4. ANALYSIS AND TRENDS

Constitution

The Constitution between Fiction and Reality.

Actually, everyone should be gratified to see that the constitutions of all the countries investigated guarantee the fundamental and civil rights laid down in the United Nations Human Rights Charter. Unfortunately, however, a gap yawns in most countries between constitutional fiction, i.e. the written text, and constitutional reality. In most cases, this is due not to any defects in the constitution but to the wanton infringement of civil rights by the executive branch. Particularly African countries, such as Zimbabwe or Angola, set negative examples in this regard. Furthermore, fundamental rights are not necessarily inalienable everywhere. In Vietnam, fundamental rights are counterbalanced by fundamental duties. Nonperformance of fundamental duties may entail the loss of fundamental rights. On the other hand, there are countries such as Brazil or Colombia where the constitution expressly forbids any restriction or suspension of all or some fundamental rights at any time, even in a state of emergency.

The fact that the office of ombudsman has been institutionalised in most of the countries investigated is a gratifying trend. Even though the duties of an ombudsman differ from state to state, they generally include guarding against infringements of fundamental and civil rights as well as documenting or prosecuting arbitrary acts. Unfortunately, however, it must be said that many ombudsmen lack the legal means required to guarantee the protection of fundamental rights effectively.

As can be clearly seen from the trends that emerge from the section on 'criminal-law administration', all the countries investigated are struggling with police violence. They merely differ in the severity, frequency, and prosecution of such outrages. Furthermore, the conditions prevailing in the prisons of the countries investigated often offend against the elementary demands of human dignity. However, we must emphasise in this context that the last-named phenomenon is mainly caused by poverty. The same holds true for the principle of equality before the law. A positive aspect that should be named first is that discrimination is not condoned by the constitution in any of the

countries investigated. Only state officials and politicians enjoy the usual privileges laid down in indemnity and immunity laws. Once again, however, reality presents a different picture. In the overwhelming majority of cases, the KAF's observers complained that criminal offences allegedly committed by members of party, political, or administrative elites were prosecuted with extreme sluggishness and mostly without result. Corruption is punished only rarely, as the chapter under the same heading shows. At the same time, a wide gap yawns between rich and poor in both criminal and civil jurisdiction. There is no country among those investigated where the chances of upper and lower-class members in court are the same. While this also happens only too often in the so-called 'developed world', discrimination in court is much more striking in the developing and emerging countries investigated, showing up a marked weakness in the rule of law.

This underlines the key argument of this section: the more prosperous a country or a region is,[1] the more will civil rights be respected. This being so, poverty is a typical cause of defects in the rule of law: it leads directly to a weak state which, in turn, leads as directly to defects in the rule of law. The only exception to this rule may be Zimbabwe where, although the country is one of the most prosperous in Africa, the rule of law suffers from the gravest defects anywhere.

The same problem may be generalised with regard to the issue of equality before the law: those countries where the poverty gradient is steepest encounter the gravest problems in ensuring the equality of their citizens before the law. It is true that many of the countries investigated, particularly those in South America, attempt to support the socially weak through positive discrimination or legal assistance, but these attempts fail in most cases because of lack of funds, corruption, or the citizens' lack of knowledge about their own rights.

Another reason why the rule of law is not implemented in some countries is the poverty-related weakness of the government machine. If courts exist only in urban centres, a system of jurisdiction that is remote from the state is bound to establish itself sooner or later in the rural areas, or criminal prosecution and jurisdiction may even disappear altogether. The problem is, then, how official judiciary should be practiced in rural areas without courts, without judges, without lawyers and without prosecutors? "Hence, minor offences in many rural areas continue to be handled by local chiefs and/or other

[1] One of the empirical standards that might be used in this context is the United Nations Human Development Index.

elderly people".[2] Also the official judiciary is often more than distorted by local official authorities due to the lack of judicial officers.

This explains yet another phenomenon, that of parallel jurisdiction, which was observed in practically all the cases investigated. Parallel jurisdiction may fall into any of three categories: first, it may serve to protect minorities. This category includes those cases where indigenous minorities, such as the Sinti or Roma in Eastern Europe, the *Indigenas* in South America, or different ethnic groups in African countries are permitted to administer their traditional laws. Because of their cultural background, these groups frequently lack access to or understanding for the official legal system, or else they approach it with deep distrust. Since minorities are often inclined in such cases to 'settle matters among themselves', the state attempts to channel such behaviour to a greater or lesser extent while strengthening the minority's trustfulness and loyalty towards it at the same time. Thus, the Roma minorities in Bulgaria and Romania have been permitted to settle civil-law disputes among themselves before their traditional *'meshere'* courts. In Vietnam, the state has been endeavouring for some ten years to strengthen rural village communities with their own traditional rules. Suppressed in previous decades, these complex social legal systems now serve increasingly to settle conflicts at the local level.

