The Legacies of Law

Long-Run Consequences of Legal Development in South Africa, 1650–2000

Jens Meierhenrich

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This highly original book examines the function of legal norms and institutions in the transition to – and from – apartheid. It sheds light on the neglected relationship between path dependence and the law. *The Legacies of Law* demonstrates that legal norms and institutions, even illiberal ones, can have an important – and hitherto undertheorized – structuring effect on democratic transitions. Focusing on South Africa during the period 1652–2000, Jens Meierhenrich finds that under certain conditions, law reduces uncertainty in democratization by invoking common cultural backgrounds and experiences. Synthesizing insights from law, political science, economics, sociology, history, and philosophy, he offers an innovative "redescription" of both apartheid *and* apartheid's endgame.

The Legacies of Law demonstrates that in instances in which interacting adversaries share qua law reasonably convergent mental models, transitions from authoritarian rule are less intractable. Meierhenrich's careful longitudinal analysis of the evolution of law – and its effects – in South Africa, compared with a short study of Chile from 1830 to 1990, shows how, and when, legal norms and institutions serve as historical parameters to *both* democratic and undemocratic rule. By so doing, *The Legacies of Law* contributes new and unexpected insights – both theoretical and applied – to contemporary debates about democracy and the rule of law. Among other things, Meierhenrich significantly advances our understanding of "hybrid regimes" in the international system and generates important policy-relevant insights into the functioning of law and courts in authoritarian regimes.

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Preface and Acknowledgments

I happened upon the subject matter of this book – the function of law in times of transition – about a decade ago. I was rereading at the time, for no particular reason at all, Ernst Fraenkel's *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Oxford University Press, 1941), a highly original yet largely forgotten study of the law of the "Third Reich." Written by a German labor lawyer of Jewish faith, *The Dual State* remains one of the most absorbing books – drafted clandestinely in the mid-1930s – ever published in the public law tradition. It was this rereading of *The Dual State* that inspired my "redescription," to borrow Ian Shapiro's term, of apartheid and apartheid's endgame.

I had first encountered Fraenkel – alongside Max Weber and Carl Schmitt – in the early 1990s, as a first-year student of law as well as political science and sociology in my native Germany. I was intrigued by the provocative argument contained in *The Dual State* and its lucid elaboration. I marveled at the effortless blend of insights from numerous disciplines and its deep grounding in the jurisprudence of Weimar Germany. At the time, however, I was preoccupied with comprehending the minutiae of constitutional law in the Federal Republic of Germany rather than the discredited legal theory and practice of the regimes – authoritarian and totalitarian – that had preceded it. It was not until several years later that I began to realize the significance of *The Dual State* for making sense not only of dictatorship then but also of democracy now. This realization had a great deal to do with South Africa, where I had just spent a considerable amount of time witnessing the country's transition from apartheid.

I lived and loved in South Africa for the better part of two years and, as such, learned a fair amount about the country and its people. Johannesburg in particular held my attention. There I met Paul van Zyl, then at the Centre for the Study of Violence and Reconciliation (CSVR). He would go on to become the Executive Director of the Truth and Reconciliation Commission of South Africa (TRC) and is now with the International Center for Transitional Justice in New York. It was Paul who, in 1995, involved me not only in the Centre's

work on the TRC (an institution that had not yet been created, let alone heralded and transplanted the world over), but also for allowing me to work, together with two other staff, over an extended period of time in Alexandra, then one of the most densely populated – and most violently contested – townships in South Africa, located on the northern fringe of Johannesburg. It was in Alexandra that I acquired a "feel" for the convoluted politics of South Africa, notably for the real – and imagined – cleavages that have driven it apart.

In May 1995, the National Peace Accord Trust had commissioned the CSVR to facilitate change in Alexandra. The project's aim was to "empower" about twelve hundred families (including their violent members) and other "stakeholders" from different "constituencies" who had been displaced as a result of collective violence that had torn to shreds the social fabric of Alexandra in 1992. Ultimately, this demanded that the CSVR, and our three-person crew who acted on its behalf, play a central role in attempting to rebuild shattered relationships, facilitate a process of sustainable local-level "reconstruction" and "development," and set into motion a process of "reconciliation." I am not sure what, if any, our contribution was in Alexandra, but I remain truly grateful to the township's hostel dwellers and inhabitants (especially those living in the "Beirut area") for welcoming me into their midst, and for allowing me glimpses into their depleted lives.

A year later, I was fortunate to work with Richard Humphries and Thabo Rapoo as well as Khehla Shubane and Steven Friedman at the Centre for Policy Studies (CPS) in Johannesburg. Our focus was on the institutional dimensions of federalism in Gauteng Province. The countless interviews with policy makers, bureaucrats (incoming and outgoing), politicians, and so forth in Johannesburg and Pretoria that we conducted provided me with precious insights into the organizational structure of the postapartheid state, and the politics of institutional stasis – and change – in times of transition. Although research at CSVR and CPS has had no direct bearing on this book, my exposure – and hopefully attunedness – to various sites of contention in South Africa has invariably influenced my account of the role of legal norms and institutions in the transition to – and from – apartheid. Most important, it has sensitized me to the necessity of adopting a perspective from the *longue durée*, of taking seriously the long-run development of institutions, formal and otherwise, for understanding politics and society.

Then came the law, to me the most interesting of all institutions. Directly responsible for my turn to law, or so I discovered in retrospect, was Dennis Davis's "Constitutional Talk," which during the drafting of South Africa's Interim Constitution aired weekly on television courtesy of the SABC, South Africa's Broadcasting Corporation. The sophisticated manner in which representatives from different political groupings as well as scholars – united (for the most part) by a belief in the centrality of law – aired their disputes and preferences was astonishing. This commitment to law was rather surprising and early on persuaded me that there was something truly remarkable about

the country's legal development that required further investigation. My investigation of legalization in South Africa began in earnest in 1998, when, as mentioned, I stumbled across *The Dual State*. Rereading Fraenkel, at this critical juncture, allowed me to lay the groundwork for an integrated, interdisciplinary analysis of legal origins and their path-dependent effects in the period 1650–2000. A few years later, my ideas fully percolated, I reconfigured Fraenkel for use in the theory of democracy. This book is the result. It also includes a tentative discussion – a plausibility probe – of my argument in the case of Chile, 1830–1990.

I could not have mustered the courage of my convictions and finished *The Legacies of Law* had it not been for those who offered wisdom while it was in the making. I am indebted to many scholars who generously read and commented on the manuscript in its entirety, namely, Edwin Cameron, Martin Chanock, Christopher Clapham, John Comaroff, Hugh Corder, John Dugard, David Dyzenhaus, Stephen Ellmann, Hermann Giliomee, Richard Goldstone, Donald Horowitz, Arend Lijphart, Michael Lobban, Frank Michelman, Dunbar Moodie, Laurence Whitehead, and Crawford Young. I shall remain forever grateful for the care that the aforementioned took in scrutinizing my argument and evidence, and for helping me mend the weaker parts. My gratitude also extends to Dikgang Moseneke and Albie Sachs, both sitting Judges of the Constitutional Court of South Africa, for their kind interest in my work. I would be remiss if I did not also acknowledge Lew Bateman, for his belief in the importance of this book, and the three anonymous reviewers for Cambridge University Press (one of whom persuaded me to provide this account of the gestation of the manuscript), whose generous praise and constructive criticism further improved the book. Laura Lawrie carefully copyedited the manuscript, Patrizia Kuriger expertly prepared the index, and Emily Spangler patiently facilitated the production. I am grateful to them all.

