Till Patrik Holterhus (ed.)

The Law Behind Rule of Law Transfers

On Rule Based Interactions of Legal Orders in a Globalized World

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The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

ISBN 978-3-8487-5716-9 (Print)
978-3-8452-9848-1 (ePDF)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-5716-9 (Print)
978-3-8452-9848-1 (ePDF)

Library of Congress Cataloging-in-Publication Data
Holterhus, Till Patrik
The Law Behind Rule of Law Transfers
On Rule Based Interactions of Legal Orders in a Globalized World
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296 p.

ISBN 978-3-8487-5716-9 (Print)
978-3-8452-9848-1 (ePDF)

1st Edition 2019

Preface

The present volume undertakes to explore *The Law Behind Rule of Law Transfers*. Rule of law transfers have already been studied extensively in academia. Yet, it is my impression that thus far scholarship has predominantly centered around the socio-political dimensions of such transfers. This volume, therefore, departs from such common paths and intends to assess rule of law transfers in their particular *legal* dimensions. Such perspective assumes that rule of law transfers do not only *consider* the rule of law as a legal concept, but hold a legal dimension *themselves*. It is particularly concerned with understanding what positive legal norms impel and drive the promotion of the rule of law abroad. It strives to explore which legal instruments and mechanisms govern and organize the actual transfer processes. And, furthermore, it asks which legal structures enable and facilitate the implementation of rule of law transfers within recipient legal orders.

The contributions included in this volume have been selected through a call for papers for a Special Issue of the Goettingen Journal of International Law (GoJIL Vol. 9, No. 1, 2018) for which I acted as a Special Issue Editor. All contributions underwent a process of double-blind peer review, not only with respect to their overall scholarly quality, but also with respect to their compatibility with this volume's particular approach as described above.

I would like to sincerely thank *Prof. Dr. Peter-Tobias Stoll* and *BVR Prof. Dr. Andreas L. Paulus* as well as The Goettingen Association for the Promotion of International Law for their generous support which enabled the publication of this volume in print. Furthermore, for an excellent collaboration I wish to express my gratitude to the Goettingen Journal of International Law and in particular its Editor-in-Chief *Maximilian Heinze* who took upon himself the efforts of overseeing the organizational aspects of the project. Last but not least, I would like to thank *Agata Daszko* and *Jasmin Evers* for their valuable assistance with the final editing.

Göttingen/Berlin, February 2019 *Till Patrik Holterhus*

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A Theoretical Introduction and Legal Perspective on Rule of Law Transfers

Till Patrik Holterhus[*]

Table of Contents

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This volume deals with the theme of *The Law Behind Rule of Law Transfers*. Transfers of the rule of law between legal orders have been studied extensively in academia. Yet, so far scholarship has, in this regard, predominantly centered around the socio-political questions.

There is, however, more to explore. The volume, therefore, departs from common scholarly paths and intends to assess and explain rule of law transfers as a *legal* phenomenon. Such an analytical perspective is based on the assumption that rule of law transfers do not only *consider* the rule of law as a legal concept but encompass a legal dimension *themselves*.

The following introduction will establish the theoretical basis on which such a legal approach shall be carried out. Four arguments will be developed: First, that there exists a plurality of state and non-state legal orders which interact on a global scale (A.). Second, that one particular way of such interaction is the transfer of legal items between legal orders (B.). Third, that the *rule of law*, as a fundamental legal concept, is such an item and subject to legal transfers (C.). And fourth, that – without doubting the influence of many social and political factors – the law itself plays an underestimated role with respect to rule of law transfers in the global plurality of legal orders (D.). Subsequently, the wide range of legal perspectives on the topic of rule of law transfers contained in this volume shall briefly be outlined (E.).

A. Interactions of Legal Orders in a Globalized World

I. The Plurality of Legal Orders

We live in a world of numerous legal orders – the phrase *legal orders* to be understood as unitary and therefore distinguishable sets of positive legal

norms and their (demanded) sphere of authority and application. The plurality of such legal orders exists for different reasons.

1. Multiple National Legal Orders

First and foremost, the legal plurality derives from the (still dominant legal axiom of the) territorial divide into (legal) communities – since the 17th century and until today, in the form of the Westphalian nation state.[1] Based on early concepts of internal and external independence as well as exclusive sovereignty, each nation state, in the course of time, has developed its specific legal order. Although comparative legal scholarship tends to sometimes group these various national legal orders into a few overall legal families or systems (*Rechtskreise*),[2] national legal orders (at least in theory) exist distinctively and independently.

2. Further Pluralization Through Globalization

This (traditional) plurality of national legal orders has experienced and continues to experience further pluralization through the contemporary phenomenon of globalization. This phenomenon can best be described as the present process of a steady increase in worldwide human communication, interrelation, interdependence and integration in numerous fields, including economic, political, social, cultural, technical, but also legal aspects, predominantly caused by new technological means of communication and advanced ways of transportation, but also the rise of shared global challenges.[3] Although such ever-closer and accelerated global exchange

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1 See E. C. Ip, 'Globalization and the Future of the Law of the Sovereign State', 8 *International Journal of Constitutional Law* (2010) 3, 636; M. Mann, 'Has Globalization Ended the Rise and Rise of the Nation-state?', 4 *Review of International Political Economy* (1997) 3, 472.

2 For an overview see H. P. Glenn, 'Comparative Legal Families and Comparative Legal Traditions', in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), 421.

