TILBURG LAW REVIEW
Journal of International and European Law

Complex Networks and Normative Horizons in the Context of Legal Pluralism: Conceptualizing Legal Borderlands in Transnational Societies

EDITORIAL

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ubiquity press

ABSTRACT

This essay reflects on how we may conceive law, the non-legal, the illegal, the a-legal, and the legal borderlands. Our point of departure is the scholarship of Hans Lindahl and his study of a-legality as a challenge of the legal boundaries. We consider that some of these original ideas may be complemented by network studies and hermeneutics. Law and legal borderlands are constituted by a shared network of meanings that circulate within civil society and the state. Individuals develop a pre-comprehension of a case and project a potential interpretative horizon towards the future. Inspired by the works of Annelise Riles and Bruno Latour, our understanding of a normative horizon emerges as a view shaped by the dynamic interactions of legal actors within the legal network with their audience constituted by the networked community of legal actors. Legal borderlands become even more complex due to normative pluralism, which implies the existence of two or more legal systems or normative orders within the same social space. Legal pluralism may also emerge from non-state legal orders, like *lex informatica*, *lex sportiva*, or *lex mercatoria*. This essay explores also two conceptions of legal pluralism – Gunther Teubner's constitutional fragmentation and Marcelo Neves' transconstitutionalism.

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KEYWORDS:
Legal Borderlands; Legal Pluralism; Normative Horizons; Networks; Transnational Law

TO CITE THIS ARTICLE:
Pedro Rubim Borges Fortes, 'Complex Networks and Normative Horizons in the Context of Legal Pluralism: Conceptualizing Legal Borderlands in Transnational Societies' (2026) 31(3) Tilburg Law Review pp. 1–15. DOI: https://doi.org/10.5334/tilr.515

Tilburg Law Review
DOI: 10.5334/tilr.515

1. INTRODUCTION

Our essay on conceptualizing legal borderlands in transnational societies will focus on the permanent existential crisis of the concept of law. What is law? What isn't law? Our point of departure will be a review of the monumental scholarship of Hans Lindahl on the fault lines of globalization and the theorization of A-Legality. Professor Hans Lindahl is emeritus chair of philosophy of law at Tilburg University and holds the chair of global law at the Law School of the Queen Mary University of London. Hans Lindahl and I had the opportunity to discuss his work at the Legal Theory Seminar at the University of Frankfurt. His innovative theoretical ideas provided food for thought.

After reviewing his work, I will then present other ideas on how to conceptualize legal borderlands in transnational societies based on network studies and normative pluralism. For more than one decade now, I have been convening the stream at the Socio-Legal Studies Association (SLSA) in the United Kingdom '*Exploring Legal Borderlands: Empirical and Interdisciplinary Methods*'. We provide a platform for research that explores the uncertainties and interactivity of legal borderlands and provides a showcase of empirical and interdisciplinary methods of socio-legal research. In our exploration of legal borderlands, we consider the division between the formal and informal, law and non-law, and jurisdictional boundaries and recognize that legal borders are often not clearly defined or static.[1] Our panels normally include papers that examine social practices falling within grey areas, that trace the development of norms and concepts within or across legal borderlands, or which trace the movement of the borders themselves through social agency.

In this special issue, we would like to focus on the conceptualization of legal borderlands in transnational societies. Originally, concepts of law and legal phenomena were conceptualized for the national state and municipal legal systems, and the original conceptions, institutions, and ideas were extrapolated to the international arena. However, legal borderlands in transnational societies require a new conceptual toolbox and debates on the nature of law, the interaction between international actors, development of new conceptions and normative paradigms, analysis of the reciprocal cultural influence between global and local ideas, and reformulations of regulation and distributive social justice.

Part of this long debate includes the exploration of conceptual legal borderlands, that is, the examination of norms, institutions, and conventions which may be considered eventually legal and/or non-legal depending on context, circumstances, and intersubjective interpretation of the relevant actors in society. In his classical statement of the concept of law, Herbert Hart theorized the rule of recognition in legal municipal systems as a decisive element for the identification of law and the demarcation of the borderlands between law and non-law.[2] Nowadays, contemporary societies are changed, being globally integrated and having developed new technologies. As demonstrated by the scholarship of Hans Lindahl on the fault lines of globalization and the theorization of a-legality, new reflections on the conceptual legal borderlands in our global technological societies are required.[3]

Our special issue is formed by a list of contributions from our panels at the SLSA Conference, which include reflections on the conceptual clarification of international judicial dialogue; conceptual engineering in transnational anti-discrimination law; the European Court of Human Rights as a bordering actor; and migration control and administrative contestation of nationality.

2. A PHILOSOPHICAL REFLECTION ON LEGAL BORDERLANDS: HANS LINDAHL'S THEORY OF A-LEGALITY

Hans Lindahl theorized about a concept of a-legality identified as 'behaviour that calls into question the distinction between itself legality and illegality as drawn by a legal order in a

1 Pedro Rubim Borges Fortes and Ioannis Kampourakis, 'Exploring Legal Borderlands: Introducing the Theme' (2019) 5 Revista Estudos Institucionais 639.

2 HLA Hart, *The Concept of Law* (Clarendon Press 1961).

3 Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (OUP 2013).

