BRILL

Comparative Sociology 8 (2009) 165–201

COMPARATIVE SOCIOLOGY

brill.nl/coso

Putting Deficient *Rechtsstaat* on the Research Agenda: Reflections on Diminished Subtypes[1]

Hans-Joachim Lauth[a] **and Jenniver Sehring**[b]

[a] *Institute of Political Science and Social Research, Department of Comparative Politics, University of Wuerzburg, Wittelsbacherplatz 1, 97074 Würzburg, Germany*
hans-joachim.lauth@uni-wuerzburg.de

[b] *Institute of Political Science and Social Research, Department of Comparative Politics, University of Wuerzburg, Wittelsbacherplatz 1, 97074 Würzburg, Germany*
jenniver.sehring@uni-wuerzburg.de

Abstract

This article proposes a typology of diminished subtypes of *Rechtsstaat*. Building on a historical overview of the different constitutional traditions in the United States, Great Britain, and Germany, an ideal type of *Rechtsstaat* is identified. This definition provides the foundation for the creation of subtypes, which are structured into two categories. First, four diminished subtypes of *Rechtsstaat* are defined: inconsistent, arbitrary, partly-implemented, and excluded. Second, three different causes for the deficiencies are identified: lack of capacities (LoC Type), powerful interests supporting alternative rules (PIAR Type), and high acceptance of alternative norm systems (HAAS Type). The latter two types of causes, PIAR and HAAS, are largely ignored in legal reform strategies and yet – according to our approach in this article – they are more prevalent empirically than the first type.

Keywords

Rechtsstaat, rule of law, diminished subtypes, deficient *Rechtsstaat*

In the process of the broad Third Wave of Democratization,[2] we are able to observe that the introduction of elections is not the sole guarantor

[1] The authors would like to thank David Sciulli and an anonymous reviewer for their helpful comments.

[2] The "Third Wave" of democratization after 1974 (Huntington 1991) encompasses states in Southern Europe, Southeast Asia, Latin America, and Eastern Europe.

DOI: 10.1163/156913309X421637

of a functioning democracy. Additional criteria adopted by modern constitutional states must be fulfilled as well. References have often been made to a lack of rule of law or checks and balances due to insufficient institutionalization of horizontal accountability (Schedler, Diamond, and Plattner 1999; Merkel 1999). O'Donnell (1999a) therefore explicitly calls for raising the issues of the existing foundations of democracy in the western context and the implicit preconditions for democracy. He considers the concepts of rule of law and constitutionalism to be particularly relevant in this context.

O'Donnell's consideration does not refer to the level of systems of government but rather to a more fundamental level, that of order (civil order) under constitutional law. This pertains to the legal form or the legal system in which a government's activities are manifested and which are subject to change by governmental action. However, blanket references to a lack or limitation of rule of law, although important, provide little opportunity to collect differentiated empirical findings. In order adequately to integrate the legal level in analyses of new democracies, we outline here a dual perspective.

First, we review the different characteristics of formal legal structures in order to develop an adequate concept of *Rechtsstaat*. Second, we develop a typology in order to classify situations in which a *Rechtsstaat* insufficiently prevails. This typology is necessary because a not fully-realized *Rechtsstaat* is often identified as the Achilles' heel of new democracies (Merkel, Puhle, Croissant and Thiery 2006; O'Donnell 1999).

Deficiencies in a *Rechtsstaat* manifest themselves in different ways, however. It is important in this respect to consider informal institutions in the neo-institutional sense, such as those of clientelism, nepotism, or corruption (Lauth 2000; Merkel and Croissant 2000). This emphasizes that not only legally codified institutions must be investigated but also informally existing structures. It is only on the basis of this broader analysis that a differentiated evaluation of previous empirical findings can be carried out. The following questions, which determine the structure of sections of this article, emerge in this approach:

- In identifying legal systems, we ask what is understood by the following three concepts: the American constitutional state, the British rule of law, and the German *Rechtsstaat*. To what extent are they identical, and how do they differ? By analyzing the historical lines of develop-

ment of each concept, we can clarify the various directions that contribute to the ambiguity in terminology we find today. At the same time, this reflection facilitates the identifying of central principles in a root concept, which we call *Rechtsstaat*. This is not identical with the German tradition but rather consists of certain core principles that we outline below.[3]

- Subsequently, we turn our attention to the construction of diminished subtypes of *Rechtsstaat*. Analogous to democracy theory (e.g. Merkel 1999), we assume there are different variations of a *Rechtsstaat* basic type that should be categorized. This discussion will concentrate on the parallel existence of *Rechtsstaat* and informal legal systems. Such alternative norm systems are considered important causes for deficiencies.

Rechtsstaat, Rule of Law, and Constitutionalism

To elaborate on the concept of *Rechtsstaat*, we must determine the meaning of the three terms that shape its main lines of interpretation. We allude to the Anglo-Saxon – or, more specifically, British – understanding of the term "rule of law," the North American discussion devoted to constitutionalism, and the *Rechtsstaat* tradition in Germany. Based on these concepts, we frame principles of a formal *Rechtsstaat* and then, at the end of this section, justify an expanded, material notion of *Rechtsstaat*.

Looking at three law systems that are regarded generally as main sources in the actual understanding of rule of law, common features and characteristics can be identified. Structured by the leading idea of the effective functioning of law, these build the basis for generating an ideal type of *Rechtsstaat*, following upon the understanding of Max Weber.[4]

---

[3] In the following, we will use the term *Rechtsstaat* for the root concept of our typology. Furthermore, the term is used in the description of the specific German understanding of the *Rechtsstaat* that differentiates between the material and the formal *Rechtsstaat*. When we refer to the general literature and assessments of rule of law, we will further use the widely used term "rule of law," indicating that we now refer to the general discourse and not to our specific concept.

[4] Concerning the limited length of this article, we cannot provide an all-embracing systematic reflexion on constitutional theory here.

The Constitutional Tradition in the United States of America

The idea of constitutionalism is closely related to the constitutional tradition of the United States and specifically refers to the Constitution ratified in 1789 (cf. Kelly et al. 1991; Edling 2008). It determines the polity, the separation of powers, and the competences of the individual powers, while including both a horizontal and vertical separation of powers. The latter – the balance between state and federal levels – is a particularly important area of conflict. It was discussed in 1787–1788 in the *Federalist Papers* and regulated in the Constitution, though not in an entirely consistent manner.

The fundamental rights of individuals are, for the most part, not incorporated into the Constitution of 1789 but rather are contained in the ten articles of the Bill of Rights of 1791, the first ten Amendments to the Constitution. They for the most part positivize civil procedure and are extended and/or specified in later Amendments. They are, however, often contained on an abstract level in texts or can only be implicitly identified as the principle of equality (Dworkin 1977, 1997). This allows for a certain breadth of interpretation that can be seen in the differing interpretations of equality and liberty (cf. race-related legislation and social laws).

The thin Constitution made further interpretation indispensable. This took place in the course of the next two centuries in the form of Supreme Court case law. Initially, very few legislative statutes of Congress were declared unconstitutional. From the beginning of the twentieth century forward, however, this type of judicial intervention was used much more frequently. We can distinguish between three phases in the historical development of constitutional interpretation and shaping (Kelly et al. 1991):

- In the nineteenth century the primary focus was on consolidating and strengthening the union. At first, many rights were reserved for the states; over time, however, they were taken away (cf. in particular the Fourteenth Amendment regarding the understanding of citizenship; Shell 1990:288f).
- The second phase is characterized by a *laissez-faire* perspective on economics that lasted until the legislation creating the New Deal in the 1930s. In this phase, any types of sociopolitical interventions by the state were declared unconstitutional on the grounds of economic freedom. It was not until the enactment of the New Deal and an increase in political pressure that this position changed.

- Finally, during the 1950s and 1960s, the enforcement of civil rights was made the center of attention. In this area as well, we can chronicle a paradigmatic change of direction exemplified with legislation dealing with segregation of the races. While segregation was first declared constitutional, it was overruled in 1954, and later, the principle of equality was "activated" with affirmative action. In addition to equal rights, civil liberties were greatly strengthened as well (cf. the liberalization of adjective law, the aggregate of rules of procedure or practice).

We can draw two conclusions from these observations. For one thing, the Constitution is interpreted in different – sometimes even opposing – manners. For another, the reason for these differences is to be found not in the Constitution itself but rather in the shaping power of dominant contemporary ideologies, visions, and guiding principles, and in changing dynamics of society. In the end, the political and judicial interpretation of the Constitution remains open within the frame of acknowledged exegesis; the contents of the Constitution can change accordingly. Kay (1998:48) refers to the discrepancy between the original Constitution and the developed tradition of Supreme Court interpretation. Over time, the judiciary has taken on the role not only of appraising but also of defining space for the creation of laws.

Constitutionalism in the American tradition does not exclusively mean the formal existence of a written constitution and governmental action according to the Constitution. Rather, the specific, normative form of the Constitution includes separation of powers and rule of law. Qualified majorities (in Congress and in the states) can change the Constitution by amendment, and such amendments cannot be nullified by the Supreme Court. However, the basic principles of separation of powers, civil and political human rights, and rule of law are guaranteed by the Supreme Court and other institutions, and hence cannot be changed.

Rule of Law: The Constitutional Tradition in Great Britain

In the British tradition, the idea of an evolutionary constitution emerged gradually, preventing the rigidity of a written definition. The contents of the constitution are not complete without the addition of several main documents (beginning with the Magna Charta and others) as well as the common law. The latter was developed in court decisions as case law. The

main documents (the Ancient Constitution), therefore, do not in summation entail a cohesive set of rules on their own; they are supplemented by the Conventions of the Constitution (unwritten tenets) (Dicey 1982, Bagehot 2001).

