

2. RESEARCH DESIGN¹

Democracy and the rule of law are not necessarily congruent. Yet realising the principle of democracy necessarily implies realising the principle of constitutionality – and vice versa. In a narrower sense, democracy means the rule of the people as a collective. The will of the sovereign must be reflected in legislation as well as in all socially binding decisions. Constitutionality, on the other hand, relates to individual liberties and opportunities of participation, protecting the citizen from the ‘tyranny of the majority’. It keeps the relationship between a majority and a minority from turning into a vote about dinner among two wolves and one sheep, as the old parable has it. Only by binding governmental authority to the law and by guaranteeing individual basic rights can democracy as a form of government become a system in which citizens make their own laws, as well as a framework for individual self-fulfilment. What is more, it is only the rule of law that can legitimise socially binding decisions. Constitutionality enables democracy to exist as a way of life for self-responsible and self-determined citizens.

Despite its importance for democratic development, the rule of law does not play a major role in democracy audits, a fact that is consistent with the claim made by leading democracy indexes of reflecting democracy in all its aspects. The *Bertelsmann Transformation Index* lists ‘constitutional democracy’ as one of its four key fields of research. However, if we break down the relevant questionnaire into its constituent elements, we find only a small number of questions that exclusively address the rule of law. Constitutionality is merely one democracy indicator among many others, such as statehood, participation, stability, and political and/or societal integration. *Freedom in the World*, a report published annually by the American NGO, Freedom House, is no different. It pays only limited attention to the field of constitutionality. No more than four of 22 questions

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address this subject, the consequence being that the examination of constitutionality remains confined to basic categories. More attention is paid to the rule of law in *Nations in Transit*, another report published by Freedom House. Next to the development of democratic institutions, the rule of law forms the key object of research in this study of the development of democracy in post-Soviet transforming countries. Limited to Eastern Europe and the CIS countries, this study is one of the most exhaustive surveys on the subject of constitutionality. However, it focuses on constitutional and institutional issues rather than the concrete administration of the law.

Generally speaking, most indexes may be said to focus mainly on economic development and institutional stability, and research is much less likely to concentrate on general democratic or constitutional developments. This is not surprising if we look at the publishers and/or sponsors of these studies. Development indexes are frequently commissioned by international economic institutions or individual enterprises (World Bank, European Bank for Reconstruction, Economist Intelligence Unit)². In its world development report of 2002, for example, the World Bank considers only certain institutions, especially those that are of interest to investors. Thus, its examination of the efficiency of judicial systems was based on the jurisdiction of civil courts which, being in charge of economic issues, act as guarantors of the certainty of the law, a crucial matter for any enterprise. As the interest in new insights was focussed elsewhere, fundamental rights and criminal jurisdiction were examined either not at all or only marginally.

2.1. Method and sampling

The following study on the status of constitutionality in 15 selected developing and transforming countries represents the second survey conducted as part of the Konrad Adenauer Foundation's Democracy Report. So far, the development of the rule of law in all its important dimensions and facets has not been in the focus of a comparative democracy audit. To close this gap in research is the purpose of this study conducted by the Konrad Adenauer Foundation in cooperation with the Governance Research Group of Duisburg-Essen University. As one of the three parts of its Democracy Report, the Konrad Adenauer Foundation investigates the development and status of the rule of law in fifteen developing and emerging countries. For this purpose, the Governance Research Group and the Konrad Adenauer Foundation developed a comprehensive questionnaire on the subject of constitutionality.

² See also: Bertelsmann Foundation: *Bertelsmann Transformation Index 2003. Towards Democracy and a Market Economy*, Gütersloh 2005, pp. 120 et seq.

