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978-1-107-02471-7 - Rule of Law Dynamics: In an Era of International and Transnational Governance

Edited by Michael Zürn, André Nollkaemper and Randy Peerenboom

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## Introduction

### Rule of Law Dynamics in an Era of International and Transnational Governance

Michael Zürn, André Nollkaemper, and Randall Peerenboom

#### 1. INTRODUCTION

The nature, objectives, and effects of rule of law promotion are undergoing major transformations as a result of the increasing international and transnational dimensions of governance. Rule of law promotion by its very nature has always been an international and transnational activity, as states, international organizations (IOs), and nongovernmental organizations (NGOs) have aimed to influence rule of law practices in other states.<sup>1</sup> However, contemporary rule of law promotion has become internationalized in two additional senses. First, the incorporation of rule of law principles into international law binding on states has become an important aspiration of rule of law promotion, in the hope that doing so will provide a common standard for all states in a manner similar to international human rights law. Second, the

<sup>1</sup> Although rule of law is a contested concept, there is general agreement that rule of law requires at minimum that law imposes meaningful limits on the state and state actors, as reflected in the principles of legality and a government of laws, the supremacy of law, and equality of all before the law. The concept of “rule of law” is therefore distinguishable from “rule by law” in which law is primarily an instrument or tool for governing but is not intended to impose meaningful limits on the state or state actors. Rule of law theories are generally divided into two types: thin (procedural) or thick (substantive) theories (see Peerenboom 2002: 65–71 and the citations therein). Briefly put, a thin theory stresses the formal aspects of rule of law – those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or nondemocratic society, capitalist or socialist, liberal or theocratic. Although proponents of thin interpretations of rule of law define it in slightly different ways, there is considerable common ground, with many building on or modifying Lon Fuller’s influential account that laws be general, public, prospective, clear, consistent, capable of being followed, stable, and enforced (Fuller 1969; see also Raz 1979). In contrast to thin versions, thick or substantive conceptions begin with the basic elements of a thin conception, but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, etc.), forms of government (democratic, single-party socialism, etc.), or conceptions of human rights (liberal, communitarian, collectivist, etc.) (Summers 1999; Tamanaha 2004). There are therefore many competing thick conceptions of rule of law (Peerenboom 2002, 2004; Tamanaha 2004).

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rule of law agenda has increasingly targeted IOs, transnational actors, and nonstate parties that now play a more significant role in rule making and governance.

The international and transnational nature of modern governance presents major challenges for the rule of law promotion agenda, at a time when the less-than-stellar results of traditional state-oriented rule of law promotion have led to increased doubts about the wisdom and feasibility of the enterprise (Carothers 2006a; Taylor 2009; Trebilcock and Daniels 2008; Trubek 2006). Have the major actors in the rule of law field, including the “great powers” and IOs, altered their strategies, programs, and practices to reflect the shift to new levels and new forms of governance? Do rule of law standards apply to new international and transnational forms of regulation? Should they be modified to fit the different context? Can the interactions between national and international levels be structured so that they do not become a new source of rule of law violation? Does international law provide a clear and acceptable set of standards that can form a common baseline for rule of law promotion applicable to both states and new forms of governance? Finally, how does rule of law promotion, whether or not it is based on standards of international law, cope with the wide variety of forms of resistance from the targets of rule of law promotion?

To contribute to our understanding of rule of law promotion, this volume seeks to address *the dynamics of rule of law in an era of international and transnational governance*. It uses the term “dynamics” to refer not only to the increasing international and transnational dimensions of rule of law promotion<sup>2</sup> but also to the interaction between the international and domestic levels of law. It conceptualizes these levels as a two-way relationship: International law influences rule of law development at the domestic and local levels; at the same time, precisely because of its potential effects, rule of law standards are being sought at the international level itself.