In this tradition, the constitution was long understood as a "mixed constitution," combining principles of monarchy, aristocracy, and democracy. The idea of indivisible sovereignty was rejected (even in direct resistance to demands for absolute monarchy, as represented by Charles I; cf. Kriele 1994: 98f). Later, evolutionary understanding was complemented by contractual understanding (Locke), which justified pre-state rights (individual civil liberties). Besides the step-by-step formation of rule of law (as examples, the right to a trial by jury and the prohibition against cruel and unusual punishment in the Bill of Rights of 1689), the element of democracy was strengthened with the development of general suffrage. Ultimately, in the twentieth century, democracy was identified as the single most important element of the British constitution.

According to many of those who interpret the British system of government, this development of constitutional doctrine was accompanied by absolute sovereignty of Parliament (Dicey 1982; Loewenstein 1967:75ff). Loewenstein first accords to parliamentary sovereignty and rule of law the status of pillars essential for supporting the constitution. Then he proceeds to emphasize that parliamentary sovereignty is the paramount constitutional norm. Along the same lines, Weber (1998:181) concludes that laws can never be unconstitutional. Vorländer (1999:39) seems somewhat skeptical of this notion, given his argument (in alignment with Blackstone) that tradition still lays claim to validity. Accordingly, the people retain a right to rebel if political oppression seeks to undermine or dissolve the constitution.

If we view matters this way, however, several key questions remain unanswered: What constitutes the constitution? Who has the power to interpret it? When is an evolutionary change in this sense legitimate, and at what point does it become a revolutionary breach? Moreover, the right to legal action in the case of human rights was lacking for a long time. Both basic civil rights and human rights were not legally positivized. The various charters – such as the Petition of Rights – are for the most part rights of the Parliament, and thus binding only on the executive (the king), not on the government as a whole (Grimm 1994:79).

There is another problem, one with which the American legal system is also familiar at least to some extent: the case law principle (an inductive principle) is not compatible with the coherent development of law (and thus with formal rule of law principles such as clarity, transparency, and consistency), nor is it consistent with the statute law decided by Parliament. Here it is also important to note that various legal traditions exist in Great Britain, including those of England, Northern Ireland, Scotland, and the Channel Islands. One rule the British employ for clarifying all of this is that if laws contradict each other, the new law automatically overrules the old one. Another is that statute law is superior to common law (Loewenstein 1967).[5]

In the British sense, the rule of law means respecting common law, its rules, principles, and norms.[6] Rule of law is formally aligned (as procedures) as well as materially bound (as rights): "Fundamental rights had their place in judge-made common law" (Grimm 1994:77).[7] Common law, therefore, is not abstractly framed but rather contained in the explanations of particular cases. A rule of law in this sense, as in the American, is an important component of the constitution (or the constitutional tradition). A distinction is traditionally made between two legal sources of law production: jurisdiction and legislation. Not only Parliament but also judges, through their interpretations of "old" cases in their new judgments, are therefore considered to be active lawmakers. Law is thus subject to a gradual process of change that counterbalances continuity on the one hand and the requirements of an ever-changing environment on the other. Common law can be changed by statute law, even if it demonstrates some level of persistency. Thus, it cannot take priority over the sovereignty of Parliament.

The British form of constitutionalism therefore differs from the American form in two fundamental ways. First, the constitution in the sense of its generally accepted functional equivalents is not the highest norm – accordingly, no Constitutional Court exists. Second, basic rights are of

---

5) For the coherency of this development, one could also use a socialization argument, which targets the small number of judges or "families of judges" who have often been known to earn their degrees from the same universities.

6) Today, common law is for the most part civil law in a wider sense. Besides civil matters, laws also govern national matters (public law). Common law must be distinguished from the more informal concept of custom law.

7) This and all subsequent citations from German were translated by the authors.

lesser significance, even though their status was improved by the recent enactment of the European Convention on Human Rights into domestic law (Human Rights act 1998; cf. Byrne and Weir 2001). Human rights have their origin in common law, and thus cannot be separated from the rule of law with regard to the development of British legal tradition. In the American context, by contrast, human rights are conceived more as a system of formal legal principles that only in the context of the Constitution get a reference to basic rights (Ten 1993:395f; cf. Raz 1977:196 and 1979:210,214f).

Both constitutional traditions share in common – although this is sometimes contested – juridical constructs which can be changed organically and historically. Yet it is only in the United States that change is carried out by way of constitutional amendments and by Supreme Court interpretations of the Constitution. In the British system, change takes place by way of simple laws and the shifting of jurisprudence into common law.[8]

The Rechtsstaat: *The Constitutional Tradition in Germany*

In nineteenth century Germany, the concept of supremacy of the constitution over other powers or over the law was unknown. Nor did basic rights create a barrier to legislation. Existing constitutions were decreed from the top down and defended the monarchic principle (the monarch as sole possessor of governmental and legislative authority). In conflicts, the monarchic power was the constitution. The only important attempt to break with this tradition and to codify a catalog of basic rights, administrative jurisdiction, and a constitutional court for the empire was pursued when a constitutional convention was supposed to meet in St. Paul's Church in Frankfurt in 1848. It failed, however.

The leading notion in comprehending the idea of a *Rechtsstaat* was the rational-legal theory of the state (Kant), which displayed both material and formal characteristics (as civil rights and procedural rights as well as administrative law; cf. Böckenförde 1976:68f). Rights are framed by the government on the basis of rational discretion (cf. Carl Theodor Welcker and

[8] Legal uncertainty exists in several aspects in both systems: in the US-based system with regard to the fluctuation in Supreme Court interpretation; in Great Britain due to the tension between common law and statute law as well as the nonuniform legal systems (cf. case law in England and canon law in Scotland) and, last but not least, the integration of these systems into that of the EU, which leads to constitutional changes (Harrison/Boyd 2006).

Robert von Mohl). In this respect, a *Rechtsstaat* is therefore the opposite of both theocracy and despotism.

It was only later, as discussion of the *Rechtsstaat* continued, that this broad understanding of it was narrowed, based on legal-positivistic concerns. This would then have far-reaching consequences for the understanding of the *Rechtsstaat* in the German Empire and the Weimar Republic.

According to Böckenförde (1976:71), this great change came because the *Rechtsstaat* is devalued from a generic idea of the state to a non-political element, a formal constitutional state, which is reduced to the mere legality of the state administration.[9] In the following, we identify three historical types of understanding of *Rechtsstaat* in German history by analyzing the respective constitutions of 1871, 1919, and 1949 (cf. Benda 1995:515ff; Böckenförde 1976:65–145; Kriele 1994:312–344).

The first constitution of 1871 was based on the monarchic principle, although it was bound to the main principles of a *Rechtsstaat* – at least in its formal version (such as respect for coherence of laws and the legal liability of the government). However, the state was still not subject to an "absolute law" (Richard Thoma) in that the legislator – the monarch – remained omnipotent. Civil rights were not enshrined in the constitution, though they were gradually made valid by way of general laws (as examples, those of economic freedom and freedom of association). A national administrative jurisdiction was also introduced so that the German constitutional state was in this sense a *Rechtsstaat*. But it did not incorporate democratization and parliamentarization into its construct: "The interconnection between individual and political freedom, which was constitutive for England, was just as disbanded in Germany as the interconnection between liberalism and democracy, which was characteristic of North America" (Vorländer 1999:71).

The constitution confined the idea of politics to the sphere of law and administration, not acknowledging the role of political participation and societal conflicts. A logical consequence was a separating of law and politics in German teachings on constitutional law. The well-known and striking definition of *Rechtsstaat* by Friedrich Julius Stahl (1802–1861) is a characteristic expression of this understanding: The "term *Rechtsstaat*…

[9] It is important to note, however, that after 1871 many basic rights were positivized in laws and incorporated in the way of thinking about the constitution as a self-evident foundation.

does not mean the goal and capacity of the state, but rather only the mode and character with which it realizes these" (from Böckenförde 1976:70f).

In the Weimar Constitution of 1919, the monarchic principle is replaced by the democratic principle, popular sovereignty. In addition, the constitution contains a detailed catalog of basic rights, which includes not only liberal individual rights (such as freedom of speech) but also social rights (like public welfare). However, none of these rights was binding: social rights were declarations of intent and individual rights had no validity vis-à-vis a legislative majority in Parliament, which could "limit them as desired" (Vorländer 1999:73). This view was shared by positivistic and formalistically characterized teachings on constitutional law, even as significant minority opinions certainly concurred as well, such as those of Hermann Heller and Rudolf Smend. The constitution was seen by all these constitutional theorists as always at the disposition of the political powers, especially the legislative branch. Because of this, it was considered possible for democracy to do away with itself (the possibility of a "legal revolution"). At the same time, this was regarded as unlikely.

The basic principle behind this idea was the belief in the infallibility of the *volonté générale*, appearing in the will of the majority (Benda 1995:516).[10] The existing State Constitutional Court was mostly designed to deal with conflicts between the empire and the states. The formal *Rechtsstaat* nonetheless proved to be bound *de facto* to norms and standards. It therefore remained a civil – "bourgeois" – *Rechtsstaat* in that it safeguarded individual liberties and property (from redistribution) whereas it more weakly interpreted other basic rights (Böckenförde 1976:6).