DOI: 10.5334/tilr.515

given situation'.[4] Citing a case study of *autoréduction* in a French store, Lindahl considers that this phenomenon calls the boundaries of law into question, by challenging 'how a certain legal order determines who ought to do what, where, and when'.[5] For him, some actions challenge 'the spatial, temporal, subjective, and material criteria that define legal behaviour as *either* proper or improper'.[6] These are episodes of normative disorientation in which a-legal behaviour intimates *another* legal order.[7]

Hans Lindahl provides the reader with a highly sophisticated philosophical reflection. His legal analysis borrows seminal ideas and insights from phenomenology. In this sense, a-legality is directly linked with an experience of *estrangement*, that is, participating actors cannot understand an experience as (il)legal, 'disrupting their capacity to orient themselves spatially, temporally, materially, and subjectively within a given legal order'.[8] A-legality is the experience of *strange* behaviour.

Another case study used by Hans Lindahl to explain a-legality comes from the practices of the Brazilian "Landless Workers Movement" (*Movimento dos Trabalhadores Rurais Sem Terra – MST*), which has repeatedly occupied unused land to establish cooperative farms.[9] But landowners sue the land occupiers and request that the MST be declared illegal for invasion of private property and evicted.[10] On the other hand, land occupiers require that Brazilian authorities should expropriate these rural properties for the purpose of agrarian reform, as they are not performing their social function.[11] For Lindahl, this case study challenges the boundaries of property law, breaking its stability through the action of people who transgress it as 'landless' or 'homeless'.[12] For him, in these cases, 'lawbreakers' are 'outlaws' and their transgressions of legal boundaries should be considered *a-legal* rather than only *il-legal*.[13]

In my initial reading of his work as a discussant to Professor Hans Lindahl at the University of Frankfurt, it seemed to me that that the domain of a-legality was neither legal, nor illegal, but rather a third category between legality and illegality because a collective agent challenged our conventional sense of legality. Professor Hans Lindahl kindly corrected me to explain that this was not an accurate interpretation of his ideas. My current understanding is that a-legality indicates a domain of contestation and renegotiation of legal meaning that transcends the analysis of what is (il)legal. The case of "Landless Workers Movement" may illustrate this point. Their practice of land occupation may be deemed illegal by the judiciary. Yet the internal perspective of the social movement is one with a view to challenging the conventional meaning of the law aligned with Lindahl's concept of a-legality.

While discussing the genealogy of legal ordering, Hans Lindahl shows that 'illegal acts precipitate and a-legal acts intimate an emergent legal order'.[14] Legal acts are intentionally structured. Importantly, the intentionality that attributes meaning to law is not of one single individual, but rather related to phenomenological account of the intersubjective character of legal experience.[15] The meaning of law is shaped by the perspective of "we" in joint action.[16] Lindahl explains the emergence of a plurality of normative orders as a result of *intersubjective estrangement* that disorients our normative expectations and alter the ways of organizing the

4 *Ibid*, 30–31.

5 *Ibid*, 36.

6 *Ibid*.

7 *Ibid*, 37.

8 *Ibid*, 38.

9 *Ibid*, 53.

10 *Ibid*.

11 *Ibid*.

12 *Ibid*, 54.

13 *Ibid*.

14 *Ibid*, 117.

15 *Ibid*, 126.

16 *Ibid*.

time, space, subjectivity, and content of joint action under law.[17] Legal pluralism consists in the co-existence of legal orders in the same spatio-temporal context.[18]

In this sense, a-legality questions how a legal order sets the boundaries that shape the distinction between legality and illegality. A-legality also challenges how the limits between legal (dis)order and the unordered are drawn. Exploring again the case study of the "Landless Workers Movement", Lindahl considers that simply to label the occupation as illegal is to miss the normative point. The MST claims that there are other practical normative possibilities as to 'who ought to do what, where, and when, than those made available by Brazilian law'.[19] Lindahl emphasizes the irruptive *force* of a-legality by examining how the MST advocates the empowerment of landless workers and the redefinition of the criteria for land ownership.[20] There is also a claim for inclusion as members of MST demand "full citizenship" and to be included in relations of legal reciprocity within the Brazilian legal order.[21] Lindahl doesn't use this expression, but it seems to me – and I may be wrong – that the idea is that the MST wants to be included in the membership of "we the people" as a whole.

Lindahl considers that a-legality has a complex normative structure with multiple possibilities that a collective could realize and others that it could not.[22] Interestingly, there is a transformative dynamic in which a-legal challenges to legal boundaries between legality and illegality are responded to by acts that constitute new boundaries.[23] A-legality calls forth *boundary-constitution* and opens up questions on how legal boundaries ought to be drawn.[24] According to Lindahl, behaviour becomes a-legal when law constitutes boundaries, 'configuring in a new way who ought to do what, where, and when'.[25]

Lindahl also refers to the European collective as a new practical possibility from which a novel collective emerged.[26] In this European context, boundaries are set as a mode of *collective de-identification* as illustrated by the case of the centre for asylum-seekers of Lampedusa in Italy.[27] For Lindahl, Lampedusa became unrecognizable as a legal part of the European Union with these asylum-seekers deprived of their status as a legal subject.[28] Lindahl focuses on the politics of a-legality and how to politicize the questioning of boundaries in a concrete manner for the inclusion of immigrants and asylum seekers, especially through the "right to have rights" and political reciprocity.[29]

Examining constitutionalism, Lindahl explains that every constitution has its own normative blind spot, which cannot be overcome.[30] Constitutions empower and disempower.[31] Legal boundaries may shift the limits of legal (dis)order, may be suspended or violated.[32] Lindahl coins the concept of "dia-logos" to explain that legal responsiveness may be considered as a dialogue and as a 'rationality of the in-between'.[33] The legal boundaries of (il)legality as part of

17 *Ibid*, 141.

