Whose Rule of Law?

Arguments for and against its Transnational Diffusion

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I. Why We (Must) Love E.P. Thompson

To begin a story about the Rule of Law in the non-“obvious” place would mean today not to start with E.P. Thompson’s final chapter of ‘Whigs and Hunters’. Indeed, such a story would be obvious in the way that it would push our noses directly into the amazing realm of contestation that the ‘unqualified human good’ in fact evokes. Starting with Thompson, we would be quite well equipped to both relativize and radicalize our engagement with the concept of the rule of law. Reading his much-discussed, rejected as well as reputed after-word of 11 pages, we would be alerted to the need to relativize, question and centre our perspectives on the Rule of Law: “Alternative perspectives must diminish the complacency of national historical preoccupation.” But, Thompson, much to his political allies’ dismay, opts for a further relativization. This time it concerns a loosening of the Marxists’ critique of (the rule of) law as an instrument in the hand of the powerful. “Why have I spent years trying to find out what could, in its essential structures, have been known without any investigation at all? […] I am disposed to think that it does matter; I have a vested interest (in five years of labour) to think it may. But to show this must involve evacuating received assumptions – that narrowing ledge of traditional middle ground – and moving out onto an even narrower theoretical ledge. This would accept, as it must, some part of the Marxist-structural critique; indeed, some parts of this study have confirmed the class-bound and mystifying functions of the law. But it

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¹ King’s College London.
would reject its ulterior reductionism and would modify its typology of superior and inferior (but determining) structures.”

A little further he famously notes, that “[t]he law may also be seen as ideology, or as particular rules and sanctions which stand in a definite and active relationship (often a field of conflict) to social norms; and, finally, it may be seen simply in terms of its own logic, rules and procedures – that is, simply as law. And it is not possible to conceive of any complex society without law.”

As readers, both favorable and disgruntled, of Thompson’s ‘rule of law’ chapter will know, it contains some of the most powerful and startling observations regarding the co-existence of law as an instrument and a limit to arbitrary power, as a lever of domination and as “inhibitions upon the actions of the rulers.”

Thompson insisted that “the notion of the regulation and reconciliation of conflicts through the rule of law – and the elaboration of rules and procedures which, on occasion, made some approximate approach towards the ideal – seems [...] a cultural achievement of universal significance.” This is, of course, followed soon thereafter, by his famous-infamous assertion that “...there is a difference between arbitrary power and the rule of law. [...] [t]he rule of law itself, the imposing of effective inhibitions upon power and the defence of citizens from power’s all-intrusive claims, seems to me to be an unqualified human good.”

I said that – if we were beginning our story with Thompson – we would find there also a starting point for a radicalization of his observations. By that I mean that in rereading his intricate and detail-driven account we may in fact find ammunition to take his claims regarding the historical as well as normative significance of the rule of law further. We might be tempted to engage with today’s proponents of the Rule of Law on a global scale in a way that is at the

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2 Ibid., 260.
3 Id.
4 “In a context of gross class inequalities, the equity of the law must always be in some part sham.” (266)
5 264.
6 265.
7 266.
same time class-conscious\textsuperscript{8} as it is committed to dismissing the rhetoric not as mere rhetoric.

Why, then, did I suggest we should – nevertheless – not start with Thompson as the obvious point of departure? The reason for this is the following: By making him our hero of the hour, the first actor on the stage, in fact, by moving him into the limelight of attention of a study that, according to the occasion, is concerned with the Rule of Law from a transnational perspective, and – at the same time – by suggesting that we should \textit{not} be too arrested by this apparition, I want to suggest a way in which we may keep him close to our endeavor, but not allow the dispute he instilled to become our obsession. For our purposes, Thompson’s political sensitivity, paired with his attention to detail and nuance as regards the real-world operations he was observing, point to the type of investigation we are here interested in. Keeping Thompson in close proximity, we place our bets, while retaining the discretion to modify the context of the game. Rather than engaging in a study of one particular stretch of history in one particular part of the world, our interest in Thompson is an interest in decentering his project and testing its merits in a context the study of which requires a number of preparatory clarifications. The context we are here concerned with is that of “transnational regulatory governance”. The examples touched upon range from humanitarian intervention to the so-called ‘war against terror’, from global administrative law to the debates over ‘international public authority’, from corporate governance rules to the quasi-labour law that might be emerging in the aftermath of world-attention attracting human suffering in distant sweatshops in China, Bangladesh or Cambodia.

The following observations do not pretend, however, to develop a satisfying account or even less a convincing critique of the elements touched upon a

\textsuperscript{8} In that vein, see the work by David Schneiderman, \textit{Transnational Legality and the Immobilization of Local Agency}, 2 Annual Review of Law and Social Sciences 387 (2006).
moment ago. Such a project is, without doubt, comprehensive and oriented towards long-term analysis, none of which can be done justice to on the pages here following. The present observations, which are gratefully submitted to comments and feedback at our seminar next week, are meant to point to the direction of my currently pursued analysis, which is, in part, concentrated around the development and compilation of teachable modules around “transnational law case studies” in a number of substantive legal fields. The core contention of these case studies is to lead students away from a study of already decided ‘cases’ to the daunting and potentially paralyzing realm of lawyering in undecided, legally mostly unchartered territory. The ‘non-cases’ or, perhaps, ‘not-yet’ cases of Bangladesh or FoxConn or the to-be-expected case-scenarios developing around the de-investment strategies of Western diamond mining corporations in South Africa constitute opportunities for becoming lawyers to shift the perspective away from the judge to the lawyer, who – in an ideal situation – musters the energy and substance to shift the interpretive stance of the precedent-observing bench by drawing on out-of-law facts and rendering them legally ‘relevant’. Radicalizing, in a way, existing forms of clinical legal education, this approach tries to instill the confidence in future law school graduates that they may not only be able (and, certainly called upon) to find the solution to a tricky case, but that they at the same time be able to challenge and, ultimately, shift the interpretive canon as it is being applied to ‘typical’ ‘facts’. Putting legal sociological insights into practice in the context of first-year class-room instruction (rather than merely in the context of upper year specialized seminars), the here pursued approach aims at capturing students in the moment where they are beginning ‘to think like a lawyer’. By widening the possible circle of relevant facts and of hard-to-uneart and to-articulate, but significant background information, which can be woven into the narrative to be unfolded before the judge (or, in negotiations with the ‘other’ parties of the dispute), the hope is to invite future graduates to start thinking ‘outside the box’ of the otherwise obvious and ready-to-apply legal principles. The attempt
is to make them see (again) that behind each dispute is a larger set of issues regarding social ordering, value differences, power disparities, dominant and silenced voices, hard and soft norms.

Closely related to this pedagogical undertaking is another construction site of my current research, namely the finalization of a book-length exploration of ‘Transnational Legal Pluralism’, an attempt to theorize transnational law on the basis of both legal and economic sociology. Against the background of previously done work in contract and company law, transitional justice and law and development, the current project seeks to narrow the gap between a largely sociological, descriptive account of emerging pluralist forms of transnational governance and an engagement with the normative stakes of these developments, as they have been addressed in political theory and philosophical discourse around ‘global governance’, ‘global constitutionalism’, and ‘cosmopolitanism’.