The Basic Constitutional Law (*Grundgesetz*) of the Federal Republic of Germany of 1949 was not enacted by way of a popular referendum but instead ratified by the parliaments of the German states. Forgoing a symbolic ceremonial act was the expression of its transitional character specifically chosen for this purpose. The principles of the Basic Constitutional Law result from the self-conception of the Federal Republic of Germany as a democratic and social *Rechtsstaat* (art. 20 and 28 GG). This is combined with a clear reference to basic rights, which – in contrast to Weimar – are

[10] Yet the understanding of the general will was not adequately conveyed according to the intention of Rousseau, who explicitly delineated this concept from the will of the majority.

now protected by an eternity clause (art. 79 GG).[11] The basic substantive principle lies in the protection of and respect for human dignity (Benda 1995:517). Several other provisions (such as legal binding of state competences, protection of fundamental rights, etc.) arise from this and are expressed in the concept of the so-called material *Rechtsstaat*. This not only includes the guarantees of a formal *Rechtsstaat* (see Table 1 below) but also basic rights. The latter include the classical liberal rights (civil liberties) to defend oneself against the state, such as freedoms of religion, opinion, press, information, assembly, and organization as well as protection of property. In addition, political rights of participation and social rights are incorporated as well as features of state organization (federalism).

The precedence of the constitution in legislation is safeguarded by the institution of a Federal Constitutional Court. This court has four main competences:

- Abstract and concrete judicial review, meaning judicial review of the compatibility of certain laws with the *Grundgesetz* (Basic Constitutional Law) or with federal law either in general or in concrete cases;
- The resolution of conflicts between state organs, for example between the *Bundestag* and the *Bundesrat* on the question if a certain law is subject to approval by the latter or not;
- Decisions to remove the legal status of organizations, such as the prohibition of a political party; and
- Constitutional complaints by individuals that perceive a certain state action (e.g. a law, a court decision, a decision by public authorities) violating his or her basic rights.

The competences of the Federal Constitutional Court are high compared to those of comparable constitutional institutions abroad, such as those in France or Italy.

Principles of Formal Rechtsstaat *and the Definition of Material* Rechtsstaat

The constitutional state in the sense of American constitutionalism is the most comprehensive concept as compared to British rule of law and

[11] Articles 1 and 20 are "protected." Besides enshrining basic rights, the federal state system is another principle covered by eternity clauses.

German *Rechtsstaat*. Due to its normative enshrinement, it can be applied only to states that have a constitution as well as other required features, such as separation of powers (an independent judiciary in particular), human rights guarantees, and rule of law.

As a concept, rule of law in the American version (unlike that in the British tradition) is, for the most part, identical with "formal *Rechtsstaat*" that prevailed during the Weimar Republic. In contrast, the form of *Rechtsstaat* in Germany today incorporates, in response to the legal-positivistic attitudes of Weimar, a certain binding character of fundamental rights and also a normative extension. That is, by including the duty of protecting human dignity and basic rights, the postwar German constitution incarnates a material *Rechtsstaat*.

The British understanding of rule of law oscillates between these two positions, formal and material *Rechtsstaat*. On the one hand, it includes a commitment to basic rights through the development of common law. On the other hand, it is subject to the caveat of parliamentary sovereignty. As all three concepts – formal and material *Rechtsstaat* and the British hybrid – are based on state monopoly of legitimate violence, a non-state legal system cannot be characterized by rule of law. At minimum, rule of law must be subordinate to and incorporated into a state legal system.

In the three lines of development of modern thinking outlined above – about constitutional states, rule of law, and *Rechtsstaat* – we can pinpoint several similarities between their main characteristics. Table 1 summarizes these as main principles of our concept of formal *Rechtsstaat*. The latter must be distinguished from the German material version, with its binding character to fundamental rights, as well as from rule of law in the specific British tradition, which includes parliamentary sovereignty.

The discussion of different traditions of systems of law demonstrates that various concepts are available, even in one country. One common feature, however, is found in the concept of rule of law as provided in the understanding of formal *Rechtsstaat* presented here. This version of rule of law is not totally identical with the respective British conception or with the American version embedded in the Constitution or with the postwar German material *Rechtsstaat*. At the same time, it does capture all common characteristics of rule of law in a coherent way.

The generic principles of formal *Rechtsstaat* thus include the character and the importance of the laws, procedural guarantees, and the objectives

of the law, which are characterized by formal consistency and generality. They also imply a reliable form of implementation. The following facts are fundamental to this legal understanding.

Governmental authority is bound by the law and political arbitrariness in judicial and legislative respect is prohibited. Both principles are primarily expressed in guarantees of process law (such as protection from arbitrary arrest and torture) and in prohibitions against retroactive laws and excessiveness, such as disproportionality of criminal law sanctions for certain statutory offenses. Governmental action in all its dimensions complies with existing law, always being of a general nature. With such law, each and every citizen is allocated rights and responsibilities, the importance of which he or she may review and, if necessary, file suit for in legal proceedings. (Judicial protection and guarantees of due process imply related attributes, such as independent and professional courts, appropriate duration of proceedings, legal counsel, free access to due process, and others). The law must be public, transparent, and consistent in order to allow the state and its citizens to act according to law. It must treat all concerned in an impartial manner.[12] In addition, the laws must remain stable to a certain extent in order to guarantee legal certainty.

Despite the remaining issue of an adequate substantiation of basic rights, their creation, and their differing interpretations (from the same abstract principles), we can confirm convergence on an empirical level: An understanding of *Rechtsstaat* always implies the inclusion of human rights. Therefore, in the following, we use the term "*Rechtsstaat*" in the sense of its material version, which adds to formal *Rechtsstaat* a guarantee of human rights.

One could also refer to a systematic argument underlining the plausibility of an understanding of the concept of "*Rechtsstaat*" that is bound to basic rights. If the idea of rule of law implies a considerable limitation of all state powers, this cannot be part of a "temporary" argument in which only current governmental and state action is bound to the laws. This would mean that future action would not be subjected to any limitations as long as one heeds the correct procedure for creating amendments. In the

[12] Equality before the law thus does not preclude the existence of special affirmative or protective laws for certain groups. Affirmative action laws target the equality of marginalized groups (among other things) and hence are not in conflict with this principle (Faundez 1994, Wolfrum 2003).

Table 1
Principles of the (formal) *Rechtsstaat*

1. The universality of the law (framing laws while unaware of the specific cases in which they will be applied, not *ad personam*).
2. The knowledge of the law among those concerned.
3. The prohibition of retroactive laws.
4. The clear and comprehensible formulation of laws.
5. The absence of contradictory laws (in and of themselves, with regard to other laws, and with regard to the constitutional norms).
6. The absence of behavioral requirements which are impossible to meet (unfair laws).
7. Relative stability of the laws (changes not made too often – legal certainty).
8. The prohibition of excesses (proportionality of ends and means).
9. Equality before the law, general application of the law independent from the social status of those concerned (fairness imperative, impartiality of the law).
10. The application of the law to the state and all its institutions (legal liability of the government, all are subject to the law, an explanation of the areas of legal basis for action, primacy of the law, caveats).
11. Independency and effective controlling competence of the courts (effective legal protection from the state, protection of the courts).
12. Adequate procedural and process law (no sentencing or imprisonment without a trial, time limits for processes, accessibility for all, legal counsel, professional judges, penalties that fit the crime, the chance to appeal, fairness, transparency and public nature of the process, equal treatment of equal cases).
13. Right to damages payments, if and to the extent applicable; government liability.
14. Realization of legal justice (relinquishment of arbitrariness and contribution to justice).

end, this would entail giving up the idea of obligation (and disavow the idea of limiting power), as no categorical barriers to future action would exist. Thus, a strictly formal version of *Rechtsstaat* cannot – as we observe in the Weimar Republic – guarantee basic human rights. In addition,

besides the potential for change into a totalitarian system, it could also turn into an authoritarian system of rule *by* law.

When we speak about *Rechtsstaat* in the sections below, we take the concept of formal *Rechtsstaat* and connect it with the guarantee of basic human rights (as provided for today in many constitutions and international declarations). With this, our root concept of a (fully working) *Rechtsstaat* is established.

Diminished Subtypes of *Rechtsstaat*

The rule of law is widely considered to be a necessary precondition for democracy and, increasingly, it is seen as an integral part of democracy itself. Scholars of democracy and transformation define rule of law as one of the "essential pillars upon which any high-quality democracy rests" (O'Donnell 2004:33). In the words of Juan Linz (1997:118): "No *Rechtsstaat*, No Democracy." Simultaneously, in the discourse of development assistance rule of law became popular within the debate over good governance. More generally, rule of law emerged as a "holy grail of good governance and sustainable development around the world" (Jensen 2003:336). Ineffective and corrupt judicial systems were seen as a major obstacle to (economic) development (cf. World Bank 2003, inter alia).

However, in many new democracies of the third wave, a *Rechtsstaat* as we define it has not been fully realized. Some commonly observed deficiencies are:[13]

- Lack of coherency and transparency in the legal system;
- Restricted access to it;
- Lack of compliance to laws (especially by the state itself);
- Lack of legal foundations for some state actions;
- Shortcomings in legal protection;
- Unfair laws regarding access to lawsuits; and
- Unfair lawsuit practices.

Therefore, our focus now is on types of deficient *Rechtsstaat*, on instances in which *Rechtsstaat* is only partially realized. These types can be formed

[13] See Ahrens and Nolte 1999; Merkel 1999; Merkel, Puhle, Croissant, Aicher, Thiery 2003, 2006; O'Donnell 1999; and Zakaria 1997.

either based on existing and missing characteristics or on the reasons for the evolution of particular deficiencies.

Typologies are essential for comparative politics as categories for analysis. In order to attain greater differentiation, it is common practice to define subtypes that specify various kinds of a certain category (Sartori 1970). This allows researchers to compare differences within a type or to focus on specific features of a subtype. There are two kinds of subtypes, both of which derive from a root concept: classical subtypes and diminished subtypes.

