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RULE OF LAW AND INFORMAL INSTITUTIONS

ESTADO DE DIREITO E INSTITUIÇÕES INFORMAIS

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Abstract: The present work addresses the legal systems that exist outside the constitutional order, through the existence of rechtsstaat and informal legal systems in the rule of law. Thus, the question is: what is the relationship between the formal systems and the right? To this do so, the law and legal systems, the concept of state and the formal systems are analyzed first. The study of the relationship between the rule of law and the formal institutions is then used.

Keywords: Rule of law. Informal institutions.

Resumo: O presente trabalho aborda os sistemas jurídicos que existem fora da ordem constitucional, através da existência de sistemas jurídicos rechtsstaat e informais no Estado de Direito. Sendo assim, pergunta-se: qual a relação entre os sistemas informais e o direito? Para tanto, analisa-se, em primeiro momento, o direito e os sistemas legais, o conceito de Estado e os sistemas informais. Passa-se, então, ao estudo da relação entre estado de direito e instituições informais.

Palavras-chave: Estado de Direito. Instituições informais

1. INTRODUCTION

Over the course of the widespread third wave of democratization, a key observation has been made frequently: the introduction of elections alone does not guarantee a functioning democracy. The main indicators used in this determination are weak rule of law and a lack of checks and balances due to an unsatisfactory level of institutionalized, horizontal accountability (Schedler/Diamond/Plattner 1999; O'Donnell 1998). Additional criteria, which are present in modern, western constitutional states, must be met. Unsurprisingly, O'Donnell (1999 and 2004) explicitly urges that the existing foundations of democracy in the West and the implicit requirements of democracy should be identified and analyzed. He considers the concepts of *Rechtsstaat*, rule of law, and the constitutional state (or constitutionalism) to be essential to the analysis. For this reason, the fundamental constitutional order, rather than systems of government, is addressed. This applies to the legal form or the judicial system, the basis for governance, in which state activity manifests itself. The analysis of systems of law is relevant not only to democracies, but also to authoritarian regimes, because it sheds light on their dynamics and stability. Investigating both kinds of regimes leads us to the following questions. Do legal systems always have characteristics of rule *of* law, or in some regimes, do they possess only an instrumental nature ('rule *by* law')?

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Passing references to missing or limited rule of law are not sufficient to gather differentiated empirical findings. In order to appropriately integrate the legal level into the analysis of young democracies, as well as authoritarian regimes, this article employs a dual perspective. First and foremost, it allows different characteristics of formal legal structures to be examined. Moreover, by employing the neo-institutionalist understanding of informal institutions (Lauth 2000; Merkel/Croissant 2000), strong emphasis can be placed not only on legally codified institutions, but, at the same time, existing informal structures can be taken into account. Both are relevant to the analysis and have to be considered, as not all judicial systems are considered in the analysis of official legal systems. Informal law and systems of rules are not systematically included in the analysis of rule of law up to today. The connection between formal and informal legal systems has not been appropriately addressed in the current literature on the topic of democratization; even comparative research on the development of rule of law is rare (Fukuyama 2010). There are numerous case studies, however, which investigate special forms of informal systems (such as indigenous and religious law or corruption and violence in the research area of rule systems; Brinks 2012).

The analysis of formal and informal law structures allows the empirical findings to be differentiated and assessed. In using this approach, the following questions emerge and allow this article to be structured into corresponding chapters:

• What is the nature of law and legal systems? What distinguishes them from rules and informal judicial systems?

• What are the core principles of *Rechtsstaat* and of related concepts (rule of law and constitutional state, or constitutionalism)?

• In the empirical analysis, attention will subsequently be given to legal systems that exist outside of the outlined forms of constitutional order. The discussion focuses on the parallel existence of *Rechtsstaat* and informal legal systems and includes thoughts about a connection between *Rechtsstaat* and alternative systems of rules based on a factual and a normative level. In order to make these considerations conducive to empirical use, the findings about rule of law will be integrated into a proposal for the creation of a typological differentiation of legal systems.

2. LAW AND LEGAL SYSTEMS

Firstly, the term “law” has to be distinguished from the term “rights.” Rights, in the sense of fundamental, human rights, draw their validity in the traditional jurisprudential thinking from their jusnaturalistic status. During the Age of the Enlightenment, this justification strategy became based on rationality. Thus, the jusnaturalistic argument was replaced by a rational law justification (Kant). Accordingly, rights have validity, even if they are not preceded by laws, because they are generally tied to the dignity and freedom of the individual. Rights can become positive law. However, does the law gain its legal status only through the inclusion of rights?

