“Rechtsstaat”: What is it that Swedish development assistance organisations “export”?

MAURO ZAMBONI∗

Abstract. This article evaluates, from a policy of law perspective, how Swedish development assistance organisations try to “export,” specifically to developing countries, the legal model of Rechtsstaat. Several definitions, as well as their accompanying values, can be seen as encompassed in the use of the Western concept of Rechtsstaat, in particular the distinction between a “formal” and a “material” Rechtsstaat. In reviewing policy documents produced by several Swedish development assistance organisations, the basis for this theoretical distinction can be viewed as the product of wider ideological and political underpinnings. It also can provide an explanation for the failures in “exporting” Western legal concepts and categories to developing countries.

1. Introduction

This paper evaluates, from a policy of law perspective, how Swedish development assistance organisations try to “export,” specifically to developing countries, the legal model of Rechtsstaat.1 The focus here in particular is the use by such organisations of the concept of Rechtsstaat in their policy documents.

The choice of the Rechtsstaat model is a result of the fact that this legal and political concept can be seen as constituting one of the most “Westernised” legal models.2 By referring to the “Westernisation” of a concept, I wish to emphasise the fact that legal ideas always tend to be, to a greater

∗ Faculty of Law, University of Stockholm, 106 91 Stockholm, Sweden. E-mail: mauro.zamboni@juridicum.su.se

1 In order to avoid controversy concerning the translation of the term, “Rechtsstaat” to English, for example, to “State governed by law” or “Constitutional State,” I have simply used the German expression. The term “Rechtsstaat” encompasses not so much a unique legal concept as the more complex problems surrounding the relations between both the public and the private sectors on one side, and the legal order on the other (Böckenförde, E.-W., 1991, pp. 47–48).

2 Another typical Western legal concept, similar to that of the Rechtsstaat, is the “rule of law.” Although these concepts may appear to be identical, as noted by McCormick, a Rechtsstaat requires as a fundamental and constitutive element the existence of a State, which is not directly necessary for a “rule of law” model. Important in the latter model is the role
or lesser extent, carriers of the values and ethics of a society or community in which the concepts have been developed. In the case of the concept of the Rechtsstaat, it can be viewed as the most “Westernised” for two reasons: the first is based on the legal-geographical grounds, and the second, on a legal-historical basis. From a legal-geographical perspective, it can be noted that the idea of Rechtsstaat is so widely spread and deeply rooted in Western legal systems and legal ideologies that it is often cited as one of the features distinguishing “our” legal systems from “others.” From an historical perspective, the Rechtsstaat identifies features common to all contemporary Western legal systems (with the exceptions of the United States and the United Kingdom) as they developed at the beginning of the 19th century.

Western countries are often identified as belonging to the “Western” legal hemisphere by their very fulfilment of that which is considered the criteria needed in order to speak of the Rechtsstaat’s legal model. Therefore, when the attempt is made to export and “transplant” this legal model into “other” legal cultures, it is natural to pose questions concerning both the concrete possibilities and the “rightness” of such a legal transplant. This paper shall in a few words attempt to address the issues of whether it is actually possible and/or “right” to export our legal concepts and legal models to other legal communities.

The first step necessary to answer these questions is to determine the meaning(s) and accompanying values encompassed in the use of the Western concept of Rechtsstaat. The first section consists of mapping out the most common distinctions of the different types of Rechtsstaat, namely between a “formal” Rechtsstaat and a “material” Rechtsstaat. We shall then explore the types of legal ideologies, or values, inherent in a choice of one model over the other.

This distinction is based on Max Weber’s “ideal-types” model in that such legal models do not tend to correspond to the concrete application of the ideas of Rechtsstaat but, nevertheless, they play an important role in establishing the fundamental features of a “Rechtsstaat in reality” phenomenon.

played by the courts, which are to guarantee a respect for the law by both the Government and the public authorities (McCormick, N., 1984, pp. 65–66).

3 As to the “transplantation” of legal rules and concepts (although in a more legal historical perspective), see the debate which can be found in the comparative legal literature, particularly between Alan Watson (1993) and William Ewald (1995).

4 “The ideal type [is] essentially . . . a mental construct for the scrutiny and systematic characterisation of individual concrete patterns which are significant in their uniqueness” (Weber, M., 1949, pp. 99–100). This means that in reality it is not possible to draw a sharp distinction between the concrete application of a “formal” Rechtsstaat and a “material” Rechtsstaat. For example, often hidden behind the “formal” idea of Rechtsstaat are values which this legal model is directed to implement, as can be seen in the 19th century with the rejection of the individualistic orientation of the “law of reason” (see footnote n. 11).