Classical subtypes possess all features of the root concept but stress a certain peculiarity or variation. For democracies, these include parliamentary and presidential democracies as well as majoritarian and consensus democracies. Diminished subtypes are those in which one or more of the features defined as part of the root concept are missing (Collier and Levitsky 1997). However, when the majority of features of the root concept remain in place, it still seems adequate to place a case in this broader category. In democratization research, there have been numerous efforts to define diminished subtypes, such as the concepts of defective democracy and deficient democracy (Merkel et al. 2003, 2006; Lauth 2004). One example is "illiberal democracy," which applies to cases in which democratic features exist, such as fair and free elections, political rights, and an effective government, but the rule of law is restricted (Zakaria 1997; Merkel et al. 2003).

Diminished subtypes of *Rechtsstaat* allow researchers to systemize the variation of observed shortcomings. However, we did not form these types inductively but rather deductively, from the definition of *Rechtsstaat* provided above, our root concept. These subtypes are therefore ideal types such that, in reality, aspects of each can be mixed among all the others. Since the guarantee of basic human rights as a component of a material *Rechtsstaat* is affected by any deficiency, we did not include this in the type formation explicitly but instead restricted it to the formal criteria. Hence, in each subtype the material dimension is not fully realized; they nonetheless differ in terms of which principles of formal *Rechtsstaat* are violated.

In the root concept definition, we listed fourteen core principles of *Rechtsstaat*. We speak of a "diminished subtype," or a deficient *Rechtsstaat*, therefore, when some of these features are ~~either~~ not fully realized ~~or com-~~

pletely missing. Still, it is highly unrealistic for one feature to be completely missing; rather, a feature may be lacking to some degree. Since we derive subtype categories from an ideal root type, full realization can also not be expected. However, to be classified as "not fully realized," a feature must be substantially reduced. A *Rechtsstaat* as such may still be in place and possess a certain degree of enforcement power, but is not fully functional; it nonetheless predominates over concurring legal systems or non-legal spheres. The question of whether a case can still be regarded as a subtype or is no longer a *Rechtsstaat* is not only about how many features are partly or completely missing, but also about their level of priority.

We structured the potentially lacking features along four dimensions, which arose from basic social science categories (Böckenförde 1976; Dworkin 1977) as well as from inductive clustering of the characteristics: consistency, reliableness, implementation, and generality. Each individual subtype is defined by the non-fulfillment of one dimension due to a lack of certain characteristics. However, we must note that each feature is not representative for only one dimension; rather, the features can occur in several subtypes as they can have different manifestations depending on the other defects with which they are combined (such as equality before the law). The type of shortcoming also allows for inferences on whether it is either intentional or unintentional. This is discussed in the next section on the causes of subtypes.

The first type is an *inconsistent Rechtsstaat.* It is characterized by a lack of consistency between and within laws, by instability due to frequent changes in the law, and by ambiguous formulation of laws that fosters vagueness. Inconsistencies can occur within an area of law or between them (whether basic rights, criminal law, or civil law). Often it is difficult even for legal experts to recognize them. However, such inconsistencies are not to be confused with incongruity between different legal systems. The former can in principle be tackled within the system of a *Rechtsstaat*. These inconsistencies lead to unintentional inequality and insecurity for the subjects in the application of legal norms. In general, it affects all legal subjects. Yet actors with the respective social or financial resources are able to find and exploit legal gaps and contradictions while marginalized actors tend to suffer from such ambiguities. They also can foster intentional manipulation of rules by way of selective application of legal norms on the part of actors in the governmental authority.

Table 2
Diminished subtypes of the *Rechtsstaat*

Type	Inconsistent *Rechtsstaat*	Arbitrary *Rechtsstaat*	Partly-implemented *Rechtsstaat*	Excluded *Rechtsstaat*
Dimension / Core features	Consistency	Reliableness	Implementation	Generality
Universality of the law	1	<1	1	<1
Awareness of the law	1	1	<1	1
No retroactive laws	1	<1	1	1
Clear and comprehensible framing of laws	<1	1	1	1
No conflicting laws	<1	<1	1	1
No unfair laws	1	<1	1	1
Relative stability of laws	<1	<1	1	1
Proportionality	1	<1	1	1
Equality before the law	<1	<1	<1	<1
Application of the law to state institutions	1	1	1	<1
Independency and effective competence of the courts	1	<1	<1	<1
Adequate procedural/process law	1	<1	<1	1
Right to compensation and government liability.	1	1	<1	<1
Realization of the legal principle	1	<1	1	<1
Intention	Unintentional	Intentional	Unintentional	Intentional

Note: 1–Nearly fully realized
<1–not fully realized (significant short comings)

In an *arbitrary Rechtsstaat*, the dimension of reliableness is not fulfilled.[14] It is arbitrary for legal subjects in that they do not know whether or not they can rely on the principles of the *Rechtsstaat*. In a deficient *Rechtsstaat* of this category key principles such as an independent judiciary, transparency, and clear formulation of laws are upheld. The principles violated are those ensuring generality of laws, equality before the law, adequacy of procedures and laws, and the non-retroactivity and stability of laws. If laws are changed so frequently that legal certainty no longer exists, if they can be retroactive, if they can be formulated for specific cases, if they are disproportional (concerning ends and needs), then it is extremely difficult for the individual citizen to comply with law. While these are very different individual features, they have in common that their (combined) occurrence reduces the reliableness of a *Rechtsstaat* and increases the arbitrariness of rule applications. It also affects the level of trust in the legal (and political) system and can thereby contribute to a strengthening of alternative law systems (such as customary law, see below), which are perceived as more reliable.

In a *partly-implemented Rechtsstaat*, it is the dimension of implementation that lacks fulfillment. The main shortcoming lies in a sound implementing of formally codified principles of a *Rechtsstaat*. The features that are not fully realized include general awareness and knowledge of laws. When concerned agencies are not familiar with relevant legal texts and necessary information, local courts and officials cannot apply the law accordingly. The lack of awareness and transparency in the public sphere undermines people's ability to make legal claims and to assert their rights. This problem is widespread and even more severe in countries with a high rate of illiteracy and a multilingual population (KAF 2006).

A second feature is when the law is not adequately applied to all people equally, independent of their social status, race, gender, etc. A *Rechtsstaat* then exists on paper but is only irregularly applied in certain territorial or functional areas, which leads to what O'Donnell (1993) characterizes as "low intensity citizenship." Also, the degree of fairness of lawsuits is restricted: lawsuits may be extremely lengthy and opaque, and legal assistance for defendants may be limited.

---

[14] We use reliableness instead of reliability in order to prevent confusion with the usage of reliability as an indicator for data assessment.

As we have shown, the deficiencies of a partly-implemented *Rechtsstaat* do not lie in the sphere of policy and law formulation, as in the case of an inconsistent *Rechtsstaat*. They instead lie in the implementation of laws on the part of the judiciary and law-enforcement agencies.

The last type is an *excluded Rechtsstaat.* It refers to a *Rechtsstaat* whose validity is excluded from certain areas or for certain actors, especially the government and state institutions themselves. It provides legal certainty for citizens, fair lawsuits, and similar rights. But state power itself is only partly subject to *Rechtsstaat* principles. Moreover, the state is not liable or comprehensively committed to realizing legal justice (such as relinquishing arbitrariness and contributing to justice). This implies that the judiciary is not fully independent. It might also exclude certain power groups, such as tolerating an alternative legal system in certain areas, whether religious law or that of a guerilla group. It thus does not provide for equality before the law either, as certain actors are excluded from its coverage.

These four proposed subtypes facilitate a classification of different diminished types of *Rechtsstaat*. This can be useful for analyzing the effects of deficiencies and who is most affected by these. It can also help to identify fields on which support strategies should concentrate. In a partly-implemented *Rechtsstaat*, it is primarily the implementing institutions like courts that must be addressed. For an inconsistent *Rechtsstaat*, it is – in contrast – decision-making institutions like the Ministry of Justice and the Parliament that are most strongly affected.

However, these diminished subtypes are not necessarily related to specific causes for their respective deficiencies. When knowledge of the law is insufficient, is it because financial resources for proper dissemination are lacking? Is it because a lack of transparency is a general feature of the administration? Is it because dissemination is intentionally prevented? When internal discrepancies and inconsistencies exist, is it because of a lack of competencies or because some people bear an interest against the reform of certain laws?

Therefore, this classification provides only a limited foundation on which to build strategies to overcome deficiencies and to foster rule of law. It does not tell us, for example, whether the duration of lawsuits is extremely lengthy because the judiciary does not have enough personnel, because it expects bribes to expedite the process, or because it discriminates against marginalized groups. Thus, it is difficult to determine whether a strategy

should focus on a greater share of budget allocations to the judiciary, the fight against corruption (or an increase in judges' salaries, for example), or awareness-raising campaigns. In this respect, it is necessary to classify additional subtypes of the deficient *Rechtsstaat* according to their causes. This is done in the following section.

Causal Subtypes of Deficient *Rechtsstaat*

In order to identify and classify causal mechanisms leading to the diminished subtypes of *Rechtsstaat* identified above, it is useful to refer to compliance theory.[15] Compliance research deals with the question of why actors do or do not comply with rules, especially when actors might perceive rules as going against their own short-term interests. Originally, compliance theory addresses international relations as it scrutinizes externally set rules. However, it grasps interrelations that can be useful in analyzing compliance with principles of a *Rechtsstaat* as well.

Lauth (2001) analyzed the primary causes leading to a deficient *Rechtsstaat* and identified the following sets:

- Insufficient administrative and financial capacities;
- Existing constellations of power and interests; and
- Existence of incompatible informal norm systems.