3 For an introductory discussion see D. Held & A. McGrew, 'The Great Globalization Debate: An Introduction', in D. Held & A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, 2nd ed. (2003), 1; see also W. Twining, 'Implications of 'Globalisation' for Law as a Discipline', in A. Halpin & V. Roeben (eds), *Theorising the Global Legal Order* (2009), 39, 40-42 [Twining, Globalisation].

and integration actually appears to bear the potential to result in a certain global harmonization (and therefore ultimately in the reduction of the plurality) of legal orders, so far, it is the contrary that has happened. Correspondingly, *Horatia Muir Watt* cites and expounds:

> "'Despite a world with globalizing pretensions, [comparatists] would discover that intensity of contact actually emphasizes a sense of difference, not of sameness.' It may be that accelerated exchange actually accentuates local particularisms; it does not appear, at any rate, that the world is becoming more homogeneous."[4]

This accurate observation stems from two reasons. First, although globalization has undeniably caused a certain decline of the nation state's supremacy within the logic of legal orders,[5] it has not (yet) accomplished an actual conversion from the overall paradigm of the nation state to a paradigm of a global community or even a single cosmopolitan society[6] (including the idea of one, or at least only a few valid (constitutionalized[7]) global legal orders).[8]

Second, in such a continuingly nation-state-oriented global order, the globalization-caused effects and challenges naturally exceed national spheres of influence. This creates a demand for legal organization above and beyond the nation state resulting in the development of not *other* but *further* distinct levels of legal orders that add to the national legal plurality. These additional levels comprise various polycentric, sometimes competing and fragmented,[9] as well as steadily diversifying, legal orders (and their

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4 H. M. Watt, 'Globalization and Comparative Law', in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), 579, 587 citing R. Munday, 'Accounting for an Encounter', in P. Legrand & R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003), 3, 21; D. Nelken, 'Comparatists and Transferability', in *ibid.*, 437, 460 [Nelken, Comparatists and Transferability].

5 See R. Michaels, 'Globalisation and Law: Law Beyond the State', in R. Banakar & M. Travers (eds), *Law and Social Theory* (2013), 287, 293-299 [Michaels, Globalisation].

6 On the paradigm of a global community in general see e.g. R. Domingo, *The New Global Law* (2010).

7 For an overview on the concept of constitutionalization in international law see A. Peters, 'Fragmentation and Constitutionalization', in A. Orford & F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016), 1011, 1015-1019.

8 See Michaels, 'Globalisation', *supra* note 5, 287, 287.

9 For an overview on the concept of fragmentation in international law see Peters, *supra* note 7, 1012-1015.

institutions[10]) – be they regional, supranational, international or transnational legal (sub)orders (the legal order of the *Council of Europe*, the legal order of the *United Nations* (UN), the legal order of the *World Trade Organisation* (WTO), the legal order of the *European Union* (EU), or various legal orders created by particular international treaties such as for human rights or international investment, the *lex mercatoria*, or the *lex sportiva*, to name but a few).

Although still predominantly created by or derived from the sovereign authority of nation states, these legal orders are no longer restricted to claims of national territorial authority but do cover and overlay multiple national territories at once, demand application in spheres beyond the nation state or even assume their universality.[11] One may in this respect be inclined to agree with *Paul Schiff Berman*'s statement:

> "[...] one does not need to believe in the death of the nation-state to recognize both that physical location can no longer be the sole criterion for conceptualizing legal authority and that nation-states must work within a framework of multiple overlapping jurisdictional assertions by state, international, and even nonstate communities."[12]

II. Intensification of Legal Order Interactions Through Globalization

It does not come as a surprise that these various overlapping legal orders interact (and collide[13]) in multiple ways.[14] Accordingly, as observed by *William Twining*:

> "[T]he possible kinds of relations between co-existing legal orders can be extraordinarily diverse: they may complement each other; the relationship may be one of co-operation, co-optation, competition, subor-

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10 For example, *The Project on International Courts and Tribunals* (PICT) has identified over 120 non-state international bodies and mechanisms that are vested with the power to make legal determinations with respect to international law (see http://www.pict-pcti.org, last visited 13 December 2018).

11 See Watt, *supra* note 4, 582-583; P. S. Berman, *Global Legal Pluralism – A Jurisprudence of Law beyond Borders* (2012), 3-22; R. Michaels, 'The True Lex Mercatoria: Law Beyond the State', 14 *Indiana Journal of Global Legal Studies* (2007) 2, 447.

12 Berman, *supra* note 11, 5.

13 For a particular focus on conflicts between legal orders see *ibid.*, 23-57.

14 W. Twining, 'Diffusion of Law – A Global Perspective', 36 *The Journal of Legal Pluralism and Unofficial Law* (2004) 49, 1, 10-15 [Twining, Diffusion of Law].

> dination, or stable symbiosis; the orders may converge, assimilate, merge, repress, imitate, echo, or avoid each other."[15]

Although such interactions of legal orders are by no means a solely modern occurrence,[16] today's state of interactions can, however, be considered a particularly extensive and dynamic one. This is, again, due to the phenomenon of globalization, which intensifies the interaction of legal orders in two ways. First, the above-described circumstances of globalization particularly allow for and facilitate the interaction between legal orders *independent* of their geographical or jurisdictional proximity or overlap. Second, the globalization-caused increase of legal orders above and beyond the nation state also leads to a structural diversification of interactions. In today's multilevel legal plurality, interactions are no longer confined to horizontal interactions between nation states, but now also comprise horizontal interactions between legal orders above or beyond the nation states, as well as vertical or diagonal cross-level interactions.[17]

B. Legal Transfers

A distinct type of interaction in this plurality of legal orders is the legal transfer.

I. Defining Legal Transfer

The notion *legal transfer* exists in various, slightly differing, connotations (a multiplicity sometimes even referred to as a "battle of metaphors"[18]). These connotations include "legal transplant", "legal migration", "diffusion of laws", "legal borrowing", "legal reception", "legal adaptation", "adoption of laws", "legal influence", "legal inspiration", "legal imitation", "legal irritation" or "legal cross-fertilization". However, at least at their core, they all describe a similar process.[19]

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15 Twining, 'Diffusion of Law', *supra* note 14, 1, 15.
16 See Twining, 'Globalisation', *supra* note 3, 52.
17 See Twining, 'Diffusion of Law', *supra* note 14, 13.
18 V. F. Perju, 'Constitutional Transplants, Borrowing, and Migrations', in M. Rosenfeld & A. Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012), 1304, 1306.
19 See *ibid.*, 1306-1308.