For comments and suggestions on the work in progress, I also thank Penelope Andrews, Kader Asmal, Robert Bates, Ursula Bentele, William Beinart, David Collier, Larry Diamond, Ivan Evans, Steven Friedman, Robert Goodin, Peter Hall, Michael Hart, Stanley Hoffmann, Richard Humphries, Andrew Hurrell, Thomas Karis, Desmond King, Roy Licklider, Irving Markovits, Shula Marks, Anthony Marx, Timothy Mitchell, Robert O'Neill, Adam Roberts, Donald Rothchild, Bruce Russett, Nicholas Sambanis, Luc Sindjoun, Jack Snyder, Alfred Stepan, Wilfried Swenden, Stephen Walt, Gavin Williams, Elisabeth Wood, Ngaire Woods, and especially Cindy Skach. Moreover, I am grateful to Rupert Taylor, Neil MacFarlane, and Charles Tilly, who were sources of encouragement in the decade from conception to completion.

Rupert was an always-available mentor and interlocutor in 1995 and 1996, when he tutored me – either at WITS, the University of the Witwatersrand, or, more likely, in a coffee shop nearby – in the vagaries of South African politics and society. Neil supported the project from the very beginning, kept me going with thoughtful advice in the middle, and with gentle pressure steered me

toward completion of the dissertation that constitutes the nucleus of this book. Chuck was crucial in the middle and also toward the end of the dissertation phase. He pushed me to clarify what was murky, offered counsel when things got stuck, and made me part of the contentious politics crowd at Columbia University – which I left behind only reluctantly when I moved on to Harvard in the millennial year.

Aside from the attention of colleagues known to me, I benefited greatly from feedback that I received during talks at Columbia University, Harvard University, the University of Oxford, and the University of Stellenbosch as well as numerous conferences and workshops, notably the "Democracy and the Rule of Law" workshop convened by Stephen Elkin under the auspices of the Democracy Collaborative at the University of Maryland in 2004. I am grateful to Steve for extending an invitation and his steadfast support of my career ever since, and to Karol Soltan and Rogers Smith for incisive comments on the occasion. Needless to say, none of the aforementioned is responsible for any errors of fact or judgment on my part.

The Rhodes Trust, Oxford, made much of the field research in South Africa possible. The Trust awarded generous funds for this and a related project, and I am especially grateful to Sir Anthony Kenny, former Warden of Rhodes House, for his support. I also received ample funding from the Centre for International Studies (CIS) at the University of Oxford. Additional funds came from the Graduate Studies Committee and St Antony's College, Oxford. Marga Lyall, Secretary at CIS, and Sally Colgan, former accountant at Rhodes House, aided gently in the administration of life. Nancy and Alfred Stepan provided shelter when a landlord struck. Funding for early field research in South Africa came from the *Deutscher Akademischer Austauschdienst* (DAAD) in Germany as well as CSVR, CPS, and the South African Institute of International Affairs at Jan Smuts House, Johannesburg. I thank Steven Friedman, Greg Mills, and Graeme Simpson, respectively.

I am indebted also to Frederik van Zyl Slabbert, Afrikaner democrat, who went out of his way to discuss, early on, the subject matter of this book with me in both Johannesburg and London, as well as Ibrahim I. Ibrahim, MP for the African National Congress (ANC), for facilitating interviews and access to Parliament in Cape Town in 1997. Helen Suzman shared her experiences with me on a memorable afternoon in Houghton. While I learned a great deal from all of my respondents over the years, only very few of whom are featured in the pages to come, I am especially grateful to those in the Natal Midlands who exposed me to KwaZulu politics, including Inkatha "warlord" David Ntombela who allowed me rare access to his world. I owe special thanks to Duncan Randall for making possible my visit to the countryside and the provincial legislature in Pietermaritzburg. Although only a fraction of the data, ethnographic and otherwise, that I collected in South Africa over the years found its way into the manuscript, it is there nonetheless – the foundation upon which my interpretation rests.

I had the good fortune to write and rewrite several chapters while a Fellow at the Institute for Social and Economic Research and Policy (ISERP) at Columbia University's Paul F. Lazarsfeld Center for the Social Sciences. There, Peter Bearman had established, and I was lucky to join, in 1999 a vibrant and diverse intellectual community in pursuit of scholarly excellence, above all in the area of comparative historical analysis. Peter's belief in my project, and my intellectual abilities more generally, gave me confidence at a time when I had little. His example and innovative scholarship have been an inspiration ever since. Similarly inspiring, in the final stages of the project, was the scholarship and mentorship of John Hagan at Northwestern University and the American Bar Foundation (ABF). Alongside John Comaroff and Terence Halliday, John made my sabbatical at the ABF, in 2006, truly memorable as well as enjoyable and productive.

I also acknowledge a European Recovery Program Fellowship in the Department of Political Science, Columbia University, awarded by the *Studienstiftung des deutschen Volkes*, Germany. Rupert Antes deserves special mention for his assistance in matters large and small. At Harvard, I express my gratitude to the International Security Program at Harvard's Belfer Center for Science and International Affairs, John F. Kennedy School of Government, especially Steven Miller, who invited me to become a Fellow. I also thank Harvard's Committee on Degrees on Social Studies, especially Judy Vichniac and Anya Bernstein; the now defunct Project on Justice in Times of Transition at Harvard Law School, the Kennedy School of Government, and the Weatherhead Center for International Affairs, especially Sara Zucker, Ina Breuer, and Philip Heymann; the University Committee on Human Rights Studies, notably Jacqueline Bhabha and Martha Minow; as well as my principal intellectual home, the Department of Government in the Faculty of Arts and Sciences, especially Robert Bates, Timothy Colton, Jorge Dominguez, Grzegorz Ekiert, Peter Hall, Stanley Hoffmann, Elizabeth Perry, Robert Putnam, and Nancy Rosenblum.

Good friends make extraordinary efforts worthwhile. Sumiko Aoki; Britt Aylor; Henning Beste; Michele Calandrino; Carolyn Chen; Ivor Chipkin; Illeana Georgiou; Hans-Martin Jāger; Melody, Josh, Tairou, Omo, and Stella Komyerov; Alex Krämer; Angelo Pacillo; Anke Rose; Shahana Rasool; Uli Scherr; Malte Stellmann; Oliver and Sylke Simons; Wilfried Swenden; and Tracy Yen as well as Michèle, Natalie, Alex, and Jerry Cohen offered, at one point or another, respite from the isolation of research and writing. Josephine, Pat, Frank, and John Skach were, for a while, a second family. Foundations for my curiosity were laid much earlier, and I gratefully acknowledge the late Roland Stief for helping lay them.

My parents, Christa and Friedel Meierhenrich, accompanied the research and writing from afar, as did my grandmother, Helene Brokmann, who contributed to the making of this book with her generous spirit. All three supported me at critical junctures in my life, and I owe each a tremendous debt. For what it is worth, this book is for them.