He considered this last point a major reason for deficiencies. Based on this, we can distinguish between three causal subtypes of deficient *Rechtsstaat*:

1) *Rechtsstaat* with lack of capacities (LoC type);
2) *Rechtsstaat* with powerful interests in alternative rules (PIAR type);
3) *Rechtsstaat* with high acceptance of alternative norm systems (HAAS type).

These three subtypes are in line with the broad schools or approaches in compliance research. The lack of capacities (LoC) type is connected with

[15] See Victor, Raustiala, and Skolnikoff 1998; Chayes and Chayes-Handler 1995; Simmons 1998; Börzel and Risse 2001; and Raustiala and Slaughter 2002.

the so-called management approach, which views non-compliance to rules as unintentional. The focus on interests (PIAR) type refers more to rational choice approaches in compliance theory, which stress the role of interests, incentives, and sanctions. The last type (HAAS) is related to normative approaches, which stress the role of social norms and perceived legitimacy of rules.

While a focus on capacities broaches problems within a *Rechtsstaat*, the other two causal mechanisms focus attention on the institutional environment in which a *Rechtsstaat* is supposed to work. That is, both refer to alternative legal systems or systems of rules that compete with a *Rechtsstaat*, whether because they possess more legitimacy or because powerful actors enforce them. In a deficient *Rechtsstaat* such alternative rules can either exist separate from the official legal system (the *Rechtsstaat*) or be incorporated into it. In identifying causal explanations for deficiencies, our interest is less in whether these contradicting institutional elements are within or outside the official legislature than in why these deficiencies exist as such. In the following, we describe each of the three causal subtypes.

Rechtsstaat *with Lack of Capacities (LoC Type)*

Insufficient administrative, financial, and personnel capacities are often indicated as primary reasons for a lack of rule of law in new democracies (cf. Ahrens and Nolte 1999, KAF 2006). Violations of rules, and thus of rule of law, are therefore unintended and result mainly from a lack of capacities (resources or competencies) or either rule inconsistency or rule misinterpretation. This source of deficiency is also stressed by the so-called management approach within compliance research, which assumes on the part of actors a general willingness to comply (Victor, Raustiala, and Skolnikoff 1998; Chayes and Chayes-Handler 1995; Levy, Keohane, and Haas 1993; Jänicke and Weidner 1997).

Personnel capacities affect not only the judicial sector – courts and lawyers – that must be familiar with and apply the law. They also affect the policy-makers that decide on laws, and thereby affect laws' consistency and clarity of formulation. A lack of administrative capacities can lead to: an extremely lengthy duration of lawsuits; a lack of transparency concerning procedures, rights, and obligations; and unclear and incoherent law formulation. Financial resources also play a role here in that they are

necessary for hiring professional personnel and having the necessary infrastructure. Underpayment is often a serious problem that results in officials seeking jobs on the side, which can make them less committed to their work and more susceptible to corruption. A state too weak to fulfill all legal functions itself can delegate "minor issues" to customary institutions (for the example of Kyrgyzstan cf. Beyer 2006, 2007). As a consequence, the latter gain relevance even though they might contradict principles of a *Rechtsstaat*.

If one assumes unintentional non-compliance, then capacity building appears to be the right strategy (Börzel 2001; Börzel, Hofmann, and Sprungk 2004). Indeed, this is the classical strategy pursued by external actors (particularly in development assistance) that wish to foster rule of law. However, many such projects have not produced the desired results. Critics argue that these factors may be *symptoms* of a deficit in the rule of law rather than *causes*; as a result, capacity-building strategies would be restricted to tackling symptoms.

For example, corruption cannot explained only by underpayment of officials because it also occurs at administrative levels with higher salaries; thus, it has a cultural and social dimension which must be considered (KAF 2006: 372; Nuijten and Anders 2007). The establishing and staffing of courts and related judicial personnel in rural areas to make the state judicial system more generally accessible will not work when a population mistrusts the concept of *Rechtsstaat* as such, perceiving it as something colonial, European, or alien (for the example of The Gambia, see Davidheiser 2007). Hence, one must ask *why* capacities, resources, training, and financial means are not provided, are not sought, or do not have an effect. This, however, already gets us to a second step in a chain of causation.

A LoC type can cause an inconsistent *Rechtsstaat* when it impairs sound formulation of laws and when it is not a result of an intentional strategy but instead stems from a lack of competencies on the part of the actors engaged in lawmaking. Most often we will see it connected to a partly-implemented *Rechtsstaat*. Here, too, a lack judicial expertise in the policy-making arena can be an initial reason, as some aspects of implementation require clarification in the formulation of laws. Mostly, however, an inadequate state of the judiciary system with understaffing, the long duration of lawsuits and poor prison conditions affect the dimension of implementation, thus resulting in a partly-implemented *Rechtsstaat*. Insufficient

financial means and remuneration can make extra earnings necessary, thereby opening doors for corruption and clientelism in the judicial sphere that undermine equal application of laws. It can also be a result of limited problem awareness due to established perception filters (Garzón Valdés 1999). Arbitrary and excluded *Rechtsstaat* are considered to be a result of an intentional diminishing of the *Rechtsstaat* and, therefore, are rather unlikely to be connected to the LoC type, which refers to unintentional non-compliance.

Rechtsstaat *with Powerful Interests in Alternative Rules (PIAR Type)*

In contrast, a second causal mechanism refers not to unintentional deficiencies but to very intentional opposition: Certain actors have an interest in not obeying a *Rechtsstaat* and are powerful enough to establish their own alternative rule systems or to exploit a *Rechtsstaat* selectively for their own purposes. The reason for the genesis or persistence of alternative legal institutions is not only that they perform a certain function, but also that they serve certain interests beyond the state.

Therefore, in order to understand why a *Rechtsstaat* is challenged by alternative systems, questions of power must be raised. Some alternative legal systems are not based on long-term developed traditions (see below) but instead on actual private enforcement powers. These include, among others, oligarchies that secure their privileges with private security forces, official armed forces that reserve the right to undertake illegal interventions when they feel their interests (or their understanding of the rules) threatened, mafia cartels that have their own arrangements and guerilla organizations or warlords that enforce their own rules in the regions they control. In this context, we can also mention local *caciques* in Latin America – in the countryside as well as in urban slum areas – or regional patrons that practice their own formulation, oversight, and enforcement of rules (see Helfrich-Bernal 2001, Volkov 2000, Schlichte and Wilke 2000).

Such alternative systems are especially likely to arise in weak and fragile states. In some Central Asian countries, for example, drug barons not only create parallel political and security regimes but even infiltrate government structures (Marat 2006; Cornell 2006). Furthermore, the rule-setting power of transnational corporations and of international development agencies with their "project law" should be scrutinized in this respect, as it may be not in line with a *Rechtsstaat* (Weilenmann 2007).

Finally, the state or government itself can have an interest in excluding certain areas from a *Rechtsstaat*, most visibly when governments exterterritorialize refugee camps (EU, Australia) or prisons (USA) in order not to have to apply their own rule of law standards (on the creation of extralegal refugee zones in South Africa, see Landau 2005). Such alternative rules are not built on a specific source of legitimacy (such as tradition, religion, or democracy) but instead evolve from the "power of the facts" of social interactions, from the actual enforcement power of actors that allows them to pursue their own rules.

These are examples of separate legal systems. There is also the possibility that contradicting legal fragments are incorporated in the general legal framework. This can be the result of the influence of certain actors on legal decision making. Alternatively, these actors can influence the implementation of laws and application of rights, which undermines equality before the law in general. In this case, powerful interests do not constitute an entire alternative system. Rather, they pursue the application of principles of a *Rechtsstaat* only in so far as it is in their interest, and then use corruption, networks or threats to try to prevent others from exercising their rights.

The PIAR type can be analyzed using rational choice approaches of compliance research. These are based on the assumption of the dominance of interests and preference for behavior of actors that try to maximize their benefits. Consequently, incentives must be set to attain compliance with rules (Simmons 1998:80–83; Börzel and Risse 2001:5–8; Raustiala and Slaughter 2002:542f). To foster rule of law, strategies must be sought that make actors see it as more beneficial to pursue resolution *of* their conflicts and acknowledgement of their claims through *Rechtsstaat* instruments than through informal institutions. Such incentives could include the reliableness of the *Rechtsstaat*, which allows decisions to be anticipated (in contrast to arbitrariness), as well as financial, economic, or social sanctions in case of non-compliance. However, "negative incentives" certainly only work when non-compliance is effectively prosecuted. This necessitates a strengthening of institutions (such as courts), which are objects of manipulation by powerful actors, in order to raise the costs of non-compliance.

A PIAR type can be linked to an inconsistent *Rechtsstaat* when the state is too weak to abolish laws that serve the interests of powerful actors or, vice versa, when powerful actors push through certain laws despite the fact that they are contradictory to others. It also can lead to a partly-implemented

Rechtsstaat, when there is no will to have a basis for a functioning *Rechtsstaat* such that necessary implementation mechanisms are not decided on.

A PIAR type is also the most likely cause of an arbitrary *Rechtsstaat*, when powerful actors do not want to be subject to *Rechtsstaat* principles and instead use the latter for their own interests and are tolerated as they do so. It is obvious that such arbitrary decisions occur deliberately, not unintentionally. For example, charges against opposition figures are easy to make and can be used as a political instrument to rein them in.

Finally, a PIAR type can also lead to an excluded *Rechtsstaat*, when the government itself refuses to subordinate or creates extra-legal zones (as in the examples given above). It is clearly an intentional deficiency when some actors insist that others adhere to *Rechtsstaat* principles but they do not wish to subordinate themselves to it. This comes close to what often is labeled "rule by law" in contrast to "rule of law".