Here, *legal transfer* shall be used.[20] It shall simply be understood as the interactive process of the intentional[21] dissemination of legal rules, institutions, regimes, concepts, theories, ideas or other legal phenomena (legal items[22]) from a donating legal order (donor order) to a receiving legal order (recipient order).[23]

Since the interactions in the above-described plurality of legal orders are no longer confined to interactions between nation states, the same holds true for legal transfers. The intentional dissemination of legal items, therefore, needs to be conceived as happening in various directions – be it the *classic* transfers between nation states, but also horizontal transfers between legal orders above or beyond the nation states, as well as vertical or diagonal cross-level transfers.[24]

II. The (Im)Possibility of Legal Transfers and the Starting Point of Scholarly Interest

Although it seems quite obvious that such transfers take place, it has been argued that legal transfers are, in fact, impossible. The argument stands that legal items are to such an extent inseparably linked to the (cultural) characteristics and realities of their original legal order that they cannot be implemented into other legal orders without necessarily losing their particular character and could, therefore, never actually be considered trans-

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20 For an interesting description of slight differences between the notions "legal transplantation", "legal translation" and "legal transfer" see J. Hendry, 'Legal Pluralism and Normative Transfer', in G. Frankenberg (ed.), *Order from Transfer – Comparative Constitutional Design and Legal Culture* (2013), 153, 165-170 [Frankenberg (ed.), Order from Transfer].

21 *Intentional* here to be understood as the deliberate induction of the dissemination solely by the donor order, solely by the recipient order, mutually by donor and recipient order, or even by third orders or actors independent of donor and recipient order.

22 The term "legal items" is inspired by *Günter Frankenberg*'s use of the term "constitutional items", G. Frankenberg, 'Constitutions as Commodities: Notes on a Theory of Transfer', in Frankenberg (ed.), Order from Transfer, *supra* note 20, 1, 1 [Frankenberg, Constitutions].

23 See Hendry, *supra* note 20, 165, 168-169; Perju, *supra* note 18, 1313-1315; J. M. Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process', 51 *American Journal of Comparative Law* (2003) 4, 839.

24 See Perju, *supra* note 18, 1319-1321.

ferred ("at best, what can be displaced from one jurisdiction to another is, literally, a meaningless form of words"[25]).[26]

This argument can be quite easily refuted: The concept of legal transfers is by no means to be understood as assuming (the possibility of) the transplantation of an identical and unchanged legal structure from one legal order to another[27] – a conception that would indeed appear quite impossible, especially with respect to culturally deeply imbedded legal items of the sphere of public law. It rather describes situations in which the intended dissemination of a legal item *in its essence* has taken place (in *Günter Frankenberg*'s terms a "de- and recontextualization"[28]). *Uwe Kischel*, therefore, rightly points out that the cognition of a change or development of a legal rule in the course of its transfer from donor order to recipient order, is not to be considered the end, but rather the starting point of scholarly interest.[29]

C. *Rule of Law Transfers*

Legal transfers take place (or have done so) with respect to a variety of legal items for quite some time – the rule of law being such a typical item.[30] Interestingly, the scholarly assessment of the rule of law as a subject of transfer has, however, emerged only fairly recently. Traditionally, (compara-

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25 P. Legrand, 'The Impossibility of 'Legal Transplants'', 4 *Maastricht Journal of European and Comparative Law* (1997) 2, 111, 120.

26 For an overview on the scholarly debate, particularly known for the controversy between the two opponents *Alan Watson* and *Pierre Legrand*, see Frankenberg, 'Constitutions', *supra* note 22, 4-7 or M. Graziadei, 'Comparative Law as the Study of Transplants and receptions', in Reimann & Zimmermann (eds), *supra* note 4, 441, 465-470.

27 See Twining, 'Diffusion of Law', *supra* note 14, 24-25.

28 On the so-called IKEA Theory see Frankenberg, 'Constitutions', *supra* note 22, 1 and G. Frankenberg, 'Constitutional Transfer: The IKEA Theory Revisited', 8 *International Journal of Constitutional Law* (2010) 3, 563 [Frankenberg, IKEA Theory Revisited].

29 U. Kischel, *Rechtsvergleichung* (2015), 67.

30 See M. Zürn, A. Nollkaemper & R. Peerenboom, 'Introduction', in M. Zürn, A. Nollkaemper & R. Peerenboom (eds), *Rule of Law Dynamics – In an Era of International and Transnational Governance* (2012), 1, 1-8 or J. Kokott, 'From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization – with Special Reference to the German Basic Law', in C. Starck (ed.), *Constitutionalism, Universalism and Democracy – A Comparative Analysis* (1999), 71, 97-102, 124-127.

tive) legal scholarship tended to have a certain preference for the assessment of the (historical) dissemination of legal items ascribed to the sphere of private law – ranging from singular legal provisions (e.g. the land registration and transfer system of *Ulrich Hübbe* in the 19th century), to entire legal codes (e.g. the *[Napoleonic] French Civil Code of 1804*).[31] Only with the emergence of comparative constitutional law as an academic discipline following World War II and, with an even stronger impetus, after the beginning of post-soviet transitions in Eastern Europe as well as the end of apartheid in South Africa in the early 1990's,[32] also the analysis of transfers in the sphere of public and constitutional law advanced into the focus of scholarly attention, including, in particular, the concept of the rule of law.[33]

I. The Rule of Law as a General Concept

For the purpose of this introduction, the (highly debated) concept of the rule of law shall be described as a set of principles organizing the public governance of a certain community by subjecting (public) power to law and legal constraints.[34]