The Legacies of Law

1

Introduction

From Afghanistan to Sierra Leone, the international community is promoting democratic norms and institutions. It is for this reason that the investigation of general and specific effects of authoritarian legacies has been identified as a "pressing challenge for political science."[1] Research on this institutional overhang is timely, for surviving institutions have received scant attention in the literature.[2] Moreover, while scholars have written widely on how to make democracy work in changing societies, they have said relatively little about the contribution of law to this endeavor. By taking legal norms and institutions seriously, this book contributes new patterns, significant connections, and improved interpretations to the theory of democracy.

The book constructs the foundations for a theory of democracy that revolves around *rules of law*. It sheds light on the neglected relationship between path dependence and the law. By showing how, and when, legal norms and institutions served as historical causes to contemporary dictatorship and democracy, the book advances unexpected insights about the ever more relevant linkages between law and politics in the international system.[3] As such, the book also contributes to the emerging debate over the legacies of liberalism.[4]

[1] Michael Bratton and Nicolas Van de Walle, *Democratic Experiments in Africa: Regime Transitions in Comparative Perspective* (Cambridge: Cambridge University Press, 1997), p. 275.

[2] Richard Snyder and James Mahoney, "The Missing Variable: Institutions and the Study of Regime Change," *Comparative Politics*, Vol. 32, No. 1 (October 1999), esp. pp. 112–117.

[3] For explorations of this linkage, see José María Maravall and Adam Przeworski, eds., *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003).

[4] For a leading contribution to this debate, see James Mahoney, *The Legacies of Liberalism: Path Dependence and Political Regimes in Central America* (Baltimore: Johns Hopkins University Press, 2001).

QUESTIONS

This book is built around an attempt to answer two central questions: How do legal norms and institutions evolve in response to individual incentives, strategies, and choices; and how, once established, do they influence the responses of individuals to large processes, especially democratization? The central theme is the importance of law in modern politics. The aim is to advance our understanding of exactly *how* law matters, to *whom*, *when*, *why*, and with *what* consequences. To this end, I advance analytic narratives of apartheid's endgame, surprisingly one of the least understood transitions from authoritarian rule.

Although the evolution of cooperation among adversaries in apartheid's endgame was impressive, the manner in which it was solved was a surprise to many. In the mid-1980s, the stakes in South Africa were perceived as incredibly high, and the depth of racial divisions too deep. The end of apartheid was an outcome expected neither by actors nor scholars. Nelson Mandela, F. W. de Klerk, and most others intimately involved in the process, did not anticipate the advent of democracy. Desmond Tutu, Archbishop Emeritus, remembers it thus:

> Nearly everybody made the most dire predictions about where South Africa was headed. They believed that that beautiful land would be overwhelmed by the most awful bloodbath, that as sure as anything, a catastrophic race war would devastate that country. These predictions seemed well on the way to fulfilment when violence broke out at the time of the negotiations for a transition from repression to freedom, from totalitarian rule to democracy.[5]

Scholars echoed this view. For Arend Lijphart, writing in the late 1970s, it was an established fact that in South Africa, "the outlook for democracy of any kind is extremely poor."[6] In the late 1980s, apartheid's endgame had just begun, David Laitin cautioned scholars and practitioners alike: "That democracy, stability, and economic justice can occur in South Africa without being induced by the threat of armed upheaval appears to me to be a dream in the guise of science."[7] Looking back on apartheid's endgame, the eminent historian Leonard Thompson observed, "The odds against a successful outcome seemed insuperable, in part because South Africa was the scene of pervasive and escalating violence."[8] Most recently, Mahmood Mamdani

[5] Desmond M. Tutu, "Foreword," in Greg Marinovich and Joao Silva, *The Bang-Bang Club: Snapshots from a Hidden War* (New York: Basic Books, 2000), p. ix.

[6] Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977), p. 236.

[7] David D. Laitin, "South Africa: Violence, Myths, and Democratic Reform," *World Politics*, Vol. 39, No. 2 (January 1987), p. 279

[8] Leonard Thompson, *A History of South Africa*, Revised Edition (New Haven: Yale University Press, 1995), p. 245.

maintained, "If Rwanda was the genocide that happened, then South Africa was the genocide that didn't."[9] Or, as *The Economist* put it:

> Cassandra would have been stumped by South Africa. How easy it was, in the long, dark days of apartheid, to predict catastrophe, only to be assured by South African boosters that all was well. ... The voices of complacency were wrong. Yet so too were those that foretold a bloodbath. Of all of the horrors of the 20th century, South Africa's was unique: it did not happen.[10]

For as Courtney Jung and Ian Shapiro remind us, "[d]espite considerable violence there was no civil war, no military coup, and the cooperation among the players whose cooperation was needed was impressive."[11] This begs explanation. Thus far, the literature has pondered the *wrong* puzzle. The puzzle is *not*, as most of the literature assumes, why cooperation between democracy-demanding and democracy-resisting forces ensued. Rather, the puzzle is why cooperation – despite great uncertainty – spawned commitments that remained credible over time, and that inaugurated one of the most admired democratic experiments in the twentieth century.

ARGUMENTS

The arguments developed in this book to explain the *real* puzzle of apartheid's endgame are counterintuitive. The empirical argument suggests that apartheid law was, in an important respect, necessary for making democracy work.[12] In pursuit of this argument, I analyze the function of legal norms and institutions in the transition *to* and *from* apartheid. The theoretical argument purports that the legal norms and institutions, even illiberal ones, at t have an important – and hitherto undertheorized – structuring effect on democratic outcomes at t_1.

In furtherance of this argument I revisit Ernst Fraenkel's forgotten concept of the dual state. Fraenkel, a German labor lawyer and social democrat, fled the Nazi dictatorship in 1938. From his exile in the United States, he published *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Oxford University Press, 1941). *The Dual State* remains one of the most erudite books on the origins of dictatorship. It provided the first comprehensive analysis of the rise and nature of National Socialism, and was the only such analysis written from within Hitler's Germany. Although widely received on publication in the United States in the 1940s, the concept of the dual state, with its two

[9] Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton: Princeton University Press, 2001), p. 185.

[10] "Africa's Great Black Hope: A Survey of South Africa," *The Economist*, February 27, 2001, p. 1.

[11] Courtney Jung and Ian Shapiro, "South Africa's Negotiated Transition: Democracy, Opposition, and the New Constitutional Order," in Ian Shapiro, *Democracy's Place* (Ithaca, NY: Cornell University Press, 1996), p. 175.

[12] This book, to be sure, does not, in any way, attempt to exonerate or justify the apartheid regime, its policies, or rights violating practices.

halves – the *prerogative state* and the *normative state* – has received only scant attention ever since. This is unfortunate, for as this book demonstrates, the dual state is of immediate relevance for the theory of democracy.

Employing Fraenkel, I demonstrate that from colonialism to apartheid, South Africa was ruled by an ever-changing dual state. This dual state served what Juan Linz termed a "racial democracy." According to Linz, the paradox of racial democracy was "reflected in the ranking of South Africa among 114 countries, according to eligibility to participate in elections and degree of opportunity for public opposition, in scale type 14 (when the least opportunity ranks 30), far above most authoritarian regimes in the world."[13] This paradox was the result of the juxtaposition of two societies and political systems. This strange juxtaposition had unintended consequences for democratic outcomes, and is the subject of this book. Mine is an analytically driven and empirically grounded argument for taking the concept of the dual state out of its original context, and for increasing its extension. The book, in short, establishes the concept's relevance for the comparative historical analysis of democracy.