In the following pages, I will only attempt to sketch some of the main assumptions with which I operate and some of the areas of application I have been interested in. In other words, the present paper is as much an invitation into my kitchen to see my utensils, cutting boards and ingredients as it is an attempt to explain some of my menus. I will revisit a well-known story about the erosion of the welfare state under the conditions of globalization (II) before calling into question the alleged universality of that same account (III). I will then shift the focus of attention away from an institutionally oriented account of the Rule of Law to an admittedly more messy engagement with the interests and ‘stakes’ of its contested and disputed invocation (IV). Concluding the journey from the Rule of Law as a ‘victim of globalization’ through the demystification of this account as a parochial, Western story towards an excursion into the world of ‘real’ interest behind principles, rules and procedures, I will suggest a methodological approach through which it might be
possible to keep the historical (however parochial) stories in play without universalizing them and to draw on diverse sources and backgrounds in the categorization and classification of emerging transnational governance structures (V).

II. Provincializing the Rule of Law

Fast forward from 1723. A more recent date or, rather a period to remember is what John Ruggie depicted as ‘embedded liberalism’, the central features of which were a concert of relatively autonomous nation-states claiming their role in an effort of reconstruction and at the dawn of a rapidly expanding world economy at the end of the second world war, collectively committed to the maintenance of economic and political self-determination and the pursuit of free markets and a peaceful international order.⁹ Arguably, what had for some time been seen as a ‘golden age’ of the nation state, managing the fine balance between market liberalism and a certain level of social cohesion¹⁰, had to come to an end, once the relative stability-guarantee of the Bretton Woods world collapsed and former allies had entered a volatile and precarious world of ‘competition states’, anxious about their access to oil and other industry-driving resources – a constellation that politically became poignantly much more amplified by an ever-faster number of former colonies entering the world stage with long-frustrated and betrayed claims to equality.¹¹

Long before John Ruggie would turn into one of the most interesting and creative architects of the continuously evolving transnational order, especially with regard to the elaboration of norms that should govern transnational

business conduct more effectively\textsuperscript{12}, he had given voice to a situation that many in the West had come to see not only as the natural institutional consequence of WW II but also as an embodiment of the lessons learned from centuries of (Western) democratic, civil revolutions and breathtaking industrial growth, from an all-out, ‘great’ war (1914-1918) through the radicalization of politics in the interwar period, from fascism and Nazism in the 1930s and 1940s and the struggle over social compromise and reconstruction after 1945. The long nineteenth century saw itself succeeded, it seems, by a breathtakingly fast-moving twentieth century. What, then, of the law and of the Rule of Law, in particular?

In the late German sociologist, Niklas Luhmann’s lucid and provocative diction, the allegedly ‘formalist’ model, conceived under the label of the Rule of Law, had soon, towards the end of the 1800s, given way to a reactive ‘social state’, which would itself in the decades immediately following WW II, morph into a pro-active, responsive and ubiquitous ‘welfare state’. Luhmann had famously quipped that the welfare state had been installed on the premise and with the confidence that, in comparison to the its predecessor, the social state, which had engaged in tirelessly addressing and responding to social problems within the range of its ability and capacity, it – the welfare state, being eager and, in fact, fearless to embrace the needs of women, Tamils, and Panda Bears – it should self-confidently (if with considerable hubris) assume the stance of actually being able to ‘solve’ social problems.\textsuperscript{13}

Reemphasizing what Upham (and along with him, an entire host of legal sociologists and other critical legal scholars) had suggested with regard to the need to contextualize the Rule of Law, we are here confronted with sticky contentions about the connection between forms of law and states of societal

\textsuperscript{12} For a captivating, autobiographical account, see John G. Ruggie, Just Business. Multinational Corporations and Human Rights (2013).

change. We may then ask, which model of law can be said to have coincided, if not corresponded to the (obvious transformations of the) state during this breathless twentieth century. In volume 2 of his “Theory of Communicative Action”, the hyper-talented sociologist and political philosopher, Jürgen Habermas, sketched a four-phases model of rights formation and state change, according to which the 17th-18th century period of state formation eventually gave way, first to one of negative rights generation, as directed against the state and perceived against the background of a distinction between public and private spheres, and, secondly, to one of positive rights formation, now directed towards the state, no longer as means of defence and protection but as vehicles through which to garner participation, access, sustenance and support. In Habermas’ famous analysis, the welfare state – arguably constituting the fourth phase in this scenario – ends up overreaching and, through the – however well-intentioned dynamics of ‘juridification’ – overwhelming and hegemonically penetrating societal structures of ordering, difference and coordination.

Building on both Habermas and Teubner, and without claiming historical accuracy nor offering the below matrix with the intention of suggesting a progress narrative to depict the transformation of the state, we nevertheless want to use it as a means to illustrate the historically evolving intersection of ‘formalist’ and ‘substantive’ understandings of law in its relation to a changing state in particular context. Rather than arguing for a progression through which we see how the model in the respectively following column replaces and substitutes the preceding one (the opposite is true!), we intend to use the following illustration as a part of departure for much of the ensuing analysis.

that focuses on the constantly recurring contestation of a single-formula labelling of law, the state and the relation between the two.

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A number of considerations are offered at a time that is most often still associated with ‘globalization’ and held out to be the major cause of why the just alluded-to equilibrium, above all as regards the state’s ability to maintain its commitment to social equality and political inclusion, had to give way to a much more volatile and competitive arrangement. By ‘considerations’ we mean here competing approaches to make sense of the offered illustration, to offer a coherent account of what has or has not happened here. In that regard, the first consideration points to a relatively straight-forward, if not simultaneously contested narrative of the state’s transformation ‘from the rule of law through the welfare state on towards different forms of post-1989 "enabling", “supervision” and “moderating” forms of the state, operating against the background of their own besieged and embattled sovereignty amidst competitive global markets as a success story – at least in part. The account is one of success, because the relationship between the state and law amounted to a considerable achievement in terms of consolidated and legitimate political

16 Amidst a host of relevant literature, see, above all, the excellent introduction of the problems as well as the shortcomings of existing conceptual and theoretical approaches by David Held/Anthony McGrew (Ed.), The Global Transformations Reader. An Introduction to the Globalization Debate (2000), 2nd ed., 2003.

ordering based on democratic participation and representation, social inclusion and overall rising levels of prosperity – with the state playing an active part in the negotiation of interests among parties of unequal footing in a context of changing institutional dynamics, domestically and – increasingly – globally.\textsuperscript{18} This story remains a success story even in light of the changes brought about by globalization, because the institutional and normative heritage is considered a hugely important legacy, which offers significant guidance even in a state of becoming a piece of globalization’s collateral damage. And so, despite the numerous challenges that arise for state-led social and political cohesion in the ‘postnational constellation’\textsuperscript{19}, the story is a hopeful one because it records and upholds the historically progressive sophistication of democratic, socially and economically responsible governance. Compared to those achievements, the narrative might offer enough of a momentum to confront the changes depicted in the third column as manageable.