The dynamics of rule of law also encompass the interaction between rule of law promotion and rule of law conversion. The success of rule of law promotion depends not only on the attractiveness of the rule of law concept but also on the ways it is promoted and the ways it is received. To be effective, rule of law promoters need to take into account the response and feedback from recipients, and they must adapt their methods accordingly. This long-recognized truth remains relevant when rule

<sup>2</sup> We follow the established practice in international relations, using “international” to refer to activities taking place between states and “transnational” to refer to societal cross-border activities (see, e.g., the chapters in Carlsnaes, Risse, and Simmons 2002). International problems are accordingly the result of dynamics between states, whereas transnational problems are the consequence of cross-border societal activities. Consequently, international governance refers to regulations set up and carried out by states. This includes international law, as defined by the state-controlled sources of international law. Transnational governance, in contrast, refers to self-regulation among societal actors. Such regulation is not part of international law as traditionally understood. Many uses of “global governance” contain both components, transnational and international governance. In this volume we look at international efforts of rule of law diffusion (see chapter by Schimmelfennig, this volume) as well as transnational efforts (see Heupel, this volume). We also look at developments in international norms (see, e.g., Aust and Nolte, this volume) as well as transnational norms (see Schuppert, this volume).

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of law promotion uses the tools of international law. It is critically relevant when rule of law promotion efforts are directed at international and transnational actors that have not previously been bound by rule of law principles.

To explore these interactive dynamics, this volume brings together the normative perspective of law with the analytical perspective of social sciences. It builds on existing literature that has studied, from both a legal perspective and a political science perspective, how modern governance includes the national, the transnational, and the international realm. That scholarship includes work on transnational law (Koh 1996; Zumbansen 2008); global administrative law (Kingsbury, Krisch, and Stewart 2005; Krisch and Kingsbury 2006); and governance beyond the state (Scott 2004; Zumbansen forthcoming). Of particular relevance for our focus on diffusion and conversion is the earlier work by Halliday and Carruthers on the relation between international and national lawmaking that addresses not only how global norms are conveyed to national settings and how such norms are implemented nationally but also recursive processes through which global and national lawmaking interact dynamically (Halliday and Carruthers 2007).

This book is organized in two parts. The first part explores the diffusion of rule of law standards across states and to new international and transnational levels of government. An analysis of quantitative indicators for the rule of law provides information on the global and regional patterns of diffusion, consolidation, and possible retreat. This analysis is complemented by more qualitative inquiries into the extent to which rule of law promotion has led to the normative expectation and legal obligation that states, IOs, and private actors performing roles traditionally reserved for government as part of new regulatory forms of transnational governance must abide by rule of law norms, principles, and rules embodied in international law.

The second half of the volume focuses on the evolving strategies and behavioral patterns underlying and responding to the diffusion processes analyzed in Part I. We focus on major players in the industry, especially the major Western powers, as well as IOs such as the World Bank, the European Union (EU), the International Criminal Court (ICC), and NGOs and new institutional nonstate players that act transnationally. Several chapters demonstrate a perhaps surprising continuity in the strategies and tools of rule of law promotion, leading to the question of whether these actors have sufficiently adjusted to lessons learned from traditional rule of law promotion efforts and to the challenges posed by new levels and forms of governance. The chapters also indicate various ways in which international law has become an important tool of rule of law promotion, for instance by the conclusion of treaties on suppression of crimes.

We then shift the focus from the supply side to the demand side, that is, from the policies and strategies of major powers and international donors to the recipient perspective. These chapters show that the outcome of rule of law promotion is to a large extent dependent on how it is received and implemented in the targeted

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societies. Although the major actors in rule of law promotion have begun to realize this, their strategic and behavioral adaptations so far have not adequately responded to this dynamic. Indeed, the parallel recognition of the need for further international law development of the rule of law setting forth generally applicable standards for all states, on the one hand, and the importance of local context, on the other, creates a theoretical and practical tension that has yet to be resolved.

All chapters in this volume emphasize different strategies, mechanisms, and processes that influence rule of law dynamics across borders, and across the national–international divide, seeking to illuminate possible paths of influence broadly so as to provide a comprehensive basis for further investigations. Taken together, the chapters show to what extent, and how, rule of law dynamics have changed in recent years, especially at the transnational and international levels of government, and to what extent the renewed academic attention to the topic reflects real-world developments rather than intellectual fashion. Moreover, the book provides an updated overview of what we do and do not understand about the reasons and mechanisms behind these dynamics. The volume as a whole also provides a basis for addressing more normative as well as policy-oriented questions in the further development of rule of law globally.