Maintaining more than 60 offices abroad, the Konrad Adenauer Foundation is engaged in promoting democracy and the rule of law in more than 100 countries, acquiring in the process a global network in political development cooperation as well as a great deal of knowledge about the opportunities and problems involved in spreading democracy. This study aims to pool the knowledge about the development of democracy that is available in the KAF's offices abroad, and to make it accessible to systematic benchmarking. An evaluation of this survey of available consultative competences and information potentials may reveal new points of departure for political development cooperation in the future. This calls for identifying general trends in the development of the rule of law as well as for placing these trends in the political, economic, and historic context of the countries under investigation.

The problem of assessing the rule of law or, more generally, the quality of judiciary systems presents a complex challenge. Developing quantitative methods and defining indicators is especially difficult. Thus, for instance, the World Bank developed a (very laborious) process for doing justice to civil proceedings in all their complexity. In addition, it developed indicators of judicial independence, such as the length of a judge's term of office. Even so, the World Bank as well as other institutions normally use qualitative methods to assess constitutionality, mainly general-population or expert surveys. Yet qualitative as well as quantitative methods are vulnerable on methodological counts.

One of the drawbacks of a general population survey (whether quantitative or qualitative) is that citizens will measure their satisfaction by the standard of their expectations. If a population expects much of a legal system (and if these expectations are not met), that legal system may be given bad ratings although, in objective terms, it may work more effectively and fairly than the judiciary in some neighbouring country, where the population does not expect as much. For this reason, general population surveys in country studies are comparable only to a limited extent (on the development of methods).³ Any comparative study must cope with the conflict between the generalisability of its results (scope) and empirical depth. Any scope enlargement is always accompanied by a reduction in complexity, so that the historical, economic, or political framework conditions of the cases under investigation can be considered only to an increasingly limited extent. Yet it is precisely these framework conditions on which the practical relevance of the results of a study crucially depends in many cases. Case studies, on the other hand, are

³ World Bank: *Institutions for Markets. World Development Report 2002*, Washington DC 2002, pp. 143 et seq.

quite capable of accommodating any degree of complexity found, but are not so easily comparable with developments in other countries. The scope of case studies is too small to permit general conclusions about effective political development work.

The path chosen for this study runs somewhere in the middle. Based on 15 selected case studies, hypotheses will be generated about trends in the development of the rule of law in developing and transforming countries in four continents. In correspondence with the main focus of interest of this study, case histories were selected from those countries where the Konrad Adenauer Foundation maintains offices and has acquired experience in political development cooperation over a number of years. Consequently, the KAF Democracy Report is a spot-check survey, just like the *Nations in Transit* report by Freedom House. The countries selected represent a cross-section of countries with widely differing cultures and diverse political and economic backgrounds. This is shown by, among other things, the scatter bandwidth of these countries in the United Nations *Human Development Index*. Thus, for example, the countries investigated include emerging nations in Latin America, EU accession candidates in Eastern Europe, and developing countries in Africa. Three nations with a comparable geographical or historic background are compared in each case. On a relatively small geographical scale, this permits identifying common features as well as differences between the countries concerned, so that specific regional peculiarities and problems can be highlighted. In total, the number of cases investigated, which is high for a qualitative study, conforms to the criterion of maximum variation. Consequently, the empirical evidence of the generalised results of the study is high, although they cannot claim global representativeness. However, they offer a sound basis for deductive analysis with a high number of cases and a wide scope. To be sure, it must be stated in qualification that not all research questions can be answered by quantitative surveys – another fact that highlights the benefits of a qualitative approach. Consequently, the research design of this survey is advantageous precisely because of its qualitative approach: unlike other well-known democracy indexes, this investigation is capable of identifying degrees of constitutionality much more precisely than purely quantitative surveys. By paying more attention to the specific framework conditions prevailing in each country the chapters try to give an adequate description of the status of the rule of law in each case.

The design of this research features two outstanding elements: first, it includes data about changes that occurred in the last five years. This permits weighting the significance and scope of each indicator as well as identifying transnational trends. Second, the design serves to identify optional ways in which the KAF might support the

development of the rule of law. In practical terms, the benefit of this study for the KAF's development work in the field results from linking any infringements of constitutionality discovered to possible forms of support that might be given by the Foundation.