As I demonstrate in Chapters 4 and 5, the law of apartheid was a blend of formally rational law and substantially irrational law. Figure 1.1 represents this blend. Box "A" represents formally rational law. Government was only weakly constrained by this law, yet it regulated white commercial activity, as well as other domains, including parts of black society. Box "B" represents substantively irrational law. Box "A" is synonymous with the normative state in Fraenkel's model. Box "B" is synonymous with the prerogative state. Law affecting the disenfranchised majority under apartheid was for the most part substantively irrational. At times, however, even substantive law took on a rational character. Such was the structure of the dual apartheid state.

I show in Chapters 6 and 7 that in apartheid's endgame, the memory of formally rational law – and agents' confidence in its past and future utility in the transition from authoritarian rule – created the conditions for the emergence of trust between democracy-demanding and democracy-resisting elites. Iterative interaction strengthened this reservoir of trust in apartheid's endgame. Adversaries at the elite level found "faith in judicial decision-making as a source of legitimacy in the governance of a post-apartheid South Africa."[14] This faith in law produced remarkable, democratic outcomes. In terms of the Freedom House index of political rights and civil liberties, postapartheid South Africa achieved a consistent score of 1 for political rights and 2 for civil liberties in the period 1995–2002. Even as early as 1994, the tumultuous year of the country's first free parliamentary elections, the scores were 2 and 3, respectively. What is more, South Africa's apartheid-era ratings are indicative

[13] Juan J. Linz, "Totalitarian and Authoritarian Regimes," in Fred I. Greenstein and Nelson W. Polsby, eds., *Handbook of Political Science, Volume 3: Macropolitical Theory* (Reading, MA: Addison-Wesley, 1975), pp. 326–327.

[14] Heinz Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge: Cambridge University Press, 2000), p. 180.

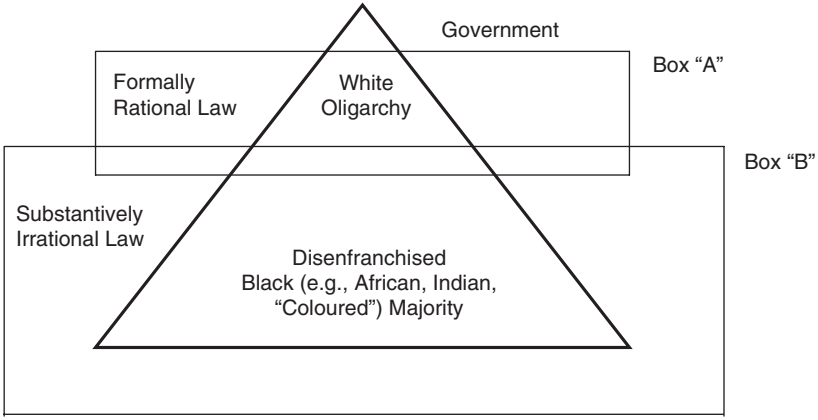

FIGURE 1.1. The Structure of Apartheid Law

of the limits the normative state was able to place on the prerogative state in select periods. The country ratings for the period 1973–1993 average an outcome of "partly free" (with annual scores ranging from 4 to 6 for both political rights and civil liberties).

EXPLANATIONS

Alternative explanations of these democratic outcomes have proved inadequate. The existing literature on apartheid's endgame suffers from three major problems: empiricism, individualism, and determinism.

Empiricism

Empiricism, the practice of describing without theorizing, is characteristic of most writings on apartheid's endgame.[15] Although descriptive narratives of apartheid's ending abound, innovative nomothetic interpretations are rare.[16]

[15] Prominent examples are Allister Sparks, *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* (Johannesburg: Struik Book Distributors, 1994); Patti Waldmeir, *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* (London: Viking, 1997); and Steven Friedman, ed., *The Long Journey: South Africa's Quest for a Negotiated Settlement* (Johannesburg: Ravan Press, 1993).

[16] Three partial exceptions are Timothy D. Sisk, *Democratization in South Africa: The Elusive Social Contract* (Princeton: Princeton University Press, 1995); Heribert Adam and Kogila Moodley, *The Opening of the Apartheid Mind: Options for the New South Africa* (Berkeley: University of California Press, 1993), published in South Africa as *South Africa's Negotiated Revolution* (Johannesburg: Jonathan Ball, 1993); and, more recently, Elisabeth Jean Wood, *Forging Democracy From Below: Insurgent Transitions in South Africa and El Salvador* (Cambridge: Cambridge University Press, 2000). Three other important nomothetic studies with even earlier cut-off dates (1989 and 1985, respectively) are Donald L. Horowitz, *A*

Empirical narratives are useful for cutting deeply into a real life setting. They provide an indispensable backdrop for theoretical explanation. But empirical narratives are problematic from the perspective of explanation if pursued in isolation. A serious drawback is that most empirical narratives embody explanations without making explicit the assumptions, tenets, and propositions that underlie explanation. Social scientists have "found it difficult to extract defensible propositions" from empirical narratives because they "often mobilize the mythology and hagiography of their times, mixing literary tropes, notions of morality, and causal reasoning in efforts both to justify and to explain."[17]

With respect to apartheid's endgame, most explanations of its negotiated settlement claim that a mutually hurting stalemate between democracy-demanding and democracy-resisting coalitions made cooperation possible, and thus democracy inevitable. The stalemate hypothesis, however, although pervasive in journalistic and scholarly accounts, cannot explain why apartheid fell and democracy won. It is useful for understanding the *origins* of commitments, but inadequate for explaining the *credibility* of commitments among adversaries, and their *stability* throughout the endgame. Although the thesis of a political stalemate may explain why bargaining occurred in South Africa (a military stalemate never materialized), it fails to illuminate why, and how, bargaining produced sustainable cooperation. In other words, this line of argument cannot answer how domestic adversaries managed to construct credible commitments that prevented political, economic, and social conflict from turning (more) violent, and from derailing democratization.[18] Although the stalemate hypothesis may be able to explain why negotiations ensue in democratization, it cannot explain when, and why, these negotiations produce sustainable, self-enforcing outcomes.

Individualism

Contingent explanations of apartheid's endgame are the norm. Essentially all empiricist analyses are also grounded in methodological individualism. In

Democratic South Africa? Constitutional Engineering in a Divided Society (Berkeley: University of California Press, 1991); Heribert Adam and Kogila Moodley, *South Africa Without Apartheid: Dismantling Racial Domination* (Berkeley: University of California Press, 1986); and Arend Lijphart, *Power-Sharing in South Africa* (Berkeley: Institute of International Studies, University of California, Berkeley, 1985).

[17] Robert H. Bates, Avner Greif, Margaret Levi, Jean-Laurent Rosenthal, and Barry R. Weingast, *Analytic Narratives* (Princeton: Princeton University Press, 1998), p. 12. For a more extensive discussion of empiricism and its pitfalls, see Terry Johnson, Christopher Dandeker, and Clive Ashworth, *The Structure of Social Theory: Strategies, Dilemmas, and Projects* (New York: St. Martin's Press, 1984), pp. 29–74. For a trenchant critique of the analytic narratives approach, in turn, see Jon Elster, "Rational-Choice History: A Case of Excessive Ambition," *American Political Science Review*, Vol. 94, No. 3 (September 2000), pp. 685–695.