In its traditional (state-centered) form, the rule of law can conceptually be divided into six core principles. First, a community must be organized by general, clear, public and accessible, prospective, and predictive laws, being equally applied, instead of being ruled arbitrarily, in the sense of random individual decisions prone to bias, prejudice etc. (legality). Second, the right and power to enforce compliance with the law must lie with the public governing institutions and not with private actors (public monopoly of power). Third, the governing institutions themselves must be bound by the law (supremacy of the law). Fourth, the power of the governing institutions must be separated into independent branches, establishing

31 On this particular private law focus see Graziadei, *supra* note 26, 444-455; Watt, *supra* note 4, 590-592.

32 M. Tushnet, 'Comparative Constitutional Law', in Reimann & Zimmermann (eds), *supra* note 4, 1225, 1226-1228.

33 See Perju, *supra* note 18, 1305-1306.

34 See M. Krygier & A. Winchester, 'Arbitrary Power and the Ideal of the Rule of Law', in C. May & A. Winchester (eds), *Handbook on the Rule of Law* (2018), 75, 76-78; M. Krygier, 'Rule of Law (and Rechtsstaat)', in J. R. Silkenat, J. E. Hickey Jr. & P. D. Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (2014) 45, 46.

checks and balances among them (separation of powers). Fifth, accessible, independent, effective and fair mechanisms to settle legal disputes must exist, in particular allowing the governed community to review the exercise of governmental power (effective judicial remedies). Sixth, the governing institutions, in particular with respect to the making, applying, enforcing and interpreting of the law, must be legitimized by the governed community itself (legitimacy).[35]

Mainly developed in the course of the struggle over the establishment of governmental powers in the Westphalian Nation-States of the 18th, 19th and 20th centuries,[36] the rule of law is today understood as being conceptually applicable to any legal (sub)order, above or beyond the State that features public governance functions.[37] Furthermore, even the public international legal order as such – essentially not functioning by typical means of public governance (in the sense of a delegation of powers), but rather as an organizational governance tool to arrange the legal relationships within a community of equal sovereign actors (states) and international organizations – is conceived as being measurable against the rule of law's principles with respect to e.g. legality, legal certainty, or the existence of effective legal dispute settlement mechanisms.[38]

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35 See T. P. Holterhus, 'The History of the Rule of Law', in F. Lachenmann & R. Wolfrum (eds), 21 *Max Planck Yearbook of United Nations Law* (2018), 430, 432-433 with further references. However, much theoretical dispute over the rule of law's further content needs to be considered unsettled: Definitions range from purely formal to quite substantive approaches; formal definitions again being separated into thinner (demanding governance by general, clear, prospective, predictive, and equally applied laws) and thicker (additionally requiring the governing institutions to be bound (and limited) by the law as well as by a separation of powers and a certain level of participation of the governed community) versions. Substantive definitions again add features such as individual rights, dignity, justice, substantive equality, and other moral values or welfare. For an overview of the theoretical dispute see B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004), 91-113; J. Møller, 'The Advantages of a Thin View' in May & Winchester (eds), *supra* note 24, 21; A. Bedner, 'The Promise of a Thick View' in May & Winchester (eds), *supra* note 24, 34.

36 On the rule of law's historical origins and development see Holterhus, *supra* note 35, 430 with further references.

37 See C. May, 'The Rule of Law as the *Grundnorm* of the New Constitutionalism', in S. Gill and A. C. Cutler (eds), *New Constitutionalism and World Order* (2014), 63.

38 On this general aspect see e.g. R. McCorquodale, 'Defining the International Rule of Law: Defying Gravity?', 65 *International & Comparative Law Quarterly* (2016) 2, 277; A. Watts, 'The International Rule of Law', 36 *German Yearbook of International Law* (1993), 15; J. Waldron, 'The Rule of International Law', 30 *Harvard*

II. The Rule of Law as a Subject of Transfer

This fundamental concept of the rule of law is subject to legal transfer, meaning subject to the intentional dissemination from donating to receiving legal orders. However, when considering the rule of law as a subject of legal transfer, one does not find such transfers to be identical or even similar in nature. In light of the above-described global plurality of legal orders and the resulting variations and directions of legal transfers, the dissemination of the rule of law does not follow a standard formula but happens in quite diverse ways.[39]

1. The Diverse Substance and Form of Rule of Law Transfers

Accordingly, when speaking of the rule of law as an item of transfer this necessarily denotes a different subject in every particular constellation. *Michele Graziadei*, on legal transfers in general, fittingly refers to this as follows:

> "When we recognize this multiplicity, we can see that what crosses boundaries is highly diverse in both substance and form, even though it may simply be 'the law' to the untrained eye."[40]

This diversity in substance and form particularly applies to the rule of law as a subject of legal transfer.

With respect to legal substance, depending on the constellation, it is more often a particular principle or even fragments thereof that are transferred rather than the concept of the rule of law as a whole (meaning the entire set of the above-described legal principles). Such variations of the transferred item are not solely a result of the (sometimes limited) intentions of the respective donors and/or recipients but are often also caused by structural particularities of the involved legal orders.[41] While, for example,

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Journal of Law & Public Policy (2006) 1, 15; S. Chesterman, 'An International Rule of Law?', 56 *American Journal of Comparative Law* (2003) 2, 331.

39 For a general perspective on the diversity of legal transfers see Twining, 'Diffusion of Law', *supra* note 14, 16-17.