A look at the evolution of law in different cultural backgrounds shows that rights are incorporated in varying degrees. First of all, this implies that the nature of law does not necessarily require the inclusion of rights into the official law system. However, a common feature of all empirical

law systems is the authoritatively binding nature of rules. In this way, legal systems are binding systems of rules; law is, therefore, always set through government power and authority, whose effectiveness can be enforced through coercion if needed (Alexy 2011). This understanding of law finds its expression in laws that are understood in the tradition of Austin as "the generalized commands of a sovereign" (Campbell 1993: 186).

The separation of law and rights or, in other words, of law and morality, is a hallmark of the traditions of the positivist theory of state law and the positivist philosophy of law (Kelsen and Hart). However, this position has not gone unchallenged (Fuller; Dworkin); even in Hart's writings, the question arises whether his "formal" acceptance criteria for "valid law" already set legal standards that are difficult to reconcile with positive law in totalitarian regimes. Due to the comprehensive political subordination of law in these kinds of regimes, it seem less convincing that this idea of law — in terms of Hart's understanding — is tenable. Here, the discussion should shift to a perversion of the law. This interpretation would be emphasized if relevant considerations of legal theory were followed according to an understanding of law as a defense against political despotism.

In using the term legal or judicial system, however, we will refer back to a basic concept of the term, which includes any (positive) law written by the state, regardless of how fair it is; this definition, however, does not include perversions of the law. This decision is based simply on the empirical facts; regardless of a regime's status, a legal system is attributed to almost all states. Were the legal term tied to certain normative standards, this classification would have to be revoked from some states, and another term would have to be used. Indeed, it is preferable to consider the law system, which is characterized by certain normative standards, as a *Rechtsstaat* or rule of law. [2]

In considering different constitutional traditions, it becomes obvious that binding the law to rights has largely prevailed in the wake of the emergence of rule of law in its different forms. In liberal and democratic societies, the law virtually draws its legitimacy from this fact. For this reason, it is appropriate to use the term "rule of law" or "Rechtsstaat" in order to make it clear that legal systems are not inherently bound to rights, although legal systems are barely viable without a minimal reference to them. Without this connection, the possibility of legal systems being legitimized is lower, and they must be increasingly based on coercion. It is assumed, however, that legal systems in other cultures also include rights. The understanding of these rights has to be examined, however, to determine to what extent these interpretations differ from those of constitutional traditions in the West.

3. CONCEPT OF RULE OF LAW (RECHTSSTAAT)

If the discussion of *Rechtsstaat* or rule of law from a continental European and Anglo-Saxon point of view is condensed, the following core idea can be recognized (Becker/Zimmerling 2004, Lauth/Sehring 2009, Schulze-Fielitz 2011, Shapiro 2012, Waldron 2008). A *Rechtsstaat* or rule of law is based on a functioning state and the commonality of law, which prohibits a law specific to one single

[2] It is possible, of course, to discuss the legal nature of specific autocratic regimes. Doing so, however, entails a cultural bias, which could tempt one to deny legal status to legal systems of other cultures if they do not meet the normative standards of a preferred legal sphere. Therefore, it is appropriate to employ a basic concept of this legal term.

individual, as well as retroactive laws. The principle of the rule of law requires equality before the law and the general application of the law, regardless of the social status of the people involved (i.e., fairness). This includes state institutions specifically. The legal bond of the state refers to the conformity of the constitution and legislation. Actions by the government and the administration ("legality of administration") have to comply with the laws. In addition, state intervention is limited by the proportionality principle.

Thus, there is a connection among formal justiciable guarantees (legal procedures) to individual citizens, who can exercise their constitutionally-granted rights against the government (court protection). For this purpose, laws must be transparent, well-defined, and consistent. At the same time, the legal guarantees require the public to be aware of them. A certain stability in the laws is also necessary to gain a familiarity with them and allow rational calculations (legal certainty). An essential prerequisite for litigation is a qualified procedural law, in addition to many other features, including the existence of an independent and professional judiciary that is accessible to all citizens and has ultimate control over the actions of the executive. The various criteria culminate in a realization of legal thought, which includes a prohibition on state despotism and can be understood as a fundamental contribution to justice.

The separation of powers among the judiciary and the other branches of government is a central criterion for determining the validity of rule of law (Böckenförde 1976, Grimm 1994). In understanding the separation of powers, the precedence of democratic legislation in comparison to other forces is assumed. Neither the judiciary, nor the executive, nor the administration, can create its own law. Administrative decrees are subject to the law. By providing institutions, standards, and procedures, the rule of law demonstrates a most striking expression of horizontal accountability, which can be differentiated into various institutional forms (Lauth 2007). The legally-secured design of public space and the political sphere means protection not only from state arbitrariness, but also from social actors who either disregard laws or try to manipulate them unconstitutionally (e.g., by means of corruption). The quality of the rule of law is restricted to the extent where it fails to curb these actors. In this regard, the rule of law outlines rights and responsibilities for the state and citizens while limiting both of them.