[18] For a conventional account of apartheid's endgame, relying on the stalemate hypothesis, see Sisk, *Democratization in South Africa*, esp. pp. 67–75, 86–87. To be sure, the stalemate hypothesis is not an inadequate, merely an insufficient, explanatory tool.

general terms, such analyses are "primarily interested in actors' manipulation of their own and their adversaries' cognitive and normative frames."[19] The most influential individualistic account of apartheid's endgame is Patti Waldmeir's *Anatomy of a Miracle*.[20] Waldmeir, a former *Financial Times* correspondent in South Africa, offers an insightful, comprehensive, and ultimately important account of the interactions between key agents, and the games between these agents and their constituencies. Yet anecdotes belie systematic analysis. What is even more problematic is the neglect of structural variables. Allister Spark's illuminating (and early) account of the hidden negotiations among incumbents and insurgents, likewise, suffers from a "myopia of the moment," favoring a contingent interpretation over a structural perspective.[21]

Determinism

Retrospective determinism refers to the scholarly belief in the inevitability of outcomes.[22] Most available analyses of apartheid's endgame are deterministic in this sense. As indicated a moment ago, with a few exceptions, South Africa's path to democracy is portrayed as an inevitable process that had to unfold the way it did, yielding inevitable outcomes that were bound to result the way they have. Yet seasoned observers viewed the country as a "tinderbox" in the 1980s with an undeclared internal war that had the potential of producing a "bloodbath."[23]

Very convincing reasons existed at the time to believe that a new order (whether democratic or otherwise) would not be negotiated, but imposed; especially because violence had become the modal way with which both democracy-demanding and democracy-resisting forces responded to the problem of social order in the 1980s. F. W. de Klerk put it thus:

[19] Herbert Kitschelt, "Political Regime Change: Structure and Process-Driven Explanations," *American Political Science Review*, Vol. 86, No. 4 (December 1992), p. 1028. The contingent study of democratization originated with the four-volume work Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead, eds., *Transitions from Authoritarian Rule: Prospects for Democracy* (Baltimore: Johns Hopkins University Press, 1986).

[20] Waldmeir, *Anatomy of a Miracle*.

[21] The more recent *Comrades in Business: Post-Liberation Politics in South Africa* (Cape Town: Tafelberg, 1997) by seasoned political sociologists Adam, Moodley, and Frederik van Zyl Slabbert, while evading the problems of empiricism, does not contain a distinct theoretical argument, but reflects on a series of existing views in the literature. The book concerns itself foremost with problems of democratic consolidation, not the immediate endgame (the transition game) that lasted from one critical juncture to another: approximately from the transition in leadership at the helm of the National Party and the government from P. W. Botha to Frederik de Klerk in 1989, to the adoption of the final constitution in 1996.

[22] For a valuable discussion of retrospective determinism in the context of postcommunist transitions, see Stathis N. Kalyvas, "The Decay and Breakdown of Communist One-Party Systems," *Annual Review of Political Science*, Vol. 2 (1999), pp. 323–43.

[23] As quoted in Lijphart, *Power-Sharing in South Africa*, p. 2.

Anyone who would have predicted then that we would be able to bring the IFP and the Freedom Front into the elections; that we would be able to defuse the threat of right-wing violence; that we would be able to hold the elections with reasonable success; that the ANC-led government would adopt responsible economic policies and that the country would be broadly at peace with itself four years after the transformation, would have been accused of hopeless optimism.[24]

De Klerk conveniently leaves out the prerogative state that stood in the way of a resolution of apartheid's endgame. Michael Clough estimated in 1985 that "the white state's coercive capabilities are more than sufficient to avoid negotiated capitulation."[25] The late Joe Slovo, a key negotiator and revered leader of the South African Communist Party (SACP), conceded in 1992 that "we [the democracy-demanding forces] were clearly not dealing with a defeated enemy."[26] And what was more, the apartheid government under de Klerk did not believe in the historical inevitability of black majority rule. Even in hindsight, de Klerk does not accept the argument that the outcome of apartheid's endgame was preordained.[27]

Leading actors in the resistance movement were equally committed to confrontation rather than cooperation. The ANC's declared goal, as evidenced in many manifestos and speeches, was a violent, revolutionary overthrow of racial domination. The historian George Fredrickson reminds us that the ANC slogan "Apartheid cannot be reformed," which so successfully mobilized township resistance in the 1980s, must be understood at face value.[28] In June 1985, the ANC's "council-of-war" conference at Kabwe, Zambia, clearly preferred confrontation to cooperation in dealing with the enemy. The delegates concluded that "we cannot even consider the issue of a negotiated settlement of the South African question while our leaders are in prison."[29] The harbingers of confrontation in the townships were civic associations, the so-called civics. Some

[24] F. W. de Klerk, *The Last Trek – A New Beginning: The Autobiography* (New York: St. Martin's Press, 1998), p. 389.

[25] Michael Clough, "Beyond Constructive Engagement," *Foreign Policy*, No. 61, (Winter 1985–86), p. 22, cited in Laitin, "South Africa," p. 277.

[26] Joe Slovo, as quoted in John Saul, "Globalism, Socialism, and Democracy in the South African Transition," *Socialist Register* 1994, p. 178.

[27] Waldmeir, *Anatomy of a Miracle*, p. 149.

[28] George M. Fredrickson, *The Comparative Imagination: On the History of Racism, Nationalism, and Social Movements* (Berkeley: University of California Press, 1997), p. 143.

[29] African National Congress, "Communiqué of the Second National Consultative Conference of the African National Congress, presented by Oliver Tambo at a Press Conference, Lusaka, Zambia, June 25, 1985," reprinted in idem., ed., *Documents of the Second National Consultative Conference of the African National Congress, Zambia, 16–23 June, 1985* (Lusaka: ANC, 1985), as quoted in Klug, *Constituting Democracy*, p. 77. Waldmeir shows that the ANC remained divided throughout the endgame on the choice of confrontation or cooperation as bargaining strategies. "In May 1990, when the Groote Schuur talks took place, the lobby in favor of compromise was frighteningly small." Waldmeir, *Anatomy of a Miracle*, p. 163.

saw the civics as expressions of "people's power" and potential seeds of a revolutionary state.[30] Nelson Mandela remarked this:

> Oliver Tambo and the ANC had called for the people of South Africa to render the country ungovernable, and the people were obliging. The state of unrest and political violence was reaching new heights. The anger of the masses was unrestrained; the townships were in upheaval.[31]

In fact, "the idea of negotiation with an undefeated enemy was ruled out as a sellout" within the ANC.[32] Despite conciliatory overtones, both the National Party and the ANC adopted "hegemonic models of bargaining" where democratic, inclusive rhetoric only masked a desire for total control.[33]

Only in hindsight is apartheid's endgame an "easy" case for analysis in which democracy was inevitable. The problem with hindsight, notes Baruch Fischhoff, is that "people consistently exaggerate what could have been anticipated in foresight."[34] The cooperative solution of apartheid's endgame – this so-called negotiated revolution – was neither expected by participants nor predicted by analysts. Apartheid's endgame could have ended differently at various critical junctures. A series of alternative outcomes come to mind, including intensified repression, modernized segregation, violent revolution, and all-out civil war. What the psychology literature calls "outcome knowledge" has clouded much of the existing literature. This outcome knowledge substantially hampers our understanding of apartheid's endgame:

> By tracing the path that appears to have led to a known outcome, we diminish our sensitivity to alternative paths and outcomes. We may fail to recognize the uncertainty under which actors operated and the possibility that they could have made different choices that might have led to different outcomes.[35]

To address the problem of outcome knowledge, but also the problems of empiricism and individualism, this book traces the behavior of particular agents, clarifies sequences, describes structures, and explores patterns of interaction employing the theoretical model developed in Chapters 2 and 3. It contains analytic narratives of apartheid's endgame. Paying explicit

[30] Khehla Shubane and Peter Madiba, *The Struggle Continues? Civic Associations in the Transition* (Johannesburg: Centre for Policy Studies, 1992).

