably. The relationship between citizen and state is being discussed, and the political leaderships are looking for practicable formulas of how they can respond to constitutional demands from their own country as well as from other parts of the world.

This is where the work of the newly founded KAF rule of law programme sets in. It aims at the development and the consolidation of constitutional structures and institutions as well as a strengthening of the understanding concerning the importance and the function of a constitutional state. First of all, knowledgeable actors from the field of law and politics should be determined in the various countries, with whom an inventory regarding the constitutional organization in the respective constitutional systems has to be carried out. Special attention is to be placed on the principle of constitutionalism as well as on the securing of institutional guarantees (loyalty to the constitution by the government organs, binding of the executive to the law and the constitution). The idea of a constitutional court functioning as a "custodian of the constitution" shall be further promoted, so that a support of such mechanisms can be established even in countries that still reject it or that are at least sceptical about it. This shall be accomplished by continuous subject-specific dialogue.

Furthermore the introduction or the consolidation of specific administrative jurisdiction as important constitutional institution (protective function of citizen from bureaucratic arbitrariness), are to be promoted. By these, the citizen's chances of verifying administrative decisions of appellate procedures or previous procedures of complaint within the administration are supposed to improve (relation: citizens to the state).

Within the framework of a dialogue about values, the ideas of a constitutional state or the rule of law against the background of different ethical traditions and traditions of law are to be discussed in addition and in public. This can be achieved by employing prominent participants, as well as by appropriate representations in the media.

Furthermore, the Asian rule of law programme promotes the securing and heeding of the principle of separation of powers, especially with regards to the support of an independent judiciary. For this purpose a dialogue is to be initiated among decision-makers of the legislature, executive and judiciary of the countries of each region concerned, about their delimitation of their respective competences within the state structure.

In addition, a contribution to increase the quality of education of judges is to be made with special regard to constitutional content, especially concerning the separation of power and independent judicial occupation.

Institutions that serve to assert civil rights and the compliance of constitutional proceedings (for example ombudsmen or also boards of complaint and suchlike) are to be strengthened or set up, so far as they do not already exist.

With the aim of the promotion of a good government leadership and to fight corruption, the responsible government agencies (for example the ministry of the interior, regional and municipal administrations or parliamentary committees, etc.) are to give advisory support concerning the introduction and/or the further development of decentralized constitutional structures. Here, too, it depends on a balanced system of mutual control that is embedded in the constitution and in the law (municipal supervision, controlled autonomy to secure national interest). The aim is to enact the principle of municipal self-government in the constitutional structures (constitutions) and that the compliance thereof is supervised by an independent authority (court or parliamentary organ).

The introduction or improvement of transparent principles concerning administrative proceedings (the right to obtain information, the right to be heard and the right of codetermination) are to be supported in order to expand the democratic-constitutional control and the possibility of the citizen's participation regarding important decisions on a municipal level.

The possibility to exchange information and experiences should be given to organizations that fight for the adherence of the human rights in order to support their work on a national level and to strengthen each respective institution. Content and legal binding of international

human rights pacts are often not adequately known within the different spheres in the judiciary system, the police, and other government authorities. They are denied from the respective management. Through dialogue these interrelations are to be stressed with the aim of contributing to a stronger respect of human rights.

Apart from many other aims, regional and sub-regional alliances concerning the structuring of the integration right are to be supported. First, a consciousness on a political level is to be established concerning the advantages of regional alliances and the necessity of stabile integration institutions with their own area of authority. The second step strives to further develop the initial stages concerning the foundation of the integration rights. In the course of this, especially the idea of legal conciliation proceedings within those alliances is to be promoted.

With its work the rule of law programme in Asia takes up the years of preliminary work that has already been achieved through the international KAF offices, and can thereby profit from the foundation's good reputation within the area of rule of law. The connection of these approaches on a national level towards a regional project, and the continuous cultivation of the emerging networks ensure the lasting effect that is desired and a greater public awareness. Thereby, the construction or the securing of democratic structures that are prerequisites of a lasting economic and social development, are supported in Asia.

Jan Woischnik

Jan Woischnik is a lawyer and was representative of KAF to Uruguay and director of the KAF rule of law programme in South America from 2001 to 2006. He is now coordinator of the worldwide rule of law programmes in KAF's International Cooperation Department in Berlin.