3.13. Venezuela

In recent years, Venezuela has experienced times of great tension, attributed, in the first place, to the institutional changes brought about by the collapse of a political elite – for some, even a political model – and the emergence in 1998-1999 of a new leadership committed to the transformation of the State and of society. In the second place, tension derived from resistance, based on either democratic principles or interests of the moment, to the changes that were initiated, and from the inadequate response of the authorities, leading to a deep divide in the heart of Venezuelan society.

From the viewpoint of the rule of law, there are contradictory sides to the transition between the 1961 constitution and the 1999 constitution. Proposals to introduce constitutional amendments or draft a new Charter had been put forward before the current president hoisted the banner of the National Constitutional Assembly, but attempts by the old Congress to introduce constitutional reform were eventually paralyzed. Many of the innovations contained in the early proposal saw the light of day years later, with their inclusion in the constitution adopted by the National Constitutional Assembly and the people of Venezuela by popular referendum in 1999. The 1999 constitution also included some controversial contents that ran counter to historical experience. However, problems started with the preparation, by said Assembly, of a public power transition regime that was to govern until the bodies constitutionally foreseen for the development of constitutional legislation were established and regulated. This transition continued indefinitely, and partially extends to the present day, seriously damaging the normative strength of the new constitution, and opening a flank that has been used to diminish the vigour of the constitutional text. As will be shown, the constitution of the Bolivarian Republic of Venezuela has many positive aspects; however, the lack of observance or incorrect interpretation of the constitution, and the overstatement of some of its formulation defects in topics crucial for the Rule of Law, raise certain questions that this report will try to answer.

I. Constitution

The Venezuelan constitution of 1999 contains numerous positive aspects and even model-type regulations in the field

Human rights

of human rights. Many of the articles included in the general part of Title III of the constitution contain principles and obligations drawn from International Human Rights Law, such as the recognition of the general obligation of respect for and guarantee of human rights (article 19), and the specific obligations to punish, investigate and redress human rights violations (articles 29 and 30). Additionally, it establishes that the actions taken for the furtherance of criminal cases when there have been serious human rights violations, war crimes and crimes against humanity shall not be subject to the statute of limitations, and their investigation and prosecution are reserved to courts of ordinary competence (article 29), thus excluding the military jurisdiction from hearing in these offences, even when military officials in active service are involved.

Regarding the rights enshrined by the constitution and their formulation, the constitutional wording also meets international standards and therefore conforms to the Universal Declaration of Human Rights and other general international instruments in this area. In this respect, the constitution indicates that international human rights treaties ratified by Venezuela have a constitutional rank at domestic level, and prevail over constitutional laws insofar as they contain provisions concerning the enjoyment and exercise of rights that are more favourable than those granted by the constitution (article 28). The main purpose of this precept is to ensure the enforcement of the conventions on human rights even though the constitution may ascribe a more limited scope to any such right. However, the meaning of this precept has been relativized by rulings of the Constitutional Division of the Supreme Court of Justice, which established that the determination of which is the most favourable norm is the responsibility of the Constitutional Division itself, regardless of what the Inter-American Court of Human Rights or other competent international bodies may have ruled.[1]

[1] This doctrine has been established by the Constitutional Division regarding freedom of expression and information, a sphere in which some of its verdicts have departed from the criteria set by the Inter-American Commission and the Inter-American Court of Human Rights regarding the absolute prohibition of censorship and the illegality of the reinforced criminal protection of the honour of certain high-ranking public officials in relation to the crimes of denigration and contempt of authority (see Sentence of the Constitutional Division of the Supreme Court of Justice Number 1942 dated July 15, 2003). The very constitutional provisions on freedom of expression and information

As regards possible restrictions of the human rights recognized in the constitution, they are licit as long as they are enforced by a law or act with the rank of law, and as long as they observe the proportionality principle. Some rules on fundamental rights are formulated in absolute terms, so they cannot be restricted even by law. Such is the case of the prohibition of slavery (article 54), and the prohibition of torture and cruel, inhumane or degrading treatment (article 46), the forced disappearance of individuals (article 45) and the death penalty (article 43). During exceptional situations (emergencies), the exercise of constitutional rights may be subjected to extraordinary restrictions, but only temporarily and pursuant to a double control by parliamentary and judicial instances. Some rights or guarantees preclude any possibility of restriction, such as the right to life, fair trial, freedom of information and all the rights contemplated in international human rights treaties ratified by Venezuela (articles 337 and 339).

Separation of powers

The constitution enshrines the separation of powers, without prejudice to the cooperation that must exist among the branches of public power for the fulfilment of the supreme purposes of the State (article 136). The separation of powers is constitutionally established in both the vertical and horizontal senses. In the vertical sense of the principle, public power is distributed among the national, state and municipal levels of government, reflecting the federal structure of the Venezuelan State. Horizontally, national power is divided into Legislative, Executive, Judiciary, Citizen and Electoral. The State and Municipal powers have a legislative branch and an executive branch, as well as their respective Comptrollers' Offices, charged with overseeing the management of public resources.

In establishing the organization and competencies of each national branch of public power, the constitution respects the principle of separation of powers: the legislative function is attributed to the National Assembly; the executive function is vested in the President of the republic with the support of the vice president and the ministers, all of whom make up the cabinet of ministers, and the judicial function rests with the courts of the Republic, whose independence is constitutionally acknowledged (article 254). The

have been objected by international bodies, by virtue of the weight they assign to demands for information truthfulness and objectivity; however, though rectifiable by means of constitutional interpretation, unfortunately such deficiencies have not been overcome.

constitution of 1999 has added citizen power and electoral power to the classical three-branch division of powers. The former is exercised by the Republican Moral Council, made up by the Chief Public Prosecutor of the Republic, the Ombudsman or Public Defender, and the Comptroller General of the Republic, while the latter is headed by the National Electoral Council and other subordinated electoral bodies.