[31] Nelson Mandela, *Long Walk to Freedom: The Autobiography of Nelson Mandela* (Randburg: Macdonald Purnell, 1994), p. 518.

[32] Adam and Moodley, *The Opening of the Apartheid Mind*, p. 45.

[33] Pierre du Toit and Willie Esterhuyse, eds., *The Mythmakers: The Elusive Bargain for South Africa's Future* (Johannesburg: Southern Books, 1990), as quoted in Adam and Moodley, *The Opening of the Apartheid Mind*, p. 159.

[34] Baruch Fischhoff, "For Those Condemned to Study the Past: Heuristics and Biases in Hindsight," in Daniel Kahneman, Paul Slovic, and Amos Tversky, eds., *Judgment Under Uncertainty: Heuristics and Biases* (Cambridge: Cambridge University Press, 1982), p. 341.

[35] Richard Ned Lebow, "What's So Different about a Counterfactual?," *World Politics*, Vol. 52, No. 4 (July 2000), p. 559.

attention to theory, these narratives examine critical episodes in the endgame. In doing so, they shed light on real and alternative paths open to agents, and the reasons why the former were traveled, and the latter were not.

METHODS

The counterintuitive argument advanced in this book – that apartheid law was necessary for making democracy work – offers a "redescription" of apartheid's endgame. Shapiro recently defended redescription as a methodological approach: "The recent emphases in political science on modeling for its own sake and on decisive predictive tests both give short shrift to the value of problematizing redescription in the study of politics. It is intrinsically worthwhile to unmask an accepted depiction as inadequate, and to make a convincing case for an alternative as more apt."[36] For the purpose of constructing such an alternative, this book synthesizes insights from law, political science, sociology, economics, philosophy, and history. Locating an inquiry "at the boundary or intersection of various established fields has obvious dangers because it may satisfy none of the respective specialists and draw the ire of all of them."[37]

This book's contribution, or so I hope, lies in the fact that it uses the interdisciplinary approach to discern new patterns, significant connections, and improved interpretations about the demise of apartheid and the resurgence of liberalism. The foundation is a synthetic methodology in which nomothetic reasoning converges with ideographic reasoning. The analysis moves back and forth between theoretical and historical levels, using one to amplify and illuminate the other. For, as recent scholarship has shown, "[b]y promoting intimate dialogue between ideas and evidence, the joint construction of history and theory can improve our knowledge of both."[38]

The analysis combines insights from rational choice institutionalism and historical institutionalism, advancing a deep, interpretive analysis that recognizes the interplay between rationality and culture.[39] For the purpose of the analysis, I assume that agents "are partly pushed by internal predispositions

[36] Ian Shapiro, "Problems, Methods, and Theories in the Study of Politics, or: What's Wrong with Political Science and What to Do About It," in Ian Shapiro, Rogers S. Smith, and Tarek E. Masoud, eds., *Problems and Methods in the Study of Politics* (Cambridge: Cambridge University Press, 2004), p. 39.

[37] Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989), p. 1.

[38] Nicholas Pedriana, "Rational Choice, Structural Context, and Increasing Returns: A Strategy for Analytic Narrative in Historical Sociology," *Sociological Methods and Research*, Vol. 33, No. 3 (February 2005), p. 350.

[39] For a discussion, see Robert H. Bates, Rui J. P. de Figueiredo, Jr., and Barry R. Weingast, "The Politics of Interpretation: Rationality, Culture, and Transition," *Politics and Society*, Vol. 26, No. 4 (December 1998), pp. 603–642.

and partly pulled by the cost and benefits of the options they face."[40] I further assume that agents "can be narrowly egoistic or ethical, but they are rational in that they act instrumentally consistently within the limits of constraints to produce the most benefit at the least cost. The variation in choice reflects the variation in constraints, often in the form of resources or institutions that delimit or enable action, promote certain beliefs over others, and provide or hide information."[41] In this book, I show not only that the formulation of preferences matters, but also, that legal norms and institutions are critical in the formulation of these preferences.[42]

The remainder of this book is organized into eight chapters. Chapter 2 elaborates the book's substantive concerns – the function of law in transitions to and from authoritarian rule. To this end, it theorizes the concept of law and the dynamics of contention in democratization. Chapter 3 introduces Ernst Fraenkel's concept of the dual state as a structural parameter to choice, making it usable for comparative historical analysis, notably by taking the concept out of its original context and by increasing its extension. Chapters 4 and 5 turn from the *theory* of law to the *history* of law. They chronicle the formation and deformation of law in South Africa. The period under investigation stretches from the days of the Cape Colony to the reform of apartheid, from 1652 to the early 1980s. From this vantage point, the chapters trace the evolution of legal norms and institutions – and explicate their effects – in the making of separate development and apartheid. They are concerned with the explanation of institutions. Although I take the apartheid state as the object to be explained in these chapters, the apartheid state becomes the thing that *does* the explaining in the next. Chapters 6 and 7 demonstrate a path-dependent relationship between law and politics. More specifically, I detail, in three analytic narratives, how apartheid's endgame was structured by the conflicting imperatives of the dual state, and its two halves – the prerogative state and the normative state. Chapter 8 extends this argument by way of a plausibility probe. By offering an individualizing comparison, revolving around Chile's transition to and from authoritarian rule, I inquire into the relevance of my findings for the comparative historical analysis of democracy more generally. Chapter 9 concludes and considers implications. I discuss implications for the study of institutions, reflecting on the contending new institutionalisms in law and the social sciences, and then turn to the practical import of my findings.

[40] Dennis Chong, *Rational Lives: Norms and Values in Politics and Society* (Chicago: University of Chicago Press, 2000), p. 7.

[41] Margaret Levi, *Consent, Dissent, and Patriotism* (Cambridge: Cambridge University Press, 1997), p. 9.

[42] For a more comprehensive discussion of agents and preferences, and strategies and outcomes, see Chapter 6. See also Geoffrey Brennan and Alan Hamlin, *Democratic Devices and Desires* (Cambridge: Cambridge University Press, 2000).