All previously introduced characteristics of the rule of law apply to the formal rule of law. The assertion of fundamental rights, however, appears logically necessary to ensure that the institution of legal process has meaning. Such an assertion is also imperative if limiting state action, an idea which is intrinsically linked to the legal process, is to be taken seriously. Correlating the limit solely with binding government actions to laws would ultimately mean accepting only a low threshold for the future action of the majority, because law-making could change accordingly.

For these reasons, it is quite plausible to conceive of fundamental rights as a material component that is — in addition to other formal procedural guarantees of the rule of law — a constituent component of rule of law (Zippelius 1991: 281); nevertheless, there is considerable room for interpretation when it comes to defining and applying abstract rights. With the essential aspects of the *Rechtsstaat* substantiated, the questions remain: what fundamental rights should be included in the understanding of rule of law, and how should they be interpreted?

The outlined understanding of a *Rechtsstaat* should not simply be separated from the thoughts about a constitutional state, because the latter has various meanings. There are positions which consider the constitutional state to be nearly identical to the substantive concept of a *Rechtsstaat*, while others understand it in the context of a positivist perspective – a position which is closely connected with the principle of "absolute" parliamentary sovereignty in Great Britain. However, key features of the *Rechtsstaat* (fundamental rights and procedural rights) are also often found in the constitutional state (constitutionalism). With this in mind, a constitutional state is not necessarily identical to a state which has only a written constitution, but does not demonstrate the required normative conditions. Nevertheless, compared to a *Rechtsstaat*, a constitutional state could have other additional features, particularly with regard to the political order, which is difficult to change. In this sense, Article 20 of the German *Grundgesetz* (constitution) crosses into the realm of the constitutional state, because it not only establishes the substantive aspects of the *Rechtsstaat*, but also the federal political order.

Table 1: Principles of the (formal) Rechtsstaat

1. The universality of the law (framing laws while being 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, i.e, applied independent of 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. Independence and effective controlling ability 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 payment for damages-to the extent applicable; government liability.
14. Realization of the principle of justice (relinquishing of arbitrariness and contributing to justice).

4. INFORMAL INSTITUTIONS

If we understand law in the sense of norms and binding systems of rules, we are referring to institutions. This understanding of institutions, which is common in classical institutional theory, will be explicitly focused on in the neo-institutionalist debate. There will be frequent references to the definition by Douglass North (1990, p. 3), who regards an "institution as a norm or set of norms that have a significant impact on the behavior of individuals" (concerned by or included in the institution). Thus, institutions constrain the actions of individuals. Although North did not emphasize the role of sanctions, in the neo-institutional debate, one can find different interpretations of constraints that are linked with them.

General agreement exists that institutions restrict individual behavior to some extent (Peters 1999). The extent and the mechanisms through which this occurs vary. Some authors (March and Olson 1989) highlight the internalization of norms during processes of primary or secondary socialization (family, kinship – school, military, companies, etc.). In this case, those who do not follow the rules have a guilty conscience, and deviations from the rules are sanctioned by an internal mechanism. External sanctioning mechanisms also exist (social discrimination or exclusion, loss of status, arrest, etc.). Rational choice perspectives include the latter, as rational choice approaches imply the possibility of suffering from disadvantages when rules are not followed. In this case, actors violating the institutions will not benefit from incentives linked to the institution.

In all types of enforcement mechanisms, defecting from the rules set by informal institutions implies losses for rule-breaking individuals. To avoid a catch-all category, which includes all sorts of inconveniences (caused by a particular sanctioning mechanism), it seems appropriate to consider institutions to be institutions only when they maintain (their own) external sanction mechanisms (which can be introduced by third parties). This obviously applies to formal institutions, such as legal systems.[3]

Even if sanctions are a defining feature of institutions, they are not the only reason why actors comply with institutions. Actors conform to institutions, because they regard them as given or 'natural'. Actors also respect institutions, because they display a legal character or because they regard them as legitimate (Lauth 2019). In accordance with North, these reflections on sanctions and the reasons why actors follow rules relate to the main purpose of institutions: "Within an institutional perspective, a core assumption is that institutions create elements of order and predictability" (March/Olson 2006, p. 4).

To summarize these reflections, institutions are defined as follows: institutions constitute a set of rules, which implies rights and responsibilities. A set of rules also creates and shapes a social order

[3] This does not mean that internal sanctions have to be absent. They can also exist in the case of formal institutions (not obeying the rule of law can create such internal mechanisms). The meaning here is simple: internal sanctions create no defining characteristic of an informal institution.

in such a way that the behavior of all actors involved in that social order is predictable. Institutions affect performance by voluntarily following the rules or being motivated by the threat of sanctions.