The second observation is, in some ways, a variation of the first in that it turns an intuitive endorsement of the depicted changes since the Rule of Law into a resource kit with a clear applicatory impetus. As such, it is equally powerful in its assertion of ‘learned lessons’ which are now, however, re-envisioned as potential ‘export’ opportunities for (domestic) Rule of Law elements onto the global governance arena. This consideration of the matrix, then, seeks to build on and take forward the achievements from the rule of law and the welfare state into the world depicted in the third column – through an encompassing inclusion of ‘affected’ stakeholders and through the means of elaborating sound and reliable rules of will formation, deliberation and interaction on a

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global scale. Support for this framing story come from different, even quite diverse accounts, given that the interpretation of state change could lend itself to the extraction of “tools” for global governance conceptualizations, based either on purely administrative, almost technical considerations, including, at minimum, perhaps a separation of powers and different, either rudimentary or sophisticated procedural standards such as due process\textsuperscript{20}, access to justice\textsuperscript{21}, accountability or transparency\textsuperscript{22}, on revisiting the Rule of Law’s (Western) life as an embodiment of a normative commitment to a concrete institutional constellation serving particular normative ends.\textsuperscript{23} Specific, but arguably more ambitiously formulated elements, which could be repackaged for global travel, might include the idea of a law-making structure based on \textit{democratic} representation and even a sense of societal commitment to the pursuit of political inclusiveness.\textsuperscript{24} It is obvious in those circumstances that a revisiting of the (Western) welfare state’s trials and tribulations is seen as a crucial backdrop for efforts in political and social theory to continue the welfare state’s normative mission – on a different playing field.\textsuperscript{25}

A third consideration or framing narrative regarding the Rule of Law, the social/welfare state and its global transformation is, again, somewhat related to the two preceding ones, only that it is even more outspoken in its endorsement

\textsuperscript{21} An impressive comparative socio-legal analysis is offered by the contributors to Daniel Bonilla Maldonado (Ed.), \textit{Constitutionalism of the Global South}, 2013.
of what it thinks has to be seen as the historical, political and social gains of
the depicted development. It is here where we see how stories of how the Rule
of Law underwent a crucial development from a ‘formalist’ to a ‘substantive’
concept are taking a particular interpretation of what ‘happened’ as a blueprint – but not only for what is at risk of being lost but what ought to be
reconstituted and enabled on a global level, barring the continuation of
‘abnormal justice’ outside the nation state.\(^{26}\) Similarly minded endorsements of
the normative legacies of the Western welfare state and its law give rise to
different iterations of *constitutionalism* concepts on a global scale – which
meet, unsurprisingly, with considerable push-back as to the institutional and
normative absence of reliable and effective global governance institutions that
could contribute to the development of such an ambitious architecture.\(^{27}\)

Inherent to such accounts, irrespective of their enthusiasm or their skepticism
towards a global re-enactment of the (Western) welfare state’s normative
programme (and some of its institutional features), is the constantly recurring
debate over the ‘nature’ of the Rule of Law. By that, however, the debating
factions mean the distinction between allegedly ‘formal’, ‘thin’ and
‘substantive’, or ‘thick’ conceptions of the Rule of Law. In fact, this occurs
despite the fact that the ‘pitfalls’ which are inevitable with any such attempt at
delineating ‘formal’ versus ‘substantive’, ‘technical’ versus ‘normative’,
‘negative’ versus ‘positive’ versions of the Rule of Law are only too well known
and have been exhaustingly exercised.\(^{28}\) In fact, the pitfalls of trying to come
down on any side of these distinctions come up in just about every invocation
or contestation of the principle, regardless, it seems, of the context in which

\(^{27}\) Anne Peters, *The Merits of Global Constitutionalism*, 16 Indiana Journal of Global Legal
Studies 397 (2009); Martin Loughlin, *In Defence of Staatslehre*, 48 Der Staat 1 (2009); Martin
Loughlin, *What is Constitutionalization?*, in: The Twilight of Constitutionalism? 47
(Dobner/Loughlin Ed. 2010).
\(^{28}\) See Raz’ poignant engagement with Hayek’s scathing analysis: Joseph Raz, *The Rule of Law
this contestation occurs. Why, then, does the circus go on? A possible reason might be the embeddedness of these debates in a quite confined reference system, where it seen as principally possible to rebuke or even ridiculize Hayek’s aggressive rejection of any normative underpinning of the Rule of Law on the basis that such a dispute is really only polemical and that the ‘good’ may prevail, if not today, then surely at some later stage. Anyone having dipped even a little into the large-scale development projects around the World Bank, US Aid and other major development agents today, will take such ‘polemics’ in fact very seriously, as – to be sure – they powerfully unmask both the parochialism of any kind of universalization of the Western welfare state’s achievements and, closely connected hereto, the immense naivety regarding the transplantability of learned domestic lessons for the world ‘out there’. To what degree there is a problem of considerable innocence operating in the context becomes clear, when we contrast the preceding three considerations with an internal account on the one hand and an external one, on the other.

The internal account, offered here as consideration number 4 critically engages the neat account of the progression of a formally conceived Rule of Law to a welfare state that is – according to Habermas – eventually “exhausted”, both financially and normatively. This critique posits that the welfare state’s problem with the ‘competitive’ as well as increasingly differentiated state of the 1970s and 1980s has much deeper roots, namely in law’s particular and in fact

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30 For a taste, see Friedrich A. Hayek, The Road to Serfdom (1944), ch. V, “Planning and Democracy”.


narrow position in a complex system of societal rationalities.\textsuperscript{33} While sharing
general sympathies for the open engagement among critical social theorists of
the Frankfurt School tradition with sociological analysis pertaining to the
advanced degree of societal differentiation\textsuperscript{34}, Teubner and others rejected the
normative impetus with which concepts such as democratic deliberation as well
as variations of ‘responsive law’\textsuperscript{35} held on to an idea of law’s ability to
cohерently govern social affairs in the name of certain normative
commitments.\textsuperscript{36} Teubner’s rejection of this approach would certainly entail
significant frictions in relation to those legal and sociological scholars who – in
one way or the other – had hoped to be able to continue the project of a
progressively minded concept of law beyond the deep transformation, if not the
demise of the welfare state.\textsuperscript{37}

To be sure, the search for the ‘politics’ in this application of systems theory is
‘still on’, so to say, with different factions of critical theory and sociological
jurisprudence (e.g. R.Banakar, R.Cotterrell) as well as Marxist social theory
(E.Christodoulidis; R.Dukes) besieging the concept of ‘society as a complex
system of coded communications’ to reveal the locus of political agency.
Meanwhile, Teubner and his followers appear to be going back and forth