IMPLICATIONS

Notwithstanding the fact that the institutional evolution of apartheid features centrally in the analysis, the theoretical – and practical – concerns raised in the book go well beyond the case of South Africa. They are of immediate relevance for the promotion of democratic norms and institutions, which is among the most important humanitarian challenges facing the international community in the twenty-first century.[43] From Bosnia and Herzegovina to Iraq, the international community has been seeking to establish democracy through the rule of law. More often than not, the imposition of legal norms and institutions has failed, as the case of Kosovo attests. The lessons of apartheid are relevant for safeguarding and sustaining democracy in times of transition. Although the lessons derived in this book offer no panacea, it is my hope that they might aid scholars and practitioners in facing uncomfortable facts about the relationship between authoritarianism and democracy – and the legacies of law therein.

[43] For leading commentary, see Thomas M. Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law*, Vol. 86, No. 1 (January 1992), pp. 46–91; W. Michael Reisman, "Why Regime Change Is (Almost Always) a Bad Idea," *American Journal of International Law*, Vol. 98, No. 3 (July 2004); and the contributions in Gregory H. Fox and Brad R. Roth, eds., *Democratic Governance and International Law* (Cambridge: Cambridge University Press, 2000).

PART I

A THEORY OF LAW

2

A Typology of Law

In this chapter and the next, I develop the theoretical argument of this book. This chapter introduces a typology of law, which is indispensable for understanding the social function of law in ordinary times, and reflects on the strategy of conflict in democratization, which is necessary for understanding the social function of law *in times of transition*. The chapter provides the intellectual foundations for my theoretical argument about the legal origins of democracy. Building on these foundations, the next chapter advances a *theory of law*, incorporating insights from the literature on path dependence and increasing returns in economics and the social sciences. In conjunction, the chapters lay the groundwork for the history of law, that is, the comparative historical analysis of apartheid (Chapters 4 and 5) and apartheid's endgame (Chapters 6 and 7) respectively.

FOUR IDEAL TYPES

Throughout this book I take law to refer to a set of norms held by citizens, encapsulated in institutions, and enforced by officials.[1] In this I follow Philip Allott who describes the social function of law thus: "(1) Law carries the structures and systems of society through time. (2) Law inserts the common interest of society into the behavior of society-members. (3) Law establishes possible futures for society, in accordance with society's theories, values, and purposes."[2] This conceptualization of law is grounded in Max Weber's contribution to conceptual jurisprudence (*Begriffsjurisprudenz*). In his attempt

[1] On the relationship between law and norms more generally, see Eric Posner, *Law and Social Norms* (Cambridge, MA: Harvard University Press, 2000). For a most important overview of contending conceptualizations of law, see Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Clarendon Press, 1995). For a distinct (albeit controversial) perspective, see also Brian Tamanaha, *A General Jurisprudence of Law and Society* (New York: Oxford University Press, 2001), and William Twining's review article, "A Post-Westphalian Conception of Law," *Law and Society Review*, Vol. 37, No. 1 (March 2003), pp. 199–258.

[2] Philip Allott, "The Concept of International Law," in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford

	Rational	Irrational
Formal	Formally rational	Formally irrational
Substantive	Substantively rational	Substantively irrational

FIGURE 2.1. Four Ideal Types of Law

to understand law comparatively, Weber formed ideal types of law.[3] (See Figure 2.1.) These ideal types are important for analyzing the dual state, especially for making sense of the prerogative state and the normative state, and the contribution of each to the political economy of law (see Chapter 3).

Weber uses two attributes to construct his ideal types. The first attribute concerns the distinction between formal and substantive law. The second concerns the distinction between rational and irrational law. In other words, the ideal types of law are "constituted by the binary oppositions of form and substance (content) as well as rationality and non-rationality (affect, tradition)."[4] In Weber's classificatory scheme, the cross-tabulation of these dichotomous attributes yields four ideal types.

Legal systems rarely fall squarely within one of these types. Historical reality entails "combinations, mixtures, adaptations, or modifications of these pure types."[5] Notwithstanding the complexity of historical reality, Weber considered *formally rational law* to be the most advanced of the four ideal types.[6] It is

University Press, 2000), p. 69. It is important to appreciate that Allott's is an attempt at capturing the concept of law *per se*, not just the concept of international law.

[3] Max Weber, *Wirtschaft und Gesellschaft: Grundriß der Verstehenden Soziologie*, Fifth Edition (Tübingen: J. C. B. Mohr, [1921] 1972), pp. 396–397. For a more comprehensive discussion of these ideal types ("Kategorien des Rechtsdenkens"), see Weber, *Wirtschaft und Gesellschaft*, pp. 395–513. Weber's ideal types are not "a simple dichotomy between the rational justice of the modern West and the kadi justice of much of the non-Western world," as some scholars erroneously claim. See Philip C. Huang, *Civil Justice in China* (Stanford: Stanford University Press, 1996), p. 229. The discussion here draws partially on Robert Marsh, "Weber's Misunderstanding of Traditional Chinese Law," *American Journal of Sociology*, Vol. 106, No. 2 (September 2000), pp. 281–302. Note, however, that Marsh offers a simplified version of Weber's ideal types.

[4] Wolf Heydebrand, "Process Rationality as Legal Governance: A Comparative Perspective," *International Sociology*, Vol. 18, No. 2 (June 2003), p. 331.

[5] Max Weber, *Max Weber on Law in Economics and Society*, edited by Max Rheinstein (Cambridge, MA: Harvard University Press, 1954), pp. 336–337.

[6] Weber writes that "the peculiarly professional, legalistic, and abstract approach to law in the modern sense is possible only in the measure that the law is formal in character." In this passage, Weber associates formally rational law with both professionalism and modernity. Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, edited by Guenther Roth and Claus Wittich (Berkeley: University of California Press, [1921] 1978), p. 657.

important to appreciate, however, that in Weber's typology of law "rationality is not primarily the attribute of a thinking and acting individual subject, but the characteristic of a structure, an institutional sphere, a normative order, or a collectivity."[7] This complements my conceptualization of the state as an institutional structure around which actors' expectations converge.[8]

Weber's typology provides a yardstick for comparative historical analysis. It is useful for making sense of legal systems generally, but especially for understanding legal systems governed by the conflicting imperatives of a dual state.[9] Weber's typology of law generates tentative answers to the question of whether, and how, law matters in a given society.[10] The next section discusses his four ideal types in more detail.

In general terms, *formal law* is internally legitimate because it is technically generalized and consistent, and *substantive law* is driven by extralegal motivations; and whereas *rational law* is controlled by the intellect, *irrational law* is governed by emotion.[11] Law is *formally irrational* (upper right quadrant in Figure 2.1) when the adjudication of law is inspired by ordeals, oracles, or other prophetic revelations. The rigor with which these methods are applied may, however, exhibit formalism, and thus irrational law may nevertheless be formal. Law is *substantively irrational* (lower right quadrant) when enforcement officials make arbitrary decisions from case to case without recourse to general rules. The result of personal discretion, whether informed by political, moral, or other concerns, is unpredictable law. Weber chiefly used the example of qadi justice (*Kadijustiz*) to illustrate the point.[12] Another lesser-known example of which Weber was fond is that of China. There, he was certain, Chinese magistrates without legal technical training reached judicial decisions arbitrarily, that is, in an unpredictable manner with no recourse to written

[7] Heydebrand, "Process Rationality as Legal Governance," pp. 331–332.

[8] For a comprehensive discussion, see Chapter 3.