By definition, systems of law can be compulsorily enforced by state actors. For this reason, they will be labeled as formal institutions. This term already indicates the existence of informal institutions. Indeed, a diversified and widespread set of informal rules exists, which partially has a considerable influence on the workings of rule of law.

To differentiate between formal and informal institutions, the following serves as a useful starting point: *Informal institutions* are institutions that are *not formally codified* in official documents (in constitutions or laws). *Formal institutions* are officially codified in written documents. Thus, regulations are included which have the status of constitutional clauses and laws, but also private contracts and norms that have legal consequences. According to this line of thought, all private contracts or rules of associations that are protected by the state are formal institutions.

Formal institutions are guaranteed by state agencies, and deviations from these institutions are sanctioned by the state. In contrast, the existence of informal institutions is the result of the emergence of social or political practices and the effectiveness of these practices. Informal institutions are known and recognized publicly; however, they are often not codified. Informal institutions also have sanctions in place. These sanctions either include mechanisms of social exclusion or mechanisms that restrict access to much needed goods and services. Under the special conditions of communist rule, we can speak of “tertiary social control”, as Podgórecki (1979: 203) illustrates: “If behind the given legal system (which is rejected by the population at large as unjust, undemocratic, etc.) there operates a complicated infrastructure of mutually interdependent interests then this legal system may become accepted, not on the basis of its own merits, but because it creates a convenient cover-system for the flourishing phenomenon of ‘dirty togertherness’.”

The authority of informal institutions stems from various sources. Firstly, informal institutions are socially accepted, which provides them with a basic degree of legitimacy. The fact that these informal institutions are socially acceptable also serves as a major source of motivation for actors when they follow these patterns of social conduct prescribed by these informal institutions. Actors pursue different purposes when they enter these patterns of conduct; purposes can be defined either narrowly or broadly. These purposes can be linked to results, as well as to certain patterns of behavior. Institutions facilitate interaction between individuals and groups. They foster stability by creating known and accepted behavioral structures that cannot be changed by individual people. Even if actors disagree with these structures, they obey them because, in accordance with rational calculation, the costs involved in rejecting them can only be offset when behavioral alternatives are available. These considerations correspond with the proposed definition by Helmke/Levitsky (2004: 727): “We define informal institutions as *socially shared rules, usually unwritten, that are created, communicated, and enforced outside of officially sanctioned channels*.”

5. INFORMAL SYSTEMS OF LAW AND INFORMAL SYSTEMS OF RULES

If law systems are conceived of as a set of formal institutions, it becomes necessary to clarify in which sense we speak of informal law systems or informal legal systems. Does it make sense to speak of “alternative” or “informal” systems of law inside a country if the status of legal systems is linked to formal institutions? If we take up this line of argumentation, we would always have to speak not only of competing judicial systems, but also of competing states inside a national territory. This is quite conceivable if we use the monopoly on force as the main indicator to identify a state. Thus, areas occupied by armed units (e.g., as is the case in guerrilla warfare) could be regarded as states and, likewise, the sphere of influence of organizations which are able to enforce their rules and assert their authority through violence (e.g., mafia).[4]

However, the sharp contrast in the area of stateness can be mitigated if we take a nuanced look at the functionality and the motives behind legal compliance. Thus, it is possible that legally analogous systems of rules or informal judicial systems – the systems of rules which make legal claims without being codified by the state – exist and are only limited by coercion. Compliance with these legal systems can occur ‘voluntarily’ if they are based on accepted social traditions or arrangements. [5] In this case, the systems establish themselves on the basis of internal, not external, ties. In the case that 'voluntary' acceptance fails, however, social sanctions can be put in place. The strength of ‘living law’ can be observed not only in traditional or transformational countries, but also in western countries which have experienced massive migration for instance, the legal behavior of Kurds in London (Tas 2014).

From a functional viewpoint, informal legal systems can be distinguished from each other. Legal spheres, such family law, property law, or criminal law, which can work according to their own rules, are worthy of consideration. These kinds of rules can be based on traditions of indigenous systems of rules (common law, clan law, and tribal law)[6] or come from larger legal systems, as mentioned, for instance, in the legal thought of certain legal traditions that are regionally bound (Bryde/Luchterhandt 1997). Examples include Islamic law, Hindu law, and Far Eastern law, among others. We can speak of informal law systems or legally analogous systems of rules if, and only if, they develop social effectiveness, and the typical characteristics of the law can be observed. This includes a recognizable, coherent system of legal norms, which are fixed and known.