40 Graziadei, *supra* note 26, 471.

41 See R. Kleinfeld, 'Competing Definitions of the Rule of Law', in T. Carothers (ed.), *Promoting the Rule of Law Abroad – In Search of Knowledge* (2006), 31, 54-65; P. C. Westerman, 'The Rule of Law as Export Product', 5 T*he Theory and Practice of Legislation* (2017) 2, 1, 2-7; Zürn, Nollkaemper & Peerenboom, *supra* note 30, 5; J.

typical organizational structures within Nation States might be quite receptive to implementing a thorough separation of powers, this would (even in the form of checks and balances) not apply to the current institutional structures of the UN as a legal order.[42]

Another diversification of what is subject to the respective rule of law transfers derives from the possible variations of the transferred item's legal form. Although transferring the rule of law's principles in the form of constitutional provisions (e.g. from one constitutional structure into another (existing or newly adopted) constitutional structure) often appears to be the most practical and actually is the most commonly chosen way, this again might not fit the intentions and/or particularities of the involved donor and recipient orders (e.g. because of the absence or impossibility of a constitutional structure in the recipient order). Rule of law transfers therefore also happen in various other forms – be it the adoption or inclusion of statutes, institutional structures, lines of adjudication, particular judicial decisions, or even established doctrine as well as jurisprudential scholarly thought and concepts, to name but a few.[43]

2. A Broad Categorization by Recipient Orders

Despite these variations in legal substance and form, an assessment of the more recent processes of rule of law transfers however allows for a broad distinction between two categories.

a. Nation States as Recipient Orders

The first category would comprise such rule of law transfers which address nation states as the recipient legal orders. A quite important example for many (attempted) rule of law transfers in this category, are the multiple waves of the so-called law and development initiatives of the post-World

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C. Reitz, 'Export of the Rule of Law', 13 *Transnational Law & Contemporary Problems* (2003) 2, 429, 442-444.

42 On the particularities of applying the rule of law to the UN generally see A. Nollkaemper, 'The Internationalized Rule of Law', 1 *Hague Journal on the Rule of Law* (2009) 1, 74, 74-75.

43 See Twining, 'Diffusion of Law', *supra* note 14, 20; Zürn, Nollkaemper & Peerenboom, *supra* note 30, 5; for the context of constitutional law see Kokott, *supra* note 30, 76-77.

War II era – peaking in the now ongoing fourth wave which started with the end of the Cold War and the downfall of the Soviet Union. Based on the belief that States organized under the rule of law were more likely to become or remain stable, and by that would serve the overall good of a peaceful global (economic) community, Western States (with the US on the early forefront), the *Bretton Woods* institutions and multiple further actors, showed and continue to show tremendous efforts to *export* the concept of the rule of law to national legal orders around the globe. To this end the law and development initiatives continue to be predominantly aimed at post-colonialist, transitional (conflict and post-conflict) and developing countries, after the end of the Cold War with a particular focus on former Soviet States, using first and foremost financial and technical foreign assistance and development aid as means of influence to develop rule of law structures in the respective recipient States.[44]

With the end of the Cold War and the downfall of the Soviet Union, it is also the EU as a supranational entity that became a significant actor and began to provide a relevant framework in the field of rule of law promotion in third States – provoking transfers not only by making the implementation of rule of law structures a precondition in its accession and enlargement policy (so-called *Copenhagen Criteria*, now laid down in Article 49 TEU), but also by making rule of law promotion an essential principle of its foreign and security policy, its neighboring policy, its development cooperation policy and its foreign common commercial policy.[45]

Furthermore, today more than ever, various international legal orders (with their respective institutions, administrative bodies, courts and tribunals), such as the UN, the *World Bank*, the *Council of Europe* or the conglomerate legal orders in the fields of international human rights law or international investment law, to name but a few examples, play an active role in the rule of law promotion on the nation state level – be it by functioning as donor orders themselves or as catalyzing intermediaries for the

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44 For an overview see e.g. D. M. Trubek, 'The 'Rule of Law' in Development Assistance: Past, Present and Future', in D. M. Trubek, & A. Santos (eds), *The New Law and Economic Development* (2006), 74; A. Magen, 'The Rule of Law and Its Promotion Abroad: Three Problems of Scope', 45 *Stanford Journal of International Law* (2009), 51, 77-83; F. Schimmelfennig, 'A Comparison of the Rule of Law Promotion Policies of Major Western Powers', in Zürn, Nollkaemper & Peerenboom (eds), *supra* note 30, 111.

45 For an overview see e.g. W. Schroeder (ed.), *Strengthening the Rule of Law in Europe* (2016), chap. 10, 11, 12; M. Kmezić, *EU Rule of Law Promotion* (2016), 1-27; L. Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action', CLEER Working Papers 2012/3.

respective dominating donor (State) orders behind these international regimes.[46]

b. Recipient Orders Above and Beyond the Nation State

The second category would consist of rule of law transfers which do not address nation states as the recipient orders but legal orders above and beyond them.[47] Such a category necessarily requires the above-discussed assumption of the possible conceptual extension and application of the rule of law to non-state legal orders featuring public governance functions.[48] On that basis, few, but quite significant transfer processes to recipient orders above and beyond the nation state take place.

An illustrative example of such a rule of law transfer to a legal order above the nation state would be the introduction of a legal review mechanism for targeted sanctions within the UN, in particular, the *UN Security Council* (UNSC). When the UN started to adopt resolutions which included so-called targeted sanctions (meaning specific economic sanctions under Chapter VII, Article 41 UN-Charter, which did not target states but individuals by ordering the freezing of their assets or banning them from travelling) in the 1990's, there was no (effective) mechanism to enable the affected individuals to review their listing for such sanctions. However, in response to political pressure from the EU (the donor order in this example) – caused by the *European Court of Justice*'s (ECJ) famous *Kadi*-adjudication, which essentially decided that the enforcement and implementation of targeted sanctions by and within the EU was precluded under EU law, as long as the UNSC would not establish an effective individual review mechanism (beyond the mere possibility of diplomatic protection) – the UNSC

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46 See e.g. M. Heupel, 'Rule of Law Promotion through International Organizations and NGOs', in Zürn, Nollkaemper & Peerenboom (eds), *supra* note 30, 133; E. Selous, 'The Rule of Law, Development and the United Nations', in C. A. Feinäugle (ed.), *The Rule of Law and Its Application to the United Nations* (2016), 211; A. Santos, 'The World Bank's Uses of the 'Rule of Law' Promise in Economic Development', in Trubek, & Santos (eds), *supra* note 44, 74.