18 *Ibid*, 142.

19 *Ibid*, 166.

20 *Ibid*, p. 167.

21 *Ibid*.

22 *Ibid*, 177.

23 *Ibid*, 202.

24 *Ibid*, 202–204.

25 *Ibid*, 205.

26 *Ibid*, 214–216.

27 *Ibid*, 218–219.

28 *Ibid*, 220.

29 *Ibid*, 246.

30 *Ibid*, 250.

31 *Ibid*, 253.

32 *Ibid*, 255.

33 *Ibid*.

'a realm of practical possibilities concerning who ought to do what, where, and when'.[34] Legal boundaries of the collective are set through the politics of a-legality.[35]

Hans Lindahl's work is a *tour de force*, combining phenomenology, collective agency theory, and analytical jurisprudence to provide an account of legal order, globalization, and the original thesis of a-legality. As a discussant to Professor Hans Lindahl at the University of Frankfurt, I commented that I missed the discussion of a few questions of hermeneutics: is there an objective legal order? If so, is objective law constituted by a collective legal consciousness? Or conversely, is the legal consciousness forged by the legal world in which we are thrown and must cope with? Professor Lindahl explained to me his opinion that hermeneutics is not radical enough and that it attempts to overcome the strange.

As a discussant, I also played one of Wittgenstein's language games with this typology of "legality", "illegality", and "a-legality" to problematize his thesis and to ask how to make sense of this conceptual theorization of the legal boundaries, if instead of using the word "legal", we decided to examine this issue by analysing the "juridical" or the "lawful". Could we eventually reflect and make sense of something as "a-juridical" or "a-lawful"? Additionally, I also asked if the normative disorientation and indeterminacy of a-legality would eventually be correlated with an attempt to create a third category like a-morality and to translate it into legal discourse. I really enjoyed the opportunity of learning more about "Fault Lines of Globalization: Legal Order and the Politics of A-Legality" from this discussion with Professor Hans Lindahl at the University of Frankfurt. His work inspires our stream *Exploring Legal Borderlands: Empirical and Interdisciplinary Methods* and our reflections on legal boundaries and the resignification of what is legal and illegal, legal and normative, lawful and unlawful, juridical and non-juridical.

3. COMPLEX NETWORKS AND NORMATIVE HORIZONS IN THE CONTEXT OF LEGAL PLURALISM

While discussing the politics of a-legality with Professor Hans Lindahl at the University of Frankfurt, I mentioned that William Twining – widely known in the Anglo-American academia as the Quain Chair of Jurisprudence at UCL and a proponent of legal realism in the UK – was also extensively cited in the book.[36] In his own work, William Twining suggested that network analysis based on the scholarship of Annelise Riles could be even richer for the study of the concept of legal boundaries.[37]

In phenomenological terms, everyone's point of view should be taken into consideration as part of a complex network of meanings. Every individual has a normative perspective with a view of what is right and wrong and of what ought to be done and of what ought not to be done. Each normative perspective contains ideas and opinions which are not communicated and remain silent inside the individual. On the other hand, normative perspectives are communicated through words, actions, and attitudes that reveal the individual's view of right and wrong, legal and illegal, lawful and unlawful. Our normative matrix is directly derived from our shared network of meanings. Importantly, understanding is not in our *minds*, but in our experience of being and the way we conduct ourselves, including our rules, beliefs, and desires.[38]

Normative meanings are shaped, defined, refined, and redefined by the shared network of meanings. The conceptual definition of law and of the legal borderlands comes from this normative matrix, which is decisive for our understanding of what is right and wrong. Because our shared network of meanings is in continuous flow, our sense of what is right and wrong, and our sense of the legal borderlands is constantly under social challenge. In contemporary legal theory, at least since Herbert Hart published *The Concept of Law*, there is a sense that the

34 *Ibid*, 257.

35 *Ibid*, 260.

36 William Twining, *Jurist in Context: A Memoir* (CUP 2019); Pedro Rubim Borges Fortes, 'An Explorer of Legal Borderlands: A Review of William Twining's *Jurist in Context: A Memoir*' (2019) 5 Revista Estudos Institucionais 777.

37 William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP 2009).

38 Hubert L Dreyfus, *Being-in-the-World: A Commentary on Heidegger's Being and Time, Division I* (MIT Press 1990), 75.

shared network of meanings of public officials is decisive for the recognition of the positive law of a municipal legal system.[39]

The shared network of meanings of civil society is different from the shared network of meanings of state public officials. Additionally, normative meanings vary among the various groups of interest in society and among the different corporations and categories of public officials. Finally, even within the same corporation and category, officials are independent to have their own normative perspective. Think of the different normative views expressed by various members of the press, unions, political parties, NGOs, the bar, the government, congress, the police, the Attorney's General Office, and the judiciary.

Examining the case study of the "Landless Workers Movement", for example, the MST developed a shared network of normative meaning within the organization. Their normative perspective is different from the viewpoint of the landowners. These different groups develop political and communicative strategies to influence and shape public opinion and the law according to their normative view. Their normative views will be reproduced and/or challenged by journalists, political leaders, lawyers to define this normative meaning as the law by the public officials. One rule is recognized as positive law if recognized hegemonically by the public officials organized within the state.

