Rule of Law Dynamics in an Era of International and Transnational Governance: Introduction

Michael Zürn
André Nollkaemper, University of Amsterdam
Randall Peerenboom

Available at: https://works.bepress.com/andre_nollkaemper/30/
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. 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

1 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).
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; Treble 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 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 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 relationship 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 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...
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.

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.
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 legal 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 (Orcutt 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 2003; Boden 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.3 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; Björndahl 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

3 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.
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 (1955, 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 1977; 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 Krüll 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 SYNOPSIS

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. 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 1990, 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 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 the 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.
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 unlikely 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 lawformulates 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 protection of individual rights — Gemkow and Zürn identify mechanisms through which the rule of law concept has diffused to the international level. Discussing some recent cases in which IOs have introduced compliance review mechanisms that allow groups of people to complain about violations of the respective organization’s own standards and policies, they argue that a combination of learning processes within IOs and political pressure from outside are the most important mechanisms. In rarer cases, emulation processes and the competition between IOs play a role as well.

In a third step, they aim at identifying the conditions under which such causal mechanisms are triggered. They set out several hypotheses that derive from the guiding hypothesis: The more IOs are exercising authority and are active in the field of rule of law promotion, the more likely is the introduction of rule of law components in IOs. These hypotheses may guide future research in a field in which future research is urgently needed.

In Chapter 4, Gunmar Folke Schuppert examines how new governance, by shifting responsibilities or functions of the government to private actors, is challenging traditional notions of rule of law that emphasize government legality, such as limited government, government accountability, administrative law, and judicial review. Schuppert focuses on one of the challenges from the growing role of private actors: the rise of transnational rule making. Transnational rule making comes in a variety of forms, from standard setting, to societal self-regulation, to World Trade Organization trade rules, to rule making in the shadow of the law, to transgovernmental networks for regulating financial markets. However, transnational rule making generally exhibits four main characteristics: the deterritorialization of rule making; the blurring of the traditional borderline between binding and nonbinding norms; a change from top-down rule making to a bottom-up system; and a trend toward informality. Schuppert suggests that rule of law principles drawn from a relatively thin or procedural conception of rule of law (as opposed to thicker conceptions that incorporate substantive values such as democracy and human rights) can provide a normative yardstick to guide and evaluate transnational rule making. At the same time, he also suggests that these procedural requirements for transnational rule making should be combined with liberal democracy and the right to participate in the rule-making process and that the rules should be implemented in ways that ensure equality before the law. However, the next crucial step is to transform these general rule of law requirements into area-specific requirements and to develop rules for rule making that have the capability to govern different rule-making processes in particular areas.

Part II. Actors: Strategies and Responses

The chapters in Part I show that the rule of law concept has developed and diffused quite dynamically. Whereas the immediate goals of rule of law promotion have been
achieved at best partially, there are unintended and unforeseen effects, especially on the international and transnational level, that have occurred. Against this background, the second part of the book focuses on the major actors in the field of rule of law dynamics. It analyzes their strategies and how they have adapted to the new dynamics.

In Chapter 5, Frank Schimmelfennig analyzes the rule of law policies and methods of promotion of major Western powers – the United States, the EU, Great Britain, Germany, and France. He finds some general similarities: Rule of law is part of broader democracy promotion and good governance agendas; their policies focus on formal and institutional aspects and emphasize the independence and efficiency of the judicial system; all use mixed approaches that combine top-down with bottom-up programs, though the emphasis has been on top-down methods; and most combine socialization (persuasion) with positive and negative conditionalities and in some cases coercion (imposition through military means), although coercion is rare and conditionality has remained contested and inconsistent. Notwithstanding these general similarities, there are many differences in content, namely concepts and components of the rule of law, organizational setup and institutional context; strategies and instruments, budgets and expenses; and target regions and countries.

Whereas rule of law promotion in the United States is highly decentralized, highly specialized, and fairly fragmented, French rule of law promotion is highly centralized, concentrated, but with low specialization, with the other powers falling in between. The amount of money spent on rule of law promotion as a percentage of official development aid varies widely, though comparisons are difficult because different countries use different categories and there have been variations in spending over time. Although the end of the Cold War led to an increase in rule of law funding, this led to a reallocation toward security concerns including policing and law enforcement.

All major powers provide global assistance, but they tend to concentrate on regions where their interests are most directly affected. The United States historically focused on Latin America, before turning to Eastern Europe after the fall of the Berlin Wall, and more recently to Iraq and Afghanistan. In Europe, patterns reflect colonial legacies as well as geographical proximity. Interestingly, most funds go to states that have made some progress on political and legal reforms rather than to the worst offenders.

In general, Schimmelfennig does not see significant strategic adaptations to the dynamics just identified. Although there seems to be an increasing recognition of the need to involve local actors, this has yet to be really reflected on the strategic level. Moreover, major states seem to pay little attention to the rule of law quality of international institutions in designing their rule of law promotion strategies.