Therefore, from the viewpoint of the constitutional framework, the separation of powers is clearly established. However, there are some deficiencies in constitutional regulation that threaten to undermine the division of powers, such as the broadness of the president's attributions to issue decrees with the rank and force of law, as long as they have been authorized by an enabling law of the National Assembly (articles 203 and 236, paragraph 8), and the power of said Assembly to remove the Magistrates of the Supreme Court of Justice with a qualified majority of two-thirds of its members, in cases of serious misconduct previously rated as such by Citizen Power (article 265). Such broadening of presidential powers and the extension of potential legislative delegation can lead to a relative emptying of the Assembly's legislative function in such delicate issues as the regulation and limitation of constitutional rights. On the other hand, the power of the National Assembly to remove Magistrates threatens judicial independence, as it subordinates the continuity in office of the Judiciary's authorities to the ultimate decision of a political instance that is itself subject to the judicial control of the Supreme Court of Justice, i.e. the National Assembly. Furthermore, the National Assembly is also responsible for defining, by law, the behaviours that constitute a serious offence, a definition that can only be made in vague terms, as has been the case with the Organic Law of the Supreme Court of Justice[2]. The risk is theoretically lessened by the prior intervention of Citizen Power.

Constitutional provisions on the composition and functions of the National Defence Council are unclear and debatable from the perspective of the division of powers. Said Council has attributions of great judicial and institutional relevance, such as establishing the strategic concept of the Nation, and its members are a mixture of organs belonging to different

[2] See article 12 of the Organic Law of the Supreme Court of Justice (Official Gazette Number 37,942, dated May 20, 2004).

branches of public power, with the prevailing position of the national executive, hence, of the president of the republic, who presides over the council (article 323).[3] Nevertheless, the greatest threats to the separation of powers in the current political-constitutional context do not derive mainly from the constitutional text but from institutional praxis, which will be discussed later on in this report.

Primacy of law

In general terms and in principle, the state, its institutions and representatives are indeed bound by law. The constitutional profile of Venezuela is that of a state that advocates the rule of law, whose authorities are bound by the constitution and the laws (article 137). The State is also liable for damages to individuals (article 140) and the government's agents are liable for misconduct contrary to law (article 139). There are institutions responsible for ensuring the observance of the law in the handling of public funds and respect for human rights, i.e. the Comptroller General of the Republic and the People Defender, respectively. The Office of Public Prosecutions is responsible for exercising the actions designed to hold public officials liable (article 285), and the Supreme Court of Justice must guarantee the supremacy and effectiveness of constitutional norms and principles (article 335).

However, in practice, the general binding of authorities to law has been undermined when high officials or certain political interests are involved. This is not a new phenomenon in the country, but it tends to become stronger. Numerous accusations against the President of the Republic or other high-ranking officials in connection with corruption, law infringement and human rights violations have not been seriously investigated. The president himself has admitted that the fight against corruption continues to be –after more than seven years of administration- a priority goal of the State. Indeed, corruption perception ratios in the country continue to be alarming. In the field of human rights, State performance is also objectionable, as shown by the reports drafted by the Inter-American Commission on Human Rights. This report will deal with such weak institutional performance in more detail below.

Judicial independence

As mentioned above, the independence of the courts is enshrined in the constitution. It is not only formulated in

[3] See, to the same end, the Organic Law of National Security (Official Gazette Number 37,594, dated December 18, 2002).

broad terms but also reflected in several provisions. The constitution establishes that the funds allocated to the court system shall not be below 2% of the ordinary national budget, and that the Supreme Court of Justice shall have functional, financial and administrative autonomy (article 254). The constitution contemplates the judicial career and the appointment of judges by means of public competitions (article 255). The constitutional guarantee of independence of the courts is weakened by the National Assembly's power to remove the Magistrates of the Supreme Court of Justice, as was mentioned earlier. However, the actual difficulties to ensure the independence of the courts lie not so much in the constitution, which in general terms contains a plausible regulation, but on the incorrect application of the constitutional framework. This topic is addressed in the section of the report that discusses the independence of the courts.

Fundamental rights protection

The Venezuelan system of constitutional justice is characterized by the co-existence of elements from the Austrian or European model and elements from the North American model of constitutionality control. Taking its own constitutional background as a starting point, such system provides for a concentrated control of the constitutionality of laws, vested in the Constitutional Division of the Supreme Court of Justice, which has the power to declare the nullity of an unconstitutional law, and a diffuse control, vested in all the judges of the Republic, who have the power to determine the non-enforcement of the unconstitutional law in specific cases (article 334). But the main piece in this system is constitutional protection as an instrument especially intended for safeguarding the fundamental rights (article 27).

Any individual who believes his/her constitutionally guaranteed rights have been violated, including all the rights recognized in international conventions on human rights ratified by Venezuela and other rights inherent to individuals (articles 22 and 23) can appeal to the protection of the constitution, and the jurisdiction competent in these matters as a general rule will be the local lower court (articles 7 and 9 of the Organic Law on the Protection of Constitutional Rights and Guarantees). In some cases, the competence is vested in the Constitutional Division of the Supreme Court of Justice or the higher courts. The appeal is a brief and simple procedure that causes the violation of the constitutional right to cease. In the case of already

perpetrated violations of constitutional rights that cannot be redressed through an appeal, individuals can use the ordinary circuits to claim punishment for the perpetrators, the satisfaction of the right, or a fair indemnity.

Equality before the law

The constitution guarantees the equality of all citizens before the law and pursues equal opportunities (article 21). Certain restrictions are admitted for the exercise of political rights, such as foreigners' right to vote, however, this is in agreement with international human rights standards. Furthermore, the constitution is comparatively generous by permitting the active vote of foreign nationals at local and state level, as long as they have resided in the country for more than ten years and meet the other requirements established by law (article 64). Nevertheless, the denial of the right to demonstrate to foreigners is not very reasonable (article 68).