\textsuperscript{36} Reza Banakar, \textit{Law and Regulation in Late Modernity}, University of Westminster School of Law Research Paper No. 13-02, available at:http://ssrn.com/abstract=2229247 (2013), at 9: “In short, the apparent solidity and timeless appearance of modernity offered an ostensibly durable foundation for building relationships based on trust, certitude and stability, which in turn provided a rational basis for social engineering and reform.”

between providing sobering examples of global functional differentiation in an attempt to show the futility of any all-encompassing theory38, let alone a normative one, and occasional admittances of what could amount to anxieties regarding the possibility that there is nothing ‘there’, in the end.39

Yet, there is another consideration caught up in this internal critique of the previous accounts, which framed the evolution of the Rule of law variably as stories of success, toolkit or progress. This critique was raised by Saskia Sassen in a number of important works and echoes in some ways the system theorists’ accounts of law’s precarious stance in a hyper-differentiated society. Sassen aimed at reversing the theory according to which globalization had victimized nation states by forcing them into handmaidens of global economic integration, robbing them of their regulatory prerogative and political agency. Instead, she contended that states had always retained important measures of agency and thus remained, in fact, the places where globalization ‘happened’.40 This critique has been immensely influential in that it helped keeping political analysis present in what would soon become a very lively and no less complex series of theoretical interventions to adequately capture the nature of globalization’s ‘impact’ on the nation state and of the DNA of the evolving transnational regulatory landscape.

III. The Plurality of the Rules of Laws

Where does this leave us? As mentioned, the first three accounts bear important insights into the ways in which narratives of state change underlie and in different ways may shape emerging global constitutionalism and global governance accounts. At the same time, both the skepticism vis-à-vis the ideological but also the conceptual blind spots of these narratives, especially with regard to the implicit claims to universality of the depicted developments as well as to the potential transplantability of core concepts of the Rule of Law to ‘developing’ countries, have begun to cast the accounts rendered thus far in a considerably dimmer light. That is even more so the case, as we move to the fifth and last consideration of the Rule of Law account in historical-conceptual perspective. That critique, en brêf, rejects the historical progression implied in the offered story, as well as it underlying claim to universality and, for sure, its self-portrayal as readily-available toolbox for the various governance woes plaguing developing countries, post-conflict societies and ‘failed’ states around the world. This critique, which emerges out of a wide array of critical theory41, post-colonial studies42 and third world approaches to international law43, posits the self-confident rendering of the Rule-of-Law account depicted above as an impressive illustration of benign ignorance and even embarrassment, once we take an honest look at the extreme mix of parochialism and arrogance which appears to underlie it.

In response, post-colonial scholars and, among them, TWAIL and other critical jurists, have been hard at work at laying bare the historical trajectories of

patterns of discrimination, subordination and ‘normalisation’ of the exception.\textsuperscript{44} Finding poignant examples practically ‘everywhere’, such efforts have been directed towards a critique of so-called ‘humanitarian interventions’\textsuperscript{45}, the rhetorically entangled and institutionally immensely powerful ‘war against terror’\textsuperscript{46} as well as the flagrant global disparities in spite of universal acclaims to the principle of sovereign equality.\textsuperscript{47} As with other innovative theoretical advances, TWAIL’s exact starting point is as elusive as the confines or boundaries of the project itself. Evolving as an internal critique to universalist stances in public international law, human rights law or the still dominant development concepts in association with ‘promoting the Rule of Law’ (Carnegie), TWAIL offers its greatest potential as a theoretically rigorous and empirically based undertaking that is both scholarly and activist, historically informed and at the same time not shying away from concrete political intervention. Even more remarkably then does it continue to be absent from most regular international law debates, let alone classroom curricula.

Despite its fluid centre\textsuperscript{48}, TWAIL’s contribution to a provincialization of the Western narrative of the rise and subsequent fall of the democratic welfare state cannot be underestimated. The skewed nature of the account becomes only too obvious, once it is contrasted with parallel accounts of the passing of

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\item \textsuperscript{44} See the seminal work by Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2005). See also the impressive manifesto offered by Obiora Chinedu Okafor, \textit{Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?}, 10 International Community Law Review 371 (2008).
\item \textsuperscript{47} M Sornarajah, Power and Justice:Third World Resistance in International Law, 10 Singapore Yearbook of International Law 19 (2006); Jothie Rajah, The Gulf Between Promise and Claim: Understanding International Law’s Failure to Decolonise, 3 Transnational Legal Theory 285 (2012).
\item \textsuperscript{48} Okafor, \textit{supra}. Gathii, \textit{supra}.
\end{itemize}
(international) time\(^49\), or with an expression of alienation or frustration regarding the alleged universality of ordering models based on the distinction between public and private, the state and the market etc.\(^{50}\) It is then, that we (in the West) begin to catch glimpses of what the world might actually looks like.

But, what comes \textit{after} the globalization account, at the end of which we were supposed to accept a narrative of loss and embrace every attempt to rescue and rebuild? I can only point here into the direction in which I think the story will have to go. In light of the findings so far, we must concern ourselves with an infinitely more complex and pluralist story, which engages questions of social, economic, political and legal order, but does so without choosing as a backdrop the allegedly sacrosanct story of the Rule of Law’s adventurous time travel. Inevitably, such a story must be one about agency and the conditions of its operation. But, what’s the form of this story, and from which angle, and from whose perspective can it be told? And, how?

\section*{IV. How Expectations create, enact and fill Spaces}

To illustrate these challenges perhaps more clearly, I want to suggest that many of today’s dominant narratives as they emanate from public and public international law discourses in the West about the state, globalization and the Rule of Law play a crucial role in creating their own reference system. In other words, certain narratives have contributed to the design and furnishing of a space, which has become material in the way that it governs future conversations about ends and means (of legal ordering), and its timelines. To be sure, such discursively constructed spaces furnish iterations of legal order in general or of the Rule of Law in particular with elements of both legality and

\footnote{49 Sundhya Pahuja, \textit{Laws of encounter: a jurisdictional account of international law}, 1 London Review of International Law 63 (2013).}

legitimacy, which explains why such spaces are to a large degree immune against any internal critique. We will see this when we turn our attention to the rhetoric informing the debate over the use of force in the face of a perceived humanitarian crisis (and, ensuing, a global terrorist threat), the constitutionalism versus administration rhetoric that drives much of today’s engagement by lawyers with the conundrum of ‘global governance’ and, lastly, the rhetoric around the need for global markets to be “adequately governed”, in other words to remain unrestrained by overzealous state regulation, seen as hindering global flows of people, goods, services and money – arguably essential to the ‘survival’ of the world economy.