Turning from states to IOs and NGOs, Monika Heuvel finds in Chapter 6 that IOs and NGOs rely on similar approaches for promoting rule of law. Drawing on the literature, she finds that IOs and NGOs adopt a broad array of strategies depending on whether they attribute shortcomings in rule of law to the lack of political will, capacity, or knowledge. To address the lack of political will, IOs and NGOs rely on exposure – explaining the benefits of rule of law and shaming and blaming governments for failing to abide by rule of law standards. They may also rely on positive and negative conditionalities, though in general NGOs are not in a position to impose conditionalities on governments. To address lack of capacity, IOs and NGOs rely on nonhierarchical (noncoercive) or in some cases more hierarchical (coercive) capacity building and technical assistance, including training for legislators, judges, lawyers, police, and other legal complex actors; programs to improve the criminal justice system and management of detention facilities; and programs to improve access to justice and the protection of human rights. To address lack of knowledge, they rely on nonhierarchical or hierarchical diffusion of knowledge and beliefs by collecting and disseminating information in print and online, for example via the UN’s online Rule of Law Document Repository or the UN Department of Peacekeeping Operations’ online Peacekeeping Resource Hub. Much of this information is in the form of reports summarizing international best practices or “lessons learned” from the organization’s experiences in various rule of law promotion initiatives.

Although the number of actors and activities is impressive, Heuvel suggests several reasons why the results have been disappointing. First, knowledge deficits remain, particularly regarding why some attempts to promote rule of law succeed whereas others fail. Second, reforms have been too top down, with the agenda driven by foreign actors often lacking in local knowledge, and with insufficient participation and empowerment of local actors. Third, efforts to promote rule of law have been undermined by the failure of international actors themselves to abide by rule of law principles. NGOs have taken note of these shortcomings, and they seem to adapt to the changing rule of law dynamics more swiftly than state actors. For instance, NGOs increasingly work to incorporate local actors in rule of law promotion and are among those who demand the rule of law on the international level as well.

The next three chapters adopt case studies to explore in greater detail the role of powerful states, IOs, NGOs, and the military. In Chapter 7, Paulette Lloyd, Beth Simmons, and Brandon M. Stewart use human trafficking to illustrate the diffusion of norms and policies to address transnational crime as part of a broader global effort to establish the rule of law at the national level. They find that concern for domestic rule of law, hegemonic pressures, and negative externalities all play a role in the recent transnational rule of law wave against crime and human trafficking in particular. The battle to combat human trafficking was led by the United States and other powerful Western states committed to rule of law domestically. However, developing countries that suffered the negative externalities of trafficking – either states with internal human trafficking problems or destination states – also actively participated in the process. Although many states had their own reasons for criminalizing human trafficking in national law, Western powers, particularly the United States, also sought to pressure them, mainly through “shaming and blaming” and other forms...
of persuasion rather than through denial of material benefits, the imposition of sanctions, or other more coercive means.

In Chapter 8, Linn Hammergren examines the evolving strategies of one of the major IOs, the World Bank, for promoting rule of law in middle-income countries (MICs). One of the criticisms of the rule of law promotion industry has been the heavy reliance on one-size-fits-all solutions that failed to distinguish between post-conflict situations and different stages of development. In low-income countries, the main obstacles to effective governance are the lack of resources and weak or nonexistent institutions. By definition, MICs have some, albeit limited, resources, and most MICs have established the usual institutions that are associated with modern states and found in high-income countries. Thus political resistance and opposition tend to become more important. Reforms produce winners and losers. Unfortunately, as Hammergren notes, the World Bank and other international donors are not well positioned to address these types of local political contests, in some cases because of limited mandates and in other cases because of the lack of local knowledge and other restraints pointed out by Heupel.

The wide diversity among MICs presents another challenge. Indeed, it is highly unlikely that MICs as currently defined (i.e., countries with per capita income from $900 to $12,000) will emerge as a useful category for analysis or a useful basis for rule of law programming. Further disaggregation is required, not only by levels of wealth but along other dimensions as well. Hammergren begins that process by distinguishing on functional grounds between four different types of MICs and then offering more tailored reform proposals for each.

In Chapter 9, Tilmann J. Röder discusses the recent emergence of the military as an important actor in rule of law promotion. He notes that the need to establish order in postconflict situations has forced the military to cooperate with civilian organizations in a range of activities to establish legal institutions and the rule of law. Although the North Atlantic Treaty Organization (NATO), the EU, and the UN use slightly different terms to describe the interaction between military and civilian organizations, their policies and strategies share several main features. First, the United States, NATO, and the EU (though not the UN) all conceive of rule of law promotion primarily as a tool to achieve military objectives rather than long-term humanitarian goals, economic development, the consolidation of democracy, or the protection of human rights, even though all also emphasize the importance of rule of law to these larger goals. Second, the emphasis has generally been on security and the “law and order” aspects of rule of law, which are colloquially referred to as the three Cs (courts, cops, and corrections) or the three Ps (police, prisons, and prosecutors). Third, all civil–military cooperation operations to date have suffered from coordination problems, even though they have adopted a variety of approaches to counter such problems. Fourth, all missions have encountered local resistance and produced less than satisfactory results in establishing the rule of law.