A constituency receiving special treatment in the constitution is that of indigenous communities. Rather than granting a privilege, the goal of this provision is to protect the cultural identity and recognize the autonomy of indigenous communities in different spheres (article 119 and subsequent articles).

Constitutional privileges

The constitution does not consider the forfeiture of fundamental rights under any circumstance whatsoever. It only permits, during states of exception, the extraordinary restriction of constitutional rights or guarantees, subject to strict factual conditions and temporal and material limits, and to stringent controls. Such extraordinary restriction does not imply a suspension of rights or a correlative suppression of proceeding guarantees (articles 27 and 337).

No group or social sector is exempt from criminal prosecution or civil liability. In this area, exceptions are limited to the assumptions of minority (children and adolescents) or unindictability on the grounds of a defective will of the subject (adults).

A special case is that of the members of the National Assembly (Deputies), who have parliamentary immunity during their tenure and are not liable for the votes and opinions expressed in the performance of their official functions (articles 199 and 200). Immunity implies that any criminal procedure against a Deputy is deferred until his/her tenure ends, unless the Supreme Court of Justice declares that there are merits to prosecute, and the National

Assembly waives the Deputy's immunity. As to the lack of liability for votes and opinions, the requirement of criminal responsibility is excluded. A privilege similar to parliamentary immunity is granted to the People Defender, in his/her sphere of action (article 282).

Control over law enforcement and military

Civil control over law enforcement and the armed forces is partially ensured by the constitutional text. It expressly sets forth that law enforcement agencies shall be of a civil nature (article 332) and provides for the principle of obedience of the National Armed Forces, assigning to the President of the Republic, an eminently civil authority, its supreme command (articles 328 and 236.5). However, constitutional provisions have not precluded individuals from the National Armed Forces to hold high positions in (civil) police agencies on various occasions. Additionally, the constitution in force, adopted in 1999, has suppressed a relevant and democratic means of civil control over the military, i.e. the involvement of parliament, through one of its Chambers, in the approval of military promotions to the highest ranks of the military hierarchy. Furthermore, it has omitted referring to the apolitical and non-deliberating nature of the armed forces that was included in the previous constitution. Additionally, an organ of the National Armed Force is assigned surveillance over the use of public property or resources allocated to the same National Armed Force, though with no prejudice to the attributions of the Office of the Comptroller General of the Republic (article 291).

Executive privilege

As mentioned above, the constitution allows the President of the Republic to issue decrees with the rank and force of law, when they have been authorized by the National Assembly by means of an enabling law, with a temporary and substantive scope that said law must indicate (articles 203 and 236.8). This procedure has been frequently used in the country's institutional praxis since its inclusion in the Venezuelan constitution of 1961. The constitution of 1999 tried to delimit this means of legislative delegation by requiring the National Assembly to determine the guidelines, purposes and framework of the respective decrees, but eliminated the material restriction contained in the previous constitution that limited them to the economic or financial sphere. Therefore, at present, this presidential attribution almost fully lacks material limits: in this point, constitutional frailty has been aggravated by virtue of the jurisprudence of the Constitutional Division of the Supreme Court of Justice, which has regarded as licit regulating

through decree-laws certain matters that are reserved to organic law, among them, the development of constitutional rights.[4]

Changes in the past five years

During the current presidential term, an enabling law was passed in November 2000 that empowered the president to issue, in a one-year term[5], decree-laws on the most diverse matters. As a result, the president issued more than forty decree-laws in areas as diverse as the right to property and to land in the countryside; the cooperative regime; fishing activity; oil and gas production and sale, including tax aspects; citizens' security, and administrative organization.

The other assumption considered by the constitution for the issuance of decree-laws has to do with so-called states of exception (article 339), which, as was already mentioned, are scrupulously regulated in the constitution. Since the adoption of the 1999 constitution, these extraordinary measures have not been used. The constitution has not been amended since its adoption in December 1999.

Non-state parallel judicial systems

The constitution provides for the administration of justice on behalf of the Republic and by authority of law (article 253), and sets forth the basis for the exercise of this public function. No parallel judicial system is allowed, but justice of peace, arbitration and other alternative means of dispute resolution are accepted (article 258). A highly relevant aspect is the constitutional acceptance of an indigenous justice (article 260). This means that institutions other than the State are empowered to resolve disputes arising within the native communities in accordance with their own rules or material parameters. However, the constitution expressly mandates that the coordination of this special jurisdiction with the national judicial system shall be established by law, and provides for the pre-eminence of the constitution and of public order.

II. Legislation

Access to information

Every citizen has the right to access the information held on administrative files without prejudice to the reserves that can be established for reasons of security, personal privacy

[4] Constitutional Division Sentence Number 1716 dated September 19, 2001.

[5] Law Authorizing the President of the Republic to Issue Decrees with Force of Law in Subjects that are Delegated (Official Gazette Number 37,077, dated November 13, 2000).

protection or other analogous reasons (article 143). This provision reaches the sphere of legislative production in which the constitution emphatically guarantees the participation of citizens (article 211), added to the possibility to invoke the right of collective habeas data to obtain information that is relevant for communities or groups of people (article 28). The National Assembly also has services to facilitate the consultation of laws in force and of the respective preparatory papers. There have been no cases of normative discrimination in this case. As regards factual barriers, illiteracy is being addressed, and plans have been developed to broaden the access of people to information technology. However, there are still gaps between the legal system and the population, owing to socio-economic and cultural factors.

Retroactive legislation

The retroactivity of legislation in principle is forbidden by the constitution, with the exception of criminal provisions that impose a lesser penalty (article 24) or reverse punishment. This principle is generally observed, particularly in criminal affairs.