Second, attempts are made to mitigate existing conflicts between minorities, a case in point being the toleration of the Sharia law in some African and Asian countries. By partially institutionalising Islamic law, these countries attempt to forestall more far-reaching demands by Muslim minorities. In most of the countries investigated, the government has restricted the application of the Sharia to civil-law cases. In the Muslim-dominated regions of the Philippines, for example, civil courts have been set up where Islamic law is administered. These courts are fully integrated in the Philippine judiciary system, including the right to appeal to the Supreme Court. In Senegal, tribal and Islamic law are gaining ground next to official jurisdiction in civil cases while the state is unable – or unwilling – to do anything about this development.

Conversely, attempts by Muslim minorities to extend the validity of the Sharia to criminal jurisdiction in the Russian republics of the Caucasus as well as in diverse African countries represent one of the most virulent threats to the rule of law as defined in the West. Logically enough, such developments are suppressed in any state where social, economic, and military conditions permit, including Russia, for instance. At the same time, Christian minorities in the

[2] See the *Angola* chapter by Vollrat von Krosigk and Anton Bösl in this volume.

Caucasian region have been increasingly permitted in recent years to administer their own traditional laws, provided they do not run counter to Russian legislation.

As mentioned above, the third cause of parallel jurisdiction lies in the weakness of governmental structures. Next to Latin America, this is to be found mainly in Africa, where the law of the state is being supplanted by traditional tribal or Sharia law in rural areas.

The first category of parallel jurisdiction is encouraged by the state. Governments either attempt, as in the Philippines, to integrate parallel jurisdiction in the official code of law in order to reduce tension, or they wink at such developments. Where the cause of parallel jurisdiction lies in the weakness of governmental institutions, the state may be unable to suppress it effectively, or else the powers-that-be may be glad to see structures forming that relieve the state of some of its most fundamental duties. Thus, while Angola's constitution expressly forbids parallel jurisdiction by tribal courts, which was widespread before the civil war, the chances of a case being heard in an ordinary court actually decrease as the distance to the nearest urban centre increases. Whenever no capital crime has been committed, local authorities assume jurisdiction. To that extent, constitutional provisions are suspended in the reality of Angolan law administration.

Most constitutions prescribe the separation of powers. Exceptions include communist Vietnam, whose constitution emphasises the 'unity of powers', and Morocco, where the separation of powers is not explicitly mentioned in the constitution. In the latter country, however, a functional separation of powers between the legislative and the executive branch has established itself by now. Not being mentioned as such in the constitution, the judicial branch is struggling for independence against both governmental and non-governmental forces. Venezuela, on the other hand, recognises not three but five branches of government. Supplementing the familiar three powers, a *'poder electoral'* is meant to guarantee independent elections while the *'poder ciudadano'* investigates offences against the constitution and looks after 'political education'. It is not yet clear whether these institutions may be regarded as branches of government in constitutional theory. At all events, they resemble the judiciary in that they are not independent but controlled by the executive and legislative arms of government.

Another problem relating to checks and balances is the dominant position accorded to the president in many Latin American and African constitutions. Presidential legislative privileges form the most frequent cause of decay in constitutional structures. Susceptible to interpretation in very generous terms, the president's legislative privileges counteract the separation of powers, weaken the influence

of parliament, and almost nullify any system of checks and balances in extreme cases when combined with corruption in the judiciary and the administration. Presidents frequently decline to take advantage of their dominant position, instead exercising self-restraint to counterbalance constitutional defects. In Senegal and Colombia, for instance, the number of decrees issued without the consent of parliament has been declining markedly in recent years.

Another problem that comes under the same heading is control over the security forces. It is true that most of the countries investigated have placed their armies and police forces under civil control, but this does nothing to mitigate the danger to the rule of law and democracy that emanates from these organs. Once again, the president's role is crucial in this context. Often, presidents or high-ranking government members have their roots in the army, thus strengthening the army's hold on the top levels of the executive. The Marcos regime in the Philippines as well as innumerable dictatorships in Africa bear witness to the gravity of the danger. The only possible conclusion from this is that giving the legislative branch control over the security forces is the most efficient way of domesticating the military.

Legislation

If you do not know the law, you cannot invoke it.
If you do not know your rights, you have none.

Defective infrastructures in rural areas constitute one of the gravest problems in communicating legislative information. While acts of legislation are generally made public in official proclamations (such as gazettes), these official papers are only read by urban populations, if at all.

Another reason for the lack of information about law-making activities in these areas is the literacy rate, which is mostly low. If you cannot read, you will not understand the written text of a law. What is more, not all people in most of these countries have received formal education (in Angola, for example, the current rate is 40 percent). Thus, the lack of fundamental language skills in combination with a defective understanding of laws due to lack of formal education causes widespread ignorance about laws in general and new laws in particular.

Next to literacy, which is often inadequate, the spread and quality of the media play a fundamental role in communication. After all, the spread of information about new laws or amendments not only relies on publications in official gazettes but also depends on dissemination by the mass media. Where daily papers are of low quality or

unmistakably partisan in their judgment of political and legislative processes, the population will necessarily be either underinformed or misinformed, as it is in Zimbabwe, where the media are clearly biased in favour of the president.