Beyond state law, informal socio-legal norms may emerge within complex social networks in spaces not entirely occupied by positive law.[40] In the Brazilian *favelas*, for instance, there is a set of alternative socio-legal arrangements. Residents have no official property rights, but only an unofficial title of possession of their house which is recognized by the local association of residents and not by the state.[41] In Ipanema Beach, different social tribes developed shared normative meanings within different communities of beachgoers with their particular norms to protect hippies, yuppies, and LGBTQIA+ individuals.[42]

Following William Twining's suggestion, we could adapt the work of Annelise Riles to reflect on how network analysis influences the law and legal boundaries. More than a common sense of a geographic place, persons and institutions share a set of informational practices.[43] For Riles, network refers to 'a set of institutions, knowledge practices, and artifacts thereof that internally generate the effects of their own reality by reflecting on themselves'.[44] The network emerged as a new form of organization, composed by groups of people with common interests and links to share information, skills, ideas, and resources.[45] In terms of structures, the network is composed by focal points and linkages, which emphasize the interrelationship of the system's components across space, time, or scale.[46]

In terms of scale, networks may be global, regional, and local.[47] They are structured as institutionalized associations devoted to information sharing, which is facilitated by the existence of focal points in these networks.[48] Focal points gather documents, facts, and relationships into themselves and the institutional libraries.[49] These focal points also share information across the linkages to all components of the network. Importantly, the chain of relationships within the network includes not only persons, but also entities of various kinds, like

39 HLA Hart, *The Concept of Law* (Clarendon Press 1961).

40 Pedro Fortes, 'Law and Development' in Rachel Sieder, Karina Ansolabehere and Tatiana Alfonso (eds), *Routledge Handbook of Law and Society in Latin America* (Routledge 2019).

41 Boaventura de Sousa Santos, 'The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada' (1977) 12 Law & Society Review 5; Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World* (June Abbott tr, Harper & Row 1989).

42 Pedro R Fortes, 'How Socio-Legal Norms Emerge within Complex Networks: Law and (In)Formality at Ipanema Beach' (2014) 10 FIU L Rev 183.

43 Annelise Riles, *The Network Inside Out* (University of Michigan Press 2000), xvi.

44 *Ibid*, 3.

45 *Ibid*, Chapter 2.

46 *Ibid*, 51.

47 *Ibid*, 59.

48 *Ibid*, 59.

49 *Ibid*, 60.

groups, facts, documents, computers, villages or institutions, for example.[50] One very important dimension of the network is its "relationality", in which a system is formed by connections that relate heterogenous actors with real complexities.[51] The works developed within the networks generate a set of new links, focal points, and a new web of personal relations.[52]

Networkers' personal relations may be examined through the viewpoint of pure individual interest within the civil society.[53] Personal relationships may be analysed from the internal – inside out – and from the external – outside – perspective.[54] Externally, these personal relationships are rooted in institutional connections and the linkages seem context free and founded on personal independence.[55] For Riles, networks and personal relationships are the same form seen twice.[56]

Importantly, networks may be non-hierarchical or hierarchical. This distinction is essential for the analysis of shared networks of meaning that constitute our understanding of positive law and the legal boundaries. Herbert Hart famously referred to the rule of recognition as the one validated by the official acceptance of public officials.[57] Therefore, the rule of recognition is not written, but it is rather a social practice.[58] Police, prosecutors, judges, and governmental officials practice and accept it from the internal point of view, that is, from inside the network of state public officials.[59]

But Herbert Hart's account should consider the internal hierarchy of state public officials. The decisive recognition comes from the public officials at the top of the hierarchy, that is, the public officials that may impose their own perspectives within their organizations across the hierarchical linkages from the top to the bottom. In the judiciary, for instance, the Supreme Court is at the apex of the judicial network and may oblige the lower courts to internalize their normative viewpoint through the doctrine of judicial precedents and its binding effect. In the Attorney's General Office, the Attorney General may also have the power of agenda-setting across the organization and may establish the professional priorities for the public prosecutors across their professional network. Likewise, the Chief of the police may exercise hierarchical control over the police stations and the police agents related to how they should enforce the criminal law.

Officials located in leadership roles at the state operate as decisive focal points for the dissemination of their normative perspectives. On the other hand, there is also a continuous flow of information and of communication from the hierarchical bottom of the judiciary, the Attorney's General Office, and the police. Alternative perspectives, counter-intuitive views, and transformative arguments may emerge in lower courts, in the street level of police action, and in prosecutorial challenges at the beginning of their cases. The normative meaning that circulates across the legal networks is not homogeneous, but rather heterogeneous. In most judicial courts, independent judges who disagree with the majority opinion of a judgment may write and publish their own dissenting opinion. In some national states, public prosecutors also hold professional independence and are free to exercise their role based on a non-hegemonic normative perspective.

Individuals express their views of a case also based on their normative horizons, which are shaped by the dynamic interactions of legal actors within the legal network. Plaintiffs may bring a new argument, once they consider that their audience constituted by the networked community of legal actors, may be ready to receive it, analyse it, and eventually consider it as an adequate normative view that provides an adequate response for the case. This concept of

50 *Ibid*, 63.

51 *Ibid*, 64.

52 *Ibid*, 68.

53 *Ibid*, 69.

54 *Ibid*.

55 *Ibid*.

56 *Ibid*.

57 HLA Hart, *The Concept of Law* (Clarendon Press 1961), Chapter 2.

58 *Ibid*.

59 *Ibid*.

normative horizons is inspired by phenomenology and by Hans Georg-Gadamer hermeneutics, because individuals develop a pre-comprehension of a case and project a potential interpretative horizon towards the future.[60] Someone may bring a case that is against the law at the initial point, but with potential to transform the law and the legal boundaries as the case advances in court, because it transforms our shared normative perspective as it is litigated in court. Legal visionaries anticipate that societies are ready for this legal change based on their view of the normative horizon and how a given case may have the force to transform our legal network as these innovative ideas advance through the linkages and the focal points to reach the top of the judiciary power.