Yet besides rational interests, normative aspects must also be considered: Powerful actors are embedded in an institutional setting such that they can refer to values or to the social acceptance of their position. Religious leaders, for instance, can base their decisions on value-rational rather than instrumental-rational considerations. These aspects can be analyzed using concepts from sociological institutionalism that are elaborated on further in the next section.

Rechtsstaat *with High Acceptance of Alternative Norm Systems (HAAS Type)*

A third school of compliance research, the normative approaches, is related to the new institutionalism in sociology. In contrast to an emphasis on interests and utility maximization, these approaches stress the role of social norms toward which the *homo sociologicus* aspires to orient his behavior (Powell and DiMaggio 1991; Simmons 1998:80–83; Raustiala and Slaughter 2002:540–544). According to March and Olson (1989:160–163), such a pursuit of social legitimacy follows a "logic of appropriateness."

Compliance research in its normative approaches highlights the significance of the social and cultural context for rule compliance. This means that compliance is greater the higher the congruence between existing social norms and the new formal rule. In contrast, when the new rule (in this case, the *Rechtsstaat*) contradicts existing social institutions (for example, because it grants the same rights to women or facilitates open debate of conflicts), it is accordingly more difficult to secure compliance. Alterna-

tive legal systems that rely on long-existing (informal) institutions like religion enjoy greater legitimacy in the eyes of their legal subjects than do relatively newly introduced formal systems of law.

What are such alternative legal systems? Some legal areas such as family law, property rights, and criminal law can have their own rules based on informal institutions that exist beyond the formal legal code. They function due to the social acceptance of the values they represent. These can be rules based on traditions of autochthonous systems of rule (such as those of clan and tribal law) or on more extensive law systems (such as those of Islamic law, Hindu law, Far Eastern law).

Such rules provide an alternative to official state law and, as a result, might lead to its disregard.[16] It is important to note that it is often not the case that only two legal systems – the *Rechtsstaat* and an informal one – exist parallel to one another but several: especially in postcolonial countries that unify previously separate political spheres as different tribes, regions, or ethnic groups, there is a plurality of customary law that differs between regions and sometimes even villages. In Islamic areas, these different customary laws can still be accomplished by the *sharia*, Islamic religious law, so that ultimately three legal spheres exist: official state law, religious law, and the respective customary law – each having different impacts in different territorial and functional areas.

Informal law systems are relevant in the understanding of deficient *Rechtsstaat* when they are not compatible with the formal and material principles of *Rechtsstaat*. A comparison of such systems can show clear contradiction, but it can also show mere dissonance, meaning neither a case of full compatibility nor one of full incompatibility. It is also possible to find functional equivalents, like customary law in Anglo-Saxon regions. Similarly, civil law that evolves in international trade relations and rights created through contracts in grassroots or advocacy organizations can be compatible with *Rechtsstaat* principles. In addition, customary law and indigenous norm systems can also be complementary to a *Rechtsstaat* (for examples from Latin America, cf. Waldmann 2001).

This is not the place to discuss the different features of such alternative legal systems or to review the extensive literature on this topic. In particular,

[16] However, alternative rule systems may nonetheless often be acknowledged by the state, such as minorities earning the right to administer themselves in certain functional spheres.

the scholarship of legal pluralism describes and discusses the multiple forms and effects of different coexisting legal systems (cf. for an overview Benda-Beckmann 2002, Merry 1988). But the research to date clearly shows that such systems are not always in line with rule of law principles like freedom and equality (cf. Bryde and Luchterhand 1995).

Many of these phenomena can be framed using the concept of "brown areas" (O'Donnell 1993:1359f), which are characterized by only partial state sovereignty and thus are informal "states within the state." When any such incompatible (informal) legal systems exist, this endangers a *Rechtsstaat*. Another consequence of the lack of legitimacy concerning a *Rechtsstaat* is that even if people trust the official legal system and prefer to bring their conflicts to it, they might not do so because they fear social consequences, such as disrespect in their community. This may be because it is against established social norms to transport a conflict outside village limits and not accept the decision of the respective customary institution.

A HAAS type occurs particularly in systems in which *Rechtsstaat* principles are only recently introduced. The level of acceptance of alternative systems is often based on legitimacy derived from long-term traditions. At the same time, it can also be based on their higher responsiveness compared to official law. Davidheiser (2007) distinguishes between two dimensions of acceptance or mistrust of official law: ideological and utilitarian.

The ideological dimension refers to rejection of official law because it is, in the perception of a local population, related to colonialism and European or American models, not indigenous models. It is perceived as alien and even potentially dangerous, as courts can disrupt existing social orders. This dimension is also useful in analyzing a *Rechtsstaat*, but here "ideological" rejection stems from a population having greater trust in and sense of legitimacy of informal institutions and customary law. This builds on their familiarity with these rule systems and their adherence to its underlying norms, as described above. In this respect, it is also necessary to know how the *Rechtsstaat* was introduced, whether by a domestic democratization process, by outside actors, or by colonial or occupying powers. These can have different path-dependent effects.

The utilitarian dimension refers to the responsiveness of official law: Does it have sufficient means to resolve existing conflicts? Here, David-

heiser points to the example of witchcraft, a prominent issue in West Africa but for which state courts have no regulations. As a result, people must turn to alternative legal institutions. Another example is the deficiencies of the state court system in India, which led, on the one hand, to a revitalization of customary law (*lok adalat*) and, on the other, to newly introduced courts. As Eckert (2004) shows for Mumbai, the offices of the local party *Shiv Sena* function as informal courts with a great deal of enforcement power. Yet they explicitly do not refer to religious or traditional norms for justification but rather to the inefficiency and inaccessibility of the state judicial system; for this reason they are accepted by the population. This shows that even in alternative systems that are based on social legitimacy, cost-benefit ratios, in the sense of previously described rational choice approaches, do indeed exist and can and should be analyzed.

While these legal systems sometimes form a separate sphere, in other cases these competing legal fragments are taken over by the official legal system and entitled to regulate certain spheres (whether family law or civil law, as examples). Examples of such incorporations are the regulations on tribal property in several African countries, which contradict the guarantee of private property laid down in their formal constitutions, and the incorporation of religious rules in family law, which curtails individual rights (especially those of women). We should also mention the transposition of *sharia* law into criminal law, for *sharia* law is not compatible with all principles of a *Rechtsstaat*. Such transposition can occur nationwide or only in certain regions (as in Nigeria).

Although such competing legal elements are then no longer informal, they are still in conflict with *Rechtsstaat* principles. The only change is that this discrepancy is now codified. While this is not an adequate strategy from the point of view institutionalizing a *Rechtsstaat*, it is nonetheless a widespread practice, and sometimes not unjustified (Waldmann 2001).

While in the first case two legal systems – a formal *Rechtsstaat* and an informal competitor – are divided, in the second case they are interwoven and the informal system gains an official character. The advantage here is that this secures a state's monopoly on legitimate violence; the disadvantage is the legal system that results is incoherent. This can become even more complicated when there are several contradicting systems of rule, some of which are incorporated, others not – as in some African countries.

Beyond informal *legal* systems in the strict sense, a *Rechtsstaat* can also be affected by informal systems *of rules* which contradict it.[17] These include, as examples, clientelistic structures and corruption which can violate equality before the law in different ways. These kinds of interferences also occur in countries with a fully functioning *Rechtsstaat*, but here they occur only sporadically and do not present a risk to established and accepted patterns of behavior. In countries with a deficient *Rechtsstaat*, however, these systems of rules can attain institutional status, such that they are accepted and perceived as a legitimate means by which citizens can assert their rights.

What can be a strategy to strengthen a *Rechtsstaat* if alternative systems are perceived as being more legitimate and responsive? If the official legal system does not enjoy a high level of trust among a population, strengthening its capacities will have only limited effects in fostering rule of law. It instead needs strategies that are not based on a "Euro-centric court-focused perspective" (Davidheiser 2007:12). An appropriate strategy in this case may be to seek functional equivalents in customary law or to recognize different possible interpretations of informal institutions, and to strengthen these and incorporate them into the formal *Rechtsstaat*. Another method could be to show how elements undermining the *Rechtsstaat* can be reformed within customary law. This is certainly not an easy task, as it would entail changing informal institutions that by definition cannot be changed by central decisions but only by social interaction; thus, this would require a long time frame.

Compliance research points to positive effects of so-called "norm entrepreneurs" can have on raising awareness regarding the compatibility of new norms with existing ones (Börzel and Risse 2001:11). Many projects as well as scholarly discussion show that ADR (alternative dispute resolution), which includes traditional elements, can be a successful strategy at least concerning correcting deficiencies in an official judiciary system (see World Bank, 2003; Kaneko 2008; Bobukeeva 2007; Davidheiser 2007).

In the HAAS type, the previously mentioned effort to incorporate other legal or norm systems transporting competing norms into the official framework can lead to an inconsistent *Rechtsstaat*. A "social blindness" of the granting of rights to marginalized groups can be grounded in traditions so that these groups and individuals experience a lack of access to law and

[17] For more on the difference between legal systems and systems of rules, see Lauth 2001:22–25.

are disadvantaged compared to socially privileged actors (O'Donnell 1999). The result of this is a partly-implemented *Rechtsstaat*. An arbitrary *Rechtsstaat* is rather unlikely to arise from the HAAS type, as is the excluded *Rechtsstaat*.