In addition, these norms are associated with a procedural law, in which the state jurisdiction is regulated by the analogous enforceability of the law. Furthermore, there must be authoritative bodies that adjudicate the application of the law and whose decisions are normally followed. An understanding of such norm systems as law can be justified by comparing it to the analogous functionality of international law vis-à-vis state law. This kind of law does not necessarily have to be

4 Almond (1960) uses the term “political system” in the same way.

5 That does not mean that formal systems of law are based only on the threat of violence. Also, in constitutional legal systems, there is a high level of voluntary observance of the law. A comprehensive overview of informal practices and rules can be found on the homepage von *Global Informality Project*: https://www.in-formality.com/wiki/index.php?title=Global_Informality_Project

6 Custom law does include all non-codified rules and behavioral patterns that prove to be enforceable in state or private tribunals. An important area has developed in the field of economic relations – especially at the international level – where private bodies conduct conflict resolution according to the self-created right of the economy. Custom law also includes folk traditions, which cannot be completely (or only partially) brought before state tribunals.

established and authorized (and enforced) by the state. Even international law cannot be enforced by any one state and is still referred to as law. A key feature of the validity of international law corresponds to custom law or, more generally, informal law.[7] In addition to the element of behavioral development, the subjective belief in a legally binding relationship for the parties involved – the group of people that fit into the law system – must be present.

Informal constitutional rules form a specific variant of informal law. Schulze-Fielitz (1984: 20) defines it in the following manner: “informal constitutional rules constitute the totality of those unwritten rules for the behavior of leading officials in the highest governing bodies of the state, but also for the political parties and publically significant social groups, whose compliance is considered an essential prerequisite for long-term orderly constitutional life, according to the prevailing beliefs.” Examples of these kinds of informal constitutional rules are proportional representation rules (gender, region, factions), which can be observed in the composition of committees, as well as coalition agreements, that establish the principles of intergovernmental cooperation. Significantly, these rules cannot be brought before and examined by general jurisdiction courts. They create customs, however, that cannot be changed without protests or political sanctions.

This definition sends a clear message: Informal constitutional rules are compatible with the existing constitutional norms and are closely associated with them. They are considered to be a necessary condition for an orderly constitutional life, because they help formal rules function or even enable their use. In this sense, they form part of the constitutional culture, which refers to the totality of individual attitudes towards the constitution and the law, which, in turn, is correlated to corresponding action by individuals and corporate actors.

Furthermore, there are *informal rule systems* that can be distinguished from informal legal systems. These informal rule systems can also be effective institutions and are connected to further sanctions.[8] Examples of such informal institutions are corruption and clientelism or specific forms of networks. These systems, however, are not legal in nature and exhibit little to no analogous legal functions (Lauth 2000). Unlike formal systems of rules in the official legal system, these informal institutions are not classified into a clearly defined category of informal legal systems. An essential part of a legal system (i.e., court proceedings) is missing. Even so, relationships exist. For example, the rule system of 'clientelism' and legal system of 'tribal law' are closely connected with one another. In addition to 'clientelism,' corruption – in its different forms – can be associated with clan structure. As shown by the remarks by Peter Waldmann (2001), the boundaries between an informal system of rules and an informal legal system can be fluid. Likewise, together they can create complex informal patterns, which are condensed into a second 'proper' informal constitution (Ledeneva 2001) or

[7] In international law, custom law denotes a continuous practice of behavioral patterns, and the states believe that they have a legal obligation to this behavior. Accordingly, the custom-law standard is composed of an objective (the practice) and a subjective (the recognition) element (Raustiala/Slaughter 2002); without the latter, the behavior is still considered a custom.

[8] If they are no sanctions in these systems, they are considered to be practices or conventions.

'delegative code' (O'Donnell 1994).[9] In this case, they have a significant impact on the workings of the official legal system (Meyer 2006).

6. RELATIONSHIP BETWEEN RULE OF LAW AND INFORMAL INSTITUTIONS: HYBRID LEGAL SYSTEMS AND DEFICIENT RULE OF LAW

Rule of law has been found to be lacking not only in authoritarian regimes, but also in many young democracies (O'Donnell 1999; Zakaria 1997). Significant deficiencies have been observed, such as incoherent, non-transparent judicial systems that are not accessible to all citizens, inadequate respect for laws – also by the state actors, who are acting without a sufficient legal basis for action, little presence of court protection, and unfair litigation practices and procedural law. Although more criteria could be added to the list, the more interesting question is: what factors lead to these kinds of findings? Do the causes for them lie in an incompetent application of the law, and would better instruction of judicial representatives lead to stricter, better enforcement of the rule of law?

There is reason to suspect that the state of affairs is often organized in a more complicated fashion. The weakness of the rule of law is not only limited to the fact that it was not fully implemented or not used to control lawless areas. The problem is also that, in the same country, preexisting, informal systems of laws or rules exist and compete and come into conflict with the rule of law. This can occur on a functional and/or a territorial level.