In order to prepare a possible deconstruction of these rhetoric spaces of meaning – ‘humanitarian intervention’ (1), ‘global constitutionalism and global administrative law’ (2) and ‘lex mercatoria’ (3), we need to first clarify the starting points as well as the anchors of such a deconstruction. It should be obvious by now that the identified three spaces draw their oxygen from the untouched state-trajectories outlined above. In other words, each of the here focused-on three rhetorical spaces exist against the backdrop of the previous four state-and-globalization narratives going unchallenged. In response, the proposal here is the following: If there is to be any chance at all for an effective deconstruction of the global world order imaginations that are proffered through these three spaces, we need to provincialize the history and trajectory of the Western state and its law/s by decentering and relativizing the existing accounts. One way of doing that might be to pay particular attention to what can be conceived as the significance of ‘our time’, directing, in other words, our interest to the moments and the places in which questions about the evolving legal-political order are being asked so that, in turn, the bias of chosen perspectives, alleged landmark moments and key ‘events’ can be made visible.51

51 For a brilliant exposition of such deconstruction, see the contributions to Fleur Johns/Richard Joyce/Sundhya Pahuja (Ed.), Events: The Force of International Law, 2010. See also the essays by Issa Shivji, Where is Uhuru? Reflections on the Struggle for Democracy in Africa (2009).
The first step in this regard is an illumination of context, something that has an impressively long tradition and is testified to with encouraging intensity today in fields such as history\textsuperscript{52} and political theory\textsuperscript{53}, but continues to enjoy only marginal status in law and legal scholarship. With regard to the usual stories about the Rule of Law’s trajectory towards a welfare state being torn apart by the forces of economic globalization, the particularity of perspective becomes quite apparent once we place this trajectory in larger geopolitical context, allowing the internal story of Western state consolidation, industrial revolutions, economic growth and the ‘rights revolution’\textsuperscript{54} to become an intimate dimension of the West’s global history\textsuperscript{55}, something that E.P. Thompson had of course already insisted on.

Contextualising narratives allows for a hopefully better understanding of where certain assertions are grounded. Against the background of alternative timelines and perspectives of story-telling, it becomes apparent that the usually offered narratives of the relationship between the state and law are only ‘true’ \textit{as long as} we accept the following premises:

1. The 20\textsuperscript{th} century history of the state is correctly depicted as a progression of a formalist rule of law to a jurisgenerative, substantive-law issuing social and welfare state – prior to its demise in a competitive global market. In other words, this development can be described as one “\textit{from government to governance}”.

\textsuperscript{53} David Armitage, Foundations of Modern International Thought (2012).
2. The nation-state’s fate under the conditions of globalization is one of erosion and of ‘de-juridification’.

3. There is a logical historical progression of modern state formation, consolidation of sovereignty, social modernisation, emancipation of formerly unfree constituencies, juridification of all areas of societal activity (for better or worse), globalisation of economic, cultural and social relations, the ‘end of history’ (1989 ff) and, recently, “9/11” as ‘exception’.

4. As far as non-Western populations are concerned, their history is appropriately captured in an account that traces the accession of former colonised peoples and nations to international statehood, governed by the principle of sovereign equality under the UN Charter.

But, what, if these premises are being challenged as resulting out of a very particular, biased and skewed way of historical narrative? How should we engage in critically revisiting the ways in which we used to narrate the story? Revealing a judge’s bias (or, what he might have had for breakfast) has thus far – on its own – never brought about a change in the form of adjudication. So, how can we even hope to place dominant and alternative narratives in relation to each other? How can we place them alongside each other as alternative and co-existing, instead of in competition, domination or suppression, but in dialogue?

A possible approach might be in identifying and highlighting not what keeps these narratives apart but what they share. In the context of investigating the meaning and operation of the Rule of Law, we may ask about the relationship between ‘legality’ and ‘legitimacy’ which might, in all different manner, terminology and association, nevertheless be inherent to both dominant and alternative accounts. Given the persuasive nature of the legality/legitimacy
language that informs each of the three rhetorical space constructions mentioned before, a closer look at how this achieved is warranted.

**Space 1:** It is created and constituted by cutting through limitless, unbounded spheres that are depicted as the real world. In this world, because we have before been living in a dream and now need to wake up, everything is possible, you (who? someone? anyone?) only need to ask.\(^{56}\)

This space is, for example, that which is constituted in responding to a crisis. It is a space where Neo, quickly overcoming his shock, notes: “We need guns, lots of them.” **Trinity** will reply, that “no one has ever tried this before.” We all know **Neo**’s answer: “That’s why it’s going to work.” This constellation is a tragic illustration of the Kosovo ‘crisis’ of international law, of the stretching of law’s imagination in the name of legitimacy and of law’s pushing back in the name of legality.\(^{57}\) Thus, the ground had been laid for what Koskenniemi aptly coined international law’s ‘turn to ethics’\(^{58}\), what Anne Orford brilliantly deconstructed as international law’s normalization of its exception\(^{59}\) and what would eventually provide much of the slippery justificatory basis for repeated invocations of Kosovo as ‘precedent’, whether in Iraq\(^{60}\), Syria\(^{61}\) or elsewhere. The rhetorical avenues opened for international law’s normalization, the embrace of a ‘war against terror’ within the confines of international law would eventually not seem such a stretch anymore, only a few years later.\(^{62}\)

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\(^{56}\) [http://www.youtube.com/watch?v=AGZiLMGdCE0](http://www.youtube.com/watch?v=AGZiLMGdCE0)


\(^{58}\) Koskenniemi 2000, *supra*.

\(^{59}\) Orford 1999, *supra*.


bigger still. As ‘law reform’ and ‘assistance’ crusades are on their way, growing
day by day, the disconnect between law’s legality and its imagined legitimacy,
invoked by those who can, widens. Chances for a true provincialization of the
rhetoric informing those efforts continue to be slim. Invocations of Rule of Law
promotions in either ‘developed’ or ‘developing’ countries aren’t nor could they
be ‘objective’ accounts of states of being. Instead, all efforts to track, measure
or account for the Rule of Law, historically, in comparison or along seemingly
objective or merely technical yardsticks, are inevitably entangled in
constructions of normative models of social order. Again, this is probably a very
obvious observation, but one that merits being retained, particularly where
assertions of the Rule of Law are embedded in narratives of ‘growth’,
‘modernization’, ‘development’, or ‘legal reform’. At a time, where public
lawyers continue to mull over the implications of a transnational version of
‘government without governance’, an abundance of comprehensive “assistance”
programmes has been under way, invoking just about every challenge of liberal
rights theory – now poignantly re-emerging in a context of ‘intervention’63, legal
‘aid’64, transitional justice and development.65

Space 2: Global Constitutionalism and, if that means being ‘immodest’66, well,
global administrative law might just well get us there, as well. But, where? And,
in expectation of what?67 Constitutionalisation, administration of what? There

Stephen Humphreys, Theatre of the Rule of Law. Transnational Legal Intervention in Theory and
Practice (2010).
64 Kerry Rittich, The Future of Law and Development: Second Generation Reforms and the
65 Rama Mani, Dilemmas of Expanding Transitional Justice, or Forging the Nexus between
66 Nico Krisch, Global Administrative Law and the Constitutional Ambition, LSE Law, Society and
Economy Working Papers 10/2009, reprinted in Dobner/Loughlin eds., The Twilight of
67 http://www.youtube.com/watch?v=26lhb05cV6g
might be more to say but who knows, especially as “GC” appears to have become by now mostly an internal debate amongst some international law scholars and even fewer political philosophers, while “GAL” might just about be hanging on for a while longer, largely owing to the imaginative creation by its proponents of arguably sophisticated procedural devices and measurements.