The three subtypes underline an analytical separation; in reality several or all causes can occur together. Also, when the legitimacy of customary law is considered the strongest obstacle to realizing a *Rechtsstaat*, this does not mean that a lack of resources and conflicting interests do not play an important role. Rather, it is precisely the embeddedness of actors in the context of informal norm systems that shapes their interests and resources. This is why it is unlikely for only one causal mechanism to exist.

The typology allows us to consider which causes prevail but also to underline that they not only mix together but also aggravate each other. For example, when a lack of capacities hinders the sound application of principles of rule of law, people may become frustrated and begin to prefer alternative systems. This in turn weakens the level of acceptance of a *Rechtsstaat* and strengthens that of alternative legal systems, as they prove more effective than official system at guaranteeing access to rights. As a *Rechtsstaat* is evaluated by its outcomes, deficiencies not only limit its effectiveness but also strengthen alternative legal institutions that exploit these weaknesses, creating a vicious circle.

Deficient *Rechtsstaat* and Hybrid Legal Systems

When the deficiencies of a *Rechtsstaat* grow, there will be a certain point at which it can no longer be considered a diminished subtype. As mentioned at the beginning, the threshold is not only a question of how many features are reduced and to what extent but also of how central the features are to the idea of a *Rechtsstaat*. The causal types described above can lead to deficiencies so severe that they can no longer be regarded as subtypes of a *Rechtsstaat*. While certain principles still exist, they no longer prevail. We call this a *hybrid legal system*. The threshold criteria between deficient *Rechtsstaat* and hybrid legal system is the strength of the alternative competing legal systems as well as the weakness of a *Rechtsstaat* in resisting rules that undermine it. When a *Rechtsstaat* prevails over competing legal systems but it is not strong enough to completely eliminate them, we use the term "deficient *Rechtsstaat.*"

Summarizing our considerations, we can distinguish between three types of systems that are formally based on *Rechtsstaat* principles:

1) Fully functioning *Rechtsstaat* (our root concept),
2) Deficient *Rechtsstaat* as a diminished subtype of the root type, and
3) Hybrid legal systems, in which a *Rechtsstaat* does not prevail.

In the last two types, a *Rechtsstaat* is partially existent and coexists with competing legal or norm systems.[18] It is either accompanied or penetrated by law-free areas or, in most cases, by alternative legal systems.

When competing informal systems are incorporated into official law, a legal system has a strong tendency toward being a deficient *Rechtsstaat*. That is, despite their contradictory character, these incorporated elements cannot break the general dominance of the *Rechtsstaat*; such dominance is broken only if fundamental areas, such as the entire criminal law system, are affected. A hybrid legal system generally only exists when legal systems are separated.

In hybrid legal systems, the *Rechtsstaat*, or its existing elements, is simply one equal-ranking legal system among others. The precondition for a hybrid legal system, therefore, is one or more competing legal system(s) which are to a great extent incompatible with a *Rechtsstaat* and also have considerable impact. They are more than just some contradictory elements, in the sense of "brown areas" noted above. These competing legal systems can be territorial (as in Columbia or Afghanistan), reserved for certain status groups (such as the military or oligarchies), or transecting the entire society (as in strong legal pluralism). Thus, certain features that also characterize a deficient *Rechtsstaat* become so strong that they no longer dominate the *Rechtsstaat* but instead constitute a coequal parallel system.

The causes for the existence of a hybrid legal system are *cum grano salis* the same as for a deficient *Rechtsstaat*: lack of capacities of the *Rechtsstaat*, powerful interests in alternative systems, and a high level of acceptance of alternative systems. It can be assumed that this will not often be the case. It is more common for the dominance of the *Rechtsstaat* to remain

[18] Certainly, deficiencies exist in Type 1 as well, but they are not institutionalized. Overcoming interferences is easier in a functioning Rechtsstaat, where only individual behavior must be corrected, whereas in a deficient Rechtsstaat, institutions must be changed.

unquestioned and for a deficient *Rechtsstaat* to exist despite the existence of one or several competing legal systems.

Conclusion

As the *Rechtsstaat* is considered essential to democracy and development, many strategies attempt to foster the rule of law and to overcome existing deficiencies. While they are implemented by the major development agencies, they have so far had only modest success (see i.a. World Bank 2003, Carothers 2006; Faundez 2005; Ledenevy 2001). For adequate strategies and a full understanding of the effects of the lack of the rule of law for democracy, it is crucial to understand a) which different deficiencies can occur and what effect they have, and b) what the different causes for deficiencies are.

One of the first tasks in better understanding the different empirical findings is the use of types and typologies. Similar to the concept of defective democracy, we propose the use of diminished subtypes of the *Rechtsstaat*. This methodological instrument is explicitly valid when root concepts are only partially realized. Beside our proposal to differentiate various subtypes of the Rechtsstaat along the deficiencies and their causes, we make a distinction between three types: fully functioning *Rechtsstaat*, deficient *Rechtsstaat*, and hybrid legal system. We hope that the proposed categories and types provide a useful framework for future research.

References

Ahrens, Helen and Detlef Nolte (eds.). 1999. *Rechtsreformen und Demokratieentwicklung in Lateinamerika*. Frankfurt am Main: Vervuert.

Bagehot, Walter. 2001. *The English Constitution* (Cambridge Texts in the History of Political Thought) edited by Paul Smith. Cambridge: Cambridge University Press.

Benda, Ernst. 1995. "Rechtsstaat." Pp. 515–519 in *Lexikon der Politik,* vol. 1, *Politische Theorien*, edited by D. Nohlen and R.-O. Schultze. München: Beck.

Benda-Beckmann, Franz von. 2002. "Who's Afraid of Legal Pluralism?" *Journal of Legal Pluralism* 47:37–82.

Beyer, Judith. 2006. "Revitalisation, Invention and Continued Existence of the Kyrgyz Aksakal Courts: Listening to Pluralistic Accounts of History." *Journal of Legal Pluralism* 53–54:141–176.

——. 2007. "Imagining the State in Rural Kyrgyzstan: How Perceptions of the State Create Customary Law in the Kyrgyz Aksakal Courts." (Working Papers. No. 95). Halle: Max Planck Institute for Social Anthropology.

Bobukeeva, Meergul. 2007. "Alternative Dispute Resolution: A Thin Peace is Better than a Good Quarrel." Paper presented at annual meeting of The Law and Society Association, Berlin, Germany, 25–28 July.

Böckenförde, Ernst-Wolfgang. 1976. *Staat, Gesellschaft, Freiheit: Studien zur Staatstheorie und zum Verfassungsrecht*. Frankfurt: Suhrkamp.

Börzel, Tanja A. 2001. "Non-Compliance in the European Union. Pathology or Statistical Artefact?" *Journal of European Public Policy* 8: 803–824.

Börzel, Tanja and Thomas Risse. 2001. Die Wirkung internationaler Institutionen: Von der Normanerkennung zur Normeinhaltung, (Reprints aus der Max-Planck-Projektgruppe Recht der Gemeinschaftsgüter 2001/15). Bonn: Max Planck Institut.

Börzel, Tanja A., Tobias Hofmann, and Carina Sprungk. 2004. "Why Do States not Obey the Law? Non-Compliance in the European Union." Paper prepared for presentation at Leiden, 11–12 June.

Bryde, Brun O. and Otto Luchterhandt. 1997. "Rechtssysteme." Pp. 450–466 in *Lexikon der Politik*, vol. 4, *Die östlichen und südlichen Länder*, edited by D. Nohlen, München: Beck.

Byrne, Iain and Stuart Weir. 2001. "The Uncertainties of Rule of Law in Britain." Pp. 224–251 in *Rechtsstaat und Demokratie*, edited by M. Becker, H.-J. Lauth, and G. Pickel. Wiesbaden: Westdeutscher Verlag.

Carothers, Thomas. 1998. "The Rule of Law Revival." *Foreign Affairs* 77:95–106.

Carothers, Thomas (ed.). 2006. *Promoting the Rule of Law Abroad: In Search of Knowledge*. Washington: Carnegie Endowment for International Peace.

Chayes, Abram and Antonia Chayes Handler. 1995. *The New Sovereignty. Compliance with International Regulatory Agreements*, Cambridge.

Collier, David and Steven Levitsky. 1997. "Democracy with Adjectives: Conceptual Innovation in Comparative Research." *World Politics* 49:430–451.

Cornell, Svante. 2006. "The Narcotics Threat in Greater Central Asia: From Crime-Terror Nexus to State Infiltration?" *China and Eurasia Forum Quarterly* 4, 1:37–67.

Croissant, Aurel and Peter Thiery. 2000. "Defekte Demokratie. Konzept, Operationalisierung und Messung." Pp. 89–111 in *Demokratiemessung: Konzepte und Befunde im internationalen Vergleich*, edited by H.-J. Lauth, G. Pickel, and C. Welzel. Opladen: Westdeutscher Verlag.

Davidheiser, Mark. 2007. Governance and Legal Reform in The Gambia and Beyond: An Anthropological Critique of Current Development Strategies. Working Paper No. 93. Halle: Max Planck Institute for Social Anthropology.

Dicey, Albert Venn. 1982. *Introduction to the Study of the Law of the Constitution*. Indianapolis: Liberty Fund (orig. 1885).

Dworkin, Ronald. 1977. *Taking Rights Seriously.* London: Duckworth.

Dworkin, Ronald D. 1997. *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge, MA: Harvard University Press.

Eckert, Julia. 2004. "Urban Governance and Emergent Forms of Legal Pluralism in Mumbai." *Journal of Legal Pluralism* 50:29–60.

Edling, Max M. 2008. *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State.* Oxford: Oxford University Press.

Faundez, Julio. 1994. *Affirmative Action. International Perspectives*. Geneva: ILO.