Some criticism has been voiced regarding the relativization of the principle of retroactivity in the sphere of land possession and ownership for agricultural purposes. The legislation on idle land and agricultural reform in force until 2001 permitted the occupation and agricultural exploitation of idle land - i.e. the land which, not having a specific owner, is in the hands of the Nation-- even without a title to property, and by virtue of said exploitation, the erection of industrial plants or other works (improvements or *bienhechurías)* was allowed. But the legislative notion changed with the Decree-Law on Lands and Agrarian Development of 2001, which implicitly modified the idle land system and denied any right to compensation to those who illegally possessed lands that were regained by the State. The respective provision (article 90) was annulled by the Constitutional Division of the Supreme Court of Justice on the grounds it harmed the right to property[6]; but the National Assembly, in the reform of the 2005 law, reintroduced the annulled law (article 86)[7]. Therefore, until the Constitutional Division gives its opinion on this

[6] Constitutional Division of the Supreme Court of Justice Sentence Number 2855 dated December 20, 2002.

[7] See Law of Partial Reform of Decree Number 1546 with the rank of Law on Land and Agrarian Development (Official Gazette 5771 extraordinary, dated May 18, 2005).

legislative reiteration, a provision that goes against the principles of legislative non-retroactivity and legitimate confidence -also recognized in the jurisprudence of the Venezuelan judicial system- remains in effect.

Discriminatory legislation

The factual reason that should be mentioned as hindering compliance with certain laws has to do with the poverty and socio-cultural exclusion of a large portion of the country's population. The low level of education of these sectors hampers their knowledge of the laws in the judicial system, and creates gaps between formal law and the day-to-day development of human relations, which are aggravated by the indifference of legislation to this reality. By way of example, there is no proper judicial treatment of the continued occupation and construction of houses on the public or private lands of slums located in the main urban hubs, and of their exchange and negotiation, which take place outside formal law.

Legal certainty

The instability of the legal system is one of the weaknesses observed in the country. Since the drafting of the constitution in 1999, major concerns were raised about the content and application of public policies in economic and financial matters. These concerns were afterwards fed by the fact that more than forty decree-laws were issued without consultation in 2001, based on the enabling law passed by the National Assembly. An additional factor was the orientation of some of them, such as the Decree-Law on Land and Agrarian Development, which transformed the legislative framework in sensitive aspects of the performance of productive activities in rural areas, based on a number of provisions that in turn were scarcely certain.

The norms and other acts issued on the basis of said Decree-Law, subsequently a Law, have kindled the instability of the legal framework in the rural environment, affecting the right to property, as the government at the national or state level has either carried out or tolerated the occupation of private estates of questionable legitimacy, without giving the damaged parties effective possibilities for a defence. In fact, the discretion exercised by the administration has allowed it to impose criteria of dubious reasonableness due to the unfeasibility of their implementation, in order to secure the recognition of the right to property claimed on the land[8].

[8] See *Ley de Tierras aviva confrontación* (Land Law Intensifies Clash), El Universal, August 31, 2004.

Recently, a pack of legal reforms has been adopted in the oil and gas industry, which have significantly altered the conditions for oil and gas exploitation by foreign companies, including the taxes they must pay to the State. Such measures have also contributed, though to a lesser degree, to legal uncertainty.

III. Courts

Government accountability in court

In theory, the possibility of holding the government accountable in court is always open, but in practice, the success of the claim frequently depends on the magnitude of the case and the political circumstances attached to it. The inefficiency of formally established procedures is sometimes due to institutional incompetence.

A review of the reports prepared by human rights non-governmental organizations and by competent international organizations such as the Inter-American Commission on Human Rights reveals that in the field of human rights the country's situation is highly problematic. The State claims to be an advocate of human rights and the constitution is generous in recognizing them, but there have been multiple cases of probable violations to said rights which were neither duly investigated nor resolved, and whose perpetrators have not been punished.[9] Most alarmingly, many of these situations opposed to human rights have been supported by verdicts of the Supreme Court of Justice[10], thus closing the doors to correction and remedy in domestic law, and making claims for the protection of human rights in the Inter-American System more frequent – even though there is a lack of effective compliance with the decisions of the Inter-American Commission or the Inter-American Court of Human Rights.[11]

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9 For examples, see, among other sources, the Annual Reports by PROVEA on the Human Rights Situation of Venezuela for October 2002-September 2003, October 2003-September 2004, and October 2004-September 2005.

10 For instance, the sentences relating to the limitations for invoking the condition of civil society organization, the admission of alleged censorship, and the reinforced criminal protection of the honour of authorities; see sentences of the Constitutional Division No. 1395, 1013 and 1942, dated November 21, 2000, June 12, 2001, and July 15, 2003, respectively.

11 Annual Report of the Inter-American Commission on Human Rights, 2004, Chapter V, Paragraph 157.

Access to justice

According to the constitution, justice is free and everybody has the right to turn to the courts for the defence of their rights or interests (article 26). However, numerous barriers exist to access justice. Justice is generally very expensive and not everybody can afford it. Costs include searching for legal advice, retaining a lawyer, participating in usually lengthy and eventful cases, and producing certain evidence. In some spheres, the State offers free legal advice and free legal proceedings, for instance in criminal cases, but there is no global system of free legal assistance, although the constitution provides for the creation of the Public Defence Service, which should also effectively encompass issues outside the criminal process (article 268). In addition to the abovementioned costs, there are para-legal costs that are still associated with the day-to-day administration of justice. Access to justice, which goes beyond filing a complaint with a court to include the delivery of a verdict on the essence of a controversy, is seriously undermined by the procedural delay that characterizes the administration of justice in Venezuela, which in turn has a negative impact on the costs of justice.[12]

It should be noted that in urban slums there are numerous conflicts that do not find a course of resolution at court, particularly regarding public and private violence. In this environment, slum dwellers are often the victims of the law enforcement and court system, sustaining human rights violations as a result of police raids of uncertain scope, while on other occasions they are taken to court and receive a discriminatory treatment because of their social origin.