**Space 3:** The last rhetorical realm we look at is that of the infamous lex mercatoria, an allegedly autonomous legal order in its own right and, arguably, bereft of any politics. A pure heaven (but on land and sea) of global commercial exchange, governed only by those rules accepted by those running the show. Even against the background of tenacious, even tedious historical accounting of the degree of state agency in this entire circus, the relevant parties could not seem to care less, whether it is in light of invocations of public law and accountability concerns or claims pertaining to private law’s inherent public protective and ultimately cosmopolitan dimensions. And even the global financial crisis appears not to have put a dent into what continues to be, after all, just a big gamble, in Cincinnati and elsewhere.

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73 [http://www.youtube.com/watch?v=UI6pSkI5s_tC](http://www.youtube.com/watch?v=UI6pSkI5s_tC). Half seriously, but half seriously, at least, compare Keynes (“But this long run is a misleading guide to current affairs.” [1923]) to Shiller (“Ironically, better financial instruments, not less activity in finance, is what we need to reduce the probability of financial crises in the future.” [2012]).
Despite their apparent differences, there is something that cuts across our exposition of these spaces. Investigations into the confines, jurisdictions and demarcations of such spaces, for example, by those for or against ‘humanitarian intervention’, or those enthusiastic or horrified over a ‘war against terror’, as well as those intrigued or bored by invocations of ‘global constitutionalism’ and, lastly those who think they can domesticate global capitalism, are mostly driven by a concern with the controlling agency, in our cases with the laws (or, conventions, standards, agreements) which govern a particular realm, a set of human interactions and institutional constellations. Our brief look at three such scenarios shows that the beauty continues to lie in the eyes of the beholder – and that is not just anyone.

V. Methodological Consequences

What a nice mess this all is, no matter from which perspective we choose to look at it. And still, much of the prevailing anxiety seems to result from a certain starting presumption that somewhere and somehow it could all be organized differently. That is, of course, a very public law perspective. This observation, however, is not just of idiosyncratic relevance, but one with considerable critical potential. As we have seen much of what governs is an almost pathological belief in the state as guarantor of (both negative and positive) rights, a facilitator of democratic public discourse, a schizophrenic protector of free markets and social welfare. It is on the rhetorical battleground of the Rule of Law that the competing contentions of law’s role vis-à-vis society (encompassing individual rights bearers such as rich land owners or weak bargaining parties, transnational corporations, religious associations as well as divorcees, prison inmates, welfare recipients, and the terminally ill with or without a death-wish) become entangled and the endless subject of negotiation. But, as long as the invocation of the concept of the Rule of Law retains even the slightest hint of a can-all, do-all institutional framework, there is in fact little
hope that we may ever gain an even remotely adequate understanding of ‘laws and societies in global contexts’. As long as we conceive of the Rule of Law automatically (rather than ironically, historically self-consciously and critically) as an institutionally evolved public law arrangement with particular institutional, procedural and normative features, many of today’s transnational law challenges – from climate change, human trafficking, workers’ rights as human rights to corporate, commercial and contract governance standards – will remain outside the ambit of our ordinary engagement with law. We will not be able to look at those regulatory challenges through the lens of legality/legitimacy as long as the conception of the Rule of Law as institutionalized, authoritative institutional arrangement to generate, enforce and adjudicate law dominates our imagination.

A. Embracing the Political Economy of Legal Ordering

Let us now try to draw some practical lessons from the work thus far. One could be that we ought to reverse or switch the perspective away from imagining (the rule of) law as an institutionalized form with a particular historical trajectory and normative aspiration. Such a perspective switch can be achieved by radically moving away from a public law conception of the Rule of Law. But, what happens if you take the Rule of Law out of the hands of public lawyers? You are bound to find a much more sober, even hands-on account of the plurality and diversity of worldwide existing order-by-rules (law, non-law, not-yet law) systems which each require a close, contextual scrutiny to be properly assessed. Such an approach might take you away from the apparent safeguard

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76 Sally Falk Moore, Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Resources, in: Law and the Social Sciences 11 (Lipson/Wheeler Ed. 1986), 19ff, arguing for a distinctly legal-sociological analysis not only of the pluralism of legal system among states, but within states themselves, as well as for a
of a model of order and its (historically evolved, fought over and consolidated) institutional architecture and its (eternally contested and tirelessly disputed) normative underpinnings. In fact, such a socio-legal and legal pluralist engagement with and in the world reveals several surprising insights. Above all, what becomes apparent is a (potentially rather) unsettling continuity between accounts of ‘fragmentation’ of legal orders promising certainty and predictability which are associated with globalization on the one hand and an in fact quite longstanding critical engagement with the relationship of law to society. What becomes apparent as well, when looking at the way in which stories of a large-scale, globalization-induced loss of coherence, unity and universality of the Rule of Law are being told, are the parallels between such discursive framings of the interests at stake both in the domestic and the international context. In light of the previous observations it is of course trite to remind us of the fact, that stories of both success or failure are always told from a particular perspective and against the background of a specific, even if only implicit, understanding of what mattered, and what was at stake and for whom.

All this suggests, at least, that there is something very wrong with just about any attempt to neatly separate the spheres of the Rule of Law ‘before’ and ‘after’ or, under the conditions of globalization. There is no fresh starting point, there are only competing justifications of why we, or anyone, should care. Instead, we are thrown back onto ourselves and forced to appreciate the very ways in which we conceive of law and its relation to social ordering. Once we adopt a contextual approach, narratives of ‘before’ and ‘after’ likely give way to decentering of a Eurocentrist categorization of legal systems and their attributes (ibid., 24ff, 29ff).


more adequate analyses of the different, intersecting forms of institutional and normative ordering which we can find in different places at different times. In this vein, Frank Upham emphasized “...that law is deeply contextual and that it cannot be detached from its social and political environment. This is just as true in developed countries as it in developing countries, but this truth is absent from the new rule-of-law orthodoxy.”80 Upham’s suggestion has significant consequences for the way in which we treat existing accounts of what has ‘worked’ and what has not. Because it turns out that, in a context of extensive human resources as well as massive funds still being poured into development projects worldwide, the way in which we manage to draw connections between domestically focused investigations into the changes to the Rule of Law and the transnational employment of the concept in hundreds of development projects worldwide becomes crucial.