Another phenomenon has emerged in Brazil. In this country, but not only there, it is the lack of quality in media coverage which is responsible for the fact that not enough information about legislation is trickling down to the citizen:

> *"It's not a lack of information [Latin American societies] are suffering from, but an excess of distorted information, whose main source has been the picture communication media are disclosing to national and international public opinion day by day. (…) Even more deleterious than causing individual disasters is the bad service rendered not only to the democratic regime, to truth of facts, when personal deficiencies are irresponsibly generalized to the whole political class".*[3]

In this case, therefore, spreading information about legislation is problematical not because citizens lack access to it but because of an over-abundance of bad or meaningless reports, which makes it difficult for existing informative formats to reach the audience in the first place.

Most of the countries investigated are characterised by a low overall level of information. In almost all cases, this was caused by low literacy rates or the relative inaccessibility of information. In some cases, this was compounded by the state influencing media coverage. Moreover, geographical fragmentation often means that there are some regions where information cannot penetrate at all.

Multilingual populations, such as those of Russia or Angola, present communication with yet another problem. Thus, the difficulty of understanding laws is enhanced not only by high illiteracy rates but also by the fact that laws are generally published in only one – the official – language. As minority populations are often largely unable to speak that language, it is nothing less than impossible for them to comply with their constitutional duty to inform themselves about the law of the land: "[…] taking into account the linguistic difficulties of illiteracy, educational deficit and the difficult access to means of communication, the persons affected are more than fifty percent of the total population".[4]

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[3] See the *Brazil* chapter by Martonio Mont' Alverne Barreto Lima in this volume.
[4] See the *Guatemala* chapter by José Arturo Sierra González in this volume.

As far as the certainty of the law is concerned, the countries investigated present a differentiated picture. A positive effect that deserves mention is that the prospect of accession to the EU is an inducement for accession candidates to ensure legal certainty for foreign investors (as in Bulgaria). This, however, relates only to codified law; there are still opportunities to interfere through corruption or political pressure. Thus, the report on Bulgaria states that "There has been definite increase of the attempts on part of individual senior government officials at influencing judges' adjudication in the past five years".[5]

The only way of reaching comprehensive legal certainty is by establishing a definite, enduring legal culture in which legislation is regarded as a good by itself, a service relating to the state as such, rather than a partisan tool serving the particular interests of a government or parliamentary majority. As the Senegalese example shows, major parts of the criminal code may be modified after a change of power to facilitate granting amnesty to political criminals.

It is a fact that constant legal certainty can be ensured only by constant legislation in a process that is guided by ideals, in which lawmakers do not regard the law as a mere pawn to serve their own interests. This is the only way in which the regular change of opposition and government parties, which is natural in any Western democracy, can establish itself as a viable model. If, however, the first thing an opposition party does after assuming power is to change the law to a massive extent to further its own interests, its political opponent will do the same once it is returned to power. This is certainly nothing to do with unbiased lawmaking.

Courts

A Rift between Codified Rights
and the Options Available of Exercising Them.

In almost all the countries investigated in this study, a rift of considerable width gapes between the constitutional guarantee of judicial independence on the one hand and the *de facto* situation of the judiciary on the other. The promise of a fair trial, equal access to jurisdiction, and representation of the rights of every individual in court, given *de iure* generally on the basis of the Hague human-rights convention and the international code of human rights, is *de facto* not kept in all the countries analysed in at least one of the categories investigated.

[5] See the *Bulgaria* chapter by Koutzkova Nelly Petrova in this volume.

Variations in the judicial structures of the 15 countries investigated as well as differences in the options available to governments to influence the decision-making processes in court may be ascribed to differences in the historic and cultural situation as well as to current local conflicts. At the same time, national reports show that issues relating to access to jurisdiction, legal representation in court, a fair trial, and the commensurable severity of crime and punishment all follow the same trend: a citizen's income and social status appear to constitute the most important criteria when it comes to making decisions about access to the law and about equal or privileged treatment in court. Together with the susceptibility of these (mostly transforming) countries to corruption and the fact that judicial personnel and state officials are underpaid, this forms a difficult basis for establishing a democratic constitutional state.

The degree to which governments are motivated to find solutions for these problems differs from country to country. In Romania, for instance, poor people who do not have enough funds to afford an attorney may either represent themselves in court or may be provided by the presiding judge with a legal representative who, however, will normally be overworked and underqualified, and whom they cannot choose themselves. In other countries, such as Angola, this kind of assistance would be unthinkable. And even if – as in Morocco – the state does offer financial aid ('jurisdictional assistance') to support poor citizens, there is at the moment no option but to rate the system as "insufficient and ineffective because of the non indemnification of advocates charged to assess and represent defendants".[6] Once again, therefore, it is the length of a person's purse and his or her social status on which the quality of legal representation in court depends.