Another interesting network study of the legal system was produced by Bruno Latour in *The Making of Law: An Ethnography of the Conseil D'État*.[61] Latour considers that the law is formed as the result of 'a mysterious set of ties that extend across the whole of France like a hidden network of lymphatic vessels which remain invisible so long as they are not brought to expression in a dispute, and which remain nonetheless mysteriously in constant operation even when no controversy arises to reveal their persistent process of translation'.[62] Latour refers to ties between custom officers, illegal migrants, humanitarian associations, journalists, court reporters, law professors, judges and lawyers to each other as part of this legal network in France.[63]

In his ethnographic observation of the internal operations of the French superior court, Bruno Latour concludes that the law is not as rigid, but rather quite flexible – *mollis lex, sed lex*: 'the law is flexible, *but it is still law*'.[64] The legal text changes under the pressure of unions and politicians, as the court will develop differentiation of constraints depending on the political circumstances and the spheres of the law that are analysed as part of the decision-making process.[65] The decision-makers have to 'anticipate through various thought experiments all the problems, obstacles, ordeals, and drawbacks' related to the law.[66] Latour does not refer to this thought experiments as "normative horizons", but he still observes that 'everything must be thought of in advance'.[67] The thinking of the legal actor includes the law, the language, labour practices, feasibility of the measures, and the political timeliness of the legislation.[68] Regarding timing of judicial decision-making, Latour noticed a collective hesitation with slowness and heaviness to form a sentence.[69] For Latour, this hesitation comes from the fact that the primary material of justice may also protect them from 'the coldest of cold monsters, the State'.[70]

Examining the formation of law in the superior court, Latour challenges the academic dogma that the law is autonomous and should be regarded as a separate sphere.[71] Law needs to be efficient and to be confronted with practical problems.[72] The fabric of law is shaped by social reality and this same reality contests the idea that law is autonomous from anything else.[73] The formation of law varies according to (1) the variable authority of the member of the court; (2) the progress of the case and its legal arguments; (3) the organization of the flow of files; (4) the dynamic modification in real time of the interest in a case; (5) the variable weight of

60 Hans-Georg Gadamer, *Truth and Method* (Garrett Barden and John Cumming eds and trs, Crossroad 1975).

61 Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'État* (Marina Brilman and Alain Pottage trs, Polity 2010).

62 *Ibid*, 41.

63 *Ibid*.

64 *Ibid*, 58.

65 *Ibid*, 62.

66 *Ibid*, 64.

67 *Ibid*.

68 *Ibid*.

69 *Ibid*, 91.

70 *Ibid*.

71 *Ibid*, 126.

72 *Ibid*.

73 *Ibid*.

case-law and precedents; and (6) the ongoing process of quality control exercised by the court, especially by its president.[74]

Bruno Latour problematizes the idea that the court produces "pure" law, because it is a complex process of decision-making with tensions, vectors, currents, pressures, and rearrangements.[75] There are interests to be won or lost, reputations to be made and unmade, and obstacles to be overcome by the invoked legal means.[76] Revisers, reporters, lawyers, and presidents gain authority and assurance, as they reinforce precedents, revise interpretations, and apply the law.[77] Latour emphasizes the one case in which the president of the court made the magnificent remark that 'we can do what we want, we tend to consider ourselves too *bound*'.[78] For Latour, it is impossible to 'say the law' without hesitations and justice may only be produced if the court hesitates.[79]

Regarding the passage of law and the reversal of precedent, the court may judge a case according to the law or may *judge the law itself* with the opportunity given by the right sort of case.[80] The transformation of law is poorly explained by formalism. Judges may avoid a rule that has become purely formal over time, may modify the form of application, may alter the law itself, and how cases are reconciled with a body of precedents.[81] Latour also observed a case in which the law became progressively unstable, the more it was explored, with judges constantly measuring, balancing, and probing what was 'solid and fragile, certain and weak, indisputable and modifiable'.[82] Everything may be disputable, everything will be in flux, and at any point in time new possibilities are open for litigation.[83]

Latour concludes that, paradoxically, 'it is entirely true of law that "the more it changes, the more it stays the same"'.[84] The legal materials have plasticity and each agent modifies the form of arguments and, at the end of the process, a triumph results not from pure law, but rather from the internal properties of the relations of force or conflicts.[85] For Latour, the authority of actors and the positions of all participants, not just the judges, are modified through the ordeal of the process.[86] And yet the 'law develops as if it had remained in a perfect homeostasis and teaches nothing new about the case at hand but simply maintain the predictability of law'.[87]

So far, I have been discussing how positive law is shaped by complex networks and normative horizons. We may also consider their influence in the context of legal pluralism. Legal pluralism implies the existence of two or more legal systems or normative orders within the same social space.[88] Legal pluralism may be recognized by the state itself, as it is the case with the Brazilian constitution that recognizes the customs and traditions of the indigenous people as part of the law too. Legal pluralism may also emerge from non-state legal orders, like *lex informatica*, *lex sportiva*, or *lex mercatoria*.

In addition to positive law of the state, there are other normative phenomena that are not directly related to the legislation approved officially by the state. In the domain of international trade, for example, there is a legal tradition since medieval times of a particular set of norms that regulate the commercial relations across different jurisdictions, with their own customs,

74 *Ibid*, 140.

75 *Ibid*, 141.