It has already been pointed out that, in different states, some areas of law (family law, property law, or criminal law) can work according to rules that are based on traditions of indigenous systems (clan and tribal law) or originate from larger legal systems (Islamic law, Hindu Law and Far Eastern law).[10] In these kinds of cases, the official law could be neglected or merely considered a potential competing alternative. Nevertheless, it makes sense to assume that competing legal systems produce a problem if, and only if, the informal legal status exists and the different legal systems are not compatible with constitutional principles. While the first criterion can be verified via its empirical characteristics and its impact, clarifying the compatibility proves to be more difficult, because it requires an additional comparison to the formal and material principles of the rule of law. Besides clear contradictions, the findings can reveal partial inconsistencies, which do not correspond to complete incompatibility. It is also possible to identify functional equivalents, as seen with customary law in an Anglo-Saxon context. Moreover, private law, which develops through international trade relations, can be compatible with principles of the rule of law; the same is true for the kind of law that is created by contractual arrangements in self-help organizations (Eckart 2004). These examples refer to other legal sources, whose constitutional codification is fundamentally possible. In the above examples, informal law forms a functional equivalent to constitutional practices and can, theoretically, be transformed into formal law. This, of course, also applies to the aforementioned informal rules of the constitution.

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9 The scholarly concept of the neo-patrimonial state (Erdmann/Engel 2007) is relevant to this issue, although here, there tends to be only a slight predominance of informal rules. The formal institutions are not only manipulated, but also have intrinsic value.

10 Compare Glenn 2008 to comparative law families and comparative legal traditions.

Although it would make sense at this point, having a normative discussion about the character of different sources of law is not appropriate, on account of the complexity of the subject matter. Contradictory findings exist in the current state of research within this comprehensive and complex field. Such a discussion should also focus on the empirical findings in individual cases, because informal legal traditions often exist in specific forms and thus, are not totally conducive to a deductive approach (Zips/Weilenmann 2011).

However, at first glance, present findings (KAF 2006) give evidence that human rights and civil liberties are not protected analogously to the rule of law in all informal legal systems. Doubts about the compatibility with the rule of law grow significantly when other forcibly established legal systems, ones not based on established legal traditions, are considered. Informal legal institutions, in which regulation based on private power occurs, are addressed. Local political bosses (caciques) – be they in the country or in urban slums, or gentry or warlords on regional level – who regulate, monitor, and enforce their own rules, should be considered. Such systems also include mafia organizations in their different forms, or guerrilla organizations, which govern their conquered territory. These examples allow the territorial component to be addressed. Many of these phenomena can be bundled into the concept of 'brown areas', which focuses on areas in which state control is mostly absent (O'Donnell 1993: 1359f.) The explosive nature of informal legal systems rises if – as illustrated – competing incompatible informal systems of laws and rules exist. The following remarks are based on this issue.

If the competing and contradictory systems of laws or rules, which are not compatible with rule of law traditions, are dominant, the rule of law is, in fact, undermined or nullified. This rare constellation, however, will not be closely examined in what follows. A closer look will be taken at cases, where the interference due to incompatible systems of laws or rules is weaker, even though serious consequences are possible. Two possibilities can be distinguished: a) equilibrium, in which the rule of law and competing legal and rule systems are in relative balance and b) domination, where the rule of law dominates the competing law and rule systems, although it cannot completely eliminate them. The first case can be seen as a *hybrid legal system*; the second as a *deficient rule of law* (Lauth/Sehring 2009).[11]

Competing legal systems can exist and persist in different ways. (1) On the one hand, they can exist beyond of formal law. Classic examples are indigenous traditions, which have survived the introduction of modern legal systems. These traditional systems persist due to their social acceptance. They are partially compatible with rule of law. Serve tensions arise, however, when we are confronted with legal systems that are enforced by social actors. Several examples, which will be addressed later, come to mind: oligarchies, which use private 'security forces' to protect their privileges; militant groups, which reserve the right to make illegal interventions, when they see their interests — i.e., their understanding of the law — threatened; mafia cartels, which act analogously; and guerrilla organizations, which enforce their own rules in the territory they control.

[11] A hybrid legal system is not totally the same as "legal hybridity" as proposed by Myint (2014). In that proposal, the rule by law – as a formal construction which is *individually* and informally manipulated by the rulers – is combined with elements of rule of law (especially, an almost completely independent judiciary).