Limited access to justice is an issue of major concern in the Venezuelan legal community.[13] In recent years, positive steps have been taken in labour matters. The Organic Procedural Law of Labour[14] created the Courts of Substantiation, Mediation and Execution – separate from Trial Courts – which have correctly performed their

[12] See: Roche, Carmen Luisa et al: *Los excluídos de la justicia en Venezuela*, Caracas 2002. As regards procedural delay, see the statements by the Minister of the Home Office, Jesse Chacón, in *El Universal,* September 8, 2005.

[13] See: Maldonado, Víctor: "Estado de Derecho y Reforma del Sistema de Justicia en Venezuela", in: Barrios, Armando et al: *Venezuela: Un acuerdo para alcanzar el desarrollo*, Caracas 2006, pp. 411 et seq.; see also the speech by the Magistrate of the Social Court of Cassation of the Supreme Court of Justice, Dr. Juan Rafael Perdomo, on access to justice, http://www.tsj.gov.ve/informacion/miscelaneas/miscelaneas.asp .

[14] Official Gazette No. 37,504, August 13, 2002.

functions, enabling the resolution of many disputes through mutual agreement in the first procedural stage. This entails a series of advantages for the parties, particularly for workers, who find it harder to afford the continuation of the legal procedure.

Fair trial

With the abovementioned exceptions, it may be argued that the constitution and the procedural laws adequately provide for the right of fair trial and assumption of innocence. Any differences in treatment that may be observed in this area mainly have to do with the class-conscious bias that pervades the penal system. In some criminal procedures or investigations of evident political intent, serious doubts appear to be cast on the presumption of innocence.[15] The double-trial prohibition, clearly established in the constitution and in legislation, however, is observed by the courts. However, there have been controversial decisions by the Supreme Court that harmed at least legal stability.[16]

Legal representation

Those imputed or accused in a criminal procedure have the full right to appoint a lawyer they trust as their defence attorney, to assist or represent them in trial, in every state and degree of the case, starting with imputation in the preliminary phase. The right of the imputed person to defend him/herself is recognized, but for certain legal proceedings, the presence of the defence attorney is required due to the technical complexity that characterizes them.[17]

Proportionality

An overall picture of Venezuelan criminal legislation leads to the assumption that the principle of proportionality is observed in the typification of offences and penalties. The Criminal Code and special criminal laws set, in relation to each offence, the minimum and maximum limits within which the judge may impose sanctions, which limits depend on the seriousness of the committed offence. The judge in turn determines the sanction within said limits, with due attention to the objective and subjective circumstances of the case, including the consideration of legally defined aggravating or attenuating factors. It may be claimed that the principle of proportionality is frequently respected in the administration of criminal justice. Some issues have been raised in terms of the quantification of punishment

[15] See the *2005 Annual Report* by the Inter-American Commission on Human Rights, Chapter IV, paragraph 348.
[16] Sentence of the Constitutional Division No. 233, dated March 11, 2005.
[17] Article 137 of the Organic Criminal Procedural Code (Official Gazette No. 5,558, November 14, 2001).

applicable to economically underprivileged individuals, a topic addressed in the following section.

Discriminatory justice

Some socio-juridical studies indicate that the quality of defence is a determining factor when it comes to establishing the punishment applicable to an accused individual. In the absence of an acquittal, the quality of defence may lead a court to impose the minimum legally established penalty, with the implications it may have as to the fulfilment of the penalty in freedom. The quality of defence is in turn highly influenced by the social status of the accused, as those of humble origins usually need to resort to public attorneys, who are normally overloaded with cases and just do what is barely essential to enable the process to continue, with a minimum of evidentiary initiative. In recent years, the mysticism of these public officials has increased, but there are no hints that the general situation has changed.[18]

In Venezuela, amnesty laws have hardly been used in recent times, and pardons or other similar measures usually respond to humanitarian reasons, and go hand-in-hand with the verification of the prisoner's conduct. In some cases, there have been acquittals for political reasons but they have been rather isolated cases. There are also no offences for which amnesties or pardons are disproportionately often pronounced.

IV. Judicial Independence

Appointment of judges

Formally, judges are appointed and sworn into office by the Supreme Court of Justice (article 255). Prior to said appointment, the selection of judges is conducted following two different procedures. The first one is a competition in which the winning candidates are designated as judges. The current competitions started in 2005, following a long interruption since 2000. The objection that these competitions have met is that they fail to comply with the requirements of article 255 of the constitution: rather than being true "public competitions based on the opposition of qualifications," they restrict participation to existing judges[19], generally holding interim appointments, thus resembling a

[18] Roche, Carmen Luisa y Richter, Jacqueline: *Defensa Pública Penal y acceso a la justicia en Caracas*, in: http://www.tsj.gov.ve/informacion/miscelaneas/miscelaneas.asp .

[19] See: PROVEA: *Annual Report for October 2004-September 2005*, Caracas 2005.

procedure of evaluation and confirmation of judges in their positions. Neither is the participation of citizens – also required by the abovementioned article – ensured in the judge selection process.

The other selection procedure is the appointment of judges to serve an interim or temporary position until the respective competition is held. Although the term suggests the opposite, most interim judges have remained in their positions for several years. By designating interim or temporary judges, the Judicial Commission of the Supreme Court of Justice decides who will fill an open position in a very discretionary manner, without any controls or transparency. In practice, this means of admission has been the most frequently used, and places judges in a situation of absolute juridical precariousness, usually being removed or dismissed from their positions at any time, without conducting any procedure or indicating the reasons for dismissal.[20] Even though there has been progress with competitions since last year, approximately forty percent of judges still have an interim status, compared to eighty percent as of May 2005. Only the (interim) judges qualify to participate in the competitions to be admitted into the judicial career.