## 2. AN ANALYTICAL OVERVIEW OF RULE OF LAW DYNAMICS

Rule of law dynamics may be conceptualized as involving the distinct but interrelated processes of rule of law promotion (the promoter perspective), rule of law conversion (the recipient perspective), and the modalities, mechanisms, and processes that link the two (the diffusion perspective). It thus brings together three distinct academic literatures and discourses on rule of law. The *promotion perspective* looks at different strategies and programs of exporting states and organizations and asks about the effectiveness of these efforts. In this sense, it focuses on the starting point of the chain of events that may eventually lead to the establishment of the rule of law. It is dominated by rule of law practitioners. The *diffusion perspective* observes the dissemination of the rule of law concept as part of the more general diffusion of Western norms and asks about the causes and mechanisms that lead to this development. Its major interest is in normative structures and the ways they develop, not so much in actor strategies. This is often the approach adopted by sociologists, political scientists, and international relations scholars. The *conversion perspective* emphasizes the decisive role that the reception of concepts plays. It looks mainly at the receiving end of norm diffusion, including the proper transfer of a concept, the translation into the local context, but also in some cases the rejection of the norms. It asks mainly about the ways in which concepts are transformed in the process of translation and about the sources of this transformation or their rejection. This approach, adopted by sociologists, anthropologists, and area specialists, is common in regional studies emphasizing the role of culture and in postcolonial studies.

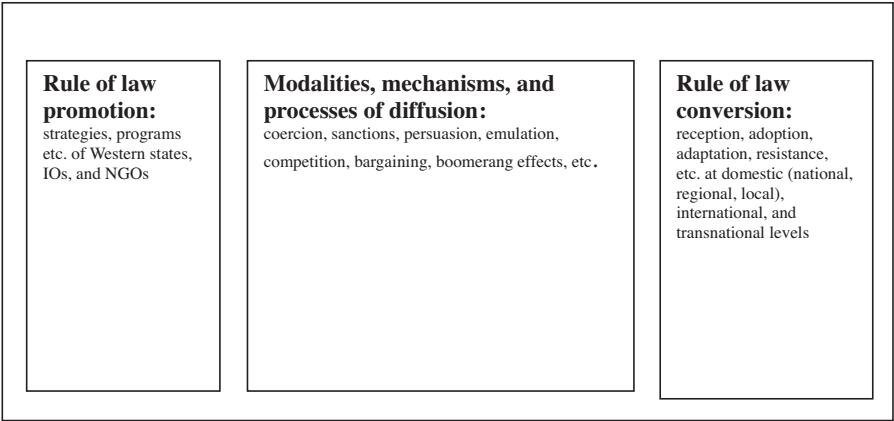


FIGURE 1.1. Rule of law dynamics disaggregated.

Each of these perspectives thus analyzes similar processes from different angles. We use these three perspectives to disaggregate the notion of “rule of law dynamics” to better understand both the positive and negative developments in the rule of law field (see Figure 1.1).

The rule of law promotion perspective focuses on the strategies, programs, and behavior of (predominantly Western) countries, IOs, and NGOs to strengthen and implement the rule of law. Rule of law promotion is itself a complicated dynamic process, in contrast to the simple ideal type that Twining (2004: 15) accurately characterizes as the naive model, namely “a *bipolar* relationship between *two countries* involving a *direct one-way* transfer of *legal rules or institutions* through the agency of *governments* involving *formal enactment or adoption* at a particular moment of time (*a reception date*) without major change.”

Rule of law promotion generally involves multiple promoters, often advocating different and competing rules, concepts, and institutions. The process may be direct or indirect, with the result depending on numerous interactions between state and nonstate actors in multiple formal and informal settings. The subject matter may be traditional laws, legal rules, and institutions, but it may also be norms, “soft law,” or nonstate regulatory mechanisms. Although the subject matter may be adopted by national governments and apply to the national level, it may also be international, regional, or local in character. The focus may be on the courts, or any other aspect of the legal complex (legislatures, police, prisons, notaries, arbitrators, mediators, law professors, and legal education) or the broader regulatory environment (administrative agencies, oversight committees, anti-corruption committees, security commissions, and private service providers). Rather than a particular moment of enactment, the norms and institutions may be established gradually and evolve and develop over time. Rarely is anything adopted without adaptation or implemented without resistance.