47 See T. Genkow & M. Zürn, 'Constraining International Authority through the Rule of Law', in Zürn, Nollkaemper & Peerenboom (eds), *supra* note 30, 68; M. Kötter & G. F. Schuppert, 'Applying the Rule of Law to Contexts Beyond the State', in Silkenat, Hickey Jr. & Barenboim (eds), *supra* note 34, 71; Nollkaemper, *supra* note 42, 74.

48 On the United Nations in particular see C. A. Feinäugle (ed.), *The Rule of Law and Its Application to the United Nations* (2016).

in 2009 actually introduced the Office of the Ombudsman which today hears individual complaints of enlisted individuals and holds quite far-reaching delisting powers. Irrespective of the question whether the Office of the Ombudsman adequately fulfills the conceptual requirements of the rule of law core principle of effective judicial remedies, a certain rule of law transfer to the UN (as a recipient order above the Nation State) is apparent.[49]

Another example of a rule of law transfer (or rather a series of continuous transfers) to a legal order above the nation state is the establishment of the rule of law as a fundamental principle within the supranational EU as a recipient order. Essentially starting in the 1960's and 1970's the development of the rule of law as a general principle of EU law – in the sense of a legally binding principle addressing all EU organs and institutions with respect to their exercise of governmental powers, be it in administrative, judicial or legislative matters – was fostered largely by ECJ adjudication. However, the ECJ did not develop the various concretizations, principles and sub-principles of an EU rule of law out of thin air – such as legality of administrative action, State liability, legal certainty, equality before the law, institutional balance (the separation of powers within the EU), effective judicial remedies, fair trial, the protection of legitimate expectations, prohibition of retroactivity, or proportionality – but explicitly derived and transferred them from the legal orders of the EU Member States, functioning as donor orders in this respect.[50]

While these different contexts and examples can only be considered a mere fraction of the entirety of the global process of rule of law transfers, they certainly are suitable to provide an impression of the variations in structure and direction of the transfer of the rule of law in the global plurality of legal orders – finding its recipient orders not only in the typical constellation of nation states, but also among the legal orders above and beyond them.

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49 On the introduction of the Office of the Ombudsperson as a response to ECJ adjudication in *Kadi I* and *II* see P. Eden, 'United Nations Targeted Sanctions, Human Rights and the Office of the Ombudsperson,' in M. Happold & P. Eden (eds), *Economic Sanctions and International Law* (2016), 135.

50 W. Schroeder, 'The European Union and the Rule of Law – State of Affairs and Ways of Strengthening,' in Schroeder (ed.), *supra* note 45, 3, 6-9; S. Mangiameli, 'Article 2 [The Homogeneity Clause],' in H.-J. Blanke & S. Mangiameli (eds), *The Treaty on European Union (TEU)* (2013), 109, paras. 29-30.

D. A Legal Perspective on Rule of Law Transfers

I. The Multitude of (Extra-legal) Analytical Perspectives and Angles

Although legal transfers concern the dissemination of *legal* items between *legal* orders, the transfer as such is, at first sight, not a genuinely legal but rather an ontological process. Therefore, to legal transfers in general and to rule of law transfers in particular, a multitude of (often extra-legal) analytical perspectives has been applied.[51] Such perspectives predominantly focus on a better understanding of the variety of mechanisms underlying the process of rule of law transfers, including sociological, political science, international relations or ethnological perspectives.

To that end, the phenomenon of rule of law transfers is usually approached from a number of typical angles, including: the roles of different actors within the transfers of the rule of law (1.), the underlying motivations behind rule of law transfers (2.), the means and instruments of rule of law implementation (3.), the empirics of and conditions for success and failure of rule of law transfers (4.), or the legitimacy of transferring the rule of law (5.).[52]

1. Actors

The focal point of the actor-centered angle usually lies with the identification of the different actors and agents taking part in the process of transferring the rule of law, such as legislatures and other lawmakers, governments, administrative bodies, law enforcers, courts and judges, inter- and supranational institutions, multinational corporations, expert networks, political movements, civil societies, non-governmental organizations, lob-

51 For a general overview see Twining, 'Social Science and Diffusion of Law', 32 *Journal of Law and Society* (2005) 2, 203 [Twining, Social Science]; see also M. Siems, 'Malicious Legal Transplants', 38 *Legal Studies* (2018) 1, 1, 8-9.

52 *William Twining*, for example, identifies not less than twelve analytical angles to the issue of legal transfers: "Processes of diffusion can vary in respect of originating sources, scale, levels, pathways, objects of diffusion, changes in the objects, agents, degrees of formality, timing, relation to pre-existing law, degree of penetration, and consequences. Diffusion of law refers to a vast and complex range of phenomena, which can be studied from a variety of standpoints for a variety of purposes." Twining, 'Social Science', *supra* note 51, 203, 205, 206, 240.

byists, religious organizations and missionaries, refugees, educational institutions, scholarly elites, etc.[53]

The aim is to understand their particular roles and functions within and outside the involved donor and recipient orders, be it in an internal role as importers, exporters or appliers, but also when functioning as external facilitators or intermediaries[54] – *Günter Frankenberg* fittingly referring to them as "merchants of transfer"[55].

2. Motivations

This angle considers rule of law transfers with a particular interest in their underlying motivational patterns. It concerns not only the motivations existing within donor orders, be it the dissemination of particular legal cultures/narratives, geostrategic stability/security or the opening of new export markets, but also the motivations within recipient orders, such as desire for (economic) reform, development and modernization, membership in international organizations or simply prestige.