This can be illustrated, very briefly, with regard to a regulatory area, which is often enough portrayed as being essential to market functioning and thus arguably immune against normative critique, unless one is willing to reject principles of private property and efficient markets altogether. At the same time, taking a look at this area – company law and corporate governance – through the lens of political economy analysis, it becomes obvious how just about any reform issue in this area is intimately tied to particular, yet never verbalized, understandings of the rule of law. But, to begin with, political economy does not come easy to most lawyers today. Trained in either the civil or the common law tradition, both law school graduates will likely have spent the majority of their time studying rules and principles, with cases offering less a window on a particular part of historical, geographical, political, socio-economic reality than a repository of evolving, affirmed or rejected rules – to be regurgitated at the sound of a bell. It comes as little surprise then, that a

80 Frank Upham, Mythmaking in the Rule-of-Law Orthodoxy, in: Promoting the Rule of Law Abroad 75 (Carothers Ed. 2006), at 75. And, id., at 76: “Law, in other words, is seen as technology when it should be seen as sociology or politics.”
conceptual approach that scholars of international relations, social and economic historians as well as certain political scientists have long been quite familiar with, has much less currency among lawyers. These have by comparison for the longest time seemed quite uninterested in immersing themselves too far into the sticky analysis of both the domestic and transnational social-political, socio-economic as well as institutional dynamics that constitute the stuff which makes “laws” function or fail. A telling example, as mentioned, are the tremendous shifts in corporate governance rule-making in the 1990s and 2000s, that corporate lawyers managed to fight over on almost purely theoretical and polemical grounds. Too occupied with the ideological dispute over competing ‘theories of the firm’ and the question whether the world (which world, exactly?) was (supposed to be), in fact, moving towards a homogenous shareholder value concept81, the detailed, historically informed and empirically sound analysis of on-the-ground interest coalitions and rule-making constellations around business associations, banks, unions and governments82 was taken up only by few (company) lawyers in an attempt to complexify the ‘convergence’ narrative unfolding in the wake of the fall of the Soviet block.83

With its focus on board structure as a key component of corporate governance, the ‘convergence vs. divergence’ debate\textsuperscript{84} turned out to be slightly ‘off target’, when the 2007-2009 global financial crisis illustrated, with devastating force, the primacy of finance over the institutional structure of companies. Not so much how companies were governed did seem to have played the major role in the run-up to the crisis (and, since), but what they and the markets they operated in could be capable of. As the focus shifted away from companies’ legal-institutional make-up to an almost exclusive scrutiny of the functioning forms of global financial markets, important insights were gained, other no less important ones were lost, seemingly forever. The ongoing attempts to come up with an effective way to both regulate and facilitate the self-regulation of border-crossing securities markets\textsuperscript{85} has quite effectively decentralised the attention of both scholars and policy makers away from companies to markets. This has significant consequences for an understanding of the political economy in which companies exist. Given that they are perceived mostly now as channeling entities of capital movements with a ridiculously far-advanced disconnect between the moneys moved and the underlying real-economy assets, goods and exchanges\textsuperscript{86}, other dimensions of their ‘reality’ such as employees and the companies’ fulfilment of its social responsibilities towards them, the companies’ place of incorporation and operation, its embeddedness in (often different) local communities and political economies are moving out of sight. Anyone teaching corporate law, business associations, company law in a law school today knows of this odd impression that what one has been speaking about for the last semester does not seem to play that much of a role

\textsuperscript{84} Ronald J. Gilson, Globalizing Corporate Governance: Convergence of Form or Function?, 49 Am. J. Comp. L. 329 (2001); Eddy Wymeersch, Convergence or Divergence in Corporate Governance Patterns in Western Europe?, in: Corporate Governance Regimes. Convergence and Diversity 230 (McCahey/Moerland/Raaijmakers/Renneborg Ed. 2002).


anymore in an environment where a large majority of shareholders is not so much aware anymore of the concrete industry the company operates in than in the place it succeeds or fails to hold in particular, nervous markets.

Why does this matter for a discussion of the Rule of Law? As emphasised at various instances so far, the assertion of both the needs of a ‘robust’ rule of law, stripped of all technicalities, as Hayek remarked, as well as of the challenges that might impede its achievement occurs – for the most part – in an abstract, ideological space. The Rule of Law is associated with processes and rights, with principles and values, and most often, these can only be asserted in a heaven of pure legal concepts.\(^{87}\) What is wanting, at least within the core confines of lawyers’ day-in, day-out, teaching and research business, is the engagement with the endlessly messy, inchoate and inconsistent operation of norms, institutions, governance patterns – ‘after’\(^{88}\) and ‘before government’\(^{89}\) on the ground. Despite lawyers’ quotidian interaction with the coincidental, accidental and unpredictable, there still seems to be an unerring belief in the law somehow being ‘above’ it all, supplying us with guidance, refuge and the promise that in the future all can be good.

Similarly, the corporate governance debate, while occurring on a highly ideological champs de bataille, still bore the possibility of looking at the facts, which in the case of the debate over convergence and divergence implied (for some scholars, at least) to really consider the places, functions and operations of companies in very concrete political economy settings. While this opportunity to apply a sound political economy analysis to the fast-changing landscape of corporations and the law that governed them was not taken up by many

\(^{87}\) See the famous engagement with Ihering by Felix Cohen, Transcendental Nonsense and the Functional Approach, 35 Columbia Law Review 809 (1935).
company lawyers, the material itself was all right there – practically in front of them. Political economists, economic sociologists, even geographers, anthropologists and comparative legal sociologists had been hard at work to illustrate the “lives of the corporation”\textsuperscript{90}, thus provide ample substance to decentre and de-polemicise the convergence vs. divergence debate.

There is little, at this point in time, that suggests, in fact, that we could see any time soon a revival of interest in corporate governance theory that could be comparable to that of the late 1990s and early 2000s.\textsuperscript{91} While that debate petered onwards for a while with a focus on issues such as executive compensation, ‘say on pay’ as well as director vs. shareholder primacy, corporate governance today is not where the action is, if by action we mean hard-hitting analysis and critique of regulatory development in a crucial governance area with transnational impact. But, that is where the Rule of Law must be searched for today.

It is then unsurprising that the questions pertaining to input- and output legitimacy\textsuperscript{92}, predictability and accountability are no longer raised in connection with the mushrooming corporate governance commissions all over the world\textsuperscript{93}, but are being pursued in the context of a poly-centric, public and private,


\textsuperscript{92} Fritz W. Scharpf, \textit{Governing Europe. Effective and Democratic?} (1999), describing ‘input-oriented’ as ‘governing by the people’, and ‘output-oriented’ legitimacy as ‘governing for the people’.

national and transnational financial market governance conundrum. The operation, goals and impact of global banking regulation is under scrutiny, as are agents whose role in domestic and global governance seems as obvious as it appears intricate and problematic. But, this shift also means that corporate law continues, for the most part, as usual. Forever, it seems, untouched by ‘context’ or political economy, 98% of all law students take corporate law either as a core preparation for their career or as ‘necessary evil’ – in both cases, little else is achieved than the training of future lawyers in stereotypes and clichés, altogether with a blatant disconnect between the law being taught and the amazingly diverse and hybrid regulatory dynamics through which it actually evolves.