76 *Ibid*.

77 *Ibid*.

78 *Ibid*, 150.

79 *Ibid*, 151–152.

80 *Ibid*, 170.

81 *Ibid*.

82 *Ibid*, 177.

83 *Ibid*, 178.

84 *Ibid*, 189.

85 *Ibid*, 192.

86 *Ibid*.

87 *Ibid*, 234.

88 John Griffiths, 'What is Legal Pluralism?' (1986) 18(24) Journal of Legal Pluralism and Unofficial Law 1.

arbitrators, and law – the *lex mercatoria*. In global diamond trade, there is a stateless law for conflict resolution which is developed within the complex network built around the chain of production and of commerce of diamonds.[89]

Likewise, international sport also has its own *lex sportiva*. There are special sets of transnational norms that regulate global, national, regional, and local competition within networks with shared normative meaning. Their focal points are the international organization and the national organization, which are responsible for the definition of the rules of the game, the sportive courts, and the enforcement across the network and within competitions, clubs, and athletes. In international football, for instance, FIFA has a set of global norms which are transnational and analogous to constitutional norms.[90] Even if national states organize their own internal legislation, these transnational norms of *lex sportiva* normally prevail over domestic positive law.[91]

Another example of legal pluralism comes from *lex informatica* in its various domains. Gunther Teubner refers to the emergence of a *lex digitalis* related to disputes on internet domains that are solved by ICANN.[92] There is also an emerging field of algorithmic law, which is related to disputes on the normativity embedded in computational codes and how it may lead to unjust and unfair outcomes.[93] The field of artificial intelligence also requires special transnational norms to reduce risks related to algocracy, digital discrimination, and violation of fundamental rights and international human rights.[94] One notable transnational institution of *lex informatica* is the oversight board of Meta, designed by the social network giant under supervision of Harvard Law Professor Noah Feldman, and that operates like a "Supreme Court".[95]

Gunther Teubner theorizes the constitutional fragmentation as the crisis and transformation of the transnational constitutional system.[96] For Teubner, the new global governance is formed by the 'networking of specialized bureaucracies from various nation states with private actors from the transnational corporations, trade associations, NGOs, and hybrid regimes'.[97] Exploring the horizontal effects of constitutional law into the private realm, Teubner conceptualizes a "societal constitution" with the extension of democratic codetermination and fundamental rights to all socially relevant organizations.[98] Teubner develops a theory of constitutional pluralism, considering that constitutions are everywhere in society, including constitutive rules for self-regulation and for the functioning of private associations.[99] Constitutional pluralism emerges within complex networks of social organizations.

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89 Barak D Richman, *Stateless Commerce: The Diamond Network and the Persistence of Relational Exchange* (Harvard University Press 2017); Barak D Richman, 'How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York' (2006) 31 Law & Social Inquiry 383; Barak D Richman, 'Community Enforcement of Informal Contracts: Jewish Diamond Merchants in New York' (Harvard John M Olin Center for Law, Economics, and Business Discussion Paper No 384, 2002).

90 Pedro Rubim Borges Fortes, 'We the Fans: Should International Football Have Its Own Constitution?' (2014) 21 Sw J Int'l L 63.

91 Pedro R Fortes, 'The Law Relating to Brazilian Sports Fans: An Introduction for a British Audience' (2013) 11 ESLJ 1.

92 Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Gareth Norbury tr, OUP 2012).

93 Pedro Rubim Borges Fortes, 'Algorithmic Law in Contemporary Brazil: From Cyber-Libertarianism to Constitutional Rights' (2026) 1 Latin American & Caribbean Law Review 7.

94 Pedro Rubim Borges Fortes, Pablo Marcello Baquero and David Restrepo Amariles, 'Artificial Intelligence Risks and Algorithmic Regulation' (2022) 13 European Journal of Risk Regulation 357; Pedro Rubim Borges Fortes, Guilherme Magalhães Martins and Pedro Farias Oliveira, 'Digital Geodiscrimination: How Algorithms May Discriminate Based on Consumers' Geographical Location' (2021) 107 Droit et société 145; Pedro Rubim Borges Fortes, 'Paths to Digital Justice: Judicial Robots, Algorithmic Decision-Making, and Due Process' (2020) 7 Asian Journal of Law and Society 453; Pedro Rubim Borges Fortes and David Restrepo Amariles, 'Law-Jobs in the Algorithmic Society' (2023) 19 International Journal of Law in Context 1.

95 Josh Cowls and others, 'Constitutional Metaphors: Facebook's "Supreme Court" and the Legitimation of Platform Governance' (2024) 26 New Media & Society 2448; Tao Huang, 'Institutional Metaphors and the Meta Oversight Board' (2025) 58 Vand J Transnat'l L 1323; Tao Huang, 'Mapping the Jurisprudence of the Facebook Court' (2024) 72 Buff L Rev 109.

96 Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Gareth Norbury tr, OUP 2012), 8.

97 *Ibid*, 9.

98 *Ibid*, 27.

99 *Ibid*, 35–37.