However, it is not only the cost of legal representation in court that makes it so difficult for underprivileged people to obtain equal treatment with regard to their access to the judiciary, their chance of being given a fair hearing, and of receiving a sentence that is in proportion to the severity of their crime. Instead, as the examples of Brazil and Venezuela show, persons of lower status are deliberately put at a disadvantage by tactical delays in the pronouncement of sentences and the payment of reimbursements, while persons with a higher income or social status are given preferential treatment. The 'financial stamina' required to survive long-drawn-out proceedings and 'bureaucratic parking loops' is a factor which, in almost all the countries investigated, plays a considerable role where equitable access to a fair representation of interests in court is concerned.

[6] See the *Morocco* chapter by Mhammed Malki in this volume.

It is not only the financial aspect, however, which decides about whether or not a matter can be brought to court. Rather, this factor is aggravated by bad 'judicial infrastructures' in almost all the countries examined. Very often, there is no equitable access to legal representation in court simply because there is no nationwide system of the kind. On top of this, there may not be enough legal staff. Next to these financial and infrastructural aspects, the report on Brazil reveals yet another dimension of discrimination. In this country, the explanatory factors already named above are linked to a persistent racial problem.

In their majority, the countries investigated have bound themselves – mostly in their constitutions – to conform to the international human-rights convention, thus attesting their constitutional and democratic nature. In Palestine, Art. 11-15 of the constitution *de facto* guarantee a 'fair trial'. In the reality of most of the countries investigated, however, such guarantees stand revealed as mere empty shells, while the way in which the principles of constitutionality and fair trial are interpreted often flies in the face of their definition in Western democracies.

Although most countries have created sets of regulations, directives, and evaluation standards to guarantee commensurability between the offence and the penalty, yet the question remains whether these instruments may really assure proportionality. Thus, there is normally no more than one judge to assess and measure the relative severity of the offence and the punishment, a judge who – as mentioned above – often figures in bribes as a second source of income, judging each case as the whim takes him:

> *"The principle of proportionality between the seriousness of the offence and the severity of the punishment is generally respected. The judge adjusts his decision according to the circumstances of the case. But in some cases, this principle is not applied. For example those under oath and recidivists are more heavily punished than others who have committed the same offences".*[7]

What is more, the case of Romania, which is representative for most of the countries analysed, shows that the range between the maximum and minimum penalties is often very broad, supporting the arbitrary 'selection' of sentences and providing it with outward legitimacy:

> *"Between the maximum and the minimum limits of the penalty, there is a satisfactory spread, so that the defendant should be punished in accordance with the gravity of the offence. In respect of the principle of proportionality between the gravity*

[7] See the *Senegal* chapter by Oumar Wade in this volume.

> *of the offence and the harshness of the penalty, some cases of obvious disproportion have been registered: the penalties for insult, libel or for failure to pay a fine are the same: imprisonment. The principle of proportionality is often infringed when wealthy and with high social status individuals are involved in the case".*[8]

The countries under investigation are still far from reaching the goal of implementing the principles of fair trial, equal access to jurisdiction, and the representation of the personal rights of each individual in court, without any trace of discrimination. As the entire KAF Democracy Report on the rule of law shows, criteria like income, social status, and race preponderate far too much in most of the countries analysed. Partly because of the problems besetting the judiciary in general in most countries, where there is neither a nationwide legal infrastructure nor an adequate supply or payment of competent legal personnel, susceptibility to corruption and arbitrariness is still extreme. In some countries, solutions have been introduced piecemeal, as in Morocco, for example, where the underprivileged are supported financially, or in Angola, where the office of a 'justice ombudsman' elected by parliament has been created

> *"as an independent public body tasked with protecting people's constitutional rights and freedoms and ensuring, by informal means, fair and lawful public administration. The justice ombudsman has the powers to receive complaints from members of the public and to make recommendations to prevent and remedy injustices".*[9]

Nevertheless, there is no reason to assume that the gap between the rule of law, which is embedded either in the constitution or in the legal code of most countries, and the realities of legal practice will close any time soon. What is more, the standards used in Western industrialised nations to assess constitutionality and the judiciary cannot yet be applied to the regions analysed without modification. The standard of constitutional and democratic tradition in all countries concerned is too low for that.

Judicial Independence

The Separation of Powers Undermined
by the Political and Economic Dependence of Judges.

The separation of powers is founded on independence and mutual control between the executive, legislative, and judiciary branches. In

[8] See the *Romania* chapter by Georgeta Voinea in this volume.
[9] See von Krosigk/Bösl in this volume.

most of the cases investigated, however, judicial independence was found to be non-existent or imperfect. As the separation of powers is generally enshrined in the constitution, indirect mechanisms are mainly used to circumvent judicial control and exercise influence. Although even physical violence does occur in some cases, for example in Senegal, it is the exception rather than the rule. A 'popular' method of influencing judges makes use of their employment status: a judge who is so badly off financially as to be barely able to make a living will be more vulnerable to corruption. Where judges are employed for limited periods which can be extended only by political decision-makers, their rulings, in a pinch, will not conflict with the interests of the executive. This is the basis for the criterion of institutional coercion through the appointment and dismissal of judges. In Venezuela, for example, the proclamation of a state of emergency was used specifically to dismiss and/or replace judges who had fallen out of political favour.