(2) On the other hand, formal and informal legal systems can be interwoven in various forms. The possibility exists that competing areas of the law can be completely or partially adopted in the official legal system and be authorized to regulate certain functional areas (e.g., as in the Bolivian Constitution, which regulates the areas of family and criminal law). In this way, the competing legal system loses its informal status, but still remains in conflict with the principles of rule of law. The disparity is simply codified and incorporated into the legal system. From the perspective of the rule of law, the presence of these kinds of solutions does not seem very likely; even so, there is sufficient empirical evidence that substantiates their existence under certain conditions (Benda-Beckmann 2002, Beyer 2006). For example, the rules of land distribution and usage in several African countries are guided by tribal law, which is difficult to reconcile with the guarantee to property which is provided by the existing constitutions. Another example concerns the inclusion of religious traditions in family law, which curtails civil rights and liberties, often of women.[12] With respect to the rule of law, such a practice is unacceptable. Another pertinent example would be the incorporation of Sharia in criminal law, which does not comply with all of the principles of the rule of law (Possamai/Richardson/Turner 2013). These kinds of legal adoptions can be in force at national level (as in Egypt) or apply only to certain states in a country (as in Nigeria).

While in the first case, two legal systems – the rule of law and an incompatible informal one – separately oppose each other, in the second case, they are intertwined, and the competing legal system has an official character. The latter case has the advantage that the state's monopoly on force remains intact; the disadvantage is that the resulting system of law is incoherent. The situation is complicated when multiple systems of law compete with the rule of law and, in doing so, overlap with each other. This variant can be empirically confirmed simply by looking at African legal systems (Ruppel/Winter 2011). In parts of Africa, remnants of colonial law, indigenous tribal law, and religious courts exist parallel to the official, constitutionally-based law system.

With these thoughts in mind we have to decide how to classify the findings. When is a legal system considered a hybrid one, and when does a deficient rule of law exist. According to the above definition, the classification depends on the strength of the competing legal system. Despite their unwieldy character, incorporated legal parts hardly ever challenge the dominance of the rule of law unless, important functional areas of law, like the criminal justice system, are substantially affected; thus, a hybrid legal system is denoted by the separation of the two systems. However, a deficient rule of law can be present in both cases if the precedence of the rule of law persists. Although a hybrid legal system is no longer considered a *Rechtsstaat*, it still possesses features that are common to rule of law. The remaining constitutional element, however, is only one part of the total legal system. In order to be identified as a hybrid legal system, empirical evidence of a competing legal system, which is largely incompatible with the rule of law, has to be provided. The rival system has to be stronger than the deficiencies observed in 'brown areas'. This constellation is true in only in some cases. Despite the existence of one or more competing legal systems, and provided that the precedence of the rule of law is not called into in question, a deficient rule of law is far more likely.

[12] Such a constellation could be observed in India regarding personal law (Rudolph/Rudolph 2001).

When the rule of law is deficient, it is assumed that the legal system in question is predominantly a *Rechtsstaat* and that the state's ability to function is impaired only in smaller areas, which, in turn, significantly exceed the level of deviations in functioning constitutional states. In the case of the existence of separate and competing legal systems, a deficiency in the rule of law is present if these deviations generate only a low level of activity ('enclave right'), or the validity of constitutional decision making is only slightly affected.

The rule of law can also deteriorate when confronted with *systems of rules* that alter constitutional logic. This change can happen through the persistence of clientelistic structures and/or corruption. Clientelistic structures, in their various forms, can infringe on equality before the law in different ways; in general, corruption undermines the law.[13] These types of deficiencies can also be found in functioning constitutional states. However, they appear there rather sporadically and do not indicate any established patterns of action. In states with a deficient rule of law, the systems of rules, however, have acquired an institutional status, which leads to a permanent connection with the formal legal system (as 'parasitic' institutions).

It is exactly this argument of the institutional status of deficiencies that separates a functioning Rechtsstaat from a deficient one. A far-reaching impact is associated with the respective functional logic of both types. For example, the elimination of defects in functioning *Rechtsstaat* is easier – as it just involves the correction of individual acts – than in the case of deficit rule of law, which requires institutional changes.

Thus, the existence of competing rule systems is a sufficient condition for a deficient rule of law. It is evident that a massive accumulation of these kinds of informal interventions could ultimately undermine the rule of law. This particular case would no longer be considered deficient rule of law, but a state of lawlessness. Unlike hybrid legal systems, a deficient rule of law does not necessarily exist in tandem with competing and incompatible legal systems.

In addition to the threat to the rule of law by competing rule systems and informal parasitic institutions, a further risk arises vis-à-vis poor handling of the rule of law itself. This potential risk stems from limited sensitivity to problems on the basis of a traditional perception filter and/or inadequate suitability and competence of institutional actors (Garzón Valdés 1999). The social 'blindness' that is found in realm of legal protection is also worth mentioning. Socially marginalized groups usually lack sufficient access to the legal system. Because they lack access, these groups cannot appropriately make use of the law and, in administration of justice, frequently find themselves disadvantaged in comparison to socially privileged actors (O'Donnell 1999). In this regard, the judicial system is often in a precarious condition, which is characterized by its poorly-staffed personnel facilities, drawn-out legal proceedings, and poor prison conditions. Moreover, there is also a lack of transparency in the body of law itself, which arises from excessive, unchecked legislation. This legislation is fraught with inconsistencies, which makes it difficult even for 'judicial staff' to work with it.[14] This discrepancy,

13 In the empirical research, these kinds of systems of rules can appear in different combinations and create specific patterns. They acquire special effectiveness in connection with informal legal systems.