A different conception of normative pluralism is Marcelo Neves' transconstitutionalism. One important paradox related to transconstitutionalism between a state order and the international order comes from the fact that 'states constitute international public law' and 'international public law constitutes states'.[100] Neves problematizes the entanglement between transnational and national legal orders, like the relationship between the European Court of Human Rights (ECtHR) and the legal cultures consolidated in the constitutional orders of the European states linked to the court.[101] Neves emphasizes also constitutional "dialogue" with other courts, foreign or international, with internal constitutional issues and the relations between international and state orders.[102]

In the European context, Neves considers it more appropriate to speak of European transconstitutionalism as the transversality of legal orders instead of a European Union Constitution. *Lex mercatoria*, *lex sportiva*, and *lex informatica* are also considered as a dimension of transconstitutionalism, and part of the analysis between state legal orders and transnational legal orders formed by private or quasi-public actors or organizations.[103] Neves makes a very interesting final comment on how the other can see your blind spot.[104] For him, transconstitutionalism would transcend provincial or parochial constitutionalism and include transversal reason to solve complex constitutional problems.[105] Because every observer has a blind spot, the diversity of vantage points would add what is unseen by one observer to the decision-making process.[106] This is a very powerful insight.

The concept of normative horizons also invites the observer to examine beyond the current state of the art of the law. The acceptance or the rejection of a legal argument depends on how a complex network will receive it, process it, and judge it in a moment in the future according to the viewpoint that is developed collectively in time. Legal actors operate within shared networks of meaning and reach their subjective decisions that are under observation, analysis, and review of an intersubjective audience. Therefore, conceptualizing legal borderlands in transnational societies implies examining dynamic interactions within complex networks. Our tools for decision-making may need to be reassessed and reconstructed through conceptual engineering. Legal borderlands are sites of contestation and negotiation between multiple actors. Law and legal borderlands are shaped, reshaped, defined, and refined within complex networks that influence our normative horizons in the context of normative pluralism.

4. CONCEPTUALIZING LEGAL BORDERLANDS IN TRANSNATIONAL SOCIETIES

In *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*, Hans Lindahl also cited the works of Edmund Husserl.[107] For Husserl, values are grounded in experience and reflect our empathic experience of others. The categorical imperative is: do the better! These two elements resonate with the politics of a-legality: reciprocity and limited improvement. On the other hand, Husserl grounds values in the life-world, not in a strange world. And he doesn't base his normative orientation on reason, but instead on love. Could we ever consider grounding the normativity of law on love, any ethical value or political emotion?

In our political communities and our positive constitutional law, normativity is not grounded directly on love, but our contemporary experience resonates with constitutional norms grounded on human dignity and human rights. Human dignity became a cornerstone of constitutional law in many jurisdictions since it was adopted by the German Constitution of 1949. The shared network of normative meanings of human dignity vary not only according to the social context,

100 Marcelo Neves, *Transconstitutionalism* (Kevin Mundy tr, Hart 2013), 86.

101 *Ibid*, 87.

102 *Ibid*, 91.

103 *Ibid*, Chapter 3.

104 *Ibid*, 183–184.

105 *Ibid*, 184.

106 *Ibid*.

107 Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology* (David Carr tr, Northwestern University Press 1970); Edmund Husserl, *Experience and Judgment: Investigations in a Genealogy of Logic* (James S Churchill and Karl Ameriks trs, Northwestern University Press 1973).

but also due to the different philosophical traditions, which may be grounded in faith-based ethical discourse and the Kantian perspective.[108] From German constitutional discourse, the concept of human dignity travelled across different continents and legal systems and received different meanings according to the particular networks that incorporated it.[109]

Likewise, human rights depend on the emergence of a particular culture, which is disseminated through a network composed of international organizations, regional courts, human rights NGOs, activists, and lawyers.[110] Normative meanings vary according to the social context and to their tradition within international human rights discourse. During the cold war there was a division between the West and the East and priority for civil and political rights or for economic, social, and cultural rights. Nowadays, there is still a rhetoric that the Asian values are different from the more individualistic values found in the liberal democracies elsewhere. Human dignity and international human rights are shaped, reshaped, defined, and refined within complex networks that influence our normative horizons in the context of normative pluralism.

Our special issue starts with the article *Dialogue, Integration, and Convergence Between International Courts: The Case for Conceptual Clarification* by Audrey Plan. Her research focuses on the proliferation of International Courts and Tribunals (ICTs) and the dynamic interactions between them and their judges. Based on an extensive literature review across multiple disciplines, Audrey Plan managed to identify and to conceptualize these dynamic interactions. "Dialogue" may be conceptualized as events and activities that connect courts and judges, including learning experiences, cooperation opportunities, and as an interaction with and toward an interlocutor. "Fragmentation" may be deemed as the coexistence of multiple norms of international law, with various treaties, bodies, regimes, collisions, and the challenges of polycentrism. "Divergence" may be conceived as a difference in interpretation of a rule by two different bodies, in contrast with "convergence". "Integration" may be conceptualized as an interaction to reach harmonization, coherence, and accommodation to the understanding of the common good for protection of citizens to an adequate standard. In her article, Audrey Plan provided a series of concrete examples of these dynamics and developed a conceptual framework to provide an analytical lens to observe, describe, and interpret context-dependent and fluid operations. Audrey Plan considers her framework to be a socio-legal tool to analyse the phenomena of ICT interaction.[111]

The conceptualization of legal borderlands in transnational societies continues with the article *Engineering Equality: Conceptual Engineering as a Method in Anti-Discrimination Law*, in which Bernardo Carvalho de Mello examined anti-discrimination law in the context of the European Court of Human Rights (ECtHR). His research investigated the question of: how may conceptual engineering reconstruct the taxonomy of protected characteristics in anti-discrimination law to better fulfil the law's equality objectives? The article contrasted the closed list of the UK Equality Act 2010 with the open clause of Article 14 of the European Convention of Human Rights. It also focused on concrete judgments made by transnational courts, like the cases of *Bayev and others v. Russia* and the case of *Schalk and Kopf v. Austria*. After this doctrinal analysis, Bernardo Carvalho de Mello developed the potential of conceptual engineering as a tool for assessment and improvement of our representational devices, especially the revision and reconstruction of protected characteristics to enhance the protection of equality. In his conclusions, Bernardo Carvalho de Mello recommended the realization of conceptual audits of anti-discrimination law to identify categories that fail to promote equality.[112]

Our special issue examined a prominent transnational court in its role of establishing legal borderlands in the article *The European Court of Human Rights as a Bordering Actor: Culpability and Collective Expulsion in the Era of Externalization* by Emilia Vassiliades. Her research

108 Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012).