By itself, the process by which judges are appointed is not an adequate criterion for assessing the options available for coercion. In most of the countries investigated, the system by which judges are recruited for the highest courts is interlaced: either a parliamentary nomination is followed by a presidential appointment, or judges are appointed by a matrix which gives each branch of government the right to nominate the same number of judges. In this case, political reality leaves quite enough space for influencing the appointment of a judge. Where the parliament proposing the judge is influenced by the head of state (as in Russia), or where all judges are members of the ruling party (as in Vietnam), a matrix that reflects the separation of powers is useless, to put it bluntly.

The method of exerting undue influence that was named most frequently is commenting on judicial decisions in the mass media. In almost all the countries investigated, political actors will not content themselves with making laws or interpreting judicial decisions *ex post* but will communicate their opinion about pending cases even before judgment is pronounced and/or criticise a judge's administration of the law afterwards, going far beyond voicing their displeasure or pleasure with a judgment in the way that is common in Western democracies. Instead, political players often question the normative and legal legitimation of judgments they do not agree with, even suggesting that judges may have been motivated by immoral considerations to arrive at their decision. Damaging the personal reputation of judges purposefully is an efficient method of intimidating them and ensuring their future tractability. Such behaviour patterns reveal a deficit in constitutional culture which relates to one of the non-institutionalised prerequisites of a democratic constitutional state: recognising courts as authorities whose judgment is binding.

Non-governmental influence on jurisdiction – even by physical violence – is to be found mainly in regions where the state has almost no influence. Colombia is a case in point. However, it is inadmissible to conclude from this that such influence recedes automatically in the opposite case – it merely shifts. The most telling example of this is Russia, where non-governmental meddling decreased noticeably after President Putin took up office while indirect governmental coercion increased just as noticeably.

Another aspect is that judges may have no opportunity to interpret the law. Whereas in Germany, for example, the Federal Constitutional Court is clearly invested with rulemaking functions, there are countries where the function of a judge is merely that of an executor.

A positive fact is that in practically all countries, new laws may not be applied retroactively against the accused. Conversely, any changes in the law that favour the accused may be applied in most cases. To be sure, there are examples like the massive expropriation of land in Zimbabwe which show that new laws may leave a great deal of room for injustice without leaving the bounds of codified law.

Criminal Justice

Police Violence as a Security Risk.

In all the countries investigated, brutal and arbitrary behaviour on the part of the police constitutes a serious problem. As this study clearly shows, there is another ill that can be diagnosed in the administration of criminal justice beyond the behaviour of the police: the persecution of those who criticise such arbitrary systems. By systematically controlling the press, and by intimidating critical journalists, reports on cases of arbitrary police violence towards the population can be kept to a minimum. If cases of maltreatment and torture become known nevertheless, the steps taken to prosecute such offences remain mostly obscure to the citizen, so that most proceedings against policemen break down very quickly. This can be observed not only in Africa but also in EU accession countries, such as Romania:

> *"The law in force stipulates that police offences shall be investigated by civil prosecutors. Nevertheless, same cases involving policemen were judged in military courts. Such investigations are heavy and, in most cases, are not followed by trials, because the prosecutors decided non-indictable solutions for grievances on policemen's abuses".*[10]

[10] See Voinea in this volume.

It even appears that in some of the countries investigated, police violence towards marginal groups is accepted to a certain degree in both government and society. In that context, such minorities may be ethnic groups, such as the Sinti and Roma in Bulgaria; groups marginalised for their sexual orientation, such as homosexuals; or religious minorities, the latter being victimised by the police particularly in African and Asian countries. However, it should be noted in this context that police brutality is also frequently condemned in human-rights reports on Germany and many other member states of the European Union. Another point that should be mentioned is that the quality, quantity, and success of official investigations in the countries under examination differ markedly from that of similar proceedings in Western and Central Europe.

Similarly worthy of note are the conditions under which prisoners are kept, which are criticised in all countries. Complaints relate not only to torture and maltreatment by prison employees and members of the police but also to unhygienic and inhuman conditions in overcrowded detention centres. This holds true particularly in Asian countries such as Mongolia, where no articles for personal hygiene are made available to the prisoners. In some South American prisons, the authorities in charge leave the prisoners themselves in partial or complete control of the administration, the consequence being that violent clans rule these prisons on a share basis. As the report states, prisons in Guatemala, for example, are ruled by force alone. There are no government provisions for surviving descendants, spouses, and orphans. This being so, prisoners' families join some criminal gang simply to survive, by which they are frequently employed as drug runners or prostitutes. For these reasons, charities and religious groups have for some decades been operating programmes to assist children and members of families which have fallen victim to violence. Assistance programmes such as those run in Brazil, for instance, are quite successful, but as they receive no financial support from the state, they quickly reach the limits of their care capacity.