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Although it is a useful starting point, rule of law promotion does not capture all significant aspects of rule of law dynamics. The rule of law promotion literature has not developed an understanding of the causal mechanisms through which promotion activities produce sometimes intentional and sometimes unintentional effects or results (the focus of the diffusion perspective). The rule of law promotion perspective also does not adequately attend to the recipient perspective and what happens to rule of law promotion efforts within the target country (the conversion process).

An equally important if less well studied aspect of rule of law dynamics is *rule of law conversion*. This refers to the dynamic process by which what is being promoted is received, adopted, adapted, and resisted. Rule of law promotion raises significant questions as to whether norms that have functioned well in one system can function similarly in other states with different legal systems, or if they have to be adjusted to fit the new context (compare Teubner 1998; Twining 2004: 19). Similar issues arise with respect to the application of rule of law standards to international law binding states and the activities of international institutions and transnational actors.

There are many metaphors that capture the complexity and interactive nature of the conversion process, such as legal translation (Langer 2004), legal transformation (Xu 2004), legal transposition (Ortücü 2002), selective adaptation (Potter 2004), and legal irritant (Teubner 1998). Legal translation, legal transposition, legal transformation, and selective adaptation all call attention to the fact that institutions, rules, and practices may be changed in the process of adoption and implementation. However, selective adaptation places more emphasis on target-state agency. Rather than merely being passive recipients, legal actors in the target state (and now the international realm) actively choose certain elements and reject others, interpret terms consistent with local perceptions and understandings, and modify or rework institutions, rules, or practices in light of domestic circumstances. The term “legal irritant” captures the way a new rule or practice may disrupt the existing legal culture and current legal practices, sometimes in unexpected and far-reaching ways.

For present purposes, the conversion of concepts and ideas when arriving at the social targets may be conceived in terms of the *translation* paradigm utilized in a range of disciplines. In the debate about a “translational turn” (Bachmann-Medick 2009; Buden and Nowotny 2009), the category of translation is no longer understood solely or primarily as a linguistic and textual concept. History, sociology, and cultural studies not only use translation as an analytical category but also consider translation a transnational cultural practice, a category of action itself (for a sociology of translation, see Renn 2006). Hence, translation serves as a category to structure the analysis of the interactive processes of the transfer of meanings that are changed or transformed. The starting point of the translation concept is not the assumption of two separate, unconnected contexts but the interpenetration and entanglement of different contexts, discourses, and social fields (Fuchs 2009).

Translation as a social practice entails ruptures and is influenced by power asymmetries, fractures, and disparities. Because the introduction of new legal norms,

rules, and institutions threatens entrenched interest groups and ways of life, they often meet resistance. Resistance marks the political awareness that cultural translation is not necessarily a harmonizing or bridge-building affair. The concept of “third space” (Bhabha 2004: 53–56) openly addresses the resistance perspective. Thus, the concept of resistance opens our analytical framework to include both the cultural and the interest dimension structuring the translation processes. Resistance and transformation of the original concept stem not only from political, economic, or coercive power attributed to the actors involved but also from the heterogeneous linguistic and cultural environments that frequently characterize the communication between predominantly Western actors and institutions and local representatives of the recipient state.

The existing rule of law literature has emphasized the rule of law promotion perspective and to a lesser extent the recipient perspective. The concept of diffusion, although not unknown in the literature, has been less well developed and underutilized.<sup>3</sup> However, rule of law dynamics also encompass the mechanisms, modalities, and processes through which rule of law is promoted and through which reception of and resistance to the concept of rule of law occur and feed back to the institutions involved in rule of law promotion. It includes the ways and means by which rule of law values and norms spread transnationally and across national and international levels and that may be employed by states that seek to make other states or international institutions accept rule of law standards, or by international institutions to make states accept rule of law standards (compare Barria and Roper 2008; Björkdahl 2005). It also includes the ways and means by which states and nonstate actors in target countries, or international institutions and transnational actors, resist and adapt rule of law values, as well as the ways they themselves seek to promote and project rule of law values and norms both internally and externally. These mechanisms, modalities, and processes include coercion, incentives, persuasion, emulation, and competition. There may also be more complicated interactive effects and processes, such as bargaining and negotiation, coalition building and alliances, and boomerang effects. In most cases, these modalities, mechanisms, and processes are not controlled by one actor or one set of actors but result from