The method chosen by the Konrad Adenauer Foundation and the Governance Research Group is a qualitative expert survey that uses a standardised, half-open questionnaire and ordinal scaling. Reaching beyond the approaches used in assessing constitutionality so far, the questionnaire not only concentrates on legal and constitutional texts but also investigates their implementation in legal practice. A second focus of the questionnaire is on players in a constitutional state, in which context it enquires about corruption, discrimination, and any kind of perversion in the course of justice.

2.2. Main indicators

The chapters were written by experts familiar with each country and its laws, with whom the Konrad Adenauer Foundation has been cooperating for a long time. Authors were requested to merge their answers to the questions into coherent national reports which form the core of the Democracy Report. Being half open, the questionnaire permitted placing the investigation indicators in the political, economic, and historical context of each country.

Seven main indicators were used to measure the development of the rule of law, representing the most important conditions for establishing a constitutional democracy. Specifically, these main indicators include:

- *Constitution*: institutional structures of the balance of powers and human rights protection in constitutional law and praxis
- *Legislation*: conditions of law-making
- *Courts*: government accountability in court, fair trial and jurisdictional biases
- *Judicial Independence*: state and non-state threats to the independence of judges and juries
- *Criminal Justice*: enforcement biases and human rights abuses
- *Corruption in Law Enforcement and the Judiciary*: corruption, its causes and measures to curb it
- *Public Administration*: the legality of public administration and remedies against wrongful acts.

2.2.1. Constitution

The catalogue of questions about the constitution and constitutional reality begins by addressing the degree to which human rights, the separation of powers, judicial independence, and the position of specific governmental players like the military are embedded in the constitution. Independently of the degree to which they are realised in fact, these constitutional principles form a normative standard regulating the behaviour of governmental authorities. However, the chapter on constitutional law enquires not only about the constitutional parameters of the rule of law but also about constitutional reality. Has the implementation of universal human rights been completed in the country? Do they apply to everyone in the state, and do political actors play the game by its constitutional rules?

2.2.2. Legislation

Next to the practice of legislation (e.g. the prohibition of retroactive laws), questions under this item address the opportunities which citizens have to inform themselves about laws and their personal rights. You can use your legal options and exercise your individual rights only if you are familiar with them. Another important question relates to the material or cultural capability of certain groups of the population to obey a given law. Another point of interest in this group of questions is the extent to which the principle of non-discrimination is implemented in legislation.

2.2.3. Courts

This aspect addresses the practice of court jurisdiction and the access available to it. Questions are asked about legal and economic options of suing for individual rights in court. Another point of interest is the right to a legal representative and the action options open to him or her. Further questions relate to the systematic discrimination and/or privileged treatment of specific population groups in court.

2.2.4. Judicial Independence

This complex of questions focuses on the actual independence of the judicial branch, inquiring about the methods used by governmental and non-governmental players to influence judicial decisions, and about the degree of their success.

2.2.5. Criminal Justice

These questions address the practice of criminal prosecution followed by the police, public prosecutors, and judicial authorities. In this case, the focus is on potential infringements of human rights and the exclusion of specific population groups from the protection of the public-security agencies.

2.2.6. Corruption in Law Enforcement and the Judiciary

The spread and prevalence of corruption is the second-but-last main indicator. Next to systematic power abuses and human-rights infringements, corruption represents the greatest threat to the rule of law. It undermines the principles of legal certainty and equality before the law. What is more, corruption always carries a grave risk of jurisdiction and governmental action losing their normative legitimacy. Thus, it prevents the formation of a democratic political culture, preparing the political soil for anti-democratic authoritarian forces.

2.2.7. Public Administration

The last main indicator addresses the practices of the public administration. Questions relate to the recruitment and training of public-service personnel and the rights and actual opportunities of citizens to protest against administrative acts.

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