In recent years, noteworthy improvements have been taking place in the EU accession countries. Authorities in the countries under examination will investigate any complaint, not wishing to endanger relations with the European countries. Offenders against human rights are now prosecuted and brought to court if proven guilty. One example illustrating this development is the reform of the Bulgarian prison system. In the run-up to the country's accession to the European Council, prison conditions were inspected carefully by, among others, the European Court of Human Rights, and they are still being monitored by the Ministry of Justice and the European Commission. Even suspended sentences now feature in the administration of Bulgarian law. Besides, human-rights infringements

are increasingly made public by prison inmates who successfully insist on their rights.

In most other countries, prison conditions have been worsening in the last five years. Although human rights are embedded in the constitutions of all countries investigated, they evidently do not apply to prisoners. While most Asian countries try to master the problem, the governments of the Latin American countries or Russia turn a blind eye only too often.

The results of the study show that, while there are formal laws and regulations to protect prisoners in some of the countries investigated, these are systematically ignored in most cases. First among the reasons for this is corruption in the government machine, followed by a lack of high-level, independent controlling and sanctioning bodies and a widespread system of nepotism, which enables everyone to cover up for the others' offences. Zimbabwe may serve as an example here: When a suspect appears for the first time before a judge, the latter will inquire formally whether he or she has been maltreated or tortured by the police. If the answer is yes – often corroborated by a show of the injuries sustained – the judge will order the injuries to be examined by a doctor. However, most prisoners are only allowed by the police to see a doctor after their wounds have healed. Alternatively, the doctors themselves may be enmeshed in the system of corruption, or they may be scared by threats into dropping the investigation.

As mentioned before, the media as well as NGOs play an important role in the suppression of torture and executive arbitrariness. Especially in the East European countries investigated, which have been strengthening their political and economic relations with the EU continuously throughout the last few years, the prosecution of police arbitrariness and torture is working better and better, particularly as human-rights infringements are made public by both NGOs and opposition parties.

Corruption in Law Enforcement and the Judiciary

Corruption as Part of Everyday Culture
and a Consequence of Administrative Inefficiency.

Corruption in law enforcement and the judiciary is one of the gravest problems encountered in the implementation of the rule of law. There is no case in this study in which corruption is rated as a negligible obstacle to democratisation and the establishment of constitutional structures. The experts questioned regard corruption either as a 'major phenomenon' (Brazil, Colombia, Mongolia, Morocco, Palestine, Romania, Vietnam) or even as part of everyday life (Angola, Bulgaria,

Guatemala, Russia, Senegal, Zimbabwe, Venezuela). In the countries investigated, there are differences in the degree of corruption between the judicial and law-enforcement authorities on the one hand and judges and jury members on the other. In most countries, neither the prevalence nor the degree of corruption have changed in the course of the last five years. The situation deteriorated in Morocco and Russia (dramatically in the latter case), whereas it improved slightly in Brazil, Guatemala, and Romania. Most of these improvements are due to the closure of legal loopholes, after which it became possible for the first time to prosecute corruption under criminal law. Both the degree and the prevalence of corruption continue stable at a high level.

In almost all national reports, the fact that employees and government officials are underpaid is cited as the reason for the wide spread of corruption in the judiciary. Bribes are regarded as an additional source of income which people budget for, as the report on Morocco emphasises: "The public servant as a human being considers every additional resource as a minimum of revenue without which he can't survive." Highly placed governmental authorities evidently tolerate the general spread of corruption, the impact of which is felt most keenly by the citizens of the countries investigated in everyday matters, such as traffic offences or applications for diverse permits. Bribes are regarded as a 'surtax' to supplement the income of government officials who cannot be paid adequately from the regular budget. However, the factor of poverty alone cannot explain everything. Once again, the example of Morocco shows why this is so: "In the judiciary, corruption can't, in any way, be explained by the level of salaries paid to judges and administrators (…). There are some corrupted judges who are paid at a level that makes them away from financial pressures".[11] Rather, the situation is aggravated by the administrative and the cultural dimension of corruption in the judiciary.

The administrative dimension relates to the inefficiency and intransparency of the judicial administration. Inefficiency greatly facilitates corrupt behaviour, while intransparency practically relieves corrupt officials from any fear of sanctions: "What can be said is that the Judiciary Power has usually been slow, and that absence of a reasonable quick and effective punishment rises up the overall image of the whole Brazilian administration to be corrupt".[12]

The report on Guatemala similarly states that it is administrative inefficiency that opens the floodgates to corruption: "Lack of coordination, information and communication among the various State

[11] See Malki in this volume.
[12] See Mont'Alverne Barreto Lima in this volume.

bodies and institutions in the justice system".[13] Failure to coordinate the actions of governmental authorities, together with an almost total lack of communication among them, gives each government official a large degree of autonomy in his decisions on individual cases, which increases the potential of corruption and, consequently, the officials' susceptibility to it. The intransparency of decision-making processes similarly encourages corrupt behaviour in the judiciary. A major complaint in the reports on Bulgaria, Colombia, Guatemala, Romania, Russia, and Mongolia is the lack of standardisation in the interpretation of laws.