<sup>3</sup> See Twining (2004) for a conceptualization of rule of law diffusion similar to our notion of rule of law dynamics. Whereas Twining uses “diffusion” to capture all three perspectives or components of rule of law dynamics, we have chosen to use “dynamics” as the more general concept because in our view “diffusion” as normally understood does not capture those processes of rule of law promotion that produce radically different outcomes than originally intended. It also does not include cases of successful resistance to rule of law diffusion. Both of these features seem to be particularly significant, however, when studying rule of law dynamics in an era of international and transnational governance. Moreover, although there is some overlap in the subject matter of promotion, diffusion, and conversion, they reflect different academic disciplines and have produced specialist literatures familiar to different actors. In an interdisciplinary volume, contributors and readers alike approach rule of law from particular perspectives. Keeping the three perspectives separate serves as a reminder that the reader may be entering unfamiliar territory.

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the interplay of a multiplicity of social actors and forces, and in that sense they are themselves interactive and iterative processes with intended and unintended effects.

In using the concept of diffusion to capture this important aspect of rule of law dynamics, we are drawing on an extensive literature in other disciplines. In economics, diffusion research focused first on the spread of new technologies and its determinants, before turning to the diffusion of corporate practices (overview in Geroski 2000). Rogers (1983, first published in 1962) and Mansfield's (1961) fundamental work developed the rationales and models explaining the S-curve phenomena, in which the object (technology, practice, etc.) in the beginning slowly diffuses among an adopter population, gaining momentum, and in the end approaches the saturation level, reaching almost 100 percent of the adopter potential.

A similar conceptual framework informs the diffusion research in sociology, closely associated with the Stanford School of sociological institutionalism and its pioneering work on the global diffusion of Western rationality (e.g., Meyer, Boli, Thomas, Ramirez 1997; Meyer, Frank, Hironaka et al. 1997; Thomas, Meyer, Ramirez, and Boli 1987; see also Finnemore 1996). This line of research demonstrates the global spread of ideas, policies, and economic and social practices from a variety of theoretical and methodological perspectives (e.g., Holzinger, Jörgens, and Knill 2007; Simmons, Dobbin, and Garret 2008). Diffusion research has traditionally emphasized the convergence of ideas and practices despite vastly different socioeconomic and cultural contexts. Only very recently has this research started emphasizing the causal mechanisms by which ideas diffuse, such as coercion, the manipulation of utility calculations, socialization, persuasion, or emulation.

In the legal sciences, Harold Koh (1996) has stressed the importance of interaction, interpretation, and internalization and has argued in favor of a theory of transnational legal process. Such a perspective is nontraditional in breaking down the strict distinction between domestic and international realms of action; nonstatist in focusing also on nonstate actors; and dynamic in pointing to vertical (both upward and downward) as well as horizontal processes connecting different areas and types of actors (see also Dezalay and Garth 1996).

We will return to these different aspects of rule of law dynamics in the concluding chapter; on the basis of the information provided in this volume, we will ask what changes have occurred and what challenges remain. Next, however, we provide detailed synopses of the chapters.

### 3. CHAPTER SYNOPSES

#### *Part I. Rule of Law at the International, National, and Transnational Levels*

The chapters in the first part of the book explore the diffusion of rule of law standards across states as well as to new transnational and international levels of government.



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The chapters aim at grasping the dynamics of rule of law norms. Has rule of law promotion been successful in the sense that more states have internalized the rule of law? Does international law obligate states to abide by rule of law principles in their internal matters? What dynamic processes have contributed to the increasing pressure on IOs to themselves comply with rule of law principles? Do new modes of governance in which private and nonstate actors play an important role challenge traditional conceptions of rule of law and require modification of rule of law principles?