Government interference

For the reasons mentioned above, judicial independence in Venezuela is seriously jeopardized. The reasons – never formally declared – that lead to the removal of interim judges – a dismissal that is generally disguised with the subterfuge of leaving the appointment with no effect – have generally had political nuances and their inhibitory effect on the rest of the judges is very high.

A still more serious issue is the general state of justice, given that some of the foundations of judicial independence have crumbled. This is evidenced by the current composition of the Supreme Court of Justice. Some of its members were designated without any transparency or control by the 1999 National Constitutional Assembly. Others were designated in late 2000 without following the constitutional procedure, while the National Assembly argued that it had not yet issued the supplementary legal provisions. And the rest were appointed based on the Organic Law of the Supreme Court of Justice in force, which extended the number of Magistrates of said Court, after a series of events that proved

[20] See: Maldonado 2006, pp. 420 et seq.

that the government had lost control over this body. This same law set forth, in violation of the constitution, that the rating of a judge misconduct as serious by Citizen Power (Republican Moral Council) entails the judge's suspension from his/her position for an indeterminate period of time, which means the sword of Damocles hangs on top judicial authorities.[21]

In court dynamics, many cases are probably resolved without political interference, but in highly relevant cases that may compromise the continuity of certain official policies or the preservation of certain governmental interests, only heroism – which cannot be assumed or demanded when it comes to measuring the autonomy of a judge – would allow judges to ignore the threat they face when making a decision. In the next paragraphs, some situations will be mentioned in which court adjudications have encountered retaliation. Not even the Magistrates of the Highest Court of the Republic have escaped political retaliation. In those cases that may threaten the continuity of certain policies, including those of a repressive nature, or which jeopardize the image that the government wants to project, or which may imply criminal responsibility for the authorities or executive officials.

As the abovementioned circumstances suggest, the country's judges, in a significant proportion, can be removed from office without any specific cause or procedure.[22] In practice, some judges have been removed after adopting a decision that was politically questioned.[23] When asked about the dismissals, the president of the Supreme Court of Justice declared that those judges were "engaging in politics"[24].

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21 Several appeals on the grounds of unconstitutionality were filed against this and other provisions of said Law in 2004, which have not yet been resolved.

22 The Judicial Commission of the Supreme Court of Justice, in hearing appeals requesting the reversal of the decision to revoke the appointment of a judge, has declared that the exercise of this power, "does not have any substantive limit;" Judicial Commission of the Supreme Court of Justice, June 16, 2003, file No. CJ-2003-0015 (Speaker: Luis Martínez Hernández).

23 See: PROVEA: *Annual Report for October 2003 to September 2004*, Caracas 2004, p. 311.

24 See the Human Rights Watch report, *Manipulando el Estado de Derecho: Independencia del Poder Judicial amenazada en Venezuela,* New York 2004, Chapter V.

Similar cases have been documented by renowned international organizations.[25]

Changes in the past five years

Judicial independence was not fully guaranteed in the prior constitutional cycle. The thorough distribution of state and social spaces of power among the major political parties of the time had a special manifestation in the judicial system. It was precisely to address this and other acts that the restructuring process of the judiciary was started by the 1999 Constitutional Assembly and continued by other instances until the present date, in a declarative manner, without the expected results. On the contrary, the situation of precarious independence of the judiciary and of judges' limited autonomy has worsened in recent years, and for the abovementioned reasons, it tends to become more established.

Non-state actor interference

The influence of non-state actors in the administration of justice is part of a black figure in crime that is hard to quantify. It involves businesses, law firms and political groups which, to serve economic interests or to avoid a criminal sentence, turn to bribery or blackmail, making the judicial system even more vulnerable. In colloquial terms, these groups are known as "judicial tribes," which are not a new phenomenon in the country, but continue to undermine, with new actors, the advancement of justice.

Changes in the past five years

V. Criminal Justice

Arbitrary enforcement

Broadly speaking, the State is in the capacity of enforcing laws, court orders and administrative acts. However, it should be noted that there are high levels of non-observance of the laws in different spheres relating to corruption,

[25] In addition to the abovementioned reports, see the *2005 Report of the Inter-American Commission on Human Rights*, Chapter IV, paragraphs 295 and subsequent paragraphs. The case of the higher judges that revoked the measure of prohibition to leave the country that had been issued against individuals allegedly connected with insurrectional acts in April 2002 is also noteworthy. On that occasion, the Judicial Commission of the Supreme Court of Justice, when attempting to justify the suspension of judges from their positions without compensation and the appointment of judges to replace them for the adoption of a new decision, declared that the performance of those judges responded to "destabilizing schemes" and the president-elect of the Supreme Court of Justice warned, "this measure should be exemplary, because we will never again allow, with the excuse of formalism, impunity to emerge (...) We are strongly willing to take the necessary corrective actions to prevent these irregular situations from occurring in the future"; see *El Universal*, February 4, 2005.

simplification of administrative formalities, functioning of public services, respect for other persons' life and property, and obedience to traffic laws, among others. The underlying factors behind these gaps between legislation and reality are wide-ranging: from socio-economic inequality and educational deficiencies, to public officials' negligence and the absence of political will and of official programs aimed at eradicating these vices.