As already pointed out in section on judicial independence, political or financial dependence may induce judges to accommodate the ruling political elite. In everyday matters involving citizens, their discretion is relatively wide in this respect. Although the independence of judges and courts forms one of the pillars of the rule of law, there is always a risk of arbitrariness present wherever there is no common interpretation of the law. Without such an interpretation, decisions made by the judicial administration or the courts will not only lack predictability; the discretion of individual officials or judges will be so wide as to practically invite corruption. What is more, reviewing individual decisions becomes almost impossible because of the large masses of official documents that are commonly produced. Thus, the advantages of corrupt behaviour far outweigh the negligible risk of being brought to book.

Although all countries investigated do have anti-corruption laws threatening penalties that are drastic in some instances, these laws often fail to take effect. Anti-corruption laws are enforced either inadequately or not at all. Judicial administrations have a particular inclination to develop into closed social systems with a marked caste consciousness. Control mechanisms applied to such systems from the outside often meet with ranks closed in collective defence. When you establish control mechanisms within such a system, the problem is that the controllers and the controlled are one and the same person in each case. Citizens who have fallen victim to corruption are confronted by the difficulty of having no governmental institutions to turn to. After all, the authorities in charge of prosecution and those being charged with corruption are identical where the judiciary is concerned. When the worst comes to the worst, the decisions of the courts and judicial authorities will cease to have any normative binding effect. On this point, the report on Bulgaria says:

> *"Any individual citizen who has lost a civil case invariably accuses the court of being corrupt. In criminal cases, victims or*

[13] See Sierra González in this volume.

> *their family always believe that the punishment imposed on the perpetrator of the offence is never sufficient to set off the damage or suffering and their most typical explanation is `corruption ´".*[14]

Thus, the legal system threatens to fail, for lack of legitimacy, in one of its key functions, which is to settle conflicts among citizens finally and peacefully through jurisdiction.

In those countries where the media are allowed a minimum of freedom in reporting, the manipulation of legal proceedings is kept in check by the broadcasting media. This clearly shows that the qualitative dimensions of democracy are interconnected (freedom of opinion and the media, participation, and the rule of law). The example of Russia shows how the decline of free media reporting blunted the development of the rule of law, and how corruption is spreading again, not least in the judicial system.

In part, the arbitrariness and unpredictability of judicial decisions results from the lack of competent staff in the system. Many judicial administrations failed to follow the – sometimes far-ranging – political and/or economic changes in the countries investigated. Here is the example of Vietnam:

> *"Entering the market economy, facing the dark side of the market mechanism, a certain number of officials and party members do not train themselves and follow short-term interests, leading to corruption and violation of law. (…) Personnel management, inspection and education are loose and weak, which could not follow the new situation. The use, plan and appointment of new staff sometimes do not suit their ability and virtue. Officials do not receive regular education and training to improve their professional capacity and political virtue".*[15]

In the young East European democracies of Bulgaria and Romania, the situation was aggravated by the fact that in the '90s, pursuing a career in the judicial system was not attractive to young academics. The resultant lack of competent university graduates coincided with the cronyism that had survived in the recruiting system from the time of the dictatorship. While the reform of the civil-servant payscale introduced in Bulgaria in 1998 served to alleviate the lack of candidates, the appointment of judicial officials and judges became an object of corruption at the same time.

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[14] See Petrova in this volume.
[15] See the *Vietnam* chapter by Dao Tri Úc and Nguyen Nhu Phat in this volume.

To be effective, the suppression of corruption should be based on administrative reforms and sound training for civil servants. Yet the problem of inefficiency and intransparency in the structures of the judicial administration pales in comparison with the cultural dimension of corruption. Where the giving and taking of bribes is ubiquitous in the relations between the citizens and the state, political and normative standards will be lost and/or fail to form in the first place. This is the most important reason why any progress made in the suppression of corruption has remained marginal in the countries investigated. Anti-corruption measures are thwarted by an 'asking-giving mechanism' (Vietnam) which forms part of the everyday culture. The extent to which corruption may be internalised as proper behaviour is demonstrated by the case of Angola, where the bribing of policemen and judicial officials is 'regulated' by a 'welfare-state' convention. To be effective, the suppression of corruption needs an anti-corruption culture that must establish itself in the judicial system in a top-down process. Where corruption is commonplace even among political leaders, there is no fulcrum for anti-corruption measures to exercise their leverage.

Public Administration

Public Administration as a Focus of Intervention for Democratisation and the Rule of Law.