Various systematizations exist in this respect.[56] As one example – with a certain focus on recipient motivations – *Jonathan M. Miller*'s descriptive sociological typology may be provided, dividing the motivations for legal transfers into the four categories: "cost-saving" (saving time and costly experimentation), "externally-dictated" (reacting to external threats, promises or opportunities), "entrepreneurial" (prospects of material or political benefits for the individuals and/or groups engaged in the importing process), and "legitimacy-generating" (increase of legitimacy by implementation of a renowned foreign legal item).[57]

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53 See Reitz, *supra* note 41, 429, 456-463; Twining, 'Social Science', *supra* note 51, 203, 236-238; J. Gillespie & P. Nicholson, 'Taking the Interpretation of Legal Transfers Seriously: The Challenge for Law and Development', in J. Gillespie & P. Nicholson, (eds), *Law and Development and the Global Discourses of Legal Transfers* (2012), 1, 9-10, 35-36.

54 See M. Seckelmann, 'Clotted History and Chemical Reactions – On the Possibility of Constitutional Transfer', in G. Frankenberg (ed.), *supra* note 20, 36, 54-55.

55 Frankenberg, 'Constitutions', *supra* note 22, 15, 25.

56 See Reitz, *supra* note 41, 448-451; Perju, *supra* note 18, 1317-1319.

57 Miller, *supra* note 23, 839.

3. Means and Instruments

Another angle emphasizes the relevance of the different means and instruments applied in rule of law implementation processes. Aiming at "a fuller appreciation of the empirical scope of external influence mechanisms deployed to affect domestic legal, institutional and normative reform", *Amichai Magen*, for example, refers to this aspect as the "spectrum of intervention", pointing out that

> "[a] non-exhaustive list of terms generated in an attempt to capture and explain external influence on domestic democratic development would include notions such as: demonstration effect, emulation, ordering-from-the-menu, diffusion, contagion, gravity, linkage, compliance, liberal community, learning, socialization, normative suasion, conditionality, and control."[58]

From there *Magen*'s contribution develops its own categorization of means and instruments, distinguishing between "coercive imposition and neotrusteeship",[59] "punitive and positive external incentives",[60] "international democratic socialization",[61] and "demonstration and emulation".[62]

Others categorize by, for instance, "the imperial, the fashionable, the systemic and the tribal" means of transfer (*David A. Westbrook*),[63] "imposition,

58 Magen, *supra* note 44, 100-101.

59 "[...] the use of military force to directly overthrow an authoritarian regime and attempt to install a viable democratic regime in its place or, more commonly, attempt to build basic conditions of public safety and legality as part of a post-conflict state reconstruction effort." *Ibid.*, 101.

60 "External incentives fall into two broad categories: punitive or positive. Punitive measures, or sanctions, are non-military, coercive political, diplomatic and economic tools used to induce policy change in a targeted country." *Ibid.*, 103.

61 "[...] facilitate internalization of democratic norms, policies and institutions through the establishment and intensification of linkages between liberal international forums and state actors in transitional countries." *Ibid.*, 107.

62 "According to this rationale, state and societal actors in transitional states accept new rules, institutions and policy choices not as a result of coercion, external incentives or active social induction, but through emulation of external models or transnational cultural associations." *Ibid.*, 113.

63 D. A. Westbrook, 'Theorizing the Diffusion of Law in an Age of Globalization: Conceptual Difficulties, Unstable Imaginations, and the Effort to Think Gracefully Nonetheless', 56 *Annals of the Faculty of Law in Belgrade – Belgrade Law Review* (2008) 3, 159.

conditionality, socialization" (*Frank Schimmelfennig*),[64] or "persuasive authority" (*Patrick Glenn*).[65]

4. Success Rates and Their Conditions

A further typical angle does not put the *process* of rule of law transfers but rather their *results*, namely the success or (more often) the failure, in the center of its attention. The scholarly interest can essentially be separated into three subdivisions. First, an interest in what outcome of a legal transfer should actually be considered successful (and what a failure, or even malicious[66]), necessarily implying the development and application of certain theoretic criteria for the vague notion of the *success* of a rule of law transfer.[67] Second, an interest in the empirical assessment and evaluation of the success of rule of law transfers – which results not only in multiple case studies on various particular transfer processes[68] but is also closely related to the quite recent emergence of global rule of law indices trying to measure rule of law implementation in legal orders throughout the world.[69] And third, considering the two aforementioned aspects, an interest in which surroundings and conditions (cultural, geographic, ideological, institutional, organizational, etc.) have influence on rendering a transfer likely to be successful or unsuccessful – in particular, when it comes to the transfer of legal items from the sphere of public law, which usually feature a deep entrenchment in their respective societal and cultural surroundings.[70]

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64 Schimmelfennig, *supra* note 44, 122-127.

65 H. P. Glenn, 'Persuasive Authority', 32 *McGill Law Journal* (1987) 2, 261.

66 See Siems, *supra* note 51, 1.

67 See J. Gillespie, 'Developing a Theoretical Framework for Evaluating Rule of Law Promotion in Developing Countries', in Zürn, Nollkaemper & Peerenboom (eds), *supra* note 30, 233, 234; D. Nelken, 'Towards a Sociology of Legal Adaptation', in D. Nelken & J. Feest (eds), *Adapting Legal Cultures* (2001), 7, 37-39, 46-50 [Nelken, Legal Adaptation].

68 See e.g. Carothers (ed.), *supra* note 41, 191-323; Gillespie & Nicholson (eds), *supra* note 53, 179-276; A. Magen & L. Morlino (eds), *International Actors, Democratization and the Rule of Law* (2009), 87-223.

69 See W. Merkel, 'Measuring the Quality of Rule of Law', in Zürn, Nollkaemper &. Peerenboom (eds), *supra* note 30, 21; Twining, 'Diffusion of Law', *supra* note 14, 30-34; see also all 11 articles of 3 *Hague Journal on the Rule of Law* (2011) 2.