109 William Twining, 'Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context' (2005) 1 International Journal of Law in Context 5; Luis Roberto Barroso, 'Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse' (2012) 35 BC Int'l & Comp L Rev 331.

110 Lawrence M Friedman, *The Human Rights Culture: A Study in History and Context* (Quid Pro Books 2011).

111 Audrey Plan, 'Dialogue, Integration, and Convergence Between International Courts: The Case for Conceptual Clarification' (2026) 31 Tilburg Law Review 16–34.

112 Bernardo Carvalho de Mello, 'Engineering Equality: Conceptual Engineering as a Method in Anti-Discrimination Law' (2026) 31 Tilburg Law Review 35–52.

DOI: 10.5334/tilr.515

contributes to our special issue with a reconceptualization of the European Court of Human Rights (ECtHR) as a bordering actor within the contemporary regime of migration control. Emilia Vassiliades examined the ECtHR's jurisprudence on collective expulsion, especially the evolution of the "own-culpable conduct" exception. Borderlands are presented as sites of contestation and negotiation among multiple actors. The case studies of *Khalifa and Others v. Italy*, *N.D. and N.T. v. Spain*, and *A.A. and Others v. North Macedonia* show how the exception evolved into an interpretive tool to perform bordering. These bordering practices may differentially exclude or include migrants from international human rights law. Emilia Vassiliades considers that the ECtHR evolved from a site of resistance to a body that performs bordering practices through doctrinal reasoning.[113]

The last article of our special issue is titled Who Decides Who Is a Citizen? Migration Control, Legal Borderlands and the Administrative Contestation of Nationality in Belgium by Claire Lefort-Rieu. Her research investigates the central question of who decides who a citizen is, that is, a member of a nation state. Historically, the attribution and loss of nationality is governed by the Belgian Nationality Code (BNC) and entrusted to authorities like the civil registrar and public prosecutors. On the other hand, the Belgian Immigration Office does not decide about nationality, but has the mission to implement migration law (entry, residence, settlement, removal, and family reunification). Claire Lefort-Rieu researched a recent action of the Immigration Officer to challenge the attribution of nationality through letters sent to municipalities. Legal borderlands are redrawn through administrative practice by the exercise of a relational administrative authority, which produces effects through the dependencies, expectations, and responses of other actors. Claire Lefort-Rieu contributes to the literature on legal borderlands with an original and relevant argument that they may be produced inside the state when a bureaucratic organization reshapes the effects of legal status beyond its competence.[114]

ACKNOWLEDGEMENTS

This essay concludes a two-year project of organizing a special issue on exploring legal borderlands at Tilburg Law Review. I am grateful for everyone at Tilburg Law Review for their invaluable support since 2025, especially Thomas Joyce, Tobias Arnoldnussen, Rory Sugrue, Şebnem Atçı, and everyone at the editorial team. Likewise, I am grateful to everyone at the Socio-Legal Studies Association in the United Kingdom, who collaborated with 'Exploring Legal Borderlands: Empirical and Interdisciplinary Approaches' for more than a decade now, especially Andra Le Roux-Kemp and Ioannis Kampourakis who held convening positions with me. I must thank also Professor Hans Lindahl for a series of reasons. First, I am grateful for the opportunity that I had to discuss his book and his ideas with him at the 'Legal Theory Seminar' at the University of Frankfurt. For that opportunity, I must also thank Gunther Teubner, Ricardo Campos, and Thomas Vesting. Second, I am grateful to Professor Hans Lindahl for his generosity, because he received the proposal for this special issue and, as the previous editor-in-chief of the Tilburg Law Review, he forwarded it to the current editorial leadership. I am grateful to all the borderlanders who presented their excellent research in our panels at the SLSA and submitted their articles for publication at this special issue, especially Audrey Plan, Bernardo Carvalho de Mello, Claire Lefort-Rieu, and Emilia Vassiliades. Finally, I am grateful to the blind reviewers and to the future audience of this special issue who are decisive for the success of this project, even if you remain anonymous to us. Many thanks to everyone! Errors are all mine.

COMPETING INTERESTS

The author has no competing interests to declare.

113 Emilia Vassiliades, 'The European Court of Human Rights as a Bordering Actor: Culpability and Collective Expulsion in the Era of Externalization' (2026) 31 Tilburg Law Review 53–77.

114 Claire Lefort-Rieu, 'Who Decides Who Is a Citizen? Migration Control, Legal Borderlands and the Administrative Contestation of Nationality in Belgium' (2026) 31 Tilburg Law Review 78–96.

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TO CITE THIS ARTICLE:
Pedro Rubim Borges Fortes, 'Complex Networks and Normative Horizons in the Context of Legal Pluralism: Conceptualizing Legal Borderlands in Transnational Societies' (2026) 31(3) Tilburg Law Review pp. 1–15. DOI: https://doi.org/10.5334/tilr.515

Published: 23 November 2026

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