The most important weaknesses that obstruct the establishment of constitutional structures in the countries investigated have been named in the preceding section: lack of effectiveness, transparency, and coordination, accompanied in some public authorities by an excess of red tape. Moreover, most public-service employees are underpaid which, together with other factors, opens the floodgates to corruption. What is more, most employees in public administrations are not qualified adequately and recruited in intransparent ways. In formal terms, most countries specify adequate qualification as the most important criterion for employment by the state. In Palestine, Guatemala, and – not surprising for a communist dictatorship – Vietnam, political and ideological 'reliability' forms a more important criterion. Nevertheless, most jobs in the public service are obtainable only through connections and bribes in the other countries as well. Jobs in public administration are in great demand, not because they are well paid, but because of the chance of increasing your income through corruption.

As a general rule, there is no practical or promising way for citizens in the countries investigated to appeal against administrative acts, although such options may be available in purely formal terms. Even where this is the case, these options are generally never used. Once

again, the main cause for this is widespread corruption or, as in the case of Brazil, the long-windedness and inefficiency of administrative procedures. Added to this is the fact that most citizens are unaware of their own rights *vis-à-vis* the authorities. In Vietnam, citizens may submit petitions which, however, the authorities are in no way obliged to review.

In addition to its impact on the rule of law, the prevalence of inefficiency and corruption in administration also gravely affects democratisation in the countries investigated because it leads to a lack of 'output legitimation', meaning the ability of governmental authorities to solve urgent societal problems. In dictatorships and countries under authoritarian rule, this undermines the legitimacy of the government system and may, at least potentially, trigger a dynamism that moves towards democratisation. In young democracies, on the other hand, the same effect threatens the stability of the state. We must emphasise once again that human-rights infringements, unequal access to the courts, defects in judicial independence and, not least, corruption effectively prevent the development of a political culture that forms the foundation of democratisation, independently of any institutions that may exist.

General Assessment

To summarise, we may say that some general trends may be derived from the various national reports. Probably the most important result of the entire study is that the situation of the rule of law in most of the countries investigated has improved slightly in the last five years. While all countries display more or less grave defects in their progress towards the rule of law, the overall trend is definitely positive. The only countries where the rule of law deteriorated in the last five years are Russia, Venezuela, and Zimbabwe. In the case of Russia, this confirms a negative trend that was observed before in the KAF Democracy Report on the freedom of the media.[16] While laws and constitutions guarantee fundamental rights and the rule of law on paper, they are threatened in real life by bureaucracy on the rampage, corruption, and the authoritarian policies of the executive.

In most cases, the problems encountered by the rule of law are not caused deliberately by political actors. Warnings against two other potential threats to democracy and the rule of law crop up in all reports almost like a red thread: corruption and poverty. Each report cites either one or the other problem as one of the main obstacles to constitutional development.

[16] See: Konrad Adenauer Foundation: *The KAF Democracy Report 2005: Media and Democracy*, Bonn 2005, pp. 231et seq.

Once again, a trend can be identified that is connected to the prosperity gradient. In the more developed countries, the key problem tends to be corruption, while in the less developed countries it is poverty and the weakness of the government. Both factors are responsible for shortcomings of the judicial systems and undermine any effort to enhance the rule of law. In those cases where the state is potentially willing and able to enforce the law, poverty remains the biggest obstacle for citizens trying to claim their rights. Intransparent legislation, illiteracy, an underdeveloped civil society, and lack of legal assistance form the causes as well as the indicators of poverty-related defects in the rule of law.

Furthermore, the countries investigated frequently have problems of their very own which result from their history, their ethnic composition, or their geostrategic position. This holds particularly true for Palestine, where a lack of territorial statehood is one of the factors that complicate the effective application of constitutional norms. In addition, virtually all countries are struggling with the burgeoning growth of crime. In an underdeveloped civil society, this may cause citizens to call for 'more drastic action' on the part of the security forces. The Bulgarian example illustrates this phenomenon:

> *"The recent years have witnessed a collision between the following two trends: the growing and increasingly severe crime rate, on the one hand, and the increasingly consistent introduction in the legislation and court practices of the requirements for respect of the human rights of the accused and defendants. Society which is torn apart by unemployment, crime, and spread of drugs readily supports ideas to have human rights restricted in the name of its security. Courts are often criticized that they are preoccupied with the rights of defendants and ignore the rights of victims".*[17]

This example shows how important civil society is in the enforcement of the rule of law. Citizens, elites, and multipliers must be awakened to the importance of fundamental rights and the rule of law. As ever, the Konrad Adenauer Foundation is taking an active part in this slow-moving process in its various partner countries. At the same time, the examples given above demonstrate the importance of a free press, the freedom of opinion, and democratic participation in the development of the rule of law. These are the pillars of the KAF's work abroad.

When asked how the KAF's cooperation could be intensified further in the years to come, some authors asked the KAF to help in the legal training of judges as well as in explaining the law to the population. As mentioned above, it is the lack of transparency in many legal systems

[17] See Petrova in this volume.

that causes confusion as well as disappointment and disillusionment among the population. Through its worldwide rule of law-programmes the KAF endeavours to remedy this situation[18] and to contribute towards the implementation of constitutional norms in its partner countries.

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[18] See the chapter on *rule of law support* by Jan Woischnik in this volume.