Law enforcement abuses

Law enforcement practices do not meet international standards. Law enforcement officials follow behavioural guidelines that depart from democratic and human rights principles. This includes military agents who are often involved in public order issues and in public security plans. There is not enough respect for the right to liberty and personal integrity, and on certain occasions even the right to life is ignored. This has been reflected in the condemnation of Venezuela before international instances, in relation with the finding of summary executions or forced disappearance of persons.[26]

Law enforcement abuses are usually linked with selective preventive and crime-fighting programs, or with the repression of punishable deeds. In the framework of general raid controls, the right to personal liberty and sometimes the intimacy of passers-by is violated, and in the procedures to search for presumed criminals, there is a disproportionate and unscrupulous use of force. Arrests without warrants should be limited to flagrant presumptions; however, law enforcement usually detains suspects in the absence of said presumption, and this practice has not received judicial censorship. Human rights NGOs and the Inter-American Commission on Human Rights have reported serious cases of police brutality.[27] Although State institutions or their agents have been involved in said acts in varying degrees, it cannot be attributed to an official policy, or to the orientation of a specific administration. It remains to a large extent as a historical vestige that has not been combated energetically enough.

As mentioned above, some discrimination is observed in law enforcement by the authorities and police officers. The

[26] Sentences of the Inter-American Court on Human Rights dated November 11, 1999 and November 28, 2005, in the cases *Caracazo vs. Venezuela* and *Blanco Romero y otros vs. Venezuela*, respectively.

[27] See the *2005 Annual Report of the Inter-American Commission on Human Rights*, Chapter IV, paragraph 307 and subsequent paragraphs.

economically weakest groups are the ones that suffer particularly often from police abuses, among other reasons, for their more limited power to complain.[28]

Changes in the past five years

Today's human rights violations are somewhat different from what they used to be in previous decades. In some aspects, there has been some progress. Arbitrary police arrests, particularly long detainments, have surely reduced, faced with a stricter normative framework that has limited the duration of police detainment and the enabling presumptions, and which permits the presence and involvement of the defence attorney right from the police phase of the investigation. Additionally, there is no Law on Vagrants and Bandits. The rights of children and adolescents today are better guaranteed and protected, so human rights violations in this sector are probably less frequent. Additionally, in the field of social rights, there have been remarkable efforts. However, in other areas, the human rights situation has worsened. Freedom of expression and information has seen strong restrictions from various fronts, with the concurring, not necessarily coordinated, participation of the executive branch, the legislative branch and the judiciary. Violence originating in political differences, coupled with negligence or connivance on the part of the State, has become more acute in 2002, 2003 and 2004, and discrimination based on political preferences and mere opposition to the government has reached unprecedented and alarming manifestations.[29] The criminalizing discourse about international financing for social organizations has already translated in parliamentary and judicial procedures as well as in proposed legislation.[30] Finally, the vacuum of domestic legislation to provide effective institutional ways to fight human rights violations of a political nature has major weight in this area of analysis.

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[28] See: Casal, Jesús María and Chacón, Hanson Alma: "La discriminación en la formulación y aplicación de la Ley como obstáculo para el acceso a la justicia", in: Casal, Jesús María et al: *Derechos Humanos, Equidad y Acceso a la Justicia*, Caracas 2005, pp. 124 et seq.

[29] Such as having tolerated the gathering of data on adversaries to the President of the Republic by means of the "Tascón" list, and the use of said data to determine the admission or permanence in jobs; see the *2005 Annual Report of the Inter-American Commission on Human Rights*, Chapter IV, paragraph 326 and subsequent paragraphs.

[30] Such as the criminal procedure taken against the executives of SUMATE organization and the subsequent parliamentary scrutiny; *El Universal,* August 26, 2006. A Bill on International Cooperation being considered by the National Assembly may limit international financing for the activities of social organizations.

The prevailing trend therefore points towards the deterioration of the principle of Rule of Law in this field.

Prosecution of human rights violations

In some cases there is prosecution and punishment of law enforcement abuses. But in many others, as we already mentioned, institutional reaction is slow and finally unsuccessful.

Selective police protection

All individuals or groups in principle can rely on police protection when they become victims of a crime. The discriminatory treatment that may be observed here is mainly due to socio-economic reasons. The requests or reports of socially underprivileged sectors are not a priority and are often neglected, unless political factors influence for them to be rapidly addressed.

Penal system

The adoption of the Organic Criminal Code in 1998, whose principles were partially recognized by the constitution of 1999, meant a decisive step towards the humanization of the penal system and its conformance to international human rights standards. Such legislative progress has to a great extent been reflected in the effective functioning of institutions. The two main deficiencies of the penal system lie, however, in the discriminatory criteria that still prevail in police and judicial behaviour[31], and in the situation of prisons, which are frankly below universal standards.

It is extremely difficult for inmates to complain against inadequate imprisonment conditions. In theory, they would be entitled to file, through a representative, a constitutional appeal or in extreme cases, a habeas corpus appeal, as well as to require the involvement of the People Defender.

Violence in jail – spurred by the overcrowding of penitentiary centres, insufficient controls and the inhumane conditions of imprisonment – has led to a condition of serious human rights violations. It is sometimes the prison guards that turn to the irrational use of coercion. This has motivated the condemnation of Venezuela before the Inter-American Court of Human Rights, which has ordered the adaptation of the penitentiary system to international standards.[32]

31 See: Casal 2005, pp. 124 et seq.

32 Sentence of the Inter-American Court of Human Rights, July 5, *Montero Aranguren y otros (Retén de Catia) vs. Venezuela*.

VI. Corruption in Law Enforcement and the Judiciary

Levels of corruption

Corruption in this sphere is rather high, particularly in the police, including traffic police, customs officials and those responsible for the custody of prisoners. The type of offence and imputed individual can influence in the magnitude of corruption. It is very high in the area of traffic and customs violations.

Concerning judges and juries, corruption is not rare. Its occurrence depends on such factors as jurisdictional order, the social position of the interested party and the case amount. Corruption goes from small bribes taken by court assistants (clerks and officers) to the issuance of sentences for an economic consideration. Corruption is a frequent phenomenon.