In Chapter 1, Wolfgang Merkel summarizes what we know about the state of rule of law globally and regionally on the basis of a survey of five well-known rule of law indices: Freedom House Civil Rights; World Bank World Governance Indicators for Rule of Law; the Bertelsmann Transformation Index for Rule of Law; the Democracy Barometer Rule of Law Index; and the World Justice Project Rule of Law Index. Actors in the rule of law field – whether international development agencies, domestic policy makers, or academics – rely heavily on these indicators in developing strategies and evaluating progress toward the goal of implementing rule of law globally. To what extent, though, is our understanding about the current state of rule of law and historical trends in rule of law development well founded? Evaluating the indices in terms of concept, validity, reliability, and aggregation rules, Merkel concludes that each falls short of social science requirements for reliable measurement. Most problematically, most indices are not based on a clear conception of rule of law.

Given the conceptual limitations of the indices, Merkel is careful in drawing strong inferences from this survey. Nevertheless, some reasonably well-supported findings do emerge. First, on the whole, these indices do not show a significant overall improvement in rule of law globally. Only the Freedom House rule of law index points to slight improvements. In the most developed countries, there is even a clear downward trend after 9/11, as the Democracy Barometer shows. However, the measurement of the rule of law in these indices is a relatively recent phenomenon. Most of them begin after 2000, including the Freedom House rule of law index (from 2005 on). The Freedom House civil liberties index shows that the most significant changes on the aggregate level may have occurred between 1990 and 1995, a time not covered by the more refined rule of law indices.

Second, some regions do better than others, depending largely on the nature of the measure; not surprisingly, regions with a large number of authoritarian regimes do less well when measured by thick liberal-democratic rule of law indices. Similarly, regions where liberal values and civil and political rights are assigned a lower priority, including parts of Asia and the Middle East, do less well on some of the measures that emphasize the protection of such rights. Nevertheless, and again as expected given the close relationship between rule of law and wealth, the Organization for Economic Cooperation and Development does relatively well on all standards, whereas sub-Saharan Africa does relatively poorly.

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Third, rule of law and democracy do not necessarily go hand in hand; some authoritarian states do well on thin rule of law measures, whereas some democracies fare poorly. More importantly, the indices show that emerging electoral democracies in which the rule of law is weak often fail and revert to authoritarianism.

In short, although the indices do not show a significant diffusion of the rule of law across states on the aggregate level in the past decades, there seem to be numerous dynamics within regions and in specific countries.

We undoubtedly live in an age where rule of law has become a much trumpeted ideal in United Nations (UN) General Assembly resolutions and the policy documents of a variety of international institutions. Nevertheless, doubts remain, in the face of widespread violations of rule of law principles, as to what extent different states are genuinely committed to the noble ideals expressed in these generally nonbinding declarations.

In Chapter 2 Helmut Philipp Aust and Georg Nolte explore the extent to which rule of law requirements have become incorporated into international law binding on states. They conclude that compliance with basic rule of law principles is not a requirement for formal state recognition, although regional organizations have relied on rule of law principles to condition a country's admission, as in the EU, or to justify suspension, as in Africa. They claim, however, that there is a growing normative expectation that states will comply with basic rule of law principles. This emerging standard of rule of law is reinforced by the traditional international law notion of a "minimum standard of justice" applicable to aliens, foreign investment law, and human rights law. The unlikelihood that these three disparate and at times conflicting areas of law will lead to a coherent concept of rule of law suggests the need for a more comprehensive and theoretically informed foundational multilateral treaty (or treaties) of the sort that have underpinned the international human rights movement, although the authors themselves do not discuss the possibility of such treaties or advocate this approach.

Whereas Chapter 2 focuses on the requirements that international law formulates for the introduction of rule of law norms and principles into domestic legal systems, the next two chapters examine rule of law at the international level.

Tim Gemkow and Michael Zürn ask in Chapter 3 to what extent and why the diffusion of the rule of law concept to the international level has occurred. They argue that the rise of political authority beyond the nation-state and the increased intrusiveness of international regulations form the decisive process underlying this development. Because political authority requires legitimacy, the incorporation of the rule of law concept may help international institutions to enhance their legitimacy.

This is, however, mainly a functional argument. Gemkow and Zürn therefore go on to ask to what extent and through which causal mechanisms institutional rules that derive from the rule of law concept have developed in the past decades. Thus the chapter inquires why rule of law norms diffuse across international and national levels. In looking at one component of the rule of law concept – the