

The Rule of Law at the National and International Levels

Contestations and Deference

— STUDIES IN INTERNATIONAL LAW —

Edited by
Machiko Kanetake
and André Nollkaemper

B L O O M S B U R Y

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• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON

2016

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: <http://www.isbs.com>

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Hart Publishing Ltd at the address above.

British Library Cataloguing in Publication Data
Data Available

Library of Congress Cataloging-in-Publication Data

Names: Kanetake, Machiko, editor. | Nollkaemper, André, editor.

Title: The rule of law at the national and international levels : contestations and deference /
edited by Machiko Kanetake and Andr?e Nollkaemper.

Description: Oxford ; Portland, Oregon : Hart Publishing Ltd, 2016. | Series: Studies
in international law ; volume 56 | "The contributions contained in the present
volume were presented originally in an international seminar in March 2013
hosted by the HiiL and the Amsterdam Center for International Law (ACIL)." | Includes
bibliographical references and index.

Identifiers: LCCN 2015045796 (print) | LCCN 2015046374 (ebook) |
ISBN 9781849466677 (hardback : alk. paper) | ISBN 9781782256168 (Epub)

Subjects: LCSH: Rule of law—Congresses. | International law and human
rights—Congresses. | International and municipal law—Congresses.

Classification: LCC K3171.A6 R848 2016 (print) | LCC K3171.A6 (ebook) |
DDC 340/.11—dc23

LC record available at <http://lcn.loc.gov/2015045796>

ISBN: 978-1-84946-667-7

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon CR0 4YY

THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS

This book aims to enhance understanding of the interactions between the international and national rule of law. It demonstrates that the international rule of law is not merely about ensuring national compliance with international law. International law and institutions (eg, international human rights treaty-monitoring bodies and human rights courts) respond to national contestations and show deference to the national rule of law. While this might come at the expense of the certainty of international law, it suggests that the international rule of law can allow for flexibility, national diversity and pluralism.

The essays in this volume are set against the background of increasing conflict between international and national legal norms. Moreover the book shows that international law and institutions do not always command blind national obedience to international law, but incorporate a process of adjustment and deference to national law and policies that are protected by the rule of law at the national level.

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Preface and Acknowledgements

The present volume is the result of a multi-year research project sponsored by the Hague Institute for the Internationalisation of Law (HiiL), which aims to explore the processes and consequences of the 'internationalisation of the rule of law'. The outcome of the project's first phase was published as Michael Zürn, André Nollkaemper, and Randall Peerenboom (eds), *Rule of Law Dynamics: In an Era of International and Transnational Governance* (Cambridge University Press, 2012). Building on this first volume, the present volume contains the outcome of the second phase of the project. Its aim is to identify and assess some of the patterns and consequences emerging from the interactions between the national and international rule of law.

The contributions contained in the present volume were presented originally in an international seminar in March 2013 hosted by the HiiL and the Amsterdam Center for International Law (ACIL). The papers presented at the international seminar were selected through a rigorous process out of over 100 submissions which the ACIL had received. The analysis and argument presented in the present volume also benefited from the discussions within a research group (called 'Interfaces') organised within the ACIL.

The editors would like to thank the HiiL for supporting the research project which generated the present volume. In particular, the editors are grateful for Morly Frishman of the HiiL for his enthusiastic support in organising the aforementioned seminar and other related events and in enriching and disseminating the outcomes of the project. The editors would also like to thank Rosanne van Alebeek, Theresa Reinold, Ingo Venzke, Michael Zürn, many other colleagues of the ACIL, and the participants to the international seminar for their advice and help in the process of developing the present volume.

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Introduction and Framework

Introduction

ANDRÉ NOLLKAEMPER

I. BACKGROUND: RULE OF LAW DYNAMICS

THE PRESENT VOLUME builds on the earlier volume *Rule of Law Dynamics in an Era of International and Transnational Governance* ('Rule of Law Dynamics').¹ That volume argued that the interaction between international and domestic law can be conceptualised as a two-way relationship. On the one hand, international law influences the contents and practice of the rule of law at the domestic level. On the other hand, the domestic rule of law standards and practices influence the development of the rule of law at the international level.

More in particular, these dynamics involve three distinct but interrelated processes: promotion, diffusion, and conversion.² The *promotion perspective* looks at strategies and programs of states and organisations to promote the rule of law elsewhere. One important dimension of such rule of law promotion is the process whereby international law, and more concretely, international institutions, seek to promote the rule of law at the national level.³

The *conversion perspective* emphasises the decisive role of reception of international legal concepts at the national level, including the transfer of a concept, the translation into the local context, but also in some cases the rejection of the norms. It asks questions about the ways in which concepts are transformed in the process of translation and about the sources of this transformation or their rejection. Of particular relevance are normative conflicts between international law and domestic law or, more generally, between international law and the national rule of law. After all, rule of law promotion does not occur in a vacuum. Rule of law reforms often conflict with, and tend to displace, existing laws.

¹ Michael Zürn, André Nollkaemper, and Randall Peerenboom (eds), *Rule of Law Dynamics: In an Era of International and Transnational Governance* (Cambridge, Cambridge University Press, 2012).

² For more details about these processes, Michael Zürn, André Nollkaemper, and Randall Peerenboom, 'Introduction: Rule of Law Dynamics in an Era of International and Transnational Governance' in Zürn, Nollkaemper, and Peerenboom (ibid) 1.

³ See Helmut Philipp Aust and Georg Nolte, 'International Law and the Rule of Law at the National Level' in Zürn, Nollkaemper, and Peerenboom (ibid) 48.

The *diffusion perspective* focuses on the dissemination of the rule of law concept and asks about the causes and mechanisms that lead to this development. A key manifestation of diffusion is the boomerang effect. The reception and contestation of international norms at domestic level may create a feedback loop to the international level; in particular, to the institutions involved in rule of law promotion. In most cases, this process is not controlled by one actor or one set of actors but results from the interplay of a multiplicity of actors and forces, and in that sense, are themselves interactive and iterative processes with intended and unintended effects. These upward effects of reception and conversion in themselves can be seen as rule of law promotion—one that increasingly targets international organisations—and in that respect there is no hard distinction between diffusion and promotion.

This boomerang effect allows us to conceptualise the relationship between the international rule of law and national law in a more complex way, beyond the conception in which the international rule of law would just require compliance with the prescriptions of international law. It is precisely the expectation of full compliance that may meet with resistance and contestation at the national level. Arguably, such resistance and contestation subsequently effects how we understand the rule of law at the international level.

This process does not mean that, under influence of national conceptions of the rule of law and of feedback loops, the international rule of law becomes a copy of, or even remotely looks like, the national rule of law. The rule of law at the international level is a completely different phenomenon which is to be adjusted to the specific nature of the international legal order.⁴ However, it does mean that international law itself, and indeed our understanding of the international rule of law, should take into account the interactive process with the national legal order. This may take a diversity of forms however, including both an increasing influence of rule of law principles in international law, and recognition of deference and diversity at the national level.

Rule of Law Dynamics concluded that to better understand the dynamics of rule of law development, more attention must be paid to the interaction between rule of law promotion, rule of law diffusion, and rule of law conversion. Further research could make us better understand the causal mechanisms that lead states, international organisations, and other transnational actors to adopt and comply with rule of law principles, and how that process may be supported.

⁴ See, eg. Jeremy Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?' (2011) 22 *European Journal of International Law* 315.