Although there are many reasons for the disappointing results, one is the lack of legitimacy. In some cases, the lack of legitimacy derives from the nature of the intervention, as when NATO intervened in Kosovo and Iraq without UN approval and a clear mandate under international law. In other cases, it results from the narrowness of the mission with its emphasis on military objectives. In still other cases, it results from how the mission is carried out. All too often there is inadequate consultation with local leaders and citizens. In many cases, citizens have different needs and priorities than the military. Although citizens do not value security, they complain most about public administration, poor governance, procedural violations, and the inability to resolve civil disputes, including conflicts over land rights. At times, the emphasis of international actors on formal institutions has undermined local institutions, which although far from perfect may be more effective than the newly created court system. Similarly, laws modeled on Euro-American precedents are frequently out of step with the level of development of the local economy or include norms at odds with local values and practices. Finally, reinforcing the need for international actors to be accountable and comply with rule of law standards, citizens have expressed outrage over the impunity of foreign military personnel for violations of local and international law.

Whereas the previous chapters focused primarily on the policies, strategies, and incentives of the main promoters of rule of law, the remaining chapters shift the focus to the recipient perspective. The identification of the sources of resistance to rule of law diffusion and the study of the dynamics of rule of law conversion capture an important aspect of the process, and they point to important fields for future research.

In Chapter 10, John Gillespie introduces the theme by discussing the different ways in which the role of recipient countries affects rule of law promotion. He emphasizes first the regulatory capacity of local institutions to adopt and implement rule of law. He notes that countries at different levels of economic and institutional development have different types of demand for rule of law, and they often lack the capacity to implement “international best practices” modeled on institutions in Euro-America and other developed countries. Moreover, he uses sociological theory to point to different mechanisms through which social actors in the recipient countries respond to the import of rule of law concepts. The theory of social subsystems on the one hand is used to explain how social systems try to incorporate external demands without changing their practice significantly. On the other hand, constructivist theorizing points to the need for legitimacy before externally induced changes can achieve the desired results. Gillespie concludes by proposing a new research agenda that does not focus on supply-side failures but attends to capacity issues and the willingness of recipients to change, and that pays particular attention to various sources of local legitimacy among different epistemic communities or constituencies.
In Chapter 11, Richard Zajac Sannerholm discusses the trials and tribulations in promoting rule of law in Kosovo, providing a cautionary tale of how things can go radically wrong when international actors fail to take into account local circumstances and the needs and desires of citizens in the recipient country. Despite the expenditure of considerable sums of money and the vast amount of technical assistance, the general consensus is that Kosovo still falls far short of any reasonable standard of rule of law. The list of maladies is long, including but not limited to lack of respect for constitutional authority, judicial corruption, ethnic discrimination, and weak implementation of newly passed laws.

The reasons for the failures are equally long, and they point to many familiar weaknesses in rule of law promotion: the rapid, top-down introduction of laws modeled on laws in high-income countries, while failing to attend to levels of development and institutional capacity; the failure to consult and empower local actors, resulting in prioritization of reforms not emphasized by citizens while the demands of citizens for other reforms were not met; the lack of understanding of local social practices; the conflict between international best practices and local norms and institutions; the failure to take advantage of existing institutions; the lack of legitimacy of the military operations; and anger over the immunity of foreign actors. Indeed, Kosovo stands for how not to promote rule of law, as acknowledged by a former UN Human Rights Commissioner who characterized the international community’s approach as benevolent despotism.

In Chapter 12, Sarah M. H. Nouwen investigates the newly established ICC’s role in rule of law promotion through a case study of Uganda. Officials and academics alike have assumed that the ICC will strengthen the rule of law. Against this background, Nouwen critically examines how the ICC’s intervention has affected the rule of law, in its various aspects, in Uganda, the first country that came within the Court’s jurisdiction. The conclusion is mixed. Nouwen demonstrates that although the ICC has strengthened the rule of law in some respects, its promotion of the rule of law can sometimes clash with other elements of the rule of law, which were safeguarded at the national or local level. She concludes that the ICC’s intervention has unleashed dynamics in Uganda that are in synergy with some aims of the rule of law (supremacy of law and accountability) but in tension with others (equality before the law, separation of powers, fairness, and legal certainty). Once again, the external intrusion of fundamental norms creates unanticipated consequences when they collide with existing rule of law norms at the national level.

4. PROVISIONAL CONCLUSION

In sum, although rule of law promotion may have produced deficient results so far, it has also triggered dynamics that have led to a diffusion of the rule of law concept to new fields and levels. Rule of law dynamics are an ongoing process, calling for constant reflection and appraisal. By seeking to understand these recent developments and the dynamics of change, this volume aims at moving beyond the perspective of rule of law promoters. Only if we understand these distinct yet interrelated processes can the lack of knowledge in this field be significantly reduced. There are many dedicated people trying their best to make things work, and many individuals whose lives would be immeasurably better were they to live in a state governed by the rule of law. It is therefore worthwhile to address these issues and point to areas in which further research is needed. We do this in the concluding chapter, where we summarize the main developments in the three areas of promotion, diffusion, and conversion; the causes of these developments; and issues for further investigation.