70 See Reitz, *supra* note 41, 463-467; Gillespie, *supra* note 67, 234-248; Y. Dezalay & B. Garth, 'The Import and Export of Law and Legal Institutions: International

5. Legitimacy

Another angle is concerned with the legitimacy of rule of law transfers, in particular the legitimacy of donor orders' efforts to promote the rule of law abroad (not to be confused with the above-discussed aspect of (a recipient's) motivation of transferring the rule of law to generate legitimacy within the receiving legal order).[71] Again, three (rather normative and often critical) aspects of the scholarly discussion on legitimacy can be distinguished. First, the aspect whether the rule of law, at least in a formalist Western one-size-fits-all form, can actually be considered universally beneficial, meeting the needs of all kinds of communities (and therefore the question whether it always is, as such, a legitimate concept to promote and transfer).[72] Second, the aspect whether the various efforts of global rule of law promotion are always based on a sufficient knowledge of the cultural contexts and legal preconditions of the particular recipient order as well as a proper understanding of the general complexities of the implementation of legal items abroad.[73] Third, the issue whether the promotion of the rule of law, at least when aiming at post-colonialist, transitional and developing countries, is always truly intended to actually benefit the respective recipient order, or whether the often top-down imposition of rule of law transfers rather happens in the hegemonistic, imperialistic or even neo-colonialistic interest of capitalist donor orders (be it Western States, or such institutions like the EU, the *World Bank* or the UN, sometimes at the same time, not living up to the rule of law's demands themselves).[74]

Strategies in National Palace Wars', in Nelken & Feest (eds), *supra* note 67, 241; Nelken, 'Legal Adaptation', *supra* note 67, 39-46.

71 For an overview see J. A. Goldston, 'The Rule of Law at Home and Abroad', 1 *Hague Journal on the Rule of Law* (2009) 1, 38.

72 See F. Upham, 'Mythmaking in the Rule-of-Law Orthodoxy', in Carothers (ed.), *supra* note 41, 75.

73 See T. Carothers, 'The Rule of Law Revival', in Carothers (ed.), *supra* note 41, 15.

74 See R. E. Brooks, 'The New Imperialism: Violence, Norms, and the "Rule of Law"', 101 *Michigan Law Review* (2003) 7, 2275; R. Peerenboom, M. Zürn & A. Nollkaemper, 'Conclusion', in Zürn, Nollkaemper & Peerenboom (eds), *supra* note 30, 305, 310-311.

II. A Legal Perspective

The provided cross section of analytical perspectives (and their above-described application in the five different angles) illustrates a certain scholarly tendency to examine and emphasize the social, political or ethnological dimensions of rule of law transfers. With that, scholarship essentially seems to correspond to and reflect the practical challenges (and inefficiencies) that the field of rule of law promotion and implementation faced over the last couple of decades. Noteworthily, *David Marshall* – even if speaking of rule of law implementation in practice – asks:

> "And would the international rule of law movement not be better if it were run and staffed by anthropologists, sociologists, and linguistic and cultural experts? Is the rule of law about understanding and working with societies, or is it about understanding and building institutions around law and legal practice?"[75]

Without answering *Marshall*'s questions, it should not be doubted that a scholarly understanding of the social, political and ethnological mechanisms behind rule of law transfers is of high epistemic and practical relevance.

1. Departing From Common Scholarly Paths

There is, however, more to explore. The present volume, therefore, departs from above-described common scholarly paths and intends to assess and explain rule of law transfers as a *legal* phenomenon. Such a perspective – which has not yet received much scholarly attention – is based on the assumption that rule of law transfers do not only *consider* the law but, although being ontological processes, encompass a legal dimension *themselves*. In light of the aforesaid, the legal analysis of rule of law transfers is particularly concerned with understanding what positive legal norms impel and drive donor orders to promote the rule of law abroad. It strives to explore what legal instruments and mechanisms govern and organize the actual transfer processes. Furthermore, it asks what legal structures enable and facilitate the implementation of rule of law transfers within recipient orders.

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75 D. Marshall, 'Introduction', in D. Marshall (ed.), T*he International Rule of Law Movement – A Crisis of Legitimacy and the Way Forward* (2014), xiii, xvi.

2. *Analytical Relevance of a Legal Perspective*

Such an assessment of rule of law transfers from a legal perspective is not an end in itself, but holds a specific analytical relevance: It helps to clarify the underestimated role that legal norms, mechanisms and structures play with respect to rule of law transfers in the global plurality of legal orders. This actual analytical relevance can be well-illustrated when such perspective is applied to the five angles (actors, motivations, means and instruments, success and its conditions, legitimacy) discussed above:

With respect to the actor-centered angle, a legal perspective might provide epistemic benefits by understanding how the legally determined allocation of competences within a legal order can define and empower actors with respect to rule of law transfers.

A legal perspective might also find that the motivations of donor orders to foster the rule of law abroad lie not solely in political ventures or diplomatic agendas, but rather are the result of constitutional or high-ranking international treaty provisions that bindingly instruct the respective donor orders to do so.

Furthermore, a legal perspective might be able to illustrate that it is not only fashion or persuasive authority, but, for example, a particular legal design of (development) contracts (e.g. by implementation of condition precedent) that is the instrument to legally ensure rule of law implementation within a recipient order before being granted a promised benefit.

The analysis of rule of law transfers from the legal perspective might also demonstrate that the existence of particular laws and legal structures within recipient orders constitutes a decisive condition for high success rates of rule of law implementation.

Finally, the legal perspective might even contribute to solving legitimacy issues of rule of law transfers, since a context-specific doctrinal adjustment in substance and form of the usually transferred Western one-size-fits-all rule of law principle could potentially render the transfer to some extent more legitimate.

E. *The Legal Perspectives in This Volume*

This volume features seven distinct contributions, all of which apply the above-discussed legal perspective to the issue of rule of law transfers. And although, of course, not all legal aspects of such transfers can be provided for in the present volume, the contributors nevertheless approach the topic from rather diverse angles covering a wide range of legal fields. Each con-