[9] For a most important treatment of the nature and role of legal systems in domestic society, see Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal System* (Oxford: Clarendon Press, 1970).

[10] Weber's conceptual jurisprudence is not without its critics. For more than a century, lawyers have objected to positivism's emphasis on logically consistent, rational propositions of law. Roscoe Pound disputed the assumption that a correct legal decision can always be derived from existing statutory texts by a process of legal deduction. See Roscoe Pound, *Interpretations of Legal History* (New York: Macmillan, 1923), p. 121. In the social sciences, scholars critical of Weber's transhistorical legal comparisons have legitimately asked how far any given society can deviate "from the 'formally rational' type of law without undercutting the utility of the concept?" See Marsh, "Weber's Misunderstanding of Traditional Chinese Law," pp. 300–301.

[11] For an empirically grounded analysis, see Weber, *Wirtschaft und Gesellschaft*, pp. 468–482.

[12] According to Weber, judgments of the qadi, the judge in the Islamic *sharia* court, take the form of pure arbitrariness. See Weber, *Wirtschaft und Gesellschaft*, pp. 563–564. Weber also considered the introduction of popular elements into criminal law, such as lay justice and forms of today's jury trials, as a form of qadi justice. See Weber, *Wirtschaft und Gesellschaft*, p. 511.

codes or precedents. Adjudication was undertaken on a case-by-case basis by generalists.

Interestingly, one scholar recently found that Weber miscategorized China: "Ch'ing dynasty legal decisions were not 'formally rational,' since they were not based on purely formal, abstract legal reasoning. *But* neither was Chinese law primarily of the 'substantively irrational' type. The general principles upon which Chinese legal decisions were based were drawn from Confucian and legalist philosophy, which though extrinsic to 'purely legal reasoning,' precisely fit Weber's definition of 'substantively rational' law."[13]

Law is *substantively rational* (lower left quadrant) when it is driven by, or the vehicle of, an extralegal moral, religious, or political ideology. Islamic law therefore qualifies as substantively rational, as it is infused with commands of the prophet Mohammed. The rationality of Islamic law – which Weber appreciated despite the law's religious underpinnings – has been elucidated in careful studies by Lawrence Rosen and other leading scholars of legal reasoning in Islam.[14] By contrast, substantively irrational qadi justice constituted a perverted form of Islamic law according to Weber. It represented the exception rather than the norm in Islamic law. *Kadijustiz* was a pejorative (rather than a merely descriptive) term for Weber. It is important to appreciate, however, the bias in Weber's interpretation of qadi justice. For as Patrick Glenn notes, "The qadi, or judge, is the most internationally known figure of [I]slamic law, and this is due largely to disparaging remarks made by common law judges on the allegedly discretionary character of the qadi's function."[15] It is therefore important not to confuse the theory of qadi justice with the history of qadi justice, thus recognizing Weber's misunderstanding of one of the most important institutions of Islamic law. This notwithstanding, Weber's interpretation of Islamic law as substantively rational remains accurate. This is so because "[q]adi dispute resolution takes place in what has been described in the west as a 'law-finding trial' (*Rechtsfindungsverfahren*), so the notion of simple application of pre-existing norms, or simple subsumption of facts under norms, is notably absent from the overall understanding of the judicial process."[16] This difference in the understanding of the judicial process accounts for the lack of formality in the law. The workings of the law in the Islamic legal tradition are dynamic. In contrast to the civil law and the common law, the judicial process in Islamic law is one "in which all cases may be

[13] Marsh, "Weber's Misunderstanding of Traditional Chinese Law," p. 298.

[14] On the sophistication of Islamic law, which Lawrence Rosen has linked to the common law, see the latter's *The Justice of Islam* (Oxford: Oxford University Press, 2000); idem., *The Anthropology of Justice: Law as Culture in Islamic Society* (Cambridge: Cambridge University Press, 1989); and Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2004). For an excellent introduction to the study of legal traditions, see H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law* (Oxford: Oxford University Press, 2000).

[15] Glenn, *Legal Traditions of the World*, p. 163.

[16] Glenn, *Legal Traditions of the World*, p. 163. Emphasis added.

seen as different and particular, and for each of which the precisely appropriate law must be carefully sought out. The law of each case is thus different from the law of every other case, and all parties, and the qadi, are under an obligation of service to God to bring together the objectively determined circumstances of the case and the appropriate principles of the shari'a."[17] The foregoing captures the conflicting imperatives of substantively rational law: the reliance on substance (i.e., the commands of the prophet) on the one hand, and reason (i.e., the systematic quest for justice) on the other. As Weber writes, substantive rationality

means that the decision of legal problems is influenced by norms different from those obtained through logical generalization of abstract interpretations of meaning. The norms to which substantive rationality accords prominence include ethical imperatives, utilitarian, and other expediential rules, and political maxims, all of which diverge from the formalism of [formally rational law and from the] uses [of] logical abstraction.[18]

Other historical examples of substantively rational law – aside from Islamic law – include early Nazi law, or Soviet and Chinese law under communism, but also law derivative of moral considerations like welfare or justice.[19] The systematized nature of these ideologies accounts for the rational character of this substantive law. As logical generalizations, such legal norms are rational; they lose their formal character because of their extralegal source.[20] Law is *formally rational* (upper left quadrant), finally, when it forms a gapless system

[17] Glenn, *Legal Traditions of the World*, p. 163.

[18] Weber, *Economy and Society*, p. 657.

[19] Weber, *Wirtschaft und Gesellschaft*, pp. 397, 468–482. Substantively rational law refers to what Weber called "*materielle Rationalität*" in German.

[20] On systematization, see Weber, *Wirtschaft und Gesellschaft*, pp. 396–397. "To a youthful law," Weber writes, "it [systematization] is unknown." Weber, *Economy and Society*, p. 656. The passage in the original German reads as follows: "Sie [Systematisierung] ist in jeder Form ein Spätprodukt. Das urwüchsige 'Recht' kennt sie nicht." Weber, *Wirtschaft und Gesellschaft*, p. 396. For an insightful and sophisticated discussion of the effects of legal systematization and legal differentiation on the social function of law that has influenced my analysis, see Niklas Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie* (Frankfurt am Main: Suhrkamp, 1981); and idem, *Legitimation durch Verfahren* (Frankfurt am Main: Suhrkamp, [1969] 1983). From within positivism, Luhmann, like this book, emphasizes law's contribution to the reduction of uncertainty, and the stabilization of agents' expectations in strategic interaction. See, for example, Luhmann, *Ausdifferenzierung des Rechts*, pp. 92–153. Elsewhere, Luhmann argues that law solves "the problem of time" in social interaction and communication. This contention is closely related to the argument developed here, which emphasizes the ability of legal norms and institutions to lengthen, under certain circumstances, the shadow of the future for interacting agents in democratization. Luhmann called this mechanism the "dearbitrarization of relations." See Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1993), pp. 124–125, 129. Law's function, according to Luhmann, is this: "Konkret geht es um die Funktion der Stabilisierung normativer Erwartungen durch Regulierung ihrer zeitlichen, sachlichen und sozialen Generalisierung." See Luhmann, *Das Recht der Gesellschaft*, p. 131. ("Concretely, [law] is concerned with the stabilization of normative expectations through a regulation of their temporal, functional and social generalization.") Translation by the author.