14 These discrepancies or tensions can occur within the same area of law or among different areas of laws. (e.g., fundamental rights, criminal law, and civil law) This non-transparency can be

however, is not identical with the addressed incompatibility of different legal systems, as it is, in principle, immanently revocable.

As a result of our considerations we adhere. A lack of rule of law leads to the differentiation between two legal systems: a *hybrid legal system* and a *deficient rule of law* or Rechtsstaat. While a hybrid legal system is characterized by the existence of competing and largely incompatible legal systems – and can no longer be understood as rule of law – in a deficient rule of law, central principles of the rule of law remain intact, despite significant defects. These principles can be endangered in three ways: by competing legal systems, by incompatible informal systems of rules, and by the actors inside the legal arena. The deficient character of the rule of law is largely reflected in the institutional status of the threats, which, in turn, are not allowed to exceed a certain amount. Once this point is reached, a deficient rule of law becomes a hybrid legal system.

7. CONCLUSION

In the discussion of law and the rule of law, the concept of a formal and a substantial rule of law was introduced and specifically defined. Because rule of law has not been fully implemented in autocracies or many young democracies yet, its relation with competing informal legal systems and systems of rules was more closely examined. Two concepts – a *deficient rule of law* and a *hybrid legal system* – were introduced and explained in the typological discussion, which should improve the classification and analysis of the empirical findings. While a functioning rule of law is compatible with democracy and is considered to be a central basis for it, this applies only limitedly to a deficient rule of law and cannot be said of a hybrid legal system. In fact, the latter undermines central elements of democratic rule.

The limited results of promoting rule of law through external actors are known (Carothers 2006). What reform strategies have potential? Reform efforts that seek to strengthen the rule of law should be related to the causes of defects in the rule of law: This first priority is preventing disturbances in the rule of law, which are based on private violence (mafia, etc.). Likewise, problematic systems of rules (e.g., corruption) have to be confronted head-on. The situation becomes more ambiguous if competing legal systems are based on autochthonous and socially-entrenched traditions. Because a complete incompatibility with traditions of the rule of law cannot be assumed in these cases, a gradual integration of both legal systems – not an outright merger – should be considered as a solution strategy. In the process of association, certain elements would be emphasized, elements which could be successfully connected with the rule of law (Kaneko 2008; van Rooij 2009). The advantage of this kind of gradual integration is that it does extend access to judicial systems and does not entail damaging the sense of justice of the parties involved, and, if the system is transformed over long enough periods of time, the changes remain manageable in practice, as well as in the minds of the people who are affected. In this way, both the cognitive and the affective dimension of human actions

fostered by the lack of coherent bodies of law. In this case – which is not unlikely – legal knowledge becomes exclusive expert knowledge, which can gravely undermine the exercise of rights.

can be respected. Nevertheless, in this development, social conditions also have to be created, conditions which ensure the effectiveness of the rule of law procedures for those who, up to that point, have had only an uncertain guarantee of the rule of law.

This goal can be realized through two concrete strategies: (1) Competing legal systems are allowed in specific, clearly defined functional areas, while, at the same time, the official legal channels are still available. In this way, conflicts can be dealt with and solved on a voluntary basis and through traditional ways.[15] (2) Competing legal systems are connected with each other, but are functionally or territorially integrated into the existing official legal system. Here, it should be noted that the disparity between the two cannot be too great; in addition, an approximation of laws and a streamlining of legislation should follow in due time.[16] This strategy is not possible, however, if fundamental principles or rights blatantly contradict each other. These comments highlight only initial thoughts vis-à-vis overcoming verified deficiencies in the rule of law, whose strengthening requires greater research efforts in the field of comparative research on the rule of law.

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[15] These kinds of possibilities can be considered as analogous to the rule of law if the state has expressly authorized these entities and delegated competencies to them (Compare to courts of arbitration) or accepts them (e.g., mediation procedures), because it considers them to be functional equivalents. This arrangement has the advantage of having functioning legal structures in place. Due to insufficient development, the official channels of the rule of law may not always be accessible in the same way that these structures are.

[16] It is possible, however, that the developments do not follow legal universalism, but legal pluralism (Rudolph/Rudolph 2001: 55f).

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