——. 2005. "The Rule of Law Enterprise – Towards a Dialogue between Practitioners and Academics." (CSGR Working Paper No. 164/05). Coventry: University of Warwick.

Garzón Valdés, Ernesto. 1999. "Rechtsphilosophische Überlegungen über Verfassungsreformen in Lateinamerika." Pp. 110–132 in *Rechtsreformen und Demokratieentwicklung in Lateinamerika*, edited by H. Ahrens and D. Nolte. Frankfurt am Main: Vervuert.

Grimm, Dieter. 1994. "Entstehungs- und Wirkungsbedingungen des modernen Konstitutionalismus." Pp. 31–66 in *Die Zukunft der Verfassung*, edited by D. Grimm. Frankfurt: Suhrkamp. 2nd edition.

Harrison, Kevin and Tony Boyd. 2006. *The Changing Constitution*. Edinburgh: Edinburgh University Press.

Helfrich-Bernal. 2001. "Rechtsstaatlichkeit und Demokratie in Kolumbien?" Pp. 139–162 in *Rechtsstaat und Demokratie*, edited by M. Becker, H.-J. Lauth, and G. Pickel. Wiesbaden: Westdeutscher Verlag.

Huntington, Samuel P. 1991. *The Third Wave. Democratization in the Late Twentieth Century.* Norman: University of Oklahoma Press.

Jänicke, Martin and Helmut Weidner. 1997. *National Environmental Policies. A Comparative Study of Capacity-Building*. Berlin et al.: Springer.

Jensen, Erik G. 2003. "The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses." Pp. 336–381 in *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, edited by E. G. Jensen and Th. C. Heller. Stanford: Stanford Law and Politics.

KAF (Konrad Adenauer Foundation) (ed.). 2006. *Rule of Law. The KAF Democracy Report 2006*. Berlin: Konrad Adenauer Foundation.

Kaneko, Yuka. 2008. "Catalistic Role of Legal Assistance between Formal Law and Social Norms: Hints from Japanese Assistance." *Journal of International Cooperation Studies*, 15, 3:49–86.

Kay, Richard S. 1998. "American Constitutionalism." Pp. 16–63 in *Constitutionalism. Philosophical Foundations*, edited by L. Alexander. Cambridge: Cambridge University Press.

Kelly, Alfred H., Harbison, Winfred A. and Herman Belz. 1991. *The American Constitution: Its Origins and Development*. New York: W W Norton & Co.

Kriele, Martin. 1994. *Einführung in die Staatslehre. Die geschichtlichen Legitimitätsgrundlagen des demokratischen Verfassungsstaates*. Opladen: Westdeutscher Verlag. 5th edition.

Lauth, Hans-Joachim. 2000. "Informal Institutions and Democracy", *Democratization* 7, 4:21–50.

——. 2001. "Rechtsstaat, Rechtssysteme und Demokratie. " Pp. 21–44 in *Rechtsstaat und Demokratie*, edited by M. Becker, H.-J. Lauth and G. Pickel. Opladen: Westdeutscher Verlag.

——. 2004. *Demokratie und Demokratiemessung*. Wiesbaden: VS-Verlag.

Ledenevy, Alena. 2001. *Unwritten Rules: How Russia Really Works*. London: CER Publications.

Levy, Marc A., Robert O. Keohane, and Peter M. Haas. 1993. "Improving the Effectiveness of International Environmental Institutions." Pp. 397–426 in *Institutions for the Earth: Sources of Effective International Environmental Protection,* edited by M. A. Levy, R. O. Keohane, and P. M. Haas. Cambridge: MIT Press.

Liebert, Ulrike and Hans-Joachim Lauth. 1999. "'Do Informal Institutions Matter?' Informelle Institutionen in der interkulturell vergleichenden Partizipations- und Demokratisierungsforschung." Pp. 11–36 in *Im Schatten demokratischer Legitimität. Informelle Institutionen und politische Partizipation im interkulturellen Demokratienvergleich*, edited by H.-J. Lauth and U. Liebert. Opladen: Westdeutscher Verlag.

Linz, Juan. 1997. "Democracy Today." *Scandinavian Political Studies* 20:115–134.

Loewenstein, Karl. 1967. *Staatsrecht und Staatspraxis von Großbritannien*. Vol 1, *Parlament, Regierung, Parteien*. Berlin et al.: Springer.

Marat, Erica. 2006. "Impact of Drug Trade and Organized Crime on State Functioning in Kyrgyzstan and Tajikistan." *China and Eurasia Forum Quarterly* 4, 1:93–111.

March, James G. and Johan P. Olson. 1989. *Rediscovering Institutions. The Organizational Basis of Politics*. New York: Free Press.

Merkel, Wolfgang. 1999. "Defekte Demokratien." Pp. 361–381 in *Demokratie in Ost und West*, edited by W. Merkel and A. Busch. Frankfurt/Main: Suhrkamp.

Merkel, Wolfgang and Aurel Croissant. 2000. "Formale und informale Institutionen in defekten Demokratien." Politische Vierteljahresschrift 41, 1:3–30.

Merkel, Wolfgang, Hans-Jürgen Puhle, Aurel Croissant, Peter Thiery. 2006. *Defekte Demokratie*. Vol 2, *Regionalanalysen*. Wiesbaden: VS Verlag.

Merkel, Wolfgang, Hans-Jürgen Puhle, Aurel Croissant, Claudia Aicher, Peter Thiery. 2003. *Defekte Demokratie*. Vol 1, *Theorie*. Opladen: Leske und Budrich.

Merry, Sally E. 1988. "Legal Pluralism." *Law and Society Review* 22:869–896.

Nuijten, Monique and Gerhard Anders (eds.). 2007. Corruption and the Secret of Law: A Legal Anthropological Perspective. Aldershot: Ashgate.

O'Donnell, Guillermo. 1993. "On the State, Democratization and some Conceptual Problems: A Latin American View with Glances at some Post-communist Countries." *World Development* 21:1355–1370.

——. 1999. "Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion." Pp. 303–337 in *The (Un)Rule of Law and the Underprivileged in Latin America*, edited by J. Méndez, G. O´Donnell, and P. S. Pinheiro. Notre Dame: University of Notre Dame Press.

——. 2004. "Why the Rule of Law Matters." *Journal of Democracy* 15, 4: 32–46.

Powell, Walter W. and Paul J. DiMaggio. 1991. *The New Institutionalism in Organizational Analysis*. Chicago: University of Chicago Press.

Raustiala, Kal and Anne-Marie Slaughter. 2002. "International Law, International Relations and Compliance." Pp. 538–558 in *Handbook of International Relations*, edited by W. Carlsnaes, Th. Risse and B. Simmons. London: SAGE Publications.

Raz, Joseph. 1979. *The Authority of Law*. Oxford: Clarendon.

Sartori, Giovanni. 1970. "Concept Misformation in Comparative Politics." *American Political Science Review* 64:1033–1053.

Schedler, Andreas, Larry Diamond, and Marc F. Plattner. 1999. *The Self-Restraining State. Power and Accountability in New Democracies*. Boulder & London: Lynne Rienner.

Schlichte, Klaus and Boris Wilke. 2000. "Der Staat und einige seiner Zeitgenossen." *Zeitschrift für Internationale Beziehungen* 2:359–384.

Shell, Kurt. 1990. "Die Verfassung von 1787." Pp. 277–287 in *Länderbericht USA I*, edited by W.P. Adams. Bonn: Bundeszentrale für politische Bildung.

Simmons, Beth. 1998. "Compliance with International Agreements" *Annual Review of Political Science* 1:75–93.

Ten, C. L. 1993. "Constitutionalism and the Rule of Law." Pp. 394–403 in *A Companion to Contemporary Political Philosophy*, edited by R.E. Goodin and Ph. Pettit. Oxford: Blackwell.

Victor, David, Kal Raustiala, and Eugene Skolnikoff. 1998. "Introduction and Overview." Pp. 1–46 in The Implementation and Effectiveness of International Environmental Commitments. Theory and Practice, edited by D. Victor, K. Raustiala, and E. Skolnikoff. Laxenburg: International Institute for Applied Systems Analysis.

Volkov, Vadim. 2000. "Gewaltunternehmer im postkommunistischen Russland" *Leviathan* 28, 2:173–191.

Vorländer, Hans. 1999. *Die Verfassung. Idee und Geschichte*. München: Beck.

Waldmann, Peter. 2001. "Alternative Normensysteme zur staatlichen Rechtsordnung in Lateinamerika." Pp. 112–129 in *Rechtsstaat und Demokratie*, edited by M. Becker, H.-J. Lauth, and G. Pickel. Wiesbaden: Westdeutscher Verlag.

Weber, Helmut. 1998. "Recht und Gerichtsbarkeit." Pp. 178–193 in *Länderbericht Großbritannien*, edited by H. Kastendieck, K. Rohe, A. Volle. Bonn: Bundeszentrale für politische Bildung.

Weilenmann, Markus. 2007. "How to Promote the Rule of Law and Democracy in Africa? A Legal Anthropological Case Study of the Normative Working Methods of Epistemic Communities within International Development Agencies." Paper presented at the annual meeting of the The Law and Society Association, Berlin, Germany, 25–28 July.

Wolfrum, Rüdiger (ed.). 2003. *Gleichheit und Nichtdiskriminierung im nationalen und internationalen Menschenrechtsschutz*. Berlin: Springer.

World Bank. 2003. Legal and Judicial Reform: Strategic Directions. Washington: the World Bank.

Zakaria, Fareed. 1997. "The Rise of Illiberal Democracy." *Foreign Affairs* 76:22–43.