B. The Spaces of the Transnational Rules of Law

What then makes up the Rule of Law in a Global Context? How are we to imagine a transnational Rule of Law? The ‘space’ in which this transnational variation of Rule of Law analysis occurs is multilayered, it is a construct to the degree that its architects evoke a governable, confined realm of human agency, institutional dynamics and rule obedience. But, it is also a discursive space of contention over values and, in the background of such disputes, over the power structures that inform, sustain and control this space. Political scientists and

geographers\textsuperscript{99} alike criticize the ‘non-death’ of the neoliberal mantra that – seemingly unbroken since the ‘Roaring Nineties’\textsuperscript{100} continues to hold strong persuasive stance, while legal sociologists ponder over the strange mix of institutional ambiguity and concrete impact of transnational power.\textsuperscript{101}

Lawyers have a lot of catching up to do in their effort to adequately penetrate and theorise these evolving transnational regulatory structures. Clearly, an important step would be to critically reflect on the role that one’s own placement in either a ‘private’ or ‘public’ law universe is playing in the way we categorise and interpret transnational governance forms. With both international and domestic public lawyers-turned-global engaged in tireless and detail-rich analyses of iterations of ‘public authority’ on the one hand\textsuperscript{102}, and emerging forms of global administrative law structures, on the other\textsuperscript{103}, private lawyers need to move beyond Hayek, but also Fuller\textsuperscript{104}, in order to start asking (again\textsuperscript{105}) the hard questions as to who does what how and in whose interests. Maybe the regulatory aftermath of the global financial crisis and its continuing permutations can, for a little longer, still offer one of the much needed opportunities for a comprehensive political economy analysis of transnational

\textsuperscript{99} David Harvey, A Brief History of Neoliberalism (2007).
\textsuperscript{102} Armin Bogdandy/Philipp Dann/Matthias Goldmann, \textit{Developing the Publicness of Public International Law}, 9 German Law Journal 1375 (2008); Armin von Bogdandy/Ingo Venzke (Ed.), International judicial lawmaking on public authority and democratic legitimation in global governance, 2012.
\textsuperscript{104} Thomas Schultz, \textit{The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences}, 2 Journal of International Dispute Settlement 59 (2011).
financial law that takes the available historical factual accounts by finance experts\textsuperscript{106} and banking and securities law scholars\textsuperscript{107} as well as regulatory governance theorists\textsuperscript{108} seriously. Yet, this space is not one for the ‘specialists’ or ‘planners’ against whom Hayek displayed such abhorrence. It is also not a space that ought to be left to experts.\textsuperscript{109} If it is true that transnational regulatory spaces are construction sites of an emerging, however fragmented legal order, then we are in need of a more sophisticated methodological approach. By showing continuities between legal realist, anti-formalist and other alternative law critiques in the domestic context on the one hand and fragmentation anxieties in the global arena, we managed to emphasize the need to recognize law as always precarious, as always in danger of being hi-jacked, instrumentalized, silenced or perverted. If transnational regulatory spaces bear the mark of the absence of well-known (and often romanticized) institutional safeguards, then it appears obvious that neither a turning-away from the transnational law project nor its appropriation through domestic transplants are an option. Instead, what is needed are means of relating the domestic and the global by conceiving of transnational law not as a distinct legal field, but as a reflective framework to consider different, co-existing and intersecting models of normative ordering.

As argued elsewhere\textsuperscript{110}, and currently incorporated into the teaching curriculum of a new Transnational Law LL.M. pathway in London, the triad of A(ctors),


\textsuperscript{110} Peer Zumbansen, Lochner Disembedded: The Anxieties of Law in a Global Context, 20 Indiana Journal of Global Legal Studies 29 (2013); Peer Zumbansen, What lies Before, Behind and
N(orms) and P(rocesses) might offer possible translation and interaction categories to bridge different governance experiences and practices in a transnational context. The triad manages to both draw on and critically engage and provincialize the insights including the dominant and contesting narratives regarding success, progress, toolkit as well as parochialism from Western Rule of Law traditions in the light of a much wider recognition of authority-bearing norms. Complementing this dimension is a complexification of transnational regulatory spaces through law’s confrontation with other disciplines’ efforts of ‘world-making’. Building on long-standing advances in socio-legal studies, including the most welcome revival of a transnationally minded economic sociology of law\footnote{See, e.g., Prabha Kotiswaran, \textit{Do Feminists Need an Economic Sociology of Law?}, 40 Journal of Law and Society 115 (2013), as well as the other contributions by Perry-Kessaris, Craven and others in the same symposium.} as well as drawing inspiration from historical and social theory research into transnational histories, lawyers are called upon to conceive of transnational regulatory spaces not as sites of emergency and ad-hoc regulation or ‘crisis management’, but as sites of interdisciplinary engagement and reflection. Through such an engagement, lawyers are likely to uncover the various political blind-spots and parochial associations of legal world construction as offered under the headings, for example, of GC or GAL. Inevitably, such an approach will shake up vocabularies, terminology and conceptual frameworks\footnote{Elizabeth Mertz/Jothie Rajah, \textit{Language-and-Law Scholarship: An Interdisciplinary Conversation and a Post-9/11 Example}, 10 Annual Review of Law and Social Sciences 9.1 (2014).}; and, at the same time, such engagement very likely cannot remain descriptive or analytical, but will have to get its hands ‘dirty’ in one way or the other.

What, then, is Transnational Law in relation to the ongoing search for a ‘new’, ‘global’ Rule of Law? Transnational Law is, we might say now, to a large degree an encounter of the familiar, but forgotten, or often not explicit, in unfamiliar,
seemingly new contexts. In those contexts, we revisit the omissions, the blind spots, the exclusions and silence/d voices, the failed protests and the aborted reforms. Half seriously, but that at least, legal positivism for our time must learn from and engage with a historically and geographically conscious pluralism – to be rightfully called legal positivism. For the time being, though, it seems that there is neither transnational law as ‘law’, nor legal positivism as ‘transnational legal positivism’. Instead, what we have is a candle burning on both ends. By critically reflecting on this our way of applying "what we know" (from domestic law, from our cases and our jurisprudence) to a “different”, “global” context, it becomes apparent that we are also calling into question this basis on which the application occurs. In that process, we likely grow insecure as to the solid foundations we are purportedly standing on, the norms, institutions, processes and actors but also the laws, principles and values we think we can rely on as the DNA of our legal system. And, then, to the degree that we let skepticism about the existing legal order’s firmness sneak in, are we pulling away the ladder on which we stand?

C. Dinner won’t be ready.

For the time being, then, we find ourselves in the grip of a growing fear of falling into an abyss of neo-liberal nightmares of market-made norms, voluntary and consumer-monitored compliance mechanisms, of soft law and codes, of strangely in-transparent but increasingly ubiquitous and influential expert committees and of just too much state-bashing in the name of an emerging autonomous legal order for world society. But, where to stop ? Is going "back" to the domestic world of the (established, practised and egalitarian) Rule of Law a serious option?

Would we really find it, waiting there for us – like Max finds his dinner when returning from where the Wild Things were?