Anti-corruption measures

In general terms, corruption is not prosecuted, at least not in an effective manner. In recent months, the President of the Republic and other high-ranking authorities have recognized the persistence of this vice[33], whose correction had been proposed as a core item on the president's agenda in 1998 and to which he declared "war to the death" in 2000[34]. He was seconded by the Comptroller of the Republic, who stated that bureaucracy and corruption are an obstacle for the administration of justice, without omitting to mention, though, that corruption exists in all countries of the world.[35]

Main causes of corruption

Causes are wide-ranging. They include institutional precariousness, the weakness and subjective and interested manoeuvring of controls, and scarce transparency in public administration. Other causes are of a cultural nature or have to do with values, and translate into a mindset that views the performance of high-ranking functions in the public sector as an opportunity to solve present and future economic urges, in a context of instability. The mindset of businesspeople, contractors and lawyers also contributes to feed corrupt practices. Economic and social factors also encourage corruption: the lack of equal opportunities for stimulating the development of employment, and the absence of an effective social security system, among others.

[33] *El Universal*, September 10, 2005, and March 26, 2006.
[34] *El Universal*, October 9, 2002.
[35] *El Universal*, December 30, 2005.

Proper measures to fight corruption have not been adopted. In the judicial sphere, the judicial reform process should be examined and elements that vindicate the dignity of the judicial function should be introduced, offering judges, after proper selection and training, stable and promising careers, in both formative and socio-economic aspects.

Changes in the past five years

According to international indices, in recent years the perception of corruption in the country tends to be more seriously aggravated. Additionally, corruption controls look increasingly fragile.[36]

VII. Public Administration

Legality of public administration

The ailment of public administration is the heavy bureaucratization that leads it to close up upon itself and lose sight of the public purpose it must serve[37]. Public officials generally lack initiative and just comply with the formalities and their working hours. They are also underpaid, and socially underestimated, due to the fact that the mentality that considers that public positions are politically distributed as the bounty of an electoral victory still persists. They often find an incentive in small or big corruption. The former is a fact of everyday life in government agencies that interact with citizens, who in turn are willing to accept it in order to avoid standing in long lines or waiting indefinitely for the completion of a formality. Additionally, it is not uncommon to see political reasons behind procedures and decisions.

Remedies

In Venezuela there is a contentious-administrative jurisdiction with competence over the control of the acts or omissions of the administration, and with legal powers to enforce its decisions. Remedies requested through the courts that are part of this jurisdictional order are frequent, and sometimes effective. However, when there is a concurring governmental or political interest of some relevance, it is very difficult to obtain a sentence against the administration.

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36 In 2004 and 2005 the index of corruption perception in Venezuela was 2.3 points, of a total of 10 points (the optimum rating), placing the country in the lowest positions of the continent, according to Transparency International, *El Universal*, October 19, 2005; http://www.transparencia.org.ve/admin/multimedia/imagenes/20051018085017.pdf .

37 Barrios, Armando, "Reformas institucionales para el sector público", in: Barrios, Armando et al: *Venezuela: Un acuerdo para alcanzar el desarrollo*, Caracas 2006, pp. 476 et seq.

VIII. General Assessment

Rule of Law: General situation

In the functioning of institutions in Venezuela there is a mixture of concepts and practices that favour the Rule of Law and others that hinder it. The notion of respect for law and the need for authorities to act with a normative background to avoid arbitrariness are deeply rooted in the Venezuelan culture. But this belief sometimes lacks substantive content and tends, perhaps unconsciously, to admit the validity of the legal mandate without regard for its contents or the ultimate principles it pursues. This explains why on certain occasions refined procedures of normative change have been used in order to achieve a political objective contrary to constitutional values, but formally presentable.

The current situation of the Rule of Law in the country raises serious concerns. In the best of cases, it may be argued that the Rule of Law exists, but with major restrictions or conditionings. The backbone of the Rule of Law rests on the limitation and effective control of the exercise of power, at the service of the protection of the inherent rights of men, and is precisely this mission that is not being truly accomplished by constitutional authorities.

Changes in the past five years

The situation that has been described is not completely new. In Venezuela, the path that leads to the rule of law has not yet been completed. But in the past five years, there have been very strong steps in the opposite direction of a true rule of law, understood as much more than a mere textual non-contradiction between normative acts and higher norms. The determination to regain control over the Supreme Court of Justice at any price – even through the subterfuge of unnecessarily and indiscriminately raising the number of members in each of its Divisions – was indeed striking. The unilateral manner and opacity with which the procedures for admission to the judicial career have been carried out, in a country whose constitution requires the participation of citizens in the selection of judges and in which judicial reform is a matter of extremely high public interest, makes any diagnosis even gloomier. Undue restrictions to freedom of expression, threats to the right of property, the inobservance of the criteria or decisions of the agencies of the Inter-American Human Rights system, and other excesses mentioned in this report finally render a framework that is adverse to the principles of the rule of law. Therefore, a clear deterioration of the level of rule of law is observed.

Major obstacles

The fundamental point has to do with recognizing the value of the rule of law as a useful instrument to preserve democratic liberties and to increase confidence in institutions; recognizing the sense of respect for legality, as a guarantee of equality and control, and as a means to foster socio-economic and political relations, therefore overcoming the inclination to stifle, through legal formalities, some of the overarching principles to which those formalities should be subordinated. The work with social organizations or citizen networks on the follow-up, design and drafting of proposals will contribute to achieve these goals.

KAF support

There are many fields in which cooperation by the Foundation is highly useful. The strengthening of social networks and the furtherance of the values of Democracy and Rule of Law are priority areas for action. However, it is advisable to be alert as to the restrictions that future regulations could impose on international cooperation, currently a topic of discussion before the National Assembly.

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Several authors contributed to this chapter, both inside and outside of Venezuela. However, its contents are the sole responsibility of KAF.

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